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JUSTICE REHNQUIST AND STATE TAXATION
VOTING PATTERNS OF U.S. SUPREME COURT JUSTICES
1975-1986

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THE POLITICAL/IDEOLOGICAL BACKGROUND

Washington, D.C.; mid afternoon, June 17, 1986: inside the U.S. News & World Report building--as editor David Gergen left a meeting in the upper-level conference room, his secretary rushed up to him and gasped: "Burger's resigned and he's appointed Rehnquist!"¹ As the word was passed through official and semi-official Washington via similar clarion calls, the Senate began to gird itself to perform its "advise and consent" function. Although William Rehnquist was already a Justice of the Supreme Court, his elevation to Chief Justice would require Senate approval. Likewise, President Reagan's nomination of Appeals Court Judge Antonin Scalia to fill the vacancy created by Chief Justice Burger's resignation would also require Senate confirmation.

With four other Justices in addition to Burger being over 77 years old, there had been speculation for several years about how many of them Reagan would get to replace. Nevertheless, the timing of Burger's resignation still took most observers by surprise. Some suggested that, confronted with the possible loss of Senate control after the November 1986 elections, Reagan saw a last chance to influence the Court dramatically. He had already named one justice, Sandra Day O'Connor, who had become a dependable coalition partner for Justice Rehnquist on most issues;² now he saw a chance to name another, and to put Rehnquist himself in administrative control of the Court.

Once confirmed, of course, a Justice is set free from shifts in the political winds and can vote as the facts and the law seem to dictate.³ The "Nixon Court" never fully materialized despite his four appointments in 1970 and 1971 (Burger, Rehnquist, Powell, and Blackmun), because of the independent voting patterns of Powell and Blackmun. Although Powell voted with the Burger/Rehnquist faction much of the time,⁴ he also split away on several key votes. Blackmun has evolved into a neo-liberal, since his early days on the Court, when he and Burger were derisively nick-named the "Minnesota Twins." (He was Burger's favorite voting partner during the 1970 and 1972 Terms of the Court.)⁵

Only one other change occurred during the turbulent 1970s: Justice Douglas was replaced by John Paul Stevens in 1975. Nixon named no others after his initial "Gang of Four," and President Carter named none at all during his four year term. Justice Douglas was, of course, the leader of the Court's "liberal" wing. Stevens' voting record is erratic, at least in ideological terms. During the 1976/77 Term, his favorite voting partner was Stewart; by the 1984/85 Term, his favorite partner was Brennan, the current leader of the "liberal" bloc. The evolution of Stevens, Powell, and Blackmun has thus prevented the formation of a solid "conservative" voting majority by the five Nixon/Ford appointees and the Stewart/O'Connor vote.

The Court has thus bounced back and forth within a relatively narrow middle ground, with the results in specific cases depending usually on which side could convince enough of the swing votes (Powell, Blackmun, Stevens, and White) to make up a majority.⁶ In several significant cases, there was no real majority at all, but rather a plurality, coupled with one or more separate concurring opinions. The Burger Court did not speak with a clear voice. There was no massive repeal of the new positions carved out by the

Warren Court, although there was some nibbling around the edges.⁸ After a decade and a half of this delicate balancing act, any attempt by President Reagan to implement his campaign promise to change the direction of the Court was bound to provoke a firestorm of controversy.

Justice O'Connor had escaped serious challenge for several reasons. As the first woman nominee, it would have been anomalous, to say the least, for her to have been opposed by women's rights groups. To some extent, she escaped the nastiness because she was something of an unknown quantity. In addition, she was merely replacing Stewart--one generally "conservative" vote in place of another.

Several factors combined to make the Rehnquist/Scalia appointments a red flag for the liberal bulls in the Senate.⁹ First, there was the "symbolism" of appointing Rehnquist as chief Justice.⁹ Burger and Rehnquist had been ideological soul-mates; out of fourteen Terms from 1971 through 1984, Rehnquist had been Burger's favorite voting partner during eleven Terms.¹⁰ What was involved was thus not really any significant voting shift, but rather the appointment of the most consistent and vigorous critic of the Warren Court's positions, as the new Chief Justice. Coupled with this "symbolism" argument was the charge that Justice Rehnquist was insensitive to the rights of women and minorities.¹¹ It was alleged that he has "harassed" voters as a pollwatcher for the Republican party in Arizona, that he had owned two pieces of real estate on which racial or religious deed restrictions had been established by prior owners, and that he had voted "in favor" of tax exemptions for schools with racially-restrictive policies.¹² In another variation, these arguments appeared as the charge that Rehnquist was "too extreme" to be Chief Justice.¹³ Rehnquist's Senate supporters argued that this was the sort of person that the country wanted as Chief Justice, since Reagan had won overwhelmingly and had promised to appoint just such persons to the courts. Aside from the charges that Rehnquist had voted in a case in which he had been involved for the Justice Department and that he had mishandled the estate of a member of his family in Arizona, his qualifications for the position seemed to be drowned in the ideological rhetoric.¹⁴ Despite his "well-qualified" rating from the American Bar Association, the Rehnquist hearings before the Senate Judiciary Committee were rather nasty, before a final vote of 13 to 5 to approve the nomination.¹⁵ The floor debates in the Senate itself also became rather heated, and increasingly partisan. In the final tally,¹⁶ 33 Senators voted against Rehnquist--2 Republicans and 31 Democrats. This was the highest number of Senators ever voting against a Supreme Court nominee, although the two-to-one ratio had occurred several times previously, most notably with Chief Justices Taney and Hughes.¹⁷ By contrast, with Rehnquist taking most of the Senate flak as the point man, the Scalia nomination sailed through the process; Scalia was confirmed by a unanimous vote of 98 to 0.¹⁸ Rehnquist and Scalia were sworn in on September 26.¹⁹ The country has a new Chief Justice, and the Supreme Court has a new member.

How valid are the charges of "extremism"? Will the Court now take a sharp swing to the Right? Has Reagan brought his "revolution" to the Court, too? Of course, at this time the answers to such questions can only be very tentative,²⁰ but most observers feel that a "Rehnquist Court" is still a vote or two away.

THE STUDY

Articles in the popular press, and even in some legal journals, usually attempt to categorize the Justices of the U.S. Supreme Court as "liberal" or "conservative," or as "activists" or "self-restrainers."²¹ This study attempts to provide a more objective measure of the voting proclivities of the Justices in one area of the law--that of state and local taxation. The method is straight-forward and relatively simple: to tabulate the votes of each Justice in each case dealing with this topic, and then to see whether there are measurable differences among them, or noticeable voting patterns.²²

THE DATA

Since the 1975-1976 Term of the Court, when Justice Stevens replaced Justice Douglas, the Court's membership remained relatively constant until 1986. The only change during that period was Justice O'Connor's replacement of Justice Stewart in 1981. Although their combined voting record is used for some statistical comparisons, separate results are also indicated, as appropriate. With only that one change in the make-up of the Court, the data thus lend themselves to statistical comparison.

During these eleven Terms, the Court has filed 50 opinions dealing with the constitutional validity of state and local taxes.²³ Four opinions were filed in the October 1975 Term,²⁴ three during the 1976 Term,²⁵ five during 1977,²⁶ three during 1978,²⁷ six during 1979,²⁸ three during 1980,²⁹ five during 1981,³⁰ six during 1982,³¹ four during 1983,³² seven during 1984,³³ and three during the 1985 Term.³⁴ Of these 50 opinions, 18 were unanimous.³⁵ For some purposes herein, the analysis will be based on the total set of 50 cases, but most attention will be directed to the 32 cases which produced split votes on the Court.

THE CASE-CATEGORIES

In order to facilitate comparative analysis, the 50 cases were grouped into five categories; state income and business activity taxes; Indian taxation; national banks and other immunities; international taxation; discrimination and other constitutional issues. Obviously, with complex, multi-issue cases, any such categorization scheme is bound to contain some elements of arbitrariness, at least at the margin. Nevertheless, categorization seemed essential for this project, due to the variety of issues involved in the cases. The resulting comparisons seem to indicate that the effort was worthwhile.

State income taxes were at issue in Complete Auto,³⁶ Moorman,³⁷ Mobil Oil,³⁸ Exxon v. Wisconsin,³⁹ Asarco,⁴⁰ Woolworth,⁴¹ Container,⁴² and Armco.⁴³ National Geographic involved the validity of state use taxes. (Washington) Department of Revenue tested the imposition of a state business and occupation tax.⁴⁵ Thus, ten of the 50 cases fell into this first category.

Even regular reading of the weekly advance sheets of the Court's opinions cannot convey the relative importance which the current Court is attaching to the issues involved in Indian taxation.⁴⁶ The process of drawing the line between permissible state taxation of activities on Indian reservations, and permissible Indian taxation of those same activities, has been one of the Court's major concerns in this area of the law over the last eleven years. There have been eleven opinions on this topic, with one of them containing decisions on two different taxes: Moe,⁴⁷ Bryan,⁴⁸ White Mountain,⁴⁹ Central Machinery,⁵⁰ Confederated Tribes (two decisions),⁵¹ United States v. New Mexico,⁵² Merrion,⁵³ Ramah,⁵⁴ Montana,⁵⁵ Kerr-McGee,⁵⁶ and Chemehuevi.⁵⁷ Whether the challenge was directed against a state tax or an Indian tax, these cases clearly seemed to warrant separate consideration.

Similarly, there seemed to be an equally obvious category centering around constitutional and statutory immunities from state taxation. Most of the cases in this category involve state efforts to impose various kinds of taxes on banks and savings and loan associations: Diamond National,⁵⁸ First Federal,⁵⁹ Chase Manhattan,⁶⁰ Memphis Bank & Trust,⁶¹ American Bank & Trust,⁶² and First National.⁶³ Pursuant to the general principles first announced by Chief Justice Marshall in McCulloch v. Maryland,⁶⁴ Congress has passed various statutes to protect banks and thrift institutions against ruinous state taxation. States keep trying to tap these sources of revenue, so the scope of these exemptions needs continuing definition. Statutory immunities were also at issue in Arizona Public Service⁶⁵ and Aloha Airlines.⁶⁶ Three recent cases have involved questions of the impact of state taxes on the operations of the national government: Washington v. U.S.,⁶⁷ Franchise Tax Board v. U.S. Postal System,⁶⁸ and Lawrence County.⁶⁹ Together, these various immunity cases were the third largest category (11 of 50).

International taxation cases also seemed to merit separate treatment, due to the unique issues involved, even though only five cases were placed in this category: Michelin Tire,⁷⁰ Japan Line,⁷¹ Xerox,⁷² Westinghouse,⁷³ and Wardair Canada.⁷⁴ The export-import clause of the Constitution clause of the Constitution provides one extra limitation in this area, and as the Court points out in Japan Line, the commerce clause also has a different meaning when state taxes have an international impact. Although "international" issues were also raised in some of the state income tax cases,⁷⁵ they seemed to fit better in that category than this one.

The final category is something of a catchall. It includes those cases alleging discrimination against out-of-state businesses and individuals, and violations of specific constitutional provisions such as the First Amendment. Included here are Boston Stock Exchange,⁷⁶ Baldwin,⁷⁷ U.S. Steel,⁷⁸ Western & Southern Life,⁷⁹ Commonwealth Edison,⁸⁰ Mueller,⁸¹ Minneapolis Star,⁸² Metropolitan Life,⁸³ Maryland v. Louisiana,⁸⁴ Williams,⁸⁵ and Hooper,⁸⁶ and Exxon v. Hunt.⁸⁷ U.S. Steel challenged the validity of the Multistate Tax Compact, under the compact clause of the Constitution.⁸⁸ Mueller dealt with

an alleged First Amendment violation, where state income tax permitted a deduction for certain parochial school expenses.⁸⁹ Minneapolis Star alleged a First Amendment violation where a use tax was imposed on the paper and ink consumed in the production of a newspaper.⁹⁰ Exxon v Hunt⁹¹ claimed that the New York state tax involved was preempted by national law.⁹¹ Each of the other eight cases alleged some form of discrimination against interstate activities.

