

THE STATISTICS

Since 1949, the *Review* has published statistical tables tracking the business of the Court.¹ What follows is a description of the contents of these tables, along with a brief explanation of their compilation. *The Statistics* is divided into three tables for analytical clarity: Table I examines the voting patterns within the Court, including actions of the individual Justices, voting alignments, and the formation of majorities in divisive cases. Table II examines the business of the Court as a whole, including its review of lower court decisions and its action on petitions for writs of certiorari. Table III examines the subject matter of opinions issued by the Court.

Explanation of Terms. — Before discussing the construction and substance of each table, it may be helpful to explain a few of the terms used throughout *The Statistics*.

A full opinion is a signed decision of the Court disposing of a case on its merits or a per curiam decision disposing of a case on its merits and containing substantial legal reasoning.² During the 2004 Term, four per curiam decisions contained legal reasoning substantial enough to be considered full opinions.³

A memorandum decision is a case decided by summary order and issued in the Court's weekly order lists throughout the Term. The memorandum tabulations include memorandum orders disposing of cases on the merits by affirming, reversing, vacating, or remanding. They exclude orders disposing of petitions for certiorari, dismissing writs of certiorari as improvidently granted, dismissing appeals for lack of jurisdiction, disposing of miscellaneous applications, and certifying questions for review. The Court's decision in *Medellin v. Dretke*,⁴ for example, is considered neither a full opinion nor a memorandum decision.

¹ *The Supreme Court, 1948 Term—The Business of the Court*, 63 HARV. L. REV. 119 (1949).

² In order to assess the scope of the Court's business more accurately, the *Review* has chewed the customary distinction classifying all unsigned opinions as memorandum opinions in favor of a more flexible standard characterizing each unsigned opinion according to its length and "the extent to which the Court elaborates upon the issues involved." *The Supreme Court, 1967 Term—The Statistics*, 82 HARV. L. REV. 301, 302 (1968). The *Review* presumes that per curiam decisions included on the Supreme Court website's "2004 Term Opinions of the Court" page have sufficient legal reasoning to merit classification as full opinions. See Supreme Court of the United States, 2004 Term Opinions of the Court, <http://www.supremecourtus.gov/opinions/04slipopinion.html> (last visited Oct. 9, 2005).

³ See *Bell v. Cone*, 125 S. Ct. 847 (2005) (per curiam); *Brousseau v. Haugen*, 125 S. Ct. 596 (2004) (per curiam); *City of San Diego v. Roe*, 125 S. Ct. 521 (2004) (per curiam); *Smith v. Texas*, 125 S. Ct. 400 (2004) (per curiam).

⁴ 125 S. Ct. 2088 (2005) (writ dismissed as improvidently granted).

A decision is considered unanimous only when all Justices hearing the case concurred in the Court's opinion as well as in its judgment. If at least one Justice concurred in the judgment, even in part, or dissented, even in part, the decision is treated as non-unanimous for purposes of Table I. Thus, the *Review* treats *Cherokee Nation of Oklahoma v. Leavitt*⁵ as unanimous despite Justice Scalia's reservations,⁶ whereas *San Remo Hotel, L.P. v. City of San Francisco*⁷ is not considered unanimous.

Table I: Voting Patterns Within the Court. — Table I examines the actions and voting patterns of the individual Justices. Except where otherwise indicated, Table I examines only full opinions.

Table I(A) catalogues the apportionment of the written work of the Court among the Justices, as well as the number of dissenting votes cast by each. The dissenting votes portion of Table I(A) records whenever a Justice voted to dispose of a case in any manner different from that specified by the majority of the Court and takes into account both full opinions and memorandum orders.

Tables I(B1) and I(B2) record how often the individual Justices agreed with one another; Table I(B1) includes all full opinions, whereas Table I(B2) records these voting alignments only for full opinions that the Court did not decide unanimously. Focusing on non-unanimous cases may provide a more accurate picture of how the Justices vote in divisive cases. Because the Justices tend to agree quite often, however, reading the two tables together provides the most complete picture of overall voting patterns.

In Tables I(B1) and I(B2), "O" represents the number of times that a particular set of two Justices agreed in opinions of the Court or opinions announcing the judgment of the Court. A Justice joined the opinion of the Court only if that Justice authored or joined at least part of the opinion of the Court, as indicated by either the Reporter of Decisions or the explicit statement of a Justice in the Justice's own opinion, and did not author or join any opinion concurring in the judgment, even in part, or dissenting, even in part. Thus, while Justices Scalia and Thomas are considered to have joined Chief Justice Rehnquist's opinion announcing the judgment of the Court in *Van Orden v. Perry*,⁸ Justice Breyer is not.⁹

"S" represents the number of decisions in which two Justices agreed in any opinion separate from the opinion of the Court. Such agreement, unconstrained by the need to encompass a five-Justice majority,

⁵ 125 S. Ct. 1172 (2005).

⁶ *Id.* at 1183 (Scalia, J., concurring in part).

⁷ 125 S. Ct. 2491 (2005).

⁸ 125 S. Ct. 2854 (2005) (plurality opinion).

