

## Pace Law Review

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Volume 37  
Issue 1 Fall 2016

Article 4

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March 2017

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Michael A. McCall  
*San Diego State University*, [mmccall@mail.sdsu.edu](mailto:mmccall@mail.sdsu.edu)

Madhavi M. McCall  
*San Diego State University*

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#### Recommended Citation

Michael A. McCall and Madhavi M. McCall, *Quantifying the Contours of Power: Chief Justice Roberts & Justice Kennedy in Criminal Justice Cases*, 37 Pace L. Rev. 115 (2017)

Available at: <https://digitalcommons.pace.edu/plr/vol37/iss1/4>

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# QUANTIFYING THE CONTOURS OF POWER: CHIEF JUSTICE ROBERTS & JUSTICE KENNEDY IN CRIMINAL JUSTICE CASES

*Michael A. McCall*<sup>1</sup> & *Madhavi M. McCall*<sup>2</sup>

## I. INTRODUCTION

More than a decade after the United States Senate confirmed John Roberts as Chief Justice of the U.S. Supreme Court, students of the judiciary continue to struggle to define the Court under his leadership. Much of the difficulty reflects a continuing attempt to answer an admittedly overly simplistic question asked shortly after Roberts's first year as Chief Justice: "Whose Court is it anyway?"<sup>3</sup> The debate over who most guides the direction of the current Court typically pits the perceived influence of Chief Justice John Roberts against that of Justice Anthony Kennedy, and existing discussions have yet to declare a clear winner. For example, a panel of constitutional law experts at an American Bar Association seminar in 2012 considered the question and concluded, "[i]t's [b]oth the Roberts and Kennedy Court."<sup>4</sup>

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1. Associate Professor of Sociology, San Diego State University. B.S., University of Akron, 1989; M.A., University of Akron, 1993; Ph.D., Washington University in St. Louis, 2004. Contact: mmccall@mail.sdsu.edu.

2. Associate Dean of the College of Arts & Letters, Professor of Political Science, San Diego State University. B.A., Case Western Reserve University, 1989; M.A., University of Akron, 1993; Ph.D., Washington University in St. Louis, 1999.

3. Editorial, *Whose Court Is It Anyway?*, N.Y. TIMES, Oct. 2, 2006, at A18.

4. Richard Brust, *It's Both the Roberts and Kennedy Court, Supreme Court Experts Say*, ABA. J. (Aug. 3, 2012, 6:49 PM), [http://www.abajournal.com/news/article/its\\_both\\_the\\_roberts\\_and\\_kennedy\\_court\\_supreme\\_court\\_experts\\_say/](http://www.abajournal.com/news/article/its_both_the_roberts_and_kennedy_court_supreme_court_experts_say/).

Popular media have echoed competing interpretations of the relative influence of Chief Justice Roberts and Justice Kennedy. Just a month after *Time Magazine* dedicated its cover and much of its issue to depict Justice Kennedy as “The Decider” on the Court,<sup>5</sup> the same magazine focused on the leading role played by Chief Justice Roberts. That issue carried a cover photograph of the Chief Justice and the headline “Roberts Rules.”<sup>6</sup>

Neither the lack of a clear impression of who leads the Court nor the tendency to focus on Chief Justice Roberts and Justice Kennedy as likely holders of that position<sup>7</sup> should be surprising. We might expect a high level of uncertainty, given that nearly half of the Court’s membership changed during the first six years of the Roberts Court era.<sup>8</sup> The death of the Court’s former conservative leader—Chief Justice William Rehnquist<sup>9</sup>—in 2005 and the near simultaneous retirement<sup>10</sup> of

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5. *From Gay Marriage to Obamacare, Justice Anthony Kennedy is The Decider*, TIME MAG. (June 18, 2012), <http://content.time.com/time/covers/0,16641,20120618,00.html>.

6. *Roberts Rules: What His Landmark Decision Means for Obama, Romney, the Court—and You*, TIME MAG. (July 16, 2012), <http://content.time.com/time/covers/0,16641,20120716,00.html>.

7. See, e.g., Linda Greenhouse, *Roberts Is at Court’s Helm, But He Isn’t Yet in Control*, N.Y. TIMES (July 2, 2006), <http://www.nytimes.com/2006/07/02/washington/02scotus.html>; Brust, *supra* note 4; Erwin Chemerinsky, *It’s Now the John Roberts Court*, 15 Green Bag 2d 389 (2012).

8. John Roberts replaced Chief Justice William Rehnquist (2005), Samuel Alito replaced Justice Sandra Day O’Connor (2006), Sonia Sotomayor replaced Justice David Souter (2009), and Elena Kagan replaced Justice John Paul Stevens (2010). See *Members of the Supreme Court of the United States*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/about/members.aspx> (last visited Nov. 15, 2016).

9. MICHAEL A. MCCALL, *William H. Rehnquist: Leadership & Influence from the Conservative Wing*, in THE REHNQUIST COURT AND CRIMINAL JUSTICE 87 (Christopher E. Smith, Christina DeJong & Michael A. McCall eds., 2011) [HEREINAFTER THE REHNQUIST COURT]; Leigh Anne Williams, *Measuring Internal Influence on the Rehnquist Court: An Analysis of Non-Majority Opinion Joining Behavior*, 68 OHIO ST. L.J. 679 (2007).

10. In July 2005, Justice O’Connor announced her plans to retire, and President George W. Bush tapped John Roberts as her replacement. See Richard W. Stevenson, *President Names Roberts as Choice for Chief Justice*, N.Y. TIMES (Sept. 6, 2005), <http://www.nytimes.com/2005/09/06/politics/politicsspecial1/president-names-roberts-as-choice-for-chief.html>. When William Rehnquist died two months

the frequent holder of the Court's critical vote<sup>11</sup>—Justice Sandra Day O'Connor—created significant power vacuums. The subsequent retirements of Justices David Souter<sup>12</sup> and John Paul Stevens<sup>13</sup> further clouded expectations about the trajectory of the Court's decisions in a range of issue areas.<sup>14</sup>

Some observers have claimed that the vacancy created by the recent death of Justice Antonin Scalia<sup>15</sup> may have already altered interactions and strategies on the Court.<sup>16</sup> While

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later, President Bush nominated Roberts as Chief Justice. *Id.* O'Connor agreed to stay on the Court until her new replacement (Samuel Alito) was found and confirmed. See Dana Bash, *Bush nominates Alito to Supreme Court*, CNN.COM (Nov. 1, 2005, 4:39 AM), <http://www.cnn.com/2005/POLITICS/10/31/SCOTUS.bush/>.

11. See, e.g., NANCY MAVEETY, *QUEEN'S COURT: JUDICIAL POWER IN THE REHNQUIST ERA 3* (2008) (“[S]he [Justice O'Connor] was the deciding vote across a range of legal issues coming before the justices, and her doctrinal and policy positions determined many minimally winning majorities.”).

12. In May 2009, Justice Souter announced his plan to retire at the end of June 2009. See Peter Baker & Jeff Zeleny, *Souter's Exit to Give Obama First Opening*, N.Y. TIMES (May 1, 2009), <http://www.nytimes.com/2009/05/02/us/02souter.html>.

13. In April 2010, Justice Stevens announced he would retire at the end of the 2009-2010 Term. See Sheryl Gay Stolberg & Charlie Savage, *Stevens's Retirement Is Political Test for Obama*, N.Y. TIMES (Apr. 10, 2010), <http://www.nytimes.com/2010/04/10/us/politics/10stevens.html>.

14. See, e.g., Christopher E. Smith, *The Changing Supreme Court and Prisoners' Rights*, 44 IND. L. REV. 853, 853-54, 877-80 (2011) (examining how membership change focuses attention on whether Justice Scalia and Justice Thomas will be able to gather support from Justice Kennedy and the Court's newest members to substantially change prisoners' rights law); David M. Estes, *Justice Sotomayor and Establishment Clause Jurisprudence: Which Antiestablishment Standard will Justice Sotomayor Endorse?*, 11 RUTGERS J.L. & RELIGION 525, 525-56 (2010) (reviewing Sotomayor's prior record to predict her role on the Court, such as whether she might join Justice Scalia to overrule the *Lemon* test); Joan Biskupic, *The Alito/O'Connor Switch*, 35 PEPP. L. REV. 495 (2008) (discussing the impact of Alito replacing Justice O'Connor on the direction of the Court in areas such as providing state legislatures more latitude to restrict abortion).

15. Adam Liptak, *Justice Scalia, Who Led Court's Conservative Renaissance, Dies at 79*, N.Y. TIMES, Feb. 14, 2016, at A1.

16. See, e.g., Margaret Hartmann, *How Scalia's Absence Is Affecting This Supreme Court Term*, N.Y. MAG. (Mar. 25, 2016, 6:14 AM), <http://nymag.com/daily/intelligencer/2016/03/how-scalias-death-affects-this-scotus-term.html> (noting key cases whose outcomes might shift in the absence of Justice Scalia and noting strategic choices that remaining Justices might make, including ordering certain cases to be reargued after a replacement is confirmed, producing a four-to-four tie (and thereby allowing a lower-court ruling to stand), and deciding whether to avoid granting

Justice Scalia's passing significantly complicates predictions about the future direction and leadership of the Court, it also highlights the need to better identify the dynamics during Roberts's first ten years as Chief Justice; the quality of estimates concerning the Court's future inevitably will depend on the quality of our understanding of its recent past.

Chief Justice Roberts and Justice Kennedy emerge as potential centers of gravity, in part, because they have assumed the roles vacated by Chief Justice Rehnquist and Justice O'Connor who, themselves, were depicted as particularly strong forces on the Court.<sup>17</sup> Chief Justice Roberts, who clerked for Chief Justice Rehnquist, has been likened to his former boss in being a skillful strategist<sup>18</sup> and conservative jurist.<sup>19</sup> Justice Kennedy, who was Justice O'Connor's only serious challenger for the spot of "median Justice" late in the Rehnquist Court era,<sup>20</sup> has held an

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certiorari in the future to those cases that are likely to produce a deadlocked vote); Tom Pryor, Timothy R. Johnson & Valerie Hoekstra, *How many cases will the Supreme Court put off till next term? Maybe none*, WASH. POST (Mar. 25, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/03/25/how-many-cases-will-the-supreme-court-put-off-till-next-term-maybe-none/?postshare=90214589> (analyzing historical data to predict strategic choices given the Court's vacancy, and expecting a large number of four-to-four decisions); Mark Joseph Stern, *The First Day of the New Supreme Court*, SLATE (Feb. 23, 2016, 7:30 AM), [http://www.slate.com/articles/news\\_and\\_politics/supreme\\_court\\_dispatches/2016/02/in\\_the\\_oral\\_arguments\\_for\\_utah\\_v\\_strieff\\_the\\_supreme\\_court\\_s\\_liberal\\_spoke.html](http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2016/02/in_the_oral_arguments_for_utah_v_strieff_the_supreme_court_s_liberal_spoke.html) (suggesting liberal Justices might feel empowered to challenge the expansion of the attenuation exception to the exclusionary rule on a Court that now appears to be divided four-to-four).

17. See, e.g., MAVEETY, *supra* note 11; Madhavi M. McCall & Michael A. McCall, *Chief Justice William Rehnquist: His Law-and-Order Legacy and Impact on Criminal Justice*, 39 AKRON L. REV. 323 (2006).

18. Adam Liptak, *The Roberts Court, Tipped by Kennedy*, N.Y. TIMES, July 1, 2009, at A1.

19. Joan Biskupic, *Roberts, Rehnquist Compel Comparisons*, USA TODAY (Sept. 6, 2005, 10:55 PM), [http://usatoday30.usatoday.com/news/washington/2005-09-06-comparing-judges\\_x.htm](http://usatoday30.usatoday.com/news/washington/2005-09-06-comparing-judges_x.htm); Stevenson, *supra* note 10.

20. See, e.g., Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1291 (2005); Patrick D. Schmidt & David A. Yalof, *The "Swing Voter" Revisited: Justice Anthony Kennedy and the First Amendment Right of Free Speech*, 57 POL. RES. Q. 209 (2004).

increasingly pivotal vote after Justice O'Connor's retirement.<sup>21</sup> However, careful estimation of the relative influence of Chief Justice Roberts and Justice Kennedy has received little systematic scrutiny to date. Indeed, little has been proposed regarding how to make such an assessment.

This Article seeks to fill some of this void and contribute to the debate with an empirical analysis of voting behavior in criminal justice cases decided during the first ten Terms of the Roberts Court era. The following section presents the study's case selection and introduces the types of measures used to illuminate influence on the High Court (Part II). Court- and individual-level tendencies (Part III) identify potential spheres of influence occupied by Chief Justice Roberts and Justice Kennedy. These bases of judicial power are examined separately in Part IV (Chief Justice Roberts) and Part V (Justice Kennedy). Some possible implications of Justice Scalia's death on these power bases are addressed in Part VI.

The analyses provide a sketch of some of the settings in which Chief Justice Roberts and Justice Kennedy wield influence. A central goal motivating this study is to identify comparative measures that are more informative and less sensitive than the types of anecdotal evidence arising from celebrated cases frequently covered by the media. The purpose is to provide a better understanding of patterns in voting tendencies, rather than to address the ability of Chief Justice Roberts or Justice Kennedy to affect policy or doctrinal approaches per se. The focus on criminal justice cases captures a large segment of the Court's production while avoiding the overly ambitious (and likely misleading) attempt to assess avenues of influence across all types of cases and issue areas.

The reader seeking the definitive answer to, "Whose Court is it?" will be disappointed. This Article strives to inform, rather than to end, that debate by providing some much-needed context through quantifiable dimensions on which Chief Justice Roberts and Justice Kennedy seem to be

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21. See, e.g., Charles Lane, *Kennedy Reigns Supreme on Court: With O'Connor's Departure, Sole Swing Voter Wields His Moderating Force*, WASH. POST, Jul. 2, 2006, at A6 ("With the departure of centrist Justice Sandra Day O'Connor, the court is now frequently split between two four-justice liberal and conservative blocs, with Kennedy as the sole remaining swing voter.").

particularly influential. The most confident estimate of who leads the Court in the area of criminal justice will require an understanding of this context coupled with a rigorous analysis contrasting the impact of Chief Justice Roberts's judicial philosophies and interpretations to those of Justice Kennedy—a task we leave for others.

## II. CASE SELECTION & ANALYTICAL APPROACH

This Article analyzes decisions by the Supreme Court of the United States in criminal justice cases during the first ten Terms of the Roberts Court. Criminal justice issues represent a significant portion of the Court's docket<sup>22</sup> and produce decisions that often reveal the tension between individual rights and some of government's most significant abilities to exert control over its citizens.

A review of Supreme Court decisions handed down from the 2005-2006 Term through the 2014-2015 Term identified over 300 cases raising criminal justice issues.<sup>23</sup> Narrowing attention to full, signed opinions excluded several per curiam decisions, and cases consolidated with another to produce single, full decisions.<sup>24</sup> The selection process yielded 264 cases

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22. 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 that as the Court's overall caseload decreased in recent decades, the percentage of criminal procedure and due process cases increased).

23. The authors reviewed all Court decisions for each of the ten terms using lists of cases generated by the Court and SCOTUSblog.com. See, e.g., 2012 Term Opinions of the Court, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/opinions/slipopinion/12> (last visited Nov. 29, 2016); Kedar S. Bhatia, *Stat Pack for October Term 2015*, SCOTUSBLOG (June 29, 2016), [http://www.scotusblog.com/wp-content/uploads/2016/06/SB\\_stat\\_pack\\_OT15.pdf](http://www.scotusblog.com/wp-content/uploads/2016/06/SB_stat_pack_OT15.pdf). A case was selected for purposes of this Article if the decision included a significant focus on at least one criminal justice issue.

24. Two consolidated cases addressing whether the use of victims' statements at trial—in which the victims themselves do not testify—violates protections under the Confrontation Clause are included separately in this study because the ruling was mixed. The case of *Davis v. Washington*, 547 U.S. 813 (2006), ended in a conservative outcome (finding that statements are nontestimonial if they result from an interrogation whose primary purpose is to respond to an emergency), while *Hammon v. Indiana*, 546 U.S. 976 (2005), produced a liberal ruling (excluding certain statements to police made in the

for analysis.<sup>25</sup>

To assess the relative influence of the two jurists of prime interest, we introduce new performance indicators and present findings using more traditional measures as well. Chief Justice Roberts and Justice Kennedy are evaluated with respect to their rates of participation in majority opinions, ability to muster support for positions as gauged by inter-agreement scores and voting bloc distributions, frequency of majority opinion authorship, their roles in the Court's most divided criminal justice decisions, their scores on various dimensions of conservatism, and in other ways.<sup>26</sup>

While we discuss the value of each metric later in this Article, one component warrants discussion here because it establishes much of the context within which to evaluate the other measures: the relative conservatism or liberalism of Justices and decisions. A common perception holds that the Justices group into one of two philosophical camps characterized by different interpretational approaches—a liberal wing and a conservative wing.<sup>27</sup> Judicial scholars often label decisions,<sup>28</sup> Justices<sup>29</sup> and entire Courts<sup>30</sup> as being

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course of investigation rather than under exigent circumstances).

