Underrepresentation and Exclusion from Influence on the U.S. Supreme Court: Senior Associate Justices and the Opinion-Assignment Power

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I. INTRODUCTION

The unrepresentative composition of the American judiciary stems from both a history of systematic discrimination in the legal profession and political influences that drive judicial selection.[1] White males monopolized

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[1] ROBERT A. CARP ET AL., JUDICIAL PROCESS IN AMERICA 144 (11th ed. 2020).

judicial decision-making for most of American history[2] and, as a result, other perspectives, experiences, and voices were excluded.[3] In the past 50 years, opportunities emerged for women and people from marginalized racial and ethnic groups to become judges.[4] Yet, as we move through the twenty-first century's third decade, the judiciary's composition remains skewed and does not reflect the demographic diversity of the nation's population.[5]

The U.S. Supreme Court was the exclusive province of white male decision-makers for most of its history.[6] More than 200 years after its establishment, the Court reached an unprecedented level of diversity in 2010 and thereafter with three women, including one Hispanic woman, and one African-American man among the nine justices.[7] Diversity increased in 2022 with the addition of an African-American woman at the retirement of a long-serving white male.[8] By reaching the point of having four women among the nine justices,[9] the Court's composition moved closer to parity with the nation's population distribution in which women are slightly more than 50%

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[2] LAWRENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY 125 (7th ed. 2013).

[3] *See, e.g.*, PAMELA C. CORLEY ET AL., AMERICAN JUDICIAL PROCESS: MYTH AND REALITY IN LAW AND COURTS 170 ("[T]his lack of diversity is problematic . . . . [I]t is important to have the full range of backgrounds, experiences, and perspectives present on the courts to ensure adequate representation of diverse interests.").

[4] *See* BAUM, *supra* note 2, at 125 ("The proportion of judgeships held by women and [people of color] has grown enormously since the 1970s. In the state courts, the proportion for women has doubled and the proportion for [people of color] has tripled in that period.").

[5] *See* Amanda Powers & Alicia Bannon, State Supreme Court Diversity – May 2023 Update, BRENNAN CTR FOR JUST (May 15, 2023), https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-may-2023-update [https://perma.cc/NN6F-ASVS] ("In 18 states, no justices identify as a person of color, including in 12 states where people of color make up at least 20 percent of the population. . . . [J]ust 20 percent of state supreme court seats are held by people of color. By contrast, people of color make up over 40 percent of the U.S. population.").

[6] In 1967, Thurgood Marshall, the first African-American appointed to the U.S. Supreme Court, broke the monopoly on Supreme Court seats held by white males. William J. Daniels, *Justice Thurgood Marshall: The Race for Equal Justice, in* THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 212, 212 (Charles M. Lamb & Stephen C. Halpern eds., 1991).

[7] MARK TUSHNET, IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT 96 (2013) [hereinafter TUSHNET, IN THE BALANCE].

[8] President Biden appointed Justice Ketanji Brown Jackson to replace retiring Justice Stephen Breyer. Annie Karni, *Ketanji Brown Jackson Becomes First Black Female Supreme Court Justice*, N.Y. TIMES (June 30, 2022), https://www.nytimes.com/2022/06/30/us/politics/ketanji-brown-jackson-sworn-in-supreme-court.html [https://perma.cc/K8HB-GPNG].

[9] Robert Barnes, *Four Women on the Supreme Court Would Bring Historic, Near Gender Parity for Institution Long Dominated by White Men*, WASH. POST (Feb. 27, 2022, 6:48 PM), https://www.washingtonpost.com/politics/2022/02/27/ketanji-jackson-supreme-court [https://perma.cc/7P4F-Q6NB].

of the population.[10] The Court's composition remains skewed, however, especially because Hispanic-Americans make up 19% of the nation's population,[11] but only one Hispanic serves on the Court–Justice Sotomayor.[12] The Court's historic and continuing unrepresentative composition has implications for judicial decision-making and the near-monopolization of both formal power and informal influence within the high court.[13]

This Article examines a specific formal power within the Supreme Court, namely the assignment of majority opinions, and especially the opportunities for and exercise of this power by justices who are not white males.[14] All of the chief justices on the nation's highest court have been white and male.[15] Under the Court's established practices, chief justices dominate majority-opinion assignment authority by selecting the opinion author whenever they vote with the majority in a given case.[16] Therefore, women justices and African-American justices can exercise the majority-opinion assignment power only when two things are true in a specific case: 1) the chief justice is among the dissenters or did not participate, and 2) they are the Senior Associate Justice (SAJ) in the majority.[17] In order to analyze the availability and application of the majority-opinion assignment power by these justices, the Article examines the number and nature of cases in which women and

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[10] The female percentage of the nation's population is 50.4%. U.S. Census Bureau, *United States Quick Facts*, https://www.census.gov/quickfacts/fact/table/US/LFE046221 [https://perma.cc/Q3C4-RGEU].

[11] Mohamad Moslimani & Luis Noe-Bustamante, *Facts on Latinos in the U.S.*, PEW RSCH. CTR. (Aug. 16, 2023), https://www.pewresearch.org/hispanic/fact-sheet/latinos-in-the-us-fact-sheet [https://perma.cc/87MP-WVHN].

[12] Associated Press, *Statue Unveiled to Honor First Hispanic SCOTUS Justice,* FOX 21 (Sept. 9, 2022, 6:50 AM), https://www.fox21news.com/features/385ispanic-heritage-month/statue-unveiled-to-honor-first-hispanic-scotus-justice [https://perma.cc/K45K-C62Z].

[13] In particular, no woman or person of color has been Chief Justice of the United States Supreme Court, a position that enables a jurist to, among other powers, speak first and lead discussion of cases in conference, and assign responsibilities for writing majority opinions in most cases. *See* JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 42–51 (2011).

[14] *See infra* notes 97–98, 123–56 and accompanying text.

[15] *See Supreme Court of the United States: Chief Justices*, FED. JUD. CTR.,

history/courts/supreme-court-united-states-chief-justices [https://perma.cc/7LLB-J7YP].

[16] STEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 230 (4th ed. 1993).

[17] *See id.* at 230–31 ("If the Chief Justice is not in the majority, the assignment is made by the most senior justice in the majority.").

African-American justices were SAJs in the majority[18] as well as majority-opinion writing opportunities assigned to these justices by SAJs.[19]

II. DATA FROM THE SUPREME COURT JUDICIAL DATABASE

Opinion assignments by and to SAJs were identified using the analytical tools provided by the Supreme Court Judicial Database through the end of the 2021 Term in June 2022, and the Oyez Project website provided data for the 2022 Term that ended in June 2023.[20] The data used for our study include only orally argued cases that produced a judgment or opinion of the Court.[21] We excluded all decrees, equally divided cases, as well as per curiam and seriatim opinions from our review.[22] Cases in these excluded categories are unlikely to have an identified author who was assigned the job of writing the opinion.[23] When determining the participation of a justice among a majority in decisions in which an SAJ was responsible for selecting the opinion author, we limited the "vote type" category to identifying voting with the majority or plurality, regular concurrence, special concurrence, and judgment of the Court.[24] We examined SAJ-assigned opinions beginning in 1967,[25] the year in which the exclusive monopolization of the Court's membership by white males ended with the appointment of Justice Thurgood Marshall, the first African-American Supreme Court justice.[26]

Several tables presented in this Article's descriptions and analysis utilize the issue category classifications in the Supreme Court Judicial Database.[27] In addition, the Article also uses the Database's familiar classifications for

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[18] *See infra* Tables 3–8.

[19] *See infra* Table 9.

[20] *The Supreme Court Database*, WASH. UNIV. L. (Dec. 24, 2023), http://scdb.wustl.edu [https://perma.cc/XG3C-9CX5]; OYEZ PROJECT, https://www.oyez.org [https://perma.cc/Z29Z-ML8W].

[21] Using the Supreme Court Judicial Database, researchers are able to identify and analyze categories of cases by selecting such variables as opinion author, issue area, and opinion assigner. *See The Supreme Court Judicial Database: Analysis Specifications - Modern Data (1946–2018)* (Dec. 24, 2023), http://scdb.wustl.edu/analysis.php [https://perma.cc/CBC4-U4QK].

[22] *Id.*

[23] *See, e.g.,* CHRISTOPHER E. SMITH, COURTS, POLITICS, AND THE JUDICIAL PROCESS 265 (2d ed. 1997) ("Other summary dispositions receive *per curiam* rulings in which the opinion comes from the Court and not from any particular justice.").

[24] *See The Supreme Court Judicial Database: Analysis Specifications - Modern Data (1946–2018)*, *supra* note 21.

[25] *Id.*

[26] *See* Daniels, *supra* note 6.

[27] *See infra* notes 152–94 and accompanying text.

direction of case outcomes as either "liberal" or "conservative."[28] According to the definitions used by the Database, for many issue categories, the direction classification depends on whether the outcome favored individuals ("liberal") or the government ("conservative").[29] Thus, these classifications occasionally can be counter-intuitive for certain specific issues in which contemporary political liberals argue that governmental authority should take precedence over claims for rights by individuals and conservatives support expanding individual rights.[30] For example, classifications for issues such as gun control and property rights often conflict with contemporary assumptions about what should be considered "liberal" or "conservative."[31] Among the cases relevant to the examination of majority-opinion assignment by SAJs, a primary example of a potentially counter-intuitive classification concerns *Walker v. Texas Division, Sons of Confederate Veterans*.[32] In that case, Justice Clarence Thomas made the majority opinion assignment as SAJ by joining his four most liberal colleagues to rule that Texas did not violate the First Amendment by rejecting a proposed specialty license plate featuring the Confederate battle flag.[33] The case is classified as having a "conservative" outcome, consistent with other classifications in the database. With the exception of Justice Thomas, the justices split along liberal–conservative lines with the liberals supporting the state's rejection of this sought-after form of expression and conservatives supporting individuals' rights.[34]

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[28] The developers of the Supreme Court Judicial Database described the definitions as "[l]iberal decisions in the area of civil liberties are pro-person accused or convicted of crime, pro-civil liberties or civil rights claimant, pro-indigent, pro-[Native American] and anti-government in due process and privacy." Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICIATURE 103, 103 (1989).

[29] *Id.*

[30] *See* Michael A. McCall et al., *Criminal Justice and the U.S. Supreme Court's 2007-2008 Term*, 36 S.U. L. REV. 33, 71 (2008) ("[*District of Columbia v.*] *Heller* [554 U.S. 570 (2008)] demonstrates how these labels are contextual rather than static. . . . In that gun ownership is a select area where support for the individual is commonly associated with conservatism . . . . Conversely, those who often are cast as members of the Court's liberal bloc . . . articulate the conservative, right-limiting . . . position.").

[31] *Id.*

[32] *Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. 200, 200 (2015).

