Hamline Law Review

Volume 38 | Issue 3 Article 1

2015

Criminal Justice and the 2013-2014 United States Supreme Court Term

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CRIMINAL JUSTICE AND THE 2013–2014 UNITED STATES SUPREME COURT TERM

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I. INTRODUCTION

Criminal justice rulings from the United States Supreme Court's 2013–2014 term are likely to be overshadowed in public discussions by debates concerning the Court's two landmark five-to-four decisions in other policy spheres. [1] In one, a narrow majority exempted family-owned companies, based on the religious objections of the companies' owners, from providing certain types of otherwise required health coverage.[2] In the other,

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[1] Adam Liptak, *Supreme Court Rejects Contraceptives Mandate for Some Corporations*, N.Y. TIMES, (June 30, 2014), http://www.nytimes.com/2014/07/01/us/hobby-lobby-case-supreme-court-contraception.html?_r=0 ; Adam Liptak, *Supreme Court Strikes Down Overall Political Donation Cap*, N.Y.TIMES, (April 2, 2014), http://www.nytimes.com/2014/04/03/us/politics/supreme-court-ruling-on-campaign-contributions.html.

[2] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

the same marginally-winning coalition struck down longstanding limits on the total amount of money one can contribute to candidates for federal office, political parties, and political action committees.[3] In these salient cases the Court returned to the topics of the Affordable Care Act and campaign finance—issues for which the Justices rendered other, controversial decisions in recent years.[4]

The latest Supreme Court Term lacked a blockbuster criminal justice case to match those in previous Roberts Court Terms.[5] *Bond v. United States* appeared to be this type of case for the 2013–2014 Term, with potentially significant implications for the roles of federal and state governments in prosecuting crimes. [6] Political conservatives hoped *Bond* would rein in congressional authority to criminalize certain domestic acts as part of the implementation of an international treaty.[7] The majority instead avoided a controversial ruling on Congress's treaty power, deciding the case on more limited grounds.[8]

Yet, several highlights from the past Term warrant a systematic examination of the Court decisions and individual voting patterns in criminal justice cases. For example, in 2013–2014 the Court ruled on issues consequential to most of society, such as privacy expectations given the

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[3] McCutcheon v. Fed. Election Comm'n., 134 S. Ct. 1434 (2014). (In both *Burwell* and *McCutcheon*, the majority included Chief Justice Roberts, and Justices Scalia, Thomas, Alito, and Kennedy).

[4] Patient Protection & Affordable Care Act, Pub. L. No. 111–148, (codified in scattered sections of 42 U.S.C., 29 U.S.C.., 26 U.S.C., 25 U.S.C., 21 U.S.C.) *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (upholding Congress's power to enact most provisions of the Affordable Care Act, commonly called Obamacare); and Citizens United v. Fed. Election Comm'n., 558 U.S. 310 (2010) (holding the First Amendment prohibits the government from restricting political independent expenditures by corporations, associations, or labor unions).

[5] *See, e.g.*, Maryland v. King, 133 S. Ct. 1958 (2013) (upholding a state's practice of taking warrantless DNA samples from all suspects arrested for certain serious offenses); Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012) (upholding suspicionless strip searches of those arrested for minor offenses before being placed in the general inmate population); McDonald v. Chicago, 561 U.S. 3025 (2010) (incorporating individuals' Second Amendment right to keep and bear arms for self-defense); Graham v. Florida, 560 U.S. 48 (2010) (finding that the sentencing of a juvenile offender to life without parole for a non-homicide crime violates the Eighth Amendment); Kennedy v. Louisiana, 554 U.S. 407 (2008) (ruling that punishing the crime of rape of a child with the death sentence violates the Eighth Amendment); District of Columbia v. Heller, 554 U.S. 570 (2008) (ruling that the prohibition on possessing handguns in the home in the District of Columbia violates the Second Amendment); Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (ruling that the G.W. Bush administration's use of military commissions to try detainees at Guantanamo Bay violates the Uniform Code of Military Justice and Geneva Conventions).

[6] Bond V. United States, 134 S. Ct. 2077 (2014).

[7] *See, e.g.*, George F. Will, *Carol Bond Case Showcases Government run Amok*, WASH. POST, Nov. 1, 2013 (calling *Bond* "the most momentous case" of the Term); and U.S. Senator Ted Cruz, *Limits on the Treaty Power*, 127 HARV. L. REV. F., 93, at 95 (2014) ("How the Court resolves *Bond* could have enormous implications for our constitutional structure.").

[8] *See infra* text accompanying notes 169–197.

growing use of advanced technologies in our daily lives,[9] as well as on questions directly involving a relatively small subset of the populace, such as what level of safeguards will be deemed sufficient when imposing death sentences on convicted individuals with developmental disabilities.[10] As the Justices grappled with balancing concern for individuals' rights with governmental efforts to control crime,[11] several themes that emerged in prior years also characterized the 2013–2014 Term.[12] However, the most striking feature from analyzing the Term's criminal justice decisions and voting tendencies may be the number of atypical findings. As discussed in the quantitative and qualitative analyses to follow, some of these were unique developments for the Roberts Court era in the area of criminal justice.[13]

II. EMPIRICAL MEASURES OF THE SUPREME COURT'S DECISION MAKING

During the 2013–2014 Term, the Supreme Court handed down fewer full, signed decisions on criminal justice issues—twenty-one—than in any of the previous eight Terms of the Roberts Court era.[14] Yet, criminal justice

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[9] Riley v. California, 134 S. Ct. 2473 (2014).

[10] Hall v. Florida, 134 S. Ct. 1986 (2014).

[11] For an influential discussion of tensions arising from two competing value systems in criminal justice (the crime control and due process models), see Herbert Packer, *Two Models of the Criminal Process*, 113 U. PENN. L. REV. 1 (1964).

[12] For example, Justice Kennedy's place in the divided Court continues to make him especially influential, *see infra* note 55 and accompanying text, just as in the prior term it was noted that "statistics demonstrate that Justice Kennedy's vote continues to be the most valuable one." Adam Liptak, *Roberts Pulls Supreme Court to the Right Step By Step*, N.Y. TIMES (June 27, 2013), http://www.nytimes.com/2013/06/28/us/politics/roberts-plays-a-long-game.html?_r=0.

[13] *See infra* Parts II & III; *see infra* notes 43–44 and accompanying text.

[14] Excluded from analyses in this Article are the Court's per curiam rulings in Stanton v. Sims, 134 S. Ct. 3 (2013); Tolan v. Cotton, 134 S. Ct. 1861 (2014); Martinez v. Illinois, 134 S. Ct. 2070 (2014); Williams v. Johnson, 134 S. Ct. 2659 (2014). This does not count separately United States v. Wurie, 134 S. Ct. 999 (2014), which was consolidated with *Riley*, 134 S. Ct. 2473 (2014). In each of the previous eight Terms, the Roberts Court decided, on average, about 28 criminal justice cases with full, signed opinions. The number of these decisions is as follows: 23 during the 2012–2013 Term; 29 in 2011–2012; 31 in 2010–2011; 29 in 2009–2010; 33 in 2008–2009; 26 in 2007–2008; 22 in 2006–2007; and 30 in 2005–2006. *See* Michael A. McCall et al., *Criminal Justice and the 2012–2013 United States Supreme Court Term*, 5 CHARLOTTE L. REV. 35, 38 (2014) [hereinafter *2012–2013 Term*]; Madhavi M. McCall et al., *Criminal Justice and the 2011–2012 United States Supreme Court Term*, 14 FLA. COASTAL L. REV. 239, 244 (2013) [hereinafter *2011–2012 Term*]; Madhavi M. McCall et al., *Criminal Justice and the 2010–2011 United States Supreme Court Term*, 53 S. TEX. L. REV. 307, 312 (2011) [hereinafter *2010–2011 Term*]; Michael A. McCall et al., *Criminal Justice and the U.S. Supreme Court's 2009–2010 Term* , 41 CUMB. L. REV. 227, 230 (2011) [hereinafter *2009–2010 Term*]; Madhavi M. McCall et al., *Criminal Justice and the U.S. Supreme Court's 2008–2009 Term*, 29 MISS. C. L. REV. 1, 4 (2010) [hereinafter *2008–2009 Term*]; Michael A. McCall et al., *Criminal Justice and the U.S. Supreme Court's 2007–2008 Term*, 36 S.U. L. REV. 33, 36–38 (2008) [hereinafter *2007–2008 Term*]; Michael A. McCall et al., *Criminal Justice and the 2006–2007 United States Supreme Court Term*, 76

policy areas continued to figure prominently in the Court's rulings[15] as 37% of the cases decided during the 2013–2014 Term addressed key questions concerning the administration of justice and the rights of individuals drawn into contact with the criminal justice system, albeit on a historically small Supreme Court docket. [16]

Scholars who study judicial behavior often label decisions and Justices as being predominantly conservative or liberal.[17] We adopt these

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UMKC L. REV. 993, 995–96 (2008) [hereinafter *2006–2007 Term*]; and Christopher E. Smith et al., *Criminal Justice and the 2005–2006 United States Supreme Court Term*, 25 QUINNIPIAC L. REV. 495, 499 (2007) [hereinafter *2005–2006 Term*].

[15] *See, e.g.*, Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1229–33 (2012) (showing over time the growing presence of criminal procedure and due process cases on the Court's docket, decline in the frequency of certain other types of cases like economic ones, and a decrease in the total number of cases heard by the Court per Term); and Adam Liptak, *In New Term, Supreme Court Shifts Focus to Crime and First Amendment*, N.Y. TIMES (Oct. 1, 2011), htt p://www.nytimes.com/2011/10/02/us/supreme-court-turns-to-criminal-and-first-amendment-cases.html?pagewanted=all&_r=0 ("Now, criminal justice is at the heart of the court's docket . . . ").

[16] *See* Kedar Bhatia, *Final Stat Pack for October Term 2013 and key takeaways*, SCOTUSBLOG, (July 3, 2014, 9:00 AM) http://www.scotusblog.com/2014/06/final-stat-pack-for-october-term-2013-and-key-takeaways-2/ (drawing on two different datasets to report that the two most recent Terms in which the Court decided fewer cases with signed opinions than in the 2013–2014 Term (67 cases) were the 2011–2012 Term (65) and the 1864–1865 Term (55)). *See, e.g.*, Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1229–33 (2012) (showing over time the growing presence of criminal procedure and due process cases on the Court's docket, decline in the frequency of certain other types of cases like economic ones, and a decrease in the total number of cases heard by the Court per Term); *see also* Adam Liptak, *In New Term, Supreme Court Shifts Focus to Crime and First Amendment*, N.Y. TIMES, Oct. 2, 2011, A17 ("Now, criminal justice is at the heart of the court's docket…"). *See* Bhatia *supra* note 16 (noting that during the 2013–2014 Term, the Roberts Court handed down 73 merits opinions). We identified 27 decisions (37%) addressing important questions in the area of criminal justice. Of these 27 criminal justice cases, 21 were decided with full, signed opinions and are analyzed in this Article, five were per curiam decisions, and one was a criminal justice case that was consolidated with another. *See infra* Part III.A–D; see *supra* notes 15–16. The primary question addressed did not need to be a criminal justice issue for a case to be included in this study. Rather, the selection process involved reading all Court decisions for the Term to identify those raising key issues in the area of criminal justice, though other additional types of issues may have been addressed; *supra* Bhatia, at Signed Opinions (drawing on two different datasets to report that the two most recent Terms in which the Court decided fewer cases with signed opinions than in the 2013–2014 Term (67 cases) were the 2011–2012 Term (65) and the 1864–1865 Term (55)). *Supra* Bhatia, at Signed Opinions (drawing on two different datasets to report that the two most recent Terms in which the Court decided fewer cases with signed opinions than in the 2013–2014 Term (67 cases) were the 2011–2012 Term (65) and the 1864–1865 Term (55)).

[17] *E.g.*, Christopher J. Casillas, Peter K. Enns, & Patrick C. Wohlfarth, *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SC. 74 (2011) (using cases with liberal outcomes that reversed lower court rulings to test the influence of public opinion on Supreme Court decisions); *e.g.*, Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1490–91 (2007) (documenting ideological movement among almost

labels, and throughout this Article categorize as "liberal" those decisions that are supportive of claims by the criminally accused or convicted.[18] Decisions labeled as "conservative" are those favoring the government's assertions of authority embodied in decisions and actions by police, prosecutors, and judges.[19] These definitions follow those in the widely used Supreme Court Database, though we independently classified all individual votes and case outcomes analyzed here.[20] When cases presented Justices with questions in multiple issue areas, coding exclusively considered the criminal justice context.[21]

Table 1 summarizes the Supreme Court's criminal justice decisions from the 2013–2014 Term by the conservative/liberal direction of outcome and the size of the majority. A notable feature of the distribution is the unusually large percentage of cases ending without dissent. With all nine Justices agreeing in judgment in more than three of every five cases, this Term witnessed the highest portion of criminal justice cases decided unanimously during the Roberts Court era to date.[22] However, other recent patterns caution against attributing this to factors such as a systematic shift in decision making processes on the Court that might signal an enduring trend. For example, just two years earlier, the Court posted the lowest rate of

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all Justices as they become more liberal or conservative over time); Jeffery A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SC. REV. 557 (1989) (using content analysis of newspaper editorials to estimate Justices' ideological scores which are then compared to their voting trends); e.g. Christopher E. Smith, *Justice John Paul Stevens: Staunch Defender of Miranda Rights*, 60 DEPAUL L. REV. 99 (2010) (examining one of the areas that helped cast Stevens as leader of the Court's liberal wing in criminal justice cases).

[18] *See, e.g.,* Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Judicial Data Base Project*, 73 JUDICATURE 103 (1989) ("Liberal decisions in the area of civil liberties are pro-person accused or convicted of crime, pro-civil liberties claimant or civil rights claimant, pro-indigent, pro-[Native American] and anti-government in due process and privacy.").

[19] *Id.*

[20] Harold J. Spaeth, et. al., *Online Code Book*, THE SUPREME COURT DATABASE, Version 2014 Release 01 (2014), http://www.supremecourtdatabase.org/documentation.php?var=decisionDirection (last visited July 24, 2014).

[21] *E.g.*, The Court held in *McCullen v. Coakley* that a state law establishing a buffer zone outside of abortion clinics violated the First Amendment. McCullen v. Coakley, 134 S. Ct. 2518 (2014). The decision is liberal with respect to the First Amendment, liberal with respect to criminal justice, and conservative with respect to abortion/reproductive rights. For purposes of this study, the decision is coded only in the context of invalidating a criminal law (liberal).

[22] The proportion of criminal justice cases decided without dissent during the 2013–2014 Term jumps to over 70% (19 of 27) if the five per curium opinions are included, and if the consolidated cases are treated separately. *See supra* notes 18, 20. The Court handed down fourteen unanimous criminal justice rulings during the 2010–2011 Term (one more than during the 2013–2014 Term). However, no prior Term of the Roberts Court posted a higher percentage of criminal justice cases decided by a unanimous Court. *See*, *2012–2013 Term*, *supra* note 14; *2011–2012 Term*, *supra* note 14; *2010–2011 Term*, *supra* note 14; *2009–2010 Term*, *supra* note 14; *2008–2009 Term*, *supra* note 14; *2007–2008 Term*, *supra* note 14; *2006–2007 Term*, *supra* note 14; and *2005–2006 Term*, *supra* note 14.

unanimous decisions in criminal justice cases since at least the 1994–1995 Term.[23] Thus, it is likely that recent swings in the share of criminal justice cases decided unanimously are pushed more by the different grouping of issues heard in various Terms than by fundamental changes in the general level of agreement on the Court.[24]

TABLE 1:
Case Distribution by Vote and Liberal/Conservative Outcome in U.S. Supreme Court Criminal Justice Decisions, 2013–2014 Term[25]

Vote	Liberal	Conservative	Total
9-0	5	8	13 (61.9%)
8-1	0	0	0 (0.0%)
7-2	1	0	1 (4.8%)
6-3	0	3	3 (14.3%)
5-4	1	3	4 (19.0%)
	7 (33.3%)	14 (66.7%)	21 (100.0%)

The dominance of conservative rulings during the 2013–2014 Term, especially in those cases that most divided the high court, provides another striking characteristic of criminal justice rulings during the most recent Term. Some might predict this to be the norm based upon common depictions of the Court's conservatism and current membership that includes five Justices usually portrayed as political conservatives.[26] Yet, in past years the Roberts Court often produced a more balanced split in the number of its

[23] *See*, *2011–2012 Term*, *supra* note 14, at 242.

