ARTICLES

Supreme Court Voting Behavior: 1995 Term

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I. Introduction

This Study, the eleventh in a series,[1] tabulates and analyzes the voting behavior of the United States Supreme Court during the 1995 Term.[2] The analysis is designed to determine whether an individual Justice, as well as the Court as a whole, is voting more "conserva-

1. Professor Robert E. Riggs began this Study with *Supreme Court Voting Behavior: 1986 Term*, 2 B.Y.U. J. Pub. L. 15 (1988). Professor Richard G. Wilkins continued the Study in *Supreme Court Voting Behavior: 1991 Term*, 7 B.Y.U. J. Pub. L. 1 (1992) [hereinafter *1991 Study*]. The last two Studies, analyzing the 1993 and 1994 Terms, were both published in the *Hastings Constitutional Law Quarterly*. *See* Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1993 Term*, 22 HASTINGS CONST. L.Q. 269 (1995) [hereinafter *1993 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1994 Term*, 23 HASTINGS CONST. L.Q. 1 (1995) [hereinafter *1994 study*].

2. The 1995 Term covers decisions made from October 1995 to July 1996.

tively," more "liberally," or about the same as compared with past terms. As in politics, whether or not a judicial trend is "conservative" or "liberal" often lies in the eye of the beholder. A lawyer for the American Civil Liberties Union could well paint an ideological picture of the Court far different from one sketched by a lawyer for Americans United For Life.

This Study attempts to remove this subjectivity by applying the following consistent classification scheme to defined categories of cases across time: "conservative" votes are those that favor an assertion of governmental power, while "liberal" votes are those that favor a claim of individual liberty.[3] By tracking the term-to-term conservative or liberal changes in the voting patterns of individual Justices and the Court as a whole across ten defined categories of cases,[4] and by applying standard statistical tests to the resulting data,[5] the Study attempts to provide reliable information regarding the current ideological posture of the Court and its members, as well as conclusions and predictions regarding its past and future trends. Whether any statistical study of a process as complex as judicial decision-making can *be* reliable is, of course, open to debate.[6] But, within the limitations inherent in an attempt to number-crunch ideology, this annual survey can still offer students and practitioners information useful for assessing how an individual Justice, or the Court as a whole, will vote in particular types of cases.

This Terms's survey reveals a Court in ideological tension. Although some measures suggest a growing, or at least continued, conservatism on the High Bench, there are several contrary liberal indicators as well. The Court was less conservative in its approach to state criminal cases than in the recent past,[7] and was also more receptive of arguments expanding federal jurisdiction.[8] First Amendment

3. There is no single, settled definition of conservatism or liberalism. *See generally* M.A. RIFF, DICTIONARY OF MODERN POLITICAL IDEOLOGIES 67-73, 141-52 (1987) (discussing various possible interpretations of the terms). This Study's definitions, however, are close to the core ideals of each ideology. *See id.* at 67 (noting that conservatism "implies fear of sudden and violent changes, respect for established institutions and rulers, support for elites and hierarchies, and a general mistrust of theory as opposed to empirical deductions"); *id.* at 142 (asserting that "twentieth-century" liberalism is "compounded of constitutionalism; doubtful[ ] of pluralism; certain[ ] of a belief in the virtues of economic freedom, and less certain[ ] of a desire to restrict government intervention in most other aspects of life").

4. *See infra* Tables 1-10.

5. *See infra* notes 99-107 and accompanying text.

6. *See infra* note 33 and accompanying text.

7. *See infra* Part IV.A.3 and Table 3.

8. *See infra* Part IV.A.8 and Table 8.

protections remain strong,[9] and equal protection claims are also making something of a comeback—although the precise contours (and content) of this resurgence are unclear.[10] These liberal indicators, however, are offset by the fact that the 1995 Court was decidedly more likely to vote in favor of the federal government in both civil[11] and criminal[12] cases and remains skeptical of statutory civil rights claims.[13] Furthermore, the uneasy hegemony of conservative coalitions over liberal coalitions in important swing vote decisions suggests that the replacement of even a single Justice on the Court could have a significant impact on future ideological trends—an issue of some importance during a presidential election year.[14] This and other information detailed below may be useful in predicting the Court's future course.

The Study has been slightly restructured this year to make it more user-friendly than in past years. The precise details of the statistical analysis—as can be gleaned from a glance at the equations and explanations contained in Appendix B—are hardly the stuff of light cocktail conversations. However, one need not have an advanced degree in mathematics to understand the general voting trends that flow from the Study's analysis. Accordingly, the Study is now separated into distinct segments designed to meet the needs of the reader who simply wants the gist of identifiable ideological trends as well as the reader who wants to probe the details of our statistical examinations.

Part II gives a description of the statistical mode of analysis employed. Part III follows with a general overview of the Study's findings. Part IV then sets out the Study's tables and figures and discusses the information contained in each. Finally, Appendices A and B detail the definitions and statistical tests that govern the Study. This approach is designed neither to choke the mathematically challenged nor to starve statistical savants.

II. Mode of Analysis

The following information is drawn from a tabulation and mathematical analysis of each Justice's votes in ten categories of cases. Nine of these categories are based on the nature of the issue (e.g., First

9. *See infra* Part IV.A.5 and Table 5.
10. *See infra* Part IV.A.6 and Table 6.
11. *See infra* Part IV.A.2 and Table 2.
12. *See infra* Part IV.A.4 and Table 4.
13. *See infra* Part IV.A.7 and Table 7.
14. *See infra* Part IV.A.10 and Table 10.

Amendment, equal protection) or on the character of the parties (e.g., state government against a private party).[15] The tenth category tabulates the number of times each Justice voted with the majority in cases decided by a single, or swing, vote.[16]

These categories are designed to demonstrate each Justice's attitude toward two broad issues underlying most Supreme Court decision-making: protection of individual rights and judicial restraint. The tabulation of votes in each category reveals, in broad strokes, the frequency with which individual Justices and the Court as a whole vote to protect individual rights[17] or to exercise judicial restraint.[18]

From the voting patterns that emerge, the Study determines whether individual Justices and the Court are taking "conservative" or "liberal" positions. The Study classifies outcomes that favor an asser-

15. The categories are as follows:

1) Civil controversies in which a state, or one of its officials or political subdivisions, is opposed by a private party.
2) Civil controversies in which the federal government, or one of its agencies or officials, is opposed by a private party.
3) State criminal cases.
4) Federal criminal cases.
5) First Amendment issues (freedoms of speech, press, association and free exercise of religion).
6) Equal protection claims.
7) Statutory civil rights claims.
8) Issues of federal court jurisdiction, party standing, justiciability, and related matters.
9) Federalism cases.

16. *See infra* note 46.

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

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

tion of governmental power as conservative, and outcomes that favor a claim of individual right as liberal.[19] Accordingly, the Study classifies as conservative a vote for 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. The Study classifies as liberal all contrary votes.

This analytical scheme is not perfect. Unanimous decisions (a significant portion of all cases decided by the Court) are included in the Study's calculations even though liberal or conservative ideology as such may not have influenced the outcome of those cases. When an opinion is unanimous, it is often true that the law or the facts, or both, pointed so clearly in one direction that ideology was not a decisional factor. Furthermore, concern for individual rights is not always, or even necessarily, the attitudinal opposite of judicial restraint.[20] This Term, for example, the dissenters in *Shaw v. Hunt*[21] and *Bush v. Vera*[22] asserted that the Court's acceptance of an equal protection-based challenge to the racial composition of voting districts, rather than evidencing a regard for individual rights, was an example of improper judicial activism.[23] In other cases, particular circumstances may result in a reversal in the expected relationship.[24]

Despite such difficulties, the basic assumption that supports this Study—that the general orientation of individual Justices and the Court to individual rights and judicial restraint is suggestive of conservative or liberal ideology—appears sound. For example, deference to legislatures frequently results in rejection of an individual's claim,

19. We are mindful of the limited validity of the "conservative" and "liberal" labels. *See supra* note 3.

20. 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).

21. 116 S. Ct. 1894 (1996).

22. 116 S. Ct. 1941 (1996).

23. *See Shaw*, 116 S. Ct. at 1907; *Bush*, 116 S. Ct. at 1993.

24. For example, see *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240 (1996), where Justice Stevens conservatively voted *against* a claim of federal preemption. This vote, however, may not be indicative of the Justice's actual ideology. In *Medtronic*, the issue was whether state tort claims were preempted by federal regulation of the safety of medical appliances. In such circumstances, Justice Stevens's rejection of the preemption claim results in increased regulation (i.e., by both state *and* federal governments) of the medical appliances industry—an outcome that could be characterized as favoring the prerogatives of individual consumers. Therefore, Justice Stevens's somewhat uncharacteristic vote in favor of state power in *Medtronic* may indicate not conservative leanings, but rather a general liberal tendency to protect individual rights through increased regulation.

especially one predicated upon the impropriety of governmental action.[25] Judicial restraint, which emphasizes the Framers' original intent, is also evident in the Court's reluctance to read new rights into the Constitution.[26] Refusal to exercise federal jurisdiction leaves the matter to state courts and their possible bias in favor of state actions against individuals, and such a refusal is a clear rebuff to the claimant seeking federal protection of rights.[27] Therefore, to the extent that the Study's basic ideological assumptions regarding liberal and conservative outcomes are accurate, it is possible to identify trends by tracking the voting patterns reflected in Tables 1 through 10.

To reckon current ideological positions within the Court, votes of individual Justices can be compared with those cast by other Justices this Term, as well as with the outcomes for the 1988 through 1994 Terms.[28] Likewise, the current ideological position of the Court as a whole can be determined by comparing present outcomes for the Court majority to those of prior terms. In the various tables, this information appears in the form of percentages for each Justice, as well as for the Court majority.[29] Figures 1 through 10, in turn, graphically demonstrate the voting trends revealed in the tables.

Finally, Regression Tables 1 through 10 analyze the voting patterns of the five Justices who have been on the Court since 1988: Chief Justice Rehnquist and Justices Stevens, Scalia, O'Connor, and Kennedy. The remaining Justices have not been on the Court long enough to perform a reliable regression analysis.[30] The purpose of the Regression Tables is to determine whether any changes in voting patterns by the analyzed Justices are statistically significant, whether a Justice's current voting pattern departs substantially from his or her prior voting behavior, and whether there is any correlation among the voting patterns of the analyzed Justices.[31]

25. *See, e.g.*, Bennis v. Michigan, 116 S. Ct. 994 (1996) (rejecting individual challenge to forfeiture statute).

26. *See, e.g.*, Meghrig v. KFC Western, Inc., 116 S. Ct. 1251 (1996) (refusing to imply private right of contribution under federal statute).

27. *See, e.g.*, Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996) (rejecting, on Eleventh Amendment grounds, plaintiff's challenge to Florida's assertion of regulatory power).

28. Although the Study began with the 1986 Term, the tables are limited to data for the past eight terms. Because of the changes in Court personnel over time, to include more than seven prior terms on the tables would prove somewhat cumbersome. Furthermore, comparative analysis of the eight terms in the tables should be more than adequate to gauge the ideological fluctuations on the Court.

29. This is not true for Table 10, which analyzes the Court's swing voting.

30. *See infra* Appendix B.

31. For a more detailed explanation, see *infra* text accompanying notes 99-107 and Appendix B.

All of this data must be interpreted with caution. The percentages and statistical results revealed on each table are affected not only by the behavior of the individual Justices, but also by the nature of the cases decided in a given term. The significant increase in the 1995 Court's receptivity of the federal government's claims on Tables 2 and 4, for example, may not indicate growing conservatism as much as increasing care and selectivity exercised by the federal government in pressing only meritorious claims upon the Court.[32] Furthermore, Supreme Court cases are not the result of random selection, and the universe of votes cast by any particular Justice is relatively small. Since both random sampling and large sample size are crucial elements of any fully reliable statistical analysis, conclusions drawn from this Study are not beyond dispute. There are, of course, obvious limitations in any empirical analysis of a subjective decision-making process.[33]

In light of these caveats, one might ask whether this Study is worth either conducting or reading. We believe it is. For years, experienced Supreme Court practitioners have attempted to predetermine the ideological predilections of individual Justices in framing their arguments to the Court. Moreover, both the media and academics are fond of attaching ideological labels to the Court and its personnel.

32. The federal government did not fare well before the Court during the early years of the Clinton Administration. *See 1994 Study*, *supra* note 1, at 31-32; *1993 Study, supra* note 1, at 283. This Term's significantly improved batting average for the Administration may flow not from growing conservatism on the part of the Court, but from the Solicitor General's increased experience in selecting winners to present to the Court. A significant portion of the federal civil cases tabulated on Table 2, for example, were unanimous or nearly unanimous decisions in favor of federal regulatory authority in the areas of labor law and taxation. *See, e.g.*, NLRB v. Town & Country Elec., Inc., 116 S. Ct. 450 (1995) (unanimous decision in favor of federal government's construction of national labor law); Commissioner of Internal Revenue v. Lundy, 116 S. Ct. 647 (1996) (7-2 decision in favor of federal government's construction of the Internal Revenue Code); United States v. Noland, 116 S. Ct. 1524 (1996) (unanimous decision in favor of federal government's construction of the Internal Revenue Code); Auciello Iron Works, Inc. v. NLRB, 116 S. Ct. 1754 (1996) (unanimous decision in favor of federal government's construction of national labor law); Brotherhood of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe R.R., 116 S. Ct. 595 (1996) (same).

33. The general reliability of statistical inference depends upon random sampling. *See* ROBERT V. HOGG & ALLEN T. CRAIG, INTRODUCTION TO MATHEMATICAL STATISTICS 157-58 (1959); RAYMOND H. MYERS, CLASSICAL AND MODERN REGRESSION WITH APPLICATIONS 9-11 (1990). This Study is limited to a small universe—the cases in which decisions have been rendered by the entire Court over the period for which data have been collected. Sample sizes vary from year to year, according to the case selection of the Court. This Study, then, is subject to sampling bias, both because the sample is not random and because it is comparatively small. Any statistical inferences, therefore, may not accurately represent a Justice's (or the Court's) views.

Consequently, Supreme Court practitioners, legal scholars, and the public have long assumed that any assessment of Court ideology is valuable—even when such an assessment may be based on little more than the gut reactions of the attorneys, scholars, and news reporters involved. This Study, based upon a systematic methodology for objectively gathering, quantifying, and analyzing data, should be more reliable than such ad hoc assessments.

III. Overview of Ideological Trends of the 1995 Term

The voting patterns that emerge from this year's Study reveal ideological instability on the Court. The data from five of the ten tables indicate conservative[34] ideological movement.[35] In contrast, the data from the other five tables suggest either liberal movement or a retention of liberal gains attained in the past few terms.[36] In sum, although it is commonplace to assume that the present Court is conservative, the statistical data do not unambiguously support this popular perception. Rather, the 1995 data demonstrate that, if anything, the Court is not heading in any consistent ideological direction.

Table 1, which gauges the ideological outcome of civil cases where one party is a state government, indicates a slight conservative movement in favor of governmental litigants. Any such conservative advance, however, is small and merely checks a liberal trend that began in 1993.[37] By contrast, the 1995 Court was less receptive of claims made by state governments in criminal cases; Table 3 demonstrates liberal, not conservative, movement in state criminal cases, and regression analysis[38] shows that the liberal movement by the three generally conservative jurists (Chief Justice Rehnquist and Justices Scalia and Kennedy) and by a more moderate swing voter (Justice O'Connor) is statistically significant.[39] The Court also seemed to be less inclined than in the past to defer to the states on the federalism issues tracked by Table 9. Thus, any distinct ideological trend in Supreme Court litigation involving the states is hard to discern—the

34. Hereinafter, the terms "conservative" and "liberal" will be used as they were defined *supra* note 3 and accompanying text.

35. *See infra* Tables 1 (state civil cases), 2 (federal civil cases), 4 (federal criminal cases), 7 (statutory civil rights claims) and 10 (swing vote cases).

36. *See infra* Tables 3 (state criminal cases), 5 (First Amendment claims), 6 (equal protection claims), 8 (jurisdictional issues), and 9 (federalism cases).

37. *See 1993 Study*, *supra* note 1, at 270.

38. See *infra* Appendix B, subpart 3 for a definition of regression analysis.

39. *See infra* Regression Table 3.

Court's possible deference to the states in civil litigation is balanced by increasing skepticism of the states' criminal and federalism claims.

The same cannot be said, however, regarding the Court's resolution of federal claims. The 1995 Court was dramatically more receptive of claims made by the federal government than in the recent past. Table 2, which collects the Court's results in civil cases where the federal government is a party, shows that the Justices were markedly more open to arguments made by the federal government in 1995. Specifically, the government was over 32 percentage points more successful in civil cases this Term than last. Table 4 reflects the same trend in federal criminal cases—most of the Justices voted in favor of the federal government more often in criminal cases in 1995 than in recent terms.

Whether the Court's treatment of various substantive claims involving the First Amendment,[40] the Equal Protection Clause of the Fourteenth Amendment,[41] and statutory civil rights claims demonstrates liberal or conservative movement is open to debate. Table 5 indicates some slight conservative movement in the Court's disposition of First Amendment cases. Despite this trend, Chief Justice Rehnquist and Justices Kennedy and O'Connor produced voting patterns that evidence statistically significant liberal movement.[42] Furthermore, the Court's overall acceptance of First Amendment claims remains historically high. It appears, then, that while the Court is not currently moving in any clear ideological direction on First Amendment issues, it is maintaining a liberal receptivity to such claims.

Table 6 demonstrates that the Court's treatment of equal protection claims is more troublesome. Although the Court accepted equal protection claims pressed by gay rights activists[43] and womens' groups[44] that virtually everyone would concede to be liberal, it also entertained claims brought by nonminority voters who claimed that the racial composition of their recently realigned voting districts violated the Equal Protection Clause.[45] Since this Study assumes that all these claims are liberal, Table 6 shows a distinct liberal trend by the Court on equal protection issues.

40. U.S. CONST. amend. I. First Amendment cases include those that involve a decision regarding freedom of expression, freedom of association, or the free exercise of religion.

