

Supreme Court Voting Behavior: 1996 Term

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I. Introduction

This Study, twelfth in a series,¹ tabulates and analyzes the voting behavior of the United States Supreme Court during the 1996 Term.² The analysis is designed to identify whether an individual Justice, as well as the Court as a whole, is voting more “conservatively,” more “liberally,” or about the same when compared with past Terms. As with political analysis, the identification of judicial trends is inherently difficult. Whether a particular voting pattern is “conservative” or “liberal” often lies in the eye of the beholder. The American Civil Liberties Union and the Christian Coalition could, for example, attach different semantic interpretations to the same behavior.

This Study attempts to remove such subjectivity by applying a consistent classification scheme to defined categories of cases across time: “conservative” votes are those that favor an assertion of governmental power, while “liberal” votes are those that favor a claim of individual liberty.³ By tracking the Term-to-Term “conservative” or “liberal” changes in

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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 this Study in *Supreme Court Voting Behavior: 1991 Term*, 7 *BYU J. PUB. L.* 1 (1992) [hereinafter 1991 Study]. The last three studies, analyzing the 1993, 1994, and 1995 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].

2. The 1996 Term includes decisions made between October 1996 and July 1997.

3. There is no single, settled definition of “conservatism” or “liberalism.” See generally M.A. RIFF, *DICTIONARY OF MODERN POLITICAL IDEOLOGIES* 67-73, 141-152 (1987) (discussing possible definitions). The Study’s definitions, however, are close to the core ideals of each ideol-

the voting patterns of individual Justices (and the Court) across ten defined categories of cases,⁴ and by applying standard statistical tests to the resulting data,⁵ this Study attempts to give reliable information regarding the current ideological posture of the Court and its personnel. Whether any statistical study of a process as complex as judicial decision making can ever be reliable, of course, is open to debate.⁶ But within the innate limitations of an attempt to “number crunch” ideology, this annual survey can be a useful tool to anticipate the Court’s or a Justice’s likely decision in a particular case.

This Term’s survey suggests continued (if somewhat uneasy) conservatism on the High Court. Only one table, focusing on cases involving statutory civil rights,⁷ unquestionably showed increased liberal receptivity in this Term. On virtually every other measure, the Court is more conservative in 1996 than in 1995, voting more often in favor of the states and federal government,⁸ against First Amendment and equal protection claims,⁹ and against the expansion of federal jurisdiction.¹⁰ Whether this trend will continue, however, is uncertain. The uneasy hegemony of conservative coalitions over liberal coalitions that prevailed this Term in important five-to-four decisions suggests that the replacement of even a single Justice could have a significant impact on the Court’s future ideological course. Justices Kennedy and O’Connor, as demonstrated by Data Table 10, set the present ideological tenor of the Court. The replacement of either Justice or the resignation of any one of the Court’s conservative core, the Chief Justice and Justices Scalia and Thomas, could significantly alter the ideological makeup of the Court.

ogy. *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 42.

7. *See infra* Data Table 7.

8. *See infra* Data Tables 1-4. The voting data involving federal civil cases, Data Table 2, is somewhat inconclusive. Although the Court *decreased* somewhat its support for the federal government in “Majority All Cases” (a “liberal” result), it *increased* its support in “Split Decisions” (a “conservative” result). Because the outcome of “Split Decisions” is more indicative of actual ideology than the outcome of unanimous cases (which are included in the “Majority All Cases” tabulation), Table 2 most likely indicates (if anything) conservative movement. Furthermore, “Category Analysis,” performed for the first time this year, *see infra* Appendix B, suggests that Table 2 provides less reliable data than other indicators contained in this Study. *See infra* Part V.

9. *See infra* Data Tables 5 and 6.

10. *See infra* Data Tables 8 and 9.

The predictive and descriptive statistics contained in this year's Study demonstrate a few other interesting results. For the past several years, we have projected anticipated future voting patterns for various Justices. This Term, that effort produced reliable results in only two areas: (1) the 1995 Study rather accurately predicted voting outcomes for five Justices in federalism cases;¹¹ and (2) that Study also closely predicted Justice Stevens' voting behavior in five categories—federal civil,¹² state criminal,¹³ statutory civil rights,¹⁴ federal jurisdiction,¹⁵ and federalism.¹⁶ Also, for the first time, we have conducted "Category" and "Frontier" analyses.¹⁷ "Category Analysis" suggests that five of the Study's nine topical categories—statutory civil rights,¹⁸ state criminal cases,¹⁹ federal jurisdiction,²⁰ federalism,²¹ and state civil cases²²—more accurately account for "liberal" versus "conservative" outcomes than the remaining categories. "Frontier Analysis" demonstrates that Justice Stevens marks the outer boundaries of liberalism on the Court, while the Chief Justice marks the outer boundaries of the Court's conservatism.

This Study is divided into sections to make it more accessible to the user. 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. Accordingly, this Study meets the needs of the reader who simply wants the gist of identifiable ideological trends as well as the reader who wants to probe the details of our statistical examinations. Part II gives a description of the mode of analysis employed. Part III follows with a general overview of the findings of the Study. 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 on them. Parts V and VI describe the methodology (and outcome) of this year's "Category" and "Frontier" Analyses. Appendices A and B detail the definitions and statistical tests that govern this Study.

11. *See infra* Data Table 9.

12. *See infra* Data Table 2.

13. *See infra* Data Table 3.

14. *See infra* Data Table 7.

15. *See infra* Data Table 8.

16. *See infra* Data Table 9.

17. *See infra* Part VI.

18. *See infra* Data Table 7.

19. *See infra* Data Table 3.

20. *See infra* Data Table 8.

21. *See infra* Data Table 9.

22. *See infra* Data Table 1.

II. Mode of Analysis

The Study is based upon the tabulation and mathematical analysis of each Justice's votes in ten categories of cases. Nine of the categories are based on the nature of the issues (for example, First Amendment, equal protection) or on the character of the parties (for example, state or federal government litigants).²³ The tenth category tabulates the number of times each Justice voted with the majority in cases decided by a single, or swing, vote.²⁴

These categories are designed to demonstrate each Justice's attitude toward two broad issues underlying most Supreme Court decision making: protection of individual rights and judicial restraint. The tabulation of votes in each category reveals, in broad strokes, the frequency with which individual Justices and the Court as a whole vote to protect individual rights²⁵ or exercise judicial restraint.²⁶ From the voting patterns that emerge, this Study determines whether individual Justices and the Court are taking "conservative" or "liberal" positions.²⁷ This Study classifies

23. 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 (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.

24. See *infra* Data Table 10.

25. 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, since 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.

26. 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 this 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 ripeness, mootness, political question, and other similar doctrines. 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.

27. The authors are mindful of the limited validity of the "conservative" and "liberal" labels given the potential for semantic misinterpretation. See RIFF, *supra* note 3.

outcomes that favor an assertion of governmental power as conservative, and outcomes that favor a claim of individual right as liberal. Accordingly, 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 is classified as conservative. All contrary votes are classified as liberal.

This analytical scheme is not perfect. Unanimous decisions (a significant portion of all cases decided by the Court) are included in this Study's calculations even though liberal or conservative ideology may not have influenced the outcome of such cases. When an opinion is unanimous, it is often true that either the law or the facts, or both, pointed so clearly in one direction that ideology was not a decisional factor. Furthermore, concern for individual rights is not necessarily the attitudinal opposite of judicial restraint. This Term, for example, the Court's disposition of *City of Boerne v. Flores*²⁸ reigned in the free exercise protection recently extended to individuals by Congress under the Religious Freedom Restoration Act of 1993 (RFRA),²⁹ while at the same time broadly asserting the Court's supremacy in "say[ing] what the law is."³⁰

Despite these difficulties, the basic assumption that supports this Study—that the general orientation of individual Justices and the Court to individual rights and judicial restraint is suggestive of conservative or liberal ideology—appears sound.³¹ For example, deference to legislatures frequently results in rejection of an individual's claim, especially one predicated upon the impropriety of governmental action.³² Such judicial restraint is associated with a reluctance to read new rights into the Consti-

28. 117 S. Ct. 2157 (1997).

29. 42 U.S.C. § 2000bb et seq. The Court reasserted its holding in *Human Resources of Oregon v. Smith*: Government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. 494 U.S. 872, 885 (1990). Congress enacted RFRA to restore the pre-*Smith* balancing test requirement, set forth in *Sherbert v. Verner*, under which the Court would determine whether a law substantially burdened a religious practice, and, if so, whether the burden was justified by a compelling government interest. 374 U.S. 398 (1963).

30. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The *Boerne* Court stated that "courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution." 117 S. Ct. at 2172.

31. See RIFF, *supra* note 3; see discussion *infra* Part V.

32. See, e.g., *Raines v. Byrd*, 117 S. Ct. 2312 (1997) (holding that individual members of Congress failed to allege a concrete injury sufficient to establish Article III standing in an action challenging the constitutionality of the Line Item Veto Act).

tution or a statute.³³ Further, refusal to exercise federal jurisdiction leaves the matter to state courts with their possible bias in favor of state governmental action and constitutes a clear rebuff to the claimant seeking federal protection of rights.³⁴ Therefore, to the extent that this 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.

To ascertain 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 1986 through 1995 Terms. 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 percentages for each Justice and for the Court majority.³⁵ Charts 1 through 10, in turn, graphically demonstrate the Court's voting trends revealed in the tables.³⁶

Mean Tables 1 through 10 and Regression Tables 1 through 10 analyze the voting patterns of the individual Justices. The purpose of these tables is to determine whether a Justice's 1996 Term voting record departs in a statistically significant manner from prior voting behavior and whether any significant correlation exists among the Term-to-Term voting patterns of the Justices.³⁷ Frontier Analysis Tables 1 through 4 and Frontier Charts 1 through 4 compare the Justice's conservative and liberal predilections this Term and over the course of the entire Study. Frontier analysis³⁸ mitigates some of the analytical difficulties previously discussed³⁹ by measuring the strength of each Justice's tendencies relative to the rest of the Court rather than against an absolute scale.

All of this data must be interpreted with caution. Both the nature of the decided cases each term and a Justice's individual behavior affect the percentages and statistical results revealed in each table. The increase in the Court's receptivity to the federal government's claims during the 1995

33. *See, e.g.*, *Blessing v. Freestone* 117 S. Ct. 1353 (1997) (holding that Title IV-D does not give individuals a federal right to force a state agency to substantially comply with its provisions).

34. *See, e.g.*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2043 (1997) ("The dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case.").

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

36. *See infra* Appendix B.

37. *See id.*

38. *See id.*

39. *See supra* text accompanying notes 28-30.

and 1996 Terms,⁴⁰ for example, may be more reflective of the increasing care and selectivity exercised by the federal government in pressing only meritorious claims upon the Court than of growing conservatism.⁴¹ 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 in any empirical analysis of a subjective decision making process.⁴²

Despite these caveats, this study is both worth conducting and reading. 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 1996 Term

The voting behavior of the 1996 Term indicates some consolidation of the Court's generally conservative stance. While last Term's data sug-

40. See *infra* Data Table 4.

41. The federal government did not fare well before the Court during the early years of the Clinton Administration. See 1994 Study, *supra* note 1, at 31; see also 1995 Study, *supra* note 1, at 281-86. Recent terms' significantly improved "batting average" for the Administration may flow from the Solicitor General's increased experience in selecting "winners" to present to the Court, rather than growing "conservatism" on the part of the Court.

42. The general reliability of statistical inference depends upon random sampling. See generally ALLEN T. CRAIG AND 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 limited: the cases in which decisions have been rendered by the Court during the period for which data have been collected. Sample sizes vary from year to year, according to the case selection of the Court. This Study, then, is subject to sampling bias, both because the sample is not random and because it is comparatively small. The statistical inferences generated below, therefore, may not accurately represent a Justice's (or the Court's) views.

gested ideological tension (with liberal movement in at least four Tables),⁴³ nine of the ten tables this Term indicate a return to (and possible reinforcement of) the conservative voting behaviors evidenced in prior Terms. The liberal movement in Data Table 7 and the uneasy balance of power in swing-vote cases in Data Table 10, however, hint that (with one or two replacements) the present conservative Court could quickly become much more liberal.

Data Table 1, gauging the Justices' voting behaviors in civil cases pitting state government parties against private parties, reveals conservative ideological movement. Since the 1993 Term, the Court has voted more often for state government, and therefore more conservatively, in each of the last four Terms—reaching an all time high score of 72.7% this year. One explanation for this trend might be that 75% of the unanimous cases were decided in favor of the state government. However, the Court also recorded the Study's second highest mark ever in this category for split decisions (where ideology presumably plays a more important role). Taken together, the three categories—"Majority All Cases," "Split Decision," and "Unanimous"—included in Data Table 1 affirm the Court's conservative posture in state civil actions involving private parties.

This conservative trend continues in Data Table 2 with civil cases involving the federal government. After a four-year liberal trend ending with the 1994 Term, the last two Terms have revealed high conservative scores by the Court. This year, although the "Majority All Cases" and "Unanimous" categories suggest liberal movement, the outcome in the "Split Decisions" category is conservative. Interestingly, Justices Breyer and Souter take the lead on Data Table 2, voting in favor of the federal government in 73.9% and 69.6% of the cases, respectively. It seems the Court (now headed up by "liberals" who vote in favor of a "liberal" federal government) has returned to its conservative ways, voting as it did prior to the 1990 Term. This trend may continue, especially if Justice Breyer's voting behavior remains as conservative as it has been the last two Terms.

Data Tables 3 and 4 similarly indicate a slightly conservative jump in criminal cases involving the state and federal governments, as the Court voted in favor of the governments 63.6% and 84.6% of the time, respectively. In state criminal cases decided by a split decision this Term, the Court voted in favor of the state 100% of the time—a strong indication of conservative voting behavior. In federal criminal cases, 75% of the split decisions and 100% of the unanimous decisions were decided in favor of the government. Although unanimous decisions may not reveal much

43. See generally, 1995 Study, *supra* note 1.

about the Court's ideological balance, the nevertheless high scores for the federal government (84.6% overall) evidence a conservative stance.

As for the Court's treatment of substantive claims involving the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, Data Tables 5 and 6 again demonstrate rather conservative voting behaviors. Data Table 5 shows that the Court expressed its lowest support of First Amendment claims since the 1990 Term, voting in favor of the claim only 28.6% of the time. Likewise, in cases involving equal protection claims, the Court voted for the claim only 20% of the time, marking the Justices' second lowest support for equal protection issues since 1989.

By contrast, Data Table 7 indicates a liberal trend in statutory civil rights cases. No single Justice voted in favor of a statutory civil rights claim less than 50% of the time. Data Table 7 is thus the single, consistently liberal indicator in this year's Study. Though isolated, "Category Analysis" suggests that this statistic is important: Data Table 7 may well be a harbinger of a liberal court to come.⁴⁴ The increased receptivity of a majority of the Court to statutory civil rights claims may be particularly significant because Data Table 7 this Term is topped by the Court's four most liberal Justices (Stevens, Souter, Breyer and Ginsburg).

In cases raising a challenge to the exercise of federal jurisdiction, the Court initially appears to have been rather stagnant. Nevertheless, a slightly conservative trend might be revealed by Data Table 8. After last Term's across-the-board liberal movement, the "Majority All Cases" category indicates a decline in the Court's willingness to expand the jurisdictional reach of the federal courts. Similarly, in cases decided by a split vote, only 28% were decided in favor of jurisdiction. Although a somewhat weak indicator of conservatism, this movement suggests that the 1996 Court has not continued any liberal tendencies from the prior Term.

Data Table 9, involving federalism issues, reveals conservative movement as the Court's support of state claims rises to its highest point since the 1990 Term. This support for the states in federalism cases is strong across the board, with only two Justices (Stevens and Souter) voting for the states less than half of the time.

Finally, Data Table 10, involving cases decided by a single vote, presents possibly the most interesting statistics. This Data Table again demonstrates the ideologically divided camps that comprise the Court: a conservative wing, composed of Chief Justice Rehnquist and Justices Scalia and Thomas, and a liberal wing, composed of Justices Ginsburg, Breyer, Souter and Stevens. Swinging between these two factions are Justices O'Connor and Kennedy, whose votes have a substantial impact on the outcome of the

44. See *infra* Part V.

most compelling issues before the Court. For the past four Terms, Justice Kennedy has “swung” the most, voting most often with the majority in close cases, followed closely by Justice O’Connor, who has held second place for the past three Terms.

In 1996, the pattern repeats itself. Data Table 10 indicates moderately conservative voting behavior, with conservative coalitions controlling 56.3% of the decisions decided by a single vote. This slight edge of conservative over liberal coalitions results from the voting patterns of Justices Kennedy and O’Connor, who side with the majority coalition 81% and 75% of the time, respectively. Ideologically, as these swingers vote, so votes the Court.

IV. The 1997 Term Voting Record

This Study seeks to quantify several characteristics of Supreme Court voting behavior by analyzing the Court’s voting record. We examine voting trends, patterns, and mean voting percentages both for individual Justices and for the Court as a whole.⁴⁵ Subpart A below explains, in simple fashion, the numerical and statistical tests used in this Study and their representation in the charts and graphs that follow.⁴⁶ Subpart B provides a categorical analysis of significant trends and patterns present in the data.

A. The Data

Data Tables 1 through 10 set out the Term-by-Term voting scores for each Justice, the breakdown of votes contributing to 1996 Term scores, our predicted 1996 Term scores, the prediction error, and our predicted scores for the 1997 Term. Scores are simply the percentage of times a Justice voted in favor of the party or claim indicated in each table’s title. Predictions are based on an ARIMA⁴⁷ forecasting model. The bottom three rows of each Data Table contain scores for the Court as a whole and are broken down into three categories. “Majority All Cases” summarizes the Court’s disposition of all decisions involving the indicated party or claim, while “Split Decision” and “Unanimous” summarize only those decisions reached by a divided or unanimous Court respectively.

