UIC Law Review

Volume 52 | Issue 4 Article 1

2019

Justice Anthony Kennedy as Senior Associate Justice: Influence and Impact, 53 UIC J. MARSHALL L. REV. 907 (2019)

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JUSTICE ANTHONY KENNEDY AS SENIOR ASSOCIATE JUSTICE: INFLUENCE AND IMPACT

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I. INTRODUCTION

In a brief note delivered to the White House on June 27, 2018, Justice Anthony Kennedy submitted his resignation as Associate Justice of the United States Supreme Court.[1] At a political event in Fargo, North Dakota later that day, President Donald Trump praised the retiring justice as a "very special guy."[2] Kennedy was appointed to the high court[3] during the Reagan Revolution of the 1980s.[4] Yet, conservatives who had expected him, and other Reagan

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1. Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html.

2. Jessica Taylor, *President Trump: Kennedy Retirement Makes Senate Control 'Vital' for Republican*, NAT'L PUB. RADIO (June 27, 2018), www.npr.org/2018/06/27/624131008/president-trump-kennedy-retirement-makes-senate-control-vital-for-republicans.

3. Linda Greenhouse, *Reagan Nominates Anthony Kennedy to the Supreme Court*, N.Y. TIMES, November 12, 1987, at A1.

4. The Reagan Revolution was a political and ideological transformation cultivated and implemented by President Ronald Reagan through his political campaigns and presidential administration. It attempted to transform economic, bureaucratic, and legal policies to undo elements of the New Deal-era programs instituted by President Franklin Delano Roosevelt and subsequent Democratic administration. The Reagan administration altered the shape of the federal bench by appointing presumptively-supportive conservative jurists to the judgeships. By the conclusion of his two terms in office, Reagan was responsible for the appointment of nearly half of all judges serving on the federal judiciary. *See* Hugh Heclo, *The Mixed Legacies of Ronald Reagan*, 38 PRESIDENTIAL STUD. Q. 555 (2008) (assessing Ronald Reagan's presidency as it related to eight broad categories of the public); MICHAEL MEEROPOL,

judicial appointees, to transform American constitutional law were often disappointed—and angry—about his failure to support the full range of policies propounded by late-twentieth century conservatives.[5] For political conservatives, Kennedy was a disappointing substitute for Judge Robert Bork, President Reagan's outspokenly-conservative and unsuccessful first choice to fill the vacancy opened on the Court by the retirement of Justice Lewis Powell.[6] In particular, Republicans were often disappointed by Kennedy's penchant for casting the fifth and deciding vote in a number of significant cases that sustained and expanded rights and liberties in ways antithetical to conservatives.[7]

When the U.S. Senate unanimously confirmed Kennedy in 1988,[8] he earned the support of many Democrats who believed his approach to constitutional interpretation was more moderate than the approaches of conservatively-doctrinaire Justice Antonin Scalia and Chief Justice William Rehnquist.[9] The hopefulness of liberals was vindicated for some issues as Kennedy regularly produced opinions that protected or expanded civil liberties and due process rights in the areas of abortion, gay rights, and affirmative action.[10] While Kennedy was not consistently liberal in his interpretation of constitutional or statutory provisions,[11] his apparent moderation

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SURRENDER: HOW THE CLINTON ADMINISTRATION COMPLETED THE REAGAN REVOLUTION (1998); Ronald Dworkin, *The Reagan Revolution and the Supreme Court*, N.Y. REV. BOOKS (July 18, 1991), www.nybooks.com/articles/1991/07/18/the-reagan-revolution-and-the-supreme-court/.

5. *See, e.g.*, JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 198-99 (2007) (stating "Ever since his apostasy on abortion in [*Planned Parenthood v. Casey*, 505 U.S. 833 (1992)], Kennedy had been anathema to the conservative movement . . .).

6. David Savage, *To the Dismay of Some, Kennedy's No Bork*, L.A. TIMES (May 22, 1996, 12:00 AM), www.latimes.com/archives/la-xpm-1996-05-22-mn-7044-story.html.

7. Andrew Sullivan, *Anthony Kennedy and the Death of True American Conservatism*, N.Y. MAG. (June 29, 2018), www.nymag.com/intelligencer/2018/06/anthony-kennedy-and-the-death-of-true-american-conservatism.html; Todd Ruger, *Reagan Aides Foresaw Kennedy Gay Rights Views that Conservatives Now Lament*, ROLL CALL (June 26, 2015), www.rollcall.com/news/reagan_aides_foresaw_kennedy_gay_rights_views_that_conservatives_now_lament-242563-1.html.

8. *See* Linda Greenhouse, *Senate, 97 to 0, Confirms Kennedy to High Court*, N.Y. TIMES (Feb. 4, 1988), www.nytimes.com/1988/02/04/us/senate-97-to-0-confirms-kennedy-to-high-court.html (stating the Senate confirmed Kennedy on February 3, 1988).

9. David M. O'Brien, *The Supreme Court: From Warren to Burger to Rehnquist*, 20 PS: POL. SCI. & POL. 12 (1987).

10. *See generally* Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) (reaffirming "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State"); Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016).

11. *See, e.g.*, MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 69-70 (2005) ("This overlooks the

provided assurances that he might be persuaded to sustain freedoms won in legal battles decades earlier.[12]

During the later years of Kennedy's career on the Court, this narrative regarding his role as the moderate "swing justice"[13] dominated the analysis of his tenure on the bench and influence on the law.[14] Discussions of his legacy and the likely impact of his successor often focused on his habit of delivering the "key vote"[15] in cases of public importance while overlooking other roles he played that impacted myriad areas of the law.[16] Kennedy inherited one such role merely due to his longevity on the Court.[17] With the retirement in 2010 of Justice John Paul Stevens, who had served for 35 years on the bench,[18] Kennedy became the "dominant senior associate justice" (dominant SAJ or DSAJ) among his eight colleagues who served as associate justices.[19] The dominant SAJ "is a Justice who—as a result of seniority, the stability of the membership of the Court, and ideological position—dominates the

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fact that O'Connor and Kennedy were conservatives . . . and were perhaps the last representatives of an older, country club Republicanism . . . .").

12. Justice Kennedy was viewed by his liberal colleagues as a generally conservative justice who was amenable to possible persuasion as evidenced, for example, by Justice John Paul Stevens's description of the unsuccessful targeting of Kennedy for conversion in the case that declared the Second Amendment to contain a right for individuals, rather than state militias alone, to possess firearms. JOHN PAUL STEVENS, THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94 YEARS 485 (2019).

13. *See, e.g.*, Peter K. Enns & Patrick C. Wohlfarth, *The Swing Justice*, 75 J. POL. 1089, 1091 (2013) (stating "We define the swing justice as the one who casts the pivotal fifth majority vote in each Supreme Court case").

14. *See, e.g.*, MARCIA COYLE, THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION 79 (2013) (illustrating that "Kennedy voted in four [cases] with the Court's liberal wing and in four with the conservative wing—a sign of his clear emergence as the Court's swing vote . . .").

15. Amy Howe, *Anthony Kennedy, Swing Justice, Announces Retirement*, SCOTUSBLOG (June 27, 2018, 7:01 PM), www.scotusblog.com/2018/06/anthony-kennedy-swing-justice-announces-retirement/.

16. In contrast, scholars have paid attention to other justices' roles other than being the decisive voter in key cases. *See* Christopher E. Smith & Ksenia Petlakh, *The Roles of Justice Sonia Sotomayor in Criminal Justice Cases*, 45 CAP. U. L. REV. 457 (2017) (examining Justice Sotomayor's opinion on criminal justice cases as it relates to her past experience in the legal field); Christopher E. Smith, *The Roles of Justice John Paul Stevens in Criminal Justice Cases*, 39 SUFFOLK L. REV. 719 (2006).

17. Justice Kennedy served on the Supreme Court for 30 years. Robert Barnes, *Justice Kennedy, the Pivotal Swing Vote on the Supreme Court, Announces His Retirement*, WASH. POST (June 27, 2018), www.washingtonpost.com/politics/courts_law/justice-kennedy-the-pivotal-swing-vote-on-the-supreme-court-announces-retirement/2018/06/27/a40a8c64-5932-11e7-a204-ad706461fa4f_story.html.

18. *See* CHRISTOPHER E. SMITH, JOHN PAUL STEVENS: DEFENDER OF RIGHTS IN CRIMINAL JUSTICE 1 (2015).

19. Charles F. Jacobs & Christopher E. Smith, *The Influence of Justice John Paul Stevens: Opinion Assignments by the Senior Associate Justice*, 51 SANTA CLARA L. REV. 743, 753 (2011).

assignment of opinion-writing duties when the Chief Justice is not in the majority."[20] In this role, the dominant SAJ will designate authorship of 50 percent or more of the opinions available to be assigned by a justice other than the chief justice and thereby exceed the number of assignments made by any other associate justice.[21]

The dominant SAJ may or may not also be the senior associate justice (SAJ), a title bestowed upon the longest-serving justice on the high court who does not hold the position of chief justice.[22] With the retirement of Justice Stevens in 2010, that title of SAJ shifted to Justice Scalia who was confirmed to the bench 18 months prior to Kennedy.[23] However, Scalia's judicial philosophy seldom put him at odds with Chief Justice John Roberts (or Chief Justice Rehnquist before him), thereby giving him few opportunities to assign writing duties as an associate justice.[24] Scalia himself suggested the insignificance of the position of SAJ if not concurrently paired with the role of DSAJ.[25] When asked during an interview about his status as the SAJ, he commented that "[a]ll it does for me is I get

20. *Id.*

21. *Id.* The definition of this concept has evolved since first operationalized in 2011. Originally, the variable was defined in such a manner that an associate justice would be recognized as dominant only if she or he assigned more opinions than all of the remaining associate justices combined. However, there are terms of the Court during which a single associate justice assigns exactly half of opinions. In this scenario, one encountered during the final years Kennedy served on the bench, the dominant SAJ still maintains more influence over the process than other associate justices.

