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Repository Citation

Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court* (2007),

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JUDICIAL ACTIVISM: AN EMPIRICAL EXAMINATION OF VOTING BEHAVIOR ON THE REHNQUIST NATURAL COURT

*Lori A. Ringhand**

This paper attempts to quantify one of the most deeply contested terms in constitutional law: “judicial activism”.¹ Most discussions of “judicial activism” define activism either in reference to a particular political ideology (such as complaints about “liberal activist judges”) or a particular method of constitutional interpretation (such as assertions that a decision was “activist” because it was not based on the original meaning of the Constitution).² This paper sidesteps those debates, focusing in-

* Associate Professor of Law, University of Kentucky College of Law. I would like to thank Professors Barry Friedman, Chris Frost and Dave Moore for their thoughtful comments on this paper. I also would like to thank two political scientists, Dr. Kirk Randazzo of the University of Kentucky and Dr. Sara Benesh of the University of Wisconsin-Milwaukee, without whose assistance this paper would not have been possible. Finally, special thanks are owed to Amy Osborne, Maria Gall, Elizabeth Bass, Nathan Goodrich, Jonathan Milby and Brian Powers for their research assistance; and to the late Gordon Baldwin, whose love of constitutional law inspired all who were lucky enough to have known him.

1. The contested nature of this term led one judge to assert that the only meaningful definition of judicial activism is “a decision one does not like.” William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217 (2002) (citing Stephen O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 89 KY. L.J. 679, 688 n.26 (1998)). Randy Barnett has noted that the term as usually used is both pejorative and “generally empty.” Randy E. Barnett, *Is the Rehnquist Court an “Activist” Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1275 (2002) (Barnett offers his own definition of activism. He argues that “it is activist for courts to adopt doctrines that contradict the text of the Constitution either to uphold or nullify a law. . . [and to] substitute for the relevant constitutional provision another provision that they think, for whatever reason, is preferable.” To Barnett, activism therefore can consist of either striking down or failing to strike down legislation.)

2. Political actors in particular have frequently invoked the first image of judicial activism, complaining about “liberal judicial activists” replacing the “will of the people” with their own preferred policy outcomes. See, for example, the following comments by President George W. Bush: “As you know, I’m a person who believes in judicial restraint, as opposed to judicial activism that takes the place of the legislative branch.” (interview with Diane Sawyer, ABC News, Dec. 16, 2003); noting during the 2004 presidential campaign that if a Democrat wins the presidency, “they could lock in liberal judicial activism for the next generation” (*Atlantic Monthly*, vol 294, issue 4, Nov. 1, 2004). Political actors also invoke the second image. See George W. Bush, noting in that same

stead on an empirical examination of how recent U.S. Supreme Court justices have *in fact* exercised their judicial power. I do this by examining the voting records of the individual justices in three areas: how often did the justices vote to invalidate federal legislation, how often did they do so in relation to state legislation, and how often did they vote to overturn existing judicial precedents?³ I also examine the issue areas in which each of the justices cast these votes and the ideological direction of the votes.

My approach consequently does not address the substantive questions of when or how judges *should* use their power of judicial review to invalidate legislation or overturn precedent. Instead, I simply examine how the justices are *in fact* using those powers.⁴ My goal in using this purely quantifiable approach is to

campaign that he wants to appoint federal judges who “know the difference between personal opinion and the strict interpretation of the law” (The Washington Post, May 29, 2005, Outlook Section, p. B01). President Ronald Reagan, who appointed three of the justices studied here (Justices O’Connor, Kennedy and Scalia) stated that he intended to appoint justices “who understand the danger of short-circuiting the electoral process and disenfranchising the people through judicial activism.” Donald H. Zeigler, *The New Activist Court*, 45 AM. U.L. REV. 1367, 1368 (1996) (citing Bernard Weinraub, *Reagan Says He’ll Use Vacancies to Discourage Judicial Activism*, N.Y. TIMES, October 21, 1985, at A1). Consider also the statement of Republican Senator Orrin Hatch at the Senate Judiciary Committee Hearings regarding the nomination of Justice Clarence Thomas: “But what liberals really ought to understand is that no one is safe when judges depart from the text of the written Constitution. . . . What we need are judges that won’t make up the law in order to institutionalize their own social policy ideas or to impose their own values, liberal or conservative, on the American people.” *Nomination of Judge Clarence Thomas: Hearings before the Senate Committee on the Judiciary*, 102d Cong., 1st sess. 174 (1991) (hereinafter, Thomas Hearings).

3. Most scholarly examinations of judicial activism include each of these three criteria. For example, one scholar has argued that judicial activism has six aspects: majoritarianism (the degree to which policies adopted through democratic processes are negated by justices); interpretive stability (the degree to which earlier court decisions are altered); interpretive fidelity (the degree to which constitutional provisions are contrary to the clear intentions of their drafters); substance/process distinction (the degree to which judicial decisions make substantive policy choices); specificity of judicial policy making (the degree to which a judicial decision establishes policy itself); and availability of an alternative policymaker (the degree to which a judicial decision supersedes consideration of the same problem by other governmental actors). See Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 236, 237 (1983). See also Christopher E. Smith and Avis Alexandria Jones, *The Rehnquist Court’s Activism and the Risk of Injustice*, 26 CONN. L. REV. 53, 54 (1993). This is a useful list; this paper attempts to quantify the two items on the list—majoritarianism and interpretive stability—that are objectively quantifiable.

4. In doing so, I do not mean to imply that all “judicial activism” so defined is invalid, or that all such “activism” is equally invalid. Our society has very conflicted ideas about how we want judges to use their power. See Vikran Amar, *The Courts; Judges Rule; “Legislating From the Bench”: It’s a Matter of Opinion*, L.A. TIMES, June 26, 2005 at M1. See also Rebecca L. Brown, *Activism is Not a Four-Letter Word*, 73 U. COLO. L. REV. 1257 (2002); Peter M. Shane, *Federalism’s “Old Deal”: What’s Right and Wrong*

move past the rhetorical debate about “activist judges” replacing legislative choices with their “personal preferences” and toward a more grounded examination of how all justices—liberal and conservative—use their judicial power. In taking this approach, I do not attempt to supplant the important substantive debate about constitutional interpretation and the role of the judiciary in our governing system, but rather to enrich it by providing quantifiable information about how recent justices actually used their judicial power.

This examination of actual judicial behavior reveals several interesting things, each relevant to the “judicial activism” debate. First, conservative justices as well as their more liberal counterparts actively “replace” legislative choices with their own preferred outcomes, and they do so at a roughly equal pace, although, as shown below, they do so in different types of cases. Second, both liberal and conservative justices use their judicial power in ideologically predictable ways: with few exceptions, liberal justices use their power to invalidate legislation and overturn precedents to generate liberal outcomes and conservative justices use that power to generate conservative outcomes.⁵ Finally, the most conservative justices on the Rehnquist Court used their power in some surprising ways, ways not easily attributable to the originalist methods of interpretation they otherwise advocate. That Court’s most conservative justices, for example, did not exclusively or even primarily use their power to invalidate federal statutes in federalism cases. While such cases were an important part of those justices jurisprudence, most of the federal invalidation votes cast by the Court’s conservative justices were actually cast in First Amendment cases—an area with a much more uncertain originalist pedigree.

This look at the actual voting behavior of recent Supreme Court justices thus provides specific, empirical data supporting what is evident to many Court-watchers: the interesting difference between the Court’s “liberal” and “conservative” justices is

with Conservative Judicial Activism, 45 VILL. L. REV. 201 (2000); ARTHUR SELWYN MILLER, TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT (1982).

5. There is a voluminous political science literature examining the relationship between the justices’ presumed ideological preferences and their voting behavior. This paper is not intended to replicate in any way the exhaustive statistical examinations done in that research, but rather to look at the issue in the context of the particular cases reviewed here. For a comprehensive discussion of the political science work in this area, see JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

not whether they used their power of judicial review “actively” but *how* they used that power. Liberal justices used the power of judicial review to protect certain First Amendment rights, certain civil rights, and the rights of criminal defendants; conservative justices used the same power to protect other First Amendment rights, other civil rights, and states’ rights.⁶ The pertinent question, therefore, is not *whether* we want our justices to be “activist”, but how and in which areas we want them to actively use their power. Do we want justices who protect civil and privacy rights or commercial speech and states’ rights? Who defer to Congress or to state legislatures? Attaching the epithet of “activism” to some of these uses of judicial power but not others adds heat but little light to this important debate, and my hope is that the information presented here will help shift the public debate to more productive ground.

EXPLANATION OF THE DATASET

This project relies on the U.S. Supreme Court Databases originally developed by political scientist Harold Spaeth, refined by Sara Benesh, and distributed by Kirk Randazzo.⁷ I use two of the Spaeth Databases here: the Supreme Court Database, which includes information about what the Supreme Court as a court did; and the Supreme Court Justice-Centered Database, which includes information about what each individual Supreme Court justice did. The Justice-Centered Database, which is the data-

6. For a discussion of contemporary Supreme Court decisions that might be considered examples of conservative judicial activism, see Marshall *supra* note 1. Non-judicial calls for the increased use of judicial review to generate politically conservative court decisions abound. Consider, for example, William H. Mellor’s call for the increased use of judicial review to protect economic and property rights (William H. Mellor, *The American Lawyer*, May 1, 2005) and the push by the American Enterprise Institute to encourage the nomination of judges who will use their power of judicial review to roll back “the entire modern welfare state” Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES, April 17, 2005, at Section 6, Column 1, Magazine Desk, 42, 45–46; (quoting Michael Greve of the American Enterprise Institute). Not that long ago, conservative legal scholars were denying that such “conservative activism” could occur. For example, in 1990 Earl Maltz considered the possibility that judicial conservatives would turn from deference to activism as they gained power on the courts, but he concluded at that time that the principle of judicial deference was too entrenched in “the conservative political program” for it to succeed. See Earl M. Maltz *The Prospects for a Rival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629, 649 (1990). Maltz also believed that traditional conservative jurisprudence, claiming to be grounded in democratic theory, necessarily combined originalism with a preference for judicial restraint. *Id.* at 632–33, 635.

7. The Spaeth Databases are available at <http://www.as.uky.edu/polisci/ulmerproject>. The creation of the Spaeth databases was supported by the National Science Foundation.

base I primarily rely on, only extends through the Court's 2000 terms. To provide a complete picture of the voting records of the justices who sat on the last Rehnquist Natural Court,⁸ I therefore supplemented the Justice-Centered Database by coding the pertinent information for the 2001-2004 terms myself. I did this by first using the more up-to-date Supreme Court Database, which extends through and includes the Court's 2004 term, to identify Supreme Court cases in which constitutional issues were addressed. I then reviewed those cases and, following Spaeth's coding rules, identified and included the relevant variables in my dataset.⁹

The Justice-Centered Database also has been altered to include only those cases decided by the last justices to sit on the Rehnquist Natural Court: Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Thomas, Souter, Ginsburg and Breyer. Because these same nine justices sat together throughout this period, this time frame provides a wealth of data while avoiding the difficulties associated with comparing decisions rendered by different justices in different cases. To ensure the validity of this direct justice-to-justice comparison, I have deleted from the dataset any cases from this period in which less than all nine of the justices participated. I also have removed informally issued opinions, including memorandum opinions and decrees, opting instead to include only formally decided cases in which the Court heard oral argument and issued a written opinion. Plurality and per curiam opinions meeting these criteria are included.¹⁰

8. A "Natural Court" is one which there are no personnel changes. *See* EPSTEIN, SEGAL, SPAETH & WALKER, *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS* 305 (1994). The last Rehnquist Natural Court ran from 1994 to 2005, and was comprised of Chief Justice Rehnquist and Justices Stevens, O'Connor, Scalia, Kennedy, Thomas, Souter, Ginsburg and Breyer.

9. Spaeth's coding rules are available in the AllCourts codebook at http://www.as.uky.edu/polisci/ulmerproject/allcourt_codebook.pdf (hereinafter, Spaeth Codebook).

10. The resulting dataset, as used for this project, is available from the author at <http://www.uky.edu/Law/faculty/ringhand.html>. Additional alterations to the Spaeth data include the imposition of certain filters necessary to avoid the double or triple counting of certain types of cases. A full explanation of the filters and coding conventions used in this analysis also is available at the above referenced website. The only significant substantive change made to the Spaeth databases involved changing a coding choice made by Spaeth that resulted in some cases arising under the 11th Amendment or section 5 of the 14th Amendment being coded as raising questions of state level judicial review, even though the justices in these cases actually considered the constitutionality of a federal statute. I changed this coding to reflect that the legally relevant decision in these cases involved the constitutionality of the federal, not the state, statute. Obviously, the inclusion, exclusion, and classification of types of cases can yield marginally different results in

I. FEDERAL LAWS AND DECLARATIONS OF UNCONSTITUTIONALITY

A. USE OF JUDICIAL REVIEW TO INVALIDATE FEDERAL LAW

The conservative justices on the Rehnquist Court, individually and as a group, cast notably more votes to declare federal statutes unconstitutional than did their more liberal counterparts.¹¹ Within the cases examined, Justice Thomas cast the most votes, 34, to declare a federal law unconstitutional. Justices Kennedy and Scalia were next, with 31 and 30 federal invalidation votes, respectively. The remaining conservative justices, Justices Rehnquist and O'Connor, followed with 25 and 24 such votes. The liberal justices, on the other hand, cast the fewest such votes: Justice Souter cast only 21 votes to overturn federal legislation, Justices Ginsburg and Stevens cast 17 such votes, and Justice Breyer cast only 14.¹²

studies like this; the trends, however, do not change. See, for example, SEGAL & SPAETH, *supra* note 5 at 415, and Stefanie A. Lindquist and Rorie Spill Solberg, "Judicial Review by the Rehnquist Court: Explaining Justices' Responses to Constitutional Challenges", forthcoming in POLITICAL RESEARCH QUARTERLY (each of which report trends identical to those identified here).

11. Political scientists have developed a variety of scales by which to measure the relative liberalism and conservatism of Supreme Court justices. See Andrew D. Martin, Kevin M. Quinn, & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275 (2005). These various methods generally concur with our intuitive sense of the justices' relative ideology. For example, based on the most recently developed of these models, the Martin Quinn scale, the relative ideology of the Rehnquist Natural Court justices in 2002 was as follows, with the most conservative justices listed first: Thomas, Scalia, Rehnquist, Kennedy, O'Connor, Souter, Breyer, Ginsburg and Stevens (based on 2002 Martin Quinn scores as reported in *The Median Justice*).

12. A list of the cases in which each justice cast his or her federal invalidation votes is available at Appendix A. For each such case, Appendix A lists the case name, the case citation, the issue area of the decision, the term in which the case was decided, the vote margin by which the case was decided and the ideological direction of the justice's invalidation vote.