[33] *Id.* at 204.

[34] *The Supreme Court Judicial Database: Analysis Specifications - Modern Data (1946–2018)*, *supra* note 21, at http://scdb.wustl.edu/analysisCaseDetail.php?sid=&cid=2014-058-01&pg=0 [https://perma.cc/L99G-EZZ6].

III. THE UNREPRESENTATIVE JUDICIARY

A. Historical Background

Lawyers created barriers to entry into the legal profession as the means to preserve monopolistic control over economic benefits and political influence.[35] These barriers not only hindered and slowed entry into the profession by males from European immigrant groups, but also coincided with exclusionary practices in American society that denied political participation and professional opportunities to women, African-Americans, Hispanics, and Asian-Americans.[36] Women did not gain the right to vote nationwide until the 1920s[37] and African-Americans could not readily register to vote throughout the country until after the enactment of the Voting Rights Act of 1965.[38] Thus, the pool of those eligible for service as judges was monopolized by white males, as was the decision-making power of judicial selectors in both appointive and elective systems.[39] The perpetuation of overt discrimination into the second half of the twentieth century is illustrated by the experiences of future Supreme Court Justices Sandra Day O'Connor[40] and Ruth Bader Ginsburg.[41] They both graduated at or near the top of their classes at elite law schools in 1952 and 1959 respectively, yet faced significant discrimination in seeking employment as their less-distinguished male classmates were readily hired by law firms and judges.[42]

At the time that Jimmy Carter assumed the presidency in 1977, only 6 women and 22 African-Americans, Hispanics, and Asian-Americans were serving among the 500 active Article III judges in the federal judiciary.[43] Carter was the first president who actively sought to increase representation within the judiciary through his appointment decisions, and he increased women's representation among federal judges to seven percent and African-

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[35] SMITH, *supra* note 23, at 62–66.

[36] *Id.*

[37] DANIEL M. SHEA ET AL., LIVING DEMOCRACY: 2018 ELECTIONS AND UPDATES EDITION 454 (2020).

[38] *Id.* at 455.

[39] *Id.* at 160–64.

[40] JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 28 (1st ed. 2005).

[41] Stephanie B. Goldberg, *The Second Woman Justice: Ruth Bader Ginsburg, in* THE SUPREME COURT AND ITS JUSTICES 304–06 (Jesse H. Choper ed., 2d ed. 2001).

[42] BISKUPIC, *supra* note 40; Goldberg, *supra* note 41.

[43] Elliot E. Slotnick, *The Paths to the Federal Bench: Gender, Race, and Judicial Recruitment Variation*, 67 JUDICATURE 371, 374 (1984).

Americans' representation to nine percent by 1981.[44] Nearly four decades later, only 26.9% of Article III judgeships were occupied by women, and 80.2% of federal judgeships were filled by non-Hispanic whites[45] in a country that is majority female[46] and 40% racially and ethnically nonwhite and Hispanic white.[47] In state courts, white males filled almost 60% of judgeships, nearly double their percentage in the demographic composition of the United States population.[48]

President Lyndon B. Johnson's appointment of Justice Thurgood Marshall in 1967 was the first alteration of white males' exclusive control of the Supreme Court.[49] Subsequently, Justice Sandra Day O'Connor's appointment by President Ronald Reagan in 1981 ended the egregious denial of representation for women who constitute half of the nation's population.[50] The Court became more diverse through the subsequent appointments of Justices Clarence Thomas (1991),[51] Ruth Bader Ginsburg (1993),[52] Sonia Sotomayor (2009),[53] Elena Kagan (2010),[54] Ginsburg's replacement Amy

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[44] *Id.*; *see also* DANIELLE ROOT ET AL., BUILDING A MORE INCLUSIVE JUDICIARY 5 (Oct. 2019), https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary [https://perma.cc/5V5T-E6CR] (portraying the rise in appointments of women and people of color for federal judgeships during the Carter Administration through graphs).

[45] *Id.* at 6 fig.2.

[46] *See* U.S. Census Bureau, *supra* note 10 (finding the population is currently 50.4% female).

[47] BANKS & O'BRIEN, *supra* note 5, at 197.

[48] TRACEY E. GEORGE & ALBERT H. YOON, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS? 7 (2016), https://eduhelphub.com/blog/wp-content/uploads/2021/11/gavel-gap-report.pdf [https://perma.cc/GE95-R3R9].

[49] MARK TUSHNET, MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961–1991 25–27 (1997).

[50] BISKUPIC, *supra* note 40, at 97–98.

[51] KEN FOSKETT, JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS 211–13, 255–56 (1st ed. 2004).

[52] MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 121–22 (1st ed. 2005).

[53] JOAN BISKUPIC, BREAKING IN: THE RISE OF SONIA SOTOMAYOR AND THE POLITICS OF JUSTICE 168–69 (2014).

[54] TUSHNET, IN THE BALANCE, *supra* note 7, at 91.

Coney Barrett (2020),[55] and Ketanji Brown Jackson (2022).[56] By 2022, African-Americans no longer lagged in representation relative to the nation's population and women moved closer to being half of the justices on the Court. [57] However, Hispanic-Americans and other minority groups remained underrepresented on the Court.[58]

B. The Impact of Diversity

Why are diversity and representation important in the judiciary?[59] Scholars have noted both symbolic and behavioral consequences related to diversity.[60] In a diverse democracy, visible diversity within prominent governmental positions provides symbolic reassurance that decision-makers come from and are accountable to various segments of society.[61] Because the judiciary relies on voluntary compliance with judicial decisions, there are fears that the monopolization of judgeships by white males will make the courts appear illegitimate in the eyes of those who feel unrepresented or underrepresented in institutions of government.[62] In addition, the substance of judicial decisions is shaped by individual judges' life experiences and values.[63] Diversity within the judiciary can bring varied insights and perspectives into the decision-making processes of the third branch of government.[64]

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[55] Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath,* NPR (Oct. 26, 2020, 8:07 PM), https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court. [https://perma.cc/8K85-J5Y8].

[56] Lauren Gambino & Joan E. Greve, *Ketanji Brown Jackson Makes History as First Black Woman Confirmed to U.S. Supreme Court*, GUARDIAN (Apr. 7, 2022, 3:44 PM), https://www.theguardian.com/us-news/2022/apr/07/ketanji-brown-jackson-confirmation-us-supreme-court [https://perma.cc/J6SL-4ZUA].

[57] On a Supreme Court with nine members, there are four women (44%), one of whom is Hispanic (11%). There is also an African-American woman and one African-American man (22%) in a country with a population that is 50.4% women, 19.1% Hispanic, and 13.6% African-American. U.S. Census Bureau, *supra* note 10.

[58] *Id.*

[59] Elliot E. Slotnick, *Gender, Affirmative Action, and Recruitment to the Federal Bench*, 14 GOLDEN GATE UNIV. L. REV. 519, 526 (1984).

[60] *See id.* at 527 ("[J]ustifications for [diversity] rely heavily on the likely impact of a more representative bench on public perceptions and confidence. It can also be argued, however, that increased representation of minorities and women would sharpen the judiciary's sensitivity to the complex substantive issues and controversial social issues facing it.").

[61] *Id.*

[62] Nancy Scherer & Brett W. Curry, *Does Descriptive Race Representation Enhance Institutional Legitimacy? The Case of the U.S. Courts*, 72 J. POL. 90, 91 (2010).

[63] Christopher E. Smith, *What If?: Human Experience and Supreme Court Decision Making on Criminal Justice*, 99 MARQ. L. REV. 813, 814–22 (2016).

[64] Slotnick, *supra* note 59, at 527.

For example, visible interactions in several cases invite the inference that justices who diversified the Supreme Court asserted their empathic understandings of specific situations in ways that affected the conclusions of their white, male colleagues.[65] During oral argument for *Virginia v. Black*[66] concerning whether states could ban cross burning without violating the First Amendment, Justice Thomas made a strong—and rare—statement from the bench about the role of cross burning in the Ku Klux Klan's reign of terror against African-Americans.[67] In the words of an attorney presenting arguments in the case, "I have never seen the atmosphere in a courtroom change so quickly."[68] Instead of making the anticipated decision favoring a broad First Amendment protection for expressive conduct, the Court ultimately permitted states to criminalize the expressive conduct of cross burning when there is proof of intent to communicate a threat.[69]

Justice Ginsburg appeared to influence her colleagues in *Safford United School District v. Redding*, a case concerning the strip search of an innocent girl by middle school officials based on the false claim by a classmate that the girl possessed prescription painkillers.[70] At the time of oral argument, Justice Ginsburg was the only woman on the Court.[71] As the justices posed questions

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[65] *See, e.g.*, TUSHNET, *supra* note 49, at 8 (discussing how Justice Thurgood Marshall, the first African-American justice, used oral argument to point attention to actual impacts on people because of their race or status as a criminal suspect).

[66] Virginia v. Black, 538 U.S. 343, 343 (2003).

[67] Linda Greenhouse, *An Intense Attack by Justice Thomas on Cross-Burning*, N.Y. TIMES (Dec. 12, 2002), https://www.nytimes.com/2002/12/12/us/an-intense-attack-by-justice-thomas-on-cross-burning.html [https://perma.cc/XP3S-6CED].

[68] Garrett Epps, *Clarence Thomas Takes on a Symbol of White Supremacy*, ATLANTIC (June 18, 2015), https://www.theatlantic.com/politics/archive/2015/06/clarence-thomas-confederate-flag/396281 [https://perma.cc/5J5Q-CK7Z].

[69] *See id.*

> A decade before, the Court had struck down a local ordinance in St. Paul, Minnesota, that made it a crime to use symbols to arouse 'anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.' . . . The Virginia statute had seemed to be on its way to a similar fate . . . [b]ut Thomas interrupted this line of argument . . . . [T]he impact of [Thomas'] comment is vivid . . . . Instead of striking the statute, the Court majority only narrowed it slightly . . . . Thomas changed the law by speaking up that day against the fiery cross.

Id.

[70] Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 364 (2009).

[71] The case was argued on April 21, 2009, *id.*, after the 2006 retirement of Justice Sandra Day O'Connor and before the August 8, 2009 swearing-in of

to attorneys in the case, with the exception of one supportive question by Justice John Paul Stevens,[72] all of the male justices' comments minimized the intrusiveness and impact of the strip search when weighed against the school's purported need to protect children from drugs.[73] By contrast, Justice Ginsburg was active and assertive in challenging the justification for the search and emphasizing the harm experienced by the girl.[74] As Justice Ginsburg remarked in a later interview, "[t]hey have never been a 13-year-old girl . . . . It's a very sensitive age for a girl. I didn't think that my colleagues, some of them, quite understood."[75] The Court ultimately decided 8-to-1 that the school officials had violated the girl's Fourth Amendment rights.[76] The comments and questions during oral argument clearly indicated that a

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Sonia Sotomayor as an Associate Justice. *About the Court*, SUP. CT. OF THE U. S., https://www.supremecourt.gov/about/justices.aspx [https://perma.cc/QA7F-WSRA].

