

Supreme Court Voting Behavior: 2007 Term

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Introduction

This Study, the twenty-second in a series,¹ tabulates and analyzes the voting behavior of the United States Supreme Court during the 2007 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

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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*. For more detail, see endnote.

2. The 2007 United States Supreme Court Term covers decisions made from October 2007 through July 2008.

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

II. 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

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.

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

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 rights⁸ or to exercise judicial restraint.⁹

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

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

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 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

10. Unanimous cases may comprise a significant portion of the cases tabulated on the various tables. This Term, for example, four of twelve cases were decided unanimously on Table 1, four of ten cases were decided unanimously on Table 2, three of thirteen cases were decided unanimously on Table 3; six of seventeen cases were decided unanimously on Table 4; one of five cases was decided unanimously on Table 5; one of seven cases was decided unanimously on Table 7; seven of fourteen cases were decided unanimously on Table 8; two of fifteen cases was decided unanimously on Table 9.

11. An example of what seems to be a fairly non-controversial case for the court was *Arave v. Hoffman*, No. 07-110 (U.S. Jan. 7, 2008) (per curiam) (case was only two 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*, 551 U.S. 192, 214 (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., 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").

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

14. *See, e.g.*, *Wilkie v. Robbins*, No. 06-219 (U.S. June 25, 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).

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 1986-2006 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 2007 Term voting record departs in a statistically significant manner from his or her prior voting pattern and whether any significant correlation exists among the Term-to-Term voting patterns of the Justices.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, a single variable (a Justice's voting score) is forecast

15. *See id.*

16. *See, e.g.,* *Burton v. Stewart*, 549 U.S. 147 (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. Sch. v. Seattle Sch. Dist. No. 1*, No. 05-908 (U.S. June 28, 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 gain a "liberal" vote, even though some might assert that their votes reflect a "conservative" value. *See supra* note 12.

18. *See infra.*

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

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 2007 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 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

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.

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.

III. Overview of the Ideological Trends of the 2006 Term

The data collected on Tables 1–10 this Term tend to show fairly consistent liberal movement—with Tables 1, 2, 4, 7, 8, and 10 showing various liberal voting patterns. The liberal movement on Tables 1 and 4 provide a strong assurance of liberal movement as factor analysis ranks those tables as the second and third most reliable indicators of bias. Table 2 falls in the middle of the pack when it comes to reliability, but showed a liberal movement in Split, Unanimous, and Majority cases. Tables 7 and 8 were the least reliable indicators of bias this Term; Table 7 had a typically small sample size (there were only six statutory civil rights cases), and Table 8, while it logged fifteen cases, included several classic pole-switching cases, where the Court exercised jurisdiction (a “liberal” result) to rule conservatively on the merits.²³ Table 10 marked a distinctly liberal trend, with the swing vote coming out liberal about 26.7 points more often than last Term. Swing votes tabulated on Table 10 often demonstrate how the Court feels about some of the more hot-ticket issues and, accordingly, may well reveal significant indicia of ideological bias.

The liberal trend on the Court seems reasonably clear, with only two Tables showing noteworthy conservative movement (e.g., the conservative outcome of Majority and Split decisions on state criminal cases on Table 3 and the conservative movement regarding federalism cases on Table 9). It should be noted that Table 3 is the most reliable indication of bias this Term, so the conservative trend on that table is significant. 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 the substantial liberal trend, the Tables also show continuing ideological polarization on the Court. Factor analysis highlights Tables 1 and 3, continuing from last Term, as the most

23. See *infra* Data Tables 7, 8.

reliable indicators of potential ideological bias during the 2007 Term. Those Tables, however, shake up the classic five/four conservative/liberal divide on the Court. Justices Ginsburg and Breyer cast the majority of their votes with the government on Table 1—the second most reliable indicator of bias this Term—falling in with the most conservative Justices on civil state cases. By contrast, Table 3, this Term’s most reliable indicator of bias, displayed the characteristic ideological split, with Justices Scalia, Alito, Roberts, Kennedy, and Thomas voting conservatively and Justices Stevens, Breyer, Souter, and Ginsburg holding the liberal slots. Nevertheless, despite Table 3’s conservative trend, the significant liberal movement on the other tabulations suggests that, viewed as a whole, the decisions of the United States Supreme Court were rather more liberal in the 2007 Term than in 2006.

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

In 2007 the Court showed a pronounced liberal movement in civil state cases, bouncing back from a slight conservative leaning in 2006. The Court voted more liberally in the outcome of Majority cases, voting for the government only 58% of the time, down from 68.4% in 2006, and significantly more liberally in Unanimous cases, voting for the government only 25% of the time, nearly fifty points less than it did in 2006. The Court showed a conservative voting movement with the Split cases, voting for the government 75% of the time. Table 1 has demonstrated volatile movement over the past few years, swinging from conservative to liberal to conservative patterns and now back to liberal. Accordingly, the data on Table 1 must be used with caution.

Continuing a fairly consistent pattern since 1999 regarding civil state cases, the Court sided with the government more than fifty percent of the time, but on the whole, voted 7.5 points more liberally than we predicted. Historically, the Court has decided the great majority of civil cases in favor of state governments; but our 2006 Study did not anticipate the interesting movement on Table 1 regarding the voting behavior of the individual Justices. Seven of the nine Justices demonstrated statistically significant changes in voting behavior; only Justices Souter and Stevens voted within ten points of our predictions. Moreover with the Court moving an astonishing forty-eight points more liberally in the Unanimous cases, the individual Justices, not surprisingly, voted somewhat atypically. Chief Justice Roberts voted more liberally and Justice Ginsburg slightly more conservatively, falling into the most conservative four Justices.

Justice Breyer also voted more conservatively while Justice Alito appeared somewhere near the middle. Justices Kennedy, Stevens, and Souter held the most liberal positions.

Finally, factor analysis for 2007 again demonstrates that Table 1 is the second most reliable indicator of bias. Based on this statistic, and past civil state outcomes, we expect that Chart 1 will continue to demonstrate rather reliably the individual Justices' ideological tendencies as well as the Court's as a whole.

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

The Court showed liberal movement in Majority, Split, and Unanimous cases. Only fifty percent of cases were decided in favor of the federal government, whose win rate has not been so low since 2000. This across-the-board movement, however, may well be more the result of case selection (and such factors as pole switching) than bias.²⁴ Furthermore, this year's liberal movement is not necessarily indicative of a change in the direction of the Court since, according to factor analysis, civil federal cases this Term were not reliable indicators of bias.

The five most liberal Justices this Term were also the only Justices to demonstrate statistically significant changes in voting behavior and did so in a liberal direction. Only the scores of Justices Scalia, Souter and Breyer were close to their predicted values.

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

This Term there was clear conservative movement in Majority, Split, and Unanimous cases. Unanimous cases were particularly striking, reaching unprecedented conservative heights, though the significance of this is somewhat tempered by the fact that there were only three Unanimous cases. However, since factor analysis indicates that Table 3 provides the most reliable evidence of conservative or liberal bias this Term, this across-the-board conservative trend could be significant.

All of the Justices who have been on the Court long enough for analysis to be possible, with the exception of Justice Thomas, demonstrated statistically significant conservative changes in voting

24. See *Davis v. FEC*, No. 07-320 (U.S. June 26, 2008) (In a classic pole switch, Chief Justice Roberts and Justices Alito, Scalia, Thomas, and Kennedy reached a liberal outcome by declaring sections 319(a)-(b) of the Bipartisan Campaign Reform Act of 2002 unconstitutional.).

behavior, with each voting more conservatively than predicted. Justice Ginsburg occupied the most liberal position this year, a place that has been occupied by Justice Stevens for four consecutive years.

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

Recovering from the 2006 Term, in which the Justices decided only three criminal Federal cases, the Court decided a substantial number of these cases during the 2007 Term. While this return to taking a significant number of cases in the category surely boosts the reliability of the category, last Term's dearth of cases does make any movement in this category corresponding less reliable. Most of the movement can be seen as a recovery.

Consequently, although the movement for the Majority and Split cases is clearly liberal and movement for Unanimous cases is clearly conservative, given last Term's small number of cases,²⁵ Table 4 does not reveal much about the ideological movement of the Court in federal criminal cases compared to the previous year. On the other hand, the movement does tend to show conformity with voting behavior during the 2004 and 2005 Terms. Considering, however, that both Chief Justice Roberts and Justice Alito served their first full Terms in 2005-2006, only future years will show the ideological movement of the Court as a whole.

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

Table 5 remains volatile and a poor indicator of bias largely because of the small number of issues in this category—only five issues were tabulated in this category this Term. Only one other voting category, Equal Protection, had a smaller data set this Term.

Table 5 has demonstrated highly volatile voting patterns over the past nine 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.

25. During the 2006 Term, the Court released seventy-five slip opinions, of which sixty-two were included in last Term's universe of cases. See *2006 Study*, *infra* endnote 1.

Data Table 6: Equal Protection Claims

The Court—as it has for the last two Terms—decided only one Equal Protection claim in 2007. A low number of cases on Table 6 is typical of the Equal Protection category.²⁶ Unsurprisingly, factor analysis indicates that Table 6 is not a reliable indication of ideological bias.²⁷ However, unlike last Term, the Court voted against the claim, a conservative shift.²⁸

Regression Table 6 shows close correlation between several sets of Justices (Kennedy/Alito, Thomas/Scalia, and Ginsburg/Souter).²⁹ However, because this category has such a small universe of cases and an accordingly small possibility of divergent voting patterns, correlation between different Justice's voting patterns may well be unremarkable.

Data Table 7: Statutory Civil Rights Claims

The Court on Table 7 has shifted liberally this Term, voting in favor of 83.3% of Statutory Civil Rights Claims, up from last Term's 66.7%.³⁰ The Majority and Split cases also tended liberal, with another thirty-point liberal movement in the outcome of Split decisions. The Unanimous cases demonstrated the same liberal trend, keeping in mind that there was only one Unanimous case. All Members of the Court but Justices Thomas and Scalia demonstrated statistically significant voting behavior, with Justice Alito showing uncharacteristic liberal behavior, voting for the claim six out of seven times. As a result of this voting pattern, Justice Alito holds one of the four most liberal places on Table 7. Justices Souter and Ginsburg (.94) and Justices Breyer and Stevens (.91) showed high voting correlations. 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 pronounced liberal movement on Table 8 during the 2007 Term in the outcome of Majority and Unanimous

26. See prior studies, *infra* endnote 1.

27. See *infra* Section V.

28. Engquist v. Or. Dep't of Agric., No. 07-474 (U.S. June 9, 2008).

29. See *infra* Regression Table 6.

30. See *infra* Data Table 7.

cases, moving from 56% to 73.3% and 50% to 85.7%, respectively. The Split cases also moved slightly liberally from 60% to 62.5%.

The 2007 Term was no exception to the Court's classically liberal stance on jurisdiction. Table 8 demonstrates that since 1999 the Court has rather consistently decided more than fifty 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 twenty points of his or her anticipated score. All but Justice Thomas demonstrated statistically significant voting behavior. Justices Ginsburg and Stevens and Ginsburg and Souter had voting correlations of .91.

Factor analysis suggests that Table 8 is the second least reliable Table at demonstrating ideological bias. This is due, at least partially, to the Court's approach to jurisdictional issues. Both liberal and conservative Justices, it appears, may be willing to stretch established jurisdictional rules in order to reach a favored outcome on the merits.

Data Table 9: Federalism Cases

Table 9 is again the fourth most reliable indicator of bias this Term and, building from its slight conservative movement of last Term, the Court's voting has moved in a notably conservative direction—marking a clear departure from the 2005 Term's clear liberal trend. In Majority and Split cases, the Court voted much more conservatively than last Term; one hundred percent of the Unanimous cases came out for the state, a clear departure from 2005 and 2006 when all of them came out against the state. This conservative movement is significant because state governments are winning substantially more than half the time, something not seen for the last five years.

