ARTICLES

INSIDE A HOUSE DIVIDED: RECENT ALLIANCES ON THE UNITED STATES SUPREME COURT

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I. INTRODUCTION

When the United States Supreme Court reconvened at the beginning of October 2016, observers focused their attention primarily on who was not there and what the upcoming term was not going to be.[1] Justice Antonin Scalia, the longtime spokesperson for the Court's conservative wing, had passed away unexpectedly in February.[2] President Barack Obama's attempt to replace Scalia with Merrick Garland, the highly respected Chief Judge of the United States Court of Appeals for the District of Columbia Circuit and a purported judicial moderate, had resulted in a political standoff between the President and the Congress that ended with the Senate refusing to vote on the nominee.[3] Consequently, when

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[1] *See, e.g.*, Dahlia Lithwick, *Amicus: 2016 Term Preview*, SLATE (Oct. 1, 2016), http://www.slate.com/articles/podcasts/amicus/2016/10/a_preview_of_the_2016_17_supreme_court_term.html; Ariane de Vogue, *Supreme Court Starts New Term with More Questions than Answers*, CNN (Oct. 4, 2016), http://www.cnn.com/2016/10/04/politics/supreme-court-session-2016/index.html; *Will the Short-Staffed Supreme Court Keep a 'Low Profile' This Term?*, PBS NEWS HOUR (Oct. 5, 2016), http://www.pbs.org/newshour/bb/will-short-staffed-supreme-court-keep-low-profile-term/; Richard Wolf, *Scalia's Absence Haunts Supreme Court's New Term*, USA TODAY (Oct. 3, 2016), https://www.usatoday.com/story/news/politics/2016/10/03/supreme-court-scalia-term-cases/91442190/.

[2] Wolf, *supra* note 1.

[3] Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution* Really *Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U.L. REV. ONLINE 53, 55–58 (2016); Victoria Bassetti, *Behind the Merrick Garland Blockade*, BRENNAN CTR. FOR JUST. (May 5, 2016), https://www.brennancenter.org/blog/behind-merrick-garland-blockade; Jacob Gershman, *Standoff over Garland Rings*

the Court resumed operations in October, only eight justices sat on the nation's highest federal judicial bench.[4] Perhaps unsurprisingly, the nation's gaze seemed to center on the speculations about whom, if anyone, would ultimately be appointed and confirmed to take that crucial empty chair on this ideologically divided Court.[5]

Further detracting from the general interest about the actual cases that the Court would hear during this term was the lack of a rampantly controversial constitutional dispute on the docket.[6] By comparison, recent terms had featured cases of general fascination on highly publicized matters such as same-sex marriage,[7] Obamacare,[8] abortion,[9] affirmative action,[10] the rights of the federal government in times of war,[11] life sentences for juvenile

Familiar, WALL ST. J. (Mar. 16, 2016), https://blogs.wsj.com/law/2016/03/16/standoff-over-garland-rings-familiar/; Richard L. Hasen, *The Battle over Replacing Justice Scalia Is Just the Start of a War over the Supreme Court*, WASH. POST (Feb. 15, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/02/15/the-battle-over-replacing-justice-scalia-is-just-the-start-of-a-war-over-the-supreme-court/?utm_term=.1cc567dbcf72; Michael A. Memoli & Lisa Mascaro, *Obama's Choice of Popular Centrist Merrick Garland for Supreme Court Puts GOP to the Test*, L.A. TIMES (Mar. 16, 2016), http://www.latimes.com/nation/politics/la-na-supreme-court-nominee-20160316-story.html.

[4] Erwin Chemerinsky, *What to Look for in the New Supreme Court Term*, ABA J. (Sept. 29, 2016), http://www.abajournal.com/news/article/chemerinsky_supreme_court_new_term; *The U.S. Supreme Court Will Return with Only 8 Justices*, REUTERS (Sept. 30, 2016), http://fortune.com/2016/09/30/us-supreme-court-justices/; Lithwick, *supra* note 1; *Will the Short-Staffed Supreme Court Keep a 'Low Profile' This Term?*, *supra* note 1.

[5] *See, e.g.*, Geoffrey Lou Guray, *Meet the Three Judges on Trump's Supreme Court Shortlist*, PBS NEWS HOUR (Jan. 31, 2017), http://www.pbs.org/newshour/updates/meet-three-judges-trumps-supreme-court-shortlist/; Noah Feldman, *Expect the Expected from President Trump's Supreme Court Pick*, BLOOMBERG (Nov. 16, 2016), https://www.bloomberg.com/view/articles/2016-11-16/expect-the-expected-from-trump-s-supreme-court-pick; Ariane de Vogue, *Who Will Trump Pick for the Supreme Court?*, CNN (Nov. 9, 2016), http://www.cnn.com/2016/11/09/politics/supreme-court-vacancy-donald-trump/index.html.

[6] *See* Glenn Harlan Reynolds, *Looking Ahead: October Term 2016*, 2016 CATO SUP. CT. REV. 313, 313 ("October Term 2016 seems likely to live up to the 'few and boring' description unless something surprising takes place."); Adam Liptak, *Supreme Court Faces Volatile, Even if Not Blockbuster, Docket*, N.Y. TIMES (Oct. 1, 2016), https://www.nytimes.com/2016/10/02/us/politics/supreme-court-faces-volatile-even-if-not-blockbuster-docket.html ("There is no case yet on the docket that rivals the blockbusters of recent terms addressing health care, abortion or same-sex marriage.").

[7] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

[8] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 530–31 (2012).

[9] *See* Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

[10] *See* Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2214–15 (2016); Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1630 (2014); David S. Cohen, *Upcoming Supreme Court Cases That Could Change History*, ROLLING STONE (Oct. 7, 2015), http://www.rollingstone.com/politics/news/6-upcoming-supreme-court-cases-that-could-change-history-20151007.

[11] *See* Boumediene v. Bush, 553 U.S. 723, 732 (2008); Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004).

offenders,[12] and hotly contested forms of speech and expression.[13] Without any cases that provided such obvious bulletin-board material, and with the eight justices vowing to find ways to reach consensus on disputes to avoid any 4–4 deadlocks in their voting, the new term opened with a whisper rather than a roar among the Court-watching members of the media and the general public.[14]

In the end, however, the term proved to be just as interesting—if not more so—as its more highly anticipated predecessors.[15] The Court contemplated plenty of highly controversial matters, rendering decisions with lasting national implications about such issues as religious liberty,[16] immigration,[17] racism in the American criminal justice system,[18] intellectual property protections,[19] the obligations of corporations,[20] and voting rights.[21] True to their promise, the justices avoided stalemates and reached consensus at a record rate, resulting in the Court handing down more unanimous decisions than had been seen from any term in recent memory.[22] The eight-member tribunal proved "unusual and awkward," in the words of Justice Samuel Alito, with justices often avoiding the type of ideological line-drawing that had characterized the Court in recent years and producing narrowly construed opinions that often seemed designed to avoid offending either side of the political aisle.[23] To see this previously highly vocal and polarized Court suddenly stepping gingerly felt out of place, much like an elephant

[12] *See* Adams v. Alabama, 136 S. Ct. 1796, 1799 (2016) (Sotomayor, J., concurring); Montgomery v. Louisiana, 136 S. Ct. 718, 725, 726 (2016).

[13] *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 788 (2011); Morse v. Frederick, 551 U.S. 393, 396 (2007); Ronald K.L. Collins, *Foreword: Exceptional Freedom—The Roberts Court, The First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 410–11 (2013); Cohen, *supra* note 10; Elizabeth Slattery, *Overview of the Supreme Court's October 2016 Term*, HERITAGE FOUND. (Sept. 12, 2016), https://www.heritage.org/courts/report/overview-the-supreme-courts-october-2016-term.

[14] *See* Reynolds, *supra* note 6, at 313; Liptak, *supra* note 6; Slattery, *supra* note 13.

[15] *See* Liptak, *supra* note 6.

[16] *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2018 (2017).

[17] *See* Sessions v. Morales-Santana, No. 15-1191, 2017 U.S. LEXIS 3724, at *8 (U.S. June 12, 2017).

[18] *See* Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017); Buck v. Davis, 137 S. Ct. 759, 776 (2017).

[19] *See* Impression Prods. v. Lexmark Int'l, Inc., 137 S. Ct. 1523, 1529 (2017); *see infra* Part II.xv.

[20] *See* Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 137 S. Ct. 1773, 1783–84 (2017) (citation omitted); *see infra* Part II.xviii.

[21] *See* Cooper v. Harris, 137 S. Ct. 1455, 1463 (2017); *see infra* Part II.xiv.

[22] Adam Liptak, *A Cautious Supreme Court Sets a Modern Record for Consensus*, N.Y. TIMES (June 27, 2017), https://www.nytimes.com/2017/06/27/us/politics/supreme-court-term-consensus.html.

[23] *Id.*

walking on tiptoe to avoid trampling on a wasp's nest.[24] For most of the term, the justices trended toward case-specific determinations rather than sweeping constitutional proclamations—a shift that was, depending on one's perspective, either a refreshing return to the Court's original function or a dull abdication of the Court's expected duties.[25]

Then President Donald Trump appointed Neil Gorsuch to the Supreme Court's bench on January 31, 2017, and the media attention once again returned to that white marble building on First Street.[26] Quickly, another heated battle erupted along political party lines.[27] Democrats in the Senate staged a filibuster against the nominee, who was widely viewed as a predictably conservative jurist with sentiments similar to Scalia's ideologies, which ended only when the Republican majority invoked the so-called "nuclear option" to break the filibuster with only fifty-one votes.[28] Finally, when the dust settled in early April, Gorsuch received his confirmation by a 54–45 margin, a partisan result that

[24] *See, e.g.*, David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, ATLANTIC (June 29, 2012), https://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/; Adam Liptak, *The Polarized Court*, N.Y. TIMES (May 10, 2014), https://www.nytimes.com/2014/05/11/upshot/the-polarized-court.html; Liptak, supra note 22; Jeffrey Segal, *Why We Have the Most Polarized Supreme Court in History*, CONVERSATION (Mar. 14, 2016), http://theconversation.com/why-we-have-the-most-polarized-supreme-court-in-history-55015.

[25] *See, e.g.*, Meghan M. Biro, *How Bad Leadership Makes Consensus Happen Anyway*, FORBES (July 18, 2017), https://www.forbes.com/sites/meghanbiro/2017/07/18/how-bad-leadership-makes-consensus-happen-anyway/#771988173918; Perry Grossman, *Common High Court Ground*, SLATE (Apr. 28, 2017), http://www.slate.com/articles/news_and_politics/politics/2017/04/the_supreme_court_finally_found_an_issue_that_unites_them.html; Jeva Lange, *The Supreme Court Was the 'Most Functional Branch of Government' This Term*, WEEK (June 27, 2017), http://theweek.com/speedreads/708568/supreme-court-most-functional-branch-government-term.

[26] Tessa Berenson, *President Trump Nominates Neil Gorsuch to Supreme Court*, TIME (Jan. 31, 2017), http://time.com/4653790/donald-trump-neil-gorsuch-supreme-court/; Ariane de Vogue & Dan Berman, *Neil Gorsuch Confirmed to the Supreme Court*, CNN (Apr. 7, 2017), http://www.cnn.com/2017/04/03/politics/senate-nuclear-neil-gorsuch/index.html.

[27] *See, e.g.*, Matt Flegenheimer, *Democrats' Vow to Filibuster Ensures Bitter Fight over Gorsuch*, N.Y. TIMES (Apr. 3, 2017), https://www.nytimes.com/2017/04/03/us/politics/senate-democrats-appear-poised-to-filibuster-gorsuch-nomination.html; Astead W. Herndon, *Senate Continues Descent into Partisan Warfare over Gorsuch*, BOSTON GLOBE (Apr. 4, 2017), https://www.bostonglobe.com/news/nation/2017/04/03/senate-continues-descent-into-partisanship-gorsuch-confirmation-heads-for-nuclear-option/ubYJ5t748BKzJXV4hwVSRL/story.html.

[28] *See* Gabrielle Levy, *Senate Confirms Gorsuch for Supreme Court*, U.S. NEWS (Apr. 7, 2017), https://www.usnews.com/news/politics/articles/2017-04-07/neil-gorsuch-confirmed-as-supreme-court-justice; Ed O'Keefe & Elise Viebeck, *Democrats Secure Enough Votes to Block Gorsuch, Setting Stage for 'Nuclear' Option*, WASH. POST (Apr. 3, 2017), https://www.washingtonpost.com/powerpost/senate-panel-prepares-to-consider-gorsuch-as-threat-of-filibuster-looms/2017/04/03/129bcd8c-186a-11e7-bcc2-7d1a0973e7b2_story.html?utm_term=.2a84863dfe4f.

represented only three Democrats in the Senate casting their votes in Gorsuch's favor.[29]

Gorsuch spent only a couple of months on the bench before the Court's term ended in June, and cast a vote in merely a handful of decisions.[30] Some of these cases proved to be among the more divisive disputes of the term.[31] With such a small sample size, however, it is too early to determine whether the Court will continue this past term's trend of seeking consensus and issuing narrow case-specific holdings, or whether Gorsuch's arrival will signal a return to the highly charged and deeply divided outcomes that have epitomized the Court in the past several years.[32] The answer to another looming question—the matter of whether Justice Anthony Kennedy, by far the least-predictable voter on the Court today, will retire—will certainly impact whether the Court's actions from this past term were an aberration or a new beginning as well.[33]

Yet even amid a term of such unanimity, significant divisions emerged among the justices, both in their temporary eight-member format and in their full nine-member body.[34] With a bevy of cases on heavily contested topics of national interest already on the

[29] *See* Audrey Carlsen & Wilson Andrews, *How Senators Voted on the Gorsuch Confirmation*, N.Y. TIMES (Apr. 7, 2017), https://www.nytimes.com/interactive/2017/04/07/us/politics/gorsuch-confirmation-vote.html; Lawrence Hurley & Andrew Chung, *In Big Win for Trump, Senate Approves His Conservative Court Pick*, REUTERS (Apr. 7, 2017), http://www.reuters.com/article/us-usa-court-gorsuch/in-big-win-for-trump-senate-approves-his-conservative-court-pick-idUSKBN1791GR.

[30] *See* Josh Gerstein, *Democrats Fume over Early Gorsuch Rulings*, POLITICO (June 28, 2017), http://www.politico.com/story/2017/06/28/democrats-gorsuch-supreme-court-rulings-240030; *The Court and Its Procedures*, SUP. CT. U.S., https://www.supremecourt.gov/about/procedures.aspx (last visited Feb. 2, 2018); Elizabeth Slattery & Ben Janacek, *Grading Neil Gorsuch After 2 Months on the Court*, DAILY SIGNAL (June 30, 2017), http://dailysignal.com/2017/06/30/grading-neil-gorsuch-2-months-court/.

[31] *See infra* Part II.xvii, xxiv.

[32] *See* Garrett Epps, *The Extreme Partisanship of John Roberts's Supreme Court*, ATLANTIC (Aug. 27, 2014), https://www.theatlantic.com/politics/archive/2014/08/john-robertss-dream-of-a-unifying-court-has-dissolved/379220/; James D. Zirin, *If the Supreme Court Becomes Any More Partisan, We'll Be on Our Way to Anarchy*, N.Y. POST (Oct. 8, 2016), http://nypost.com/2016/10/08/if-the-supreme-court-becomes-any-more-partisan-well-be-on-our-way-to-anarchy/.

[33] *See* Margaret Hartmann, *Justice Anthony Kennedy Retirement Watch Is Already Back On*, N.Y. MAG. (July 3, 2017), http://nymag.com/daily/intelligencer/2017/07/justice-anthony-kennedy-retirement-watch-is-already-back-on.html; Eliana Johnson, *Kennedy Stays Quiet on Whether He'll Retire at End of Supreme Court Term*, POLITICO (June 25, 2017), http://www.politico.com/story/2017/06/25/justice-kennedy-retire-supreme-court-239940; Ariane de Vogue, *Anthony Kennedy Retirement Watch at a Fever Pitch*, CNN (June 26, 2017), http://www.cnn.com/2017/06/24/politics/anthony-kennedy-retirement-rumors/index.html.

[34] *See, e.g.*, Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 874 (2017) (Thomas, J., dissenting) (citations omitted) (discussing a division in the Court surrounding a Sixth Amendment case decided 5–3); *infra* Parts II, III.

horizon for the Court's upcoming term—including President Trump's travel ban, cellphone privacy, labor-management clashes, and struggles between the rights of same-sex couples and religious organizations—one can logically expect these fissures within the Court to stretch to the extreme in the months ahead.[35]

This article reveals these alliances and divisions that formed on the Court during this most recent term. By focusing solely on the Court's divided decisions—those cases in which at least one justice felt strongly enough about the outcome to publicly stand in opposition to his or her colleagues—this article examines the voting behaviors of the justices in these most hotly contested matters. In doing so, this article shows how frequently or infrequently each justice voted with each of his or her Supreme Court brethren during this past term, a result which demonstrates which justices appear to be most ideologically similar and which justices appear to be most ideologically opposed. From there, the article delves deeper into this data to highlight such topics as the frequency of each justice's appearance on the majority side of divided cases during the last term, voting trends in the most heavily contested matters of all—cases that ended with a 5–4 or a 5–3 vote—and individual cases that emerge as outliers in this data with voting results that defy the norm. Lastly, the article looks at some voting blocs that appeared during this past term, and examines what might lie ahead for the Court if these trends remain constant in the terms to come.

II. DIVIDED DECISIONS FROM THE OCTOBER 2016 COURT TERM

i. Buck v. Davis[36]

Duane Edward Buck was convicted for a double-murder.[37] During the penalty phase of his trial, the defense presented testimony from a clinical psychologist regarding Buck's risk of future dangerous behaviors.[38] On cross-examination, the prosecution elicited testimony from the psychologist that the race

[35] *See* Jonathan H. Adler, *The Supreme Court's 2016–2017 Term — 'The Calm Before the Storm'*, WASH. POST (June 27, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/27/the-supreme-courts-2016-2017-term-the-calm-before-the-storm/?utm_term=.50a581caed5c; Todd Ruger, *Next Supreme Court Term Stacked with Major Cases*, ROLL CALL (June 27, 2017), https://www.rollcall.com/news/next-supreme-court-term-stacked-major-cases; Liptak, *supra* note 22.

[36] Buck v. Davis, 137 S. Ct. 759 (2017).

[37] *Id.* at 768.

[38] *Id.*

factor "black" did, in the psychologist's opinion, enhance the chance that a criminal defendant would act dangerously in the future.[39] Ultimately, the jury sentenced Buck to death.[40] Buck appealed, arguing that he had received ineffective assistance of counsel because his attorney had called an expert witness who testified that an individual who was black was scientifically more likely to cause future harm, thereby prejudicing the jury to vote in favor of sentencing him to die.[41]

By a 6–2 margin, the Court held in Buck's favor.[42] Writing for the majority, Chief Justice John Roberts stated that Buck's case met all of the elements of ineffective assistance of counsel.[43] It was reasonably probable, Roberts wrote, that the jury would not have imposed the death penalty if Buck's attorney had not introduced the psychologist's testimony.[44] Under this rationale, the Court's majority decided that due to this testimony, Buck's race had played a significant role in the jury's decision to sentence him to die.[45] Such a situation, Roberts stated, was "a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are."[46]

Justice Clarence Thomas, joined by Justice Samuel Alito, dissented.[47] Thomas argued that Buck failed to demonstrate that the actions of his lawyer at the trial had materially prejudiced his defense.[48] While introducing the clinical psychologist as an expert witness debatably may have been a risky trial strategy, Thomas determined that it was not a mistake so egregious as to influence the entire outcome of the jury's decision-making regarding Buck's sentence.[49] Given the heinous nature of the crime, Thomas wrote, a reasonable jury may have sentenced Buck to death even without the psychologist's testimony regarding race.[50] As the defense counsel's actions did not materially prejudice the outcome in the case, Thomas concluded that Buck had not met the standards of proving

[39] *Id.* at 769.
[40] *Id.*
[41] *Id.* at 767.
[42] *Id.* at 767, 780.
[43] *See id.* at 780.
[44] *See id.* at 776.
[45] *See id.* at 777 (citation omitted).
[46] *Id.* at 778.
[47] *See id.* at 780 (Thomas, J., dissenting).
[48] *See id.* at 781, 782 (citation omitted).
[49] *See id.* at 782 ("But the prosecution's evidence of both the heinousness of petitioner's crime and his complete lack of remorse was overwhelming.").
[50] *See id.* (citation omitted).

ineffective assistance of counsel.[51]

ii. Pena-Rodriguez v. Colorado

A Colorado trial court convicted Miguel Angel Pena-Rodriguez of harassment and unlawful sexual conduct.[52] Following the guilty verdict, two jurors told Pena-Rodriguez's attorney that a member of the jury had declared during the jury's deliberations that Pena-Rodriguez was likely guilty because Pena-Rodriguez was Hispanic "and Mexican men take whatever they want."[53] The same juror made similarly biased statements to the rest of the jury regarding two of Pena-Rodriguez's alibi witnesses, both of whom were Hispanic.[54] Pena-Rodriguez moved for a new trial, and was denied.[55] On appeal, however, the Supreme Court of Colorado held that the jurors' sworn statements regarding the other juror's biased comments were inadmissible, citing a state rule of evidence that prohibited jurors from testifying about anything that occurred during the jury's deliberations.[56]

By a 5–3 vote, the United States Supreme Court overturned the Colorado Supreme Court's decision.[57] In his majority opinion, Justice Kennedy devoted considerable attention to the Court's respect for the confidentiality of jury deliberations in the American criminal justice system, stating that the Court was always reluctant to overturn a decision based on statements that were made only within the sanctity of the deliberation room.[58] However, Kennedy continued, such deference to the jury could not extend to a situation where the defendant's Sixth Amendment right to an impartial jury had been breached.[59] Here, Kennedy wrote, the juror made

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[51] *See id.* Thomas also stated that the holding in this matter should have little-to-no effect on the Court's decisions in future ineffective assistance of counsel cases, as the majority's opinion treated this matter as a "perfect storm" of circumstances, placing "special weight" on the fact that the jury imposed the death penalty and that race as such was a prominent factor in rendering this sentence. *See id.* at 776, 785–86 (citations omitted).

[52] Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017).

[53] *Id.* at 862 (citation omitted).

[54] *Id.* (citation omitted).

[55] *Id.*

[56] *See id.* (citing Pena-Rodriguez v. People, 350 P.3d 287, 293 (Colo. 2015)).

[57] *See Pena-Rodriguez*, 137 S. Ct. at 860.

[58] *See id.* at 861.

[59] *See id.* at 869 ("[T]he Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.").

declarations that were "egregious and unmistakable in their reliance on racial bias," and then vigorously encouraged other jurors to join him in this line of thinking.[60] In such a circumstance, Kennedy determined, the Colorado law forbidding the introduction of these statements needed to yield to the Sixth Amendment's guarantee that the accused would face a jury that was impartial.[61]

Chief Justice Roberts, Justice Thomas, and Justice Alito dissented.[62] Thomas vehemently argued that the majority opinion distorted the Sixth Amendment, stating that common law tradition prevented overturning a verdict based on one juror's biased acts.[63] A change to this precedent, Thomas wrote, requires legislative action, not a judicial decision.[64] Writing separately, Alito added that the history of the American criminal justice system was filled with instances where juror testimony had been deemed inadmissible, and that the Court had twice rejected attempts to carve out a Sixth Amendment exception to this standard.[65] Such an important tradition of preserving the inviolability of the jury's deliberative processes, Alito stated, should not be overrun merely because the form of impartiality at issue in this case was bias on the basis of ethnicity and race.[66]

iii. NLRB v. SW General[67]

When the General Counsel of the National Labor Relations Board ("NLRB") resigned, the President of the United States directed Lafe Solomon to serve as the NLRB's Acting General Counsel.[68] Six months later, the President nominated Solomon to serve as the full-fledged General Counsel of the NLRB, but the Senate did not confirm him.[69] However, the Senate did not confirm a different nominee until three more years had passed from the date that the

[60] *Id.* at 870.

