

Supreme Court Voting Behavior

2003 Term

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I. Introduction

This Study, the eighteenth in a series,¹ tabulates and analyzes the voting behavior of the United States Supreme Court during the 2003 Term.² The analysis is designed to determine whether individual Justices and the Court as a whole are voting more “conservatively,”

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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*].

2. The 2003 United States Supreme Court Term covers decisions made from October 2003 through June 2004.

more “liberally,” or about the same when compared with past Terms. As in politics, whether a judicial trend is “conservative” or “liberal” often lies in the eye of the beholder. On such a point, members of the American 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 categories of cases,⁴ and by applying standard statistical tests to the resulting data,⁵ this Study attempts to provide reliable information regarding the current ideological posture of the Court and its members, as well as conclusions and projections regarding its past and future trends. Whether statistical analysis of a complex and subjective process (like 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.

For the 2003 Term, seven of the Study’s ten Tables demonstrate liberal movement in the outcome of Majority Opinions (as compared

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.

with outcomes from the prior Term).⁷ Last Term, six Tables demonstrated liberal movement.⁸ Accordingly, the liberal trend noted last year may have continued. Any such conclusion, however, is complicated by evidence of conservative momentum in 2003, including conservative patterns on three Tables that statistical testing (i.e., factor analysis) suggests are reasonably reliable evidence of ideological bias.⁹

Last Term we noted a “seesaw” pattern in the trends identified by this Study.¹⁰ In 2003, this conservative-to-liberal-to-conservative-and-back-again movement (evident for the past four Terms) falters (at least temporarily).¹¹ The ideological tilt of the Court in 2003 is rather unclear. Based on the data, 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, as evidenced by two Terms of continued gradual lessening of conservative voting power across a broad range of cases,¹² or (b) a Court that remains basically conservative, with liberal outcomes in 2002 and 2003 suggesting (at most) a slight recalibration in the scales of justice.¹³ Either description seems defensible on the basis of the data.

Whatever characterization ultimately proves accurate, the Study again demonstrates a rather unsteady balance between liberal and conservative ideologies on the United States Supreme Court. Con-

7. Civil/State, Civil/Federal, First Amendment, Equal Protection, Statutory Civil Rights, Federal Jurisdiction, and Federalism cases. *See infra* Data Tables 1, 2, 5-9.

8. Last Term, liberal movement in Majority outcomes was noted on the Tables tabulating outcomes in Civil/State, Criminal/Federal, Equal Protection, Statutory Civil Rights, Federalism, and Swing-Vote cases. *See 2002 Study, supra* note 1, at Data Tables 1-10. Three of these Tables — Civil/State, Equal Protection and Statutory Civil Rights — demonstrate liberal momentum in 2003.

9. Tables 1, 3 and 4, tabulating results in Civil State, Criminal/State, and Criminal/ Federal cases, are ranked among the 2003 Study’s most reliable indicators of ideological bias (Section V, below). Those Tables also demonstrate notable conservative movement in the outcome of Split Cases.

10. *2002 Study, supra* note 1, at 505.

11. A seesaw pattern is evident in the past four Terms. The 1999 Study suggested conservative movement (*1999 Study, supra* note 1, at 544), the 2000 Term evidenced liberal results (*2000 Study, supra* note 1, at 248), the 2001 Term showed conservative momentum (*2001 Study, supra* note 1, at 308), with the 2002 Term again moving in a slight overall liberal direction. *2002 Study, supra* note 1, at 498.

12. The 2002 Study demonstrated overall liberal movement in six of the ten Tables. *2002 Study, supra* note 1, at 505.

13. Liberal movement on six or seven Tables in 2002 and 2003 may not be significant, particularly when considered against the generally conservative outcomes of the majority of cases tabulated during those Terms.

servative voting patterns, moreover, appear to be in decline. Accordingly, the ideological views of future Justices will almost certainly rebalance (perhaps dramatically) what has been for some time a judicial seesaw.¹⁴

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 rights¹⁶ or to exercise judicial restraint.¹⁷

14. It hardly takes advanced statistical analysis to demonstrate that ideology has taken center stage in current discussions (and official actions) related to the federal judiciary. It increasingly appears that judicial nominees are selected by the President and opposed by the Senate on ideological grounds — resulting in an on-going political and constitutional dispute regarding the nomination, confirmation and subsequent role of federal judges. See, e.g., William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L. J. 1279, 1285 (2005) (speaking of the Judicial activism on the Burger and Rehnquist courts as a response to gay rights, women's rights, and traditional values countermovements); Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. Rev. 847, 858 (2005) (speaking of the amount of criticism to the Supreme Court's recent activism); *Fight over judges; Agreement likely won't end long-running war*, SAN DIEGO UNION TRIB., May 25, 2005, at Opinions section; *Rushing to Judgement* [sic], BOSTON GLOBE, Apr. 7, 2005, at A22.

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 asserting private rights. The federalism decisions tabulated in Table 9 are less obviously relevant to individual rights because such decisions focus on the balance of federal and state authority. Never-

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

theless, 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. This Term, for example, seven of 11 cases were decided unanimously on Table 4 and three of six cases were decided unanimously on Table 7.

19. An example of what seems to be a fairly non-controversial case for the court was *Muhammad v. Close*, 540 U.S. 749 (2004) (case was only 6 pages long and decided per curiam).

20. For example, the Court was rather receptive to statutory civil rights claims this Term. See Data Table 7. Justice Scalia (generally considered a conservative jurist) voted to uphold the statutory claim in four of six cases. Justice Scalia’s actions in these cases may involve not only concern for individual rights (classified as a liberal impulse by the Study), but a conservative value as well: commitment to judicial restraint. Justice Scalia also manifested this behavior in other categories such as his strict construction of the statute in a Criminal State case: *Dretke v. Haley*, 541 U.S. 386 (2004) (voted liberally against the court

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 1986-2002 Terms. Likewise, the current ideological position of the Court as a whole can be determined by comparing present outcomes of the

majority to emphasize innocence and strict construction of criminal statute). Another example was Justice Scalia's concurring opinion in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (voting liberally for the claim of Jurisdiction with a broad reading of the statute).

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

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

23. See *id.*

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

25. Of course, the data are only as reliable as our assumptions. The Study's general assumption that votes favoring individual rights or the federal government (in federalism cases) reflect liberal views is almost certainly not accurate in every case. For example, see *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), where the more "conservative" members of the Court voted in favor of a First Amendment claim rejected by the most "liberal" jurists. There, the state's canon of judicial conduct prohibited candidates for judicial election from expressing their views on certain First Amendment topics, such as abortion. The "conservative" Justices apparently valued free speech more than continued expansion of the abortion right. Similarly, in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the more conservative members of the Court voted liberally against the state in order to reaffirm the importance of economic rights, generally considered to be a conservative value. Thus, while voting in favor of a First Amendment Claim and for the federal government on federalism issues are liberal results under the definitional scheme of this Study, not everyone would agree that these votes suggest "liberal" motivations.

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 2003 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 2004 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 2003 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 2003 Term

Seven of the ten Tables this year manifested liberal movement in the outcome of Majority Cases.³¹ The outcome of Majority, Split and Unanimous Cases on those Tables, considered as a whole, also suggests liberal movement on seven Tables.³² This continues an overall liberal trend noted last Term. The strength of this trend, however, is questionable.

In the decision of Split Cases — where outcomes may be more heavily influenced by ideology — only four of the ten Tables indicate liberal movement.³³ Moreover, the three Tables identified by factor analysis as the most reliable indicators of conservative/liberal bias demonstrate conservative movement in the decision of Split Cases.³⁴

30. See *supra* note 6.

31. See *supra* note 7 above and accompanying text.

32. See *infra* Charts 1, 2, 5-9.

33. See *infra* Data Tables 2, 5, 7, 9.

34. Factor analysis identifies Criminal/State, Civil/State, and Criminal/Federal cases as the three most reliable indicators of ideological bias in 2003 (Section V below). The outcomes in Split Cases on all three Tables moved in a conservative direction this Term. Last Term, by contrast, three of the Tables showing liberal movement (Civil/State, Criminal/Federal and Federalism) were ranked among the most reliable indicators of ideological

This conservative movement may be more notable in light of the fact that six of the ten Tables (considered independently of movement or trend) reflect conservative outcomes in more than half of the decided cases.³⁵ In light of this continued conservative strength, and particularly the conservative movement in the more reliable categories, any liberal trend may not be as significant as it first appears.

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

The Court extended a liberal trend in the decision of Civil/State Cases that began last Term. This Term, only three Justices voted more conservatively than during the prior Term: Justices Kennedy, Scalia and Chief Justice Rehnquist. What is probably more telling on Table 1 is that even the most conservative Member of the Court, Justice Kennedy, only voted for the government 57.1% of the time. Five Justices voted for the government less than 50% of the time. The Court Majority also made liberal movement by only voting for the state government in only 46.7% of the cases. Unanimous Cases were decided almost 17 points more liberally than in 2002.

The only indication of conservative movement comes from the Court's disposition of Split Cases — where 50% of such decisions were decided in favor of state governments. While this figure represents a 5.6 point conservative increase in the Court's support of state governments from the 2002 Term, a governmental success rate of 50% is hardly the work of a conservative steamroller. Therefore, we conclude that the data on Table 1 suggests continuation of the liberal movement on Table 1 that began last Term.

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

Table 2 indicates that the Court in 2003 had a substantially different level of support for the federal government than for state governments in civil cases. For the last several Terms, Table 2 has been a very conservative category for the Court.³⁶ This Term, even the most *liberal* voting pattern evidenced by a Member of the Court was surprisingly conservative: Justice Ginsburg voted for the government 66.7% of the time.³⁷ Every other Justice voted *even more often* for the

bias. 2002 Study, *supra* note 1, at 505 (Civil/State), 507 (Criminal/Federal), 509 (Federalism), 564 (Factor Analysis ranking).

35. See *infra* Data Tables 2-5, 9-10 (tables show a conservative stance on the court as a whole, in more than 50% of the cases, regardless of movement from the prior term).

36. See *infra* Data Table 2 (cases decided for the government in at least 75% of the cases since 2001 Term).

37. See *infra* Data Table 2.

federal government, with Justice O'Connor reaching the conservative "top" at 83.3%.

Despite the seeming conservatism of the outcomes, however, Table 2 demonstrates liberal movement. There was slight liberal movement (2.6 points) in the outcome of Majority Cases, with a more substantial 33.3 point liberal decrease in the Court's support for the federal government in Split Cases. This liberal movement is not completely offset by a 13.9 point conservative increase in the Court's support for the federal government in Unanimous Cases.

All of the data, taken together, suggests that the liberal trend on Table 2 is hardly breathtaking. Outcomes on Table 2 — as they have in other Terms analyzed by this Study — remain rather conservative. Nevertheless, the most notable movement on the Table, including the movement in Split Decisions (where ideology may play its most significant role), is liberal.

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

This Term, factor analysis suggests that Table 3 tabulates the most reliable evidence of conservative or liberal bias on the Court. Overall, the movement on Table 3 appears to be conservative. Five members of the Court (including Justices often considered "liberal") voted more conservatively in the 2003 Term than in 2002.³⁸ In addition, another five Justices voted conservatively in 2003 more than 60% of the time.³⁹ Majority and Split decisions also evidence conservative movement — with 4.2 and 12.5 point increases, respectively, in support of state governments.

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

This Table shows clear conservative movement in almost every measure relevant to the determination of voting trends. Each individual Justice voted more conservatively this Term than in the 2002 Term. Majority, Split and Unanimous decisions all indicate strong conservative movement in support of the federal government. Indeed, the Court decided only three cases liberally — and those cases were decided unanimously (where ideology may play a lesser role in decisional outcomes). Table 4, therefore, as with Table 3, suggests conservative momentum in the decision of criminal cases.

38. Justices O'Connor, Breyer, Souter, Ginsburg, and Stevens.

39. Chief Justice Rehnquist and Justices Thomas, Scalia, O'Connor, and Kennedy.

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

Some may be surprised to find the Court's traditionally "conservative bloc" leading the liberal movement evidenced on Table Five this Term. Justice Thomas scored the most liberal voting pattern on the Court, voting 100% of the time in favor of First Amendment claims.⁴⁰ Six other Justices voted more liberally this Term than last.⁴¹ In addition, all cases — Majority, Split and Unanimous — were decided more liberally in 2003 than during the 2002 Term.

Nevertheless, despite this overall liberal movement, fewer than 50% of Majority Cases were decided in favor of a First Amendment Claim. Moreover, the Court has not approached the liberal First Amendment position evident in the 2000 and 2001 Terms.

Data Table 6: Equal Protection Claims

The Court decided only one Equal Protection Case this Term. It is no surprise, therefore, that factor analysis selects Table 6 as the poorest indicator of ideological bias in 2003. The sole case was decided unanimously for the Equal Protection Claim.⁴²

40. See Appendix C regarding the *McConnell* case.

41. Chief Justice Rehnquist and Justices Scalia, Kennedy, Souter, and Ginsburg.

42. Because of doctrinal difficulties encountered in recent Equal Protection decisions, the Court may not be eager to grant review in such cases for the immediate future. Last Term's sharply divided opinions in the affirmative action arena resulted in fractured opinions and arguably inconsistent application of prior precedent. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003). Among other things, different voting majorities on the Court (1) reaffirmed "strict scrutiny" as the standard of review for Equal Protection challenges to affirmative action programs (*Gratz*, 539 U.S. at 270; *Grutter*, 539 U.S. at 326), but (2) applied that standard somewhat less than "strictly." *But see also Grutter*, 539 U.S. at 380 (Rehnquist C.J., dissenting) ("Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.") The Court may be hesitant to address similarly important Equal Protection questions until somewhat more coherent ideological voting blocs coalesce. The listing of opinions and voting coalitions in the *Grutter* case illustrates this inability to agree:

O'Connor, J., delivered the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined, and in which Scalia and Thomas, JJ., joined in part insofar as it is consistent with the views expressed in Part VII of the opinion of Thomas, J. Ginsburg, J., filed a concurring opinion, in which Breyer, J., joined. Scalia, J., filed an opinion concurring in part and dissenting in part, in which Thomas, J., joined. Thomas, J., filed an opinion concurring in part and dissenting in part, in which SCALIA, J., joined as to Parts I-VII. Rehnquist, C. J., filed a dissenting opinion, in which Scalia, Kennedy, and Thomas, JJ., joined. Kennedy, J., filed a dissenting opinion.

539 U.S. at 310. The *Gratz* case also evidences the same inability to agree:

Data Table 7: Statutory Civil Rights Claims

Data Table 7 demonstrates decided liberal movement this Term. The Court decided Majority Cases liberally 66.7% of the time; the most liberal outcome for the past 10 Terms. All of the Justices, furthermore, voted liberally in favor of the claim at least 50% of the time. In addition, Split and Unanimous Cases were decided considerably more liberally than they have been since the 1998 Term.

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

Data Table 8 reveals further liberal movement for 2003. Majority and Unanimous Cases demonstrated rather substantial liberal movement of 10.6 and 30 points, respectively. Split Cases demonstrated 6.1 points of conservative movement, but this was offset by the liberal voting patterns scored by the individual Justices.

Only two Justices did not vote more liberally this Term than last: Chief Justice Rehnquist and Justice O'Connor voted the same percentages as in 2002 term (and these percentages liberally favored a claim of federal jurisdiction more than 50% of the time). Justice Thomas was the only Justice to vote conservatively more than 50% of the time.

The 2002 study anticipated rather accurately the outcomes on Table 8. The voting patterns of five Justices were anticipated within five points.⁴³ The votes cast by three of the remaining four Justices were anticipated within ten points.⁴⁴

Data Table 9: Federalism Cases

The Court continued the liberal movement on Table 9 that began last Term. The movement was substantial in the outcome of Split Cases, where only 28.6% of the cases were decided conservatively in favor of the State — down from 50% in the 2002 Term. The Court

Rehnquist, C. J., delivered the opinion of the Court, in which O'Connor, Scalia, Kennedy, and Thomas, JJ., joined. O'Connor, J., filed a concurring opinion, in which Breyer, J., joined in part. Thomas, J., filed a concurring opinion. Breyer, J., filed an opinion concurring in the judgment. Stevens, J., filed a dissenting opinion, in which Souter, J., joined. Souter, J., filed a dissenting opinion, in which Ginsburg, J., joined as to Part II. Ginsburg, J., filed a dissenting opinion, in which Souter, J., joined, and in which Breyer, J., joined as to Part I.

539 U.S. at 248.

43. Chief Justice Rehnquist and Justices Ginsburg, Souter, O'Connor, and Kennedy.

44. Justices Stevens, Scalia, and Thomas.

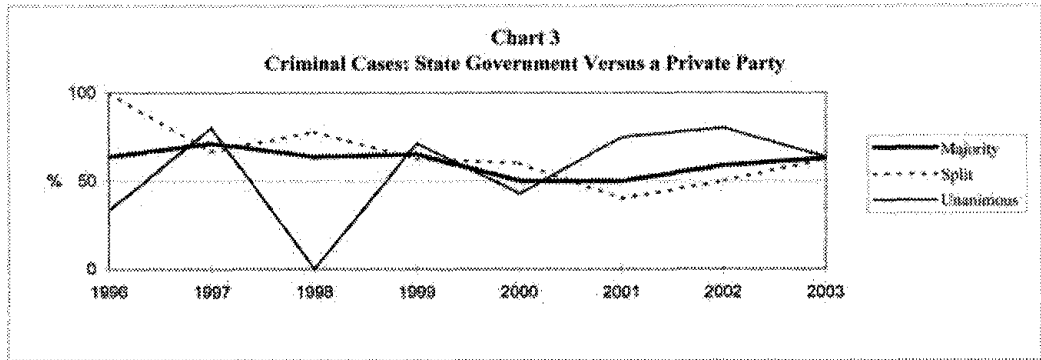
voted 6.5 points more liberally in the outcome of Majority Cases. This liberal movement is offset, however, by a 12.5 point conservative movement in favor of state governments in the decision of Unanimous Cases. Nevertheless, even here, the states prevailed only 50% of the time; a tally that does not reflect impressive conservative power. According to factor analysis, Table 9 sets out the fourth most reliable indication of liberal/conservative bias on the Court this Term.

Data Table 10: Swing-Vote Cases

Justice O'Connor, as in 2002, remained the Justice who voted most often with the Court Majority in the outcome of close 5-4 cases. She cast the deciding vote in an impressive 73.7% of these cases. Justices Thomas and Kennedy tied for second place, voting with the majority 63.2% of the time. Justice Breyer voted the fewest times with the majority at 44.4%. There was slight conservative movement in the outcome of Majority Swing-Vote Cases this Term (1.6 points) from the 2002 Term. This continues a conservative trend that begun with the 1999 Term following two years of liberal voting in Swing-Vote Cases

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

Justice	% Votes for Government										N _i	2003 Term		Anticipated Scores		
	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003		For Gov't	Against Gov't	2003 Term	Error	2004 Term
	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term						
Thomas	91.7	66.7	63.6	92.3	80.0	82.6	66.7	84.6	94.1	80.0	20	5	89.8	-9.8	83.3	
Rehnquist	91.7	66.7	63.6	76.9	72.7	87.0	58.3	84.6	82.4	76.9	20	6	72.6	4.3	75.0	
Scalia	83.3	55.6	63.6	84.6	72.7	82.6	66.7	84.6	82.4	76.9	20	6	80.2	-3.3	83.7	
O'Connor	58.3	44.4	63.6	71.4	63.6	78.3	50.0	46.2	62.5	69.2	18	8	34.6	14.6	62.3	
Kennedy	75.0	55.6	54.6	76.9	54.6	78.3	50.0	76.9	64.7	64.0	16	9	63.4	0.6	64.7	
Breyer	41.7	22.2	36.4	50.0	36.4	40.9	25.0	30.8	29.4	44.0	11	14	27.9	16.1	30.8	
Souter	41.7	22.2	54.6	57.1	36.4	27.3	33.3	23.1	35.3	40.0	10	15	21.3	18.7	34.9	
Ginsburg	41.7	33.3	45.5	42.9	27.3	36.4	25.0	23.1	23.3	36.0	9	16	18.8	17.2	22.6	
Stevens	8.3	22.2	18.2	23.1	9.1	27.3	33.3	15.4	29.4	32.0	8	17	18.7	13.3	25.4	
Majority	58.3	35.6	63.6	71.4	63.6	65.2	50.0	50.0	58.6	63.0	17	10	58.3	4.7	59.8	
Split	60.0	75.0	100.0	66.7	77.8	62.5	60.0	40.0	50.0	62.5	10	6				
Unanimous	50.0	40.0	33.3	80.0	0.0	71.4	42.9	75.0	80.0	63.6	7	4				



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

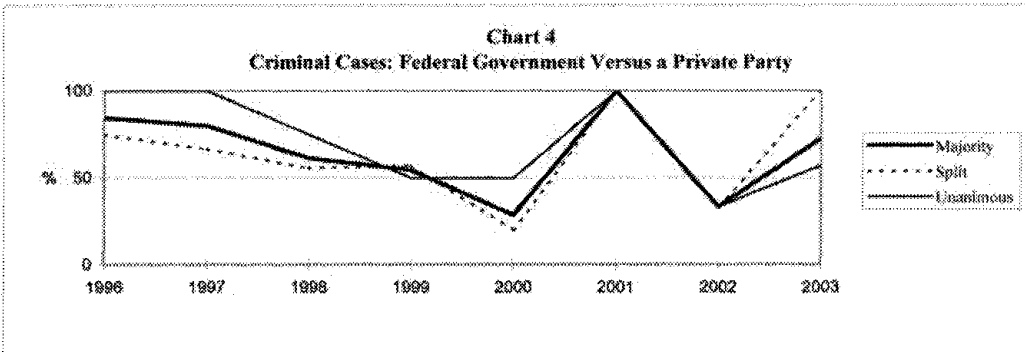
Justice	Mean Voting Percentage All Prior Terms (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (σ)	Actual Voting Percentage This Term (N _i)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	78.6	+/- 6.2	9.97	76.92	no
Stevens	21.8	+/- 6.0	9.60	32.00	yes
O'Connor	62.6	+/- 8.0	12.83	69.23	no
Scalia	75.1	+/- 6.9	11.02	76.92	no
Kennedy	65.4	+/- 7.6	11.87	64.00	no
Souter	41.1	+/- 10.9	15.31	40.00	no
Thomas	80.9	+/- 7.9	10.63	80.00	no
Ginsburg	34.2	+/- 7.3	8.97	36.00	no
Breyer	34.7	+/- 7.6	8.81	44.00	yes

