Supreme Court Voting Behavior: 2006 Term

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Introduction

This Study, the twenty-first in a series,[1] tabulates and analyzes the voting behavior of the United States Supreme Court during the 2006

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1. Professor Robert E. Riggs began this Study with *Supreme Court Voting Behavior: 1986 Term*, 2 BYU J. PUB. L. 15 (1988). Professor Richard G. Wilkins continued the Study in *Supreme Court Voting Behavior: 1991 Term*, 7 BYU J. PUB. L. 1 (1992) [hereinafter *1991 Study*]. The last thirteen Studies, analyzing the 1993 to 2005 terms, have been published in the *Hastings Constitutional Law Quarterly*. *See* Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1993 Term*, 22 HASTINGS CONST. L.Q. 269 (1995) [hereinafter *1993 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1994 Term*, 23 HASTINGS CONST. L.Q. 1 (1995) [hereinafter *1994 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1995 Term*, 24 HASTINGS CONST. L.Q. 1 (1996) [hereinafter *1995 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1996 Term*, 25 HASTINGS CONST. L.Q. 35 (1997) [hereinafter *1996 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1997 Term*, 26 HASTINGS CONST. L.Q. 533 (1999) [hereinafter *1997 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1998 Term*, 27 HASTINGS CONST. L.Q. 423 (2000) [hereinafter *1998 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1999 Term*, 28 HASTINGS CONST. L.Q. 543 (2001) [hereinafter *1999 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2000 Term*, 29 HASTINGS CONST. L.Q. 247 (2002) [hereinafter *2000 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2001 Term*, 30 HASTINGS CONST. L.Q. 307 (2003) [hereinafter *2001 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2002 Term*, 31 HASTINGS CONST. L. Q. 497 (2005) [hereinafter *2002 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2003 Term*, 32 HASTINGS CONST. L. Q. 769 (2005) [hereinafter *2003 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2004 Term*, 32 HASTINGS CONST. L.Q. 909 (2005) [hereinafter *2004 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2005 Term*, 34 HASTINGS CONST. L. Q. 505 (2007) [hereinafter *2005 Study*].

Term.[2] The analysis is designed to measure 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. On such a point, members of the American Constitution Society for Law and Politics and the Federalist Society for Law and Public Policy Studies might well disagree.

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 ten categories,[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 statistical analysis of a complex and subjective process (such as judicial decision making) provides useful information may well be debatable.[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

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2. The 2006 United States Supreme Court Term covers decisions made from October 2006 through July 2007.

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 change[s], respect for established institutions and rulers, support for elites and hierarchies and a general mistrust of theory as opposed to empirical deductions"). *See also id.* at 142 (asserting that "twentieth century" liberalism is "compounded of constitutionalism; doubtful of pluralism; certain of a belief in the virtues of economic freedom, and less certain of a desire to restrict government intervention in most other aspects of life").

4. *See infra* Data Tables 1–10.

5. *See infra* Appendix B.

6. The general reliability of statistical inference depends on random sampling. *See generally* Robert V. Hogg & Allen T. Craig, Introduction to Mathematical Statistics 157–58 (5th ed. 1994); Raymond H. Myers, Classical and Modern Regression with Applications 9–11 (2d ed. 1990). The Court's method of selecting cases is far from random. Rather, it is the result of a conscious decisional process. Furthermore, reliable statistics generally require large quantities of information to produce reliable results. As sample sizes become larger, inferences become more accurate. This Study is subject to sampling bias, both because the sample is not random and because it is comparatively small. The statistical inferences below, therefore, may not accurately represent a Justice's (or the Court's) views.

Justice has voted—and may vote in the future—in particular categories of cases.

I. Mode of Analysis

This Study is based on the tabulation and mathematical analysis of each Justice's votes in ten categories of cases. Nine of the categories are based on the nature of the issues addressed (e.g., First Amendment and Equal Protection) or on the character of the parties involved (i.e., state or federal government litigants).[7] The tenth category tabulates the number of times each Justice voted with the majority in cases decided by a single, or swing, vote.

The first nine categories are designed to detect each Justice's attitude toward two broad issues underlying most Supreme Court decisions: the protection of individual rights and judicial restraint. The tabulation of votes in these nine categories reveals, in broad strokes, the frequency with which individual Justices and the Court as a whole vote to protect individual rights[8] or to exercise judicial restraint.[9]

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

8. 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, and thus is counted as a conservative vote.

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

From the voting patterns that emerge, the Study determines whether individual Justices and the Court are taking conservative or liberal positions. The Study classifies outcomes that favor an assertion of government power as "conservative" and outcomes that favor a claim of individual rights as "liberal." Accordingly, the Study classifies as conservative a vote for the government against an individual, a vote against a claim of constitutional or statutory rights, a vote against the exercise of federal jurisdiction or a vote favoring state (as opposed to federal) authority on federalism questions. The Study classifies all other 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.[10] 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.[11] Furthermore, concern for individual rights is not always, or even necessarily, the attitudinal opposite of judicial restraint.[12]

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

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judicial restraint is traditionally identified with respect for the role of the states within the federal system.

10. Unanimous cases may comprise a significant portion of the cases tabulated on the various tables. This Term, for example, five of eighteen cases were decided unanimously on Table 1, seven of fifteen cases were decided unanimously on Table 2, four of sixteen cases were decided unanimously on Table 3; one of three cases was decided unanimously on Table 5, three of six cases were decided unanimously on Table 7; six of twenty-three cases were decided unanimously on Table 8; one of nine cases was decided unanimously on Table 9.

11. An example of what seems to be a fairly non-controversial case for the court was Lance v. Coffman, 127 S. Ct. 1194 (2007) (per curiam) (case was only six pages long and decided by a per curiam—or unsigned—opinion).

12. For example, Justice Scalia voted against the federal government on four of the eight cases tabulated on Table 4 (Federal/Criminal Cases) this Term. These votes result in a voting record that is less "liberal" than anticipated. However, Justice Scalia's "concern for individual rights" on Table 4 this year does not necessarily suggest that he has abandoned any commitment to "judicial restraint." Some of Justice Scalia's votes on Table 4 reflect his preference for giving statutory language its "plain" or "ordinary" meaning. See, e.g., James v. United States, 127 S. Ct. 1586, 1601 (2007) (Scalia, J., dissenting). While "plain meaning" resulted in a "liberal" voting pattern on Table 4, Justice Scalia's enthusiasm for "plain meaning" may well flow from (rather than run contrary to) his conservative values. See, e.g., M.A. RIFF, DICTIONARY OF MODERN POLITICAL IDEOLOGIES, supra note 3 (noting that conservatism "implies fear of sudden and violent change[s], respect for established institutions and rulers, support for elites and hierarchies and a general mistrust of theory as opposed to empirical deductions").

restraint is suggestive of conservative or liberal ideology—appears sound.[13] For example, deference to legislatures frequently results in rejection of an individual's claim, especially one predicated upon the impropriety of governmental action.[14] Judicial restraint is associated with a reluctance to read new rights into the Constitution or statutes.[15] Refusal to exercise federal jurisdiction leaves the matter to the state courts with their possible bias in favor of state governmental action and is a clear rebuff to the claimant seeking federal protection of rights.[16] Therefore, to the extent that the Study's basic ideological assumptions regarding liberal and conservative outcomes are sound, it is possible to identify trends by tracking the voting patterns reflected in Data Tables 1 through 10.[17]

To determine current ideological positions within the Court, votes of the individual Justices can be compared with those cast by other Justices this Term, as well as with the outcomes for the 1986–2005 Terms. Likewise, the current ideological position of the Court as a whole can be determined by comparing present outcomes of the Court majority with those of prior Terms. In Data Tables 1–10, this information appears in the form of voting percentages for each Justice and for the Court majority. Charts 1–10, in turn, graphically depict the voting trends revealed over the years in the outcomes of Majority, Split and Unanimous cases on each Table.

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 2006 Term voting record departs in a statistically significant manner from his or her prior voting pattern and

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

14. *See, e.g.,* Wilkie v. Robbins, 127 S. Ct. 2588 (2007) (holding that a ranch owner did not have a private right of action under the Fourth Amendment against employees of the Bureau of Land Management who allegedly tried to extort from him an easement for governmental use).

15. *See id.*

16. *See, e.g.,* Burton v. Stewart, 127 S. Ct. 793, (2007) (per curiam) (holding that district court lacked jurisdiction to consider habeas petition because prisoner did not obtain permission from the Court of Appeals to file successive petition).

17. Of course, the data are only as reliable as our assumptions. The Study's general assumption that votes favoring individual rights reflect liberal views is almost certainly not accurate in every case. *See, e.g.,* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (the typical conservative majority voted against the government and in favor of an Equal Protection claim that the use of racial classifications to maintain racial balance within individual schools was unconstitutional). In this case, the typically conservative Justices rack up a "liberal" vote, even though some might assert that their votes reflect a "conservative" value. *See supra* note 12.

whether any significant correlation exists among the Term-to-Term voting patterns of the Justices.[18]

The Study also calculates an anticipated 2007 Term voting score for each Justice on the various Tables. This statistic is calculated with an Auto Regressive Integrated Moving Average (ARIMA) forecasting model.[19] The ARIMA model is useful in situations where, as in this Study at the time of writing, a single variable (a Justice's voting score) is forecast based only on its present and prior values with no other explanatory variables.

In order to determine which categories best reveal the conservative and liberal leanings of the Court, we apply factor analysis. This analysis tests the extent to which the Justices' disposition of the cases on each of the first nine Tables may have been influenced by liberal/conservative bias. Factor analysis has been used in various empirical studies of human behavior, including psychological inquiries into such personal traits as personality and intelligence.[20] The results of the factor analysis for the 2006 Term appear in Part V of this article.

Finally, Frontier Analysis Tables 1–4 and Frontier Charts 1–4 compare the Justices' conservative and liberal predilections this Term and over the course of the entire Study. Frontier analysis mitigates some of the analytical difficulties previously discussed by measuring the strength of each Justice's tendencies relative to the rest of the Court with respect to the cases actually decided in a given Term rather than against an absolute scale.[21]

All of the data and statistics reported in this Study must be interpreted with caution. The percentages and statistical results revealed in each table are affected not only by the dispositions of the individual Justices but also by the nature of the cases decided each Term. Furthermore, Supreme Court cases are not the result of random selection and the universe of votes cast by the Justices is relatively small. Since both random sampling and large sample size are crucial elements of any fully reliable statistical analysis, conclusions drawn from this Study are hardly beyond dispute. There are obvious limitations to any empirical analysis of a subjective decision-making process.[22]

In light of these caveats, one might ask whether this Study is worth conducting or reading. We believe it is. For years, experienced Supreme

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18. *See infra* Mean Tables 1–10 and Regression Tables 1–10.

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

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

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

22. *See supra* note 6.

Court practitioners have attempted to divine the ideological leanings of individual Justices in framing their arguments to the Court. Moreover, both the media and academicians are fond of attaching ideological labels to the Court and its personnel. Supreme Court practitioners, legal scholars and the public have long assumed that assessments of Court ideology are valuable, even though such assessments may be based upon little more than the gut reactions of the attorneys, scholars and news reporters involved. This Study, based upon a systematic methodology for objectively gathering, quantifying and analyzing data over time, should be substantially more reliable than these ad hoc assessments.

II. Overview of the Ideological Trends of the 2006 Term

The data collected on Tables 1–10 this Term tend to show fairly consistent conservative movement in a broad range of cases—with Tables 1, 2, 4, 8, 9 and 10 showing conservative movement of various degrees. The conservative movement on Table 4 may be less than notable, due to the small universe of decided cases, and the movement on Tables 8 and 9 is rather weak (considering the fact that the majority of jurisdictional cases on Table 8 continue to be decided liberally in favor of a claim of federal jurisdiction and the majority of the federalism claims on Table 9 are still decided liberally against the state). Nevertheless, the conservative trend on the Court seems rather clear, with only two Tables showing noteworthy liberal movement (e.g., the liberal outcome of Majority and Split decisions on state criminal cases on Table 3 and the liberal movement in the decision of statutory civil rights claims on Table 7). The limited amount of data collected on Tables 5 and 6 (First Amendment and Equal Protection claims) and the volatile voting patterns demonstrated on those Tables make it difficult to gauge whether they demonstrate either conservative or liberal voting behavior.

In addition to an over-all conservative trend, the Tables also show continuing ideological polarization on the Court. Factor Analysis highlights Tables 1 and 3 as the most reliable indicators of potential ideological bias during the 2006 Term. Those Tables, moreover, demonstrate the five/four conservative/liberal divide on the Court—with Justices Scalia, Thomas, Roberts, Alito and Kennedy taking conservative positions and Justices Stevens, Breyer, Ginsburg and Souter holding the liberal slots.

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

In 2006, the Court demonstrated conservative movement on Table 1—although not as pronounced as the liberal movement on Table 1 last Term. Six of the seven Justices with an extensive enough voting history to make the calculation possible demonstrated statistically significant changes in voting behavior, all in a conservative direction. The Court as a whole, moreover, voted more conservatively in the outcome of Majority, Split, and Unanimous cases than in 2005. Nevertheless, Table 1 has demonstrated volatile movement over the past few years, swinging from conservative to liberal to conservative patterns. Accordingly, the data on Table 1 must be used with caution.

As it has in every Term but one since 1999, the Court sided with the government more than 50 percent of the time. The Court decides the great majority of civil cases in favor of state governments—over two thirds this Term. In the 2005 Study, we anticipated that Table 1 would become more polarized between conservative and liberal Justices. While the Court's overall conservative movement undercuts this prediction somewhat, the data does show that the Court split along stereotypical lines—with Justice Scalia holding the most conservative position (84.2), Justice Kennedy the middle (63.2), while the liberal positions on the Table (led by Justice Stevens at 47.4) were held by the four most liberal Members of the Court.

Finally, Factor Analysis for 2006 demonstrates that Table 1 is the second most reliable indicator of possible bias. Based on this statistic, and the orientation of the individual Justices on Table 1 over time, we expect that—regardless of whether the Court as a whole moves in a more liberal or conservative direction—Civil State cases will continue to demonstrate rather reliably the individual Justice's ideological tendencies.

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

The Court reversed last year's liberal movement on Table 2 by returning to a conservative norm in 2006. The general rule that the federal government wins in the Supreme Court continues to hold, with an impressive 76.5 percent win rate, the third highest in the past decade.

In departing from the somewhat idiosyncratic results of last year, Justice Souter has fallen from the third to the sixth most conservative Justice and Chief Justice Roberts has moved from the most liberal to the most conservative position on the Table. While Justice Scalia, rather than Justice Kennedy, occupies the middle position, the Court still divided along the typical five-Member conservative and four-Member liberal blocs.

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

Factor analysis indicates that Table 3 provides the most reliable evidence of conservative or liberal bias this Term. The movement, however, is somewhat split, diverging from the 2005 Term's clear conservative movement. The Unanimous cases (where ideology may play less of a role[23]) show conservative movement, with 80 percent of such cases reaching conservative outcomes. Majority and Split cases, by contrast, show liberal movement. The Majority cases shifted liberally nearly ten points, with the Split cases demonstrating a more dramatic 16.7 point shift. These voting patterns suggest that—in divided (and more contentious) cases—the Court in 2006 tended to favor liberal outcomes, reaching conservative results only in unanimous cases where ideology plays less of a role. The Court's increasingly idiosyncratic and unpredictable analysis of death penalty cases may explain the somewhat unusual voting behaviors demonstrated on Table 3 this Term.