Charts 1 through 10 display, in graphical form, the Court’s voting record in each category over the course of the Study. The “Majority All Cases” line reveals trends in the Court’s disposition of cases within the in-

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

46. For additional information regarding our methods of analysis, *see* Appendix B.

47. ARIMA stands for AutoRegressive, Integrated Moving-Average. For more information on this procedure, *see* Appendix B.

dicated category from one Term to the next. The "Split Decisions" line is perhaps more interesting because it includes only those cases in which Justices disagreed with one another and so may provide a better indication of the Court's "balance" in each category. The "Unanimous" line rounds out the information presented by demonstrating the outcome of cases in which there was no ideological division.

Mean Tables 1 through 10 set out the mean of all scores recorded for each Justice during the first ten Terms of this Study (1986-1995). Also shown are the 99% confidence interval for the true mean, the standard deviation of the scores, and the 1996 Term scores. The final column indicates whether 1996 Term scores differed in a statistically significant way from the Justices' past mean scores.

Finally, Regression Tables 1 through 10 show Pearson correlations and adjusted r^2 statistics relating the Justices' Term-to-Term voting patterns. The r^2 statistic is a more reliable indicator of correlation than the Pearson statistic. A high positive correlation between Justices does not indicate that they vote together, but rather that their Term-to-Term scores tend to move in similar directions. In fact, this statistic may provide more information regarding the nature of the cases decided each Term than it does regarding the Court's voting behavior. Although some general indications of bloc voting behavior might be deduced from this information, more reliable information can be gleaned from our swing vote analysis⁴⁸ and frontier analysis.⁴⁹ For this reason, we devote only minimal discussion to the correlation statistic this Term, but continue to include the data in order to maintain consistency with information provided by the Study in prior Terms.

48. See *infra* Data Table 10.

49. See *infra* Part VI. and Appendix B.

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

JUSTICE	% VOTES FOR GOVERNMENT												(\bar{X}_2)	1996 TERM VOTES FOR GOV'T	PREDICTIONS		
	1986 TERM	1987 TERM	1988 TERM	1989 TERM	1990 TERM	1991 TERM	1992 TERM	1993 TERM	1994 TERM	1995 TERM	1996 TERM	1997 TERM			PREDICTION FOR 1996 TERM	PREDICTION ERROR FOR 1997 TERM	PREDICTIONS FOR 1997 TERM
Rehnquist	71.8	67.9	66.7	70.3	84.0	71.4	52.8	68.2	60.0	43.8	84.9	28	5	51.7	-33.2	42.9	
Thomas ¹	30.8	34.5	21.5	27.0	28.0	71.4	41.7	45.5	55.0	67.4	77.4	24	7	-	-	77.7	
Scalia	64.1	51.7	59.2	64.9	64.0	64.3	41.7	50.0	60.0	52.9	77.4	24	7	53.3	-24.1	57.2	
Kennedy	-	50.0	57.1	61.1	76.0	42.9	41.7	40.9	40.0	41.2	71.9	23	9	34.5	-37.4	38.6	
O'Connor	64.1	50.0	57.4	67.6	68.0	50.0	50.0	40.9	40.0	47.1	68.8	22	10	41.4	-27.4	74.5	
Breyer ²	36.8	44.8	30.9	33.2	24.0	35.7	30.3	42.9	42.1	29.4	54.6	18	15	-	-	()	
Souter ³	33.3	34.5	20.4	27.0	63.6	52.5	36.4	45.5	35.0	29.4	54.6	18	15	-	-	31.1	
Ginsburg ⁴	45.0	53.6	55.1	59.5	64.0	59.5	51.4	40.9	50.0	35.3	53.1	17	15	-	-	()	
Stevens	46.2	37.9	35.4	40.5	36.0	29.3	31.3	27.3	42.1	23.5	48.5	16	17	32.5	-16.0	19.9	
Majority All Cases	-	-	51.0	51.4	64.0	52.4	41.7	40.9	45.0	52.9	72.7	24	9	-	-	81.6	
Split Decisions	-	-	64.0	52.4	68.8	51.6	44.4	46.2	45.5	72.7	69.2	9	4	-	-	-	
Unanimous	-	-	50.0	50.0	55.6	54.6	38.9	33.3	44.4	16.7	75.0	15	5	-	-	-	

- = no data available

() = could not be calculated with available data

1 Justice Thomas replaced Justice Marshall in 1991.

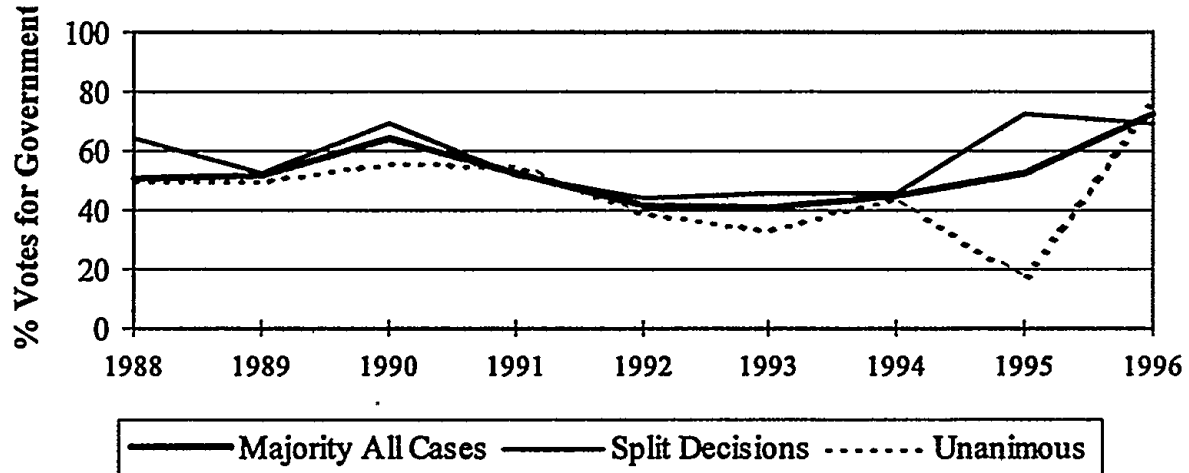
2 Justice Breyer replaced Justice Blackmun in 1994.

3 Justice Souter replaced Justice Brennan in 1990.

4 Justice Ginsburg replaced Justice White in 1993.

Chart 1

Civil Cases: State Government Versus a Private Party



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

Justice	Mean Voting Percentage, 1986-1995 (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage for 1996 Term (X_2)	Did 1996 Show a Statistically Significant Change in Voting Behavior?
Breyer	35.8	()	9.0	54.6	No
Ginsburg	42.1	± 42.5	7.4	53.1	No
Kennedy	50.1	± 13.9	12.4	71.9	Yes
O'Connor	53.5	± 10.6	10.3	68.8	Yes
Rehnquist	65.7	± 11.4	11.1	84.9	Yes
Scalia	57.3	± 8.1	7.9	77.4	Yes
Souter	43.7	± 21.0	12.7	54.6	No
Stevens	35.0	± 7.3	7.1	48.5	Yes
Thomas	56.2	± 26.9	13.1	77.4	Yes

- = no data available

() = could not be calculated with available data

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

Justice	Correlation (ρ) / R^2 (adjusted)								
	Breyer	Ginsburg	Kennedy	O'Connor	Rehnquist	Scalia	Souter	Stevens	Thomas
Breyer									
Ginsburg	.93/.76								
Kennedy	.85/.43								
O'Connor	.72/.03		.93/.85						
Rehnquist	.99/.96	.78/.41	.79/.57						
Scalia	.97/.83	.83/.53			.73/.47				
Souter	.95/.80		.80/.56	.75/.46	.95/.87				
Stevens	.96/.85	.99/.96							
Thomas						.86/.66			

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

JUSTICE	% VOTES FOR GOVERNMENT											(X ₂)	1996 TERM VOTES FOR AGAINST GOV'T	PREDICTIONS		
	1986 TERM	1987 TERM	1988 TERM	1989 TERM	1990 TERM	1991 TERM	1992 TERM	1993 TERM	1994 TERM	1995 TERM	1996 TERM			PREDICTION FOR 1996 TERM	ERROR	PREDICTION FOR 1997 TERM
Breyer ²	53.1	50.0	60.7	66.3	60.0	57.1	48.5	68.8	47.4	60.0	73.9	17	6	-	-	()
Souter ³	43.8	45.5	37.0	53.6	55.6	71.4	70.0	76.5	42.1	75.0	69.6	16	7	-	-	68.6
Rehnquist	90.6	61.8	71.4	78.6	70.0	71.4	74.2	58.8	52.6	75.0	69.6	16	7	49.6	-20.0	62.5
Ginsburg ⁴	87.1	72.7	71.4	75.0	70.0	81.0	69.7	58.8	52.6	85.0	65.2	15	8	-	-	()
Stevens	50.0	55.9	42.9	57.1	40.0	57.1	34.4	70.6	68.4	63.2	65.2	15	8	65.4	0.2	66.7
Kennedy	-	58.3	66.7	60.7	55.6	76.2	70.0	52.9	47.4	80.0	63.6	14	8	49.6	-14.0	66.6
O'Connor	75.0	76.5	60.7	60.7	60.0	52.4	62.5	56.3	27.8	62.5	59.1	13	9	21.6	-37.5	45.1
Scalia	82.8	62.5	59.3	60.7	57.9	71.4	67.7	52.9	42.1	60.0	45.5	10	12	48.7	3.3	48.3
Thomas ¹	46.9	44.1	39.3	50.0	55.0	53.3	64.5	47.1	42.1	65.0	40.9	9	13	-	-	56.9
Majority All Cases	-	-	64.3	71.4	60.0	81.0	66.7	52.9	42.1	75.0	69.6	16	7	-	-	63.8
Split Decisions	-	-	66.7	66.7	60.0	83.3	76.5	42.8	33.3	63.6	69.2	9	4	-	-	-
Unanimous	-	-	61.5	76.9	60.0	77.8	56.3	60.0	57.1	88.9	70.0	7	3	-	-	-

- = no data available

() = could not be calculated with available data

1 Justice Thomas replaced Justice Marshall in 1991.

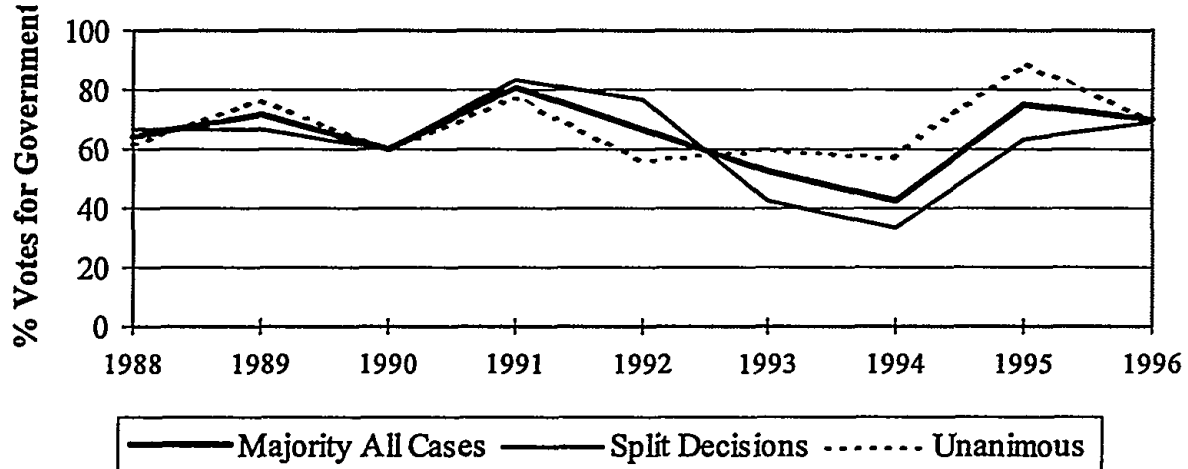
2 Justice Breyer replaced Justice Blackmun in 1994.

3 Justice Souter replaced Justice Brennan in 1990.

4 Justice Ginsburg replaced Justice White in 1993.

Chart 2

Civil Cases: Federal Government Versus a Private Party



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

Justice	Mean Voting Percentage, 1986-1995 (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage for 1996 Term (X_2)	Did 1996 Show a Statistically Significant Change in Voting Behavior?
Breyer	53.7	()	8.9	73.9	No
Ginsburg	65.5	± 98.5	17.2	65.2	No
Kennedy	63.1	± 12.2	10.9	63.6	No
O'Connor	53.5	± 13.8	10.3	59.1	No
Rehnquist	65.7	± 11.0	11.1	69.6	No
Scalia	61.7	± 11.2	10.9	45.5	Yes
Souter	65.1	± 22.2	13.5	69.6	No
Stevens	54.0	± 12.4	12.1	48.5	Yes
Thomas	54.4	± 21.1	10.3	40.9	Yes

- = no data available

() = could not be calculated with available data

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

Justice	Correlation (ρ) / R^2 (adjusted)								
	Breyer	Ginsburg	Kennedy	O'Connor	Rehnquist	Scalia	Souter	Stevens	Thomas
Breyer									
Ginsburg									
Kennedy		.99/.97							
O'Connor	.80/.29	.72/.29							
Rehnquist	.71/.00	.92/.78	.73/.47						
Scalia		.83/.53			.77/.55				
Souter	.76/.16			.78/.52					
Stevens		-.84/.55							
Thomas		.89/.68	.76/.46		.73/.41	.77/.49			

DATA TABLE 3
STATE CRIMINAL CASES

JUSTICE	% VOTES FOR GOVERNMENT										(\bar{X}_2)	1996 TERM VOTES		PREDICTIONS		
	1986 TERM	1987 TERM	1988 TERM	1989 TERM	1990 TERM	1991 TERM	1992 TERM	1993 TERM	1994 TERM	1995 TERM		1996 TERM	FOR GOV'T	AGAINST GOV'T	PREDICTION FOR 1996 TERM	PREDICTION ERROR FOR 1997 TERM
O'Connor	75.8	61.1	77.8	76.5	66.7	33.3	66.7	68.8	58.3	44.4	63.6	7	4	51.4	-12.2	45.0
Rehnquist	87.9	73.7	85.2	85.3	81.5	66.7	90.0	81.3	91.7	66.7	63.6	7	4	90.8	27.2	72.8
Scalia	81.8	47.4	77.8	73.5	74.1	77.8	86.4	81.3	83.3	55.6	63.6	7	4	78.4	14.8	71.4
Thomas ¹	80	53	14.8	88	0.0	75.0	85.7	87.5	91.7	66.7	63.6	7	4	-	-	62.9
Souter ²	80	53	13.5	11.8	68.0	55.6	55.0	25.0	41.7	22.2	54.6	6	5	-	-	28.2
Kennedy	-	70.0	81.5	73.5	57.7	50.0	77.3	50.0	75.0	55.6	54.6	6	5	60.5	6.0	49.5
Ginsburg ⁴	81.8	49.4	77.8	73.5	48.0	55.6	75.0	43.8	41.7	33.3	45.5	5	6	-	-	()
Breyer ²	30.3	26.3	37.0	35.3	14.8	33.3	25.0	12.5	41.7	22.2	36.4	4	7	-	-	()
Stevens	21.2	21.1	37.0	20.6	0.0	27.8	31.8	25.0	8.3	22.2	18.2	2	9	16.6	-1.6	22.4
Majority All Cases	-	-	70.4	64.7	55.6	44.4	77.3	56.3	58.3	55.6	63.6	7	4	-	-	56.2
Split Decisions	-	-	72.7	70.0	68.2	33.3	84.6	61.5	60.0	75.0	100.0	5	0	-	-	-
Unanimous	-	-	60.0	25.0	0.0	66.6	66.7	33.3	50.0	40.0	33.3	2	4	-	-	-

- = no data available

() = could not be calculated with available data

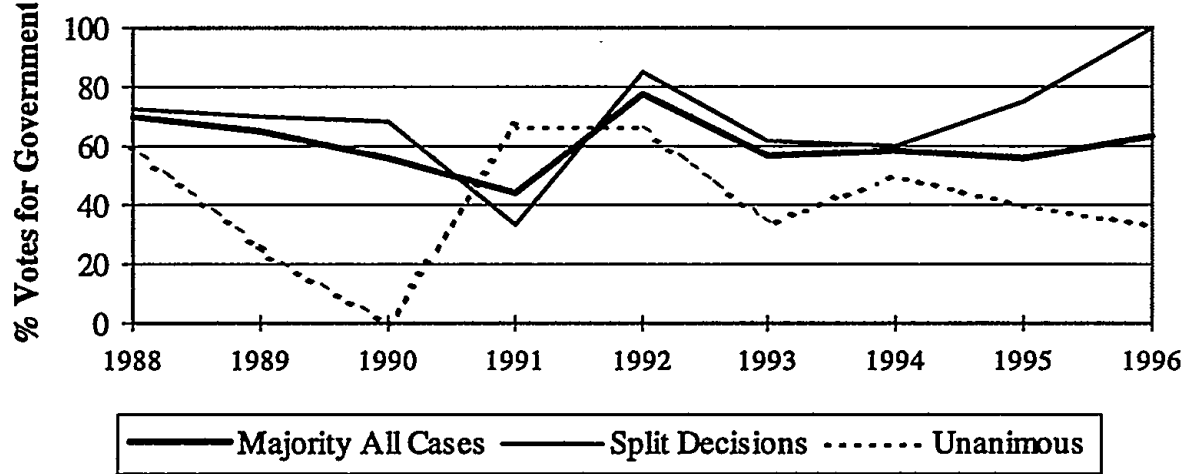
1 Justice Thomas replaced Justice Marshall in 1991.