[24] *See, e.g.*, Thomas R. Hensley & Christopher E. Smith, *Membership Change and Voting Change: An Analysis of the Rehnquist Court's 1986–1991 Terms*, 48 POL. RES. Q. 837, 849–52 (1995) (explaining that changes in patterns of Supreme Court decisions are a function of different factors including changes in the nature of issues that the Court decided in specific Terms).

[25] *See infra* Part III.A–D.

[26] *See, e.g.*, David Cole, *The Roberts Court: What Kind of Conservatives?* N.Y. REV. OF BOOKS BLOG (Oct. 7, 2013, 9:43 AM) http://www.nybooks.com/blogs/nyrblog/2013/oct/07/roberts–court-what-kind-conservatives/ (describing the Roberts Court as "a confidently conservative institution" and predicting that in major cases in the 2013–2014 Term, "the real question is not whether the conservatives will win, but how they win"); Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES (July 24, 2010), http://www.nytimes.com/2010/07/25/us/25roberts.html?pagewanted=all, (reporting on a statistical analysis of Court eras and noting that current members Roberts, Scalia, Alito and Thomas rank among the six most conservative Justices to sit on the Court since 1937, and that Kennedy is among the top ten); Joan Biskupic, *Reshaped Supreme Court Charts New Era*, USA TODAY (Nov. 2, 2010, 6:23 PM), http://www.usatoday.com/news/washington/judicial/2010-10-01-court01_ST_N.htm ("The court under Chief Justice John Roberts has pushed the law to the right").

liberal and conservative criminal justice rulings.[27] Moreover, in all but two of the previous eight Terms, five-member majorities have been more likely to favor claims of individual suspects, defendants, or convicted offenders than to support interests of justice system officials.[28] The atypical distribution of decisions by direction of outcome during the 2013–2014 Term, then, further suggests the importance of examining the specific criminal justice issues considered by the Court this past year.[29]

Table 2 presents the voting patterns for individual Justices along the liberal-conservative dimension, as well as the degree to which each Justice supported the majority position by direction of outcome. Unlike previous Terms, the voting tendencies do not reveal immediately the liberal and conservative wings of the Court; typically, Chief Justice Roberts, and Justices Alito, Thomas, Scalia, and—to a lesser extent—Kennedy vote for conservative outcomes notably more often than do Justices Ginsburg, Breyer, Sotomayor, and Kagan.[30] The relative scarcity of non-unanimous criminal justice decisions in the 2013–2014 Term may have obscured this usually clear dividing line. It is presumably in non-unanimous decisions that the sincerest representations of judicial preferences are most likely to be expressed given that there is little need to compromise, at least not for the sake of unanimity.[31] Thus, the reduced opportunity in the most recent Term to express such preferences likely compressed the ideological distance between the Justices. Notably, the only Justices to support both non-unanimous liberal outcomes were those traditionally depicted as members of the Court's liberal wing (Justices Ginsburg, Breyer, Sotomayor, Kagan),[32] and the more moderate conservative (Justice Kennedy).[33]

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[27] *E.g.*, *2012–2013 Term*, *supra* note 14, at 38 (showing that 12 of the Court's criminal justice decisions ended in a liberal outcome that Term while 11 could be characterized as conservative).

[28] Criminal justice cases ending in a five-to-four or five-to-three vote produced more conservative than liberal decisions during the 2008–2009 Term and during the 2006–2007 Term. *See 2008–2009 Term*, *supra* note 14, at 4; *2006–2007 Term*, *supra* note 14, at 995–96. In all other previous Terms of the Roberts Court, more liberal than conservative decisions were handed down by five-member majorities. *See*, *2012–2013 Term*, *supra* note 14, at 38; *2011–2012 Term*, *supra* note 14, at 244; *2010–2011 Term*, *supra* note 14, at 312; *2009–2010 Term*, *supra* note 14, at 230; *2007–2008 Term*, *supra* note 14, at 38; *2005–2006 Term*, *supra* note 14, at 499.

[29] *See infra* Part III.

[30] *See, e.g.*, Liptak, *supra* note 26 (placing the conservatism of Roberts, Scalia, Thomas, Alito, and Kennedy, JJ. into historical context); and *2011–2012 Term*, *supra* note 14, at 247 (showing that Roberts, Scalia, Thomas, and Alito, JJ. each voted for conservative outcomes in more than 60% of non-unanimous criminal justice cases that Term, while the rate for Kennedy, J. was about 41%, and was less than 25% for Kagan, Breyer, Sotomayor, and Ginsburg).

[31] This logic extends to *en banc* courts more generally. *See* Christopher E. Smith, *Polarization and Change in the Federal Courts: En Banc Decisions in the U.S. Courts of Appeals*, 74 JUDICATURE 133, 134 (1990).

[32] *See, e.g.*, Hannah Fairfield & Adam Liptak, A More Nuanced Breakdown of the Supreme Court, N.Y. Times (June 26, 2014), http://www.nytimes.com/2014/06/27/

TABLE 2:
Voting Rates by Justice in Non-unanimous (and All) Criminal Justice Decisions, 2013–2014 Term[34]

Justice	Percent Conservative Voting	Percent in the Majority	Voted with Conservative Majority	Voted with Liberal Majority
Alito	87.5 (71.4)	62.5 (85.7)	5 of 6 (13 of 14)	0 of 2 (5 of 7)
Thomas	75.0 (66.7)	50.0 (81.0)	4 of 6 (12 of 14)	0 of 2 (5 of 7)
Kennedy	75.0 (66.7)	100.0 (100.0)	6 of 6 (14 of 14)	2 of 2 (7 of 7)
Roberts	50.0 (57.1)	50.0 (81.0)	3 of 6 (11 of 14)	1 of 2 (6 of 7)
Scalia	50.0 (57.1)	50 (81.0)	3 of 6 (11 of 14)	1 of 2 (6 of 7)
Breyer	50.0 (57.1)	75.0 (90.5)	4 of 6 (12 of 14)	2 of 2 (7 of 7)
Kagan	50.0 (57.1)	75.0 (90.5)	4 of 6 (12 of 14)	2 of 2 (7 of 7)
Ginsburg	37.5 (52.4)	62.5 (85.7)	3 of 6 (11 of 14)	2 of 2 (7 of 7)
Sotomayor	12.5 (42.9)	37.5 (76.2)	1 of 6 (9 of 14)	2 of 2 (7 of 7)

Despite the compression of individual voting rates by direction of outcome, Justice Alito again distinguished himself as the most conservative member of the Court in criminal justice cases.[35] The 2013–2014 Term, however, did record Alito's first departure from a conservative majority in a criminal justice case since arriving on the Court in 2006. When the majority in *Abramski v. United States*[36] ruled against a man who purchased a firearm for another buyer but did not disclose that intent on a federal form, Alito

upshot/a-more-nuanced-breakdown-of-the-supreme-court.html?_r=0 (last visited July 26, 2014).

[33] *See, e.g.*, Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 40–1 (2008).

[34] Data regard the eight non-unanimous and twenty-one total criminal justice cases analyzed in this Article. *See infra* Part III.A–D.

[35] Emily Bazelon, *Mysterious Justice Samuel Alito*, NY TIMES MAGAZINE, Mar. 20, 2011, MM13 (drawing on statistical analysis to report that Alito "has ruled for the defense in only 17% of the criminal cases he has heard since he joined the court, putting him to the right of Roberts, Scalia, Thomas—and *every* other justice of the past 65 years other than William Rehnquist . . . ."; and *2012–2013 Term*, *supra* note 14, at n32 ("In each Term from 2006–2007 through 2010–2011, Justice Alito posted the most conservative voting record in criminal justice cases . . . .").

[36] Abramski v. United States, 134 S. Ct. 2259 (2014).

joined Scalia's dissenting opinion along with Roberts and Thomas.[37] The case also marks the first time these four conservative Justices dissented from a conservative criminal justice decision,[38] and illustrates the occasional discrepancy between the use of conservative and liberal labels here versus in common political discourse. Because the decision in *Abramski* is pro-law enforcement and anti-defendant, it is coded as conservative. However, support among the broader population for restrictions on gun purchases and ownership is stronger among political liberals.

All members of the Court except Justice Sotomayor voted to support a conservative outcome in at least half of the criminal justice cases decided this Term.[39] Some maintain Sotomayor's liberalism in the area of criminal justice[40] and her general approach to cases reflect a sensitivity she developed through life experiences to certain claims against government.[41] Sotomayor's lone conservative vote in a non-unanimous criminal justice case was also cast in the category-defying, *Abramski* case.[42]

The most recent Term chronicled another first: it is the first Term in which any Justice on the Roberts Court voted on the winning side of every criminal justice case.[43] Justice Kennedy's participation in all twenty-one majorities that handed down criminal justice rulings during the 2013–2014

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[37] *See infra* text accompanying notes 305–317 for a fuller discussion of *Abramski*.

[38] For summaries of all five-member majority, criminal justice decisions on the Roberts Court that we identified (none of which ended with Roberts, Scalia, Thomas and Alito in dissent from a conservative outcome). *See 2012–2013 Term*, *supra* note 14, at 55–74; *2011–2012 Term*, *supra* note 14, at 267–80; *2010–2011 Term*, *supra* note 14, at 334–42; *2009–2010 Term*, *supra* note 14, at 273–81; *2008–2009 Term*, *supra* note 14, at 30–45; *2007–2008 Term*, *supra* note 14, at 71–85; *2006–2007 Term*, *supra* note 14, at 1025–42; and *2005–2006 Term*, *supra* note 14, at 529–45.

[39] *See supra* Table 2.

[40] *See, e.g.*, *2012–13 Term*, *supra* note 14, at 40 (showing Justices Sotomayor and Ginsburg tied in having the most liberal voting record in criminal justice cases decided that Term).

[41] For examples of those asserting that Sotomayor's experiences (e.g., a Latina, growing up in a housing project, prosecutor) have given her a heightened appreciation for the 'real-world' consequences of criminal justice decisions and of failures in the criminal justice system, see Rachel E. Barkow, *Justice Sotomayor and Criminal Justice in the Real World*, YALE L.J. FORUM (Mar. 24, 2014), http://yalelawjournal.org/forum/justice-sotomayor-and-criminal-justice-in-the-real-world; Veronica Couzo, *Sotomayor's Empathy Moves the Court a Step Closer to Equitable Adjudication*, 89 NOTRE DAME L. REV. 403 (2013); Linda Greenhouse, *The Roberts Court, Version 4.0*, N.Y. TIMES OPINIONATOR (Oct. 2, 2010, 6:16 PM), http://opinionator.blogs.nytimes.com/2010/10/02/the-roberts-court-version-4-0/.

[42] *Abramski*, 134 S. Ct. 2259 (2014).

[43] For tables and case summarizes demonstrating that no Justice has been a member of all criminal justice decisions in previous Terms of the Roberts Court, see; *2012–2013 Term*, *supra* note 14, at 40; *2011–2012 Term*, *supra* note 14, at 247; *2010–2011 Term*, *supra* note 14, at 327–42; *2009–2010 Term*, *supra* note 14, at 234; *2008–2009 Term*, *supra* note 14, at 7; *2007–2008 Term*, *supra* note 14, at 50–85; *2006–2007 Term*, *supra* note 14, at 1015–42; and *2005–2006 Term*, *supra* note 14, at 519–45.

Term furthers his reputation as an especially influential member of the high court.[44]

Interagreement rates of paired Justices are presented in Tables 3 and 4. Judicial scholars have drawn upon interagreement tables for decades to reveal shared voting tendencies among Justices and to identify potential voting blocs.[45] Classifying Justices as part of a bloc does not indicate they trade votes or even consciously seek to vote with one another. Instead, frequently supporting the same outcome suggests that members of a voting bloc may share certain judicial philosophies and policy preferences.[46]

A bloc exists when the average agreement scores for a set of justices exceeds a threshold known as the Sprague criterion.[47] This criterion is calculated by subtracting the average agreement score for the entire Court from one hundred; the result is divided by two and added to the Court average. That sum is the threshold level for defining a voting bloc.[48] A notable advantage of the Sprague criterion is that when the general rate of agreement is high on the Court—such as in 2013–2014 criminal justice cases[49]—the calculation raises the threshold which avoids confusing broader consensus with voting blocs.[50]

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[44] *See, e.g.*, Epstein & Jacobi, *supra* note 33; Charles Lane, *Kennedy Reigns Supreme on Court: With O'Connor's Departure, Sole Swing Voter Wields His Moderating Force*, WASH. POST, July 2, 2006, A6; Richard Wolf, *From gay marriage to voting law, Kennedy is the key*, USA TODAY, (11:31 PM, June 27, 2013) http://www.usatoday.com/story/news/politics/2013/06/27/supreme-court-athony-kennedy-race-voting-abortion-gay-marriage/2161701/;Robert Barnes, *Justice Kennedy: The Highly Influential Man in the Middle Court's 5 to 4 Decisions Underscore His Power*, WASH. POST, May 13, 2007, A1.

[45] *See, e.g.*, GARRISON NELSON, PATHWAYS TO THE U.S. SUPREME COURT: FROM THE ARENA TO THE MONASTERY 171–72 (2013) (noting The Harvard Review's long history of using interagreement rates in summarizing Supreme Court Terms).

[46] We coded agreement with respect to judgment only. Occasionally, this approach can overestimate the degree of agreement between Justices. For example, four Justices dissented in *Paroline v. United States*. *See* Paroline v. United States, 134 S. Ct. 1710 (2013). While Roberts, Scalia, and Thomas dissented to assert that flaws in the existing law did not permit victim restitution in that case, Sotomayor dissented alone to argue the victim was entitled to more than the majority concluded. *See infra* notes 290–304, and accompanying text for a fuller discussion of *Paroline*. For purposes of Tables 3 and 4, however, Sotomayor is coded as agreeing with the other dissenters, if only in terms of their opposition to the majority opinion; *See, e.g.*, John M. Scheb II, Colin Glennon, & Hemant Sharma, *A Statistical Look at the Supreme Court's 2009 Term*, 7 TENN. J.L. & POL'Y, 7, 12–15 (2011).

[47] JOHN D. SPRAGUE, VOTING PATTERNS OF THE UNITED STATES SUPREME COURT: CASES IN FEDERALISM, 1889–1959, 7 (1968).

[48] *Id.* at 51–61.

[49] *See supra* Table 1 (providing the percentage of cases ending in a unanimous decision).

[50] Saul Brenner, *Ideological Voting on the U.S. Supreme Court: A Comparison of the Original Vote on the Merits with the Final Vote*, 22 JURIMETRICS 287, 289–90 (1982).