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

The Justices decided only three federal criminal cases during the 2006 Term, with only four Justices voting in all of the cases. As a result, the reliability of the data on Table 4 has decreased considerably this year. The small universe of federal criminal cases in 2006 may result from the decision of *Rita v. United States*,[24] which concerned federal sentencing guidelines. Because of the potential importance of this decision, the Court may have accepted fewer cases in 2006, waiting to see how lower courts would react to its *Rita* opinion.

Accordingly, although the movement in this category is clearly conservative with 100 percent of the cases decided in favor of the government, given the small number of cases, Table 4 does not reveal much about the ideological orientation of the Court in federal criminal cases. One interesting note is that Justice Scalia voted the most liberally on Table 4 this Term, voting only 33 percent of the time in the government's favor.   Justice Scalia's plain language approach to constitutional and statutory decision-making may well explain this seemingly anomalous departure from his typical conservative stance.[25]

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23. *See supra* notes 10–12 and accompanying text.

24. Rita v. United States, 127 S. Ct. 2456 (2007).

25. *See* United States v. Resendiz-Ponce, 127 S. Ct. 782 (2007) (Scalia, J., dissenting) (arguing that in upholding an unspecific grand jury indictment, the Majority diverged from well-established law that the indictment must "fully, directly, and expressly" set forth all elements of a

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

The outcomes on Table 5 remain volatile, partly because of the few number of First Amendment questions that have come before the Court: last Term there were only six issues tabulated and this Term there were only four. Only Table 6, Equal Protection, has a smaller data set.

Table 5 has demonstrated highly volatile voting patterns over the past eight Terms, with no coherent trend (either conservative or liberal) evident in the tabulated data. Perhaps the most important inference that can be drawn from the data on Table 5 is that the Court—over the course of nearly a decade—has been unable to articulate a coherent and consistent approach to the First Amendment issues it has addressed.

Data Table 6: Equal Protection Claims

The Court—as it did last Term—decided only one Equal Protection claim in 2006. However, a low number of cases on Table 6 is typical.[26] Unlike last Term, furthermore, the Court voted in favor of the claim, a liberal shift.[27] In a pole-switching vote, the conservative Justices upheld the claim to reach a conservative result on the merits. Accordingly, a "liberal" vote to achieve a "politically conservative" outcome in a single case provides very little reliable statistical data. Not surprisingly, Factor Analysis demonstrates that Table 6 provides little reliable indication of ideological bias.[28]

Data Table 7: Statutory Civil Rights Claims

The Court on Table 7 seems to have shifted slightly more liberally this Term with the Court voting in favor of 66.7 percent of Statutory Civil Rights Claims, up from last year's 54.5 percent.[29] The trend in Majority and Split cases is liberal, with a 30-point liberal movement in the outcome of Split decisions. The Unanimous cases demonstrate slight conservative movement, although remaining at a relatively high liberal outcome in 75 percent of the cases. As a result, the overall trend appears to be liberal.

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crime (quoting United States v. Carll, 105 U.S. 611, 612 (1882))); James v. United States, 127 S. Ct. 1586 (2007) (Scalia, J., dissenting) (taking issue with the Court's interpretation of a federal statute).

26. *See* studies cited *supra* note 1.

27. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

28. *See infra* Section V.

29. *See infra* Data Table 7.

Nevertheless, Factor Analysis ranks Table 7 as the least reliable indicator of ideological bias this Term.

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

The Court demonstrated slight conservative movement on Table 8 during the 2006 Term in the outcome of Majority, Split and Unanimous cases. In Majority and Split cases, the conservative movement was approximately six points, with a somewhat largely 10 point conservative movement in Unanimous decisions.

The Court is fairly predicable on jurisdictional issues. As demonstrated by Chart 8, since 1999 the Court has rather consistently decided more than 50 percent of all cases (Majority, Split and Unanimous) in favor of an assertion of federal jurisdiction. This high predictability results in fairly accurate predictions of the voting behaviors of individual Justices; this Term every Justice voted within 20 points of his or her anticipated score. While Factor Analysis suggests that Table 8 is one of the least reliable Tables at demonstrating ideological bias, this is likely due, at least partially, to the fluid nature of the Court's approach to jurisdictional issues, with both liberal and conservative Justices often willing to stretch established jurisdictional rules in order to reach a favored outcome on the merits.

Data Table 9: Federalism Cases

Table 9 is the fourth most reliable indicator of bias this Term and the trend, albeit a weak one, is conservative. Regardless, it is a notable shift after last Term's clear liberal trend. In Majority and Split cases, the Court voted somewhat more conservatively than last Term; however, 100 percent of the Unanimous cases came out against the state, as they did last Term. This conservative movement should not be overstated, however, because—regardless of the shift in their favor—state governments are winning significantly less than half the time.

Interestingly, three of the most traditionally liberal Justices on the Court seem to favor state claims more often than the traditionally conservative Members of the court. In 2006, Justices Stevens, Breyer and Ginsburg all voted with the state 40 percent of the time.[30]

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30. *See infra* Mean Table 9.

Data Table 10: Swing-Vote Cases

Justice Kennedy's power is nowhere more evident than on Table 10, which he controlled with a staggering 100 percent of votes with the majority in closely divided cases. As one would expect with the most moderate of the conservative Justices controlling the outcome of these cases, Table 10 shows a moderate conservative trend, with 60 percent of swing votes yielding a conservative outcome—up nearly seven points from the results last Term. The generally conservative tenor of this Table continues as it has to varying degrees since 1999.[31] Despite Justice Kennedy's willingness to vote liberally in some cases, liberal frustration with the Court can be seen in the scores of the other eight Justices—the four more conservative Justices each were able to vote with the majority in close cases more often than the four liberal Justices.

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31. *Id.*

Data Table 1															
Civil Cases: State Government Versus a Private Party															
Justice	% Votes for Government										X2	2006 Term Votes		Anticipated Scores		
	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	2005 Term	2006 Term		For Gov't	Against Gov't	2006 Term	Error	2007 Term
Scalia	60.0	55.2	50.0	60.0	62.5	48.0	53.9	78.9	75.0	84.2	16	3		66.0	18.2	79.2
Thomas	60.0	65.5	50.0	60.0	75.0	60.0	53.3	89.5	75.0	82.4	14	3		74.1	8.3	80.2
Roberts	60.0	65.5	66.7	60.0	75.0	40.0	53.3	82.4	73.3	73.7	14	5		*	*	*
Alito	53.3	55.2	55.6	53.3	53.3	44.0	40.0	68.4	66.7	63.2	12	7		*	*	*
Kennedy	53.3	51.7	44.4	53.3	68.8	36.0	57.1	84.2	68.8	63.2	12	7		63.3	-0.1	63.7
Souter	46.7	37.9	50.0	53.9	43.8	52.0	42.9	63.2	43.8	57.9	11	8		50.3	7.6	48.1
Ginsburg	46.7	31.0	44.4	46.2	50.0	56.0	35.7	57.9	37.5	57.9	11	8		58.6	-0.7	41.0
Breyer	46.7	44.8	52.9	35.7	50.0	48.0	35.7	73.7	31.3	52.6	10	9		75.4	-22.8	47.1
Stevens	37.5	17.2	41.2	40.0	37.5	54.2	28.6	52.6	37.5	47.4	9	10		41.9	5.5	38.2
Majority	46.7	44.8	55.6	60.0	68.8	52.0	46.7	73.7	62.5	68.4	13	6		62.1	6.3	65.8
Split	33.3	47.1	58.3	63.6	70.0	44.4	50.0	66.7	63.6	66.7	8	4				
Unanimous	55.6	41.7	50.0	50.0	66.7	56.3	40.0	85.7	60.0	71.4	5	2				

Chart 1
Civil Cases: State Government Versus a Private Party
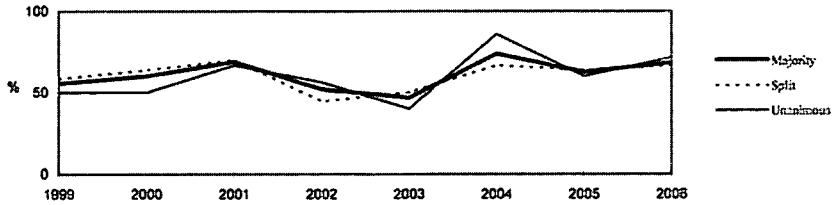
Mean Table 1					
Civil Cases: State Government Versus a Private Party					
Justice	Mean Voting Percentage All Prior Terms (µ)	99% Confidence Interval for True Mean	Standard Deviation of µ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Roberts	65.9	*	*	73.68	*
Stevens	37.2	+/- 5.4	9.33	47.37	yes
Alito	54.7	*	*	63.16	*
Scalia	59.7	+/- 5.6	9.81	84.21	yes
Kennedy	54.8	+/- 8.2	13.85	63.16	yes
Souter	46.9	+/- 6.2	9.64	57.59	yes
Thomas	63.1	+/- 8.7	13.12	82.35	yes
Ginsburg	45.0	+/- 6.0	8.45	57.59	yes
Breyer	45.4	+/- 9.0	12.16	52.63	no

Regression Table 1								
Civil Cases: State Government Versus a Private Party								
Correlation (ρ) / R²								
Justice	Roberts	Stevens	Alito	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens	*							
Alito	*	*						
Scalia	*		*					
Kennedy	*		*	0.76/0.55				
Souter	*		*					
Thomas	*		*	0.88/0.75	0.76/0.56			
Ginsburg	*	0.92/0.84	*			0.73/0.49		
Breyer	*		*			0.72/0.47		0.70/0.45

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

Justice	% Votes for Government									X2	2006 Term Votes		Anticipated Scores		
	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	2005 Term	2006 Term	For Gov't	Against Gov't	2006 Term	Error	2007 Term
Roberts	38.1	50.0	70.0	58.8	70.8	90.9	79.2	71.4	50.0	80.0	12	3	•	•	•
Alito	61.9	73.3	60.0	50.0	61.9	54.6	83.3	62.5	66.7	76.5	13	4	•	•	•
Kennedy	45.5	50.0	50.0	47.1	62.5	90.9	75.0	62.5	54.5	76.5	13	4	61.9	14.6	67.5
Thomas	33.3	55.6	40.0	52.9	45.8	63.6	75.0	75.0	63.6	75.0	12	4	65.2	9.8	72.4
Scalia	52.4	61.1	60.0	56.3	56.5	63.6	73.9	62.5	54.5	68.8	11	5	55.8	13.0	61.2
Souter	47.6	66.7	50.0	52.9	50.0	63.6	75.0	50.0	63.6	66.7	12	6	48.1	18.6	57.7
Stevens	55.0	68.4	50.0	64.3	62.5	50.0	69.6	62.5	54.5	58.8	10	7	62.7	-3.9	64.2
Ginsburg	40.9	68.4	50.0	52.9	66.7	72.7	66.7	75.0	54.5	58.8	10	7	71	-12.2	62.8
Breyer	57.1	61.1	70.0	50.0	66.7	72.7	75.0	87.5	54.5	46.7	7	8	89.7	-43.0	49.2
Majority	36.4	61.1	50.0	47.1	75.0	81.8	79.2	75.0	54.5	76.5	13	4	72.3	4.2	68.9
Split	26.7	50.0	33.3	44.4	69.2	100.0	66.7	60.0	50.0	75.0	6	2			
Unanimous	57.1	75.0	75.0	50.0	81.8	77.8	91.7	100.0	57.1	77.8	7	2			

Chart 2
Civil Cases: Federal Government Versus a Private Party

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

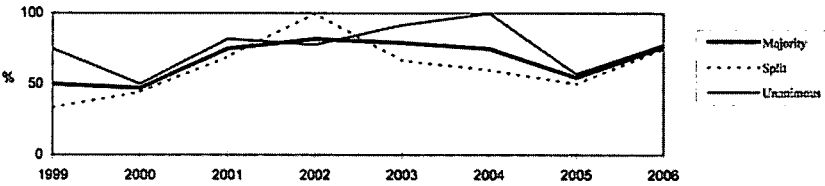| Justice	Mean Voting Percentage All Prior Terms (μ)	95% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Roberts	67.7	•	•	80.00	•
Stevens	57.1	+/- 5.9	10.21	58.82	no
Alito	61.4	•	•	76.47	•
Scalia	60.2	+/- 5.3	9.26	68.75	yes
Kennedy	61.5	+/- 7.4	12.49	76.47	yes
Souter	61.2	+/- 7.3	11.35	66.67	no
Thomas	54.5	+/- 8.6	12.96	75.00	yes
Ginsburg	62.3	+/- 8.6	12.01	58.82	no
Breyer	64.7	+/- 8.7	11.75	46.67	yes

Regression Table 2
Civil Cases: State Government Versus a Private Party
Correlation (ρ) / R²

Justice	Roberts	Stevens	Alito	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens	•							
Alito	•	o						
Scalia	•		•					
Kennedy	•		o					
Souter	•		•					
Thomas	•		•					
Ginsburg	•		o		0.71/0.46			
Breyer	•		•					

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

Justice	% Votes for Government										X2	2006 Term Votes		Anticipated Scores		
	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	2005 Term	2006 Term	For Gov't	Against Gov't	2006 Term	Error	2007 Term
Alito	71.4	63.6	78.3	50.0	46.2	62.5	69.2	53.8	75.0	94.1	16	1	*	*	*
Scalia	84.6	72.7	82.6	65.7	84.6	82.4	76.9	76.9	78.3	88.2	15	2	58.5	29.7	80.1
Thomas	92.3	80.0	82.6	66.7	84.6	94.1	80.0	80.8	82.6	88.2	15	2	89.1	-0.9	89.3
Roberts	76.9	72.7	87.0	58.3	84.6	82.4	76.9	65.0	78.3	82.4	14	3	*	*	*
Kennedy	76.9	54.6	78.3	50.0	76.9	64.7	64.0	61.5	69.6	64.7	11	6	65.1	-0.4	70.6
Breyer	50.0	36.4	40.9	25.0	30.8	29.4	44.0	46.2	39.1	29.4	5	12	40.5	-11.1	37.9
Stevens	23.1	9.1	27.3	33.3	15.4	29.4	32.0	23.1	34.8	23.5	4	13	24.4	-0.9	28
Souter	57.1	36.4	27.3	33.3	23.1	35.3	40.0	23.1	47.8	23.5	4	13	22.2	1.3	28.9
Ginsburg	42.9	27.3	36.4	25.0	23.1	23.5	36.0	34.6	47.8	23.5	4	13	42.6	-19.1	29.5
Majority	71.4	63.6	65.2	50.0	50.0	58.8	63.0	50.0	69.6	58.8	10	7	63.9	-5.1	61.9
Split	66.7	77.8	62.5	60.0	40.0	50.0	62.5	44.4	65.7	50.0	6	6			
Unanimous	80.0	0.0	71.4	42.9	75.0	80.0	63.6	62.5	72.7	80.0	4	1			