THE OPINION-WRITERS

There are marked variations in the number of majority opinions written by each Justice. Justice Stewart wrote only one majority opinion in the 22 cases in which he voted, for a majority-writing percentage (in that smaller group of cases) of 4.5%.⁹² Justice O'Connor also wrote just one majority opinion in the 25 cases in which she participated during the 1981-82 to 1985-86 Terms.⁹³ As a team, their two majority opinions make them the lowest producer, with 4.0% of the 50 opinions. Three opinions were unsigned per curiams.⁹⁴ Chief Justice Burger and Justices Stevens and Rehnquist were only a bit more productive in this area, with three majority opinions each, or 6.0% of the total for each.⁹⁵

The six majority opinions by Justice Brennan put him in "double figures," with 12.0 percent of the total.⁹⁶ Justices Powell and White, with six each, also wrote 12.0 percent apiece.⁹⁷ Just two of the Justices--Blackmun and Marshall--have produced over one-third (36.0 percent) of the majority opinions in these 50 cases. Each has written nine majority opinions.⁹⁸ Their voices have clearly been the dominant ones on the subject of state taxation. Five Justices have thus accounted for nearly three-fourths of the Court's 50 opinions; the other four Justices, for not quite one-fourth.⁹⁹

Also instructive is an examination of the distribution of the majority opinions in the 32 cases where the Justices disagreed. Six of these cases involved state income taxes.¹⁰⁰ Indian taxation issues produced eight split votes.¹⁰¹ The immunity cases resulted in four split votes.¹⁰² Three of the five international tax cases produced disagreement.¹⁰³ As one might expect, the discrimination cases resulted in the most split votes--eleven.¹⁰⁴

Here, too, there was a noticeable disproportion in the allocation of majority opinion writing. Justice Powell assumes a more significant role in this distribution, accounting for almost one-fifth of the total majority opinions in these split vote cases (6 of 32).¹⁰⁵ In the six disputed cases involving state income taxes, Powell wrote exactly half of the Court's opinions.¹⁰⁶ He thus becomes the key spokesman for the Court on that subtopic.

Justice Marshall also wrote for the majority in six of the split-vote cases.¹⁰⁷ Marshall's area of interest and expertise is the Indian tax cases, in which he wrote four of the eight majority opinions.¹⁰⁸ Justice White has his double opinion in Confederated Tribes,¹⁰⁹ and Williams,¹¹⁰ plus an opinion on immunities¹¹¹ and one on discrimination.¹¹²

Justice Blackmun counts four majority opinions,¹¹³ so that four Justices write 21 of these 32 opinions for the Court, or almost two-thirds. Blackmun's efforts, however, are scattered, with one opinion on state income taxes,¹¹⁴ one on immunities,¹¹⁵ one on international taxation,¹¹⁶ and one on discrimination.¹¹⁷

Justice Brennan has one opinion on state income taxes,¹¹⁸ one on international taxation,¹¹⁹ and one on discrimination.¹²⁰ Justice Rehnquist wrote one on immunities¹²¹ and one on discrimination.¹²² Chief Justice Burger wrote for the majority in the Xerox case,¹²³ and in Hooper.¹²⁴ Justice Stevens' solo effort was Moorman.¹²⁵ Justice O'Connor's only majority opinion in her 25 votes was the decision for a divided Court in Minneapolis Star.¹²⁶ Justice Stewart wrote no majority opinion in the 32 split-vote cases. Diamond National was a per curiam, although the votes split 7-2.¹²⁷ In the Chemehuevi per curiam, Stevens voted to affirm the Ninth Circuit's invalidation of the California tax; Brennan voted to deny certiorari; Marshall dissent from the summary disposition; and Blackmun voted for plenary consideration of the case.¹²⁸

THE CASE OUTCOMES

The solo opinions of Stewart and O'Connor were against the validity of the tax at issue.¹²⁹ Justice Stevens wrote three opinions in favor of the tax being challenged.¹³⁰ Rehnquist approved two taxes,¹³¹ and disapproved one.¹³² Chief Justice Burger supported one tax, but vetoed two others.¹³³ Two per curiam opinions were against the tax at issue;¹³⁴ Chemehuevi approved California's requiring the Indians to collect the state cigarette tax on sales to non-Indians.¹³⁵

Of the "Big Five" opinion writers, Blackmun voted for the challenged tax in six of the nine cases where he wrote the majority opinion.¹³⁶ Justice Marshall had three opinions in favor of the tax and six against.¹³⁷ Powell¹⁴⁰ wrote in favor of one tax,¹³⁸ and against five others.¹³⁹ So did White,¹⁴¹ Brennan reversed their results, with five opinions upholding the tax,¹⁴² and one against.¹⁴³ Of the 50 challenged taxes, twenty-three were upheld and twenty-seven invalidated--a remarkably even division.

The results in the 32 split-vote cases were less evenly divided: thirteen taxes upheld, nineteen invalidated.¹⁴³

In the six state income tax cases which produced split votes, three were decided each way.¹⁴⁴ Justice Powell wrote three majority opinions invalidating the taxes at issue.¹⁴⁵ Blackmun, Brennan, and Stevens each wrote a majority opinion supporting a tax.¹⁴⁶

Justice Marshall approved one Indian tax,¹⁴⁷ but vetoed three others.¹⁴⁸ Justice White, in his double opinion in Confederated Tribes, upheld one tax and invalidated the other.¹⁴⁹ Justice Powell's opinion in Montana was against the tax.¹⁵⁰ The percuriam opinion in Chemehuevi approved the state's power to require the Indians to collect its cigarette tax.¹⁵¹

Predictably, Justice Rehnquist's opinion in the split-vote immunity case upheld the tax.¹⁵² Justices Blackmun and White each invalidated the tax at issue.¹⁵³ So did the split-vote per curiam opinion.¹⁵⁴

Burger and Blackmun each overruled the challenged "international" tax in their opinions for the Court.¹⁵⁵ Brennan upheld the tax.¹⁵⁶

Of the eleven split-vote discrimination cases, five upheld the tax, and six disapproved.¹⁵⁷ Justice Powell wrote one opinion each way.¹⁵⁸ So did Justice Marshall.¹⁵⁹ Justices Blackmun, Brennan, Marshall, and Rehnquist each approved of the challenged tax.¹⁶⁰ Burger and O'Connor each disapproved one tax; White vetoed two.¹⁶¹

THE WINNING TEAM

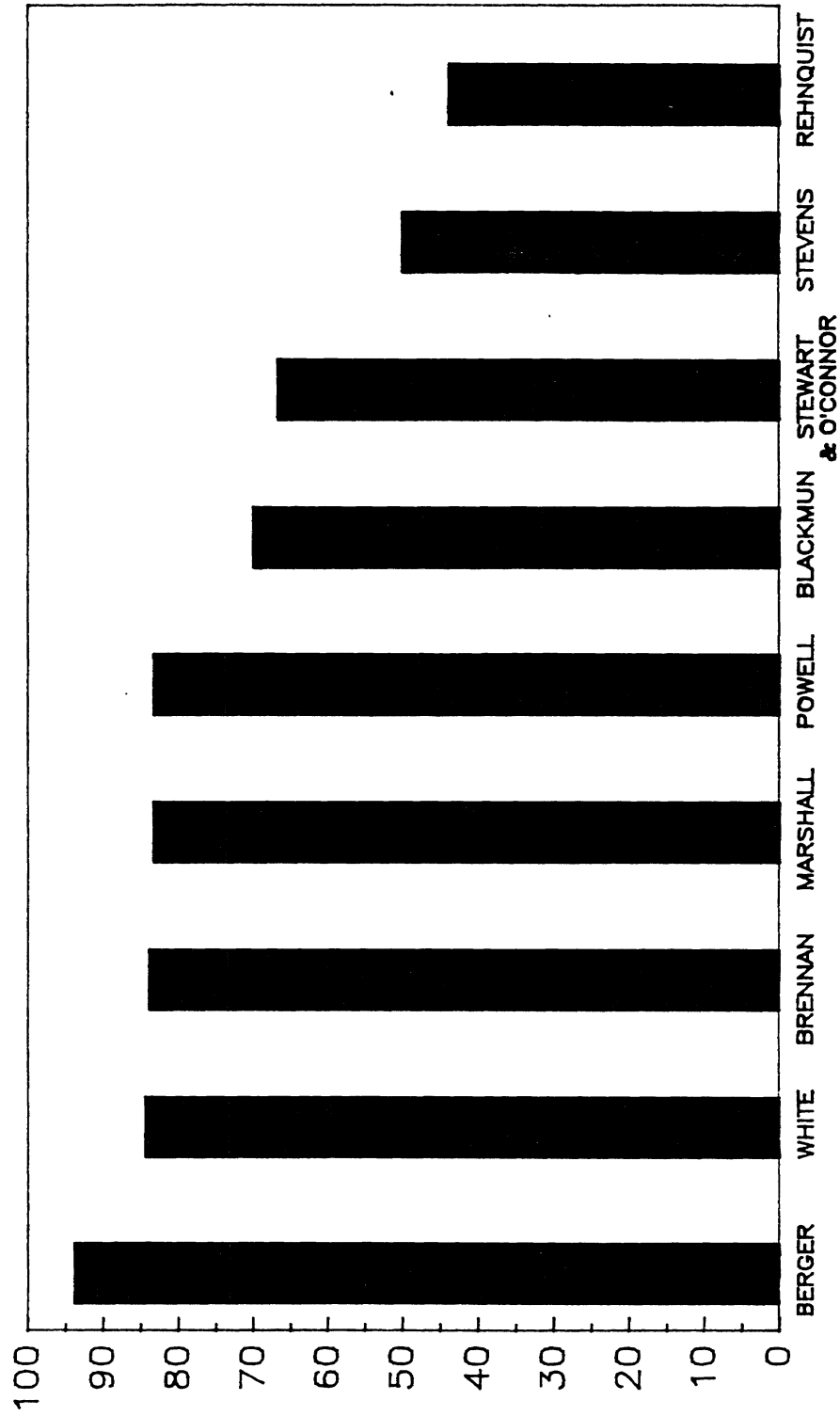
Another interesting measurement involves the number of times each of the Justices voted with the majority. Since all Justices agreed with the result in eighteen of the 50 cases,¹⁶² everyone who participated in these eighteen cases was by definition with the "majority." Moreover, recent decisions have tended to be somewhat more divided than those earlier in this eleven-year period. Three of four decisions during the 1975 Term, all three during the 1976 Term, two of five during the 1977 Term, and two of three during the 1978 Term were unanimous.¹⁶³ In other words, during these first four terms, two-thirds of the Court's decisions in state taxation cases were unanimous. By contrast, during the last seven Terms involved in this study, there have been only eight cases in which all participating Justices agreed on the result.¹⁶⁴ For these last seven Terms, the Court's unanimity percentage drops to 23 percent; disagreement was thus almost three times as likely to occur. As previously noted, in the 32 cases where the Justices disagreed as to the results, the majority voted to uphold the challenged tax in thirteen, and to invalidate it in nineteen.¹⁶⁵

For all these reasons, it seemed advisable to calculate "winning" percentages both ways--using all 50 cases, and using only the 32 cases in which at least one Justice disagreed. Obviously, there were degrees of disagreement--all the way from 8 to 1, to 5 to 4. In five cases, the votes were in fact 8-1;¹⁶⁶ in two cases, 7-1;¹⁶⁷ in one, 6-1,¹⁶⁸ and in one, 5-1.¹⁶⁹ Seven-to-two votes appeared in five cases;¹⁷⁰ one case was decided 6-2.¹⁷¹ Six-three splits were the most common, appearing thirteen times.¹⁷² (Six of the 6-3 cases were in favor of the tax; seven were against.¹⁷³) The classic 5-4 split occurred four times.¹⁷⁴

With all 50 cases included, Chief Justice Burger has the highest winning percentage--a phenomenal 95.3, with 47 majority votes out of the 49 cases in which he participated. White scores 90.0 (45 wins in 50 cases). Just behind are Brennan and Marshall--tied at 89.6 (43 wins in 48 cases), and Powell at 89.4 (42 of 47 wins). There is then a notable drop-off to Blackmun at 81.3 (39 wins of 48 cases). Lagging behind is the Stewart-O'Connor team at 78.7 (37 wins of 47 cases). Stewart did a bit better by himself, winning at 81.8 percent (18 of 22 cases); O'Connor separately stands at 76.0 percent (19 wins and six dissents). A further drop-off occurs to Justice Stevens' 67.3 percent (33 wins, 16 dissents). The most frequent dissenter in these cases is Justice Rehnquist. His winning percentage is 63.2, with 31 wins in 43 cases.

TABLE 1
 % VOTES WITH MAJORITY (32 CASES)

PERCENT

With the unanimous votes removed, the winning percentages look quite different. Burger, at 93.8 (30 of 32), is still clearly the leader. White is second at 84.4 (27 of 32); Brennan registers 83.9 (26 of 31). Marshall and Powell tie for fourth at 83.3 (25 of 30), close behind Brennan and White.

After this top five, there are significant fall-offs. Blackmun is over thirteen points lower at 70.0 (21 of 30), followed by the Stewart/O'Connor team at 66.7 (20 of 30). Stewart separately is 8 of 12; O'Connor is 12 of 18. Stevens is sixteen points lower at 50.0 (16 of 32)--exactly half his votes with the majority. Rehnquist is in a class by himself, with only 14 of 32 votes with the majority, for a 43.8 mark, another six points below Stevens.

