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A STATISTICAL LOOK AT THE SUPREME COURT'S 2009 TERM

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Whether a change in membership occurs or not, every Supreme Court term presents a unique set of controversies and decisions for legal scholars to examine. Herein, we offer a discussion of the Court's recently completed 2009-2010 term. Rather than analyzing specific opinions in detail (as many have already done), we generate a comprehensive statistical analysis of justice voting behavior for the term. In particular, we examine consensus and division on the Court, the ideological tenor of the term, voting alignments among the justices, the production of opinions, and the Court's overall ideological spectrum based on individual voting patterns. Ultimately, we also assess the ramifications of our findings for the future study of judicial behavior.

Production of Opinions

The Court handed down ninety full-opinion decisions during the 2009 term. Seventeen of these decisions came by way of *per curiam* opinions.⁴ Ten of these *per curiam* opinions came in unanimous decisions, but the Court issued *per curiam* opinions in seven non-

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⁴ "For the Court," i.e., not attributed to any particular justice.

unanimous decisions as well. In the seventy-three cases with signed majority opinions, the workload was evenly distributed.⁵ All members of the Court wrote either eight or nine majority opinions, with the exception of Justice Stevens, who authored only six majority opinions. Justice Stevens, however, was the most prolific opinion writer overall, due predominantly to the fact that he wrote nearly twice as many dissents as anyone else on the Court. Justice Sonia Sotomayor opened her freshman term by writing the initial opinion of the Court, a unanimous decision in *Mohawk Industries v. Carpenter*.⁶ Sotomayor went on to write an additional seven majority opinions, which put her at the Court's mean. Half of Justice Sotomayor's opinions for the Court involved unanimous cases; she also penned two concurrences, four dissents, and two opinions in which she concurred in part and dissented in part.

Table 1: Production of Opinions, 2009 Term

	Majority	Concurring	Dissenting	Concurring/ Dissenting in Part	Total Opinions
Stevens	6	13	12	2	33
Scalia	8	15	6	0	29
Thomas	8	13	4	1	26
Alito	8	10	7	0	25
Breyer	9	6	7	2	24
Kennedy	9	8	4	0	21
Sotomayor	8	2	4	2	16
Ginsburg	9	3	3	0	15
Roberts	8	3	2	2	15

⁵ See Table 1: Production of Opinions, 2009 Term.

⁶ *Mohawk Indus. v. Carpenter*, 130 S. Ct. 599 (2009).

Consensus and Division on the Court

In terms of the political ideology of decisions, much of the public discussion of the Court's 2009 term centered around two high-profile cases, *Citizens United v. Federal Election Commission*⁷ and *McDonald v. City of Chicago*.⁸ In *Citizens United*, the Court struck down a federal law limiting electioneering communications by corporations and labor unions.⁹ In *McDonald*, the Court struck down a Chicago ordinance that effectively banned the possession of handguns.¹⁰ Both decisions were widely seen as conservative; both were enormously controversial; and both were five-to-four rulings. Because the media, the attentive public, and the scholarly community focus on cases like these, where the Court is sharply divided, it seems that attention is often drawn to ideological divisions on the Court.

However, it should not be overlooked that, statistically, during the 2009 term, there was a substantial degree of consensus on the Court. This is not a new development. In fact, since 1953, the average number of unanimous decisions has been 41 percent.¹¹ In the 2009 term, 44.0 percent of the Court's decisions were unanimous.¹²

Further, 29.7 percent of all cases saw either a six or seven vote majority, indicating some controversy among the justices, but not a division that can be explained strictly along ideological lines.¹³

⁷ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

⁸ *McDonald v. Chicago*, 130 S. Ct. 3020 (2010).

⁹ *Citizens United*, 130 S. Ct. at 898.

¹⁰ *McDonald*, 130 S. Ct. at 3050.

¹¹ HAROLD J. SPAETH ET AL., SUPREME COURT DATABASE CODE BOOK, available at <http://scdb.wustl.edu> (last visited June 1, 2010).

¹² See *infra* Table 2: Number of Decisions by Voting Margin, 2009-10 Term.

