Adjudicating Dignity: Judicial Motivations and Justice Kennedy's Jurisprudence of Dignity

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> They ask for equal dignity in the eyes of the law. The Constitution grants them that right.[1]
>
> - Justice Kennedy, *Obergefell v. Hodges* (2015)

Introduction

In Justice Kennedy's majority opinion in *Obergefell v. Hodges*,[2] the Supreme Court announced that the fundamental right to marriage extended to same sex marriages. While the decision itself made headlines, there was a flurry of coverage concerning the importance of dignity inherent in the decision. Some coverage of the *Obergefell* decision highlighted quotes from the majority and dissenting decisions with Kennedy's line concerning equal dignity often grabbing top billing.[3] Other writers, from diverse sources such as New Civil Rights Movement, *The New Republic*, *Crisis Magazine*, and commentary on the Heritage Foundation's website, traced Kennedy's use of

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1. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

2. 135 S. Ct. 2584 (2015).

3. *E.g.*, The Editorial Board, *A Profound Ruling Delivers Justice on Gay Marriage*, N.Y. TIMES (June 27, 2015), https://www.nytimes.com/2015/06/27/opinion/a-profound-ruling-delivers-justice-on-gay-marriage.html; Brian Levin, *Our Love Is Equal: Justice Kennedy and Civil Rights*, HUFFINGTON POST (June 26, 2016), https://www.huffingtonpost.com/brian-levin-jd/our-love-is-equal-justice_b_7673114.html; Adam B. Lerner, *The Supreme Court's Most Memorable Quotes on Gay Marriage*, POLITICO (June 26, 2015), https://www.politico.com/story/2015/06/supreme-court-justices-opinions-memorable-quotes-gay-marriage-119477.html (containing a remarkably straightforward title for our purposes).

dignity in *Obergefell* back to previous decisions.[4] Some authors, from the *National Review* to *Slate* and *The Atlantic*, wrestled with the legal argument within the Kennedy decision as well as the possible far-reaching consequences and "undetermined legacy" about the right to dignity.[5] While different outlets engaged in multiple ways with Kennedy's usage of dignity, the media recognized the importance of dignity within the *Obergefell* decision.

This concept, however, did not magically appear in the *Obergefell* decision, or even in the earlier, related decision of *United States v. Windsor*.[6] The constitutional argument for dignity has been a consistent principle for Kennedy dating back at least as far as his 1988 Senate confirmation hearings. Responding to a question from Senator Leahy concerning fundamental rights that are judicially enforceable, then-Judge Kennedy answered, "We look to the concepts of individuality and liberty and dignity that those who drafted the Constitution understood . . . We see whether or not the right has been accepted as part of the rights of a free people in the historical interpretation of our own Constitution and the intentions of the framers."[7] He later elaborated that the right of human dignity could be considered based upon, "the injury to the person, the harm to the person, the anguish to the person, the inability of the person to manifest his or her own personality, the inability of a person to obtain his or her own self-fulfillment, [and] the inability of a person to reach his or her own potential."[8] What emerges from his Senate testimony is the concept of the right to human dignity and its relation to constitutional interpretation, privacy, equal protection, and due process rights.

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4. *E.g.*, Claude Summers, Justice Kennedy's Jurisprudence of Dignity (June 7, 2016), https://www.thenewcivilrightsmovement.com/2016/06/new_blog; Eric Sasson, *The LGBT Movement's Supreme Court Hero: Anthony Kennedy*, THE NEW REPUBLIC (June 26, 2015), https://newrepublic.com/article/122182/lgbt-movements-supreme-court-hero-anthony-kennedy; Anthony Esolen, *On Justice Kennedy's Tenuous Grasp of Human Dignity*, CRISIS MAGAZINE (July 2, 2015), http://www.crisismagazine.com/2015/on-justice-kennedys-tenuous-grasp-of-human-dignity; David Azerrad, *Justice Kennedy and the Lonely Promethean Man of Liberalism*, THE HERITAGE FOUND. (Sept. 21, 2015), https://www.heritage.org/node/1282/print-display.

5. *See, e.g.*, Howard Slugh, *Justice Kennedy's Judicial Power Grab*, NAT'L REV. (July 1, 2015), https://www.nationalreview.com/2015/07/obergefell-and-constitution/; Katherine Franke, *"Dignity" Could Be Dangerous at the Supreme Court*, SLATE (June 25, 2015), https://slate.com/human-interest/2015/06/in-the-scotus-same-sex-marriage-case-a-dignity-rationale-could-be-dangerous.html; Jeffrey Rosen, *The Danger of a Constitutional "Right to Dignity"*, THE ATLANTIC (Apr. 29, 2015), https://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796/.

6. 133 S. Ct. 2675 (2013).

7. *Nomination of Anthony M. Kennedy to Be Associate Justice of* the *Supreme Court of* the *United States*: Hearings Before the S. Comm. on the Judiciary, 100th Cong. 86 (1987) (testimony of Judge Anthony M. Kennedy).

8. *Id.*

The legal community has not ignored Kennedy's use and development of the right to dignity expanding across a range of case issue areas. For instance, Siegel[9] considers the use of dignity as the guiding structure of the undue burden test employed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[10] and *Gonzales v. Carhart*.[11] Broadly, she notes that Kennedy has utilized the concept of dignity in substantive due process and equal protection cases in three distinct ways to mean either life, liberty, or equality.[12] Yoshino finds a similar relationship between substantive due process, liberty, and dignity.[13] He argues that Kennedy's use of dignity differs in *Obergefell*[14] compared to *Lawrence v. Texas*,[15] *Casey*,[16] and *Windsor*[17] when discussing the possibility of establishing a new form of equality in constitutional law.[18] In a completely different direction, Althouse[19] examines Kennedy's use of dignity in relation to state's rights and new federalism within the context of his decision in *Alden v. Maine*.[20] While these case issue areas are distinct Tribe argues that for Kennedy "there is no significant gap between the older concept of dignity [found in *Alden*] . . . and the newer concept of dignity" in *Obergefell*.[21] What *Obergefell* does, however, is mark the articulation of the doctrine of equal dignity based upon Kennedy's interpretation of the Due Process Clause and Equal Protection Clause.[22] Kennedy's invocation of dignity in his written opinion is, thus, well documented in both the media and legal communities.

Though there has been a great amount written about the content as well as methods of constitutional interpretation of Justice Kennedy's legal decisions, we investigate *how* Kennedy has been able to develop and expand on legal concepts, such as dignity, on the Supreme Court. To be clear, this

9. Reva Siegel, *Dignity and the Politics of Protection: Abortion Restrictions under Casey/Carhart*, 117 YALE L.J. 1694 (2008).

10. 505 U.S. 833 (1992).

11. 550 U.S. 124 (2007).

12. Siegel, *supra* note 9, at 1737.

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

14. 135 S. Ct. 2584 (2015).

15. 539 U.S. 558 (2003).

16. 505 U.S. 833 (1992).

17. 133 S. Ct. 2675 (2013).

18. Yoshino, *supra* note 13.

19. Ann Althouse, *On Dignity and Deference: The Supreme Court's New Federalism*, 68 U. CIN. L. REV. 245 (2005).

20. 527 U.S. 706 (1999).

21. Lawrence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. FORUM 16, 22 (2015).

22. *Id.*

is not a story about Kennedy's theory of constitutional interpretation or development of a legal doctrine. Rather, we use Kennedy's opinions as a case study to examine how institutional position on the Supreme Court allows median justices to look beyond policy goals and consider legal goals and motivations in their decision-making. Drawing primarily on scholarship concerning legal motivation and the decision-making of Supreme Court median justices, we argue that Kennedy's institutional position as median justice allows him to articulate and advance the legal concept of dignity. Our goal for this paper is to better understand the institutional importance of the median justice in shaping legal language through the examination of Kennedy's use, articulation, and application of dignity.

I. Justice Kennedy and Dignity: The Influence of Institutional Position and Legal Motivations

Our analysis engages with theories about the behavior of the median justice and how median justices may be effective in pursuing legal motivations and goals while on the bench. Studies concerning judicial behavior have typically focused on judicial votes across terms or case issue areas to explain outcomes in the decisions or understanding how certain justices may vote. While this type of research may give a broad perspective to the mechanisms of the theories, we choose a different approach. Specifically, we start from the perspective that "institutional settings are an omnipresent feature of our attempts to pursue a preferred course of action" and that "different contexts make it more or less possible for individuals to act on different sets of beliefs."[23]

To accomplish this, we focus on one single justice—Justice Kennedy. We examine where he has invoked and articulated his concept of dignity, cross-referenced with his institutional position on the Supreme Court, to show how his institutional position has aided his approach and allowed him to pursue legal motivations. First, we review the current literature about Justice Kennedy's jurisprudence in addition to research from judicial politics concerning median justices and legal goals and motivations. Next, we introduce our methodology and data before presenting our analysis. Finally, we highlight the key patterns we find that suggest the importance of institutional position by demonstrating Kennedy's consistent use of dignity, which also increases when Kennedy is the median justice especially in majority opinions in narrowly decided cases.

