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### Nine Justices, Ten Years: A Statistical Retrospective

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## NINE JUSTICES, TEN YEARS: A STATISTICAL RETROSPECTIVE

The 2003 Term marked an unprecedented milestone for the Supreme Court: for the first time in history, nine Justices celebrated a full decade presiding together over the nation's highest court.<sup>1</sup> The continuity of the current Court is especially striking given that, on average, one new Justice has been appointed approximately every two years since the Court's expansion to nine members in 1837.<sup>2</sup> Although the *Harvard Law Review* has prepared statistical retrospectives in the past,<sup>3</sup> the last decade presents a rare opportunity to study the Court free from the disruptions of intervening appointments.

Presented here is a review of the 823 cases decided by the Court over the past decade. Of course, bare statistics cannot capture the nuanced interactions among the Justices nor substantiate any particular theory about the complex dynamics of the Court. Rather, this statistical compilation and the preliminary observations articulated here are intended only as a starting point — a modest effort to showcase trends that deserve closer attention and to jumpstart more robust analyses of how the Court, despite its apparent stability, has evolved over the past decade.

Even a cursory review of this retrospective produces several noteworthy insights. Some implicate broad institutional trends that cannot be explained by the voting patterns of any particular Justice. For instance, Table I suggests that while the Court has reviewed a decreasing number of cases from its appellate docket, in forma pauperis petitions have climbed steadily despite judicial<sup>4</sup> and congressional<sup>5</sup> efforts to curb this trend.<sup>6</sup> What has not changed is the Ninth Circuit's status

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<sup>1</sup> A seven-Justice Court sat together for more than a decade only once, from Justice Joseph Story's appointment in 1812 to Justice Brockholst Livingston's death in 1823. See SUPREME COURT OF THE UNITED STATES, MEMBERS OF THE SUPREME COURT OF THE UNITED STATES 1 (n.d.), available at <http://www.supremecourtus.gov/about/members.pdf> (last visited Oct. 10, 2004). Justice Stephen Breyer, the most recent appointee to the Court, took the judicial oath on August 3, 1994. *Id.* at 2.

<sup>2</sup> Eighty-five Justices have been appointed to the Court since 1837, when the Court was expanded to nine members, yielding an average of one new Justice every two years. See *id.* at 1–2.

<sup>3</sup> *The Supreme Court, 1999 Term—The Supreme Court in the Nineties: A Statistical Retrospective*, 114 HARV. L. REV. 402 (2000); *The Supreme Court, 1989 Term—The Supreme Court in the Eighties: A Statistical Retrospective*, 104 HARV. L. REV. 367 (1990).

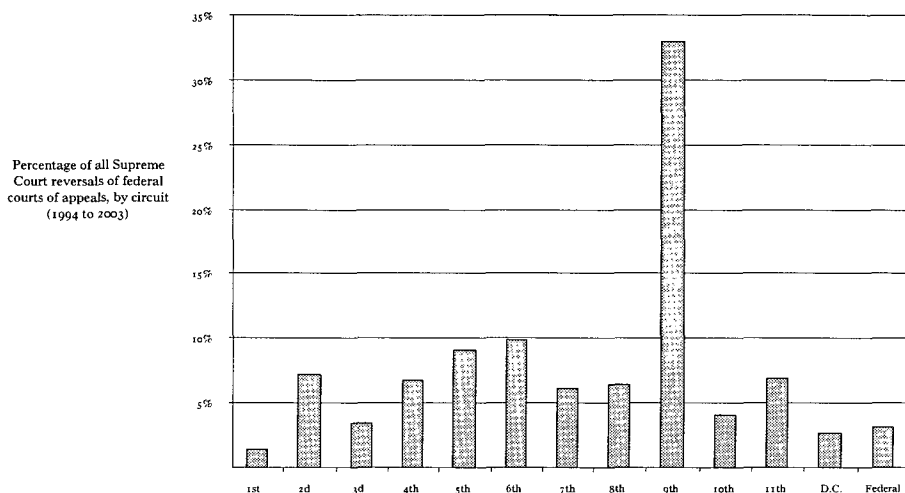
<sup>4</sup> See *Martin v. D.C. Court of Appeals*, 506 U.S. 1, 2 (1992) (per curiam) (ordering the Clerk of the Court to refuse in forma pauperis petitions for certiorari from petitioners abusing the Court's certiorari process). *But see id.* at 4 (Stevens, J., dissenting).

<sup>5</sup> The Prison Litigation Reform Act, for example, contains a “three strikes” provision barring in forma pauperis actions by prisoners who have previously filed three frivolous claims. 28 U.S.C. § 1915(g) (2000).

<sup>6</sup> This trend may be attributed to ballooning prison population and inmate litigation. See generally Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003).

as the tribunal most frequently reversed by the Supreme Court — a trend noted by legislators<sup>7</sup> and jurists<sup>8</sup> alike. Table VI(D) reveals that the Ninth Circuit accounts for over thirty percent of the cases in which the Supreme Court reversed a federal court of appeals decision. Although the Ninth Circuit's docket size no doubt offers a partial explanation, this side-by-side comparison is nonetheless striking.