[61] *See id.* at 869, 870 (discussing societal interests justifying the need for the Colorado statute to yield to the Sixth Amendment's guarantees of an impartial jury in matters involving a juror's blatant declaration of race-based animus against a defendant).

[62] *See id.* at 871 (Thomas, J., dissenting); *id.* at 874 (Alito, J., dissenting).

[63] *See id.* at 874 (Thomas, J., dissenting) (citation omitted).

[64] *Id.*

[65] *See id.* at 878 (Alito, J., dissenting).

[66] *See id.* at 882 ("The real thrust of the majority opinion is that the Constitution is less tolerant of racial bias than other forms of juror misconduct, but it is hard to square this argument with the nature of the Sixth Amendment right on which petitioner's argument and the Court's holding are based.").

[67] NLRB v. SW Gen., Inc., 137 S. Ct. 929 (2017).

[68] *Id.* at 937 (citation omitted).

[69] *Id.*

NLRB's former general counsel had resigned.[70]

During this intervening period of time, the NLRB had considered an unfair labor practices claim against SW General, a corporation that provided ambulance services to hospitals in Arizona.[71] When an administrative law judge decided that SW General had committed unfair labor practices, SW General argued that Solomon was serving in violation of the Federal Vacancies Reform Act ("FVRA"), a statute focusing on positions requiring appointment by the President and confirmation by the United States Senate.[72] The FVRA prevented an interim officer from becoming the nominee for that position and forbade the nominee to fill a vacancy from serving in an acting position unless the nominee had previously served as the "first assistant" to the vacant position during the previous year.[73] Solomon had not met either of these criteria, even though he was serving as the Acting General Counsel for the NLRB.[74]

In a 6–2 decision, the Court sided with SW General.[75] According to Chief Justice Roberts's majority opinion, the NLRB violated the plain language of the FVRA by permitting Solomon to continue serving as the Acting General Counsel after the Senate had rejected his nomination.[76] No other interpretation of the law was plausible.[77] In a concurring opinion, Justice Thomas added that in his opinion, the NLRB had also run afoul of the Appointments Clause of the Constitution by permitting Solomon to carry out the duties of the office even though the Senate had not confirmed him.[78]

Justice Sonia Sotomayor authored a dissent, joined by Justice Ruth Bader Ginsburg, stating that the Court's majority had construed the text of the FVRA incorrectly.[79] According to Sotomayor and Ginsburg, the FVRA's restrictions on nominees to a

[70] *See id.* (citations omitted).

[71] *Id.*

[72] *See id.* at 934–37 (citations omitted) (discussing in significant detail the history and purpose of the FVRA).

[73] *Id.* at 936–37.

[74] *Id.* at 937–38 (citations omitted).

[75] *See id.* at 934.

[76] *See id.* at 941.

[77] Furthermore, the Court's majority rejected the NLRB's arguments that the "legislative history, purpose, and post-enactment practice" of the FVRA called for a different interpretation than what the text of the law itself required. *Id.* at 941–42, 943–44 (citations omitted).

[78] *See id.* at 945, 946, 948 (Thomas, J., concurring) (citations omitted) (stating that the general counsel of the NLRB was both an "officer of the United States" and a principal officer, and that appointments of individuals to this position therefore constitutionally required the advice and consent of the Senate).

[79] *See id.* at 949 (Sotomayor, J., dissenting).

position performing the duties of that office applied only to "first assistants" who automatically assume the role of an acting official in certain situations.[80] As Solomon did not automatically assume the role of an acting office, but rather had been directed to serve as the Acting General Counsel by the President of the United States "to serve out a consecutive Senate-confirmed term in the vacant office," Sotomayor and Ginsburg determined that the terms of the FVRA did not bar Solomon's service at the time of the NLRB's decision against SW General.[81]

iv. SCA Hygiene Products v. First Quality Baby Products[82]

SCA Hygiene Products notified First Quality Baby Products that First Quality had interfered with one of SCA's patents.[83] First Quality responded that the SCA patent was invalid, as it was fundamentally identical to a previously filed patent.[84] SCA then asked the United States Patent Office to re-examine its patent.[85] Three years later, the Patent Office decided that SCA's patent was valid.[86]

Three year after that, SCA sued First Quality for patent infringement.[87] First Quality argued that SCA had unreasonably delayed the litigation and moved for summary judgment.[88] SCA responded by pointing to the United States Supreme Court's decision in *Petrella v. Metro-Goldwyn-Mayer*,[89] in which the Court had determined that an argument of unreasonable delay could not bar copyright infringement suits that commenced within the three-year statute of limitations for such cases.[90] If such a rationale governed copyright infringement cases, SCA argued, then an equivalent rationale should hold true for patent infringement cases as well.[91]

By a 7–1 margin, the Supreme Court agreed with SCA's

[80] *See id.* at 949–50 (citations omitted).
[81] *See id.* at 952, 954.
[82] SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954 (2017).
[83] *Id.* at 959 (citation omitted).
[84] *Id.* (citations omitted).
[85] *Id.* (citation omitted).
[86] *Id.*
[87] *Id.*
[88] *Id.* (citation omitted).
[89] Petrella v. MGM, 134 S. Ct. 1962 (2014).
[90] *SCA Hygiene Prods.*, 134 S. Ct. at 960 (citations omitted) (discussing *Petrella*).
[91] *See SCA Hygiene Prods.*, 134 S. Ct. at 962–63 (citations omitted).

reasoning.[92] Justice Alito, joined by all of his colleagues except for Justice Stephen Breyer, wrote that an unreasonable delay defense could not bar a patent infringement claim filed within the applicable six-year statute of limitations period.[93] According to the Court's majority, this concept was well-established at the time of the Patent Act's enactment.[94] The entire purpose of an unreasonable delay defense, Alito continued, was to prevent undue slowness in litigation in a matter for which no statute of limitations existed.[95] Therefore, allowing a party to utilize this defense during the statute of limitations period would fly in the face of the intent of the defense.[96]

Breyer based his dissenting argument on the absence of a definitive statute of limitations period within the Patent Act.[97] The Act, Breyer pointed out, "permits a patentee to sue any time after an [alleged] infringement" occurs.[98] The six-year time frame upon which the majority based their decision dealt only with damages, as a patentee successful in an infringement suit could recover significant damages from the preceding six years.[99] Since this law did not impose a time barrier to actually commencing a patent infringement lawsuit, Breyer argued that it was not a true statute of limitations, thus proving the need to grant defendants the right to protect their interests with an undue delay defense.[100]

v. Manuel v. City of Joliet[101]

Police stopped Elijah Manuel on a roadway in Illinois for failing to signal.[102] During this stop, a police officer smelled marijuana in the car.[103] The officer then dragged Manuel out of the vehicle, kicked him and pushed him, and handcuffed him.[104] When the

[92] *See id.* at 958, 967.

[93] *See id.* at 959, 961, 963 (citing *Petrella*, 134 S. Ct. at 1978).

[94] *See SCA Hygiene Prods.*, 134 S. Ct. at 963 (citations omitted).

[95] *See id.* at 960 (first citing *Petrella*, 134 S. Ct. at 1967; then citing County of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226, 244 n.16 (1985)).

[96] *See SCA Hygiene Prods.*, 134 S. Ct. at 963 (citations omitted).

[97] *See id.* at 967 (Breyer, J., dissenting) (citation omitted) ("In my view, however, the majority has ignored the fact that, despite the 1952 Act's statute of limitations, there remains a 'gap' to fill. . . . Laches fills this gap.").

[98] *See id.*

[99] *See id.* at 967–68.

[100] *See id.* (citations omitted).

[101] *See* Manuel v. City of Joliet, 137 S. Ct. 911 (2017).

[102] *Id.* at 915.

[103] Manuel v. City of Joliet, 590 F. App'x 641, 642 (7th Cir. 2015).

[104] *Manuel*, 137 S. Ct. at 915.

officer conducted a pat-down of Manuel, the officer found and confiscated a bottle of pills.[105] Later, the police tested the contents of the bottle, falsified the results to wrongly claim that the pills were an illegal drug called ecstasy, and arrested Manuel based on the falsified results.[106] The police continued to rely on their falsified test outcomes even after Manuel brought forward a set of accurate test results from the police laboratory, testifying to the veracity of their falsified results before a grand jury.[107] Manuel was held in pretrial detention for forty-eight days until the Assistant State's Attorney assigned to the case sought dismissal of the charges.[108]

Manuel sued the City of Joliet for malicious prosecution.[109] The federal district court dismissed Manuel's case on the grounds that a Fourth Amendment violation could not give rise to a malicious prosecution claim under federal law if state law could provide an adequate remedy.[110] Manuel responded by arguing that a malicious prosecution case based on Fourth Amendment grounds could still go forward where officers misrepresented evidence, as they had done with the results of his drug test.[111]

By a 6–2 margin, the Supreme Court agreed with Manuel's assertions.[112] In an opinion authored by Justice Elena Kagan, the Court held that the Fourth Amendment's protection against unreasonable searches and seizures by law enforcement remains in effect throughout the legal process of a criminal matter.[113] Police had arrested Manuel without probable cause, and prosecutors had brought a case against Manuel without the support of an arrest based on probable cause.[114] Therefore, Kagan wrote, Manuel could still bring this case for malicious prosecution based on Fourth Amendment grounds.[115]

Justices Alito and Thomas dissented.[116] The Fourth Amendment, Alito wrote, focuses on a right to be free from unreasonable searches and seizures by law enforcement officers.[117] Since law enforcement

[105] *Id.*
[106] *Id.* (citations omitted).
[107] *Id.* at 915 n.2.
[108] *Id.* at 915–16.
[109] *Id.* at 921 (citing Wallace v. Kato, 549 U.S. 384, 389–90 (2007)).
[110] *Manuel*, 137 S. Ct. at 916 (citations omitted).
[111] *Id.* at 915 n.2, 917 (citing Bailey v. United States, 568 U.S. 186, 192 (2013)).
[112] *See Manuel*, 137 S. Ct. at 914, 917.
[113] *See id.* at 918–19 (citation omitted).
[114] *See id.* at 919.
[115] *See id.* at 919–20.
[116] *Id.* at 922 (Thomas, J., dissenting); *id.* at 923 (Alito, J., dissenting).
[117] *See id.* at 925–26 (Alito, J., dissenting) (first citing Rehberg v. Paulk, 566 U.S. 356, 371

officers do not initiate prosecution, Manuel could not use a Fourth Amendment violation as grounds for a malicious prosecution claim.[118] Furthermore, Alito pointed out that malicious prosecution cases require a showing of subjective bad faith by the prosecutor, a standard that was far different from the objective standards used to evaluate the existence of a Fourth Amendment violation.[119] In the dissenters' views, the standards surrounding the Fourth Amendment were simply too distinct from the standards regarding a malicious prosecution claim to permit a malicious prosecution case based on Fourth Amendment grounds to prevail.[120]

vi. Star Athletica v. Varsity Brands[121]

Varsity Brands accused Star Athletica of infringing upon five copyrighted two-dimensional designs of decorations used on cheerleading uniforms.[122] Star asserted that the designs were never copyrightable, as they could not be conceptually or physically separated from a "useful article"—the uniforms—on which they appeared.[123] Without these designs, a cheerleader's uniform would be simply a normal dress, Star argued.[124] Therefore, since the designs were fundamental to the purpose of the uniforms, they were ineligible to receive separate protection under the Copyright Act.[125] In response, Varsity claimed that the two-dimensional designs were separable from the uniforms and could stand on their own merit as unique artistic expressions, thereby making the copyrights valid.[126]

Writing for the Court's 6–2 majority, Justice Thomas stated that although two-dimensional surface decorations or designs may not always be copyrightable, the artwork applied to the cheerleading uniforms in this case was eligible for copyright protection.[127] Thomas relied on text from the Copyright Act to point out that a feature incorporated into the design of a "useful article" is

(2012); then citing Ashcroft v. al-Kidd, 566 U.S. 731, 736 (2011)).

[118] *See Manuel*, 136 S. Ct. at 925 (first citing *Rehberg*, 566 U.S. at 371; then citing *al-Kidd*, 566 U.S. at 736).

[119] *See Manuel*, 136 S. Ct. at 925 (citing *al-Kidd*, 566 U.S. at 736).

[120] *See Manuel*, 136 S. Ct. at 926 (citing Wilson v. Garcia, 471 U.S. 261, 277 (1985)).

[121] Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017).

[122] *Id.* at 1007.

[123] *Id.* at 1007–08, 1009 (citations omitted).

[124] *Id.* at 1007–08 (citation omitted).

[125] *Id.* at 1009.

[126] *Id.* at 1006, 1013 (citations omitted).

[127] *See id.*

copyrightable under certain circumstances.[128] First, the design must be perceived as a two or three dimensional work of art that is separable from the useful article.[129] Secondly, and perhaps more challengingly, the two or three dimensional artwork at issue must be protectable on its own as a "pictorial, graphic, or sculptural work" if it were produced separately from the useful article.[130] In other words, the design in question must be able to stand on its own as something other than merely part of a replica of the useful article in a different medium.[131] The majority held that the designs in the instant case satisfied both prongs of this test, as the decorations that appeared on the cheerleading uniforms possessed their own unique pictorial and graphical qualities, and would be copyrightable on their own if separated from the uniforms.[132]

Justice Ginsburg agreed with the Court's outcome, but disagreed with the two-pronged test that formed the backbone of Thomas's opinion.[133] Ginsburg argued that the designs were unquestionably "pictorial, graphical, or sculptural works," a category which by itself is copyrightable.[134] The analysis, she continued, did not need to proceed any further.[135] The simple reproduction of these designs on a useful article should not cloud the issue, as the copyright for a "pictorial, graphical, or sculptural work" included the right to reproduce such a work on a useful article and exclude others from doing the same.[136] Therefore, in Ginsburg's view, the discussion of whether the two-dimensional designs was separable from the useful article was unnecessary.[137]

Justice Breyer dissented, joined by Justice Kennedy.[138] Although Breyer agreed with the test that Thomas described in the majority opinion, he argued that the majority made a mistake regarding the first prong of the analysis.[139] The designs at issue could be represented only as two-dimensional replicas of the uniforms, Breyer stated.[140] Since the designs could not be extracted without

[128] *Id.* at 1008 (citation omitted).
[129] *See id.* at 1007, 1009.
[130] *Id.* at 1007, 1010 (citation omitted).
[131] *See id.* at 1010 (citation omitted).
[132] *See id.* at 1016.
[133] *See id.* at 1019 (Ginsburg, J., concurring).
[134] *Id.* (citation omitted).
[135] *See id.*
[136] *Id.* (citation omitted).
[137] *See id.*
[138] *See id.* at 1030 (Breyer, J., dissenting).
[139] *See id.*
[140] *See id.* at 1030–31.

replicating the uniforms in another medium, the pictures were not separable from the useful article, and therefore were not eligible for copyright protection.[141]

vii. Czyzewski v. Jevic Holding Corp.[142]

Jevic Transportation, Inc., filed for bankruptcy under Chapter Eleven of the United States Bankruptcy Code.[143] Two lawsuits against Jevic quickly arose after Jevic's filing.[144] One suit came from truck drivers who had worked for Jevic, arguing that Jevic had not given the legally mandated sixty days' notice before they were laid off.[145] The other came from a group of unsecured creditors to whom Jevic owed a total of approximately twenty million dollars.[146] The unsecured creditors eventually negotiated a settlement that disposed of many of the claims but left out the aggrieved truck drivers entirely.[147] The drivers objected, pointing out that their claims fell under a higher priority category under the Bankruptcy Code and, therefore, should have been resolved first.[148] The bankruptcy court rejected this argument and approved the settlement.[149] On appeal, a federal district court and the United States Court of Appeals for the Third Circuit affirmed the bankruptcy court's decision, holding that the bankruptcy court possessed the authority to approve a settlement that did not match the Bankruptcy Code's priority-of-distribution scheme.[150]

In a 6–2 decision, the Supreme Court overturned the lower federal courts' decisions.[151] Justice Breyer's majority opinion determined that a bankruptcy court cannot authorize a settlement that fails to follow the Bankruptcy Code's priority-of-distribution scheme unless the affected parties consent to doing so.[152] While the Bankruptcy Code grants some latitude to bankruptcy court judges, Breyer stated that the judge in this matter took this flexibility too

141 *See id.* at 1035–36.
142 Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2017).
143 *Id.* at 980.
144 *Id.*
145 *Id.* (citation omitted).
146 *Id.* at 980, 981.
147 *Id.* at 981 (citation omitted).
148 *Id.* at 978 (citation omitted).
149 *See id.* (citation omitted).
150 *In re* Jevic Holding Corp., 787 F.3d 173, 186 (3d Cir. 2015).
151 *See Czyzewski*, 137 S. Ct. at 977–78, 987.
152 *See id.* at 978.

far.[153] Even though the Bankruptcy Code does not explicitly order the priority-of-distribution rules to apply to all dismissal settlements, Breyer wrote that the priority structure is integral to the overall purpose of the Code.[154] Absent a clear statement from Congress declaring otherwise, Breyer concluded the priority-of-distribution rules should always be legally presumed to apply.[155]

Justice Thomas dissented, joined by Justice Alito.[156] Thomas claimed that the majority's opinion represented judicial overreach, as the parties briefed and argued a narrower question than what the Court had ultimately decided.[157] As this narrower question had not yet been thoroughly addressed by the lower courts, Thomas wrote, the Court should have declined to answer it.[158] To Thomas, resolving such a "novel question of bankruptcy law" was wholly unnecessary when considering the much more limited question that initially brought the case before the Court.[159]

viii. Moore v. Texas[160]

In 1980, a trial court convicted Bobby James Moore of murdering a store clerk in Texas and sentenced him to death.[161] Multiple appeals ensued.[162] A federal court ultimately granted habeas corpus relief in 2001, but Moore was again sentenced to death at the subsequent penalty hearing.[163] Moore argued that the government could not execute him, because he was intellectually disabled under the standards set by the United States Supreme Court in *Atkins v. Virginia*.[164] However, the Texas Court of Criminal Appeals disagreed, finding that Moore had not proved that he possessed an intellectual disability.[165] In making this decision, the Texas court used a definition of the term "intellectual disability" that dated back to 1992.[166]

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153 *See id.* at 983.
154 *See id.* at 980, 984 (citation omitted).
155 *See id.* at 984.
156 *See id.* at 987 (Thomas, J., dissenting).
157 *See id.* at 987–88 (quoting *In re* Jevic Holding Corp., 787 F.3d 173, 175 (3d Cir. 2015)).
158 *See Czyzewski*, 137 S. Ct. at 987–88 (Thomas, J., dissenting).
159 *Id.* at 987–88 (quoting *Jevic*, 787 F.3d at 175).
160 Moore v. Texas, 137 S. Ct. 1039 (2017).
161 *Id.* at 1044 (citations omitted).
162 *Id.* at 1044–45 (citations omitted).
163 *Id.* (citations omitted).
164 *See id.* at 1044 (first citing Atkins v. Virginia, 536 U.S. 304, 318 (2002); then citing Hall v. Florida, 134 S. Ct. 1986, 2001 (2014)).
165 *See Moore*, 137 S. Ct. at 1046 (citations omitted).
166 *Id.* at 1046 (citations omitted).

The United States Supreme Court reversed the Texas court's findings by a 5–3 margin.[167] In an opinion by Justice Ginsburg, the majority held that Texas had violated the Eighth Amendment's protections against cruel and unusual punishment by using an outdated definition of "intellectual disability" in sentencing Moore to die.[168] While states are permitted to develop their own standards for deciding whether a person is exempt from the death penalty, the Court's majority determined that a state did not have the right to ignore modern medical standards in defining "intellectual disability" when making such a judgment.[169] By ignoring contemporary medical findings and processes, and using outmoded research based on old stereotypes about mental disabilities, the Court found that Texas had created an unacceptable risk that intellectually disabled persons would be executed.[170]

Chief Justice Roberts dissented, joined in his argument by Justice Thomas and Justice Alito.[171] While Texas had used a badly outdated definition of "intellectual disability," Roberts stated that available evidence, such as Moore's IQ score, demonstrated that Moore was not intellectual disabled.[172] Furthermore, Roberts argued, the Court's majority had done a disservice to the entire country by providing very little guidance to the states about how to enforce the Eighth Amendment's ban on executing mentally disabled persons.[173] The only thing that other states could learn from the majority opinion was that Texas's definition and actions had been wrong, Roberts declared, but they could glean nothing from this majority opinion about what procedures they should follow to avoid Eighth Amendment violations in the future.[174]

ix. McLane Company v. Equal Employment Opportunity Commission[175]

McLane Company required all new employees, as well as employees returning after medical leave, to take a physical capability strength test if the employee worked in a position

[167] *See id.* at 1043, 1053.
[168] *See id.* at 1044, 1053 (citing *Hall*, 134 S. Ct. at 2000).
[169] *See Moore*, 137 S. Ct. at 1053 (citing *Hall*, 134 S. Ct. at 1999).
[170] *See Moore*, 137 S. Ct. at 1051–52 (quoting *Hall*, 134 S. Ct. at 1990; *Ex parte* Briseno, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004)).
[171] *See Moore*, 137 S. Ct. at 1053 (Roberts, C.J., dissenting).
[172] *See id.* at 1056 (citation omitted).
[173] *See id.* at 1058–59.
[174] *See id.* at 1058–59, 1061.
[175] McLane Co. v. EEOC, 137 S. Ct. 1159 (2017).

classified by the company as "physically demanding."[176] When one employee failed this test three times, McLane terminated the employee's employment.[177] The employee filed a charge against McLane with the Equal Employment Opportunity Commission ("EEOC") for violating Title VII of the Civil Rights Act of 1964.[178] During the ensuing investigation, the EEOC subpoenaed documents and information that McLane refused to provide.[179] The EEOC then filed a subpoena enforcement action with a federal district court judge, who required McLane to divulge only some of the subpoenaed information.[180] The EEOC then appealed to the United States Court of Appeals for the Ninth Circuit, which partially reversed and partially vacated the district court's judgment.[181] In doing so, the Ninth Circuit reviewed the district court's decision *de novo*, not giving any deference to the lower court's findings, but openly questioned whether this was the correct standard of review in such a case.[182]

In a 7–1 decision, the Supreme Court found that the Ninth Circuit had erred in conducting this *de novo* review.[183] Justice Sotomayor's majority opinion stated that a district court's determination about enforcing an EEOC subpoena should be reviewed for "abuse of discretion," deferring to the lower court's judgment absent a blatantly arbitrary, capricious, or unjust outcome.[184] While nothing in the relevant law commands such deference, the Court's majority found that the history of appellate practice overwhelmingly featured reviews of such cases under the abuse of discretion standard.[185] The majority held that continuing this practice was sensible, as a single judge was better positioned than an appellate panel to decide whether to enforce or quash a subpoena in an administrative proceeding.[186]

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[176] *Id.* at 1165.