41. U.S. CONST. amend. XIV.

42. *See infra* Regression Table 5.

43. Romer v. Evans, 116 S. Ct. 1620 (1996).

44. United States v. Virginia, 116 S. Ct. 2264 (1996) (educational gender bias).

45. Shaw v. Hunt, 116 S. Ct. 1894 (1996); Bush v. Vera, 116 S. Ct. 1941 (1996).

Table 7, on the other hand, reveals that the Court's stance on statutory civil rights was conservative no matter how one analyzes the data. Table 7, Figure 7 and Regression Table 7 all show that (at the very least) the Court majority continues to view statutory civil rights claims with suspicion, a trend that began in 1989.

Table 8, which demonstrates the Court's willingness to expand the jurisdictional reach of the federal courts, shows across-the-board liberal movement in 1995. Every Justice on the Court was more hospitable to claims of federal jurisdiction than in the past two terms. Figure 8, in fact, shows that the Court is headed back toward the liberal highs scored from 1989-1991.

Perhaps the most important, although least surprising, statistics contained in this Study are collected in Table 10. That Table analyzes the voting influence of the various members of the Court in swing vote decisions.[46] Table 10 reveals (as it has for the past couple of terms) that the present Court is sharply divided into two ideological camps: a liberal group composed of Justices Stevens, Souter, Ginsburg and Breyer, and a conservative group composed of Chief Justice Rehnquist and Justices Scalia and Thomas. Between these two factions operate the Court's two moderate swing voters, Justices Kennedy and O'Connor. These two Justices have tremendous impact. Their votes often determine the outcome of the most pressing questions before the Court.[47] This Term, as in the past two terms, Justice Kennedy was the Court's most influential member in close cases. Justice O'Connor ran a close second.

Whether the power held by these two Justices is good or bad (either for the Court or the American system of justice) is beyond the scope of this Study. What *can* be demonstrated by this analysis, however, is that the Court's moderate swing voters have caused the Court

46. This category includes five-four decisions, four-three decisions, as well as five-three and four-two decisions resulting in reversal of a lower court decision. Affirmances by a vote of five-three or four-two are not included because a shift of one vote from the majority to the minority position would still result in affirmance by a tie vote.

47. Witness, for example, the fractured opinions in *Bush v. Vera*. There, although a five-member majority ultimately accepted the plaintiffs' equal protection claims, it did so on two different rationales. Justice O'Connor, writing for herself, the Chief Justice, and Justice Kennedy, concluded that, when drawing voting districts, states must not improperly subordinate relevant districting principles to race. 116 S. Ct. at 1970 (O'Connor, J., concurring). The final two votes were supplied by Justices Scalia and Thomas, who would apply strict scrutiny to such cases. *Id.* at 1973 (Thomas, J., concurring). Because it is the more limited rationale, Justice O'Connor's view controls, even though it was supported by only three votes. *See* Marks v. United States, 430 U.S. 188, 193 (1977).

to vacillate markedly between liberal and conservative outcomes.[48] In 1991, the outcome of close cases was usually controlled by a liberal coalition. In 1992 and 1993, however, Justices Kennedy and O'Connor apparently found conservative views more amenable, and control shifted to conservative coalitions. In 1994, control again returned to the liberal bloc. And now, in 1995, control has switched back into conservative hands.

This ideological instability is unlikely to be resolved by future developments within the Court itself. Rather, the ultimate ideological direction of the Court will be determined by the outcome of the next few resignations from, and appointments to, the High Bench. If one of the conservative or swing vote Justices is replaced with a politically liberal jurist, the ideological direction of the Court could quickly shift from the generally conservative (albeit wavering) course of the recent past. By contrast, because the reliably liberal bloc is presently one Justice larger than the reliably conservative bloc, it would take two replacements from the current liberal coalition to produce a similar conservative shift.

IV. The Voting Record

Subpart A sets out Tables 1-10 and Figures 1-10 and discusses the trends they reveal. Subpart B then sets out Regression Tables 1-10 and addresses the significance of that data.[49]

48. *See infra* Figure 10.

49. The following cases were not included on the Tables because they did not conform to the definitions governing this Study as set out *infra* Appendix A:

Netherland v. Tuggle, 116 S. Ct. 4 (1995)
Citizens Bank v. Strumpf, 116 S. Ct. 286 (1995)
Louisiana v. Mississippi, 116 S. Ct. 290 (1995)
Field v. Mans, 116 S. Ct. 437 (1995)
Zicherman v. Korean Air Lines Co., 116 S. Ct. 629 (1996)
Lotus Dev. Corp. v. Borland Int'l, Inc., 116 S. Ct. 804 (1996)
Norfolk & W. Ry. Co. v. Hiles, 116 S. Ct. 890 (1996)
Bowersox v. Williams, 116 S. Ct. 1312 (1996)
Markman v. Westview Instruments, Inc., 116 S. Ct. 1384 (1996)
Exxon Co., U.S.A. v. Sofec, Inc., 116 S. Ct. 1813 (1996)
Brown v. Pro Football, Inc., 116 S. Ct. 2116 (1996).

TABLE 1
CIVIL CASES: STATE GOVERNMENT VERSUS A PRIVATE PARTY

JUSTICE	1995 TERM VOTES			% VOTES FOR GOVERNMENT						
	FOR GOV'T	AGAINST GOV'T	1995 TERM	1994 TERM	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Thomas	11	6	64.7	55.0	45.5	41.7	71.4	—	—	—
Scalia	9	8	52.9	60.0	50.0	41.7	64.3	64.0	64.9	59.2
O'Connor	8	9	47.1	40.0	40.9	50.0	50.0	68.0	67.6	57.4
Rehnquist	7	9	43.8	60.0	68.2	52.8	71.4	84.0	70.3	66.7
Kennedy	7	10	41.1	40.0	40.9	41.7	42.9	76.0	61.1	57.1
Ginsburg	6	11	35.3	50.0	40.9	—	—	—	—	—
Breyer	5	12	29.4	42.1	—	—	—	—	—	—
Souter	5	12	29.4	35.0	45.5	36.4	52.5	63.6	—	—
Stevens	4	13	23.5	42.1	27.3	31.3	29.3	36.0	40.5	35.4
Majority	9	8	52.9	45.0	40.9	41.7	52.4	64.0	51.4	51.0
Split Decisions	8	3	72.7	45.5	46.2	44.4	51.6	68.8	52.4	64.0
Unanimous	1	5	16.7	44.4	33.3	38.9	54.6	55.6	50.0	50.0

FIGURE 1

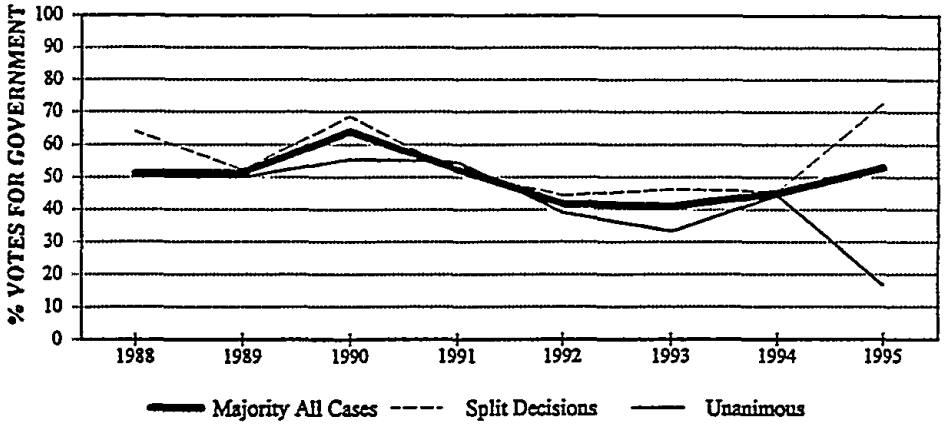


TABLE 2
CIVIL CASES: FEDERAL GOVERNMENT VERSUS A PRIVATE PARTY

JUSTICE	1995 TERM VOTES			% VOTES FOR GOVERNMENT						
	FOR GOV'T	AGAINST GOV'T	1995 TERM	1994 TERM	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Ginsburg	17	3	85.0	61.1	58.8	—	—	—	—	—
Kennedy	16	4	80.0	47.4	52.9	70.0	76.2	55.6	60.7	66.7
Rehnquist	15	5	75.0	52.6	58.8	74.2	71.4	70.0	78.6	71.4
Souter	15	5	75.0	42.1	76.5	70.0	71.4	55.6	—	—
O'Connor	13	7	65.0	27.8	56.3	62.5	52.4	60.0	60.7	60.7
Thomas	13	7	65.0	42.1	47.1	64.5	53.3	—	—	—
Stevens	12	7	63.2	68.4	70.6	34.4	57.1	40.0	57.1	42.9
Scalia	12	8	60.0	42.1	52.9	67.7	71.4	57.9	60.7	59.3
Breyer	12	8	60.0	47.4	—	—	—	—	—	—
Majority All Cases	15	5	75.0	42.1	52.9	66.7	81.0	60.0	71.4	64.3
Split Decisions	7	4	63.6	33.3	42.8	76.5	83.3	60.0	66.7	66.7
Unanimous	8	1	88.9	57.1	60.0	56.3	77.8	60.0	76.9	61.5

FIGURE 2

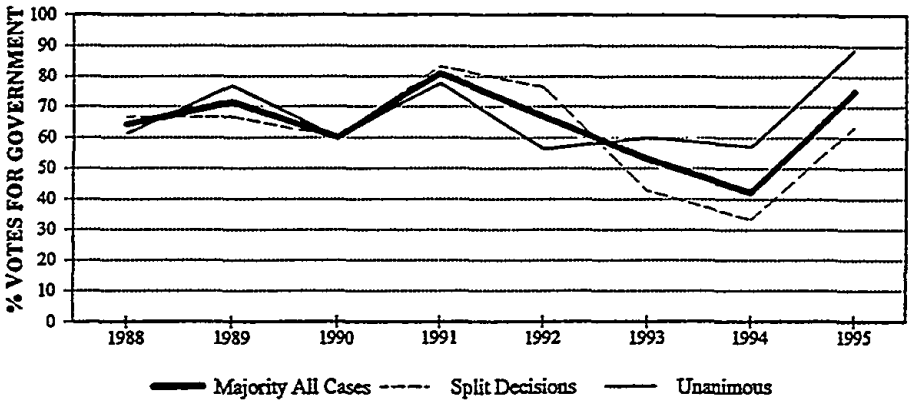


TABLE 3
STATE CRIMINAL CASES

JUSTICE	1995 TERM VOTES			% VOTES FOR GOVERNMENT						
	FOR GOV'T	AGAINST GOV'T	1995 TERM	1994 TERM	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Rehnquist	6	3	66.7	91.7	81.3	90.0	66.7	81.5	85.3	85.2
Thomas	6	3	66.7	91.7	87.5	85.7	75.0	—	—	—
Kennedy	5	4	55.6	75.0	50.0	77.3	50.0	57.7	73.5	81.5
Scalia	5	4	55.6	83.3	81.3	86.4	77.8	74.1	73.5	77.8
O'Connor	4	5	44.4	58.3	68.8	66.7	33.3	66.7	76.5	77.8
Ginsburg	3	6	33.3	41.7	43.8	—	—	—	—	—
Souter	2	7	22.2	41.7	25.0	55.0	55.6	68.0	—	—
Stevens	2	7	22.2	8.3	25.0	31.8	27.8	0.0	20.6	37.0
Breyer	2	7	22.2	41.7	—	—	—	—	—	—
Majority All Cases	5	4	55.6	58.3	56.3	77.3	44.4	55.6	64.7	70.4
Split Decisions	3	1	75.0	60.0	61.5	84.6	33.3	68.2	70.0	72.7
Unanimous	2	3	40.0	50.0	33.3	66.7	66.7	0.0	25.0	60.0

FIGURE 3

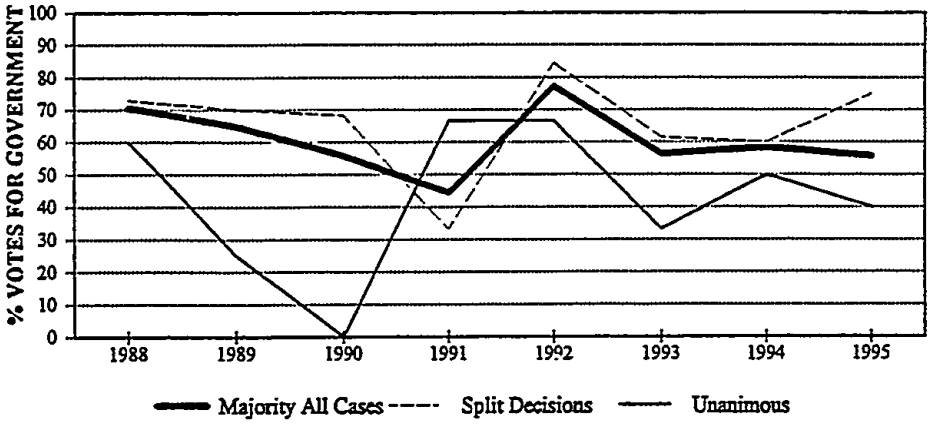


TABLE 4
FEDERAL CRIMINAL CASES

JUSTICE	1995 TERM VOTES			% VOTES FOR GOVERNMENT						
	FOR GOV'T	AGAINST GOV'T	1995 TERM	1994 TERM	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Scalia	11	3	78.6	53.9	66.7	62.5	76.9	40.0	66.7	66.7
Souter	11	3	78.6	61.5	58.3	43.8	69.2	75.0	—	—
Rehnquist	10	4	71.4	69.2	83.3	81.3	76.9	70.0	77.8	88.0
O'Connor	10	4	71.4	69.2	75.0	75.0	76.9	70.0	77.8	77.8
Thomas	10	4	71.4	61.5	83.3	81.3	54.6	—	—	—
Kennedy	10	4	71.4	61.5	66.7	60.0	84.6	50.0	66.7	88.9
Breyer	10	4	71.4	69.2	—	—	—	—	—	—
Ginsburg	10	4	71.4	61.5	58.3	—	—	—	—	—
Stevens	7	7	50.0	30.8	50.0	26.7	38.5	60.0	33.3	66.7
Majority All Cases	11	3	78.6	53.9	66.7	68.8	69.2	60.0	66.7	88.9
Split Decisions	6	1	85.7	55.6	50.0	77.8	55.6	50.0	83.3	100.0
Unanimous	5	2	71.4	50.0	83.3	57.1	100.0	75.0	33.3	66.7

FIGURE 4

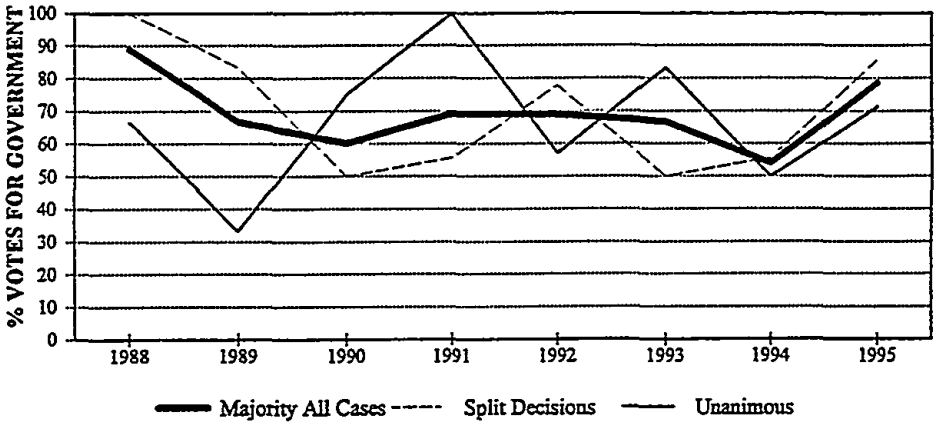


TABLE 5
FIRST AMENDMENT RIGHTS OF EXPRESSION, ASSOCIATION, AND FREE EXERCISE OF RELIGION

JUSTICE	1995 TERM VOTES			% VOTES FOR RIGHTS CLAIM						
	FOR CLAIM	AGAINST CLAIM	1995 TERM	1994 TERM	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Kennedy	7	1	87.5	88.9	71.4	77.8	77.8	41.7	40.0	37.5
Souter	6	2	75.0	77.8	57.1	60.0	88.9	41.7	—	—
Breyer	6	2	75.0	66.7	—	—	—	—	—	—
Ginsburg	6	2	75.0	66.7	71.4	—	—	—	—	—
Rehnquist	5	3	62.5	55.6	42.9	36.4	50.0	16.7	13.3	18.8
O'Connor	5	3	62.5	66.7	57.1	36.4	77.8	54.5	26.7	25.0
Stevens	5	3	62.5	66.7	57.1	90.0	100.0	50.0	46.7	64.7
Thomas	3	5	37.5	66.7	85.7	40.0	20.0	—	—	—
Scalia	3	5	37.5	55.6	85.7	45.5	37.5	25.0	26.7	35.3
Majority All Cases	6	2	75.0	77.8	57.1	45.5	66.7	25.0	40.0	35.3
Split Decisions	5	2	71.4	83.3	40.0	33.3	57.1	30.0	40.0	22.2
Unanimous	1	0	100.0	66.7	100.0	60.0	100.0	0.0	40.0	50.0