TABLE 3:
Interagreement Percentages for Paired Justices in U.S. Supreme Court Criminal Justice Decisions, 2013–2014 Term[51]

	Scalia	Thomas	Alito	Kennedy	Breyer	Sotomayor	Kagan	Ginsburg
Roberts	90.5	90.5	85.7	81.0	81.0	76.2	71.4	66.7
Scalia		90.5	85.7	81.0	71.4	76.2	81.0	76.2
Thomas			95.2	81.0	71.4	66.7	71.4	66.7
Alito				85.7	76.2	61.9	76.2	71.4
Kennedy					90.5	76.2	90.5	85.7
Breyer						85.7	81.0	85.7
Sotomayor							85.7	90.5
Kagan								95.2

Court mean: 80.4
Sprague criterion: 90.2
Voting blocs:
Roberts-Scalia-Thomas: 90.5
Alito-Thomas-Scalia: 90.5*
Alito-Roberts-Thomas: 90.5*
Ginsburg-Sotomayor-Kagan: 90.5*
Ginsburg-Kagan-Kennedy: 90.5*
(*) denotes that the average agreement of the group meets the threshold though one interagreement pair within the subset falls a fraction of a case below the criterion.

Two pairs of Justices (Ginsburg and Kagan; Alito and Thomas) tied for the highest interagreement rate for the 2013–2014 Term. Members of each dyad agreed regarding judgment in all but one criminal justice case.[52] Perhaps not surprisingly, the Justices with the most liberal (Sotomayor) and

[51] Percentages are rounded. Data regard the 21criminal justice cases analyzed in this Article. Assessments regard majority and dissenting positions relative to the Court's judgment only. Positions are not distinguished further by concurring opinions. *See infra* Part III.A–D.

[52] Kagan was in the majority while Ginsburg dissented in *White v. Woodall*. White v. Woodall, 134 S. Ct. 1697 (2014) (concerning sentencing jury instructions regarding a convicted man's decision not to testify during the penalty phase of his trial). Alito was in the majority while Thomas dissented in *Paroline v. United States*. *Paroline*, 134 S. Ct. at 1710 (regarding restitution to a victim of child pornography).

the most conservative voting records (Alito)[53] were the most polarized from an interagreement perspective. However, never before during the Roberts Court era have two Justices failed to agree on every non-unanimous, criminal justice decision like Justices Alito and Sotomayor in the 2013–2014 Term.[54] The paucity of non-unanimous decisions during the most recent Term[55] cautions against overstating this finding, though Alito and Sotomayor agreed in only one non-unanimous decision during the 2012–2013 Term when given far more opportunities.

TABLE 4:
Interagreement Percentages for Paired Justices in U.S. Supreme Court Criminal Justice Non-unanimous Decisions, 2013–2014 Term[56]

	Scalia	Thomas	Alito	Kennedy	Breyer	Sotomayor	Kagan	Ginsburg
Roberts	75.0	75.0	62.5	50.0	50.0	37.5	25.0	12.5
Scalia		75.0	62.5	50.0	25.0	37.5	50.0	37.5
Thomas			87.5	50.0	25.0	12.5	25.0	12.5
Alito				62.5	37.5	0.0	37.5	25.0
Kennedy					75.0	37.5	75.0	62.5
Breyer						62.5	50.0	62.5
Sotomayor							62.5	75.0
Kagan								87.5

Court mean: 48.6
Sprague criterion: 74.3
Voting blocs:
Roberts-Scalia-Thomas: 75.0
Alito-Thomas-Scalia: 75.0*
Alito-Roberts-Thomas: 75.0*
Ginsburg-Sotomayor-Kagan: 75.0*

[53] *See supra* Table 2 (showing Alito with the Term's highest conservative voting percentage and Sotomayor with the lowest).

[54] *See*, *2012–2013 Term*, *supra* note 14, at 42; *2011–2012 Term*, *supra* note 14, at 250; *2010–2011 Term*, *supra* note 14, at 320; *2009–2010 Term*, *supra* note 14, at 236; *2008–2009 Term*, *supra* note 14, at 10; *2007–2008 Term*, *supra* note 14, at 43–4; *2006–2007 Term*, *supra* note 14, at 1000–1; and *2005–2006 Term*, *supra* note 14, at 508.

[55] *See supra* Table 1.

[56] Percentages are rounded. Data regard the eight non-unanimous criminal justice cases analyzed in this Article. Assessments regard majority and dissenting positions relative to the Court's judgment only. Positions are not distinguished further by concurring opinions. *See infra* Part III.B–D.

Ginsburg-Kagan-Kennedy: 75.0*

(*) denotes that the average agreement of the group meets the threshold though one interagreement pair within the subset falls a fraction of a case below the criterion.

The Term produced evidence of several larger voting blocs. The ideological wings of the Court are a bit clearer here than in Table 2. Three different subsets of Justices from the conservative wing of the Court—each with three members—voted in the same direction with respect to judgment sufficiently often for each to be considered a voting bloc.[57] Also, for the second consecutive year, the three women on the Court routinely found themselves on the same side of criminal justice issues.[58]

Much more remarkable is Justice Kennedy's presence in a voting bloc with Justices Ginsburg and Kagan. Although Kennedy's occasional support for liberal outcomes as a "median" and "swing" Justice are well documented, he has never before been part of a criminal justice voting bloc during the Roberts Court era with multiple members of the liberal wing.[59] This unique development and other atypical patterns noted previously underscore the value of examining more closely the Court's criminal justice decisions of the 2013–2014 Term.

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[57] *See supra* Tables 3 and 4 (indicating the following conservative voting blocs: Roberts-Scalia-Thomas; Alito-Thomas-Scalia; and Alito-Roberts-Thomas). One four-member subset including Roberts, Scalia, Thomas, and Alito might be considered a near-bloc with a mean interagreement rate of 89.7 in all criminal justice cases and 72.9 in non-unanimous ones.

[58] *See*, *2012–2013 Term*, *supra* note 14, at 42 (showing that the only bloc of three or more Justices in criminal justice cases that Term was that of Ginsburg, Sotomayor, and Kagan). *See also*, Fairfield & Liptak, *supra* note 32 (reporting on all Supreme Court cases and noting, "In the term that ended in June 2013, the three women on the court—Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan—were tightly bunched on the left side of the array. They cast liberal votes around 70% of the time.").

[59] *See, e.g.*, Epstein & Jacobi, *supra* note 33, at 40–1 (". . . there are super medians—Justices so powerful that they are able to exercise significant control over the outcome and content of the Court's decisions. Justice Kennedy was one [in the 2006–2007 Term]. . . ."); HELEN J. KNOWLES, THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY 4 (2009) (asserting that "there is no escaping the fact that for most of his two decades on the Supreme Court Kennedy has been the model of a median justice."); and Barnes, *supra* note 44 (quoting Richard Dieter, "So Justice Kennedy is even more of an important swing vote than he was before"); *See*, *2012–2013 Term*, *supra* note 14, at 42; *2011–2012 Term*, *supra* note 14, at 249–50; *2010–2011 Term*, *supra* note 14, at 317, 320; *2009–2010 Term*, *supra* note 14, at 235–36; *2008–2009 Term*, *supra* note 14, at 9–10; *2007–2008 Term*, *supra* note 14, at 43–4; *2006–2007 Term*, *supra* note 14, at 1000–01; and *2005–2006 Term*, *supra* note 14, at 507–08.

III. CASE DECISIONS

A. Unanimous Decisions

As noted, the Court handed down an unusually large percentage of criminal justice decisions without dissent during the 2013–2014 Term.[60] All four criminal justice opinions authored by the Chief Justice this Term were unanimous rulings, as were both opinions written by Justice Sotomayor and the only criminal justice opinion authored by Justice Breyer.[61] We begin with a discussion of the eight conservative, unanimous rulings.[62]

The Court's conservative, unanimous ruling in *Burt v. Titlow* refused habeas relief under the Anti-terrorism and Effective Death Penalty Act (AEDPA).[63] In this ineffective assistance of counsel case, the Court held that federal courts should use the "doubly deferential" standard which gives the benefit of doubt to defense counsel and to lower court rulings regarding counsel competence, and advises appellate courts to assume counsel's performance was adequate absent indicators otherwise.[64] Here, the Court held that the federal court should have accepted the state court's finding that counsel was not ineffective.[65] According to Justice Alito's majority opinion (for all Justices except Justice Ginsburg who concurred in judgment),[66] the AEDPA does not permit federal courts to "so casually second-guess the decisions of their state-court colleagues or defense attorneys."[67]

The Court also made the use of deadly force to stop high speed car chases easier to justify in *Plumhoff v. Rickard,* another conservative ruling authored by Justice Alito.[68] Police chased Donald Rickard and his passenger for several miles.[69] Police attempted to stop Rickard's car using a rolling roadblock but were unsuccessful.[70] Police pursued Rickard through traffic at speeds that at times surpassed 100 miles per hour.[71] He was nearly cornered in a parking lot where he continued to attempt escape.[72] At that point, police

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60 *See supra* note 22, and accompanying text.

61 Robers v. United States, 134 S. Ct. 1854 (2014); United States v. Apel, 134 S. Ct. 1144 (2014); *Bond*, 134 S. Ct. at 2077 (2014); *McCullen*, 134 S. Ct. at 2518; *Riley*, 134 S. Ct. at 2473; Kansas v. Cheever, 134 S. Ct. 596 (2013); United States v. Castleman, 134 S. Ct. 1405 (2014);

62 Burt v. Titlow, 134 S. Ct. 10 (2013); Plumhoff v. Rickard, 134 S. Ct. 2012 (2014); Walden v. Fiore, 134 S. Ct. 1115 (2014); *Cheever*, 134 S. Ct. at 596; *Apel*, 134 S. Ct. at 1144 (2014); *Castleman*, 134 S. Ct. at 1405; Loughrin v. United States, 134 S. Ct. 2384 (2014); *Robers*, 134 S. Ct. at 1854 (2014).

63 *Burt*, 134 S. Ct. at 17–8.

64 *Id*. at 13.

65 *Id*. at 15–7.

66 *Id*. at 24 (Ginsburg, J. concurring in judgment).

67 *Id*. at 13.

68 *Plumhoff*, 134 S. Ct. at 2012 (2014).

69 *Id*. at 2017.

70 *Id*.

71 *Id*.

72 *Id*.

exited their cruisers and first fired three shots at Rickard's car.[73] When those failed to halt Rickard, police fired several more shots, eventually killing both Rickard and the passenger.[74] Rickard's surviving daughter brought suit against the officers and other government officials asserting they had violated her father's Fourth and Fourteenth Amendment rights by using excessive force.[75] The officers made a claim of qualified immunity but the district court refused to grant them summary judgment.[76] The district court and the circuit court found a Fourth Amendment violation and the Supreme Court granted certiorari.[77]

Writing for the Court, Justice Alito held that the officers did not violate constitutional protections nor did they violate clearly established law.[78] First, Alito noted that Fourth Amendment excessive force cases are governed by determining if the police's actions were excessive given the totality of the circumstances from the viewpoint of a "reasonable officer on the scene."[79] Rickard's daughter argued that the standard was violated twice because the officers did not have the right to use deadly force to stop the chase[80] and that they used excessive force by firing too many shots at the car.[81] Alito found both arguments unpersuasive. He held that police can use deadly force to stop a chase that threatens the lives of innocent bystanders.[82] Further, Alito noted that if officers were authorized to use deadly force, the police do not have to stop until the threat is over.[83] Since Rickard at no point attempted to surrender, the second round of shots were justified.[84] The presence of a passenger does not change the argument as Alito asserted it was Rickard and not the police who endangered the passenger.[85] Finally, regarding the question of qualified immunity, Alito found that the police would have been entitled to immunity even if the Court had ruled the Fourth Amendment was violated because the police had not violated clearly established law.[86]

The Court also handed down a conservative ruling protecting law enforcement from suits filed under *Bivens v. Six Unknown Federal Narcotics Agents* by asserting that the lower court did not have jurisdiction over the law

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73 *Id*. at 2018.
74 *Plumhoff*, 134 S. Ct. at 2018.
75 *Id*.
76 *Id*.
77 *Id*.
78 *Id*. at 2021–22.
79 *Id*. at 2020.
80 *Plumhoff*, 134 S. Ct. at 2021.
81 *Id*.
82 *Id*. at 2021–22.
83 *Id*. at 2022.
84 *Id*.
85 *Id*.
86 *Plumhoff*, 134 S. Ct. at 2022–23.

enforcement officer in *Walden v. Fiore*.[87] Justice Thomas wrote the Court's opinion.

In *Kansas v. Cheever* the Court ruled that court-ordered psychiatric examinations may be used by the state to rebut a defendant's claim of intoxication without violating the Fifth Amendment's protection against self-incrimination.[88] In this case, Scott Cheever shot and killed a local sheriff following a night in which Cheever cooked and consumed methamphetamine.[89] Before the case proceeded to trial, Kansas's death penalty scheme was deemed unconstitutional by the state high court.[90] Unable to obtain a death sentence for Cheever, the state dismissed the charges and allowed federal prosecutors to charge Cheever under the Federal Death Penalty Act of 1994.[91] Because Cheever indicated that he intended to introduce evidence that he was intoxicated during the commission of the murder thereby reducing his culpability, the Court ordered Cheever undergo a psychiatric evaluation consistent with Federal Rules of Criminal Procedure.[92] Eventually, the federal case was dismissed without prejudice.[93] By then, the United States Supreme Court had found Kansas's death penalty procedures constitutional; Kansas decided to try Cheever in state court.[94]

At trial, Cheever introduced expert testimony that his long-term drug use made him incapable of forming premeditation.[95] The state, in rebuttal and over defense's objections, introduced the psychiatric evaluation conducted during the federal trial.[96] Defense's objection centered on the constitutional claim that the evaluation was not voluntary and thus its introduction violated Cheever's Fifth Amendment right against self-incrimination.[97] The trial court allowed the rebuttal testimony, the jury found Cheever guilty and recommended a death sentence and Cheever appealed.[98] The Kansas Supreme Court agreed with Cheever and United States Supreme Court granted certiorari.[99]

Writing for the Court, Justice Sotomayor found that Cheever's Fifth Amendments rights had not been violated. Justice Sotomayor noted that the Court had previously ruled in *Estelle v. Smith* that court-ordered psychiatric evaluations could not be used against a defendant when the defendant did not

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87 *Walden*, 403 U.S. 388.
88 *Cheever*, 134 S. Ct at 603.
89 *Id*. at 599.
90 *Id.*
91 *Id*.
92 *Id*.
93 *Id*.
94 *Cheever*, 134 S. Ct. at 599.
95 *Id*. at 600.
96 *Id*.
97 *Id*.
98 *Id*.
99 *Id*.

initiate the evaluation or introduce psychiatric evidence herself.[100] However, the Court clarified in *Buchanan v. Kentucky* that this type of testimony could be used as rebuttal evidence when the defendant introduced testimony related to a mental capacity defense.[101] Reaffirming the ruling in *Buchanan*, the Court found the state may rebut a defendant's mental state defense using court-ordered evaluations.[102]

The Court also handed down a conservative ruling in *United States v. Apel*.[103] Chief Justice Roberts, writing for a unanimous Court, held that for the purposes of federal law, individuals barred from military installments are barred from all areas under the commanding officers' area of responsibility, including those designated free speech protest areas and parts of highways.[104] When defense counsel and noted constitutional scholar Erwin Chemerinsky attempted to focus on First Amendment claims during oral argument, the Justices appeared more interested in the property ownership aspect of the case.[105]