¹³ *Id.*

Finally, 20.9 percent of the decisions could be classified as sharply divided—i.e., five-to-four rulings. Table 2 illustrates the breakdown of decisions by number of votes in the majority.¹⁴

Table 2: Number of Decisions by Voting Margin,
2009-2010 Term

Number of Votes for Decision	N	%
9	40	44.0%
8	5	5.5%
7	17	18.7%
6	10	11.0%
5	19	20.9%
Total	90	100.1%

Ideological Tenor of the 2009 Term

In a recent article in the *New York Times*, Adam Liptak asserted that the Roberts Court is “the most conservative one in living memory. . . .”¹⁵ According to Liptak, “In its first five years, the Roberts court issued conservative decisions 58 percent of the time. And, in the term ending a year ago, the rate rose to 65 percent, the highest number in any year since at least 1953.”¹⁶

Our coding of decisions handed down during the 2009 term,¹⁷ however, reveals a significant reduction in the proportion of conservative decisions. As can be seen in Table 3, when all decisions are considered, including the

¹⁴ *Id.*

¹⁵ Adam Liptak, *Court Under Roberts Is Most Conservative in Decade*, N.Y. TIMES, July 24, 2010, http://www.nytimes.com/2010/07/25/us/25roberts.html?_r=2&hp.

¹⁶ *Id.*

¹⁷ HAROLD J. SPAETH ET AL., SUPREME COURT DATABASE CODE BOOK, available at <http://scdb.wustl.edu/documentation.php?var=decisionDirection> (last visited July 27, 2010).

forty-four cases that are unanimous, the rate of conservative decisions in the 2009 term is 51.1 percent.

When viewed in its totality, then, the 2009 term appears to have been a rather moderate one. Whether this is a single term aberration or the beginning of a shift in the Court's ideological leanings remains to be seen. Furthermore, whether this figure is skewed in any way by the large number of unanimous cases (which are more prevalent than they have been since 2005) also requires investigation.

Table 3: Ideological Direction of Decision and Issue Type by Unanimous/Non-unanimous Decision

Ideological Direction	Unanimous	Nonunanimous	All Decisions
Conservative	41.0%	59.2%	51.1%
Liberal	59.0%	40.8%	48.9%
Issue Type	Unanimous	Nonunanimous	All Decisions
Civil Rights/Liberties	50.0%	56.9%	53.8%
Economic	27.5%	23.5%	25.3%
Other	22.5%	19.6%	20.9%

As shown in Table 3, there is a significant difference in the ideological direction of the unanimous and non-unanimous decisions. Fifty-nine percent of the unanimous decisions were liberal, while only 41.0 percent of the unanimous decisions were conservative. It is also interesting to note that 50.0 percent of the Court's unanimous decisions involved issues of civil rights or liberties, matters on which we would expect disagreement along ideological lines. While these findings could be a

one-term anomaly, historical evidence suggests that they are not, as previous examinations of the Vinson, Warren, and Burger Courts reveal, among other things, that liberal outcomes were consistently more likely in unanimous cases during those eras, as well.¹⁸ Whether this reflects a general liberal tenor in more settled areas of law and constitutional doctrine is one possibility that is open for debate.

Voting Alignments among the Justices

Beyond examining cases themselves, followers of the Court have long been interested in “voting blocs” on the bench.¹⁹ Political scientists have been particularly concerned with political phenomena that lead to the formation of blocs of voters within ideological parameters.²⁰ Today, for example, it is common to hear media commentators refer to the Court’s “liberal wing” or “conservative bloc.” The 2009 term certainly provides support for such characterizations, as clear liberal and conservative coalitions appear.

However, before delving into an assessment of voting blocs, we must determine whether to examine all decisions, or simply non-unanimous ones, in our assessment of voting behavior. Within the judicial behavior literature, there has been a longstanding debate as to whether unanimous decisions should be included in measures of judicial ideology. Early on in the evolution of the field, C. Herman Pritchett argued that in cases in which there is no dissent, “presumably the facts and the law are so clear that no opportunity is allowed for the autobiographies of the

¹⁸ See Saul Brenner and Theodore S. Arrington, *Unanimous Decision Making on the U.S. Supreme Court: Case Stimuli and Judicial Attitudes*, 9 POL. BEHAV. 75-86 (1987).

¹⁹ Stefanie A. Lindquist et al., *The Impact of Presidential Appointments to the U. S. Supreme Court: Cohesive and Divisive Voting Within Presidential Blocs*, 53 POL. RES. Q. 4, 795-814 (2000).

²⁰ *Id.*

justices to lead them to opposing conclusions.”²¹ Pritchett and others who favor this approach suggest that in unanimous cases, ideological preferences of the judges are tempered by non-controversial legal factors that lead to the nine to zero outcome.²² As a result, they choose to focus on non-unanimous cases; that is what Jeffrey Segal and Harold Spaeth do in offering their “attitudinal model,” which propounds the notion that justices are motivated solely by their ideological orientations.²³

The rates at which justices agreed with one another in all non-unanimous cases during the most recent term are displayed in Table 4. The rates of agreement are consistent with the ideological leanings that Court followers would expect from each of the justices. For example, Justice Thomas agrees much more often with fellow conservatives Scalia and Alito, and Justice Stevens more often with the Court’s liberal justices, such as Sotomayor and Breyer.