22. The longest-serving justice, who is the literal SAJ, has two distinctive roles in sitting next to the chief justice as the center of the bench during oral arguments and speaking second, after the chief justice, when cases are discussed at the Supreme Court's weekly private conference. However, the literal SAJ will not necessarily be in the majority when the chief justice dissents. Thus, the literal SAJ need not necessarily be the dominant SAJ for opinion-assigning purposes. *See* JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 135 (2011) (stating "Seniority determines where each of the nine justices sit. The chief has the center seat, the senior associate sits on his right . . ."); STEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 230 (4th ed. 1993) ("The chief justice makes the initial presentation of a case. . . .Each justice, the most senior justice first and the most junior justice last, then comments.").

23. Justice Scalia was confirmed by the United States Senate on September 17, 1986 by a vote of 98-0. The Senate approved the nomination of Kennedy on February 3, 1988. *See* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATES, DECISIONS, AND DEVELOPMENTS 418-19 (6th ed. 2015).

24. During his time on the bench, Justice Scalia assigned writing duties on 19 occasions including seven that he assigned to himself. In the time that he spent as SAJ, he assigned just 13 opinions to his colleagues, the last in the spring of 2015 during the Court's 2014 term. *See The Supreme Court Database*, WASH. U. LAW, scdb.wustl.edu/index.php (last visited September 12, 2019].

25. Tony Mauro & Marcia Coyle, *Supreme Court Brief: Kavanaugh's First (and Only) SCOTUS Argument; Justice Clarence Thomas in the 'Right' Seat* (July 11, 2018, 7:30 AM), www.law.com/supremecourtbrief/2018/07/11/kavanaughs-first-and-only-scotus-argument-thomas-gets-the-right-seat-400-892/?slreturn=20190603124226.

introduced as the senior associate justice. I feel I ought to come in with a walker. No good otherwise."[26] Hence, the role of literal SAJ is merely honorific, as Scalia bemoaned, serving as a title that bestows little power or responsibility when the judicial philosophy of the SAJ and the Chief Justice align.[27] Because Kennedy disagreed more frequently with Chief Justice Roberts, the position Kennedy inherited granted significantly more substantive responsibility.[28] After Stevens retired in 2010, when Roberts dissented or recused himself from a case for which Kennedy voted with the majority, Kennedy regularly had the power to influence legal reasoning and doctrinal development by choosing the majority opinion's author.[29]

Scholars have recognized the importance of the power to designate the author of majority opinions;[30] a power exercised by the chief justice in most cases.[31] For example, Walter Murphy, a political scientist and prominent constitutional scholar, offered some initial discussion of this process, theorizing that "an astute [c]hief [j]ustice can . . . utilize his opinion-assigning power to increase his influence on the Court."[32] By leveraging this power, Murphy suggested that a strategic assignment—often to a moderate member of the Court—has the capacity to "prevent defections or gain adherents" to the majority position.[33] In doing so, the chief justice may favor certain colleagues with weightier and more significant cases while saddling disfavored colleagues with the burden of crafting opinions for less interesting legal questions or

26. *Id.*

27. *Id.*

28. *See infra* Table 1 (providing the majority opinion assignments by senior associate justices for the 2010 term through the 2017 term).

29. The choice of the justice who will write the majority opinion ultimately affects the tone and content of the opinion, including creating risks that a selected justice in a close-vote case will write an opinion that is too emphatic to retain the support of a majority of justices. *See, e.g.*, CHRISTOPHER E. SMITH, THE SUPREME COURT AND THE DEVELOPMENT OF LAW 144-52 (2016) (describing Justice Potter Stewart removing his decisive support for the initial majority in *Houchins v. KQED*, 438 U.S. 1 (1978) in reaction to the articulation of a strong First Amendment write in the draft majority opinion written by Justice Stevens).

30. *See* DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 306 (3d ed. 1993) (stating "The power of opinion assignment is perhaps a chief justice's 'single most influential function'").

31. For example, in the Supreme Court's 2018 Term, Chief Justice Roberts voted with the majority, and thereby exercised the power to assign the majority opinion, in 85 percent of cases. Adam Feldman, *Final Stat Pack for October Term 2018*, SCOTUSBLOG (June 28, 2019, 5:59 PM), www.scotusblog.com/2019/06/final-stat-pack-for-october-term-2018/ (providing link to Table titled: Frequency in the Majority, www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_30_19-18.pdf).

32. WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 84 (1964).

33. *Id.*

with little likelihood of long-term legal impact.[34]

The value of penning any decision, as Lee Epstein and Jack Knight suggest, is that "the author of the initial opinion draft can significantly affect the policy the Court produces because the opinion writer's first draft establishes the initial position over which justices bargain."[35] Because opinion assignments have consequences for the development of legal doctrine, scholars have focused some attention on the influence the chief justice has on this process including the pattern of assignments and policy outcomes.[36] Given that Justice Kennedy exerted opinion-assigning authority in his role as DSAJ, he deserves examination to determine if discernible patterns or strategies exist that were employed to shape legal policy.[37]

II. THE RECORD OF JUSTICE KENNEDY AS DOMINANT SENIOR ASSOCIATE JUSTICE

After 35 years serving as an associate justice, John Paul Stevens announced his resignation from the bench in April of 2010.[38] For the final 16 years of his tenure, the long-serving justice had acted as both the literal SAJ and DSAJ in the later years of the Rehnquist Court era and first years of the Roberts Court era.[39] Stevens was effectively replaced by Kennedy in the DSAJ role at the opening of the 2010 term of the Court,[40] and Kennedy subsequently assumed the role of literal SAJ with the passing of Scalia in February of 2016.[41] As previously discussed, Scalia's high rate of agreement with Chief Justice Roberts limited his opportunities to assign majority opinions during the six years in which he was SAJ.[42] Kennedy, however, like Stevens before him,[43] had numerous opportunities to make majority opinion assignments because he

34. *Id.*

35. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 126 (1998).

36. *See* Jacobs & Smith, *supra* note 19, at 745-46 (noting that the chief justice is typically part of the majority and hence has significant influence over writing assignments); O'BRIEN, *supra* note 30, at 306-14.

37. *See infra* Table 1 (providing the majority opinion assignments by senior associate justices for the 2010 term through the 2017 term).

38. Robert Barnes, *Justice John Paul Stevens Announces His Retirement from Supreme Court*, WASH. POST (April 10, 2010), www.washingtonpost.com/wp-dyn/content/article/2010/04/09/AR2010040902312_pf.html.

39. Jacobs & Smith, *supra* note 19, at 751-54.

40. *See infra* Table 1 (providing the majority opinion assignments by senior associate justices for the 2010 term through the 2017 term).

41. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?module=Promotron&region=Body&action=click&pgtype=article.

42. *See supra* notes 23-28 and accompanying text (noting data that indicates Scalia's agreement with the chief justice and the limits this place on his ability to exercise his role as SAJ).

43. Jacobs & Smith, *supra* note 19, at 758.

regularly joined liberal majorities when Roberts was among the conservative dissenters.[44] The examination of Kennedy's record as the DSAJ will benefit from a comparison to Stevens, the colleague who preceded him in the position of DSAJ. Comparing Stevens offers insight into the behavior of another associate justice who wielded this significant authority to assign the drafting of case decisions.[45] Such an appraisal will help reveal the existence of patterns or trends and also underscore how differences and similarities between and among DSAJs shape the exercise of the authority granted to those in this position.[46]

Kennedy assumed the role of DSAJ with the start of the 2010 term of the Court, then served eight years in this role.[47] His tenure in this position was half as long as Justice Stevens who was the DSAJ for 16 years.[48] Stevens assigned majority opinion to his colleagues in 177 cases, or 11.1 cases per each term as DSAJ.[49] By contrast, across his entire career on the high court, Kennedy assigned a total of 47 majority opinions as the DSAJ, or nearly a half-dozen each term.[50] As Table 1 shows, Kennedy's role as

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44. *See* Jonathan H. Adler, *Say Good-Bye to the Kennedy Court*, REASON (June 28, 2018), www. reason.com/2018/06/28/say-goodbye-to-the-kennedy-court/ (describing Kennedy's role on the Court including his agreement with the Court's liberals in one-third of cases that deeply-divided the justices).

45. Jacobs & Smith, *supra* note 19, at 748-51.

46. *Id.*

47. *See supra* notes 40-41 and accompanying text (noting that although Scalia was the titular SAJ, Kennedy exercised the power to assign opinions as SAJ with more regularity because he was less often in the majority with the chief justice).

48. Jacobs & Smith, *supra* note 19, at 755.

49. Data for this analysis were collected using *The Supreme Court Database*, *supra* note 24. The total number of case assignments made by both Stevens and Kennedy were determined by using the analytical tools provided by the site that provided the ability to select parameters that help to identify when particular justices assigned the opinion-writing duties. For Justice Stevens, we reviewed his initial year on the bench (the 1975 term) through his retirement after the 2009 term of the Court. For Justice Kennedy, our examination included the 1987 through the 2017 term. For each year, we included only orally argued cases that produced a judgment or opinion of the Court. We excluded all decrees, equally divided cases, as well as per curiam and seriatim opinion from our review—all of which are unlikely to have an identified author who was assigned the job of writing the opinion. For previous research on the behavior of the DSAJ, see Jacobs & Smith, *supra* note 19, at 750 n.45, which utilized a different approach to identifying the assignor of the decision that included a review of opinion-assignment sheets of Chief Justice William Rehnquist and review of the coalition of justices in each case when that resource was unavailable. As a result, there are differences between the total reported previously for Justice Stevens and those presented here—although those differences are small.

