THE SUPREME COURT
2003 TERM

NINE JUSTICES, TEN YEARS:
A STATISTICAL RETROSPECTIVE

By

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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.\(^1\) 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.\(^2\) Although the Harvard Law Review has prepared statistical retrospectives in the past,\(^3\) 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\(^4\) and congressional\(^5\) efforts to curb this trend.\(^6\) What has not changed is the Ninth Circuit’s status

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\(^1\) 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 (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.

\(^2\) 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.


\(^4\) 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).

\(^5\) 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).

\(^6\) 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 and jurists 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. Table confirms that Justice O'Connor found herself in five-Justice majorities more often than any of her colleagues, casting decisive votes in over three-

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8 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”).

quarters of 5–4 decisions. In these closest of cases, two coalitions have been said to flank Justice O'Connor. 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.

These statistics also reinforce longstanding characterizations of Justice Stevens as the Court's most independent voice. 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

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10 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. Colin Mangrum, State Aid to Students in Religiously Affiliated Schools: Agostini v. Felton, 31 CREIGHTON L. REV. 1155, 1205 (1998).


12 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.

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. 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, 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.

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.

14 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).


16 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 1

#### (A) Final Disposition of Cases

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#### (B) Method of Disposition<sup>a</sup>

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#### (C) Disposition of Cases Reviewed on Writ of Certiorari<sup>a</sup>

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<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 1996, 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.
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.

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).

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.

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>
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* 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.III(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

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*Note: The table continues with more years and justices' voting alignments by percentage.*
### TABLE II (continued)

#### (B) AVERAGE VOTING ALIGNMENTS

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b 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 = D × N and CN = N × 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.(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. 405, 404 n.n (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

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These figures represent the average annual number of opinions and dissents per Justice over the ten-year period.

(B) ACTIONS OF INDIVIDUAL JUSTICES:
TOTAL DISSenting VOTES

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* These figures represent the average annual number of opinions and dissents per Justice over the ten-year period.
TABLE IV
UNANIMITY AND DISSENT

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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

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For explanations of the figures in this table, 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, 502-03 nn.i-v (2004). 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

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Total: 175

*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 1E of the annual Statistics. E.g., The Supreme Court, 2003 Term—The Statistics, 118 HARV. L. REV. 497, 503 nn.n-ν (2004).*
### TABLE VI

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