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SUPER MEDIANS

Lee Epstein & Tonja Jacobi

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It is not surprising that virtually all analyses of the Supreme Court stress the crucial role played by the swing, pivotal, or median Justice: in theory, the median should be quite powerful. In practice, however, some are far stronger than others. Just as there are "super precedents" and "super statutes"—those that are weightier or more entrenched than others—there are "super medians"—Justices so powerful that they are able to exercise significant control over the outcome and content of the Court's decisions.

Conventional wisdom holds that Justices accumulate power by virtue of their personality, methodological approach, or even background characteristics. But our analysis suggests the opposite. Using sophisticated theoretical tools and systematically developed data, we demonstrate that the strength of the median has less to do with who occupies the center seat than with those Justices who sit close to the center. When median Justices are ideologically remote from their nearest colleagues, they will emerge as super medians. They will find themselves on the winning side of cases, breaking ties throughout the Term, and authoring opinions in key cases. But when medians are ideologically proximate to their closest colleagues, they will be far less dominant.

This analysis has important implications for historical understandings of the Court, for identifying the best strategies for attorneys arguing before the Justices, and for predicting whether new appointees will affect the direction of the Court's decisions. We provide advice for advocates, as well as Presidents and senators contemplating judicial appointments, and identify plausible nominees for future Republican and Democratic administrations.

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INTRODUCTION

> The cheese stands alone
> The cheese stands alone
> Hi-ho, the derry-o
> The cheese stands alone[1]

Justices Hugo L. Black and Anthony M. Kennedy would seem to have almost nothing in common. Justice Black was appointed by one of the most liberal Presidents of the twentieth century, Franklin D. Roosevelt; Justice Kennedy, by one of the most conservative, Ronald Reagan.[2] Before he ascended to the bench, Black was a politician, a U.S. senator no less;[3] Kennedy, a federal judge for thirteen years.[4] Justice Black was a self-proclaimed textualist;[5] Justice Kennedy, an oft-described idealist.[6] But they do share at least one distinction: at one time or another, both served as the Court's

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1. The Farmer in the Dell, *available at* http://kids.niehs.nih.gov/lyrics/farmer.htm (last visited Aug. 12, 2008).

2. We base these claims on Jeffrey A. Segal, Richard J. Timpone & Robert M. Howard, *Buyer Beware? Presidential Success Through Supreme Court Appointments*, 53 POL. RES. Q. 557, 561-63 (2000), which uses systematic data to characterize Franklin D. Roosevelt as the most economically liberal and Ronald Reagan as the most conservative of the Presidents serving since 1932. *See also* Mark A. Zupan, *Measuring the Ideological Preferences of U.S. Presidents: A Proposed (Extremely Simple) Method*, 73 PUB. CHOICE 351, 353-59 (1992) (using scores developed by Americans for Democratic Action to show that, as of 1989, Reagan was the most conservative President since World War II); Keith T. Poole, NOMINATE Data, http://voteview.ucsd.edu/dwnl.htm (last visited Aug. 12, 2008) (presenting Common Space scores that show that Reagan was the most conservative President of those examined—Dwight D. Eisenhower through George W. Bush).

3. Hugo Black (D-Ala.) was elected to the Senate in 1927, where he remained until Roosevelt appointed him to the Court in 1937. LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 320 tbls.4-8 (4th ed. 2007).

4. In 1975, President Gerald Ford appointed Anthony Kennedy to the U.S. Court of Appeals for the Ninth Circuit, where he served until his appointment to the Supreme Court in 1988. *Id.* at 337.

5. In his writings and in interviews, Justice Black frequently recounted his fidelity to the text of the Constitution. *See, e.g.*, HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 45-46 (1968) ("As I have said innumerable times before I simply believe that 'Congress shall make no law' means Congress shall make no law."). Indeed, as Philip Bobbitt reports, during an interview with CBS News, "as if to dramatize the textual perspective, . . . Justice Black produced from his coat pocket a small copy of the Constitution . . . ." Philip Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695, 710 (1980). He told the reporter that he always carried it. *Id.*

6. *See, e.g.*, Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 105 (2007) ("Justice Kennedy has always been an idealist . . . ."); Linda Greenhouse, *Clues to the New Dynamic on the Supreme Court*, N.Y. TIMES, July 3, 2007, at A11 (quoting Barry Friedman) ("Justice Kennedy is more of an idealist than a pragmatist . . . ."); Edward Lazarus, *The New Supreme Court Term: Justice Kennedy's Pivotal Role in Abortion and Race Cases*, FINDLAW, Sept. 28, 2006, http://writnews.findlaw.com/lazarus/20060928.html ("Kennedy is very much an idealist when it comes to race.").

swing, pivotal, or, in the parlance of social science, the "median" Justice.[7] During the 1965 Term, four Justices were to Justice Black's ideological left and four to his right.[8] Roughly forty years later, Justice Kennedy finds himself in much the same position.[9]

Characterized in this way, it would seem that a single Justice serves as the median each Term, and that these swings wield considerable power regardless of their ideological or jurisprudential leanings. The first is most certainly true. As long as the Court consists of an odd number of members,[10] there will be an identifiable median Justice.[11]

The second point also holds, but more precariously. While in theory the median Justice should be quite powerful,[12] in practice some are far stronger than others. In fact, just as there are "super precedents"[13] and "super

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7. Formally, the median Justice is "the Justice in the middle of a distribution of Justices, such that (in an ideological distribution, for example) half the Justices are to the right of (more 'conservative' than) the median and half are to the left of (more 'liberal' than) the median." Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1277 (2005). For the identity of each median Justice since the 1953 Term, see *infra* Figure 3.

8. *See infra* Figure 8.

9. *See infra* Figure 1.

10. For roughly 192 of its 218 years (through 2007), an odd number of Justices have sat on the Court. The exceptions are 1790-1806 (six Justices); 1845, 1861, 1867-69, 1969 (eight Justices); and 1863-1865 (ten Justices). *See* CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION app. A (8th ed. 2004).

11. On an even-numbered Court, there is a median, but it is between the two middle Justices, so no individual Justice constitutes the median. For more on this point, see *infra* Part II.

12. *See infra* Part II.

13. *See, e.g.*, Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1750-51 (2007) (noting that scholars have promoted "landmark statutes and superprecedents to a central role in constitutional argument"); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205-06 (2006) ("Super precedents are the doctrinal, or decisional, foundations for subsequent lines of judicial decisions . . . ."); Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363, 365 (2007) ("To say a case is a super-precedent means it is judicially unshakeable, a precedential monument which may not be gainsaid, akin to having the statute-like force of vertical stare decisis horizontally.").

Gerhardt suggests that the idea of super precedents traces at least back to Abraham Lincoln. Gerhardt, *supra*, at 1205 n.5 (noting Lincoln's assertion that "[j]udicial decisions are of greater or less authority as precedents, according to circumstances"). It was William M. Landes and Richard A. Posner who coined the phrase "superprecedent" in *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 251 (1976) (referring to precedent "so effective in defining the requirements of the law that it prevents legal disputes from arising in the first place"). The idea of a super precedent gained more traction when Judge J. Michael Luttig invoked it in *Richmond Medical Center for Women v. Gilmore*, 219 F.3d 376, 376 (2000) ("I understand the Supreme Court to have intended its decision in *Planned Parenthood of Southeastern Pa. v. Casey* to be a decision of super-*stare decisis* . . . ." (citation omitted)). But it was not a part of the public dialogue until Senator Arlen Specter referred to "super-duper" precedents in questions he put to John G. Roberts during his confirmation proceedings. *Confirmation Hearing on the Nomination of John G.*

statutes"[14]—those that are weightier or more entrenched than others—there are super medians—Justices so powerful that they are able to exercise significant control over the outcome and content of the Court's decisions.

Justice Kennedy was one; Justice Black was not. Over the course of the 2006 Term, Kennedy helped form majorities in all but two cases;[15] he was a member of the winning coalition in each and every case decided by a five-to-four vote.[16] Justice Black, on the other hand, voted with the majority in only

Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 145 (2005) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary) (asking Judge Roberts whether *Roe* qualified as a super-duper precedent); *see also* Arlen Specter, Op-Ed., *Bringing the Hearings to Order*, N.Y. TIMES, July 24, 2005, § 4, at 12 ("[I]t would be appropriate to ask how to weigh the importance of precedent in deciding whether to overrule a Supreme Court decision. Some legal scholars attach special significance to what they call superprecedents, which are decisions like Roe v. Wade that have been reaffirmed in later cases.").

Despite the widespread use of the term, some commentators take issue with the idea of super precedents altogether. *See* Russell A. Hilton, *The Case for the Selective Disincorporation of the Establishment Clause: Is* Everson *a Super-Precedent?*, 56 EMORY L.J. 1701, 1703-04 (2007).

14. *See, e.g.*, Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1491 (2005) (defining super statutes as "pervasive, preference-transforming laws"); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215 (2001) (defining super statutes as laws that "successfully penetrate public normative and institutional culture in a deep way"); Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1512 (2007) ("Whether or not one thinks it useful to attach the label of 'super-statutes' to statutes that have somehow acquired a vaguely 'constitutional' nimbus, legislatures clearly do enact statutes with a view to liquidating or construing an ambiguous constitutional text, and these statutes often become de facto entrenched over time." (footnote omitted)).

15. Of the sixty-seven cases decided after oral argument with a signed majority opinion or judgment of the Court, Justice Kennedy was in the majority in sixty-four and in dissent in two: *Cunningham v. California*, 549 U.S. 270 (2007) (holding that California's determinate sentencing law violated the Sixth Amendment right to a jury trial), and *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, 127 S. Ct. 1786 (2007) (ruling that county flow-control ordinances did not violate the Commerce Clause). He did not participate in one, *Credit Suisse Securities (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007) (holding that securities laws precluded the application of antitrust laws in the context of this dispute). Our data is derived from Harold J. Spaeth's Original U.S. Supreme Court Judicial Database (Dec. 10, 2007 version), with *analu=0* and *dec_type=1* or *7*. *See* Harold J. Spaeth, U.S. Supreme Court Databases, http://www.cas.sc.edu/poli/juri/sctdata.htm (last visited Aug. 12, 2008).

16. With *analu=0* and *dec_type=1*, Spaeth's Original U.S. Supreme Court Database identifies twenty-four cases decided by a five-to-four vote. *See* Spaeth, *supra* note 15. Justice Kennedy was also in the majority in the one case decided by a five-to-three vote, *Watters v. Wachovia Bank*, 127 S. Ct. 1559 (2007).

Because Spaeth had yet to code the 2007 Term when we wrote this Article, our data end with the 2006 Term. In 2006-2007, Justice Kennedy was, without doubt, a super median, as we conceptually and operationally define the term. We cannot say without Spaeth's data whether he retained that status in the 2007 Term. Because of ideological drift and other factors, it is entirely possible for a Justice to serve as a super median in one term and lose

half of the closely divided decisions of the 1965 Term.[17] Even more telling, Justice Black found himself in dissent in some of the Term's most celebrated decisions, including *Sheppard v. Maxwell*[18] and *Harper v. Virginia Board of Elections*.[19] In contrast, Justice Kennedy joined or wrote the opinion of the Court in virtually every high-profile dispute of the 2006 Term,[20] whether over employment discrimination,[21] abortion,[22] or environmental protection.[23]

Why was Justice Black so much weaker than Justice Kennedy? More generally, why is it that some medians, like some precedents and some statutes,

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that status in the next term, even if the Court's membership remains stable. *See infra* Part III. On the other hand, many summaries of the 2007 Term point to Justice Kennedy's continued dominance. *See, e.g.*, David S. Broder, *Decider on the High Court*, WASH. POST, July 6, 2008, at B7 (stating that Justice Kennedy may be "the single most influential arbiter of domestic policy in the land"); Linda Greenhouse, *On the Court that Defied Labeling, Kennedy Made the Boldest Mark*, N.Y. TIMES, June 29, 2008, at A1 ("[I]f the Roberts court in its third term . . . were to be summed up in a sound bite, it would be this: It was, once again, Justice Kennedy's court."); SCOTUSblog, Super StatPack—0T07 Term Recap, http://www.scotusblog.com/wp/wp-content/uploads/2008/06/superstatpackot07.pdf (last visited Aug. 12, 2008) ("Though Justice Kennedy was not 'perfect' in 5-4s as he was last Term, he still exerted more than considerable influence.").

17. With *analu=0* and *dec_type=1*, Spaeth's Original U.S. Supreme Court Database identifies ten cases decided by a five-to-four margin during the 1965 Term. *See* Spaeth, *supra* note 15. Black joined the majority in five and dissented in five.

18. 384 U.S. 333 (1966) (holding that the extensive media coverage and publicity surrounding Sheppard's trial interfered with his right to a fair trial).

19. 383 U.S. 663 (1966) (holding that poll taxes violate the Fourteenth Amendment's Equal Protection Clause).

20. Here and throughout the article, we operationally define the terms "high-profile," "salient," "consequential," and "important" cases as those that received coverage on the front-page of the *New York Times* on the day after they were decided by the Court. This is a common definition in social science literature and, increasingly, in law journals. For social science studies using this *New York Times* measure, see, for example, DAVID R. MAYHEW, DIVIDED WE GOVERN 9 (1991); Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 72-81 (2000); James H. Fowler et al., *Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court*, 15 POL. ANALYSIS 324, 338 (2007). For its use in law-centered publications, see, for example, Lee Epstein, Daniel E. Ho, Gary King & Jeffrey A. Segal, *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 61 (2005); Andrea McAtee & Kevin T. McGuire, *Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?*, 41 LAW & SOC'Y REV. 259, 272 (2007); Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1750-51 n.85 (2006).

Using this measure, the Court handed down six decisions of note during the 2006 Term: *Parents Involved in Community Schools v. Seattle School District*, 127 S. Ct. 2738 (2007); *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007); *Tellabs Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007); *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007); *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007); and *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007). Justice Kennedy was in the majority in all six.

21. *Ledbetter*, 127 S. Ct. 2162.

22. *Carhart*, 127 S. Ct. 1610.

23. Massachusetts v. EPA, 127 S. Ct. 1438 (2007).

are so super in stature that they are able to extract considerable deference and exert inordinate influence on the Court? The answer, we argue, centers less on the Justices in the middle than on those surrounding them. When median Justices are ideologically remote from their nearest colleagues—as Justice Kennedy was from Justice David Souter (on his left) and Justice Samuel Alito (on his right) in 2006[24]—they will emerge as super medians. They will find themselves on the winning side of cases, breaking ties throughout the Term, and authoring opinions in key cases. But when medians are ideologically proximate to their closest colleagues—the situation in which Justice Black found himself in 1965[25]—they will be far less dominant. Consequently, two conditions precipitate truly powerful swings: (1) the ideological distance between medians and the Justices on either side of them—or what we call the "gap"; and (2) the degree to which the preferences of medians and the Justices closest to them converge—the "overlap." As the gap grows and the overlap decreases, super medians emerge. On the other hand, when medians and those Justices ideologically closest to them are indistinct, the median's clout diminishes considerably.

In short, our claim is that power on the Court does not arise merely by virtue of occupying the swing position; it is rather a function of the relative proximity between the swing Justice and those nearest to him or her. To paraphrase the classic nursery rhyme, when the cheese stands alone, he really does control the dell.[26]

We develop these ideas in five steps. After a brief discussion of the special characteristics of median Justices in Part II, we turn to super medians. Part III delineates the criteria required to attain that status, and Part IV identifies those Justices who have met them. So that there will be no mystery about it, our analysis indicates that Justice Kennedy is only the most recent example of a super median. In previous Terms, five others were nearly as dominant: Justices Tom Clark, Arthur Goldberg, Sandra Day O'Connor, Lewis Powell, and Byron White.

After unmasking the super medians, in Part V we explore theoretically and empirically the two conditions that precipitate them: the gap and the overlap. Our theoretical analysis invokes the logic of simple spatial models—tools used to gain insight into a wide array of legal phenomenon—to explain why gaps and overlaps are crucial to the creation of dominant medians. Employing

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24. *See infra* Figure 1.

25. In the 1965 Term, Justice Black was located quite near the Justices on his right (Tom Clark) and left (William Brennan). *See infra* Figure 8.

26. Linda Greenhouse had a similar insight when, at the end of the 2006 Term, she wrote, "A new dynamic emerged in the court's last term, which ended last week with Justice Kennedy standing in the middle, all alone. Not only the lawyers, but also the Justices themselves, are now in the business of courting him." Linda Greenhouse, *Clues to the New Dynamic on the Supreme Court*, N.Y. TIMES, July 3, 2007, at A11.

sophisticated measures of the Justices' ideology and novel indicators of median power, our empirical analysis provides affirmation of the theoretical account. We find, for example, that as the ideological distance (that is, the gap) widens between swing Justices and those to their right and left, they are far more likely to dominate Court decisions than are medians who are quite proximate to their nearest colleagues.

These findings are interesting in their own right. They suggest that medians, like laws and precedents, come in different flavors. But the implications of our results may be even more intriguing. In Part VI we develop two. The first centers on the appointment of Justices and challenges an entrenched piece of conventional wisdom: that only nominees who "move the median" will influence the direction and content of the Court's decisions. In direct juxtaposition, our account suggests that the influence of strong swings can be weakened (or strengthened) even when they cannot be replaced or moved. So, for example, those interested in diluting the power of Justice Kennedy may be well advised to support Supreme Court candidates ideologically proximate to him rather than candidates who are ideologically extreme. To this end, we identify plausible nominees for future Republican and Democratic administrations, depending on which of the current Justices depart. The second implication considers the propensity of attorneys litigating before the Court or filing briefs as amicus curiae to focus on the median Justice. What we demonstrate, again contrary to the prevailing wisdom, is that attorneys may be pursuing this strategy to their own detriment. In fact, under certain circumstances, litigators can increase their odds of success by attending to the entire center of the Court, rather than lavishing all their attention on its median.