Only four of the nine Justices demonstrated statistically significant voting behavior on Table 9 (Thomas, Kennedy, Ginsburg, and Breyer). Interestingly, two of the most traditionally liberal Justices on the Court seemed to favor state claims more often than usual. In the 2007 Term, Justices Breyer and Ginsburg both voted with the state at least fifty percent of the time.³¹

31. See *infra* Mean Table 9.

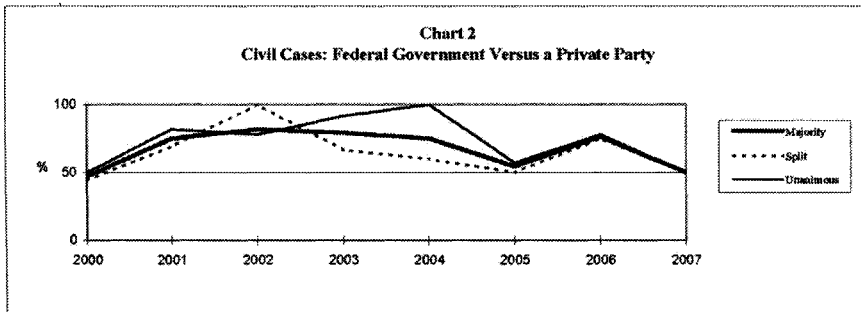
Data Table 10: Swing-Vote Cases

For yet another Term, Justice Kennedy's influence over the direction of the Court is nowhere more evident than on Table 10, which he controlled by casting two-thirds of his votes with the majority in closely divided cases. In other words, he voted with the majority in two out of every three split decisions. Unlike last Term, however, where no Justice could even begin to approach his one hundred percent streak for voting with the majority, Justice Kennedy was not alone in the top position. Justice Thomas also voted with the majority in two out of every three split decisions. Considering Justice Thomas's reputation for being a very conservative Justice, it is fascinating to see that there was a clear liberal movement this Term with sixty percent of cases coming out liberally and forty percent coming out conservative—the exact opposite of last Term. Despite this liberal movement, there has been a generally conservative tenor on this Table to varying degree since 1999.³² This conservative tenor can be expected to continue because, even with the liberal movement this Term, the conservative Justices continue to vote with the majority in close cases more often than the liberal Justices.

32. *Id.*

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

Justice	% Votes For Government										X2	2007 Term		Anticipated Scores		
	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007		For Gov't	Against Gov't	2007 Term	Error	2008 Term
	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term						
Roberts	50.0	70.0	50.0	70.0	90.9	75.7	71.4	50.0	80.0	70.0	7	3	*	*	*	
Alito	73.3	60.0	50.0	51.9	54.0	83.3	62.3	66.7	76.5	60.0	6	4	*	*	*	
Scalia	61.1	60.0	56.3	56.5	63.6	73.9	62.5	54.5	68.8	60.0	6	4	61.2	-1.2	59.2	
Thomas	55.6	40.0	52.9	45.8	63.6	75.0	75.0	63.6	75.0	60.0	6	4	72.4	-12.4	67.4	
Souter	66.7	50.0	52.9	50.0	63.6	75.0	50.0	63.6	66.7	50.0	5	5	57.7	-7.7	61.4	
Ginsburg	68.4	50.0	52.9	66.7	72.7	66.7	75.0	54.5	58.8	50.0	5	5	62.8	-12.8	56.2	
Breyer	61.1	70.0	50.0	66.7	72.7	75.0	87.5	54.5	46.7	50.0	5	5	49.2	0.8	57.2	
Stevens	68.4	50.0	64.3	62.5	50.0	69.6	62.5	54.5	58.8	40.0	4	6	64.2	-24.2	57.5	
Kennedy	50.0	50.0	47.1	62.5	90.9	75.0	62.5	54.5	76.5	40.0	4	6	67.5	-27.5	59.6	
Majority	61.1	50.0	47.1	75.0	81.8	79.2	75.0	54.5	76.5	50.0	5	5	68.9	-18.9	67.1	
Split	50.0	33.3	44.4	69.2	100.0	66.7	60.0	50.0	75.0	50.0	3	3				
Unanimous	75.0	75.0	50.0	81.8	77.8	91.7	100.0	57.1	77.8	50.0	2	2				



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

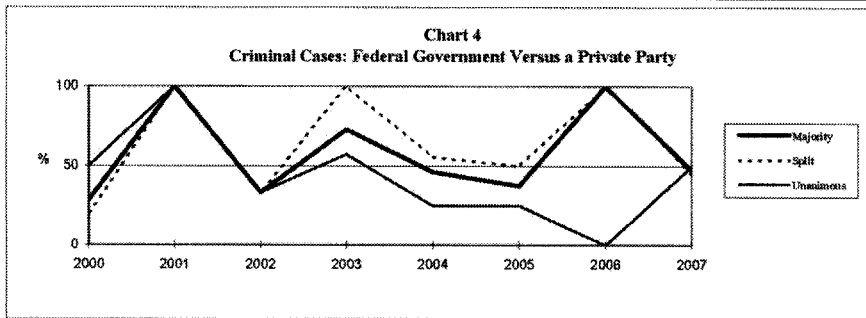
Justice	Mean Voting Percentage	99% Confidence Interval for True Mean		Standard Deviation of μ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
	All Prior Terms (μ)	Interval	Mean	Deviation of μ (s)		
Roberts	68.3	+/- 7.5		13.31	70.00	no
Stevens	57.2	+/- 5.6		9.96	40.00	yes
Alito	62.1	+/- 6.5		11.64	60.00	no
Scalia	60.6	+/- 5.2		9.22	60.00	no
Kennedy	62.3	+/- 7.3		12.61	40.00	yes
Souter	61.6	+/- 6.9		11.07	50.00	yes
Thomas	55.8	+/- 8.7		13.52	60.00	no
Ginsburg	62.0	+/- 8.0		11.58	50.00	yes
Breyer	63.3	+/- 8.8		12.31	50.00	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								
Scalia								
Kennedy	0.75/0.54							
Souter								
Thomas								
Ginsburg								
Breyer					0.73/0.50			

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

Justice	% Votes for Government										X2	2007 Term Votes		Anticipated Scores		
	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007		For Gov't	Against Gov't	2007 Term	Error	2008 Term
	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term						
Alito	84.6	54.6	57.1	100.0	40.0	72.7	61.5	66.7	100.0	82.4	14	3	*	*	*	
Thomas	61.5	54.6	85.7	87.5	66.7	80.0	53.8	62.5	66.7	64.7	11	6	65.1	-0.4	64.6	
Roberts								50.0	100.0	58.8	10	7	*	*	*	
Scalia	46.2	63.6	85.7	100.0	60.0	70.0	30.8	50.0	33.3	52.9	9	8	44.5	8.4	53.6	
Stevens	38.5	36.4	14.3	62.5	0.0	45.5	15.4	25.0	66.7	47.1	8	9	26.0	21.1	29.7	
Kennedy	76.9	54.6	28.6	100.0	50.0	72.7	61.5	50.0	100.0	47.1	8	9	51.8	-4.7	73.2	
Breyer	53.9	45.5	28.6	100.0	33.3	54.6	38.5	12.5	100.0	47.1	8	9	14.5	32.6	48.8	
Souter	46.2	36.4	16.7	75.0	33.3	36.4	15.4	12.5	66.7	35.3	6	11	25.3	10.0	29.4	
Ginsburg	53.9	36.4	28.6	75.0	33.3	54.6	15.4	25.0	66.7	29.4	5	12	24.6	4.8	33.2	
Majority	61.5	54.5	28.6	100.0	33.3	72.7	46.2	37.5	100.0	47.1	8	9	39	8.1	67.2	
Split	55.6	57.1	20.0	100.0	33.3	100.0	55.6	50.0	100.0	45.5	5	6				
Unanimous	75.0	50.0	50.0	100.0	33.3	57.1	25.0	25.0	*	50.0	3	3				



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

Justice	Mean Voting Percentage	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?
	All Prior Terms (μ)				
Roberts	76.5	+/- 6.9	12.29	58.82	yes
Stevens	41.6	+/- 10.5	18.64	47.06	no
Alito	74.5	+/- 8.2	14.50	82.35	yes
Scalia	64.2	+/- 10.0	17.80	52.94	yes
Kennedy	69.5	+/- 10.6	18.44	47.06	yes
Souter	51.7	+/- 14.7	23.56	35.29	yes
Thomas	71.9	+/- 8.5	13.25	64.71	yes
Ginsburg	51.2	+/- 13.7	19.90	29.41	yes
Breyer	57.4	+/- 18.7	26.16	47.06	no

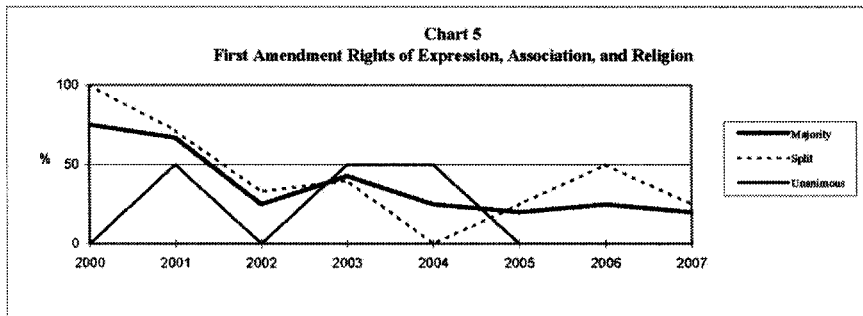
Regression Table 4
Criminal Cases: Federal Government Versus a Private Party

Correlation (ρ) / R²

Justice	Roberts	Stevens	Alito	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
Alito		0.71/0.47						
Scalia								
Kennedy	0.82/0.65		0.75/0.54					
Souter		0.75/0.54						
Thomas								
Ginsburg	0.72/0.49	0.76/0.55			0.78/0.59	0.95/0.89		
Breyer	0.87/0.74	0.82/0.64	0.77/0.55		0.86/0.72	0.86/0.72		0.86/0.71

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

Justice	% Votes for Claim										X ²	2007 Term		Anticipated Scores		
	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007		For Claim	Against Claim	2007 Term	Error	2008 Term
	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term						
Scalia	100.0	56.6	25.0	44.4	25.0	66.7	0.0	20.0	25.0	40.0	2	3	24.8	15.2	25.2	
Kennedy	100.0	77.8	75.0	66.7	0.0	50.0	50.0	16.7	25.0	40.0	2	3	35.0	5.0	35.7	
Souter	100.0	28.6	50.0	66.7	25.0	33.3	75.0	20.0	25.0	40.0	2	3	36.2	3.8	36.4	
Ginsburg	100.0	33.3	50.0	55.6	25.0	33.3	50.0	60.0	25.0	40.0	2	3	44.0	-4.0	19.4	
Roberts								25.0	25.0	20.0	1	4	*	*	*	
Alito								50.0	25.0	20.0	1	4	*	*	*	
Thomas	100.0	66.7	25.0	66.7	25.0	100.0	0.0	20.0	25.0	20.0	1	4	35.7	-15.7	28.6	
Breyer	50.0	12.5	75.0	55.6	25.0	16.7	25.0	66.7	0.0	20.0	1	4	32.6	-12.6	17.7	
Stevens	100.0	37.5	50.0	66.7	33.3	33.3	75.0	50.0	25.0	0.0	0	5	45.8	-45.8	33.9	
Majority Split	100.0	44.4	75.0	66.7	25.0	42.9	25.0	20.0	25.0	20.0	1	4	34.0	-14.0	27.1	
Unanimous	100.0	0.0	0.0	50.0	0.0	50.0	50.0	0.0	0.0	0.0	0	1				



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

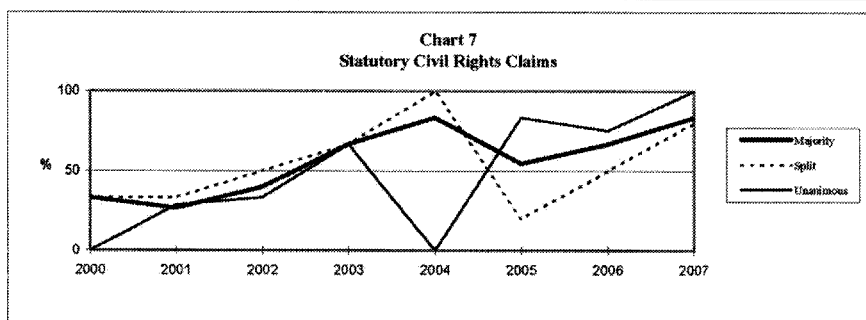
Justice	Mean Voting Percentage	99% Confidence Interval for True Mean		Standard Deviation of μ (s)	Actual Voting Percentage This Term (X ²)	Did This Term Show a Statistically Significant Change in Voting Behavior?
	All Prior Terms (μ)					
Roberts	29.0	+/- 9.6		17.04	20.00	yes
Stevens	54.8	+/- 13.5		24.10	0.00	yes
Alito	38.5	+/- 11.8		20.91	20.00	yes
Scalia	41.5	+/- 14.7		26.21	40.00	no
Kennedy	55.4	+/- 16.7		28.94	40.00	yes
Souter	52.5	+/- 16.8		26.90	40.00	no
Thomas	47.7	+/- 21.8		33.90	20.00	yes
Ginsburg	50.2	+/- 17.4		25.34	40.00	no
Breyer	37.1	+/- 20.3		28.46	20.00	no

