Supreme Court Voting Behavior 2004 Term

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I. Introduction

This Study, the nineteenth in a series,[1] tabulates and analyzes the voting behavior of the United States Supreme Court during the 2004 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.

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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 ten Studies, analyzing the 1993 to 2002 terms, have been published in the Hastings Constitutional Law Quarterly. *See* Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1993 Term*, 22 Hastings Const. L.Q. 269 (1995) [hereinafter *1993 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1994 Term*, 23 Hastings Const. L.Q. 1 (1995) [hereinafter *1994 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1995 Term*, 24 Hastings Const. L.Q. 1 (1996) [hereinafter *1995 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1996 Term*, 25 Hastings Const. L.Q. 35 (1997) [hereinafter *1996 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1997 Term*, 26 Hastings Const. L.Q. 533 (1999) [hereinafter 1997 Study]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1998 Term*, 27 Hastings Const. L.Q. 423 (2000) [hereinafter *1998 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1999 Term*, 28 Hastings Const. L.Q. 543 (2001) [hereinafter *1999 Study]*; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2000 Term*, 29 Hastings Const. L.Q. 247 (2002) [hereinafter 2000 Study]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2001 Term*, 30 Hastings Const. L.Q. 307 (2003) [hereinafter *2001 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2002 Term*, 31 Hastings Const. L. Q. 497 (2005) [hereinafter *2002 Study*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2003 Term*, 32 Hastings Const. L. Q. 769 (2005) [hereinafter *2003 Study*].

2. The 2004 United States Supreme Court Term covers decisions made from October 2004 through July 2005.

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 Civil Liberties Union and the Federalist Society for Law and Public Policy Studies might well disagree.

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

The 2004 Term Study is notable for two reasons: (1) it tabulates the final votes cast by two eminent Members of the United States Su-

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3. There is no single, settled definition of conservatism or liberalism. *See generally* M.A. RIFF, DICTIONARY OF MODERN POLITICAL IDEOLOGIES 67-73, 141-52 (1987) (discussing various possible interpretations of the terms). This Study's definitions, however, are close to the core ideals of each ideology. *See id.* at 67 (noting that conservatism "implies fear of sudden and violent 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.

preme Court, and (2) the tabulated data suggest the continuation (for the third year in a row) of a liberal voting trend on the United States Supreme Court.[7] The ideological posture of those who will ultimately fill the current openings on the Court for the 2005 Term will determine whether a three-year liberal trend gathers speed, slows down, or halts.

The Honorable William H. Rehnquist, Chief Justice of the United States Supreme Court, passed away on September 3, 2005,[8] and the Honorable Sandra Day O'Connor, Associate Justice of the United States Supreme Court, announced her resignation approximately two months earlier.[9] The late Chief Justice had been a consistent conservative vote on the Court.[10] Justice O'Connor, for her part, had frequently cast the decisive vote in legally, socially and politically important cases.[11] Their absence during the 2005 Term will unquestionably alter the ideological stance of the Court.

The outcomes noted by the 2004 edition of this Study, moreover, highlight how important the ideological leanings of the new Chief and Associate Justices might be. Six of the 10 Tables of this Study demonstrated liberal movement during the 2004 Term, as opposed to four Tables producing conservative movement.[12] While various interpretations of the data on the various Tables is certainly possible, it appears to us (on balance) that the 2004 Term continued the modest liberal trend in Supreme Court voting behavior that began in 2002.[13]

Liberal power (of various magnitudes of strength and reliability) is manifest on six Tables. But, while conservative voting patterns emerge on four Tables, the strength of the conservative voting power on two of those four Tables (8 and 9) is questionable, and a four-

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7. *2003 Study*, supra note 1, at 819. Note: even though Justice O'Connor did announce her retirement, she will sit during the 2005 Term at least until her replacement is confirmed.

8. The Chief Justice passed away on September 3, 2005, following nearly a year-long struggle with thyroid cancer. http://www.cnn.com/2005/LAW/09/03/rehnquist.obit (last visited 09 November 2005).

9. Justice O'Connor, the first woman to serve on the Supreme Court, announced her resignation on the final day of the 2004 Term. http://www.cnn.com/2005/LAW/07/01/resignation.supreme/ (last visited 17 September 2005).

10. *See* Constrained Conservative Frontier Chart 1.

11. *See* discussion of Table 10, Section IV, *infra*; Conclusion, *infra*.

12. Liberal movement was evidenced on Tables 2 (Federal Civil Cases), 3 (State Criminal Cases), 4 (Federal Criminal Cases), 6 (Equal Protection Claims), 7 (Statutory Civil Rights Claims) and 10 (Swing-Vote Cases), while conservative movement appeared on Tables 1 (State Civil Cases), 5 (First Amendment Claims), 8 (Challenges to Federal Jurisdiction) and 9 (Federalism Cases).

13. *See* discussion of Tables 1-10, Section IV, *infra*, and Conclusion, *infra*.

member liberal bloc managed to control the outcome of Table 7 – despite the individual conservative voting patterns of five other Justices. These statistical factors, considered together with liberal control of Swing-Vote Cases on Table 10 for the first time in six years, suggest that conservative voting power was indeed ebbing during the last year of William Rehnquist's service as Chief Justice.

If we are correct, the ideological views held by the replacements confirmed for the Chief and Associate Justices will determine the future viability of the Court's present trend. Replacement of the late Chief Justice with a jurist less consistently conservative than William H. Rehnquist, or selection of an Associate Justice even incrementally more (or less) conservative than Justice O'Connor (the Supreme Court's all-time swing-vote champion),[14] will largely determine whether the three-Term liberal trend noted by the 2004 Study continues, stops or reverses course.

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).[15] The tenth category tabulates the number of times each Justice voted with the majority in cases decided by a single, or swing, vote.

The first nine categories are designed to detect each Justice's attitude toward two broad issues underlying most Supreme Court decisions: the protection of individual rights and judicial restraint. The tabulation of votes in these nine categories reveals, in broad strokes, the frequency with which individual Justices and the Court as a whole vote to protect individual rights[16] or to exercise judicial restraint.[17]

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14. *See* Data Table 10, *infra*.

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

16. 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 as-

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

This analytical scheme is not perfect. Unanimous decisions, which constitute a significant portion of all cases decided by the Court, are included in the Study's calculations even though liberal or conservative ideology may not have influenced the outcome of such cases.[18] 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.[19] Furthermore, concern for individual rights is not always, or even necessarily, the attitudinal opposite of judicial restraint.[20]

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serting 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.

17. 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.

18. Unanimous cases may comprise a significant portion of the cases tabulated on the various tables. This Term, for example, two of four cases were decided unanimously on Table 5 and six of ten cases were decided unanimously on Table 8.

19. An example of what seems to be a fairly non-controversial case for the court was San Diego v. Roe, 125 S. Ct. 521 (2004)* (case was only eight pages long and decided by a per curiam – or unsigned – opinion).

20. For example, Justice Scalia voted against the federal government on nine of the 13 cases tabulated on Table 4 (Federal/Criminal Cases) this Term. These votes result in a surprisingly "liberal" voting record. However, Justice Scalia's "concern for individual rights" on Table 4 this year does necessarily suggest that he has abandoned any commit-

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.[21] For example, deference to legislatures frequently results in rejection of an individual's claim, especially one predicated upon the impropriety of governmental action.[22] Judicial restraint is associated with a reluctance to read new rights into the Constitution or statutes.[23] 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.[24] 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.[25]

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

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ment to "judicial restraint." Several of Justice Scalia's votes on Table 4 reflect his preference for giving statutory language its "plain" or "ordinary" meaning. *See, e.g.*, United States v. Booker, 125 S. Ct. 738, 793 (2005) (Scalia, J., dissenting in part), Johnson v. United States, 125 S. Ct. 1571, 1583 (2005)¥ (Kennedy, J., dissenting, joined by Scalia), Pasquantino v. United States, 125 S. Ct. 1766, 1781, 1786-88 (2005) (Ginsburg, J., dissenting joined by Scalia). 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, above (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").

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

22. *See, e.g.*, Johanns v. Livestock Marketing Assn., 125 S. Ct. 2055 (2005)* (holding that the Secretary of Agriculture's promotion of beef under the Beef Promotion and Research Act of 1985 is not subject to a compelled-subsidy challenge from ranchers).

23. *See id.*

24. *See, e.g.*, San Remo Hotel, L.P. v. City and County of San Francisco, 125 S. Ct. 2491, 2500 (2005)* (declining to create an exception to the full faith and credit statute (28 U.S.C. § 1738) for claims brought under the takings clause of the Fifth Amendment in order to assure an eventual federal forum for takings claims that must first be presented to state courts).

25. 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. For example, *see* Pasquantino v. United States, 125 S. Ct. at 1781, 1786-87 (Ginsburg, J., dissenting, joined by Scalia, J.) (voting against the government on the ground that Congress did not plainly include in a criminal statute an exception to the rule that the United States does not enforce another nation's tax laws). In this case, Justice Scalia – along with Justice Ginsburg – racks up a "liberal" vote, even though some might assert that Justice Scalia's vote reflects a "conservative" value. *See supra* note 20.

1986–2003 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 2004 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.[26]

The Study also calculates an anticipated 2005 Term voting score for each Justice on each Table. This statistic is calculated with an Auto Regressive Integrated Moving Average (ARIMA) forecasting model.[27] The ARIMA model is useful in situations where, as in this Study, a single variable (a Justice's voting score) is forecast based only on its present and prior values with no other explanatory variables.

In order to determine which categories best reveal the conservative and liberal leanings of the Court, we apply factor analysis. 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.[28] The results of the factor analysis for the 2004 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.[29]

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

26. *See infra* Appendix B.

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

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

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

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.[30]

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 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 2004 Term

The outcomes tabulated on six of ten Tables in 2004, considered as a whole, manifest overall liberal movement. The Study this Term, accordingly, documents continuation of a modest liberal trend that began two Terms ago.[31]

Liberal movement is noted on Tables 2, 3, 4, 6, 7 and 10. Factor analysis indicates that Table 3 provides the most reliable evidence of ideological bias this Term, while Table 4 is the fourth most reliable.[32] Table 6, involving Equal Protection Claims, does not provide compelling evidence of liberal movement, inasmuch as the Table has a historically small sample base and the voting behaviors of the Justices (and the Court) have been rather volatile over time.[33] The reliability of Table 7 may be questioned for similar reasons. This Term, however, Table 7 tabulates results from six cases involving Statutory Civil Rights Claims, a fairly large sample (at least as the words "fairly large

30. *See supra* note 6.

31. *2003 Study*, *supra* note 1, at 819.

32. *See* Factor Analysis, Section V, *infra*.

33. *See* discussion of Table 6, Section IV, *infra*. *See, e.g.*, *2002 Study* at 509-10; *2001 Study* at 326; *2000 Study* at 257-58; *1999 Study* at 552.

sample" are understood within the constraints of this Study). Furthermore, the outcome in 2004 reflects a liberal high-water mark for the Court on Table 7; an outcome achieved by a stable four-member liberal voting bloc that prevailed in spite of five Justices who tallied significantly more conservative individual voting patterns. The votes cast by the four-member liberal bloc, in short, demonstrated solidarity, while the votes cast by the generally conservative Justices evidenced fragmentation.

Four Tables demonstrate conservative movement, Tables 1, 5, 8 and 9. Table 1 – which reflects rather significant conservative movement in the outcome of State Civil Cases – is the second most reliable indicator of ideological bias according to factor analysis, while the somewhat more ambiguous conservative movement on Table 9 is ranked as the fourth most reliable indicator of bias.[34] On balance, however, the liberal movement on Tables 2, 3, 4, 6, 7 and 10 seems more noteworthy than the conservative movement on the remaining four Tables.

The seemingly dramatic conservative movement on Table 1 merely brings the outcomes on that Table (involving State Civil Cases) in line with historical outcomes on Table 2 (Federal Civil Cases).[35] This conservative movement, therefore, may simply indicate that state officials are becoming (or were) more adept in presenting their cases before the Court in 2004.[36] The conservative movement on Table 5 (as with the liberal movement on Table 6) has dubious validity for several reasons, including small sample size and unusually volatile voting behavior by individual Justices on First Amendment Claims during several recent Terms.[37] The outcomes charted on Table 8, which tabulates results in cases raising challenges to federal jurisdiction, remain rather liberal notwithstanding the Table's slight conservative movement in 2004. The outcomes on Table 9, finally, while conservative within the terms of this Study, do not suggest that the Court tends to favor assertions of state over federal regulatory power; on the contrary, the results of Table 9 can be read to support

34. *Id.*

35. *See* discussion of Table 2 in Section IV, *infra*.

36. *Id.*

37. Factor analysis does not suggest that Table 5 is a highly reliable indicator of ideological bias. *See* Factor Analysis, Section V, *infra*. Table 5 also reflects relatively few decisions, which – in recent years – may have been affected by significant "pole switching" behavior. *See, e.g.*, *infra* at 32-33; *See also 2003 Study*, *supra* note 1, at 814, *2000 Study*, *supra* note 1, at 322; *1996 Study*, *supra* note 1, at 91.

precisely the contrary conclusion.[38]

Considered together, the data this Term appears to suggest ongoing consolidation (and strengthening) of liberal voting power. Continuation of this trend will depend upon the ideological positions of the jurists who replace William H. Rehnquist and the retired Sandra Day O'Connor.

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

In 2004 the Court dramatically reversed the liberal trend of the past two Terms, with a strong conservative movement. The voting pattern of every Justice was statistically significant and each Member of the Court voted more conservatively than last year. In fact, there are only four instances since the 1988 Term that *any* Justice has voted more conservatively on Table 1 than in 2004. The Court as a whole, moreover, moved conservatively in the outcome of Majority, Split and Unanimous cases. Such unusual voting behaviors may result from the facts or procedural posture of particular cases, which encourage "liberal Justices" to take "conservative" positions – and vice versa (sometimes denominated in this Study as "pole switching"). While at least one case on Table 1 may evidence pole switching,[39] the overall movement on Table 1 is so significant that this phenomenon does not appear to provide anything close to an adequate explanation. The Court, it seems, was markedly more conservative in 2004 in cases involving state government.

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

The Court registered slight liberal movement on Table 2, Federal Civil Cases. The individual rankings of the Justices were somewhat interesting, with Justice Breyer as the conservative leader and Justice Souter the liberal standard bearer. Justice Breyer has held (or shared) the "conservative top" several times before (in 1999 and 1996), but Justice Souter has not been the most liberal Justice on Table 2 at any time during the past decade. The actual voting behavior of every Justice was rather close to that anticipated in the 2003 Study; all of the Justices' scores were anticipated within ten points and three Justices (Chief Justice Rehnquist and Justices Stevens and O'Connor) voted within five points of their anticipated behavior. The import of the liberal movement on Table 2 is lessened by the fact that even the

38. *See discussion* of Table 9 in Section IV, *infra.*

39. *See, e.g.*, Kelo v. New London, 125 S. Ct. 2655 (2005) (discussed *infra* in Section IV, Table 1).

most liberal member of the Court (Justice Souter) voted with the federal government 50% of the time.

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

Factor analysis indicates that Table 3 provides the most reliable evidence of conservative or liberal bias on the Court this Term, and the movement (considered as a whole) is liberal. Majority, Split, and Unanimous decisions all showed liberal movement from the prior Term. The anticipated voting behavior on Table 3 this Term was also rather accurate. Justice Thomas again led the conservative bloc, with Justices Souter and Stevens tied in the most liberal positions on the Table. Some things to note on Table 3 are: (1) the late Chief Justice "took no part in the decision" of six questions tabulated on the Table, and (2) what might be called "the Justice O'Connor factor." The substantial liberal movement on the Court may well be related to Justice O'Connor's individual voting behavior.[40] As with Table 2, and despite the liberal movement in 2004, the Court has retained a generally conservative stance in State Criminal Cases: half of all cases on Table 3 were decided in favor of the state governments.

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

This Table evidenced liberal movement for the Court as a whole, with interesting individual and group voting behaviors. Justices Thomas and Scalia both made rather significant liberal gains – perhaps explained by their adherence to "conservative" canons of strict judicial construction of criminal statutes. Seven of the nine Justices also evidenced statistically significant movements in their voting behavior on Table 4 (as compared with past Terms). Chief Justice Rehnquist, in his last Term of service on the Court, maintained his position as the most conservative Justice in Federal Criminal Cases, while Justices Stevens, Souter and Ginsburg tied for the most liberal Members of the Court, favoring the federal government with only 15.4% of their votes.

The Court continued the erratic behavior that has dominated the outcome of cases on Table 4 since the 1999 Term. Majority, Split and Unanimous issues were all decided more liberally this Term, which moved the Court substantially away from last Term's more conservative posture. The tabulations shown on Table 4 over the past five Terms reveal continuing unsteadiness in the Court's resolution of federal criminal cases.

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40. *See* discussion of Table 3, Section IV, *infra*.

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

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

Perhaps the most notable observation on Table 5 involves the voting behavior of Justice Thomas. In 2004, Justice Thomas holds the position as the most conservative Justice on First Amendment issues. Last Term's Study noted his receptiveness to such claims; in 2004 he failed to vote for a First Amendment claim even once. Justices Scalia and Thomas also demonstrate rather highly correlated voting patterns Table 5 this Term.

Data Table 6: Equal Protection Claims

The Court only decided four equal protection claims this Term, but a low number of cases on Table 6 is not unusual.[41] Three of those four cases were decided in favor of the claim.[42] Although this is a rather striking liberal outcome, its significance should not be overstated: because of the small universe of cases, Table 6 is (again) the least reliable indicator of ideological bias.[43] In contrast to last Term,[44] the voting blocs on Table 6 in 2004 were less fractured.[45]

Data Table 7: Statutory Civil Rights Claims

The Court on Table 7 set a liberal high-water mark for this Study, with the Court voting in favor of 83.3% of Statutory Civil Rights Claims – topping last year's previous high of 66.7%.[46] Table 7

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41. In the previous three Terms there have been only 5 Equal Protection cases. See *2003 Study*, *supra* note 1, at 779 (one case); *2002 Study*, *supra* note 1, at 507 (four cases); *2001 Study*, *supra* note 1, at 316 (no cases).

42. Miller-El v. Dretke, 125 S. Ct. 2317 (2005),* Johnson v. California (57), 125 S. Ct. 2410 (2005),* Halbert v. Michigan, 125 S. Ct. 2582 (2005).*

43. See *infra* Section V.

44. *See 2003 Study*, *supra* note 1, at 779 n.42.

45. For example, in Johnson v. California(57), 125 S. Ct. at 2412 (2005), the voting coalitions were well-defined: Stevens, J., delivered the opinion of the Court, in which Rehnquist, C. J., and O'Connor, Scalia, Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. Breyer, J., filed a concurring opinion. Thomas, J., filed a dissenting opinion.

46. *See infra* Data Table 7.

has tabulated the results of six or fewer cases since the 2002 Term.[47] Accordingly, small sample size limits the inferences that may be drawn from the data. Nevertheless, in 2004 the only case decided *against* the claim was a unanimous opinion (where the outcome may be less influenced by ideology than in split decisions).[48] Accordingly, Table 7 in 2004 may indicate greater liberal movement with regard to statutory civil rights claims than for any Term during the past ten years.

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

Federal jurisdiction cases show slight conservative movement in 2004, down nearly three points in the outcome of Majority opinions and 3.9 points in the outcome of Split decisions. Unanimous decisions are down a more substantial 13.3 points.[49] Despite this conservative movement, however, neither the Justices nor the Court (considered as a whole) are markedly more conservative on jurisdictional issues than in the past.

Six of the nine Justices voted more liberally this Term than last, with the voting behavior of four (Chief Justice Rehnquist and Justices Souter, Kennedy and Scalia) departing in a statistically significant manner from their past behaviors on Table 8.[50] Moreover, every member of the Court voted liberally on Table 8 at least 50% of the time, including Justice Thomas (who was the only member of the Court who did not do so last Term).[51]

Data Table 9: Federalism Cases

The liberal trend that began in federalism cases in 2002 stalled this Term, except in the outcome of Unanimous Cases. The Court decided the outcome of Majority Cases about eight points more conservatively than last Term and 21.4 points more conservatively in Split Cases.[52] The outcome in Unanimous Cases, by contrast, moved in a liberal direction, with the Court voting for the State in only 40% of the cases, down 10 points from last Term.[53]

According to factor analysis, Table 9 is the third most reliable in-

47. Numbers the past three years: 2004:6; 2003:5; 2002:5.
48. Rancho Palos Verdes v. Abrams, 125 S. Ct. 1453 (2005).*
49. *See infra* Data Table 8.
50. *Id.*; See also *infra* Mean Table 8.
51. *See infra* Data Table 8.
52. *See infra* Data Table 9.
53. *Id.*

dicator of ideological bias this Term. If so, there may not be a strong wellspring of conservative power in federalism cases in the near future, especially with the retirement of Justice O'Connor and death of Chief Justice Rehnquist. Despite Justice O'Connor's rather consistent role as a swing voter,[54] both the late Chief Justice and Justice O'Connor tended to favor the states in federalism cases.[55] The views of their successors could significantly alter the outcomes tabulated on Table 9.

Data Table 10: Swing-Vote Cases

Table 10 charts two "firsts": (1) a three-way tie for the "top swing voter" and (2) *every* member of the Court voted with the majority at least half the time. Justices O'Connor, Kennedy and Souter cast the deciding vote in 61.9% of cases decided by one vote. Somewhat surprisingly, every member of the Court joined the controlling swing vote bloc at least half the time: Justices Stevens and Breyer joined 57.1% of these cases; Justices Scalia, Thomas and Ginsburg joined 52.4%; and the late Chief Justice joined 50%—becoming in 2004 the least influential Member of the Court in closely divided cases.[56] But the Chief Justice's voting record is remarkable for more than the fact that he landed at the "bottom" of Table 10: this is the *only* time in the past decade that the "least influential Justice" has nevertheless joined 50% of the controlling swing-vote opinions.[57]

The Court took a liberal turn in the outcome of Swing Vote Cases, with liberal coalitions controlling the outcome of 52.4% of closely divided cases – the first time liberal coalitions have governed these cases since 1998.[58] The anticipated voting behaviors of the individual Justices were fairly accurate, with seven voting within 10 points of their projected scores.[59] In voting movements that perhaps reflect the liberal orientation on Table 10 this Term, Justice O'Connor voted 19.4 points less often – while Justice Stevens voted 18 points more often – with the swing-vote majority than last Term's Study anticipated.

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54. Justice O'Connor has ranked as either the first or second most influential swing voter on the Court every Term but one (1997) since 1995. *See* Data Table 10.

55. *See, e.g.*, Justice O'Connor's dissenting opinion in Gonzales v. Raich, 125 S. Ct. 2195, 2220 (2005) this Term. In addition, review of Table 9 demonstrate that the Chief Justice and Justice O'Connor were, more often than not, tabulating conservative outcomes Term to Term on federalism issues.

56. *See infra* Data Table 10.