I. THE SPECIAL ROLE OF THE MEDIAN JUSTICE

Once a term bandied about almost exclusively by social scientists or statisticians, the "median Justice" has now entered the legal and even public lexicon.[27] In an interview conducted shortly before the Senate confirmed Samuel Alito, Dean Erwin Chemerinsky predicted that "Anthony Kennedy will be the new median justice," and that he will move the Court "significantly to

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27. *See, e.g.*, Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 69 (2007) ("[C]onservative appointments have pushed the Court's median Justice slightly to the right . . . ."); Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100, 1126 n.92 (2001) ("In the last quarter century, the shift in the median Justice has been from Justice Powell or Justice Stewart to Justice Kennedy or Justice O'Connor— probably not a very significant difference."); L.A. Powe, Jr., *The Not-So-Brave New Constitutional Order*, 117 HARV. L. REV. 647, 680 (2003) (book review) ("After 1962, Brennan was the Warren Court's median Justice; the Rehnquist Court's is either O'Connor or Kennedy. When the median Justice is Rehnquist or Scalia, then talk of revolution will be appropriate." (citations and footnotes omitted)).

the right."[28] A little over a year later, Professor Steven Calabresi confirmed that "Kennedy is very much the median justice now, as Justice O'Connor was, and he is to her right."[29]

In these and many other statements we have found,[30] the speakers invoke the term "median" to signify power on a nine-member U.S. Supreme Court. As Dean Chemerinsky put it, "[i]n any body with *odd numbers*, you're going to be able to identify someone who is the median vote. As a result, *that person carries some weight*."[31] He is correct on both counts.

Why odd numbers give rise to identifiable medians traces directly to the definition of a median on the Court: "the Justice in the middle of a distribution of Justices, such that (in an ideological distribution, for example) half the Justices are to the right of (more 'conservative' than) the median and half are to the left of (more 'liberal' than) the median."[32] In other words, if a Court is composed of nine members (or any odd number) it is easy to identify the Justice who sits in the middle. On the other hand, when eight members (or any even number) sit on the Court, a median still exists but no one Justice holds that position.

Figure 1 shows why (and also allows us to introduce several concepts critical to the analyses to come). Note that it consists of two pictures, or, to use the term of art, spatial models. In each, the horizontal line represents a policy space—a continuum really, ordered from left (most "liberal") to right (most "conservative"). The policy space could be most any area of the law, from the privilege against self-incrimination to freedom of the press to federal taxation. As long as we can represent it on a single line—for example, from the most supportive of criminal defendants to the most supportive of the government prosecuting them—it does not matter. More to the point, we need not separate out one issue from the next: a rather large body of literature tells us that a single left-right dimension underlies virtually all Supreme Court cases in virtually all areas of the law.[33] (The same, we might add, holds for Congress.[34])

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28. Jacob Dagger, *Q & A: The Shape of the Supreme Court*, DUKE MAG., Jan.-Feb. 2006 (quoting Erwin Chemerinsky), *available at* http://www.dukemagazine.duke.edu/dukemag/issues/010206/depqa.html.

29. Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1 (quoting Steven Calabresi).

30. *See, e.g.*, Lain, *supra* note 27, at 69; Revesz, *supra* note 27, at 1126 n.92; Powe, *supra* note 27, at 680.

31. Dagger, *supra* note 28 (emphasis added) (quoting Erwin Chemerinsky).

32. Martin, Quinn & Epstein, *supra* note 7, at 1277.

33. Nearly all systematic quantitative work on the U.S. Supreme Court suggests that the issue space is single-dimensional—that is, despite their individual differences, in the aggregate, Supreme Court cases can be arrayed meaningfully on a single left-right dimension. *See, e.g.*, Bernard Grofman & Timothy J. Brazill, *Identifying the Median Justice on the Supreme Court Through Multidimensional Scaling: Analysis of "Natural Courts" 1953-1991*, 112 PUB. CHOICE 55, 58 (2002) (noting that the single-dimension solution explains much of the Justices' voting behaviors). Some law scholars, however, take issue

**Figure 1. Preference Configurations for the 1969 and 2006 Terms of the
Supreme Court**
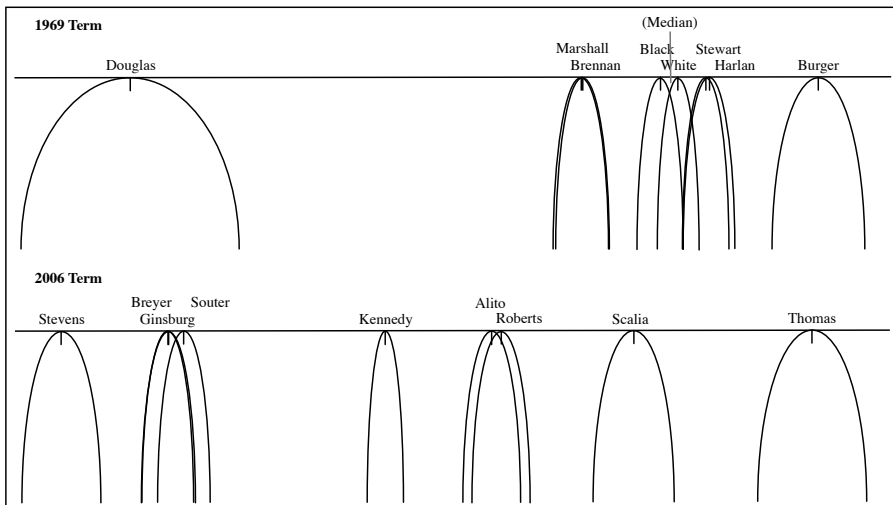
Note: The short vertical lines represent the most preferred position for each
Justice over a left-right policy space. The curves show the distribution of their
preferences.

Within this policy space, the short vertical lines show the most preferred
position, or "ideal point" of each member of the Court in the 1969 and 2006
Terms—such that each prefers an outcome that is nearer to his or her most
preferred position than one that is further away.[35] This is known as "single-
peakedness of preferences," and it means that starting from a Justice's ideal
point, "utility always declines monotonically" in either direction.[36]

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with this idea. *See, e.g.*, Evan H. Caminker, *Sincere and Strategic Voting Norms on
Multimember Courts*, 97 MICH. L. REV. 2297, 2320 (1999) ("It is frequently assumed that . . .
the majority will converge in a moderate or median position. This may well be quite likely
when the Justices' ideal points can be lined up nicely in a single-peaked fashion along a
single dimension, for instance from liberal to conservative. . . . But sometimes the options
under discussion cannot easily be aligned along a single dimension.").

34. *See* Keith T. Poole, *Changing Minds? Not in Congress!*, 131 PUB. CHOICE 435,
437 (2007) (reporting that voting in Congress is almost exclusively one-dimensional, such
that now "a single dimension accounts for about 92 percent of roll call voting").

35. More specifically, these are Andrew D. Martin and Kevin M. Quinn's ideal point
estimates. Martin and Quinn derive the scores from the votes cast by the Justices via a
Bayesian modeling strategy. *See* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal
Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10
POL. ANALYSIS 134, 135 (2002). The updated Martin and Quinn ideal point estimates, along
with all other data used in this study, are available at http://epstein.law.northwestern.edu/
research/SuperMedians.html.

36. Monotonicity here means that, whatever the pace of change, the further an

The ideal points of each Justice are drawn from Andrew D. Martin and Kevin Quinn's estimates of their ideology.[37] These "Martin-Quinn scores" are based on the voting history of each Justice during their tenure on the Court and are calculated by considering every imaginable combination of the Supreme Court Justices' preferences that could explain the pattern of votes in the cases the Supreme Court decided between 1937 and today. In particular, Martin and Quinn make inferences from the patterns of voting coalitions seen in the cases. For example, a Justice who is often a lone dissenter in conservative cases will be ranked as more liberal than a colleague who sometimes joins her in dissent in 7-2 conservative decisions. That Justice, in turn, is considered more liberal than a Justice who dissents in 6-3 conservative cases, and more liberal still than a Justice in the majority in a conservative case. So another way of saying that Justice Thomas is the most conservative Justice on the Court is to say that he is the Justice who is least likely to join a liberal majority.

One advantage of the Martin-Quinn scores is that they allow for standardized comparisons over time, even of Justices who never served together on the Court. For example, although Justice Marshall and Justice Ginsburg never sat together, they both served with Chief Justice Rehnquist, and so Rehnquist can be used as a point of comparison for them.[38]

These ideal points represent the overall preferred position of each Justice in the aggregate. The single peakedness of these ideal points does not necessarily mean that the distribution of preferences (the parabolas or "slopes" in either direction around the ideal point) are equivalent for all Justices.[39] In fact, for

outcome moves from a Justice's ideal point, utility only decreases, and does not at any point increase. Keith Krehbiel, *Spatial Models of Legislative Choice*, 13 LEGIS. STUD. Q. 259, 263 (1988).

37. Martin & Quinn, *supra* note 35. We (and Martin and Quinn) are agnostic as to whether judges behave sincerely or strategically in casting those votes—that is, whether they simply vote their views on the cases, or consider the likely effect of those votes, particularly in light of their expectations of other Justices' likely behavior. *But see infra* note 214.

38. The Martin-Quinn scores for the Justices use a constant scale, where the zero point is the approximate historical mean of the Court, with negative numbers translating to liberalism and positive numbers translating to conservatism. Justice Douglas is by far the most liberal Justice to have served since 1937, with an average ideological score of -4.00 and a zenith of -6.42 in 1974, his final term. On the conservative end, Justice Rehnquist has the record for the highest score, of 4.30, but Justice Thomas is the most conservative Justice over his career, with an average ideological score of 3.60.

All the figures in this Article that display preference configurations, such as Figure 1, are on the Martin-Quinn constant scale. Moreover, they are anchored, so that the positions of the Justices are directly comparable, with the exceptions of the 1965 and 1969 Terms. Because Justice Douglas is so far to the left, for representational purposes, we moved these figures to the right, but the scale remains the same. In 1969, the zero point lay between Brennan and Black, in 1965 the zero point was between White and Stewart, and in 2006, the zero point laid between Kennedy and Breyer.

39. In other words, the ideal point is essentially the mean position taken by the Justice over a distribution of cases. In Figure 1 and others to follow, we plot a distribution for each

those serving in 2006, they were not. As we can see in Figure 1, Justice Kennedy has a very narrow distribution, while Justice Thomas's is a good deal wider. Because these distributions represent how consistently a Justice decides cases vis-à-vis his or her ideology, we can conclude that Justice Kennedy was a more consistent voter than Justice Thomas in 2006.[40] Put another way, Justice Kennedy's ideal point provides a better prediction of how he will rule in any given case than does Justice Thomas's. Note too that in some instances the distributions of preferences converge, as they do, for example, in the cases of Justices Breyer, Souter, and Ginsburg, while Justice Kennedy's shows no overlap. Such convergence raises the possibility that Justices who appear very distant from one another—that is, the gap between their ideal points is wide—could actually have more in common than their "most preferred positions" suggest.

Because these concepts of the "distribution of preferences," "overlapping preferences," and the "gap" between ideal points become crucial to our understanding of the conditions that give rise to super medians, we return to them in Part V. For now, the chief point is that we can identify a clear median for the 2006 Term from the spatial model displayed in Figure 1: Justice Kennedy, or more generically, "Justice 5" (J5), reflecting the fact that four Justices are to J5's left and four are to his right. For the 1969 Term, we also can identify a median: the line located between Justices Black and White. In other words, because the Court in 1969 was composed of an even number of members,[41] a line and no one single Justice holds the median position.

This explains why Dean Chemerinsky is right to say that only on an odd-numbered Court will one Justice emerge as the median. He is also correct when he says that the median may carry "some weight."[42] Five decades ago, the economist Duncan Black demonstrated as much in a landmark series of studies.[43] What Black showed was that under certain circumstances,[44] the outcome of a majority vote should gravitate towards the position favored by the

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Justice of one standard deviation above and below the ideal point, which captures 68% of a normally distributed curve.

40. *But see infra* notes 183-85.

41. Justice Fortas left the Court on May 14, 1969 and Chief Justice Warren departed on June 23, 1969. The new President, Richard Nixon, was able to name Warren Burger to replace Earl Warren before the start of the 1969 Term but he was unable to fill the Fortas vacancy until the very end of the Term (Harry Blackmun in May of 1970). The two candidates he nominated prior to Blackmun, Clement Haynsworth and G. Harrold Carswell, were rejected by the Senate.

42. Dagger, *supra* note 28 (quoting Erwin Chemerinsky).

43. DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS (1958) [hereinafter BLACK, THEORY]; Duncan Black, *On the Rationale of Group Decision-Making*, 56 J. POL. ECON. 23, 27-28 (1948).

44. The key circumstances are (1) voters with single-peaked preferences and (2) voters operating in a single-dimensional issue space. *See generally* Keith Krehbiel, *supra* note 36, at 260-69 (1988).

median because the median is essential to securing a majority. In the context of the Supreme Court, this means that the legal policy desired by the median Justice—Kennedy in Figure 1—ought to be (again, under certain conditions and voting procedures) the choice of the Court's majority in any given case.[45]

Nonetheless, just as some laws and some precedents appear weightier than others, over the course of a Term some medians seem more influential than others. To return to our tale of two Justices, Black and Kennedy, a search of prominent newspapers uncovered not one article acknowledging a special role for Black during the 1965 Term even though he was the Court's clear median.[46] On the other hand, by the end of the 2006 Term, virtually no commentator failed to mention the enormous power Kennedy seemed to wield. Indeed, Professor Steve Calabresi's remark to this effect—"Kennedy is very much the median justice now"[47]—was the *New York Times*'s "Quotation of the Day."[48]

II. THE ATTRIBUTES OF SUPER MEDIANS

If not all swing Justices are created equal[49]—and it seems they are not—what differentiates a Justice Kennedy from a Justice Black, a super median from a less influential swing? Other than Kennedy, have any medians emerged as truly powerful? We reserve the second question, on the identity of super medians, for Part IV. In what directly follows, we tackle the first. We begin by setting out the criteria for dominant medians and then turn to exploring the various requirements using data from the 1953 through 2006 Terms. From this empirical analysis, we are ultimately able to distinguish the super from the not-so-super medians serving over the last five decades.

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45. *See, e.g.*, Jack M. Balkin & Sanford Levinson, *The Process of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 501 (2006) ("[T]he median Justice in a multimember Court, simply because he or she is the median, tends to push the Court's work back to the center."); Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 897 (2006) (noting "the decisive influence for the median Justice" in federalism cases); Martin, Quinn & Epstein, *supra* note 7, at 1281-83 (providing a theoretical demonstration of the power of the median Justice in sex discrimination cases).

46. We conducted searches in ProQuest of articles on the Supreme Court in the *Chicago Tribune*, *Los Angeles Times*, *New York Times*, *Wall Street Journal*, and *Washington Post*.

47. Greenhouse, *supra* note 29 (quoting Steven Calabresi).

48. *Quotation of the Day*, N.Y. TIMES, July 1, 2007, at A2.

49. We adapt this phrase from Eskridge and Ferejohn, who write that "[n]ot all statutes are created equal." Eskridge & Ferejohn, *supra* note 14, at 1215.

A. *The Criteria for Super Medians*

When Arlen Specter referred to *Roe v. Wade*[50] as a "super-duper precedent,"[51] he seemed to capture the thinking of commentators and the public alike.[52] While both understand that it is not atypical for Supreme Court decisions to break new ground, they also realize that some precedents become so entrenched that they may warrant greater deference and weight from the courts and policy makers.[53] Similarly resonant is Eskridge and Ferejohn's claim that some statutes are so "super" that they take on constitutional status.[54] Along these lines, we can imagine few serious students of legislative politics arguing that the Civil Rights Act of 1964[55] and the Alcohol and Drug Abuse Amendments are equally important.[56]

In the cases of super statutes and super precedents, analysts have outlined their characteristics. Precedents become super, according to Professor Michael Gerhardt, when:

> (1) [they] have endured over time; (2) political institutions repeatedly have endorsed and supported [them]; (3) [they] have influenced or shaped doctrine in at least one area of constitutional law; (4) [they] have enjoyed, in one form or another, widespread social acquiescence; and (5) [they] are widely recognized by the courts as no longer meriting the expenditure of scarce judicial resources.[57]

To Eskridge and Ferejohn, a super statute "(1) seeks to establish a new normative or institutional framework for state policy and (2) over time . . . 'stick[s]' in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect

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50. 410 U.S. 113 (1973).

51. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 144-45 (2005) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary).

52. Ackerman argues that Specter's references to super precedents indicate that

> our operational canon presently contains at least two components: one part is composed of the official canon, and the other of judicial superprecedents. The Supreme Court has an institutional obligation to recognize that superprecedents crystallize fixed points in our constitutional tradition, and should not be overruled or ignored in the course of doctrinal development. In this, of course, superprecedents resemble formal amendments, which play a similar shaping role in the operational canon.

Ackerman, *supra* note 13, at 1752.

53. *See, e.g.*, *id.*; Gerhardt, *supra* note 13, at 1205-06.

54. Eskridge & Ferejohn, *supra* note 14, at 1216-17.

55. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

56. Alcohol and Drug Abuse Amendments, Pub. L. No. 98-24, 97 Stat. 175 (1983). As Eskridge and Ferejohn note, the Alcohol Amendments were "a pallid response to the deadly effects of the drug nicotine" in that they only require the Secretary of Health and Human Services to report every three years on the "addictive property of tobacco." Eskridge & Ferejohn, *supra* note 14, at 1215 n.2.

57. Gerhardt, *supra* note 13, at 1213.

beyond the four corners of the statute."[58]

How might we distinguish a super median from a weaker one? How do we know a super median when we see one? On our account, super medians are those swings who (1) are crucial to the formation of majority coalitions and, thus, to the outcome of any given decision and (2) are influential in dictating the terms of the Court's opinion and, thus, to the formulation of any precedent it establishes, especially in consequential or otherwise high-profile decisions.

The first is a threshold consideration. Unless the median is a member of the majority, she has no say over the outcome of a case. Likewise, when she is in dissent she plays only a highly circumscribed role in shaping legal policy over the matter litigated, whether in the short or the longer term. While it is true that a number of dissents have spurred legislative action aimed at counteracting the majority's opinion[59] or have even come to represent the views of the majority at a later date,[60] they are the exceptions. In a system with vertical and horizontal stare decisis, it is the opinion of the Court that will carry the greatest weight with the lower courts—and with the Supreme Court itself.[61] By the same token, at least in some areas of the law, Congress is significantly more likely to codify the majority's views than to reverse them.[62]

The second criterion goes directly to Chemerinsky's idea of "weight":[63] it is one thing for a swing to be a member of a majority coalition and quite

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58. Eskridge & Ferejohn, *supra* note 14, at 1216.

59. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 375 (1972) (Burger, C.J., dissenting) (arguing that the majority is mistaken in holding that existing death penalty statutes are unconstitutional). On the day after the Court handed down the *Furman* decision, President Nixon held a press conference during which he addressed the issue of capital punishment. "[H]e said that he had not gotten 'through all nine opinions,' [but] he had read [Chief Justice Burger's] dissent. Based on Burger's opinion, he found 'the holding of the Court must not be taken . . . to rule out capital punishment.'" LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 84 (1992) (citing *Transcript of President Nixon's News Conference Emphasizing Foreign Affairs*, N.Y. TIMES, June 30, 1972, at A2). Shortly thereafter, the President introduced a bill to reinstate the death penalty for federal crimes. Over thirty states followed suit. *Id.* at 84-87.

60. A prominent example is *Betts v. Brady*, 316 U.S. 455 (1942), in which Justice Black dissented from the majority's holding that the U.S. Constitution does not guarantee the right to counsel in criminal cases. Twenty-one years later, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), Justice Black wrote the majority opinion overturning *Betts*. *See generally* Vanessa Anne Baird & Tonja Jacobi, *How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court* (USC Legal Studies Research Paper Series, Paper No. 05-21, 2005), *available at* http://ssrn.com/abstract=846585 (showing that justices successfully use federalism as a basis to dissent and transform the minority position into a majority in later cases in a statistically significant number of cases).

61. In fact, since its creation, the Court has explicitly overruled fewer than 250 of its own decisions. EPSTEIN ET AL., *supra* note 3, at 208-21 tbls.2-17.

62. *See* Nancy C. Staudt et al., *Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954-2005*, 82 N.Y.U. L. REV. 1340, 1345 (2007) ("Legislators often follow the lead of the Justices when drafting and amending statutes.").

63. Dagger, *supra* note 28.

another for her to so dominate the coalition that the resulting opinion reflects her ideal resolution of the case. Super medians do both. Their influence is such that they are able to elicit special weight and deference on the part of the other members of the majority, as well as from attorneys arguing before the Court. To continue with our example of Justice Kennedy, scores of accounts have documented the lengths to which both lawyers and his colleagues are willing to go to allure him. Summarizing the views of many, Solicitor General Paul D. Clement noted, "This current court is going to be about as conservative or about as liberal as Justice Kennedy."[64] Justice Stevens was downright frank. When asked whether *Roe v. Wade*[65] would survive, he responded, "Well, it's up to Justice Kennedy."[66]

B. *The Empirical Indicators of Median Power*

Justice Kennedy is a clear example of a dominant median, but are there others? And, if so, how do we identify them? We approach these questions, first, by identifying all the median Justices who have served since 1953 and, second, by devising and analyzing empirical indicators of the two major criteria or dimensions of median power: membership in the majority coalition and influence on the Court's opinion.

Let us elaborate, beginning with the first: identifying the medians. To accomplish this task, we rely again on the Martin-Quinn estimates of judicial ideal points. From these estimates, we can locate the median (that is, "Justice 5," or "J5" for short) for each Term since 1953.

Figure 2 illustrates our method. In both the 1991 and 2001 Term panels, we display the Justices ordered from left (most liberal) to right (most conservative) based on their Martin-Quinn estimates. Although the distances between them and their closest ideological colleagues vary quite a bit—a point to which return in Part V—Justices Souter and O'Connor are medians in 1991 and 2001, respectively: half the Justices are to their right and half to their left.
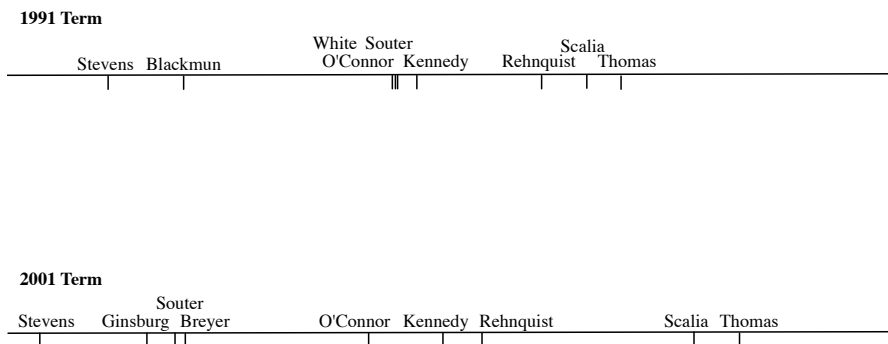
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64. Robert Barnes, *Supreme Court to Take on Contentious Cases in New Term*, WASH. POST, Oct. 1, 2007, at A8.

65. 410 U.S. 113 (1973).

66. Jeffrey Rosen, *The Dissenter*, N.Y. TIMES, Sept. 23, 2007, § 6 (Magazine), at 50.

Figure 2. Ideal Point Estimates for Justices Serving During the 1991 and 2001 Terms of the Supreme Court[67]

1991 Term

2001 Term

We repeated this procedure for each Term between 1953 and 2006, with the panels in Figure 3 displaying the results: the name of each median Justice and his or her ideal point estimate, such that the most liberal points are located towards the left and the most conservative towards the right.[68]

Even a glance at Figure 3 reveals several interesting patterns: the relatively liberal medians during the 1960s and the movement toward the right in the 1970s and into the 1990s (compare, for example, Justices Marshall in 1968 and

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67. The short vertical lines show the Martin-Quinn ideal point estimates. Martin & Quinn, *supra* note 35. For interpretive complications, see *infra* note 68.

68. Because only eight Justices served during the 1969 Term, we exclude it from this and all subsequent analyses. Other complications are as follows:

1954 Term: Until Justice Harlan's confirmation in March 1955, this was an eight-member Court. If we exclude Harlan, the median would be between Justices Frankfurter and Clark. With Harlan's inclusion, Frankfurter is the median. We chose to include Harlan.

1961 Term: Until April 1962, this was a nine-person Court with Justice Clark as the median. On March 31, 1962, Justice Whittaker retired; he was replaced by Byron White on April 16, 1962. But prior to White's arrival, Justice Frankfurter suffered a stroke, which eventually led him to retire in August 1962. White and Frankfurter never voted together—meaning that an eight-person Court operated from roughly April 1962 through the end of the Term. We chose to consider the nine-person Court prior to White's arrival, Whittaker's departure, and Frankfurter's stroke. Hence, Clark is the median Justice in this Term.

2005 Term: Until Alito's arrival in January 2006, Justice O'Connor was the median. After she retired, Kennedy moved into the swing position. To capture both, we include the Term twice: pre-Alito and post-O'Connor.

For each of these Terms, we conducted robustness checks on all our analyses. The checks called for no major changes in interpretation.

Figure 3. Medians on the U.S. Supreme Court, 1953-2006 Terms
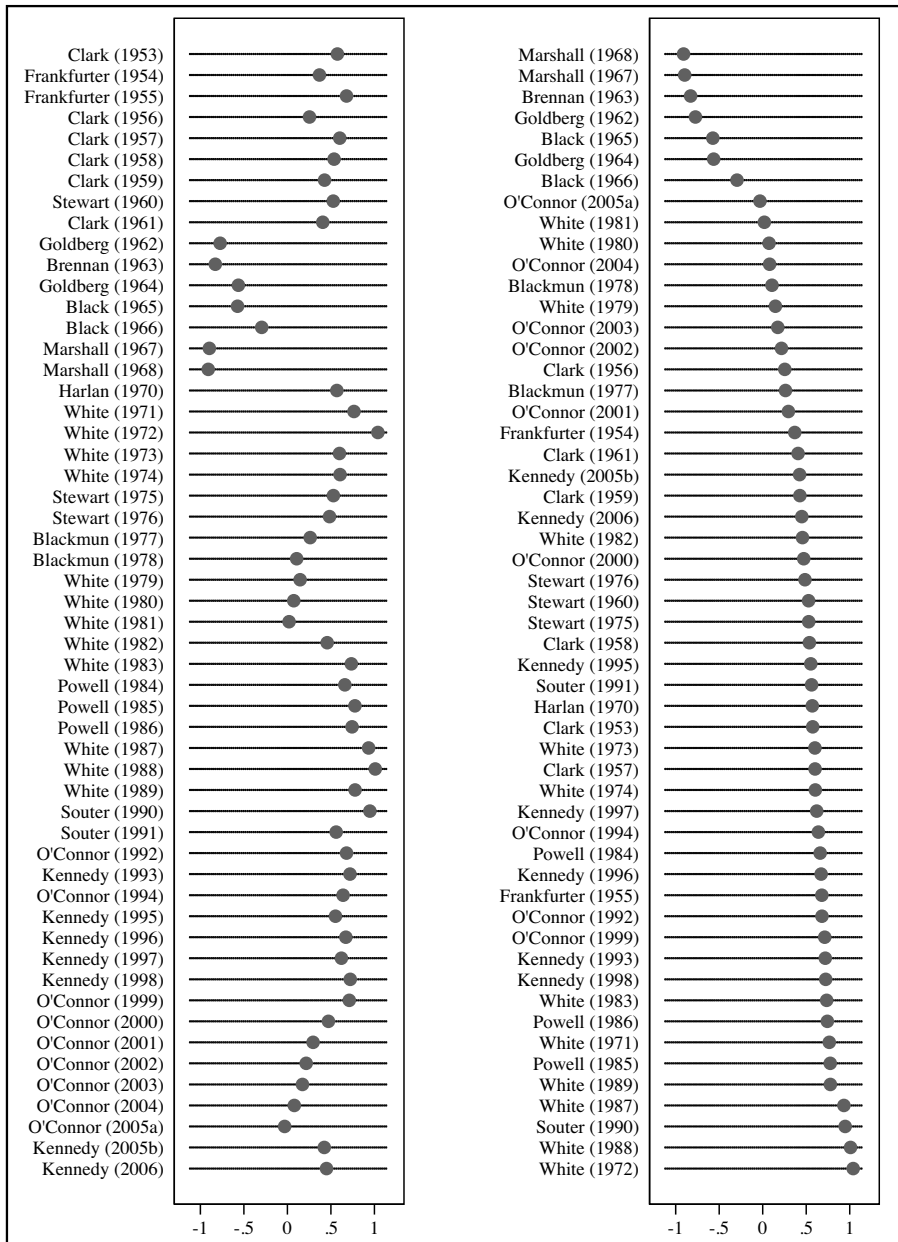
Note: The panel on the left orders the medians by Term. The panel on the right sorts them by their ideal point estimate (from most liberal to most conservative).

White in 1972), the absence of Chief Justices in the swing seat, the repeat appearance of several medians (notably, Justices Kennedy, O'Connor, Clark, and White), and the one-off nature of others (e.g., Justices Harlan and Souter). Note also the extent to which Justices White and Powell dominated the 1980s in much the same way that Kennedy and O'Connor traded off the swing seat in the 1990s.[69] Finally, observe that of the fourteen individuals who held the swing position, more than half had not served on the federal bench; or, to put it another way, of the fifty-three Terms included in our study, in only fourteen (or 26%) was the median a U.S. court of appeals judge prior to joining the Court.

In a day and age when there seems to be a norm of federal judicial experience for candidates to the Supreme Court[70]—for the first time in history, each and every member of the 2007 Term Court served on a U.S. circuit court—this is an interesting finding, and one that deserves attention. Nonetheless, for our purposes it and the other trends we have uncovered are of less immediate interest than the question of whether any of the medians depicted in Figure 3 performed particularly well on the two dimensions of interest: membership in the majority coalition and influence over the majority opinion. To address it, we developed and analyzed empirical measures of each.

1. *Membership in the majority coalition*

Beginning with the median's role in the formation of majorities, we devised an obvious indicator: the percentage of cases in which the Justice joined the winning coalition in his or her swing Term.[71] Recall that this is a crucial consideration: if medians are not in the majority, their ability to influence doctrine may be severely curtailed.

In light of Black's Median Voter Theorem,[72] it should come as no surprise that virtually all medians serving since the 1953 Term shine in this dimension. Figure 4 makes this much clear. There we have ordered the medians by the percentage of cases in which they were in the majority. Those most often in the winning coalition are located towards the top and those least often towards the

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69. Martin and Quinn's ideal point estimates allow for the possibility that judicial ideology changes over time, and, in fact, recent scholarship indicates significant drift among some Justices. Lee Epstein et al., *Ideological Drift on the U.S. Supreme Court*, 101 Nw. U. L. Rev. 1483 (2007). This opens the possibility of changes in the median Justice even in the absence of personnel changes on the Court. So, for example, during the ten Terms between 1994 and 2004, when the Court's membership remained stable, the swing seat switched back and forth between Justices O'Connor and Kennedy.

70. *See* Lee Epstein, Jack Knight & Andrew D. Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 Cal. L. Rev. 903 (2003).

71. We derive these data from Spaeth, *supra* note 15, using *dec_type=1* or *7* and *analu=0*.

72. Black, Theory, *supra* note 43.

bottom[73]—though "most often" and "least often" are not wholly distinct. On average, the medians lent their vote to the majority in nearly 90% of the cases decided in their swing Term—an astoundingly high figure for a period when at least one Justice dissented in two out of every three disputes.[74] By the same token, the standard deviation around the mean is quite small,[75] indicating little diversity in their willingness to join the majority voting bloc.

Still, we do observe some variation.[76] Justices Brennan (1963), Marshall (1967 and 1968), O'Connor (1999 and 2005a) and, once again, Kennedy (1993 and 2006) all ranked in the top tenth percentile, voting with the majority in 95% to 100% of the cases decided during their swing Terms. At least on this indicator, then, the four deserve special attention in our quest to identify dominant medians. On the other hand, to the extent that they find themselves in (or near) the bottom tenth percentile on this crucial indicator of majority participation, Justices Stewart (1960), Blackmun (1977), Frankfurter (1955), Clark (1957), and, of course, Black during the 1965 Term (and again in 1966) could hardly be classified as super medians.

2. *Influence on the Court's decisions*

Joining the majority, albeit a threshold matter, is only one of two dimensions of median power. The second centers on the ability to influence the Court's decisions, and to capture it we examined several indicators: the centrality of the medians' votes in close cases, the extent to which they wrote or joined opinions concurring in the judgment, and their relative role in producing important decisions.

The first, the medians' role in closely divided decisions, is an especially crucial dimension of median dominance because it supplies information about the swing's relevance to the formation of a majority and, in turn, the extent to which the resulting opinion reflects her preferences. Indeed, in their descriptions of Justice Kennedy's power during the 2006 Term, nary an analyst missed the fact that the Justice had been in the majority in every five-to-four

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73. Note that Justice Kennedy's percentage for the 2005 Term reflects his voting after Justice O'Connor departed.

74. Of the Court's 5711 decisions handed down between the 1953 and 2006 Terms, at least one Justice cast a dissenting vote in 3629 decisions (or 65.54%). These figures are derived from Spaeth, *supra* note 15, using *dec_type=1* or *7* and *analu=0*.

75. The mean is 88.6%, with a standard deviation of 5.2%.

76. The range is from a low of 74.4% (Frankfurter in 1955) to highs of near or at 100% (Marshall in 1967, O'Connor in 2005, and Kennedy in 2006).

Figure 4. Voting with the Majority, 1953-2006 Terms
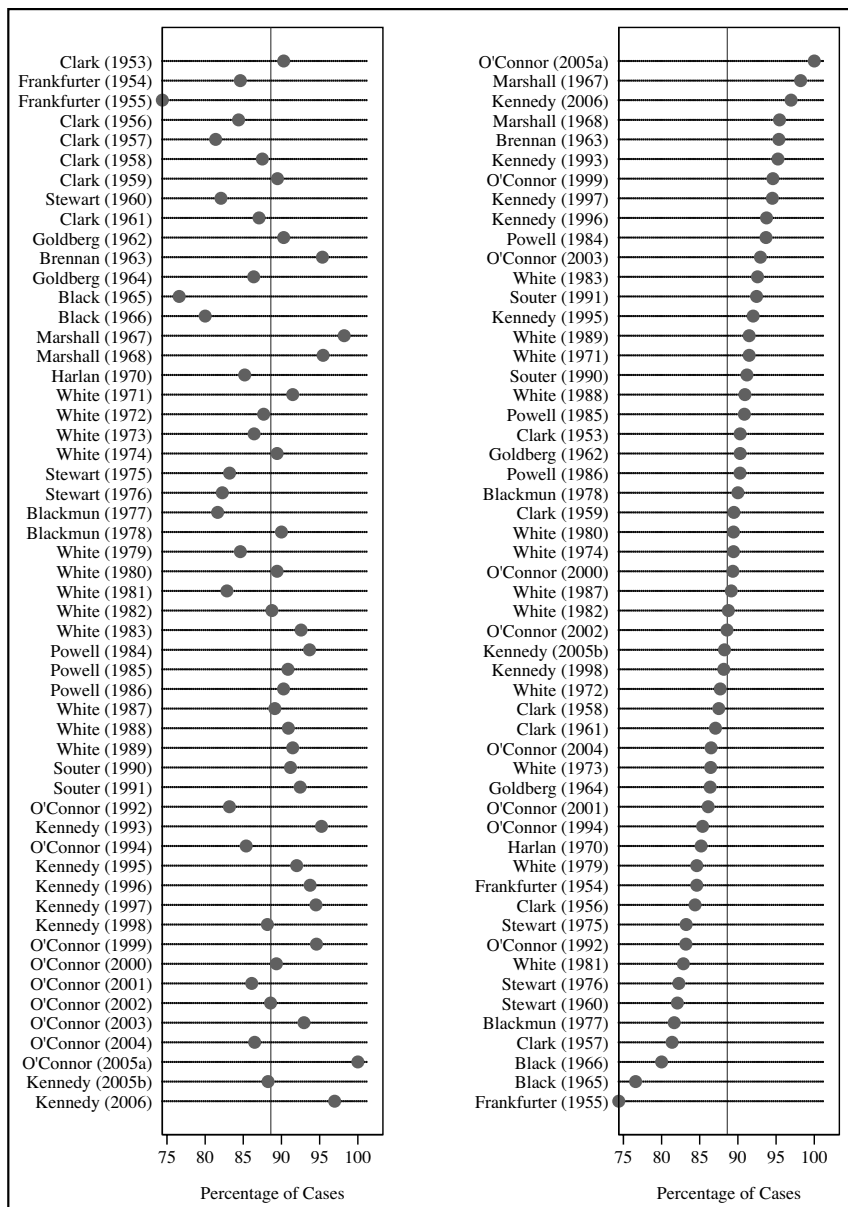
Note: This figure shows the percentage of cases in which the medians voted with the majority during the Term they served as the median. The panel on the left sorts the medians by Term; the panel on the right sorts them by percentage. The thin vertical line indicates the mean (88.6%).[77]

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77. For more details on the data underlying this figure, see *supra* notes 68, 71, 73.

case.[78] Medians who are this important and this influential in split decisions draw attention from the media, the public, and the legal community, and should receive scrutiny in our study as well.

