

Supreme Court Voting Behavior:

2002 Term

By RICHARD G. WILKINS,* SCOTT WORTHINGTON,**
SARA BECKER, *** LORIANNE UPDIKE****

I. Introduction

This Study, the seventeenth in a series,¹ tabulates and analyzes the voting behavior of the United States Supreme Court during the 2002 Term.² The analysis is designed to determine whether individual Justices and the Court as a whole are voting more "conservatively," more "liberally," or about the same when compared with past Terms. As in politics, whether a judicial trend is "conservative" or "liberal"

* Professor of Law, J. Reuben Clark Law School, Brigham Young University.

** J.D., J. Reuben Clark Law School, Brigham Young University, 1999.

*** J.D., J. Reuben Clark Law School, Brigham Young University, 2004.

**** J.D. Candidate, J. Reuben Clark Law School, Brigham Young University, 2005.

1. Professor Robert E. Riggs began this Study with *Supreme Court Voting Behavior: 1986 Term*, 2 BYU J. PUB. L. 15 (1988). Professor Richard G. Wilkins continued the Study in *Supreme Court Voting Behavior: 1991 Term*, 7 BYU J. PUB. L. 1 (1992) [hereinafter *1991 Study*]. The last nine Studies, analyzing the 1993 to 2001 terms, have been published in the *Hastings Constitutional Law Quarterly*. See Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1993 Term*, 22 HASTINGS CONST. L.Q. 269 (1995) [hereinafter *1993 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1994 Term*, 23 HASTINGS CONST. L.Q. 1 (1995) [hereinafter *1994 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1995 Term*, 24 HASTINGS CONST. L.Q. 1 (1996) [hereinafter *1995 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1996 Term*, 25 HASTINGS CONST. L.Q. 35 (1997) [hereinafter *1996 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1997 Term*, 26 HASTINGS CONST. L.Q. 533 (1999) [hereinafter *1997 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1998 Term*, 27 HASTINGS CONST. L.Q. 423 (2000) [hereinafter *1998 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1999 Term*, 28 HASTINGS CONST. L.Q. 543 (2001) [hereinafter *1999 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2000 Term*, 29 HASTINGS CONST. L.Q. 247 (2002) [hereinafter *2000 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2001 Term*, 30 HASTINGS CONST. L.Q. 307 (2003) [hereinafter *2001 Study*].

2. The 2002 United States Supreme Court Term covers decisions made from November 2002 to June 2003.

often lies in the eye of the beholder. A lawyer for the American Civil Liberties Union could well paint an ideological picture of the Court far different from one sketched by a member of the Federalist Society for Law and Public Policy Studies.

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

This Term's survey demonstrates overall liberal movement for the Court, reversing the pattern revealed last Term. Majority

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

4. *See infra* Data Tables 1-10.

5. *See infra* Appendix B.

6. The general reliability of statistical inference depends on random sampling. *See generally* ROBERT V. HOGG & ALLEN T. CRAIG, *INTRODUCTION TO MATHEMATICAL STATISTICS* 157-58 (5th ed. 1994); RAYMOND H. MYERS, *CLASSICAL AND MODERN REGRESSION WITH APPLICATIONS* 9-11 (2d ed. 1990). The Court's method of selecting cases is far from random. Rather, it is the result of a conscious decisional process. Furthermore, reliable statistics generally require large quantities of information to produce reliable results. As sample sizes become larger, inferences become more accurate. This Study is subject to sampling bias, both because the sample is not random and because it is comparatively small. The statistical inferences below, therefore, may not accurately represent a Justice's (or the Court's) views.

decisions in six of ten categories (Civil/State, Criminal/Federal, Equal Protection, Statutory Civil Rights, Federalism and Swing-Vote) indicate varying degrees of liberal movement. Some of this movement may be notable. Three categories—Civil/State, Criminal/Federal and Federalism—are among this Study's most reliable indicators of ideological bias.⁷ For example, the Civil/State category, the Study's second most reliable indicator of liberal/conservative bias,⁸ demonstrates nearly a 17-point decrease in the Court's support of state government claims.⁹ Similarly, in Criminal/Federal cases, the Court voted for the government only 33.0% of the time.¹⁰

Liberal movement is confirmed by voting patterns in Swing-Vote cases. This Term, in close ideologically charged cases, the Court voted conservatively 56.3% of the time.¹¹ Last Term, the Court voted conservatively 68% of the time. This 12-point movement by the Court demonstrates that liberal coalitions within the Rehnquist Court are gaining ground, even though the overall outcome of closely divided cases still tends to be conservative.

This liberal trend is tempered by conservative voting patterns in Civil/Federal,¹² Criminal/State,¹³ First Amendment¹⁴ and Federal Jurisdiction¹⁵ cases. Nevertheless, the conservative movement in these categories may be less notable than the liberal movement reflected on other tables. Only one of the categories evidencing liberal movement, Criminal/State, ranks within the Study's top four most reliable indicators of liberal/conservative bias.¹⁶

The conservative movement in jurisdictional cases this Term results in an interesting interplay with the Court's liberal movement in other categories. In both Majority and Unanimous decisions involving jurisdictional questions, the Court voted more conservatively (that is, against a claim to expand federal court jurisdiction). Thus, a somewhat more "liberal" Court voted

7. *See infra* Part V.

8. *See infra* Part V.

9. *See infra* Data Table 1.

10. *See infra* Data Table 4.

11. *See infra* Data Table 10.

12. *See infra* Data Table 2.

13. *See infra* Data Table 3.

14. *See infra* Data Table 5.

15. *See infra* Data Table 8.

16. *See infra* Part V.

"conservatively" this Term against expanding its own jurisdictional power.¹⁷

The accuracy of the individual Justices' anticipated voting patterns for the 2002 Term varied widely. In three categories, Criminal/State, Equal Protection and Federalism, last Term's Study anticipated the outcome for Majority opinions with some accuracy.¹⁸ The anticipated scores in the First Amendment category differed most from the Justices' actual scores, deviating by more than 20 points for eight of the nine Justices.¹⁹ This substantial difference is explained by looking at the past volatility of First Amendment voting patterns in Majority, Split and Unanimous cases over the past nine Terms.²⁰

Category analysis, introduced in the 1996 Study and included in the Study again this Term, indicates that the categories of Criminal/State,²¹ Civil/State,²² Federalism²³ and Criminal/Federal²⁴ are the best indicators of the conservative/liberal predilections of the Justices. The remaining categories—including First Amendment,²⁵ Jurisdiction,²⁶ Statutory Civil Rights,²⁷ Civil/Federal²⁸ and Equal Protection²⁹ cases—are less reliable indicators of the Justices' ideological propensities.³⁰

Frontier analysis revealed a few interesting changes. Justice Thomas moved into the top spot on the Conservative Frontier, with a super-efficient score of 118.0%, displacing Chief Justice Rehnquist as the most conservative Justice for the Term.³¹ Justice Thomas was the only Justice on the Conservative Frontier to record a super-efficient score above 100.0%. On the other end of the spectrum, Justice

17. See *infra* Data Table 8.

18. See *infra* Data Tables 3, 6, 9.

19. See *infra* Data Table 5. Justice Stevens' anticipated score deviated the least, at -16.4 points. Justice Kennedy's score deviated the most, at -75.1 points.

20. See *infra* Data Table 5.

21. See *infra* Data Table 3.

22. See *infra* Data Table 1.

23. See *infra* Data Table 9.

24. See *infra* Data Table 4.

25. See *infra* Data Table 5.

26. See *infra* Data Table 8.

27. See *infra* Data Table 7.

28. See *infra* Data Table 2.

29. See *infra* Data Table 6.

30. See *infra* Part V.

31. See *infra* Frontier Analysis Table 1; see also 2000 Study, *supra* note 1, at 251.

Stevens remained in the top spot on the Liberal Frontier, with a super-efficient score of 109.0%.³² Justice Ginsburg took the second spot on the Liberal Frontier, with a super-efficient score of 108%. Justice Breyer followed in third place, with a super-efficient score of 107.0%.

This Study is divided into sections to make the information more accessible. The precise details of the statistical analysis—as can be gleaned from a glance at the equations and explanations in Appendix B—are hardly the topic of light social conversation. However, one need not have an advanced degree in mathematics to understand the general trends that flow from the Study's analysis. Part II gives a description of the mode of analysis employed by the Study. Part III follows with a general overview of this Term's findings. Part IV sets out the Study's numerical tables, graphs, and statistical charts and discusses—table by table and chart by chart—the information contained therein. Parts V and VI describe the methodology and outcome of this year's Category and Frontier analyses, respectively. Appendices A and B detail the definitions and statistical tests employed by this Study.

II. Mode of Analysis

This Study is based on the tabulation and mathematical analysis of each Justice's votes in ten categories. Nine of the categories are based on the nature of the issues addressed (*e.g.*, First Amendment and Equal Protection) or on the character of the parties involved (*e.g.*, state or federal government litigants).³³ The tenth category tabulates the number of times each Justice voted with the majority in cases decided by a single, or swing, vote.

The first nine categories are designed to detect each Justice's attitude toward two broad issues underlying most Supreme Court decisions: the protection of individual rights and judicial restraint. The tabulation of votes in each category reveals, in broad strokes, the frequency with which individual Justices and the Court as a whole

32. *See infra* Frontier Analysis Table 2.

33. The categories are as follows: (1) civil controversies in which a state or one of its officials or political subdivisions is opposed by a private party; (2) civil controversies in which the federal government or one of its agencies or officials is opposed by a private party; (3) state criminal cases; (4) federal criminal cases; (5) First Amendment issues of freedom of speech, press, religion, and association; (6) Equal Protection claims; (7) statutory civil rights claims; (8) issues of federal court jurisdiction, party standing, justiciability, and related matters; and (9) federalism cases.

vote to protect individual rights³⁴ or to exercise judicial restraint.³⁵

From the voting patterns that emerge, the Study determines whether individual Justices and the Court are taking "conservative" or "liberal" positions. The Study classifies outcomes that favor an assertion of government power as conservative and outcomes that favor a claim of individual rights as liberal. Accordingly, the Study classifies as conservative a vote for the government against an individual, a vote against a claim of constitutional or statutory rights, a vote against the exercise of federal jurisdiction, or a vote favoring state (as opposed to federal) authority on federalism questions. The Study classifies all contrary votes as liberal.

This analytical scheme is not perfect. Unanimous decisions, which constitute a significant portion of all cases decided by the Court, are included in the Study's calculations even though liberal or conservative ideology may not have influenced the outcome of such cases. Unanimous opinions often result when either the law or the facts, or both, point so clearly in one direction that ideology is not a decisional factor. Furthermore, concern for individual rights is not always, or even necessarily, the attitudinal opposite of judicial restraint.

Despite the difficulties with our classification scheme, the basic assumption that supports this Study—that the general orientation of

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

35. Jurisdictional questions (Table 8), which exhibit the relative propensity of the Justices to avoid judicial decisions, are perhaps the most direct statistical evidence of judicial restraint. Other tables included in the Study, however, also provide some indication of the individual Justices' (and the Court's) positions on the "judicial restraint/judicial activism" axis. Judicial restraint is normally identified with deference to the policy-making branches of government, adherence to precedent, avoidance of constitutional bases of decision when narrower grounds exist, respect for the Framers' intent when construing constitutional text, and avoidance of issues rendered unnecessary by the doctrines of ripeness, mootness, political questions, etc. As a result, a vote in favor of individual rights claims (Tables 1-7) may provide some indication of "judicial activism" because judicial recognition of individual rights often requires the Court to overturn precedent or invalidate an existing statute. Federalism issues (Table 9) are also relevant because judicial restraint is traditionally identified with respect for the role of the states within the federal system.

individual Justices and the Court regarding individual rights and judicial restraint is suggestive of conservative or liberal ideology—appears sound.³⁶ For example, deference to legislatures frequently results in rejection of an individual's claim, especially one predicated upon the impropriety of governmental action.³⁷ Judicial restraint is associated with a reluctance to read new rights into the Constitution or statutes.³⁸ Refusal to exercise federal jurisdiction leaves the matter to the state courts with their possible bias in favor of state governmental action and is a clear rebuff to the claimant seeking federal protection of rights.³⁹ Therefore, to the extent that the Study's basic ideological assumptions regarding liberal and conservative outcomes are sound, it is possible to identify trends by tracking the voting patterns reflected in Data Tables 1 through 10.⁴⁰

To determine current ideological positions within the Court, votes of the individual Justices can be compared with those cast by other Justices this Term, as well as with the outcomes for the 1992–2001 Terms. Likewise, the current ideological position of the Court as a whole can be determined by comparing present outcomes of the Court majority with those of prior terms. In Data Tables 1–10, this information appears in the form of voting percentages for each Justice and for the Court majority. Charts 1–10, in turn, graphically depict the voting trends revealed in the tables.

Mean Tables 1–10 and Regression Tables 1–10 analyze the voting patterns of the individual Justices. The purpose of these tables

36. See *supra* note 3 and accompanying text. See also *infra* Part V.

37. See, e.g., *Nguyen v. INS*, 533 U.S. 53 (2001) (holding that the statutory distinction in 8 U.S.C. § 1409, which imposes different requirements for a child's acquisition of U.S. citizenship based on whether the mother or father is the citizen parent, is consistent with Equal Protection).

38. See *id.*

39. See, e.g., *Rivet v. Regions Bank*, 522 U.S. 470, 476–77 (1998) (holding that claim preclusion by reason of a prior federal judgment is a defensive plea that provides no ground for removal from state to federal court).

40. Of course, the data are only as reliable as our assumptions. The general assumption that a vote in favor of the government reflects conservative views may not be accurate in all cases. For example, see *Republican Party v. White*, 536 U.S. 765 (2002), where the more conservative members of the Court voted in favor of a First Amendment claim. There, the state's canon of judicial conduct prohibited candidates for judicial election from expressing their views on certain First Amendment topics, such as abortion. *Id.* at 768. The "conservative" Justices apparently valued free speech more than continued expansion of the abortion right. This is not necessarily a "conservative" outcome, however. Similarly, in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the more conservative members of the Court voted liberally against the state in order to reaffirm the importance of economic rights, generally considered to be a conservative value.

is to determine whether a Justice's 2002 Term voting record departs in a statistically significant manner from his or her prior voting pattern and whether any significant correlation exists among the Term-to-Term voting patterns of the Justices.⁴¹

In order to calculate the anticipated voting scores of the Justices, we use an Auto Regressive Integrated Moving Average (ARIMA) forecasting model.⁴² The ARIMA model is useful in situations where, as in this Study, a single variable (a Justice's voting score) is forecast based only on its present and prior values with no other explanatory variables.

In order to determine which categories best reveal the conservative and liberal leanings of the Court, we apply factor analysis. This analysis tests the extent to which the Justices' disposition of cases within the Study's categories may have been affected by liberal/conservative bias. Factor analysis has long been used by psychologists attempting to identify characteristics of personality and intelligence.⁴³ The results of the factor analysis for the 2002 Term appear in Part V of this article.

Finally, Frontier Analysis Tables 1–4 and Frontier Charts 1–4 compare the Justices' conservative and liberal predilections this Term and over the course of the entire Study. Frontier analysis mitigates some of the analytical difficulties previously discussed by measuring the strength of each Justice's tendencies relative to the rest of the Court with respect to the cases actually decided in a given Term rather than against an absolute scale.⁴⁴

All of the data and statistics reported in this Study must be interpreted with caution. The percentages and statistical results revealed in each table are affected not only by the dispositions of the individual Justices but also by the nature of the cases decided each Term. Furthermore, Supreme Court cases are not the result of random selection and the universe of votes cast by the Justices is relatively small. Since both random sampling and large sample size are crucial elements of any fully reliable statistical analysis, conclusions drawn from this Study are hardly beyond dispute. There are obvious limitations to any empirical analysis of a subjective decision-making process.⁴⁵

41. *See infra* Appendix B.

42. *See infra* Appendix B for a more detailed explanation of ARIMA.

43. *See infra* Appendix B for a more detailed analysis of factor analysis.

44. *See infra* Appendix B for a more detailed analysis of frontier analysis.

45. *See supra* note 6.

In light of these caveats, one might ask whether this Study is worth conducting or reading. We believe it is. For years, experienced Supreme Court practitioners have attempted to divine the ideological leanings of individual Justices in framing their arguments to the Court. Moreover, both the media and academicians are fond of attaching ideological labels to the Court and its personnel. Supreme Court practitioners, legal scholars and the public have long assumed that assessments of Court ideology are valuable, even though such assessments may be based upon little more than the gut reactions of the attorneys, scholars and news reporters involved. This Study, based upon a systematic methodology for objectively gathering, quantifying and analyzing data over time, should be more reliable than these ad hoc assessments.

III. Overview of the Ideological Trends of the 2002 Term

This Term's results, viewed as a whole, indicate liberal movement, reversing last Term's conservative trend. This year's liberal movement, however, merely continues a Term-to-Term "seesaw" pattern of liberal-to-conservative-and-back-to-liberal voting behavior.⁴⁶ Overall, the Justices voted more liberally this Term than last in six out of ten categories. The outcome of closely divided Swing Vote cases was also 12 points more liberal than last Term, even though the Court "swung" conservatively 53.6% of the time.⁴⁷ This liberal movement was offset by unprecedented conservatism in Federal/Civil cases, where the Court voted for the government in 81.8% of Majority decisions.

