

Supreme Court Voting Behavior: 2000 Term

by RICHARD G. WILKINS,* SCOTT WORTHINGTON,** CARTER K.F.
CHOW,*** SARAH K.L. CHOW,**** ADAM BECKER*****

I. Introduction

This Study, the fifteenth in a series,¹ tabulates and analyzes the voting behavior of the United States Supreme Court during the 2000 Term.² The analysis is designed to determine whether individual Justices and the Court as a whole are voting more “conservatively,” more “liberally,” or about the same when compared with past Terms. As in politics, whether a judicial trend is “conservative” or “liberal” often lies in the eye of the beholder. A lawyer for the American Civil

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

** J.D., J. Reuben Clark Law School, Brigham Young University, 1999. Associate, Robinson, Seiler & Glazier.

*** J.D., J. Reuben Clark Law School, Brigham Young University, 2002.

**** J.D., J. Reuben Clark Law School, Brigham Young University, 2002.

***** J.D. Candidate, J. Reuben Clark Law School, Brigham Young University, 2003.

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

2. The 2000 United States Supreme Court Term covers decisions made from November 2000 to June 2001.

Liberties Union could well paint an ideological picture of the Court far different from one sketched by a lawyer from the Pacific Justice Institute.

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

This Term’s survey shows mixed results, but suggests slight liberal movement for the Court as a whole, following last Term’s conservative voting trend. The “Majority” decisions in six of the ten categories (Civil/Federal Party, Criminal/State Party, Criminal/Federal Party, First Amendment, Statutory Civil Rights, and Federalism) indicate varying degrees of liberal movement. For example, the voting results from the Criminal/State Party category, the Study’s second most reliable category for ideological

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

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

5. *See infra* Appendix B.

6. *See infra* note 38.

manifestations of voting behavior,⁷ reveal a decline in the Court's support of the State Government.⁸ Similarly, the Court showed significantly less support of the Federal Government in the Criminal/Federal Party category, holding in favor of the federal government only 28.6% of the time in "Majority" decisions.⁹ However, the liberal movement in some categories, such as the First Amendment category, must be viewed with caution. Because the Court only heard four cases with First Amendment claims, the results of the First Amendment category may not be reliable. Furthermore, although the Court showed liberal movement in its "Majority" decisions in Civil/Federal Party and Statutory Civil Rights cases, these two categories ranked as the two most unreliable indicators of the Court's ideological voting trends this Term.

Of the categories that showed conservative movement (Civil/State Party, Equal Protection, Federal Jurisdiction and Swing-vote), the statistics from the Swing-vote and Civil/State Party categories are most significant. The statistics from the Swing-vote category indicate that in close, ideologically charged cases, the Court voted conservatively 60% of the time.¹⁰ The conservative movement of the Court in Civil/State party cases is also significant because the Civil/State Party category is the most reliable indicator of the Court's ideology this Term.¹¹ Although the Court showed conservative movement in the Equal Protection category, the results may not be reliable because the Court only decided four Equal Protection cases this Term. The movement in the Federal Jurisdiction category, although nominally "conservative," is somewhat ambiguous because, compared with outcomes for the past nine Terms, this year's score is still relatively "liberal."

The anticipated voting scores for the 2000 Term were not as close to the Court's actual scores as they have been in past years. Like last year, the Study most accurately anticipated results for the Civil/State Party category; however, this Term, the average difference between anticipated and actual scores in the category was 9.29 percentage points per Justice compared to last Term's average difference of 4.95 percentage points per Justice.¹² The anticipated

7. *See infra* Part V.

8. *See infra* Data Table 3.

9. *See infra* Data Table 4.

10. *See infra* Data Table 10.

11. *See infra* Part V.

12. *See infra* Data Table 1; 1999 Study *supra* note 1, at 554.

scores in the Statutory Civil Rights Claims category differed most from the Justices' actual scores, deviating by an average of 40.33 percentage points per Justice.¹³ However, the great difference between the anticipated and actual scores could be due to the fact that the Court only heard four cases with Statutory Civil Rights claims this Term.

Generally, the Study's anticipated voting scores for "Majority" decisions were much closer to the Court's actual scores than the anticipated votes of individual Justices. In the Federalism category, for example, the anticipated and actual scores for "Majority" decisions differed by only 2.4 points, while the greatest difference was in the Criminal/Federal Party category where the actual and anticipated scores differed by 22.8 points. With regard to the accuracy of anticipated scores for individual Justices, Justice Kennedy's anticipated scores were closest to his actual scores, differing by an average of only 10.32 points in each category. Because Justice Kennedy is considered a "swing-voter," it would seem that his voting behavior would be more difficult to anticipate. However, the anticipated scores for Justices Souter and Breyer deviated most from their actual scores, by 23.26 and 26.41 points respectively.

Category analysis, introduced in the 1996 Study and included in the Study again this Term, indicates that the categories of Civil/State Party,¹⁴ Criminal/State Party,¹⁵ Criminal/Federal Party,¹⁶ and Federalism¹⁷ are the best indicators of the conservative/liberal predilections of the Justices. The remaining categories, Equal Protection,¹⁸ First Amendment,¹⁹ Federal Jurisdiction,²⁰ Civil/Federal Party,²¹ and Statutory Civil Rights,²² are relatively poor indicators of the Justices' voting propensities.²³

Frontier analysis this Term revealed a few interesting changes. Justice Scalia moved into the top spot on the "Conservative Frontier"

13. *See infra* Data Table 7.

14. *See infra* Data Table 1.

15. *See infra* Data Table 3.

16. *See infra* Data Table 4.

17. *See infra* Data Table 9.

18. *See infra* Data Table 6.

19. *See infra* Data Table 5.

20. *See infra* Data Table 8.

21. *See infra* Data Table 2.

22. *See infra* Data Table 7.

23. *See infra* Part V.

with a super efficiency score of 101%, displacing Chief Justice Rehnquist as the most conservative Justice this Term. Justice Thomas also moved in front of Chief Justice Rehnquist, taking the second spot on the “Conservative Frontier” with a score of 100%.²⁴ On the other end of the spectrum, Justice Breyer took over the distinction of the most liberal Justice on the Court with a frontier analysis score of 120%.²⁵ The top three Justices on the “Liberal Frontier” – Justices Breyer, Stevens, and Souter – all recorded super efficiency scores above 100%.

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

II. Mode of Analysis

This Study is based on the tabulation and mathematical analysis of each Justice’s votes in ten categories. Nine of the categories are based on the nature of the issues addressed (e.g., First Amendment, Equal Protection, etc.) or on the character of the parties involved (e.g., state or federal government litigants).²⁶ The tenth category tabulates the number of times each Justice voted with the majority in cases decided by a single, or swing, vote.

The first nine categories are designed to detect each Justice’s

24. See *infra* Frontier Analysis Table 1.

25. See *infra* Frontier Analysis Table 2.

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

attitude toward two broad issues underlying most Supreme Court decisions: the protection of individual rights and judicial restraint. The tabulation of votes in each category reveals, in broad strokes, the frequency with which individual Justices and the Court as a whole vote to protect individual rights²⁷ or to exercise judicial restraint.²⁸

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

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

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

28. Jurisdictional questions (Table 8), which exhibit the relative propensity of the Justices to avoid judicial decisions, are perhaps the most direct statistical evidence of judicial restraint. Other Tables included in the Study, however, also provide some indication of the individual Justices’ (and the Court’s) positions on the “judicial restraint/judicial activism” axis. Judicial restraint is normally identified with deference to the policy-making branches of government, adherence to precedent, avoidance of constitutional bases of decision when narrower grounds exist, respect for the Framers’ intent when construing constitutional text, and avoidance of issues rendered unnecessary by the doctrines of ripeness, mootness, political questions, etc. As a result, a vote in favor of individual rights claims (Tables 1, 2, 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.

always, or even necessarily, the attitudinal opposite of judicial restraint.

Despite the difficulties with our classification scheme, the basic assumption that supports this Study – that the general orientation of individual Justices and the Court regarding individual rights and judicial restraint is suggestive of conservative or liberal ideology – appears sound.²⁹ For example, deference to legislatures frequently results in rejection of an individual's claim, especially one predicated upon the impropriety of governmental action.³⁰ Judicial restraint is associated with a reluctance to read new rights into the Constitution or a statute.³¹ Refusal to exercise federal jurisdiction leaves the matter to state courts with their possible bias in favor of state governmental action and is a clear rebuff to the claimant seeking federal protection of rights.³² Therefore, to the extent that the Study's basic ideological assumptions regarding liberal and conservative outcomes are accurate, it is possible to identify trends by tracking the voting patterns reflected in Data Tables 1 through 10.³³

To reckon current ideological positions within the Court, votes of the individual Justices can be compared with those cast by other Justices this Term, as well as with the outcomes for the 1991 through 1999 Terms. Likewise, the current ideological position of the Court as a whole can be determined by comparing present outcomes of the Court majority with those of prior Terms. In Data Tables 1-10, this

29. See *supra* note 3 and accompanying text; see also *infra* Part V.

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

31. See *id.*

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

33. Of course, the data is only as reliable as our assumptions. The general assumption that a vote in favor of the government reflects conservative views may not be accurate in all cases. For example, see *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), where the more conservative members of the Court voted liberally against the state in order to reaffirm the importance of economic rights – generally considered to be a conservative value. Similarly, in *Solid Waste Agency v. U.S. Army Corps.*, 531 U.S. 159 (2001), the conservative members of the Court voted liberally against the federal government based on the their desire to avoid deciding a constitutional question. While our classification scheme is far from perfect, it does have the advantage of being consistent. Moreover, this consistent scheme is applied to every case the Court decides. Therefore, on balance, the data should provide relatively reliable indicators of the Court's conservative or liberal leanings.

information appears in the form of voting percentages for each Justice and for the Court majority. Charts 1-10, in turn, graphically depict the Court's voting trends revealed in the tables.

Mean Tables 1-10 and Regression Tables 1-10 analyze the voting patterns of the individual Justices. The purpose of these tables is to determine whether a Justice's 2000 Term voting record departs in a statistically significant manner from his or her prior voting pattern and whether any significant correlation exists among the Term-to-Term voting patterns of the Justices.³⁴

In past studies, we included "predictions" of the Justices' voting scores in the Data Tables. However, this year, we changed the title "Predictions" to "Anticipated Voting Behavior" in order to more accurately reflect the utility of our data; the term "Predictions" seems to suggest that our data is robust enough to have predictive value. It does not. However, "Anticipated Voting Behavior" – based on the statistical analysis of past voting behavior – is useful in gauging the relative importance of changes in voting patterns from Term to Term. In order to calculate the anticipated voting scores of the Justices, we use an Auto Regressive Integrated Moving Average (ARIMA) forecasting model.³⁵ The ARIMA model is useful in situations where, as in this Study, a single variable (a Justice's voting score) is forecast based only on its present and prior values with no other explanatory variables.

In order to determine which categories best reveal the conservative and liberal leanings of the Court, we apply factor analysis, which "tests" the Justices' disposition of cases in the various categories. Factor analysis has long been used by psychologists attempting to identify characteristics of personality or intelligence.³⁶ The results of the factor analysis for the 2000 Term appear in Part V of this article.

Finally, Frontier Analysis Tables 1-4 and Frontier Charts 1-4 compare the Justices' conservative and liberal predilections this Term and over the course of the entire Study. Frontier analysis³⁷ mitigates some of the analytical difficulties previously discussed by measuring the strength of each Justice's tendencies relative to the rest of the Court with respect to the cases actually decided in a given Term rather than against any absolute scale.

34. See *infra* Appendix B.

35. See *id.* for a more detailed explanation of ARIMA.

36. See *id.* for a more detailed explanation of factor analysis.

37. See *id.* for a more detailed explanation of frontier analysis.

All of these data and statistics must be interpreted with caution. The percentages and statistical results revealed in each table are affected not only by the dispositions of the individual Justices but also by the nature of the cases decided each Term. Furthermore, Supreme Court cases are not the result of random selection, and the universe of votes cast by the Justices is relatively small. Since both random sampling and large sample size are crucial elements of any fully reliable statistical analysis, conclusions drawn from this Study are not beyond dispute. There are obvious limitations to any empirical analysis of a subjective decision making process.³⁸

In light of these caveats, one might ask whether this Study is worth conducting or reading. We believe it is. For years, experienced Supreme Court practitioners have attempted to divine the ideological 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 2000 Term

The results of this Term's survey suggest slight liberal movement after last Term's conservative voting trend. Six of the ten categories showed liberal movement in "Majority" decisions. Specifically, the Court's support of the federal government in criminal cases plummeted to an all time low of 28.6%, and the Study's second most reliable category for indicating conservative/liberal trends, Criminal/State Party, showed liberal movement in all types of

38. The general reliability of statistical inference depends on random sampling. See generally ALLEN T. CRAIG & ROBERT V. HOGG, *INTRODUCTION TO MATHEMATICAL STATISTICS* 157-58 (1995); RAYMOND H. MYERS, *CLASSICAL AND MODERN REGRESSION WITH APPLICATIONS* 9-11 (1990). The Court's method of selecting cases is far from random. Rather, it is the result of a conscious decisional process. Furthermore, reliable statistics generally require large quantities of information to produce reliable results. As sample sizes become larger, inferences become more accurate. This Study is subject to sampling bias, both because the sample is not random and because it is comparatively small. The statistical inferences below, therefore, may not accurately represent a Justice's (or the Court's) views.

decisions. Yet, this apparent liberal movement is somewhat counter-balanced by the fact that the Study's most reliable category for indicating conservative/liberal trends, Civil/State Party, demonstrated conservative movement. Also, in Swing-vote decisions, the Court voted conservatively 60% of the time. An overview of the results in each individual category follows. A more in-depth analysis of each category is set forth in Part IV of this Study.

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

This Term the Court showed a conservative trend in favor of the state government in "Majority" and "Split" decisions. The Justices maintained roughly the same positions in the rankings as last Term, with the exception of Justice Breyer – who moved from the third most conservative position last Term to the most liberal position this Term. Chief Justice Rehnquist, Justice Scalia, and Justice Thomas tied for the most conservative ranking, with Justice Stevens and Justice Breyer holding the two most liberal positions. The anticipated voting scores for the 2000 Term were generally quite accurate in this category. Justices Ginsburg and Stevens continue to have a strong voting correlation of 0.97 and a high R^2 of 0.93. Factor analysis also shows that, of Data Tables 1 through 9 of this Study, Data Table 1 provides the most reliable indication of conservative/liberal bias.

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

The Court's treatment of the Federal Government in civil cases is difficult to plumb this Term. Over time, the Court seems to be following a slightly liberal trend. However, it is uncertain whether the Court voted more liberally or more conservatively this Term in Civil/Federal Party cases because, even though the Court's "Majority" and "Unanimous" cases showed liberal movement, its "Split" cases (which usually are a more reliable indicator of ideology) showed conservative movement. Furthermore, six of the nine Justices showed a statistically significant change in their voting behavior, with historically liberal Justice Stevens recording the most conservative score this Term. Federal civil cases have generally been a reliable indicator of conservative/liberal bias. This Term, however, and perhaps partly because of the unusual voting patterns recorded on Data Table 2, factor analysis dropped federal civil cases from the top tier of ideological reliability.

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

The data in this category reveals a significant liberal shift on the Court this Term. Seven of the Justices voted considerably more liberally than they did last Term, with only Justice Stevens and Justice Souter voting slightly more conservatively than they did in 1999. Although the voting was very close, the Court favored states in “Split” decisions and favored private parties in “Unanimous” decisions. In “Majority” cases, the Court decided six cases in favor of the states and six cases in favor of private parties. Data Table 3 this Term reflects the classic conservative/liberal ranking – with Justices Scalia, Thomas, Rehnquist, Kennedy, and O’Connor at the conservative “top of the chart” and Justices Stevens, Souter, Breyer, and Ginsburg at the liberal “bottom” – usually associated with the current Court.

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

The liberal trend from the previous three Terms continued in this category. The 2000 Term scores for “Majority” and “Split” cases were the most liberal they have been since this Study began. For the first time in ten years, more cases were decided against the federal government than for the federal government. The individual rankings of the Justices remained roughly the same as last Term.

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

The Court demonstrated liberal movement and increased support of First Amendment claims in both “Majority” and “Split” cases this Term. Like last Term, however, the Court did not vote unanimously in favor of any First Amendment claims. Conclusions regarding voting trends in this category may not be reliable because the Court only considered four cases with First Amendment issues. Regarding the individual Justice’s voting behavior, Justice Kennedy’s voting scores were the most liberal for the third Term in a row and the most predictable this Term. The data suggests that Justice Kennedy may well provide the most dependable vote in favor of First Amendment claims.

Data Table 6: Equal Protection Claims.

Although the Court decided more Equal Protection cases than it

has in the last few Terms, the small number of cases in this category makes it difficult to identify trends with much certainty. Furthermore, the small number of cases makes it almost impossible to anticipate a Justice's voting behavior with accuracy. Despite the small number of cases, the Court exhibits clear conservative movement this Term compared to last Term. Oddly, Justice Stevens voted the most conservatively on Equal Protection cases this Term.