Accordingly, we examined the percentage of one-vote margin cases (predominately five-to-four[79]) in which our swings were in the majority. Figure 5 provides the results, and they differ in several interesting ways from the data displayed in Figure 4. Most obviously, while the correlation between the two series is reasonably high, the overall mean of voting with the majority in close cases is quite a bit lower than the mean of voting with the majority in all cases (72.5% versus 88.6%). (Note that these calculations, along with Figure 5, exclude Goldberg (1964), Marshall (1967), and O'Connor (2005a) because the total number of one-vote margin cases was five or less: for Goldberg, *N=5*; for Marshall, *N=3*; for O'Connor, *N=2*. For all other Justices, the number on which the percentage in Figure 5 is based is ten or greater.)

This is not entirely unexpected but the degree of variation among the medians is surprising in its magnitude.[80] Recall that when it comes to voting with the majority, swing Justices not only evince very high rates but rates that are also quite uniform: well over half the medians are a part of the majority coalition in 83% to 94% of the cases.[81] Not so with membership in the majority in close decisions. The range is quite large, from a low of 43.5% (Stewart in 1976) to a high of a perfect 100% (Kennedy in 2006). The standard deviation is also rather large (11.8%), meaning that about two-thirds of the medians are in the majority in 61% to 87% of the highly contested cases (given that the data are normally distributed). This is hardly a precise interval, of course, but one that provides some leverage on separating the run-of-the-mill median from the truly super median, precisely because of its size.

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78. *See, e.g.*, Jonathan H. Adler, *How Conservative is this Court?*, NAT'L REV. ONLINE, July 5, 2007 (available on LexisNexis) ("As the swing justice, Justice Kennedy was able to dictate the outcome in many cases. He voted with the majority in every one of this term's 5-4 decisions, even those that were not decided along ideological lines."); Jim Fry, *Conservatives Hold Edge on U.S. Supreme Court*, VOICE OF AM. NEWS, July 11, 2007 ("Kennedy—on the winning side in every close case—has become the court's crucial swing vote."); Warren Richey, *Supreme Court Tilt to Right Had Its Limits*, CHRISTIAN SCI. MONITOR, July 2, 2007, at 1 ("The most significant development at the court this term was the emergence of Justice Kennedy, a conservative centrist swing voter, as the center of power in the Roberts court. . . . [He] was on the winning side in all [five-to-four vote] cases.").

79. Between the 1953 and 2006 Terms, 1238 of the Court's 5711 cases were decided by a one-vote margin, meaning that a one-vote change would have altered the outcome of the case (that is, from reversed to affirmed, or from reversed to a tied vote). Of the 1238, 9 were decided by votes of four-to-two, 39 by four-to-three votes, 213 by five-to-three votes, and 977 by votes of five-to-four. We derived these figures from Spaeth, *supra* note 15, using *dec_type=1* or *7* and *analu=0*.

80. All the figures in this paragraph exclude Goldberg, Marshall, and O'Connor.

81. This calculation reflects a mean of 88.6%, with a standard deviation of 5.2%.

Figure 5. Voting with the Majority in One-Vote Margin Cases, 1953-2006 Terms
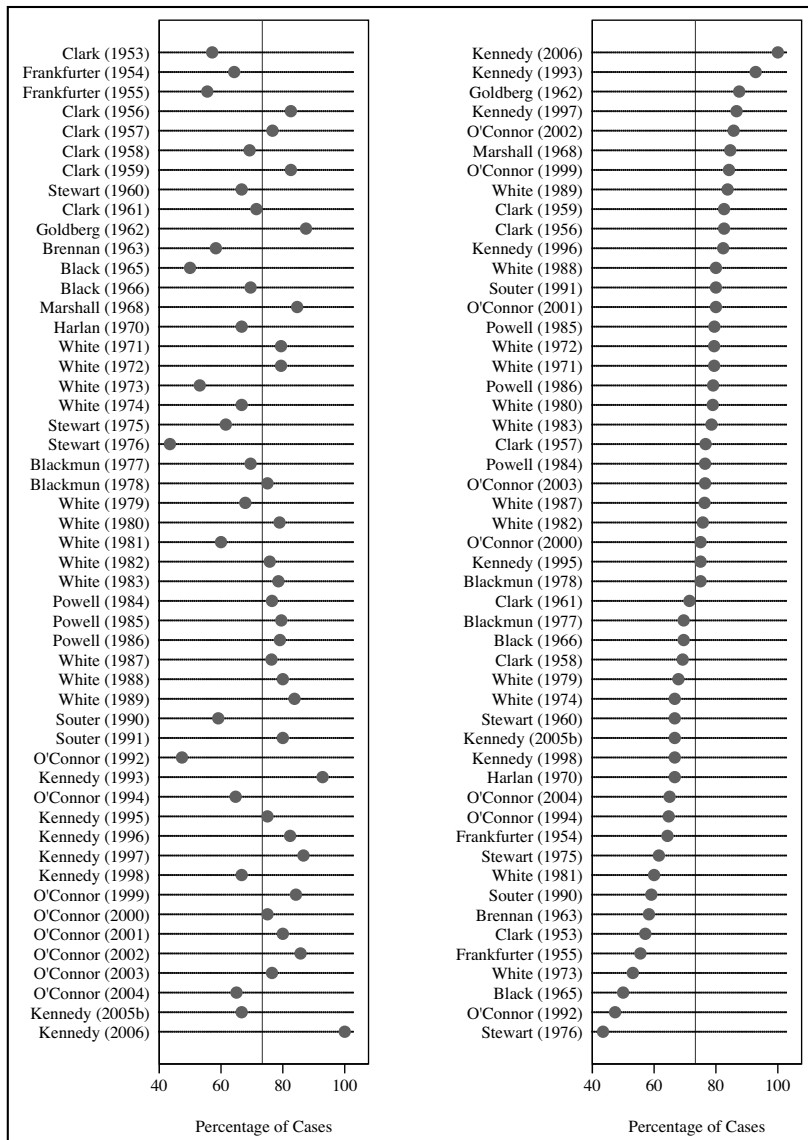
Note: This figure shows the percentage of cases in which the medians voted with the majority in closely divided (mostly five-to-four) cases during the Term they served as the median. The panel on the left sorts the medians by Term; the panel on the right sorts them by percentage. The thin vertical line indicates the mean (73.4%).[82]

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82. For more details on the data underlying this figure, see *supra* note 79.

On the high end of the range, as Figure 5 shows, are seven Justices representing a total of fourteen Terms.[83] Justices White (1988, 1989), O'Connor (2001, 1999, 2002), Clark (1956, 1959), and, yet again, Kennedy (1996, 1997, 1993, 2006) appear among the top ranks multiple times. Marshall (1968), Goldberg (1962), and Souter (1991) are all one-hit wonders, though each found himself in at least eight out of every ten minimum winning coalitions in their swing Term.

On the very low end, voting with the majority in 50% or fewer of the one-vote margin decisions, three Justices stand out: Justices Stewart (1976), Black (1965), and, oddly enough, O'Connor in 1992. Even though she found herself in the very high range in three Terms (1999, 2001, and 2002), she was actually in the bottom 25th percentile in as many (1992, 1994, and 2004). Likewise, in two Terms (1973 and 1981) Justice White found himself dissenting in closely divided cases almost as frequently as he joined the majority. This, despite the fact that he was among the top Justices in the 1988 and 1989 Terms.

What these patterns suggest is that attaining super median status may have less to do with the Justices' biographies—e.g., whether or not they lacked federal judicial experience—than with the circumstances in which they find themselves in their swing Term. Why else would we observe Justices O'Connor and White so willing to join the majority in some years and so unwilling in others?

Because this idea of "circumstances" forms the centerpiece of our discussion in Part V of how and why super medians emerge, for now let us turn to yet another indicator of median power—one that represents the flipside of breaking ties in closely divided cases: whether the median was prone to write or join opinions concurring in the judgment. Certainly some of these "special concurrences," as social scientists often deem them,[84] have been highly influential.[85] But even in those rare instances, such opinions may indicate a

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83. These Justices are in the top 75th percentile of the range, which means being in the majority in at least 80% of cases.

84. *See, e.g.*, Gregory A. Calderia & Christopher J.W. Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 AM. J. POL. SCI. 874, 877 (1998) ("[A] justice has the option of joining one or more colleagues' regular or special concurrences . . . ."); Patrick D. Schmidt & David A. Yalof, *The "Swing Voter" Revisited: Justice Anthony Kennedy and the First Amendment Right of Free Speech*, 57 POL. RES. Q. 209, 214 tbl.2 (2004) (comparing "Regular Concurrences" and "Special Concurrences" for the 1994-2001 Terms); James F. Spriggs II & Thomas G. Hansford, *The U.S. Supreme Court's Incorporation and Interpretation of Precedent*, 36 L. & SOC'Y REV. 139, 149 (2002) (using "special concurrences" in a model of precedent).

85. The canonical example along these lines is Justice Jackson's concurrence in the judgment in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). *See, e.g.*, Sarah H. Cleveland, Hamdi *Meets* Youngstown*: Justice Jackson's Wartime Security Jurisprudence and the Detention of "Enemy Combatants"*, 68 ALB. L. REV. 1127, 1128 (2005) ("It is impossible to exaggerate the significance of Justice Jackson's concurrence in *Youngstown* for U.S. foreign relations jurisprudence."); Bernadette Meyler,

diminution in the medians' influence—an inability to induce the production of a majority opinion that reflects their most preferred resolution of the case.

To tap this measure of median power, we computed the percentage of cases in which the median was in the majority and did not write or join a special concurrence.[86] Figure 6 displays the results, such that more frequent concurrers are located toward the bottom and the less frequent toward the top.

Quite clearly, the results on this measure of median power reveal the same lack of diversity we observed over the membership in the majority coalition (see Figure 4): the mean is quite high (94.8%) and the standard deviation, only 3.5%. Most medians, in other words, rarely felt inclined to concur in the judgment when they were in the majority.

This comes as no great surprise. Given the clout of swing Justices, we would expect to observe opinion writers accommodating them, thereby diminishing their need to break from the majority. Even so, just as we found for membership in the majority coalition (see Figure 4), the medians are not entirely lacking in variation in their concurring behavior. Nor, for that matter, are individual Justices. Take Lewis Powell. In the 1985 Term, he may have been in the majority in 91% of the cases, but he was so prone to concur in the judgment (in ten of 127 cases) that he ranks near the bottom of all medians serving since 1953. Note, though, that just the Term before, he wrote or joined a special concurrence in just one of the eighty-eight cases in which he joined the majority. For that Term, he was in the top tenth percentile.

To us, this provides further evidence that median influence is less a function of who occupies the swing seat than the circumstances in which the swing finds herself—once again, a claim we explore in Part V. For the discussion here, though, the more relevant point is that some Justices in some Terms perform so poorly on this indicator that it would be difficult to accord them super median status. Powell in 1985 is one example, but surely Harlan in 1970—his last Term on the Court—is a true outlier on this dimension. Of the ninety-one cases in which Harlan was in the majority, he felt insufficiently accommodated by the opinion writer to author or join special concurrences in eighteen (nearly 20%). Moreover, a third of the eighteen came in some of the

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Economic Emergency and the Rule of Law, 56 DEPAUL L. REV. 539, 561 (2007) (calling Jackson's concurrence in *Youngstown* "the opinion that has subsequently proved the most influential"); Haridimos V. Thravalos, Comment, *The Military Commission in the War on Terrorism*, 51 VILL. L. REV. 737, 759 (2006) (stating that Jackson's concurrence sets forth "the seminal three-part test for separation of powers analysis").

86. Computed from Spaeth, *supra* note 15, using *dec_type=1* or *7* and *analu=0*. For each median (for example, Clark), we used the following Stata code to derive the percentages:

generate ClarkSp=1 if clkv==4
replace ClarkSp=0 if (clk-v==1 clkv==3)

Figure 6. Concurring in the Judgment, 1953-2006 Terms
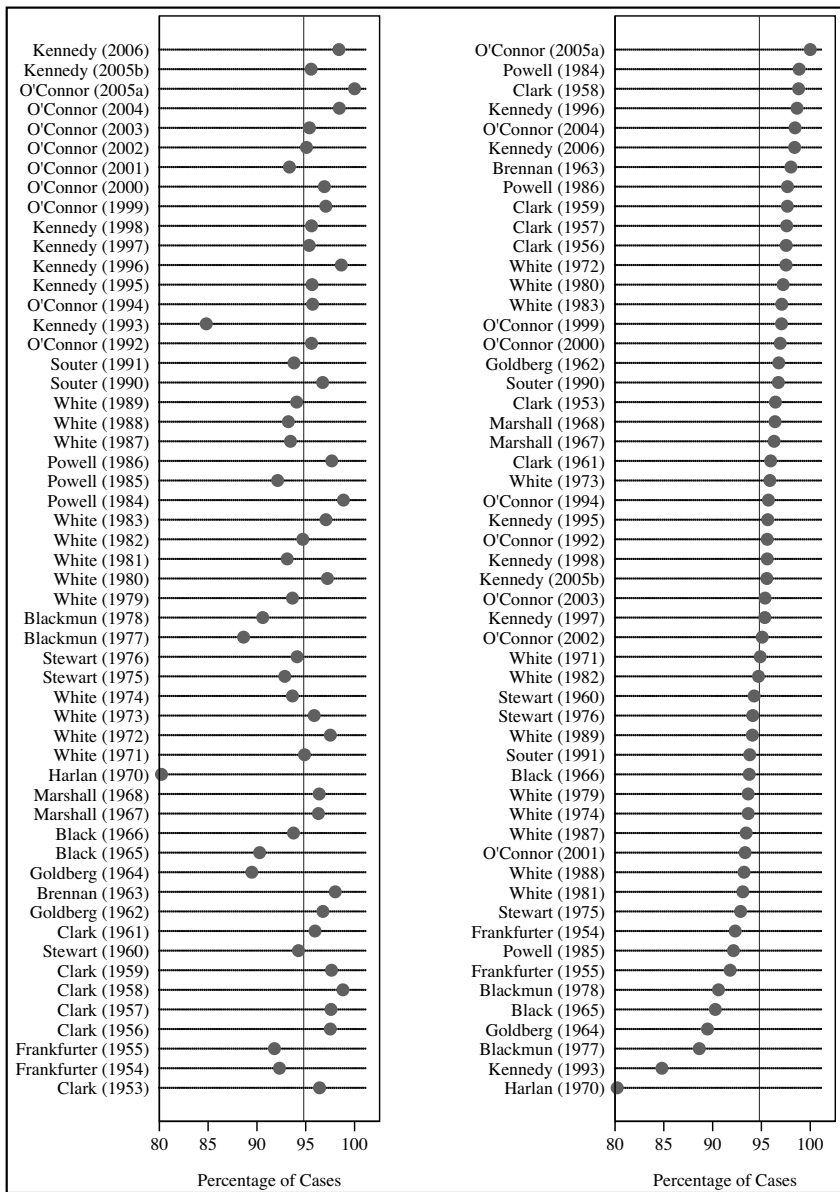
Note: This figure shows the percentage of cases in which the medians voted with the majority and did not join or write a concurrence in the judgment ("special concurrence") during the Term they served as the median. The panel on the left sorts the medians by Term; the panel on the right sorts them by percentage. The thin vertical line indicates the mean (94.8%).[87]

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87. For more details on the data underlying this figure, see *supra* notes 68, 73, 86.

Term's most noteworthy cases, including *Tate v. Short*,[88] in which the majority held that the Equal Protection Clause of the Fourteenth Amendment prohibited the state from imprisoning the petitioner solely because of his indigency. Harlan concurred in the judgment: he believed the case should have been resolved on the Due Process Clause, and not on equal protection. Likewise, in *Whitcomb v. Chavis*,[89] Harlan agreed with the Court's decision to reverse the judgment below, which had "disestablished" a county's multimember district, but would have remanded it as well and directed the lower court to dismiss the complaint on the ground that the federal courts have no business restructuring state electoral processes. Finally, in *McKeiver v. Pennsylvania*,[90] Justice Harlan did not take issue with the Court's decision to allow judges to adjudicate juveniles delinquent without a jury trial. Rather, following his own previous opinions in *Duncan v. Louisiana*[91] and *Williams v. Florida*,[92] he would have affirmed "on the ground that criminal jury trials are not constitutionally required of the States, either as a matter of Sixth Amendment law or due process."[93]

If these special concurrences suggest an inability on Harlan's part to direct the contents of the majority opinion in prominent disputes—hardly the attribute of a super median—then joining, or especially authoring, the majority opinion in such disputes signifies power. In fact, in two senses writing opinions in big cases may be particularly indicative of median dominance. First, given the opinion writer's near "monopoly power,"[94] authoring prominent decisions provides evidence of the median's impact on the content of legal policy.[95] Second, given the goal of opinion assigners (typically the Chief Justice[96]) to keep the majority coalition intact, a high fraction of important assignments to

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88.   401 U.S. 395, 401 (1971) (Harlan, J., concurring).