50. Kennedy assigned a total of 48 opinions during his time on the Court. However, through a quirk of the seniority possessed by the combination of justices in the majority, he made one assignment in 2007 when all of his colleagues with greater seniority, Stevens and Scalia, joined Roberts as dissenters. That opinion, *Watters v. Wachovia Bank*, 550 U.S. 1 (2007), was assigned by Kennedy to Justice Ruth Bader Ginsburg.

dominant senior associate justice (DSAJ) stems from the fact that he assigned the majority opinion in 47 of the 65 cases during this time period in which Chief Justice Roberts was among the dissenters. In the eighteen cases in which Kennedy did not assign the majority opinion, he joined Roberts among the dissenters, thereby leaving the most senior associate justice in the majority to make the assignment.[51]

During the period that Kennedy served as DSAJ, the justices announced the judgment or opinion of the Court in 527 cases—an average of 65.9 full decisions per year. Senior associate justices assigned 12.3 percent of that total (65 cases) while Kennedy handled 8.9 percent as DSAJ (47 cases) which constituted nearly three-quarters of all SAJ-assigned cases (72.3 percent). Table 1 illustrates that for two of his eight years as DSAJ, Kennedy made all of the assignments not made by the Chief Justice—2015 and 2016. During the 2013 term, he made just half of the assignments, sharing the role of DSAJ with Justice Scalia who made three of the six assignments that fell to associate justices. The greatest number of assignments Kennedy made in a single term was twelve in 2014. The least number of assignments he made in a term was three, in two different terms.[52]

Table 1: Majority Opinion Assignments by Senior Associate Justices, 2010 Term-2017 Term[53]

Term	Total Cases Per Term	Cases Assigned by All SAJs	Percent of Total Cases	Assigned by Kennedy as DSAJ	Percent of SAJ Assignments by Kennedy
2010	75	8	10.7%	4	50.0%
2011	64	8	12.5%	6	75.0%
2012	73	11	15.1%	7	63.6%
2013	67	6	9.0%	3	50.0%
2014	66	15	22.7%	12	80.0%
2015	62	7	11.3%	7	100.0%
2016	61	5	8.2%	5	100.0%
2017	59	5	8.5%	3	60.0%
Total	527	65	12.30%	47	72.3%

As Table 2 illustrates, Stevens's time as the dominant SAJ differed from that of Kennedy in several ways. First, the Court heard 1,206 total cases over the 16-year period under review, nearly

51. For example, during the 2016 Term, Justice Kennedy and Chief Justice Roberts were together among the dissenters in only two cases, which included *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) and *Patchak v. Zinke*, 138 S. Ct. 897 (2018). In *Sessions*, 138 S. Ct. 1204, Justice Ruth Bader Ginsburg was the senior associate justice in the majority and she assigned the majority opinion to Justice Elena Kagan. In *Patchak*, 138 S. Ct. 897, Justice Clarence Thomas was the senior associate justice in the majority and he assigned the plurality opinion to himself.

52. *The Supreme Court Database*, *supra* note 24.

53. *Id.*

10 more cases per year than when Kennedy held position as DSAJ.[54] Of that total, SAJs assigned writing responsibility in 15.7 percent of all cases, and Stevens as DSAJ assigned authorship in 14.7 percent of the decisions—higher percentages than Kennedy in both instances. Notably, 93.7 percent of all opinion-writing assignments by SAJs were made by Stevens, eclipsing the proportion made by Kennedy by more than 20 percent. This difference is likely attributable to the ideological position of each justice in relation to their colleagues. Stevens, as the most liberal member of the Court during his tenure as DSAJ, was not likely in the minority with conservative Chief Justices Rehnquist and Roberts. Unlike Stevens, Kennedy was the median justice—a position often synonymously termed "the swing justice." Sitting as he did in this location, it was more likely that he would find himself in majorities constituted by conservatives that included Chief Justice Roberts as well as more frequently in dissent when Chief Justice Roberts also dissented. Opportunities to assign majority opinion-writing duties as the SAJ in the majority and the attendant ability to exert influence over the content of decisions are affected by the frequency of disagreement between the chief justice and the SAJ.[55]

Table 2: Majority Opinion Assignments by Senior Associate Justice, 1994 Term-2009 Term[56]

Term	Total Cases Per Term	Cases Assigned by All SAJs	Percent of Total Cases	Assigned by Stevens as DSAJ	Percent SAJ Assignments by Stevens
1994	82	13	15.9%	13	100%
1995	77	11	14.3%	11	100%
1996	80	10	12.5%	10	100%
1997	91	10	11.0%	10	100%
1998	77	14	18.2%	14	100%
1999	75	9	12.0%	9	100%
2000	78	15	19.2%	13	86.7%
2001	76	13	17.1%	12	92.3%
2002	72	9	12.5%	9	100%
2003	72	14	19.4%	14	100%
2004	74	25	33.8%	22	88%
2005	71	8	11.3%	8	100%
2006	67	10	14.9%	8	80%
2007	67	8	11.9%	7	87.5%
2008	74	14	18.9%	12	85.7%
2009	73	6	8.2%	5	83.3%
Total	1206	189	15.7%	177	93.7%

54. *Id*.

55. *Id*. Prior to Stevens assuming the role of DSAJ (the terms from 1975 until 1993), Stevens was in the Court majority 58.7 percent of the time. For the 16 terms he served as DSAJ (1994 to 2009), he found himself in the majority 59.4 percent of the time. For Kennedy, prior to becoming DSAJ (1987 to 2009), he joined the majority in 74.9 percent of all cases. During the eight terms he served as DSAJ, that number rose to 86 percent.

56. *Id*.

Table 3 presents a comparison of majority opinion-writing assignments by Justice Kennedy and Stevens across the issues categories in which each made the greatest number of assignments. The list constitutes half of the fourteen issue areas used for classifying cases in the Supreme Court Database.[57] During their time as DSAJ, both Kennedy and Stevens allocated the greatest percentage of cases in the area of criminal procedure—38 percent for Kennedy and 35 percent for Stevens. This is not surprising as criminal procedure cases constituted more than 25 percent of all cases on the Court's docket during period when Stevens became DSAJ in 1994 until Kennedy's departure from the bench in 2017.[58]

Table 3: Number and Percentage of Majority Opinion Assignments Made (per Issue Area): A Comparison of Justices Kennedy and Stevens[59]

Issue Area	Number of Majority Opinion Assignments Made: Kennedy	Number of Majority Opinion Assignments Made: Stevens	Percentage Of Total Assignments Made: Kennedy (N=47)	Percentage Of Total Assignments Made: Stevens (N=177)
Criminal Procedure	18	62	38.2%	35.0%
Economic Activity	10	20	21.3%	11.3%
Civil Rights	9	32	19.1%	18.1%
Due Process	4	6	8.5%	3.4%
Judicial Procedures	2	16	4.3%	9.0%
Federalism	2	13	4.3%	7.3%
First Amendment	0	16	0.0%	9.0%

Of the issue categories in the Supreme Court Database, Criminal Procedure is the umbrella classification for the largest number of sub-issues (60) among any issue areas.[60] The second most numerous area of law assigned by Kennedy concerned disputes related to economic questions (21 percent) followed closely by civil rights issues (19 percent). For Stevens, the order of the second and third categories were flipped—18 percent of his assignments were for civil rights cases and 11 percent for questions regarding economic issues. For both justices, the percentage of total assignments constituted by these three areas of law was quite

57. The Supreme Court Database uses the following categories to classify cases: Attorneys; Civil Rights; Criminal Procedure; Due Process; Economic Activity; Federal Taxation; Federalism; First Amendment; Interstate Relations; Judicial Power; Miscellaneous; Privacy; Private Action; Unions. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

large—64 percent for Stevens and 78 percent for Kennedy—suggesting that these issue areas were relatively numerous and most frequently divided the justices in ways that placed conservative chief justices among the dissenters.

An additional 18 percent of the cases Stevens assigned were in the areas of the First Amendment and judicial procedures, each constituting nine percent of all opinions for which he chose the majority opinion writer. Kennedy's next largest assignment area involved questions of due process for which he assigned a total of four cases or 8.5 percent of the total. In no other category of law did Kennedy assign writing duties in more than two cases. The longer time period for which Stevens was DSAJ, as well as his greater frequency of disagreement with conservative Chief Justices Rehnquist and Roberts, provided him with a larger number of cases in which to assign opinions and also shaped the issue areas in which those assignments were made.[61]

Table 4 provides a summary of the assignment choices made by Justice Kennedy in his role as DSAJ. Although we cannot know the reasons for the choices made concerning each case or issue, lurking within these decisions are assignment strategies that justices acknowledge as factors that drive the selection of majority opinion writers.[62] The strategies employed by majority opinion assigners, whether chief justices or SAJs, include consideration of both the issue area and the tone of opinions typically written by individual justices.[63] Opinion assigners can write majority opinions themselves "as a means of advancing [their] values and policy preferences."[64] Alternatively, opinion assigners may use other strategies to shape legal doctrines and solidify majority support for a case outcome:

> If the chief justice or senior majority justice wishes to establish a strong, clear precedent, he or she may assign the opinion to the most outspoken member of the majority. If he or she fears that some members of the majority are wavering, he or she may avoid a strident opinion that might drive less committed justices over to the other side.[65]

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61. *See* Christopher E. Smith, Madhavi M. McCall & Michael A. McCall, *The Roberts Court and Criminal Justice: An Empirical Assessment*, 40 AM. J. CRIM. JUST. 416, 422 (2015) (showing the agreement rate for Roberts and Stevens in criminal justice cases was lower than that for Roberts and any other justice).