2 Justice Breyer replaced Justice Blackmun in 1994.

3 Justice Souter replaced Justice Brennan in 1990.

4 Justice Ginsburg replaced Justice White in 1993.

Chart 3
State Criminal Cases



MEAN TABLE 3
STATE CRIMINAL CASES

Justice	Mean Voting Percentage, 1986-1995 (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage for 1996 Term (X_2)	Did 1996 Show a Statistically Significant Change in Voting Behavior?
Breyer	31.9	()	13.8	36.4	No
Ginsburg	39.6	± 31.7	5.5	45.5	No
Kennedy	65.5	± 13.8	12.3	54.6	Yes
O'Connor	62.9	± 14.8	14.4	63.6	No
Rehnquist	81.0	± 9.3	9.1	63.6	Yes
Scalia	73.9	± 13.0	12.6	63.6	Yes
Souter	44.6	± 30.1	18.3	54.6	No
Stevens	21.5	± 11.0	10.7	18.2	No
Thomas	81.3	± 21.1	10.2	63.6	Yes

- = no data available

() = could not be calculated with available data

REGRESSION TABLE 3
STATE CRIMINAL CASES

Justice	Correlation (ρ) / R ² (adjusted)								
	Breyer	Ginsburg	Kennedy	O'Connor	Rehnquist	Scalia	Souter	Stevens	Thomas
Breyer									
Ginsburg	.84/.41								
Kennedy									
O'Connor	.86/.48	.94/.83							
Rehnquist			.72/.46						
Scalia	.88/.55								
Souter	.78/.22								
Stevens	-.88/.55								
Thomas					.93/.83	.89/.74			

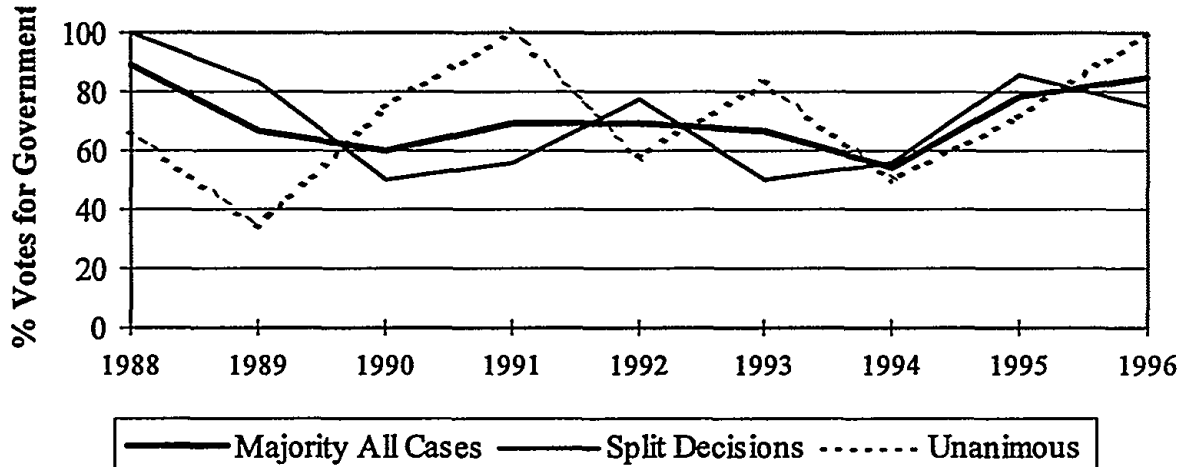
DATA TABLE 4
FEDERAL CRIMINAL CASES

JUSTICE	% VOTES FOR GOVERNMENT										(X ₂)	1996 TERM VOTES		PREDICTIONS		
	1986 TERM	1987 TERM	1988 TERM	1989 TERM	1990 TERM	1991 TERM	1992 TERM	1993 TERM	1994 TERM	1995 TERM		1996 TERM	FOR GOV'T	AGAINST GOV'T	PREDICTION FOR 1996 TERM	PREDICTION ERROR FOR 1997 TERM
Scalia	70.0	64.3	66.7	66.7	40.0	76.9	62.5	66.7	53.9	78.6	92.3	12	1	()	-	76.3
O'Connor	90.0	71.4	77.8	77.8	70.0	76.9	75.0	75.0	69.2	71.4	92.3	12	1	66.9	-25.4	75.1
Thomas ¹	100	28.6	33.3	33.3	50.0	54.6	81.3	88.3	61.5	71.4	84.6	11	2	-	-	78.2
Souter ²	100	33.5	25.0	25.0	75.0	69.2	43.8	58.3	61.5	78.6	84.6	11	2	-	-	87.5
Rehnquist	80.0	85.7	88.9	77.8	70.0	76.9	81.3	83.3	69.2	71.4	84.6	11	2	70.7	-13.9	71.9
Kennedy	-	71.4	88.9	66.7	50.0	84.6	60.0	66.7	61.5	71.4	84.6	11	2	61.6	-23.0	77.3
Ginsburg ⁴	90.0	85.7	88.9	77.8	60.0	69.2	56.3	58.3	61.5	71.4	76.9	10	3	-	-	()
Breyer ²	80.0	78.6	55.6	44.4	70.0	61.5	46.7	58.3	69.2	71.4	69.2	9	4	-	-	()
Stevens	40.0	64.3	66.7	33.3	60.0	38.5	26.7	50.0	30.8	50.0	53.8	7	6	29.2	-24.6	38.3
Majority All Cases	-	-	88.9	66.7	60.0	69.2	68.8	66.7	53.9	78.6	84.6	11	2	-	-	84.8
Split Decisions	-	-	100.0	83.3	50.0	55.6	77.8	50.0	55.6	85.7	75.0	6	2	-	-	-
Unanimous	-	-	66.7	33.3	75.0	100.0	57.1	83.3	50.0	71.4	100.0	5	0	-	-	-

- = no data available

- () = could not be calculated with available data
- 1 Justice Thomas replaced Justice Marshall in 1991.
- 2 Justice Breyer replaced Justice Blackmun in 1994.
- 3 Justice Souter replaced Justice Brennan in 1990.
- 4 Justice Ginsburg replaced Justice White in 1993.

Chart 4
Federal Criminal Cases



MEAN TABLE 4
FEDERAL CRIMINAL CASES

Justice	Mean Voting Percentage, 1986-1995 (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage for 1996 Term (X_2)	Did 1996 Show a Statistically Significant Change in Voting Behavior?
Breyer	70.3	()	1.5	69.2	No
Ginsburg	63.8	± 39.0	6.8	76.9	Yes
Kennedy	69.0	± 13.5	12.0	84.6	No
O'Connor	75.5	± 6.2	6.0	92.3	Yes
Rehnquist	78.5	± 6.9	6.7	84.6	Yes
Scalia	64.6	± 11.4	11.1	92.3	Yes
Souter	64.4	± 20.1	12.7	84.6	Yes
Stevens	46.0	± 14.7	14.3	53.9	No
Thomas	71.4	± 28.5	13.8	84.6	No

- = no data available

() = could not be calculated with available data

REGRESSION TABLE 4
FEDERAL CRIMINAL CASES

Justice	Correlation (ρ) / R ² (adjusted)								
	Breyer	Ginsburg	Kennedy	O'Connor	Rehnquist	Scalia	Souter	Stevens	Thomas
Breyer									
Ginsburg									
Kennedy		.88/.67							
O'Connor									
Rehnquist									
Scalia		.88/.67	.77/.55.0						
Souter		1.00/.99							
Stevens							.75/.48		
Thomas					.74/.43				

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

JUSTICE	% VOTES FOR RIGHTS CLAIM												(\bar{X}_2)	1996 TERM VOTES		PREDICTIONS	
	1986 TERM	1987 TERM	1988 TERM	1989 TERM	1990 TERM	1991 TERM	1992 TERM	1993 TERM	1994 TERM	1995 TERM	1996 TERM	1997 TERM		FOR CLAIM	AGAINST CLAIM	FOR 1996 TERM	ERROR FOR 1997 TERM
Thomas ¹	91.7	84.6	76.5	73.3	61.5	20.0	40.0	85.7	66.7	37.5	85.7	6	1	-	-	77.1	
Scalia	36.4	38.5	35.3	26.7	25.0	37.5	45.5	85.7	55.6	37.5	85.7	6	1	55.3	-30.4	65.8	
Kennedy		66.7	37.5	40.0	41.7	77.8	71.4	88.9	87.5	57.1	57.1	4	3	100.0	42.9	89.0	
Souter ²	91.7	84.7	81.3	73.3	41.7	88.9	60.0	57.1	77.8	75.0	57.1	4	3	-	-	70.3	
Ginsburg ⁴	41.7	30.8	23.5	20.0	15.4	50.0	36.4	71.4	66.7	75.0	57.1	4	3	-	-	()	
Stevens	50.0	50.0	64.7	46.7	50.0	100.0	90.0	57.1	66.7	62.5	42.9	3	4	65.9	23.0	56.8	
O'Connor	45.5	23.1	25.0	26.7	54.5	77.8	36.4	57.1	66.7	62.5	28.6	2	5	73.9	45.3	59.2	
Rehnquist	16.7	16.7	18.8	13.3	16.7	50.0	36.4	42.9	55.6	62.5	28.6	2	5	70.7	-28.6	66.2	
Breyer ²	72.7	69.2	41.2	60.0	69.2	88.9	90.0	71.4	66.7	75.0	14.3	1	6	-	-	()	
Majority All Cases	-	-	35.3	40.0	25.0	66.7	45.5	57.1	77.8	75.0	28.6	2	5	-	-	71.1	
Split Decisions	-	-	22.2	40.0	30.0	57.1	33.3	40.0	83.3	71.4	28.6	2	5	-	-	-	
Unanimous	-	-	50.0	40.0	0.0	100.0	60.0	100.0	66.7	100.0	0.0	0	0	-	-	-	

- = no data available

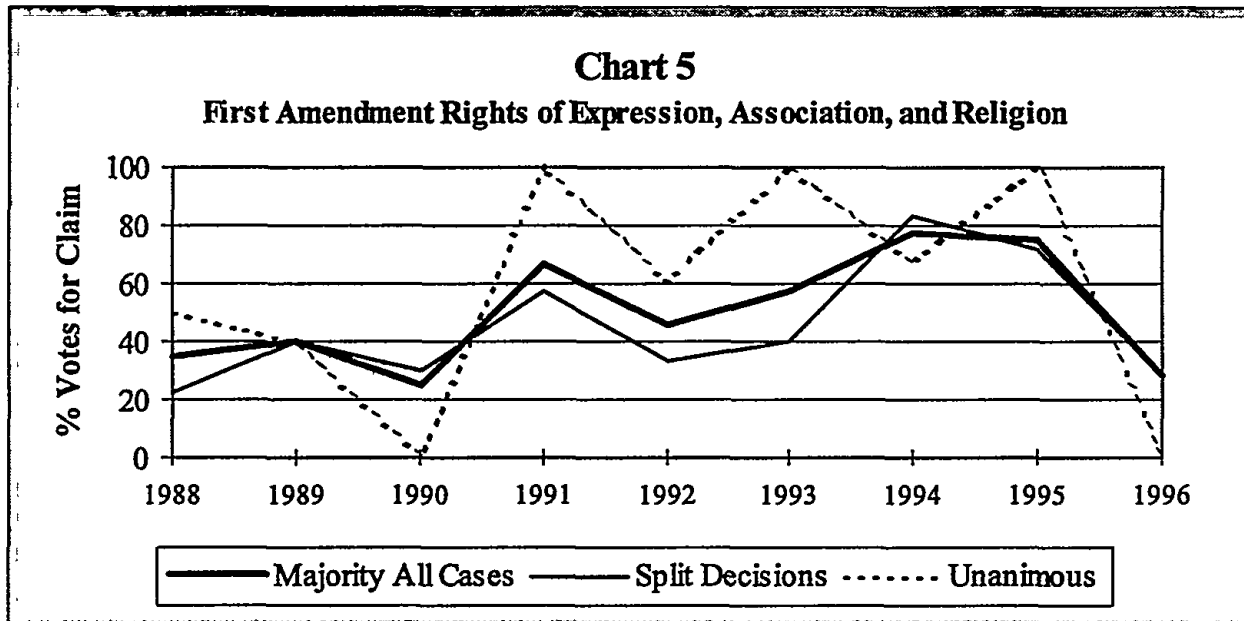
() = could not be calculated with available data

1 Justice Thomas replaced Justice Marshall in 1991.

2 Justice Breyer replaced Justice Blackmun in 1994.

3 Justice Souter replaced Justice Brennan in 1990.

4 Justice Ginsburg replaced Justice White in 1993.



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

Justice	Mean Voting Percentage, 1986-1995 (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage for 1996 Term (\bar{x})	Did 1996 Show a Statistically Significant Change in Voting Behavior?
Breyer	70.8	()	5.9	14.3	Yes
Ginsburg	71.0	± 23.9	4.18	57.1	Yes
Kennedy	65.5	± 23.0	20.5	57.1	No
O'Connor	47.5	± 19.7	19.2	28.6	Yes
Rehnquist	33.0	± 6.9	18.7	28.6	No
Scalia	42.4	± 18.0	17.5	85.7	Yes
Souter	66.8	± 28.0	17.0	57.1	No
Stevens	63.8	± 18.5	18.0	42.9	Yes
Thomas	50.0	± 53.6	26.0	85.7	Yes

- = no data available

() = could not be calculated with available data

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

	Correlation (ρ) / R^2 (adjusted)								
Justice	Breyer	Ginsburg	Kennedy	O'Connor	Rehnquist	Scalia	Souter	Stevens	Thomas
Breyer									
Ginsburg	.94/.76								
Kennedy	.99/.95	.73/.29							
O'Connor	.97/.90	.82/.52							
Rehnquist	1.00/.99	.82/.50	.89/.76	.76/.52					
Scalia	-.97/.88								
Souter	.97/.88		.81/.58		.85/.66				
Stevens	.96/.84	.75/.34							
Thomas	-.87/.51					.95/.88		-.85/.65	

DATA TABLE 6
EQUAL PROTECTION CLAIMS

JUSTICE	% VOTES FOR RIGHTS CLAIM												(\bar{X}_2)	1996 TERM VOTES		PREDICTIONS	
	1986 TERM	1987 TERM	1988 TERM	1989 TERM	1990 TERM	1991 TERM	1992 TERM	1993 TERM	1994 TERM	1995 TERM	1996 TERM	1997 TERM		FOR CLAIM	AGAINST CLAIM	FOR 1996 TERM	ERROR FOR 1997 TERM
O'Connor	42.9	12.5	66.7	25.0	28.6	33.3	40.0	100.0	66.7	80.0	50.0	2	2	73.9	23.9	84.3	
Stevens	33.3	28.6	66.7	0.0	83.3	66.7	40.0	100.0	33.3	40.0	40.0	2	3	65.9	25.9	59.0	
Kennedy		33.3	57.1	25.0	42.9	50.0	20.0	100.0	66.7	80.0	33.3	1	2	100.0	66.7	78.8	
Scalia	14.3	12.5	57.1	25.0	14.3	33.3	20.0	0.0	66.7	40.0	25.0	1	3	55.3	30.3	41.0	
Thomas ¹	71.4	37.5	50.0	0.0	100.0	60.0	20.0	0.0	66.7	50.0	25.0	1	3	()	()	44.4	
Souter ²	71.4	37.5	50.0	0.0	50.0	50.0	40.0	100.0	33.3	40.0	20.0	1	4	()	()	22.1	
Ginsburg ⁴	28.6	12.5	66.7	0.0	42.9	50.0	0.0	100.0	33.3	40.0	20.0	1	4	-	-	()	
Breyer ³	57.1	50.0	60.0	0.0	88.3	50.0	40.0	100.0	33.3	40.0	20.0	1	4	-	-	()	
Rehnquist	14.3	12.5	57.1	20.0	14.3	50.0	20.0	0.0	66.7	60.0	0.0	0	5	70.7	70.7	57.4	
Majority All Cases	-	-	57.1	0.0	42.9	50.0	20.0	100.0	66.7	80.0	20.0	1	4	-	-	73.8	
Split Decisions	-	-	100.0	0.0	50.0	50.0	33.3	100.0	66.7	100.0	33.3	1	2				
Unanimous	-	-	50.0	0.0	33.3	50.0	0.0	0.0	0.0	0.0	0.0	0	2				

- = no data available

() = could not be calculated with available data

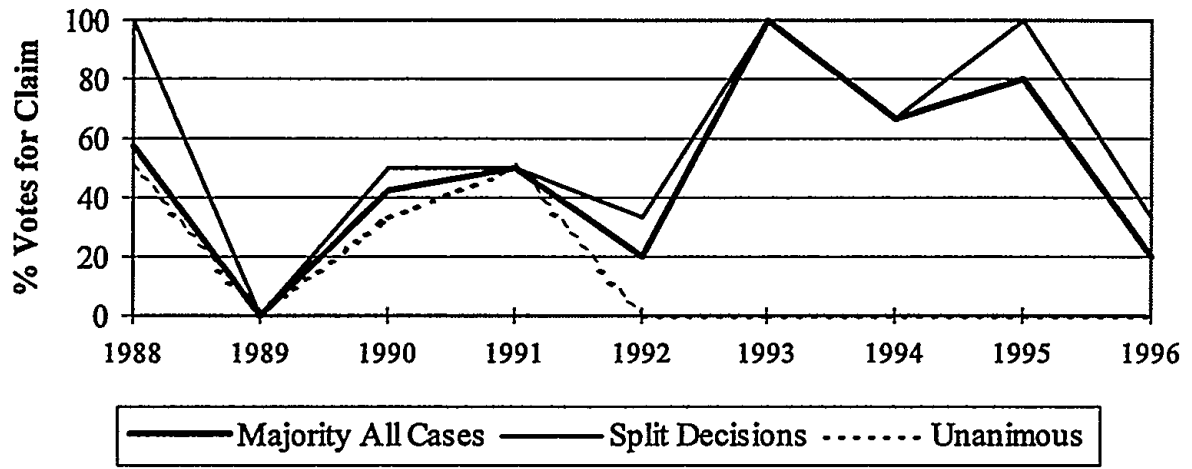
1 Justice Thomas replaced Justice Marshall in 1991.