Table 1

Justice	Votes to Declare a Federal Statute Unconstitutional
Thomas	34
Kennedy	31
Scalia	30
Rehnquist	25
O'Connor	24
Souter	21
Ginsburg	17
Stevens	17
Breyer	14

Obviously, the conservative justices on the Rehnquist Court were much more likely than their liberal counterparts to vote to declare federal statutes unconstitutional. Each of the conservative justices voted to invalidate more federal laws on constitutional grounds than did each of the liberal justices, with Justices Thomas, Kennedy and Scalia voting to do so in more than *twice* as many cases as did Justice Breyer. Plainly, judicial conservatism, at least as actually practiced by the justices of the Rehnquist Court, cannot be associated with the institutionally conservative value of judicial deference: the most conservative justices on the Rehnquist Court also were the justices most likely to use their power of judicial review to invalidate federal legislation.¹³

B. ISSUE AREAS IN WHICH THE JUSTICES VOTED TO INVALIDATE FEDERAL LAWS

The conservative and the liberal justices also differed in the issue areas in which they cast their votes to invalidate federal

13. Archibald Cox discussed this fusion of conservatism and judicial restraint, and the tension it would eventually create, in 1987, when he wrote that "[T]he ranks of the conservative policy-oriented critics have been greatly strengthened by institutional critics of excessive judicial activism. The conservatives on the political axis who might be judicial activists if they were in the saddle and the true advocates of strong judicial restraint can join hands in damning creative decisions of a liberal cast." Archibald Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 118, 129 (1987). See also Maltz, *supra* note 6 at 632-33, 635; and text accompanying *supra* notes 1 and 4.

legislation. The Supreme Court Databases assign each justice's vote a discrete issue area (coded as "values"). These issue areas are as follows: criminal procedure, civil rights, First Amendment, due process, federalism and federal taxation. The criminal procedure area includes cases involving the constitutional rights of criminal defendants.¹⁴ The civil rights area includes cases raising issues of voting rights; Fourteenth Amendment rights; affirmative action; discrimination claims based on race, sex, sexuality and disability; assertions of welfare rights; and cases raising issues involving immigration and naturalization.¹⁵ The First Amendment area includes cases raising freedom of speech or religion claims, including campaign finance cases, commercial speech cases, and pornography and obscenity cases.¹⁶ The due process area includes procedural due process and Takings Clause cases.¹⁷ The federalism area includes cases raising constitutional questions about the relative scope of national and state power, including Tenth and Eleventh Amendment cases, Commerce Clause cases, and—as recoded for this paper—cases arising under section 5 of the Fourteenth Amendment.¹⁸ The federalism category does not include cases decided on the basis of federal statutory preemption.¹⁹ The final issue area, federal taxation, includes only one case that appears in the analysis presented here: *United States v. United States Shoe Corporation*, in which Justice Ginsburg, writing for a unanimous Court, struck down the Harbor Maintenance Tax as violating the Export Clause of the U.S. Constitution.²⁰ There also is a "miscellaneous" code for cases not falling into any of these categories.²¹

As shown below, the conservative justices cast most of their federal invalidation votes in First Amendment cases, followed by federalism cases. In contrast, the liberal justices cast their federal invalidation votes overwhelmingly in First Amendment cases.²²

14. Spaeth Codebook, *supra* note 10 at 45–47.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* See also, *supra* note 11.

19. *Id.*

20. 523 U.S. 360 (1998).

21. *Id.* The one "miscellaneous" case in the federal invalidations data presented here is *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (holding by a 7 to 2 vote that a federal statute requiring federal courts to reopen final judgments entered in private civil actions violated separation of powers principles embodied in Article III of the U.S. Constitution)

22. The Spaeth coding protocols code the issues listed here as "values". The value variable is determined by clustering numerous sub-issues into larger categories. For a full explanation of the content of each of these issues areas, see Spaeth Codebook, *supra*

Table 2

	Crim Pro	Civil Rights	1st Am	Due Process	Federal- ism	Fed Tax	Misc	Total
Thomas	2	0	15	2	13	1	1	34
Kennedy	1	0	15	2	11	1	1	31
Scalia	1	0	13	2	12	1	1	30
Rehnquist	1	0	9	2	11	1	1	25
O'Connor	1	0	9	2	10	1	1	24
Souter	3	0	14	2	0	1	1	21
Ginsburg	3	0	11	2	0	1	0	17
Stevens	3	0	12	1	0	1	0	17
Breyer	2	0	8	2	0	1	1	14

The most significant area of disagreement between the liberal and conservative justices clearly is the federalism cases.²³ In those cases, conservative Justices Thomas and Scalia cast 13 and 12 votes, respectively, to invalidate federal legislation; their fellow conservatives Justices Kennedy and Rehnquist each cast 11 such votes; and Justice O'Connor cast 10.²⁴ The liberal members

note 10 at 19–20.

23. Cases included in this area include Commerce Clause cases, such as *United States v. Lopez*, 514 U.S. 549 (1995), in which the Court imposed new limits on Congress's ability to regulate interstate commerce, and 10th Amendment cases, such as *Printz v. United States*, 521 U.S. 898 (1997), in which the Court limited Congress's ability to govern the states as states. Also included are cases, such as *Alabama v. Garrett*, 531 U.S. 356 (2001), limiting Congress's power to legislate under section 5 of the 14th Amendment, and 11th Amendment cases, such as *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), expanding the doctrine of state sovereign immunity and restricting Congress's power to abrogate that immunity.

24. The three federalism cases in which Justice Thomas voted to invalidate a federal law but Justice O'Connor did not were: *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (holding, over the dissent of Justices Thomas, Scalia and Kennedy, that the 11th Amendment did not bar state employees from recovering money damages in federal court in the event of the state's failure to comply with the family-care provision of the Family and Medical Leave Act); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004) (holding, over the dissent of Justices Thomas and Scalia, that a federal bankruptcy court's discharge proceeding involving a student loan was not a suit against the state prohibited by the 11th Amendment); and *Tennessee v. Lane*, 541 U.S. 509 (2004) (holding, over the dissent of Justices Rehnquist, Thomas, Kennedy and Scalia, that Title II of the ADA, as applied to cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' enforcement power under the Fourteenth Amendment). The replacement of Justice O'Connor with Justice Samuel Alito may mean that the issue raised in these cases will constitute the new front in the Court's federalism battles.

of the Rehnquist Court cast no federal invalidation votes in this area.

That the conservative justices are more active than their liberal counterparts in the federalism cases is not surprising; the Rehnquist Court's "federalist revolution" has been discussed widely in the legal and political science literature.²⁵ Interestingly, however, while the federalism cases were the area of greatest disagreement between the liberal and conservative justices, this was *not* the issue area in which most of the Rehnquist Court's conservative justices' federal invalidation votes were cast. Rather, with the exception of Chief Justice Rehnquist, the most conservative justices on that Court (Justices Thomas and Scalia) cast more of their federal invalidation votes in First Amendment cases than in federalism cases. In fact, even if the federalism cases are removed from analysis, Justices Thomas, Kennedy and Scalia *still* voted to invalidate more federal laws than did Justices Ginsburg, Stevens and Breyer.²⁶

The votes of the conservative justices in these First Amendment cases are interesting, because they are somewhat of a poor fit with the method of constitutional interpretation (originalism or original meaning originalism) purportedly preferred by the Rehnquist Court's most conservative justices. Justice Thomas, for example, is one of the Rehnquist Court's strongest proponents of original meaning interpretivism.²⁷ Yet of the nine First Amendment cases in which Justice Thomas voted to invalidate a federal law and Justice Breyer (the justice with the fewest federal invalidation votes) did not, three involved campaign finance regulation²⁸, three involved commercial

25. See, for example, Frank B. Cross and Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741 (2000); Charles Tiefer, *The Eleventh Amendment, Federalism, and Judicial Activism: Questions and Answers: Helping Those Who Can Help Themselves: The Rehnquist Court's Direct and Indirect Conservative Activism*, 1 GEO. J.L. & PUB. POL'Y 103 (2002); Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431 (2002); J. Mitchell Pickerill, *Leveraging Federalism: The Real Meaning of the Rehnquist Court's Federalism Jurisprudence for States*, 66 ALB. L. REV. 823 (2003).

26. This belies the assertion, frequently heard in discussions of the Rehnquist Court, that the more conservative justices on that Court were not truly "activist" because their federal invalidation decisions merely shifted authority from the Congress to state legislatures, rather than removing any particular policy choice from the realm of democratic decisionmaking.

27. G. Edward White, *The Jurisprudence of the Rehnquist Court*, 43–44, available at http://law.bepress.com/uvalwps/uva_publications/art53.

28. *Federal Election Com'n v. Colorado Republican Fed. Campaign Cmt.*, 533 U.S. 431 (2001); *Federal Election Com'n v. Beaumont*, 539 U.S. 146 (2003); and *McConnell v. Federal Election Com'n*, 540 U.S. 93 (2003).

speech²⁹ and one involved the Federal Communication Carriers “must carry” rules for broadcasters—areas not readily implicated under an originalist understanding of the First Amendment.³⁰ Thus, whatever the merits of the conservative justices’ invalidation votes in these cases, it is far from obvious that such votes can be justified by reference to the original meaning of the First Amendment, which most scholars agree is—at best—indeterminate or unhelpful in such cases.³¹

None of this, of course, shows that the conservative justices on the Rehnquist Court were more “activist” than their liberal counterparts in First Amendment cases. Liberal Justice Souter joined the more conservative justices in voting to invalidate federal laws in many of these cases, and the other liberal justices also cast some similar votes. The point, rather, is two-fold: 1) it is inaccurate to attribute the conservative justices’ high number of

29. *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457 (1997); *U.S. v. United Foods, Inc.*, 533 U.S. 405 (2001); and *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002).

30. *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180 (1997). Of the remaining two cases, one involved the religion clause (*City of Boerne v. Flores*, 521 U.S. 507 (1997)) and one was a complex case in which Justice Thomas’s dissenting opinion advocated invalidating the statute while nonetheless imposing fewer protections for pornographic material than did the majority opinion upholding the statute (*U.S. v. X-Citement Video, Inc.*, 513 U.S. 64 (1994)).

31. See, e.g., DANIEL A. FARBER, *THE FIRST AMENDMENT* 8–10 (2nd ed 2003) (noting that historical evidence regarding the intended meaning of the First Amendment is “ambiguous” and “unclear”); Ronald Dworkin, *Comment*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 124 (1997) (noting that the meaning of the First Amendment at the time of its enactment was much more contested than it is now). This is true even among the most conservative scholars. Robert Bork, for example, has argued that the original meaning of the constitution would strip all but explicit, “non dangerous” political speech of First Amendment protection. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 20–35 (1971) (as cited in DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY* 25–36 (2002)). Justice Scalia, a vigorous proponent of originalism as a method of constitutional interpretation, also has acknowledged that the original meaning of the First Amendment is of little value in deciding many First Amendment cases. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring in part and concurring in the judgment) (as cited in Martin H. Redish, *Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 *YALE L.J.* 139, 146–47 (2006)). Justice Scalia in 44 *Liquormart* calls for more research on federal and local practices at the time of the adoption of the First Amendment. It is far from clear, however, that such research would yield results justifying more protection. See Michael Kent Curtis, *Teaching Free Speech from an Incomplete Fossil Record*, 34 *AKRON L. REV.* 231 (2000) (tracing the long history of the repression of speech by the states). This is perhaps particularly true in regard to the commercial speech doctrine—the constitutional protection of commercial speech has little historic pedigree and was not constitutionally protected at all until 1976. See C. Edwin Baker, *Paternalism, Politics and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 *CASE W. RES. L. REV.* 1161 (2004); and Alan Morrison, *How We Got the Commercial Speech Doctrine: An Originalist’s Recollections*, 54 *CASE W. RES. L. REV.* 1189 (2004).

federal invalidation votes primarily to federalism cases; and 2) the most conservative justices' high level of activity in this area is not readily reconcilable with their preferred method of constitutional interpretation. While Justices Scalia and Thomas may use originalist reasoning to reject extending rights in some areas, they do not appear to impose the same constraint on their use of judicial power in these First Amendment cases.³²

C. IDEOLOGICAL DIRECTION OF THE JUSTICES' VOTES TO INVALIDATE FEDERAL LAWS

Both the conservative and the liberal justices of the Rehnquist Court appear to have used their power to invalidate federal laws in ideologically predictable ways. The Supreme Court Databases assign each individual justice's vote a "direction" variable of either liberal or conservative. In cases involving criminal procedure, civil rights, the First Amendment, and due process, a liberal vote is one in favor of a person accused or convicted of a crime, a person asserting a civil rights claim, or a vote in favor of an indigent or American Indian.³³ Votes favoring affirmative action, religious neutrality, campaign finance regulation, and abortion rights also are coded as liberal, as are votes supporting the government in Takings Clause cases.³⁴ In issues pertaining to unions and economic activity, votes that are pro-union, pro-liability, pro-injured person, pro-consumer, anti-business, or anti-employer are coded as liberal.³⁵ In each of these issue areas, votes not meeting these criteria are coded as conservative.³⁶

32. When originalist justices discuss original meaning in First Amendment cases, they tend to do so at a much higher level of generalization than when applying that interpretive theory in other cases. Compare, for example, Justice Kennedy's concurring opinion, joined by Justice Scalia, in *Colorado Republican Federal Campaign Cmt. v. FEC* (striking down a campaign spending regulation and expounding that "The First Amendment embodies a 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'" (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)), 514 U.S. 604, 629 (1996), with Justice Scalia's dissenting opinion in *Lawrence v. Texas*, arguing that the Constitution does not protect consensual, adult gay sex from criminal prosecution because "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws" 539 U.S. 558, 596 (2003) (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

33. See Spaeth Codebook, *supra* note 10 at 57-60.

34. *Id.*

35. *Id.*

36. *Id.*

Using this coding methodology, the direction of each justice's votes in the cases in which that justice voted to declare a federal law unconstitutional was as follows:

Table 3

	Conservative Votes	Liberal Votes	Uncoded Votes ³⁷	Total Votes
Thomas	22	11	1	34
Kennedy	17	13	1	31
Scalia	21	8	1	30
Rehnquist	17	7	1	25
O'Connor	14	9	1	24
Souter	2	18	1	21
Ginsburg	3	14	0	17
Stevens	1	16	0	17
Breyer	2	11	1	14

As shown above, the majority of the votes cast by the conservative justices were conservative and the majority of the votes cast by the liberal justices were liberal. Conservative Justices Scalia and Thomas each cast more than 20 conservative invalidation votes, but only 8 (Justice Scalia) and 11 (Justice Thomas) liberal invalidation votes. Justice Souter, on the other hand, cast 18 liberal invalidation votes and only two conservative invalidation votes, while Justice Stevens cast 16 liberal votes and only one conservative vote.³⁸

This raises two interesting points. First, both the liberal and the conservative justices on the Rehnquist Court appear to have used their federal level judicial review power primarily to further their ideologically preferred results. In other words, the conservative justices, just like their liberal counterparts, advanced their presumptively preferred substantive outcomes not by deferring

37. Seven of the justices' federal invalidation votes were deemed by Spaeth to be ideologically uncodable, meaning they did not comply with either the liberal or the conservative coding rules for their issue area.

