STATISTICAL ABSTRACT

Supreme Court Voting Behavior: 1993 Term

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I. Introduction

This Article, the ninth in a series,[1] tabulates and analyzes the voting behavior of the United States Supreme Court during the 1993 Term.[2] Our tabulations and statistical analyses are designed to identify movement in the ideological leanings of individual Justices and of the Court as an institution. The data for the 1993 Term reveal several interesting developments.

First, the Court moved to a more liberal position in civil litigation involving state and federal governments and in litigation raising First Amendment concerns. Much of this movement, however, came from unexpected quarters: Justices Blackmun and Stevens began to vote in favor of state and federal governments and against the First Amendment, "conservative" outcomes, while Justices Scalia and Thomas took the opposite, and "liberal" tack. This partial reversal of ideological poles appears to be the result of the individual Justices' (and the Court's) reorientation to new political realities.

Second, the Rehnquist Court was, and continues to be, relatively conservative in its approach to statutory civil rights and jurisdictional issues. Furthermore, the conservative coalitions that generally determined the outcome of closely divided cases in 1992 continued to prevail in 1993. Even with the appointment of Justice Ginsburg, conservative members of the Court—with Justice Kennedy as the preeminent fifth vote—largely retained control of the swing-vote docket.

The 1993 voting record also gave more insight into Justice Souter's ideologies. Dubbed the "stealth candidate" at the time of his appointment,[3] Justice Souter aligned himself most closely with the liberal members of the Court in 1993 despite his relatively centrist position during his first Term on the Court.[4]

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

2. The 1993 Term covers decisions made from October, 1993 to October, 1994.

3. *See, e.g.*, Christopher Scanlan, *Nominee Provides a Moment of Drama for Senators*, PHIL. INQUIRER, Sept. 14, 1990, at A10 (recounting story of Souter being labeled as the "Stealth" nominee by Alabama Senator Howell Heflin).

4. *See* Robert E. Riggs & Guy L. Black, *Supreme Court Voting Behavior: 1990 Term*, 6 B.Y.U. J. PUB. L. 1 (1992).

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 (First Amendment, Equal Protection, etc.) or the character of the parties (that is state and federal government litigants).[5] The tenth category tabulates the number of times each Justice voted with the majority in cases decided by a single, swing, vote.

These categories are designed to demonstrate each Justice's attitude toward two broad issues underlying most Supreme Court decisionmaking: 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 rights[6] and/or exercise judicial restraint.[7]

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5. These categories include:

1) Civil controversies in which a state, or one of its officials or political subdivisions, is opposed by a private party.

2) Civil controversies in which the federal government, or one of its agencies or officials, is opposed by a private party.

3) State criminal cases.

4) Federal criminal cases.

5) First Amendment issues of freedom of speech, press, association, and free exercise of religion.

6) Equal protection issues.

7) Statutory civil rights claims.

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

9) Federalism issues.

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

7. Jurisdictional questions (Tbl. 8), which exhibit the relative propensity of the Justices to avoid judicial decisions, are perhaps the most direct statistical evidence of the exercise of judicial restraint. Other tables included in this study, however, also provide some reading 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 (Tbls. 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 (Tbl. 9) are also relevant because judicial

From the voting patterns that emerge, we attempt to determine whether individual Justices and the Court are taking "conservative" or "liberal" positions.[8] 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 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.[9] Concern for individual rights, furthermore, is not always (or even necessarily) the attitudinal opposite of judicial restraint.[10] In other cases, particular circumstances may create a reversal in the expected relationship; for example, liberals voting against and conservatives in favor of a claim of individual rights. Such events may have occurred several times this Term.[11]

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restraint is traditionally identified with respect for the role of the states within the federal system.

8. 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).

9. 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. Several ostensibly unanimous decisions this Term, however, nevertheless demonstrated substantial ideological discord. *E.g.*, Johnson v. De Grandy, 114 S. Ct. 2647 (1994) (unanimously rejecting a claimed violation of § 2 of the Voting Rights Act of 1965, but splitting as to the controlling rationale); Williamson v. United States, 114 S. Ct. 2431 (1994) (producing three separate opinions suggesting different approaches to the issue whether an exception to the hearsay rule applies); Davis v. United States, 114 S. Ct. 2350 (1994) (unanimously rejecting a claimed *Miranda* violation, but with Court splitting five-to-four on the governing rationale).

10. 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).

11. *E.g.*, Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994) (the Court's three leading liberals, Blackmun, Souter, and Stevens, join with Kennedy and Rehnquist to *reject* a First Amendment claim); Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (conservative Justices Kennedy, O'Connor, Rehnquist (C.J.), Scalia, and Thomas voted in favor of Fifth Amendment claim disfavored by the liberal wing of the Court); MCI Telecom. Corp. v. AT&T, 114 S. Ct. 2223 (1994) (the Court's most liberal members, Blackmun, Souter, and

Nevertheless, the basic assumption that undergirds this study—that the individual Justices' and the Court's general orientation to individual rights and judicial restraint is suggestive of liberal or conservative ideology—appears generally sound.[12] Furthermore, to the extent that this assumption accurately reflects the proposed ideological tendencies, one can identify trends by tracking the votes of the Justices and the Court on Tables 1 through 10.

The individual votes cast can be compared with those of other Justices for any given year to discern ideological positions within the Court. Determination of the current ideological position of the Court as a whole, however, requires comparisons over time. For the present analysis, the best available baseline is the comparable data generated for the five prior Terms (1987-1992). In the tables, this information appears in the form of percentages for each Justice and, in all but the Swing-Vote Table (Tbl. 10), for the Court majority. Figures 1 through 10 also graphically demonstrate the voting trends of the Court majority in all cases, including the voting trends of the Court in unanimous and split decisions.

This year, for the first time since the inception of this study, we included a regression analysis for all the Justices who have been members of the Supreme Court since 1987: Chief Justice Rehnquist and Justices Scalia, O'Connor, Blackmun, Kennedy and Stevens. The remaining three Justices have not been on the Court long enough to perform a reliable regression analysis.[13] This analysis, drawn from our data for the 1987 through 1992 Terms and presented in Appendix B as Tables 1a through 10a, yields predicted 1993 Justice-by-Justice voting

Stevens, voted in favor of a federal agency's invocation of regulatory power rejected by the remainder of the Court); Staples v. United States, 114 S. Ct. 1793 (1994) (Blackmun and Stevens, alone in dissent, voted in favor of the federal government in a criminal gun control prosecution arguing *against* a scienter requirement in a criminal prosecution); NLRB v. Health Care & Retirement Corp. of Am., 114 S. Ct. 1778 (1994) (liberal wing of the Court, Blackmun, Ginsburg, Souter, and Stevens, voted in favor of agency regulation while conservative Justices voted against the federal government).

12. 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.

13. Even the regression analysis for Justices Rehnquist (C.J.), Scalia, O'Connor, Blackmun, Kennedy, and Stevens may be of limited value because the data includes only the 1987 to 1992 Terms. As a result, the readings of statistical significance generated by regression analysis may not be entirely reliable.

percentages (p(v)) for each table.[14] These predicted values can be compared with a Justice's (and the Court's) actual voting percentages (a(v)). Ideological reorientation may be indicated where an individual Justice's (or the Court's) actual voting rates differ from the predicted values, particularly if the difference between the two figures is statistically significant.[15]

Such data must be interpreted with caution because 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 regression analysis is designed

14. Each Justice's, and the Court's, voting percentages were plotted on a graph by year. From those figures the value of $p(v)$ was determined by the following equation:

$$p(v) = a + b(x)$$

where a represents the y intercept, b the slope, and x the value of a particular Term. MICHAEL S. LEWIS-BECK, APPLIED REGRESSION: AN INTRODUCTION 9-10, 17-20 (1980).

15. The confidence interval of $p(v)$ was determined by the following equations:

$$C = p(v) \ 2(SE)\text{—for 95\% confidence}$$

$$C = p(v) \ 3(SE)\text{—for 99\% confidence}$$

where $p(v)$ represents the predicted value and SE the standard error. *Id.* at 13, 19-20, 30-31, 53-54. The confidence interval is important to the reader because it determines the range in which a Justice's, or the Court's, actual 1993 Term voting percentage (a(v)) can deviate from their predicted 1993 Term voting percentage (p(v)) and still not be statistically significant. ROBERT S. PINDYCK & DANIEL L. RUBINFELD, ECONOMIC MODELS AND ECONOMIC FORECASTS, 36-40 (2d ed. 1981). Where the difference between a Justice's predicted value and actual value is statistically significant at the 0.05 level of confidence (marked with a "*" in the "Sgnf." column in Appendix B), it can be said with 95% confidence that the shift was due to a change from one year to the next, and not a random fluxuation. *Id.* Where the difference is statistically significant at the 0.01 level of confidence (marked with a "**" in the "Sgnf." column in Appendix B), such conclusions can be made with a 99% confidence. *Id.*

In addition, the Durbin-Watson test was used to determine the occurrence of auto-correlation which, if present, systematically biases the standard error of the equation. When auto-correlation exists it can lead to a smaller error variance estimate than is actually present. *Id.* at 152. Thus, for our study, auto-correlation occurs when the errors of one point on the graph "carry over into future time periods." *Id.* The result is that the analysis produces a smaller estimate of error than is actually true. *Id.* at 153-54. Where auto-correlation exists in this study, it places in question the statistical significance of a given shift. Therefore, such occurrences shall be noted and the reader is cautioned that the statistical significance of the shift may be a result of a biased standard error. This bias can lead to the false conclusion that the difference between a predicted value and an actual value is statistically significant. When there is no auto-correlation present, the Durbin-Watson statistic, which varies between zero and four, will be close to two. Values significantly above or below two indicate auto-correlation. While more precise calculations can be made, a generally accepted rule is that Durbin-Watson values less than one or greater than three indicate auto-correlation. *Id.* at 158-61. This general rule is used in evaluating the equations contained in Tables 1a through 10a which are set out fully in Appendix B. If the Durbin-Watson test falls into an unacceptable range, it will be noted and considered in interpreting the meaning of any test of statistical significance.

to increase reliability, statistics remain a blunt analytical tool for probing the mysteries of judicial decisionmaking. Percentage changes from Term to Term may not necessarily reflect changes in the ideological orientation of an individual Justice or the Court majority.[16] However, directional changes across a number of Tables, particularly when those shifts are statistically significant, strengthen the hypothesis that a genuine shift in attitude has occurred.[17]

III. The Voting Record

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

TABLE 1
CIVIL CASES: STATE GOVERNMENT
VERSUS A PRIVATE PARTY

JUSTICE	1993 TERM VOTES				% VOTES FOR GOVERNMENT				
	FOR GOV'T	AGAINST GOV'T	1993 TERM		1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Rehnquist	15	7	68.18		52.8	71.4	84.0	70.3	66.7
Scalia	11	11	50.00		41.7	64.3	64.0	64.9	59.2
Souter	10	12	45.45		36.4	52.5	63.6	-----	-----
Thomas	10	12	45.45		41.7	71.4	-----	-----	-----
Blackmun	9	12	42.86		30.3	35.7	24.0	43.2	30.6
Ginsburg	9	13	40.91		---	---	---	---	---
Kennedy	9	13	40.91		41.7	42.9	76.0	61.1	57.1
O'Connor	9	13	40.91		50.0	50.0	68.0	67.6	57.4
Stevens	6	16	27.27		31.3	29.3	36.0	40.5	35.4
Majority All Cases	9	13	40.91		41.7	52.4	64.0	51.4	51.0
Split Decisions	6	7	46.15		44.4	51.6	68.8	52.4	64.0
Unanimous	3	6	33.33		38.9	54.6	55.6	50.0	50.0

16. For example, a vote to uphold a greater percentage of criminal convictions than in a previous Term may mean that the Justices or the Court has become tougher on criminal defendants. Alternatively, such a statistical record may mean only that the facts, the law, or both of a number of individual cases were less favorable to the defendant this Term than in previous years.

17. Although factual and legal variations may skew analysis of a given category of cases (producing unexpectedly liberal or conservative results), it is less likely that such factors would account for a pronounced directional change in several tables.

Figure 1
Civil Cases: State Government Versus a Private Party

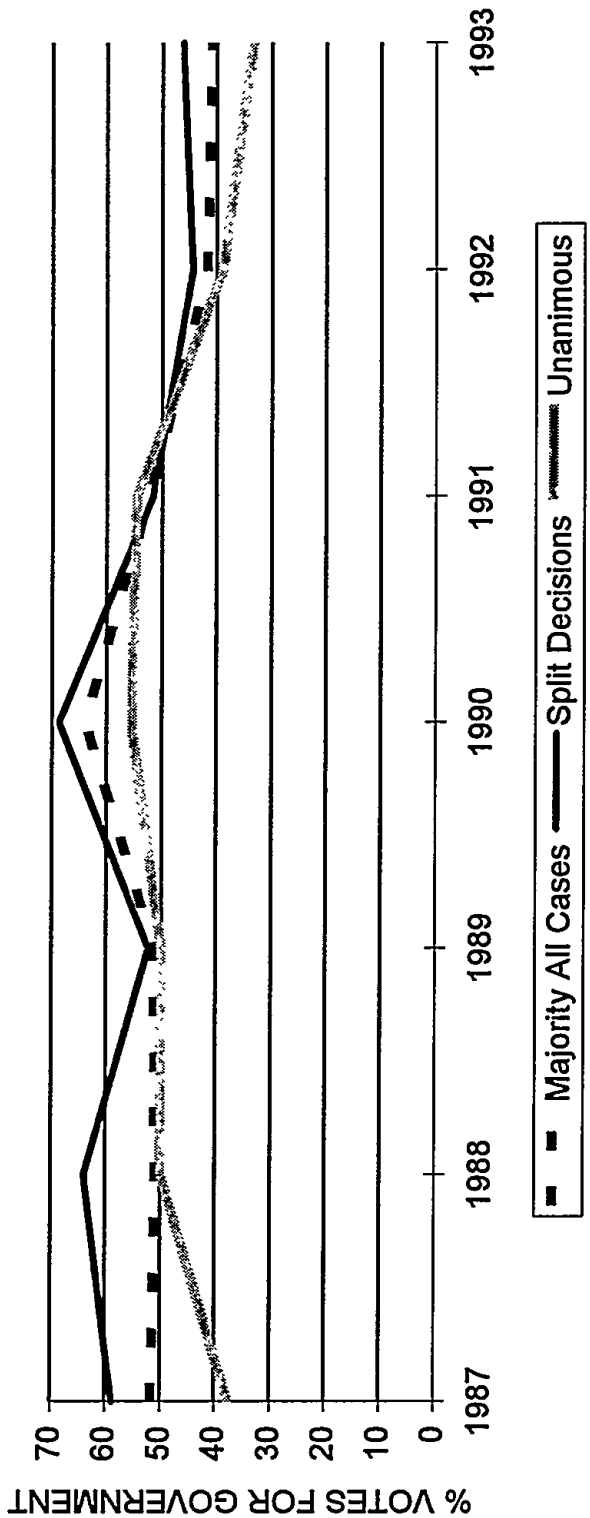


Table 1[18] and Figure 1 show that the Court's overall voting pattern in 1993 continued a trend that began in 1991: the decision of

18. Cases decided in favor of state government: Holder v. Hall, 114 S. Ct. 2581 (1994) (refusing to extend § 2 of the Voting Rights Act of 1965 to challenges to the size of a governing authority); Heck v. Humphrey, 114 S. Ct. 2364 (1994) (holding that a 42 U.S.C. § 1983 plaintiff who alleges unconstitutional imprisonment must establish that the underlying conviction has been reversed on direct appeal, expunged by executive order, declared invalid, or rendered suspect by a federal court's issuance of a writ of habeas corpus); Barclay Bank PLC v. Franchise Tax Bd., 114 S. Ct. 2268 (1994) (upholding California's use of a "worldwide combined reporting" method to determine corporate franchise tax of foreign multinational corporations); Department of Taxation & Fin. v. Milhelm Attea & Bros., 114 S. Ct. 2028 (1994) (determining that bookkeeping requirements and quantity limitations imposed by New York on wholesalers who sell untaxed cigarettes to Native Americans were not preempted by federal law); Waters v. Churchill, 114 S. Ct. 1878 (1994) (plurality opinion) (stating that the *Connick* test—used to determine whether a government employee's speech is protected—applies to what public employer reasonably believed the employee said rather than what a fact finder determines actually was said); Northwest Airlines v. County of Kent, 114 S. Ct. 855 (1994) (finding that county airport's user fees did not violate the Anti-Head Tax Act or the Commerce Clause); Department of Revenue v. ACF Indus., 114 S. Ct. 843 (1994) (approving Oregon ad valorem tax imposed upon railroad property despite the fact that the taxing scheme exempted many other classes of commercial and industrial property); Albright v. Oliver, 114 S. Ct. 807 (1994) (deciding that criminal prosecution pursuant to invalid arrest warrant does not violate due process guarantees).