23. HOWARD GILLMAN & CORNELL W. CLAYTON, *Introduction*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 3 (Howard Gillman & Cornell W. Clayton eds., 1999).

A. Justice Kennedy and Looking for "Dignity"

In the introduction, we noted that multiple legal scholars examined Justice Kennedy's use of dignity in his opinions, but that political scientists have not paid as great of attention to his use of dignity as a legal concept. While we are only using Kennedy's opinions as a case study, we would be remiss to ignore the valuable insights scholars have made into the justice's method of interpretation. This includes two key studies[24] concerning his method of constitutional interpretation (or lack thereof) and jurisprudence of liberty that address dignity as a part of liberty. While Justice Kennedy is often portrayed as a justice that draws criticism for not having a cohesive jurisprudential philosophy, both challenge this portrayal by focusing on the importance of liberty in Kennedy's decisions and providing a cohesion to his jurisprudence despite his own protestations otherwise. Importantly for us, this work demonstrates the influence of dignity within Kennedy's jurisprudence.

Drawing on individual liberties cases, Knowles argues that Kennedy's jurisprudence is consistent and moderately libertarian consisting of three elements.[25] First, there is the belief in the toleration of different viewpoints by the government; second, the importance of dignity in relation to personal liberty against government attempts to classify individuals; and third, personal responsibility that allows some government interference due to the relation between rights and responsibility.[26] She argues that Kennedy's use of dignity is based on the "libertarian belief that an individual's dignity is violated by government actions that treat that person in a particular way because of their possession of a certain characteristic."[27] For Knowles, the emphasis on dignity informs the humane aspect of Kennedy's jurisprudence and corresponds with individual autonomy (liberty) to determine their own identity.

Similarly, Colucci argues that Kennedy has a cohesive jurisprudence that focuses on the importance of liberty and, like Knowles, sees dignity as being a part of liberty.[28] He characterizes Kennedy as believing "that the Western concepts of liberty and human dignity serve as foundations for the U.S. Constitution" and that "this conception of liberty requires judicial sensitivity to the many ways in which government actions . . . can prevent

24. FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY (2009); HELEN J. KNOWLES, THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY (2009).

25. KNOWLES, *supra* note 24, at 36–48.

26. *Id*.

27. *Id.* at 198.

28. COLUCCI, *supra* note 24 *passim*.

individuals from fully developing their own personalities."[29] Unlike Knowles, Colucci extends his analysis of Kennedy's usage of dignity beyond individual rights to issues arising under federalism and separation of powers. Kennedy's use of dignity in this realm of case law comes to the federal government respecting individual autonomy; however, it is state sovereignty and not individuals that must be respected.[30]

Both Colucci and Knowles raise the importance of dignity within Kennedy's jurisprudence.[31] According to Colucci and Knowles, dignity is part of how Kennedy considers liberty and is a central part of his judicial philosophy and process of decision making.[32] While many justices claim to be motivated by a concern for protecting liberty, dignity, as its own legal concept, seems to be unique to Kennedy. Colucci and Knowles both acknowledge that Kennedy cares about dignity, but they do not emphasize this as a unique legal concern for Kennedy. This is where we break from this informative work. Dignity is not the core of Kennedy's overarching judicial philosophy, but rather is a legal concept that he believes belongs in American law, that is already present in law, and he tries to shape what it means for the American political system. He informed the Senate Judiciary Committee of this fact during his confirmation hearings and, as we explain later in this piece, he discusses it in written decisions in almost every term he served on the Supreme Court. We argue that he has been able to pursue the further articulation of dignity because he is the median justice.

Our analysis focuses on this specific concept rather than the broader concept of liberty because entrenching dignity within case law is, in many ways, a more tangible goal than shifting philosophical and legal notions of liberty. Moreover, as a study about a median justice's pursuit of legal goals and concepts, dignity is prevalent throughout Kennedy's jurisprudence, presented clearly in his opinions, and is more uniquely a province of Kennedy's writings, compared to other justices, than liberty is. Taken together, this suggests that dignity is important to Kennedy, that it is possible to trace this specific concept through his opinions, and that it is a legal goal that is peculiar to him. Consequently, dignity, as Kennedy's unique legal concern, allows us to investigate our claims regarding the institutional position of median justices. As is noted in the literature (and discussed below), median justices often demonstrate behavior different from their peers. Looking at Kennedy as an example of a median justice, and dignity rather than the more expansive concept of liberty, allows us to investigate

29. COLUCCI, *supra* note 24 at 35.

30. *Id.* at 168.

31. *See generally* COLUCCI, *supra* note 24; *see generally* KNOWLES, *supra* note 24.

32. *See generally* COLUCCI, *supra* note 24; *see generally* KNOWLES, *supra* note 24.

the importance of the median justice's institutional position for legal motivations.

B. Median Justice

We seek to explain why the institutional position of the median justice matters for obtaining legal goals and content by looking at one specific justice and one specific goal. Within the context of judicial decision-making, there is the assumption that the median justice influences the majority opinion.[33] This influence makes understanding the median justice important for understanding the decision-making process on the Court, as well as the ultimate rulings the Court issues. However, we must first address what is meant by "median" justice and how this relates to decision-making.

There are two popular conceptions of median justice in the literature. On the one hand, the median justice is conceptualized as when a justice is an ideological swing vote and crosses the ideological divide or voting blocs. Studies that have considered swing justice have looked at the behavior of a specific justice being the crucial vote—being the most likely to be in the majority of ideologically divergent groups of justices—in cases decided by a 5-4 vote.[34] On the other hand, the median justice may also be the middle justice based upon a specific term's ideological spectrum.[35]

While we primarily focus on the idea of the median justice based on a term's specific ideological spectrum, we also pay attention to voting blocs in narrowly decided cases. We primarily focus on the ideological middle point as this person is, inherently, the balancing point for potential ideological shifts in rulings. Any 5-4 ruling that breaks along ideological lines would see the median justice as the one logically most likely to shift the balance. Of course, not all 5-4 rulings are decided strictly on ideology, as other issues could intervene to lead to different voting blocs. For this reason we also consider the importance of narrowly divided cases, as we would expect the median justice—in this case acting as a swing justice—to have the most sway on the ultimate content of the opinion as the other justices in the majority could not afford to lose the "swing" vote, and with it their majority coalition.

33. *See* THOMAS H. HAMMOND ET AL., STRATEGIC BEHAVIOR AND POLICY CHOICE ON THE U.S. SUPREME COURT (2005); Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275 (2005).

34. *See, e.g.*, Janet L. Blasecki, *Justice Lewis F. Powell: Swing Voter or Staunch Conservative?*, 52 THE J. OF POLITICS 530 (1990); Patrick D. Schmidt & David A. Yalof, *The "Swing Voter" Revisited: Justice Anthony Kennedy and the First Amendment Right of Free Speech*, 57 POLITICAL RES. Q. 209 (2004).

35. *See generally* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POLITICAL ANALYSIS 134 (2002) (creating and justifying a measure of judicial ideology that situates justices into an ideological spectrum, with measures for each justice specific to each Court term).

In our analysis below we provide data on term median justices, as well as draw attention to where Kennedy uses dignity in closely divided cases.

As applied by the attitudinal model, all justices—whether at the ideological extremes or middle of the spectrum—will vote according to their ideological preferences.[36] Research, however, suggests that the median justice—regardless of how it is defined—is less likely to rely on simple ideological considerations than their colleagues on the ideological wings of the Court. This may help to explain the lack of voting consistency[37] and variance in the magnitude of ideological voting.[38] Building upon these insights of the decision making of the median justice, we argue that the median justice is particularly well situated to pursue legal goals and motivations, and not just policy preferences and ideological considerations.

Even with difference in definition, multiple studies have demonstrated that numerous factors influence the decision-making of median justices that go beyond personal policy preferences. In their study of Kennedy acting as the swing justice, Schmidt and Yalof[39] raise the idea that a swing voter on the Court may emerge based upon ideology, facts of the case, or internal institutional factors. More broadly, median justices who function as ideological swing justices may vote in an unexpected ideological direction due to greater reliance on case-specific factors,[40] the presence of the Solicitor General as a party,[41] oral arguments,[42] and controlling precedent and legal facts of the case.[43] Likewise, justices that are towards the ideological median

36. *See* JEFFREY ALLAN SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

37. *See* Paul M. Collins, *The Consistency of Judicial Choice*, 70 THE J. OF POLITICS 861 (2008).