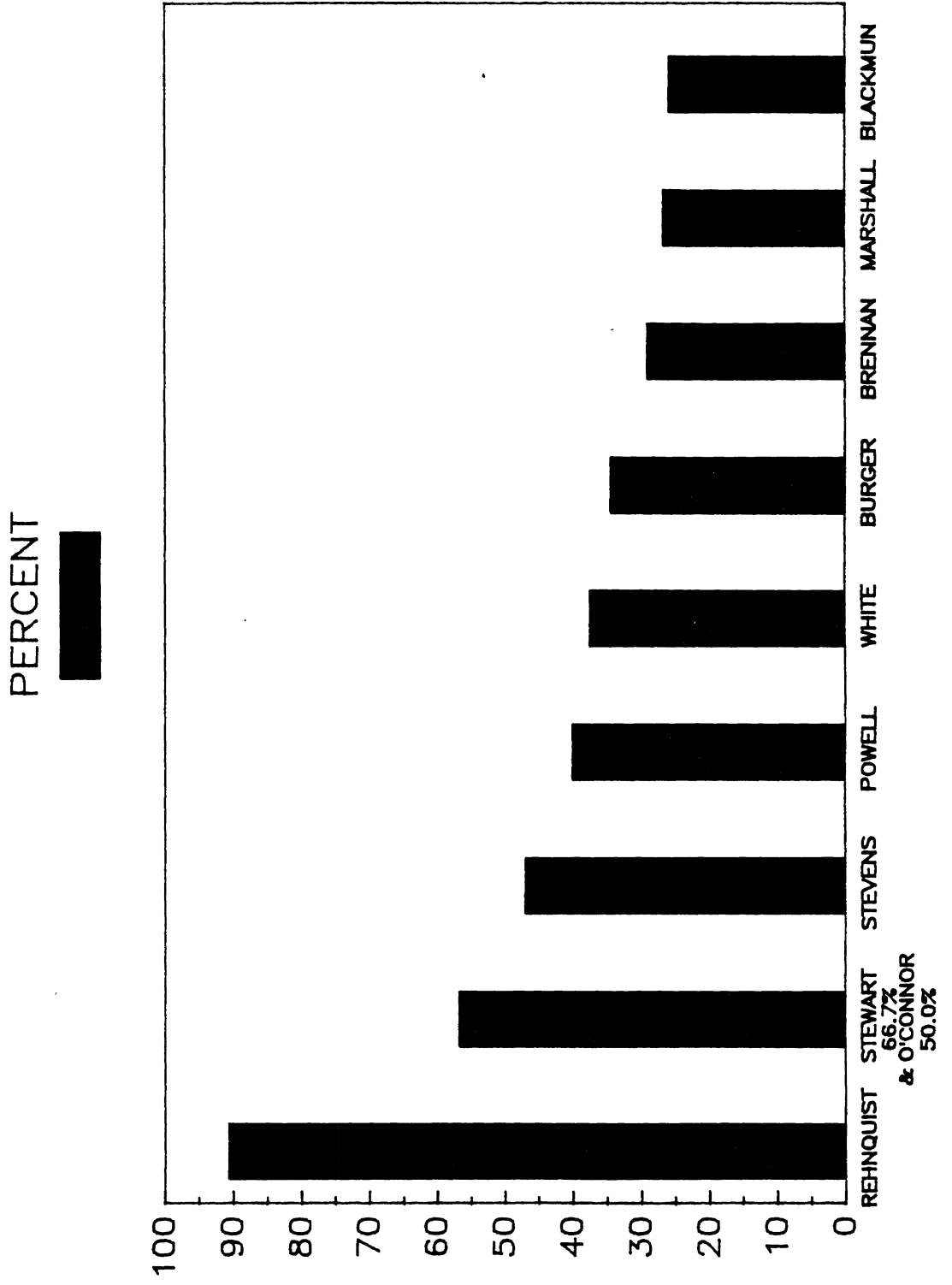
THE YES VOTES

The data in Table II indicate some interesting voting patterns among the Justices. Justice Rehnquist can clearly be counted on to vote for nearly any challenged state tax, at least in cases where the issues are close enough to produce a split vote on the Court. His voting record in the 32 split-vote cases over the past eleven years is truly astonishing: 29 of 32 votes in favor of the challenged state tax. One of his "No" votes is explainable due to the fact that an Indian tax was at issue there; as developed by the majority opinion, ¹⁷⁵ the Indian tax had the effect of depriving the state of the revenues at issue. Thus this vote was really also a vote "for" the taxing power of the states. His "Yes" percentages, based on 29 of 32 Yes votes is a staggering 90.6%! Eliminating the Merrion vote, it rises to 93 percent. At this rate, Justice Rehnquist approaches the ideological purity of Ivory Soap (99.4%). He is clearly an outlier.

Justice Blackmun, on the other hand, can be counted on to vote against the tax most (74.2 percent) of the time, although not in the extreme percentages of Rehnquist. Justices Marshall (73.3 against), Brennan (70.4), Burger (65.6) White (62.5), and Powell (60.0) were also key votes against the challenged tax in the split-vote cases. Stevens is also slightly more likely to vote against a tax than for it, in a split-vote case (53.1% against; 46.9% for). He is thus not a dependable member of any potential pro-tax, Rehnquist-led coalition.

Only the Stewart-O'Connor team, in addition to Rehnquist, has voted for over half the challenged taxes in the 32 split-vote cases (17 of 30 votes). Even here, however, the signs are anything but encouraging for the Rehnquist position. Justice Stewart voted for the tax in these cases at a rate of 66.7% (8 yes of 12 votes). His successor, Justice O'Connor, is as likely to vote against a tax as for it (9 yes of 18 votes). Thus, of the current members of the Court, only Rehnquist is voting for the tax in more than half of the split-vote decisions.

TABLE II
 % YES VOTES (FOR THE TAX) (32 CASES)



Faced with these odds, it is no wonder that Rehnquist is having difficulty building coalitions to uphold state taxes, and is therefore having to dissent more frequently. With Stewart on the Court, Rehnquist was on the winning team in 7 of 13 split-vote cases, all seven of which upheld the tax at issue. With O'Connor having taken Stewart's place, Rehnquist has been with the majority in only seven of 19 cases, and two of these were "no" votes.

Perhaps even more instructive than the total Yes votes are the Yes votes by category, reported in Table III, and the Justices' Yes vote rankings by category, shown in Table IV.

Some notable differences are observable in the Justices' voting behavior across the five categories, even when all 50 cases (including the eighteen unanimous opinions) are used. Since only five cases were placed in the International category, a change of one vote means a variation of twenty percentage points, if the Justice voted in all five cases. Only two votes separate the maximum Yes support of Rehnquist and Powell (3 of 5, for 60 percent) from the single Yes vote of Blackmun (1 of 5, for 20 percent). Justices Stevens, O'Connor, and Stewart also voted Yes in only one international case each, but since they did not vote in all five of these cases, their respective Yes percentages are 25.0, 33.3, and 50.0.

Major variations are observable in the Yes votes on the ten Income tax cases. Justice Rehnquist's Yes percentage again ranks number one, with 9 of 9 Yes votes (100 percent support for these taxes). Stewart has the same Yes percentage, since he voted for the income tax in all four cases in which he participated. Blackmun and White also supported most of these taxes (8 of 10, or 80.0 percent, for Blackmun; 7 of 10, or 70.0 percent, for White). While Rehnquist was supporting all these taxes, Powell voted for only half of them (5 of 10). Brennan and Burger also voted in favor of five each, out of the nine cases in which each of them participated. Rehnquist was thus a sure vote for state income taxes, while Powell, Brennan and Burger were toss-ups.

Lesser, but still significant variations are observable in the eleven Immunities cases. Rehnquist still has the highest percentage of Yes votes, but he is much closer to his average in the International cases than to his perfect 100 percent in the Income tax cases. He voted for 7 of 11 challenged taxes in the Immunities category, for a Yes percentage of 63.6. Stevens cast only one fewer Yes votes in this category (6 of 11) for a Yes percentage of 54.5. At the bottom of the list are Blackmun, Marshall, and White, each of whom voted Yes on three of the 11 challenged taxes. (Stewart voted Yes in only one of the four Immunities cases in which he participated; the Stewart/O'Connor tandem voted Yes in 4 of 10 cases in which they participated.)

The two largest categories, Indian taxation and Discrimination, also contain the largest absolute variations. Whereas the range from high to low was only two votes in the International category, and only four votes in Income and in Immunities, the range is six votes in Indian tax cases, and eight votes in the Discrimination category! Rehnquist voted for 9 of 12 challenged taxes in the Indian category. At the other extreme, Brennan and Marshall each voted Yes on three of 11 challenged taxes in this group. Clearly, the issues involved in this category are perceived very differently by the Justices.

TABLE III

% YES VOTES--BY CATEGORIES--ALL 50 CASES

	INCOME	INDIAN	IMMUNITIES	INT'L	DISCRIMINATION
R	100.0(9/9)	R:75.0(9/12)	R:63.6(7/11)	R:60.0(3/5)	R:83.3(10/12)
ST	100.0(4/4)	O:66.7(4/6)	SV:54.5(6/11)	P:60.0(3/5)	O:66.7(4/6)
BL	80.0(8/10)	SV:58.3(7/12)	O:50.0(3/6)	ST:50.0(1/2)	ST:66.7(4/6)
S/O:	75.0(6/8)	S/O:58.3(7/12)	S/O:40.0(4/10)	S/O:40.0(2/5)	S/O:66.7(8/12)
W	70.0(7/10)	W:58.3(7/12)	BR:36.4(4/11)	BR:40.0(2/5)	BU:41.7(5/12)
M	66.7(6/9)	ST:50.0(3/6)	BU:36.4(4/11)	BU:40.0(2/5)	P:40.0(4/10)
SV	60.0(6/10)	P:45.5(5/11)	P:36.4(4/11)	M:40.0(2/5)	BR:33.3(4/12)
BR	55.6(5/9)	BL:36.4(4/11)	BL:27.3(3/11)	W:40.0(2/5)	M:33.3(4/12)
BU	55.6(5/9)	BU:33.3(4/12)	M:27.3(3/11)	O:33.3(1/3)	SV:33.3(4/12)
P	50.0(5/10)	BR:27.3(3/11)	W:27.3(3/11)	SV:25.0(1/4)	SV:33.3(4/12)
O	50.0(2/4)	M:27.3(3/11)	ST:25.0(1/4)	BL:20.0(1/5)	BL:16.7(2/12)

% YES VOTES--BY CATEGORIES--32 SPLIT-VOTE CASES

	INCOME	INDIAN	IMMUNITIES	INT'L	DISCRIMINATION
R	100.0(6/6)	R:85.7(7/8)	R:100.0(4/4)	R:66.7(2/3)	R:90.7(10/11)
ST	100.0(1/1)	ST:75.0(3/4)	SV:75.0(3/4)	P:66.7(2/3)	ST:80.0(4/5)
BL	66.7(4/6)	SV:62.5(5/8)	O:50.0(1/2)	O:50.0(1/2)	S/O:72.7(8/11)
S/O:	60.0(3/5)	S/O:62.5(5/8)	S/O:33.3(1/3)	BR:33.3(1/3)	O:66.7(4/6)
O	50.0(2/4)	W:62.5(5/8)	BR:25.0(1/4)	BU:33.3(1/3)	BU:45.5(5/11)
W	50.0(3/6)	O:50.0(2/4)	BU:25.0(1/4)	M:33.3(1/3)	P:44.4(4/9)
M	40.0(2/5)	P:37.5(3/8)	P:25.0(1/4)	SV:33.3(1/3)	BR:36.4(4/11)
SV	33.3(2/6)	BL:28.6(2/7)	BL:-0-(0/4)	S/O:33.3(1/3)	M:36.4(4/11)
BR	33.3(2/6)	BU:25.0(2/8)	M:-0-(0/4)	W:33.3(1/3)	SV:36.4(4/11)
BU	33.3(2/6)	BR:14.3(1/7)	ST:-0-(0/1)	BL:-0-(0/3)	W:27.3(3/11)
P	16.7(1/6)	M:14.3(1/7)	W:-0-(0/4)	ST:-0-(0/1)	BL:18.2(2/11)

TABLE IV

% YES VOTES--RANK BY CATEGORIES--ALL 50 CASES.