[72] *See* Safford Unified School District v. Redding, OYEZ, https://www.oyez.org/cases/2008/08-479#:~:text=The%20Supreme%20Court%20held%20that,Roberts%2C%20and%20Justices%20Antonin%20G____[https://perma.cc/VY3H-4B4J] (click "Oral Argument – April 21, 2009" on the left side of the webpage under subheading "Media"). In the case, a middle school student was searched based on the false claim by another student that she possessed prescription strength pain killer pills. *Id.* The attorney for the school district claimed that there was little likelihood that students would be subjected to searches based on falsehoods from other students, by saying "there's a different incentive here. Students can be disciplined if they—if they tell tales. And so if she tells a lie she faces the risk of discipline." *Id.* This statement by the attorney led Justice Stevens to ask, "[w]hat discipline did the tipster receive? What discipline was the erroneous tipster given?" *Id.* In response, the school district's attorney conceded, "[o]h, there was no discipline that I know of in the record, Your Honor." *Id.*

[73] For example, Justice Stephen Breyer expressed sympathy for the need for school officials to search under students' clothing based on unsubstantiated suspicions when he said,

> I'm worried about what to write in this as a general standard. And so am I supposed to say, look, school—school officials who think that children could hide things in their underwear when they know they're not supposed to have them, is that school official really unreasonable except in a special case?

Id.

[74] For example, Justice Ginsburg's choice of words emphasized her sympathy for the girl and skepticism of the school's arguments when she said:

> There's one aspect of this considering the reasonableness of the school administrator's behavior. In addition to not following up with Glines, after Redding was searched and nothing was found, she was put in a chair outside the vice principal's office for over two hours and her mother wasn't called. What was the reason for that humiliating, putting her in that humiliating situation?

Id.

[75] *Ginsburg: Court Needs Another Woman*, ABC NEWS (May 6, 2009, 12:25 AM) https://abcnews.go.com/Politics/ginsburg-court-woman/story?id=7513795 [https://perma.cc/J925-U7QS].

[76] Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 364 (2009).

majority of justices were leaning the other way,[77] thus inviting the inference that Justice Ginsburg persuasively highlighted her empathic understanding during the conference discussion or the circulation of draft opinions.[78]

The foregoing anecdotal examples are supplemented by research results.[79] For example, the presence of an African-American judge on a court of appeals panel for certain kinds of cases, such as affirmative action issues, can influence case outcomes.[80] Presumably, the presence of an African-American judge influences persuasive interactions or otherwise alters white judges' sensitivities about these particular issues.[81] Research also indicates that the presence of women on appellate panels affects outcomes in discrimination cases but not necessarily with respect to other issues examined by studies.[82]

IV. OPINION-ASSIGNMENT AUTHORITY

A. Uneven Distribution of Opportunities for Influence

Insights, persuasion, and even the mere presence among a body of judicial decision-makers provide sources of potential influence through which the diversification of the judiciary affects case outcomes and the development of law.[83] However, the most direct and powerful opportunity to impact the development of law comes through a judge's ability to write

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[77] *See* Safford Unified School District v. Redding (Oral Argument Transcript), *supra* note 72.

[78] Because justices' discussions of cases at conference and their circulation of preliminary draft opinions are confidential, the public has no opportunity to know with certainty whether and how changes occurred in justices' viewpoints on a case unless and until it is revealed years later in the release of deceased justices' papers to the Library of Congress or other libraries. *See, e.g.*, CHRISTOPHER E. SMITH, THE SUPREME COURT AND THE DEVELOPMENT OF LAW: THROUGH THE PRISM OF PRISONERS' RIGHTS 129, 144–52 (2016). As revealed in Justice Harry Blackmun's papers in the Library of Congress, the draft majority opinion by Justice Stevens was too strongly supportive of reporters' First Amendment right to visit a jail and thereby lost the decisive vote of Justice Potter Stewart in *Houchins v. KQED*, 438 U.S. 1 (1978). *Id.*

[79] *See, e.g.*, Laura Moyer, *Rethinking Critical Mass in the Federal Appellate Courts*, 34 J. WOMEN, POL. & POL'Y 49 (2013) (discussing research on appellate court decisions influenced by presence of women judges and chief judges).

[80] Jonathan Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 179 (2013).

[81] *Id.*

[82] Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 389 (2010); Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J. L., ECON. & ORG. 299, 299 (2004).

[83] *See* Kastellec, *supra* note 80.

majority opinions.[84] As scholars have observed, "the ability to draft an opinion has long been recognized as providing a judge with a critical first-mover advantage to shape an opinion to her liking."[85] Majority opinions directly define law through their holdings and reasoning.[86] Thus, opportunities to write such opinions constitute especially important sources of influence for individual judges, especially Supreme Court justices whose words have a nationwide impact.[87]

On the Supreme Court, a related and powerful opportunity for influence flows from the authority to choose which justices will be assigned to write specific majority opinions.[88] These opinion-assignment choices shape law and policy as chief justices and SAJs make considered judgments about whose imprint of reasoning, style, and voice will define doctrines and guide case outcomes throughout the court system.[89] Because opinion-assigning justices can assign to themselves the responsibility for writing important majority opinions, these two sources of influence—assigning and writing majority opinions—can be connected to each other.[90] Moreover, the assigning justice can also be influential in the strategic bargaining processes within the Court that determine outcomes and the substance of legal reasoning.[91]

The familiar rule for making majority opinion assignments on the Supreme Court is that such authority is granted to chief justices when the

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[84] Sean Farhang et al., *The Politics of Opinion Assignment and Authorship on the US Court of Appeals: Evidence from Sexual Harassment Cases*, 44 J. LEGAL STUD. 59, 60 (2015).

[85] *Id.*

[86] *See, e.g.*, LAWRENCE BAUM, THE SUPREME COURT 122 (4th ed. 1992) (writing that the U.S. Supreme Court's majority "opinion lays down general principles of law that are applicable to other cases, principles that theoretically are binding on lower court judges whenever they are relevant.").

[87] FORREST MALTZMAN ET AL., CRAFTING THE LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 7 (2000) ("Because of their control over the shape of the opinion, majority opinion authors are traditionally considered to wield considerable influence over Court opinions . . . . A large part of the assigned author's influence stems from his or her position as an agenda setter . . . .").

[88] *Id.* at 8.

[89] 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, 751–53 (2011).

[90] *See, e.g.*, Charles F. Jacobs & Christopher E. Smith, *Justice Anthony Kennedy as Senior Associate Justice: Influence and Impact,* 52 UIC L. REV. 907, 933–34 (2019) ("In his role as [dominant senior associate justice], Kennedy was notable in his self-assignment of majority opinions for blockbuster cases concerning same-sex marriage and LGBTQ rights, an area in which he had already established himself as a leading figure in the development of protective legal doctrines.").

[91] Jeffrey R. Lax & Kelly Rader, *Bargaining Power in the Supreme Court: Evidence from Opinion Assignment and Vote Switching*, 77 J. POL. 648, 661–62 (2015).

chief justices are in the majority.[92] The senior justice in the majority makes the assignments when the chief justice is a dissenter or did not participate in a case.[93] Because all chief justices throughout the Court's history have been white males,[94] women and African-American justices gain opportunities to influence the development of law through this exercise of authority only when they are the SAJ in the majority while voting in opposition to (or in the absence of) the chief justice.[95] For these justices, and all other associate justices, the number and nature of opportunities to be the opinion-assigning SAJ depend on several factors: 1) length of service on the Court; 2) frequency of agreement or disagreement with the chief justice; 3) seniority on the Court relative to other associate justices; and 4) frequency of agreement or disagreement with other associate justices who hold seniority relative to others on the Court.[96] As illustrated by Table 1, the foregoing factors have operated to provide relatively few opportunities for women and African-American justices to exercise the authority for assigning majority opinions.

Table 1. Number of Majority Opinion Assignments Made by U.S. Supreme Court Justices, 1967 Term-2022 Term (Most to Least; Women and African-American Justices Italicized)

Justice [* Chief Justice]	Majority Opinion Assignments Made
Burger*	1913
Rehnquist*	1491
Roberts*	1027
Brennan	300
Warren*	191
Stevens	185
Douglas	83
Kennedy	48

[92] *See* BAUM *supra* note 86, at 125.

[93] *Id.*

[94] *See Supreme Court of the United States: Chief Justices*, *supra* note 15.

[95] *See* BAUM, *supra* note 86, at 125.

[96] These factors are illuminated in a comparison of opinion-assigning opportunities for long-serving Associate Justices William O. Douglas (Supreme Court service 1939–1975) and John Paul Stevens (Supreme Court service 1975–2010); *see* Jacobs & Smith, *supra* note 89, at 748–51.

White	38
Black	35
Blackmun	25
Thomas	20
Scalia	19
Ginsburg	8
Marshall	6
Harlan	5
O'Connor	4
Breyer	2
Sotomayor	1
Alito; *Barrett*; Fortas; Gorsuch; *Jackson*; *Kagan*; Kavanaugh; Powell; Souter	0
TOTAL	5401

As shown in Table 1, over the course of their careers on the Court, totaling more than 120 years of combined service as associate justices, women and African-American justices have been the SAJ with authority to assign majority opinions for only 39 cases.[97] This number is 0.72% of the total majority opinions (5,401) assigned by justices who have served since the appointment of Justice Marshall in 1967. In contrast, Justices Brennan and Stevens, both white males, were the opinion assigning SAJs in 300 and 185 cases respectively.[98] The difference in these totals reflects the operation of the previously listed four factors.[99]

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[97] The combined years of service was calculated from the total service time of Justice Marshall (1967 Term through 1990 Term), Justice O'Connor (1981 Term through 2004 Term), Justice Thomas (1991 Term through 2022 Term), Justice Ginsburg (1993 Term through 2019 Term), Justice Sotomayor (2009 Term through 2022 Term), Justice Kagan (2010 Term through 2022 Term), Justice Barrett (2020 Term through 2022 Term), and Justice Jackson (2022 Term). *See About the Court: Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/U6TD-7Z8T].

[98] Justice Brennan served on the Supreme Court for 34 years (1956–1990), including 21 years with conservative chief justices with whom he frequently disagreed: Chief Justice Warren Burger (1969–1986) and Chief Justice William Rehnquist (1986–1990). *See, e.g.,* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 263–68 (1993) (analyzing Justice Brennan's dominance as an opinion-assigner among the Court's associate justices from 1975 to the end of his career due to his seniority and frequency of disagreement with conservative Chief Justices Burger and Rehnquist).

[99] *See supra* note 96 and accompanying text.

