

# Supreme Court Voting Behavior: 1999 Term

by RICHARD G. WILKINS,<sup>\*</sup> SCOTT WORTHINGTON,<sup>\*\*</sup> RACHELLE  
FLEMING,<sup>\*\*\*</sup> MATTHEW FLEMING,<sup>\*\*\*\*</sup> CARTER CHOW<sup>\*\*\*\*\*</sup>

## I. Introduction

This Study, the fifteenth in a series,<sup>1</sup> tabulates and analyzes the voting behavior of the United States Supreme Court during the 1999 Term.<sup>2</sup> 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 as compared with past Terms. As in politics, whether a judicial trend is “conservative” or “liberal” often lies in the eye of the beholder. A lawyer for the American Civil

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<sup>\*</sup> Professor of Law, J. Reuben Clark Law School, Brigham Young University.

<sup>\*\*</sup> J.D., J. Reuben Clark Law School, Brigham Young University, 1999. Associate, Robinson, Seiler & Glazier.

<sup>\*\*\*</sup> J.D., J. Reuben Clark Law School, Brigham Young University, 2001. Associate, Stoel Rives LLP.

<sup>\*\*\*\*</sup> J.D., J. Reuben Clark Law School, Brigham Young University, 2001. Associate, Stoel Rives LLP.

<sup>\*\*\*\*\*</sup> J.D. Candidate, J. Reuben Clark Law School, Brigham Young University, 2002.

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 six studies, analyzing the 1993, 1994, 1995, 1996, 1997, and 1998 Terms, were 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].

2. The 1999 Term covers decisions made from October 1999 to July 2000.

Liberties Union could well paint an ideological picture of the Court far different from one sketched by a lawyer for Americans United For Life.

This Study attempts to remove this subjectivity by applying the following consistent classification scheme to 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.<sup>3</sup> 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,<sup>4</sup> and by applying standard statistical tests to the resulting data,<sup>5</sup> this Study attempts to provide reliable information regarding the current ideological posture of the Court and its members, as well as conclusions and predictions regarding its past and future trends. Whether any statistical study of a process as complex as judicial decision-making can be reliable is, of course, open to debate.<sup>6</sup> But, within the limitations inherent in an attempt to “number crunch” ideology, this annual survey offers students and practitioners information useful for assessing how the Court or an individual Justice will vote in particular types of cases.

This Term’s survey shows mixed results, but suggests an overall conservative voting trend in most categories. Majority decisions in six of the ten categories (Civil/State Party, Criminal/State Party, First Amendment, Statutory Civil Rights, Federalism, and Swing Vote) indicate varying degrees of conservative movement. For example, the voting results from the Statutory Civil Rights category reveal a marked decline in the Court’s support of such claims. Also, Civil/State Party decisions—one of the Study’s most reliable categories for ideological manifestations of voting behavior<sup>7</sup>—show

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3. There is no single, settled definition of conservatism or liberalism. *See generally* M.A. RIFF, *DICTIONARY OF MODERN POLITICAL IDEOLOGIES* 67-73, 141-52 (1987) (discussing various possible interpretations of the terms). This Study’s definitions, however, are close to the core ideals of each ideology. *See id.* at 67 (noting that conservatism “implies fear of sudden and violent changes, respect for established institutions and rulers, support for elites and hierarchies, and a general mistrust of theory as opposed to empirical deductions”); *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. *See infra* note 32.

7. *See infra* Part V.

solid conservative movement in “Majority,” “Split,” and “Unanimous” decisions.<sup>8</sup> Finally, the statistics from the Swing Vote category indicate that in close, ideologically charged cases the Court voted conservatively 61.5% of the time, reversing the liberal inclination of the previous two Terms.<sup>9</sup>

Of the four categories that showed liberal movement, only two are particularly noteworthy: Civil/Federal Party and Criminal/Federal Party. In the 1999 Term, the Court decreased its support of the federal government in both civil and criminal cases, recording its second lowest score since 1990 in criminal cases. The liberal movement in the other two categories (Equal Protection and Federal Jurisdiction) should be viewed with caution. The result in the Equal Protection category, which showed a significant liberal increase, is undermined by the fact that the Court decided only one Equal Protection case this Term. Furthermore, while the Court exercised federal jurisdiction over claims more often this Term than in any other Term since the inception of this Study, this category ranks last in terms of its reliability as an indicator of liberal and conservative ideology.<sup>10</sup> Therefore, these liberal results may not be as indicative of a Court-wide trend as the trends identified in other categories.

Last Term’s predictive statistics had mixed success in forecasting this Term’s actual voting patterns. The Study most accurately predicted results for civil cases involving a state government party, with an average error of only about 4.95 percentage points per Justice.<sup>11</sup> The least accurate predictions were in the Jurisdiction category, with an average error of 27.1 points per Justice.<sup>12</sup> This is quite different from last Term, when cases involving questions of jurisdiction were the most predictable. With respect to individual Justices, last Term’s predicted scores were most accurate for Justice Ginsburg, with an average error of only 8.56 percentage points. Oddly, Justice Ginsburg was the most difficult to predict in the preceding Term. Conversely, the least accurate predictions were for Justice Stevens, with an average error of 24.0 percentage points, and

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8. *See infra* Data Table 1.

9. *See infra* Data Table 10.

10. *See infra* Part V.

11. *See infra* Data Table 1.

12. *See infra* Data Table 8. This excludes the Equal Protection category, which, because of the lack of cases dealing with equal protection issues, has an unusually high degree of volatility among the Justices’ individual voting patterns, which in turn results in unusually inaccurate predictions.

Justice Thomas, deviating on average by 23.9 points. The small sample of cases in the Equal Protection and First Amendment categories in this and last Term accounted for a significant portion of the prediction error for most of the Justices.

The “Category” analysis, introduced in the 1996 Study and included in the Study again this Term, indicates that the categories of Criminal/Federal Party,<sup>13</sup> Civil/State Party,<sup>14</sup> Civil/Federal Party,<sup>15</sup> Criminal/State Party,<sup>16</sup> and First Amendment<sup>17</sup> are the best indicators, in that order, of the liberal/conservative predilections among the Justices. The remaining categories—Statutory Civil Rights,<sup>18</sup> Federalism,<sup>19</sup> Equal Protection,<sup>20</sup> Jurisdiction,<sup>21</sup> and Swing Votes,<sup>22</sup>—are relatively poor indicators of the Justices’ voting propensities.<sup>23</sup>

Frontier analysis this Term held few surprises, with the Chief Justice and Justice Stevens retaining their customary positions as the most conservative and liberal Justices respectively.<sup>24</sup> Perhaps the most surprising result this Term was Justice Thomas’s fourth place showing behind third place Justice O’Connor on the conservative frontier.

This Study is divided into sections to make it more accessible to the reader. 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 stuff of light cocktail conversations. But 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 in them. Parts V and VI describe the methodology (and outcome) of this year’s “Category” and “Frontier” analyses

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13. *See infra* Data Table 4.

14. *See infra* Data Table 1.

15. *See infra* Data Table 2.

16. *See infra* Data Table 3.

17. *See infra* Data Table 5.

18. *See infra* Data Table 7.

19. *See infra* Data Table 9.

20. *See infra* Data Table 6.

21. *See infra* Data Table 8.

22. *See infra* Data Table 10.

23. *See infra* Part V.

24. *See infra* Frontier Analysis Tables 1 and 2; Frontier Charts 1 and 2.

respectively. Appendices A and B detail the definitions and statistical tests employed by this Study.

## II. Mode of Analysis

The 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, equal protection, etc.) or on the character of the parties involved (e.g., state or federal government litigants).<sup>25</sup> 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: protection of individual rights and judicial restraint. The tabulation of votes in each category reveals, in broad strokes, the frequency with which individual Justices and the Court as a whole vote to protect individual rights<sup>26</sup> or exercise judicial restraint.<sup>27</sup>

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25. 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, 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.

26. 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 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.

27. Jurisdictional questions (Table 8), which exhibit the relative propensity of the Justices to avoid judicial decisions, are perhaps the most direct statistical evidence of judicial restraint. Other Tables included in the Study, however, also provide some indication of the individual Justices' (and the Court's) positions on the "judicial restraint/judicial activism" axis. Judicial restraint is normally identified with deference to the policy-making branches of government, adherence to precedent, avoidance of constitutional bases of decision when narrower grounds exist, respect for the Framers' intent when construing constitutional text, and avoidance of issues rendered unnecessary by the doctrines of ripeness, mootness, political questions, etc. As a result, a vote in favor of individual rights claims (Tables 3, 4, 5, 6, 7) may 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.

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 governmental power as conservative, and outcomes that favor a claim of individual right 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 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 (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 these difficulties with our classification scheme, the basic assumption that supports this Study—that the general orientation of individual Justices and the Court to individual rights and judicial restraint is suggestive of conservative or liberal ideology—appears sound.<sup>28</sup> For example, deference to legislatures frequently results in rejection of an individual’s claim, especially one predicated upon the impropriety of governmental action.<sup>29</sup> Judicial restraint is associated with a reluctance to read new rights into the Constitution or a statute.<sup>30</sup> Refusal to exercise federal jurisdiction leaves the matter to 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.<sup>31</sup> Therefore, to the extent the Study’s basic ideological assumptions regarding liberal and conservative outcomes are accurate, it is possible to identify trends by tracking the voting patterns reflected in Data Tables 1 through 10.

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28. See *supra* text accompanying note 3; see also category analysis discussion *infra* part V.

29. See, e.g., *Christensen v. Harris County*, 529 U.S. 576 (2000) (holding that the Fair Labor Standards Act, 29 U.S.C. § 201(o), does not grant employees the right to prevent the county from compelling the use of compensatory time).

30. See *id.*

31. See, e.g., *Rivet v. Regions Bank of L*, 522 U.S. 470, 478 (1998) (holding that claim preclusion by reason of a prior federal judgment is a defensive plea that provides no ground for removal of state law claims based on federal question jurisdiction).

To reckon 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 1990 through 1998 Terms. Likewise, the current ideological position of the Court as a whole can be determined by comparing present outcomes for 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 Court's 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 is to determine whether a Justice's 1999 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.<sup>32</sup>

Finally, Frontier Analysis Tables 1-4 and Frontier Charts 1-4 compare the Justice's conservative and liberal predilections this Term and over the course of the entire Study. Frontier analysis<sup>33</sup> 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 presented in a given Term rather than against any absolute scale.

All of these data and statistics must be interpreted with caution. The percentages and statistical results revealed on 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 not beyond dispute. There are obvious limitations to any empirical analysis of a subjective decision making process.<sup>34</sup>

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32. See *infra* Appendix B.

33. See *id.*

34. The general reliability of statistical inference depends on random sampling. See generally ALLEN T. CRAIG & ROBERT V. HOGG, INTRODUCTION TO MATHEMATICAL STATISTICS 157-58 (1995); RAYMOND H. MYERS, CLASSICAL AND MODERN REGRESSION WITH APPLICATIONS 9-11 (1990). The Court's method of selecting cases is far from random. Rather, it is the result of a conscious decisional process. 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

In light of these caveats, one might ask whether this Study is worth either conducting or reading. We believe it is. For years, experienced Supreme Court practitioners have attempted to divine the ideological predilections 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 such ad hoc assessments.

### **III. Overview of the Ideological Trends of the 1999 Term**

This Term's survey suggests a reversal of the Court's liberal trend over the past two Terms, with conservative movement in six of the ten categories. Specifically, the Court's support of statutory civil rights claims plummeted to an all time low, while the Court exhibited a dramatic conservative shift in cases decided by one vote. Furthermore, the Study's second most reliable category for indicating liberal/conservative trends, Civil/State Party, showed solid conservative movement in all types of decisions. Yet, this apparent conservative movement is counter balanced somewhat by the fact that the Study's most reliable category for indicating conservative/liberal trends, Criminal/Federal Party, demonstrated some liberal movement. An overview of the results in each individual category follows. A more in-depth analysis for each category is set forth in Part IV of this Study.

#### **Data Table 1: Civil Cases – State Government versus a Private Party.**

This Term, the Court's decisions involving a state government party in a civil action indicated a conservative trend in favor of the state government in "Majority," "Split" (i.e., non-unanimous) and "Unanimous" decisions. While Chief Justice Rehnquist and Justice Stevens maintained the highest rank and lowest rank, respectively, Justice Thomas moved in rank considerably, voting surprisingly less often in favor of state governments. The statistical voting predictions

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small. The statistical inferences below, therefore, may not accurately represent a Justice's (or the Court's) views.



for the 1999 Term were generally quite accurate in this category. Justices Ginsburg and Stevens have a strong voting correlation of 0.97 and a high  $R^2$  statistic<sup>35</sup> of 0.93 (hereinafter correlation and  $R^2$  will be noted consecutively as correlation/ $R^2$ —e.g., 0.97/0.93), making these two the most likely members of the Court to vote together when a state government is party in a civil case. A high  $R^2$  statistic indicates that one of the two Justices' score may be predicted with a high degree of accuracy based on the score of the other. Correlation does not, however, imply causation.

**Data Table 2: Civil Cases – Federal Government versus a Private Party.**

The Court showed slight liberal movement during the 1999 Term in its treatment of the federal government in civil cases, finding against the government more often in “Split” decisions and for the government only 50% of the time in “Majority” decisions. All but two Justices showed decreased support for the federal government compared to last Term. Of particular interest in this category was the unusual voting behavior of traditionally liberal Justice Breyer. Justice Breyer voted for the federal government 70% of the time, tying the Chief Justice as the Justice most supportive of the federal government.

**Data Table 3: Criminal Cases – State Government versus a Private Party.**

The data in this category reveal a conservative trend, as the Court increased its support of state governments over last Term. Every Justice, except for Justice Souter, voted for the states more often this Term than in the 1998 Term. Furthermore, the Court favored the states more often in “Majority” and “Unanimous” decisions. However, the Court's support of the states in “Split” decisions dropped by 15 percentage points this Term from the 1998 Term, somewhat buffering the otherwise conservative movement in this category. Despite this decline, the Court nonetheless favored state governments most of the time this Term in “Split” decisions. As usual, this category exhibited rather polarized voting, with Chief Justice Rehnquist on the conservative end of the spectrum—recording a score of 87%, and Justices Stevens and Souter on the liberal end—each with a score of 27.3%.

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35. The  $R^2$  statistic is an estimate of  $r^2$ , the true measure of correlation between the dependant variable and its independent counterpart(s).

**Data Table 4: Criminal Cases – Federal Government versus a Private Party.**

The liberal trend detected in this category by the 1998 Term statistics has continued. Support of the federal government in the “Majority” and “Unanimous” categories decreased for the fourth year in a row. In fact, the Court has only recorded a lower score in the “Majority” category one time in the last ten years. But, despite this liberal trend, most of the cases were still decided in favor of the government.

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

Unlike the past two Terms, the Court decided more than just a couple of cases involving First Amendment issues in the 1999 Term. While this increase in First Amendment claims provides insight into the Court’s current stance on such claims, the lack of First Amendment claims in the prior two Terms makes it difficult to identify trends in voting with any certainty. That said, the majority of the Court voted in favor of the claim only 44.4% of the time in the 1999 Term, a 55 percentage point drop from last Term. The Court’s support of First Amendment claims in “Split” and “Unanimous” decisions dropped dramatically as well. Thus, voting in this category exhibited a conservative trend.

**Data Table 6: Equal Protection Claims.**

The Supreme Court addressed only one Equal Protection issue this Term and decided the single issue in favor of the claim. This lone data point makes it impossible to identify trends or positions with any certainty. Furthermore, because the Court reached a unanimous decision on the single Equal Protection issue addressed this Term, statistics regarding the individual Justices, voting correlation, and predictions are inconclusive.

**Data Table 7: Statutory Civil Rights Claims.**

The Court’s liberal trend of increased support of statutory civil rights, present in the last four Terms, ended this Term with the Court deciding significantly less often in favor of the claim in “Majority,” “Split,” and “Unanimous” decisions. Additionally, with the exception of Chief Justice Rehnquist and Justice Thomas, each Justice voted less often in favor of the claim, and thus more conservatively, than predicted. Mean Table 7 indicates that this

Term's voting record shows a statistically significant change in voting for five of the nine Justices. In regards to the accuracy of last year's predictions, the Court's unexpected conservative leanings this Term resulted in predictions that were generally too liberal.