Data Table 7: Statutory Civil Rights Claims.

The data in this category shows slight liberal movement this Term but conservative movement over time. The fact that seven of the nine Justices showed a statistically significant change in voting behavior also indicates volatility in this area. Five Justices voted more liberally than anticipated, and two Justices voted more conservatively than anticipated. Justices Stevens and Breyer showed the highest level of voting correlation. Because the Court only considered three cases involving statutory civil rights claims this Term, we cannot draw definite conclusions based on the data.

Data Table 8: Federal Jurisdiction Claims.

It is likely that, after last Term's significant liberal movement and anomalous support of Federal Jurisdiction claims, the Court is returning to more normal voting patterns in this category. Every Justice on the Court voted more conservatively this Term than last Term, and the Court as a whole also showed conservative movement in its "Majority," "Split," and "Unanimous" decisions. None of the Justices showed a statistically significant change in voting behavior. The five most historically liberal Justices held the five most liberal positions on the data table, with Justice Stevens holding the most liberal position for the third Term in a row.

Data Table 9: Federalism Cases.

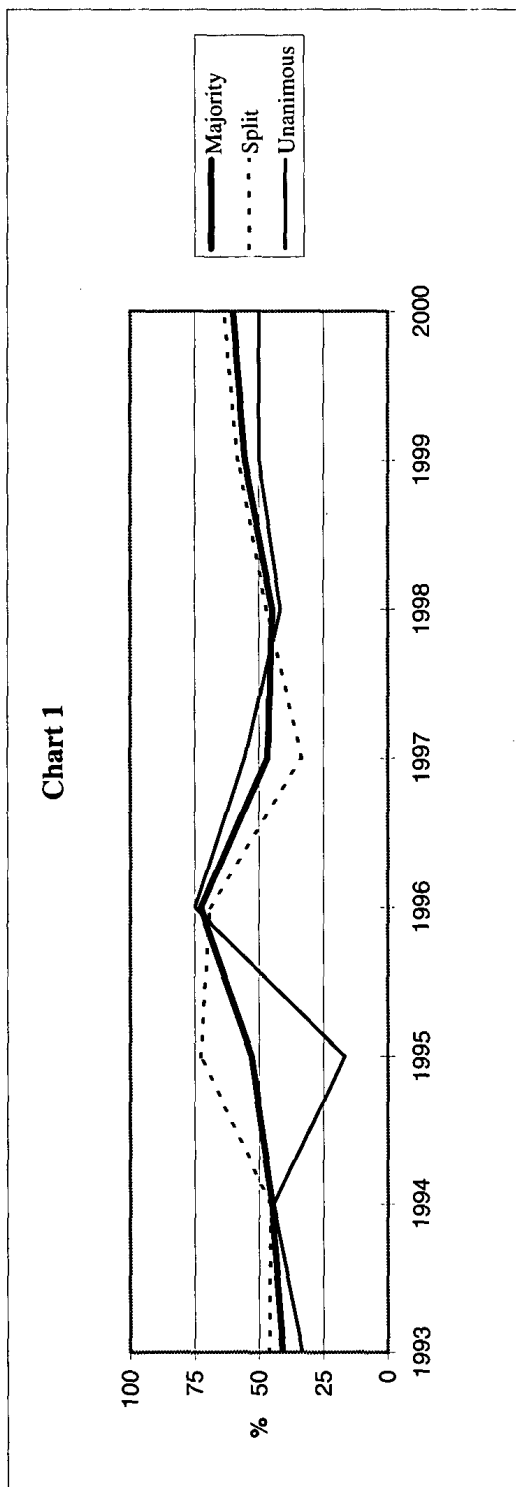
Again we see the classic conservative/liberal split on the Court with the traditionally conservative Justices at the top of the rankings. The voting behavior this Term was mixed. The Court was slightly more liberal than last Term in two categories, slowing the conservative trend in "Majority" and "Split" decisions over the last three Terms. The "Unanimous" decisions moved in the opposite direction, with a more conservative outcome than the past three Terms. While this pattern is somewhat ambiguous, the Court voted against the state more often than not in all three categories of

Federalism cases: “Majority,” “Split,” and “Unanimous” decisions. On balance, therefore, Data Table 9 provides some evidence of liberal movement.

Data Table 10: Swing Vote Cases.

The Court’s voting record in cases that were decided by one vote this Term continued the conservative trend that began last Term. Although the 1999 Study anticipated that Justice O’Connor would vote with the majority most often, Justice Kennedy was the most frequent swing-voter this Term, voting with the majority in 83.33% of the swing vote cases. Justice O’Connor, the second most noted “swinger” on the Court, voted with the majority in 66.67% of the Swing-vote cases.

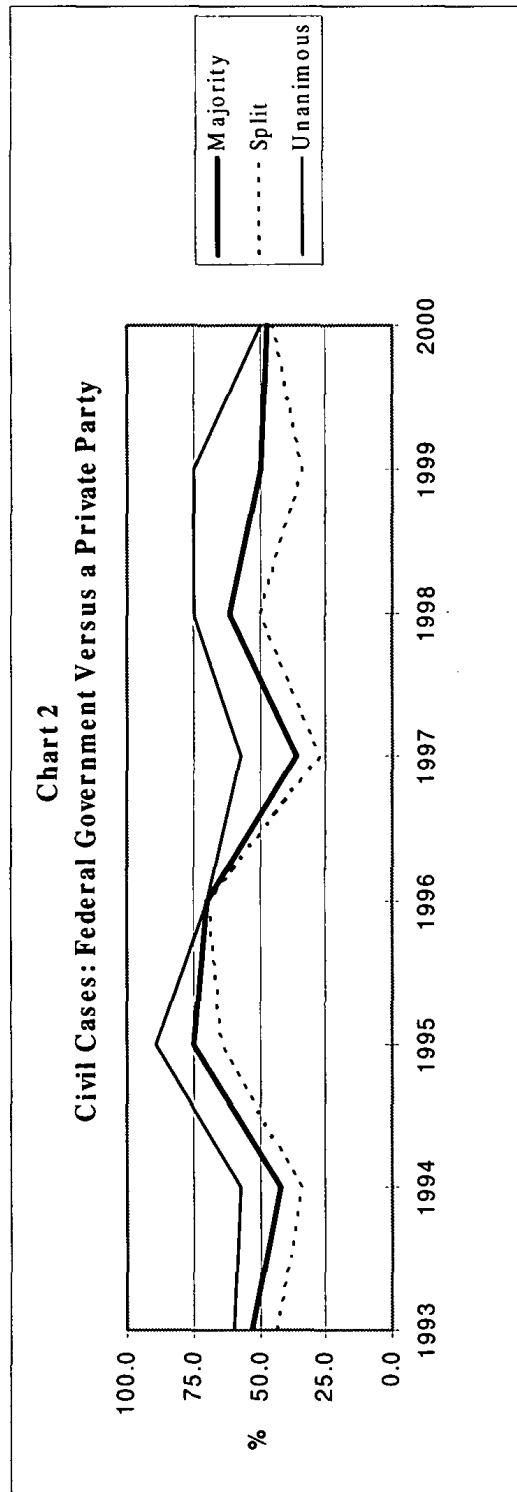
Justice		Civil Cases - State Government versus a Private Party														Anticipated Voting Behavior			
		% Votes for Government												2000 Term		2000 Term		2001 Term	
		1991 Term	1992 Term	1993 Term	1994 Term	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	2000 Term	X2	For Gov't	Against Gov't	2000 Term	Error	2001 Term		
Rehnquist	71.4	52.8	68.2	60.0	43.8	84.9	60.0	65.5	66.7	60.0	60.0	6	9	65.7	-5.7	65.3			
Scalia	64.3	41.7	50.0	60.0	52.9	77.4	60.0	55.2	50.0	60.0	60.0	6	9	52.0	8.0	56.0			
Thomas	71.4	41.7	45.5	55.0	67.4	77.4	60.0	65.5	50.0	60.0	60.0	6	9	65.2	-5.2	59.7			
Souter	52.5	36.4	45.5	35.0	29.4	54.6	46.7	37.9	50.0	53.9	53.9	7	7	37.5	16.4	53.2			
Kennedy	42.9	41.7	40.9	40.0	41.2	71.9	53.3	51.7	44.4	53.3	53.3	8	8	49.4	3.9	47.1			
O'Connor	50.0	50.0	40.9	40.0	47.1	68.8	53.3	55.2	55.6	53.3	53.3	8	8	55.4	-2.1	53.9			
Ginsburg*	59.5	51.4	40.9	50.0	35.3	53.1	46.7	31.0	44.4	46.2	46.2	6	6	33.8	12.4	47.8			
Stevens	29.3	31.3	27.3	42.1	23.5	48.5	37.5	17.2	41.2	40.0	40.0	6	6	24.5	15.5	31.4			
Breyer*	35.7	30.3	42.9	42.1	29.4	54.6	46.7	44.8	52.9	35.7	35.7	5	5	50.1	-14.4	54.5			
Majority	52.4	41.7	40.9	45.0	52.9	72.7	46.7	44.8	55.6	60.0	60.0	9	9	51	9.0	58			
Split	51.6	44.4	46.2	45.5	72.7	69.2	33.3	47.1	58.3	63.6	63.6	7	7						
Unanimous	54.6	38.9	33.3	44.4	16.7	75.0	55.6	41.7	50.0	50.0	50.0	2	2						



Mean Table 1
Civil Cases - State Government versus a Private Party

Justice	Mean Voting Percentage All Prior Terms (F)	99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Kennedy	51.7	+/- 8.5	11.96	53.33	no
O'Connor	54.9	+/- 6.5	9.48	53.33	no
Rehnquist	66.7	+/- 7.4	10.75	60.00	yes
Scalia	58.2	+/- 6.1	8.83	60.00	no
Stevens	35.3	+/- 6.0	8.75	40.00	no
Breyer*	45.1	+/- 9.5	9.04	35.71	no
Ginsburg*	43.1	+/- 7.7	7.90	46.15	no
Thomas	59.3	+/- 10.5	12.18	60.00	no
Souter	45.2	+/- 8.5	10.48	53.85	yes

Regression Table 1									
Civil Cases - State Government versus a Private Party									
Correlation (D) / R ²									
Justice	Kennedy	O'Connor	Rehnquist	Scalia	Stevens	Breyer*	Ginsburg*	Thomas	
O'Connor	0.90/0.80								
Rehnquist	0.74/0.52								
Scalia									
Stevens									
Breyer*			0.86/0.70						
Ginsburg*				0.83/0.66	0.97/0.93				
Thomas									
Souter	0.72/0.46		0.82/0.64						



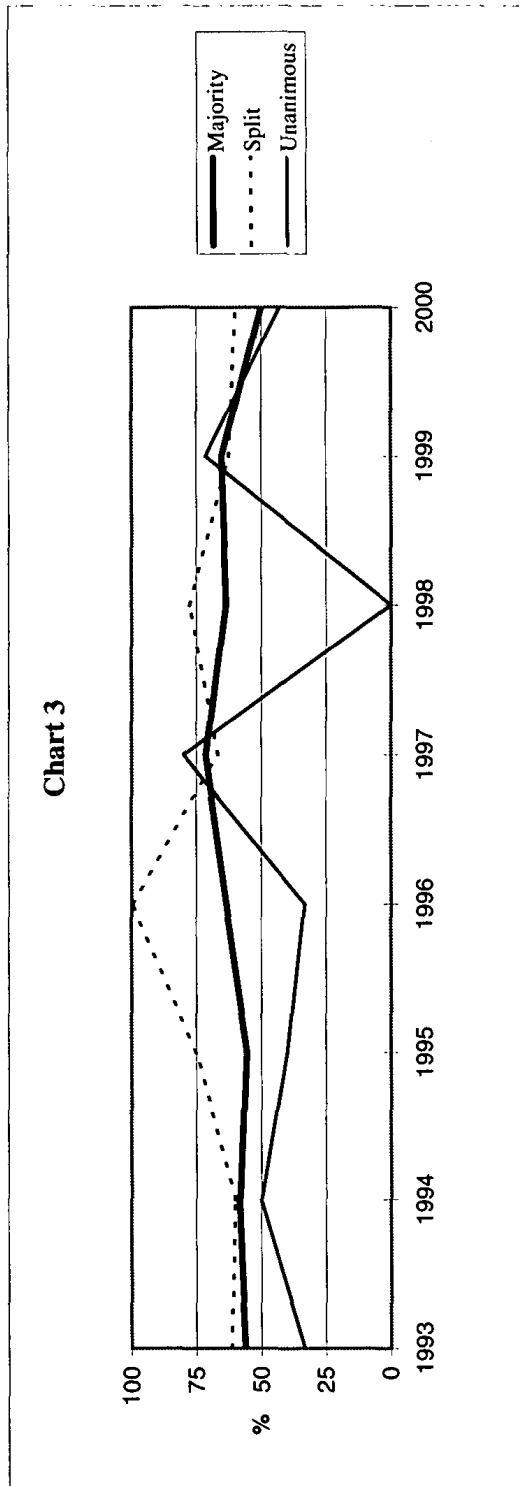
Mean Table 2 Civil Cases - Federal Government versus a Private Party						
Justice	Mean Voting Percentage All Prior Terms (F)	99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?	
Kennedy	59.8	+/- 7.9	11.04	47.06	yes	
O'Connor	60.6	+/- 8.1	11.76	50.00	yes	
Rehnquist	66.6	+/- 9.1	13.28	58.82	yes	
Scalia	59.7	+/- 7.0	10.23	56.25	no	
Stevens	55.6	+/- 7.7	11.18	64.29	yes	
Breyer*	61.6	+/- 9.9	9.46	50.00	yes	
Ginsburg*	60.1	+/- 14.0	14.39	52.94	no	
Thomas	49.1	+/- 9.6	11.19	52.94	no	
Souter	62.4	+/- 10.1	12.45	52.94	yes	

Regression Table 2
Civil Cases - Federal Government versus a Private Party

Correlation (D) / R²

Justice	Kennedy	O'Connor	Rehnquist	Scalia	Stevens	Breyer*	Ginsburg*	Thomas
O'Connor	0.73/0.49							
Rehnquist								
Scalia								
Stevens								
Breyer*								
Ginsburg*	0.87/0.72						0.84/0.66	
Thomas								
Souter	0.72/0.47						0.77/0.53	

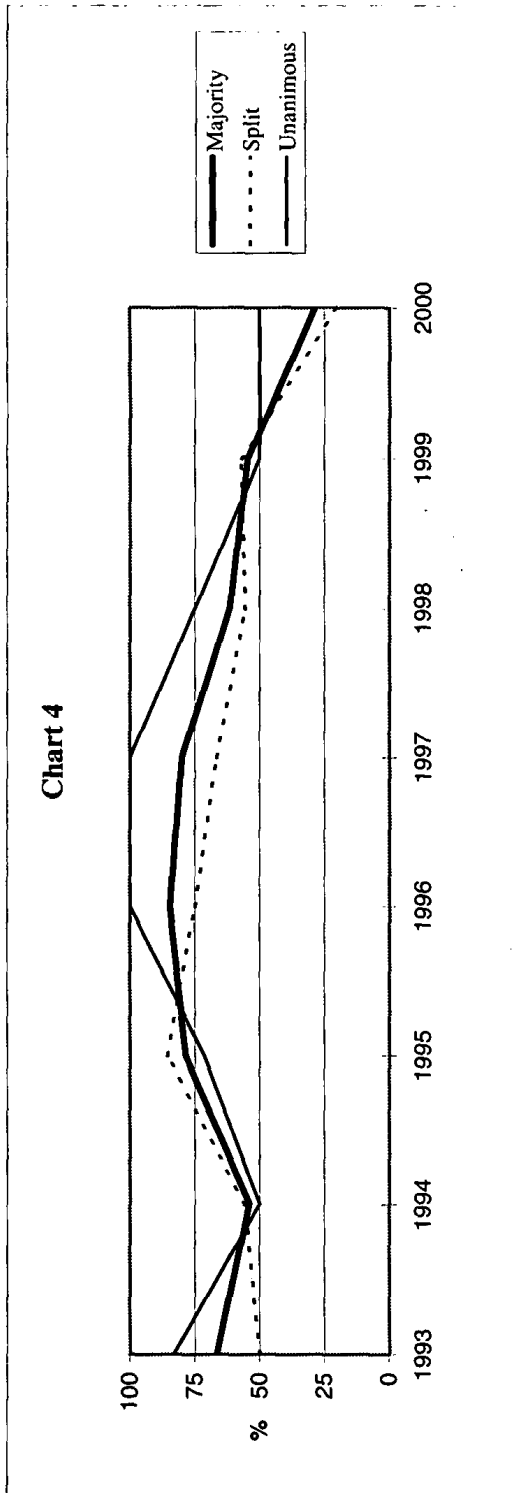
Justice		Data Table 3 Criminal Cases - State Government versus a Private Party																			
		% Votes for Government										X2				2000 Term		Anticipated Voting Behavior			
		1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2000	2000	2000	2000	2000	2000	2000	2000	2000	2001
Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	
Scalia	77.8	86.4	81.3	83.3	55.6	63.6	84.6	72.7	82.6	66.7	8	4	75.6	-8.9	82.5						
Thomas	75.0	85.7	87.5	91.7	66.7	63.6	92.3	80.0	82.6	66.7	8	4	80.8	-14.1	80.1						
Rehnquist	66.7	90.0	81.3	91.7	66.7	63.6	76.9	72.7	87.0	58.3	7	5	73.5	-15.2	78.5						
Kennedy	50.0	77.3	50.0	75.0	55.6	54.6	76.9	54.6	78.3	50.0	6	6	55.7	-5.7	67.2						
O'Connor	33.3	66.7	68.8	58.3	44.4	63.6	71.4	63.6	78.3	50.0	6	6	66.8	-16.8	61.6						
Stevens	27.8	31.8	25.0	8.3	22.2	18.2	23.1	9.1	27.3	33.3	4	8	13.7	19.6	30.1						
Souter	55.6	55.0	25.0	41.7	22.2	54.6	57.1	36.4	27.3	33.3	4	8	27.8	5.5	24.9						
Breyer*	33.3	25.0	12.5	41.7	22.2	36.4	50.0	36.4	40.9	25.0	3	9	42.2	-17.2	18.9						
Ginsburg*	55.6	75.0	43.8	41.7	33.3	45.5	42.9	27.3	36.4	25.0	3	9	30.2	-5.2	32.2						
Majority	44.4	77.3	56.3	58.3	55.6	63.6	71.4	63.6	65.2	50.0	6	6	64.3	-14.3	63.2						
Split	33.3	84.6	61.5	60.0	75.0	100.0	66.7	77.8	62.5	60.0	3	2									
Unanimous	66.6	66.7	33.3	50.0	40.0	33.3	80.0	0.0	71.4	42.9	3	4									