Table 4: Agreement Scores, 2009 Term
(Non-unanimous decisions only)

	Breyer	Ginsburg	Kennedy	Roberts	Sotomayor	Scalia	Stevens	Thomas
Alito	44.7%	35.4%	70.8%	79.2%	38.6%	64.6%	29.2%	70.8%
Breyer		77.1%	50.0%	50.0%	79.5%	31.3%	66.7%	33.3%
Ginsburg			61.2%	61.2%	75.6%	38.8%	59.2%	40.8%
Kennedy				79.6%	53.3%	65.3%	44.9%	55.1%
Roberts					53.3%	77.6%	40.8%	67.3%
Sotomayor						40.0%	71.1%	33.3%
Scalia							26.5%	85.7%
Stevens								24.5%

²¹ C. Herman Pritchett, *Divisions of Opinion Among Justices of the United States Supreme Court, 1939-1941*, 35 AM. POL. SCI. REV. 5, 890 (1941).

²² See *id.*

²³ JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

The mean level of agreement across all justices for the term is 54.9 percent. The highest level of agreement is between Justice Scalia and Justice Thomas, who voted together 85.7 percent of the time. The lowest level of agreement is between Justice Stevens and Justice Thomas, who agreed only 24.5 percent of the time. Lawrence Baum stated that “analyses based solely on non-unanimous decisions may provide an incomplete picture of individual and collective voting patterns in the Court’s full set of decisions.”²⁴ This suggests that unanimous cases should also be accounted for in crafting voting scores, as they still reveal ideological preferences of the justices.

Consistent with the notion that both kinds of cases should be examined, Table 5 displays agreement figures that are based on all decisions, including unanimous ones. The rates of agreement seen in Table 5 are of course higher across the Court, and for each pairing of justices. Justice Thomas still agrees much more often with Justice Scalia than he does with Justice Stevens, but the extremity of the difference is attenuated. The mean level of agreement for all cases in the 2009 term is 75.4 percent. The highest level of agreement is between Justices Scalia and Thomas, who voted together 92.0 percent of the time. The lowest level of agreement involves Justices Stevens and Thomas, who agreed only 57.5 percent of the time.

²⁴ Lawrence Baum, *Membership and Collective Voting Change in the Supreme Court*, 54 J. POL. 1, 8 (1992).

Table 5: Agreement Scores, 2009 Term (all decisions)

	Breyer	Ginsburg	Kennedy	Roberts	Sotomayor	Scalia	Stevens	Thomas
Alito	69.8%	75.9%	83.9%	88.5%	67.1%	80.5%	60.5%	83.9%
Breyer		87.4%	72.4%	72.4%	89.0%	62.1%	81.4%	63.2%
Ginsburg			78.4%	78.4%	86.7%	65.9%	77.0%	67.0%
Kennedy				88.6%	74.7%	80.7%	69.0%	75.0%
Roberts					74.7%	87.5%	66.7%	81.8%
Sotomayor						67.5%	84.1%	63.9%
Scalia							58.6%	92.0%
Stevens								57.5%

Given these voting alignments, it is easy to discern two voting blocs on the Court, as shown in Table 6. The liberal bloc, consisting of Justices Breyer, Ginsburg, Sotomayor and Stevens, voted together, on average, 71.5 percent of the time in non-unanimous cases, and 85.0 percent of the time when all decisions are considered. The conservative bloc, composed of Chief Justice Roberts and Justices Scalia, Thomas, Alito and Kennedy, voted together, on average, 71.6 percent of the time when there was division, and 84.3 percent of the time in all cases.

Table 6: Voting Blocs on the Court, 2009 Term

Conservative bloc:

Alito
Kennedy
Roberts
Scalia
Thomas

Liberal bloc:

Breyer
Ginsburg
Sotomayor
Stevens

Mean Agreement (all decisions) = 84.3 percent

Mean Agreement (non-unanimous only) = 71.6 percent

Mean Agreement (all decisions) = 85.0 percent

Mean Agreement (non-unanimous only) = 71.5 percent

Justice Kennedy: Swing Voter?