**Data Table 8: Federal Jurisdiction Claims.**

There was a sharp decrease in the number of cases involving issues of federal jurisdiction this Term (6) compared to last Term (20). The Court accepted 83.3% of all claims in favor of federal jurisdiction in the 1999 Term. The Court also showed liberal movement by voting for federal jurisdiction 66.7% of the time in "Split" decisions and for federal jurisdiction 100% of the time in "Unanimous" decisions. Each individual Justice voted in favor of federal jurisdiction more often than ever before and all of the Justices except Justice Breyer evidenced a statistically significant change in voting behavior. Interestingly, Justice Breyer tied generally conservative Chief Justice Rehnquist and Justice Scalia in voting for federal jurisdiction the least number of times.

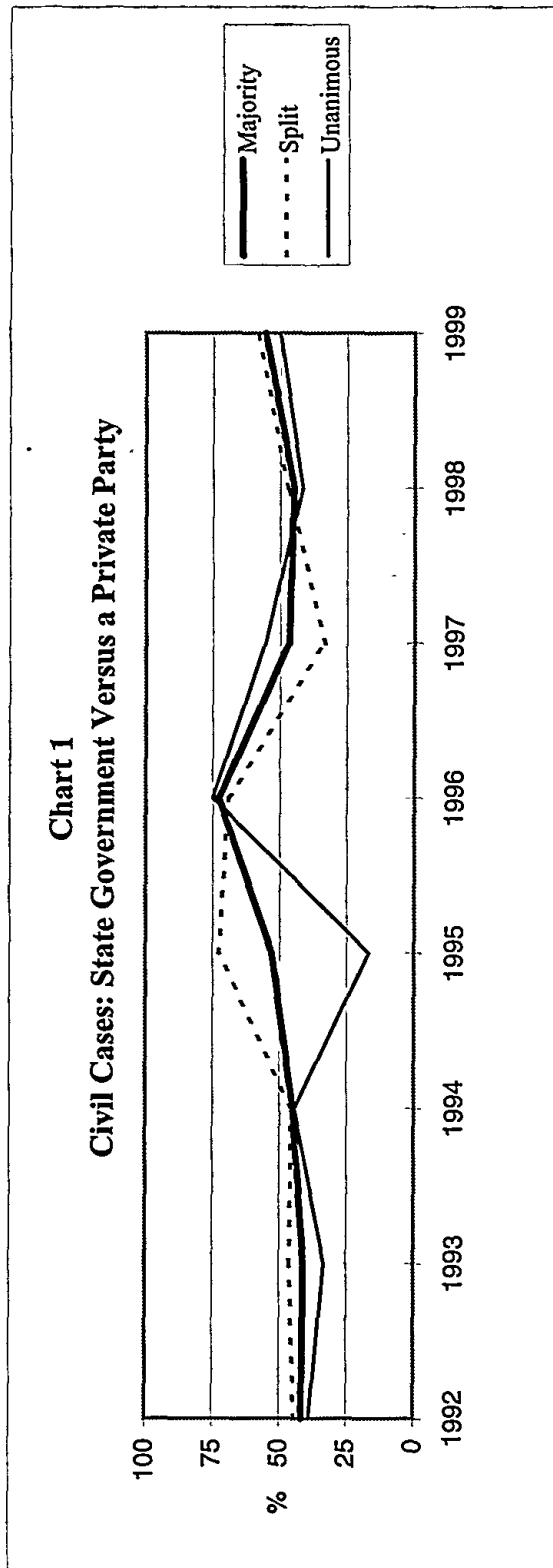
**Data Table 9: Federalism Cases.**

This Term's voting reveals a slight conservative movement in this category as the Court increased its support of states' rights in each type of decision—"Majority," "Split," and "Unanimous." However, despite such broad increase, the Court nonetheless found for the state less than half of the time in this category during the 1999 Term. Any conservative movement on this Table, therefore, is moderate at best.

**Data Table 10: Swing Vote Cases.**

The Court reached a conservative outcome much more often this Term than in the 1998 Term in cases decided by one vote, evidencing a reversal of the liberal trend over the past two Terms. Sixty-one percent of swing vote decisions resulted in a conservative outcome. Perhaps the most notable result revealed by the statistics in this category is the increased polarization of the Court. Specifically, a 38-percentage point difference separates the traditionally conservative and liberal camps.

Data Table 1 Civil Cases: State Government Versus a Private Party																	
Justice	% Votes for Government										X2		1999 Term Votes		Predictions		
	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	1999 Term	1999	For Gov't	Against Gov't	Prediction 1999	Error	Prediction 2000
	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term				
Rehnquist	84.0	71.4	52.8	68.2	60.0	43.8	84.9	60.0	65.5	66.7	6	12	6	58.3	8.4	65.7	
O'Connor	68.0	50.0	50.0	40.9	40.0	47.1	68.8	53.3	55.2	55.6	8	10	8	59.5	-3.9	55.4	
Breyer*	24.0	35.7	30.3	42.9	42.1	29.4	54.6	46.7	44.8	52.9	8	9	8	53.5	-0.6	50.1	
Scalia	64.0	64.3	41.7	50.0	60.0	52.9	77.4	60.0	55.2	50.0	9	9	9	58.8	-8.8	52.0	
Thomas*	28.0	71.4	41.7	45.5	55.0	67.4	77.4	60.0	65.5	50.0	9	9	9	55.0	-5.0	65.2	
Souter*	63.6	52.5	36.4	45.5	35.0	29.4	54.6	46.7	37.9	50.0	8	8	8	46.5	3.5	37.5	
Kennedy	76.0	42.9	41.7	40.9	40.0	41.2	71.9	53.3	51.7	44.4	8	8	10	37.6	6.8	49.4	
Ginsburg*	64.0	59.5	51.4	40.9	50.0	35.3	53.1	46.7	31.0	44.4	8	8	10	44.0	0.4	33.8	
Stevens	36.0	29.3	31.3	27.3	42.1	23.5	48.5	37.5	17.2	41.2	7	7	10	34.0	7.2	24.5	
Majority	64.0	52.4	41.7	40.9	45.0	52.9	72.7	46.7	44.8	55.6	10	10	8	42.8	12.8	51	
Split	68.8	51.6	44.4	46.2	45.5	72.7	69.2	33.3	47.1	58.3	7	7	5				
Unanimous	55.6	54.6	38.9	33.3	44.4	16.7	75.0	55.6	41.7	50.0	3	3	3				



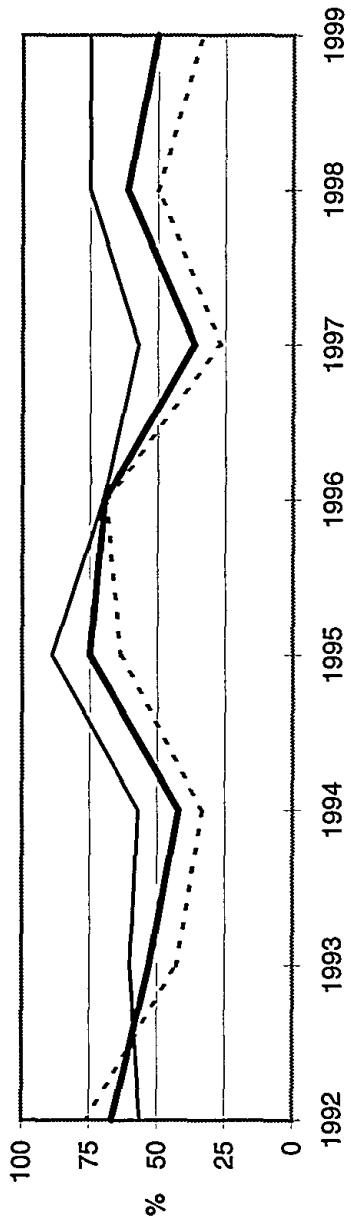
Mean Table 1						
Civil Cases: State Government Versus a Private Party						
Justice	Mean Voting Percentage All Prior Terms (F)	99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?	
Kennedy	52.3	+/- 9.1	12.28	44.44		yes
O'Connor	54.8	+/- 7.1	9.87	55.56		no
Rehnquist	66.7	+/- 8.0	11.19	66.67		no
Scalia	58.9	+/- 6.3	8.85	50.00		yes
Stevens	34.8	+/- 6.4	8.93	41.18		yes
Breyer*	43.5	+/- 10.5	9.15	52.94		no
Ginsburg*	42.8	+/- 9.1	8.62	44.44		no
Thomas**	60.5	+/- 11.4	12.47	50.00		yes
Souter**	44.6	+/- 9.4	10.96	50.00		no



Justice		Data Table 2 Civil Cases: Federal Government Versus a Private Party														Predictions		
		% Votes for Government										X2		1999 Term Votes		Prediction 1999	Error	Prediction 2000
		1990 Term	1991 Term	1992 Term	1993 Term	1994 Term	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	1999 For Gov't	1999 Against Gov't	Prediction 1999	Error	Prediction 2000		
Rehnquist	70.0	71.4	74.2	58.8	52.6	75.0	69.6	38.1	50.0	70.0	7	3	65.2	4.8	50.9			
Breyer*	60.0	57.1	48.5	68.8	47.4	60.0	73.9	57.1	61.1	70.0	7	3	64.2	5.8	49.8			
O'Connor	60.0	52.4	62.5	56.3	27.8	62.5	59.1	61.9	73.3	60.0	6	4	51.1	8.9	65.9			
Scalia	57.9	71.4	67.7	52.9	42.1	60.0	45.5	52.4	61.1	60.0	6	4	51.2	8.8	69.4			
Kennedy	55.6	76.2	70.0	52.9	47.4	80.0	63.6	45.5	50.0	50.0	5	5	52	-2.0	65.3			
Stevens	40.0	57.1	34.4	70.6	68.4	63.2	65.2	55.0	68.4	50.0	5	5	65	-15.0	52.4			
Ginsburg*	70.0	81.0	69.7	58.8	52.6	85.0	65.2	40.9	68.4	50.0	5	5	0	0	47.7			
Souter*	55.6	71.4	70.0	76.5	42.1	75.0	69.6	47.6	66.7	50.0	5	5	53.9	-3.9	40.9			
Thomas*	55.0	53.3	64.5	47.1	42.1	65.0	40.9	33.3	55.6	40.0	4	6	49.6	-9.6	42.2			
Majority Split	60.0	81.0	66.7	52.9	42.1	75.0	69.6	36.4	61.1	50.0	5	5	48.1	1.9	54.1			
Unanimous	60.0	83.3	76.5	42.8	33.3	63.6	69.2	26.7	50.0	33.3	2	4						
	60.0	77.8	56.3	60.0	57.1	88.9	70.0	57.1	75.0	75.0	3	1						



Chart 2  
Civil Cases: Federal Government Versus a Private Party



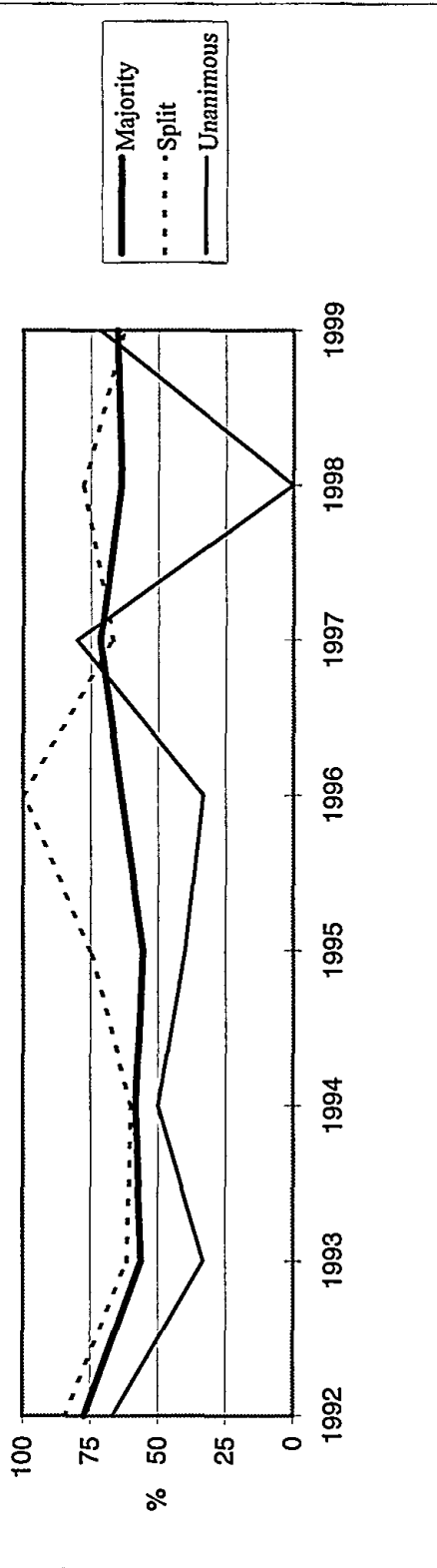
Majority  
Split  
Unanimous

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?	
Kennedy	60.6	+/- 8.3	11.12	50.00	yes	
O'Connor	60.7	+/- 8.7	12.24	60.00	no	
Rehnquist	66.3	+/- 9.8	13.79	70.00	no	
Scalia	59.7	+/- 7.6	10.65	60.00	no	
Stevens	56.0	+/- 8.2	11.52	50.00	no	
Breyer*	59.9	+/- 11.0	9.52	70.00	no	
Ginsburg*	61.8	+/- 15.8	14.99	50.00	no	
Thomas*	50.2	+/- 10.4	11.39	40.00	yes	
Souter*	63.8	+/- 10.6	12.37	50.00	yes	

Regression Table 2									
Civil Cases: Federal Government Versus a Private Party									
Correlation (D) / R <sup>2</sup>									
Justice	Kennedy	O'Connor	Rehnquist	Scalia	Stevens	Breyer*	Ginsburg*	Thomas*	
O'Connor	0.73/0.49								
Rehnquist									
Scalia									
Stevens									
Breyer*									
Ginsburg*	0.87/0.70								
Thomas*	0.74/0.48						0.93/0.83		
Souter*	0.70/0.43						0.76/0.50		

Data Table 3																		
Criminal Cases: State Government Versus a Private Party																		
Justice	% Votes for Government												X2		1999 Term		Predictions	
	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	1999 Term	Against Gov't	For Gov't	Prediction 1999	Error	Prediction 2000		
Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	
Rehnquist	81.5	66.7	90.0	81.3	91.7	66.7	63.6	76.9	72.7	87.0	87.0	20	3	80.2	6.8	73.5		
Scalia	74.1	77.8	86.4	81.3	83.3	55.6	63.6	84.6	72.7	82.6	82.6	19	4	76.1	6.5	75.6		
Thomas*	0.0	75.0	85.7	87.5	91.7	66.7	63.6	92.3	80.0	82.6	82.6	19	4	78.1	4.5	80.8		
Kennedy	57.7	50.0	77.3	50.0	75.0	55.6	54.6	76.9	54.6	78.3	78.3	18	5	61.6	16.7	55.7		
O'Connor	66.7	33.3	66.7	68.8	58.3	44.4	63.6	71.4	63.6	78.3	78.3	18	5	61.6	16.7	66.8		
Breyer*	14.8	33.3	25.0	12.5	41.7	22.2	36.4	50.0	36.4	40.9	40.9	9	13	58.0	-17.1	42.2		
Ginsburg*	48.1	55.6	75.0	43.8	41.7	33.3	45.5	42.9	27.3	36.4	36.4	8	14	43.2	-6.8	30.2		
Stevens	0.0	27.8	31.8	25.0	8.3	22.2	18.2	23.1	9.1	27.3	27.3	6	16	36.0	-8.7	13.7		
Souter*	68.0	55.6	55.0	25.0	41.7	22.2	54.6	57.1	36.4	27.3	27.3	6	16	20.6	6.7	27.8		
Majority	55.6	44.4	77.3	56.3	58.3	55.6	63.6	71.4	63.6	65.2	65.2	15	8	64.8	0.4	64.3		
Split	68.2	33.3	84.6	61.5	60.0	75.0	100.0	66.7	77.8	62.5	62.5	10	6					
Unanimous	0.0	66.6	66.7	33.3	50.0	40.0	33.3	80.0	0.0	71.4	71.4	5	2					

