



ALAN MORRISON SUPREME COURT ASSISTANCE PROJECT

**STATISTICAL SURVEY OF PUBLIC INTEREST CASES
OCTOBER TERM 2008**

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Introduction

Since 1990, the Alan Morrison Supreme Court Assistance Project (SCAP) has provided assistance to the “little guy” in public-interest Supreme Court cases. SCAP helps plaintiffs’ lawyers, legal services advocates, public defenders, and other small-firm practitioners, who often find themselves up against big businesses represented by experienced Supreme Court practitioners and backed by substantial resources, or against the federal government, represented by the prestigious Office of the Solicitor General. SCAP helps lawyers around the country preserve public interest victories by assisting on oppositions to certiorari and, after cases are accepted for plenary review, with merits briefing and oral argument preparation.

In addition, shortly before each of the Justices’ conferences during the Supreme Court Term, SCAP sends an email to our growing listserv, highlighting the key upcoming cases and the Court’s recent decisions and attaching our “Watch List,” which provides data on public interest cases pending before the Court.

Now that the 2008 Term has ended, we thought we would do something a bit different by compiling statistics on the Court’s record in what we view as the public interest cases of the past Term. We included forty-three of the seventy-four cases in which the Court heard argument and issued signed opinions. We divided those forty-three cases into four categories, then examined the Justices’ voting patterns in each category.

We hope you find this guide to the Court’s public interest cases useful.

Methodology

This statistical analysis examines the votes of the Supreme Court Justices during the 2008 Term on issues involving individual and environmental rights. We considered the forty-three cases on the Court’s docket that dealt with Access to Courts and Remedies, Civil Rights, Constitutional Rights, and Environmental Claims.¹ We further broke down three of the broad categories into subcategories: Access to Courts and Remedies includes cases involving agency procedure, arbitration, immunity, jurisdiction, pleading standards, preemption, punitive damages, and standing; Civil Rights includes discrimination claims, education issues, and Voting Rights Act cases; and Constitutional Rights includes claims invoking due process and the First, Fourth, Fifth, and Sixth Amendments. Our categorization of each case and the Justices’ votes are displayed in the appendix to this report.

The Justices’ votes were rated on a simple yes-or-no basis: Was the vote or decision in the direction of the expansion of rights or the contraction of rights? Although this approach does not account for the subtleties of the cases—or which side had the stronger argument—it does reveal

¹Three of these cases—*Summers v. Earth Island Institute*, *14 Penn Plaza, LLC v. Pyett*, and *Safford Unified School District No. 1 v. Redding*—presented more than one issue or could be fairly viewed as dealing with more than one category of rights. Therefore, members of the Court have been rated a total of forty-six times.

general trends. Moreover, in at least two instances, a vote for the expansion of rights did not necessarily align with the politically liberal position.²

Overview

This Term, forty-three cases on the Supreme Court’s docket presented the Court with the opportunity to expand or contract individual and environmental rights. On the whole, the Court contracted rights on two-thirds of the issues presented (31 of 46). That percentage did not vary much from category to category, with the exception of Environmental Law, where the Court held against environmental claims in all five cases:

Broad Category	Expansion of Rights	Contraction of Rights	% Contraction of Rights
Access to Courts & Remedies	6	9	60%
Civil Rights	3	7	70%
Constitutional Rights	6	10	63%
Environmental Claims	0	5	100%
Total	15	31	67%

Overall, the individual justices lined up as would be expected. Justice Ginsburg was most likely to vote in favor of expanding rights and did so on 76% of the issues. She was also the only justice to vote in favor of environmental claims in each of the five cases. Unsurprisingly, Justice Ginsburg was followed closely by Justice Stevens (voting to expand rights on 72% of the issues), Justice Souter (70%), and Justice Breyer (59%). On the other end of the scale, Justice Alito voted most frequently against the expansion of rights, voting to contract rights on 91% of the issues. On access to courts and remedies issues, Justice Alito voted against expansion of rights 100% of the time. He was followed by Chief Justice Roberts (voting to contract rights on 87% of the issues), Justices Scalia and Thomas (each voting to contract rights on 85% of issues), and Justice Kennedy (76%).

These numbers reveal that the “conservative” justices—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—are each more likely to vote to contract rights than any of the four “liberal” justices are likely to vote to expand or preserve rights. In other words, to the extent that votes to expand or contract rights measure political conservatism or liberalism, all the “conservative”

²*Locke v. Karass* and *Ysursa v. Pocatello Education Association* pitted the First Amendment against union payroll deductions or bans. In *Locke*, the Court held that the union could charge nonunion members of collective bargaining units for national litigation if they also could have been charged for local litigation. Nonunion members had argued that the deduction violated their First Amendment right not to be forced to bankroll a political undertaking. In *Ysursa*, the Court decided against the union, upholding Idaho’s ban on unions’ political payroll deductions as applied to local government employees. There, the union had contended that the ban violated its First Amendment right to political expression.