57. *Id.*

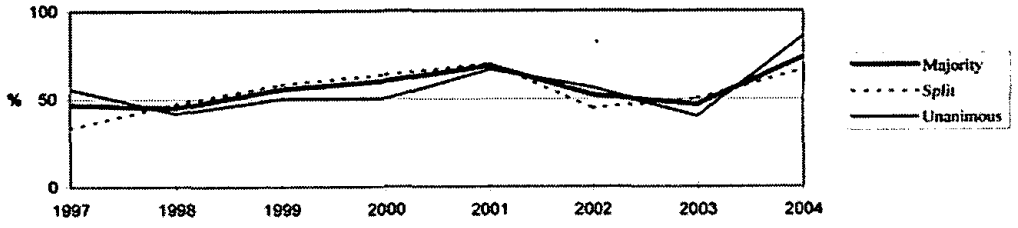
58. *Id.*

59. *Id.*

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

Justice	% Votes for Government									X2	2004 Term Votes		Anticipated Scores		
	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	For Gov't	Against Gov't	2004 Term	Error	2005 Term
Thomas	67.4	77.4	60.0	65.5	50.0	60.0	75.0	60.0	53.3	89.5	17	2	59.6	29.9	59.7
Kennedy	41.2	71.9	53.3	51.7	44.4	53.3	68.8	36.0	57.1	84.2	16	3	49.8	34.4	62.0
Rehnquist	43.8	84.9	60.0	65.5	66.7	60.0	75.0	40.0	53.3	82.4	14	3	56.5	25.9	54.2
Scalia	52.9	77.4	60.0	55.2	50.0	60.0	62.5	48.0	53.9	78.9	15	4	54.4	24.5	56.0
Breyer	29.4	54.6	46.7	44.8	52.9	35.7	50.0	48.0	35.7	73.7	14	5	45.7	28.0	23.4
O'Connor	47.1	68.8	53.3	55.2	55.6	53.3	53.3	44.0	40.0	68.4	13	6	40.4	28.0	53.3
Souter	29.4	54.6	46.7	37.9	50.0	53.9	43.8	52.0	42.9	63.2	12	7	45.7	17.5	45.3
Ginsburg	35.3	53.1	46.7	31.0	44.4	46.2	50.0	56.0	35.7	57.9	11	8	55.9	2.0	42.0
Stevens	23.5	48.5	37.5	17.2	41.2	40.0	37.5	54.2	28.6	52.6	10	9	41.1	11.5	29.4
Majority	52.9	72.7	46.7	44.8	55.6	60.0	68.8	52.0	46.7	73.7	14	5	50.5	23.2	59.4
Split	72.7	69.2	33.3	47.1	58.3	63.6	70.0	44.4	50.0	66.7	8	4			
Unanimous	16.7	75.0	55.6	41.7	50.0	50.0	66.7	56.3	40.0	85.7	6	1			

Chart 1
Civil Cases: State Government Versus a Private Party



Mean Table 1
Civil Cases: State Government Versus a Private Party

Justice	Mean Voting Percentage All Prior Terms (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	64.6	+/- 7.3	11.95	82.35	yes
Stevens	36.3	+/- 5.5	9.09	52.63	yes
O'Connor	53.3	+/- 5.6	9.29	68.42	yes
Scalia	57.8	+/- 5.0	8.24	78.95	yes
Kennedy	52.2	+/- 7.5	11.94	84.21	yes
Souter	46.0	+/- 6.4	9.23	63.16	yes
Thomas	60.2	+/- 7.9	11.03	89.47	yes
Ginsburg	44.5	+/- 6.2	7.94	57.89	yes
Breyer	44.0	+/- 6.7	8.20	73.68	yes

Regression Table 1
Civil Cases: State Government Versus a Private Party
Correlation (ρ) / R^2

Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
O'Connor	0.73/0.50							
Scalia	0.74/0.52		0.70/0.46					
Kennedy	0.76/0.56		0.79/0.60	0.79/0.60				
Souter								
Thomas				0.86/0.72	0.74/0.52			
Ginsburg		0.96/0.92						
Breyer	0.71/0.45		0.73/0.48			0.74/0.49		

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

Justice	% Votes for Government									X2	2004 Term Votes		Anticipated Scores		
	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	For Gov't	Against Gov't	2004 Term	Error	2005 Term
Breyer	60.0	73.9	57.1	61.1	70.0	50.0	66.7	72.7	75.0	87.5	7	1	79.8	7.7	83.5
Thomas	65.0	40.9	33.3	55.6	40.0	52.9	45.8	63.6	75.0	75.0	6	2	70.9	4.1	72.7
Ginsburg	85.0	65.2	40.9	68.4	50.0	52.9	66.7	72.7	66.7	75.0	6	2	66.1	8.9	71.6
Rehnquist	75.0	69.6	38.1	50.0	70.0	58.8	70.8	90.9	79.2	71.4	5	2	70.9	0.5	68.9
Stevens	63.2	65.2	55.0	68.4	50.0	64.3	62.5	50.0	69.6	62.5	5	3	61.7	0.8	67.5
O'Connor	62.5	59.1	61.9	73.3	60.0	50.0	61.9	54.6	83.3	62.5	5	3	57.9	4.6	61.5
Scalia	60.0	45.5	52.4	61.1	60.0	56.3	56.5	63.6	73.9	62.5	5	3	65.9	-3.4	59.6
Kennedy	80.0	63.6	45.5	50.0	50.0	47.1	62.5	90.9	75.0	62.5	5	3	69.4	-6.9	65.0
Souter	75.0	69.6	47.6	66.7	50.0	52.9	50.0	63.6	75.0	50.0	4	4	54.6	-4.6	60.0
Majority	75.0	69.6	36.4	61.1	50.0	47.1	75.0	81.8	79.2	75.0	6	2	70.8	4.2	72.3
Split	63.6	69.2	26.7	50.0	33.3	44.4	69.2	100.0	66.7	60.0	3	2			
Unanimous	88.9	70.0	57.1	75.0	75.0	50.0	81.8	77.8	91.7	100.0	3	0			

Chart 2
Civil Cases: Federal Government Versus a Private Party

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

Justice	Mean Voting Percentage All Prior Terms (μ)	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?
Rehnquist	68.4	+/- 8.1	13.42	71.43	no
Stevens	56.9	+/- 6.5	10.69	62.50	yes
O'Connor	61.0	+/- 7.3	12.03	62.50	no
Scalia	60.4	+/- 5.9	9.68	62.50	no
Kennedy	61.9	+/- 8.2	13.13	62.50	no
Souter	61.9	+/- 8.1	11.75	50.00	yes
Thomas	52.2	+/- 8.7	12.18	75.00	yes
Ginsburg	61.8	+/- 9.5	12.28	75.00	yes
Breyer	63.4	+/- 8.0	9.88	87.50	yes

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

Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
O'Connor								
Scalia								
Kennedy	0.82/0.65							
Souter								
Thomas				0.71/0.46				
Ginsburg					0.77/0.55		0.75/0.52	
Breyer								

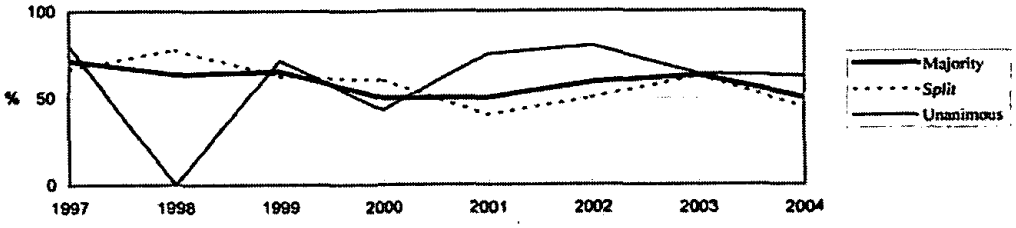
Data Table 3

Criminal Cases: State Government Versus a Private Party

Justice	% Votes for Government									X2	2004 Term Votes		Anticipated Scores		
	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	For Gov't	Against Gov't	2004 Term	Error	2005 Term
Thomas	66.7	63.6	92.3	80.0	82.6	66.7	84.6	94.1	80.0	80.8	21	5	83.5	-2.7	79.3
Scalia	55.6	63.6	84.6	72.7	82.6	66.7	84.6	82.4	76.9	76.9	20	6	83.7	-6.8	77.0
Rehnquist	66.7	63.6	76.9	72.7	87.0	58.3	84.6	82.4	76.9	65.0	13	7	75.0	-10.0	75.0
Kennedy	55.6	54.6	76.9	54.6	78.3	50.0	76.9	64.7	64.0	61.5	16	10	64.7	-3.2	63.9
O'Connor	44.4	63.6	71.4	63.6	78.3	50.0	46.2	62.5	69.2	53.8	14	12	62.3	-8.5	58.2
Breyer	22.2	36.4	50.0	36.4	40.9	25.0	30.8	29.4	44.0	46.2	12	14	30.8	15.4	41.1
Ginsburg	33.3	45.5	42.9	27.3	36.4	25.0	23.1	23.5	36.0	34.6	9	17	22.6	12.0	27.9
Stevens	22.2	18.2	23.1	9.1	27.3	33.3	15.4	29.4	32.0	23.1	6	20	25.4	-2.3	25.9
Souter	22.2	54.6	57.1	36.4	27.3	33.3	23.1	35.3	40.0	23.1	6	20	34.9	-11.8	25.3
Majority	55.6	63.6	71.4	63.6	65.2	50.0	50.0	58.8	63.0	50.0	13	13	59.8	-9.8	62.3
Split	75.0	100.0	66.7	77.8	62.5	60.0	40.0	50.0	62.5	44.4	8	10			
Unanimous	40.0	33.3	80.0	0.0	71.4	42.9	75.0	80.0	63.6	62.5	5	3			

Chart 3

Criminal Cases: State Government Versus a Private Party



Mean Table 3

Criminal Cases: State Government Versus a Private Party

Justice	Mean Voting Percentage All Prior Terms (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	78.5	+/- 5.9	9.68	65.00	yes
Stevens	22.4	+/- 5.8	9.62	23.08	no
O'Connor	63.0	+/- 7.6	12.54	53.85	yes
Scalia	75.2	+/- 6.5	10.70	76.92	no
Kennedy	65.3	+/- 7.2	11.50	61.54	no
Souter	41.0	+/- 10.1	14.71	23.08	yes
Thomas	80.8	+/- 7.3	10.18	80.77	no
Ginsburg	34.4	+/- 6.6	8.53	34.62	no
Breyer	35.7	+/- 7.2	8.80	46.15	yes

Regression Table 3

Criminal Cases: State Government Versus a Private Party

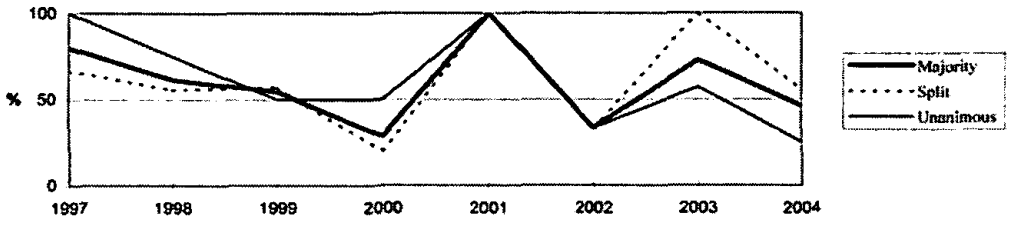
Correlation (ρ) / R^2

Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
O'Connor								
Scalia								
Kennedy	0.73/0.51							
Souter								
Thomas	0.79/0.59			0.88/0.75				
Ginsburg								
Breyer								

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

Justice	% Votes for Government										X2	2004 Term Votes		Anticipated Scores		
	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	For Gov't	Against Gov't	2004 Term	Error	2005 Term
Rehnquist	71.4	84.6	70.0	76.9	63.5	57.1	100.0	66.7	80.0	72.7	8	3	65.6	7.1	72.7
O'Connor	71.4	92.3	80.0	84.6	54.6	57.1	100.0	40.0	72.7	61.5	8	5	63.9	-2.4	71.4
Kennedy	71.4	84.6	90.0	76.9	54.6	28.6	100.0	50.0	72.7	61.5	8	5	60.9	0.6	73.1
Thomas	71.4	84.6	90.0	61.5	54.6	85.7	87.5	66.7	80.0	53.8	7	6	74.8	-21.0	76.9
Breyer	71.4	69.2	70.0	53.9	45.5	28.6	100.0	33.3	54.6	38.5	5	8	39.0	-0.5	48.4
Scalia	78.6	92.3	70.0	46.2	63.6	85.7	100.0	60.0	70.0	30.8	4	9	74.3	-43.5	65.7
Stevens	50.0	53.9	55.6	38.5	36.4	14.3	62.5	0.0	45.5	15.4	2	11	19.5	-4.1	37.0
Souter	78.6	84.6	70.0	46.2	36.4	16.7	75.0	33.3	36.4	15.4	2	11	32.8	-17.4	26.3
Ginsburg	71.4	76.9	60.0	53.9	36.4	28.6	75.0	33.3	54.6	15.4	2	11	32.0	-16.6	45.5
Majority	78.6	84.6	80.0	61.5	54.5	28.6	100.0	33.3	72.7	46.2	6	7	55.5	-9.3	72.0
Split	85.7	75.0	66.7	55.6	57.1	20.0	100.0	33.3	100.0	55.6	5	4			
Unanimous	71.4	100.0	100.0	75.0	50.0	50.0	100.0	33.3	57.1	25.0	1	3			

Chart 4
Criminal Cases: Federal Government Versus a Private Party



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

Justice	Mean Voting Percentage All Prior Terms (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	76.9	+/- 6.2	10.16	72.73	no
Stevens	42.6	+/- 10.8	17.72	15.38	yes
O'Connor	74.2	+/- 8.5	13.99	61.54	yes
Scalia	68.6	+/- 9.0	14.79	30.77	yes
Kennedy	69.3	+/- 11.1	17.83	61.54	no
Souter	56.1	+/- 14.2	20.64	15.38	yes
Thomas	74.4	+/- 9.5	13.25	53.85	yes
Ginsburg	55.4	+/- 12.9	16.56	15.38	yes
Breyer	59.6	+/- 17.1	21.02	38.46	yes

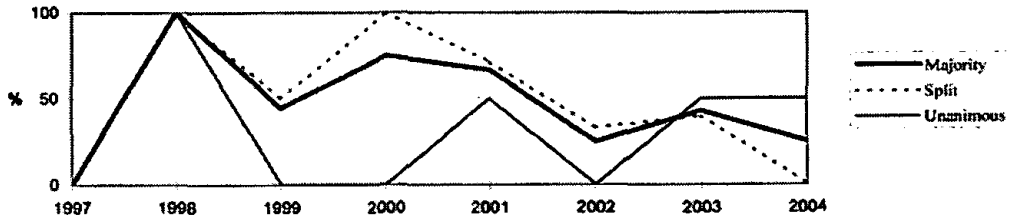
Regression Table 4
Criminal Cases: Federal Government Versus a Private Party
Correlation (ρ) / R^2

Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
O'Connor	0.75/0.53							
Scalia								
Kennedy	0.76/0.56		0.79/0.60					
Souter		0.80/0.61						
Thomas								
Ginsburg		0.84/0.67	0.78/0.57		0.74/0.50	0.95/0.89		
Breyer	0.78/0.56	0.86/0.71	0.83/0.66		0.86/0.71	0.87/0.72		0.88/0.74

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

Justice	% Votes for Claim									X2	2004 Term Votes		Anticipated Scores		
	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	For Claim	Against Claim	2004 Term	Error	2005 Term
Stevens	62.5	42.9	0.0	100.0	37.5	50.0	66.7	33.3	33.3	75.0	3	1	44.0	31.0	40.5
Souter	37.5	57.1	100.0	100.0	28.6	50.0	66.7	25.0	33.3	75.0	3	1	43.3	31.7	55.1
Kennedy	87.5	57.1	0.0	100.0	77.8	75.0	66.7	0.0	50.0	50.0	2	2	52.5	-2.5	46.6
Ginsburg	75.0	57.1	0.0	100.0	33.3	50.0	55.6	25.0	33.3	50.0	2	2	23.8	26.2	30.9
Rehnquist	62.5	28.6	0.0	50.0	44.4	25.0	22.2	0.0	33.3	25.0	1	3	31.4	-6.4	34.1
O'Connor	62.5	28.6	0.0	50.0	33.3	50.0	55.6	0.0	16.7	25.0	1	3	25.5	-0.5	25.4
Breyer	75.0	14.3	0.0	50.0	12.5	75.0	55.6	25.0	16.7	25.0	1	3	10.0	15.0	2.5
Scalia	37.5	85.7	0.0	100.0	56.6	25.0	44.4	25.0	66.7	0.0	0	3	45.8	-45.8	63.6
Thomas	37.5	85.7	0.0	100.0	66.7	25.0	66.7	25.0	100.0	0.0	0	3	30.2	-30.2	100.0
Majority	75.0	28.6	0.0	100.0	44.4	75.0	66.7	25.0	42.9	25.0	1	3	52.5	-27.5	38.5
Split	71.4	28.6	0.0	100.0	50.0	100.0	71.4	33.0	40.0	0.0	0	2			
Unanimous	100.0	0.0	0.0	100.0	0.0	0.0	50.0	0.0	50.0	50.0	1	1			

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



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

Justice	Mean Voting Percentage All Prior Terms (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	29.6	+/- 11.2	18.40	25.00	no
Stevens	55.6	+/- 14.9	24.59	75.00	yes
O'Connor	39.4	+/- 13.4	22.01	25.00	yes
Scalia	45.9	+/- 15.4	25.35	0.00	yes
Kennedy	59.8	+/- 17.9	28.65	50.00	no
Souter	55.1	+/- 18.3	26.55	75.00	yes
Thomas	55.3	+/- 23.4	32.82	0.00	yes
Ginsburg	51.6	+/- 21.4	27.56	50.00	no
Breyer	39.1	+/- 23.2	28.44	25.00	no

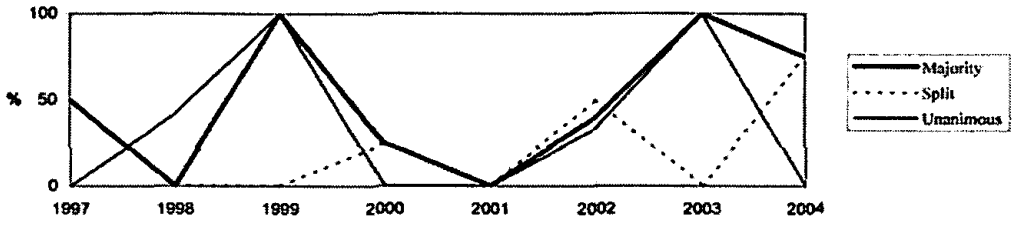
Regression Table 5
First Amendment Rights of Expression, Association, and Religion
Correlation (ρ) / R^2

Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
O'Connor	0.72/0.49							
Scalia								
Kennedy	0.88/0.75		0.77/0.57					
Souter								
Thomas				0.94/0.87				
Ginsburg	0.76/0.54	0.91/0.80	0.80/0.61		0.84/0.68			
Breyer			0.86/0.71					

Data Table 6
Equal Protection Claims

Justice	% Votes for Claim									X2	2004 Term Votes		Anticipated Scores		
	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	For Claim	Against Claim	2004 Term	Error	2005 Term
Stevens	40.0	40.0	50.0	0.0	100.0	25.0	0.0	25.0	100.0	100.0	4	0	30.1	69.9	53.3
O'Connor	80.0	50.0	50.0	0.0	100.0	50.0	0.0	40.0	100.0	75.0	3	1	45.4	29.6	65.8
Kennedy	80.0	33.3	50.0	0.0	100.0	50.0	0.0	60.0	100.0	75.0	3	1	70.3	4.7	65.5
Souter	40.0	20.0	100.0	0.0	100.0	50.0	0.0	20.0	100.0	75.0	3	1	22.8	52.2	50.5
Ginsburg	40.0	20.0	100.0	0.0	100.0	50.0	0.0	20.0	100.0	75.0	3	1	26.5	48.5	52.2
Breyer	40.0	20.0	100.0	0.0	100.0	50.0	0.0	40.0	100.0	75.0	3	1	57.2	17.8	70.8
Rehnquist	60.0	0.0	50.0	0.0	100.0	50.0	0.0	60.0	100.0	33.3	1	2	50.6	-17.3	69.8
Scalia	40.0	25.0	0.0	0.0	100.0	50.0	0.0	60.0	100.0	25.0	1	3	72.2	-47.2	59.6
Thomas	50.0	25.0	0.0	0.0	100.0	50.0	0.0	60.0	100.0	0.0	0	4	79.5	-79.5	67.2
Majority	80.0	20.0	50.0	0.0	100.0	25.0	0.0	40.0	100.0	75.0	3	1	48.5	26.5	59.4
Split	100.0	33.3	50.0	0.0	0.0	25.0	0.0	50.0	0.0	75.0	3	1			
Unanimous	0.0	0.0	0.0	41.7	100.0	0.0	0.0	33.3	100.0	0.0	0	0			

Chart 6
Equal Protection Claims



Mean Table 6
Equal Protection Claims

Justice	Mean Voting Percentage All Prior Terms (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	37.5	+/- 20.0	32.96	33.33	no
Stevens	46.2	+/- 20.3	33.41	100.00	yes
O'Connor	49.2	+/- 19.2	31.59	75.00	yes
Scalia	34.3	+/- 19.5	32.08	25.00	no
Kennedy	51.1	+/- 19.7	31.56	75.00	yes
Souter	50.2	+/- 25.1	36.46	75.00	yes
Thomas	40.9	+/- 26.0	36.43	0.00	yes
Ginsburg	51.2	+/- 32.2	41.43	75.00	no
Breyer	48.3	+/- 32.0	39.23	75.00	no

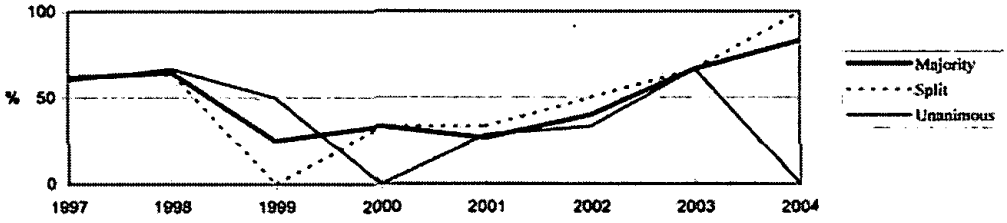
Regression Table 6
Equal Protection Claims
Correlation (ρ) / R^2

Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
O'Connor		0.77/0.56						
Scalia	0.90/0.80							
Kennedy		0.79/0.60	0.94/0.88					
Souter		0.85/0.69	0.78/0.59		0.78/0.58			
Thomas	0.88/0.75			0.96/0.91				
Ginsburg		0.88/0.75	0.81/0.63		0.80/0.60	1.00/1.00		
Breyer	0.77/0.55	0.85/0.70	0.78/0.57		0.80/0.59	0.99/0.97		0.99/0.97