25. Nearly all of the excluded criminal justice cases were excluded because they ended in a per curiam decision. Such Court decisions do not permit analysis of opinion authorship—a topic of interest in this study. See, e.g., *infra* Part V.B.

26. See *infra* Parts III-V.

27. 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/upshot/a-more-nuanced-breakdown-of-the-supreme-court.html>.

28. See, e.g., Michael A. McCall, Madhavi M. McCall & Christopher E. Smith, *Criminal Justice and the 2012-2013 United States Supreme Court Term*, 5 CHARLOTTE L. REV. 35, 57 (2014) (“In an important liberal, five-to-four ruling, the Court determined in *Florida v. Jardines* [133 S. Ct. 1409 (2013)] that police use of a drug-sniffing dog was a search within the meaning of the Fourth Amendment . . .”).

29. See, 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) (analyzing Justices’ liberal and conservative voting trends).

30. See, e.g., Herman Schwartz, *Introduction*, in *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* 13 (Herman Schwartz ed. 2002) (“The Rehnquist Court is the most conservative Supreme Court since before the New Deal.”); Richard G. Wilkins, Scott Worthington, Jacob Reynolds & John



predominantly conservative or liberal. Despite the oversimplification that such designations risk, the approach can prove helpful to the degree that the conservative and liberal labels offer insight into judicial philosophies<sup>31</sup> and reflect the likelihood that a Justice or Court might express certain positions.<sup>32</sup>

Throughout this analysis, we apply the term “liberal” to characterize Court decisions and individual votes favoring the person accused or convicted of a crime, or against government in matters of due process or privacy; “conservative” decisions and votes, then, are those supporting government interests in criminal justice cases.<sup>33</sup> These definitions reflect reasonably well the competing value systems in criminal justice that Herbert Packer, Professor of Law at Stanford University,

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J. Nielsen, *Supreme Court Voting Behavior 2004 Term*, 32 HASTINGS CONST. L.Q. 909, 909 (2005) (adding to a series of studies measuring “whether individual Justices and the Court as a whole are voting more ‘conservatively,’ more ‘liberally,’ or about the same when compared with past Terms”); Russell W. Galloway, Jr., *The Third Period of the Warren Court: Liberal Dominance (1962-1969)*, 20 SANTA CLARA L. REV. 773, 775 n.7 (1980) (examining the voting on the Warren Court and noting, “[i]t is probably safe to say that at no time in its previous history had the United States Supreme Court had so liberal a panel of justices”).

31. See, e.g., RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 6-15 (1997) (describing Justice Scalia’s decision-making as rooted in his conservatism and in his association with the jurisprudential school of Reasoned Elaboration); Sue Davis, *Justice Rehnquist’s Judicial Philosophy: Democracy v. Equality*, 17 POLITY 88, 91 (1984) (noting that Rehnquist’s brand of conservatism tended to emphasize “majority rule and the elected officials’ accountability via the electoral process while de-emphasizing the notion that the Constitution protects certain individual rights regardless of the will of the majority”).

32. See, e.g., David J. Garrow, *Justice Souter Emerges*, N.Y. TIMES MAG. (Sept. 25, 1994), <http://www.nytimes.com/1994/09/25/magazine/justice-souter-emerges.html?pagewanted=all> ) (quoting Linda Greenhouse of *The New York Times* who noted that Justice Souter’s moderate pragmatism “is probably as responsible as any single factor for the failure of the conservative revolution” in American constitutional law); Epstein et al., *supra* note 29, at 1528-41 (explaining certain case outcomes through change in ideological leanings of Justices, and discussing implications for doctrinal change on the Roberts Court).

33. These definitions follow those in the Supreme Court Judicial Database. See HAROLD J. SPAETH ET AL., THE SUP. CT. DATABASE CODE BOOK (2015), [http://www.supremecourtdatabase.org/\\_brickFiles/2015\\_02/SCDB\\_2015\\_02\\_c odebook.pdf](http://www.supremecourtdatabase.org/_brickFiles/2015_02/SCDB_2015_02_c odebook.pdf).

identified decades ago as the due process model and crime control model.<sup>34</sup>

We depart from the general strategy (e.g., pro-individual as liberal) in one area—gun control—only when restriction on the general lawfulness of gun ownership or gun purchasing is at issue.<sup>35</sup> A pro-individual position, here, aligns more with conservative sentiments in the broader political context. This departure from the standard classification scheme leads to labeling two individual rights-affirming decisions as “conservative” and one rights-restricting ruling as “liberal.” Specifically, the Court’s decisions expanding rights under the Second Amendment in *District of Columbia v. Heller*<sup>36</sup> and *McDonald v. City of Chicago*<sup>37</sup> are coded as conservative. The Court in *Abramski v. United States* upheld the conviction of a gun buyer who (while otherwise eligible to legally purchase a firearm) falsely claimed he was purchasing the gun for himself, and the ruling is treated as liberal.<sup>38</sup> If *Heller* and *McDonald* were coded using the general classification, they would be only two instances in the 264 cases reviewed in which all liberal members of the Court dissented from a liberal decision. Similarly, if *Abramski* were counted as a conservative decision, it would be the only conservative ruling in this study in which the four most conservative members of the Court<sup>39</sup> dissented. Adjusting the coding of these three cases to match generally held conservative and liberal attitudes avoids obfuscating patterns of greater interest in this study.

Twelve Justices served on the Roberts Court during the period examined. Although Justices Stevens, Souter,

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34. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

35. The standard labels apply to other gun-related cases, such as those concerning sentence-enhancements. In those cases, the pro-law enforcement position of seeking more severe penalties for crimes committed with a firearm is consistent with commonly held conservative views. *E.g.*, *Johnson v. United States*, 135 S. Ct. 2551 (2015); *Dean v. United States*, 556 U.S. 568 (2009).

36. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

37. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

38. *Abramski v. United States*, 134 S. Ct. 2259 (2014).

39. *See infra* Table 2 (showing Chief Justice Roberts and Justices Alito, Thomas and Scalia as having the most conservative voting records in criminal justice cases).

Sotomayor, and Kagan did not serve during all Terms, each posted a sufficient number of votes to permit meaningful interpretation of related trends. We do not attempt to analyze Justice O'Connor's role; she was part of only six criminal justice decisions by the Roberts Court before her retirement.

### III. OVERVIEW OF THE COURT'S CRIMINAL JUSTICE DECISIONS

#### A. Institutional-level Characteristics

Legal commentators typically portray the first decade of the Roberts Court as being solidly conservative.<sup>40</sup> The initial assessment of criminal justice decisions partially corroborates that reputation and suggests that the Rehnquist Court's tendency to favor law enforcement<sup>41</sup> continued under Chief Justice Roberts. As shown in Table 1, nearly two-thirds of unanimous criminal justice cases decided during the first ten Terms of the Roberts Court era ended in a conservative outcome.<sup>42</sup>

However, the distribution also reveals a fractured Court. Despite Chief Justice Roberts's expressed goal of forging greater consensus on the bench,<sup>43</sup> not only were most decisions non-unanimous, but many were also deeply divided. While the Roberts Court decided 118 criminal justice cases (45 percent)

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40. *E.g.*, MARCIA COYLE, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION* 3 (2013) (describing the Roberts Court as having "a confident conservative majority with a muscular sense of power"); Joan Biskupic, *Key Events in Chief Justice John Roberts' Tenure: Reshaped Supreme Court Charts New Era*, USA TODAY (Nov. 2, 2010, 6:23 PM), [http://usatoday30.usatoday.com/news/washington/judicial/2010-10-01-court01\\_ST\\_N.htm](http://usatoday30.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 . . ."); 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?\\_r=0](http://www.nytimes.com/2010/07/25/us/25roberts.html?_r=0) (reporting on a statistical analysis of Court eras).

41. McCall & McCall, *supra* note 17, at 332-36.

42. *See infra* Table 1 (showing that sixty of ninety-two unanimous criminal justice decisions during this period produced a conservative outcome).

43. The Associated Press, *Chief Justice Says His Goal Is More Consensus on Court*, N.Y. TIMES, May 22, 2006, at A16.

either unanimously or with a single dissenting vote, another 106 cases (40 percent) each produced at least three dissenters.

TABLE 1: DISTRIBUTION OF CRIMINAL JUSTICE DECISIONS BY LIBERAL & CONSERVATIVE OUTCOME, 2005-2015

<i>Majority</i> <sup>44</sup>	<i>Liberal</i>	<i>Conservative</i>	<i>Total (%)</i>
Unanimous	32	60	92 (34.8)
Non-unanimous	85	87	172 (65.2)
Five-Member	39	31	70 (26.5)
All	117 (44%)	147 (56%)	264

Moreover, the probability of a liberal criminal justice decision has been greatest in cases that divided the Roberts Court. A liberal outcome characterizes virtually half of non-unanimous decisions—compared to about a third of unanimous decisions—and minimally-winning majorities have been most likely to support the position of the prisoner or criminally accused over government interests.<sup>45</sup> Judicial scholars and commentators often have particular interest in five-to-four decisions, given the large portion of cases decided during the Roberts Court era ending in such a narrow majority<sup>46</sup> and

44. “Five-member” majority decisions are included in “Non-unanimous.” The five-member category includes six cases decided five-to-three. During its first ten Terms, the Roberts Court decided twenty-six criminal justice cases with eight members due to a Justice’s recusal (Justice Kagan thirteen times, Justice Alito nine times, Justice Sotomayor twice, Chief Justice Roberts once, and Justice Breyer once).

45. See *supra* Table 1 (showing that a liberal outcome was produced in thirty-nine of seventy—or 56 percent—of criminal justice decisions ending in a five-member majority).

46. E.g., Christopher E. Smith, Madhavi M. McCall & Michael A. McCall, *The Roberts Court and Criminal Justice: An Empirical Assessment*, 40 AM. J. CRIM. JUST. 416 (2015); David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, THE ATLANTIC (June 29, 2012), <http://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/> (noting the historically high level of five-to-four decisions by the Roberts Court and that “[s]cholars consider these narrow decisions the most political. Research indicates that five-to-four rulings are the most likely to be overturned by later Courts. They carry the same legal authority as more unanimous

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because “[t]he most closely divided rulings of the Roberts Court reveal sharply divergent views of history, approaches to interpreting the Constitution, the role of government in American lives, and what makes a just society.”<sup>47</sup>

This first glance at rulings by the Roberts Court suggests potential bases of significant power for both the Chief Justice and Justice Kennedy. As head of a conservative Court, Chief Justice Roberts has had substantial opportunities to shape criminal law in a more conservative direction. At the same time, Justice Kennedy’s oft-stated influence as a pivotal vote appears especially worthy of scrutiny in criminal justice cases given the high proportion of these cases decided by the thinnest of majorities.

### ***B. Two Camps in Criminal Justice***

Although institutional-level descriptors are informative, examining trends in the voting behavior of individual Justices better assesses the accuracy of assumptions regarding conservatism on the Court, and further clarifies some of the influential roles played by Chief Justice Roberts and Justice Kennedy. Findings presented in Table 2 comport with the common impression that the Justices fall roughly into one of two camps, and that the Court’s newest members have not dramatically altered its rightward tilt. The records of Chief Justice Roberts and Justice Alito establish both as dependable conservatives in criminal justice cases. Justices Sotomayor and Kagan seem at home in the left wing of the Court, though their more limited service to date cautions that this is a tentative assessment. Among members just prior to Justice Scalia’s death in February 2016, Chief Justice Roberts, Justice

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opinions—but not the same moral authority.”); Juliet Lapidus, *Five-Four*, N.Y. TIMES: TAKING NOTE (June 18, 2012), <http://takingnote.blogs.nytimes.com/2012/06/18/five-four/> (calculating that, regarding cases across all issue areas since 1946, “Chief Justice Roberts doesn’t just hold the single-term record—he beats other chief justices for the greatest share of five-four splits over his career to date: 22.2 percent, versus 20.3 for William Rehnquist, 16.9 for Warren Burger, 11.7 for Earl Warren and 15 for Fred Vinson”).

47. COYLE, *supra* note 40, at 4.

Kennedy, Justice Alito, Justice Thomas, and Justice Scalia were each much more likely than Justices Ginsburg, Breyer, Sotomayor and Kagan to support government's law enforcement interests in criminal justice cases.

TABLE 2: CONSERVATIVE, MAJORITY & SELECT DISSENT VOTING RATES IN ALL CRIMINAL JUSTICE CASES, 2005-2015, BY JUSTICE

<i>Percent of each Justice's votes that were:</i>			
<i>Justice (n votes)<sup>48</sup></i>	<i>Conservative</i>	<i>In the Majority</i>	<i>Solo dissents or one of only two dissenters</i>
Alito (249)	80.7	75.1	5.6
Thomas (264)	76.5	72.3	9.5
<b>Roberts (263)</b>	<b>68.1</b>	<b>84.0</b>	<b>0.8</b>
Scalia (264)	66.7	76.9	5.7
<b>Kennedy (264)</b>	<b>59.1</b>	<b>91.3</b>	<b>1.1</b>
Breyer (263)	42.6	78.7	3.8
Sotomayor (151)	36.4	82.1	2.6
Ginsburg (264)	36.4	77.7	4.9
Kagan (111)	36.0	84.7	0.9
Souter (111)	36.0	75.7	4.5
Stevens (140)	33.6	70.7	10.0

Presumably, the sincerest representations of judicial preferences are expressed most often in non-unanimous decisions, at least to the degree that votes in such cases do not reflect the compromising of positions purely for the sake of unanimity.<sup>49</sup> Data supports this contention and reveals the

48. Justice Sandra O'Connor participated in six of these decisions (four unanimous and two non-unanimous) before her retirement. The low number of Justice O'Connor's votes prohibits a meaningful analysis of her voting patterns on the Roberts Court.

49. See e.g., C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN

extent of ideological distance between the two wings of the Court. For example, 73 percent of the votes cast by members of the conservative wing in non-unanimous, criminal justice cases supported the conservative position; conversely, 77 percent of the votes from the remaining Justices favored the liberal position.<sup>50</sup>

Chief Justice Roberts and Justice Kennedy rank atop all others for being in the most criminal justice majorities in decisions.<sup>51</sup> Nearly four out of every five decisions by the Court during the period analyzed ended with *both* Chief Justice Roberts and Justice Kennedy on the winning side.<sup>52</sup> Remarkably, only ten criminal justice cases decided during these ten Terms ended with both Chief Justice Roberts and Justice Kennedy dissenting.<sup>53</sup>

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JUDICIAL POLITICS AND VALUES xii (1948) (non-unanimous decisions permit Justices to “supply information about their attitudes and their values which is available in no other way.”); Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10:2 SOC’Y FOR POL. METHODOLOGY 134-35, 137 n.3 (2002), <https://deepblue.lib.umich.edu/bitstream/handle/2027.42/116239/pa02.pdf?sequence=1&isAllowed=y> (stating that they “suspect that unanimity results from motivations rooted in institutional legitimacy” and estimating Justices’ preferred positions exclusively in non-unanimous cases).

50. Of the 853 votes cast by Chief Justice Roberts, Justice Kennedy, Justice Thomas, Justice Alito, and Justice Scalia in non-unanimous, criminal justice cases decided from 2005-2015, 619 favored a conservative outcome, while 524 of 680 votes cast by Justices Stevens, Ginsburg, Breyer, Souter, Sotomayor and Kagan favored a liberal outcome. See *infra* Table 4 for percentages of individual Justices.

51. See *supra* Table 2. Justice Kagan’s majority participation rate (84.7 percent) is slightly higher than Chief Justice Roberts’s (84.0 percent). However, as the Court’s newest member, Justice Kagan has voted with the majority in far fewer cases (94) than has Chief Justice Roberts (221).