Mean Table 3
Criminal Cases - State Government versus a Private Party

Justice	Mean Voting Percentage		99% Confidence Interval for True Mean		Standard Deviation of F (s)	Actual Voting Percentage		Did This Term Show a Statistically Significant Change in Voting Behavior?
	All Prior Terms (F)					This Term (X2)		
Kennedy	65.8		+/- 8.6		12.05	50.00		yes
O'Connor	64.7		+/- 8.8		12.83	50.00		yes
Rehnquist	79.3		+/- 6.4		9.30	58.33		yes
Scalia	74.5		+/- 7.9		11.51	66.67		yes
Stevens	20.9		+/- 6.7		9.73	33.33		yes
Breyer*	37.9		+/- 9.6		9.18	25.00		yes
Ginsburg*	38.7		+/- 6.4		6.61	25.00		yes
Thomas	80.6		+/- 8.8		10.31	66.67		yes
Souter	44.3		+/- 13.0		15.96	33.33		no

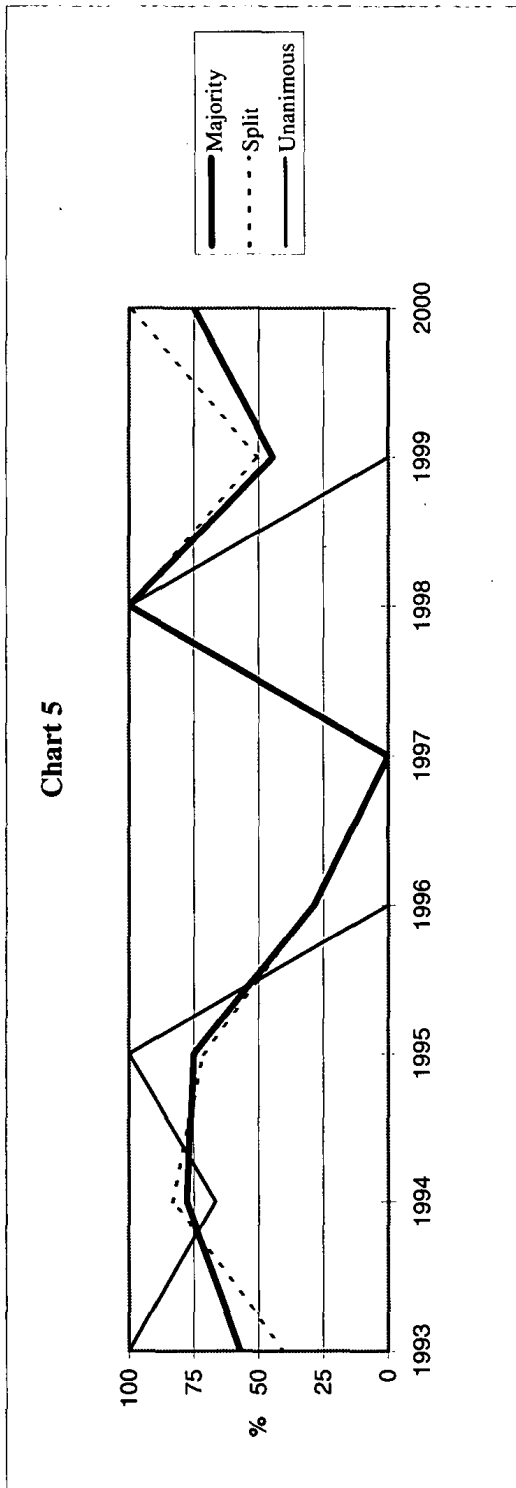
Justice		Criminal Cases - Federal Government versus a Private Party																
		% Votes for Government										X2		2000 Term		Anticipated Voting Behavior		
		1991 Term	1992 Term	1993 Term	1994 Term	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	2000 Term	2000 Term	For Gov't	Against Gov't	2000 Term	2001 Term	Error	
Scalia	76.9	62.5	66.7	53.9	78.6	92.3	70.0	46.2	63.6	85.7	6	1	65.4	20.3	66.2			
Thomas	54.6	81.3	88.3	61.5	71.4	84.6	90.0	61.5	54.6	85.7	6	1	53.3	32.4	68.3			
O'Connor	76.9	75.0	75.0	69.2	71.4	92.3	80.0	84.6	54.6	57.1	4	3	81.6	-24.5	63.7			
Rehnquist	76.9	81.3	83.3	69.2	71.4	84.6	70.0	76.9	63.5	57.1	4	3	74.7	-17.6	58.3			
Kennedy	84.6	60.0	66.7	61.5	71.4	84.6	90.0	76.9	54.6	28.6	2	5	73.6	-45.0	44.4			
Breyer*	61.5	46.7	58.3	69.2	71.4	69.2	70.0	53.9	45.5	28.6	2	5	40.5	-11.9	18.1			
Ginsburg*	69.2	56.3	58.3	61.5	71.4	76.9	60.0	53.9	36.4	28.6	2	5	27.2	1.4	23.0			
Souter	69.2	43.8	58.3	61.5	78.6	84.6	70.0	46.2	36.4	16.7	1	5	31.2	-14.5	7.2			
Stevens	38.5	26.7	50.0	30.8	50.0	53.9	55.6	38.5	36.4	14.3	1	6	34.5	-20.2	29.6			
Majority	69.2	68.8	66.7	53.9	78.6	84.6	80.0	61.5	54.5	28.6	2	5	51.4	-22.8	19.6			
Split	55.6	77.8	50.0	55.6	85.7	75.0	66.7	55.6	57.1	20.0	1	4						
Unanimous	100.0	57.1	83.3	50.0	71.4	100.0	100.0	75.0	50.0	50.0	1	1						



Mean Table 4
Criminal Cases - Federal Government versus a Private Party

Justice	Mean Voting Percentage All Prior Terms (F)	99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Kennedy	71.3	+/- 9.3	13.06	28.57	yes
O'Connor	76.1	+/- 6.5	9.39	57.14	yes
Rehnquist	77.1	+/- 5.1	7.41	57.14	yes
Scalia	65.6	+/- 9.0	13.13	85.71	yes
Stevens	46.0	+/- 8.9	12.87	14.29	yes
Breyer*	63.2	+/- 11.4	10.85	28.57	yes
Ginsburg*	59.8	+/- 12.7	13.02	28.57	yes
Thomas	72.0	+/- 12.4	14.42	85.71	yes
Souter	62.4	+/- 13.1	16.07	16.67	yes

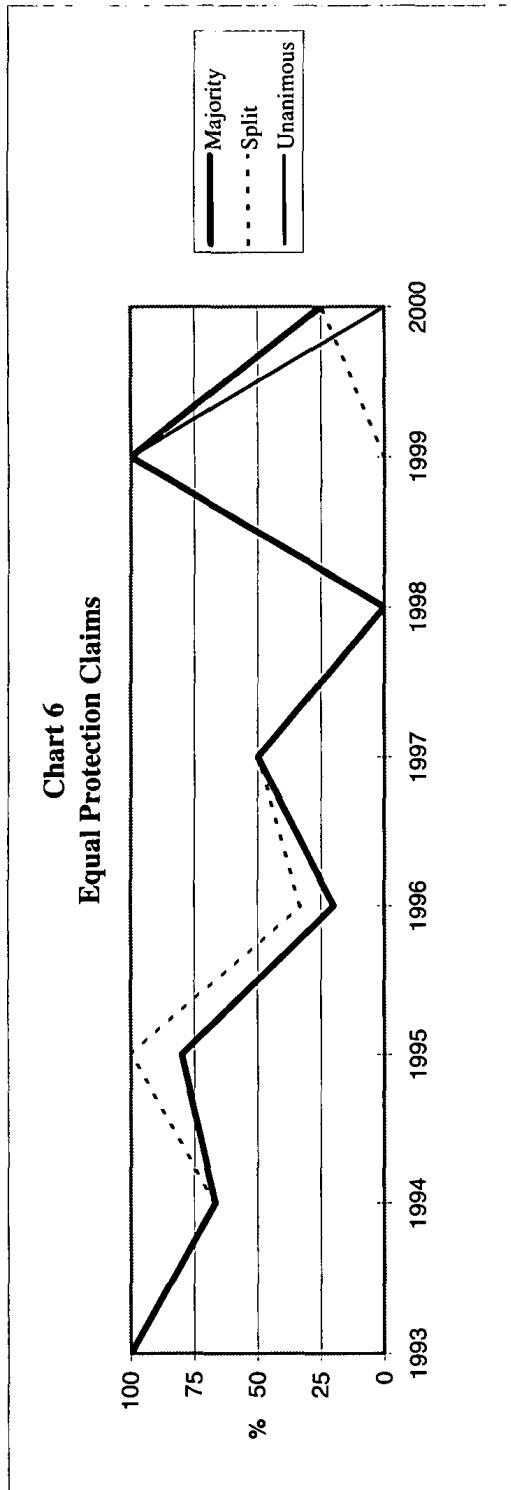
Justice		Data Table 5 First Amendment Rights of Expression, Association, and Religion																	
		% Votes for Rights Claim												X2		2000 Term Votes		Anticipated Voting Behavior	
		1991 Term	1992 Term	1993 Term	1994 Term	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	2000 Term	For Claim	Against Claim	2000 Term	2001 Term	2000 Term	2001 Term		
Kennedy	77.8	77.8	71.4	88.9	87.5	57.1	0.0	100.0	77.8	75.0	3	1	77.3	-2.3	83.2				
Breyer*	88.9	90.0	71.4	66.7	75.0	14.3	0.0	50.0	12.5	75.0	3	1	4.8	70.2	27.6				
O'Connor	77.8	36.4	57.1	66.7	62.5	28.6	0.0	50.0	33.3	50.0	2	2	44.6	5.4	41.9				
Stevens	100.0	90.0	57.1	66.7	62.5	42.9	0.0	100.0	37.5	50.0	2	2	42.3	7.7	48.3				
Ginsburg*	50.0	36.4	71.4	66.7	75.0	57.1	0.0	100.0	33.3	50.0	2	2	58.1	-8.1	21.6				
Souter	20.0	40.0	85.7	66.7	37.5	57.1	100.0	100.0	28.6	50.0	2	2	98.9	-48.9	62.9				
Rehnquist	50.0	36.4	42.9	55.6	62.5	28.6	0.0	50.0	44.4	25.0	1	3	51.8	-26.8	44.8				
Scalia	37.5	45.5	85.7	55.6	37.5	85.7	0.0	100.0	56.6	25.0	1	3	75.6	-50.6	73.1				
Thomas	20.0	40.0	85.7	66.7	37.5	85.7	0.0	100.0	66.7	25.0	1	3	77.5	-52.5	59.0				
Majority	66.7	45.5	57.1	77.8	75.0	28.6	0.0	100.0	44.4	75.0	3	1	64.2	10.8	43.1				
Split	57.1	33.3	40.0	83.3	71.4	28.6	0.0	100.0	50.0	100.0	3	0							
Unanimous	100.0	60.0	100.0	66.7	100.0	0.0	0.0	100.0	0.0	0.0	0	1							



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

Justice	Mean Voting Percentage		99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage		Did This Term Show a Statistically Significant Change in Voting Behavior?
	All Prior Terms (F)	This Term (X2)			This Term (X2)	This Term (X2)	
Kennedy	63.4		+/- 19.6	27.41	75.00	75.00	no
O'Connor	41.9		+/- 14.4	20.94	50.00	50.00	no
Rehnquist	32.3		+/- 13.1	18.99	25.00	25.00	no
Scalia	47.6		+/- 18.7	27.14	25.00	25.00	yes
Stevens	58.4		+/- 18.1	26.35	50.00	50.00	no
Breyer*	36.4		+/- 33.2	31.55	75.00	75.00	yes
Ginsburg*	57.7		+/- 31.5	32.35	50.00	50.00	no
Thomas	55.8		+/- 28.7	33.46	25.00	25.00	yes
Souter	59.7		+/- 23.4	28.69	50.00	50.00	no

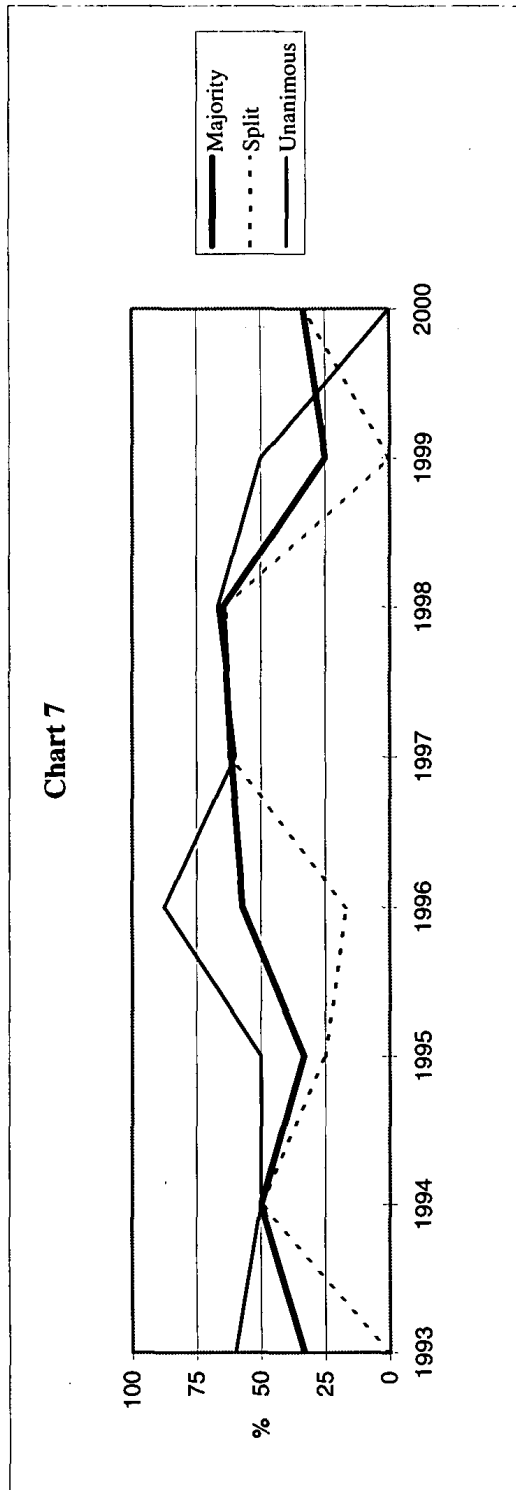
Data Table 6																			
Equal Protection Claims																			
Justice	% Votes for Rights Claim										X2	2000 Term		Anticipated Voting Behavior					
												Votes		2000		2001			
	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000		For Claim	Against Claim	Term	Term	Error	Term		
Kennedy	50.0	20.0	100.0	66.7	80.0	33.3	50.0	0.0	100.0	50.0	2	2	33.8	16.2	65.6				
O'Connor	33.3	40.0	100.0	66.7	80.0	50.0	50.0	0.0	100.0	50.0	2	2	52.7	-2.7	70.8				
Rehnquist	50.0	20.0	0.0	66.7	60.0	0.0	50.0	0.0	100.0	50.0	2	2	7.2	42.8	55.1				
Scalia	33.3	20.0	0.0	66.7	40.0	25.0	0.0	0.0	100.0	50.0	2	2	9.5	40.5	46.1				
Breyer*	50.0	40.0	100.0	33.3	40.0	20.0	100.0	0.0	100.0	50.0	2	2	6.7	43.3	100.0				
Ginsburg*	50.0	0.0	100.0	33.3	40.0	20.0	100.0	0.0	100.0	50.0	2	2	0.0	50.0	79.00				
Thomas	60.0	20.0	0.0	66.7	50.0	25.0	0.0	0.0	100.0	50.0	2	2	18.2	31.8	49.4				
Souter	50.0	40.0	100.0	33.3	40.0	20.0	100.0	0.0	100.0	50.0	2	2	0.2	49.8	66.5				
Stevens	66.7	40.0	100.0	33.3	40.0	40.0	50.0	0.0	100.0	25.0	1	3	0	0	66.4				
Majority	50.0	20.0	100.0	66.7	80.0	20.0	50.0	0.0	100.0	25.0	1	3	33.5	-8.5	71.4				
Split	50.0	33.3	100.0	66.7	100.0	33.3	50.0	0.0	0.0	25.0	1	3							
Unanimous	50.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	100.0	0.0	0	0							