FIGURE 5

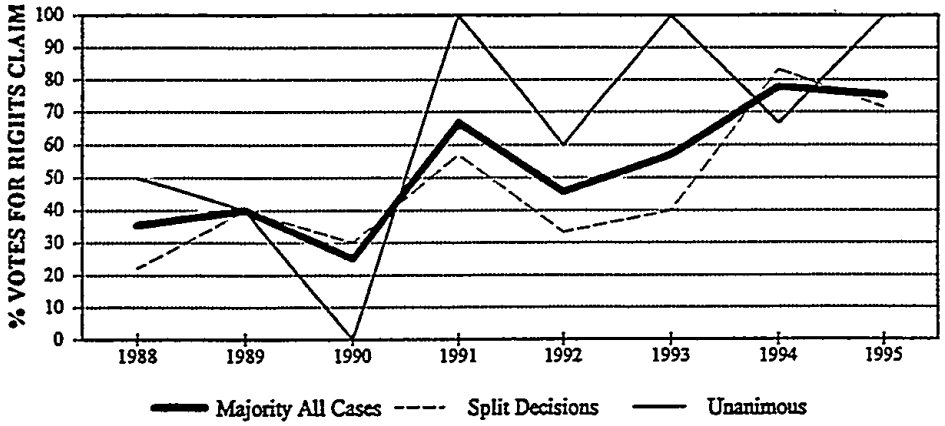


TABLE 6
EQUAL PROTECTION CLAIMS

JUSTICE	1995 TERM VOTES		% VOTES FOR RIGHTS CLAIM							
	FOR CLAIM	AGAINST CLAIM	1995 TERM	1994 TERM	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Kennedy	4	1	80.0	66.7	100.0	20.0	50.0	42.9	25.0	57.1
O'Connor	4	1	80.0	66.7	100.0	40.0	33.3	28.6	25.0	66.7
Rehnquist	3	2	60.0	66.7	0.0	20.0	50.0	14.3	20.0	57.1
Thomas	2	2	50.0	66.7	0.0	20.0	60.0	—	—	—
Souter	2	3	40.0	33.3	100.0	40.0	50.0	50.0	—	—
Ginsburg	2	3	40.0	33.3	100.0	—	—	—	—	—
Stevens	2	3	40.0	33.3	100.0	40.0	66.7	83.3	0.0	66.7
Breyer	2	3	40.0	33.3	—	—	—	—	—	—
Scalia	2	3	40.0	66.7	0.0	20.0	33.3	14.3	25.0	57.1
Majority All Cases	4	1	80.0	66.7	100.0	20.0	50.0	42.9	0.0	57.1
Split Decisions	4	0	100.0	66.7	100.0	33.3	50.0	50.0	0.0	100.0
Unanimous	0	1	0.0	0.0	0.0	0.0	50.0	33.3	0.0	50.0

FIGURE 6

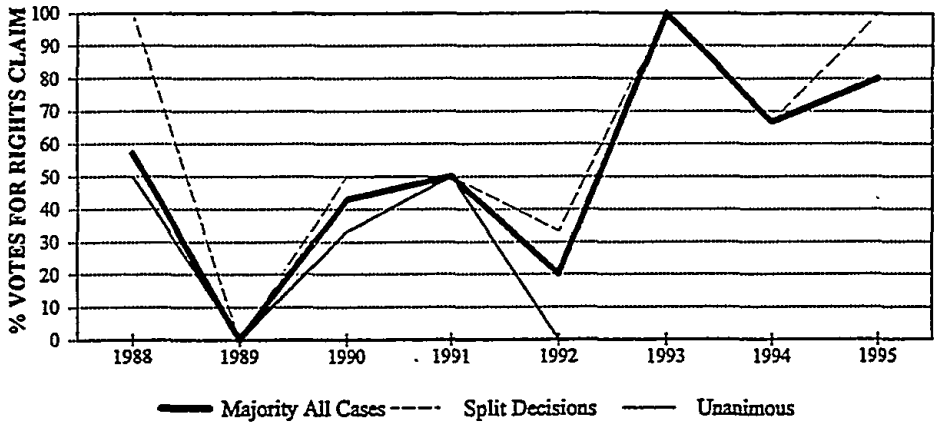


TABLE 7
STATUTORY CIVIL RIGHTS CLAIMS

JUSTICE	1995 TERM VOTES			% VOTES FOR RIGHTS CLAIM						
	FOR CLAIM	AGAINST CLAIM	1995 TERM	1994 TERM	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Stevens	5	1	83.3	75.0	55.6	70.0	88.9	80.0	77.8	73.7
Breyer	5	1	83.3	75.0	—	—	—	—	—	—
Ginsburg	4	2	66.7	75.0	44.4	—	—	—	—	—
Souter	4	2	66.7	75.0	44.4	45.5	44.4	57.1	—	—
O'Connor	2	4	33.3	50.0	33.3	54.6	55.6	53.3	55.6	52.6
Rehnquist	1	5	16.7	50.0	33.3	36.4	44.4	33.3	44.4	35.0
Kennedy	1	5	16.7	25.0	33.3	36.4	55.6	33.3	62.5	45.0
Thomas	1	5	16.7	25.0	33.3	45.5	28.6	—	—	—
Scalia	1	5	16.7	25.0	33.3	45.5	44.4	46.7	55.6	40.0
Majority	2	4	33.3	50.0	33.3	50.0	55.6	53.3	88.9	50.0
Split Decisions	1	3	25.0	50.0	00.0	50.0	40.0	33.3	83.3	25.0
Unanimous	1	1	50.0	50.0	60.0	50.0	75.0	83.3	100.0	87.5

FIGURE 7

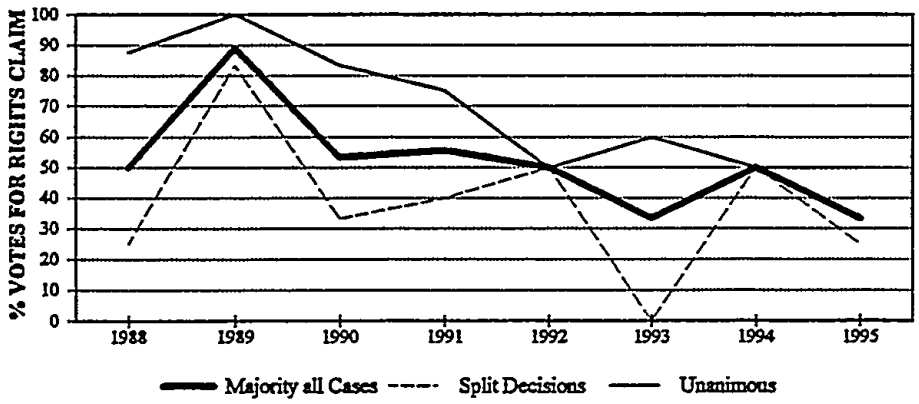


TABLE 8
CASES RAISING A CHALLENGE TO THE EXERCISE OF FEDERAL JURISDICTION

JUSTICE	1995 TERM VOTES			% VOTES FOR JURISDICTION						
	FOR JURIS.	AGAINST JURIS.	1995 TERM	1994 TERM	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Stevens	15	5	75.0	42.1	44.4	69.7	75.0	91.4	68.0	73.0
Souter	13	6	68.4	30.0	33.3	56.3	75.0	57.6	—	—
Ginsburg	13	6	68.4	36.8	33.3	—	—	—	—	—
Breyer	12	7	63.2	33.3	—	—	—	—	—	—
Kennedy	12	9	57.1	40.0	33.3	51.5	73.3	58.3	64.0	51.4
O'Connor	10	11	47.6	40.0	22.2	53.1	63.3	51.3	68.0	51.4
Rehnquist	9	12	42.9	30.0	22.2	54.6	62.1	54.3	60.0	51.4
Scalia	9	12	42.9	35.0	22.2	51.5	55.2	48.5	60.0	50.0
Thomas	9	12	42.9	30.0	33.3	54.6	66.7	—	—	—
Majority	12	9	57.1	40.0	33.3	52.9	73.3	63.9	64.0	62.2
Split Decisions	6	6	50.0	54.6	33.3	37.5	69.2	38.9	33.0	62.5
Unanimous	6	3	66.7	22.2	40.0	66.7	76.5	88.9	81.3	61.9

FIGURE 8

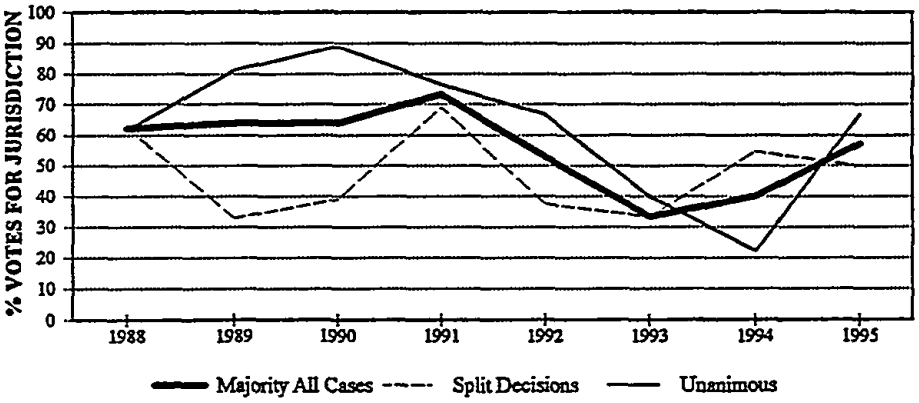


TABLE 9
FEDERALISM CASES

JUSTICE	1995 TERM VOTES			% VOTES FOR STATE CLAIM						
	FOR STATE	AGAINST STATE	1995 TERM	1994 TERM	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Thomas	14	11	56.0	72.2	42.9	66.7	35.0	—	—	—
Scalia	15	12	55.6	81.3	57.1	60.0	26.1	71.4	56.3	76.2
Kennedy	14	13	51.9	55.6	42.9	60.0	26.1	71.4	56.3	72.7
Rehnquist	14	13	51.9	72.2	71.4	73.3	43.5	71.4	56.3	81.0
O'Connor	12	15	44.4	55.6	57.1	73.3	39.1	71.4	56.3	73.7
Ginsburg	10	16	38.5	50.0	57.1	—	—	—	—	—
Souter	9	17	34.6	44.4	57.1	60.0	36.4	83.3	—	—
Breyer	9	17	34.6	38.9	—	—	—	—	—	—
Stevens	8	19	29.6	55.6	57.1	60.0	31.8	28.6	43.8	57.1
Majority All Cases	14	13	51.9	55.6	57.1	66.7	26.1	71.4	43.8	59.1
Split Decisions	10	6	62.5	36.4	50.0	57.1	28.6	80.0	25.0	50.0
Unanimous	4	7	36.4	85.7	60.0	75.0	22.2	50.0	50.0	70.0

FIGURE 9

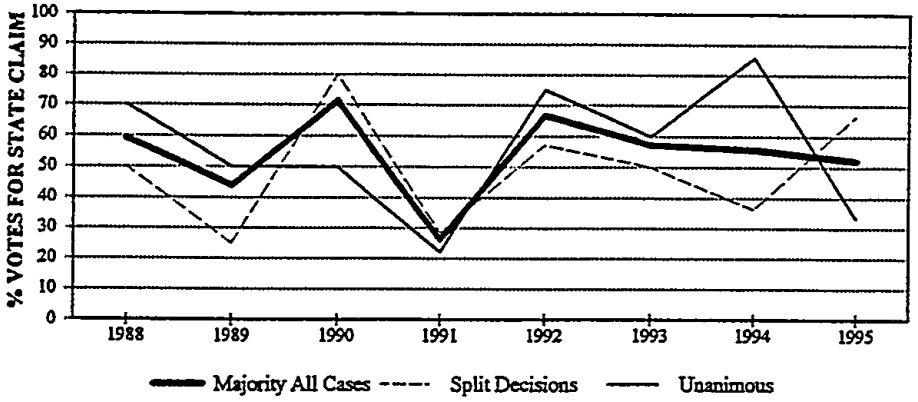
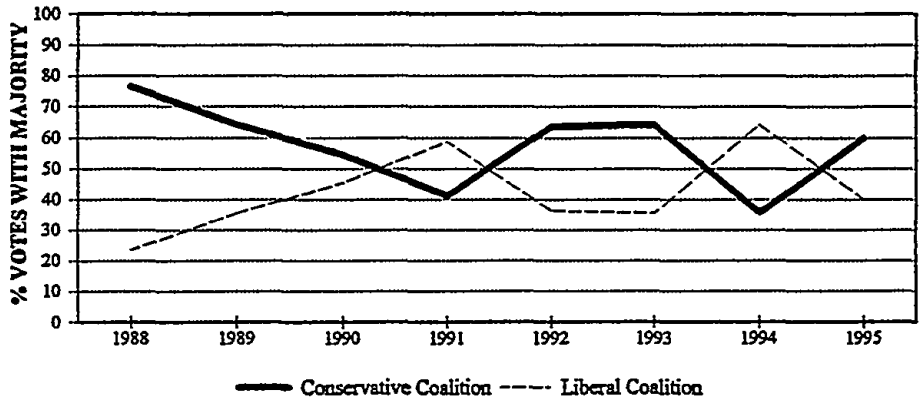


TABLE 10
SWING-VOTE ANALYSIS: WHO VOTES MOST OFTEN WITH THE MAJORITY IN CLOSE CASES

JUSTICE	1995 TERM VOTES			% VOTES FOR GOVERNMENT						
	FOR MAJ.	AGAINST MAJ.	1995 TERM	1994 TERM	1993 TERM	1992 TERM	1991 TERM	1990 TERM	1989 TERM	1988 TERM
Kennedy	17	3	85.0	81.3	92.9	72.7	64.7	52.2	71.4	82.4
O'Connor	16	4	80.0	68.8	57.1	40.9	58.8	69.6	69.0	76.5
Scalia	15	5	75.0	56.3	71.4	81.8	35.3	52.2	66.7	73.5
Thomas	15	5	75.0	50.0	57.1	72.7	23.5	—	—	—
Rehnquist	15	5	75.0	62.5	71.4	72.7	41.2	69.6	66.7	76.5
Ginsburg	6	14	30.0	50.0	35.7	—	—	—	—	—
Souter	6	14	30.0	37.5	42.9	31.8	82.4	59.1	—	—
Breyer	5	15	25.0	43.8	—	—	—	—	—	—
Stevens	5	15	25.0	50.0	35.7	40.9	58.8	47.8	42.9	26.5
Conservative Outcome	12	8	60.0	35.7	64.3	63.6	41.2	54.5	64.3	76.5
Liberal Outcome	8	12	40.0	64.3	35.7	36.4	58.8	45.5	35.7	23.5

FIGURE 10



A. The Data

1. Table 1: Civil Cases—State Government Versus a Private Party

Table 1[50] shows a 7.9 percentage point increase in the Court's support of state governments in civil cases, resulting in a score of 52.9% in the Majority All Cases category. This moderate result, coupled with that of last Term, appears to have checked the gradual decline in state support noted in our review of the 1993 Term.[51] In fact, 1995's score signals some degree of steadiness in the Court's approach to civil cases involving state governments—an approach that, with the exception of the 1990 Term, has hovered comfortably around 47.9% since 1988.

The moderate overall conservative movement this Term, however, is punctuated by dramatic, offsetting shifts in the Unanimous and Split Decisions categories. Private litigants prevailed in five of the six unanimous state civil cases, resulting in an unprecedented low mark of 16.7% for state governments. This score, a plunge of 27.7 points from 1994, is by far the lowest (and most liberal) ever recorded since this Study began.[52] By contrast, the percentage of Split Decisions favoring the states changed in an equally dynamic, but opposite, fashion. A divided Court decided 72.7% of split civil decisions in favor of the states, up 27.2 points from the previous Term, and the most conservative showing recorded in this Study.[53]

These divergent results are graphed on Figure 1. On the graph, the upsurge in the Split Decisions category is particularly significant. A unanimous decision often indicates that the case commanded clear-

50. Cases decided in favor of state government:

Bennis v. Michigan, 116 S. Ct. 994 (1996)
Dalton v. Little Rock Family Planning Serv., 116 S. Ct. 1063 (1996)
Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996)
Jaffee v. Redmond, 116 S. Ct. 1923 (1996)
Leavitt v. Jane L., 116 S. Ct. 2068 (1996)
Lewis v. Casey, 116 S. Ct. 2174 (1996).

Cases decided against state government:

Fulton Corp. v. Faulkner, 116 S. Ct. 848 (1996)
Barnett Bank, N.A. v. Nelson, 116 S. Ct. 1103 (1996)
44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996)
Romer v. Evans, 116 S. Ct. 1620 (1996)
Quackenbush v. Allstate Ins. Co., 116 S. Ct. 1712 (1996)
Richards v. Jefferson County, 116 S. Ct. 1761 (1996)
Shaw v. Hunt, 116 S. Ct. 1894 (1996)
Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342 (1996)
O'Hare Truck Serv., Inc. v. City of Northlake, 116 S. Ct. 2353 (1996).

51. *See 1993 Study*, *supra* note 1, at 278.

52. The previous low, 33.3%, was achieved in 1993.

53. The next most conservative score was 68.8% in 1990.

cut results, such that the Justices' individual ideological leanings play a lesser role. Split decisions, on the other hand, may be a better indicator of individual Justices' (and thus the Court's) true ideological tenets. Accordingly, the fact that the Court this Term favored the states in nearly three-fourths of split decisions is noteworthy—it validates and underscores the small conservative shift graphed by the Majority All Cases line on Figure 1.

A glance at the individual voting records of the different Justices notably reveals that no one faction of the Court presided over the conservative turn this Term. Justice Thomas topped the chart, voting for the government in 64.7% of cases, an increase of 9.7 points from last Term. Justice Scalia followed with 52.9%.

All of the remaining Justices, however, voted more often than not *against* state governments. The scores of three Justices moved significantly in a liberal direction this Term.[54] Chief Justice Rehnquist plummeted from his 1994 perch as the most conservative Justice to take fourth place. He voted in favor of state governments only 43.8% of the time, a 16.2 point decrease from 1994 and 9 points below his next lowest score.[55] Justices Stevens and Ginsburg fell 18.6 and 14.7 percentage points, respectively, both achieving their most liberal scores.[56] Justices Stevens, Souter, and Breyer favored the states in less than a third of the civil cases presented to the Court.

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

Table 2[57] confirms that the Court in 1995 was vastly more supportive of federal government claims in civil cases. Indeed, govern-

54. Indeed, Chief Justice Rehnquist's and Justice Stevens's shifts were statistically significant. *See infra* note 108 and accompanying text.

55. In 1992, the Chief Justice scored 52.8%.

56. Justice Stevens's previous low was 27.3% (in 1993), while Justice Ginsburg's was 40.9% (also in 1993, the year she joined the Court).