[177] *Id.*

[178] *Id.*; *see also id.* at 1164 (discussing the history and general application of the Civil Rights Act of 1964).

[179] *Id.* at 1166.

[180] *Id.* at 1166 (first citing EEOC v. McLane Co., No. CV-12-615-PHX-GMS, 2012 U.S. Dist. LEXIS 47443, at *5 (D. Ariz. Apr. 4, 2012); then citing EEOC v. McLane Co., No. CV-12-02469-PHX-GMS, 2012 U.S. Dist. LEXIS 164920, at *18 (D. Ariz. Nov. 19, 2012)).

[181] *See McLane*, 137 S. Ct. at 1166 (citing U.S. EEOC v. McLane Co., 804 F.3d 1051, 1059 (9th Cir. 2015), *vacated*, 137 S. Ct. 1159 (2017)).

[182] *McLane*, 137 S. Ct. at 1166 (citing *McLane*, 804 F.3d at 1056 n.3, 1057).

[183] *McLane*, 137 S. Ct. at 1170.

[184] *Id.* at 1167, 1170.

[185] *Id.* at 1167.

[186] *Id.* at 1167, 1168 (citations omitted).

Justice Ginsburg dissented regarding the outcome of the case.[187] Although she agreed with the majority in finding that abuse of discretion was the correct standard of review overall, Ginsburg found that the district court had made errors of law in refusing to enforce the EEOC's subpoena in full.[188] Because errors of law were at issue, Ginsburg argued, the Ninth Circuit had been correct to conduct a *de novo* review in this particular matter.[189]

x. Manrique v. United States[190]

A federal district court convicted Marcelo Manrique of possession of child pornography, sentencing him to a life term of supervised release and mandatory restitution.[191] The judgment entered against him did not include the precise amount for the restitution, but instead said that this information would be included in the final amended judgment.[192] Before the entry of this amended judgment, Manrique filed his notice of appeal.[193] Subsequently, the district court entered the amended judgment containing the precise amount of restitution.[194] The United States Court of Appeals for the Eleventh Circuit ruled that it lacked jurisdiction to consider a challenge to the restitution award, because Manrique had filed his notice of appeal before the district court entered its amended judgment.[195]

In a 6–2 decision, the Supreme Court agreed with the Eleventh Circuit's opinion.[196] Justice Thomas, writing for the majority, stated that an appellate court may not review a restitution award if the defendant filed the notice of appeal before the lower court entered an amended judgment providing the precise amount of restitution owed.[197] In the opinion of the Court's majority, the initial decision requiring some form of restitution and the amended judgment providing the exact amount of restitution could not combine to form a single judgment.[198] Instead, Thomas stated that

[187] *Id.* at 1170 (Ginsburg, J., dissenting).
[188] *Id.*
[189] *Id.* (citations omitted).
[190] Manrique v. United States, 137 S. Ct. 1266 (2017).
[191] *Id.* at 1270 (citations omitted).
[192] *Id.* (citations omitted).
[193] *Id.* (citations omitted).
[194] *Id.*
[195] *Id.* at 1271.
[196] *Id.* at 1269, 1274.
[197] *Id.* at 1270.
[198] *Id.* at 1272–73 (citations omitted).

the initial judgment and the amended judgment were distinct entities that required separate notices of appeal.[199] As a consequence, the Eleventh Circuit could not review anything contained in the amended judgment regarding restitution, as Manrique never filed a separate notice to appeal after receiving the amended judgment.[200]

Justice Ginsburg dissented, joined by Justice Sotomayor.[201] Pointing out that the district court never notified Manrique of his right to appeal the amended judgment, Ginsburg stated that Manrique never reasonably would have known that he needed to file a second notice of appeal.[202] Furthermore, Ginsburg continued, the district court clerk sent the record of the amended judgment directly to the appellate court.[203] The fact that the court clerk did so demonstrated that the district court itself had conferred jurisdiction upon the appellate court, thus removing from Manrique the burden of filing a new notice of appeal.[204]

xi. Nelson v. Colorado[205]

Two Colorado residents were arrested and convicted of sexual assault crimes.[206] One of these individuals subsequently was acquitted of all charges, and the other was acquitted of two of the charges against him.[207] Both sought refunds from the state for the penalties that they had been charged, as the convictions leading to those financial penalties were now overturned.[208] The Supreme Court of Colorado found that, under the state's Exoneration Act, an individual exonerated from a conviction may not recover fiscal losses resulting from an arrest unless that individual can prove "by clear and convincing evidence, her actual innocence of the offense of conviction."[209] As the exoneration of these two individuals did not rise to the required level of proof of actual innocence, the state was

[199] *Id.* at 1273 (citation omitted).
[200] *Id.* at 1274.
[201] *Id.* (Ginsburg, J., dissenting).
[202] *Id.*at 1275 (citations omitted).
[203] *Id.* (citation omitted).
[204] *Id.* (quoting Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982)).
[205] Nelson v. Colorado, 137 S. Ct. 1249 (2017).
[206] *Id.* at 1252–53 (first citing People v. Nelson, 362 P.3d 1070, 1071 (Colo. 2015); then citing People v. Madden, 364 P.3d 866, 867 (Colo. 2015)).
[207] *Nelson*, 137 S. Ct. at 1253 (citing *Nelson*, 362 P.3d at 1071; *Madden*, 364 P.3d at 867).
[208] *Nelson*, 137 S. Ct. at 1253.
[209] *Id.* at 1254 (citing COLO. REV. STAT. §§ 13-65-101 to -102; *Nelson*, 362 P.3d at 1075).

not required to issue reimbursements.[210]

In a 7–1 decision, the United States Supreme Court reversed the Colorado Supreme Court's holding.[211] Justice Ginsburg's opinion for the Court's majority struck down the "actual innocence" provision of Colorado's Exoneration Act as a violation of the Due Process Clause of the Fourteenth Amendment.[212] The Court's majority focused on the three sets of due process inquiries established in *Matthews v. Eldridge*:[213] the private interest impacted, the risk of erroneous deprivation if the existing process is the affected party's only remedy, and the interests at stake for the government.[214] With respect to these factors, Ginsburg's majority opinion noted that the two individuals had an obvious interest in reimbursement of fines paid for convictions that were later overturned, and that the Exoneration Act did not follow the American criminal justice system's tradition of presuming defendants to be innocent until proving otherwise.[215] Turning to the government's interests, Ginsburg concluded that the state had no claim of right to these funds, as they were collected in response to convictions that were later legally reversed.[216] On balance, therefore, the majority decided that the individuals' interests far outweighed the issues at stake for the government, proving that this provision of the Exoneration Act violated the Due Process Clause.[217]

Justice Thomas authored a lone dissent, stating that the two defendants lacked entitlement to the money that they had paid to the state.[218] To Thomas, the defendants failed to prove that they were "deprived of a protected property interest."[219] Nothing in the law, according to Thomas, indicated that these two individuals had a substantive entitlement to this money.[220] They had paid the money in response to convictions that were valid at the time, and nothing in state law guaranteed anyone an automatic refund if the

[210] *Nelson*, 137 S. Ct. at 1254 (citing *Nelson*, 362 P.3d at 1077–78; COLO. REV. STAT. §§ 13-65-101 to -103).

[211] *Nelson*, 137 S. Ct. at 1252, 1258, 1263.

[212] *Id.* at 1254–55 (citing COLO. REV. STAT. §§ 13-65-101(1), -102(1)).

[213] Mathews v. Eldridge, 424 U.S. 319 (1976).

[214] *Nelson*, 137 S. Ct. at 1255 (citing *Mathews*, 424 U.S. at 335).

[215] *Nelson*, 137 S. Ct. at 1255–56 (citations omitted).

[216] *Id.* at 1257 (citation omitted).

[217] *Id.* at 1257–58.

[218] *Id.* at 1263 (Thomas, J., dissenting).

[219] *Id.* at 1246, 1266 (citing Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005)).

[220] *Nelson*, 137 S. Ct. at 1265 (Thomas, J., dissenting) (citing McDonald v. City of Chicago, 561 U.S. 742, 811 (2010) (Thomas, J., concurring)).

convictions were overturned.[221] Without a government-imposed deprivation of a constitutionally protected interest, Thomas concluded that the two individuals had not proved a Due Process Clause breach.[222]

xii. Midland Funding, L.L.C. v. Johnson[223]

Aleida Johnson filed for bankruptcy in Alabama under Chapter Thirteen of the Bankruptcy Code.[224] Midland Funding filed a proof of claim in the same bankruptcy court, pointing out the company had purchased nearly $2,000 of debt from Johnson.[225] However, because more than six years had passed since the last transaction between Johnson and Midland Funding, Johnson correctly stated that the statute of limitations for debt collection in Alabama had expired.[226] Johnson then sued in federal court on the grounds that the Fair Debt Collection Practices Act ("FDCPA") forbade bankruptcy actions in matters where the statute of limitations period had passed.[227]

A divided Supreme Court disagreed.[228] Justice Breyer's opinion for the 5–3 majority stated that the FDCPA guarded against debt collectors acting in a manner that was "false," "deceptive," "misleading," "unconscionable," or "unfair."[229] According to Justice Breyer, filing a claim in a bankruptcy proceeding for a debt that is legally time-barred fit none of these categories.[230] Justice Breyer wrote that such an act was not misleading, because the obligation, while uncollectable due to the expiration of the limitations period, remained a "claim" for bankruptcy law purposes.[231] Congress, Justice Breyer explained, "intended . . . to adopt the broadest available definition of 'claim'" when drafting the Bankruptcy Code.[232] Nor did any of the other negative adjectives apply, Justice Breyer continued, as the debtor would likely be protected by the

[221] *See Nelson*, 137 S. Ct. at 1264–65 (citing People v. Nelson, 362 P.3d 1070, 1076–78 (2015)).
[222] *See Nelson*, 137 S. Ct. at 1266.
[223] Midland Funding, L.L.C. v. Johnson, 137 S. Ct. 1407 (2017).
[224] *Id.* at 1411 (citation omitted).
[225] *See id.*
[226] *See id.* (citing ALA. CODE §6-2-34 (2014)).
[227] *Midland Funding*, 137 S. Ct. at 1411.
[228] *See id.* at 1410, 1416.
[229] *See id.* at 1410, 1415–16.
[230] *See id.* at 1411 (citations omitted).
[231] *See id.* at 1411–12.
[232] *Id.* at 1412 (quoting Johnson v. Home State Bank, 501 U.S. 78, 83 (1991)).

"knowledgeable" bankruptcy trustee, thereby avoiding the chance that the debtor would "pay a stale claim just to avoid going to court."[233]

In an opinion that was longer than the Court majority's holding, Justice Sotomayor dissented, joined by Justice Ginsburg and Justice Kagan.[234] Noting the existence of an enormous market for buying stale debts from consumers "for pennies on the dollar," Justice Sotomayor expressed grave concerns that the majority's opinion permitted operations designed to "entrap consumers."[235] Such efforts, she wrote, "have no place in honest business practice."[236] She further stated that the majority gave an impractical degree of credence to bankruptcy trustees, noting that the trustees' trade association itself had filed an amicus brief describing how difficult it would be to object to every stale claim that arose in each bankruptcy proceeding.[237]

Debt collectors might use this to their advantage, Sotomayor wrote, as the stale debts had value because of the likelihood that trustees might forget about them.[238] While one could blame the trustees for negligence in such a situation, the only party ultimately hurt would be the debtor relying on the trustee for advice.[239] Since Congress had passed the FDCPA to safeguard debtors' rights, Sotomayor concluded, it made little sense to open the door to a process that was nothing more than "a trap for the unwary."[240]

xiii. Kindred Nursing Centers v. Clark[241]

Two residents at Kindred Nursing Centers designated their relatives as attorneys-in-fact granting them significant authority to act as their fiduciaries in transactions and agreements.[242] Both of these attorneys-in-fact signed contracts with Kindred Nursing Centers which included an alternative dispute resolution clause, stating that any disputes between the residents and Kindred

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[233] *See Midland Funding*, 137 S. Ct. at 1413 (citing Bankruptcy Code, 11 U.S.C. § 1302(a) (2012)).

[234] *Midland Funding*, 137 S. Ct. at 1416 (Sotomayor, J., dissenting).

[235] *Id.* at 1416, 1419 (citation omitted).

[236] *Id.* at 1419.

[237] *See id.* at 1420 (citing Brief for United States as Amicus Curiae supporting Respondent at 25–26, *Midland Funding*, 137 S. Ct. 1407 (No. 16-348)).

[238] *See Midland Funding*, 137 S. Ct. at 1421 (citation omitted).

[239] *See id.* (citation omitted).

[240] *Id.*

[241] Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017).

[242] *Id.* at 1425.

Nursing would be resolved through arbitration rather than through a lawsuit.[243] After both residents passed away, the two attorneys-in-fact filed wrongful death and personal injury suits on the residents' behalf.[244] Kindred Nursing moved to dismiss the lawsuits and compel arbitration based on the alternative dispute resolution clause of the contract.[245] A state trial court denied Kindred Nursing's motions in accordance with the Supreme Court of Kentucky's decision of *Ping v. Beverly Enterprises*,[246] in which the court found that an attorney-in-fact's authority could not extend to binding the principal to an optional arbitration agreement.[247]

In a 7–1 decision, the United States Supreme Court reversed the Kentucky court and ruled in favor of Kindred Nursing.[248] Justice Kagan's opinion for the Court's majority centered on the Court's decades-old trend of upholding binding arbitration agreements under the Federal Arbitration Act ("FAA"), a statute ordering all states to advance public policies that promoted the use of arbitration.[249] Under the FAA, Kagan wrote, a court can find an arbitration agreement unenforceable only by using legal principles that would apply to any contract.[250] Therefore, she continued, the FAA preempts separate categories of laws or regulations that focus exclusively upon arbitration agreements.[251] As the *Ping* precedent dealt with arbitration agreements alone, rather than with a rule generally applicable to all forms of contracts, the Court's majority found that the FAA invalidated *Ping*, making the arbitration agreement in this case fully enforceable by Kindred Nursing.[252]

Justice Thomas's lone dissent continued his longstanding objection to the application of the FAA in state court proceedings.[253] Given that the plain language of the FAA did not supersede the judgment of state tribunals, Thomas held that the FAA was

[243] *Id.* (citation omitted).
[244] *See id.*; Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306, 317 (Ky. 2015).
[245] *Kindred Nursing Ctrs.*, 137 S. Ct. at 1425.
[246] Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 593 (Ky. 2012).
[247] *See Extendicare Homes*, 478 S.W.3d at 327 (citing *Ping*, 376 S.W.3d at 594).
[248] *Kindred Nursing Ctrs.*, 137 S. Ct. at 1424, 1429.
[249] *Id.* at 1428 (citing Federal Arbitration Act (FAA), 9 U.S.C. § 2).
[250] *Id.* at 1426 (citing 9 U.S.C. § 2).
[251] *Kindred Nursing Ctrs.*, 137 S. Ct. at 1426 (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)).
[252] *See Kindred Nursing Ctrs.*, 137 S. Ct. at 1429; *see also Ping*, 376 S.W.3d at 593 (finding healthcare institutions lack the authority to choose arbitration because arbitration is not a healthcare decision; this distinction is at odds with the enforceability of other contractual, non-healthcare related terms).
[253] *Kindred Nursing Ctrs.*, 137 S. Ct. at 1429 (Thomas, J., dissenting) (citations omitted).

applicable in federal proceedings alone.[254] Accordingly, in Thomas's view, the Court should permit the *Ping* decision to stand unscathed in Kentucky, invalidating the arbitration agreement between the nursing facility and the attorneys-in-fact.[255]

xv. Cooper v. Harris[256]

Two North Carolina residents sued the State of North Carolina, arguing that the state's redistricting plan following the 2010 Census intentionally placed more African-American voters into two districts to dilute the impact of African-American voters in other districts.[257] Both residents stated that race was the predominant reason for the state's decision to draw the new districts in this manner, thus constituting a racial gerrymander in violation of the Equal Protection Clause.[258] North Carolina responded that it had re-drawn the districts to comply with Section Two of the federal Voting Rights Act, which required states to construct districts that had a "black voting-age population" of "50 percent . . . plus one."[259] A three-judge panel on a federal district court sided with the two residents, finding that North Carolina's redistricting plan represented an unconstitutional racial gerrymander.[260]

By a 5–3 vote, the United States Supreme Court agreed.[261] Writing for the majority, Justice Kagan determined that North Carolina had used race as a factor too heavily in designing the state's new voting districts.[262] To the Court's majority, the state failed to satisfy its burden of proving that the federal district court committed "clear error" in finding for the plaintiffs.[263] While the Court's majority agreed that complying with the Voting Rights Act seemed to be a compelling reason for the state to take action, North Carolina's means of doing so was not closely tailored enough to this purported goal.[264] As little-to-no prior evidence of "white-bloc

[254] *Id.*
[255] *See id.* at 1430.
[256] Cooper v. Harris, 137 S. Ct. 1455 (2017).
[257] *Id.* at 1466–67 (citations omitted).
[258] *See id.* at 1463, 1466 (citations omitted).
[259] Harris v. McCrory, 159 F. Supp. 3d 600, 613 (M.D.N.C. 2016), *cited in Cooper*, 137 S. Ct. at 1468–69 (citations omitted).
[260] *Cooper*, 137 S. Ct. at 1466 (citing *Harris*, 159 F. Supp. 3d at 611).
[261] *Cooper*, 137 S. Ct. at 1463, 1481–82.
[262] *Id.*
[263] *See id.* at 1481–82.
[264] *See id.* at 1469–72 (citing Ala. Legis. Black Caucus v. Alabama, 135 S. Ct. 1257, 1273 (2015)).

voting" existed, the state did not have any sufficient reason to believe that a Voting Rights Act violation was imminent.[265] Consequently, the Voting Rights Act did not provide justification for North Carolina's race-based plan.[266]

In dissent, Justice Alito, joined by Chief Justice Roberts and Justice Kennedy, called for a legal presumption in favor of the government when evaluating a racial gerrymandering claim.[267] The burden in such cases, according to the dissenters, belongs on the claimants, not on the state legislature.[268] In the instant case, Justice Alito wrote, the claimants failed to satisfy this burden by never submitting a map showing an alternative plan for drawing the districts.[269] Since the claimants had not shown that the state could have achieved its legitimate objectives of complying with the Voting Rights Act through a different redistricting scheme, the dissenters concluded that the Court should not have overturned North Carolina's new redistricting plan.[270]

xvi. Impression Products v. Lexmark International[271]

Lexmark International sold refillable print cartridges which, according to a "post-sale restriction" contract that it required customers to sign, could be refilled and resold only by Lexmark.[272] Another company, Impression Products, began selling refilled Lexmark cartridges for a price lower than what Lexmark charged.[273] Lexmark sued Impression, claiming that Impression had infringed upon Lexmark's patents by refilling cartridges in the United States when Lexmark specifically prohibited reuse and resale and by importing into the United States cartridges that Lexmark sold overseas.[274] Impression responded by stating that Lexmark could not legally control the use of their print cartridges at

[265] *See id.* at 1471.

[266] *See id.* at 1472.

[267] *Id.* at 1486, 1488 (Alito, J., dissenting) (citing Miller v. Johnson, 515 U.S. 900, 916 (1995)).

[268] *Cooper*, 137 S. Ct. at 1489 (citing Easley v. Cromartie, 532 U.S. 234, 258 (2001)).

[269] *See Cooper*, 137 S. Ct. at 1489 (citation omitted).

[270] *See id.* at 1486, 1504 (citations omitted).

[271] Impression Prods. v. Lexmark Int'l, Inc., 137 S. Ct. 1523 (2017).

[272] *See id.* at 1529, 1530, 1534.

[273] *See id.* at 1529; Brian Fung, *How a Supreme Court Ruling on Printer Cartridges Changes What It Means to Buy Almost Anything*, WASH. POST (May 31, 2017) https://www.washingtonpost.com/news/the-switch/wp/2017/05/31/how-a-supreme-court-ruling-on-printer-cartridges-changes-what-it-means-to-buy-almost-anything/?utm_term=.7e5d413efcb2.

[274] *Impression Prods.*, 137 S. Ct. at 1530.

any juncture after the point of sale.[275]

The Supreme Court agreed with Impression by a 7–1 margin.[276] According to Chief Justice John Roberts's majority opinion, Lexmark exhausted its patent rights over a cartridge as soon as it sold that cartridge to a customer.[277] At that point, the customer is free to do virtually anything with that cartridge, including refilling and reselling it.[278] Although Lexmark had required customers to sign the "post-sale restriction" agreement, the Court's majority decided that these contracts were unprotected by either contract law or patent law.[279] Ruling otherwise would almost certainly damage the "smooth flow of commerce," leaving both consumers and businesses wary of repairing or improving any product due to the constantly impending threat of a patent suit.[280]

In a lone dissent, Justice Ginsburg disagreed with the majority only on the issue of Lexmark's international market.[281] Unlike a domestic sale, Ginsburg wrote, a foreign transaction did not necessarily exhaust a patent-holder's rights to enforce its patent regarding activities within the United States' borders.[282] Based on this rationale, Ginsburg concluded that Lexmark did have a valid claim against Impression regarding the Lexmark cartridges that Impression had imported from abroad.[283]

xvii. Ziglar v. Abbasi[284]

A group of male non-U.S. citizens were detained after the September 11, 2001, terrorist attacks and treated as persons "of interest" in the federal government's investigation of these attacks.[285] Most of these individuals were Muslims of Middle Eastern ethnicity.[286] They alleged that they were "denied access to most forms of communication with the outside world," that their

[275] *Id.*

[276] *See id.* at 1528, 1538.

[277] *See id.* at 1529, 1531, 1533.

[278] *See id.* at 1534 ("As a result, the sale transfers the right to use, sell, or import because those are the rights that come along with ownership, and the buyer is free and clear of an infringement lawsuit because there is no exclusionary right left to enforce.").

[279] *See id.* at 1531, 1533, 1535.

[280] *See id.* at 1532; *see also id.* at 1536 (applying the same fundamental principles to the sales of these products abroad).

[281] *See id.* at 1538 (Ginsburg, J., dissenting).

[282] *See id.*

[283] *See id.* at 1539.

[284] Ziglar v. Abbasi, 137 S. Ct. 1843 (2017).

[285] *See id.* at 1852, 1853.