Mean Table 6 Equal Protection Claims						
Justice	Mean Voting Percentage All Prior Terms (F)	99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?	
Kennedy	50.6	+/- 21.5	30.08	50.00	no	
O'Connor	49.7	+/- 20.8	30.22	50.00	no	
Rehnquist	33.2	+/- 21.1	30.68	50.00	no	
Scalia	29.2	+/- 19.8	28.73	50.00	yes	
Stevens	48.7	+/- 21.7	31.57	25.00	yes	
Breyer*	48.9	+/- 44.0	41.88	50.00	no	
Ginsburg*	56.2	+/- 41.7	42.84	50.00	no	
Thomas	35.7	+/- 30.5	35.48	50.00	no	
Souter	53.3	+/- 28.8	35.38	50.00	no	

Regression Table 6
Equal Protection Claims
Correlation (D) / R²

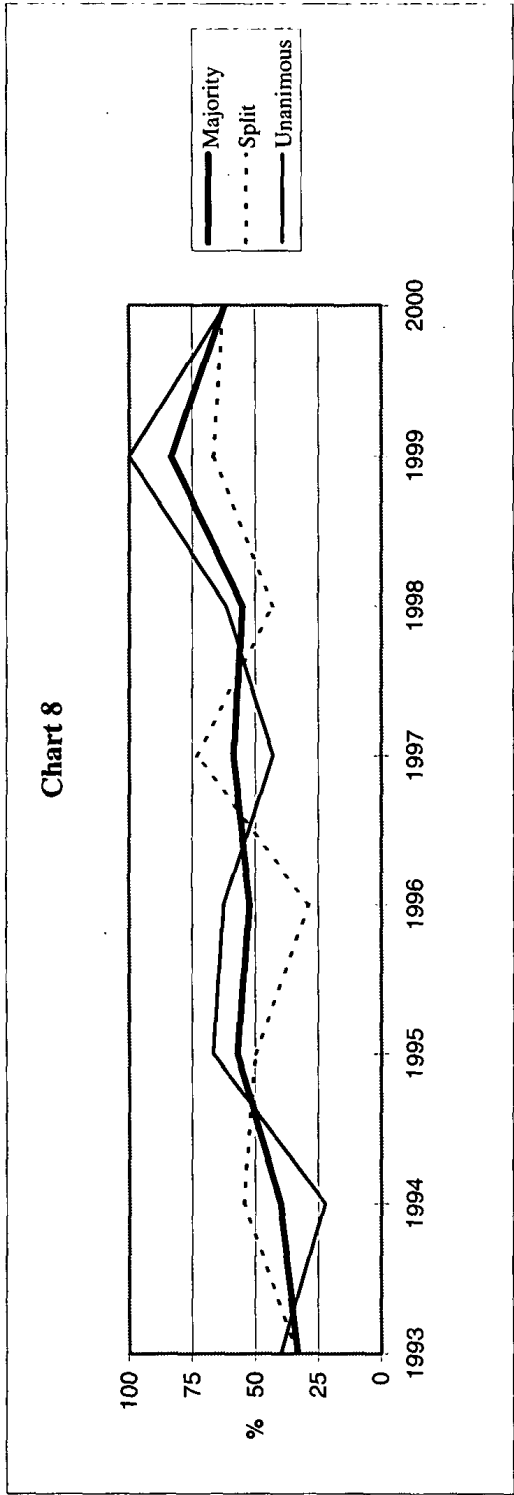
Justice	Kennedy	O'Connor	Rehnquist	Scalia	Stevens	Breyer*	Ginsburg*	Thomas
O'Connor	0.93/0.85							
Rehnquist			0.85/0.70					
Scalia								
Stevens	0.74/0.51		0.74/0.45		0.80/0.58			
Breyer*					0.85/0.67	1.00/1.00		
Ginsburg*	0.74/0.47	0.70/0.41	0.84/0.67	0.97/0.93	0.77/0.55	1.00/1.00	1.00/1.00	
Thomas								
Souter	0.72/0.47							



Mean Table 7
Statutory Civil Rights Claims

Justice	Mean Voting Percentage		99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage		Did This Term Show a Statistically Significant Change in Voting Behavior?
	All Prior Terms (F)				This Term (X2)		
Kennedy	42.9		+/- 11.5	16.03		33.33	no
O'Connor	46.6		+/- 8.3	12.05		33.33	yes
Rehnquist	36.5		+/- 6.3	9.10		33.33	no
Scalia	38.7		+/- 8.6	12.51		0.00	yes
Stevens	78.9		+/- 6.7	9.32		100.00	yes
Breyer*	81.0		+/- 5.0	4.78		100.00	yes
Ginsburg*	69.6		+/- 11.5	11.80		100.00	yes
Thomas	30.1		+/- 9.5	11.01		0.00	yes
Souter	64.9		+/- 13.4	16.47		100.00	yes

Justice		Data Table 8 Federal Jurisdiction Claims																	
		% Votes for Rights Claim												X2		2000 Term Votes		Anticipated Voting Behavior	
		1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2000	2000	2000	2000	2000	2000	2000	2001
Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	
Stevens	75.0	69.7	44.4	42.1	75.0	69.6	51.7	65.0	100.0	68.4	13	6	57.4	11.0	70.5				
Souter	75.0	56.3	33.3	30.0	68.4	56.5	60.7	60.0	83.3	68.4	13	6	43.9	24.5	70.4				
Kennedy	73.3	51.5	33.3	40.0	57.1	56.5	58.6	55.0	83.3	61.9	13	8	59.4	2.5	63.1				
Ginsburg*	69.0	60.6	33.3	36.8	68.4	56.5	55.2	60.0	83.3	61.9	13	8	64.2	-2.3	0				
Breyer*	71.4	66.7	50.0	33.3	63.2	65.2	51.7	65.0	66.7	60.0	12	8	41.9	18.1	67.3				
Rehnquist	62.1	54.6	22.2	30.0	42.9	56.5	60.0	45.0	66.7	52.4	11	10	43.6	8.8	50.7				
Scalia	55.2	51.5	22.2	35.0	42.9	47.8	43.3	40.0	66.7	47.6	10	11	43.6	4.0	46.4				
Thomas	66.7	54.6	33.3	30.0	42.9	47.8	46.7	45.0	83.3	47.6	10	11	54.8	-7.2	55.3				
O'Connor	63.3	53.1	22.2	40.0	47.6	54.6	43.3	55.0	83.3	47.4	9	10	64.1	-16.7	53.6				
Majority	73.3	52.9	33.3	40.0	57.1	52.2	58.6	55.0	83.3	61.9	13	8	52.8	9.1	61.6				
Split	69.2	37.5	33.3	54.6	50.0	28.6	73.3	42.9	66.7	62.5	5	3							
Unanimous	76.5	66.7	40.0	22.3	66.7	62.5	42.9	61.5	100.0	61.5	8	5							



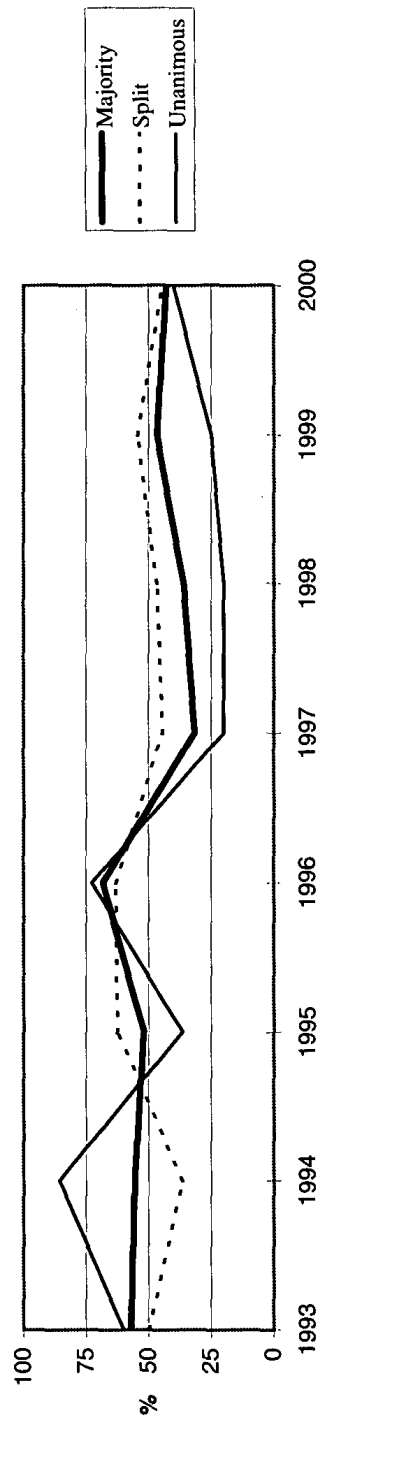
Mean Table 8 Federal Jurisdiction Claims						
Justice	Mean Voting Percentage All Prior Terms (F)	99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?	
Kennedy	56.8	+/- 9.1	12.68	61.90	no	
O'Connor	53.1	+/- 10.0	14.49	47.37	no	
Rehnquist	51.5	+/- 9.1	13.15	52.38	no	
Scalia	47.2	+/- 8.1	11.80	47.62	no	
Stevens	68.1	+/- 11.0	16.00	68.42	no	
Breyer*	57.5	+/- 13.7	13.04	60.00	no	
Ginsburg*	56.2	+/- 16.9	17.31	61.90	no	
Thomas	50.0	+/- 14.2	16.50	47.62	no	
Souter	58.1	+/- 13.4	16.49	68.42	no	

Regression Table 8
Federal Jurisdiction Claims
Correlation (D) / R²

Justice	Kennedy	O'Connor	Rehnquist	Scalia	Stevens	Breyer*	Ginsburg*	Thomas
O'Connor	0.88/0.76							
Rehnquist	0.87/0.74	0.83/0.66						
Scalia	0.86/0.71	0.94/0.88	0.91/0.81					
Stevens	0.76/0.54	0.79/0.59		0.76/0.54				
Breyer*					0.80/0.56			
Ginsburg*	0.95/0.90	0.88/0.74	0.81/0.61	0.90/0.79	0.95/0.89	0.82/0.61		
Thomas	0.92/0.82	0.91/0.81	0.83/0.65	0.92/0.82	0.89/0.76		0.86/0.70	
Souter	0.95/0.88	0.81/0.62	0.84/0.67	0.85/0.68	0.79/0.58	0.84/0.64	0.98/0.95	0.84/0.67

Justice		Data Table 9 Federalism Cases														2000 Term		Anticipated Voting Behavior			
		% Votes for Rights State Claim														X2		Votes		Error	
		1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2000	2000	2000	2000	2000	2000	2000	2000	2001	
Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term		
Scalia	26.1	60.0	57.1	81.3	55.6	73.2	31.6	52.0	46.7	57.1	8	6	46.7	10.4	35.6						
Thomas	35.0	66.7	42.9	72.2	56.0	73.2	36.8	64.0	60.0	57.1	8	6	0	0	66.8						
Rehnquist	43.5	73.3	71.4	72.2	51.9	75.6	36.8	60.0	46.7	50.0	7	7	58.8	-8.8	51.4						
Kennedy	26.1	60.0	42.9	55.6	51.9	68.3	42.1	40.0	53.3	42.9	6	8	42.6	0.3	52.5						
O'Connor	39.1	73.3	57.1	55.6	44.4	70.7	29.4	45.8	46.7	35.7	5	9	44.7	-9.0	40.2						
Stevens	31.8	60.0	57.1	55.6	29.6	45.0	35.0	8.0	26.7	35.7	5	9	19.0	16.7	22.2						
Breyer*	43.5	53.3	71.4	38.9	34.6	50.0	15.8	32.0	13.3	35.7	5	9	56.3	-20.6	0						
Souter	36.4	60.0	57.1	44.4	34.6	43.9	15.8	32.0	20.0	35.7	5	9	41.1	-5.4	15.7						
Ginsburg*	30.4	66.7	57.1	50.0	38.5	51.3	36.8	28.0	33.3	28.6	4	10	33.5	-4.9	23.6						
Majority	26.1	66.7	57.1	55.6	51.9	68.3	31.6	36.0	46.7	42.9	6	8	40.5	2.4	45.2						
Split	28.6	57.1	50.0	36.4	62.5	63.2	44.4	46.7	54.6	44.4	4	5									
Unanimous	22.2	75.0	60.0	85.7	36.4	72.7	20.0	20.0	25.0	40.0	2	3									

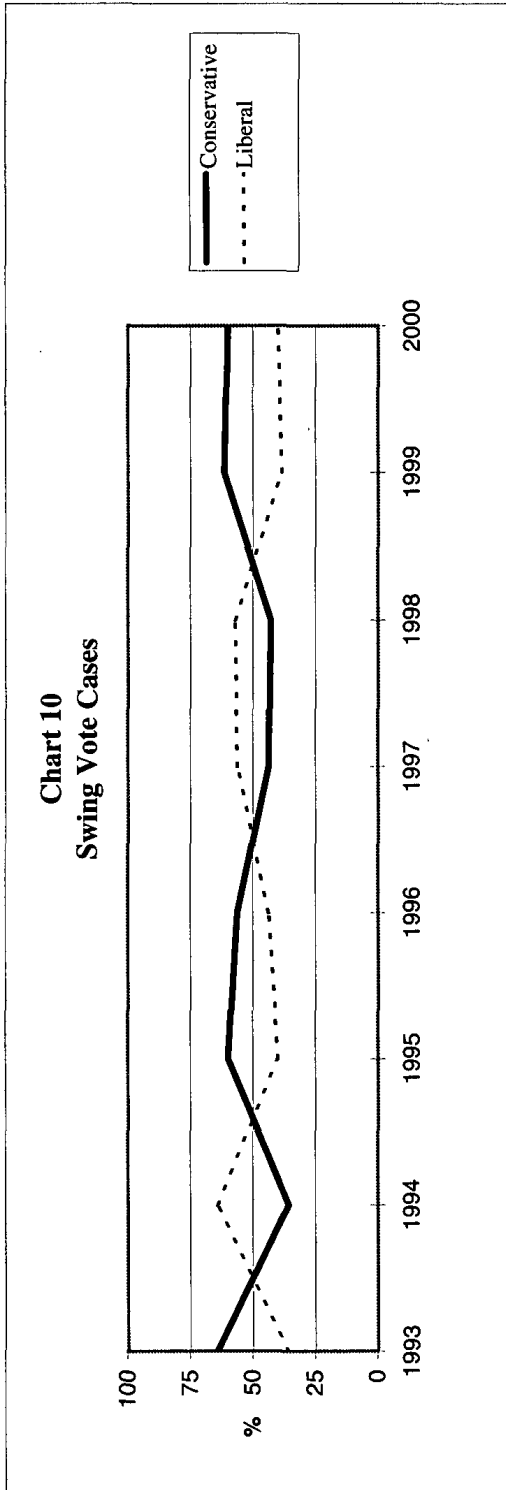
Chart 9
Federalism Cases



Mean Table 9
Federalism Cases

Justice	Mean Voting Percentage All Prior Terms (F)	99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Kennedy	51.8	+/- 10.3	14.47	42.86	yes
O'Connor	53.6	+/- 11.0	15.34	35.71	yes
Rehnquist	60.5	+/- 10.4	14.50	50.00	yes
Scalia	55.2	+/- 12.7	17.83	57.14	no
Stevens	40.3	+/- 11.0	15.37	35.71	no
Breyer*	30.8	+/- 14.7	14.01	35.71	no
Ginsburg*	42.2	+/- 10.4	10.72	28.57	yes
Thomas	56.3	+/- 12.6	14.71	57.14	no
Souter	42.8	+/- 16.3	20.06	35.71	no