In terms of the Court's voting blocs, Justice Kennedy has often been characterized as the key "swing vote," (i.e., the one not primarily aligned with either bloc). Indeed, some commentators have, in recent years, referred to the Court as "the Kennedy Court," rather than the Roberts Court, due to Kennedy's inordinate influence as the Court's swing voter.²⁵ Specific research indicates that Kennedy has predominately aligned himself with the conservatives on the court, but has also had a willingness to veer from his natural bloc in certain case areas, unlike previously defined swing voters.²⁶

Yet, as Linda Greenhouse noted recently in the *New York Times*, the characterization of Kennedy as a swing voter may no longer be apt.²⁷ Certainly, it does not apply to the Court's most recent term, in which Justice Kennedy voted approximately 82 percent with the other members of the conservative bloc in all cases (68 percent in non-unanimous cases) and an average of 73 percent with the members of the liberal bloc (52 percent in non-unanimous cases). However, when the majority consisted of only five justices, Kennedy voted with the other conservatives approximately 63 percent of the time, but voted with the liberals, on average, only 26 percent of the time. The gap between these rates of agreement belies any depiction of Kennedy as a "swing voter."

²⁵ Patrick D. Schmidt & David A. Yalof, *The "Swing Voter" Revisited: Justice Anthony Kennedy and the First Amendment Right of Free Speech*, 57 POL. RES. Q. 109, 209-17 (2004).

²⁶ *Id.*

²⁷ Linda Greenhouse, *Is the 'Kennedy Court' Over?*, N.Y. TIMES, July 15, 2010, <http://opinionator.blogs.nytimes.com/2010/07/15/rethinking-the-kennedy-court/>.

The Court's Ideological Spectrum

Using the well-established coding rules associated with the Supreme Court Database, we coded the ideological direction of each of the Court's 2009-2010 decisions.²⁸ Three of the decisions could not be coded liberal or conservative.²⁹ One of the decisions, *Skilling v. United States*,³⁰ contained two holdings cutting in opposite directions, so we coded this case as two decisions.³¹ Of the eighty-eight instances that we could code ideologically, forty-five (51 percent) were conservative rulings and forty-three (49 percent) were liberal ones. This ideological balance may well account for the relatively high esteem in which the American public continues to hold the Court.³²

Figure 1 arrays the justices according to the percentage of liberal votes cast. In terms of individual voting scores, Justice Scalia emerges as the Court's most conservative justice, with a liberal voting score of only 36.4 percent in all cases, and 18.4 percent in non-unanimous cases. At the other extreme, Justice Stevens completed his final term on the Court as the most liberal justice, with a liberal score of 83.7 percent in all cases, and 72.4 percent in non-unanimous decisions.

²⁸ HAROLD J. SPAETH ET AL., SUPREME COURT DATABASE CODE BOOK, available at <http://scdb.wustl.edu> (last visited June 1, 2010).

²⁹ *Mohawk Indus.*, 130 S. Ct. at 599; *South Carolina v. North Carolina*, 130 S. Ct. 854 (2010); *Alabama v. North Carolina*, 130 S. Ct. 2295 (2010).

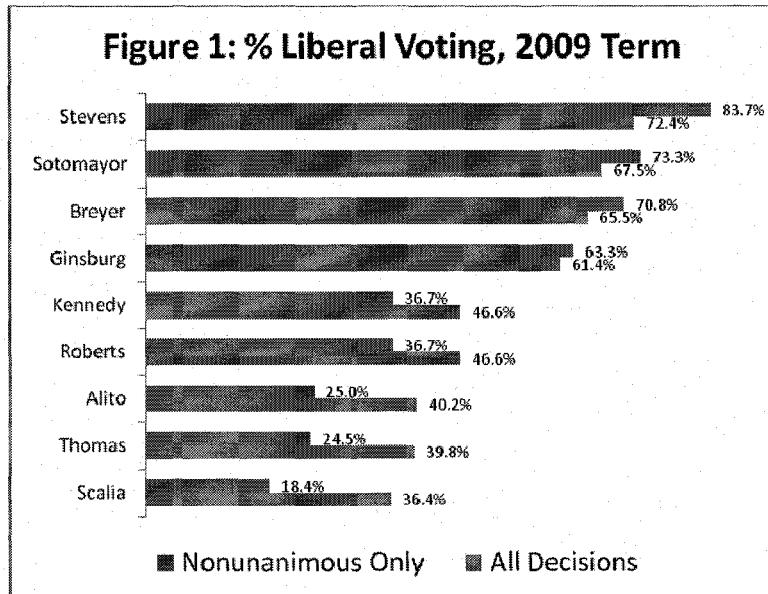
³⁰ *Skilling v. United States*, 130 S. Ct. 2896 (2010).