89.   403 U.S. 124, 165 (1971) (Harlan, J., concurring).

90.   403 U.S. 528, 557 (1971) (Harlan, J., concurring).

91.   391 U.S. 145, 171 (1968) (Harlan, J., dissenting).

92.   399 U.S. 78, 117 (1970) (Harlan, J., concurring).

93.   *McKeiver*, 403 U.S. at 557.

94.   Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the U.S. Supreme Court*, 23 J.L. ECON. & ORG. 276, 276-77 (2007).

95.   On this much scholars and the Justices agree. *See, e.g.*, Abe Fortas, *Chief Justice Warren: The Enigma of Leadership*, 84 YALE L.J. 405, 405 (1975) ("If the Chief Justice assigns the writing of the opinion of the Court to Mr. Justice *A*, a statement of profound consequence may emerge. If he assigns it to Mr. Justice *B*, the opinion of the Court may be of limited consequence."). For a scholarly analysis, see, for example, Forrest Maltzman & Paul J. Wahlbeck, *Opinion Assignment on the Rehnquist Court*, 89 JUDICATURE 121, 122 (2005) ("Which justice writes an opinion is . . . highly consequential for the legal choices made by the Court.").

96.   If the Chief Justice is in the majority, he makes the opinion assignment; if he is not, the task falls to the most senior Associate Justice in the majority. For the 1953-2006 Terms, the Chief Justice was in the majority in 85.9 percent of the cases. We derived these percentages from Spaeth, *supra* note 15, using *dec_type=1* or *7* and *analu=0*.

the median provides a measure of her centrality toward ensuring achievement of that objective. To take but one example, no doubt Kennedy's influence in the 2006 Term stemmed as much from his membership in most majority coalitions as it did from his membership in all majority coalitions producing important precedent—not to mention his authorship of one of the Term's most publicized (and controversial) opinions, *Gonzales v. Carhart*[97] (upholding the Partial-Birth Abortion Ban Act of 2003[98]).

To explore these ideas, we considered the percentage of cases in which the median participated in rendering the Term's most salient decisions—whether by joining the majority (or plurality) opinion coalition or, more importantly, writing the opinion of the Court.[99] Figure 7 displays the results, and several are quite intriguing.

From the left panel we learn that trends in membership in the majority in important cases and in all cases (see Figure 4) are rather similar.[100] For both, the means are high, and for both, a handful of medians find themselves with perfect, or nearly so, records of membership in the majority—including Justices Marshall in 1968, O'Connor in 1999, and of course Kennedy in 2006.

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97. 127 S. Ct. 1610 (2007). Justice Kennedy's opinion generated enormous press coverage. A LexisNexis search in News, All (English, Full Text), conducted on December 31, 2007, brought up 421 stories. It also has already received considerable play in the law reviews. *See, e.g.*, Martha C. Nussbaum, *The Supreme Court, 2006 Term: Foreword— Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 84 (2007) (arguing that the implications of *Carhart* "for the future of sex equality are ominous"); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 431 (2007) ("As this Essay was going to press, the Court decided *Gonzales v. Carhart* . . . . *Carhart*'s rhetoric is striking."); *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 265-69 (2007) (summarizing the *Carhart* holding and the Justices' opinions).

98. Partial-Birth Abortion Act, Pub. L. No. 108-105, 117 Stat. 1201 (2003).

99. We use the *New York Times* measure to assess case importance. As we explained, *see supra* note 20, this measure taps importance as perceived at the time the Court handed down the case—contemporary salience—rather than whether the case actually achieved long-term influence. Since both median power and the *New York Times* measure of importance are assessed ex ante, long-term influence is not relevant to our inquiry.

We derive the percentage of important cases in which the median was in the majority opinion coalition from Spaeth, *supra* note 15, using *dec_type=1* or *7* and *analu=0*. To determine whether the median (for example, Clark) wrote the opinion or judgment of the Court in important cases, we also used the Spaeth Database, and the following Stata code:

generate ClarkWNYT=1 if (clicv==1 clkv==6) (clko==1 clko==2) (nyt==1)
replace ClarkWNYT=0 if (C1arkWNYT==. clkm==1) (nyt==1)

Note that in calculating the percentage of majority or plurality opinions authored by the median in prominent cases, the numerator is the number of opinions written by the median and the denominator is the number of prominent cases in which the median was in the majority. Finally, due to a small *N* (=2), we exclude O'Connor (2005a) in both panels.

100. The correlation between the two measures is a reasonably high 0.43.

Figure 7. Majority Participation in Important Cases, 1953-2006 Terms

Note: The left panel shows the percentage of important cases in which each median was a member of the majority (or plurality) opinion coalition during the Term she or he served as the median. The right panel displays the percentage of majority (or plurality) opinions authored by the median in important cases when she or he was in the majority vote coalition. In both panels, the thin vertical line indicates the mean.[101]

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101.   For more details on the data underlying this figure, see *supra* notes 68, 73, 99.

Likewise, several Justices perform poorly on both, notably Black in 1965. He is the only median more likely to be outside the opinion coalition than in it. To us, this suggests a diminished role in establishing policy in the Term's most prominent cases—a clear sign of median weakness.

More informative are the data in the right panel, showing authorship of majority (or plurality) opinions in high-profile cases. Again, appearing at the bottom of the list is Justice Black in 1965 to whom Chief Justice Warren assigned not one opinion in a high-profile case.[102] Along with Black are five others—Blackmun (1977), Clark (1953), Goldberg (1964), Souter (1990), and White (1972)—Justices who against all odds never wrote in a prominent dispute, despite their presence in the majority coalition and their status as the Term's median.

In contrast come the rather astonishing records of Justices Goldberg (1962), Clark (1959), Kennedy (2005b), and especially White (1987, 1982, 1971, 1988) and O'Connor (2003, 2002, and 2000). For these five, the sheer percentage of their assignments in highly prominent cases was far higher than chance alone would predict.[103] But Justices White in 1987 and O'Connor in 2002 are nearly off the charts: both wrote for the Court in four out of every ten important cases, including, in O'Connor's case, the majority opinion in *Grutter v. Bollinger*[104] and in White's, *Hazelwood School District v. Kuhlmeier*.[105]

III. THE IDENTITIES OF SUPER MEDIANS

Looking over the results thus far a number of particularly noteworthy findings emerge. One is that some discrepancies arise among the various indicators of median dominance. Take Justice Frankfurter in the 1955 Term. While he was in the majority in all the Term's most prominent disputes, in fewer than 12% did he write the opinion of the Court, and his rate of joining special concurrences or writing the judgment was substantially higher than the mean of 5.2%. More noticeably, he was in the majority in only 55.6% of the 1955 Term's eighteen cases decided by a one-vote margin. So, despite his role in high-profile cases, deeming him a super median would be unwarranted—and commentary of the day seems to agree. In not one story or article we consulted

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102. During the 1965 Term eighteen cases registered on the *New York Times* measure. Of those, Justice Black dissented in eight and joined the majority in ten. In all ten in which he joined the majority, so did the Chief Justice. *See also supra* note 96.

103. Even if we assume minimum-winning coalitions in these cases (meaning a one-in-five chance that any given Justice would write the opinion of the Court), their percentages are still significantly higher ($p<0.05$).

104. 539 U.S. 306 (2003) (upholding the University of Michigan Law School's use of race in its admissions decisions).

105. 484 U.S. 260 (1988) (allowing educators to impose certain standards over the contents of a high school newspaper).

did an analyst point to Justice Frankfurter's role as a swing Justice in 1955. This, in spite of the publication of his book *Of Law and Men*, which provided ample opportunity for reviewers to comment on the Justice's influence on the Court.[106] They did not take it.

On the other hand, several patterns do emerge from our analyses. Once again, Kennedy's dominance during the 2006 Term is hard to miss. He was crucial to the formation of majorities in one-vote difference cases, as well as in suits of national importance.

It turns out, though, that Justice Kennedy is only the most recent example of a super median. Taken collectively, our data suggest that since the onset of the Warren Court era in 1953, five others achieved that status: Justices Clark, Goldberg, White, Powell, and O'Connor.[107] On most, if not all, of the dimensions of interest, each wielded enormous power on the Court for at least one Term and in several instances for many more. Justice Clark was influential throughout the late 1950s, but especially in the 1959 Term. Justice Goldberg was on the Court for only three Terms but was the median in two (1962 and 1964), and an extraordinarily dominant median in one (1962). Since the 1953 Term, Justice White holds the record for service as a median Justice: twelve Terms (see Figure 3). In at least five (1971, 1982, 1983, 1987, and 1988) he was extremely powerful, though his strongest may well have been in his first stint as swing, in 1971. For Lewis Powell, the opposite holds: only in his last Term, in 1986, did he attain super median status. Powell's protégé, Justice O'Connor, served as the Court's pivot for nine of her nearly twenty-five Terms but was at the height of her power in 1999, in the early 2000s, and right before she departed in 2005. Finally, while Justice Kennedy in 2006 is without a doubt the most powerful median in our data set, he was also quite dominant in 1996 and, again, in 1997.

For the most part, these statistical findings comport with conventional wisdom today and, perhaps more reliably, with commentary analyzing Court decisions as they were made. Byron R. White provides an example. Our results indicate that of all medians serving during the Burger Court years, Justice White may well have been the most influential, especially on the critical measures of breaking ties in close cases and authoring opinions in highly

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106. Actually, reports of the day stressed Earl Warren's emerging liberalism, which resulted in his "throwing the decisive vote to the liberal wing" in five-to-four decisions. *See, e.g.*, James Reston, *The Liberal Three: A Study of Chief Justice Warren's Accord with Douglas and Black in Many Cases*, N.Y. TIMES, June 15, 1956, at 14.

107. We characterize these Justices as super medians because (1) they ranked in the 50th percentile or higher on the crucial indicators of membership in the majority in all cases, *see supra* Figure 4, and in one-vote-margin cases, *see supra* Figure 5; (2) they were in or above the 50th percentile when it came to authoring important opinions, *see supra* Figure 7; and (3) more generally, in looking across all five measures of median power, each found themselves in the 75th percentile or higher on at least two but more typically three indicators.

salient disputes. On the latter, White was practically in his own league, ranking in the 75th percentile or higher of all medians during an extraordinary six Terms—including four while Burger was Chief (1971, 1974, 1982, and 1983) and two during Rehnquist's reign (1987 and 1988).

These and other indicators of Justice White's dominance hardly escaped contemporaneous writers. In his analysis of the 1971 Term, Fred Graham of the *New York Times* noted:

> The unusual cohesiveness of the Nixon four gave the "swing" position to an appointee of President Kennedy—Byron R. White. Because Justice Potter Stewart tended to line up with the three liberal hold-overs from the Warren Court—Justices Douglas, Marshall and William J. Brennan Jr.—Justice White found himself increasingly as the deciding vote between evenly divided 4-to-4 blocs.
>
> Thus he was able to set the tone of the final weeks . . . .
>
> The cases in which Justice White tipped the balance [are] almost the story of the Court Term . . . . [108]

Graham went on to list the many cases in which White wrote the opinion for the Court in five-to-four decisions, including *Branzburg v. Hayes*,[109] *Johnson v. Louisiana*,[110] and *Gravel v. United States*.[111] Writing sixteen years later, Graham's colleague, Linda Greenhouse, echoed the sentiment, noting that White "filled the role of the Court's swing Justice."[112] And Lance Liebman had this to say about the 1971 Term: "[I]n the middle—as close to the center of this nine-man body as is statistically possible—was Justice Byron White."[113]

Even when White retired in 1993, and at the time of his death a decade later, writers continued to recount his role in the 1970s as a super median. On the occasion of his departure from the Court, one reporter noted:

> White joined the court under Chief Justice Earl Warren when it was changing the face of civil rights law and expanding protections for criminal defendants. White agreed with rulings broadly interpreting constitutional requirements of equality in public education and voting rights. But he took a tougher stand on criminal law issues than the court majority, dissenting, for instance, in Miranda vs. Arizona . . . .
>
> Later in his court career, White often found himself in the middle, a swing

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108. Fred P. Graham, *Supreme Court, in Recent Term, Began Swing to the Right That Was Sought by Nixon*, N.Y. TIMES, July 2, 1972, at 18.

109. 408 U.S. 665 (1972) (refusing to recognize a special privilege for reporters).

110. 406 U.S. 356 (1972) (holding that a less-than-unanimous jury verdict does not necessarily violate the Sixth Amendment).

111. 408 U.S. 606 (1972) (finding that the Speech or Debate Clause fails to shield a senator's aide from certain grand jury questions).

112. Linda Greenhouse, *A Divided Supreme Court Ends the Term with a Bang*, N.Y. TIMES, July 1, 1990, at E3.

113. Lance Liebman, *Swing Man on the Supreme Court*, N.Y. TIMES, Oct. 8, 1972, § 6 (Magazine), at 16.

vote on some volatile issues.[114]

Likewise, David Savage's obituary of White declared, "During the 1970s, the court moved to the right, as four new appointees of President Nixon took their seats. White found himself at the center, the court's swing vote."[115]

Nonetheless, as commentators also noted, by the 1990s White's power seemed to wane. He was no longer perceived as the Court's middle but as a reliable member of its conservative wing.[116] That White had ceded his swing seat—to David Souter and eventually to Justices O'Connor and Kennedy— squares with our data, though not because of any drift to the right during his last Terms in office. Actually, compared with the early 1960s, White grew significantly more conservative at the start of the Burger Court era—a shift that enabled him to move into the pivotal position.[117] By 1990, however, he was to the left of the median (Souter), where he remained until he retired in 1993.[118]

And yet, in his day Justice White may have been as much a super median as Justices Kennedy and O'Connor—both of whom, to no one's surprise, easily fit that descriptor. Through much of the 1990s and into the 2000s, the two traded off the median position (see Figure 3), though only in a few Terms apiece was each a truly dominant swing.

O'Connor's crucial years all came towards the end of her tenure: in the early 2000s, in her last Term in 2005, but most notably in 1999. Writing at the conclusion of the 1999 Term, Savage observed, "O'Connor, President Reagan's first appointee, stands at the center of the court's divide . . . ."[119] Greenhouse of the *New York Times* agreed,[120] as did Edward P. Lazarus:

> According to conventional wisdom, the current U.S. Supreme Court is highly unpredictable. It lurches without consistency from politically liberal decisions, like the ruling that Nebraska's ban on partial-birth abortions violated a woman's right to choose, to politically conservative ones, like the

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114. Linda P. Campbell, *White Leaving High Court: Interest Groups Lobbying Clinton*, CHI. TRIB., Mar. 20, 1993, at 1.

115. David G. Savage, *Byron White, 84; Ex-Supreme Court Justice*, L.A. TIMES, Apr. 16, 2002, at 10.

116. *See, e.g.*, MARK TUSHNET, A COURT DIVIDED 34 (2005) (listing Byron White among the conservatives on the Rehnquist Court); Linda Greenhouse, *Byron R. White, Longtime Justice and a Football Legend, Dies at 84*, N.Y. TIMES, Apr. 16, 2002, at A1 ("Though [White] was then the court's sole remaining Democrat, he was in many ways more at home in the conservative era of Chief Justice William H. Rehnquist.").

117. Epstein et al., *supra* note 69, at 1514 ("Compared with the early 1960s, [Justice White] grew significantly more conservative at the start of the Burger Court era . . . .").

118. *Id.* at 1508 ("During his first two Terms, Souter was the Court's likely median, or swing, Justice.").

119. David G. Savage, *Supreme Court Ends Term with Eye on November*, L.A. TIMES, July 2, 2000, at 1.

120. Linda Greenhouse, *Split Decisions; the Court Rules, America Changes*, N.Y. TIMES, July 2, 2000, § 4, at 1 ("At the center of the court this term [was] Justice O'Connor, who cast only five dissenting votes . . . .").

ruling striking down the Violence Against Women Act as an intrusion on state's rights.

　　This is half-right. The court does lurch across the political spectrum. But in at least one important sense, the court is predictable: As Justice Sandra Day O'Connor votes, so goes the court.[121]

To Lazarus's list, we could add several other important cases of the 1999 Term, including *Boy Scouts of America v. Dale*,[122] in which Justice O'Connor voted with the five-member majority to allow the Boy Scouts to exclude gays from serving as troop leaders.

O'Connor's role was nearly as crucial in the early 2000s and right before she left the Court in 2005. In 2002, for example, she authored the opinion or judgment of the Court in 44.4% of the Term's most consequential decisions.[123] And she dissented in only two of the Term's fourteen five-to-four decisions. In no closely divided cases in 2005 did she fail to find herself in the majority, and she did not write or even join a concurrence in the judgment of the Court. Justice O'Connor was so dominant, some speculated that her "imminent departure" actually affected internal decision-making procedures.[124] Douglas Kmiec put it simply enough: "For better or worse, it was O'Connor who had to be satisfied."[125]

After her departure, Justice Kennedy's role as the newest super median moved into relief. While he had attained that status before, in the mid-1990s, observers could not help but notice that by the end of the 2005 Term Kennedy was "the new Sandra Day O'Connor."[126] Only in the 2006 Term, however, did commentators begin to deem (what should have been the onset of) the Roberts Court, "the Kennedy Court." In their eyes, he was that dominant—and seemingly not by accident or coincidence. As Dahlia Lithwick noted, "[U]nlike O'Connor, who invariably pooh-poohed her pivotal role on the court by saying she simply had one vote like every other justice, Kennedy is said to relish it. [One former clerk for Justice Blackmun has] claimed that Kennedy deliberately stakes out positions that would make him a 'necessary but distinctive fifth vote

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121. Edward P. Lazarus, *It's All About O'Connor*, L.A. TIMES, July 9, 2000, at 2.

122. 530 U.S. 640 (2000).

123. She was in the majority in nine of the Term's eleven important cases. Of the nine, she wrote for the majority (or plurality) in four.

124. *See, e.g.*, Linda Greenhouse, *Supreme Court Allows Disabled Georgia Inmate to Proceed with Suit Against State*, N.Y. TIMES, Jan. 11, 2006, at A27 ("[T]he imminent departure of Justice Sandra Day O'Connor, who has been at the center of the federalism debates, might have prompted the court to decide the new case promptly, and therefore narrowly, and to defer the hard questions.").