Justice		Data Table 10 Swing Vote Cases																	
		% Votes with the Majority												X2		2000 Term Votes		Anticipated Voting Behavior	
		1991 Term	1992 Term	1993 Term	1994 Term	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	2000 Term	For Maj.	Against Maj.	2000 Term	2001 Term	Error	2001 Term		
Kennedy	64.7	72.7	92.9	81.3	85.0	81.3	87.5	67.9	73.1	83.33	25	5	76.9	6.4	81.8				
O'Connor	58.8	40.9	57.1	68.8	80.0	75.0	53.3	75.0	84.6	66.67	20	10	80.3	-13.6	71.1				
Rehnquist	41.2	72.7	71.4	62.5	75.0	62.5	56.3	46.4	76.9	63.33	19	11	43.5	19.8	61.4				
Scalia	35.3	81.8	71.4	56.3	75.0	56.3	50.0	50.0	73.1	63.33	19	11	47.0	16.3	61.2				
Thomas	23.5	72.7	57.1	50.0	75.0	56.3	56.3	50.0	84.6	63.33	19	11	56.1	7.2	69.3				
Stevens	58.8	40.9	35.7	50.0	25.0	50.0	43.8	60.7	26.9	43.33	13	17	33.7	9.6	39.8				
Souter	82.4	31.8	42.9	37.5	30.0	43.8	43.8	46.4	34.6	43.33	13	17	50.6	-7.3	32.3				
Breyer*	70.6	31.8	35.7	43.8	25.0	43.8	56.3	50.0	19.2	36.67	11	19	36.5	0.2	34.6				
Ginsburg*	64.7	54.6	35.7	50.0	30.0	31.3	56.3	53.6	30.8	36.67	11	19	51.2	-14.5	36.4				
Conservative	41.2	63.6	64.3	35.7	60.0	56.3	43.7	42.9	61.5	60.0	18	12	43.6	16.4	50.0				
Liberal	58.8	36.4	35.7	64.3	40.0	43.7	56.3	57.1	38.5	40.0	12	18	56.4	-16.4	50.0				



Mean Table 10
Swing Vote Cases

Justice	Mean Voting Percentage All Prior Terms (F)	99% Confidence Interval for True Mean	Standard Deviation of F (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Kennedy	75.7	+/- 7.8	10.86	83.33	yes
O'Connor	67.2	+/- 8.6	12.07	66.67	no
Rehnquist	65.2	+/- 8.1	11.27	63.33	no
Scalia	62.2	+/- 9.5	13.27	63.33	no
Stevens	43.9	+/- 9.0	12.66	43.33	no
Breyer*	39.7	+/- 15.2	14.48	36.67	no
Ginsburg*	41.1	+/- 11.4	11.69	36.67	no
Thomas	58.4	+/- 15.3	17.80	63.33	no
Souter	45.2	+/- 12.6	15.51	43.33	no

Regression Table 10
Swing Vote Cases
Correlation (D) / R²

Justice	Kennedy	O'Connor	Rehnquist	Scalia	Stevens	Breyer*	Ginsburg*	Thomas
O'Connor								
Rehnquist								
Scalia			0.88/0.76					
Stevens			-0.73/0.50					
Breyer*		-0.78/0.54	-0.90/0.77	-0.97/0.94	0.82/0.61			
Ginsburg*			-0.81/0.60	-0.82/0.61		0.83/0.62		
Thomas			0.89/0.76	0.88/0.75	-0.83/0.65	-0.91/0.79		
Souter			-0.71/0.44	-0.83/0.65		0.80/0.56		-0.87/0.74

IV. Analysis

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

Data Table 1 shows that the Court continued last Term's conservative trend in "Majority" and "Split" decisions in this category.³⁹ However, there was no change in the voting pattern of the Court's "Unanimous" decisions. The Court's scores this Term in "Majority," "Split," and "Unanimous" decisions were 60.0%, 63.6%, and 50.0% respectively.⁴⁰

The ordering of the Justices was similar to last Term's ordering, with the exception of Justice Breyer. He made a significant move from the third most conservative Justice last Term to this Term's most liberal Justice.⁴¹ Justice Breyer voted for the state 52.9% of the time last Term but only voted for the state 35.7% of the time this Term. Justice Stevens was the second most liberal Justice this Term, marking the first time in five years that he was not ranked as the most liberal Justice in this category. Chief Justice Rehnquist maintained his position as the most conservative Justice the last four years by voting in favor of the state 60.0% of the time. Justices Scalia and Thomas, who also voted in favor of the state 60.0% of the time, joined the Chief Justice at the top of the data table.⁴²

Mean Table 1 indicates that both Justice Rehnquist and Justice Souter showed a statistically significant change in voting behavior.⁴³ Justice Rehnquist's score of 60.0% was slightly below his mean voting percentage of 66.7% for all prior Terms in this category. Justice Souter, on the other hand, was 8.65 percentage points higher than his 45.2% statistical mean score for all prior Terms.⁴⁴ For the 2000 Term,

39. Cases decided in favor of state government: *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001); *Atwater v. Lago Vista*, 532 U.S. 318 (2001); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Hunt v. Cromartie*, 532 U.S. 234 (2001); *Shaw v. Murphy*, 532 U.S. 223 (2001); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *City News & Novelty, Inc. v. Waukesha*, 531 U.S. 278 (2001); *Seling v. Young*, 531 U.S. 250 (2001). Cases decided against the state government: *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Becker v. Montgomery*, 532 U.S. 757 (2001); *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000); *Indianapolis v. Edmond*, 531 U.S. 32 (2000).

40. *See infra* Data Table 1.

41. *See id.*

42. *See id.*

43. *See infra* Mean Table 1.

44. *See id.*

Justices Ginsburg and Stevens had a voting correlation of 0.97 and an R^2 score of 0.93.⁴⁵ This means that, over time, the voting behavior of these two Justices in Civil/State Party cases has moved in tandem.

The anticipated voting scores in this category were fairly accurate this Term. The anticipated voting scores of Justices O'Connor and Kennedy were the most accurate, with a very small error of -2.1 and 3.9 points respectively. The least accurate anticipated voting scores were for Justice Souter (whose actual score was 16.4 percentage points more conservative than anticipated) and for Justice Stevens (whose actual score was 15.5 percentage points more conservative than anticipated). For the 2001 term, we anticipate that Chief Justice Rehnquist will again be the most conservative Justice and that Justice Stevens will be the most liberal Justice in this category.⁴⁶

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

The Court's voting behavior on Data Table 2 is unclear this Term.⁴⁷ While the Court showed liberal movement in its "Majority" and "Unanimous" decisions, it also showed conservative movement in its "Split" decisions.⁴⁸ Chart 2 shows that, for 2000, the voting trends in "Split" and "Unanimous" cases converged on the trend line charted by the "Majority" decisions.

The unusual movement this Term is also demonstrated by the fact that six of the nine Justices (everyone except Justices Scalia, Ginsburg, and Thomas) showed statistically significant changes in their voting behavior.⁴⁹ Two of these statistically significant voting patterns (Justices Souter and Stevens) were more conservative than last Term, and four of the statistically significant scores (Justices

45. See *infra* Regression Table 1.

46. See *infra* Data Table 1.

47. Cases decided in favor of the federal government: *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Saucier v. Katz*, 533 U.S. 194 (2001); *Nguyen v. INS*, 533 U.S. 53 (2001); *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706 (2001); *United States v. Hatter*, 532 U.S. 557 (2001); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001); *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001). Cases decided against the federal government: *United States v. Mead Corp.*, 533 U.S. 218 (2001); *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706 (2001); *United States v. Hatter*, 532 U.S. 557 (2001); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001); *Central Green Co. v. United States*, 531 U.S. 425 (2001); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001).

48. See *infra* Data Table 2.

49. See *infra* Mean Table 2.

Rehnquist, Breyer, Kennedy, and O'Connor) were more liberal than last Term.⁵⁰

With regard to ranking, historically liberal Justice Stevens recorded the most conservative score this Term, voting for the Federal Government in 64.3% of the cases.⁵¹ Chief Justice Rehnquist, who voted most conservatively last Term, moved to the second most conservative position, voting for the Federal Government in 58.8% of the cases.⁵² Interestingly, Justices Ginsburg, Thomas, and Souter comprised the middle bloc of Justices,⁵³ Justices Ginsburg and Souter normally vote very liberally in this category, and Justice Thomas is considered to be a conservative judge (although he voted more liberally on Data Table 2 last Term).⁵⁴ However, the Justices' voting scores were so close to each other that a Justice's vote in one case could have significantly altered the Justice's position on the table. For example, if Justice Ginsburg had voted against the government in one more case, she would have tied for the most liberal spot.

Generally, this category has been a reliable indicator of conservative/liberal bias. However, factor analysis this Term dropped Data Table 2 to the eighth most reliable indicator of ideological bias.⁵⁵ This dramatic drop in reliability may be due to the unusual rank-order voting patterns recorded this Term (with Justice Stevens as the top "conservative"), the large number of statistically significant departures from prior voting patterns, and the close bloc voting of five members of the Court (Justices Ginsburg, Thomas, and Souter at 52.9, and Justices O'Connor and Breyer at 50.0).

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

Data Table 3 exhibits a decrease in the Court's support for the states in criminal cases.⁵⁶ Although the court voted for the state in

50. *See infra* Data Table 2.

51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.*

55. *See infra* Part V.

56. Cases decided in favor of the state government: *Tyler v. Cain*, 533 U.S. 656 (2001); *Duncan v. Walker*, 533 U.S. 167 (2001); *Penry v. Johnson*, 532 U.S. 782 (2001); *Arkansas v. Sullivan*, 532 U.S. 769 (2001); *Texas v. Cobb*, 532 U.S. 162 (2001); *Ohio v. Reiner*, 532 U.S. 17 (2001). Cases decided against the state government: *Alabama v. Bozeman*, 533 U.S. 146 (2001); *Penry v. Johnson*, 532 U.S. 782 (2001); *Florida v. Thomas*, 532 U.S. 774 (2001); *Shafer v. South Carolina*, 532 U.S. 36 (2001); *Fiore v. White*, 531 U.S. 225 (2001); *Artuz v.*

60% of the “Split” decisions, the Court voted for the state in only 42.9% of the “Unanimous” decisions and 50% of the “Majority” decisions. More importantly, the Court voted more liberally (less often for the state) in all three categories of decisions than it did last Term.⁵⁷ Seven of the Justices voted considerably more liberally than they have the past four Terms. The fact that all the Justices except Justice Souter showed a statistically significant change in voting behavior also indicates that the court may well be moving in a liberal direction.⁵⁸ Unexpected liberal voting patterns, especially by the traditionally conservative Justices, suggest a possible reorientation of the Court.

Despite the uniform liberal movement this Term, the polarization of the Court on Data Table 3 remained very high. Over 41 points separated the most “liberal” and “conservative” Justices. However, the polarization this Term was not quite as high as it has been the last few years.⁵⁹

The ordering of the Justices was consistent with the classic ideological organization of the Court. Justices Scalia and Thomas recorded the highest score in this category, finding for the states 66.7% of the time. Not surprisingly, Chief Justice Rehnquist followed Justices Scalia and Thomas, voting for the state 58.3% of the time. The remaining six Justices voted in blocs of two. The traditional “swing-voters,” Justices Kennedy and O’Connor, voted for the state 50% of the time. Justices Souter and Stevens voted for the state 33.3% of the time, with Justices Breyer and Ginsburg voting for the state only 25% of the time.⁶⁰

In light of the unusual liberal movement this Term, the anticipated scores for both the Court and the individual Justices were too conservative. Only the anticipated voting scores for Justices Stevens and Souter, the only Justices to vote more conservatively than last Term, were too liberal. The 2000 Term marked the most liberal voting scores Chief Justice Rehnquist and Justice Ginsburg have recorded on this Data Table since they were appointed to the Court.⁶¹

Bennett, 531 U.S. 4 (2000).

57. See *infra* Data Table 3.

58. See *infra* Mean Table 3.

59. See *infra* Data Table 3.

60. See *id.*

61. See *id.*

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

The Court has decreased its support of the federal government in criminal cases over the last four years.⁶² Data Table 4 shows the Court's continuation of this liberal trend. Since this Study began, the Court has never shown less support for the federal government than it did this Term.⁶³ This Term's voting score was 28.6% in "Majority" decisions and 20.0% in "Split" decisions. This is a significant drop of 25.9 points and 37.1 points, respectively, compared to last Term. The Court's score remained the same as last Term's score in "Unanimous" decisions, but with only one unanimous decision made by the Court this Term, no real comparisons can be drawn.⁶⁴

This pronounced liberal movement seems noteworthy. All of the Justices showed a statistically significant change in voting behavior.⁶⁵ And, with the exception of Justices Ginsburg, Scalia, and Thomas, whose scores were 1.4, 20.3, and 32.4 points more conservative than expected, the rest of the Court voted more liberally than anticipated. Last Term we posited that one possible reason for the court's liberal movement over the last four Terms could be the Court's "strict" reading of criminal statutes, which leads to liberal outcomes.⁶⁶ Close adherence to statutory text, generally speaking, is a conservative judicial stance. Thus, the liberal movement in Data Table 4 could be explained as the result of ideologically conservative Justices reading statutory text narrowly, thereby favoring the criminal defendants. However, last year's explanation for the Court's support of private parties seems suspect this Term, as the traditionally conservative Justices voted against private parties more than half of the time. Justices Scalia and Thomas voted against private parties 85.7% of the time, and Chief Justice Rehnquist and Justice O'Connor voted against private parties 57.1% of the time.⁶⁷ The data this Term suggests that the Court might have indeed demonstrated a slight liberal reorientation in federal criminal cases.

62. Cases decided in favor of the federal government: *Buford v. United States*, 532 U.S. 59 (2001); *Lopez v. Davis*, 531 U.S. 230 (2001). Cases decided against the federal government: *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Calcano-Martinez v. INS*, 533 U.S. 348 (2001); *INS v. St. Cyr*, 533 U.S. 289 (2001); *Glover v. United States*, 531 U.S. 198 (2001).

63. *See infra* Data Table 4.

64. *See id.*

65. *See infra* Mean Table 4.

66. *See* 1999 Study *supra* note 1, at 554.

67. *See infra* Data Table 4.

Justices Souter and Stevens voted for the government in criminal cases only 16.7% and 14.3% of the time, while Justices Kennedy, Breyer, and Ginsburg voted for the federal government 28.6% of the time.⁶⁸ Justice Kennedy voted significantly more liberally than he did last Term, marking the most liberal score ever for Justice Kennedy in this category. Overall, the Court remains polarized in federal criminal cases, with a bare majority of the Court (Justices Breyer, Ginsburg, Souter, Stevens and Kennedy) favoring private parties over the federal government in criminal cases.

As with last Term, the strongest correlation in voting behavior was between Justices Souter and Ginsburg. They had a voting correlation of 0.97 and an R^2 score of 0.94.⁶⁹ For the 2001 Term, the Study anticipates that the Court will continue its liberal trend.⁷⁰

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

Data Table 5 demonstrates liberal movement and increased support of First Amendment claims by the Court this Term.⁷¹ The score for “Majority” cases increased by 30.6 points, and the score for “Split” cases increased by 50 points.⁷² Like last Term, there were no “Unanimous” cases in favor of First Amendment claims.⁷³

Only four of the Justices voted within 10 points of their anticipated scores; the other five Justices’ scores deviated from their anticipated scores by 26.8 to 70.2 points.⁷⁴ The large error between the anticipated and actual scores of the individual Justices demonstrates volatility in this category and could be due to the small number of First Amendment cases heard by the Court this Term. However, it is notable that even though more than half of the Justices’ voting scores deviated significantly from their anticipated scores, the error between the Court’s overall anticipated and actual voting scores for “Majority” cases was only 10.8 points.⁷⁵ Thus, while

68. *See id.*

69. *See infra* Regression Table 4.

70. *See infra* Data Table 4.

71. Cases decided in favor of the First Amendment claim: *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001). Cases decided against the First Amendment claim: *Shaw v. Murphy*, 532 U.S. 223 (2001).

72. *See infra* Data Table 5.

73. *See id.*

74. *See infra* Data Table 5.

75. *See id.*

individual Justices demonstrated somewhat unusual voting patterns, the Court (as a whole) remained within anticipated limits.

Of the three Justices who demonstrated a statistically significant change in voting behavior this Term, Justices Scalia and Thomas voted more conservatively than expected by 50.6 and 52.5 points, respectively, while Justice Breyer voted more liberally by 70.2 points.⁷⁶

Justice Kennedy continued to show high receptivity to First Amendment claims this Term, although his scores were not as high as they have been in past years. Justice Kennedy held in favor of First Amendment claims in 75% of the cases this Term, tying Justice Breyer for the most liberal ranking.⁷⁷ In 1999, Justice Kennedy also held the most liberal ranking with a score of 77.8, and in 1998, he tied with five other Justices for the most liberal position with a score of 100.⁷⁸ Justice Kennedy's voting score was the most predictable this Term; his actual score deviated from his anticipated score by only 2.3 points.⁷⁹ These statistics suggest that Justice Kennedy may be the most consistently receptive member of the Court to First Amendment claims.

Two of the most conservative Justices, Justices Scalia and Thomas, showed the highest level of correlation with a score of 0.97 and an R^2 score of 0.94.⁸⁰ Justices Stevens and Ginsburg, two of the most liberal Justices, also showed a very high level of correlation with a score of 0.97 and an R^2 score of 0.92.⁸¹ The First Amendment voting patterns of these two pairs of Justices, therefore, move together over time.

Data Table 6: Equal Protection Claims.