Chart 3  
Criminal Cases: State Government Versus a Private Party



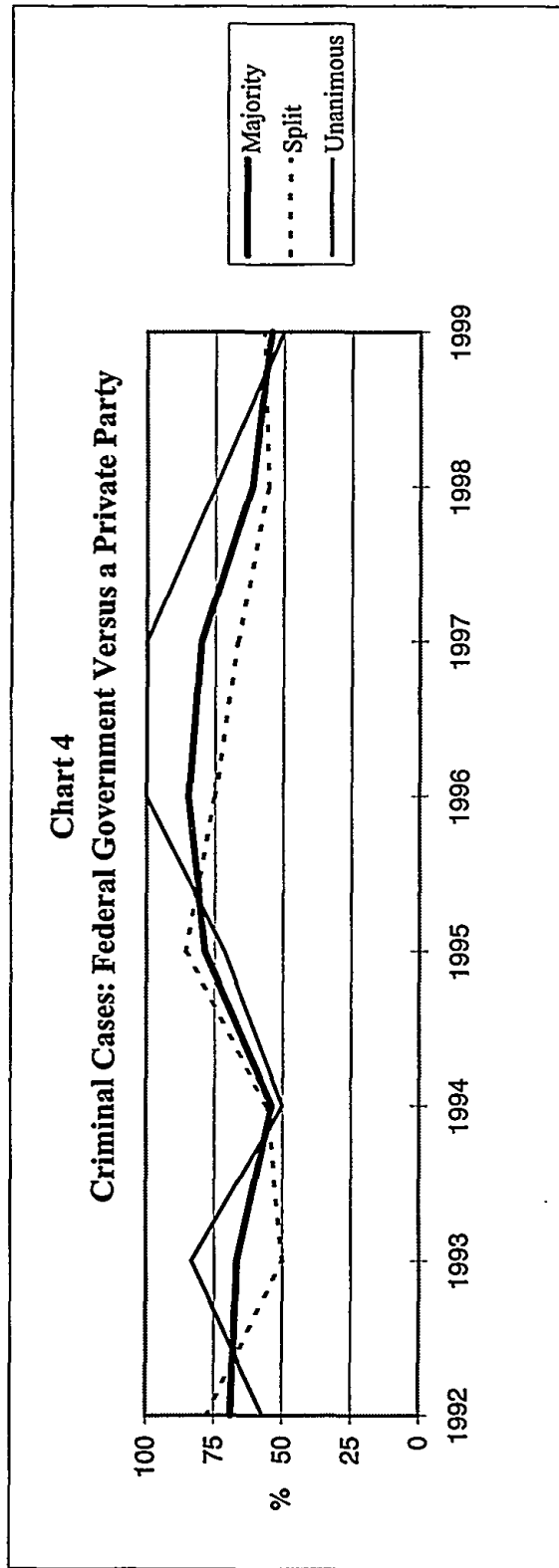
**Mean Table 3**  
Criminal Cases: State Government Versus a Private Party

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?
Kennedy	64.7	+/- 8.9	11.95	78.26	yes
O'Connor	63.7	+/- 9.1	12.72	78.26	yes
Rehnquist	78.7	+/- 6.7	9.40	86.96	yes
Scalia	73.8	+/- 8.4	11.73	82.61	yes
Stevens	20.4	+/- 7.1	9.95	27.27	yes
Breyer*	37.3	+/- 11.7	10.13	40.91	no
Ginsburg*	39.1	+/- 7.5	7.16	36.36	no
Thomas*	80.3	+/- 10.0	10.99	82.61	no
Souter*	46.2	+/- 13.5	15.70	27.27	yes



Justice		Criminal Cases: Federal Government Versus a Private Party														Predictions				
		% Votes for Government												X2		1999 Term		Votes		
		1990 Term	1991 Term	1992 Term	1993 Term	1994 Term	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	1999 Term	1999 Term	For Gov't	Against Gov't	Prediction 1999	Error	Prediction 2000		
Scalia	40.0	76.9	62.5	66.7	53.9	78.6	92.3	70.0	46.2	63.6	7	4	81.9	-18.3	65.4					
Rehnquist	70.0	76.9	81.3	83.3	69.2	71.4	84.6	70.0	76.9	63.5	7	4	79.8	-16.3	74.7					
Kennedy	50.0	84.6	60.0	66.7	61.5	71.4	84.6	90.0	76.9	54.6	6	5	71.4	-16.9	73.6					
O'Connor	70.0	76.9	75.0	75.0	69.2	71.4	92.3	80.0	84.6	54.6	6	5	0	0	81.6					
Thomas*	50.0	54.6	81.3	88.3	61.5	71.4	84.6	90.0	61.5	54.6	6	5	56.5	-2.0	53.3					
Breyer*	70.0	61.5	46.7	58.3	69.2	71.4	69.2	70.0	53.9	45.5	5	6	56.4	-11.0	40.5					
Stevens	60.0	38.5	26.7	50.0	30.8	50.0	53.9	55.6	38.5	36.4	4	7	64.4	-28.0	34.5					
Ginsburg*	60.0	69.2	56.3	58.3	61.5	71.4	76.9	60.0	53.9	36.4	4	7	39.0	-2.6	27.2					
Souter*	75.0	69.2	43.8	58.3	61.5	78.6	84.6	70.0	46.2	36.4	4	7	45.9	-9.5	31.2					
Majority	60.0	69.2	68.8	66.7	53.9	78.6	84.6	80.0	61.5	54.5	6	5	69.8	-15.3	51.4					
Split	50.0	55.6	77.8	50.0	55.6	85.7	75.0	66.7	55.6	57.1	4	3								
Unanimous	75.0	100.0	57.1	83.3	50.0	71.4	100.0	100.0	75.0	50.0	2	2								





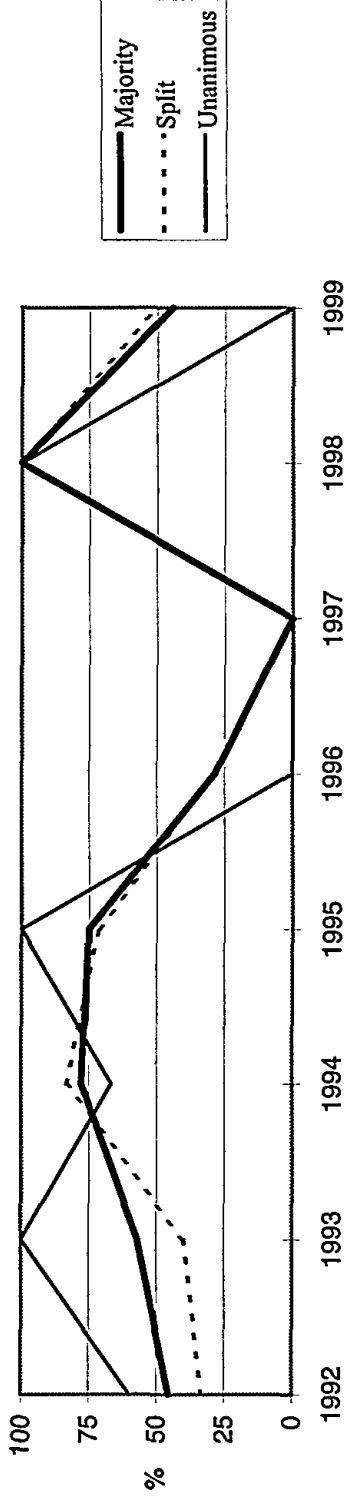
**Mean Table 4**  
Criminal Cases: Federal Government Versus a Private Party

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?
Kennedy	72.7	+/- 9.4	12.58	54.55	yes
O'Connor	77.8	+/- 5.2	7.32	54.55	yes
Rehnquist	78.2	+/- 4.7	6.56	63.54	yes
Scalia	65.7	+/- 9.8	13.65	63.64	no
Stevens	46.8	+/- 9.3	13.08	36.36	yes
Breyer*	66.7	+/- 8.4	7.26	45.45	yes
Ginsburg*	63.7	+/- 9.1	8.70	36.36	yes
Thomas*	74.2	+/- 12.5	13.75	54.55	yes
Souter*	65.3	+/- 12.0	14.02	36.36	yes

Regression Table 4									
Criminal Cases: Federal Government Versus a Private Party									
Correlation (D) / R <sup>2</sup>									
Justice	Kennedy	O'Connor	Rehnquist	Scalia	Stevens	Breyer*	Ginsburg*	Thomas*	Souter*
O'Connor									
Rehnquist									
Scalia									
Stevens									
Breyer*									
Ginsburg*		0.71/0.40				0.88/0.72			
Thomas*						0.70/0.37			
Souter*					0.71/0.45	0.91/0.79	0.95/0.89		

Justice		Data Table 5 First Amendment Rights of Expression, Association, and Religion														Predictions				
		% Votes for Rights Claim												X2		1999 Term Votes		Prediction 1999	Error	Prediction 2000
		1990 Term	1991 Term	1992 Term	1993 Term	1994 Term	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	1999 Term	For Claim	Against Claim						
Kennedy	41.7	77.8	77.8	71.4	88.9	87.5	57.1	0.0	100.0	77.8	77.8	7	2	65.1	12.7	77.3				
Thomas*	61.5	20.0	40.0	85.7	66.7	37.5	85.7	0.0	100.0	66.7	66.7	6	3	32.0	34.7	77.5				
Scalia	25.0	37.5	45.5	85.7	55.6	37.5	85.7	0.0	100.0	56.6	56.6	5	4	49.4	7.2	75.6				
Rehnquist	16.7	50.0	36.4	42.9	55.6	62.5	28.6	0.0	50.0	44.4	44.4	4	5	0.0	44.4	51.8				
Stevens	50.0	100.0	90.0	57.1	66.7	62.5	42.9	0.0	100.0	37.5	37.5	3	6	0	0	42.3				
O'Connor	54.5	77.8	36.4	57.1	66.7	62.5	28.6	0.0	50.0	33.3	33.3	3	6	99	-65.7	44.6				
Ginsburg*	15.4	50.0	36.4	71.4	66.7	75.0	57.1	0.0	100.0	33.3	33.3	3	6	43.7	-10.4	58.1				
Souter*	61.5	20.0	40.0	85.7	66.7	37.5	57.1	100.0	100.0	28.6	28.6	2	5	45.6	-17.0	98.9				
Breyer*	69.2	88.9	90.0	71.4	66.7	75.0	14.3	0.0	50.0	12.5	12.5	1	7	0.0	12.5	4.8				
Majority	25.0	66.7	45.5	57.1	77.8	75.0	28.6	0.0	100.0	44.4	44.4	4	5	44.4	0.0	64.2				
Split	30.0	57.1	33.3	40.0	83.3	71.4	28.6	0.0	100.0	50.0	50.0	4	4							
Unanimous	0.0	100.0	60.0	100.0	66.7	100.0	0.0	0.0	100.0	0.0	0.0	0	1							

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



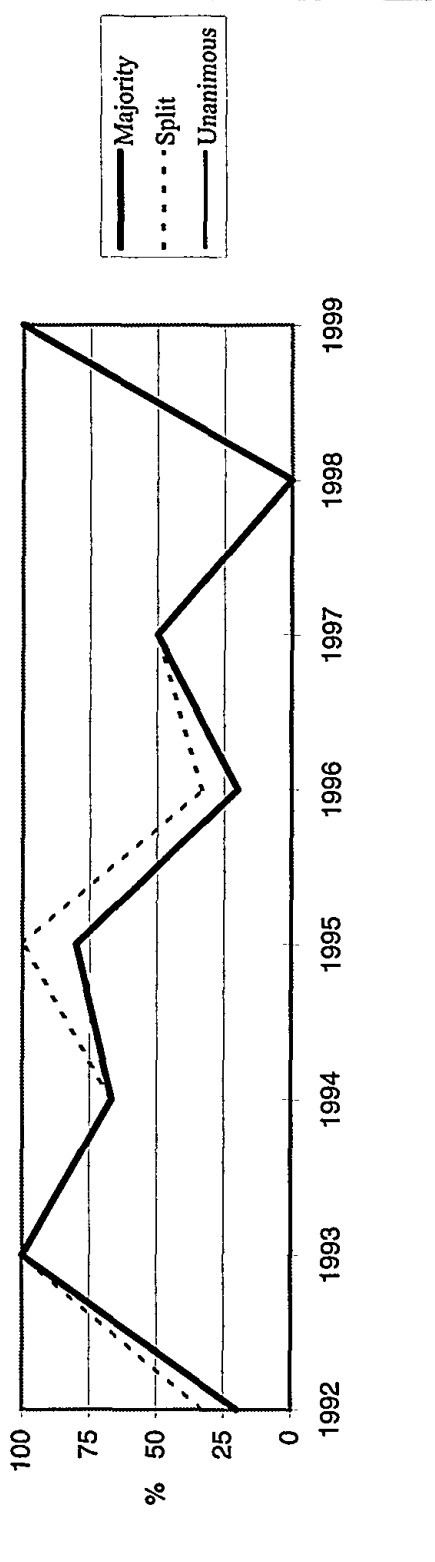
Mean Table 5 First Amendment Rights of Expression, Association and Religion						
Justice	Mean Voting Percentage All Prior Terms (F)	99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?	
Kennedy	62.2	+/- 21.0	28.27	77.78	no	
O'Connor	42.6	+/- 15.5	21.64	33.33	no	
Rehnquist	31.4	+/- 13.9	19.42	44.44	yes	
Scalia	46.9	+/- 20.1	28.12	56.56	no	
Stevens	60.0	+/- 19.1	26.70	37.50	yes	
Breyer*	41.2	+/- 37.7	32.75	12.50	no	
Ginsburg*	61.7	+/- 35.2	33.44	33.33	no	
Thomas*	54.4	+/- 32.3	35.51	66.67	no	
Souter*	63.2	+/- 24.2	28.13	28.57	yes	



Justice		Data Table 6 Equal Protection Claims														Predictions				
		% Votes for Rights Claim												X2		1999 Term Votes		Prediction 1999	Error	Prediction 2000
		1990 Term	1991 Term	1992 Term	1993 Term	1994 Term	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	1999 Term	1999 Term	For Claim	Against Claim					
Kennedy	42.9	50.0	20.0	100.0	66.7	80.0	33.3	50.0	0.0	0.0	100.0	100.0	1	0	32.4	67.6	33.8			
O'Connor	28.6	33.3	40.0	100.0	66.7	80.0	50.0	50.0	0.0	0.0	100.0	100.0	1	0	27.4	72.6	52.7			
Rehnquist	14.3	50.0	20.0	0.0	66.7	60.0	0.0	50.0	0.0	0.0	100.0	100.0	1	0	45.2	54.8	7.2			
Scalia	14.3	33.3	20.0	0.0	66.7	40.0	25.0	0.0	0.0	0.0	100.0	100.0	1	0	14.4	85.6	9.5			
Stevens	83.3	66.7	40.0	100.0	33.3	40.0	40.0	50.0	0.0	0.0	100.0	100.0	1	0	40.5	59.5	0			
Breyer*	88.3	50.0	40.0	100.0	33.3	40.0	20.0	100.0	0.0	0.0	100.0	100.0	1	0	100.0	0.0	6.7			
Ginsburg*	42.9	50.0	0.0	100.0	33.3	40.0	20.0	100.0	0.0	0.0	100.0	100.0	1	0	99.3	0.7	0.0			
Thomas*	100.0	60.0	20.0	0.0	66.7	50.0	25.0	0.0	0.0	0.0	100.0	100.0	1	0	0.0	100.0	18.2			
Souter*	50.0	50.0	40.0	100.0	33.3	40.0	20.0	100.0	0.0	0.0	100.0	100.0	1	0	100.0	0.0	0.2			
Majority	42.9	50.0	20.0	100.0	66.7	80.0	20.0	50.0	0.0	0.0	100.0	100.0	1	0	37.7	62.3	33.5			
Split	50.0	50.0	33.3	100.0	66.7	100.0	33.3	50.0	0.0	0.0	0.0	0.0	0	0						
Unanimous	33.3	50.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	100.0	100.0	1	0						