52. Chief Justice Roberts and Justice Kennedy voted together and with the majority in 208 of the 263 cases (79.1 percent) in which they both participated. The Chief Justice did not participate in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

53. Both Chief Justice Roberts and Justice Kennedy casted dissenting votes in ten of the cases examined. These are: *Alleyne v. United States*, 133 S. Ct. 2151 (2013); *Florida v. Jardines*, 133 S. Ct. 1409 (2013); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *Magwood v. Patterson*, 561 U.S. 320 (2010); *Dolan v. United States*, 560 U.S. 605 (2010); *Arizona v. Gant*, 556 U.S. 332 (2009); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *United States v. Santos*, 553 U.S. 507 (2008); *Danforth v. Minnesota*, 552 U.S. 264 (2008); *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

Chief Justice Roberts and Justice Kennedy have been especially unlikely to dissent against large majorities, such as in eight-to-one and seven-to-two decisions. In contrast, one of every ten votes cast in a criminal justice case by liberal stalwart<sup>54</sup> Justice Stevens during this period was as a sole dissenter or with only one other Justice. Moreover, with the exception of relative newcomer Justice Elena Kagan, who participated in far fewer cases, Chief Justice Roberts and Justice Kennedy are the only members of the Court who did not file a single, lone dissent in a criminal justice case from 2005-2015.<sup>55</sup>

Interestingly, the other three conservatives on the Court exhibited a willingness to break from large majorities. Indeed, Justices Alito, Thomas and Scalia account for three of every five lone dissents in criminal justice cases decided during the period examined,<sup>56</sup> and the rate of dissenting either alone or with only one other Justice is over 50 percent higher for Alito, Scalia and Thomas than for those commonly perceived to be in the left wing of the Court.<sup>57</sup>

Although most of the dissents by Justices Scalia, Thomas, and Alito were against liberal majorities, Justices Scalia and Thomas recorded twelve dissenting votes in nine cases decided by large majorities, producing conservative outcomes.<sup>58</sup> Chief

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54. Christopher E. Smith & Michael A. McCall, *Introduction*, in CHRISTOPHER E. SMITH, CHRISTINA DEJONG & MICHAEL A. MCCALL (eds. 2011), *THE REHNQUIST COURT AND CRIMINAL JUSTICE* 1, 7 (presenting lifetime voting records that rank Stevens among the most liberal Rehnquist Court Justices in criminal procedure cases).

55. Justice Thomas dissented most often (ten times) from an otherwise unanimous Court. Justices Stevens and Alito were each lone dissenters four times. Justices Scalia, Ginsburg and Sotomayor each cast the lone dissent in two criminal justice cases, while Justices Breyer and Souter did so once each.

56. Justices Alito, Scalia and Thomas wrote sixteen of the twenty-six solo dissents in the cases analyzed.

57. Of the 777 votes cast by Justices Scalia, Alito and Thomas, fifty-four (6.9 percent) of the votes placed one of them in a very small minority of no larger than two dissenters. Of the 1,040 votes by Justices Stevens, Ginsburg, Breyer, Souter, Sotomayor and Kagan, forty-seven (4.5 percent) votes produced such a result. *See supra* Table 2.

58. Justice Alito did not dissent against a single conservative majority of any size. *See infra* Table 7. Thomas and Scalia were the only dissenters in *United States v. Kebodeaux*, 133 S. Ct. 2496 (2013); *United States v. Comstock*, 560 U.S. 126 (2010); and *Indiana v. Edwards*, 554 U.S. 164 (2008).



Justice Roberts and Justice Kennedy were almost always in the conservative majority in these instances.<sup>59</sup> The willingness of Justices Scalia and Thomas to dissent—especially when a criminal justice case raised other types of issues of greater importance to them<sup>60</sup>—exposes limits to the ability of Chief Justice Roberts and Justice Kennedy to keep the conservative bloc together in some instances.

Rates of being in the majority are important for the obvious reason that it is difficult to be particularly influential, at least in the short term, if routinely absent from the group whose interpretation of law is authoritative. This underscores the value of examining the influence of Chief Justice Roberts and Justice Kennedy in that at least one (and usually both) of these Justices helped shape law as members of the majority in 254 of the 264 criminal justice cases decided during the first ten years of the Roberts Court era.<sup>61</sup>

Majority participation has particular relevance to Roberts in that, as Chief Justice, he assigns the Court's opinion when he is in the majority.<sup>62</sup> A frequent member of the majority, Chief Justice Roberts routinely holds this power. Justice Kennedy supported the majority position more often still,<sup>63</sup> and, as discussed later, many of his opinion-writing opportunities have not been dependent on Chief Justice Roberts.<sup>64</sup> We turn, first, to the Chief Justice and his most

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Justice Thomas dissented (with Justice Kennedy) in *Camreta v. Greene*, 563 U.S. 692 (2011) and was the sole dissenter in *Gonzalez v. United States*, 553 U.S. 242 (2008). Justice Scalia was the sole dissenter in *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007), and one of two dissenters in *San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015); *Michigan v. Bryant*, 562 U.S. 344 (2011) and (along with Chief Justice Roberts) in *United States v. Hayes*, 555 U.S. 415 (2009).

59. For exceptions, see *Camreta*, 563 U.S. at 716, and *Hayes*, 555 U.S. at 430.

60. For examples of Justices Scalia's and Thomas's dissents from large conservative, majority opinions, which they perceived inappropriately expanded federal power, see *Kebodeaux*, 133 S. Ct. at 2509, and *Comstock*, 560 U.S. at 158-59 (2010).

61. See *supra* note 53 (listing the ten criminal justice cases in which both Chief Justice Roberts and Justice Kennedy dissented).

62. LAWRENCE BAUM, *THE SUPREME COURT* 133 (7th ed. 1992).

63. See *supra* Table 2.

64. See *infra* Part V.B.

important administrative power<sup>65</sup>—assigning the Court’s opinion when in the majority.<sup>66</sup>

#### IV. CHIEF JUSTICE JOHN ROBERTS

##### A. *Chief Justice Roberts as Assigner of Majority Opinions*

Generations of scholars have analyzed the distribution of opinion assignments in evaluating Chief Justices’ decision-making processes and exercise of power.<sup>67</sup> Deciding who writes the Court’s opinion can determine the quality and scope of rulings, the efficiency in which they are produced, whether majority coalitions are maintained, and the degree to which policy preferences of the assigner are emphasized.<sup>68</sup> Each of these considerations is constrained by an equity assumption among Court members—that each will receive his or her ‘fair share’ of assignments.<sup>69</sup> Although data limitations prevent a systematic testing of strategies Chief Justice Roberts might

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65. See, e.g., Felix Frankfurter, “The Administrative Side” of Chief Justice Hughes, 63 HARV. L. REV. 1, 3 (1949) (“Perhaps no aspect of the ‘administrative side’ that is vested in the Chief Justice is more important than the duty to assign the writing of the Court’s opinion.”).

66. We follow the practice common among judicial scholars of assuming that the Chief Justice assigns the opinion when in the majority and that the most senior Associate Justice does so when the Chief Justice dissents or does not participate. If Chief Justice Roberts joined a majority after dissenting at the initial conference vote, this assumption would lead to the incorrect identification of Chief Justice Roberts as having assigned the opinion. See LEE EPSTEIN ET. AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS 425-26 (1994).

67. E.g., WALTER MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964); Forrest Maltzman & Paul J. Wahlbeck, *May It Please the Chief? Opinion Assignments in the Rehnquist Court*, 40 AM. J. POL. SCI. 421 (1996); Saul Brenner, *Issue Specialization as a Variable in Opinion Assignment on the U.S. Supreme Court*, 46 J. POL. 1217 (1984); Elliot E. Slotnick, *Who Speaks for the Court? Majority Opinion Assignments from Taft to Burger*, 23 AM. J. POL. SCI. 60 (1979).

68. See Sandra L. Wood et al., *Opinion Assignment and the Chief Justice: 1888-1940*, 81 SOC. SCI. Q. 798, 798-800 (2000) (summarizing traditional models that explain opinion assignment choices).

69. See generally Sara C. Benesh et al., *Equity in Supreme Court Opinion Assignment*, 39 JURIMETRICS 377 (1999) (analyzing more than four decades of opinion assignments in terms of distributional equality).

pursue in assigning the Court's criminal justice opinions,<sup>70</sup> patterns provide tentative support for certain interpretations of the Chief Justice's decision calculus.

Table 3 presents the distribution of authorship of the Court's criminal justice decisions when Chief Justice Roberts was in the majority. Given that any Chief Justice's strategic choices are constrained by the voting tendencies of others,<sup>71</sup> the allocation of writing opportunities is surprisingly even. For example, Justices Alito, Scalia, Breyer, and Ginsburg each authored thirteen unanimous decisions for the Court.<sup>72</sup> Moreover, Chief Justice Roberts assigned unanimous, *liberal* criminal justice decisions to members of the *conservative wing*—and unanimous conservative decisions to liberal Justices—in almost precise proportion to the conservative-liberal composition of the Court.<sup>73</sup>

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70. For example, a full examination of the possible influence of the equity expectation requires consideration of the distribution of opinion authorship across the Court's complete docket of cases and not just a subset of criminal justice decisions.

71. *E.g.*, Justice Stevens received relatively few assignments from Chief Justice Roberts in part because Justice Stevens—the Justice least likely to agree with Roberts in criminal justice cases—often was not in the majority when Chief Justice Roberts was. See *infra* Table 4. Similarly, it is not surprising that Chief Justice Roberts assigned Justices Thomas and Alito a total of forty-two conservative and only eleven liberal opinions, given that these two jurists have been by far the least likely members of the Court to join a liberal majority. See *infra* Table 3, Table 7.

72. See *infra* Table 3.

73. If assignments were randomly distributed, we would expect the five more conservative Justices to author eighteen of the thirty-two liberal, unanimous decisions; they actually wrote nineteen. The more liberal Justices wrote twenty-six of the sixty conservative, unanimous decisions, versus the random expectation of twenty-seven.

TABLE 3: OPINION ASSIGNMENTS BY CHIEF JUSTICE ROBERTS<sup>74</sup> IN CRIMINAL JUSTICE CASES, BY JUSTICE AND MAJORITY TYPE, 2005-2015

<i>Majority opinions authored by type of majority</i>							
		Unanimous		Non-Unanimous		Five-Member	
<i>Author</i>	<i>Total</i>	<i>Con</i>	<i>Lib</i>	<i>Con</i>	<i>Lib</i>	<i>Con</i>	<i>Lib</i>
Alito	30	8	5	16	1	7	0
Scalia	28	10	3	10	5	4	0
<b>Roberts</b>	<b>27</b>	<b>5</b>	<b>5</b>	<b>13</b>	<b>4</b>	<b>3</b>	<b>1</b>
Breyer	27	10	3	9	5	0	0
Ginsburg	26	11	2	4	9	0	1
Thomas	23	6	4	12	1	7	0
<b>Kennedy</b>	<b>21</b>	<b>5</b>	<b>2</b>	<b>8</b>	<b>6</b>	<b>6</b>	<b>1</b>
Sotomayor	11	3	0	3	5	0	0
Stevens	10	0	1	4	5	1	0
Kagan	10	2	3	2	3	0	0
Souter	8	0	4	1	3	0	0
TOTAL	221	60	32	82	47	28	3

Justices Ginsburg and Breyer were among the most frequent authors of conservative, unanimous opinions, while no one wrote more unanimous, liberal criminal justice opinions than the Chief Justice. Notably, the Justices with the most polar voting patterns received relatively few assignments for a unanimous Court in the direction one might expect. Justice Alito authored only eight conservative Court opinions without dissent and Justice Stevens wrote only one liberal one. Chief Justice Roberts assigned eleven conservative, unanimous opinions to Justice Ginsburg, but only two liberal ones.

These somewhat curious tendencies are made less puzzling considering the strategic choices Chief Justice Roberts might be making in his assignment of opinions. Although unanimous,

74. See EPSTEIN ET AL., *supra* note 66, at 425-26 (regarding assumptions about opinion assignments).

conservative decisions provide Chief Justice Roberts with opportunities to vigorously pursue his policy goals by assigning opinions to close ideological allies, his frequent use of Justices from the liberal wing to craft these opinions helps preserve unanimity by minimizing the risk of defection from the majority,<sup>75</sup> thereby accomplishing his goal of fostering greater consensus on the Court.<sup>76</sup>

Moreover, it is reasonable to assume that a skillful strategist like Chief Justice Roberts<sup>77</sup> understands that every conservative, unanimous (and presumably less controversial) decision written by liberal Justices like Ginsburg reduces the amount of time such Justices have to author opinions in more divisive cases. Meanwhile, assigning more than half of the Court's liberal, unanimous decisions to members of the conservative wing not only minimizes defection from the majority, but also likely constrains the scope of liberalism in some of these opinions and lessens the degree to which the resulting policies diverge from the Chief Justice's preferred positions.

Other potential evidence of Chief Justice Roberts's strategic use of opinion assignments emerges from the findings. For instance, the Chief Justice relied extensively on the relatively moderate Justice Breyer<sup>78</sup> to write majority opinions in cases raising criminal justice issues, especially when the Court ruled in favor of government interests. Of Justice Breyer's twenty-seven majority opinions likely assigned by Chief Justice Roberts, nineteen opinions were in cases producing a conservative outcome.<sup>79</sup>

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75. Scholars have long noted the logic of such an opinion assignment strategy though, understandably, most attention has been given to choices that minimize defection when the majority is fragile. *See, e.g.*, David J. Danelski, *The Influence of the Chief Justice in the Decisional Process of the Supreme Court*, in *THE FEDERAL JUDICIAL SYSTEM* 147 (Thomas P. Jahnige & Sheldon Goldman eds. 1968); David W. Rohde, *Policy Goals, Strategic, Choice and Majority Opinion Assignments in the U.S. Supreme Court*, 16 *MIDWEST J. POL. SCI.* 652 (1972).

76. *See* The Associated Press, *supra* note 43.

77. *See* Liptak, *supra* note 18.

78. *See supra* Table 2 (showing that Justice Breyer posted the most conservative voting rate in criminal justice cases among those considered to be liberal Justices).

79. *See supra* Table 3.

Also, in the rare instances in which Chief Justice Roberts was part of a five-member majority handing down a liberal criminal justice decision, the author of the Court's decision tended to come from the conservative wing. For example, Chief Justice Roberts self-assigned the decision in *Hemi Group, LLC v. City of New York*,<sup>80</sup> and joined the opinion in *Arizona v. United States*,<sup>81</sup> authored by his fellow conservative, Justice Kennedy.<sup>82</sup>

While in those cases Chief Justice Roberts's assignment choices may have been motivated by an attempt to limit the degree of liberalism expressed in the Court's decision, elsewhere he may have been more concerned with maintaining a fragile, conservative majority. When the Court decided a sentencing guidelines case with a five-member majority that did not include Justice Kennedy, Chief Justice Roberts assigned the conservative opinion to Justice Stevens, the only majority member from the liberal wing.<sup>83</sup> Furthermore, in the only conservative criminal justice decision that Chief Justice Roberts assigned to Justice Souter (*Clark v. Arizona*),<sup>84</sup> Justice Souter's vote was critical. In *Clark*, the only other Justice from

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80. *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 4-5 (2010) (holding that the Racketeer Influence and Corrupt Organizations Act cannot be used to collect damages from out-of-state internet vendors who fail to pay city taxes on cigarettes).

81. *Arizona v. United States*, 132 S. Ct. 2492, 2510-11 (2012) (holding key sections of Arizona's immigration law were preempted by federal law).

82. Of the cases analyzed, the only other marginally-winning, liberal majority in which Chief Justice Roberts was a member was *Yates v. United States*, 135 S. Ct. 1074, 1087 (2015) (defining the meaning of "tangible objects" for the purposes of federal legislation originally enacted to combat securities and financial fraud). Justice Ginsburg wrote for the Court. *Id.* at 1078. Chief Justice Roberts's options were more constrained because the only other conservative Justice in the majority wrote a concurring opinion to assert the decision should have been based on grounds more narrow than those used by the majority. *See id.* at 1089 (Alito, J., concurring).

83. *Irizarry v. United States*, 553 U.S. 708, 715-16 (2008) (holding that an above-guidelines sentence imposed a variance rather than a departure from the guidelines and, thus, the judge was not required to provide both sides with notice before imposing the sentence).

84. *Clark v. Arizona*, 548 U.S. 735, 742 (2006) (holding that due process does not prohibit the state from using an insanity test that measures only the ability of the defendant to determine whether an act is right or wrong and limiting defendant's evidence of mental defect to that which is relevant to the test).

the liberal wing to join the six-member majority opinion also dissented in part, making it a tenuous majority.<sup>85</sup>

In most instances, however, the size and cohesiveness of the conservative bloc meant that Chief Justice Roberts did not need to garner support from a member of the liberal wing in order to preserve a conservative outcome.<sup>86</sup> Yet here—in non-unanimous, conservative decisions that rarely depended on recruiting a member from the liberal wing—Chief Justice Roberts assigned a disproportionate number of opinions to the more liberal Justices. Specifically, the Chief Justice assigned nearly 30 percent of the non-unanimous, conservative decisions to members of the liberal wing, even though these Justices provided less than one-fourth of the majority votes in these cases.<sup>87</sup>

The findings also tentatively support Professor Wahlbeck's prediction that, in many instances, the conservative tilt of the Court would permit Chief Justice Roberts to distribute opinion assignments across several Justices without risking that the outcome would stray far from his preferred position.<sup>88</sup> As shown previously in Table 3, Chief Justice Roberts assigned non-unanimous opinions rather evenly to his fellow members of the conservative wing (seventeen each to himself and Justice Alito, and thirteen to fifteen each to Justices Scalia, Kennedy and Thomas).

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85. *Id.* at 779-80 (Breyer, J., concurring in part, dissenting in part). Justice Souter's vote was especially important given that Justice Breyer would have remanded the case to the state court.