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

The Court voted more liberally this Term against state governments in Majority (16.8 points), Split (25.6 points) and Unanimous (10.4 points) opinions. Although this category has historically been the most reliable indicator of conservative/liberal bias, factor analysis this Term drops the category to second place. This change may be due to the rather unusual rank order displayed by the Justices. Justice Thomas tops the chart with the most conservative 2002 voting pattern in Civil/State cases. Somewhat

46. The 2001 Term reflected conservative movement, which reversed the 2000 Term's slight liberal trend. *2001 Study, supra* note 1, at 308. The Court in 2002 again reverses field.

47. *See infra* Data Table 10.

surprisingly, however, Justices Ginsburg and Stevens are ranked second and third, respectively, as the next most conservative Justices. Chief Justice Rehnquist and Justice Kennedy's voting patterns place them at the bottom of the chart in the most liberal positions. The voting behaviors of Justices Stevens and Ginsburg were closely correlated. Despite the unusual voting pattern this Term, the Study anticipates that Chief Justice Rehnquist and Justice Stevens will regain their usual positions next Term at the conservative top (for the Chief Justice) and the liberal bottom (for Justice Stevens) of Data Table 1.

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

Last year's conservative movement on Data Table 2 continued this Term, yielding an unprecedented vote for the government in 100% of all Split decisions. Votes for the government in Majority and Unanimous decisions were also high, at 81.8% and 77.8%, respectively. Chief Justice Rehnquist is again the most conservative Justice. Justice Stevens moved from his "moderate" position last Term to the most liberal ranking on the Court. All six Justices with statistically significant movement moved in a conservative direction. Factor analysis, however, places this category in eighth place in terms of reliability. Accordingly, it may not be possible to infer too much from the table.

Data Table 3: Criminal Cases—State Government Versus a Private Party.

Factor analysis selects this category as the most reliable indicator of conservative/liberal bias for the 2002 Term. Data Table 3 demonstrates moderate conservative movement in Majority decisions (8.8 points), Split decisions (10 points) and Unanimous decisions (5 points). The traditionally conservative Justices hold the top four positions, with Justice Thomas topping the chart. The traditionally liberal Justices hold the bottom four positions, with Justice Ginsburg displaying the most liberal voting pattern on the Court.

Data Table 4: Criminal Cases—Federal Government Versus Private Party.

There was significant liberal movement in Criminal/Federal cases this Term. The Court voted for the government in all cases (Majority, Split and Unanimous) in 2001. Accordingly, some liberal movement (that is, the casting of *some* votes against the government) is hardly unexpected. The magnitude of the liberal movement this Term, however, is nevertheless significant. The government prevailed in only one-third of the Majority, Split and Unanimous decisions decided by the Court—a low point for the federal government (and a high-water liberal voting pattern for the Court) unmatched since the 1993 Term.⁴⁸ Only one Justice—Justice Rehnquist—voted more conservatively than expected. The remaining eight Justices voted more liberally than expected, with surprisingly high liberal voting exhibited by Justices Scalia, Thomas, and Stevens. Data Table 4 displays established conservative/liberal voting blocs, with Chief Justice Rehnquist holding the most conservative position, Justice O'Connor in the middle, and Justice Stevens at the liberal bottom. There is a statistically significant correlation between the voting patterns of Justices Ginsburg and Souter in Criminal/Federal cases.

Data Table 5: First Amendment Rights of Expression, Association, and Religion.

The Court continued its generally conservative stance on First Amendment issues in 2002. Unanimous, Split and Majority decisions were all decided more conservatively than last Term. Indeed, only the 1996 and 1997 Terms were less receptive to First Amendment claims. However, the small universe of cases in this category—four—renders predictions or analysis based upon the data unreliable.

Data Table 6: Equal Protection Claims.

Data Table 6 demonstrates liberal movement. But, as with Data Table 5, the number of cases (four) involving Equal Protection claims was small, rendering the statistical reliability of this category questionable. The cases, furthermore, evidence notable "pole switching" (where nominally liberal results evidence politically

48. Lower scores for the federal government on Data Table 4 were recorded in the 2000 Term for Majority (28.6) and Split (20) opinions. *2001 Study, supra* note 1, at 331.

conservative impulses and vice versa). This occurred most markedly with two affirmative action cases, *Gratz v. Bollinger*⁴⁹ and *Grutter v. Bollinger*,⁵⁰ in which the plaintiffs asserted that the University of Michigan's "racial balancing" admissions policy violated the Equal Protection Clause. In the specific circumstances of these cases, nominally liberal votes in favor of the Equal Protection claim—as well as nominally conservative votes in favor of the government—may not in fact demonstrate any such ideological motivation.

Data Table 7: Statutory Civil Rights.

The Court demonstrated slight liberal movement in Majority (13.3 points), Split (16.7 points) and Unanimous (4.7 points) cases involving Statutory Civil Rights claims. Nevertheless, the outcome in Majority cases was some 16 points more conservative than the Study anticipated based on prior voting patterns. The data collected in this category is unusual because there are only two voting patterns: the one displayed by seven Justices who voted in favor of Statutory Civil Rights claims twice and against such claims three times, and the pattern displayed by Justices Stevens and Souter—who each voted in favor of statutory claims once, while rejecting such claims four times. The unusual conservative positions held by Justices Stevens and Souter at the bottom of Data Table 8 may be explained by this remarkable voting pattern.

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

In keeping with its conservative trend since 1999, the Court again slightly decreased its receptiveness to assertions of federal jurisdiction this Term. Although the Court moved 10 points in a liberal direction with Split decisions involving a jurisdictional question, both Unanimous and Majority decisions continued the conservative trend (with 12.1- and 20-point conservative movements, respectively). The voting patterns of Justices Ginsburg and Souter on jurisdictional questions display a high level of correlation.

49. 539 U.S. 244 (2003).

50. 539 U.S. 306 (2003).

Data Table 9: Federalism Cases.

The Court voted slightly more liberally in Majority (7.1 points) and Split (7.1 points) decisions involving Federalism questions. This was offset by a 4.2 point conservative movement in Unanimous decisions. The voting pattern for Justice Ginsburg was somewhat unexpected, in that she voted in favor of state authority more often than the Chief Justice. The anticipated voting pattern for the Court as a whole was fairly accurate. There is a high correlation between the year-to-year voting patterns of Justices Breyer and Souter.

Data Table 10: Swing-Votes.

Although conservative coalitions still decided more than 50% of the closely divided cases this Term, Data Table 10 nevertheless demonstrates liberal movement. Conservative coalitions controlled 56.3% of the Swing Votes this Term, down 11.7 points from last Term. Conservative coalitions fared worse in only three of the past nine Terms. Justice O'Connor is again the Court's most influential swing voter, voting with the majority 100% of the time, followed by Chief Justice Rehnquist, who voted with the majority 65% of the time.

IV. Analysis*Table 1: Civil-State Party*⁵¹

51. Several cases this Term involved disputes where one issue was decided "for" while another issue was decided "against" a governmental party, often by different voting majorities. This article, for example, lists three cases as "for" and "against" the state. *See, e.g.,* *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003) (state action may constitute a regulatory taking—against the state) (despite regulatory taking, no compensation is due—in favor of the state); *Pharm. Research v. Walsh*, 538 U.S. 644 (2003) (plaintiff has not established grounds for a preliminary injunction—in favor of state) (plaintiff may nevertheless be entitled to relief on remand—against the state); *Virginia v. Black*, 538 U.S. 343 (2003) (a statute forbidding the burning of crosses with intent to intimidate does not necessarily violate the First Amendment—in favor of state) (Virginia cross burning statute is nevertheless facially invalid—against the state). Cases collected in footnotes 72, 93 and 122 also appear on "both sides" of their respective Tables. Cases decided in favor of state governments: *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003); *Pharm. Research v. Walsh*, 538 U.S. 644 (2003); *Ky. Assoc. of Health Plans v. Miller*, 538 U.S. 329 (2003); *Wash. State Dep't of Social and Health Servs. v. Keffeler*, 537 U.S. 371 (2003); *Conn. Dep't of Safety v. Doe*, 538 U.S. 1 (2003); *City of L.A. v. David*, 538 U.S. 715 (2003); *Pierce County Wash. v. Guillen*, 537 U.S. 129 (2003); *City of Cuyohoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *Fitzgerald v. Racing*, 539 U.S. 103 (2003);

Data Table 1 and Chart 1 indicate decreasing support on the Court for state government in civil cases.⁵² In contrast to the gradually increasing support for state governments since the 1997 Term, this Term's data shows liberal movement in "Majority," "Split," and "Unanimous" decisions. Split cases are typically the best indicator of political movement on the Court, and in these decisions the Court voted 25.6 points more often against state government than last Term.⁵³ Despite this uniform liberal movement, however, the Court still decided 52% of Civil/State cases in favor of the government.⁵⁴ This suggests that, despite liberal movement, the Court remains conservative in its general approach to the cases on Table 1; the Court has not returned to the liberal data seen in the 1995 Term. The Civil/State party is this Term's second most reliable indicator of conservative/liberal leanings.⁵⁵

Statistically, predicted voting patterns for 1996 were generally more liberal than anticipated. According to Mean Table 1, six of the nine Justices showed a statistically significant change in voting behavior, with four out of the six voting more liberally than expected.⁵⁶ Chief Justice Rehnquist and Justice Kennedy had the highest liberal deviation of 21.0 and 20.7 points, respectively.⁵⁷ Justice Stevens had the highest conservative deviation at 20.3 points.

The rank ordering of the Justices on Data Table 1 is somewhat unusual this Term, because Justices Ginsburg and Stevens—two traditionally "liberal" jurists—hold positions near the conservative "top of the chart." The unusual posture of several cases included on

Virginia v. Hicks, 539 U.S. 113 (2003); Illinois ex. rel. Madigan v. Telemarketing Co., 538 U.S. 600 (2003); Virginia v. Black, 538 U.S. 343 (2003); Yellow Transp. v. Michigan, 537 U.S. 36 (2002). Cases decided against state governments: Brown v. Legal Found. of Wash., 538 U.S. 216 (2003); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003); Pharm. Research v. Walsh, 538 U.S. 644 (2003); Entergy La. Inc. v. La. Public Serv. Comm'n., 539 U.S. 39 (2003); Hillside Dairy v. Lyons, 539 U.S. 59 (2003); Virginia v. Black, 538 U.S. 343 (2003); Franchise Tax Board of Ca. v. Hyatt, 538 U.S. 588 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); Jinks v. Richland County, 538 U.S. 456 (2003).

52. See *infra* Data Table 1 and Chart 1.

53. See *infra* Data Table 1.

54. See *infra* Data Table 1.

55. See *infra* Part V.

56. See *infra* Mean Table 1. Justices Ginsburg, Stevens, Scalia, O'Connor, Kennedy and the Chief Justice displayed statistically significant departures from past voting behavior. All of these Justices except Ginsburg and Stevens voted more conservatively than anticipated.

57. See *infra* Data Table 1.

Data Table 1, which presented appealing "conservative" resolutions for politically "liberal" issues, may explain this notable change of position for the two Justices. For instance, Justice Stevens voted for the government in Equal Protection affirmative action cases⁵⁸ and First Amendment cases.⁵⁹ These somewhat unusual cases may account for Justices Ginsburg's, Stevens' and Souter's ranking as three of the four most "conservative" jurists on Data Table 1.⁶⁰

There is one notable voting correlation on Data Table 1. Justices Stevens and Ginsburg hold an adjusted correlation score of 0.96 and an r^2 score of 0.91.⁶¹ These scores indicate that the Justices' voting patterns tend to move in tandem from Term to Term.

*Table 2: Civil-Federal Party*⁶²

Data Table 2 and Chart 2 show that the Court continued last year's conservative trend in all three voting categories—Majority, Split, and Unanimous.⁶³ In Split cases, the Court voted 100.0% in favor of the federal government.⁶⁴ In Majority cases, the Court reached an all-time high, voting 81.8% of the time in favor of the federal government.⁶⁵ In Unanimous cases, the Court reached its third highest average by voting 77.8% of the time in favor of the

58. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger* 539 U.S. 244 (2003).

59. See *Virginia v. Black*, 538 U.S. 343, 368 (2003) (Stevens, J., concurring); *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003).

60. For an example of the Court's unusual voting alignment, see *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (showing that Justices Scalia, Thomas, Stevens, and Ginsburg vote conservatively in this case for a strict construction of the president's powers). The Court's outcomes in the Civil/State party category this Term also reveal a fractured Court. See, e.g., *Pharm. Research v. Walsh*, 538 U.S. 644 (2003).

61. See *infra* Regression Table 1.

62. Cases decided in favor of federal government: *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146 (2003); *Cook County v. United States*, 538 U.S. 119 (2003); *Eldred v. Ashcroft*, 537 U.S. 186 (2003); *Boeing Co. v. United States*, 537 U.S. 437 (2003); *Barnhart v. Peabody Coal*, 537 U.S. 149 (2003); *Nat'l Park Hospitality v. Dep't of Interior*, 538 U.S. 803 (2003); *United States v. Navajo Nation*, 537 U.S. 488 (2003); *INS v. Ventura*, 537 U.S. 12 (2003); *United States v. Am. Library Ass'n.*, 539 U.S. 194 (2003); *United States v. Bean*, 537 U.S. 71 (2002). Cases decided against of federal government: *F.C.C. v. NextWave Personal Comm'ns*, 537 U.S. 293 (2002); *United States v. White Mountain Apache Tribe*, 537 U.S. 456 (2003).

63. See *infra* Data Table 2 and Chart 2.

64. See *1997 Study*, *supra* note 1, at 540.

65. See *infra* Data Table 2 and Chart 2.

government.⁶⁶

According to Mean Table 2, all but one of the six Justices demonstrating statistically significant changes in voting behavior voted more conservatively than anticipated, which may be another indicator of a significant conservative movement by the Court in this category.⁶⁷ Chief Justice Rehnquist and Justice Kennedy cast votes 90.9% of the time in favor of the federal government, each voting between 32 and 45 points more conservatively than expected.⁶⁸ Justice Stevens is the notable exception to the conservative trend in this category: he voted significantly more liberally than anticipated by 20.7 points.⁶⁹

Although the Court showed increased support for the federal government in Civil/Federal cases, the conservative movement on this table may be unreliable. Factor analysis this Term ranks Civil/Federal cases as the second least reliable indicator of conservative/liberal bias.⁷⁰

Data Table 2, like Data Table 1, displays some unusual "reversals" in the usual conservative/liberal ranking of the Justices. Justices Ginsburg and Breyer, traditionally considered to be "liberal" members of the Court, are ranked this Term in the top "conservative" half of Data Table 2. This result may simply be an indication of Data Table 2's low level of reliability this Term. However, as with Data Table 1, this ranking may result from the nature of the cases before the Court. In at least two cases this Term, traditionally conservative Justices invoked the "conservative" interpretive canon of strict statutory construction to yield "liberal" results under the terms of this Study.⁷¹

Chief Justice Rehnquist tops the chart as the most conservative Justice in Civil/Federal cases while Justice Stevens holds the bottom position as the most liberal Justice. The Study anticipates that the Chief Justice will again hold the most conservative position on Data Table 2 for the 2003 Term.

66. *See infra* Data Table 2 and Chart 2.

67. *See infra* Mean Table 2. Justices Kennedy, Ginsburg, Breyer, Thomas, Stevens and the Chief Justice displayed statistically significant departures from past voting behavior. Only Justice Stevens voted more conservatively than expected.

68. *See infra* Data Table 2.

69. *See supra* note 67 and accompanying text.

70. *See infra* Part V.

71. *See* *Boeing v. United States*, 537 U.S. 437 (2003); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003).

*Table 3: State Criminal Cases*⁷²

Data Table 3 and Chart 3 demonstrate moderate conservative movement in favor of the state in Majority, Split and Unanimous decisions. The Court voted for the government 58.8% of the time in Majority decisions, 50% of the time in Split decisions, and 80% of the time in Unanimous decisions.

This Term, state criminal cases emerge as our most reliable indicator of conservative/liberal bias. As discussed above, the Civil/State and Civil/Federal Data Tables have emerged as unreliable predictors of conservative/liberal bias (perhaps due to somewhat unconventional pole-switching).⁷³ However, and whatever the explanation for the unusual conservative/liberal rankings on Data Tables 1 and 2, Data Table 3 returns to the more conventional ideological divisions generally displayed by the Court, with the five traditionally conservative Justices topping the chart and the four traditionally "liberal" Justices on the bottom.

Individually, Justice Thomas ranks as the most conservative Justice in State/Criminal cases and Justice Ginsburg is positioned as the most liberal. For the 2003 Term we anticipate Justice Thomas to return as the most conservative Justice in this category and Justice Stevens to rank as the most liberal (followed closely by Justice Ginsburg).