The first and third factors, length of service and relative seniority on the Court, determine the possibility of being the SAJ in any group of five justices in the majority for a decision.[100] In other words, a justice cannot be the SAJ without more seniority than at least four other justices (or three other justices in the case of four-member plurality opinions).[101] Thus, it is to be expected that the most recently appointed justices on the current Roberts Court, including all but one of the women,[102] had yet to exercise opinion-assignment authority by the end of the 2022 Term.[103] Moreover, the status as one of the four "most-recently-appointed" justices can last for many years when the Court's composition is relatively stable with few retirements, deaths, and attendant new appointees.[104] For example, Justice Thomas was one of the four most recently appointed justices for nearly 20 years until the appointment of the fourth new associate justice after he joined the Court in 1991.[105] That justice was Justice Sotomayor in 2009.[106] Table 2 presents the length of service for women and African-American justices prior to achieving eligibility to be SAJ by having more seniority than four other associate justices.

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[100] *Id.*

[101] *Id.*

[102] Justice Sotomayor assigned one majority opinion in the role of SAJ in *Wilkins v. United States*, 143 S.Ct. 870 (2023). She had longer tenure in office than four other associate justices beginning with the appointment of Justice Barrett in October 2020. *See About the Court: Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/C3PE-NLVQ]. But the fact of being senior to at least four other associate justices does not guarantee opportunities to become the SAJ in a case unless the chief justice dissents and no other longer-serving associate justice is in the majority.

[103] *See* Table 1; *see also supra* note 96 and accompanying text.

[104] In recent decades when the Supreme Court's composition has become more diverse, there was a period of extraordinary compositional stability from the appointment of Justice Stephen Breyer in 1994 to the appointment of Justice Samuel Alito in 2006. During this time, in which no new associate justices were appointed, thereby delaying the speed at which the Rehnquist and Roberts Court-era associate justices became the associate justices with more seniority than four other associate justices. Justice Stephen Breyer, who was appointed to the Court by President Obama in 1994, did not achieve this status until the appointment of Justice Brett Kavanaugh in 2018. *See About the Court: Justices 1789 to the Present*, *supra* note 102.

[105] *Id.*

[106] *Id.*

Table 2. Length of Service on the U.S. Supreme Court for Women and African-American Justices Before Achieving Eligibility to Assign Five-Member Majority Opinions as Senior Associate Justice

Associate Justice	Year of Appointment	Fourth Subsequent Associate Appointed	Year of Appointment for Fourth Subsequent Associate	Years of Service Prior to Eligibility for Assigning Five-Member Majority Opinions as SAJ
Marshall	1967	Stevens	1975	9
O'Connor	1981	Thomas	1991	11
Thomas	1991	Sotomayor	2009	19
Ginsburg	1993	Kagan	2010	17
Sotomayor	2009	Barrett	2020	12
Kagan	2010	Jackson	2022	13
Barrett	2020	NA	NA	NA
Jackson	2022	NA		NA

The second factor affecting assignment opportunities in the role of SAJ,[107] frequency of disagreement with the chief justice, facilitated the large number of majority-opinion assignments made by Justices Brennan[108] and Stevens.[109] Their judicial philosophies and values[110] led them to disagree frequently with the more-conservative chief justices with whom they served

[107] *See supra* note 96 and accompanying text.

[108] *See* SEGAL & SPAETH, *supra* note 98.

[109] *See* Jacobs & Smith, *supra* note 89, at 751.

[110] Both Justices Brennan and Stevens were known for strongly supporting the protection and expansion of constitutional rights for individuals, thus making them among the Court's most liberal justices during their respective tenures on the Court. *See, e.g.,* SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 545–46 (2010) ("John Paul Stevens emerged as a key liberal during a tenure that ultimately lasted longer than Brennan's . . . . Brennan remained the very embodiment of a liberal justice . . . ."); CHRISTOPHER E. SMITH, JOHN PAUL STEVENS: DEFENDER OF RIGHTS IN CRIMINAL JUSTICE 27 (2015) ("With the retirements of liberal Warren Court holdovers Justices Brennan and Marshall . . . , Stevens became the most senior and influential defender of constitutional rights on the Court for nearly two decades.").

after becoming long-serving associate justices.[111] By contrast, it is well-recognized that Justices O'Connor and Thomas had higher rates of agreement with these chief justices.[112]

The fourth factor, frequency of disagreement with other associate justices whose seniority makes them eligible to assign majority opinions as SAJ, has been especially impactful in limiting opinion-assigning opportunities for women and African-American justices.[113] For example, Justices Brennan and Marshall had a high rate of interagreement and served together for all but the final year of Justice Marshall's career.[114] Thus, five of the six opinion assignments made by Marshall occurred during the 1990 Term, the lone term that Marshall served after the retirement of Brennan.[115] The one exception was a statutory interpretation decision assigned by Marshall that did not divide the justices according to their typical liberal-conservative alignments as Brennan dissented along with Chief Justice Warren Burger and Justices White and Blackmun.[116] The split between Marshall and Brennan in this case made Justice Marshall the SAJ in a majority bloc with Justices O'Connor, Rehnquist, Powell, and Stevens.[117]

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[111] In voting on case outcomes, Justice Brennan's overall interagreement rate with Chief Justice Burger was 57.7% and his agreement rate with Associate Justice and later Chief Justice Rehnquist was 50.3%. Justice Stevens's overall interagreement rate with Chief Justice Burger was 66.7%, his interagreement rate with Chief Rehnquist was 61.1%, and his interagreement rates with Chief Justice Roberts was 59.7%. LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 606–07, 636–37 (5th ed. 2012).

[112] Justice O'Connor's interagreement rate with Chief Justice Burger was 87.6% and her interagreement rate with Rehnquist was 85.1%. Justice Thomas's interagreement rate with Chief Justice Rehnquist was 85.5%. His interagreement rate with Chief Justice Roberts was 85.0%. Thomas was appointed after the retirement of Chief Justice Burger in 1986. *Id.* at 626, 640.

[113] *See infra* notes 114–22 and accompanying text.

[114] Justice Marshall's interagreement rate with Justice Brennan was 92.8%. EPSTEIN ET AL., *supra* note 111, at 606.

[115] *See generally* Parker v. Dugger, 498 U.S. 308 (1991); Salve Regina College v. Russell, 499 U.S. 225 (1991); Lankford v. Idaho, 500 U.S. 10 (1991); Burns v. United States, 501 U.S. 129 (1991); Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).

[116] *See generally* United Steelworkers of America v. Sadlowski, 457 U.S. 102 (1982) (holding that a union may restrict union candidates for union office from accepting campaign contributions from nonmembers).

[117] *Id.*

In the case of Justice O'Connor, who was eligible to be the opinion-assigning SAJ for the final 15 years of her career,[118] Justice Stevens typically had the most seniority among the associate justices in the majority.[119] Justice Stevens was on the Supreme Court during O'Connor's entire career, having been appointed six years earlier and retired five years later than the Court's first woman justice.[120] If Justices Brennan or Stevens had retired earlier than they did, there would have been more opportunities for Justices Marshall and O'Connor, respectively, to exercise the SAJ's opinion-assignment authority.[121] The tenure of Justice Stevens also affected Justice Ginsburg's opportunities as they frequently voted together when Chief Justices Rehnquist and Roberts dissented, and Stevens served with Ginsburg during her first 17 years on the Court.[122]

B. Majority Opinions Assigned by Women and African-American Justices

Exclusive monopolization of the majority-opinion-assignment power by white male justices has been dented, but not significantly altered, by the 39 opportunities to assign majority opinions for three women justices (O'Connor, Ginsburg, Sotomayor) and two African-American justices (Marshall, Thomas).[123] These justices had no control over which issues or cases would be placed under their assignment authority.[124] Lawyers' briefs, oral arguments, and discussions among the justices at conferences combined with the justices' interpretive theories, judicial values, and individual agendas determine the vote in each case.[125] These justices, in effect, inherited each

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[118] Justice O'Connor, who retired in January 2006, had more seniority than four other associate justices when Justice Thomas was appointed in 1991. *See About the Court: Justices 1789 to Present*, *supra* note 102; *see also* Table 2 (describing when during their careers the women and justices of color had four justices on the Court with them who had fewer years of service).

[119] Throughout the time period beginning in 1991 in which Justice O'Connor might have been the senior associate justice in a five-member majority when the chief justice dissented, Justice Stevens was much more likely to be the SAJ because of his lower agreement rate with Chief Justice Rehnquist. *See supra* note 118 and accompanying text; *see infra* notes 120–22 and accompanying text.

[120] Justice Stevens was appointed in 1975 and retired in 2010. Justice O'Connor was appointed in 1981 and retired in January 2006. *See About the Court: Justices 1789 to the Present*, *supra* note 102.

[121] *See supra* notes 115–20 and accompanying text.

[122] Justice Ginsburg was appointed to the Court in 1993 after Justice Stevens had already served for 18 years and she served with him until his retirement in 2010. *See About the Court: Justices 1789 to the Present*, *supra* note 102. Justice Ginsburg's interagreement rate with Justice Stevens was 83.9%. EPSTEIN ET AL., *supra* note 111, at 637.

[123] *See* Table 1.

[124] The SAJ gains assignment authority over those cases in which the Chief Justice is in the dissent, thus the mix of issues that fall into this category of outcomes is unpredictable. *See* Jacobs & Smith, *supra* note 90, at 919–20.

[125] BAUM, *supra* note 86, at 121–68.

opportunity to serve as SAJ through the individual circumstances affecting decision-making for these 39 cases.[126] With respect to the assignment decision itself, by contrast, these justices had the opportunity to control their own considered judgments in making choices about which justices would write for the Court.[127]

Modern chief justices typically make majority opinion assignments, in part, by considering the creation of an equitable workload among the justices, shared opportunities to speak for the Court, and avoidance of a backlog of pending opinions if slower authors become overburdened by assignments.[128] By contrast, as found in a study of opinion-assignments during the Burger Court era, "the associate justice is freed from the contextual constraints to which the chief is subjected."[129] Both chief justices and SAJs must be concerned about holding their majorities together when the justices are deeply divided over an issue.[130] Thus, for closely divided decisions in particular, all majority-opinion assigners must consider using the strategy of assigning the opinion to the justice perceived to be most at risk of wavering and reversing the preliminary outcome of the case by switching sides during the opinion drafting process.[131] For example, as revealed in Justice Harry Blackmun's papers in the Library of Congress, Justice Stevens wrote a draft majority opinion in *Houchins v. KQED*[132] that Justice Potter Stewart regarded as too forcefully supportive of a First Amendment right for the news reporters to gain access to and interview people confined in local jails.[133] As a result, Stewart defected from the majority, gave the initial dissenters the ability to determine the outcome of the case, and thereby limited the definition of the purported First Amendment right.[134] Commentators point

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[126] *See* Jacobs & Smith, *supra* note 90, at 919–20.

