COMMENTS

INTERDISCIPLINARY DUE DILIGENCE: THE CASE FOR COMMON SENSE IN THE SEARCH FOR THE SWING JUSTICE

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[N]ature gives a clear answer when a scientist asks her a clear question.

—Freeman Dyson[1]

Since the publication of Professors Lloyd Shapley and Martin Shubik's pathbreaking "power index" in 1954,[2] political scientists have revelled in the ability to make mathematically precise predictions of the relative power that particular individuals or coalitions are likely to

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1. Freeman Dyson, quoted in JAMES GLEICK, GENIUS 424 (1992), describing fellow physicist Richard Feynman's famous televised demonstration before Congress—involving little more than a glass of ice water and a bit of rubber—that the shuttle's rubber O-rings were the likely cause of the 1986 *Challenger* disaster. "The public saw with their own eyes how science is done, how a great scientist thinks with his hands, how nature gives a clear answer when a scientist asks her a clear question." *Id.*

2. *See* Lloyd S. Shapley & Martin Shubik, *A Method for Evaluating the Distribution of Power in a Committee System*, 48 AM. POL. SCI. REV. 787 (1954); *see also* MARTIN SHUBIK, GAME THEORY IN THE SOCIAL SCIENCES: CONCEPTS AND SOLUTIONS 200-201 (1982) (describing the "measure [that] has come to be known as the *Shapley-Shubik power index*," and acknowledging the contribution of earlier work by von Neumann and Morgenstern).

wield under voting schemes with various characteristics.[3] Lawyers, too, have been seduced by the possibility of mathematical precision, employing the Shapley-Shubik index and its progeny in voting rights cases to demonstrate the likely effects of various electoral districting schemes on the relative ability of racial minorities and other groups to be "winners" in the political process.[4]

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3. *See, e.g.*, Philip D. Straffin, Jr., *Power and Stability in Politics*, *in* II HANDBOOK OF GAME THEORY 1127, 1150-51 (Robert J. Aumann & Sergiu Hart eds., 1994) (listing sources); SHUBIK, *supra* note 2, at 434-91 (listing sources); D.R. Miller, *A Shapley Value Analysis of the Proposed Canadian Constitutional Amendment Scheme*, 6 CAN. J. POL. SCI. 140 (1973); Guillermo Owen, *Evaluation of a Presidential Election Game*, 69 AM. POL. SCI. REV. 947 (1975); I. MANN & LLOYD S. SHAPLEY, VALUES OF LARGE GAMES, VI: EVALUATING THE ELECTORAL COLLEGE EXACTLY (A RAND Note, RM-3158-PR, RAND Corp. 1962).

4. One descendant of the Shapley-Shubik index, the "Banzhaf index," has been particularly popular among voting rights lawyers even though the U.S. Supreme Court has consistently rejected it as a measure of violations of the "one person, one vote" standard. *See, e.g.*, John F. Banzhaf, III, *Weighted Voting Doesn't Work: A Mathematical Analysis*, 19 RUTGERS L. REV. 317 (1965); John F. Banzhaf, III, *Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle?*, 75 YALE L.J. 1309 (1966) [hereinafter Banzhaf, *Multi-Member Districts*].

See also Holder v. Hall, 512 U.S. 874, 925-26 (1994) (Thomas, J., concurring) (observing that "the statutory command to determine whether members of a minority have had an equal 'opportunity . . . to participate in the political process and to elect representatives' provides no guidance concerning which one of the possible standards setting undiluted voting strength should be chosen over the others," and declining "to embark on the ambitious project of developing a theory of political equality to be imposed on the Natiou" (quoting Voting Rights Act, 42 U.S.C. § 1973 (b) (1994))) (footnotes omitted); Board of Estimate v. Morris, 489 U.S. 688, 698 (1989) (observing that "the Banzhaf methodology 'remains a theoretical one' and is unrealistic in not taking into account 'any political or other factors which might affect the actual voting power of the residents, which might include party affiliation, race, previous voting characteristics or any other factors which go into the entire political voting situation'") (quoting Whitcomb v. Chavis, 403 U.S. 124, 145-46 (1971); *id.* at 704 (Blackmun, J., concurring in part and concurring in the judgment) ("I . . . suspect the Court is correct in rejecting the Banzhaf index . . . ."); *Whitcomb*, 403 U.S. at 145-46 (declining to "quarrel with plaintiff's mathematics" (namely, the Banzhaf index), but noting that "the position remains a theoretical one and, . . . knowingly avoids and does 'not take into account any political or other factors which might affect the actual voting power of the residents, which might include party affiliation, race, previous voting characteristics or any other factors which go into the entire political voting situation'"; concluding that the "real-life impact of multi-member districts on individual voting power has not been sufficiently demonstrated, at least on this record, to warrant departure from prior cases") (footnotes omitted); *id.* at 169 (separate opinion of Harlan, J.) (observing that "Professor Banzhaf's model also reveals that minor variations in assumptions can lead to major variations in results," and concluding that "[i]t is not surprising therefore that the Court in this case declines to embrace the measure of voting power suggested by Professor Banzhaf"); Kilgarin v. Hill, 386 U.S. 120, 125 n.3 (1967) (per curiam) (observing that the Banzhaf index suggests that multi-member districts "are adequately represented, if not over-represented" and citing Banzhaf, *Multi-Member Districts*, *supra*).

But see Whitcomb, 403 U.S. at 168 n.2 (separate opinion of Harlan, J.) (supporting use of the Banzhaf index by the Court in resolving districting disputes, and observing that "[t]he only relevant difference between the elementary ['one person, one vote'] arithmetic on which the Court relies and the elementary probability theory on which Professor Banzhaf relies is that calculations in the latter field cannot be done on one's fingers"). *Cf.* John F. Banzhaf, III, *One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 304 (1968).

To date, scholars have shown little interest in using the Shapley-Shubik index or other sophisticated measures of relative voting strength within decisionmaking bodies to study the United States Supreme Court.[5] Professors Paul Edelman and Jim Chen, however, have determined that this gap in the political science and legal literature merits filling. Seeking to substitute mathematical "proof" for mere public perception of the voting power of individual Supreme Court justices, they have undertaken to "extend the theory of cooperative games" to derive "a measure of voting strength based solely on the record of the Justices' voting alignments."[6] Taking the Banzhaf index as their starting point,[7] Edelman and Chen have crafted a new "power index"[8] which they use to examine the Court's decisions during the 1994 and 1995 Terms.

Edelman and Chen conclude that Ruth Bader Ginsburg is the "Most Dangerous Justice" on today's Supreme Court,[9] and that Justices Kennedy and Souter are, respectively, "the First Runner-Up and Mr. Congeniality" for the combined 1994 and 1995 Terms.[10] Justice O'Connor, commonly perceived to have "perfected the role of the

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For examples of how the Shapley-Shubik index can be usefully employed in legal scholarship, see Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 730 (1992) (contribution to symposium on "Law and Economics of Local Government"); Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 18 J.L. & POL. (forthcoming 1997).

5. The major exceptions are Paul Edelman & Jim Chen, *The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics*, 70 S. CAL. L. REV. 63 (1996) and ARTHUR Q. FRANK & LLOYD SHAPLEY, THE DISTRIBUTION OF POWER IN THE U.S. SUPREME COURT (A RAND Note, N-1735-NSF, RAND Corp. 1981). One plausible explanation for the persistence of this gap in the literature is set forth *infra* Part II Section C.

6. Edelman & Chen, *supra* note 5, at 66.

7. The major difference between the Banzhaf index and the Shapley-Shubik index, according to Professor Shubik, is that

> the Shapley-Shubik index depends on equiprobable permutations of *N*, whereas the Banzhaf index depends on equiprobable combinations of *N*. Each permutation produces exactly one pivot, but a single combination rarely produces a single swinger. Thus there is an inherent additive measure in the Shapley-Shubik index which is not present in the Banzhaf index.

SHUBIK, *supra* note 2, at 203-204.

8. Edelman & Chen, *supra* note 5, at 71-72.

9. *See id.* at 84 (Table 3.2.3).

10. *See id. Cf. id.* at 91. Justices Kennedy and Ginsburg "were the only Justices to wield more than their pro rata share of the Supreme Court's voting power in both the 1994 Term and the 1995 Term." *Id.* at 96. "Justices Kennedy and Ginsburg compiled two-year power ratings of 12.7 and 12.9 respectively, with Justice Souter trailing badly in third at 11.7." *Id.* at 96 n. 136.

'median Justice,'"[11] to be "the Court's consummate 'accommodationist,'"[12] ties with Justice Scalia for eighth place overall in Edelman and Chen's "Power Pageant of the Justices."[13]

Counter-intuitive results, particularly when obtained through intimidatingly complex mathematical methods, always grab attention. Alas, they may also be a sign that something is amiss in the logic or mechanics of the math employed. In this Article, I argue that the problem of determining the Court's most powerful or "dangerous" Justice is readily solved in any of three standard ways. The elaborate mathematics of Edelman and Chen is both unnecessary to the project and explicitly based on assumptions that are inappropriate to the question they claim to seek to answer.