38. *See* Brandon L. Bartels, *Choices in Context: How Case-Level Factors Influence the Magnitude of Ideological Voting on the U.S. Supreme Court*, 39 AMERICAN POLITICS RES. 142 (2011).

39. *See* Schmidt & Yalof, *supra* note 34.

40. *See* Peter K. Enns & Patrick C. Wohlfarth, *The Swing Justice*, 75 THE J. OF POLITICS 1089 (2013).

41. *See, e.g.*, Ryan C. Black & Ryan J. Owens, *Solicitor General Influence and Agenda Setting on the U.S. Supreme Court*, 64 POLITICAL RES. Q. 765 *passim* (2011).

42. *See, e.g.*, Timothy R. Johnson et al., *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AMERICAN POLITICAL SCI. REV. 99 *passim* (2006).

43. *See, e.g.*, Michael A. Bailey & Forrest Maltzman, *Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court*, 102 AMERICAN POLITICAL SCI. REV. 369 *passim* (2008); *see* MICHAEL A BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE *passim* (2011); *see* Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 THE J. OF POLITICS 1062 *passim* (2009).

during a term may be influenced by public opinion,[44] legal considerations,[45] or other strategic influences.[46]

As a whole, the literature on median justices suggests that justices in this institutional position are more likely to take into account other factors beyond personal policy preferences. This leads us to argue that ideologically median justices are not only more likely to consider factors other than policy preferences, but also are likely to use their position as the middle point of the Court to shape judicial opinions to reflect their legal considerations. In terms of Kennedy, our example of a median justice in this paper, we expect him to write dignity into his legal opinions most often when he is serving as the ideological middle point of the Court, and even more so when he is also in the majority of a narrowly divided case. Thus, when the median justice is "median" in both common uses of the term, this justice is most enabled to pursue legal motivations, and we expect to see evidence of this in their written opinions.

One final debate concerning the median justice within the literature that we need to address is who counts as the median justice. Studies have investigated particular justices to understand if their voting behavior identifies said justice as the median justice, in terms of the ideological swing vote, on the Supreme Court. These studies focus on one particular justice, such as Justice Powell[47] and Justice Kennedy.[48] More commonly, however, scholars have utilized ideological scores to identify the swing justices on the Supreme Court. This effort has been led by Martin and Quinn[49] to estimate ideal points of justices' policy preferences over time. The Martin-Quinn scores in particular are important for identifying the probability that a justice is the median justice in a given term.[50]

This split within the literature demonstrates the flexibility of the term "median justice" such that it could apply to judicial behavior, as is the case when median means "swing' vote, or it could mean ideological middle point, as is the case with Martin-Quinn scores and studies utilizing these. While our research does focus on a specific justice, we do not assume that Kennedy is the median justice in all of the cases. Instead, we examine his institutional

44. *See* William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 THE J. OF POLITICS 169 (1996).

45. *See* Black & Owens, *supra* note 41; *see* Enns & Wohlfarth, *supra* note 40; *see* Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AMERICAN POLITICAL SCI. REV. 305 (2002).

46. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998).

47. *See, e.g.*, Blasecki, *supra* note 34

48. *See, e.g.*, Schmidt & Yalof, *supra* note 34.

49. Martin & Quinn, *supra* note 35.

50. *Id.* at 151.

position on the Supreme Court as it relates to his use of the right to human dignity in his decisions.[51] We look at both ideological positioning and closely decided cases to try to account for both related uses of the term "median justice" within the literature.

C. Judicial Motivations

Traditionally, judicial decision-making scholarship has advocated that judges are motivated by their policy preferences. Whether or not they may pursue their sincere or sophisticated preferences has been a key question in the debate between attitudinal and strategic models of behavior, but both have nevertheless emphasized justices and policy goals. As Baum cautions, even when policy goals seems to be the dominate goal, "legal considerations could affect the content of opinions to a greater, and more measureable, degree than they affect votes."[52] In other words, legal goals and motivations may be a factor in the decision-making, but appear more in the construction and details of the opinions rather than the votes themselves. For this reason, it is even more important to look at the content of opinions. Moreover, regardless of the mechanism of decision making used, judicial opinions shape the law after the case leaves the Court. In order to find evidence of judicial attempts to shape the law through legal considerations, it is necessary to examine the written opinions.

The conceptualization of legal motivations as simply seeking legal accuracy and/or legal clarity might be shortsighted and underdeveloped. For instance, there is the argument that external satisfaction, such as gaining reputation, could be related to legal motivations where judges that want to be perceived as influencers on the court and therefore may be less willing to follow precedent.[53] Alternatively, it may be simply that, "the value of working within the existing body of law can be an important feature of a craft orientation to judging."[54] Other works have considered personal attributes of justices, such as reputation creators or esteems grantors as influencing behavior and adherence to precedent.[55] What becomes clear is

51. Table A in the Appendix specifically charts the term median justice for Kennedy's time on the Court, as well as the number and types of cases in which Kennedy invoked dignity each term.

52. LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 71 (1997).

53. *See* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2008); Gilat Levy, *Careerist Judges and the Appeals Process*, 36 RAND J. OF ECONOMICS 275 (2005).

54. Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. OF POLITICAL SCI. 11, 20–21 (2013).

55. Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 629 (2000).

that first, it is necessary to consider beyond policy-seeking goals and second, legal motivations are a useful place to start but that scholars should go beyond legal clarity and accuracy in their conceptualization.

Part of this increased attention paid to the effects of legal rules, doctrine, and precedents coincides with an emphasis to remember that the "law is both legal and political"[56] still takes into account the "jurisprudence" aspect in the study of political jurisprudence.[57] This effort to bring in law as a factor in decision-making has led to the development of the doctrinal politics approach, which seeks to reconcile legal realist, behavioral, and strategic approaches to judicial politics.[58] He articulates that the doctrinal politics approach is organized around four key points: (1) greater recognition of judicial structures, which emphasizes "legal cases as the vehicles for policy making" and further integrates "the practice of law with a political, policy-seeking perspective"; (2) more investigation about the "content and structure of judicial preferences and legal opinions"; (3) focus more on the interaction between legality and hierarchy; and, (4) examining "how judges use doctrine to get what they want."[59]

This doctrinal politics approach goes beyond judicial votes and argues for a case-space model which "highlights legal cases as the vehicles for policy making" by "integrating the practice of law with a political, policy-seeking perspective."[60] In particular, Lax proposes understanding how judges make policy using legal rules, or doctrinal instrumentalism, as well as looking at the use of precedents and theories of interpretation as ways to affect behavior and outcomes.[61] This is similar to the theoretical and empirical considerations with which Tiller and Cross[62] engage, including looking at the decision structures found within opinions and how legal doctrine may mirror judicial motivations.

Posner argues that a judge's response is a combination of factors of legal doctrine, institutional constraints, policy preferences, and strategic considerations among other factors.[63] Here, Posner describes the judicial

56. Emerson H. Tiller & Frank B. Cross, *What is Legal Doctrine?*, 100 NW. L. REV. 517, 528 (2006).

57. *See* Martin Shapiro, *Political Jurisprudence*, 52 KY. L.J. 294 (1963); C. Herman Pritchett, *The Development of Judicial Research*, FRONTIERS OF JUDICIAL RES. (Joel Grossman & Joseph Tannenhaus eds., 1969).

58. *See* Jeffrey R. Lax, *The New Judicial Politics of Legal Doctrine*, 14 ANN. REV. OF POLITICAL SCI.131 (2011).

59. *Id.* at 133–34.

60. *Id.* at 133.

61. *Id.* at 135–36.

62. Tiller & Cross, *supra* note 56, at 528–30.

63. *See generally* RICHARD A. POSNER, HOW JUDGES THINK (First Harvard University Press paperback ed. 2010).

decision-making process as involving a variety of factors, including considerations not always factored in to political science literature on decision making, which echoes Baum's[64] insights. We take seriously the contention that institutional context influences decision-making. Specifically, building on the median justice's behavior, legal motivations, and judicial decision-making literature, we argue that median justices are more likely to pursue legal motivations and write their ideas into the law than other justices. Furthermore, we expect this will be particularly evident in narrowly divided decisions where median justices have greater institutional status to craft their decision and clearly articulate their legal goals. As a means of testing our hypotheses, we turn to Kennedy and his development of the legal concept of dignity as a case involving a specific median justice interested in a specific legal concept.

II. Methodology and Data

While literature about a median justice's behavior and his or her legal motivations may seem disconnected at first, we argue that findings about median justices on the Supreme Court suggest that a justice in this institutional position may be ripe for studying legal motivations and goals. First, median justices are more likely to consider other factors, including legal implications, when making their decisions. Second, judicial decision-making at the Court level traditionally shows that justices are concerned with policy outcomes, but median justices appear to be different and are less likely to rely on ideological considerations and personal policy preferences than the other justices.[65] If median justices are less likely to rely on their own policy preferences, what are other possible motivations beyond policy? One suggested answer has been a median justice's legal motivations and goals with more attention given to understanding the importance legal rules, doctrine, and precedents in judicial behavior.[66] If legal goals, meaning legal rules, precedent, or doctrine affect behavior, it is necessary to understand the circumstances that allow justices to pursue those goals beyond simple policy decisions.