⁹ *Id.* at 2868 (Breyer, J., concurring in the judgment).

may better represent philosophical agreement between two Justices than agreement in the opinion of the Court. Such separate opinions include concurrences, dissents, and those portions of an opinion of the Court not joined by at least four other Justices.¹⁰ Justices who together joined more than one separate opinion in a case are considered to have agreed only once. For the purpose of counting separate opinions, a Justice who joined an opinion in part is considered to have joined it fully. Thus, Chief Justice Rehnquist is treated as having joined Justice Thomas's dissent in *Clark v. Martinez*.¹¹ Furthermore, the tables treat two Justices as having agreed only if they joined the same opinion, even if they agreed in the result of the case and wrote separate opinions revealing little or no philosophical disagreement. Thus, Justice O'Connor is not considered to have joined Justice Souter's dissenting opinion in *Van Orden*.¹²

"D" represents the number of decisions in which two Justices agreed in a majority, plurality, dissenting, or concurring opinion. A decision is counted only once in the "D" category if two Justices joined the opinion of the Court, joined a separate concurrence, or both. "N" represents the number of decisions in which two Justices participated, and thus the number of opportunities for agreement. "P" represents the percentage of decisions in which two Justices agreed, calculated by dividing "D" by "N" and multiplying the resulting figure by 100.

Table I(C) highlights the degree of unanimity and dissent within the Court, both in full opinions and in memorandum orders.

Table I(D) reports the frequency with which individual Justices joined non-unanimous opinions of the Court and the frequency with which they agreed to dispose of cases in the same manner as did the majority.

Table I(E) records the groups of Justices forming majorities in this Term's 5-4 decisions. A decision is counted as 5-4 only if four Justices voted to dispose of the case or set of consolidated cases in a manner different from that specified by the majority of the Court. Plurality opinions in which the Justices divided 5-4 on the disposition are in-

¹⁰ In past years, only concurrences and dissents have counted as separate opinions for the purposes of assigning "S" credit. Thus, the practice of counting portions of the opinion of the Court as separate opinions is a break from precedent, but necessary to provide an accurate picture of voting alignments within the Court. For example, Part III-A of Justice Kennedy's opinion announcing the judgment of the Court in *Spector v. Norwegian Cruise Line Ltd.*, 125 S. Ct. 2169, 2181 (2005), was joined only by Justices Stevens, Souter, and Thomas, even though other parts of his opinion had garnered a majority of the Court. If Part III-A were not treated as a separate opinion, the substantial agreement between Justice Thomas and Justices Stevens, Kennedy, and Souter would go uncounted.

¹¹ 125 S. Ct. 716, 728 (2005) (Thomas, J., dissenting).

¹² 125 S. Ct. at 2891 (O'Connor, J., dissenting).

cluded.¹³ Cases in which there was a 5-4 split in the reasoning of the majority opinion but not in the disposition of the case are not included.¹⁴ Cases with multiple dispositions are counted as 5-4 if the Justices divided 5-4 with respect to any one disposition.¹⁵

Table II: The Business of the Whole Court. — Table II examines the business of the Court as a whole, including the management of its docket and its oversight of lower courts. Except where otherwise indicated, Table II examines the entire docket of the Court including full opinions, memorandum orders, and petitions for certiorari denied, dismissed, or withdrawn. This table includes both the appellate docket, which consists of all paid cases, and the miscellaneous docket, which consists of all cases filed *in forma pauperis*. Tables II(A), II(B), and II(C) are prepared from statistics compiled each year by the Supreme Court.¹⁶

Table II(A) outlines the Court's management of its docket for the 2004 Term. The table examines the appellate and miscellaneous dockets, as well as the Court's original jurisdiction cases, in outlining how much work has been done over the course of the Term and how much remains for the 2005 Term.

Table II(B) reports the number of cases granted review on each of the dockets and the percentage of cases granted review out of the number of petitions considered.

Table II(C) reviews the total number of cases decided through each method of disposition, as derived from Table II(A).

Table II(D) records the disposition of cases decided on the merits and reviewed on writ of certiorari. This breakdown of dispositions on the merits may clarify the reasoning of the Court in granting certiorari to some cases but not to others.

Table II(E) reports the origin and disposition of each case on which the Court reached the merits.

Table III: The Subject Matter of Full Opinions. — Table III records the subject matter of dispositions by full opinion. Table III initially classifies each case based on the court of origin and the nature of the proceeding, such as civil or criminal.

Table III divides cases according to the parties involved: a civil case, for example, can be either federal government litigation, state or local government litigation, or private litigation. Federal government litigation cases are further subdivided based on the type of case — a

¹³ See, e.g., *id.* at 2854 (plurality opinion).

¹⁴ See, e.g., *San Remo Hotel, L.P. v. City of San Francisco*, 125 S. Ct. 2491 (2005).

¹⁵ See, e.g., *McConnell v. FEC*, 124 S. Ct. 619 (2003).

¹⁶ See October Term 2004, Statistical Sheet No. 28 (June 28, 2005) (unpublished statistical sheet, on file with the Harvard Law School Library).

taxation case, review of an administrative action, or some other action involving the federal government as a party.

A principal issue is also discerned from each case, whether it be the interpretation of a statute, such as the Age Discrimination in Employment Act,¹⁷ or a constitutional challenge, such as an Equal Protection Clause claim.¹⁸ Once the principal issue has been decided, the case is categorized as primarily constitutional or not.¹⁹ Finally, a case is counted as “for the government” only if the government as a party prevailed on all of the issues before the Court and “against the government” only if the party opposing the government prevailed on all of the issues before the Court. If the government prevailed on at least one but not all of the issues before the Court, the decision is counted as neither “for the government” nor “against the government.”

¹⁷ See *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005).

¹⁸ See, e.g., *Johnson v. California*, 125 S. Ct. 1141 (2005).

¹⁹ Cases invoking a mixture of statutory interpretation and constitutional adjudication are particularly difficult to classify. Compare, e.g., *Shepard v. United States*, 125 S. Ct. 1254 (2005) (primarily constitutional), with *Clark v. Martinez*, 125 S. Ct. 716 (2005) (primarily not constitutional).