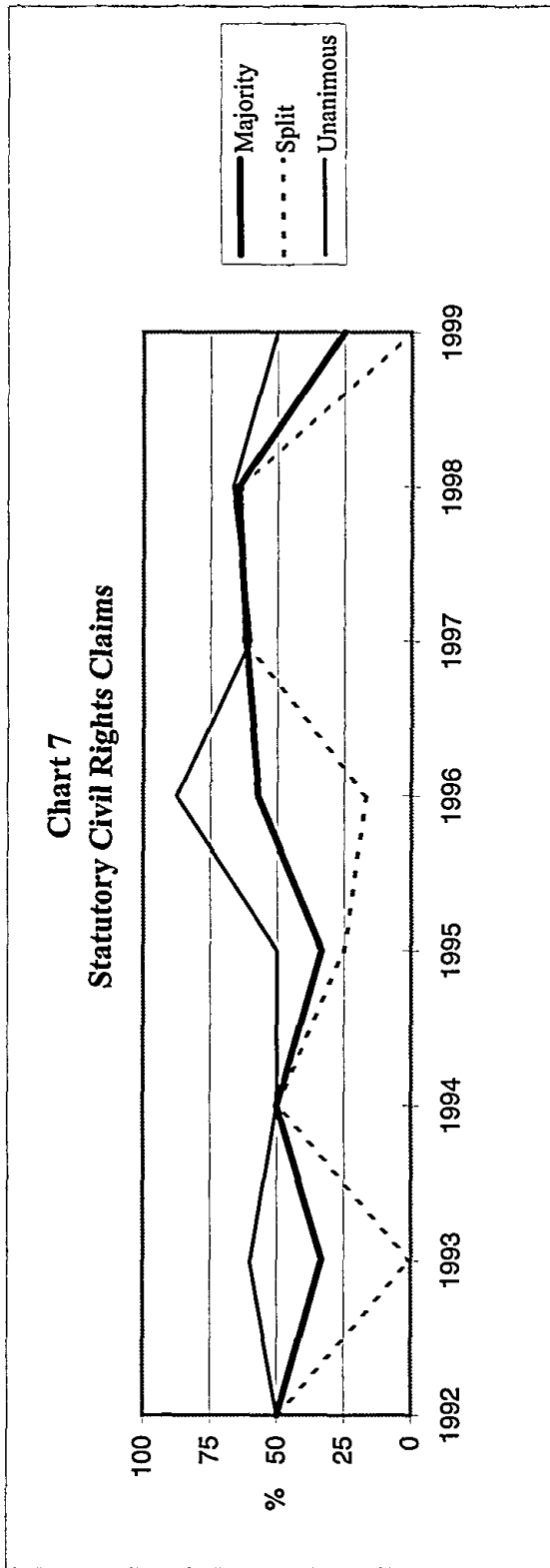
Chart 6  
Equal Protection Claims



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?	
Kennedy	46.5	+/- 20.3	27.33	100.00	yes	
O'Connor	45.8	+/- 19.7	27.61	100.00	yes	
Rehnquist	28.1	+/- 17.8	24.88	100.00	yes	
Scalia	23.7	+/- 15.0	21.06	100.00	yes	
Stevens	44.8	+/- 20.7	29.04	100.00	yes	
Breyer*	38.7	+/- 43.2	37.54	100.00	yes	
Ginsburg*	48.9	+/- 44.0	41.88	100.00	yes	
Thomas*	27.7	+/- 25.4	27.85	100.00	yes	
Souter*	48.1	+/- 28.6	33.25	100.00	yes	

Regression Table 6 Equal Protection Claims Correlation (D) / R <sup>2</sup>									
Justice	Kennedy	O'Connor	Rehnquist	Scalia	Stevens	Breyer*	Ginsburg*	Thomas*	
O'Connor	0.93/0.85								
Rehnquist			0.85/0.69						
Scalia									
Stevens			0.74/0.43		0.83/0.61				
Breyer*	0.76/0.53								
Ginsburg*	0.74/0.45	0.70/0.39			0.87/0.70	1.00/1.00			
Thomas* <sup>c</sup>			0.84/0.66	0.97/0.93	0.80/0.59	1.00/1.00	1.00/1.00		
Souter*	0.72/0.46								

Justice		Data Table 7 Statutory Civil Rights Claims														Predictions				
		% Votes for Rights Claim												X2		1999 Term Votes		Prediction 1999	Error	Prediction 2000
		1990 Term	1991 Term	1992 Term	1993 Term	1994 Term	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	1999 Term	1999 Term	For Claim	Against Claim					
Stevens	80.0	88.9	70.0	55.6	75.0	83.3	85.7	84.6	88.2	75.0	75.0	3	1	87.4	-12.4	58.0				
Breyer*	80.0	88.9	63.6	77.8	75.0	83.3	85.7	84.6	82.4	75.0	75.0	3	1	81.0	-6.0	68.3				
Ginsburg*	53.3	66.7	50.0	44.4	75.0	66.7	78.6	76.9	70.6	75.0	75.0	3	1	78.7	-3.7	19.6				
Souter*	57.1	44.4	45.5	44.4	75.0	66.7	92.9	76.9	70.6	75.0	75.0	3	1	79.7	-4.7	51.7				
Kennedy	33.3	55.6	36.4	33.3	25.0	16.7	50.0	61.5	47.1	25.0	25.0	1	3	41.6	-16.6	36				
O'Connor	53.3	55.6	54.6	33.3	50.0	33.3	64.3	41.7	58.8	25.0	25.0	1	3	54.0	-29.0	78.5				
Rehnquist	33.3	44.4	36.4	33.3	50.0	16.7	50.0	30.8	35.3	25.0	25.0	1	3	21.7	3.3	0				
Scalia	46.7	44.4	45.5	33.3	25.0	16.7	50.0	23.1	41.2	25.0	25.0	1	3	34.6	-9.6	38.9				
Thomas*	86.7	28.6	45.5	33.3	25.0	16.7	50.0	23.1	23.5	25.0	25.0	1	3	18.1	6.9	40.5				
Majority	53.3	55.6	50.0	33.3	50.0	33.3	57.1	61.5	64.7	25.0	25.0	1	3	61.5	-36.5	48.9				
Split	33.3	40.0	50.0	0.0	50.0	25.0	16.7	62.5	63.6	0.0	0.0	0	2							
Unanimous	83.3	75.0	50.0	60.0	50.0	50.0	87.5	60.0	66.7	50.0	50.0	1	1							



**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?
Kennedy	44.4	+/- 11.7	15.77	25.00	yes
O'Connor	48.2	+/- 7.7	10.75	25.00	yes
Rehnquist	37.4	+/- 6.3	8.82	25.00	yes
Scalia	39.8	+/- 8.8	12.36	25.00	yes
Stevens	79.2	+/- 7.2	9.66	75.00	no
Breyer*	82.2	+/- 4.9	4.22	75.00	yes
Ginsburg*	68.7	+/- 13.3	12.66	75.00	no
Thomas*	30.7	+/- 10.6	11.59	25.00	no
Souter*	63.7	+/- 14.6	17.05	75.00	no

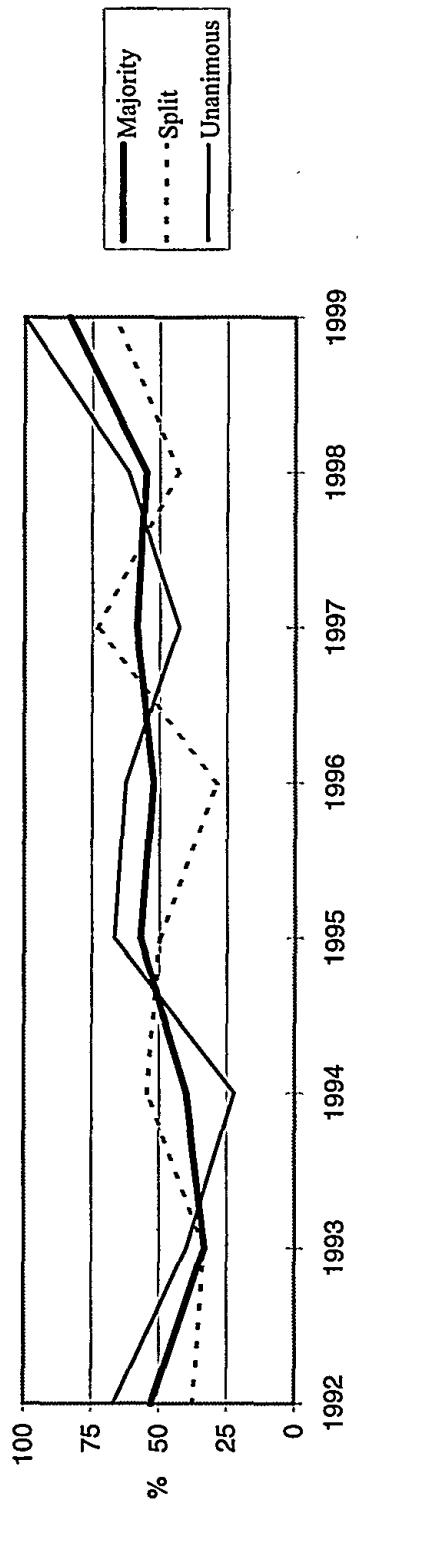


**Data Table 8**  
**Cases Raising a Challenge to the Exercise of Federal Jurisdiction**

Justice	% Votes for Rights Claim													X2				1999 Term Votes			Predictions			
	1990		1991		1992		1993		1994		1995		1996		1997		1998		1999 Term		Against Claim		Prediction	
	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	For Claim	Against Claim	1999	2000
Stevens	91.4	75.0	69.7	44.4	42.1	75.0	69.6	51.7	65.0	100.0	6	0	57.4	42.6	57.4	57.4	57.4	42.6	57.4	6	0	57.4	42.6	57.4
Kennedy	58.3	73.3	51.5	33.3	40.0	57.1	56.5	58.6	55.0	83.3	5	1	59.4	23.9	59.4	59.4	59.4	23.9	59.4	5	1	59.4	23.9	59.4
O'Connor	54.3	63.3	53.1	22.2	40.0	47.6	54.6	43.3	55.0	83.3	5	1	64.1	19.2	64.1	64.1	64.1	19.2	64.1	5	1	64.1	19.2	64.1
Ginsburg*	63.9	69.0	60.6	33.3	36.8	68.4	56.5	55.2	60.0	83.3	5	1	64.2	19.1	64.2	64.2	64.2	19.1	64.2	5	1	64.2	19.1	64.2
Thomas*	85.7	66.7	54.6	33.3	30.0	42.9	47.8	46.7	45.0	83.3	5	1	54.8	28.5	54.8	54.8	54.8	28.5	54.8	5	1	54.8	28.5	54.8
Souter*	57.6	75.0	56.3	33.3	30.0	68.4	56.5	60.7	60.0	83.3	5	1	43.9	39.4	43.9	43.9	43.9	39.4	43.9	5	1	43.9	39.4	43.9
Rehnquist	54.3	62.1	54.6	22.2	30.0	42.9	56.5	60.0	45.0	66.7	4	2	43.6	23.1	43.6	43.6	43.6	23.1	43.6	4	2	43.6	23.1	43.6
Scalia	48.5	55.2	51.5	22.2	35.0	42.9	47.8	43.3	40.0	66.7	4	2	43.6	23.1	43.6	43.6	43.6	23.1	43.6	4	2	43.6	23.1	43.6
Breyer*	80.0	71.4	66.7	50.0	33.3	63.2	65.2	51.7	65.0	66.7	4	2	41.9	24.8	41.9	41.9	41.9	24.8	41.9	4	2	41.9	24.8	41.9
Majority	63.9	73.3	52.9	33.3	40.0	57.1	52.2	58.6	55.0	83.3	5	1	52.8	30.5	52.8	52.8	52.8	30.5	52.8	5	1	52.8	30.5	52.8
Split	38.9	69.2	37.5	33.3	54.6	50.0	28.6	73.3	42.9	66.7	2	1	66.7	30.5	66.7	66.7	66.7	30.5	66.7	2	1	66.7	30.5	66.7
Unanimous	88.9	76.5	66.7	40.0	22.3	66.7	62.5	42.9	61.5	100.0	3	0	100.0	30.5	100.0	100.0	100.0	30.5	100.0	3	0	100.0	30.5	100.0



**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

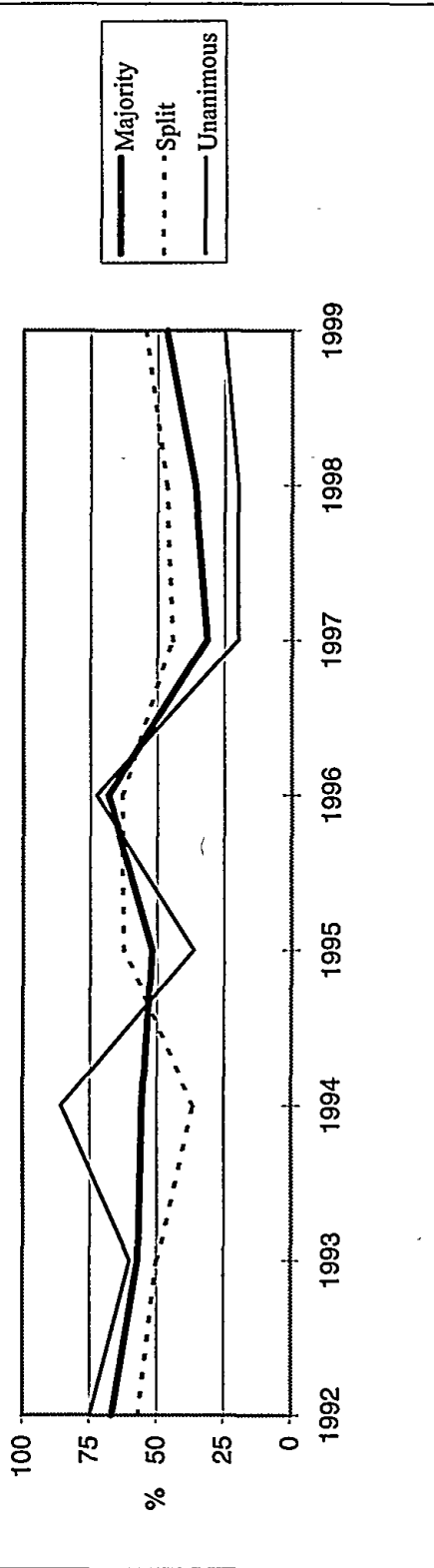
Justice	Mean Voting Percentage All Prior Terms (F)	99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Kennedy	54.6	+/- 7.7	10.30	83.33	yes
O'Connor	50.8	+/- 8.6	12.06	83.33	yes
Rehnquist	50.4	+/- 9.2	12.91	66.67	yes
Scalia	45.7	+/- 7.7	10.81	66.67	yes
Stevens	65.6	+/- 9.7	13.64	100.00	yes
Breyer*	55.7	+/- 15.8	13.69	66.67	no
Ginsburg*	51.7	+/- 14.4	13.72	83.33	yes
Thomas*	45.9	+/- 10.5	11.54	83.33	yes
Souter*	55.3	+/- 12.7	14.75	83.33	yes

**Regression Table 8**  
Cases Raising a Challenge to the Exercise of Federal Jurisdiction  
Correlation (D) / R<sup>2</sup>

Justice	Kennedy	O'Connor	Rehnquist	Scalia	Stevens	Breyer*	Ginsburg*	Thomas*
O'Connor	0.90/0.80							
Rehnquist	0.88/0.74	0.83/0.67						
Scalia	0.86/0.72	0.95/0.89	0.91/0.80					
Stevens	0.76/0.55	0.79/0.60		0.76/0.53				
Breyer*					0.80/0.54			
Ginsburg*	0.95/0.89	0.90/0.76	0.81/0.59	0.90/0.78	0.95/0.88	0.82/0.59		
Thomas*	0.93/0.85	0.91/0.80	0.84/0.66	0.92/0.83	0.89/0.77		0.87/0.71	
Souter*	0.95/0.89	0.85/0.68	0.84/0.68	0.85/0.69	0.80/0.60	0.84/0.63	0.98/0.96	0.87/0.72



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?	
Kennedy	51.7	+/- 11.2	15.11	53.30	no	
O'Connor	54.2	+/- 11.8	15.88	46.70	no	
Rehnquist	61.6	+/- 10.8	14.52	46.70	yes	
Scalia	56.0	+/- 13.7	18.43	46.70	no	
Stevens	41.5	+/- 11.5	15.47	26.70	yes	
Breyer*	34.3	+/- 14.3	12.41	13.30	yes	
Ginsburg*	43.6	+/- 11.5	10.94	33.30	no	
Thomas*	55.8	+/- 14.3	15.66	60.00	no	
Souter*	45.3	+/- 16.8	19.51	20.00	yes	