Part I explains the game-theoretic notion of the "median" Justice in order to clarify the question that Edelman and Chen sought to answer: Who is the Court's "most powerful" or median Justice? Part II discusses four substantial flaws in the Edelman and Chen methodology which ultimately doom their attempt to answer this question. These flaws in their methodology suggest that Edelman and Chen importantly misunderstand the existing measures of relative voting strength within decisioumaking bodies from which they claim to have derived their own "power index." Part III presents three different, yet interrelated, methods for answering the question that Edelman and Chen originally posed. Part IV announces the winner and runners up in a 1994 Term, a 1995 Term, and a two-year composite "Power Pageant"[14] conducted under the new (and improved) rules set out in Part III. The Article concludes with a brief discussion of whether such Power Pageants have any practical benefits or are merely an amusing (at least to lawyers) "parlor game."

I. THE NOTION OF "THE MEDIAN JUSTICE"

Game-theoretic analyses of the a priori distribution of power in a decisionmaking body center on the notion of a "pivot" or "swing

11. *Id.* at 65.

12. *Id.* at 65. *See also* David J. Garrow, *The Rehnquist Reins*, N.Y. TIMES, Oct. 6, 1996, at 65, 69 ("a former Rehnquist clerk notes how O'Connor's 'personality is in many ways just the opposite of Justice Scalia's. She's very willing to build consensus on opinions.'").

13. This is for both the 1994 and 1995 Terms combined. *See id.* at 84 (table 3.2.3); *cf. id.* at 86. Justice O'Connor finished a stunning dead last in the E-C Index "power" rankings for the October 1994 Term, *see id.* at 84 (table 3.2.1), but rose to second in the October 1995 Term rankings. *See id.* at 84 (table 3.2.2).

14. The clever nomenclature is Edelman and Chen's. *See id.* at 86.

voter," sometimes also termed the "median voter."[15] The classic Shapley-Shubik index considers all possible orders in which a vote can take place. If, as in the case of the Supreme Court, there are nine voters (n), there will be 9! ($n!$) or 262,880 possible orderings. For *each* such ordering, the "pivot" or "swing" is the voter "who is in a position to provide the coalition with just enough strength to win."[16] The Shapley-Shubik index of a given voter's power within the organization is determined by counting the number of orderings in which that voter is the pivot, then dividing by the total number (n!) of such orderings.[17]

Consider a hypothetical case in which six Justices—Rehnquist, Stevens, Kennedy, Souter, Ginsburg and Breyer—find in favor of the Respondents, while the remaining three Justices dissent.[18] In order to identify the pivotal Justice for this decision, the Shapley-Shubik measure requires us to consider all 9! possible orderings for these Justices' votes. Since, in game-theoretic terms, the Supreme Court is a nine-player game with five votes required for victory,[19] the pivot will always be the member of the majority whose vote is in fifth position *among the majority voters.*

In the following ordering, for example, Justice Rehnquist is the pivot: Stevens (R)[20], Kennedy (R), Thomas (P)[21], Ginsburg (R), Breyer (R), REHNQUIST (R), Scalia (P), Souter (R), O'Connor (P). Justice Ginsburg, however, is the pivot in this ordering: Rehnquist (R), Scalia (P), Thomas (P), O'Connor (P), Stevens (R), Kennedy (R), Souter (R), GINSBURG (R), Breyer (R). Thus, in the case of a 6-3 decision, each of the six members of the majority will occupy this position of fifth among the six the same one-sixth of the time. And each of these six Justices therefore has the same one-sixth likelihood of having been the actual pivot or swing voter in this decision.

It should now be clear that although each *permutation* or ordering of the n voters produces a single pivot, any given *combination* of votes (for example, a 6-3 decision with O'Connor, Scalia, and Thomas

15. *See, e.g.*, SHUBIK, *supra* note 2, at 200-04. *Cf.* Edelman & Chen, *supra* note 5, at 76.

16. SHUBIK, *supra* note 2, at 203.

17. *See id.*. *Cf.* Edelman & Chen, *supra* note 5, at 76.

18. *Cf., e.g.*, Variety Corp. v. Howe, 116 S. Ct. 1065 (1996).

19. In formal terms, this game is denoted (5; 1, 1, 1, 1, 1, 1, 1, 1, 1), where 5 is the "quota" and each of the nine players has an equal vote. *Cf.* SHUBIK, *supra* note 2, at 203.

20. (R) indicates that the Justice voted in favor of the Respondent in the case.

21. (P) indicates that the Justice voted in favor of the Petitioner in the case.

dissenting) will only rarely produce a single pivot.[22] In other words, if for each decision one knew the actual ranking of the Justices "in declining order of the intensity of their support, from rabid advocates to lukewarm allies to unregenerate opponents,"[23] one would be able to identify the actual pivot, or median Justice for each decision. But when the only information available is the combination, rather than a linear ordering, of votes, the best that game theory can do is confirm our intuitions: (1) that one of the Justices in the majority was the true pivot or median Justice in the case, and (2) that each of the Justices in the majority is equally likely to have been that swing voter.

In sum, in order to answer the question of who the most powerful Justice was during a particular past Term of the Court, game theory suggests that one must simply count up the number of times that each Justice was a member of the winning coalition. The Justice with the highest total is the "median" or "pivotal" or "Most Dangerous"[24] Justice for the relevant Term.

II. THE EDELMAN-CHEN POWER INDEX: "FULL OF SOUND AND FURY, SIGNIFYING NOTHING"[25]

In constructing their new measure of the relative power wielded by individual Supreme Court Justices (hereinafter "the E-C Index"), Professors Edelman and Chen get off to a sensible start. They proclaim that they "will eschew the irreducibly subjective project of assessing the Justices' ideological proclivities or the ideological implications of case outcomes."[26] "Rather than attempting the hopeless task of identifying the amorphous ideological fissures that divide the Justices," they add, "we will rely on the record of interaction among the Justices."[27] Unfortunately, however, Edelman and Chen

22. Indeed, in the case of the U.S. Supreme Court, a given combination of votes is able to produce a single pivot only when the Justices divide into more than two groups, as in the relatively rare case of a 4-1-4 decision.

As Professor Shubik has explained, the difference between the Shapley-Shubik and Banzhaf indexes is that the former "depends on equiprobable permutations of *N*, whereas, the Banzhaf index depends on equiprobable combinations of *N*. Each permutation produces exactly one pivot, but a single combination rarely produces a single swinger." SHUBIK, *supra* note 2, at 204.

23. Edelman & Chen, *supra* note 5, at 76.

24. *Cf. id.* at 63.

25. WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5 (1673) (Life "is a tale/ Told by an idiot, full of sound and fury,/ Signifying nothing.").

26. Edelman & Chen, *supra* note 5, at 80.

27. *Id.* at 80.

go on to base their index on three premises, each of which is seriously flawed.

A. PREMISE ONE OF THE E-C INDEX: ONLY FIVE-JUSTICE WINNING COALITIONS ARE RELEVANT

In examining "the winning coalitions of Justices from October Term 1994, October Term 1995, and the two Terms taken together," Edelman and Chen decide that they must consider only five-Justice coalitions.[28] "The key idea," they assert, "is that the only time that an individual Justice's vote matters is when he is in a coalition of exactly five Justices."[29] In these instances, "the defection of any one Justice would make losers of the other four."[30]

The most obvious problem with proceeding in this way is that winning coalitions of *exactly* five Justices are the great exception rather than the rule.[31] During the October 1994 Term, for example, only twenty-three (*twenty-seven percent*) of the Court's eighty-six decisions met this requirement.[32] During the most recent Term, this number was even smaller: sixteen of eighty-four decisions, or *nineteen percent*.[33] And if one's goal is to determine the "Most Powerful" or "median" Justice during a particular Term of the Court, ignoring *seventy to eighty percent* of the available data seems a counter-productive way to proceed.[34]

Edelman and Chen appreciate this difficulty.[35] Instead of rethinking their decision to consider only five-Justice coalitions, however, they conclude that they can "circumvent the problem of small numbers,[36] by basing their calculations on the 'larger sample'[37] of five-

28. *See id.* at 66.

29. *Id.* at 66.

30. *Id.*

31. This is a problem that Edelman and Chen explicitly acknowledge. *See id.* at 73.

32. *See infra* Table One.

33. *See infra* Table Two.

34. *Cf.* GLEICK, *supra* note 1, at 419-25 (describing how NASA researchers simply did not consider "the possibility that the weather had any effect" on the resiliency of the *Challenger*'s rubber O-rings; the physicist Richard Feynman, in contrast, considered all the possibilities and ultimately "showed that failure of the cold seals had been virtually inevitable—not a freakish event, but a consequence of the plain physics of materials").

35. They observe, for example, that "[t]he Court decided only eighty-six cases in the 1994 Term and another eighty-six in the 1995 Term, and relatively few of these cases were decided by five-justice coalitions." Edelman & Chen, *supra* note 5, at 73. In fact, in only twenty-three cases in the 1994 Term and sixteen cases in the 1995 Term did the majority consist of precisely five Justices. *See infra* Tables One and Three.