Cases decided against state government: Board of Educ. v. Grumet, 114 S. Ct. 2481 (1994) (ruling that a New York school district comprising exclusively a religious village violates the Establishment Clause); Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (concluding that the city had not met its burden of establishing that easements required of landowner in exchange for building permit were reasonably related to the proposed construction); West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205 (1994) (invalidating, under the Commerce Clause, a Massachusetts assessment on all fluid milk sold to retailers within the state); Ibañez v. Florida Dep't of Business and Professional Regulation, 114 S. Ct. 2084 (1994) (rejecting, as violating the First Amendment, a Florida Board of Accountancy decision to censure attorney for using the designations CPA and CFP in her advertising); Lividas v. Bradshaw, 114 S. Ct. 2068 (1994) (holding that National Labor Relations Act preempted State Labor Commissioner's policy of not enforcing an immediate payment statute on behalf of employees covered by a collective bargaining agreement containing an arbitration clause); City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994) (invalidating city ordinance banning all residential signs except those falling within one of ten exemptions contained in the ordinance); Associated Indus. of Mo. v. Lohman, 114 S. Ct. 1815 (1994) (determining that Missouri "use tax" violated the Commerce Clause in those localities where it exceeded the local sales tax); C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677 (1994) (using Commerce Clause to strike down local ordinance requiring that all solid waste be processed at town's transfer station); J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994) (ruling that a state cannot exercise peremptory challenges solely on the basis of the potential juror's gender); Oregon Waste Sys. v. Department of Envtl. Quality, 114 S. Ct. 1345 (1994) (finding an Oregon surcharge on the disposal of solid waste generated in other states facially invalid under the negative Commerce Clause); Elder v. Holloway, 114 S. Ct. 1019 (1994) (holding that courts are not bound by the authorities cited to it when deciding whether a right is "clearly established" for purposes of qualified immunity); Florence County Sch. Dist. Four v. Carter, 114 S. Ct. 361 (1993) (allowing reimbursement to parents who remove their child from a public school that fails to provide an adequate

fewer and fewer civil cases in favor of state government. The percentage of cases decided unanimously in favor of state government in 1993, 33.3%, is the lowest figure since the inception of this study. Moreover, the meager number of unanimous decisions in favor of state government is statistically significant.[19] Regression analysis (see App. B, Tbl. 1a) predicts that the Court would have decided 50.4% of all cases unanimously in favor of state litigants. The actual percentage of cases so decided, 33.3%, 17.1% below the predicted value, is significant to the 0.05 level of confidence and suggests that the Court has, in fact, moved in a liberal direction since 1990 (Figure 1).

The significant movement in the decision of unanimous cases is also reflected in the decision of "all cases" and "split decisions" categories. Although the 1993 "all cases" figure of 40.9% does not diverge in a statistically significant fashion from the predicted 1993 value of 48.7% (App. B, Tbl. 1a), the number is consistent with the constant downward trend that began in 1991. Indeed, between the 1990 Term and the present, the percentage of "all cases" decided in favor of state government has decreased by a total of 22.1 percentage points. A similar trend is seen in the outcome of split decisions. In 1990 68.8% of the split decisions were decided in favor the states. In contrast, only 46.2% of the split decisions were so decided in 1993.

Chief Justice Rehnquist—as he has done every year since this survey's inception—tops Table 1 as the Justice most likely to vote in favor of state government in civil cases. The Chief Justice's record of voting for state government on 68.2% of the issues presented this Term represents an increase of 15.4 percentage points over his 1992 Term record. More notable, however, is the position of the Chief Justice relative to the other Justices. Not only does he outdistance the next closest Justice, Justice Scalia, by almost 20 percentage points, he stands as the only Justice to vote in favor of state government more than half of the time. At the table's other extreme is Justice Stevens, who voted for state government only 27.3% of the time. His 4.0 percentage point decrease from last Term, however, is unremarkable.

The remaining seven Justices—who are spread out over a span of less than 10%—are separated by votes in only two cases. Because of this small point spread, it is unlikely that these statistics have any ideo-

education under Individual with Disabilities Education Act in favor of enrolling their child in a private school that, while proper under IDEA, does not meet all the requirements of 20 U.S.C. § 1401(a)(18)).

19. The significance of the above data, however, should not be overstated. The Durbin-Watson value (DW) of 0.97 for the unanimous decision outcome on Table 1a suggests possible auto-correlation. *See supra* note 15.

logical value. Justice Scalia, second only to the Chief Justice in his pro-state voting record, voted for state government on 50% of the issues presented during the 1993 Term—an 8.3 percentage point increase over the 1992 Term. Justice Souter and Justice Thomas tied for third place, each voting for state government on 45.5% of the issues addressed. Justice Blackmun, in fifth place, voted in favor of state government 42.9% of the time—a 12.6 percentage point increase from the 1992 Term. Tied in sixth place are Justices Ginsburg,[20] Kennedy and O'Connor, who each voted in favor of state government 40.9% of the time. None of these voting percentages deviates in a statistically significant manner from predicted values (App. B, Tbl. 1a).

TABLE 2
CIVIL CASES: FEDERAL GOVERNMENT VERSUS A PRIVATE PARTY

JUSTICE	1993 TERM VOTES				% VOTES FOR GOVERNMENT				
	FOR GOV'T	AGAINST GOV'T	1993 TERM		1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Souter	13	4	76.47		70.0	71.4	55.6	----	----
Stevens	12	5	70.59		34.4	57.1	40.0	57.1	42.9
Blackmun	11	5	68.75		48.5	57.1	60.0	64.3	60.7
Ginsburg	10	7	58.82		---	---	---	---	---
Rehnquist	10	7	58.82		74.2	71.4	70.0	78.6	71.4
O'Connor	9	7	56.25		62.5	52.4	60.0	60.7	60.7
Kennedy	9	8	52.94		70.0	76.2	55.6	60.7	66.7
Scalia	9	8	52.94		67.7	71.4	57.9	60.7	59.3
Thomas	8	9	47.06		64.5	53.3	----	----	----
Majority All Cases	9	8	52.94		66.7	81.0	60.0	71.4	64.3
Split Decisions	3	4	42.86		76.5	83.3	60.0	66.7	66.7
Unanimous	6	4	60.00		56.3	77.8	60.0	76.9	61.5

20. Although it is impossible to ascertain any "movement" by Justice Ginsburg, since she has been on the Court only one Term, she ended the 1993 Term one position from the bottom of Table 1. By contrast, her predecessor, Justice White, was second only to the Chief Justice during the 1992 Term. Justice Ginsburg's voting record, therefore, has undoubtedly contributed to the overall liberal trend of the whole Court noted in Table 1.

Figure 2
Civil Cases: Federal Government Versus a Private Party

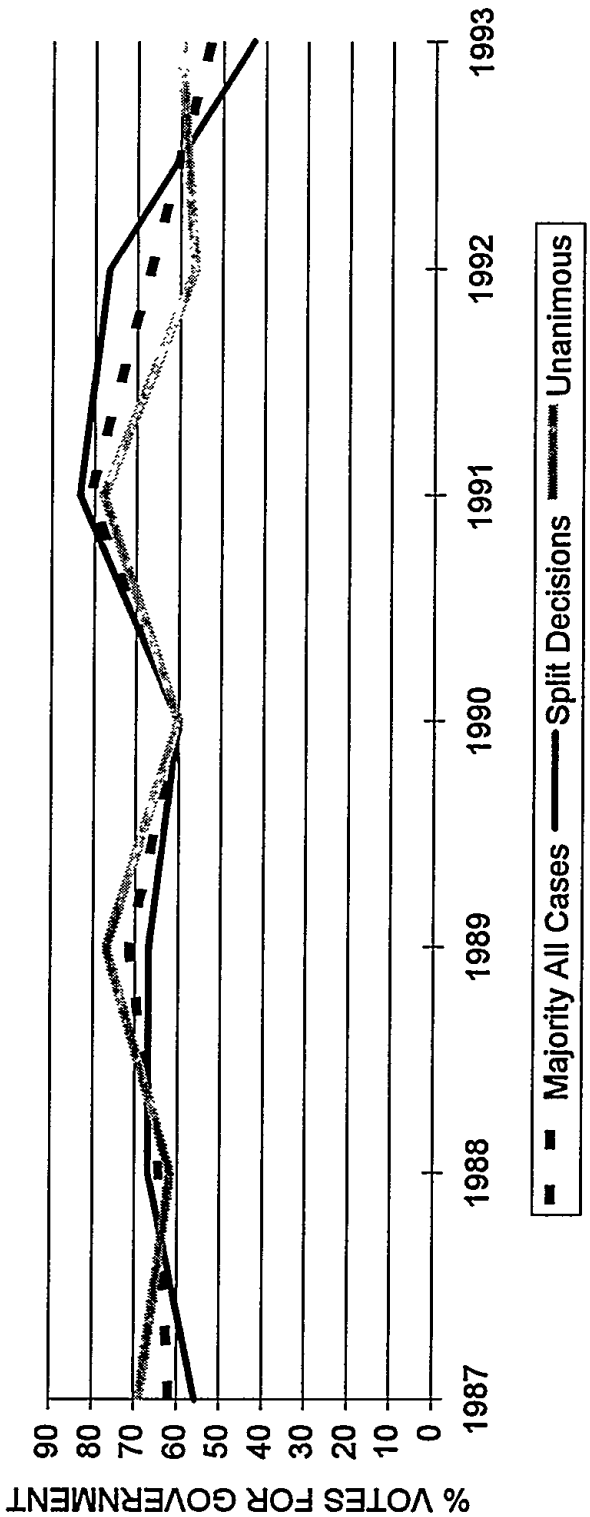


Table 2[21] exhibits a sizeable decrease in the total percentage of civil cases decided in favor of the federal government, from 66.7% during the 1992 Term to 52.9% in 1993. The movement is even greater when one regards the Court's record in close cases. Split decisions, in which ideology may play a greater role than in cases decided by a unanimous Court, were decided in favor of the federal government one-third less often during the 1993 Term than during the 1992 Term. In fact, the 1993 Term's results, both overall and in split decisions, represent the lowest percentage of civil cases decided in favor of the federal government during the nine years of this study.

21. Cases holding in favor of the federal government: Thomas Jefferson Univ. v. Shalala, 114 S. Ct. 2381 (1994) (affirming a Secretary of Health and Human Services decision barring a hospital from recovering certain educational costs borne in prior years by its affiliated medical college); United States v. Carlton, 114 S. Ct. 2018 (1994) (refusing to find a due process violation in the retroactive application of a federal estate tax amendment); Key Tronic Corp. v. United States, 114 S. Ct. 1960 (1994) (declining to allow the award of attorney's fees to private litigants who bring a cost recovery action under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980); BFP v. Resolution Trust Corp., 114 S. Ct. 1757 (1994) (holding that the price received in a mortgage foreclosure sale qualifies as a "reasonably equivalent value" of mortgage property for bankruptcy purposes); United States v. Irvine, 114 S. Ct. 1473 (1994) (holding that the disclaimer of a remainder interest in a trust was subject to gift tax after enactment of federal gift tax statute); FDIC v. Meyer, 114 S. Ct. 996 (1994) (refusing to extend *Bivens* rationale to actions against a federal agency); ABF Freight Sys. v. NLRB, 114 S. Ct. 835 (1994) (ratifying NLRB order to reinstate employee, despite the fact that the employee lied to an Administrative Law Judge about his reasons for not complying with job-related responsibilities); United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993) (refusing to permit the dismissal of a forfeiture action which was not filed in compliance with the timing requirements of 19 U.S.C. §§ 1602-04).

Cases holding against the federal government: Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994) (vacating the district court's grant of summary judgment in favor of the U.S. and remanding for inquiry into factual basis of government's assertions); Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 114 S. Ct. 2251 (1994) (invalidating "true doubt rule" applied by Department of Labor authorities because it violates the Administrative Procedure Act by shifting the burden of proof to the party opposing a benefits claim); MCI Telecom. Corp. v. AT&T, 114 S. Ct. 2223 (1994) (finding that an FCC policy de-tariffing nondominant long distance carriers exceeded the Commission's authority); O'Melveny & Myers v. FDIC, 114 S. Ct. 2048 (1994) (recognizing that California law, rather than federal law, governs the tort liability of attorneys who counseled now-failed savings and loan); Farmer v. Brennan, 114 S. Ct. 1970 (1994) (holding that the "deliberate indifference" standard under the Eighth Amendment is met when a defendant disregards a substantial risk of serious harm); NLRB v. Health Care & Retirement Corp. of Am., 114 S. Ct. 1778 (1994) (striking down the NLRB's test for assessing whether nurses are supervisors under NLRA); FDIC v. Meyer, 114 S. Ct. 996 (1994) (holding that the sue-and-be-sued clause applicable to Federal Savings and Loan Insurance Corporation is not limited to cases in which it would be subject to liability as a private entity as provided by the jurisdictional grant of the Federal Tort Claims Act); United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993) (establishing that under most circumstances the government is required to afford notice and a meaningful opportunity to be heard before seizing real property pursuant to civil forfeiture laws).

The importance of the above movement is supported by the regression analysis, which shows that both the 13.8 percentage point drop in the "all cases" category and the 33.6 percentage point decrease in the split decisions category decided in favor of the federal government are statistically significant. Indeed, the decrease in the federal government's success rate in split decisions is significant to the 0.01 level of confidence (App. B, Tbl. 2a). Thus, the Court is moving in a liberal direction in favoring private litigants over the federal government.

Table 2 reveals another interesting fact. The liberal faction is headed by Justices Thomas and Scalia, hardly known for liberal political ideology, while the most conservative positions on Table 2 are held by none other that Justices Souter, Stevens, and Blackmun, none of whom is viewed to embrace politically conservative ideologies. This unusual pattern arguably presents some uncertainty in the validity of this study's underlying assumptions and its corresponding conclusions. Why are Justices who are traditionally considered politically liberal voting in favor of the federal government while politically conservative jurists are doing the opposite? Before attempting an answer, we will examine the voting patterns of the individual Justices.

Three Justices voted in favor of the federal government a greater percentage of the time during the 1993 Term than during the 1992 Term. Justice Souter voted in favor of the federal government 76.5% of the time, an increase of 6.5 percentage points over the 1992 Term. Perhaps the most notable movements on the table, however, are those shown by Justices Blackmun and Stevens, who substantially increased the number of cases in which they voted for the government. Justice Stevens, who ended up in the table's second position, voted in favor of the government 70.6% of the time—more than a twofold increase over his percentage last Term of 34.4 (the lowest position on Table 2 in 1992). Justice Blackmun, in the third position, voted in favor of the government 68.8% of the time, rising 20.3 percentage points. In fact, the movements evidenced by both of these Justices are statistically significant—in the case of Justice Stevens, to the 0.01 level of confidence (App. B, Tbl. 2a).

The other statistically significant movements revealed by Table 2 are the voting records of Chief Justice Rehnquist and Justices Kennedy and Scalia.[22] These Justices *all* voted for the federal government

22. Those Justices whose movements could not be adjudged statistically significant are arranged as follows: Justice Ginsburg is tied with the Chief Justice for the middle position on Table 2, each voting for the federal government 58.8% of the time. Next is Justice

in substantially fewer cases than previous years' data predicted. The Chief Justice's actual record of 58.8%, 17.8 percentage points below his predicted value, and Justice Scalia's actual record of 52.9%, 16.3 percentage points below his predicted value, are statistically significant to the 0.01 level of confidence. Justice Kennedy's record, which shows he voted for the federal government nearly 20 percentage points less often than his past record would predict, shows liberal movement that is significant to the 0.05 level of confidence.

But, what do these changes mean? The above data suggest that the Court's members are reorienting themselves to new political realities. As these adjustments occur, voting patterns will change.

During the first eight years of this study, a Republican President occupied the White House and, consequently, a Republican Solicitor General was responsible for initiating governmental appeals to the Supreme Court. In January 1993, however, Democrat William Jefferson Clinton was inaugurated as the forty-second President of the United States. With the ascendancy of the new president, Republican Solicitor General Kenneth Starr was excused from office and Democrat Drew S. Days III was installed as the new Solicitor General. One can safely assume that Mr. Days has taken more *politically* liberal positions than his immediate predecessors. Are the results on Table 2, then, nothing more than instrumental reactions to the shift in the nature of the cases being pursued by the Solicitor General—with the liberals favoring politically liberal policies and the conservatives opposing them?

This theory can be tested by analyzing the civil cases involving the federal government decided during the 1993 Term. We will limit our inquiry to cases decided by a divided Court because unanimous decisions are generally decided on non-ideological grounds. There were a total of seven such cases during the 1993 Term.[23]

O'Connor, who voted in favor of the federal government 56.3% of the time during the 1993 Term, down from the 62.5% she voted during the 1992 Term. Justice Thomas voted for the government on a mere 47.1% of the issues which he decided in the 1993 Term; this results in a 16.2 percentage point drop from his percentage of 64.5 during the previous Term.

23. Thomas Jefferson Univ. v. Shalala, 114 S. Ct. 2381 (1994); Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 114 S. Ct. 2251 (1994); MCI Telecom. Corp. v. American Tel. & Tel. Co., 114 S. Ct. 2223 (1994); Key Tronic Corp. v. United States, 114 S. Ct. 1960 (1994); NLRB v. Health Care & Retirement Corp. of Am., 114 S. Ct. 1778 (1994); BFP v. Resolution Trust Corp., 114 S. Ct. 1757 (1994); United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993).

Of these seven cases, four were appealed by the Solicitor General on behalf of the federal government.[24] In these four cases, Justices Blackmun, Souter and Stevens sided with the federal government on every issue but one.[25] They were in the majority once,[26] dissented three times,[27] and in one of those dissents the group was joined by Justice Ginsburg.[28] In the same four cases, however, the traditionally conservative wing of the Court, comprising Chief Justice Rehnquist and Justices Scalia and Thomas, sided with the federal government only once.[29]

From the above data, it appears that the federal government pressed more liberal claims in 1993 than in the recent past. Based on this inference, it can then be argued that Table 2 merely demonstrates that a politically conservative Court voted *against* a politically liberal executive department. This explanation, of course, creates some analytical difficulties for this study. We have posited that a vote in favor of government is conservative while a contrary vote is liberal. Those who chafe at the thought of attaching the adjective liberal to Justice Scalia, therefore, might assert that Table 2 undercuts the foundation of that analysis: the "true" liberals, the argument would go, are now voting *with* the government while the "true" conservatives are voting *against* it.

Such an objection, while not without force, does not undercut the validity of this study. While we acknowledge the inherent limitations

24. *Greenwich Collieries*, 114 S. Ct. at 2251; *MCI Telecom. Corp.*, 114 S. Ct. at 2223; *Health Care & Retirement Corp. of Am.*, 114 S. Ct. at 1778; *James Daniel Good Real Property*, 114 S. Ct. at 492.