	INCOME	INDIAN	IMMUNITIES	INT'L	DISCRIMINATION	AVE.
BL	2	6	7	9	9	6.6
BR	7	8	4	3	5	5.4
BU	7	7	4	3	3	4.8
M	5	8	7	3	5	5.6
P	9	5	4	1	4	4.6
R	1	1	1	1	1	1.0
SV	6	2	2	8	5	4.6
ST/O	3	2	3	3	2	2.6
W	4	2	7	3	8	4.8

O	9	2	3	7	2	4.6
ST	1	5	9	2	2	3.8

% YES VOTES--RANK BY CATEGORIES--SPLIT-VOTE CASES

	INCOME	INDIAN	IMMUNITIES	INT'L	DISCRIMINATION	AVE.
BL	2	6	7	9	9	6.6
BR	6	8	4	3	5	5.2
BU	6	7	4	3	3	4.6
M	5	8	7	3	5	5.6
P	9	5	4	1	4	4.6
R	1	1	1	1	1	1.0
SV	6	2	2	3	5	3.6
ST/O	3	2	3	3	2	2.6
W	4	2	7	3	8	5.2

O	3	4	3	2	2	2.8
ST	1	2	7	9	2	4.2

An even wider gulf separates the Justices in the Discrimination cases. Rehnquist has his second highest Yes percentage in this category (10 Yes votes of 12, for 83.3 percent). In contrast, Blackmun voted for only two of these 12 challenged taxes, and White, for only three. Blackmun's 16.7 Yes percentage here stands in sharp contrast to his 80.0 percent support of Income taxes. For White, the Yes percentages are 25.0 percent Yes on Discrimination issues, versus 70.0 percent Yes on Income taxes. Obviously, these two Justices perceive significant differences in the issues raised in these two categories. For Income taxes, Blackmun was the second most likely supporter, and White the fourth most likely supporter of the tax at issue. In the cases raising Discrimination issues, they are the two least likely supporters of the challenged tax.

Removal of the unanimous opinions from each category provides a further refinement of this analysis. Using only the 32 split-vote opinions, there are three cases in the International category, four on Immunities, six on Income taxes, eight on Indian taxation, and eleven on Discrimination issues. With these deletions, the relative size of the categories changes dramatically. The Immunities category, which had contained 11 of the 50 total cases, now counts for only 4 of 32 split-vote cases, just one more than International. Similarly, only six of the ten Income tax cases produced split votes. While the relative rankings of the Justices remain generally the same within this smaller subset of cases, their respective degrees of support for the challenged taxes show even more variation. By removing the 18 cases on which all Justices agreed, the differences among them stand out more sharply.

Since there were only the three split-vote cases in the International category, and only four on Immunities, there is not much room for variation among the Justices. Nonetheless, even in these very small groupings, there are clearly different perceptions at work. Rehnquist and Powell each voted Yes in two of the three International cases; Blackmun voted for none of the three. (Stewart voted against the tax in his only International case.) On Immunities, Rehnquist voted Yes in 4 of 4 cases, and Stevens in 3 of 4. At the other extreme, Blackmun, Marshall, and White voted for none of the 4. (Stewart again voted No in the only Immunities case in which he participated.) Blackmun thus voted against every challenged tax in these two categories, while Rehnquist voted Yes on six of seven. Stewart was also not impressed too easily on the issues involved in these two categories, since he voted against both taxes in the two split-vote cases in which he participated.

Although the Income tax category shrank to six split-vote cases (from the original total of ten), the smaller number produced even larger percentage variations between the Justices. Justice Powell voted for half of the 10 challenged taxes in this category, but since four of his Yes votes were in unanimous cases, he voted for only one of six taxes in the split-vote cases. Rehnquist again has a perfect score: 6 Yes votes in 6 cases. Obviously, the percentage variation between these two extremes is very large--83.3 points. Brennan, Burger, and Stevens each voted Yes in only two of six cases; Marshall, in two of five.

Eight split-vote decisions remain in the Indian category after the four unanimous cases are removed. Here too, there are significant percentage variations among the Justices. Rehnquist again leads the way, with 7 Yes votes out of the eight decisions. Brennan and Marshall each supported only one Indian tax out of the seven decisions in which they participated. (Blackmun voted Yes on only two of seven taxes; Burger, on only two of eight.)

Once again, the range between the high and low Yes percentages is very large: 71.4 points. Stevens, White, and the Stewart/O'Connor team also voted for the challenged Indian taxes more than half the time (5 Yes votes for each). The issues at stake in this group of cases were also viewed quite differently by the different Justices, and, in the case or particular Justices, differently than they viewed the issues in other categories. Blackmun's 2 Yes votes of seven in this category contrast with his 4 of 6 Yes votes on state Income taxes, and with his combined zero for seven on the International and Immunities cases. Blackmun, at least, seems to be applying different tests of validity to taxes in the different categories.

Blackmun is also the least likely to cast a Yes vote in the largest group of split-vote cases--the Discrimination category. He voted Yes in only two of 11 of these cases. White voted in favor of only three of these taxes. Their low levels of support contrast sharply with Rehnquist's ten Yes votes in the eleven cases. Rehnquist has 90.7 percent Yes votes here; Blackmun, 18.2 percent. Once again, the variation is over seventy percentage points. Since this is by far the largest group of split-vote cases (just over one-third of the 32), there is of course more room for disagreement. The wide disparity in results in this largest category would seem to confirm the fact that the Justices view these cases quite differently. Blackmun voted against nearly all the challenged taxes in four of the five categories (four total Yes votes out of 25 cases). Conversely, Rehnquist voted for nearly all the challenged taxes in all five categories (29 Yes votes in 32 decisions). The Stewart/O'Connor combination votes for one-third of the taxes in the International and Immunities categories, but for slightly more than half of the challenged Income taxes (3 of 5 Yes) and Indian taxes (5 of 8), and for nearly three-fourths of the taxes in the Discrimination category (8 of 11). Stewart and O'Connor seem singularly unimpressed by the "discrimination" arguments, but somewhat more sympathetic to the problems involving International and Immunities issues. Burger voted Yes on almost half of the Discrimination decisions (5 Yes votes of 11), but only cast two Yes votes of 6 in the Income tax category, 2 of 8 on Indian taxes, 1 of 4 on Immunities, and 1 of 3 in the International category.

Table IV demonstrates these variations another way, by showing the Justices' relative rankings in each of the five categories. Rehnquist is number one in Yes votes in each category, although he is tied by Powell in the smallest category, International taxation. Stewart/O'Connor together rank second or third in each category. As indicated by the data summarized above, Blackmun ranks lowest in Yes votes in three categories, sixth in the Indian category, and second in the Income tax category. Powell's Yes ranking drops from number one on International, to fourth on Immunities and Discrimination, to fifth on Indian taxes, to ninth on Income taxes. He too is using a very different constitutional yardstick to measure the issues in the various categories.

In sum, it is clear that there are significant variations across categories in the voting patterns of individual Justices, as well as significant differences between Justices.

THE FAVORITE PARTNERS

Table V lists the number of times each Justice voted with each colleague, and the resultant percentages. Table VI ranks the percentages for each two-Justice voting combination, in the 32 split-vote cases, excluding those cases where one of the two did not vote. Table VI also indicates the spread between each Justice's favorite partner and least-favorite partner, and the average voting-with percentage for each Justice.

Here, too, some interesting voting patterns are observable. Brennan and Marshall are the Castor and Pollux of state taxation, voting together 93.3% of the time. Each is by far the other's favorite partner, and this is far and away the most frequently occurring combination. Marshall is also White's favorite partner (80.0%); White is thus ranked number two by Marshall. Burger and Powell are also closely aligned at 83.3%, making each the other's favorite voting-mate. Burger also ranks first with the Stewart/O'Connor team (66.7%). Stewart/O'Connor in turn rates number one with Rehnquist, at 63.3%; they rank him second (Stewart voting with Rehnquist 8 of 12 times). Blackmun (64.5%) and Stevens (53.1%) rate White as their favorite partner.

Brennan is the likeliest partner for Blackmun (65.5%), and second for Burger (77.4%) and Powell (72.4%). These percentages affirm Brennan's reputation as a master coalition-builder.¹⁷⁶ Burger was the second choice of Brennan (77.4%), Stevens (50.0%), and White (75.0%), which helps explain why Burger was on the Winning Team 93.8 percent of the time. White was Marshall's second choice (80.0%). Rehnquist's second favorite partner was Stevens, at 50.0%; the other six Justices each voted with Rehnquist less than 50 percent of the time.

Rehnquist was the least favorite partner for six of the other eight Justices: Blackmun (29.0%), Brennan (32.3%), Burger (43.8%), Marshall (30.0%), Powell (33.3%), and White (40.6%). Reciprocally, Blackmun was Rehnquist's least favorite partner, followed by Marshall, Brennan, and Powell. The true extent of Rehnquist's isolation from his Brethren on these state taxation issue is shown by his relative rankings of Burger and White. Rehnquist is Burger's least favorite voting partner, at 43.8%, but that percentage makes Burger Rehnquist's third most likely partner. Similarly, Rehnquist is last with White, at 40.6%, but that rate makes White Rehnquist's fourth most likely partner. The Stewart/O'Connor team and Stevens each rate the other as the least favorite partner, at 40.0%, a rate which approaches some of those for Rehnquist. This antipathy between Rehnquist's two favorite partners makes his coalition-building job next to impossible: while each of them votes with him at least half the time (and they are the only Justices to do so), they also vote against each other sixty percent of the time.

Obviously, many win/lose combinations are possible, since the votes may range from 8 to 1, to 5 to 4, and since Marshall, Powell, Stewart, and O'Connor each sat out one case. The combined partner-percentages nevertheless seem to give a rough indication of the likelihood that a particular Justice will be part of a winning coalition. Justices Burger (66.8%), Marshall (65.0%), Brennan (64.8%), White (63.1%), and Powell (61.0%) average in the mid-to-low sixties; each of them voted with the majority over eighty percent of the time. Justices Blackmun (55.2%) and Stewart/O'Connor (57.1%) averaged in the mid fifties; their winning percentages were 70.0, and 66.7. Stevens'

TABLE V

THE FAVORITE PARTNERS

3 TIMES VOTING WITH EACH COLLEAGUE (32 CASES)

	BL	BR	BU	M	P	R	SV	SW/O	W
BL	X	20	13	13	18	9	14	15	20
BR	20	X	24	28	21	10	13	18	23
BU	12	24	X	23	25	14	16	20	25
M	13	28	23	X	18	9	15	18	24
P	18	21	25	18	X	10	13	17	20
R	2	10	14	9	10	X	16	10	13
SV	14	13	16	15	13	16	X	12	17
SW/O	15	18	20	18	17	10	12	X	15
W	20	23	22	24	28	13	17	15	X

SW	4/12	7/12	8/12	8/12	6/11	8/12	7/12	X	6/12
O	10/15	11/15	12/18	11/17	10/17	11/18	5/18	X	9/18

PERCENT VOTING WITH EACH COLLEAGUE, EXCLUDING ABSTENTIONS (32 CASES)

	BL	BR	BU	M	P	R	SV	SW/O	W
BL	X	64.5	61.3	63.3	62.1	27.0	45.2	51.7	64.5
BR	64.5	X	77.4	93.3	72.4	32.3	41.9	62.0	74.9
BU	61.3	77.4	X	75.9	83.3	43.8	50.0	66.7	75.0
M	63.3	93.3	75.9	X	64.3	20.0	50.0	62.1	80.0
P	62.1	72.4	83.3	64.3	X	33.3	44.8	60.7	66.7
R	23.0	32.3	43.8	30.0	33.3	X	50.0	63.3	40.6
SV	45.2	41.2	50.0	50.0	44.8	50.0	X	40.0	53.1
SW/O	51.7	62.0	65.7	62.1	60.7	63.3	40.0	X	50.0
W	64.5	74.9	75.0	80.0	66.7	40.6	53.1	50.0	X

TABLE VI
THE FAVORITE PARTNERS - BY PERCENTAGES

	BL	BR	BU	M	P	R	SV	SW/O	W
SPREAD	35.5	61.0	39.5	63.9	43.4	34.3	13.1	26.7	39.4
1.	W 64.5	M 93.3	P 83.3	BR 93.3	BU 83.3	SO 63.3	W 53.1	BU 66.7	M 88.6
2.	BR 64.5	BU 77.4	BR 77.4	W 80.0	BR 78.4	SV 51.0	BU 50.0	R 63.3	BU 75.0
3.	M 63.3	W 74.3	M 76.9	BU 75.9	W 66.7	BU 43.8	R 50.0	M 62.1	BR 74.9
4.	P 62.1	P 72.4	W 75.0	P 64.3	M 64.3	W 40.6	M 50.0	BR 62.1	P 66.7
5.	BU 61.3	BL 64.5	SO 66.7	BL 63.3	BL 62.1	P 33.3	BL 45.2	P 60.7	BL 64.5
6.	SO 51.4	SO 62.0	BL 61.3	SO 62.1	SO 60.7	BR 32.3	P 44.8	BL 51.7	SV 53.1
7.	SV 45.2	SV 41.9	SV 50.0	SV 50.0	SV 44.8	M 30.0	BR 41.9	W 50.0	SO 50.0
8.	R 23.0	R 32.3	R 43.8	R 30.0	R 33.3	BL 29.0	SO 40.0	SV 40.0	R 40.6

COMBINED	441.6	518.7	534.4	510.0	487.6	322.3	375.0	456.6	594.8
AVERAGES	55.2	64.8	66.8	65.0	61.0	40.3	46.9	57.1	63.1

JUSTICES' FAVORITE PARTNERS - BY RANK

	BL RANKS	BR RANKS	BU RANKS	M RANKS	P RANKS	R RANKS	SV RANKS	SW/O RANKS	W RANKS	
(AVERAGE RANK)										
45(5.625)	BL	X	5	6	5	5	8	5	6	5
26(3.250)	BR	1	X	2	1	2	6	7	3	3
19(2.375)	BU	5	2	X	3	1	3	2	1	2
25(3.125)	M	3	1	3	X	4	7	2	4	1
33(4.125)	P	4	4	1	4	X	5	6	5	4
52(6.500)	R	8	8	8	8	8	X	2	2	8
50(6.375)	SV	7	7	7	7	7	2	X	8	6
45(5.625)	S/O	6	6	5	6	6	1	8	X	7
25(3.125)	W	1	3	4	2	3	4	1	7	X

combined partner-percentage was 46.7; his winning percentage was 50.0. Rehnquist is an outlier by both measures: 40.3 partner-percentage, and 43.8 winning percentage.