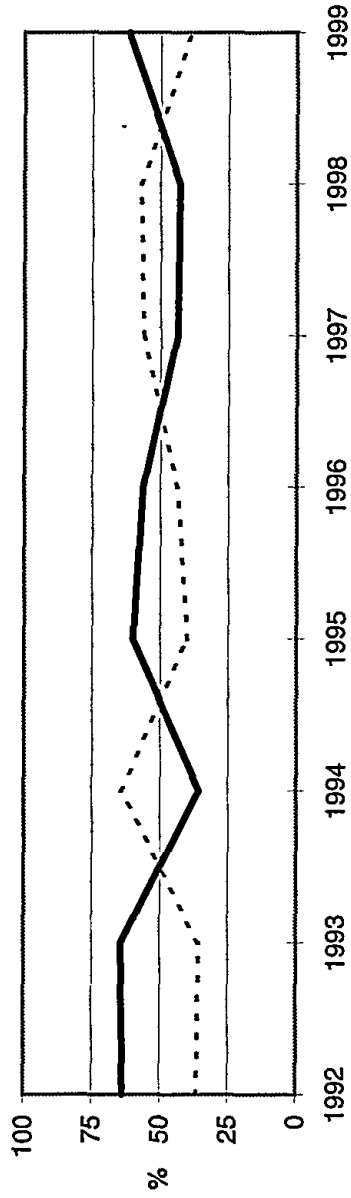
**Regression Table 9**  
Federalism Cases  
Correlation (D) / R<sup>2</sup>

Justice	Kennedy	O'Connor	Rehnquist	Scalia	Stevens	Breyer*	Ginsburg*	Thomas*
O'Connor	0.85/0.70							
Rehnquist	0.73/0.49	0.92/0.83						
Scalia	0.85/0.70	0.83/0.67	0.90/0.78					
Stevens								
Breyer*		0.82/0.59	0.90/0.77	0.84/0.62	0.95/0.87			
Ginsburg*			0.72/0.42	0.85/0.68		0.74/0.43		
Thomas*	0.81/0.61		0.76/0.53			0.95/0.88	0.82/0.61	
Souter*		0.82/0.62						

Justice		Swing-Vote Analysis: Who Votes Most Often with the Majority in Close Cases?														Predictions		
		% Votes with the Majority										X2			1999 Term Votes			
		1990 Term	1991 Term	1992 Term	1993 Term	1994 Term	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	1999 Term	1999 Term	1999 Prediction	Error	Prediction	2000	
O'Connor	69.6	58.8	40.9	57.1	68.8	80.0	75.0	53.3	75.0	84.62	22	4	68.9	15.7	80.3			
Thomas*	43.5	23.5	72.7	57.1	50.0	75.0	56.3	56.3	50.0	84.62	22	4	80.4	4.2	56.1			
Rehnquist	69.6	41.2	72.7	71.4	62.5	75.0	62.5	56.3	46.4	76.92	20	6	47.0	29.9	43.5			
Kennedy	52.2	64.7	72.7	92.9	81.3	85.0	81.3	87.5	67.9	73.08	19	7	55.4	17.7	76.9			
Scalia	52.2	35.3	81.8	71.4	56.3	75.0	56.3	50.0	50.0	73.08	19	7	51.2	21.9	47			
Souter*	59.1	82.4	31.8	42.9	37.5	30.0	43.8	43.8	46.4	34.62	9	17	69.5	-34.9	33.7			
Ginsburg*	60.9	64.7	54.6	35.7	50.0	30.0	31.3	56.3	53.6	30.77	8	18	62.8	-32.0	51.2			
Stevens	47.8	58.8	40.9	35.7	50.0	25.0	50.0	43.8	60.7	26.92	7	19	50.6	-23.7	0			
Breyer*	47.8	70.6	31.8	35.7	43.8	25.0	43.8	56.3	50.0	19.23	5	21	44.6	-25.4	0.2			
Conservative	54.5	41.2	63.6	64.3	35.7	60.0	56.3	43.7	42.9	61.5	16	10	37.4	24.1	43.6			
Liberal	45.5	58.8	36.4	35.7	64.3	40.0	43.7	56.3	57.1	38.5	10	16	62.5	-24.0	56.4			



Chart 10  
Swing-Vote Analysis



— Conservative  
..... Liberal

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

Justice	Mean Voting Percentage		99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage		Did This Term Show a Statistically Significant Change in Voting Behavior?
	All Prior Terms (F)	This Term (X2)			This Term (X2)	Significant Change in Voting Behavior?	
Kennedy	75.9		+/- 8.4	11.31	73.08		no
O'Connor	65.7		+/- 8.4	11.36	84.62		yes
Rehnquist	64.2		+/- 8.3	11.19	76.92		yes
Scalia	61.3		+/- 10.0	13.43	73.08		yes
Stevens	45.3		+/- 9.0	12.10	26.92		yes
Breyer*	43.8		+/- 13.5	11.69	19.23		yes
Ginsburg*	42.8		+/- 12.4	11.80	30.77		no
Thomas*	55.1		+/- 14.4	15.86	84.62		yes
Souter*	46.4		+/- 13.7	15.97	34.62		no

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

Justice	Correlation (D) / R <sup>2</sup>									
	Kennedy	O'Connor	Rehnquist	Scalia	Stevens	Breyer*	Ginsburg*	Thomas*		
O'Connor										
Rehnquist										
Scalia			0.88/0.76							
Stevens			-0.74/0.50							
Breyer*		-0.83/0.61	-0.90/0.76	-0.97/0.93	0.83/0.61					
Ginsburg*			-0.82/0.61	-0.82/0.60		0.83/0.60				
Thomas*			0.89/0.76	0.88/0.74	-0.84/0.66	-0.91/0.78				
Souter*			-0.71/0.44	-0.83/0.64		0.85/0.65		-0.88/0.74		

## IV. Analysis

### Data Table 1: Civil Cases – State Government versus a Private Party.

The Court's decisions this Term involving state governments in civil suits indicate a conservative trend in favor of the state governments in "Majority," "Split," and "Unanimous" decisions.<sup>36</sup> Last year we noted a slight conservative sentiment apparent in the non-unanimous or "Split" decisions.<sup>37</sup> This sentiment appears to have increased considerably as the Court voted for the state government party 55.6% in "Majority" decisions, 58.3% in "Split" decisions, and 50% in "Unanimous" decisions compared to last Term's votes in favor of the government of 44.8%, 47.1%, and 41.7%, respectively.

Regarding the individual results, Chief Justice Rehnquist maintained his position as the Justice most often voting in favor of the state-party—a position the Chief Justice has held for the past four Terms. Justice Stevens likewise maintained the rank he has held repeatedly, the position of voting least often for the state government party. Interestingly, Justice Thomas, typically among the top two most conservative voters in the civil state government party category, fell in rank—tying for fourth with Scalia and Souter. As indicated by Mean Table 1, this Term's voting record demonstrated a statistically significant change in voting behavior for Justices Kennedy, Scalia, Stevens, and Thomas. But, while Justices Kennedy and Scalia both voted less often in favor of the state government, neither Justice moved significantly in rank. And, although Justice Stevens maintained his rank as most liberal, he voted significantly more often in favor of the state government party than he has in the past—voting more often in favor of the state government in only two other Terms the last 10 years.<sup>38</sup>

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36. Cases decided in favor of state governments: *Christensen v. Harris County*, 529 U.S. 576 (2000); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Hill v. Colorado*, 530 U.S. 703 (2000); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000); *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15 (2000); *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999) (missing 2). Cases decided against state governments: *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal.*, 528 U.S. 458 (2000); *Rice v. Cayetano*, 528 U.S. 495 (2000); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000).

37. See 1998 Study, *supra* note 1.

38. Stevens voted conservatively in 1996 and 1994.

Regression Table 1, setting forth the voting correlations between the individual Justices, provides a couple of notable voting correlations. First, Justices Ginsburg and Stevens have a very strong voting correlation and  $R^2$  statistic of 0.97/0.93, making the two the most likely to vote together when a state government is party in a civil case. Also with strong voting correlation are: Justices Breyer and Souter, and Justices O'Connor and Kennedy. Interestingly, the Chief Justice and Justice Breyer also have a relatively strong voting correlation of 0.90/0.76.

The statistical voting predictions for the 1999 Term were generally very accurate in the Civil/State Party category. For example, the Majority voted in favor of the state party in 50% of the decisions reached, while the 1999 prediction was 48.1%, resulting in a rather small error of 1.9 points. The predictions made for individual Justices were also quite accurate, with the exception of the predictions made for Justice Thomas and Justice Stevens.

#### **Data Table 2: Civil Cases - Federal Government versus a Private Party.**

The voting results this Term suggest slight liberal movement on the High Court in the Civil/Federal Party category. While percentages in "Unanimous" decision cases stayed the same as last Term, the Court's support of the federal government in civil cases decreased in both "Majority" and "Split" decisions.<sup>39</sup> Seven of the nine Justices voted less often for the federal government than they did last Term. However, the individual scores of all the Justices except Justice Thomas remained at or above 50%.

The most notable statistic among the individual Justices' voting records is that historically liberal Justice Breyer tied Justice Rehnquist for the most conservative voting spot. Both Justices were supportive of the federal government in 70% of the cases this Term.<sup>40</sup> Conversely, normally conservative Justice Thomas was the least supportive of the federal government, voting in favor of the

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39. Cases decided in favor of the federal government: *Baral v. United States*, 528 U.S. 431 (2000); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Public Lands Council v. Babbitt*, 529 U.S. 728 (2000); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1 (2000); *Drye v. United States*, 528 U.S. 49 (1999). Cases decided against the federal government: *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000); *Mobil Oil Exploration v. United States*, 530 U.S. 604 (2000); *Sims v. Apfel*, 530 U.S. 103 (2000); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000).

40. See *supra* Data Table 2.

government only 40% of the time.<sup>41</sup> With regard to statistically significant changes in voting behavior, Justice Kennedy was more liberal this Term than in the past, and Justice Souter was more conservative than usual.<sup>42</sup>

Regression Table 2 shows an interestingly strong correlation in voting behavior between Justice Thomas and Justice Ginsburg,<sup>43</sup> generally two ideologically opposed Justices. Justice Kennedy proved to be the most predictable Justice in this category of cases as his score of 50% was only 2 percentage points from his predicted score. Overall, predicted scores for the Justices were much closer to their actual scores this Term than last Term.

### **Data Table 3: Criminal Cases - State Government versus a Private Party.**

Data Table 3 exhibits an increase in the Court's support of the states in criminal cases.<sup>44</sup> The Court voted more often for the state in the 1999 Term in both "Majority" and "Unanimous" decisions than last Term, indicating a slight conservative trend. While the Court's support of state governments in "Split" decisions decreased by fifteen percentage points this Term, it still scored a rather conservative 62.5%. The existence of a slight conservative trend is further bolstered by the fact all of the Justices, except for Justice Souter, favored the state more often this Term than in the 1998 Term.<sup>45</sup> Additionally, with the exception of Justices Breyer, Ginsburg, and Stevens, the Justices' increased support of the states was statistically significant.<sup>46</sup> Data Table 3 also reveals that the Court is becoming increasingly polarized in Criminal/State Party cases; over thirty-seven points separated the "liberal" and "conservative" groups. The polarization in the category has been increasing since the 1996 Term.

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41. *Id.*

42. *Id.*

43. *See supra* Regression Table 2.

44. Cases decided in favor of the states: *Edwards v. Carpenter*, 529 U.S. 446 (2000); *Garner v. Jones*, 529 U.S. 244 (2000); *Illinois v. Wardlow*, 528 U.S. 119 (2000); *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152 (2000); *Miller v. French*, 530 U.S. 327 (2000); *New York v. Hill*, 528 U.S. 110 (2000); *Portoondo v. Agard*, 529 U.S. 61 (2000); *Ramdass v. Angelone*, 530 U.S. 156 (2000); *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *Slack v. McDaniel*, 529 U.S. 473 (2000); *Smith v. Robins*, 528 U.S. 259 (2000); *Weeks v. Angelone*, 528 U.S. 225 (2000); *Williams v. Taylor*, 529 U.S. 362 (2000). Cases decided against the states: *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Carmell v. Texas*, 529 U.S. 513 (2000); *Florida v. J.L.*, 529 U.S. 266 (2000); *Slack v. McDaniel*, 529 U.S. 473 (2000); *Williams v. Taylor*, 529 U.S. 362 (2000); *Flippo v. West Virginia*, 528 U.S. 11 (1999).

45. *See supra* Data Table 3.

46. *See supra* Mean Table 3.

The ordering of the Justices was fairly consistent within their respective ideological ranks. Chief Justice Rehnquist recorded the highest score in this category, finding for the states 87% of the time. By doing so, he dethroned Justice Thomas as the most conservative Justice in this category. Prior to this Term, Justice Thomas had recorded the highest score in this category every Term since 1992 when, not surprisingly, Chief Justice Rehnquist scored the highest. The Chief Justice was followed this Term by Justices Thomas and Scalia, who each voted for the states 82.6% of the time. On the liberal end of the spectrum, Justices Souter and Stevens tied with a score of 27.3%. This was a marked increase for Justice Stevens, who voted in favor of the states in only 9% of issues last Term.

With a few exceptions, this Term's predictions were relatively accurate. The predictions for six of the nine Justices were within ten points of their actual scores. However, Justices O'Connor and Kennedy favored the government 16.7 percentage points more often this Term than was predicted. Given the rather neutral nature of their past voting in this category, such a large error should come as no surprise. Indeed, their score of 78.3% was a personal high for both Justice O'Connor and Justice Kennedy. The prediction for "Majority" decisions was quite accurate, deviating only 0.4 points from the actual score.

#### **Data Table 4: Criminal Cases - Federal Government versus a Private Party.**

For the third time in three years, the Court's support for the federal government in criminal cases decreased in the 1999 Term.<sup>47</sup> Although the Justices' scores show only a slight liberal movement, this movement appears to be a real shift in voting behavior. It should be noted, however, that a "strict" reading of criminal statutes leads to a liberal outcome.<sup>48</sup> This could be the reason for the liberal

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47. Cases decided in favor of the federal government: *Carter v. United States*, 530 U.S. 255 (2000); *Fischer v. United States*, 529 U.S. 667 (2000); *Johnson v. United States*, 529 U.S. 694 (2000); *Ohler v. United States*, 529 U.S. 753 (2000); *United States v. Johnson*, 529 U.S. 53 (2000); *United States v. Martinez-Salazar*, 528 U.S. 304 (2000). Cases decided against the federal government: *Bond v. United States*, 529 U.S. 334 (2000); *Castillo v. United States*, 530 U.S. 120 (2000); *Dickerson v. United States*, 530 U.S. 428 (2000); *Jones v. United States*, 529 U.S. 848 (2000); *United States v. Hubble*, 530 U.S. 27 (2000).

48. *See, e.g.*, *Fischer v. United States*, 529 U.S. 667 (2000) (strict reading of 18 U.S.C. § 666(b) caused Justices Scalia and Thomas to find that the defendant had not received "benefits" within the meaning of the statute and had, therefore, done nothing to defraud a health care provider); *Johnson v. United States*, 529 U.S. 694 (2000) (strict reading of 18 U.S.C. § 3583(e)(3) caused Justice Scalia to find that the defendant had not violated

movement of the Court over the last few years. Close adherence to statutory text, generally speaking, is a conservative judicial stance.<sup>49</sup> Thus, the “liberal” movement on this Table could be explained as the result of ideologically conservative Justices reading statutory texts narrowly, thereby favoring the criminal defendants.<sup>50</sup>

The Court held for the federal government only 54.5% of the time. The Court has only recorded a lower score in “Majority” decisions once in the last ten Terms. Furthermore, the 50% score for the “Unanimous” category matches the all-time low score the Court received in the 1994 Term. In “Split” decision cases, the Court decided for the federal government in only five of the nine cases.<sup>51</sup>

Although every Justice, except Justice Scalia, showed a statistically significant change in voting behavior,<sup>52</sup> the normal conservative to liberal ordering of the Justices remained true to form.<sup>53</sup> The Court’s liberal trend is illuminated in the Justices’ individual voting scores. All but Justice Scalia voted less often for the federal government than last Term, and those scores were the lowest in four years for the individual Justices.<sup>54</sup> Justice Scalia’s score was his second lowest score in the same four-year period.<sup>55</sup>

As with last Term, the strongest correlation in voting behavior was between Justice Souter and Justice Ginsburg. This pair recorded a relatively high correlation and  $R^2$  score of 0.95/0.89.<sup>56</sup>

Statistically predicted voting patterns for the 1999 Term were much too conservative, both for the Court and for individual Justices. Justice Thomas displayed the most predictable voting behavior; his score of 54.6% was only two percentage points from his predicted score. Justice Ginsburg showed similarly predictable voting behavior with a deviation of only 2.6 points from her predicted score. Justice Stevens, who usually varies in this category, was the least predictable Justice with a prediction error of 28 points.