In *United States v. Castleman* the Court further defined the meaning of the words "physical force" in a unanimous, conservative ruling written by Justice Sotomayor.[106] Federal law holds that anyone convicted of a misdemeanor crime of domestic violence is barred from obtaining or engaging in commercial activity related to fire arms and ammunition.[107] A misdemeanor domestic violence offense is defined as one that "has, as an element, the use or attempted use of physical force."[108] James Castleman pleaded guilty to the state charge of "intentionally or knowingly causeing bodily injury to" the mother of his child.[109] Years later, he was indicted by the federal government for trafficking weapons; he was charged with possessing a firearm after being convicted of a misdemeanor crime of domestic violence.[110] Castleman argued that the federal law did not apply to him because his state crime did not involve physical force and, thus, was not a misdemeanor crime of domestic violence under federal law.[111] Justice Sotomayor held that absent any other indications, Congress intended to use the common-law meaning of "force."[112] The common-law definition includes

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100 *Cheevers,*134 S. Ct. at 600 (*citing* Estelle v. Smith, 451 U.S. 454 (1981)).
101 *Id.* at 601 (*citing* Buchanan v. Kentucky, 483 U.S. 402, 423-24 (1987)).
102 *Id*. at 602–03.
103 *Cheever*, 134 S. Ct. 1144 (2014).
104 *Id*. at 1153.
105 *See, e.g.*, Adam Liptak, *Dismissing Speech Claims, Justices Turn to Plain Line-Drawing*, N.Y. TIMES, Dec. 5, 2013, at A20.
106 *Castleman*, 134 S. Ct. at 1405.
107 *Id*. at 1409.
108 *Id*.
109 *Id*.
110 *Id*.
111 *Id*.
112 *Castleman*, 134 S. Ct. at 1410.

offensive touching and, under this definition of physical force, Castleman's state conviction qualified as a misdemeanor crime of domestic violence.[113]

In *Loughrin v. United States*, a decision written by Justice Kagan, the Court ruled that the federal bank fraud statute did not require the government to prove the defendant intended to defraud a financial institution.[114] Rather, a showing that the defendant intentionally engaged in criminal conduct to obtain property under control of the bank was sufficient to support the conviction.[115]

In the final conservative criminal justice decision without dissent during the 2013–2014 Term, the Court clarified in *Robers v. United States* the obligations of convicted criminals under the Mandatory Victims Restitution Act of 1996 (MVRA).[116] In this case, Benjamin Robers committed mortgage fraud by misrepresenting his income and intent to repay loans. He obtained approximately $470,000 worth of loans from banks, and when he failed to make the loan payments, the banks foreclosed and eventually sold the properties for about $280,000.[117] When Robers failed to make the loan payments, the banks foreclosed and eventually sold the properties for about $280,000.[118] Robers was ordered to pay restitution of about $220,000, the difference between the original loans and the sales prices minus fees.[119] Robers appealed the restitution amount, arguing that when the banks foreclosed, part of their property was returned and, according to statute, the fair market value of the properties—which was higher than the amount for which the houses sold—should have been used to calculate restitution.[120] In a decision written by Justice Breyer, the Court disagreed and held that the banks' property in this regard was the loan amount rather than the collateral; thus, the actual sale prices should be used to calculate the restitution amount and not the market value of the homes at the time of foreclosure.[121]

The Court handed down five unanimous, liberal decisions in criminal justice cases during the 2013–2014 Term. Interestingly, members of the Court's conservative wing authored all five of these liberal decisions.[122]

In an important liberal ruling that law professor Jeffrey Rosen called "a landmark decision translating the Fourth Amendment into a digital

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113 *Id*. at 1413.
114 *Loughrin*, 134 S. Ct. at 2389–90.
115 *Id*. at 2390–91.
116 *Robers*, 134 S. Ct. at 1854.
117 *Id*. at 1856.
118 *Id*.
119 *Id*.
120 *Id*. at 1857.
121 *Id*. at 1858–59.
122 Chief Justice Roberts authored *Bond*, 134 S. Ct. 2077; *McCullen*, 134 S. Ct. 2518; and *Riley*, 134 S. Ct. 2473. Justice Scalia wrote for the Court in Burrage v. United States, 134 S. Ct. 881 (2014); and Justice Thomas authored the Court's decision in Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014).

age,"[123] the Court ruled in *Riley v. California* that cell phones cannot be viewed by police under the incident to a valid arrest exception to the warrant requirement. [124] David Riley was arrested for possession of concealed weapons after being stopped for driving with expired registration tags.[125] During a search incident to the arrest, officers seized Riley's smart phone.[126] A police officer specializing in gangs found information on the phone implicating Riley in gang activity.[127] Based on this evidence, police filed additional charges regarding an earlier gang related shooting and other weapons charges. [128] Riley moved to suppress the evidence from the cell phone, holding that his Fourth Amendment rights had been violated because the search was not justified by exigent circumstances.[129] Since the crimes were allegedly committed while involved in gang activity, the government sought and received an enhanced sentence.[130]

Chief Justice Roberts wrote the Court's unanimous ruling and held the searches were invalid under the Fourth Amendment.[131] Searches without a warrant must stem from one of the specific exceptions established by the Court. Here, the searches were conducted using the incident to a valid arrest exception.[132]

But, Chief Justice Roberts wrote, searches incident to a valid arrest are predicated on either a need to ensure officer safety or to ensure that evidence will not be destroyed.[133] As a result, searches incident to a valid arrest are limited by spatial considerations; officers may search a person and items within the person's reach to both secure evidence and ensure safety. [134] Chief Justice Roberts also noted that the Court later added that the reasonableness of searches of a person incident to an arrest was not

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[123] *How the Supreme Court Changed America This Year*, POLITICO MAG., July 1, 2014. http://www.politico.com/magazine/story/2014/07/how-the-supreme-court-changed-america-this-year-108497.html#.U-fF3D8qv9o (Last visited Aug. 10, 2014).

[124] *Riley*, 134 S. Ct. at 2473. *Riley v. California* was decided together with United States v. Wurie, No. 13-212.

[125] *Id*. at 2480.

[126] *Id*.

[127] *Id*. at 2481.

[128] *Id*.

[129] *Id*.

[130] *Riley*, 134 S. Ct. at 2481.

[131] In the companion case, Brima Wurie was arrested after officers observed what appeared to be a drug transaction. Upon arrest, officers seized two cell phones. One of those phones, a flip phone, received several phone calls from a location that was identified as "my house." The police traced the number to an apartment, obtained a warrant, and eventually seized illegal drugs, drug paraphernalia, a weapon, and money. Wurie moved to suppress the evidence from his apartment arguing that the evidence resulted from an illegal search in violation of the Fourth Amendment. Both Riley and Wurie lost, the United States Supreme Court granted certiorari and consolidated the two cases. *Riley,*134 S. Ct. at 2481-82.

[132] *Id*. at 2482.

[133] *Id*. at 2483

[134] *Id.* (citing Chimel v. California, 395 U.S. 752 (1969)).

dependent on the probability of finding evidence or weapons.[135] Finishing his review of relevant precedents, Chief Justice Roberts wrote that the Court's 2009 decision in *Arizona v. Gant* recognized that the incident to an arrest exception allowed police to search cars "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."[136] However, the attributes of car searches permitted the search of vehicles' passenger compartments when it was reasonable to believe that evidence of the offense leading to the arrest might be discovered in the vehicle.[137]

Applying these concepts to the search of a cell phone, Chief Justice Roberts recognized that cell phones are a pervasive part of American life and that that these technologies were "inconceivable" when the prior cases were decided.[138] He and the Court refused to extend the *Robinson* decision to cell phones because cell phones contain an incredible amount of personal information and searches of them do not resemble the less intrusive physical searches justified in *Robinson*.[139] Using *Chimel*, the Court noted further that obtaining information from cell phones does not aid in ensuring officer safety, and that preventing the destruction of evidence was an unpersuasive justification because once the cell phone is in police custody, the defendant cannot remove information from the phone.[140] Finally, the *Gant* standard does not apply because the reduced expectation of privacy and increased needs of law enforcement regarding vehicles do not match the cell phone context.[141]

The Chief Justice and the Court also noted that substantial privacy interests are jeopardized when cell phones are searched given the amount of personal information such phones often contain.[142] The unanimous decision required police in these instances, generally, to obtain a warrant before accessing the information on a cell phone.[143]

In another unanimous, liberal decision authored by Chief Justice Roberts, the Court upheld rights under the First Amendment in *McCullen v. Coakley*.[144] The case deals with enforcement of a Massachusetts law that made it illegal to stand within thirty-five feet of any location where abortions are performed, other than hospitals.[145] The law contained exceptions for

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[135] *Riley*, 134 S. Ct. at 2483–84 (citing United States v. Robinson, 414 U.S. 218 (1973)).

[136] *Id.* at 2484 (quoting Arizona v. Gant, 556 U.S. 332, 343 (2009)).

[137] *Id.*

[138] *Id*.

[139] *Id*. at 2485.

[140] *Id.* at 2485–86.

[141] *Riley*, 134 S. Ct. at 2492.

[142] *Id.* at 2490.

[143] *Id*. at 2493. The Court made no distinction between the relatively simple flip phone used by Wurie and the more advanced smart phone used by Riley.

[144] *McCullen*,134 S. Ct. at 2518.

[145] *Id.* at 2526.

those with business within the location, but otherwise created a strict buffer zone.[146] Here, Eleanor McCullen, a "sidewalk counselor," stood outside abortion clinics and offered those entering information regarding alternatives to abortion. McCullen argued that direct eye contact is necessary to make these encounters effective and the Massachusetts law significantly restricted her ability to counsel.[147] Other sidewalk counselors made similar arguments and sued the state in 2008, arguing that the statute violated their First Amendment right to free speech.[148]

Writing for the majority, Chief Justice Roberts found that public spaces have long been regarded as areas available for the free discussion of ideas.[149] As such, the government's ability to limit speech on the public walkways is limited.[150] Although the government can regulate the time, place and manner of speech, laws restricting speech must be content neutral and narrowly tailored to meet significant government interest.[151]

Addressing first the neutrality of the law, Chief Justice Roberts held that the law is content neutral and thus did not need to be evaluated using the strict scrutiny standard.[152] However, Chief Justice Roberts found the law was not narrowly tailored to meet significant government objectives.[153] The law forced street counselors to stand far away from their intended subjects, thereby reducing the effectiveness of their message.[154] Therefore, the Court concluded that the law "burden[s] substantially more speech than necessary to achieve the Commonwealth's asserted interests" of maintaining public safety.[155]

In another case raising First Amendment issues, the Court's ruling in *Susan B. Anthony List v. Driehaus* held that an interest group could sue to enjoin enforcement of an Ohio law making it a crime to present certain false statements during an election before the group was prosecuted for violating the law.[156] Here, an organization called the Susan B. Anthony List characterized an Ohio congressman's support for the Affordable Care Act as support for abortions funded at taxpayer expense.[157] The congressman, Steve Driehaus, filed a complaint with the Ohio Elections Commission, asserting that the Anthony group had violated the Ohio law by making false statements.[158]

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146 *Id*.
147 *Id.* at 2527.
148 *Id*. at 2528.
149 *Id.* at 2529.
150 *McCullen*, 134 S. Ct. at 2529.
151 *Id*.
152 *Id*. at 2531–34.
153 *Id*. at 2535.
154 *Id*.
155 *Id*. at 2537.
156 *Susan B. Anthony List*, 134 S. Ct. at 2345.
157 *Id*. at 2339.
158 *Id*.

Driehaus lost his reelection bid and dropped the complaint, but Susan B. Anthony List filed suit in federal court arguing that the Ohio law violated the First and Fourteenth Amendments by criminalizing speech.[159] Once the complaint by Driehaus was dismissed, Susan B. Anthony List amended the suit alleging that the Ohio law was unconstitutional as it had an impermissible and unconstitutional chilling effect on their rights to free speech, especially given the group's intention to continue to make similar statements about other politicians in the future.[160]

The lower federal courts, consolidating this case with another from the Coalition Opposed to Additional Taxing and Spending, held that the litigants failed to show actual harm for the purposes of standing and determinations of ripeness, and as a result, found the cases were not justiciable.[161]

Justice Thomas—writing for a unanimous Court—reversed, and held that the litigants had shown sufficiently that the threat of prosecution impacted their behavior.[162] Although the Court did not resolve the central question dealing with the constitutionality of criminalizing false statements during an election cycle, the ability of both groups to sue should ensure that this issue is addressed by the lower courts.

In *Burrage v. United States*, the Court considered mandatory-minimum sentences under the Controlled Substances Act (CSA). Joshua Banka died of a drug overdose after binging on multiple drugs, including heroin purchased from Marcus Burrage.[163] Although the medical examiners could not determine if Banka would have lived but for the fact that he took heroin, and despite the determination that Banka died from "mixed-drug intoxication," Burrage was sentenced to twenty years in prison for selling heroin to Banka under the CSA.[164] Although the defense argued that the government had to show that the heroin was "but-for cause of death," the trial court held instead that the government merely had to show that the heroin was a contributing factor to Banka's death.[165]

Writing for the Court, Justice Scalia held that Burrage could not be held liable for enhanced sentencing unless the heroin was the cause of Banka's death.[166] Since the medical experts could not determine if death would not have resulted without the heroin, the sentence enhancement did not apply. Also, Justice Scalia held that the jury must decide if the victim's death was a foreseeable result of Burrage's drug dealing.[167] Justice Scalia held that based on past decisions, all findings that increase the mandatory

159 *Id.* at 2340.
160 *Id*.
161 *Id*. at 2340–41.
162 *Susan B. Anthony List*, 134 S. Ct. at 2343–46.
163 *Burrage*, 134 S. Ct. 881 at 885.
164 *Id*. at 886.
165 *Id*.
166 *Id*. at 892.
167 *Id*. at 887.

minimum sentences to which defendants are exposed must be submitted to a jury and found beyond a reasonable doubt.[168]

In perhaps the most awaited criminal justice decision of the term, Chief Justice Roberts delivered the Court's ruling in *Bond v. United States*.[169] Although all nine Justices voted to overturn Bond's conviction, three did so based on constitutional grounds far removed from the statutory arguments used by remaining six Court members. This has prompted some to classify the decision as unanimous while others characterize it as a six-to-three vote.[170] We list this as a unanimous liberal decision given that all nine Justices ruled in Bond's favor.

In 1997, the President signed and the Senate ratified the Convention on the Prohibition of the Development, Production, Stock-piling, and Use of Chemical Weapons and on Their Destruction.[171] This treaty was not self-executing and required congressional legislation to implement. In 1998, Congress passed the Chemical Weapons Convention Implementation Act which prohibited any individual from knowingly using, developing or acquiring chemical weapons.[172] The Implementation Act defined chemical weapons broadly as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals . . ." when used for something other than peaceful purposes.[173]

The case began in 2006 when Carol Ann Bond discovered that her husband and her best friend, Myrlinda Haynes, were having an affair that resulted in a pregnancy.[174] Bond decided to get revenge by placing chemical irritants on Haynes's car door, mailbox and door knob.[175] Although the chemicals used could be deadly, Bond's undisputed intent was to cause Haynes discomfort.[176] Haynes, however, saw the substance in each instance but one and avoided contact.[177] On the one occasion that Haynes touched the irritant, she suffered a minor thumb burn which she treated by washing her hands.[178] Although the local police failed to respond to Haynes complaints, federal postal inspectors placed surveillance cameras around Haynes's home

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[168] *Id*. at 887 (citing Alleyne v. United States, 133 S. Ct. 2151 (2013); Apprendi v. New Jersey, 530 U.S. 466 (2000)).

[169] *Bond*, 134 S. Ct. at 2077.

[170] *See, e.g.*, *Bond v. United States,* THE OYEZ PROJECT AT IIT CHICAGO-KENT COLLEGE OF LAW. http://www.oyez.org/cases/2010-2019/2013/2013_12_158 (treating the decision as six-to-three) (last visited Aug.10, 2014); *Bond v. United States*, SCOTUSBLOG. http://www.scotusblog.com/case-files/cases/bond-v-united-states-2/ (classifying the decision as unanimous) (last visited Aug. 10, 2014).