[286] *See id.* at 1853.

treatment during their detention was excessively harsh, and that their ethnicity and national origin played a determinative role in the government's decision to subject them to this detention.[287]

In a lawsuit against the federal government, this group of individuals argued that their detention violated their constitutional due process and equal protection rights.[288] While the case was ongoing, the United States Supreme Court decided *Ashcroft v. Iqbal*,[289] a landmark federal civil procedure case determining that a complaint must allege sufficient facts to be plausible enough for a court to draw a reasonable inference that the defendant may be liable for the conduct at issue.[290] Based on this ruling, the United States Court of Appeals for the Second Circuit dismissed some of the plaintiffs' claims and remanded others.[291]

In a 4–2 plurality, the Supreme Court ruled in favor of the federal government.[292] Writing the controlling opinion of the Court, Justice Kennedy stated that the Court did not find it legally appropriate to interpret a statute as granting individuals a private right of action against government officials.[293] While the case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[294] did establish an "implied cause of action" to sue a federal official for monetary damages arising from the official's constitutional violation, the Court in *Ziglar* held that the extent of *Bivens* was very limited.[295] The Court's controlling plurality then developed a new test to decide whether a *Bivens* suit could proceed.[296] If plaintiffs in a lawsuit against the federal government are applying *Bivens* to a "new context," Kennedy wrote, then the courts must question whether "Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong."[297]

The Court's controlling plurality then applied this test to the facts of the case at hand.[298] According to Kennedy's opinion, the detained parties were attempting to apply *Bivens* in a "new context," because

[287] *See id.* at 1853–54.
[288] *Id.*
[289] Ashcroft v. Iqbal, 556 U.S. 662 (2009).
[290] *See id.* at 678 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556–57, 570 (2007)).
[291] *See* Turkmen v. Hasty, 789 F.3d 218, 265 (2d Cir. 2015).
[292] *See Ziglar*, 137 S. Ct. at 1851, 1869.
[293] *See id.* at 1855–57 (citations omitted).
[294] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).
[295] *See Ziglar*, 137 S. Ct. at 1860 (citations omitted).
[296] *See id.* at 1859–60.
[297] *See id.* at 1858.
[298] *See id.* at 1863, 1864, 1865.

no one had previously used *Bivens* to sue executive officials for detaining individuals following a terrorist attack.[299] From there, the plurality's decision focused on several reasons why a *Bivens* remedy would not be appropriate, including the threat that litigation would pose to confidential executive branch discussions, the fact that Congress had known about these complaints for years but had never passed a law creating a *Bivens* cause of action under these circumstances, and the interpretation that *Bivens* was meant to redress wrongdoings by individual federal agents rather than address illegal federal policies.[300] Lastly, Kennedy wrote that the government officials deserved qualified immunity, because a reasonable government official in their position would not have known that their conduct toward the detainees was supposedly unlawful.[301]

Justice Breyer dissented, joined by Justice Ginsburg.[302] Contrary to the assertions in Kennedy's opinion, Breyer stated that this case was actually quite similar to other *Bivens* suits that the Court had previously considered.[303] In fact, the type of harm that the plaintiffs suffered in this case was rather similar to the injuries that the Court addressed in *Bivens* itself, as well as the lineage of cases following *Bivens*.[304] Therefore, Breyer concluded, the context of this suit was not new, and should accordingly proceed under the same framework that *Bivens* had established.[305]

xvii. McWilliams v. Dunn[306]

James McWilliams was convicted of murder.[307] During the sentencing phase of the trial, McWilliams's counsel requested the court to order McWilliams to undergo neuropsychological testing.[308] The court ordered the state's Department of Corrections to perform the tests.[309] However, the department of corrections doctor who tested McWilliams then recommended further testing from a

[299] *See id.* at 1860 (citations omitted).
[300] *See id.* at 1858, 1861, 1863 (citations omitted).
[301] *See id.* at 1868–69 (citing Saucier v. Katz, 533 U.S. 194, 202 (2001)).
[302] *Ziglar*, 137 S. Ct. at 1872 (Breyer, J., dissenting).
[303] *See id.* at 1873.
[304] *See id.* at 1877.
[305] *See id.* (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72 (2001)).
[306] McWilliams v. Dunn, 137 S. Ct. 1790 (2017).
[307] *Id.* at 1793.
[308] *Id.* at 1795–96.
[309] McWilliams v. Dunn, 634 F. App'x 698, 701 (11th Cir. 2015), *rev'd*, 137 S. Ct. 1790 (2017).

different doctor.[310] By the time the second doctor's report arrived at the court, the sentencing hearing was only two days away.[311] The court refused to grant a continuance to permit the defense attorney to review the report with an expert.[312] That day, the court sentenced McWilliams to death.[313] McWilliams argued that the sentence violated the United States Supreme Court's holding in *Ake v. Oklahoma*,[314] in which the Court found that an indigent defendant's due process rights included meaningful independent expert assistance.[315]

The Court agreed with McWilliams's argument.[316] Justice Breyer's opinion for the 5–4 majority found that under *Ake*, an indigent defendant whose mental condition was relevant to the outcome in a criminal case was indeed entitled to a competent mental health expert to assist with the "evaluation, preparation, and presentation" of the case.[317] The Court's majority refused to decide the larger question of whether *Ake* required the government to provide an indigent defendant with an expert retained exclusively for the defense.[318] Instead, Breyer wrote, the fact that defense counsel was not permitted time to review the evaluation with an outside expert was enough to determine that the state had not met its due process obligations under *Ake*.[319]

Justice Alito dissented, joined by Chief Justice Roberts, Justice Thomas, and—barely two months after joining the Court—Justice Neil Gorsuch.[320] To Alito, *Ake* did not require the government to provide a separate expert to the defense team.[321] Having the Department of Corrections' doctor conduct an evaluation satisfied *Ake*, as did the second doctor's report.[322] According to the dissenters, defense counsel was legally entitled to nothing

[310] *Id.* at 701–02.
[311] *Id.* at 702.
[312] *McWilliams*, 137 S. Ct. at 1796–97 (citation omitted).
[313] *Id.* at 1797 (citation omitted).
[314] Ake v. Oklahoma, 470 U.S. 68 (1985).
[315] *McWilliams*, 137 S. Ct. at 1797.
[316] *See id.* at 1801 (citing 28 U.S.C. § 2254(d)(1) (2012)).
[317] *See id.* at 1799–1801 (quoting *Ake*, 470 U.S. at 83).
[318] *See McWilliams*, 137 S. Ct. at 1799.
[319] *See id.* at 1800–01.
[320] *Id.* at 1801 (Alito, J., dissenting). Justice Neil Gorsuch was sworn in on April 10, 2017. *See* Julie Hirschfeld Davis, *Neil Gorsuch Is Sworn In as Supreme Court Justice*, N.Y. TIMES (Apr. 10, 2017), https://www.nytimes.com/2017/04/10/us/politics/neil-gorsuch-supreme-court.html?_r=0.
[321] *See McWilliams*, 137 S. Ct. at 1802 (Alito, J., dissenting).
[322] *See id.* at 1803.

further.[323]

xix. Bristol-Myers Squibb Co. v. Superior Court of California[324]

More than 600 individuals, eighty-six of whom were California residents, brought a lawsuit against Bristol-Myers Squibb regarding alleged defects with the drug Plavix, which Bristol-Myers Squibb manufactured.[325] Bristol-Myers Squibb moved to dismiss, arguing that California lacked personal jurisdiction to hear the case.[326] Since the majority of the plaintiffs were not California residents, were not injured by Plavix in California, and had not received Plavix in California, and because Bristol-Myers Squibb did not manufacture Plavix or conduct research on the drug in California, Bristol-Myers Squibb claimed that it lacked minimum contacts with the state, arguing that the state therefore had no right to hail the company into court.[327] The plaintiffs responded by stating that Bristol-Myers Squibb had sufficient contacts with the state, as the company maintained five offices, four research facilities, and one government affairs office in California, as well as employing 250 sales representatives within the state.[328]

The United States Supreme Court found for Bristol-Myers Squibb by an 8–1 tally.[329] In an opinion authored by Justice Alito, the Court's majority decided that the company lacked sufficient contacts with California for the state to force the company to defend a lawsuit in a California court.[330] Since all of the relevant actions that gave rise to the dispute had occurred beyond California's borders, the state could not prove a sufficient connection with the controversy at hand.[331] Stating that Bristol-Myers Squibb maintained offices and salespeople at various sites within the state was not enough for California to gain personal jurisdiction over this matter.[332] Therefore, the company's due process rights would be abridged if they were forced to defend against this lawsuit in a

[323] *See id.* at 1806 (quoting Woods v. Donald, 135 S. Ct. 1372, 1376 (2015)).

[324] Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 137 S. Ct. 1773 (2017).

[325] *See id.* at 1778 (citing Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 377 P.3d 874, 878 (Cal. 2016)).

[326] *See Bristol-Myers Squibb Co.*, 137 S. Ct. at 1778.

[327] *See id.* (citing *Bristol-Myers Squibb Co.*, 377 P.3d at 878–79).

[328] *See Bristol-Myers Squibb Co.*, 137 S. Ct. at 1778 (citing *Bristol-Myers Squibb Co.*, 377 P.3d at 870).

[329] *See Bristol-Myers Squibb Co.*, 137 S. Ct. at 1777, 1784.

[330] *See id.* at 1781–83 (citations omitted).

[331] *See id.* at 1782–83.

[332] *See id.* at 1778, 1782, 1783.

California courthouse.[333]

Justice Sotomayor, in a lone dissent, argued that the Court's majority had established a dangerous precedent, one that would stack the deck in favor of large businesses in the future.[334] Since Bristol-Myers Squibb had "purposefully avail[ed] itself" of California's laws, protections, and services by maintaining offices and selling its products within the state, sufficient minimum contacts existed for the company to defend itself in a California court without injuring any "traditional notions of fair play and substantial justice."[335] Holding otherwise, Sotomayor stated, would make it far more difficult for the plaintiffs to aggregate their claims against this company or any large company, thus leading to an increase in scattered litigation and improving the odds of a company avoiding liability by dividing the cases against it among many state forums.[336]

xx. Weaver v. Massachusetts[337]

Kentel Weaver was convicted of first-degree murder.[338] During jury selection for Weaver's trial, a court officer had closed the courtroom to several members of the public, including Weaver's family, on the basis that the room was growing overcrowded.[339] Weaver subsequently filed a motion for a new trial, arguing that he was denied effective assistance of counsel because his attorney failed to object to the closure of the courtroom, an action that Weaver claimed violated his Sixth Amendment right to a public trial.[340] The trial court denied Weaver's motion.[341] On appeal, the Supreme Judicial Court of Massachusetts found that Weaver's case had not been prejudiced by his attorney's failure to object to the closure of the courtroom.[342]

In a 7–2 decision, the Court sided with the decisions of the Massachusetts courts.[343] Writing for the Court's majority, Justice Kennedy explained that a criminal defendant raising a structural

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[333] *See id.* at 1780–81 (citations omitted).
[334] *See id.* at 1784 (citation omitted).
[335] *Id.* at 1785–86 (citations omitted).
[336] *See id.* at 1788–89 (citations omitted).
[337] Weaver v. Massachusetts, 137 S. Ct. 1899 (2017).
[338] *Id.* at 1905–06.
[339] *Id.* at 1906.
[340] *Id.*
[341] *Id.*
[342] *Id.* at 1907 (citation omitted).
[343] *See id.* at 1904, 1913–14.

error via an ineffective assistance of counsel claim must demonstrate that the outcome of his or her case likely would have been different without the attorney's error.[344] If Weaver had objected to the closure immediately at trial and raised a direct appeal based on this issue, Kennedy wrote, then Weaver would have automatically received a new trial.[345] However, because Weaver waited until later to raise this issue in a claim for ineffective assistance of counsel, Weaver bore the higher burden of needing to prove that he suffered prejudice because of the attorney's purported error.[346] As Weaver could not prove that the outcome of his case likely would have differed if the courtroom had remained open to everyone, Weaver could not prevail in an ineffective assistance of counsel claim.[347]

Justice Thomas wrote a concurring opinion, joined by Justice Gorsuch, arguing that the Sixth Amendment's right to a public trial did not even extend to the jury selection phase.[348] According to them, the entire ineffective assistance of counsel analysis contained in the majority opinion was unnecessary, as Weaver had claimed the violation of a right that he never possessed in the first place.[349] In a separate concurring opinion, Justice Alito stated that Kennedy's opinion overcomplicated the matter with its discussion of "structural errors."[350] The matter, Alito wrote, was more straightforward: Weaver could not demonstrate that his attorney committed serious error that prejudiced the outcome of the case.[351] Therefore, Weaver could not meet the established legal elements of an ineffective assistance of counsel claim.[352]

Writing in dissent, Justice Breyer, joined by Justice Kagan, cited precedent showing that the existence of a structural error—such as a breach of a criminal defendant's Sixth Amendment right to a public trial—exempted a defendant from proving that the outcome of the case would have differed without that error.[353] Accordingly,

[344] *See id.* at 1910, 1911 (quoting Strickland v. Washington, 466 U.S. 668, 687, 694 (1984)).

[345] *See Weaver*, 137 S. Ct. at 1910 (citing Neder v. United States, 527 U.S. 1, 7 (1999)) ("Thus, in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.'").

[346] *See Weaver*, 137 S. Ct. at 1910, 1912.

[347] *See id.* at 1913.

[348] *See id.* at 1914 (Thomas, J., concurring) (citations omitted).

[349] *See id.* (citations omitted).

[350] *See id.* at 1915–16 (citations omitted).

[351] *See id.* at 1916.

[352] *See id.*

[353] *See id.* at 1917 (Breyer, J., dissenting) (citations omitted).

Breyer wrote, the only thing that Weaver needed to prove to prevail in his case for ineffective assistance of counsel was the gross deficiency of his lawyer's actions.[354]

xxi. Turner v. United States[355]

A group of teenagers were indicted in a robbery, kidnapping, and murder case.[356] Two of the teenagers confessed and agreed to testify for the prosecution.[357] Their testimony differed on certain details regarding the events of the crime.[358] Nevertheless, the jury found seven of the teenagers guilty.[359] Twenty-five years later, however, several of the defendants then moved for new trials, arguing that the prosecution had suppressed material evidence regarding the inconsistencies in the two teens' statements that, if brought to light, would have favored the defense's case.[360]

The United States Supreme Court ruled in favor of the government.[361] Writing the opinion of the 6–2 majority, Justice Breyer opined that the suppressed evidence was not "material" under the standard previously established in *Brady v. Maryland*.[362] Under the *Brady* standard, the defendant bears the burden of proving within a reasonable certainty that the suppressed evidence, if properly disclosed by the prosecution, would have led to a different outcome in the case.[363] Here, Breyer wrote, the suppressed evidence did not sufficiently undermine the outcome of the case to rise to the level of a *Brady* violation.[364] Instead, the discrepancies within the two teenagers' stories were "too little, too weak, or too distant from" the other evidence that the prosecution presented to likely produce a different jury verdict.[365]

Justice Kagan dissented, joined by Justice Ginsburg.[366] While acknowledging that the prosecution had presented a strong case of the teenagers' guilt, Kagan ultimately determined that if the

[354] *See id.* at 1917–18.
[355] Turner v. United States, 137 S. Ct. 1885 (2017).
[356] *See id.* at 1889.
[357] *See id.*
[358] *See id.*
[359] *See id.* at 1891 (citation omitted).
[360] *See id.* at 1891, 1892.
[361] *See id.* at 1888 (citations omitted).
[362] *See id.* at 1893 (citations omitted); Brady v. Maryland, 373 U.S. 83 (1963).
[363] *Turner*, 137 S. Ct. at 1893 (citations omitted) (quoting Cone v. Bell, 556 U.S. 449, 469–70 (2009)).
[364] *See Turner*, 137 S. Ct. at 1895 (citation omitted).
[365] *See id.* at 1894.
[366] *Id.* at 1896 (Kagan, J., dissenting).

defense had introduced the two conflicting accounts of what happened during the commission of the crime, "one or more jurors could well have concluded that the Government had not proved its case beyond a reasonable doubt."[367] The evidence was therefore material to the defendants' guilt, Kagan wrote, and the prosecution had violated *Brady* by withholding this evidence from the defense.[368]

xxii. Lee v. United States[369]

Jae Lee, a Korean citizen who had lived lawfully in the United States since 1982, was arrested and charged with possession of drugs with the intent to distribute.[370] His attorney told him that the government's case against him was strong, and that entering a guilty plea would not produce any immigration-related consequences.[371] Relying on this advice, Lee pled guilty to the charges.[372] However, because Lee had pled guilty to an aggravated felony, he now was eligible for deportation under the provisions of the Immigration and Nationality Act.[373] Lee then appealed his conviction, arguing that he had received ineffective assistance of counsel, as he pled guilty only after his attorney assured him that no negative immigration consequences could result from entering such a plea.[374]

By a 6–2 margin, the Supreme Court ruled in Lee's favor.[375] In his opinion for the Court's majority, Chief Justice Roberts pointed out that Lee would have exercised his right to receive a trial at which he would enjoy the legal presumption of innocence if his attorney had advised him correctly regarding the immigration consequences of entering a guilty plea.[376] Even though the government's evidence strongly suggested that Lee would lose at trial, the wrongful guidance from Lee's lawyer prejudiced Lee's ability to properly weigh his options and their ultimate effects.[377] Since Lee forfeited his right to a trial only after relying upon the

[367] *Id.* at 1899.
[368] *See id.* at 1897.
[369] Lee v. United States, 137 S. Ct. 1958 (2017).
[370] *Id.* at 1962.
[371] *Id.*
[372] *Id.*
[373] *See id.*
[374] *Id.*
[375] *See id.* at 1962, 1969 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).
[376] *Lee*, 137 S. Ct. at 1968–69.
[377] *See id.* (citations omitted).

incorrect information that his attorney provided, he had suffered serious attorney error that prejudiced the outcome of the case, thereby proving ineffective assistance of counsel.[378]

Justice Thomas dissented, joined by Justice Alito.[379] According to Thomas, the Sixth Amendment's guarantee of effective assistance of counsel did not extend to a lawyer's advice regarding the immigration consequences of taking a plea bargain.[380] The Court's majority, in Thomas's view, had taken this amendment to a place that the drafters of the amendment had never intended.[381] Furthermore, Thomas continued, Lee's case could not pass muster even if the Sixth Amendment were relevant to the facts presented.[382] Lee could not provide an adequate showing that the outcome of the entire proceeding would have differed if his attorney had advised him properly about the immigration consequences of pleading guilty.[383] In fact, Thomas pointed out, the Court's majority itself noted that the government had built a strong opinion against Lee, and Lee likely would have lost even if the case had proceeded to trial.[384] Therefore, Thomas concluded, Lee could not show that his case was truly prejudiced by his attorney's mistake, and therefore could not meet the legal standard for ineffective assistance of counsel.[385]

xxiii. Murr v. Wisconsin[386]

The Murr family purchased two adjacent tracts of land as separate pieces of property in 1960.[387] A decade later, the family tried to sell one of these two contiguous lots.[388] To the family's surprise, the county in which the land rested had passed a new ordinance requiring both lots to be merged.[389] When the family applied for an exemption to this ordinance, seeking to sell just one of these tracts of land, the county denied their application.[390] The

[378] *See id.* (citations omitted).
[379] *Id.* at 1969 (Thomas, J., dissenting).
[380] *See id.* (citations omitted).
[381] *See id.* at 1969 (citations omitted) ("Neither the Sixth Amendment nor this Court's precedents support that conclusion.").
[382] *Id.* at 1973–74 (citations omitted).
[383] *Id.* at 1970–71 (citations omitted).
[384] *See id.* at 1974 (citations omitted).
[385] *See id.* (citations omitted).
[386] Murr v. Wisconsin, 137 S. Ct. 1933 (2017).
[387] *Id.* at 1940.
[388] *Id.* at 1941 (citation omitted).
[389] *See id.* at 1941 (citation omitted).
[390] *Id.* (citation omitted).

Murr family then sued the state and county, arguing that this ordinance amounted an unconstitutional uncompensated governmental taking of their property.[391]

The Supreme Court disagreed with the Murrs.[392] In a sharply fragmented 5–3 decision, Justice Kennedy's majority opinion determined that the county's new ordinance was not so burdensome as to effectively constitute a taking.[393] The analysis, Kennedy explained, demanded a balancing test between the government's interest in enacting the new regulation and the private interest in the use of the land.[394] In conducting this "objective" evaluation, Kennedy continued, one should take into account such interests as the "physical characteristics of the land[,]" the level of burden imposed by the government regulation in question, and "the prospective value of the regulated land."[395] Kennedy then proceeded to apply these tests to the facts of the case at hand, ultimately finding that the government's interests in regulating land within the county outweighed those of the Murr family.[396] Based on this rationale, Kennedy concluded that no regulatory taking had occurred, and that the government owed no compensation to the Murrs.[397]

Chief Justice Roberts dissented, joined by Justice Alito and joined partially by Justice Thomas.[398] Writing that the majority's holding "does not trouble [him,]" Roberts emphasized that he was quite dissatisfied with the rationale that the majority used to arrive at their conclusion.[399] "Put simply," Roberts wrote, "today's decision knocks the definition of 'private property' loose from its foundation on stable state law rules."[400] State statutes, he explained, created property rights with respect to certain "things," including "horizontally bounded plots of land."[401] The fact that the same individuals owned the two adjoining lots was no reason to overlook the fact that the government had essentially destroyed the value of

391 *See id.* (citation omitted).
392 *See id.* at 1949.
393 *See id.* at 1939, 1949 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)).
394 *See Murr*, 137 S. Ct. at 1947.
395 *See id.* at 1945, 1946.
396 *See id.* at 1949–50.
397 *See id.* at 1950.
398 *See id.* (Roberts, C.J., dissenting).
399 *See id.* ("Where the majority goes astray, however, is in concluding that the definition of the 'private property' at issue in a case such as this turns on an elaborate test . . . .").
400 *See id.* at 1956.
401 *Id.* at 1953 (citing Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331–32 (2002)).

one of those lots by forcing the merger of the two tracts of land.[402] The proper outcome, Roberts concluded, would be to remand the case for a new decision about whether a taking had occurred, ordering the court to render that decision in the context of the boundaries drawn by Wisconsin's real property laws rather than applying Kennedy's multi-part test.[403]

Justice Thomas authored a lone dissent, agreeing with the outcome of Roberts's opinion but disagreeing with portions of Roberts's analysis.[404] Thomas stated that Roberts's dissent correctly applied the Court's precedents regarding regulatory takings, but then argued that the Court should revisit those decisions.[405] Neither the majority's multi-part test in the instant case nor the various multi-part tests applied in prior takings decisions should continue to stand, Thomas wrote, as none of these tests were ever contemplated by the takings clause of the Fifth and Fourteenth Amendments.[406] The takings clause required the government to pay just compensation whenever it seized private property for public use.[407] Such a standard, Thomas claimed, was simple enough to evaluate without adding any new judicially created tests to muddle a clear constitutional standard.[408]

xxiv. Perry v. Merit Systems Protection Board[409]

Anthony Perry received a notice of upcoming termination from the United States Census Bureau on the basis of his poor attendance record.[410] Subsequently, Perry reached an agreement with the Bureau in which Perry would receive thirty days of suspension and would take an early retirement, in exchange for dropping discrimination claims that Perry had filed against the Bureau.[411] After serving his suspension and retiring before the required date, Perry brought a case against the Census Bureau before the federal Merit Systems Protection Board, claiming that he was improperly coerced into signing the agreement and settling the

402 *See Murr*, 137 S. Ct. at 1955 (Roberts, C.J., dissenting).
403 *See id.* at 1956.
404 *See id.* at 1957 (Thomas, J., dissenting).
405 *See id.*
406 *See id.*; *see also id.* at 1956 (Roberts, C.J., dissenting).
407 *See id.* at 1957 (Thomas, J., dissenting) (citations omitted).
408 *See id.* (citations omitted).
409 Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975 (2017).
410 *See id.* at 1982 (citation omitted).
411 *See id.* (citation omitted).

case.[412]