Finally, the "spread" indicates the range between a Justice's percentage of votes with the favorite partner and that with the least favorite partner. As shown by their spread percentages of 63.3 points and 61.0 points, Marshall and Brennan are men of extremes. They voted with each other over ninety percent of the time (93.3%), but voted with Rehnquist only 20.0% and 29.6%, respectively. Stevens, on the other hand, is almost as likely to vote with any of the other Justices as against them; he is clearly the man in the middle. His voting rate with his favorite partner, White, was only 53.1%; he voted with the Stewart/O'Connor team, his least favorite partner, 40.0 percent of the time. His spread differential is thus the narrowest of margins--13.1 points. The Stewart/O'Connor record shows only a little more variation--just 27.7 points between their favorite Burger and their least favorite Stevens. Rehnquist's relatively low point spread of 34.3 is understandable, since he didn't vote with anyone as frequently as most of the other Justices, and was voted against most frequently by the other Justices. The variations for the other four Justices are all over 35 points; Powell's is nearing 50 points. The wider this range, the more difference a Justice perceived among his colleagues, as being in agreement or disagreement with his own views on the taxes at issue. The narrower this range, the more a Justice perceived his colleagues' views as being about the same, as compatible or incompatible with his own.

THE NEW PLAYER

Justice Scalia's elevation to the Court introduces a new unknown into our equation. While he is said to be a philosophical conservative, that term is not very useful as a voting predictor in state taxation cases, as indicated by the data explained above. Justices Rehnquist, Burger, and Powell would all generally be described as "conservatives," but their voting records in these cases are quite different. Rehnquist almost always voted for the challenged tax; Burger, at least towards the end of his tenure, usually voted against the tax; Powell regularly voted against some types of taxes, but in favor of others. Scalia's conservatism may provide a clue as to his probable votes on some issues, but it is not much help here.

The journal articles which Scalia authored or co-authored are likewise of limited predictive value, since most of them deal with administrative law, the subject which he taught prior to his appointment to the Court of Appeals.¹⁷⁷ A LEXIS search produced fourteen other journal articles in which "Scalia" appeared in combination with "state tax."¹⁷⁸ Obviously, most of these articles are general commentaries on the work of the courts, in which the terms would both appear, but not necessarily in relation to each other. These general commentaries by other authors contain little or no guidance as to how Justice Scalia will perceive the issues involved in the constitutionality of various types of state taxes.

Finally, since the best predictor of how a judge will vote in the future is his voting pattern in the past, a LEXIS search was also made of the USAPP (Court of Appeals) file, using the combination "Scalia and State within/8 tax!" LEXIS listed 24 cases containing that word combination.¹⁷⁹ Again, most of these cases are not even marginally relevant to state taxation issues. Several of them are appeals involving issues of United STATES TAX law, thus they appeared on the list if Scalia was on the panel which decided them.¹⁸⁰ Several involve issues of state taxes as part of compensable "costs" under various government programs.¹⁸¹ Incredibly, one listed case is the appeal of a criminal conviction for possession of heroin!¹⁸² In one case, which does involve the validity of certain taxes levied by the Virgin Islands, Scalia appears only in two footnotes, as an Assistant Attorney General who exchanged letters with the Department of the Interior in 1975.¹⁸³ Two of the cases do cite the Boston Stock Exchange decision, which is one of the 50 Supreme Court cases in our main data set,¹⁸⁴ but do so only on the issue of standing to challenge a regulation.

Only two cases seem to be closely enough related to state tax problems to be worth further examination--Pearlstein, and Covelo Indian Community.¹⁸⁵ Pearlstein is an appeal from a ruling on priorities in a bankruptcy proceeding. The D.C. Bankruptcy Court held that a District of Columbia lien for unpaid sales taxes, although perfected later, had priority over an earlier perfected security interest arising from a loan to the debtor business.¹⁸⁶ The SBA had guaranteed a portion of the loan, paid off the bank when the debtor business defaulted, and taken an assignment of the bank's claim and perfected security interest.¹⁸⁷ The D.C. District Court reversed, holding that "the concept of 'first in time, first in right' applies with full force when a perfected security interest is faced with a statutory tax lien."¹⁸⁸ A unanimous panel of the D.C. Court of Appeals (which included Scalia) reversed the District Court and reaffirmed the Bankruptcy Court's analysis. The Court of Appeals held that the priority of valid liens must be determined by non-bankruptcy law, and that the D.C. tax statute involved specifically granted priority to tax claims by the District.¹⁸⁹ Scalia's agreement with this decision affirming to the "state's" (District's) taxing powers might be read as an indication of his willingness to defer to the states in tax matters. Conversely, since the precise issue in the case is a question of lien priorities in bankruptcy, it might also be argued that this decision can not really be used as a predictor of his views on the constitutionality of the various state taxes which he will confront.

Covelo Indian Community v. Watt is of even less direct relevance to state taxation issues. It does, however, involve Indian claims, and might therefore provide a vague hint of Scalia's feelings about the special legal status of Indians, which has been a major issue in that sub-set of state tax cases. The majority of the D.C. Court of Appeals affirmed a District Court order which directed the Secretary of the Interior, James Watt, to submit to Congress by December 15, 1982, legislative proposals for resolving certain Indian claims; to institute litigation to prevent the statute of limitations from running on those claims if the necessary legislative proposals could not be submitted by that date; and to notify the Indian claimants of the status of their claims.¹⁹⁰ Watt argued that the Indian claimants lacked standing to bring the suit; that the statute involved did not require the government to submit legislative proposals; and that, since he had already told Congress why further legislation on these claims was unwarranted, requiring him to do more

would violate the separation of powers doctrine.¹⁹¹ Scalia's dissent may be founded on one of these specific legal points, such as separation of powers, or may presage a general reluctance to grant a special legal status to Native Americans. Here again, the evidence is too scanty and too marginally relevant to venture a solid prediction.

CONCLUSIONS

What does the foregoing analysis of the Supreme Court's voting patterns in state taxation cases tell us? First, Justice Rehnquist is clearly a "Man With A Mission." The data fairly cry out with his obvious bias in favor of the states. We already knew of this favoritism, from other sources,¹⁹² but the evidence presented here is clear--and convincing. If we accept the premise that a case in which certiorari has been granted by the U.S. Supreme Court must have some pretty fair legal arguments on each side, one would expect that a dispassionate examination of the merit of each case would produce a distribution of results somewhere around 50-50. As the data indicate, Justice Rehnquist's votes hardly represent a random distribution.

Rehnquist's isolation from his colleagues on state taxation issues is demonstrated by several facts. He is the least favorite voting partner for six of his eight colleagues. Only two of the current members vote with him half the time or more--Stevens (16 of 32 cases) and O'Connor (11 of 18 cases). He has lost Stewart, who voted with him in 8 of the 12 cases in this period. His third and fourth favorite partners both rank him as their least favorite partner. He dissented alone in 4 of 32 cases, or 12.5% of his votes; there were only five other solo dissents out of the 248 votes cast by the other eight Justices--just over two percent.

Barring the appointment of one or more additional new Justices, or a significant change of position by one or more current Justices, it seems unlikely that Rehnquist will be able to put together a winning coalition in support of most state taxes. He voted with the majority in seven split-vote cases during the 1977 to 1980 Terms; Stevens and Stewart voted together in three of the six of these cases where they both participated. They also voted together with Rehnquist on two of his six dissents during the 1975 through 1980 Terms. In contrast, Justice Stevens has voted with O'Connor in only two of the seven Rehnquist majorities since she came on the Court in 1981, and one was the atypical Xerox case, with a NO majority. Stevens and O'Connor have voted together in only one of Rehnquist's twelve dissents. If Stevens had joined Rehnquist, O'Connor, Brennan and Marshall in the Metropolitan Life case, the outcome would have changed and the tax would have been upheld.

In addition to his difficulties in getting Stevens and O'Connor to work together, Rehnquist also lost Burger's vote--almost completely. Burger voted with Rehnquist in 7 of 13 splits from 1975/76 through 1980/81. Leaving out Xerox and Merrion, where they both voted NO, Burger voted with Rehnquist in only two of the fourteen split-vote cases during the 1981 through 1984 Terms--the 5 to 4 YES majorities in Mueller and Washington. Burger had developed into a relatively solid vote against state taxes, prior to his final Term on the Court. Further, besides ranking Rehnquist as his least favorite partner, he ranked Stevens seventh and Stewart/O'Connor fifth.

TABLE VII
 % VOTES WITH REHNQUIST (32 SPLIT--VOTE CASES)