62. *See, e.g.*, Jeffrey Rosen, *The Dissenter*, N.Y. TIMES MAG., Sept. 23, 2007, at 53 (Justice Stevens acknowledged during an interview that he assigned majority opinions in close cases to "somebody [who] might not be solid" in order to have them strengthen his or her own views by writing the majority's reasoning.).

63. CHRISTOPHER E. SMITH, COURTS, POLITICS, AND THE JUDICIAL PROCESS 269 (2d ed. 1997).

64. *Id.*

65. *Id.*

Table 4: Justice Kennedy's majority opinion assignments as DSAJ, by Author and Issue Area[66]

Justice	Criminal Procedure	Economic Activity	Civil Rights	Due Process	Other
Kennedy	5	3	4	4	1
Breyer	4	2	4	0	2
Ginsburg	2	1	1	0	2
Sotomayor	4	1	0	0	1
Kagan	2	2	0	0	0
Alito	1	0	0	0	0
Thomas	0	1	0	0	0
TOTAL (N=47)	18	10	9	4	6

Kennedy, like Stevens before him, self-assigned the greatest number of opinions by awarding themselves 36.2 and 33.3 percent of cases, respectively.[67] Kennedy took for himself more cases than he assigned to any other justice in the three of the four most frequently-arising issue areas, and he shared the top spot with Justice Stephen Breyer in one classification—civil rights cases. Obviously, self-assignment provides the most direct opportunity to shape legal doctrine and such opportunities may be difficult to resist when a DSAJ has strong views about how the majority opinion should be crafted.[68] As prior research has shown, SAJs are most likely to assign majority opinions to justices who are close to sharing their own judicial philosophies for a particular issue.[69] Hence, it is unsurprising that Kennedy made so many assignments to Breyer. For example, Justice Breyer had the highest rate of agreement with Kennedy on criminal justice-related issues when Chief Justice Roberts is excluded from consideration, as Roberts must be for this analytical point because Kennedy's assignment opportunities only arose when he disagreed with a dissenting Roberts.[70]

III. ASSESSING THE IMPACT OF JUSTICE KENNEDY AS DOMINANT SENIOR ASSOCIATE JUSTICE

An SAJ could distribute majority opinion assignments like dealing a deck of cards around a table, if imposing equal opinion-writing responsibilities on majority members was the sole criterion

66. *The Supreme Court Database*, *supra* note 24.

67. Jacobs & Smith, *supra* note 19, at 758.

68. *See, e.g.*, FORREST MALTZMAN, JAMES F. SPRIGGS & PAUL J. WAHLBECK, CRAFTING THE LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 56 (2000) (stating "Associate justices, like chief justices, also pursue their policy preferences by giving desirable assignments to those with whom they agree (frequently themselves)").

69. *Id.*

70. Smith, McCall, & McCall, *supra* note 61, at 422.

for assignments.[71] However, SAJs are known to make strategic decisions in assigning majority opinions.[72] For example, Justice Stevens appeared to target Justice Kennedy, in particular, with assignments.[73] Many observers presume that Kennedy, as the median "swing justice" in the Court's ideological spectrum,[74] was the colleague whom Stevens feared was most likely to defect to the other side during the weeks or months of the opinion-drafting process if Kennedy was not actively involved in and putting his own imprint upon that process.[75] By contrast, Kennedy was his own "defector" from the conservative wing in many of the 5-4 liberal decisions during his SAJ service on the Roberts Court.[76] Thus, he did not need to worry about losing a vote during the opinion-writing process. As DSAJ, Kennedy was not at risk of losing his own decisive vote in those cases for which he gained opinion-assignment duties—especially when voting with the Court's four most liberal justices.[77]

It is important to remember that Kennedy did not choose these issues as part of an agenda to influence the development of law by knowing that he would write majority opinions in these cases.[78]

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71. Research indicates that, unlike chief justices who consider equitable distribution of assignments as a factor in making opinion assignments, SAJs do not appear to include that consideration in choices about to whom a majority opinion should be assigned:

> [Associate justices] appear unaffected by many of the contextual factors that shape the chief's assignments. Associate justices during the Burger Court did not favor justices with lighter workloads or justices failing to carry their fair share of the opinion-writing burden. While the chief's institutional responsibilities limited his ability to pursue preferred legal outcomes, senior associate justices did not experience such a constraint.

MALTZMAN, SPRIGGS, & WAHLBECK, *supra* note 68, at 56 (discussing the development of law through the process of decision writing).

72. *See supra* notes 61-68 and accompanying text.

73. Jacobs & Smith, *supra* note 19, at 759-61.

74. Enns & Wohlfarth, *supra* note 13, at 1095; Howe, *supra* note 15.

75. *See, e.g.*, Jacobs & Smith, *supra* note 19, at 761 (explaining "Justice Stevens may have assigned the [privacy rights] opinions to Justice Kennedy for fear that opinions written in a too-liberal manner may have lost the votes of both Justices Kennedy and O'Connor and thereby turned the outcome in a different and, in the view of Justice Stevens, undesirable direction").

76. *See, e.g.*, Smith, McCall & McCall, *supra* note 61, at 426-27 (Kennedy was the conservative justice who most frequently parted company with his typically like-minded colleagues in order to create a five-member majority in support of a liberal outcome in criminal justice cases).

77. *Id.* (The opinion author cannot risk losing the least-committed voter in a five-justice majority by writing a too-strong opinion when it is the opinion author, him- or herself, who is the least committed voter, as was typically the case for Kennedy when he wrote on behalf of his four liberal colleagues).

78. All of the Court's justices participate in selecting cases for hearing, typically without knowing with certainty in advance how each justice will vote in every case. *See* PAMELA C. CORLEY, ARTEMUS WARD, & WENDY L. MARTINEK, AMERICAN JUDICIAL PROCESS: MYTH AND REALITY IN LAW AND COURTS 382-92 (2016) (description of involvement of nine justices and 36 law clerks in the process of sifting through thousands of petitions in order to select fewer than

These issues happened to be the ones that divided the Court, and left Kennedy in disagreement with Chief Justice Roberts. Certain types of issues that generated such divisions in multiple cases, especially LGBTQ equality,[79] criminal sentencing,[80] and representation by counsel,[81] constituted a significant portion of the cases in which Kennedy made assignment decisions. Within these issues, Kennedy's influence can be seen in the cases for which he chose to shape the law by writing the majority opinions himself.[82]

A. Legal Protections for LGBTQ Persons

During his service as dominant SAJ, Justice Stevens assigned Justice Kennedy the responsibility for two path-breaking majority opinions providing constitutional recognition of and protection for LGBTQ persons.[83] In *Romer v. Evans*,[84] Kennedy wrote for a six-member majority in a case concerning a Colorado ballot initiative that barred municipalities in that state from enacting anti-discrimination ordinances to protect gays and lesbians from unfair treatment in housing, employment, and other important aspects of life.[85] Justice Kennedy's majority opinion invalidated the Colorado voters' decision on equal protection grounds and thereby freed municipalities to expand legal protections.[86] Until that moment, discrimination against LGBTQ persons was so pervasive, longstanding, and widely-accepted that many feared the Supreme Court would never act against it.[87]

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100 cases for complete hearings and decisions). Thus, Kennedy's votes to grant certiorari were made without him knowing with certainty either how the justices would ultimately vote on the merits or who would be assigned the majority opinion.

79. *See infra* notes 83-102 and accompanying text (providing examples of cases that included issues concerning same-sex marriage).

80. *See infra* notes 126-147 and accompanying text (providing examples of cases that included issues about defendants' mental capacity and life sentences for juveniles).

81. *See infra* notes 148-159 and accompanying text (providing examples of cases that included issues regarding defense attorneys' responsibilities during plea negotiations).

82. *See infra* notes 103-123 and accompanying text (providing examples of cases that included cases about issues concerning federal antidiscrimination laws).

83. *Romer*, 517 U.S. 620; *Lawrence*, 539 U.S. 558; *see* Jacobs & Smith, *supra* note 19, at 766-67 (discussing the role of the Chief Justice in the process of assigning the duty to draft an opinion).

84. *Romer*, 517 U.S. at 620.

85. *Id.* at 623-25.

86. *Id.* at 635-36.