We posit that institutional position—specifically that of median justices—places some justices in a better position to pursue their legal goals than other justices on the Court. To do this, we focus on a single justice and a unique legal concept: Justice Kennedy and his concept of dignity. Prior studies of Kennedy have noted his use of dignity within his interpretation of

64. *See generally* BAUM, *supra* note 53.

65. *See generally* Enns & Wohlfarth, *supra* note 40.

66. *See, e.g.*, Epstein & Knight, *supra* note 54 *passim*; *see generally* Lax, *supra* note 58; *see generally* Tiller & Cross, *supra* note 56.

liberty, but the focus has been more on his methods of constitutional interpretation and jurisprudence.[67] We make no claims about Kennedy's method of interpretation nor the development of a legal doctrine. Rather, we trace a specific *legal concept* that Kennedy has articulated since his confirmation hearing and demonstrate how his shifting institutional position on the Court has allowed him to pursue a legal goal and expand the concept of dignity.

For this analysis, we adopt a qualitative approach that utilizes a content analysis. To do this, we analyze all of Kennedy's written opinions from when he joined the Court in 1988 through the end of the Court's 2017-2018 term, coinciding with his retirement from the Court. Across this 30-year period, Kennedy wrote 545 discrete opinions for the Court. However, we include only the opinions for which Kennedy signed his name. Thus, we exclude from our analysis *per curium* opinions and joined opinions. We want to investigate Kennedy's use of his institutional position to aid his articulation of a legal concept regarding dignity, and thus restrict our analysis to his signed opinions. One important point to make is that we did include both *Planned Parenthood v. Casey*[68] and *National Federation of Independent Businesses v. Sebelius (NFIB)*.[69] These cases deserve special mention as Kennedy coauthored the plurality opinion in *Casey* with Justices O'Connor and Souter, and he coauthored a dissent with Justice Scalia in *NFIB*. In *NFIB*, Kennedy claimed authorship over these opinions, even if it was shared authorship, we included them in review of Kennedy's opinions.

We subsequently searched all 545 Supreme Court opinions authored by Kennedy for use of the word, "dignity," or related words, including "dignitary," "dignified," "indignity," and "indignation." We believe that these words are similar enough to "dignity" that they were worth including in our examination to be sure we were catching multiple ways in which Kennedy could be articulating his stance on dignity. Of these opinions, 54 contained at least one use of dignity or one of our identified related terms. Specifically, 48 of them make use of dignity, five use "indignity" or "indignities," and the remaining case uses "indignation." These 54 cases count for approximately 10% (9.9%) of Kennedy's written opinions.[70]

67. *See* COLUCCI, *supra* note 24; *see also* KNOWLES, *supra* note 24.

68. 505 U.S. 833 (1992).

69. 132 S. Ct. 2566 (2012).

70. We limit our analysis to "dignity" and the closely related "indignity," "indignities," and "indignation" to let us focus on Kennedy's legal concept of dignity. We are not trying to fully articulate Kennedy's concept of dignity in all of its theoretical richness, but rather, we are using the concept as a means of studying a legal goal of a median justice. We do not expand our search to potentially related terms, such as "honor," "respect," or "decency." We hope to explore these concepts more in our future research.

III. Analysis and Discussion

Kennedy's use of dignity stretches across a variety of opinion types and issues. Most of Kennedy's uses of dignity come in his majority opinions[71] (38 of the 54 cases,[72] including Kennedy's co-authored plurality opinion in *Casey* [73]). Additionally, in 32 of the 54 cases, Kennedy is the only justice to invoke dignity in any of the Court's opinions. In cases, such as *U.S. v. Windsor*[74] and *Obergefell v. Hodges*[75], where Kennedy writes for the majority, the other justices who use dignity do so in dissent, typically in direct quotes from Kennedy's majority opinion and often while critiquing Kennedy's reasoning. These numbers suggest that Kennedy works on his own conception of dignity that is unique to his jurisprudence. He often engages in the sole use of the phrase, and when other justices use "dignity," it is often to address Kennedy's usage of the term. This suggests Kennedy is discussing dignity in a way unique to him and that studying these uses helps us capture the pursuit of legal goals by a median justice.

Using the Supreme Court Database[76] for issue coding, we see that Kennedy uses dignity in a variety of areas, but most often to discuss equal protection, due process, and privacy.[77] Table 1 presents the case breakdown by issue area and legal provision for the cases where Kennedy discusses dignity.

71. To simplify distinctions, we counted opinions for the Court as "majority," even if, technically, they were plurality opinions, as was the case in *Casey*.

72. Of the 54 opinions where Kennedy invoked dignity or one of its related terms, 38 of them were majority opinions, three were regular concurring opinions, three were concurring in part and concurring in the judgment, four were concurring in the judgment, and the remaining six opinions were dissenting opinions.

73. *See generally Casey*, 505 U.S. 833.

74. *See generally* U.S. v. Windsor, 133 S. Ct. 2675 (2013).

75. *See generally Hodges*, 135 S. Ct. 2584 (2015).

76. Harold J. Spaeth et al., 2018 Supreme Court Database, Version 2017 Release 2, SUPREME COURT DATABASE, http://supremecourtdatabase.org (last visited March 16, 2019).

77. The data in Table 1, using the coding from the Supreme Court Database, *id.*, reflects all of Kennedy's opinions during his tenure on the Supreme Court.

Table 1: Cases Containing "Dignity"

Case Issue Area	N	Law at Issue	N
Criminal Procedure	17	Infrequently Litigated Statute	7
Civil Rights	12	Fourteenth Amendment (Due Process)	6
Privacy	7	Fourth Amendment	6
First Amendment	5	Fourteenth Amendment (Equal Protection)	5
Economic Activity	4	First Amendment (Speech, Press, Assembly)	5
Federalism	3	Eighth Amendment (Cruel and Unusual Punishment)	4
Judicial Power	2	Eleventh Amendment	3
Due Process	2	Americans with Disabilities Act	2
Attorneys	1	Habeas Corpus	2
Miscellaneous	1	Federal Rules of Civil Procedure	2
		No Entry in Database	2
		Article III (Case and Controversy Requirement)	1
		Fifth Amendment (Equal Protection)	1
		Sixth Amendment (right to trial by jury)	1
		Fifteenth Amendment (Other)	1
		Clean Air Act	1
		Reconstruction Civil Rights Acts (42 U.S.C. § 1983)	1

		Religious Freedom Restoration Act	1
		Sherman Act	1
		Interstate Compact	1
		First Amendment (free exercise of religion)	1
Total	54	**Total**	54

In Table 1, we can see that Kennedy's use of dignity occurs most often in cases that deal with government interference in private lives (search and seizure and privacy cases), as well as how the government treats us relative to our personhood (abortion, cruel and unusual punishment, and race-based discrimination).

Kennedy employs the language of dignity when it comes to government interference in our lives. He also uses dignity when discussing governmental actions that run the risk of degrading who we are or the intrinsic value of human life. This allows Kennedy to link issues to dignity that, without this concept, might otherwise seem to be separate considerations. For example, Kennedy's conception of dignity allows him to call for the humane treatment of prisoners,[78] question certain death penalty practices,[79] reject certain abortion restrictions while upholding others,[80] reject sex-based and race-based use of preemptory challenges,[81] and question the harm done by embracing affirmative action policies.[82] Furthermore, these issues all share the central concern expressed in three of Kennedy's most prominent cases involving dignity, *Lawrence v. Texas*,[83] *U.S v. Windsor*,[84] and *Obergefell v.*

78. *See generally* Barber v. Thomas, 560 U.S. 474 (2010); Brown v. Plata, 563 U.S. 493 (2011).

79. *See generally* Hall v. Florida, 134 S. Ct. 1986 (2014); Kennedy v. Louisiana, 554 U.S. 407 (2008); Roper v. Simmons, 543 U.S. 551 (2005).

80. *See generally* Gonzales v. Carhart, 550 U.S. 124 (2007); Ohio v. Akron Center for Reproductive Health, 497 US 502 (1990); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); Stenberg v. Carhart, 530 U.S. 914 (2000).

81. *See*, *e.g.*, Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); J.E.B. v. Alabama ex rel. TB, 511 U.S. 127 (1994); Powers v. Ohio, 499 U.S. 400 (1991).