The Court decided four Equal Protection cases this Term,⁸² which is as many as it decided during the last three Terms combined – one in 1999, one in 1998, and two in 1997. The small number of cases in this category makes it difficult to identify trends and to anticipate

76. *See id; infra* Mean Table 5.

77. *See infra* Data Table 5.

78. *See id.*

79. *See id.*

80. *See infra* Regression Table 5.

81. *See id.*

82. Cases decided in favor of the Equal Protection claim: *Bush v. Gore*, 531 U.S. 98 (2000). Cases decided against the Equal Protection claim: *Nguyen v. INS*, 533 U.S. 53 (2001); *Hunt v. Cromartie*, 532 U.S. 234 (2001); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

voting behavior. Although it cannot conclusively be called a trend, the data shows slight conservative movement on Data Table 6. In past years, we have analyzed the limited data in conjunction with prior Terms' results in hope that a comparative analysis would provide a better indicator of ideological trends in this category of decisions.⁸³ The results of these comparisons have shown that the majority tends to support Equal Protection claims 50% of the time.

Interestingly, with increased data this Term, eight of the nine Justices voted for the Equal Protection claim 50% of the time.⁸⁴ Only Justice Stevens, oddly the most "conservative" Justice on Data Table 6 this Term, voted for the claim only 25% of the time.⁸⁵ Overall, the Court seems to be maintaining its historically conservative disposition in Equal Protection cases.

Most likely because of the small universe of cases, the Justices' actual scores deviated significantly from anticipated voting scores. Chief Justice Rehnquist, Justice Scalia, Justice Ginsburg, Justice Breyer, and Justice Souter voted over forty points more liberally than anticipated. Justice O'Connor was the most predictable Justice in this category with a difference of only 2.7% from her anticipated score.⁸⁶ Only Justices Scalia and Stevens showed a statistically significant change in voting behavior this Term.⁸⁷

There was an extremely high correlation of 1.00 and an extremely high R^2 score of 1.00 between the historically liberal Justices Breyer, Ginsburg, and Souter.⁸⁸ Justice Thomas and Justice Scalia also recorded a high correlation of 0.97 and a high R^2 score of 0.93.⁸⁹ However, the high number of correlated pairs may be due to the small number of cases in this category.

Data Table 7: Statutory Civil Rights Claims.

Table 7 shows slight liberal movement compared to the previous Term. However, since the Court decided only three cases in this category, it is difficult to make any definitive conclusions about the Court's voting behavior.⁹⁰ The data, furthermore, seems to indicate

83. See 1998 Study *supra* note 1, at 483-84; 1999 Study *supra* note 1, at 549.

84. See *infra* Data Table 6.

85. See *id.*

86. See *id.*

87. See *infra* Mean Table 6.

88. See *infra* Regression Table 6.

89. See *id.*

90. Cases decided in favor of the Statutory Civil Rights claim: *PGA Tour, Inc. v.*

conservative movement over time in this category despite the liberal movement this Term.⁹¹

While there were only three cases in this category this Term, the voting behavior of the Justices was sharply divided between the liberal and conservative Justices. The conservative movement of the two most conservative Justices and the liberal movement of the liberal bloc of Justices demonstrate the Court's increased polarization on statutory civil rights claims. Justices Stevens, Breyer, Ginsburg, and Souter all voted in favor of the claim 100% of the time, while Justices Kennedy, O'Connor, and Rehnquist voted in favor of the claim only 33.3% of time. Justices Scalia and Thomas never voted in favor of the claim.⁹² These voting blocs reflect the profound conservative/liberal split of the current Court.

There is a great deal of volatility in the Court in this category of cases. Mean Table 7 indicates that all of the Justices except Chief Justice Rehnquist and Justice Kennedy showed a statistically significant change in voting behavior.⁹³ This change in voting behavior is also reflected in the large error between the actual and anticipated voting scores of the Justices. With the exception of Chief Justice Rehnquist, who voted 33.3 points more liberally than anticipated, the historically conservative Justices voted more conservatively than anticipated, and the historically liberal Justices voted more liberally than anticipated. Specifically, Justice Ginsburg voted 80.4 points more liberally than anticipated, Justice Souter voted 48.3 points more liberally than anticipated, and Justice Stevens voted 42.0 points more liberally than anticipated. Justice O'Connor, on the other hand, voted 45.2 points more conservatively than anticipated, Justice Scalia voted 38.9 points more conservatively, and Justice Thomas voted 40.5 points more conservatively than anticipated.⁹⁴

Justices Stevens' and Breyer's voting patterns tend to move similarly over time on statutory civil rights claims, with a correlation of 0.97 and an R^2 score of 0.92.⁹⁵ Justices Souter and Ginsburg demonstrate a weaker, but possibly significant relationship. The data

Martin, 532 U.S. 661 (2001). Cases decided against the Statutory Civil Rights claim: *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Resources*, 532 U.S. 598 (2001); *Alexander v. Sandoval*, 532 U.S. 275 (2001).

91. *See infra* Data Table 7.

92. *See id.*

93. *See infra* Mean Table 7.

94. *See infra* Data Table 7.

95. *See infra* Regression Table 7.

this Term shows that their voting patterns have a correlation of 0.95 and an R^2 score of 0.90.

Data Table 8: Federal Jurisdiction Claims.

After showing significant liberal movement and increased support of federal jurisdiction last Term, the Court showed conservative movement in its “Majority,” “Split,” and “Unanimous” decisions,⁹⁶ and each Justice’s individual scores were more conservative than they were last Term.⁹⁷

Last Term, all of the Justices except Justice Breyer showed a statistically significant change in voting behavior.⁹⁸ However, none of the Justices showed a statistically significant change in voting behavior this Term.⁹⁹ The error between the overall anticipated and actual voting scores of the Court’s “Majority” cases was also fairly low at 9.1 points.¹⁰⁰ Thus, it appears that the Court is likely returning to more normal voting patterns after last Term’s significant liberal movement and anomalous support of federal jurisdiction. However, despite the Court’s conservative movement, this Term’s scores were still more liberal than seven of the past nine “Majority” decisions, six of the past nine “Split” decisions, and three of the past nine “Unanimous” decisions.¹⁰¹

Justice Stevens was the most liberal Justice for the third year in a row. Justice O’Connor, who tied for the second most liberal score last Term, voted most conservatively this Term.¹⁰² Justice Ginsburg

96. Cases in favor of the exercise of federal jurisdiction: *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Calcano-Martinez v. INS*, 533 U.S. 348 (2001); *INS v. St. Cyr*, 533 U.S. 289 (2001); *Becker v. Montgomery*, 532 U.S. 757 (2001); *United States v. Hatter*, 532 U.S. 557 (2001); *C & L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001); *Ohio v. Reiner*, 532 U.S. 17 (2001); *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000); *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57 (2000); *Artuz v. Bennett*, 531 U.S. 4 (2000). Cases decided against the exercise of federal jurisdiction: *Tyler v. Cain*, 533 U.S. 656 (2001); *Calcano-Martinez v. INS*, 533 U.S. 348 (2001); *INS v. St. Cyr*, 533 U.S. 289 (2001); *Saucier v. Katz*, 533 U.S. 194 (2001); *New Hampshire v. Maine*, 532 U.S. 742 (2001); *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504 (2001); *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438 (2001); *City News & Novelty, Inc. v. Waukesha*, 531 U.S. 278 (2001).

97. *See infra* Data Table 8.

98. *See* 1999 Study *supra* note 1, at 584, Mean Table 8.

99. *See infra* Mean Table 8.

100. *See infra* Data Table 8.

101. *See id.*

102. *See id.*

shared the highest correlation score of 0.98 and highest R^2 score of 0.95 with Justice Souter and the second highest correlation score of 0.95 and an R^2 score of 0.90 with Justice Kennedy.¹⁰³

Last Term, Jurisdiction cases were the least reliable indicator of ideology in the Court's voting trends. This Term, Jurisdiction moved up two positions to the seventh most reliable indicator, in part because the Civil/Federal Party and Criminal/State Party categories dropped significantly in their levels of reliability as indicators of the Court's conservative/liberal bias under factor analysis.¹⁰⁴

Data Table 9: Federalism Cases.

Data Table 9 shows a slight liberal trend in the Court's treatment of federalism issues.¹⁰⁵ For the first time in three Terms, the Court voted more liberally in "Majority" and "Split" decisions than it had in the prior Term, thus slowing the conservative trend of recent years. Although the Court showed a conservative increase of 15% in "Unanimous" decisions over last Term, more Justices voted against the state in all categories of cases with federalism issues this Term.¹⁰⁶ Thus, considered as a whole, Data Table 9 suggests slight liberal movement.

Justices Scalia and Thomas recorded the most conservative score on Data Table 9 by voting in favor of states' rights in 57.1% of the federalism cases. Justice Ginsburg recorded the most liberal score in this category, voting for the state only 28.6% of the time. There is no significant change in the historical conservative/liberal ranking of the Court in this category.

Although four of the nine Justices showed a statistically significant change in voting behavior this Term,¹⁰⁷ this category showed the least amount of overall error between the Court's

103. See *infra* Regression Table 8.

104. See *infra* Part V.

105. Cases decided in favor of the state government: *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); *Hunt v. Cromartie*, 532 U.S. 234 (2001); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Semtek Int'l Inc., v. Lockheed Martin Corp.*, 531 U.S. 497 (2001); *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438 (2001); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). Cases decided in favor of the federal government: *Idaho v. United States*, 533 U.S. 262 (2001); *Kansas v. Colorado*, 533 U.S. 1 (2001); *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001); *Shafer v. South Carolina*, 532 U.S. 36 (2001); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Bush v. Gore*, 531 U.S. 98 (2000); *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

106. See *infra* Data Table 9.

107. See *infra* Mean Table 9.

anticipated and actual scores of “Majority” cases. The 40.5% anticipated score was only 2.4% more liberal than the actual score of 42.9%. The anticipated score for Justice Kennedy was only 0.3% more liberal than his actual score of 42.9%.¹⁰⁸ There was no real significant correlation between the voting behavior of any of the Justices in this category.

Data Table 10: Swing Vote Cases.

Data Table 10 contains the voting scores from cases that were decided by a margin of one vote this Term.¹⁰⁹ Because of the narrow voting margin, Swing-vote cases may well be the most reliable indicator of the Court’s position on the conservative/liberal spectrum. (We use factor analysis to gauge the relative value of the other nine tables in assessing ideology. *See supra* Part V.) This Term, the Court reached a conservative result in 60.0% of Swing-vote cases.¹¹⁰ This result is nearly identical to last year’s 61.5% score and continues last Term’s trend of reaching conservative outcomes in cases decided by one vote.¹¹¹

This Term, Justice Kennedy was the Justice who voted most often with the majority in cases decided by one vote, voting with the majority 83.33% of time.¹¹² His return to the top of the Table moved him back to the position that he held during the 1992-1997 Terms.¹¹³ At the other end of the spectrum, the most recent nominees to the Court, Justices Ginsburg and Breyer, tied as the Justices most likely not to vote with the majority, voting only 36.67% of the time with the

108. *See infra* Data Table 9.

109. Swing-vote cases reaching a conservative outcome: *Tyler v. Cain*, 533 U.S. 656 (2001); *Nguyen v. INS*, 533 U.S. 53 (2001); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t. of Health & Human Resources*, 532 U.S. 598 (2001); *City of Atwater v. Lago Vista*, 532 U.S. 318 (2001); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Hunt v. Cromartie*, 532 U.S. 234 (2001); *Texas v. Cobb*, 532 U.S. 162 (2001); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). Swing-vote cases reaching a liberal outcome: *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Calcano-Martinez v. INS*, 533 U.S. 348 (2001); *INS v. St. Cyr*, 533 U.S. 289 (2001); *Idaho v. United States*, 533 U.S. 262 (2001); *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706 (2001); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159 (2001); *Bush v. Gore*, 531 U.S. 98 (2000).

110. *See infra* Data Table 10.

111. *See id.*

112. *See id.*

113. *See id.*

majority in Swing-vote cases.¹¹⁴

The anticipated voting scores for the Justices were fairly accurate this Term.¹¹⁵ Six of the Justices' actual scores (Justices Kennedy, O'Connor, Thomas, Stevens, Souter, and Ginsburg) were within 15 percentage points of their anticipated voting scores. Chief Justice Rehnquist and Justice Scalia voted more often with the majority than anticipated by 19.8% and 16.3% respectively.¹¹⁶ Only Justice Kennedy showed a statistically significant change in voting behavior this Term.¹¹⁷ Anticipated voting scores for the 2001 Term show that Justices Kennedy and O'Connor, again, will be the most likely Justices to vote with the majority in cases decided by one vote and that Justices Souter and Breyer will be the least likely to vote with the majority in such cases.¹¹⁸

The regression table demonstrates an interesting negative correlation this Term. With a negative correlation score of -0.97 and an R^2 score of 0.94 , there is a high negative correlation in voting behavior between Justices Breyer and Scalia.¹¹⁹ These scores suggest that, over time, these two Justices tend to be on opposite sides of closely divided cases.

During the 1999 Term, the conservative Justices voted more often with the majority while the liberal Justices voted less often with the majority than they did during the 1998 Term. However, this Term, with the exception of Justice Kennedy, the conservative Justices voted less often with the majority, and the liberal Justices voted more often with the majority than they did in the 1999 Term.¹²⁰ Thus, although the Court voted conservatively in roughly the same percentage of cases as it did last Term, there appears to be increased tension in the Court with regard to who is voting with the majority when cases are decided by one vote.

114. *See id.*

115. *See infra* Data Table 10.

116. *See id.*

117. *See infra* Mean Table 10.

118. *See infra* Data Table 10.

119. *See infra* Regression Table 10.

120. *See infra* Data Table 10.

Frontier Analysis Table 1 "Conservative Frontier"—Constrained												
Justice	Percent of Frontier	Percent Super Eff.	Category Weights									
			Civil/	Civil/	Crim./	Crim./	1st Am.	Equal Protect.	Stat. Civ. Rt.	Juris.	Fed'ism	
Scalia	101%	101%	14	14	0	14	14	0	0	14	14	14
Thomas	100%		50	50	0	0	0	0	0	0	0	0
Rehnquist	96%		14	14	0	14	14	0	0	14	14	14
Kennedy	82%		50	50	0	0	0	0	0	0	0	0
O'Connor	82%		14	14	0	14	14	0	0	14	14	14
Stevens	78%		14	14	0	14	14	0	0	14	14	14
Souter	74%		14	14	0	14	14	0	0	14	14	14
Ginsburg	70%		14	14	0	14	14	0	0	14	14	14
Breyer	63%		14	14	0	14	14	0	0	14	14	14

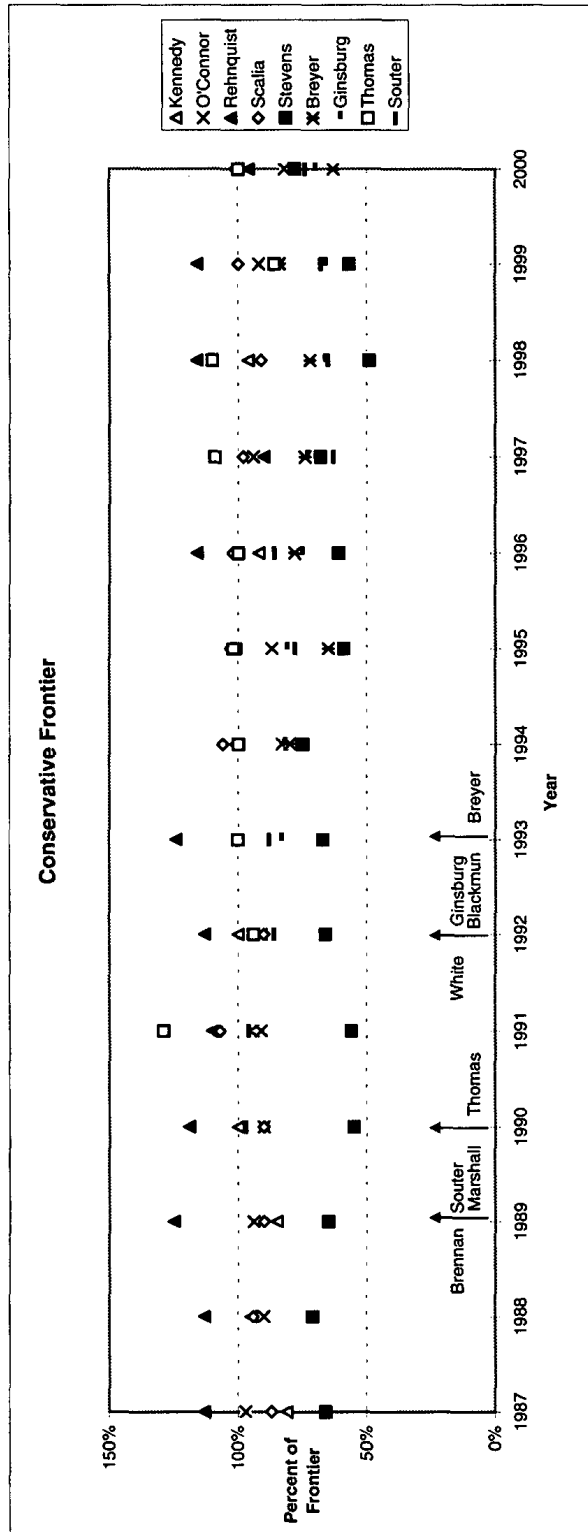
**Frontier Analysis Table 2
“Liberal Frontier” –Constrained**