87. *See, e.g.*, Linda Greenhouse, *The Gay Rights Ruling: The Ruling; Gay Rights Laws Can't Be Banned, High Court Rules*, N.Y. TIMES (May 21, 1996), https://www.nytimes.com/1996/05/21/us/gay-rights-ruling-ruling-gay-rights-laws-can-t-be-banned-high-court-rules.html (stating "The lawyer for the Lambda Legal Defense and Education Fund, who worked on the case said the

A few years later, Stevens assigned Kennedy the majority opinion in *Lawrence v. Texas*,[88] the landmark decision that broke new ground in its declaration regarding liberty interests that provide constitutional protection for consensual, non-commercial, private sexual conduct for all adults.[89] The decision invalidated the Texas sodomy statute that authorized criminal prosecution for same-sex sexual conduct and forthrightly overturned the Court's existing precedent from *Bowers v. Hardwick*.[90] As described by Jeffrey Toobin:

> There was no mistaking the significance of Kennedy's opinion. The point was not that the Court was halting sodomy prosecutions, which scarcely took place anymore. Rather, the Court was announcing that gay people could not be branded as criminals simply because of who they were. They were citizens. They were like everyone . . . . The people who had devoted their lives to that cause understood precisely what had happened, which was why, to a degree unprecedented in the Court's history, the benches [in the courtroom] were full of men and women sobbing with joy.[91]

Justice Kennedy's important role in writing opinions concerning equality led observers to speculate that he saw the Court's provision of legal protection to LGBTQ persons as part of his personal legacy in constitutional law.[92] Thus, it was no surprise to such observers when Kennedy assigned himself the majority opinion in *Windsor v. United States*[93] after he inherited the role of DSAJ at the time of Justice Stevens's 2010 retirement from the Court.[94] The case concerned two women who resided in New York and married in Canada prior to the legality of such marriages in the United States.[95] When one died, her spouse sought benefits through

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decision marked 'a historic shift in the Court's response to anti-gay discrimination'").

88. *Lawrence*, 539 U.S. 558.

89. *Id.* at 578.

90. *Id.*

91. TOOBIN, *supra* note 5, at 190.

92. Even when ruling in a manner contrary to the preferences of LGBTQ equality advocates, Kennedy emphasized his commitment to his legacy on equality for this group that continues to be victimized by differential treatment. *See* Joan Biskupic, *Kennedy Keeps Eye Toward Legacy in Same-sex Wedding Cake case*, CNN (June 4, 2018), https://www.cnn.com/2018/06/04/politics/anthony-kennedy-same-sex-marriage-colorado-baker/index.html (stating "Supreme Court Justice Anthony Kennedy tried to make clear on Monday that he was not retreating from his landmark 2015 decision allowing same-sex marriage nationwide, while he sided with a Colorado baker who refused to create a wedding cake for two gay men").

93. Windsor v. United States, 570 U.S. 744 (2013).

94. Sheryl Gay Stolberg & Charlie Savage, *Stevens's Retirement is Political Test for Obama*, N.Y. TIMES (Apr. 9, 2010), https://www.nytimes.com/2010/04/10/us/politics/10stevens.html.

95. Robert D. McFadden, *Edith Windsor, Whose Same-Sex Marriage Fight Led to Landmark Ruling, Dies at 88*, N.Y. TIMES (Sept. 12, 2017), https://www.nytimes.com/2017/09/12/us/edith-windsor-dead-same-sex-

the spousal exemption to the federal estate tax.[96] The U.S. Internal Revenue Service denied these benefits based on the federal Defense of Marriage Act (DOMA), a statute enacted by Congress in 1996 that defined "marriage" solely as the legal union between one man and one woman.[97] In his *Windsor* opinion on behalf of a five-member majority, Justice Kennedy struck down DOMA as violating the equal protection guarantee contained in the Fifth Amendment Due Process Clause.[98]

Two years later, Justice Kennedy cemented his legacy as the Court's foremost protector of equal rights for LGBTQ persons by assigning himself the majority opinion in the 5-4 decision in *Obergefell v. Hodges*.[99] This case produced the blockbuster decision declaring that states' prohibitions on same-sex marriages violate the fundamental right to marry, a liberty protected by the Fourteenth Amendment.[100] Kennedy's opinion in *Windsor* clearly set the stage for this additional step in marriage equality.[101] Unquestionably, the *Obergefell* decision will be regarded as transformational in expanding liberty and equality for people whose personal relationship decisions were long excluded from constitutional protection.[102]

B. Other Controversial Equality Issues

Conservatives and liberals have long debated what evidence should be required to establish a violation of federal anti-discrimination laws.[103] At the heart of the debate is whether an intent to discriminate must be proven or whether discrimination can be established by pointing to racial disparities in the aftermath of decisions.[104] These disagreements have occurred continuously since the Supreme Court began examining cases under federal employment discrimination statutes that examined whether

marriage-doma.html.

96. *Id.*

97. *Id.*

98. *Windsor*, 570 U.S. 744 (stating equal protection guards against discriminatory actions by the federal government).

99. *Obergefell*, 135 S. Ct. 2584.

100. Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), https://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html.

101. *Id.*

102. Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 147 (2015).

103. Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After Inclusive Communities,* 101 CORNELL L. REV. 1115, 1120-27 (2016).

104. *See, e.g.*, Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395 (2011) (discussion of theories and approaches for proving discrimination, including existence or lack thereof of specific policies producing discrimination).

apparently neutral employment criteria and practices produced racial and gender disparities in hiring.[105] Central to the debate is differing interpretations and conclusions about the intent of Congress in enacting, amending, and renewing anti-discrimination statutes.[106]

In *Texas Department of Housing v. Inclusive Communities Project, Inc.*,[107] the justices split along liberal-conservative dimensions concerning this debate with respect to enforcement of the Fair Housing Act.[108] In effect, Justice Kennedy cast the deciding vote. He assigned himself the majority opinion on behalf of a five-member liberal majority to declare that discrimination could be established by disparate impact theory.[109] The case concerned whether the use of federal tax credits in Texas had the impact of increasing racial segregation by concentrating construction of low-income housing in central city areas rather than suburbs.[110] This continuing controversy stands out as a prime example of a Supreme Court doctrine that could change in light of Justice Kennedy's replacement by the presumptively-more-conservative Justice Brett Kavanaugh.[111]

Justice Kennedy similarly cast a deciding vote and assigned himself the majority opinion in a 4-3 decision in *Fisher v. University of Texas* endorsing considerations of race in affirmative action efforts within universities.[112] Affirmative action in university admissions had divided the Court beginning with its first decision on the issue in *Regents of the University of California v. Bakke*.[113] After the Court's composition changed significantly in the quarter-century after *Bakke*,[114] the justices reconsidered the issue in cases

105. *Id.*

106. Ann C. McGinley, *Ricci v. DeStefano: Diluting Disparate Impact and Redefining Disparate Treatment*, 12 NEV. L.J. 626, 631 (2012).

107. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015).

108. *Id.*

109. Bagenstos, *supra* note 103, at 1127-31.

110. Alana Samuels, *Supreme Court vs. Neighborhood Segregation*, THE ATLANTIC (June 25, 2015), https://www.theatlantic.com/business/archive/2015/06/supreme-court-inclusive-communities/396401/.

111. Adam Liptak, *How Brett Kavanaugh Would Transform the Supreme Court,* N.Y. TIMES (Sept. 2, 2018), https://www.nytimes.com/2018/09/02/us/politics/judge-kavanaugh-supreme-court-justices.html ("'The key is . . . the many areas where Kennedy was with the liberals in 5-4 decisions . . . [including] allowing proof of discrimination based on disparate impact. In all of these areas of law, Kavanaugh replacing Kennedy will likely mean a significant change.'"); *see also* Kevin Cope & Joshua Fischman, *It's Hard to Find a Federal Judge More Conservative than Brett Kavanaugh*, WASH. POST (Sept. 5, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/09/05/its-hard-to-find-a-federal-judge-more-conservative-than-brett-kavanaugh/?utm_term=.27818d1b1835.

112 *Fisher*, 136 S. Ct. 2198.

113. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

114. Twenty-five years after *Bakke*, only two justices—Rehnquist and

challenging the use of race as a factor in admissions at the University of Michigan.[115] In a major controversial opinion for a deeply-divided Court, Justice O'Connor, in *Grutter v. Bollinger*,[116] approved the continuation of racial considerations in admissions as long as it was just one component of a process examining an array of factors.[117] In that case, Justice Kennedy wrote a dissenting opinion to complain that O'Connor and the majority had failed to apply the "strict scrutiny" standard required by Justice Powell's foundational opinion in *Bakke*.[118] In its first iteration in *Fisher*, Chief Justice Roberts assigned Justice Kennedy the responsibility for writing the majority opinion that remanded a white student's challenge to the use of race as a consideration in admission to the lower court.[119] In light of his prior dissent in *Grutter*,[120] some observers anticipated that Justice Kennedy could be part of a slim majority to reject this form of affirmative action in university admissions[121] when the *Fisher* case reached the Court a second time and was decided in 2016.[122] However, Kennedy stood with the liberal justices and spoke on their behalf in approving the Texas practices, thereby continuing the opportunity for universities to include race considerations in admissions in order to facilitate a diverse student body.[123] As with disparate impact theory,[124] the legal community will be watching closely to see if this might be another precedent susceptible to change through a decisive vote in a different direction by Kennedy's replacement, Justice

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Stevens—remained from the nine decisionmakers who issued the seminal affirmative action decision in 1978. *See* Christopher E. Smith & Madhavi McCall, *Criminal Justice and the 2002-2003 United States Supreme Court Term*, 32 CAP. U. L. REV. 859, 869 (2004) (listing justices serving in 2003); *see also* CHRISTOPHER E. SMITH, THE REHNQUIST COURT AND CRIMINAL PUNISHMENT 24-29 (1997) (description of post-*Bakke* appointees who were serving in 2003: Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter, Clarence Thomas, Ruth Bader Ginsburg, and Stephen Breyer).

115. *See* TUSHNET, *supra* note 11, at 226-39 (discussing *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

116. *Grutter*, 539 U.S. 306.