Data Table 7
Statutory Civil Rights Claims

Justice	% Votes for Claim									X2	2004 Term Votes		Anticipated Scores		
	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	For Claim	Against Claim	2004 Term	Error	2005 Term
Stevens	83.3	85.7	84.6	88.2	75.0	100.0	53.3	20.0	66.7	83.3	5	1	61.7	21.6	66.5
Souter	66.7	92.9	76.9	70.6	75.0	100.0	60.0	20.0	80.0	83.3	5	1	72.7	10.6	86.6
Ginsburg	66.7	78.6	76.9	70.6	75.0	100.0	60.0	40.0	66.7	83.3	5	1	66.5	16.8	69.9
Breyer	83.3	85.7	84.6	82.4	75.0	100.0	53.3	40.0	80.0	83.3	5	1	54.8	28.5	85.0
O'Connor	33.3	64.3	41.7	58.8	25.0	33.3	26.7	40.0	66.7	33.3	2	4	59.2	-25.9	58.9
Scalia	16.7	50.0	23.1	41.2	25.0	0.0	13.3	40.0	66.7	33.3	2	4	44.0	-10.7	30.1
Kennedy	16.7	50.0	61.5	47.1	25.0	33.3	20.0	40.0	66.7	33.3	2	4	43.7	-10.4	35.2
Thomas	16.7	50.0	23.1	23.5	25.0	0.0	20.0	40.0	50.0	33.3	2	4	45.3	-12.0	31.5
Rehnquist	16.7	50.0	30.8	35.3	25.0	33.3	13.3	40.0	50.0	20.0	1	4	23.2	-3.2	37.7
Majority	33.3	57.1	61.5	64.7	25.0	33.3	26.7	40.0	66.7	83.3	5	1	41.3	42.0	81.5
Split	25.0	16.7	62.5	63.6	0.0	33.3	33.3	50.0	66.7	100.0	5	0			
Unanimous	50.0	87.5	60.0	66.7	50.0	0.0	28.6	33.3	66.7	0.0	0	1			

Chart 7
Statutory Civil Rights Claims



Mean Table 7
Statutory Civil Rights Claims

Justice	Mean Voting Percentage All Prior Terms (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	36.0	+/- 6.3	10.32	20.00	yes
Stevens	74.4	+/- 11.5	18.41	83.33	no
O'Connor	45.5	+/- 7.9	13.02	33.33	yes
Scalia	36.8	+/- 10.3	16.97	33.33	no
Kennedy	42.2	+/- 10.2	16.33	33.33	yes
Souter	64.9	+/- 14.7	21.38	83.33	yes
Thomas	29.3	+/- 10.2	14.33	33.33	no
Ginsburg	68.5	+/- 12.8	16.50	83.33	yes
Breyer	75.9	+/- 14.0	17.21	83.33	no

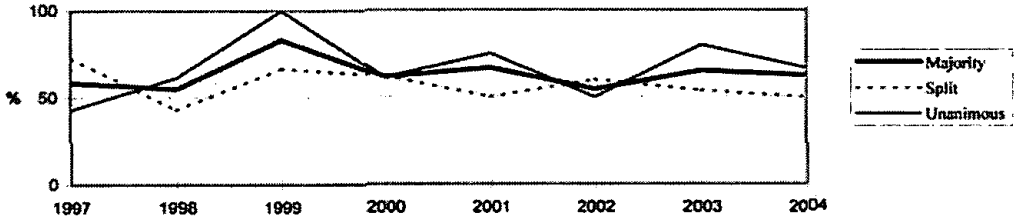
Regression Table 7
Statutory Civil Rights Claims
Correlation (ρ) / R^2

Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
O'Connor	0.74/0.53							
Scalia			0.71/0.48					
Kennedy				0.71/0.47				
Souter		0.72/0.49						
Thomas				0.90/0.79				
Ginsburg		0.88/0.76				0.94/0.87		
Breyer		0.96/0.92				0.91/0.81		0.90/0.79

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

Justice	% Votes for Claim									X2	2004 Term Votes		Anticipated Scores		
	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	For Claim	Against Claim	2004 Term	Error	2005 Term
Souter	68.4	56.5	60.7	60.0	83.3	68.4	83.3	54.6	69.6	75.0	6	2	70.5	4.5	73.5
Rehnquist	42.9	56.5	60.0	45.0	66.7	52.4	66.7	54.6	54.6	62.5	5	3	54.5	8.0	55.5
Stevens	75.0	69.6	51.7	65.0	100.0	68.4	83.3	47.6	77.3	62.5	5	3	68.5	-6.0	70.7
Kennedy	57.1	56.5	58.6	55.0	83.3	61.9	58.3	50.0	54.6	62.5	5	3	55.8	6.7	58.7
Ginsburg	68.4	56.5	55.2	60.0	83.3	61.9	83.3	54.6	81.8	62.5	5	3	78.9	-16.4	69.2
Scalia	42.9	47.8	43.3	40.0	66.7	47.6	50.0	31.8	52.6	57.1	4	3	43.1	14.0	49.2
Thomas	42.9	47.8	46.7	45.0	83.3	47.6	58.3	38.1	45.5	57.1	4	3	34.2	22.9	45.9
O'Connor	47.6	54.6	43.3	55.0	83.3	47.4	63.6	66.7	66.7	50.0	4	4	63.5	-13.5	59.7
Breyer	63.2	65.2	51.7	65.0	66.7	60.0	83.3	63.6	77.3	50.0	4	4	74.1	-24.1	60.9
Majority	57.1	52.2	58.6	55.0	83.3	61.9	66.7	54.6	65.2	62.5	5	3	63.0	-0.5	66.3
Split	50.0	28.6	73.3	42.9	66.7	62.5	50.0	60.0	53.9	50.0	1	1			
Unanimous	66.7	62.5	42.9	61.5	100.0	61.5	75.0	50.0	80.0	66.7	4	2			

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



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

Justice	Mean Voting Percentage All Prior Terms (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	52.8	+/- 7.3	12.05	62.50	yes
Stevens	68.3	+/- 9.4	15.46	62.50	no
O'Connor	54.9	+/- 8.3	13.69	50.00	no
Scalia	46.8	+/- 6.7	11.07	57.14	yes
Kennedy	56.7	+/- 7.0	11.20	62.50	yes
Souter	61.2	+/- 10.8	15.69	75.00	yes
Thomas	49.2	+/- 10.1	14.17	57.14	no
Ginsburg	61.4	+/- 13.3	17.12	62.50	no
Breyer	62.9	+/- 11.1	13.57	50.00	yes

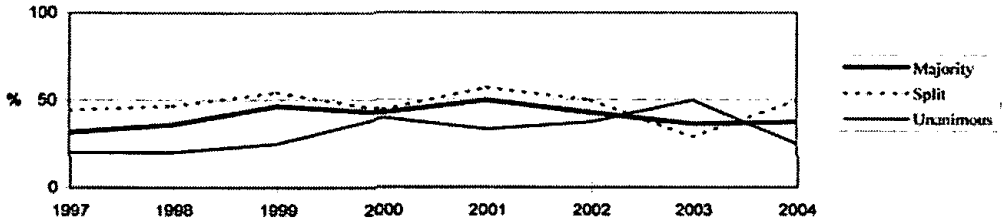
Regression Table 8
Cases Raising a Challenge to the Exercise of Federal Jurisdiction
Correlation (ρ) / R^2

Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
O'Connor	0.77/0.57							
Scalia	0.82/0.66	0.74/0.52	0.74/0.52					
Kennedy	0.81/0.63	0.71/0.47	0.74/0.52	0.83/0.67				
Souter	0.85/0.70	0.74/0.52	0.71/0.47	0.81/0.63	0.85/0.71			
Thomas	0.77/0.57	0.83/0.67	0.71/0.47	0.88/0.76	0.91/0.81	0.80/0.62		
Ginsburg	0.78/0.56	0.91/0.80	0.81/0.62	0.81/0.62	0.77/0.55	0.93/0.85	0.75/0.51	
Breyer								0.84/0.67

Data Table 9
Federalism Cases

Justice	% Votes for State									X2	2004 Term Votes		Anticipated Scores		
	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	For State	Against State	2004 Term	Error	2005 Term
Rehnquist	51.9	75.6	36.8	60.0	46.7	50.0	50.0	35.7	54.6	50.0	4	4	36.7	13.3	43.4
Stevens	29.6	45.0	35.0	8.0	26.7	35.7	30.0	35.7	36.4	50.0	4	4	35.8	14.2	37.8
O'Connor	44.4	70.7	29.4	45.8	46.7	35.7	60.0	35.7	45.5	50.0	4	4	35.0	15.0	36.0
Thomas	56.0	73.2	36.8	64.0	60.0	57.1	70.0	64.3	50.0	50.0	4	4	65.2	-15.2	64.5
Souter	34.6	43.9	15.8	32.0	20.0	35.7	30.0	28.6	45.5	37.5	3	5	28.1	9.4	38.3
Ginsburg	38.5	51.3	36.8	28.0	33.3	28.6	40.0	42.9	36.4	37.5	3	5	34.2	3.3	36.6
Breyer	34.6	50.0	15.8	32.0	13.3	35.7	30.0	28.6	36.4	37.5	3	5	27.4	10.1	35.8
Scalia	55.6	73.2	31.6	52.0	46.7	57.1	55.6	57.1	60.0	25.0	2	6	65.7	-40.7	59.9
Kennedy	51.9	68.3	42.1	40.0	53.3	42.9	70.0	50.0	54.6	25.0	2	6	49.7	-24.7	51.2
Majority	51.9	68.3	31.6	36.0	46.7	42.9	50.0	42.9	36.4	37.5	3	5	40.2	-2.7	38.3
Split	62.5	63.2	44.4	46.7	54.6	44.4	57.1	50.0	28.6	50.0	2	2			
Unanimous	36.4	72.7	20.0	20.0	25.0	40.0	33.3	37.5	50.0	25.0	1	3			

Chart 9
Federalism Cases



Mean Table 9
Federalism Cases

Justice	Mean Voting Percentage All Prior Terms (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	57.4	+/- 8.9	14.22	50.00	yes
Stevens	39.0	+/- 8.5	13.62	50.00	yes
O'Connor	51.4	+/- 9.2	14.77	50.00	no
Scalia	55.8	+/- 9.7	15.49	25.00	yes
Kennedy	52.4	+/- 8.5	13.53	25.00	yes
Souter	40.5	+/- 12.0	17.48	37.50	no
Thomas	57.6	+/- 9.2	12.92	50.00	no
Ginsburg	40.3	+/- 7.3	9.35	37.50	no
Breyer	31.5	+/- 8.7	10.73	37.50	no

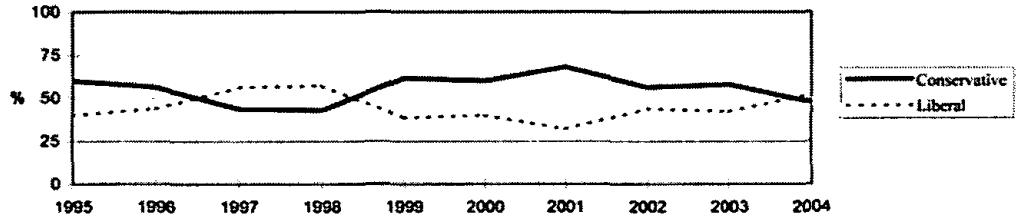
Regression Table 9
Federalism Cases
Correlation (ρ) / R^2

Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
O'Connor	0.87/0.75							
Scalia	0.74/0.52							
Kennedy			0.73/0.51	0.82/0.66				
Souter	0.76/0.54		0.74/0.51					
Thomas				0.75/0.52	0.73/0.50			
Ginsburg		0.77/0.56						
Breyer	0.74/0.50					0.91/0.82		

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

Justice	% Votes for Majority									X2	2004 Term Votes		Anticipated Scores		
	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	2004 Term	For Maj	Against Maj	2004 Term	Error	2005 Term
O'Connor	80.0	75.0	53.3	75.0	84.6	66.7	84.0	100.0	73.7	61.9	13	8	81.3	-19.4	72.8
Kennedy	85.0	81.3	87.5	67.9	73.1	83.3	80.0	56.3	63.2	61.9	13	8	68.2	-6.3	64.7
Souter	30.0	43.8	43.8	46.4	34.6	43.3	28.0	56.3	55.6	61.9	13	8	42.4	19.5	56.5
Stevens	25.0	50.0	43.8	60.7	26.9	43.3	24.0	37.5	55.6	57.1	12	9	39.1	18.0	40.5
Breyer	25.0	43.8	56.3	50.0	19.2	36.7	32.0	56.3	44.4	57.1	12	9	45	12.1	48.5
Scalia	75.0	56.3	50.0	50.0	73.1	63.3	80.0	43.8	55.6	52.4	11	10	57.8	-5.4	53.0
Thomas	75.0	56.3	56.3	50.0	84.6	63.3	80.0	43.8	63.2	52.4	11	10	61.3	-8.9	66.4
Ginsburg	30.0	31.3	56.3	53.6	30.8	36.7	20.0	43.8	55.6	52.4	11	10	49.5	2.9	48.8
Rehnquist	75.0	62.5	56.3	46.4	76.9	63.3	72.0	62.5	47.4	50.0	9	9	59.7	-9.7	56.2
Conservative	60.0	56.3	43.7	42.9	61.5	60.0	68.0	56.3	57.9	47.6	10	11	56.2	-8.6	56.3
Liberal	40.0	43.7	56.3	57.1	38.5	40.0	32.0	43.8	42.1	52.4	11	10	43.8	8.6	43.7

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



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

Justice	Mean Voting Percentage All Prior Terms (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	64.3	+/- 6.8	10.86	50.00	yes
Stevens	43.0	+/- 7.8	12.46	57.14	yes
O'Connor	70.4	+/- 8.5	13.63	61.90	yes
Scalia	61.8	+/- 8.3	13.26	52.38	yes
Kennedy	74.5	+/- 7.0	11.18	61.90	yes
Souter	45.4	+/- 9.9	14.40	61.90	yes
Thomas	59.7	+/- 11.7	16.44	52.38	no
Ginsburg	40.3	+/- 9.5	12.23	52.38	yes
Breyer	40.7	+/- 10.2	12.48	57.14	yes

Regression Table 10
Swing-Vote Analysis: Who Votes Most Often with the Majority in Close Cases
Correlation (ρ) / R^2

Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens	-0.76/0.55							
O'Connor								
Scalia	0.81/0.64							
Kennedy								
Souter	-0.74/0.52			-0.85/0.70				
Thomas	0.76/0.55	-0.72/0.48		0.89/0.78		-0.84/0.69		
Ginsburg	-0.85/0.69	0.79/0.60		-0.81/0.62				
Breyer	-0.80/0.59	0.71/0.45		-0.91/0.80		0.78/0.57	-0.89/0.78	0.75/0.51

IV. Analysis[60]

Table 1: Civil-State Party[61]

For the third year running, Data Table 1 provides the second most reliable evidence of ideological bias on the Court[62] – and the evidence all points in a single direction. In a dramatic reversal of two years of liberal movement, the Court (without statistical exception) reversed course from the 2003 Term, voting 27 points more conservatively in the outcome of Majority Cases, 16.7 points more conservatively in Split Cases and 45.7 points more conservatively in Unanimous Cases. Similarly dramatic conservative movement is displayed

60. Throughout Section IV, a footnote will list the cases tabulated on Tables 1-10. An asterisk ("*") following a case citation indicates that it appears more than once on Tables 1 through 9. All cases on Table 10, except for one, appeared at least once on Tables 1 through 9. (Till v. SCS Credit Corp., 541 U.S. 465 (2004), appears only on Table 10.) A "slashed Y" (" ¥ ") following 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 2004, the following cases did not fall within the Study's established parameters: Virginia v. Maryland, 540 U.S. 56 (2003); Olympic Airways v. Husain, 540 U.S. 644 (2004); Yates v. Hendon, 541 U.S. 1 (2004); S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004); Cent. Laborers' Pension Fund v. Heinz, 541 U.S. 739 (2004); F. Hoffman-La Roche Ltd. v. Empagran S. A., 542 U.S. 155 (2004).

61. San Diego v. Roe, 125 S. Ct. 521,* Brosseau v. Haugen, 125 S. Ct. 596 (2004), Muehler v. Mena, 125 S. Ct. 1465 (2005), Rancho Palos Verdes v. Abrams, 125 S. Ct. 1453,* City of Sherrill v. Oneida Indian Nation of N.Y. (2005), 125 S. Ct. 1478, Smith v. City of Jackson, 125 S. Ct. 1536 (2005),*¥ Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074 (2005), Clingman v. Beaver, 125 S. Ct. 2029,* San Remo Hotel, L.P. v. City and County of San Francisco, 125 S. Ct. 2491 (2005),* American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n, 125 S. Ct. 2419 (2005),* Mid-Con Freight Systems, Inc. v. Michigan Pub. Serv. Comm'n, 125 S. Ct. 2427 (2005),* Kelo v. New London, 125 S. Ct. 2655, Van Orden v. Perry, 125 S. Ct. 2854 (2005), Castle Rock v. Gonzales, 125 S. Ct. 2796 (2005), Jackson v. Birmingham Bd. of Ed., 125 S. Ct. 1497 (2005),* Granholm v. Heald, 125 S. Ct. 1885 (2005),* Cutter v. Wilkinson, 125 S. Ct. 2113 (2005),* McCreary County v. American Civil Liberties Union of Ky., 125 S. Ct. 2722 (2005).

62. *See 2003 Study, supra* note 1, at 819.

in the voting patterns of the individual Justices and in the statistical tests (such as anticipated voting behaviors) employed by this Study.

The voting behavior of all nine Members of the Court on Table 1 departed in a statistically significant manner from past behavior.[63] Moreover, the behavior of all nine Members was more conservative in 2004 than in 2003.[64] Except for Chief Justice Rehnquist and Justice O'Connor (who both voted somewhat more conservatively in the 1996 Term than this year), Table 1 reflects the most conservative voting patterns scored by any Member of the Court since 1995.[65] In fact, since the 1988 Term, only three Justices (the late Chief Justice in 1996 and 1990, Justice O'Connor in 1996 and Justice Souter in 1990) have *ever* charted scores more conservative than those noted this Term.[66]

The unusual nature of this conservative movement is further evidenced in the error between anticipated and actual voting behaviors for the 2004 Term.[67] For the last two Terms, ARIMA forecasting has produced reasonably accurate anticipated voting behaviors on Table 1 for the individual Justices and the Court as a whole. In 2002, the Study anticipated the actual voting behavior of five Justices within 10 points and the remaining four Justices within 21 points.[68] Last Term, the actual behavior of four Members was within 10 points of their anticipated scores, with the remaining five Members voting within 20 points of their anticipated scores.[69] This Term, by contrast, only one Member of the Court (Justice Ginsburg) voted within 10 points of her anticipated score, with two others (Justices Stevens and Souter) voting within 20 points of their anticipated scores.[70]

Strong individual movements by the Justices naturally resulted in conservative outcomes with regard to other statistical measures. The outcome of Majority Cases was 23.2 points more conservative than anticipated.[71] This is the most conservative Majority outcome for the

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63. *See infra* Mean Table 1.

64. *See infra* Data Table 1.

65. *See infra* Data Table 1.

66. *See infra* Data Table 1 (Chief Justice Rehnquist in 1996, Justice O'Connor in 1996). *See 1995 Study*, *supra* note 1, at 13 (Data Table 1 in the 1995 study shows that Chief Justice Rehnquist and Justice Souter both voted more conservatively in the 1990 Term than they did this Term).

67. *See supra/infra* Data Table 1.

68. *See 2002 Study*, *supra* note 1, at 523 (Data Table 1).

69. *See 2003 Study*, *supra* note 1, at 782 (Data Table 1).

70. *See infra* Data Table 1.

71. *See infra* Data Table 1.

Court since the 1988 Term.[72] As for positioning, Justice Stevens maintains his position as the most liberal Justice on Table 1, a distinction he has held eight of the last ten Terms.[73] Justice Thomas regained the position as the most conservative Justice on the Court in State Civil Cases, a position he has held or shared for seven of the last ten Terms.[74]

Unanticipated voting outcomes, like those on Table 1, challenge analysts (including us) to provide "an explanation." In recent Studies, we have opined that unanticipated voting movements may reflect judicial "pole-switching" (where a politically appealing regulatory regime persuades generally liberal Justices to vote conservatively in favor the government, while generally conservative Justices react in the opposite manner). In 2002, for example, "pole-switching" provided at least a partial explanation for the "conservative" ranking of traditionally liberal Justices on Table 1.[75] But, while one case this Term may have involved "pole-switching,"[76] this phenomenon does not account for the consistent (and significant) liberal movements on Table 1: unlike 2002, for example, both the traditionally liberal *and* conservative blocs voted more conservatively than in the past.[77] This data does not suggest that the voting patterns on Table 1 are the result of "pole-switching." Something more basic (and straightforward) seems to be involved.

The explanation for the voting movements on Table 1 may be as simple as this: the Supreme Court in 2004 favored state governments

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72. *See infra* Data Table 1. *See 1995 Study, supra* note 1, at 13 (Data Table 1 in 1995 shows the results of the Majority outcome since 1988). As Data Table 1 shows also, the court was nearly as conservative in 1996.

73. *See infra* Data Table 1 (In 2002 there was "pole-switching" that resulted in a much more "conservative" vote from Justice Stevens. In the 2000 Term, Justice Breyer took the most liberal position and Justice Stevens was in the second most liberal position).

74. *See infra* Data Table 1 (Justice Thomas shared the most conservative position on the court in the 2001, 2000, 1998, and 1997 Terms. He held the position by himself in the 1995, 2002, and 2004 Terms).

75. *See 2003 Study*, supra note 1, at 793.

76. For example, in Kelo v. New London, 125 S. Ct. 2655, the traditionally liberal justices (Stevens, Souter, Ginsburg, Breyer, joined by Justice Kennedy) voted "conservatively" in favor of the government's action, while the conservatives (Rehnquist, O'Connor, Scalia, Thomas) voted "liberally" against it out of a concern for private property rights. *See 2002 Study, supra* note 1, at 510-511 (explaining the unexpected rankings on Data Table 1); *see also 2003 Study, supra* note 1, at 792-94 (Data Table 1 discussion and explanation of the 2002 Term outcome).

77. *See infra* Data Table 1 (in 2002, when the traditionally liberal block – Justices Souter, Ginsburg, and Stevens – voted conservatively, the traditional conservatives – Justices Kennedy, Scalia and Chief Justice Rehnquist – voted relatively liberally).

in civil cases more often than not. There may also be a somewhat more sophisticated (but speculative) explanation for the movement on Table 1. The "conservative sweep" on Table 1 in 2004 brings the outcome of state civil cases more "in line" with the outcome of federal civil litigation on Table 2. The movement on Table 1 this Term, therefore, may suggest that state governments are doing a better job of representing their interests before the Nation's High Court than in the recent past (in 2002, state governments won only 52% of their cases, while in 2003 the figure was 46.7 %).

Data Table 2: Civil Cases – Federal Government versus a Private Party[78]

Data Table 2 does not reveal any startling development. It does not, for example, reflect the "sea change" movements shown on Table 1. Despite conservative gains in the outcome of Unanimous Cases, the Table reflects slight liberal movement in the outcome of Split Cases; opinions that are presumably more influenced by ideological bias than Unanimous Cases. The Table also reflects slight liberal movement in the outcome of Majority Cases.