2 Justice Breyer replaced Justice Blackmun in 1994.

3 Justice Souter replaced Justice Brennan in 1990.

4 Justice Ginsburg replaced Justice White in 1993.

Chart 6
Equal Protection Claims



MEAN TABLE 6
EQUAL PROTECTION CLAIMS

Justice	Mean Voting Percentage, 1986-1995 (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage for 1996 Term (\bar{x})	Did 1996 Show a Statistically Significant Change in Voting Behavior?
Breyer	36.7	()	4.7	20.0	No
Ginsburg	57.8	()	36.7	20.0	No
Kennedy	52.8	± 29.4	26.3	33.3	No
O'Connor	49.6	± 28.4	27.6	50.0	No
Rehnquist	31.5	± 24.8	24.2	0.0	Yes
Scalia	28.3	± 21.6	21.0	25.0	No
Souter	52.2	± 39.9	24.3	20.0	Yes
Stevens	49.2	± 30.4	29.6	40.0	No
Thomas	39.3	± 58.3	28.3	25.0	No

- = no data available

() = could not be calculated with available data

REGRESSION TABLE 6
EQUAL PROTECTION CASES

Justice	Correlation (ρ) / R ² (adjusted)								
	Breyer	Ginsburg	Kennedy	O'Connor	Rehnquist	Scalia	Souter	Stevens	Thomas
Breyer									
Ginsburg	1.00/1.00								
Kennedy	1.00/.60	.86/.60							
O'Connor	1.00/.97	.93/.79	.87/.73						
Rehnquist	.91/.66								
Scalia					.89/.77				
Souter	1.00/1.00	1.00/1.00	.72/.46						
Stevens	.89/.77	.96/.89					.86/.69		
Thomas	.74/.09				.92/.80	.91/.79			

DATA TABLE 7
STATUTORY CIVIL RIGHTS CLAIMS

JUSTICE	% VOTES FOR RIGHTS CLAIM											(\bar{X}_2)	1996 TERM VOTES	PREDICTIONS			
	1986 TERM	1987 TERM	1988 TERM	1989 TERM	1990 TERM	1991 TERM	1992 TERM	1993 TERM	1994 TERM	1995 TERM	1996 TERM			FOR CLAIM	AGAINST CLAIM	PREDICTION FOR 1996 TERM	ERROR
Souter ²	84.6	87.5	95.0	100.0	57.1	44.4	45.5	44.4	44.4	75.0	66.7	92.9	13	1	()	()	84.5
Breyer ²	84.6	87.5	80.0	88.9	80.0	88.9	63.6	77.8	75.0	83.3	85.7	85.7	12	2	-	-	()
Stevens	-	87.5	73.7	77.8	80.0	88.9	70.0	55.6	75.0	83.3	85.7	85.7	12	2	78.2	-7.5	87.8
Ginsburg ⁴	61.5	62.5	55.0	88.9	53.5	66.7	50.0	44.4	75.0	66.7	78.6	78.6	11	3	-	-	()
O'Connor	30.8	42.9	52.6	55.6	53.3	55.6	54.6	33.3	50.0	33.3	64.3	64.3	9	5	48.8	-15.5	41.6
Thomas ¹	84.6	87.5	94.4	100.0	86.7	28.6	45.5	33.3	25.0	16.7	50.0	50.0	7	7	()	()	20.4
Rehnquist	38.5	37.5	35.0	44.4	33.3	44.4	36.4	33.3	50.0	16.7	50.0	50.0	7	7	57.0	7.0	19.7
Kennedy	-	66.7	45.0	62.5	33.3	55.6	36.4	33.3	25.0	16.7	50.0	50.0	7	7	20.3	-29.7	15.6
Scalia	38.5	57.1	40.0	55.6	46.7	44.4	45.5	33.3	25.0	16.7	50.0	50.0	7	7	16.6	-33.4	15.0
Majority All Cases	-	-	50.0	88.9	53.3	55.6	50.0	33.3	50.0	33.3	57.1	57.1	8	6	-	-	31.1
Split Decisions	-	-	25.0	83.3	33.3	40.0	50.0	0.0	50.0	25.0	16.7	16.7	1	5			
Unanimous	-	-	87.5	100.0	83.3	75.0	50.0	60.0	50.0	50.0	87.5	87.5	7	1			

- = no data available

() = could not be calculated with available data

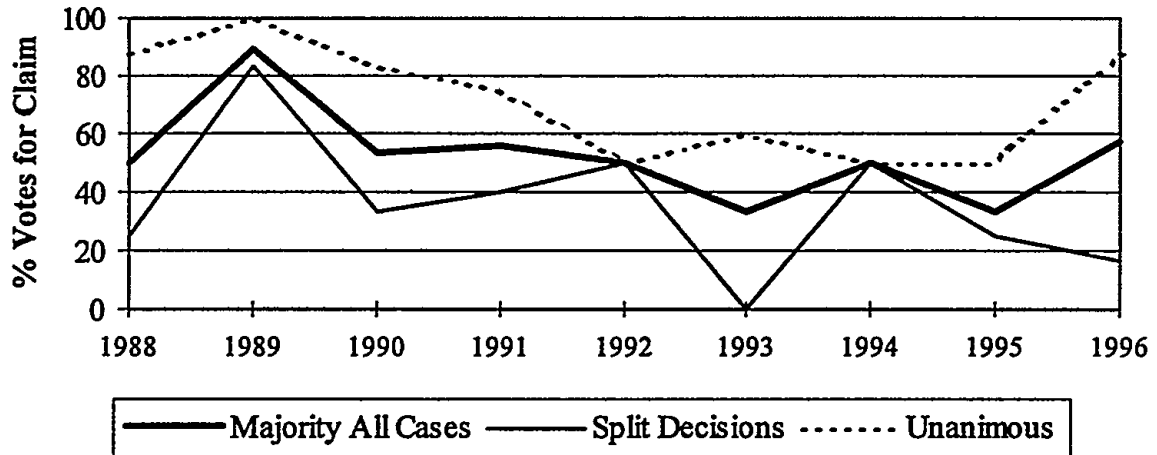
1 Justice Thomas replaced Justice Marshall in 1991.

2 Justice Breyer replaced Justice Blackmun in 1994.

3 Justice Souter replaced Justice Brennan in 1990.

4 Justice Ginsburg replaced Justice White in 1993.

Chart 7
Statutory Civil Rights Claims



MEAN TABLE 7
STATUTORY CIVIL RIGHTS

Justice	Mean Voting Percentage, 1986-1995 (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage for 1996 Term (%)	Did 1996 Show a Statistically Significant Change in Voting Behavior?
Breyer	85.7	()	5.9	85.7	No
Ginsburg	62.0	()	15.8	78.6	No
Kennedy	41.6	± 29.4	17.1	50.0	No
O'Connor	46.2	± 28.4	10.2	64.3	Yes
Rehnquist	37.0	± 24.8	8.98	50.0	Yes
Scalia	40.3	± 21.6	12.7	50.0	Yes
Souter	55.5	± 39.9	13.1	92.9	Yes
Stevens	76.9	± 30.4	10.2	85.7	Yes
Thomas	29.8	± 58.3	10.7	50.0	Yes

- = no data available

() = could not be calculated with available data

REGRESSION TABLE 7
 STATUTORY CIVIL RIGHTS CLAIMS

Justice	Correlation (ρ) / R^2 (adjusted)								
	Breyer	Ginsburg	Kennedy	O'Connor	Rehnquist	Scalia	Souter	Stevens	Thomas
Breyer									
Ginsburg									
Kennedy									
O'Connor		.77/.40							
Rehnquist									
Scalia			.88/.76						
Souter		.95/.87							
Stevens		.89/.69							
Thomas						.87/.70			

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

JUSTICE	% VOTES FOR JURISDICTION											(\bar{X}_2)	1996 TERM VOTES		PREDICTIONS	
	1986 TERM	1987 TERM	1988 TERM	1989 TERM	1990 TERM	1991 TERM	1992 TERM	1993 TERM	1994 TERM	1995 TERM	1996 TERM		FOR JURIS.	AGAINST JURIS.	PREDICTION FOR 1996 TERM	PREDICTION ERROR FOR 1997 TERM
Stevens	71.4	57.1	73.0	68.0	91.4	75.0	69.7	44.4	42.1	75.0	69.6	16	7	60.2	-9.4	65.8
Breyer ²	64.3	58.1	64.9	79.2	80.0	71.4	66.7	50.0	33.3	63.2	65.2	15	8	-	-	()
Ginsburg ⁴	71.4	51.2	62.2	68.0	63.9	69.0	60.6	33.3	36.8	68.4	56.5	13	10	-	-	()
Rehnquist	67.9	47.9	51.4	60.0	54.3	62.1	54.6	22.2	30.0	42.9	56.5	13	10	31.4	-25.1	43.3
Souter ³	60.7	62.8	66.7	87.5	57.6	75.0	56.3	33.3	30.0	68.4	56.5	13	10	()	()	51.9
Kennedy	-	56.3	51.4	64.0	58.3	73.3	51.5	33.3	40.0	57.1	56.5	13	10	45.7	-10.8	54.9
O'Connor	64.3	42.9	51.4	68.0	54.3	63.3	53.1	22.2	40.0	47.6	54.6	12	10	38.2	-16.4	48.4
Thomas ¹	57.1	57.1	75.0	87.5	66.7	54.6	33.3	30.0	42.9	47.6	47.8	11	12	-	-	46.6
Scalia	61.5	36.6	50.0	60.0	48.5	55.2	51.5	22.2	35.0	42.9	47.8	11	12	32.2	-15.6	43.6
Majority All Cases	-	-	62.2	64.0	63.9	73.3	52.9	33.3	40.0	57.1	52.2	12	11	-	-	51.4
Split Decisions	-	-	62.5	33.0	38.9	69.2	37.5	33.3	54.6	50.0	28.6	2	5	-	-	-
Unanimous	-	-	61.9	81.3	88.9	76.5	66.7	40.0	22.2	66.7	62.5	10	6	-	-	-

- = no data available

() = could not be calculated with available data

1 Justice Thomas replaced Justice Marshall in 1991.

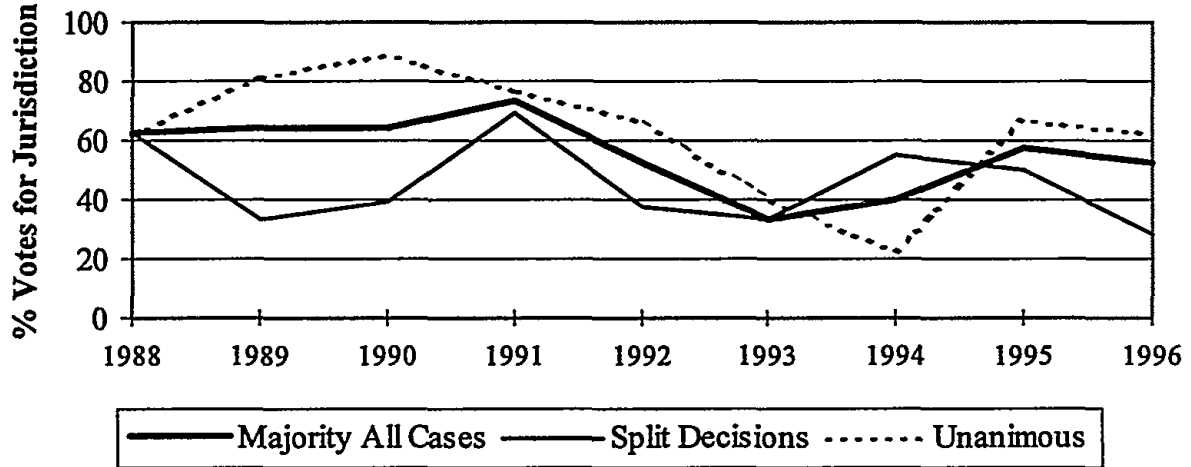
2 Justice Breyer replaced Justice Blackmun in 1994.

3 Justice Souter replaced Justice Brennan in 1990.

4 Justice Ginsburg replaced Justice White in 1993.

Chart 8

Cases Raising a Challenge to Federal Jurisdiction



MEAN TABLE 8
 CASES RAISING A CHALLENGE TO FEDERAL JURISDICTION

Justice	Mean Voting Percentage, 1986-1995 (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage for 1996 Term (X_2)	Did 1996 Show a Statistically Significant Change in Voting Behavior?
Breyer	48.3	()	21.1	65.2	No
Ginsburg	46.2	()	19.3	56.5	No
Kennedy	53.9	± 13.4	12.0	56.5	No
O'Connor	50.7	± 14.0	13.6	54.6	No
Rehnquist	49.3	± 14.7	14.3	56.5	No
Scalia	46.3	± 12.6	12.3	47.8	No
Souter	53.4	± 30.1	18.3	56.5	No
Stevens	66.7	± 15.4	15.0	69.6	No
Thomas	45.5	± 31.3	15.2	47.8	No

- = no data available

() = could not be calculated with available data

REGRESSION TABLE 8
 CASES RAISING A CHALLENGE TO FEDERAL JURISDICTION

Justice	Correlation (ρ) / R ² (adjusted)								
	Breyer	Ginsburg	Kennedy	O'Connor	Rehnquist	Scalia	Souter	Stevens	Thomas
Breyer									
Ginsburg	.91/.64								
Kennedy	1.00/.99	.95/.75							
O'Connor	.90/.64	.77/.40	.88/.75						
Rehnquist	.89/.57	.77/.40	.89/.78	.94/.87					
Scalia	.95/.79	.81/.49	.82/.63	.98/.96	.94/.88				
Souter	.94/.75	.99/.96	.94/.85	.81/.60	.83/.63	.82/.60			
Stevens	.98/.91	.98/.93	.71/.44		.73/.48		.82/.60		
Thomas	.98/.91	.83/.52	.89/.74	.85/.65	.91/.79	.88/.71	.85/.66	.82/.59	

DATA TABLE 9
FEDERALISM CASES

JUSTICE	% VOTES FOR STATE CLAIM												(\bar{X}_2)	1996 TERM VOTES		PREDICTIONS	
	1986 TERM	1987 TERM	1988 TERM	1989 TERM	1990 TERM	1991 TERM	1992 TERM	1993 TERM	1994 TERM	1995 TERM	1996 TERM	1997 TERM		FOR STATE	AGAINST STATE	FOR 1996 TERM	ERROR FOR 1997 TERM
Rehnquist	-	46.2	81.0	56.3	71.4	43.5	73.3	71.4	72.2	51.9	75.6	31	10	69.4	-6.2	()	
Thomas ¹																	
Scalia	-	30.8	76.2	56.3	71.4	26.1	60.0	57.1	81.3	55.6	73.2	30	11	()	()	64.8	
O'Connor	-	33.3	73.7	56.3	71.4	39.1	73.3	57.1	55.6	44.4	70.7	29	12	73.8	0.6	57.7	
Kennedy	-	33.3	72.7	56.3	71.4	26.1	60.0	42.9	55.6	51.9	68.3	28	13	62.1	-8.6	42.6	
Ginsburg ⁴																	
Breyer ²																	
Stevens	-	46.2	57.1	43.8	28.6	31.8	60.0	57.1	55.6	29.6	51.3	20	19	-	-	()	
Souter ³																	
Majority All Cases	-	53.8	31.8	37.5	83.3	36.4	60.0	57.1	44.4	34.6	45.0	18	22	42.6	-2.4	43.3	
Split Decisions	-	-	59.1	43.8	71.4	26.1	66.7	57.1	55.6	51.9	63.2	12	7	-	-	-	
Unanimous	-	-	70.0	50.0	50.0	22.2	75.0	60.0	85.7	36.4	72.7	16	6	-	-	()	

- = no data available

() = could not be calculated with available data

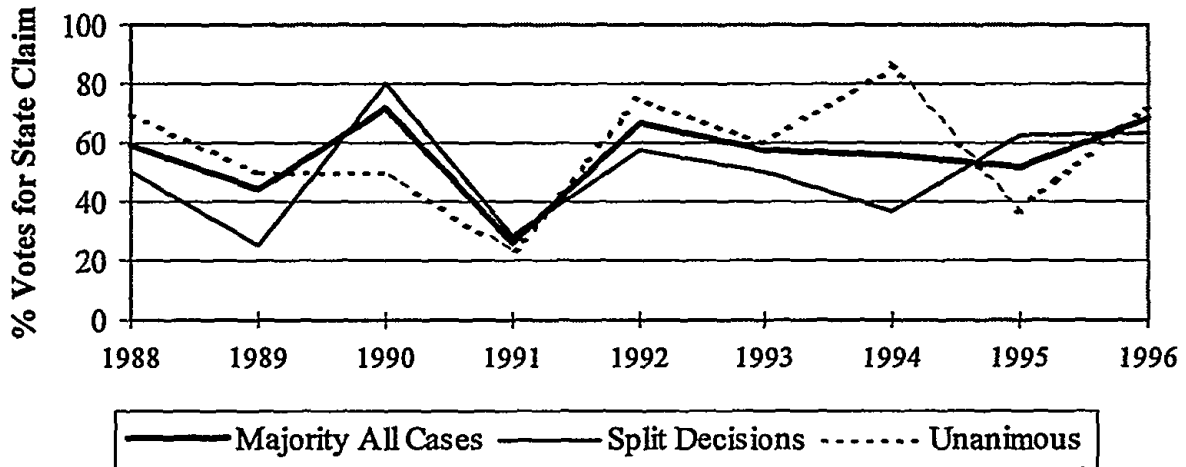
1 Justice Thomas replaced Justice Marshall in 1991.