³¹ In *Skilling*, the Court rendered a conservative decision on an issue of pretrial publicity, but also produced a liberal ruling on the scope of a federal honest services fraud criminal statute. 18 U.S.C. § 1346 (1988). *Skilling v. United States*, No. 08-1394, slip op. at 1-2 (U.S. June 24, 2010).

³² LINDA SAAD, HIGH COURT TO START TERM WITH NEAR DECADE-HIGH APPROVAL, GALLUP (SEPT. 9, 2009), <http://www.gallup.com/poll/122858/high-court-start-term-near-decade-high-approval.aspx>.

Consistent with our voting bloc analysis, we can easily identify the natural ideological break point between Justices Ginsburg and Kennedy. As show in Figure 1, Justice Ginsburg, the least liberal member of the Court's liberal wing, voted liberal in 63.3 percent of non-unanimous cases; 61.4 percent in all cases. By contrast, Justice Kennedy's liberal voting score is identical to that of Chief Justice Roberts (36.7 percent in non-unanimous cases; 46.6 percent in all cases). Clearly, in terms of bloc voting, Justice Kennedy belongs with the Court's conservatives, at least in the 2009 term.

One should note that the five justices who make up the Court's conservative bloc all vote liberal at a much higher rate in unanimous cases than they do in non-unanimous ones, while the four justices in the liberal bloc do the opposite; they vote liberal at a higher rate in non-unanimous cases than unanimous ones. One might wonder why the Court's conservatives are more likely to vote liberal than the Court's liberals are likely to vote conservative. Is it because the conservatives are more collegial than their liberal colleagues? Was this a one term anomaly? Or does this merely reflect the liberal underpinnings of modern American law? The answers to these questions are beyond the scope of this article, but provide a rich area of exploration for future scholars of judicial behavior.



Justice Sotomayor's First Term

During the battle over Sonia Sotomayor's nomination to the Supreme Court, there was widespread speculation as to where she would fit into the Court's ideological spectrum. The prevailing view was, of course, that she would join the liberal wing of the Court—it was simply a matter of *how* liberal she would rule.

Her behavior during the 2009 Term is consistent with previous findings that freshman justices do not differ from their senior colleagues with respect to joining established voting blocs—as she seems to have settled into the more liberal side of the liberal bloc.³³ The data reveal that Justice Sotomayor voted, on average, 87 percent of the time in all cases with the Court's liberals, and only

³³ See Terry Bowen & John M. Scheb, II, *Reassessing the "Freshman Effect": The Voting Bloc Alignment of New Justices on the United States Supreme Court, 1921-90*, 15 POL. BEHAV. 1, 1 (1993) (stating "[f]reshman justices do not differ from their senior colleagues with respect to bloc voting").

approximately 70 percent of the time with the conservatives. When considering all cases in which she voted, she aligned with the term's most liberal justice, Justice Stevens, 83.7 percent³⁴ of the time in all cases, and 72.4 percent³⁵ of the time in non-unanimous cases.

Conversely, she voted with the term's most conservative justice, Justice Scalia, only 40.0 percent³⁶ of the time in non-unanimous cases.

Overall, her liberal voting score in all cases was 67.5 percent³⁷ and 73.3 percent³⁸ in non-unanimous cases—making her the Court's second-most liberal justice, behind Stevens.

Conclusion

In summary, our most interesting findings revolve around the vast differences in individual voting behavior in unanimous and non-unanimous cases. This indicates that, even in an era where observers are prone to deriding the politicization of the judicial branch, data indicate that ideology is not the only factor driving judicial decision-making. Certain high-profile cases may be more likely to lead justices to exhibit specific ideological differences, but the majority of cases seem to involve the location of some degree of consensus among ideologically disparate actors. The implication for scholars of the Court is that non-ideological factors, such as interaction with other justices and/or adherence to legal or constitutional doctrine, may be important avenues for further inquiry. We feel that simply referring to unanimous cases as the “easy” ones is inadequate; after all, these cases present legal questions difficult enough that, in many cases, lower courts do not

³⁴ See Figure 1: % Liberal Voting, 2009 Term.

³⁵ *Id.*

³⁶ See Table 4: Agreement Scores, 2009 Term.

³⁷ See Figure 1: % Liberal Voting, 2009 Term.

³⁸ *Id.*

achieve consensus. Ultimately, while political scientists have fixated on non-unanimous cases for many decades—in the search for the factors that lead justices to differ—it may be time to offer a more thorough appraisal of unanimous decisions. Future research may well wish to use textual analysis to isolate specific legal or constitutional concepts on which the justices are in agreement in order to locate the reasons why justices may agree, as they do in nearly half of the cases in the 2009 term.