[127] *See* Jacobs & Smith, *supra* note 89.

[128] MALTZMAN ET AL., *supra* note 87, at 52, 56.

[129] *Id.* at 53.

[130] *See, e.g.*, Jeffrey Rosen, *The Dissenter, Justice John Paul Stevens*, N.Y. TIMES MAG., Sept. 23, 2007, at 53 ("When he is in the majority, [Justice] Stevens is careful not to lose votes that start off on his side, often assigning the opinion to [Justice] Kennedy when Kennedy seems to be on the fence."); BILL BARNHART & GENE SCHLICKMAN, JOHN PAUL STEVENS: AN: AN INDEPENDENT LIFE 229-30 (2010) ("[T]he power to assign an opinion may be used strategically by the senior justice on a case to secure the fifth vote, in effect by appealing to a wavering justice's pride of authorship.").

[131] Rosen, *supra* note 130; BARNHART & SCHLICKMAN, *supra* note 130.

[132] Houchins v. KQED, 438 U.S. 1 (1978).

[133] SMITH, *supra* note 78, at 146.

[134] *Id.* at 147–52.

to other examples, such as assignments made by Justice Stevens, to illustrate SAJs' majority-preserving strategic considerations underlying opinion assignments in controversial, closely decided cases.[135]

Because the tone and content of majority opinions articulate the reasoning and conclusions underlying legal doctrines, the opportunity to write a majority opinion enables individual justices to influence very directly the development of law.[136] Chief justices often assign important, controversial opinions to themselves,[137] such as Chief Justice Earl Warren[138] in *Brown v. Board of Education* concerning school desegregation[139] and Chief Justice Burger[140] in *United States v. Nixon*, the pivotal Watergate case.[141] In unanimous decisions, such as *Brown* and *Nixon*, the Court's justices recognize that they are asserting their institution's full legitimacy as represented in the chief justice's symbolic role as leader and spokesperson for the Court.[142] In addition, institutional considerations about equitable distribution of workload and efficient opinion writing may lead chief justices to assign opinions across the Court to justices with various philosophies and ideological orientations.[143] By contrast, such institutional considerations seem less likely to influence opinion-assignment decisions for SAJs, especially those SAJs who enjoy very few opportunities to make majority opinion

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[135] *See* Linda Greenhouse, *Justice John Paul Stevens as Abortion-Rights Strategist*, 43 U.C. DAVIS L. REV. 749, 782 (2010) (writing that Justice Stevens assigned a majority opinion in a controversial abortion case to Justice Stephen Breyer to avoid rhetoric that might alienate Justice O'Connor); JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 22–23 (2007) (writing that Justice Stevens assigned a majority opinion in a controversial affirmative action case to Justice O'Connor to help retain her support for the issue).

[136] *See, e.g.*, WASBY, *supra* note 16, at 267 ("The breadth of an opinion, its doctrinal bases, and the other content it contains . . . affect not only an opinion's immediate policy effects but also its value as precedent.").

[137] Elliot E. Slotnick, *The Chief Justices and Self-Assignment of Majority Opinions: A Research Note*, 31 W. POL. Q. 219, 225 (1978); WASBY, *supra* note 16, at 250.

[138] ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 284–85 (1997).

[139] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[140] BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 366–67 (1979).

[141] United States v. Nixon, 418 U.S. 683 (1974).

[142] *See* CRAY, *supra* note 138, at 284 ("Warren suggested to the [justices] that the [*Brown*] decision might be more palatable in the Old South if one of the southerners on the Court wrote it. Several of the justices protested. From the early days of the Republic . . . the chief justice had always assumed the politically important cases."); WOODWARD & ARMSTRONG, *supra* note 140, at 411 (when discussing *United States v. Nixon* with his law clerks, Justice Douglas said, "[i]t seems a good idea to have only one opinion and have the Chief do it.").

[143] CORLEY ET AL., *supra* note 3, at 401; WASBY, *supra* note 16, at 248.

assignments.[144] Unless they make strategic assignments to hold together fragile majorities, SAJs presumably enjoy greater freedom than chief justices to self-assign majority opinions and assert themselves in shaping the law with their reasoning and conclusions.[145] Indeed, a study of Burger Court era assignments found that "associate justices have a proclivity for self-assignment."[146] Obviously, for women and African-American SAJs, as with any other justice, the decision to self-assign may depend on their interest in the particular issue[147] or their collegiality-preserving inclination to avoid burdening colleagues with tedious or otherwise uninteresting assignments.[148]

Table 3. Self-Assignment Rate for Majority Opinions Assigned by Senior Associate Justices, 1967 Term-2022 Term

Associate Justice	**Assignments Made**	**Assigned to Self**	**Percentage of Self-Assigned Cases**
Sotomayor	1	1	100%
O'Connor	4	2	50.00%
Stewart	8	4	50.00%
White	38	15	39.50%
Kennedy	48	18	37.50%
Scalia	19	7	36.80%
Brennan	300	110	36.70%

[144] *See* MALTZMAN ET AL.*, supra* note 87, at 56 ("[T]he assignment decisions made by associate justices . . . appear unaffected by many of the contextual factors that shape the chief's assignments.").

[145] *Id.* at 53.

[146] *Id.*

[147] For example, as SAJ, Justice Kennedy "was notable in his self-assignment of majority opinions for blockbuster cases concerning same-sex marriage and LGBTQ rights, an area in which he had already established himself as a leading figure in the development of protective legal doctrines." Jacobs & Smith, *supra* note 90.

[148] Scholars have noted that appellate judges work together in small groups for long periods of time. As a result, most judges make efforts to maintain good relationships with their colleagues, especially because such relationships are likely to enhance cooperation and persuasion as judges seek to gain support for their preferred case outcomes. G. ALAN TARR, JUDICIAL PROCESS AND JUDICIAL POLICYMAKING 267 (7th ed. 2019).

Stevens	185	63	34.10%
Marshall	6	2	33.30%
Blackmun	25	8	32.00%
Black	35	9	25.70%
Thomas	20	5	25.00%
Harlan	5	1	20.00%
Douglas	83	11	13.30%
Ginsburg	8	0	0.00%
Breyer	2	0	0.00%

Table 3 displays a comparative overview of self-assignment rates for SAJs since the appointment of Justice Marshall in 1967. Although the universe of opinion-assignment opportunities for women and African-Americans is small, it raises questions about the circumstances and motives that may differentiate these justices.[149] The power to assign the majority opinion provides the chance to seize the opportunity to write on behalf of the Court.[150] On the other hand, the specific issues that happen to divide the Court in ways that create assignment opportunities for these justices will not necessarily be attractive to the individual justices who are SAJs for these cases.[151]

***See Appendix* for Table 4. Opportunities for Influence in the Role of Senior Associate Justice (Women and African-American Justices by Issue Area Classification and Direction of Case Outcome)**

Table 4 provides an overview of the issue categories for the cases assigned by these justices.[152] As shown in the table, certain kinds of issues were more frequently subject to their opinion-assignment powers than were other issues. Four of the five justices had opportunities to make assignment selections for the Supreme Court's largest issue category, criminal procedure cases, which is not surprising since such issues make up a notable portion of

[149] Justices may have different priorities when assigning opinions, including cultivating the cooperation of other justices or seizing the opportunity to write about issue of importance. Jacobs & Smith, *supra* note 89, at 762, 766–67, 769–70.

[150] Jacobs & Smith, *supra* note 90.

[151] For example, unlike the high percentage of civil rights and due process opinions that he assigned to himself, Justice Kennedy spread assignments of cases concerning economic issues around among other justices. *Id.* at 918.

[152] The issue categories are those used by the Supreme Court Judicial Database. *See The Supreme Court Judicial Database: Analysis Specifications - Modern Data (1946–2018), supra* note 20.

the Court's docket each term.[153] Consistent with their voting records in other cases, [154] Justices Marshall and Ginsburg gained their SAJ-assignment opportunities in cases with liberal outcomes. Justices O'Connor and Thomas made assignments in cases with conservative outcomes as well as liberal outcomes, reflecting their patterns of joining their liberal colleagues when the Court was divided on certain issues.[155] The small number of majority opinions assigned thus far by women and African-American justices in the role of SAJ continues to provide a limitation on the overall influence of these justices, especially when contrasted with the numerous assignments made by certain white male justices.[156]

C. Assignments by Individual Senior Associate Justices

Table 5 displays Justice Marshall's opinion-assignment decisions when he was the SAJ. He self-assigned for two of the six cases.[157] It is not clear from his record on the Court,[158] however, that the issues in these cases, labor law,[159] and sentencing guidelines,[160] were of more interest to him than the two death penalty issues[161] or the First Amendment speech issue[162] that he assigned to others. Indeed, Marshall was exceptionally interested in the death penalty.[163] The 5-to-4 decisions on the death penalty and freedom of speech that he assigned to other justices, including his conservative-but-frequently-

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[153] Over the years in which these justices served, the Supreme Court regularly includes criminal justice cases as one-third or more of its annual docket. *See, e.g.,* Christopher E. Smith et al., *Criminal Justice and the 2004-2005 United States Supreme Court Term*, 36 U. MEM. L. REV. 951, 953–54 (2006) ("Of the seventy-four cases for which the Supreme Court issued full opinions during the 2004–2005 Term, thirty-four dealt with criminal justice. This figure highlights the Court's continued, heightened attention to criminal justice . . . .").

[154] EPSTEIN ET AL., *supra* note 111, at 562.

[155] Christopher E. Smith, *The Rehnquist Court and Criminal Justice: An Empirical Assessment*, 19 J. CONTEMP. CRIM. JUST. 161, 173 (2003).

[156] *See supra* notes 97–98 and accompanying text.

[157] United Steelworkers of Am. v. Sadlowski, 457 U.S. 102, 104 (1981); Burns v. United States, 501 U.S. 129, 131 (1991).

[158] *See, e.g.*, Daniels, *supra* note 6, at 212–37 (reviewing Justice Marshall's record during the Burger Court era).

[159] *Sadlowski*, 457 U.S. at 104.

[160] *Burns*, 501 U.S. at 131.

[161] Parker v. Dugger, 498 U.S. 308, 310 (1991); Lankford v. Idaho, 500 U.S. 110, 111 (1991).

[162] Gentile v. State Bar of Nev., 501 U.S. 1030, 1032 (1991).