86. A supporting vote from a Justice in the liberal wing to produce a conservative decision for a five-member majority that included Chief Justice Roberts occurred in only five of the 264 analyzed cases. *See Navarette v. California*, 134 S. Ct. 1683 (2014); *Maryland v. King*, 133 S. Ct. 1958 (2013); *Williams v. Illinois*, 132 S. Ct. 2221 (2012); *Irizarry v. United States*, 553 U.S. 708 (2008); *James v. United States*, 550 U.S. 192 (2007).

87. Members of the liberal wing wrote twenty-three of the eighty-two non-unanimous, conservative decisions (28 percent) that included Roberts in the majority. In those eighty-two cases, liberal Justices provided only 120 of the 504 votes (23.8 percent) supporting the majority.

88. Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1754-55 (2006) (predicting that "Chief Justice Roberts will enjoy leading a Court where the median is a relatively conservative voice. This will enable him to distribute opinion assignments across many Justices without any discernible policy loss.").

***B. Chief Justice Roberts as Leader of the  
Conservative Core***

When broad consensus is achieved, Chief Justice Roberts benefits from leading a Court that overwhelmingly supports conservative outcomes in criminal justice cases.<sup>89</sup> Of course, dissents are hardly rare on the Roberts Court, and philosophical differences between Justices and shared voting patterns among them are clarified when attention is focused on non-unanimous decisions.<sup>90</sup> Tendencies regarding the voting behavior of individual Justices in non-unanimous, criminal justice cases are summarized in Table 4.

The findings depict Chief Justice Roberts as occupying a powerful position in the middle of the conservative bloc during his first ten years on as Chief Justice. Justices Alito and Thomas have been more inclined than Roberts to support government interests in deterring, investigating and punishing criminal behavior, while Justice Scalia (slightly) and Justice Kennedy (considerably) had been more likely than Chief Justice Roberts to favor claims of prisoners and of the criminally accused.<sup>91</sup>

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89. See *supra* Table 1 (showing that unanimous conservative decisions outnumber liberal ones by nearly two-to-one).

90. Christopher E. Smith, Michael A. McCall & Madhavi M. McCall, *Criminal Justice and the 2005-2006 United States Supreme Court Term*, 25 QUINNIPIAC L. REV. 495, 504 (2007) (“[T]he philosophical divisions between the Justices concerning criminal justice cases become accentuated when unanimous cases are removed from the analysis.”); 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) (noting that on an en banc appellate court like the Supreme Court, a “dissenter can usually share the burden of opinion writing . . . and therefore more freely indicate his or her actual views on an issue”).

91. See *infra* Table 4 (showing “percent conservative” which is the rate of voting in support of government interests). See *supra* notes 27-39 and accompanying text discussing the coding of votes and decisions as conservative or liberal.



TABLE 4: JUSTICES' RATES OF AGREEING WITH ROBERTS OR KENNEDY IN NON-UNANIMOUS, CRIMINAL JUSTICE DECISIONS, 2005-2015

<i>Justice (n votes)<sup>92</sup></i>	<i>Percent conservative</i>	<i>Percent in agreement with Roberts</i>	<i>Percent in agreement with Kennedy</i>
Roberts (171)	69.6	---	73.7
Kennedy (172)	55.8	73.7	---

<i>3 Other Conservatives, Mean<sup>93</sup></i>	79.2	75.5	56.3
Alito	88.0	79.4	63.3
Thomas	82.6	69.6	51.2
Scalia	67.4	77.8	54.7

<i>6 Liberals, Mean<sup>94</sup></i>	22.9	45.1	60.0
Breyer (171)	30.4	50.6	65.5
Souter (74)	23.0	41.1	54.1
Ginsburg (172)	20.9	42.1	58.1
Kagan (72)	20.8	45.8	66.7
Stevens (95)	20.0	37.2	54.7
Sotomayor (96)	17.7	51.0	58.3

The Chief Justice's position in the conservative wing appears especially strong relative to that of Justice Kennedy with regard to garnering support from other conservative

92. Justice O'Connor's two votes in non-unanimous cases are not included.

93. Percentages for '3 Other Conservatives' are weighted means and reflect the Justices' different participation rates over this period.

94. Percentages for '6 Liberals' are weighted means and reflect the Justices' different participation rates over this period.

Justices as indicated by the inter-agreement statistics.<sup>95</sup> Justices Alito, Thomas and Scalia each posted substantially higher agreement rates with the Chief Justice than with Justice Kennedy.

In fact, Justice Kennedy was less likely, on average, to vote with Justices Alito, Thomas or Scalia than he was with a random Justice from the Court's liberal wing.<sup>96</sup> While this underscores the need to accommodate Justice Kennedy's views to maintain a conservative majority in certain cases, it also ranks Chief Justice Roberts as clearly the more reliable conservative in criminal justice cases.

Justice Kennedy's most common ally in these cases—by a substantial margin—has been Chief Justice Roberts. This heightens the importance of Chief Justice Roberts's role while highlighting Justice Kennedy's relative isolation from the rest of the conservative core. Chief Justice Roberts is one of only two Justices to vote with Justice Kennedy in at least two-thirds of non-unanimous, criminal justice decisions; the other is Justice Kagan.<sup>97</sup> Every Justice, other than Justice Kennedy, enjoys agreement rates with at least three other Justices that surpass the 67 percent level.<sup>98</sup>

Chief Justice Roberts agrees most frequently with the Court's most conservative member in criminal justice issues—Justice Alito. Justice Alito's record differs significantly from that of Justice O'Connor, whom he replaced and who provided several critical swing votes in support of thin liberal majorities

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95. Decades of Court analyses have drawn upon inter-agreement tables to illustrate shared voting patterns among Justices and to identify potential voting blocs. *See, e.g.*, GARRISON NELSON, *PATHWAYS TO THE US SUPREME COURT: FROM THE ARENA TO THE MONASTERY* 171-72 (2013) (noting The Harvard Review's use of inter-agreement rates dating to the late 1940s in summarizing Supreme Court Terms, and C. Herman Pritchett's pioneering work of the late 1930s on the related topic of bloc voting).

96. Justice Kennedy agreed with Justices Scalia, Alito or Thomas 287 times in the 510 opportunities to do so in non-unanimous, criminal justice decisions (56.3 percent). Justice Kennedy agreed with Justices Breyer, Souter, Sotomayor, Ginsburg, Kagan or Stevens in 408 of 680 such chances (60.0 percent). *See supra* Table 4.

97. *See supra* Table 4.

98. Rates are based on the authors' analysis of cases and votes selected. *See supra* Part II (discussing case selection).

during the Rehnquist Court.<sup>99</sup> Justice Alito voted for the liberal position in only twenty non-unanimous, criminal justice decisions in his first ten years on the Court, and only three times when a case produced at least three dissenters.<sup>100</sup> However, Chief Justice Roberts's high rate of agreement with Justice Alito has not relegated the Chief Justice to the Court's periphery. Chief Justice Roberts also regularly voted with Justices Scalia and Thomas; this is significant because, in recent years, the grouping of Justices Scalia, Alito, and Thomas proved to be one of the Court's strongest voting blocs in criminal justice cases.<sup>101</sup>

In the decisions examined, Justices Scalia, Thomas and Alito ended on the same side of the vote count in nearly three of every four cases in which they all participated. As shown in Table 5, Chief Justice Roberts was much more likely than Justice Kennedy to join the three other conservatives in these instances. For example, in the 100 cases in which Justices Scalia, Alito and Thomas took a similar position with respect to judgment in a non-unanimous decision, Chief Justice Roberts

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99. See, e.g., Madhavi M. McCall, *Sandra Day O'Connor: Influence from the Middle of the Court*, in THE REHNQUIST COURT, *supra* note 9, at 158-59; Elisabeth Bumiller & Carl Hulse, *Court in Transition: The Overview; Bush Picks U.S. Appeals Judge to Take O'Connor's Seat*, N.Y. TIMES, Nov. 1, 2005, at A1 (noting that Alito's arrival and O'Connor's departure as a swing vote "could shift the balance of the [C]ourt and change the laws of the nation well into the century"); Smith & McCall, *supra* note 54, at 11; Martin et al., *supra* note 20, at 1291 ("[O]n virtually all conceptual and empirical definitions, O'Connor is the Court's center—the median, the key, the critical and the swing Justice.").

100. Justice Alito voted with a five-member, liberal majority in *Yates*, 135 S. Ct. at 1074, and in *Hemi Grp.*, 559 U.S. at 1, and in the six-to-three decision in *Giles v. California*, 554 U.S. 353 (2008). In all three cases, Justice Alito and Chief Justice Roberts were in the majority, while Justice Kennedy dissented.

101. See, e.g., Madhavi M. McCall, Michael A. McCall & Christopher E. Smith, *Criminal Justice and the 2011-2012 United States Supreme Court Term*, 41 FL. COASTAL L. REV. 239, 249-50 (2013) (finding that the only grouping of Justices to agree sufficiently often in criminal justice cases that Term to meet the statistical threshold for being called a voting bloc consisted of Justices Scalia, Alito and Thomas); Christopher E. Smith, Michael A. McCall & Madhavi M. McCall, *The Roberts Court and Criminal Justice at the Dawn of the 2008 Term*, 3 CHARLESTON L. REV. 265, 273 (2009) (finding Chief Justice Roberts and Justices Alito, Thomas, and Scalia to be the strongest voting bloc in criminal justice cases decided during the first four years of the Roberts Court).

joined them ninety-one times—or about 50 percent more often than did Kennedy (sixty-one times). Chief Justice Roberts broke with a majority that included Justices Scalia, Alito and Thomas only twice in the 264 cases reviewed during the first decade of the Roberts Court era. In one, Chief Justice Roberts dissented when the majority (which included all four remaining conservative Justices, along with Justices Ginsburg and Kagan) ruled against a defendant’s challenge to a pre-trial asset seizure.<sup>102</sup> Chief Justice Roberts filed a dissenting opinion to assert that defendants have the right to challenge forfeiture, especially when those funds are intended to pay for legal counsel.<sup>103</sup>

In the other case,<sup>104</sup> the majority held that state courts could apply retroactively a court’s criminal procedure rule regarding the Confrontation Clause of the Sixth Amendment more broadly than precedent required.<sup>105</sup> Chief Justice Roberts disagreed and argued that such issues of retroactivity should be decided by federal, rather than state, courts.<sup>106</sup> Interestingly, the only other dissenter in *Danforth* was Justice Kennedy and he joined the Chief Justice’s dissent.<sup>107</sup> Thus, this case did not improve Justice Kennedy’s agreement rate with the three other conservatives relative to Chief Justice Roberts’s rate. In short, Chief Justice Roberts was out of a single majority that included Justices Kennedy, Scalia, Thomas and Alito in a criminal justice case decided during this period.<sup>108</sup> In contrast, Justice Kennedy dissented seven times when all four of his fellow conservatives were in the majority.<sup>109</sup>

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102. *Kaley v. United States*, 134 S. Ct. 1090 (2014).

103. *Id.* at 1105 (Roberts, C.J., dissenting).

104. *Danforth v. Minnesota*, 552 U.S. 264 (2008).

105. *Id.* at 267-68.

106. *Id.* at 291-92 (Roberts, C.J., dissenting).

107. *Id.*

108. *Kaley*, 134 S. Ct. at 1090.

109. *Setser v. United States*, 132 S. Ct. 1463 (2012); *Wood v. Allen*, 558 U.S. 290 (2010); *Barber v. Thomas*, 560 U.S. 474 (2010); *Hemi Grp. v. City of New York*, 559 U.S. 1 (2010); *Giles v. California*, 554 U.S. 353 (2008); *Irizarry v. United States*, 553 U.S. 708 (2008); *Clark v. Arizona*, 548 U.S. 735 (2006).

TABLE 5: THE CONSERVATIVE BLOC, CRIMINAL JUSTICE CASES 2005-2015

<i>Type of Outcome</i>		
<i>Category / Grouping by number of cases in which:</i>	<i>Non-Unanimous</i>	<i>All</i>
Roberts, Kennedy, Scalia, Thomas, and Alito participated	165	248 <sup>110</sup>
Scalia, Thomas, Alito agreed with each other	100	183
And in the majority	69	152
Roberts, Scalia, Thomas & Alito agreed with each other	91	174
And in the majority	67	150
Kennedy, Scalia, Thomas & Alito agreed with each other	61	144
And in the majority	61	144
<i>Percent Voting Together</i>		
Roberts, Scalia, Thomas & Alito	55.2 %	70.2 %
Kennedy, Scalia, Thomas & Alito	37.0 %	58.1 %

An examination of voting behaviors across four dimensions in non-unanimous cases affords a more detailed, comparative assessment of members of the conservative wing, and of Chief Justice Roberts's and Justice Kennedy's relative placement

110. Only four conservative Justices participated in sixteen of the Court's 264 cases criminal justice cases during this period. Justice Alito did not participate in fifteen (including six cases decided when Justice O'Connor was still on the Court). Chief Justice Roberts did not participate in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), in which Justices Scalia, Alito, and Thomas agreed with each other, and disagreed with Justice Kennedy.

within that camp. These dimensions<sup>111</sup> are scaled to focus on voting in the conservative wing and tap each Justice's

*Consistency:* Dependability to vote conservative as measured by the percent of a Justice's votes favoring law enforcement interests;

*Efficiency:* Likelihood that a Justice's conservative vote will be endorsed by the Court as measured by the percent of a Justice's conservative votes that fell in the majority;

*Gravity:* Ability to attract support from other conservative Justices as measured by the weighted mean percent agreement with the other conservative Justices; and

*Criticality:* Dependability to cast a crucial conservative vote in cases decided by a five-member majority as measured by the percent of a Justice's votes favoring law enforcement interests in such cases.

The findings presented in Table 6 expose the vast distance between Chief Justice Roberts's position in the conservative wing from that occupied by Justice Kennedy. While Chief Justice Roberts ranks as the median conservative in criminal justice cases, Justice Kennedy demonstrates why judicial scholars often label him the Court's median Justice<sup>112</sup> by posting the lowest conservative consistency score among the

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111. Gravity scores are similar to inter-agreement rates but with respect to all members of the conservative wing. *See supra* Table 4. The efficiency measure gauges the efficiency of conservative votes only. Consistency scores are presented elsewhere in this Article as "percent conservative." Calculations for the criticality dimension regard voting only in those seventy cases ending five-to-four or five-to-three. Other dimensions regard voting in 172 criminal justice cases decided by a non-unanimous Court from the 2005-2006 Term through the 2014-2015 Term.

112. *See, e.g.,* HELEN J. KNOWLES, *THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY* 4 (2009) ("[T]here 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.").

five members of the dominant, conservative wing.<sup>113</sup>

However, Justice Kennedy has been extraordinarily efficient in his support of law enforcement interests in that few of his conservative votes in these cases have been in dissent. Indeed, five of every six conservative votes cast by Justice Kennedy in non-unanimous, criminal justice decisions during the last ten Terms were with the majority.<sup>114</sup> This efficiency allowed Justice Kennedy to be a member of more conservative majorities in divided cases (eighty) than was Justice Thomas (seventy-eight) or Justice Scalia (seventy-one), despite Justices Thomas and Scalia voting conservative more often than Justice Kennedy. Chief Justice Roberts ranks second in conservative voting efficiency among his fellow conservatives with about 69 percent of his conservative votes in these cases supporting a majority.<sup>115</sup> In contrast, over 40 percent of the conservative votes cast by Justices Alito and Thomas—the Court’s most consistent conservatives—placed these Justices in the minority.<sup>116</sup>

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113. Justice Kennedy cast twenty-three fewer conservative votes than did Chief Justice Roberts (96 compared to 119) in these cases.

114. Of Justice Kennedy’s ninety-six conservative votes in non-unanimous, criminal justice cases during this period, eighty were with the majority.