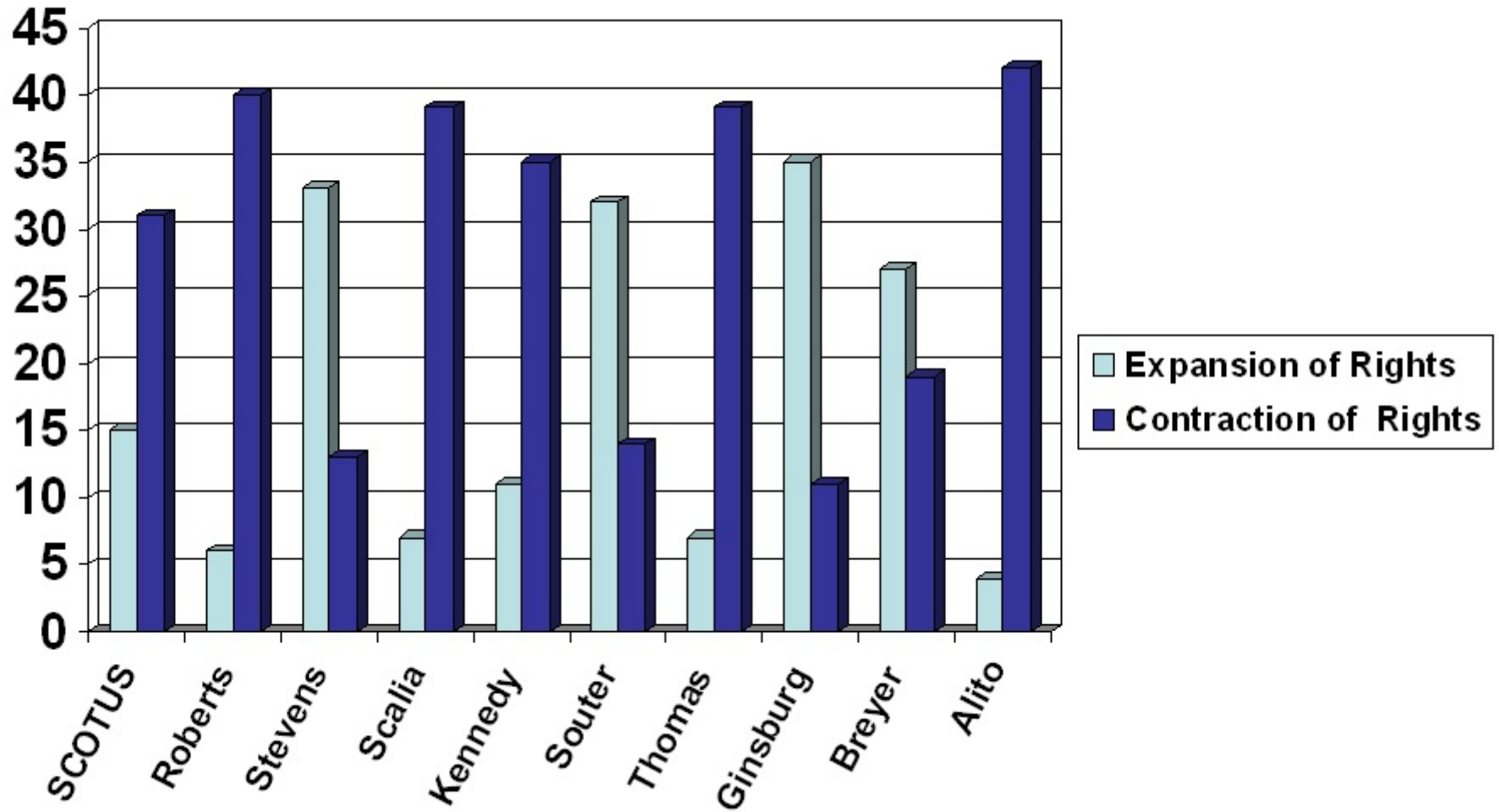
justices are more conservative than any of the “liberal” justices are liberal. Justice Breyer, considered one of the Court’s “liberal” justices, was just as likely to vote to contract rights as to expand them in three of the four categories of cases.³ And the Court’s “swing” justice—Justice Kennedy—voted to contract rights three-fourths of the time.

Noteworthy cases and the Justices’ voting patterns in each category—Access to Courts and Remedies, Civil Rights, Constitutional Rights, and Environmental Claims—are explored in more detail below. The Justices’ votes on subcategories of issues are illustrated by accompanying charts and graphs.⁴ This report also briefly discusses Chief Justice Roberts’s and Justice Stevens’s opinion-assignment patterns in significant cases. Finally, a chart displaying each of the cases we considered, our categorization of each case, and the votes of each Justice on each case or issue is included as an appendix. The appendix comprises the raw data from which these statistics were gathered.