2 Justice Breyer replaced Justice Blackmun in 1994.

3 Justice Souter replaced Justice Brennan in 1990.

4 Justice Ginsburg replaced Justice White in 1993.

Chart 9
Federalism Cases



MEAN TABLE 9
FEDERALISM CASES

Justice	Mean Voting Percentage, 1986-1995 (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage for 1996 Term (%)	Did 1996 Show a Statistically Significant Change in Voting Behavior?
Breyer	36.7	()	3.0	50.0	No
Ginsburg	48.5	± 53.9	9.4	51.3	No
Kennedy	52.2	± 17.1	15.8	68.3	Yes
O'Connor	56.0	± 16.7	14.9	70.7	Yes
Rehnquist	63.0	± 15.3	13.6	75.6	Yes
Scalia	57.2	± 21.0	18.8	73.2	Yes
Souter	52.6	± 30.1	18.3	43.9	No
Stevens	45.5	± 14.3	12.8	45.0	No
Thomas	54.6	± 32.2	15.7	73.2	No

- = no data available

() = could not be calculated with available data

REGRESSION TABLE 9
FEDERALISM CASES

Justice	Correlation (p) / R ² (adjusted)								
	Breyer	Ginsburg	Kennedy	O'Connor	Rehnquist	Scalia	Souter	Stevens	Thomas
Breyer									
Ginsburg	.78/.20								
Kennedy	1.00/.99								
O'Connor	.99/.95		.89/.76						
Rehnquist	.80/.28	.87/.64	.81/.61	.91/.81					
Scalia			.88/.75	.79/.58	.88/.75				
Souter		.95/.84		.71/.40					
Stevens		.91/.74							
Thomas	.75/.12		.94/.84	.70/.36	.71/.37	.88/.72			

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

JUSTICE	% VOTES WITH MAJORITY										(\bar{X}_2)	1996 TERM VOTES		PREDICTIONS		
	1986 TERM	1987 TERM	1988 TERM	1989 TERM	1990 TERM	1991 TERM	1992 TERM	1993 TERM	1994 TERM	1995 TERM		1996 TERM	FOR MAJ.	AGAINST MAJ.	PREDICTION FOR 1996 TERM	ERROR FOR 1997 TERM
Kennedy	-	71.4	82.4	71.4	52.2	64.7	72.7	92.9	81.3	85.0	81.3	13	3	84.9	3.6	87.3
O'Connor	-	64.5	76.5	69.0	69.6	58.8	40.9	57.1	68.8	80.0	75.0	12	4	90.7	15.7	74.7
Rehnquist	-	70.0	76.5	66.7	69.6	41.2	72.7	71.4	62.5	75.0	62.5	10	6	84.9	22.4	69.9
Thomas ¹		38.7	23.5	35.7	43.5	23.5	72.7	57.1	50.0	75.0	56.3	9	7	()	()	()
Scalia	-	66.7	73.5	66.7	52.2	35.3	81.8	71.4	56.3	75.0	56.3	9	7	60.2	4.0	67.1
Stevens	-	61.3	26.5	42.9	47.8	58.8	40.9	35.7	50.0	25.0	50.0	8	8	()	()	30.5
Souter ²		40.0	26.5	35.7	59.1	82.4	31.8	42.9	37.5	30.0	43.8	7	9	()	()	21.8
Breyer ²		53.2	38.2	33.3	47.8	70.0	31.8	35.7	43.8	25.0	43.8	7	9	-	-	()
Ginsburg ⁴		77.1	76.5	78.6	60.9	64.7	54.6	35.7	50.0	30.0	31.3	5	11	-	-	()
Conservative Outcome	-	-	76.5	64.3	54.5	41.2	63.6	64.3	35.7	60.0	56.3	9	7	-	-	56.8
Liberal Outcome	-	-	23.5	35.7	45.5	58.8	36.4	35.7	64.3	40.0	43.7	7	9	-	-	50.4

- = no data available

() = could not be calculated with available data

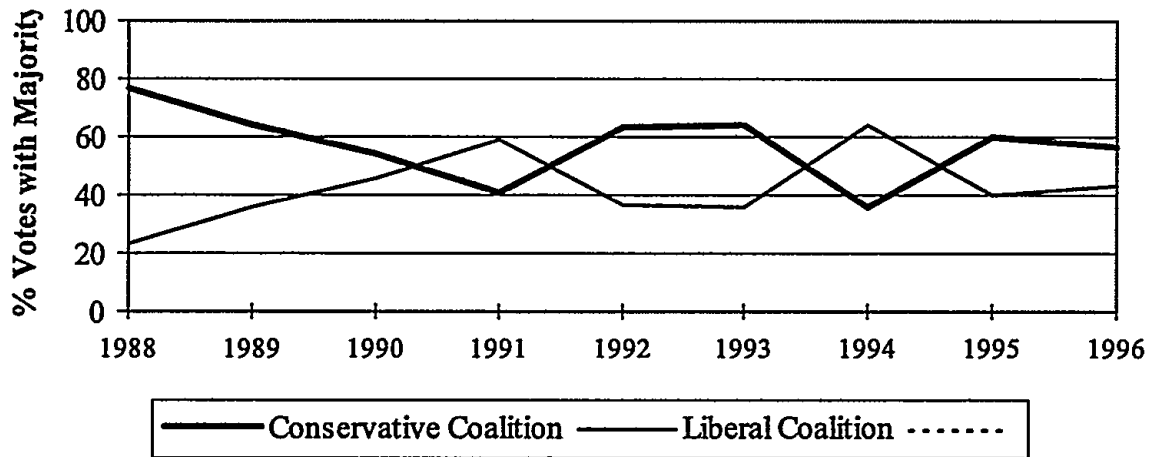
1 Justice Thomas replaced Justice Marshall in 1991.

2 Justice Breyer replaced Justice Blackmun in 1994.

3 Justice Souter replaced Justice Brennan in 1990.

4 Justice Ginsburg replaced Justice White in 1993.

Chart 10
Swing Vote Analysis



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

Justice	Mean Voting Percentage, 1986-1995 (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage for 1996 Term (X_2)	Did 1996 Show a Statistically Significant Change in Voting Behavior?
Breyer	34.4	()	13.3	43.8	No
Ginsburg	38.6	()	10.3	31.3	No
Kennedy	74.9	± 13.5	12.1	81.3	No
O'Connor	65.0	± 13.1	11.7	75.0	Yes
Rehnquist	67.3	± 11.9	10.7	62.5	No
Scalia	64.3	± 15.9	14.2	56.3	No
Souter	47.3	± 44.3	20.1	43.8	No
Stevens	43.2	± 14.3	12.8	50.0	No
Thomas	55.7	± 35.3	20.8	56.3	No

- = no data available

() = could not be calculated with available data

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

Justice	Correlation (ρ) / R ² (adjusted)								
	Breyer	Ginsburg	Kennedy	O'Connor	Rehnquist	Scalia	Souter	Stevens	Thomas
Breyer									
Ginsburg	()								
Kennedy	()								
O'Connor	()	.92/.69							
Rehnquist	()								
Scalia	()				.88/.75				
Souter	()				-.95/.87	-.87/.71			
Stevens	()						.73/.41		
Thomas	()	-.73/.07			.85/.63	.85/.64	-.80/.52	-.74/.40	

() = could not be calculated with available data

B. Analysis

Table 1: Civil—State Party

Data Table 1 and Chart 1 indicate a marked increase in the Court's support of state government in civil cases.⁵⁰ Although there has been gradually increasing support for state governments for the past two Terms, this year's data reaches new highs in two categories. Both the "Majority All Cases" and "Unanimous" categories rose to record highs during the 1996 Term, from 52.9% to 72.7% and 16.7% to 75% respectively. The "Split Decisions" category remained relatively consistent with last Term's record level, dipping insignificantly from 72.7% to 69.2%. Overall, the steady incline in favor of state governments spanning the 1993 Term to the present indicates increasingly conservative voting behavior.

Individually, Chief Justice Rehnquist reemerges as the most conservative Justice in civil cases involving state governments. In 1996, he voted in favor of state governments 84.9% of the time, his highest score ever by almost a full percentage point. This is a significant increase compared with his last year's all-time low score of 43.8%. Justices Thomas and Scalia tied for second this year with personal all time high scores of 77.4%.⁵¹ Justice Kennedy's support of state governments rose from 41.2% to 71.9%, an increase second only to that of the Chief Justice. The smallest increase is in the score of Justice Thomas, which only rose 10 points from 67.4% to 77.4%.

50. Cases decided in favor of state governments: *General Motors v. Tracy*, 117 S. Ct. 811 (1997); *California Div. of Labor v. Dillingham Const.*, 117 S. Ct. 832 (1997); *Regents of Univ. of California v. Doe*, 117 S. Ct. 900 (1997); *Auer v. Robbins*, 117 S. Ct. 905 (1997); *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997); *Lambert v. Wicklund*, 117 S. Ct. 1169 (1997); *Blessing v. Freestone*, 117 S. Ct. 1353 (1997); *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364 (1997); *Board of County Comm'rs v. Brown*, 117 S. Ct. 1382 (1997); *Edwards v. Balisok*, 117 S. Ct. 1584 (1997); *McMillian v. Monroe County*, 117 S. Ct. 1734 (1997); *DeBuono v. NYSA-ILA Medical*, 117 S. Ct. 1747 (1997); *Arkansas v. Farm Credit Serv.*, 117 S. Ct. 1776 (1997); *Gilbert v. Homar*, 117 S. Ct. 1807 (1997); *Mazurek v. Armstrong*, 117 S. Ct. 1865 (1997); *Agostini v. Felton*, 117 S. Ct. 1997 (1997); *Idaho v. Coeur d' Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997); *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997); *Lawyer v. Department of Justice*, 117 S. Ct. 2186 (1997); *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997); and *Vacco v. Quill*, 117 S. Ct. 2293 (1997). Cases decided against state governments: *Lopez v. Monterey County*, 117 S. Ct. 340 (1996); *M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1996); *Greene v. Georgia*, 117 S. Ct. 578 (1996); *General Motors v. Tracy*, 117 S. Ct. 811 (1997); *Chandler v. Miller*, 117 S. Ct. 1295 (1997); *Camp Newfound Inc. v. Harrison*, 117 S. Ct. 1590 (1997); *Suitim v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659 (1997); *Johnson v. Fankell*, 117 S. Ct. 1800 (1997); *Richardson v. McKnight*, 117 S. Ct. 2100 (1997); and *Foreman v. Dallas County*, 117 S. Ct. 2357 (1997).

51. Justices Thomas and Scalia did not reach the civil-state party issue in *DeBuono v. NYSL*, 117 S. Ct. 1747 (1997). Thus, they addressed one less case than did the Court as a whole in Data Table 1.

Statistically predicted voting patterns for 1996 were far too liberal.⁵² Justice Kennedy, predicted to vote for state governments 34.5% of the time, instead voted that way 71.9% of the time, a 37-point error. Justice Stevens' voting behavior was closer to the predicted mark, but even he voted more often for the states than predicted, siding with the states 48.5% of the time, rather than the predicted 32.5%. These disparities may be explained in part by the fact that this Term marked only the second year, in the eleven years of this Study, that every Justice voted more conservatively than in the preceding Term.⁵³ Such movement represents a statistically significant departure from the previous voting means of the Chief Justice and Justices Kennedy, O'Connor, Scalia, Stevens and Thomas.

The most notable voting correlations in this category are between Justices Stevens and Ginsburg and between the Chief Justice and Justice Breyer. Both pairings show adjusted r^2 statistics of 96%. This high r^2 statistic indicates that each pair's scores vary from one Term to another in such a way that the score of one Justice may be predicted with a high degree of accuracy based on the score of the other. Correlation does not, however, imply causation.

Table 2: Civil—Federal Party

The Court's support of the federal government in civil cases dwindled slightly this Term.⁵⁴ The "Majority All Cases" support for the federal government fell about five points, from 75% in 1995 to 69.6%. Likewise, the outcome in "Unanimous" cases dropped 19 points, from 88.9% in 1995 to 70% in 1996. But, despite this apparently "liberal" movement, the overall record is mixed. The Court *increased* its receptivity to the federal gov-

52. Predictions were made for C.J. Rehnquist, and JJ. Scalia, Kennedy, O'Connor, and Stevens for the 1996 Term.

53. The only other year in which this occurred was in the 1989 Term. *See e.g.*, 23 HASTINGS CONST. L. Q. 1, 9 (1995).

54. Cases decided in favor of the federal government: *I.N.S. v. Yang*, 117 S. Ct. 350 (1996); *O'Gilvie v. United States*, 117 S. Ct. 452 (1996); *United States v. Jose*, 117 S. Ct. 463 (1996); *In Re Gaydos*, 117 S. Ct. 466 (1996); *Walters v. Metropolitan Educ. Enter.*, 117 S. Ct. 660 (1997); *Atherton v. Federal Deposit Ins. Corp.*, 117 S. Ct. 666 (1997); *Bibles v. Oregon Natural Desert Assoc.*, 117 S. Ct. 795 (1997); *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Program, Dept. of Labor*, 117 S. Ct. 796 (1997); *United States v. Brockamp*, 117 S. Ct. 849 (1997); *Turner Broad. Sys., Inc. v. Federal Communications Comm'n*, 117 S. Ct. 1174 (1997); *Metropolitan Stevedore Co. v. Rambo*, 117 S. Ct. 1953 (1997); *Glickman v. Wileman Brothers & Elliot, Inc.*, 117 S. Ct. 2130 (1997); *Lawyer*, 117 S. Ct. at 2186; *Raines*, 117 S. Ct. at 2312. Cases decided against the federal government: *Babbitt v. Youpee*, 117 S. Ct. 727 (1997); *Dunn v. Commodity Futures Trading Comm'n*, 117 S. Ct. 913 (1997); *Commissioner v. Estate of Hubert*, 117 S. Ct. 1124 (1997); *Bennett v. Spear*, 117 S. Ct. 1154 (1997); *Hughes Aircraft v. United States*, 117 S. Ct. 1871 (1997); *Boerne*, 117 S. Ct. at 2157; and *Reno v. ACLU*, 117 S. Ct. 2329 (1997).

ernment in split decisions, with the government gaining about five points, from 63.6% in 1995 to 69.2% in 1996. This data suggests that, in closer cases, the present Court now votes more often in favor of the federal government—with Justices Breyer and Souter leading the way.

Table 2, in fact, may suggest something of a conservative/liberal “re-orientation” on the Court. The normally “conservative” Justices Scalia and Thomas occupy the liberal bottom of Table 2, with the ostensibly more “liberal” Justices Breyer and Souter holding the conservative top. Moreover, except for the interposition of the Chief Justice at position number three, the top five spots on Table 2 are held by the Court’s politically liberal wing—Justices Stevens, Souter, Ginsburg and Breyer. The scores of Justices Scalia, Stevens and Thomas all dropped sufficiently compared with their previous mean scores, to register a statistically significant difference. This data may suggest that politically liberal Justices are now casting “conservative” votes in favor of a politically liberal administration.

The predictions made for the 1996 Term were extremely accurate for Justices Stevens and Scalia, missing by only 0.2 and 3.3 points respectively. The statistical prediction for Justice O’Connor was the most inaccurate. She voted 37.5 points more often in favor of the government than her prior behavior predicted. Justices Kennedy and Ginsburg have highly correlated voting patterns in this category with an adjusted r^2 statistic of 97%. No other correlations are particularly noteworthy.

Table 3: State Criminal Cases

The support for states in criminal cases increased by the largest margin since the 1992 Term, rising from 55.6% to 63.6%, as shown in Data Table 3 and Chart 3.⁵⁵ However, even more ideologically significant is the score in the “Split Decision” category. Of the five cases decided by a split vote, all five were decided in favor of the states. Since the 1994 Term, the Court’s support of the state governments has steadily increased in the “Split Decision” category from 61.5% to its all-time high of 100% this Term. Only in “Unanimous” cases did the Court’s support of the states wane, dropping from 40% in 1995 to 33.3% in 1996. Taken as a whole, however, Data Table 3 evidences (if anything) continued conservative behavior.

55. Cases decided in favor of the states: *California v. Roy*, 117 S. Ct. 337 (1996); *Ohio v. Robinette*, 117 S. Ct. 417 (1996); *Maryland v. Wilson*, 117 S. Ct. 882 (1997); *Richards v. Wisconsin*, 117 S. Ct. 1416 (1997); *Lambrix v. Singletary*, 117 S. Ct. 1517 (1997); *O’Dell v. Netherland*, 117 S. Ct. 1969 (1997); and *Pounders v. Watson*, 117 S. Ct. 2359 (1997). Cases decided against the states: *Lynce v. Mathis*, 117 S. Ct. 891 (1997); *Young v. Harper*, 117 S. Ct. 1148 (1997); *Richards*, 117 S. Ct. at 1416; and *Bracy v. Gramley*, 117 S. Ct. 1793 (1997).

The Court's traditional conservatism on state criminal issues may be tempering somewhat. Individually, Chief Justice Rehnquist and Justice Thomas recorded their lowest scores thus far, both voting in favor of state governments only 63.6% of the time. Similarly, Justice Kennedy recorded his second lowest score of 54.6%. Nevertheless, the overall trend in the data this Term is conservative. Six of nine Justices voted for the state more often than in the 1995 Term, and the three who voted less often for the state (Justices Thomas, Kennedy and Stevens) did so by narrow margins, with the most pronounced decrease in state support being the four-point drop by Justice Stevens. The scores of the Chief Justice and Justices Kennedy, Scalia and Thomas, while high compared to the other Justices, nevertheless dropped by a statistically significant amount when compared with their previous mean scores in this category.

As predicted, Justice Stevens continued to vote consistently in this category. His behavior varied from his predicted score by only 1.6 points. The prediction for Chief Justice Rehnquist, on the other hand, was the most inaccurate, as his past behavior suggested he would vote 27.2 points more often for the states than he actually did. But, despite this error, the Chief Justice tied with three other Justices for the high score, voting 63.6% of the time in favor of the government. No correlations among the Justices scores were particularly strong in this category.