115. See *infra* Table 6 (showing rankings by efficiency of conservative votes).

116. *Id.*

TABLE 6: DIMENSIONS OF CONSERVATIVE VOTING IN NON-UNANIMOUS, CRIMINAL JUSTICE CASES, 2005-2015

<i>Ranked Scores on Dimensions of Conservative Voting</i> <sup>117</sup>			
<i>Consistency</i>		<i>Efficiency</i>	
Alito	88.0	<b>Kennedy</b>	<b>83.3</b>
Thomas	82.6	<b>Roberts</b>	<b>68.9</b>
<b>Roberts</b>	<b>69.6</b>	Scalia	61.2
Scalia	67.4	Alito	57.5
<b>Kennedy</b>	<b>55.8</b>	Thomas	54.9
<i>Gravity</i>		<i>Criticality</i>	
<b>Roberts</b>	<b>75.1</b>	Alito	97.0
Alito	71.8	<b>Roberts</b>	<b>91.3</b>
Scalia	70.0	Scalia	82.9
Thomas	68.6	Thomas	78.6
<b>Kennedy</b>	<b>60.6</b>	<b>Kennedy</b>	<b>55.7</b>

As noted previously, Chief Justice Roberts garnered far more support from Justices Scalia, Thomas, and Alito for his criminal justice positions than did Justice Kennedy.<sup>118</sup> Indeed, inter-agreement rates in non-unanimous, criminal justice decisions suggest that no other member of the conservative wing possesses as much “gravitational pull” on his fellow conservatives as does Chief Justice Roberts. At the other end of the spectrum, Justice Kennedy has been the least successful member of that wing in attracting the support of other conservatives, and his gravity score would be lower still if not for his relatively high agreement rate with the Chief Justice.<sup>119</sup>

The most substantial gap between the voting behaviors of Chief Justice Roberts and Justice Kennedy emerges in the Court’s most divided decisions. Chief Justice Roberts voted

117. See *supra* note 100 and accompanying text for discussion of how each measure is calculated.

118. See *supra* Table 4.

119. Of the votes by Justices Scalia, Thomas and Alito in non-unanimous, criminal justices cases decided during the first ten Terms of the Roberts Court era, 383 agreed with the positions on judgment taken by Chief Justice Roberts, while only 287 agreed with Justice Kennedy’s votes. Excluding the Chief Justice, Justice Kennedy’s gravity score drops to 56.3.



liberal in only six<sup>120</sup> of the sixty-nine criminal justice cases in which he participated that ended in a minimally-winning majority (conservative criticality score of 91.3); only Justice Alito proved more reliable in providing a critical fifth, conservative vote in the Court's most divided criminal justice decisions from 2005-2015.<sup>121</sup> In contrast, Justice Kennedy has been almost as likely to support liberal outcomes as conservative ones in criminal justice cases decided by a five-member majority,<sup>122</sup> making him unquestionably the least dependable member of the conservative wing in the Court's most highly divided decisions.<sup>123</sup>

It is reasonable to assume that, as the Court's median Justice during this period,<sup>124</sup> Justice Kennedy played a crucial role in the conservative bloc in ways not captured by the criticality dimension. For example, one might argue that as the Justice who "mediates the liberal and conservative voting blocs"<sup>125</sup> on this ideologically divided Court, Justice Kennedy may not support law enforcement interests as often as his fellow conservatives, but few conservative decisions arise

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120. Chief Justice Roberts voted with the liberal majority in *Yates v. United States*, 135 S. Ct. 1074 (2015); *Arizona v. United States*, 132 S. Ct. 2492 (2012); and in *Hemi Grp. v. New York*, 559 U.S. 1 (2010). He also dissented from five-member, conservative majorities in *Paroline v. United States*, 134 S. Ct. 1710 (2013); *Dolan v. United States*, 560 U.S. 605 (2010); and in *Oregon v. Ice*, 555 U.S. 160 (2009). In each of these cases characterized by an unusual split among the Justices, Chief Justice Roberts voted with at least one other conservative Justice.

121. See *supra* Table 6. Both of Justice Alito's pro-defendant votes in criminal justice cases ending in five-member majorities involved somewhat unusual cases in this dataset in that the defendants represented commercial interests. In *Yates v. United States*, 135 S. Ct. 1074 (2015), the Court determined whether throwing undersized fish overboard constituted the destruction or concealment of a "tangible object" criminalized by the Sarbanes-Oxley Act. *Hemi Grp. v. New York*, 559 U.S. 1 (2010) involved the attempt to collect taxes on cigarettes sold over the Internet.

122. Justice Kennedy voted in favor of a liberal outcome in thirty-one of seventy criminal justice cases decided by a five-member majority.

123. See *supra* Table 6.

124. See, e.g., Robert Barnes, *Justice Kennedy: The Highly Influential Man in the Middle*, WASH. POST (May 13, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/12/AR2007051201586.html>.

125. RYAN A. MALPHURS, RHETORIC AND DISCOURSE IN SUPREME COURT ORAL ARGUMENTS: SENSEMAKING IN JUDICIAL DECISIONS 98 (2013).

without Kennedy's support. The data sustains this assertion; from 2005-2015, the Court handed down only seven conservative criminal justice decisions without Kennedy's conservative vote.<sup>126</sup>

Even in this regard, however, Chief Justice Roberts ranks as more influential than Justice Kennedy. The Court decided only five cases in favor of law enforcement interests during this period without Chief Justice Roberts in the conservative majority.<sup>127</sup>

Thus, on virtually all measures Chief Justice Roberts has demonstrated himself to be more central to the conservative bloc in criminal justice cases than has Justice Kennedy, and a more dependable conservative vote, especially in the Court's most divided decisions. However, many of the Court's split decisions produced liberal outcomes, and as discussed in the next section, it is in these cases that Justice Kennedy's influence emerges most noticeably.

## V. ASSOCIATE JUSTICE ANTHONY KENNEDY

### A. *Justice Kennedy & Liberal Outcomes*

The tendency of observers to concentrate on the influence of Justice Kennedy and Chief Justice Roberts is not surprising, given the frequency in which Court decisions align with these Justices' positions. Not only are Chief Justice Roberts and Justice Kennedy among the most likely Justices to be in the majority in criminal justice decisions, they also are the only members of the Court to have joined more than half of all liberal, non-unanimous majorities and more than half of all conservative ones over the first ten Terms of the Roberts Court

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126. *Setser v. United States*, 132 S. Ct. 1463 (2012); *Camreta v. Greene*, 131 S. Ct. 2020 (2011); *Dolan v. United States*, 560 U.S. 605 (2010); *Barber v. Thomas*, 560 U.S. 474 (2010); *Wood v. Allen*, 558 U.S. 290 (2010); *Irizarry v. United States*, 553 U.S. 708 (2008); *Clark v. Arizona*, 548 U.S. 735 (2006).

127. *Kaley v. United States*, 134 S. Ct. 1090 (2014); *Paroline v. United States*, 134 S. Ct. 1710 (2013); *Dolan v. United States*, 560 U.S. 605 (2010); *United States v. Hayes*, 555 U.S. 415 (2009); *Oregon v. Ice*, 555 U.S. 160 (2009). Justice Kennedy joined Chief Justice Roberts's dissent in *Dolan*, 560 U.S. at 621.

era, as summarized in Table 7.

TABLE 7: SWING AND MAJORITY VOTING IN NON-UNANIMOUS, CRIMINAL JUSTICE DECISIONS, BY JUSTICE AND MAJORITY TYPE, 2005-2015<sup>128</sup>

<i>Justice (votes)</i>	<i>% in Majority</i>	<i>% in Conservative Majority</i>	<i>% in Liberal Majority</i>	<i>% in 5-Member Majority</i>	<i>Swing Votes</i>
<b>Kennedy (172)</b>	86.6	92.0	81.2	82.9	29
Kagan (72)	76.4	46.7	97.6	65.6	1
<b>Roberts (171)</b>	75.4	94.3	56.0	44.9	3
Sotomayor (96)	71.9	38.6	100.0	63.2	1
Breyer (171)	67.3	47.7	87.1	55.7	7
Ginsburg (172)	65.7	36.8	95.3	58.6	3
Scalia (172)	64.5	81.6	47.1	47.1	9
Souter (74)	63.5	38.1	96.9	51.6	1
Alito (166)	62.7	100.0	24.4	47.8	2
Thomas (172)	57.6	89.7	24.7	51.4	8

128. Swing votes are those from a member of the conservative wing that help produce a five-member liberal majority, and those from a member of the liberal wing that help produce a five-member conservative majority. More than one Justice can cast a swing vote in a given case. *See, e.g.*, Smith & McCall, *supra* note 54, at 10-12 (“Here ‘swing votes’ in criminal justice cases are defined as individual justices’ outcome-determining votes in 5 to 4 decisions that deviated from the ‘expected vote.’ The expected vote in each case is defined as the five justices with the most conservative lifetime voting records in criminal justice cases lining up against the four most liberal lifetime voters . . .”). Justice O’Connor (not shown in Table 7) did not provide a swing vote in either of the two non-unanimous, criminal justice decisions by the Roberts Court in which she participated. Percentages reflect only those cases in which a given Justice participated.

Stevens (95)	56.8	29.6	92.7	50.0	2
<b>N Majorities</b>	<b>172</b>	<b>87</b>	<b>85</b>	<b>70</b>	<b>66</b>

Justice Kennedy, however, played a far more instrumental role than Chief Justice Roberts in producing the Court's liberal decisions. Indeed, Justice Kennedy was part of more majorities generating liberal, non-unanimous decisions (sixty-nine of eighty-five) during this period than were Chief Justice Roberts and Justice Thomas combined,<sup>129</sup> and in almost as many as Justice Breyer,<sup>130</sup> whom legal commentators and scholars depict as a key member of the liberal bloc.<sup>131</sup>

Because of Justice Kennedy's routine presence in both liberal and conservative majorities (in criminal justice and in other types of cases), advocates and fellow Justices often seek his crucial vote.<sup>132</sup> The importance of Justice Kennedy's support in explaining case outcomes has prompted some

129. Chief Justice Roberts was in forty-seven majorities in these cases, while Justice Thomas was in twenty-one. Chief Justice Roberts did not participate in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

130. Justice Breyer was in seventy-four liberal, non-unanimous majorities.

131. See, e.g., CHRISTOPHER E. SMITH, MADHAVI MCCALL & CYNTHIA PEREZ MCCLUSKEY, LAW AND CRIMINAL JUSTICE: EMERGING ISSUES IN THE TWENTY-FIRST CENTURY 30 (2005) (finding through statistical analysis that the liberal bloc in criminal justice cases from 1995-2002 included Justices Breyer, Souter and Ginsburg); Jeffrey Toobin, *Without a Paddle: Can Stephen Breyer Save the Obama Agenda in the Supreme Court?*, NEW YORKER (Sept. 27, 2010), <http://www.newyorker.com/magazine/2010/09/27/without-a-paddle> (characterizing the liberal wing with Justice Stevens' retirement as: "Ginsburg is a loner; Sotomayor and Kagan are new. On this day, Breyer led the left, as he likely will for years to come").

132. See, e.g., MALPHURS, *supra* note 125, at 98 (describing Justice Kennedy as "one of the most important justices on the Court" whose support is often the focus of attorneys and fellow Justices during oral arguments); 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/> (describing how Justice Kennedy is perceived by advocates and others as having the decisive vote on various questions facing the Court as indicated by, among other things, the frequent mention of Justice Kennedy by name in amicus briefs filed with the Supreme Court).

judicial experts to dub him a “super median” Justice.<sup>133</sup> Such Justices are considered “so powerful that they are able to exercise significant control over the outcome and content of the Court’s decisions.”<sup>134</sup> This title is particularly apt in the area of criminal justice, given the large number of such cases decided by the narrowest of margins, and because many of those five-to-four decisions have ended in liberal rulings.

Indeed, many of Justice Kennedy’s liberal votes were decisive, “swing votes”—votes that helped produce minimally-winning coalitions favoring the claims of the criminally accused or convicted.<sup>135</sup> On the recent Court, swing votes typically arose when a conservative Justice (and most commonly, Justice Kennedy) joined the four members of the liberal wing, though swing votes occurred in other configurations, and some were cast by liberal Justices.<sup>136</sup> Scholars frequently emphasize the importance of the swing vote and the often-related median vote when using rational choice and other jurisprudential theories to explain or predict Court interpretations.<sup>137</sup> As the label

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133. Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 67 (2008) (identifying Justice Kennedy as one of five super median Justices since the beginning of the Warren Court era).

134. *Id.* at 37.

135. For our operationalization of the term swing vote, see *supra* note 128 and accompanying text.

136. During the first ten Terms of the Roberts Court, for a liberal Justice to cast a swing vote, at least one of the five conservative Justices would have had to dissent or not participate. On some occasions, more than one Justice from the conservative wing dissented from a minimally-winning majority that nevertheless produced a conservative outcome. Consequently, there were fifteen swing votes from liberal Justices in eight cases ending in a conservative ruling. These cases (and swing votes) are: *Navarette v. California*, 134 S. Ct. 1683 (2014) (Breyer); *Paroline v. United States*, 134 S. Ct. 1710 (2013) (Breyer, Ginsburg, and Kagan); *Maryland v. King*, 133 S. Ct. 1958 (2013) (Breyer); *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (Breyer); *Dolan v. United States*, 560 U.S. 605 (2010) (Breyer, Ginsburg and Sotomayor); *Oregon v. Ice*, 555 U.S. 160 (2009) (Ginsburg, Stevens and Breyer); *Irizarry v. United States*, 553 U.S. 708 (2008) (Stevens); and *James v. United States*, 550 U.S. 192 (2007) (Souter and Breyer).

137. See, e.g., Martin et al., *supra* note 20 (presenting a new method for assessing median voters and using this approach to assess whether Justice O’Connor moved to the left during her career, and the likelihood that President George W. Bush would be able to shift dramatically the direction of the Court); Peter K. Enns & Patrick C. Wohlfarth, *The Swing Justice*, 75(4) J. OF POLIT. 1089 (2011) (asserting that the median and swing vote are not necessarily the same, and identifying conditions when the swing vote Justice

suggests, the swing vote determines which faction prevails and which interpretation becomes law.

In this regard, Justice Kennedy's power on the Court in the area of criminal justice currently has been without equal. He provided far more swing votes (twenty-nine) in such cases during the first ten Terms of the Roberts Court than any other Justice, and more than his four fellow conservatives combined.<sup>138</sup> Chief Justice Roberts served as a swing vote only three times,<sup>139</sup> and in one of these cases, he joined an opinion written by Justice Kennedy who ruled that key sections of Arizona's immigration law were preempted by federal law.<sup>140</sup>

Narrowing the analytical lens to those split decisions driven by a single, swing vote accentuates Justice Kennedy's dominance as the Court's median Justice. Justice Kennedy supplied the swing vote in twenty-seven of the thirty-three

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may be motivated more by strategic than attitudinal considerations); Mario Bergara, Barak Richman & Pablo T. Spiller, *Modeling Supreme Court Strategic Decision Making: The Congressional Constraint*, 28 LEGIS. STUD. Q. 247 (2003) (using median-Justice theory to demonstrate strategic decision making by the Court when confronted with institutional constraints from the legislative branch); R. Randall Kelso & Charles D. Kelso, *Swing Votes on the Current Supreme Court: The Joint Opinion in Casey and Its Progeny*, 29 PEPP. L. REV. 637 (2002) (analyzing five-to-four decisions of the 1990s to posit that differences among Justices O'Connor, Kennedy and Souter on dimensions of natural law help explain voting differences between these three pivotal voters despite sharing a basic decision-making philosophy); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POLIT. SCI. REV. 28, 41-42 (1997) (using median positions on the Court and advocating for other policy players to test the separation-of-powers model, asserting Justices typically vote their sincere preferences).

138. See *supra* Table 7 (showing that Justice Kennedy cast twenty-nine swing votes while Chief Justice Roberts and Justices Thomas, Scalia, and Alito collectively accounted for twenty-two).

139. *Yates v. United States*, 135 S. Ct. 1074 (2015) (ending in an unusual majority including Chief Justice Roberts and Justices Alito, Breyer, Sotomayor and Ginsburg); *Arizona v. United States*, 132 S. Ct. 2492 (2012) (ending in a five-to-three decision in which Justice Kagan did not participate, and in which Justices Scalia, Alito and Thomas dissented); *Hemi Group v. New York*, 559 U.S. 1 (2010) (finding that the city did not substantiate a RICO claim in a case involving online sales of cigarettes) (Chief Justice Roberts wrote for an unusual majority for a liberal decision that included Justices Scalia, Thomas, Alito and Ginsburg; Justices Breyer, Stevens and Kennedy dissented, while Justice Sotomayor did not participate.).

140. *Arizona*, 132 S. Ct. at 2492.

criminal justice cases decided by a five-member majority that included such a sole defection.<sup>141</sup> The only six other singular, swing votes were cast by Justices Breyer (three),<sup>142</sup> Scalia,<sup>143</sup> Thomas<sup>144</sup> and Stevens.<sup>145</sup> Justice Kennedy's unchallenged role as *the* swing vote explains why he has been part of far more five-member majorities in cases raising criminal justice issues than any other Justice on the Roberts Court. Conversely, of the eleven members who have served on the Court during the last decade,<sup>146</sup> Chief Justice Roberts has been the Justice most likely to be on the losing side when a criminal justice case ends in a five-member majority.<sup>147</sup>

As shown in Table 8, the previously noted advantage enjoyed by Chief Justice Roberts over Justice Kennedy of being in more conservative majorities<sup>148</sup> evaporates in the context of these highly-divided decisions. Not only did Justice Kennedy join one more fragile majority producing a conservative outcome than did Chief Justice Roberts,<sup>149</sup> he also was a

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141. *See infra* notes 155-164 (listing these cases in which Justice Kennedy supplied the sole swing vote).

142. *Navarette*, 134 S. Ct. at 1683 (holding that a traffic stop in which the officer reasonably suspected drunk driving based on the totality of circumstances including an anonymous tip did not violate the Fourth Amendment); *King*, 133 S. Ct. 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); *William*, 132 S. Ct. 2221 (holding that it does not violate the Confrontation Clause for testimony about DNA results to be given by experts who did not perform the test).

143. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) (upholding the right to counsel of choice).

144. *Alleyne v. United States*, 133 S. Ct. 2151 (2013) (holding that any findings that increase the mandatory minimum sentence of a crime must be found by a jury and not by a judge alone).