FIGURE 1. SUPREME COURT REVERSALS OF CIRCUIT COURT DECISIONS



Unique to this retrospective is the possibility of documenting a specific Justice's voting pattern without the complications of changes in the Court's composition. Take, for example, Justice O'Connor, whose vote is widely regarded as crucial in close cases.<sup>9</sup> Table V confirms that Justice O'Connor found herself in five-Justice majorities more often than any of her colleagues, casting decisive votes in over three-

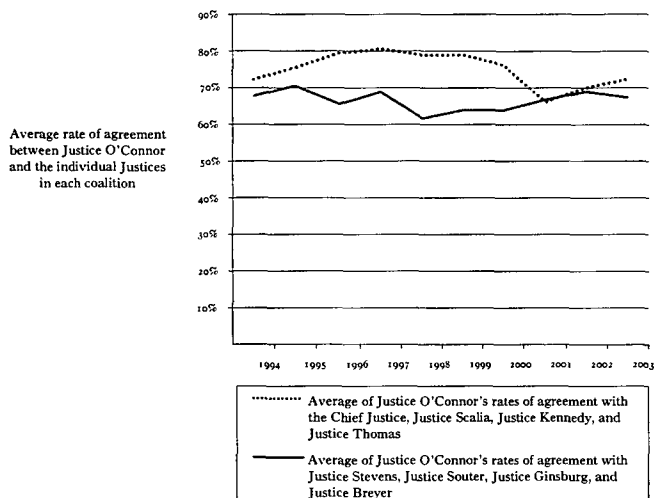
<sup>7</sup> See *Confirmation Hearings on Federal Appointments Before the Senate Comm. on the Judiciary, Part 6*, 108th Cong. 533 (2004) (statement of Sen. Orrin G. Hatch) (describing the Ninth Circuit's reversal rate in the Supreme Court as the "highest and widest . . . in the country"), available at [http://judiciary.senate.gov/member\\_statement.cfm?id=1030&wit\\_id=2628](http://judiciary.senate.gov/member_statement.cfm?id=1030&wit_id=2628).

<sup>8</sup> See, e.g., *Kennedy v. Lockyer*, No. 01-55246, 2004 U.S. App. LEXIS 17190, at \*80-81 (9th Cir. June 14, 2004) (O'Scannlain, J., dissenting) (lamenting that the Ninth Circuit's reversal rate in certain contexts "has become a source of repeated public embarrassment").

<sup>9</sup> See, e.g., Paul H. Edelman & Jim Chen, *The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics*, 70 S. CAL. L. REV. 63, 65 (1996); Lyle Denniston, *High Court OK's School Vouchers*, BOSTON GLOBE, June 28, 2002, at A1 (noting that Justice O'Connor is often the deciding vote in close cases).

quarters of 5-4 decisions.<sup>10</sup> In these closest of cases, two coalitions have been said to flank Justice O'Connor.<sup>11</sup> To one side were Justices Stevens, Souter, Ginsburg, and Breyer, with whom Justice O'Connor voted twenty-eight times. To the other were Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas, with whom she voted eighty-two times. But an analysis of Justice O'Connor's voting tendencies in all cases — not just 5-4 ones — demonstrates that her rates of agreement with the two coalitions appear to have converged over the past eight years.<sup>12</sup>

FIGURE 2. JUSTICE O'CONNOR'S VOTING ALIGNMENTS



These statistics also reinforce longstanding characterizations of Justice Stevens as the Court's most independent voice.<sup>13</sup> Table III(B) demonstrates that Justice Stevens issued more dissenting opinions — 251 in total — than any other Justice. In fact, he authored more than twice

<sup>10</sup> Justice Kennedy has also been characterized as a "swing vote," particularly in the Court's First Amendment and religious freedom jurisprudence. See, e.g., R. Collin Mangrum, *State Aid to Students in Religiously Affiliated Schools: Agostini v. Felton*, 31 CREIGHTON L. REV. 1155, 1205 (1998).

<sup>11</sup> See, e.g., Lino A. Graglia, *The Myth of a Conservative Supreme Court: The October 2000 Term*, 26 HARV. J.L. & PUB. POL'Y 281, 287 (2003) (describing Justice O'Connor's choice between the "conservative bloc" and the "liberal four").

<sup>12</sup> This trend did not hold last Term, however, when Justice O'Connor aligned herself with Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas seventy-two percent of the time.

<sup>13</sup> See, e.g., ROBERT JUDD SICKELS, JOHN PAUL STEVENS AND THE CONSTITUTION 1 (1988); Linda Greenhouse, *In the Matter of Labels, a Loner*, N.Y. TIMES, July 23, 1984, at A8.

as many dissents as Justice O'Connor and nearly three times as many as Justice Kennedy.

But the statistics also shed light on other popular impressions about the Justices. The voting patterns of Justices Scalia and Thomas, for example, have long been cast as unusually indistinguishable.<sup>14</sup> Table II(B) indeed indicates that Justices Scalia and Thomas agreed in 86.7% of cases during the past decade, more than any other two members of the Court. It also reveals, however, that Justices Souter and Ginsburg — who have received far less attention for their jurisprudential similarities — agreed in 85.6% of the cases over the same period. In addition, contrary to the view that Justice Thomas infrequently authors opinions,<sup>15</sup> Table III(A) reveals that Justice Thomas has emerged as one of the Court's most prolific writers: over the past three years, Justice Thomas averaged nearly twenty-six opinions per Term, more than all but two of his colleagues.<sup>16</sup>

Raw numbers, of course, will never tell the full story. Why have certain circuits consistently suffered higher rates of reversal than others? Do voting coalitions change from one substantive field to the next? And, indeed, what effect has the Court's continuity ultimately had on its jurisprudence? We hope this retrospective will help to raise such questions and inspire the scholarship that endeavors to answer them.

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<sup>14</sup> See, e.g., Richard Carelli, *Thomas' Decisions Show Archconservative Bent*, ST. LOUIS POST-DISPATCH, Feb. 27, 1992, at 1C (quoting one litigator's assessment that Justice Thomas could become a "clone" of Justice Scalia).

<sup>15</sup> See, e.g., Kathryn E. Diaz, *There Is No Plain Meaning: The Jurisprudence of ERISA and the "Exclusive Benefit" Rule*, 4 U. PA. J. LAB. & EMP. L. 71, 93 (2001) (describing Justice Thomas as the "least prolific opinion writer on the Court").