38. As noted above, political scientists have extensively examined the extent to which Supreme Court justices vote in accordance with their ideological preferences. *See supra* note 5.

to legislative policy choices, but by using their power of judicial review to supplant those choices. Second, the conservative justices nonetheless appeared more willing than their liberal counterparts to vote *against* their presumed ideological preference, at least when casting their federal invalidation votes. For example, more than 33 percent of Justice Thomas's ideologically coded federal invalidation votes appear to have been cast in furtherance of *liberal* outcomes, while only 10 percent of Justice Souter's votes were cast in favor of conservative outcomes.

A closer examination of the underlying cases, however, shows that this observation is somewhat misleading. A coding rule used in compiling the Supreme Court Databases codes most First Amendment cases as "liberal" whenever the constitutional claimant wins. This means that several types of First Amendment cases, such as cases involving commercial speech and campaign finance regulations, yield ideological direction codes not necessarily consistent with today's political preferences.³⁹ This in turn results in the high rate of "liberal" invalidation tallies of the Rehnquist Court's most conservative justices.

Looking at the ideological direction of the justices' federal invalidation votes in reference to the issue areas in which they were cast shows the effect of this First Amendment coding choice on the data. The chart below shows the ideological direction, by issue area, of the justices' federal invalidation votes. The fourth column of Table 4 shows the effect of re-coding as conservative votes to invalidate statutes in commercial speech and campaign finance cases. Table 5 shows the effect of this recoding on the ideological orientation of each justice's invalidation votes (conservative votes are listed first):

39. For a discussion of the impact of this coding rule, see Lori A. Ringhand, *The Rehnquist Court: A "By-the-Numbers" Retrospective*, forthcoming Spring 2007 in the UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW.

Table 4

	Criminal Pro	First Am	1st Am Recoded	Due Process	Federal-Ism	Federal Tax
Thomas	1/1	5/10	11/4	2/0	13/0	1/0
Kennedy	0/1	3/12	8/7	2/0	11/0	1/0
Scalia	1/0	5/8	11/2	2/0	12/0	1/0
Rehnquist	0/1	3/6	7/2	2/0	11/0	1/0
O'Connor	0/1	1/8	5/4	2/0	12/0	1/0
Souter	0/2	0/15	7/8	1/1	0/0	1/0
Ginsburg	0/3	1/10	3/8	1/1	0/0	1/0
Stevens	0/2	0/13	4/9	0/1	0/0	1/0
Breyer	0/2	0/8	3/5	1/1	0/0	1/0

Table 5

	Before Recoding	After Recoding
Thomas	22/11	28/5
Kennedy	17/13	22/8
Scalia	21/8	27/2
Rehnquist	17/7	21/3
O'Connor	16/8	20/4
Souter	2/18	9/11
Ginsburg	3/14	5/12
Stevens	1/16	5/12
Breyer	2/11	5/8

Clearly, when the ideological drift in the First Amendment cases is taken into account, it is evident that the Court's more conservative justices cast very few genuinely liberal federal invalidation votes.⁴⁰ Of Justice Thomas's 11 purportedly liberal votes, six were cast in commercial speech or campaign finance cases, as were six of Justice Scalia's eight "liberal" votes.

Thus, the re-coding of these cases illuminates the ideologically predictable nature of most of the justices' federal invalidation votes. Conservative Justices Scalia and Thomas cast 93 and 85 percent, respectively, of their ideologically coded federal invalidation votes in furtherance of conservative outcomes; while

40. See Appendix A.

liberal justices Ginsburg and Stevens each cast 70 percent of their votes in furtherance of liberal outcomes. Only Justices Souter and Breyer were somewhat less ideologically predictable. Only 55 percent of Justice Souter's ideologically coded federal invalidation votes were liberal, while only 61 percent of Justice Breyer's were. Even this meager diversity, however, is attributable almost exclusively to ideologically elusive First Amendment cases.

STATE LAWS AND DECLARATIONS OF UNCONSTITUTIONALITY

A. USE OF JUDICIAL REVIEW TO INVALIDATE STATE LAWS

The state cases present a different picture. Unlike in the federal invalidation cases, in these cases it is the liberal justices who most actively used their power. As shown below, Justice Stevens voted to invalidate the most state laws, casting 46 such votes.⁴¹ He is followed by Justices Souter and Breyer, with 45 and 44 state invalidation votes respectively, and Justice Ginsburg, with 41. Justices O'Connor and Kennedy are next, with 39 and 36 votes each, followed by Justices Scalia and Thomas with 27 votes each. Justice Rehnquist cast the fewest votes to invalidate state legislation, with 21—less than half as many such votes as cast by Justices Stevens, Souter and Breyer:

41. A list of the cases in which each justice cast his or her state invalidation votes is available at Appendix B. For each such case, Appendix B lists the case name, the case citation, the issue area of the case, the term in which the case was decided, the vote margin by which the case was decided and the ideological direction of the justice's invalidation vote.

Table 6

Justice	Votes to declare a state law unconstitutional
Stevens	46
Souter	45
Breyer	44
Ginsburg	41
O'Connor	39
Kennedy	36
Scalia	27
Thomas	27
Rehnquist	21

Clearly, the Rehnquist Court justices generally regarded as the most conservative (Chief Justice Rehnquist and Justices Scalia and Thomas) were far more reticent to invalidate state laws than were their more liberal counterparts. This is consistent with the pro-states' rights, pro-federalism perspective frequently associated with these justices. Again, however, the more interesting thing about these cases may be how—not whether—the various justices used their power.

B. ISSUE AREAS IN WHICH THE JUSTICES VOTED TO INVALIDATE STATE LAWS

As in the federal invalidation cases, the liberal and the conservative justices used their power in these state-level cases quite differently:

Table 7

	Crim Pro	Civil Rights	1st Am	Due Proc	Privacy	Economic Activity	Federal- ism	Total
Stevens	11	7	11	4	4	7	2	46
Souter	8	7	11	4	5	7	3	45
Breyer	9	7	8	4	4	8	4	44
Ginsburg	9	7	10	3	5	5	2	41
O'Connor	4	9	7	4	5	7	3	39
Kennedy	4	9	9	3	2	6	3	36
Scalia	2	7	7	3	1	6	1	27
Thomas	2	6	8	3	2	5	1	27
Rehnquist	1	6	4	3	1	4	2	21

As shown above, the areas of most disagreement between the liberal and conservative justices were criminal procedure and the First Amendment. In both of those issue areas, the liberal justices voted to invalidate far more statutes than did their more conservative counterparts. The criminal procedure cases in which these votes were cast varied, and included two death penalty challenges, numerous challenges under the Ex Post Facto Clause, and a challenge to California's "three strikes" statute.⁴² Within the First Amendment cases, some of the conservative justices' invalidation votes, as discussed above, came in commercial speech and campaign regulation cases.⁴³ The Court's more liberal justices also cast invalidation votes in these types of cases, with much of the difference being made up in pornography and Establishment Clause cases.⁴⁴

The other key area of difference between the justices in the state invalidation cases is the Civil Rights cases. While the justices cast a roughly similar number of votes to invalidate state legislation in this area, they did so in very different cases, and their votes furthered different ideological outcomes. Of the Civil Rights invalidation votes cast by the Court's most conservative justices (Justices Thomas and Scalia), three involved Fourteenth

42. See Appendix B.

43. *Id.*

44. *Id.*

Amendment-based “racial gerrymandering” challenges to legislative redistricting plans⁴⁵ and the fourth struck down an effort by Hawaii to reserve spots on a governing board to native born Hawaiians.⁴⁶ None of the Court’s liberal justices cast any of their state level invalidation votes in these types of cases.⁴⁷

These Fourteenth Amendment votes are striking because, like the First Amendment cases discussed above, they also rest on somewhat questionable originalism grounds. Whether the original meaning of the Fourteenth Amendment’s Equal Protection Clause compels striking down the legislative redistricting plans at issue in these cases is far from clear⁴⁸, and does not seem to be relied on by those justices in these cases.⁴⁹ As in the federal level cases, it thus appears that the Rehnquist Court’s most conservative justices were willing to use their power to invalidate state laws in ways not clearly mandated by an originalist interpretation of the Constitution.

C. IDEOLOGICAL DIRECTION OF THE JUSTICES’ VOTES TO INVALIDATE FEDERAL LAWS

The justices’ state invalidation votes, listed by the issue areas in which they were cast, were as follows (conservative votes within each issue area are listed first):

45. *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 517 U.S. 899 (1996); and *Bush v. Vera*, 517 U.S. 952 (1996).

46. *Rice v. Cayetano*, 528 U.S. 495 (2000).

47. See Appendix B.

48. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §16-22, at 1523, n.9 (2d ed. 1988); Erwin Chemerinsky, *The Rehnquist Court and Justice: An Oxymoron?*, 1 WASH. U. J.L. & POL’Y 37, 47 (1999); Daniel Lowenstein, *You Don’t Have to be a Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779 (1998) (citing Jeffrey Rosen, *Kiryas Joel and Shaw v. Reno: A Text-Bound Interpretivist Approach*, 26 CUMB. L. REV. 387, 402–03 (1996)).

49. For a discussion of Justices Thomas’ and Scalia’s silence on this issue, see Michael Selmi, *The Life of Bakke: An Affirmative Action Retrospective*, 87 GEO. L.J. 981, 1000, n. 113 (1999). See also, Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

Table 8

	Crim Pro	Civil Rights	1st Am	Due Proc	Privacy	Economic Activity ⁵⁰	Feder- alism	Total
Stevens	0/11	0/7	1/10	0/4	0/4	6/1	0/2	7/39
Souter	0/8	1/6	1/10	0/4	0/5	5/2	0/3	7/38
Breyer	0/9	1/6	1/7	0/4	0/4	6/2	0/4	8/36
Ginsburg	0/9	0/7	1/9	0/3	0/5	4/1	0/2	5/36
O'Connor	0/4	4/5	0/7	1/3	0/5	6/1	0/3	11/28
Kennedy	0/4	4/5	1/8	1/2	0/2	4/2	0/3	10/26
Scalia	0/2	4/3	2/5	2/1	0/1	5/1	0/1	13/14
Thomas	0/2	4/2	2/6	2/1	0/2	5/0	0/1	13/14
Rehnquist	0/1	4/2	1/3	2/1	0/1	4/0	0/2	11/10

As shown above, liberal justices Stevens, Souter, Breyer and Ginsburg each cast most of their state invalidation votes in furtherance of substantively liberal outcomes. Conservative justices Scalia, Thomas and Rehnquist, in comparison, each cast an almost equal number of conservative and liberal state invalidation votes. Moderate justices O'Connor and Kennedy, not surprisingly, fell roughly in-between these two ideological blocs, cast an almost even number of liberal and conservative state invalidation votes in this issue area.⁵¹

50. The constitutional cases in the economic activity category consist primarily of Dormant Commerce Clause and Privileges and Immunity Clause cases. In economic activity cases, the Spaeth coding protocols deem votes to invalidate state taxation schemes "pro-business". Such votes therefore are coded as conservative. See Spaeth Codebook, *supra* note 10 at 58-59. This does not, however, mean that all cases striking down state legislation under the Dormant Commerce Clause are coded as conservative. For example, *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), invalidating a state taxation scheme under the Dormant Commerce Clause, is coded as a conservative outcome, but *Camps Newfound/O Watonna* (*infra* note 51), invalidating a state law exempting charitable organizations from state property tax, is coded as a liberal.

51. The state invalidation cases in which the conservative-centrists justices, Justices O'Connor and Kennedy, deviate from the conservative block are interesting. For example, both of these justices voted with their more liberal counterparts in *Romer v. Evans*, 517 U.S. 620 (1996), to strike down an amendment to the Colorado constitution that prohibited the state from enacting via regular legislation laws designed to prohibit discrimination on the basis of homosexual or bisexual orientation. They also both voted with the more liberal justices in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), to strike down a Mississippi statute that conditioned a person's right to appeal certain judicial decisions on prepayment of fees; in *Indianapolis v. Edmond*, 531 U.S. 32 (2000) to strike down under the Fourth Amendment a city ordinance establishing vehicle checkpoints solely for the pur-

What is perhaps more surprising than the difference between the liberal and conservative justices in this area is number of liberal outcomes, as shown above, that the most conservative justices *did* vote for when casting their state invalidation votes. Each of the most conservative justices cast close to half of their state invalidation votes in furtherance of liberal outcomes. Justices Scalia and Thomas, for example, each cast an even number of liberal and conservative state invalidation votes. Justice Rehnquist cast just two more conservative than liberal votes.

These are much closer conservative/liberal invalidation vote ratios than we see for any of the liberal justices. Of the liberal justices, Justice Breyer had the highest conservative/liberal ratio, and he cast just 8 of his 44 invalidation votes in furtherance of conservative outcomes. Moreover, while some of the conservatives' liberal invalidation votes are attributable to the types of First Amendment cases discussed above, such cases play a much smaller role here than they do in the federal invalidation cases.⁵²

pose of intercepting illegal drugs; in *Chicago v. Morales*, 527 U.S. 41 (1999) to strike down as unconstitutionally vague a Chicago law prohibiting criminal street gang members from loitering in public places; and in *Camps Newfound/O Watonna, Inc. v. Town of Harrison, ME*, 520 U.S. 564 (1997) to strike down under the Dormant Commerce Clause a Maine law that exempted charitable organizations incorporated in Maine from state real estate and personal property taxes. Justice O'Connor dissented with the liberal justices in *Montana v. Egelhoff*, 518 U.S. 37 (1996), arguing that a Montana law that prevented a defendant's intoxicated state from being used in his defense in a vehicular homicide case violated the defendant's constitutional right to a fair opportunity to defend himself; in *Oklahoma Tax Com'n. v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), arguing in dissent with Justice Breyer that Oklahoma's tax on the gross price of interstate bus tickets sold in Oklahoma violates the Dormant Commerce Clause and in *Stenberg v. Carhart*, 530 U.S. 914 (2000) to invalidate a Nebraska statute that banned "partial birth abortions" without providing an exception for the preservation of the mother's health. She also dissented, again with Justice Breyer, in *Jefferson County, Alabama v. Acker*, 527 U.S. 423 (1999), arguing in that case that a county tax violated the intergovernmental tax immunity doctrine. Justice Kennedy voted with the more liberal justices in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) to strike down an Arkansas term limits law; he also voted in dissent with Justice Stevens in *Los Angeles Police Dept. v. United Reporting Publishing, Corp.*, 528 U.S. 32 (1998) (arguing that a state law prohibiting the release to commercial entities information regarding names and addresses of recently arrested individuals violated the First Amendment).