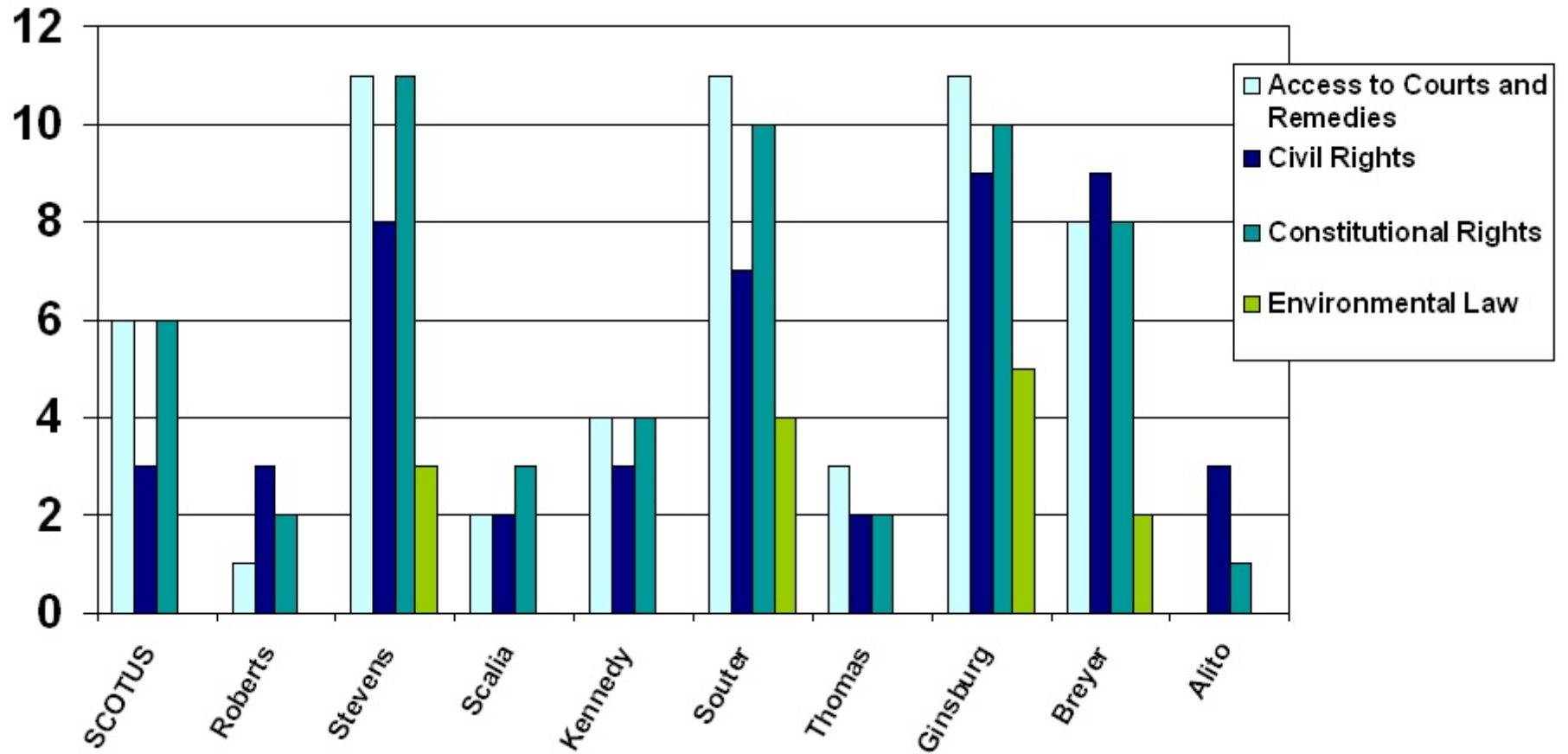
³Justice Breyer voted to contract rights in 7 of 15 (47%) Access to Courts and Remedies cases, 8 of 16 (50%) Constitutional Rights cases, and 3 of 5 (60%) Environmental cases. Only in Civil Rights cases did Justice Breyer consistently vote for the expansion of rights, and he did so 90% of the time.

⁴The type of chart or graph used was depended on the number of subcategories and most effective display of the relevant information. With the exception of the first graph, all graphs display the number of times each Justice voted for the expansion of rights. The first graph displays the absolute number of each Justice’s votes for both the expansion and contraction of rights.

Votes for the Expansion and Contraction of Rights Across All Categories



Votes for the Expansion of Rights By Category



Access to Courts and Remedies

The Access to Courts and Remedies category includes issues dealing with agency procedure, arbitration, immunity, jurisdiction, pleading standards, preemption, punitive damages, and standing. Notable cases in this category include *Pearson v. Callahan*, which overturned the requirement that courts address the constitutionality of an official's action before determining whether the official has qualified immunity; *Wyeth v. Levine*, which held that approval of a drug label by the Food and Drug Administration did not preempt a state-law inadequate-warning claim; *Ashcroft v. Iqbal*, which held that the plaintiff's complaint failed to sufficiently plead discrimination claims against the Attorney General and others as the architects of the post-9/11 detention of Muslim men; and *Safford Unified School District No. 1 v. Redding*, which held that although the strip-search of a middle school student for ibuprofen was unconstitutional, school officials were entitled to qualified immunity. As a whole, the Court proved to be friendly toward claims of immunity, holding in favor of immunity in all four of the cases. On the other hand, the Court favored access to courts in all three preemption cases, rejecting preemption and allowing state-law tort and civil rights claims to go forward.