<sup>16</sup> Interestingly, Justice Thomas's opinion production reached its lowest point — sixteen — in 1996, the same Term that his rate of agreement with Justice Scalia reached its peak — 97.7%. By comparison, Justices Scalia and Thomas agreed in just 75.9% of the cases last Term, when Justice Thomas authored a personal-record twenty-seven opinions.

TABLE I<sup>a</sup>  
(A) FINAL DISPOSITION OF CASES

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
Original Docket	2	5	2	1	2	5	2	1	1	2
Appellate Docket	2155	2081	2083	2106	2066	2096	1981	1890	1855	1749
On Review <sup>b</sup>	87	74	82	80	82	104	76	82	82	71
Summarily Decided	52	62	66	36	44	34	63	57	46	37
Appeals and Petitions for Review Denied, Dismissed, or Withdrawn	2016	1945	1935	1990	1940	1958	1842	1751	1727	1641
Miscellaneous Docket	4976	4511	4606	4611	4947	5273	5730	6133	6486	6030
On Review <sup>b</sup>	7	17	9	16	10	18	11	6	10	12
Summarily Decided	14	55	15 <sup>c</sup>	14	11	16	61	13	17	13
Appeals and Petitions for Review Denied, Dismissed, or Withdrawn	4955	4439	4582	4581	4926	5239	5658	6114	6459	6005
Total	7133	6597	6691	6718	7015	7374	7713	8024	8342	7781

(B) METHOD OF DISPOSITION<sup>d</sup>

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
On Review	94	91	91	96	92	122	87	88	92	83
Summarily Decided	66	117	81	50	55	50	124	70	63	50
By Denial, Dismissal, or Withdrawal of Appeals or Petitions for Review	6971	6384	6517	6571	6866	7197	7500	7865	8186	7646

(C) DISPOSITION OF CASES REVIEWED ON WRIT OF CERTIORARI<sup>e</sup>

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
Percentage Reversed	37.3	24.2	32.9	30.6	33.8	39.5	27.0	35.2	24.6	43.2
Percentage Vacated	43.0	59.8	50.6	43.3	48.5	36.1	58.2	46.2	42.1	42.4
Percentage Affirmed	19.7	16.0	16.5	26.1	17.7	24.4	14.8	18.6	33.3	14.4

<sup>a</sup> All information in Table I is derived from data provided by the Supreme Court. See, e.g., *The Supreme Court, 2003 Term—The Statistics*, 118 HARV. L. REV. 497, 504 n.a (2004); see also, e.g., October Term 2003, Statistical Sheet No. 28 (June 30, 2004) (unpublished statistical sheet, on file with the Harvard Law School Library).

<sup>b</sup> The *Harvard Law Review's* annual *Statistics* introduced the category "On Review" in 1998. See *The Supreme Court, 1997 Term—The Statistics*, 112 HARV. L. REV. 366, 372 n.d (1998) (describing the distinction between this category and its predecessor). Data for the 1994, 1995, and 1996 Terms have been assembled by evaluating statistics provided by the Supreme Court in its annual journal. See, e.g., *Statistics as of June 29, 1995*, J. SUP. CT. U.S., Oct. Term 1994, at II, available at <http://supremecourtus.gov/orders/journal.html>. For these years, the number of decisions made "On Review" was determined by adding the total number of petitions for certiorari and appeals granted by the Court to the number of cases available for argument at the beginning of the Term, and then subtracting those available for argument after the end of the Term. These decisions were then allocated between the appellate and miscellaneous dockets such that the sum of "On Review," "Summarily Decided," and "Appeals and Petitions for Review Denied, Dismissed, or Withdrawn" on each docket matched the total number of cases on each docket according to the Supreme Court's own report. In the data for October Term 1997, a discrepancy of one case was noted between the sum of "On Review," "Summarily Decided," and "Appeals and Petitions Denied, Dismissed, or Withdrawn" and the total number of cases disposed according to the *Journal*.

TABLE I (*continued*)

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As a result, the total number of cases reported in the appellate docket here is higher than the total number of cases in the appellate docket according to the *Journal*.

<sup>c</sup> In the 1996 Term, the *Harvard Law Review's* annual *Statistics* did not include the number of cases that were summarily decided in the miscellaneous docket. The figure in this table was, therefore, calculated by subtracting the number of cases in which review was granted from the total number of cases decided on the merits in the miscellaneous docket during that Term. See *The Supreme Court, 1996 Term—The Statistics*, 111 HARV. L. REV. 431, 435 (1997).

<sup>d</sup> The data in this table were derived directly from Table II(A) of the annual *Statistics* rather than from Table II(C), which has intermittently included cases from the Court's original docket not relevant to this analysis. See *The Supreme Court, 1997 Term—The Statistics*, 112 HARV. L. REV. 366, 373 n.k (1998). These data were derived by adding the number of cases disposed by each method within the appellate and miscellaneous dockets. Cases arising under original jurisdiction have been excluded.

<sup>e</sup> This table includes only cases disposed of by full opinions or by per curiam opinions containing legal reasoning substantial enough to be considered full opinions. For examples of per curiam opinions containing sufficient legal reasoning to be included in these tables, see *The Supreme Court, 2003 Term—The Statistics*, 118 HARV. L. REV. 497, 497 n.a (2004).