52. Only three of the state-level invalidation votes cast by Justices Thomas or Scalia in the First Amendment area involved commercial speech or campaign finance regulation: *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) and *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

III. OVERTURNING PRECEDENT⁵³

The preceding sections examined the willingness of individual justices to invalidate state and federal legislation. An alternative way of measuring “judicial activism” is by considering a justice’s willingness to overturn existing precedent. Using votes to overturn precedent as a measure of judicial activism is controversial. Votes to overturn precedent are qualitatively different than votes to invalidate federal or state legislation. A vote to invalidate federal or state legislation measures a justice’s willingness to use his or her power in relation to duly elected legislative bodies. A vote to overturn precedent measures a justice’s use of his or her power in relation to prior courts. This is a noteworthy distinction, and different institutional implications are raised by each scenario.

I opt to include this information nonetheless for two reasons. First, the use of judicial power to overturn precedent has at least some of the same qualities that the use of judicial review to invalidate federal or state legislation does—in both cases, for example, the Court undeniably uses its judicial power to change existing law. Second, many legal scholars incorporate this measure into their own assessments of judicial activism.⁵⁴ The inclusion of the information here will be useful for scholars taking that approach.⁵⁵

The Supreme Court Databases code each justice’s votes to formally overturn precedent. A vote will be recorded as a vote to overturn precedent when a justice writes or joins an opinion stating that an existing Supreme Court precedent is or should be overruled, or when a dissenting justice persuasively argues that the majority is in fact overturning a precedent.⁵⁶ Cases in which a justice distinguishes an existing precedent from the case at bar are not counted as votes to overturn precedent.⁵⁷

As measured by their relative willingness to overturn precedent, there is no doubt that the conservative members of the

53. Unlike the data in the preceding sections, the data regarding the individual justices’ votes to overturn precedent extend only through the Court’s 2000 term.

54. See, for example, Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism,”* 92 CAL. L. REV. 1441, 1466–69 (2004).

55. See Canon, *supra* note 3 at 241 (noting that critics of the Warren Court often attacked it as activist for its “unwillingness to maintain continuity, precedent or ‘neutral principles’”). See also Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1789 (2005).

56. See Spaeth Codebook, *supra* note 10 at 64.

57. *Id.*

Rehnquist Natural Court were more “activist” than the liberal members:⁵⁸

Table 9

Justice	Votes to Overturn Precedent
Thomas	23
Scalia	19
Kennedy	16
Rehnquist	12
O'Connor	12
Breyer	10
Stevens	9
Ginsburg	8
Souter	7

As we can see, Justice Thomas outstrips even his conservative colleagues in this area. He cast the most votes—23—to invalidate precedent. This is more than three times as many as Justice Souter, who has cast the fewest such votes (7).

The exception to these high numbers among the more conservative justices is, again, Justice Rehnquist. Justice Rehnquist voted to overturn only 12 precedents. This put him closer to the conservative-leaning centrists Justices Kennedy and O'Connor than to his more solidly conservative colleagues Justices Thomas and Scalia. In fact, Justice Rehnquist's record on this point is closer to that of all four of the liberal justices than it is to Justice Thomas's. As in the state invalidation cases, we again see Justice Rehnquist engaged in a more restrained type of conservative jurisprudence than is apparent in the voting records of Justices Thomas and Scalia.

58. A list of the cases in which each justice cast his or her votes to overturn precedent is available at Appendix C. For each such case, Appendix C lists the case name, the case citation, the issue area of the case, the term in which the case was decided, the vote margin by which the case was decided and the ideological direction of the justice's invalidation vote.

The issue areas and ideological direction of the justices' votes to overturn precedent also differed, and are as follows (conservative votes within each issue area are listed first):

Table 10

	Crim Pro	Civ Rgts	1st Am	Due Proc	Priv	Econ Act	Jud Pw	Feder- alism	Total
Thomas	4/2	2/0	4/2	1/0	1/0	1/1	0/1	3/1	16/7
Scalia	3/2	2/0	4/1	1/0	1/0	0/1	0/1	3/0	14/5
Kennedy	2/3	1/0	4/1	1/0	0	0/1	0/1	2/0	10/6
Rehnquist	1/1	1/0	2/1	1/0	1/0	0/1	0/1	2/0	8/4
O'Connor	1/1	1/0	2/1	1/0	0	0/1	0/2	2/0	7/5
Breyer	0/4	0/1	1/1	0	0	0/1	0/2	0	1/9
Stevens	0/3	0/1	0/2	0	0	0/1	0/2	0	0/9
Ginsburg	0/3	0/1	0/2	0	0	0/1	0/1	0	0/8
Souter	0/2	0/1	0/2	0	0	0/1	0/1	0	0/7

As shown above the justices' votes to overturn existing precedents appear to be quite ideologically predictable. Justice Thomas cast 69 percent of his votes to overturn precedent in furtherance of a conservative case outcome, while 73 percent of Justice Scalia's votes to overturn precedent were ideologically conservative. The liberal justices were even more ideologically consistent in this area. Justices Stevens, Souter and Ginsburg each cast a full 100 percent of their votes here in furtherance of a liberal outcome, with Justice Breyer trailing just behind at 90 percent.

CONCLUSION

"Judicial activism" is, and is likely to remain, a deeply contested term. This paper has attempted to give the term some quantifiable meaning by defining it in three objectively verifiable ways: a justice's willingness to invalidate federal legislation, to invalidate state legislation, and to overturn precedent. Using these measures of judicial activism—the only such measures not resting on fundamentally contested theories of constitutional interpretation—we see that the "judicial conservatives" sitting on

the Rehnquist Court were in many ways more “activist” than their more “liberal” counterparts. Although the liberal justices invalidated more state laws than did the conservative justices, the conservatives were much more willing to invalidate federal laws and to overturn precedents than were their liberal counterparts. The cognizant difference between the justices, therefore, was not *whether* they engaged in such activism, but the issue areas in which they did so, the ideological direction their activism took, and the institutional levels at which it occurred. While this finding is consistent with current legal scholarship and thus not itself surprising, my hope is that this paper, by providing comprehensive and empirical data about actual judicial behavior, will contribute to the growing effort to steer constitutional scholarship away from abstract theories of judicial review and toward a more grounded understanding of the role judicial power and constitutional interpretation in fact play in our legal system.

APPENDIX A
VOTES TO INVALIDATE FEDERAL LAWS

Justice Rehnquist	U.S. Cite	Issue Area	Vote Direction	Vote	Term
Plaut v. Spendthrift Farm, Inc.	514 U.S. 211	miscellaneous	uncoded	72	1994
Rubin v. Coors Brewing Co.	514 U.S. 476	first amendment	liberal	90	1994
U.S. v. Lopez	514 U.S. 549	federalism	conservative	54	1994
Seminole Tribe of Florida v. Florida	517 U.S. 44	federalism	conservative	54	1995
Colorado Republican Fed. Campaign Cmt. v. FEC	518 U.S. 604	first amendment	liberal	72	1995
Babbitt v. Youpee	519 U.S. 234	due process	conservative	81	1996
Glickman v. Wileman Bros. & Elliott, Inc.	521 U.S. 457	first amendment	liberal	54	1996
City of Boerne v. Flores	521 U.S. 507	first amendment	conservative	63	1996
Reno v. American Civil Liberties Union	521 U.S. 844	first amendment	liberal	90	1996
Printz v. U.S.	521 U.S. 898	federalism	conservative	54	1996
U.S. v. U.S. Shoe Corp.	523 U.S. 360	federal taxation	conservative	90	1997
Eastern Enterprises v. Apfel	524 U.S. 498	due process	conservative	54	1997
Greater New Orleans Broadcasting Ass'n v. U.S.	527 U.S. 173	first amendment	liberal	90	1998
Florida Prepaid v. College Sav. Bank	527 U.S. 627	federalism	conservative	54	1998
College Sav. Bank v. Florida Prepaid	527 U.S. 666	federalism	conservative	54	1998
Alden v. Maine	527 U.S. 706	federalism	conservative	54	1998
Kimel v. Florida Bd. of Regents	528 U.S. 62	federalism	conservative	54	1999
U.S. v. Morrison	529 U.S. 598	federalism	conservative	54	1999
Dickerson v. U.S.	530 U.S. 428	criminal procedure	liberal	72	1999

Board of Trustees of University of Alabama v. Garrett	531 U.S. 356	federalism	conservative	54	2000
U.S. v. United Foods, Inc.	533 U.S. 405	first amendment	liberal	63	2000
FEC v. Colorado Republican Fed. Campaign Cmt.	533 U.S. 431	first amendment	conservative	54	2000
McConnell v. Federal Election Com'n	540 U.S. 93	first amendment	conservative	54	2003
Tennessee v. Lane	541 U.S. 509	federalism	conservative	54	2003
Gonzales v. Raich	545 U.S. 1	federalism	conservative	63	2004
Total					25

Justice Stevens	U.S. Cite	Issue Area	Vote Direction	Vote	Term
U.S. v. National Treasury Employees Union	513 U.S. 454	first amendment	liberal	63	1994
Rubin v. Coors Brewing Co.	514 U.S. 476	first amendment	liberal	90	1994
Denver Area Educ. Telcoms. Consor- tium v. FCC	518 U.S. 727	first amendment	liberal	72	1996
City of Boerne v. Flores	521 U.S. 507	first amendment	liberal	63	1996
Reno v. American Civil Liberties Union	521 U.S. 844	first amendment	liberal	90	1996
U.S. v. U.S. Shoe Corp.	523 U.S. 360	federal taxation	conservative	90	1997
U.S. v. Bajakajian Greater New Orleans Broadcast- ing Ass'n, Inc. v. U.S.	524 U.S. 321	criminal procedure	liberal	54	1997
U.S. v. Playboy Entertainment Group, Inc.	529 U.S. 803	first amendment	liberal	54	1999
Dickerson v. U.S. Legal Services Corp. v. Velazquez	530 U.S. 428	criminal procedure	liberal	72	1999
	531 U.S. 533	first amendment	liberal	54	2000

U.S. v. United Foods, Inc.	533 U.S. 405	first amendment	liberal	63	2000
Dusenbery v. U.S.	534 U.S. 161	due process	liberal	54	2001
Ashcroft v. Free Speech Coalition	535 U.S. 234	first amendment	liberal	63	2001
Ashcroft v. American Civil Liberties Union	535 U.S. 564	first amendment	liberal	81	2001
U.S. v. American Library Ass'n, Inc.	539 U.S. 194	first amendment	liberal	63	2002
Johanns v. Livestock Marketing Ass'n	544 U.S. 550	first amendment	liberal	63	2004
Total					17

Justice O'Connor	U.S. Cite	Issue Area	Vote Direction	Vote	Term
U.S. v. National Treasury Employees Union	513 U.S. 454	first amendment	liberal	63	1994
Plaut v. Spendthrift Farm, Inc.	514 U.S. 211	miscellaneous	uncoded	72	1994
Rubin v. Coors Brewing Co.	514 U.S. 476	first amendment	liberal	90	1994
U.S. v. Lopez	514 U.S. 549	federalism	conservative	54	1994
Seminole Tribe of Florida v. Florida	517 U.S. 44	federalism	conservative	54	1995
Colorado Republican Fed. Campaign Cmt. v. FEC	518 U.S. 604	first amendment	liberal	72	1995
Denver Area Educ. Telcoms. Consortium v. FCC	518 U.S. 727	first amendment	liberal	72	1996
Babbitt v. Youpee	519 U.S. 234	due process	conservative	81	1996
Turner Broadcasting System, Inc. v. F.C.C.	520 U.S. 180	first amendment	liberal	54	1996
Reno v. American Civil Liberties Union	521 U.S. 844	first amendment	liberal	90	1996
Printz v. U.S.	521 U.S. 898	federalism	conservative	54	1996
U.S. v. U.S. Shoe Corp.	523 U.S. 360	federal taxation	conservative	90	1997
Eastern Enterprises v. Apfel	524 U.S. 498	due process	conservative	54	1997

Greater New Orleans Broadcasting Inc. v. U.S.	527 U.S. 173	first amendment	liberal	90	1998
Florida Prepaid v. College Sav. Bank	527 U.S. 627	federalism	conservative	54	1998
College Sav. Bank v. Florida Prepaid	527 U.S. 666	federalism	conservative	54	1998
Alden v. Maine	527 U.S. 706	federalism	conservative	54	1998
Kimel v. Florida Bd. of Regents	528 U.S. 62	federalism	conservative	54	1999
U.S. v. Morrison	529 U.S. 598	federalism	conservative	54	1999
Dickerson v. U.S.	530 U.S. 428	criminal procedure	liberal	72	1999
Board of Trustees of University of Alabama v. Garrett	531 U.S. 356	federalism	conservative	54	2000
U.S. v. United Foods, Inc.	533 U.S. 405	first amendment	conservative	63	2000
Thompson v. Western States Medical Center	535 U.S. 357	first amendment	liberal	54	2001
Gonzales v. Raich	545 U.S. 1	federalism	conservative	63	2004
Total					24

Justice Scalia	U.S. Cite	Issue Area	Vote Direction	Vote	Term
U.S. v. X-Citement Video, Inc.	513 U.S. 64	first amendment	conservative	72	1994
Plaut v. Spendthrift Farm, Inc.	514 U.S. 211	miscellaneous	uncoded	72	1994
Rubin v. Coors Brewing Co.	514 U.S. 476	first amendment	liberal	90	1994
U.S. v. Lopez	514 U.S. 549	federalism	conservative	54	1994
Seminole Tribe of Florida v. Florida	517 U.S. 44	federalism	conservative	54	1995
Colorado Republican Fed. Campaign Cmt. v. FEC	518 U.S. 604	first amendment	liberal	72	1995
Babbitt v. Youpee	519 U.S. 234	due process	conservative	81	1996
Turner Broadcasting System, Inc. v. F.C.C.	520 U.S. 180	first amendment	liberal	54	1996
Glickman v. Wileman Bros. & Elliott, Inc.	521 U.S. 457	first amendment	liberal	54	1996