82. *See, e.g.*, Fisher v. Univ. of Texas at Austin, 579 U.S. 14 (2016); Parents Involved in Cmty. Schools v. Seattle School District No. 1, 551 U.S. 701 (2007); Rice v. Cayetano, 528 U.S. 495 (2000); Schuette v. Coal. to Defend Affirmative Action (BAMN), 134 S. Ct. 1623 (2014).

83. 539 U.S. 558 (2003).

84. 133 S. Ct. 2675 (2013).

Hodges.[85] The central concern in these cases is the damage done to dignity when we start to criminalize or otherwise discriminate against people's core identity, which in these specific cases pertains to gays and lesbians.[86] Despite the rather wide range of topics, for Kennedy, each case raises concerns about issues of dignity, and we see his efforts to articulate these views about human dignity in his decisions.

As shown in Table 2, for Kennedy, dignity involves issues of limiting how and when the government can become involved in the lives of individuals. This, we label as "government interference," which shows up in issues of privacy, personal identity, and questions touching on the value of human life. However, Kennedy's use of dignity in his opinions also appears in issues regarding what we are calling "institutional dignity," which pertains to sovereignty and the law. Table 2 summarizes these two forms of dignity.

Table 2: The Contours of Dignity

Type of Dignity	Description	Sample Cases
Government Interference	Protection for **privacy** (personal choices regarding sex and marriage, limited access to abortion, protection from unreasonable search and seizures), **personal identity** (non-discrimination on the basis of personal identifying characteristics, such as race, sex, or sexual orientation), and preservation of the **value of human life** (death penalty and abortion limitations, and requirements of human treatment of prisoners)	1) *Obergefell v. Hodges* (2015)[87] 2) *Powers v. Ohio* (1991)[88] 3) *Roper v. Simmons* (2005)[89]

85. 135 S. Ct. 2584 (2015).

86. We hesitate to go further than Kennedy actually does in any of these cases and refer to rights for the entire LGBT community as transgender individuals, in particular, have largely been left out of recent Court victories for gays and lesbians.

87. 135 S. Ct. 2584 (2015).

88. 499 U.S. 400 (1991).

89. 543 U.S. 551 (2005).

Institutional Dignity	Full acknowledgment and respect of **sovereignty** (fair and equal treatment of sovereign entities, including sovereign immunity) and of **court and the legal profession** (considerations over maintaining the legitimacy and majesty of our legal system)	1) *Idaho v. Coeur D'Alene Tribe of Idaho* (1997)[90] 2) *Williams-Yulee v. The Florida Bar* (2015)[91]

As mentioned, Kennedy develops dignity within the law not only in regard to government interference, but also in cases pertaining to institutional dignity, primarily around government structures and bodies. In these cases related to a structural part of the government, Kennedy uses dignity to refer to the dignity owed to coequal sovereigns. An example of this in Kennedy's opinions in Tenth Amendment cases about respect the dignity of states as coequal sovereigns with the national government. Kennedy also invokes this notion of institutional dignity when writing about the dignity that needs to be preserved in and for our legal system, as happens in a case discussing civil forfeitures related to when defendants flee the country. As an example of the first use, consider Kennedy's majority opinion in *Alden v. Maine*.[92] *Alden* involves questions about the degree of applicability of the Fair Labor Standards Act to state probations officers and, more specifically, whether these officers can bring suit in federal courts. As a sovereign immunity case involving conflict between the national government's attempts to force states to follow federal employment standards and states' ability to control their own employment standards for state employees, Kennedy discusses the importance of sovereignty and respecting the dignity of the states. Kennedy writes:

> Federalism requires that Congress accord States the respect and dignity due [to] them as residuary sovereigns and joint participants in the Nation's governance. Immunity from suit in federal courts is not enough to preserve that dignity, for the indignity of subjecting a nonconsenting State to the coercive process of judicial tribunals at the instance of private parties exists regardless of the forum.[93]

90. 521 U.S. 261 (1997).
91. 135 S. Ct. 1656 (2015).
92. 527 U.S. 706 (1999).
93. *Alden*, 527 U.S. at 711.

Here, we see Kennedy invoke dignity as an important part of our federal system and as a way to analyze how sovereign entities interact in general. Kennedy not only talks about the need for "respect and dignity," but also talks about what is needed to "preserve that dignity" and avoid "the indignity" of forcing rules on sovereign entities. In this sense, dignity echoes what Kennedy is setting up for individuals—equal treatment, liberty, and protection from coercive governmental overreach—only applying it to state. This suggests that, for Kennedy, dignity applies to sovereignty as it applies to individual autonomy, and in both cases, dignity is about protecting some inherent characteristic of an individual entity.

Kennedy provides an example of the second use of institutional dignity as well. Instead of preserving power and respect for sovereigns, we see Kennedy express concern for integral parts of our governmental structure, often courts and the legal system. This is on display in Kennedy's majority opinion in *Degen v. U.S.*[94] The petitioner, Brian J. Degen, who has dual citizenship with the U.S. and Switzerland, was living in Switzerland at the time that he was indicted under charges related to alleged drug dealings.[95] Additionally, the U.S. government sought to forfeit property Degen owned in three different states under the claim that Degen either purchased the proper with money from his drug dealings, or he used the property to facilitate drug sales.[96] Degen refused to return to answer the criminal charges, and he cannot be extradited back to the U.S.[97] He did, however, try to challenge the forfeiture proceedings in a separate civil matter.[98] The district court granted summary judgment for the state, and the Ninth Circuit affirmed, through application of the "fugitive disentitlement doctrine" that bars those outside of the country who refuse to answer for criminal charges to pursue legal claims while they are fugitives.[99]

Kennedy spends time in his opinion considering what enforcing this rule means for the "dignity" of the court and for the "indignity" visited upon the courts by fugitives and their legal claims.[100] He emphasizes these points near the end of his opinion when he asserts:

> It remains the case, however, that the sanction of disentitlement is most severe and so could disserve the dignitary purposes for

94. 517 U.S. 820 (1996).
95. *Id.* at 822.
96. *Id.* at 821.
97. *Id.*
98. *Id.*
99. *Degen*, 517 U.S. at 821–22.
100. *Id.*

> which it is invoked. The dignity of a court derives from the respect accorded its judgments. That respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits.[101]

Kennedy ultimately reverses and remands the grant of summary judgment for further consideration.[102] But, in so doing, as the above quote shows, he wrestles with preserving the "dignity" of courts and what best preserves this "dignitary" interest. Although maintaining the dignity of courts is incredibly important, Kennedy feels the respect that derives from the dignity of the courts is harmed more by refusing to consider the merits of a case than by allowing fugitives to bring claims in court. Not only does Kennedy consider the dignity of the court, he imparts his own understanding of what best serves this dignity into the legal doctrine he is shaping.

Again, this is similar to how he uses dignity in the context of individuals, where spousal notifications for abortion go against a woman's dignity and autonomy,[103] but parental notifications for minors with a judicial waiver do not.[104] Both raise concerns regarding preserving dignity, and in both cases Kennedy acts as the arbiter of how best to protect dignity (and what valid dignity interests even are). Kennedy's use of dignity expands beyond just concern over individual human dignity to include considerations of the dignity that is part of sovereignty or part of governing institutions, with 15 of his dignity opinions addressing issues of sovereignty and respect for our institutions (8 on sovereignty and 7 on institutional dignity), yet he does so in ways that are largely consistent with how he presents individual dignity concerns. Dignity regarding government interference is a broader concept for Kennedy, involving the preservation of individual respect and autonomy. Institutional dignity is about preserving sovereignty, maintaining a coequal position between states and the national government, and is also about what institutions are owed, or afforded. This makes both types of dignity about preserving inherent qualities in both individuals and institutions.[105] Thus, despite the two iterations, dignity appears to be a largely legally consistent concept for Kennedy, about preserving and protecting inherent value and worth for both individuals and state entities, albeit when Kennedy believes doing so is consistent with the law.

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101. *Degen*, 517 U.S. at 828.

102. *Id.*

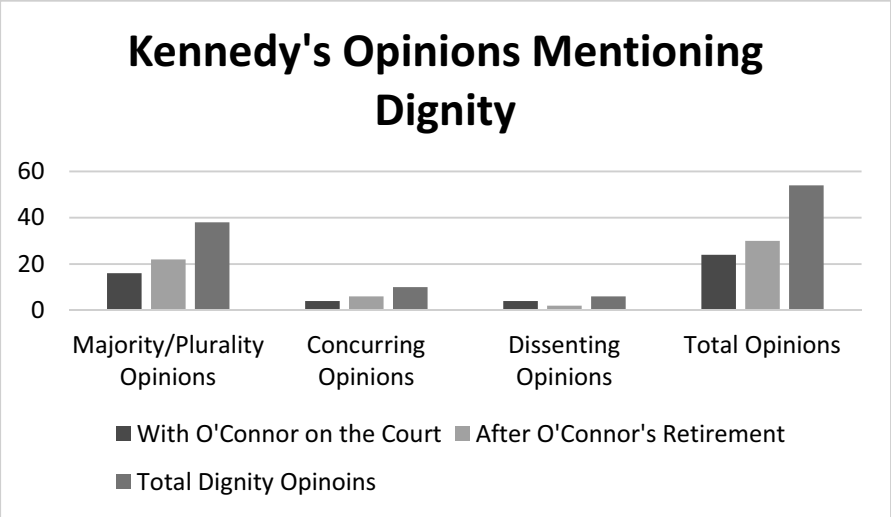
103. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).