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	0.71/0.48							
Scalia								
Kennedy	0.83/0.68							
Souter								
Thomas				0.93/0.86				
Ginsburg	0.74/0.51	0.84/0.69	0.81/0.63		0.77/0.55			
Breyer			0.84/0.69					0.71/0.46

Data Table 7
Statutory Civil Rights Claims

Justice	% Votes for Claim										X2	2007 Term		Anticipated Scores		
	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	2005 Term	2006 Term	2007 Term		For Claim	Against Claim	2007 Term	Error	2008 Term
	Stevens	88.2	75.0	100.0	53.3	20.0	66.7	83.3	81.8	83.3		85.7	6	1	78.5	7.2
Alito								33.3	66.7	85.7	6	1	*	*	*	
Souter	70.6	75.0	100.0	60.0	20.0	80.0	83.3	81.8	83.3	85.7	6	1	86.6	-0.8	87.3	
Ginsburg	70.6	75.0	100.0	60.0	40.0	66.7	83.3	81.8	83.3	85.7	6	1	87.0	-1.3	87.4	
Kennedy	47.1	25.0	33.3	20.0	40.0	66.7	33.3	54.5	66.7	71.4	5	2	58.2	13.2	58.3	
Breyer	82.4	75.0	100.0	53.3	40.0	80.0	83.3	81.8	83.3	66.7	4	2	85.8	-19.1	73.2	
Roberts								50.0	60.0	57.1	4	3	*	*	*	
Scalia	41.2	25.0	0.0	13.3	40.0	66.7	33.3	45.5	50.0	42.9	3	4	42.4	0.5	38.6	
Thomas	23.5	25.0	0.0	20.0	40.0	50.0	33.3	45.5	50.0	28.6	2	5	48.7	-20.1	36.2	
Majority	64.7	25.0	33.3	26.7	40.0	66.7	83.3	54.5	66.7	83.3	5	2	56.5	14.9	70.1	
Split	63.6	0.0	33.3	33.3	50.0	66.7	100.0	20.0	50.0	80.0	4	2				
Unanimous	66.7	50.0	0.0	28.6	33.3	66.7	0.0	83.3	75.0	100.0	1	0				



Mean Table 7
Statutory Civil Rights Claims

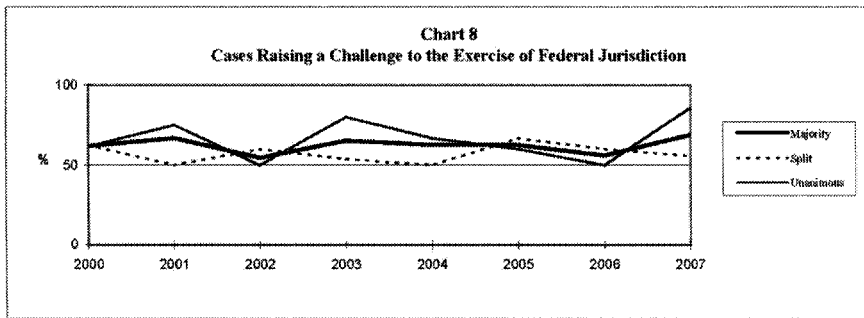
Justice	Mean Voting Percentage	99% Confidence Interval for True Mean		Standard Deviation of μ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
	All Prior Terms (μ)					
Roberts	37.0	+/- 6.7		11.87	57.14	yes
Stevens	75.7	+/- 9.9		17.17	85.71	yes
Alito	45.3	+/- 7.6		13.47	85.71	yes
Scalia	37.7	+/- 9.0		16.03	42.86	no
Kennedy	43.6	+/- 9.4		16.31	71.43	yes
Souter	68.1	+/- 12.8		20.52	85.71	yes
Thomas	31.8	+/- 9.2		14.30	28.57	no
Ginsburg	71.6	+/- 10.8		15.71	85.71	yes
Breyer	77.5	+/- 10.9		15.21	66.67	yes

Regression Table 7
Statutory Civil Rights Claims
Correlation (ρ) / R²

Justice	Roberts	Stevens	Alito	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
Alito	0.73/0.51							
Scalia								
Kennedy	0.71/0.48							
Souter		0.74/0.51						
Thomas				0.89/0.78				
Ginsburg		0.89/0.77				0.94/0.87		
Breyer		0.91/0.81				0.85/0.70		0.81/0.63

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

Justice	% Votes for Claim										X2	2007 Term Votes		Anticipated Scores		
	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	2005 Term	2006 Term	2007 Term		For Claim	Against Claim	2007 Term	Error	2008 Term
Stevens	65.0	100.0	68.4	83.3	47.6	77.3	62.5	73.3	72.0	93.3	14	1	74.6	18.7	75.4	
Ginsburg	60.0	83.3	61.9	83.3	54.6	81.8	62.5	60.0	72.0	87.5	14	2	70.9	16.6	77.2	
Breyer	65.0	66.7	60.0	83.3	63.6	77.3	50.0	66.7	56.5	86.7	13	2	67.3	19.4	59.6	
Souter	60.0	83.3	68.4	83.3	54.6	69.6	75.0	66.7	61.5	80.0	12	3	68.4	11.6	74.4	
Kennedy	55.0	83.3	61.9	58.3	50.0	54.6	62.5	75.0	56.0	68.8	11	5	61.3	7.5	63.9	
Roberts	43.0	66.7	57.1	66.7	54.6	54.6	62.5	57.1	45.8	62.5	10	6	*	*	*	
Alito	40.0	66.7	47.6	50.0	31.8	52.6	57.1	57.1	48.0	62.5	10	6	*	*	*	
Scalia	40.0	66.7	47.6	50.0	31.8	52.6	57.1	50.0	37.5	50.0	8	8	49.3	0.7	45.3	
Thomas	45.0	83.3	47.6	58.3	38.1	45.5	57.1	43.8	33.3	43.8	7	9	40.7	3.1	43.4	
Majority	55.0	83.3	61.9	66.7	54.6	65.2	62.5	62.5	56.0	68.8	11	3	61.0	7.8	65.0	
Split	42.9	66.7	62.5	50.0	60.0	53.9	50.0	66.7	60.0	55.6	5	4				
Unanimous	61.5	100.0	61.5	75.0	50.0	80.0	66.7	60.0	50.0	85.7	6	1				



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

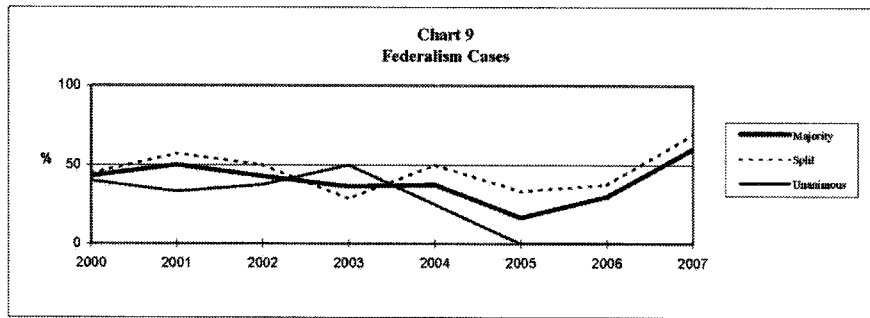
Justice	Mean Voting Percentage	99% Confidence Interval for True Mean		Standard Deviation of μ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
	All Prior Terms (μ)					
Roberts	53.1	+/- 6.4		11.46	62.50	yes
Stevens	68.5	+/- 8.1		14.38	93.33	yes
Alito	54.4	+/- 7.2		12.76	62.50	yes
Scalia	47.0	+/- 6.0		10.69	50.00	no
Kennedy	57.9	+/- 6.4		11.12	68.75	yes
Souter	62.4	+/- 9.1		14.57	80.00	yes
Thomas	48.4	+/- 8.7		13.52	43.75	no
Ginsburg	62.1	+/- 10.5		15.29	87.50	yes
Breyer	61.7	+/- 8.9		12.45	86.67	yes

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	0.78/0.59							
Scalia	0.82/0.66		0.74/0.53					
Kennedy	0.79/0.60	0.70/0.47	0.71/0.48	0.79/0.60				
Souter	0.85/0.71	0.77/0.56	0.72/0.49	0.79/0.60	0.83/0.66			
Thomas	0.72/0.48			0.85/0.70	0.73/0.51	0.70/0.46		
Ginsburg	0.74/0.51	0.91/0.82	0.76/0.54	0.72/0.48		0.91/0.82		
Breyer		0.74/0.52				0.73/0.49		0.83/0.65

Data Table 9
Federalism Cases

Justice	% Votes for State										X2	2007 Term		Anticipated Scores		
	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007		For	Against	2007	Error	2008
	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term		State	State	Term		Term
Thomas	64.0	60.0	57.1	70.0	64.3	50.0	50.0	41.7	55.6	66.7	10	5	43.0	23.7	59.2	
Scalia	52.0	46.7	57.1	55.6	57.1	60.0	25.0	33.3	60.0	53.3	8	7	38.2	15.1	47.1	
Ginsburg	28.0	33.3	28.6	40.0	42.9	36.4	37.5	8.3	40.0	53.3	8	7	20.6	32.7	43.2	
Roberts	60.0	46.7	50.0	50.0	35.7	54.6	50.0	18.2	40.0	50.0	7	7	*	*	*	
Breyer	32.0	13.3	35.7	30.0	28.6	36.4	37.5	16.7	40.0	50.0	7	7	20.7	29.3	32.4	
Alito	45.8	46.7	35.7	60.0	35.7	45.5	50.0	25.0	30.0	46.7	7	8	*	*	*	
Stevens								8.3	40.0	40.0	6	9	26.8	13.2	31.4	
Kennedy	40.0	53.3	42.9	70.0	50.0	54.6	25.0	41.7	30.0	40.0	6	9	44.0	-4.0	38.5	
Souter	32.0	20.0	35.7	30.0	28.6	45.5	37.5	8.3	20.0	33.3	5	10	14.9	18.4	19.9	
Majority	36.0	46.7	42.9	50.0	42.9	36.4	37.5	16.7	30.0	60.0	9	6	30.7	29.3	31.1	
Split	46.7	54.6	44.4	57.1	50.0	28.6	50.0	33.3	37.5	69.2	9	4				
Unanimous	20.0	25.0	40.0	33.3	37.5	50.0	25.0	0.0	0.0	0.0	0	2				



Mean Table 9
Federalism Cases

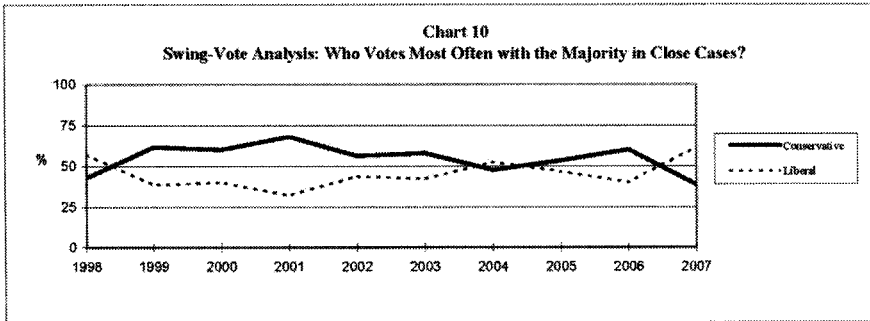
Justice	Mean Voting Percentage	95% Confidence	Standard	Actual Voting Percentage	Did This Term Show a Statistically Significant Change in Voting Behavior?
	All Prior Terms (μ)	Interval for True Mean	Deviation of μ (s)	This Term (X2)	
Roberts	54.2	+/- 9.3	16.11	50.00	no
Stevens	38.0	+/- 8.4	14.53	40.00	no
Alito	48.9	+/- 8.9	15.43	46.67	no
Scalia	53.3	+/- 9.5	16.53	53.33	no
Kennedy	49.4	+/- 8.5	14.72	40.00	yes
Souter	37.2	+/- 11.3	18.12	33.33	no
Thomas	56.0	+/- 7.9	12.32	66.67	yes
Ginsburg	37.8	+/- 8.1	11.81	53.33	yes
Breyer	31.5	+/- 7.6	10.67	50.00	yes