City of Boerne v. Flores	521 U.S. 507	first amendment	conservative	63	1996
Reno v. American Civil Liberties Union	521 U.S. 844	first amendment	liberal	90	1996
Printz v. U.S.	521 U.S. 898	federalism	conservative	54	1996
U.S. v. U.S. Shoe Corp.	523 U.S. 360	federal taxation	conservative	90	1997
Eastern Enterprises v. Apfel	524 U.S. 498	due process	conservative	54	1997
Greater New Orleans Broadcasting Inc. v. U.S.	527 U.S. 173	first amendment	liberal	90	1998
Florida Prepaid v. College Sav. Bank	527 U.S. 627	federalism	conservative	54	1998
College Sav. Bank v. Florida Prepaid	527 U.S. 666	federalism	conservative	54	1998
Alden v. Maine	527 U.S. 706	federalism	conservative	54	1998
Kimel v. Florida Bd. of Regents	528 U.S. 62	federalism	conservative	54	1999
U.S. v. Morrison	529 U.S. 598	federalism	conservative	54	1999
Dickerson v. U.S. Board of Trustees of University of Alabama v. Garrett	530 U.S. 428	criminal procedure	conservative	72	1999
U.S. v. United Foods, Inc.	531 U.S. 356	federalism	conservative	54	2000
FEC v. Colorado Republican Fed. Campaign Cmt.	533 U.S. 405	first amendment	liberal	63	2000
Thompson v. Western States Medical Center	533 U.S. 431	first amendment	conservative	54	2000
Nevada Dept. of Human Resources v. Hibbs	535 U.S. 357	first amendment	liberal	54	2001
Federal Election Com'n v. Beaumont	538 U.S. 721	federalism	conservative	63	2002
McConnell v. Federal Election Com'n	539 U.S. 146	first amendment	conservative	72	2002
Tennessee Student Assistance Corp. v. Hood	540 U.S. 93	first amendment	conservative	54	2003
Tennessee v. Lane	541 U.S. 440	federalism	conservative	72	2003
	541 U.S. 509	federalism	conservative	54	2003
Total					30

Justice Kennedy	U.S. Cite	Issue Area	Vote		Term
			Direction	Vote	
U.S. v. National Treasury Employees Union	513 U.S. 454	first amendment	liberal	63	1994
Plaut v. Spendthrift Farm, Inc.	514 U.S. 211	miscellaneous	.	72	1994
Rubin v. Coors Brewing Co.	514 U.S. 476	first amendment	liberal	90	1994
U.S. v. Lopez	514 U.S. 549	federalism	conservative	54	1994
Seminole Tribe of Florida v. Florida	517 U.S. 44	federalism	conservative	54	1995
Colorado Republican Fed. Campaign Cmt. v. FEC	518 U.S. 604	first amendment	liberal	72	1995
Denver Area Edu. Telecommunications v. F.C.C.	518 U.S. 727	first amendment	liberal	72	1995
Babbitt v. Youpee	519 U.S. 234	due process	conservative	81	1996
City of Boerne v. Flores	521 U.S. 507	first amendment	conservative	63	1996
Reno v. American Civil Liberties Union	521 U.S. 844	first amendment	liberal	90	1996
Printz v. U.S.	521 U.S. 898	federalism	conservative	54	1996
U.S. v. U.S. Shoe Corp.	523 U.S. 360	federal taxation	conservative	90	1997
Eastern Enterprises v. Apfel	524 U.S. 498	due process	conservative	54	1997
Greater New Orleans Broadcasting Inc. v. U.S.	527 U.S. 173	first amendment	liberal	90	1998
Florida Prepaid v. College Sav. Bank	527 U.S. 627	federalism	conservative	54	1998
College Sav. Bank v. Florida Prepaid	527 U.S. 666	federalism	conservative	54	1998
Alden v. Maine	527 U.S. 706	federalism	conservative	54	1998
Kimel v. Florida Bd. of Regents	528 U.S. 62	federalism	conservative	54	1999
U.S. v. Morrison	529 U.S. 598	federalism	conservative	54	1999
U.S. v. Playboy Entertainment Group, Inc.	529 U.S. 803	first amendment	liberal	54	1999
Dickerson v. U.S.	530 U.S. 428	criminal procedure	liberal	72	1999

Board of Trustees of University of Alabama v. Garrett	531 U.S. 356	federalism	conservative	54	2000
Legal Services Corp. v. Velazquez	531 U.S. 533	first amendment	liberal	54	2000
U.S. v. United Foods, Inc.	533 U.S. 405	first amendment	liberal	63	2000
FEC v. Colorado Republican Fed. Campaign Cmt.	533 U.S. 431	first amendment	conservative	54	2000
Ashcroft v. Free Speech Coalition	535 U.S. 234	first amendment	liberal	63	2001
Thompson v. West- ern States Medical Center	535 U.S. 357	first amendment	liberal	54	2001
Nevada Dept. of Human Resources v. Hibbs	538 U.S. 721	federalism	conservative	63	2002
McConnell v. Federal Election Com'n	540 U.S. 93	first amendment	conservative	54	2003
Tennessee v. Lane	541 U.S. 509	federalism	conservative	54	2003
Johanns v. Live- stock Marketing Ass'n	544 U.S. 550	first amendment	liberal	63	2004
Total					31

Justice Souter	U.S. Cite	Issue Area	Vote Direction	Vote	Term
U.S. v. National Treasury Employ- ees Union	513 U.S. 454	first amendment	liberal	63	1994
Plaut v. Spendthrift Farm, Inc.	514 U.S. 211	miscellaneous	uncoded	72	1994
Rubin v. Coors Brewing Co.	514 U.S. 476	first amendment	liberal	90	1994
Colorado Republi- can Fed. Campaign Cmt. v. FEC	518 U.S. 604	first amendment	liberal	72	1995
Denver Area Educ. Telcoms. Consor- tium v. FCC	518 U.S. 727	first amendment	liberal	72	1996
Babbitt v. Youpee	519 U.S. 234	due process	conservative	81	1996
Glickman v. Wileman Bros. & Elliott, Inc.	521 U.S. 457	first amendment	liberal	54	1996

Reno v. American Civil Liberties Union	521 U.S. 844	first amendment	liberal	90	1996
U.S. v. U.S. Shoe Corp.	523 U.S. 360	federal taxation	conservative	90	1997
U.S. v. Bajakajian	524 U.S. 321	criminal procedure	liberal	54	1997
National Endowment for the Arts v. Finley	524 U.S. 569	first amendment	liberal	81	1997
Greater New Orleans Broadcasting Inc. v. U.S.	527 U.S. 173	first amendment	liberal	90	1998
U.S. v. Playboy Entertainment Group, Inc.	529 U.S. 803	first amendment	liberal	54	1999
Dickerson v. U.S. Legal Services Corp. v. Velazquez	530 U.S. 428	criminal procedure	liberal	72	1999
U.S. v. United Foods, Inc.	531 U.S. 533	first amendment	liberal	54	2000
Dusenbery v. U.S. Ashcroft v. Free Speech Coalition	533 U.S. 405	first amendment	liberal	63	2000
Thompson v. Western States Medical Center	534 U.S. 161	due process	liberal	54	2001
U.S. v. American Library Ass'n, Inc.	535 U.S. 234	first amendment	liberal	63	2001
Johanns v. Livestock Marketing Ass'n	535 U.S. 357	first amendment	liberal	54	2001
	539 U.S. 194	first amendment	liberal	63	2002
	544 U.S. 550	first amendment	liberal	63	2004
Total					21

Justice Thomas	U.S. Cite	Issue Area	Vote Direction	Vote	Term
U.S. v. X-Citement Video, Inc.	513 U.S. 64	first amendment	conservative	72	1994
Plaut v. Spendthrift Farm, Inc.	514 U.S. 211	miscellaneous	uncoded	72	1994
Rubin v. Coors Brewing Co.	514 U.S. 476	first amendment	liberal	90	1994
U.S. v. Lopez	514 U.S. 549	federalism	conservative	54	1994
Seminole Tribe of Florida v. Florida	517 U.S. 44	federalism	conservative	54	1995

Colorado Republican Fed. Campaign Cmt. v. FEC	518 U.S. 604	first amendment	liberal	72	1995
Babbitt v. Youpee	519 U.S. 234	due process	conservative	81	1996
Turner Broadcasting System, Inc. v. F.C.C.	520 U.S. 180	first amendment	liberal	54	1996
Glickman v. Wileman Bros. & Elliott, Inc.	521 U.S. 457	first amendment	liberal	54	1996
City of Boerne v. Flores	521 U.S. 507	first amendment	conservative	63	1996
Reno v. American Civil Liberties Union	521 U.S. 844	first amendment	liberal	90	1996
Printz v. U.S.	521 U.S. 898	federalism	conservative	54	1996
U.S. v. U.S. Shoe Corp.	523 U.S. 360	federal taxation	conservative	90	1997
U.S. v. Bajakajian	524 U.S. 321	criminal procedure	liberal	54	1997
Eastern Enterprises v. Apfel	524 U.S. 498	due process	conservative	54	1997
Greater New Orleans Broadcasting Inc. v. U.S.	527 U.S. 173	first amendment	liberal	90	1998
Florida Prepaid v. College Sav. Bank	527 U.S. 627	federalism	conservative	54	1998
College Sav. Bank v. Florida Prepaid	527 U.S. 666	federalism	conservative	54	1998
Alden v. Maine	527 U.S. 706	federalism	conservative	54	1998
Kimel v. Florida Bd. of Regents	528 U.S. 62	federalism	conservative	54	1999
U.S. v. Morrison	529 U.S. 598	federalism	conservative	54	1999
U.S. v. Playboy Entertainment Group, Inc.	529 U.S. 803	first amendment	liberal	54	1999
Dickerson v. U.S.	530 U.S. 428	criminal procedure	conservative	72	1999
Board of Trustees of University of Alabama v. Garrett	531 U.S. 356	federalism	conservative	54	2000
U.S. v. United Foods, Inc.	533 U.S. 405	first amendment	liberal	63	2000
FEC v. Colorado Republican Fed. Campaign Cmt.	533 U.S. 431	first amendment	conservative	54	2000
Ashcroft v. Free Speech Coalition	535 U.S. 234	first amendment	liberal	63	2001

Thompson v. Western States Medical Center	535 U.S. 357	first amendment	liberal	54	2001
Nevada Dept. of Human Resources v. Hibbs	538 U.S. 721	federalism	conservative	63	2002
Federal Election Com'n v. Beaumont	539 U.S. 146	first amendment	conservative	72	2002
McConnell v. Federal Election Com'n	540 U.S. 93	first amendment	conservative	54	2003
Tennessee Student Assistance Corp. v. Hood	541 U.S. 440	federalism	conservative	72	2003
Tennessee v. Lane	541 U.S. 509	federalism	conservative	54	2003
Gonzales v. Raich	545 U.S. 1	federalism	conservative	63	2004
Total					34

Justice Ginsburg	U.S. Cite	Issue Area	Vote Direction	Vote	Term
U.S. v. National Treasury Employees Union	513 U.S. 454	first amendment	liberal	63	1994
Rubin v. Coors Brewing Co.	514 U.S. 476	first amendment	liberal	90	1994
Denver Area Edu. Telecommunications v. F.C.C.	518 U.S. 727	first amendment	liberal	72	1995
Babbitt v. Youpee	519 U.S. 234	due process	conservative	81	1996
Turner Broadcasting System, Inc. v. F.C.C.	520 U.S. 180	first amendment	liberal	54	1996
City of Boerne v. Flores	521 U.S. 507	first amendment	conservative	63	1996
Reno v. American Civil Liberties Union	521 U.S. 844	first amendment	liberal	90	1996
U.S. v. U.S. Shoe Corp.	523 U.S. 360	federal taxation	conservative	90	1997
U.S. v. Bajakajian	524 U.S. 321	criminal procedure	liberal	54	1997
Greater New Orleans Broadcasting Inc. v. U.S.	527 U.S. 173	first amendment	liberal	90	1998

U.S. v. Playboy Entertainment Group, Inc.	529 U.S. 803	first amendment	liberal	54	1999
Dickerson v. U.S. Legal Services Corp. v. Velazquez	530 U.S. 428	criminal procedure	liberal	72	1999
Dusenbery v. U.S. Ashcroft v. Free Speech Coalition	531 U.S. 533	first amendment	liberal	54	2000
U.S. v. American Library Ass'n, Inc.	534 U.S. 161	due process	liberal	54	2001
U.S. v. Booker	535 U.S. 234	first amendment	liberal	63	2001
	539 U.S. 194	first amendment	liberal	63	2002
	543 U.S. 220	criminal procedure	liberal	54	2004
Total					17

Justice Breyer	U.S. Cite	Issue Area	Vote Direction	Vote	Term
U.S. v. National Treasury Employees Union	513 U.S. 454	first amendment	liberal	63	1994
Plaut v. Spendthrift Farm, Inc.	514 U.S. 211	miscellaneous	uncoded	72	1994
Rubin v. Coors Brewing Co.	514 U.S. 476	first amendment	liberal	90	1994
Colorado Republican Fed. Campaign Cmt. v. FEC	518 U.S. 604	first amendment	liberal	72	1995
Denver Area Educ. Telcoms. Consortium v. FCC	518 U.S. 727	first amendment	liberal	72	1996
Babbitt v. Youpee	519 U.S. 234	due process	conservative	81	1996
Reno v. American Civil Liberties Union	521 U.S. 844	first amendment	liberal	90	1996
U.S. v. U.S. Shoe Corp.	523 U.S. 360	federal taxation	conservative	90	1997
U.S. v. Bajakajian	524 U.S. 321	criminal procedure	liberal	54	1997
Greater New Orleans Broadcasting Inc. v. U.S.	527 U.S. 173	first amendment	liberal	90	1998
Dickerson v. U.S.	530 U.S. 428	criminal procedure	liberal	72	1999

Legal Services

Corp. v. Velazquez	<i>531 U.S. 533</i>	first amendment	liberal	54	2000
Dusenbery v. U.S.	<i>534 U.S. 161</i>	due process	liberal	54	2001
Ashcroft v. Free Speech Coalition	<i>535 U.S. 234</i>	first amendment	liberal	63	2001
Total					14

APPENDIX B
VOTES TO INVALIDATE STATE LAW

Justice Rehnquist	U.S. Cite	Issue Area	Vote Direction	Vote	Term
Reich v. Collins	513 U.S. 106	economic activity	conservative	90	1994
Miller v. Johnson	515 U.S. 900	civil rights	conservative	54	1994
Fulton Corp. v. Faulkner	516 U.S. 325	economic activity	conservative	90	1995
Cooper v. Oklahoma	517 U.S. 348	due process	liberal	90	1995
44 Liquormart, Inc. v. Rhode Island	517 U.S. 484	first amendment	liberal	90	1995
Shaw v. Hunt	517 U.S. 899	civil rights	conservative	54	1995
Bush v. Vera	517 U.S. 952	civil rights	conservative	54	1995
Lynce v. Mathis	519 U.S. 433	criminal procedure	liberal	90	1996
Foster v. Love	522 U.S. 67	civil rights	liberal	90	1997
South Central Bell Telephone v. Alabama	526 U.S. 160	economic activity	conservative	90	1998
Hunt-Wesson v. Franchise Tax Bd. of Cal.	528 U.S. 458	economic activity	conservative	90	1999
Rice v. Cayetano	528 U.S. 495	civil rights	conservative	72	1999
Troxel v. Granville	530 U.S. 57	privacy	liberal	63	1999
Crosby v. National Foreign Trade Council	530 U.S. 363	federalism	liberal	90	1999
California Democratic Party v. Jones	530 U.S. 567	first amendment	liberal	72	1999
Cook v. Gralike	531 U.S. 510	civil rights	liberal	90	2000
Lorillard Tobacco Co. v. Reilly	533 U.S. 525	first amendment	liberal	54	2000
Brown v. Legal Foundation of Washington	538 U.S. 216	due process	conservative	54	2002
Virginia v. Black American Ins. Ass'n v. Garamendi	538 U.S. 343	first amendment	liberal	72	2002
	539 U.S. 396	federalism	liberal	54	2002