**TABLE II**  
**(A1) VOTING ALIGNMENTS BY PERCENTAGE: 1994-1998<sup>a</sup>**

		Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer
Rehnquist	1994	—	50.6	76.7	80.0	83.7	68.6	81.4	67.1	67.1
	1995	—	49.4	79.7	82.3	78.5	67.1	82.1	65.8	58.2
	1996	—	53.5	78.8	81.4	84.9	69.8	81.4	67.4	60.5
	1997	—	62.4	84.8	74.2	89.2	73.1	77.4	74.2	73.1
	1998	—	39.5	82.5	81.5	81.5	59.3	87.7	51.9	56.3
Stevens	1994	50.6	—	55.3	45.2	61.2	69.4	42.4	75.0	70.7
	1995	49.4	—	59.7	45.5	64.9	70.1	44.7	72.7	74.0
	1996	53.5	—	55.3	44.2	61.6	73.3	44.2	79.1	77.9
	1997	62.4	—	62.0	48.4	65.6	75.3	54.8	77.4	76.3
	1998	39.5	—	46.3	44.4	46.9	67.9	37.0	74.1	70.0
O'Connor	1994	76.7	55.3	—	68.2	75.6	76.7	67.4	64.7	74.4
	1995	79.7	59.7	—	72.2	78.5	78.5	71.8	68.4	74.7
	1996	78.8	55.3	—	78.8	80.0	70.6	80.0	69.4	67.1
	1997	84.8	62.0	—	72.8	85.9	72.8	78.3	65.2	75.0
	1998	82.5	46.3	—	77.5	80.0	68.8	75.0	62.5	68.4
Scalia	1994	80.0	45.2	68.2	—	75.3	60.0	88.2	59.5	59.3
	1995	82.3	45.5	72.2	—	73.4	60.8	87.2	58.2	54.4
	1996	81.4	44.2	78.8	—	79.1	61.6	97.7	58.1	53.5
	1997	74.2	48.4	72.8	—	68.8	62.4	87.1	58.1	57.0
	1998	81.5	44.4	77.5	—	72.8	60.5	84.0	53.1	50.0
Kennedy	1994	83.7	61.2	75.6	75.3	—	73.3	73.3	76.5	72.0
	1995	78.5	64.9	78.5	73.4	—	74.7	69.2	75.9	68.4
	1996	84.9	61.6	80.0	79.1	—	72.1	79.1	67.4	65.1
	1997	89.2	65.6	85.9	68.8	—	75.3	76.3	74.2	78.5
	1998	81.5	46.9	80.0	72.8	—	63.0	72.8	61.7	60.0
Souter	1994	68.6	69.4	76.7	60.0	73.3	—	55.8	80.0	82.9
	1995	67.1	70.1	78.5	60.8	74.7	—	57.7	83.5	88.6
	1996	69.8	73.3	70.6	61.6	72.1	—	61.6	79.1	76.7
	1997	73.1	75.3	72.8	62.4	75.3	—	62.4	86.0	83.9
	1998	59.3	67.9	68.8	60.5	63.0	—	55.6	84.0	78.8
Thomas	1994	81.4	42.4	67.4	88.2	73.3	55.8	—	54.1	58.5
	1995	82.1	44.7	71.8	87.2	69.2	57.7	—	55.1	48.7
	1996	81.4	44.2	80.0	97.7	79.1	61.6	—	58.1	52.3
	1997	77.4	54.8	78.3	87.1	76.3	62.4	—	59.1	61.3
	1998	87.7	37.0	75.0	84.0	72.8	55.6	—	45.7	50.0
Ginsburg	1994	67.1	75.0	64.7	59.5	76.5	80.0	54.1	—	82.7
	1995	65.8	72.7	68.4	58.2	75.9	83.5	55.1	—	74.7
	1996	67.4	79.1	69.4	58.1	67.4	79.1	58.1	—	81.4
	1997	74.2	77.4	65.2	58.1	74.2	86.0	59.1	—	82.8
	1998	51.9	74.1	62.5	53.1	61.7	84.0	45.7	—	76.3
Breyer	1994	67.1	70.7	74.4	59.3	72.0	82.9	58.5	82.7	—
	1995	58.2	74.0	74.7	54.4	68.4	88.6	48.7	74.7	—
	1996	60.5	77.9	67.1	53.5	65.1	76.7	52.3	81.4	—
	1997	73.1	76.3	75.0	57.0	78.5	83.9	61.3	82.8	—
	1998	56.3	70.0	68.4	50.0	60.0	78.8	50.0	76.3	—

<sup>a</sup> Tables II(A1) and II(A2) record the frequency with which each pair of Justices voted together in full opinion decisions, including per curiam decisions containing sufficient legal reasoning to be considered full opinions. The percentages are drawn directly from the annual voting alignment tables for all written opinions. *E.g.*, *The Supreme Court, 2003 Term—The Statistics*, 118 HARV. L. REV. 497, 499 tbl.(B1) (2004). For a full explanation of how these figures were determined, see *id.* at 501 n.g.



TABLE II (continued)  
 (A2) VOTING ALIGNMENTS BY PERCENTAGE: 1999-2003<sup>a</sup>

		Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer
Rehnquist	1999	—	48.1	92.2	74.0	85.7	57.1	76.6	59.7	66.2
	2000	—	49.4	81.0	84.9	89.5	57.6	86.0	54.7	51.8
	2001	—	54.3	72.7	76.3	82.7	56.8	76.5	58.0	61.3
	2002	—	57.7	79.2	75.6	89.7	70.5	70.1	70.5	68.8
	2003	—	52.5	85.9	69.6	82.5	55.7	73.8	61.3	66.7
Stevens	1999	48.1	—	51.9	41.6	50.6	84.4	49.4	85.7	76.6
	2000	49.4	—	57.1	41.2	57.6	81.0	44.7	78.8	81.0
	2001	54.3	—	61.0	40.0	56.8	80.2	44.4	84.0	83.8
	2002	57.7	—	61.0	51.3	61.5	78.2	48.1	71.8	68.8
	2003	52.5	—	60.3	40.5	58.8	83.5	42.5	81.3	75.6
O'Connor	1999	92.2	51.9	—	67.5	81.8	63.6	74.0	66.2	72.7
	2000	81.0	57.1	—	71.4	79.8	65.1	72.6	66.7	67.5
	2001	72.7	61.0	—	61.8	72.7	77.9	57.1	62.3	65.8
	2002	79.2	61.0	—	64.9	72.7	74.0	63.2	67.5	73.7
	2003	85.9	60.3	—	64.9	76.9	64.9	61.5	67.9	76.3
Scalia	1999	74.0	41.6	67.5	—	71.4	46.8	89.6	45.5	53.2
	2000	84.9	41.2	71.4	—	79.1	50.6	89.5	48.8	47.1
	2001	76.3	40.0	61.8	—	73.8	43.8	82.5	40.0	40.5
	2002	75.6	51.3	64.9	—	74.4	60.3	84.4	64.1	54.5
	2003	69.6	40.5	64.9	—	60.8	44.9	75.9	48.1	46.8
Kennedy	1999	85.7	50.6	81.8	71.4	—	54.5	75.3	55.8	59.7
	2000	89.5	57.6	79.8	79.1	—	65.9	77.9	62.8	60.0
	2001	82.7	56.8	72.7	73.8	—	63.0	76.5	61.7	61.3
	2002	89.7	61.5	72.7	74.4	—	73.1	70.1	69.2	66.2
	2003	82.5	58.8	76.9	60.8	—	62.0	65.0	60.0	62.8
Souter	1999	57.1	84.4	63.6	46.8	54.5	—	54.5	88.3	81.8
	2000	57.6	81.0	65.1	50.6	65.9	—	50.6	90.6	83.3
	2001	56.8	80.2	77.9	43.8	63.0	—	40.7	86.4	80.0
	2002	70.5	78.2	74.0	60.3	73.1	—	53.2	91.0	83.1
	2003	55.7	83.5	64.9	44.9	62.0	—	46.8	87.3	75.6
Thomas	1999	76.6	49.4	74.0	89.6	75.3	54.5	—	51.9	50.6
	2000	86.0	44.7	72.6	89.5	77.9	50.6	—	48.8	48.2
	2001	76.5	44.4	57.1	82.5	76.5	40.7	—	45.7	46.3
	2002	70.1	48.1	63.2	84.4	70.1	53.2	—	53.2	44.7
	2003	73.8	42.5	61.5	75.9	65.0	46.8	—	48.8	47.4
Ginsburg	1999	59.7	85.7	66.2	45.5	55.8	88.3	51.9	—	80.5
	2000	54.7	78.8	66.7	48.8	62.8	90.6	48.8	—	87.1
	2001	58.0	84.0	62.3	40.0	61.7	86.4	45.7	—	83.8
	2002	70.5	71.8	67.5	64.1	69.2	91.0	53.2	—	84.4
	2003	61.3	81.3	67.9	48.1	60.0	87.3	48.8	—	87.2
Breyer	1999	66.2	76.6	72.7	53.2	59.7	81.8	50.6	80.5	—
	2000	51.8	81.0	67.5	47.1	60.0	83.3	48.2	87.1	—
	2001	61.3	83.8	65.8	40.5	61.3	80.0	46.3	83.8	—
	2002	68.8	68.8	73.7	54.5	66.2	83.1	44.7	84.4	—
	2003	66.7	75.6	76.3	46.8	62.8	75.6	47.4	87.2	—

TABLE II (continued)  
 (B) AVERAGE VOTING ALIGNMENTS<sup>b</sup>

		Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer
Rehnquist	CD	—	427	663	643	702	526	655	522	515
	CN	—	823	815	824	827	825	825	826	817
	P	—	51.9	81.3	78.0	84.9	63.8	79.4	63.2	63.0
Stevens	CD	427	—	463	363	483	626	372	641	615
	CN	823	—	812	820	823	821	821	822	814
	P	51.9	—	57.0	44.3	58.7	76.2	45.3	78.0	75.6
O'Connor	CD	663	463	—	570	640	580	572	538	576
	CN	815	812	—	812	815	813	813	814	805
	P	81.3	57.0	—	70.2	78.5	71.3	70.4	66.1	71.6
Scalia	CD	643	363	570	—	601	455	713	440	421
	CN	824	820	812	—	824	822	822	823	814
	P	78.0	44.3	70.2	—	72.9	55.4	86.7	53.5	51.7
Kennedy	CD	702	483	640	601	—	560	608	551	536
	CN	827	823	815	824	—	825	825	826	817
	P	84.9	58.7	78.5	72.9	—	67.9	73.7	66.7	65.6
Souter	CD	526	626	580	455	560	—	445	705	665
	CN	825	821	813	822	825	—	823	824	816
	P	63.8	76.2	71.3	55.4	67.9	—	54.1	85.6	81.5
Thomas	CD	655	372	572	713	608	445	—	430	416
	CN	825	821	813	822	825	823	—	824	815
	P	79.4	45.3	70.4	86.7	73.7	54.1	—	52.2	51.0
Ginsburg	CD	522	641	538	440	551	705	430	—	670
	CN	826	822	814	823	826	824	824	—	816
	P	63.2	78.0	66.1	53.5	66.7	85.6	52.2	—	82.1
Breyer	CD	515	615	576	421	536	665	416	670	—
	CN	817	814	805	814	817	816	815	816	—
	P	63.0	75.6	71.6	51.7	65.6	81.5	51.0	82.1	—

<sup>b</sup> This table records the total number of decisions ("CD") in which one Justice voted in agreement with another Justice over the last decade. "CN" represents the cumulative number of decisions in which both Justices participated and thus the total number of opportunities for agreement. "P" represents the percentage of cases in which two Justices agreed, calculated by dividing CD by CN. Note that  $CD = \Sigma D$  and  $CN = \Sigma N$ , where D and N are drawn directly from the voting alignment tables for all written opinions for each of the last ten years. *E.g., The Supreme Court, 2003 Term—The Statistics*, 118 HARV. L. REV. 497, 499 tbl.I(B1), 501 n.g (2004). Note also that this table includes all opinions authored by the Justices rather than solely non-unanimous opinions; because the Justices tend to agree quite often, the rates of agreement presented here are higher than those reflected in the annual presentation of voting patterns in non-unanimous cases. *See id.* at 501 n.h.