125. Douglas W. Kmiec, *Who Rules the High Court?*, L.A. TIMES, July 8, 2006, at 15.

126. *See, e.g.*, Charles Krauthammer, Editorial, *Emergency Over, Saith the Court*, WASH. POST, July 7, 2006, at A17; Ruth Marcus, Editorial, *The Kennedy Center; the Supreme Court's Balance Is Precarious*, WASH. POST, July 5, 2006, at A13.

for a majority.'"[127] Whether or not it was this strategy or, as we believe, other dynamics at work on the Court,[128] according to our data and virtually all extant commentary, by 2006 Justice Kennedy had succeeded. In not one five-to-four vote did Kennedy find himself in the minority, and in not one decision of consequence was he in dissent. It is no wonder Savage quipped, "The only sure guide to the outcome in all the close cases was to watch Justice Anthony Kennedy."[129]

Tom C. Clark's position as an all-powerful median during the 1959 Term received more subtle attention. Many observers of the day made hay of his pivotal role in the much-anticipated quartet of cases dealing with the constitutionality of military trials for civilians.[130] Because Justice Clark had dissented in *Reid v. Covert* (holding that civilian dependents could not be tried by courts martial overseas during peacetime),[131] his vote in the 1959 quartet—refusing to allow the military to subject civilian employees and their dependents to military trials—surprised commentators. As Anthony Lewis put it, "When Justice Clark announced . . . that he had the opinions of the court in the four cases, his prior position led observers to assume that the court had decided to uphold the validity of [the] courts-martial in all except the narrow class covered by the 1957 decision-dependent capital cases."[132] Others drew attention to Clark's consequential votes in business cases. One political scientist wrote, "It is not too much to say that on issues of economic liberalism, as Clark went, so went the Court."[133] On the other hand, in his end-of-the-Term review, Lewis pointed to the crucial role played by both Clark and Potter Stewart. "Justices Tom C. Clark and Potter Stewart have become the swing men on the Supreme Court," he wrote.[134] Not really. Stewart found himself in the minority in nearly 20% of the Term's seventy-five cases; for Clark, that figure was only one out of every ten. In the twenty-three closely divided decisions, Stewart dissented in more than double the number Clark did.[135]

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127. Dahlia Lithwick, *A Supreme Court of One*, WASH. POST, July 2, 2006, at B1.

128. *See infra* Part V.

129. David G. Savage, *Roberts Steers Law to Right*, CHI. TRIB., July 1, 2007, at 3.

130. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960).

131. 354 U.S. 1 (1957).

132. Anthony Lewis, *Supreme Court Curbs Rights of the Military to Try Civilians*, N.Y. TIMES, Jan. 19, 1960, at 1; *see also The Supreme Court, 1959 Term*, 74 HARV. L. REV. 95, 117 (1960) (pointing out that Clark had dissented in *Reid* but now joined with Warren, Black, Douglas, and Brennan to strike down the provision).

133. Harold J. Spaeth, *Warren Court Attitudes Toward Business: The "B" Scale*, *in* JUDICIAL DECISION-MAKING 79, 89 (Glendon Schubert ed., 1963).

134. Anthony Lewis, *Supreme Court Balance of Power Often Held by Clark and Stewart*, N.Y. TIMES, July 4, 1960, at 1.

135. Nine dissents for Stewart versus four for Clark. The figures are derived from Spaeth, *supra* note 15, with *analu=0* and *dec_type=1* or *7*.

Lewis, though, immediately picked up on Arthur Goldberg's key role in the 1962 Term, noting that he frequently completed the "bare majority of five that prevailed in a number of major cases."[136] Bernard Schwartz was even more specific, recounting case after case in which Goldberg cast decisive votes.[137] One example is *Gibson v. Florida Legislative Investigative Committee*,[138] a high-profile dispute between the Florida legislature, which subpoenaed the NAACP's membership records and contributor list, and the NAACP, which refused to produce the documents. The Florida Supreme Court had ruled in the legislature's favor, and at their initial conference in December 1961, five U.S. Supreme Court Justices agreed. *Gibson* had been argued in the 1961 Term, but reargument became necessary when Justice Whittaker retired and Justice Frankfurter became incapacitated.[139] By the time the case was reargued in October 1962, Byron White had replaced Whittaker and Goldberg had replaced Frankfurter. The White-for-Whittaker exchange made no difference. White voted to affirm, as had Whittaker. But the Goldberg-for-Frankfurter trade was of consequence: Unlike Frankfurter, Goldberg voted to reverse and was rewarded with the majority opinion assignment. The NAACP would not have to turn over its records, and an important precedent was established.

Even from this brief analysis, it seems clear that our chief statistical findings square with conventional thinking. But there are some exceptions—sins of omission really—notably the absence of Potter Stewart altogether and the exclusion of Lewis Powell for all but his last Term, in 1986. Account after account on swing Justices devotes space to both, but especially to Powell during the early years of the Burger Court. Writing about the 1971 Term, Woodward and Armstrong declared that "Powell had positioned himself in the center, along with Stewart and White. And since Stewart and White went in opposite directions on so many key issues, Powell was becoming the true swing vote."[140]

Woodward and Armstrong got it wrong. White—not Powell—served as the median Justice in 1971.[141] More accurate, though, was their claim, some thirty

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136. Anthony Lewis, *New Judges and Doctrines Alter Character of Supreme Court*, N.Y. TIMES, June 23, 1963, at 64. The five were Justices Warren, Black, Douglas, Brennan, and Goldberg.

137. BERNARD SCHWARTZ, SUPER CHIEF 449-74 (1983).

138. 372 U.S. 539 (1963).

139. SCHWARTZ, *supra* note 137, at 452-53.

140. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 224 (1979).

141. Closer to the mark was a remark made later by Al Kamen: "Justice Lewis F. Powell Jr. sits second from the left when the Supreme Court takes the bench; seating follows seniority. But if Justices were arrayed by philosophy, Powell would sit exactly in the middle." Al Kamen, *Powell Acts as Court Majority-Maker; Virginian Is Swing Vote on Divided Bench*, WASH. POST, Apr. 1, 1985, at A1. Powell was indeed the median Justice in the 1984 Term but only in 1986 was he a truly dominant swing.

pages later, about the 1972 Term: "The leadership belonged to the Justices in the center, the swing votes . . . . It belonged to Stewart and White and Lewis Powell if he chose."[142] Actually, for the reasons we explain momentarily, this was far more accurate than even Woodward and Armstrong probably realized. During the 1972 Term and several others, neither Powell, Stewart, nor, for that matter, White, was able to dominate precisely because they were forced to share the seat of power.

IV. THE CAUSES OF STRONG AND WEAK MEDIANS: GAPS AND OVERLAPS

This brings us to the crux of the matter: While each Term produces a median, commentary suggests—and our data now confirm—that some are far more powerful and, ultimately, far more able to shape legal policy. Why? Why are some so dominant, so super, and others far less so?

When it comes to explanations for the emergence of super precedent, many writers suggest that the Court itself is in the driver's seat: it can attempt to "elevate the . . . stature" of a precedent by repeatedly affirming it or even declaring it a super precedent, however implicitly.[143] Other analysts place control in the hands of "public institutions," such that when they "repeatedly endorse[] and support[]" a precedent, it can take on super status.[144] As for super statutes, Eskridge and Ferejohn see them as responses—albeit "reflective and deliberative" responses—to pressing public problems, even crises.[145] On their account, the courts, administrators, and even the public may have a role to play, but Congress, of course, is the chief instigator.

Our account of super medians is institutionally centered as well. While many analysts place emphasis on the position itself (thus treating all swings equally)[146] or stress the lengths to which some Justices have gone to grab the seat of power (thus focusing attention on particular "great men and women"),[147] we propose an entirely different approach. To us, the emergence of super medians has less to do with the Justice who finds herself in the swing seat than it does with the Justices nearby. Along these lines, we contend that two factors explain the rise of super medians: (1) the ideological distance between the median and the Justices on either side of her—or what we call the "gap," and (2) the degree to which the preference distributions of the median and the closest Justices converge—the "overlap." As the gap grows and as overlap decreases, super medians emerge.

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142. WOODWARD & ARMSTRONG, *supra* note 140, at 256.

143. Sinclair, *supra* note 13, at 401.

144. Gerhardt, *supra* note 13, at 1207.

145. Eskridge & Ferejohn, *supra* note 14, at 1230-31.

146. The literature along these lines is voluminous. For examples, see *supra* note 45.

147. The quote about Justice Kennedy in Lithwick, *supra* note 127, falls into this category.

Both the gap and the overlap implicate the extent to which the median is necessary to establish a majority coalition, in other words, the extent to which the Court's opinion will reflect the median's preferences. But because the gap and overlap are distinct dimensions—meaning that it is possible for a swing to be stronger on one than the other—in what follows we explore them separately.

A. *The Gap*

On our account, super medians emerge when they are ideologically distinct from those Justices surrounding them. That is, as the distance or the gap between "J5" (the median) and "J4" (the Justice to the median's left) and the gap between J5 and "J6" (the Justice to the median's right) grows, the swing will wield considerably more power because it will be difficult—if not impossible—for either the liberal or the conservative camp to form a coalition without her.

To see why, consider the three different scenarios representing the 1965, 2004, and 2006 Terms depicted in Figure 8. In each, a median emerges, of course, but the gap between him or her and the surrounding Justices varies considerably, such that—at least on our account—median power should become stronger as we move from Scenario 1 (1965) to Scenario 2 (2004) to Scenario 3 (2006).

Starting with the 1965 Term, we observe the presence of two outliers, the very extreme Justice Douglas—among the most liberal ever to serve on the Court—and the somewhat less extreme Harlan, whose ideological estimate suggests a conservative akin to Chief Justice Rehnquist during the 1990 Term.[148] Also note that while Justice Black is, in fact, the median, six others clump rather closely—and clump in the middle of the Court at that: the gap between Justice Brennan (J4) and Black is quite small (0.28), as is the space between Black and Clark (J6) to his right (0.52), for a total distance between J4 and J6 of only about 0.80 on the Martin-Quinn scale.[149]

Under these circumstances, the median's power may be quite limited. The problem for Black, and others similarly situated, is that those to his left and his right could form a majority that would exclude him. On the conservative end, Justices Stewart, White, and Clark might enlist Justices Brennan and Warren; and on the liberal end, it would not be much of a stretch for Justices Fortas, Warren, and Brennan to reach across Black to attract Justices Clark and White.

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148. The mean Martin and Quinn ideal point estimate since the 1953 Term is -0.01, with a standard deviation of 2.1. The minimum (most liberal) value is -6.4 (Douglas in the 1974 Term) and the maximum (most conservative) value is 4.3 (Rehnquist in the 1975 Term). For the 1965 Term, Justice Douglas's score is -5.7, and Harlan's is 2.1 (virtually identical to Rehnquist's of 1990).

149. The "on average" gap between the Justices occupying positions 4 and 6 (those to the median's immediate left and right) since the 1953 Term was nearly double, at 1.3.

Figure 8. Preference Configurations for the 1965, 2004, and 2006 Terms of the Supreme Court
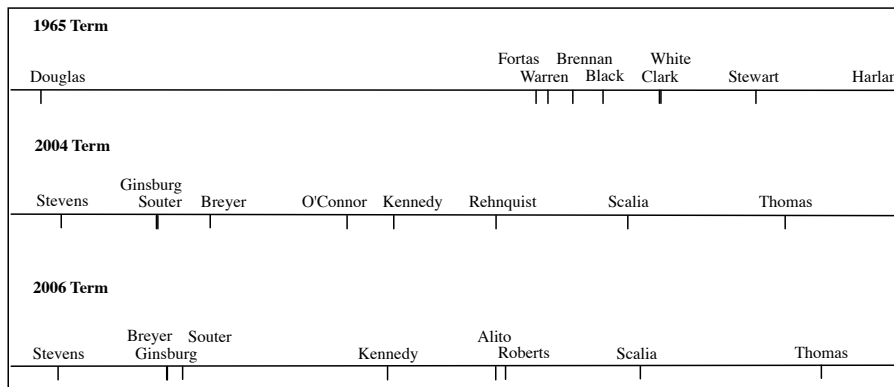
Note: The short vertical lines represent Martin and Quinn's ideal point estimate for each Justice.

These and other median-eliminating scenarios, we hasten to note, are not hypothetical. Actually, they occurred with sufficient frequency in 1965 that Justice Black, the then-median, was in dissent in nearly a quarter of the Term's ninety-four decisions.[150] Even more telling is that the list of decisions excluding Black included some of the Term's most momentous. In *Schmerber v. California*,[151] a case still excerpted in many criminal procedure books,[152] the Court held that compulsory blood tests given to those arrested for driving while intoxicated do not violate the privilege against self-incrimination, the right to counsel, or the right against unreasonable searches and seizures. Black was not among the five-person majority; in fact, he wrote a dissent taking particular issue with the majority's analysis of the self-incrimination claim. Likewise, in *Sheppard v. Maxwell*,[153] another important case in criminal law,

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150. Of the ninety-four decisions, Black dissented in twenty-two. We calculated this from Spaeth, *supra* note 15, with *analu=0* and *dec_type=1* or *7*.

151. 384 U.S. 757 (1966).

152. *See, e.g.*, YALE KAMISAR ET AL., ADVANCED CRIMINAL PROCEDURE 35-36 (11th ed. 2005); LEADING CASES ON CRIMINAL JUSTICE 790-99 (Lloyd L. Weinreb ed., 2007); ARNOLD H. LOEWY, CRIMINAL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 914-19 (2d ed. 2006).

153. 384 U.S. 333 (1966).

Black dissented from the majority's holding that the extensive media coverage and publicity surrounding Sheppard's trial interfered with his rights. Justice Black again found himself in the minority in *Harper v. Virginia State Board of Elections*,[154] in which the Court ruled that poll taxes violate the Fourteenth Amendment's Equal Protection Clause. All in all, of the eighteen high-profile cases decided during the 1965 Term, Black dissented in eight—a very poor showing for a so-called swing Justice.[155]

While the 1965 Term provides an example of a preference configuration that leads to a weak median, the 2004 Term opens the door to a slightly stronger swing. As we show in Figure 8, the ideological spread of the Justices is fairly uniform or, at the least, wider than in 1965. There is less clumping in the middle, though Justice Kennedy is not terribly far from O'Connor's (the median's) ideal point.

When we observe a preference configuration of this sort—with one Justice quite close to the median and the others somewhat more distant—the swing should be more powerful than when several Justices are clumped in the middle. That is because fewer possibilities exist for the formation of a majority coalition without the median.

Still, fewer is not none. Because the gap between J5 and J6 (O'Connor and Kennedy in Figure 8) is relatively small (0.43), it is entirely possible that in any given case, J6 (Kennedy) could be to the left of the median, J5 (O'Connor). This, in turn, raises the prospect of five-to-four majority coalitions that exclude the median but include Justice Kennedy and the more left-leaning Justices. And, in fact, during the 2004 Term, this occurred in two of the Term's most publicized (and controversial) cases: *Kelo v. City of New London*[156] and *Roper v. Simmons*.[157] In both, it was Kennedy who provided the crucial vote; and in both it was Kennedy, far more so than the median, O'Connor, who was able to move legal policy in the direction of his most preferred position. This was especially true in *Roper*, in which Kennedy wrote the majority opinion overturning *Stanford v. Kentucky*,[158] a decision in which O'Connor voted with the winning side. On the other hand, in looking at all other coalition sizes (for example, 9-0, 8-1, and 7-2), O'Connor was in the majority in over 90% (51 out of 54). Not surprisingly, this compares favorably with Black's record: as Figure 8 shows, it was comparatively easier for six or even more Justices to bypass Black than O'Connor.

If Justice Black was a weak median in 1965 and Justice O'Connor a stronger one in 2004, Justice Kennedy was the epitome of the super median in

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154. 383 U.S. 663 (1966).

155. For our definition of high-profile or important cases, see *supra* note 20.

156. 545 U.S. 469 (2005).

157. 543 U.S. 551 (2005).

158. 492 U.S. 361 (1989).

the 2006. Why? What happened between 2004 and 2006?

The juxtaposition between the middle and last panels of Figure 8 supplies the answer. Observe first the effect of the two most recent membership changes: John G. Roberts for Chief Justice Rehnquist and Samuel Alito for Justice O'Connor. Because Roberts and Rehnquist had similar ideal points,[159] that swap had a rather negligible impact on the Court's ideological configuration. Not so for the Alito-for-O'Connor exchange. While Alito was slightly to the left of Roberts,[160] he was substantially more conservative than O'Connor.[161] This change, coupled with Breyer's move to the left between 2004 and 2006,[162] radically increased the gap between J4 and J6.

Now consider the consequences of the alteration in the preference configuration: Unlike in 2004, when a liberal majority could include Kennedy to the exclusion of the median (O'Connor), by 2006 it became extremely difficult for either the left or the right to bypass Kennedy. Moreover, given the distance between J4 and J6, we would expect to observe a large number of five-to-four majority coalitions, which, naturally, would include Kennedy.[163] As a result, Kennedy—in contrast to Black and, to a lesser extent, O'Connor—was in a very strong position to dictate the terms of majority opinions.

Of course, this is precisely what we observe. During the 2006 Term, 35.8% of the Court's sixty-seven decisions were produced by a five-to-four vote, the largest fraction in modern-day history.[164] Justice Kennedy was in the majority in an astonishing 100%. Moreover, he was in dissent in not one of the six highly salient decisions of the Term;[165] and in all but one—*Tellabs, Inc. v. Makor Issues & Rights, Ltd.*[166]—his vote was crucial to the

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159. Roberts's ideal point estimate in 2005 was 1.51; Rehnquist's in 2004 was 1.40.

160. For the 2005 Term, Roberts's ideal point estimate was 1.51; Alito's was a slightly more liberal 1.45. Likewise, in the 2006 Term Alito was to Roberts's left (1.44 and 1.53 ideal point estimates, respectively). We computed these estimates from Martin & Quinn, *supra* note 35.

161. 1.45 and -0.032 respectively in 2005. We computed these from Martin & Quinn, *supra* note 35.