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conditions of his supervised release).

49. See text accompanying note 29.

50. See *supra* note 46.

51. See *supra* Data Table 4.

52. See *supra* Mean Table 4.

53. See *supra* Data Table 4.

54. *Id.*

55. *Id.*

56. See *supra* Regression Table 4.



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

Table 5 demonstrates a sharp decline in the Court's support of First Amendment claims in the 1999 Term.<sup>57</sup> Support for such claims fell in both "Majority" and "Split" decisions: from 100% last Term to 44.4% for "Majority" decisions and from 100% last Term to 50% this Term for "Split" decisions. However, it is difficult to conclude that this decrease in support of First Amendment claims indicates a trend, as only a couple of First Amendment cases were decided in each of the preceding two Terms.

The conservative/liberal ordering of the Justices in this category was very unusual this Term.<sup>58</sup> For example, Justices Kennedy, Thomas, and Scalia recorded the three most liberal scores, scoring 77.8%, 66.7%, and 56.6%, respectively. In contrast, Justices Breyer, Souter, and Ginsburg recorded the three most conservative scores, scoring 12.5%, 28.6%, and 33.3%, respectively. Further illustrating the strange ordering of this category, Justices Stevens and Rehnquist, two rather ideologically opposed Justices, were next to each other in the middle of the pack. Only the Chief Justice and Justices Stevens and Souter exhibited a statistically significant change in their voting behavior.<sup>59</sup>

The unusual ordering of the Justices in this category may result from many of the Justices voting in a manner opposite to their respective historical patterns (i.e., traditionally conservative Justices voting in favor of the claim and traditionally liberal Justices voting against the claim).<sup>60</sup> In many instances, the Justices did so in response to the underlying subject matter of the First Amendment claim. For example, the First Amendment issues in *Boy Scouts of America v. Dale*<sup>61</sup> and *Hill v. Colorado*<sup>62</sup> were homosexual and abortion rights,

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57. See *supra* Data Table 5. Cases decided in favor of the First Amendment claim: *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000); *Boy Scouts of Am. v. Dale*, 530 U.S. 640(2000); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000); *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000); *L.A. Police Dept. v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999). Cases decided against the First Amendment claim: *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Hill v. Colorado*, 530 U.S. 703 (2000); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000).

58. See *supra* Data Table 5.

59. See *supra* Mean Table 5.

60. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000); *Hill v. Colorado*, 530 U.S. 703 (2000); *Nixon v. Shrink Mo.*, 528 U.S. 377 (2000).

61. 530 U.S. 640 (2000).

62. 530 U.S. 703 (2000).

respectively. In both cases, a vote in favor of the First Amendment claim was, in essence, a vote against these claimed rights.<sup>63</sup> Thus, Justices Stevens, Souter, Ginsburg, Breyer (typical supporters of homosexual and abortion rights) voted against the claims in both cases, while the Chief Justice and Justices Scalia, Thomas, and Kennedy voted for the claim. In short, the First Amendment category in the 1999 Term was dominated by the Justices' ideological attitudes toward the subject matter of the underlying claim.

Ideology also pervaded the voting correlation among the Justices. For example, the voting of ideologically similar Justices Stevens and Ginsburg exhibited a relatively strong correlation of 0.97/0.93, while the voting of Justices Thomas and Scalia exhibited the same high degree of correlation, 0.97/0.93.<sup>64</sup>

In summary, the lack of cases involving First Amendment claims in the past few Terms, coupled with the apparent impact of subject matter ideology on First Amendment claims this Term, make it difficult to gauge the Justices' attitude toward First Amendment claims and, thereby, draw any conclusions regarding trends in the voting behavior of the Court.

#### **Data Table 6: Equal Protection Claims.**

During the 1999 Term, the Supreme Court decided only one case involving an equal protection issue.<sup>65</sup> Consequently, it is difficult, if not impossible, to identify trends or positions with any certainty. In the past three Terms, the Court has addressed a total of only four equal protection issues—one in 1998 and two in 1997. In both the 1997 and 1998 Term studies, we analyzed the limited data in conjunction with the prior years' results with the hope that combining the decisions would provide a better indicator of any ideological trends in this category of decisions.<sup>66</sup> Adding this Term's single

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63. For example, in *Boy Scouts of America*, the Court was confronted with the issue of whether requiring the Boy Scouts to admit Respondent, an openly homosexual individual, into a troop as an assistant scoutmaster violated its First Amendment right of expressive association. Consequently, a vote in favor of the claim essentially curtailed homosexual rights. Likewise, in *Hill*, petitioners argued that a Colorado statute limiting the ability of abortion protestors to approach and speak to people entering health care facilities where abortions were performed infringed on their First Amendment right to freedom of speech. Thus, a vote in favor of the First Amendment claim was essentially a vote to deter abortion.

64. See *supra* Regression Table 5.

65. *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000).

66. See 1998 Study at 483, *supra* note 1.

decision in support of the equal protection claim with the single decision against the claim in the 1998 Term, and the two decisions in 1997—the majority finding in favor of the claim in one and against the claim in the other—results in the majority voting in support of the equal protection claim 50% of the time. This would support the conclusion asserted last year that “the Court is maintaining its generally conservative disposition.”<sup>67</sup>

Because the Court reached a unanimous decision on the single equal protection issue addressed this Term, statistics regarding the individual Justices, such as rank, significant change in voting behavior, and correlation between the Justices, are inconclusive. Additionally, Data Table 6 indicates that the prediction for “Majority” decisions this Term was 62.7 points in error, and the predictions for the individual Justices generally resulted in high percentage points of error as well. These large errors are a result of the lack of equal protection cases decided in the previous two Terms and the single decision addressed this Term.

#### **Data Table 7: Statutory Civil Rights Claims.**

The Court’s decisions in recent Terms have exhibited a liberal trend, as the Court has increased its support of statutory civil rights in each of the past four Terms.<sup>68</sup> However, Data Table 7 and Chart 7 indicate that this trend ended this Term since the Court decided only 25% of all issues in favor of the civil rights claim.<sup>69</sup> This is the least support statutory civil rights have received in the fourteen Terms covered by this Study. The conservative turnabout is also very apparent in the “Split” decision where ideology may be particularly relevant. Here, the Court found against the claim 100% of the time. Additionally, the Court unanimously voted against statutory civil rights in 50% of all “Unanimous” decisions. Therefore, “Majority,” “Split,” and “Unanimous” decisions all indicate a decrease in support of statutory civil rights claims and thus, a conservative trend for the first time in four Terms.

The Statutory Civil Rights Claims category clearly reflects the typical voting nature of the individual Justices. The Court appears

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67. *Id.*

68. *See id.* at 484; 1997 Study at 93, *supra* note 1; 1996 Study at 591, *supra* note 1.

69. Cases decided in favor of the statutory civil rights claim: *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000). Cases decided against the statutory civil rights claim: *Texas v. Lesage*, 528 U.S. 18 (1999); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

split, with Justices Stevens, Breyer, Ginsburg, and Souter all voting liberally in support of the claim on 75% of the issues and Chief Justice Rehnquist, with Justices Kennedy, O'Connor, Scalia, and Thomas voting conservatively, supporting the claim in only 25% of the cases decided this Term. Because this voting breakdown results in a four-way tie for most liberal and a five-way tie for most conservative, the individual ranks of the Justices are not otherwise noteworthy.

However, changes in voting behavior of the individual Justices reflected on Mean Table 7 do warrant additional comment. The 1999 Term showed a statistically significant change in voting behavior for Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Breyer, with Justices Kennedy, O'Connor, Scalia, and Chief Justice Rehnquist voting more conservatively than in the past and Justice Breyer voting more liberally. This voting trend, as with Table 10, shows the increasing polarization of the Court. Among the Justices, the only voting correlation worth noting is that between Justice Souter and Justice Ginsburg of 0.94/0.85.

The Court's unexpected conservative leanings this Term resulted in predictions that were far too liberal across the board, with the exceptions of those predictions for characteristically conservative Chief Justice Rehnquist and Justice Thomas. The greatest error—36.5 points—is found with the prediction for “Majority” decisions. As mentioned previously, the Majority only supported the claim 25% of the time, remarkably less often than the predicted 61.5%. Additionally, our prediction for Justice O'Connor resulted in a high error of 29 points, with Justice O'Connor voting again less often in support of the claim than predicted.

#### **Data Table 8: Federal Jurisdiction Claims.**

Data Table 8 lists the Justices from the most liberal to the most conservative based on their voting in the Jurisdiction category.<sup>70</sup> Data Table 8 shows the Court's increased support for federal jurisdiction.<sup>71</sup> For the first time in a decade, the Court showed increased support of federal jurisdiction over the previous Term in all three categories of

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70. *See supra* Data Table 8.

71. *See id.* Cases decided in favor of exercising jurisdiction: *Adarand v. Slater*, 528 U.S. 216 (2000); *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000); *Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc.*, 528 U.S. 167 (2000); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Sims v. Apfel*, 530 U.S. 103 (2000). Case decided against exercising jurisdiction: *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1 (2000).

decisions – “Majority,” “Spilt,” and “Unanimous.” Indeed, all three categories experienced a large shift in liberal voting. All nine Justices also voted more often for federal jurisdiction this Term than last Term.<sup>72</sup> Nevertheless, as each Justice voted for federal jurisdiction in at least two thirds of the cases, it may be difficult to glean much from this Term’s jurisdiction statistics. Perhaps these statistics do not reflect the ideology of the Court as much as the nature of the jurisdiction cases before the Court. However, all of the Justices, except the traditionally liberal Justice Stevens, show a statistically significant change in voting behavior.<sup>73</sup> Thus, this chart tends to indicate that the Court, as a whole, is voting more liberally in this category, and that this trend in voting behavior constitutes real movement in favor of federal jurisdiction.

Regression Table 8 shows that the Justices were very much in favor of federal jurisdiction this Term. Several pairs of Justices showed an unusually high correlation and  $R^2$  relationship. Historically liberal Justices Souter and Ginsburg’s 0.98/0.96 score was notably high. A number of other pairs recorded a strong correlation of 0.95/0.89; these pairs are Justices Scalia and O’Connor, Justices Ginsburg and Kennedy, and Justices Souter and Kennedy. The increased number of correlated pairs in this category may be due to the nature of the jurisdiction cases this Term.

Other than the Equal Protection category, where there was only one case this Term, the percentage of error for voting predictions was the highest for federal jurisdiction cases. The voting predictions for each individual Justice, and consequently for the Court as a whole, were too conservative.<sup>74</sup> Data Table 8 indicates that the Study’s 1999 prediction for “Majority” decisions was 30.5 points in error.<sup>75</sup> The average percentage of error for each individual Justice was 27.1 points.

#### **Data Table 9: Federalism Cases.**

Data Table 9 shows a slight conservative trend in the Court’s treatment of federalism issues.<sup>76</sup> For example, in “Majority”

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72. *See id.*

73. *See supra* Mean Table 8.

74. *See supra* Data Table 8

75. *See id.*

76. *See supra* Data Table 9. Cases decided in favor of the state: *Christensen v. Harris County*, 529 U.S. 576 (2000); *Jones v. United States*, 529 U.S. 848 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Smith v. Robbins*, 528 U.S. 259 (2000); *United States v.*

decisions, the Court increased its support of states' rights by 10.7 percentage points over the 1998 Term. Both "Split" and "Unanimous" decisions in favor of the state also increased this Term. Yet, despite this apparent trend, the Court nonetheless voted for the state in less than half of the issues with which it was presented.

Although Justice Thomas decreased his support of states' rights this Term, he still recorded the most conservative score at 60%. Chief Justice Rehnquist exhibited a statistically significant change in voting behavior by decreasing his support for the states by 13.3 points to a score of 46.7%.<sup>77</sup> Such a decrease in support dropped him in conservative/liberal rank to fourth on the list. On the other end of the spectrum, Justice Breyer recorded the most liberal score in this category, voting for the state only 13.3% of the time. This was his lowest score since becoming a member of the Court. He was followed by Justice Souter, who also decreased his support of states' rights by recording a score of 20%. Justices Souter and Breyer's move to the bottom of list resulted in a statistically significant change in the voting behavior of each Justice.<sup>78</sup>

The voting behavior of many of the Justices was highly correlated in this category.<sup>79</sup> For example, the correlation between the Chief Justice and Justice O'Connor was 0.92/0.83. The Chief Justice shared a rather high correlation with Justices Scalia and Breyer of 0.90/0.78 and 0.90/0.77, respectively. The highest voting correlation in federalism cases existed between Justices Breyer and Souter, 0.95/0.88.

With the exception of Justices O'Connor, Ginsburg, and Stevens, the predictions for the 1999 Term were relatively accurate in this category.<sup>80</sup> For example, Justice Kennedy recorded a score of 53.5%, only 0.2 points less than his predicted score. Similarly, the Chief Justice's score was within 1.4 points of the prediction. However, a few predictions were rather inaccurate. Perhaps most notable was the

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Morrison, 529 U.S. 598 (2000); *Vt. Agency of Natural Res. v. United States*, 529 U.S. 765 (2000); *Williams v. Taylor*, 529 U.S. 362 (2000). Cases decided in favor of the federal government: *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344 (2000); *Reno v. Condon*, 528 U.S. 141 (2000); *United States v. Locke*, 529 U.S. 89 (2000); *Drye v. United States*, 528 U.S. 49 (1999).

77. *See supra* Mean Table 9.

78. *See id.*

79. *See supra* Regression Table 9.

80. *See supra* Mean Table 9.

18.7 point error in predicting Justice Stevens' score. This large error resulted from Justice Stevens' surprising 18.7 point increase in support of states' rights over last Term. Although Justice Ginsburg was predicted to dramatically decrease her support of states in federalism cases, she actually increased her support of states' rights, resulting in the largest error in this category of 24.8 points.

#### **Data Table 10: Swing Vote Cases.**

Data Table 10 and Chart 10 contain the voting scores for the cases this Term that were decided by a margin of one vote.<sup>81</sup> Because of the narrow voting margin, swing-vote cases are perhaps the most reliable indicator of the Court's position on the conservative/liberal spectrum. Justices O'Connor and Thomas tied for the Justices that voted most often with the majority by recording scores of 84.62% each. This is the second consecutive Term that Justice Kennedy has not occupied this position—a position he held for the preceding five Terms. In contrast, Justice Breyer was the least likely to follow the majority, voting with the majority on only 19.23% of issues this Term. Justice Breyer exhibited a statistically significant change in voting behavior to reach this low score, his lowest score since joining the Court in 1994. Overall, the Court reached a conservative result in 61.5% of swing-vote issues.

Predictions for this Term were generally inaccurate.<sup>82</sup> The prediction for Justice Thomas was the only one within less than 15 points of the actual score. Justices Souter and Ginsburg voted much less often with the majority than was predicted, resulting in an error of over 30 points for both Justices.

Perhaps the most dramatic result revealed by Data Table 10 is the increasing polarization of the Court. Justices O'Connor, Thomas,

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81. Swing-vote cases reaching a conservative outcome: *Carter v. United States*, 530 U.S. 255 (2000); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Illinois v. Wardlow*, 528 U.S. 119 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Ohler v. United States*, 529 U.S. 753 (2000); *Ramdass v. Angelone*, 530 U.S. 156 (2000); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Shalala v. Illinois*, 529 U.S. 1 (2000); *Smith v. Robbins*, 528 U.S. 259 (2000); *United States v. Morrison*, 529 U.S. 598 (2000); *Weeks v. Angelone*, 528 U.S. 225 (2000); *Williams v. Taylor*, 529 U.S. 362 (2000). Swing-vote cases reaching a liberal outcome: *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Carmell v. Texas*, 529 U.S. 513 (2000); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *Sims v. Apfel*, 530 U.S. 103 (2000); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000); *Williams v. Taylor*, 529 U.S. 362 (2000).