25. The one issue on which the three Justices held against the interest of the United States was found in *James Daniel*. In that case, the Justices joined a majority opinion which held that the government's ex parte seizure of the defendant's real property violated due process. *James Daniel Good Real Property*, 114 S. Ct. at 505. On the second issue addressed in the case, the three Justices, with the unanimous accord of the Court, voted to reverse the lower court's ruling to dismiss the case for failing to comply with the internal timing requirements of 19 U.S.C. §§ 1602-1604 but was filed within the five-year statute of limitations. *Id.* at 507.

26. *Id.* at 492.

27. *Greenwich Collieries*, 114 S. Ct. at 2259 (Souter, J., dissenting); *MCI Telecom. Corp.*, 114 S. Ct. at 2233 (Stevens, J., dissenting); *Health Care & Retirement Corp. of Am.*, 114 S. Ct. at 1785 (Ginsburg, J., dissenting).

28. *Health Care & Retirement Corp. of Am.*, 114 S. Ct. at 1785 (Ginsburg, J., dissenting).

29. *James Daniel Good Real Property*, 114 S. Ct. at 507 (Rehnquist, C.J., concurring in part and dissenting in part); *Id.* at 515 (Thomas, J., concurring in part and dissenting in part). Chief Justice Rehnquist and Justice Thomas also sided with the government in the unanimous half of the Court's opinion in *James Daniel*. *Id.* at 497-98 and 505-07 (respectively). *See supra* note 25.

of any statistical study of judicial attitude,[30] we are sensitive to the ambiguities inherent in any use of ideological labels,[31] and would not argue that Justices Scalia or Thomas suddenly became "born-again" liberal Democrats. The use of the liberal and conservative appellations in this study is not synonymous with the use of those terms in ordinary politics. Rather, we posit that a liberal jurist will generally prefer a claim of individual right over an assertion of government power, while the conservative reaction will be the opposite. We believe these assumptions remain sound even when ideological roles are reversed, as they may be on the present Court.

When government pursues a politically conservative agenda, ideologically sympathetic members of the Court, for example, Justices Scalia and Thomas, may align themselves with the government and vote in its favor—a conservative judicial embrace of conservative politics. Similarly, liberal Justices unsympathetic to such political goals. For example, Justices Blackmun and Stevens, might choose to vote against the government—a liberal reaction to conservative politics. In neither of these instances are there serious quibbles with the use of the conservative or liberal tags, perhaps because the use of those labels accords with ordinary political usage: the conservative Justices, in the example posited, favor conservative policies while the liberal Justices favor liberal policies. However, this is not the sense in which we use the ideological labels. Under the definitional stance of this study, the "conservative" Justice is conservative because he or she supports the assertion of governmental power, while the "liberal" opposes it.

This use of the conservative and liberal labels remains valid even when political roles are reversed. Thus, when a politically liberal jurist embraces liberal politics to uphold an assertion of governmental power, that action is properly denominated conservative. Similarly, when a politically conservative jurist rejects some new assertion of governmental regulatory power, that action is appropriately described as liberal. In both circumstances, the conservative supports the assertion of government power while the liberal opposes it.[32]

30. Any assertion that statistics measure attitudinal changes on the Court is problematic. There appears to be no real way to measure the attitudes of the Justices, or to determine whether vote change or attitude change is the independent variable. The formal nature of the Justices' positions does not allow for the usual methods of measuring attitude as the independent variable (for example, surveys or interviews). Thus, we are left to measure changes in voting patterns and then infer possible causes from those patterns.

31. *See* COFFIN, *supra* note 8.

32. *See infra* table 5, notes 43-55, and accompanying text (noting Justice Blackmun's and Justice Stevens' retreat from—and Justice Scalia's and Justice Thomas' embrace of—the First Amendment).

Therefore, Table 2 does not demonstrate that the Justices have radically changed their political ideologies. Rather, as federal governmental politics have shifted, the conservative and liberal roles on the Supreme Court have also shifted. Table 2 accurately reflects that the Supreme Court is somewhat more liberal in 1993 than it was in 1990. The liberal flag may simply be passing from politically liberal jurists who opposed politically conservative agendas to the hands of politically conservative Justices who, in the same manner, now oppose politically liberal invocations of governmental control. When Justice Scalia voted against an exercise of governmental power in 1994,[33] it was no more paradoxical to attach a liberal label to his action than it was, in 1973, to attach the same label to Justice Blackmun.[34]

TABLE 3
STATE CRIMINAL CASES

JUSTICE	1993 TERM VOTES				% VOTES FOR GOVERNMENT				
	FOR GOV'T	AGAINST GOV'T	1993 TERM		1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Thomas	14	2	87.50		85.7	75.0	----	----	----
Rehnquist	13	3	81.25		90.0	66.7	81.5	85.3	85.2
Scalia	13	3	81.25		86.4	77.8	74.1	73.5	77.8
O'Connor	11	5	68.75		66.7	33.3	66.7	76.5	77.8
Kennedy	8	8	50.00		77.3	50.0	57.7	73.5	81.5
Ginsburg	7	9	43.75		—	—	—	—	----
Souter	4	12	25.00		55.0	55.6	68.0	----	----
Stevens	4	12	25.00		31.8	27.8	0.0	20.6	37.0
Blackmun	2	14	12.50		25.0	33.3	14.8	35.3	37.0
Majority All Cases	9	7	56.25		77.3	44.4	55.6	64.7	70.4
Split Decisions	8	5	61.54		84.6	33.3	68.2	70.0	72.7
Unanimous	1	2	33.33		66.7	66.7	0.0	25.0	60.0

33. *E.g., MCI Telecom. Corp.*, 114 S. Ct. at 2226; *Greenwich Collieries*, 114 S. Ct. at 2253.

34. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (Blackmun delivered the opinion of the Court establishing the right to abortion under certain circumstances).

Figure 3
State Criminal Cases

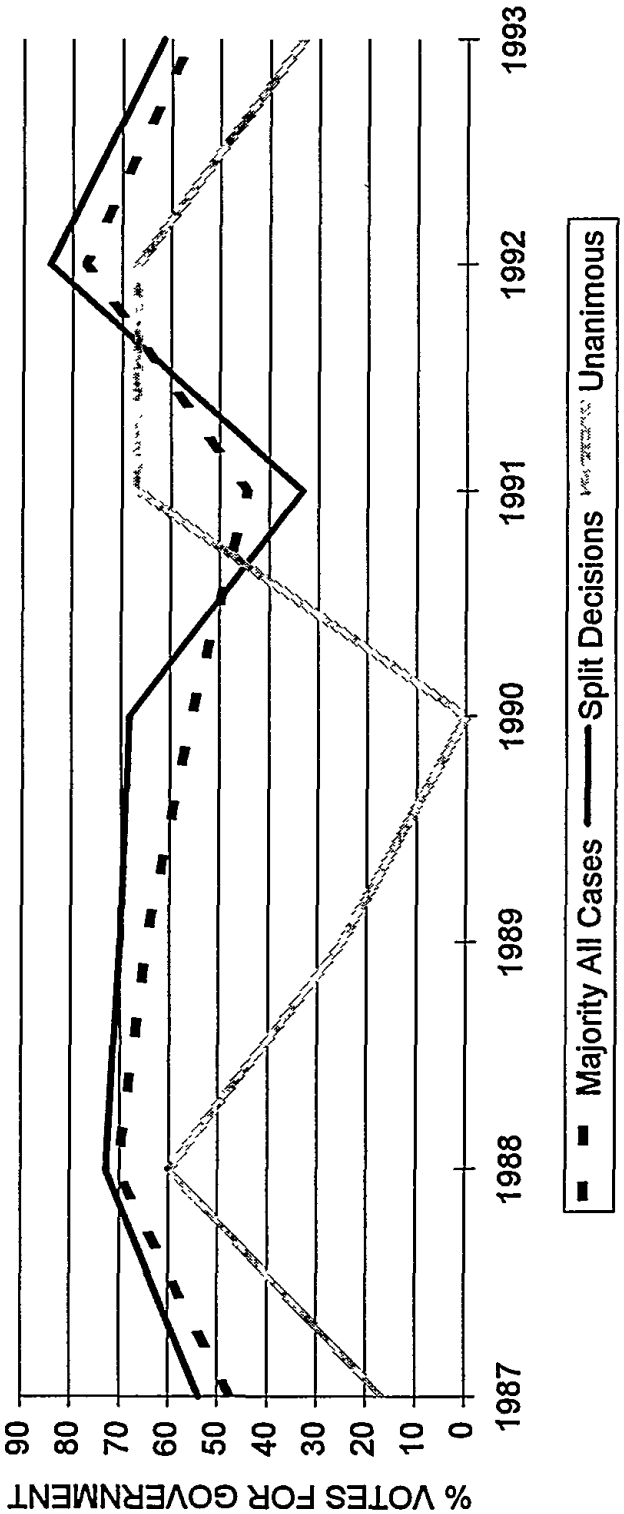


Table 3[35] illustrates that the 1993 Court voted in favor of state criminal convictions less frequently than the 1992 Court. The 1993 Court voted to uphold state criminal convictions 56.3% of the time in 1993 as opposed to 77.3% in 1992. This 21 percentage point drop is notable, moreover, because it results from decreases in the frequency of state success in both split decisions and unanimous cases. In fact, states were successful in unanimous cases only half as frequently in the 1993 Term[36] as they were during the 1992 Term.[37] Whether Table 3 represents any general liberal trend, however, is questionable. Figure 3 shows that voting patterns in state criminal cases have been rather volatile, and regression analysis indicates that none of the

35. Cases decided in favor of state government: Tuilaepa v. California, 114 S. Ct. 2630 (1994) (upholding California death penalty statute against allegations that it is unconstitutionally vague); Reed v. Farley, 114 S. Ct. 2291 (1994) (holding that a court's failure to abide by speedy trial requirement was not cognizable under federal habeas statute when petitioner did not object to trial date at time of trial and suffered no prejudice from delay); Simmons v. South Carolina, 114 S. Ct. 2187 (1994) (refusing to require that a jury be instructed that a life term without parole is the alternative to the death penalty unless the state puts a defendant's future dangerousness in issue); Romano v. Oklahoma, 114 S. Ct. 2004 (1994) (deciding that the admission of evidence concerning petitioner's prior death sentence did not violate the Constitution); Victor v. Nebraska, 114 S. Ct. 1239 (1994) (finding that Nebraska definition of "reasonable doubt" passes constitutional muster); Hagen v. Utah, 114 S. Ct. 958 (1994) (finding that the location of a crime committed by petitioner was not "Indian Country" therefore the state could permissibly exercise jurisdiction over the petitioner); Caspari v. Bohlen, 114 S. Ct. 948 (1994) (reversing a Court of Appeals decision granting habeas relief because the court's holding constituted a new rule under *Teague* nonretroactivity principal); Schiro v. Farley, 114 S. Ct. 783 (1994) (refusing to vacate death sentence and rejecting argument that petitioner's sentencing hearing violated double jeopardy clause).

Cases decided against state government: McFarland v. Scott, 114 S. Ct. 2568 (1994) (concluding that the statutory right to counsel for capital defendants in federal habeas proceedings adheres prior to the filing of a habeas petition); Simmons v. South Carolina, 114 S. Ct. 2187 (1994) (ruling that since the state raised the issue of petitioner's future dangerousness, petitioner should have been allowed to inform the jury that a sentence of life imprisonment carried no possibility of parole); Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994) (determining that a tax imposed under the Montana Dangerous Drug Tax Act can qualify as a "second punishment" for purposes of the double jeopardy clause); Stansbury v. California, 114 S. Ct. 1526 (1994) (establishing that an officer's subjective view of whether a person being interrogated is a suspect is irrelevant to the determination of whether a person is in custody for the purposes of *Miranda*); Powell v. Nevada, 114 S. Ct. 1280 (1994) (holding that the *McLaughlin* rule, which states that a 48-hour delay between a warrantless arrest and a probable cause hearing violates the Constitution, is to be applied retroactively); Burden v. Zant, 114 S. Ct. 654 (1994) (reversing and remanding denial of habeas petition for inquiry into possible conflict of interest involving petitioner's pretrial counsel).

36. Since only three decisions rendered during the 1993 Term fit this classification, the importance of this finding is dubious.

37. In split decisions, the states won 61.5% of the time during the 1993 Term as opposed to 84.6% of the time during the 1992 Term, a decrease of 23.1 percentage points.

movement in the 1993 Term is statistically significant. Consequently, the general decrease in support of state and local government claims is likely due to the issues or types of cases presented before the Court and not the result of attitudinal shifts.

The individual Justices maintained roughly the same relative positions on Table 3 during the 1993 Term that they occupied during the 1992 Term. Justice Thomas supplanted Chief Justice Rehnquist as the Justice most likely to vote in favor of states in criminal cases, voting in the state's favor 87.5% of the time. Chief Justice Rehnquist and Justice Scalia tied for second, voting for the states on 81.2% of the issues presented during this Term.[38] These same three Justices occupied the top three spots on last Term's table as well. In the fourth spot on the table, 12.4 percentage points lower than the pair who tied for second, is Justice O'Connor.[39]

Justice Kennedy immediately follows Justice O'Connor, although nearly 20 percentage points separate the two Justices. For Justice Kennedy, his 1993 record—voting 50% of the time in favor of the states—is 27.3 percentage points lower than his 1992 Term percentage of 77.3. Justice Ginsburg is next, voting for state governments 43.8% of the time. Tying for seventh are Justices Souter and Stevens, each voting in favor of states only 25% of the time. Justice Souter's record during the 1993 Term is 30 percentage points lower than his 55% rate during the 1992 Term. At the bottom of the table, in the same position he occupied during the 1992 Term, is Justice Blackmun—who voted in favor of the states only 12.5% of the time (half of his tally in 1992).

While none of the vote tallies noted above demonstrates statistically significant movement (see App. B, Tbl. 3a), Table 3 does suggest one interesting piece of information. The 20 percentage point gap between Justice O'Connor and Justice Kennedy separates the Justices whose voting percentages changed very little between 1992 and 1993 from those Justices who were responsible for the overall 21 percentage point decline. The top four Justices on Table 3, Chief Justice Rehnquist and Justices Thomas, Scalia and O'Connor, averaged only a 2.4 percentage point decrease from the 1992 Term to the 1993 Term.

38. For Chief Justice Rehnquist, this represents a decrease of 8.8 percentage points from last Term while for Justice Scalia it represents a 5.4 percentage point fall.

39. Justice O'Connor's 68.8% record, a 2.1 percentage point increase over the 1992 Term, makes her one of the two Justices who voted more frequently for the states this Term than last. Justice Thomas was the other.

The bottom five Justices, however, Justices Kennedy, Ginsburg,[40] Souter, Stevens and Blackmun, averaged a decline of 21.6 percentage points from last Term to this Term.

TABLE 4
FEDERAL CRIMINAL CASES

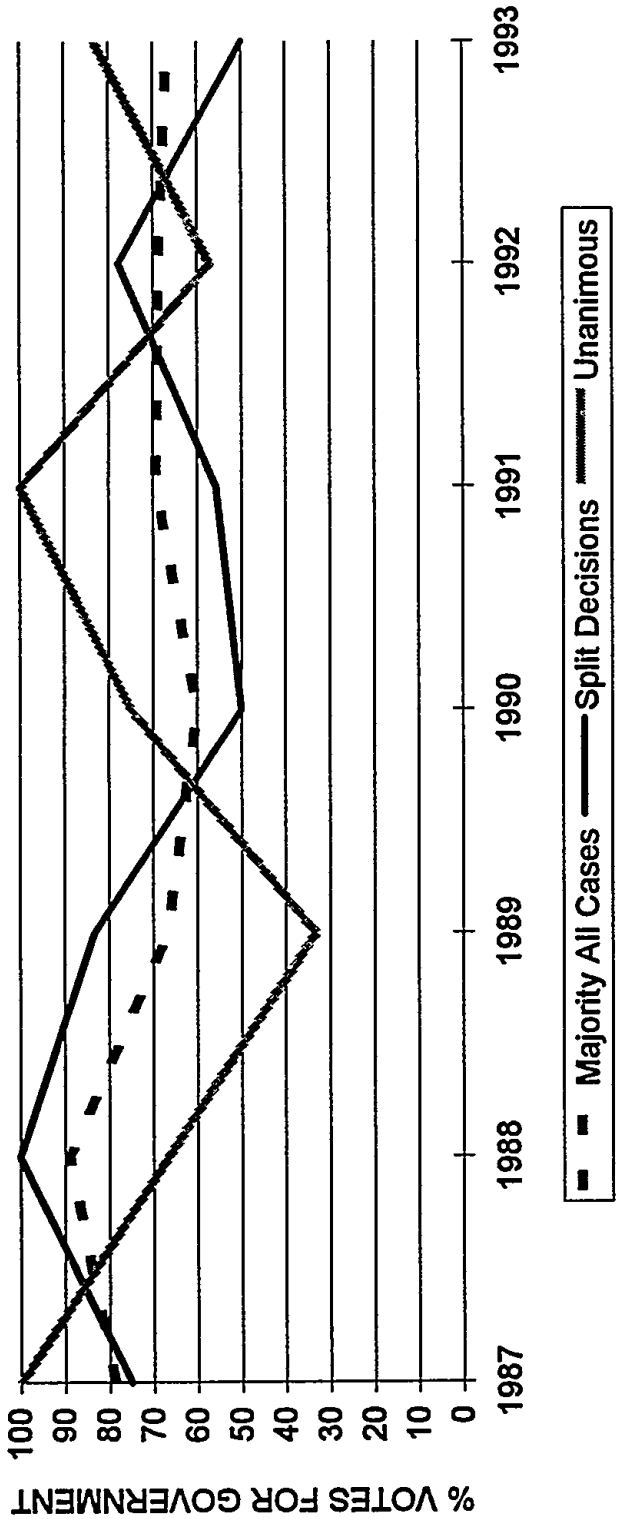
JUSTICE	1993 TERM VOTES				% VOTES FOR GOVERNMENT				
	FOR GOV'T	AGAINST GOV'T	1993 TERM		1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Rehnquist	10	2	83.33		81.3	76.9	70.0	77.8	88.9
Thomas	10	2	83.33		81.3	54.6-	----	----	----
O'Connor	9	3	75.00		75.0	76.9	70.0	77.8	77.8
Kennedy	8	4	66.67		60.0	84.6	50.0	66.7	88.9
Scalia	8	4	66.67		62.5	76.9	40.0	66.7	66.7
Blackmun	7	5	58.33		46.7	61.5	70.0	44.4	55.6
Ginsburg	7	5	58.33		---	---	---	---	---
Souter	7	5	58.33		43.8	69.2	75.0	----	----
Stevens	6	6	50.00		26.7	38.5	60.0	33.3	66.7
Majority All Cases	8	4	66.67		68.8	69.2	60.0	66.7	88.9
Split Decisions	3	3	50.00		77.8	55.6	50.0	83.3	100.0
Unanimous	5	1	83.33		57.1	100.0	75.0	33.3	66.7

Table 4[41] sends mixed messages. The percentage of cases decided unanimously in favor of the federal government increased from 57.1%

40. For comparative purposes, Justice Ginsburg's 1993 Term voting percentage was compared with the 1992 voting percentage of the Justice whom she replaced, Justice White. Justice White voted for the state 75.0% of the time during the 1992 Term. Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1991 Term*, 7 B.Y.U. J. PUB. L. 1, 244 (1992).