36. Edelman & Chen, *supra* note 5, at 84.

Justice 'feasible' coalitions. A 'feasible' coalition, they explain, differs from an actually occurring coalition in that the former is the product of 'the intersection of any collection of actual coalitions, that is, subsets of Justices (of any size) who concurred in an opinion (majority or otherwise) during a Term."[38]

Having manufactured the set of all "feasible" coalitions, Edelman and Chen are interested in further analyzing only "five-Justice feasible coalition[s]."[39] Moreover, they will credit each Justice's membership in a five-Justice feasible coalition toward his or her "Power Index"[40] only if "the [four-Justice] coalition obtained by removing that Justice [from the five-Justice feasible coalition] is a feasible coalition as well."[41] That is, only if the four-Justice coalition that results when one removes a particular Justice from the five-Justice feasible coalition is itself a coalition that could be generated by "the intersection of any collection of actual coalitions" during the relevant Term of the Court.[42]

I shall leave further discussion of Edelman and Chen's notion of "feasible" coalitions for the next section. For present purposes, two observations are sufficient. First, it is Edelman and Chen's exclusive focus on five-Justice winning coalitions that causes them ultimately to manufacture the set of "feasible" coalitions rather than simply examining the set of "actually occurring" coalitions for the relevant time period.[43] The subset of five-Justice winning coalitions, of course, is not without allure: Five-justice winning coalitions are ones in which the pool of possible "median" or "swing" voters is smallest,[44] and the fragility of the winning coalition is most obvious.[45] But this self-imposed

37. *Id.*

38. *See id.* at 82 (footnote omitted).

39. *See id.* at 83.

40. *Id.* at 84 (Tables 3.2:1 through 3.2.3).

41. *See id.* at 83.

42. *See id.* at 82.

43. In manufacturing the set of all "feasible" coalitions, Edelman and Chen explicitly consider all "actual coalitions" or "collections of Justices (of any size)." *See id.* But they go on to consider only the subset of "five-Justice feasible coalition[s]" when calculating each Justice's "Power Index." *See id.* at 83. *See also supra* text accompanying notes 37 - 42.

44. That is, when the majority consists of precisely five Justices, any of those five Justices may be the "actual" swing voter or "pivot." As the size of the winning coalition increases, so does the number of Justices who may be the true median or swing Justice in that case.

45. The smaller the size of the winning coalition, the more likely it is that the defection of a single voter will transform the remaining members into a losing coalition. *Cf.* Edelman & Chen, *supra* note 5, at 66 ("Since each Justice is as much a 'swing voter' as any of the others in this *fragile* coalition of five, voting power is equally distributed among the Justices (twenty percent each)." (emphasis added)).

restriction on the data that Edelman and Chen are willing to examine is both unnecessary and highly likely to preclude them from accurately identifying the most powerful sitting Justice.

Second, and quite related, it is patently *not* the case when seeking to identify the most powerful or "median" Justice that "the only time that an individual Justice's vote matters is when he is in a coalition of exactly five Justices."[46] A five-Justice winning coalition differs from one numbering six, seven, eight, or even nine only in the number of Justices who may be the "true" median or swing Justice in that particular case. The fact that *two* Justices rather than one must defect from a six-Justice winning coalition in order to transform it into a losing one does not mean that the six-Justice coalition has no median or swing Justice. Someone litigating a similar case before the same Court, for example, would presumably focus her remarks on the six Justices who were previously in the majority since two of those six—alas, she can't be sure *which* two—are likely to hold her client's fate in their hands, and one of those six is also likely to be the Court's center in her case. For the purpose of determining the most powerful or "median" Justice, the members of the winning coalition, no matter what its size, are importantly different from the other Justices.

To be sure, an 8-1 or 7-2 decision seems to yield information *mostly* about who is on the Court's ideological fringe, and taken alone does not distinguish among the seven or eight Justices in the majority. But the fact that a particular Justice is an outlier less often than the others is obviously relevant to identifying the Court's "median" or most powerful Justice. In addition, it is necessary to consider *all* of the winning coalitions of any size that *actually occurred* during a particular Term of the Court if one seeks to determine who the most powerful Justice was during that Term. It is far from clear what question is being answered when Edelman and Chen instead (1) manufacture a list of all "feasible" coalitions,[47] and (2) consider only the five-Justice coalitions on the list,[48] then (3) credit a Justice with membership in

46. *Id.*

47. *See id.* at 82 ("the set of feasible coalitions can be expressed as the intersection of any collection of actual coalitions, that is, subsets of Justices (of any size) who concurred in an opinion (majority or otherwise) during a Term").

48. *See id.* at 83 ("For each Justice, we count the number of times that (1) the Justice appears in a five-Justice feasible coalition, *and* (2) the coalition obtained by removing that Justice is a feasible coalition as well.").

such a five-Justice coalition only if the four-Justice "coalition obtained by removing that Justice is a feasible coalition as well."[49]

B. Premise Two of the E-C Index: Only "Feasible Coalitions" (Rather than "All Actual Coalitions" or "All Theoretically Possible Coalitions") Should Be Considered

As we have seen, Edelman and Chen's exclusive consideration of five-Justice winning coalitions[50] and their concern with the small number of such coalitions that actually occur during any one Term[51] cause them to conclude that they need a measure of "all *feasible coalitions*" of the Court during a given Term.[52] "In mathematical terms," Edelman and Chen explain, "the set of feasible coalitions can be expressed as the intersection of any collection of actual coalitions, that is, subsets of Justices (of any size) who concurred in an opinion (majority or otherwise) during a Term."[53] They proceed to "count the number of times that (1) the Justice appears in a five-Justice *feasible* coalition, *and* (2) the coalition obtained by removing that Justice is a feasible coalition as well."[54]

Two objections to this purported solution to Edelman and Chen's self-created problem of small sample size are immediately apparent.[55] First, why are the *intersections* of actually occurring winning coalitions relevant to the search for the median Justice? Why don't Edelman and Chen simply consider all possible coalitions to constitute the set of "feasible coalitions"?

Second, it is not clear why one should be concerned with whether "[t]he [four Justice] coalition obtained by removing [a particular] Justice [from a given five-Justice feasible coalition] is a feasible coalition as well."[56] Edelman and Chen contend that this "inquiry is designed to eliminate situations in which [a particular] Justice could *not* have

49. *See id.*

50. *See supra* note 43 and accompanying text.

51. *See supra* note 35 and accompanying text.

52. *See* Edelman & Chen, *supra* note 5, at 82 (emphasis added).

53. *Id.* (footnote omitted).

54. *Id.* at 83 (emphasis added).

55. Edelman and Chen, of course, would not be faced with the problem of small sample size if they were willing to consider *all winning coalitions of any size* that actually occurred during a given Term of the Court, rather than restricting their consideration to five-Justice winning coalitions.

56. Edelman & Chen, *supra* note 5, at 83.

cast the pivotal vote" in a five-Justice feasible coalition.[57] They add: "If the four Justices left by [a particular] Justice's defection do not themselves form a feasible coalition, that is a reliable signal that our original Justice is on the ideological fringe rather than a pivotal position."[58]

Unfortunately, Edelman and Chen's creative attempt to distinguish among the Justices in each five-Justice *feasible* coalition is both unnecessary and destined to yield meaningless results. It is unnecessary because the stated task is to identify the median or most powerful Justice over the course of a particular Term, not the "swing" Justice of a single decision of the Court. In addition, it is hardly clear why information about a manufactured set of five-Justice coalitions that did not actually occur during the relevant Term is useful. Edelman and Chen tell us that generating the list of "feasible" five-Justice coalitions enables them to "determine[ ] the maximum number of times that [a particular Justice] might have cast the pivotal vote in a five-Justice feasible coalition."[59] But they never explain why they prefer to examine "feasible" rather than actually occurring winning coalitions of Justices, or why only five-Justice feasible coalitions merit attention.

Even if one were persuaded that it is more useful to study "feasible" rather than actually occurring winning coalitions during a particular Term, Edelman and Chen do not convincingly explain why they count a Justice's membership in a "five-Justice feasible coalition" only if "the [four-Justice] coalition obtained by removing that Justice is a feasible coalition as well."[60] They state that a member of a five-Justice feasible coalition who fails to meet this condition "is on the ideological fringe rather than a pivotal position" because "[a] threat by such a Justice to defect [from the five-Justice feasible(!!) coalition] would not be credible, because a Justice who lacks plausible mates with whom to form a new winning coalition has nowhere to go."[61]

But why would such a Justice's threat to defect *not* be credible? Contrary to Edelman and Chen's claim, a Justice need not undertake to "form a new winning coalition" if he chooses not to join an opinion of four of his colleagues. Indeed, Edelman and Chen seemed to have understood earlier in their article that a Justice does not face a simple

57. *Id.*.
58. *Id.*
59. *Id.*
60. *See id.*.
61. *See id.*.

binary choice when casting his vote in a given case. "Positive law," they earlier observed, "arguably *requires* distinctions among Justices who do not concur in the same opinion."[62] Thus, they applauded the *Harvard Law Review*'s annual survey of the Supreme Court because it "decline[s] to 'treat two Justices as having agreed if they did not join the same opinion, even if they agreed in the result of the case and wrote separate opinions revealing very little philosophical disagreement,"[63] and they criticized the Frank-Shapley index because it "simply fails to account for the increasing prevalence and legal significance of plurality opinions, opinions concurring solely in the judgment, and dissenting opinions."[64]

In sum, to the extent that some winning coalitions of Justices surely occur more frequently than others, and some Justices are more frequently members of the winning coalition than others, this information is readily obtained simply by counting actual occurrences over the course of the relevant Term. We can only wonder what is being measured when Edelman and Chen instead (1) manufacture a list of all "feasible" coalitions, and (2) consider only the five-Justice coalitions on the list, then (3) credit a Justice with membership in such a five-Justice coalition only if the four-Justice "coalition obtained by removing that Justice is a feasible coalition as well."[65] And we can only wonder why this information would ever be useful in a search for the median or most powerful Justice during a particular Term of the Court.