117. STEVENS, *supra* note 12, at 398-401.

118. FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY 126-28 (2009).

119. Fisher v. Univ. of Tex., 570 U.S. 297 (2013).

120. COLUCCI, *supra* note 118118.

121. Garrett Epps, *Is Affirmative Action Finished?*, ATLANTIC (Dec. 10, 2015), https://www.theatlantic.com/politics/archive/2015/12/when-can-race-be-a-college-admissions-factor/419808/.

122. *Fisher*, 136 S. Ct. 2198.

123. Adam Liptak, *Supreme Court Upholds Affirmative Action Program at the University of Texas*, N.Y. TIMES (June 23, 2016), https://www.nytimes.com/2016/06/24/us/politics/supreme-court-affirmative-action-university-of-texas.html.

124. *See supra* notes 104-13 and accompanying text.

Kavanaugh.[125]

C. Criminal Sentencing

Justice Kennedy influenced the reasoning behind divisive issues surrounding criminal sentencing through assignments in cases that produced liberal outcomes. He assigned himself the majority opinion in *Hall v. Florida*, a 5-4 decision concerning the death penalty for adults with intellectual disabilities.[126] Previously, in *Atkins v. Virginia*, Justice Stevens, a dominant SAJ, had self-assigned a controversial majority opinion that declared the death penalty could not be imposed on homicide offenders with developmental disabilities.[127] The state of Florida responded to that opinion by setting the minimum IQ test score threshold for death penalty eligibility at 71.[128] Hall, who was convicted of murder, scored 71 on the test and was sentenced to death.[129] Justice Kennedy's majority opinion rejected Florida's rigid reliance on a single test score by noting that psychiatric professionals do not treat such tests as having sufficient precision and, therefore, science-based evaluations of intellectual disabilities are determined by examining and considering a number of factors.[130]

In several related cases, Justice Kennedy divided the assignments among several justices. He assigned Justice Ginsburg the responsibility for writing on behalf of a 5-3 majority in *Moore v. Texas*.[131] Justice Ginsburg's opinion declared that the Texas appellate court failed to follow the Supreme Court's precedent in *Hall*.[132] Therefore, Texas violated the Eighth Amendment by using an outdated definition of intellectual disability for purposes of determining eligibility for capital punishment.[133] In *Brumfield v. Cain*, on a related statutory issue based on an assignment from Kennedy, Justice Sotomayor's majority opinion declared that the Anti-Terrorism and Effective Death Penalty Act could not block a Louisiana prisoner on death row from seeking a hearing on the extent of his intellectual disability via the habeas corpus process.[134] In *McWilliams v. Dunn*, Justice Breyer received the majority opinion assignment and declared that Alabama had failed to fulfill

125. Lorenzo Arvanitis & Serena Cho, *Kavanaugh Poses a Potential Threat for Affirmative Action, Experts Say,* YALE DAILY NEWS (Oct. 15, 2018), https://yaledailynews.com/blog/2018/10/15/kavanaugh-poses-a-potential-threat-for-affirmative-action-experts-say/.

126. Hall v. Florida, 572 U.S. 701 (2014).

127. Atkins v. Virginia, 536 U.S. 304 (2002).

128. *Hall*, 572 U.S. at 704.

129. *Id.*

130. *Id.* at 712-14.

131. Moore v. Texas, 137 S. Ct. 1039 (2017).

132. *Id.* at 1049.

133. *Id.* at 1050.

134. Brumfield v. Cain, 135 S. Ct. 2269 (2015).

its constitutional duty to provide a death penalty defendant with a mental health expert to address questions related to a psychiatric evaluation of the accused's capacity and culpability.[135] For another sentencing issue, he also assigned Justice Kagan the landmark majority opinion in *Miller v. Alabama* declaring that the Eighth Amendment's Cruel and Unusual Punishment Clause precludes subjecting juvenile homicide offenders to mandatory sentences of life without parole.[136] Her opinion in *Miller* also concerned mental capacity issues by recognizing prior precedents that focused on the less-than-fully-developed brains and thinking capacity of teenagers.[137]

Clearly, issues of mental capacity divided the Court and led Kennedy to side with the liberals for issues concerning matters such as developmental disabilities, psychiatric evaluation, and juveniles' brain development.[138] Justice Kennedy had previously written the majority opinion in *Graham v. Florida*, declaring that juveniles could not receive life-without-parole sentences for non-homicide offenses.[139] He did not self-assign in *Graham*, as both Chief Justice Roberts and then-dominant SAJ Justice Stevens concurred in the result.[140] In 2005, Justice Kennedy also wrote the majority opinion in *Roper v. Simmons*, the landmark 5-4 decision declaring that the Eighth Amendment barred the imposition of a death sentence on juvenile defendants for crimes committed prior to reaching age eighteen.[141] The opinion in *Roper* relied on emerging understandings from neuroscience about the continuing development of juveniles' brains that impeded complete understanding of risks and consequences and, therefore, justified different punishments than those imposed on adults.[142] Justice Kennedy's experience in writing these opinions may have built his interest and expertise in sentencing issues relating to mental capacity and developmental disabilities.[143] Much like the series of cases that established Kennedy's legacy with respect to rights for LGBTQ persons, Kennedy established a parallel, albeit less recognized, liberal legacy as the Court's leader for these issues.[144]

The Court experienced similar divisions for statutory

135. McWilliams v. Dunn, 137 S. Ct. 1790 (2017).

136. Miller v. Alabama, 567 U.S. 460 (2012).

137. *Id.* at 471-72.

138. *See supra* notes 126-37 and accompanying text.

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

140. *Id.*

141. Roper v. Simmons, 543 U.S. 551 (2005).

142. *Id.* at 570-75.

143. *See, e.g.*, Tamar R. Birckhead, *Graham v. Florida: Justice Kennedy's Vision of Childhood and the Role of Judges*, 6 DUKE J. CONST. L. & PUB. POL'Y 66, 66 (2010) (stating "His view of childhood and the proper role of judges is consistent: children and adolescents are unformed works in progress, in the midst of both character and brain development").

144. *See supra* notes 83-102 and accompanying text.

sentencing issues concerning the applicability of federal sentencing guidelines. In *Freeman v. United States*, Justice Kennedy self-assigned the Court's plurality opinion declaring that a defendant who agreed to a specific sentence in a plea agreement could benefit from the U.S. Sentencing Commission's subsequent retroactive reduction for the presumptive sentence for his offense.[145] In the latter case of *Hughes v. United States*, Kennedy's self-assigned majority opinion put his *Freeman* plurality reasoning firmly into precedential law by gaining the additional support of Justices Sotomayor and Gorsuch for a six-member majority supporting requests for sentence reductions by federal drug offenders after retroactive changes by the U.S. Sentencing Commission.[146] In *Dorsey v. United States,* an earlier case concerning a parallel retroactivity issue, Justice Kennedy assigned the majority opinion to Justice Breyer in a 5-4 decision granting retroactive benefits to affected offenders convicted prior to congressional passage of the Fair Sentencing Act.[147] Because these statutory sentencing issues divided the Court in a way that placed Kennedy with a liberal majority, they created opportunities for him to use his DSAJ authority to influence the development of law through the assignment of opinions.

D. Representation by Counsel

Issues surrounding the right to presence of, representation by, and effective assistance from counsel divided the Court in ways that separated Justice Kennedy from Chief Justice Roberts with respect to several issues. Indeed, the gulf between conservative and liberal justices on this issue in the Roberts Court era seems to be ever-widening as Justices Thomas and Gorsuch have presented an originalist challenge to the idea that the Sixth Amendment should actually require appointment of counsel to indigent criminal defendants, let alone further require such representative to be effective.[148]

Justice Kennedy self-assigned two majority opinions addressing responsibilities of criminal defense attorneys in plea negotiations.[149] In *Missouri v. Frye,* an attorney representing a man with multiple convictions for driving with a revoked license received a prosecutorial offer recommending a 90-day jail sentence in exchange for a guilty plea to a reduced misdemeanor charge.[150] The

145. Freeman v. United States, 564 U.S. 522 (2011).

146. Hughes v. United States, 138 S. Ct. 1765 (2018).

147. Dorsey v. United States, 567 U.S. 260 (2012).

148. Garza v. Idaho, 139 S. Ct. 738, 756-759 (2019) (Thomas, J., dissenting).

149. Missouri v. Frye, 566 U.S. 134 (2012); Lafler v. Cooper, 566 U.S. 156 (2012).

150. *Frye*, 132 S. Ct. at 138.

attorney never communicated that offer to his client.[151] Instead, the client was sentenced to three years in prison after conviction on a felony charge for the offenses.[152] On behalf of a five-member majority, Kennedy declared that criminal defense attorneys have an obligation to inform their clients about plea agreements offered by the prosecution.[153]

In the companion case of *Lafler v. Cooper* that involved a non-fatal shooting, the defendant communicated to the court a willingness to plead guilty in exchange for several dropped charges and a sentence of 51 to 85 months in prison.[154] However, the attorney persuaded the defendant to withdraw any formal acceptance of the offer and instead go to trial because the attorney gravely misunderstood the elements of assault with intent to murder.[155] The defendant was convicted at trial on all charges and sentenced to 185 to 360 months in prison—a minimum period of incarceration that was nearly four times greater than that contained in the offer he declined on the mistake-driven advice of his attorney.[156] Justice Kennedy's majority opinion found a violation of the right to effective assistance of counsel should exist when a defendant declines a plea agreement due to his attorney's advice based on an erroneous understanding of applicable law.[157]