Chart 3
Criminal Cases: State Government Versus a Private Party

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

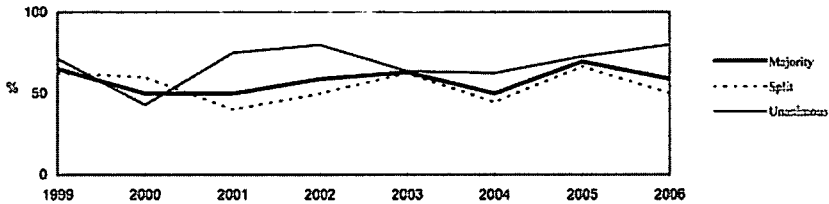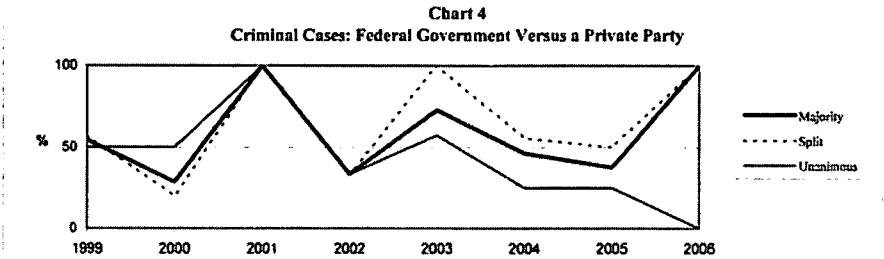| Justice	Mean Voting Percentage All Prior Terms (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Roberts	77.8	*	*	82.35	*
Stevens	23.0	+/- 5.5	9.51	23.53	no
Alito	63.2	*	*	94.12	*
Scalia	75.4	+/- 5.8	10.15	88.24	yes
Kennedy	65.3	+/- 6.5	10.92	64.71	no
Souter	40.3	+/- 9.4	14.55	23.53	yes
Thomas	80.9	+/- 6.3	9.43	88.24	yes
Ginsburg	35.4	+/- 6.2	8.63	23.53	yes
Breyer	36.0	+/- 6.4	8.55	29.41	yes

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

Justice	Roberts	Stevens	Alito	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens	*							
Alito	*	*						
Scalia	*			*				
Kennedy	*			*				
Souter	*			*				
Thomas	*			*	0.88/0.75			
Ginsburg	*			*				
Breyer	*			*				

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

Justice	% Votes for Government									X2	2006 Term Votes		Anticipated Scores		
	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	2005 Term	2006 Term	For Gov't	Against Gov't	2006 Term	Error	2007 Term
Roberts	70.0	76.9	63.6	57.1	100.0	66.7	80.0	72.7	50.0	100.0	3	0	•	•	•
Alito	80.0	84.6	54.6	57.1	100.0	40.0	72.7	61.5	57.1	100.0	3	0	•	•	•
Kennedy	90.0	76.9	54.6	28.6	100.0	50.0	72.7	61.5	50.0	100.0	3	0	58.4	41.6	51.8
Breyer	70.0	53.9	45.5	28.6	100.0	33.3	54.6	38.5	12.5	100.0	3	0	26.4	73.6	14.5
Stevens	55.6	38.5	36.4	14.3	62.5	0.0	45.5	15.4	25.0	66.7	2	1	23.2	43.5	26
Souter	70.0	46.2	36.4	16.7	75.0	33.3	36.4	15.4	12.5	66.7	2	1	16.4	50.3	25.3
Thomas	90.0	61.5	54.6	85.7	87.5	66.7	80.0	53.8	62.5	66.7	2	1	67.8	-1.1	65.1
Ginsburg	60.0	53.9	36.4	28.6	75.0	33.3	54.6	15.4	25.0	66.7	2	1	25.2	41.5	24.6
Scalia	70.0	46.2	63.6	85.7	100.0	60.0	70.0	30.8	50.0	33.3	1	2	59.4	-26.1	44.5
Majority	80.0	61.5	54.5	28.6	100.0	33.3	72.7	46.2	37.5	100.0	3	0	59.2	40.8	39.0
Split	66.7	55.6	57.1	20.0	100.0	33.3	100.0	55.6	50.0	100.0	3	0			
Unanimous	100.0	75.0	50.0	50.0	100.0	33.3	57.1	25.0	25.0	•	0	0			

Chart 4
Criminal Cases: Federal Government Versus a Private Party

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

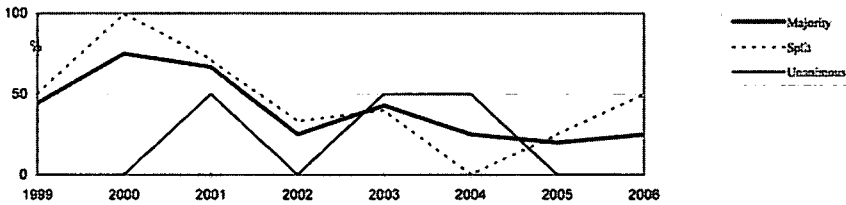| Justice	Mean Voting Percentage All Prior Terms (µ)	99% Confidence Interval for True Mean	Standard Deviation of µ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Roberts	75.3	•	•	100.00	•
Stevens	40.4	+/- 10.5	18.19	66.67	yes
Alito	72.7	•	•	100.00	•
Scalia	65.7	+/- 9.7	16.76	33.33	yes
Kennedy	67.9	+/- 10.3	17.45	100.00	yes
Souter	50.8	+/- 15.5	24.01	66.67	yes
Thomas	72.3	+/- 9.1	13.64	66.67	no
Ginsburg	50.0	+/- 14.4	20.19	66.67	yes
Breyer	53.9	+/- 17.7	23.84	100.00	yes

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

Justice	Roberts	Stevens	Alito	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens	•							
Alito	•	•						
Scalia	•		•					
Kennedy	•	0.71/0.48	•					
Souter	•	0.78/0.59	•					
Thomas	•		•					
Ginsburg	•	0.83/0.67	•		0.77/0.55	0.96/0.91		
Breyer	•	0.84/0.69	•		0.87/0.74	0.86/0.72		0.86/0.72

Justice	% Votes for Claim										X2	2006 Term Votes		Anticipated Scores		
	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	2005 Term	2006 Term		For Claim	Against Claim	2006 Term	Error	2007 Term
Roberts	0.0	50.0	44.4	25.0	22.2	0.0	33.3	25.0	25.0	25.0	1	3	*	*	*
Stevens	0.0	100.0	37.5	50.0	66.7	33.3	33.3	75.0	50.0	25.0	1	3	51.3	-26.3	45.8
Alito	0.0	50.0	33.3	50.0	55.6	0.0	16.7	25.0	50.0	25.0	1	3	*	*	*
Scalia	0.0	100.0	56.6	25.0	44.4	25.0	66.7	0.0	20.0	25.0	1	3	31.7	-6.7	24.8
Kennedy	0.0	100.0	77.8	75.0	66.7	0.0	50.0	50.0	16.7	25.0	1	3	43.6	-18.6	35.0
Souter	100.0	100.0	28.6	50.0	66.7	25.0	33.3	75.0	20.0	25.0	1	3	49.6	-24.6	36.2
Thomas	0.0	100.0	66.7	25.0	66.7	25.0	100.0	0.0	20.0	25.0	1	3	48.4	-23.4	35.7
Ginsburg	0.0	100.0	33.3	50.0	55.6	25.0	33.3	50.0	60.0	25.0	1	3	30.9	-5.9	44.0
Breyer	0.0	50.0	12.5	75.0	55.6	25.0	16.7	25.0	66.7	0.0	0	3	24.2	-24.2	32.6
Majority	0.0	100.0	44.4	75.0	66.7	25.0	42.9	25.0	20.0	25.0	1	3	38.6	-13.6	34.0
Split	0.0	100.0	50.0	100.0	71.4	33.0	40.0	0.0	25.0	50.0	1	1			
Unanimous	0.0	100.0	0.0	0.0	50.0	0.0	50.0	50.0	0.0	0.0	0	2			

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

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

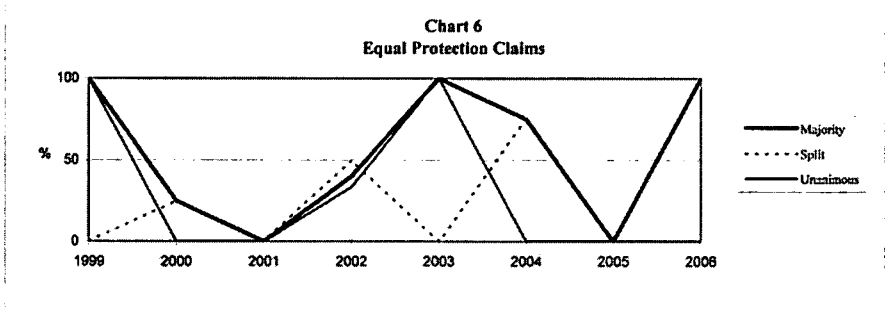|	Mean Table 5				
	First Amendment Rights of Expression, Association, and Religion				
Justice	Mean Voting Percentage All Prior Terms (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Roberts	29.2	*	*	25.00	*
Stevens	56.3	+/- 13.7	23.71	25.00	yes
Alito	39.2	*	*	25.00	*
Scalia	42.4	+/- 15.3	26.60	25.00	yes
Kennedy	57.0	+/- 17.0	28.81	25.00	yes
Souter	54.2	+/- 17.3	26.80	25.00	yes
Thomas	49.3	+/- 23.0	34.52	25.00	yes
Ginsburg	52.1	+/- 18.1	25.28	25.00	yes
Breyer	40.2	+/- 20.3	27.35	0.00	yes

Regression Table 5							
First Amendment Rights of Expression, Association, and Religion							
Correlation (ρ) / R²							
Justice	Roberts	Stevens	Alito	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens	*							
Alito	*	*						
Scalia	*		*					
Kennedy	*		*					
Souter	*		*					
Thomas	*		*	0.94/0.88				
Ginsburg	*	0.91/0.81	*		0.76/0.55			
Breyer	*		*					0.70/0.45

Justice	% Votes for Claim									X2 2006 Term	2006 Term Votes		Anticipated Scores		
	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	2005 Term	2006 Term	For Claim	Against Claim	2006 Term	Error	2007 Term
Roberts	50.0	0.0	100.0	50.0	0.0	60.0	100.0	33.3	0.0	100.0	1	0	*	*	*
Alito	50.0	0.0	100.0	50.0	0.0	40.0	100.0	75.0	0.0	100.0	1	0	*	*	*
Scalia	0.0	0.0	100.0	50.0	0.0	60.0	100.0	25.0	0.0	100.0	1	0	20.6	79.4	39.7
Kennedy	50.0	0.0	100.0	50.0	0.0	60.0	100.0	75.0	0.0	100.0	1	0	71.0	29.0	44.6
Thomas	0.0	0.0	100.0	50.0	0.0	60.0	100.0	0.0	0.0	100.0	1	0	30.1	69.9	29.3
Stevens	50.0	0.0	100.0	25.0	0.0	25.0	100.0	100.0	100.0	0.0	0	1	69.0	-69.0	73.0
Souter	100.0	0.0	100.0	50.0	0.0	20.0	100.0	75.0	0.0	0.0	0	1	70.9	-70.9	37.6
Ginsburg	100.0	0.0	100.0	50.0	0.0	20.0	100.0	75.0	0.0	0.0	0	1	69.1	-69.1	29.6
Breyer	100.0	0.0	100.0	50.0	0.0	40.0	100.0	75.0	100.0	0.0	0	1	94.4	-94.4	100.9
Majority	50.0	0.0	100.0	25.0	0.0	40.0	100.0	75.0	0.0	100.0	1	0	75.7	24.3	40.3
Split	50.0	0.0	0.0	25.0	0.0	50.0	0.0	75.0	0.0	100.0	1	0			
Unanimous	0.0	41.7	100.0	0.0	0.0	33.3	100.0	0.0	0.0	0.0	0	0			

Data Table 6
Equal Protection Claims

Chart 6
Equal Protection Claims

Justice	Mean Voting Percentage All Prior Terms (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Roberts	35.4	*	*	100.00	*
Stevens	51.6	+/- 20.5	35.67	0.00	yes
Alito	48.0	*	*	100.00	*
Scalia	32.2	+/- 18.1	31.35	100.00	yes
Kennedy	49.6	+/- 19.2	32.56	100.00	yes
Souter	48.6	+/- 23.7	36.85	0.00	yes
Thomas	35.4	+/- 24.4	36.67	100.00	yes
Ginsburg	49.1	+/- 29.4	41.12	0.00	yes
Breyer	54.9	+/- 29.0	38.99	0.00	yes

Mean Table 6
Equal Protection Claims

Justice	Roberts	Stevens	Alito	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens	•							
Alito	•	•						
Scalia	•			•				
Kennedy	•			•				
Souter	•			•				
Thomas	•			•	0.97/0.93			
Ginsburg	•			•		1.00/1.00		
Breyer	•	0.89/0.77		•		0.76/0.54		0.76/0.54

Regression Table 6
Equal Protection Claims
Correlation (ρ) / R^2

	Data Table 7														
	Statutory Civil Rights Claims														
Justice	% Votes for Claim									X2	2006 Term Votes		Anticipated Scores		
	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	2005 Term	2006 Term	For Claim	Against Claim	2006 Term	Error	2007 Term
Stevens	84.6	88.2	75.0	100.0	53.3	20.0	66.7	83.3	81.8	83.3	5	1	74.7	8.6	78.5
Souter	76.9	70.6	75.0	100.0	60.0	20.0	80.0	83.3	81.8	83.3	5	1	89.0	-5.7	86.6
Ginsburg	76.9	70.6	75.0	100.0	60.0	40.0	66.7	83.3	81.8	83.3	5	1	82.7	0.6	87
Breyer	84.6	82.4	75.0	100.0	53.3	40.0	80.0	83.3	81.8	83.3	5	1	76.4	6.9	85.8
Alito	41.7	58.8	25.0	33.3	26.7	40.0	66.7	33.3	37.5	66.7	4	2	•	•	•
Kennedy	61.5	47.1	25.0	33.3	20.0	40.0	66.7	33.3	54.5	66.7	4	2	33.5	33.2	58.2
Roberts	30.8	35.3	25.0	33.3	13.3	40.0	50.0	20.0	50.0	60.0	3	2	•	•	•
Scalia	23.1	41.2	25.0	0.0	13.3	40.0	66.7	33.3	45.5	50.0	3	3	33.7	16.3	42.4
Thomas	23.1	23.5	25.0	0.0	20.0	40.0	50.0	33.3	45.5	50.0	3	3	36.7	13.3	48.7
Majority	61.5	64.7	25.0	33.3	26.7	40.0	66.7	83.3	54.5	66.7	4	2		66.7	56.5
Split	62.5	63.6	0.0	33.3	33.3	50.0	66.7	100.0	20.0	50.0	1	1			
Unanimous	60.0	66.7	50.0	0.0	28.6	33.3	66.7	0.0	83.3	75.0	3	1			

Chart 7
Statutory Civil Rights Claims

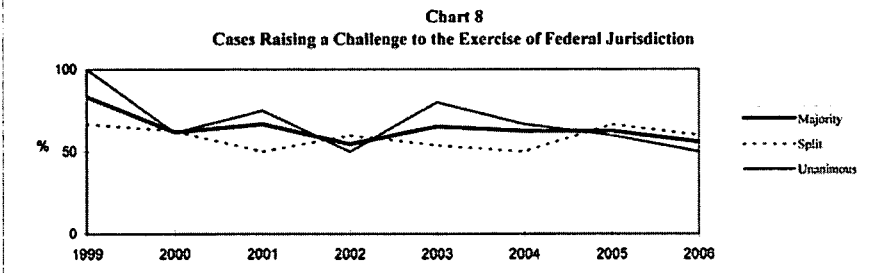| | Mean Table 7 | | | | |
	Statutory Civil Rights Claims				
Justice	Mean Voting Percentage All Prior Terms (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Roberts	35.9	•	•	60.00	•
Stevens	75.3	+/- 10.4	17.55	83.33	no
Alito	44.5	•	•	66.67	•
Scalia	37.0	+/- 9.3	16.19	50.00	yes
Kennedy	42.4	+/- 9.3	15.80	66.67	yes
Souter	67.1	+/- 13.4	20.80	83.33	yes
Thomas	30.6	+/- 9.3	13.92	50.00	yes
Ginsburg	70.7	+/- 11.4	15.96	83.33	yes
Breyer	77.0	+/- 11.7	15.78	83.33	no