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

Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
O'Connor								
Scalia								
Kennedy	0.75/0.53							
Souter								
Thomas	0.83/0.66			0.88/0.75				
Ginsburg								
Breyer			0.79/0.59					

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

Justice	% Votes for Government										N2	2003 Term Votes		Anticipated Scores		
	1994 Term	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term		For Gov't	Against Gov't	2003 Term	Error	2004 Term
Rehnquist	69.2	71.4	84.6	70.0	76.9	63.5	57.1	100.0	66.7	80.0	8	2	75.6	6.4	65.6	
Thomas	61.5	71.4	84.6	90.0	61.5	54.6	85.7	66.7	80.0	8	2	-80.4	-0.4	74.8		
O'Connor	69.2	71.4	92.3	80.0	84.6	54.6	57.1	100.0	40.0	72.7	8	3	98.5	-25.8	63.9	
Kennedy	61.5	71.4	84.6	90.0	76.9	54.6	28.6	100.0	50.0	72.7	8	3	70.2	2.5	60.9	
Scalia	53.9	78.6	92.3	70.0	46.2	63.6	85.7	100.0	60.0	70.0	7	3	79.1	-9.1	74.3	
Ginsburg	61.5	71.4	78.9	60.0	53.9	36.4	28.6	75.0	33.3	54.6	6	5	43.7	19.9	32.0	
Breyer	69.2	71.4	69.2	70.0	53.9	45.5	28.6	100.0	33.3	54.6	6	5	63.2	-8.7	39.0	
Stevens	30.8	50.0	53.9	55.6	38.5	36.4	14.3	62.5	0.0	45.5	5	6	63.3	-17.9	19.5	
Souter	61.5	78.6	84.6	70.0	46.2	36.4	16.7	75.0	33.3	36.4	4	7	40.9	-4.5	32.8	
Majority	53.9	78.6	84.6	80.0	61.5	54.5	28.6	100.0	33.3	72.7	8	3	78.0	-5.3	85.5	
Split	55.6	85.7	75.0	66.7	55.6	57.1	20.0	100.0	33.3	100.0	4	0				
Unanimous	50.0	71.4	100.0	100.0	75.0	50.0	50.0	100.0	33.3	57.1	4	3				



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

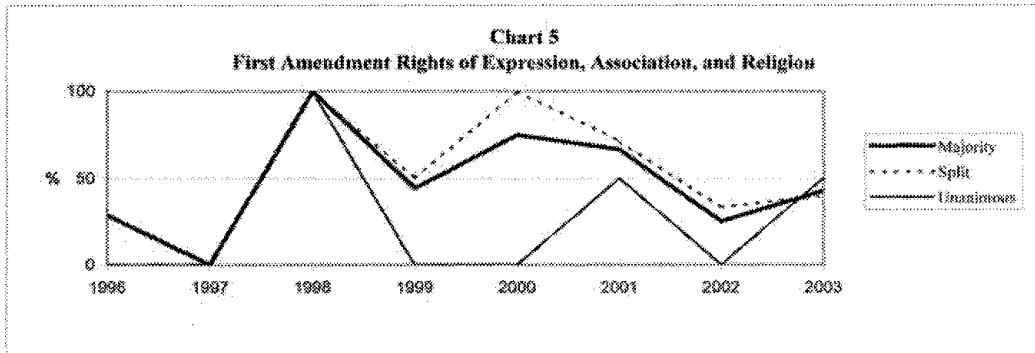
Justice	Mean Voting Percentage All Prior Terms (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage This Term (N2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	76.7	+/- 6.5	10.44	80.00	no
Stevens	42.4	+/- 11.4	18.25	45.45	no
O'Connor	74.3	+/- 9.0	14.42	72.73	no
Scalia	68.5	+/- 9.5	15.24	70.00	no
Kennedy	69.1	+/- 11.8	18.39	72.73	no
Souter	57.6	+/- 14.8	20.65	36.36	yes
Thomas	74.0	+/- 10.2	13.73	80.00	no
Ginsburg	55.5	+/- 14.2	17.46	54.55	no
Breyer	60.1	+/- 19.1	22.22	54.55	no

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

Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
O'Connor	0.75/0.53							
Scalia								
Kennedy	0.76/0.55		0.79/0.60					
Souter		0.77/0.55						
Thomas								
Ginsburg	0.75/0.52	0.83/0.65	0.85/0.68		0.84/0.68	0.94/0.87		
Breyer	0.81/0.61	0.85/0.68	0.83/0.65		0.87/0.73	0.86/0.71		0.91/0.80

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

Justice	% Votes for Claim										N ₂		2003 Term Votes		Anticipated Scores		
	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	For Claim	Against Claim	2003 Term	Error	2004 Term		
	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term							
Thomas	66.7	37.5	85.7	0.0	100.0	66.7	25.0	66.7	25.0	100.0	6	0	61.5	38.5	30.2		
Scalia	55.6	37.5	85.7	0.0	100.0	56.6	25.0	44.4	25.0	66.7	4	2	55.7	11.0	45.8		
Kennedy	88.9	87.5	57.1	0.0	100.0	77.8	75.0	66.7	0.0	50.0	3	3	57.1	-7.1	52.5		
Rehnquist	55.6	62.5	28.6	0.0	50.0	44.4	25.0	22.2	0.0	33.3	2	4	16.4	16.9	31.4		
Stevens	66.7	62.5	42.9	0.0	100.0	37.5	50.0	66.7	33.3	33.3	2	4	61.0	-27.7	44.0		
Souter	66.7	37.5	57.1	100.0	100.0	28.6	50.0	66.7	25.0	33.3	2	4	60.2	-26.9	43.3		
Ginsburg	66.7	75.0	37.1	0.0	100.0	33.3	50.0	55.6	25.0	33.3	2	4	38.2	-1.9	23.8		
O'Connor	66.7	62.5	28.6	0.0	50.0	33.3	50.0	55.6	0.0	16.7	1	5	32.5	-15.8	25.5		
Breyer	66.7	75.0	14.3	0.0	50.0	12.3	75.0	55.6	25.0	16.7	1	5	43.6	-26.9	10.0		
Majority	77.8	75.0	28.6	0.0	100.0	44.4	75.0	66.7	25.0	42.9	3	4	64.1	-21.2	52.5		
Split	83.3	71.4	28.6	0.0	100.0	50.0	100.0	71.4	35.0	40.0	2	5					
Unanimous	66.7	100.0	0.0	0.0	100.0	0.0	0.0	50.0	0.0	50.0	1	1					



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

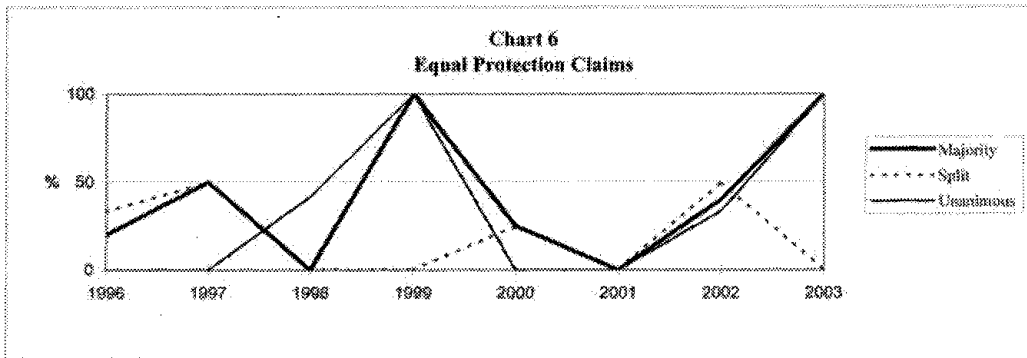
Justice	Mean Voting Percentage	99% Confidence Interval for True Mean		Standard Deviation of μ (σ)	Actual Voting Percentage This Term (X_2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
	All Prior Terms (μ)					
Rehnquist	29.4	+/- 11.8	18.94	33.33	no	
Stevens	36.9	+/- 13.4	24.69	33.33	yes	
O'Connor	40.8	+/- 13.7	21.92	16.67	yes	
Scalia	44.7	+/- 16.0	25.58	66.67	yes	
Kennedy	60.4	+/- 19.0	29.48	50.00	no	
Souter	56.8	+/- 19.2	26.85	33.33	yes	
Thomas	51.6	+/- 23.3	21.28	100.00	yes	
Ginsburg	53.4	+/- 23.1	28.34	33.33	no	
Breyer	41.6	+/- 24.9	28.99	16.67	yes	

Regression Table 5
First Amendment Rights of Expression, Association, and Religion
Correlation (ρ) / R²

Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
O'Connor	0.72/0.49	0.70/0.46						
Scalia								
Kennedy	0.88/0.75	0.72/0.49	0.77/0.57					
Souter								
Thomas				0.92/0.84				
Ginsburg	0.77/0.54	0.95/0.89	0.81/0.62	0.71/0.45	0.84/0.68			
Breyer			0.85/0.70					

Data Table 6
Equal Protection Claims

Justice	% Votes for Claim										X ₂	2003 Term		Anticipated Scores	
	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003		Votes		2003	Error
	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	For Claim	Against Claim	Term		Term
Rehnquist	66.7	60.0	0.0	50.0	0.0	100.0	50.0	0.0	60.0	100.0	1	0	36.1	83.9	30.6
Stevens	33.3	40.0	40.0	50.0	0.0	100.0	25.0	0.0	25.0	100.0	1	0	32.4	87.6	30.1
O'Connor	66.7	80.0	50.0	50.0	0.0	100.0	30.0	0.0	40.0	100.0	1	0	46.1	53.9	43.4
Scalia	66.7	40.0	25.0	0.0	0.0	100.0	50.0	0.0	60.0	100.0	1	0	34.2	65.8	72.2
Kennedy	66.7	80.0	33.3	50.0	0.0	100.0	50.0	0.0	60.0	100.0	1	0	40.6	59.4	70.3
Souter	33.3	40.0	20.0	100.0	0.0	100.0	50.0	0.0	20.0	100.0	1	0	34.9	65.1	22.8
Thomas	66.7	50.0	25.0	0.0	0.0	100.0	50.0	0.0	60.0	100.0	1	0	30.9	69.1	79.5
Ginsburg	33.3	40.0	20.0	100.0	0.0	100.0	50.0	0.0	20.0	100.0	1	0	24.2	75.8	26.5
Breyer	33.3	40.0	20.0	100.0	0.0	100.0	50.0	0.0	40.0	100.0	1	0	30.0	70.0	57.2
Majority	66.7	80.0	20.0	50.0	0.0	100.0	25.0	0.0	40.0	100.0	1	0	34.1	65.9	48.5
Split	66.7	100.0	33.3	50.0	0.0	0.0	25.0	0.0	50.0	0.0	0	0			
Unanimous	0.0	0.0	0.0	0.0	0.0	100.0	0.0	0.0	33.3	100.0	1	0			



Mean Table 6
Equal Protection Claims

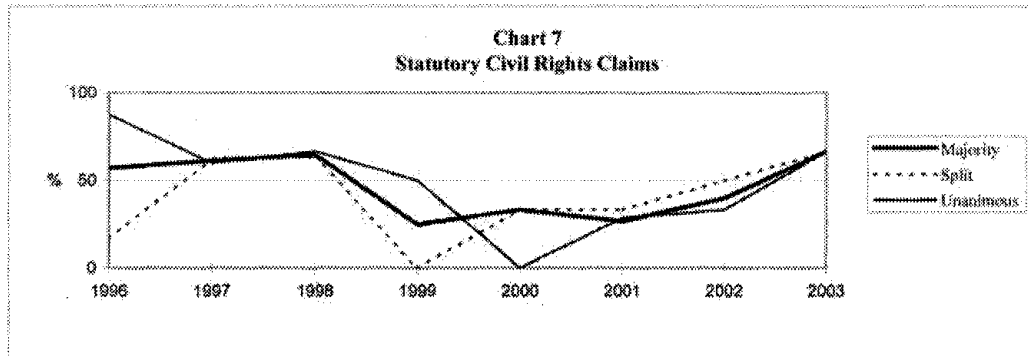
Justice	Mean Voting Percentage All Prior Terms (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage This Term (X_2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	33.8	+/- 18.7	29.93	100.00	yes
Stevens	43.1	+/- 19.7	31.53	100.00	yes
O'Connor	46.2	+/- 18.6	29.82	100.00	yes
Scalia	30.5	+/- 17.8	28.43	100.00	yes
Kennedy	48.0	+/- 18.2	29.89	100.00	yes
Souter	46.4	+/- 24.9	34.89	100.00	yes
Thomas	36.0	+/- 24.7	33.22	100.00	yes
Ginsburg	46.3	+/- 32.7	40.20	100.00	yes
Breyer	42.6	+/- 31.7	36.88	100.00	yes

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

Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
O'Connor		0.76/0.56						
Scalia	0.90/0.80							
Kennedy		0.79/0.60	0.94/0.87					
Souter		0.85/0.70	0.78/0.57		0.78/0.57			
Thomas	0.90/0.79			0.98/0.95				
Ginsburg		0.90/0.78	0.81/0.61		0.79/0.59	1.00/1.00		
Breyer	0.82/0.63	0.87/0.74	0.77/0.54		0.79/0.57	0.99/0.97		0.99/0.97

Data Table 7
Statutory Civil Rights Claims

Justice	% Votes for Claim									X ₂	2003 Term Votes		Anticipated Scores		
	1994 Term	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term		2003 Term	For Claim	Against Claim	2003 Term	Error
Souter	75.0	66.7	92.9	76.9	70.6	75.0	100.0	60.0	20.0	80.0	4	1	40.4	39.6	72.7
Breyer	75.0	83.3	85.7	84.6	82.4	75.0	100.0	53.3	40.0	80.0	4	1	36.0	44.0	54.8
Stevens	75.0	83.3	85.7	84.6	88.2	75.0	100.0	53.3	20.0	66.7	4	2	43.5	23.2	61.7
O'Connor	50.0	33.3	64.3	41.7	58.8	25.0	33.3	26.7	40.0	66.7	4	2	29.2	37.5	59.2
Scalia	25.0	16.7	50.0	23.1	41.2	25.0	0.0	13.3	40.0	66.7	4	2	13.4	53.3	44.0
Kennedy	25.0	16.7	50.0	61.5	47.1	25.0	33.3	20.0	40.0	66.7	4	2	28.2	38.5	43.7
Ginsburg	75.0	66.7	78.6	76.9	70.6	75.0	100.0	60.0	40.0	66.7	4	2	15.4	51.3	66.5
Rehnquist	50.0	16.7	50.0	30.8	35.3	25.0	33.3	13.3	40.0	50.0	3	3	14.1	35.9	23.2
Thomas	25.0	16.7	50.0	23.1	23.5	25.0	0.0	20.0	40.0	50.0	3	3	26.8	23.1	45.3
Majority	50.0	33.3	37.1	61.5	64.7	25.0	33.3	26.7	40.0	66.7	4	2	28.3	38.4	41.3
Split	50.0	25.0	16.7	62.5	63.0	0.0	33.3	33.3	50.0	66.7	2	1			
Unanimous	50.0	50.0	87.5	60.0	66.7	50.0	0.0	28.6	33.3	66.7	2	1			



Mean Table 7
Statutory Civil Rights Claims

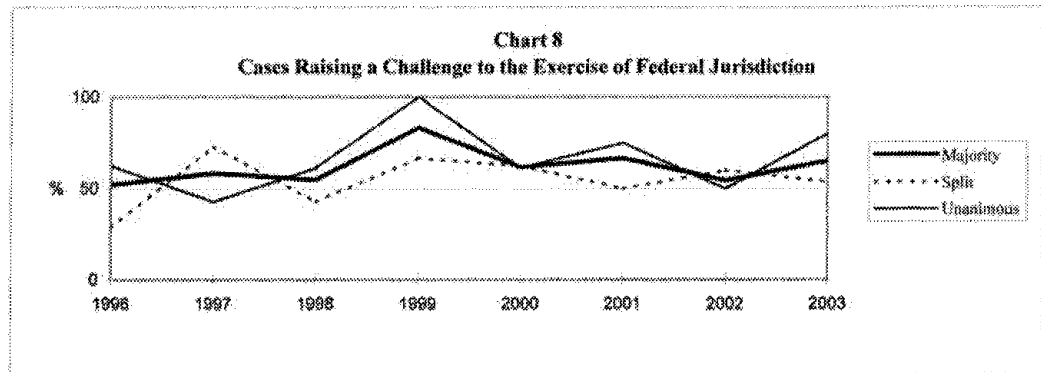
Justice	Mean Voting Percentage All Prior Terms (μ)	95% Confidence Interval for True Mean	Standard Deviation of μ (σ)	Actual Voting Percentage This Term (X_2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	35.1	± 6.5	10.01	50.00	yes
Stevens	74.9	± 12.2	18.90	66.67	no
O'Connor	44.2	± 7.7	12.27	66.67	yes
Scalia	35.0	± 9.8	15.71	66.67	yes
Kennedy	40.7	± 10.0	15.56	66.67	yes
Souter	63.7	± 15.6	21.78	80.00	yes
Thomas	27.6	± 10.0	13.48	50.00	yes
Ginsburg	68.7	± 14.2	17.38	66.67	no
Breyer	75.5	± 15.6	18.19	80.00	no

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

Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
O'Connor	0.73/0.50							
Scalia			0.72/0.49					
Kennedy				0.71/0.47				
Souter		0.72/0.48						
Thomas				0.90/0.80				
Ginsburg		0.88/0.76				0.94/0.86		
Breyer		0.96/0.91				0.91/0.80		0.90/0.79

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

Justice	% Votes for Claim										X ₂	2003 Term		Anticipated Scores	
	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003		For	Against	2003	2004
	Term	Term	Term	Term	Term	Term	Term	Term	Term	Term	Claim	Claim	Term	Term	
Ginsburg	36.8	68.4	56.5	55.2	60.0	83.3	61.9	83.3	54.6	81.8	18	4	86.0	-4.2	78.9
Stevens	42.1	75.0	69.6	51.7	65.0	100.0	88.4	83.3	47.6	77.3	17	5	68.9	8.4	68.5
Breyer	33.3	63.2	65.2	51.7	65.0	66.7	60.0	83.3	63.6	77.3	17	9	89.1	-11.8	74.1
Souter	30.0	68.4	56.5	60.7	60.0	83.3	68.4	83.3	54.6	69.6	16	7	71.0	-1.4	70.5
O'Connor	40.0	47.6	54.6	43.3	55.0	83.3	47.4	63.6	66.7	66.7	14	7	63.0	3.7	63.5
Rehnquist	30.0	42.9	56.5	60.0	45.0	66.7	52.4	66.7	54.6	54.6	12	10	54.4	0.1	54.5
Kennedy	40.0	57.1	56.5	58.6	55.0	83.3	61.9	58.3	50.0	54.6	12	10	57.3	-2.8	55.8
Scalia	35.0	42.9	47.8	43.3	40.0	66.7	47.6	50.0	31.8	52.6	10	9	45.3	7.3	43.1
Thomas	30.0	42.9	47.8	46.7	45.0	83.3	47.6	58.3	38.1	45.5	10	12	53.7	-8.3	34.2
Majority	40.0	57.1	52.2	58.6	55.0	83.3	61.9	66.7	54.6	68.2	15	8	61.2	4.0	63.0
Split	54.6	50.0	28.6	73.3	42.9	66.7	62.5	50.0	60.0	53.9	7	6			
Unanimous	22.3	66.7	62.5	42.9	61.5	100.0	61.5	75.0	50.0	80.0	8	2			



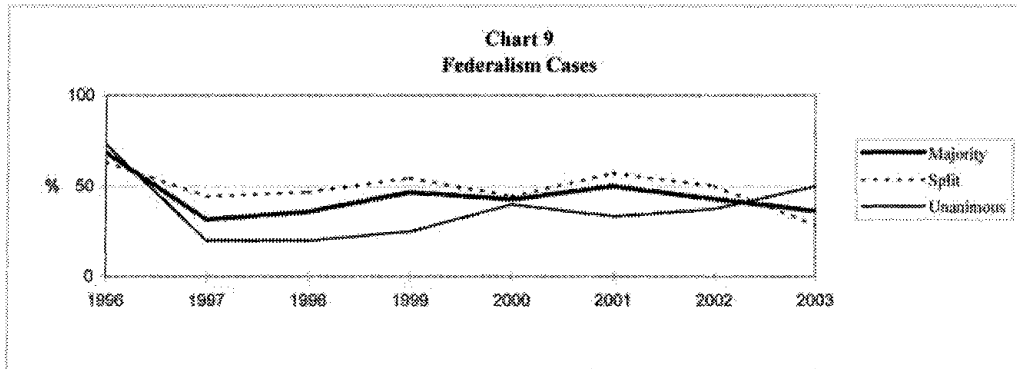
Mean Table 8
Cases Raising a Challenge to the Exercise of Federal Jurisdiction

Justice	Mean Voting Percentage All Prior Terms (μ)	99% Confidence Interval for True Mean	Standard Deviation of μ (s)	Actual Voting Percentage This Term (X_2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	52.7	+/- 7.8	12.41	54.55	no
Stevens	67.8	+/- 9.9	15.77	77.27	yes
O'Connor	54.2	+/- 8.6	13.78	66.67	yes
Scalia	46.5	+/- 7.1	11.31	52.63	yes
Kennedy	56.8	+/- 7.4	11.56	54.55	no
Souter	60.6	+/- 11.5	16.13	69.57	no
Thomas	49.5	+/- 11.0	14.25	45.45	no
Ginsburg	59.3	+/- 13.5	16.57	81.82	yes
Breyer	61.3	+/- 11.5	13.36	77.27	yes