41. Cases decided in favor of the federal government: Shannon v. United States, 114 S. Ct. 2419 (1994) (rejecting the contention that a defendant is entitled to have a jury be informed of the consequences of a not guilty by reason of insanity verdict); Davis v. United States, 114 S. Ct. 2350 (1994) (declining to extend the *Edwards* rule to circumstances where a suspect's request for an attorney is ambiguous or equivocal); Nichols v. United States, 114 S. Ct. 1921 (1994) (allowing a defendant's previous uncounseled misdemeanor conviction to be considered during sentencing for a subsequent offense, as long as the previous conviction did not result in incarceration); Posters 'n' Things Ltd. v. United States, 114 S. Ct. 1747 (1994) (construing 21 U.S.C. § 857(a)(1) to require the government to prove that a defendant knowingly conveyed interstate commerce items that he knew were likely to be used with illegal drugs and finding that § 857 is not unconstitutionally vague); Custis v.

Figure 4
Federal Criminal Cases



in 1992 to 83.3% in 1993. This, of course, suggests conservative movement. If, however, one focuses on the outcome of split decisions—where ideological concerns arguably loom larger than in unanimous outcomes—the Court then appears to vote less often in favor of the government: down 27.8 percentage points from the 1992 split decision tally. This movement, particularly because it occurred in split decisions, may suggest that the Court is advancing toward more liberal outcomes in federal criminal cases.

Most likely, Table 4 does not symbolize any shift by the Court, whether liberal or conservative. Figure 4 shows that the Court's voting record has been rather volatile in federal criminal cases. Regression analysis, furthermore, demonstrates that none of the percentage changes in 1993 is statistically significant (App. B, Tbl. 4a). Table 4, in short, does not demonstrate a reliable trend.

Table 4, however, may indicate *why* the 1993 Court was arguably more conservative in its decision of unanimous cases. In 1993, Justices Stevens and Blackmun substantially increased their voting record in favor of the federal government in criminal cases, with Justice Stevens gaining 23.3 and Justice Blackmun adding 11.6 percentage points. Regression analysis, moreover, indicates that these values, while not statistically significant, are nevertheless higher than either Justice Stevens' or Justice Blackmun's prior performances would predict; in the case of Justice Stevens by 26.3 percentage points and in the case of Justice Blackmun by 10.4. Thus, the conservative movement demonstrated by the Court's decision of unanimous cases this Term may not

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United States, 114 S. Ct. 1732 (1994) (refusing to allow a defendant in a federal sentencing proceeding to collaterally attack his previous state convictions, unless such convictions were obtained in violation of the right to counsel); Beecham v. United States, 114 S. Ct. 1669 (1994) (concluding that defendants convicted under federal law must have their civil rights restored under federal law in order to possess a firearm pursuant to exemption granted in 18 U.S.C. § 922(g)); Liteky v. United States, 114 S. Ct. 1147 (1994) (holding that the "extrajudicial source" doctrine limits a judge's required recusal under 28 U.S.C. § 455(a)); Weiss v. United States, 114 S. Ct. 752 (1994) (rejecting several constitutional challenges to a military court's authority to convict).

Cases decided against federal government: Williamson v. United States, 114 S. Ct. 2431 (1994) (refusing to extend the "inculpatory statement" exception to the hearsay rule to statements that are not self-inculpatory); Staples v. United States, 114 S. Ct. 1793 (1994) (requiring the government to establish that a defendant knew the firearm's illegal character in order to obtain a conviction under the National Firearms Act); United States v. Granderson, 114 S. Ct. 1259 (1994) (defining the phrase "original sentence" in 18 U.S.C. § 3565(a) as the maximum prison term available under the sentencing guidelines); Ratzlaf v. United States, 114 S. Ct. 655 (1994) (interpreting 31 U.S.C. § 5313(a) to require the government prove the defendant knew that structuring financial transactions to avoid federal reporting requirements was illegal).

come from politically conservative members, but from the more conservative voting records of the politically liberal wing of the Court.[42]

As in last Term's survey, Chief Justice Rehnquist and Justice Thomas together occupy the top position on Table 4, voting for the federal government 83.3% of the time and differing only slightly from the mark of 81.3% achieved last Term. The Table's other extreme also follows last Term's precedent, with Justice Stevens ranking last of the nine Justices and voting for the government only 50% of the time.

Among those Justices in the middle, Justice O'Connor closely follows the pair in first place, voting for the federal government on 75% of the issues presented. After Justice O'Connor are Justices Scalia and Kennedy, who each voted for the government 66.7% of the time. The trio of Justices Ginsburg, Souter and Blackmun tied for sixth with a voting record of 58.3% in favor of the government.

Table 5[43] presents curious data. Overall, the chart totals appear to demonstrate a noteworthy liberal shift: the Court increased its acceptance of First Amendment claims in all cases by some 12 percentage points and in split decisions by nearly 7 percentage points. In unanimous decisions, moreover, the Court supported the First Amendment in every case. The ranking of individual Justices on Table 5, however, may be more noteworthy than the vote tallies for the Court overall.

Justice Stevens, who last Term tied with Justice Blackmun for first place on Table 5 voting for 90% of all First Amendment claims, ended the 1993 Term only one vote away from the bottom of the chart. Justice Blackmun, for his part, sinks from the top of the Table to the middle, favoring only a bare majority, 57.1%, of all First Amendment claims presented. By contrast, Justices Scalia and Thomas, who in the 1992 Term ranked fifth and sixth respectively, tied for first place in 1993.

42. A possible explanation for this phenomenon is given in the discussion of Table 2, in text accompanying notes 21-34, *supra*.

43. Cases decided in favor of the claim: Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516 (1994) (holding that some provisions of injunction against anti-abortion protestors unnecessarily burdened free speech in violation of the First Amendment); Ibañez v. Florida Dep't of Business and Professional Regulation, 114 S. Ct. 2084 (1994); City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994).

Cases decided against the claim: *Madsen*, 114 S. Ct. 2516 (1994) (holding that the 36-foot buffer zone around abortion clinic entrances and driveway, and noise restrictions, did not violate First Amendment); Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994); Waters v. Churchill, 114 S. Ct. 1878 (1994).

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

JUSTICE	1993 TERM VOTES				% VOTES FOR RIGHTS CLAIM				
	FOR CLAIM	AGAINST CLAIM	1993 TERM		1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Scalia	6	1	85.71		45.5	37.5	25.0	26.7	35.3
Thomas	6	1	85.71		40.0	20.0	-----	-----	-----
Ginsburg	5	2	71.43		---	---	---	---	---
Blackmun	5	2	71.43		90.0	88.9	69.2	60.0	41.2
Kennedy	5	2	71.43		77.8	77.8	41.7	40.0	37.5
O'Connor	4	3	57.14		36.4	77.8	54.5	26.7	25.0
Souter	4	3	57.14		60.0	88.9	41.7	-----	-----
Stevens	4	3	57.14		90.0	100.0	50.0	46.7	64.7
Rehnquist	3	4	42.86		36.4	50.0	16.7	13.3	18.8
Majority All Cases	4	3	57.14		45.5	66.7	25.0	40.0	35.3
Split Decisions	2	3	40.00		33.3	57.1	30.0	40.0	22.2
Unanimous	2	0	100.00		60.0	100.0	0.0	40.0	50.0

This role reversal can be traced to two cases: *Turner Broadcasting Systems, Inc. v. FCC*[44] and *Madsen v. Women's Health Center, Inc.*[45] These two cases, which together address three separate First Amendment issues,[46] arguably caused the Court, and the individual Justices, to reorient themselves to a new political climate.

In *Turner*, cable television owners challenged sections four and five of the Cable Television Consumer Protection and Competition Act of 1992, which requires cable companies to devote a portion of their channels to local commercial and public broadcast stations.[47] The Court voted five-to-four, with Justices Stevens and Blackmun

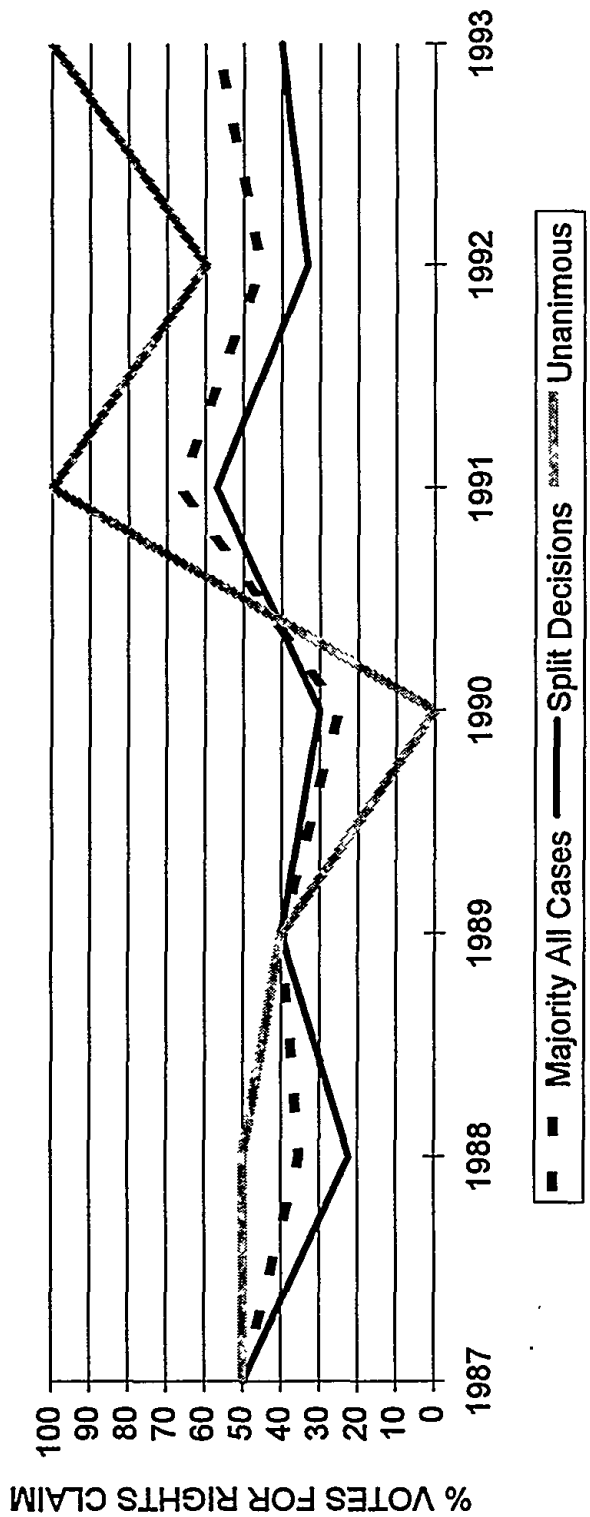
44. 114 S. Ct. 2445 (1994).

45. 114 S. Ct. 2516 (1994).

46. We divided *Madsen* into two separate issues. First, did the court's injunction creating a 36-foot buffer zone around the entrance to an abortion clinic and limiting noise violate the First Amendment? *Id.* at 2530. Second, did the remainder of the injunction violate the First Amendment? *Id.* Although there were myriad other bases upon which we could have divided the case, these two issues fully encompassed the different votes cast by the Justices and at the same time retained some level of simplicity.

47. *Turner*, 114 S. Ct. at 2451.

Figure 5
First Amendment Rights of Expression, Association, and Free Exercise of Religion



joining the Chief Justice and Justices Kennedy and Souter, to reject the cable owners' claim that the First Amendment required (almost certainly fatal) strict scrutiny of the Act.[48]

Madsen, for its part, pitted pro-life protestors' First Amendment claims against the rights of women attempting to obtain abortions.[49] By a six-to-three[50] margin, the Court upheld a district court injunction barring demonstrators from a thirty-six foot area surrounding an abortion clinic entrance. The Court, however, by an eight-to-one margin,[51] struck down the remaining portions of the injunction as violative of the First Amendment.

The outcomes in *Turner* and *Madsen* largely account for the unexpected individual rankings on Table 5. Contrary to prior predilections, Justice Stevens rejected all three First Amendment claims presented (one in *Turner* and two in *Madsen*), while Justice Blackmun rejected the First Amendment claim in *Turner* and accepted only one of the two *Madsen* claims. Regression analysis, moreover, suggests that the resulting voting percentages are unusual when considered in light of prior patterns. Justice Stevens' comparatively low tolerance for First Amendment claims is nearly 41 percentage points below his predicted 1993 score (App. B, Tbl. 5a). Similarly, Justice Blackmun's 1993 drop, while not meeting the rigorous standard for statistical significance, nevertheless results in a First Amendment voting percentage some 24 percentage points below the outcome predicted by regression analysis.

While Justices Stevens and Blackmun adopted a variety of stances towards First Amendment claims, Justices Scalia and Thomas became quite receptive to free speech concerns. Justice Scalia, in fact, largely because of his votes in *Turner* and *Madsen*, increased his acceptance of First Amendment claims by some 40 percentage points. This movement is statistically significant to the 0.01 level of confi-

48. *Id.* at 2469. The five-member majority, however, stopped short of actually upholding the Act. Instead, the majority sent the matter back to the district court to determine whether the Act could survive intermediate First Amendment scrutiny. *Id.* at 2472. The dissenters, on the other hand, would have invalidated the "must carry" provisions of the Act under strict First Amendment scrutiny. *Id.* at 2476 (O'Connor, J., concurring in part and dissenting in part); *Id.* at 2481 (Ginsburg, J., concurring in part and dissenting in part).

49. *Madsen*, 114 S. Ct. at 2521.

50. Chief Justice Rehnquist, and Justices Blackmun, Ginsburg, O'Connor, Souter, and Stevens voted against the First Amendment claims. Justices Kennedy, Scalia and Thomas voted in their favor.

51. Justice Stevens was the lone dissenter from this portion of the opinion. *Id.* at 2533.

dence[52] (App. B, Tbl. 5a). Justice Thomas' amenability to First Amendment claims increased even more, rising by almost 46 percentage points. Justice Thomas' movement is not statistically significant because he has not been on the Court long enough for us to perform a plausible regression analysis.

These results are explainable by a single factor. We believe the answer, as set out in the discussion of Table 2, is that the conservative and liberal poles on the Court are shifting.[53] As a politically liberal federal government undertakes various actions, such as attempting to promote "diversity" by regulating the content of broadcast speech[54] and attempting to promote "autonomy" by limiting the free speech rights of abortion protestors,[55] politically liberal Justices reasonably can be expected to cast conservative votes while politically conservative jurists may be inclined to take the liberal, anti-government stance.

Table 5 demonstrates that the Court has been somewhat more liberal on First Amendment claims than in the recent past. Additionally, part of that increasing liberality is coming from such unexpected quarters as Justices Scalia and Thomas.

Table 6 affords no real opportunity to assess statistically the Court's movement on equal protection issues, because only one case addressing an equal protection issue was decided by the Court during the 1993 Term. That case, *J.E.B. v. Alabama ex rel. T.B.*,[56] broadened the application of gender under the Equal Protection Clause. In *J.E.B.*, the Court held, six to three (with the Chief Justice and Justices Scalia and Thomas dissenting), that the exercise of peremptory challenges on the basis of gender violates the Equal Protection Clause.[57] Apart from the fact that the Court decided a qualitatively important equal protection question, this single case imparts very little statistical

52. The Durbin-Watson value (DW) for this figure, however, is 0.76. This suggests auto-correlation and possibly a biased standard of error value. Justice Scalia's increase is so high from both his 1992 score and his predicted value, however, that any possible bias is not likely to significantly undermine its statistical significance.

53. *See supra* text accompanying notes 21-34.

54. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460. Justice O'Connor, joined by Justices Scalia, Ginsburg, and Thomas, concluded that the must-carry portions of the Act "are content based [and] are an impermissible restraint on the cable operators' editorial discretion as well as on the cable programmers' speech." Turner Broadcasting Sys. Inc. v. FCC, 114 S. Ct. 2445, 2479 (1994) (O'Connor, J., concurring in part and dissenting in part).

55. *Madsen*, 114 S. Ct. at 2548 (Scalia, J., concurring in part and dissenting in part) (arguing that 36-foot buffer zone injunction could not withstand strict scrutiny under the First Amendment).

56. 114 S. Ct. 1419 (1994).

57. *Id.* at 1422.

TABLE 6
EQUAL PROTECTION CLAIMS

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

data. We can only note (as could virtually anyone who reads *J.E.B.*) that three generally conservative members of the Court disagreed with a significant gender discrimination ruling.