[171] *Bond*, 134 S.Ct. at 2083.

[172] *Id*.

[173] *Id*. at 2085.

[174] *Id*.

[175] *Id*.

[176] *Bond*, 134 S. Ct. at 2083.

[177] *Id*. at 2085.

[178] *Id*.

and caught Bond placing the chemicals on Haynes's mail and inside her car's muffler.[179] The federal government charged Bond with mail theft and with a violation of the federal Chemical Weapons Ban treaty through the Implementation Act. Bond pleaded guilty after reserving her ability to challenge the constitutionality of her arrest under the Implementation Act.[180] On appeal, Bond argued that the Implementation Act violated the 10th Amendment by encroaching on states' rights.[181] She furthered argued that her conduct was not covered under the treaty because the treaty intended to cover "warlike" activities and not the criminal conduct exhibited here.[182] The Third Circuit Court of Appeals rejected her arguments and the Supreme Court granted certiorari.[183]

Writing for Justices Kennedy, Breyer, Ginsburg, Sotomayor, and Kagan, Chief Justice Roberts avoided the constitutional questions surrounding Congress's ability to implement non self-executing treaties on its domestic population by instead resolving the conflict on statutory grounds.[184] When acts intended to implement treaties are passed, those acts must conform with the scheme of federalism the Constitution establishes. In order to assume that Congress intended to reach purely local crimes and interfere with the states' policing powers, there must be clear indication of that intent within the statute. Finding none, Roberts concluded that Congress did not intend to cover local crimes.[185]

Further, Roberts noted that a fair reading of the Implementation Act indicated it is not as broad as prosecutors in this case asserted. Rather, Roberts noted there is a large difference between using a chemical weapon and using a "chemical in a way that caused some harm."[186] When taken in that light, the chemicals used here, while certainly used to cause harm, were not used in a situation that most would consider chemical warfare and, as such, were not covered by the Implementation Act.[187] Nor would the spreading of chemical irritants on a mailbox, with the intent to cause a rash, be considered a warlike activity conducted during "combat."[188] Although use of the same chemicals to poison the city's water would be considered a chemical weapons attack and thus could be prosecuted using the Implementation Act, Bond's situation is so far removed from this scenario

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179 *Id*.
180 *Id*. at 2085–6.
181 *Id*. at 2086.
182 *Bond*, 134 S. Ct. at 2086.
183 *Id*. This was the second time the Court granted certiorari regarding these events. The Court previously ruled in 2011 that individuals and not just states have standing to raise Tenth Amendment challenges to federal law. Bond v. United States, 564 U.S. _____ (2011).
184 *Bond*, 134 S. Ct. at 2088.
185 *Id*. at 2088–91.
186 *Id*. at 2090.
187 *Id.* at 2091.
188 *Id*. at 2090–91.

that to using the Implementation Act to cover her conduct exceeds congressional intent.[189]

Chief Justice Roberts further rejected the government's interpretation of what constitutes chemical weapons. Roberts noted that the government's definition would render "everything from the detergent under the kitchen sink to the stain remover in the laundry room" chemical weapons.[190] This broad reading is not consistent with what the average person considers to constitute a chemical weapon.[191]

In short, Roberts's decision relied a great deal on a 'I-know-it-when-I-see-it' type of analysis holding that the average person understands chemical weapons to cover, for instance, the use of mustard gas on enemy troops or on a domestic population for the purposes of terrorism, but would not recognize Bond's behavior as anything more than "an act of revenge born of romantic jealousy."[192] By ruling that the prosecution of Bond exceeded the scope of the Implementation Act as intended by Congress, Roberts and the majority overturned Bond's conviction while avoiding the controversial issues related to federalism and Congress's treaty powers.[193]

Justice Scalia filed a concurring opinion that was joined by Justice Thomas and in part by Justice Alito.[194] Scalia agreed with the majority that Bond's conviction must be overturned, but based his argument instead on constitutional grounds holding that Congress exceeded its authority by passing the Implementation Act in the first place.[195] Scalia began by asserting that Bond's behavior was covered by the Implementation Act. Bond used chemicals for non-peaceful purposes with the intent to cause injury, satisfying the mandates of the Act.[196] Because the Act covers Bond's actions, the question the Court should have addressed is whether Congress has the ability to pass sweeping legislation that provides the legislature with the type of policing powers generally reserved to the states, and then apply legislation to local criminal activity.[197]

After mocking the majority's interpretation of the Implementation Act as not covering Bond's actions, Scalia turned to the constitutional issue. Here, Scalia took issue with Court's 1920 ruling in *Missouri v. Holland*[198] that held the Necessary and Proper Clause allows Congress to pass legislation to implement valid treaties.[199] *Holland's* landmark ruling could be interpreted as providing Congress enormous power to implement

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189 *Id*. at 2091.
190 *Bond*, 134 S. Ct. at 2091.
191 *Id.* at 2090.
192 *Id*. at 2090–91.
193 *Id.* at 2092–93.
194 *Id*. at 2094 (Scalia, J., concurring).
195 *Id*. at 2099.
196 *Bond*, 134 S. Ct. at 2094.
197 *Id*.
198 Missouri v. Holland, 252 U.S. 416 (1920).
199 *Bond*, 134 S. Ct. at 2098.

international treaties in the domestic sphere. For example, "By negotiating a treaty and obtaining the requisite consent of the Senate, the President…may endow Congress with a source of legislative authority independent of the powers enumerated in Article I."[200]

Scalia found fault with such a conceptualization. Instead, Scalia argued that Congress has the ability to make all laws necessary and proper for *making* treaties but, because treaty implementation in not one of Congress's enumerated powers, not for executing them.[201] The power to make treaties is not synonymous with the power to implement those treaties and the use of *Holland*, according to Scalia, to treat the two activities as both falling under Congress's implied powers conflicts with constitutional limits on federal authority.[202]

Justice Scalia warned that if the treaty making power were not limited based on its subject matter, Congress would be able to regulate citizens' activities through treaty implementation by obtaining policing powers generally left to the states.[203] For example, if Congress wanted to again ban the possession of guns near schools—something the Court ruled in *United States v. Lopez* was beyond Congress's powers under the Commerce Clause—a treaty could be ratified with another nation establishing that neither nation would allow the bringing of weapons to a school.[204] Congress then could pass a law implementing that treaty and circumvent *Lopez*.[205] Seeing this type of congressional activity as a violation of the principles of federalism, Justice Scalia found the use of the Implementation Act against Bond to be unconstitutional.[206]

Justice Thomas also filed an opinion concurring in judgment that was joined in full by Justice Scalia and in part by Justice Alito.[207] Justice Thomas wrote separately to express his view "that the Treaty Power is itself a limited federal power" in addition to limits on Congress's authority under the Necessary and Proper Clause.[208] Justice Thomas closes by emphasizing the need for the Court to address the bounds of the Treaty Power given the appropriate case, and seems to signal to interested parties his willingness to take up this task if the issue is brought to the Court.[209]

Justice Alito's opinion concurring in judgment also asserted that the issue in this case regarded the constitutionality of the Implementation Act.[210] Justice Alito maintained that any reading of the Convention that "obligate[s]

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200 *Id*. at 2099 (quoting Lawrence Tribe).
201 *Id*. at 2098–89.
202 *Id*. at 2099–2100.
203 *Id. at* 2099–2101.
204 *Id.* at 2100 (discussing *United States v. Lopez*, 514 U.S. 549 (1995)).
205 *Bond*, 134 S. Ct. at 2100. (Scalia, J., concurring).
206 *Id*. at 2102.
207 *Id*. at 2102. (Thomas, J., concurring).
208 *Id*. at 2102–03.
209 *Id*. at 2110–11.
210 *Id*. at 2111 (Alito, J., concurring).

the United States to enact domestic legislation criminalizing conduct of the sort at issue in this case, which typically is the sort of conduct regulated by the States . . . exceeds the scope of the treaty power."[211] Thus, all three Justices concurring in judgment would reverse Bond's conviction but would do so based on constitutional grounds rather than on a reading of statutory intent.

B. Seven-to-Two Decision

The 2013–2014 Term marked the first Term during the Roberts Court era in which no criminal justice case was decided with a single dissent,[212] and for the first time since the 2006–2007 Term, only one ended in a seven-to-two vote.[213] In the sole criminal justice case decided seven-to-two this Term, the outcome favored the criminally convicted.

Specifically, the Court's ruling in *Rosemond v. United States*[214] held that the trial court erred in its jury instructions regarding the crime of aiding and abetting. Justus Rosemond and one other male and a female were involved in a drug deal during which either Rosemond or the other male fired a weapon.[215] Because the identity of the shooter was in dispute, the government charged Rosemond both with using a gun in the commission of a drug crime and with aiding and abetting the use of a gun during a drug offense.[216] The trial court judge instructed the jury that they could find Rosemond guilty of aiding and abetting if "(1) the defendant knew his cohort used a firearm in the drug trafficking crime, and (2) the defendant knowingly and actively participated in the drug trafficking crime."[217] The jury convicted using these instructions and Rosemond appealed.[218]

The Court, in an opinion written by Justice Kagan and joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer and Sotomayor in full, and by Justice Scalia in part, held that the jury instructions were faulty.[219] The Court noted that a defendant must have advance knowledge that an accomplice carried a firearm to the planned illegal activity.[220] Without that finding, the defendant cannot have knowingly aided the use of a firearm. The Court's decision provides a much needed

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[211] *Bond*, 134 S. Ct. at 2111 (Alito, J., concurring).

[212] *See 2012–2013 Term*, *supra* note 14, at 38; *2011–2012 Term*, *supra* note 14, at 244; *2010–2011 Term*, *supra* note 14, at 312; *2009–2010 Term*, *supra* note 14, at 230; *2008–2009 Term*, *supra* note 14, at 4; *2007–2008 Term*, *supra* note 14, at 38; *2006–2007 Term*, *supra* note 14, at 994; and *2005–2006 Term*, *supra* note 14, at 499.

[213] *See 2006–2007 Term*, *supra* note 14, at 994.

[214] Rosemond v. United States, 134 S. Ct. 1240 (2014).

[215] *Id*. at 1243.

[216] *Id*. at 1243–44.

[217] *Id*. at 1244.

[218] *Id*.

[219] *Id*. at 1242.

[220] *Rosemond*, 134 S. Ct. at 1249.

clarification of the law of aiding and abetting given the conflicting interpretations among the circuit courts.[221] Here, the jury's verdict was vacated and the case remanded.[222]

Justice Alito, joined by Justice Thomas, filed an opinion concurring in part and dissenting in part. Although Alito agreed with much of the Court's analysis, he disagreed with the notion that the burden of proof falls with the government to show that the defendant had prior knowledge of the presence of a firearm at the crime.[223]

C. Six-to-Three Decisions

The Court handed down three decisions ending in a six-to-three vote during the 2013–2014 Term.[224] All three resulted in a conservative outcome from which Justice Sotomayor dissented.

The Court held in *Kaley v. United States* that when assets have been seized before trial in response to a grand jury's indictment, defendants do not have the right to contest the grand jury's probable cause determination.[225] The defendants were accused of selling stolen medical equipment. Based on a grand jury's indictment, the government seized the defendants' assets, including those intended to be used to pay legal fees.[226] Defendants challenged the seizure and attempted to re-litigate the probable cause determination by the grand jury.[227] Writing for Justices Thomas, Scalia, Alito, Kennedy, and Ginsburg, Justice Kagan found they had no right to do so.[228]

Chief Justice Roberts, joined by Justices Breyer and Sotomayor, dissented,[229] arguing that defendants have the right to challenge forfeiture, especially where those funds are intended to pay for legal counsel.[230] Roberts wrote that the assistance of counsel, "In many ways…is the most precious right a defendant has, because it is his attorney who will fight for the other rights the defendant enjoys."[231] This marks the first criminal justice case in which Chief Justice Roberts dissented when all of his fellow conservative colleagues (Justices Scalia, Thomas, Alito and Kennedy) were in the majority.[232]

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[221] *Id*. at 1245.

[222] *Id*. at 1252.

[223] *Id.* at 1252–53 (Alito, J., concurring in part, dissenting in part).

[224] Kaley v. United States, 134 S. Ct. 1090 (2014); Fernandez v. California, 134 S. Ct. 1126 (2014); and *White*, 134 S. Ct. 1697 (2014).

[225] *Kaley*, 134 S. Ct. at 1090.

[226] *Id*. at 1095–96.

[227] *Id*. at 1096.

[228] *Id*. at 1105.

[229] *Id*. at 1105 (2014) (Roberts, C.J. dissenting).

[230] *Id*. at 1105–6.

[231] *Kaley*, 134 S. Ct. at 1107.

[232] In only one other criminal justice case—Danforth v. Minnesota—has Chief Justice Roberts dissented when Justices Scalia, Thomas and Alito were in the majority. In

White v. Woodall also resulted in a conservative, six-to-three ruling.[233] The case addressed Fifth Amendment protections against self-incrimination during the penalty phase of a capital case.

Robert Woodall raped and killed a teenage girl.[234] Faced with considerable evidence of his guilt, Woodall pleaded guilty to the charges and proceeded to sentencing.[235] Woodall produced witnesses arguing for mitigation but he did not testify during the sentencing phase of the trial.[236] He then requested jury instructions indicating that the jury should not draw negative inferences from his failure to testify.[237] The trial court judge denied the request and Woodall eventually filed for federal habeas relief arguing that failure to give the jury instructions regarding his lack of testimony violated his Fifth Amendment protection against self-incrimination.[238]

Justice Scalia, writing for Chief Justice Roberts and Justices Alito, Thomas, Kennedy, and Kagan, found no Fifth Amendment violation. Rather, Scalia noted that just because a defendant is entitled to no-adverse-inference jury instructions during the guilt phase of a trial, there is no such entitlement during the penalty phase.[239] The Sixth Circuit's ruling that the Fifth Amendment had been violated was unjustified because the state court had not operated against clearly established federal law because the Court previously had not addressed directly the question here.[240]

Justice Breyer wrote for Justices Sotomayor and Ginsburg in dissent.[241] Breyer asserted that the Court's rulings that a no-adverse-inference instruction is necessary at the penalty phase of a trial were well-defined and, consequently, the state court had violated clearly established federal law.[242]

In another conservative ruling prompting three dissenting votes, the Court refused to extend its holding in *Georgia v. Randolph* and allowed the search of a tenant's home over the prior objections of another tenant who was not physically present during the search.[243] In the case of *Fernandez v. California*,[244] Walter Fernandez was suspected of being involved in a gang-related robbery.[245] Police were informed that one of the suspects (Fernandez) had run into an apartment and a few minutes later police heard screaming

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Danforth, Justice Kennedy joined Roberts's dissent. 552 U.S. 264 (2008) (Roberts, J. dissenting).