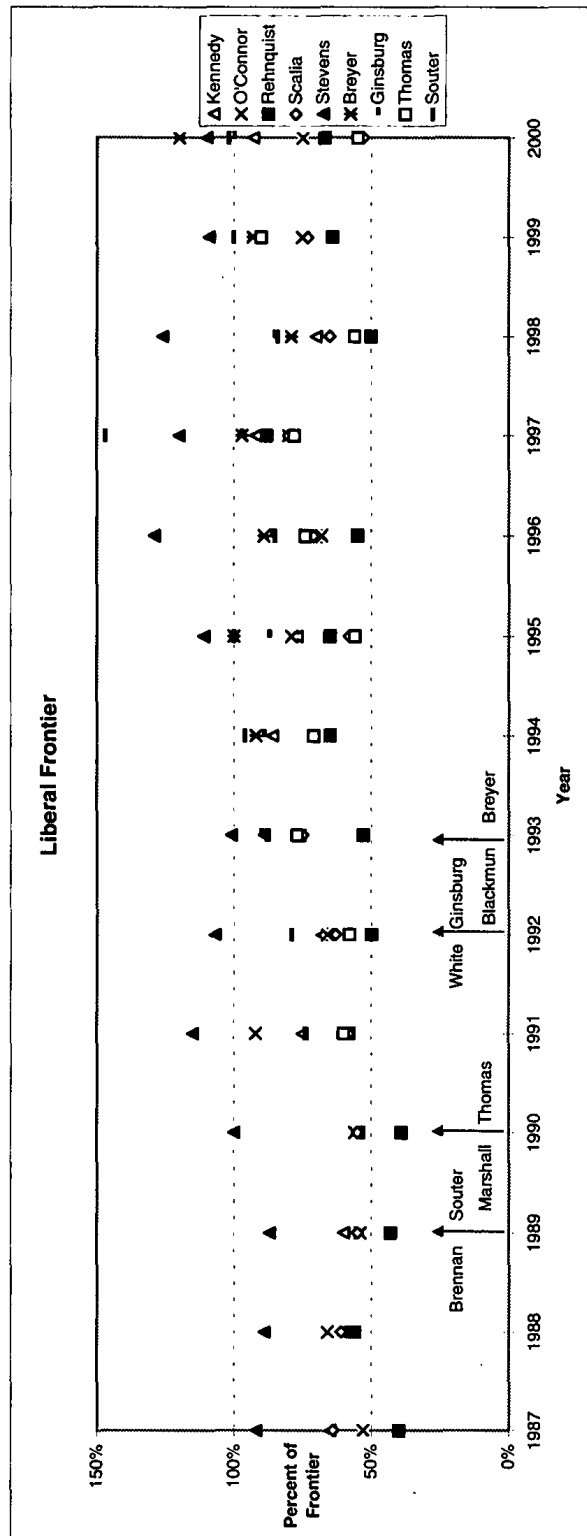
Justice	Percent of Frontier	Percent Super Eff.	Category Weights										
			Civil/	Civil/	Crim./	Crim./	1st Am.	Equal Protect.	Stat. Civ. Rt.	Juris.	Fed'ism		
Breyer	120%	120%	0	0	50	0	0	50	0	0	0	0	0
Stevens	110%	110%	40	0	0	60	0	0	0	0	0	0	0
Souter	102%	102%	0	0	11	37	11	11	11	11	11	11	11
Ginsburg	100%		0	0	100	0	0	0	0	0	0	0	0
Kennedy	93%		30	30	0	39	0	0	0	0	0	0	0
O'Connor	75%		33	33	0	33	0	0	0	0	0	0	0
Rehnquist	67%		33	33	0	33	0	0	0	0	0	0	0
Thomas	55%		33	33	0	33	0	0	0	0	0	0	0
Scalia	53%		33	33	0	33	0	0	0	0	0	0	0

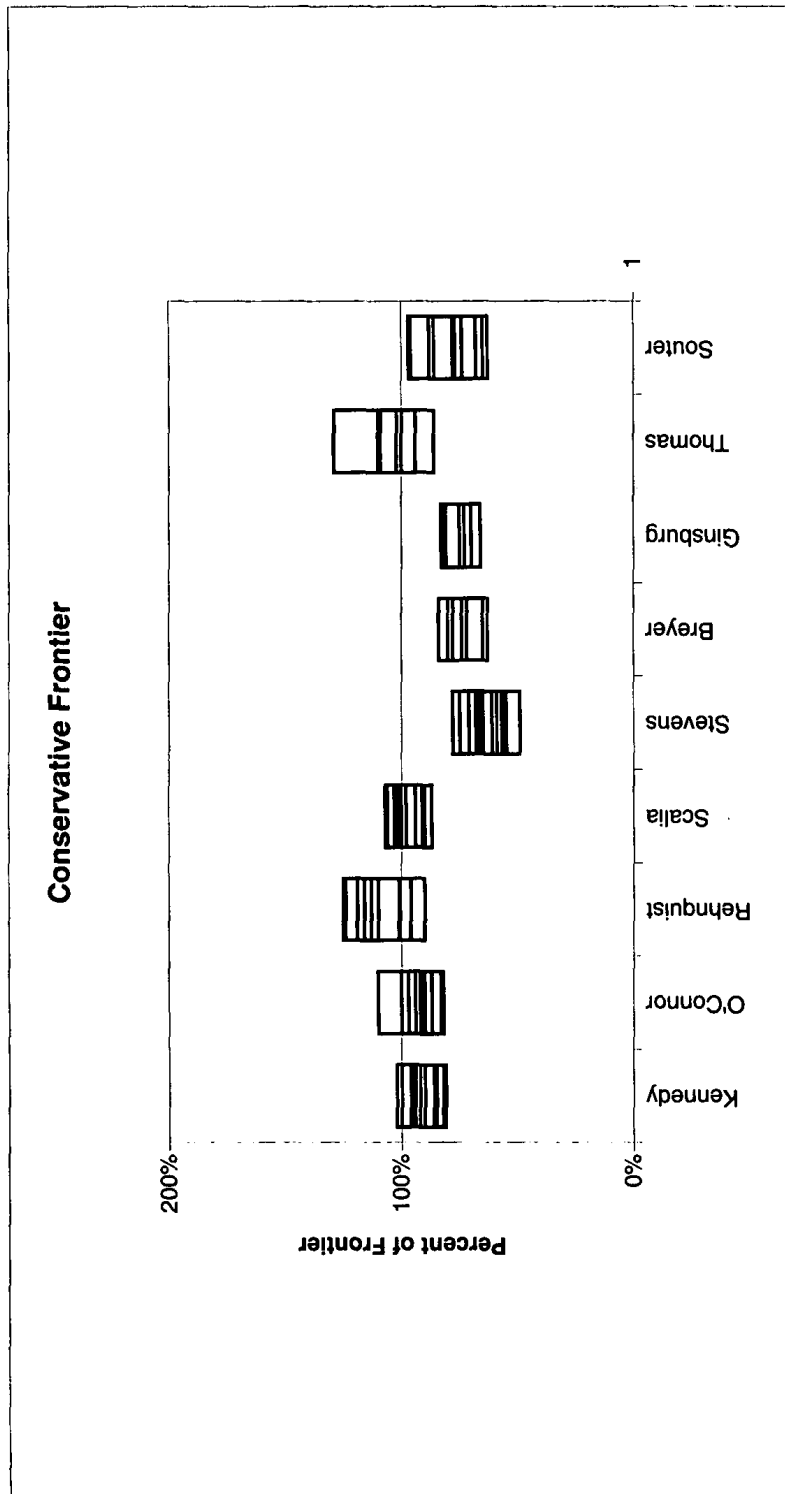
Frontier Analysis Table 3 "Conservative Frontier" - Unconstrained												
Justice	Percent of Frontier	Percent Super Eff.	Category Weights							Juris.	Fed'ism	
			Civil/	Civil/	Crim./	Crim./	1st Am.	Equal Protect.	Stat. Civ. Rt.			
Stevens	150%	150%	0	0	0	0	0	0	100	0	0	0
Scalia	105%	105%	0	83	0	17	0	0	0	0	0	0
Rehnquist	103%	103%	0	76	0	0	24	0	0	0	0	0
O'Connor	100%		0	0	0	0	0	0	0	0	100	0
Thomas	100%		0	0	0	0	0	0	0	100	0	0
Souter	94%		65	0	0	0	0	0	44	0	0	0
Ginsburg	88%		0	60	0	0	0	0	8	0	32	0
Kennedy	93%		56	0	0	0	0	0	44	0	0	0
Breyer	87%		0	2	0	0	0	0	44	0	54	0

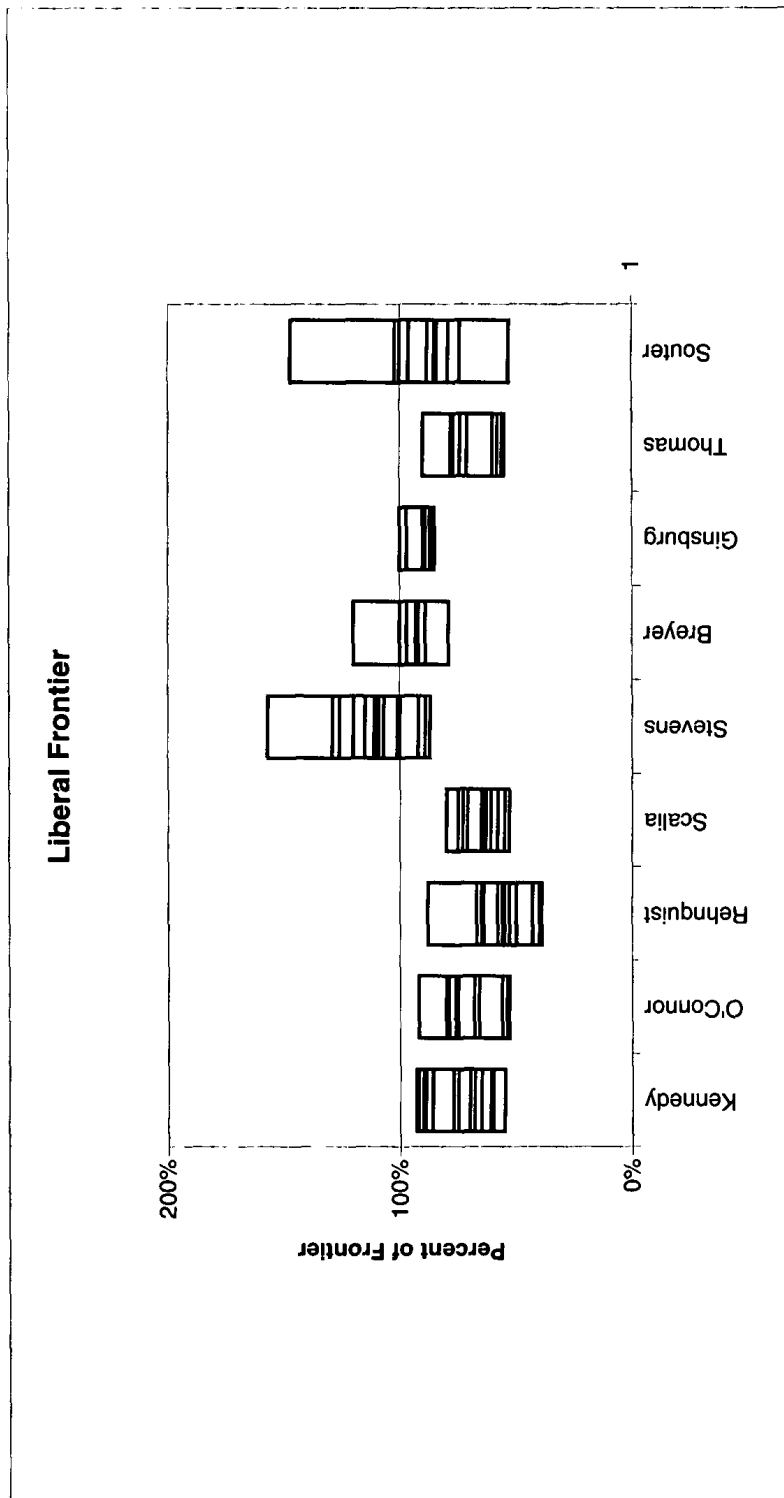
**Frontier Analysis Table 4
"Liberal Frontier"—Unconstrained**

Justice	Percent of Frontier	Percent Super Eff.	Category Weights											
			Civil/	Civil/	Crim./	Crim./	1st Am.	Equal Protect.	Stat. Civ. Rt.	Juris.	Fed'ism			
Stevens	110%	110%	40	0	0	60	0	0	0	0	0	0	0	0
Ginsburg	111%	111%	0	0	0	0	0	0	0	0	0	0	0	100
Souter	112%	112%	0	0	0	64	0	0	36	0	0	0	0	0
Breyer	129%	129%	0	0	0	0	0	0	73	0	0	27	0	0
Kennedy	106%	106%	0	100	0	0	0	0	0	0	0	0	0	0
Scalia	100%		0	0	0	0	0	0	100	0	0	0	0	0
O'Connor	100%		71	0	0	0	0	0	0	0	0	29	0	0
Thomas	100500%		0	0	0	0	0	0	100	0	0	0	0	0
Rehnquist	100%		0	0	0	0	0	0	100	0	0	0	0	0









V. Category Analysis

Beginning in the 1996 Term, we began to analyze the effectiveness of this Study's categories in measuring liberal and conservative tendencies and trends. As might be expected, certain categories are better indicators than others of the Court's collective and individual predilections.

Some categories, although tending to divide the Court into conservative/liberal blocs, may "change polarity" depending on the specific issues presented. For example, during the 1996 Term, our First Amendment tally placed Justices Scalia and Thomas at the top – a liberal position under this Study's definitions, and a position not commonly occupied by these particular Justices. Conversely, Justice Breyer held the bottom spot during that Term. These unusual results seemed to result from other ideological issues implicated in the decisions.¹²¹ We have also encountered other problems over the years. For example, a small sample within a given category results in highly volatile score movements from Term to Term because a single case may account for many percentage points. This point was dramatically illustrated in the 1999 Term in the Equal Protection category, with only one case touching on the issue.¹²² Because only one Equal Protection issue was decided (and was decided unanimously for the claim), each Justice scored 100% in that category – an unprecedented result.¹²³

In order to determine which categories best differentiate between the more conservative and more liberal Justices, we apply factor analysis.¹²⁴ By applying this method, we have determined that a primary factor may be extracted from the Study's categories that accounts for over 25% of the variance revealed by the data on Tables 1 through 9.¹²⁵ We interpret this factor as conservative/liberal bias because that is what this Study purports to measure. The categories load onto this primary factor this Term as follows:

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

122. See 1999 Study *supra* note 1, at 574, Data Table 6.

123. See *id.*

124. See *infra* Appendix B for more information regarding factor analysis.

125. We applied a QMAX rotation to achieve this result. See *infra* note 136 for more information on QMAX rotation

Category	Factor 1
Criminal/State Party	0.848
Civil/State Party	0.852
Criminal/Federal Party	0.690
Federalism	0.623
Equal Protection	0.372
First Amendment	0.206
Jurisdiction	0.205
Civil/Federal Party	0.159
Statutory Civil Rights	0.045
Variance	2.5584
% Variance	0.284

According to this ranking, the Civil/State Party category appears to be our best indicator of conservative/liberal leanings, while the Statutory Civil Rights category is our poorest indicator this Term. Over the years, cases with statutory civil rights claims have been rare and have produced volatile results. Although Equal Protection cases moved up three spots to the fifth best indicator this year, cases in this category have also become increasingly rare (only four cases this Term and only one last Term).¹²⁶ First Amendment cases were also rare this Term and have produced volatile results over the years.¹²⁷ First Amendment cases also tend toward pole swapping. For example, if the 1996 Term's free speech issues had concerned flag burning rather than abortion clinic demonstrations and gay rights, the scores might have been nearly reversed.¹²⁸

Although Civil/Federal Party cases have become steadily better indicators of the Court's ideology over the course of this Study, this category of cases dropped to second to the last this year. Cases in this category 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 fell to 61% after President Clinton took office. On the other hand, Justice Stevens averaged 48% under the Republicans and 59% under President Clinton.¹²⁹ This category will be interesting to follow under

126. See *supra* Data Table 6.

127. See *supra* Data Table 5.

128. 1996 Study *supra* note 1, at 91.

129. See *supra* discussion of Data Table 2.

the Bush Administration.

In summary, category analysis of the 2000 Term suggests that the most reliable indicator of the Court's ideology is the data collected in Table 1 (Civil/State Party), with Tables 3 (Criminal/State Party), 4 (Criminal/Federal Party), and 9 (Federalism) providing the next most reliable data. Tables 6 (Equal Protection), 5 (First Amendment), 8 (Jurisdiction), 2 (Civil/Federal Party), and 7 (Statutory Civil Rights) provide the least reliable information.