Regression Table 9
Federalism Cases
Correlation (ρ) / R²

Justice	Roberts	Stevens	Alito	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
Alito	0.89/0.79							
Scalia	0.71/0.48							
Kennedy			0.74/0.53	0.74/0.53				
Souter	0.82/0.65		0.80/0.62					
Thomas				0.75/0.54				
Ginsburg		0.81/0.63						
Breyer						0.73/0.50		

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

Justice	% Votes for Majority										2007 Term Votes		Anticipated Scores		
	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	2005 Term	2006 Term	2007 Term	For Maj	Against Maj	2007 Term	Error	2008 Term
Kennedy	67.9	73.1	83.3	80.0	56.3	63.2	61.9	66.7	100.0	66.7	8	4	84.1	-17.4	72.8
Thomas	50.0	84.6	63.3	80.0	43.8	63.2	52.4	53.3	62.5	66.7	8	4	58.3	8.4	64.3
Roberts								69.2	70.8	58.3	7	5	*	*	*
Stevens	60.7	26.9	43.3	24.0	37.5	55.6	57.1	46.7	29.2	58.3	7	5	45.6	12.7	37.36
Scalia	50.0	73.1	63.3	80.0	43.8	55.6	52.4	60.0	62.5	58.3	7	5	60.4	-2.1	60.7
Alito								63.6	70.8	50.0	6	6	*	*	*
Souter	46.4	34.6	43.3	28.0	56.3	55.6	61.9	53.3	33.3	50.0	6	6	43.6	6.4	44.5
Ginsburg	53.6	30.8	36.7	20.0	43.8	55.6	52.4	53.3	29.2	50.0	6	6	45.6	4.4	45.1
Breyer	50.0	19.2	36.7	32.0	56.3	44.4	57.1	40.0	43.5	41.7	5	7	43.7	-2.0	43.6
Conservative	42.9	61.5	60.0	68.0	56.3	57.9	47.6	53.3	60.0	38.3	4	7	54.6	-16.1	32.5
Liberal	57.1	38.5	40.0	32.0	43.8	42.1	52.4	46.7	40.0	61.3	7	4	46.6	14.9	47.5



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

Justice	Mean Voting Percentage	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
	All Prior Terms (μ)				
Roberts	64.2	+/- 6.1	10.66	58.33	yes
Stevens	43.2	+/- 7.1	12.32	58.33	yes
Alito	69.7	+/- 7.3	12.73	50.00	yes
Scalia	61.3	+/- 7.1	12.35	58.33	no
Kennedy	74.7	+/- 7.1	12.29	66.67	yes
Souter	46.1	+/- 8.8	14.07	50.00	no
Thomas	59.0	+/- 9.6	14.91	66.67	no
Ginsburg	41.3	+/- 8.4	12.15	50.00	yes
Breyer	42.2	+/- 8.4	11.74	41.67	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	-0.75/0.54							
Alito								
Scalia	0.80/0.62							
Kennedy								
Souter	-0.72/0.49	0.70/0.46		-0.83/0.67				
Thomas	0.71/0.46			0.87/0.75		-0.82/0.64		
Ginsburg	-0.77/0.56	0.81/0.63		-0.76/0.54		0.75/0.53		
Breyer	-0.75/0.52			-0.90/0.79			-0.86/0.72	

IV. Analysis³³

*Table 1: Civil-State Party*³⁴

Data Table 1 this Term demonstrates the effects of the Court's decisions in areas such as gun control³⁵ and political party procedure.³⁶ For the sixth year in a row, Data Table 1 provides the second most

33. 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 1–9. All cases on Table 10 appeared at least once on Tables 1–9. A “slashed Y” (“^Y”) 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 2007, the following cases did not fall within the Study’s established parameters: *Bd. of Ed. of City Sch. Dist. Of N.Y. v. Tom F.*, No. 06-637 (U.S. Oct. 10, 2007) (per curiam); *Sprint/United Mgmt. Co. v. Mendelsohn*, No. 06-1221 (U.S. Feb. 26, 2008); *Warner-Lambert Co. v. Kent*, No. 06-1498 (U.S. Mar. 3, 2008) (per curiam); *New Jersey v. Delaware*, No. 134, Orig. (U.S. Mar. 31, 2008); *Quanta Computer, Inc. v. LG Electronics, Inc.*, No. 06-937 (U.S. June 9, 2008); *Bridge v. Phoenix Bond & Indemnity Co.*, No. 07-210 (U.S. June 9, 2008); *Allison Engine Co. v. U.S. ex rel Sanders*, No. 07-210 (U.S. June 9, 2008); *Exxon Shipping Co. v. Baker*, No. 07-219 (U.S. June 25, 2008).

34. **CSX Transp., Inc. v. Ga. State Bd. of Equalization*, No. 08-1034 (U.S. Dec. 4, 2007); **N.Y. State Bd. of Elections v. Torres*, No. 06-766 (U.S. Jan. 16, 2008); **Rowe v. N.H. Motor Transp. Ass’n.*, No. 06-457 (U.S. Feb. 20, 2008); **Wash. State Grange v. Wash. State Republican Party*, No. 06-1498 (U.S. Mar. 3, 2008); *MeadWestvaco Corp. v. Ill. Dep’t of Revenue*, No. 06-1413 (U.S. Apr. 15, 2008); **Crawford v. Marion County Election Bd.*, No. 07-21 (U.S. Apr. 28, 2008); **Dep’t of Revenue of Ky. v. Davis*, No. 06-666 (U.S. May 19, 2008); **Riley v. Kennedy*, 128 No. 07-77 (U.S. May 27, 2008); **Engquist v. Or. Dep’t of Ag.*, No. 07-474 (U.S. June 9, 2008); **Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, No. 07-312 (U.S. June 16, 2008); **Chamber of Commerce v. Brown*, No. 06-552 (U.S. June 19, 2008); *District of Columbia v. Heller*, No. 07-290 (U.S. June 26, 2008).

35. See *Heller*, No. 07-290 (U.S. June 26, 2008). This case was a classic pole switch, with the conservative Justices voting liberally against the state in favor of the Second Amendment’s right to bear arms—a constitutional clause that conservatives love and liberals detest.

36. See *Torres*, No. 06-766 (U.S. Jan. 16, 2008); *Wash. State Grange*, No. 06-1498 (U.S. Mar. 3, 2008); *Crawford*, No. 07-21 (U.S. Apr. 28, 2008).

reliable evidence of ideological bias on the Court³⁷ with the Court moving in a markedly liberal direction. The Court voted 10.1 points more liberally than in 2006 in the outcome of Majority cases, 8.3 points more conservatively in Split cases, and 46.4 points more liberally in Unanimous cases.³⁸

The interesting and atypical outcomes on Table 1 are evidenced by the discrepancy in our predicted and actual voting behaviors for the 2007 Term.³⁹ The voting behaviors of only two Justices (Souter and Stevens) were within ten points of their anticipated scores, with Justice Ginsburg voting within seventeen points, Justice Breyer eleven points, and Justices Thomas, Kennedy and Scalia more than twenty points. We did not anticipate scores for the Court's two newest Justices, Chief Justice Roberts and Justice Alito.⁴⁰ Although unanimous outcomes are less likely to indicate bias, these cases demonstrated significant liberal deviation from last Term's more conservative results.

Pronounced individual liberal movement by typically conservative Justices with only slight conservative movement among the more liberal Justices naturally resulted in a more liberal outcome with regard to other statistical measures. As for positioning, the Justices seemed to move toward each other. Justices Roberts (58.3), Thomas (58.3), Ginsburg (58.3), and Breyer (58.3) were most conservative; followed by Justices Scalia (50.0), Alito (50.0) and Stevens (41.7); and Kennedy (41.7) and Souter (41.7) voting most liberally. The analysis does not suggest that the Justices voted in any identifiable dyads on Table 1, which is to be expected based on the dramatic liberal trend.

37. See *2006 Study*, *infra* endnote 1, at 546 (indicating that year was the fourth in a row).

38. It should be kept in mind that there were only four unanimous cases on Data Table 1.

39. See *supra* Data Table 1.

40. For more information about the vagaries of ARIMA forecasting, see *infra* note 115.

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

The Court showed significant liberal movement across Majority, Split, and Unanimous cases; in all three categories the Court moved in a liberal direction by at least twenty-five points. However, this across-the-board movement is probably more indicative of the cases than bias.⁴² Furthermore, this year's liberal movement is tempered by the fact that, according to factor analysis, civil federal cases were not very indicative of bias.⁴³

The five most liberal Justices this Term (Kennedy, Stevens, Breyer, Ginsburg, and Souter) were the only Justices to demonstrate statistically significant changes in voting behavior and did so in a liberal direction. Only the scores of Justices Scalia, Souter, and Breyer were close to the predicted values: Justice Scalia's predicted score was within 1.2 points of his actual score, Justice Souter's predicted score was within 7.7 points of his actual scores, and Justice Breyer's predicted score was within .8 points of his actual score.

Last Term, the federal government won 76.5% of cases brought before the Court, following the general rule that the federal government wins Supreme Court cases.⁴⁴ However, despite our prediction that the federal government would win over two-thirds of cases this Term,⁴⁵ the government won only fifty percent of cases. While this voting behavior is not unprecedented,⁴⁶ it is a deviation from the trend established in the 2001–2006 Terms in which the federal government won between 75 and 81.8% of the time (2005

41. *Ali v. Fed. Bureau of Prisons*, No. 06-9130 (U.S. Oct. 29, 2007); *John R. Sand & Gravel Co. v. United States*, No. 06-1164 (U.S. Jan. 8, 2008); *Knight v. Comm'r*, No. 06-1286 (U.S. Jan. 16, 2008); **Fed. Express Corp. v. Holowecki*, No. 06-1322 (U.S. Feb. 27, 2008); *United States v. Clintwood Elkhorn Mining Co.*, No. 07-308 (U.S. Apr. 15, 2008); **Gomez-Perez v. Potter*, No. 06-1321 (U.S. May 27, 2008); **Richlin Sec. Serv. Co. v. Chertoff*, No. 06-1717 (U.S. June 2, 2008); **Taylor v. Sturgell*, No. 07-371 (U.S. June 12, 2008); **Dada v. Mukasey*, No. 06-1181 (U.S. June 16, 2008); **Davis v. FEC*, No. 07-320 (U.S. June 26, 2008).

42. See *FEC*, No. 07-320 (U.S. June 26, 2008). (In a classic pole switch, Roberts, Alito, Scalia, Thomas, and Kennedy reached a liberal outcome by declaring sections 319(a)–(b) of the Bipartisan Campaign Reform Act of 2002 unconstitutional.)

43. See *infra* Factor Analysis (Data Table 2—Civil cases involving the Federal Government as party—ranked fifth this year for reliability with a score of .295, significantly lower than fourth place Data Table 9's score of .594).

44. For a good example of this sort of case, see *Clintwood*, No. 07-308 (U.S. Apr. 15, 2008) (unanimously upholding the government's position that a citizen must file a timely administrative refund claim before bringing suit against the government).

45. See *2006 Study*, *infra* endnote 1, Table 2.

46. During the 1998–2000 Terms, the government won only about fifty percent of cases. See *1999 Study*; *2000 Study*; *2001 Study* *infra* endnote 1.

excepted). Despite this Term's low score, it is still anticipated that the federal government will win over two-thirds of the cases next Term.

*Data Table 3: Criminal Cases—State Government versus a Private Party*⁴⁷

There is clear conservative movement in Majority, Split, and Unanimous criminal-state cases. While Majority and Split cases reached similar levels in 2003 and 2005, Unanimous cases have never before reached such conservative heights, though the significance of this unprecedented level is somewhat tempered by the fact that there were only three Unanimous cases. However, because factor analysis indicates that Table 3 provides the most reliable evidence of conservative or liberal bias this Term, this across-the-board conservative trend is particularly significant.⁴⁸

All of the Justices who have been on the Court long enough for analysis to be possible, with the exception of Justice Thomas, voted more conservatively than anticipated. With the exception of Justices Thomas and Roberts, each Justice exhibited statistically significant conservative shifts in voting behavior.

The traditional conservative/liberal blocs (with the Chief Justice and Justices Alito, Scalia, and Kennedy forming the conservative five-member majority) are displayed on the Table. Justice Ginsburg occupies the most liberal position this year, a place that has been occupied by Justice Stevens for four consecutive years. Justice Alito was the most conservative Justice for the second year in a row, edging out Justices Scalia and Thomas who typically occupy this position.