145. *Irizarry v. United States*, 553 U.S. 708 (2008) (holding that Rule 32(h) does not apply to a variance from the recommended sentencing guideline range).

146. Again, we exclude Justice O'Connor's limited number of votes during this period.

147. *See supra* Table 7 (showing that Chief Justice Roberts was part of about 45 percent of such majorities in cases in which he participated, while Justice Kennedy posted the Court's highest rate of inclusion in five-member majorities at 83 percent).

148. *See supra* Table 7.

149. Of the thirty-one marginally winning majorities producing a conservative decision in a criminal justice case during this period, Justice

member of twenty-nine minimal majorities ruling in a liberal direction, while Chief Justice Roberts was in only three such majorities.<sup>150</sup> Justice Kennedy joined the Court's four most liberal Justices against all his fellow conservatives<sup>151</sup> in all but two of the five-member liberal majorities of which he was a part.<sup>152</sup>

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Kennedy and Chief Justice Roberts both dissented in *Dolan v. United States*, 560 U.S. 605 (2010). Justice Kennedy also dissented in *Irizarry*, 553 U.S. 708, while Chief Justice Roberts dissented in *Paroline v. United States*, 134 S. Ct. 1710 (2013), and in *Oregon v. Ice*, 555 U.S. 160 (2009).

150. See *supra* note 139 (identifying Chief Justice Roberts's three swing votes).

151. Three of these cases ended five-to-three. Justice Kennedy voted with the liberal wing and against the three other participating members of the conservative wing in *House v. Bell*, 547 U.S. 518 (2006) (Justice Alito did not participate); *Georgia v. Randolph*, 547 U.S. 103 (2006) (Justice Alito did not participate); and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (Chief Justice Roberts did not participate).

152. The two outliers are *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) (ruling that involuntary blood draws during drunk driving investigations are searches and do not automatically qualify as exigency exceptions to the warrant requirement; the majority included Justices Kennedy, Scalia, Ginsburg, Sotomayor and Kagan); and *Arizona v. United States*, 132 S. Ct. 2492 (2012) (ruling key sections of Arizona's immigration law were preempted by federal law; the majority included Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer and Sotomayor; Justice Kagan did not participate in this case).



TABLE 8: OUTCOME-DETERMINING VOTES<sup>153</sup> BY JUSTICE, IN CRIMINAL JUSTICE CASES, 2005-2015

		Outcome-Determining Votes		
Justice (all votes)	Total	Conservative	Liberal	As a % of Justices Total Votes
<b>Kennedy (264)</b>	<b>58</b>	<b>29</b>	<b>29</b>	<b>22.0</b>
Kagan (111)	21	1	20	18.9
Sotomayor (151)	24	1	23	15.9
Ginsburg (264)	41	3	38	15.5
Breyer (263)	39	7	32	14.8
Souter (111)	16	1	15	14.4
Thomas (264)	36	28	8	13.6
Stevens (140)	18	2	16	12.9
Alito (249)	32	30	2	12.9
Scalia (264)	33	24	9	12.5
<b>Roberts (263)</b>	<b>31</b>	<b>28</b>	<b>3</b>	<b>11.8</b>
Totals (2,350)	350	155	195	14.9

153. Outcome-determining votes are those in which the liberal-conservative direction of the outcome would change if a given Justice voted differently. Positions taken by other Justices are assumed fixed. Consideration of outcome regards the direction of judgment only. The Court handed down seventy such criminal justice decisions during the ten Terms reviewed. Included in the totals, but not shown separately, are Justice O'Connor's six criminal justice votes on the Roberts Court, including one outcome-determining vote in which she joined the conservative, five-member majority in *Brown v. Sanders*, 546 U.S. 212 (2006).

That is, in twenty-seven cases Justice Kennedy provided the pivotal, lone swing vote that determined the outcome in favor of the criminally accused or convicted.<sup>154</sup> In these cases, Justice Kennedy and the Court limited the application of the death penalty<sup>155</sup> and preserved other Eighth Amendment protections,<sup>156</sup> made claims regarding police use of excessive force easier to demonstrate,<sup>157</sup> supported certain claims of actual innocence as a gateway to federal review,<sup>158</sup> expanded *Miranda* protections,<sup>159</sup> clarified detainee jurisprudence and the rights of enemy combatants,<sup>160</sup> expanded the right to

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154. See *infra* notes 155-164 (listing these twenty-seven cases).

155. *Brumfield v. Cain*, 135 S. Ct. 2269 (2015) (finding that the defendant was entitled to have his *Atkins* claim considered on its merits in federal court); *Hall v. Florida*, 134 S. Ct. 1986 (2014) (ruling that the state had created an unacceptable risk of executing those with intellectual disabilities); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding that imposing the death penalty for the crime of child rape 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); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007) (ruling that the state's jury instructions for capital sentencing did not allow jurors to give full consideration and effect to mitigating evidence); *Brewer v. Quarterman*, 550 U.S. 286 (2007) (finding that the state appeals court erred in its application of federal law when that court denied relief after finding the state capital sentencing statute prevented the jury from meaningfully considering relevant mitigating evidence); *Smith v. Texas*, 550 U.S. 297 (2007) (finding the state court erred by requiring a standard of egregious harm when it evaluated whether an unconstitutional jury instruction invalidated a death sentence).

156. *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (ruling mandatory life sentences without possibility of parole are unconstitutional for juvenile offenders); *Brown v. Plata*, 131 S. Ct. 1910 (2011) (ruling a court-mandated population limit was necessary to remedy a violation of prisoners' constitutional protections against cruel and unusual punishment).

157. *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015).

158. *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013); *House v. Bell*, 547 U.S. 518 (2006).

159. *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (holding age is an appropriate factor to consider in determining police custody, and that juvenile suspects may be entitled to a more protective approach to *Miranda* warnings that considers their less-developed ability to understand the context of police interrogations).

160. *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that detainees at the U.S. military base in Guantanamo Bay, Cuba are entitled to the writ of habeas corpus and other constitutional rights); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (ruling that procedures established for military commissions to try detainees at Guantanamo Bay violated the Uniform Code of Military

effective counsel<sup>161</sup> and related protections,<sup>162</sup> limited the definition of consent searches,<sup>163</sup> and voted in a rights-protective fashion in other contexts.<sup>164</sup> Thus, in over two-thirds of the Court's highly divided, liberal decisions,<sup>165</sup> Justice

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Justice and the Geneva Conventions).

161. *Trevino v. Thaler*, 133 S. Ct. 1911 (2013) (finding an inmate can make an ineffective counsel claim for the first time in a federal habeas petition in this instance because state rules made it virtually impossible for him to raise that issue during an appeal in state court); *Missouri v. Frye*, 132 S. Ct. 1399 (2012) (holding defense counsel is obligated to communicate to the defendant formal plea offers from the prosecutor that may be favorable to the defendant); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) (establishing a remedy for when ineffective counsel leads to the rejection of a plea agreement and a subsequent trial that ended in a conviction and a sentence much harsher than the defendant likely would have had under the plea agreement offer).

162. *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (holding that while states are not automatically required to provide counsel to indigent defendants in civil contempt cases such as those involving child support, states must have alternative safeguards in place to reduce the risk of erroneous deprivation of liberty); *United States v. Denedo*, 556 U.S. 904 (2009) (finding a military appellate court has jurisdiction to consider a petition for writ of error *coram nobis* challenging a much earlier conviction that threatened to lead to the respondent's deportation; the respondent claimed his counsel during the original plea bargaining was ineffective for failing to consider adequately the respondent's concerns about deportation).

163. *Los Angeles v. Patel*, 135 S. Ct. 2443 (2015) (limiting administrative searches of information regarding hotel patrons); *Georgia v. Randolph*, 547 U.S. 103 (2006) (holding police do not have the authority to search of a house where one resident consents to the search while another resident is present and objects).

164. *See, e.g., Peugh v. United States*, 133 S. Ct. 2072 (2013) (holding that sentencing a defendant based on federal guidelines set forth after the defendant committed the crime—when the new guidelines provide for a higher sentencing range than the version at the time of the offense—violates the Ex Post Facto Clause); *Dorsey v. United States*, 132 S. Ct. 2321 (2012) (finding that reduced mandatory minimum sentences under the Fair Sentencing Act apply to defendants who committed their offense before, but were sentenced after, the Act was passed); *Freeman v. United States*, 131 S. Ct. 2685 (2011) (finding a sentence based on a plea agreement is subject to retroactive reduction given changes in sentencing guidelines); *Corley v. United States*, 556 U.S. 330 (2009) (holding that even voluntary confessions are generally inadmissible if the period of detention in which they are made violates the prompt presentment requirement); *Abramski v. United States*, 134 S. Ct. 2259 (2014) (upholding the conviction of a gun buyer who falsely claimed he was purchasing the gun for himself).

165. Justice Kennedy joined members of the liberal wing to produce twenty-seven of the thirty-nine liberal rulings (69 percent) ending with five-member majorities in criminal justice cases decided during the first ten Terms of the Roberts Court.

Kennedy provided the decisive vote as the only member of the conservative wing to affirm individual rights.<sup>166</sup>

In short, no Justice during the Roberts Court era to date has cast as many pivotal, outcome-determining votes in criminal justice cases as Anthony Kennedy.<sup>167</sup> Moreover, unlike those of all of his colleagues, Justice Kennedy's votes in these instances have been split equally between supporting the interests of law enforcement and supporting the interests of defendants and prisoners.<sup>168</sup>

These tendencies place Justice Kennedy among the most common members of the Court's majority in criminal justice and other<sup>169</sup> cases. They also help explain why the Roberts Court through the 2014-2015 Term—dominated by five conservative members—produced an otherwise surprisingly large number of decisions favoring the criminally accused, especially in cases that most divided the Court.<sup>170</sup> Through his willingness to support individual claims regarding the death penalty, the right to counsel and other matters, Justice Kennedy has been instrumental in making the Supreme Court's criminal justice jurisprudence less monolithic and its rulings less predictable.

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166. See *supra* notes 35-39 and accompanying text regarding the treatment of the rights-affirming cases of *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010), and regarding the treatment of the rights-restricting decision in *Abramski v. United States*, 134 S. Ct. 2259 (2014).

167. See *supra* Table 8 (showing that Justice Kennedy provided a total of fifty-eight outcome-determining votes, followed by Justice Ginsburg at forty-one).

168. See *supra* Table 8 (showing that while Justice Kennedy voted with twenty-nine conservative and twenty-nine liberal majorities in highly divided cases, the distributions for each of the other Justices in criminal justice cases during this period is heavily skewed toward either liberal or conservative outcomes).

169. See, e.g., Memorandum, SCOTUSBLOG.COM, End-of-Term Statistical Analysis—October Term 2012, at 5 (June 29, 2013), [http://sblog.s3.amazonaws.com/wp-content/uploads/2013/06/Summary\\_Memo\\_OT12.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2013/06/Summary_Memo_OT12.pdf) (“Justice Kennedy is, for the fifth consecutive Term, the Justice most likely to appear in the majority.”).

170. See *supra* Table 1.

**B. Justice Kennedy as the Frequent Voice of the Court**

Several of the previously discussed voting patterns predict that Justice Kennedy might play a prominent role in authoring the Court's criminal justice opinions. For example, as the median Justice<sup>171</sup> who is usually in the majority,<sup>172</sup> Justice Kennedy often provides a critical vote<sup>173</sup> on a divided Court<sup>174</sup> that produces a large percentage of highly divided decisions.<sup>175</sup> It is reasonable to assume that others on the Court might seek to attract Justice Kennedy's support in order to forge or maintain a majority by offering him the opportunity to author the Court's majority opinion.<sup>176</sup>

Analysis of opinion authorship in non-unanimous, criminal justice cases decided during the first ten Terms of the Roberts Court supports this hypothesis. Findings, as summarized in Table 9, reveal that Justice Kennedy has been by far the most frequent writer of such opinions. He wrote substantially more non-unanimous liberal decisions during this period than any other Justice.<sup>177</sup> While Justice Kennedy wrote fewer non-unanimous conservative decisions, he still authored almost as many as Justice Scalia, who was considered a leading legal voice of the conservative movement.<sup>178</sup>

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171. See *supra* Table 2 and accompanying text.

172. See *supra* Table 7.

173. See *supra* Part V.A.

174. See *supra* Part III.B.

175. See *supra* Table 1.

176. See, e.g., DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS*, ch. 5 (10th ed. 2014) (reviewing various strategic considerations in assigning the task of opinion writing, including assigning the Justice closest to the Court's middle in order to maintain support from those members who may have the weakest commitment to the majority's position); FORREST MALTZMAN ET AL., *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 101* (2000) (noting the value of assigning the majority opinion to the median Justice to gain the critical, fifth vote, at least in minimally-winning majorities); Rohde, *supra* note 75.

177. See *infra* Table 9. Justice Kennedy wrote the liberal opinion for a non-unanimous Court in eighteen of the sixty-nine such majorities in which he participated. This rate (26.1 percent) nearly matches that by Justice Stevens (26.3 percent; ten of thirty-eight).

178. See, e.g., BRISBIN, *supra* note 31; Liptak, *supra* note 15; Tony Mauro, *Justice Scalia, Leader of the Court's Conservative Wing, Dies at 79*,

The mathematically expected number of majority opinions authored (denoted  $E[M]$  in Table 9) by a given Justice is calculated by summing the probabilities of that Justice writing for the Court in each majority of which she was a member.<sup>179</sup> For example, a Justice who was part of a six-member majority and a five-member majority randomly would be expected to author 0.37 majority opinions ( $1/6 + 1/5$ ). Justice Kennedy, who authored twenty-seven of the Court's non-unanimous, criminal justice rulings, exceeded his expected number by over two opinions. Justice Stevens is the only member of the Roberts Court other than Justice Kennedy to write at least two more non-unanimous majority opinions than predicted.<sup>180</sup> As the most senior member of the liberal bloc, Justice Stevens self-assigned half of his liberal, non-unanimous majority opinions in criminal justice cases decided by the Roberts Court.<sup>181</sup>

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NAT'L L.J. (Feb. 13, 2016, 6:30 PM), <http://www.nationallawjournal.com/id=1202749702587/Justice-Antonin-Scalia-Leader-of-Courts-Conservative-Wing-Dies-at-79>.

179. Analyses in this section are of non-unanimous, criminal justice decisions only.

180. *See infra* Table 9.

181. Justice Stevens authored ten liberal, non-unanimous, criminal justice decisions during this period. In five of these cases, Chief Justice Roberts dissented or did not participate, and Justice Stevens was the most senior member of the majority. Those five are: *Arizona v. Gant*, 556 U.S. 332 (2009); *Danforth v. Minnesota*, 552 U.S. 264 (2008); *Brewer v. Quarterman*, 550 U.S. 286 (2007); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). *See supra* note 66 and accompanying text regarding assumptions about opinion assignments when the Chief Justice is not in the majority.

TABLE 9: NON-UNANIMOUS, CRIMINAL JUSTICE MAJORITY OPINIONS AUTHORED AND OPINION AUTHORSHIP RATIO BY JUSTICE, 2005-2015

		<i>Number of majority opinions authored</i>				
Justice	Total	Liberal	Conserv.	Five-Member	E[M] <sup>182</sup>	OAR <sup>183</sup>
<b>Kennedy</b>	<b>27</b>	<b>18</b>	<b>9</b>	<b>19</b>	<b>24.95</b>	<b>1.082</b>
Scalia	19	9	10	8	18.06	1.052
Breyer	19	9	10	5	18.81	1.010
Alito	17	1	16	7	16.94	1.003
Ginsburg	17	11	6	4	18.61	0.913
<b>Roberts</b>	<b>17</b>	<b>4</b>	<b>13</b>	<b>4</b>	<b>20.69</b>	<b>0.821</b>
Thomas	15	3	12	9	16.57	0.905
Stevens	14	10	4	5	8.80	1.590
Sotomayor	13	10	3	5	11.39	1.141
Kagan	8	5	3	2	9.15	0.875
Souter	6	5	1	2	7.66	0.783
Totals	172	85	87	70	172	

To ease comparison, an Opinion Authorship Ratio (OAR) is calculated for each member of the Court by dividing the actual number of majority opinions authored by the expected number of opinions authored for each Justice.<sup>184</sup> An OAR over 1.0

182. E[M] is the expected number of majority opinions authored based upon the number and size of majorities of which a given Justice was a member. E[M] equals the sum of probabilities of writing each majority opinion. The probability of writing a given decision, if the Justice is in the majority, equals one divided by the number of majority members; if the Justice dissents, the probability is zero. Justice O'Connor did not write the majority opinion in any non-unanimous, criminal justice case in which she participated during this period. Her expected number of authored majorities (not shown separately in Table 9 but included in the total E[M]) is 0.37.

183. OAR (Opinion Authorship Ratio) equals the number of actual majority opinions authored by a given Justice divided by the expected number for that Justice. For Table 9 then, OAR = TOTAL / E[M].