A previous *Statistics* retrospective noted that a change in the *Law Review's* methodology for assessing agreement among Justices in separate opinions ("S") may have resulted in slight overreporting of the rates of agreement for certain Terms. *The Supreme Court, 1999 Term—The Supreme Court in the Nineties: A Statistical Retrospective*, 114 HARV. L. REV. 402, 404 n.a (2000). However, calculating rates of agreement as a quotient of the decisions in which the Justices agreed ("D") has eliminated any such overreporting by counting agreements between Justices only once for any particular case without respect to the number of opinions two Justices joined together. *See, e.g., The Supreme Court, 2003 Term—The Statistics, supra*, at 501 n.g.

**TABLE III**  
**(A) ACTIONS OF INDIVIDUAL JUSTICES:**  
**TOTAL OPINIONS WRITTEN**

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	Total	Avg.
Rehnquist	16	15	14	17	18	14	14	14	12	14	148	14.8
Stevens	34	35	32	30	34	32	34	25	28	29	313	31.3
O'Connor	29	15	22	16	15	15	17	21	17	14	181	18.1
Scalia	24	26	28	35	21	25	29	27	25	30	270	27.0
Kennedy	15	18	12	20	18	19	14	17	19	23	175	17.5
Souter	18	20	19	21	15	23	17	17	22	18	190	19.0
Thomas	23	22	16	17	24	21	22	23	27	27	222	22.2
Ginsburg	21	18	17	22	19	18	20	17	17	16	185	18.5
Breyer	16	19	26	27	22	23	24	23	18	22	220	22.0
Total	196	188	186	205	186	190	191	184	185	193	1904	—
Average	21.8	20.9	20.7	22.8	20.7	21.1	21.2	20.4	20.6	21.4	—	21.2 <sup>a</sup>

**(B) ACTIONS OF INDIVIDUAL JUSTICES:**  
**TOTAL DISSENTING VOTES**

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	Total	Avg.
Rehnquist	13	14	13	10	16	9	14	12	11	12	124	12.4
Stevens	26	24	27	23	29	31	28	24	20	19	251	25.1
O'Connor	12	8	12	11	8	8	8	10	9	5	91	9.1
Scalia	15	17	18	23	13	20	18	22	21	21	188	18.8
Kennedy	6	6	6	7	9	12	7	9	15	11	88	8.8
Souter	16	12	12	16	16	24	18	18	13	17	162	16.2
Thomas	21	18	17	18	16	17	17	17	28	17	186	18.6
Ginsburg	12	16	17	17	20	24	21	17	18	16	178	17.8
Breyer	12	16	23	14	19	23	23	15	18	15	178	17.8
Total	133	131	145	139	146	168	154	144	153	133	1446	—
Average	14.8	14.6	16.1	15.4	16.2	18.7	17.1	16.0	17.0	14.8	—	16.1 <sup>a</sup>

<sup>a</sup> These figures represent the average annual number of opinions and dissents per Justice over the ten-year period.

TABLE IV  
UNANIMITY AND DISSENT<sup>a</sup>

	Unanimous	With Concurrence	With Dissent	5-4	Total
1994	28 (32.6%)	8 (9.3%)	50 (58.1%)	16 (18.6%)	86
1995	29 (38.7%)	3 (4.0%)	43 (57.3%)	11 (14.7%)	75
1996	32 (37.2%)	7 (8.1%)	47 (54.7%)	18 (20.9%)	86
1997	40 (43.0%)	6 (6.5%)	47 (50.5%)	15 (16.1%)	93
1998	24 (29.6%)	5 (6.2%)	52 (64.2%)	16 (19.8%)	81
1999	27 (35.1%)	5 (6.5%)	45 (58.4%)	18 (23.4%)	77
2000	30 (34.9%)	7 (8.1%)	49 (57.0%)	27 (31.4%)	86
2001	27 (33.3%)	6 (7.4%)	48 (59.3%)	21 (25.9%)	81
2002	30 (38.5%)	5 (6.4%)	43 (55.1%)	14 (17.9%)	78
2003	25 (31.3%)	12 (15.0%)	43 (53.8%)	19 (23.8%)	80
Total	292 (35.5%)	64 (7.8%)	467 (56.7%)	175 (21.3%)	823

<sup>a</sup> For explanations of the figures in this table, see the notes accompanying Tables I(C)-(E) of the annual *Statistics*. E.g., *The Supreme Court, 2003 Term—The Statistics*, 118 HARV. L. REV. 497, 502-03 nn.i-v (2004). Note that, due to rounding, the sum of the percentages representing the proportion of unanimous, with concurrence, and with dissent cases may be slightly greater than 100.0%.