[163] *See* TUSHNET, *supra* note 49, at 163–78.

centrist colleagues Justices O'Connor and Kennedy,[164] raise the possibility that his choice of authors was driven by a concern for preserving a narrow majority.[165] His assignments to Justices Blackmun and Stevens, whose votes closely aligned with his at the end of his career, were consistent with the study of Burger Court era cases that found the SAJ "largely assigns opinions to those justices who are ideologically allied."[166] Because nearly all of Marshall's assignment opportunities came during his final year on the Court when he was known to be quite ill, his physical condition may have limited his inclination to self-assign majority opinions.[167]

Table 5. Opinion Assignments by Justice Thurgood Marshall as Senior Associate Justice

Issue Category	**Specific Issue (Year)**	**Vote**	**Liberal/ Conservative**	**Assignment Recipient**
Economic Activity	Labor law (1982)	5-4	Liberal	Self-assigned
Criminal Procedure	Death penalty mitigation (1991)	5-4	Liberal	O'Connor
Judicial Power	Appellate review standards (1991)	6-3	Liberal	Blackmun
Criminal Procedure	Death penalty (1991)	5-4	Liberal	Stevens
Criminal Procedure	Sentencing guidelines (1991)	5-4	Liberal	Self-assigned
First Amendment	Attorney pretrial statements (1991)	5-4	Liberal	Kennedy

[164] *See, e.g.*, Steven R. Shapiro, *The Center Holds, But Where is the Center?: A Response to James Simon*, 40 N.Y. L. SCH. L. REV. 935, 938 (1996) ("By that definition, it is fair to say that Justices O'Connor and Kennedy occupy the Court's ideological middle.").

[165] In this way, Justice Marshall may have been like Justice Stevens who made assignments to Kennedy and O'Connor with presumptively strategic objectives for maintaining majority support. *See* Jacobs & Smith, *supra* note 89, at 752–53, 760–63.

[166] MALTZMAN ET AL., *supra* note 87, at 53.

[167] *See, e.g.*, DAVID N. ATKINSON, LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END 179 (1999) ("Of the three most recent justices to extend their tenure into their eighties, only Justice Marshall was clearly unable to function satisfactorily in his last years.").

As indicated by Table 6, half of Justice O'Connor's four opportunities to assign majority opinions came during Chief Justice Rehnquist's absence while he received cancer treatments in the year prior to his death in 2005.[168] She self-assigned in two cases. One self-assignment concerned the commercial speech of pharmaceutical companies.[169] The other was an Equal Protection Clause case concerning racial segregation in a prison processing center.[170] Her opinion carved out a middle ground between the absolutist and diametrically opposed dissenting opinions of Justice Stevens and Justice Thomas.[171] Her role and approach in this case were similar to her delineation of the middle ground for controversial issues[172] such as abortion,[173] affirmative action,[174] and legal rights of "enemy combatants" captured in and transported from Afghanistan.[175] She may very well have seen herself as best positioned to

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[168] *See* JOHN A. JENKINS, THE PARTISAN: THE LIFE OF WILLIAM REHNQUIST 262–63 (2012) ("When Rehnquist returned to the Court in October 2004 for the start of the new term, he was bothered by a persistent sore throat . . . . The eighty-year-old chief justice, a lifelong smoker, had anaplastic thyroid cancer—a type that was aggressive and usually rapidly fatal.").

[169] Thompson v. W. States Med. Ctr., 535 U.S. 357, 360 (2002).

[170] Johnson v. California, 543 U.S. 499, 502 (2005).

[171] Justice O'Connor concluded that strict scrutiny analysis must be applied to an equal protection claim concerning racial segregation in California's prison processing center, but she remanded the case to the lower courts to apply the standard. *Id.* at 515. By contrast, Justice Thomas's dissent argued for application of the rational basis test that would permit segregation in the processing center while Justice Stevens dissented because he thought the application of the strict scrutiny standard should produce a ruling against California without remanding for further proceedings. *Id.* at 523, 548–50.

[172] *See* NANCY MAVEETY, QUEEN'S COURT: JUDICIAL POWER IN THE REHNQUIST ERA 8 (2008) (analysis of Justice O'Connor as the central figure in Rehnquist Court decisions in which "rule-of-thumb balancing approaches prevailed over bright-line, ideologically driven rules for deciding cases and adjudicating legal issues.").

[173] In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), Justice O'Connor issued an opinion jointly authored with Justices Souter and Kennedy that preserved the right of choice for abortion while permitting states to impose certain restrictions. BISKUPIC, *supra* note 40, at 270–272.

[174] In *Grutter v. Bollinger*, 539 U.S. 306 (2003), Justice O'Connor's majority opinion for a divided Court preserved the use race as one factor among others in higher education admissions while it prohibited the awarding of specific credit in the competitive admissions process for the factor of race alone. *Id.* at 319–22.

[175] In *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004), Justice O'Connor's opinion established middle ground by requiring that a U.S. citizen arrested in Afghanistan and detained at a military jail in the United States be given access to an attorney and a court hearing. By contrast, Justice Scalia, on behalf of Justice Stevens, argued in dissent that a U.S. citizen in detention is entitled to all constitutional rights provided to a defendant in a criminal case while Justice Thomas's dissent argued that the president has the authority to hold Americans in detention indefinitely without providing any evidence of wrongdoing or access to judicial processes. Christopher E. Smith

navigate a middle course[176] in the prison case that divided the Court into three different viewpoints and conclusions.[177]

Table 6. Opinion Assignments by Justice Sandra Day O'Connor as Senior Associate Justice

Issue Category	Specific Issue (Year)	Vote	Liberal/ Conservative	Assignment Recipient
Criminal Procedure	Sentencing guidelines (2001)	6-3	Conservative	Ginsburg
First Amendment	Commercial speech (2002)	5-4	Liberal	Self-assigned
Civil Rights	Racial segregation in prison (2005)	5-3	Liberal	Self-assigned
Criminal Procedure	Death penalty habeas corpus (2005)	5-3	Conservative	Kennedy

Justice Thomas made 16 of his 20 majority-opinion assignments after the death of Justice Scalia in 2016, whose passing left Thomas as the Court's most senior consistent conservative.[178] As indicated by Table 7, Thomas self-assigned five majority opinions in his role as SAJ. One of the self-assignments concerned sentencing guidelines, [179] an issue of interest to Thomas who had joined his liberal colleagues in several decisions that insisted on a fact-finding role for juries before judges could enhance sentences based on their own

& Cheryl D. Lema, *Justice Clarence Thomas and Incommunicado Detention: Justifications and Risks*, 39 VAL. U. L. REV. 783, 786–92 (2005).

[176] For example, Justice O'Connor said of herself that she was "a little more pragmatic than some other justices. I liked to find solutions that would work." Walter Isaacson, *A Justice Reflects*, THE DAILY BEAST (Apr. 25, 2017, 2:47 PM), http://www.thedailybeast.com/a-justice-reflects [https://perma.cc/Q8G8-88M2].

[177] Johnson v. California, 543 U.S. 499, 502, 517, 524 (2005).

[178] Wilson Andrews et al., *How Scalia Compared with Other Justices*, N.Y. TIMES (Mar. 9, 2016), https://www.nytimes.com/interactive/2016/02/14/us/supreme-court-justice-ideology-scalia.html [https://perma.cc/CM6A-WULY].

[179] Alleyne v. United States, 570 U.S. 99, 102–03 (2013).

conclusions of fact.[180] In *Walker v. Texas Division, Sons of Confederate Veterans*, Thomas arguably deviated from his usual First Amendment based-opposition to government-perpetrated viewpoint discrimination by voting to permit Texas to prohibit the placement of Confederate flags on specialty license plates.[181] Observers speculated that the racist symbolism of such plates triggered Thomas's resistance to the First Amendment claim.[182] He assigned to Justice Breyer the task of writing the majority opinion that collided with Justice Alito's "dissent that could have come from Thomas's pen," in light of Thomas's previously expressed views on First Amendment speech issues in other cases.[183] Justice Thomas assigned six opinions to Justice Gorsuch[184] and three to Justice Kagan among the opinions that he did not assign to himself.[185]

Table 7. Opinion Assignments by Justice Clarence Thomas as Senior Associate Justice

Issue Category	Specific Issue (Year)	Vote	Liberal/ Conservative	Assignment Recipient
Judicial Power	Restitution authority (2010)	5-4	Liberal	Breyer

[180] *See, e.g.*, Linda Greenhouse, *Supreme Court Limits Judges' Sentencing Power*, N.Y. TIMES (Jan. 23, 2007), https://www.nytimes.com/2007/01/23/washington/23scotus.html [https://perma.cc/XEU9-W4NQ] (concerning Justice Thomas joining his liberal colleagues in limiting sentencing authority of judges as he had done in prior cases in which he supported leaving certain determinations to juries).

[181] Walker v. Tex. Div., Sons of Confederate Veterans, 576 U.S. 200, 200 (2015) (Thomas concurring). *See* Epps, *supra* note 68.

[182] Epps, *supra* note 68.

[183] *Id.*

[184] Justice Gorsuch wrote majority opinions in: Va. Uranium v. Warren, 139 S. Ct. 1894 (2019) (concerning federal preemption); Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (concerning unanimity in criminal jury verdicts); Niz-Chavez v. Garland, 593 U.S. 155 (2021) (concerning an immigration law statute); Whole Women's Health v. Jackson, 595 U.S. 30 (2021) (concerning a pre-enforcement challenge to Texas Heartbeat Act); Mallory v. Norfolk S. Ry. Co., 600 U.S. 122 (2023) (concerning the Federal Employers' Liability Act); and Nat'l. Pork Producers Council v. Ross, 598 U.S. 356 (2023) (concerning the Commerce Clause).

[185] Justice Kagan wrote majority opinions assigned by Justice Thomas in: Iancu v. Brunetti, 139 S. Ct. 2294 (2019) (concerning registration of trademarks), Borden v. United States, 593 U.S. 420 (2021) (concerning the Armed Career Criminal Act), and Becerra v. Empire Health Found., 597 U.S. 424 (2022) (concerning Medicare payments).