There were no statistically significant correlations in the voting patterns of the Justices in Criminal/State cases.⁷⁴ The 2001 Study anticipated the voting pattern in Majority cases rather accurately, deviating only 2.5 points from the actual score. Justices Ginsburg and

72. Cases decided in favor of the state: *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); *Woodford v. Garceau*, 538 U.S. 202 (2003); *Price v. Vincent*, 538 U.S. 634 (2003); *Chavez v. Martinez*, 538 U.S. 760 (2003); *Overton v. Bazetta*, 539 U.S. 126 (2003); *Ewing v. California*, 538 U.S. 11 (2003); *Sattazhan v. Pennsylvania*, 537 U.S. 101 (2002); *Woodford v. Visciotti*, 537 U.S. 19 (2002); *Early v. Packer*, 537 U.S. 3 (2002). Cases decided against the state: *Stogner v. California*, 539 U.S. 607 (2003); *Lawrence v. Tex.*, 123 S.Ct. 2472 (2003); *Miller v. Cockrell*, 537 U.S. 322 (2003); *Kaupp v. Texas*, 538 U.S. 626 (2003); *Chavez v. Martinez*, 538 U.S. 760 (2003); *Bunkley v. Florida*, 538 U.S. 835 (2003); *Wiggins v. Smith*, 539 U.S. 510 (2003). *Chavez v. Martinez*, 538 U.S. 760 (2003), involved a question decided in favor, as well as a question decided against, the state: the state defendant is entitled to qualified immunity (for the state); plaintiff may nevertheless assert a substantive due process claim on remand (against the state). See *supra* note 51.

73. See discussion *supra* on Civil/State and Civil/Federal Parties.

74. See *infra* Regression Table 3.

Breyer voted almost exactly as anticipated, with margins of error of only 0.3 and -1.6 points, respectively.

*Table 4: Federal Criminal Cases*⁷⁵

Data Table 4 and Chart 4 show liberal movement by the Court.⁷⁶ Majority, Split and Unanimous decisions all moved in a liberal direction, with only 33.3% of all cases decided in favor of the government. Liberal movement on Data Table 4, however, is not unexpected. Last Term, the Justices voted 100.0% for the federal government in all cases. Accordingly, unless the federal government had continued an unusual winning streak, some "liberal" movement this Term was unavoidable.

Nevertheless, the magnitude of the movement appears to be significant. With the single exception of Justice Thomas, the voting patterns of all Justices on Data Table 4 showed a statistically significant change in voting behavior.⁷⁷ And, of the eight Justices that demonstrated a statistically significant change in voting behavior, all but Chief Justice Rehnquist voted more liberally than anticipated.⁷⁸ The most liberal movement was evidenced by the scores of Justices Scalia and Thomas, who voted 33.2 and 25.9 points more liberally than anticipated.⁷⁹

In spite of the general liberal movement, the rank ordering of the Justices on Data Table 4 is not unexpected. The most conservative spots on the table are held by the Chief Justice, followed by Justices Thomas, Scalia, Kennedy and O'Connor. Justice Stevens did not vote for the federal government a single time on Data Table 4, setting a liberal "high water" mark for the Justice in Federal/Criminal cases.⁸⁰

Justice Ginsburg's and Justice Souter's voting patterns tend to move similarly over time in criminal federal cases, with a correlation

75. Cases decided in favor of the federal government: *United States v. Recio*, 537 U.S. 270 (2003); *Sell v. United States*, 539 U.S. 166 (2003); *Demore v. Kim*, 538 U.S. 510 (2003). Cases decided against the federal government: *Massaro v. United States*, 538 U.S. 500 (2003); *Price v. United States*, 537 U.S. 1152 (2003); *Clay v. United States*, 538 U.S. 522 (2003).

76. *See infra* Data Table 4 and Chart 4.

77. *See infra* Mean Table 4.

78. *See infra* Mean Table 4. For 2002, the Chief Justice voted 9 points more conservatively on Data Table 4 than last year's Study had anticipated. *Id.*

79. *See infra* Mean Table 4.

80. *See 1997 Study, supra* note 1, 540.

score of 0.97 and an r^2 of 0.94.⁸¹

*Table 5: First Amendment Claims*⁸²

In First Amendment cases this Term, the Court followed a conservative trend that began in the 2000 Term.⁸³ In the Majority category, the Court voted for the claim only 25.0% of the time, a conservative shift of 41.7 points from the previous Term, marking the second lowest score recorded in this category.⁸⁴ The Split category mirrored this shift, favoring First Amendment claims only 33.0% of the time, a drop of more than 38 points.⁸⁵ The Court did not vote for any First Amendment claims in the Unanimous category.

The Justices' individual voting behaviors further evidence this conservative shift. Each member of the Court voted more conservatively than anticipated. Notably, the Chief Justice, along with Justices Kennedy and O'Connor, did not accept any of the four First Amendment claims presented to the Court.⁸⁶ Furthermore, the voting patterns of every member of the Court, with the single exception of Justice Breyer, demonstrated a statistically significant change in voting behavior.⁸⁷ Moreover, all of the Justices (including Justice Breyer) voted more conservatively than anticipated.⁸⁸

Individually, Justice Kennedy's score showed a marked decrease from past Terms. Typically, Justice Kennedy tops the chart in First Amendment cases, voting most often in favor of First Amendment claims. His support of First Amendment claims fell 66.7 points from last Term, the most dramatic movement of any Justice on Data Table 5, marking an all-time low score for Justice Kennedy. Justices Scalia and Thomas uncharacteristically hold two of the most liberal positions on the chart.

81. See *infra* Regression Table 4.

82. Cases decided for the claim: *Virginia v. Black*, 538 U.S. 343 (2003). Cases decided against the claim: *Eldred v. Ashcroft*, 537 U.S. 186 (2003); *United States v. Am. Library Ass'n.*, 539 U.S. 194 (2003); *City of Cuyohoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *Virginia v. Hicks*, 539 U.S. 113 (2003); *Illinois ex. rel. Madigan v. Telemarketing Co.*, 538 U.S. 600 (2003).

83. See *infra* Data Table 5 and Chart 5.

84. In the 1997 Term, the Court voted 0 times for the claim in the Majority category. *1997 Study, supra* note 1, at 540.

85. See *infra* Data Table 5.

86. See *infra* Data Table 5.

87. See *infra* Mean Table 5.

88. See *infra* Data Table 5.

The unusual rankings and movement demonstrated on Data Table 5 may be due to the small universe of First Amendment cases (four). In addition, the voting patterns charted on Data Table 5 have tended to be relatively volatile.⁸⁹ Perhaps because of these considerations, factor analysis suggests that First Amendment cases this Term are not reliable indicators of the individual Justices' (and the Court's) conservative/liberal bias.⁹⁰

Justices Thomas and Scalia tend to display similar voting patterns in First Amendment cases.⁹¹ The voting patterns of Justices Ginsburg and Stevens also display rather high levels of correlation.⁹²

*Data Table 6: Equal Protection Claims*⁹³

Data Table 6 and Chart 6 show a liberal trend in the decision of Majority, Split and Unanimous Equal Protection cases.⁹⁴ However, the small universe of cases (five) and factor analysis (which suggests that Equal Protection cases are the least reliable indicators of conservative/liberal bias this Term⁹⁵), render any conclusions based on Data Table 6 somewhat tenuous. Nevertheless, the voting patterns revealed in Data Table 6 are interesting.

The table demonstrates a rather unusual rank order, with traditionally conservative Justices (including the Chief Justice and Justices Scalia, Kennedy and Thomas) holding the four top "liberal" positions on the chart, while traditionally liberal members of the Court (including Justices Breyer, Stevens, Souter and Ginsburg) hold down the conservative bottom. This remarkable voting pattern is almost certainly due to the nature of the Equal Protection cases heard

89. See *infra* Data Table 5 (between the 1993 Term and the 2001 Term, the outcome of Majority decisions on Data Table 5 has ranged from a low of no cases decided in favor of a First Amendment claim to a high of 100%, with most Term-to-Term results evidencing relatively dramatic point shifts).

90. See *infra* Part V.

91. See *infra* Regression Table 5.

92. See *infra* Regression Table 5.

93. Cases decided for the claim: *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003). Cases decided against the claim: *City of Cuyohoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fitzgerald v. Racing*, 539 U.S. 103 (2003). *Grutter v. Bollinger*, 539 U.S. 306 (2003), involved a question decided in favor, as well as a question decided against, the state: state affirmative action program must survive strict scrutiny—against the state; state affirmative action program survives strict scrutiny—for the state. See *supra* note 51.

94. See *infra* Data Table 6 and Chart 6.

95. See *infra* Part V.

by the Court this Term—as well as closely correlated patterns of voting displayed by several pairs of Justices.

In *Grutter v. Bollinger*,⁹⁶ and *Gratz v. Bollinger*,⁹⁷ the Court was faced with claims—brought by non-minority plaintiffs—that state attempts to balance the racial composition of university student bodies violated the Equal Protection Clause. In these cases, the typically "conservative" Justices voted in favor of the Equal Protection claims (a "liberal" result under the terms of this Study) while the typically "liberal" Justices voted against the claims (a "conservative" result).⁹⁸

In addition to "pole switching," the Study reveals an unusual cluster of correlated voting behaviors by the Justices in Equal Protection cases. Justices Ginsburg and Souter display perfectly correlated voting behavior on Data Table 6.⁹⁹ In addition, the voting patterns of three additional pairs on the Court—Justices Thomas and Scalia, Justices Breyer and Souter, and Justices Breyer and Ginsburg—are also closely correlated.¹⁰⁰ The voting patterns of Justices Kennedy and O'Connor in Equal Protection cases, finally, tend to move in tandem.¹⁰¹ These closely correlated voting patterns, combined with the "reverse discrimination" claims heard this Term, probably account for the counter-intuitive ranking of the Justices on Data Table 6 for 2002.

96. 539 U.S. 306 (2003).

97. 539 U.S. 244 (2003).

98. In *Grutter*, 539 U.S. at 306, Justices Breyer, Ginsburg, O'Connor, Souter, and Stevens all voted in a traditionally conservative manner, or against the Equal Protection claim, and Justices Kennedy, Scalia, Thomas, and Chief Justice Rehnquist all voted in a traditionally liberal manner, or for the Equal Protection claim. The Justices voted similarly in *Gratz*, 539 U.S. at 244, wherein Justices Ginsburg and Souter voted against the Equal Protection claim and Justices Breyer, Kennedy, O'Connor, Scalia, Thomas and Chief Justice Rehnquist voted for the Equal Protection claim. Justice Stevens would have dismissed the claim for lack of standing and therefore abstained from casting a vote concerning the Equal Protection claim.

99. See *infra* Regression Table 6. Last Term, the voting patterns of three pairs of Justices were perfectly correlated. 2001 Study, *supra* note 1, at 342. In addition to Justices Ginsburg and Souter, the voting patterns of Justices Breyer and Souter and the patterns of Justices Breyer and Ginsburg were perfectly correlated. *Id.*

100. See *infra* Regression Table 6.

101. See *infra* Regression Table 6 (showing that Justices Kennedy and O'Connor's voting patterns have a correlation score of .93 and an r^2 score of .85).

*Table 7: Statutory Civil Rights Cases*¹⁰²

Data Table 7 and Chart 7 show slight liberal movement for the Court in Statutory Civil Rights cases.¹⁰³ The Justices voted for the claim in Majority decisions 40.0% of the time, as compared to last Term's 26.7%. They voted for the claim in Split decisions 50.0% of the time, as compared to last Term's 33.3% of the time. Finally, the Court voted for the claim in Unanimous decisions 33.3% of the time, as compared to last Term's 28.6%.

As with Data Table 6, the rank order of the Justices on Data Table 7 is somewhat unusual. Traditionally "conservative" Justices (including the Chief Justice and Justice Scalia) hold "liberal" positions at the top of the chart, while traditionally "liberal" Justices hold down the "conservative" bottom. Indeed, the unusually "conservative" voting patterns displayed by Justices Ginsburg, Breyer, Stevens and Souter on Data Table 7 all represent statistically significant departures from their past behavior.¹⁰⁴

Nevertheless, the unusual ranking of the Justices on Data Table 7 may be a momentary aberration. As with Equal Protection claims, the universe of Statutory Civil Rights cases was small (five) and factor analysis does not place this table among the most reliable indicators of conservative/liberal bias.¹⁰⁵ Furthermore, there are only two voting patterns revealed on Data Table 7. Seven of the nine Justices voted for the claim 40.0% of the time, while the remaining two Justices—Stevens and Souter—voted for the claim 20.0% of the time. Accordingly, no one Justice is really much more "conservative" or "liberal" than any other Justice on Data Table 7.

The voting patterns of Justices Breyer and Stevens and Justices Ginsburg and Souter are highly correlated.¹⁰⁶

102. Cases decided for the claim: *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *Georgia v. Ashcroft*, 539 U.S. 461 (2003). Cases decided against the claim: *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440 (2003); *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701 (2003); *Meyer v. Holley*, 537 U.S. 280 (2003).

103. See *infra* Data Table 7 and Chart 7.

104. See *infra* Mean Table 7. Justice Thomas' voting pattern also departs from his past practice in a statistically significant manner, although he departs in a liberal direction. *Id.*

105. See *infra* Part V.

106. See *infra* Regression Table 7.

*Table 8: Jurisdiction*¹⁰⁷

Data Table 8 and Chart 8 reveal moderate conservative movement in the Court's voting behavior on jurisdictional issues.¹⁰⁸ Although the Court demonstrated a 10-point liberal movement in the outcome of Split decisions, this was offset by 12.1 and 20-point conservative movements in the outcome of Majority and Unanimous decisions. Conservative movement is also confirmed by the fact that four Justices with statistically significant departures from past voting behaviors—Justices Kennedy, Stevens, Thomas and Scalia—voted more conservatively on Data Table 8 this Term than last year.¹⁰⁹

Individually, the most significant change in voting behavior is Justice Stevens' 35.7 point decrease in his support of federal jurisdictional claims.¹¹⁰ In keeping with tradition, Justice Scalia holds the bottom, most conservative position on Data Table 8 as the Justice voting least often in favor of expanding the Court's power—a position he has held every year but one since the inception of this Study.¹¹¹

Regression analysis demonstrates that the voting patterns of Justices Ginsburg and Souter are closely correlated on questions of jurisdiction.¹¹² The voting patterns of these two Justices are also correlated in Criminal/Federal, Equal Protection and Statutory Civil Rights cases.¹¹³

107. Cases decided for the claim: *Clay v. United States*, 537 U.S. 522 (2003); *Sell v. United States*, 539 U.S. 166 (2003); *Charles Demore v. Kim*, 538 U.S. 510 (2003); *Roell v. Withrow*, 538 U.S. 580 (2003); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003); *United States v. White Mountain Apache Tribe*, 537 U.S. 456 (2003); *Pierce County Wash. v. Guillen*, 537 U.S. 129 (2003); *Fitzgerald v. Racing*, 539 U.S. 103 (2003); *Jinks v. Richland County*, 538 U.S. 456 (2003); *Virginia v. Hicks*, 539 U.S. 113 (2003). Cases decided against the claim: *Syngenta v. Henson*, 537 U.S. 28 (2003); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003); *Pacifica Health Sys. v. Book*, 538 U.S. 401 (2003); *Nat'l Park Hospitality v. Dep't of Interior*, 538 U.S. 803 (2003); *United States v. Navajo Nation*, 537 U.S. 488 (2003); *INS v. Ventura*, 537 U.S. 12 (2003); *U.S. v. Bean*, 537 U.S. 71 (2002); *Howsom v. Dean Wittier Reynolds Inc.*, 537 U.S. 79 (2002).

108. See *infra* Data Table 8 and Chart 8.

109. See *infra* Mean Table 8. Justice O'Connor's voting pattern demonstrated statistically significant liberal movement this Term. *Id.*

110. See *infra* Data Table 8.

111. See *1996 Study*, *supra* note 1, at 74.

112. See *infra* Regression Table 8.

113. See *infra* Regression Tables 4, 6, 7.

*Table 9-Federalism Cases*¹¹⁴

Data Table 9 and Chart 9 show slight liberal movement from last Term. In the Majority and Split decisions, the Court voted 7.1 points more liberally than last Term, while in the Unanimous category the Court voted 4.2 points more conservatively.

Three Justices—including the Chief Justice and Justices O'Connor and Souter—demonstrated statistically significant changes in voting behavior on Data Table 9.¹¹⁵ All three of these Justices voted more liberally (that is, against a claim of state government authority) than in 2001.¹¹⁶

This Term, the ranking of the Justices reveals a traditional alignment of the Court, excepting the positions of Justice Ginsburg and Justice O'Connor. The top four "conservative" Justices (voting most often in favor of the state) were Justices Thomas, Scalia, Kennedy, and—surprisingly—Justice Ginsburg.¹¹⁷ Chief Justice Rehnquist and Justices Stevens, O'Connor, Souter, and Breyer follow these Justices.

Anticipated voting behaviors were rather accurate for Data Table 9: all Justices voted within 17.1 points of their anticipated scores.¹¹⁸ The anticipated voting scores for Justices Thomas and O'Connor deviated by 2 points or less.¹¹⁹ The anticipated score for the outcome of Majority decisions deviated from the actual score by only 0.4 point.¹²⁰

The voting patterns of Justices Breyer and Souter demonstrate a high degree of correlation.¹²¹

114. Cases decided in favor of the state: *Lockeyer v. Andrade*, 538 U.S. 63 (2003); *Ewing v. California*, 538 U.S. 11 (2003); *Pharm. Research v. Walsh*, 538 U.S. 644 (2003); *Ky. Ass'n. of Health Plans v. Miller*, 538 U.S. 329 (2003); *City of Cuyohoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). Cases decided in favor of the U.S.: *Branch v. Smith*, 538 U.S. 254 (2003); *State Farm Mutual v. Campbell*, 538 U.S. 406 (2003); *Am. Ins. Ass'n. v. Garamendi*, 539 U.S. 396 (2003); *Entergy La. Inc. v. La. Public Serv. Comm'n.*, 539 U.S. 39 (2003); *Hillside Dairy v. Lyons*, 539 U.S. 59 (2003); *Yellow Trans. v. Michigan*, 537 U.S. 36 (2002).