C. Premise Three of the E-C Index: Predicting the Future Is the Same as Examining the Past

Edelman and Chen's unnecessary concern with the intersections of artificially manufactured "feasible" five- and four-Justice coalitions during a given Court Term is the result, at least in part, of their acknowledged choice to "reject one aspect of cooperative game theory as it is conventionally used to measure differences in power within a voting system."[66] Specifically, they reject the assumption, common to "[m]ost such applications of game theory," that "coalitions may freely form within any given population of voters" and that "the probability that any given coalition of voters will emerge depends only on the size

62. *Id.* at 79 (footnote omitted).
63. *Id.*
64. *Id.*
65. *See id.* at 83; *see also* text accompanying notes 47 - 49.
66. Edelman & Chen, *supra* note 5, at 67.

of the coalition."[67] When the voters at issue are Supreme Court Justices, this common assumption does at first seem to strain credulity. Even casual Court watchers would surely contend, for example, that Justice Scalia is likely to agree with Justice Thomas much more often than with Justice Ginsburg over the course of any one Term.[68]

What Edelman and Chen seem not to appreciate, however, is that the applications of game theory that assume that "the probability that any given coalition of voters will emerge depends only on the size of the coalition"[69] are *theoretical* attempts to predict the *future* in the face of *incomplete* information. This assumption is an entirely sensible starting point if, for example, one is curious to know with mathematical precision whether California is likely to have more or less power than it currently does in Congress if representation in both

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67. *Id.* (footnote omitted).

68. It is worth noting that casual Court watchers, as well as experts such as Edelman and Chen, have almost surely arrived at this view by observing the frequency with which different coalitions of Justices have actually formed over time. See, for example, journalist Linda Greenhouse's discussion of the Court's October 1995 Term:

> As has been true for the last several years, the Court's center of gravity is occupied by two moderate conservatives, Justices O'Connor and Anthony M. Kennedy, as the term's statistics show. They dissented the least of any Justices, only five times for Justice Kennedy and six for Justice O'Connor. Justice Stevens cast 19 dissenting votes in the 75 cases the Court decided [during the October 1995 Term]. With 34 of those cases, or 45 percent, having been decided by 9-to-0 votes, Justice Stevens dissented in nearly half of the contested cases.
>
> Where Justices Kennedy and O'Connor were, the Court was. Of the dozen cases decided by 5-to-4 votes, they were each in the majority nine times, more than any other Justices.

Linda Greenhouse, *In Supreme Court's Decisions, A Clear Voice, and a Murmur*, N.Y. TIMES, July 3, 1996, at A1. *See also* Jeffrey Rosen, *Annals of Law: The Agonizer*, THE NEW YORKER, Nov. 11, 1996, at 82:

> Where Justice Kennedy goes, so goes the Supreme Court: for the past three terms, in 5-4 cases, he has voted with the majority more often than any other Justice, and so has been the pivotal figure in case after case. At a time when Chief Justice William Rehnquist appears to have lost interest in producing coalitions or legal arguments, Kennedy's views determine the Court's views in closely divided cases. His leadership, it should be said, is passive rather than active: other Justices must persuade him of *their* views, rather than the other way around.

See also Garrow, *supra* note 12, at 65 (describing Anthony Kennedy as "the one crucial Justice who most oftentimes is the deciding voice whenever the Court is split 5 to 4"); *id.* at 82 (observing that "in the just-completed 1995-96 term, Kennedy again was the Court's least frequent dissenter (in just 5 of 75 cases) and was in the majority in 9 of the 12 5-4 outcomes"):

> But the most important Justice on the 1996 Rehnquist court is not the angry Antonin Scalia; it's the man who ascended to the Court in the wake of Robert H. Bork's rejection: Anthony Kennedy. A quiet and thoughtful Californian, Kennedy throughout his eight-year tenure has been both the crucial fifth vote for virtually all of Rehnquist's major victories *and* the decisive vote and voice when Rehnquist has suffered historic defeats in cases like Casey and Romer. . . . Kennedy term after term has been the balance wheel of the Rehnquist Court.

Id.

69. Edelman & Chen, *supra* note 5, at 67 (footnote omitted).

chambers were instead apportioned on the basis of population, and a two-thirds majority in each chamber were necessary for passage.[70]

Edelman and Chen's project is quite different. They have *complete* information about the coalitions that formed during a particular *past* Term of the Supreme Court and seek to determine who the "median" or "swing" or "Most Dangerous" Justice *in fact was.* Predicting the future is at issue only insofar as one might *subsequently* extrapolate from these results to predict that the median or most powerful Justice during some *future* Term (assuming no change in the Court's personnel) will be the same as during one or more previous Terms.

It is worth noting that this important distinction between predicting the future and examining the past, between a priori speculation and real world results, is likely the reason why aficionados of the Shapley-Shubik and Banzhaf Indexes have shown little interest in studying the Supreme Court. As a nine-member decisionmaking body operating under "one member, one vote" and a simple majority decision rule, there is little to interest the student of voting systems. "[F]or any ordering of the justices, the one ranked fifth is the pivot."[71] Case closed. And there seems little reason to speculate on how changes in the current scheme—to weighted voting on the basis of seniority or to a super-majority decision rule, for example—would alter the distribution of power within the Court, since no such changes in the institution seem even remotely likely.

D. Premise Four of the E-C Index: The "Median" Justice Is Not the "Most Powerful" Justice

Perhaps the oddest premise of the E-C Index is the authors' contention that the Court's "Most Powerful" Justice during a particular Term is different from the "median" Justice. Assuming *arguendo* that Edelman and Chen are correct that their "variant of the generalized Banzhaf index measures the propensity of each Justice to vote at the margins of a winning coalition,"[72] one is left to wonder how this differs from a search for the "median" Justice. The mystery only deepens as they elaborate: "The most dangerous Justices are those who are

70. *Cf.* Baker & Dinkin, *supra* note 4, at Part III.

71. Frank & Shapley, *supra* note 5, at 8; *cf.* Edelman & Chen, *supra* note 5, at 66.

72. Edelman & Chen, *supra* note 5, at 96.

most able—and willing—to switch their votes on incremental but decisive legal propositions. What we seek to measure, then, is the marginal propensity to cast the critical vote in contestable and contested disputes over legal reasoning in Supreme Court decisions."[73]

Finally, they let us in on the secret: "The power at the margin is the power to decide . . . . The marginalist emphasis should make it clear that we are not looking for the 'median' Justice."[74] Edelman and Chen are correct that the most powerful Justice is the one who holds "[t]he power at the margin." Unfortunately, however, they have lost sight of the critical fact that the Justice who stands at the "margin" *of two groups* of her colleagues necessarily stands at the Court's center. And this is the very definition of the "median" Justice in whom Edelman and Chen ultimately claim to have no interest.

It is further puzzling that earlier in their Article Edelman and Chen appeared both to have a good grasp of the standard notion of the "median" voter and to be seeking the Court's "median" or "swing" Justice. "The Court's likeliest tiebreakers," they wrote, are "those Justices who, first, are close enough to the ideological center of gravity on a variety of legal issues to find themselves in a greater number of majority coalitions and, second, are sufficiently flexible to join a broader range of coalitions."[75] They add that "[a] Justice who dissents in more than a quarter of a Term's cases is either too quirky or too far from the Court's ideological center of gravity to cast a large number of pivotal votes."[76]

Given the sensibleness of these early statements, the incoherence of Edelman and Chen's later descriptions of their project are all the more disorienting. What, for example, is one to make of the following: "We are not asking whether a Justice stands in the Court's ideological mainstream or along the fringes. Rather, we are measuring how smoothly a Justice, regardless of her jurisprudential preferences, forms winning coalitions with her colleagues."[77]

In the end one is left with the profound sense that Edelman and Chen's professed search for the Court's "Most Powerful" Justice was doomed simply because they never truly understood the target of their search.

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73. *Id.*
74. *Id.* at 96-97.
75. *Id.* at 85.
76. *Id.* at 86.
77. *Id.* at 97.