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

Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
O'Connor	0.81/0.63							
Scalia	0.81/0.64	0.78/0.58						
Kennedy	0.80/0.62	0.73/0.50	0.76/0.54					
Souter	0.84/0.69	0.79/0.59	0.76/0.53	0.80/0.61				
Thomas	0.77/0.55	0.86/0.71	0.74/0.50	0.88/0.76	0.91/0.81			
Ginsburg	0.80/0.60	0.91/0.81	0.81/0.62	0.85/0.69	0.78/0.56	0.96/0.90		
Breyer		0.70/0.43				0.82/0.63		0.87/0.72

Justice	% Votes for State									X2	2003 Term Votes		Anticipated Scores		
	1994 Term	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term		2003 Term	For State	Against State	2003 Term	Error
	Scalia	81.3	55.6	73.2	31.6	52.0	46.7	57.1	35.6	37.1	60.0	6	4	47.6	12.4
Rehnquist	72.2	51.9	75.6	36.8	60.0	46.7	50.0	50.0	35.7	54.6	6	5	51.7	2.8	36.7
Kennedy	55.6	51.9	68.3	42.1	40.0	53.3	42.9	70.0	50.0	54.6	6	5	53.4	1.2	49.7
Thomas	72.2	56.0	73.2	36.8	64.0	60.0	57.1	70.0	64.3	50.0	5	5	67.2	-17.2	65.2
O'Connor	55.6	44.4	70.7	29.4	45.8	46.7	35.7	60.0	35.7	45.5	5	6	48.9	-3.5	35.0
Souter	44.4	34.6	43.9	15.8	32.0	20.0	35.7	30.0	28.6	45.5	5	6	14.8	30.7	28.1
Stevens	55.6	29.6	45.0	35.0	8.0	26.7	35.7	30.0	35.7	36.4	4	7	27.5	8.9	35.8
Ginsburg	50.0	38.5	51.3	36.8	28.0	33.3	28.6	40.0	42.9	36.4	4	7	39.9	-3.5	34.2
Breyer	38.9	34.6	50.0	15.8	32.0	13.3	35.7	30.0	28.6	36.4	4	7	25.7	10.7	27.4
Majority	55.6	51.9	68.3	31.6	36.0	46.7	42.9	50.0	42.9	36.4	4	7	49.6	-13.2	40.2
Split	36.4	62.5	63.2	44.4	46.7	54.6	44.4	57.1	50.0	28.6	2	5			
Unanimous	85.7	36.4	72.7	20.0	20.0	25.0	40.0	33.3	37.5	30.0	2	2			

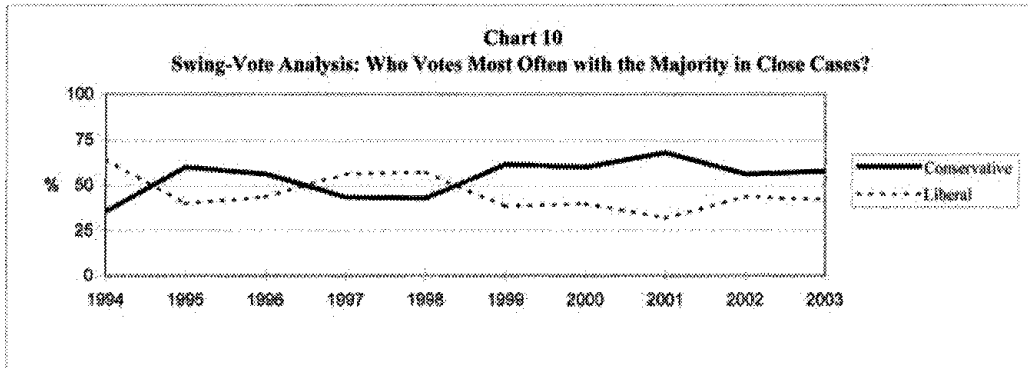


Justice	Mean Voting Percentage	99% Confidence Interval for True Mean		Standard Deviation of μ (σ)	Actual Voting Percentage This Term (X2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
	All Prior Terms (μ)					
Rehnquist	57.6	+/- 9.4		14.67	54.55	no
Stevens	39.1	+/- 9.0		14.05	36.36	no
O'Connor	51.8	+/- 9.8		15.17	48.45	no
Scalia	55.5	+/- 10.3		15.86	60.00	no
Kennedy	52.3	+/- 9.0		13.96	54.55	no
Souter	40.1	+/- 13.0		16.13	43.45	no
Thomas	58.2	+/- 9.9		13.28	50.00	no
Ginsburg	40.6	+/- 7.9		9.76	36.36	no
Breyer	31.0	+/- 9.7		11.24	36.36	no

Justice	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
Stevens								
O'Connor	0.88/0.76							
Scalia	0.77/0.56		0.73/0.49					
Kennedy			0.80/0.62	0.78/0.59				
Souter	0.76/0.54		0.74/0.50					
Thomas				0.78/0.57	0.76/0.55			
Ginsburg		0.84/0.68						
Breyer	0.77/0.55			0.82/0.64		0.91/0.81		

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

Justice	% Votes for Majority										X2		2003 Term Votes		Anticipated Scores	
	1994 Term	1995 Term	1996 Term	1997 Term	1998 Term	1999 Term	2000 Term	2001 Term	2002 Term	2003 Term	For Maj	Against Maj	2003 Term	Error	2004 Term	
O'Connor	68.8	80.0	75.0	53.3	75.0	84.6	66.7	84.0	100.0	73.7	14	3	90.8	-17.1	81.3	
Kennedy	81.3	85.0	81.3	87.3	67.9	73.1	83.3	80.0	56.3	63.2	12	7	71.6	-8.4	68.2	
Thomas	50.0	75.0	56.3	56.3	50.0	84.6	63.3	80.0	43.8	63.2	12	7	64.5	-4.3	61.3	
Stevens	50.0	25.0	50.0	43.8	60.7	26.9	43.3	24.0	37.5	55.6	10	8	65.6	-10.0	39.1	
Scalia	56.3	75.0	56.3	50.0	50.0	73.1	63.3	80.0	43.8	55.6	10	8	80.6	-25.0	57.8	
Souter	37.5	30.0	43.8	43.8	46.4	34.6	43.3	28.0	56.3	55.6	10	8	24.4	31.2	42.4	
Ginsburg	50.0	30.0	31.3	56.3	53.6	30.8	36.7	20.0	43.8	55.6	10	8	40.3	15.3	49.5	
Rehnquist	62.5	75.0	62.5	56.3	46.4	76.9	63.3	72.0	62.5	47.4	9	10	24.4	23.0	59.7	
Breyer	43.8	25.0	43.8	56.3	50.0	19.2	36.7	32.0	56.3	44.4	8	10	34.1	10.3	45.0	
Conservative	35.7	60.0	56.3	43.7	42.9	61.5	60.0	68.0	56.3	57.9	11	8	55.1	2.8	56.2	
Liberal	84.3	40.0	43.7	56.3	57.1	38.5	40.0	32.0	43.8	42.1	8	11	44.9	-2.8	43.8	



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 (X_2)	Did This Term Show a Statistically Significant Change in Voting Behavior?
Rehnquist	65.3	± 8.6	10.27	47.37	yes
Stevens	42.2	± 8.0	12.42	55.56	yes
O'Connor	76.2	± 9.0	14.05	73.68	no
Scalia	62.2	± 8.8	13.59	55.56	no
Kennedy	75.2	± 7.2	11.15	63.16	yes
Souter	44.6	± 10.5	14.67	55.56	yes
Thomas	59.4	± 12.7	17.13	63.16	no
Ginsburg	38.8	± 9.6	11.73	55.56	yes
Breyer	40.3	± 11.3	13.17	44.44	no

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	-0.74/0.52							
O'Connor								
Scalia	0.81/0.63							
Kennedy								
Souter	-0.72/0.48			-0.85/0.70				
Thomas	0.76/0.55	-0.73/0.48		0.89/0.77		-0.86/0.71		
Ginsburg	-0.83/0.66	0.77/0.55		-0.80/0.60				
Breyer	-0.76/0.53			-0.92/0.82		0.74/0.49	-0.90/0.79	0.73/0.47

IV. Analysis⁴⁵

Table 1: Civil-State Party⁴⁶

For the second year in a row, Data Table 1 is the second most reliable indicator of conservative/liberal bias on the Court. The Table, again like last Term, suggests a liberal trend, with outcomes in Majority and Unanimous Cases moving in a liberal direction.⁴⁷ This is balanced against the outcome of Split Cases, which demonstrates 5.6 points of conservative movement. Nevertheless, only 50% of Split Cases were decided in favor of state governments, suggesting that this conservative movement does not seriously undermine the liberal movements noted in Majority and Unanimous Cases.

The liberal trend suggested by Table 1 is reinforced by the voting patterns of individual Justices. Only three Justices (Chief Justice Rehnquist and Justices Kennedy and Scalia) voted more conservatively in 2003 than last Term. The remaining six Members of the Court — including Justice Thomas, who reaches his lowest conservative voting score for all but the 1999 Term — vote more liberally in

45. Throughout section IV, we begin discussing each table with a footnote that cites each case, pertaining to that table, for the 2003 Term. The “*” symbol following a case indicates that the case also appeared on another table (Tables 1-9) for analysis, not including Table 10: Swing-Vote Cases (all cases in Data Table 10 save for *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004) are on another Table). The “¥” symbol indicates that the case represent more than one voting pattern for the current table. This means that the case represented at least two issues, for the given table, and the Justices voted in different groupings on those issues. Note that some cases may be decided both liberally and conservatively in the same category, or in different categories. Where a case is decided conservatively/liberally multiple times (meaning on more than one issue with distinct voting pattern) a number will follow the case citation with and “x”: e.g. “2x.” Furthermore, there were six cases this term that we could not graph. See Appendix A: *The Universe of Cases*. This means that these cases were not on any of the Data Tables 1-10. The cases that were not able to be placed on Data Tables 1-10 this Term are: *Virginia v. Maryland*, 540 U.S. 56 (2004); *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).

46. Cases decided in favor of the state: *Locke v. Davey*, 540 U.S. 712 (2004)*; *Nixon v. Mo. Mun. League*, 541 U.S. 124 (2004)*; *Vieth v. Jubelirer*, 541 U.S. 267 (2004)*; *City of Littleton v. Z. J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004)*; *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004)*¥(2x)(On second issue only Justices O’Connor, Rehnquist and Thomas voted, so it is not controlling); *Pa. State Police v. Suders*, 542 U.S. 129 (2004)*¥. Cases decided against the state: *Frew v. Hawkins*, 540 U.S. 431 (2004); *Muhammad v. Close*, 540 U.S. 749 (2004)*; *Engine Mfrs. Ass’n v. S. Coast Air Quality* (2004)*; *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004)*; *Tennessee v. Lane*, 541 U.S. 509 (2004)*; *Hibbs v. Winn*, 542 U.S. 88 (2004)*¥(2x); *Pa. State Police v. Suders*, 542 U.S. 129 (2004)*¥.

47. The outcome in Majority Cases moved only 5.3 points. However, the liberal movement in Unanimous Cases was a more substantial 16.3 points.

2003 than during the 2002 Term.⁴⁸

One of the most intriguing facts revealed by Table 1 this Term is a 10-point drop in support for state governments between the last of the four Justices at the conservative top of Table 1 and the “most conservative” of the five Justices holding the liberal bottom: Justice Thomas’ 53.3% score on Table 1 is followed by the 42.9% score of Justice Souter.⁴⁹ Justice Stevens, as anticipated by the 2002 Study, fulfilled expectations by casting only 28.6% of his votes for state governments; the most liberal voting pattern on Table 1.⁵⁰

Justice Kennedy led the conservative effort this Term, making a huge jump from the most liberal position on Table 1 last year to the most conservative position in 2003. Despite this jump, his voting has been so erratic over the past ten years that this shift does not represent a statistically significant change in voting behavior over time. Furthermore, despite Justice Kennedy’s volatile voting record, the 2002 Study anticipated his voting behavior this Term rather accurately: Justice Kennedy voted only 7.1 points more conservatively than anticipated by the 2002 Study. His voting behavior in 2004 is expected to be more liberal than in 2003.

Another interesting trend in 2003 is a return to “normalcy” on Table 1. In 2002, Chief Justice Rehnquist and Justices Scalia and Kennedy voted liberally more than 50% of the time — a rather unexpected phenomenon.⁵¹ But that was not the only unusual pattern in 2002; the traditionally liberal Justices were uncharacteristically conservative. These outcomes suggest that Civil/State Cases on the 2002 docket encouraged “pole switching,” where generally conservative Justices voted liberally and vice versa.⁵² Table 1 in 2003 indicates a more standard pattern for both camps, with conservatives generally voting more conservatively and liberals voting more liberally.⁵³

The voting patterns anticipated in 2002 for Table 1 this Term

48. See *infra* Data Table 1.

49. Such a gap has not been matched since the 1996 Study, where Table 1 revealed a gap of 14.2 points between five conservative Justices and the first of four liberal Justices.

50. See *infra* Data Table 1. While Justice Stevens’ 28.6% score is somewhat more liberal than the 40.4% score anticipated by the 2002 Study, his actual behavior deviated from anticipated behavior by less than 12 points and — as anticipated in 2002 — he holds the most liberal position on Table 1.

51. *Id.*

52. See 2002 Study, *supra* note 1, at 510-11 (speaking of the “liberal jurists,” Justices Ginsburg and Stevens, had positioned themselves at the conservative end of the rank order). See also *id.* at 525 (Mean Table 1 shows that those “liberal jurists” had voted in a statistically significant fashion last Term).

53. See Data Table 1.

were within 20 points of the actual voting behaviors of every Member of the Court. Four Justices' voting patterns were within 10% of their anticipated scores (Justices Souter, Scalia, Kennedy, and O'Connor). Justice Souter's 2003 voting record was the closest to anticipated, with only a 1.2 point difference in his actual voting percentage. The only notable vote correlation in Civil/State Cases involves Justices Ginsburg and Stevens, suggesting that their voting behavior tends to move similarly over time.⁵⁴

Data Table 2: Civil Cases – Federal Government versus a Private Party⁵⁵

Table 2, taken as a whole, seems to demonstrate liberal movement this Term. The strength of this liberal trend, however, is questionable.

Table 2 evidences significant liberal movement in the decision of Split Cases (33.3 points — down from a 100% vote in favor of the federal government last Term). There is also slight liberal movement (2.6 points) in the outcome of Majority Cases. Balanced against these indicators of a liberal trend is a 13.9 conservative movement in Unanimous Cases. With conflicting indications, this Study assumes that movement in the outcome of Split Cases is more significant than movement in Unanimous Cases (based on the assumption that ideology plays a more significant role in the resolution of questions decided by a divided vote). Therefore, on balance, Table 2 appears to demonstrate liberal movement.

This liberal movement, however, is at best minimal and perhaps non-indicative. Table 2 has consistently reflected conservative outcomes over time. This Term, the most *liberal* Justice — Justice Ginsburg — voted for the federal government 66.7% of the time. The most conservative jurist, Justice O'Connor, cast 83.3% of her votes

54. Regression Table 1 reveals an R2 statistic of .9 for Justices Ginsburg and Stevens.

55. Cases decided for the federal government: *Barnhart v. Thomas*, 540 U.S. 20 (2003); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003)*¥(5x); *SEC v. Edwards*, 540 U.S. 389 (2004); *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004); *Doe v. Chao*, 540 U.S. 614 (2004); *U.S. Postal Serv. v. Flamingo Indus.*, 540 U.S. 736 (2004); *United States v. Galletti*, 541 U.S. 114 (2004); *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004); *Household Credit Servs. Inc. v. Pfennig*, 541 U.S. 232 (2004); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004); *Cheney v. U.S. Dist. Court for D.C.*, 124 S. Ct. 2576 (2004)*; *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004)*¥; *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). Cases decided against the federal government: *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003)*¥; *Bedroc Ltd. v. United States*, 541 U.S. 176 (2004); *Scarborough v. Principi*, 541 U.S. 401 (2004)*; *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004)*¥; *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004)*.

for the government.⁵⁶ Furthermore, there are only ten instances beginning with the 1995 Term where a Justice has voted less than 50% of the time for the federal government on Table 2.⁵⁷ With such consistent conservative voting patterns over time, and with overall outcomes on Table 2 this Term remaining conservative, the liberal trend evidenced by the Table may be a temporary anomaly. Supreme Court practitioners may also wish to note that this statistical history suggests that the federal government is highly favored in the outcome of Civil/Federal Cases.

Thus, trend data from Table 2 must be considered with caution. Although Table 2 tabulates outcomes from a relatively large sample (at least as “large sample” is understood under the constraints of this Study),⁵⁸ factor analysis demonstrates that Data Table 2 provides the second least reliable evidence of ideological bias this Term.⁵⁹ This lack of reliability may flow from the fact that Table 2 demonstrates “liberal” movement on a Table that — considered over time — has demonstrated relatively conservative voting patterns.

Table 2 this Term also reflects a large number of statistically significant changes in the voting patterns of individual Justices. Of all the Justices, only Justice Ginsburg’s 2003 voting pattern lacked statistical significance when compared with her mean voting percentage over time. The voting patterns of the remaining members of the Court were statistically significant, with two voting more liberally than in 2002 (Chief Justice Rehnquist and Justices Kennedy) and six moving in a conservative direction (Justices O’Connor, Thomas, Breyer, Scalia, Souter, and Stevens).

56. This was a leap from the second most liberal position last Term at 54.6%. Justice O’Connor’s jump represented the largest movement on the Court on Table 2 — with the result that her score was 28 points more conservative than anticipated. Traditionally, Justice O’Connor is one of the more liberal Justices on Table 2, and the Study anticipates she will return to a more liberal position next Term. *See infra* Data Table 2

57. Surprisingly, seven of those instances involved traditionally conservative Justices: Justice Thomas four times, in 1996, 1997, 1999 and 2001, Justice Kennedy twice, in 1997 and 2000, and Justice Scalia once, in 1996. *See infra* Data Table 2.

58. Table 2 tabulates the outcome of 24 decisive votes by the Court in 2003. Only Table 3, which tabulates the results of 27 decisive votes, has a larger sample size. Table 2 tabulates a relatively large voting sample, in part, because of the numerous opinions, issues and outcomes of the *McConnell* case, which dealt with the McCain-Feingold campaign finance legislation. *See* Appendix C for a detailed explanation of how we understood the *McConnell* case.

59. *See* Section V below.

Data Table 3: Criminal Cases – State Government versus a Private Party⁶⁰

Factor analysis for 2003 selects Table 3, Criminal/State Cases, as the most reliable indicator of conservative/liberal bias on the Court.⁶¹ Table 3 indicates a continuing and significant conservative trend on a Court plainly divided in two ideological blocs.

Various data on Table 3 demonstrate a conservative trend in the disposition of State/Criminal Cases. Only two individual voting patterns (those of Justices Stevens and Breyer) moved in a statistically significant manner — and that movement was conservative.⁶² The outcome of Split and Majority Cases, furthermore, continue a conservative trend that began two years ago.

In 2001, Majority Cases were decided for the government 50% of the time — this Term, the success rate for state governments rose to 63%. Similarly, in the 2001 Term, Split Cases were decided in favor of the states 40% of the time — this Term, the outcome of 62.5% of the Split Cases favored state governments. The outcome of Unanimous Cases moved 16.4 points in a liberal direction this Term — but the Court still favored state governments in 63.6% of these cases (a rather strong conservative outcome when measured against results from prior Terms). Table 3, therefore, suggests substantial conservative momentum in the decision of State/Criminal Cases.

This conservative trend has been dominated by bloc voting, with five conservative Justices and four liberal Justices on Table 3.⁶³ Historically, there has been a significant “point gap” between these two blocs. The gap this Term, while greater than it has been in the recent past,⁶⁴ it is less extreme than in some prior Studies.⁶⁵

60. Cases decided for the state government: *Yarborough v. Gentry*, 540 U.S. 1 (2003)*; *Mitchell v. Esparza*, 540 U.S. 12 (2003)*; *Maryland v. Pringle*, 540 U.S. 366 (2003); *Illinois v. Lidster*, 540 U.S. 419 (2004) ¥ (2x); *Illinois v. Fisher*, 540 U.S. 544 (2004)*; *Baldwin v. Reese*, 541 U.S. 27 (2004); *Iowa v. Tovar*, 541 U.S. 77 (2004); *Dretke v. Haley*, 541 U.S. 386 (2004); *Middleton v. McNeil*, 541 U.S. 433 (2004); *Yarborough v. Alvarado*, 541 U.S. 652 (2004); *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177 (2004); *Pliler v. Ford*, 542 U.S. 225 (2004); *Beard v. Banks*, 124 S. Ct. 2504 (2004); *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004); *Holland v. Jackson*, 124 S. Ct. 2736 (2004). Cases decided against the state government: *Groh v. Ramirez*, 540 U.S. 551 (2004) ¥(3x); *Banks v. Dretke*, 540 U.S. 668 (2004) ¥(2x); *Crawford v. Washington*, 541 U.S. 36 (2004); *Nelson v. Campbell*, 541 U.S. 637 (2004)*; *Blakely v. Washington*, 124 S. Ct. 2531 (2004); *Tennard v. Dretke*, 124 S. Ct. 2562 (2004); *Missouri v. Seibert*, 124 S. Ct. 2601 (2004).