Economic Activity	Employer liability statute (2011)	5-4	Liberal	Ginsburg
Criminal Procedure	Sentencing guidelines (2013)	5-4	Liberal	Self-assigned
First Amendment	Specialty license plates (2015)	5-4	Conservative	Breyer
Judicial Power	Jurisdiction stripping statute (2018)	5-4	Conservative	Self-assigned
Criminal Procedure	Criminal statute (2019)	5-4	Conservative	Self-assigned
Federalism	Federal preemption (2019)	5-4	Conservative	Gorsuch
Judicial Power	Civil procedure (2019)	5-4	Liberal	Self-assigned
Judicial Power	Standing (2019)	5-4	Conservative	Ginsburg
First Amendment	Permissible trademarks (2019)	6-3	Liberal	Kagan
Criminal Procedure	Jury Trial (2020)	6-3	Liberal	Gorsuch
Criminal Procedure	Statutory interpretation of criminal law (2021)	5-4	Liberal	Kagan

Civil Rights	Immigration and Naturalization (2021)	6-3	Liberal	Gorsuch
Judicial Power	Standing (2021)	8-1	Liberal	Self-assigned
Economic Activity	Miscellaneous Economic Regulation (2022)	5-4	Liberal	Kagan
Judicial Power	Jurisdiction (2021)	5-4	Conservative	Gorsuch
Criminal Procedure	Sentencing guidelines (2022)	5-4	Liberal	Sotomayor
Due Process	State regulation (2023)	5-4	Conservative	Gorsuch
Economic Activity	State regulation (2023)	5-4	Conservative	Gorsuch
Economic Activity	Copyright Act (2023)	7-2	Liberal	Sotomayor

In Justice Ginsburg's eight opportunities to assign majority opinions, Table 8 shows that she was notable for never assigning an opinion to herself. Her assignment opportunities arose exclusively during a three-year period from 2018 through 2020 during which she assigned three of the eight opinions to women justices.[186] Except for one opinion assignment to Justice

[186] Justice Kagan wrote majority opinions in Sessions v. Dimaya, 138 S. Ct. 1204 (2018) (concerning the Immigration and Nationality Act) and Gundy v. United States, 139 S. Ct. 2116 (2019) (concerning the federal Sex Offender Registration and Notification Act). Justice

Breyer,[187] Justice Ginsburg assigned the other opinions to the Court's conservative newcomers, Justices Gorsuch[188] and Kavanaugh.[189] Three of these cases had five-member majorities so perhaps her assignments to conservative justices reflected a concern about potentially losing their votes in close decisions.[190]

Table 8. Opinion Assignments by Justice Ruth Bader Ginsburg as Senior Associate Justice

Issue Category	**Specific Issue (Year)**	**Vote**	**Liberal/ Conservative**	**Assignment Recipient**
Due Process	Deportation (2018)	5-4	Liberal	Kagan
Miscellaneous	Delegation doctrine (2019)	5-3	"Unspecifiable"	Kagan
Civil Rights	Native American treaty rights (2019)	5-4	Liberal	Breyer
Economic Activity	Antitrust (2019)	5-4	Liberal	Kavanaugh
Civil Rights	Native American treaty rights (2019)	5-4	Liberal	Sotomayor
Criminal Procedure	Trial by jury (2019)	5-4	Liberal	Gorsuch
Due Process	Vagueness of criminal statute (2019)	5-4	Liberal	Gorsuch
Civil Rights	Native American	5-4	Liberal	Gorsuch

Sotomayor wrote the majority opinion in Herrera v. Wyoming, 139 S. Ct. 1686 (2019) (concerning the 1868 Treaty between United States and Crow Tribe of Indians).

[187] Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (2019) (concerning Washington State Department of Licensing fees).

[188] United States v. Haymond, 139 S. Ct. 2369 (2019) (concerning the Due Process Clause and the Sixth Amendment right to jury trial); United States v. Davis, 139 S. Ct. 2319 (2019) (concerning the Hobbs Act); McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (concerning the Major Crimes Act).

[189] Apple, Inc. v. Pepper, 139 S. Ct. 1514 (2019) (concerning anti-trust concerns).

[190] *See supra* notes 130–35 and accompanying text.

	treaty rights (2020)			

Justice Sotomayor made her lone opinion assignment as SAJ in a 2023 decision involving questions of court jurisdiction concerning a property dispute between a Montana couple and the federal government.[191] She assigned to herself this majority opinion in *Wilkins v. United States* when both Chief Justice Roberts and Justice Thomas dissented[192] and the recent 2022 retirement of Justice Breyer left her as the Court's most senior liberal justice.[193]

V. WAITING FOR THE CALL

A. Opinion Assignments to Women and African-American Justices by Senior Associate Justices

The assignment power of the SAJ provides one of the most direct avenues through which women and African-American justices can influence the development of law.[194] Moreover, unlike a chief justice, who may advance an institutional goal to equitably distribute writing duties among the justices or balance the workload within the Court, SAJs are freer to choose justices whose experiences or viewpoints would reflect their own preferences for reasoning and tone in a majority opinion.[195] Thus, majority-opinion assignments from SAJs could potentially expand opportunities for influence by women and African-American justices even as they have had relatively few opportunities to exercise opinion-assignment authority themselves.[196] These opportunities may be important for the benefits of diversity in the judiciary because scholars recognize that judges' backgrounds and experiences can impact their understanding of society and contributions to law.[197]

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[191] Wilkins v. United States, 143 S.Ct. 870 (2023) (concerning the scope of an easement).

[192] *Id.*

[193] *See* Elie Mystal, *How Sonia Sotomayor Became the Conscience of the Supreme Court*, NATION, (September 5/12, 2022), https://www.thenation.com/article/politics/sonia-sotomayor-liberal-justice [https://perma.cc/DA2S-9UC2] ("With the retirement of Stephen Breyer in June, Sotomayor has become the senior liberal justice on the [C]ourt.").

[194] *See supra* notes 88–91 and accompanying text.

[195] *See supra* notes 144–46 and accompanying text.

[196] *Id.*

[197] *See, e.g.*, Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 58 AM. J. POL. SCI. 37, 52 (2015) ("[A]cross cases involving

Table 9. Majority Opinion Assignments Received from SAJs, 1967 Term-2022 Term (Ranked by percentage of assignments received when eligible; Women and African-American Justices italicized) [self-assignments excluded]

Justice	Cases in Majority Coalition with SAJ Making the Opinion Assignment	Cases Assigned to Justice by an SAJ	Percentage of Assignments Received from SAJs When in Majority Coalition
Gorsuch	22	10	45.5
Harlan	35	12	34.3
Brennan	116	28	24.1
Stewart	169	39	23.1
Kennedy	218	41	18.8
Douglas	29	5	17.2
Ginsburg	254	41	16.1
Scalia	134	21	15.7
Breyer	233	36	15.5
Sotomayor	134	21	15.7
Mean Percentage			**15.0**
White	303	44	14.5
Powell	182	26	14.3
Stevens	314	44	14.0
Blackmun	334	46	13.8
Kagan	81	11	13.5
Souter	228	26	11.4
Kavanaugh	9	1	11.1
Barrett	9	1	11.1

gender issues, judges who parent daughters as opposed to sons are more likely to reach liberal decisions—possibly because having daughters causes judges to learn about women's issues."); *see also* Adam Liptak, *Another Factor Said to Sway Judges to Rule for Women's Rights: A Daughter*, N.Y. TIMES, June 16, 2014, at A14 ("Having daughters . . . is just one kind of personal experience, but there could be other things—for example, serving in the military, adopting a child or seeing a law clerk come out as gay. All of these things could affect a Justice's worldview.").

Rehnquist [as Associate Justice]	63	7	11.1
O'Connor	230	25	10.9
Marshall	411	39	9.5
Thomas	107	9	8.4
Alito	38	2	5.3
Fortas	12	0	0.0
Jackson	3	0	0.0

Table 9 presents the number of majority opinions assigned by SAJs to each Associate Justice from Justice Marshall's appointment in 1967 through the 2022 Term.[198] The table includes the number and percentage of opinion assignments from SAJs for cases in which each associate justice was eligible for consideration by virtue of voting with the majority when the chief justice was a dissenter or did not participate. The data exclude any self-assigned opinions by SAJs and therefore illuminate only cases assigned to other associate justices by SAJs.[199]

From the time of Marshall's appointment to the Supreme Court in 1967 through the 2022 Term, 23 associate justices received majority-opinion assignments from SAJs. Justice Fortas never received an assignment from an SAJ during his brief overlap in service with Marshall prior to Fortas's resignation amid controversies that generated threats of impeachment.[200] Justice Jackson did not receive any such assignments from an SAJ during her first year on the Court during the 2022 Term.[201] The justice most relied upon

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[198] *See supra* notes 20–26 and accompanying text.

[199] *See supra* notes 144–50 and accompanying text and Table 3.

[200] ATKINSON, *supra* note 167, at 140–42.

[201] All five of the majority opinions written by Justice Jackson were assigned to her by Chief Justice Roberts: Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382 (2023) (concerning alleged violations of automatic stay); Lora v. United States, 599 U.S. 453 (2023) (concerning aiding and abetting the use and carrying of a firearm); Santos-Zacaria v. Garland, 598 U.S. 411 (2023) (concerning application for withholding of removal); MOAC Mall Holdings LLC v. Transform Holdco LLC, 598 U.S. 288 (2023) (concerning a court approved sale); Health and Hospital Corp. of Marion v. Tavelski, 142 S.Ct. 2673 (2023) (concerning the Federal Nursing Home Reform Act); Delaware v. Pennsylvania, 598 U.S. 115 (2023) (concerning Delaware's escheatment of certain abandoned financial products).There were only four opportunities to receive a majority opinion assignment from an SAJ during the

by SAJs was Justice Gorsuch who wrote the majority opinion in 10 of the 22 cases (45.5%) in which he was the member of a majority with an opinion-assigning SAJ. By contrast, the percentage of possible assignments received by Justices Ginsburg (16.1%) and Sotomayor (15.5%) were very close to the Court mean of 15.0 percent. Yet, as the top diversity representatives among the authors of SAJ-assigned opinions, they were not among those justices with the highest percentages of assignments received. More notably, the other women justices who received SAJ-assigned majority opinions, Justices Barrett, Kagan, and O'Connor, as well as the African-American justices who received such assignments, Justices Marshall and Thomas, were below the mean. Indeed, the latter three are among the justices who received the lowest percentage of assignments, along with Justice Jackson, who did not receive a majority opinion assignment from an SAJ during her first term on the Court.

VI. CONCLUSION

The end of formal racial and gender exclusion from institutions and processes in the United States does not instantly facilitate equal participation and influence by the newcomers who were previously excluded.[202] The necessity of continuing to push past obstacles is a familiar component of the entry of women and African-Americans into professions, the electorate, businesses, and, of course, authoritative institutions of government.[203] Yet, at the U.S. Supreme Court, the women and African-Americans appointed to serve as justices were accomplished professionals with superb qualifications and credentials equal to those of the white males who previously had the Supreme Court as their exclusive domain.[204] The newcomers, all but one of whom (former Harvard Law School Dean and U.S. Solicitor General Elena Kagan) had experience as federal judges, arrived at the Court fully prepared

2022 Term. Two of those assignments went to Justice Gorsuch, Mallory v. Norfolk Southern Railway Co., 600 U.S. 122 (2023) (concerning Federal Employers' Liability Act) and National Pork Producers Council v. Ross, 598 U.S. 356 (2023) (concerning a ballot initiative barring sales of whole pork), and two went to Justice Sotomayor, Wilkins v. United States, 143 S.Ct. 870 (2023) (concerning the scope of an easement) and Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023) (concerning screenprint illustrations).

[202] For example, legal prohibitions on racial and gender discrimination in education and employment have not automatically created proportionate demographic representation in the federal judiciary because selection of judges in controlled by the President and the U.S. Senate. *See, e.g.*, Carl Tobias, *President Donald Trump's War on Judicial Diversity*, 54 WAKE FOREST L. REV. 531, 555 (2019) ("Of 174 Trump [judicial] nominees, twenty-three are people of color . . . .").