57. Cases decided in favor of the federal government:

NLRB v. Town & Country Elec., Inc., 116 S. Ct. 450 (1995)
Brotherhood of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe R.R., 116 S. Ct. 595 (1996)
Lawrence v. Chater, 116 S. Ct. 604 (1996)
Commissioner of Internal Revenue v. Lundy, 116 S. Ct. 647 (1996)
Behrens v. Pelletier, 116 S. Ct. 834 (1996)
Hercules Inc. v. United States, 116 S. Ct. 981 (1996)
Wisconsin v. City of New York, 116 S. Ct. 1091 (1996)
Holly Farms Corp. v. NLRB, 116 S. Ct. 1396 (1996)
United States v. Noland, 116 S. Ct. 1524 (1996)
Auciello Iron Works, Inc. v. NLRB, 116 S. Ct. 1754 (1996)
Lane v. Pena, 116 S. Ct. 2092 (1996)
United States v. Reorganized CF & I Fabricators, Inc., 116 S. Ct. 2106 (1996) (one issue decided for the federal government, another against)

ment support jumped well over 30 percentage points in the Majority All Cases category to reach 75.0%. This surprisingly conservative outcome appears to signal a rebound by the Court from the decidedly liberal turns of the past few terms.[58]

The magnitude of the conservative movement on Table 2 is undercut somewhat by the fact that eight of nine cases decided by a unanimous Court were decided in favor of the federal government. As noted previously, unanimously decided cases may not indicate ideological leanings as confidently as split decisions.[59] Even discounting all unanimous cases, though, this Term's outcomes are still strongly conservative when compared to 1994—support for the federal government in the Split Decisions category rose a whopping 30.3 percentage points in 1995 to reach 63.6%.

The Court's conservatism is further evidenced by the voting behavior of the individual Justices. Table 2, especially when considered together with Tables 4 and 6, heralds a rather unexpected result—the emergence of a conservative Justice Stevens. Justice Stevens was the only member of the Court to move in a liberal direction on this Table this Term, falling a mere 5.2 points and dropping from first place to near last in receptivity to federal claims. However, while Justice Stevens's raw 1995 record is somewhat liberal when compared to 1994, regression analysis of the past several terms demonstrates a generally conservative reorientation in the Justice's voting pattern in federal civil matters.[60] In short, Justice Stevens's scores on Tables 2, 4, and 6 this Term do not reveal a jurist staunchly defending individuals against official incursions; rather, they display a Justice who, more often than not, has voted for the federal government.

Every other Justice increased, by wide margins, his or her friendliness to federal government claims this Term. Justice Ginsburg

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United States v. Ursery, 116 S. Ct. 2135 (1996).

Cases decided against the federal government:

Henderson v. United States, 116 S. Ct. 1638 (1996)
Degen v. United States, 116 S. Ct. 1777 (1996)
United States v. International Bus. Mach. Corp., 116 S. Ct. 1793 (1996)
United States v. Reorganized CF & I Fabricators, Inc., 116 S. Ct. 2106 (1996)
(one issue decided for the federal government, another against)
United States v. Winstar Corp., 116 S. Ct. 2432 (1996).

Although there are only 18 cases analyzed on Table 2, one case (*Reorganized CF & I Fabricators*) involved two issues, one decided for and one against the federal government. As a result, Table 2 tabulates 19 votes.

58. Between 1988 and 1992 federal government support on the Court averaged 68.9%. In 1993, support dipped to 52.9% and then to 42.1% in 1994.

59. *See supra* text following note 53.

60. *See infra* notes 112-17 and accompanying text.

jumped 23.9 points to take Justice Stevens's place at the top of the chart with 85.0%. Below her, Justice Kennedy jumped 32.6 points, Chief Justice Rehnquist 22.4, Justice Souter 32.9, Justice O'Connor 37.2,[61] Justice Thomas 22.9, and Justice Scalia 17.9. Even Justice Breyer, in last place, jumped 12.6 points. Six of the nine Justices achieved all-time high conservative ratings this Term.[62]

The government's vastly increased success rate this Term in civil cases may be due to several factors. The unexpectedly conservative shift may be explained (at least partially) by the considerable number of labor-related cases this Term in which the federal government was aligned with union workers and opposed by corporate management. In these cases, a conservative (pro-government) vote by a member of the Court may actually mask a liberal vote in favor of workers' rights.[63] It is also possible that the Clinton Administration, which did not fare well before the Court in federal civil matters initially,[64] has learned to be more selective of the cases it brings before the Court.

3. *Table 3: State Criminal Cases*

Table 3[65] charts a moderate liberal trend in the Court's disposition of state criminal matters. The Majority All Cases category reveals a slight decrease in support for state governments in criminal cases, from 58.3% to 55.6%. A 10 point decrease in the Unanimous

61. Justice O'Connor's climb, though not statistically significant (*see infra* Regression Table 2) is noteworthy because it suggests that her uncharacteristically liberal showing in 1994 was a small blip in an otherwise consistently conservative record.

62. Chief Justice Rehnquist and Justices Ginsburg, Kennedy, O'Connor, Thomas, and Breyer.

63. The following four cases involved federal agencies siding with labor in disputes against corporations: NLRB v. Town & Country Elec., Inc., 116 S. Ct. 450 (1995); Brotherhood of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe R.R., 116 S. Ct. 595 (1996); Holly Farms Corp. v. NLRB, 116 S. Ct. 1396 (1996); Auciello Iron Works, Inc. v. NLRB, 116 S. Ct. 1754 (1996).

64. *See supra* note 32.

65. Cases decided in favor of the states:

Wood v. Bartholomew, 116 S. Ct. 7 (1995)
Montana v. Egelhoff, 116 S. Ct. 2013 (1996)
Calderon v. Moore, 116 S. Ct. 2066 (1996)
Gray v. Netherland, 116 S. Ct. 2074 (1996)
Felker v. Turpin, 116 S. Ct. 2333 (1996).

Cases decided against state government:

Tuggle v. Netherland, 116 S. Ct. 283 (1995)
Thompson v. Keohane, 116 S. Ct. 457 (1995)
Lonchar v. Thomas, 116 S. Ct. 1293 (1996)
Cooper v. Oklahoma, 116 S. Ct. 1373 (1996).

category is countered by a 15 point increase in the ideologically more significant Split Decisions category.

These fairly small movements by the Court as a whole could well be overlooked, but the voting behaviors of the individual Justices reflect important motion away from the states in criminal matters. Regression Table 3 shows that the 1995 voting patterns of the Chief Justice and Justices Kennedy, O'Connor and Scalia are statistically significant (and more liberal) than their prior records. The slight liberal movement on Table 3, therefore, cannot be disregarded.

The alignment of the individual Justices on Table 3 is not unusual. As in last Term, the Court appears to be polarized, with conservative Justices voting together at the top of the chart and liberal Justices forming a bloc at the bottom. Chief Justice Rehnquist and Justice Thomas coalesced again to top Table 3. They voted for the states 66.7% of the time, a drop of 25 points from their 1994 showings of 91.7%. This drop, although leaving them in the top conservative positions on Table 3, nevertheless displays statistically significant liberal movement.[66] Justices Scalia and Kennedy (who also evidenced statistically significant liberal movement[67]) rounded out the conservative half of Table 3, casting 55.6% of their votes for state governments.

Justices Stevens, Souter and Breyer, who voted for the states a mere 22.2% of the time, and Justice Ginsburg, who favored the states with 33.3% of her votes, took the liberal positions on Table 3 this Term. The substantiality of these Justices' liberal voting behavior is underscored by the nature of the cases decided unanimously. The only two conservative votes cast by Justices Stevens, Souter and Breyer were in unanimous cases, and these three Justices, along with Justice Ginsburg, voted overwhelmingly against the states in the tougher split decisions.

Justice O'Connor sat at the fulcrum between these two camps again this Term. Her drop from 58.3% in 1994 to 44.4% in 1995 is statistically significant[68] and places her almost precisely halfway between the voting patterns established by the conservative and liberal blocs.[69]

66. *See infra* Regression Table 3.

67. *See infra* Regression Table 3.

68. *See infra* Regression Table 3.

69. Justice O'Connor's score of 44.4% is about 11 points lower than Justice Scalia's mark of 55.6%, and about 11 points higher than Justice Ginsburg's 33.3%. Justice O'Connor is also about 20 points away from both the top and the bottom marks on Table 3.

4. Table 4: Federal Criminal Cases

Table 4[70] demonstrates that the Court's support for the federal government in criminal cases this Term increased almost as markedly as it did in civil cases.[71] In 1995, the majority voted in favor of the government 78.6% of the time, a vault of 24.7 points over 1994. With this showing, the Court reached conservative heights unseen since 1988. The dependability of this score, moreover, is buttressed by strong conservative movement in each statistic graphed on Figure 4. The Court jumped over 20 percentage points in the Unanimous category and almost 35 points in the Split Decisions category to reach 71.4% and 85.7%, respectively. In addition, all nine Justices voted more frequently in favor of the government than they did last Term.

This Term's results are also noteworthy for their uniformity. Six members of the Court, politically both liberal and conservative, voted for the government in 71.4% of criminal cases. Furthermore, every Justice voted for the government in at least half of all cases.[72] Justices Scalia and Souter topped the chart with 78.6%, with Justice Scalia moving dramatically upward (a 24.7 point climb from his second-to-last place finish on Table 4 in 1994).[73]

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70. Cases decided in favor of the federal government:

Libretti v. United States, 116 S. Ct. 356 (1995)
Stutson v. United States, 116 S. Ct. 600 (1996)
Neal v. United States, 116 S. Ct. 763 (1996)
Carlisle v. United States, 116 S. Ct. 1460 (1996)
United States v. Armstrong, 116 S. Ct. 1480 (1996)
Loving v. United States, 116 S. Ct. 1737 (1996)
Whren v. United States, 116 S. Ct. 1769 (1996)
Koon v. United States, 116 S. Ct. 2035 (1996)
Melendez v. United States, 116 S. Ct. 2057 (1996)
United States v. Ursery, 116 S. Ct. 2135 (1996) (also on Table 2 because it involved two consolidated cases, one criminal and one civil forfeiture)
Lewis v. United States, 116 S. Ct. 2163 (1996).

Cases decided against the federal government:

Bailey v. United States, 116 S. Ct. 501 (1995)
Rutledge v. United States, 116 S. Ct. 1241 (1996)
Ornelas v. United States, 116 S. Ct. 1657 (1996).

71. *See supra* Table 2.

72. Although Justice Stevens anchored the chart with a 50.0% showing, this figure is nevertheless a 19.2 point increase from his 1994 bottom-of-the-chart score.

73. Justice Scalia's jump on Table 4 is statistically significant. *See infra* Regression Table 3 and note 119.

5. *Table 5: First Amendment Rights of Expression, Association, and Free Exercise of Religion*

Table 5[74] initially shows a slight conservative shift in First Amendment claims in 1995. Overall, the Court embraced these claims 75.0% of the time, a decrease of 2.8 points from 1994. A somewhat larger conservative movement took place in the Split Decisions category, which dropped nearly 12 points to 71.4% in 1995.[75] But, despite these marginal shifts, Table 5 reveals that, consistent with conventional wisdom, the current Court remains highly receptive of First Amendment claims.

Indeed, three Justices demonstrated statistically significant *liberal* movement this Term on First Amendment claims; the Chief Justice and Justices Kennedy and O'Connor all *increased* their receptivity of First Amendment arguments when compared with their past voting behaviors.[76] The conservative outcomes sketched by the Majority All Cases and Split Decision categories, furthermore, do not approach the conservative results typical of the Court before 1994. Excluding 1991, which in many accounts was extraordinary,[77] the Court averaged

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74. Cases decided in favor of First Amendment claims:

44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996)
Colorado Republican Fed. Campaign Comm. v. FEC, 116 S. Ct. 2309 (1996)
Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342 (1996)
O'Hare Truck Serv., Inc. v. City of Northlake, 116 S. Ct. 2353 (1996)
Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996) (one issue decided in favor of a First Amendment claim and one issue decided against a claim).

Cases decided against First Amendment claims:

Romer v. Evans, 116 S. Ct. 1620 (1996)
Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996) (one issue decided against a First Amendment claim, and one issue decided in favor of a claim).

Case where issue was addressed but failed to gain a majority vote:

Morse v. Republican Party, 116 S. Ct. 1186 (1996) (Kennedy, Rehnquist, Scalia, and Thomas voted in favor of the claim; Ginsburg and Stevens voted against it; and Breyer, O'Connor, and Souter did not reach it).

Although only seven cases reached the merits of a First Amendment question, there are eight First Amendment votes tabulated on Table 5. This is because one case, *Denver Area*, involved two free speech issues—one decided in favor of, and the other against, the constitutional claim.

75. This result is still 12 to 50 points higher (more liberal) than all previous years on the Table except for 1994.

76. *See infra* Regression Table 5.

77. *See 1991 Study, supra* note 1, at 5-7, 16-17 (cataloging the surge of a centrist bloc comprised of Justices Stewart, Blackmun, Souter, Kennedy, and O'Connor, and noting the Court's acceptance of claims in such politically charged cases as Planned Parenthood v. Casey, 505 U.S 833 (1992); Lee v. Weisman, 505 U.S. 577 (1992); Lee v. International Soc'y for Krishna Consciousness, Inc., 505 U.S. 830 (1992)).

40.6% in the Majority All Cases category between 1988 and 1993. Accordingly, it is not at all clear that Table 5 shows conservative movement overall. Rather, the Court's First Amendment posture probably remains unchanged from 1994—a clear high-water mark for First Amendment claims.

However, while the Court remains supportive of First Amendment claims, it has not been able to muster consistent voting blocs to resolve those claims. The First Amendment, in fact, has been a uniquely confusing battleground this Term. Although the Court was able to muster at least five votes to dispose of two cases involving First Amendment rights in the context of government employment and one case involving the constitutionality of cable television regulations,[78] yet another First Amendment case was decided without a governing opinion for the Court.[79] Indeed, even in the one case decided unanimously this Term, there were four *different* rationales for the "unanimous" result.[80] Thus, the First Amendment remains uncommonly contentious.

Reflecting this, the voting behavior of the individual Justices on Table 5 in 1995 was more evenly distributed along the ideological spectrum than in 1994, when five members of the Court (including both politically conservative and politically liberal jurists) voted for the claim in 66.67% of cases. Justice Kennedy topped this Term's chart with 87.5%, while Justices Scalia and Thomas tied for last place, favoring the First Amendment claim in only 37.5% of such cases. Both of these Justices dropped significantly from their scores last Term.[81]

Surprisingly, and in contrast to Justices Scalia and Thomas, Chief Justice Rehnquist moved from the bottom to the middle of the chart in an uncharacteristically liberal jump, given his long-standing status

78. O'Hare Truck Serv., Inc. v. City of Northlake, 116 S. Ct. 2353 (1996) (seven Justices concluding that the withholding of government contracts in retaliation for the exercise of free speech violates the First Amendment); Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342 (1996) (same); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996) (one five-member and one six-member coalition invalidating cable television regulations on First Amendment grounds).

79. Colorado Republican Fed. Campaign Comm. v. FEC, 116 S. Ct. 2309 (1996) (seven Justice's voting in favor of First Amendment claim, but on the basis of two different rationales, neither of which attracted more than four votes).

80. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996). In *44 Liquormart*, Justices Stevens, O'Connor, Scalia and Thomas each wrote separate opinions. None of the various opinions, alone, commanded five votes.

81. Justice Scalia's 18.1 point fall was not statistically significant, however. *See infra* Regression Table 5. Justice Thomas dropped 29.2 percentage points.

as the Court's most conservative Justice in the First Amendment arena. He had anchored the chart in every Term except 1991 since this Study began.[82] This Term, the Chief Justice joined Justice Stevens, historically the Court's most liberal Justice on First Amendment questions, to vote in favor of 62.5% of such claims. Above them on Table 5, Justices Souter, Breyer and Ginsburg combined to favor the claim in 75.0% of cases, mirroring the Court's Majority All Cases outcome.

6. *Table 6: Equal Protection Claims*

Table 6[83] is difficult to analyze. The Court this Term considered five cases involving equal protection claims—a very small sample from which to draw reliable conclusions. The statistics from prior terms are even more frail. In 1994, the Court resolved only three equal protection cases,[84] and in 1993 it considered only one.[85] Given these constraints, the statistics on Table 6 may best be viewed in the context of the particular cases from which they are derived. The equal protection cases, involving such contentious issues as gay rights, gender discrimination, and the improper use of racial criteria,[86] undoubtedly will provide ample fodder for more traditional (and subjective) legal analysis than is contemplated by this Study.

On the whole, however, there are some notable outcomes this Term. First, the Court's liberal movement in the Majority All Cases category (reaching 80.0%) is the result of a 100.0% liberal result in the Split Decisions category. Second, presiding over this liberal movement were Justices Kennedy and O'Connor, who are (and for the past several Terms have been) the Justices most influential in cases decided by a single or swing vote.[87] Regression Table 6 shows that the liberal

82. In the 1988, 1989, and 1990 Terms, the Chief Justice voted for the claim less than 20% of the time. His conservatism continued, relative to the other members of the Court, in 1992, 1993, and 1994.

83. Cases decided in favor of the equal protection claim:

Romer v. Evans, 116 S. Ct. 1620 (1996)
Shaw v. Hunt, 116 S. Ct. 1894 (1996)
Bush v. Vera, 116 S. Ct. 1941 (1996)
United States v. Virginia, 116 S. Ct. 2264 (1996).

Case decided against the equal protection claim:

Wisconsin v. City of New York, 116 S. Ct. 1091 (1996).

84. *See 1994 Study, supra* note 1, at 38.

85. *See 1993 Study, supra* note 1, at 297.

86. For a closer look at the cases assessed in Table 6, *see infra* Part IV.B.6.

87. *See infra* Part IV.A.10.

1995 voting records on equal protection claims of Chief Justice Rehnquist and Justices Kennedy and O'Connor are statistically significant.