The very dearth of equal protection cases this Term, however, may have some significance. Various civil rights statutes now occupy fields that previously might have been addressed under the Equal Protection Clause.[58] Some scholars have suggested that the Clause provides a difficult (and perhaps implausible) basis for judicial intervention.[59] Thus, apart from cases raising race or gender issues, the Equal Protection Clause may again become—as Justice Oliver Wendel Holmes once quipped—"the usual last resort of constitutional arguments."[60]

58. U.S. CONST. amend. XIV, § 1. *E.g.*, Johnson v. DeGrandy, 114 S. Ct. 2647 (1994) (Voting Rights Act litigation); Holder v. Hall, 114 S. Ct. 2581 (1994) (Voting Rights Act litigation); Rivers v. Roadway Express, Inc., 114 S. Ct. 1510 (1994) (construing 1991 Civil Rights Act); Landgraf v. USI Film Prod., 114 S. Ct. 1483 (1994) (construing Civil Rights Act of 1991).

59. GERALD GUNTHER, CONSTITUTIONAL LAW 601-08 (12th ed. 1991).

60. Buck v. Bell, 274 U.S. 200, 208 (1927).

Figure 6
Equal Protection Claims

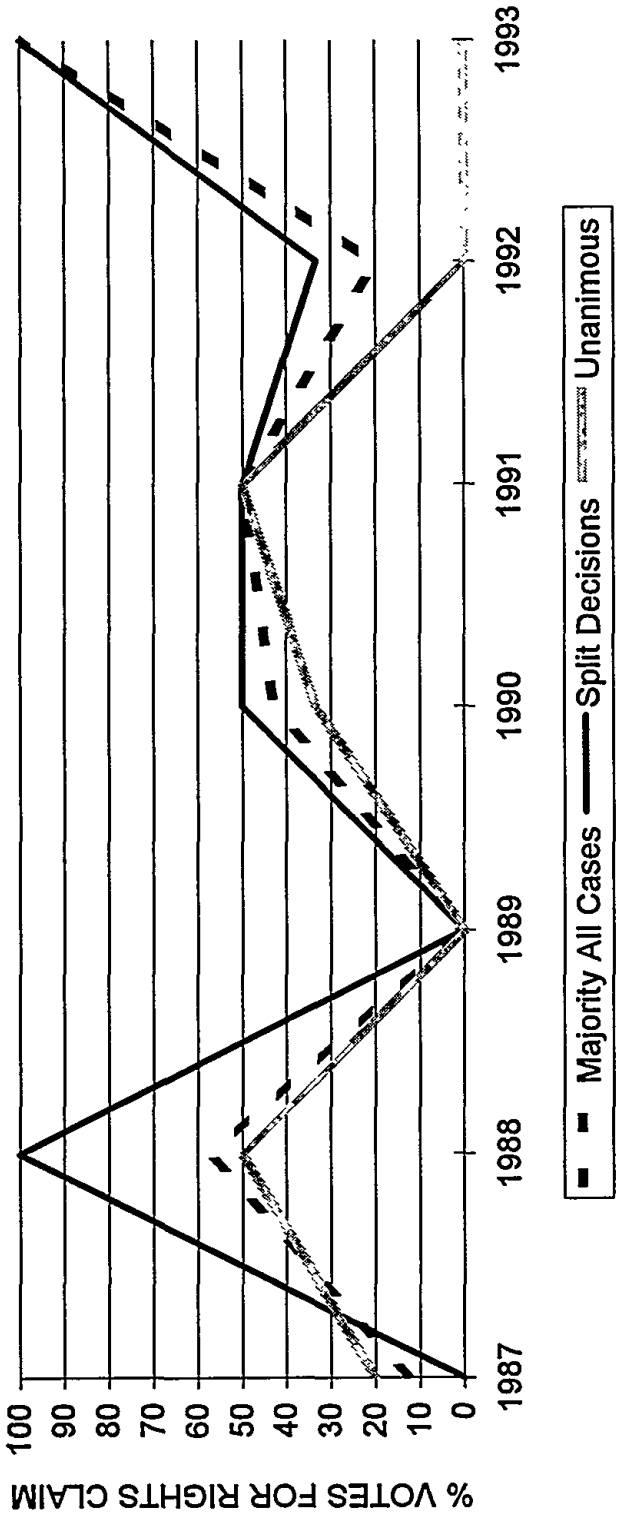


TABLE 7
STATUTORY CIVIL RIGHTS CLAIMS

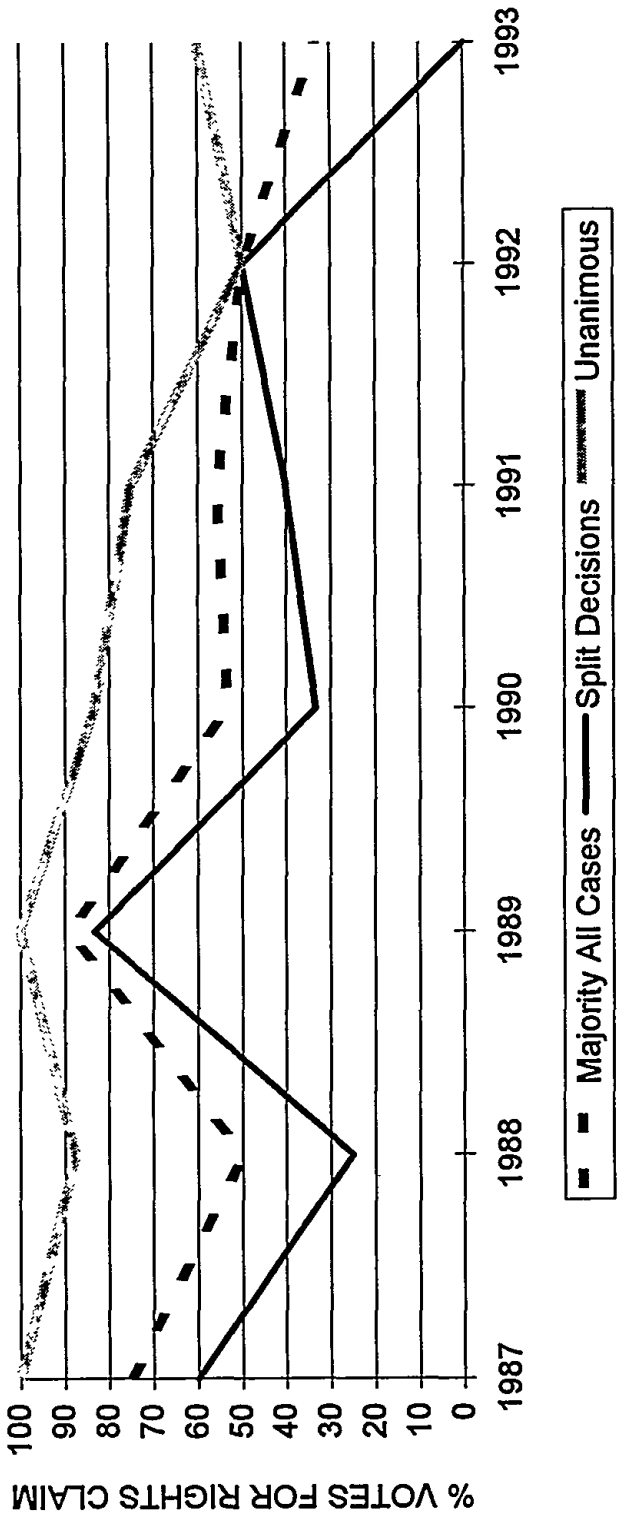
JUSTICE	1993 TERM VOTES				% VOTES FOR RIGHTS CLAIM				
	FOR CLAIM	AGAINST CLAIM	1993 TERM		1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Blackmun	7	2	77.78		63.6	88.9	80.0	88.9	80.0
Stevens	5	4	55.56		70.0	88.9	80.0	77.8	73.7
Ginsburg	4	5	44.44		---	---	---	---	---
Souter	4	5	44.44		45.5	44.4	57.1	-----	-----
Kennedy	3	6	33.33		36.4	55.6	33.3	62.5	45.0
O'Connor	3	6	33.33		54.6	55.6	53.3	55.6	52.6
Rehnquist	3	6	33.33		36.4	44.4	33.3	44.4	35.0
Scalia	3	6	33.33		45.5	44.4	46.7	55.6	40.0
Thomas	3	6	33.33		45.5	28.6	-----	-----	-----
Majority All Cases	3	6	33.33		50.0	55.6	53.3	88.9	50.0
Split Decisions	0	4	0.00		50.0	40.0	33.3	83.3	25.0
Unanimous	3	2	60.00		50.0	75.0	83.3	100.0	87.5

Table 7[61] evidences a significant decrease in the percentage of votes favoring statutory civil rights claims. This Table provides fairly

61. Cases decided in favor of claim: Lividas v. Bradshaw, 114 S. Ct. 2068 (1994) (holding that the National Labor Relations Act preempted the State Labor Commissioner's policy of not enforcing immediate payment on behalf of employees covered by a collective bargaining agreement containing an arbitration clause); Harris v. Forklift Sys. Inc., 114 S. Ct. 367 (1993) (establishing that an employee need not suffer injury or serious psychological harm in order to file an action under Title VII of the Civil Rights Act of 1964 for an "abusive work environment"); Florence County Sch. Dist. Four v. Carter, 114 S. Ct. 361 (1993) (allowing reimbursement to parents who remove their child from a public school that fails to provide an adequate education under the Individual with Disabilities Education Act).

Cases decided against claim: Johnson v. De Grandy, 114 S. Ct. 2647 (1994) (finding that § 2 of the Voting Rights Act does not provide a cause of action for minority voters who formed voting majorities in a percentage of house districts proportional to the minority's percentage of the population as a whole); Holder v. Hall, 114 S. Ct. 2581 (1994) (refusing to extend § 2 of the Voting Rights Act of 1965 to challenges to the size of a governing authority); Heck v. Humphrey, 114 S. Ct. 2364 (1994) (holding that a 42 U.S.C. § 1983 plaintiff who alleges unconstitutional imprisonment must establish that the underlying conviction has been reversed on direct appeal, expunged by executive order, declared invalid, or rendered suspect by a federal court's issuance of a writ of habeas corpus); Rivers v. Roadway Express, Inc., 114 S. Ct. 1510 (1994) (refusing to apply § 101 of the Civil Rights

Figure 7
Statutory Civil Rights Claims



clear evidence that, despite apparent liberal movement in civil actions involving state and federal governments (Tbls. 1 & 2) and First Amendment claims (Tbl. 5), the Rehnquist Court remains rather conservative in its construction of civil rights statutes. Table 7 suggests that the current Court is reluctant to extend congressional civil rights enactments to their broadest possible reach.

As Figure 7 demonstrates, the voting percentages in favor of statutory civil rights claims peaked in 1989 in both the "all cases" and "split decision" categories. In that year, both percentages surpassed 80%. In contrast, the Court dropped to 33.3% in 1993 in the "all cases" category.

Even greater is the drop in the success rate of split decisions. As seen in Figure 7, the high point for statutory civil rights claims accepted by a divided Court was reached in 1989, when a majority voted for over 80% of such claims. In 1993, by contrast, a divided Court did not rule in favor of a single statutory claim; statutory civil rights claimants either carried the entire Court or lost. In fact, at no previous time in this study has the Court ever dropped below a 20% rate in split decisions.[62] Thus, it appears that the Court has become relatively conservative in this area.

For the most part, regression analysis confirms the above observations. In the "split decisions" category, the Court majority dropped from a 1992 score of 50% to 0% in 1993. This dramatic decrease from the predicted score (43.1) is significant at the 0.05 level[63] (App. B, Tbl. 7a).

On an individual basis, Justice O'Connor experienced the greatest shift in 1993. She decreased her voting percentage in favor of statutory civil rights from 54.6% in 1992 to 33.3% in 1993. This represents a 25.6 percentage point decrease from her predicted percentage of 59, a conservative movement that is significant to the 0.01

Act of 1991 retroactively); Landgraf v. USI Film Prod., 114 S. Ct. 1483 (1994) (holding that § 102 of the Civil Rights Act of 1991 does not apply to lawsuits that were on appeal at the time the Act was adopted); Albright v. Oliver, 114 S. Ct. 807 (1994) (holding that criminal prosecution without probable cause is a constitutional tort, actionable under 42 U.S.C. § 1983 only if accompanied by "palpable consequences").

62. *See* Riggs & Black, *supra* note 4, at 7.

63. It may surprise some that the drastic movement in 1993 split decisions is not statistically significant at the 0.01 level of confidence. This fact, however, is due to the significant divergence of past scores. The greater the difference between scores from year to year, the greater the deviation has to be in order to be statistically significant. For example, notice the low (Low column) and high bounds (High column) of the confidence interval on Table 7a. They range from a low of 1.1% to 85.1%. Thus, to be statistically significant, the actual score has to fall outside this range.

level of confidence. Justice Stevens also dramatically shifted his voting behavior. Table 7a shows a decrease of 20.1 percentage points from his 1993 predicted value (75.7%) to his actual value (55.6%). This difference is significant at the 0.05 level. The remaining Justices, with the exception of Justice Blackmun,[64] show slight decreases in their voting percentages.

TABLE 8
CASES RAISING A CHALLENGE TO THE EXERCISE OF JURISDICTION

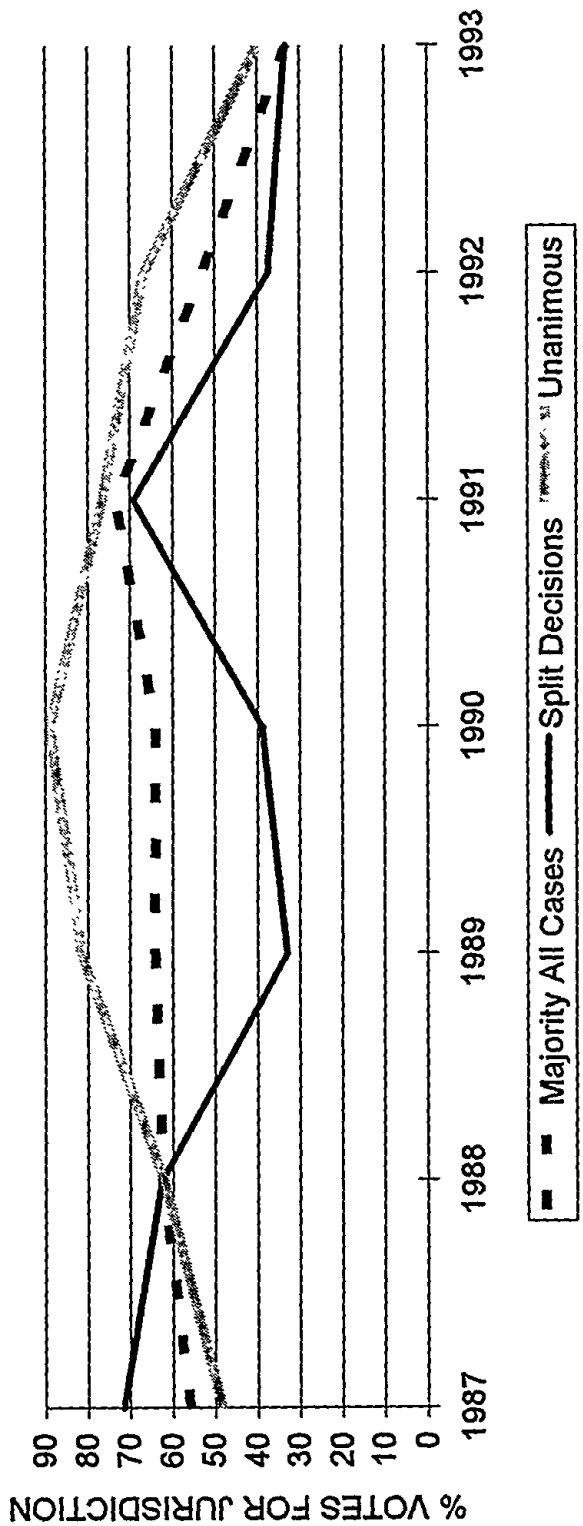
JUSTICE	1993 TERM VOTES			% VOTES FOR JURISDICTION				
	FOR JURIS.	AGAINST JURIS.	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Blackmun	4	4	50.00	66.7	71.4	80.0	79.2	64.9
Stevens	4	5	44.44	69.7	75.0	91.4	68.0	73.0
Ginsburg	3	6	33.33	—	—	—	—	—
Kennedy	3	6	33.33	51.5	73.3	58.3	64.0	51.4
Souter	3	6	33.33	56.3	75.0	57.6	—	—
Thomas	3	6	33.33	54.6	66.7	—	—	—
O'Connor	2	7	22.22	53.1	63.3	54.3	68.0	51.4
Rehnquist	2	7	22.22	54.6	62.1	54.3	60.0	51.4
Scalia	2	7	22.22	51.5	55.2	48.5	60.0	50.0
Majority All Cases	3	6	33.33	52.9	73.3	63.9	64.0	62.2
Split Decisions	1	2	33.33	37.5	69.2	38.9	33.0	62.5
Unanimous	2	3	40.00	66.7	76.5	88.9	81.3	61.9

Table 8[65] indicates significant conservative movement on jurisdictional issues. As Figure 8 illustrates, in 1991 the Court majority accepted nearly 75% of all jurisdictional claims. In 1993, however, the

64. Justice Blackmun tops Table 7 by voting in favor of statutory civil rights claims 77.8% of the time; this represents an increase of 14.2 percentage points over his 1992 Term percentage of 63.6. Justice Blackmun voted against a statutory civil rights claim only when the entire Court acted unanimously.