	Regression Table 7						
	Statutory Civil Rights Claims						
	Correlation (ρ) / R²						
Justice	Roberts	Stevens	Alito	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens	•							
Alito	•	*						
Scalia	•		•					
Kennedy	•		•	0.72/0.49				
Souter	•	0.73/0.50	•					
Thomas	•		•	0.91/0.81				
Ginsburg	•	0.88/0.76	•			0.94/0.37		
Breyer	•	0.96/0.92	•			0.91/0.31		0.90/0.78

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

Justice	% Votes for Claim									X2	2006 Term Votes		Anticipated Scores		
	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	2005 Term	2006 Term	For Claim	Against Claim	2006 Term	Error	2007 Term
Stevens	51.7	65.0	100.0	68.4	83.3	47.6	77.3	62.5	73.3	72.0	18	7	65.9	6.1	74.6
Ginsburg	55.2	60.0	83.3	61.9	83.3	54.6	81.8	62.5	60.0	72.0	18	7	80.6	-8.6	70.9
Souter	60.7	60.0	83.3	68.4	83.3	54.6	69.6	75.0	66.7	61.5	16	10	76.7	-15.2	68.4
Breyer	51.7	65.0	66.7	60.0	83.3	63.6	77.3	50.0	66.7	56.5	13	10	71	-14.5	67.3
Kennedy	58.6	55.0	83.3	61.9	58.3	50.0	54.6	62.5	75.0	56.0	14	11	44.3	11.7	61.3
Alito	43.3	55.0	83.3	47.4	63.6	66.7	66.7	50.0	54.5	48.0	12	13	*	*	*
Roberts						54.6	54.6	62.5	57.1	45.8	11	13	*	*	*
Scalia	43.3	40.0	66.7	47.6	50.0	31.8	52.6	57.1	50.0	37.5	9	15	48.4	-10.9	49.3
Thomas	46.7	45.0	83.3	47.6	58.3	38.1	45.5	57.1	43.8	33.3	8	16	52.8	-19.5	40.7
Majority	58.6	55.0	83.3	61.9	66.7	54.6	65.2	62.5	62.5	56.0	14	11	63.6	-7.6	61.0
Split	73.3	42.9	66.7	62.5	50.0	60.0	53.9	50.0	66.7	60.0	9	6			
Unanimous	42.9	61.5	100.0	61.5	75.0	50.0	80.0	66.7	60.0	50.0	5	5			

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

Legend: Majority, Split, Unanimous

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

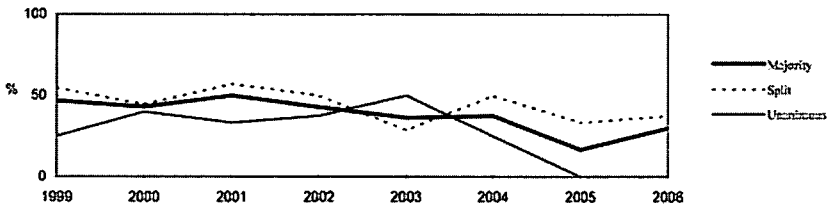| Justice	Mean Voting Percentage All Prior Terms (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Roberts	53.5	*	*	45.83	*
Stevens	68.3	+/- 8.5	14.73	72.00	no
Alito	54.6	*	*	48.00	*
Scalia	47.5	+/- 6.2	10.73	37.50	yes
Kennedy	57.9	+/- 6.7	11.42	56.00	no
Souter	62.4	+/- 9.7	15.05	61.54	no
Thomas	49.4	+/- 8.9	13.37	33.33	yes
Ginsburg	61.4	+/- 11.2	15.64	72.00	yes
Breyer	62.2	+/- 9.6	12.90	56.52	no

Regression Table 8
Cases Raising a Challenge to the Exercise of Federal Jurisdiction
Correlation (ρ) / R²

Justice	Roberts	Stevens	Alito	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens	*							
Alito	*	*						
Scalia	*	0.71/0.48	*					
Kennedy	*		*	0.79/0.60				
Souter	*	0.74/0.52	*	0.80/0.61	0.82/0.65			
Thomas	*	0.75/0.52	*	0.86/0.73	0.77/0.57	0.76/0.54		
Ginsburg	*	0.89/0.78	*	0.74/0.51		0.91/0.81		
Breyer	*		*					0.78/0.57

Data Table 9 Federalism Cases															
Justice	% Votes for State									X2	2006 Term Votes		Anticipated Scores		
	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	2005 Term	2006 Term	For State	Against State	2006 Term	Error	2007 Term
Scalia	31.6	52.0	46.7	57.1	55.6	57.1	60.0	25.0	33.3	60.0	6	4	20.3	39.7	38.2
Thomas	36.8	64.0	60.0	57.1	70.0	64.3	50.0	50.0	41.7	55.6	5	4	48.3	7.3	43.0
Roberts	36.8	60.0	46.7	50.0	50.0	35.7	54.6	50.0	18.2	40.0	4	6	*	*	*
Stevens	35.0	8.0	26.7	35.7	30.0	35.7	36.4	50.0	8.3	40.0	4	6	24.8	15.2	26.8
Ginsburg	36.8	28.0	33.3	28.6	40.0	42.9	36.4	37.5	8.3	40.0	4	6	22.9	17.1	20.6
Breyer	15.8	32.0	13.3	35.7	30.0	28.6	36.4	37.5	16.7	40.0	4	6	37.3	2.7	20.7
Alito	29.4	45.8	46.7	35.7	60.0	35.7	45.5	50.0	22.2	30.0	3	7	*	*	*
Kennedy	42.1	40.0	53.3	42.9	70.0	50.0	54.6	25.0	41.7	30.0	3	7	44.7	-14.7	44
Souter	15.8	32.0	20.0	35.7	30.0	28.6	45.5	37.5	8.3	20.0	2	8	31.2	-11.2	14.9
Majority	31.6	36.0	46.7	42.9	50.0	42.9	36.4	37.5	16.7	30.0	3	7	36.7	-6.7	30.7
Split	44.4	46.7	54.6	44.4	57.1	50.0	28.6	50.0	33.3	37.5	3	5			
Unanimous	20.0	20.0	25.0	40.0	33.3	37.5	50.0	25.0	0.0	0.0	0	2			

Chart 9
Federalism Cases

Mean Table 9 Federalism Cases					
Justice	Mean Voting Percentage All Prior Terms (µ)	99% Confidence Interval for True Mean	Standard Deviation of µ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Roberts	55.0	*	*	40.00	*
Stevens	37.9	+/- 8.8	14.92	40.00	no
Alito	49.8	*	*	30.00	*
Scalia	53.0	+/- 10.0	16.50	60.00	no
Kennedy	50.4	+/- 8.5	14.38	30.00	yes
Souter	38.3	+/- 11.7	18.15	20.00	yes
Thomas	56.0	+/- 8.5	12.75	55.56	no
Ginsburg	37.6	+/- 8.8	12.27	40.00	no
Breyer	30.8	+/- 8.0	10.82	40.00	yes

Regression Table 9 Federalism Cases Correlation (ρ) / R²								
Justice	Roberts	Stevens	Alito	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens	*							
Alito	*	*						
Scalia	*		*					
Kennedy	*		*	0.75/0.54				
Souter	*		*					
Thomas	*		*	0.76/0.55				
Ginsburg	*	0.83/0.67	*			0.72/0.48		
Breyer	*		*			0.78/0.58		

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

Justice	% Votes for Majority									X2	2006 Term Votes		Anticipated Scores		
	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	2005 Term	2006 Term	For Maj	Against Maj	2006 Term	Error	2007 Term
Kennedy	87.5	67.9	73.1	83.3	80.0	56.3	63.2	61.9	66.7	100.0	24	0	67.4	32.6	84.1
Roberts									69.2	70.8	17	7	•	•	•
Alito									69.2	70.8	17	7	•	•	•
Scalia	50.0	50.0	73.1	63.3	80.0	43.8	55.6	52.4	60.0	62.5	15	9	53.2	9.3	60.4
Thomas	56.3	50.0	84.6	63.3	80.0	43.8	63.2	52.4	53.3	62.5	15	9	64.5	-2.0	58.3
Breyer	56.3	50.0	19.2	36.7	32.0	56.3	44.4	57.1	40.0	43.5	10	13	50.1	-6.6	43.7
Souter	43.8	46.4	34.6	43.3	28.0	56.3	55.6	61.9	53.3	33.3	8	16	57.7	-24.4	43.6
Stevens	43.8	60.7	26.9	43.3	24.0	37.5	55.6	57.1	46.7	29.2	7	17	44.7	-15.5	45.6
Ginsburg	56.3	53.6	30.8	36.7	20.0	43.8	55.6	52.4	53.3	29.2	7	17	54.4	-25.2	45.6
Conservative	43.7	42.9	61.5	60.0	68.0	56.3	57.9	47.6	53.3	60.0	12	8	50.9	9.1	54.6
Liberal	56.3	57.1	38.5	40.0	32.0	43.8	42.1	52.4	46.7	40.0	8	12	49.1	-9.1	46.6

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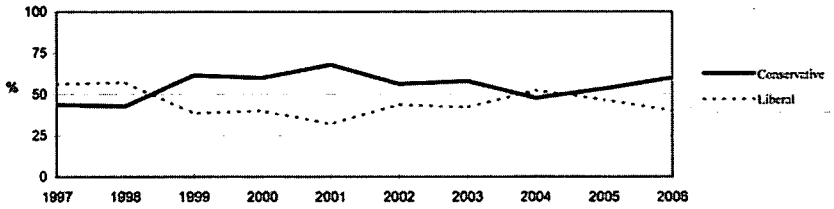
Mean Table 10
Swing-Vote Analysis: Who Votes Most Often with the Majority in Close Cases?

Justice	Mean Voting Percentage All Prior Terms (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Roberts	63.8	•	•	70.83	•
Stevens	43.9	+/- 7.2	12.20	29.17	yes
Alito	69.9	•	•	70.83	•
Scalia	61.2	+/- 7.5	12.69	62.50	no
Kennedy	73.4	+/- 6.5	11.05	100.00	yes
Souter	46.9	+/- 9.1	14.13	33.33	yes
Thomas	58.8	+/- 10.2	15.41	62.50	no
Ginsburg	42.2	+/- 8.7	12.11	29.17	yes
Breyer	42.0	+/- 9.1	12.25	43.48	no

Regression Table 10
Swing-Vote Analysis: Who Votes Most Often with the Majority in Close Cases
Correlation (ρ) / R²

Justice	Roberts	Stevens	Alito	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens	•							
Alito	○	○						
Scalia	•		○					
Kennedy	•		○					
Souter	•	0.72/0.48	○	-0.83/0.67				
Thomas	•	-0.71/0.47	○	0.89/0.77		-0.84/0.68		
Ginsburg	•	0.80/0.62	○	-0.76/0.55		0.74/0.51		
Breyer	•		○	-0.90/0.79			-0.87/0.73	

III. Analysis[32]

Table 1: Civil-State Party[33]

This Term Data Table 1 featured several of the most high-profile cases of the Term—the school race cases, a school speech case, and a partial-birth abortion case all fall within Data Table 1.[34] Furthermore, for the fifth year running, Data Table 1 provides the second most reliable evidence of ideological bias on the Court[35]—and the Court moved in a

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32. Throughout Section IV, a footnote will list the cases tabulated on Tables 1–10. An asterisk ("*") preceding a case citation indicates that it appears more than once on Tables 1 through 9. All cases on Table 10 appeared at least once on Tables 1 through 9. A "slashed Y" ("ᵞ̸") preceding a case citation indicates that more than one voting pattern was tabulated for the case. *See* Appendix A ("A case is included more than once on the same table if it raises two or more distinct issues affecting the outcome of the case and the issues are resolved by different voting alignments"). When more than one voting pattern is tabulated for a case, a number—followed by an "x"—will follow the case citation. For example, "(2x)" means that two voting patterns were tabulated for the case. Because more than one voting pattern may be tabulated, some cases reflect both "liberal" and "conservative" outcomes on different issues. Not every case decided by the Court is included on Tables 1–10. If a case does not involve the federal or state government, or has governmental entities on both sides, it may not be included on Tables 1–4. *See* Appendix A (definitions). Cases are included on Tables 5–9 only when they involve questions involving the subject matter of those Tables (First Amendment, Equal Protection, Statutory Civil Rights, Jurisdiction and Federalism questions). *Id.* Table 10 tabulates the outcome of all cases decided by a single vote. *Id.* As a result of this classification scheme, not every Supreme Court opinion is included in this Study. For 2006, the following cases did not fall within the Study's established parameters: Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499 (2007); Credit Suisse Sec., L.L.C. v. Billing, 127 S. Ct. 2383 (2007); Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339 (2007); Beck v. Pace Int'l Union, 127 S. Ct. 2310 (2007); Safeco Ins. Co. of Am. v. Burr, 127 S. Ct. 2201 (2007); Bell Atl. Corp. v. Twombly 127 S. Ct. 1955 (2007); Microsoft Corp. v. AT&T Corp., 127 S. Ct. 1746 (2007); KSR Int'l Co. v. Teleflex Inc., 127 S. Ct. 1727 (2007); Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 127 S. Ct. 1199 (2007); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 127 S. Ct. 1069 (2007); and Norfolk S. Ry. Co. v. Sorrell, 127 S. Ct. 799 (2007).

33. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007); Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007); *Morse v. Frederick, 127 S. Ct. 2618 (2007); *TSSAA v. Brentwood Acad., 127 S. Ct. 2489 (2007); *Powerex Corp. v. Reliant Energy Servs., 127 S. Ct. 2411 (2007); *Permanent Mission of India to the UN v. City of New York, 127 S. Ct. 2352 (2007); *Davenport v. Wash. Educ. Ass'n, 127 S. Ct. 2372 (2007); Erickson v. Pardus, 127 S. Ct. 2197 (2007) (per curiam); Sole v. Wyner, 127 S. Ct. 2188 (2007); *L.A. County v. Rettele, 127 S. Ct. 1989 (2007); *ᵞ̸Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994 (2007) (2x); Scott v. Harris, 127 S. Ct. 1769 (2007); *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786 (2007); Gonzales v. Carhart, 127 S. Ct. 1610 (2007); *Watters v. Wachovia Bank, 127 S. Ct. 1559 (2007); *Lance v. Coffman, 127 S. Ct. 1194 (2007) (per curiam); Wallace v. Kato, 127 S. Ct. 1091 (2007); *Purcell v. Gonzelez, 127 S. Ct. 5 (2006) (per curiam).

34. *See Parents Involved*, 127 S. Ct. 2738; *Morse*, 127 S. Ct. 2618; *Carhart*, 127 S. Ct. 1610.