Table 6, in short, raises the possibility that the Chief Justice, joined by Justices Kennedy, O'Connor and Thomas, are the new liberals on equal protection issues. By contrast, and also as evidenced by Tables 2 and 4, Justice Stevens is in the process of assuming the unaccustomed role of a Court conservative. In both 1994 and 1995 Justice Stevens was twice as supportive of assertions of government regulatory power in the equal protection arena than other traditionally conservative Justices. As we stated in our review of last Term, "[w]e will leave it to legal philosophers and other pundits to debate which is the truly conservative or liberal position."[88]

7. Table 7: Statutory Civil Rights Claims

Table 7[89] evinces significant conservative movement in the Court's acceptance of statutory civil rights claims. The Court accepted only a third of all claims presented this Term, whereas last Term it accepted one half. Moreover, the conservative movement demonstrated by the Chief Justice and Justices Kennedy, O'Connor and Scalia is statistically significant.[90] Figure 7 demonstrates that the Court has been moving in a steadily conservative direction since 1989. Although difficulties associated with the small statistical sample on Table 7 preclude giving this finding too much emphasis, it is almost certainly true that the Court remains conservative in the area of statutory civil rights. Whether it is becoming demonstrably *more* conservative is less clear.

The results on Table 7 are heavily influenced by Justice O'Connor. The Chief Justice combined with Justices Kennedy, Thomas and Scalia to form a decidedly conservative bloc. All four voted for the civil rights claim in only one of the six cases involving statutory claims, a mere 16.7%. Moreover, that one vote came in a unanimously decided case.[91] By contrast, Justices Stevens and Breyer

88. *1994 Study, supra* note 1, at 39. *But see infra* notes 121-23 and accompanying text.

89. Cases decided in favor of statutory civil rights claims:

Morse v. Republican Party, 116 S. Ct. 1186 (1996)
O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996).

Cases decided against statutory civil rights claims:

Lockheed Corp. v. Spink, 116 S. Ct. 1783 (1996)
Shaw v. Hunt, 116 S. Ct. 1894 (1996)
Bush v. Vera, 116 S. Ct. 1941 (1996)
Lane v. Pena, 116 S. Ct. 2092 (1996).

90. *See infra* Regression Table 7.

91. *O'Connor*, 116 S. Ct. 1307.

(voting 83.3% of the time for the claim and appearing at the top of Table 7), along with Justices Ginsburg and Souter (voting 66.7% of the time for the claim), formed a liberal coalition. Thus, it was Justice O'Connor's vote that determined the Court's disposition and her score of 33.3% mirrors that of the Court as a whole.[92]

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

Table 8[93] reveals a liberal shift in the Court's overall acceptance of jurisdictional claims. Receptivity increased 17.1 percentage points in the Majority All Cases category to 57.1%. A large rise in the percentage of unanimous cases accepting jurisdiction spurred this overall result. In the Unanimous category, the Court's acceptance rose by 44.5 points to reach 66.7%. Conversely, acceptance in the Split Decisions category declined a slight 4.6 points.

In addition to the Court's overall liberal movement this Term, every Justice recorded a personal increase in his or her receptivity of jurisdictional claims. Four Justices, in particular, increased their showings this Term: Justice Stevens jumped from 42.1% in 1994 to 75.0% in 1995, taking first place on Table 8; Justices Souter and Ginsburg

92. The bloc voting behavior seen this Term is not unique. Table 7 shows its strong history. In almost every year, Justice O'Connor has played the pivotal swing role. Notice, for example, the correlation between Justice O'Connor's score and the score of the Court overall in 1990, 1991, 1993, and 1994, as well as 1995.

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

Yamaha Motor Corp., U.S.A. v. Calhoun, 116 S. Ct. 619 (1996)
Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 116 S. Ct. 637 (1996)
Behrens v. Pelletier, 116 S. Ct. 834 (1996)
Varity Corp. v. Howe, 116 S. Ct. 1065 (1996)
Morse v. Republican Party, 116 S. Ct. 1186 (1996)
United Food & Commercial Workers Union Local 751 v. Brown Group, Inc. 116 S. Ct. 1529 (1996)
Henderson v. United States, 116 S. Ct. 1638 (1996)
Quackenbush v. Allstate Ins. Co., 116 S. Ct. 1712 (1996)
Shaw v. Hunt, 116 S. Ct. 1894 (1996)
Calderon v. Moore, 116 S. Ct. 2066 (1996)
Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211 (1996)
Felker v. Turpin, 116 S. Ct. 2333 (1996).

Cases decided against exercising jurisdiction:

Things Remembered, Inc. v. Petrarca, 116 S. Ct. 494 (1995)
Commissioner of Internal Revenue v. Lundy, 116 S. Ct. 647 (1996)
Peacock v. Thomas, 116 S. Ct. 862 (1996)
Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996)
Meghrig v. KFC Western, Inc., 116 S. Ct. 1251 (1996)
Carlisle v. United States, 116 S. Ct. 1460 (1996)
Degen v. United States, 116 S. Ct. 1777 (1996)
Gray v. Netherland, 116 S. Ct. 2074 (1996)
Lewis v. Casey, 116 S. Ct. 2174 (1996).

tied at 68.4%, skyrocketing 38.4 and 31.6 points respectively; and Justice Breyer climbed nearly 30 points to reach 63.2%.[94] The increased receptivity on the part of the Court's core conservatives, Chief Justice Rehnquist and Justices Scalia and Thomas, is less pronounced. The voting behavior of these three Justices coalesced this Term, each achieving a 42.9% score.

9. *Table 9: Federalism Cases*

The Court this Term significantly increased the number of cases it heard involving federalism issues; Table 9 tabulates a universe of twenty-seven votes.[95] As a majority, the Court voted in favor of the

94. Justices Stevens, Souter, Ginsburg and Breyer did not reach the jurisdictional issue presented in all of the cases included on Table 8. Accordingly, their percentages are calculated based on a smaller sampling than the 21 cases decided by the remaining members of the Court.

95. Cases decided in favor of the state:

Wood v. Bartholomew, 116 S. Ct. 7 (1995)
Yamaha Motor Corp., U.S.A. v. Calhoun, 116 S. Ct. 619 (1996)
Matsushita Elec. Indus. Co. v. Epstein, 116 S. Ct. 873 (1996)
Dalton v. Little Rock Family Planning Serv., 116 S. Ct. 1063 (1996)
Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996)
Montana v. Egelhoff, 116 S. Ct. 2013 (1996)
Leavitt v. Jane L., 116 S. Ct. 2068 (1996)
Gray v. Netherland, 116 S. Ct. 2074 (1996)
Lewis v. Casey, 116 S. Ct. 2174 (1996) (two issues decided in favor of state by differing majorities)
Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211 (1996)
Medtronic, Inc. v. Lohr, 116 S. Ct. 2240 (1996) (two issues decided in favor of the state by differing majorities)
Felker v. Turpin, 116 S. Ct. 2333 (1996).

Cases decided in favor of the federal government:

Fulton Corp. v. Faulkner, 116 S. Ct. 848 (1996)
Wisconsin v. City of New York, 116 S. Ct. 1091 (1996)
Barnett Bank, N.A. v. Nelson, 116 S. Ct. 1103 (1996)
Cooper v. Oklahoma, 116 S. Ct. 1373 (1996)
44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996)
BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996)
Romer v. Evans, 116 S. Ct. 1620 (1996)
Doctor's Assoc., Inc. v. Casarotto, 116 S. Ct. 1652 (1996)
Quackenbush v. Allstate Ins. Co., 116 S. Ct. 1712 (1996)
Smiley v. Citibank, N.A., 116 S. Ct. 1730 (1996)
Richards v. Jefferson County, 116 S. Ct. 1761 (1996)
Bush v. Vera, 116 S. Ct. 1941 (1996)
United States v. Virginia, 116 S. Ct. 2264 (1996).

Case where issue was addressed but failed to gain a majority vote:

Shaw v. Hunt, 116 S. Ct. 1894 (1996) (Justices Breyer, Ginsburg, Souter, and Stevens would have voted in favor of the state; Justices Kennedy, O'Connor, Rehnquist, Scalia, and Thomas did not reach the issue).

Table 9 collects 25 cases. Two of these cases, however, presented multiple federalism issues that increased the total possible federalism votes to 27. Lewis v. Casey, 116 S. Ct. 2174 (1996); Medtronic, Inc. v. Lohr, 116 S. Ct. 2240 (1996). Not all Justices reached every

states only 51.9% of the time—a result in tension with the popular perception that the Court is wildly supportive of state sovereign rights. Indeed, the 1995 federalism score is slightly less favorable to the states than the Court majority's 55.6% score in 1994 and continues the gradual decline since 1992. The present Court, in short, is hardly a monolithic supporter of states' rights.

The 1995 data do not demonstrate that the states are wholly friendless. In unanimous decisions, the Court favored the federal government in 7 out of 11 cases—voting 36.4% of the time for the states, a drop of 49.3 points from 1994's record-breaking 85.7%. However, the 1995 Court was quite likely to support state government in close federalism cases. In a reversal from 1994, the Court tended toward the states in split decisions 62.5% of the time this Term, compared to 36.4% of the time in 1994. These outcomes show that, despite the overall decline in support for state federalism positions, the Court's support of the states rallied when the issue was controversial.

The reliability of any increased support for the states in divided cases, however, is unclear. Mathematical analysis indicates statistically significant liberal (that is, pro-federal, not state) movement this Term by the Chief Justice and Justices O'Connor and Stevens.[96] Although Justice Stevens has never been a big states' rights fan, the Chief Justice has generally been second only to Justice Scalia in his support of the states. Justice O'Connor, furthermore, often plays a crucial role in the outcome of federalism cases. Accordingly, the Chief Justice's and Justice O'Connor's possible realignment on federalism questions does not bode well for the states.

This Term's most ardent supporter of states' rights was Justice Thomas. Favoring the states in 56.0% of cases, he replaced Justice Scalia (who fell to second place) at the top of Table 9. Justice Scalia, at 55.6%, and Chief Justice Rehnquist with Justice Kennedy, both at 51.9%, varied only slightly from Justice Thomas's score. Indeed, these Justices combined to form a pro-states wing. On the other hand, Justices Ginsburg, Souter, Breyer and Stevens coalesced to form a bloc favoring the federal government. Justice O'Connor's voting behavior (44.4%) placed her nearly halfway between these two camps, sug-

federalism issue. In 1995, Justices Thomas, Ginsburg, Souter, Breyer and Stevens fell into this category.

Compare the number of federalism cases decided this Term with that of previous terms: 18 in 1994, 7 in 1993. *See 1994 Study, supra* note 1, at 41.

96. *See infra* Regression Table 9.

gesting that—as with federal civil rights claims—she occupies a pivotal, central role in the federalism arena.

10. Table 10: Swing Vote[97] Analysis

Table 10[98] reveals yet another significant reversal in the fortunes of conservative and liberal coalitions on the Court. Whereas last Term five-member coalitions voted for liberal results in 64.3% of all swing vote cases, conservative coalitions achieved similar results this Term (60.0%), returning to the conservative levels reached in 1993 and 1992. But, as Figure 10 reveals, Court watchers should not hold their breath waiting for the dust to settle on the question of which camp will ultimately control the nation's judicial ideology. Since 1991, no coalition (conservative or liberal) has managed to maintain command of the governing majorities for more than two terms. Table 10 and Figure 10, therefore, show (if anything) that the Court's ideological volatility in close cases is more likely to be settled by changes in Court

97. For a definition of what cases qualify for this category, see *supra* note 46.

98. Swing vote cases reaching a conservative outcome:

Wood v. Bartholomew, 116 S. Ct. 7 (1995) (two categories—both conservative outcomes)
Bennis v. Michigan, 116 S. Ct. 994 (1996)
Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996) (three categories—all conservative outcomes)
Holly Farms Corp. v. NLRB, 116 S. Ct. 1396 (1996) (two categories—both conservative outcomes)
Shaw v. Hunt, 116 S. Ct. 1894 (1996) (four categories—one conservative outcome and three liberal outcomes)
Bush v. Vera, 116 S. Ct. 1941 (1996) (three categories—one conservative outcome and two liberal outcomes)
Montana v. Egelhoff, 116 S. Ct. 2013 (1996) (two categories—both conservative outcomes)
Leavitt v. Jane L., 116 S. Ct. 2068 (1996) (two categories—both conservative outcomes)
Gray v. Netherland, 116 S. Ct. 2074 (1996) (two categories—one conservative outcome and one liberal outcome)
Lewis v. United States, 116 S. Ct. 2163 (1996)
Lewis v. Casey, 116 S. Ct. 2174 (1996)
Medtronic, Inc. v. Lohr, 116 S. Ct. 2240 (1996).

Swing vote cases reaching a liberal outcome:

Morse v. Republican Party, 116 S. Ct. 1186 (1996) (two categories—both liberal outcomes)
BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996)
Shaw v. Hunt, 116 S. Ct. 1894 (1996) (four categories—three liberal outcomes and one conservative outcome)
Bush v. Vera, 116 S. Ct. 1941 (1996) (three categories—two liberal outcomes and one conservative outcome)
Gray v. Netherland, 116 S. Ct. 2074 (1996) (two categories—one liberal outcome and one conservative outcome)
Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996).

personnel than by some resurgence of power in either ideological wing.

Table 10 measures the influence of each member of the Court in effecting conservative or liberal results in close cases. The Justice who most often votes with the majority in swing vote cases wields significant sway in shaping the disposition of the nation's most contentious issues. As he did in 1994 and 1993, Justice Kennedy topped the chart, moving up 3.7 percentage points to reach 85.0%. Justice O'Connor, also in a repeat from last Term, showed herself the next most influential Justice, voting with a majority in 80.0% of the swing vote cases. Chief Justice Rehnquist and Justices Scalia and Thomas shared third chair, voting with the swing vote majorities 75.0% of the time. Together, these five Justices formed a formidable alliance.

Conversely, the Court's more liberal Justices significantly decreased their participation in swing vote majorities this Term. Justices Ginsburg and Souter voted with the majorities 30.0% of the time, while Justices Stevens and Breyer did so in only 25.0% of such cases.

Table 10 reveals, at bottom, what conventional wisdom suggests, that is, that the Court remains polarized between its core conservatives, Chief Justice Rehnquist and Justices Scalia and Thomas, and an equally intrepid liberal wing, Justices Stevens, Souter, Ginsburg and Breyer. As in past terms, Justices Kennedy and O'Connor led the Court's decision-making in close cases, this Term favoring conservative results. The replacement of any member of the conservative bloc or of either of the central swing voters, however, could rapidly change the balance of ideological power on the Court. The relatively consistent voting bloc of Justices Stevens, Souter, Ginsburg and Breyer, if joined by a single jurist of like mind, could quickly dominate the Court.

B. Regression Analysis

The voting patterns of the five Justices analyzed in Tables 1 through 10 have been tracked over a ten-year period.[99] Tables 1 through 10 list the year-by-year voting scores for each Justice, expressed as a percentage of votes for the government, or for a particular type of claim, etc. The Regression Tables identify and describe

99. Specifically, the Study includes the 1986 through the 1995 Terms for all categories except Federalism and Swing Cases, which were tracked from 1988 through 1995. Although data from years 1986 and 1987 (where available) are included in the Study's regression calculations, they are not included on Tables 1-10. *See supra* note 28.

patterns and trends present in that data. Statistical techniques are used to answer the following three questions:

> (1) Does a Justice's score this Term depart in a statistically significant way from his or her past *average* score in a given category?
> (2) Does a Justice's score this Term depart significantly from what the Study predicted it would be based on his or her past *voting trend* in a given category?[100]
> (3) Do the Justices show significant *correlation* (positive or negative) between and among their voting patterns over time?

To answer the first question, a pooled t-test statistic compares each Justice's 1995 voting percentage[101] with his or her historical voting percentage[102] for each category. If the two scores differ to a statistically significant degree,[103] the Study concludes that the Justice's voting behavior in the 1995 Term has changed significantly from that of previous terms.

The second question is answered by comparing a Justice's actual score this Term with the Study's previous prediction of that score. Predictions are based on ARIMA modeling of prior terms' data.[104] Scores that depart significantly from ARIMA predictions may be indicative of a change in the trend of voting behavior.[105]

The third question is answered by performing regression calculations between and among the Justices' voting patterns over the course of the Study.[106] Strong correlations indicate that the score of one Justice may be predicted with some level of confidence based upon the score of another Justice or group of Justices. Note, however, that this

100. These first two questions seek to determine if change has occurred by examining two discrete criteria, average and trend. At times, the two measures may conflict. For example, a Justice whose scores are 10, 20, 30, and 40 in successive terms will depart significantly from his or her average in the next term with a score of 50. However, based on the established trend, 50 is the most reasonable prediction for the term.

101. Identified as *X2* in the Regression Tables.

102. Identified as μ in the Regression Tables.

103. We have chosen a 95% confidence interval for this statistic. See *infra* Appendix B for further information regarding this procedure.

104. ARIMA stands for Auto Regressive Integrated Moving Average. It is a strictly empirical (rather than theoretical), highly refined, curve-fitting procedure. It often produces better forecasts than more theoretically sophisticated models. For more information on this procedure, see *infra* Appendix B and HENRY J. CASSIDY, USING ECONOMETRICS, A BEGINNER'S GUIDE 197-203 (1981).

105. Note, however, that these predictions are susceptible to errors based on the inherent difficulties in measuring human behavior, natural trend boundaries (0% and 100%), etc.

106. The correlation among the Justices' votes in the current Term is not calculated, but rather the correlation in the term-to-term movement of their scores in each category over the course of this Study is calculated.

does not imply that a particular Justice's voting pattern *causes* another Justice's voting behavior.[107]

107. "Correlation" and "causation" are distinct concepts. Correlation describes the similar (or dissimilar) movement of two variables over a range of values. For example, the correlation between temperature and ice cream purchases might be highly positive for various values of the "temperature" and "ice cream purchased" variables. As the "temperature" value rises over a given range (say, 85 to 105 degrees), the "ice cream purchased" value might also rise proportionately. Perfect correlation occurs when a unit change in one variable is always matched by a fixed proportional unit change of the other variable in the same direction—if, for example a unit (perhaps one degree Fahrenheit) rise in "temperature" is always matched by a proportional unit (perhaps three gallons) rise in "ice cream purchased." In this Study, two Justices' scores would be perfectly correlated if every 3% rise or fall in the score of Justice1 were always matched by a corresponding 5% rise or fall in the score of Justice2. Justice1's "units" would be 3% variances while Justice2's "units" would be 5% variances.