[203] *See, e.g.*, Elin Johnson, *Racial Inequality, at College and in the Workplace*, INSIDE HIGHER ED. (Oct. 17, 2019), https://www.insidehighered.com/news/2019/10/18/racial-inequality-college-and-workplace [https://perma.cc/F6SH-N67X] ("White workers are also paid more than black or Latinx workers in good jobs at every level of education received . . . . The study also found that in 2016 white workers held 77 percent of the good jobs despite only representing 69 percent of available job holders.").

[204] *See About the Court: Justices 1789 to the Present*, *supra* note 102.

to participate in every aspect of the Court's work.[205] In contrast to the accomplished legal professionals appointed to the Supreme Court, pioneering first participants in some other contexts had to learn about the operations and processes from which they had previously been completely excluded.[206] In addition, the Supreme Court purports to be an institution committed to constitutional principles, including equal protection of the laws, and, indeed, is responsible for ensuring legal equality in American society.[207] That responsibility and self-conception did not necessarily exist in other institutional and organizational contexts that formally ended exclusionary rules, yet still maintained barriers to entry.[208] Indeed, what other institution proclaims its purported commitment with the words "Equal Justice Under Law" prominently etched in marble above its front doors?[209]

Of course, the nation's highest court is a human institution.[210] Like other human institutions, it reflects the values, prejudices, and flaws of American society, including its own long history of exclusion.[211] As in other contexts,

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[205] *Id.*

[206] *See e.g.*, Thomas Gibbons-Neff, *The Marines Didn't Think Women Belonged in the Infantry. She's Proving Them Wrong,* N.Y. TIMES (Aug. 9, 2018), https://www.nytimes.com/2018/08/09/us/politics/marines-women-combat-platoon.html [https://perma.cc/45Y5-B7A9] (describing the challenges facing first woman infantry officer in the Marines).

[207] *See, e.g.*, STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 64 (2010) (Justice Breyer characterized "the ultimate challenge of the Supreme Court's role in American life" at its aspiration "not only to declare the 'truth' about the Constitution's meaning but also make law 'a *living* truth,' obeyed by the country and animating its social practices.").

[208] In fact, other institutions had to be forced, through judicial decisions and legislative actions, to formally end various forms of exclusionary discrimination. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (holding that Alabama was forbidden from using arbitrary height and weight requirements to deny women employment as corrections officers).

[209] *See* Photograph of Supreme Court Building on the Supreme Court of the United States, https://www.supremecourt.gov [https://perma.cc/LQW5-UAPN].

[210] *See, e.g.*, SMITH, *supra* note 78, at 7 ("At the individual level, social scientists have provided strong evidence of the influence of judicial decision makers' individual attitudes, values, and policy preferences in shaping constitutional law.").

[211] For example, there were no African-American women who were invited to serve as law clerks at the Supreme Court until Karen Hastie Williams in 1974. James Romoser, *The Lives They Lived and the Court They Shaped*, SCOTUSBLOG, (Dec. 31, 2021, 7:12 PM), https://www.scotusblog.com/2021/12/the-lives-they-lived-and-the-court-they-shaped-remembering-those-we-lost-in-2021 [https://perma.cc/DP7S-V72V]. Nearly two decades into the twenty-first century, Supreme Court law clerks were still overwhelmingly white and male, with only one-quarter women, less than two percent African-American, and one percent Hispanic. Tony Mauro, *Supreme Court Clerks Are Overwhelmingly White and Male. Just Like 20 Years Ago*, USA TODAY (Jan. 8, 2018, 3:29 PM),

the rules and practices affecting the federal judiciary, such as the political nature of the appointment process, preserve white males' hegemony and reinforce the unequal exercise of influence, even when they were not specifically designed to do so.[212] For example, unlike in several state supreme courts,[213] there has yet to be a woman appointed to serve as Chief Justice of the United States and be granted the extensive opinion-assignment authority possessed by that office.[214] The practical politics of judicial appointments has meant that those justices bringing diversity to the Court typically must wait for opportunities to assign opinions as they are junior to longer-serving justices with similar judicial philosophies.[215] For example, Justice Marshall's opportunities to act as SAJ were severely limited by the presence of Justice Brennan, a like-minded and longer-serving justice who retired only one year before Marshall's ill health forced him off the Court, too.[216] Justice Kagan faces the same issue as long as like-minded Justice Sotomayor, who was appointed one year prior to Kagan, remains on the Court.[217] Similarly, recent appointee Justice Barrett may have a long wait before she has opportunities to act as SAJ because the two justices, Gorsuch and Kavanaugh, appointed by President Trump immediately preceding her appointment are relatively

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https://www.usatoday.com/story/opinion/2018/01/08/supreme-court-clerks-overwhelmingly-white-male-just-like-20-years-ago-tony-mauro-column/965945001 [https://perma.cc/5ASV-E35L].

[212] For example, because all states, no matter what their size, have the same two votes in the U.S. Senate, members of Senate disproportionately represent white voters and underrepresent voters of color with potential consequences for how this body evaluates and considers nominees for federal judgeships. *See* Tom McCarthy & Alvin Chang, *'The Senate Is Broken': System Empowers White Conservatives, Threatening U.S. Democracy*, GUARDIAN (Mar. 12, 2021, 10:00 PM), https://www.theguardian.com/us-news/2021/mar/12/us-senate-system-white-conservative-minority [https://perma.cc/7UVL-RW8P]. Another example is the overrepresentation of white males among U.S. Supreme Court law clerks who will gain career advantages in government and private practice from serving in that prestigious role. Mauro, *supra* note 211.

[213] *See* Otto Stockmeyer, *Trailblazing Women Chief Justices*, W. MICH. U. COOLEY L. SCHOOL BLOG (Spring 2019), https://info.cooley.edu/blog/trailblazing-women-chief-justices [https://perma.cc/Z9B5-BRRM] ("As of January 2019, a woman has headed the judiciary of 40 states at one time or another . . . . Several states' court systems have been led by multiple women. No state can top Michigan in that regard, with six female Chief Justices. . . .").

[214] *See supra* note 15 and accompanying text.

[215] *Id.*

[216] *See supra* notes 113–30 and accompanying text.

[217] During the 2019 Term, Justices Kagan and Sotomayor disagreed on the result in only 12% of the Supreme Court's decisions. Adam Feldman, *Final Stat Pack for October Term 2019 (Updated)*, SCOTUSBLOG, (July 10, 2020, 7:36 PM), https://www.scotusblog.com/2020/07/final-stat-pack-for-october-term-2019 [https://perma.cc/XER7-RSYE] ("Justice Agreement" table).

young, consistently conservative, and likely to agree with her in many cases.[218] These issues do not solely affect women and African-American justices as a number of white male justices have been similarly affected by limited opportunities.[219] However, there is arguably a more powerful effect on women and African-American justices because, unlike white male justices, they have been uniformly limited by these circumstances.[220] As a result, these justices are not merely deprived of opportunities to act as the opinion-assigning SAJ. The country is also arguably deprived of potential benefits from their life experiences, perspectives, and understandings of law and society that might otherwise be reflected in their assignment decisions, including self-assigned majority opinions.[221]

The composition of the U.S. Supreme Court, as well as the federal judiciary generally, remains unrepresentative of society.[222] This should be a continuing matter of concern for scholars and citizens as observers worry about the Court's legitimacy in the eyes of various segments of society.[223] Moreover, the country has yet to gain the full benefits of diverse life experiences and perspectives that reflect the breadth of the nation in the Court's majority opinions.[224] When the day comes that a woman is appointed to be Chief Justice of the United States and that appointment is regarded by society as unremarkable, the analysis of opinion assignment opportunities will be quite different, especially if other women justices and people from previously excluded demographic groups are also senior, long-serving

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[218] *See, e.g.*, Joan Biskupic, *How Amy Coney Barrett Has Changed the Supreme Court in Ways Kavanaugh Hasn't*, CNN (May 5, 2021, 12:12 PM), https://www.cnn.com/2021/05/05/politics/barrett-supreme-court-kavanaugh/index.html [https://perma.cc/C6LW-EZB8] (describing how Justice Barrett was in near-complete agreement with Justices Gorsuch and Thomas in her initial participation in the Supreme Court's decisions).

[219] According to the Analysis tool in the Supreme Court Judicial Data Base, Justice David Souter never made a majority opinion assignment in his two-decade career on the Court (1990–2009) because Justice Stevens, appointed in 1975, typically made such assignments for majorities Souter supported when Chief Justices Rehnquist or Roberts dissented. Justice Souter had an 81 percent interagreement rate with Justice Stevens. EPSTEIN ET AL., *supra* note 111, at 636.

[220] By contrast, certain white male justices, such as Stevens and Kennedy, enjoyed frequent opportunities to assign majority opinions. Jacobs & Smith, *supra* note 89, at 755; Jacobs & Smith, *supra* note 90, at 916.

[221] *See supra* notes 63–82 and accompanying text.

[222] *See supra* notes 45–48 and accompanying text.

[223] *See supra* note 62 and accompanying text.

[224] *See supra* notes 45–48, 63–84 and accompanying text.

associate justices.[225] It took nearly two hundred years for the hegemonic white, male control over the Supreme Court's power to be dented, not eliminated, by the appointment of Justice Marshall in 1967.[226] The next monopoly that needs to fall in order to open opportunities for spreading opinion-assignment authority, as well as the benefits of representational and substantive diversity, is the Court's center chair where the chief justice presides.

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[225] In contrast to the U.S. Supreme Court, which has never had a woman as chief justice, in Michigan it is unremarkable now for a woman to serve as chief justice of the state supreme court because there have been six female chief justices. *See* Stockmeyer, *supra* note 213.

[226] *See* TUSHNET, *supra* note 49, at 24–27 (description of nomination and confirmation of Justice Marshall for the Supreme Court in 1967).

VII. APPENDIX

Table 4. Opportunities for Influence in the Role of Senior Associate Justice (Women and African-American Justices by Issue Area Classification and Direction of Case Outcome)

Justice	Civil Rights	Criminal Procedure	Due Process	Economic Activity	Federalism	First Amendment
O' Connor	1	2				1
Ginsburg	3	1	2	1		
Sotomayor						
Marshall		3		1		1
Thomas	1	5	1	4	1	2
Total	5	11	3	6	1	4

Conservative Result	Liberal Result	Misc	Judicial Power
2	2		
0	7	1*	
	1		1
0	6		1
8	12		6
10	28	1	8

*The outcome for one "Miscellaneous" issue case assigned by Justice Ginsburg was labeled as "unspecifiable" for purposes of using the labels "liberal" or "conservative." *Gundy v. United States*, 139 S.Ct. 2116 (2019).