III. WHO IS THE COURT'S MOST POWERFUL JUSTICE?: THREE EASY APPROACHES

If the E-C Index is fatally flawed, how then might one accurately determine the identity of the Court's most powerful or "median" Justice during the October 1994 Term, the October 1995 Term, and the two Terms taken together? The most obvious and sensible approach—which I shall denote the Standard Measure—is to examine all of the Court's decisions during the relevant Term, and simply to count the number of times each Justice was a member of a winning coalition of *any* size (*i.e.*, 5, 6, 7, 8, or 9 Justices, or a four-Justice plurality). The Justice with the highest total is the median Justice for that Term.

A second approach—for those who believe that the benefits of considering only the decisions in which the winning coalition numbers precisely five Justices outweigh the costs of ignoring as much as eighty percent of the available data[78]—is to consider only the Court's five-Justice winning coalitions. One must simply count the number of times each Justice was a member of a five-Justice majority, and the median or most powerful Justice is again the one with the highest total during the relevant Term.[79] (We might call this, not entirely accurately, the "5-4 Decision Method.")

Finally, one might be of the view that the identity of the median or swing Justice is highly dependent on the issue being litigated. One might expect Justice Kennedy, for example, to be the Court's "most powerful" Justice on matters of federalism,[80] and Justice O'Connor to

78. As was explained *supra* notes 32-34 and accompanying text, winning coalitions of exactly five Justices occurred in only twenty-seven percent of cases decided during the 1994 Term and nineteen percent of cases decided during the 1995 Term.

79. In order to see this more clearly, consider a scenario under which one, and only one, Justice is in the majority on *all* of the Court's 5-4 decisions during the relevant Term. This is clearly the Justice one wonld seek to persuade in an argument before the Court since history tells you that if this Justice is not on your side, the decision is unlikely to be 5-4 in your favor. (Of course, the decision might nonetheless be 6-3 or 7-2 or 8-1 in your favor, a possibility considered in the Standard Measure *supra*.)

80. *See, e.g.*, Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996) (joining Rehnquist, C.J., and Justices O'Connor, Scalia, and Thomas in the majority); U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995) (joining Justices Stevens, Souter, Ginsburg, and Breyer in the majority); United States v. Lopez, 115 S. Ct. 1624 (1995) (joining Rehnquist, C.J., and Justices O'Connor, Scalia, and Thomas in the majority); *see also* Lynn A. Baker, *"They the People": A Comment on* U.S. Term Limits, Inc. v. Thornton, 38 ARIZ. L. REV. 859, 861-62 (1996) (observing that "when visiting the University of Arizona last fall, Justice Anthony Kennedy several times stated that the importance of the *Term Limits* decision to his mind lay in the fact that the Court came within one vote—his, presumably—of abolishing 'We the People'").

be the swing voter in racial districting[81] or abortion cases.[82] This view suggests that one should tabulate votes on a *particular issue* across all Terms of the same Court, instead of considering all the Court's decisions on every topic rendered during a particular Term. As before, the Justice most often in the winning coalition in decisions involving the chosen subject matter is the median or most powerful Justice on issues of that type.

IV. "THE POWER PAGEANT OF THE JUSTICES" REVISITED

Now we are ready to conduct a Power Pageant for the October 1994 Term, the October 1995 Term, and the two Terms of the Court taken together using the Standard Measure and the 5-4 Decision

81. *See, e.g.*, Bush v. Vera, 116 S. Ct. 1941 (1996) (joining Rehnquist, C.J., and Justices Scalia, Kennedy and Thomas in the majority); Miller v. Johnson, 115 S. Ct. 2475 (1995) (same); Shaw v. Reno, 509 S. Ct. 630 (1993) (same); *see also* Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, *in* THE SUPREME COURT REVIEW: 1995, at 45 (Dennis J. Hutchinson, David A. Strauss & Geoffrey R. Stone eds., 1996) ("given the rather persistent four-one-four division on the Supreme Court, the battles over redistricting seemed doomed to be fought under the terms of Justice O'Connor's enigmatic and idiosyncratically fact-based views of how any particular cartographical arrangement might strike her fancy"); NANCY MAVEETY, JUSTICE SANDRA DAY O'CONNOR: STRATEGIST ON THE SUPREME COURT 109, 119 (1996) (observing that, since *Shaw*, O'Connor "has emerged as the Court's leading voice on the constitutionality of race-based electoral districting," and noting that "the jurisprudential accommodationism of her position is apparent when compared with the more stringent formulations from her conservative colleagues" in post-*Shaw* voting-rights cases); Jeffrey Rosen, *TRB: Sandramandered*, NEW REPUBLIC, July 8, 1996, at 6, 41 (observing that "[f]or the past three years, [Justice O'Connor has] struggled ineffectually to split the difference between four liberal Justices, who think that the Constitution doesn't prevent the states from drawing voting districts on the basis of race, and four conservative Justices, who think it does," and terming O'Connor "our least decisive Justice"); Greenhouse, *supra* note 68, at A1 ("with Justice Sandra Day O'Connor retaining her equivocal role at the center of the debate over the meaning of the equal-protection guarantee, the Court has not yet settled clearly on a standard for evaluating the use of race in drawing district lines"); Jeffrey Toobin, *Annals of Law: Supreme Sacrifice*, NEW YORKER, July 8, 1996, at 43, 47 ("O'Connor is usually the swing vote in the Court's race cases").

If the Court accepts a disproportionately large number of racial districting cases for the October 1996 Term, I would predict that Justice O'Connor will prevail over Justice Kennedy in that Term's Power Pageant. *Cf.* Greenhouse, *supra* note 68, at A1 (observing that "The Court has already accepted new voting-rights cases for its next term, indicating that this debate will continue").

82. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992) (joining Justices Kennedy and Souter in the Court's plurality opinion); *see also* MAVEETY, *supra* note 81, at 94 (observing that "as a jurist, O'Connor has clearly been vital to the forging of a position of relative compromise in the issue area of reproductive rights," and noting that "[t]he accommodationist tendencies that are found in O'Connor's work generally are well illustrated in her abortion opinions"); DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 225 (1992) (describing O'Connor as the Court's "pivotal justice" who "held the balance on abortion").

Method described in Part III above. We can then compare the results with those obtained by Edelman and Chen using the E-C Index.

TABLE ONE

OCTOBER 1994 TERM ALL DECISIONS

cases per winning coalition size	Rehn.	Stvns.	O'Con	Scalia	Ken.	Souter	Thom.	Gins.	Breyer
26 (9-Jus.)	26	26	26	26	26	26	26	26	26
13 (8-Jus.)	13	8	12	11	13	13	11	12	11
11 (7-Jus.)	10	4	10	8	10	9	9	7	10
12 (6-Jus.)	7	7	8	7	10	9	5	11	8
23 (5-Jus.)	16	11	14	10	19	11	9	14	11
1 (4-Jus.)	1	0	0	1	1	0	1	0	0
Total=86	73	56	70	63	79	68	61	70	66

TABLE TWO

OCTOBER 1994 TERM POWER PAGEANT

	E-C Index	Standard Measure	5-4 Decision Method
1	Kennedy	Kennedy	Kennedy
2	Ginsburg	Rehnquist	Rehnquist
3	Breyer	O'Connor/Ginsburg	O'Connor/Ginsburg
4	Scalia	O'Connor/Ginsburg	O'Connor/Ginsburg
5	Souter	Souter	Stevns/Souter/Breyer
6	Rehnquist	Breyer	Stevns/Souter/Breyer
7	Stevens	Scalia	Stevns/Souter/Breyer
8	Thomas	Thomas	Scalia
9	O'Connor	Stevens	Thomas

As Tables One and Two reveal, both the Standard Measure and the 5-4 Decision Method yield a substantially different ordering of the Justices for the October 1994 Term than Edelman and Chen obtained with the "sophisticated" version of their index.[83] Consistent with Edelman and Chen's calculations, Justice Kennedy is the clear winner of the 1994 Term Power Pageant under both the Standard Measure and the 5-4 Decision Method. Justice O'Connor, however, who finished a stunning "dead last" when the E-C Index was used,[84] ties for third with Justice Ginsburg under both the Standard Measure and the

83. *See* Edelman & Chen, *supra* note 5, at 84 (Table 3.2.1). Edelman and Chen set forth a self-proclaimed "naive" index, *see id.* at 72, before proceeding to a "more sophisticated" analysis of all feasible conditions. *See id.* at 76-77.

84. *See id.* at 92.

5-4 Decision Method. Justice Scalia, who finished fourth under the E-C Index, comes in a distant seventh under the Standard Measure and eighth under the 5-4 Decision Method.

There is similar divergence among the measures in the results obtained for the October 1995 Term. As Table Four indicates, the results of the E-C Index and the Standard Measure are in agreement only regarding the second place finish of Justice O'Connor, the fourth place finish of Justice Rehnquist, and the last place finish of Justice Stevens. Justice Ginsburg, the winner under the E-C Index, ties for sixth with Justice Scalia under the Standard Measure, and finishes a similarly distant sixth under the 5-4 Decision Method.