When an administrative law judge ruled that the Board lacked jurisdiction to review voluntary actions claims that resulted in a settlement with a federal agency, Perry appealed to the United States Court of Appeals for the District of Columbia Circuit, which transferred the case on jurisdictional grounds to the United States Court of Appeals for the Federal Circuit.[413] The Federal Circuit docketed the case and granted Perry's motion to suspend proceedings until the United States Supreme Court decided which court system held jurisdiction over the case.[414]

The Supreme Court held that the federal district court was the appropriate forum for judicial review of this decision.[415] Writing the opinion for the Court's 6–2 majority, Justice Ginsburg based the Court's rationale on provisions from the Civil Service Reform Act of 1978 ("CSRA").[416] Under the CSRA, Ginsburg wrote, a so-called "mixed case"—a Board decision to dismiss a dispute with mixed claims on jurisdictional grounds—could travel one of many procedural routes.[417] In matters where the Board decided the case on its merits or on procedural grounds, Ginsburg stated that the CSRA designated federal district court for judicial review.[418] Although the government argued that the text of CSRA stated that federal district court received appeals in discrimination claims and the Federal Circuit heard appeals regarding CSRA claims, focusing on a statutory distinction between jurisdictional rulings and merits and procedural decisions, Ginsburg wrote that such a system was unduly complex and burdensome.[419] No law should force employees to divide their appeals and negotiate the difficult procedural waters in both the district court and the Federal Circuit simultaneously, Ginsburg concluded.[420] Therefore, the federal district court was the proper forum to hear Perry's appeal in its entirety.[421]

Writing a dissent that Justice Thomas joined, Justice Gorsuch pointed out that the plain language of the CSRA directed federal

[412] *See id.* (citation omitted).
[413] *See id.* at 1982–83.
[414] *Cf. id.* at 1983 (citations omitted) (noting that the D.C. Circuit found the Federal Circuit did have jurisdiction, but then the Supreme Court granted certiorari to review the D.C. Circuit's decision).
[415] *Id.* at 1988 (citations omitted).
[416] *Id.* at 1979 (citation omitted).
[417] *See id.* at 1983, 1988.
[418] *See id.* at 1985 (citations omitted).
[419] *See id.* at 1983–84, 1986 (citations omitted).
[420] *See id.* at 1987.
[421] *Id.* at 1988.

discrimination claims to the district court and CSRA appeals to the Federal Circuit.[422] If the procedural framework were indeed burdensome, Congress bore the burden of fixing these pitfalls.[423] Furthermore, Gorsuch continued, the CSRA did not clearly define a "mixed case" or its procedural paths.[424] The majority's decision, Gorsuch argued, overstepped the judicial branch's lawful bounds, using its power to second-guess the lawmaking work of the people's elected representatives in Congress.[425] Perry should be required to appeal in accordance with the precise directions that the CSRA had established.[426]

xxv. Trinity Lutheran Church of Columbia, Inc. v. Comer[427]

The State of Missouri offered grants for qualifying organizations to purchase recycled tires for resurfacing playgrounds.[428] Trinity Lutheran Church of Columbia, which operated a state-licensed preschool and daycare, applied for one of these grants.[429] The state denied Trinity's application, citing a state constitutional provision stating "[t]hat no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion."[430] Trinity sued the state, claiming that this denial constituted a violation of the First Amendment's protections of freedom of religion and speech, as well as a violation of the Fourteenth Amendment's Equal Protection Clause.[431]

Chief Justice Roberts and the rest of the Court's heavily divided 7–2 majority agreed with Trinity's arguments.[432] Missouri's grant program was a secular and otherwise neutral governmental initiative.[433] Laws that denied an otherwise generally available government-issued benefit solely because the party in question had a stated religious affiliation violated the First Amendment's protections of religious liberty, which were applied to the states

[422] *Id.* at 1988, 1989 (Gorsuch, J., dissenting) (citation omitted).
[423] *See id.* at 1988.
[424] *See id.* at 1992 (quoting Kloeckner v. Solls, 568 U.S. 41, 50, 56 (2012)).
[425] *See Perry*, 137 S. Ct. at 1988 (Gorsuch, J., dissenting).
[426] *See id.* at 1994.
[427] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).
[428] *See id.* at 2017.
[429] *See id.*
[430] *Id.* (citing MO. CONST. art. I, § 7).
[431] *See id.* at 2018, 2024 n.5.
[432] *Id.* at 2016, 2017, 2024–25.
[433] *See id.* at 2017.

through the Fourteenth Amendment.[434] While the section at issue in Missouri's constitution did not prevent Trinity from practicing its religion, the fact that this provision automatically barred Trinity from competing from a state benefit that was available to all secular organizations was enough to constitute breaches of the First and Fourteenth Amendments.[435] Such a barrier could survive only if the state proved that the provision was narrowly tailored to uphold a compelling state interest.[436] Since the state constitutional provision merely drew a wide berth around all religious establishments, Roberts determined that the state's interest was neither sufficiently compelling nor narrowly tailored.[437]

Justice Thomas authored a separate concurring opinion, joined by Justice Gorsuch.[438] Given that the Free Exercise Clause of the First Amendment barred laws that on their face discriminate against religion, Thomas wrote, the Missouri constitutional provision at issue should have been easily overturned.[439] The Court majority's allowance for the possibility of any state constitutional segment or state statute that could burden religious institutions represented an incorrect interpretation of the Free Exercise Clause, Thomas determined, even if the legal provision were designed to avoid the state's entanglement with religion.[440] Gorsuch also wrote a separate concurring opinion, joined by Thomas, declaring that the Court majority improperly tried to draw a line between laws that discriminate based on religious status and statutes that discriminate based on religious use.[441] Both categories, in the view of Gorsuch and Thomas, violated the Free Exercise Clause.[442]

Justice Breyer wrote a lone concurring opinion that focused on his interpretation of the purpose of the First Amendment.[443] Religious organizations should not face obstacles to accessing benefits from the government, Breyer wrote, as such an outcome would run contrary to the Constitution's overriding goals of promoting the general welfare of the citizenry.[444] As the grants at issue here were

[434] *Cf. id.* at 2020 (applying the protections of the First Amendment to a state's action).
[435] *See id.* at 2024 (citations omitted).
[436] *See id.* (citation omitted).
[437] *See id.*
[438] *See id.* at 2025 (Thomas, J., concurring).
[439] *Id.* (citations omitted).
[440] *See id.* (citations omitted).
[441] *See id.* at 2025–26 (Gorsuch, J., concurring) (citation omitted).
[442] *See id.* (citations omitted).
[443] *See id.* at 2027 (Breyer, J., concurring) (citation omitted).
[444] *See id.* at 2026–27.

developed for the betterment of the state's young people, it would be counterintuitive to basic public policy if certain young people were automatically banned from enjoying the benefits of this funding simply because they attended a parochial preschool.[445] An interpretation of the Constitution that allowed such a ban would be akin to preventing religious organizations from accessing other government benefits provided for health and safety, such as police protection and fire department services.[446]

In dissent, Justice Sotomayor, joined by Justice Ginsburg, wrote that the Court's majority provided the type of link between church and state that the Framers had enacted the Establishment Clause to prevent.[447] Missouri had developed a protective barrier between the government and religious institutions, but now the majority had required the state to directly fund a religious organization in a manner that could assist that organization in spreading its religious messages.[448] Second-guessing the state's efforts to avoid such entanglements with religious entities was an improper exercise of the Court's power, Sotomayor stated.[449] Rather than claiming that the Missouri constitutional provision was an unlawful form of religious-based discrimination, Sotomayor stated that the state's choice to avoid an immediate financial relationship with religious organizations met the federal Constitution's standards under the First and Fourteenth Amendments and should remain in place.[450]

xxvi. California Public Employees' Retirement System v. ANZ Securities[451]

California's Public Employees' Retirement System ("CPERS") purchased securities from the Lehman Brothers global investment bank.[452] When Lehman Brothers went bankrupt in 2008, another retirement fund filed a putative class-action suit against Lehman for making false and misleading statements in violation of Section Eleven of the Securities Act of 1933.[453] More than three years later, while the federal district court was still weighing whether to certify

[445] *Id.*
[446] *See id.* at 2027 (citation omitted).
[447] *See id.* (Sotomayor, J., dissenting).
[448] *See id.* at 2029 (citation omitted).
[449] *See id.* at 2030–31 (citations omitted).
[450] *See id.* at 2032–33, 2033 n.5 (citations omitted).
[451] Cal. Pub. Emp.'s Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042 (2017).
[452] *Id.* at 2047–48.
[453] *Id.* at 2048.

the lawsuit as a class action, CPERS brought a separate suit against Lehman.[454] The court then merged the case with the original suit and transferred the case to the court where the original suit was still pending.[455] When the parties in the original suit decided to settle with Lehman, however, CPERS sought to pursue its claims against Lehman individually.[456] The district court dismissed CPERS' suit, holding that it was time-barred by the three-year limitations period contained within Section Thirteen of the Securities Act.[457] Filing as part of the original putative class action suit was not enough, as the Court of Appeals held, as the relevant statute of limitations focused on the time limit for filing an individual claim.[458]

In a 5–4 decision, the Supreme Court agreed with the lower courts' findings.[459] In the opinion for the Court's majority, Justice Kennedy focused on a distinction between statutes of limitation and statutes of repose.[460] Statutes of repose represented a legislative decision that a defendant should be free from liability after a certain point, Kennedy wrote, which is why they begin to run after the defendant's final act for which he or she may be found culpable.[461] By contrast, statutes of limitations were meant to encourage plaintiffs to pursue their claims diligently, which is why they commonly did not begin to run until the plaintiff knew or reasonably should have known about the purported wrongdoing leading to the claim.[462] As the applicable section of the Securities Act called for the proverbial clock to start running from the defendant's last untrue statement, Kennedy determined that the statute had to be a statute of repose, not a statute of limitations.[463] Since the objective of a statute of repose was "to grant complete peace to defendants," Kennedy concluded that it would be improper to toll the limitations period during the course of the plaintiff's participation in a class action suit.[464]

Justice Ginsburg dissented, joined by Justice Sotomayor, Justice

[454] *Id.*
[455] *Id.*
[456] *See id.*
[457] *See id.* (citing Am. Pipe & Constr. v. Utah, 414 U.S. 538, 558 (1974)).
[458] *See Cal. Pub. Emp.'s Ret. Sys.*, 137 S. Ct. at 2048 (citation omitted).
[459] *Id.* at 2046, 2055.
[460] *Id.* at 2049 (citation omitted).
[461] *See id.* (quoting CTS Corp. v. Waldburger. 134 S. Ct. 2175, 2179 (2014)).
[462] *Cal. Pub. Emp.'s Ret. Sys.*, 137 S. Ct. at 2049 (quoting *CTS Corp.*, 134 S. Ct. at 2182, 2183).
[463] *See Cal. Pub. Emp.'s Ret. Sys.*, 137 S. Ct. at 2049.
[464] *See id.* at 2051, 2052.

Kagan, and Justice Breyer.[465] To the dissenters, Congress had crafted Section Thirteen of the Securities Act only to provide notice of potential liability to defendants within three years.[466] Section Thirteen was not designed to limit all potential claims against defendants to those that could be filed within a three-year period, Ginsburg wrote, and the Court's majority had harmed investors seeking to protect their legal rights by interpreting Section Thirteen otherwise, allowing ill-intentioned defendants to drag out securities cases until investors ran out of money or grew weary of fighting their claims.[467] Lehman Brothers had timely notice of their potential liability because the class action lawsuit had been filed within the three-year time period, Ginsburg stated, and Section Thirteen did not warrant an additional notification of a suit on the same subject simply because the case was now coming from an individual plaintiff.[468]

xxvii. Davila v. Davis[469]

Erick Davila was convicted of murder and sentenced to death.[470] Davila sought habeas corpus relief at the state level, which was denied.[471] He then sought habeas corpus relief at the federal level, claiming that he had received ineffective assistance of counsel at the trial, appellate, and state habeas levels.[472] A federal district court denied habeas corpus relief, as Davila did not raise a claim regarding ineffective assistance of counsel in the state habeas proceedings.[473] The United States Court of Appeals for the Fifth Circuit affirmed the district court's ruling.[474]

The United States Supreme Court agreed with the holdings of the district court and the Fifth Circuit.[475] Justice Thomas, writing for the 5–4 majority, stated that a federal court typically cannot review habeas corpus claims that were "procedurally defaulted in state

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[465] *Id.* at 2056 (Ginsburg, J., dissenting).

[466] *See id.*

[467] *See id.* at 2056, 2058 (quoting *CTS Corp.*, 134 S. Ct. at 2183).

[468] *See Cal. Pub. Emp.'s Ret. Sys.*, 137 S. Ct. at 2056 (Ginsburg, J., dissenting) (quoting *CTS Corp.*, 134 S. Ct. at 2183).

[469] Davila v. Davis, 137 S. Ct. 2058 (2017).

[470] *Id.* at 2063.

[471] *Id.* (citing *Ex Parte* Davila, Nos. WR-75, 356-01, 2013 Tex. Crim. App. Unpub. LEXIS 486, at *1 (Tex. Crim. App. Apr. 17, 2013)).

[472] *Davila*, 137 S. Ct. at 2063.

[473] *See id.* at 2063–64 (citation omitted).

[474] *Id.* at 2062, 2064 (citing Davila v. Davis, 650 F. App'x 860, 867–68 (5th Cir. 2016)).

[475] *Davila*, 137 S. Ct. at 2064 (citation omitted).

court."[476] "A state prisoner may overcome" this presumption only by proving that "actual prejudice resulted from [an underlying] constitutional violation" and that just cause existed for his or her failure to raise the issue previously.[477] While an exception to this rule existed for situations where the state government prevented defendants from bringing an ineffective assistance of counsel claim on direct appeal, the exception did not apply to Davila's case, as this case dealt chiefly with appellate counsel.[478] Enlarging the existing exception was not necessary or desirable, Thomas stated, as it would impose substantial costs upon the criminal justice system without actually adding any new substantive protections for defendants.[479]

Justice Breyer dissented, joined by Justice Ginsburg, Justice Kagan, and Justice Sotomayor.[480] The exception that the Court's majority had dismissed should apply to ineffective assistance of appellate counsel as well as trial counsel, Breyer wrote.[481] Just as a defendant lacked the opportunity to raise an ineffective assistance of counsel claim until after the trial, a defendant likewise could not raise an ineffective assistance of appellate counsel claim until the appellate proceeding had ended.[482] The same underlying due process concerns that existed at the trial level also existed at the appellate level, Breyer stated, and nothing definitively indicated that recognizing such due process protections at the appellate level would lead to a significant increase in costs.[483]

xxviii. Hernandez v. Mesa[484]

A border patrol agent shot and killed a fifteen-year-old Mexican national named Sergio Adrian Hernandez Guereca.[485] The border patrol was on United States land when he fired the shot.[486] The bullet crossed the border and struck Hernandez, who was standing

[476] *Id.*
[477] *See id.* at 2064–65 (quoting Wainwright v. Sykes, 433 U.S. 72, 84 (1977); then citing Coleman v. Thompson, 501 U.S. 722, 750 (1991); then quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)).
[478] *See Davila*, 137 S. Ct. at 2065–66 (citations omitted).
[479] *See id.* at 2070 (quoting Engle v. Isaac, 456 U.S. 107, 128 (1982)).
[480] *Davila*, 137 S. Ct. at 2070 (Breyer, J., dissenting).
[481] *See id.* at 2071 (citation omitted).
[482] *See id.* at 2073 (citations omitted).
[483] *See id.* at 2075 (citation omitted).
[484] Hernandez v. Mesa, 137 S. Ct. 2003 (2017).
[485] *Id.* at 2004, 2005.
[486] *See id.* at 2005.

on land just inside the Mexican border.[487] Six months later, Hernandez's parents brought a lawsuit against the border patrol agent, alleging that the agent violated the Fourth Amendment of the United States Constitution by unnecessarily using deadly force.[488] The border patrol agent responded by claiming that Hernandez lacked any protection from the United States Constitution, as Hernandez was a Mexican citizen standing within the Mexican border at the time when the bullet from the agent's gun struck him.[489] The agent also argued that he was entitled to qualified immunity, as Hernandez was not a United States citizen.[490] A federal district court ruled in the agent's favor and dismissed the lawsuit, a decision with which the United States Court of Appeals for the Fifth Circuit agreed.[491]

In a *per curiam* opinion, the Supreme Court's 5–3 majority vacated the lower courts' decision and remanded the matter for further review.[492] Since the lower courts gave no consideration to whether the lawsuit for damages against a federal official could proceed under the standards established in *Bivens v. Six Unknown Named Agents*, the Court's majority held that the opinions from both the district court and the Fifth Circuit were incomplete.[493] Additionally, the Court's majority determined that the border patrol agent was not entitled to qualified immunity, because the agent never knew that Hernandez was not a United States citizen until after the agent had shot him.[494]

Justice Breyer dissented, joined by Justice Ginsburg.[495] Hernandez fell under the ambit of the Fourth Amendment's protections when the agent shot him, Breyer wrote, because Hernandez was standing in a "special border-related area" to which the United States contributed tens of millions of dollars annually.[496] It was subject to the provisions of international treaties, because the shooter was a federal officer who knowingly shot from United States territory into the area on the Mexican side of the border, and

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[487] *See id.*

[488] *See id.*; Hernandez v. United States, 802 F.2d 834, 838 (W.D. Tex. 2011).

[489] *See Hernandez*, 137 S. Ct. at 2005 (citation omitted).

[490] *See id.* at 2007.

[491] *See id.* at 2005–06 (citing Hernandez v. United States, 757 F.3d 249, 267, 272, 275, 279, 280–81, 282 (2014)).

[492] *See Hernandez*, 137 S. Ct. at 2004, 2008; *see also id.* at 2008 (Breyer, J., dissenting).

[493] *See id.* at 2006–07 (quoting Hernandez v. United States, 785 F.3d 117, 121 n.1 (2015) (Jones, J., concurring)).

[494] *See Hernandez*, 137 S. Ct. at 2007.

[495] *Id.* at 2008 (Breyer, J., dissenting).

[496] *Id.* at 2009.

because not applying the Fourth Amendment to this specific area "would produce serious anomalies."[497] Therefore, the land on which Hernandez was standing at the moment of the shooting had "sufficient involvement with, and connection to, the United States to subject the culvert [land] to Fourth Amendment protections."[498]

Justice Thomas filed a separate lone dissent arguing that *Bivens* could not possibly apply to this set of facts.[499] A *Bivens* remedy, Thomas argued, should be available only if the facts of the newer case were substantially similar to the facts of *Bivens*.[500] Since the context of the instant case differed noticeably from the context of *Bivens*, Thomas concluded that the Court's majority acted improperly by remanding the matter for further consideration in light of the *Bivens* precedent.[501]

xxix. Pavan v. Smith[502]

Two same-sex couples were married in states with statutes recognizing the legality of same-sex weddings.[503] Each couple gave birth to a child in Arkansas.[504] Each couple completed the paperwork required in Arkansas for birth certificates.[505] In both cases, the state of Arkansas listed only one parent on the birth certificate, citing a state law authorizing the state's Department of Health to issue birth certificates containing only the mother's name.[506] Both couples filed a lawsuit against the state of Arkansas, arguing that this state law was inconsistent with the United States Supreme Court's recent decision in *Obergefell v. Hodges*.[507]

By a 6–3 margin, the Court agreed with both couples.[508] In a *per curiam* opinion, the Court's majority stated that the Arkansas statute deprived legally married same-sex couples from having the same rights that opposite-sex couples possessed.[509] Under this statute, a non-biological father married to the child's biological

497 *See id.* at 2009, 2010.
498 *See id.* at 2011.
499 *See id.* at 2008 (Thomas, J., dissenting).
500 *See id.* (citation omitted).
501 *See id.*
502 Pavan v. Smith, 137 S. Ct. 2075 (2017).
503 *See id.* at 2077.
504 *See id.*
505 *See id.*
506 *See id.*
507 *See id.* at 2076–77 (quoting Obergefell v. Hodges 135 S. Ct. 2584, 2604 (2015)).
508 *See Pavan*, 137 S. Ct. at 2075, 2079; *see also id.* at 2079 (Gorsuch, J., dissenting).
509 *See id.* at 2076, 2078–79 (citation omitted).

mother could be listed on the child's birth certificate.[510] However, a biological mother married to another female could not be listed on the birth certificate.[511] To the Court's majority, this denial could unjustly harm the ability of same-sex parents to participate in transactions that require legal proof of parentage.[512] Therefore, the Court concluded, such a statute could not survive the interpretation of the Equal Protection Clause and the Due Process Clause under *Obergefell v. Hodges*.[513]

Justice Gorsuch dissented, joined by Justice Thomas and Justice Alito.[514] According to Gorsuch, the Court's prior holding in *Obergefell* dealt solely with the legal recognition of marriage between individuals of the same gender.[515] Such a decision did not extend to matters regarding birth certificates, an issue that was traditionally the sole legal responsibility of the state.[516] By writing this "new" protection into *Obergefell*, Gorsuch determined, the Court had improperly broadened the reach of its precedent in this area.[517]

III. VOTING ALLIANCES AND TRENDS FROM THE OCTOBER 2016 TERM

i. Divided Decisions Overall

The voting alignments from the twenty-eight divided decisions that the Supreme Court rendered during the October 2016 term are as follows:

[510] *Id.* at 2077 (quoting ARK. CODE ANN. § 20-18-401(e) (West 2017)).
[511] *Pavan*, 137 S. Ct. at 2078 (quoting ARK. CODE ANN. § 20-18-401(l)(1)).
[512] *Pavan*, 137 S. Ct. at 2078 (citation omitted).
[513] *See id.* at 2078, 2079 (first citing DeBoer v. Snyder, 772 F.3d 388, 398–99 (6th Cir. 2014); then citing Obergefell v. Hodges 135 S. Ct. 2584, 2604 (2015)).
[514] *Pavan*, 137 S. Ct. at 2079 (Gorsuch, J., dissenting).
[515] *See id.* (citation omitted).
[516] *See id.* (citing ARK. CODE ANN. § 9-10-201 (West 2017)).
[517] *See Pavan*, 137 S. Ct. at 2080.

Chief Justice Roberts (Criminal Cases)[518]

Justice	**Percentage of Agreement on Case Outcomes**[519]
Kennedy	73%
Alito	73%
Thomas	63%
Sotomayor	55%
Breyer	55%
Ginsburg	45%
Kagan	45%
Gorsuch[520]	100%

[518] Reviewing the cases discussed in the preceding section, the Court decided a total of eleven divided criminal cases during the October 2016 term: *Buck v. Davis*, *Pena-Rodriguez v. Colorado*, *Manuel v. Joliet*, *Moore v. Texas*, *Manrique v. United States*, *Nelson v. Colorado*, *McWilliams v. Dunn*, *Weaver v. Massachusetts*, *Turner v. United States*, *Lee v. United States*, and *Davila v. Davis*. Some of these cases incorporate both criminal law and civil law principles, and thus do not fit neatly into either category. In such situations, the author has endeavored to place the case into the category that best illustrates the justices' views on the legal principles central to the outcome of the case. For instance, even though *Manuel v. Joliet* began with a civil lawsuit for malicious prosecution, the case appears in the "criminal cases" category because the result hinged on the Court's interpretation of the bounds of the Fourth Amendment when evaluating the conduct of law enforcement officers, a classic criminal law question. 137 S. Ct. 911, 916, 922 (2017).

[519] Roberts cast a vote in all of the Court's eleven divided criminal cases during the October 2016 term.