61. See Section V.

62. See *infra* Mean Table 3.

63. See *infra* Data Table 3.

64. The gap this Term was 20 points, in 2000 it was 16.7, in 2001 it was 15.4. See *infra* Data Table 3.

In 2003, Justice Thomas (voting for state governments 80.0% of the time) leads the conservative alliance, the ninth time he has held the top position on Table 3 over the last ten years.⁶⁶ Justice Stevens holds the most liberal position on the Table, a slot he has held for eight of the last ten years.⁶⁷ Next Term, the Study anticipates that Justices Scalia and Thomas will be in close competition for most conservative Justice, while Justices Ginsburg and Stevens will vie for most liberal position.⁶⁸

Since the 1994 Term the “conservative” bloc of five Justices has been separated from the “liberal” bloc of Justices by an average of 17.7 points.⁶⁹ This Term, the gap between the conservative and liberal blocs is 20 points — the distance between Justice Kennedy’s 64.0% vote tally (at the bottom of the conservative bloc) and Justice Breyer’s 44.0% total (at the top of the liberal bloc).⁷⁰ Last Term, the gap between voting blocs was 27 points.⁷¹ The high-water mark was the 1999 Term, when 37.4 points divided the blocs on the Court.

Over the years, the Justices have narrowed the 1999 gap between voting blocs,⁷² and the 2003 Term is no exception. Table 3 suggests that both the conservative and liberal blocs are making incremental moderating movement toward each other. This Term, four Justices at the conservative top of Table 3 moved liberally from last year’s percentages: Chief Justice Rehnquist, and Justices Thomas, Scalia, and

65. In 1999 the difference between the blocs was 37.4, and in 2002 it was 27.2.

66. *See infra* Data Table 3 (sole exception was 1999 when Rehnquist was the conservative leader).

67. *See infra* Data Table 3 (sole exceptions were 2000 [Ginsburg and Breyer led the liberal voting], and 2002 [Ginsburg led the liberal voting]).

68. *See infra* Data Table 3. Perhaps because Justice Stevens has made a statistically significant conservative movement over the last two terms, the Study anticipates that he will be slightly more conservative than Ginsburg. *Id.*; *see also* Mean Table 3.

69. *See infra* Data Table 3. This was computed by comparing the fifth most conservative Justice with the sixth most conservative Justice in each year since 1994. This calculation does not take into account when Justice O’Connor swung liberally in the 2001 Term to create a 30-point gap between “conservative” and “liberal” blocs for that Term.

70. *See infra* Data Table 3.

71. *See infra* Data Table 3.

72. *See infra* Data Table 3. Although the 2000 Term had only a 16.7 point gap between voting blocs, in 2001 Justice O’Connor swung liberally and the court was divided by 30 percentage points. *Id.* On a graph since 1999 therefore of the split between the two blocs the 2000 Term would appear as a severe anomaly amidst a otherwise smooth line downwards. The 2000 Term cannot wholly be discounted, as it is more representative of the pre-1999 Term split differential. However, we point out that it is something of an anomaly along an otherwise smoothly downward sloping line from the 1999 Term. The unambiguous “trend” illustrated by Data Table 3 is that the court is slowly calming down from its 1999 polarization.

Kennedy. The remaining five Members of the Court (Justices O'Connor, Breyer, Souter, Ginsburg, and Stevens) all voted more conservatively than last Term.⁷³ As a result, although the 2002 Study anticipated that the 2003 "point gap" would be 26.7 points,⁷⁴ the Court narrowed that distance by about seven points. The Study anticipates continued bloc voting on Table 3 for the 2004 Term.⁷⁵

One other point on Table 3 is worthy of note: the significant role played by Justice O'Connor in the outcome of Criminal/State Cases. There is a close relationship between Justice O'Connor's voting patterns on Table 3 and the outcome of Majority Cases.⁷⁶ In the seven Terms between 1994-2000, Justice O'Connor's voting pattern precisely matched the outcome in Majority Cases five times.⁷⁷ In two of the last three Terms, furthermore, her voting pattern was closer to the outcome of Majority Cases than any other Member of the Court.⁷⁸ Based on these percentages alone, it appears that as goes Justice O'Connor, so goes the Court in the disposition of State/Criminal Cases.⁷⁹

Data Table 4: Criminal Cases – Federal Government versus a Private Party⁸⁰

Table 4, Federal Criminal Cases, provides the third most reliable evidence of conservative/liberal bias this Term.⁸¹ This Table demonstrates marked conservative movement by the Court — in an area that, until the 2002 Term, had not evidenced the classic conservative/liberal voting blocs.

73. See *infra* Data Table 3. See also note 72 above.

74. See *infra* Data Table 3 (anticipated scores); 2002 Study, *supra* note 1, at 531 (Data Table 3 showing predictions for this Term).

75. See *infra* Data Table 3.

76. See *infra* Data Table 3.

77. See *infra* Data Table 3 (1994, 1996-98, 2000).

78. See *infra* Data Table 3 (2001, 2002).

79. To make a more definite assertion we would need to actually review all the individual cases and see that Justice O'Connor's vote actually was part of the majority vote. However, even that review would not change the fact that since 1994 her voting percentage has been such an amazing indicator of the majority vote.

80. Cases decided in favor of the federal government: United States v. Banks, 540 U.S. 31 (2003); United States v. Flores-Montano, 541 U.S. 149 (2004); United States v. Lara, 541 U.S. 193 (2004)*; Sabri v. United States, 541 U.S. 600 (2004); Thornton v. U.S., 541 U.S. 615 (2004); United States v. Dominguez Benitez, 542 U.S. 74 (2004); United States v. Patane, 124 S. Ct. 2620 (2004)¥; Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004)*. Cases decided against the federal government: Castro v. United States, 540 U.S. 375 (2003)*; Fellars v. United States, 540 U.S. 519 (2004); United States v. Patane, 124 S. Ct. 2620 (2004)¥.

81. See Section V.

The outcome of Majority, Split, and Unanimous Cases all evidenced conservative movement. Every Split Case this Term was decided in favor of the federal government. Outcomes in Majority and Unanimous Cases evidenced significant conservative movement as well, moving from 33.3% (in 2002) to 77.8% of Majority Cases decided in favor of the government in 2003, with a similar increase from 33.3% (in 2002) to 66.7% of Unanimous Cases. Chief Justice Rehnquist and Justice Thomas led the conservative movement, with 80% of their votes cast in favor of the government.⁸² Justice Souter was the most liberal Justice, placing only 36.4% of his votes with the federal government.⁸³ Next Term, the Study anticipates that the Court will remain conservative, with six Justices voting for the government at least 50% of the time.⁸⁴

Unlike Table 3, Table 4 does not have an extensive history of readily identifiable “blocs” of Justices separated by significant “gaps” in voting percentages. During the 1995-1997 Terms, all of the Justices voted for the federal government in criminal cases at least 50% of the time. In 1998 the Court began to divide somewhat more sharply, but the voting blocs evident on Table 3 did not emerge until the 2002 Term.⁸⁵ Instead of evidencing fixed ideological blocs separated by a substantial voting gap, the votes on Table 4 have reflected rather volatile voting behavior by the individual Justices and the Court as a whole.⁸⁶

Bloc voting in 2003 is evidenced by the 15.4 point gap between the “bottom” of the conservative bloc, Justice Scalia (70%), and the “top” of the liberal bloc, Justice Ginsburg (54.6%). But, even with this bloc voting, seven of the nine Justices voted conservatively at least 50% of the time. Justices Stevens and Souter are the only Justices who voted for the government less than 50% of the time. In addition, each Justice increased their individual voting percentage in favor of the government this Term.

82. See *infra* Data Table 4.

83. See *infra* Data Table 4.

84. The voting patterns of the individual Justices in 2003 were anticipated quite accurately in the 2002 Study. The anticipated voting patterns of five Justices were within 10 points of their actual outcomes: Justice Thomas (.4), Justice Kennedy (2.5), Justice Souter (4.5), Chief Justice Rehnquist (6.4), and Justice Scalia (9.1). See *supra/infra* Data Table 4, and 2002 Study, *supra* note 1, at 535 (actual table where prediction was made).

85. In the 2002 Term, the voting alignment on Table 4 was similar to that of Table 3, with the Chief Justice and Justices Thomas, Scalia, Kennedy, and O'Connor holding the five “most conservative” positions on the Table. However, the point gap between this conservative bloc and the liberal bloc was not startling: just 6.7 points in 2002. See *infra* Data Table 4.

86. See *infra* Chart 4 (see lines since 1999).

Justice Souter was the only Justice to manifest a statistically significant change in voting behavior on Table 4. This “significant” change was produced by a seemingly small 3.1-point movement from last Term. By contrast, Justice Stevens’s 45.5-point movement in 2003 is statistically “insignificant.” What explains these seemingly incongruous results? The fact that statistical significance is determined by measuring a Justice’s voting behavior against the Justice’s average mean *over time*.

Significance is *not* measured simply by comparing one Term’s voting behavior with the next. Justice Stevens’ behavior on Table 4 has been highly volatile — last Term he did not vote for the government a single time.⁸⁷ As a result, a 45.5-point movement *does not* depart significantly from Justice Stevens’ mean voting behavior over time. Justice Souter’s 3.1-point movement *does*.⁸⁸

Table 4, finally, reveals several relationships between the voting behaviors of two pairs of Justices. The voting behavior of Justices Ginsburg and Souter, and Justices Ginsburg and Breyer, are highly correlated, with R² scores of .87 and .79, respectively.

Data Table 5: First Amendment Cases – Rights of Expression, Association, and Religion⁸⁹

Table 5 demonstrates liberal movement by the Court in the disposition of First Amendment issues, possibly suggesting increased receptivity to such claims (in contrast to the Court’s rather conservative rejection of free speech claims during the prior two Terms). Any forecast of the future course of First Amendment law, however, seems problematic.⁹⁰

The Court favored First Amendment Claims in 42.9% of Majority Cases in 2003 — a seemingly conservative result that nevertheless represents a considerable liberal jump of 17.9 percentage points from the previous Term. The Split and Unanimous Cases also evidence liberal movement. Last Term, no Unanimous Case accepted a First

87. See *infra* Data Table 4; see also *2002 Study, supra* note 1, at 514 (naming this phenomenon a “high water mark” for the Justice).

88. Justice Souter’s voting percentage was also statistically significant last year. See *2002 Study, supra* note 1, at 537 (Mean Table 4 for 2002 Term).

89. Cases decided in favor of the First Amendment claim: *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003)*¥; *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004)*. Cases decided against the First Amendment claim: *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003)*¥(3x); *Locke v. Davey*, 540 U.S. 712 (2004)*; *City of Littleton v. Z. J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004)*.

90. Voting patterns on Table 5 have been highly volatile over the past ten Terms. See *infra* Data Table 5.

Amendment Claim; the Court's acceptance of 50% of such claims in 2003 demonstrates clear liberal movement.⁹¹ The outcome in Split Cases moved a more modest seven points in favor of the First Amendment Claim.

The voting patterns on Table 5 have been highly volatile in recent years. As a consequence, the voting behaviors for the Justices and the Court anticipated in the 2002 Study were not very accurate; only two anticipated voting patterns for the 2003 Term (involving Justices Kennedy and Scalia) were within 10 points of actual outcomes. The Study also anticipated rather more liberal results for the Court as a whole. Nevertheless, the 2003 Term does evidence liberal movement away from the conservative approach that has dominated since the 2000 Term.⁹² Indeed, Justice Breyer was the only Justice to vote more conservatively this Term than in 2002.⁹³

The 2003 Term marks an approach to more traditional voting patterns on Table 5. In 2002, Chief Justice Rehnquist, along with Justices Kennedy and O'Connor, never voted for a First Amendment claim. Such behavior had not been exhibited on Table 5 since the 1997 Term.⁹⁴ This Term, by contrast, all of the Justices voted for the claim at least once.⁹⁵

Some may be surprised to find Justice Thomas holding the most liberal position on Table 5. But, given past trends, this should not be too surprising: in the ten Terms since 1994, Justice Thomas has held the first or second most liberal spot on First Amendment issues eight times.⁹⁶ Admittedly, Justice Thomas voted in favor of First Amendment claims in 2003 (100%) well beyond his mean voting percentage for all prior Terms (51.6%).⁹⁷ The Study anticipates that, in 2004, Justice Thomas will vote more conservatively, closer to his mean voting

91. See *infra* Data Table 5.

92. See *infra* Data Table 5. See also *2002 Study*, *supra* note 1, at 515 (discussion of the trend).

93. Six of the nine Justices evidenced statistically significant changes in their voting behavior, including Justices Stevens, O'Connor, Scalia, Souter, Thomas, and Breyer. See *infra* Mean Table 5.

94. See *infra* Data Table 5. See also *2002 Study*, *supra* note 1, at 515 (discussion of vote).

95. See *infra* Data Table 5.

96. See *infra* Data Table 5 (was in second most liberal position in 1994, 1997, 1999, 2002) It should be noted that in 1997 there were only two possible positions. *1997 Study*, *supra* note 1, at 540 (stating that there was only one case in the 1997 Term). Four of those years Justice Thomas held the most liberal position of the court. See *infra* Data Table 5 (1996, 1998, 2001, 2003).

97. See *infra* Mean Table 5.

pattern over time.⁹⁸

The voting behavior of Justices Scalia and Thomas is closely correlated on Table 5. They currently share an R^2 statistic of .84. The correlation between Justices Stevens and Ginsburg percentages is even stronger, with an R^2 of .89.⁹⁹

Data Table 6: Equal Protection Cases¹⁰⁰

Table 6, which this Term collected results from the Court's decision of a single case, is the most difficult to discuss in a meaningful way. Not surprisingly, factor analysis ranks Table 6 the lowest of any Table with regard to reliability on the issue of ideological bias.¹⁰¹ As noted last Term, the paucity of Equal Protection Cases makes statistical analysis highly problematic.¹⁰²

Nevertheless, and while their significance is decidedly limited, Table 6 suggests some interesting relationships between the voting patterns of various Justices.¹⁰³ The voting percentages of Justices Souter and Ginsburg on Table 6 are perfectly correlated over time.¹⁰⁴ This does not mean that these Justices cast the same votes; this Study — which analyzes percentage outcomes in categories of cases, not outcomes in particular cases — precludes any such assertion.¹⁰⁵ The correlation of Justices Souter and Ginsburg's voting patterns does mean their voting percentages for Equal Protection Cases have been *identical* for the period they have both been on the court. In a similar fashion, Justice Breyer shares an almost perfect correlation ($R^2 = .97$) with Justices Souter and Ginsburg.¹⁰⁶ The only conservative pair of Justices with a comparable correlation is Justice Thomas and Justice Scalia ($R^2 = .95$).¹⁰⁷

98. See *infra* Mean Table 5; see *infra* Data Table 5.

99. See *infra* Regression Table 5.

100. Cases decided in favor of the Equal Protection claim: *Jones v. R. R. Donnelley & Sons*, 541 U.S. 369 (2004). Cases decided against the Equal Protection claim: none.

101. See *infra* Factor Analysis.

102. 2002 Study, *supra* note 1, at 507-08.

103. See *infra* Regression Table 6.

104. See *infra* Regression Table 6. See also *infra* Appendix B, section "D. Correlation." (describing that correlation in this context does not measure the correlation of how the judges vote on a case-by-case basis; rather, the *correlation* spoken of in this article merely refers to correlation in total voting percentage scores at the end of each Term).

105. *Id.* As explained in Appendix B, our correlations measure the correlation of final percentage votes for the government or for the claim.

106. See *infra* Regression Table 6.

107. As noted in text, the significance of the correlations demonstrated on Table 6 is questionable. The small number of Equal Protection Cases that renders statistical results

Data Table 7: Statutory Civil Rights Claims¹⁰⁸

Table 7, Statutory Civil Rights Cases, indicates a liberal trend for the 2003 Term.¹⁰⁹ In 2002, the Court decided Majority Cases in favor of the claim only 40% of the time. This year, the claim won 66.7% of the time. Split and Unanimous Cases were also decided 66.7% of the time in favor of the claim, up from 50% and 33.3%, respectively, in the previous Term.¹¹⁰ This liberal trend is noteworthy when viewed in light of the 1999 and 2000 Terms, where the divide between the conservative majority and liberal minority was greater and more distinct.¹¹¹ Table 7 seems to suggest increased homogeneity in the Court's disposition of Statutory Civil Rights Cases, as conservative Justices vote increasingly in favor of the claim.¹¹²

After holding the most conservative position on the Court in the 2002 Term,¹¹³ Justice Souter regained (along with Justice Breyer) the leading liberal position (80%) he held from 1999-2001. Although Justice Souter has only the fourth most liberal mean over time for statutory civil rights claims prior to 2003,¹¹⁴ his rise to most liberal Justice on Table 7 this Term may precipitate his rise to most liberal Justice on the Table over time. This possibility is based on his voting history in recent years and his statistically significant voting percentage this Term.¹¹⁵ If so, Justice Souter could displace Justices Stevens and Breyer, who have had the highest voting averages on Table 7 over the course of this Study.¹¹⁶

A liberal trend is also evidenced by the voting behaviors of the individual Justices this Term. The 2003 Term voting behaviors for

questionable may well explain why the Table exhibits an unusual cluster of correlated voting behaviors.

108. Cases decided in favor of the Statutory Rights claim: *Muhammad v. Close*, 540 U.S. 749 (2004)*; *Tennessee v. Lane*, 541 U.S. 509 (2004)*; *Nelson v. Campbell*, 541 U.S. 637 (2004)*; *Pa. State Police v. Suders*, 542 U.S. 129 (2004)*. Cases decided against the Statutory Rights claim: *Raytheon v. Hernandez*, 540 U.S. 44 (2003); *Gen. Dynamics v. Cline*, 540 U.S. 581 (2004).

109. Factor analysis suggests that Table 7 does not provide reliable evidence of ideological bias on the Court. *See infra* section V. Factor analysis.

110. *See infra* Data Table 7.

111. *See infra* Data Table 7.

112. *See infra* Data Table 7. For example, Chief Justice Rehnquist and Justice Thomas are on the conservative extreme of Table 7. Nevertheless, they still voted for the claim 50% of the time.

113. *See infra* Data Table 7.

114. *See infra* Mean Table 7. Justice Souter's position, however, is hard to anticipate; past volatility in his voting behavior has produced a large standard deviation for Table 7.

115. *See infra* Mean Table 7.

116. *See infra* Mean Table 7.

Table 7 anticipated by the 2002 Study were not very accurate.¹¹⁷ All of the Justices voted more liberally this Term than in 2002 and much more liberally than anticipated.¹¹⁸ These liberal voting patterns, furthermore, were statistically significant for six Justices: Chief Justice Rehnquist and Justices Scalia, Thomas, Kennedy, O'Connor, and Souter.¹¹⁹

In 2003, the Study anticipates some rather unusual results during the 2004 Term. Next year, the Study anticipates that five Justices will vote in favor of the claim more than 50% of the time — Justices Souter (72.7), Breyer (54.8), Stevens (61.7), O'Connor (59.2), and Ginsburg (66.5). But, in a seemingly inconsistent fashion, the Study also anticipates that the Court Majority will favor Statutory Civil Rights Claims only 41.3% of the time.¹²⁰ On the face of things, these numbers appear to pose an interesting dilemma because the two results seem to be mutually exclusive: five Justices favoring the claim *more* than 50% of the time *should* result in *more* than 50% — not 41.3% — of Majority Cases favoring the claim. This “inconsistency,” while theoretically possible, results from the interaction of multiple (and concededly imprecise) statistical calculations of anticipated behavior.

As the results of this 2003 Study demonstrate, the anticipated behavior of an individual Justice deviated at least 10 points from actual voting patterns about 60% of the time.¹²¹ Accordingly, if Justice O'Connor's actual behavior in 2004 deviates in a conservative direction 10 or 11 points from her anticipated behavior (59.2%), any “inconsistency” in anticipated 2004 behaviors set out on Table 7 disappears. If only four Justices vote more than 50% of the time in favor of the claim, as would be the reasonably expected outcome if Justice O'Connor's actual behavior is 10 or 11 points more conservative than anticipated, a “liberal” outcome in 41.3% of Majority Cases would be fairly expected.

It is, of course, impossible to anticipate accurately the voting behavior of five Justices of the United States Supreme Court — let alone the Court as a whole. Nevertheless, the statistical calculations

117. See *infra* Data Table 7 (only six cases this Term).

118. See *infra* Data Table 7.

119. See *infra* Mean Table 7.

120. See *infra* Mean Table 7.

121. By taking the absolute value of all the errors, then ordering them, it is found that of the 90 outcomes, 36 of them (40%) are within 10 percentage points of their anticipated. The median of the absolute values of all the errors is 13.3 (Justice Stevens Data Table 3). The maximum was 75.8 (Justice Ginsburg Data Table 6), the minimum was .15 (Chief Justice Rehnquist Data Table 8), and the average absolute value of the errors was 19.98.

of this Study provide a consistent theoretical basis for examining and discussing ideological voting trends on the Court. “Conservative” or “liberal” ideology may be devilishly difficult to either track or anticipate by means of statistical analysis, but a systematic quantitative approach (at least over time) should be more reliable than assessments based upon a less rigorous and thorough foundation. If, as seems to be the case, judicial appointments will increasingly turn upon assessments of judicial ideology, the trends documented by this Study may prove to have more than mere academic interest.