As mentioned above, Justice Alito voted against access to courts and remedies in 100% of the cases. Chief Justice Roberts voted in favor of access to courts only once, on an arbitration issue. Justices Stevens, Souter, and Ginsburg tied for the highest number of votes in favor of access to courts, including in each of the subcategories. Justices Stevens and Ginsburg were the only two Justices to vote against qualified immunity in *Safford*. They did not vote identically in all matters, however: Justice Stevens voted to join Chief Justice Roberts's opinions, where Justice Ginsburg did not, in two Federal Arbitration Act (FAA) cases involving procedural and jurisdictional issues, *Vaden v. Discover Bank* and *Arthur Andersen LLP v. Carlisle*. Justice Souter voted the same as Justices Stevens and Ginsburg in 12 of the 15 Access to Courts and Remedies cases, but split his votes on the FAA cases, voting with Justice Ginsburg in *Vaden* and with Justice Stevens in *Arthur Andersen*. He did not join Justices Stevens and Ginsburg on the immunity issue in *Safford*. Justice Breyer split the category nearly in half.

Eight of the fifteen cases in this category were decided 5 to 4, with Justice Kennedy arguably the swing vote in five of them. Justice Kennedy joined the "conservative" bloc in three of those cases and the "liberal" in two. In *Atlantic Sounding Co. v. Townsend*, Justice Thomas wrote the opinion in favor of punitive damages and was joined by the Court's "liberals." Justice Scalia did the same in *Cuomo v. Clearing House Ass'n LLC*, an important no-preemption ruling. On the FAA question in *Vaden*, involving whether federal jurisdiction over a § 4 petition could be based solely on a defendant's counterclaim, the Court defied any ideological categorization, with Justices Scalia, Kennedy, Souter, and Thomas joining Justice Ginsburg's majority opinion.

Votes for the Expansion (E) and Contraction (C) of Rights on Access to Courts and Remedies Issues