233 *White*, 134 S. Ct. at 1697.
234 *Id*. at 1700–01.
235 *Id*. at 1701.
236 *Id*.
237 *Id.*
238 *Id*.
239 *White*, 134 S. Ct. at 1703.
240 *Id*. at 1702, 1707.
241 *Id*. at 1707 (Breyer, J. dissenting)
242 *Id*. at 1710.
243 Georgia v. Randolph, 547 U.S. 103 (2006).
244 *Fernandez*, 134 S. Ct. at 1126.
245 *Id*. at 1130.

from that apartment.[246] Police found Roxanne Rojas inside the apartment. Police asked Rojas, who appeared to have been recently in a fight, to step outside so they could conduct a protective sweep and found Fernandez in the residence.[247] Fernandez refused police entry but police arrested him on suspicion of a domestic assault, and he was later identified as a member of the gang robbery.[248] About an hour after Fernandez's arrest and removal from the home, police returned to Rojas' and Fernandez's home, informed Rojas that Fernandez had been arrested and asked to search the apartment.[249] Police received both written and verbal consent from Rojas[250] and the search produced evidence implicating Fernandez in the robbery.[251] Fernandez moved to suppress the evidence but was unsuccessful; he was found guilty on several charges and sentenced to fourteen years in prison.[252] The United States Supreme Court granted certiorari to determine if a co-tenant's physical presence is necessary to deny consent to search.[253]

Writing for the majority, Justice Alito noted that generally, consent searches are permissible when one tenant of a jointly occupied property provides consent.[254] However, in *Randolph*, the Court crafted a narrow exception to this rule, holding that "a physically present inhabitant's express refusal of consent to a police search [of his home] is dispositive as to him, regardless of the consent of a fellow occupant."[255] That is, when a co-tenant refuses police consent, that refusal is controlling and police may not search regardless of consent provided by other occupants. Alito noted, however, that the *Randolph* ruling dealt with a physically present tenant.[256] Here, Fernandez was not present when the police received consent to search from Rojas. The majority found that although Fernandez had objected earlier, his lack of physical presence during the time of the second entry into his home makes his prior denial of consent irrelevant.[257] Rather, *Randolph* only applies as an exception to a consent search when the objecting party is physically present. Given that Fernandez had already been arrested and removed from the apartment and police obtained permission from Rojas, the search was valid under the Fourth Amendment.[258]

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246 *Id*.
247 *Id*.
248 *Id*.
249 *Id*.
250 *Fernandez*, 134 S.Ct. at 1130.
251 *Id*. at 1131.
252 *Id*.
253 *Id*.
254 *Fernandez*, 134 S. Ct. at 1132–33.
255 *Id*. at 1133 (quoting *Randolph*, 547 U.S. at 122–23) (alteration in original) (italics omitted).
256 *Id*. at 1133–34.
257 *Id*. at 1134.
258 *Id*. at 1137.

Justice Ginsburg filed a dissenting opinion that was joined by Justices Sotomayor and Kagan.[259] Ginsburg argued the Fourth Amendment was violated and that the case should have been viewed as nothing more than an application of *Randolph*.[260] A faithful application would have resulted in the search being overturned. Ginsburg argued that the ruling significantly reduced the value of the exception provided in *Randolph*.[261]

D. Five-to-Four Decisions

Marginally-winning coalitions decided four criminal justice cases during the U.S. Supreme Court's 2013–2014 Term.[262] Despite three of these producing conservative outcomes, Justice Scalia was in the minority in all of four cases ending in five-member majorities.[263] As will be shown, Scalia's dissents, in part, reveal how certain issue areas can lead some Justices to depart from their normal voting patterns and the care required in interpreting decisions as being either liberal or conservative.

The Court's ruling in *Navarette v. California* dealt with the reliability of an anonymous tip and law enforcement's ability to conduct investigative stops based on such a tip.[264] An anonymous caller informed a 911 operator that a driver of a truck had just run her off the road.[265] She provided the operator with the make and model of the truck, the license plate number, the vehicle's direction and approximate location.[266] Based on that information, California Highway Police a few minutes later stopped a truck fitting that profile.[267] As they approached the truck, police smelled marijuana, conducted an investigative search and found thirty pounds of marijuana.[268] Defendants Lorenzo and Josa Navarette moved to have the evidence suppressed arguing that police did not have reasonable suspicion to conduct the investigative stop because the stop was based on nothing more

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[259] *Id*. at 1138 (Ginsburg, J. dissenting). *Fernandez* is one of only two criminal justice cases this Term in which Justice Kagan was not in the majority; the other was *Navarette v. California*. Navarette v. California, 134 S. Ct. 1683 (2014). Justice Breyer was also in 19 of the 21 majorities analyzed in this Article. However, Breyer dissented in different cases than did Kagan. *See* Kaley v. United States, 134 S. Ct. 1090 (2014); *White*, 134 S. Ct. 1697 (2014). This explains why, despite the high rate of majority participation by both Kagan and Breyer, the interagreement rate between these two Justices is only about average for the Court in non-unanimous cases decided during the 2013–2014 Term. *S*ee *supra*, Table 4).

[260] *Fernandez*, 134 S. Ct. at 1139.

[261] *Id*. at 1141–42.

[262] *Abramski*, 134 S. Ct. at 2259; *Navarette*, 134 S. Ct. at 1683; *Paroline*, 134 S. Ct. at 1710; *Hall*, 134 S. Ct. at 1986.

[263] *Abramski*, 134 S. Ct. at 2259; *Navarette*, 134 S. Ct. at 1683; *Paroline*, 134 S. Ct. at 1710.

[264] *Navarette*, 134 S. Ct. at 1683.

[265] *Id*. at 1686–87.

[266] *Id*.

[267] *Id*. at 1687.

[268] *Id*.

than an anonymous tip without collaboration.[269] The trial court disagreed, the Navarettes pleaded guilty to transporting marijuana and their case eventually reached the high court on appeal.[270]

Justice Thomas, writing for Chief Justice Roberts and Justices Kennedy, Alito and Breyer, found the search did not violate the Fourth Amendment.[271] The Court held that the tip was sufficiently collaborated to justify the stop.[272] The tip specified the make and model of the car and provided first hand eyewitness testimony of wrongdoing.[273] Further, the tipster had information regarding a potentially dangerous driver which this context lent further credence to the tip's reliability.[274] Based on the totality of the circumstances the tip was sufficiently collaborated; consequently, the brief investigative stop was justified and constitutional under the Fourth Amendment.[275]

Justice Scalia, writing for Justices Ginsburg, Sotomayor and Kagan, filed a dissent.[276] Scalia noted that the Court had, in prior cases, required that evidence from anonymous tips be collaborated before being used as the basis of a search.[277] Here, the tip was anonymous reducing its credibility.[278] Scalia wrote that the tipster had "[p]lenty of time to dissemble or embellish," such that the information did not rise to the level of common exceptions to the hearsay rule that permit an assumption of greater credibility to certain statements.[279] Scalia maintained that through this decision, the Court created a new rule regarding anonymous tips that essentially holds that "an anonymous and uncorroborated tip regarding a possibly intoxicated highway driver provides without more the reasonable suspicion necessary to justify a stop."[280]

In a complicated series of votes in *Paroline v. United States*, the Court held in a five-to-four conservative decision that victims of child pornography are entitled to restitution under the Violence Against Women Act from individuals who possess the pornographic images.[281] However, the Court also held that individuals who possess the pornographic images cannot be held liable for the entire amount of the victim's losses but are only

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269 *Id*.
270 *Navarette*, 134 S. Ct. at 1687.
271 *Id.* at 1685.
272 *Id.* at 1688–99.
273 *Id*.
274 *Id*. at 1689.
275 *Id*. at 1692.
276 *Navarette*, 134 S. Ct. at 1692 (Scalia, J. dissenting).
277 *Id*.
278 *Id.*
279 *Id*. at 1693–94.
280 *Id*. at 1692.
281 *Paroline*, 134 S. Ct. at 1710.

required to pay restitution in proportion to his or her contributions to the victim's losses.[282]

Here, Doyle Paroline was arrested for having images of child pornography on his computer. Of the 150 to 300 images on his computer, two images were of the victim "Amy."[283] Amy had been sexually abused as a child by her uncle, and her images were put on the internet and widely circulated.[284] Although there was, of course, no clear indication of how many of these images existed, Court documents indicated that Paroline was one of thousands of perpetrators who had pictures of the victim.[285] Amy filed for restitution under the Violence Against Women Act and was awarded $3.4 million by the lower courts; those courts held that Paroline was liable for Amy's entire loss.[286] Paroline appealed and the Court granted certiorari.[287]

Writing for Justices Breyer, Ginsburg, Kagan and Alito, Justice Kennedy held that, although Paroline was liable for some of Amy's losses, he was liable only for those caused by his individual behavior.[288] Victims could thus collect damages from all those convicted of having the pornographic images. As Kennedy wrote, "it makes sense to spread payment among a larger number of offenders in amounts more closely in proportion to their respective causal roles and their own circumstances . . . ."[289] Kennedy also stated that "[t]his would serve the twin goals of helping the victim achieve eventual restitution for all her child-pornography losses and impressing upon offenders the fact that child pornography crimes, even simple possession, affect real victims."[290] Through the ruling, the Court upheld the general concept that victims of child pornography could obtain monetary damages, but adopted a moderate approach towards determining damages for any particular perpetrator. [291]

In dissent, Chief Justice Roberts, joined by Justices Scalia and Thomas, argued that the congressional statute authorizing restitution is flawed and as written does not allow for victims of child pornography to collect damages from those who possess the images.[292] Rather, Chief Justice Roberts stated that while he agreed with the majority that child pornography victims should be able to receive monetary damages, he asserted the statute is poorly written to address the types of qualitative harm suffered by Amy

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[282] *Id*. at 1727.
[283] *Id*. at 1717–18.
[284] *Id*. at 1717.
[285] *Id*.
[286] *Id*. at 1718.
[287] *Paroline*, 134 S. Ct. at 1718.
[288] *Id*. at 1720.
[289] *Id*. at 1729.
[290] *Id*. at 1727.
[291] Because this aspect of the ruling permits at least some restitution potentially from each identified perpetrator, we code the decision as conservative.
[292] *Paroline*, 134 S. Ct. at 1730 (Roberts, C.J. dissenting).

from multiple offenders.[293] Justices Roberts, Scalia and Thomas proposed giving Congress the opportunity to correct the law.[294]

Justice Sotomayor dissented but for very different reasons than did the others.[295] Arguing that Congress intended the perpetrators to be liable for the full amount of the victim's losses, Sotomayor would have upheld the entire $3.4 million verdict against Paroline.[296]

The Court's conservative decision in favor of gun regulation in *Abramski v. United States*[297] again highlights the occasional difficulty encountered when classifying Supreme Court cases as either liberal or conservative. Because the decision in *Abramski* supports the government's position and is rights-restrictive, it is conservative as defined here. However, in the broader political context, increasing the effectiveness of gun regulations is considered a liberal position. This inconsistency explains why *Abramski* is the first criminal justice decision in which Chief Justice Roberts and Justices Thomas, Alito and Scalia dissented from a conservative outcome.[298]

In this case, Bruce Abramski offered to purchase a gun for his uncle and entered into an agreement, complete with prepayment, to do so.[299] He then went to a federally licensed firearm dealer, filled out paperwork as the actual buyer of the gun, signed a statement acknowledging his understanding that lying on the federal paperwork was a federal crime, passed the background check, took possession of the weapon and then transferred the weapon to his uncle.[300] Abramski was indicted for falsely asserting that he was the buyer of the weapon. Abramski eventually pleaded guilty but preserved his right to appeal.[301] The Supreme Court granted certiorari to determine if straw purchases of weapons are permissible and to determine if the actual buyer of the weapon was Abramski or the intended owner, Abramski's uncle.[302]

Writing for the majority, Justice Kagan noted that the federal government has for 40 years regulated the sale of firearms to ensure that individuals who are ineligible to own weapons, like those with mental illness or drug addiction, do not obtain them.[303] Kagan noted that allowing straw

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293 *Id*. at 1732–33.

294 *Id*. at 1735.

295 *Id*. at 1735 (Sotomayor, J. dissenting).

296 *Id*. In this sense, Sotomayor took the most conservative position on the Court in this case by supporting the largest penalty. However, given the coding scheme, her vote against a conservative decision is categorized as liberal.

297 *Abramski*, 134 S. Ct. at 2259.

298 *See supra* note 46.

299 *Abramski*, 134 S. Ct. at 2264–65.

300 *Id*. at 2265.

301 *Id*.

302 *Id*.

303 *Id*. at 2261–63. Justice Kagan, the most recent addition to the Court, has slowly increased her production of majority opinion authorship in non-unanimous criminal justice cases. During the 2013–2014 Term, she authored three such opinions—*Rosemond v. United*

purchases of weapons would render those firearm protections meaningless; if a convicted felon, for instance, could obtain a weapon simply by getting someone else to purchase it for him, the ability of the federal government to keep weapons out of the hands of undesirables would be limited needlessly.[304] Therefore, the entire law, taken in context, must be understood to mean that the "actual buyer" of the weapon was the uncle and not Abramski.[305] Therefore, Abramski falsely stated that he was a buyer and in so doing, violated federal law.

Although Abramski's uncle was eligible to purchase the gun, this fact was irrelevant because, as Kagan noted, those eligible to own weapons may still use a straw buyer to ensure that the weapon is not traced back to them if they are planning criminal activity.[306] Justice Kagan's opinion was joined by Justices Kennedy, Breyer, Ginsburg and Sotomayor. In dissent, Justice Scalia, writing for Chief Justice Roberts and Justices Thomas and Alito, argued that the plain meaning of the words indicate that Abramski was the buyer of the gun.[307] Scalia maintained that the falsification by Abramski was not a fact material to the lawfulness of the purchase of the firearm because Abramski's uncle was legally eligible to purchase the weapon.[308]

The Term's lone liberal, criminal justice decision decided five-to-four was *Hall v. Florida*,[309] which again revealed Justice Kennedy's importance in death penalty cases.[310] In *Hall*, Kennedy provided a critical, swing vote necessary for a liberal outcome.[311]

Hall addressed the implementation of the Court's ruling in *Atkins v. Virginia*[312] which prohibited as a violation of the Eighth and Fourteenth Amendments the execution of those deemed to be developmentally disabled[313] but left to states to define that threshold. The issue in *Hall*

States, *Kaley v. United States*, and *Abramski v. United States*. *Rosemond*, 134 S. Ct. at 1240; *Kaley*, 134 S. Ct. at 1090; *Abramski*, 134 S. Ct. at 2259. During the 2012–2013 Term, Kagan wrote only two non-unanimous criminal justice opinions. *See 2012–2013 Term, supra* note 14, at 40. And she authored only a single such opinion during the preceding Term. *See 2011–2012 Term supra* note 14, at 247).

[304] *Abramski*, 134 S. Ct. at 2267–68.

[305] *Id*. at 2272.

[306] *Id*. at 2268–69.

[307] *Id*. at 2275 (Scalia, J., dissenting).

[308] *Id*. at 2275–76.

[309] *Hall*, 134 S. Ct. at 1986.

[310] *See, e.g.*, Christopher Dunn, *Justice Kennedy: The Man in Control of the Death Penalty*, 238 N.Y. L.J. 3 (2007); Barnes, *supra note* 58; Linda E. Carter, *The Evolution of Justice Kennedy's Eighth Amendment Jurisprudence on Categorical Bars in Capital Cases*, 44 MCGEORGE L. REV. 229 (2013).

[311] All four remaining conservative Justices dissented in this case. *Hall*, 134 S. Ct. at 2001 (Alito, J. dissenting).

[312] Atkins v. Virginia, 536 U.S. 304 (2002)

[313] In *Atkins* the Court used the phrase "mental retardation" to describe those with significantly subpar intellectual abilities. The language has changed and the Court uses the new descriptor "intellectual disability" instead. We remain consistent with the Court's new

concerned the process by which Florida determined whether or not an individual's developmental disability met the threshold for exclusion from death penalty eligibility.