115. *See infra* Mean Table 9.

116. *See infra* Data Table 9.

117. Justice Ginsburg voted against substantive due process in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

118. *See infra* Data Table 9.

119. *See infra* Data Table 9.

120. *See infra* Data Table 9.

121. *See infra* Regression Table 9.

*Table 10: Swing-Vote Cases*¹²²

Data Table 10 and Chart 10 indicate voting scores for the sixteen cases that were decided by a margin of one vote. Because of the narrow voting margin, Swing-Vote cases may well be the most reliable indicator of the Court's position on the conservative/liberal spectrum. Data Table 10 this Term reveals a liberal trend – even though conservative coalitions still controlled the outcome of more than 50% of the Swing-Vote cases heard by the Court.

This Term, conservative coalitions controlled the crucial fifth vote 56.3% of the time. However, the Justices with liberal tendencies were not far behind—controlling the outcome in seven of the sixteen closely divided cases decided this Term. Moreover, last Term conservative coalitions determined the decision of 68% of all cases decided by a single vote. Conservative coalitions, therefore, lost nearly 12 points this Term.

Furthermore, review of the outcomes of Swing-Vote cases for the past nine Terms suggests that the decisional power of conservative coalitions may have peaked. In the 1999, 2001 and 2002 Terms, conservative coalitions possessed marked power (deciding 61.5%, 60.0%, and 68.0% of the Swing-Vote cases those years, respectively). The 56.3% figure chalked up this Term is the lowest ebb of this four-Term conservative "run." Conservative coalitions last controlled 56.3% of closely divided cases in the 1996 Term – just before losing control of Swing-Vote cases for two years to liberal coalitions in 1997 and 1998. Thus, while conservative coalitions held sway this Term, decisional momentum may now favor the liberal wing of the Court. The current Court may be conservative in the decision of Swing-Vote cases, but its conservative tendencies are unsteady and perhaps diminishing.

For the second year in a row, Justice O'Connor is the Court's

122. Swing-vote cases reaching a conservative outcome: *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Sattazhan v. Pennsylvania*, 537 U.S. 101 (2003); *Ewing v. California*, 538 U.S. 11 (2003); *Charles Demore v. Kim*, 538 U.S. 510 (2003). Swing-vote cases reaching a liberal outcome: *U.S. v. White Mountain Apache Tribe*, 537 U.S. 436 (2003); *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396 (2003); *Grutter v. Bollinger*, 539 U.S. 306; *Stogner v. California*, 539 U.S. 607 (2003); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Charles Demore v. Kim*, 538 U.S. 510 (2003); *Roell v. Withrow*, 538 U.S. 580 (2003). *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Demore v. Kim*, 538 U.S. 510 (2003), involved swing votes where one issue was decided by a "conservative" coalition while another issue was decided by a "liberal" coalition. See *supra* note 51.

most influential swing voter.¹²³ This Term she voted with the majority in an unprecedented 100% of closely divided cases. This single statistic renders Justice O'Connor the most powerful member of the Court. Should she decide to retire, her replacement would be the most significant personnel change on the current Court.

Following Justice O'Connor, the Chief Justice is the next most influential member of the Court. This Term he voted with the majority in 62.5% of closely divided cases. Justice Kennedy, who in past years vied with Justice O'Connor for the spot as the Court's most influential "swinger,"¹²⁴ this Term is tied for third place with Justices Souter and Breyer. Justice Stevens was the Justice least likely to vote with the majority, voting only 37.5% of the time with the majority.

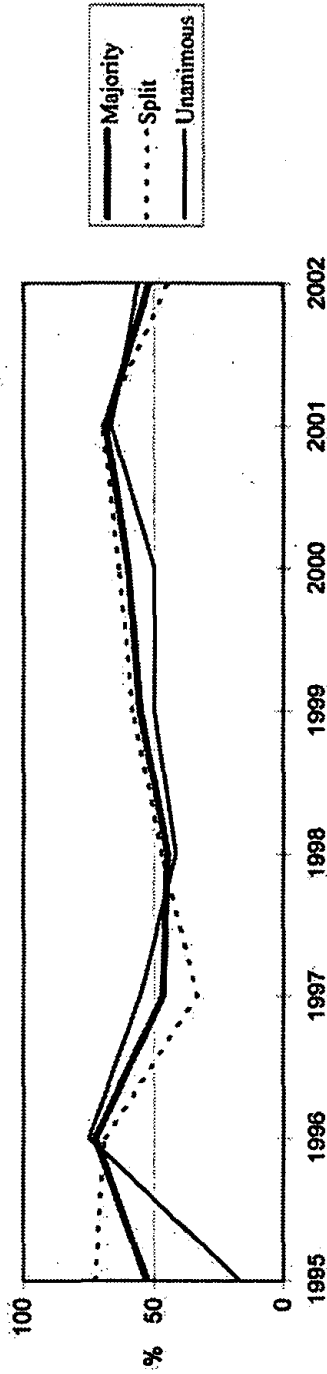
123. See *infra* Data Table 10.

124. See 1996 Study, *supra* note 1, at 96, 97 ("For the fourth year, Justice Kennedy is the Court's most influential swing voter, voting with the majority 81.3% of the time '[A]s Justice Kennedy votes, so votes the Court.'"); see generally, 2000 Study, *supra* note 1.

Data Table 1
Civil Cases: State Government Versus a Private Party

Justice	% Votes for Government														X2		2002 Term Votes		Anticipated Scores					
	1993		1994		1995		1996		1997		1998		1999		2000		2001		2002 Term		2002 Term		2003 Term	
	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	For Gov't	Against Gov't	2002 Term	Error	2003 Term	
Thomas	45.5	55.0	67.4	77.4	60.0	65.5	50.0	60.0	75.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	15	10	63.1	-3.1	67.7		
Ginsburg	40.9	50.0	35.3	53.1	46.7	31.0	44.4	46.2	50.0	56.0	44.4	46.2	46.2	50.0	56.0	56.0	50.0	14	11	49.7	6.3	54.9		
Stevens	27.3	42.1	23.5	48.5	37.5	17.2	41.2	40.0	37.5	54.2	17.2	41.2	40.0	37.5	54.2	40.0	37.5	13	11	33.9	20.3	40.4		
Souter	45.5	35.0	29.4	54.6	46.7	37.9	50.0	53.9	43.8	52.0	37.9	50.0	53.9	43.8	52.0	53.9	43.8	13	12	44.2	7.8	44.1		
Scalia	50.0	60.0	52.9	77.4	60.0	55.2	50.0	60.0	62.5	48.0	55.2	50.0	60.0	62.5	48.0	60.0	62.5	12	13	61.4	-13.4	58.2		
Breyer	42.9	42.1	29.4	54.6	46.7	44.8	52.9	35.7	50.0	48.0	44.8	52.9	35.7	50.0	48.0	50.0	48.0	12	13	45.9	2.1	52.9		
O'Connor	40.9	40.0	47.1	68.8	53.3	55.2	55.6	53.3	53.3	44.0	55.2	55.6	53.3	53.3	44.0	60.0	75.0	11	14	53.7	-9.7	48.0		
Rehnquist	68.2	60.0	43.8	84.9	60.0	65.5	66.7	60.0	60.0	40.0	65.5	66.7	60.0	60.0	40.0	40.0	40.0	10	15	61.0	-21.0	73.0		
Kennedy	40.9	40.0	41.2	71.9	53.3	51.7	44.4	53.3	53.3	36.0	51.7	44.4	53.3	53.3	36.0	68.8	68.8	9	16	56.7	-20.7	50.0		
Majority Split	40.9	45.0	52.9	72.7	46.7	44.8	53.6	60.0	68.8	52.0	44.8	53.6	60.0	68.8	52.0	70.0	68.8	13	12	64.0	-12.0	57.7		
Unanimous	46.2	45.5	72.7	69.2	33.3	47.1	58.3	63.6	70.0	44.4	47.1	58.3	63.6	70.0	44.4	66.7	66.7	4	5					
	33.3	44.4	16.7	75.0	55.6	41.7	50.0	50.0	55.6	56.3	41.7	50.0	50.0	55.6	56.3	66.7	66.7	9	7					

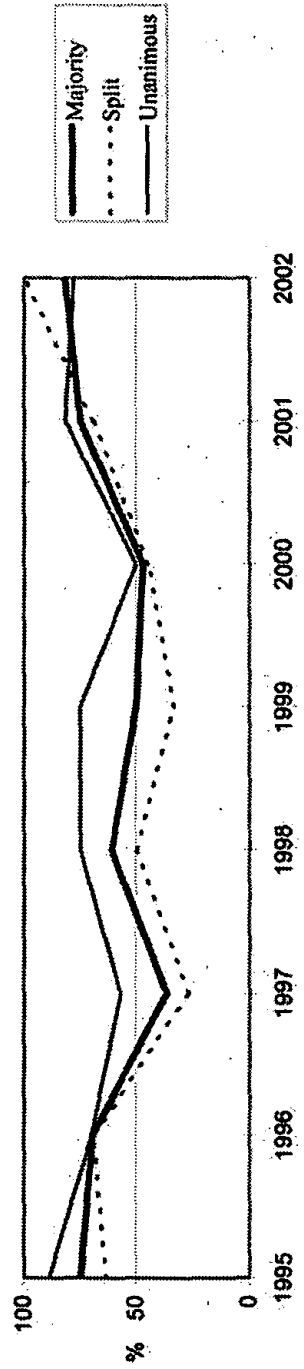
Chart 1
Civil Cases: State Government Versus a Private Party



Mean Table 1
Civil Cases: State Government Versus a Private Party

Justice	Mean Voting Percentage All Prior Terms (F)	99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	66.8	+/- 6.7	10.38	40.00	yes
Stevens	35.7	+/- 5.3	8.24	54.17	yes
O'Connor	54.7	+/- 5.7	8.84	44.00	yes
Scalia	58.6	+/- 5.3	8.30	48.00	yes
Kennedy	53.0	+/- 7.9	11.91	36.00	yes
Souter	45.8	+/- 7.3	9.82	52.00	no
Thomas	60.8	+/- 9.2	11.87	60.00	no
Ginsburg	44.2	+/- 6.2	7.25	56.00	yes
Breyer	44.5	+/- 7.8	8.60	48.00	no

Chart 2
Civil Cases: Federal Government Versus a Private Party



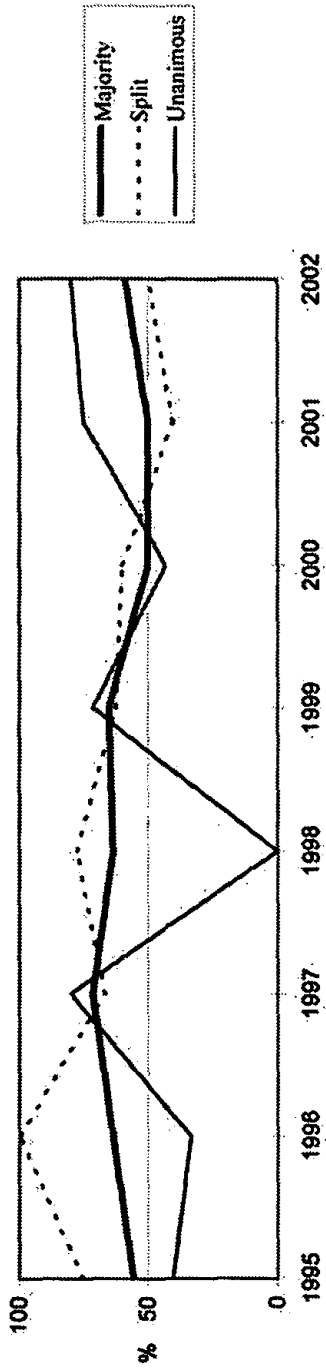
Mean Table 2
Civil Cases: Federal Government Versus a Private Party

Justice	Mean Voting Percentage All Prior Terms (F)	99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	66.4	+/- 8.1	12.57	90.91	yes
Stevens	56.6	+/- 6.9	10.75	50.00	yes
O'Connor	60.0	+/- 7.3	11.27	54.55	no
Scalia	59.3	+/- 6.2	9.60	63.64	no
Kennedy	59.1	+/- 7.2	10.78	90.91	yes
Souter	60.6	+/- 9.0	12.06	63.64	no
Thomas	49.1	+/- 7.9	10.13	63.64	yes
Ginsburg	60.1	+/- 11.1	12.93	72.73	yes
Breyer	60.8	+/- 8.4	9.27	72.73	yes

Data Table 3
Criminal Cases: State Government Versus a Private Party

Justice	% Votes for Government												X2			2002 Term Votes			Anticipated Scores					
	1993		1994		1995		1996		1997		1998		1999		2000		2001		2002 Term		2002 Term		2003 Term	
	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	For Gov't	Against Gov't	2002 Term	Error	2003 Term
Thomas	87.5	91.7	66.7	63.6	92.3	80.0	82.6	66.7	84.6	94.1	16	73.0	21.1	89.8										
Rehnquist	81.3	83.3	66.7	63.6	76.9	72.7	87.0	58.3	84.6	82.4	14	65.0	17.4	72.6										
Scalia	81.3	83.3	55.6	63.6	84.6	72.7	82.6	66.7	84.6	82.4	14	74.2	8.1	80.2										
Kennedy	50.0	75.0	55.6	54.6	76.9	54.6	78.3	50.0	76.9	64.7	11	49.1	15.6	63.4										
O'Connor	68.8	58.3	44.4	63.6	71.4	63.6	78.3	50.0	46.2	62.5	10	51.9	10.6	54.6										
Souter	25.0	41.7	22.2	54.6	57.1	36.4	27.3	33.3	23.1	35.3	6	29.1	6.2	21.3										
Stevens	25.0	8.3	22.2	18.2	23.1	9.1	27.3	33.3	15.4	29.4	5	22.5	6.9	18.7										
Breyer	12.5	41.7	22.2	36.4	50.0	36.4	40.9	25.0	30.8	29.4	5	31.0	-1.6	27.9										
Ginsburg	43.8	41.7	33.3	45.5	42.9	27.3	36.4	25.0	23.1	23.5	4	22.2	0.3	18.8										
Majority Split	56.3	58.3	55.6	63.6	71.4	63.6	65.2	50.0	50.0	58.8	10	56.3	2.5	58.3										
Unanimous	61.5	60.0	75.0	100.0	66.7	77.8	62.5	60.0	40.0	50.0	6	50.0												
	33.3	50.0	40.0	33.3	80.0	0.0	71.4	42.9	75.0	80.0	4	80.0												

Chart 3
Criminal Cases: State Government Versus a Private Party

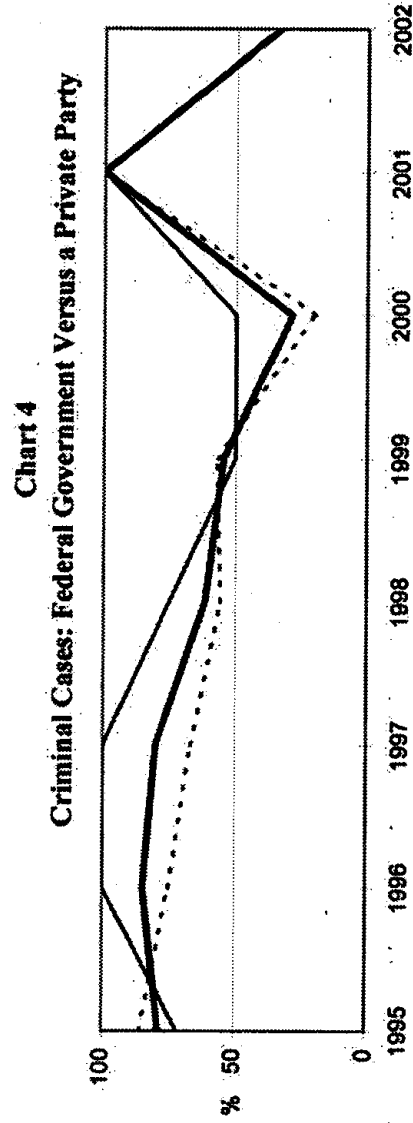


Mean Table 3
Criminal Cases: State Government Versus a Private Party

Justice	Mean Voting Percentage All Prior Terms (F)	99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	78.3	+/- 6.6	10.25	82.35	no
Stevens	21.3	+/- 6.3	9.71	29.41	yes
O'Connor	62.7	+/- 8.5	13.25	62.50	no
Scalia	74.6	+/- 7.2	11.21	82.35	yes
Kennedy	65.5	+/- 8.2	12.28	64.71	no
Souter	41.6	+/- 11.8	15.89	35.29	no
Thomas	79.7	+/- 8.0	10.25	94.12	yes
Ginsburg	35.4	+/- 7.4	8.64	23.53	yes
Breyer	35.4	+/- 8.4	9.17	29.41	no

Regression Table 3
Criminal Cases: State Government Versus a Private Party
Correlation (D) / R²

	Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens									
O'Connor									
Scalia									
Kennedy		0.75/0.53							
Souter									
Thomas		0.83/0.65			0.88/0.75				
Ginsburg									
Breyer				0.78/0.55					