47. *Allen v. Siebert*, No. 06-1680 (U.S. Nov. 5, 2007) (per curiam); **Arave v. Hoffman*, No. 07-110 (U.S. Jan. 7, 2008) (per curiam); *Wright v. Van Patten*, No. 07-212 (U.S. Jan. 7, 2008) (per curiam); *Danforth v. Minnesota*, No. 06-8273 (U.S. Feb. 20, 2008); **Snyder v. Louisiana*, No. 06-10119 (U.S. Mar. 19, 2008); *Medellin v. Texas*, No. 06-984 (U.S. Mar. 25, 2008); **Baze v. Rees*, No. 07-5439 (U.S. Apr. 16, 2008); *Virginia v. Moore*, No. 06-1082 (U.S. Apr. 23, 2008); *Indiana v. Edwards*, No. 07-208 (U.S. June 19, 2008); *Rothgery v. Gillespie County*, No. 07-440 (U.S. June 23, 2008); *Giles v. California*, No. 07-6053 (U.S. June 25, 2008); *Kennedy v. Louisiana*, No. 07-343 (U.S. June 25, 2008).

48. See *infra* Factor Analysis (Data Table 3 – Criminal cases involving a State Government as party).

*Data Table 4: Criminal Cases—Federal Government versus a Private Party*⁴⁹

After an unusual year in which the 2006 Court took only three criminal federal cases, the 2007 Court again took a significant number of federal criminal cases. More importantly, Table 4 yet again maintained its position as the third most reliable indicator of bias for the Term.

Table 4 shows significant movement for Majority, Split, and Unanimous decisions. The Majority and Split decisions moved significantly in the liberal direction while Unanimous decisions moved in a significantly conservative direction. Such movement, however, is deceptive. Not only did the 2006 Court hear only three cases in this category, but the Unanimous decisions were a null set in 2006.⁵⁰ Thus, when compared to the years immediately preceding 2006 it is apparent that the liberal movement in the Majority and Split decisions for 2007, while significant, is not as dramatic as it might first seem. The same logic applies to the conservative movement in the Unanimous decisions with the additional caveat that Unanimous cases are less indicative of bias than Split decisions.

Justices Thomas, Scalia, Kennedy, Ginsburg, and Souter were all within ten points of their anticipated voting scores. Since Justices Alito and Roberts have not yet been on the Court long enough to obtain predictions, this means that only the predictions for Justices Breyer and Stevens were outside an acceptable range. The error of the whole was close and most patterns were statistically significant.

The only significant correlated voting behavior is between Justices Souter and Ginsburg, signifying somewhat parallel voting

49. *Logan v. United States*, No. 06-6911 (U.S. Dec. 4, 2007); *Gall v. United States*, No. 06-7949 (U.S. Dec. 10, 2007); *Watson v. United States*, No. 06-571 (U.S. Dec. 10, 2007); *Kimbrough v. United States*, No. 06-6330 (U.S. Dec. 10, 2007); *Boulware v. United States*, No. 06-1509 (U.S. Mar. 3, 2008); *Burgess v. United States*, No. 06-11429 (U.S. Apr. 16, 2008); *Begay v. United States*, No. 06-11543 (U.S. Apr. 16, 2008); *Gonzalez v. United States*, No. 06-11612 (U.S. May 12, 2008); *United States v. Ressaam*, No. 07-455 (U.S. May 19, 2008); *United States v. Williams*, No. 06-694 (U.S. May 19, 2008); *United States v. Rodriguez*, No. 06-1646 (U.S. May 19, 2008); *United States v. Santos*, No. 06-1005 (U.S. June 2, 2008); *Cuellar v. United States*, No. 06-1456 (U.S. June 2, 2008); *Munaf v. Geren*, No. 06-1666 (U.S. June 12, 2008); *Irizarry v. United States*, No. 06-7517 (U.S. June 12, 2008); *Boumediene v. Bush*, No. 06-1195 (U.S. June 12, 2008); *Greenlaw v. United States*, No. 07-330 (U.S. June 23, 2008).

50. Additional deception comes from the fact that the null set for Unanimous decisions appears on the graph as a zero. A more useful conceptualization of unanimous data for 2006 would be to delete the point and imagine a dotted line (representing the null set) connecting the 2005 and 2007 Terms. Such a line would demonstrate how the movement from 2005 to 2006 and 2006 to 2007 is not as dramatic as it first appears.

behavior by the Justices which is confirmed by the fact that they voted the same way in all but one case this Term.

*Data Table 5: First Amendment Cases—Rights of Expression, Association, and Religion*⁵¹

Table 5 remains volatile and a poor indicator of bias largely because of the small number of cases on this table. This Term only five First Amendment decisions were tabulated and last year there were only four. Both doctrine and voting patterns remain chaotic with only a single case garnering a Unanimous decision.

Keeping with the theme of chaos, the stereotypical voting blocs are in disarray. Justice Scalia's score is as liberal as well as the scores of Justices Kennedy, Souter, and Ginsburg, while Justice Stevens is the only Justice with a perfect conservative score as he voted against every First Amendment claim this Term. Despite this disarray, predicted scores were fairly accurate: Justices Kennedy, Souter, and Ginsburg voted within five points of their anticipated score, while all other Justices with a sufficient voting record to make calculation possible, with the exception of Justice Stevens, voted within about fifteen points of their anticipated scores.

In addition to small sample size problems and incoherent doctrine, the specter of pole-switching votes continues to make First Amendment cases poor subjects for statistical analysis. For example in *Davis v. FEC*,⁵² the Court addressed the constitutionality of an election law which created asymmetric campaign finance restrictions that worked to the detriment of self-financing candidates. One such self-financing candidate asserted a First Amendment claim. In a classic pole-switch vote, Justices Alito, Roberts, Scalia, Kennedy, and Thomas voted in favor of the claim while Justices Stevens, Souter, Ginsburg, and Breyer voted against the claim.

*Data Table 6: Equal Protection Cases*⁵³

The Court generally decides few, if any,⁵⁴ Equal Protection cases each Term, so it is not surprising that Table 6 is one of the least

51. *N.Y. State Bd. of Elections v. Torres, No. 06-766 (U.S. Jan. 16, 2008); *Wash. State Grange v. Wash. State Republican Party, No. 06-1498 (U.S. Mar. 3, 2008); *Crawford v. Marion County Election Bd., No. 07-21 (U.S. Apr. 28, 2008); *Williams, No. 06-694 (U.S. May 19, 2008); *Davis v. FEC, No. 07-320 (U.S. June 26, 2008).

52. *FEC*, No. 07-320 (U.S. June 26, 2008).

53. *Engquist v. Or. Dep't of Agric.*, No. 07-474 (U.S. June 9, 2008).

54. *See, e.g., 2001 Study, infra* endnote 1, at 316; *see also 2003 Study, infra* endnote 1, at 28.

reliable indicators of ideological bias on the Court,⁵⁵ as well as one of the most volatile categories of cases analyzed by the Study. This Term, like the last two, the Court decided only one Equal Protection claim. But, unlike last Term, the 2007 Court ruled against the claim. In *Engquist v. Oregon Department of Agriculture*, a public employee asserted a claim under the Equal Protection Clause. Rather than alleging that her arbitrary treatment was based upon her membership in a particular class, she based her claim on a “class-of-one” theory.⁵⁶ Holding that there is a crucial difference between the government acting as a regulator and an employer, the Court refused to apply the “class-of-one” theory in the public employment context.⁵⁷

*Data Table 7: Statutory Civil Rights Claims*⁵⁸

Factor analysis indicates that Table 7 is again the least reliable indicator of bias this Term.⁵⁹ The trend in the Majority cases is liberal, up from 66.7% to 83.3% of votes going in favor of the claim. The move in Split cases is significantly liberal, shifting another thirty percentage points (the same as last Term) to eighty percent, and the Unanimous cases moved liberally from seventy-five percent to one hundred 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 should be taken with a grain of salt.

Table 7 shows the typical ideological rankings quite nicely, except for Justice Alito showing up in the most liberal four Justices. Not surprisingly, Justice Kennedy holds the middle vote with Justices Breyer, Roberts, Scalia and Thomas voting more conservatively, respectively. Justices Ginsburg and Souter had the highest voting correlation at .94; Justices Stevens and Breyer came in at .91. Our predicted voting behavior was 26.8 points off the actual score for the Court as a whole, and was fairly accurate for a number of the individual Justices; Justices Stevens, Souter, Ginsburg, and Scalia all

55. See *supra* Chart 6.

56. *Engquist*, No. 07-474 (U.S. June 9, 2008).

57. *Id.* at 1–2.

58. **Fed. Express Corp. v. Holowecki*, No. 06-1322 (U.S. Feb. 27, 2008); **Riley v. Kennedy*, 128 No. 07-77 (U.S. May 27, 2008); *CBOCS West, Inc. v. Humphries*, No. 06-1431 (U.S. May 27, 2008); **Gomez-Perez v. Potter*, No. 06-1321 (U.S. May 27, 2008); **Richlin Sec. Serv. Co. v. Chertoff*, No. 06-1717 (U.S. June 2, 2008); *Meacham v. Knolls Atomic Power Lab.*, No. 06-1505 (U.S. June 19, 2008); **Ky. Ret. Sys. v. Equal Employment Opportunity Comm’n.*, No. 06-1037 (U.S. June 19, 2008).

59. See *supra* Chart 7.

voted within ten points of our predictions. Justices Thomas, Breyer, and Kennedy voted within thirteen to twenty points of our predictions.

*Data Table 8: Cases Raising a Challenge to the Exercise of Federal Jurisdiction*⁶⁰

Showing significant liberal movement, Table 8 demonstrates continuation of the Court's long-term liberal tendency to reject challenges to federal jurisdiction. This Term, the Court voted 73.3% of the time in favor of the claim, up from 56% last Term. An examination of past Table 8 outcomes 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, 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% to 66.7% in the last decade and now have jumped to 73.3%.⁶¹ With such significant expansion of federal jurisdiction, it is no wonder the Court utilized a wide range of doctrines to delimit its power, including that of equitable discretion,⁶² and a much broader interpretation of standing.⁶³

Our voting predictions, were fairly accurate regarding Justices Scalia, Thomas, and Souter, but significantly off for Justices Stevens,

60. *Arave v. Hoffman, No. 07-110 (U.S. Jan. 7, 2008) (per curiam); Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., No. 06-43 (U.S. Jan 15, 2008); LaRue v. DeWolff, Boberg & Assocs., Inc., No. 06-856 (U.S. Feb 20, 2008); *Holowecki, No. 06-1322 (U.S. Feb. 27, 2008); Hall St. Assocs., L.L.C. v. Mattel, Inc., No. 06-989 (U.S. Mar. 25, 2008); *Gonzalez v. United States, No. 06-11612 (U.S. May 12, 2008); *Riley v. Kennedy, 128 No. 07-77 (U.S. May 27, 2008); *Munaf v. Geren, No. 06-1666 (U.S. June 12, 2008); Republic of the Phil. v. Pimentel, No. 06-1204 (U.S. June 12, 2008); *Taylor v. Sturgell, No. 07-371 (U.S. June 12, 2008); Metro. Life Ins. Co. v. Glenn, No. 06-923 (June 19, 2008); Sprint Commc'ns Co. v. APCC Servs., Inc., No. 07-552 (U.S. June 23, 2008); *Davis v. FEC, No. 07-320 (U.S. June 26, 2008). It bears noting that *Plains Commerce Bank v. Long Family Land & Cattle Co.* is a rather difficult case to categorize because it involved sovereigns on both sides and may have been a conservative vote, thus skewing the liberal trend had it been included. In this case, a 5-4 majority voted against Indian sovereignty. No. 07-411 (U.S. June 25, 2008).

61. See *supra* Data Table 8.

62. See *Stoneridge Inv. Partners*, No. 06-43 (U.S. Jan 15, 2008). Here the Court uses classic equitable considerations to conclude that there is no implied right of action and if there is, it must be provided by reversal. See *LaRue*, No. 06-856 (U.S. Feb 20, 2008). The Court here implies a right of action ostensibly on the basis of plain language, but arguably on the basis of equitable discretion as well.

63. See *Sprint Commc'ns*, No. 07-552 (U.S. June 23, 2008). The Court has never ruled that an individual could create standing by private contract. This case marks a very broad expansion of standing.

Ginsburg, Breyer, and Kennedy. For the Court as a whole, our predictions came within 12.3 points of the Court's actual voting; the Court voted more liberally, voting for the claim 73.3% of the time, up from 56% last Term.