35. *See 2006 Study, supra* note 1, at 546 (indicating that year was the fourth in a row).

conservative direction. The Court voted 5.9 points more conservatively than in 2005 in the outcome of Majority Cases, 3.1 points more conservatively in Split Cases, and 11.4 points more conservatively in Unanimous Cases. The voting behavior of six of the seven Members of the Court with enough history to make the calculations possible departed in a statistically significant manner from past behavior on Table 1—and every Justice voted more conservatively than his (or her) lifetime average.[36] Only Justices Alito and Kennedy voted more liberally than in 2005.[37]

But, despite this uniform conservative movement, the outcome on Table 1 for 2006 may not be terribly noteworthy. Indeed, the unremarkable nature of the outcomes on Table 1 is evidenced in the fairly close correlation between anticipated and actual voting behaviors for the 2006 Term.[38] The voting behaviors of five Justices (Ginsburg, Souter, Stevens, Kennedy and Thomas) were within 10 points of their anticipated scores, while Justice Scalia was within 20 points of his anticipated score. Since we did not project anticipated scores for the Court's two newest Justices, only Justice Breyer's score was greater than 20 points from the anticipated score.[39] Given the statistical limitations of this Study, these voting behaviors were remarkably stable. Much of the conservative movement may be attributable to the nature of the unanimous cases the Court decided. Although unanimous outcomes are less likely to indicate bias, these cases demonstrated the greatest conservative deviation from last Term's more liberal results. Still the conservative drift is worth noting, as the Court registered its third most conservative outcome in the past decade—at 68.4, it is topped only by the 2001 (68.8) and 2004 (73.7) Terms.

Moderate individual conservative movement by most of the Justices naturally resulted in moderate conservative outcomes with regard to other statistical measures. The outcome of Majority Cases was 6.3 points more conservative than anticipated.[40] As for positioning, most Justices aligned themselves along typical ideological lines—Justices Scalia (84.2) and Thomas (82.4) were most conservative, followed by Chief Justice Roberts (73.7). Justice Alito shares the middle spot with Justice Kennedy (63.2) and the four liberal Justices each are somewhat less conservative—ranging from Justice Souter's 57.9 to Justice Stevens' 47.4. Justices Stevens and

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36. *See supra* Mean Table 1.

37. *See supra* Data Table 1.

38. *See supra* Data Table 1.

39. For more information about Justice Breyer's anticipated score and the vagaries of ARIMA forecasting, see *infra* note 117.

40. *See supra* Data Table 1.

Ginsburg voted together most often, followed by Justices Scalia and Thomas.

Data Table 2: Civil Cases—Federal Government versus a Private Party[41]

Data Table 2[42] also evidences conservative movement on the Court, somewhat undercutting our hypothesis that last Term's liberal movement was significant.[43] Contrary to that suggestion, Data Table 2 exhibits a return to typical patterns of the past few years. Since 2001, the Court has ranged between 75.0 and 81.8 points, except for 2005. Thus, 2006's 76.5 percent is well within the Court's rather consistent conservative behavior— in fact, only 4.2 points off our prediction. Every Justice except Justice Breyer voted more conservatively in 2006 than in 2005. Nevertheless, Data Table 2 is not a strong indicator of ideological bias.[44]

Last year, we noted that Chief Justice Roberts "demonstrated surprisingly liberal voting behavior, siding with the government only half the time."[45] That score may have been an aberration, as the Chief Justice racks up the most conservative voting record on the Court this Term.

While the Court split along the usual lines—the four liberal Justices voting more liberally than the other five—the division is not as pronounced as on Data Table 1. The gap between the fifth- and sixth- most conservative Justices is only 2.1 points, as opposed to 5.3 points on Data

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41. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007); *Hein v. Freedom From Religion Found, 127 S. Ct. 2553 (2007); *¥Wilkie v. Robbins, 127 S. Ct. 2588 (2007) (2x); *Federal Elec. Comm'n v. Wis. Right to Life, 127 S. Ct. 2653 (2007); United States v. Atl. Research Corp., 127 S. Ct. 2331 (2007); *Office of Sen. Mark Dayton v. Hanson, 127 S. Ct. 2018 (2007); *Hinck v. United States, 127 S. Ct. 2011 (2007); EC Term of Years Trust v. United States, 127 S. Ct. 1763; Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423 (2007); *Rockwell Int'l v. United States 127 S. Ct. 1397 (2007); *¥Osborn v. Haley, 127 S. Ct. 881 (2007) (3x); *Jones v. Bock, 127 S. Ct. 910 (2007); Gonzales v. Duenas-Alvarez, 127 S. Ct. 815 (2007); BP Am. Prod., Co. v. Burton, 127 S. Ct. 638 (2006); Lopez v. Gonzales, 127 S. Ct. 625 (2006).

42. Observant readers may note that the Justices voted between fifteen and eighteen times in this category, although the Court as a whole only voted seventeen times. Justice Souter (eighteen votes) cast a vote on an issue that no other Justice reached in *Osborn*, while Justices Scalia and Thomas (sixteen votes each) each declined to reach an issue that the rest of the Court did vote on in that case. Chief Justice Roberts and Justice Breyer each recused themselves on two cases and, therefore, only cast fifteen votes each.

43. *See 2005 Study, supra* note 1, at 548.

44. Factor analysis does not suggest that Table 2 provides highly reliable evidence of ideological bias this Term. *See infra* Factor Analysis (Data Table 2—Civil cases involving the federal government as party—ranked in fifth place this year for reliability with a score of -0.291, significantly lower than fourth-place Data Table 9's score of 0.592).

45. *See 2005 Study, supra* note 1, at 549.

Table 1. Moreover, Justice Scalia occupies the middle position, while Justice Kennedy (in the third-most conservative position) voted less liberally than Justice Thomas.

Despite our skepticism last year,[46] the general rule that the federal government wins in the Supreme Court continues to hold.[47] The federal government won 76.5 percent of the cases it brought before the Court. We project that the federal government will win over two thirds of its cases again next Term.

Data Table 3: Criminal Cases—State Government versus a Private Party[48]

The Court registered somewhat of a fractured record for Table 3 in the 2006 Term, indicating the ideological tension among the Justices on some issues in the State Criminal arena. Interestingly the Court showed conservative movement when it voted unanimously, voting conservatively 80 percent of the time. In contrast, the Majority and Split cases show a liberal movement. The greatest movement occurred in the Split cases, with a 16.7 point liberal movement. This may be due to the "headline cases" falling under Table 3, which were capital murder cases, indicating the contentiousness of this debate. Roberts vigorously dissented in two cases, declaring that precedents in this area of the law were "a dog's breakfast of divided, conflicting, and ever-changing analyses."[49]

Table 3 displays the stereotypical voting patterns of the individual Justices with very pronounced bloc voting. Justice Kennedy, the least conservative of the conservative bloc, voted at 64 percent while Justice Breyer, the least liberal of the liberal bloc, voted more than 30 points more liberally, down to 29 percent, indicating quite polarized voting behavior on the Court. Justice Alito voted the most conservatively at 94.1 percent, with

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46. *See 2005 Study, supra* note 1, at 549–50.

47. For a good example of this sort of case, see BP Am. Prod., Co. v. Burton, 127 S. Ct. 638 (2006) (unanimously affirming the federal government's interpretation of statute regulating gas and oil royalty payments).

48. Ayers v. Belmontes, 127 S. Ct. 469 (2006); Carey v. Musladin, 127 S. Ct. 649 (2006); Burton v. Stewart, 127 S. Ct. 793, (2007); Cunningham v. California, 127 S. Ct. 856 (2007); Lawrence v. Florida., 127 S. Ct. 1079 (2007); Whorton v. Bockting, 127 S. Ct. 1173 (2007); Abdul-Kabir v. Quarterman, 127 S. Ct. 1654 (2007); Brewer v. Quarterman, 127 S. Ct. 1706 (2007); Smith v. Texas, 127 S. Ct. 1686 (2007); Schriro v. Landrigan, 127 S. Ct. 1933 (2007); Roper v. Weaver, 127 S. Ct. 2022 (2007) (per curiam); Uttecht v. Brown, 127 S. Ct. 2218 (2007); Fry v. Pliler, 127 S. Ct. 2321 (2007); Bowles v. Russell, 127 S. Ct. 2360 (2007); Brendlin v. California, 127 S. Ct. 2400 (2007); Panetti v. Quarterman, 127 S. Ct. 2842 (2007).

49. Brewer v. Quarterman, 127 S. Ct. 1706, 1715 (Roberts, C.J., dissenting); Abdul-Kabir v. Quarterman, 127 S. Ct. 1654 (2007) (Roberts, C.J., dissenting).

Scalia voting more conservatively than was predicted at 88.2 percent, markedly more than our prediction of 58.5 percent. In contrast, Justice Ginsburg voted more liberally than predicted at 23.5 percent, instead of our prediction of 42.6 percent.

The only correlated voting behavior—and a weak correlation at that—is between Justice Scalia and Justice Thomas, signifying somewhat parallel voting behavior by the Justices.[50]

Data Table 4: Criminal Cases—Federal Government versus a Private Party[51]

This was a strange Term for Criminal Federal cases, with only three cases falling into this category and only four Justices who voted in all of the cases. Regardless, Table 4 held its position as the third most reliable indicator of bias for this Term. Furthermore, the 2006 Court decided *Rita v. United States*,[52] a case which shook up federal sentencing guideline procedures. This could explain why the Court decided so few other Criminal Federal cases this Term (with the Court possibly deciding to wait to see how lower courts handled its opinion in *Rita*).

Notably on Table 4, Justice Scalia voted more liberally than any other member of the Court, voting with the federal government in only 33.3 percent of the decided issues. This voting behavior may be explained by Justice Scalia's inclination to accept "plain language" arguments—which often lead him to vote in favor of federal criminal defendants.[53]

Data Table 5: First Amendment Cases—Rights of Expression, Association, and Religion[54]

The Supreme Court tends to accept few First Amendment cases, making it difficult to track changes in voting behaviors of individual Justices and the Court. However, this is not the only difficulty plaguing Table 5. In addition to small sample size, the Court's First Amendment jurisprudence has been far from consistent and clear, rendering voting behavior of the Justices and the Court as chaotic as the resulting doctrine.

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50. *See supra/infra* Regression Table 3.

51. United States v. Resendiz-Ponce 127 S. Ct. 782 (2007); James v. United States, 127 S. Ct. 1586 (2007); Rita v. United States, 127 S. Ct. 2456 (2007).

52. *Rita*, 127 S. Ct. 2456.

53. United States v. Resendiz-Ponce 127 S. Ct. 782 (2007) (Scalia, J., dissenting); James v. United States, 127 S. Ct. 1586 (2007) (Scalia, J., dissenting).

54. *Federal Elec. Comm'n v. Wis. Right to Life, 127 S. Ct. 2653 (2007); *Morse v. Frederick, 127 S. Ct. 2618 (2007); *TSSAA v. Brentwood Acad., 127 S. Ct. 2489 (2007); *Davenport v. Wash. Educ. Ass'n, 127 S. Ct. 2372 (2007).

The disarray on Table 5 is striking. Four Justices (Stevens, Souter, Thomas and Breyer) voted more than 20 points off their anticipated scores, and one (Kennedy) 18.6 points off. All seven Justices with enough of a lifetime voting record to make the calculation possible exhibited statistically significant changes in their voting behavior on First Amendment issues. Rather than evidencing changing voting behaviors, these statistics seem to indicate doctrinal disarray.

This Term featured four First Amendment votes, down from last Term's six. Only one of the four First Amendment claims in *Federal Election Commission v. Wisconsin Right to Life, Inc.*[55] captured a majority of the Court and each Justice only voted for a First Amendment claim once, except for Justice Breyer, who voted against all First Amendment claims this Term.[56] Two of the cases were Unanimous,[57] and two Split.[58]

The two Split cases illustrate the Court's inability to agree on a consistent ideology. In *Wisconsin Right to Life, Inc*, the five Justice plurality reversed the Court's course on campaign finance, upholding a broad as-applied challenge to the same provision it had found facially constitutional four years earlier.[59] However, Justices Scalia, Kennedy and Thomas openly disagreed with the Chief Justice's plurality opinion as to the rationale.[60] Likewise, in *Morse* (the famous "BONG HiTS 4 JESUS" case), Chief Justice Roberts had five votes for a plurality outcome, but did not command a coherent ideological rationale.[61] Justice Thomas, for example, concurred in the plurality's result but indicated a willingness to go much farther in reversing decades of the Court's precedents. Further demonstrating the lack of cohesion within the plurality, Justices Alito and Kennedy concurred separately to note the extreme narrowness of the Court's holding,[62] essentially rendering the case a one-time exception to prior cases without much further jurisprudential significance. Even the four liberal Justices did not agree in dissent: Justice Stevens wrote a vigorous First Amendment based dissent,[63] but Justice Breyer declined to

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55. *Wis. Right to Life*, 127 S. Ct. at 2658.

56. Note, however, that he declined to reach the First Amendment issue in *Morse*, 127 S. Ct. at 2638 (Breyer, J., concurring in part and dissenting in part).

57. *Brentwood*, 127 S. Ct. 2489; *Davenport*, 127 S. Ct. 2372.

58. *Wis. Right to Life*, 127 S. Ct. at 2658.

59. *Id.*

60. *Id.* at 2674 (Scalia, J., concurring).

61. *Morse*, 127 S. Ct. 2618.

62. *Id.* at 2636 (Alito, J., concurring).

63. *Id.* at 2643 (Stevens, J., dissenting).

even reach the First Amendment issue, stating that he would have decided the order-of-battle question differently.[64]

Data Table 6: Equal Protection Cases[65]

The Court generally decides few, if any,[66] Equal Protection cases each Term, so it is not surprising that Table 6 is one of the least reliable indicators of ideological bias on the Court,[67] as well as one of the most volatile categories of cases analyzed by the Study. This Term, like last, the Court decided only one Equal Protection claim. But, unlike last Term, the Court ruled in favor of the Equal Protection claim in a "pole switching" opinion where conservative Justices cast liberal votes in favor of the Equal Protection claim in order to achieve a politically conservative result.

Parents Involved in Community Schools v. Seattle School District No. 1, concerned a Seattle school district's use of race as a tie-breaking factor in deciding school admittance to maintain racial balance in school populations.[68]   The conservative bloc on the Court accepted the Equal Protection claim that use of race was unconstitutional, thereby reaching a politically conservative result on the merits.[69]

Data Table 7: Statutory Civil Rights Claims[70]

Factor Analysis indicates that Table 7 is the least reliable indicator of bias this Term.[71] The trend in the Majority cases is liberal, up from 54.5 percent to 66.7 percent of votes going in favor of the claim. The move in Split cases is markedly liberal, moving 30 percentage points more liberal, but still only reaching 50 percent, and the Unanimous cases changed slightly conservatively from 83.3 percent down to 75 percent. Since Split cases are more indicative of bias, the overall trend seems to be liberal. Nevertheless, because of the small universe of cases, the movement on Table 7 is hardly significant.

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64.   *Id.* at 2638 (Breyer, J., concurring in part and dissenting in part).

65.   Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

66.   *See, e.g., 2001 Study, supra* note 1, at 316. *See also 2003 Study, supra* note 1, at 28.

67.   *See supra* Chart 6.

68.   *Parents Involved*, 127 S. Ct. at 2742.

69.   *Id.* at 2742.

70.   Purcell v. Gonzalez, 127 S. Ct. 5 (2006) (per curiam); Jones v. Bock, 127 S. Ct. 910 (2007); Office of Sen. Mark Dayton v. Hanson, 127 S. Ct. 2018 (2007); Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994 (2007); Ledbetter v. Goodyear Tire and Rubber Co., Inc. 127 S. Ct. 2162 (2007); TSSAA v. Brentwood Acad., 127 S. Ct. 2489 (2007).

71.   *See supra* Chart 7.

Like Table 4, Table 7 shows the ideological rankings quite nicely with Justices Alito and Kennedy holding the middle position, both with four votes for the claim.[72] Interestingly, on this Table, Justice Alito votes more liberally than Chief Justice Roberts.[73] Justice Scalia and Justice Thomas had a high voting correlation of .91, while Justice Breyer and Stevens held the highest correlation at .96. Fairly strong correlations also occurred between Justices Breyer and Souter and Justices Ginsburg and Souter.[74] Our predicted voting behavior was fairly accurate on this Table, with less than a twenty point deviation for all but one Justice.[75] Justices Scalia and Thomas had a much greater deviation than anticipated.