104. Ohio v. Akron Center for Reproductive Health, 497 US 502, 531 (1990).

105. For more support of this claim, see the Appendix for information pertaining to KWIC analysis of both types of Kennedy's dignity opinions.

Kennedy's institutional position as the median justice on the Court also contributes to his ability to formulate and express his concept of dignity. Of the 30 full terms covered in our study, Kennedy was likely the median justice for 16.5 of those terms (the half term is because O'Connor was the median justice in 2005 until her retirement, at which point Kennedy became the median justice).[106] This puts Kennedy in a strong position to influence the Court's final vote in close cases. As Figure 1 indicates, Kennedy was more likely to insert dignity into majority opinions than concurring opinions, and the least likely to mention dignity in dissent. Moreover, Figure 1 captures the impact of O'Connor's absence, which solidified Kennedy as the median justice. Without O'Connor on the Court, Kennedy wrote more majority and concurring opinions concerning dignity and fewer dissents than he did when she was still on the Court.

Figure 1:

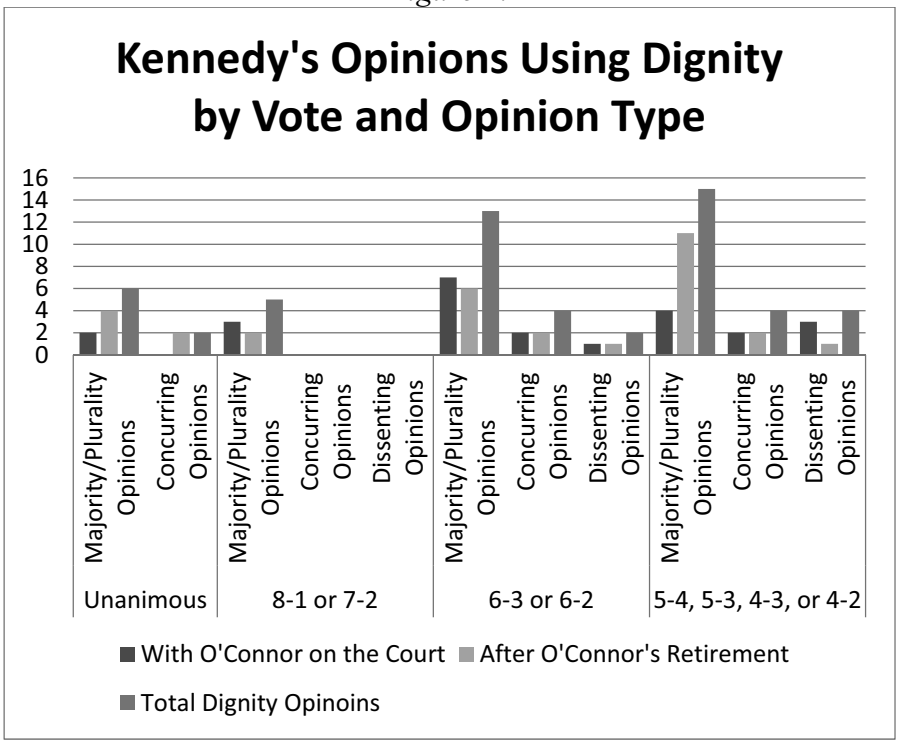


Not only does Kennedy mention dignity more often in opinions after O'Connor's retirement, he does so more often in narrowly divided cases than in cases with high concordance among the justices. Figure 2 depicts the number of cases where Kennedy mentions dignity by vote and by opinion

106. *See* Table A in the Appendix for a breakdown of the most likely median justice for all of these Court terms, and for the number and types of dignity opinions Kennedy wrote in these terms. While Kennedy mentions dignity fairly consistently across his time on the Court, he does so more often and in more majority opinions when he is the median justice, and more so after O'Connor retires (strongly solidifying his position as the Court's median justice). Additionally, at the time of writing, the Martin-Quinn scores were not yet available for the 2017-2018 term, so the information in Table A does not account for the 2017 term.

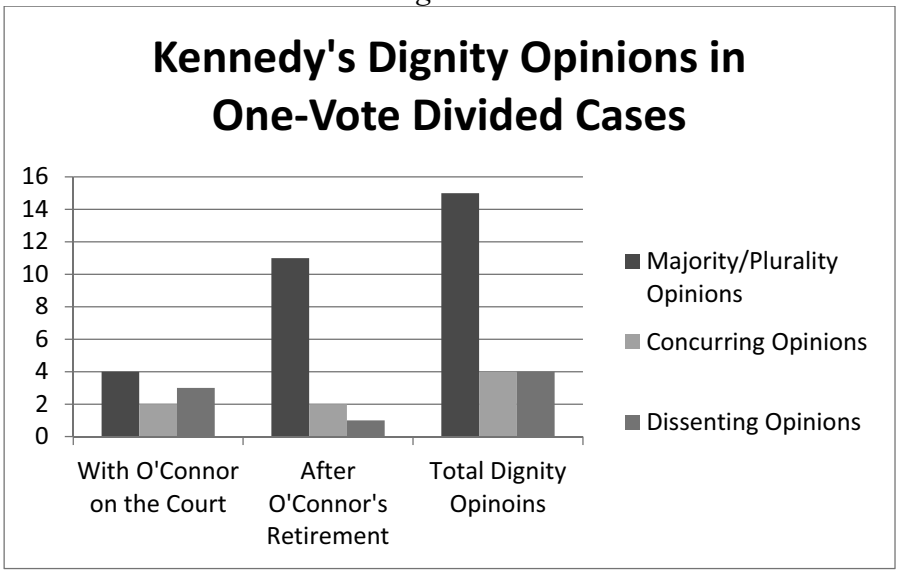
type. Although Kennedy mentions dignity in many types of cases, he is more likely to discuss it where the Court is split compared to when they are in agreement. Moreover, he was more likely to discuss dignity in these divided cases after O'Connor's retirement.

Figure 2:



Looking solely at those cases that were decided by one vote we can see just how important Kennedy's institutional position was for allowing him to write his conception of dignity into law. Figure 3 shows the dignity references by opinion in cases decided by one-vote. As shown, Kennedy was far more likely to discuss dignity in a majority opinion (15 of his one-vote dignity opinions) than in a concurring or dissenting opinion (4, each, of his one-vote dignity opinions). This is especially true after O'Connor's retirement where we see Kennedy's one-vote majority dignity opinions jump from 4 to 11, despite this period being shorter (January 31, 2006-end of the 2017-2018 term) than the time he spent on the Court with O'Connor (February 1988-January 31, 2006). While his concurrences mentioning dignity stayed the same regardless of O'Connor's presence, he mentions dignity in dissent in a narrowly-divided case only once after she left, compared to three times with her still on the Court.

Figure 3:



We argue that these numbers strongly suggest that Kennedy was able to use his institutional position as a median justice (especially as this position was solidified after O'Connor's retirement) to write dignity into the law through is opinions. He did so more often as median justice than not, but also more often in narrowly divided cases. As the median justice, and thus the swing vote, he was able to use his position to control the case outcome, and to insert his understanding of dignity into the law through majority opinions.

Part of this institutional position also accounts for seniority. By custom, the chief justice or the most senior justice in the majority assigns the opinion writer in a case. As the median justice, Kennedy's vote could swing the case one way or the other, and one means of keeping him in the majority was to assign the opinion to him. This could account for the increase in his majority opinions after O'Connor's retirement. Another factor is the retirement of Justice John Paul Stevens on June 29, 2010. Without Stevens on the Court, Kennedy was the most senior justice while voting with the so-called liberal wing of the Court. After Justice Scalia's death in 2016, Kennedy became the senior associate justice, outranked only by Chief Justice Roberts. Each of these changes further strengthened Kennedy's institutional position. Each change made it more likely that he would either assign close opinions to himself, or that assigning justices were incentivized to assign close cases to Kennedy. Table 3 lists the assigning justices and cases for each of the 15 majority opinions mentioning dignity that Kennedy wrote in one-vote cases.