82. *See supra* Data Table 10.

Rehnquist, Kennedy, and Scalia all voted more often with the majority this Term than in the 1998 Term. On the other hand, Justices Souter, Ginsburg, Stevens, and Breyer all voted less often with the majority this Term. Consequently, a pronounced gap of over thirty-eight points separates the “conservative” and “liberal” groups. These results, coupled with the Court’s 18.6 point increase in the number of conservative outcomes on swing-vote issues this Term, indicate a conservative trend in controversial cases. The nature of the Justices appointed by the new President—conservative or liberal—could either increase or reverse this conservative trend in close, ideologically charged cases. Therefore, the selection of George W. Bush as President of the United States rather than former Vice President Gore could have a profound effect on the future voting behavior of the Court.<sup>83</sup>

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83. Interestingly, the Court itself decided the outcome of an election that could have significant impact on the future voting trends of the Court. *See Bush v. Gore*, 531 U.S. 98 (2000).

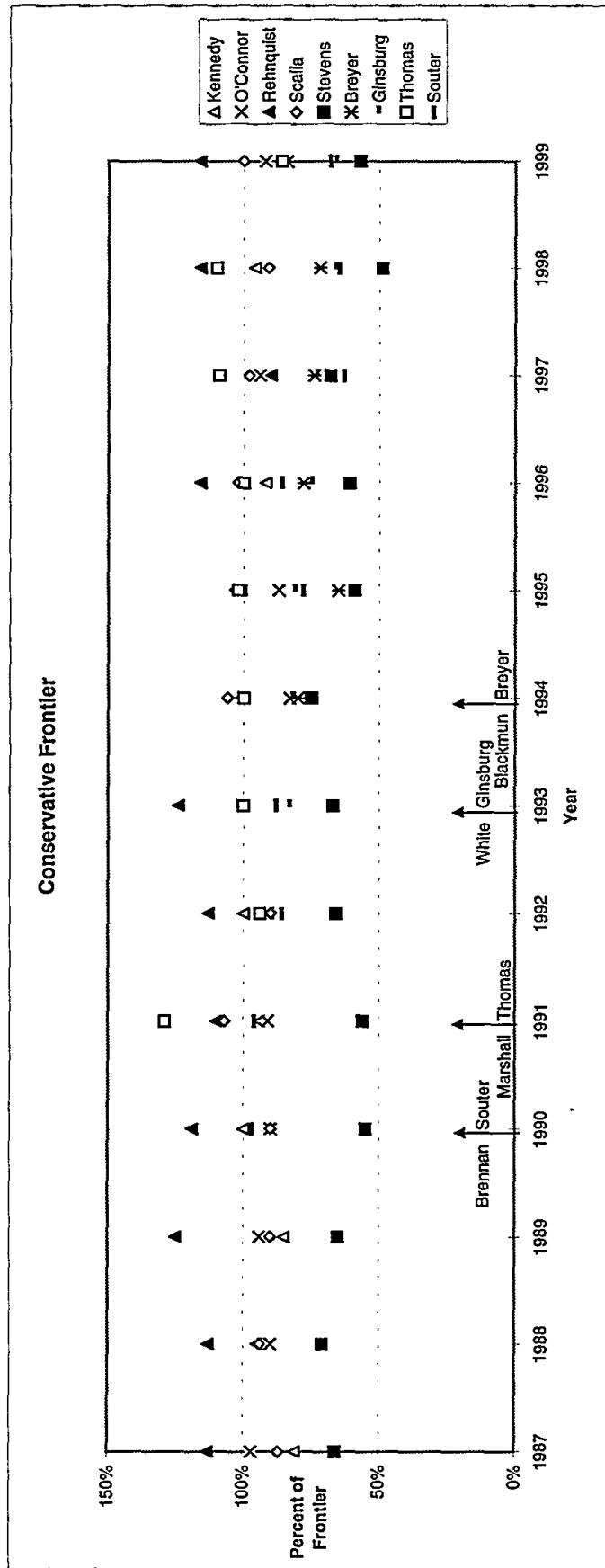


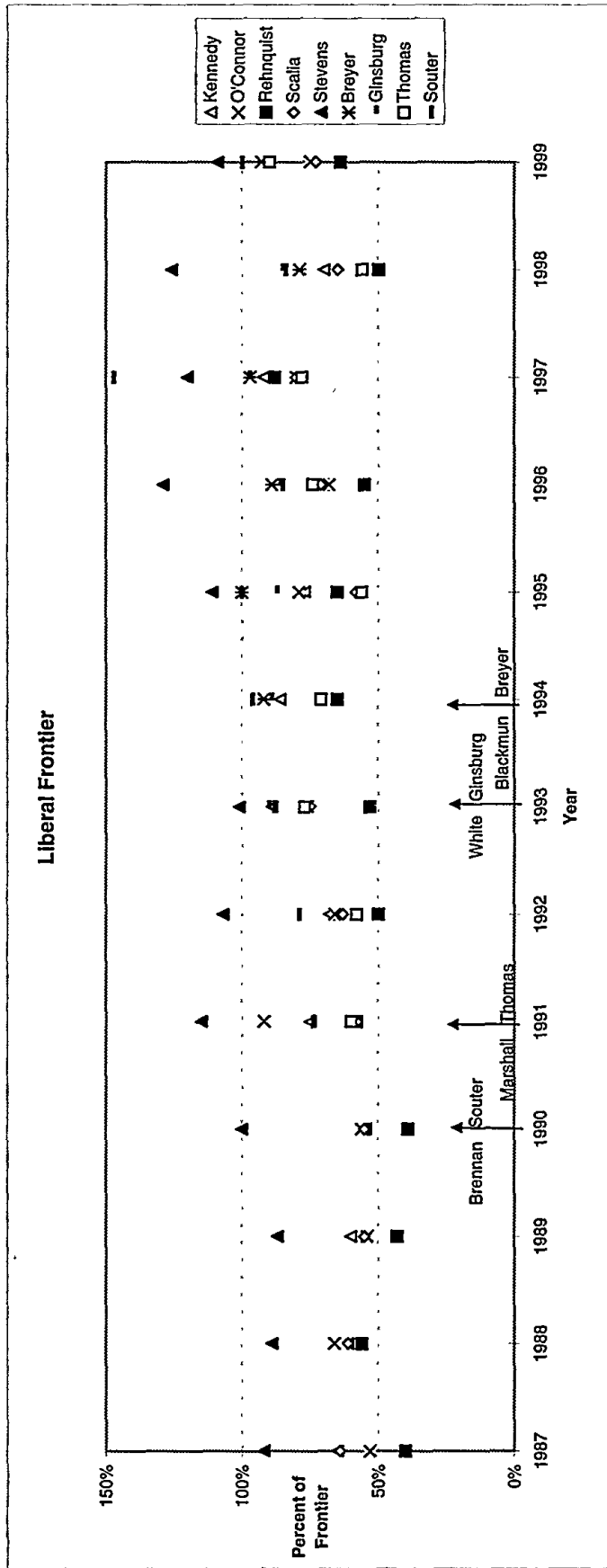
FRONTIER ANALYSIS TABLE I										
"CONSERVATIVE FRONTIER" --CONSTRAINED										
JUSTICE	PERCENT OF FRONTIER	PERCENT SUPER-EFF.	CATEGORY WEIGHTS							
			CIVIL/ STATE	CIVIL/ FEDERAL	CRIM./ STATE	CRIM./ FEDERAL	1ST AM.	EQUAL PROTECT	STAT. CIV. RT.	JURIS. FEDISM
Rehnquist	100%	116%	30%	30%	6%	6%	30%	6%		
Scalia	100%			100%						
O'Connor	92%		14%	14%	14%	14%	14%	14%	14%	14%
Thomas	86%			100%						
Kennedy	86%			100%						
Breyer	84%		33%				33%			
Souter	68%		33%				33%			
Ginsburg	66%		20%	20%	20%	20%	20%	20%	20%	
Stevens	64%		33%				33%			

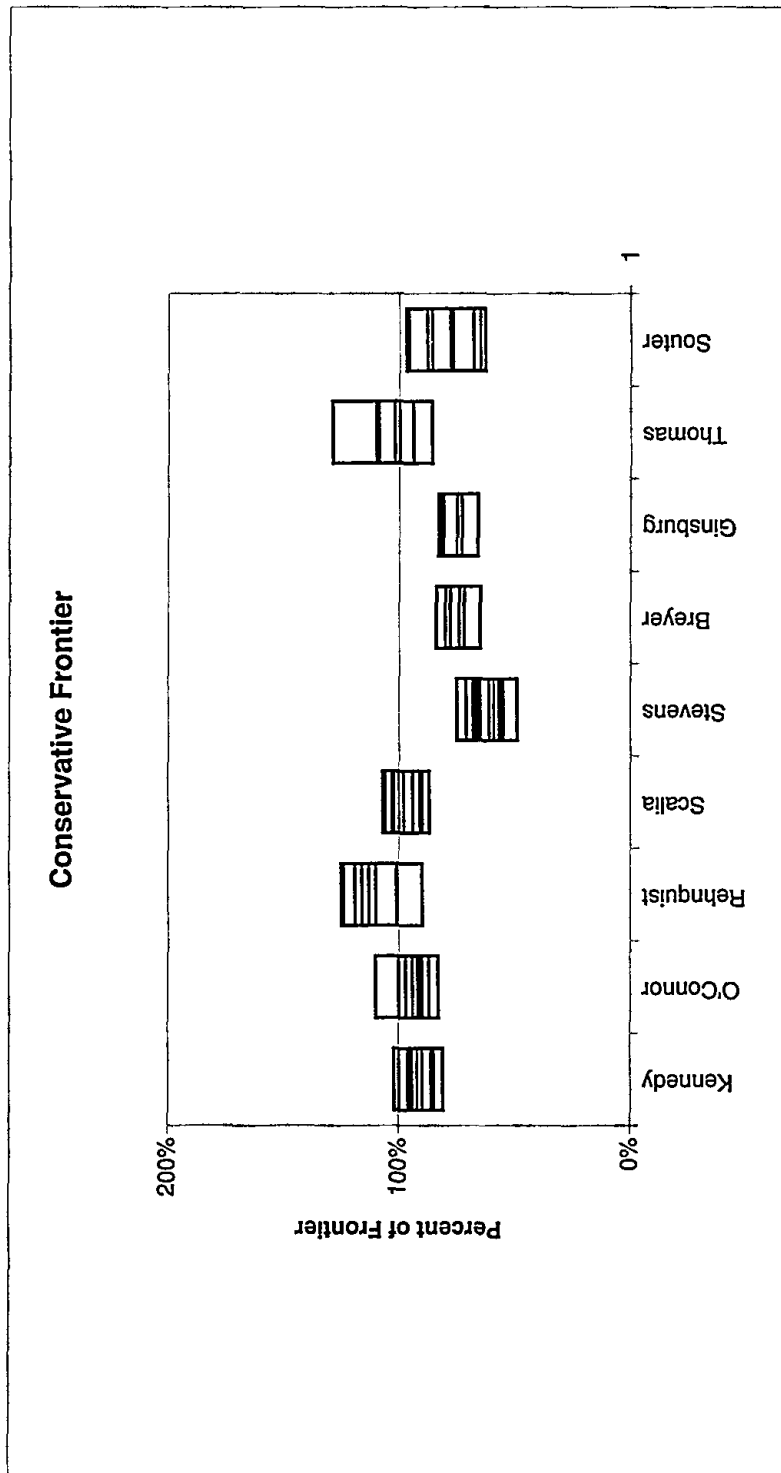
FRONTIER ANALYSIS TABLE 2															
"LIBERAL FRONTIER"--CONSTRAINED															
JUSTICE	PERCENT OF FRONTIER	PERCENT SUPER- EFF.	CATEGORY WEIGHTS												
			CIVIL/ STATE	CIVIL/ FEDERAL	CRIM./ STATE	CRIM./ FEDERAL	1ST AM.	EQUAL PROTECT	STAT. CIV. RT.	JURIS.	FEDISM				
Stevens	100%	109%	50%		50%										
Ginsburg	100%			100%		100%									
Souter	100%														
Breyer	93%			20%		20%		20%		20%		20%			20%
Thomas	90%			33%		33%									
Kennedy	90%			50%				50%							
O'Connor	75%			33%		33%		33%							
Scalia	73%			33%		33%		33%							
Rehnquist	64%			17%				17%		17%		17%		17%	17%

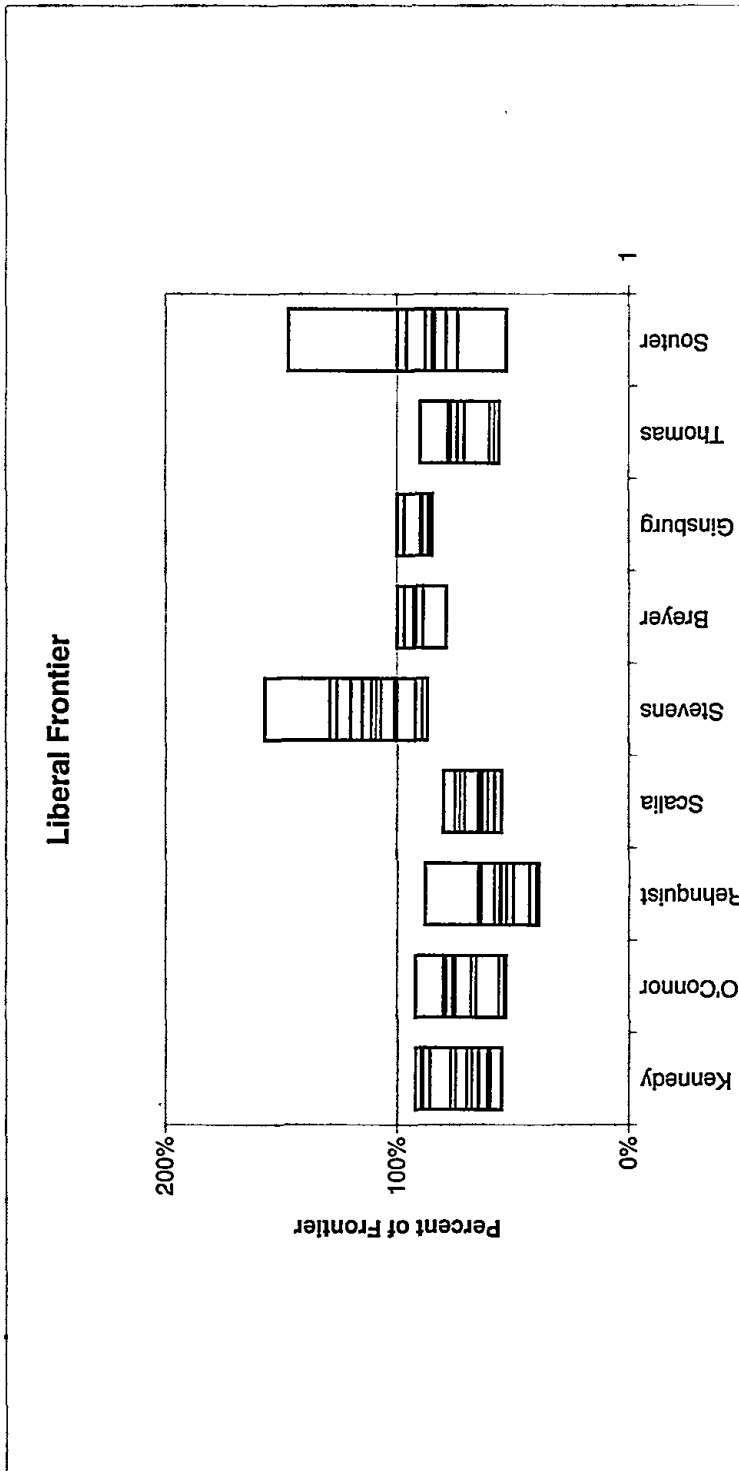
FRONTIER ANALYSIS TABLE 3														
CONSERVATIVE FRONTIER"--UNCONSTRAINED														
JUSTICE	PERCENT OF FRONTIER	PERCENT SUPER-EFF.	CATEGORY WEIGHTS											
			CIVIL/ STATE	CIVIL/ FEDERAL	CRIM./ STATE	CRIM./ FEDERAL	1ST AM.	EQUAL PROTECT	STAT. CIV. Rt.	JURIS. FED'ISM				
Breyer	100%	127%	72%					78%		22%				
Rehnquist	100%	126%		5%				13%		23%				0%
Thomas	100%	115%						62%						87%
O'Connor	100%													38%
Kennedy	100%			23%							100%			
Scalia	100%						100%							
Ginsburg	91%							62%						38%
Souter	88%		60%					40%						
Stevens	83%							62%						38%













## 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 better indicators than others of the Court's collective and individual predilections.