[520] Roberts and Gorsuch both cast a vote in three divided criminal cases during the October 2016 term.

Chief Justice Roberts (Civil Cases)[521]

Justice	**Percentage of Agreement on Case Outcomes**[522]
Kennedy	88%
Alito	88%
Kagan	75%
Thomas	65%
Breyer	59%
Sotomayor	56%
Ginsburg	41%
Gorsuch[523]	60%

Justice Sotomayor (Criminal Cases)

Justice	**Percentage of Agreement on Case Outcomes**[524]
Ginsburg	91%
Breyer	82%
Kennedy	82%
Kagan	73%
Roberts	55%
Alito	27%
Thomas	18%

[521] Reviewing the cases discussed in the preceding section, the Court decided seventeen civil cases by a divided vote during the October 2016 term: *NLRB v. SW General*, *SCA Hygiene Products v. First Quality Baby Products*, *Star Athletica v. Varsity Brands*, *Czyzewski v. Jevic Holding*, *McLane v. EEOC*, *Midland Funding v. Johnson*, *Kindred Nursing Centers v. Clark*, *Cooper v. Harris*, *Impression Products v. Lexmark International*, *Ziglar v. Abbasi*, *Bristol-Myers Squibb v. Superior Court of California*, *Murr v. Wisconsin*, *Perry v. Merit Systems Protection Board*, *Trinity Lutheran Church v. Comer*, *California Public Employees' Retirement System v. ANZ Securities*, *Hernandez v. Mesa*, and *Pavan v. Smith*. *See supra* Part II. Some of these cases incorporate both civil law and criminal law principles, and thus do not fit neatly into either category. *See e.g.*, Hernandez v. Mesa, 137 S. Ct. 2003, 2005 (2017) (citation omitted). In such situations, the author has endeavored to place the case into the category that best illustrates the justices' views on the legal concepts central to the outcome of the case. For instance, even though *Hernandez v. Mesa* touches upon Fourth Amendment concepts in its analysis, the ultimate result hinges upon the justices' interpretation of *Bivens* and the ability of a plaintiff to bring a civil lawsuit against a federal officer for damages. *Id.*

[522] Roberts cast a vote in all of the Court's seventeen divided civil cases decided during the October 2016 term.

[523] Roberts and Gorsuch both cast a vote in five divided civil cases during the October 2016 term.

[524] Sotomayor cast a vote in all of the Court's eleven divided criminal cases decided during the October 2016 term.

Gorsuch[525]	33%

Justice Sotomayor (Civil Cases)

Justice	**Percentage of Agreement on Case Outcomes**[526]
Kagan	81%
Ginsburg	75%
Breyer	56%
Kennedy	56%
Roberts	56%
Alito	44%
Thomas	31%
Gorsuch[527]	0%

Justice Ginsburg (Criminal Cases)

Justice	**Percentage of Agreement on Case Outcomes**[528]
Sotomayor	91%
Kagan	82%
Breyer	73%
Kennedy	73%
Roberts	45%
Alito	18%
Thomas	9%
Gorsuch[529]	33%

[525] Sotomayor and Gorsuch both cast a vote in three divided criminal cases during the October 2016 term.

[526] Sotomayor cast a vote in sixteen of the Court's divided civil cases decided during the October 2016 term, recusing herself from *Ziglar v. Abbasi*.

[527] Sotomayor and Gorsuch both cast a vote in five divided civil cases during the October 2016 term.

[528] Ginsburg cast a vote in all of the eleven divided criminal cases that the Court decided during the October 2016 term.

[529] Ginsburg and Gorsuch both cast a vote in three divided criminal cases during the October 2016 term.

Justice Ginsburg (Civil Cases)

Justice	**Percentage of Agreement on Case Outcomes**[530]
Sotomayor	81%
Kagan	75%
Breyer	59%
Kennedy	47%
Roberts	47%
Alito	41%
Thomas	35%
Gorsuch[531]	50%

Justice Kagan (Criminal Cases)

Justice	**Percentage of Agreement on Case Outcomes**[532]
Breyer	91%
Ginsburg	82%
Kennedy	64%
Sotomayor	82%
Roberts	45%
Alito	18%
Thomas	9%
Gorsuch[533]	0%

Justice Kagan (Civil Cases)

Justice	**Percentage of Agreement on Case Outcomes**[534]
Sotomayor	81%
Breyer	81%

[530] Ginsburg cast a vote in all of the seventeen divided civil cases that the Court decided during the October 2016 term.

[531] Ginsburg and Gorsuch both cast a vote in five divided civil cases during the October 2016 term.

[532] Kagan cast a vote in all of the eleven divided criminal cases that the Court decided during the October 2016 term.

[533] Kagan and Gorsuch both cast a vote in three divided criminal cases during the October 2016 term.

[534] Kagan cast a vote in sixteen of the Court's divided civil cases decided during the October 2016 term, recusing herself from *Ziglar v. Abbasi*.

Roberts	75%
Kennedy	75%
Ginsburg	75%
Alito	63%
Thomas	63%
Gorsuch[535]	60%

Justice Breyer (Criminal Cases)

Justice	**Percentage of Agreement on Case Outcomes**[536]
Kagan	91%
Sotomayor	82%
Kennedy	82%
Ginsburg	73%
Roberts	55%
Alito	27%
Thomas	18%
Gorsuch[537]	0%

Justice Breyer (Civil Cases)

Justice	**Percentage of Agreement on Case Outcomes**[538]
Kennedy	71%
Kagan	71%
Ginsburg	59%
Roberts	59%
Sotomayor	53%
Alito	47%
Thomas	47%
Gorsuch[539]	40%

[535] Kagan and Gorsuch both cast a vote in five divided civil cases during the October 2016 term.

[536] Breyer cast a vote in all of the eleven divided criminal cases that the Court decided during the October 2016 term.

[537] Breyer and Gorsuch both cast a vote in three divided criminal cases during the October 2016 term.

[538] Breyer cast a vote in all of the seventeen divided civil cases that the Court decided during the October 2016 term.

[539] Breyer and Gorsuch both cast a vote in five divided civil cases during the October 2016 term.

Justice Kennedy (Criminal Cases)

Justice	**Percentage of Agreement on Case Outcomes**[540]
Breyer	82%
Sotomayor	82%
Ginsburg	73%
Kagan	73%
Roberts	73%
Alito	45%
Thomas	36%
Gorsuch[541]	66%

Justice Kennedy (Civil Cases)

Justice	**Percentage of Agreement on Case Outcomes**[542]
Roberts	88%
Alito	76%
Breyer	71%
Kagan	71%
Sotomayor	53%
Thomas	53%
Ginsburg	41%
Gorsuch[543]	71%

Justice Alito (Criminal Cases)

Justice	**Percentage of Agreement on Case Outcomes**[544]
Thomas	91%
Roberts	73%

[540] Kennedy cast a vote in all of the eleven divided criminal cases that the Court decided during the October 2016 term.

[541] Kennedy and Gorsuch both cast a vote in three divided criminal cases during the October 2016 term.

[542] Kennedy cast a vote in all of the seventeen divided civil cases that the Court decided during the October 2016 term.

[543] Kennedy and Gorsuch both cast a vote in five divided civil cases during the October 2016 term.

[544] Alito cast a vote in all of the eleven divided criminal cases that the Court decided during the October 2016 term.

Kennedy	45%
Breyer	27%
Sotomayor	27%
Ginsburg	18%
Kagan	18%
Gorsuch[545]	100%

Justice Alito (Civil Cases)

Justice	**Percentage of Agreement on Case Outcomes**[546]
Roberts	88%
Thomas	76%
Kennedy	76%
Kagan	62%
Breyer	47%
Sotomayor	43%
Ginsburg	29%
Gorsuch[547]	80%

Justice Thomas (Criminal Cases)

Justice	**Percentage of Agreement on Case Outcomes**[548]
Alito	91%
Roberts	63%
Kennedy	36%
Breyer	18%
Sotomayor	18%
Ginsburg	9%
Kagan	9%
Gorsuch[549]	100%

[545] Alito and Gorsuch both cast a vote in three divided criminal cases during the October 2016 term.

[546] Alito cast a vote in all of the seventeen divided civil cases that the Court decided during the October 2016 term.

[547] Alito and Gorsuch both cast a vote in five divided civil cases during the October 2016 term.

[548] Thomas cast a vote in all of the eleven divided criminal cases that the Court decided during the October 2016 term.

[549] Thomas and Gorsuch both cast a vote in three divided criminal cases during the October 2016 term.

Justice Thomas (Civil Cases)

Justice	**Percentage of Agreement on Case Outcomes**[550]
Alito	76%
Roberts	65%
Kennedy	53%
Breyer	47%
Kagan	50%
Ginsburg	29%
Sotomayor	31%
Gorsuch[551]	100%

Justice Gorsuch (Criminal Cases)

Justice	**Percentage of Agreement on Case Outcomes**[552]
Thomas	100%
Alito	100%
Roberts	100%
Kennedy	67%
Sotomayor	33%
Ginsburg	33%
Kagan	0%
Breyer	0%

[550] Thomas cast a vote in all of the seventeen divided civil cases that the Court decided during the October 2016 term.

[551] Thomas and Gorsuch both cast a vote in five divided civil cases during the October 2016 term.

[552] Gorsuch cast a vote in three of the divided criminal cases that the Court decided during the October 2016 term: *Davila v. Davis*, *McWilliams v. Dunn*, and *Weaver v. Massachusetts*.

Justice Gorsuch (Civil Cases)

Justice	**Percentage of Agreement on Case Outcomes**[553]
Thomas	100%
Alito	80%
Kennedy	60%
Roberts	60%
Breyer	40%
Kagan	40%
Ginsburg	20%
Sotomayor	0%

These alignments reveal some extraordinarily high and extraordinarily low percentages of agreement. For instance, Justice Alito and Justice Thomas agreed on the outcome in 91 percent of the divided criminal cases and 75 percent of the divided civil cases that the Court decided during the last term.[554] Justice Ginsburg and Justice Sotomayor voted for the same outcome in 91 percent of the divided criminal cases during this same period.[555] Justice Kagan and Justice Breyer agreed on the overall result in 91 percent of divided criminal cases during this time.[556] Chief Justice Roberts

[553] Gorsuch cast a vote in five of the divided civil cases that the Court decided during the October 2016 term: *Bristol-Myers Squibb v. Superior Court of California*, *Perry v. Merit Systems Protection Board*, *Trinity Lutheran Church v. Comer*, *California Public Employees' Retirement System v. ANZ Securities*, and *Pavan v. Smith*.

[554] The only divided criminal matter on which Thomas and Alito did not agree regarding the outcome during the last term was *Nelson v. Colorado*. Alito voted with the majority, holding that the exonerated criminal defendants were entitled to refunds of the financial penalties that they had paid to the state. *See* Nelson v. Colorado, 137 S. Ct. 1249, 1260 (2017). Thomas authored a lone dissent, arguing that the exonerated defendants lacked any entitlement to the money that they had paid to the government as a result of their wrongful criminal conviction. *See id.* at 1263 (Thomas, J., dissenting).

[555] The only divided criminal matter on which Ginsburg and Sotomayor disagreed regarding the outcome during the last term was *Turner v. United States*. 137 S. Ct. 1885, 1887 (2017). Sotomayor voted with the Court's majority, holding that the evidence that the prosecution suppressed was not "material" under the standard established in *Brady v. Maryland* and thus did not undermine the outcome of the case. *See id.* at 1888. Ginsburg joined Kagan in dissent, arguing that although the prosecution had a strong case, the suppressed evidence reasonably may have introduced reasonable doubt into one or more of the jurors' minds, and that the prosecution therefore may have undermined the verdict by suppressing this evidence. *See id.* at 1898–99 (Kagan, J., dissenting) (citations omitted).

[556] The only divided criminal case on which Kagan and Breyer disagreed regarding the outcome during the last term was *Turner*. *See Turner*, 137 S. Ct. at 1887. Breyer voted with the Court's majority, holding that the prosecution did not undermine the verdict of the case by suppressing the evidence. *See id.* at 1887, 1888. Kagan dissented, arguing that the suppressed evidence may have introduced reasonable doubt into the mind of at least one juror, therefore making the suppressed evidence "material" under the *Brady v. Maryland*

agreed with Justice Alito and Justice Kennedy in 88 percent of the divided civil cases.[557]

Such numbers bolster the case that the Court, even in a year of unprecedented consensus, remains a politically polarized body. Justice Thomas and Justice Alito are considered predictable voters on the right side of the political spectrum.[558] Justice Ginsburg and Justice Sotomayor are commonly regarded as leaders of the political left on the Court—a wing that also includes Justice Kagan and Justice Breyer.[559] Chief Justice Roberts is generally viewed as a steady conservative, but not an absolute one, and Justice Kennedy, while an unpredictable "swing voter" overall, is commonly recognized as a politically conservative justice.[560] The fact that these groups of justices still aligned so closely with one another on divided cases during a term when the Court purportedly strove to reach consensus demonstrates how starkly divided along political lines the nation's highest federal tribunal has become.[561]

Some statistics, however, indicate an unexpected break from these entrenched political ranks. For example, the typically-

standard. *See id.* at 1898–99 (Kagan, J., dissenting) (citations omitted).

[557] Roberts and Alito parted ways on *Czyzewski v. Jevic Holding Corp.* Roberts voted with the majority, requiring the parties to follow the priority-of-distribution standards established under the Bankruptcy Code. *See* Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 977–78 (2017) (citation omitted). Alito dissented, joining Thomas's argument that the Court had engaged in judicial overreach by deciding a broader question than what the parties had briefed. *See id.* at 987 (Thomas, J., dissenting). Roberts and Kennedy disagreed on the outcome in *Star Athletica, L.L.C. v. Varsity Brands, Inc.* Roberts sided with the majority's opinion that the two-dimensional designs of the cheerleading outfits qualified for copyright protection. *See* Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1006, 1007 (2017). Kennedy joined Breyer's dissent, holding that the designs could be represented only as two-dimensional replicas of the uniforms, and thus could not qualify for copyright protection. *See id.* at 1030, 1036 (Breyer, J., dissenting).

[558] *See* Adam Liptak, *Supreme Court Agenda in the Trump Era? A Justice Seems to Supply One*, N.Y. TIMES (Nov. 28, 2016), https://www.nytimes.com/2016/11/28/us/politics/supreme-court-trump-samuel-alito.html.

[559] *See* Taylor Kate Brown, *Trump Supreme Court Pick: Who Are The Current Eight Justices?*, BBC NEWS MAG. (Feb. 1, 2017), http://www.bbc.com/news/magazine-33103973; Alicia Parlapiano and Karen Yourish, *Where Neil Gorsuch Would Fit on the Supreme Court*, N.Y. TIMES (Feb. 1, 2017), https://www.nytimes.com/interactive/2017/01/31/us/politics/trump-supreme-court-nominee.html.

[560] *See* Benjamin Pomerance, *What Might Have Been: 25 Years of Robert Bork on the United States Supreme Court*, 1 BELMONT L. REV. 221, 225 (2014); *see also* Adam Liptak, *Chief Justice John Roberts Amasses a Conservative Record, and Wrath from the Right*, N.Y. TIMES (Sept. 28, 2015), https://www.nytimes.com/2015/09/29/us/politics/chief-justice-john-roberts-amasses-conservative-record-and-the-rights-ire.html.

[561] *See* Richard Wolf, *Chief Justice John Roberts' Supreme Court at 10, Defying Labels*, USA TODAY (Sept. 28, 2015), https://www.usatoday.com/story/news/politics/2015/09/28/supreme-court-john-roberts-conservative-liberal/72399618/ ("It's a political court. It's an ideological court. But [Roberts is] confronted with the additional problem that it looks like a partisan court.").

conservative Chief Justice Roberts and the typically liberal Justice Kagan agreed on the outcome in 75 percent of divided civil cases in which they both voted from the October 2016 term. Roberts also agreed with the typically liberal Justices Sotomayor and Breyer on the outcomes in more than half of the divided criminal cases from this period. Justice Kennedy sided with the liberal Justices Breyer and Sotomayor on 82 percent of the divided criminal cases decided during the October 2016 term, and with Justice Ginsburg on 73 percent of the divided criminal cases from this same timeframe. Justice Breyer agreed with Justice Kennedy more frequently than Justice Ginsburg in divided criminal cases, and sided with both Kennedy and Chief Justice Roberts more frequently than Justice Sotomayor in divided civil cases. Justice Alito, widely considered one of the most politically conservative members of the Court, agreed with the more liberal Justice Kagan on more than half of the divided civil cases that the Court decided during the last term.

Of course, a single term is a relatively small sample size, meaning that observers should not immediately pronounce Justice Kagan increasingly conservative on civil cases or insist that Justice Kennedy is now a flaming liberal on criminal matters. At the same time, however, these recent trends merit close future scrutiny. Perhaps these trends do represent an arrival of a period of greater consensus upon the Court's bench. Or, perhaps the alignments from this past term signal a shift toward the political left or the political right in certain types of cases for one or more of the justices discussed above. As with so many things involving the Court, the answers to these questions will come only from the passage of time and the longer-term observations over that duration.

One can also draw reasonable inferences from studying the entire list of a justice's percentages of agreement with his or her colleagues. Such a review indicates that Justice Thomas is an extremely polarizing figure on the Court on criminal matters, agreeing with one justice (Alito) on 91 percent of divided criminal cases decided during the October 2016 term, but agreeing with four other justices (Breyer, Sotomayor, Ginsburg, and Kagan) on fewer than 20 percent of divided criminal cases from this same period.[562] By contrast, Chief Justice Roberts demonstrated a greater degree of consensus on divided criminal cases during the last term, with a

[562] Notably, Justice Thomas and Justice Alito are considered the most consistently politically conservative justices on the Court, while Justices Breyer, Sotomayor, Ginsburg, and Kagan are widely viewed as the Court's most consistent political liberals. *See* Brown, *supra* note 559; Liptak, *supra* note 558.

high-water mark of agreement at 73 percent (Kennedy and Alito) and a low-water mark of agreement at 45 percent (Ginsburg and Kagan). Justice Breyer's record on divided civil cases similarly shows a trend toward consensus rather than disagreement, ranging from a high of 71 percent (Kagan and Kennedy) to a low of 47 percent (Alito and Thomas). Overall, one can deduce that the justices without a vast numerical canyon between the justice with whom they agree most often and the justice with whom they agree least often are most likely to find a way to reach a consensus regarding the overall outcome of a case.[563]

Lastly, Justice Gorsuch's limited time on the bench provides some stark numbers regarding the colleagues with whom his voting most frequently aligns. In the three divided criminal matters in which Gorsuch took part in the decision, Gorsuch voted for the same outcome as Justice Thomas, Justice Alito, and Chief Justice Roberts in all three of the cases. In each of these cases, Gorsuch voted for the opposite outcome as Justices Kagan and Breyer. Put another way, Gorsuch voted identically with the individuals who are widely considered the Court's most ideologically conservative justices 100 percent of the time, and voted with individuals who are widely regarded as two of the Court's most liberal justices zero percent of the time.[564]

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[563] One can look to historical examples for illustrations of this principle. For instance, many historians view Chief Justice Earl Warren as one of the finest consensus builders in the Supreme Court's history. *See, e.g.*, C. TRUETT BAKER, CHURCH-STATE COOPERATION WITHOUT DOMINATION: A NEW PARADIGM FOR CHURCH-STATE RELATIONS 163 (2010) ("Chief Justice Warren was a gifted consensus builder and favored common sense and fairness over appeal to precedence."); Charles F. Howlett, *Earl Warren*, *in* HISTORICAL DICTIONARY OF THE 1940S 406 (James G. Ryan & Leonard Schlup eds., 2006) ("A politician rather than a jurist, Warren was a consensus builder."); THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 11 (Del Dickson ed., 2001); Jeffrey Rosen, *A Fine Balance: How a Liberal Republican Governor Shaped the Modern Supreme Court*, The WASH. POST (Dec. 17, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/12/14/AR2006121401477.html. While Warren's decisions generally fell on the liberal side of the political spectrum, Warren managed to attract colleagues from both sides of the political aisle to side with him on extremely controversial cases, including *Brown v. Board of Education Topeka*, *Heart of Atlanta Motel v. United States*, *Engel v. Vitale*, *Griswold v. Connecticut*, and *Reynolds v. Sims*. *See* Howlett, *supra*, at 406; MELVIN I. UROFSKY, THE WARREN COURT: JUSTICES, RULINGS, AND LEGACY 263 (2001). Warren's willingness to compromise on key issues to gain ultimate victories rather than entrenching himself in rigid ideological positions allowed him to control the overall direction of the Court. *See* Tom Curry, *For Court Clout, No Judicial Experience Needed*, NBC NEWS (May 12, 2010), http://www.nbcnews.com/id/37072697/ns/politics-supreme_court/t/court-clout-no-judicial-experience-needed/#.Wbcw9bpFzIU; A. Leon Higginbotham, Jr., *45 Years in Law and Civil Rights*, EBONY, Nov. 1990, at 80, 82; Howlett, *supra*, at 406; Rosen, *supra* ("[Warren was] more concerned about unanimity and consensus than about ideological purity.").

[564] In each of these divided criminal decisions, Gorsuch joined the other members of the Court's conservative wings in voting for the interests of the government over the individual

In the five divided civil cases in which Justice Gorsuch cast a vote, the numbers also appear to tell a story. Justice Gorsuch voted for the same outcome as Justice Thomas in 100 percent of these cases. On the opposite end of both the political spectrum and the numerical spectrum, Gorsuch did not vote for the same outcome as Justice Sotomayor in any of these cases. In between were Justice Alito (agreeing with Gorsuch on four of the five outcomes), Justice Kennedy and Chief Justice Roberts (agreeing with Gorsuch on three of the five outcomes), Justices Breyer and Kagan (two of the five outcomes), and Justice Ginsburg (one of the five outcomes). The four justices with whom Gorsuch agreed most frequently in these five cases—Thomas, Alito, Kennedy, and Roberts—are generally considered the most politically conservative members of the Court, while the justices with whom Gorsuch agreed least frequently—Breyer, Kagan, Ginsburg, and Sotomayor—are typically seen as the Court's most politically liberal members.[565]

Again, it is impossible to forecast the future with any certainty based on five divided civil cases and three divided criminal cases. However, if these early results are any indication of forthcoming trends, Justice Gorsuch appears poised to become the newest member—and, perhaps, even one of the most predictable members—of the Court's conservative bloc.

ii. The Toughest Cases

Given that divided decisions provide the best look at ideological divisions among the Court's justices, one would reasonably expect that the closest cases—those decided by a vote of 5–4 or, considering the length of time during the past term when the Court existed with

defendant. In *Davila v. Davis*, Gorsuch joined Thomas's majority opinion, holding that the defendant's federal habeas case could not go forward because the alleged ineffective assistance of counsel came from appellate counsel, not trial counsel. *See* Davila v. Davis, 137 S. Ct. 2058, 2062, 2066–67 (citing Martinez v. Ryan, 566 U.S. 1, 12, 16 (2012)). In *McWilliams v. Dunn*, Gorsuch joined Alito's dissent, arguing that the defendant who had been sentenced to death was not entitled to the evaluation of a requested mental health expert. *See* McWilliams v. Dunn, 137 S. Ct. 1790, 1801, 1810 (2017) (Alito, J., dissenting) (citing Harrington v. Richter, 562 U.S. 86, 103 (2011)). Lastly, in *Weaver v. Massachusetts*, Gorsuch voted with the majority's determination that the defendant's case was not materially prejudiced by the decision to close the courtroom, and therefore a new trial was not warranted. *See* Weaver v. Massachusetts, 137 S. Ct. 1899, 1904, 1913 (2017). Additionally, Gorsuch cast the tiebreaking vote that rejected a petition for the Court to review the cases of several inmates that the State of Arkansas wanted to execute before its supply of lethal drugs expired, declining to hear any of the death row inmates' arguments. *See* McGehee v. Hutchinson, 137 S. Ct. 1275, 1276 (2017).