This concept is important because it illustrates that the degree of correlation between Justices' voting patterns does not measure the extent to which they vote together. Rather, it measures the extent to which their voting patterns move proportionally in the same (or opposite) direction over the course of the Study. The degree of correlation is denoted by a correlation coefficient, which is a number between +1.00 (perfect positive correlation) and -1.00 (perfect negative correlation). A correlation coefficient of 0.00 indicates no correlation between the variables.

Causation, on the other hand, is present when a change in one variable *causes* a change in another variable. Although two variables may be highly correlated, they may have absolutely no causal relationship. The perfect correlation described above (between "temperature" and "ice cream purchased") may be purely coincidental—the rise in "ice cream purchased" might be wholly caused by a drop in the price. Then again, the correlation might be partially caused by a price reduction and partially caused by increasing temperature. The tension between simple correlation and causation, as well as the difficulty in delineating causal factors, is a major empirical barrier to regression inference. Accordingly, regardless of the presence of high correlation among the Justices' voting patterns, readers should not automatically infer causation.

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

Justice	Mean Voting Percentage, 1986-1994 (μ)		Actual voting percentage for 1995 Term ($\overline{X_2}$)	Did 1995 show a statistically significant change in voting behavior?	Prediction for 1995 Term, and (error compared to actual 1995 voting percentage)	Prediction for 1996 Term
	99% Confidence Interval for True Mean	Standard Deviation of μ (s)				
Kennedy	51.209 ± 15.793	12.764	41.112	No	33.966 (-7.146)	34.530
O'Connor	54.223 ± 11.925	10.662	47.059	No	37.353 (-9.707)	41.357
Rehnquist	68.123 ± 9.557	8.545	43.750	Yes	64.500 (+20.75)	51.652
Scalia	57.766 ±9.144	8.176	52.941	No	51.036 (-1.905)	53.251
Stevens	36.217 ± 6.949	6.213	23.529	Yes	33.062 (+9.533)	32.497

	Correlations with other Justices ($-0.7 > \rho > +0.7$)	Regression equation(s)	(1) Regression r^2 (adjusted); (2) "Student's t" non-rejections
O'Connor	Kennedy (0.912)	O'Connor = 14.8 + 0.75 Kennedy	(1) r^2 (adj) = 80.9% (2) constant falls within a "zero" null hypothesis
Rehnquist	Kennedy (0.720)	Rehnquist = 31.3 + 0.673 Kennedy	(1) r^2 (adj) = 45.0% (2) no constant or variable falls within a "zero" null hypothesis

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

Justice	Mean Voting Percentage, 1986-1994 (μ)		Actual voting percentage for 1995 Term ($\overline{X_2}$)	Did 1995 show a statistically significant change in voting behavior?	Prediction for 1995 Term, and (error compared to actual 1995 voting percentage)	Prediction for 1996 Term
	99% Confidence Interval for True Mean	Standard Deviation of μ (s)				
Kennedy	52.939 ± 13.786	12.326	80.000	Yes	44.503 (-35.497)	49.645
O'Connor	59.090 ± 15.853	14.174	75.000	No	37.254 (-27.746)	21.592
Rehnquist	69.942 ± 12.591	11.258	75.000	No	52.118 (-22.883)	Could not be estimated
Scalia	61.931 ±12.861	11.449	60.000	No	44.931 (-15.069)	48.703
Stevens	52.939 ± 13.786	12.326	63.158	Yes	79.771 (+16.613)	65.417

	Correlations with other Justices ($-0.7 > \rho > +0.7$)	Regression equation(s)	(1) Regression r^2 (adjusted); (2) "Student's t" non-rejections
Rehnquist	Kennedy (0.726)	Rehnquist = 32.3 + 0.569 Kennedy	(1) r^2 (adj) = 46.0% (2) no constant or variable falls within a "zero" null hypothesis
Scalia	Kennedy (0.755)	Scalia = 22.6 + 0.583 Kennedy	(1) r^2 (adj) = 50.8% (2) constant falls within a "zero" null hypothesis
	O'Connor (0.708)	Scalia = 27.6 + 0.574 O'Connor	(1) r^2 (adj) = 44.0% (2) constant falls within a "zero" null hypothesis
		Scalia = 14.6 + 0.461 Kennedy + 0.273 O'Connor	(1) r^2 (adj) = 62.8% (2) constant and O'Connor fall within a "zero" null hypothesis
	Rehnquist (0.844)	Scalia = 1.6 + 0.853 Rehnquist	(1) r^2 (adj) = 67.5% (2) constant falls within a "zero" null hypothesis
		Scalia = 11.3 + 0.383 Kennedy + 0.351 Rehnquist	(1) r^2 (adj) = 50.6% (2) constant and all variables falls within a "zero" null hypothesis
		Scalia = 0.3 + 0.247 O'Connor + 0.664 Rehnquist	(1) r^2 (adj) = 70.3% (2) constant and O'Connor fall within a "zero" null hypothesis
		Scalia = 10.0 + 0.377 Kennedy + 0.242 O'Connor + 0.171 Rehnquist	(1) r^2 (adj) = 57.3% (2) constant and all variables falls within a "zero" null hypothesis

REGRESSION TABLE 3
STATE CRIMINAL CASES

Justice	Mean Voting Percentage, 1986-1994 (μ)		Actual voting percentage for 1995 Term ($\overline{X}_2$)	Did 1995 show a statistically significant change in voting behavior?	Prediction for 1995 Term, and (error compared to actual 1995 voting percentage)	Prediction for 1996 Term
	99% Confidence Interval for True Mean	Standard Deviation of μ (s)				
Kennedy	66.875		55.556	Yes	Could not be estimated	60.491
	± 15.481	12.513				
O'Connor	65.001		44.444	Yes	60.080 (+15.636)	51.378
	± 15.291	13.671				
Rehnquist	82.577		66.667	Yes	88.018 (+21.351)	90.830
	± 8.976	8.025				
Scalia	75.929		55.556	Yes	86.371 (+30.815)	78.443
	± 12.858	11.496				
Stevens	21.423		22.222	No	14.591 (-7.631)	16.565
	± 12.720	11.373				

	Correlations with other Justices ($-0.7 > \rho > +0.7$)	Regression equation(s)	(1) Regression r^2 (adjusted); (2) "Student's t" non-rejections
Rehnquist	O'Connor (0.763)	Rehnquist = 50.8 + 0.480 O'Connor	(1) r^2 (adj) = 53.0% (2) no constant or variable falls within a "zero" null hypothesis

REGRESSION TABLE 4
FEDERAL CRIMINAL CASES

Justice	Mean Voting Percentage, 1986-1994 (μ)		Actual voting percentage for 1995 Term ($\overline{X_2}$)	Did 1995 show a statistically significant change in voting behavior?	Prediction for 1995 Term, and (error compared to actual 1995 voting percentage)	Prediction for 1996 Term
	99% Confidence Interval for True Mean	Standard Deviation of μ (s)				
Kennedy	68.729 ± 15.883	12.837	71.429	No	62.104 (-9.325)	61.618
O'Connor	75.906 ± 6.943	6.207	71.429	No	71.316 (-0.113)	66.942
Rehnquist	79.242 ± 7.394	6.611	71.429	Yes	74.068 (+2.639)	70.710
Scalia	63.071 ± 11.851	10.596	78.57	Yes	60.700 (-17.870)	Could not be estimated
Stevens	45.581 ± 16.927	15.134	50.000	No	32.834 (-17.166)	29.167
	Correlations with other Justices ($-0.7 > \rho > +0.7$)		Regression equation(s)		(1) Regression r^2 (adjusted); (2) "Student's t" non-rejections	
Scalia	Kennedy (0.735)		Scalia = 15.0 + 0.710 Kennedy		(1) r^2 (adj) = 47.5 (2) constant falls within a "zero" null hypothesis	

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

Justice	Mean Voting Percentage, 1986-1994 (μ)		Actual voting percentage for 1995 Term ($\overline{X_2}$)	Did 1995 show a statistically significant change in voting behavior?	Prediction for 1995 Term, and (error compared to actual 1995 voting percentage)	Prediction for 1996 Term
	99% Confidence Interval for True Mean	Standard Deviation of μ (s)				
Kennedy	62.725 ± 24.855	20.089	87.500	Yes	86.566 (-0.934)	100.000
O'Connor	45.866 ± 21.888	19.569	62.500	Yes	72.797 (+10.297)	73.875
Rehnquist	29.669 ± 18.521	16.559	62.500	Yes	57.251 (+5.249)	70.695
Scalia	42.908 ± 20.666	18.477	37.500	No	70.918 (+33.418)	55.264
Stevens	63.912 ± 21.346	19.085	62.500	No	76.320 (+13.82)	65.854
	Correlations with other Justices ($-0.7 > \rho > +0.7$)		Regression equation(s)		(1) Regression r^2 (adjusted); (2) "Student's t" non-rejections	
Rehnquist	Kennedy (0.886) O'Connor (0.770)		Rehnquist = -18.8 + 0.817 Kennedy Rehnquist = -2.8 + 0.752 O'Connor Rehnquist = -21.9 + 0.587 Kennedy + 0.381 O'Connor		(1) r^2 (adj) = 75.3% (2) constant falls within a "zero" null hypothesis (1) r^2 (adj) = 54.2% (2) constant falls within a "zero" null hypothesis (1) r^2 (adj) = 88.9% (2) O'Connor falls within a "zero" null hypothesis	

REGRESSION TABLE 6
EQUAL PROTECTION CLAIMS

Justice	Mean Voting Percentage, 1986-1994 (μ)		Actual voting percentage for 1995 Term ($\overline{X_2}$)	Did 1995 show a statistically significant change in voting behavior?	Prediction for 1995 Term, and (error compared to actual 1995 voting percentage)	Prediction for 1996 Term
	99% Confidence Interval for True Mean	Standard Deviation of μ (s)				
Kennedy	49.371 ± 31.989	25.855	80.000	Yes	81.826 (+1.826)	77.319
O'Connor	46.189 ± 30.229	27.037	80.000	Yes	83.146 (+3.146)	76.766
Rehnquist	28.319 ± 25.900	23.326	60.000	Yes	Could not be estimated	48.991
Scalia	27.022 ± 24.487	21.894	40.000	No	24.778 (-15.222)	40.638
Stevens	50.214 ± 34.876	31.183	40.000	No	97.340 (+57.34)	71.080

	Correlations with other Justices ($-0.7 > \rho > +0.7$)	Regression equation(s)	(1) Regression r^2 (adjusted); (2) "Student's t" non-rejections
O'Connor	Kennedy (0.895)	O'Connor = -2.3 + 0.966 Kennedy	(1) r^2 (adj) = 77.3% (2) constant falls within a "zero" null hypothesis
Scalia	Rehnquist (0.944)	Scalia = 2.44 + 0.822 Rehnquist	(1) r^2 (adj) = 87.7% (2) constant falls within a "zero" null hypothesis

REGRESSION TABLE 7
STATUTORY CIVIL RIGHTS CLAIMS

Justice	Mean Voting Percentage, 1986-1994 (μ)		Actual voting percentage for 1995 Term ($\overline{X_2}$)	Did 1995 show a statistically significant change in voting behavior?	Prediction for 1995 Term, and (error compared to actual 1995 voting percentage)	Prediction for 1996 Term
	99% Confidence Interval for True Mean	Standard Deviation of μ (s)				
Kennedy	44.724 ± 18.910	15.283	16.667	Yes	Could not be estimated	20.337
O'Connor	47.632 ± 10.812	9.632	33.333	Yes	44.561 (+11.228)	48.781
Rehnquist	39.208 ± 6 489	5.802	16.667	Yes	39.574 (+22.907)	57.028
Scalia	42.908 ± 11.367	10.163	16.667	Yes	21.475 (+4.808)	16.561
Stevens	76.056 ±·13.041	10.540	83.333	No	97.340 (+14.007)	78.205

	Correlations with other Justices ($-0.7 > \rho > +0.07$)	Regression equation(s)	(1) Regression r^2 (adjusted); (2) "Student's t" non-rejections
Scalia	Kennedy (0.882)	Scalia = 11.6 + 0.693 Kennedy	(1) r^2 (adj) = 74.6% (2) constant falls within a "zero" null hypothesis

REGRESSION TABLE 8
CASES RAISING A CHALLENGE TO THE EXERCISE OF FEDERAL JURISDICTION

Justice	Mean Voting Percentage, 1986-1994 (μ)		Actual voting percentage for 1995 Term ($\overline{X_2}$)	Did 1995 show a statistically significant change in voting behavior?	Prediction for 1995 Term, and (error compared to actual 1995 voting percentage)	Prediction for 1996 Term
	99% Confidence Interval for True Mean	Standard Deviation of μ (s)				
Kennedy	53.520 ± 17.733	12.716	57.143	No	39.079 (-18.064)	45.716
O'Connor	51.061 ± 16 054	14.354	47.619	No	36.813 (-10.806)	38.200
Rehnquist	50.043 ± 16.701	14.932	42.857	No	29.629 (-13.228)	31.421
Scalia	46.721 ± 14.491	12.957	42.857	No	34.681 (-8.176)	32.231
Stevens	65.794 ± 17.401	15.558	75.000	No	43.500 (-31.500)	60.189

	Correlations with other Justices ($-0.7 > \rho > +0.7$)	Regression equation(s)	(1) Regression r^2 (adjusted); (2) "Student's t" non-rejections
O'Connor	Kennedy (0.880)	O'Connor = -4.3 + 0.992 Kennedy	(1) r^2 (adj) = 74.2% (2) constant falls within a "zero" null hypothesis
Rehnquist	Kennedy (0.904)	Rehnquist = -7.5 + 1.02 Kennedy	(1) r^2 (adj) = 79.0% (2) constant falls within a "zero" null hypothesis
	O'Connor (0.941)	Rehnquist = -.081 + 0.989 O'Connor	(1) r^2 (adj) = 87.2% (2) constant falls within a "zero" null hypothesis
		Rehnquist = -4.83 + 0.391 Kennedy + 0.630 O'Connor	(1) r^2 (adj) = 87.5% (2) constant and all variables fall within a "zero" null hypothesis
Scalia	Kennedy (0.818)	Scalia = 1.4 + 0.802 Kennedy	(1) r^2 (adj) = 62.1% (2) constant falls within a "zero" null hypothesis
	O'Connor (0.981)	Scalia = 1.35 + 0.887 O'Connor	(1) r^2 (adj) = 95.8% (2) constant and all variables fall within a "zero" null hypothesis
	Rehnquist (0.949)	Scalia = 6.05 + 0.817 Rehnquist	(1) r^2 (adj) = 88.8% (2) constant and all variables fall within a "zero" null hypothesis
		Scalia = 5.77 - 0.204 Kennedy + 1.01 O'Connor	(1) r^2 (adj) = 96.6% (2) constant and Kennedy fall within a "zero" null hypothesis
		Scalia = 8.48 - 0.153 Kennedy + 0.939 Rehnquist	(1) r^2 (adj) = 84.2% (2) constant and Kennedy fall within a "zero" null hypothesis
		Scalia = 1.50 + 0.699 O'Connor + 0.190 Rehnquist	(1) r^2 (adj) = 95.9% (2) constant and Rehnquist fall within a "zero" null hypothesis
		Scalia = 7.19 - 0.320 Kennedy + 0.828 O'Connor + 0.295 Rehnquist	(1) r^2 (adj) = 97.7% (2) constant, Kennedy, and Rehnquist fall within a "zero" null hypothesis

Stevens	Kennedy (0.705)	Stevens = 16.0 + 0.930 Kennedy	(1) r^2 (adj) = 42.6% (2) constant falls within a "zero" null hypothesis
	Rehnquist (0.728)	Stevens = 29.0 + 0.764 Rehnquist	(1) r^2 (adj) = 47.2% (2) constant falls within a "zero" null hypothesis
		Stevens = 22.3 + 0.087 Kennedy + 0.829 Rehnquist	(1) r^2 (adj) = 45.2% (2) constant and all variables fall within a "zero" null hypothesis

REGRESSION TABLE 9
FEDERALISM CASES

Justice	Mean Voting Percentage, 1986-1994 (μ)		Actual voting percentage for 1995 Term ($\overline{X}_2$)	Did 1995 show a statistically significant change in voting behavior?	Prediction for 1995 Term, and (error compared to actual 1995 voting percentage)	Prediction for 1996 Term
	99% Confidence Interval for True Mean	Standard Deviation of μ (s)				
Kennedy	52.276 ± 20.934	16.920	51.852	No	42.823 (-9.029)	49.146
O'Connor	57.479 ± 18.902	15.277	44.444	Yes	56.130 (+11.686)	62.131
Rehnquist	64.416 ± 17.174	13.881	51.852	Yes	77.418 (+25.566)	69.360
Scalia	57.397 ± 24.807	20.051	55.556	No	74.365 (+18.809)	73.761
Stevens	47.528 ± 14.970	12.099	29.630	Yes	57.935 (+28.305)	42.631