Table 4: Federal Criminal Cases

Data Table 4 and Figure 4 demonstrate the Court's continuing strong support for the federal government in criminal cases.⁵⁶ In the "Majority All Cases" category, the Court voted for the government 84.6% of the time, the highest score in the last eight Terms. While governmental support in the "Split Decisions" category fell from 85.7% to 75%, it was countered by 100% support for the government in "Unanimous" cases. Moreover, four Justices recorded their highest scores ever, with Justices Scalia and O'Connor leading the way by voting for the federal government 92.3% of the time. As with the 1995 Term, this Term's results were also

56. Cases decided in favor of the federal government: *United States v. Watts*, 117 S. Ct. 633 (1997); *United States v. Wells*, 117 S. Ct. 921 (1997); *United States v. Gonzales*, 117 S. Ct. 1032 (1997); *United States v. Lanier*, 117 S. Ct. 1219 (1997); *Johnson v. United States*, 117 S. Ct. 1544 (1997); *Edmond v. United States*, 117 S. Ct. 1573 (1997); *United States v. Hyde*, 117 S. Ct. 1630 (1997); *United States v. LaBonte*, 117 S. Ct. 1673 (1997); and *United States v. O'Hagan*, 117 S. Ct. 2199 (1997). Cases decided against the federal government: *Old Chief v. United States*, 117 S. Ct. 644 (1997); and *Lindh v. Murphy*, 117 S. Ct. 2059 (1997).

notable for their uniformity, with four Justices voting for the federal government in 84.6% of criminal cases.⁵⁷

Individually, Justice O'Connor's score showed a marked increase from past Terms. Her support of the federal government, in 92.3% of federal criminal cases, rose nearly 21 points, the most dramatic movement of the Term in this category. By contrast, Justice Stevens' voting behavior remained the most liberal, as it has for the past six years. He voted for the government only 53.8% of the time. Nevertheless, and for the first time in six years, Justice Stevens voted for the federal government in criminal cases over 50% of the time.

Overall, individual Justices voted more conservatively than their past term behavior would indicate. Indeed, the Court as a whole has not voted for the government this often since the 1988 Term. The scores of Justices Ginsburg, O'Connor, Scalia, and Souter, and Chief Justice Rehnquist each shifted to a more conservative position by a statistically significant degree when compared with their prior mean scores. Justices Souter and Ginsburg's voting patterns correlate to a high degree in this category, with an adjusted r^2 statistic of 99% and identical scores for the 1993 and 1994 Terms. In 1995 and 1996, their scores continued to move substantially in tandem, although Justice Souter voted somewhat more conservatively than did Justice Ginsburg.

Table 5: First Amendment

Data Table 5 and Chart 5 demonstrate a dramatic conservative ideological shift in the area of First Amendment claims.⁵⁸ In the "Majority All Cases" category, the Court voted for the claim only 28.6% of the time, a conservative shift of 46.4 points from the previous Term. The "Split Decision" category mirrored this shift, favoring First Amendment claims only 28.6% of the time. This score, the lowest in this category during the last six Terms, is significant. All First Amendment claims this year were decided by split decisions, and the governing majorities appeared somewhat hostile to First Amendment claims.

This apparent "hostility" to the First Amendment in 1996 might be due to the competing ideological interests involved in three cases this

57. These four Justices included the Chief Justice and Justices Thomas, Souter and Kennedy.

58. Cases decided in favor of the First Amendment claim: *Schenck v. Pro-Choice Network of Western N.Y.*, 117 S. Ct. 855 (1997); *Reno v. ACLU*, 117 S. Ct. 2329 (1997). Cases decided against the First Amendment claim: *Schenck*, 117 S. Ct. at 855; *Turner Broad. Sys., Inc.*, 117 S. Ct. at 1174; *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364 (1997); *Glickman v. Wileman Bros. & Elliot, Inc.*, 117 S. Ct. 2130 (1997).

Term. *Turner Broadcasting Systems, Inc. v. FCC*,⁵⁹ involving the constitutional propriety of government regulations that required cable broadcasters to carry certain local television stations,⁶⁰ displayed an unusual voting alignment. Generally conservative Justices (Scalia, Thomas and O'Connor, joined by Justice Ginsburg) supported the First Amendment claim, while more traditionally liberal jurists (Stevens, Souter, and Breyer, joined by Kennedy and the Chief Justice) turned their back on free speech. *Glickman v. Wileman Brothers*,⁶¹ involving the constitutional validity of "generic" fruit advertising supported by compelled government assessments, similarly pitted First Amendment values against the perceived demands of the modern administrative state—with the Court's more liberal members rejecting the constitutional claim.⁶² *Schenk v. Pro-Choice Network*,⁶³ meanwhile, forced a choice between free speech and abortion rights, with the free speech interest prevailing only partially.⁶⁴ In each of these cases, traditionally liberal jurists may have been more responsive to the perceived need for government regulation rather than free speech, while the very existence of government regulation impelled the traditionally conservative judges to embrace First Amendment values. If so, the ideological guidance provided by Table 5 this Term is obscure at best.

Whatever subjective analysis might suggest, Table 5 demonstrates that the First Amendment fared poorly in 1996. Every Justice supported fewer First Amendment claims, with the exception of Justices Thomas and Scalia—who uncharacteristically topped the chart by supporting First Amendment claims 85.7% of the time. Chief Justice Rehnquist and Justice O'Connor both lowered their support for First Amendment claims some 34 points, favoring the claim only 28.6% of the time. The Chief Justice's score, however, is consistent with his position as the most conservative Justice in First Amendment cases during eight of the last ten Terms.

At bottom, the conservative swing of the Court on First Amendment issues is explained by the low scores of normally supportive Justices. Jus-

59. 117 S. Ct. 1174.

60. *See id.*

61. 117 S. Ct. 2130.

62. The majority was comprised of Justices Breyer, Kennedy, Ginsburg, Stevens and O'Connor.

63. 117 S. Ct. 855.

64. *See id.* at 866-68 (Rehnquist, C.J., joined by Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas and Ginsburg) (addressing the propriety of "floating" and "fixed" buffer zones which limit the activities of abortion protestors, and finding that "floating" buffer zones violate the First Amendment); *see id.* at 868-71 (Rehnquist, C.J., joined by Stevens, O'Connor, Souter, Ginsburg, Breyer, J.J.) (finding that "fixed" buffer zones do not violate the First Amendment); and *see id.* at 874-75 (Scalia, J., dissenting, joined by Kennedy, Thomas, J.J.) (arguing that Court's action sustaining "fixed" buffer zones "makes a destructive inroad upon First Amendment law").

tice Breyer, for example, voted the most conservatively, voting for the claim only 14.3% of the time, which marked an all-time low score for him. In fact, his score dropped 61 points from the previous Term. Whether the Court's unusual hostility to the First Amendment this Term is an aberration, best explained by the ideological cross currents discussed above, remains to be seen.

The Court's unprecedented 47-point decrease in its support of First Amendment claims also rendered predictions in this realm for the 1996 Term quite inaccurate. In *Turner*, *Glickman*, and *Schenk*, normally conservative Justices voted liberally, and normally liberal Justices voted conservatively. The scores of six of the nine Justices deviated in a statistically significant manner from their prior mean scores.⁶⁵ The shifts were in both liberal and conservative directions, with normally liberal Justices Breyer, Ginsburg, and Stevens shifting in a conservative direction and normally conservative Justices Scalia and Thomas shifting in a liberal direction. Justice O'Connor, who, as previously noted, occupies a swing position on the Court, followed the liberal bloc in voting more conservatively this Term. The voting patterns of the Chief Justice and Justice Breyer show a near-perfect correlation, with an adjusted r^2 statistic of 99%.

Table 6: Equal Protection

Data Table 6 and Chart 6 demonstrate conservative movement this Term, compared to last Term's relatively liberal voting behavior.⁶⁶ In the "Majority All Cases" category, the Court voted for the equal protection claim only 20% of the time, compared with 80% of the time during the 1995 Term. This conservative trend was also evidenced in the "Split Decision" category, with the Court voting for the claim only 33.3% of the time. Thus, the scores this Term indicate a fairly steep decline in support for equal protection claims. Only five cases involving such claims were argued this Term, however, and reliable conclusions are hard to draw from such a small sample of cases.

Individual Justices also exhibited some rather dramatic shifts in voting behaviors. For example, Chief Justice Rehnquist did not support an Equal Protection claim in any case this Term. Justice Souter, in turn, only voted for the claim 20% of the time, marking an all-time low for him.

65. The six judges were as follows: Justices Breyer, Ginsburg, O'Connor, Scalia, Stevens and Thomas.

66. Case decided in favor of the equal protection claim: *M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1996). Cases decided against the equal protection claim: *General Motors*, 117 S. Ct. at 811; *Lawyer*, 117 S. Ct. at 2186; and *Vacco*, 117 S. Ct. at 2293.

Predicted voting behaviors involving equal protection claims were markedly inaccurate, perhaps due to the small sampling of equal protection cases appearing over the course of this Study. Because the Justices' scores have varied so widely from Term to Term, very large deviations are required to register a statistically significant shift from historical means. Only the Chief Justice and Justice Souter posted scores demonstrating such a shift, a conservative one in both cases. Justices Breyer, Ginsberg, and Souter have voted identically in this category over the course of the Study and, therefore, have perfectly correlated voting patterns, with an r^2 statistic of 100%.

Table 7: Statutory Civil Rights

Data Table 7 and Chart 7 show the Court voting more frequently in favor of statutory civil rights claims this term.⁶⁷ In the "Majority All Cases" category, the Court accepted 57.1% of all the claims presented—the second highest score since the inception of this Study. This liberal movement is offset by an eight-point drop in the acceptance rate of statutory claims in split decisions; the Court accepted the claims in this category only 16.7% of the time, compared with a 25% acceptance rate last Term. The overall liberal movement in Table 7 is reinforced by the 87.5% acceptance of statutory claims in "Unanimous" cases.

Because the liberal movement in statutory civil rights claims results largely from the outcomes of "Unanimous cases" (where ideology is ostensibly less relevant), such movement perhaps should not be overstated. Nevertheless, the rankings of the individual Justices in Table 7 suggest that the outcome may be significant since the top four positions are held by the Court's most liberal Justices. Justice Souter, for example, leads the Court in his support of statutory civil rights claims, voting for such claims 92.9% of the time. Justices Breyer, Stevens, and Ginsburg follow, each voting for the claims more than three-fourths of the time. The Court's most conservative Justices (the Chief Justice and Justices Scalia and Thomas), by contrast, accept statutory claims only half the time. Interestingly, the four

67. Cases decided in favor of statutory civil rights claims: *Lopez v. California*, 117 S. Ct. 340 (1996); *Walters v. Metropolitan Educ. Enters.*, 117 S. Ct. 660 (1997); *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997); *Reno v. Bossier Parish Sch. Bd.*, 117 S. Ct. 1491 (1997); *Young v. Fordice*, 117 S. Ct. 1228 (1997); *Johnson v. Fankell*, 117 S. Ct. 1800 (1997); *Richardson v. McKnight*, 117 S. Ct. 2100 (1997); and *Foreman v. Dallas County*, 117 S. Ct. 2357 (1997). Cases decided against statutory civil rights: *Board of County Comm'rs v. Brown*, 117 S. Ct. 1382 (1997); *Reno v. Bossier Parish Sch.*, 117 S. Ct. 1491 (1997); *Edwards v. Balisok*, 117 S. Ct. 1584 (1997); *McMillian v. Alabama*, 117 S. Ct. 1734 (1997); *Abrams v. Johnson*, 117 S. Ct. 1925 (1997); and *Boerne*, 117 S. Ct. at 2157.

Justices with 50% scores this Term (the Chief Justice and Justices Scalia, Thomas and Kennedy) also had identical 16.7% scores last Term.

The predictions regarding Chief Justice Rehnquist and Justice Stevens were relatively accurate, as the Chief Justice voted just 7 points less often for the claims than his predicted behavior of 57%. Justice Stevens' behavior was also close to the predicted mark, as he voted just 7.5 points more often for the claim than predicted. Justice Scalia, who voted for the claim an uncharacteristic 50% of the time (his highest score in the last eight Terms), was the least predictable Justice on statutory civil rights claims. The scores of the Chief Justice and Justices O'Connor, Souter, Stevens, and Thomas departed in a statistically significant manner from their previous means. All shifted in a liberal direction.

Table 8: Jurisdiction

Data Table 8 and Chart 8 reveal no startling changes in the Court's voting behavior in 1996.⁶⁸ In the "Majority All Cases" category, the Court only slightly decreased its support for federal jurisdiction, dropping about five points from 57.1% to 52.2%. This change seems rather innocuous. However, in 1996, the Court supported jurisdictional claims in "Split Decisions" only 28.6% of the time—a 21-point drop from its 1995 support of federal jurisdictional claims. Coupled with the four-point drop in "Unanimous" cases, this movement suggests a slightly conservative trend.

Individually, the most significant change in voting behavior is the Chief Justice's nearly 14-point increase in his support of federal jurisdictional claims. Indeed, except for the Chief Justice's movement, the top (Justice Stevens) and bottom (Justices Thomas and Scalia) of Table 8 remain unchanged from last Term, with only slight variances in the order of the remaining Justices.

Predicted voting behaviors on jurisdictional issues, accordingly, were relatively accurate. Justice Stevens was again the most predictable, voting for the exercise of federal jurisdiction only 9.4 points more often than his

68. Cases decided in favor of the exercise of jurisdiction: *Robinette*, 117 S. Ct. at 417; *United States v. Jose*, 117 S. Ct. 463 (1996); *Caterpillar v. Lewis*, 117 S. Ct. 467 (1996); *Walters*, 117 S. Ct. at 660; *Ingalls Shipbuilding Inc.*, 117 S. Ct. at 796; *General Motors*, 117 S. Ct. at 811; *United States v. Wells*, 117 S. Ct. 921 (1997); *Bennett*, 117 S. Ct. at 1154; *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997); *Suitim v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659 (1997); *DeBuono*, 117 S. Ct. at 1747; and *Clinton v. Jones*, 117 S. Ct. 1636 (1997). Cases decided against the exercise of jurisdiction: *In Re Gaydos*, 117 S. Ct. at 466; *Adams v. Robertson*, 117 S. Ct. 1028 (1997); *Arizonans for Official English*, 117 S. Ct. at 1055; *Harbor Tug & Barge Co. v. Papai*, 117 S. Ct. 1535 (1997); *Arkansas v. Farm Credit Serv. of Cent. Arkansas*, 117 S. Ct. 1776 (1997); *Johnson*, 117 S. Ct. at 1800; *Hughes Aircraft*, 117 S. Ct. at 1871; *Coeur d'Alene Tribe of Idaho*, 117 S. Ct. at 2028; *Lindh*, 117 S. Ct. at 2059; *Amchem Products Inc. v. Windsor*, 117 S. Ct. 2231 (1997); and *Raines*, 117 S. Ct. at 2312.

past behavior indicated. Chief Justice Rehnquist was the most unpredictable, voting for federal jurisdiction 25 points more often than prior behavior suggested. Except for the Chief Justice, no Justice strayed from his or her predicted behavior by more than 16.4 points. Perhaps the most notable fact regarding the predictions was that they were all too conservative, with every Justice voting more often to support a claim of jurisdiction than his or her prior record foreshadowed.

No Justice's score varied to a statistically significant degree from its prior mean in this category. Many correlations are apparent in the voting patterns. The strongest is between Justices Kennedy and Breyer, with an r^2 statistic of 99%.

Table 9: Federalism

Data Table 9 and Chart 9 demonstrate significant conservative consolidation on federalism issues.⁶⁹ Although the "Split Decision" category recorded only a slight increase in support of the state claims, rising from 62.5% to 63.2%, the "Majority All Cases" category recorded its second highest score since the inception of this Study—rising from 51.9% to 68.3%. The "Unanimous" category's score likewise increased dramatically, moving from 36.4% in 1995 to 72.7% this Term.

On an individual level, the Chief Justice led the conservative trend, voting for the state 75.6% of the time. This marked a 23.7 point conservative increase from last Term. But, while the Chief took the top conservative spot on Table 9, Justice O'Connor evidenced the most significant movement, climbing 26.3 points from last Term. Only the Court's two most liberal Justices (Justices Stevens and Souter) voted for the state

69. Cases decided in favor of the states: California, 117 S. Ct. at 337; Robinette, 117 S. Ct. at 417; *Greene v. Georgia*, 117 S. Ct. 578 (1996); *Atherton*, 117 S. Ct. at 666; *California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 117 S. Ct. 832 (1997); *Regents of Univ. of California v. Doe*, 117 S. Ct. 900 (1997); *Auer v. Robbins*, 117 S. Ct. 905 (1997); *Arizonans for Official English*, 117 S. Ct. at 1055; *Blessing v. Freestone*, 117 S. Ct. 1353 (1997); *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364 (1997); *Reno*, 117 S. Ct. at 1491; *Lords Landing Village Condominium Council v. Continental Ins. Co.*, 117 S. Ct. 1731 (1997); *McMillian v. Monroe County*, 117 S. Ct. 1734 (1997); *De Buono*, 117 S. Ct. at 1747; *Arkansas*, 117 S. Ct. at 1776; *Johnson*, 117 S. Ct. at 1800; *Gilbert v. Homar*, 117 S. Ct. 1807 (1997); *O'Dell*, 117 S. Ct. at 1969; *Agostini v. Felton*, 117 S. Ct. 1997 (1997); *Idaho*, 117 S. Ct. at 2028; *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997); *City of Boerne*, 117 S. Ct. at 2157; *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997); *Vacco*, 117 S. Ct. at 2293; and *Printz v. United States*, 117 S. Ct. 2365 (1997). Cases decided in favor of the federal government: *Lopez*, 117 S. Ct. at 340; *Caterpillar*, 117 S. Ct. at 467; *M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1996); *Young v. Fordice*, 117 S. Ct. 1228 (1997); *Chandler v. Miller*, 117 S. Ct. 1295 (1997); *Reno*, 117 S. Ct. at 1491; *Lambrix*, 117 S. Ct. at 1517; *Boggs v. Boggs*, 117 S. Ct. 1754 (1997); *Associates Commercial Corp. v. Rash*, 117 S. Ct. 1879 (1997); *United States v. Alaska*, 117 S. Ct. 1888 (1997); *Richardson v. McKnight*, 117 S. Ct. 2100 (1997); *Foreman*, 117 S. Ct. at 2357; *Pounders*, 117 S. Ct. at 2359.

claims less than half of the time, and Justice Kennedy recorded his highest score of the six most recent Terms. Thus, an overall conservative trend is evidenced by the voting behavior of the individual Justices this Term.