Mean Table 4
Criminal Cases: Federal Government Versus a Private Party

Justice	Mean Voting Percentage All Prior Terms (F)	99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	77.3	+/- 6.7	10.44	66.67	yes
Stevens	45.1	+/- 9.7	15.09	0.00	yes
O'Connor	76.4	+/- 7.6	11.76	40.00	yes
Scalia	69.0	+/- 10.0	15.58	60.00	yes
Kennedy	70.4	+/- 12.2	18.29	50.00	yes
Souter	59.6	+/- 15.0	20.18	33.33	yes
Thomas	74.6	+/- 11.0	14.20	66.67	no
Ginsburg	58.0	+/- 14.2	16.56	33.33	yes
Breyer	63.5	+/- 19.3	21.18	33.33	yes

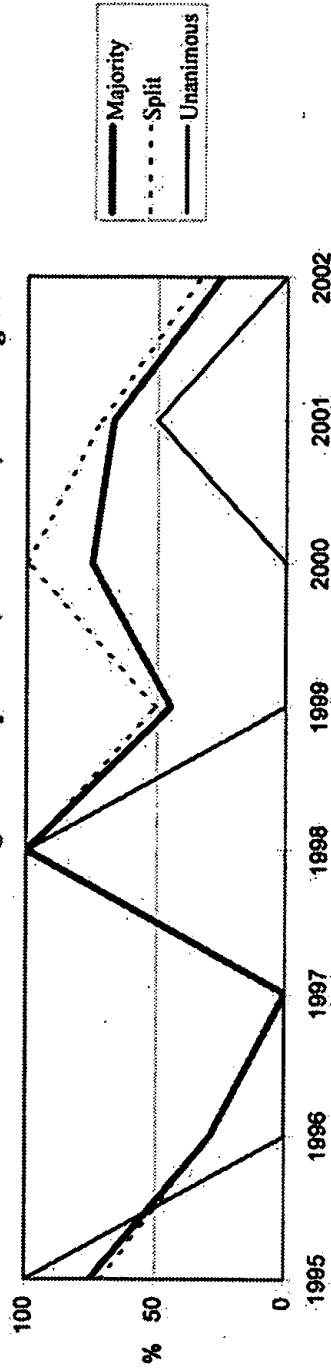
Regression Table 4
Criminal Cases: Federal Government Versus a Private Party
Correlation (D) / R²

Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
O'Connor	0.75/0.54							
Scalia								
Kennedy	0.76/0.55	0.83/0.65	0.79/0.60		0.73/0.49			
Souter								
Thomas								
Ginsburg	0.76/0.53	0.84/0.66	0.85/0.68		0.85/0.68	0.97/0.94		
Breyer	0.84/0.66	0.86/0.71	0.83/0.65		0.88/0.75	0.87/0.73		0.91/0.80

Data Table 5
First Amendment Rights of Expression, Association, and Religion
% Votes for Government

Justice	% Votes for Government												X2		2002 Term Votes		Anticipated Scores					
	1993		1994		1995		1996		1997		1998		1999		2000		2001		2002		2003	
	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term
Stevens	57.1	66.7	62.5	42.9	0.0	100.0	37.5	50.0	66.7	33.3	1	2	49.7	-16.4	61							
Scalia	85.7	55.6	37.5	85.7	0.0	100.0	56.6	25.0	44.4	25.0	1	3	59.0	-34.0	55.7							
Souter	85.7	66.7	37.5	57.1	100.0	100.0	28.6	50.0	66.7	25.0	1	3	64.3	-39.3	60.2							
Thomas	85.7	66.7	37.5	85.7	0.0	100.0	66.7	25.0	66.7	25.0	1	3	48.3	-23.3	61.5							
Ginsburg	71.4	66.7	75.0	57.1	0.0	100.0	33.3	50.0	55.6	25.0	1	3	51.4	-26.4	35.2							
Breyer	71.4	66.7	75.0	14.3	0.0	50.0	12.5	75.0	55.6	25.0	1	3	46.6	-21.6	43.6							
Rehnquist	42.9	55.6	62.5	28.6	0.0	50.0	44.4	25.0	22.2	0.0	0	4	29.9	-29.9	16.4							
O'Connor	57.1	66.7	62.5	28.6	0.0	50.0	33.3	50.0	55.6	0.0	0	4	54.5	-54.5	32.5							
Kennedy	71.4	88.9	87.5	57.1	0.0	100.0	77.8	75.0	66.7	0.0	0	4	75.1	-75.1	57.1							
Majority	57.1	77.8	75.0	28.6	0.0	100.0	44.4	75.0	66.7	25.0	1	3	73.3	-48.3	64.1							
Split	40.0	83.3	71.4	28.6	0.0	100.0	50.0	100.0	71.4	33.0	1	2										
Unanimous	100.0	66.7	100.0	0.0	0.0	100.0	0.0	0.0	50.0	0.0	0	1										

Chart 5
First Amendment Rights of Expression, Association, and Religion



Mean Table 5
First Amendment Rights of Expression, Association, and Religion

Justice	Mean Voting Percentage All Prior Terms (F)	99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	31.2	+/- 11.5	17.93	0.00	yes
Stevens	58.4	+/- 15.9	24.72	33.33	yes
O'Connor	43.3	+/- 12.8	19.87	0.00	yes
Scalia	46.0	+/- 16.7	25.89	25.00	yes
Kennedy	64.4	+/- 17.0	25.56	0.00	yes
Souter	59.5	+/- 19.5	26.20	25.00	yes
Thomas	54.0	+/- 24.5	31.61	25.00	yes
Ginsburg	56.6	+/- 24.2	28.14	25.00	yes
Breyer	43.6	+/- 27.6	30.27	25.00	no

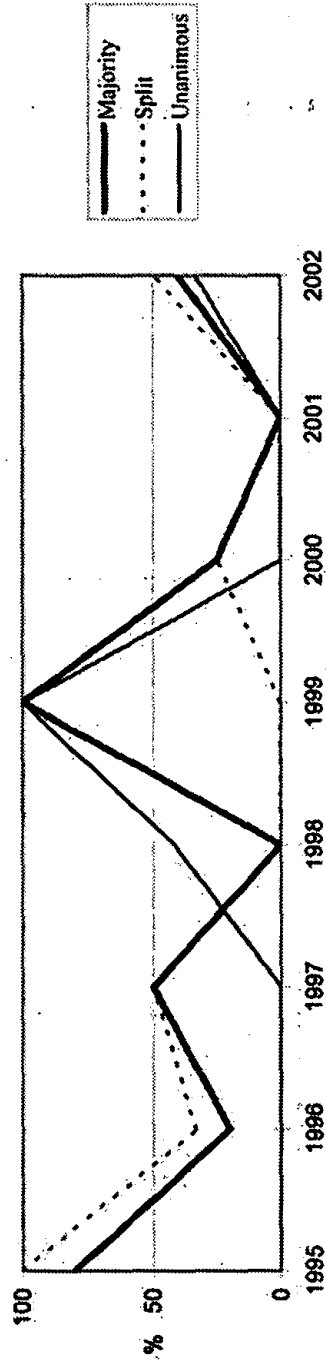
Regression Table 5
First Amendment Rights of Expression, Association, and Religion
Correlation (D) / R²

Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
O'Connor	0.76/0.55							
Scalia								
Kennedy	0.88/0.76	0.72/0.49	0.78/0.58					
Souter								
Thomas				0.95/0.90				
Ginsburg	0.78/0.57	0.95/0.88	0.80/0.60	0.77/0.54	0.84/0.68		0.75/0.51	
Breyer			0.84/0.67					

Data Table 6
Equal Protection Claims

Justice	% Votes for Government												X2		2002 Term Votes		Anticipated Scores		
													2001 Term	2002 Term	For Gov't	Against Gov't	2002 Term	Error	2003 Term
	1993 Term	1994 Term	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2002 Term	2002 Term	2002 Term	2002 Term	2002 Term	2002 Term	2003 Term		
Rehnquist	0.0	66.7	60.0	0.0	50.0	0.0	100.0	50.0	0.0	60.0	60.0	3	2	49.6	10.4	36.1			
Scalia	0.0	66.7	40.0	25.0	0.0	0.0	100.0	50.0	0.0	60.0	60.0	3	2	48.3	11.7	34.2			
Kennedy	100.0	66.7	80.0	33.3	50.0	0.0	100.0	50.0	0.0	60.0	60.0	3	2	41.1	18.9	40.6			
Thomas	0.0	66.7	50.0	25.0	0.0	0.0	100.0	50.0	0.0	60.0	60.0	3	2	24.3	35.7	30.9			
O'Connor	100.0	66.7	80.0	50.0	50.0	0.0	100.0	50.0	0.0	40.0	40.0	2	3	44.6	-4.6	46.1			
Breyer	100.0	33.3	40.0	20.0	100.0	0.0	100.0	50.0	0.0	40.0	40.0	2	3	26.8	13.2	30.0			
Stevens	100.0	33.3	40.0	40.0	50.0	0.0	100.0	25.0	0.0	25.0	25.0	1	3	52.3	-27.3	32.4			
Souter	100.0	33.3	40.0	20.0	100.0	0.0	100.0	50.0	0.0	20.0	20.0	1	4	74.3	-54.3	34.9			
Ginsburg	100.0	33.3	40.0	20.0	100.0	0.0	100.0	50.0	0.0	20.0	20.0	1	4	30.4	-10.4	24.2			
Majority	100.0	66.7	80.0	20.0	50.0	0.0	100.0	25.0	0.0	40.0	40.0	2	3	44.9	-4.9	34.1			
Split	100.0	66.7	100.0	33.3	50.0	0.0	0.0	25.0	0.0	50.0	50.0	1	1						
Unanimous	0.0	0.0	0.0	0.0	0.0	41.7	100.0	0.0	0.0	33.3	33.3	1	2						

Chart 6
Equal Protection Claims

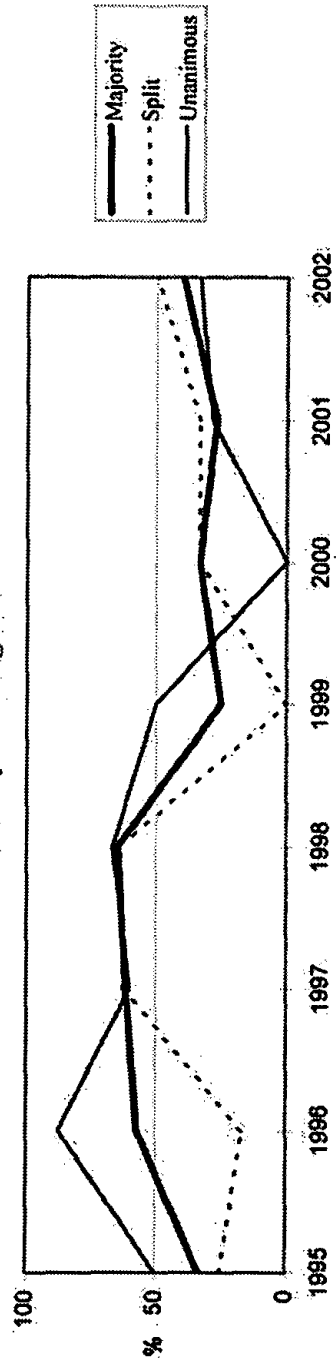


Mean Table 6 Equal Protection Claims						
Justice	Mean Voting Percentage All Prior Terms (F)	99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?	
Rehnquist	32.2	+/- 19.4	30.11	60.00	yes	
Stevens	44.2	+/- 20.7	32.21	25.00	yes	
O'Connor	46.6	+/- 19.8	30.76	40.00	no	
Scalia	28.6	+/- 18.2	28.30	60.00	yes	
Kennedy	47.2	+/- 20.5	30.76	60.00	no	
Souter	48.6	+/- 26.4	35.49	20.00	yes	
Thomas	33.8	+/- 26.4	33.93	60.00	yes	
Ginsburg	49.3	+/- 35.6	41.49	20.00	no	
Breyer	42.9	+/- 35.9	39.42	40.00	no	

Data Table 7
Statutory Civil Rights Claims

Justice	% Votes for Government										X2		2002 Term Votes			Anticipated Scores	
	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	For Gov't	Against Gov't	2002 Term	2002 Term	2002 Term	Error	2003 Term
	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term							
Rehnquist	33.3	50.0	16.7	50.0	30.8	35.3	25.0	33.3	13.3	40.0	2	3	40.0	39.2	0.8	14.1	
O'Connor	33.3	50.0	33.3	64.3	41.7	58.8	25.0	33.3	26.7	40.0	2	3	40.0	35.7	4.3	29.2	
Sullivan	33.3	25.0	16.7	50.0	23.1	41.2	25.0	0.0	13.3	40.0	2	3	40.0	13.5	26.5	13.4	
Kennedy	33.3	25.0	16.7	50.0	61.5	47.1	25.0	33.3	20.0	40.0	2	3	40.0	21.4	18.6	28.2	
Thomas	33.3	25.0	16.7	50.0	23.1	23.5	25.0	0.0	20.0	40.0	2	3	40.0	7.0	33.0	26.9	
Ginsburg	44.4	75.0	66.7	78.6	76.9	70.6	75.0	100.0	60.0	40.0	2	3	40.0	3.0	0	15.4	
Breyer	77.8	75.0	83.3	85.7	84.6	82.4	75.0	100.0	53.3	40.0	2	3	40.0	100.0	-60.0	36.0	
Stevens	55.6	75.0	83.3	85.7	84.6	88.2	75.0	100.0	53.3	20.0	1	4	20.0	99.5	-79.5	43.5	
Souter	44.4	75.0	66.7	92.9	76.9	70.6	75.0	100.0	60.0	20.0	1	4	20.0	100.0	-80.0	40.4	
Majority Split	33.3	50.0	33.3	57.1	61.5	64.7	25.0	33.3	26.7	40.0	2	3	40.0	56.4	-16.4	28.3	
Unanimous	60.0	50.0	25.0	16.7	62.5	63.6	0.0	33.3	33.3	50.0	1	1	50.0				
		50.0	50.0	87.5	60.0	66.7	50.0	0.0	28.6	33.3	1	2	33.3				

Chart 7
Statutory Civil Rights Claims



**Mean Table 7
Statutory Civil Rights Claims**

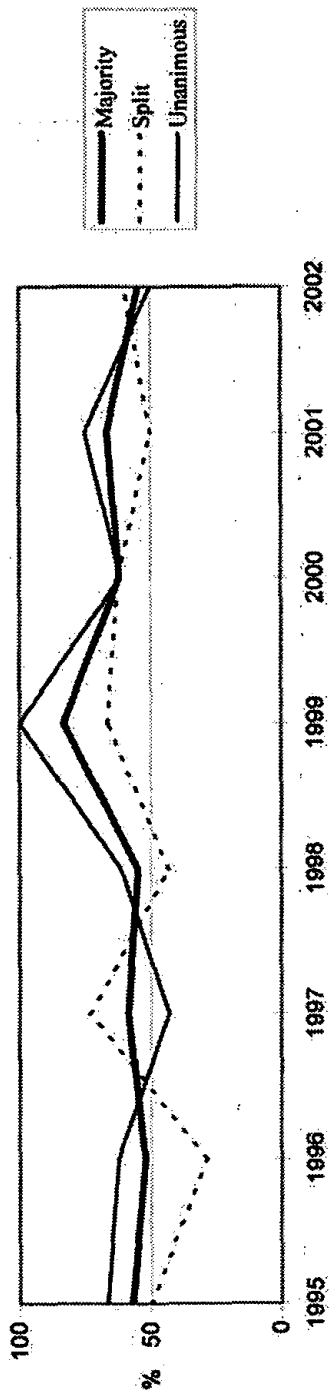
Justice	Mean Voting Percentage All Prior Terms (F)	99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	34.8	+/- 6.6	10.26	40.00	no
Stevens	78.6	+/- 8.2	12.37	20.00	yes
O'Connor	44.5	+/- 8.1	12.62	40.00	no
Scalia	34.7	+/- 10.4	16.17	40.00	no
Kennedy	40.8	+/- 10.7	16.10	40.00	no
Souter	67.4	+/- 13.5	18.15	20.00	yes
Thomas	26.4	+/- 10.5	13.53	40.00	yes
Ginsburg	71.9	+/- 12.9	15.01	40.00	yes
Breyer	79.9	+/- 12.1	13.26	40.00	yes

Regression Table 7 Statutory Civil Rights Claims Correlation (D) / R ²									
Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer
Stevens									
O'Connor									
Scalia									
Kennedy									
Souter		0.76/0.54							
Thomas				0.89/0.76		0.96/0.90			
Ginsburg		0.88/0.75				0.91/0.80			
Breyer		0.98/0.95						0.92/0.82	