The outcome of Unanimous Cases was conservative; the federal government won 100% of these cases (an increase of 8.3 points from last Term). This conservative movement was countered by liberal movement in the outcome of Majority Cases (4.2 points) and Split Cases (6.7 points). Considered as a whole, the outcomes on Table 2 are slightly liberal,[79] with six of the nine Justices voting more liberally in 2004 than in 2003 (the Chief Justice and Justices Stevens, O'Connor, Scalia, Kennedy and Souter).[80]

Five of the Justices exhibited statistically significant voting behavior this Term on Table 2.[81] Of those five, three top the chart as the most conservative Members of the Court: Justices Breyer, Thomas

78. Commissioner v. Banks, 125 S. Ct. 826 (2005), Tenet v. Doe, 125 S. Ct. 1230 (2005), Johanns v. Livestock Marketing Assn., 125 S. Ct. 2055,* Gonzales v. Raich, 125 S. Ct. 2195,* Orff v. United States, 125 S. Ct. 2606 (2005), National Cable and Telecommunications Assn. v. Brand X Internet Services, 125 S. Ct. 2688 (2005), Ballard v. Commissioner, 125 S. Ct. 1270 (2005), Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson, 125 S. Ct. 2444 (2005).

79. *Compare* outcomes for Majority, Split and Unanimous Cass on Tables 1 and 2 (except in outcome of Unanimous cases, governmental success rates are within 7 points of each other).

80. Factor analysis does not suggest that Table 2 provides highly reliable evidence of ideological bias this Term. *See infra* Factor Analysis (Data Table 2 – Civil cases involving the Federal Government as party – ranked in eighth place this year for reliability with a score of -0.218).

81. *See infra* Mean Table 2 (Justices Breyer, Thomas, Ginsburg, Stevens and Souter).

and Ginsburg.[82] They were also the only Justices who did not vote more liberally this Term than in 2003.[83]

Justice Breyer is the most conservative Justice in Federal Civil Cases, a position he shared in the 2003 and 1999 Terms and held alone in 1996.[84] Justice Souter held the most liberal position on the court this Term, a position he has never held since joining the Court in 1990.[85] Next Term, ARIMA analysis anticipates that Justice Breyer will again hold the conservative top of Table 2, while Justice Scalia (contrary to what some might expect) is anticipated to be the most liberal of the Justices.[86]

The voting blocs described above are one of the most interesting features of Table 2 in 2004. The four most conservative Justices are Justices Breyer, Thomas, Ginsburg and the late Chief Justice.[87] After these "liberal" four, Justices Stevens, O'Connor, Scalia and Kennedy cast 62.5% of their votes for the government, with Justice Souter – the most "liberal" Member of the Court – voting for the federal government only half the time.[88]

Last Term's Study emphasized the rather consistent conservative nature of the Court in Federal Civil Cases.[89] Those observations still hold true: since 1995 there have only been 10 instances where any Justice has voted less than 50% of the time for the federal government (half of those coming in 1997 alone).[90] The Majority has voted for the government at least 50% of the time in eight of the last ten Terms.[91] There have only been three instances since 1995 that the Court has decided Split Cases less than 50% of the time for the government.[92]

The voting behavior of the Court anticipated by the 2003 Study was quite accurate. All of the Justices' actual voting patterns this Term fell within ten points of anticipated behavior; six voted within

82. *See infra* Data Table 2.

83. *See infra* Data Table 2.

84. *See infra* Data Table 2 (In 1999 Justice Breyer shared the most conservative position with Chief Justice Rehnquist at 70% Votes for the Government).

85. *See infra* Data Table 2. *See also 1995 Study*, *supra* note 1, at 14 (Data Table 2 shows the votes back to when Justice Souter came on the court).

86. *See infra* Data Table 2.

87. *See infra* Data Table 2.

88. *See infra* Data Table 2.

89. *See 2003 Study*, *supra* note 1, at 794-95 (discussing the conservative strength of the court for this category).

90. *See 2003 Study*, *supra* note 1, at 795 n.57.

91. *See infra* Data Table 2 (the 1997, and 2000 Terms are the only two Terms below 50%).

92. *See infra* Data Table 2 (the 1997, 1999, and 2000 Terms).

five points of the 2003 ARIMA calculations.[93] The outcome of Majority Cases was within 4.2 points of the anticipated score.[94]

Data Table 3: Criminal Cases – State Government versus a Private Party[95]

This Table, according to factor analysis, provides the most reliable evidence of conservative or liberal bias on the Court this Term.[96] This Table shows clear liberal movement. This liberal shift counteracts the conservative trend that has dominated Table 3 since the 2001 Term.[97]

Despite the liberal shift, the voting patterns on Table 3 were still reasonably well anticipated by the 2003 Study, with six of the Justices' anticipated scores falling within ten points of their actual score.[98] Even the Majority outcome was within 10 points of the predicted score.[99] Only four of the Justices evidenced statistically significant changes in their voting behavior this Term,[100] and (not surprisingly) three of those Justices voted outside their anticipated score by 10 or more points.[101]The only Justice's score that was not anticipated within 10 points and that also did not depart in a statistically significant manner from prior voting behavior was Justice Ginsburg, whose voting behavior in 2003 was anticipated to be 12 points more conserva-

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93. *See infra* Data Table 2.

94. *See infra* Data Table 2.

95. Kowalski v. Tesmer, 125 S. Ct. 564 (2004),* Devenpeck v. Alford, 125 S. Ct. 588 (2004), Florida v. Nixon, 125 S. Ct. 551 (2004), Illinois v. Caballes, 125 S. Ct. 834 (2005), Bell v. Cone, 125 S. Ct. 847 (2005), Johnson v. California, 125 S. Ct. 1141,*¥ Brown v. Payton, 125 S. Ct. 1432 (2005), Pace v. DiGuglielmo, 125 S. Ct. 1807 (2005),¥ Bradshaw v. Stumpf, 125 S. Ct. 2398 (2005),¥ Wilkinson v. Austin, 125 S. Ct. 2384 (2005), Gonzalez v. Crosby, 125 S. Ct. 2641 (2005),¥ Mayle v. Felix, 125 S. Ct. 2562 (2005), Bell v. Thompson, 125 S. Ct. 2825 (2005), Smith v. Texas, 125 S. Ct. 400 (2004), Smith v. Massachusetts, 125 S. Ct. 1129 (2005), Roper v. Simmons, 125 S. Ct. 1183 (2005), Wilkinson v. Dotson, 125 S. Ct. 1242 (2005),* Rhines v. Weber, 125 S. Ct. 1528 (2005),* Deck v. Missouri, 125 S. Ct. 2007 (2005), Johnson v. California, 125 S. Ct. 2410,* Miller-El v. Dretke, 125 S. Ct. 2317 (2005),* Rompilla v. Beard, 125 S. Ct. 2456 (2005), Halbert v. Michigan, 125 S. Ct. 2582 (2005).*

96. *See infra* Factor Analysis (Criminal State Cases rank highest on the chart with a score of -0.854).

97. *See 2003 Study*, *supra* note 1, at 796 (Data Table 3 analysis in the 2003 Study spoke of the "continuing and significant conservative trend on the Court.").

98. *See infra* Data Table 3.

99. *See infra* Data Table 3.

100. *See infra* Mean Table 3.

101. *See infra* Data Table 3 (Chief Justice Rehnquist -10.0, Justice Souter -11.8, and Justice Breyer - 15.4).

tive than her actual 2004 voting tally of 34.6%.[102]

Other individual scores worth noting were Justices Stevens, Thomas, and Kennedy, whose voting behaviors were all anticipated within four points of their actual behavior.[103] Justice Thomas led the conservative bloc again this Term with a slightly more conservative voting pattern than last Term.[104] Justice Thomas has held the most conservative position Table 3 for nine of the last ten Terms.[105] Justices Souter and Stevens tied for the most liberal position in State Criminal Cases this Term.[106] Justice Souter has shared this position twice in the past—both times, as here, with Justice Stevens.[107] Justice Stevens has been in the most liberal position eight of the last ten years in this category.[108]

Table 3 suggests some notable voting patterns by the Court and individual Justices. For the Court as a whole, Table 3 suggests liberal movement. Although the trend is not quite as overwhelming as the movement on Data Table 1,[109] there is clear liberal movement in the outcome of Majority, Split, and Unanimous Cases.[110] In Majority Cases, the Court voted 13 points more liberally than last Term,[111] while Split Cases made an 18-point liberal jump.[112] There were nearly the same number of issues tabulated on Table 3 in 2004 as in 2003, and five of the nine Justices cast almost identical voting patterns in both Terms.[113] The liberal movement in 2004 appears to result from the voting patterns of the late Chief Justice, retired Justice O'Connor

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102. *See infra* Data Table 3. Justice Ginsburg actually voted nearly precisely her "Mean Voting Percentage" for All Prior Terms, missing it by only .22. *See infra* Mean Table 3.

103. *See infra* Data Table 3.

104. *See infra* Data Table 3 (Justice Thomas voted 80.0 last Term and 80.8 this Term).

105. *See infra* Data Table 3 (Justice Thomas held the position alone in 1997-98, 2002-04. He failed to be the most conservative in 1999 when that position was held solely by Justice Rehnquist).

106. *See infra* Data Table 3.

107. *See infra* Data Table 3 (Justice Souter shared the most liberal position in 1999 with Justice Stevens, and in 1995 he shared it with both Justice Stevens and Justice Breyer).

108. *See infra* Data Table 3.

109. *See supra* Discussion of Data Table 1.

110. *See infra* Data Table 3.

111. *See infra* Data Table 3.

112. *See infra* Data Table 3.

113. *See 2003 Study, supra* note 1, at 784 (Data Table 3 shows that there were 27 issues decided in Criminal State cases by the Court). *See infra* Data Table 3 (Shows that this Term there were 26 issues decided by the Court and that Justices Thomas, Scalia, Kennedy, Breyer, and Ginsburg more or less voted the same as they did last Term).

and Justices Stevens and Souter.

Chief Justice Rehnquist "took no part in the decision" of eight cases this Term, six of which were in this category.[114] However, it is doubtful that his absence had a significant impact on the outcome of the cases (because – even without his participation – all of these cases were decided by five or more votes.)[115] Justice Stevens moved nearly nine points in a liberal direction on Table 3, while Justice Souter evidenced the most prominent liberal movement of 16.9 points.[116] But, while the votes cast by the foregoing Justices obviously had some effect on the 13-point liberal movement in the outcome of Majority Cases, much of the trend may be attributable to Justice O'Connor's 15.4-point liberal change of direction.[117]

The 2003 Study explained the significance of the "O'Connor factor" on Table 3, stating that: "it appears that as goes Justice O'Connor, so goes the Court in the disposition of State/Criminal Cases."[118] As can be seen in the data on Table 3 across time, Justice O'Connor's vote has been the most reliable indicator of the outcome in Majority Cases on Table 3 for eight of the last ten Terms.[119] In seven of those Terms, Justice O'Connor's voting percentage was within four points of the outcome in Majority Cases.[120] It is therefore no surprise that a 15.4-point liberal movement by Justice O'Connor resulted in a similar 13-point liberal movement in the results of Majority Cases. Accordingly, the ideological stance of Justice O'Connor's replacement could have a significant impact indeed in the outcome of State Criminal Cases.

Even though the outcome in Majority Cases moved more liberally this Term, the Court still maintained its long tradition of voting at least 50% of the time for the government.[121] The last time the Court

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114. Devenpeck v. Alford, 125 S. Ct. 588 (2004), Florida v. Nixon, 125 S. Ct. 551 (2004), Illinois v. Caballes, 125 S. Ct. 834 (2005), Commissioner v. Banks, 125 S. Ct. 826 (2005), Johnson v. California(23), 125 S. Ct. 1141 (2005), Cherokee Nation of Oklahoma v. Leavitt, 125 S. Ct. 1172 (2005), Shepard v. United States, 125 S. Ct. 1254 (2005), Brown v. Payton, 125 S. Ct. 1432, Smith v. City of Jackson, 125 S. Ct. 1536 (2005), Small v. United States, 125 S. Ct. 1752 (2005).

115. *Devenpeck*, *Nixon*, *Banks*, and *Cherokee Nation* were all unanimous decisions, and *Caballes* was 6-2 in favor of government. The rest already had the necessary five votes.

116. *See infra* Data Table 3.

117. *See infra* Data Table 3.

118. *See 2003 Study*, *supra* note 1, at 798.

119. *See infra* Data Table 3 (1996-2002, 2004).

120. *See infra* Data Table 3 (1996-98, 2000-02, 2004).

121. *See infra* Data Table 3.

voted less than 50% of the time for the government in the outcome of Majority Cases on Table 2 was in the 1991 Term, when it voted for the state only 44.4% of the time.[122] State Criminal Cases, like Federal Civil Cases, tends to be a category where the Court heavily favors the government.[123] But, unlike the voting patterns displayed on Table 2's tabulation of Federal Civil Cases, Table 3's tabulations show a somewhat wider range between the voting behaviors tallied by the individual Justices over time.[124] This may be one reason that Table 3 tends to provide rather reliable evidence of bias. For the last 10 years, moreover, Table 3 has evidenced clearly identifiable bloc voting, with the most conservative Justices retaining Justice O'Connor's vote most of the time.[125]

Data Table 4: Criminal Cases – Federal Government versus a Private Party[126]

Federal Criminal Cases dropped from providing the third most reliable evidence of ideological bias in 2004 to fourth this Term.[127] The movement indicated on the Table from the previous Term is clearly liberal.

On the individual level, seven of the nine Justices demonstrated statistically significant changes in their voting behavior this Term.[128] Nevertheless, the voting behaviors of many Justices were still rather accurately anticipated by the 2003 Study, with five Justices' actual scores falling within 10 points of their anticipated outcomes.[129]

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122. *See infra* Data Table 3. *See also 1995 Study*, *supra* note 1, at 15 (Data Table 3 continues this Term's Table from 1995 back to 1988).

123. *See supra* discussion of the Civil Federal Cases and the amount of votes for the government.

124. Compare Data Tables 2 and 3. As stated in the discussion regarding Data Table 2, Justices rarely vote less than 50% of the time for the government on Table 3.

125. *See infra* Data Table 3.

126. Whitfield v. United States, 125 S. Ct. 687 (2005), United States v. Booker, 125 S. Ct. 738 (2005),[¥] Jama v. Immigration and Customs Enforcement, 125 S. Ct. 694 (2005), Johnson v. United States, 125 S. Ct. 1571 (2005),[¥] Pasquantino v. United States, 125 S. Ct. 1766 (2005), Dodd v. United States, 125 S. Ct. 2478 (2005), Leocal v. Ashcroft, 125 S. Ct. 377 (2004), Clark v. Martinez, 125 S. Ct. 716 (2005), Shepard v. United States, 125 S. Ct. 1254 (2005), Small v. United States, 125 S. Ct. 1752 (2005), Arthur Andersen LLP v. United States, 125 S. Ct. 2129 (2005).

127. *See 2003 Study*, *supra* note 1, 813-14 (Section V); *see also* Section V below showing this year's ranking.

128. *See infra* Mean Table 4 (Chief Justice Rehnquist and Justice Kennedy are the only Justices whose vote was not statistically significant).

129. *See infra* Data Table 4 (Chief Justice Rehnquist 7.1, and Justices O'Connor -2.4, Kennedy 0.6, Breyer -0.5, and Stevens -4.1).

Perhaps the most interesting voting behavior of any Justice on Table 4 this Term was that of Justice Scalia – who made a rather dramatic liberal jump.[130] Not only was his movement from the previous Term significant in terms of raw points (39.2), but his voting pattern was far and away the most unanticipated (43.5 points more liberal than expected).[131] Typically, one might assume that a Justice's dramatic departure from a prior Term's voting behavior would necessarily result in a similarly substantial departure from the Justice's anticipated voting behavior, but this is not always true. This Term, for example, Justice Ginsburg made the identical liberal point movement as Justice Scalia (39.2), but her actual voting behavior deviated only 16.6 points from her anticipated score.[132] As a result, Justice Scalia's movement this Term appears to be more notable.

While both Justice Scalia's and Ginsburg's departures from prior behavior on Table 4 were statistically significant, the movement of Justice Scalia – as shown by the dramatic difference between his anticipated and actual voting behaviors – may well have more import than the movement of Justice Ginsburg.[133] The substantial quantitative evidence of liberal movement in Justice Scalia's voting behavior on Table 4 this Term may also have practical significance for Supreme Court practitioners and scholars. For one thing, the results on Table 4 may suggest the presence of some "qualitative theme" running through the Court's Criminal Federal Cases in 2004 that resulted in Justice Scalia's unusual voting behavior;[134] the Justice's most liberal voting pattern since the Hastings Constitutional Law Quarterly has

130. *See infra* Data Table 4.

131. *See infra* Data Table 4.

132. *See infra* Data Table 4.

133. *See infra* Mean Table 4 and Data Table 4.

134. *See* Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson, 125 S. Ct. 2444 (2005), National Cable and Telecommunications Assn. v. Brand X Internet Services, 125 S. Ct. 2688 (2005), Pasquantino v. United States, 125 S. Ct. 1766 (2005), Johnson v. United States, 125 S. Ct. 1571 (2005), Shepard v. United States, 125 S. Ct. 1254 (2005), Clark v. Martinez, 125 S. Ct. 716 (2005), United States v. Booker, 125 S. Ct. 738 (2005). Because this Study undertakes a quantitative rather than a qualitative analysis of voting behavior, we have not attempted to identify in this Study a convincing "over-arching explanation" for Justice Scalia's unusually liberal voting pattern this Term. We note, however, one possibility. As a "strict constructionist" who believes in (and enforces) both rules and the plain meaning of words, Justice Scalia may be applying "conservative" judicial norms to the decision of Federal Criminal Cases in a manner that produces "liberal" outcomes. If so, Justice Scalia's performance on Table 4 may not represent a significant reorientation in his judicial philosophy, but rather consistent adherence to that philosophy.

published this Study.[135]

Other individual scores of interest include those of the late Chief Justice, who in his final Term, again held the most conservative position on the Court – voting for the Federal government in 72.7% of Federal Criminal Cases.[136] Chief Justice Rehnquist held this position from 2001 until his final Term.[137] Last Term, the Chief Justice shared the position with Justice Thomas. Justice Thomas, however, as with Justice Scalia, demonstrated a remarkably liberal voting pattern this Term, voting against the federal government 36.2 points more often than in 2003.[138] The most liberal position this Term was shared by Justices Stevens, Souter and Ginsburg, who each voted for the federal government in only 15.4% of the cases.[139]

As a whole, the Court evidenced rather significant liberal movement away from last Term's conservative marks.[140] The outcome of Majority Cases moved 26.5 points in a liberal direction, while the outcome of Split Cases dropped from complete victory last Term to government success in 55.6% of the Split Cases on Table 4 this year. Even the outcome in Unanimous Cases moved liberally, from 57.1% in 2003 to 25% in 2004 – a 27.1-point drop in support for the federal government.[141]

The outcome on Table 4 continues the erratic behavior that has persisted on the Court in Federal Criminal Cases since 1999.[142] Since that Term, the average difference between Terms has been 45.99 points.[143] Compare this rather sizeable variation with the average difference during the 1995-1999 Terms, which was only 9.03 points.[144] Similar unsteadiness in the Court's decision of Federal Criminal

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135. *See infra* Data Table 4; *see also 1995 Study*, *supra* note 1, at 16 (Data Table 4 shows Scalia's history back to the 1988 Term).

136. *See infra* Data Table 4.

137. *See infra* Data Table 4.

138. *See infra* Data Table 4. This liberal movement by Justice Thomas who, like Justice Scalia, is known as a strict constructionist, may support the inference that some common element in the cases on Table 4 this Term produced "liberal" voting behavior by "conservative" jurists. *See supra*, note 131.

139. *See infra* Data Table 4.

140. *See infra* Data Table 4.

141. *See infra* Data Table 4.

142. *See infra* Chart 4; *see also infra* Data Table 4.

143. This was calculated by taking the average of the absolute value of the differences between Terms beginning with the difference between the 1999 and 2000 Terms (25.90) and including the difference between the 2003 and 2004 Terms (26.58). *See infra* Data Table 4 for the numbers used to calculate.

144. Calculated the same as was described in the previous footnote.

Cases since 1999 is also seen in the outcome of Majority, Split, and Unanimous Cases over time. Beginning with the 1988 Term and continuing 1999, the Court had never voted for the federal government in Majority or Split Cases less than 50% of the time.[145] During the same twelve-year time span, only one Term (1989) produced less than 50% victory for the federal government in the outcome of Unanimous Cases.[146] However, in the five years since 1999, including the 2000 through 2004 Terms, the outcomes in Majority, Split, and Unanimous Cases have fallen below 50% in favor of the federal government seven times.[147]

This recent fluctuation in the outcome of Federal Criminal Cases could arise from a number of factors. This quantitative Study, furthermore, does not attempt to ascertain irrefutable explanations for the possible causes of unusual outcomes, such as those on Table 4. The Study demonstrates beyond question, however, that the federal government's record of success on Table 5 has wavered significantly since 2000, at least when compared with prior outcomes on Table 5 shown by this Study.[148]

Nevertheless, and while the following assertions are speculative and cannot be "proven" by review of this Study's statistics, the federal government's uneven record of victory in criminal cases since the 2000 Term may indicate: (a) that the Court does not support the position of the current Administration in criminal cases as consistently as it did the position of the prior Administration (similar to this Study's suggestion, more than a decade ago, that the Clinton Administration fared somewhat poorly during its initial appearances before the Court, with performance improving as the Administration gained more experience in bringing cases before the Court);[149] (b) that the Court may indeed be moving – albeit in fits and starts – toward a more liberal stance in Federal Criminal Cases, or (c) simply that the quality of the government's advocacy efforts (or its decisions regarding which criminal matters to pursue vigorously on appeal) has been uneven.

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145. *See infra* Data Table 4. *See 1995 Study*, *supra* note 1, at 16 (Data Table 4 shows history of study back to 1988 Term).

146. *See infra* Data Table 4. *See 1995 Study*, *supra* note 1, at 16 (Data Table 4 that in 1989 the cases unanimous cases were decided in favor of the government on 33% of the time).

147. *See infra* Data Table 4.

148. *See supra* p. 2.

149. *See 1994 Study* at 3; *1995 Study* at note 32 at 8 and 26; *1996 Study* note 41 at 41.

Data Table 5: First Amendment Cases – Rights of Expression, Association, and Religion[150]

This Table shows conservative movement from the previous Term.[151] This movement reverses the brief liberal movement noted last Term.[152] But, as was also stated last Term: "Any forecast of the future course of First Amendment law . . . seems problematic."[153] Last Term there were only seven issues counted on this table,[154] and this Term there were only four.[155] Nevertheless, Table 5 presents some information of possible note.

Last year's Study emphasized Justice Thomas' position as the most liberal Justice on First Amendment issues; a voting position with which he was quite familiar.[156] This Term, however, Justice Thomas – whose mean voting average on First Amendment issues over time has favored the claim 55.3% of the time – tallied a statistically significant change in voting behavior, moving to the *most* conservative position possible: zero votes for the claim.[157] Justice Stevens was the most liberal Justice on First Amendment issues in 2004, a position he also achieved in the 2001 and 2002 Terms.[158]

ARIMA analysis did not anticipate voting behaviors on Table 5 with great accuracy.[159] This result is unexceptionable, in light of the few First Amendment issues addressed by the Court over time. In fact, the only category of cases in this Study with a larger "99% Confidence Interval for True Mean" is Table 6, Equal Protection Cases.[160]

Five Justices' scores were statistically significant this Term.[161] As for correlations, last Term's study noted that the First Amendment

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150. San Diego v. Roe, 125 S. Ct. 521 (2005),* Johanns v. Livestock Marketing Assn., 125 S. Ct. 2055 (2005),* Clingman v. Beaver, 125 S. Ct. 2029,* Tory v. Cochran, 125 S. Ct. 2108 (2005).*

151. *See infra* Section V discussion of Factor Analysis and ranking.