PERCENT

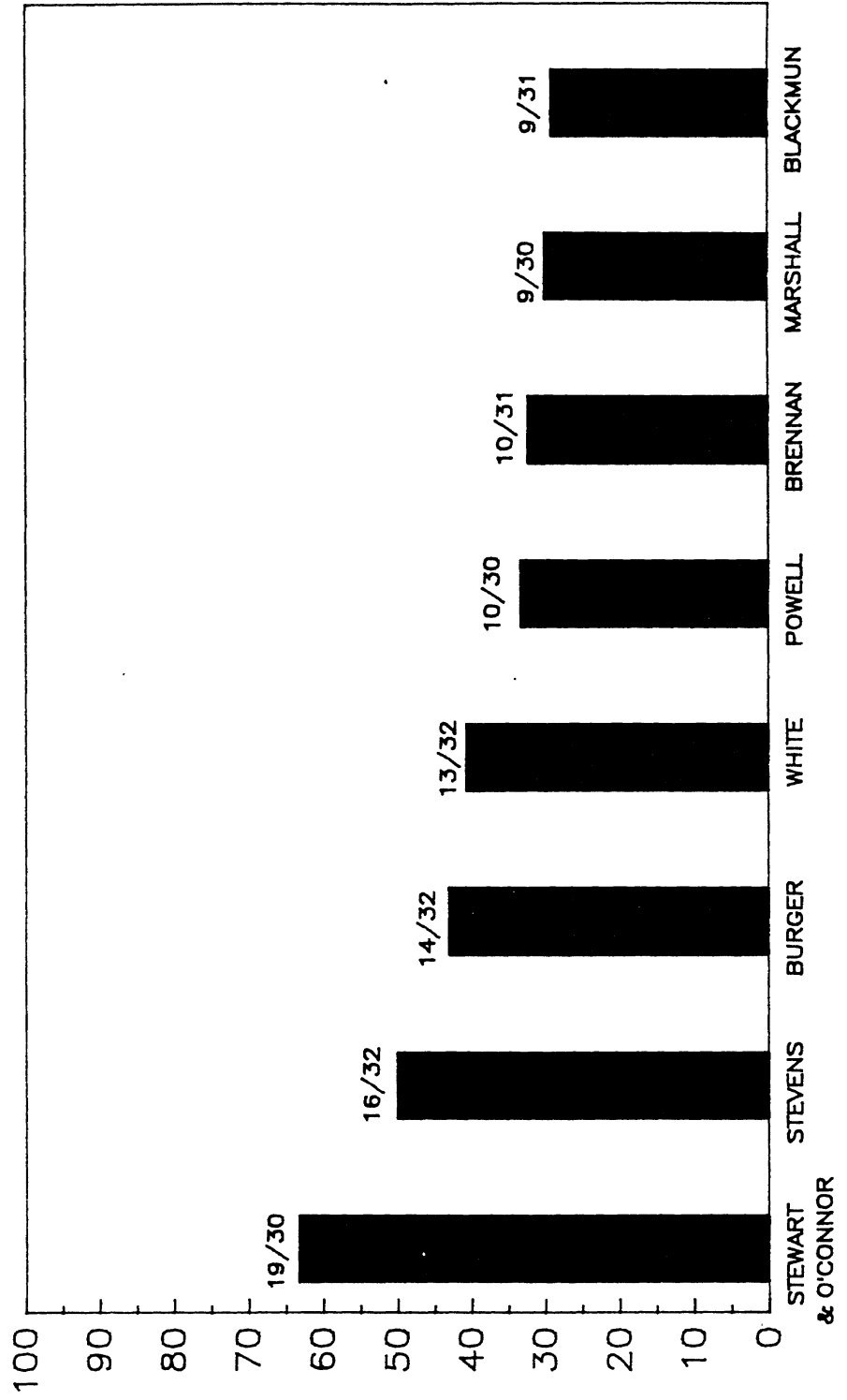
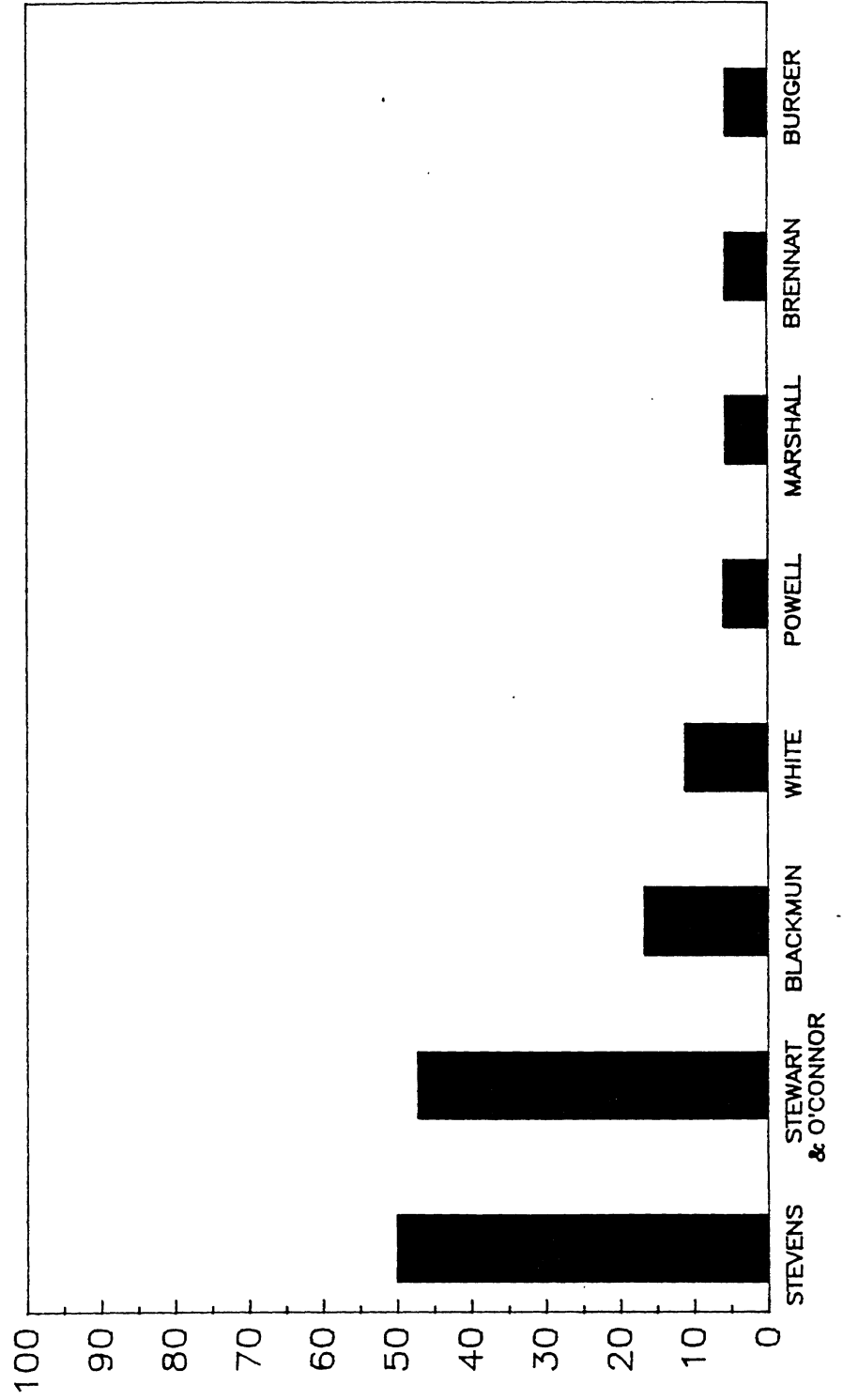


TABLE VIII
 % VOTES WITH REHNQUIST DISSENTS (18 CASES)

PERCENT



Powell voted with Rehnquist majorities to uphold taxes in five out of seven cases from 1975/76 through 1980/81. He joined Rehnquist for one dissent of five during this same period: the 5-4 loss in Central Machinery. From the 1981 Term through the 1985 Term, Powell voted with Rehnquist only twice (Rehnquist's 5-4 victories in Mueller and Washington), out of 16 split-vote decisions. Powell, too, has become a dependable NO vote, his aberration in Xerox notwithstanding. While Powell and Burger were each other's favorite partners, Powell also ranks Rehnquist last, Stevens seventh, and Stewart/O'Connor sixth.

O'Connor voted with Rehnquist in all three of the 5-4 splits which have occurred since 1981; Stewart voted with Rehnquist in the 1979 5-4 split, Central Machinery. White made the fifth vote for a majority in Mueller; Brennan did the honors in Washington. Brennan and Marshall voted with Rehnquist and O'Connor in the 5-4 loss in Metropolitan Life; a vote from Burger, or Powell, or Stevens would have made a majority. Powell and Stevens did vote with Rehnquist and Stewart in Central Machinery; a YES from Burger would have made the difference. Blackmun voted against Rehnquist and the challenged tax in all of the 5-4 decisions. If Scalia does become a more dependable YES vote than Burger was, the Rehnquist position could prevail in more of these close votes.

Liberals are usually considered pro-tax; conservatives are usually considered pro-states, as against the national government. Is a vote against a state's power to tax liberal, or conservative? Arguments could be made either way. In sum, the "liberal" and "conservative" labels do not seem very useful in describing the work of the Court in the area of state taxation. The core Justices on these issues are Brennan, Burger, Marshall, and White--who range all the way across the ideological spectrum. Blackmun (an evolving liberal) and Powell (a moderate conservative) are also frequent members of the winning coalitions. The limited usefulness of these traditional labels is starkly illustrated in Metropolitan Life, where Rehnquist and O'Connor are joined in dissent by Brennan and Marshall.

The Stewart/O'Connor team is hard to categorize. They come out looking quite moderate on most of the indices used, but some real differences may be obscured by combining their votes. It seems abundantly clear that O'Connor is a less dependable Rehnquist partner in this area than Stewart was, even though she voted with Rehnquist in all three 5 to 4 decisions which have thus far occurred during her tenure on the Court. Further, the team's winning percentage looks as good as it does, in part, due to participation in eight of eleven Rehnquist majorities. Further, O'Connor is voting 50-50; half for Rehnquist and the tax, half against Rehnquist and the tax. Such random results hardly merit an ideological label. Stevens can best be described as a maverick, on state taxation issues. He sees many cases differently, as best exemplified by his solo dissents in Mobil, Chemehuevi, and Exxon v. Hunt. He is no longer a dependable Rehnquist voting partner, especially since he does not see the issues the same as O'Connor.

Rehnquist's "help the States" agenda is not faring well in the area of state taxation. This Lone Ranger still needs a Tonto or two.

Amidst all the permutations and combinations, only a few consistencies appear. Rehnquist is consistently for state taxes. Burger consistently voted on the winning side. Brennan and Marshall consistently vote together. Marshall, Blackmun, Brennan, and Powell consistently vote against Rehnquist. Based on past voting records, if the issues in a case are significant enough to produce a split vote on the Court, the probability is that the challenged state tax will be disapproved.

NOTES:

1. Rehnquist made the cover of the next week's issue. Gest, et al., Reagan's Court: Two Steps to the Right, U.S.NEWS&W.R., (June 30, 1986), 16-20.
2. During her first three years on the Court, she voted with Rehnquist 87 percent of the time--nearly nine of every 10 cases. For the 10 years in which Rehnquist and her predecessor Stewart were on the Court together, they voted together 66 percent of the time. This one change thus resulted in Rehnquist's positions picking up another vote in one-fifth of the cases decided by the Court. Tribe, What Difference Can a Justice or Two Make?, 71 ABAJ 60, 62 (September, 1985). See also, Shenon, Reagan Is as Intent as Ever on Making Over the Courts, NY TIMES, (June 1, 1986), E5; Weinraub, Reagan Predicts Impact Of Judicial Appointees, NY TIMES, (August 6, 1986), 9.
3. Tribe, op. cit., 60. See also, Shipp, Scalia's Midwest Colleagues Cite His Love of Debate, Poker and Piano, NY TIMES, (July 26, 1986), 7.
4. During his first fourteen full years on the Court, Powell voted most often with Burger for 10 years, with Rehnquist for three years, and with O'Connor for one year. He voted least frequently with Marshall during six Terms, with Douglas during five Terms, and with Brennan during two Terms. Conversely, he was Burger's favorite partner during the 1979 Term. Schwartz, A Pragmatic Independent, 72 ABAJ 42 (June 15, 1986); Friedman, The Community's Protector, 72 ABAJ 14, 16 (June 15, 1986).
5. Friedman, op. cit., 16.
6. About one-fifth of the Court's decisions during the decade from 1974 to 1984 were by a 5-to-4 vote! Tribe, op. cit., 60.
7. E.g., Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981). On the process of accumulating a majority, see Brennan, An Inside Look at Supreme Court and Its Cases, NY TIMES, (June 24, 1986), 10.
8. E.g., Miranda v. Arizona, 384 U.S. 436 (1966), has not yet been overruled, but its effect has certainly been qualified by such cases as Segura v. U.S., 468 U.S. 796(1984).
9. This was the main argument of Senator Paul Simon of Illinois. Greenhouse, Senate, 65 to 33, Votes to Confirm Rehnquist as 16th Chief Justice, NY TIMES, (September 28, 1986), 1, 17.
10. Friedman, op. cit., 16.
11. Williams, President of Urban League Urges Rejection of High Court Nominees, NY TIMES, (July 21, 1986), 6; Valid Doubts About Justice Rehnquist, NY TIMES, (September 11, 1986), 26; Edwards, No: He Has Advocated Segregation, NY TIMES, (September 14, 1986), 28.
12. Edwards, op. cit., 28.
13. Lewis, The Court: Rehnquist, NY TIMES, (June 23, 1986), 17.

14. Fein, Yes: He Has Demonstrated Ability, NY TIMES, (September 14, 1986), 28; Taylor, Rehnquist Critics Press Ethics Charge, NY TIMES, (September 11, 1986), 15; MacKenzie, Mr. Rehnquist's Opinion, NY TIMES, (August 25, 1986), 18; One Last Smear, WALL ST.J, (August 14, 1986), 16; Wermiel, Chaotic Confirmation Process for Bench Nominees Suggests Politics, Not Qualifications, Prevails, WALL ST.J, (August 14, 1986), 42.

15. Senator Orrin Hatch, Republican of Utah, characterized the proceedings as a "Rehnquisition." Republican Majority Leader Robert Dole of Kansas said the President characterized some of the opposition as a "lynch mob." New Chief Justice "Delighted" by Confirmation, ANN ARBOR NEWS, (September 18, 1986), E-1.

16. Greenhouse, op. cit., 1.

17. Taylor, Rehnquist Says He Wants 'To Be a Good Chief Justice', NY TIMES, (September 19, 1986), 15; Reznek, Rehnquist Can Find Comfort in Hughes's Ordeal, NY TIMES, (September 27, 1986), 19.

18. Taylor, op. cit., 15. Rehnquist and Scalia Pass Their First Test in Senate, NY TIMES, (August 17, 1986), S.4, p. 1; Senate Unit Backs Rehnquist, 13 to 5, NY TIMES, (August 15, 1986), 1, 9; Taylor, Scalia Returns Soft Answers To Questions From Senators, NY TIMES, (August 6, 1986), 9.

19. Taylor, Rehnquist Sworn in as Chief Justice, NY TIMES, (September 27, 1986), 1, 11.

20. The Rehnquist Court Still Seems an Appointment Away, NY TIMES, (September 21, 1986), E8; Taylor, The Morning Line on the Bench, as Revised, NY TIMES, (September 25, 1986), 12.

21. Goodman, The Politics of Picking Federal Judges, JURIS DOCTOR, (June 1977), 19-22, 26; Jenkins, The Partisan, NY TIMES MAGAZINE, (March 3, 1985), 29-35, 88, 100-101; Serrill, The Power of William Brennan, TIME, (July 22, 1985), 62; Tribe, op. cit., 60-62; Saperstein and Lardner, Rehnquist: the Accidental Jurist, WASH. POST, (July 28, 1986), 6-8; Leeds, A Life on the Court, NY TIMES MAGAZINE, (October 5, 1986), 25-26, 74-79.