Data Table 8
Cases Raising a Challenge to the Exercise of Federal Jurisdiction

Justices	% Votes for Government												X2		2002 Term Votes		Anticipated Scores							
	1993		1994		1995		1996		1997		1998		1999		2000		2001		2002		2002 Term		2003	
	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	For Gov't	Against Gov't	2002 Term	Error
O'Connor	22.2	40.0	47.6	54.6	43.3	55.0	83.3	47.4	63.6	66.7	14	7	63.6	66.7	63.6	66.7	63.6	66.7	63.6	14	7	53.8	12.9	63
Breyer	50.0	33.3	63.2	65.2	51.7	65.0	66.7	60.0	83.3	66.7	14	8	83.3	63.6	83.3	63.6	83.3	63.6	83.3	14	8	81.0	0.0	89.1
Rehnquist	22.2	30.0	42.9	56.5	60.0	45.0	52.4	66.7	66.7	54.6	12	10	66.7	54.6	66.7	54.6	66.7	54.6	66.7	12	10	54.5	0.0	54.4
Souter	33.3	30.0	68.4	56.5	60.7	60.0	68.4	68.4	83.3	60.0	12	10	83.3	54.6	83.3	54.6	83.3	54.6	83.3	12	10	74.3	-19.8	71
Ginsburg	33.3	36.8	68.4	56.5	55.2	60.0	68.4	61.9	83.3	60.0	12	10	83.3	54.6	83.3	54.6	83.3	54.6	83.3	12	10	81.0	-26.5	86.0
Kennedy	33.3	40.0	57.1	56.5	58.6	55.0	61.9	61.9	58.3	50.0	11	11	58.3	50.0	58.3	50.0	58.3	50.0	58.3	11	11	62.4	-12.4	57.3
Stevens	44.4	42.1	75.0	69.6	51.7	65.0	68.4	68.4	83.3	47.6	10	11	83.3	47.6	83.3	47.6	83.3	47.6	83.3	10	11	70.1	-22.5	68.9
Thomas	33.3	30.0	42.9	47.8	46.7	45.0	47.8	47.8	83.3	38.1	8	13	83.3	38.1	83.3	38.1	83.3	38.1	83.3	8	13	52.7	-14.6	53.7
Scalia	22.2	35.0	42.9	47.8	43.3	40.0	47.8	47.8	50.0	31.8	7	15	50.0	31.8	50.0	31.8	50.0	31.8	50.0	7	15	48.0	-16.2	45.3
Majority	33.3	40.0	57.1	52.2	58.6	55.0	61.9	61.9	83.3	66.7	12	10	66.7	66.7	66.7	66.7	66.7	66.7	66.7	12	10	63.4	-8.9	61.2
Split	33.3	54.6	50.0	28.6	73.3	42.9	62.5	62.5	66.7	50.0	6	4	66.7	50.0	66.7	50.0	66.7	50.0	66.7	6	4			
Unanimous	40.0	22.3	66.7	62.5	42.9	61.5	61.5	61.5	100.0	50.0	6	6	100.0	50.0	100.0	50.0	100.0	50.0	100.0	6	6			

Chart 8
Cases Raising a Challenge to the Exercise of Federal Jurisdiction



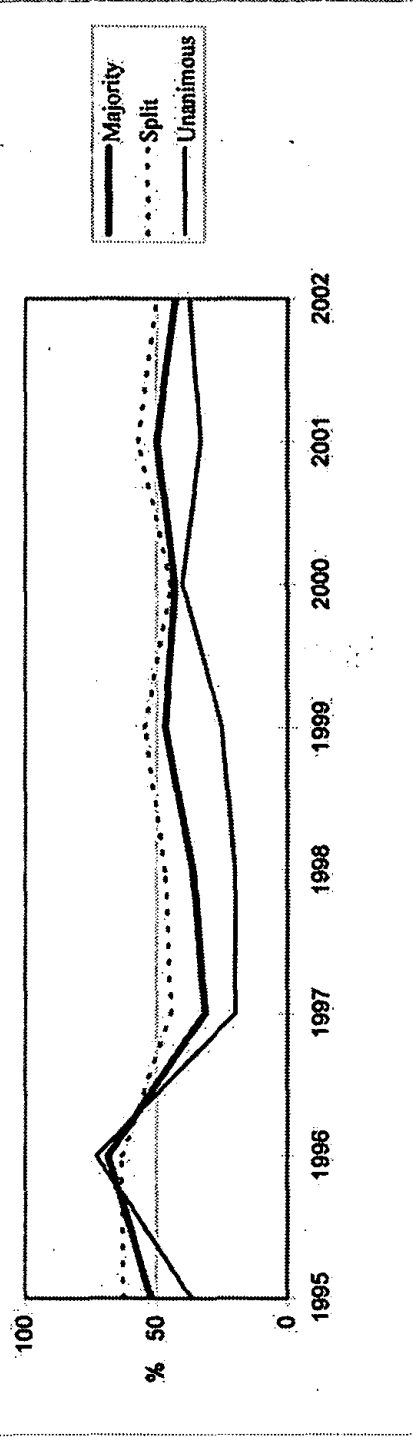
Mean Table 8
Cases Raising a Challenge to the Exercise of Federal Jurisdiction

Justice	Cases Raising a Challenge to the Exercise of Federal Jurisdiction		Standard Deviation of F (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
	Mean Voting Percentage All Prior Terms (F)	99% Confidence Interval for True Mean			
Rehnquist	52.5	+/- 8.2	12.81	54.55	no
Stevens	69.1	+/- 9.9	15.38	47.62	yes
O'Connor	53.4	+/- 8.9	13.84	66.67	yes
Scalia	47.4	+/- 7.1	11.01	31.82	yes
Kennedy	57.3	+/- 7.9	11.81	50.00	yes
Souter	61.1	+/- 12.5	16.75	54.55	no
Thomas	50.6	+/- 11.7	15.00	38.10	yes
Ginsburg	59.9	+/- 15.0	17.48	54.55	no
Breyer	61.1	+/- 13.0	14.25	63.64	no

Data Table 9
Federalism Cases

Justice	% Votes for Government												X2		2002 Term Votes		Anticipated Scores							
	1993		1994		1995		1996		1997		1998		1999		2000		2001		2002 Term		2002 Term		2003	
	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	For Gov't	Against Gov't	Term	Error	Term	
Thomas	42.9	72.2	56.0	73.2	36.8	64.0	36.8	73.2	36.8	64.0	60.0	57.1	70.0	64.3	9	5	62.3	67.2	9	5	62.3	2.0	67.2	
Scalia	57.1	81.3	55.6	73.2	31.6	52.0	31.6	73.2	31.6	52.0	46.7	57.1	55.6	57.1	8	6	74.2	47.6	8	6	74.2	-17.1	47.6	
Kennedy	42.9	55.6	51.9	68.3	42.1	40.0	42.1	68.3	42.1	40.0	53.3	42.9	70.0	50.0	7	7	44.6	53.4	7	7	44.6	5.4	53.4	
Ginsburg	57.1	50.0	38.5	51.3	36.8	28.0	36.8	51.3	36.8	28.0	33.3	28.6	40.0	42.9	6	8	27	39.9	6	8	27	15.9	39.9	
Rehnquist	71.4	72.2	51.9	75.6	36.8	60.0	36.8	75.6	36.8	60.0	46.7	50.0	50.0	35.7	5	9	48.3	51.7	5	9	48.3	-12.6	51.7	
Stevens	57.1	55.6	29.6	45.0	35.0	8.0	35.0	45.0	35.0	8.0	26.7	35.7	30.0	35.7	5	9	29.5	27.5	5	9	29.5	6.2	27.5	
O'Connor	57.1	55.6	44.4	70.7	29.4	45.8	29.4	70.7	29.4	45.8	46.7	35.7	60.0	35.7	5	9	34.6	48.9	5	9	34.6	1.1	48.9	
Souter	57.1	44.4	34.6	43.9	15.8	32.0	15.8	43.9	15.8	32.0	20.0	35.7	30.0	28.6	4	10	13.3	14.8	4	10	13.3	15.3	14.8	
Breyer	71.4	38.9	34.6	50.0	15.8	32.0	15.8	50.0	15.8	32.0	13.3	35.7	30.0	28.6	4	10	21.2	25.7	4	10	21.2	7.4	25.7	
Majority Split	57.1	55.6	51.9	68.3	31.6	36.0	31.6	68.3	31.6	36.0	46.7	42.9	50.0	42.9	6	8	42.5	49.6	6	8	42.5	0.4	49.6	
Unanimous	50.0	36.4	62.5	63.2	44.4	46.7	44.4	63.2	44.4	46.7	54.6	44.4	57.1	50.0	3	3	37.5	3	3	3				
	60.0	85.7	36.4	72.7	20.0	20.0	20.0	72.7	20.0	20.0	25.0	40.0	33.3	37.5	3	3			3	3				

Chart 9
Federalism Cases



Mean Table 9 Federalism Cases						
Justice	Mean Voting Percentage All Prior Terms (F)	99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?	
Rehnquist	59.1	+/- 9.3	13.93	35.71	yes	
Stevens	39.3	+/- 9.7	14.51	35.71	no	
O'Connor	52.8	+/- 10.0	15.07	35.71	yes	
Scalia	55.4	+/- 11.0	16.52	57.14	no	
Kennedy	52.4	+/- 9.6	14.44	50.00	no	
Souter	41.1	+/- 13.8	18.59	28.57	yes	
Thomas	57.6	+/- 10.7	13.79	64.29	no	
Ginsburg	40.4	+/- 8.9	10.32	42.86	no	
Breyer	31.3	+/- 10.9	11.98	28.57	no	

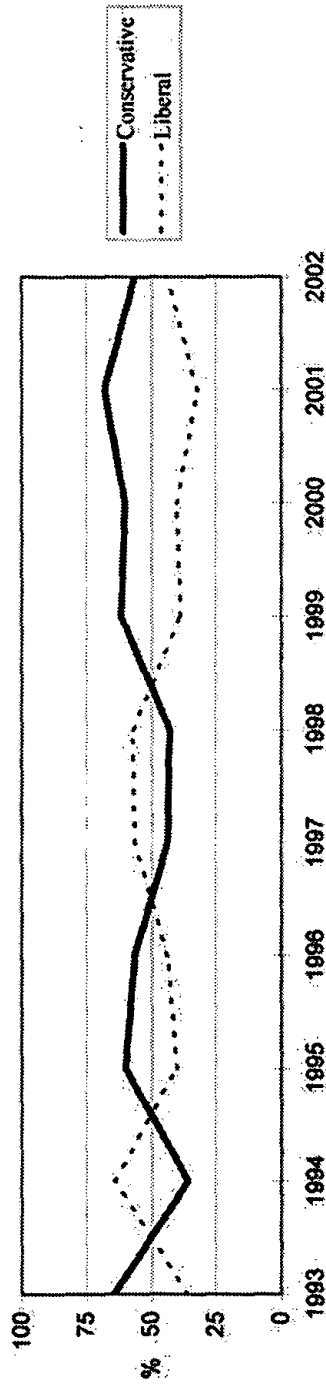
Regression Table 9
Federalism Cases
Correlation (D) / R²

	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Justice								
Stevens								
O'Connor	0.88/0.76							
Scalia	0.78/0.57		0.74/0.51					
Kennedy			0.81/0.64	0.78/0.58				
Souter	0.77/0.55		0.75/0.53					
Thomas				0.82/0.63	0.80/0.60			
Ginsburg		0.85/0.69				0.71/0.43		
Breyer	0.78/0.55			0.83/0.64		0.95/0.89		

Data Table 10
Swing-Vote Analysis: Who Votes Most Often with the Majority in Close Cases?
% Votes for Government

Justice	X2												2002 Term Votes			Anticipated Scores								
	1993		1994		1995		1996		1997		1998		1999		2000		2001		2002 Term		2002 Term		2003 Term	
	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	For Maj	Against Maj	2002 Term	Error	2003 Term
O'Connor	57.1	68.8	80.0	75.0	53.3	75.0	84.6	66.7	84.0	100.0	16	0	76.5	23.5	90.8									
Rehnquist	71.4	62.5	75.0	62.5	56.3	46.4	76.9	63.3	72.0	62.5	10	6	64.7	-2.2	64.5									
Kennedy	92.9	81.3	85.0	81.3	87.5	67.9	73.1	83.3	80.0	56.3	9	7	85.4	-29.2	71.6									
Souter	42.9	37.5	30.0	43.8	43.8	46.4	34.6	43.3	28.0	56.3	9	7	33.4	23.9	40.3									
Breyer	35.7	43.8	25.0	43.8	56.3	50.0	19.2	36.7	32.0	56.3	9	7	35.5	20.8	34.1									
Scalia	71.4	56.3	75.0	56.3	50.0	80.0	73.1	63.3	80.0	43.8	7	9	66.9	-23.2	65.6									
Thomas	57.1	50.0	75.0	56.3	56.3	50.0	84.6	63.3	80.0	43.8	7	9	68.6	-24.0	80.6									
Ginsburg	35.7	50.0	30.0	31.3	56.3	53.6	30.8	36.7	20.0	43.8	7	9	31.1	12.7	24.4									
Stevens	35.7	50.0	25.0	50.0	43.8	60.7	26.9	43.3	24.0	37.5	6	10	41.3	-3.8	34.5									
Conservative	64.3	35.7	60.0	56.3	43.7	42.9	61.5	60.0	68.0	56.3	9	7	63	-6.8	55.1									
Liberal	35.7	64.3	40.0	43.7	56.3	57.1	38.5	40.0	32.0	43.8	7	9												

Chart 10
Swing-Vote Analysis: Who Votes Most Often with the Majority in Close Cases?



Mean Table 10

Justice	Mean Voting Percentage All Prior Terms (F)	99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	65.5	+/- 7.1	10.60	62.50	no
Stevens	42.5	+/- 8.5	12.79	37.50	no
O'Connor	68.3	+/- 8.0	12.00	100.00	yes
Scalia	63.4	+/- 8.7	13.11	43.75	yes
Kennedy	76.5	+/- 6.8	10.29	56.25	yes
Souter	43.6	+/- 11.1	14.88	56.25	yes
Thomas	60.8	+/- 13.4	17.21	43.75	yes
Ginsburg	38.2	+/- 10.6	12.31	43.75	no
Breyer	38.3	+/- 11.4	12.54	56.25	yes

Regression Table 10
Swing-Vote Analysis: Who Votes Most Often with the Majority in Close Cases

Correlation (D) / R²

Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens	-0.72/0.48							
O'Connor	0.84/0.68							
Scalia								
Kennedy								
Souter	-0.71/0.46			-0.85/0.70				
Thomas	0.86/0.71	-0.79/0.58		0.90/0.80		-0.90/0.79		
Ginsburg	-0.80/0.59	0.73/0.48		-0.82/0.62		0.80/0.58	-0.74/0.49	
Breyer	-0.83/0.64			-0.91/0.81			-0.91/0.80	0.75/0.50

V. Category Analysis

Beginning in the 1996 Term, we began to analyze the effectiveness of this Study's categories in measuring liberal and conservative tendencies and trends. As might be expected, some categories turn out to be more reliable indicators of ideological tendencies than others.

Some categories, although dividing the Court into liberal/conservative blocs, may "change polarity" depending on the specific issues presented. For example, contrast the votes of generally liberal Justices Stevens, Ginsburg, Breyer and Souter in *Hill v. Colorado*¹²⁵ with their votes in *Los Angeles v. Alameda Books, Incorporated*¹²⁶. In *Hill*, these Justices voted "conservatively" against a First Amendment claim that would have invalidated a buffer zone between protesters and clients of abortion clinics.¹²⁷ On the other hand, in *Alameda Books*, the same bloc voted "liberally" in favor of a First Amendment claim that would have invalidated a city ordinance limiting the concentration of adult entertainment businesses.¹²⁸ It is possible that the specific context of the First Amendment claims—*i.e.*, whether the claim was asserted in an abortion rather than an obscenity context—influenced the "conservative" versus "liberal" votes cast by these Justices. First Amendment cases, as a result, may provide a less reliable indication of a Justice's ideological leanings over time than another category of cases. (This Term, First Amendment cases are ranked as the fifth most reliable category among nine.)

The reliability of other categories may be influenced by a small sample size. Data Table 5, which collects the results from cases involving Equal Protection claims, is a good example. The number of Equal Protection issues decided each Term tends to be small;¹²⁹ this year, only five cases raised such a claim.¹³⁰ Because a single vote in these categories may account for many percentage points, these categories demonstrate highly volatile (and therefore less reliable) ideological movements from Term to Term. (Equal Protection

125. 530 U.S. 703 (2000).

126. 535 U.S. 425 (2002).

127. 530 U.S. at 735 (6-3 decision) (Souter, O'Connor, Ginsburg, Breyer, JJ., concurring).

128. 535 U.S. at 453 (Souter, Stevens, Ginsburg, Breyer, JJ., dissenting).

129. There were no cases involving Equal Protection claims in the 2001 Term. 2001 Study, *supra* note 1, at 365.

130. See *supra* Data Table 5.

claims, this Term, are the least reliable indicators of ideological movement.)

In order to determine which categories best differentiate between the voting patterns of more liberal and more conservative Justices, we have applied a statistical tool known as factor analysis.¹³¹ By applying this tool, we have determined that a primary factor may be extracted from the Study's categories over the entire life of the Study that accounts for more of the variance revealed by the data on Tables 1 through 9 than any other factor.¹³² We interpret this "Factor 1" as liberal/conservative bias because that is what this Study purports to measure. The categories currently load onto Factor 1 as follows:

<u>Category</u>	<u>Factor 1</u>
Criminal/State Party	-0.843
Civil/State Party	-0.835
Federalism	-0.643
Criminal/Federal Party	-0.630
First Amendment	-0.383
Jurisdiction	-0.375
Statutory Civil Rights	-0.317
Civil/Federal Party	-0.188
Equal Protection	-0.148
Variance	2.6643
% Variance	0.296

According to this ranking, the "Criminal/State Party" category is the most reliable indicator of liberal/conservative leanings over time, while Equal Protection is the poorest. Liberal/conservative bias may play a relatively reliable role in votes tabulated on Data Tables 1 (Civil/State Party), 9 (Federalism), and 4 (Criminal: Federal Party). The information on Data Tables 5 (First Amendment), 8 (Jurisdiction), 7 (Statutory Civil Rights), 2 (Civil/Federal Party) and 6 (Equal Protection) may be less heavily influenced by the liberal/conservative predilections of the individual Justices.