Data Table 8: Cases Raising a Challenge to the Exercise of Federal Jurisdiction[76]

Table 8,[77] despite slight conservative movement, demonstrates continuation of the Court's long-term liberal tendency to reject challenges to federal jurisdiction. Table 8, particularly when examined over time, suggests that the Court favors federal jurisdiction more often than not and that the Court's liberal stance is fairly stable. With the exception of 1999,

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72. *Cf. supra* Data Table 1 (Justices Alito and Kennedy again demonstrated identical voting behavior).

73. *See supra* Data Table 7.

74. *See supra* Regression Table 7.

75. *See supra* Data Table 7.

76. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007); *Hein v. Freedom From Religion Found., 127 S. Ct. 2553 (2007); *Wilkie v. Robbins, 127 S. Ct. 2588 (2007); *Federal Elec. Comm'n v. Wis. Right to Life, 127 S. Ct. 2653 (2007); *Morse v. Frederick, 127 S. Ct. 2618 (2007); *Powerex Corp. v. Reliant Energy Servs., 127 S. Ct. 2411 (2007); *Bowles v. Russell, 127 S. Ct. 2360 (2007); *Permanent Mission of India to the UN v. City of New York, 127 S. Ct. 2352 (2007); Watson v. Philip Morris Cos., Inc., 127 S. Ct. 2301 (2007); *Roper v. Weaver, 127 S. Ct. 2022 (2007) (per curiam); *Office of Sen. Mark Dayton v. Hanson, 127 S. Ct. 2018 (2007); *Hinck v. United States, 127 S. Ct. 2011 (2007); *Smith v. Texas, 127 S. Ct. 1686 (2007); Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc., 127 S. Ct. 1513 (2007); Massachusetts v. EPA, 127 S. Ct. 1438 (2007); Limtiaco v. Camacho, 127 S. Ct. 1413 (2007); *¥Rockwell Int'l v. United States, 127 S. Ct. 1397 (2007) (2x); *Lance v. Coffman, 127 S. Ct. 1194 (2007) (per curiam); Sinochem Int'l v. Malaysia Int'l Shipping, 127 S. Ct. 1184 (2007); *¥Osborn v. Haley, 127 S. Ct. 881 (2007) (2x); Burton v. Stewart, 127 S. Ct. 793, (2007) (per curiam); MedImmune, Inc. v. Genentech, Inc., 127 S. Ct. 764 (2007).

77. Observant readers may note that the Justices voted between twenty-three and twenty-six times in this category, although the Court as a whole only voted twenty-five times. Justice Souter (twenty-six votes) cast a vote on an issue that no other Justice reached in *Osborn*, while Justices Scalia and Thomas (twenty-four votes each) each declined to reach an issue that the rest of the Court did vote on in that case. Chief Justice Roberts (twenty-four votes) recused himself in *Hanson*, while Justice Breyer (twenty-three votes) recused himself in *Rockwell*, in which the rest of the Court voted on two jurisdictional issues.

when an unusually high number of jurisdictional challenges were rejected, the outcomes of Majority Cases on Table 8 have fluctuated within a relatively narrow range of 54.6 percent to 66.7 percent in the last decade.[78]

For the fourth year in a row,[79] the voting behaviors anticipated by the Study were fairly accurate, both for the individual Justices and the Court as a whole (an outcome that may reinforce our observations regarding the Court's established liberal stance on jurisdictional issues). The actual voting behavior of all seven Justices for whom predictions could be made fell within twenty points of their anticipated scores.

Despite the accuracy of prediction on Data Table 8, it remains the second-least useful table at measuring ideological bias. We speculate that this is due to the high amount of pole-switching voting on Table 8. It appears that all of the Justices are willing to stretch various established rules in order to favor their preferred outcomes on the merits. For instance, all Justices were willing to reach the merits of the Equal Protection claim in *Parents Involved*, despite the fact that the racial integration plan at the heart of that litigation had not been employed in years and the students who had been affected by it then had long since graduated from high school.[80] Despite these facts, not a single Justice even cited to *DeFunis v. Odegaard*,[81] a classic mootness case in which the Court refused to reach the merits because the petitioner would graduate from law school before the Court's decision could affect his claim for prospective relief. Rather than discussing the difficult mootness issues fairly raised by its precedents, the Court glossed over them to reach the merits. Barring a change of course, we continue to expect moderate-to-liberal outcomes on Data Table 8.

Data Table 9: Federalism Cases[82]

Table 9 is the fourth most reliable indicator of bias this Term.[83] The trend on Majority and Split cases is conservative, although the outcomes in

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78. *See supra* Data Table 8.

79. *See 2004 Study, supra* note 1, at 950.

80. *Parents Involved*, 127 S. Ct. at 2742.

81. DeFunis v. Odegaard, 416 U.S. 312 (1974) (per curiam).

82. *Parents Involved*, 127 S. Ct. at 2738, 2742; Purcell v. Gonzalez, 127 S. Ct. 5 (2006) (per curiam); Cunningham v. California, 127 S. Ct. 856 (2007); Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007); Watters v. Wachovia Bank, 127 S. Ct. 1559 (2007); United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786 (2007); Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994 (2007); L.A. County v. Rettele, 127 S. Ct. 1989 (2007); Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007).

83. *See infra* Part V.

two Unanimous cases reached liberal results. But, while there is arguably a conservative trend on Table 9, the state is still winning less than half of the time. Split cases are at 37.5 percent, up from 33.3 percent.

Table 9 shows Justices Scalia and Thomas voting the most in favor of the state, a predictable outcome. Somewhat more surprising, however, is the fact that three liberal Justices (Ginsburg, Stevens and Breyer) voted for the state 40 percent of the time, more frequently than the Court as a whole.[84] Justices Alito and Kennedy both voted only 30 percent of the time in favor of the state. In another notable voting pattern, Justice Souter is the most liberal Justice on this Table.[85]

Data Table 10: Swing-Vote Analysis: Who Votes Most Often With the Majority in Close Cases?[86]

Cases decided by a single vote (which most often involve five-four decisions, but also include other circumstances where a change in a single vote would alter the outcome, such as a five-three vote to reverse) fall into the "swing vote" category and generally provide reliable evidence of ideological trends on the Court.[87] Many previous editions of this Study demonstrate that Justices O'Connor and Kennedy tended to be the "leaders" in casting the decisive vote in closely divided cases.[88] With the departure of Justice O'Connor, Justice Kennedy has moved squarely into the limelight. In the 2006 Term, Justice Kennedy cast a staggering 100 percent of his votes with the majority in close cases—in other words, Justice Kennedy decided every split decision in the 2006 Term.

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84. *See supra* Data Table 9.

85. *Id.*

86. Panetti v. Quarterman, 127 S. Ct. 2842 (2007); Leegin Creative Leather Prod. v. PSKS, Inc., 127 S. Ct. 2705 (2007); *Parents Involved*, 127 S. Ct. 2738; *Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518; Hein v. Freedom From Religion Found, 127 S. Ct. 2553 (2007); Federal Elec. Comm'n v. Wis. Right to Life, 127 S. Ct. 2653 (2007); Morse v. Frederick, 127 S. Ct. 2618 (2007); Bowles v. Russell, 127 S. Ct. 2360 (2007); Uttecht v. Brown, 127 S. Ct. 2218 (2007); Ledbetter v. Goodyear Tire and Rubber Co., Inc. 127 S. Ct. 2162 (2007); Schriro v. Landrigan, 127 S. Ct. 1933 (2007); Smith v. Texas, 127 S. Ct. 1686 (2007); Brewer v. Quarterman, 127 S. Ct. 1706 (2007); Abdul-Kabir v. Quarterman, 127 S. Ct. 1654 (2007); James v. United States, 127 S. Ct. 1586 (2007); Gonzales v. Carhart, 127 S. Ct. 1610 (2007); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534 (2007); Massachusetts v. EPA, 127 S. Ct. 1438 (2007); Limtiaco v. Camacho, 127 S. Ct. 1413 (2007); Marrama v. Citizens Bank of Mass., 127 S. Ct. 1105 (2007); *Philip Morris USA*, 127 S. Ct. 1057; Lawrence v. Florida, 127 S. Ct. 1079 (2007); Ayers v. Belmontes, 127 S. Ct. 469 (2006).

87. *See 2003 Study, supra* note 1, at 36; *2002 Study, supra* note 1, at 521.

88. *See 2001 Study, supra* note 1, at 318, 326, 331; *2000 Study, supra* note 1, at 259; *1999 Study, supra* note 1, at 605; *1998 Study, supra* note 1, at 434, 489; *1997 Study, supra* note 1, at 597.

Justice Kennedy's influence moved the Court in a slightly conservative direction compared to previous years. This year's Swing votes were 60 percent conservative, up from 53.3 percent last Term.[89] While this is a recent high, one should not read too much into it. The Swing Vote percentage has ranged within 10 points of 50 percent conservative/liberal for the last decade, with only two exceptions. If Justice Kennedy moves farther to the right, the Court as a whole will likely follow, but Justice Kennedy is notoriously difficult to predict.

Conservative Justices clearly have more influence on the direction of the Court in closely divided cases than the liberal Justices—Chief Justice Roberts and Justice Alito are the next most influential Justices after Justice Kennedy (voting with the majority 70.8 percent of the time), followed by Justices Scalia and Thomas (voting with the majority 62.5 percent of the time). None of the liberal Justices managed to vote with the majority more than 50 percent of the time—they ranged from 43.5 percent (Justice Breyer) to 29.2 percent (Justices Stevens and Ginsburg).

IV. Category Analysis

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

The reliability of the various tables in this Study can be influenced by many factors, including the particular makeup of the Court's caseload and small sample size. Equal Protection cases in Data Table 6, for example, tend to make up a small portion of the court's workload each term[90] and are consistently the least reliable indicator of ideological bias.

In order to determine which categories best differentiate between the voting patterns of more liberal and more conservative Justices, we have applied a statistical tool known as factor analysis.[91] In applying this tool, we have determined that a primary factor may be extracted from the Study's categories over the entire life of the Study that accounts for more of the variance revealed by the data on Tables 1 through 9 than any other factor.[92] We interpret this "Factor 1" as liberal/conservative bias simply

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89. Note that swing vote cases that are not otherwise within our universe of cases are not tallied toward liberal/conservative outcomes, though they are counted toward a Justice's percentage voting with the majority in Swing Vote cases. *See infra* Appendix A.

90. *See 2003 Study, supra* note 1, at 37. *See also supra* note 61 and accompanying text.

91. *See 2002 Study, supra* note 1, at 564.

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

because that is what this Study purports to measure. The categories currently load onto Factor 1 as follows:

Category	Factor 1
Criminal/State Party	-0.856
Civil/State Party	-0.777
Criminal/Federal Party	-0.638
Federalism	-0.592
Civil/Federal Party	-0.292
First Amendment	-0.274
Equal Protection	-0.204
Jurisdiction	-0.154
Statutory Civil Rights	-0.112
Variance	2.3311
% Variance	0.259

According to this ranking, Table 3 (Criminal/State Party) cases are again the most reliable indicator of liberal/conservative leanings over time. Tables 3, 1, 4, and 9 are ranked in the same order of reliability as last Term, and remain the most reliable indicators of ideological bias, while the remaining five continue to be of questionable value in that regard.

As we noted in the 2003 Study,[93] these results may seem counter-intuitive to those holding a stereotypical understanding of the Court—that issues relating to the First Amendment, Statutory Civil Rights, and Equal Protection would (seemingly) provide nearly perfect opportunities for the Justices to show their ideological leanings. However, as we have discussed in three prior studies,[94] such cases often involve "pole-switching," where Justices vote "conservatively" (under the definitions of this Study) in order to further a "liberal" policy preference, or vice versa.[95]

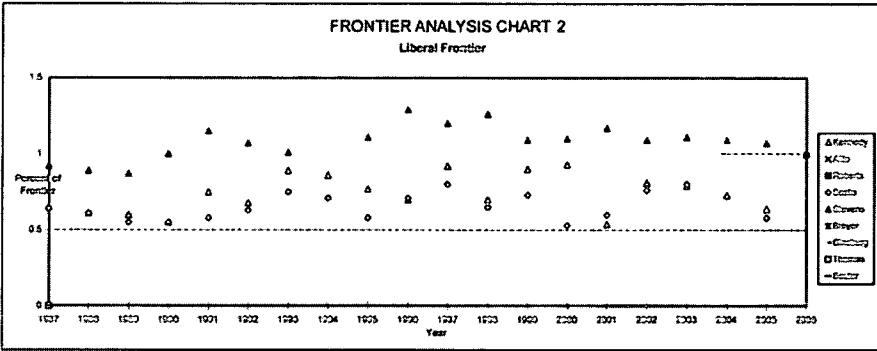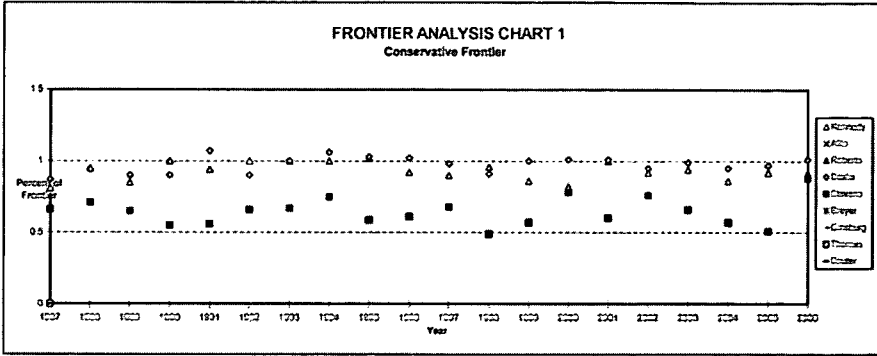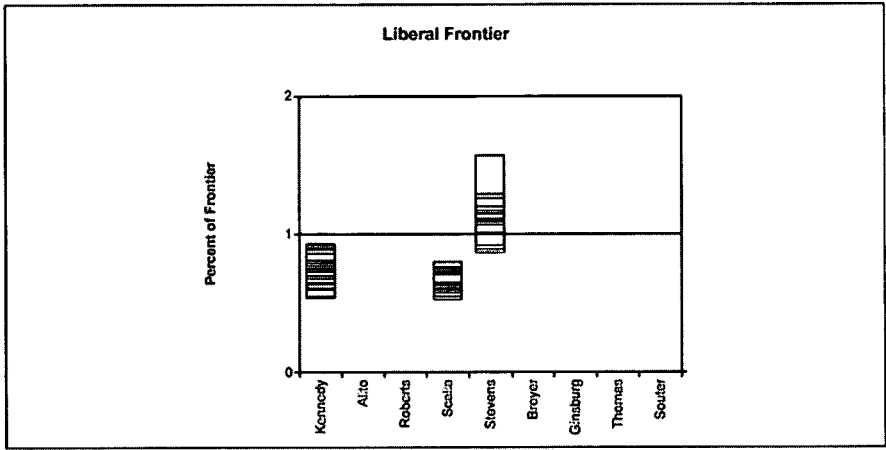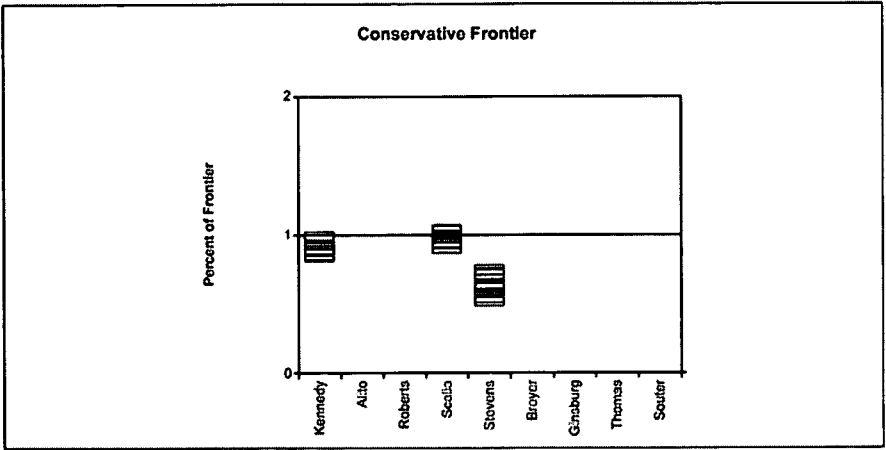93. *See supra* Data Table 5 and accompanying text.
94. *Id.*
95. *Id.*