Data Table 8: Jurisdiction – Cases Raising a Challenge to the Exercise of Federal Jurisdiction¹²²

Table 8, Jurisdiction, as with all but three Tables this Term, demonstrates a liberal trend. The Court increased its liberal support for extending federal jurisdiction in Majority Cases by 10.6 points.¹²³ Although the outcome in Split Cases moved toward the conservative pole of Table 8 by 6.1 points, Unanimous Cases moved toward the liberal pole by 30 points.¹²⁴ The 2003 Term’s liberal voting cycle was led by Justice Ginsburg, who cast 81.8% of her votes in favor of expanding federal jurisdiction. The Study anticipates that she will continue to lead a liberal Court on jurisdictional issues next Term.¹²⁵

One of the more interesting potential “ideological gaps” on the Court lies between Chief Justice Rehnquist (who voted to expand federal jurisdiction in 54.6% of the cases on Table 8) and Justice

122. Cases decided in favor of the Jurisdictional claim: *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003)*¥; *Castro v. United States*, 540 U.S. 375 (2003)*; *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Illinois v. Fisher*, 540 U.S. 544 (2004)*; *United States v. Lara*, 541 U.S. 193 (2004)*; *Scarborough v. Principi*, 541 U.S. 401 (2004)*; *Republic of Austria v. Altmann*, 541 U.S. 677 (2004); *Hibbs v. Winn*, 542 U.S. 88 (2004)*¥(2x); *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004)*; *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004); *Cheney v. U.S. Dist. Court for D.C.*, 124 S. Ct. 2576 (2004)*; *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004)*¥; *Rasul v. Bush*, 124 S. Ct. 2686 (2004). Cases decided against the Jurisdictional claim: *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003)*¥(2x); *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004) (only counted for three votes on table: Justices Souter, Stevens, and Thomas — therefore we did not count it in majority, split, or unanimous opinions); *Vieth v. Jubelirer*, 541 U.S. 267 (2004)*; *Johnson v. California*, 541 U.S. 428 (2004); *Grupo Dataflux v. Atlas Global Group, L. P.*, 541 U.S. 567 (2004)*; *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004)*; *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004)*¥; *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004)*.

123. *See infra* Data Table 8

124. Factor analysis indicates that Table 8 is only the sixth best predictor of conservative or liberal bias. *See infra* Section V. As a result, the seemingly significant liberal movement on Table 8 this Term may not be any more noteworthy than last Term’s somewhat less pronounced liberal trend.

125. *See infra* Data Table 8.

O'Connor (whose voting behavior was 12.1 points more "liberal," at 66.7%).¹²⁶ This gap suggests that — at least with regard to jurisdictional questions — the sometimes-conservative Justice O'Connor may now be more closely aligned with a liberal voting bloc.

The foregoing observation, however, may obscure another potentially interesting ideological development: the fact that *every* Member of the Court (except for Justice Thomas) favored the expansion of federal jurisdiction in 2003 more than 50% of the time.¹²⁷ Indeed, the history of Table 8 demonstrates the Court's strong tendency, over time, to vote liberally to expand federal court jurisdiction.¹²⁸ 1994 was the last Term in which jurisdictional claims prevailed less than 50% of the time. The Court, in short, has been extending federal court jurisdiction more often than not for nearly the last decade¹²⁹ — a trend that appears to be intensifying with time.¹³⁰

Perhaps because of the consistent liberal trend noted above, the anticipated voting behaviors on Table 8 were quite accurate. The actual voting behavior for every Justice was within 10 points of their anticipated votes, except for Justice Breyer — who only deviated 11.8 points from his anticipated voting pattern. The voting patterns of five Justices came within five points of anticipated behavior: Chief Justice Rehnquist (.1), Justice Souter (1.4), Justice Kennedy (2.8), Justice O'Connor (3.7), and Justice Ginsburg (4.2).¹³¹ Next Term the Court's majority is expected to vote for extending jurisdiction 63% of the time.¹³²

126. *See infra* Data Table 8 (same votes as the 2002 Term).

127. *See infra* Data Table 8. The 2003 Study anticipates that Justice Thomas will continue as the conservative leader on jurisdictional issues next Term. *See supra/infra* Data Table 8. Justice Scalia is the only other Member of the Court anticipated to vote less than 50% of the time against extending jurisdiction in 2004.

128. *See infra* Data Table 8.

129. *See* note 17 explaining the definition of the Jurisdiction category.

130. In the five Terms covered from 1994-1998, only one Justice voted more than 70% of the time to extend the jurisdiction of the federal courts: Justice Stevens in 1995. *See infra* Data Table 8. Over the last five Terms, this has occurred 13 times. *See infra* Data Table 8 (1999: 6 times, 2001: 4 times, 2003: 3 times).

131. *See infra* Data Table 8 (Justice Scalia [7.3], Justice Thomas [8.3], Justice Stevens [8.4]).

132 *See infra* Data Table 8.

Data Table 9: Federalism Cases¹³³

The Federalism Cases this Term showed clear liberal movement, which continues the ideological trend of the Court on this Table from last Term.¹³⁴ In Split Cases tabulated on Table 9, the Court ruled in favor of state governments only 28.6% of the time; a 21.4 point liberal movement from the 2002 Term.¹³⁵ The outcome of Majority Cases also went against the states in 2003; only 36.4% of these cases were decided in their favor; a more modest 6.5 point liberal trend.¹³⁶ This liberal movement was slightly diminished by a 12.5 conservative trend in the outcome of Unanimous Cases. However, the outcome of Unanimous Cases may be less heavily influenced by ideology at the margin.¹³⁷ Therefore, on balance, it appears that Table 9 evidences a liberal trend.¹³⁸

The alignment of the Court on Table 9 this Term returned to the traditional conservative and liberal alignment challenged by last Term's ranking of Justice Ginsburg as the fourth most conservative Justice.¹³⁹ Eight of the last ten Terms have seen Chief Justice Rehnquist and Justices Scalia, Kennedy, Thomas, and O'Connor holding the top five conservative positions on Table 9.¹⁴⁰ The rank order within this "group of five" has been rather stable: either Justice Kennedy or Justice O'Connor has held the "least conservative" (or "most liberal") position within the voting bloc for each of those eight years, except for the 2001 Term (when Chief Justice Rehnquist held

133. Cases decided in favor of the state: *Yarborough v. Gentry*, 540 U.S. 1 (2003)*; *Mitchell v. Esparza*, 540 U.S. 12 (2003)*; *Nixon v. Mo. Mun. League*, 541 U.S. 124 (2004)*; *Vieth v. Jubelirer*, 541 U.S. 267 (2004)*. Cases decided against the state (in favor of the federal claim of relief): *Frew v. Hawkins*, 540 U.S. 431 (2004); *Alaska Dept. of Env'tl. Conservation v. EPA*, 540 U.S. 461 (2004); *Engine Mfrs. Ass'n v. S. Coast Air Quality* (2004)*; *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004)*; *Tennessee v. Lane*, 541 U.S. 509 (2004)*; *Hibbs v. Winn*, 542 U.S. 88 (2004)*; *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004)*.

134. *2002 Study*, *supra* note 1, at 520.

135. *See infra* Data Table 9.

136. *See infra* Data Table 9.

137. *See* text accompanying note 19 above.

138. In addition, only two Justices this Term voted more liberally than the previous Term: Justice Thomas (50%), who was the conservative leader last Term at 64.3%; and Justice Ginsburg (36.4%), who ranked as the fourth most conservative Justice in 2002 – voting 42.9% of the time in favor of state governments. *See infra* Data Table 9. The lack of a clear liberal voting trend by individual Justices, however, may not be significant as none of their voting patterns on Table 9 this Term demonstrated a statistically significant change in voting behavior. *See infra* Mean Table 9.

139. *See infra* Data Table 9.

140. *See infra* Data Table 9.

the post).¹⁴¹

Over the last ten Terms, the Court has exhibited little volatility on Table 9. Chart 9, however, graphically demonstrates that — over the past two Terms — the Court has tended to trend in a liberal direction with regard to the outcome of Split and Majority Cases. That trend, as noted above, continues in 2003.

Next Term, the Study anticipates that Justices Scalia and Thomas will be the conservative leaders, with Justices Breyer and Souter as the liberal leaders.¹⁴² The Study also anticipates that the outcome of Majority Cases will continue to trend in a liberal direction.¹⁴³

Data Table 10: Swing-Vote Cases: Who votes Most Often with the Majority in Close Cases?¹⁴⁴

Table 10's tabulation of Swing-Vote Cases — which includes all cases decided by a single vote (or where the change in a single vote would alter the outcome, including a 5-3 vote to reverse)¹⁴⁵ — generally provides reliable evidence of ideological trends on the Court.¹⁴⁶ This Term, the cases on Table 10 continue a five-Term conservative streak in the outcome of these important cases.¹⁴⁷

The Justices fell into five discrete ranks on Table 10 in 2003. Justice O'Connor holds first place on the Table, voting with the Majority

141. See *infra* Data Table 9.

142. See *infra* Data Table 9.

143. See *infra* Data Table 9.

144. Swing-vote cases decided conservatively: *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003)*; *Vieth v. Jubelirer*, 541 U.S. 267 (2004)*; *Grupo Dataflux v. Atlas Global Group, L. P.*, 541 U.S. 567 (2004); *Yarborough v. Alvarado*, 541 U.S. 652 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004)*; *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177 (2004); *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004); *Beard v. Banks*, 124 S. Ct. 2504 (2004); *Rumsfeld v. Padilla*, 124 S. Ct. 711 (2004); *United States v. Patane*, 124 S. Ct. 2620 (2004); *Holland v. Jackson*, 124 S. Ct. 2736 (2004) (we note that this case was treated as a swing case even though the liberal bloc did not technically vote). Swing-vote cases decided liberally: *Alaska Dept. of Env'tl. Conservation v. EPA*, 540 U.S. 461 (2004); *Groh v. Ramirez*, 540 U.S. 551 (2004); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004) (note that this case was not on any other Data Table 1-9, but it was still a Swing-vote so it is included here, and not in note 45 for that reason); *Tennessee v. Lane*, 541 U.S. 509 (2004)*; *Hibbs v. Winn*, 542 U.S. 88 (2004)*; *Blakely v. Washington*, 124 S. Ct. 2531 (2004); *Missouri v. Seibert*, 124 S. Ct. 2601 (2004); *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004).

145. See Appendix A: The Swing-Vote Cases.

146. 2002 Study, *supra* note 1, at 521.

147. See *infra* Data Table 10. It would not be fair the last five years a conservative trend when noting the liberal movements between the 1999-2000 Terms and the 2001-2002 Terms. *Id.* Instead, there is evidence of a conservative streak since the 1999 Term. This means that the Swing-Votes since 1999 have been decided conservatively more than 50% of the time.

73.7% of the time. Justices Kennedy and Thomas tied for second place, voting with the Majority in 63.3% of Swing-Vote Cases. The third group, composed of Justices Stevens, Scalia, Souter, and Ginsburg, each voted with the Majority 55.6% of the time. Chief Justice Rehnquist holds fourth place on Table 10 (47.4%). Justice Breyer brings up the rear, voting with the Majority in only 44.4% of the Swing-Vote Cases. Justice Breyer replaces Justice Stevens in 2003 as the least influential Justice on the Court in closely divided cases.¹⁴⁸

Chief Justice Rehnquist, and Justices Stevens, Kennedy, Souter, and Ginsburg all exhibited a statistically significant change in voting behavior this Term in swing-vote cases.¹⁴⁹

Justice O'Connor was not as influential in 2003 as in 2002, hardly a surprising result (considering her perfect 100% Swing-Vote record last Term).¹⁵⁰ She retains her position as the most influential Justice in Swing-Vote Cases, even though that influence is some 17 points less than the Study anticipated last Term.¹⁵¹ Justice Scalia was also substantially less influential this Term than the 2002 Study anticipated, voting with the Majority 25 points less often than predicted.¹⁵² The 2002 Study, however, anticipated Justice Thomas' voting pattern on Table 10 rather well; his actual outcome varied only 1.2 points from his anticipated score.¹⁵³

Conservative coalitions retained decisional control of Swing-Vote Cases this Term; 57.9% of such cases were decided conservatively.¹⁵⁴ This is the fifth straight year that more than 50% of Swing-Vote Cases were decided by conservative coalitions.¹⁵⁵

148. *See infra* Data Table 10.

149. *See infra* Mean Table 10.

150. *See infra* Data Table 10.

151. *See infra* Data Table 10 (prediction minus actual outcome was -15.8).

152. *See infra* Data Table 10.

153. *See infra* Data Table 10.

154. *See infra* Data Table 10. This continues the Conservative control spoken of last term. 2002 Study, *supra* note 1, at 521.

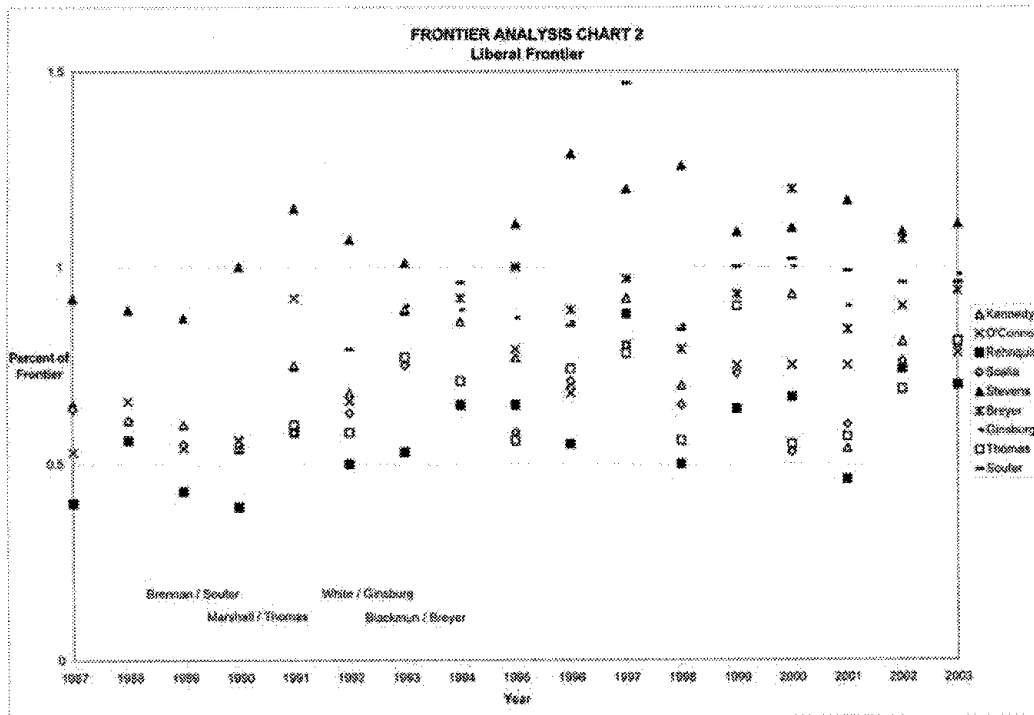
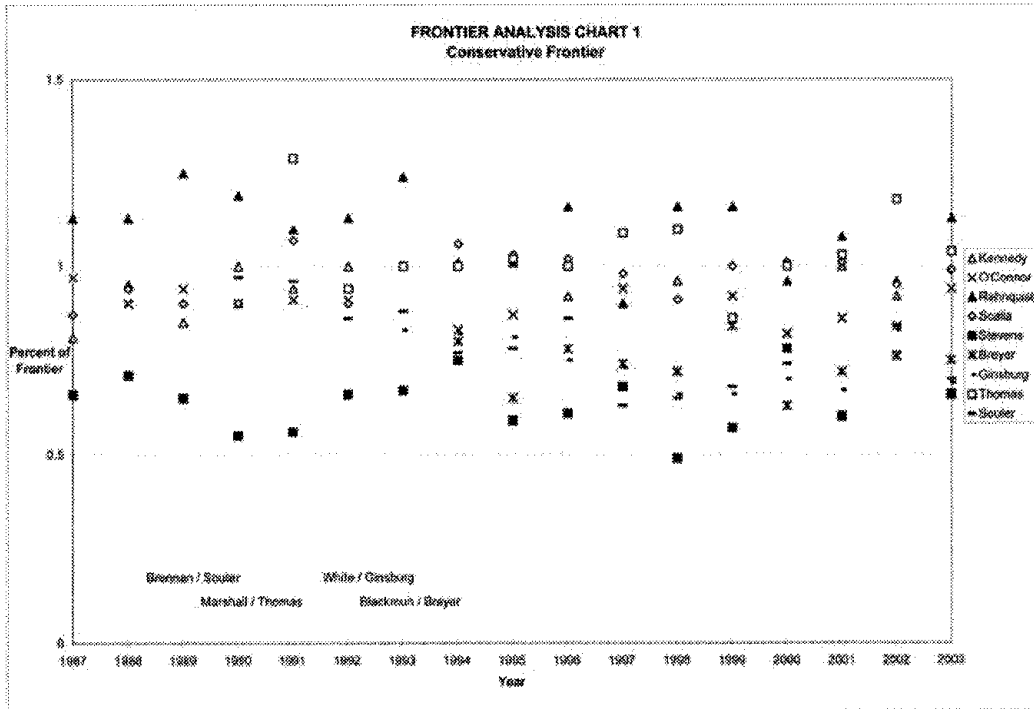
155. *See infra* Data Table 10.

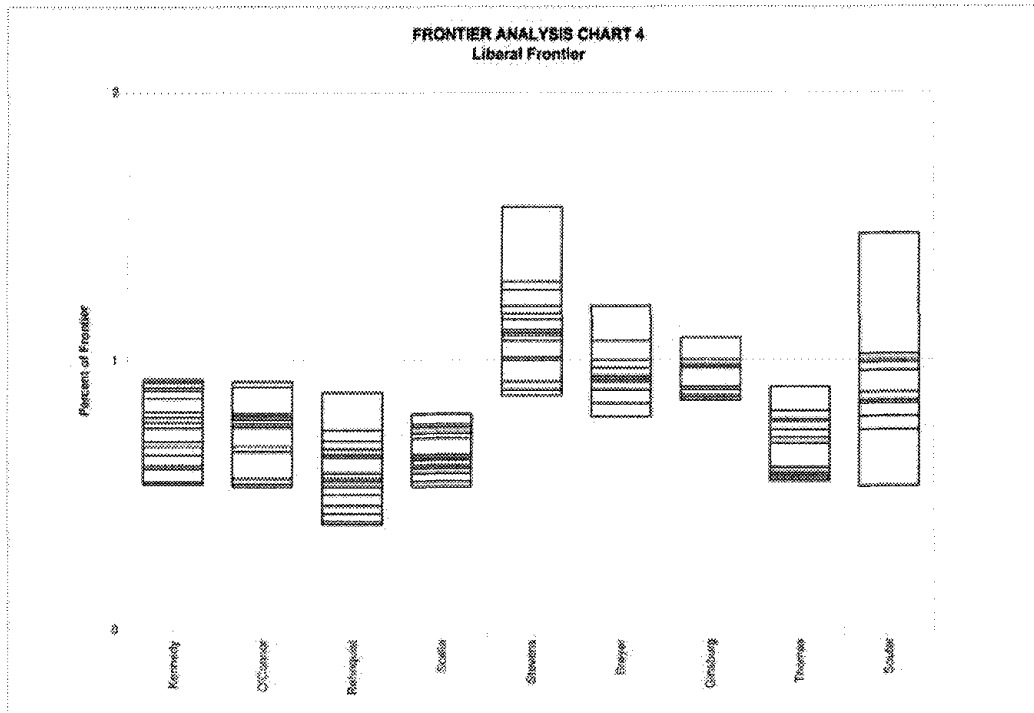
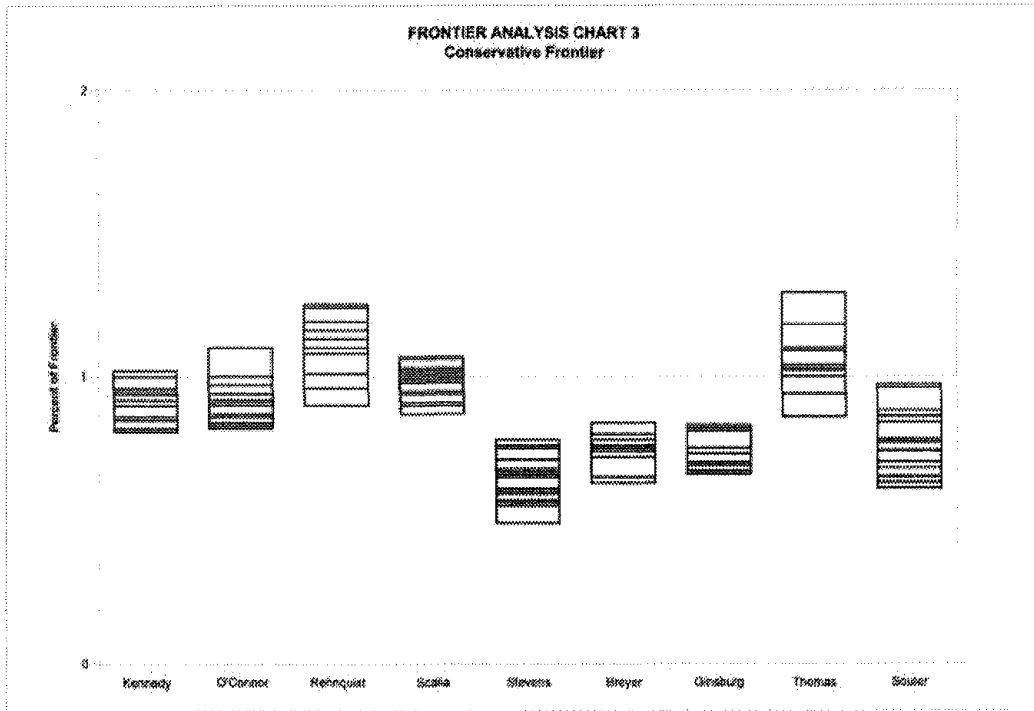
Frontier Analysis Table 1 "Conservative Frontier"—Constrained												
Justice	Percent of Frontier	Percent Super Eff.	Category Weights									
			Civil / State	Civil / Fed.	Crim. / State	Crim. / Fed.	1st Am.	Equal Protect.	Stat. Civ. Rt.	Jura.	Fed'ism	
Rehnquist	100%	113%	15	0	17	14	14	0	0	14	14	14
Thomas	100%	104%	0	0	100	0	0	0	0	0	0	0
Scalia	99%		47	0	47	2	2	0	0	0	0	2
O'Connor	94%		20	0	20	20	20	0	0	0	0	20
Kennedy	94%		25	0	25	25	0	0	0	0	0	25
Breyer	77%		20	0	20	20	20	0	0	0	0	20
Souter	70%		13	13	12	13	13	0	13	13	13	13
Ginsburg	69%		20	0	20	20	20	0	0	0	0	20
Savaris	66%		12	13	12	13	13	0	13	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.	Jura.	Fed'ism	
Stevens	100%	111%	38	0	38	23	0	0	0	0	0	0
Ginsburg	98%		11	11	11	11	11	11	11	11	11	11
Souter	96%		14	0	14	14	14	0	14	14	14	14
Breyer	93%		11	11	11	11	11	11	11	11	11	11
Thomas	81%		20	0	20	20	20	0	0	0	0	20
Scalia	80%		11	11	11	11	11	11	11	11	11	11
Kennedy	79%		11	11	11	11	11	11	11	11	11	11
O'Connor	78%		11	11	11	11	11	11	11	11	11	11
Rehnquist	70%		11	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.	Jura.	Fed'ism	
Rehnquist	100%	127%	0	0	0	0	17	0	83	0	0	0
Thomas	100%	118%	0	0	0	0	0	0	10	90	0	0
O'Connor	100%	112%	0	0	34	0	66	0	0	0	0	0
Scalia	100%	110%	0	0	0	0	0	0	0	0	0	100
Kennedy	100%	107%	98	0	0	0	2	0	0	0	0	0
Breyer	100%	100%	0	0	0	0	100	0	0	0	0	0
Souter	92%		24	76	0	0	0	0	0	0	0	0
Ginsburg	88%		0	0	0	0	50	0	50	0	0	0
Savaris	86%		0	0	0	0	50	0	50	0	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.	Jura.	Fed'ism	
Thomas	100%	150%	0	0	0	0	100	0	0	0	0	0
Souter	100%	118%	0	0	0	59	0	0	41	0	0	0
Stevens	100%	115%	72	0	0	28	0	0	0	0	0	0
Ginsburg	100%	110%	0	100	0	0	0	0	0	0	0	0
Breyer	100%	108%	0	0	0	0	0	0	41	0	0	59
Scalia	100%	103%	0	52	0	0	15	0	33	0	0	0
Rehnquist	100%		0	0	0	0	0	100	0	0	0	0
Kennedy	100%		0	0	0	0	0	100	0	0	0	0
O'Connor	100%		0	0	0	0	0	100	0	0	0	0





V. Category Analysis

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

The reliability of the various Tables on this Study can be influenced by many factors, including the particular makeup of the Court's caseload for a given Term and small sample size. Data Table 6, which collects the results from cases involving Equal Protection claims, is a good example. The number of Equal Protection issues decided each Term tends to be small; this year, only one case is included on Table 6.¹⁵⁶ Accordingly, Table 6 is the least reliable indicator of ideological bias (again) this Term.¹⁵⁷

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.¹⁵⁸ By 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.¹⁵⁹ We interpret this "Factor 1" as liberal/conservative bias for a simple reason: liberal/conservative bias is what this Study purports to measure. The categories currently load onto Factor 1 as follows:

156. There were no cases involving Equal Protection claims in the 2001 Term. *2001 Study, supra* note 1, at 365. In 2002 there were only four cases. *2002 Study, supra* note 1, at n. 93. This term there was only one case: *Jones v. R. R. Donnelley & Sons*, 541 U.S. 369 (2004).