22. For other methodological approaches, see, inter alia, Kort, Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the "Right to Counsel" Cases, 51 AMER.POL. SCI.R. 1 (1957); Schubert, The Study of Judicial Decision-Making as an Aspect of Political Behavior, 52 AMER.POL.SCI.R. 1007 (1958); Murphy, Lower Court Checks on Supreme Court Power, 53 AMER.POL. SCI.R. 1017 (1959); Ulmer, The Analysis of Behavior Patterns in the United States Supreme Court, 22 J.POLS. 629 (1960); Spaeth, Judicial Power as a Variable Motivating Supreme Court Behavior, 6 MIDW.J.POL.SCI. 54 (1962); Mendelson, The Neo-Behavioral Approach to the Judicial Process: A Critique, 57 AMER.POL.SCI.R. 593 (1963); Spaeth, The Judicial Restraint of Mr. Justice Frankfurter--Myth or Reality, 8 MIDW.J.POL.SCI. 22 (1964); Nagel, Applying Correlation Analyses to Case Prediction, 42 TEXAS LR 1006 (1964); Spaeth, Unidimensionality and Item Invariance in Judicial Scaling, 10 BEH.SCI. 290 (1965); Grunbaum and Newhouse, Quantitative Analysis of Judicial Decisions: Some Problems in Prediction, 3 HOUSTON LR 201 (1965); MacRae, Indices of Pairwise Agreement Between Justices

or Legislators, 10 MIDW.J.POL.SCI. 138 (1966); Watson, Downing and Spiegel, Bar Politics, Judicial Selection and the Representation of Social Interests, 61 AMER.POL.SCI.R. 54 (1967); Schubert, Academic Ideology and the Study of Adjudication, 61 AMER.POL.SCI.R. 106 (1967); Kort, A Nonlinear Model for the Analysis of Judicial Decisions, 62 AMER.POL.SCI.R. 546 (1968); Spaeth and Peterson, The Analysis and Interpretation of Dimensionality: The Case of Civil Liberties Decision Making, 15 MIDW.J.POL.SCI. 415 (1971); Rohde, Policy Goals, Strategic Choice and Majority Opinion Assignments in the U.S. Supreme Court, 16 MIDW.J.POL.SCI. 652 (1972); Kort, Regression Analysis and Discriminant Analysis: an Application of R.A. Fisher's Theorem to Data in Political Science, 67 AMER.POL.SCI.R. 555 (1973); Rathjen, Policy Goals, Strategic Choice, and Majority Opinion Assignments in the U.S. Supreme Court: A Replication, 18 AMER.J.POL.SCI. 713 (1974); Casper, The Supreme Court and National Policy Making, 70 AMER.POL.SCI.R. 50 (1976); Ulmer, Selecting Cases for Supreme Court Review: An Underdog Model, 72 AMER.POL.SCI.R. 902 (1978); Gibson, Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model, 72 AMER.POL.SCI.R. 911 (1978); Rathjen and Spaeth, Access to the Federal Courts: An Analysis of Burger Court Policy Making, 73 AMER.J.POL.SCI. 360 (1979); Ulmer, The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable, 78 AMER.POL.SCI.R. 901 (1984). For a criticism of some of the early efforts to apply statistical techniques in this area, see Hoyer, Mayer, and Bernd, Some Problems in Validation of Mathematical and Stochastic Models of Political Phenomena: The Case of the Supreme Court, 21 Amer. J. Pol. Sci. 381 (1977).

23. Massachusetts v. United States, 435 U.S. 444, was excluded from this study, since the "tax" at issue was a U.S. annual registration fee for civilian aircraft. The majority held that the state was not exempt from paying the fee. Justices Rehnquist and Burger dissented; Blackmun did not participate.

24. Diamond National Corp. v. State Board of Equalization, 425 U.S. 268; Michelin Tire Corp. v. Wages, 423 U.S. 726; Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463; Bryan v. Itasca County, Minnesota, 426 U.S. 373.

25. Boston Stock Exchange v. State Tax Commission, 429 U.S. 318; Complete Auto Transit Co. v. Brady, 430 U.S. 274; National Geographic Society v. California Board of Equalization, 430 U.S. 551.

26. First Federal Savings & Loan v. Tax Commission of Massachusetts, 437 U.S. 255; Moorman Mfg. Co. v. Bair, 437 U.S. 267; Department of Revenue v. Association of Stevedoring Cos., 435 U.S. 734; Baldwin v. Fish & Game Commission, 436 U.S. 371; U.S. Steel Corp. v. Multistate Tax Commission, 434 U.S. 452.

27. Chase Manhattan Bank v. Finance Administration, 440 U.S. 447; Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434; Arizona Public Service Co. v. Snead, 441 U.S. 141.

28. White Mountain Apache Tribe v. Bracker, 448 U.S. 136; Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160; Washington v. Confederated Tribes of Colville, 447 U.S. 134 (two decisions); Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425; Exxon Corp. v. Wisconsin

Department of Revenue, 447 U.S. 207. In Confederated Tribes, the Court held that the State of Washington could impose its cigarette and sales taxes on reservation sales of cigarettes to nonmembers of the tribes, but that it could not tax motor vehicles owned by tribal members and used both on and off the reservation. Since the votes of some Justices were different on these two issues, each set of votes is separately tabulated in the analyses herein.

29. *Western & Southern Life Insurance Co. v. State Board of Equalization*, 452 U.S. 648; *Maryland v. Louisiana*, 451 U.S. 725; *Commonwealth Edison Co. v. Montana*, 453 U.S. 609.

30. *ASARCO Inc. v. Idaho State Tax Commission*, 458 U.S. 307; *F.W. Woolworth Co. v. Taxation & Revenue Department*, 458 U.S. 354; *United States v. New Mexico*, 455 U.S. 720; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130; *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832.

31. *Container Corp. v. Franchise Tax Board*, 103 S.Ct. 2933; *Mueller v. Allen*, 463 U.S. 388; *Xerox Corp. v. Harris County, Texas*, 103 S.Ct. 523; *Memphis Bank & Trust Co. v. Garner*, 103 S.Ct. 692; *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 103 S.Ct. 1365; *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855; *Washington v. United States*, 103 S.Ct. 1344.

32. *Franchise Tax Board v. United States Postal Service*, 104 S.Ct. 2549; *Aloha Airlines v. Director of Taxation of Hawaii*, 104 S.Ct. 291; *Armco Inc. v. Hardesty*, 104 S.Ct. 2620; *Westinghouse Electric Corp. v. Tully*, 104 S.Ct. 1856.

33. *Lawrence County v. Lead-Deadwood School District*, 105 S.Ct. 695; *First National Bank of Atlanta v. Bartow County Board*, 105 S.Ct. 1516; *Metropolitan Life Insurance Co. v. Ward*, 105 S.Ct. 1676; *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 105 S.Ct. 1900; *Montana v. Blackfeet Tribe of Indians*, 105 S.Ct. 2399; *Williams v. Vermont*, 105 S.Ct. 2465; *Hooper v. Bernalillo County Assessor*, 105 S.Ct. 2862.

34. *California State Board of Equalization v. Chemehuevi Indian Tribe*, 106 S.Ct. 289; *Exxon Corp. v. Hunt*, 106 S.Ct. 1103; *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 106 S.Ct. 2369.

35. *Michelin Tire, Moe, Bryan*, supra note 24; *Boston Stock Exchange, Complete Auto, National Geographic*, supra note 25; *First Federal, Department of Revenue*, supra note 26; *Chase Manhattan, Arizona Public Service*, supra note 27; *Exxon*, supra note 28; *United States*, supra note 30; *Memphis Bank*, supra note 31; *Franchise Tax Board, Aloha Airlines*, supra note 32; *First National Bank, Kerr-McGee*, supra note 33.

36. 430 U.S. 274.

37. 437 U.S. 267.

38. 445 U.S. 425.

39. 447 U.S. 207.

40. 458 U.S. 307.

41. 458 U.S. 354.

42. 103 S.Ct. 2933.

43. 104 S.Ct. 2620.

44. 430 U.S. 551.

45. 435 U.S. 734.

46. For further reading, see Cameron, Indian Taxation of Reservation Minerals--A Domestic OPEC in the Making?, AM.BUS.L.J. (Fall, 1984), 429-438, and works there cited.

47. 425 U.S. 463.

48. 426 U.S. 373.

49. 448 U.S. 136.

50. 448 U.S. 160.

51. 447 U.S. 134.

52. 455 U.S. 720.

53. 455 U.S. 130.

54. 458 U.S. 832.

55. 105 S.Ct. 2399.

56. 105 S.Ct. 1900.

57. 106 S.Ct. 289.

58. 425 U.S. 268.

59. 437 U.S. 255.

60. 440 U.S. 447.

61. 103 S.Ct. 692.

62. 463 U.S. 855.

63. 105 S.Ct. 1516.

64. 17 U.S. 316.

65. 441 U.S. 141.

66. 104 S.Ct. 291.
67. 103 S.Ct. 1344.
68. 104 S.Ct. 2549.
69. 105 S.Ct. 695.
70. 423 U.S. 726.
71. 441 U.S. 434.
72. 103 S.Ct. 523.
73. 104 S.Ct. 1856.
74. 106 S.Ct. 2369.
75. E.g., Mobil Oil, ASARCO, Woolworth, and Container. See Tolchin, With Lobbies in Full Cry, California Debates Repeal of Multinational Tax, N.Y.TIMES, (Feb. 18, 1986), 7; Tannenwald, The Pros and Cons of Worldwide Unitary Taxation, NEW ENG.ECON.R. (July/Aug, 1984), 17-27; Salibra, Worldwide Unitary Taxation-- the Battle Still Rages, ROUNDTABLE REPT., I (Feb/Mar, 1984), 2-3.
76. 429 U.S. 318.
77. 436 U.S. 371.
78. 434 U.S. 452.
79. 451 U.S. 658.
80. 453 U.S. 609.
81. 463 U.S. 688.
82. 103 S.Ct. 1365.
83. 105 S.Ct. 1676.
84. 451 U.S. 725.
85. 105 S.Ct. 2465.
86. 105 S.Ct. 2862.
87. 106 S.Ct. 1103.
88. 434 U.S. 452.
89. 463 U.S. 688.
90. 103 S.Ct. 1365.

91. 106 S.Ct. 1103.
92. Justice Stewart wrote for a unanimous Court in *Arizona Public Service*. Justice Stewart sat out *Mobil Oil and Exxon*; O'Connor did not participate in *American Bank*; Burger, in *National Geographic*; Powell, in *Maryland v. Louisiana*, and Kerr-McGee; Brennan, in *Washington Department of Revenue*; Stevens, in *Michelin Tire*; Marshall, in *Mobil Oil*; and Rehnquist, in *National Geographic*. In *Chemehuevi*, Brennan voted to deny certiorari; Marshall dissented from the summary disposition; and Blackmun would have given plenary disposition.
93. *Minneapolis Star*.
94. *Diamond National*; *Chase Manhattan*; *Chemehuevi Indian Tribe*.
95. Stevens: *First Federal*, *Moorman*, and *Franchise Tax Board*; Rehnquist: *Moe*, *Mueller*, and *Washington v. U.S.*; Burger: *Xerox*, *Kerr-McGee*, *Hooper*.
96. *Michelin Tire*, *Bryan*, *National Geographic*, *Western & Southern Life*, *Container*, and *Wardair Canada*.
97. Powell: *U.S. Steel*, *ASARCO*, *Woolworth*, *Armco*, *Metropolitan Life*, and *Montana*; White: *Boston Stock Exchange*, *Confederated Tribes* (two cases; two majority opinions), *Maryland v. Louisiana*, *Lawrence County*, and *Williams*.
98. Blackmun: *Complete Auto*, *Washington Department of Revenue*, *Baldwin*, *Japan Line*, *Mobil Oil*, *U.S. v. New Mexico*, *American Bank*, *Westinghouse*, and *First National Bank*; Marshall: *White Mountain Apache Tribe*, *Central Machinery*, *Exxon*, *Commonwealth Edison*, *Merrion*, *Ramah Navajo School Board*, *Memphis Bank & Trust*, and *Aloha Airlines*.
99. The three unsigned per curiams (supra note 94) account for the balance.
100. *Moorman*, *Mobil Oil*, *ASARCO*, *Woolworth*, *Container*, *Armco*.
101. *White Mountain*, *Central Machinery*, *Confederated Tribes* (two different splits on the two taxes at issue), *Merrion*, *Ramah*, *Montana*, *Chemehuevi*.
102. *Diamond National*, *American Bank & Trust*, *Washington v. U.S.*, *Lawrence County*.
103. *Japan Line*, *Xerox*, *Wardair Canada*.
104. *Baldwin*, *U.S. Steel*, *Western & Southern Life*, *Maryland v. Louisiana*, *Commonwealth Edison*, *Mueller*, *Minneapolis Star*, *Metropolitan Life*, *Williams*, *Hooper*, *Exxon v. Hunt*.
105. All of Powell's six majority opinions (supra note 97) are written in split-vote cases.
106. *ASARCO*, *Woolworth*, *Armco*.