152. *See 2003 Study*, *supra* note 1, at 800-02 (Data Table 5 analysis).

153. *See 2003 Study*, *supra* note 1, at 800 (Data Table 5 comment 1st paragraph).

154. *See 2003 Study*, *supra* note 1, at 786 (Data Table 5).

155. *See infra* Data Table 5.

156. *See 2003 Study*, *supra* note 1, at 801-02 (First Amendment analysis states that "in the ten Terms since 1994, Justice Thomas has held the first or second most liberal spot on First Amendment issues eight times.").

157. *See infra* Mean Table 5. In Tory v. Cochran, 125 S. Ct. 2108 (2005), both Justice Thomas and Justice Scalia declined to address the First Amendment issue.

158. *See infra* Data Table 5.

159. *See infra* Data Table 5 (only three scores within 10 points of anticipations).

160. *See infra* Mean Tables 1-10 (this assertion is based on the average of the absolute values of the "99% Confidence Interval for True Mean" columns for each Mean Table).

161. *See infra* Mean Table 5 (Justices Stevens, O'Connor, Scalia, Souter, and Thomas).

voting behaviors of Justices Stevens and Ginsburg were more closely correlated than the behaviors of Justices Scalia and Thomas.[162] However, that ranking has flipped this Term, with Justices Scalia and Thomas sharing an R^2 statistic of 0.87 and Justices Stevens and Ginsburg dropping to a shared score of 0.80.[163]

Data Table 6: Equal Protection Cases[164]

The Court generally decides few, if any,[165] equal protection cases each Term, so it is not surprising that Table 6 has been, and remains, the least reliable indicator of ideological bias on the Court,[166] as well as one of the most volatile categories of cases analyzed by the Study. Last Term, the Court decided one equal protection case, where it unanimously favored the claim. Table 6 this Term tabulates the results of four cases, making it substantially less likely that 100% of equal protection issues would be decided in favor of the claim. Accordingly, the Court's conservative movement of 25 points in the outcome of Majority Cases is hardly unexpected.

What may be more noteworthy is the fact that, while the movement in Majority Cases is "conservative," the Court nevertheless favored the claim – in four cases involving Split Decisions – 75% of the time. ARIMA analysis anticipated conservative movement in 2004, but movement rather more conservative than that which was actually charted; the Court voted for the Equal Protection Claim 75% of the time rather than the 48.5% score anticipated. Accordingly, both the 2003 and 2004 Terms suggest a liberal orientation for the Court on Equal Protection Claims. Nevertheless, the wide range in outcomes demonstrated on Table 6 over time, as well as Table 6's relatively small statistical sample, precludes firm assertions regarding *any* "ideological direction" of the Court on equal protection issues.

Several pairs of Justices demonstrate rather strongly correlated voting behaviors on equal protection questions, particularly among the most conservative (Justices Thomas and Scalia, R^2=0.91) and most liberal (Justices Breyer and Ginsburg R^2 =0.97; Justices Souter and Breyer, R^2=0.97; Justices Ginsburg and Souter, R^2=1.00 – or perfect

162. *See 2003 Study*, *supra* note 1, at 802.

163. *See infra* Regression Table 5.

164. Miller-El v. Dretke, 125 S. Ct. 2317 (2005),* Halbert v. Michigan, 125 S. Ct. 2582 (2005),* Johnson v. California(57), 125 S. Ct. 2410 (2005),* Johnson v. California(23), 125 S. Ct. 1141 (2005).*

165. *See 2003 Study*, *supra* note 1, at 779 (one case); *2002 Study*, *supra* note 1, at 507 (four cases); *2001 Study*, *supra* note 1, at 316 (no cases). For more cases, *see supra* note 1.

166. *See infra* Chart 6.

correlation). Two of the more moderate Members of the Court, Justices Kennedy and O'Connor, also exhibit rather closely correlated voting patterns on Table 5, with an R^2=0.88 and a Pearson correlation coefficient of 0.94 (a somewhat less accurate measure of correlation than the R^2 statistic).[167]

The alignment of the Court on Table 6 demonstrates bloc voting, but suggests that a rather large liberal bloc – at least on Equal Protection Claims in 2004 – obtained control of the Court. Justice Stevens voted for 100% of all Equal Protection Claims, while Justices O'Connor, Kennedy, Souter, Ginsburg and Breyer voted for 75% of such claims. The three most conservative members of the Court voted substantially less often in favor of the claim, with the late Chief Justice favoring precisely one-third of Equal Protection Claims, Justice Scalia voting for one-fourth (or 25%) of the claims, and Justice Thomas rejecting all Equal Protection Claims. Accordingly, Table 6 suggests that the "core conservatives" (the late Chief Justice and Justices Scalia and Thomas) tend to vote rather conservatively on equal protection issues, while the remaining Members of the Court are significantly more receptive. The reliability of this inference, however, is rather low, due to the fact that Table 6 (at least in a statistical sense, where large samples provide greater reliability) has tabulated relatively few equal protection votes for the individual Justices and the Court over the course of the Study.

The actual voting behaviors of Justices Souter, Ginsburg and Scalia were within three points of their anticipated voting scores. The Study anticipates that the Court will continue to move in a conservative direction during the 2005 Term, with the Majority voting for 59.4% (rather than this Term's 75%) of the claims. However, due to the volatility of Table 6 over time, voting behaviors on Equal Protection Claims are exceptionally difficult to anticipate with any accuracy.

Data Table 7: Statutory Civil Rights Claims[168]

Table 7 tabulates the results from only six cases, and accordingly has somewhat questionable statistical reliability. Nevertheless, the data on Table 7 suggest the possibility of a few rather interesting trends.

The Court continued the liberal trend regarding Statutory Civil

167. *See* Appendix B, *infra.*

168. Rancho Palos Verdes v. Abrams, 125 S. Ct. 1453 (2005),* Wilkinson v. Dotson,* 125 S. Ct. 1242 (2005), Jackson v. Birmingham Bd. of Ed., 125 S. Ct. 1497 (2005),* Smith v. City of Jackson, 125 S. Ct. 1536 (2005),* Spector v. Norwegian Cruise Line Ltd., 125 S. Ct. 2169 (2005).

Claims that began last Term, with the outcome in Majority and Split Cases favoring these claims more often than at any other time during the past decade.[169] And, while Table 7 demonstrates what has become "classic" conservative/liberal bloc voting on the Rehnquist Court, the four *liberal* Justices controlled the outcomes tabulated on the Table.

In 2004, the Court's most liberal Members (Justices Stevens, Souter, Ginsburg, and Breyer) all voted in favor of five Statutory Civil Rights Claims, rejecting only one such claim (a claim unanimously rejected by the Court).[170] The remaining five Justices (who have often comprised the Court's controlling conservative voting bloc) charted rather more conservative voting patterns. The historical swing voters, Justices O'Connor and Kennedy, each cast their votes for the claim twice and against the claim four times. The same voting pattern was displayed by the traditionally conservative Justices Scalia and Thomas. Chief Justice Rehnquist was the most conservative of these five Justices, favoring only one statutory civil rights claim in 2004.

But, even though these five Justices rejected Statutory Civil Rights Claims at least twice as often as they accepted them, their conservative voting patterns did not determine the overall outcome on Table 7. Rather, it was the liberal four-member bloc that determined the outcome of cases involving Statutory Civil Rights Claims, as each of the five Justices with "conservative" voting behaviors joined (at various times) the rather solid liberal bloc. As a result, the Court – by Split Decisions – accepted five of the six claims on Table 7.

Table 7 demonstrates rather closely correlated voting behaviors by two pairs of traditionally liberal Justices (Justices Breyer and Stevens R2=0.96; Justices Ginsburg and Souter R^2=0.94). As the 2003 Study anticipated, all four of these Justices voted for Statutory Civil Rights Claims more than 50% of the time.[171]

The increasing homogeneity on the Court suggested by the voting patterns displayed in the 2003 Study[172] was all but wiped out in 2004: the liberal Justices (Justices Stevens, Souter, Ginsburg and Breyer) all voted more liberally in 2004 than in 2003, while the remaining five Justices (the Chief Justice and Justices O'Connor, Kennedy, Scalia and Thomas) voted more conservatively.[173] Five of these

169. *See infra* Data Table 7, Chart 7.

170. Rancho Palos Verdes v. Abrams, 125 S. Ct. 1453 (2005)*.

171. *See 2003 Study*, *supra* note 1, at 788.

172. *Id.* at 803.

173. *See infra* Data Table 7.

voting patterns (by the Chief Justice and Justices Souter, Ginsburg, O'Connor and Kennedy) represented statistically significant departures from past behaviors.[174]

But, despite increased (rather than decreased) disparity between the voting scores tallied by the "liberal" and "conservative" blocs on the Court, the liberal movement beginning last Term (which the Study attributed at least in part to lessening fragmentation among the Justices) continued in 2004. These outcomes might suggest that, while ideological tensions between the Justices have not lessened (as suggested by last year's Study), the voting power of variously composed liberal coalitions on the Court may have increased. The accuracy of this quantitative inference will be tested next Term. The 2004 Study anticipates a slight conservative move (less than two points) for the Court as a whole in 2005. If, instead of slight conservative movement in 2005, Table 7 demonstrates continued liberal movement, the Court may well be in the process of ideological re-orientation on Statutory Civil Rights cases.

Data Table 8: Cases Raising a Challenge to the Exercise of Federal Jurisdiction[175]

Although Table 8 shows some nominal "conservative" movement in 2004 (in the outcome of Split and Unanimous Cases), the data – considered as a whole – demonstrate continuation of the Court's long-term liberal tendency to reject challenges to federal jurisdiction. Table 8, particularly when examined over time, suggests that the Court favors federal jurisdiction more often than not and that the Court's liberal stance is fairly stable. With the exception of 1999, 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 52.2% to 66.7%.[176]

For 2004, the outcome in Majority Cases was identical to the 2003 Term, with the Court accepting 62.5% of all claims favoring federal jurisdiction.[177] And, despite a 3.9-point conservative movement

174. *See infra* Mean Table 7.

175. Kowalski v. Tesmer, 125 S. Ct. 564 (2004),* Howell v. Mississippi, 125 S. Ct. 856 (2005), San Remo Hotel, L.P. v. City and County of San Francisco, 125 S. Ct. 2491 (2005),* Rhines v. Weber, 125 S. Ct. 1528 (2005),* Exxon Mobil Corp. v. Saudi Basic Industries Corp., 125 S. Ct. 1517 (2005), Tory v. Cochran, 125 S. Ct. 2108 (2005),* Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg., 125 S. Ct. 2363 (2005), Exxon Mobil Corp. v. Allapattah Services, Inc., 125 S. Ct. 2611 (2005).

176. *See id.*

177. *See infra* Chart 8.

in the outcome of Split Cases and a similar 13.3-point move in Unanimous Cases, for the first time since 2001 *every* member of the Court voted at last half of the time in 2004 to reject challenges to federal jurisdiction.[178] These relatively liberal individual voting patterns of the Justices do not support the contention that Table 8, in 2004, marks a "real" departure from the Court's historically liberal stance regarding Federal jurisdictional matters.

For the second year in a row,[179] the voting behaviors anticipated by the Study were fairly accurate, both for the individual Justices and the Court as a whole (an outcome that may reinforce our observations regarding the Court's established liberal stance on jurisdictional issues). The actual voting behavior of seven of the nine Justices (the Chief Justice and Justices Souter, Kennedy, Ginsburg, Scalia, Thomas and O'Connor) fell within eight points of their anticipated scores. The outcome in Majority Cases in 2004, furthermore, was only one-half point *less* liberal than anticipated by the Study in 2003.[180]

The voting patterns of two Justices this Term are rather interesting. The voting behavior of the late Chief Justice and Justice Breyer seem to run counter to their supposed ideological leanings: Chief Justice Rehnquist was the second most liberal Member of the court this Term with regard to expanding federal jurisdiction, while Justice Breyer was tied with Justice O'Connor as the Members of the Court most likely to reject federal jurisdictional claims.[181] (The conservative voting patterns of Justices Breyer and O'Connor are somewhat unusual when compared with their generally liberal stance on jurisdictional issues in the recent past.)[182]

Data Table 9: Federalism Cases[183]

Table 9 displaced Table 4 (Federal Criminal Cases) this Term as the third most reliable indicator of ideological bias, as established by

178. *See infra* Data Table 8.

179. *See 2003 Study*, *supra* note 1, at 806 (five justices within 5 points of anticipated behavior and all justices within 11.8 points).

180. *See infra* Data Table 8.

181. *Id.*

182. *See 2003 Study*, *supra* note 1, at 789 (Data Table 8); *compare* 2003/2004 scores on Data Table 8, *infra*.

183. Bates v. Dow Agrosciences LLC, 125 S. Ct. 1788 (2005),[¥] American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n, 125 S. Ct. 2419 (2005),* Mid-Con Freight Systems, Inc. v. Michigan Pub. Serv. Comm'n, 125 S. Ct. 2427 (2005),* Norfolk Southern R. Co. v. James N. Kirby, Pty. Ltd., 125 S. Ct. 385 (2005), Granholm v. Heald, 125 S. Ct. 1885 (2005),* Cutter v. Wilkinson, 125 S. Ct. 2113 (2005),* Gonzales v. Raich, 125 S. Ct. 2195 (2005).*

factor analysis.[184] The Court moved conservatively in deciding the outcome of Majority Cases (eight points) and Split Cases (21.4 points), but moved 10 points in a liberal direction in the decision of Unanimous Cases. Because of our assumption that ideology plays a more significant role in the outcome of Split Cases than Unanimous Cases,[185] Table 9 suggests conservative movement (with the Court favoring state rather than the federal government) in the decision of federalism issues in 2004.

Interestingly enough, only three voting patterns emerged on Table 9 for the 2004 term: four Justices ruled in favor of the state government 50% of the time (the Chief Justice and Justices Stevens, O'Connor and Thomas); three Justices favored the state with 37.5% of their federalism votes (Justices Souter, Ginsburg and Breyer); while the most liberal two Justices – Justices Scalia and Kennedy – favored state over federal government in only 25% of the cases. This unusual "three bloc pattern" on Table 9 is made even more interesting by the fact that the generally liberal Justice Stevens joined the "most conservative" bloc on federalism questions in 2004, while generally conservative Justice Scalia joined the "most liberal bloc." Table 9, in fact, records Justice Stevens' highest support for state government in 10 years.[186]

ARIMA forecasting did not anticipate the voting behavior of individual Justices very accurately, as only Justice Souter's and Breyer's actual voting behaviors fell within 10 points of their anticipated scores. Nevertheless, the anticipated outcome in Majority Cases was rather accurate; the 2003 Study anticipated the Court's 2004 outcome within 4.2 points (ARIMA forecasting suggested that the Court's overall behavior this Term would be 4.2 points *less* liberal than it was in actual fact).[187]

Despite the conservative movement in Majority and Split Cases this Term, there are indications of the Court's emerging liberal inclinations on federalism issues. The Court rejected claims of state authority in five instances, and ruled in favor of the state four times – suggesting liberal movement in the overall outcome of the nine cases. But numbers alone do not indicate the development of the federalism case law. Three of the five federalism issues decided against state

184. *See* Section V, *infra*.

185. *See supra* notes 18 and 19 with accompanying text.

186. See *infra* Data Table 9.

187. *Id.*

power involved unanimous decisions,[188] while only one federalism issue was decided unanimously in favor of the state.[189] Under the presumptions of this Study, these five unanimous outcomes are less likely to be motivated by the ideological leanings of individual Justices.[190] As a result, the primary indications of bias on Table 9 this Term should be derived from an examination of the outcome of Split Cases – where four federalism issues each were decided evenly between the conflicting assertions of state and federal power: two cases for[191] and two cases against[192] state power.

As noted above, this outcome in Split Cases results in a 21.4-point liberal movement from last Term. But whether the quantitative increase in the Court's conservative support of the states signals increased receptivity to assertions of state regulatory power is highly questionable—particularly when one considers the nature of the issues decided in favor of the states in split decisions during 2004, and compares those cases with the nature of the issued involved in the split decisions against the state.

Both split decisions favoring the state involved questions of preemption, where the Court was hesitant to displace state authority on the basis of somewhat ambiguous federal statutes.[193] But, once beyond its hesitancy to displace state authority without a clear congressional mandate, the Court seemed quite willing to limit state power in

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188. *See infra* Data Table 8; The three cases with unanimous decisions against state power were: Norfolk Southern R. Co. v. James N. Kirby, Pty. Ltd., 125 S. Ct. 385 (2005) (holding that a transportation contract covering both sea and land travel was essentially a maritime contract subject to federal law), Bates v. Dow Agrosciences LLC, 125 S. Ct. 1788 (2005)[¥] (explaining that FIFRA pre-empted state tort claims under certain circumstances), and Cutter v. Wilkinson, 125 S. Ct. 2113 (2005)* (reasoning that state safety and security interests at prisons outweigh some prisoner's claim to religious accommodation; federal provision constitutional, even though Ohio contended that it impermissibly restricted state authority (see Thomas, J., dissenting)).

189. American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n, 125 S. Ct. 2419 (2005)* (holding that a state fee imposed on trucks did not violate the dormant commerce clause).

190. *See supra* at 105 (specifically the accompanying text, as well as footnotes 18 and 19).

191. Bates v. Dow Agrosciences LLC, 125 S. Ct. 1788 (2005),[¥] Mid-Con Freight Systems, Inc. v. Michigan Pub. Serv. Comm'n, 125 S. Ct. 2427 (2005).*

192. Granholm v. Heald, 125 S. Ct. 1885 (2005),* Gonzales v. Raich, 125 S. Ct. 2195 (2005).*

193. Mid-Con Freight Systems, Inc. v. Michigan Pub. Serv. Comm'n, 125 S. Ct. 2427 (2005)* (holding that a state imposed trucking fee upheld under against dormant commerce clause attack in a companion cases was not preempted by federal registration requirements); Bates v. Dow Agrosciences LLC, 125 S. Ct. 1788 (2005)[¥] (holding that state tort claims did not impose "labeling requirements" preempted by federal law).

favor of federal regulatory authority. The two split decisions decided against the state restricted state authority to regulate alcohol sales over the internet[194] or allow limited, medical use of marijuana.[195] Both cases (at least viewed in light of recent decisions expanding state regulatory power despite commerce clause objections[196]) seemingly increased federal regulatory power under the commerce clause, with the second case arguably stalling what some scholars had identified as the Rehnquist Court's federalism-based "revival" of state regulatory authority.[197] Accordingly, the ostensible quantitative increase in the Court's conservative support of state authority in 2004 may, in fact, be insignificant. The 2004 Term's liberal revival of doctrinal restrictions on state power may well overshadow the quantitative conservative movement observed on Table 9.

194. In *Granholm v. Heald*, 125 S. Ct. 1885 (2005), the Court held that a state could not tax direct sales of alcohol (such as wine purchased over the internet), without violating the intent of the commerce clause.

195. In *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), the court upheld congressional power to regulate the use of marijuana under the commerce clause, invalidating state laws allowing for medical or "compassionate" use.

196. *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000).

197. The court's decisions in *United States v. Lopez*, 514 U.S. 549 (2005), and *United States v. Morrison*, 529 U.S. 598 (2005), were implicated in *Gonzales v. Raich*. The majority narrowed the scope of *Lopez* and *Morrison* largely by focusing upon and reviving a post-Depression Era decision, *Wickard v. Filburn*, 317 U.S. 111 (1942) – a case whose reasoning had been undercut by the analysis of the two more recent opinions. *Gonzales* seems to signal that a new voting coalition on the Court is rethinking the "revival" of state regulatory authority within the federal system. *Compare* Jesse H. Choper, *Taming Congress' Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 Ark. L. Rev. 731 (2003); Steven G. Calabresi, "Federalism and the Rehnquist Court: A Normative Defense," 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24 (2001).

Data Table 10: Swing-Vote Analysis: Who Votes Most Often With the Majority in Close Cases?[198]

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.[199] Many editions of this Study have demonstrated that Justices O'Connor and Kennedy have tended to be the "leaders" in casting the decisive vote in closely divided cases.[200] In 2004, these two Justices, joined by Justice Souter, tied as the "most influential Justices" during the 2004 Term, voting 61.9% of the time with the controlling majority in Swing-Vote Cases. This outcome ends Justice O'Connor's three-year hold on the "most influential Justice" position. With her retirement, ARIMA analysis anticipates that – among the current Members of the Court – Justice Thomas will take over the "most influential" position next Term.[201]

The Justices fit into four voting patterns on Table 10 this Term: Justices O'Connor, Kennedy and Souter voted with the majority 61.9% of the time; Justices Stevens and Breyer joined 57.1% of the controlling opinions in closely divided cases; Justices Scalia, Thomas and Ginsburg voted with the majority 52.4% of the time; and the late Chief Justice joined the controlling majority opinion in precisely half of the Swing-Vote Cases. 2004 marks the first time in a decade that every Justice voted with the majority in swing cases at least half the time.[202]

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198. Swing-vote cases reaching a conservative outcome: United States v. Booker, 125 S. Ct. 738 (2005), Jama v. Immigration and Customs Enforcement, 125 S. Ct. 694 (2005), Brown v. Payton, 125 S. Ct. 1432 (2005), Johnson v. United States, 125 S. Ct. 1571 (2005), Pasquantino v. United States, 125 S. Ct. 1766 (2005), Pace v. DiGuglielmo, 125 S. Ct. 1807 (2005), Dodd v. United States, 125 S. Ct. 2478 (2005), Kelo v. New London, 125 S. Ct. 2655 (2005), Van Orden v. Perry, 125 S. Ct. 2854 (2005), Bell v. Thompson, 125 S. Ct. 2825 (2005), Smith v. Massachusetts, 125 S. Ct. 1129 (2005), Roper v. Simmons, 125 S. Ct. 1183 (2005), Shepard v. United States, 125 S. Ct. 1254 (2005), Jackson v. Birmingham Bd. of Ed., 125 S. Ct. 1497 (2005), Small v. United States, 125 S. Ct. 1752 (2005), Granholm v. Heald, 125 S. Ct. 1885 (2005), Spector v. Norwegian Cruise Line Ltd., 125 S. Ct. 2169 (2005), Rompilla v. Beard, 125 S. Ct. 2456 (2005), Exxon Mobil Corp. v. Allapattah Services, Inc., 125 S. Ct. 2611 (2005), McCreary County v. American Civil Liberties Union of Ky., 125 S. Ct. 2722 (2005).

199. *See 2003 Study*, *supra* note 1, at 808, *2002 Study*, *supra* note 1, at 521.

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

201. *See infra* Data Table 10.