Some categories, although tending to divide the Court into liberal/conservative blocs, may "change polarity" depending on the specific issues presented. For example, during the 1996 Term, our First Amendment tally placed Justices Scalia and Thomas at the top—a liberal position under this Study's definitions, and a position not commonly occupied by these particular Justices. Conversely, Justice Breyer held the bottom spot during that Term. These unusual results seemed to result from other ideological issues implicated in the decisions.<sup>84</sup> Other problems are also encountered. For example, a small sample within a given category results in highly volatile score movements from Term to Term because a single case may account for many percentage points. This point is dramatically illustrated this Term in the Equal Protection category, with only one case touching on the issue.<sup>85</sup> Because only one equal protection issue was decided, and was decided unanimously for the claim, each Justice scored 100% in the category<sup>86</sup> – an unprecedented result.

In order to determine which categories best differentiate between the more liberal and more conservative Justices, we have applied factor analysis.<sup>87</sup> By applying this method, we have determined that a primary factor may be extracted from the Study's categories that accounts for over 25% of the variance revealed by the data on Tables 1 through 9.<sup>88</sup> We interpret this factor as liberal/conservative bias because that is what this Study purports to measure. The categories currently load onto this primary factor as follows:

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84. See 1996 Study at 90-92, *supra* note 1.

85. See *supra* Data Table 6.

86. See *supra* Data Table 6.

87. For more information regarding factor analysis, see Appendix B.

88. We employed a QMAX rotation to achieve this result. See *infra* Appendix B, Section E.

<b>Category</b>	<b>Factor 1</b>
Criminal/Federal Party	0.726
Civil/State Party	0.701
Civil/Federal Party	0.648
Criminal/State Party	0.622
First Amendment	0.610
Statutory Civil Rights	0.281
Federalism	0.120
Equal Protection	-0.034
Jurisdiction	-0.700
Variance	2.296
% Variance	0.255

According to this ranking, the “Criminal: Federal versus Private Party” category appears to be our best differentiator of liberal/conservative leanings, while “Jurisdiction” is our poorest. A look at the data seems to confirm this result.

Jurisdiction cases have become increasingly rare (only six cases this Term). Equal protection claims are also rare and produce volatile results.<sup>89</sup>

Interestingly, Civil/Federal Party cases have become steadily better indicators over the course of this Study. These cases tend to switch poles as executive administrations change. Liberal administrations will bring different types of cases before the Court than will conservative administrations and will garner the support of different Justices. For example, Chief Justice Rehnquist’s average score was 74% under Republican administrations, but has fallen to 61% since President Clinton took office. On the other hand, Justice Stevens averaged 48% under the Republicans and 59% under President Clinton.<sup>90</sup> This category’s increasing accuracy as an indicator each Term may stem from the fact that an increasing majority of the Terms included in this Study (eight out of twelve now) have transpired during Democratic administrations.

First Amendment cases also tend toward pole swapping. For example, if the 1996 Term’s free speech issues had concerned flag burning rather than abortion clinic demonstrations and gay rights, the scores might have been nearly reversed.<sup>91</sup>

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89. See *supra* Chart 6.

90. See *id.*; see also discussion of Table 2.

91. See 1996 Study, note 1 at 91, *supra* note 1. Note, however, that because of the

In summary, category analysis suggests that the most reliable indicator of actual ideology is the data collected on Table 4 (Criminal/Federal Party), with Tables 1 (Civil/State Party), 2 (Civil/Federal Party), 3 (Criminal/State Party), and 5 (First Amendment) providing the next most reliable data. Tables 7 (Statutory Civil Rights), 9 (Federalism), 6 (Equal Protection) and 8 (Jurisdiction) provide the least reliable information.

## 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 questions 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.<sup>92</sup>

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. Moreover, by adjusting the relative weights allocated to each category, the frontier can be adjusted to reflect each category's effectiveness as determined by factor analysis.

We present liberal and conservative frontier data for the Court in Frontier Analysis Tables 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 described above.<sup>93</sup> In other words, each Justice is allowed to "choose" the weights that produce the highest frontier score for him or her, subject to the limitation that Statutory Civil Rights cannot receive more weight than Criminal/State, Civil/State cannot receive more weight than Statutory Civil Rights, and so forth. Tables 3 and 4 apply no weighting constraints at all, allowing each Justice to "choose" those

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First Amendment category's small sampling for the last two years, (only three cases for the 1997 Term and 1998 Term combined), it has not been as indicative of ideological positions as it has in the past.

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

93. See *supra* note 20 and accompanying text.

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 of less than 100% indicate that the most conservative/liberal score the Justice could obtain with optimal weighting places him or her the indicated percentage of the way toward the frontier. In some cases, an optimal combination of weights may even place a Justice beyond the frontier. This condition is known as “superefficiency” and is noted in the charts when present.

Frontier Charts 1 and 2 show the constrained scores of each Justice over the course of this Study in graphical form. Near the bottom of each chart is an indication of new Justices replacing outgoing Justices on the Court. Although former Justices’ scores are not indicated, they contributed to frontier determination 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 Justices’ relative positions and score ranges overall. They do not, however, show any trend information.

The Charts reveal several interesting trends. Frontier Chart 1 shows Justice Thomas making a superefficient conservative “splash” during his first Term on the Court, then settling in around the frontier thereafter—until this Term where he finished in the middle of the pack. Frontier Chart 2 continues to show clear and growing domination of the liberal frontier by Justice Stevens.<sup>94</sup>

Frontier Chart 3 shows 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 has demonstrated conservative super-efficiency in each Term other than 1997. Frontier Chart 4 clearly displays Justice Stevens’ super-efficient liberal tendencies. In fact, he so dominates the liberal frontier that only three other Justices, Breyer, Ginsburg and Souter, have managed to touch the frontier. Justice Ginsburg just managed to reach the liberal frontier for the first time this Term. Previously she was alone in reaching neither the liberal nor the conservative frontiers during her tenure on the Court.

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94. See *supra* Frontier Analysis, Table 2. This superefficiency is due in large part to Justice Souter’s lone vote in favor of the only First Amendment issue decided by the Court this Term.

## VII. Conclusion

The voting in the 1999 Term generally exhibits a reversal of the liberal trend of the past few Terms. Supporting this conclusion is the conservative movement in six of the Study's ten categories, with two of the remaining four categories showing only trivial liberal movement. Furthermore, the results in the Swing Vote category (perhaps the Study's most reliable indicator of the Court's posture) reveal that, in close cases, the Court is inclined to vote for a conservative outcome. This result is contrary to the past several Terms, when swing votes have usually been liberal. The Swing Vote category, as well as the Criminal/State Party category, also reveals increasing polarization in the Court. Such polarization, coupled with this Term's conservative trend, indicates that the Court is becoming more divided, with the balance of power favoring conservative outcomes.

## APPENDIX A

### 1. The Universe of Cases

The only cases included in the database are those 1999 Term cases decided by full opinion. Decisions on motions have been excluded even if accompanied by an opinion. Cases handled by summary disposition are included only if they are accompanied by a full opinion of the Court, but 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 curium 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. Although habeas corpus is a civil proceeding,<sup>95</sup> we classify habeas corpus actions as criminal because they inevitably involve review of criminal actions. 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 1999 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 government attorneys represent that official, 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

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95. James Wm. Moore et al., 1-4 Moore's Federal Practice §4.40 (3d ed. 2001).

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. § 1983 are included if the substantive right asserted is based on a federal statute, or if the issue involves the application of 42 U.S.C. § 1983 to the case at hand. However, 42 U.S.C. § 1983 actions are excluded if the substantive right asserted is based on the United States Constitution and the issue relates to that constitutional right. The purpose of this exclusion is to preserve 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 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 also includes five-four decisions and four-three decisions, if any, as well as five-three and four-two decisions that reverse a lower court decision. Affirmances by a vote of five-three or four-two are not included because a shift of one vote from the majority to the minority position would still result in affirmance by a tie vote. A case is included more than once in the Table if it raises two or more distinct issues affecting the disposition of the case and the issues are resolved by different voting alignments.



## APPENDIX B

### I. 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. We analyze these characteristics both for the Court as a whole and for individual Justices.<sup>96</sup> 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.

#### B. Predictive Modeling

Data in this project were fitted to an Auto Regressive Integrated Moving Average (ARIMA) forecasting model.<sup>97</sup> 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 modeling is most easily explained by starting in the middle of the acronym:

##### 1. Integrated:

This 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 only one differencing operation.

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96. Our ability to analyze newer Justices' voting patterns may be restricted or precluded in some instances due to insufficient data.

97. ARIMA computer modeling was accomplished using MINITAB® statistical software with  $p = 1$ ,  $d = 1$ , and  $q = 1$ . For more information regarding the ARIMA ( $p$ ,  $d$ ,  $q$ ) model, see Peter Kennedy, *A Guide to Econometrics* 248-49 (1992).

## 2. Auto-Regression:

Once the series has been made stationary, an autoregressive parameter may be determined.<sup>98</sup> 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.<sup>99</sup>

## 3. 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  $X_{t-1}$ .<sup>100</sup> 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.

## 4. 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 score for the following Term.

98. Many statistical models employ more than one autoregressive parameter due to various properties of the data series. Our data series produces the most accurate forecasts with single-parameter (first order) AR and MA models.

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

100. Although this operation may not seem as intuitive as the autoregression operation, it may help to think of the error terms as "shocks" that initially set the process in motion and continue to keep it in motion thereafter." JOHN C. HOFF, A PRACTICAL GUIDE TO BOX-JENKINS FORECASTING 50 (1983).

### C. Mean Testing

We use a “student’s t test”<sup>101</sup> 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.<sup>102</sup> We hypothesize that  $X_1$  is also the true mean of the population  $\mu$ , 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  $\mu$  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  $\mu$  from its previous value on the real number line. Therefore, the two samples are not statistically equivalent.

We then set out to prove the alternative hypothesis, within a certain confidence interval,<sup>103</sup> by rejecting the null hypothesis.<sup>104</sup> This is accomplished by calculating the following statistic:

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

The result of this equation (t) is compared to the entry on a t-distribution table corresponding to the confidence interval desired ( $\alpha$ ) and the appropriate number of degrees of freedom (n-k).<sup>105</sup> If the absolute value of t is greater than the table entry,  $H_o$  is rejected and we say that the Justice has shown a statistically significant change in voting behavior this Term.

### D. Correlation

Relationships between two Justices’ voting records may be mapped over a two-dimensional Cartesian plane as in Figures 1 and 2.

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

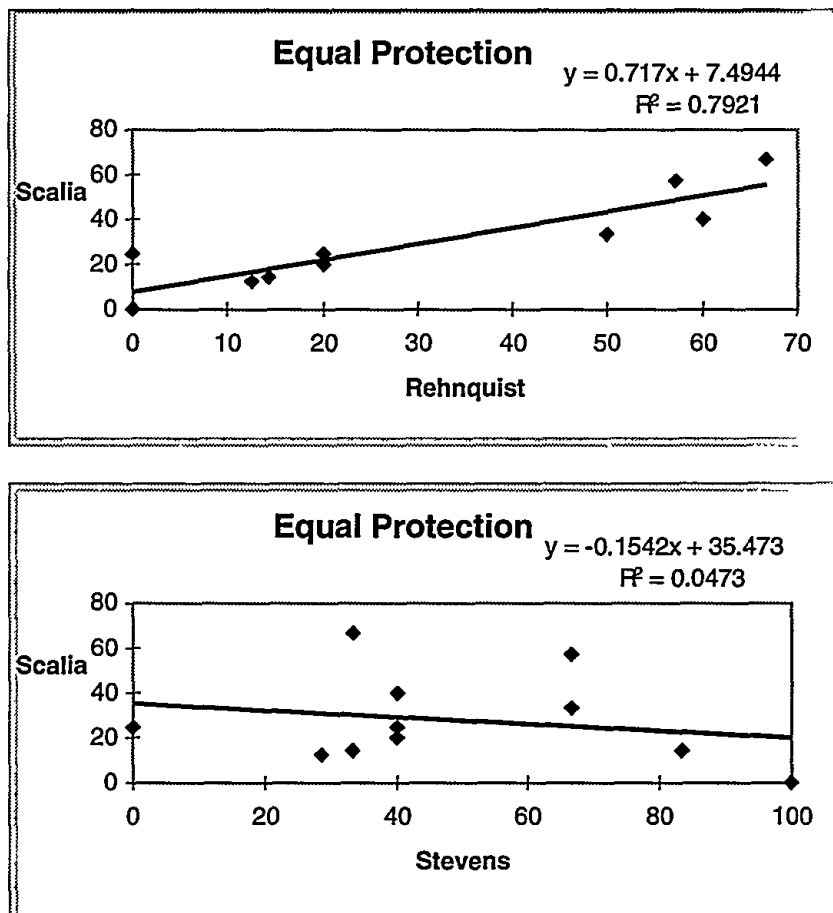
102. This approach introduces potential bias problems due to non-random sampling, small samples, and dissimilar sample standard deviations. Nevertheless, we use the test to impose some measure of discipline in analyzing the available data.

103. We have selected a confidence interval of 95%. Because this is a two-tailed test,  $\alpha = .025$ .

104. 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 99.

105.  $k$  = the number of parameters being tested; here,  $\mu$  is the only hypothesized parameter, so  $k = 1$ .

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 Chief Justice 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.<sup>106</sup> Notice that Justices, such as Justice Breyer, for whom we have few data points, are especially likely to show high Pearson coefficients, but low  $R^2$  statistics. The latter is a more reliable measure of the actual level of correlation.



The correlation measured in this case is in the Term-to-Term

106. 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.

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 from Minitab, Inc. The factor loadings presented were obtained by 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 provide reasonably simple explanations of this complex process.<sup>107</sup>

#### *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:

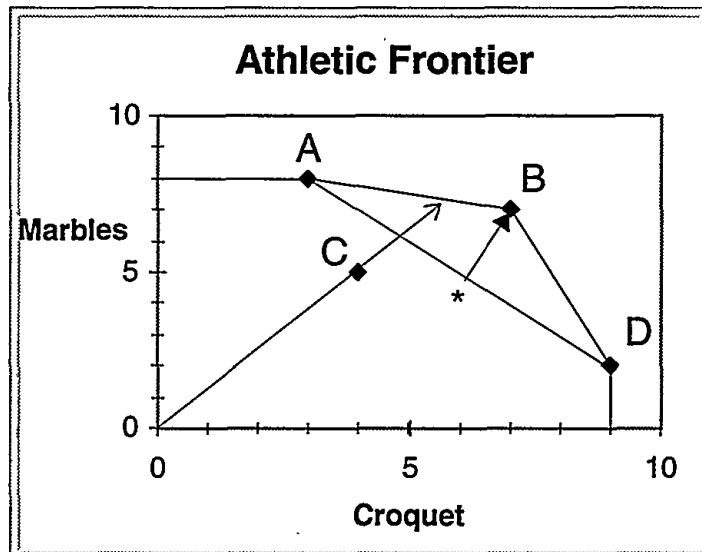
	Croquet	Marbles
Alan	9	2
Betty	7	7
Chuck	4	5
Debbie	3	8

Alan's agent would argue that the title should go to the best croquet player, while Debbie's agent would argue that the best marbles player should win. Betty's agent would argue that each sport should receive equal weight. To see why, weight each of the scores above by 50% and add each athlete's resulting scores together. Alan would score  $(9 \times 0.5) + (2 \times 0.5) = 5.5$ . Betty would score  $(7 \times 0.5) + (7 \times 0.5) = 7$ . Chuck's score would be 4.5, and Debbie's score would be

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107. See generally Dennis Child, *The Essentials of Factor Analysis* (2d ed. 1990).

5.5. The situation is presented graphically in the following figure:



A, B, C, and D represent the athletes. The solid line connecting 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 it 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.<sup>108</sup>

108. For more information on frontier analysis, see Donald L. Adolphson & Stephen Jenkins, *Manager’s Toolkit: Managerial Decision Modeling and Analysis with Excel Spreadsheets* (1998).