65. Cases where the Court exercised jurisdiction: McFarland v. Scott, 114 S. Ct. 2568 (1994) (holding that a federal court has jurisdiction to enter a stay of execution once capital defendant invokes right to appointment of habeas counsel under federal statute); FDIC v. Meyer, 114 S. Ct. 996 (1994) (holding that federal, not state, law provides source of liability for constitutional tort claim against federal agency); National Org. for Women v. Scheidler, 114 S. Ct. 798 (1994) (establishing that the Racketeer Influenced and Corrupt

Figure 8
Cases Raising a Challenge to the Exercise of Jurisdiction



acceptance rate for all jurisdictional claims dropped to 33.3%. The Court issued unanimous opinions on jurisdictional issues in favor of jurisdictional claims only 40% of the time, down 26.7 percentage points from 1992.[66]

Regression analysis confirms that the above trend is significant. The Court majority's actual voting percentage in the "all" category cases (33.3%) was 30.6 percentage points below its 1993 predicted value (63.9%), a difference significant at the 0.01 level[67] (App. B, Tbl. 8a). In addition, the 1993 rate for unanimous decisions in Table 8 is 44.9 percentage points below the 1993 predicted value (84.9%) and the actual value (40%). This difference is also statistically significant at the 0.01 level[68] (App. B, Tbl. 8a).

On an individual basis, every single Justice for whom a regression analysis can be performed showed a statistically significant decrease (at the 0.01 level) in his or her 1993 jurisdictional voting pattern.[69] Justice Blackmun decreased from a 1992 rate of 66.7% and a 1993 predicted rate of 76.4% to an actual rate of 50%. Justice Stevens decreased from 69.7% in 1992 to a 1993 actual rate of 44.4%, 37.2 per-

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Organizations Act does not require that racketeering or its predicate acts be motivated by an economic purpose).

Cases where the Court did not exercise jurisdiction: Digital Equip. Corp. v. Desktop Direct, Inc., 114 S. Ct. 1992 (1994) (holding that a court's refusal to enforce a settlement agreement allegedly immunizing a party from suit is not immediately appealable as a collateral order); Dalton v. Specter, 114 S. Ct. 1719 (1994) (refusing to review Senator's request for an injunction to prevent the closure of a Naval shipyard); Kokkonen v. Guardian Life Ins. Co. of Am., 114 S. Ct. 1673 (1994) (ruling that a federal district court cannot exercise jurisdiction over a breach of contract claim merely because the contract in question was part of the settlement of an earlier federal lawsuit); Northwest Airlines v. County of Kent, 114 S. Ct. 855, 862 (1994) (declining to assert jurisdiction over the issue whether Anti-Head Tax Act creates a private cause of action); Thunder Basin Coal Co. v. Reich, 114 S. Ct. 771 (1994) (holding that federal Safety and Health Amendments Act of 1977 precludes district court jurisdiction over pre-enforcement challenges to the Act); Izumi Seimitsu Kogyo v. U. S. Philips Corp., 114 S. Ct. 425 (1993) (dismissing writ of certiorari as improvidently granted because the question that needed to be addressed was not presented in the original petition for certiorari).

66. Split decisions, in which jurisdictional claims were accepted only 33.3% of the time, fall in the same range as the acceptance rates for all and unanimous cases. This 33.3% split decision percentage, however, is not unusual when compared with the 1989 and 1990 split decision percentages of 33% and 38.9%.

67. The Durbin-Watson value (DW) of 0.97 for this movement, however, suggests possible auto-correlation.

68. As with the movement in the "all" category cases, the Durbin-Watson value (DW) of 0.84 suggests auto-correlation. While the difference between the predicted and actual values in the unanimous category is fairly large (44.9), the small Durbin-Watson value nonetheless places the statistical significance finding in question.

69. The Durbin-Watson value for Justice Blackmun's score, 0.94, suggests auto-correlation. This score is 0.06 below the acceptable Durbin-Watson range of one through three.

centage points below his predicted rate of 81.6%. Justice Kennedy dropped from 51.5% in 1992 to 33.3% in 1993, 29.4 percentage points lower than his predicted rate. Justice O'Connor dropped 30.9 percentage points from her 1992 voting percentage (53.1) and 40.6 percentage points from her predicted rate to score only 22.2% in 1993. Chief Justice Rehnquist went from 54.6% in 1992 to 22.2% in 1993, 38.8 percentage points below his predicted value of 61%. Finally, Justice Scalia dropped from 51.5% in 1992 to 22.2% in 1993, 35.9 percentage points below his 1993 predicted value.

Such dramatic statistics clearly suggest that the Court was more conservative on jurisdictional issues in 1993 than in earlier years. Commentators noted that the Supreme Court heard less than the usual number of cases during the 1993 Term and the Court decided only eight-four cases with full opinions.[70] Furthermore, on the opening day of the 1994 Term—for the first time in memory[71]—the Court did not accept review of *any* new cases. Table 8, of course, does not explain *why* the Court has become markedly more conservative in the exercise of its constitutional and statutory authority. It does, however, suggest that the Court's shrinking docket may be linked to a growing reticence to expand the jurisdiction of the federal courts.

Although Table 9[72] shows that states were less successful during the 1993 Term than during the 1992 Term in cases where their interests collided with federal authority, the overall data do not reveal any

70. Glen Elsasser, *High Court Chooses Not to Decide: Justices Examine Lowest Number of Cases Since 1960's*, CHI. TRIB., July 3, 1994, at 7; Linda Greenhouse, *A Split Court*, ST. PETERSBURG TIMES, July 10, 1994, at D1; *Supreme Court Without Lions*, BALTIMORE SUN, July 11, 1994, at 6A.

71. Aaron Epstein, *High Court Supremely Picky in '94: Record Few Cases Reaching the Top*, PHIL. INQUIRER, Oct. 9, 1994, at D2 (stating that "on the opening day of the court's 204th season, the justices [sic] had 1,626 cases before them and couldn't muster the four votes needed to accept any" cases); *Supreme Court Turns Down 1,600 Appeals*, S.F. CHRON., Oct. 4, 1994, at A4 (noting that the Court "granted review in none of the new cases" and that "[n]o one around the court could recall a First Monday in October without a grant of review").

72. Cases decided in favor of states: Hawaiian Airlines Inc. v. Norris, 114 S. Ct. 2239 (1994) (holding that the Railway Labor Act does not preempt state law tort actions that do not arise out of a collective-bargaining agreement); O'Melveny & Myers v. FDIC, 114 S. Ct. 2048 (1994) (recognizing that California law rather than federal law governs the tort liability of attorneys who counseled a now-failed savings and loan); American Dredging Co. v. Miller, 114 S. Ct. 981 (1994) (concluding that Louisiana *forum non conveniens* statute governing admiralty cases was not preempted by federal law); Northwest Airlines v. County of Kent, 114 S. Ct. 855 (1994) (finding that county airport's user fees did not violate Anti-Head Tax Act or the Commerce Clause); Department of Revenue v. ACF Indus., 114 S. Ct. 843 (1994) (approving Oregon ad valorem tax imposed upon railroad property despite the fact that the taxing scheme exempted many other classes of commercial and industrial property).

TABLE 9
FEDERALISM CASES

JUSTICE	1993 TERM VOTES				% VOTES FOR STATE CLAIM				
	FOR STATE	FOR U.S.	1993 TERM		1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Blackmun	5	2	71.43		53.3	43.5	14.3	43.8	40.9
Rehnquist	5	2	71.43		73.3	43.5	71.4	56.3	81.0
Ginsburg	4	3	57.14		—	—	—	—	—
O'Connor	4	3	57.14		73.3	39.1	71.4	56.3	73.7
Scalia	4	3	57.14		60.0	26.1	71.4	56.3	76.2
Souter	4	3	57.14		60.0	36.4	83.3	—	—
Stevens	4	3	57.14		60.0	31.8	28.6	43.8	57.1
Kennedy	3	4	42.86		60.0	26.1	71.4	56.3	72.7
Thomas	3	4	42.86		66.7	35.0	—	—	—
Majority All Cases	4	3	57.14		66.7	26.1	71.4	43.8	59.1
Split Decisions	1	1	50.00		57.1	28.6	80.0	25.0	50.0
Unanimous	3	2	60.00		75.0	22.2	50.0	50.0	70.0

significant conservative or liberal shift. Figure 9 demonstrates that the Court's voting pattern in the federalism area has been volatile, ranging from the low mid-twenties (1989) to 80.0% (1990). The outcome for the Court as a whole in all, split, and unanimous decisions for 1993 is at about the midpoint of these previous gyrations.

The voting rates for the individual Justices confirm the above analysis. Only Justice Blackmun evidences significant movement, increasing his voting percentage in favor of state claims by 18.1 percentage points over his 1992 score, a difference significant at the 0.05 level (App. B, Tbl. 9a). This movement, however, merely restores Blackmun to the top of Table 9, a position he occupied in 1991.[73] The remaining Justices made slight shifts in both directions, but none that

Cases decided in favor of the federal government: West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205 (1994) (invalidating, under the Commerce Clause, a Massachusetts assessment on all fluid milk sold to retailers within the state); Lividas v. Bradshaw, 114 S. Ct. 2068 (1994) (holding that the National Labor Relations Act preempted state labor commissioner's policy of not enforcing immediate payment statute on behalf of employees covered by a collective bargaining agreement containing an arbitration clause).

73. Wilkins et al., *supra* note 40, at 23.

Figure 9
Federalism Cases

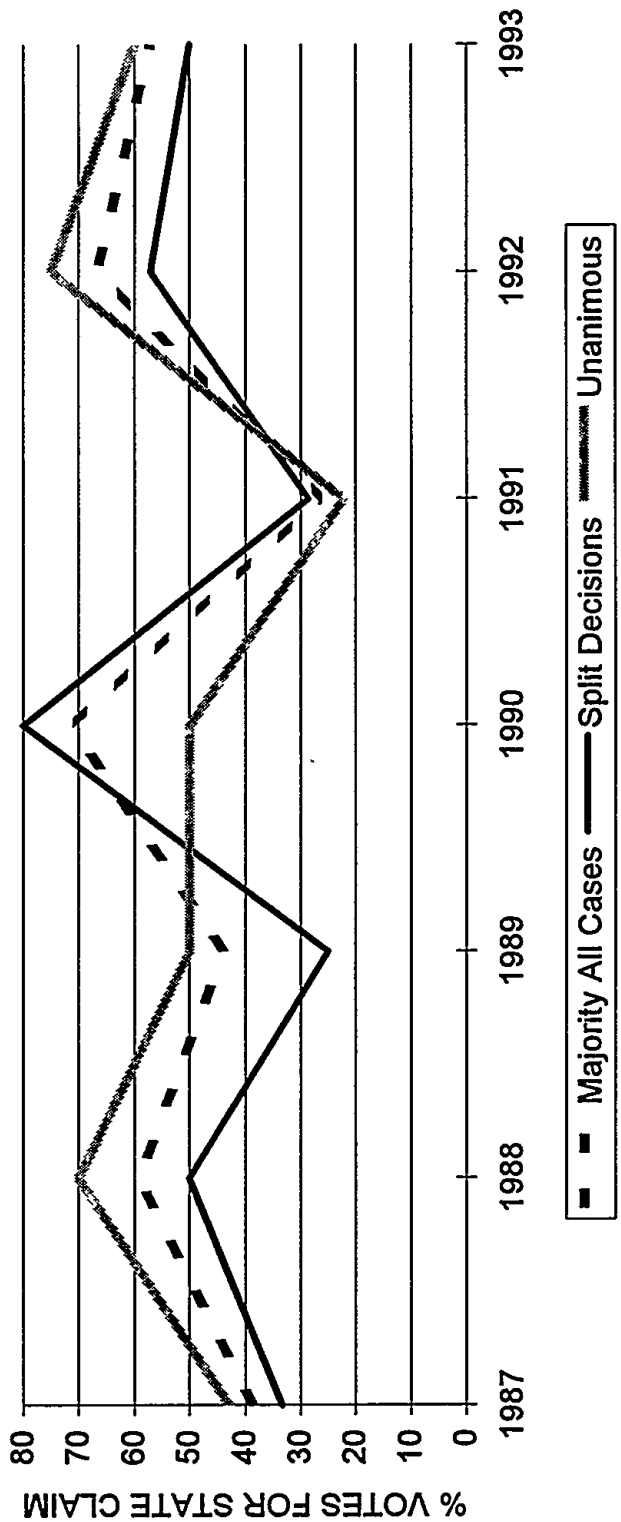


TABLE 10
SWING-VOTE ANALYSIS: WHO VOTES MOST OFTEN WITH THE MAJORITY IN CLOSE CASES

JUSTICE	1993 TERM VOTES				% VOTES WITH MAJORITY			
	FOR MAJ.	AGAINST MAJ.	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Kennedy	13	1	92.86	72.7	64.7	52.2	71.4	82.4
Rehnquist	10	4	71.43	72.7	41.2	69.6	66.7	76.5
Scalia	10	4	71.43	81.8	35.3	52.2	66.7	73.5
O'Connor	8	6	57.14	40.9	58.8	69.6	69.0	76.5
Thomas	8	6	57.14	72.7	23.5	----	----	----
Souter	6	8	42.86	31.8	82.4	59.1	----	----
Blackmun	5	9	35.71	31.8	70.6	47.8	33.3	38.2
Ginsburg	5	9	35.71	----	----	----	----	----
Stevens	5	9	35.71	40.9	58.8	47.8	42.9	26.5
Conservative Coalition	9	5	64.29	63.6	41.2	54.5	64.3	76.5
Liberal Coalition	5	9	35.71	36.4	58.8	45.5	35.7	23.5

are statistically significant. Thus, it appears that the Court did not significantly modify its position with respect to federalism issues during the 1993 Term.

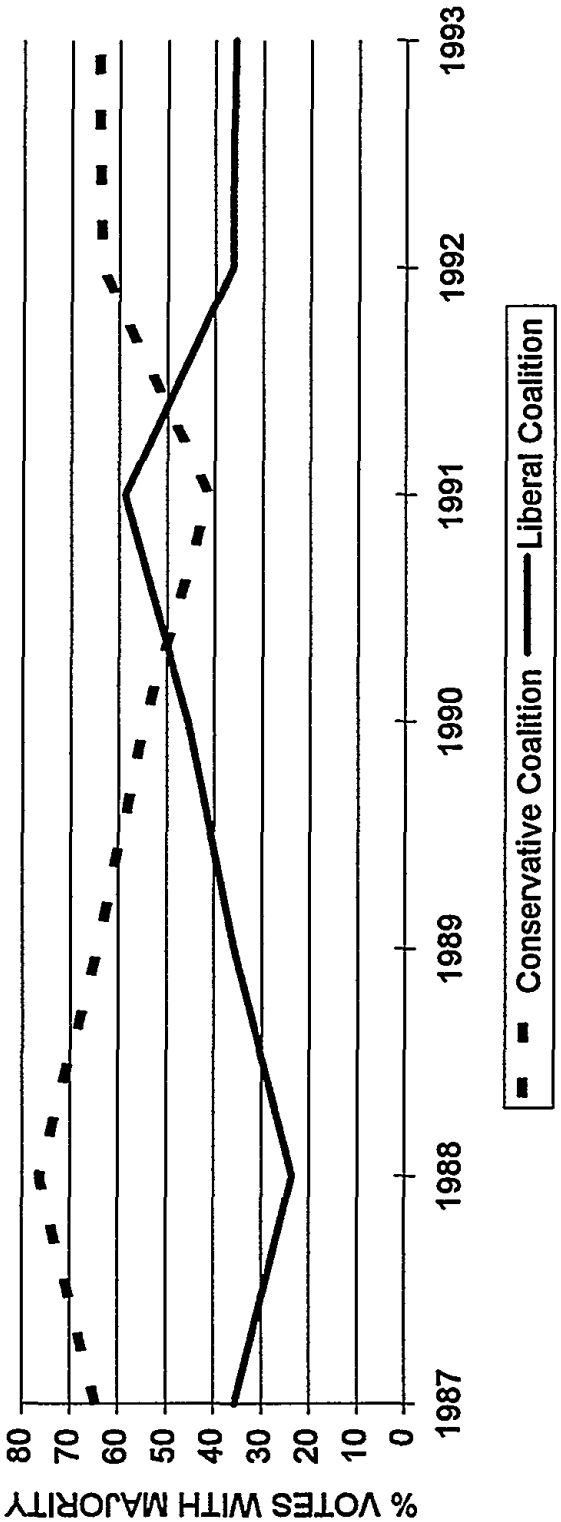
In 1993, 14 cases were decided by a margin of one vote. In these "swing-vote" cases,[74] the shift of a single Justice from the majority to the minority position would result in a different outcome. As in 1992, in 1993 a conservative coalition most often collected the crucial fifth vote.[75] A conservative coalition was victorious in 64.3% of the cases decided by a single vote, an outcome within a single percentage point of the 1992 figure (63.6%).

Although their order is somewhat different, the Justices who hold the top three positions on Table 10 in 1993 are the same as last Term. Justice Kennedy claimed the top spot as the Court's most "swinging"

74. We call this "swing-vote" analysis because it identifies members of the Court who most frequently shift, or "swing," from one voting coalition to another in order to form a majority. Because each vote is crucial to the outcome of a case decided by a single vote, swing voting is an important index of ideological influence on Court decisionmaking.

75. The definitions of conservative and liberal used elsewhere in this study are also used when classifying a coalition as conservative or liberal.

Figure 10
Swing-vote Analysis: Who Votes Most Often with the Majority in Close Cases



member, voting with the majority coalition 92.9% of the time. In fact, other members of the Court were able to forge a five-member coalition only once this Term without garnering the vote of Justice Kennedy.[76] Justice Scalia, who last Term topped the chart, fell to second place (where he tied with the Chief Justice at 71.4%). Next came another pair, Justices O'Connor and Thomas, who joined the majority 57.1% of the time.

The gap between Justice Thomas and Justice Souter divides the Justices who formed the usual conservative coalition from those who composed the usual liberal group. Justice Souter voted with the majority only 42.9% of the time—a fairly dramatic 40 percentage point decrease from 1991, when he was the most influential swing voter on the Court. This swing-vote statistic suggests that Justice Souter may have abandoned his early role as a "moderate" centrist in favor of a more peripheral liberal role on the Court.[77] At the bottom of the chart are Justices Blackmun, Stevens, and Ginsburg, who all tied for last place, voting with the majority 35.7% of the time.