Kelo v. City of New London, Conn.	<i>162 L. Ed.2d</i> <i>0439</i>	due process	conservative	54	2004
Total					21

Justice Stevens	U.S. Cite	Issue Area	Vote		Term
			Direction	Vote	
Reich v. Collins	<i>513 U.S. 106</i>	economic activity	conservative	90	1994
Harris v. Alabama	<i>513 U.S. 504</i>	criminal procedure	liberal	81	1994
McIntyre v. Ohio Elections Com'n	<i>514 U.S. 334</i>	first amendment	liberal	72	1994
California Dept. of Corrections v. Morales	<i>514 U.S. 499</i>	criminal procedure	liberal	72	1994
U.S. Term Limits, Inc. v. Thornton	<i>514 U.S. 779</i>	federalism	liberal	54	1994
Fulton Corp. v. Faulkner	<i>516 U.S. 325</i>	economic activity	conservative	90	1995
Cooper v. Oklahoma	<i>517 U.S. 348</i>	due process	liberal	90	1995
44 Liquormart, Inc. v. Rhode Island	<i>517 U.S. 484</i>	first amendment	liberal	90	1995
Romer v. Evans	<i>517 U.S. 620</i>	civil rights	liberal	63	1995
Montana v. Egelhoff	<i>518 U.S. 37</i>	due process	liberal	54	1995
M.L.B. v. S.L.J.	<i>519 U.S. 102</i>	civil rights	liberal	63	1996
General Motors Corp. v. Tracy	<i>519 U.S. 278</i>	economic activity	conservative	81	1996
Lynce v. Mathis	<i>519 U.S. 433</i>	criminal procedure	liberal	90	1996
Chandler v. Miller	<i>520 U.S. 305</i>	privacy	liberal	81	1996
Timmons v. Twin Cities Area New Party	<i>520 U.S. 351</i>	civil rights	liberal	63	1996
Camps Newfound/ Owatonna v. Harrison	<i>520 U.S. 564</i>	economic activity	liberal	54	1996
Kansas v. Hendricks	<i>521 U.S. 346</i>	due process	liberal	54	1996
Foster v. Love	<i>522 U.S. 67</i>	civil rights	liberal	90	1997
Lunding v. New York Tax Appeals Tribunal	<i>522 U.S. 287</i>	economic activity	conservative	63	1997

Buckley v. Am. Constitutional Law Found.	525 U.S. 182	first amendment	liberal	63	1998
South Central Bell Telephone v. Alabama	526 U.S. 160	economic activity	conservative	90	1998
Saenz v. Roe	526 U.S. 489	civil rights	liberal	72	1998
City of Chicago v. Morales	527 U.S. 41	due process	liberal	63	1998
LA Police Dept. v. United Reporting Pub.	528 U.S. 32	first amendment	liberal	72	1999
Hunt-Wesson v. Franchise Tax Bd. of Cal.	528 U.S. 458	economic activity	conservative	90	1999
Rice v. Cayetano	528 U.S. 495	civil rights	liberal	72	1999
Crosby v. National Foreign Trade Council	530 U.S. 363	federalism	liberal	90	1999
California Democ- ratic Party v. Jones	530 U.S. 567	first amendment	conservative	72	1999
Stenberg v. Carhart	530 U.S. 914	privacy	liberal	54	1999
City of Indianapo- lis v. Edmond	531 U.S. 32	criminal procedure	liberal	63	2000
Cook v. Gralike	531 U.S. 510	civil rights	liberal	90	2000
Lorillard Tobacco Co. v. Reilly	533 U.S. 525	first amendment	conservative	54	2000
Kelly v. South Carolina	534 U.S. 246	criminal procedure	liberal	54	2001
City of Los Ange- les v. Alameda Books, Inc.	535 U.S. 425	first amendment	liberal	54	2001
McKune v. Lile	536 U.S. 24	criminal procedure	liberal	54	2001
Watchtower Bible & Tract Soc. v. Stratton	536 U.S. 150	first amendment	liberal	81	2001
Ring v. Arizona	536 U.S. 584	criminal procedure	liberal	72	2001
Zelman v. Simmons-Harris	536 U.S. 639	first amendment	liberal	54	2001
Board of Ed. of Independent School District	536 U.S. 822	privacy	liberal	54	2001
Ewing v. California	538 U.S. 11	criminal procedure	liberal	54	2002
Smith v. Doe	538 U.S. 84	criminal procedure	liberal	63	2002

Virginia v. Black	538 U.S. 343	first amendment	liberal	72	2002
Lawrence v. Texas	539 U.S. 558	privacy	liberal	63	2002
Stogner v. California	539 U.S. 607	criminal procedure	liberal	54	2002
Hiibel v. 6th Judicial Dist. Court of Nevada	542 U.S. 177	criminal procedure	liberal	54	2003
Clingman v. Beaver	544 U.S. 581	first amendment	liberal	63	2004
McCreary County, Ky v. ACLU	162 L. Ed.2d 0729	first amendment	liberal	54	2004

Total 47

Justice O'Connor	U.S. Cite	Issue Area	Vote Direction	Vote	Term
Reich v. Collins	513 U.S. 106	economic activity	conservative	90	1994
Oklahoma Tax Com'n v. Jefferson Lines	514 U.S. 175	economic activity	conservative	72	1994
McIntyre v. Ohio Elections Com'n	514 U.S. 334	first amendment	liberal	72	1994
Miller v. Johnson	515 U.S. 900	civil rights	conservative	54	1994
Fulton Corp. v. Faulkner	516 U.S. 325	economic activity	conservative	90	1995
Cooper v. Oklahoma	517 U.S. 348	due process	liberal	90	1995
44 Liquormart, Inc. v. Rhode Island	517 U.S. 484	first amendment	liberal	90	1995
Romer v. Evans	517 U.S. 620	civil rights	liberal	63	1995
Shaw v. Hunt	517 U.S. 899	civil rights	conservative	54	1995
Bush v. Vera	517 U.S. 952	civil rights	conservative	54	1995
Montana v. Egelhoff	518 U.S. 37	due process	liberal	54	1995
M.L.B. v. S.L.J.	519 U.S. 102	civil rights	liberal	63	1996
Lynce v. Mathis	519 U.S. 433	criminal procedure	liberal	90	1996
Chandler v. Miller	520 U.S. 305	privacy	liberal	81	1996
Camps Newfound/Owatonna v. Harrison	520 U.S. 564	economic activity	liberal	54	1996
Foster v. Love	522 U.S. 67	civil rights	liberal	90	1997

Lunding v. New York Tax Appeals Tribunal	522 U.S. 287	economic activity	conservative	63	1997
South Central Bell Telephone v. Alabama	526 U.S. 160	economic activity	conservative	90	1998
Saenz v. Roe	526 U.S. 489	civil rights	liberal	72	1998
City of Chicago v. Morales	527 U.S. 41	due process	liberal	63	1998
Jefferson County, Ala. v. Acker	527 U.S. 423	federalism	liberal	72	1998
Hunt-Wesson v. Franchise Tax Bd. of Cal.	528 U.S. 458	economic activity	conservative	90	1999
Rice v. Cayetano	528 U.S. 495	civil rights	conservative	72	1999
Troxel v. Granville	530 U.S. 57	privacy	liberal	63	1999
Crosby v. National Foreign Trade Council	530 U.S. 363	federalism	liberal	90	1999
California Democratic Party v. Jones	530 U.S. 567	first amendment	liberal	72	1999
Stenberg v. Carhart	530 U.S. 914	privacy	liberal	54	1999
City of Indianapolis v. Edmond	531 U.S. 32	criminal procedure	liberal	63	2000
Cook v. Gralike	531 U.S. 510	civil rights	liberal	90	2000
Lorillard Tobacco Co. v. Reilly	533 U.S. 525	first amendment	liberal	54	2000
Kelly v. South Carolina	534 U.S. 246	criminal procedure	liberal	54	2001
Watchtower Bible & Tract Soc. v. Stratton	536 U.S. 150	first amendment	liberal	81	2001
Board of Independent School District	536 U.S. 822	privacy	liberal	54	2001
Virginia v. Black	538 U.S. 343	first amendment	liberal	72	2002
American Ins. Ass'n v. Garamendi	539 U.S. 396	federalism	liberal	54	2002
Lawrence v. Texas	539 U.S. 558	privacy	liberal	63	2002
Stogner v. California	539 U.S. 607	criminal procedure	liberal	54	2002
Kelo v. City of New London, Conn.	162 L.Ed.2d 0439	due process	conservative	54	2004

McCreary County, Ky v. ACLU	<i>162 L. Ed.2d 0729</i>	first amendment	liberal	54	2004
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Total					39
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Justice Scalia	U.S. Cite	Issue Area	Vote Direction	Vote	Term
Reich v. Collins	<i>513 U.S. 106</i>	economic activity	conservative	90	1994
Miller v. Johnson	<i>515 U.S. 900</i>	civil rights	conservative	54	1994
Fulton Corp. v. Faulkner	<i>516 U.S. 325</i>	economic activity	conservative	90	1995
Cooper v. Oklahoma	<i>517 U.S. 348</i>	due process	liberal	90	1995
44 Liquormart, Inc. v. Rhode Island	<i>517 U.S. 484</i>	first amendment	liberal	90	1995
Shaw v. Hunt	<i>517 U.S. 899</i>	civil rights	conservative	54	1995
Bush v. Vera	<i>517 U.S. 952</i>	civil rights criminal procedure	conservative	54	1995
Lynce v. Mathis	<i>519 U.S. 433</i>	liberal	liberal	90	1996
Chandler v. Miller	<i>520 U.S. 305</i>	privacy	liberal	81	1996
Foster v. Love	<i>522 U.S. 67</i>	civil rights	liberal	90	1997
Lunding v. New York Tax Appeals Tribunal	<i>522 U.S. 287</i>	economic activity	conservative	63	1997
Buckley v. Am. Constitutional Law Found.	<i>525 U.S. 182</i>	first amendment	liberal	63	1998
South Central Bell Telephone v. Alabama	<i>526 U.S. 160</i>	economic activity	conservative	90	1998
Saenz v. Roe	<i>526 U.S. 489</i>	civil rights	liberal	72	1998
Nixon v. Shrink Missouri Government PAC	<i>528 U.S. 377</i>	first amendment	conservative	63	1999
Hunt-Wesson v. Franchise Tax Bd. of Cal.	<i>528 U.S. 458</i>	economic activity	conservative	90	1999
Rice v. Cayetano	<i>528 U.S. 495</i>	civil rights	conservative	72	1999
Crosby v. National Foreign Trade Council	<i>530 U.S. 363</i>	federalism	liberal	90	1999
California Democ- ratic Party v. Jones	<i>530 U.S. 567</i>	first amendment	liberal	72	1999
Cook v. Gralike	<i>531 U.S. 510</i>	civil rights	liberal	90	2000

Lorillard Tobacco Co. v. Reilly	533 U.S. 525	first amendment	liberal	54	2000
Watchtower Bible & Tract Soc. of NY	536 U.S. 150	first amendment	liberal	81	2001
Ring v. Arizona	536 U.S. 584	criminal procedure	liberal	72	2001
Brown v. Legal Foundation of Washington	538 U.S. 216	due process	conservative	54	2002
Locke v. Davey	540 U.S. 712	first amendment	conservative	72	2003
Granholm v. Heald	544 U.S. 460	economic activity	liberal	54	2004
Kelo v. City of New London, Conn.	162 L.Ed.2d 0439	due process	conservative	54	2004
Total					27

Justice Kennedy	U.S. Cite	Issue Area	Vote Direction	Vote	Term
Reich v. Collins	513 U.S. 106	economic activity	conservative	90	1994
McIntyre v. Ohio Elections Com'n	514 U.S. 334	first amendment	liberal	72	1994
U.S. Term Limits, Inc. v. Thornton	514 U.S. 779	federalism	liberal	54	1994
Miller v. Johnson	515 U.S. 900	civil rights	conservative	54	1994
Fulton Corp. v. Faulkner	516 U.S. 325	economic activity	conservative	90	1995
Cooper v. Oklahoma	517 U.S. 348	due process	liberal	90	1995
44 Liquormart, Inc. v. Rhode Island	517 U.S. 484	first amendment	liberal	90	1995
Romer v. Evans	517 U.S. 620	civil rights	liberal	63	1995
Shaw v. Hunt	517 U.S. 899	civil rights	conservative	54	1995
Bush v. Vera	517 U.S. 952	civil rights	conservative	54	1995
M.L.B. v. S.L.J.	519 U.S. 102	civil rights	liberal	63	1996
Lynce v. Mathis	519 U.S. 433	criminal procedure	liberal	90	1996
Chandler v. Miller	520 U.S. 305	privacy	liberal	81	1996
Camps Newfound/ Owatonna v. Harrison	520 U.S. 564	economic activity	liberal	54	1996
Foster v. Love	522 U.S. 67	civil rights	liberal	90	1997

Buckley v. Am. Constitutional Law Found.	525 U.S. 182	first amendment	liberal	63	1998
South Central Bell Telephone v. Alabama	526 U.S. 160	economic activity	conservative	90	1998
Saenz v. Roe	526 U.S. 489	civil rights	liberal	72	1998
City of Chicago v. Morales	527 U.S. 41	due process	liberal	63	1998
LA Police Dept. v. United Reporting Pub.	528 U.S. 32	first amendment	liberal	72	1999
Nixon v. Shrink Missouri Government PAC	528 U.S. 377	first amendment	conservative	63	1999
Hunt-Wesson v. Franchise Tax Bd. of Cal.	528 U.S. 458	economic activity	conservative	90	1999
Rice v. Cayetano	528 U.S. 495	civil rights	conservative	72	1999
Crosby v. National Foreign Trade Council	530 U.S. 363	federalism	liberal	90	1999
California Democratic Party v. Jones	530 U.S. 567	first amendment	liberal	72	1999
City of Indianapolis v. Edmond	531 U.S. 32	criminal procedure	liberal	63	2000
Cook v. Gralike	531 U.S. 510	civil rights	liberal	90	2000
Lorillard Tobacco Co. v. Reilly	533 U.S. 525	first amendment	liberal	54	2000
Kelly v. South Carolina	534 U.S. 246	criminal procedure	liberal	54	2001
Watchtower Bible & Tract Society of NY	536 U.S. 150	first amendment	liberal	81	2001
Ring v. Arizona	536 U.S. 584	criminal procedure	liberal	72	2001
Brown v. Legal Foundation of Washington	538 U.S. 216	due process	conservative	54	2002
Virginia v. Black American Ins. Ass'n v. Garamendi	538 U.S. 343	first amendment	liberal	72	2002
Lawrence v. Texas	539 U.S. 396	federalism	liberal	54	2002
Granholt v. Heald	539 U.S. 558	privacy	liberal	63	2002
	544 U.S. 460	economic activity	liberal	54	2004
Total					36