Putting aside *Casey* for a moment due the problems with discussing assignment, we see that Rehnquist assigned two institutional dignity cases to Kennedy, both touching on sovereignty. Stevens assigned Kennedy three cases, all of which were government interference dignity cases relating in one way or another to the death penalty. These assignments show Rehnquist shoring up the conservative block with Kennedy in the two sovereignty cases, and Stevens doing the same with the liberal block with the three death penalty cases. Roberts did the same with the conservative block for the government interference dignity cases *Gonzales v. Carhart*[107] (upholding the Partial-Birth Abortion Ban Act) and *Ziglar v. Abbasi*[108] (with Justices Sotomayor, Kagan, and Gorsuch not participating, and the conservative justices on one side and Ginsburg and Breyer on the other), although *Maryland v. King*,[109] a Fourth Amendment government interference dignity case, had a more mixed group with Kennedy joined by Roberts, Thomas, Breyer, and Alito. Most of these one-vote cases have Kennedy writing about contentious legal issues for a largely ideologically consistent block of justices, and inserting his conception of dignity into each of those opinions.

Table 3:

One-Vote Cases Where Kennedy Mentions Dignity in a Majority/Plurality Decision		
Assigning Justice	**Case**	**n**
Rehnquist	Planned Parenthood of Southeastern Pennsylvania v. Casey (1992)[110]	3
	Idaho v. Coeur D'Alene Tribe of Idaho (1997)[111]	
	Alden v. Maine (1999)[112]	
Stevens	Roper v. Simmons (2005)[113]	3
	House v. Bell (2006)[114]	

107. 550 U.S. 124 (2007).
108. 137 S. Ct. 1843 (2017).
109. 133 S. Ct. 1958 (2013).
110. 505 U.S. 833 (1992).
111. 521 U.S. 261.
112. 527 U.S. 706 (1999).
113. 543 U.S. 551 (2005).
114. 547 US 518 (2006).

	Kennedy v. Louisiana (2008)[115]	
Kennedy	Brown v. Plata (2011)[116]	6
	U.S. v. Windsor (2013)[117]	
	Hall v. Florida (2014)[118]	
	Obergefell v. Hodges (2015)[119]	
	Fisher v. University of Texas at Austin (2016)[120]	
	Pena-Rodriguez v. Colorado (2017)[121]	
Roberts	Gonzales v. Carhart (2007)[122]	3
	Maryland v. King (2013)[123]	
	Ziglar v. Abbasi (2017)[124]	

Note: We follow the Supreme Court Database's lead in listing Chief Justice Rehnquist as the assigning justice for *Planned Parenthood v. Casey* (1992),[125] relying in part on the justices' docket books.[126] Determining assigning justice is difficult here as three-member plurality claims joint authorship of the opinion and the other justices joined various parts, but none in whole. Rehnquist ultimately files a separate opinion concurring in part and dissenting in part.

When we look at the narrowly decided cases where Kennedy assigned himself the opinion, we see that they are all are fairly monumental decisions, and all pertain to dignity protections from governmental interference. In *Brown v. Plata*,[127] sees Kennedy upholding a finding that California prison overcrowding constitutes an Eight Amendment violation by virtue of

115. 554 U.S. 407 (2008).
116. 563 U.S. 493 (2011).
117. 133 S. Ct. 2675 (2013).
118. 134 S. Ct. 1986 (2014).
119. 135 S. Ct. 2584 (2015).
120. 579 U.S. 14 (2016).
121. 137 S. Ct. 855 (2017).
122. 550 U.S. 124 (2007).
123. 133 S. Ct. 1958 (2013).
124. 137 S. Ct. 1843 (2017).
125. 505 U.S. 833 (1992).
126. Spaeth et al., *supra* note 76.
127. 563 U.S. 493 (2011).

allowing the suit to move forward. *Hall v. Florida* [128] also involves the Eighth Amendment. In his opinion, Kennedy declared the process of executing individuals with cognitive impairment unconstitutional. As we have previously stated, *Windsor*[129] and *Obergefell*[130] pertain to equality protections for homosexuals in striking down portions of the Defense of Marriage Act of 1996 ("DOMA"),[131] and upheld the right of same-sex couples to marry. Finally, in *Fisher*,[132] Kennedy finds no Fourteenth Amendment violation in the University of Texas at Austin's consideration of race in determining admissions. Here as the median justice, the swing vote, and the senior associate (for all but *Plata* (2011)[133]), Kennedy was able to self-assign these opinions and pursue his legal goals pertaining to his conception of dignity and what it means for various rights guarantees.

Although Kennedy seemed to be capitalizing on his position as median justice in important ways, it is worth emphasizing that his attention to the concept of dignity was not new to his jurisprudence. As we mentioned in the introduction, Kennedy discusses dignity in his confirmation hearings to become a Supreme Court justice. Once on the Court, Kennedy has crafted at least one opinion invoking dignity in 25 of his 30 terms, starting with a dignity case in the 1988 term, which was his first full term on the Court. Of these 25 terms with dignity opinions, all but 3 involve at least one majority opinion invoking dignity, this means that 22 of his 30 full terms on the Court involve creating at least one binding precedent that makes use of the concept of dignity. Consequently, the development of this legal concept of dignity is not something he started after O'Connor left, or that he has implemented only as the term median justice (although he issued dignity opinions in 14.5 of his terms as the median justice). This was a concept he has developed over time, and as the median justice, has pursued increasingly in his opinions.

While he had long worked on integrating dignity into case law, there is a decided uptick in how often Kennedy had done this since O'Connor has left the Court. After O'Connor's retirement, Kennedy is firmly the ideologically median justice for each of the Court's terms, and he has the

128. 134 S. Ct. 1986, 1990 (2014).

129. 133 S. Ct. 2675, 2695 (2013).

130. 135 S. Ct. 2584 (2015).

131. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1. U.S.C. § 7 (2000)).

132. 579 U.S. 14 (2016).

133. 563 U.S. 493, 493 (2011).

highest probability of all justices for being in the majority.[134] In this period, Kennedy wrote 30 of his 54 dignity opinions, which included 22 majority opinions. This means that over half of all of his dignity opinions, and over half of his dignity majority opinions came at a time when, institutionally speaking, his vote was the most important. As shown above, this included 11 majority opinions in one-vote cases since O'Connor's retirement. Dignity comes up in only two of Kennedy's dissents after O'Connor retires, and only once in a one-vote case. The remaining dignity opinions include three concurring opinions, two concurring in part and concurring in the judgment opinions, and one concurring in the judgment opinion.

At first glance, it seems Kennedy was using his institutionally unique, and important, position to shape the Court's precedents to include his conception of dignity. However, the fact that his use of dignity spans a much larger period suggests that it is about much more than manipulating his institutional position or about following policy preferences. Kennedy's conception of dignity and his attempts to ascribe it in law are about more than politics and policy, as they also reflect a concern for law and doctrine. As the median justice, Kennedy had the benefit of being able to shape the legal opinions, not just policy outcomes, of close rulings from the Court. As someone who has long articulated a belief in a greater role for dignity in shaping the law, he is strategically situated to accomplish this goal. Legal goals and motivations must be factored in when considering the institutional role and power of median justices, with Kennedy's development of dignity as a legal concept as an example.

Conclusion

We have provided reasons to believe that Kennedy has pursued his concept of dignity as a legal goal across a variety of legal issues. We also present evidence to suggest that Kennedy is using his institutional position as median justice not just to pursue policy, but to follow legal motivations in shaping doctrine. Our content analysis, while not primarily about all of the ways Kennedy uses dignity in his opinions, does allow us to reach certain conclusions about Kennedy's dignity jurisprudence.

First, much of it is about figuring out what is owed to individuals and where the state's power runs into the protective wall of dignity. Kennedy struggles to articulate important dignitary concerns, but these do not always override state concerns. In this way, Kennedy is not simply using "dignity" to pursue preferred policy outcomes, or as a catch-all term for a limitation

134. As shown in the Appendix, the Martin-Quinn Scores for Kennedy for each term (and the remaining half-term from the 2005 term) after O'Connor's retirement place him firmly as the term median justice.

on state power. Kennedy's abortion jurisprudence provides a vivid example of how he fully acknowledges the importance of bodily autonomy and choice for dignity concerns, but is also willing to uphold at least some abortion restrictions as either not infringing on women's dignity[135] or because of his concerns for the dignity of human life regarding a fetus.[136] Similar points can be made regarding Kennedy's use of dignity in Fourth Amendment cases, where he can acknowledge dignity interests but still uphold certain searches as non-violations of these concerns.[137]

Second, while complex and not guaranteed protections from state power, it seems that dignity for Kennedy does involve some degree of negative liberty from state overreach. It speaks to what the government is prohibited from doing, and thus certain areas where the government must not interfere with private, personal decisions. *Lawrence*[138] and *Obergefell*[139] seem to fit into this category of dignity elements, as both involve rejections of state attempts to police sex acts and intimate relationships, including the solidification of a loving relationship in the bonds of marriage.