	Correlations with other Justices ($-0.7 > \rho > +0.7$)	Regression equation(s)	(1) Regression r^2 (adjusted); (2) "Student's t" non-rejections
O'Connor	Kennedy (0.875)	O'Connor = 12.9 + 0.826 Kennedy	(1) r^2 (adj) = 73.2% (2) constant falls within a "zero" null hypothesis
Rehnquist	Kennedy (0.791)	Rehnquist = 27.4 + 0.682 Kennedy	(1) r^2 (adj) = 57.2% (2) no constant or variable falls within a "zero" null hypothesis
	O'Connor (0.901)	Rehnquist = 16.9 + 0.823 O'Connor	(1) r^2 (adj) = 78.5% (2) constant falls within a "zero" null hypothesis
		Rehnquist = 16.9 + 0.008 Kennedy + 0.815 O'Connor	(1) r^2 (adj) = 75.0% (2) constant and all variables fall within a "zero" null hypothesis
Scalia	Kennedy (0.873)	Scalia = 3.2 + 1.03 Kennedy	(1) r^2 (adj) = 72.7% (2) constant falls within a "zero" null hypothesis
	O'Connor (0.774)	Scalia = 2.8 + 0.972 O'Connor	(1) r^2 (adj) = 54.1% (2) constant falls within a "zero" null hypothesis
		Scalia = 2.5 + 0.990 Kennedy + 0.054 O'Connor	(1) r^2 (adj) = 68.3% (2) constant and all variables fall within a "zero" null hypothesis
	Rehnquist (0.872)	Scalia = -18.4 + 1.20 Rehnquist	(1) r^2 (adj) = 72.7% (2) constant falls within a "zero" null hypothesis
		Scalia = -15.2 + 0.579 Kennedy + 0.669 Rehnquist	(1) r^2 (adj) = 80.0% (2) constant and all variables fall within a "zero" null hypothesis
		Scalia = -19.0 - 0.083 O'Connor + 1.28 Rehnquist	(1) r^2 (adj) = 68.2% (2) constant and all variables fall within a "zero" null hypothesis
		Scalia = -19.0 + 0.980 Kennedy - 0.981 O'Connor + 1.27 Rehnquist	(1) r^2 (adj) = 87.5% (2) constant and O'Connor fall within a "zero" null hypothesis

REGRESSION TABLE 10
SWING VOTE ANALYSIS

Justice	Mean Voting Percentage, 1986-1994 (μ)		Actual voting percentage for 1995 Term ($\overline{X_2}$)	Did 1995 show a statistically significant change in voting behavior?	Prediction for 1995 Term, and (error compared to actual 1995 voting percentage)	Prediction for 1996 Term
	99% Confidence Interval for True Mean	Standard Deviation of μ (s)				
Kennedy	73.615 ± 15.185	12.615	85.000	Yes	84.333 (-0.667)	84.949
O'Connor	63.151 ± 13.530	10.936	80.000	Yes	61.831 (-18.169)	90.669
Rehnquist	66.330 ± 13.569	10.967	75.000	No	Could not be estimated	67.004
Scalia	62.984 ± 18.065	14.600	75.000	Yes	64.174 (-10.828)	60.160
Stevens	45.491 ± 14.317	11.572	25.000	Yes	Could not be estimated	Could not be estimated
	Correlations with other Justices ($-0.7 > \rho > +0.7$)		Regression equation(s)		(1) Regression r^2 (adjusted); (2) "Student's t" non-rejections	
Scalia	Rehnquist (0.878)		Scalia = -14.6 + 1.117 Rehnquist		(1) r^2 (adj) = 73.8% (2) constant falls within a "zero" null hypothesis	

1. *Regression Table 1: Civil Cases—State Government Versus a Private Party*

Regression Table 1 shows a statistically significant shift in the voting behavior of the Chief Justice and Justice Stevens during the 1995 Term, both of whom recorded their lowest scores ever in this category.[108] The decreases in support for state government by the other Justices, while notable, were not statistically significant.

Last year's predictions for voting behavior in this category were within 10 points for Justices Kennedy, O'Connor, and Stevens, and within 2 points for Justice Scalia. Conversely, our prediction for the Chief Justice was high by about 21 points, making his voting behavior the most unexpected in the category.

Regression analysis reveals a strong link between the votes of Justices O'Connor and Kennedy, whose voting patterns are linked about 81% of the time in state civil cases.[109] What initially appears to be a significant relationship between the voting behavior of Chief Justice Rehnquist and Justice Kennedy (whose voting patterns on state civil cases in 1995 are quite close) is, in reality, of little moment. Over the ten-year course of this Study, the voting patterns of these Justices are linked only about 45% of the time.

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108. *See supra* Table 1. Two related cases seem to account for the Chief Justice's result. *Board of County Commissioners v. Umbehr*, 116 S. Ct. 2342 (1996), and *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S. Ct. 2353 (1996), both involved contractors' rights to protected political speech against government officials. The Chief Justice supported these claims (voting against the state), while generally conservative Justices Scalia and Thomas opposed them.

Justice Stevens's low showing in favor of state government, moreover, may actually understate his generally liberal ideological orientation. Notably, three of Justice Stevens's four votes for state government produced arguably liberal results. In *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996), he voted to recognize a "psychotherapist privilege" and to extend the privilege to social workers (two votes in favor of the state). In *Shaw v. Hunt*, 116 S. Ct. 1894 (1996), he voted to support a state's plan for carving voting districts which tended to ensure majorities of racial minorities.

109. We say that voting patterns are "linked" when the regression equation describing the relationship between the voting patterns of two or more Justices reasonably "explains" the actual data points generated by the relationship. The adjusted r^2 statistic we use to make this determination is a measure of the proportion of the variance in one variable that can be attributed (linked) to a variance in another variable (keeping in mind that causation is in no way implied). An r^2 value of 1 (or 100%) indicates a perfect fit. A value of 0 (or 0%) indicates that the regression equation is no more useful than the sample mean in describing the relationship between the variables. For a more complete explanation of this statistic, see *infra* Appendix B and CASSIDY, *supra* note 104.

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

Justices Kennedy and Stevens exhibited statistically significant changes in their voting behavior this Term in civil cases involving the federal government. Justice Kennedy recorded his highest score ever for this category and Justice Stevens his third highest.[110] Similarly, all other Justices voted in favor of the government at a rate greater than their previous averages. As a result, the Court's composite voting displayed a strong corresponding conservative trend, rising nearly 33 points from last Term.[111]

The voting patterns predicted for 1995 did not closely correspond to actual voting scores. This can be explained, in part, by the significant conservative shift demonstrated by the entire Court on Regression Table 2 this Term. When (as in 1995) all nine Justices openly embrace more federal civil claims than previously, individual departures from predicted trends—here ranging from a 35-point miss for Justice Kennedy to about a 15-point miss for Justice Scalia—are not unexpected.[112]

Examination of the rather significant departures from this Study's voting predictions, however, does yield one interesting inference: Justice Stevens's recent voting patterns may have been influenced by the 1992 change from a Republican to a Democratic Administration. In 1993, Justice Stevens radically changed his voting behavior, jumping over 35 percentage points to favor the government in 70.6% of the cases.[113] Since 1993, his support of the federal government has decreased somewhat. However, given the magnitude of his 1993 shift, his scores in 1994 and 1995 have remained significantly conservative as measured against his mean voting percentage. The fact that Justice Stevens's 1995 showing fell nearly 17 points below what was predicted based on his post-1992 voting pattern suggests he has come to occupy a new niche in civil cases involving the federal government.

Justice Stevens's 63% voting pattern in favor of the federal government departs significantly from his past patterns which, except for the past two Terms, have generally hovered well *below* the 63% mark.[114] In the past two Terms, however, Justice Stevens has shown

110. *See supra* Table 2.

111. *See supra* Table 2.

112. The 20-point rise in the Chief Justice's score this Term, *see supra* Table 2, though relatively large, is not a statistically significant departure from his previous average.

113. *See supra* Table 2.

114. *See supra* Table 2.

remarkably increased receptivity to claims made by the federal government—moving from a score of 34.4% in the 1992 Term to scores of 68.4% and 70.6% in 1993 and 1994.[115] His predicted score for 1995 was based on the trend established by that dramatic rise. Justice Stevens, in 1995, continued to vote more often in favor of the federal government than was predicted from the average of his prior Term's behavior, although (by missing his predicted 1995 mark) he has now moderated that trend from the patterns exhibited in 1993 and 1994.

What the statistical significance and predicted score calculations suggest, therefore, is that Justice Stevens has indeed altered his voting behavior. The data on Regression Table 2 indicate that (as hypothesized in last year's Study[116]) Justice Stevens has reoriented himself to new political realities. During the Bush Administration, he generally cast liberal votes against the federal government. Under the new Administration, by contrast, he is now consistently casting more conservative votes—perhaps in favor of politically liberal claims brought by a politically liberal Administration. Further dramatic increases in Justice Stevens's receptivity to federal civil claims, however, is not likely—the Study now predicts that future votes in favor of the federal government will hover in the current range.[117]

Many correlations among voting patterns are noted on Regression Table 2. The strongest in this category are between Justice Scalia and the Chief Justice, whose voting patterns are linked about 68% of the time. Furthermore, when the Chief Justice and Justice O'Connor vote together, Justice Scalia's voting pattern is linked with them about 70% of the time. Other correlations, however, are fairly weak.

3. Regression Table 3: State Criminal Cases

All Justices listed on Regression Table 3, except Justice Stevens, voted significantly less often in favor of state government this Term than their previous averages would suggest. This broad-based and statistically significant liberal shift is unusual. The import of that shift, however, may be diminished somewhat because the state criminal category comprised only nine cases this Term; each case thus accounted for 11 percentage points in the Justices' scores. Moreover, one-third of the decisions tabulated on Regression Table 3 were decided unanimously against the state. These facts may have skewed this Term's

115. *See supra* Table 2.

116. *See 1994 Study, supra* note 1, at 31.

117. Justice Stevens's predicted score for 1996 is 65%, only 2 points higher than his score this Term.

statistics in a liberal direction.[118] Despite these caveats, the moderate liberal movement shown by Regression Table 3—because of its statistical significance—cannot be completely discounted.

The accuracy of our predictions of the Justices' voting percentages in this category ranged from within 8 points for Justice Stevens to 31 points for Justice Scalia. In addition, a weak correlation between Justices Rehnquist and O'Connor is noted on the table; their voting patterns were linked about 53% of the time.

4. Regression Table 4: Federal Criminal Cases

Regression Table 4 shows statistically significant changes in the voting patterns of Chief Justice Rehnquist and Justice Scalia. The Chief Justice voted less often in favor of the federal government than was predicted based on his previous voting average, while Justice Scalia voted more often in favor of federal criminal prosecutors than in the past. Neither of these shifts, however, should be overemphasized.

The Chief Justice's departure from his historical average is small in absolute terms (about 9 points). The statistical significance of this shift is due to his remarkable consistency in this category over the course of this Study, with a standard deviation of a little more than 6 points. Justice Scalia's score, moreover, was heavily influenced by the fact that five cases were decided unanimously in favor of the government.[119]

Only one weak correlation is shown in Regression Table 4. The voting patterns of Justices Scalia and Kennedy were linked about 48% of the time.

5. Regression Table 5: First Amendment Rights of Expression, Association, and Free Exercise of Religion

Regression Table 5 shows a statistically significant change from the historical voting averages for three of the five Justices analyzed. The Chief Justice and Justices Kennedy and O'Connor all moved in a liberal direction. This movement, furthermore, is consistent with the

118. If just one of the unanimous cases this Term had been decided in favor of the state, the scores of the Chief Justice and Justice Kennedy would no longer show a statistically significant shift, and Justice Stevens's score would show a conservative shift. Such are the limitations of the small universe of cases from which this Study is derived.

119. The impact of unanimous cases upon Justice Scalia's score is underscored by the fact that half of the federal criminal cases this Term were decided unanimously and two of Justice Scalia's three votes *against* the federal government were cast in these unanimous cases.

three Justices' predicted trends: Justice Kennedy's actual voting pattern departed less than 1 point from the score predicted on the basis of his recent First Amendment votes, while Justice O'Connor's and the Chief Justice's actual voting patterns departed about 10 and 5 points, respectively, from the predictions calculated from their past First Amendment votes.[120] This data appears to validate the ideological significance of the Justices' liberal movement in the First Amendment arena.

Two fairly strong correlations are noted in the Table. The Chief Justice's voting pattern is linked with that of Justice Kennedy about 75% of the time, and when Justices Kennedy and O'Connor vote together, their pattern is linked with that of the Chief Justice almost 89% of the time. These correlations—together with the inferences drawn from the statistical significance and predicted score calculations discussed above—suggest that these three Justices are emerging as a reliable voting bloc on First Amendment questions.

6. Regression Table 6: Equal Protection Claims

Regression Table 6 shows a statistically significant difference between the current and past voting patterns of three Justices. The Chief Justice and Justices Kennedy and O'Connor all voted in a more liberal manner this Term than in the past. Conclusions based upon these calculations, however, are tenuous due to the small number of cases involved (five) and the questionable classification of the results in two of those cases as liberal.

In *Bush v. Vera*[121] and *Shaw v. Hunt*,[122] the question before the Court was whether state officials had violated equal protection strictures by their use of race in drawing voting district boundaries. Five-member majorities, consisting of the Chief Justice and Justices Kennedy, O'Connor, Scalia and Thomas, upheld the equal protection claim in both cases—a "liberal" result under the definitions used in this Study. But, while this outcome favored the claim of individual rights pressed by the plaintiffs, it arguably (at least in the eyes of the four dissenting "conservative" Justices) ignored the rights of voters who had been subjected to discrimination in the past.[123] Because it is

120. This is a good example of how a Justice's score for a term may differ significantly from his or her previous average for a category and yet be predictable from the Justice's voting trend for that category over the course of the Study.

121. 116 S. Ct. 1941 (1996).

122. 116 S. Ct. 1894 (1996).

123. *See Bush*, 116 S. Ct. at 1978 (Stevens, J., dissenting) ("[T]he risk of true 'discrimination' in this case is extremely tenuous in light of the remedial purpose the classification is

not entirely clear who is casting a vote "for the individual" and "against the government" in such cases, it is difficult to assign unambiguously either the "liberal" or "conservative" label to the voting outcomes in *Bush* and *Shaw*.

This difficulty is borne out by the fact that there is a "reverse-image" linking of Regression Table 6 and Regression Table 7 (Statutory Civil Rights). The Justices who voted in a "liberal" fashion in *Bush* and *Shaw* (favoring the equal protection claim) *rejected* the argument that the Voting Rights Act provided a complete defense to the equal protection claim, a "conservative" result.[124] Thus, while Regression Table 6 shows statistically significant liberal movement for the Chief Justice and Justices O'Connor and Kennedy, Regression Table 7 shows equally significant conservative movement for the same Justices (as well as Justice Scalia).

Despite the above difficulties, the Court *does* appear to be increasing its receptivity to equal protection claims. In addition to *Bush* and *Shaw*, the Court ratified equal protection claims raised by gay rights proponents[125] and women seeking admission to previously male-only military schools.[126] In fact, the only equal protection claim the Court rejected (by a unanimous vote) was a plea to apply heightened equal protection scrutiny to the methodology employed by the federal government in the last federal census.[127] This, of course, is hardly a surprising outcome, considering the usual judicial deference the Court grants in regulatory and economic matters. The Court's receptivity to the four substantial equal protection claims it heard this Term insures future ideological growth in this area of the law, even if it remains debatable whether this Term's ideological movement was liberal or conservative.

The predictions for this Term's equal protection voting patterns were quite close for Justices Kennedy and O'Connor (within about 2 and 3 points, respectively). By contrast, the prediction for Justice Ste-

intended to achieve and the long history of resistance to giving minorities a full voice in the political process."); *Shaw*, 116 S. Ct. at 1907 (Stevens, J., dissenting) ("I am convinced that the Court's aggressive supervision of state action designed to accommodate the political concerns of historically disadvantaged minority groups is seriously misguided.")

124. *See Bush*, 116 S. Ct. at 1962 ("The districts before us exhibit a level of racial manipulation that exceeds what § 2 could justify."); *Shaw*, 116 S. Ct. at 1903 ("[W]e find that creating an additional majority-black district was not required under a correct reading of § 5 and that District 12, as drawn, is not a remedy narrowly tailored to the State's professed interest in avoiding § 2 liability.")

125. Romer v. Evans, 116 S. Ct. 1620 (1996).

126. United States v. Virginia, 116 S. Ct. 2264 (1996).

127. Wisconsin v. City of New York, 116 S. Ct. 1091 (1996).

vens missed by an impressive 57 points. Thus a Justice who, based on past performance trends, was predicted to accept nearly all equal protection claims pressed upon the Court instead voted in favor of only two of the five claims presented. A quick glance at Table 6, however, helps to explain the difficulty of predicting Justice Stevens's behavior. His past scores range from 0% to 100%, yielding a standard deviation of 31.2 points! Moreover, as noted above, the ideological nature of the equal protection claims presented this Term present problematic issues of characterization.

Two strong correlations are noted in Regression Table 6. The voting patterns of Justices O'Connor and Kennedy are linked in about 77% of cases. The patterns of Justice Scalia and the Chief Justice are linked almost 88% of the time.

7. Regression Table 7: Statutory Civil Rights Claims

The scores for all of the Justices listed on Regression Table 7 except Justice Stevens show statistically significant conservative movement. This movement is also reflected in the Court's general conservative trend on statutory civil rights, shown on Figure 7. Although reliable statistical generalizations regarding statutory civil rights are difficult because of the small number of cases addressing the issue, a consistent conservative trend over the course of this Study is apparent.

Differences between the Study's predicted scores for 1995 and the actual scores ranged from within 5 points for Justice Scalia to almost 23 points for the Chief Justice. However, because each vote in this category moves a Justice's voting percentage by 20 points, a 23-point miss is not particularly surprising.

Comparison of Justice Stevens's predicted and actual scores on Regression Table 7 with his predicted and actual scores on Regression Table 6 is interesting. On Regression Table 6, Justice Stevens's actual performance differed 57 points from his predicted performance. On Regression Table 7, however, the Justice's actual performance was about 14 points from his predicted performance. This contrast confirms Justice Stevens's long-standing receptivity to statutory civil rights claims, as well as his emerging hostility to equal protection claims like those presented in *Bush* and *Shaw*. The data from Regression Tables 6 and 7, in short, demonstrate that—at least in the difficult area of individual rights and race—Justice Stevens is on a quite differ-

ent ideological plane than the Chief Justice and Justices O'Connor, Scalia and Kennedy.[128]

One fairly strong correlation is noted on Regression Table 7. The voting patterns of Justices Scalia and Kennedy are linked almost 75% of the time.

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

Regression Table 8 reveals no statistically significant departures from past voting patterns. Differences between the Study's predicted scores and actual scores varied from about 8 points for Justice Scalia to more than 31 points for Justice Stevens.