While the results of this Table are not dispositive proof of any Justice's ideological position, they nevertheless suggest two rather notable alignments. First, as noted above, Justice Souter's solid position within the Court's liberal coalition suggests that any conservative promise held by this Bush-appointee may have vanished. Second, Justice Ginsburg's placement with the two most politically liberal Justices, Blackmun and Stevens, suggests that she may well turn out to be more liberal than she was portrayed in the popular press at the time of her appointment.[78] Despite this possibility, her appointment has not

76. Reed v. Farley, 114 S. Ct. 2291 (1994).

77. It is also possible that the Court has moved to the right and acquired a new ideological center. Such a proposition is dubious, however, when one considers that the only change in the makeup of the Court since the 1991 Term has been the retirement of Justice White and his replacement with the seemingly more liberal Justice Ginsburg.

78. Joan Biskupic, *Justice Ginsburg Goes 25 for 25 on Voting with Court Majority*, WASH. POST, Apr. 1, 1994, at A3 (relating that "[a]s an appeals judge, Ginsburg was known for a moderate judicial approach"); Timothy M. Phelps, *Independent Streak Leads Dead Center: Justice Ginsburg's Rulings are Neither as Liberal as the White House Expected Nor as Conservative as Many Liberals had Feared*, ORLANDO SENTINEL, July 10, 1994, at G1 (asserting that "Ginsburg's place in the dead center on a generally conservative court may have surprised some in the White House"). *But cf.* Harold W. Anderson, *Call Judge Ginsburg "Liberal" Like Clinton*, OMAHA WORLD HERALD, Aug. 14, 1994, at 25A (arguing that Justice Ginsburg may be more liberal than many journalists, who frequently refer to her as a "centrist," are willing to admit).

(at least yet) placed a liberal coalition at the helm of the Court's five-to-four composition.[79]

IV. Conclusion

Generally, the 1993 Term showed a decrease in the Court's support of state and local governments in both civil and criminal cases, and a resurgence in the Court's sensitivity to First Amendment concerns. This liberal ideological movement, however, is remarkable because it appears to come *not* from Justices Blackmun and Stevens, but rather from Justices Scalia and Thomas. Whether this unusual development will continue, or whether it is only a ephemeral reaction to transitory politics, remains to be seen.

The Rehnquist Court, in any event, remains quite conservative in its approach to statutory civil rights and jurisdictional issues. Despite the appointment of Justice Ginsburg, conservative coalitions continue to control the outcome of closely divided cases. They have done so, however, only because Justice Kennedy holds a virtual stranglehold on the crucial fifth vote. Justice Kennedy, who voted with the Court majority in almost 93% of all five-to-four decisions, is arguably the single most influential Justice of the 1993 Term.

79. *Cf.* Wilkins et al., *supra* note 40, at 261 (raising the question whether Justice Ginsburg's appointment to the Court would shift the locus of control in swing-vote decisions).

V. Appendix A

A. The Universe of Cases

Only cases decided during the 1993 Term by a full opinion setting forth reasons for the decision are included in the data. Decisions on motions are excluded even if accompanied by an opinion. Cases handled by summary disposition are included if accompanied by a full opinion of the Court, but not if the only opinion is a dissent. Cases decided by a four-to-four vote, hence resulting in affirmance without written opinion, are excluded. Both signed and per curiam opinions are considered full opinions if they set forth reasons in a more than perfunctory manner. Cases not fitting within any of the categories of the different tables are, of course, not included in the database for any of the tables.

B. 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 1993 raised such a question.

C. Cases Classified by Nature of the Parties—Tables 1 through 4

Cases are included in Tables 1 through 4 only if governmental and private entities appear as opposing parties. This is necessarily true of criminal cases. Civil cases are excluded from these tables if they do not satisfy this criterion. The governmental entity might be the government itself, one of its agencies or officials, or, with respect to state government, one of its political subdivisions. A suit against an official in her personal capacity is included if she is represented by government attorneys or if the interests of the government are otherwise clearly implicated. In instances of multiple parties, a civil case is excluded if governmental entities appear on both sides of the controversy. If both a state and a federal entity are parties to the same suit on the same side with only private parties on the other, the case is included in Tables 1 and 2. A case is included more than once in the same table if it raises two or more distinct issues affecting the outcome of the case and the issues are resolved by different voting alignments.

D. Classification by Nature of the Issue—Tables 5 through 9

A case is included in each category of Tables 5 through 9 for which it raises a relevant issue that is addressed in the written opin-

ion(s). One case may thus be included in two or more tables. A case is also included more than once in the same table if it raises two or more distinct issues in that category affecting the disposition of the case and if the issues are resolved by different voting alignments. A case is not included for any issue which, though raised by one of the litigants, is not addressed in any opinion.

Identification of First Amendment and equal protection issues poses no special problem. In each instance, the nature of the claim is expressly identified in the opinion. Issues of freedom of speech, press, association, and free exercise of religion are included. Establishment Clause cases are excluded, however, because one party's claim of religious establishment is often arrayed against another party's claim of free exercise or some other individual right, thus blurring the issue of individual rights.

Cases included in Table 7, statutory civil rights claims, are limited to those invoking relevant sections of the Civil Rights Act of 1964,[80] as amended; the Voting Rights Act of 1965;[81] and the civil rights statutes expressly barring discrimination on the basis of race, color, national origin, sex, religion, age, or physical handicap. Actions brought under 42 U.S.C. § 1983 are included if the substantive right asserted is based on a federal statute or if the issue is the application of § 1983; that is, whether or how that section's protections apply in the case at hand. However, § 1983 actions are excluded if the substantive right asserted is based on the United States Constitution and the issue relates to the constitutional right. The purpose of the distinction in § 1983 cases is to preserve a demarcation between constitutional and non-constitutional claims.

For Table 8, jurisdictional questions are defined to include not only jurisdiction per se but also standing, mootness, ripeness, abstention, equitable discretion, and justiciability. Jurisdictional questions are excluded if neither party challenges jurisdiction and no member of the Court dissents on the question, even though the Court may comment on its jurisdiction.

Table 9, federalism cases, is limited to issues raised by conflicting actions of federal and state or local governments. Common examples are preemption, intergovernmental immunities, application of the Tenth and Eleventh Amendments as a limit on action by the federal government, and federal court interference with state court activities (other than review of state court decisions). Issues of "horizontal"

80. PUB. L. No. 88-352, 78 Stat. 252 (codified as amended in scattered statutes).
81. PUB. L. No. 89-110, 79 Stat. 435 (codified as amended at 42 U.S.C. § 1973 (1994)).

federalism or interstate relationships, such as those raised by the dormant Commerce Clause[82] or the Privileges and Immunities Clause,[83] are excluded from the Table.

E. The "Swing-vote" Cases—Table 10

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

F. Cases Included in Statistical Tables

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

Albright v. Oliver, 114 S. Ct. 807 (1994)
Associated Industries of Missouri v. Lohman, 114 S. Ct. 1815 (1994) (unanimous)
Barclay Bank v. Franchise Tax Board, 114 S. Ct. 2268 (1994)
Board of Education v. Grumet, 114 S. Ct. 2481 (1994)
C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677 (1994)
City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994) (unanimous)
Department of Revenue v. ACF Industries, 114 S. Ct. 843 (1994)
Department of Taxation & Finance v. Milhelm Attea, 114 S. Ct. 2028 (1994) (unanimous)
Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (swing vote)
Elder v. Holloway, 114 S. Ct. 1019 (1994) (unanimous)
Florence County School District Four v. Carter, 114 S. Ct. 361 (1993) (unanimous)
Heck v. Humphrey, 114 S. Ct. 2364 (1994) (unanimous)
Holder v. Hall, 114 S. Ct. 2581 (1994) (swing vote)
Ibañez v. Florida Department of Business and Professional Regulation, 114 S. Ct. 2084 (1994) (two issues, one unanimous)
J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994)
Lividas v. Bradshaw, 114 S. Ct. 2068 (1994) (unanimous)

82. U.S. CONST. art. I, § 8, cl. 3.
83. U.S. CONST. amend. XIV, § 1.

Northwest Airlines v. County of Kent, 114 S. Ct. 855 (1994) (Blackmun, J., did not participate in the decision)
Oregon Waste Systems v. Department of Environmental Quality, 114 S. Ct. 1345 (1994)
Waters v. Churchill, 114 S. Ct. 1878 (1994)
West Lynn Creamery v. Healy, 114 S. Ct. 2205 (1994)

Table 2: Civil Cases: Federal Government versus Private Party

ABF Freight System v. NLRB, 114 S. Ct. 835 (1994) (unanimous)
BFP v. Resolution Trust Corporation, 114 S. Ct. 1757 (1994) (swing vote)
Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 114 S. Ct. 2251 (1994)
FDIC v. Meyer, 114 S. Ct. 996 (1994) (two issues; two unanimous—one for, one against)
Farmer v. Brennan, 114 S. Ct. 1970 (1994) (unanimous)
Key Tronic Corporation v. United States, 114 S. Ct. 1960 (1994)
MCI Telecommunications Corporation v. AT&T, 114 S. Ct. 2223 (1994) (O'Connor, J., did not participate in the decision)
NLRB v. Health Care & Retirement Corporation of America, 114 S. Ct. 1778 (1994) (swing vote)
O'Melveny & Myers v. FDIC, 114 S. Ct. 2048 (1994) (unanimous)
Thomas Jefferson University v. Shalala, 114 S. Ct. 2381 (1994) (swing vote)
Thunder Basin Coal Co. v. Reich, 114 S. Ct. 771 (1994) (unanimous)
Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994) (unanimous)
United States v. Carlton, 114 S. Ct. 2018 (1994) (unanimous)
United States v. Irvine, 114 S. Ct. 1473 (unanimous) (Blackmun, J., did not participate in the decision)
United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993) (two issues, one unanimous, one swing vote)

Table 3: State Criminal Cases

Burden v. Zant, 114 S. Ct. 654 (1994) (unanimous)
Caspari v. Bohlen, 114 S. Ct. 948 (1994)
Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994) (swing vote)
Hagen v. Utah, 114 S. Ct. 958 (1994)
McFarland v. Scott, 114 S. Ct. 2568 (1994) (two issues, one swing vote)

Powell v. Nevada, 114 S. Ct. 1280 (1994)
Reed v. Farley, 114 S. Ct. 2291 (1994) (swing vote)
Romano v. Oklahoma, 114 S. Ct. 2004 (1994) (swing vote)
Schiro v. Farley, 114 S. Ct. 783 (1994)
Simmons v. South Carolina, 114 S. Ct. 2187 (1994) (two issues, one swing vote)
Stansbury v. California, 114 S. Ct. 1526 (1994) (unanimous)
Tuilaepa v. California, 114 S. Ct. 2630 (1994)
Victor v. Nebraska, 114 S. Ct. 1239 (1994) (two issues, one unanimous)

Table 4: Federal Criminal Cases

Beecham v. United States, 114 S. Ct. 1669 (1994) (unanimous)
Custis v. United States, 114 S. Ct. 1732 (1994)
Davis v. United States, 114 S. Ct. 2350 (1994) (unanimous)
Liteky v. United States, 114 S. Ct. 1147 (1994) (unanimous)
Nichols v. United States, 114 S. Ct. 1921 (1994)
Posters 'n' Things Ltd. v. United States, 114 S. Ct. 1747 (1994) (unanimous)
Ratzlaf v. United States, 114 S. Ct. 655 (1994) (swing vote)
Shannon v. United States, 114 S. Ct. 2419 (1994)
Staples v. United States, 114 S. Ct. 1793 (1994)
United States v. Granderson, 114 S. Ct. 1259 (1994)
Weiss v. United States, 114 S. Ct. 752 (1994) (unanimous)
Williamson v. United States, 114 S. Ct. 2431 (1994) (unanimous)

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

City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994) (unanimous)
Ibañez v. Florida Department of Business and Professional Regulation, 114 S. Ct. 2084 (1994) (two issues, one unanimous)
Madsen v. Women's Health Center, Inc., 114 S. Ct. 2516 (1994) (two issues)
Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994) (swing vote)
Waters v. Churchill, 114 S. Ct. 1878 (1994)

Table 6: Cases Involving Equal Protection Claims

J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994)

Table 7: Cases Involving Statutory Civil Rights Claims

Albright v. Oliver, 114 S. Ct. 807 (1994)
Florence County School District Four v. Carter, 114 S. Ct. 361 (1993) (unanimous)
Harris v. Forklift Systems, 114 S. Ct. 367 (1993) (unanimous)
Heck v. Humphrey, 114 S. Ct. 2364 (1994) (unanimous)
Holder v. Hall, 114 S. Ct. 2581 (1994) (swing vote)
Johnson v. De Grandy, 114 S. Ct. 2647 (1994) (unanimous)
Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994)
Lividas v. Bradshaw, 114 S. Ct. 2068 (1994) (unanimous)
Rivers v. Roadway Express, Inc., 114 S. Ct. 1510 (1994)

Table 8: Cases Involving Jurisdictional Issues

Dalton v. Specter, 114 S. Ct. 1719 (1994) (unanimous)
Digital Equipment Corporation v. Desktop Direct, Inc., 114 S. Ct. 1992 (1994) (unanimous)
FDIC v. Meyer, 114 S. Ct. 996 (1994) (unanimous)
Izumi Seimitsu Kogyo v. U. S. Philips Corp., 114 S. Ct. 425 (1993)
Kokkonen v. Guardian Life Insurance Company of America, 114 S. Ct.
1673 (1994) (unanimous)
McFarland v. Scott, 114 S. Ct. 2568 (1994) (swing vote)
National Organization for Women v. Scheidler, 114 S. Ct. 798 (1994) (unanimous)
Northwest Airlines v. County of Kent, 114 S. Ct. 855 (1994) (Blackmun, J., did not participate in the decision)
Thunder Basin Coal Co. v. Reich, 114 S. Ct. 771 (1994) (unanimous)

Table 9: Cases Raising a Federalism Issue

American Dredging Co. v. Miller, 114 S. Ct. 981 (1994)
Department of Revenue v. ACF Industries, 114 S. Ct. 843 (1994)
Hawaiian Airlines Inc. v. Norris, 114 S. Ct. 2239 (1994) (unanimous)
Lividas v. Bradshaw, 114 S. Ct. 2068 (1994) (unanimous)
Northwest Airlines v. County of Kent, 114 S. Ct. 855 (1994) (Blackmun, J., did not participate in the decision)
O'Melveny & Myers v. FDIC, 114 S. Ct. 2048 (1994) (unanimous)
West Lynn Creamery, Inc., v. Healy, 114 S. Ct. 2205 (1994)

Table 10: Swing-Vote Cases

BFP v. Resolution Trust Corporation, 114 S. Ct. 1757 (1994) (conservative outcome)
Central Bank v. First Interstate Bank, 114 S. Ct. 1439 (1994) (conservative outcome)
Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994) (liberal outcome)
Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (conservative outcome)
Holder v. Hall, 114 S. Ct. 2581 (1994) (conservative outcome)
McFarland v. Scott, 114 S. Ct. 2568 (1994) (liberal outcome)
NLRB v. Health Care & Retirement Corporation of America, 114 S. Ct. 1778 (1994) (conservative outcome)
Ratzlaf v. United States, 114 S. Ct. 655 (1994) (liberal outcome)
Reed v. Farley, 114 S. Ct. 2291 (1994) (conservative outcome)
Romano v. Oklahoma, 114 S. Ct. 2004 (1994) (conservative outcome)
Simmons v. South Carolina, 114 S. Ct. 2187 (1994) (conservative outcome)
Thomas Jefferson University v. Shalala, 114 S. Ct. 2381 (1994) (conservative outcome)
Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994) (liberal outcome)
United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993) (liberal outcome)

TABLE 1a
CIVIL CASES: STATE GOVERNMENT
VERSUS A PRIVATE PARTY

	% VOTES FOR GOVERNMENT																
JUSTICE	1987	1988	1989	1990	1991	1992	a	b	SE	p(v)	Low	High	a(v)	Dif.	Sgnf.	DW	AC
Rehnquist	67.9	66.7	70.3	84.0	71.4	52.8	2780	-1.363	10.0	64.1	44.1	84.1	68.2	4.1		1.88	
Scalia	51.7	59.2	64.9	64.0	64.3	41.7	2081	-1.017	9.3	54.1	35.5	72.6	50.0	-4.1		1.39	
O'Connor	50.0	57.4	67.6	68.0	50.0	50.0	1296	-0.623	8.7	55.0	37.5	72.4	40.9	-14.1		0.93	#
Blackmun	44.8	30.6	43.2	24.0	35.7	30.3	4378	-2.183	8.1	27.1	11.0	43.3	42.9	15.7		2.75	
Kennedy	50.0	57.1	61.1	76.0	42.9	41.7	3988	-1.977	12.9	47.9	22.1	73.7	40.9	-7.0		1.39	
Stevens	37.9	35.4	40.5	36.0	29.3	31.3	3207	-1.594	4.1	29.5	21.2	37.8	27.3	-2.2		0.84	#
Majority All Cases	51.7	51.0	51.4	64.0	52.4	41.7	1939	-0.949	7.1	48.7	34.5	62.9	40.9	-7.8		1.14	
Split Decisions	58.8	64.0	52.4	68.8	51.6	44.4	5332	-2.651	8.9	47.4	29.5	65.3	46.2	-1.2		1.57	
Unanimous	37.5	50.0	50.0	55.6	54.6	38.9	-1453	0.754	7.8	50.4	34.9	66.0	33.3	-17.1	*	0.97	#