Of all of the Tables, voting behaviors on federalism issues were the most accurately predicted. The highest error recorded was for Justice Kennedy. His score of 68.3% was 19.2 points more conservative than his predicted score of 49.1%. The remaining Justices voted almost exactly as predicted. Justice Scalia was the most predictable, with an error of less than a point. Justice Stevens voted more conservatively than predicted by only 2.4 points. Justice O'Connor voted more conservatively than predicted by 8.6 points, and the Chief Justice exceeded his anticipated behavior by 6.2 points.

The scores of the Chief Justice and Justices Kennedy, O'Connor, and Scalia all shifted in a statistically significant, conservative direction from their previous means. The most notable correlation in voting patterns in this category is between Justices Kennedy and Breyer, with an adjusted r^2 statistic of 99%.

Table 10: Swing Votes

Data Table 10 and Chart 10 indicate voting scores for the sixteen cases that were decided by a margin of one vote.⁷⁰ The scores indicate an equalization of "Conservative" and "Liberal" coalitions. The two coalitions' scores were the second closest in the history of the Study at only 12.6 points apart. The "Conservative Coalition" "out-swung" the "Liberal Coalition", collecting the crucial fifth vote 56.3% of the time. The "Liberal Coalition", however, was not far behind—controlling the outcome in seven of the 16 closely divided cases decided this Term.

For the fourth year, Justice Kennedy is the Court's Most influential swing voter, voting with the majority 81.3% of the time. Justice O'Connor likewise retains her second place position, voting with the majority 75% of the time. In fact, for the third Term in a row, the Justices in the top three swing vote positions are the same: the Chief Justice and Justices Kennedy and O'Connor. Moreover, the swing-vote majority was only able to gather the crucial fifth vote in three of the 16 cases *without* the vote of Justice Kennedy. Because he sided with the majority in 13 of the 16 swing vote

70. Swing-vote cases reaching a conservative outcome: Turner, 117 S. Ct. at 1174; Board of County Comm'rs, 117 S. Ct. at 1382; McMillian, 117 S. Ct. at 1734; Abrams, 117 S. Ct. at 1925; O'Dell, 117 S. Ct. at 1969; Agostini v. Felton, 117 S. Ct. 1997 (1997); Idaho, 117 S. Ct. at 2028; Kansas, 117 S. Ct. at 2072; Glickman, 117 S. Ct. at 2130; Lawyer, 117 S. Ct. at 2186; and Printz, 117 S. Ct. at 2365. Swing-vote cases reaching a liberal outcome: Old Chief, 117 S. Ct. at 644; Camps Newfound/Owaloana Inc. v. Harrison, 117 S. Ct. 1590 (1997); Boggs, 117 S. Ct. at 1754; Lindh, 117 S. Ct. at 2059; and Richardson, 117 S. Ct. at 2100.

cases, it seems apparent that, in the clear majority of close cases, “as Justice Kennedy votes, so votes the Court.” Justice Ginsburg continued in her contrarian ways, swinging with the majority only 31.3% of the time.

The swing-vote tallies for the past eight Terms suggest that the Court faces something of an ideological stand-off. The 1988 and 1989 Terms were the last time that conservative coalitions possessed marked power (deciding 76% and 64% of the swing-vote cases those years, respectively). In 1990, power was almost evenly divided between conservative and liberal coalitions, and in 1991, liberal coalitions held sway. Similarly, in 1994, liberal coalitions decided about 64% of the cases decided by a five-member majority. Although conservative coalitions have controlled the outcome of close cases in three of the past four Terms, conservative coalitions are prevailing less dramatically than they did in 1988 and 1989. In short, while the current Court is conservative, the unsteady and apparently diminishing power of conservative coalitions suggests that the Rehnquist Court is unlikely to cut bold, new conservative ground in the near future.

V. Category Analysis

With data now collected from eleven Terms, we can begin to analyze the effectiveness of this Study’s categories in measuring liberal and conservative tendencies and trends. As might be expected, some categories more clearly indicate the Court’s collective and individual predilections than others. Some, although tending to divide the Court into liberal/conservative blocs, may “change polarity,” depending on the specific issues presented. For example, this Term’s First Amendment scores show Justices Scalia and Thomas at the top—a liberal position by this Study’s definitions, and a position not commonly occupied by these particular Justices. Conversely, Justice Breyer holds the bottom spot this Term, in contrast to second place last Term. Other categories, such as equal protection claims, tend to be implicated in very few cases. This results in highly volatile score movements from Term to Term because a single case may account for many percentage points.

Factor analysis⁷¹ provides one method for evaluating the ability of a particular test, a category in the case of this Study, to measure a characteristic or factor. By applying this method, we have determined that a primary factor may be extracted from the Study’s categories that accounts for nearly 40% of the variance revealed by the data on Tables 1 through 9.⁷² We interpret this factor as liberal/conservative bias because that is what

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

72. We employed a QMAX rotation to achieve this result. See *infra* note 91.

this Study purports to measure. The categories load onto this primary factor as follows:

<u>Category</u>	<u>Factor 1</u>
Statutory Civil Rights	0.856
Criminal/State Party	0.847
Jurisdiction	0.765
Federalism	0.721
Civil/State Party	0.691
Criminal/Federal Party	0.604
First Amendment	0.340
Civil/Federal Party	0.080
Equal Protection	-0.055
Variance	3.523
% Var.	0.391

According to this ranking, the Statutory Civil Rights category appears to be our best differentiator of liberal/conservative leanings, while equal protection is our poorest. A look at the data seems to confirm this result. As previously discussed, equal protection claims are relatively rare and produce volatile results.⁷³ In the Civil/Federal Party category, also a poor differentiator, case scores 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 64% since President Clinton took office. On the other hand, Justice Stevens averaged 48% under the Republicans and 67% under President Clinton.⁷⁴ First Amendment cases also tend toward pole swapping. If this Term's free speech issues had concerned flag burning, for example, rather than abortion clinic demonstrations and government regulation, the scores might have been nearly reversed.⁷⁵

Category analysis, in short, suggests that the most reliable indicator of actual ideology is the data collected on Table 7 (statutory civil rights), with Tables 3 (state criminal cases), 8 (jurisdiction), 9 (federalism) and 1 (state civil actions) providing the next most reliable data. Tables 4 (federal criminal cases), 5 (First Amendment), 2 (federal civil actions) and 6 (equal protection) provide the least reliable information. To the extent that the

73. See *supra* Chart 6.

74. See *supra* Table 2.

75. See *supra* Table 5.

foregoing analysis is accurate, and Table 7 indeed gives the most reliable information regarding the ideological leanings of individual Justices and the court as a whole, the liberal movement shown on that table may be more notable than the generally uniform (and undramatic) conservative data evidenced on the remaining Tables.

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 accounting for inconsistency in the nature of cases appealed to the Court from one Term to the next and in 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,⁷⁶ which 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, itself adjustable to reflect each category's importance.

We present liberal and conservative frontier data for the Court in Frontier Analysis Tables 1 through 4 below. Two versions of each frontier are presented. In Tables 1 and 2 we constrain the weights allocated to each category according to the factor analysis hierarchy described above.⁷⁷ 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 the Criminal/State category can not receive more weight than the Statutory Civil Rights category, Jurisdiction can not receive more weight than Criminal/State, and so forth. Tables 3 and 4 apply no weighting constraints at all, allowing each Justice to "choose" those weights that present him or her in the most conservative or liberal light possible. Each table lists a "% of Frontier" score for each Justice. Those with a score of 100% reach the frontier by employing the category weight distribution shown in the category columns. Scores less than 100% indicate that the most conservative/liberal score the Justice could obtain with optimal weighting places him or her the indicated percentage of the way toward the frontier. In some cases, an optimal combination of weights may even place a Justice

76. For more information regarding frontier analysis, see Appendix B.

77. See *supra* text accompanying notes 71-75 and Appendix B.

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. Because a black and white line graph containing nine data series can be difficult to read, we have displayed lines for only Justice Rehnquist, who dominates the conservative frontier during most Terms, and Justice Stevens, who usually dominates the liberal frontier. Markers without lines represent the remaining Justices. 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 overall.

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. Frontier Chart 2 shows clear and growing domination of the liberal frontier by Justice Stevens. This chart also provides evidence that Justice Souter's reputation as the "stealth justice" may be justified.⁷⁸ Beginning his tenure on the Court in 1990 with a liberal frontier score of just 53%, Justice Souter subsequently registered scores of 74%, 79%, 88%, 96%, and 100% prior to backing off to 85% in the 1996 Term.

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 never dropped below it, i.e., he has demonstrated conservative super-efficiency each Term. Frontier Chart 4 clearly displays Justice Stevens' super-efficient liberal tendencies. In fact, he so dominates the liberal frontier that only two other Justices, Breyer and Souter, have managed to touch the frontier. Justice Ginsburg is alone in reaching neither the liberal nor the conservative frontiers during her four Terms on the Court.

78. See, e.g., *Souter's Recent Turn to Left Makes Him Justice to Watch on Supreme Court*, BOSTON GLOBE, July 11, 1993, at A11. The article stated: "In his first term, he wrote so little he was nicknamed the 'stealth justice.'" Last term, he was lumped into a trio of moderate conservatives. Now, in the term just ended, Supreme Court Justice David Souter is the surprise of most high-court prognosticators for displaying increasingly liberal tendencies." *Id.*

FRONTIER ANALYSIS TABLE 1
 "CONSERVATIVE FRONTIER" -CONSTRAINED

JUSTICE	% OF FRONTIER	% SUPER-EFF.	CATEGORY WEIGHTS											
			CIVIL/ STATE	CIVIL/ FEDERAL	CRIM./ STATE	CRIM./ FEDERAL	1 ST AM.	EQUAL PROTECT.	STAT. CIV. RT.	JURIS.	FED'ISM			
Rehnquist	100%	117%	10%	10%	10%	10%	10%	10%	10%	10%	10%	10%	10%	10%
Scalia	100%	102%	-	-	-	335	-	-	-	-	33%	-	-	33%
Thomas	100%	-	-	-	-	-	-	-	-	-	100%	-	-	-
O'Connor	96%	-	-	14%	14%	14%	14%	14%	-	-	14%	14%	14%	14%
Breyer	83%	-	-	20%	20%	20%	20%	20%	-	-	20%	-	-	20%
Kennedy	81%	-	-	-	-	-	-	-	-	-	100%	-	-	-
Ginsburg	77%	-	-	25%	25%	25%	25%	25%	-	-	25%	-	-	25%
Souter	76%	-	-	13%	13%	13%	13%	13%	13%	13%	13%	13%	13%	13%
Stevens	67%	-	-	17%	17%	17%	17%	17%	-	-	17%	17%	17%	17%

FRONTIER ANALYSIS TABLE 2
 "LIBERAL FRONTIER" -CONSTRAINED

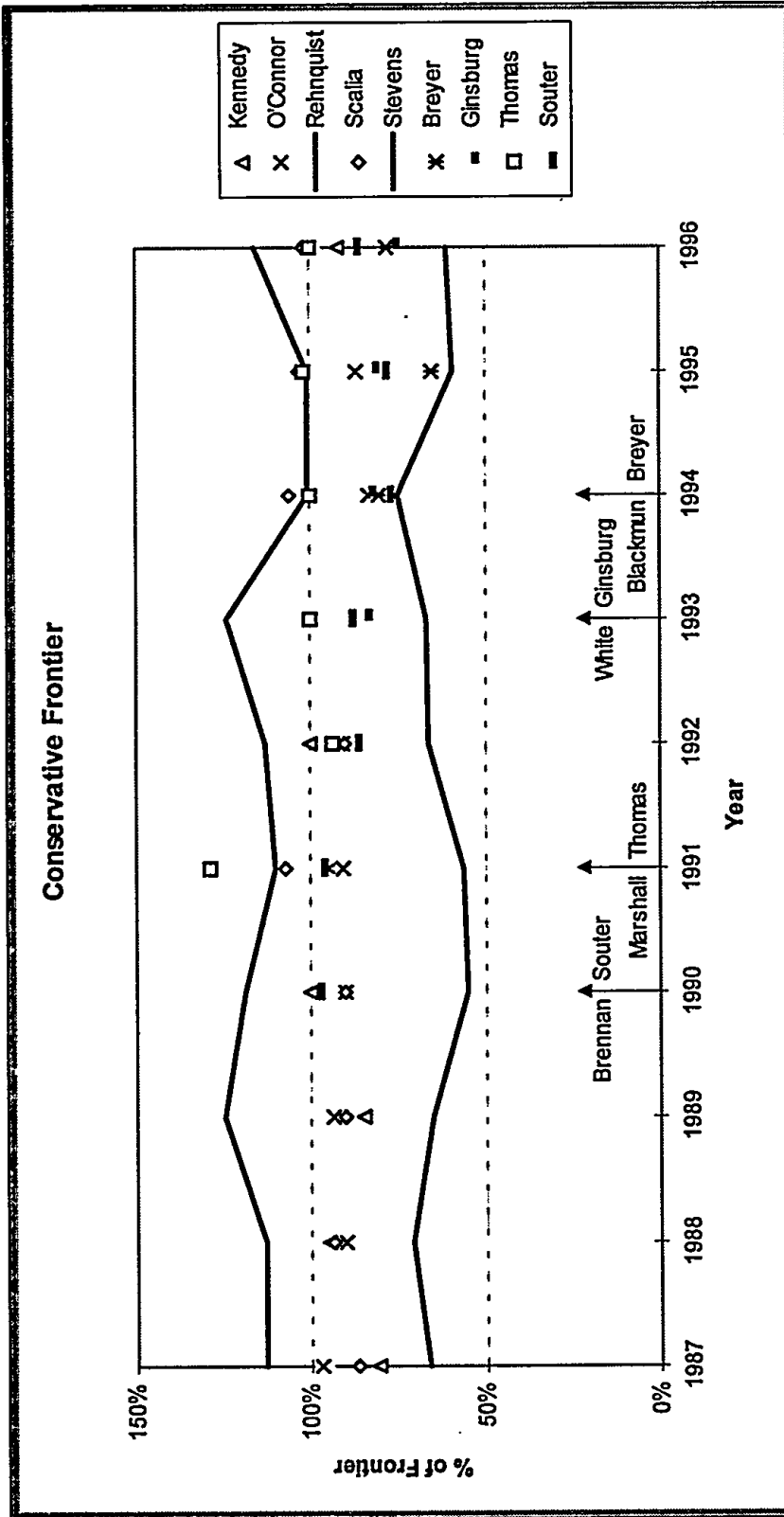
JUSTICE	% OF FRONTIER	% SUPER-EFF.	CATEGORY WEIGHTS											
			CIVIL/ STATE	CIVIL/ FEDERAL	CRIM./ STATE	CRIM./ FEDERAL	1 ST AM.	EQUAL PROTECT.	STAT. CIV. RT.	JURIS.	FED'ISM			
Stevens	100%	129%	-	-	100%	-	-	-	-	-	-	-	-	-
Breyer	89%	-	-	-	50%	-	-	-	-	-	50%	-	-	-
Ginsburg	86%	-	13%	13%	12%	13%	13%	13%	-	-	12%	13%	13%	13%
Souter	85%	-	13%	13%	13%	13%	13%	13%	-	-	13%	13%	13%	13%
Thomas	74%	-	13%	13%	13%	13%	13%	13%	-	-	13%	13%	13%	13%
Scalia	71%	-	13%	13%	13%	13%	13%	13%	-	-	13%	13%	13%	13%
Kennedy	70%	-	11%	11%	11%	11%	11%	11%	11%	11%	11%	11%	11%	11%
O'Connor	68%	-	11%	11%	11%	11%	11%	11%	11%	11%	11%	11%	11%	11%
Rehnquist	55%	-	13%	13%	13%	13%	13%	13%	-	-	13%	13%	13%	13%