202. *Id.*

For the first time in six Terms, the outcome of Swing-Vote Cases was determined more often than not by a liberal voting bloc,[203] ending a conservative streak which began in 1999. All of the Justices save Justice Thomas showed statistically significant changes in their voting behavior from last Term.[204] But, despite these statistical departures from past practice, ARIMA analysis was relatively accurate in anticipating the voting behavior of the individual Justices – within 10 points for seven of the Justices (the Chief Justice and Justices Kennedy, Souter, Breyer, Scalia, Thomas and Ginsburg). ARIMA forecasting also anticipated the outcome of the cases on Table 10 within 10 points, although the analysis suggested that the 2004 tallies would still demonstrate conservative (rather than liberal) control of closely divided cases.[205] The Study anticipates a return to conservative control next Term – a result that may well prove to be erroneous in light of the death of the Chief Justice and the retirement of Justice O'Connor (two relatively regular "conservative" votes on the Court).[206]

The significance of the liberal trend on Table 10 is difficult to estimate. Six of the 10 Tables of this Study (Tables 2, 3, 4, 6, 7 and 10) demonstrate liberal movement in 2004 – with Tables 3 and 4 providing (according to factor analysis) relatively reliable indications that ideological bias influenced the outcome of the decisions on those Tables. On the other hand, four Tables (1, 5, 8 and 9) indicate conservative movement, with factor analysis selecting Tables 1 and 9 as providing relatively reliable indications of ideological bias. Nevertheless, the "conservative movement" on two of these Tables, 8 (dealing with federal jurisdiction) and 9 (federalism questions) is questionable.

The Court retains an overall liberal posture on Table 8 despite the conservative movement in 2004, and the rather small 10-point conservative movement in the outcome of Split Decisions on Table 9 is offset by the fact that the Court still decided five of nine federalism issues in 2004 against the state. Furthermore, while the outcome in Split Cases on Table 9 moved in a conservative direction, the Court's voting patterns on the substantive issues presented by those Split Cases suggest that the Court may be rethinking its recent willingness to defer to state regulatory power.

Finally, when the results of Table 7 are considered together with the results of Table 10, a somewhat notable emergence of liberal vot-

203. *See infra* Chart 10.

204. *See infra* Mean Table 10.

205. *See infra* Data Table 10.

206. *Id.*

ing power is revealed. On Table 7, the conservative voting patterns of five Justices did not dictate a liberal outcome in Statutory Civil Rights cases because this seeming "conservative bloc" did not vote together, but instead fractured its voting power to join (one Justice here, another one or two there) a more solid four-Member liberal bloc. This quantitative evidence, combined with liberal control of the outcome of Swing-Votes on Table 10, may suggest a significant consolidation of liberal voting power in 2004.

Frontier Analysis Table 1
"Conservative Frontier"–Constrained

Justice	Percent of Frontier	Percent Super Eff.	Category Weights: Civil / State	Civil / Fed.	Crim. / State	Crim. / Fed	1st Am.	Equal Protect.	Stat. Civ. Rt.	Juris.	Fed'ism
Rehnquist	100%	113%	15	0	17	14	14	0	14	14	14
Thomas	100%	104%	0	0	100	0	0	0	0	0	0
Scalia	99%		47	0	47	2	2	0	0	0	2
O'Connor	94%		20	0	20	20	20	0	0	0	20
Kennedy	94%		25	0	25	25	0	0	0	0	25
Breyer	77%		20	0	20	20	20	0	0	0	20
Souter	70%		13	13	12	13	13	0	13	13	13
Ginsburg	69%		20	0	20	20	20	0	0	0	20
Stevens	68%		12	13	12	13	13	0	13	13	13

Frontier Analysis Table 2
"Liberal Frontier"–Constrained

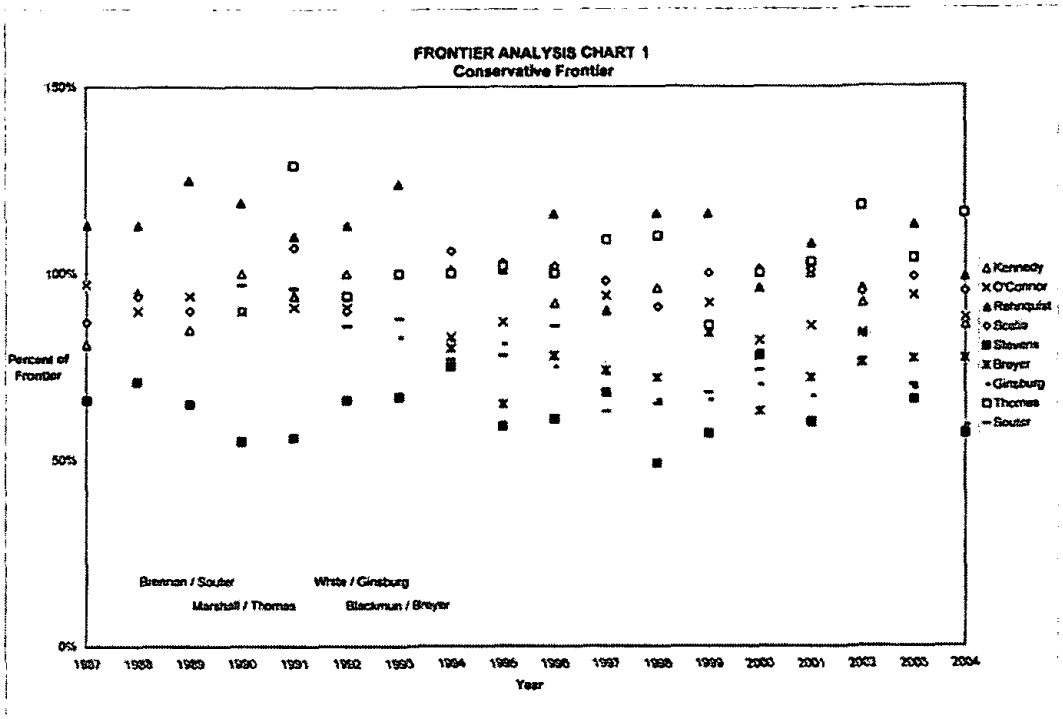
Justice	Percent of Frontier	Percent Super Eff.	Category Weights: Civil / State	Civil / Fed.	Crim. / State	Crim. / Fed	1st Am.	Equal Protect.	Stat. Civ. Rt.	Juris.	Fed'ism
Stevens	100%	111%	38	0	38	23	0	0	0	0	0
Ginsburg	98%		11	11	11	11	11	11	11	11	11
Souter	96%		14	0	14	14	14	0	14	14	14
Breyer	93%		11	11	11	11	11	11	11	111	11
Thomas	81%		20	0	20	20	20	0	0	0	20
Scalia	80%		11	11	11	11	11	11	11	11	11
Kennedy	79%		11	11	11	11	11	11	11	11	11
O'Connor	78%		11	11	11	11	11	11	11	11	11
Rehnquist	70%		11	11	11	11	11	11	11	11	11

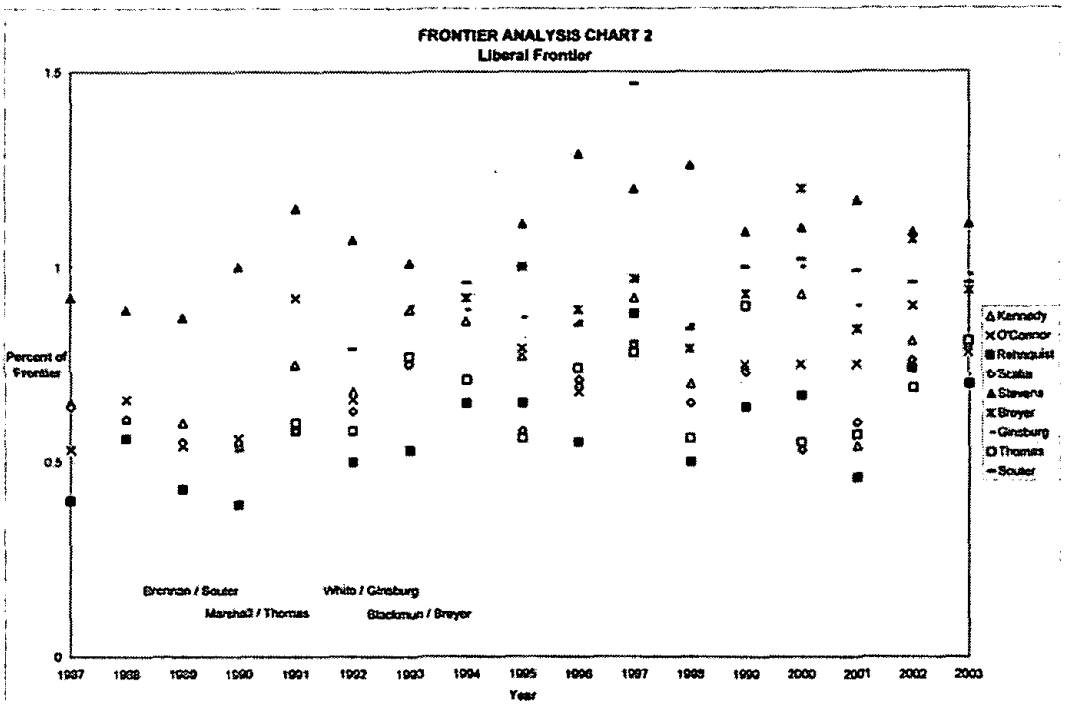
Frontier Analysis Table 3
"Conservative Frontier"–Unconstrained

Justice	Percent of Frontier	Percent Super Eff.	Category Weights: Civil / State	Civil / Fed.	Crim. / State	Crim. / Fed	1st Am.	Equal Protect.	Stat. Civ. Rt.	Juris.	Fed'ism
Rehnquist	100%	127%	0	0	0	0	17	0	83	0	0
Thomas	100%	118%	0	0	0	0	0	0	10	90	0
O'Connor	100%	112%	0	0	34	0	66	0	0	0	0
Scalia	100%	110%	0	0	0	0	0	0	0	0	100
Kennedy	100%	107%	98	0	0	0	2	0	0	0	0
Breyer	100%	100%	0	0	0	0	100	0	0	0	0
Souter	92%		24	76	0	0	0	0	0	0	0
Ginsburg	88%		0	0	0	0	50	0	50	0	0
Stevens	86%		0	0	0	0	50	0	50	0	0

Frontier Analysis Table 4
"Liberal Frontier"–Unconstrained

Justice	Percent of Frontier	Percent Super Eff.	Category Weights: Civil / State	Civil / Fed.	Crim. / State	Crim. / Fed	1st Am.	Equal Protect.	Stat. Civ. Rt.	Juris.	Fed'ism
Thomas	100%	150%	0	0	0	0	100	0	0	0	0
Souter	100%	118%	0	0	0	59	0	0	41	0	0
Stevens	100%	113%	72	0	0	28	0	0	0	0	0
Ginsburg	100%	110%	0	100	0	0	0	0	0	0	0
Breyer	100%	108%	0	0	0	0	0	0	41	0	59
Scalia	100%	103%	0	52	0	0	15	0	33	0	0
Rehnquist	100%		0	0	0	0	0	100	0	0	0
Kennedy	100%		0	0	0	0	0	100	0	0	0
O'Connor	100%		0	0	0	0	0	100	0	0	0


FRONTIER ANALYSIS CHART 1
Conservative Frontier
150%
100%
50%
0%
Percent of Frontier
Brennan / Souter
Marshall / Thomas
White / Ginsburg
Blackmun / Breyer
1987 1988 1989 1990 1991 1992 1993 1994 1996 1996 1997 1998 1999 2000 2001 2003 2005 2004
Year
Kennedy
O'Connor
Rehnquist
Scalia
Stevens
Breyer
Ginsburg
Thomas
Souter


FRONTIER ANALYSIS CHART 2
Liberal Frontier
1.5
1
0.5
0
Percent of Frontier
Brennan / Souter
Marshall / Thomas
White / Ginsburg
Blackmun / Breyer
1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003
Year
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O'Connor
Rehnquist
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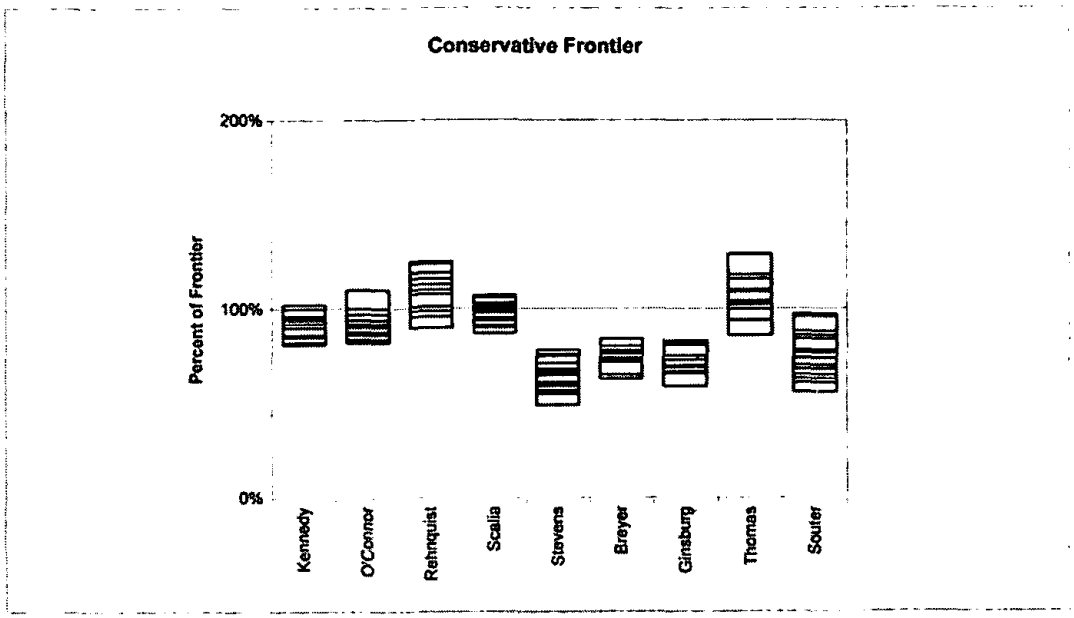
Conservative Frontier
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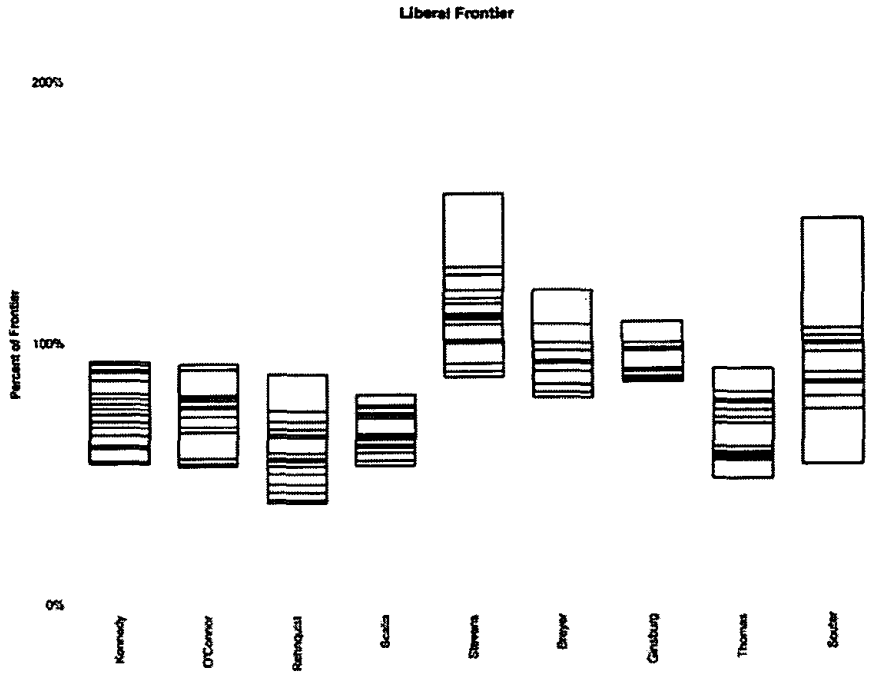
Liberal Frontier
200%
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Percent of Frontier
Kennedy
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Thomas
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V. Category Analysis

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

The reliability of the various tables in this study can be influenced by many factors, including the particular makeup of the Court's caseload and small sample size. Equal protection cases in Data Table 6, for example, tend to make up a small portion of the court's workload each term[207] and are consistently the least reliable indicator of ideological bias.

In order to determine which categories best differentiate between the voting patterns of more liberal and more conservative Justices, we have applied a statistical tool known as factor analysis.[208] 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.[209] 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	-0.854
Civil/State Party	-0.781
Federalism	-0.633
Criminal/Federal Party	-0.617
First Amendment	-0.343
Jurisdiction	-0.310
Statutory Civil Rights	-0.242
Civil/Federal Party	-0.218
Equal Protection	-0.145
Variance	2.4604
% Variance	0.273

207. Over the previous three Terms there have only been five Equal Protection cases. See authority at note 165 above.

208. *2002 Study*, *supra* note 1, at 564.

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

According to this ranking, Table 3 (Criminal/State Party) cases are again the most reliable indicator of liberal/conservative leanings over time; in fact, the ranking established by Factor Analysis is identical to that from last Term's analysis, except that Table 9 (Federalism) has moved ahead of Table 4 (Criminal/Federal Party).[210] These three Tables along with Table 1 remain relatively reliable indicators of ideological bias, while the remaining five continue to be of questionable value in that regard.

As we noted in last term's Study,[211] these results may seem counter-intuitive to those holding a stereotypical understanding of the Court—that issues relating to the First Amendment, Statutory Civil Rights, and Equal Protection would (seemingly) provide nearly perfect opportunities for the Justices to show their ideological leanings; however, as we have discussed in two prior studies,[212] 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.[213] The prime example this Term is *Kelo v. New London*, in which ostensibly "liberal" Justices, Stevens, Souter, Ginsburg, and Breyer, joined by Justice Kennedy, voted "conservatively" to favor a local government's power of eminent domain, possibly to further the "liberal" political view that urban renewal projects should trump private property rights.

VI. Frontier Analysis

Attempting to quantify the magnitude of a Justice's liberal or conservative tendencies and to identify trends in such tendencies over time is challenging for a variety of reasons. One challenge already discussed is that of choosing appropriate tests and assessing their validity. Another is dealing with inconsistency in the nature of cases appealed to the Court from one Term to the next and the Court's selection of which cases it will decide. With varying parameters such as these, is there any meaningful way to quantify, analyze and compare the Justices' inclinations? One potentially useful method is frontier analysis.[214]

Frontier analysis focuses on the Justices' relative scores rather than their absolute scores. Boundaries, or "frontiers," are defined by

210. *2003 Study*, *supra* note 1, at 814.

211. *Id.*

212. *See* 2003 *Study*, *supra* note 1, at 814, *2002 Study*, *supra* note 1, at 507-08.

213. *2003 Study*, *supra* note 1, at 814.

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

the highest and lowest scores in each category and each combination of categories. Each Justice is then evaluated relative to the established frontier. By adjusting the relative weights allocated to each category, the frontier can be adjusted to reflect each category's reliability—as determined by the factor analysis described in Section V.

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

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

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

Each Table lists a "% of Frontier" score for each Justice. Those with a score of 100% reach the frontier by employing the category weight distribution shown in the category columns. Scores less than 100% indicate that the most conservative/liberal score the Justice could obtain with optimal weighting places him or her at the indicated percentage of the way toward the frontier. In some cases, an optimal combination of weights may place a Justice beyond the frontier. This condition is known as "superefficiency" and is noted in the charts when present.

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

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

According to the Frontier Analysis Table 1, "Conservative Frontier – Constrained," Chief Justice Rehnquist lost his position as the

most conservative Justice, replaced in that position by Justice Thomas.[215] Justice Thomas was the only Justice this Term that reached the conservative frontier on the constrained Frontier Analysis Table,[216] with a superefficient score of 116%. This is an interesting score because it is calculated by weighting the tables according to factor analysis.[217] Justice Rehnquist fell to second most conservative justice on this Table and nearly reached the frontier, with a score of 99%.[218] Justices Stevens (57%) and Souter (56%) were the least conservative Justices on the constrained Frontier Analysis Table.[219] The rankings on this Table did not shift much from 2003 to 2004.[220]

Frontier Analysis Table 2, which shows the results from of a constrained calculation of the liberal frontier, shows two Justices with superefficient scores: Justices Stevens (109%) and Souter (105%).[221] Justice Souter's score is intriguing because, in calculating his score on Table 2, all of the Tables were weighted equally (except for Equal Protection). He was nevertheless still able to achieve a superefficient score.[222] Justice Thomas, as with Frontier Analysis Table 1, replaced Justice Rehnquist as the least liberal Justice.[223]

In the 2003 Term, the rank ordering of the Justices on Frontier Analysis Tables 1 and 2 was rather unusual.[224] This Term stands in stark contrast, because the rank ordering is what might be expected. In other words, a person might readily predict an individual Justice's

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215. *See infra* Frontier Analysis Table 1.

216. *See infra* Frontier Analysis Table 1.

217. *See* Factor Analysis section for rankings. *See also infra* Frontier Analysis Table 1 (Justice Thomas is only measured on Civil/State, Criminal/State, and Federalism).

218. *See infra* Frontier Analysis Table 1.

219. *Id.*

220. Justice Breyer scored a 77% again as he did last year. *See 2003 Study*, *supra* note 1, at 811 (Frontier Analysis Table 1). However, it is important to note that these numbers are not comparable year to year. The frontier is different every year. Therefore, the "quantity" that 77% represents may be more or less than the previous Term. What is comparable however is how close the Justices come to the frontier in a given year. An analogy would be comparing LSAT scores of students who took different tests (*e.g.*, one takes the October test and another takes the February test).

221. *See infra* Frontier Analysis Table 2.

222. *See infra* Frontier Analysis Table 2 (notice that Justice Souter's weights on all the tables are "13" except for on Equal Protection which was left empty). Compare to Justice Thomas on Frontier Analysis Table 1 who reached the Conservative Frontier but was only weighed on Three tables. *See infra* Frontier Analysis Table 1.

223. *See infra* Frontier Analysis Table 2; *compare 2003 Study*, *supra* note 1, at 810 (Frontier Analysis Table 2).

224. *See 2003 Study*, *supra* note 1, at 816-17 (In 2003, the rank ordering of the Justices on the two constrained tables seemed counterintuitive because Justices Scalia and Thomas were not in their "opposite" positions across Tables).

ranking on Table 2 if given that Justice's ranking on Table 1. The arguably more "consistent" results on Frontier Analysis Tables 1 and 2 may be the result of fewer cases involving "pole-switching" behavior and, accordingly, the Justices showed their "true" biases more accurately this Term. The only two Justices that did not following identical ranking on Frontier Tables 1 and 2 are Justices Stevens and Souter. However, their slight change of positions on the two Tables may well be of minimal importance.[225]

Last Term the unexpected switch in rankings across Frontier Tables 1 and 2 was attributed to the theory "that Justices Scalia and Thomas are not as bound to conservative or liberal ideologies as other Members of the Court" and therefore their voting patterns "demonstrated conservative *and* liberal patterns, as the constrained Frontier Analysis Tables demonstrate."[226] While this may still be true, another theory not explored last Term was that the switch in expected ranking was due to "pole-switching," voting behavior that was in substantial evidence last Term.[227]

The unconstrained Frontier Analysis Tables maximize the effects of pole-switching and other potentially "distorting" voting behaviors and, therefore, do not provide very reliable evidence of conservative or liberal bias. The real importance of the unconstrained Tables is that they illustrate the value of the constrained analysis and the importance of factor analysis.[228]

It is interesting to note that some Justices are unable to reach either the unconstrained conservative or liberal frontiers – regardless of the combination of weights used to enhance their conservative and liberal voting tendencies. On Frontier Analysis Table 3, the unconstrained conservative table, Justice Kennedy fell short of the frontier by two points, while Justice Souter was 25 points short of the conservative frontier. Every other Member of the Court reached the conservative frontier, with four (the Chief Justice and Justices Thomas, Breyer and O'Connor marking super-efficient scores.[229] On Unconstrained Frontier Analysis Table 4, showing the unconstrained liberal

225. *See infra* Frontier Analysis Tables 1 and 2. Justice Souter is the "least conservative" Justice but is only second place on the liberal table.