TABLE 2a
CIVIL CASES: FEDERAL GOVERNMENT
VERSUS A PRIVATE PARTY

	% VOTES FOR GOVERNMENT																
JUSTICE	1987	1988	1989	1990	1991	1992	a	b	SE	p(v)	Low	High	a(v)	Dif.	Sgnf.	DW	AC
Stevens	55.9	42.9	57.1	40.0	57.1	34.4	4709	-2.343	10.0	39.7	19.6	59.8	70.6	30.9	**	2.95	
Blackmun	50.0	60.7	64.3	60.0	57.1	48.5	1341	-0.646	6.3	54.5	42.0	67.1	68.8	14.2	*	2.00	
Rehnquist	61.8	71.4	78.6	70.0	71.4	74.2	-2964	1.526	5.5	76.6	65.5	87.7	58.8	-17.8	**	1.62	
Kennedy	58.3	66.7	60.7	55.6	76.2	70.0	-4591	2.340	7.8	72.8	57.2	88.4	52.9	-19.8	*	2.11	
Scalia	62.5	59.3	60.7	57.9	71.4	67.7	-3319	1.700	5.2	69.2	58.7	79.7	52.9	-16.3	**	1.90	
O'Connor	76.5	60.7	60.7	60.0	52.4	62.5	5496	-2.731	7.9	52.6	36.8	68.3	56.3	3.7		1.31	
Majority All Cases	61.8	64.3	71.4	60.0	81.0	66.7	-3525	1.806	7.7	73.9	58.4	89.3	52.9	-20.9	*	2.13	
Split Decisions	55.6	66.7	66.7	60.0	83.3	76.5	-8322	4.217	10.3	82.9	62.4	103.4	42.9	-40.0	**	1.76	
Unanimous	68.8	61.5	76.9	60.0	77.8	56.3	1801	-0.871	9.1	63.8	45.7	82.0	60.0	-3.8		3.01	#

TABLE 3a
STATE CRIMINAL CASES

	% VOTES FOR GOVERNMENT																
JUSTICE	1987	1988	1989	1990	1991	1992	a	b	SE	p(v)	Low	High	a(v)	Dif.	Sgnf.	DW	AC
Rehnquist	73.7	85.2	85.3	81.5	66.7	90.0	-1182	0.634	8.6	82.6	65.3	99.9	81.3	-1.4		2.64	
Scalia	47.4	77.8	73.5	74.1	77.8	86.4	-11046	5.589	13.3	92.4	65.8	119.0	81.3	-11.1		1.13	
O'Connor	61.1	77.8	76.5	66.7	33.3	66.7	6618	-3.294	16.2	52.2	19.8	84.5	68.8	16.6		1.95	
Kennedy	70.0	81.5	73.5	57.7	50.0	77.3	4263	-2.109	12.1	61.0	36.7	85.2	50.0	-11.0		1.95	
Stevens	21.1	37.0	20.6	0.0	27.8	31.8	-278	0.151	12.9	23.6	-2.3	49.4	25.0	1.4		2.13	
Blackmun	26.3	37.0	35.3	14.8	33.3	25.0	2194	-1.089	8.3	24.8	8.2	41.4	12.5	-12.3		1.94	
Majority All Cases	47.4	70.4	64.7	55.6	44.4	77.3	-3487	1.783	13.0	66.2	40.1	92.3	56.3	-10.0		2.66	
Split Decisions	53.8	72.7	70.0	68.2	33.3	84.6	-1869	0.971	17.9	67.2	31.4	102.9	61.5	-5.6		2.96	
Unanimous	16.7	60.0	25.0	0.0	66.7	66.7	-13893	7.003	28.9	63.7	5.8	121.6	33.3	-30.4		2.20	

Where: a = y intercept b = slope of the line SE = Standard Error

p(v) = 1993 predicted voting percentage LOW = the low bound of confidence at the .05 level

HIGH = the high bound of confidence at the .05 level a(v) = 1993 actual voting percentage

Dif. = difference between the predicted value and the actual value (Dif. = p(v) - a(v))

Sgnf. (if marked with a "*" or a "**") = difference between the predicted value and the actual value is statistically significant at either the .05 ("*") or .01("**") level of confidence

DW = Durbin-Watson statistic

AC (if marked with a #) = Durbin-Watson statistic is either below 1 or above 3, suggesting auto-correlation

TABLE 4a

FEDERAL CRIMINAL CASES

	% VOTES FOR GOVERNMENT																
JUSTICE	1987	1988	1989	1990	1991	1992	a	b	SE	p(v)	Low	High	a(v)	Dif.	Sgnf.	DW	AC
Rehnquist	85.7	88.9	77.8	70.0	76.9	81.3	3820	-1.880	6.7	73.5	60.0	87.0	83.3	9.8		1.11	
O'Connor	71.4	77.8	77.8	70.0	76.9	75.0	-352	0.214	3.4	75.6	68.8	82.3	75.0	-0.6		2.96	
Kennedy	71.4	88.9	66.7	50.0	84.6	60.0	4993	-2.474	14.7	61.6	32.2	91.0	66.7	5.1		2.67	
Scalia	64.3	66.7	66.7	40.0	76.9	62.5	353	-0.146	12.3	62.3	37.8	86.9	66.7	4.3		3.02	#
Blackmun	78.6	55.6	44.4	70.0	61.5	46.7	6665	-3.320	13.3	47.8	21.2	74.5	58.3	10.5		1.95	
Stevens	64.3	66.7	33.3	60.0	38.5	26.7	14026	-7.026	17.4	23.7	-11.2	58.5	50.0	26.3		1.95	
Majority All Cases	78.6	88.9	66.7	60.0	69.2	68.8	6598	-3.280	10.2	60.6	40.2	80.9	66.7	6.1		1.34	
Split Decisions	75.0	100.0	83.3	50.0	55.6	77.8	8742	-4.357	18.4	58.4	21.6	95.2	50.0	-8.4		1.52	
Unanimous	100.0	66.7	33.3	75.0	100.0	57.1	4216	-2.083	25.8	64.7	13.2	116.3	83.3	18.6		2.07	

TABLE 5a

FIRST AMENDMENT RIGHTS OF EXPRESSION,

ASSOCIATION, AND FREE EXERCISE OF RELIGION

	% VOTES FOR RIGHTS CLAIM																
JUSTICE	1987	1988	1989	1990	1991	1992	a	b	SE	p(v)	Low	High	a(v)	Dif.	Sgnf.	DW	AC
Scalia	38.5	35.3	26.7	25.0	37.5	45.5	-2233	1.140	7.7	38.7	23.3	54.2	85.7	47.0	**	0.76	#
Blackmun	69.2	41.2	60.0	69.2	88.9	90.0	-14499	7.323	18.4	95.4	58.6	132.1	71.4	-24.0		1.16	
Kennedy	66.7	37.5	40.0	41.7	77.8	77.8	-10067	5.089	19.3	74.7	36.1	113.3	71.4	-3.3		1.08	
O'Connor	23.1	25.0	26.7	54.5	77.8	36.4	-14324	7.220	21.6	65.9	22.6	109.1	57.1	-8.8		1.35	
Rehnquist	16.7	18.8	13.3	16.7	50.0	36.4	-11087	5.586	14.6	44.9	15.6	74.1	42.9	-2.0		1.04	
Stevens	50.0	64.7	46.7	50.0	100.0	90.0	-17509	8.834	22.9	97.8	52.1	143.5	57.1	-40.7		1.58	
Majority All Cases	50.0	35.3	40.0	25.0	66.7	45.5	-3179	1.620	14.2	49.4	21.1	77.8	57.1	7.7		2.41	
Split Decisions	50.0	22.2	40.0	30.0	57.1	33.3	-598	0.320	13.0	39.9	13.9	65.9	40.0	0.1		3.00	
Unanimous	50.0	50.0	40.0	0.0	100.0	60.0	-9045	4.571	32.2	66.0	1.5	130.5	100.0	34.0		2.03	

TABLE 6a

EQUAL PROTECTION CLAIMS

	% VOTES FOR RIGHTS CLAIM																
JUSTICE	1987	1988	1989	1990	1991	1992	a	b	SE	p(v)	Low	High	a(v)	Dif.	Sgnf.	DW	AC
Blackmun	50.0	60.0	0.0	83.3	50.0	40.0	-140	0.094	27.4	47.5	-7.3	102.4	100.0	52.5		2.51	
Kennedy	33.3	57.1	25.0	42.9	50.0	20.0	4011	-1.997	14.5	31.1	2.1	60.0	100.0	68.9	**	2.14	
O'Connor	12.5	66.7	25.0	28.6	33.3	40.0	-2291	1.169	18.3	38.4	1.8	75.1	100.0	61.6	**	1.57	
Stevens	28.6	66.7	0.0	83.3	66.7	40.0	-7928	4.009	30.6	61.6	0.3	122.8	100.0	38.4		2.48	
Rehnquist	12.5	57.1	20.0	14.3	50.0	20.0	-568	0.300	19.4	30.0	-8.8	68.8	0.0	-30.0		2.29	
Scalia	12.5	57.1	25.0	14.3	33.3	20.0	2562	-1.274	16.6	22.6	-10.5	55.7	0.0	-22.6		2.04	
Majority All Cases	12.5	57.1	0.0	42.9	50.0	20.0	-3329	1.689	22.8	36.3	-9.3	82.0	100.0	63.7	*	2.14	
Split Decisions	0.0	100.0	0.0	50.0	50.0	33.3	-3741	1.900	37.5	45.5	-29.5	120.6	100.0	54.5		2.66	
Unanimous	20.0	50.0	0.0	33.3	50.0	0.0	3817	-1.906	22.8	18.9	-26.7	64.4	0.0	-18.9		2.31	

Where: a = y intercept b = slope of the line SE = Standard Error

p(v) = 1993 predicted voting percentage LOW = the low bound of confidence at the .05 level

HIGH = the high bound of confidence at the .05 level a(v) = 1993 actual voting percentage

Dif. = difference between the predicted value and the actual value (Dif. = p(v) - a(v))

Sgnf. (if marked with a "*" or a "**") = difference between the predicted value and the actual value is statistically significant at either the .05 ("*") or .01("**") level of confidence

DW = Durbin-Watson statistic

AC (if marked with a #) = Durbin-Watson statistic is either below 1 or above 3, suggesting auto-correlation

TABLE 7a

STATUTORY CIVIL RIGHTS CLAIMS

	% VOTES FOR RIGHTS CLAIM																
JUSTICE	1987	1988	1989	1990	1991	1992	a	b	SE	p(v)	Low	High	a(v)	Dif.	Sgnf.	DW	AC
Blackmun	87.5	80.0	88.9	80.0	88.9	63.6	5862	-2.906	9.7	71.3	51.9	90.7	77.8	6.5		2.33	
Stevens	87.5	73.7	77.8	80.0	88.9	70.0	2336	-1.134	7.5	75.7	60.7	90.6	55.6	-20.1	*	1.10	
Kennedy	66.7	45.0	62.5	33.3	55.6	36.4	8514	-4.254	13.8	35.0	7.4	62.7	33.3	-1.7		2.09	
O'Connor	42.9	52.6	55.6	53.3	55.6	54.6	-3654	1.863	4.8	59.0	49.3	68.6	33.3	-25.6	**	1.32	
Rehnquist	37.5	35.0	44.4	33.3	44.4	36.4	-621	0.331	4.8	39.7	30.1	49.2	33.3	-6.3		3.01	#
Scalia	57.1	40.0	55.6	46.7	44.4	45.5	3101	-1.534	6.7	42.8	29.4	56.3	33.3	-9.5		1.84	
Majority All Cases	75.0	50.0	88.9	53.3	55.6	50.0	8236	-4.109	16.1	47.8	15.5	80.0	33.3	-14.4		1.84	
Split Decisions	60.0	25.0	83.3	33.3	40.0	50.0	3175	-1.571	21.0	43.1	1.1	85.1	0.0	-43.1	*	2.31	
Unanimous	100.0	87.5	100.0	83.3	75.0	50.0	17374	-8.691	18.7	52.2	14.8	89.6	60.0	7.8		0.63	#

TABLE 8a

CASES RAISING A CHALLENGE TO

THE EXERCISE OF JURISDICTION

	% VOTES FOR JURISDICTION																
JUSTICE	1987	1988	1989	1990	1991	1992	a	b	SE	p(v)	Low	High	a(v)	Dif.	Sgnf.	DW	AC
Blackmun	58.1	64.9	79.2	80.0	71.4	66.7	-3528	1.809	8.5	76.4	59.3	93.5	50.0	-26.4	**	0.88	#
Stevens	57.1	73.0	68.0	91.4	75.0	69.7	-5180	2.640	11.2	81.6	59.2	104.0	44.4	-37.2	**	1.35	
Kennedy	56.3	51.4	64.0	58.3	73.3	51.5	-1987	1.029	8.4	62.7	46.0	79.5	33.3	-29.4	**	1.35	
O'Connor	42.9	51.4	68.0	54.3	63.3	53.1	-4094	2.086	8.9	62.8	44.9	80.7	22.2	-40.6	**	1.24	
Rehnquist	47.9	51.4	60.0	54.3	62.1	54.6	-3350	1.711	5.3	61.0	50.5	71.6	22.2	-38.8	**	1.21	
Scalia	36.6	50.0	60.0	48.5	55.2	51.5	-4418	2.246	7.9	58.2	42.4	73.9	22.2	-35.9	**	1.34	
Majority All Cases	55.8	62.2	64.0	63.9	73.3	52.9	-1001	0.534	7.2	63.9	49.6	78.2	33.3	-30.6	**	0.97	#
Split Decisions	71.4	62.5	33.0	38.9	69.2	37.5	8209	-4.100	17.5	37.7	2.8	72.7	33.3	-4.4		1.60	
Unanimous	48.3	61.9	81.3	88.9	76.5	66.7	-8081	4.097	14.6	84.9	55.7	114.2	40.0	-44.9	**	0.84	#

TABLE 9a

FEDERALISM CASES

	% VOTES FOR STATE CLAIM																
JUSTICE	1987	1988	1989	1990	1991	1992	a	b	SE	p(v)	Low	High	a(v)	Dif.	Sgnf.	DW	AC
Blackmun	46.2	40.9	43.8	14.3	43.5	53.3	-744	0.394	13.4	41.7	14.8	68.6	71.4	29.7	*	1.26	
Rehnquist	46.2	81.0	56.3	71.4	43.5	73.3	-2104	1.089	15.5	65.8	34.8	96.8	71.4	5.7		2.92	
O'Connor	33.3	73.7	56.3	71.4	39.1	73.3	-6269	3.180	18.1	69.0	32.9	105.1	57.1	-11.8		2.85	
Scalia	30.8	76.2	56.3	71.4	26.1	60.0	-560	0.309	20.7	54.5	13.1	96.0	57.1	2.6		2.73	
Stevens	46.2	57.1	43.8	28.6	31.8	60.0	1301	-0.631	12.8	42.4	16.8	67.9	57.1	14.8		1.41	
Kennedy	33.3	72.7	56.3	71.4	26.1	60.0	-447	0.251	19.5	54.2	15.2	93.1	42.9	-11.3		2.78	
Majority All Cases	38.5	59.1	43.8	71.4	26.1	66.7	-3905	1.989	17.6	57.9	22.6	93.2	57.1	-0.8		3.29	#
Split Decisions	33.3	50.0	25.0	80.0	28.6	57.1	-6196	3.137	21.0	56.6	14.7	98.6	50.0	-6.6		3.36	#
Unanimous	42.9	70.0	50.0	50.0	22.2	75.0	-920	0.489	19.1	53.4	15.1	91.7	60.0	6.6		2.60	

Where: a = y intercept b = slope of the line SE = Standard Error

p(v) = 1993 predicted voting percentage LOW = the low bound of confidence at the .05 level

HIGH = the high bound of confidence at the .05 level a(v) = 1993 actual voting percentage

Dif. = difference between the predicted value and the actual value (Dif. = p(v) - a(v))

Sgnf. (if marked with a "*" or a "**") = difference between the predicted value and the actual value is statistically significant at either the .05 ("*") or .01("**") level of confidence

DW = Durbin-Watson statistic

AC (if marked with a #) = Durbin-Watson statistic is either below 1 or above 3, suggesting auto-correlation

TABLE 10a

SWING-VOTE ANALYSIS: WHO VOTES MOST OFTEN

WITH THE MAJORITY IN CLOSE CASES

	% VOTES WITH MAJORITY																
JUSTICE	1987	1988	1989	1990	1991	1992	a	b	SE	p(v)	Low	High	a(v)	Dif.	Sgnf.	DW	AC
Kennedy	71.4	82.4	71.4	52.2	64.7	72.7	3809	-1.880	10.1	62.6	42.4	82.7	92.9	30.3	**	1.25	
Rehnquist	70.0	76.5	66.7	69.6	41.2	72.7	5154	-2.557	12.6	57.2	31.9	82.5	71.4	14.3		2.36	
Scalia	66.7	73.5	66.7	52.2	35.3	81.8	3109	-1.531	16.6	57.3	24.2	90.5	71.4	14.1		1.99	
O'Connor	64.5	76.5	69.0	69.6	58.8	40.9	9755	-4.871	12.4	46.2	21.4	71.0	57.1	11.0		1.11	
Blackmun	45.2	38.2	33.3	47.8	70.6	31.8	-2496	1.277	14.3	49.0	20.4	77.5	35.7	-13.2		2.14	
Stevens	61.3	26.5	42.9	47.8	58.8	40.9	58	-0.006	12.8	46.3	20.8	71.9	35.7	-10.6		2.16	
Conservative Coalition	64.5	76.5	64.3	54.5	41.2	63.6	6893	-3.434	11.9	48.7	25.0	72.5	64.3	15.5		1.49	
Liberal Coalition	35.5	23.5	35.7	45.5	58.8	36.4	-6793	3.434	11.9	51.3	27.5	75.0	35.7	-15.5		1.50	

Where: a = y intercept b = slope of the line SE = Standard Error

p(v) = 1993 predicted voting percentage LOW = the low bound of confidence at the .05 level

HIGH = the high bound of confidence at the .05 level a(v) = 1993 actual voting percentage

Dif. = difference between the predicted value and the actual value (Dif. = p(v) - a(v))

Sgnf. (if marked with a "*" or a "**") = difference between the predicted value and the actual value is statistically significant at either the .05 ("*") or .01("**") level of confiden

DW = Durbin-Watson statistic

AC (if marked with a #) = Durbin-Watson statistic is either below 1 or above 3, suggesting auto-correlation