Frontier Analysis Table 1
"Conservative Frontier"–Constrained

Justice	Percent of Frontier	Percent Super Eff.	Category Weights								
			Civ J / State	Civ J / Fed	Crim. / State	Crim. / Fed	1st Am.	Equal Protect.	Stat. Civ Rt	Juris.	Fed sm
Alito	100%	107%	10	0	60	16	0	0	0	0	0
Thomas	100%	105%	20	0	20	0	0	0	0	0	0
Breyer	100%	104%	14	14	14	14	14	14	0	0	14
Roberts	100%	103%	21	18	21	21	0	0	0	0	10
Scalia	100%	101%	50	0	50	0	0	0	0	0	0
Kennedy	91%		15	15	15	15	15	12	0	0	15
Ginsburg	90%		17	13	17	13	13	13	0	0	13
Souter	68%		17	13	17	13	13	13	0	0	13
Stevens	65%		15	15	15	15	13	13	0	0	15

Frontier Analysis Table 2
"Liberal Frontier"–Constrained

Justice	Percent of Frontier	Percent Super Eff.	Category Weights								
			Civ J / State	Civ J / Fed	Crim. / State	Crim. / Fed	1st Am.	Equal Protect.	Stat. Civ Rt	Juris.	Fed sm
Stevens	100%	105%	50	0	50	0	0	0	0	0	0
Souter	100%	104%	25	0	25	25	0	0	0	0	25
Ginsburg	100%		0	0	100	0	0	0	0	0	0
Kennedy	100%		14	14	14	14	14	14	0	0	14
Scalia	100%		14	14	14	14	14	14	0	0	14
Breyer	92%		0	0	100	0	0	0	0	0	0
Alito	90%		14	14	14	14	14	14	0	0	14
Thomas	88%		14	14	14	14	14	14	0	0	14
Roberts	86%		14	14	14	14	14	14	0	0	14

Frontier Analysis Table 3
"Conservative Frontier"–Unconstrained

Justice	Percent of Frontier	Percent Super Eff.	Category Weights								
			Civ J / State	Civ J / Fed	Crim. / State	Crim. / Fed	1st Am.	Equal Protect.	Stat. Civ Rt	Juris.	Fed sm
Breyer	100%	133%	0	0	0	75	0	25	0	0	0
Souter	100%	113%	0	44	0	0	0	21	0	35	0
Thomas	100%	112%	0	0	0	11	0	0	0	89	0
Alito	100%	112%	0	0	50	10	0	31	0	0	0
Roberts	100%	109%	29	0	0	40	0	0	0	0	31
Scalia	100%	103%	0	0	0	0	0	0	0	0	100
Ginsburg	100%	107%	37	18	0	0	0	21	0	0	26
Kennedy	100%		0	100	0	0	0	0	0	0	0
Stevens	100%		0	0	0	0	0	100	0	0	0

Frontier Analysis Table 4
"Liberal Frontier"–Unconstrained

Justice	Percent of Frontier	Percent Super Eff.	Category Weights								
			Civ J / State	Civ J / Fed	Crim. / State	Crim. / Fed	1st Am.	Equal Protect.	Stat. Civ Rt	Juris.	Fed sm
Scalia	100%	200%	0	0	0	100	0	0	0	0	0
Breyer	100%	130%	0	100	0	0	0	0	0	0	0
Souter	100%	129%	0	0	0	23	0	0	0	0	77
Kennedy	100%	123%	0	0	63	0	0	37	0	0	0
Stevens	100%	122%	83	0	0	14	0	0	0	0	0
Roberts	100%		0	0	0	0	0	100	0	0	0
Ginsburg	100%		0	0	0	0	0	0	100	0	0
Alito	100%		0	0	0	0	0	0	100	0	0
Thomas	100%		0	0	0	0	0	100	0	0	0

FRONTIER ANALYSIS CHART 1
Conservative Frontier

FRONTIER ANALYSIS CHART 2
Liberal Frontier

Conservative Frontier

Liberal Frontier

V. Frontier Analysis

Attempting to quantify the magnitude of a Justice's liberal or conservative tendencies and to identify trends in such tendencies over time is challenging for a variety of reasons. One challenge already discussed is that of choosing appropriate tests and assessing their validity. Another is dealing with inconsistency in the nature of cases appealed to the Court from one Term to the next and the Court's selection of which cases it will decide. With varying parameters such as these, is there any meaningful way to quantify, analyze and compare the Justices' inclinations? One potentially useful method is frontier analysis.[96]

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

We present liberal and conservative frontier data for the Court in Frontier Analysis Tables 1–4 and Frontier Analysis Charts 1–4. Two versions of each frontier are presented.

In Frontier Analysis Tables 1 and 2, we constrain the weights applied to each category according to the factor analysis hierarchy in Part V. On these Tables, weights are chosen for each Justice that produce the highest frontier score for him or her, subject to the limitation that Equal Protection (the least reliable category) cannot receive more weight than Civil Federal Party (the next least reliable category), Civil Federal Party cannot receive more weight than Statutory Civil Rights, and so forth, moving upward from the least reliable category set out in Part V.

Frontier Analysis Tables 3 and 4 apply no weighting constraints at all; instead, these tables choose, for each Justice, those weights that present him or her in the most conservative or liberal light possible.

Each Table lists a "% of Frontier" score for each Justice. Those with a score of 100 percent reach the frontier by employing the category weight distribution shown in the category columns. Scores less than 100 percent indicate that the most conservative/liberal score the Justice could obtain with optimal weighting places him or her at the indicated percentage of the way toward the frontier. In some cases, an optimal combination of weights

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

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

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

According to the Frontier Analysis Table 1, "Conservative Frontier—Constrained," Justice Alito was the most conservative Justice in 2006.[97] Five Justices were able to reach the conservative frontier on the constrained Frontier Analysis Table,[98] with superefficient scores ranging from 107 percent (Justice Alito) to 101 percent (Justice Scalia). Somewhat surprisingly, Justice Breyer was able to reach the conservative frontier (at 104 percent superefficiency), while Justice Kennedy fell short (at 91 percent). Justices Stevens (88 percent) and Souter (88 percent) were the least conservative Justices on the constrained Frontier Analysis Table.[99]

Frontier Analysis Table 2, which shows the results from a constrained calculation of the liberal frontier, shows two Justices with superefficient scores: Justices Stevens (109 percent) and Souter (104 percent).[100] Justices Ginsburg, Kennedy and Scalia were each able to reach the constrained liberal frontier, scoring exactly 100 percent. Chief Justice Roberts was the least liberal Justice (86 percent).[101]

The unconstrained Frontier Analysis Tables maximize the effects of pole-switching and other potentially "distorting" voting behaviors and, therefore, do not provide very reliable evidence of conservative or liberal bias. The real importance of the unconstrained Tables is that they illustrate

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97. *See supra* Frontier Analysis Table 1.

98. *Id.*

99. *Id.*

100. *See supra* Frontier Analysis Table 2.

101. *See supra* Frontier Analysis Table 2. Compare this to *2003 Study, supra* note 1, at Frontier Analysis Table 2.

the value of the constrained analysis and the importance of factor analysis.[102]

Unlike last year, every Justice was able to reach the unconstrained frontier on both Tables 3 and 4. The overall suggestion of the frontier analysis charts may well be that the Court, as a whole, is not as divided as it has been in past years. The scatterplot charts show that the Justices are clustered much closer together near the liberal and conservative frontiers than the Justices of some past Courts. Whether this result is an aberration, a fulfillment of Chief Justice Roberts's stated goal of acting with consensus on the Court, or some other factor will likely become evident in future years.

Conclusion

The voting patterns tabulated by the 2006 Study reveal (as should be expected) a Court in transition. The generally consistent conservative voting patterns of Chief Justice Rehnquist have been replaced with several surprisingly liberal voting patterns tallied by Chief Justice John Roberts (who was the most liberal Member of the Court on Table 2, and who voted more liberally on Tables 4 and 9 than the historical practice of the past Chief Justice). Associate Justice Alito voted rather more conservatively on Table 3 than the historic patterns of Associate Justice O'Connor (whom he replaced on the Court). As a result, Table 3—this Term's most reliable indicator of ideological bias—demonstrates a significantly wider "gap" between the conservative and liberal wings of the Court than in the recent past. The overall-all conservative impact of Justice Alito, however, is tempered by the fact that (as with the new Chief Justice) he demonstrated fairly consistent liberal voting behavior on Tables 4 and 9.

The ideological posture of the Court—considered as a whole—may be difficult to reckon. Six Tables demonstrate conservative movement (Tables 1, 2, 4, 8, 9 and 10) while two Tables demonstrate liberal movement (Tables 3 and 7) and two Tables (5 and 6) present so little data that they are of little value in evaluating ideological trends (a conclusion which might also be applied to Table 7). The Court, therefore, appears to be moving in a moderately conservative direction.

The question for the future is whether the conservative bloc (led by Justice Kennedy in the decision of swing-vote cases) will hold as new

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102. *See 2003 Study, supra* note 1, at 818 ("The unconstrained Frontier Tables amplify the effects of pole-switching. Accordingly, the most reliable evidence of ideology on these Tables comes from the constrained analysis.").

appointees are named to the Court. While our Frontier Analysis may suggest that the Court, viewed as a whole, may be "voting together" somewhat more than in the recent past, the voting patterns tabulated on Tables 1–10 continue to show a Court that (in contested cases) continues to be polarized into five-Member conservative and four-Member liberal blocs. A change in the ideological orientation of only a single Justice, in such circumstances, can dramatically impact the outcome across the entire range of issues examined by this Study.

APPENDIX A

1.   The Universe of Cases

The only cases included in the database are those cases decided by full opinion. Decisions on motions have been excluded even if accompanied by an opinion. Cases handled by summary disposition are included only if they are accompanied by a full opinion of the Court and not if the only opinion is a dissent. Cases decided by a four-four vote resulting in affirmance without written opinion have been excluded. Both signed and unsigned per curium opinions are considered full opinions if they set forth reasons in a more than perfunctory manner. Cases not fitting within any of these categories are not included in the database for any of the tables. For the 2006 Term, the Supreme Court released seventy-five slip opinions. Of these, two were summary dismissals,[103] while eleven did not raise issues in any of our nine categories.[104] Thus, the universe of cases for the 2006 Term includes sixty-two cases.

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103. Toledo-Flores v. United States, 127 S. Ct. 638 (2006) (per curiam) (dismissing the writ of certiorari as improvidently granted); Claiborne v. United States, 127 S. Ct. 2245 (2007) (per curiam) (vacating as moot the Eighth Circuit's judgment upon notice of the death of the petitioner).

104. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499 (2007); Credit Suisse Sec., L.L.C. v. Billing, 127 S. Ct. 2383 (2007); Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339 (2007); Beck v. Pace Int'l Union, 127 S. Ct. 2310 (2007); Safeco Ins. Co. of Am. v. Burr, 127 S. Ct. 2201 (2007); Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007); Microsoft Corp. v. AT&T Corp., 127 S. Ct. 1746 (2007); KSR Int'l Co. v. Teleflex Inc., 127 S. Ct. 1727 (2007); Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 127 S. Ct. 1199 (2007); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 127 S. Ct. 1069 (2007); Norfolk S. Ry. Co. v. Sorrell, 127 S. Ct. 799 (2007).

2.   Cases Classified as Civil or Criminal

The classification of cases as civil or criminal follows commonly understood definitions.[105]   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 2006 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[106] or, with respect to a state government, one of its political subdivisions. A suit against a government official in a personal capacity is included if that official is represented by government attorneys, or if the interests of the government are otherwise clearly implicated.[107]   In instances of multiple parties, a civil case is excluded if United States governmental entities appear on both sides of the controversy.[108] If both a state and a federal entity are parties to the same suit on the same side with only private parties on the other, the case is included on Data Tables 1 and 2.[109] A case is included more than once on

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105. Note that petitions for federal habeas relief, though technically civil cases (generally against a state warden or other prison official), are classified as criminal. *See, e.g.*, Ayers v. Belmontes, 127 S. Ct. 469 (2006); Brewer v. Quarterman, 127 S. Ct. 1706 (2007); Abdul-Kabir v. Quarterman, 127 S. Ct. 1654 (2007). Also note that actions protesting prison conditions or treatment are classified as civil, despite involving parties incarcerated under criminal law. *See, e.g.*, Erickson v. Pardus, 127 S. Ct. 2197 (2007) (per curiam) (regarding the proper administration of prisoner's hepatitis treatment).

106. *E.g.*, Office of Sen. Mark Dayton v. Hanson, 127 S. Ct. 2018 (2007). The Office of Senator Dayton is treated as a federal party.

107. *E.g.*, Scott v. Harris, 127 S. Ct. 1769 (2007) (involving Fourth Amendment issues relating to a high-speed car chase where state would likely indemnify police officer).

108. *E.g.*, Limtiaco v. Camacho, 127 S. Ct. 1413 (2007) (Attorney General and Governor of Guam on opposing sides); Massachusetts v. EPA, 127 S. Ct. 1438 (2007); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534 (2007). However, a case is included in Data Table 1 or Data Table 2 if a foreign sovereign opposes a U.S. government party. *E.g.*, Permanent Mission of India to the United Nations v. City of New York, 127 S. Ct. 2352 (2007). The Study's definition of conservative as voting for a U.S. government party does not break down if that vote is against a foreign government, whereas the case is unclassifiable if the vote is *for* one U.S. government entity but *against* another.

109. *E.g.*, Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007). The Arizona attorney general and the United States solicitor general both were interested parties as attorneys of record on the same side.

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.[110]

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

A case is included in each category of Data Tables 5 through 9 for which it raises a relevant issue that is addressed by written opinion. One case may thus be included on two or more tables. A case is also included more than once on the same table if it raises two or more distinct issues in the category affecting the disposition of the case and the issues are resolved by different voting alignments. A case is not included on a table if an issue raised by one of the litigants is not addressed in any opinion.

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

Statutory civil rights included on Data Table 7 are limited to those invoking the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Religious Freedom Restoration Act and other civil rights statutes expressly barring discrimination on the basis of race, color, national origin, sex, religion, age or physical handicap.[111] 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.[112] The purpose of this exclusion is to preserve the distinction between constitutional and non-constitutional claims.