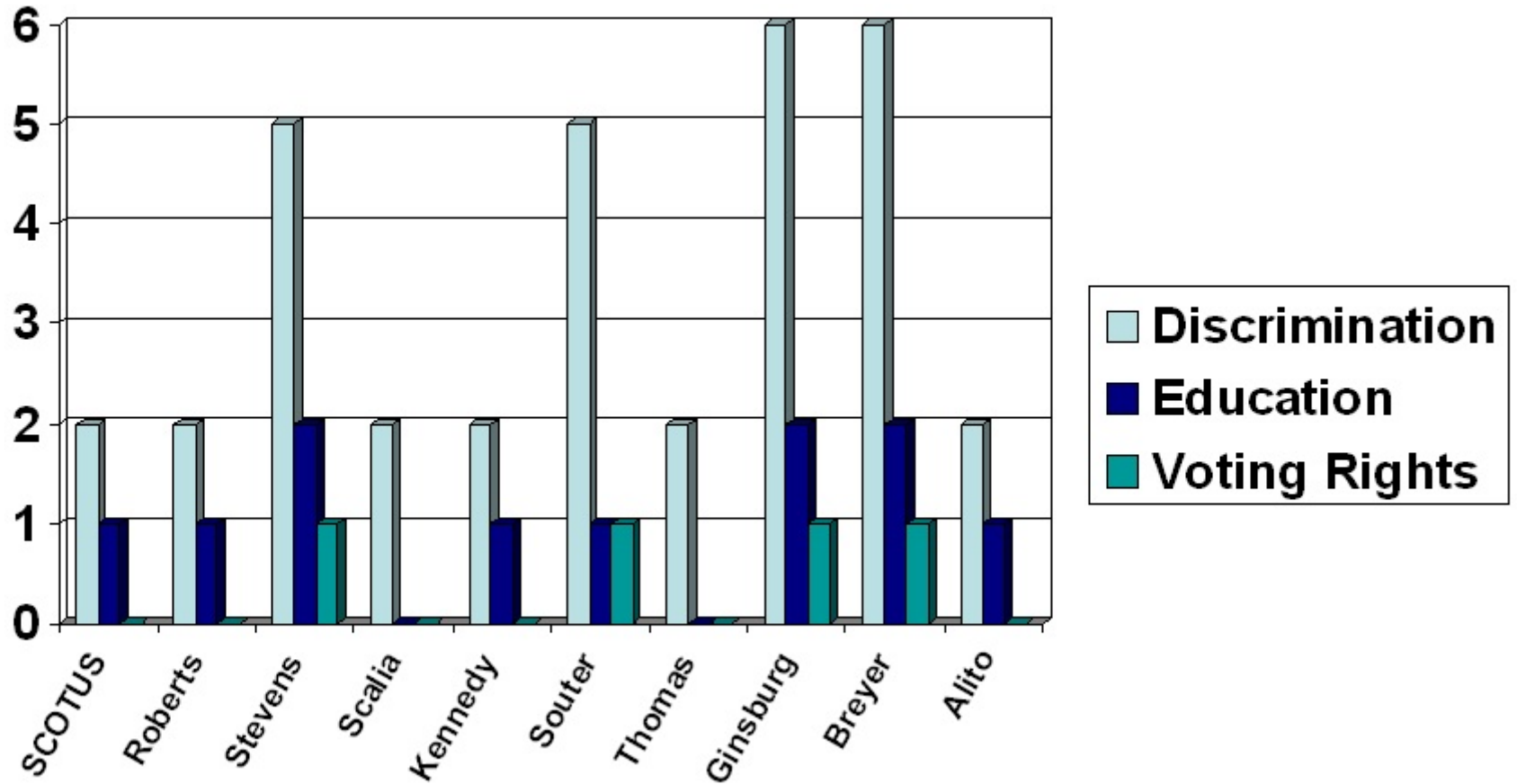
	SCOTUS		Roberts		Stevens		Scalia		Kennedy		Souter		Thomas		Ginsburg		Breyer		Alito	
	E	C	E	C	E	C	E	C	E	C	E	C	E	C	E	C	E	C	E	C
Access to Courts & Remedies	6	9	1	14	11	4	2	13	4	11	11	4	3	12	11	4	8	7	0	15
Agency Procedure	0	1	0	1	1	0	0	1	0	1	1	0	0	1	1	0	0	1	0	1
Arbitration	1	2	1	2	2	1	1	2	1	2	3	0	1	2	2	1	1	2	0	3
Immunity	0	4	0	4	1	3	0	4	0	4	0	4	0	4	1	3	0	4	0	4
Jurisdiction	1	0	0	1	1	0	0	1	1	0	1	0	0	1	1	0	1	0	0	1
Pleading Standards	0	1	0	1	1	0	0	1	0	1	1	0	0	1	1	0	1	0	0	1
Preemption	3	0	0	3	3	0	1	2	2	1	3	0	1	2	3	0	3	0	0	3
Punitive Damages	1	0	0	1	1	0	0	1	0	1	1	0	1	0	1	0	1	0	0	1
Standing	0	1	0	1	1	0	0	1	0	1	1	0	0	1	1	0	1	0	0	1

Civil Rights

The Civil Rights category includes cases involving discrimination, education, and voting rights. In cases involving civil rights, the Justices aligned themselves as the “liberal” and “conservative” labels would predict. Notable civil rights cases this Term included *Gross v. FBL Financial Services, Inc.*, in which the Court stiffened the burden for plaintiffs under the Age Discrimination and Employment Act; *Northwest Austin Municipal Utility District No. 1 v. Holder*, in which a majority of the Court avoided the question whether § 5 of the Voting Rights Act is constitutional, but held that the utility district could seek to bail out from the Act’s preclearance requirements; and *Ricci v. DeStefano*, in which the Court struck down a fire department’s affirmative action efforts. Five of the ten civil rights cases were decided 5 to 4, and, in each one, Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito made up the majority, while Justices Stevens, Souter, Ginsburg, and Breyer dissented.

Justice Breyer had a more expansive view of rights in the civil rights category than he did in any other category, voting in favor of the expansion of rights in 90% of the cases. Justice Ginsburg voted identically, and both voted on the side of an expansion of rights in 100% of the Court’s discrimination and education cases. By contrast, Justice Kennedy voted squarely with the “conservative” side of the bench in every case, voting with Chief Justice Roberts and Justice Alito in each case. Chief Justice Roberts and Justices Kennedy and Alito were in the majority in every civil rights case. Justices Scalia and Thomas voted for a more expansive view of civil rights only twice; in both of those cases, the plaintiff alleging discrimination won unanimously.