Justice Souter	U.S. Cite	Issue Area	Vote		Term
			Direction	Vote	
Reich v. Collins	<i>513 U.S. 106</i>	economic activity	conservative	90	1994
McIntyre v. Ohio Elections Com'n	<i>514 U.S. 334</i>	first amendment	liberal	72	1994
California Dept. of Corrections v. Morales	<i>514 U.S. 499</i>	criminal procedure	liberal	72	1994
U.S. Term Limits, Inc. v. Thornton	<i>514 U.S. 779</i>	federalism	liberal	54	1994
Fulton Corp. v. Faulkner	<i>516 U.S. 325</i>	economic activity	conservative	90	1995
Cooper v. Oklahoma	<i>517 U.S. 348</i>	due process	liberal	90	1995
44 Liquormart, Inc. v. Rhode Island	<i>517 U.S. 484</i>	first amendment	liberal	90	1995
Romer v. Evans	<i>517 U.S. 620</i>	civil rights	liberal	63	1995
Montana v. Egelhoff	<i>518 U.S. 37</i>	due process	liberal	54	1995
M.L.B. v. S.L.J.	<i>519 U.S. 102</i>	civil rights	liberal	63	1996
Lynce v. Mathis	<i>519 U.S. 433</i>	criminal procedure	liberal	90	1996
Chandler v. Miller	<i>520 U.S. 305</i>	privacy	liberal	81	1996
Timmons v. Twin Cities Area New Party	<i>520 U.S. 351</i>	civil rights	liberal	63	1996
Camps Newfound/Owatonna v. Harrison.	<i>520 U.S. 564</i>	economic activity	liberal	54	1996
Kansas v. Hendricks	<i>521 U.S. 346</i>	due process	liberal	54	1996
Foster v. Love	<i>522 U.S. 67</i>	civil rights	liberal	90	1997
Lunding v. New York Tax Appeals Tribunal	<i>522 U.S. 287</i>	economic activity	conservative	63	1997
Buckley v. Am. Constitutional Law Found.	<i>525 U.S. 182</i>	first amendment	liberal	63	1998
South Central Bell Telephone v. Alabama	<i>526 U.S. 160</i>	economic activity	conservative	90	1998
Saenz v. Roe	<i>526 U.S. 489</i>	civil rights	liberal	72	1998
City of Chicago v. Morales	<i>527 U.S. 41</i>	due process	liberal	63	1998

Hunt-Wesson v. Franchise Tax Bd. of Cal.	528 U.S. 458	economic activity	conservative	90	1999
Rice v. Cayetano	528 U.S. 495	civil rights	conservative	72	1999
Troxel v. Granville	530 U.S. 57	privacy	liberal	63	1999
Crosby v. National Foreign Trade Council	530 U.S. 363	federalism	liberal	90	1999
California Democratic Party v. Jones	530 U.S. 567	first amendment	liberal	72	1999
Stenberg v. Carhart	530 U.S. 914	privacy	liberal	54	1999
City of Indianapolis v. Edmond	531 U.S. 32	criminal procedure	liberal	63	2000
Cook v. Gralike	531 U.S. 510	civil rights	liberal	90	2000
Lorillard Tobacco Co. v. Reilly	533 U.S. 525	first amendment	conservative	54	2000
City of Los Angeles v. Alameda Books, Inc.	535 U.S. 425	first amendment	liberal	54	2001
McKune v. Lile	536 U.S. 24	criminal procedure	liberal	54	2001
Watchtower Bible & Tract Society of NY	536 U.S. 150	first amendment	liberal	81	2001
Ring v. Arizona	536 U.S. 584	criminal procedure	liberal	72	2001
Zelman v. Simmons-Harris	536 U.S. 639	first amendment	liberal	54	2001
Board of Independent School District No. 22	536 U.S. 822	privacy	liberal	54	2001
Ewing v. California	538 U.S. 11	criminal procedure	liberal	54	2002
Virginia v. Black American Ins. Ass'n v. Garamendi	538 U.S. 343	first amendment	liberal	72	2002
Lawrence v. Texa	539 U.S. 396	federalism	liberal	54	2002
Stogner v. California	539 U.S. 558	privacy	liberal	63	2002
Hiibel v. 6th Judicial Dist. Court of Nevada	539 U.S. 607	criminal procedure	liberal	54	2002
Granholm v. Heald	542 U.S. 177	criminal procedure	liberal	54	2003
Clingman v. Beaver	544 U.S. 460	economic activity	liberal	54	2004
	544 U.S. 581	first amendment	liberal	63	2004

McCreary County, Ky v. ACLU	<i>162 L.Ed.2d 0729</i>	first amendment	liberal	54	2004
Total					45

Justice Thomas	U.S. Cite	Issue Area	Vote		Term
			Direction	Vote	
Reich v. Collins	<i>513 U.S. 106</i>	economic activity	conservative	90	1994
McIntyre v. Ohio Elections Com'n	<i>514 U.S. 334</i>	first amendment	liberal	72	1994
Miller v. Johnson	<i>515 U.S. 900</i>	civil rights	conservative	54	1994
Fulton Corp. v. Faulkner	<i>516 U.S. 325</i>	economic activity	conservative	90	1995
Cooper v. Oklahoma	<i>517 U.S. 348</i>	due process	liberal	90	1995
44 Liquormart, Inc. v. Rhode Island	<i>517 U.S. 484</i>	first amendment	liberal	90	1995
Shaw v. Hunt	<i>517 U.S. 899</i>	civil rights	conservative	54	1995
Bush v. Vera	<i>517 U.S. 952</i>	civil rights	conservative	54	1995
Lynce v. Mathis	<i>519 U.S. 433</i>	criminal procedure	liberal	90	1996
Chandler v. Miller	<i>520 U.S. 305</i>	privacy	liberal	81	1996
Foster v. Love	<i>522 U.S. 67</i>	civil rights	liberal	90	1997
Lunding v. New York Tax Appeals Tribunal	<i>522 U.S. 287</i>	economic activity	conservative	63	1997
Buckley v. Am. Constitutional Law Found.	<i>525 U.S. 182</i>	first amendment	liberal	63	1998
South Central Bell Telephone v. Alabama	<i>526 U.S. 160</i>	economic activity	conservative	90	1998
Nixon v. Shrink Missouri Government PAC	<i>528 U.S. 377</i>	first amendment	conservative	63	1999
Hunt-Wesson v. Franchise Tax Bd. of Cal.	<i>528 U.S. 458</i>	economic activity	conservative	90	1999
Rice v. Cayetano	<i>528 U.S. 495</i>	civil rights	conservative	72	1999
Troxel v. Granville	<i>530 U.S. 57</i>	privacy	liberal	63	1999
Crosby v. National Foreign Trade Council	<i>530 U.S. 363</i>	federalism	liberal	90	1999
California Democratic Party v. Jones	<i>530 U.S. 567</i>	first amendment	liberal	72	1999

Cook v. Gralike	531 U.S. 510	civil rights	liberal	90	2000
Lorillard Tobacco Co. v. Reilly	533 U.S. 525	first amendment	liberal	54	2000
Watchtower Bible & Tract Society of NY	536 U.S. 150	first amendment	liberal	81	2001
Ring v. Arizona	536 U.S. 584	criminal procedure	liberal	72	2001
Brown v. Legal Foundation of Washington	538 U.S. 216	due process	conservative	54	2002
Locke v. Davey	540 U.S. 712	first amendment	conservative	72	2003
Kelo v. City of New London, Conn.	162 L.Ed.2d 0439	due process	conservative	54	2004
Total					27

Justice Ginsburg	U.S. Cite	Issue Area	Vote Direction	Vote	Term
Reich v. Collins	513 U.S. 106	economic activity	conservative	90	1994
McIntyre v. Ohio Elections Com'n	514 U.S. 334	first amendment	liberal	72	1994
U.S. Term Limits, Inc. v. Thornton	514 U.S. 779	federalism	liberal	54	1994
Fulton Corp. v. Faulkner	516 U.S. 325	economic activity	conservative	90	1995
Cooper v. Oklahoma	517 U.S. 348	due process	liberal	90	1995
44 Liquormart, Inc. v. Rhode Island	517 U.S. 484	first amendment	liberal	90	1995
Romer v. Evans	517 U.S. 620	civil rights	liberal	63	1995
M.L.B. v. S.L.J.	519 U.S. 102	civil rights	liberal	63	1996
Lynce v. Mathis	519 U.S. 433	criminal procedure	liberal	90	1996
Chandler v. Miller	520 U.S. 305	privacy	liberal	81	1996
Timmons v. Twin Cities Area New Party	520 U.S. 351	civil rights	liberal	63	1996
Kansas v. Hendricks	521 U.S. 346	due process	liberal	54	1996
Foster v. Love	522 U.S. 67	civil rights	liberal	90	1997
Buckley v. Am. Constitutional Law Found.	525 U.S. 182	first amendment	liberal	63	1998

South Central Bell Telephone v. Alabama	<i>526 U.S. 160</i>	economic activity	conservative	90	1998
Saenz v. Roe	<i>526 U.S. 489</i>	civil rights	liberal	72	1998
City of Chicago v. Morales	<i>527 U.S. 41</i>	due process	liberal	63	1998
Hunt-Wesson v. Franchise Tax Bd. of Cal.	<i>528 U.S. 458</i>	economic activity	conservative	90	1999
Rice v. Cayetano	<i>528 U.S. 495</i>	civil rights	liberal	72	1999
Troxel v. Granville	<i>530 U.S. 57</i>	privacy	liberal	63	1999
Crosby v. National Foreign Trade Council	<i>530 U.S. 363</i>	federalism	liberal	90	1999
California Democratic Party v. Jones	<i>530 U.S. 567</i>	first amendment	conservative	72	1999
Stenberg v. Carhart	<i>530 U.S. 914</i>	privacy	liberal	54	1999
City of Indianapolis v. Edmond	<i>531 U.S. 32</i>	criminal procedure	liberal	63	2000
Cook v. Gralike	<i>531 U.S. 510</i>	civil rights	liberal	90	2000
Lorillard Tobacco Co. v. Reilly	<i>533 U.S. 525</i>	first amendment	conservative	54	2000
Kelly v. South Carolina	<i>534 U.S. 246</i>	criminal procedure	liberal	54	2001
City of Los Angeles v. Alameda Books, Inc.	<i>535 U.S. 425</i>	first amendment	liberal	54	2001
McKune v. Lile	<i>536 U.S. 24</i>	criminal procedure	liberal	54	2001
Watchtower Bible & Tract Society of NY	<i>536 U.S. 150</i>	first amendment	liberal	81	2001
Ring v. Arizona	<i>536 U.S. 584</i>	criminal procedure	liberal	72	2001
Zelman v. Simmons-Harris	<i>536 U.S. 639</i>	first amendment	liberal	54	2001
Board of Independent School District No. 22	<i>536 U.S. 822</i>	privacy	liberal	54	2001
Ewing v. California	<i>538 U.S. 11</i>	criminal procedure	liberal	54	2002
Smith v. Doe	<i>538 U.S. 84</i>	criminal procedure	liberal	63	2002
Virginia v. Black	<i>538 U.S. 343</i>	first amendment	liberal	72	2002
Lawrence v. Texas	<i>539 U.S. 558</i>	privacy	liberal	63	2002
Stogner v. California	<i>539 U.S. 607</i>	criminal procedure	liberal	54	2002
Hübel v. 6th	<i>542 U.S. 177</i>	criminal	liberal	54	2003

Judicial Dist. Court of Nevada		procedure			
Granholm v. Heald	544 U.S. 460	economic activity	liberal	54	2004
Clingman v. Beaver	544 U.S. 581	first amendment	liberal	63	2004
McCreary County, Ky v. ACLU	162 L.Ed.2d 0729	first amendment	liberal	54	2004
Total				42	

Justice Breyer	U.S. Cite	Issue Area	Vote Direction	Vote	Term
Reich v. Collins	513 U.S. 106	economic activity	conservative	90	1994
Oklahoma Tax Com'n v. Jefferson Lines, Inc.	514 U.S. 175	economic activity	conservative	72	1994
McIntyre v. Ohio Elections Com'n	514 U.S. 334	first amendment	liberal	72	1994
U.S. Term Limits, Inc. v. Thornton	514 U.S. 779	federalism	liberal	54	1994
Fulton Corp. v. Faulkner	516 U.S. 325	economic activity	conservative	90	1995
Cooper v. Oklahoma	517 U.S. 348	due process	liberal	90	1995
44 Liquormart, Inc. v. Rhode Island	517 U.S. 484	first amendment	liberal	90	1995
Romer v. Evans	517 U.S. 620	civil rights	liberal	63	1995
Montana v. Egelhoff	518 U.S. 37	due process	liberal	54	1995
M.L.B. v. S.L.J.	519 U.S. 102	civil rights	liberal	63	1996
Lynce v. Mathis	519 U.S. 433	criminal procedure	liberal	90	1996
Chandler v. Miller	520 U.S. 305	privacy	liberal	81	1996
Camps Newfound/ Owatonna v. Harrison	520 U.S. 564	economic activity	liberal	54	1996
Kansas v. Hendricks	521 U.S. 346	due process	liberal	54	1996
Foster v. Love	522 U.S. 67	civil rights	liberal	90	1997
Lunding v. New York Tax Appeals Tribunal	522 U.S. 287	economic activity	conservative	63	1997