[565] *See* Parlapiano & Yourish, *supra* note 559.

eight members, 5–3—would provide the strongest picture of the alliances among the justices.[566] During the last term, the Court decided seven of these cases.[567] Justice Gorsuch cast a vote in three of these 5–4 decisions.[568]

The voting in these cases provide an even plainer picture of the political Rubicon on the Court today. In 100 percent of these decisions, the four justices viewed as the most politically liberal members of the Court—Ginsburg, Sotomayor, Kagan, and Breyer—all voted for the same outcome.[569] In 100 percent of these decisions, two of the justices viewed as the most politically conservative members of the Court—Alito and Roberts—voted for the same outcome.[570] In all but one of these decisions, Thomas and Alito—jurists recognized as two of the Court's most politically conservative justices—voted for the same outcome.[571]

The inverse effect also holds true. Chief Justice Roberts did not vote with any of the four consistently liberal justices (Ginsburg, Sotomayor, Kagan, and Breyer) in any of these close decisions.[572] None of the four liberal justices voted with Justice Alito in any of these close decisions.[573] Thomas sided with the liberals only once in

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[566] *See* Robert E. Riggs, *When Every Vote Counts: 5-4 Decisions in the United States Supreme Court, 1900-90*, 21 HOFSTRA L. REV. 667, 710 (1993) (discussing the "highly politicized" nature of 5–4 decisions).

[567] *See* Cal. Pub. Emp.'s Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042, 2046 (2017); *Davila*, 137 S. Ct. at 2062; Murr v. Wisconsin, 137 S. Ct. 1933, 1939 (2017); *McWilliams*, 137 S. Ct. at 1793; Cooper v. Harris, 137 S. Ct. 1455, 1463 (2017); Moore v. Texas, 137 S. Ct. 1039, 1043 (2017); Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017).

[568] *See Cal. Pub. Emp.'s Ret. Sys.*, 137 S. Ct. at 2046; *Davila*, 137 S. Ct. at 2062; *McWilliams*, 137 S. Ct. at 1793.

[569] These four justices all voted for the Court's majority opinion in *Pena-Rodriguez*, *Moore*, *Cooper*, *McWilliams*, and *Murr*. *See Murr*, 137 S. Ct. at 1939; *McWilliams*, 137 S. Ct. at 1793; *Cooper*, 137 S. Ct. at 1463; *Moore*, 137 S. Ct. at 1043; *Pena-Rodriguez*, 137 S. Ct. at 860. They all dissented in *Cal. Pub. Emp.'s Ret. Sys*, and *Davila*. *See Cal. Pub. Emp.'s Ret. Sys*, 137 S. Ct. at 2046; *Davila*, 137 S. Ct. at 2062.

[570] Alito and Roberts dissented together in *Pena-Rodriguez*, *Moore*, *Cooper*, *McWilliams*, and *Murr*. *See Murr*, 137 S. Ct. at 860; *McWilliams*, 137 S. Ct. at 1793; *Cooper*, 137 S. Ct. at 1043; *Moore*, 137 S. Ct. at 1043; *Pena-Rodriguez*, 137 S. Ct. at 860. They voted together for the Court's majority opinion in *California Public Employees' Retirement System* and *Davila*. *See Cal. Pub. Emp.'s Ret. Sys.*, 137 S. Ct. at 2046; *Davila*, 137 S. Ct. at 2062.

[571] The lone outlier was *Cooper v. Harris*. Thomas voted with the Court's majority, finding that North Carolina had engaged in unconstitutional racial gerrymandering. *See Cooper*, 137 S. Ct. at 1482. Alito joined by Roberts and Kennedy in dissent, arguing to preserve North Carolina's re-districting scheme. *See Cooper*, 137 S. Ct. at 1503–04 (Alito, J., dissenting).

[572] *Cal. Pub. Emp.'s Ret. Sys*, 137 S. Ct. at 2046; *Davila*, 137 S. Ct. at 2062; *Murr*, 137 S. Ct. at 1939; *McWilliams*, 137 S. Ct. at 1793; *Cooper*, 137 S. Ct. at 1463; *Moore*, 137 S. Ct. at 1043; *Pena-Rodriguez*, 137 S. Ct. at 860.

[573] *Cal. Pub. Emp.'s Ret. Sys*, 137 S. Ct. at 2046; *Davila*, 137 S. Ct. at 2062; *Murr*, 137 S. Ct. at 1939; *McWilliams*, 137 S. Ct. at 1793; *Cooper*, 137 S. Ct. at 1463; *Moore*, 137 S. Ct. at 1043; *Pena-Rodriguez*, 137 S. Ct. at 860.

these seven cases.[574]

Justice Gorsuch's appointment to the Court did nothing to alleviate the party-lines breakdown of these cases. In the three 5–4 decisions in which Gorsuch cast a vote, Gorsuch called for the same outcome as all of the Court's most reliable politically conservative justices—Thomas, Alito, and Roberts—one hundred percent of the time.[575] Never did Gorsuch vote for the same outcome as any member of the Court's liberal bloc in a 5–4 decision.[576]

Overall, the outcome of each 5–4 or 5–3 decision came down to the opinion of Justice Kennedy.[577] True to his reputation as the Court's "swing voter," Kennedy voted with the majority in all but one of these seven cases. Four times, Kennedy sided with the solid liberal bloc of Ginsburg, Sotomayor, Kagan, and Breyer.[578] Twice, Kennedy voted with the solid conservative bloc of Roberts, Alito, Thomas, and Gorsuch.[579] In the remaining case, decided prior to Gorsuch's arrival on the bench, Kennedy joined Roberts and Alito in dissent.[580]

Commentators who condemn the current Court as a garishly politically partisan entity can find plenty of grist for their mill in

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[574] *See, e.g.*, *Cooper*, 137 S. Ct. at 1463 (showing that Kagan delivered the opinion of the court, Thomas, Ginsburg, Breyer, and Sotomayor joined, and Thomas wrote a concurring opinion); *see Cal. Pub. Emp.'s Ret. Sys.*, 137 S. Ct. at 2046; *Davila*, 137 S. Ct. at 2062; *Murr*, 137 S. Ct. at 1939; *McWilliams*, 137 S. Ct. at 1793; *Moore*, 137 S. Ct. at 1043; *Pena-Rodriguez*, 137 S. Ct. at 860.

[575] Gorsuch voted in the Court's majority in *Davila* and *California Public Employees' Retirement System*. *See Cal. Pub. Emp.'s Ret. Sys.*, 137 S. Ct. at 2046; *Davila*, 137 S. Ct. at 2062. He voted in the Court's dissent in *McWilliams*. *See McWilliams*, 137 S. Ct. at 1793.

[576] *Cal. Pub. Emp.'s Ret. Sys.*, 137 S. Ct. at 2046; *Davila*, 137 S. Ct. at 2062; *McWilliams*, 137 S. Ct. at 1793.

[577] *Cal. Pub. Emp.'s Ret. Sys.*, 137 S. Ct. at 2046; *Davila*, 137 S. Ct. at 2062; *Murr*, 137 S. Ct. at 1939; *McWilliams*, 137 S. Ct. at 1793; *Cooper*, 137 S. Ct. at 1463; *Moore*, 137 S. Ct. at 1043; *Pena-Rodriguez*, 137 S. Ct. at 860.

[578] Kennedy voted with the liberal bloc in *Pena-Rodriguez v. Colorado*, *Moore v. Texas*, *McWilliams v. Dunn*, and *Murr v. Wisconsin*. Three of these cases—*Pena-Rodriguez*, *Moore*, and *McWilliams*—were criminal matters in which Kennedy voted for the interests of the individual criminal defendant instead of the government. *See McWilliams*, 137 S. Ct. at 1793; *Moore*, 137 S. Ct. at 1053; *Pena-Rodriguez*, 137 S. Ct. at 869. In the remaining case, *Murr*, Kennedy and the liberal bloc sided with the county government instead of the individual, holding that the county's new regulations did not constitute a "taking" of the landowner's property. *See Murr*, 137 S. Ct. at 1939.

[579] Kennedy voted with the conservative bloc in *Davila v. Davis* and *California Public Employees' Retirement System v. ANZ Securities*. In both cases, Kennedy sided with the government's interests over the individual's claims, voting against the tolling of the statutory deadline in *California Public Employees' Retirement System* and voting to deny habeas corpus relief to the defendant in *Davila*. *See Cal. Pub. Emp.'s Ret. Sys.*, 137 S. Ct. at 2055; *Davila*, 137 S. Ct. at 2063.

[580] The only 5-4 decision in which Kennedy dissented during the last term was *Cooper v. Harris*, in which Kennedy joined Alito's dissenting opinion, arguing that the plaintiffs had not proved that the State of North Carolina had engaged in unconstitutional racial gerrymandering. *See Cooper*, 137 S. Ct. at 1463; *see id.* at 1504 (Alito, J., dissenting).

these statistics. Once again, it is crucial to remember that this sample size is small. Still, the picture shown from the Court's activity in these most contentious cases during the past term fits the commonly reported picture of two deeply entrenched political sides with a single man—Kennedy—setting the Court's course by resolving virtually every stalemate. The solidity of the politically liberal and politically conservative blocs on the Court in these most difficult cases speaks volumes about the manner in which many of the nation's most challenging legal issues are resolved.

iii. The Women on the Court

The three female justices on the Court—Justices Ginsburg, Sotomayor, and Kagan—frequently voted as a bloc during the October 2016 term. All three of these justices voted for the same outcome in 73 percent of the divided criminal cases in which all three cast a vote during this period.[581] In divided civil cases during the past term in which the three female justices all cast a vote, all three voted for the same result 63 percent of the time.[582] All three of the female justices voted together in each of the seven 5–4 or 5–3 decisions that the Court rendered in the last term.[583]

Given that most commentators recognize each of the female justices on the Court as predictable political liberals, the frequency with which these three jurists voted together is not entirely surprising.[584] More unexpected are the times when at least one of these justices broke ranks with the other two. Civil matters, in particular, demonstrated some separations among these three justices during the past term, with divisions among the three

[581] *See Davila*, 137 S. Ct. at 2062; Lee v. United States, 137 S. Ct. 1958, 1962 (2017); *McWilliams*, 137 S. Ct. at 1793; Nelson v. Colorado, 137 S. Ct. 1249, 1252 (2017); *Moore*, 137 S. Ct. at 1043; Manuel v. Joliet, 137 S. Ct. 911, 914 (2017); *Pena-Rodriguez*, 137 S. Ct. at 869; Buck v. Davis, 137 S. Ct. 759, 766 (2017).

[582] *See Murr*, 137 S. Ct. at 1939 (2017); Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975, 1979 (2017); *Cooper*, 137 S. Ct. at 1463; Kindred Nursing Center. Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017); Midland Funding, L.L.C. v. Johnson, 137 S. Ct. 1407 (2017); Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 978 (2017); Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1006 (2017); SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954, 958 (2017).

[583] *See Cal. Pub. Emp.'s Ret. Sys.*, 137 S. Ct. at 2046; *Davila*, 137 S. Ct. at 2062; *Murr*, 137 S. Ct. at 1939; *McWilliams*, 137 S. Ct. at 1793; *Cooper*, 137 S. Ct. at 1463; *Midland Funding*, 137 S. Ct. at 1410; Bank of Am. Corp. v. City of Miami, 197 L. Ed. 2d 678, 684 (2017); *Moore*, 137 S. Ct. at 1043.

[584] *See, e.g.*, James Barron, *A New York Bloc on the Supreme Court*, N.Y. TIMES (May 12, 2010), http://www.nytimes.com/2010/05/12/nyregion/12newyorkers.html ("Three of the four New Yorkers—Justices Ginsburg and Sotomayor and Ms. Kagan . . . would form the court's liberal wing with Justice Stephen G. Breyer.").

female justices occurring six times in sixteen divided civil cases.[585] For instance, in *Bristol-Myers Squibb v. Superior Court of California*, Justice Sotomayor determined that Bristol-Myers Squibb had established minimum contacts with California and should defend against a lawsuit there,[586] while Justices Ginsburg and Kagan held that the Superior Court of California could not exercise personal jurisdiction over the corporation.[587] In *Trinity Lutheran Church v. Comer*, Justice Kagan decided that the government of Missouri could not exclude religious entities from a state grants program,[588] while Justices Ginsburg and Sotomayor wrote that the state should be allowed to take reasonable measures to avoid entanglement in religious affairs.[589] Justices Sotomayor and Kagan stated that a district court's determination about enforcing an Equal Employment Opportunity Commission subpoena should be reviewed for "abuse of discretion" in *McLane Co. v. EEOC*,[590] while Justice Ginsburg insisted that the appellate court should apply *de novo* review.[591]

A number of observers have studied the actions of the Court's female justices collectively.[592] If this past term is indicative of larger trends, one can reasonably state that these three liberal female jurists commonly vote for the same outcome. At the same time, a wise advocate will not assume that a vote from one of these justices guarantees a vote from all three, as the past term verifies that such unanimity is certainly not definite.

iv. The Outliers

Certain cases from this last term produced particularly surprising voting alignments. In *Cooper v. Harris*, for instance, Justice Thomas broke ranks with his fellow conservatives and voted for the same outcome as the four typically liberal justices (Ginsburg,

[585] *See* Hernandez v. Mesa, 137 S. Ct. 2003, 2008 (2017); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2016 (2017); Bristol-Myers Squibb v. Superior Ct. of Cal., 137 S. Ct. 1773, 1777 (2017); Impression Prods. v. Lexmark Int'l, 137 S. Ct. 1523, 1528 (2017); McLane Co. v. EEOC, 137 S. Ct. 1159, 1163 (2017); NLRB v. SW Gen., 137 S. Ct. 929, 934 (2017). In *Ziglar v. Abbasi*, two of the female justices, Sotomayor and Kagan, did not take part in the decision of the Court. 137 S. Ct. 1843, 1850 (2017).

[586] *See Bristol-Myers Squibb Co.*, 137 S. Ct. at 1787 (Sotomayor, J., dissenting) (citations omitted).

[587] *See id.* at 1777.

[588] *See Trinity Lutheran Church*, 137 S. Ct. at 2025.

[589] *See id.* at 2036 (Sotomayor, J., dissenting).

[590] *McLane*, 137 S. Ct. at 1164.

[591] *See id.* at 1170 (Ginsburg, J., dissenting) (citations omitted).

[592] *See, e.g.*, Collins, *supra* note 13, at 455–56, 465.

Sotomayor, Breyer, and Kagan), finding that North Carolina had engaged in unconstitutional racial gerrymandering.[593] Unlike Roberts, Alito, and Kennedy, Thomas refused to recognize a legal presumption in favor of the government when evaluating a racial gerrymandering claim.[594]

In *Hernandez v. Mesa*, the Court's majority ruling that remanded the case back to the lower court requesting a *Bivens* analysis consisted of two justices recognized as political liberals—Justices Sotomayor and Kagan—and a trio of justices recognized as political conservatives: Chief Justice Roberts and Justices Alito and Kennedy.[595] Another criminal matter, *Turner v. United States*, featured the liberal Justices Sotomayor and Breyer joining the conservative Chief Justice Roberts and Justices Kennedy, Alito, and Thomas in ruling for the government and finding that the suppressed evidence was not "material" to the outcome of the case.[596] *Weaver v. Massachusetts* brought together the politically liberal Justices Ginsburg and Sotomayor and all of the Court's politically conservative justices in finding that a criminal defendant failed to prove that his attorney's failure to object to the courtroom being closed to the public rose to the level of unconstitutional ineffective assistance of counsel.[597]

Overall, however, these alignments reaching across the anticipated political lines were few and far between in the divided cases during the Court's last term, just as they have been in prior recent terms. While it is reassuring to view instances where justices—particularly justices other than Justice Kennedy—vote for an outcome that is distinct from their expected political inclinations, it is equally disappointing to see that such situations appear to be little more than outliers amid a far more politically predictable trend.

v. Justices in the Majority

One way of evaluating a justice's leadership on the United States Supreme Court is to look at how frequently that justice votes with

[593] Cooper v. Harris, 137 S. Ct. 1455, 1463 (2017); *see also id.* at 1485–86 (Thomas, J., concurring) (citations omitted).

[594] *Compare Cooper*, 137 S. Ct. at 1503–04 (Alito, J., dissenting), *with Cooper*, 137 S. Ct. at 1485 (Thomas, J., concurring) (citation omitted).

[595] Hernandez v. Mesa, 137 S. Ct. 2003, 2007 (2017) (per curiam) (citations omitted).

[596] Turner v. United States, 137 S. Ct. 1885, 1893 (2017) (quoting Cone v. Bell, 556 U.S. 449, 469–70 (2009)).

[597] Weaver v. Massachusetts, 137 S. Ct. 1899, 1904, 1913 (2017).

the Court's majority. Under this line of thought, a justice who emerges as a leader at conference and among the Court's membership overall will be more likely to convince other justices to join with them regarding the outcome of a case. Justices who are able to consistently persuade at least four of their colleagues to join them, thus constituting the majority opinion of a case, will be the individuals most likely to shape the Court's direction in the immediate future.

During the October 2016 term, Justice Kennedy voted with the Court's majority more frequently than any other justice. In the twenty-eight divided cases that the Court decided during this past term, Kennedy joined the dissenting opinion only twice.[598] The fact that Kennedy voted with the Court's majority in 93 percent of last term's divided decisions once again underscores the extent to which Kennedy's viewpoints steer the course of the Court today.

Behind Kennedy, an unforeseen tie for second place emerges. Both Chief Justice Roberts and Justice Kagan dissented only five times in these twenty-eight divided cases.[599] Slightly behind them are Justices Breyer and Sotomayor, both of whom dissented in seven of these divided decisions.[600]

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[598] The only cases in which Kennedy dissented during the October 2016 term were *Star Athletica v. Varsity Brands*, in which Kennedy joined Breyer's dissent arguing that the drawings of the cheerleading uniforms could be produced only as two-dimensional replicas of the actual products, and *Cooper v. Harris*, where Kennedy joined Alito's dissenting opinion, arguing that the plaintiffs had not proved that the State of North Carolina had engaged in unconstitutional racial gerrymandering. *See Cooper*, 137 S. Ct. at 1486, 1492 n.7 (Alito, J., dissenting) (citation omitted); Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1030 (2017) (Breyer, J., dissenting).

[599] For Roberts' dissents, *see* Murr v. Wisconsin, 137 S. Ct. 1933, 1950 (2017) (Roberts, C.J., dissenting); McWilliams v. Dunn, 137 S. Ct. 1790, 1801 (2017) (Alito, J., dissenting); *Cooper*, 137 S. Ct. at 1486 (Alito, J., dissenting); Moore v. Texas, 137 S. Ct. 1039, 1053 (2017) (Roberts, C.J., dissenting); Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 874 (2017) (Alito, J., dissenting). For Kagan's, *see* Cal. Pub. Emp.'s Ret. Sys. v. ANZ Sec. Inc., 137 S. Ct. 2024, 2056 (2017) (Ginsburg, J., dissenting); Davila v. Davis, 137 S. Ct. 2058, 2070 (2017) (Breyer, J., dissenting); *Turner*, 137 S. Ct. at 1896 (Kagan, J., dissenting); *Weaver*, 137 S. Ct. at 1916 (Breyer, J., dissenting); Midland Funding v. Johnson, 137 S. Ct. 1407, 1416 (2017) (Sotomayor, J., dissenting).

[600] For Breyer's dissents, *see Cal. Pub. Emp.'s Ret. Sys.*, 137 S. Ct. at 2056 (Ginsburg, J., dissenting); *Davila*, 137 S. Ct. at 2070 (Breyer, J., dissenting); Hernandez v. Mesa, 137 S. Ct. 2003, 2008 (2017) (Breyer, J., dissenting); *Weaver*, 137 S. Ct. at 1916 (Breyer, J., dissenting); Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Breyer, J., dissenting); *Star Athletica*, 137 S. Ct. at 1030 (Breyer, J., dissenting); SCA Hygiene Prods. v. First Quality Baby Prods., LLC, 137 S. Ct. 954, 967 (2017) (Breyer, J., dissenting). For Sotomayor's, *see Cal. Pub. Emp.'s Ret. Sys.*, 137 S. Ct. at 2056 (Ginsburg, J., dissenting); *Davila*, 137 S. Ct. at 2070 (Breyer, J., dissenting); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2027 (2017) (Sotomayor, J., dissenting); Bristol-Myers Squibb v. Superior Ct. of Cal., 137 S. Ct. 1773, 1784 (2017) (Sotomayor, J., dissenting); *Midland Funding*, 137 S. Ct. at 1416 (Sotomayor, J., dissenting); Manrique v. United States, 137 S. Ct. 1266, 1274 (2017)

On the opposite end of the spectrum is Justice Thomas, who dissented in thirteen of the twenty-eight divided cases during the most recent term.[601] The second-lowest percentage of voting with the majority from the October 2016 term belongs to Justice Ginsburg, who voted with the dissenters in eleven of the twenty-eight cases.[602] Next on the list is Justice Alito, who dissented in ten of these twenty-eight decisions.[603]

From these statistics, one can glean a couple of important inferences. While commentators often list Justice Ginsburg as the leader of the Court's "liberal wing," Justice Ginsburg persuaded her colleagues to join her regarding the outcome of the case less frequently than any other liberal justice. Justices Sotomayor, Kagan, and Breyer all achieved a greater number of cases in which their opinion about the matter's outcome matched the majority opinion of the Court. The same holds true with Justice Thomas, whom some observers consider to be the intellectual leader of the Court's conservatives but who voted with the Court's majority less frequently than any other justice during the last term, including less-tenured conservative justices such as Chief Justice Roberts.

Such numbers return to the question of what it truly means to be a leader on the Court today. Even if a justice has a distinguished tenure on the Court and is recognized as an intellectual leader,

(Ginsburg, J., dissenting); NLRB v. SW Gen., 137 S. Ct. 929, 949 (2017) (Sotomayor, J., dissenting).

[601] *See Hernandez*, 137 S. Ct. at 2008 (Thomas, J., dissenting); Pavan v. Smith, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting); Lee v. United States, 137 S. Ct. 1958, 1969 (2017) (Thomas, J., dissenting); *Murr*, 137 S. Ct. at 1957 (Roberts, C.J., dissenting); Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975, 1988 (2017) (Gorsuch, J., dissenting); *McWilliams*, 137 S. Ct. at 1801 (Alito, J., dissenting); Kindred Nursing Center. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1429 (2017) (Thomas, J., dissenting); Nelson v. Colorado, 137 S. Ct. 1249, 1263 (2017) (Thomas, J., dissenting); *Moore*, 137 S. Ct. at 1053 (Roberts, C.J., dissenting); Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 987 (2017) (Thomas, J., dissenting); *Manuel*, 137 S. Ct. at 922 (Thomas, J., dissenting); *Pena-Rodriguez*, 137 S. Ct. at 871 (Alito, J., dissenting); Buck v. Davis, 137 S. Ct. 759, 780 (2017) (Thomas, J., dissenting).