Votes in Favor of the Expansion of Rights in Civil Rights Cases



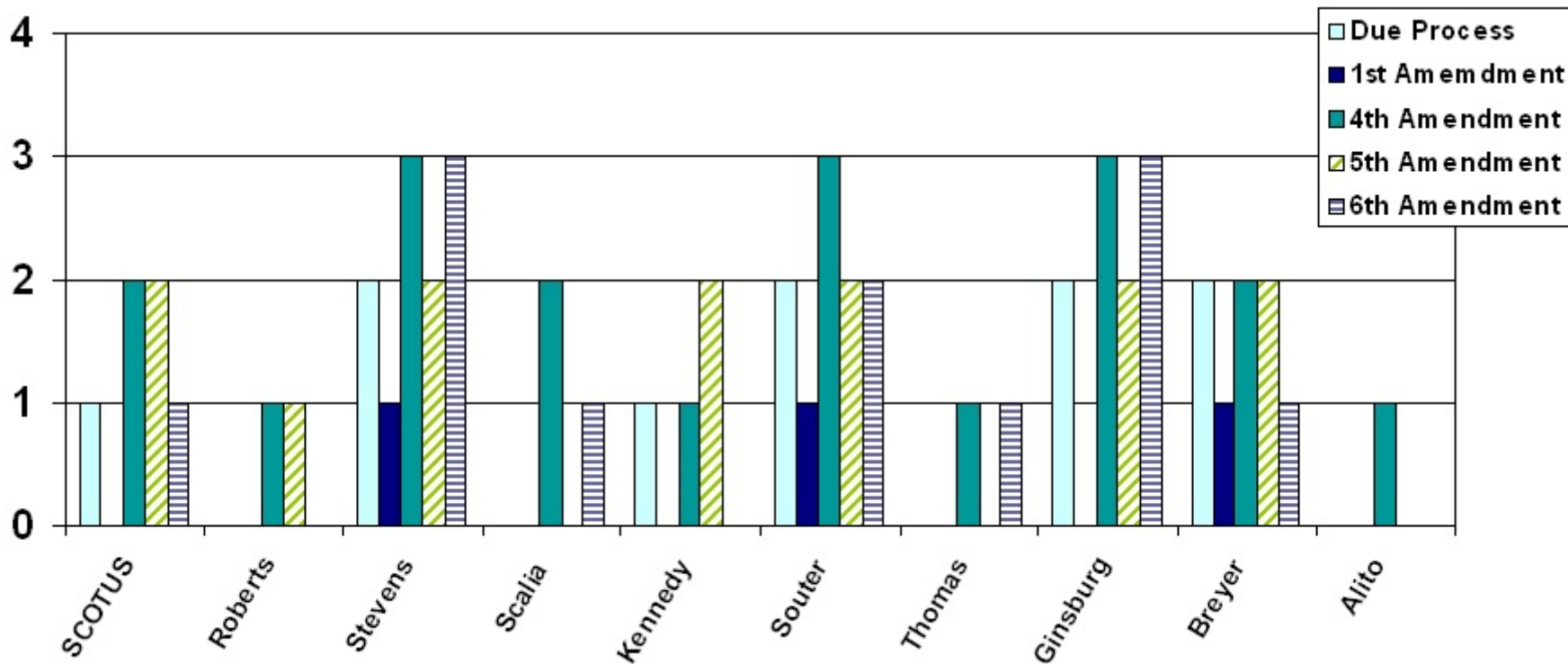
Constitutional Rights

The Constitutional Rights category includes cases involving due process and the First, Fourth, Fifth, and Sixth Amendments. Notable constitutional rights cases from this term include *Pleasant Grove City v. Summum*, in which the Court held that a monument in a public park is government speech; *Caperton v. A.T. Massey Coal Co.*, in which the Court held that, in some circumstances, due process prohibits an elected judge who received campaign contributions from interested parties from deciding a case; *District Attorney's Office for the Third Judicial District v. Osborne*, in which the Court found no due process violation when a state prohibited an inmate access to the evidence used against him so that the inmate might pursue DNA testing at his own expense; *Melendez-Diaz v. Massachusetts*, in which the Court held that, under the Sixth Amendment, a criminal defendant has a right to confront a lab analyst when lab evidence is proffered against the defendant; and *Safford Unified School District No. 1 v. Redding*, in which the Court held that the strip-search of a middle-school student for ibuprofen violated the Fourth Amendment.

The Court decided both due process cases 5 to 4, with Justice Kennedy serving as the swing vote. In both cases, Chief Justice Roberts wrote for the members of the Court finding no due process violation. Overall, the Court decided seven of sixteen constitutional rights questions by a 5 to 4 vote. Justice Kennedy did not always serve as the swing vote and drafted the dissenting opinion in *Melendez-Diaz*.

Justice Stevens voted in favor of the expansion of constitutional rights more often than any other justice (69%), followed by Justice Ginsburg (63%). This category was the only one in which Justice Ginsburg was not the Justice with the most votes for the expansion of rights. Meanwhile, Justice Alito voted for the contraction of constitutional rights most frequently (94%), voting for the expansion of rights in only one Constitutional Rights case (*Safford*).