131. For more information regarding factor analysis, see *infra* Appendix B.

132. We extract a single factor via principal components analysis and employ a QMAX rotation to achieve this result.

VI. Frontier Analysis

Attempting to quantify the magnitude of a Justice's liberal or conservative tendencies and to identify trends in such tendencies over time is challenging for a variety of reasons. One challenge already discussed is that of choosing appropriate tests and assessing their validity. Another is dealing with inconsistency in the nature of cases appealed to the Court from one Term to the next and the Court's selection of which cases it will decide. With varying parameters such as these, is there any meaningful way to quantify, analyze and compare the Justices' inclinations? One potentially useful method is frontier analysis.¹³³

Frontier analysis focuses on the Justices' relative scores rather than their absolute scores. Boundaries or "frontiers" are defined by the highest and lowest scores in each category and each combination of categories. Each Justice is then evaluated relative to the established frontier. By adjusting the relative weights allocated to each category, the frontier can be adjusted to reflect each category's reliability—as determined by the factor analysis described in Part V.

We present liberal and conservative frontier data for the Court in Frontier Analysis Tables and Charts 1-4. Two versions of each frontier are presented. In Tables 1 and 2, we constrain the weights applied to each category according to the factor analysis hierarchy in Part V. On these tables, weights are chosen for each Justice that produce the highest frontier score for him or her, subject to the limitation that Equal Protection (the least reliable category) cannot receive more weight than Civil/Federal Party (the next least reliable category), Civil/Federal Party cannot receive more weight than Statutory Civil Rights, and so forth, moving upward from the least reliable category set out in Part V. Tables 3 and 4 apply no weighting constraints at all, choosing for each Justice those weights that present him or her in the most conservative or liberal light possible. Each table lists a "% of Frontier" score for each Justice. Those with a score of 100% reach the frontier by employing the category weight distribution shown in the category columns. Scores less than 100% indicate that the most conservative/liberal score the Justice could obtain with optimal weighting places him or her at the indicated percentage of the way toward the frontier. In some cases, an optimal combination of weights may place a Justice beyond the frontier. This condition is known as "superefficiency" and is noted in the charts

133. For more information regarding frontier analysis, *see infra* Appendix B.

when present.

Frontier Charts 1 and 2 show the constrained scores for each Justice over the course of this Study in graphical form. Near the bottom of each chart is an indication of new Justices as they replace outgoing Justices on the Court. Although former Justices' scores are not indicated, they contributed to the determination of the liberal and conservative frontiers during Terms in which they sat on the Court.

Frontier Charts 3 and 4 show each Justice's range of frontier scores during the course of this Study. They are easier to read than the line graphs and give a clearer picture of the Justice's relative positions and score ranges overall. They do not, however, show any trend information.

Frontier Analysis Table 1 shows Justice Thomas as the most conservative Justice and Justices Breyer and Stevens tied for least conservative. Frontier Chart 2 shows Justice Stevens as the most liberal of the Justices and Justice Thomas as the least liberal. Justice Thomas is the sole "superefficient" Justice on the conservative chart this Term, while Justices Stevens, Ginsburg and Breyer are all superefficient on the liberal chart.

Frontier Charts 1 and 3 show that Chief Justice Rehnquist and Justices Kennedy, Scalia, O'Connor and Thomas have all reached the conservative frontier at some point during the Study. In fact, the Chief Justice dropped below it this Term for only the third time. Frontier Charts 2 and 4 clearly display Justice Stevens' superefficient liberal tendencies. In fact, he so dominates the liberal frontier that only three other Justices (Breyer, Ginsburg and Souter) have managed to reach the frontier during the course of the Study.

V. Conclusion

This Term's data—as with last Term—reveal continued polarization and voting instability on the Court.¹³⁴ Consider the following:

1. *The Court is having substantial difficulty speaking with a unanimous voice:* Only two categories of cases, Civil/State and Civil/Federal, were decided with predominantly Unanimous opinions.¹³⁵ In Criminal/State and First Amendment cases, the bulk of the cases were decided by Split opinions.¹³⁶ In the remaining categories, the division between Split and Unanimous opinions was about equal.¹³⁷

2. *The voting patterns of the Justices departed frequently from past practice:* This Term, on eight of the ten data tables, more than half of the members of the Court voted in a manner that departed, in a statistically significant fashion, from their past voting behavior.¹³⁸ While statistically significant swings in voting behavior from year-to-year may be due to many factors (including small sample size and the peculiarities of particular cases), the fairly substantial number of statistically significant voting movements this Term may indicate that the Justices are having some difficulty holding a steady course as they navigate their way through the Court's workload.

3. *The data tables reveal consistent ideological bloc voting:* Data Tables 3, 4 and 7 display the expected conservative/liberal voting blocs on the Court—with generally conservative Justices O'Connor, Scalia, Kennedy and Thomas, joined by the Chief Justice, holding conservative positions, and Justices Ginsburg, Breyer, Souter and

134. See 2001 Study, *supra* note 1, at 383 (noting polarization and voting instability).

135. See *supra* Data Table 1 (Civil/State)(16 of 25 cases decided by unanimous opinion; 9 by split opinion); Data Table 2 (Civil/Federal)(9 of 11 cases decided by unanimous opinion; 2 by split opinion).

136. Data Table 3 (5 of 17 cases decided by Unanimous opinion; 12 by Split opinion); Data Table 5 (1 of 4 cases decided by Unanimous opinion; 4 by Split opinion).

137. See *supra* Data Table 4 (Criminal/Federal)(3 of 6 cases decided by unanimous opinion; 3 by split opinion); Data Table 6 (Equal Protection)(3 of 5 cases decided by unanimous opinion, 2 by split opinion); Data Table 7 (Statutory Civil Rights)(3 of 5 cases decided by unanimous opinion, 2 by split opinion); Data Table 8 (Jurisdiction)(12 of 22 cases decided by unanimous opinion, 10 by split opinion); Data Table 9 (Federalism)(8 of 14 cases decided by unanimous opinion; 8 by split opinion).

138. See *supra* Mean Table 1 (Civil/State)(6 Justices); Mean Table 2 (Civil/Federal)(6 Justices); Mean Table 4 (Criminal/Federal)(8 Justices); Mean Table 5 (First Amendment)(8 Justices); Mean Table 6 (Equal Protection)(5 Justices); Mean Table 7 (Statutory Civil Rights)(5 Justices); Mean Table 8 (Jurisdiction)(5 Justices); Mean Table 10 (Swing-Vote)(6 Justices).

Stevens holding liberal slots.¹³⁹ There *are* surprises in the rank order of the Justices on some tables. For example, on Data Tables 1 and 2, traditionally liberal Justices are found near the conservative top, while traditionally conservative Justices are found at the liberal bottom.¹⁴⁰ The situation is reversed on Data Table 6, where traditionally conservative jurists hold the liberal top and liberals hold the conservative bottom.¹⁴¹ These unusual rankings, however, may be explained by the nature of the cases considered by the Court; on these tables, the Court decided cases in which conservative outcomes appealed to politically liberal jurists and vice versa.¹⁴² If this is correct, six of the Study's ten tables provide some evidence of ideological polarization.

4. *In spite of evident polarization, the Court oscillates between conservative and liberal outcomes:* As noted, the Court's voting behavior continues to demonstrate ideological poles. With such behavior, one might expect the Court to display a fairly consistent voting stance. That has not been true. Last Term, the Court moved in a conservative direction, reversing the modest liberal trend of the 2000 Term.¹⁴³ This Term, that conservative trend reverses course, with the Court moving liberally in six of nine categories. This vacillation—which has taken place despite the presence of identifiable voting blocs—suggests that those blocs are experiencing some difficulty in "holding their ideology together."

5. *The conservative Rehnquist Court may be losing steam:* The Court's vacillation between conservative and liberal outcomes suggests that the much-touted conservatism of the Rehnquist Court may be waning. Furthermore, Data Table 10 suggests as much. That table, which lists the voting patterns of the Justices in 5/4 cases, does *not* rank the Justices within the traditional "conservative/liberal" voting blocs shown on Data Tables 3, 4 and 7 (and 1, 2 and 6 for that matter). Instead, the five "top slots" on the chart—held by the Justices who vote most often with the majority—are occupied by Justice O'Connor, the Chief Justice, Justice Kennedy and *liberal* Justices Souter and Breyer.¹⁴⁴ Justice Stevens holds down the bottom

139. See *supra* Data Tables 3, 4, 7.

140. See *supra* Data Tables 1, 2.

141. See *supra* Data Table 6.

142. See *supra* discussions of Data Tables 1, 2 and 6.

143. 2001 Study, *supra* note 1, at 382-83.

144. See *supra* Data Table 10. Justice Breyer reaches the constrained liberal frontier this Term (and scores, in fact, a "superefficient" score of 107%), whereas Justice Souter

of the chart—as the least influential member of the Court in close cases—while conservative Justices Scalia and Thomas are tied with liberal Justice Ginsburg as the next least influential Justices.¹⁴⁵ Data Table 10, in short, demonstrates that the traditional conservative/liberal blocs are *not* "holding together" in closely divided cases. Conservative coalitions seem to be losing steam.

6. *Justice O'Connor has become more liberal and is now "the vote to get" in closely decided cases:* Justice O'Connor, as she was last Term, is clearly the decisive vote in contentious cases. In last year's Study, she voted with the Court majority in 84% of closely divided cases.¹⁴⁶ This Term, she cast the deciding vote in 100% of these cases—and conservative coalitions lost nearly 12 points of control.¹⁴⁷ These figures suggest that Justice O'Connor may be somewhat more likely to vote with a liberal bloc than in the past (a possibility supported by frontier analysis, which demonstrates that Justice O'Connor comes closer to the constrained liberal frontier than she does to the constrained conservative frontier¹⁴⁸).

This year's Study reveals a United States Supreme Court that is divided into two uneasy camps, with neither side holding a position of sustained dominance. The Court speaks with a divided voice, and the individual Justices frequently cast (at least in a statistical sense) somewhat unexpected votes. Despite its polarization, the Court does not consistently reach either liberal or conservative results. Rather, it seems to drift in a conservative direction one Term and reverse that course the next. This unsteady drift belies any claim that the Court is a conservative monolith.

One point seems clear. Justice O'Connor holds a position of unusual importance. The replacement of any Justice on a Court this polarized and unstable *could* have a significant impact. The replacement of Justice O'Connor, however, would *unquestionably* alter—perhaps dramatically—the voting patterns tracked by this Study.

reaches 96% of the way to the constrained liberal frontier. *See supra* Frontier Analysis Table 2.

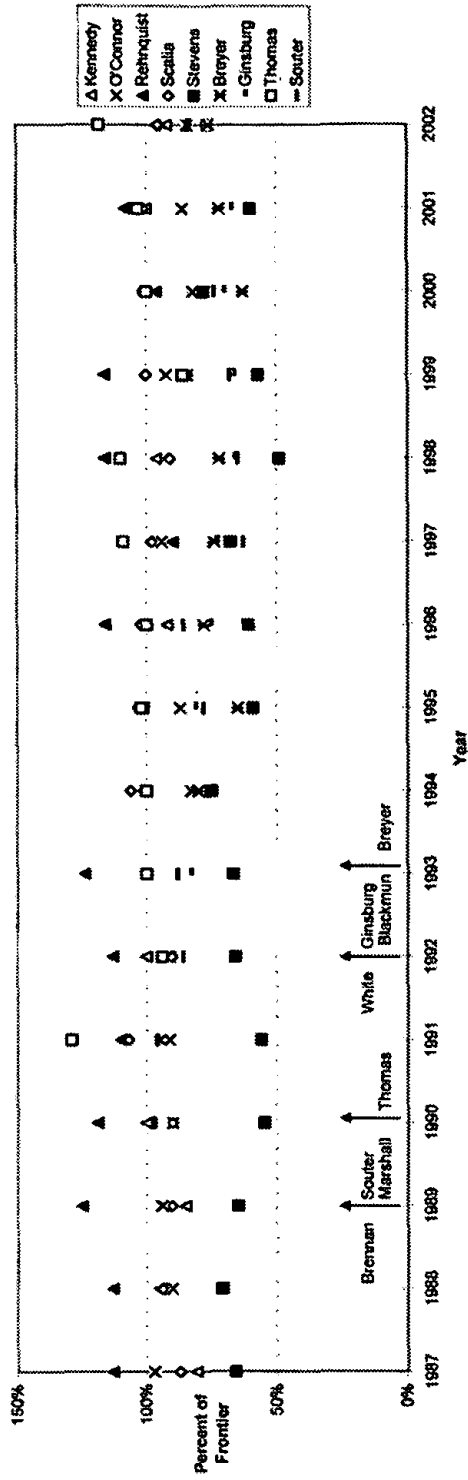
145. *See supra* Data Table 10. Justice Ginsburg reached the constrained liberal frontier this Term with a superefficient score of 108%. *See supra* Frontier Analysis Table 2. Justice Scalia reaches 95% of the way to the constrained conservative frontier; Justice Thomas is the sole justice to reach the constrained conservative frontier with a superefficient score of 118%. *See supra* Frontier Analysis Table 1.

146. *2001 Study, supra* note 1, at 370.

147. *See supra* Data Table 10.

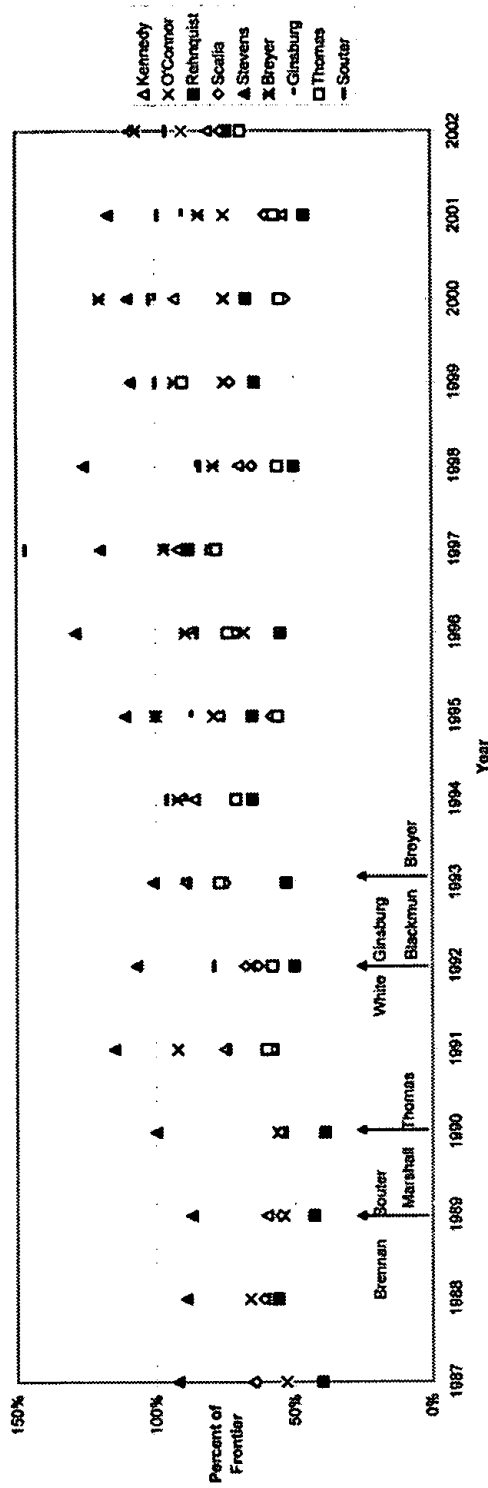
148. Justice O'Connor reaches 90% of the constrained "liberal frontier," but only goes 84% of the way toward the constrained "conservative frontier." *See supra* Frontier Analysis Tables 1, 3.