Florida law required that an individual score a 70 or lower on a standard IQ test—where 100 is considered average and a score of 70 falls about two standard deviations below this mean—in order to be considered developmentally disabled to an extent that made the individual ineligible for capital punishment.[314] If the individual scores above a 70, even if that score falls within the test's standard error of measurement (SEM), no further analysis is needed and the individual cannot be deemed sufficiently developmentally disabled.[315] For Florida, a score of 70 or lower was a threshold requirement before other evidence of developmental disability could be considered.[316]

In 1978, Freddie Lee Hall and his accomplice murdered Karol Hurst after kidnapping, beating and raping her.[317] They then killed a sheriff's deputy and Hall received the death penalty.[318]

The Supreme Court ruled in 1987 that death penalty candidates must be allowed to present non-statutory mitigating evidence during sentencing; Hall's death sentence was re-litigated.[319] During these hearings, Hall presented significant evidence of developmental disability but the jury nevertheless imposed the death penalty.[320] In 2002, following the high court's determination that those who are developmentally disabled could not be executed, Hall again challenged his death sentence.[321] Although Hall had taken nine IQ tests resulting in scores ranging from 60–80, the sentencing court considered only those scores above 70. Because these did not meet the threshold required by Florida law for sufficient developmental disability, the Florida Supreme Court rejected Hall's appeal, upholding his death sentence.[322]

Justice Kennedy (writing also for Justices Ginsburg, Breyer, Kagan and Sotomayor) found Florida's use of a strict 70 IQ score cutoff in determining developmental disability to be a violation of the Eighth Amendment.[323] Kennedy first noted that protections against cruel and unusual punishments must be evaluated using the "evolving standards of

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language and also use intellectual disability when referring to what was previously termed mental retardation.

314 *Hall*, 134 S. Ct. at 1990, 1994–95.
315 *Id*. at 1994–95.
316 *Id*.
317 *Id*. at 1990.
318 *Id*.
319 *Id*. at 1991.
320 *Hall*, 134 S. Ct. at 1991.
321 *Id*. at 1991-92.
322 *Id*. at 1992.
323 *Id*. at 2000–01.

decency that mark the progress of a maturing society"[324] and by this standard, Kennedy found that Florida's use of a strict cut-off ignored established medical practices.[325] Kennedy wrote, "The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range."[326] Further, Kennedy held that by failing to take the standard error into consideration, Florida's formulation ran contrary to what a majority of states use in implementing *Atkins*.[327] Kennedy found, "The rejection of the strict 70 cutoff in the vast majority of States and the 'consistency in the trend' toward recognizing the SEM provide strong evidence of consensus that our society does not regard this strict cutoff as proper or humane."[328]

Moreover, Kennedy noted that the ruling in *Atkins* itself appears to reject the use of a strict cutoff.[329] Based then on the guidance provided by the medical professionals, the states, and *Atkins*, Kennedy found Florida's scheme for implementing *Atkins* to be unconstitutional and a threshold requirement of a test score of 70 without considering other factors such as measurement error to be unsound.[330] As Kennedy noted, "Intellectual disability is a condition, not a number."[331]

Justice Alito filed a dissenting opinion[332] that was joined by Chief Justice Roberts and Justices Scalia and Thomas. Alito found the Florida scheme consistent with the Constitution, in part because the state used multiple test scores which, according to Alito, accounted for the risk of measurement error.[333] Alito urged the Court not to impose a national standard for the implementing the mandates of *Atkins*.[334] That recommendation is consistent with the general tendency among the dissenters to defer to conservative positions articulated at the state level.[335]

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[324] *Id*. at 1992 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
[325] *Hall*, 134 S. Ct at 1994–95.
[326] *Id*. at 1995.
[327] *Id*. at 1996.
[328] *Id*. at 1998.
[329] *Id*. at 1999.
[330] *Id*. at 2000–1.
[331] *Hall*, 134 S. Ct at 2001.
[332] *Id*. at 2001 (Alito, J., dissenting).
[333] *Id*. at 2011.
[334] *Id*. at 2002.
[335] *See, e.g.*, Adam Liptak & Jonathan D. Glater, *Alito's Dissents Show Deference to Lower Courts*, N.Y. TIMES (Nov. 3, 2005), http://www.nytimes.com/2005/11/03/politics/politicsspecial1/03legal.html?ei (last visited Aug. 10, 2014) (reviewing Alito's tendencies as a judge on the Third Circuit Court of Appeals); *Graham*, 560 U.S. 48, 97 (2011) (Thomas, J. dissenting) (criticizing the majority for rejecting the judgments of legislatures and state courts in a case involving life sentences for juveniles convicted of non-homicide offenses); Miller v. Alabama, 132 S. Ct. 2455, 2477 (2012) (Roberts, C.J. dissenting) (criticizing the majority for disregarding decisions by state legislators and the prevalence of statutes allowing juveniles to be sentenced to mandatory life imprisonment without parole).

IV. DISCUSSION OF SELECT THEMES AND TRENDS

The foregoing quantitative[336] and qualitative[337] analyses reveal some recurring trends with respect to criminal justice decisions, and suggest the possibility of some new, emerging ones as well. The 2013–2014 U.S. Supreme Court Term witnessed such decision-making tendencies at both the Court and individual-Justice level. We begin with a discussion of key patterns characterizing positions taken by individual members of the Court.

A. Individual-Level Patterns

The most recent term again demonstrated the influential role played by Justice Anthony Kennedy. Kennedy's historic record this term of being on the winning side of every criminal justice decision[338] differs only slightly from his voting tendencies in criminal justice cases decided by the Roberts Court in previous terms; during the first nine years of the Roberts Court, Kennedy voted with the majority in over 90% of all criminal justice cases—far more often than did any other Justice.[339] This helps explain why scholars and other Court watchers find that Kennedy often commands a disproportionate amount of attention from both advocates before the Court and from his fellow Justices, especially in closely divided cases.[340] We see no reason to expect this to change in the near future.

Kennedy's role in providing a critical fifth vote was especially apparent during the 2013–2014 Term. This was in part because none of the marginally-winning coalitions in criminal justice cases consisted of all five members of the conservative wing aligned against the four more liberal Justices. In these cases ending in five-to-four decisions, Kennedy joined the four members of the liberal wing to uphold regulations on gun purchases, helped preserve a narrow conservative majority when Scalia dissented in a Fourth Amendment case involving an anonymous tip, and authored the Court's decision establishing certain parameters of victim compensation under the Violence Against Women Act that produced an unusual majority

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336 *See supra* Part II.

337 *See supra* Part III.

338 *See supra* note 57 and accompanying text.

339 *See supra* Table 2; *2012–2013 Term*, *supra* note 14, at 40; *2011–2012 Term*, *supra* note 14, at 247; *2010–2011 Term*, *supra* note 14, at 327–42; *2009–2010 Term*, *supra* note 14, at 234; *2008–2009 Term*, *supra* note 14, at 7; *2007–2008 Term*, *supra* note 14, at 50–85; *2006–2007 Term*, *supra* note 14, at 1015–42; and *2005–2006 Term*, *supra* note 14, at 519–45.

340 *See, e.g.*, RYAN A. MALPHURS, RHETORIC AND DISCOURSE IN SUPREME COURT ORAL ARGUMENTS: SENSEMAKING IN JUDICIAL DECISIONS 98 (2013); Barnes, *supra* note 44; Richard Wolf, *From Gay Marriage to Voting Law, Kennedy is the Key*, USA TODAY, (June 27, 2013, 11:31 PM), http://www.usatoday.com/story/news/politics/2013/06/27/supreme-court-athony-kennedy-race-voting-abortion-gay-marriage/2161701/.

configuration including Justices Kennedy, Alito, Breyer, Ginsburg and Kagan.[341]

Notably, Kennedy also provided an outcome-determining swing vote in an important death penalty case during the 2013–2014 Term,[342] as he has in several other capital punishment cases in past years.[343]

Breyer was the only Justice other than Kennedy to vote with the majority in all criminal justice cases decided by a marginally-winning coalition during the 2013–2014 Term, and it was in these cases that one of the more striking tendencies in Justice Breyer's voting behavior in criminal justice matters reappears.[344] Namely, *Navarette v. California* serves as another example of Justice Breyer providing a conservative vote in a Fourth Amendment case while Justice Scalia voted with members of the liberal wing.[345] Justice Breyer's longstanding support of law enforcement interests on such issues demonstrates the challenge confronting the other members of the liberal bloc in search and seizure cases, even when able to persuade one of the more conservative Justices to join them.

However, the importance of Justice Scalia's willingness to defect from his fellow conservatives should not be minimized. Scalia's recent string

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[341] *Abramski*, 134 S. Ct. at 2259; *see supra* notes 297–308 and accompanying text; *Navarette*, 134 S. Ct. at 1683; *see supra* notes 264–280 and accompanying text; *Paroline*, 134 S. Ct. at 1710; *see supra* notes 281–296; *Hall*, 134 S. Ct. at 1986. *See supra* note 309 and accompanying text.

[342] *Hall*, 134 S. Ct. 1986 (2014). *See supra* note 321 and accompanying text.

[343] *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (holding that the imposition of capital punishment for crimes committed while under the age of 18 years is unconstitutional); Panetti v. Quarterman, 551 U.S. 930 (2007) (barring the execution of prisoners who do not have a rational understanding of the reason for their execution); Brewer v. Quarterman, 550 U.S. 286 (2007) (finding the lower court erred in denying relief after a jury was prevented from meaningfully considering relevant mitigating evidence); Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007) (finding the state's jury instructions for capital sentencing to be inadequate); Smith v. Texas, 550 U.S. 297 (2007) (finding the lower court erred when evaluating whether an unconstitutional jury instruction invalidated a death sentence). Kennedy also wrote for four liberal Justices in *Graham v. Florida*, which held that it was unconstitutional to sentence juvenile offenders to life imprisonment without parole for non-homicide offenses. *Grahan*, 560 U.S. at 48. Chief Justice Roberts's concurrence made *Graham* a six-to-three decision.

[344] *See supra* Part III.D.

[345] *Navarette*, 134 S. Ct. at 1683; s*ee, e.g.*, *King*, 133 S. Ct. at 1958 (holding that it is reasonable under the Fourth Amendment to take without a warrant a cheek swab for DNA analysis of someone held in custody after being arrested for a serious offense based on probable cause, ending in the same line up of Justices as *Navarette*); Florida v. Jardines, 133 S. Ct. 1409 (2013) (finding that police use of a drug-sniffing dog on the porch of a home was a search within the meaning of the Fourth Amendment and consequently required a search warrant, ending in a liberal decision in which Scalia and Thomas voted with the three women on the Court and Breyer supported law enforcement interests in dissent); Jacob Gershman, *The Fourth Amendment's Strange Bedfellows*, WALL ST. J. LAW BLOG, June 3, 2013 6:34 PM, http://blogs.wsj.com/law/2013/06/03/the-fourth-amendments-strange-bedfellows/ (quoting Orin Kerr of George Washington University Law School, '"Justice Scalia has been on the defense side of every non-unanimous Fourth Amendment case" while Justice Breyer has come down on the side of the government.')..

of votes and opinions in which he joined his liberal colleagues in supporting Fourth Amendment rights may be due to his purported "longstanding libertarian streak in some civil liberties cases."[346] With his claimed adherence to an originalist approach to constitutional interpretation,[347] Scalia's decisions concerning constitutional rights in criminal justice most frequently support assertions of authority by police and prosecutors rather than rights claims by suspects and defendants.[348] Scalia's understanding of the Constitution's original meaning, however, has led in recent terms to his outspoken support for protecting Fourth Amendment rights in prominent decisions concerning search and seizure.[349] In *United States v. Jones*, Scalia wrote the majority opinion declaring that the use of a GPS tracking device on a suspected drug trafficker's car constituted a "search" under the Fourth Amendment that required authorization by a warrant or other permissible justification.[350] Justice Scalia's majority opinion in *Florida v. Jardines* similarly barred police officers without a warrant from seeking evidence by bringing a drug-sniffing dog to the front door of a home in order to investigate a suspected drug house.[351] He also joined the Court's liberals when he wrote a strong dissenting opinion in *Maryland v. King* against the majority's approval of a state statute authorizing mandatory DNA sample extractions from unconvicted individuals arrested for certain serious crimes.[352] Similarly, in *Missouri v. McNeely*, Scalia voted to require police officers to seek a warrant when possible before drawing blood samples from suspected drunk drivers notwithstanding the state's arguments that warrantless blood draws are essential because of the rapid disappearance of evidence (i.e., natural reduction of blood alcohol level) over time.[353] In the 2013–2014 Term, Scalia continued this recent trend of outspoken support for Fourth Amendment rights with his dissenting opinion, joined by the Court's most liberal Justices, in *Navarette v. California*[354] that objected to reliance on an anonymous tip as the basis for a police traffic stop.[355] Although it is too soon to judge whether these cases reflect changes in Scalia's approach to

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[346] *See supra* note accompanying text 345; Scott Lemieux, *Scalia Gets It Right*, AM. PROSPECT ONLINE, (June 3, 2013), prospect.org/article/scalia-gets-it-right.

[347] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997).

[348] Christopher E. Smith & Madhavi M. McCall, *Antonin Scalia: Outspoken and Influential Originalist*, in CHRISTOPHER E. SMITH, CHRISTINA DEJONG & MICHAEL M. MCCALL, eds., THE REHNQUIST COURT AND CRIMINAL JUSTICE 169 (2011).

[349] *See, e.g.,* Lemieux, *supra* note 346 (noting Scalia's dissenting opinion against mandatory extraction of DNA samples from arrestees in *Maryland v. King*).

[350] United States v. Jones, 132 S. Ct. 945, 948 (2012).

[351] *Jardines*, 133 S. Ct. at 1409, 1417–18.

[352] *King*, 133 S. Ct. 1958, 1980 (2013) (Scalia, J., dissenting).

[353] Missouri v. McNeely, 133 S. Ct. 1552, 1568 (2013).

[354] *Navarette*, 134 S. Ct. 1683 (2014).

[355] *See supra* notes 276–280 and accompanying text.

understanding the Fourth Amendment[356] or merely a flurry of specific issues that call forth his preexisting viewpoints on situations in which protections against improper searches should exist,[357] the recent term helped to demonstrate that his recent role as a protector of Fourth Amendment rights continues.

While Scalia remains a dependable conservative on most other criminal justice issues, his conservative voting record lags significantly behind that of Justice Alito who has now posted the highest percent conservative voting in criminal justice cases in seven of the last eight terms.[358] During the 2013–2014 Term, Alito seemed especially inclined to call for deference to state court decisions.[359] Such use of deference in support of law enforcement interests echoes arguments commonly made in the past by Justices Thomas[360] and Scalia.[361] Thus, it seems likely that interpretational preferences regarding certain views of states' rights and judicial constraint will continue to be expressed frequently on the Court for the foreseeable future to justify particular conservative positions in the area of criminal justice.

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[356] There is evidence that Scalia changed his interpretive approach with respect to one criminal justice issue: prisoners' rights. Initially, Scalia's prisoners' rights decisions appeared to involve strategic and controversial characterizations of precedents as a means to shape new doctrines without reference to his usual claim of following originalism. Christopher E. Smith, *The Malleability of Constitutional Doctrine and Its Ironic Impact on Prisoners' Rights*, 11 B.U. PUB. INT. L. J. 73, 84–87, 89–95 (2001). However, Scalia later switched to more consistent application of his claimed adherence to originalism after he was apparently persuaded to do so by Justice Thomas's strong assertion of an originalism perspective in such cases. Jan Crawford Greenburg, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 120 (2007).

[357] There were earlier Fourth Amendment cases in which Scalia strongly supported individual rights, thus indicating that certain issues elicited a rights-protective viewpoint from him. *See, e.g.,* Arizona v. Hicks, 480 U.S. 321 (1987) (Scalia-authored majority opinion, joined by the Court's most liberal justices, forbidding police officers from warrantless movement of electronic items in plain view in order to see if their serial numbers provided evidence that they were stolen); Kyllo v. United States, 533 U.S. 27 (2001) (Scalia-authored majority opinion forbidding warrantless use of heat-detection device pointed at outside of home in order to investigate whether the home contained lights used for indoor cultivation of marijuana).