Votes in Favor of the Expansion of Constitutional Rights



Votes for the Expansion (E) and Contraction (C) of Constitutional Rights

	SCOTUS		Roberts		Stevens		Scalia		Kennedy		Souter		Thomas		Ginsburg		Breyer		Alito	
	E	C	E	C	E	C	E	C	E	C	E	C	E	C	E	C	E	C	E	C
Constitutional Rights	6	10	2	14	11	5	3	13	4	12	10	6	2	14	10	6	8	8	1	15
Due Process	1	1	0	2	2	0	0	2	1	1	2	0	0	2	2	0	2	0	0	2
First Amendment	0	3	0	3	1	2	0	3	0	3	1	2	0	3	0	3	1	2	0	3
Fourth Amendment	2	2	1	3	3	1	2	2	1	3	3	1	1	3	3	1	2	2	1	3
Fifth Amendment	2	1	1	2	2	1	0	3	2	1	2	1	0	3	2	1	2	1	0	3
Sixth Amendment	1	3	0	4	3	1	1	3	0	4	2	2	1	3	3	1	1	3	0	4

Environmental Law

The Court held against parties bringing environmental claims in all five of the environmental cases on the Court’s docket. Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito voted against the environmental claimants in each case. Justice Ginsburg was the sole justice to vote in favor of the environmental claims in all five cases. Justice Souter did so in four cases, Justice Stevens in three, and Justice Breyer in two.

Opinion Assignment

Another area of interest to Supreme Court watchers is to which Justice significant opinions are assigned. Chief Justice Roberts and Justice Stevens are almost always on opposing sides in important, divisive cases, and therefore are almost always responsible for assigning drafting duties for the majority and dissenting opinions. Majority and primary dissenting opinions in noteworthy cases were assigned as follows:

Case	Majority Assigner	Majority Drafter	Dissent Assigner	Dissent Drafter
<i>Pearson v. Callahan</i>	Roberts	Alito	(none)	(none)
<i>Summers v. Earth Island Inst.</i>	Roberts	Scalia*	Stevens	Breyer
<i>Wyeth v. Levine</i>	Stevens	Stevens	Roberts	Alito
<i>Ashcroft v. Iqbal</i>	Roberts	Kennedy*	Stevens	Souter
<i>Montejo v. Louisiana</i>	Roberts	Scalia*	Stevens	Stevens
<i>Caperton v. A.T. Massey Coal Co.</i>	Stevens	Kennedy*	Roberts	Roberts
<i>Dist. Attorney's Office of Third Judicial Dist. v. Osborne</i>	Roberts	Roberts*	Stevens	Stevens
<i>Gross v. FBL Fin. Servs., Inc.</i>	Roberts	Thomas*	Stevens	Stevens
<i>Nw. Austin Mun. Util. Dist. No. 1 v. Holder</i>	Roberts	Roberts	(none)	(none)
<i>Melendez-Diaz v. Massachusetts</i>	Stevens	Scalia*	Roberts	Kennedy
<i>Safford Unified Sch. Dist. No. 1 v. Redding (Fourth Amendment)</i>	Roberts	Souter	Thomas	Thomas
<i>Safford Unified Sch. Dist. No. 1 v. Redding (Immunity)</i>			Stevens	Stevens
<i>Cuomo v. Clearing House Ass’n, LLC</i>	Stevens	Scalia*	Roberts	Thomas
<i>Ricci v. DeStefano</i>	Roberts	Kennedy*	Stevens	Ginsburg

*5-4 decisions.

These numbers reveal that Chief Justice Roberts and Justice Stevens collectively were slightly more likely to assign the majority opinion in a significant 5 to 4 decision to Justice Scalia than to Justice Kennedy, the Court’s so-called “swing” vote. “Swing” vote considerations aside, Chief Justice Roberts and Justice Stevens was each most likely to assign the opinion to himself. In particular, when Justice Stevens assigned dissenting opinions, he assigned the opinion to himself in four of seven significant cases. Both assigning justices spread the remaining opinions reasonably evenly among their colleagues.