107. White Mountain Apache Tribe, Central Machinery, Commonwealth Edison, Merrion, Ramah Navajo School Board, Exxon v. Hunt.
108. White Mountain Apache Tribe, Central Machinery, Merrion, Ramah Navajo School Board.
109. 447 U.S. 134.
110. 105 S.Ct. 2465.
111. Lawrence County.
112. Maryland v. Louisiana.
113. Baldwin, Japan Line, Mobil Oil, American Bank & Trust.
114. Mobil Oil.
115. American Bank & Trust.
116. Japan Line.
117. Baldwin.
118. Container.
119. Wardair Canada.
120. Western & Southern Life.
121. Washington v. U.S.
122. Mueller. Both of Rehnquist's split-vote majorities were five to four.
123. 103 S.Ct. 523.
124. 105 S.Ct. 2862.
125. 437 U.S. 267.
126. 103 S.Ct. 1365.
127. 425 U.S. 268.
128. 106 S.Ct. 289.
129. Stewart: Arizona Public Service; O'Connor: Minneapolis Star.
130. Moorman, First Federal, Franchise Tax Board.
131. Mueller; Washington v. U.S.
132. Moe.

133. Yes: Kerr-McGee; No: Xerox, Hooper.
134. Diamond National, Chase Manhattan.
135. 106 S.Ct. 289.
136. Yes: Complete Auto, Washington Department of Revenue, Baldwin, Mobil Oil, U.S. v. New Mexico, First National Bank; No: Japan Line, American Bank & Trust, Westinghouse.
137. Yes: Exxon v. Wisconsin, Commonwealth Edison, Merrion; No: White Mountain Apache Tribe, Central Machinery, Ramah Navajo School Board, Memphis Bank & Trust, Aloha Airlines, Exxon v. Hunt.
138. U.S. Steel.
139. ASARCO, Woolworth, Armco, Metropolitan Life, Montana.
140. Yes: Confederated Tribes (cigarette tax); No: Boston Stock Exchange, Confederated Tribes (motor vehicle tax), Maryland v. Louisiana, Lawrence County, Williams.
141. Michelin Tire, National Geographic, Western & Southern Life, Container, Wardair Canada.
142. Bryan.
143. Tax upheld: Moorman, Baldwin, U.S. Steel, Confederated Tribes (cigarette tax), Mobil Oil, Western & Southern Life, Commonwealth Edison, Merrion, Container, Mueller, Washington v. U.S., Chemehuevi, Wardair Canada.
Tax invalidated: Diamond National, Japan Line, White Mountain Apache Tribe, Central Machinery, Confederated Tribes (motor vehicle tax), Maryland v. Louisiana, Asarco, Woolworth, Ramah Navajo School Board, Xerox, Minneapolis Star, American Bank & Trust, Armco, Lawrence County, Metropolitan Life, Montana, Williams, Hooper, Exxon v. Hunt.
144. Tax valid: Moorman, Mobil Oil, Container. Tax invalid: ASARCO, Woolworth, Armco.
145. ASARCO, Woolworth, Armco.
146. Blackmun: Mobil Oil; Brennan: Container; Stevens: Moorman.
147. Tax valid: Merrion.
148. Tax invalid: White Mountain Apache Tribe, Central Machinery, Ramah Navajo School Board.
149. Cigarette tax valid; motor vehicle tax invalid.
150. 105 S.Ct. 2399.
151. 106 S.Ct. 289.

152. Washington v. U.S.
153. Blackmun: American Bank & Trust; White: Lawrence County.
154. Diamond National.
155. Burger: Xerox; Blackmun: Japan Line.
156. 106 S.Ct. 2369.
157. Tax valid: Baldwin, U.S. Steel, Western & Southern Life; Commonwealth Edison, Mueller.
Tax invalid: Minneapolis Star, Metropolitan Life, Maryland v. Louisiana, Williams, Hooper, Exxon v. Hunt. These latter six cases invalidating the challenged taxes have all been decided in the last four terms of the Court, four of them during the 1984-1985 Term.
158. Tax valid: U.S. Steel; tax invalid: Metropolitan Life.
159. Tax valid: Commonwealth Edison; tax invalid: Exxon v. Hunt.
160. Blackmun: Baldwin; Brennan: Western & Southern Life; Rehnquist: Mueller.
161. Burger: Hooper; O'Connor: Minneapolis Star; White: Maryland v. Louisiana, Williams.
162. Michelin Tire; Moe; Bryan; Boston Stock Exchange; Complete Auto; National Geographic; First Federal; Washington Department of Revenue; Chase Manhattan; Arizona Public Service; Exxon v. Wisconsin; U.S. v. New Mexico; Memphis Bank & Trust; Franchise Tax Board; Aloha Airlines; Westinghouse; First National Bank; Kerr-McGee.
163. 1975 Term: Michelin, Moe, Bryan; 1976 Term: Boston Stock Exchange, Complete Auto, National Geographic; 1977 Term: First Federal, Washington Department of Revenue; 1978 Term: Chase Manhattan, Arizona Public Service.
164. 1979 Term: Exxon; 1980 Term: none; 1981 Term: U.S. v. New Mexico; 1982 Term: Memphis Bank & Trust; 1983 Term: Franchise Tax Board, Aloha Airlines, Westinghouse; 1984 Term: First National Bank, Kerr-McGee.
165. Supra note 143.
166. Japan Line, Xerox, Minneapolis Star, Armco, Wardair Canada.
167. Maryland v. Louisiana, Exxon v. Hunt.
168. Mobil Oil.
169. Chemehuevi. See text at note 128.
170. Diamond National, U.S. Steel; Confederated Tribes (motor vehicle tax); Western & Southern Life; Lawrence County.

171. American Bank & Trust.

172. Moorman, Baldwin, White Mountain Apache Tribe, Confederated Tribes (cigarette tax), Commonwealth Edison, Asarco, Woolworth, Merrion, Ramah Navajo School Board, Container, Montana, Williams, Hooper.

173. Tax valid: Moorman, Baldwin, Confederated Tribes (cigarette tax), Commonwealth Edison, Merrion, Container. Tax invalid: White Mountain Apache Tribe, Asarco, Woolworth, Ramah Navajo School Board, Montana, Williams, Hooper.

174. Central Machinery (1979 Term, tax invalid); Mueller (1982 Term, tax valid); Washington v. U.S. (1982 Term, tax valid); Metropolitan Life (1984 Term, tax invalid).

Four cases of 50 represents 8.0 percent of these cases. By way of contrast, Tribe found that "about one-fifth" of all the cases in the decade from 1974 to 1984 were decided by a 5 to 4 vote. Tribe, supra note 2.

175. Merrion.

176. Serrill, supra note 21. Brennan himself says he feels uncomfortable with this label, since it implies that he personally lobbies the other Justices; he denies doing so. Leeds, supra note 21.

177. Scalia, The Chairman's Report, 7 ADMIN.L.NEWS 1 (Fall 1981); Scalia, Chairman's Message, 34 ADMIN.L.R. v (Fall, 1981); Scalia, Separation of Functions: Obscurity Preserved, 34 ADMIN. L.R. v (Winter 1982); Scalia, Support Your Local Professor of Administrative Law, 34 ADMIN.L.R. v (Spring 1982); Scalia, Rulemaking as Politics, 34 ADMIN.L.R. v (Summer 1982); Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 SUFFOLK U.L.R. 881 (Winter 1983); Scalia Morality, Pragmatism and the Legal Order, 9 HARVARD J.L.&PUB.POL. 123 (Winter 1986); Scalia et al., Improving the Administrative Process--Time for a New APA?, 32 ADMIN.L.R. 357 (Spring 1980); Scalia, et al., Legislative Vetoes and the E.R.A. Case, 68 A.B.A.J. 362 (March 1982); Scalia, et al., Judicial Review of Administrative Action in an Era of Deregulation, 105 F.R.D. 321 (June 1985).

178. Austin, Due Process, Court Access Fees, and the Right to Litigate, 57 N.Y.U.L.R. 768 (1982); Savitt, Laws Respecting an Establishment of Religion, 58 N.Y.U.L.R. 207 (1983); The Constitutionality of Tax Relief for Parents of Children Attending Public and Nonpublic Schools, 67 MINN.L.R. 793 (1983); Developments in the law of Immigration: Policy and the Rights of Aliens, 96 HARVARD L.R. 1286 (1983); Foote, Administrative Preemption: An Experiment with Regulatory Federalism, 70 VIRGINIA L.R. 1429 (1984); The Supreme Court, 1983 Term: Leading Case of the 1983 Term, 98 HARVARD L.R. 247 (1984); Shapiro, The Supreme Court, Comment: 1983 Term, 98 HARVARD L.R. 61 (1984); Easterbrook, The Supreme Court, 1983 Term, 98 HARVARD L.R. 4 (1984); Tribe, Colloquy: Constitutional Calculus: Equal Justice or Economic Efficiency, 98 HARVARD L.R. 592 (1985); Pisem, The Second Circuit Review--1983-1984 Term, 51 BROOKLYN L.R. 642 (1985); McMahon, Note: Chadha and the Nondelegation Doctrine: Defining a Restricted Legislative Veto, 94 YALE L.J. 1493 (1985); The Supreme Court, 1984 Term, 99 HARVARD L.R. 264 (1985); Cass, Models of Administrative Action, 72 VIRGINIA L.R. 363 (1986); Maycheck, Comment: Shareholder Liability in Professional Legal Corporations: A Survey of the States, 47 U.PITT.L.R. 817 (1986).

179. Hohri v. U.S., 793 F.2d 304 (C.A./D.C. 1986); Church of Scientology of California v. I.R.S., 792 F.2d 146 (C.A./D.C. 1986); Church of Scientology of California v. I.R.S., 792 F.2d 153 (C.A./D.C. 1986); Mathes v. C.I.R., 788 F.2d 33 (C.A./D.C. 1986); Baker v. C.I.R., No. 85-1276, slip opinion (C.A./D.C. 1986); Morris v. Washington Metropolitan Area Transit Authority, 781 F.2d 218 (C.A./D.C. 1986); Illinois Commerce Commission v. Interstate Commerce Commission, 776 F.2d 355 (C.A./D.C. 1985); Humana, Inc. v. Heckler, 758 F.2d 696 (C.A./D.C. 1985); Lebron v. Washington Metropolitan Area Transit Authority, 749 F.2d 893 (C.A./D.C. 1984); Illinois Commerce Commission v. Interstate Commerce Commission, (C.A./D.C. 1984); Leaf Tobacco Exporters Assn., Inc. v. Block, 749 F.2d 1106 (C.A./D.C. 1984); Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517 (C.A./D.C. 1984); United Municipal Distributors Group v. Federal Energy Regulatory Commission, 732 F.2d 202 (C.A./D.C. 1984); Boyer v. C.I.R., 732 F.2d 191 (C.A./D.C. 1984); Threadgill v. Black, 730 F.2d 810 (C.A./D.C. 1984); Murray v. Buchanan, 720 F.2d 689 (C.A./D.C. 1983); Pearlstein v. U.S. Small Business Administration, 719 F.2d 1169 (C.A./D.C. 1983); Ryan v. Bureau of Alcohol, Tobacco and Firearms, 715 F.2d 644 (C.A./D.C. 1983); Council of and for the Blind of Delaware County Valley, Inc. v. Regan, 709 F.2d 1521 (C.A./D.C. 1983); Adams v. Bell, 711 F.2d 161 (C.A./D.C. 1983); U.S. v. Lipscomb, 702 F.2d 1049 (C.A./D.C. 1983); Community Nutrition Institute v. Block, 698 F.2d 1239 (C.A./D.C. 1983); Covelo Indian Community v. Watt, #82-2377 slip opinion (C.A./D.C. 1982); Virgin Islands v. Blumenthal, 642 F.2d 641 (C.A./D.C. 1980).

180. E.g., Church of Scientology; Baker; Boyer; Ryan; Council of and for the Blind.

181. E.g., Illinois Commerce Commission (both decisions); Humana; United Municipal Distributors Group.

182. U.S. v. Lipscomb. "STATES" appears as United States; "TAX" is failure to pay U.S. income tax; the case in which these words appear is cited as a precedent. U.S. v. Lipscomb, 702 F.2d 1049, 1057 (C.A./D.C. 1983).

183. Virgin Islands v. Blumenthal, 642 F.2d 641, 645 (C.A./D.C. 1980).

184. Leaf Tobacco Exporters Assn., 749 F.2d 1106, 1110 (C.A./D.C. 1984)-- "SCALIA" is cited at p. 1114 as an opinion-writer in another precedent case, Community Nutrition Institute, in which Boston Stock Exchange is also cited as a precedent.

185. Pearlstein, supra, note 179; Covelo Indian Community, supra, note 179.

186. 17 B.R. 660.

187. 719 F.2d 1169, 1170.

188. 27 B.R. 153.

189. 719 F.2d 1169.

190. Covelo, supra note 179.

191. Id.

192. Jenkins, supra note 21.