As in the 2006 Term, Data Table 8 remains the second-least useful table at measuring ideological bias. This may be a result of more pole-switching in the area of jurisdiction. The Justices are sometimes willing to expand jurisdiction in order to favor their preferred outcomes on the merits. One example this Term was *Munaf v. Geren*,⁶⁴ a case concerning the right of habeas corpus for U.S. citizens held overseas by American forces. The Court determined that U.S. courts had jurisdiction over habeas petitions filed on behalf of such persons, a liberal move, but then declared the district courts could not enjoin the United States from transferring individuals charged with crimes in a foreign sovereign to that sovereign for criminal prosecution on that basis alone. Further, before granting a preliminary injunction to the transfer of the individual from U.S. to foreign power, the district court must first consider the merits of the petition. Thus, while the Court asserted itself in the area of jurisdiction, characteristically a liberal move, it chose to tread carefully in areas of international law, an arguably conservative move on the merits.⁶⁵ We continue to expect moderate-to-liberal outcomes on Data Table 8.

*Data Table 9: Federalism Cases*⁶⁶

Table 9 is, again, the fourth most reliable indicator of bias this Term.⁶⁷ The trend on Majority and Split cases is markedly conservative; Majority cases went from 30% to 60% and Split from

64. *Munaf*, No. 06-1666 (U.S. June 12, 2008).

65. *Id.* at 5, 9–11.

66. **CSX Transp., Inc. v. Ga. State Bd. of Equalization*, No. 08-1034 (U.S. Dec. 4, 2007); *Danforth v. Minnesota*, No. 06-8273 (U.S. Feb. 20, 2008); *Riegel v. Medtronic, Inc.*, No. 06-179 (U.S. Feb. 20, 2008); *Preston v. Ferrer*, No. 06-1463 (U.S. Jan. 14, 2008); **Rowe v. N.H. Motor Transp. Ass'n.*, No. 06-457 (U.S. Feb. 20, 2008); **Wash. State Grange v. Wash. State Republican Party*, No. 06-1498 (U.S. Mar. 3, 2008); **Snyder v. Louisiana*, No. 06-10119 (U.S. Mar. 19, 2008); **Baze v. Rees*, No. 07-5439 (U.S. Apr. 16, 2008); **Crawford v. Marion County Election Bd.*, No. 07-21 (U.S. Apr. 28, 2008); **Dep't of Revenue of Ky. v. Davis*, No. 06-666 (U.S. May 19, 2008); **Riley v. Kennedy*, 128 No. 07-77 (U.S. May 27, 2008); **Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, No. 07-312 (U.S. June 16, 2008); **Chamber of Commerce v. Brown*, No. 06-552 (U.S. June 19, 2008); **Ky. Ret. Sys. v. Equal Employment Opportunity Comm'n.*, No. 06-1037 (U.S. June 19, 2008); *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, No. 06-1457 (U.S. June 26, 2008).

67. *See infra* Part V.

37.5% to 69.2%. Both Unanimous cases came out in favor of state governments. This Term the Court favored the state considerably more than in past years in which the state typically won less than half of the time. Despite the Court's continuation of its conservative trend from last Term, with such dramatic movement, our anticipated score for the Court as a whole was about 29.3 points off.

Interestingly, Table 9 shows Justices Ginsburg and Breyer voting more frequently in favor of the state than Justice Kennedy and even Justice Alito. Justice Ginsburg tied with Justice Scalia with eight votes for the state, almost reaching Justice Thomas, the most conservative voter on Table 9, with ten votes.⁶⁸ For another Term in a row, Justice Souter is the most liberal Justice on this Table.⁶⁹

*Data Table 10: Swing-Vote Analysis: Who Votes Most Often With the Majority in Close Cases?*⁷⁰

Cases decided by a single vote (which most often involve 5–4 decisions, but also include other circumstances where a change in a single vote would alter the outcome, such as a 5–3 vote to reverse) fall into the “swing vote” category and generally provide reliable evidence of ideological trends on the Court.⁷¹ 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.⁷² With the departure of Justice O'Connor, Justice Kennedy moved squarely into the limelight. In the 2007 Term, Justice Kennedy maintained his leadership by casting 66.7% of his votes with

68. See *supra* Data Table 9.

69. *Id.*

70. *Ali v. Fed. Bureau of Prisons*, No. 06-9130 (U.S. Oct. 29, 2007); *United States v. Santos*, No. 06-1005 (U.S. June 2, 2008); *Irizarry v. United States*, No. 06-7517 (U.S. June 12, 2008); *Boumediene v. Bush*, No. 06-1195 (U.S. June 12, 2008); *Dada v. Mukasey*, No. 06-1181 (U.S. June 16, 2008); **Ky. Ret. Sys. v. Equal Employment Opportunity Comm'n.*, No. 06-1037 (U.S. June 19, 2008); *Sprint Commc'ns Co. v. APCC Servs., Inc.*, No. 07-552 (U.S. June 23, 2008); *Kennedy v. Louisiana*, No. 07-343 (U.S. June 25, 2008); *District of Columbia v. Heller*, No. 07-290 (U.S. June 26, 2008); **Davis v. FEC*, No. 07-320 (U.S. June 26, 2008).

71. See *2003 Study*, *infra* endnote 1, at 36; *2002 Study*, *infra* endnote 1, at 521.

72. See *2001 Study*, *infra* endnote 1, at 318, 326, 331; *2000 Study*, *infra* endnote 1, at 259; *1999 Study*, *infra* endnote 1, at 605; *1998 Study*, *infra* endnote 1, at 434, 489; *1997 Study*, *infra* endnote 1, at 597. *But see FEC*, No. 07-320 (U.S. June 26, 2008) (a classic First Amendment pole-switching issue—beloved by political conservatives, detested by liberals, and scorned by researchers everywhere for pole-switching's distorting effect on voting behavior patterns).

the majority in close cases—in other words, Justice Kennedy decided two out of every three split decisions during the 2007 Term.

Unlike last Term, however, Justice Kennedy was not alone in the crowning position. Justice Thomas, far from a usual leader in the category, tied Justice Kennedy this year for voting with the majority in two out of every three cases. More pertinent, though, is the effect their combined voting had on the Court's direction.

Very surprisingly, Justice Kennedy and Thomas's combined influence moved the Court in a significantly liberal direction compared to previous Terms. This Term's Swing votes were 61.5% liberal, up from 40% last Term.⁷³ Though this is a significant movement and a recent high, one should not read too much into it. The Swing Vote percentage has ranged within 10 points of 50% conservative/liberal for the last decade, with only three exceptions. And two of those times, including this time, were only 11.5 points of the 50% mark. This Study predicts that Justice Kennedy will still have considerable influence over the outcome of swing-vote cases for the foreseeable future, but as to what those outcomes will likely be is hard to say—Justice Kennedy is notoriously difficult to predict.

Another interesting aside is that though there was significant liberal movement, conservative Justices clearly continue to have more influence on the direction of the Court in closely divided cases than the liberal Justices—two of the top three Justices are largely viewed as conservative (Justice Thomas and Chief Justice Roberts) and three of the top five are so viewed (addition of Justice Scalia). Thus, though there was significant liberal movement to a recent liberal high, one can expect the category to float around the fifty percent line—again, likely subject to the voting predilections of Justice Kennedy.

V. Factor 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

73. 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.

Data Table 6, for example, tend to make up a small portion of the Court's workload each Term⁷⁴ and are consistently one of 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

.⁷⁵ 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.⁷⁶ We interpret this "Factor 1" as liberal/conservative bias simply because that is what this Study purports to measure. The categories currently load onto Factor 1 as follows:

Category	Factor 1
Criminal/State Party	-0.845
Civil/State Party	-0.78
Criminal/Federal Party	-0.652
Federalism	-0.594
Civil/Federal Party	-0.295
First Amendment	-0.257
Equal Protection	-0.149
Jurisdiction	-0.099
Statutory Civil Rights	-0.061
Variance	2.2894
% Variance	0.254

According to this ranking, Table 3 (Criminal/State Party), for the third Term in a row, is 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.

74. 2003 Study, *infra* endnote 1, at 37.

75. 2002 Study, *infra* endnote 1, at 564.

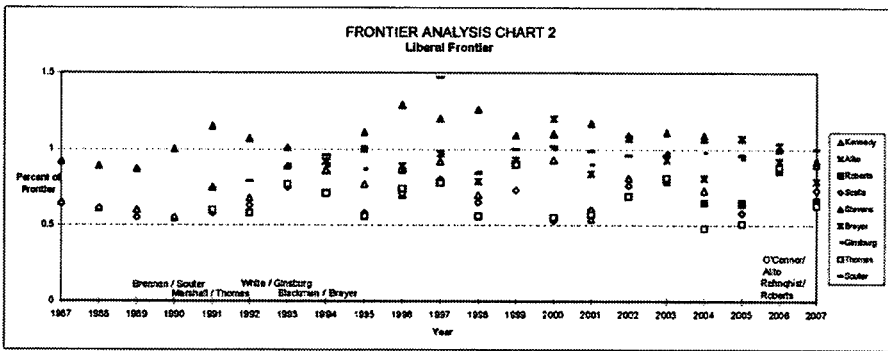
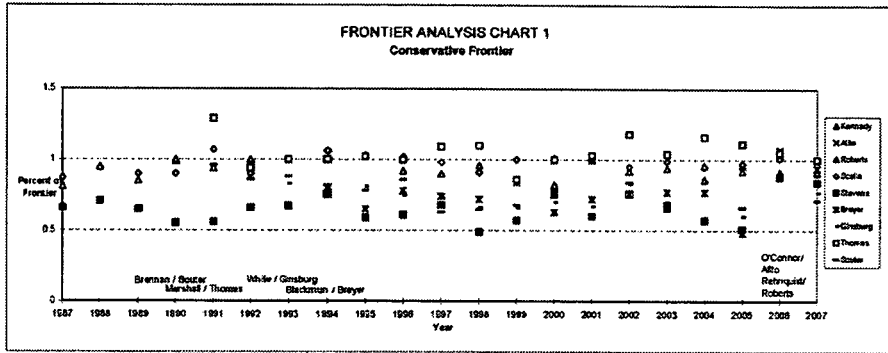
76. For more information regarding factor analysis, see Appendix B.

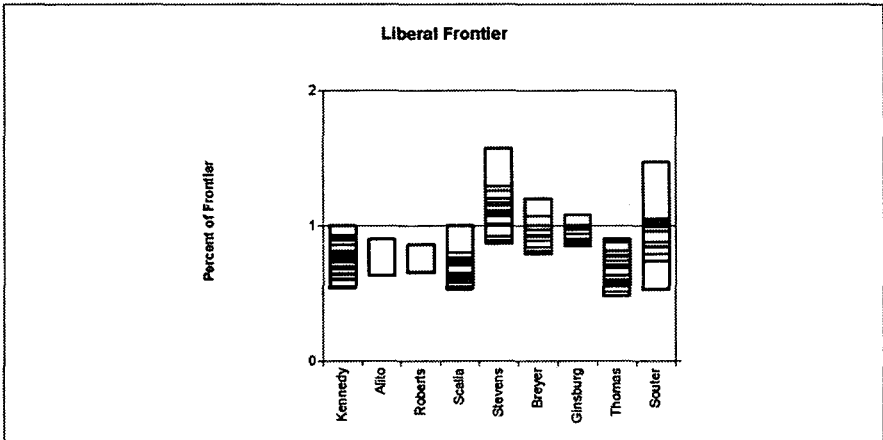
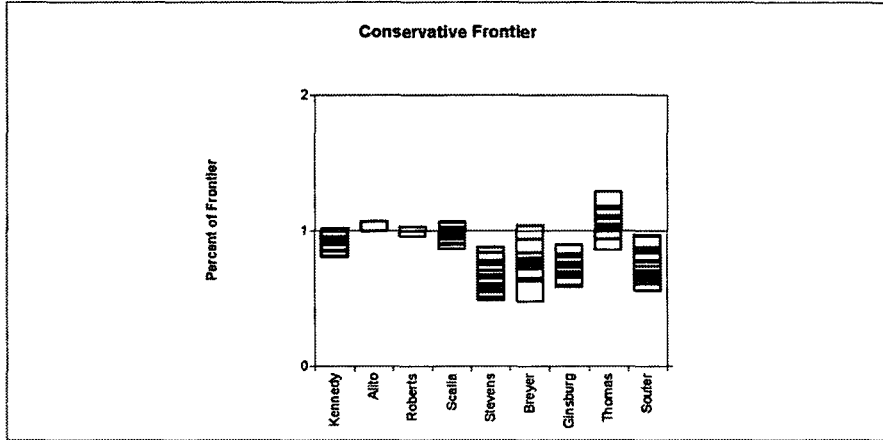
As we noted in the 2003 Study,⁷⁷ these results may seem counterintuitive to those holding a stereotypical understanding of the Court—that issues relating to the First Amendment, Statutory Civil Rights, and Equal Protection would (seemingly) provide nearly perfect opportunities for the Justices to show their ideological leanings. However, as we have discussed in three prior studies,⁷⁸ 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.⁷⁹

77. See discussion *supra* Data Table 5.

78. *Id.*

79. *Id.*





VI. Frontier Analysis

Quantifying the magnitude of a Justice's liberal or conservative tendency, or bias, and identifying trends in these tendencies over time is challenging. A variety of reasons create this challenge, such as choosing appropriate tests and assessing their validity or dealing with inconsistency in the nature of cases before the Court from Term to Term. Despite such varied parameters, one useful method to quantify, analyze, and compare the Justice's tendencies is frontier analysis.⁸⁰

Rather than focusing on the Justice's absolute scores for each category, frontier analysis focuses on their relative scores. Boundaries, or frontiers, are defined by the highest and lowest scores in each category as well as each combination of categories. Each Justice is then evaluated relative to the frontier created by this method. By adjusting the relative weights allocated to each category, the frontier can be adjusted to reflect each category's reliability (which itself was determined by the factor analysis as described in Part V, *supra*). Data for the Court is presented on both conservative and liberal frontiers as well as on both constrained and unconstrained versions of each frontier.