226. *See 2003 Study*, *supra* note 1, at 817.

227. *See 2003 Study*, *supra* note 1, at 814 (study discusses a couple of pole-switching cases).

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

229. *See infra* Frontier Analysis Table 3.

frontier, Justice O'Connor (87%), Chief Justice Rehnquist (83%) and Justice Thomas (78%) all failed to reach the unconstrained liberal frontier.[230] This outcome may again evidence that the data for 2004 is somewhat more reliable than in 2003; last Term, as a result of significant pole-switching behavior, all of the Justices reached the liberal frontier on the unconstrained analysis.[231]

VII. Conclusion

Last year the Study suggested that, "the United States Supreme Court may have embarked on a new course."[232] We noted that the "strength of the [liberal] trend is subject to reasonable dispute," but nevertheless appeared "real."[233] The "reality" of this perceived trend is now a question of great import: two Members of the Court will be replaced before (or during) the 2005 Term.[234] Furthermore, the consolidation of liberal voting power noted in 2003 appears to have continued. These two factors, the replacement of two Justices and the apparent continuation in 2004 of the liberal movement first noted in 2002, may have significant impact on the future ideological course of the United States Supreme Court.

2004 is the last full Term in which two distinguished jurists will sit on the nation's highest judicial bench.[235] Their departure – as the statistical data gathered by this Study over nearly two decades demonstrates – has the unquestionable potential to alter the ideological stance of the United States Supreme Court.

Justice O'Connor's construction of the Constitution and federal legislation has frequently been decisive in controversial (and some-

230. *See infra* Frontier Analysis Table 4.

231. *See 2003 Study*, *supra* note 1, at 818.

232. *See id.* at 819.

233. *Id.*

234. At the time this Study was in final stages of preparation, it appeared more likely than not that John Roberts would be confirmed as the new Chief Justice of the United States Supreme Court. *See, e.g.*, Deb Reichmann, *Leahy to Back Roberts for Chief Justice*, Associated Press, September 21, 2005, http://www.guardian.co.uk/worldlatest/story/0,1280,-5293033,00.html (last visited September 25, 2005) (noting that the ranking Democratic Senator on the Senate Judiciary Committee would vote to confirm Roberts). Justice O'Connor's retirement announcement included an assurance that she would continue to serve until a replacement was confirmed. *See, e.g.*, Associated Press, *Senate Republicans Want O'Connor Successor On Court by October*, http://www.azcentral.com/specials/special47/articles/0701ScotusSenate01-ON.html (last visited September 21, 2005) (noting the content of Justice O'Connor's retirement announcement).

235. *See* note 234, *supra*, noting the possibility Justice O'Connor may serve for an initial period during the 2005 Term.

times legally significant) cases decided by a single vote.[236] Her views have also been influential in the outcome of certain categories of cases, particularly those involving state governments (such as those tabulated on Tables 1, 3 and 9). Last Term, this Study noted what it called "the O'Connor factor,"[237] which demonstrated – as it does again this Term – that Justice O'Connor's voting pattern in State Criminal Cases is closely related to the outcome of Majority Cases on Table 3.

The late Chief Justice, for his part, has demonstrated relatively stable consistent, conservative voting behavior during his tenure on the Court, as review of the Study's Frontier Analysis demonstrates. During the course of an 18-year period beginning in 1987, the Chief Justice has held the "most conservative position" on the constrained conservative frontier 11 times.[238] Only three Members of the Court, moreover, (Justices Scalia, Kennedy and Thomas) have *ever* exceeded Chief Justice Rehnquist's position on Constrained Conservative Frontier Chart 1 – Justice Scalia once, Justice Kennedy twice, and Justice Thomas five times.[239]

Accordingly, the departure of these two Members could have a major influence upon the ideological stance of an institution that will lack the strong conservative voice of the late Chief Justice as well as the moderating (but often conservative) influence of Justice O'Connor. Unless the replacement for the late Chief Justice is as consistently conservative as Chief Justice Rehnquist[240], or if the replacement for Justice O'Connor demonstrates ideological tendencies even slightly less conservative (or more liberal) than hers, the newly

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236. *See* Data Table 10 (demonstrating that, in the past 10 years, Justice O'Connor has joined the opinions that determined the outcome of at least two-thirds of all cases decided by a single vote, with the exception of the 1997 Term, where she joined the majority opinions in only 53.7% of swing-vote cases, and this Term, where – by casting her vote with the majority in 61.9% of these cases – she tied with Justices Kennedy and Souter as one of the three most influential "swing voters" on the Court for 2004). In 2002, Justice O'Connor joined every swing-vote majority. *See infra* Data Table 10. See *infra* note 200. *2003 Study*, *supra* note 1, 823-24.

237. *2003 Study*, *supra* note 1, at 823-24.

238. Constrained Frontier Analysis Chart 1 *infra*.

239. Constrained Conservative Frontier Chart 1 demonstrates that Justice Scalia held a more conservative position in 1995, Justice Kennedy in 2000 and Justice Thomas in 1991, 1997, 2000, 2002 and 2004.

240. As this Conclusion was being written, it appeared that John Roberts would be confirmed to replace the late Chief Justice William Rehnquist. *See* note 234, *supra*. Any "prediction" regarding his "conservative" or "liberal" leanings, however, would be purely speculative. Judge Roberts managed to avoid providing clear answers to many questions from Senators seeking a firm grip on his judicial ideology. *See, e.g.*, "Roberts Refuses to Discuss Roe v. Wade," Womens' Issues Blog, http://womensissues.about.com/b/a/202413.htm (last visited on September 25, 2005).

constituted Court could readily continue (and intensify) the liberal trend noted in 2002, 2003 and – now – 2004. This possibility is supported by this Study's results, which suggest that, during 2004, the influence of liberal voting blocs seemed to increase while conservative voting blocs were less stable and (accordingly) less powerful.

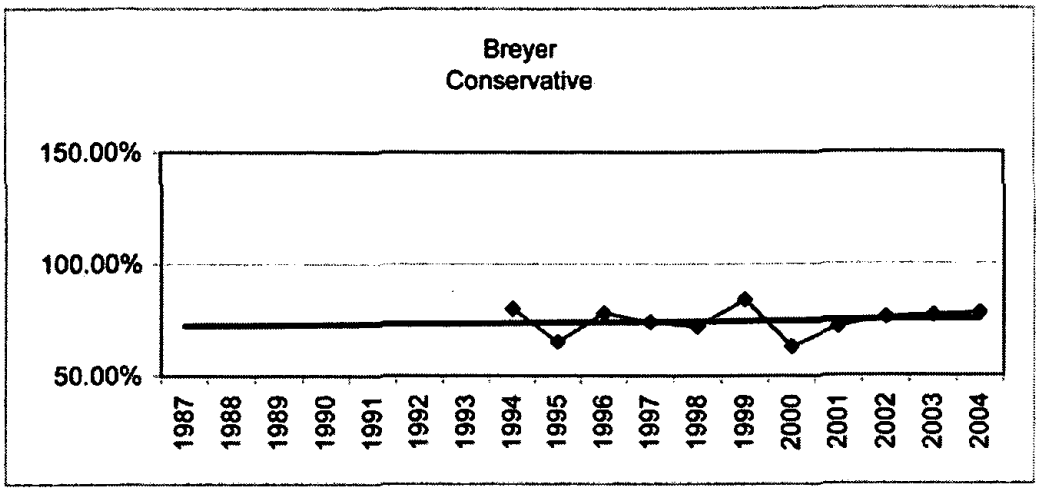
The Study last year noted that the 2003 Term ended a "see-saw" pattern of conservative-to-liberal-and-back-again movement. Rather than a continuing pattern of ideological reversals, the Study found that outcomes in 2002 and 2003 suggested a slight, overall liberal trend.[241] The 2003 Study explained that "one could plausibly assert that 2003 Term voting patterns suggest either (a) a Court in transition, moving from a generally conservative to a somewhat more liberal posture . . . or (b) a Court that remains basically conservative," with the liberal trends noted in 2002 and 2003 "suggesting (at most) a slight recalibration in the scales of justice."[242] As in 2003, "[e]ither description seems defensible on the basis of the data."[243]

Nevertheless, the totality of the quantitative data in 2004 suggests that assertion (a) may be somewhat more accurate than the alternative possibility posited; the data collected and analyzed on Tables 1-10 above suggest that the Court may well be in transition from a generally conservative to a somewhat more liberal posture. Nevertheless, and notwithstanding whatever opinions we could provide, the jurists finally confirmed to replace the Chief Justice and Justice O'Connor will ultimately determine whether the results of the 2005 Term continue to support possibility (b), confirm (instead) alternative (b), or mark an entirely new ideological trend on the United States Supreme Court (including the emergence of either notably more liberal *or* conservative voting coalitions).

241. *2003 Study*, *supra* note 1, at 819.

242. *2003 Study*, *supra* note 1, at 771.