Conservative Frontier

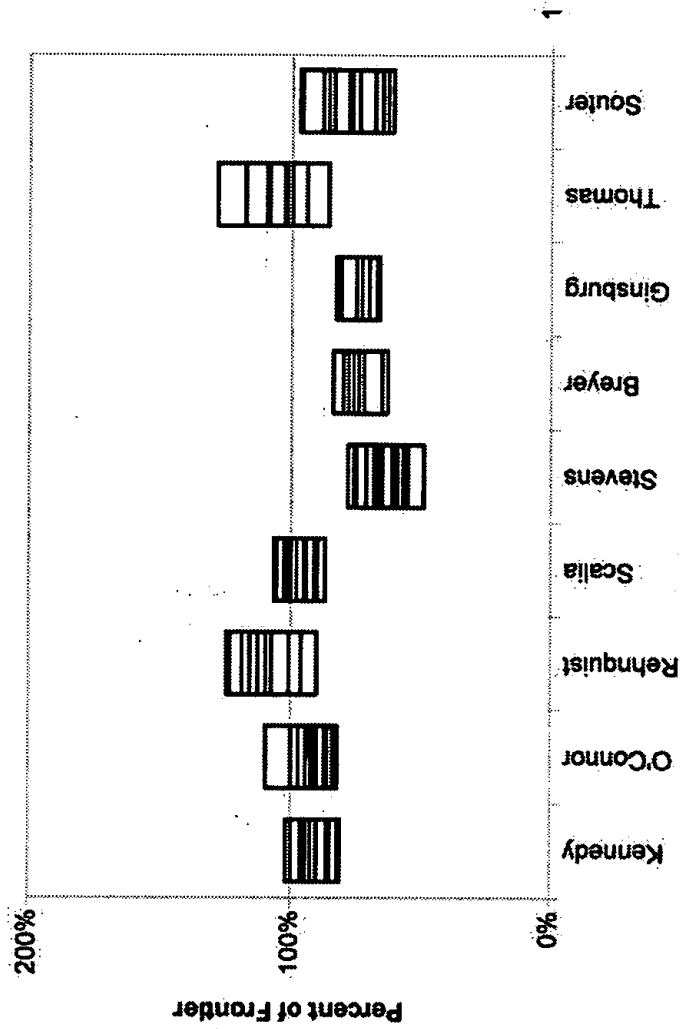


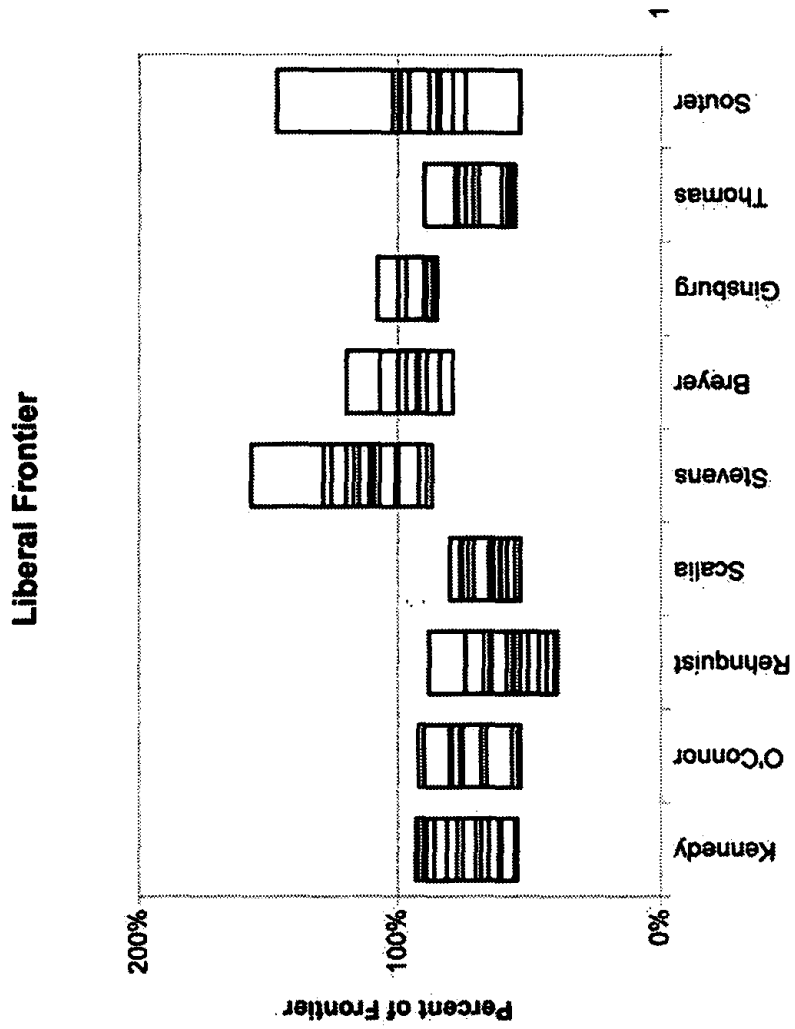
Annotations on the x-axis:
 1988: Brennan
 1990: Souter, Marshall, Thomas
 1992: White
 1993: Ginsburg, Blackmun, Breyer

Liberal Frontier



Conservative Frontier





APPENDIX A

1. The Universe of Cases

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

2. Cases Classified as Civil or Criminal

The classification of cases as civil or criminal follows commonly understood definitions. Generally, the nature of the case is clearly identified in the opinion. Only occasionally does a case pose a problem of classification. No cases in 2001 raised such a question.

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

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

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

A case is included in each category of Data Tables 5 through 9

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

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

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

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

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

are excluded from the table.

5. The Swing Vote Cases

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

APPENDIX B

Study Methodology

This Study seeks to quantify three characteristics of Supreme Court voting behavior: voting trends, mean voting percentages and relationships among the Justices' voting patterns. The following sections explain the statistical methods employed in this Study and how test results should be interpreted.

A. Scores

Each score in this Study is simply the percentage of times a Justice voted in favor of the party or claim specified by the category. Some categories contain fewer samples than others, resulting in coarser score increments. For example, a category including ten cases during the term will have the potential for eleven different scores (0% through 100%, in 10% increments), while a category with only one case during the Term will provide only two score possibilities (0% and 100%).

B. Predictive Modeling

Data in this project were fitted to an Auto Regressive Integrated Moving Average (ARIMA) forecasting model.¹⁴⁹ This model is useful in circumstances where, as in this Study, a single variable (a Justice's score) is to be forecast based only on its present and prior values with no other explanatory variables. ARIMA is an acronym for Auto Regressive Integrated Moving Average. The model is most easily explained by starting in the middle of the acronym:

Integrated: This term refers to a differencing process which operates in a manner similar to differentiation of a continuous function in calculus. The goal is simply to remove trend from the time series data by subtracting each score in the time series from the next score in the series. The resulting differences form a new time series. This operation may be repeated successively until a trendless or "stationary" series results. Our model employs

149. ARIMA computer modeling was accomplished using MINITAB® statistical software with $p = 1$, $d = 1$, and $q = 1$. For more information regarding the ARIMA (p,d,q) model, see PETER KENNEDY, A GUIDE TO ECONOMETRICS 248-49 (3d ed. 1992).

only one differencing operation.

Auto-Regression:

Once the series has been made stationary, an autoregressive parameter may be determined.¹⁵⁰ This parameter seeks to relate each data point in the stationary series to the data point immediately preceding it through multiplication. That is:

$$X_t = AX_{t-1}$$

where X_t is the value of the data series at point t , A is the autoregressive parameter, and X_{t-1} is the value of the data series point immediately preceding X_t .

Because we are dealing with a *series* of data points, however, a single parameter will almost never precisely produce the relationship just described for all data point pairs. Some error is inevitable. We therefore seek to determine that parameter which produces the least total error when applied to the entire series.¹⁵¹

Moving Average:

A second parameter is determined that relates the value of each series element X_t to the *error* between the estimated value and the actual value of the previous element X_{t-1} . That is:

$$X_t = -BX_{t-1}$$

where $-B$ is the Moving Average parameter. The value of this parameter is also optimized to minimize its total error when applied to the series.

150. Many statistical models employ more than one autoregressive parameter due to various properties of the data series. Our data uses single-parameter (first order) AR and MA models.

151. This is accomplished by applying least squares estimation, i.e., the parameter is chosen such that the sum of the squared errors is minimized.

Synthesis:

The previous operations are combined into the equation:

$$X_t = Ax_{t-1} - Bx_{t-1} + E_t$$

where E_t represents the residual error remaining between the calculated and actual values of X_t . This final equation is used to predict the series score for the upcoming Term.

C. Mean Testing

We use a "student's t test"¹⁵² to determine whether this Term's score (X_2), departs in a statistically significant manner from the mean of all previous Terms' scores (X_1). Essentially, we treat these two numbers as the means of two independent samples drawn from the universe of all scores in the category.¹⁵³ We hypothesize that X is also the true mean of the population μ , and we set up this hypothesis (the "null" hypothesis) and its corresponding alternative hypothesis as follows:

$H_o: \mu = X_1$ The "null" hypothesis, i.e., X_2 does not significantly shift μ from its previous value on the real number line. Therefore, the two samples are statistically equivalent.

$H_a: \mu \neq X_1$ The alternative hypothesis, i.e., X_2 significantly shifts μ from its previous value on the real number line. Therefore, the two samples are not statistically equivalent.

We then set out to prove the alternative hypothesis, within a

152. For a practical perspective on this procedure, see DAVID S. MOORE & GEORGE P. MCCABE, *INTRODUCTION TO THE PRACTICE OF STATISTICS* 500-18 (2d ed. 1993). See also HOGG & CRAIG, *supra* note 6.

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

certain confidence interval,¹⁵⁴ by rejecting the null hypothesis.¹⁵⁵ This is accomplished by calculating the following statistic:

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

The result of this equation (t) is compared to the entry on a t-distribution table corresponding to the confidence interval desired (•) and the appropriate number of degrees of freedom (n-k).¹⁵⁶ If the absolute value of t is greater than the table entry, H_0 is rejected and we say that the Justice has shown a statistically significant change in voting behavior this Term.

D. Correlation

Relationships between two Justices' voting records may be mapped over a two-dimensional Cartesian plane as in Figures 1 and 2. Figure 1 shows a high degree of positive correlation ($R^2=0.7921$) between the voting percentages of the Chief Justice and Justice Scalia for the Equal Protection category. The points all fall close to an upward sloping line. On the other hand, Figure 2 shows that the voting percentages of the Justice Scalia and Justice Stevens show only a very weak, negative correlation ($R^2=0.0473$). The points are widely scattered about a downward sloping line. Statistically significant correlations between and among Justices' Term-to-Term voting patterns are shown in Regression Tables 1-10. The first number in each pair is the Pearson correlation coefficient. The second number is an r^2 statistic, which is a more reliable measure of the actual level of correlation.¹⁵⁷

154. We have selected a confidence interval of 95%. Because this is a two-tailed test \bar{X}_2 may shift μ in either a positive or negative direction = .025.

155. A full description of the logic behind this seemingly convoluted procedure is beyond the scope of this article. However, its purpose is to control Type I (or alpha) error. For a complete explanation, see MOORE & MCCABE, *supra* note 152.

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

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

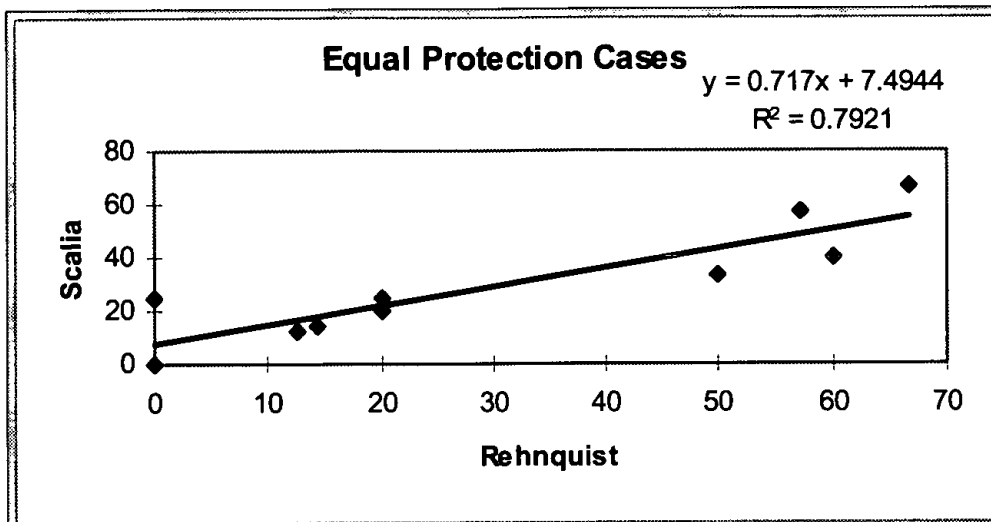


Figure 1

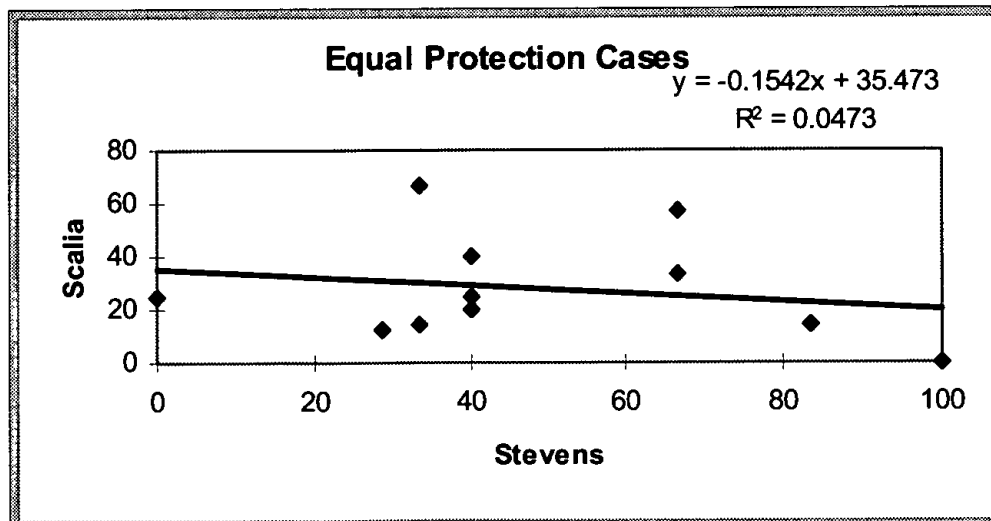


Figure 2

The correlation measured in this case is in the Term-to-Term movement of Justices' scores. A high correlation between two Justices does not mean that they necessarily vote together often. It

simply means that their scores tend to move up and down together from one Term to another. Also note that correlation in no way implies causation.

E. Factor Analysis

Factor analysis has long been used by psychologists who attempt to identify characteristics of personality or intelligence by using batteries of tests. Their challenge has been to develop tests that validly measure the characteristics of interest. This Study similarly attempts to measure the Justices' liberal and conservative leanings by "testing" their disposition of certain types of cases.

We performed a factor analysis of the Study categories using Minitab software. The factor loadings presented were obtained by extracting a single factor, using principal components analysis and applying a QMAX rotation to the data. A full description of the theory and mathematics underlying factor analysis is beyond the scope of this appendix, but several books on the subject are available that provide reasonably simple explanations of this complex process.¹⁵⁸

F. Frontier Analysis

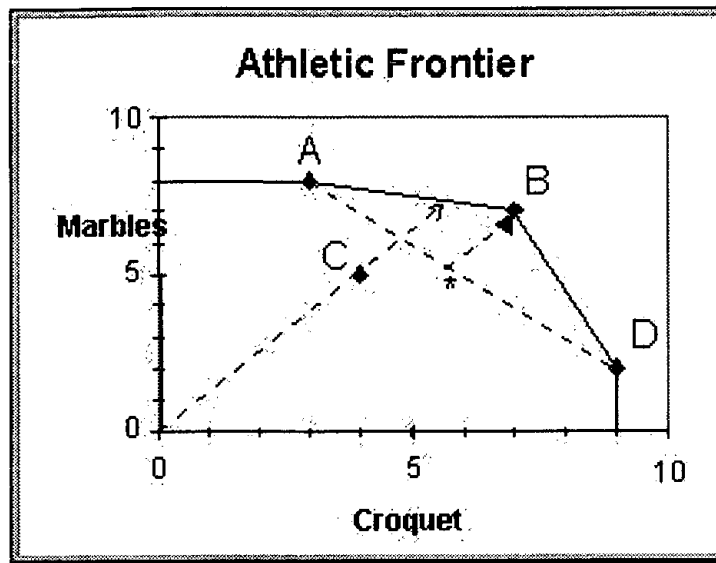
Frontier analysis can probably best be described with an example. Suppose four individuals are competing for the title of "world's greatest athlete." Their scores in two events are listed in the following table:

	Croquet	Marbles
Alan	9	2
Betty	7	7
Chuck	4	5
Debbie	3	8

Alan would argue that the title should go to the best croquet player because he has scored highest in the croquet category, while Debbie would argue that the best marbles player should win because each has scored highest in that category. On the other hand, Betty would argue that each sport should receive equal weight, because her combined score with equal weightings would be higher than either Alan's or Debbie's, i.e., Betty would score $(7 \times 0.5) + (7 \times 0.5) = 7$, while Alan would score $(9 \times 0.5) + (2 \times 0.5) = 5.5$, Chuck would score

¹⁵⁸ See generally DENNIS CHILD, *THE ESSENTIALS OF FACTOR ANALYSIS* (2d ed. 1990).

4.5, and Debbie would score 5.5. The following figure plots the athlete's scores graphically:



A, B, C, and D represent the athletes. The solid line connecting points A, B, and D represents the athletic frontier, i.e., the boundary beyond which no athlete has performed regardless of the relative weights assigned to marbles and croquet. A, B, and D are located at 100% of the frontier. Moreover, B can be said to be super-efficient to the extent her point lies beyond the line AD connecting the two points adjacent to it on the frontier. A and D are also super-efficient to the extent they lie beyond lines (not shown) connecting B with the points at which the frontier meets each axis. C falls short of the frontier regardless of the weights assigned to marbles and croquet. However, an optimal set of weights may be selected such that C "looks his best," i.e., he comes closest to reaching the frontier.

The same concept can be applied to the Court to determine which Justice is "most conservative" or "most liberal." However, instead of two dimensions (croquet and marbles), the Court analysis includes nine dimensions (all Study categories except Swing Votes). Although human minds have difficulty envisioning nine dimensions, computers can handle the required calculations with ease. We performed our analysis using Microsoft Excel's solver feature. Although the formulas and procedures involved are straightforward, a complete description of them is beyond the scope of this appendix.