184. The traditional OAR measure is "Majority Assignment Ratio" and reflects scholars' typical interest in how Chief Justices assign opinions for majorities in which they are members. See, e.g., Wood et al., *supra* note 68; Maltzman & Wahlbeck, *supra* note 67; Terry Bowen & John M. Scheb II,

indicates that a Justice penned a disproportionate number of majority opinions, while a lower ratio signifies that a Justice authored fewer opinions than one would expect given her participation rates in majorities of different sizes.

Scholars have constructed and used such OAR metrics in various ways. Our version possesses the advantage of acknowledging that the probability of writing the majority opinion depends on the size of the majority.<sup>185</sup>

None of the Justices serving during the entire period analyzed posted a higher OAR in criminal justice cases than did Justice Kennedy.<sup>186</sup> The authorship ratios for Justices Stevens and Sotomayor (both high)—as well as those for Justices Souter and Kagan (both low)—are sensitive to the lower number of cases in which each of these Justices participated.

The rates of non-unanimous opinion writing in criminal justice cases for most other Justices are relatively in line with expectations, except for Chief Justice Roberts. Chief Justice Roberts, whose majority opinion production is nearly four short of expectations, has the lowest OAR among current members of the Court with respect to these criminal justice decisions.<sup>187</sup> Chief Justice Roberts seems to focus his writing efforts in criminal justice cases more on important unanimous

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*Freshman Opinion Writing on the U.S. Supreme Court, 1921-1991*, 76 JUDICATURE 239 (1993); Brenner, *supra* note 67. The measure and its label are changed slightly for this Article given the focus on authorship regardless of assigner.

185. It is not uncommon for others simply to use the percentage of time that a Justice is assigned the majority opinion when she is in the majority, without respect to whether that majority has nine members or five. See Saul Brenner, *Measuring Policy Leadership on the U.S. Supreme Court: A Focus on Majority Opinion Authorship*, in STUDIES IN U.S. SUPREME COURT BEHAVIOR 136 (Harold J. Spaeth & Saul Brenner ed., 1990) (noting related limitations of typical constructions and applications of the OAR measure).

186. Justice Kennedy's Opinion Authorship Ratio in criminal justice cases was considerably higher prior to the 2014-2015 Term (OAR = 1.17). That year, Justice Kennedy did not write a single non-unanimous, criminal justice opinion for the Court. In each of the preceding nine Terms, Justice Kennedy authored at least two and as many as six such opinions.

187. See *supra* Table 9. The gap between the number of actual (17) and expected (20.69) non-unanimous opinions authored by Roberts is also the largest on the Court.



decisions<sup>188</sup> and on the occasional dissent.<sup>189</sup> In recent years, many of Chief Justice Roberts's most notable opinions have addressed issues not related directly to criminal justice, such as voting rights,<sup>190</sup> the Patient Protection and Affordable Care Act<sup>191</sup> and political contributions.<sup>192</sup> This serves as an important reminder that the comparisons in Table 9 regard non-unanimous, criminal justice cases only.

Justice Kennedy, on the other hand, tends to author multiple non-unanimous, criminal justice decisions for the Court each Term, and has been an especially prolific author of the Court's most divided decisions. Indeed, Justice Kennedy wrote more criminal justice decisions for a five-member majority during the first decade of the Roberts Court (nineteen) than did Chief Justice Roberts and Justices Breyer, Ginsburg, Souter, and Kagan combined (seventeen).<sup>193</sup> Of the decisions written by Justice Kennedy for five-member majorities, twelve favored the rights of the convicted or criminally accused.<sup>194</sup> Put differently, Justice Kennedy authored nearly one-third of all liberal criminal justice decisions from 2005-2015 that ended in a marginally-winning coalition.<sup>195</sup>

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188. *See, e.g.*, *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) (ruling a state law prohibiting most people from standing within a set distance from abortion clinics violates the First Amendment); *Riley v. California*, 134 S. Ct. 2473 (2014) (holding that a lawful arrest generally does not permit police to search the cellphone of an arrested individual without a warrant); *Bond v. United States*, 134 S. Ct. 2077 (2014) (finding that the types of offenses in an act implementing an international treaty were not applicable to the criminal behavior in this case); *Brigham City v. Stuart*, 547 U.S. 398 (2006) (regarding exigent circumstances and the warrant requirement).

189. *See, e.g.*, *Georgia v. Randolph*, 547 U.S. 103 (2006).

190. *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

191. *King v. Burwell*, 135 S. Ct. 475 (2015); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

192. *McCutcheon v. F.E.C.*, 134 S. Ct. 1434 (2014).

193. *See supra* Table 9.

194. *Hall v. Florida*, 134 S. Ct. 1986 (2014); *Arizona v. United States*, 132 S. Ct. 2492 (2012); *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Freeman v. United States*, 131 S. Ct. 2685 (2011); *Brown v. Plata*, 131 S. Ct. 1910 (2011); *United States v. Denedo*, 556 U.S. 904 (2009); *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Boumediene v. Bush*, 553 U.S. 723 (2008); *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Smith v. Texas*, 550 U.S. 297 (2007); *House v. Bell*, 547 U.S. 518 (2006).

195. *See supra* Table 1 (showing that five-member majorities decided thirty-nine cases in a liberal direction during this period).

Chief Justice Roberts assigned only one of Justice Kennedy's opinions for a five-member, liberal majority. In *Arizona v. United States*,<sup>196</sup> the majority struck down provisions in a state law that allowed police to arrest individuals for suspicion of being an illegal immigrant, requiring legal immigrants to carry registration documents and making it a crime for an undocumented immigrant to search for or hold a job in the state.

Chief Justice Roberts did assign to Justice Kennedy six important, conservative decisions that split the Court five-to-four. In these decisions, Justice Kennedy wrote for the Court to hold that the mere act of remaining silent was not, in itself, sufficient to imply that the suspect had invoked his *Miranda* rights;<sup>197</sup> that officials may conduct suspicionless strip searches of individuals arrested for minor offenses before admitting those individuals to the general inmate population;<sup>198</sup> and that certain types of post-arrest DNA collection practices are part of a reasonable, legitimate police booking procedure.<sup>199</sup> Justice Kennedy also wrote for the conservative majorities that supported deference to trial court decisions regarding potential jurors in capital cases<sup>200</sup> and found jury instructions about the consideration of mitigating evidence in a death penalty case to be sufficiently clear.<sup>201</sup> In a case raising racial and religious profiling claims after the September 11 terrorist attacks, Justice Kennedy held that the plaintiff failed to provide sufficient facts to state a plausible claim of unlawful discrimination.<sup>202</sup> In five of these six conservative opinions assigned by the Chief Justice, all members of the conservative wing voted in the majority, while all liberal Justices dissented.<sup>203</sup>

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196. *Arizona v. United States*, 132 S. Ct. 2492 (2012).

197. *Berghuis v. Thompkins*, 560 U.S. 370 (2010).

198. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012).

199. *Maryland v. King*, 133 S. Ct. 1958 (2013).

200. *Uttecht v. Brown*, 551 U.S. 1 (2007).

201. *Ayers v. Belmontes*, 549 U.S. 7 (2006).

202. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

203. In the lone exception—*King*, 133 S. Ct. 1958—Justice Scalia dissented and Justice Breyer joined the remaining conservative Justices in the majority.

Most of Justice Kennedy's opinions for five-member majorities, however, produced liberal outcomes,<sup>204</sup> and were not assigned by Chief Justice Roberts.<sup>205</sup> In these decisions authored by Justice Kennedy, the Court limited the application of the death penalty,<sup>206</sup> made it easier to challenge capital convictions<sup>207</sup> and to make certain claims regarding ineffective counsel,<sup>208</sup> eased the eligibility for sentence reduction in certain instances,<sup>209</sup> upheld the right of detainees at Guantanamo Bay to habeas corpus,<sup>210</sup> and ruled that the overcrowding of California prisons caused such violations to prisoners' Eighth Amendment rights regarding adequate safety and health care that a court-ordered population limit was justified.<sup>211</sup>

Justice Kennedy also authored several criminal justice decisions for larger non-unanimous majorities.<sup>212</sup> Some

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204. *See supra* Table 9.

205. Chief Justice Roberts dissented from eleven of Justice Kennedy's liberal decisions for minimally-winning majorities. Based on our assumptions regarding opinion assignments, see *supra* note 60 and accompanying text; five of Justice Kennedy's liberal opinions for five-member majorities were self-assigned (*Hall v. Florida*, 134 S. Ct. 1986 (2014); *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Freeman v. United States*, 131 S. Ct. 2685 (2011); *Brown v. Plata*, 131 S. Ct. 1910 (2011)) and six were assigned by Justice Stevens (*United States v. Denedo*, 556 U.S. 904 (2009); *Boumediene v. Bush*, 553 U.S. 723 (2008); *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Smith v. Texas*, 550 U.S. 297 (2007); *House v. Bell*, 547 U.S. 518 (2006)).

206. *Hall*, 134 S. Ct. at 1986; *Kennedy*, 554 U.S. at 407; *Panetti*, 551 U.S. at 930.

207. *Smith*, 550 U.S. at 297; *House*, 547 U.S. at 518.

208. *Frye*, 132 S. Ct. at 1399; *Lafler*, 132 S. Ct. at 1376; *Denedo*, 556 at U.S. 904.

209. *Freeman*, 131 S. Ct. at 2685.

210. *Boumediene*, 553 U.S. at 723.

211. *Brown v. Plata*, 131 S. Ct. 1910 (2011).

212. Justice Kennedy authored eight non-unanimous, criminal justice decisions during this period for majorities larger than five-members. In addition to the four noted in text, he authored the decisions in: *Bailey v. United States*, 133 S. Ct. 1031 (2013) (finding that the detention of a man away from his home while his apartment was being searched by police violated the Fourth Amendment); *Sykes v. United States*, 564 U.S. 1 (2011) (ruling that vehicle flight qualified in this case as a violent felony under the Armed Career Criminals Act); *Negusie v. Holder*, 555 U.S. 511 (2009) (clarifying that certain actions taken under duress do not automatically bar an applicant's request for asylum); *Gonzalez v. United States*, 553 U.S. 242

centered on issue areas common in Justice Kennedy's other opinions. For example, his seven-to-two decision for the Court in *Martinez v. Ryan*<sup>213</sup> expanded the right of federal habeas review of ineffective assistance of counsel claims. He also wrote for the Court to find that the sentencing of a juvenile offender to life without parole for a non-homicide crime violated the Eighth Amendment prohibition on cruel and unusual punishments.<sup>214</sup> Justice Kennedy, who has a reputation for being a strong defender of free speech principles,<sup>215</sup> also authored the Court's decision striking down as unconstitutional the Stolen Valor Act, a federal law that criminalized making false statements about having been awarded the Medal of Honor and other military decorations.<sup>216</sup> In one of the first major cases decided by the Roberts Court,<sup>217</sup> Justice Kennedy wrote for the majority in *Gonzales v. Oregon*<sup>218</sup> holding that Attorney General Ashcroft lacked the authority to declare as illegitimate medical practices related to physician-assisted suicide when such practices were sanctioned by state law. Thus, throughout the Roberts Court era to date, Justice Kennedy has been a frequent author of important criminal justice decisions of the Court.<sup>219</sup>

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(2008) (holding magistrates may preside over *voir dire* and jury selection with consent of counsel despite lacking express consent of the defendant).

213. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

214. *Graham v. Florida*, 560 U.S. 48 (2010).

215. See, e.g., KNOWLES, *supra* note 112; Ashutosh Bhagwat & Matthew Struhar, *Justice Kennedy's Free Speech Jurisprudence: A Quantitative and Qualitative Analysis*, 44 MCGEORGE L. REV. 167 (2013); Helen J. Knowles, *What a Difference Five Years Haven't Made: Justice Kennedy and the First Amendment, 2007-2012*, 82 UMKC L. REV. 79 (2013); Schmidt & Yalof, *supra* note 20.

216. See *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

217. See *On the Issues: Significant Decisions of the Roberts Court*, WASH. POST, <http://www.washingtonpost.com/wp-srv/nation/supreme-court-roberts/roberts.html#2005> (last visited Nov. 20, 2016) (listing *Gonzales v. Oregon* as one of the five "Significant Cases" of the first Term of the Roberts Court).

218. See *Gonzales v. Oregon*, 545 U.S. 243 (2006).

219. See *supra* note 186 and accompanying text regarding the absence of such signed opinions by Justice Kennedy during the 2014-2015 Term.

**VI. BRIEF COMMENT ON THE POSSIBLE  
IMPLICATIONS OF JUSTICE SCALIA'S DEATH ON  
CHIEF JUSTICE ROBERTS'S AND JUSTICE  
KENNEDY'S POWER BASES**

Justice Scalia was the longest serving member of the most recent Court<sup>220</sup> and the intellectual leader of its conservative wing.<sup>221</sup> His passing in February 2016 will profoundly affect the future direction of the Court in many ways, including a possible re-orientation away from its rightward tilt.<sup>222</sup> As a result, the judicial vacancy immediately became embroiled in presidential and congressional politics.<sup>223</sup>

During his last decade on the bench, Justice Scalia supported the interests of law enforcement twice as often as those of the criminal accused or convicted.<sup>224</sup> Yet, Justice

220. See *supra* note 8 (showing Scalia as the longest serving Justice of the most recent Court). (click on View Text Version) (providing dates to calculate that Scalia's near-thirty years on the Court ranks his tenure as the fifteenth longest in history; where relevant (e.g., Rehnquist), we combined years of service as Associate Justice and Chief Justice).

221. Liptak, *supra* note 15; Mauro, *supra* note 178.

222. See, e.g., *supra* Table 2 (showing Scalia as one of the five Justices who tended to vote conservative in criminal justice cases decided by the Roberts Court); See also Robert Barnes & Terri Rugar, *Scalia's death flips Supreme Court dynamics, hurts conservative hopes*, WASH. POST (Feb. 14, 2016), [https://www.washingtonpost.com/politics/courts\\_law/scalias-death-flips-supreme-court-dynamics-hurts-conservative-hopes/2016/02/14/b8f1f8ac-d322-11e5-9823-02b905009f99\\_story.html](https://www.washingtonpost.com/politics/courts_law/scalias-death-flips-supreme-court-dynamics-hurts-conservative-hopes/2016/02/14/b8f1f8ac-d322-11e5-9823-02b905009f99_story.html) (last visited Mar. 25, 2016) (reporting that the vacancy created by Scalia's death has left the Court split four-to-four on certain issues until a replacement is confirmed).

223. See, e.g., Sarah Kerman, *Professors project impact of Scalia's death on upcoming election*, THE CHRONICLE (Feb. 23, 2016), <http://www.dukechronicle.com/article/2016/02/160223-kerman-scalia-talk>; Josh Lederman, *After Scalia's death, a constitutional clash with Congress*, DENVER POST, (Feb. 20, 2016, 9:36 AM), [http://www.denverpost.com/ci\\_29541138/supreme-court-scuffle-triggering-constitutional-clash](http://www.denverpost.com/ci_29541138/supreme-court-scuffle-triggering-constitutional-clash); Mara Liasson, *5 Ways Scalia's Death Complicates the 2016 Election*, NPR (Feb. 16, 2016, 11:22 AM), <http://www.npr.org/2016/02/16/466935651/5-ways-scalias-death-is-complicating-the-2016-election>; Kristina Peterson & Siobhan Hughes, *Battle Lines Drawn in Congress Over Justice Antonin Scalia's Successor*, WALL STREET JOURNAL, (Feb. 14, 2016, 12:26 PM), <http://www.wsj.com/articles/battle-lines-drawn-in-congress-over-justice-antonin-scalias-successor-1455411187>.

224. See *supra* Table 2 (showing that Scalia voted conservative in 66.7

Scalia's "brand of constitutional interpretation, or textualism, sometimes led him to . . . join[] unusual coalitions of the justices in cases such as upholding free-speech rights of those with whom he disagreed, or siding with criminal defendants who challenged law enforcement techniques."<sup>225</sup>

While scholars undoubtedly will debate Justice Scalia's criminal justice legacy for decades to come, certain likely implications of his departure on the spheres of influence occupied by Chief Justice Roberts and Justice Kennedy seem clear. For example, Chief Justice Roberts lost a powerful ally in criminal justice cases,<sup>226</sup> as he and Justice Scalia often were among the Justices most likely to agree in a given Term's criminal justice cases over the last decade.<sup>227</sup> Indeed, Chief Justice Roberts and Justice Scalia were the only conservative Justices to agree sufficiently often in such cases during the most recent Term to be considered a voting bloc.<sup>228</sup> In contrast, Justice Kennedy and Justice Scalia disagreed far more often and voted in a similar direction in only about five of every nine

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percent of the criminal justice cases analyzed).