243. *Id.*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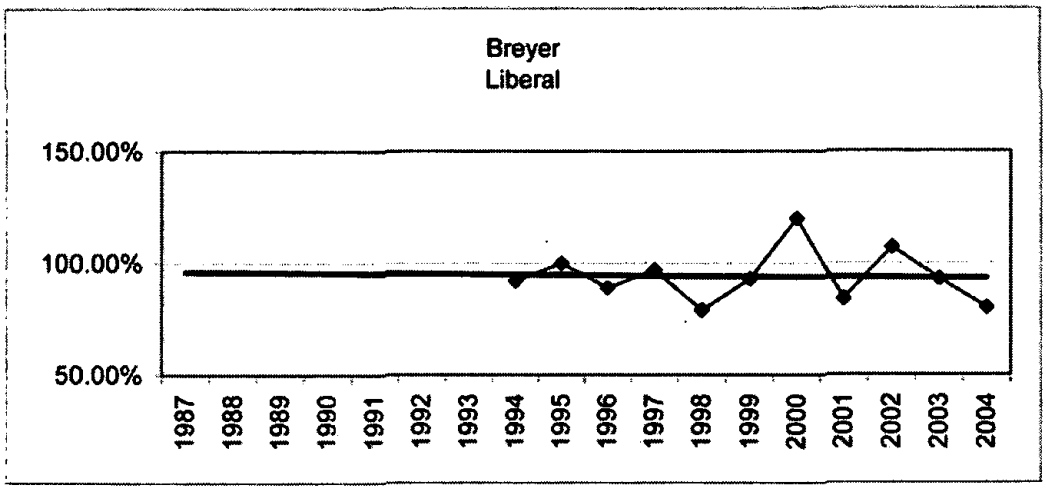
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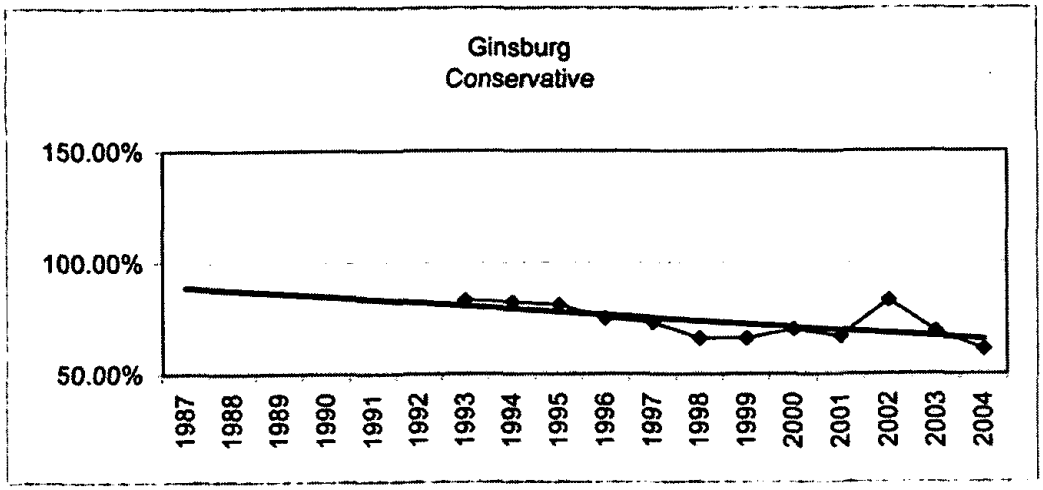
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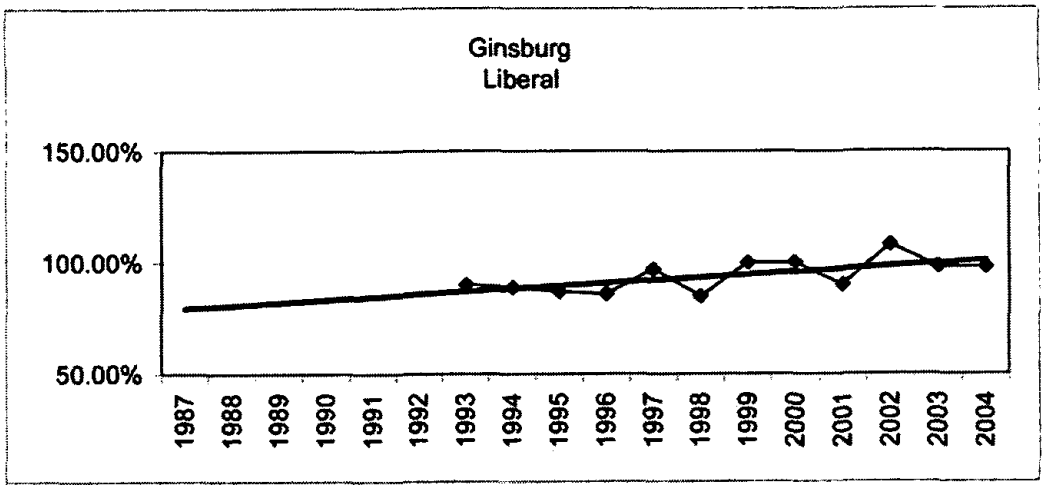
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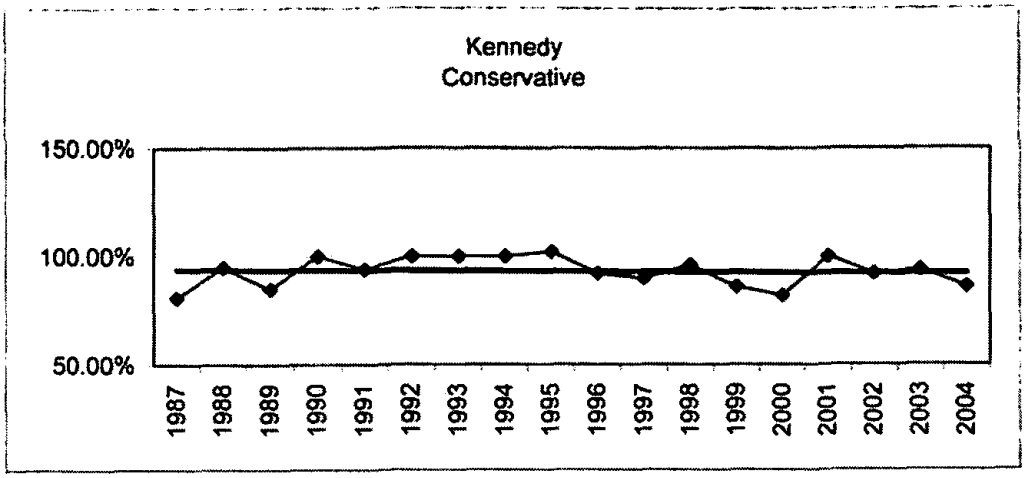
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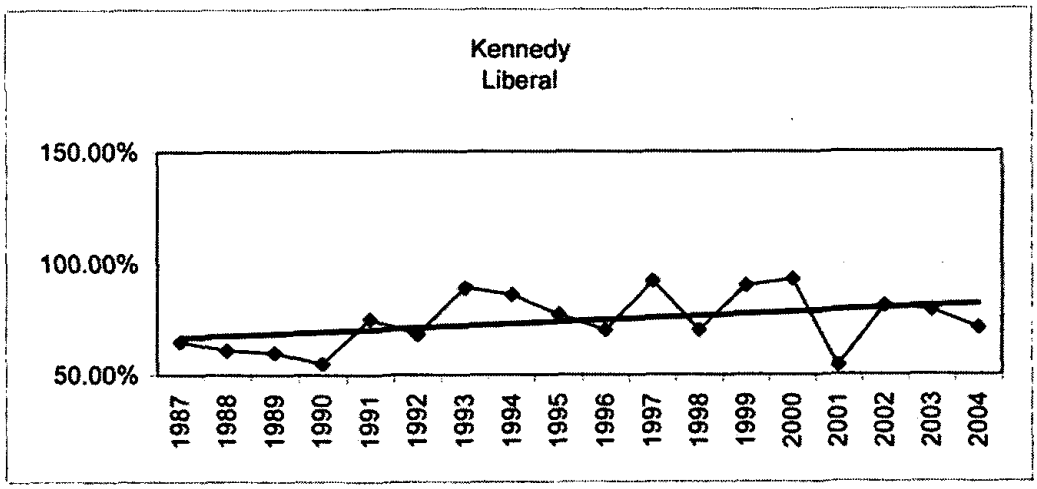
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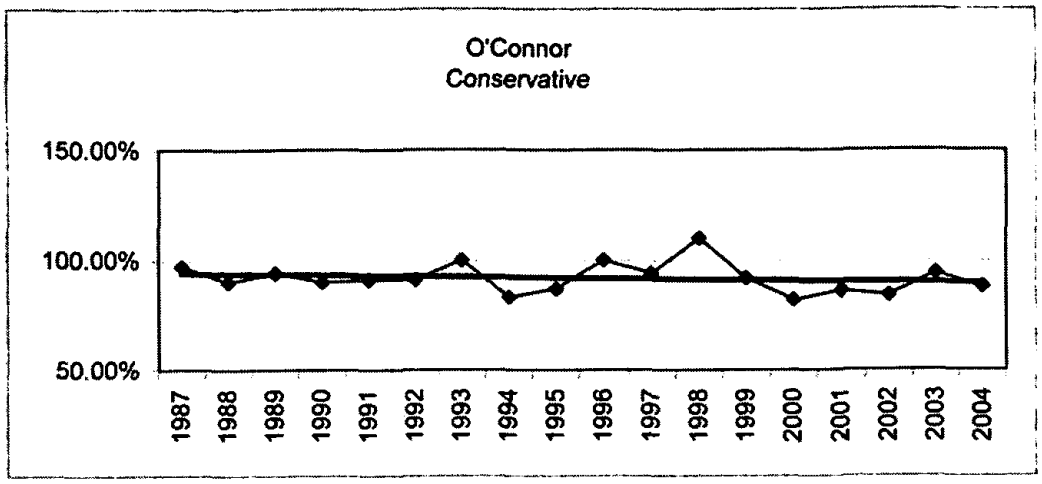
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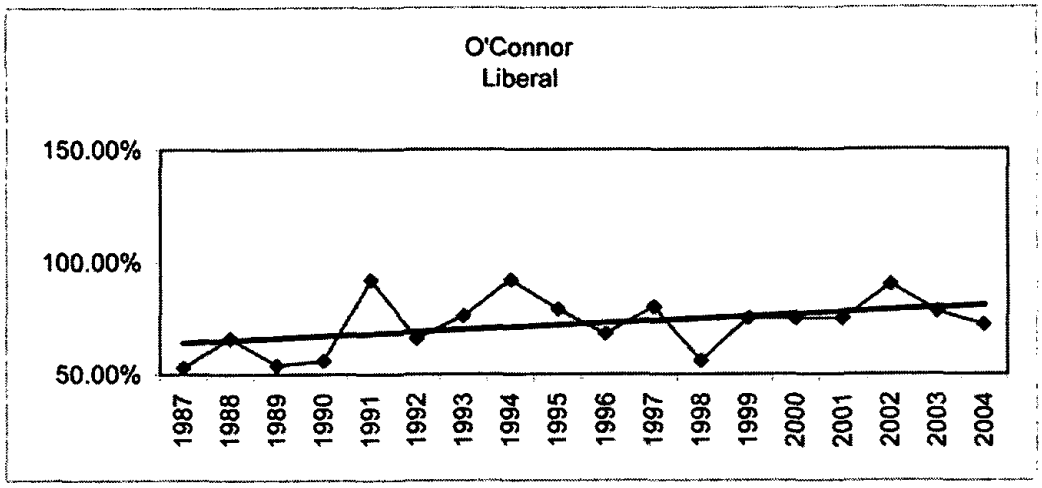
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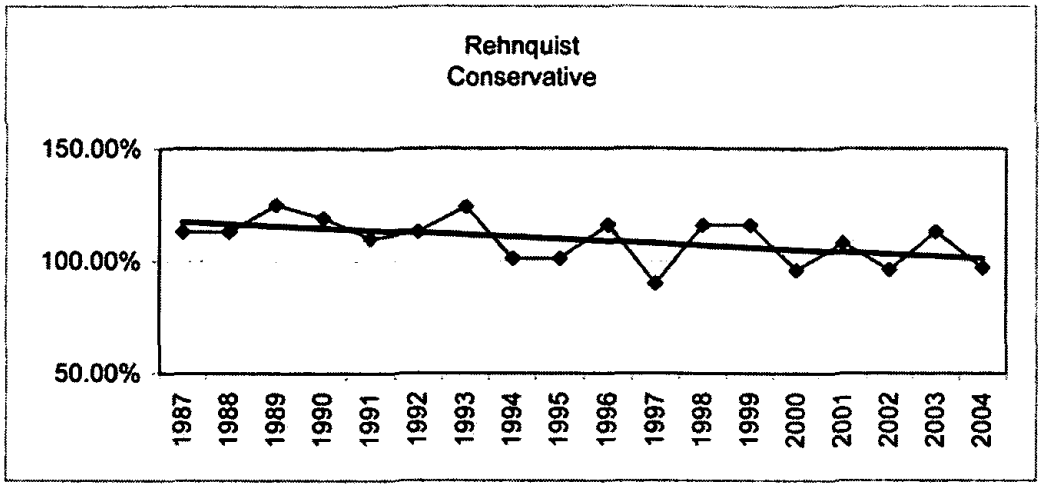
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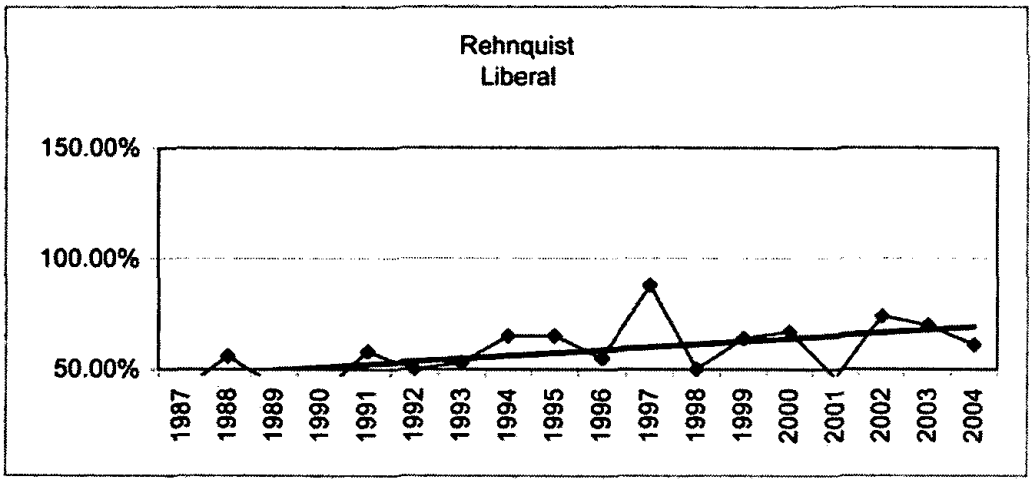
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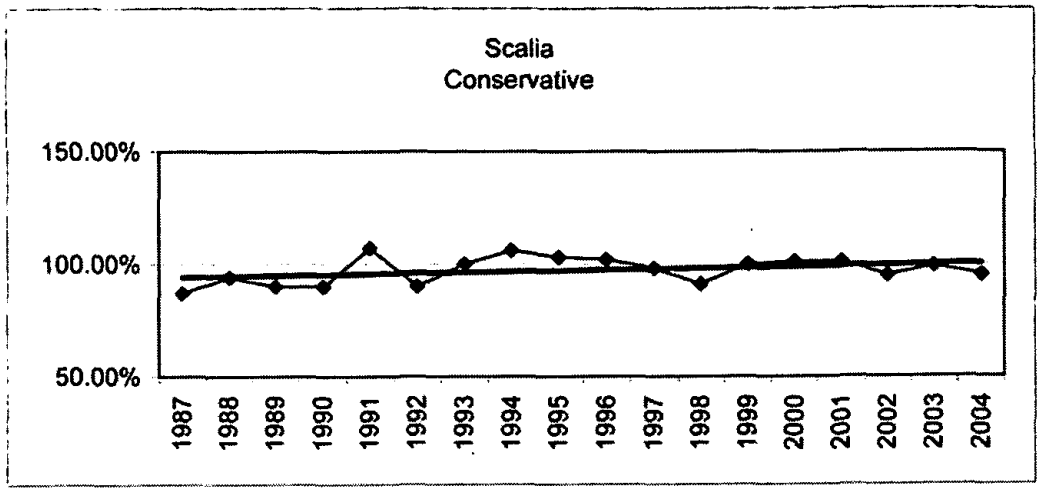
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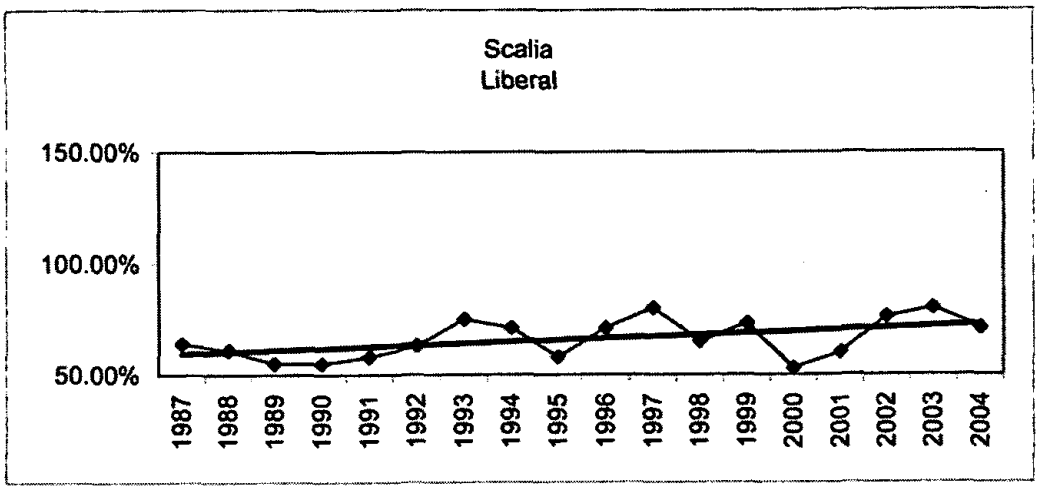
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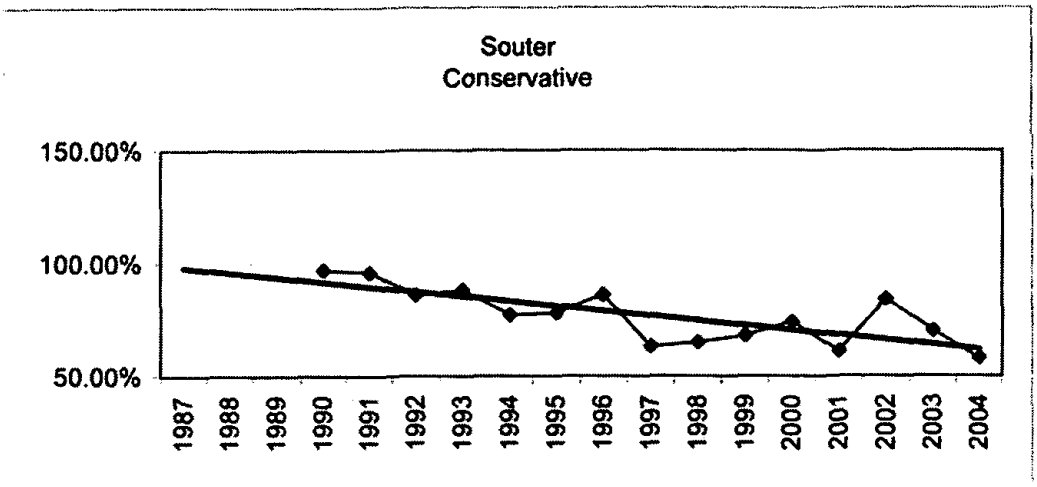
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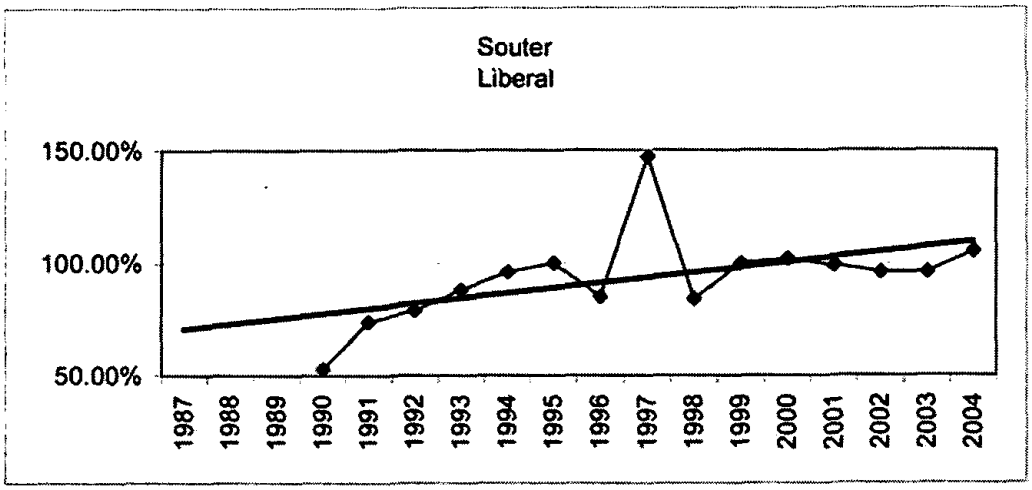
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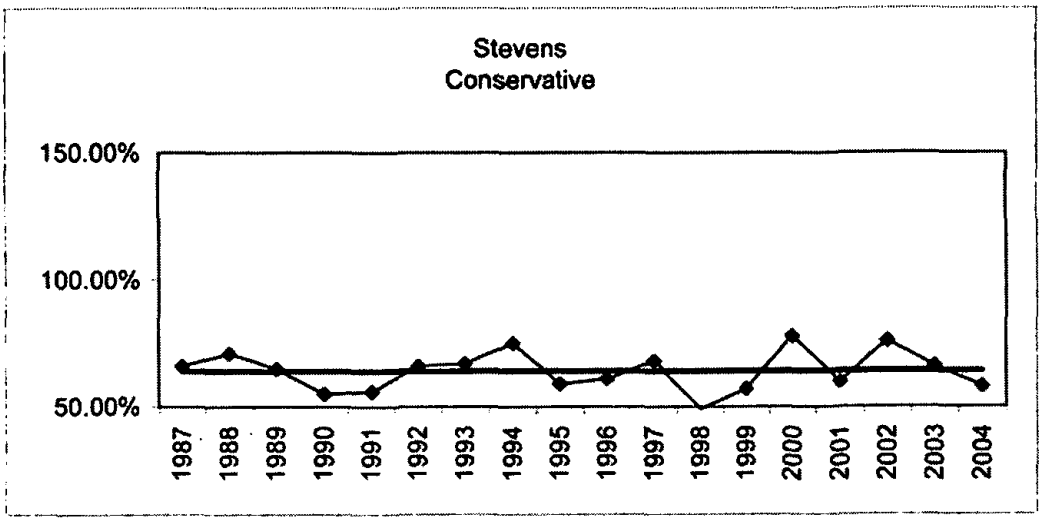
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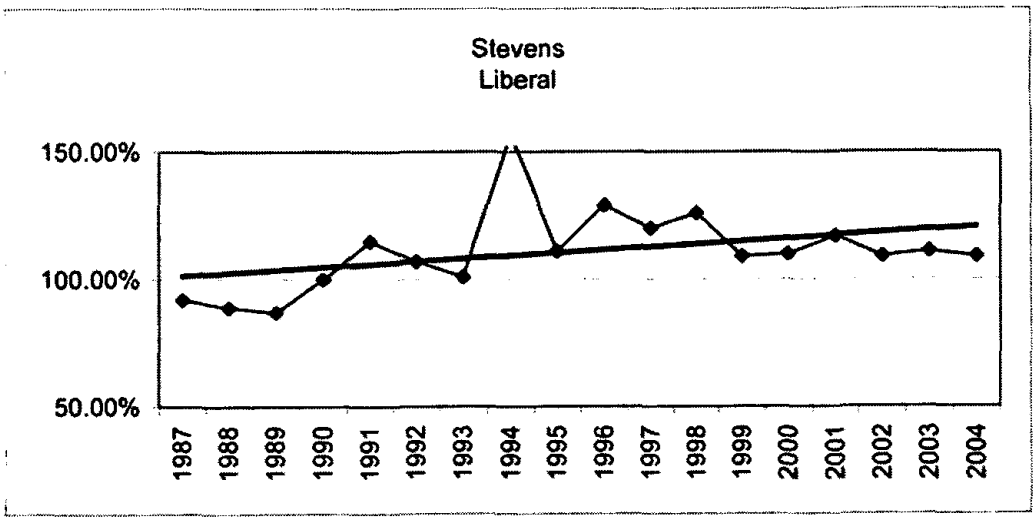
Stevens
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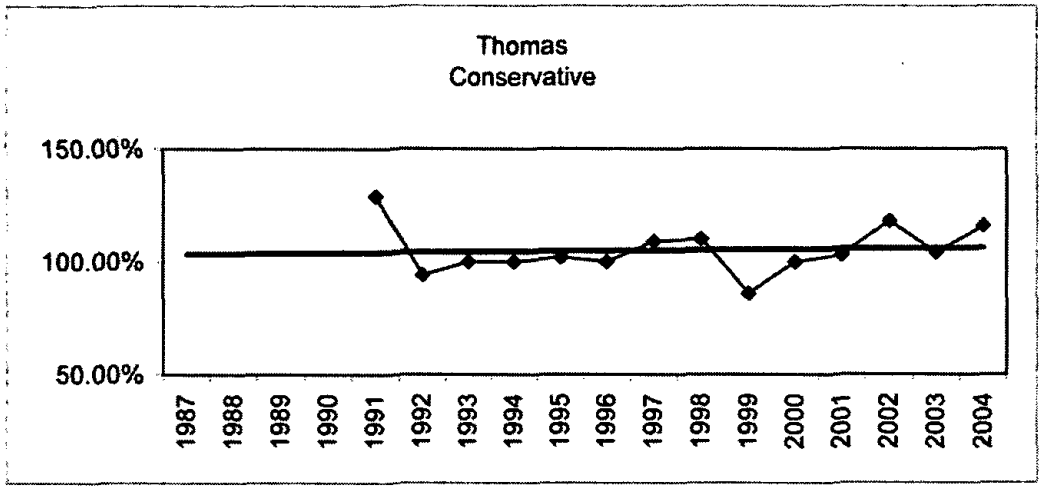
Thomas
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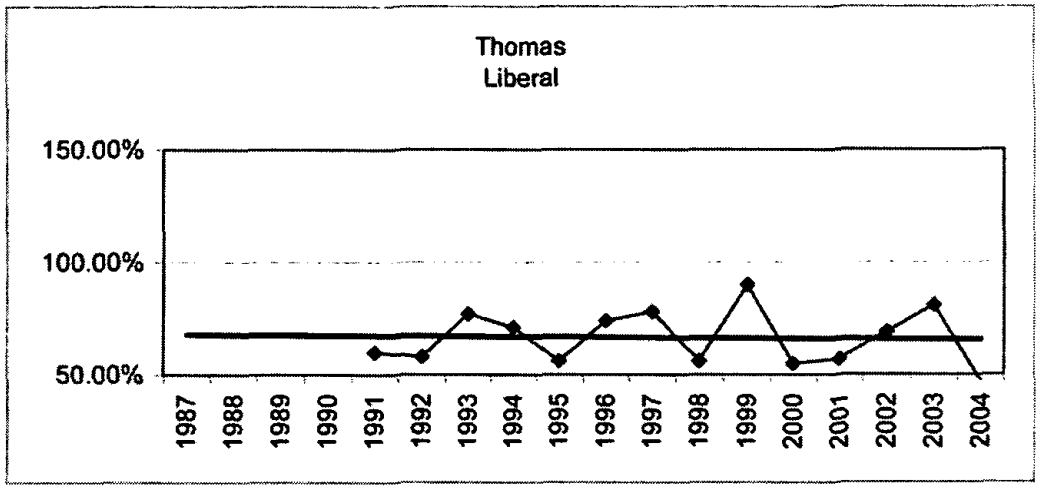
Thomas
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APPENDIX A

1. The Universe of Cases

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

2. Cases Classified as Civil or Criminal

The classification of cases as civil or criminal follows commonly understood definitions. Generally, the nature of the case is clearly identified in the opinion. Only occasionally does a case pose a problem of classification. No cases in 2001 raised such a question.

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

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

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

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

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

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

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

Federalism cases on Data Table 9 are limited to those cases in which there were issues raised by 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 or interstate relationships, such as those raised by the dormant Commerce Clause or the Privileges and Immunities Clause, are excluded from the table.

5. The Swing Vote Cases

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

APPENDIX B

Study Methodology

This Study seeks to quantify three characteristics of Supreme Court voting behavior: voting trends, mean voting percentages and relationships among the Justices' voting patterns. 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%).

B. Predictive Modeling

Data in this project were fitted to an Auto Regressive Integrated Moving Average (ARIMA) forecasting model.[244] 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

244. 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).

"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.[245] This parameter seeks to relate each data point in the stationary series to the data point immediately preceding it through multiplication. That is:

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

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

Because we are dealing with a *series* of data points, however, a single parameter will almost never precisely produce the relationship just described for all data point pairs. Some error is inevitable. We therefore seek to determine that parameter which produces the least total error when applied to the entire series.[246]

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.

245. 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.

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

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.

C. Mean Testing

We use a "student's t test"[247] 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.[248] We hypothesize that X_1 is also the true mean of the population μ, and we set up this hypothesis (the "null" hypothesis) and its corresponding alternative hypothesis as follows:

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

H_a: $\mu \bullet X_1$ — 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,[249] by rejecting the null hypothesis.[250] This is

247. For a practical perspective on this procedure, see DAVID S. MOORE & GEORGE P. MCCABE, INTRODUCTION TO THE PRACTICE OF STATISTICS 500-18 (2d ed. 1993). *See also* HOGG & CRAIG, *supra* note 6.

248. 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.

249. We have selected a confidence interval of 95%. Because this is a two-tailed test (X_2 may shift μ in either a positive or negative direction), • = .025.

accomplished by calculating the following statistic:

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

The result of this equation (t) is compared to the entry on a t-distribution table corresponding to the confidence interval desired (•) and the appropriate number of degrees of freedom (n-k).[251] If the absolute value of t is greater than the table entry, H_o is rejected and we say that the Justice has shown a statistically significant change in voting behavior this Term.

D. Correlation

Relationships between two Justices' voting records may be mapped over a two-dimensional Cartesian plane as in Figures 1 and 2. Figure 1 shows a high degree of positive correlation (R^2=0.7921) between the voting percentages of the Chief Justice and Justice Scalia for the Equal Protection category. The points all fall close to an upward sloping line. On the other hand, Figure 2 shows that the voting percentages of the Justice Scalia and Justice Stevens show only a very weak, negative correlation (R^2=0.0473). The points are widely scattered about a downward sloping line. Statistically significant correlations between and among Justices' Term-to Term voting percentages are shown in Regression Tables 1-10. The first number in each pair is the Pearson correlation coefficient. The second number is an r^2 statistic, which is a more reliable measure of the actual level of correlation.[252]

250. A full description of the logic behind this seemingly convoluted procedure is beyond the scope of this article. However, its purpose is to control Type I (or alpha) error. For a complete explanation, see MOORE & MCCABE, *supra* note 152.

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

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

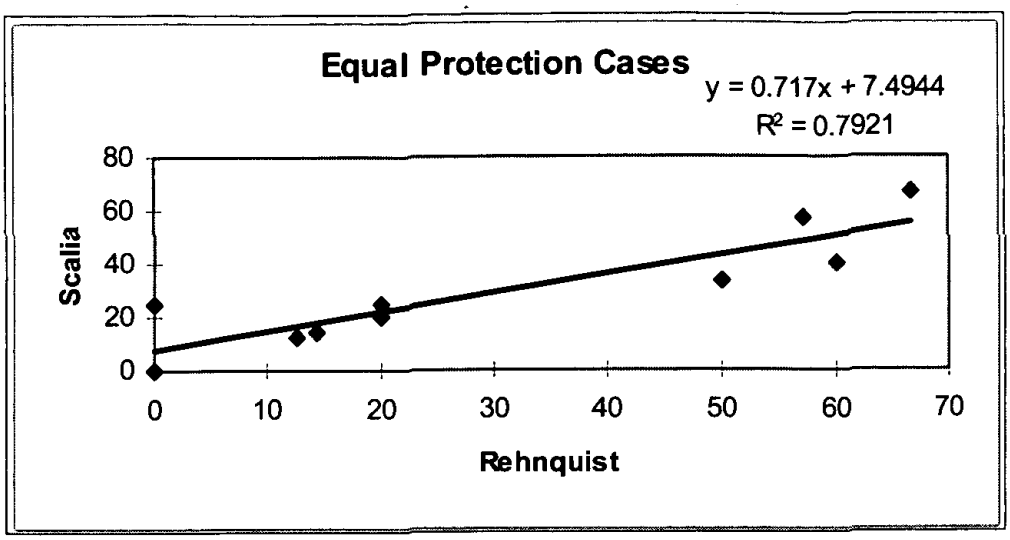


Figure 1

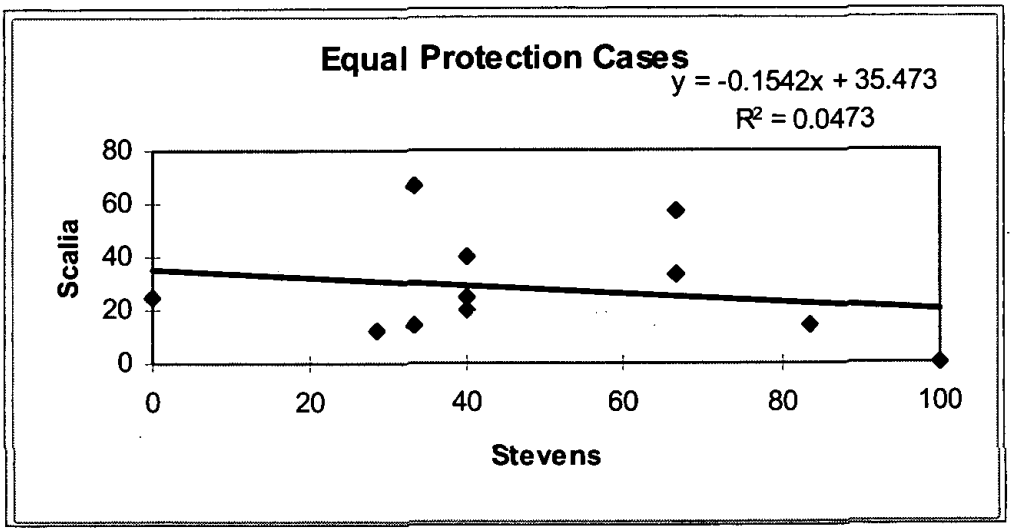


Figure 2

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 bat-

teries 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.[253]

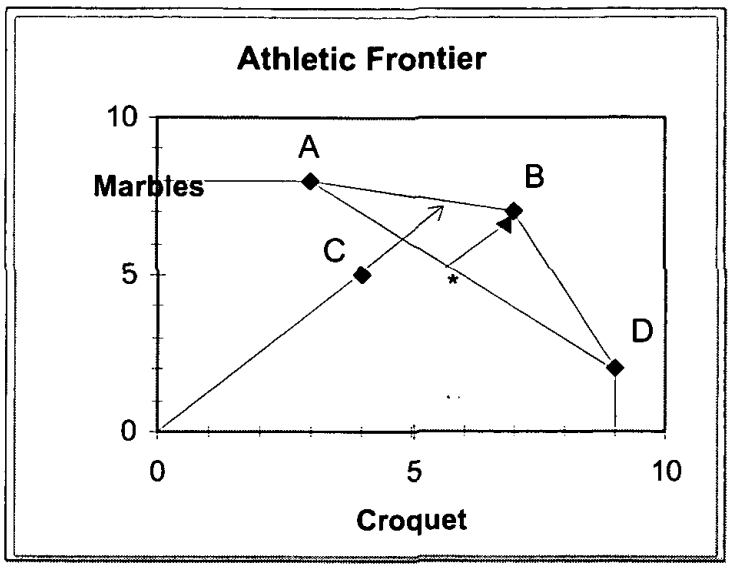
F. Frontier Analysis

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

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

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

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



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.[254]