[602] *See Cal. Pub. Emp.'s Ret. Sys.*, 137 S. Ct. at 2056 (Ginsburg, J., dissenting); *Davila*, 137 S. Ct. at 2070 (Breyer, J., dissenting); *Hernandez*, 137 S. Ct. at 2008 (Breyer, J., dissenting); *Trinity Lutheran Church*, 137 S. Ct. at 2027 (Sotomayor, J., dissenting); *Turner*, 137 S. Ct. at 1896 (Kagan, J., dissenting); *Ziglar*, 137 S. Ct. at 1872 (Breyer, J., dissenting); Impression Prods. v. Lexmark Int'l, Inc., 137 S. Ct. 1523, 1538 (2017) (Ginsburg, J., dissenting); *Midland Funding*, 137 S. Ct. at 1416 (Sotomayor, J., dissenting); *Manrique*, 137 S. Ct. at 1274 (Ginsburg, J., dissenting); McLane Co. v. EEOC, 137 S. Ct. 1159, 1170 (2017) (Ginsburg, J., dissenting); *SW Gen.*, 137 S. Ct. at 949 (Sotomayor, J., dissenting).

[603] *See Murr*, 137 S. Ct. at 1950 (Roberts, C.J., dissenting); *Lee*, 137 S. Ct. at 1969 (Thomas, J., dissenting); *Pavan*, 137 S. Ct. at 2079 (Gorsuch, J., dissenting); *McWilliams*, 137 S. Ct. at 1801 (Alito, J., dissenting); *Cooper*, 137 S. Ct. at 1486 (Alito, J., dissenting); *Moore*, 137 S. Ct. at 1053 (Roberts, C.J., dissenting); *Czyzewski*, 137 S. Ct. at 987 (Thomas, J., dissenting); *Manuel*, 137 S. Ct. at 923 (Thomas, J., dissenting); *Pena-Rodriguez*, 137 S. Ct. at 874 (Alito, J., dissenting); *Buck*, 137 S. Ct. at 780 (Thomas, J., dissenting).

these prized traits do not inherently mean that this individual will succeed in actually guiding the Court's jurisprudential directions. Other attributes, such as the ability to frequently attract consensus among at least four other justices to secure the majority position, are in many ways more valuable from a pragmatic standpoint when it comes to leading this judicial body. One could reasonably assert that the justices whose names appear most frequently on the Court's majority opinions have learned this lesson the best.

vi. The Next Swing Vote?

As the end of the last Supreme Court term drew near, speculation ran rampant about whether Justice Kennedy intended to retire.[604] When the final day of the term closed without Kennedy delivering his retirement papers, many political liberals breathed a sigh of relief, alleviating their fears of President Trump replacing the Court's longtime "swing vote" with a staunch politically conservative justice.[605] Still, this day that many liberals fear and many conservatives eagerly await may not be far off. Kennedy recently celebrated his eighty-first birthday, and while history holds occasional examples of Justices serving past the age of ninety, recent signals indicate that Kennedy will retire soon.[606] Tellingly, the longest-serving Justice on the Court's bench did not hire any clerks for the October 2018 term, and reportedly has even alerted applicants for these coveted positions that he is "considering retirement."[607]

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[604] *See* Ryan Lovelace, *DC Tries to Read the Tea Leaves on Whether Kennedy Will Retire from Supreme Court*, WASH. EXAMINER (June 30, 2017), http://www.washingtonexaminer.com/dc-tries-to-read-the-tea-leaves-on-whether-kennedy-will-retire-from-supreme-court/article/2627520; Daniel Politi, *Is Justice Anthony Kennedy Getting Ready to Announce Retirement?*, SLATE (June 24, 2017), http://www.slate.com/blogs/the_slatest/2017/06/24/is_anthony_kennedy_getting_ready_to_announce_his_retirement_from_supreme.html; Mark Sherman, *Rumors Fly Surrounding Justice Kennedy's Retirement, But He's Not Talking*, CHI. TRIBUNE (May 4, 2017), http://www.chicagotribune.com/news/nationworld/politics/ct-justice-kennedy-retirement-rumors-20170504-story.html.

[605] *See* Janice Williams, *Supreme Court Justice Anthony Kennedy Not Retiring for at Least Another Year*, NEWSWEEK (July 3, 2017), http://www.newsweek.com/anthony-kennedy-supreme-court-retirement-631222.

[606] *See* Hartmann, *supra* note 33; David Ingold, *Eighty Is the New 70 as Supreme Court Justices Serve Longer and Longer*, BLOOMBERG POLITICS (Apr. 7, 2017), https://www.bloomberg.com/graphics/2017-supreme-court-justice-tenure/; Joseph P. Williams, *All Eyes Are on Justice Kennedy's Retirement Plans*, U.S. NEWS & WORLD REP. (July 10, 2017), https://www.usnews.com/news/national-news/articles/2017-07-10/all-eyes-are-on-justice-anthony-kennedys-retirement-plans.

[607] *See* Nina Totenberg, *Justice Neil Gorsuch Votes 100 Percent of the Time with Most Conservative Colleague*, NPR (July 1, 2017), http://www.npr.org/2017/07/01/535085491/justic

If Kennedy's deliberations do result in him deciding to leave the Court after thirty years of service, President Trump will almost certainly nominate a politically conservative jurist with inclinations similar to those of Justice Gorsuch.[608] If Kennedy retires before the next midterm elections, then the President's nominee will be guaranteed a vote by a Republican-controlled Senate, who will likely confirm this individual to the Court in spite of fierce resistance from the chamber's Democrats.[609] As observers galore have already noted, such a scenario would leave the Court without a swing voter for the first time in decades, further politicizing an already-polarized bench.[610]

Yet if anyone is likely to step into Kennedy's role of jurisprudential unpredictability, data indicates that Chief Justice Roberts would be the most probable candidate. Much like Kennedy, Roberts was appointed by a Republican president (Ronald Reagan for Kennedy, George W. Bush for Roberts) and received bipartisan support from the Senate.[611] Similar to Kennedy, Roberts has amassed a record of decisions that establish him as a member of the Court's conservative wing in the majority of cases.[612] And in a

e-neil-gorsuch-votes-100-percent-of-the-time-with-most-conservative-colleague.

[608] *See* Ariane de Vogue & Joan Biskupic, *Conservatives Prepare For Justice Anthony Kennedy's Retirement*, CNN (May 2, 2017), http://www.cnn.com/2017/05/01/politics/justice-anthony-kennedy-retirement-rumors/index.html; Nate Madden, *Justice Kennedy's Retirement Could Prove Terrible for the GOP Agenda*, CONSERVATIVE REV. (July 3, 2017), https://www.conservativereview.com/articles/justice-kennedys-retirement-could-prove-terrible-for-gop-agenda; Ruth Marcus, *The Terrifying and Terrible Prospect of Justice Kennedy Retiring*, WASH. POST (June 23, 2017), https://www.washingtonpost.com/opinions/the-terrifying-and-terrible-prospect-of-justice-kennedy-retiring/2017/06/23/bc73ff9a-5830-11e7-a204-ad706461fa4f_story.html?utm_term=.3840c04c080f.

[609] *See* De Vogue & Biskupic, *supra* note 608. Importantly, the "nuclear option" invoked during Gorsuch's confirmation battle means that the nominee to replace Kennedy would require the votes of only a simple majority—fifty-one Senators—to gain this seat on the Court. *See id.*

[610] *See, e.g.*, Hartmann, *supra* note 33; Marcus, *supra* note 608; Sherman, *supra* note 604; Totenberg, *supra* note 607.

[611] *Compare* Charles Babington & Peter Baker, *Roberts Confirmed as 17th Chief Justice*, WASH. POST (Sept. 30, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/29/AR2005092900859.html (showing that Chief Justice Roberts was appointed by President Bush and there was bipartisan support from the Senate), *with* Pomerance, *supra* note 560, at 225 (showing that Justice Kennedy was appointed by President Reagan and received strong support from the Senate).

[612] *See, e.g.*, Paul M. Barrett, *John Roberts, Chief Conservative Strategist*, BLOOMBERG (Apr. 11, 2014), https://www.bloomberg.com/news/articles/2014-04-10/john-roberts-leads-supreme-court-shift-to-the-right; Vincent M. Bonventre, *Focus on Chief Justice Roberts (Supreme Court: How Partisan? Ideological? Activist?)*, N.Y. CT. WATCHER (May 18, 2012), http://www.newyorkcourtwatcher.com/2012/05/part-6-focus-on-chief-justice-roberts.html; Liptak, *supra* note 560 (stating that despite facing criticism from conservative commentators, Roberts's overall voting record on the Court remains conservative).

slowly developing trend that also draws parallels to Kennedy, Roberts has shocked conservatives by voting with the Court's liberals in some extremely contentious and high-profile cases, including protecting employees who are pregnant from discriminatory treatment by a private sector employer, preventing judicial candidates from soliciting campaign contributions, and, most prominently, rejecting constitutional challenges to the Affordable Care Act.[613]

Data from the Court's most recent term supports the notion that Roberts is the most logical successor to Kennedy as a swing voter in certain pivotal cases. Roberts agreed with Kennedy in 88 percent of divided civil cases and 73 percent of divided criminal cases during the last term.[614] This demonstrates that Roberts typically followed Kennedy's logic regarding the outcome in these contested cases, regardless of what side of the political aisle Kennedy happened to favor within his varied decisions.[615]

Furthermore, Roberts aligned himself frequently with justices from both ends of the political spectrum during the October 2016 term. Unsurprisingly, as noted in the charts above, the

[613] King v. Burwell, 135 S. Ct. 2480, 2484, 2496 (2015); Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1661, 1662 (2015); Young v. United Parcel Serv., 135 S. Ct. 1338, 1343, 1344 (2015) (citation omitted); Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 524, 588 (2012).

[614] The only divided civil cases in which Roberts and Kennedy differed during the last term were *Star Athletica v. Varsity Brands* and *Murr v. Wisconsin*. In *Star Athletica*, Roberts voted with the Court's majority, holding that the two-dimensional designs for the cheerleading uniforms were copyrightable by themselves. Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1006, 1007 (2017). Kennedy joined Breyer's dissent, arguing that the two-dimensional designs were merely exact replicas of the actual uniforms and therefore not eligible for copyright. *Id.* at 1030–31 (Breyer, J., dissenting) (citation omitted). In *Murr*, Kennedy wrote the opinion of the Court, stating that the new land use regulation did not constitute a regulatory taking and no compensation from the government to the landowners was necessary. Murr v. Wisconsin, 137 S. Ct. 1933, 1939, 1950 (2017). Roberts wrote a dissent arguing that the majority erred by failing to follow the state's real property laws. *Id.* at 1950 (Roberts, C.J., dissenting). The only divided criminal cases in which Roberts and Kennedy disagreed regarding the outcome during the last term were *Pena-Rodriguez v. Colorado*, *Moore v. Texas*, and *McWilliams v. Dunn*. In each of these decisions, Kennedy voted with the Court's majority, while Roberts dissented. *See* McWilliams v. Dunn, 137 S. Ct. 1790, 1793 (2017); Moore v. Texas, 137 S. Ct. 1039, 1043 (2017); Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017).

[615] For example, the often-conservative Roberts joined Kennedy in voting with some or all of the Court's typically politically liberal justices in such controversial cases as *Buck v. Davis*, *Manuel v. City of Joliet*, and *Pavan v. Smith*, breaking ranks from the Court's typically politically conservative justices (e.g., Thomas, Alito, and, where applicable, Gorsuch) each time. *See* Paven v. Smith, 137 S. Ct. 2075, 2079 (2017); Manuel v. Joliet, 137 S. Ct. 911, 914 (2017); Buck v. Davis, 137 S. Ct. 759, 766 (2017). Ironically, only a couple of years ago at least one commentator considered Roberts and Kennedy to be "battling for control of the Court" and locked in "a contest for power, position, and influence." Eric Segall, *The Supreme Rivalry that Runs America*, DAILY BEAST (Apr. 11, 2015), http://www.thedailybeast.com/the-supreme-rivalry-that-runs-america.

conservative Chief Justice agreed with the politically conservative Justice Alito in 88 percent of divided civil cases and 73 percent of divided criminal cases, and with the politically conservative Justice Thomas in 65 percent of divided civil cases and 63 percent of divided criminal cases. However, Roberts also agreed with the politically liberal Justices Breyer and Sotomayor in more than half of the term's divided civil cases (59 percent agreement rate with Breyer, 53 percent agreement rate with Sotomayor) and more than half of the term's divided criminal cases (55 percent agreement rate for both justices). Perhaps even more unexpectedly, Roberts voted for the same outcome as the typically politically liberal Justice Kagan in 71 percent of the term's divided civil cases, as well as 45 percent of the term's divided criminal cases. Justice Ginsburg, viewed by some Court observers as the Chief Justice's most vehement ideological opponent, nevertheless voted for the same outcome as Roberts in 45 percent of divided criminal cases and 41 percent of divided civil cases decided during the last term.[616]

As noted previously, Roberts's complete voting record from the October 2016 term demonstrated his role as an even-keeled consensus builder rather than a polarizing figure during this period. In divided criminal cases, Roberts agreed with his colleagues no more than 73 percent of the time and no less than 45 percent of the time. In divided civil cases, the numbers are a little more extreme on the high side, voting for the same outcome as Kennedy and Alito in 88 percent of these cases. However, the statistics are equally impressive on the low side, with Roberts agreeing with his colleagues no less than 41 percent of the time, and with every colleague other than Ginsburg no less than 53 percent of the time. To an extent, these numbers may be somewhat higher than normal, given that Roberts pledged to find ways to broker agreements among the justices to avoid deadlocks during the time when the Court consisted of only eight members. Overall, though, these statistics reveal a jurist who is both willing and able to obtain and maintain support from justices on both sides of the political spectrum, providing yet another parallel between Roberts and Kennedy.

Roberts wrote or joined a dissenting opinion in only five of the

[616] *See, e.g.*, Adam Liptak, *Court Is 'One of Most Activist,' Ginsburg Says, Vowing to Stay*, N.Y. TIMES (Aug. 24, 2013), http://www.nytimes.com/2013/08/25/us/court-is-one-of-most-activist-ginsburg-says-vowing-to-stay.html; Damon Root, *Justice Ginsburg Attacks Chief Justice Roberts for His 'Crabbed Reading of the Commerce Clause'*, REASON (June 28, 2012), http://reason.com/blog/2012/06/28/justice-ginsburg-attacks-chief-justice-r.

twenty-eight divided cases that the Court decided during the October 2016 term. The fact that Roberts was a member of the Court's majority in 82 percent of these divided decisions strongly indicates that Roberts has established himself as a leader on the Court, successful in persuading colleagues from both political poles to join his viewpoints. Notably, the only justice with a greater number of votes with the Court's majority in divided decisions during the October 2016 term was Kennedy himself. Certain decisions from the October 2016 term particularly stand out as unexpected from a justice who is conventionally associated with politically conservative ideals. In *Buck v. Davis*, for instance, Roberts wrote the majority opinion finding that the defendant in a criminal matter suffered from ineffective assistance of counsel, as the attorney's missteps had resulted in the defendant's race playing a significant role in the jury's decision to sentence the defendant to death.[617] Both Justice Thomas and Justice Alito dissented against Roberts's opinion.[618] In *Manuel v. City of Joliet*, Roberts joined Justice Kagan's majority opinion stating that the defendant could bring a case for malicious prosecution based on Fourth Amendment grounds, as police had arrested the defendant without probable cause and then falsified evidence to continue to the prosecution.[619] Thomas and Alito voted in opposition to Roberts's holding.[620] *Lee v. United States* featured a majority opinion authored by Roberts again finding that an attorney provided ineffective assistance of counsel, as the defendant would have exercised his right to receive a fair trial if his attorney had advised him correctly regarding the immigration consequences of entering a guilty plea.[621] Once again, Roberts voted against Alito and Thomas in rendering this decision.[622]

On the civil side, Roberts joined the *per curiam* opinion in *Pavan v. Smith* holding that a state statute deprived legally married same-sex couples from having the same rights as opposite-couples possessed, thus violating the Equal Protection and the Due Process rights of legally wed same-sex couples—a decision in which Roberts broke ranks with Justices Alito, Thomas, and Gorsuch.[623] In

[617] *See Buck*, 137 S. Ct. at 777 (citation omitted).
[618] *Id.* at 780 (Thomas, J., dissenting).
[619] *See Manuel*, 137 S. Ct. at 919–20.
[620] *Id.* at 923 (Alito, J., dissenting).
[621] *See* Lee v. United States, 137 S. Ct. 1958, 1969 (2017) (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985)).
[622] *See Lee*, 137 S. Ct. at 1962; see *id.* at 1969 (Thomas, J., dissenting).
[623] *See* Pavan v. Smith, 137 S. Ct. 2075, 2076, 2078–79 (2017).

Czyzewski v. Jevic Holding Corp., Roberts separated from Thomas and Alito to vote that a bankruptcy court cannot authorize a settlement that fails to follow the Bankruptcy Code's priority-of-distribution scheme.[624] In *Perry v. Merit Systems Protection Board*, Roberts joined Ginsburg's majority opinion determining that a federal district court was the proper forum to hear an aggrieved employee's appeal, a decision in which Roberts voted in opposition to Thomas and Gorsuch.[625]

Of course, one can point to other statistics to demonstrate Roberts's more typical ideological tendencies. For example, given that Roberts voted with the Court's conservative bloc in all the Court's 5–4 or 5–3 decisions from the October 2016 term, there is little question that the Chief Justice still usually resolves hotly disputed issues in favor of the same interests that a politically conservative policymaker would support.

Still, the statistics and examples highlighted in the preceding paragraphs indicate that Roberts bears significant similarities to Kennedy, as both justices typically vote in favor of politically conservative opinions but remain unafraid to cross ideological lines at times, even in highly visible cases. Time will tell whether these trends will continue, and, if Roberts will ultimately assume the swing voter's mantle that Kennedy will shed when he retires. More than a decade ago, Roberts promised the Senate that he would decide cases like an umpire in a baseball game, calling balls and strikes with a vision unclouded by outside interests.[626] After Kennedy departs from the Court, the nation will soon learn how close the Chief Justice will be willing to come to this goal of "call[ing] 'em as [he] see[s] 'em."[627]

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[624] *See* Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 978, 987 (2017) (citations omitted); *see also id.* at 987 (Thomas, J., dissenting).

[625] *See* Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975, 1982, 1988 (2017); *see id.* at 1988 (Gorsuch, J., dissenting).

[626] *See* Jeffrey Toobin, *No More Mr. Nice Guy*, NEW YORKER (May 25, 2009), https://www.newyorker.com/magazine/2009/05/25/no-more-mr-nice-guy ("'Judges are like umpires,' Roberts said [during his confirmation hearing]. 'Umpires don't make the rules. They apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ballgame to see the umpire.'"); *Roberts: 'My Job is to Call Balls and Strikes and Not to Pitch or Bat'*, CNN (Sept. 12, 2005), http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/.

[627] With apologies to Bill Klem, the Hall of Fame baseball umpire who purportedly coined this oft-repeated phrase. *See* HARRY LEWIS, BASEBALL AS A SECOND LANGUAGE: EXPLAINING THE GAME AMERICANS USE TO EXPLAIN POLITICS 19 (2012); THE DICTIONARY OF MODERN PROVERBS 32 (Charles C. Doyle et al. eds., 2012).

IV. FINAL THOUGHTS

In the end, the October 2016 term proved to signify far more than simply the loss of Justice Scalia and the eventual entrance of Justice Gorsuch. Consensus carried the day far more frequently than in prior terms, proving that the current Court could reach compromises and issue narrowly tailored decisions rather than following the rancorously divisive trends of its recent past. Such outcomes felt reassuring to many commentators, demonstrating that the Court could decide cases on matters of national importance without falling into the familiar contemporary pattern of Chief Justice Roberts and Justices Thomas and Alito voting for the outcome that a political conservative would praise, Justices Ginsburg and Sotomayor and Kagan and Breyer voting for the outcome that a political liberal would praise, and Justice Kennedy casting the vote that decided the direction of the Court.

Still, even within a term with surprising levels of agreement and unanimity, divisions appeared and frequent voting alliances formed on the federal judiciary's loftiest bench. By looking at the divided criminal cases and divided civil cases from this past term, this article demonstrated that the Court still commonly decides issues along expected political lines, particularly in the cases that featured a 5–4 or 5–3 vote. Justice Thomas, for instance, remained far more likely to vote for the same outcome as Justice Alito and Chief Justice Roberts than to vote for the same result as Justices Kagan, Ginsburg, and Sotomayor. Justice Ginsburg, by contrast, typically agreed with Justices Sotomayor, Kagan, and Breyer, and typically disagreed with Justices Alito and Thomas. Even during a period of heightened consensus, the Court's final decision still rested upon the shoulders of Justice Kennedy with astonishing frequency.

The arrival of Justice Gorsuch appears likely to heighten this tendency. On the divided criminal cases and divided civil cases in which Gorsuch cast a vote, the newest justice sided with the members of the Court's conservative wing with almost complete uniformity. Of course, the sample size of Gorsuch's work on the Court is small at this point, and nothing prevents Gorsuch—or any other justice—from shifting ideologically and jurisprudentially. Still, the fact that Gorsuch agreed with Thomas and Alito on 100 percent of the divided criminal cases on which they both took part sends a notable message, as does the fact that Gorsuch agreed with Breyer and Kagan on zero percent of these same cases. Such numbers, as well as other statistics discussed in this article,

strongly suggest that Gorsuch will serve as one of the Court's most predictable politically conservative voters.

With Justice Kennedy contemplating retirement after decades of service on the Court, the eyes of Court commentators are now focused on who, if anyone, will take up Kennedy's mantle as the jurist who steers the Court's direction. This article demonstrated that Chief Justice Roberts may be the likeliest member of the Court to assume this role. Like Kennedy, Roberts unquestionably votes with the Court's conservatives on the majority of divisive issues. Still, this article pointed out that Roberts has a propensity to vote with the Court's liberal justices intermittently, even siding with the liberals in extremely high-profile cases. In fact, during this past term, Roberts's overall record was quite similar to Kennedy's own voting, particularly in divided civil cases. Statistics from the October 2016 term showed that Roberts was both a frequent consensus-builder and a leader on the Court, frequently voting as a member of the Court's majority and amassing an impressive recorded of agreement with colleagues on both sides of the political aisle. Given how comparable these attributes are with the hallmarks of Kennedy's conduct, it would not be surprising to see Roberts become the leader and periodic "swing voter" on the Court after Kennedy's retirement.

Soon, the Court will convene again for another term, this time arriving in Washington, D.C., with a full array of nine justices on the bench from the outset. With so many extremely controversial and highly visible issues slated for review during this term, the justices will be constantly challenged to remain the spirit of consensus that marked significant portions of the prior term. With so many of these upcoming decisions carrying weighty political baggage, people will quickly see whether the justices break from their expected ranks or whether they will continue voting along predictable political lines. When the Court cannot agree on the proper outcome—an event which may occur quite frequently during the upcoming term—the public will also see whether the voting alliances that formed during the October 2016 term remain constant or whether they shift in a particular direction. The extent to which this judicial house is divided, and the locations of any foundational cracks, will soon be on full display again. Perhaps the only question that remains is whether such a structure can continue to properly stand.