162. From -1.18 to -1.47, computed from Martin & Quinn, *supra* note 35.

163. As Tonja Jacobi notes, under this sort of preference configuration and with the exception of cases with extreme status quos, it may be difficult for larger blocs to form. On the other hand, to the extent that six Justices can manage to coalesce, they should be able to craft an opinion that would include the other three, for an opinion able to satisfy the sixth Justice should also be able to garner support from the seventh, eighth, and ninth Justices. Tonja Jacobi, *Competing Models of Judicial Coalition Formation and Case Outcome Determination*, 1 J. LEGAL ANALYSIS (forthcoming 2008) (manuscript at 15), *available at* http://ssrn.com/abstract=947592.

164. Or, at least, since the 1953 Term. We computed the percentage from Spaeth, *supra* note 15, using *analu=0* and *dec_type=1* or *7*.

165. *See supra* note 20 (listing the six cases).

166. 127 S. Ct. 2499 (2007).

outcome.[167]

In short, for Black in 1965, O'Connor in 2004, and Kennedy in 2006, the gap provides a reasonable explanation of the relative power of the three medians. Moving from Scenario 1, in the 1965 Term, to Scenarios 2 and 3, the distance between the swing and the Justices surrounding him or her grew considerably, making it less and less possible for a majority to exclude the median. But what of the other fifty Terms in our data set? Does the gap provide as powerful a predictor of median power?

To address this question, we used the Martin and Quinn ideal point estimates to calculate the absolute ideological distance between the median (J5) and those Justices to her immediate left (J4) and right (J6)—that is, the interval between J4 and J6. As we show in Figure 9, quite a bit of variation exists among the medians—ranging from almost no gap (Souter in 1991) to the unusually wide one between Kennedy and Souter-Alito in 2006.[168]

With the ideological distance figures—our measure of the gap—in hand, we turned to the task of determining whether they account for median dominance. For purposes of this preliminary assessment, we simply regressed the various indicators of the dimensions of median power on the interval between J4 and J6 (the gap). The dimensions, recall, are two. One is membership in the majority coalition, which we measure by the percentage of cases in which the median was a member of the majority.[169] The other is the median's influence over the resulting opinion, which we assess via four indicators: the percentage of cases in which the median (1) was in the majority in one-vote margin decisions;[170] (2) failed to write or join opinions concurring in the judgment; (3) wrote the opinion of the Court; or (4) joined the majority opinion coalition in especially consequential disputes.[171] If the gap provides a reasonable explanation of median dominance, then we should observe a positive relationship between its size and each indicator.

For all but one indicator, this is exactly what we find[172]: that is, super medians do, in fact, emerge when the gap is wide. Consider, for example, the relative importance of swing Justices to the formation of majorities in closely

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167. All but *Tellabs* were decided by one-vote margins.

168. The mean of the gap is 1.25, with a standard deviation of 0.65. The range is 0.20 (minimum) to 2.88 (maximum).

169. The raw data appear *supra* Figure 4.

170. *See supra* Figure 5.

171. For data on the last two indicators, see *supra* Figure 7.

172. The gap is a significant predictor for the propensity of the median to be in the majority, in both general cases and five-to-four cases, and of the propensity to concur. In relation to important cases, recall that we assess two indicators of the median's relative role in producing important decisions: joining the majority (or plurality) and opinion writing. The gap is not, to a statistically significant degree, associated with the former but it is with the latter, as it is with all other measures ($p \leq 0.5$).

Figure 9. The Gap, 1953-2006 Terms
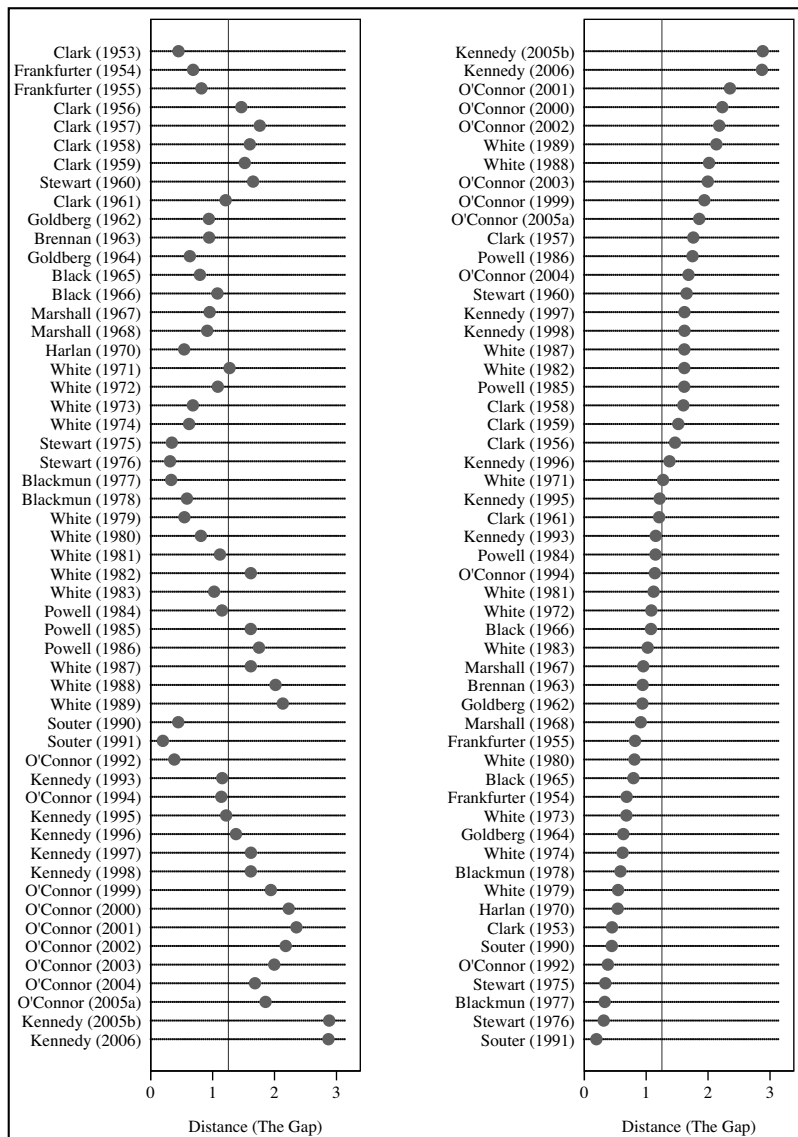
Note: This figure depicts the (absolute) ideological distance between the median Justice (J5) and those to his or her immediate left (J4) and right (J6), or what we call "the gap." The panel on the left orders the medians by Term. The panel on the right sorts them by gap. The thin vertical line indicates the mean (1.25).[173]

173. For more details on the data underlying this figure, see *supra* notes 35, 68, 73,

divided decisions—or what some commentators consider the truly distinctive feature of a powerful median. As we show in the left panel of Figure 10, when the interval between J4 and J6 is quite narrow, the probability of a median finding himself a member of a one-vote-margin coalition is just over 0.60[174]— well below the mean of 0.72. Moving to the widest gaps, the odds increase by 47%, to 0.88.[175]

Of course, the relationship between ideological distance and median power on the indicator of one-vote-margin cases holds better for some Justices than others.[176] Given the rather large gap in the 2004 Term between the median, Justice O'Connor, and especially J4 (Justice Breyer to her left), the model predicted that O'Connor would find herself in the majority in about 75% of the one-vote-margin cases; the actual figure is 65%. On the other hand, the estimate was nearly spot on for O'Connor in 2001, predicting 82.9% versus the actual value of 80.0%.

Regressing the percentage of important decisions authored by the swing on the gap yields equally impressive results. On average, medians write about 17.5% of the Term's most important cases—a figure not altogether higher than we would expect based on chance alone.[177] But for those with a small gap between J4 and J6, the expected percentage declines precipitously, to 7.29%,[178] as the right panel of Figure 10 shows. On the other hand, for relatively isolated medians, the percentage increases to 31.69%[179]—a figure significantly higher than chance alone, regardless of the size of the coalition.

Overall, the relationship between the gap and median power is as we predicted for all but one measure of median power. In terms of the median's propensity to be in the majority, in both general cases and five-to-four cases, as well as the propensity to concur, and the likelihood of getting to write the opinion in important cases, the gap is a strong and reliable predictor. Now we turn to the second aspect that we predict will strongly correlate with median power: the overlap.

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174. At the smallest distances, the probability is 0.62, with a 95% confidence interval of [0.57, 0.68].

175. The 95% confidence interval is [0.81, 0.95].

176. In the regression of one-vote-margin cases on the gap, the coefficient on distance is 9.58, with a 95% confidence interval of [5.24, 13.91]. The RMSE is 10.06.

177. Of the 726 important decisions in which nine Justices voted, 32.5% were decided by five-to-four votes and 24.5% were six-to-three; 21% were unanimous. (The remaining were seven-to-two or eight-to-one.) If each member of the five-person majority had an equal chance of writing the opinion (0.20), no significant difference emerges between the medians' percentage and those of her colleagues. If it was a unanimous coalition (0.11), 0.17 is significantly higher than we would expect (at $p<0.05$), again assuming each member had an equal chance of writing.

178. The 95% confidence interval is [2.17, 12.42].

179. The 95% confidence interval is [24.34, 39.03].

Figure 10. Predicted Percentages as the Gap (the Distance from the Median) Increases from Very Narrow to Very Wide
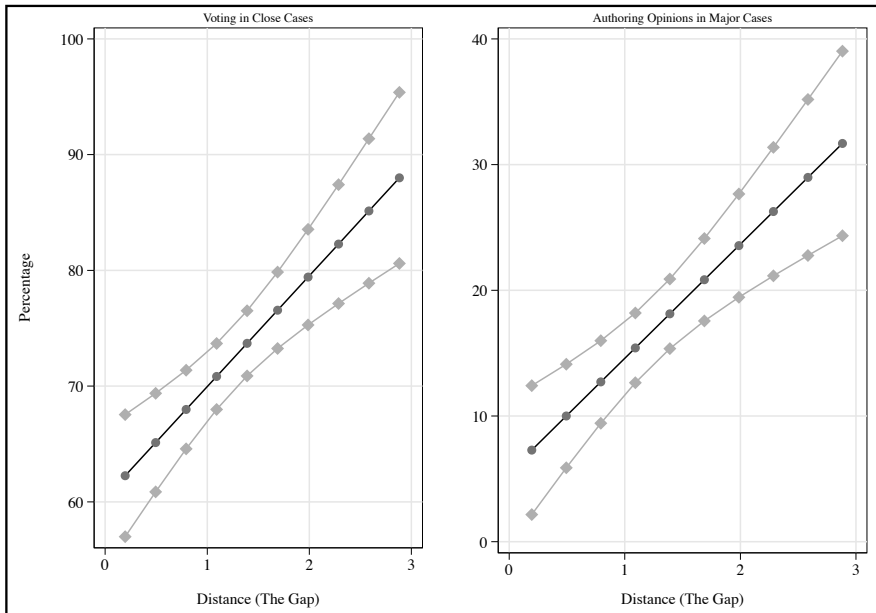
Note: The left panel shows the percentage of one-margin-vote cases where we expect to find the median in the majority. The right panel shows the percentage of majority opinions in important cases that we expect the median to author. In both panels, the dark lines indicate the predicted values and the light gray lines show the 95% confidence interval.[180]

B. *The Overlap*

As stark as these findings are, they should come as no real surprise. As the gap grows, medians become increasingly crucial to the majority. Indeed, keeping them in the coalition may require certain concessions (such as control of the opinion), especially in cases of contemporaneous salience. Nonetheless, as we have emphasized throughout, the gap is not the only factor that contributes to the emergence of super medians. Another crucial consideration is the overlap, that is, the extent of convergence among the preference distributions of the median and the closest Justices on either side. On our account, the greater the overlap of preferences, the less likely the median will be super in strength.

Preference distributions, to reiterate, reflect ideological consistency.

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180. To create this figure, we used J. SCOTT LONG & JEREMY FREESE, REGRESSION MODELS FOR CATEGORICAL OUTCOMES USING STATA (2d ed. 2005).

Narrow distributions are suggestive of Justices who decide cases consistently vis-à-vis their ideology, meaning that their ideal point provides a reasonably close approximation of how they will rule in any given case.[181] In the 2001 Term, Justices Kennedy and O'Connor were such Justices, as Figure 11 shows.[182] Note that relative to most of their colleagues, the "slopes" surrounding their ideal point are quite narrow. Justices Scalia, Stevens, and especially Thomas,[183] on the other hand, have far wider distributions, indicating that their votes are harder to predict based exclusively on their ideal points.[184]

Of central interest to us here, though, are not the preference distributions themselves but the extent to which the distribution of the median coincides with the distributions of J4 and J6. Obviously, this extent—this overlap—is connected to the gap: a small gap makes a large overlap likely.[185] But even with a small gap, the median can still play a decisive role as long as the other Justices' distributions are sufficiently narrow. Conversely, even if the gap is

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181. *See supra* Part II.

182. Keep in mind that the distributions we illustrate here are one standard deviation above and below the Justices' ideal points, which predict 68% of their votes, assuming a normal distribution. *See supra* note 39.

183. The standard deviation around Justice Thomas's ideal point was 0.41, almost four times the mean standard deviation of Justice White's in the 1970s, and over 50% larger than his own standard deviation in 1991.

Given commentary suggesting that Justice Thomas is among the Court's most predictable (conservative) voters, this finding presents something of a challenge, and one worthy of brief consideration. The seeming paradox presented by Justice Thomas illustrates the interplay between our two factors, the gap and the overlap. In 2006, Justice Thomas's distribution was the widest on the Court, yet he was positioned so far to the right that no convergence emerged between his distribution and any other Justice's, including Justice Scalia's. While Justice Thomas did occasionally overlap with another Justice—in both 1991 and 2001, he converged with Justice Scalia—he is consistently the most conservative voter on the Court. As such, despite his consistently wide distribution, his position at the extreme dampens casual observers' appreciation of his inconsistency. A similar analysis applies to Justice Stevens on the left, who in recent years has had the second broadest distribution but is consistently the most liberal voter. However, *see* note 184, *infra*.

184. Comparisons between the distributions of Justices at the center of the court and those at the extremes must be treated with great caution, as the Martin and Quinn scores systematically overestimate the width of the distributions of the extreme Justices. In simple terms, this is because the scores are derived by comparing multiple arrays of Justices and finding which set of scores best describe the votes we observe. Since the scores are unbounded, the Justices at the extremes could theoretically be more or less extreme and still result in the same voting patterns, if, for example, extreme Justices dissented on their own most often. This renders large standard errors for all of the extreme Justices. Since our ana-lysis considers only the distributions of the three central Justices, this systematic bias in the distributions of the extreme Justices should not significantly affect our results. Nevertheless, we repeated our analysis using the probability of each Justice having a specific ranking—J1, J2, etc.—instead of their ideological scores. The results were substantially identical.

185. And, in fact, our measures of the gap and of the overlap, *see infra* note 188, are highly correlated (-0.76).

wide, if the overlap is also wide, the median loses power. The reason is simple: the greater the overlap between the median and any other Justice, the more likely a majority can form without the median.

Figure 11. Preference Configurations for the 1991 and 2001 Terms of the Supreme Court
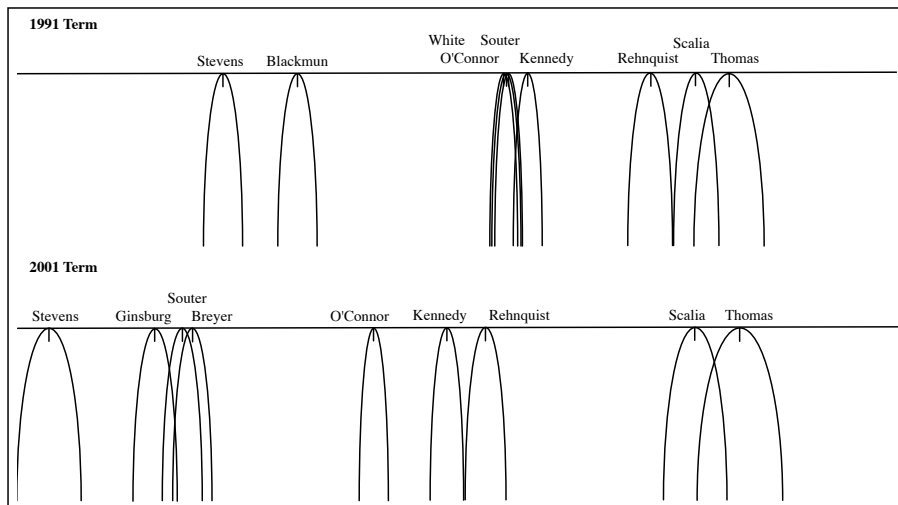
Note: The short vertical lines represent Martin and Quinn's ideal point estimate for each Justice. The curves show the distribution of their preferences.

Figure 11 shores up these points. Starting with 1991, Justice Souter may have been the Term's swing vote but, as we now know, he registered as relatively weak on several indicators of median power. In only one of the Term's sixteen prominent cases,[186] for example, did he write for the majority or plurality—and that was the joint opinion (with Justices Kennedy and O'Connor) in *Planned Parenthood v. Casey*.[187] This works out to 6.25%, well below the mean of 16.9% for the other swings (see Figure 7).

Why Justice Souter was no super median is hardly a mystery: as Figure 11 shows, an almost complete overlap exists among the distributions of Justices White (J4), O'Connor (J6), and Souter, and there is considerable convergence with Kennedy (J7) as well. To us, this suggests that Souter was the median in name only—in any given case, Justice White or Justice O'Connor were almost as likely to provide a fifth vote. The four Justices to Souter's right could have

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186. Actually, there were nineteen salient cases in the 1991 Term, but Justice Souter was in dissent in two and did not participate in one.

187. 505 U.S. 833 (1992).

coalesced with White or O'Connor, and the liberals could plausibly have formed majorities with White, O'Connor, and Kennedy.

As a result, Justice Souter was ill-poised to dictate the terms of the Court's opinions. Not so of Justice O'Connor in 2001. In direct contrast to Souter, her preferences converge with no other Justice's. This lack of overlap, in turn, made it more difficult for either camp to jump to her right or left to form a majority, leaving Justice O'Connor reasonably well positioned to see her preferences written into law.