225. Barnes, *supra* note 124; *see also* Christopher E. Smith & Madhavi M. McCall, *Antonin Scalia: Outspoken & Influential Originalist*, in *THE REHNQUIST COURT AND CRIMINAL JUSTICE* 169, 175-76 (CHRISTOPHER E. SMITH, CHRISTINA DEJONG & MICHAEL A. MCCALL, eds., 2011); DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, *THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA* (1996); Joanmarie Ilaria Divoli, *Justice Scalia for the Defense?* 40 U. BALT. L. REV. 4 (2011); Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L. J. 183 (2005).

226. *See supra* Table 4 (showing that Chief Justice Roberts's second highest inter-agreement score in cases analyzed was with Justice Scalia—surpassed only by the Chief Justice's slightly higher rate of agreement with Justice Alito).

227. *See, e.g.*, Madhavi M. McCall, Michael A. McCall, & Christopher E. Smith, *Criminal Justice and the 2013-2014 United States Supreme Court Term*, 38 HAMLIN L. REV. 361, 372 (2015); Madhavi M. McCall, Michael A. McCall, & Christopher E. Smith, *Criminal Justice and the 2010-2011 United States Supreme Court Term*, 53 S. TEX. L. REV. 307, 320 (2011); Michael A. McCall, Madhavi M. McCall, & Christopher E. Smith, *Criminal Justice and the U.S. Supreme Court's 2007-2008 Term*, 36 S.U. L. REV. 33, 44 (2008); Michael A. McCall, Madhavi M. McCall, & Christopher E. Smith, *Criminal Justice and the 2006-2007 United States Supreme Court Term*, 76 UMKC L. REV. 993, 1000-01 (2008); Smith, McCall, & McCall, *supra* note 90, at 508.

228. Michael A. McCall, Madhavi M. McCall & Christopher E. Smith, *Criminal Justice and the 2014-2015 United States Supreme Court Term*, 61 S. DAKOTA L. REV. 242, 254 (2016).

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non-unanimous, criminal justice decisions since 2005.<sup>229</sup> In his final year, Justice Scalia authored two non-unanimous, criminal justice decisions; the Chief Justice joined both while Justice Kennedy dissented from one,<sup>230</sup> and filed a concurring opinion in the other in which he disagreed with Justice Scalia's constitutional interpretation.<sup>231</sup>

It seems probable that Justice Scalia's successor will be ideologically more distant from Chief Justice Roberts than Justice Scalia was on many issues. In opinion assignments, this new Justice would be a less attractive choice for Chief Justice Roberts through which to maximize the Chief Justice's policy preferences than was Justice Scalia; Chief Justice Roberts frequently tapped Justice Scalia to write for the Court on criminal justice matters.<sup>232</sup> Worse still for the Chief Justice, Justice Scalia's replacement might regularly join the existing four-member liberal wing of the Court. In that scenario, Chief Justice Roberts could face the choice in several future criminal justice cases of either supporting a liberal decision from which he might otherwise prefer to dissent, or relinquish the power to assign the Court's opinion. Chief Justice Roberts rarely had to do the latter when Justice Scalia was on the bench.<sup>233</sup>

The potential implications of Justice Scalia's departure are also significant concerning Justice Kennedy's influence on the Court. If Justice Scalia's replacement is ideologically to the left of Justice Kennedy on criminal justice issues, Justice Kennedy will no longer represent the Court's median Justice in these

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229. See *supra* Table 4.

230. See *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) (Kennedy, J., concurring) (holding that the residual clause of the Armed Career Criminal Act (ACCA) was unconstitutionally vague, demonstrating Justice Kennedy's disagreement with Justice Scalia's finding regarding the unconstitutionality of the ACCA, and expressing a fundamentally different logic that led to the same outcome as the majority).

231. See *Jennings v. Stephens*, 135 S. Ct. 793 (2015) (holding that a petitioner may rely on a theory that was previously rejected by a lower court without having to file a cross-appeal or obtain a certificate of appealability).

232. See *supra* Table 3 (showing that only Justice Alito received more criminal justice opinion assignments from Roberts over the last decade than did Justice Scalia). See *supra* note 66 and accompanying text (addressing assumptions concerning opinion assignments).

233. See *supra* Table 2 (showing Chief Justice Roberts has voted with the majority in 84 percent of criminal justice cases).

areas. Instead, the newest member of the Court or Justice Breyer most likely would occupy that influential position,<sup>234</sup> and we would expect the frequency in which Justice Kennedy's liberal votes determine the outcome of cases to decline sharply.<sup>235</sup>

On a related but different base of power for Justice Kennedy, we also anticipate that such a reconfiguration of the Court will reduce the regularity in which Justice Kennedy writes for the liberal majority in criminal justice cases.<sup>236</sup> Although Justice Scalia's seniority entitled him to assign opinions when in the majority without Chief Justice Roberts,<sup>237</sup> Justice Scalia's departure will not diminish Justice Kennedy's writing opportunities directly because Justice Scalia did not assign a single criminal justice opinion to Justice Kennedy during the entire Roberts Court era.<sup>238</sup> Instead, the effect on Justice Kennedy's opportunities to write liberal decisions will be indirect. Namely, if Justice Scalia's replacement routinely joins the liberal wing of the Court, Justice Kennedy's vote will become less critical to those Justices who would then constitute a majority. While Justice Kennedy could still self-assign opinions as the most senior member, assuming Chief Justice Roberts dissents,<sup>239</sup> the hypothetical liberal majority presumably would be less inclined than in the past to compromise with Justice Kennedy to attract his vote. The

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234. See *supra* Table 2 (ordering the Roberts Court Justices by their tendency to vote conservative in criminal justice cases).

235. See *supra* Table 8.

236. See *supra* Table 9.

237. See *supra* note 66 and accompanying text (regarding assumptions about opinion assignments); see also *supra* note 220 and accompanying text (regarding Justice Scalia's seniority).

238. Justices Scalia and Kennedy were in the majority without Chief Justice Roberts only twice in the 264 cases analyzed—that is, Justice Scalia had only two opportunities as the most senior Justice in the majority to assign Justice Kennedy the majority opinion. Justice Sotomayor wrote for the Court in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), and Justice Kagan authored the decision in *Kaley v. United States*, 134 S. Ct. 1090 (2014).

239. See, e.g., *SCOTUS Seniority: U.S. Supreme Court Justices by Age and Tenure*, THREESTORY INSIGHTS, <http://threestory.com/scotus/> (last visited Nov. 20, 2016) (showing Justice Kennedy as the longest serving Associate Justice currently on the Court); see also *supra* note 66 and accompanying text (regarding opinion assignment assumptions).



result could be five-to-four decisions that are more liberal in scope from which Justice Kennedy dissents.

Of course, future voting patterns on the Court will depend in large part upon the ideological leanings and philosophical approaches of the next Justice, and on whether political battles will produce a confirmation under President Obama or force the judicial vacancy to continue until a new President presents his or her own nominee.<sup>240</sup> At this juncture, none of those answers seem eminently clear.

## VII. CONCLUSION

In many ways, Chief Justice Roberts and Justice Kennedy have established remarkably similar voting patterns in criminal justice cases. They vote together with respect to judgment at a very high rate; indeed, the Chief Justice has been Justice Kennedy's most common voting ally during the first decade of the Roberts Court era.<sup>241</sup> Both have been on the winning side of nearly all criminal justice decisions producing a conservative outcome and, more generally, no Justice during the period reviewed has been a part of as many criminal justice majorities as has Chief Justice Roberts and Justice Kennedy.<sup>242</sup> The tendency among commentators when debating who leads the Court to focus on these two jurists seems justified.

Yet, profound differences emerge from the examination of the Court's decisions over the last ten Terms and do so in ways that illuminate the competing spheres of influence in criminal justice that Chief Justice Roberts and Justice Kennedy have carved out. The metrics used in this Article provide an initial sketch of these spheres. By avoiding the common approach of

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240. See, e.g., Michael D. Shear, Julie Hirschfeld Davis & Gardiner Harris, *Obama Pick Engages Supreme Court Battle*, N.Y. TIMES, Mar. 17, 2016, at A1 (evaluating Judge Merrick Garland as President Obama's nominee to succeed Scalia and reporting on the stated refusal by some Republican Senate leaders to consider any nomination until after the presidential election). See generally Martin et al., *supra* note 20, at Part IV.B (modeling predicted changes to the median Justice after the 2004 presidential election given various hypothesized Court retirements and different combinations of party control of Congress and the presidency).

241. See *supra* Table 4.

242. See *supra* Tables 2 & 5 and accompanying text.

focusing on a few celebrated cases, the resulting analysis offers not only a more systematic assessment of influence exercised by each jurist, but also provides a baseline for evaluating future power shifts on this dynamic, decision-making body.

As for the Chief Justice, evidence suggests that Roberts strategically assigns criminal justice opinions in ways that minimizes policy losses and defection from majority coalitions.<sup>243</sup> Moreover, Chief Justice Roberts not only commands a Court that has leaned strongly to the right on many criminal justice issues, but he also has occupied the central, core position of the dominant conservative wing.<sup>244</sup> As the median conservative Justice on the Court with respect to criminal justice matters in his first decade as Chief Justice, Roberts possessed substantial gravitational pull on his fellow conservatives as gauged by the dimensions of conservatism presented earlier.<sup>245</sup> Chief Justice Roberts has kept the conservative wing together against dissenting votes from all four liberal members of the Court in several important cases.<sup>246</sup> In these, Chief Justice Roberts and his fellow conservatives incorporated the right to bear arms<sup>247</sup> while ruling in a rights-restricting fashion with respect to interests of the detained, accused, or convicted, such as in cases regarding jury selection,<sup>248</sup> the death penalty,<sup>249</sup> the exclusionary rule,<sup>250</sup> strip searches,<sup>251</sup> right to counsel,<sup>252</sup> *Miranda* and other self-incrimination protections,<sup>253</sup> fair trials and prosecutorial

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243. See *supra* Part IV.A.

244. See *supra* Part IV.B.

245. See *supra* Table 6 rankings by gravity and accompanying text.

246. Of the thirty-one conservative decisions analyzed ending in a five-member majority, twenty-two (71 percent) found all members of the conservative wing lined up against all participating members of the liberal wing.

247. See *McDonald v. Chicago*, 561 U.S. 742 (2010); see also *District of Columbia v. Heller*, 554 U.S. 570 (2008).

248. See *Davis v. Ayala*, 135 S. Ct. 2187 (2015).

249. See *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

250. See *Herring v. United States*, 555 U.S. 135 (2009); see also *Hudson v. Michigan*, 547 U.S. 586 (2006).

251. See *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012).

252. See *Montejo v. Louisiana*, 556 U.S. 778 (2009).

253. See *Salinas v. Texas*, 133 S. Ct. 2174 (2013); see also *Berghuis v. Thompkins*, 560 U.S. 370 (2010).

misconduct,<sup>254</sup> among others.<sup>255</sup>

However, the Chief Justice has struggled at times to overcome defections by Justices Thomas and Scalia—and more frequently by Justice Kennedy and especially in the Court's most divided criminal justice cases. The ironic result: Chief Justice Roberts ranks as one of the most likely Justices to vote with the majority in criminal justice cases over the last decade, but also is the least likely member of the Court to be on the winning side of when the vote count is five-to-four.<sup>256</sup> This is a particularly notable weakness given the proportion of this Court's decisions ending in a minimally-winning majority. If Justice Scalia's replacement is more inclined to join the liberal wing, as opposed to the remaining conservative Justices in such cases, Chief Justice Roberts's influence in split decisions would likely diminish further. More generally, Chief Justice Roberts could lose much of his significant control over opinion assignments if the liberal wing becomes dominant.<sup>257</sup>

Justice Kennedy has been by far the Justice most likely to be in the majority of sharply divided criminal justice decisions. While considerable attention understandably has been afforded Justice Kennedy's influence on the Court's death penalty jurisprudence,<sup>258</sup> he has cast outcome-determining votes on

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254. See *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

255. See, e.g., Smith et al., *supra* note 41, at 428-33 (discussing conservative activism and other developments in five-to-four conservative criminal justice decisions by the Roberts Court).

256. During the period analyzed, Chief Justice Roberts was part of only 45 percent of five-member majorities (thirty-one of sixty-nine). Remarkably, in the remaining 194 criminal justice cases in which he participated, he voted with the majority 190 times (98 percent).

257. Notably, it would be a rare development in the modern era for a Court to be dominated by an ideological wing that did not include the Chief Justice. Chief Justice Roberts and his Court, to date, have been conservative, as was true for Chief Justices Rehnquist and Burger. Liberal Chief Justice Warren led a Court that favored the criminally accused in most years. For ideological characterizations of particular Court eras, see generally Schwartz, *supra* note 30; Smith et al., *supra* note 46; Smith & McCall, *supra* note 54; Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003). See also HOWARD GILLMAN, *THE VOTES THAT COUNTED* (2001); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); Galloway, *supra* note 30.

258. See, e.g., Linda E. Carter, *The Evolution of Justice Kennedy's*

several other criminal justice questions. After so doing, he often wrote the Court's decision.<sup>259</sup> As the leading author of the Court's non-unanimous, criminal justice opinions over the last decade (and author of more non-unanimous, liberal opinions than any member of the liberal wing),<sup>260</sup> Justice Kennedy has been a powerful voice on a range of issues. However, his formidable role as median Justice has been a function of the distribution of philosophical approaches and policy preferences on the Court, and that configuration may change dramatically in the next few years and perhaps as soon as Justice Scalia's successor is confirmed.

Indeed, the timelier question is not 'Who leads the Court' but rather 'Who will lead the Court in the near future?' Not only will Justice Scalia's successor alter the dynamics of the Court, but commentators also have mused over the implications of the possible retirements of Justices Ginsburg (83 years old) and Breyer (77).<sup>261</sup> Justice Kennedy—now the longest serving member on the Court—celebrated his eightieth

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*Eighth Amendment Jurisprudence on Categorical Bars in Capital Cases*, 44 MCGEORGE L. REV. 229 (2013) (examining Justice Kennedy's leadership role in constitutional interpretation in a select type of death penalty cases); Kenneth C. Haas, *The Emerging Death Penalty Jurisprudence of the Roberts Court*, 6 PIERCE L. REV. 387, 436 (2008) (predicting that *Kennedy v. Louisiana*, 554 U.S. 407 (2008) "almost certainly will be decided by a five-to-four vote with Justice Kennedy providing the pivotal vote. Moreover, it is likely to be one of many future death penalty cases in which Justice Kennedy's reaction to arguments about how to interpret and apply the Eighth Amendment will prove to be decisive."); Christopher Dunn, *Justice Kennedy: The Man in Control of the Death Penalty*, 238 N.Y. L.J. 3 (2007) (noting that the Court decided seven death penalty cases during the 2006-2007 Term, each ending in a five-to-four vote in which the four most liberal Justices lined up against the four most conservative Justices, with Justice Kennedy casting the deciding vote).

259. See *supra* Part V.B.

260. See *supra* Table 9.

261. See, e.g., Richard Wolf, *Court icons Scalia and Ginsburg: Together at the peak*, USA TODAY (Feb. 14, 2015, 5:37 PM), <http://www.usatoday.com/story/news/politics/2015/02/13/supreme-court-scalia-ginsburg/23184991/>; Sheryl Gay Stolberg, *An Aging Court Raises Stakes of Presidential Election*, N.Y. TIMES, June 28, 2012, at A18; Sarah E. Pugh, *Predicting the Fate of the Judiciary After Obama*, 7 STUDENT PULSE 2 (2015), <http://www.studentpulse.com/a?id=995> (last visited Nov. 20, 2016); Randall Kennedy, *The Case for Early Retirement*, NEW REPUBLIC (Apr. 28, 2011), <http://www.newrepublic.com/article/politics/87543/ginsburg-breyer-resign-supereme-court>.

birthday in July 2016.<sup>262</sup>

Because Chief Justice Roberts's and Justice Kennedy's power bases derive substantially from the particular divisions on the Court, the degree to which each will continue to exert such influence will be affected by the Senate's unwillingness to consider President Obama's nomination to replace Justice Scalia,<sup>263</sup> and on what nomination opportunities the new President receives.<sup>264</sup> When the Court's composition does change in yet unforeseeable ways, the measures in this Article sketching the contours of power wielded by Chief Justice Roberts and Justice Kennedy in criminal justice cases will serve as important benchmarks by which to evaluate the impact of new members.

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262. SUP. CT. OF THE U.S, *supra* note 8 (click on Biographies of current Justices of the Supreme Court).

263. See Shear et al., *supra* note 240; See also Fred Imbert, *McConnell: Senate Won't Consider Garland Nomination*, CNBC (Mar. 16, 2016, 12:23 PM), <http://www.cnbc.com/2016/03/16/president-obama-to-announce-supreme-court-nominee-at-11-am-et.html>.

264. See, e.g., Rebecca Shabad, *How Could the Next President Reshape the Supreme Court?* CBSNEWS (Jan. 5, 2016, 6:00 AM), <http://www.cbsnews.com/news/the-next-president-could-reshape-the-supreme-court/> (summarizing likely nomination opportunities prior to Justice Scalia's death and quoting law professor Stephen Wermiel as saying, "I think there's no denying the next president is likely to have a very significant impact on the court.").