TABLE V  
(A) 5-4 DECISIONS: VOTING WITH THE MAJORITY<sup>a</sup>

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	Total
Rehnquist	10	7	12	9	9	13	18	15	8	10	111
Stevens	8	3	9	6	8	5	9	8	7	10	73
O'Connor	11	9	13	10	11	15	21	17	13	15	135
Scalia	9	7	10	7	10	14	18	14	7	10	106
Kennedy	13	9	14	13	11	13	21	15	7	12	128
Souter	6	4	9	5	8	6	11	7	8	9	73
Thomas	8	7	10	11	10	15	18	14	6	12	111
Ginsburg	8	5	6	6	7	5	10	6	6	9	68
Breyer	7	4	7	8	6	4	9	9	8	8	70
Total <sup>b</sup>	16	11	18	15	16	18	27	21	14	19	175

<sup>a</sup> This table records the number of times that each Justice voted with the majority in a 5-4 decision. For an explanation of the voting arrangements that constitute a 5-4 decision, as well as a detailed list of the cases included here, see the notes accompanying Table I(E) of the annual *Statistics*. E.g., *The Supreme Court, 2003 Term—The Statistics*, 118 HARV. L. REV. 497, 503 nn.n-v (2004).

<sup>b</sup> The numbers in this row represent the total number of 5-4 decisions rendered by the Court in a given Term.

TABLE V (continued)  
 (B) 5-4 DECISIONS: VOTING BLOCS  
 CONSTITUTING THE MAJORITY<sup>c</sup>

Justices Constituting the Majority	Number of Decisions
Rehnquist, O'Connor, Scalia, Kennedy, Thomas	82
Stevens, O'Connor, Souter, Ginsburg, Breyer	28
Stevens, Kennedy, Souter, Ginsburg, Breyer	14
Rehnquist, Stevens, Scalia, Kennedy, Thomas	3
Rehnquist, Scalia, Kennedy, Thomas, Ginsburg	3
Stevens, Scalia, Souter, Thomas, Ginsburg	3
Stevens, Souter, Thomas, Ginsburg, Breyer	3
Rehnquist, Stevens, O'Connor, Kennedy, Breyer	2
Rehnquist, Stevens, Souter, Ginsburg, Breyer	2
Rehnquist, O'Connor, Scalia, Kennedy, Breyer	2
Rehnquist, O'Connor, Kennedy, Thomas, Breyer	2
Rehnquist, O'Connor, Souter, Ginsburg, Breyer	2
Rehnquist, Scalia, Kennedy, Souter, Thomas	2
Stevens, O'Connor, Kennedy, Souter, Breyer	2
Stevens, O'Connor, Kennedy, Ginsburg, Breyer	2
Stevens, Kennedy, Souter, Thomas, Ginsburg	2
Rehnquist, Stevens, O'Connor, Scalia, Breyer	1
Rehnquist, Stevens, O'Connor, Kennedy, Souter	1
Rehnquist, Stevens, O'Connor, Souter, Ginsburg	1
Rehnquist, Stevens, Kennedy, Souter, Breyer	1
Rehnquist, Stevens, Kennedy, Ginsburg, Breyer	1
Rehnquist, O'Connor, Scalia, Souter, Thomas	1
Rehnquist, O'Connor, Scalia, Thomas, Ginsburg	1
Rehnquist, O'Connor, Scalia, Thomas, Breyer	1
Rehnquist, O'Connor, Kennedy, Souter, Ginsburg	1
Rehnquist, O'Connor, Kennedy, Souter, Breyer	1
Rehnquist, Scalia, Kennedy, Thomas, Breyer	1
Stevens, O'Connor, Kennedy, Souter, Thomas	1
Stevens, O'Connor, Kennedy, Thomas, Breyer	1
Stevens, O'Connor, Souter, Thomas, Ginsburg	1
Stevens, Scalia, Kennedy, Souter, Thomas	1
Stevens, Scalia, Kennedy, Souter, Ginsburg	1
Stevens, Scalia, Souter, Thomas, Breyer	1
Stevens, Scalia, Souter, Ginsburg, Breyer	1
O'Connor, Scalia, Kennedy, Souter, Thomas	1
O'Connor, Kennedy, Souter, Ginsburg, Breyer	1
Scalia, Souter, Thomas, Ginsburg, Breyer	1
Total	175

<sup>c</sup> This table records the number of times over the last ten years that a particular group of five Justices has constituted the majority in a 5-4 decision. For a detailed definition of the voting arrangements necessary for a case to be included as a 5-4 decision, see the notes accompanying Table I(E) of the annual *Statistics*. E.g., *The Supreme Court, 2003 Term—The Statistics*, 118 HARV. L. REV. 497, 503 nn.n-v (2004).

**TABLE VI**  
**(A) ORIGIN OF ALL CASES**

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	Total	Avg.
Federal Courts	72	72	81	83	70	64	68	71	57	70	706	70.6
Circuit Courts	69	68	71	80	66	62	66	70	53	68	671	67.1
First Circuit	1	4	1	5	0	1	1	1	1	0	15	1.5
Second Circuit	3	4	6	3	4	3	8	4	2	2	39	3.9
Third Circuit	5	2	3	4	6	1	5	1	0	4	31	3.1
Fourth Circuit	3	10	3	2	4	9	5	11	3	4	54	5.4
Fifth Circuit	8	1	5	12	5	9	6	2	3	6	57	5.7
Sixth Circuit	7	4	3	3	4	4	7	10	7	8	57	5.7
Seventh Circuit	7	7	3	7	4	8	4	2	3	4	49	4.9
Eighth Circuit	5	4	8	13	3	5	3	5	1	4	51	5.1
Ninth Circuit	17	13	28	17	18	10	17	18	23	25	185	18.5
Tenth Circuit	4	5	3	1	4	2	4	4	1	3	31	3.1
Eleventh Circuit	3	5	6	2	8	5	3	4	4	4	44	4.4
D.C. Circuit	3	5	1	9	2	3	1	3	3	3	32	3.2
Federal Circuit	3	4	1	2	4	2	2	5	2	1	26	2.6
District Courts	2	3	9	2	3	2	2	1	4	2	30	3.0
Other Courts	1	1	1	1	1	0	0	0	0	0	5	0.5
State Courts	12	11	9	10	11	12	14	9	21	8	117	11.7
<b>Total</b>	<b>84</b>	<b>83</b>	<b>90</b>	<b>93</b>	<b>81</b>	<b>76</b>	<b>82</b>	<b>80</b>	<b>78</b>	<b>78</b>	<b>823</b>	<b>82.3</b>