TABLE THREE

OCTOBER 1995 TERM ALL DECISIONS

cases per winning coalition size	Rehn.	Stvns.	O'Con	Scalia	Ken.	Souter	Thom.	Gins.	Breyer
36 (9-Jus.)	36	36	36	36	36	36	36	36	36
8 (8-Jus.)	8	3	8	7	8	8	6	8	8
14 (7-Jus.)	11	8	13	9	13	14	9	11	10
8 (6-Jus.)	4	5	5	4	7	7	3	6	7
16 (5-Jus.)	11	4	13	11	14	5	11	6	5
2 (other)	0	1	1	0	1	2	0	0	2
Total=84	70	57	76	67	79	72	65	67	68

TABLE FOUR

OCTOBER 1995 TERM POWER PAGEANT

	E-C Index	Standard Measure	5-4 Decision Method
1	Ginsburg	Kennedy	Kennedy
2	O'Connor	O'Connor	O'Connor
3	Kennedy	Souter	Rehn/Scalia/Thom
4	Rehnquist	Rehnquist	Rehn/Scalia/Thom
5	Scalia	Breyer	Rehn/Scalia/Thom
6	Thomas	Scalia/Ginsburg	Ginsburg
7	Souter	Scalia/Ginsburg	Souter/Breyer
8	Breyer	Thomas	Souter/Breyer
9	Stevens	Stevens	Stevens

Most striking of all is the difference between the E-C Index and Standard Measure results for the 1994 and 1995 Terms combined. As Table Six shows, Justice Ginsburg, again the winner under the E-C

Index, finishes only fifth under the Standard Measure and ties for fifth with Justice Thomas under the 5-4 Decision Method. Justice O'Connor, in contrast, who tied with Justice Scalia for seventh under the E-C Index, finishes second under the Standard Measure and ties with Chief Justice Rehnquist for second under the 5-4 Decision Measure. Edelman and Chen, it appears, would have us believe that Justice O'Connor, far from being "the Court's consummate 'accommodationist,'"[85] has in fact occupied the Court's ideological fringe during the past two Terms.

TABLE FIVE

OCTOBER 1994 AND OCTOBER 1995 TERMS
ALL DECISIONS

cases per winning coalition size	Rehn.	Stvns.	O'Con	Scalia	Ken.	Souter	Thom.	Gins.	Breyer
62 (9-Jus.)	62	62	62	62	62	62	62	62	62
21 (8-Jus.)	21	11	20	18	21	21	17	20	19
25 (7-Jus.)	21	12	23	17	23	23	18	18	20
20 (6-Jus.)	11	12	13	11	17	16	8	17	15
39 (5-Jus.)	27	15	27	21	33	16	20	20	16
3 (other)	1	1	1	1	2	2	1	0	2
Total=170	143	113	146	130	158	140	126	137	134

TABLE SIX

OCTOBER 1994 AND OCTOBER 1995 TERM
POWER PAGEANT

	E-C Index	Standard Measure	5-4 Decision Method
1	Ginsburg	Kennedy	Kennedy
2	Kennedy	O'Connor	Rehnquist/O'Connor
3	Souter	Rehnquist	Rehnquist/O'Connor
4	Rehnquist	Souter	Scalia
5	Breyer	Ginsburg	Thomas/Ginsburg
6	Thomas	Breyer	Thomas/Ginsburg
7	O'Connor/Scalia	Scalia	Souter/Breyer
8	O'Connor/Scalia	Thomas	Souter/Breyer
9	Stevens	Stevens	Stevens

85. *See supra* note 12 and accompanying text. *See also supra* notes 11, 81, and 82.

CONCLUSION: IS THE POWER PAGEANT JUST A PARLOR GAME?

One question remains. Do Power Pageants of the Court offer anything more than entertainment? That is, does the identity of the Court's median or most powerful Justice matter? For those litigating before the Court, and even for the Justices themselves, the answer is likely "yes." One must simply take care to conduct the proper Pageant.

If one is litigating a case in which there is no decision of the current Court even moderately on point,[86] it seems sensible to "pitch" one's argument to the Justice who has historically most often been at the current Court's center.[87] *In the absence of other information*, one would expect that Justice to be more likely than the others to be the swing voter in the case. This approach was apparently taken last Term by the lead counsel for both sides in *Romer v. Evans*.[88] Jean Dubofsky (lead plaintiffs' counsel) and Tim Tymkovich (counsel for the State of Colorado) have both publicly stated that they considered Justices Kennedy and O'Connor to be the "swing" votes in that case.[89] Justices Kennedy and O'Connor finished first and second, respectively, in the combined 1994 and 1995 Term "Power Pageant" using

86. Recent cases that might fit this description include U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995) (term limits), and Romer v. Evans, 116 S. Ct. 1620 (1996) (gay rights); *see also* Lynn Baker, *The Missing Pages of the Majority Opinion in* Romer v. Evans, 68 U. COLO. L. REV. (forthcoming 1997) (explaining why the Court's 1986 decision in *Bowers v. Hardwick* did not logically require that Amendment 2 be sustained).

87. Of course, the litigator is still left with the question of how to go about persuading the median Justice. Although surely useful, knowing one's target is not the same as knowing how to hit it.

88. 116 S. Ct. 1620 (1996).

89. Both attorneys recently made statements to this effect at a conference (including the author) entitled "Gay Rights and the Courts: The Amendment Two Controversy" held at the University of Colorado School of Law on October 4, 1996, as well as at a dinner for conference participants (including the author) on October 3, 1996.

See also Garrow, *supra* note 12, at 85 (describing the "6-3 *Romer* ruling, in which two swing Justices, Anthony Kennedy and Sandra Day O'Connor, sided with the 'liberal' foursome of Stevens, Souter, Ginsburg and Breyer rather than with Rehnquist, Scalia and Thomas").

the Standard Measure,[90] and the six-Justice winning coalition in *Romer* in fact included both Justices.[91]

If one is instead litigating a case in an area in which several relevant precedents of the current Court exist, one would seemingly do best to focus one's argument on the median Justice for the particular issue (for example, abortion, states' rights, voting rights, affirmative action).[92] This is in fact the approach commonly taken by Professor Laurence Tribe, a frequent, and frequently successful, advocate before the Supreme Court.[93]

And should one find one's self a newly appointed Justice of the United States Supreme Court, the same logic applies—with one addition. If one hopes to *become* the Court's median or "Most Dangerous" Justice, whether on a particular issue or during a particular Term, the route to victory is now clear: One must simply take care to join the winning coalition more often than the other Power Pageant contestants, even if this requires changing one's vote.[94]

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90. *See supra* tbl. Six. Edelman and Chen presumably would have advised the attorneys in *Romer* to focus their arguments instead on Justices Ginsburg (the "most powerful" Justice during the combined 1994 and 1995 Terms, according to the E-C Index) and Kennedy (second place under the E-C Index for the Combined 1994 and 1995 Terms). *See* Edelman & Chen, *supra* note 5, at 84. And they presumably would have suggested that the attorneys simply ignore Justice O'Connor, who tied for eighth with Justice Scalia under the relevant E-C Index. *See id.*

91. *See Romer*, 116 S. Ct. at 1623. The other members of the Romer majority were Justices Stevens, Souter, Ginsburg, and Breyer. *See id.*

92. Of course, the questions of whether there is relevant precedent and which decisions these might be will often generate a range of answers.

93. *See* Toobin, *supra* note 81, at 46 (Tribe "has prevailed in fifteen of twenty-three cases before the Court"); *id.* at 44:

> For his entire career, Tribe has studied the ideological predilections of the Justices, and, with dispassionate, almost cynical detachment, he designs his arguments to appeal to a majority. His briefs consist of messages aimed at those Justices whose votes he needs. "The center of his thinking is: Who's on the Court now and how can I get that vote," his friend and former Harvard colleague John Hart Ely says.

See also id. at 47:

> In *Bowers* [*v. Hardwick*], as always, Tribe counted votes. "We knew it was an uphill battle from the start, but it was clear that we had to have Justice Powell to win," Tribe said, "so our brief took careful account of his views—citing opinions he had written and also those written by Justice John Marshall Harlan, whom Powell saw as a role model on the Court. There was a line of cases about the protection of the home as a special place, and there were cases establishing rights of intimate personal association, and I thought this one was at the intersection of the two." Kathleen Sullivan, who worked with Tribe on the brief in *Bowers*, joked that their effort was "a love song to Lewis Powell sung in the key of Justice Harlan."

94. At least one commentator has recently offered evidence that this passive and wavering route is the one that Justice Kennedy has taken, perhaps unintentionally, to becoming the Court's "most powerful" Justice during the past two Terms: "Kennedy's views determine the Court's views in closely divided cases. His leadership, it should be said, is passive rather than

active: other Justices must persuade him of their views, rather than the other way around." Rosen, *supra* note 68, at 82. *See also id.* (describing Kennedy as "publicly agonizing about the merits of his own decision" in *Texas v. Johnson*); *id.* (observing that in *Planned Parenthood v. Casey*, Kennedy "had changed his position unexpectedly and had cast the crucial vote to uphold the core of *Roe v. Wade*"); *id.* at 84 (Kennedy "has a self-dramatizing tendency, which leads him to worry about cases, both in public and in private, and to change his positions after casting his votes").