Finally, Kennedy's concept of dignity clearly involves a strong component of equal treatment. Not just focusing on that with which the government may not interfere, but also looking at the treatment we are owed or how the government may conceive of us. Again, the Fourth Amendment search and seizure cases fit here, but so to do the Eighth Amendment cruel and unusual punishment cases. In these cases, Kennedy addresses what fair, equal, and dignified treatment of individuals requires, including those either already in prison[140] or those who have been sentenced to death.[141] Kennedy's position on the Court has allowed him to write this version of dignity into law.

However, this element of dignity also applies to unacceptable ways in which the government might seek to reduce people to a single element of their existence, especially for purposes of discrimination. This was clearly on display in the rejection of DOMA in *U.S. v. Windsor* (2013),[142] but also

135. *See* Ohio v. Akron Center for Reproductive Health, 497 US 502 (1990); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

136. *See* Gonzales v. Carhart, 550 U.S. 124 (2007); Stenberg v. Carhart, 530 U.S. 914 (2000).

137. *See generally* Bailey v. United States, 133 S. Ct. 1031 (2013); City of Ontario, Cal. v. Quon, 560 U.S. 746 (2010); Maryland v. King, 133 S. Ct. at 1958; Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1989); United States v. Drayton, 536 U.S. 194 (2002).

138. Lawrence v. Texas, 539 U.S. 558 (2003).

139. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

140. *See* Barber v. Thomas, 560 U.S. 474 (2010); Brown v. Plata, 563 U.S. 493 (2011).

141. *See* Hall v. Florida, 134 S. Ct. 1986 (2014); Kennedy v. Louisiana, 554 U.S. 407 (2008); Roper v. Simmons, 543 U.S. 551 (2005).

142. 133 S. Ct. 2675 (2013).

in various opinions touching on race. This consideration for not simplifying people to one element allows Kennedy to reject the use of sex- and race-based preemptory challenges,[143] but also race-based voting restrictions in Hawaii enacted to protect native Hawaiians,[144] or to question affirmative action policies as potentially destructive of equal treatment and equal dignity.[145] For Kennedy, a respect of human dignity means not being discriminated against because of who you are, nor being overly simplified to one element of your identity. Kennedy's concept of dignity involves elements of due process, but also life, liberty, and equality. All of these elements have been reflected in Kennedy's majority opinions employing his concept of dignity.

Justice Kennedy's position as median voter, especially after Justice O'Connor's retirement, allows Kennedy to expand upon his concept of dignity and not just for preferred policy goals. Kennedy's use of dignity seems to reflect the ideas he expressed regarding dignity in his confirmation hearings. While not conclusive, and certainly an area for future studies, this suggests continuity to Kennedy's thinking about dignity's place within our law.[146] His institutional position allowed him to write dignity into the Court's precedents. Moreover, as his use of dignity gained more outside attention, in particular from the media in response to his opinion for the Court in *Obergefell* the potential for expanded legal effect of this concept of dignity exists. As we have argued, Kennedy's unique position on the Court as the median justice allows him to pursue legal considerations, including his seemingly idiosyncratic conception of dignity. Kennedy provides an example of how median justices can use their position to not only pursue policy and political outcomes, but also legal considerations through attempts to shape legal doctrine. For Justice Kennedy, dignity in its various manifestations appears to be one such legal consideration.

143. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); J.E.B. v. Alabama ex rel. TB, 511 U.S. 127 (1994); Powers v. Ohio, 499 U.S. 400 (1991).

144. *See* Rice v. Cayetano, 528 U.S. 495 (2000).

145. *See* Fisher v. Univ. of Texas at Austin, 579 U.S. 14 (2016); Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007); Schuette v. Coal. to Defend Affirmative Action (BAMN), 134 S. Ct. 1623 (2014).

146. *See* COLUCCI, *supra* note 24; KNOWLES, *supra* note 24.

Appendix

Table A: Median Justice and Justice Kennedy's Use of Dignity

Term	Most Likely Median Justice	Probability	Majority Opinions	Concurring Opinions	Dissenting Opinions	Opinions Mentioning Dignity (Total)
1988	White	0.89	1			1
1989	White	0.98	1	2		3
1990	Souter	0.53	3			3
1991	O'Connor	0.30	1			1
1992	O'Connor	0.59				0
1993	**Kennedy**	**0.68**		**1**		**1**
1994	O'Connor	0.52			1	1
1995	**Kennedy**	**0.68**	**1**			**1**
1996	**Kennedy**	**0.68**	**1**			**1**
1997	**Kennedy**	**0.82**				**0**
1998	**Kennedy**	**0.56**	**1**	**1**		**2**
1999	O'Connor	0.76	1		2	3
2000	O'Connor	0.92				0
2001	O'Connor	0.99	1			1
2002	O'Connor	0.98	2			2
2003	O'Connor	0.98			1	1
2004	O'Connor	0.93	2			2
2005a	O'Connor	0.86				0
2005b	**Kennedy**	**0.99**	**2**			**2**
2006	**Kennedy**	**1.00**	**1**	**2**		**3**
2007	**Kennedy**	**1.00**	**2**			**2**
2008	**Kennedy**	**1.00**				**0**
2009	**Kennedy**	**1.00**	**1**	**2**	**1**	**4**
2010	**Kennedy**	**0.99**	**3**	**1**		**4**
2011	**Kennedy**	**1.00**	**1**			**1**
2012	**Kennedy**	**1.00**	**3**			**3**
2013	**Kennedy**	**0.99**	**2**	**1**		**3**
2014	**Kennedy**	**1.00**	**3**		**1**	**4**
2015	**Kennedy**	**0.98**	**1**			**1**
2016	**Kennedy**	**0.91**	**2**			**2**
2017	**Kennedy**	**.50**	**2**			**2**
					Total	**54**

Table B: Collocates for "Dignity" in Kennedy's Dignity Opinions by Type of Dignity

Government Interference Collocates			Institutional Dignity Collocates	
Occurring Three or More Times			Occurring Three or More Times	
Frequency	**Collocate**		**Frequency**	**Collocate**
12	persons		6	state
9	respect		6	respect
9	personal		6	court
9	human		3	states
8	all		3	sovereign*
7	equal		3	preserve
6	same		3	foreign
6	central		3	affront
5	protection		3	afforded
5	own		2*	sovereignty
5	individual		1*	sovereigns
4	integrity			
4	choices			
4	autonomy			
4	amendment			
4	act			
3	upon			
3	state			
3	privacy			
3	person			
3	Oregon			
3	nation			
3	man			
3	guarantees			
3	death			
3	court			
3	basic			

Table B presents a collocate analysis for words within five words of Kennedy's use of dignity performed as part of a Key Words in Context (KWIC) analysis. The data in Table B is limited to those words that show up at least three times near one of Kennedy's uses of dignity, while excluding articles, conjunctions, and prepositions for the sake of clarity. The exceptions, marked with an * above, are that we included "sovereignty" and "sovereigns" to accompany "sovereign," even though Kennedy does not use sovereigns or sovereign at least three times (twice and once, respectively). We included these as they are variations of sovereign, which Kennedy does use three times near dignity, and it is an important aspect to institutional dignity for Kennedy.

We ran the KWIC and collocates analyses to compare how Kennedy was presenting "dignity" in the cases we identified as pertaining to "government interference" dignity and "institutional dignity." While we are not exploring the contours and full meaning of dignity for Kennedy in this piece, we include this analysis as a check to see if "dignity" is a coherent enough legal concept for Kennedy—again, without fully exploring what this concept means for Kennedy here—to justify our use of this legal concept, and of Kennedy, as an example of how a median justice can use his or her institutional position to pursue legal goals. For the purpose of this analysis we are looking for rough consistency to suggest, as we suspect, that there is consistency to how Kennedy discusses dignity in his opinions for the Supreme Court.[147]

More of Kennedy's dignity opinions address the government interference strand of dignity rather than institutional dignity, and thus there are more entries for collocates for this more-common form of dignity. However, both sets of words indicate a focus on inherent value to both individuals and institutions of which dignity is a part. "Respect" is a common element to how Kennedy discusses both forms of dignity, and we see focus on "persons," "humans," and "all" for government interference dignity, and "state" and "states" for institutional dignity, suggesting common levels of focus in each area, just on a different scale. In many ways, these uses track with how Kennedy discussed the concept of dignity in his Senate confirmation hearings, as we discuss in our introduction. We argue that the collocates, as well as a review of the overall KWIC analysis indicates enough consistency for how Kennedy presents dignity in these two areas that treating "dignity" as a valid, consistent legal concept for Kennedy is justified in the context of the present study.[148]

147. *See* COLUCCI, *supra* note 24; KNOWLES, *supra* note 24.

148. *See* Tribe, *supra* note 21.