Justice Kennedy assigned two other counsel-related cases to Justice Breyer, his most like-minded colleague, in cases with liberal outcomes. In *Turner v. Rogers*, Breyer wrote for a five-member majority in identifying a due process-based right to counsel, or equivalent safeguards, for people facing the possibility of jail as a result of a failure to pay child support.[158] The other Breyer opinion in *Trevino v. Thaler* granted to a Texas death row inmate the opportunity to raise ineffective assistance of counsel claims belatedly as part of habeas corpus review when that state's procedures did not provide a realistic opportunity for the claim to be raised earlier on direct appeal.[159]

E. Other Criminal Justice Issues

Justice Kennedy asserted himself as the opinion writer in two other important cases with slim five-member majorities. In *Williams v. Pennsylvania*, in the course of a post-conviction proceeding in state court, a convicted death row offender submitted

151. *Id.*
152. *Id.* at 1405.
153. *Id.* at 1408.
154. *Lafler*, 132 S. Ct. at 160.
155. *Id.*
156. *Id.*
157. *Id.* at 172-74.
158. Turner v. Rogers, 564 U.S. 431 (2011).
159. Trevino v. Thaler, 569 U.S. 413 (2013).

a request for a state supreme court justice to recuse himself.[160] At the time of trial, the justice had been the district attorney for the jurisdiction in which the defendant was convicted and had personally approved a subordinate's decision to seek the death penalty in the case.[161] Addressing the matter as a case of first impression, Kennedy's opinion declared that this situation presented a due process violation because of the impermissible risk of bias from one adjudicator that was a key decision maker in the accusatory process.[162]

The second case raised the question of whether the Supreme Court would recognize an exception to the traditional common law rule that the jury's deliberations and verdict shall not be questioned after the verdict has been issued.[163] In *Peña-Rodriguez v. Colorado*, the jury found the defendant guilty of sexual assault.[164] In the course of talking to jurors before they departed the courthouse, a defense attorney learned from two jurors that a third juror had made ethnically-biased statements about the defendant, including assumptions about the aggressiveness of "Mexican" men toward women.[165] The two jurors signed affidavits confirming what they had told the attorney, and the attorney submitted this information to the trial judge who declined to overturn the verdict or order a new trial.[166] Instead, the judge cited state rules of evidence and their reliance on the traditional common law practice of accepting the finality of the jury's verdict based on an eighteenth-century English court decision prohibiting jurors from providing information about what was said in the course of jury deliberations.[167] When American jurisdictions codified the rule, there were very few exceptions that would lead to a legally-mandated reconsideration of a verdict.[168] In seventeen states, these state-law exceptions include racial-bias exceptions.[169] In this case, however, the Court was asked if there could be a constitutional violation from post-verdict revelations about prejudicial jurors' statements in a state criminal case.[170] Justice Kennedy's reasoning placed great emphasis on the essential need to rid the justice system of racial discrimination and bias even if there is good reason to respect the finality of jury verdicts.[171] Kennedy articulated the Court's holding as:

> [W]here a juror makes a clear statement that indicates he or she

160. Williams v. Pennsylvania, 136 S. Ct. 1899, 1903 (2016).
161. *Id.*
162. *Id.* at 1909-10.
163. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017).
164. *Id.*
165. *Id.*
166. *Id.* at 862.
167. *Id.* at 862-63.
168. *Id.*
169. *Id.* at 870.
170. *Id.*
171. *Id.* at 867-68.

> relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the [traditional jury] 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.[172]

Justice Kennedy emphasized that not every prejudicial statement will produce a constitutional violation.[173] Instead, "the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict."[174]

In the *Williams* and *Peña-Rodriguez* cases,[175] Justice Kennedy seized the opportunity to place his imprint on the developing law affecting fairness and equality in the justice system.[176] Much like his majority opinions concerning sentences for juveniles and limiting death penalty eligibility for murder defendants with intellectual disabilities, these were consequential decisions that made important statements about the ideals of the justice system.[177] It is certainly true that one could imagine other justices within the five-member majorities writing powerful opinions on these issues, such as Justice Sotomayor if she had been assigned the opinion in *Peña-Rodriguez*.[178] However, it seems clear that Kennedy wanted the opportunity to assert himself on these issues and thereby, in effect, make them a component of his historic legacy.[179]

Justice Kennedy assigned himself the majority opinion in an exceptionally divisive, controversial prison reform case, *Brown v. Plata*.[180] From the 1970s through the 1990s, federal judges throughout the country issued orders requiring improvements in prison conditions and practices to fulfill Eighth Amendment standards.[181] These decisions were very controversial because they required significant public expenditures on incarcerated populations in order to improve facilities, provide health care, and mandate hiring and training staff to increase health and safety in correctional institutions.[182] Critics of judicial intervention into

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172. *Id.* at 869.

173. *Id.*

174. *Id.*

175. *Williams*, 136 S. Ct. 1899; *Peña-Rodriguez*, 137 S. Ct. at 861.

176. *See supra* notes 160-74 and accompanying text.

177. *See supra* notes 126, 136-43 and accompanying text.

178. *See, e.g.*, Smith & Petlakh, *supra* note 16, at 463 (stating "Justice Sotomayor gained national attention . . . for her explicit and assertive rejection of Chief Justice John Roberts's effort to downplay problems of racial inequality and discrimination in American society").

179. Justice Kennedy had the option of assigning these opinions to Justice Sotomayor or other justice in the majority, but he chose to employ his authority as DSAJ to assign the majority opinions to himself.

180. Brown v. Plata, 563 U.S. 493 (2011).

181. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 34-46 (1998).

182. *Id.*

correctional institutions pushed Congress to impose procedural rules on judicial authority under civil rights statutes in order to limit what they regarded as expensive interference into the operations of state and local corrections systems.[183] The Prison Litigation Reform Act of 1996 ("PLRA")[184] made it more difficult for prisoners to file federal civil rights lawsuits and limited the authority of federal judges to issue remedial orders and then maintain supervision over the implementation of those orders.[185] Following this, federal judicial supervision of and intervention into corrections systems focused on very specific problems in prisons rather than orchestrating large-scale institutional or systemic reforms.[186] And then came *Brown*, the case in which Justice Kennedy's majority opinion reminded that nation that conditions in prisons could be so deficient as to require expensive judicial-ordered remedies, even under the restrictions imposed by the PLRA.[187]

When the case reached the Supreme Court, California's prisons had been at nearly 200 percent capacity for at least 11 years, with a state-wide prison population of 156,000.[188] One consequence of the state's prison overcrowding, in addition to cramming rows of bunk beds into prison gyms and other available spaces, was a lack of proper medical and mental health facilities.[189] As a result, evidence documented preventable deaths every month from untreated medical conditions and suicides as well as horrific treatment of prisoners with mental health crises.[190] Justice Kennedy's majority opinion took the extraordinarily unusual step of including photographs of overcrowded conditions and phone-booth-sized cages where officials locked up prisoners who needed mental health treatment.[191] The majority opinion, on behalf of five justices,

183. ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT 188-89 (2003).

184. Prison Litigation Reform Act of 1996, 42 U.S.C. § 1997e (1996).

185. SANDLER & SCHOENBROD, *supra* note 183, at 188-89.

186. *See* FEELEY & RUBIN, *supra* note 181, at 50 (stating that "[t]he Prison Litigation Reform Act . . . require[es] courts to link their remedial orders to specific constitutional violations").

187. *See, e.g.*, Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. 165, 165 (2013) (explaining that "[n]ot since 1978 had the Court ratified a lower court's crowding-related order in a jail or prison case").

188. *Brown*, 131 S. Ct. at 500.

189. *Id.*

190. *See, e.g.*, Christopher E. Smith, *The Changing Supreme Court and Prisoners' Rights*, 44 IND. L. REV. 853, 885 (2011). During oral arguments, Justice Sotomayor pointedly challenged California's attorney by asking, "When are you going to avoid the needless deaths that were reported in the record? When are you going to avoid or get around [to] people sitting in their feces for days in a dazed state?" *Id.*

191. *See* Dave Gilson, *California's Jam-Packed Prisons*, MOTHER JONES (July 25, 2011), www.motherjones.com/politics/2011/07/california-crowded-prisons/ (stating the reproduction of photographs from Justice Kennedy's opinion along with the author's comment that inclusion of the photographs in

supported the lower court's remedial order that required the prison system to reduce its population to 137 percent capacity and significantly improve the availability and operation of medical and mental health services.[192]

Justice Kennedy's opinion elicited stark, shrill dissenting opinions written by Justices Scalia and Alito.[193] Justice Scalia viewed the decision as demonstrating that judges interfere too often in public policy issues about which they have no expertise and competence. As a longtime critic of liberal judicial policy making,[194] Justice Kennedy's opinion epitomized all that Scalia viewed as wrong with judicial policy making by affecting the governance of institutions and imposing costs on society.[195] Justice Alito used frightening language about the Court's opinion requiring the release of tens of thousands of dangerous felons who would prey on the citizens of California and cause untold violence and carnage.[196] In actuality, the judicial decision effectively permitted California to develop a plan for reducing the prison population.[197] California did not engage in wholesale prisoner release as Alito and Scalia assumed would be the case.[198] Instead, the prison population went down through the process of scheduled parole releases combined with a focus on sending fewer people to prison.[199] California worked with counties to pay for a new sentencing plan that would have people convicted of non-violent, non-sex offenses, those that drew sentences of three years or less, serve their time in county jails—at state expense—rather than add to the population of prisons.[200] Much like Kennedy's opinions in LGBTQ equality cases,[201] the reasoning and the conclusion of the majority opinion in *Brown* demonstrated that he had greater sensitivity and concern than his usual conservative allies[202] about the treatment of those whose daily

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the opinion "suggest[ed] they played a role in convincing Kennedy").