**(B) ORIGIN OF AFFIRMED CASES**

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	Total	Avg.
Federal Courts	23	26	20	33	21	26	24	17	15	16	221	22.1
Circuit Courts	22	24	15	32	20	24	24	16	14	15	206	20.6
First Circuit	1	2	0	2	0	1	0	1	1	0	8	0.8
Second Circuit	1	1	0	2	1	0	5	0	0	0	10	1.0
Third Circuit	2	2	1	3	2	1	2	0	0	1	14	1.4
Fourth Circuit	1	1	1	1	2	4	3	4	0	3	20	2.0
Fifth Circuit	3	0	1	6	1	3	3	0	0	0	17	1.7
Sixth Circuit	3	2	1	0	2	1	2	1	2	2	16	1.6
Seventh Circuit	5	3	0	3	0	2	2	2	1	2	20	2.0
Eighth Circuit	0	1	4	5	2	4	2	1	0	1	20	2.0
Ninth Circuit	3	2	1	3	4	1	4	4	5	6	33	3.3
Tenth Circuit	1	2	2	1	3	1	1	1	0	0	12	1.2
Eleventh Circuit	1	1	4	0	1	3	0	0	2	0	12	1.2
D.C. Circuit	0	3	0	5	1	3	0	1	2	0	15	1.5
Federal Circuit	1	4	0	1	1	0	0	1	1	0	9	0.9
District Courts	1	1	4	1	1	2	0	1	1	1	13	1.3
Other Courts	0	1	1	0	0	0	0	0	0	0	2	0.2
State Courts	3	3	3	3	2	4	2	2	4	2	29	2.9
<b>Total</b>	<b>26</b>	<b>29</b>	<b>23</b>	<b>36</b>	<b>23</b>	<b>30</b>	<b>26</b>	<b>19</b>	<b>19</b>	<b>18</b>	<b>250</b>	<b>25.0</b>

TABLE VI (continued)  
(C) ORIGIN OF VACATED CASES

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	Total	Avg.
Federal Courts	8	13	17	13	14	1	5	9	8	10	97	9.7
Circuit Courts	7	13	14	13	14	1	4	9	7	10	91	9.1
First Circuit	0	1	0	1	0	0	0	0	0	0	2	0.2
Second Circuit	0	1	0	0	1	0	0	0	0	0	2	0.2
Third Circuit	0	0	1	0	1	0	0	1	0	1	4	0.4
Fourth Circuit	0	4	1	0	2	0	0	1	0	1	9	0.9
Fifth Circuit	0	0	1	2	1	0	1	0	0	1	6	0.6
Sixth Circuit	1	0	1	2	0	0	0	0	0	0	4	0.4
Seventh Circuit	0	1	0	3	2	0	0	0	0	0	6	0.6
Eighth Circuit	1	1	1	2	0	0	0	1	1	0	7	0.7
Ninth Circuit	2	1	7	1	4	1	2	3	5	3	29	2.9
Tenth Circuit	1	2	1	0	0	0	0	0	0	0	4	0.4
Eleventh Circuit	1	2	0	0	1	0	0	0	0	2	6	0.6
D.C. Circuit	1	0	1	2	1	0	0	0	1	2	7	0.7
Federal Circuit	0	0	0	0	1	0	1	3	0	0	5	0.5
District Courts	1	0	3	0	0	0	1	0	1	0	6	0.6
Other Courts	0	0	0	0	0	0	0	0	0	0	0	0.0
State Courts	0	0	0	2	0	0	1	1	3	0	7	0.7
Total	8	13	17	15	14	1	6	10	11	10	104	10.4

(D) ORIGIN OF REVERSED CASES

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	Total	Avg.
Federal Courts	41	33	44	37	35	37	39	45	34	44	388	38.8
Circuit Courts	40	31	42	35	32	37	38	45	32	43	374	37.4
First Circuit	0	1	1	2	0	0	1	0	0	0	5	0.5
Second Circuit	2	2	6	1	2	3	3	4	2	2	27	2.7
Third Circuit	3	0	1	1	3	0	3	0	0	2	13	1.3
Fourth Circuit	2	5	1	1	0	5	2	6	3	0	25	2.5
Fifth Circuit	5	1	3	4	3	6	2	2	3	5	34	3.4
Sixth Circuit	3	2	1	1	2	3	5	9	5	6	37	3.7
Seventh Circuit	2	3	3	1	2	6	2	0	2	2	23	2.3
Eighth Circuit	4	2	3	6	1	1	1	3	0	3	24	2.4
Ninth Circuit	12	10	20	13	10	8	11	11	13	16	123	12.3
Tenth Circuit	2	1	0	0	1	1	3	3	1	3	15	1.5
Eleventh Circuit	1	2	2	2	6	2	3	4	2	2	26	2.6
D.C. Circuit	2	2	0	2	0	0	1	2	0	1	10	1.0
Federal Circuit	2	0	1	1	2	2	1	1	1	1	12	1.2
District Courts	0	2	2	1	2	0	1	0	2	1	11	1.1
Other Courts	1	0	0	1	1	0	0	0	0	0	3	0.3
State Courts	9	8	6	5	9	8	11	6	14	6	81	8.1
Total	50	41	50	42	44	45	50	51	48	50	469	46.9