[358] During the 2011–2012 Term, Justice Thomas held the most conservative voting record in criminal justice cases. In all other years since the 2006–2007 Term, Alito has held that position. *See supra* note 34 and accompanying table; *2012–2013 Term*, *supra* note 14.

[359] *See, e.g.*, *supra* text accompanying note 67 (noting deference as a justification for Alito's majority opinion in *Burt v. Titlow* regarding an ineffective counsel claim); and *supra* text accompanying note 333 and accompanying text (noting Alito's dissent in *Hall v. Florida*, in which he urged the Court to avoid imposing a national implementation standard for determining the cognitive development of those facing the death penalty).

[360] *See, e.g.*, Joyce A. Baugh, *Clarence Thomas: Consistent, Conservative, & Contrarian*, in CHRISTOPHER E. SMITH, CHRISTINA DEJONG & MICHAEL M. MCCALL, eds., THE REHNQUIST COURT AND CRIMINAL JUSTICE 231, 237-8, 240-1 (2011).

[361] *See, e.g.*, Smith & McCall, *supra note* 348, at 174.

At the other end of the ideological spectrum, Justice Sotomayor posted for the third consecutive term either the most or second most liberal voting rate (behind Ginsburg) in criminal justice cases decided by the Court.[362] This suggests that Sotomayor may be Ginsburg's increasingly likely heir as the leading liberal voice on the Court.[363] Moreover, the tendency of Justices Sotomayor, Ginsburg and Kagan to support liberal positions and to agree with one another—in criminal justice and other cases—has generated substantial interest in this liberal bloc of three women.[364] Ginsburg, herself, seems to have suggested that the importance of this bloc may affect her decision on whether or not to retire.[365]

B. Court-Level Patterns

A seemingly paradoxical set of themes characterized the 2013–2014 Term with respect to broader voting patterns in criminal justice cases. First, an unusually high portion of cases decided unanimously blurred some of the typically clear distinctions between the liberal and conservative wings of the Court.[366] Given the degree to which this distribution contrasts with those in prior terms, it seems prudent at this juncture to interpret the level of consensus during the most recent term as a product of the idiosyncratic mix of issues decided rather than as the sign of an emerging trend.[367] Second, other indicators suggest the ideological divide on the Court not only

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[362] *See supra* Table 2; *2012–2013 Term*, *supra* note 14, at 40; *2011–2012 Term*, *supra* note 14, at 247.

[363] *See, e.g.*, David G. Savage, *Justice Ruth Bader Ginsburg Signals She Has No Plans to Retire Soon*, L.A. TIMES (Sept. 20, 2014), http://www.latimes.com/nation/la-na-court-ginsburg-20140921-story.html#page=1 ("At 81, Ginsburg has emerged as the Court's liberal leader . . . . [A]s she begins her 22nd year on the high court, Ginsburg is at the height of her influence and public acclaim."); Some judicial scholars over the last few years have suggested that Sotomayor eventually might assume such a role. *See, e.g.*, Christopher E. Smith & April Sanford, *The Roberts Court and Wrongful Convictions*, 32 ST. LOUIS U PUB. L. REV. 307, 315 (2013) (contemplating Sotomayor's potential role in wrongful conviction cases given the retirement of Justice John Paul Stevens—the Court's previous, leading liberal voice on the topic); David Fontana, *Sonia Sotomayor: How She Became the Public Face of the Supreme Court's Liberal Wing*, NEW REPUBLIC, June 29, 2011, http://www.newrepublic.com/article/politics/91013/sonia-sotomayor-supreme-court-liberal-voice (asserting that Sotomayor's reliably liberal vote on a variety of issues and her engaging style makes her an especially likely leader of the liberal wing in the eyes of the public).

[364] *See supra* Tables 2, 3 and 4; *see, e.g.*, Adam Liptak, *Three Justices Bound by Beliefs, Not Just Gender*, N.Y. TIMES (July 2, 2013), http://www.nytimes.com/2013/07/02/us/bound-together-on-the-court-but-by-beliefs-not-gender.html?_r=0.

[365] Amy Davidson, *Ruth Bader Ginsburg's Retirement Dissent*, THE NEW YORKER, Sept. 24, 2014, http://www.newyorker.com/news/amy-davidson/ruth-bader-ginsburgs-retirement-dissent (quoting Ginsburg response from an interview with Elle Magazine, "When Sandra [Day O'Connor] left, I was all alone. I'm rather small, so when I go with all these men in this tiny room. Now Kagan is on my left, and Sotomayor is on my right. So we look like we're really part of the Court and we're here to stay.").

[366] *See supra* Table 1; *see supra* Table 2 and accompanying text.

[367] *See supra* note 28 and accompanying text.

persisted, but may have hardened somewhat. For example, the unusually large number of voting blocs that emerged this term show that most Justices voted with other members of their respective wing at very high rates, with only a couple of Justices falling outside of a traditional bloc.[368] The low level of agreement among members of different camps in non-unanimous decisions and the tendency of such decisions to align the most conservative Justices against the most liberal ones, may jeopardize the perceived legitimacy of the Court if the public increasingly comes to see the Court's decisions as products of an ideological divide. As one long-time Court observer warned, "The perception that partisan politics has infected the court's work may do lasting damage to its prestige and authority and to Americans' faith in the rule of law."[369]

A particularly interesting set of findings this term regard the potentially strategic use of opinion assignments by the Chief Justice.[370] For example, Roberts assigned the writing of all five liberal, unanimous decisions to conservative Justices.[371] While several factors undoubtedly influenced these choices by the Chief Justice, by assigning liberal decisions to the Court's more conservative members, Roberts likely minimized the chances of defection from unanimous rulings, while limiting the degree of liberalism of some opinions, thereby reducing the degree to which the resulting policies diverged from his preferred positions.[372]

Evidence for such motivations seems strongest in unanimous opinions that Roberts self-assigned.[373] In writing the Court's much awaited opinion in *Bond v. United States*, for example, Roberts avoided further exposing the divide on the Court regarding constitutional interpretations by resolving the case on statutory grounds issues arising from an act implementing a treaty.[374] This not only preserved unanimity at least in judgment, but also likely limited the expression of more liberal

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[368] *See supra* Tables 3 and 4; *See also supra* note 30 and accompanying text (showing that Breyer's voting tendencies did not place him in a liberal voting bloc, nor did Kennedy's align strongly with those of other conservatives though he did vote often with certain members of the liberal wing).

[369] Adam Liptak, *The Polarized Court*, N.Y. TIMES (N.Y. edition) (May 11, 2014), http://www.nytimes.com/2014/05/11/upshot/the-polarized-court.html?_r=0&abt=0002&abg=1.

[370] LAWRENCE BAUM, THE SUPREME COURT, 125 (4th ed. 1992) (noting that the Chief Justice assigns the Court's opinion when he is in the majority).

[371] *See supra* note 122.

[372] *See, e.g.*, Sandra L. Wood, Linda Camp Keith, Drew Noble Lanier, & Ayo Ogundele, *Opinion Assignment and the Chief Justice: 1988–1940*, 81 SOC. SCI. Q. 798, 798–800 (2000) (summarizing traditional models explaining opinion assignment choices).

[373] Such cases possess added relevance in that for the second year in a row, Chief Justice Roberts did not author a single non-unanimous criminal justice decision. *See supra* Parts III.B–D; *2012–2013 Term*, *supra* note 14, at 40.

[374] *See Bond*, 134 S. Ct. at 2077; *see supra* notes 184–193 and accompanying text.

interpretations of sweeping congressional powers than if the constitutional issues had been the focus.[375]

A similar example also illustrates the purported tendency of Chief Justice John Roberts to seek incremental change in legal doctrine rather than support reversals of precedent that lead to sudden and dramatic redefinitions of the law and constitutional rights.[376] Further, this approach reportedly frustrates his conservative allies who want to move faster in reworking the law to fit their visions of proper constitutional interpretation.[377] Consistent with these reports, evidence emerged in a criminal justice case in the 2013–2014 Term to support these observations. In *McCullen v. Coakley*, concerning the free speech rights of anti-abortion protesters, Chief Justice Roberts's majority opinion struck down the restrictive Massachusetts law but left in place other precedents concerning the possibility of time, place, and manner restrictions on protests outside abortion clinics.[378] By contrast, in his concurring opinion, Justice Scalia expressed frustration with the Roberts majority opinion for failing to also overrule other precedents that left in place possible restrictions on abortion clinic protests.[379]

For purposes of criminal justice law and policy, the development during the 2013–2014 Term that could be most significant if it continues concerns the small number of criminal justice cases accepted for decision.[380] The Roberts Courts has received considerable attention and criticism for its pursuit of an activist agenda aimed at reworking law to support conservative political values and policy preferences.[381] It may be that the majority's purportedly agenda-driven attention[382] to other continuing disputed matters of law and policy, such as voting rights,[383] same-sex marriage,[384] and health-

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[375] Admittedly, such expressions may have been limited to dissents.

[376] Liptak, *Roberts Pulls Supreme Court*, *supra* note 12.

[377] Adam Liptak, *Roberts's Incremental Approach Frustrates Supreme Court Allies*, N.Y. TIMES (July 14, 2014), http://www.nytimes.com/2014/07/15/us/supreme-court-shows-restraint-in-voting-to-overrule-precedents.html. This point also applies to Roberts's opinion in *Bond* to which a disgruntled Scalia authored a concurring opinion (see *supra* notes 194–206 and accompanying text).

[378] *McCullen*, 134 S. Ct. at 2537.

[379] *Id.* at 2541 (Scalia, J., concurring).

[380] *See supra* notes 14–19, and *supra* Table 1 and accompanying text.

[381] *See Editorial, Activism and the Roberts Court*, N.Y TIMES, March 29, 2012, at A26; Anne Marie Lofaso, *Judicial Activism on the Roberts Court: Anti-Union Ideology Driving Analysis*, AM. CON. SOC. BLOG (July 2, 2012), http://www.acslaw.org/acsblog/judicial-activism-on-the-roberts-court-anti-union-ideology-driving-the-analysis; Adam Liptak, *Court Is 'One of Most Activist,' Ginsburg Says, Vowing to Stay,* N.Y. TIMES, Aug. 25, 2013, at A1; Noah Feldman, *Roberts Court Cloaks Activism in Complexity,* BLOOMBERGVIEW (Oct. 16, 2013), http://www.bloombergview.com/articles/2013-10-16/roberts-court-cloaks-activism-in-complexity.

[382] *Supra* note 372.

[383] Adam Liptak, *Justices Enter Into Dispute Over Districts Alabama Set*, N.Y. TIMES, June 3, 2014, at A12.

care reform,[385] will lead to less attention to criminal justice issues in subsequent terms. If the trend toward accepting fewer criminal justice cases continues, those cases that are reviewed and the issues they raise will gain added significance. Under such circumstances, future assessments might expect the mix of questions reaching the Court to change as the opportunities for Justices to weigh and express competing interpretations of due process, the reasonableness of police behavior, and other criminal justice issues become more constrained. These and other potential implications of patterns emerging from the Court's criminal justice decisions during the 2013–2014 Term remain to be seen.

V. CONCLUSION

Although it is difficult to know if voting data for any individual term manifested key characteristics that serve as harbingers of future terms, the individual decisions during every term are important as they establish precedents for judges and other actors in the system to follow.[386] Moreover, individual Justices' opinions and case outcomes may, when analyzed in light of other decisions from recent terms, raise important questions about developments occurring at the high court.[387]

Despite the continued shrinking of the Supreme Court docket,[388] the 2013–2014 Term produced important decisions in the area of criminal justice likely to have lasting effects.[389] Some questions like those regarding a defendant's qualifications to receive the death penalty sharply divided the

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[384] Adam Liptak, *Both Sides in Gay Marriage Fight in Utah Agree: Supreme Court Should Hear Case*, N.Y. TIMES (Aug. 7, 2014), http://www.nytimes.com/2014/08/08/us/politics/utah-gay-marriage-lawyers-ask-supreme-court-to-act.html.

[385] Adam Liptak, *Birth Control Order Deepens Divide Among Justices*, N.Y. TIMES (July 3, 2014), http://www.nytimes.com/2014/07/04/us/politics/supreme-court-order-suspends-contraception-rule-for-christian-college.html.

[386] *See, e.g., supra* note 24 and accompanying text ("[I]t is likely that recent swings in the share of criminal justice cases decided unanimously are pushed more by the different grouping of issues heard in various Terms than by fundamental changes in the general level of agreement on the Court.").

[387] For example, the Supreme Court's decision in Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ___ (2014), concerning family-owned corporations' option to avoid covering contraceptives in employee medical coverage is seen by critics as part of a pattern of Supreme Court decisions that increasingly denigrate women's rights while simultaneously showing greater support for the rights of gays and lesbians. Adam Liptak, *Justices' Rulings Advance Gays; Women Less So*, N.Y. TIMES, Aug. 5, 2014, at A1.

[388] *See supra* notes 14–19 and accompanying text.

[389] For example, of the 11 "key" decisions issued by the Supreme Court during the 2013–2014 Term as identified by *The New York Times*, three involved criminal justice related cases. *See Key Supreme Court Decisions 2014*, N.Y. TIMES (June 30, 2014), http://www.nytimes.com/interactive/2014/06/19/us/major-supreme-court-decisions-in-2014.html?module=Search&mabReward=relbias%3Ar%2C{%222%22%3A%22RI%3A18%22. These are *McCullen v. Coakley*, *Riley v. California*, and *Hall v. Florida*. *See supra* notes 144–160; *supra* notes 123–143 and accompany text; *supra* notes 309–335 and accompanying text.

Court,[390] while others found broad consensus such as when the Court considered privacy expectations in an increasingly technology-driven society.[391]

Findings suggest several potentially fertile areas for judicial scholars to examine more rigorously. For example, Roberts's criminal justice opinion assignments—especially to himself—seem to justify the label of 'skillful strategist' that some have applied to the Chief Justice.[392] Further research might explore the degree to which strategic considerations not only explain the distribution of criminal justice opinion authorship across different Justices, but also the scope of decisions produced. This appears to be particularly instructive given Roberts's presumed preference for slow, incremental changes to legal doctrine, at least on certain issues.[393]

Subsequent examinations also might gauge whether the influence of the Court's more ideologically consistent voters (e.g., Alito among conservatives and Sotomayor among liberals)[394] increases or decreases if the current ideological divide on the Court persists, and especially if it widens. Relatedly, students of the judiciary may wish to closely monitor public opinion regarding the perceived legitimacy of the Court, particularly if voting alignments lead to a growing sense that the Court's criminal justice and other decisions are products of partisan differences.

Kennedy's presence in all of the Court's majorities in criminal justice cases this Term underscores his role not only as the Court's median voter but also as its leading swing voter.[395] The degree to which the liberal bloc can garner Kennedy's support likely will continue to be an important predictor of the direction of future Supreme Court decisions in criminal justice cases. However, one should not overlook the importance of Scalia, Breyer and other Justices who might provide an outcome-determining vote in any given case as the issues addressed and agreement among groups of Justices undoubtedly will shift—even if only subtly—from term to term.

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390 *Hall*, 134 S. Ct. at 1986.

391 *Riley*, 134 S. Ct. at 2473.

392 *E.g.*, Adam Liptak, *Roberts Court Shifts Right, Tipped by Kennedy*, N.Y. TIMES, July 1, 2009, at A1.

393 *See supra* note 376 and accompanying text.

394 *See supra* notes 52–55 and accompanying text.

395 *See, e.g.*, Epstein & Jacobi, *supra* note 33; Lane, *supra* note 44.