192. *Brown*, 131 S. Ct. at 1938-43.

193. Christopher E. Smith, *Inside America's Criminal Justice System: The Supreme Court on the Rights of the Accused and the Incarcerated: Brown v. Plata, the Roberts Court, and the Future of Conservative Perspectives on Rights Behind Bars*, 46 AKRON L. REV. 519, 539-45 (2013).

194. *See, e.g.*, Missouri v. Jenkins, 495 U.S. 33, 58 (1990) (Kennedy, J., concurring in part and concurring in judgment) (stating "[i]n my view, the Court . . . goes further, much further to embrace by broad dictum an expansion of power in the Federal Judiciary beyond all precedent.").

195. *Brown*, 131 S. Ct. at 550-59 (Scalia, J., dissenting).

196. *Brown*, 131 S. Ct. at 579-81 (Alito, J., dissenting).

197. Schlanger, *supra* note 187, at 184-85.

198. *See, e.g.*, *Brown*, 131 S. Ct. at 565 (Alito, J., dissenting). "The three-judge court ordered the premature release of approximately *46,000 criminals—the equivalent of three Army divisions*[.]" *Id.*

199. Schlanger, *supra* note 187, at 184-91.

200. *Id.*

201. *See supra* notes 83-102 and accompanying text.

202. *See, e.g.*, Smith, *supra* note 190, at 876-79 (describing the initial orientation of Chief Justice Roberts and Justice Alito toward cases raising issues concerning prisoners' rights).

experiences are often viewed with indifference or hostility by a large segment of the American population.[203]

IV. CONCLUSION

Authorship of judicial opinions is typically the most visible means by which Supreme Court justices shape the law and impact society.[204] In the aftermath of Justice Kennedy's retirement from the Supreme Court in 2018, scholars presented analyses of Kennedy's opinions in order to assess his influence over the course of his three decades on the high court.[205] However, the authorship of opinions is not the sole path to influence for those associate justices who serve long enough to become the SAJ with authority to make majority opinion assignments for cases in which the chief justice is a dissenter.[206] Opinion assignments by the SAJ have rarely been analyzed by scholars.[207] But, they deserve attention in the case of Justice Kennedy because he, like his predecessor Justice Stevens, emerged as the dominant assigner of majority opinions among associate justices for his era, making nearly four dozen assignments from 2010 to 2018.[208]

In his role as DSAJ, Kennedy was notable in his self-assignment of majority opinions for blockbuster cases concerning same-sex marriage and LGBTQ rights,[209] an area in which he had already established himself as a leading figure in the development

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203. *See* Jennifer Lackey, *The Measure of a Country is How it Treats its Prisoners. The U.S. is Failing.*, WASH. POST (Feb. 6, 2019), www.washingtonpost.com/opinions/the-measure-of-a-country-is-how-it-treats-its-prisoners-the-us-is-failing/2019/02/06/8df29acc-2a1c-11e9-984d-9b8fba003e81_story.html (providing descriptions of incarcerated individuals treated with indifference, thereby contributing to harsh and dangerous living conditions in institutions).

204. Justice Stevens once said, "You judge Justices by the work product that they produce when they're on the Court." THE SUPREME COURT: A C-SPAN BOOK FEATURING THE JUSTICES IN THEIR OWN WORDS 50 (Brian Lamb, Susan Swain & Mark Farkas, eds., 2010).

205. *See* Mitchell Berman & David Peters, *Kennedy's Legacy: A Principled Justice*, 46 HASTINGS CONST. L.Q. 311 (2019); Erwin Chemerinsky, *Justice Kennedy: A Free Speech Justice? Only Sometimes*, 70 HASTINGS L.J. 1193 (2019); Matthew Coles, *The Profound Political But Elusive Legal Legacy of Justice Anthony Kennedy's LGBT Decisions*, 70 HASTINGS L.J. 1199 (2019); Frank J. Colucci, *Justice Anthony Kennedy's Federalism and the Limits of State Sovereignty*, 49 PUBLIUS: J. FEDERALISM 490 (2019); Owen Kerr, *Justice Kennedy and the Counter-Majoritarian Difficulty*, 70 HASTINGS L.J. 1213 (2019).

206. Jacobs & Smith, *supra* note 19, at 753-64.

207. The exceptional analyses that focus on opinion assignments by SAJs are Jacobs & Smith, *supra* note 19, at 753-64, MALTZMAN, SPRIGGS, & WAHLBECK, *supra* note 68, at 53-56, and SMITH, *supra* note 18, at 244-245.

208. *See supra* Tables 1-4.

209. *See supra* notes 93-102 and accompanying text.

of protective legal doctrines.[210] In so doing, he cemented his legacy as the key figure in any scholarly or journalistic analyses of the development of legal protections for LGBTQ individuals.[211] By contrast, with respect to issues of mental capacity and criminal sentencing, Kennedy also assigned opinions to other justices rather than use assignment power as an opportunity to further his direct impact on authoritative reasoning and enhance his own legacy for that issue.[212] Interestingly, Kennedy's overall voting record on criminal justice issues placed him among the Court's conservatives, albeit moderately conservative rather than predictably conservative like Chief Justice Roberts and Justices Scalia, Thomas, and Alito.[213] Yet, he stood out for using his assignment powers to self-assign important rights-protective cases in criminal justice for such matters as protecting defendants in the plea bargaining process,[214] diminishing discrimination in jury trials,[215] and improving conditions of confinement in prison.[216] Justice Kennedy's assertion of his own reasoning in these cases did not reflect inconsistency with his generally conservative voting record but, instead, reaffirmed the observation of one scholar: "He found himself in the middle because his jurisprudential commitments led him to vote in ways that did not cluster neatly in one area on a conventional ideological spectrum."[217]

As indicated by this analysis of Justice Kennedy, as well as the comparison to Justice Stevens, the Supreme Court's associate justices deserve attention and analysis for their important opinion-assigning duties when the chief justice is among the dissenters. The foregoing discussion illustrates how Kennedy impacted the development of law, especially by using opportunities for self-assignment for a number of notable decisions. The new SAJ most likely to assign majority opinions is Justice Ruth Bader Ginsburg, when the four most-liberal justices earn the fifth vote of a conservative justice. That is, unless the defecting conservative is Justice Clarence Thomas, who could then make the assignment

210. *See supra* notes 84-9191 and accompanying text.

211. *See, e.g.*, Biskupic, *supra* note 92 (describing Kennedy's legacy and its maintenance even in a decision that went against expanded constitutional protections for LGBTQ individuals); Lucy Li, *A Lesson from Supreme Court Justice Anthony Kennedy*, THE TEX. ORATOR (Sept. 10, 2018), thetexasorator.com/2018/09/10/a-lesson-from-supreme-court-justice-anthony-kennedy/. "What Kennedy will be most remembered for, more than upholding the rights of women and minorities, is his contribution to the LGBTQ community." *Id.*

212. *See supra* 126-45 and accompanying text.

213. Smith, McCall & McCall, *supra* note 61, at 422.

214. *Frye*, 566 U.S. 134; *Lafler*, 566 U.S. 156.

215. *Peña-Rodriguez*, 137 S. Ct. at 861.

216. *Brown*, 563 U.S. 493.

217. Jack L. Goldsmith, *In Tribute: Justice Anthony M. Kennedy*, 132 HARV. L. REV. 1, 13 (2018).

himself.[218] However, recent news that eighty-six-year-old Justice Ginsburg has been treated for cancer for the fourth time raises questions about her likely future tenure on the Court and the number of potential opportunities she may receive to assign majority opinions as the SAJ.[219] If she were to leave the Court prior to the 2020 elections and be replaced by a conservative appointee of President Donald J. Trump, it would presumably create a consistent six-member conservative majority that would be unaffected by the defection of one justice.[220] This potential scenario is a reminder that the opportunities and impact of SAJs as majority opinion assigners depends on the context of the Court during each historical period. The impact and influence exercised by Justices Kennedy and Stevens over dozens of cases in their time as DSAJ[221] may not occur again for a justice unless the Court's composition and voting coalitions allow an influential dominant SAJ to emerge. Indeed, any appointments by President Trump that solidify the conservative majority in the near future will simply increase the already-potent assignment power of Chief Justice Roberts—who would less frequently find himself among the dissenters.[222]

218. Justice Thomas was appointed to the Supreme Court in 1991 and Justice Ginsburg was appointed in 1993. *About the Court: Current Members*, S. CT., www.supremecourt.gov/about/biographies.aspx.

219. Emily S. Rueb, *Ruth Bader Ginsburg Treated for Tumor on Her Pancreas*, N.Y. TIMES (Aug. 23, 2019), www.nytimes.com/2019/08/23/us/ruth-bader-ginsburg-health-cancer.html

220. Ed Kilgore, *A Supreme Court Vacancy in 2020 Could Change Everything*, N.Y. MAG (Aug. 26, 2019), nymag.com/intelligencer/2019/08/ginsburgs-health-a-reminder-supreme-court-big-2020-prize.html.

221. *See supra* Tables 1-4.

222. For example, during the 2018 term, Chief Justice Roberts was in the majority in 85 percent of the Court's 72 full cases. Among the eleven cases in which he was a dissenter, nine of those decisions were 5-to-4 votes that would have actually placed Roberts in the majority if Ginsburg had been replaced earlier by a Trump-appointed conservative. Adam Feldman, *Final Stat Pack for October Term 2018,* SCOTUSBLOG (June 28, 2019, 5:59 PM), www.scotusblog.com/2019/06/final-stat-pack-for-october-term-2018/.