For Data Table 8, jurisdictional questions are defined to include not only jurisdiction *per se*, but also standing, mootness, ripeness, abstention,

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110. *E.g.*, Wilkie v. Robbins, 127 S. Ct. 2588 (2007); Fry v. Pliler, 127 S. Ct. 2321 (2007); Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994 (2007); Rockwell Int'l v. United States, 127 S. Ct. 1397 (2007); Osborn v. Haley, 127 S. Ct. 881 (2007).

111. This includes IDEA, despite much of that statute moving beyond antidiscrimination to creating positive entitlements. Thus, *Winkelman*, 127 S. Ct. 1994, is included in the statutory civil rights category.

112. *See, e.g.*, Erickson v. Pardus, 127 S. Ct. 2197 (2007) (per curiam). Petitioner sued under 42 U.S.C. § 1983 alleging that his Eighth Amendment rights were violated when his hepatitis treatment was discontinued.

equitable discretion[113] and justiciability.[114]   Jurisdictional questions are excluded if neither party challenges jurisdiction and no member of the Court dissents on the question, even though the Court may comment on its jurisdiction.

Federalism cases on Data Table 9 are limited to those cases in which there were issues raised by the conflicting actions of federal and state or local governments.   Common examples of these issues are preemption, intergovernmental immunities, application of the Tenth and Eleventh Amendments as a limit on federal government action and federal court interference with state court activities (other than review of state court decisions). Issues of "horizontal" federalism (where the regulatory power of one state assertedly conflicts with the regulatory interests of sister states) or interstate relationships, such as those raised by the dormant Commerce Clause or the Privileges and Immunities Clause, in most instances are excluded from the table.[115]

5.   The Swing Vote Cases

Data Table 10 includes all cases where the outcome turns on a single vote. This category includes five-four decisions and four-three decisions, if any, as well as five-three and four-two decisions that reverse a lower court decision. Affirmances by a vote of five-three or four-two are not included because a shift of one vote from the majority to the minority position would still result in affirmance by a tie vote. Reversals by a vote of five-two are also not included, as four-three reversals, though disfavored, are valid.[116] A case is included more than once in the table if it raises two or more distinct issues affecting the disposition of the case and the issues are resolved by different voting alignments.   Swing votes are considered liberal or conservative outcomes when the same voting alignment is used to decide

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113. Also included in this concept is the Court's decision itself not to exercise its discretionary jurisdiction. *E.g.*, Roper v. Weaver, 127 S. Ct. 2022 (2007) (per curiam).

114. *E.g.*, Hinck v. United States, 127 S. Ct. 2011 (2007) (declining jurisdiction in one Article I court in favor of jurisdiction in another).

115. This Term, one opinion involving the Dormant Commerce Clause—United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786 (2007)—was included on Table 9 (Federalism) because the Court's rejection of the Dormant Commerce Clause claim unequivocally favored state rather than federal regulatory power.

116. For an example of such a case, see Hartman v. Moore, 126 S. Ct. 1695 (2006).

an issue on Tables 1–9; cases that do not appear on Tables 1–9 are not counted as liberal or conservative outcomes.[117]

APPENDIX B

Study Methodology

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

A.   Scores

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

B.   Predictive Modeling

Data in this project were fitted to an Auto Regressive Integrated Moving Average (ARIMA) forecasting model.[118] This model is useful in circumstances where, as in this Study, a single variable (a Justice's score) is to be forecast based only on its present and prior values with no other explanatory variables. ARIMA is an acronym for Auto Regressive Integrated Moving Average. The model is most easily explained by starting in the middle of the acronym:

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117. *E.g.*, Leegin Creative Leather Prod. v. PSKS, Inc., 127 S. Ct. 2705 (2007), Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534 (2007); Limtiaco v. Camacho, 127 S. Ct. 1413 (2007); Marrama v. Citizens Bank of Mass., 127 S. Ct. 1105 (2007).

118. ARIMA computer modeling was accomplished using MINITAB® statistical software with p = 1, d = 1, and q = 1. For more information regarding the ARIMA (p,d,q) model, see Peter Kennedy, A GUIDE TO ECONOMETRICS 248–49 (1992).

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

Auto-Regression: Once the series has been made stationary, an
                          autoregressive parameter may be determined.[119]
                          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.[120]

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

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

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

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

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.

Synthesis: The previous operations are combined into the equation:

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

where E_t represents the residual error remaining between the calculated and actual values of X_t. This final equation is used to predict the series score for the upcoming Term.[121]

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121. This term, our prediction for Justice Breyer on Table 2 was off by 43 points. After inspecting a graph of the actual data series (see Figure xx), one might wonder how our predictive model could have gone so wrong.

Justice Breyer—Chart 2
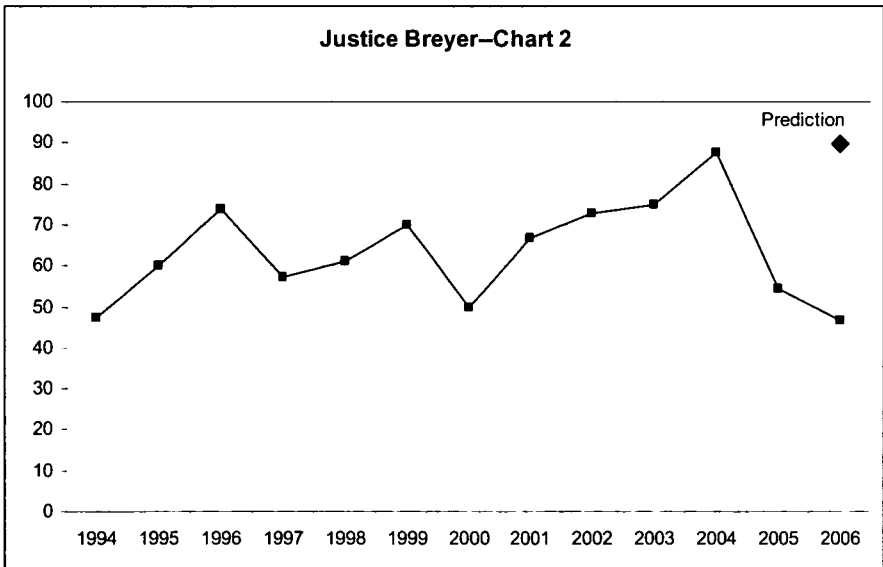
Figure xx

However, if we remove the actual 2006 score (which was unknown and therefore not available as input to the model), and if we add the complete set of scores predicted by the model (see Figure xy), things look a little better.

Justice Breyer–Chart 2
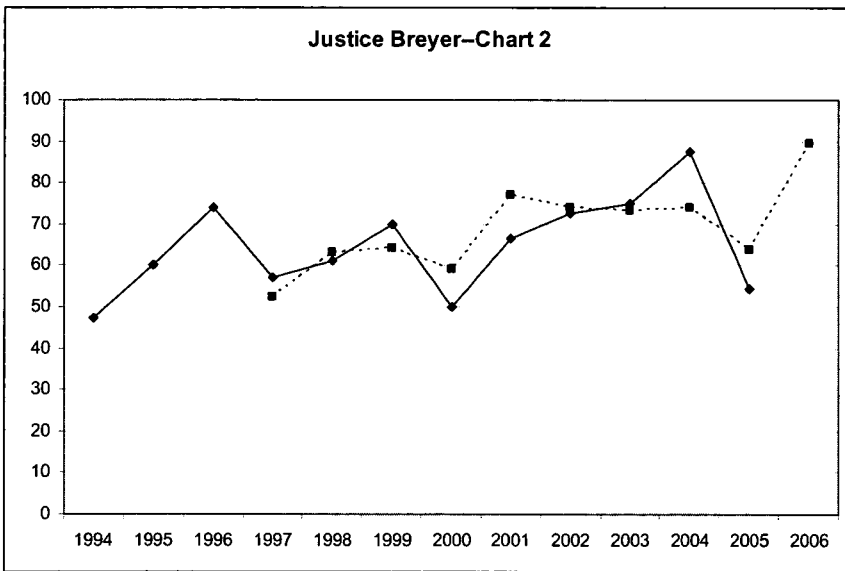
Figure xy

The dotted line in the graph shows the ARIMA estimates for each point based on best fit (least error) values for μ, $\varnothing$, and θ (see Appendix A, Part B. *Predictive Modeling*). The model does a pretty good job of tracing the actual data—up to the last (2006) estimate. The last estimate, however, does not seem so unreasonable if one considers that Justice Breyer's actual 2006 score is visually rather an "outlier" in the context of the five scores immediately preceding it which trend upward toward our 2006 estimate. Also, ARIMA's more visually satisfying prediction for 2007 helps to bolster confidence in the model (see Figure xz).

C. Mean Testing

We use a "student's t test"[122] 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.[123] 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_o: $\mu = X_1$ The "null" hypothesis, i.e., X_2 does not significantly shift μ from its previous value on the real number line. Therefore, the two samples are statistically equivalent.

Justice Breyer–Chart 2
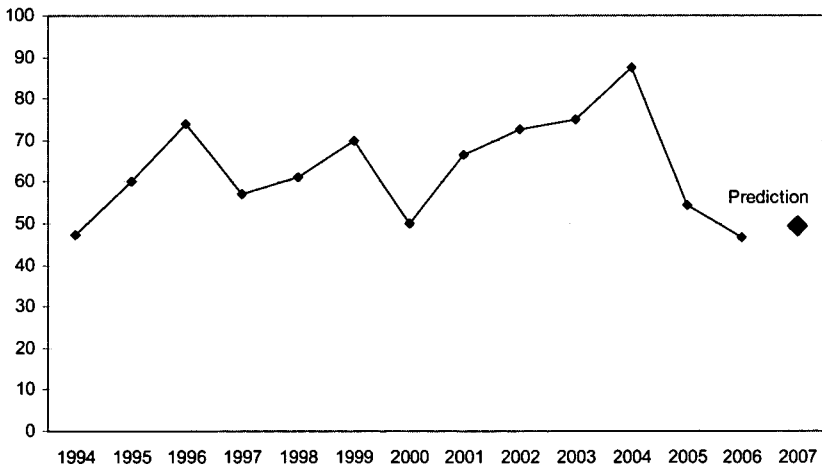
Figure xz

Attempting to predict the Justices' scores is an ambitious undertaking, but the authors enjoy trying.

122. 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 & Hogg, *supra* note 6.

123. 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.

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

We then set out to prove the alternative hypothesis, within a certain confidence interval,[124] by rejecting the null hypothesis.[125] This is accomplished by calculating the following statistic:

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

The result of this equation (t) is compared to the entry on a t-distribution table corresponding to the confidence interval desired (() and the appropriate number of degrees of freedom (n-k).[126] If the absolute value of t is greater than the table entry, H_o is rejected and we say that the Justice has shown a statistically significant change in voting behavior this Term.

D. Correlation

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

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

125. A full description of the logic behind this seemingly convoluted procedure is beyond the scope of this article. However, its purpose is to control Type I (or alpha) error. For a complete explanation, see MOORE & MCCABE, *supra* note 122.

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

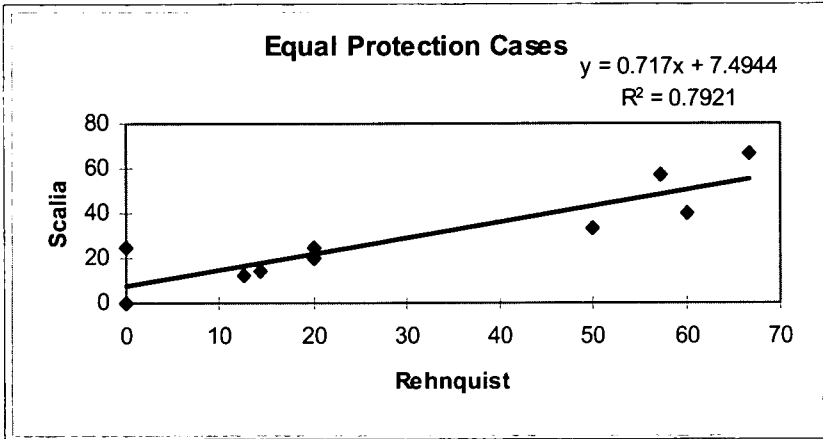coefficient. The second number is an r^2 statistic, which is a more reliable measure of the actual level of correlation.[127]

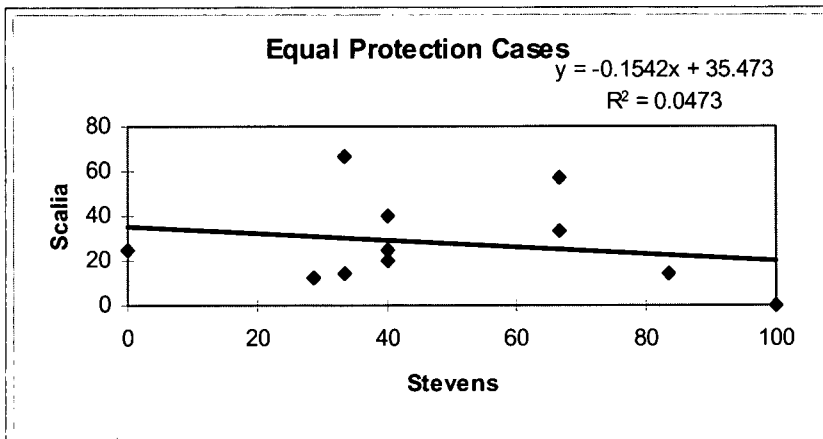**Figure 1**

Figure 2

127. The r^2 statistic is an estimate of $\beth^2$, 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.

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

E. Factor Analysis

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

We performed a factor analysis of the Study categories using Minitab software. The factor loadings presented were obtained by extracting a single factor, using principal components analysis and applying a QMAX rotation to the data. A full description of the theory and mathematics underlying factor analysis is beyond the scope of this appendix, but several books on the subject are available that provide reasonably simple explanations of this complex process.[128]

F. Frontier Analysis

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

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

Alan would argue that the title should go to the best croquet player because he has scored highest in the croquet category, while Debbie would argue that the best marbles player should win because each has scored highest in that category. On the other hand, Betty would argue that each sport should receive equal weight, because her combined score with equal

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

weightings would be higher than either Alan's or Debbie's, i.e., Betty would score (7 x 0.5) + (7 x 0.5) = 7, while Alan would score (9 x 0.5) + (2 x 0.5) = 5.5, Chuck would score 4.5, and Debbie would score 5.5. The following figure plots the athlete's scores graphically:
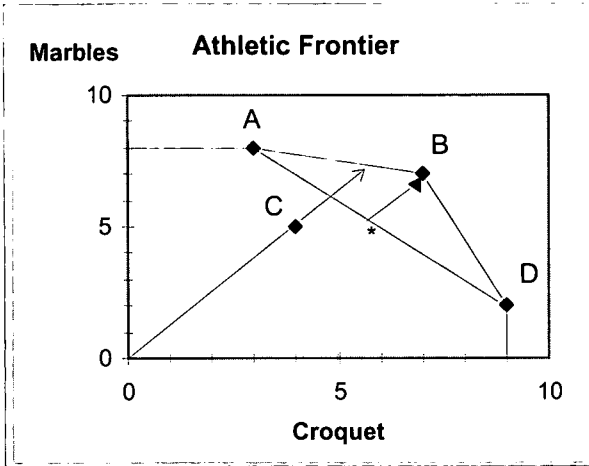
A, B, C, and D represent the athletes. The solid line connecting points A, B, and D represents the athletic frontier, i.e., the boundary beyond which no athlete has performed regardless of the relative weights assigned to marbles and croquet. A, B, and D are located at 100 percent of the frontier. Moreover, B can be said to be superefficient to the extent her point lies beyond the line AD connecting the two points adjacent to it on the frontier. A and D are also superefficient 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.