Appendix

Supreme Court October Term 2008	Category	Subcategory		Expansion	Contraction
07-1239	Winter v. Natural Res. Def. Council	Environmental Law		6-3 G: DS B	R: JS AS K T A
07-562	Altria Group, Inc. v. Good	Access to Courts & Remedies	Preemption	5-4 JS: K DS G B	T: R AS A
07-513	Herring v. United States	Constitutional Rights	Fourth Amendment	5-4 G: JS DS B	R: AS K T A
07-610	Locke v. Karass	Constitutional Rights	First Amendment	9-0	B: R JS AS K DS T G A
07-751	Pearson v. Callahan	Access to Courts & Remedies	Immunity	9-0	A: R JS AS K DS T G B
07-1125	Fitzgerald v. Barnstable Sch. Comm.	Civil Rights	Discrimination	9-0 A: R JS AS K DS T G B	
06-1595	Crawford v. Metro. Gov't of Nashville & Davidson County	Civil Rights	Discrimination	9-0 DS: R JS AS K T G B A	
07-1122	Arizona v. Johnson	Constitutional Rights	Fourth Amendment	9-0	G: R JS AS K DS T B A
07-854	Van de Kamp v. Goldstein	Access to Courts & Remedies	Immunity	9-0	B: R JS AS K DS T G A
07-869	Ysursa v. Pocatello Educ. Ass'n	Constitutional Rights	First Amendment	6-3 JS: DS B	R: AS K T G A
07-665	Pleasant Grove City v. Sumnum	Constitutional Rights	First Amendment	9-0	A: R JS AS K DS T G B
07-463	Summers v. Earth Island Inst.	Environmental Law		5-4 B: JS DS G	AS: R K T A
		Access to Courts & Remedies	Standing		
06-1249	Wyeth v. Levine	Access to Courts & Remedies	Preemption	6-3 JS: K DS T G B	A: R AS
07-689	Bartlett v. Strickland	Civil Rights	Voting Rights	5-4 DS: JS G B	K: R AS T A
07-773	Vaden v. Discover Bank	Access to Courts & Remedies	Arbitration	5-4 G: AS K DS T	R: JS B A
07-1315	Knowles v. Mirzayance	Constitutional Rights	Sixth Amendment	9-0	T: R JS AS K DS G B A
07-588	Entergy Corp. v. Riverkeeper, Inc.	Environmental Law		6-3 JS: DS G	AS: R K T B A
07-581	14 Penn Plaza LLC v. Pyett	Access to Courts & Remedies	Arbitration	5-4 DS: JS G B	T: R AS K A
		Civil Rights	Discrimination		
07-10441	Corley v. United States	Constitutional Rights	Fifth Amendment	5-4 DS: JS K G B	A: R AS T
07-542	Arizona v. Gant	Constitutional Rights	Fourth Amendment	5-4 JS: AS DS T G	A: R K B
07-1209	Shinseki v. Sanders	Access to Courts & Remedies	Agency Procedure	6-3 DS: JS G	B: R AS K T A
07-1356	Kansas v. Ventris	Constitutional Rights	Sixth Amendment	7-2 JS: G	AS: R K DS T B A
07-1601	Burlington N & Santa Fe R.R. Co. v. United States	Environmental Law		8-1 G	JS: R AS K DS T B A

Supreme Court October Term 2008		Category	Subcategory		Expansion	Contraction
08-146	Arthur Andersen LLP C. Carlisle	Access to Courts & Remedies	Arbitration	6-3	DS: R JS	AS: K T G B A
07-1015	Ashcroft v. Iqbal	Access to Courts & Remedies	Pleading Standards	5-4	DS: JS G B	K: R AS T A
07-543	AT&T Corp. v. Hulteen	Civil Rights	Discrimination	7-2	G: B	DS: R JS AS K T A
07-10374	Haywood v. Drown	Access to Courts & Remedies	Jurisdiction	5-4	JS: K DS G B	T: R AS A
07-1529	Montejo v. Louisiana	Constitutional Rights	Sixth Amendment	5-4	JS: DS G B	AS: R K T A
08-598	Bobby v. Bies	Constitutional Rights	Fifth Amendment	9-0		G: R JS AS K DS T B A
07-1090	Republic of Iraq v. Beaty	Access to Courts & Remedies	Immunity	9-0		AS: R JS K DS T G B A
08-22	Caperton v. A.T. Massey Coal Co.	Constitutional Rights	Due Process	5-4	K: JS DS G B	R: AS T A
08-6	Dist. Attorney's Office for Third Judicial Dist. v. Osborne	Constitutional Rights	Due Process	5-4	JS: DS G B	R: AS K T A
08-67	Yeager v. United States	Constitutional Rights	Fifth Amendment	6-3	JS: R K DS G B	AS: T A
08-441	Gross v. FBL Fin. Servs., Inc.	Civil Rights	Discrimination	5-4	JS: DS G B	T: R AS K A
08-322	Nw. Austin Mun. Util. Dist. No. 1 v. Holder	Civil Rights	Voting Rights	9-0		R: JS AS K DS T G B A
08-305	Forest Grove Sch. Dist. v. TA	Civil Rights	Education	6-3	JS: R K G B A	DS: AS T
07-984	Coeur Alaska, Inc. v. Se. Alaska Conservation Council	Environmental Law		6-3	G: JS DS	K: R AS T B A
07-591	Melendez-Diaz v. Massachusetts	Constitutional Rights	Sixth Amendment	5-4	AS: JS DS T G	K: R B A
08-479	Safford Unified Sch. Dist. #1 v. Redding	Constitutional Rights	Fourth Amendment	8-1	DS: R JS AS K G B A	T
		Access to Courts & Remedies	Immunity	7-2	JS: G	DS: R AS K T B A
08-214	Atlantic Sounding Co. v. Townsend	Access to Courts & Remedies	Punitive Damages	5-4	T: JS DS G B	A: R AS K
08-289	Horne v. Flores	Civil Rights	Education	5-4	B: JS DS G	A: R AS K T
08-453	Cuomo v. Clearing House Ass'n, LLC	Access to Courts & Remedies	Preemption	5-4	AS: JS DS G B	T: R K A
07-1428	Ricci v. DeStefano	Civil Rights	Discrimination	5-4	G: JS DS B	K: R AS T A