157. *2002 Study, supra* note 1, at 564.

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

159. We extract a single factor via principal components analysis and employ a QMAX rotation to achieve this result.

Category	Factor 1
Criminal/State Party	-0.852
Civil/State Party	-0.831
Criminal/Federal Party	-0.647
Federalism	-0.642
First Amendment	-0.393
Jurisdiction	-0.310
Statutory Civil Rights	-0.282
Civil/Federal Party	-0.211
Equal Protection	-0.163
Variance	2.648
% Variance	0.294

According to this ranking, the Table 3, Criminal/State Cases, is the most reliable indicator of liberal/conservative leanings over time. Factor analysis also suggests that Table 1, Civil/State Party, Table 4, Criminal/Federal Party, and Table 9, Federalism, also provide relatively reliable evidence of bias. The reliability of the last five Tables is more questionable.

This is an interesting outcome, and may seem to contradict what many Court observers might assume. Categories such as First Amendment Rights, Equal Protection Claims, Jurisdiction, and Statutory Civil Rights (all of which rank rather low following factor analysis) may seem to be prime opportunities for the Justices to manifest their individual biases. However, as discussed in the 2002 Study, these categories may also provide ample opportunity for “pole-switching,” where Justices vote “conservatively” (under the definitions of this Study) in order to further a “liberal” policy preference, or vice versa.¹⁶⁰ An example of pole-switching this Term occurred in the *Locke v. Davey* case, wherein the more liberal Justices voted against (conservatively) a First Amendment free exercise claim, while Justices Scalia and Thomas voted for (liberally) the claim.¹⁶¹ Another example of pole-switching this Term involved the various opinions in the *McConnell* case, where complete voting blocs on the Court apparently engaged in pole switching.¹⁶²

160. 2002 Study, *supra* note 1, at 563 (discussing the *Hill* and *Alameda Books* cases and the pole switching involved).

161. 540 U.S. 712 (2004) (state denial of scholarship to theology student) (note, however, that free exercise claims are not included in this Study pursuant to our definitional scheme); see *supra* note 15; see also Appendix A, subsection 4, *Classification by Nature of the Issue-Data Tables 5 through 9*.

162. See Appendix C, Pattern A on First Amendment issues.

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.¹⁶³

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

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

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

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

Each Table lists a "% of Frontier" score for each Justice. Those with a score of 100% 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

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

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, Chief Justice Rehnquist regained his position as the most conservative Justice, with a superefficient score of 113%.¹⁶⁴ Justice Thomas (104%) was the only other Justice to have a superefficient conservative score on the constrained Table.¹⁶⁵ The Table further indicates that Justice Ginsburg (69%) and Justice Stevens (66%) were the least conservative Justices this Term.¹⁶⁶ Justice Stevens shared the position of least conservative position last Term with Justice Breyer,¹⁶⁷ who this Term ranks only as fourth least conservative Justice.¹⁶⁸

Frontier Analysis Table 2 shows that Justice Kennedy is the only Member of the Court achieving a superefficient, constrained liberal score.¹⁶⁹ Not surprisingly, Chief Justice Rehnquist is the least liberal Justice, a position he has held 12 times since 1987.¹⁷⁰ What might be surprising, however, is that Justice O’Connor is the second least liberal Justice.¹⁷¹ The Table shows also that Justice Thomas is the fifth least liberal, followed by Scalia, who is fourth least liberal.¹⁷²

This outcome creates an interesting comparison between the rank ordering of Frontier Analysis Tables 1 and 2. Typically a person

164. *See infra* Frontier Analysis Table 1.

165. *Id.*

166. *Id.*

167. *2002 Study, supra* note 1, at 566.

168. *See infra* Frontier Analysis Table 1.

169. *See infra* Frontier Analysis Table 2.

170. *See infra* Frontier Analysis Chart 2.

171. *See infra* Frontier Analysis Table 2.

172. *Id.*

would think that the “most conservative” Justice also would be “the least liberal” and vice versa — as is the case with Justice Stevens and Chief Justice Rehnquist — and that the orders of the rest of the judges would be similarly reversed. However, the Tables in this Study show otherwise.

Even though Justices Thomas and Scalia are second and third most conservative on Table 1,¹⁷³ they do not fill in the seventh and eighth “least liberal” positions on Frontier Analysis Table 2 — positions held by Justices Kennedy and O’Connor.¹⁷⁴ At the same time, however, the more liberal Justices on the Court *do* retain “mirror image” positions on the constrained Conservative Table¹⁷⁵ and the constrained Liberal Table.¹⁷⁶

While the precise reason for the foregoing is certainly open to debate, it may suggest that Justices Scalia and Thomas are not as bound to conservative or liberal ideologies as other Members of the Court. Their voting patterns this Term demonstrated conservative *and* liberal patterns, as the constrained Frontier Analysis Tables demonstrate. This was surprising to the authors, because it seems natural to think that the voting patterns of Justices O’Connor and Kennedy — the traditional “swing voters” on the Court — would be more likely to demonstrate this outcome (i.e., “conservative” Justices with a “liberal” streak).¹⁷⁷

Frontier Analysis Tables 3 and 4 can be used for multiple purposes. These tables allow people to say what they want to say about the Justices by focusing on a certain category of cases with disregard to the rest — or in other words, to make a biased assertion, to give an uninformed opinion, or to submit an incomplete analysis. For instance, if 100% of the weight for determining a “liberal” justice was placed on First Amendment cases, then Justice Thomas would be by far the most liberal Justice on the Court.¹⁷⁸ Of course, this does not

173. *See infra* Frontier Analysis Table 1.

174. *See infra* Frontier Analysis Table 2.

175. *See infra* Frontier Analysis Table 1.

176. *See infra* Frontier Analysis Table 2.

177. There is most likely a more direct way to determine whether or not this assertion of “mirror rankings” is true. However, we offer it now as merely a point of academic interest. At best we can say this is a hypothesis that may be correct, and we find it interesting to consider. On the most neutral interpretive level, the reason the blocs are not mirrored is that the calculations for the liberal frontier will select category weights that optimize the liberal score for a Justice. The conservative calculations do the same for the conservative score, but may (and almost always do) select a different set of category weights. The relationships are loosely coupled, but quite complex.

178. *See infra* Frontier Analysis Table 4.

mean that Justice Thomas is the most liberal Justice on the Court; but it does evidence something of the discussion above, that he has liberal tendencies, as defined by this Study, which may disrupt the ordering of the Justices on the constrained conservative and liberal Frontier Tables.¹⁷⁹ Justice Scalia is the only other traditionally “conservative” Justice that can claim a superefficient score on the unconstrained liberal table.¹⁸⁰ This suggests that, as discussed above, Justice Scalia has liberal tendencies in at least some areas.

Justice Breyer is the only traditionally liberal Justice that made it to the conservative frontier on the unconstrained analysis.¹⁸¹ Conversely, each Justice on the Court was able to make it to the liberal frontier on the unconstrained analysis.¹⁸² This result, however, most likely results from the fact that there was only a single Equal Protection case this Term.¹⁸³ Justices Rehnquist, Kennedy, and O’Connor merely reached the frontier — and did not achieve a superefficient liberal score — because 100% of the weight was placed on the single Equal Protection case.¹⁸⁴ If there had been a more adequate sampling of Equal Protection cases, or if we simply excluded Table 6 as a statistical outlier, it is probable that these three Justices would have failed to reach the liberal frontier.

The foregoing discussion demonstrates that the constrained Frontier Tables provide the most reliable evidence of ideological position. Few experienced observers of the Court (if any) would label Chief Justice Rehnquist a “liberal.” The unconstrained analysis would allow application of that moniker — even though based solely on the outcome of one case. Justice Thomas could similarly claim to be the most liberal Justice, which (while based on the outcome of votes in First Amendment and Equal Protection cases) would be questionable as well.

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. Readers should keep in mind that, while the categories of this Study are not perfect indicators of conservative/liberal bias, some categories are nevertheless better indicators than others.

179. Justice Thomas, may not have been evidencing a true liberal tendency, but instead may have been pole switching.

180. See *infra* Frontier Analysis Table 4.

181. See *infra* Frontier Analysis Table 3.

182. See *infra* Frontier Analysis Table 4.

183. *Jones v. R. R. Donnelley & Sons*, 541 U.S. 369 (2004). See discussion of Equal Protection Data Table 6 above.

184. See *infra* Frontier Analysis Table 4.

VII. Conclusion

The 2003 data suggests that the United States Supreme Court may have embarked on a new course. The 2003 Term marks the second year of a liberal trend on a majority of the Tables of this Study. The strength of the trend is subject to reasonable dispute,¹⁸⁵ but appears real nevertheless. The trend, furthermore, suggests a weakening in the conservative posture of the Court.

Only three Tables indicate sustained conservative movement. The most substantial conservative movement is demonstrated on Tables 3 and 4 where the Court has a pronounced tendency to rule in favor of state and federal governments. Conservative coalitions also retain control of the outcome in close, 5-4 cases. But the power of conservative coalitions with regard to the outcome of close five-to-four cases has not notably increased,¹⁸⁶ nor have conservative coalitions resumed the strength exhibited in 1999-2001 Terms.¹⁸⁷ Meanwhile, traditionally liberal Justices (most notably Justices Stevens, Ginsburg and Souter) are "moving up" in their ranking on Table 10.¹⁸⁸ Seven Tables also suggest liberal movement in the Court's voting patterns. This movement continues a liberal trend that began last year, as examination of Charts 1, 2, 5, 6, 7, 8 and 9 confirms.

Last Term we noted that four years of vacillating voting patterns (with conservative movement one year followed by liberal movement the next) on a Court dominated by bloc voting suggested that the Court's ideological blocs may be "experiencing some difficulty in 'holding their ideology together.'"¹⁸⁹ The 2002 Study intimated, but did not directly assert, that it was the Court's conservative (rather than liberal) forces that were losing ground.¹⁹⁰ The 2003 data suggest somewhat more clearly that the Court's conservative bloc is, indeed, losing coherence.¹⁹¹ The on-going decline in conservative voting

185. See discussion of Tables 2, 8 and 9, above (some indications of conservative movement though we stated that the table manifests liberal movement overall). Also, the categories are unequal in their ability to detect conservative or liberal bias. See Section V.

186. In 2002, conservative coalitions controlled the outcome of 56.3% of the Swing-Vote Cases; this Term, the figure is a mere 1.6 points higher — 57.9%.

187. See *supra* Data Table 10 (conservative outcome in those Terms was 61.5%, 60.0%, and 68.0%).

188. In 2003, Justices Stevens, Ginsburg, and Souter joined the same percentage of majority Swing-Vote cases as Justice Scalia. Table 10, *supra*.

189. 2002 Study, *supra* note 1, at 568.

190. 2002 Study, *supra* note 1, at 568. ("The Court's vacillation between conservative and liberal outcomes suggests that the much-touted conservatism of the Rehnquist Court may be waning.").

191. There is one area, however, where the Court's "coherence" may be increasing.

power on the Rehnquist Court may be the most notable finding of the 2003 Study.

Consider the following:

1. As in 2002, the voting patterns of the Justices departed frequently from past practice and many of these departures are liberal: In 2002, more than half of the Members of the Court, on eight Tables, departed in a statistically significant fashion from past voting practices.¹⁹² Significant departures from past voting patterns are not as prominent this Term, but are still rather marked. The voting patterns of at least five Members of the Court on six Tables this Term departed significantly from past practice.¹⁹³ While statistically significant swings in voting behavior may be due to many factors, the fairly substantial number of statistically significant voting movements this Term (as in 2002) may indicate “that the Justices are having some difficulty holding a steady course as they navigate their way through the Court’s workload.”¹⁹⁴ This Term, much of this possible “unsteadiness” has resulted in liberal movement.

There were seven tables that manifested a liberal movement. Discounting completely Table 6 (where all nine Justices’ votes were both statistically significant and liberal — but where the voting sample consists of a single case) and Table 5 (where the unusual contours of *McConnell* may have prompted pole-switching behavior),¹⁹⁵ three

During the 2003 Term, the Court managed to speak more often than not on Tables 1 through 9 with Unanimous Opinions. See Tables 1-9, *infra*. In last year’s study, by contrast, only Tables 1 and 2 reflected a similar level of solidarity on the Court. *2002 Study, supra* note 1, at 523, 527.

192. *2002 Study, supra* note 1, at 525, 529, 537, 541, 545, 549, 553, 561 (Mean Tables 1, 2, 4-8, 10).

193. Table 1 (Civil/State) (6 Justices); Table 2 (Civil/Federal) (8 Justices); Table 5 (First Amendment) (6 Justices); Table 6 (Equal Protection) (9 Justices); Table 7 (Statutory Civil Rights) (6 Justices); Table 8 (Jurisdiction) (5 Justices). Table 10, Swing-Vote Cases, also demonstrated statistically significant swings in voting behavior by five Justices. Nevertheless, we exclude Table 10 from the analysis in the text because on this Table statistically significant changes in a Justice’s voting pattern includes that Justice’s participation in *both* liberal and conservative coalitions. (Table 10 tracks the percentage of the time the Justice is “with the majority,” which may involve either a liberal or conservative coalition.). Statistically significant departures in a Justice’s voting pattern on Table 10, therefore, can not support an inference that the Justice’s voting has moved in either a liberal or conservative direction.

194. *2002 Study, supra* note 1, at 567.

195. Pole-switching occurs when a Justice casts a seemingly “liberal” or “conservative” vote in order to preserve a contrary policy. See *supra* note 162 and accompanying text discussing the *Locke v. Davey* case. Table 5 appears to have been affected by this phenomenon in 2003. See *supra* note 163 and accompanying text. See also Appendix C. On Table 5,

of the remaining four Tables indicate relatively notable statistical departures in a liberal direction. On Table 7, Statutory Civil Rights Claims, six Members of the Court display statistically significant changes in their voting behavior — and all of it liberal.¹⁹⁶ The same this is true for the five Justices exhibiting statistically significant behavior on Table 8, Jurisdiction — all significant movements are liberal.¹⁹⁷ Table 1 is not as monolithic, but still suggests that departures from past practice tend toward the liberal. There, four of six Justices' voting patterns moved significantly in a liberal direction.¹⁹⁸ Table 2 is the only Table where the majority of the statistically significant departures (six of eight) are conservative.¹⁹⁹

Thus, a major portion of the “statistically significant” voting movements of the Justices in 2003 demonstrated a liberal trend. These patterns suggest that the Court, in 2003, may have experienced real movement toward liberal outcomes.

2. The data tables reveal consistent ideological bloc voting, but conservative coalitions continue to lose steam: Last Term, three Tables demonstrated “expected conservative/liberal voting blocs.”²⁰⁰ There seems to be equally clear evidence of bloc voting in 2003, coupled with continuing indications that conservative coalitions on the Court (as was noted last Term) are “losing steam.”²⁰¹

Tables 3 (State/Criminal), 4 (Federal/Criminal), 8 (Jurisdiction), and 9 (Federalism) demonstrate rather obvious voting blocs. Conservative blocs composed of the Chief Justice and Justices Thomas, Scalia, Kennedy, and O'Connor — arrayed against the liberal bloc of

three liberal Members of the Court (Justices Stevens, Souter and Breyer) show statistically significant “conservative” movement. The Court's most prominent “swing voter” — Justice O'Connor — likewise shows statistically significant “conservative” voting. By contrast, two of the Court's most conservative Members, Justices Thomas and Scalia, chalk up statistically significant “liberal” vote movements. The meaning of these movements is so muddled by the unusual contours of the First Amendment issues on Table 5 this Term that inferences based on this data would be exceptionally problematic.

196. The Chief Justice, and Justices Scalia, Thomas, Kennedy, O'Connor, and Souter. *See infra* Mean Table 7.

197. Justices Stevens, O'Connor, Scalia, Ginsburg, and Breyer. *See infra* Mean Table 7.

198. Justices O'Connor, Thomas, Ginsburg, and Breyer. *See infra* Mean Table 7.

199. Justices O'Connor, Thomas, Breyer, Scalia, Souter, and Stevens. *See infra* Mean Table 2.

200. 2002 Study, *supra* note 1, at 567. (“Data Tables 3, 4 and 7 display the expected conservative/liberal voting blocs on the Court — with generally conservative Justices O'Connor, Scalia, Kennedy, and Thomas, joined by the Chief Justice, holding conservative positions, and Justices Ginsburg, Breyer, Souter, and Stevens holding liberal slots.”).

201. 2002 Study, *supra* note 1, at 568.

Justices Stevens, Ginsburg, Breyer, and Souter — are most obvious on Tables 3 and 4.

On Table 8, the Court's most conservative Justices (the Chief Justice and Justices Thomas, Scalia, and Kennedy) are clustered together at the conservative end of the Table. But Justice O'Connor, whose vote provided the crucial fifth vote in nearly 74% of this Term's Swing-Vote Cases, racks up a voting pattern closer to two Members of the Court who often join liberal coalitions — Justices Souter and Breyer — than to *any member* of the traditional conservative coalition. On Table 9, the traditional bloc rankings are still apparent, only this time Justices O'Connor *and* Souter (who hold the same liberal 45% voting pattern) mark the boundary between the Court's most conservative Members (the Chief Justice and Justices Thomas, Scalia and Kennedy) and its most liberal (Justices Stevens, Ginsburg, and Breyer).

These Tables not only suggest that the Court continues to vote in identifiable blocs, but that Justice O'Connor is becoming a less reliable member of a controlling conservative coalition. This possibility is further supported by Justice O'Connor's voting pattern on Table 5, where she ranks squarely in the middle of the traditionally liberal Justices who (apparently as a result of pole-switching flowing from *McConnell*) voted most often against First Amendment Claims this Term.²⁰²

That conservative coalitions on the Court are "losing steam" is further supported by Table 10. As in 2002, Table 10 in 2003 does not rank the Justices within the traditional "conservative/liberal" voting blocs shown on Table 3, where bloc voting (as well as conservative dominance) seems absolutely clear. Instead, the "top slot" is held by Justice O'Connor (joining 73.7% of the majority opinions in closely divided cases), followed by Justices Kennedy and Thomas, who each joined 63.2% of such opinions.