On Frontier Analysis Tables 1 and 2, for conservative and liberal scoring respectively, the weights applied to each category are constrained according to the factor analysis hierarchy discussion in Section V. Weights are chosen for each Justice that produces the highest possible frontier score for each table, once to appear the most conservative possible and once the most liberal. However, these weights are subject to the following limitation: Statutory Civil Rights (the least reliable category) cannot receive more weight than Jurisdiction (the second least reliable category), Jurisdiction cannot receive more weight than Equal Protection (the third least reliable category), and so on moving upward from the least reliable to the most reliable category as set out in Section V.

By contrast, no weighting constraints are applied to Frontier Analysis Tables 3 and 4. Instead, on these tables weights are chosen that present each Justice in the most conservative or liberal light possible without the constraint of category reliability.

These four Tables each lists a "% of Frontier" score for each Justice. Those Justices with a score of 100% of the frontier reach the frontier by employing the category weight distribution shown in the

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

category columns (where the number shown represents the percent weight given to that category). A score less than 100% indicates that the most conservative/liberal score the Justice could obtain with optimal weighting places him or her at the indicated percentage of the way towards the frontier. In some cases, an optimal combination of weights may place a Justice beyond the frontier. This condition is known as “superefficiency” and is noted in the “% Super Efficient” column of the charts when applicable.

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 Frontier Analysis Table 1, “Conservative Frontier—Constrained,” Justice Thomas was the most conservative Justice in 2007.⁸¹ Four Justices were able to reach the conservative frontier on this constrained Frontier Analysis Table,⁸² with three Justices reaching superefficient scores ranging from 111% (Justice Thomas) to 101% (Justice Scalia). Justice Kennedy, for the second year in a row, fell short at 91%. Justice Souter (71%) maintained his position as the least conservative Justices in the 2007 Term.⁸³

Frontier Analysis Table 2, displaying the results from a constrained calculation of the liberal frontier, shows two Justices were able to meet the frontier, both with superefficient scores: Justices Ginsburg (117%) and Souter (111%).⁸⁴ Justices Thomas and Alito tied for being the least liberal Justice (63%) of the 2007 Term.⁸⁵

The unconstrained Frontier Analysis Tables maximize the effects of pole-switching and other potentially distorting voting behaviors and, therefore, do not provide reliable evidence of conservative or

81. *See supra* Frontier Analysis Table 1.

82. *Id.*

83. *Id.*

84. *See supra* Frontier Analysis Table 2.

85. *Id.*; *compare Study 2003, infra* endnote 1, at Frontier Analysis Table 2.

liberal bias. The real importance of the unconstrained Tables lies in their illustration of the value of constrained analysis and the importance of factor analysis.⁸⁶

Unlike last Term, not every Justice was able to reach the unconstrained frontiers on Tables 3 and 4. Justice Souter stands alone in not reaching the conservative frontier while Justice Breyer, Justice Thomas, and Chief Justice Roberts were each unable to reach the liberal frontier. Last year, when every Justice was able to reach both frontiers, the Study suggested that this might indicate that the Court, as a whole, was not as divided as it had been in previous years. The scatterplot charts show that during the 2007 Term the Justices were not clustered as close together near the liberal and conservative frontiers as during the 2006 Term, but they are still clustered much more tightly than the Justices of some past Courts. This Study previously noted that this result could be an aberration, the fulfillment of Chief Justice Roberts's stated goal of acting with consensus on the Court, or the result of some other factor. As of yet it is still too soon to tell, but continued clustering in subsequent years might make the Chief Justice smile if he passes to look back over this Study.

Conclusion

The voting patterns tabulated by the 2007 Study reveal (as should be expected) a somewhat unsettled Court. The areas most indicative of bias diverged in opposite directions. Most surprising has been the voting behavior of the more liberal Justices in a more conservative bent. Justices Ginsburg and Breyer voted conservatively in civil-state cases—an area that is the second most indicative of ideological bias on the Court—an interesting result given the overall trend of Table 1 and the Court was as a whole was liberal. On Table 2, Justices Souter, Ginsburg, and Breyer voted toward the conservative side of the liberal bloc. Table 3, the most indicative of bias, there was a decidedly conservative leaning.

The ideological posture of the Court—considered as a whole—may be difficult to reckon, but appears to lean liberally. Six Tables demonstrated liberal movement (Tables 1, 2, 4, 7, 8, and 10). Interestingly, last Term, five of these tables (Tables 1, 2, 4, 8, and 10)

86. See *2003 Study*, *infra* endnote 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.”).

showed conservative movement; Tables 1 and 4 have both been highly indicative of bias last Term and this Term. It bears noting, however, that Table 3 is the most reliable indicator of bias this Term and it showed significant conservative movement. While Tables 5 and 6 show somewhat of a conservative trend, they present so little data that they are of little value in evaluating ideological trends (a conclusion which might also be applied to Table 7, which moved liberally). The Court, therefore, appears to be moving in a moderately liberal direction.

As for individual voting behavior, some of the Justices are voting somewhat uncharacteristically. For example, factor analysis highlights Tables 1 and 3, civil-state and criminal-state cases, as the most indicative of bias. Those Tables, however, shake up the classic five/four, conservative/liberal divide on the Court. Interestingly, Justices Ginsburg and Breyer cast the majority of their votes with the government on Table 1—the second most reliable indicator of bias this Term—falling in with the most conservative Justices on civil-state cases. Also, Justice Thomas joined Justice Kennedy in being the determinative vote for closely decided cases.

As we noted last Term, 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 curiam opinions are considered full opinions if they set forth reasons in a more than perfunctory manner. Cases not fitting within any of these categories are not included in the database for any of the tables. For the 2007 Term, the Supreme Court released seventy-three slip opinions. Of these, two were per curiam decisions affirmed by an equally divided

Court,⁸⁷ while six did not raise issues in any of our nine categories.⁸⁸ Thus, the universe of cases for the 2006 Term includes sixty-two cases.

2. *Cases Classified as Civil or Criminal*

The classification of cases as civil or criminal follows commonly understood definitions.⁸⁹ 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 2007 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.⁹⁰ The governmental entity might be the United States government or one of its agencies or officials⁹¹ 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.⁹² In instances of multiple parties, a civil case is excluded if

87. *Bd. of Ed. of City Sch. Dist. Of N.Y. v. Tom F.*, No. 06-637 (U.S. Oct. 10, 2007) (per curiam); *Warner-Lambert Co., L.L.C. v. Kent*, No. 06-1498 (U.S. Mar. 3, 2008) (per curiam).

88. *Sprint/United Mgmt. Co. v. Mendelsohn*, No. 06-1221 (U.S. Feb. 26, 2008); *New Jersey v. Delaware*, No. 134, Orig. (U.S. Mar. 31, 2008); *Quanta Computer, Inc. v. LG Electronics, Inc.*, No. 06-937 (U.S. June 9, 2008); *Bridge v. Phoenix Bond & Indem. Co.* No. 07-210 (U.S. June 9, 2008); *Allison Allison Engine Co., Inc. v. U.S. ex rel Sanders*, No. 07-210 (U.S. June 9, 2008); *Exxon Shipping Co. v. Baker*, No. 07-219 (U.S. June 25, 2008).

89. 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., Danforth v. Minnesota*, No. 06-8273 (U.S. Feb. 20, 2008); *Medellin v. Texas*, No. 06-984 (U.S. Mar. 25, 2008); *Munaf v. Geren*, No. 06-1666 (U.S. June 12, 2008); *Boumediene v. Bush*, No. 06-1195 (U.S. June 12, 2008). Also note that actions protesting prison conditions or treatment are classified as civil, despite involving parties incarcerated under criminal law. The *2006 Study* offers a good example of this in *Erickson v. Pardus*, No. 06-7317 (U.S. June 4, 2007) (per curiam) (regarding the proper administration of prisoner's hepatitis treatment).

90. *E.g., New Jersey*, No. 134, Orig. (U.S. Mar. 31, 2008).

91. *E.g., Gomez-Perez v. Potter*, No. 06-1321 (U.S. May 27, 2008). Potter is the Postmaster General and thus is a federal party.

92. A good example of this kind of case appeared in the *2006 Study* with *Scott v. Harris*, 550 U.S. 372 (2007) (involving Fourth Amendment issues relating to a high-speed car chase where state would likely indemnify police officer).

United States governmental entities appear on both sides of the controversy.⁹³ 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 2.⁹⁴ 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.⁹⁵

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,

93. See *2006 Study*, *Limtiaco v. Camacho*, 549 U.S. 483 (2007) (Attorney General and Governor of Guam on opposing sides); *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81 (2007). However, a case is included on 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 U.N. v. City of New York*, No. 06-134 (U.S. June 14, 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.

94. See *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, No. 06-340 (U.S. June 25, 2007). The Arizona Attorney General and the United States Solicitor General both were interested parties as attorneys of record on the same side.

95. No cases in the 2007 Term resulted in multiple votes on one table.

national origin, sex, religion, age or physical handicap.⁹⁶ 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.⁹⁷ The purpose of this exclusion is to preserve the distinction between constitutional and non-constitutional claims.

For Data Table 8, jurisdictional questions are defined to include not only jurisdiction *per se*, but also standing, mootness, ripeness, abstention, equitable discretion,⁹⁸ and justiciability. Jurisdictional questions are excluded if neither party challenges jurisdiction and no member of the Court dissents on the question, even though the Court may comment on its jurisdiction.

Federalism cases on Data Table 9 are limited to those cases in which there were issues raised by the conflicting actions of federal and state or local governments. Common examples of these issues are preemption, intergovernmental immunities, application of the Tenth and Eleventh Amendments as a limit on federal government action, and federal court interference with state court activities (other than review of state court decisions). Issues of “horizontal” federalism (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.⁹⁹

96. *Richlin Sec. Serv. Co. v. Chertoff*, No. 06-1717 (U.S. June 2, 2008). The Equal Access to Justice Act (EAJA) is considered a statutory civil right and is included in the statutory civil rights category.

97. *See, e.g., Engquist v. Or. Dep't of Agric.*, No. 07-474 (U.S. June 9, 2008). While the petitioner sued under Equal Protection, Justices Stevens, Souter, and Ginsburg dissented, declaring that Engquist's claim fell under 42 U.S.C. § 1983.

98. *E.g., Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc.*, No. 06-43 (U.S. Jan 15, 2008). Here the Court uses classic equitable considerations to conclude that there is no implied right of action and if there is, it must be provided by reversal.

99. For an example of a Dormant Commerce Clause issue that did appear on a table, see *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007). This case was included on Table 9 (Federalism) in the *2006 Study* because the Court's rejection of the Dormant Commerce Clause claim unequivocally favored state rather than federal regulatory power.