VI. Frontier Analysis

Attempting to quantify the magnitude of a Justice's liberal or conservative tendencies and identifying trends in such tendencies over time is challenging for a variety of reasons. One challenge already discussed is that of choosing appropriate tests and assessing their validity. Another is dealing with inconsistency in the nature of cases appealed to the Court from one Term to the next and the Court's selection of which issues it will decide. Given these varying parameters, is there any meaningful way to quantify, analyze, and compare the Justices' inclinations? One potentially useful method is frontier analysis.¹³⁰

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

We present liberal and conservative frontier data for the Court in Frontier Analysis Tables 1-4 below. Two versions of each frontier are presented. In Tables 1 and 2, we constrain the weights applied to each category according to the factor analysis hierarchy described in Part V of this article. 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 no category can receive more weight than a more reliable category (e.g. Criminal/State Party – this Term's most reliable factor – cannot receive more weight than Civil/State Party – this Term's most reliable factor). 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

130. See *infra* Appendix B for more information regarding frontier analysis.

conservative or liberal light possible without regard to the factor analysis hierarchy. Each table lists a “Percent 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 that are less than 100% indicate that the most conservative or 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 place a Justice beyond the frontier. This condition is known as “superefficiency” and is noted in the charts when present.

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

Frontier Charts 3 and 4 show each Justice’s range of frontier scores during the course of this Study. They are easier to read than the line graphs and give a clearer picture of the Justice’s relative positions and score ranges over time. They do not, however, show any trend information (that is, the charts do not demonstrate whether, during the past several Terms, each Justice has been voting closer to or farther away from a respective frontier).

Frontier Tables 3 and 4, where the “frontier” is established without weighting the reliability of the nine categories of this Study, provide some interesting results. Perhaps most surprisingly, Justice Stevens tops both tables as both the most “conservative” and “liberal” Justice on both frontiers – even scoring a superefficient score of 150% on the unconstrained conservative frontier. Somewhat less surprising are the Justices who follow Justice Stevens on Table 3: Justices Scalia, Rehnquist, O’Connor, and Thomas (each reaching at least 100% of the unconstrained conservative frontier, with Justices Scalia and Rehnquist scoring modestly superefficient scores).

Table 3 also shows that Justice Kennedy – the often-crucial fifth vote on the Court – is near the bottom of the unconstrained conservative frontier table. He is also precisely in the middle of Table 4, which plots the unconstrained liberal frontier. These voting patterns are consistent with Justice Kennedy’s role this Term as the predominant “swing-voter”: he is on the liberal fringe of the unconstrained conservative frontier and right behind the dominant actors on the unconstrained liberal frontier. In this position, he is poised to provide the crucial fifth vote when either a conservative or a

liberal four-member bloc of the Court appears.

Tables 1 and 2, which constrain the frontiers according to the outcome of our factor analysis, demonstrate voting patterns that are quite consistent with commonly held, non-quantitative (that is, non-statistical and non-mathematical) views of the Justices' and the Court's ideology. Justice Scalia, with a superefficient score of 101%, marks the outer boundary of the constrained conservative frontier plotted on Table 1 and lands at the bottom of the constrained liberal frontier set by Table 2. Conversely, Justice Breyer sets the outer perimeter of the constrained liberal frontier on Table 2 and holds the last place on the constrained conservative frontier contained on Table 1. The next two most conservative points on the constrained conservative frontier of Table 1 are held by Justices Thomas and Rehnquist – who also hold corresponding positions at the bottom of the constrained liberal frontier of Table 2. Justices Kennedy and O'Connor hold the fourth and fifth most conservative slots on Table 1 and essentially identical positions at the bottom of Table 2 (although Justice O'Connor, rather than Justice Kennedy, holds the more conservative position on Table 2). Justices Breyer, Ginsburg, Souter, and Stevens hold the most liberal positions at the bottom of Table 1 and corresponding positions (in a slightly different order) at the top of the constrained liberal frontier of Table 2.

Frontier Charts 1 and 2 demonstrate, in graphic form, the results summarized above. Charts 3 and 4 demonstrate the range of scores that each Justice has plotted on the constrained conservative and liberal frontiers during the course of this Study by showing the “top” and “bottom” conservative and liberal scores of each Justice. The width of the various lines plotted between these two points represent, in graphic form, the number of times each Justice has scored within that range – the “thicker” the line between the top and bottom scores, the more times a score at that point on the frontier has been plotted.

Chart 3 shows that Justices Rehnquist and Thomas have set the outer (and superefficient) boundaries of the constrained conservative frontier. The other three Justices that make up the “conservative” swing bloc on the Court, Justices Kennedy, O'Connor and Scalia, have all – at one time or another – reached 100% of the constrained conservative frontier. Only Justices Stevens, Breyer, Ginsburg, and Souter have never reached the frontier. Over time, Justice Stevens, for his part, has stayed in the range farthest from the constrained conservative frontier.

Chart 4 demonstrates that Justices Stevens, Breyer, and Souter dominate the outer reaches of the constrained liberal frontier. Justice

Stevens, moreover, has consistently demonstrated superefficient voting patterns on Chart 4. In addition to these three Justices with superefficient scores, Justice Ginsburg has also reached the constrained liberal frontier. By contrast, no member of the “conservative five” has reached the constrained liberal frontier. Chief Justice Rehnquist exhibits voting patterns, over time, farthest from the 100% line of the frontier on Chart 4.

VII. Conclusion

The Court’s voting behavior during the 2000 Term arguably exhibits a modest liberal trend. The Court voted more liberally in six of the ten categories of the Study this Term compared to last Term. The strength of this liberal trend, however, is unknown. Factor analysis suggests that Civil/State Party cases are the best indicator of conservative/liberal bias, while Swing-vote data (not subjected to factor analysis) also seems to provide a fairly reliable indication of the Court’s ideological stance. In both of these categories, the Court showed conservative movement. Therefore, it is difficult to state with any assurance that the Court is moving in any sustained way along either a liberal or a conservative axis.

It does seem clear, however, that the current Court is voting in identifiable blocs. The Civil/State Party scores, our most reliable statistical evidence of conservative/liberal bias, are indicative of this fact. Data Table 1 reflects identifiable voting groups within the Court – with Justices Rehnquist, Scalia, and Thomas posting identical scores and Justices Kennedy and O’Connor falling in behind them (also with identical scores). Although the picture from Data Table 1 is less than conclusive, since Justice Souter (a frequent visitor to the liberal frontier) finds himself wedged between the most conservative three and Justices Kennedy and O’Connor, even clearer evidence of conservative/liberal blocs is shown on Data Tables 3, 4, and 10. Moreover, Data Table 10, the Swing-vote data, demonstrates that – while the Court this Term continued a conservative trend that began last Term – the liberal bloc of the Court is nevertheless gaining ground in these closely divided cases.

All of this gives substantial quantitative evidence that the present Court stands in an uneasy ideological balance. It is impossible to know with certainty from the data whether the Court is more or less conservative (or liberal) in 2000 than it was in 1999. What is obvious is that the balance of power within the Court is fragile. As a result, the replacement of any of the three most conservative members of the

Court (the Chief Justice and Justices Scalia and Thomas) or the two “swing-votes” (Justices Kennedy and O’Connor) could well result in an avulsive change in the ideological stance of the Court.

APPENDIX A

1. The Universe of Cases

The only cases included in the database are those 2000 Term cases decided by full opinion. Decisions on motions have been excluded even if accompanied by an opinion. Cases handled by summary disposition are included only if they are accompanied by a full opinion of the Court, but not if the only opinion is a dissent. Cases decided by a four-four vote resulting in affirmance without written opinion have been excluded. Both signed and unsigned per curiam opinions are considered full opinions if they set forth reasons in a more than perfunctory manner. Cases that do not fit within any of the nine 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.¹³¹ 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 the 2000 Term 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 in this category if government attorneys represent the official or if the interests of the government are otherwise clearly implicated. In instances of multiple parties, a civil case is excluded if governmental entities appear on both sides of the controversy. If both a state and a federal entity are parties to the same suit on the same side with only private parties on the other, the case is included on both Data Tables 1 and 2. A case is included more than once on

131. Although habeas corpus actions are civil in nature, we classify them as criminal because they inevitably involve review of criminal actions.

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. Thus, one case may 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.¹³²

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

For Data Table 8, jurisdictional questions are defined to include not only federal jurisdiction¹³³ per se, but also standing, mootness,

132. See, e.g., *Good News Club v. Milford Cent. School*, 533 U.S. 98 (2001). Although the plaintiffs claimed that the defendant violated both free speech rights and the Establishment Clause, only the free speech issue was included in the First Amendment category.

133. We only include a case in the Jurisdiction category if it raises an issue of federal jurisdiction, as opposed to state court or Indian Tribal Court jurisdiction. For example, even though the Court decided an issue of Tribal Court jurisdiction in *Nevada v. Hicks*,

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.¹³⁴

Federalism cases on Data Table 9 are limited to those cases in which there are 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. Swing Vote Cases

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

533 U.S. 353 (2001), we did not include the case in the Jurisdiction category because no issue of federal jurisdiction was present.

134. *See, e.g., Florida v. Thomas*, 532 U.S. 774 (2001). Although the case was dismissed for lack of jurisdiction, we did not include it in the Jurisdiction category because neither of the parties raised the issue of jurisdiction and the Court decided the issue unanimously.

APPENDIX B

I. Study Methodology

This Study seeks to quantify three characteristics of Supreme Court voting behavior: voting trends, mean voting percentages, and relationships among the Justices' voting patterns. We analyze these characteristics both for the Court as a whole and for individual Justices.¹³⁵ 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. Anticipated Voting Behavior

Data in this project were fitted to an Auto Regressive Integrated Moving Average (ARIMA) forecasting model.¹³⁶ This model is useful in circumstances where, as in this Study, a single variable (a Justice's or the Court's score) is to be forecast based only on its present and prior values with no other explanatory variables. ARIMA modeling is most easily explained by starting in the middle of the acronym:

1. Integrated:

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

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

136. ARIMA computer modeling was accomplished using MINITAB® statistical software with p (the number of autoregressive terms) = 1, d (the number of non-seasonal differences) = 1, and q (the number of lagged forecast errors in the prediction equation) = 1. For more information regarding the ARIMA (p,d,q) model, see PETER KENNEDY, *A GUIDE TO ECONOMETRICS* 248-49 (1992).

2. Auto-Regression:

Once the series has been made stationary, an autoregressive parameter may be determined.¹³⁷ This parameter seeks to relate each data point in the stationary series to the data point immediately preceding it through multiplication. That is:

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

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

Because we are dealing with a *series* of data points, however, a single parameter will almost never precisely produce the relationship just described for all data point pairs. Some error is inevitable. We therefore seek to determine that parameter which produces the least total error when applied to the entire series.¹³⁸

3. Moving Average:

A second parameter is determined that relates the value of each series element X_t to the *error* between the estimated value and the actual value of the previous element X_{t-1} .¹³⁹ That is:

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

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

4. Synthesis:

The previous operations are combined into the equation:

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

where E_t represents the residual error remaining between the calculated and actual values of X_t . This final equation is used to determine the anticipated voting score for the following Term.

137. Many statistical models employ more than one auto-regressive 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.

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

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

C. Mean Testing

We use a “student’s t test”¹⁴⁰ 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.¹⁴¹ 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 interval¹⁴² by rejecting the null hypothesis.¹⁴³ This is accomplished by calculating the following statistic:

$$s / \sqrt{n}$$

The result of this equation (t) is compared to the entry on a t -distribution table corresponding to the confidence interval desired (\bullet) and the appropriate number of degrees of freedom ($n-k$).¹⁴⁴ 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

140. 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 38.

141. 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.

142. We have selected a confidence interval of 95%. Because this is a two-tailed test, X_2 may shift μ in either a positive or negative direction, $\bullet = .025$.

143. 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 AND MCCABE, *supra* note 140.

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

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 Justice Stevens and Justice Scalia show only a very weak, negative correlation ($R^2 = 0.0473$). The points are widely scattered about a downward sloping line. Statistically significant correlations between and among Justices' Term-to Term voting patterns are shown in Regression Tables 1-10. The first number in each pair is the Pearson correlation coefficient. The second number is an R^2 statistic.¹⁴⁵ Notice that Justices for whom we have few data points, such as Justice Breyer, 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.

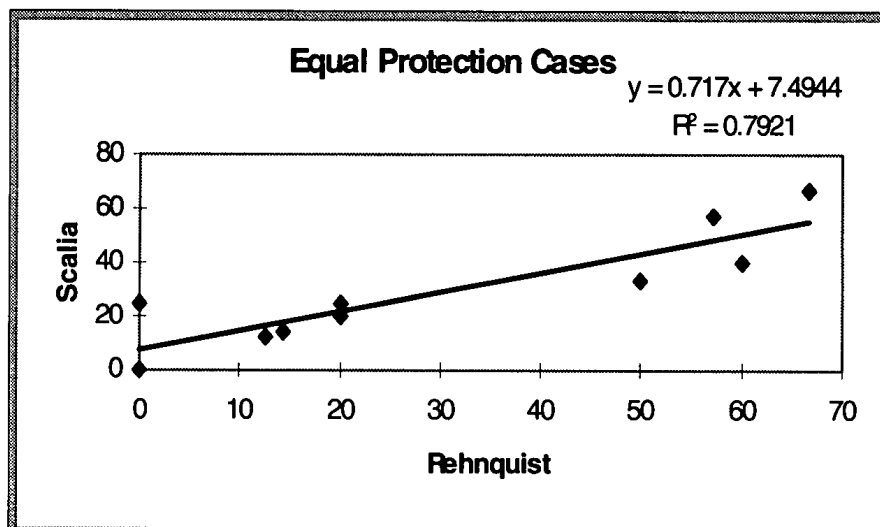


Figure 1

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

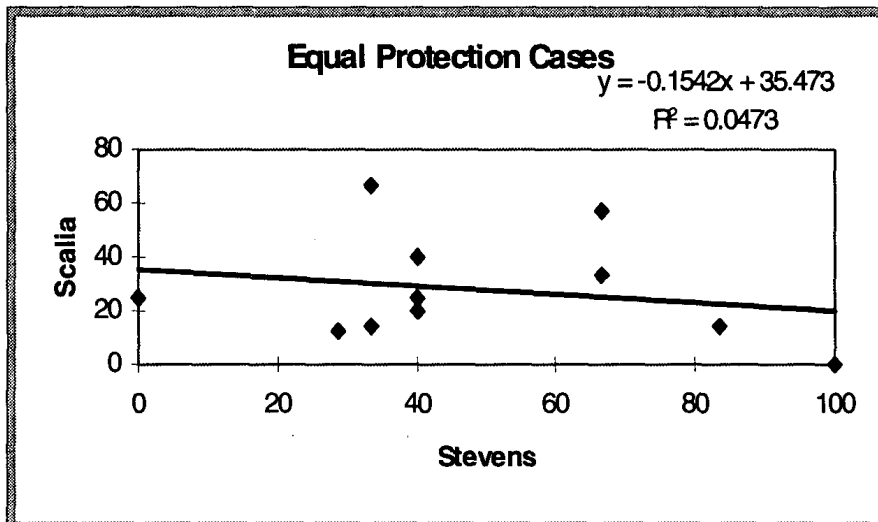


Figure 2

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.¹⁴⁶

F. Frontier Analysis

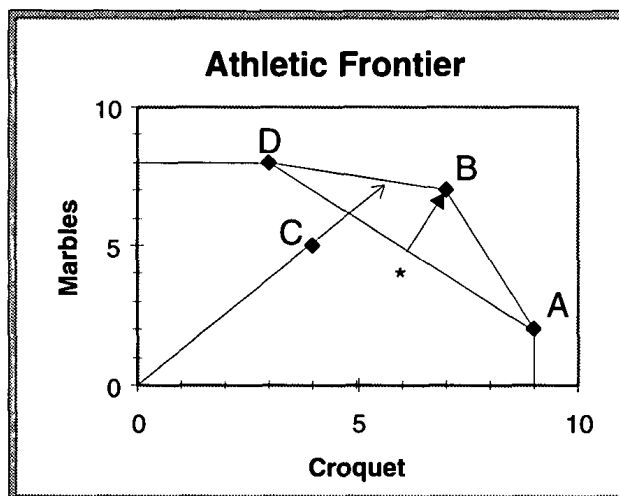
Frontier analysis can probably best be described with an

146. See generally DENNIS CHILD, *THE ESSENTIALS OF FACTOR ANALYSIS* (2d ed. 1990); see also *supra* Part V.

example. Suppose four individuals are competing for the title of "world's greatest athlete." Their scores in two events are listed in the following table:

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

Alan's agent would argue that the title should go to the best croquet player, while Debbie's agent would argue that the best marbles player should win. Betty's agent would argue that each sport should receive equal weight. To see why, weigh 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:



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.¹⁴⁷

147. For more information on frontier analysis, see DONALD L. ADOLPHSON, *MANAGER’S TOOLKIT: MANAGERIAL SPREADSHEET ANALYSIS* (1998).