> After discussing a case for hours with his clerks, often sketching out the various arguments on a white board that he keeps on an easel in his chambers, [Kennedy] will announce that he is persuaded to accept one side. The next morning, he will sometimes arrive at work and announce, a bit sheepishly, that he has been thinking about the case overnight and is now persuaded to take the opposite position. He may go back and forth for several rounds before finally settling on a tentative resting point.
>
> . . . The indecision can be harrowing for Kennedy's clerks and his colleagues. And Justice Kennedy may, in some cases, be swayed by the temptations of public approval.

Id. at 85-86. *See also id.* at 87 ("It was Justice David Souter, according to clerks, who first formally proposed to Justice Kennedy and Justice Sandra Day O'Connor that the three meet in secret to explore the possibility of an opinion that would preserve the core of *Roe v. Wade*."); *id.* ("Until the final days before the opinion [in *Casey*] circulated, Kennedy continued to waver . . . .").

APPENDIX A

WINNING COALITIONS DURING OCTOBER 1994 TERM

NINE-JUSTICE WINNING COALITIONS (26)

United States v. Shabani, 115 S. Ct. 382 (1994)
U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386 (1994)
Reich v. Collins, 115 S. Ct. 547 (1994)
Brown v. Gardner, 115 S. Ct. 552 (1994)
Nebraska Dept. of Revenue v. Loewenstein, 115 S. Ct. 557 (1994)
ICC v. Transcon Lines, 115 S. Ct. 689 (1995)
Nationsbank of N.C. v. Variable Annuity Life Ins., 115 S. Ct. 810 (1995)
McKennon v. Nashville Banner Pub. Co., 115 S. Ct. 879 (1995)
Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co., 115 S. Ct. 981 (1995)
Swint v. Chambers County Comm'n, 115 S. Ct. 1203 (1995)
Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223 (1995)
Goeke v. Branch, 115 S. Ct. 1275 (1995) (per curiam)
Anderson v. Edwards, 115 S. Ct. 1291 (1995)
Qualitex v. Jacobson Products Co., 115 S. Ct. 1300 (1995)
Shalala v. Whitecotton, 115 S. Ct. 1477 (1995)
Heintz v. Jenkins, 115 S. Ct. 1489 (1995)
New York Conference of Blue Cross v. Travelers Ins., 115 S. Ct. 1671 (1995)
United States v. Robertson, 115 S. Ct. 1732 (1995) (per curiam)
Kansas v. Colorado, 115 S. Ct. 1733 (1995)
Wilson v. Arkansas, 115 S. Ct. 1914 (1995)
First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920 (1995)
Ryder v. United States, 115 S. Ct. 2031 (1995)
Johnson v. Jones, 115 S. Ct. 2151 (1995)
United States v. Gaudin, 115 S. Ct. 2310 (1995)
Hurley v. Irish-American Gay Group of Boston, 115 S. Ct. 2338 (1995)
Nat'l. Private Truck Council v. Okl. Tax Comm'n, 115 S. Ct. 2351 (1995)

EIGHT-JUSTICE WINNING COALITIONS (13)

Asgrow Seed Co. v. Winterboer, 115 S. Ct. 788 (1995) (Sc, R, O, K, So, T, G, B)
Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961 (1995) (Sc, R, St, K, So, T, G, B)
Harris v. Alabama, 115 S. Ct. 1031 (1995) (O, R, Sc, K, So, T, G, B)

Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212 (1995) (St, R, O, Sc, K, So, G, B)
Director, Office of Workers' Comp. v. Newport News Shipbuilding and Dry Dock Co., 115 S. Ct. 1278 (1995) (Sc, R, St, O, K, So, T, B)
Freightliner Corp. v. Myrick, 115 S. Ct. 1483 (1995) (T, R, St, O, K, So, G, B)
Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995) (T, R, O, Sc, K, So, G, B)
North Star Steel Co. v. Thomas, 115 S. Ct. 1927 (1995) (So, R, St, O, K, T, G, B)
Nebraska v. Wyoming, 115 S. Ct. 1933 (1995) (So, R, St, O, Sc, K, G, B)
Reno v. Koray, 115 S. Ct. 2021 (1995) (R, O, Sc, K, So, T, G, B)
City of Milwaukee v. Cement Div., Nat'l. Gypsum Co., 115 S. Ct. 2091 (1995) (St, R, O, Sc, K, So, T, G)
Wilton v. Seven Falls Co., 115 S. Ct. 2137 (1995) (O, R, St, Sc, K, So, T, G)
Metropolitan Stevedore Co. v. Rambo, 115 S. Ct. 2144 (1995) (K, R, O, Sc, So, T, G, B)

SEVEN-JUSTICE WINNING COALITIONS (11)

United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994) (R, St, O, K, So, G, B)
Federal Election Comm'n v. NRA Political Victory Fund, 115 S. Ct. 537 (1994) (R, O, Sc, K, So, T, B)
United States v. Mezzanatto, 115 S. Ct. 797 (1995) (T, R, O, Sc, K, G, B)
Allied-Bruce Terminix Companies, Inc. v. Dobson, 115 S. Ct. 834 (1995) (B, R, St, O, K, So, G)
Arizona v. Evans, 115 S. Ct. 1185 (1995) (R, O, Sc, K, So, T, B)
Celotex Corp. v. Edwards, 115 S. Ct. 1493 (1995) (R, O, Sc, K, So, T, B)
California Dept. of Corrections v. Morales, 115 S. Ct. 1597 (1995) (T, R, O, Sc, K, G, B)
Reynoldsville Casket Co. v. Hyde, 115 S. Ct. 1745 (1995) (B, R, St, Sc, So, T, G)
Purkett v. Elem, 115 S. Ct. 1769 (1995) (R, O, Sc, K, So, T, G)
Garlotte v. Fordice, 115 S. Ct. 1948 (1995) (G, St, O, Sc, K, So, B)
United States v. Hays, 115 S. Ct. 2431 (1995) (O, R, Sc, K, So, T, B)

SIX-JUSTICE WINNING COALITIONS (12)

O'Neal v. McAninch, 115 S. Ct. 992 (1995) (B, St, O, K, So, G)

Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995) (Sc, R, O, K, So, T)
McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995) (St, O, K, So, G, B)
Stone v. INS, 115 S. Ct. 1537 (1995) (K, R, St, Sc, T, G)
United States v. Williams, 115 S. Ct. 1611 (1995) (G, St, O, Sc, So, B)
Hubbard v. United States, 115 S. Ct. 1754 (1995) (St, Sc, K, T, G, B)
City of Edmonds v. Oxford House, Inc., 115 S. Ct. 1776 (1995) (G, R, St, O, So, B)
Chandris, Inc. v. Latsis, 115 S. Ct. 2172 (1995) (O, R, Sc, K, So, G)
Witte v. United States, 115 S. Ct. 2199 (1995) (O, R, K, So, G, B)
Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322 (1995) (K, R, Sc, So, T, G)
Vernonia School Dist. 47 J v. Acton, 115 S. Ct. 2386 (1995) (Sc, R, K, T, G, B)
Babbitt v. Sweet Home Chapter of Communities for a Great Or., 115 S. Ct. 2407 (1995) (St, O, K, So, G, B)

FIVE-JUSTICE WINNING COALITIONS (23)

Hess v. Port Auth. Trans-Hudson Corp., 115 S. Ct. 394 (1994) (G, St, K, So, B)
Tonie v. United States, 115 S. Ct. 696 (1995) (K, St, Sc, So, G)
American Airlines, Inc. v. Wolens, 115 S. Ct. 817 (1995) (G, R, K, So, B)
Schlup v. Delo, 115 S. Ct. 851 (1995) (St, O, So, G, B)
Duncan v. Henry, 115 S. Ct. 887 (1995) (per curiam) (R, Sc, O, K, T)
United States v. National Treasury Employees Union, 1995 S. Ct. 1003 (1995) (St, K, So, G, B)
Jeronie B. Grubart v. Great Lakes Dredge & Dock, 115 S. Ct. 1043 (1995) (So, R, O, K, G)
Gustafson v. Alloyd Co., 115 S. Ct. 1061 (1995) (K, R, St, O, So)
Shalala v. Guernsey Mem'l Hosp., 115 S. Ct. 1232 (1995) (K, R, St, G, B)
Oklahonia Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331 (1995) (So, R, St, K, G)
Kyles v. Whitley, 115 S. Ct. 1555 (1995) (So, St, O, G, B)
United States v. Lopez, 115 S. Ct. 1624 (1995) (R, O, Sc, K, T)
U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995) (St, K, So, G, B)
Missouri v. Jenkins, 115 S. Ct. 2038 (1995) (R, O, Sc, K, T)

Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (O, R, Sc, K, T)
Commissioner v. Schleier, 115 S. Ct. 2159 (1995) (St, R, K, G, B)
Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S. Ct. 2214 (1995) (G, R, Sc, K, T)
Gutierrez de Martinez v. Lamagno, 115 S. Ct. 2227 (1995) (G, St, O, K, B)
Sandin v. Conner, 115 S. Ct. 2293 (1995) (R, O, Sc, K, T)
United States v. Aguilar, 115 S. Ct. 2357 (1995) (R, O, So, G, B)
Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995) (O, R, Sc, T, B)
Miller v. Johnson, 115 S. Ct. 2475 (1995) (K, R, O, Sc, T)
Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510 (1995) (K, R, O, Sc, T)

FOUR-JUSTICE WINNING COALITIONS (1)
Capitol Square Review and Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995) (Sc, R, K, T) (4-3-2 decision)

APPENDIX B

WINNING COALITIONS DURING OCTOBER 1995 TERM

NINE-JUSTICE WINNING COALITIONS (36)

Tuggle v. Netherland, 116 S. Ct. 283 (1995) (per curiam)
Citizens Bank of Maryland v. Strumpf, 116 S. Ct. 286 (1995)
Louisiana v. Mississippi, 116 S. Ct. 290 (1995)
NLRB v. Town & Country Elec., Inc., 116 S. Ct. 450 (1995)
Things Remembered, Inc. v. Petrarca, 116 S. Ct. 494 (1995)
Bailey v. United States, 116 S. Ct. 501 (1995)
Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe R.R. Co., 116 S. Ct. 595 (1996)
Yamaha Motor Corp., U.S.A. v. Calhoun, 116 S. Ct. 619 (1996)
Zicherman v. Korean Air Lines Co., 116 S. Ct. 629 (1996)
Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 116 S. Ct. 637 (1996)
Neal v. United States, 116 S. Ct. 763 (1996)
Fulton Corp. v. Faulkner, 116 S. Ct. 848 (1996)
Norfolk & Western Ry. Co. v. Hiles, 116 S. Ct. 890 (1996)
Dalton v. Little Rock Family Planning Services, 116 S. Ct. 1063 (1996)
Wisconsin v. City of New York, 116 S. Ct. 1091 (1996)
Barnett Bank of Marion County, N.A. v. Nelson, 116 S. Ct. 1103 (1996)
Rutledge v. United States, 116 S. Ct. 1241 (1996)
Meghrig v. KFC Western, Inc., 116 S. Ct. 1251 (1996)
Lonchar v. Thomas, 116 S. Ct. 1293 (1996)
O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996)
Cooper v. Oklahoma, 116 S. Ct. 1373 (1996)
Markman v. Westview Instruments, Inc., 116 S. Ct. 1384 (1996)
44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996)
United States v. Noland, 116 S. Ct. 1524 (1996)
United Food and Commercial Workers v. Brown Group, 116 S. Ct. 1529 (1996)
Quackenbush v. Allstate Ins. Co., 116 S. Ct. 1712 (1996)
Smiley v. Citibank (S.D.), N.A., 116 S. Ct. 1730 (1996)
Loving v. United States, 116 S. Ct. 1737 (1996)
Auciello Iron Works, Inc. v. NLRB, 116 S. Ct. 1754 (1996)
Richards v. Jefferson County, Ala., 116 S. Ct. 1761 (1996)
Whren v. United States, 116 S. Ct. 1769 (1996)
Degen v. United States, 116 S. Ct. 1777 (1996)
Lockheed Corp. v. Spink, 116 S. Ct. 1783 (1996)

Exxon Co., U.S.A. v. Sofec, Inc., 116 S. Ct. 1813 (1996)
Calderon v. Moore, 116 S. Ct. 2066 (1996) (per curiam)
Felker v. Turpin, 116 S. Ct. 2333 (1996)

EIGHT-JUSTICE WINNING COALITIONS (8)

Libretti v. United States, 116 S. Ct. 356 (1995) (O, R, Sc, K, So, Th, G, B)
Peacock v. Thomas, 116 S. Ct. 862 (1996) (T, R, O, Sc, K, So, G, B)
United States v. Armstrong, 116 S. Ct. 1480 (1996) (R, O, Sc, K, So, T, G, B)
Doctor's Associates, Inc. v. Casarotto, 116 S. Ct. 1652 (1996) (G, R, St, O, Sc, K, So, B)
Ornelas v. United States, 116 S. Ct. 1657 (1996) (R, St, O, K, So, T, G, B)
United States v. Reoranized CF & I Fabricators of Utah, Inc., 116 S. Ct. 2106 (1996) (So, R, St, O, Sc, K, G, B)
Brown v. Pro Football, Inc., 116 S. Ct. 2116 (1996) (B, R, O, Sc, K, So, T, G)
United States v. Ursery, 116 S. Ct. 2135 (1996) (R, O, K, So, G, B, Sc, T)

SEVEN-JUSTICE WINNING COALITIONS (14)

Field v. Mans, 116 S. Ct. 437 (1995) (So, R, St, O, K, T, G)
Thompson v. Keohane, 116 S. Ct. 457 (1995) (G, St, O, Sc, K, So, B)
Commissioner v. Lundy, 116 S. Ct. 647 (1996) (O, R, Sc, K, So, G, B)
Behrens v. Pelletier, 116 S. Ct. 834 (1996) (Sc, R, O, K, So, T, G)
Carlisle v. United States, 116 S. Ct. 1460 (1996) (Sc, R, O, So, T, G, B)
Jaffee v. Redmond, 116 S. Ct. 1923 (1996) (St, O, K, So, T, G, B)
Melendez v. United States, 116 S. Ct. 2057 (1996) (T, R, Sc, K, So, G, St)
Lane v. Pena, 116 S. Ct. 2092 (1996) (O, R, Sc, K, So, T, G)
Lewis v. United States, 116 S. Ct. 2163 (1996) (O, R, Sc, So, T, K, B)
United States v. Virginia, 116 S. Ct. 2264 (1996) (G, St, O, K, So, B, R)
Bd. of Cty. Comm'rs, Wabaunsee County, Kan. v. Umbehr, 116 S. Ct. 2342 (1996) (O, R, St, K, So, G, B)
O'Hare Truck Service, Inc. v. City of Northlake, 116 S. Ct. 2353 (1996) (K, R, St, O, So, G, B)

United States v. Winstar Corp., 116 S. Ct. 2432 (1996) (So, St, B, O, Sc, K, T)
Pennsylvania v. Labron, 116 S. Ct. 2485 (1996) (R, O, Sc, K, So, T, B) (per curiam)

SIX-JUSTICE WINNING COALITIONS (8)
Stutson v. United States, 116 S. Ct. 600 (1996) (O, St, So, K, B, G) (per curiam)
Lawrence v. Chater, 116 S. Ct. 604 (1996) (O, St, So, K, B, G) (per curiam)
Matsushita Elec. Indus. Co. v. Epstein, 116 S. Ct. 873 (1996) (T, R, O, Sc, K, B)
Hercules, Inc. v. United States, 116 S. Ct. 981 (1996) (R, Sc, K, So, T, G)
Varity Corp. v. Howe, 116 S. Ct. 1065 (1996) (B, R, St, K, So, G)
Romer v. Evans, 116 S. Ct. 1620 (1996) (K, St, O, So, G, B)
Henderson v. United States, 116 S. Ct. 1638 (1996) (G, St, Sc, K, So, B)
United States v. International Business Machines Corp., 116 S. Ct. 1793 (1996) (T, R, O, Sc, So, B)

FIVE-JUSTICE WINNING COALITIONS (16)
Wood v. Bartholomew, 116 S. Ct. 7 (1995) (R, O, Sc, K, T) (per curiam)
Bennis v. Michigan, 116 S. Ct. 994 (1996) (R, O, Sc, T, G)
Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996) (R, O, Sc, K, T)
Morse v. Republican Party, 116 S. Ct. 1186 (1996) (St, G, B, O, So)
Bowersox v. Williams, 116 S. Ct. 1312 (1996) (R, O, Sc, K, T)
Holly Farms Corp. v. NLRB, 116 S. Ct. 1396 (1996) (G, St, K, So, B)
BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589 (1996) (St, O, K, So, B)
Shaw v. Hunt, 116 S. Ct. 1894 (1996) (R, O, Sc, K, T)
Bush v. Vera, 116 S. Ct. 1941 (1996) (O, R, K, T, Sc)
Montana v. Egelhoff, 116 S. Ct. 2013 (1996) (Sc, R, K, T, G)
Koon v. United States, 116 S. Ct. 2035 (1996) (K, R, O, Sc, T)
Leavitt v. Jane L., 116 S. Ct. 2068 (1996) (R, O, Sc, K, T)
Gray v. Netherland, 116 S. Ct. 2074 (1996) (R, O, Sc, K, T)
Lewis v. Casey, 116 S. Ct. 2174 (1996) (Sc, R, O, K, T)
Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211 (1996) (G, O, K, So, B)
Medtronic, Inc. v. Lohr, 116 S. Ct. 2240 (1996) (St, K, So, G, B)

FOUR-JUSTICE WINNING COALITIONS (1)
Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996) (B, St, O, So) (4-2-3 decision)

THREE-JUSTICE WINNING COALITIONS (1)
Colorado Republican Fed. Campaign Comm. v. FEC, 116 S. Ct. 2309 (1996) (B, O, So) (3-4-2 decision)