South Central Bell Telephone v. Alabama	<i>526 U.S. 160</i>	economic activity	conservative	90	1998
Saenz v. Roe	<i>526 U.S. 489</i>	civil rights	liberal	72	1998
City of Chicago v. Morales	<i>527 U.S. 41</i>	due process	liberal	63	1998
Jefferson County, Ala. v. Acker	<i>527 U.S. 423</i>	federalism	liberal	72	1998
Hunt-Wesson v. Franchise Tax Bd. of Cal.	<i>528 U.S. 458</i>	economic activity	conservative	90	1999
Rice v. Cayetano	<i>528 U.S. 495</i>	civil rights	conservative	72	1999
Troxel v. Granville	<i>530 U.S. 57</i>	privacy	liberal	63	1999
Crosby v. National Foreign Trade Council	<i>530 U.S. 363</i>	federalism	liberal	90	1999
California Democratic Party v. Jones	<i>530 U.S. 567</i>	first amendment	liberal	72	1999
Stenberg v. Carhart	<i>530 U.S. 914</i>	privacy	liberal	54	1999
City of Indianapolis v. Edmond	<i>531 U.S. 32</i>	criminal procedure	liberal	63	2000
Cook v. Gralike	<i>531 U.S. 510</i>	civil rights	liberal	90	2000
Lorillard Tobacco Co. v. Reilly	<i>533 U.S. 525</i>	first amendment	conservative	54	2000
Kelly v. South Carolina	<i>534 U.S. 246</i>	criminal procedure	liberal	54	2001
City of Los Angeles v. Alameda Books, Inc.	<i>535 U.S. 425</i>	first amendment	liberal	54	2001
McKune v. Lile	<i>536 U.S. 24</i>	criminal procedure	liberal	54	2001
Watchtower Bible & Tract Society of NY	<i>536 U.S. 150</i>	first amendment	liberal	81	2001
Ring v. Arizona	<i>536 U.S. 584</i>	criminal procedure	liberal	72	2001
Zelman v. Simmons-Harris	<i>536 U.S. 639</i>	first amendment	liberal	54	2001
Ewing v. California	<i>538 U.S. 11</i>	criminal procedure	liberal	54	2002
Smith v. Doe	<i>538 U.S. 84</i>	criminal procedure	liberal	63	2002
Virginia v. Black	<i>538 U.S. 343</i>	first amendment	liberal	72	2002
American Ins. Ass'n v. Garamendi	<i>539 U.S. 396</i>	federalism	liberal	54	2002
Lawrence v. Texas	<i>539 U.S. 558</i>	privacy	liberal	63	2002
Stogner v.	<i>539 U.S. 607</i>	criminal	liberal	54	2002

California		procedure				
Hiibel v. 6th Judicial Dist.		criminal				
Court of Nevada	<i>542 U.S. 177</i>	procedure	liberal	54	2003	
Granholm v. Heald	<i>544 U.S. 460</i>	economic activity	liberal	54	2004	
McCreary County, Ky v. ACLU	<i>162 L.Ed.2d 0729</i>	first amendment	liberal	54	2004	
Total					44	

APPENDIX C
VOTES TO OVERTURN PRECEDENT

Justice Rehnquist	U.S. Cite	Issue Area	Vote Direction	Vote	Term
Adarand Constructors, Inc. v. Pena	<i>515 U.S. 200</i>	civil rights criminal	conservative	54	1994
U.S. v. Gaudin	<i>515 U.S. 506</i>	procedure	liberal	90	1994
Seminole Tribe of Florida v. Florida	<i>517 U.S. 44</i>	federalism	conservative	54	1995
44 Liquormart, Inc. v. Rhode Island	<i>517 U.S. 484</i>	first amendment	liberal	90	1995
Quackenbush v. Allstate Ins. Co.	<i>517 U.S. 706</i>	judicial power	liberal	90	1995
Lewis v. Casey	<i>518 U.S. 343</i>	due process	conservative	81	1995
Agostini v. Felton	<i>521 U.S. 203</i>	first amendment	conservative	54	1996
State Oil Co. v. Khan	<i>522 U.S. 3</i>	economic activity	liberal	90	1997
Hudson v. U.S.	<i>522 U.S. 93</i>	criminal procedure	conservative	90	1997
College Sav. Bank v. Florida Prepaid	<i>527 U.S. 666</i>	federalism	conservative	54	1998
Mitchell v. Helms	<i>530 U.S. 793</i>	first amendment	conservative	63	1999
Stenberg v. Carhart	<i>530 U.S. 914</i>	privacy	conservative	54	1999
Total					12

Justice Stevens	U.S. Cite	Issue Area	Vote Direction	Vote	Term
Hubbard v. U.S.	<i>514 U.S. 695</i>	criminal procedure	liberal	63	1994
U.S. v. Gaudin	<i>515 U.S. 506</i>	criminal procedure	liberal	90	1994
44 Liquormart, Inc. v. Rhode Island	<i>517 U.S. 484</i>	first amendment	liberal	90	1995
Quackenbush v.	<i>517 U.S. 706</i>	judicial power	liberal	90	1995

Allstate Ins. Co.						
Bush v. Vera	517 U.S. 952	civil rights	liberal	54	1995	
State Oil Co. v. Khan	522 U.S. 3	economic activity	liberal	90	1997	
Jefferson v. City of Tarrant, Ala.	522 U.S. 75	judicial power	liberal	81	1997	
Hohn v. U.S.	524 U.S. 236	criminal procedure	liberal	54	1997	
Mitchell v. Helms	530 U.S. 793	first amendment	liberal	63	1999	
Total						9

Justice O'Connor	U.S. Cite	Issue Area	Vote Direction	Vote	Term	
Adarand Constructors, Inc. v. Pena	515 U.S. 200	civil rights	conservative	54	1994	
U.S. v. Gaudin	515 U.S. 506	criminal procedure	liberal	90	1994	
Seminole Tribe of Florida v. Florida	517 U.S. 44	federalism	conservative	54	1995	
44 Liquormart, Inc. v. Rhode Island	517 U.S. 484	first amendment	liberal	90	1995	
Quackenbush v. Allstate Ins. Co.	517 U.S. 706	judicial power	liberal	90	1995	
Lewis v. Casey	518 U.S. 343	due process	conservative	81	1995	
Agostini v. Felton	521 U.S. 203	first amendment	conservative	54	1996	
City of Boerne v. Flores	521 U.S. 507	judicial power	liberal	63	1996	
State Oil Co. v. Khan	522 U.S. 3	economic activity	liberal	90	1997	
Hudson v. U.S.	522 U.S. 93	criminal procedure	conservative	90	1997	
College Sav. Bank v. Florida Prepaid	527 U.S. 666	federalism	conservative	54	1998	
Mitchell v. Helms	530 U.S. 793	first amendment	conservative	63	1999	
Total						12

Justice Scalia	U.S. Cite	Issue Area	Vote Direction	Vote	Term
Allied-Bruce Terminix v. Dobson	513 U.S. 265	federalism	conservative	72	1994
Hubbard v. U.S.	514 U.S. 695	criminal procedure	liberal	63	1994
Adarand Constructors, Inc. v. Pena	515 U.S. 200	civil rights	conservative	54	1994
U.S. v. Gaudin	515 U.S. 506	criminal procedure	liberal	90	1994
Seminole Tribe of Florida v. Florida	517 U.S. 44	federalism	conservative	54	1995
44 Liquormart, Inc. v. Rhode Island	517 U.S. 484	first amendment	liberal	90	1995
Quackenbush v. Allstate Ins. Co.	517 U.S. 706	judicial power	liberal	90	1995
Lewis v. Casey	518 U.S. 343	due process	conservative	81	1995
Agostini v. Felton	521 U.S. 203	first amendment	conservative	54	1996
State Oil Co. v. Khan	522 U.S. 3	economic activity	liberal	90	1997
Hudson v. U.S.	522 U.S. 93	criminal procedure	conservative	90	1997
Campbell v. Louisiana	523 U.S. 392	civil rights	conservative	72	1997
College Sav. Bank v. Florida Prepaid	527 U.S. 666	federalism	conservative	54	1998
Nixon v. Shrink Missouri Government PAC	528 U.S. 377	first amendment	conservative	63	1999
Dickerson v. U.S.	530 U.S. 428	criminal procedure	conservative	72	1999
Mitchell v. Helms	530 U.S. 793	first amendment	conservative	63	1999
Stenberg v. Carhart	530 U.S. 914	privacy	conservative	54	1999
Texas v. Cobb	532 U.S. 162	criminal procedure	conservative	54	2000
Federal Election Com'n v. Colorado Rep.	533 U.S. 431	first amendment	conservative	54	2000
Total					19

Justice Kennedy	U.S. Cite	Issue Area	Vote Direction	Vote	Term
Hubbard v. U.S. Adarand Constructors, Inc. v. Pena	514 U.S. 695 515 U.S. 200	criminal procedure civil rights	liberal conservative	63 54	1994 1994
U.S. v. Gaudin Seminole Tribe of Florida v. Florida	515 U.S. 506 517 U.S. 44	criminal procedure federalism	liberal conservative	90 54	1994 1995
44 Liquormart, Inc. v. Rhode Island	517 U.S. 484	first amendment	liberal	90	1995
Quackenbush v. Allstate Ins. Co.	517 U.S. 706	judicial power	liberal	90	1995
Lewis v. Casey	518 U.S. 343	due process	conservative	81	1995
Agostini v. Felton	521 U.S. 203	first amendment	conservative	54	1996
State Oil Co. v. Khan	522 U.S. 3	economic activity	liberal	90	1997
Hudson v. U.S.	522 U.S. 93	criminal procedure	conservative	90	1997
Hohn v. U.S.	524 U.S. 236	criminal procedure	liberal	54	1997
College Sav. Bank v. Florida Prepaid	527 U.S. 666	federalism	conservative	54	1998
Nixon v. Shrink Missouri Government PAC	528 U.S. 377	first amendment	conservative	63	1999
Mitchell v. Helms	530 U.S. 793	first amendment	conservative	63	1999
Texas v. Cobb	532 U.S. 162	criminal procedure	conservative	54	2000
Federal Election Com'n v. Colorado Rep.	533 U.S. 431	first amendment	conservative	54	2000
Total					16

Justice Souter	U.S. Cite	Issue Area	Vote Direction	Vote	Term
U.S. v. Gaudin	515 U.S. 506	criminal procedure	liberal	90	1994
44 Liquormart, Inc. v. Rhode Island	517 U.S. 484	first amendment	liberal	90	1995

Quackenbush v. Allstate Ins. Co.	<i>517 U.S. 706</i>	judicial power	liberal	90	1995
Bush v. Vera	<i>517 U.S. 952</i>	civil rights	liberal	54	1995
State Oil Co. v. Khan	<i>522 U.S. 3</i>	economic activity	liberal	90	1997
Hohn v. U.S.	<i>524 U.S. 236</i>	criminal procedure	liberal	54	1997
Mitchell v. Helms	<i>530 U.S. 793</i>	first amendment	liberal	63	1999
Total					7

Justice Thomas	U.S. Cite	Issue Area	Vote Direction	Vote	Term
Allied-Bruce Terminix v. Dobson	<i>513 U.S. 265</i>	federalism	conservative	72	1994
Hubbard v. U.S.	<i>514 U.S. 695</i>	criminal procedure	liberal	63	1994
Adarand Constructors, Inc. v. Pena	<i>515 U.S. 200</i>	civil rights	conservative	54	1994
U.S. v. Gaudin	<i>515 U.S. 506</i>	criminal procedure	liberal	90	1994
Seminole Tribe of Florida v. Florida	<i>517 U.S. 44</i>	federalism	conservative	54	1995
44 Liquormart, Inc. v. Rhode Island	<i>517 U.S. 484</i>	first amendment	liberal	90	1995
Quackenbush v. Allstate Ins. Co.	<i>517 U.S. 706</i>	judicial power	liberal	90	1995
Lewis v. Casey	<i>518 U.S. 343</i>	due process	conservative	81	1995
Agostini v. Felton	<i>521 U.S. 203</i>	first amendment	conservative	54	1996
State Oil Co. v. Khan	<i>522 U.S. 3</i>	economic activity	liberal	90	1997
Hudson v. U.S.	<i>522 U.S. 93</i>	criminal procedure	conservative	90	1997
Campbell v. Louisiana	<i>523 U.S. 392</i>	civil rights	conservative	72	1997
Mitchell v. U.S.	<i>526 U.S. 314</i>	criminal procedure	conservative	54	1998
College Sav. Bank v. Florida Prepaid	<i>527 U.S. 666</i>	federalism	conservative	54	1998
Nixon v. Shrink Missouri Government PAC	<i>528 U.S. 377</i>	first amendment	conservative	63	1999
Dickerson v. U.S.	<i>530 U.S. 428</i>	criminal procedure	conservative	72	1999

Mitchell v. Helms	530 U.S. 793	first amendment	conservative	63	1999
Stenberg v. Carhart	530 U.S. 914	privacy	conservative	54	1999
Texas v. Cobb	532 U.S. 162	criminal procedure	conservative	54	2000
Cooper Industries, Inc. v. Leatherman	532 U.S. 424	economic activity	conservative	81	2000
U.S. v. United Foods, Inc.	533 U.S. 405	first amendment	liberal	63	2000
Federal Election Com'n v. Colorado Rep.	533 U.S. 431	first amendment	conservative	54	2000
Lorillard Tobacco Co. v. Reilly	533 U.S. 525	federalism	liberal	54	2000
Total					23

Justice Ginsburg	U.S. Cite	Issue Area	Vote Direction	Vote	Term
Hubbard v. U.S.	514 U.S. 695	criminal procedure	liberal	63	1994
U.S. v. Gaudin	515 U.S. 506	criminal procedure	liberal	90	1994
44 Liquormart, Inc. v. Rhode Island	517 U.S. 484	first amendment	liberal	90	1995
Quackenbush v. Allstate Ins. Co.	517 U.S. 706	judicial power	liberal	90	1995
Bush v. Vera	517 U.S. 952	civil rights	liberal	54	1995
State Oil Co. v. Khan	522 U.S. 3	economic activity	liberal	90	1997
Hohn v. U.S.	524 U.S. 236	criminal procedure	liberal	54	1997
Mitchell v. Helms	530 U.S. 793	first amendment	liberal	63	1999
Total					8

Justice Breyer	U.S. Cite	Issue Area	Vote Direction	Vote	Term
Hubbard v. U.S.	514 U.S. 695	criminal procedure	liberal	63	1994
U.S. v. Gaudin	515 U.S. 506	criminal procedure	liberal	90	1994

44 Liquormart, Inc. v. Rhode Island	517 U.S. 484	first amendment	liberal	90	1995
Quackenbush v. Allstate Ins. Co.	517 U.S. 706	judicial power	liberal	90	1995
Bush v. Vera	517 U.S. 952	civil rights	liberal	54	1995
City of Boerne v. Flores	521 U.S. 507	judicial power	liberal	63	1996
State Oil Co. v. Khan	522 U.S. 3	economic activity	liberal	90	1997
Hohn v. U.S.	524 U.S. 236	criminal procedure	liberal	54	1997
Mitchell v. Helms	530 U.S. 793	first amendment	conservative	63	1999
Daniels v. U.S.	532 U.S. 374	criminal procedure	liberal	54	2000
Total					10