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.¹⁰⁰ Reversals by a vote of five-two are also not included, as four-three reversals, though disfavored, are valid.¹⁰¹ 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 an issue on Tables 1–9; cases that do not appear on Tables 1–9 are not counted as liberal or conservative outcomes.¹⁰²

APPENDIX B

Study Methodology

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

A. Scores

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

100. See *Stoneridge Inv. Partners*, No. 06-43 (U.S. Jan 15, 2008) (which is a 5-3 affirmance, not a reversal, and so is not included on Table 10); cf. *Bd. of Ed. of City Sch. Dist. Of N.Y. v. Tom F.*, No. 06-637 (U.S. Oct. 10, 2007) (per curiam) (affirmed by an equally divided Court of 4-4).

101. For an example of such a case, see *Hartman v. Moore*, 547 U.S. 250 (2006).

102. All cases on Table 10 appeared on at least one of Tables 1-9.

B. Predictive Modeling

Data in this project were fitted to an Auto Regressive Integrated Moving Average (“ARIMA”) forecasting model.¹⁰³ This model is useful in circumstances where, as in this Study, a single variable (a Justice’s score) is to be forecast based only on its present and prior values with no other explanatory variables. ARIMA is an acronym for Auto Regressive Integrated Moving Average. The model is most easily explained by starting in the middle of the acronym:

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

Auto-Regression: Once the series has been made stationary, an autoregressive parameter may be determined.¹⁰⁴ 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 .

103. 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).

104. 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.

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.¹⁰⁵

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

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

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

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.¹⁰⁶

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

106. In the 2006 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.

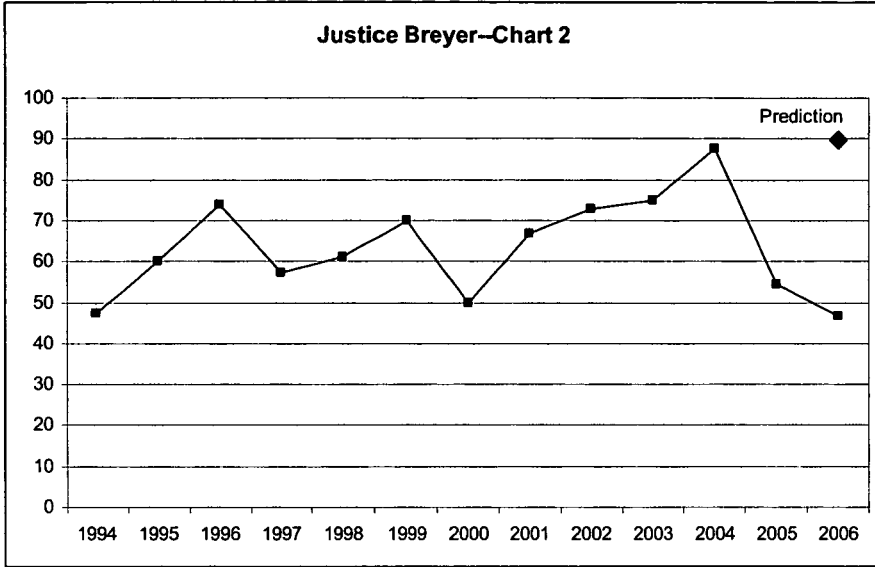


Figure xx

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.

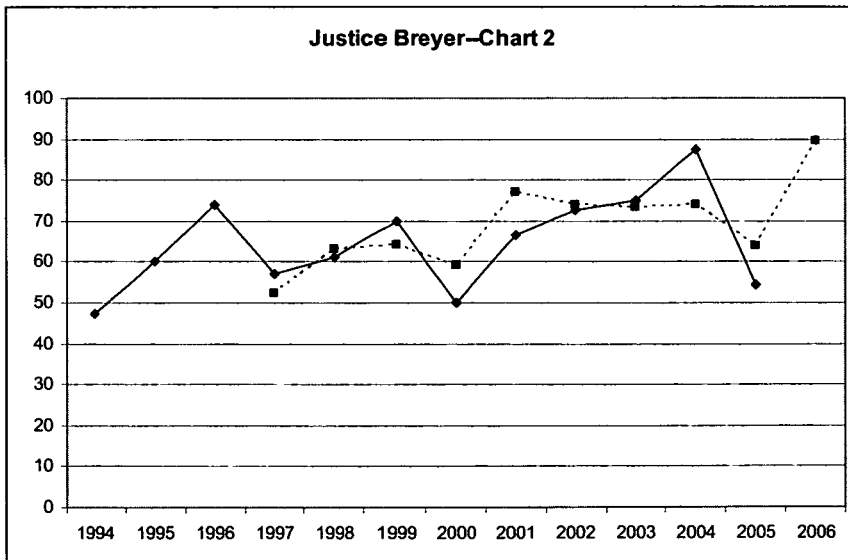


Figure xy

The dotted line in the graph shows the ARIMA estimates for each point based on best fit (least error) values for μ , ϕ , and θ (see Appendix A, Part B. *Predictive Modeling*). The model does a pretty good job of tracing the actual data—up to the 2006 estimate as shown

C. Mean Testing

We use a “student’s t test”¹⁰⁷ 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.¹⁰⁸ 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:

in the figure. 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). Indeed, the actual 2007 data displayed only a .8 difference from the prediction.

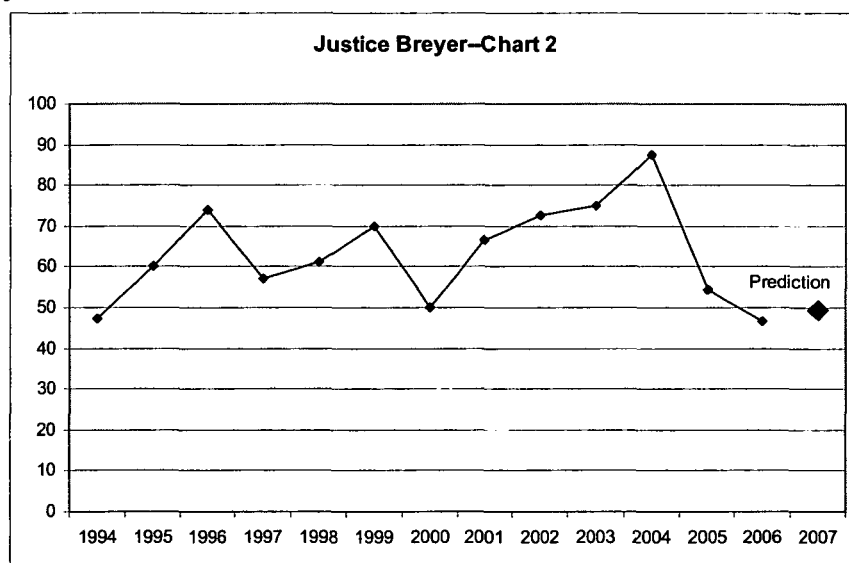


Figure xz

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

107. For a practical perspective on this procedure, see David S. Moore & George P. McCabe, Introduction to the Practice of Statistics 500–18 (1993). See also Craig and Hogg, *supra* note 33.

108. 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.

$H_0: \mu = X_1$ The "null" hypothesis, i.e., X_2 does not significantly shift μ from its previous value on the real number line. Therefore, the two samples are statistically equivalent.

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

We then set out to prove the alternative hypothesis, within a certain confidence interval,¹⁰⁹ by rejecting the null hypothesis.¹¹⁰ This is accomplished by calculating the following statistic:

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

The result of this equation (t) is compared to the entry on a t-distribution table corresponding to the confidence interval desired (.) and the appropriate number of degrees of freedom (n-k).¹¹¹ If the absolute value of t is greater than the table entry, H_0 is rejected and we say that the Justice has shown a statistically significant change in voting behavior this Term.

D. Correlation

Relationships between two Justices' voting records may be mapped over a two-dimensional Cartesian plane as in Figures 1 and 2. Figure 1 shows a high degree of positive correlation ($R^2=0.7921$) between the voting percentages of the 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

109. We have selected a confidence interval of 95%. Because this is a two-tailed test

\bar{X}_2 may shift μ in either a positive or negative direction), = .025.

110. A full description of the logic behind this seemingly convoluted procedure is beyond the scope of this article. However, its purpose is to control Type I (or alpha) error. For a complete explanation, see Moore and McCabe, *supra* note 131.

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

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 coefficient. The second number is an r^2 statistic, which is a more reliable measure of the actual level of correlation.¹¹²

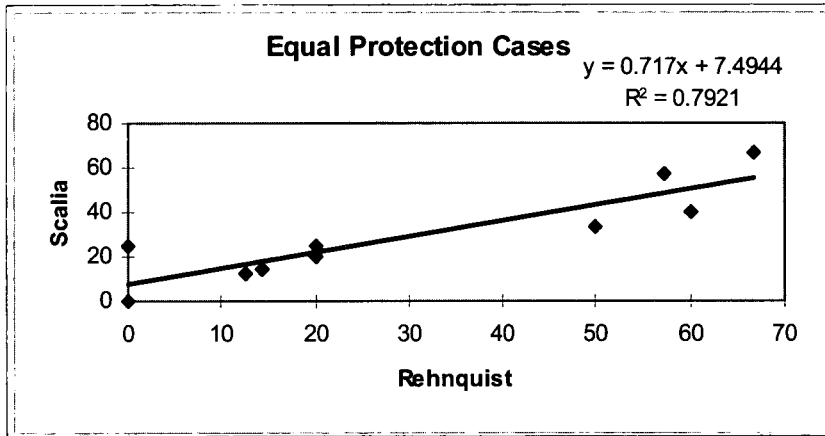


Figure 1

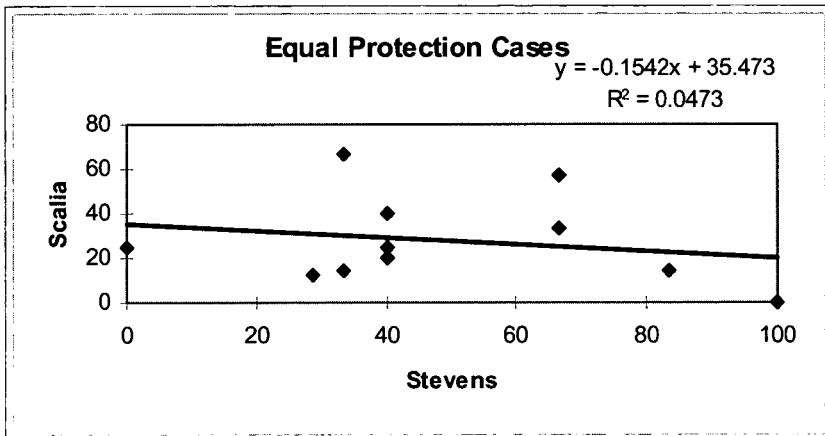


Figure 2

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

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.¹¹³

F. Frontier Analysis

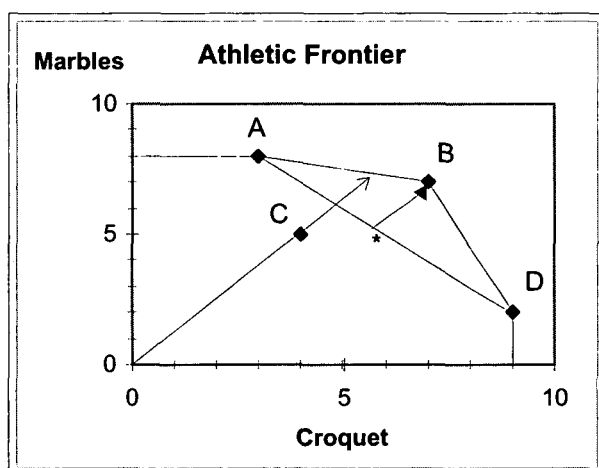
Frontier analysis can probably best be described with an example. Suppose four individuals are competing for the title of "world's greatest athlete." Their scores in two events are listed in the following table:

	<u>Croquet</u>	<u>Marbles</u>
Alan	9	2
Betty	7	7
Chuck	4	5
Debbie	3	8

Alan 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

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

each has scored highest in that category. On the other hand, Betty would argue that each sport should receive equal weight, because her combined score with equal weightings would be higher than either Alan's or Debbie's, i.e., Betty would score $(7 \times 0.5) + (7 \times 0.5) = 7$, while Alan would score $(9 \times 0.5) + (2 \times 0.5) = 5.5$, Chuck would score 4.5, and Debbie would score 5.5. The following figure plots the athlete's scores graphically:



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

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

Although the formulas and procedures involved are straightforward, a complete description of them is beyond the scope of this appendix.

ⁱ 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. 499 (2004) [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*]. Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2006 Term*, 36 HASTINGS CONST. L. Q. 51 (2008) [hereinafter *2006 Study*].