Then, in a truly astonishing show of lessened conservative power, four Members of the Court — Justices Stevens, Souter, Ginsburg, *and* Scalia — all share "third place" by joining 55.6% of Majority Swing-Vote Cases. The Chief Justice, who joined 47.4% of these opinions, is just one step up from the *least* influential Member of the Court this Term, the generally-liberal Justice Breyer (at 44.4%). A Court where Justice Stevens is as likely to join the majority of a five-to-four case as Justice Scalia, and where the Chief Justice is *less likely than either* to be a member of the controlling opinion, is hardly a conservative jug-

202. See Appendix C for analysis of the *McConnell* case.

gernaut. Even more than in 2002, it appears that the “the traditional conservative/liberal blocs are *not* ‘holding together.’”²⁰³

3. Justice O'Connor is still “the vote to get” in closely decided cases — and is becoming more a member of the traditionally Liberal bloc: Justice O'Connor, as she was last Term, is clearly the decisive vote in contentious cases. In 2002, she voted with the Court majority an astonishing 100% of the time in closely divided cases.²⁰⁴ Her dominance (perhaps not surprisingly) diminishes for the 2003 Term, but remains at a chart-topping 73.7% — more than 10 points higher than her nearest rival on the Court, Justice Kennedy.²⁰⁵ Individually Justice O'Connor has voted more liberally this Term than she has in the past.²⁰⁶ Moreover, and perhaps more significant to the future of this Study, as noted above, this year's Study suggests that Justice O'Connor's voting pattern may fall closer to a liberal than a conservative coalition.²⁰⁷

The 18th Edition of this Study thus reveals a United States Supreme Court that remains divided into two uneasy camps. This is hardly earth-shattering news. What is different in 2003 is that, while the data from the past several Terms has suggested that neither camp holds “a position of sustained dominance,”²⁰⁸ this reality may be changing. In 2003, the Court continued a second year of sustained liberal movement and erosion in conservative voting power. This movement and erosion in conservative power, much more than the unsteady “drift” noted in 2002, “belies any claim that the Court is a conservative monolith.”²⁰⁹ The Court, as it nears the end of its stewardship under Chief Justice William H. Rehnquist, may well be mov-

203. 2002 Study, *supra* note 1, at 568.

204. 2002 Study, *supra* note 1, at 522.

205 See *infra* Data Table 10.

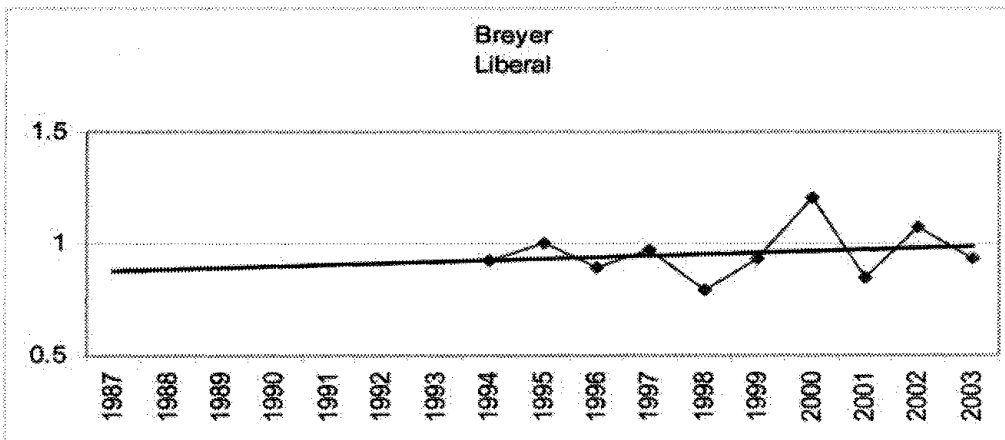
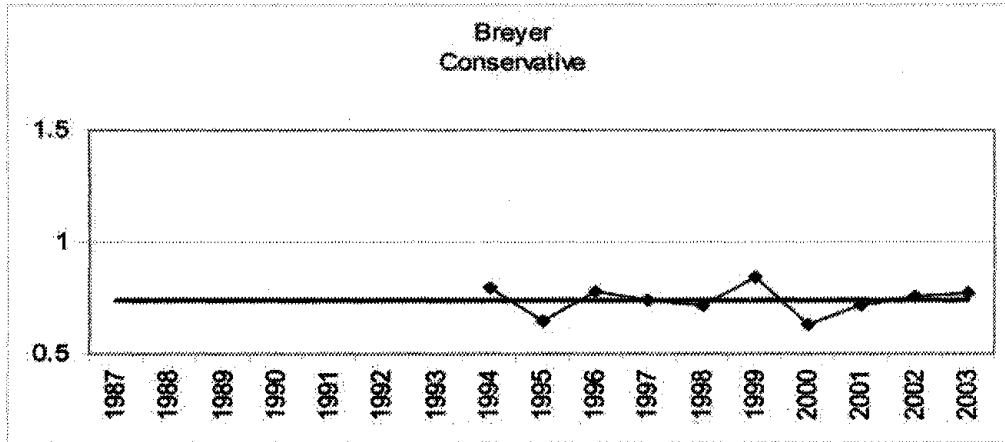
206 See *infra* Data Tables 1-10. Justice O'Connor is voting more liberally now than she did in 2001 as evidenced on Tables 1, 4, and 6-9. As compared to the to the 2002 Term, it could be argued that she has made substantial conservative movement on Tables 2-4, and 9. However, at the same time she made liberal movement on Tables 1, and 5-7, and retained an equally liberal voting percentage (66.7%) on Table 8. What is clear is that she has not returned to the much more conservative position she held in the 2001 Term, which was a more conservative term in general for the court. 2001 Study, *supra* note 1, at 382-383.

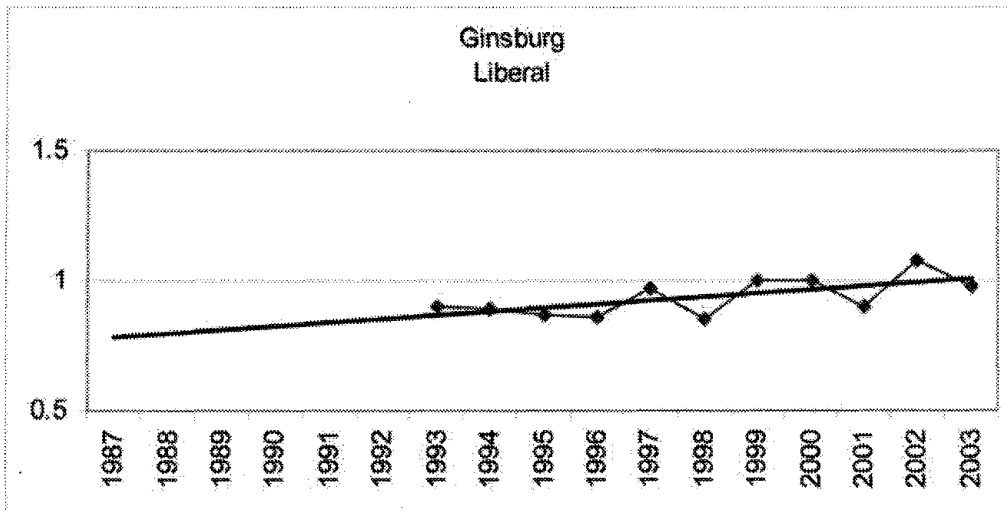
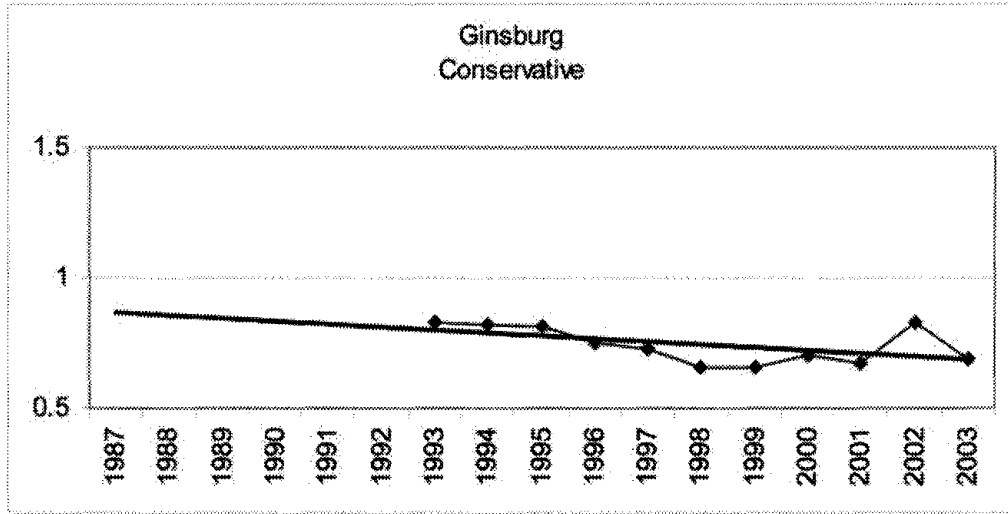
207 In Data Tables 1-10 there are only 3 in which Justice O'Connor is not closer to the traditionally liberal bloc: Data Tables 2-4. An interesting example is her votes in First Amendment cases where she deeply embeds herself among the traditionally liberal coalition.

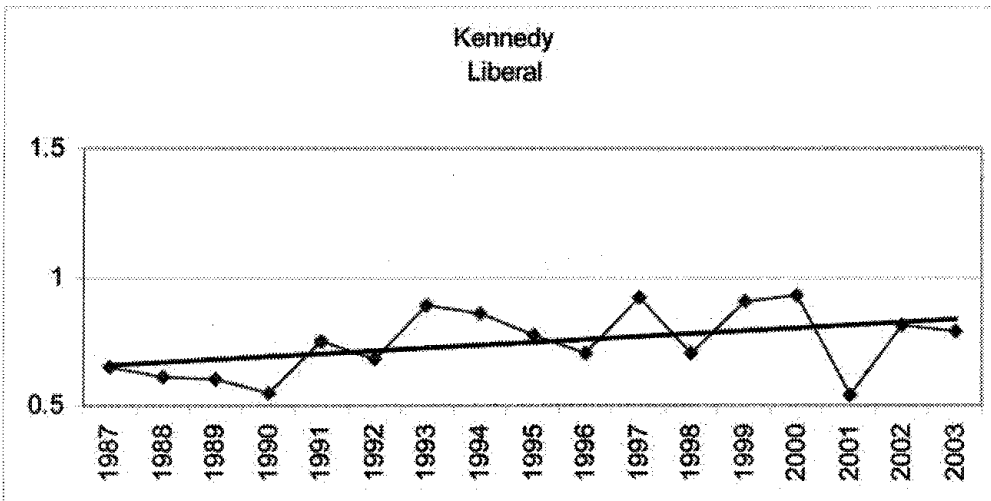
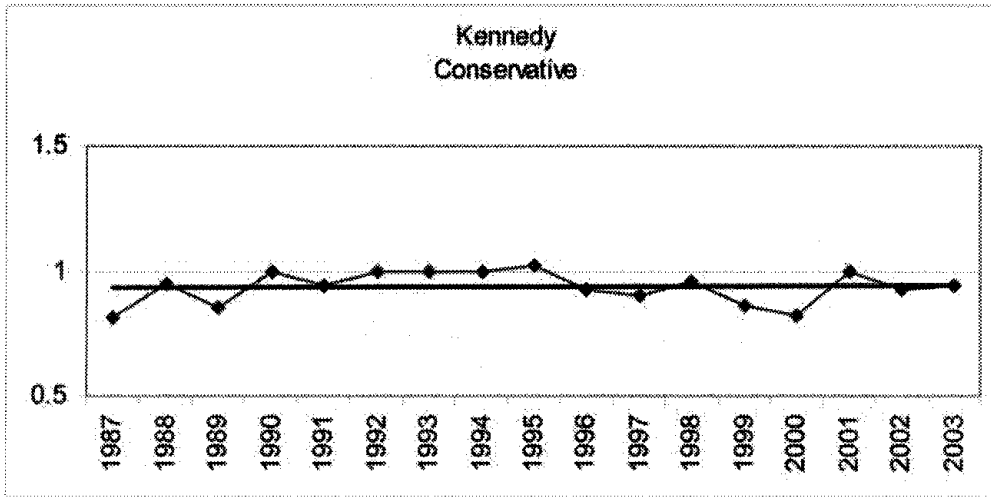
208 2002 Study, *supra* note 1, at 569.

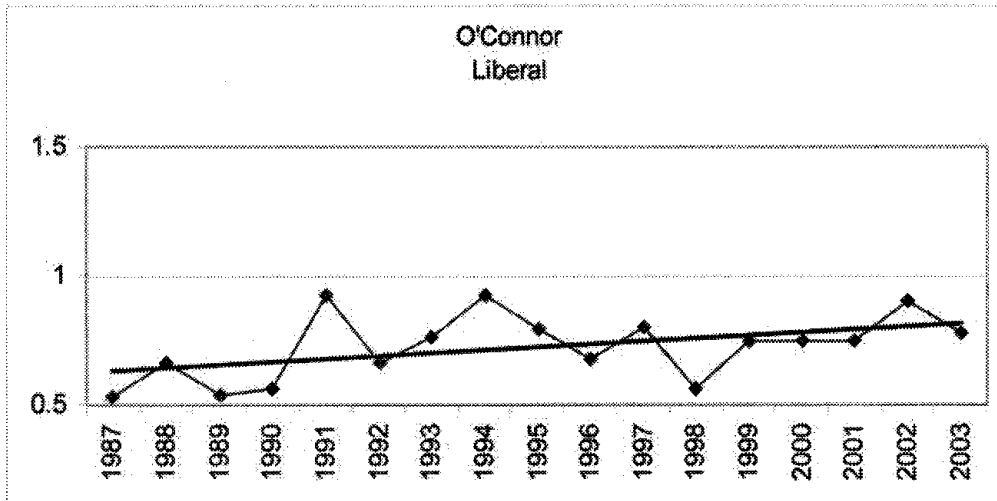
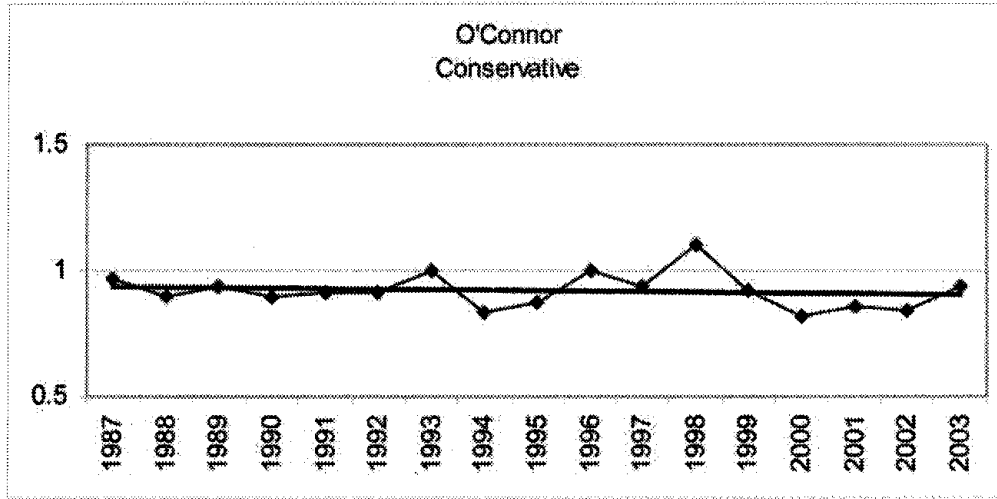
209 Id.

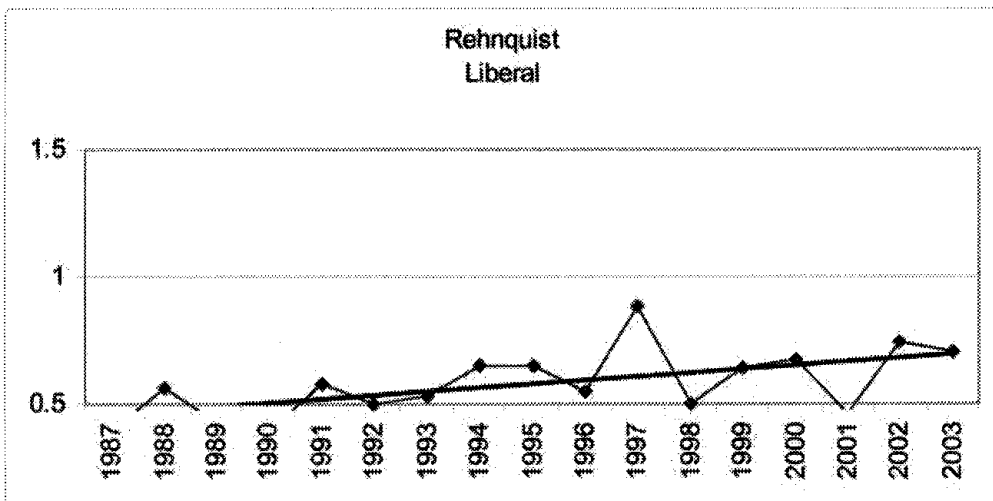
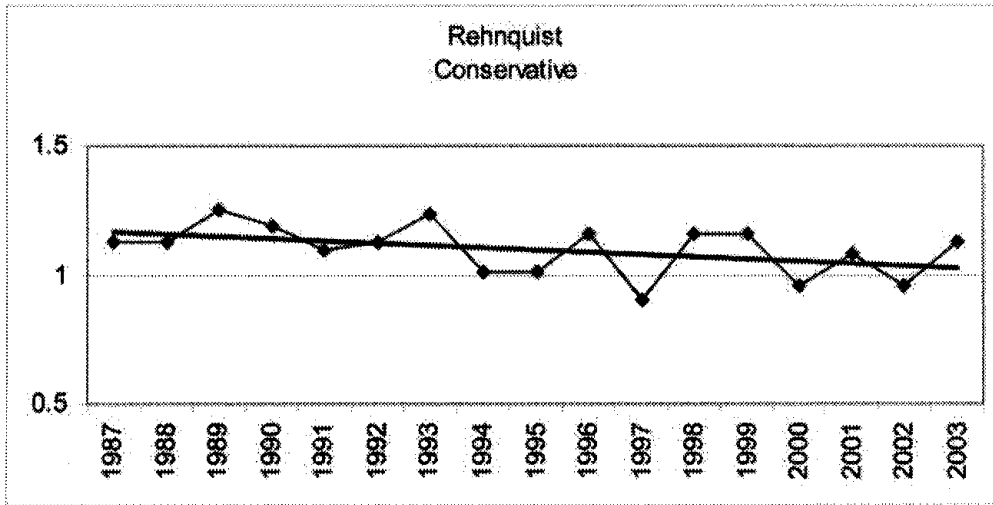
ing — however cautiously — away from the conservative labels so consistently attached to it.

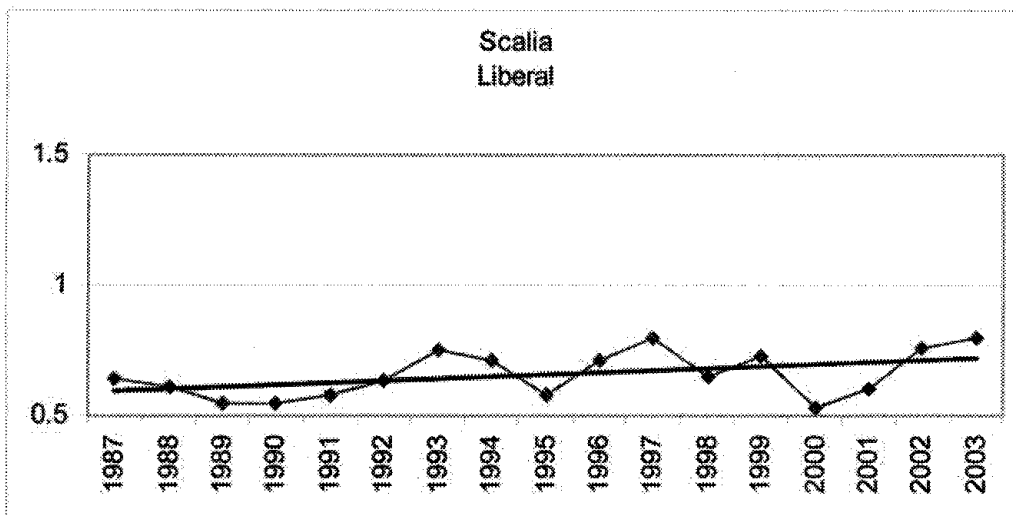
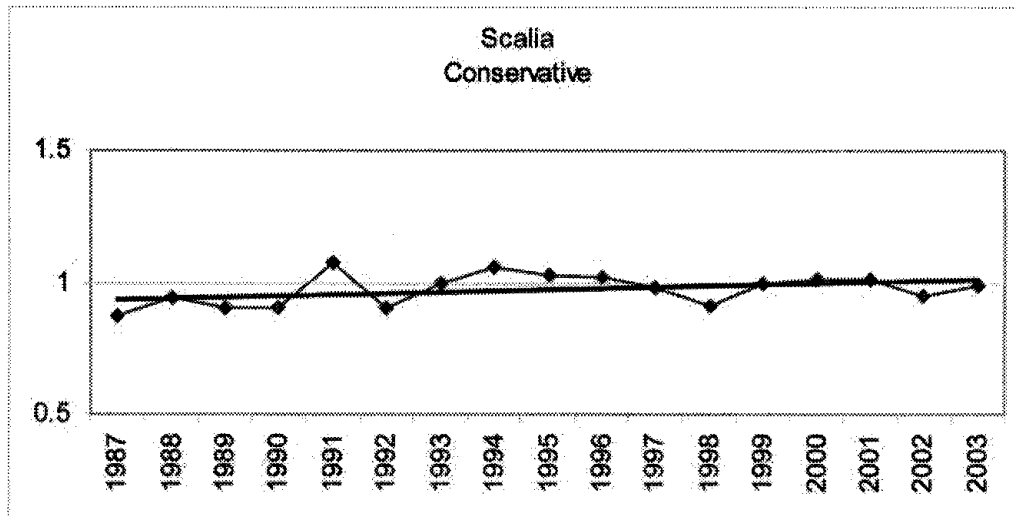