FRONTIER ANALYSIS TABLE 3
 "LIBERAL FRONTIER" - UNCONSTRAINED

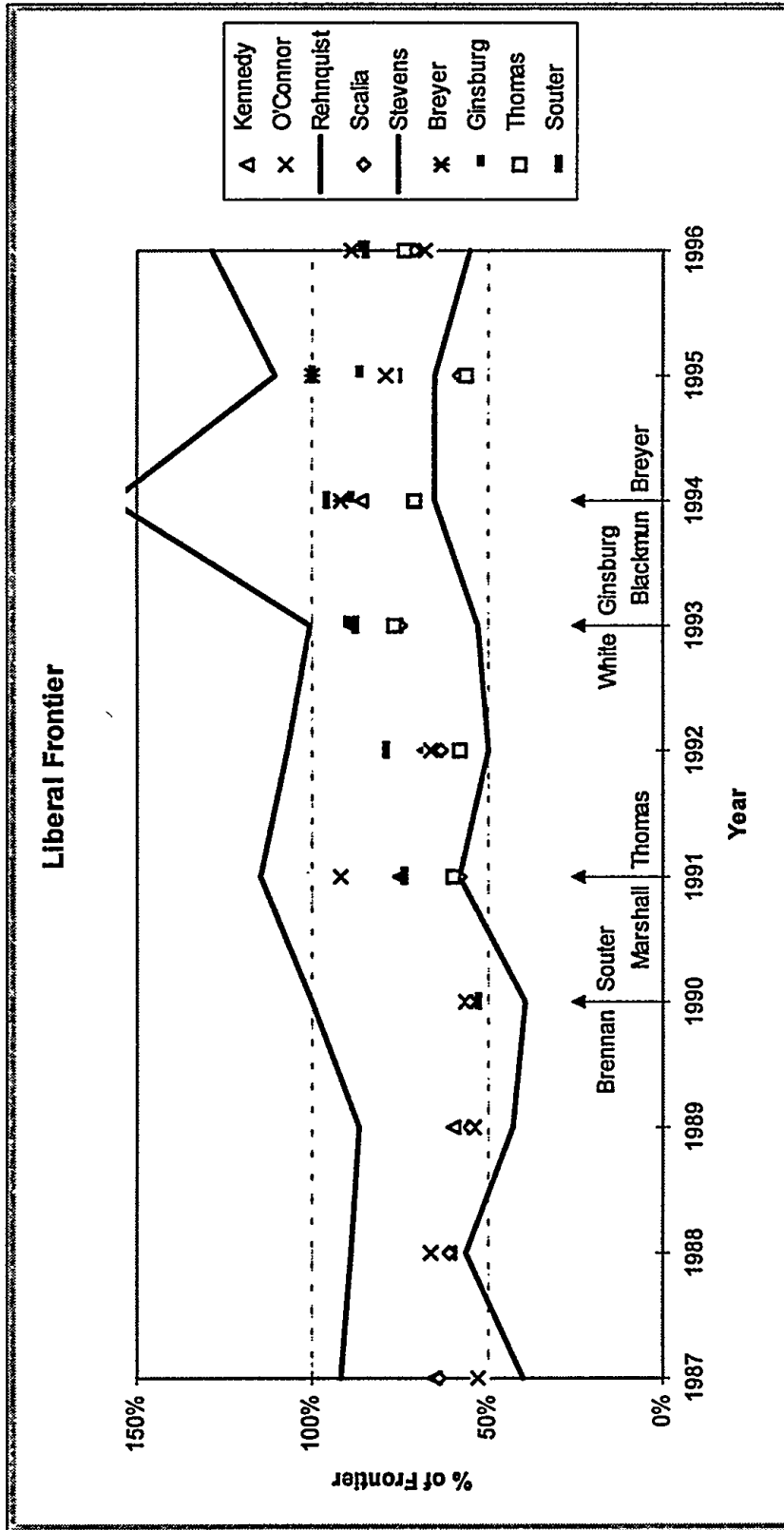
JUSTICE	% OF FRONTIER	% SUPER-EFF.	CATEGORY WEIGHTS									
			CIVIL/ STATE	CIVIL/ FEDERAL	CRIM./ STATE	CRIM./ FEDERAL	1 ST AM.	EQUAL PROTECT.	STAT. CIV. RT.	JURIS.	FED'ISM	
Stevens	100%	171%	-	-	-	54%	8%	38%	-	-	-	-
O'Connor	100%	150%	-	-	-	-	-	100%	-	-	-	-
Breyer	100%	133%	-	-	100%	-	-	-	-	-	-	-
Thomas	100%	122%	-	45%	-	55%	-	-	-	-	-	-
Souter	100%	116%	-	-	-	-	14%	-	-	86%	-	-
Ginsburg	100%	115%	25%	-	-	55%	20%	-	-	-	-	-
Kennedy	100%	105%	-	-	-	-	16%	20%	-	-	64%	-
Scalia	100%	-	-	-	-	-	100%	-	-	-	-	-
Rehnquist	.92	-	-	14%	-	-	12%	-	-	-	74%	-

FRONTIER ANALYSIS TABLE 4
"CONSERVATIVE FRONTIER"—UNCONSTRAINED

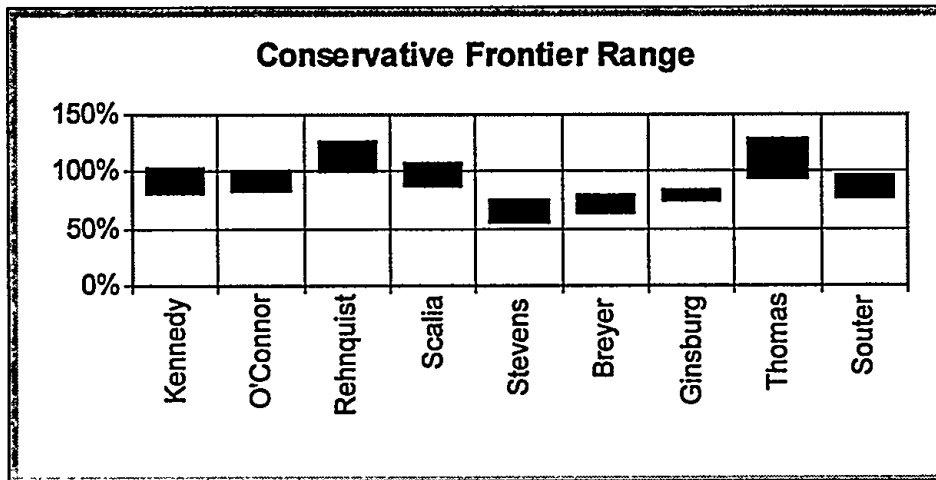
JUSTICE	% OF FRONTIER	% SUPER-EFF.	CATEGORY WEIGHTS								
			CIVIL/ STATE	CIVIL/ FEDERAL	CRIM./ STATE	CRIM./ FEDERAL	1 ST AM.	EQUAL PROTECT.	STAT. CIV. RT.	JURIS.	FED'ISM
Rehnquist	100%	136%	-	-	-	-	14%	50%	36%	-	-
Breyer	100%	120%	-	-	-	100%	-	-	-	-	-
O'Connor	100%	108%	-	-	-	88%	12%	-	-	-	-
Scalia	100%	107%	-	-	-	65%	-	-	35%	-	-
Kennedy	100%	-	-	-	-	-	-	-	100%	-	-
Souter	100%	-	-	26%	-	22%	-	-	-	52%	-
Thomas	100%	-	54%	-	-	-	-	-	-	46%	-
Ginsburg	98%	-	-	26%	-	-	-	-	-	74%	-
Stevens	89%	-	-	89%	-	-	-	-	11%	-	-



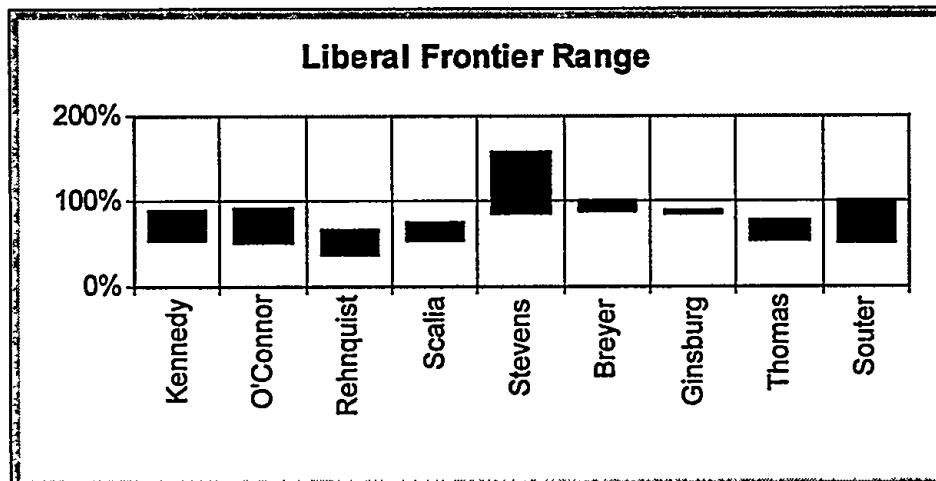
Frontier Chart 1



Frontier Chart 2



Frontier Chart 3



Frontier Chart 4

Conclusion

The 1996 Term, overall, reflects consolidation—rather than expansion—of the current Court’s conservatism. Although the Court continues to vote in a conservative manner on most of the Data Tables comprising this Study, the Court’s actions (with the possible exception of its atypical and marked rejection of First Amendment claims) are neither dramatic nor surprising. The surprisingly “conservative” failure of First Amendment claims this Term, moreover, may well be due to cross-cutting ideological issues in the decided cases—not to substantive rejection of liberal free speech norms.⁷⁹ Moreover, Data Table 2 (where the most politically liberal members of the Court have taken the lead in supporting the federal government) and Data Table 7 (where those same Justices have cast consistently liberal votes in favor of statutory civil rights claims) suggest that liberal forces on the Court are not quiescent. That reality is underscored by Data Table 10, which shows, once again, that whichever ideological wing catches Justice Kennedy obtains the right to decide the Nation’s most controversial cases. The ideology of the Rehnquist Court, in sum, is mature and ripe for change. The next replacements on the Court will either energize the Court’s extant, but somewhat quiescent, conservatism, or tip the balance of power in favor of an already established liberal wing.

79. See *supra* text accompanying note 58.

APPENDIX A

1. *The Universe of Cases*

The only cases included in the database are those 1996 Term cases decided by full opinion. Decisions on motions have been excluded even if accompanied by an opinion. Cases handled by summary disposition are included only if they are accompanied by a full opinion of the Court and not if the only opinion is a dissent. Cases decided by a four-four vote resulting in affirmance without written opinion have been excluded. Both signed and unsigned per curiam opinions are considered full opinions if they set forth reasons in a more than perfunctory manner. Cases not fitting within any of these categories are not included in the database for any of the tables.

2. *Cases Classified as Civil or Criminal*

The classification of cases as civil or criminal follows commonly understood definitions. Generally, the nature of the case is clearly identified in the opinion. Only occasionally does a case pose a problem of classification. No cases in 1996 raised such a question.

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

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

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

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

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

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

The statutory civil rights issues 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.

The 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

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.⁸⁰ 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 fit into an Auto Regressive Integrated Moving Average (ARIMA) forecasting model.⁸¹ 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:

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

81. 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).

Auto-Regression: Once the series has been made stationary, an auto-regressive parameter may be determined.⁸² 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 auto regressive 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. However, we therefore seek to determine that parameter which produces the least total error when applied to the entire series.⁸³

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} .⁸⁴ 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.

82. 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.

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

84. 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).

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.

C. Mean Testing

We use a "student's t test"⁸⁵ 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.⁸⁶ We hypothesize that X_1 is also the true mean of the population μ , and we set up this hypothesis (the "null" hypothesis) and its corresponding alternative hypothesis as follows:

$$H_0: \mu = X_1$$

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

$$H_a: \mu \neq X_1$$

The alternative hypothesis, i.e., X_2 significantly shifts μ from its previous value on the real number line. Therefore, the two samples are not statistically equivalent.

We then set out to prove the alternative hypothesis, within a certain confidence interval,⁸⁷ by rejecting the null hypothesis.⁸⁸ This is accomplished by calculating the following statistic:

85. For a practical perspective on this procedure, see DAVID S. MOORE & GEORGE P. MCCABE, INTRODUCTION TO THE PRACTICE OF STATISTICS 500-18 (1993). See also CRAIG AND HOGG, *supra* note 42.

86. 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.

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

88. 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 85.

Equation :

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

The result of this equation (t) is compared to the entry on a t -distribution table corresponding to the confidence interval desired (α) and the appropriate number of degrees of freedom ($n-k$).⁸⁹ If the absolute value of t is greater than the table entry, H_0 is rejected, and we say that the Justice has shown a statistically significant change in voting behavior this Term.

D. Correlation

Relationships between two Justices' voting records may be mapped over a two-dimensional Cartesian plane as in Figures 1 and 2. Figure 1 shows a high degree of positive correlation ($R^2=0.7921$) between the voting percentages of the Chief Justice and Justice Scalia for the Equal Protection category. The points all fall close to an upward sloping line. On the other hand, Figure 2 shows that the voting percentages of the 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 through 10. The first number in each pair is the Pearson correlation coefficient. The second number is an R^2 statistic.⁹⁰ 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.

89. k = the number of parameters being tested. Here, μ is the only hypothesized parameter, so $k = 1$.

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

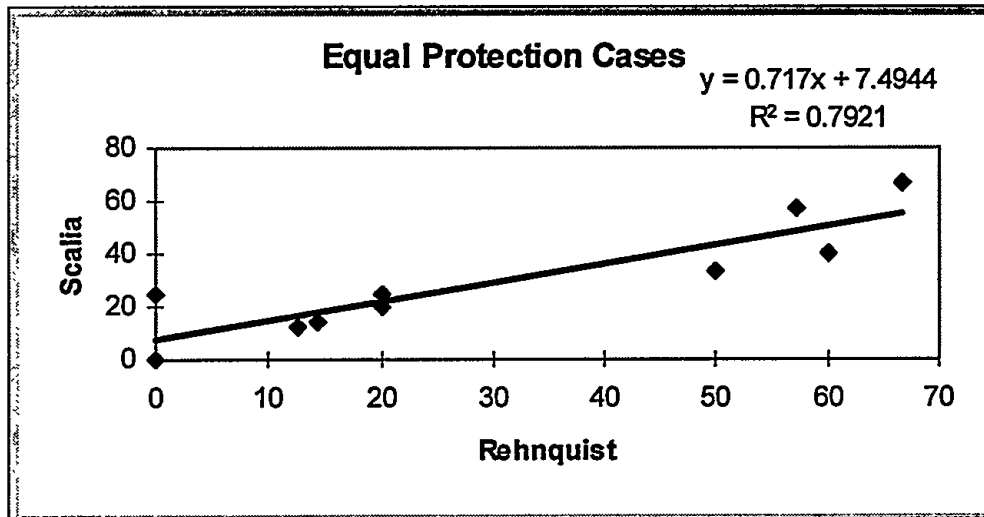


Figure 1

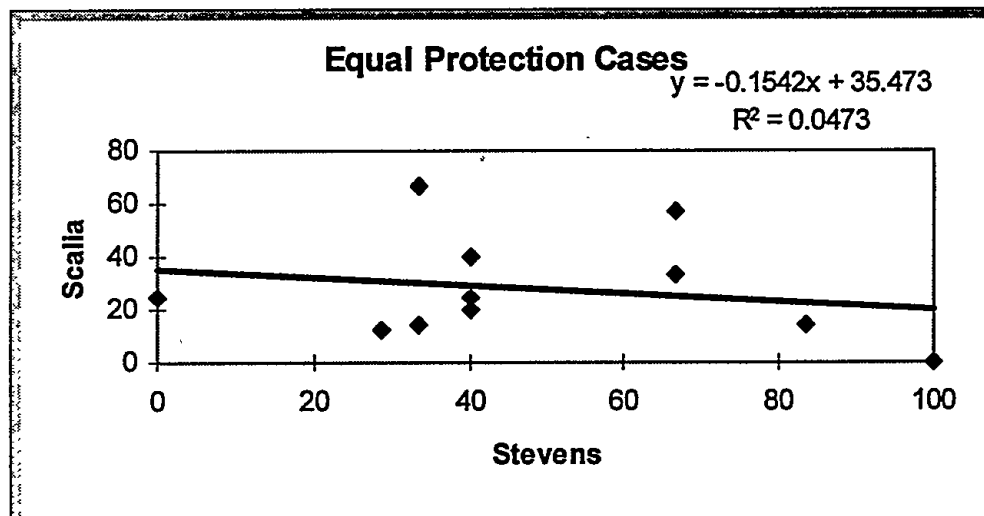


Figure 2

The correlation measured is in the Term-to-Term movement of Justices' scores. A high correlation between two Justices does not mean that they necessarily vote together often. It simply means that their scores tend to move up and down together from one Term to another. Also note that correlation in no way implies causation.

E. Factor Analysis

Factor analysis has long been used by psychologists who attempt to identify characteristics of personality or intelligence by using batteries of tests. Their challenge has been to develop tests that validly measure the characteristics of interest. This Study similarly attempts to measure the

Justices' liberal and conservative leanings by "testing" their disposition of certain types of cases.

We performed a factor analysis of the Study categories using Minitab software 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.⁹¹

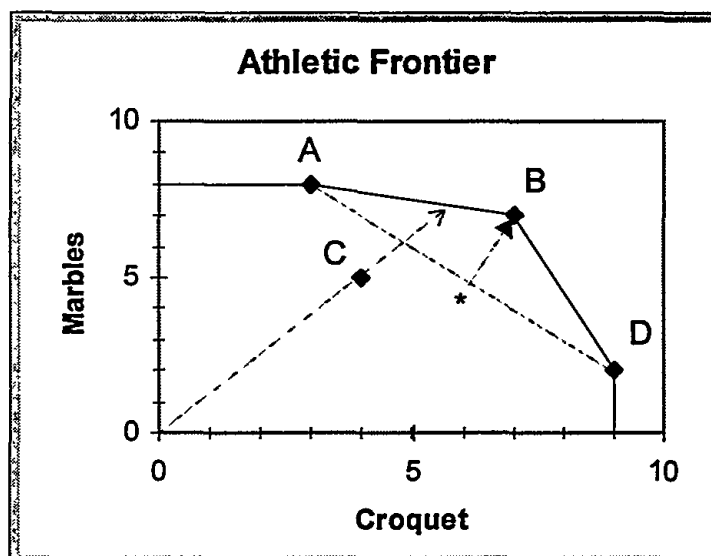
F. Frontier Analysis

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:

	<u>Croquet</u>	<u>Marbles</u>
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 5.5. The situation is presented graphically in the following figure:

91. See generally DENNIS CHILD, *THE ESSENTIALS OF FACTOR ANALYSIS* (2d ed. 1990); PAUL KLINE, *AN ESSAY GUIDE TO FACTOR ANALYSIS* (1994).



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.*

* For more information on frontier analysis, see DONALD L. ADOLPHSON, *MANAGER’S TOOLKIT: MANAGERIAL SPREADSHEET ANALYSIS* [to be published 1998].