The degree of ideological stability revealed by Regression Table 8 is worthy of note. Voting patterns on jurisdictional issues are correlated among virtually all of the analyzed Justices. This high degree of correlation may suggest that the criteria each Justice uses in determining jurisdictional issues have remained reasonably stable over time or even that the Justices employ highly similar criteria in reaching their decisions.[129]

Particularly interesting are the linkages between the Chief Justice and Justices O'Connor, Kennedy and Scalia. The Chief Justice's votes on jurisdictional issues are correlated with those of Justice Kennedy about 79% of the time, and with Justice O'Connor about 87% of the time. Justice O'Connor's voting pattern, in turn, is linked with that of Justice Kennedy about 74% of the time on jurisdictional issues. Justice Scalia, finally, shows a 95% correlation with Justice O'Connor, a 62% correlation with Justice Kennedy, and nearly an 89% correlation with the Chief Justice. These Justices, in short, often vote together as a bloc on jurisdictional issues.

9. *Regression Table 9: Federalism Cases*

The scores of three Justices (the Chief Justice and Justices Stevens and O'Connor) show a statistically significant departure from past averages in this category, each in a liberal direction. This liberal shift may result from the fact that seven of eleven unanimous federal-

128. This conclusion, of course, is hardly news to anyone who has read the various opinions in *Shaw v. Hunt*, 116 S. Ct. 1894 (1996). It is interesting, nevertheless, that the divergent ideological views expressed in the majority and dissenting opinions in *Shaw* can be consistently (and mathematically) demonstrated.

129. Although the Justices might weigh the criteria differently, and thus do not vote identically in each case, their *patterns* of voting and *relative* movements from term-to-term show a high degree of correlation.

ism cases were decided against state government, yielding the lowest state success rate in unanimous federalism decisions ever recorded by this Study. Statistically significant liberal movement by two generally conservative jurists (the Chief Justice and Justice O'Connor), however, cannot be ignored and suggests that the overall (albeit small) liberal movement by the Court this Term is important.

Justice Stevens's movement on Regression Table 9 is particularly dramatic. Four of Justice Stevens's eight votes in favor of the states were in unanimous and (presumably) less ideologically charged cases. Of Justice Stevens's four remaining conservative federalism votes, two were voting district cases involving assertions of racial gerrymandering where Justice Stevens voted to uphold the districting plan[130]—conservative results under the terms of the Study but, nevertheless, arguably liberal outcomes. Therefore, Justice Stevens's movement away from the states on federalism issues may be even more remarkable than first appears.[131]

Differences between predicted and actual scores varied from a low of about 9 points for Justice Kennedy to a high of about 28 points for Justice Stevens, whose score was down this term by more than 25 points from his scores for each of the previous three Terms.[132] As in Regression Table 7, the Chief Justice and Justices O'Connor, Scalia and Kennedy demonstrate close correlations.

10. Regression Table 10: Swing Vote Analysis

During the 1994 Term, liberal coalitions held sway in the majority of swing decisions, prompting us to suggest (as in 1991, when liberal coalitions also decided the majority of single-vote outcomes[133]) that the Court was moderating the course set by the conservative coalitions that had prevailed in 1992 and 1993.[134] But, in 1995, ideological control has again reversed, with conservative coalitions governing the result in 60% of all swing vote cases.

This pronounced volatility in the ideological control of swing decisions is presented in graphic form on Figure 10. The vacillations ap-

130. Shaw v. Hunt, 116 S. Ct. 1894 (1996); Bush v. Vera, 116 S. Ct. 1941 (1996).

131. By contrast, the departures of the Chief Justice and Justice O'Connor from their previous means were barely significant in a statistical sense, each turning on a single case out of 27 this Term. Also, if the unanimously decided cases are removed, leaving only the closer cases in which the Justices' ideological tendencies become more apparent, both the Chief Justice's and Justice O'Connor's scores fall comfortably within their historic ranges.

132. *See supra* Table 9.

133. *See 1991 Study, supra* note 1, at 28.

134. *1994 Study, supra* note 1, at 43-44.

parent on Figure 10 suggest that the swing vote outcome for any particular term has little value in predicting future ideological movement. With this caveat in mind, Regression Table 10 nevertheless suggests that the 1995 swing back to conservative control is significant.

Of the Justices listed on the Table, only the Chief Justice's voting pattern did not vary in a statistically significant way from past records. Justices Kennedy's, O'Connor's, and Scalia's presence with governing *majorities* in swing vote cases is statistically significant, as is Justice Stevens's presence in swing vote *minorities*. Justices Kennedy, O'Connor and Scalia, moreover, *all* voted more often with swing vote majorities than past mathematical predictions of their scores indicated. Regression Table 10, in short, demonstrates that decisional power in close cases shifted to ideological conservatives in 1995. Only time (and perhaps a new appointment to the Court) will tell whether this shift will be as short-lived as others tracked on Figure 10.

The only correlation noted on Regression Table 10 is between the voting patterns of Justice Scalia and the Chief Justice, who were linked about 74% of the time. Although Justice O'Connor voted in an almost identical manner with the Chief Justice and Justice Scalia this Term, her voting pattern over the course of this Study has not shown significant correlation with their voting patterns.[135]

The predicted scores on Regression Table 10, finally, confirm Justice Kennedy's central position on the current Court. Justice Kennedy's predicted and actual scores on Regression Table 10 were exceptionally close (within a point). Justice Kennedy, furthermore, has topped Table 10 as the most influential swing voter since the 1993 Term.[136] Because Justice Kennedy's predicted 1995 voting pattern, which was calculated based upon trends established in terms dominated by both liberal and conservative swing vote coalitions, was almost perfect, it seems clear that, at present, Justice Kennedy is the proverbial "man in the middle." His vote, more than any other on the Court, determines the outcome of the nation's closest cases.

V. Conclusion

The precise ideological position of the present Court is hard to ascertain. Tables 1, 2, 4, 7 and 10 suggest that conservative Justices in

135. This example illustrates the possible hazard of confusing correlation among Justices' voting *patterns over the course of the Study* with correlation among their *actual votes in the current Term.* The Regression Tables demonstrate correlation over time, not simple coincidence of voting patterns within a single term.

136. *See supra* Table 10.

1995 had the upper hand. Tables 3, 5, 6, 8, and 9 give some indication to the contrary. However one reads the foregoing tables, it is indisputable that the Court, in close cases, remains seriously divided, with the reins of power held by Justices Kennedy and O'Connor. This ideological dynamic is unlikely to be resolved by a shifting of views within the Court; Table 10 and Figure 10 indicate that new governing majorities are unlikely to arise. Rather, as go Justices Kennedy and O'Connor, so goes the Court. It would appear that this present trend will only be altered by the resignation and replacement of one or more of the current Justices.

Appendix A

1. The Universe of Cases

The only cases included in the database are those 1995 Term cases decided by full opinion. Decisions on motions have been excluded even if accompanied by an opinion. Cases handled by summary disposition are included only if they are accompanied by a full opinion of the Court and not if the only opinion is a dissent. Cases decided by a four-four vote resulting in affirmance without written opinion have been excluded. Both signed and per curiam opinions are considered full opinions if they set forth reasons in a more than perfunctory manner. Cases not fitting within any of these categories are not included in the database for any of the tables.

2. Cases Classified as Civil or Criminal

The classification of cases as civil or criminal follows commonly understood definitions. Generally, the nature of the case is clearly identified in the opinion. Only occasionally does a case pose a problem of classification. No cases in 1995 raised such a question.

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

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

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

A case is included in each category of Tables 5 through 9 for which it raises a relevant issue that is addressed by written opinion. One case may thus be included on two or more tables. A case is also

included more than once on the same table if it raises two or more distinct issues in the category affecting the disposition of the case and the issues are resolved by different voting alignments. A case is not included on a table if an issue raised by one of the litigants is not addressed in any opinion.

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

Statutory civil rights cases included on Table 7 are limited to those invoking the Civil Rights Act of 1964, the Voting Rights Act of 1965, and other civil rights statutes expressly barring discrimination on the basis of race, color, national origin, sex, religion, age, or physical handicap. Actions brought under 42 U.S.C. § 1983 are included if the substantive right asserted is based on a federal statute, or if the issue involves the application of 42 U.S.C. § 1983 to the case at hand. However, 42 U.S.C. § 1983 actions are excluded if the substantive right asserted is based on the United States Constitution and the issue relates to that constitutional right. The purpose of this exclusion is to preserve a distinction between constitutional and non-constitutional claims.

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

Federalism cases on Table 9 are limited to those cases in which there were issues raised by conflicting actions of federal and state or local governments. Common examples of these issues are preemption, inter-governmental immunities, application of the Tenth and Eleventh Amendments as a limit on federal government action, and federal court interference with state court activities (other than review of state court decisions). Issues of "horizontal" federalism or interstate relationships, such as those raised by the dormant Commerce Clause or the Privileges and Immunities Clause, are excluded from the table.

5. The Swing Vote Cases

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

Appendix B

1. Student's t Testing[137]

The purpose of this test is to determine whether this Term's score ($\overline{X}_2$), departs in a statistically significant manner from the mean of all previous terms' scores ($\overline{X}_1$). Essentially, we treat these two numbers as the means of two independent samples drawn from the universe of all scores in the category.[138] We hypothesize that $\overline{X}_1$ is also the true mean of the population μ, and we set up this hypothesis (the "null" hypothesis) and its corresponding alternative hypothesis as follows:

H_o: $\mu = \overline{X}_1$

The "null" hypothesis, i.e., $\overline{X}_2$ does not shift μ from its previous value on the real number line. Therefore, the two samples are statistically equivalent.

H_a: $\mu \neq \overline{X}_1$

The alternative hypothesis, i.e., $\overline{X}_2$ shifts μ from its previous value on the real number line. Therefore, the two samples are not statistically equivalent.

We then set out to prove the alternative hypothesis, within a certain confidence interval,[139] by rejecting the null hypothesis.[140] This is accomplished by calculating the following statistic:

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

The result of this equation (t) is compared to the entry on a t-distribution table corresponding to the confidence interval desired (α) and the appropriate number of degrees of freedom (n-k).[141] If the absolute value of t is greater than the table entry, H_o is rejected and we say that the Justice has shown a statistically significant change in voting behavior this Term.

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137. For a practical perspective on this procedure, see DAVID S. MOORE AND GEORGE P. MCCABE, INTRODUCTION TO THE PRACTICE OF STATISTICS 500-18 (1993). *See also,* HOGG AND CRAIG, *supra* note 33.

138. This approach introduces potential bias problems due to non-random sampling, small samples, and dissimilar sample standard deviations. Nevertheless, we use the test to impose some measure of discipline in analyzing the available data.

139. We have selected a confidence interval of 95%. Because this is a two-tailed test ($\overline{X}_2$ may shift μ in either a positive or negative direction), $\alpha = .025$.

140. A full description of the logic behind this seemingly convoluted procedure is beyond the scope of this Article. However, its purpose is to control Type I (or alpha) error. For a complete explanation, *see* MOORE & MCCABE, *supra* note 137.

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

2. Predictive Modeling

Data in this project were fitted to an Auto Regressive Integrated Moving Average (ARIMA) forecasting model.[142] This model is useful in circumstances where, as in this Study, a single variable (a Justice's score) is to be forecast based only on its present and prior values with no other explanatory variables. ARIMA is an empirical (rather than theoretical), highly refined, curve-fitting procedure.

3. Correlation and Regression Analysis

Relationships between two Justices' voting records may be mapped over a two-dimensional Cartesian plane as in Figures 11 and 12. Figure 11 shows a high degree of positive correlation (+.944) between the voting percentages of the Chief Justice and Justice Scalia for the Equal Protection category. The points all fall close to an upward sloping line. On the other hand, Figure 12 shows that the voting percentages of the Chief Justice and Justice Stevens show a very weak, negative correlation (-.140). The points are widely scattered about a downward-sloping line. Statistically significant correlations between and among Justices are shown in Regression Tables 1 through 10. The first and second columns of these tables list the Justices showing correlations and their corresponding correlation coefficient. The third column contains the associated regression line equation(s). The vertical distance between the actual points and the regression line represent that portion of the relationship between the Justices' voting patterns which is unexplained by the regression equation. In this Study, we say that voting patterns are "linked" to the extent that the regression equation *does* explain the relationship. The degree to which the relationship is explained is represented by the adjusted r2 statistic in the fourth column.

Linear regression is, in its simplest form, an attempt to estimate accurately the true values of the slope between two or more variables. However, one crucial difference between simple correlation and regression is the presumption of causation. A linear regression model is one that attempts to use one or more explanatory, or independent, variables to explain the variance in one dependant variable. Most linear regression computer results test the hypothesis that the estimated parameters, or βs, are equivalent to 0. The analyst actually typically

142. ARIMA computer modeling was accomplished using MINITAB® statistical software with p = 1, d = 1, and q = 1. For more information regarding the ARIMA (p,d,q) model, see PETER KENNEDY, A GUIDE TO ECONOMETRICS 248-49 (1992). *See also* CASSIDY, *supra* note 104.

Figure 11

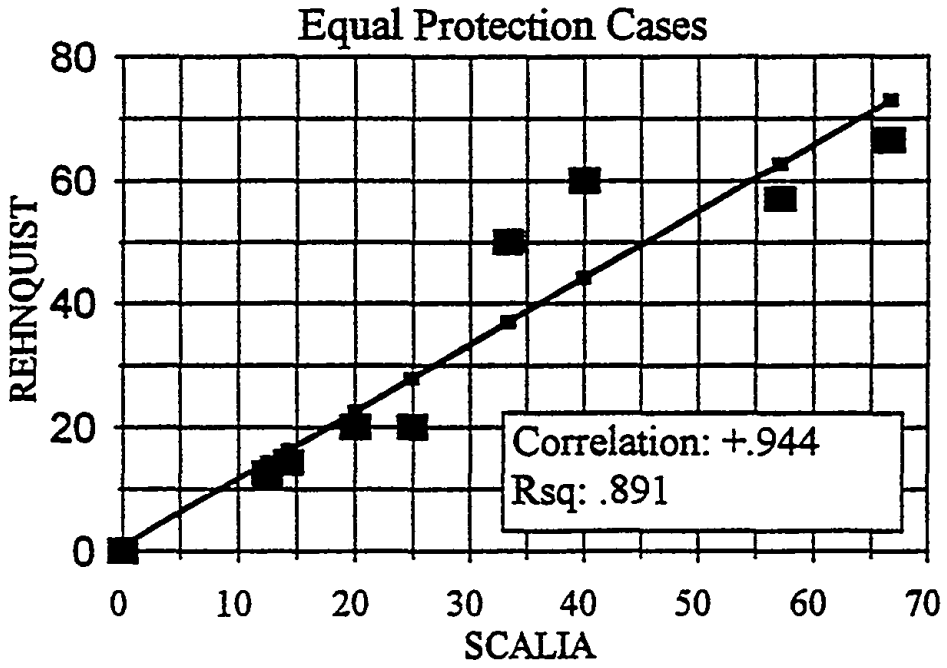
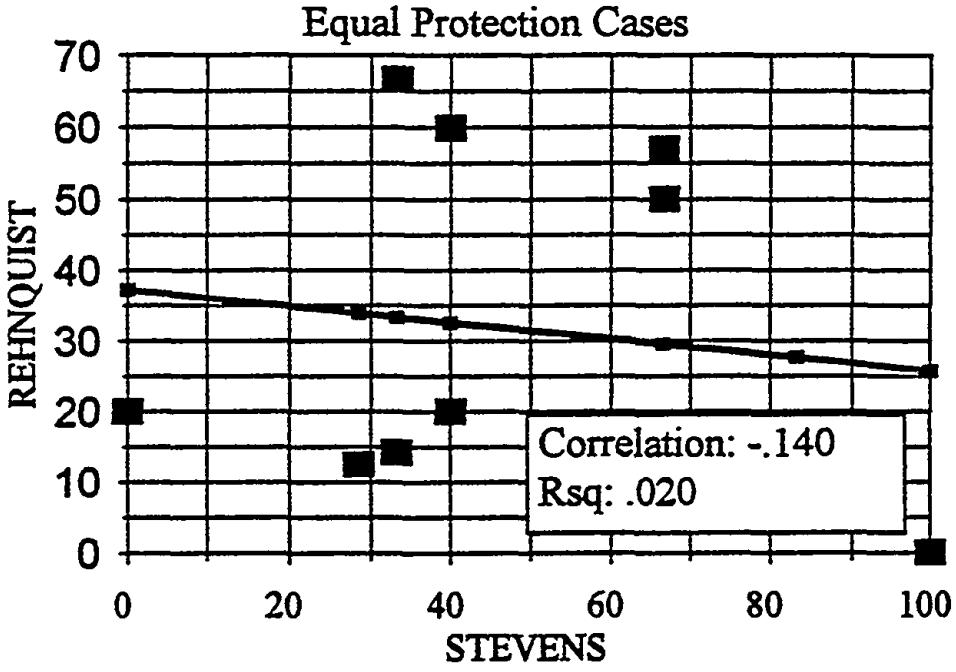


Figure 12



desires that such a result not occur—in other words, he or she wants the data to summarily reject the statistical test of this hypothesis, thereby proving the alternate hypothesis that the βs are *not* equivalent to 0. It is important to remember, though, that neither a rejection of the null hypothesis that β equals 0 or a high r^2 (adjusted) statistic[143] as listed in the fourth column of the table imply causation. Justice Scalia's voting record might correlate quite highly with that of Justice Stevens's on equal protection questions. That does not, however, imply that Justice Scalia causes Justice Stevens to vote the way he does or vice versa.

There are five assumptions necessary for a valid classical regression model:

1) The dependant variable may be calculated as a linear function of one or more independent variables.
2) The mean value of the disturbance term *e* (the difference between observed and expected dependant variable values) is 0.
3) The variance of the disturbance term is constant (homoskedasticity).
4) Observations of independent variables are fixed with regard to repeated sampling.
5) The number of observations is greater than the number of independent variables, and there are no linear relationships between independent variables (multicollinearity).

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

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