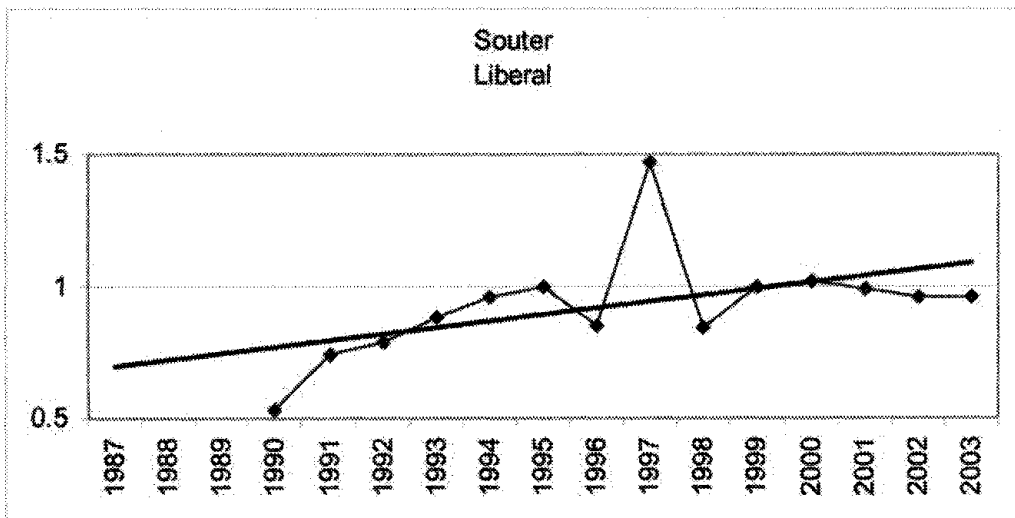
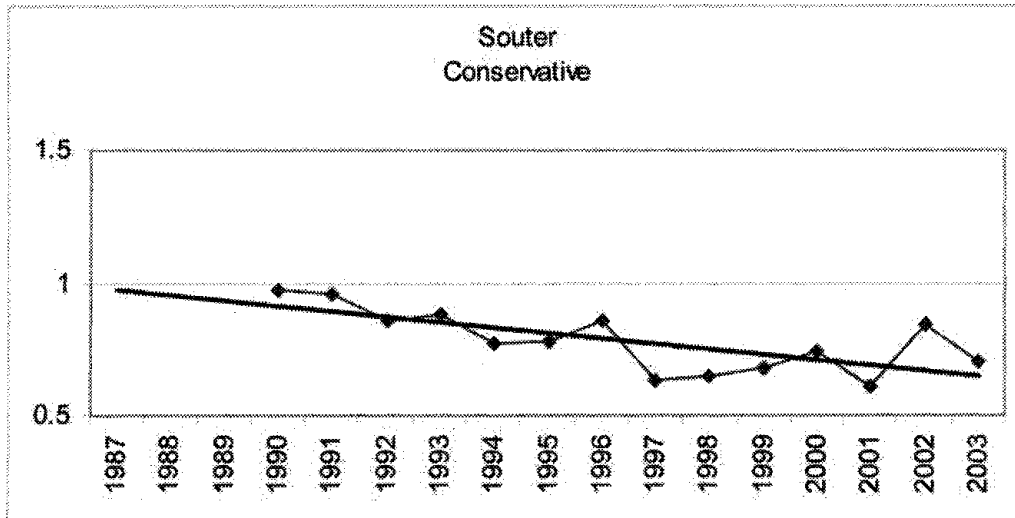


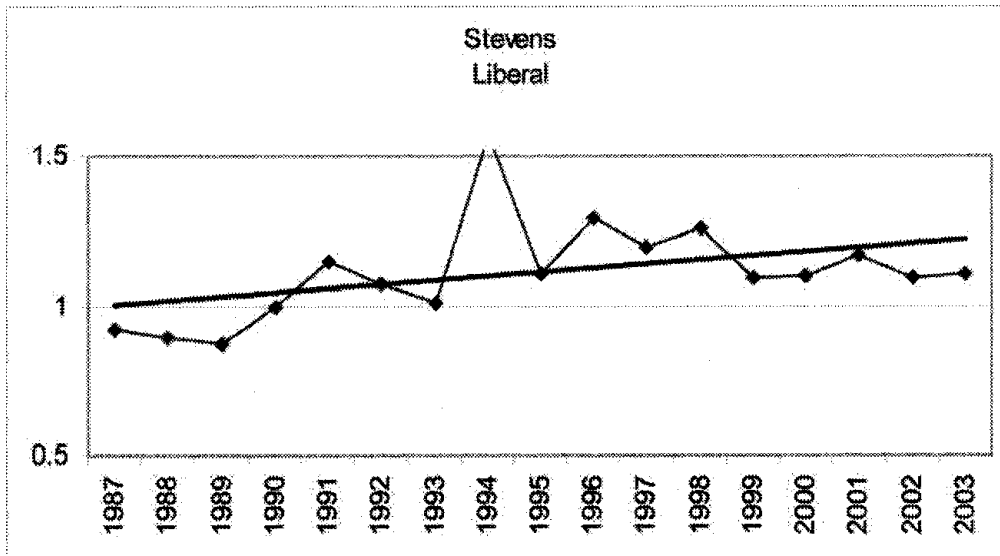
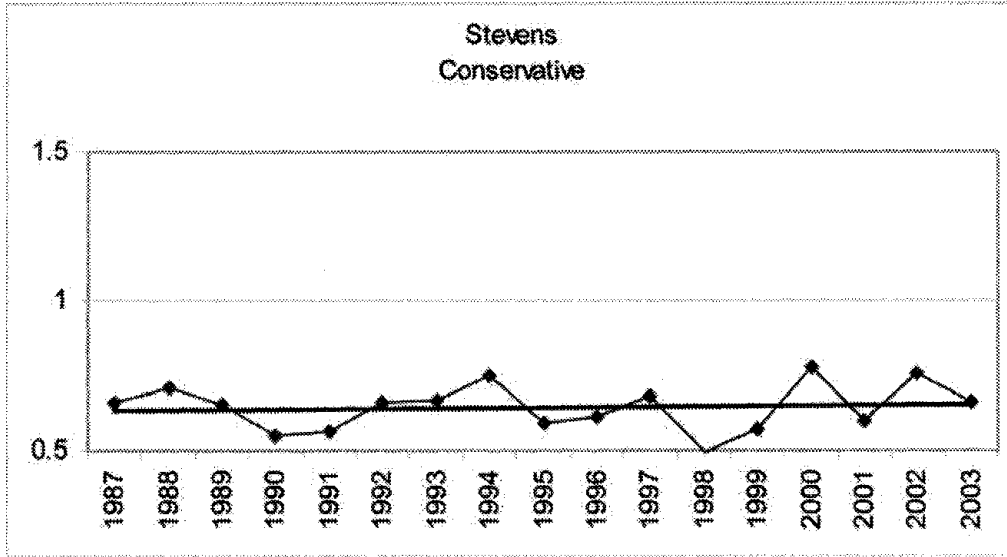


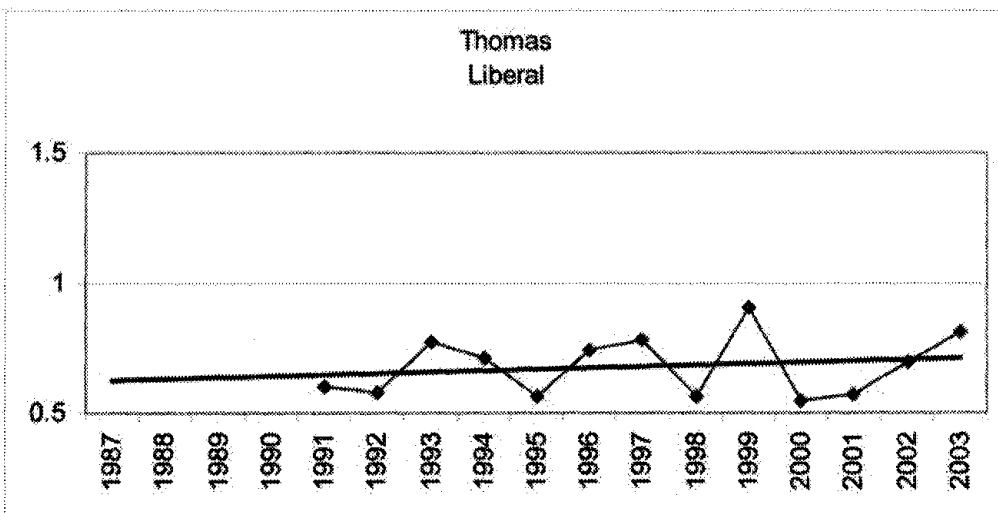
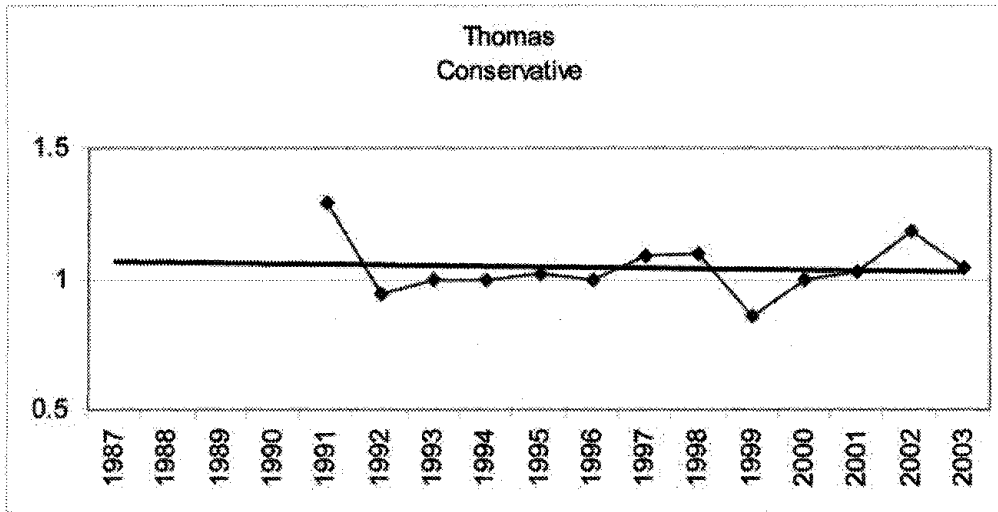












APPENDIX A

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 opin-

ion. 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.²¹⁰ This model is useful in circumstances where, as in this Study, a single variable (a Justice's score) is to be forecast based only on its present and prior values with no other explanatory variables. ARIMA is an acronym for Auto Regressive Integrated Moving Average. The model is most easily explained by starting in the middle of the acronym:

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

210. ARIMA computer modeling was accomplished using MINITAB® statistical software with $p = 1$, $d = 1$, and $q = 1$. For more information regarding the ARIMA (p,d,q) model, see PETER KENNEDY, A GUIDE TO ECONOMETRICS 248-49 (1992).

Auto-

Regression: Once the series has been made stationary, an autoregressive parameter may be determined.²¹¹ 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.²¹²

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

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

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

Synthesis: The previous operations are combined into the equation:

$$X_t = AX_{t-1} - BX_{t-1} + E_t$$

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

211. 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.

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

C. Mean Testing

We use a “student’s t test”²¹³ 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.²¹⁴ We hypothesize that X_1 is also the true mean of the population μ , and we set up this hypothesis (the “null” hypothesis) and its corresponding alternative hypothesis as follows:

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

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

We then set out to prove the alternative hypothesis, within a certain confidence interval,²¹⁵ by rejecting the null hypothesis.²¹⁶ This is accomplished by calculating the following statistic:

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

The result of this equation (t) is compared to the entry on a t-distribution table corresponding to the confidence interval desired (\bullet) and the appropriate number of degrees of freedom (n-k).²¹⁷ If the ab-

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

214. 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.

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

216. A full description of the logic behind this seemingly convoluted procedure is beyond the scope of this article. However, its purpose is to control Type I (or alpha) error. For a complete explanation, see MOORE AND MCCABE, *supra* note 213.

217. k = the number of parameters being tested; here, μ is the only hypothesized pa-

solute value of t is greater than the table entry, H_0 is rejected and we say that the Justice has shown a statistically significant change in voting behavior this Term.

D. Correlation

Relationships between two Justices' voting records may be mapped over a two-dimensional Cartesian plane as in Figures 1 and 2. Figure 1 shows a high degree of positive correlation ($R^2=0.7921$) between the voting percentages of the Chief Justice and Justice Scalia for the Equal Protection category. The points all fall close to an upward sloping line. On the other hand, Figure 2 shows that the voting percentages of the 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.²¹⁸

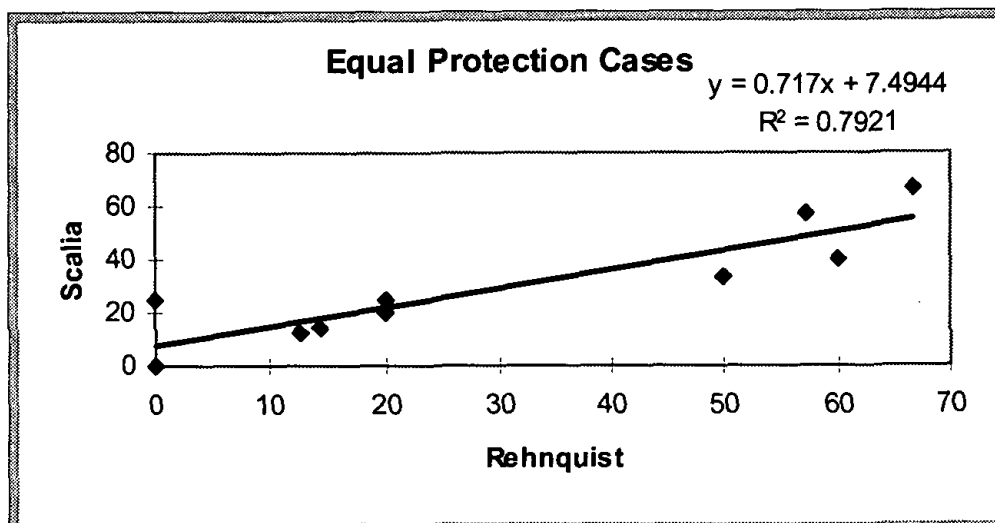


Figure 1

parameter, so $k = 1$.

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

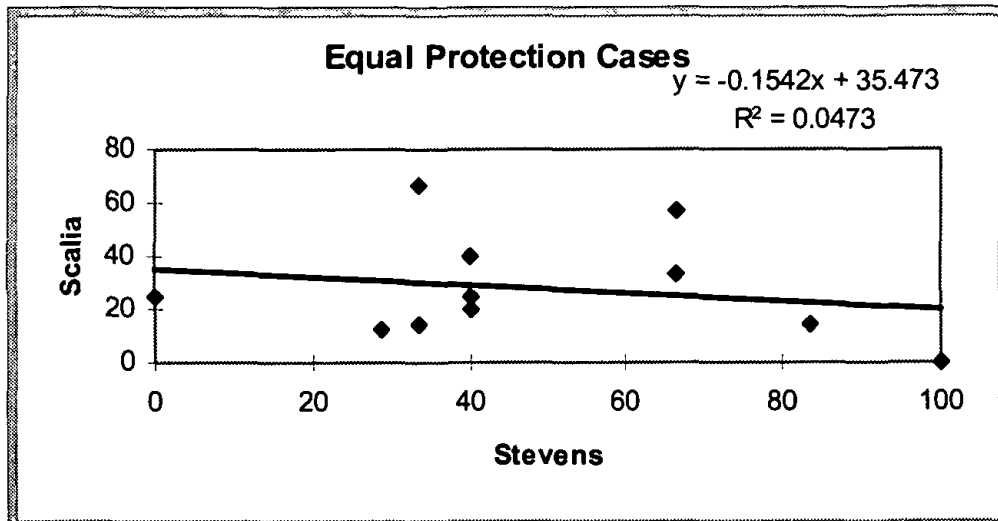


Figure 2

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

E. Factor Analysis

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

We performed a factor analysis of the Study categories using Minitab software. The factor loadings presented were obtained by extracting a single factor, using principal components analysis and applying a QMAX rotation to the data. A full description of the theory and mathematics underlying factor analysis is beyond the scope of this appendix, but several books on the subject are available that provide reasonably simple explanations of this complex process.²¹⁹

F. Frontier Analysis

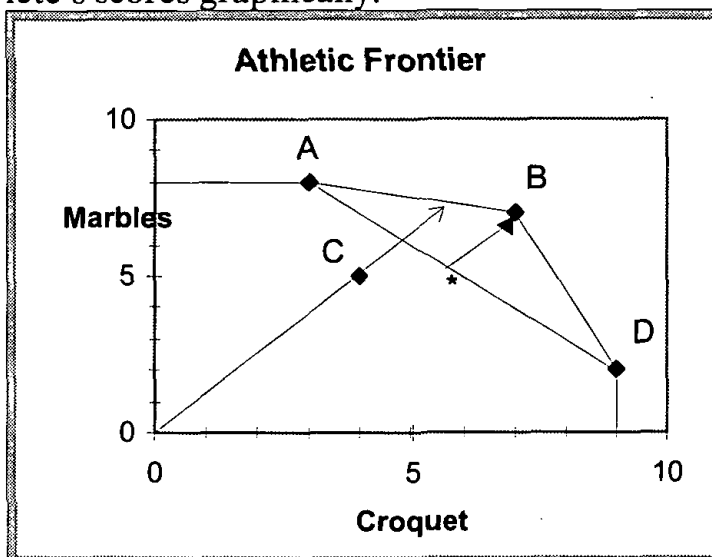
Frontier analysis can probably best be described with an example. Suppose four individuals are competing for the title of "world's greatest athlete." Their scores in two events are listed in the follow-

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

ing table:

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

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



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

ever, 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.²²⁰

APPENDIX C

McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003)

McConnell was an exceptionally difficult case to tabulate this Term — perhaps the most difficult case encountered in the 18 years of this Study. We set out this detailed explanatory footnote to demonstrate how the established parameters of the Study were used to tabulate the results from *McConnell*.

In order to accurately capture the voting patterns determinative of the numerous precise questions decided in *McConnell*, we first identified the specific “questions” addressed by the voting coalitions on the Court. We found 19 such questions, listed below. Some questions were tabulated on more than one Table. (For example, the first question is properly included on Table 5, First Amendment and Table 2, Civil Cases, Federal Government versus a Private Party.) The parenthetical after each question sets out the Tables on which each question was initially tabulated: (1A) = 1st Amendment, (J) = Jurisdiction, (FCP) = Federal Civil Party. We found 14 First Amendment questions, 5 Jurisdiction questions, and 19 Federal Civil Party questions.

1. Are the provisions of FECA Sections 323(a), (b), (d), (f) constitutional? (1A)(FCP)
2. Is FECA Section 323(3) constitutional? (1A)(FCP)
3. Are the disclosure requirements of Section 201 of the BCRA constitutional as applied to executory contracts? (1A)(FCP)
4. Are the disclosure requirements of Section 201 of the BCRA constitutional outside the context of executory contracts? (1A)(FCP)
5. Are the disclosure requirements of Section 202 of the BCRA as applied to coordinated communications with a candidate constitutional? (1A)(FCP)
6. Are the disclosure requirements of Section 202 of the BCRA as applied to coordinated communications with a political party constitutional? (1A)(FCP)
7. Is FECA Section 616(b)(2) constitutional? (1A)(FCP)
8. Is FECA Section 316(c)(6) constitutional? (1A)(FCP)
9. Is the dispute regarding the disclosures required by Section 212 of the BCRA relating to executory contracts ripe for decision? (J)(FCP)
10. Are the disclosures required by Section 212 of the BCRA relating to executory contracts constitutional? (1A)(FCP)

11. Is Section 213 of the BCRA constitutional? (1A)(FCP)
12. Is Section 214 of the BCRA constitutional? (1A)(FCP)
13. Do plaintiffs have standing to challenge Section 305 of the BCRA? (J)(FCP)
14. Do plaintiffs have standing to challenge Section 307 of the BCRA? (J)(FCP)
15. Do plaintiffs have standing to challenge Sections 304, 316, 319 of the BCRA? (J)(FCP)
16. Is Section 311 of the BCRA constitutional? (1A)(FCP)
17. Is Section 318 of the BCRA's prohibition on contributions by minors constitutional? (1A)(FCP)
18. Does the FEC have standing to intervene? (J)(FCP)
19. Is Section 504 of the BCRA constitutional? (1A)(FCP)

The voting patterns displayed on these questions were sometimes identical. For example, the "conservative/liberal" pattern displayed on questions 1, 3, 6-10, 12 and 19 were identical. (See definitional rule three: "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.") Application of this rule resulted in six discrete voting patterns being tabulated on the final results for Tables 2, 5 and 8. These voting patterns, labeled A through F, are set out below:

Pattern A: questions 1, 3, 6-10, 12 and 19 (Swing vote: Justices Breyer, Ginsburg, O'Connor, Souter, Stevens)

Pattern B: questions 2, 4, 5

Pattern C: questions 11, 17, 18

Pattern D: question 13

Pattern E: question 14, 15

Pattern F: question 16

The final tabulation sheet for *McConnell*, accordingly, looked like this:

	Civil, Federal Party		1st Amendment		Jurisdiction	
	For Gov't	Against	For Claim	Against	For Claim	Against
Breyer	A,B,E,F	C,D	C	A,B,F	C,D	E
Ginsburg	A,B,E,F	C,D	C	A,B,F	C,D	E
Kennedy	B,D,E,F	A,C	A,C	B,F	C	D,E
O'Connor	A,B,D,E,F	C	C	A,B,F	C	D,E
Rehnquist	B,D,E,F	A,C	A,C	B,F	C	D,E
Scalia	D,E,F	A,B,C	A,B,C	F	C	D,E
Souter	A,B,D,E,F	C	C	A,B,F	C	D,E
Stevens	A,B,E,F	C,D	C	A,B,F	C,D	E
Thomas	D,E	A,B,C,F	A,B,C,F		C	D,E
Vote	Conservative	Liberal	Liberal	Cons.	Liberal	Cons.