Seen in this way, the cases of Justices Souter and O'Connor fit our general account of the relationship between the overlap and median power: configurations in which the Justices' distributions converge a great deal (e.g., the 1991 Term) lead to weak medians because coalitions can be created without them. Configurations with no overlap (for example, the 2001 Term), conversely, present far fewer opportunities for the majority to exclude the median and so give rise to stronger swings—potentially even super medians.

But does our account hold for all medians serving since 1953? To address this question, we calculated the overlap of the preference distributions for each median and the most proximate Justices (J4 and J6). Then, as we did for our analysis of the gap, we regressed each indicator of median dominance on the overlap.

Let us elaborate on both steps, beginning with our measure of the overlap. The basic idea, to reiterate, is to capture the convergence of the preference distributions of J4, J5 (the median), and J6—the shaded area indicated in Figure 12. From a statistical standpoint, this presents no great difficulties. The Martin and Quinn ideal point estimates (and standard deviations) for the median and the most proximate Justices enable us to generate one overlapping coefficient for the preference distributions of J4 and the median and one for J6 and the median.[188] The mean of the two coefficients supplies our estimate of the "overlap." Estimates close to zero indicate little overlap, while estimates close to one indicate substantial convergence.

Just as the medians evince quite a bit of variation on our measure of the gap (see Figure 9), we also observe substantial differences on our approach to assessing the overlap.[189] Figure 13 makes this clear. There we display the

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188. Put simply, the overlapping coefficient (OVL) provides a measure of agreement of two distributions (here, the Justices' preference distributions). If the OVL is 0, then the distributions do not overlap; if the OVL is 1, then the distributions are the same. For more details, including the formula used to calculate the OVL when the standard deviations of the distributions differ (as they do for the Justices), see Edwin L. Bradley, *The Overlapping Coefficient*, *in* ENCYCLOPEDIA OF STATISTICAL SCIENCES (2006), http://mrw.interscience. wiley.com/emrw/9780471667193/ess/article/ess1900/current/html (paid subscription). Also available is a Stata module, which estimates the OVL. *See* Data Analysis and Statistical Software, http://www.stata.com (last visited Sept. 8, 2008).

189. The mean of the overlap is 0.239, with a standard deviation of 0.184. The range is 0.004 (minimum) to 0.719 (maximum).

overlap for each median serving since 1953 (those with the smallest overlaps are located toward the top; those with the largest, near the bottom).

Figure 12. Hypothetical Preference Distributions for the Three Center Justices
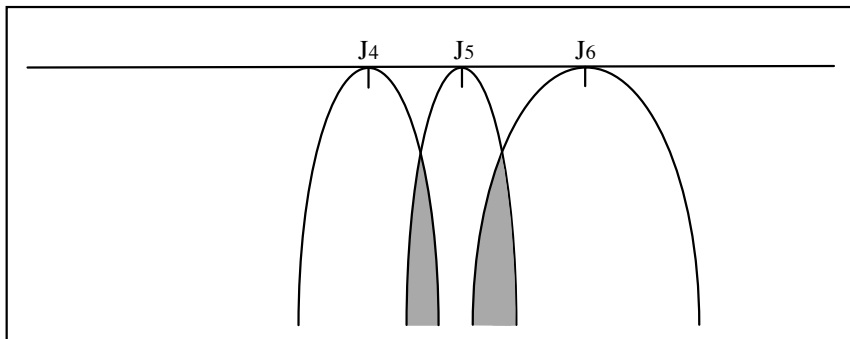
Note: The shaded area indicates the overlap, which we capture via the overlapping coefficient.[190]

Note, first, the rather large range. At one extreme are Justices O'Connor (2001 and 2005a), White (1982), Clark (1956), and Kennedy (2005b and 2006) who failed to converge with either J4 to their left or J6 to their right. At the other is Justice Souter (1991): as Figure 11 indicates, his preferences almost completely converged with those of Justices O'Connor (J5) and Kennedy (J6) and so it is not surprising that he appears at the bottom of Figure 13. Similarly situated was Justice Stewart in 1975, whose distribution was nearly indistinguishable from Justice White's.[191]

Now consider our expectation about the inverse relationship between the overlap and median power; that is, as the former decreases, the latter increases. Even a cursory look at Figure 13 lends some support to our hypothesis. With but one exception (Kennedy in 1996), all the super medians are located below the mean just as we would anticipate—and most fall in the bottom 25th percentile, including Justices Powell (1986), O'Connor (in the early 2000s), and yet again Kennedy (2006).

More systematic analyses generally confirm what our eyes tell us: for most indicators of median dominance, the overlap is a powerful predictor.[192] In

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190. For more details on the overlapping coefficient, see *supra* note 188.

191. For Justices Stewart and White, the overlapping coefficient was 0.957. This was second only to Justices Brennan and Marshall in 1968 (0.963).

192. As was the case for the gap, *see supra* note 172, our analysis of the overlap and membership in the opinion coalition in important cases fails to provide support for the hypothesis of a negative and statistically significant relationship. The resulting OLS coefficient attains statistical significance but is positive (meaning that the larger the overlap, the more likely the median is to find herself in the coalition). For membership in the majority vote coalition, the relationship runs in the hypothesized direction (negative) but is not

other words, just as we theorized, the smaller the overlap, the stronger the median.

Consider the role of swings in closely divided cases—among the most important markers of a super median. Our analysis in Part V.A indicates that the wider the interval (or gap) between Justices 4 and 6, the higher the likelihood that the median will be a member of a minimum-winning majority. The same holds for the overlap, only in reverse: it is tiny (or even no) overlaps that make the swing indispensable to minimum-winning coalitions.

This much the left panel of Figure 14 confirms. As the overlap moves from its smallest (0) to its largest levels (0.72, Souter in 1991), the expected percentage of closely divided cases in which the median finds himself in the majority declines by nearly 25%, from 78.7%[193] to 59.6%.[194] Put another way, when the convergence of preference distributions is nearly complete, it is possible that a (near) majority of winning coalitions in closely divided cases will exclude the Court's swing.[195]

Turning to the right panel of Figure 14, we can see that the overlap—no less than the gap—has a nontrivial effect on authoring important opinions. Recall from our analysis of the gap (see Figure 10) that when it is extremely wide, the median could expect to write for the majority in about a third of the Term's high-profile cases. For the overlap, the number is lower (writing about 25% of such cases)[196] but still above what we would expect by chance alone.[197] Note, too, that when convergence is extremely high, the expected percentage declines to nearly zero.[198]

Finally, just as a wide interval decreases the median's need to file special concurrences, so too does a minimal overlap. To be sure, medians only infrequently write (or join) such opinions; in fact, even when convergence among J4, J5, and J6 is very high, we expect the median to concur in the judgment in only about 5 to 10% of the cases in her swing Term.[199] Nonetheless, when the overlap is minimal, even that small percentage falls to the 2 to 5% range.

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statistically significant. The overlap is, to a statistically significant degree ($p<0.05$), associated with all other measures of median dominance, and the relationship is negative (just as we would expect if smaller overlaps lead to strong swings).

193. The 95% confidence interval is [73.90, 83.50].

194. The 95% confidence interval is [51.20, 67.90].

195. We refer here to the lower bound of the 95% confidence interval. *See supra* note 191.
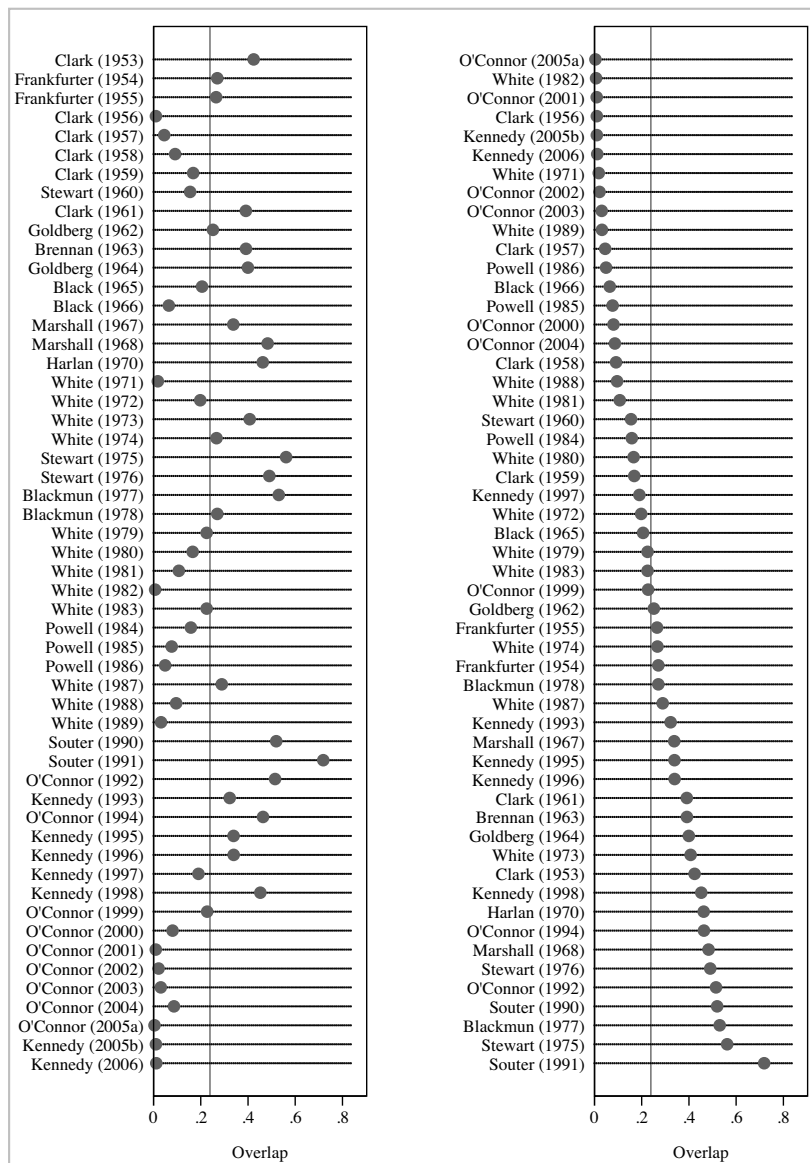
196. With a 95% confidence interval of [19, 28].

197. *See supra* note 177.

198. 2.63, with an upper bound of 10.42.

199. The expected percentage is 7.83% [5.29, 10.38].

Figure 13. The Overlap, 1953-2006 Terms

Note: This figure depicts the mean of the overlapping coefficients for (1) the median Justice (J5) and J4 and (2) the median Justice (J5) and J6. The panel on the left orders the medians by Term. The panel on the right sorts them by the overlapping coefficient. The thin vertical line indicates the mean (0.239).[200]

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200. For more details on the data underlying this figure, see *supra* notes 35, 68, 73, 168.

Figure 14. Predicted Percentages as the Overlap Increases from Very Narrow to Very Wide
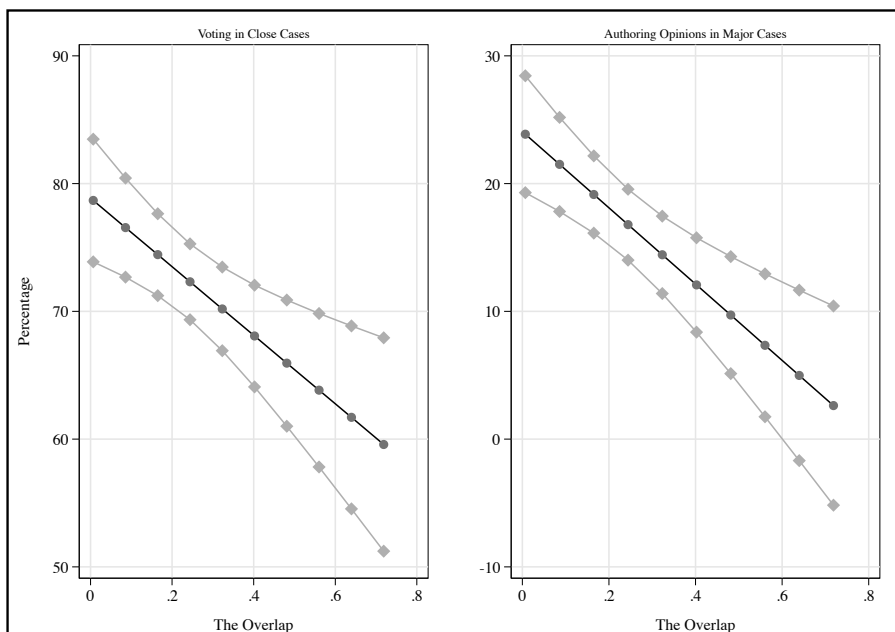
Note: The left panel shows the percentage of cases we expect to find the median in the majority in one-vote-margin cases; the right panel shows the percentage of majority opinions in important cases we expect the median to author. In both panels, the dark lines indicate the predicted values and the light gray lines show the 95% confidence interval.[201]

Our expectation was that the relationship between the overlap and median power was the inverse of the relationship between the gap and median power: as the gap increases and the overlap decreases, we predicted that median power would increase. Our findings supported our predictions on three of our five measures. In terms of predicting the median's propensity to be in the majority in five-to-four cases, the propensity to concur, and the likelihood of getting to write the opinion in important cases, the overlap is a strong and reliable predictor. Our findings in relation to the gap were similar, and we also found an effect in terms of the median's propensity to join the majority in all cases. Neither measure correlated with a tendency to be in the majority in important cases, however both predicted the tendency to author opinions in those

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201. To create this figure, we used LONG & FREESE, *supra* note 180. Because the lower bounds of the confidence interval dip below zero for the two highest levels of convergence, we do not depict them.

important cases. To test our theory, we had to develop new measures of median power, because the question of the relative strength of court medians had not been addressed before. It is possible that other, perhaps better, measures of median power can be developed to further test our theory.[202] Meanwhile, this Article provides strong preliminary evidence that our intuition that median power is shaped not simply by the position of the median but by the overall distribution of the Court has been largely borne out.

V. The Consequences of Strong and Weak Medians

We have determined which median Justices are more powerful than others, which have reached the status of super medians, and what factors determine whether a super median will emerge. As such, we believe our inquiry has obvious implications for the study of the Court. But our analysis, we believe, also yields practical implications for those who seek to influence Court outcomes, either through altering the Court's composition or shaping its determinations in specific cases. That is, our study provides clues for Presidents and senators considering potential appointments to the Court, and for practitioners litigating before it.

A. *Appointing Justices*

At the outset, we noted that the term "median Justice" has entered the legal and public lexicon. Scholars, citizens, and policy makers alike all seem to believe—and rightly so—that this is a position of some importance on the Court. Because the median, as the swing vote, determines the outcome in any close case, the question of how to "move the median" has become paramount—especially when it comes to the appointment of Justices.[203] If an appointment does not move the median, then it will not be expected to change the outcome

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202. One worthwhile line of inquiry for future work to test the relative power of medians beyond those factors we tested here would be to ascertain whether some medians, and particularly super medians, can influence other Justices' voting behavior more than others. It would be possible to test whether some medians are more or less able to shape their colleagues' votes, thereby influencing case outcomes, by comparing rates of change between conference votes and final votes.

203. As far as we can tell, Keith Krehbiel framed the term "move-the-median" to describe strategic interactions over Supreme Court appointments. Keith Krehbiel, *Supreme Court Appointments as a Move-the-Median Game*, 51 Am. J. Pol. Sci. 231, 232 (2007). But as Krehbiel notes, other scholars have developed move-the-median games, which he defines as "models that capture not only interinstitutional politics of appointments but also final-stage decision making via collective choice." *Id.* For examples pertaining to the Supreme Court, see Byron J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 Am. J. Pol. Sci. 1069, 1071 (1999); David W. Rohde & Kenneth A. Shepsle, *Advising and Consenting in the 60-Vote Senate: Strategic Appointments to the Supreme Court*, 69 J. Pol. 664, 666 (2007).

of cases. Replacement of a left-leaning judge with another, even with a relatively more left-wing judge, will not change the outcome of cases if the median remains the same; the same applies to right-wing nominees.

These days, scholars assume that the President, in selecting a nominee, is motivated by the effect that his new Justice will have on the Court's median.[204] Likewise, conventional wisdom has it that senators, in deciding whether to confirm a Justice, consider whether the new median, created by filling the vacancy, will be closer to their preferences than the previous swing.[205] Given all this attention to the Court's center, it is hardly surprising that candidates who could alter the ideological or partisan balance (and, thus, move the median) are seen as especially "critical"—so much so that they generate more than their fair share of controversy and may be far more likely to face rejection in the Senate.[206]

However informative this extant commentary, it raises two concerns. First, as a practical matter, moving the median via appointments is extremely difficult. Due to the often opposing preferences of the Senate and the President, any shift in the Court's center can only occur when the President and the Senate are (ideologically) to one side of the existing median's ideal point, and the outgoing Justice and the President do not both lie to one side of the median's ideal point.[207] Second, even if appointers succeed in moving the median, substantial legal change may not follow.[208] For, as we have demonstrated throughout, not all medians are created equal; rather, their power depends on the relative proximity and consistency of the swing's closest ideological neighbors.

Given all these complications, should Presidents and senators abandon the idea of using appointments to shift the Court's center? Hardly. While empirical evidence suggests that moving the median is difficult to do, and our analysis casts doubt on whether replacing the median is enough to affect legal decisions, our study also provides an alternative: Presidents and senators can potentially affect the relative dominance of a median, and thus judicial decisions, by

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204. *See, e.g.*, Krehbiel, *supra* note 203; Moraski & Shipan, *supra* note 203.

205. The extent to which the President must take into account the Senate's preferences depends on the institutional configuration among the President, the Senate, and the Court median prior to the vacancy being filled. *See* Moraski & Shipan, *supra* note 203, at 1075. On some accounts, the ideal point of the outgoing justice is also important. Krehbiel, *supra* note 203, at 234.

206. P.S. Ruckman, Jr., *The Supreme Court, Critical Nominations, and the Senate Confirmation Process*, 55 J. POL. 793, 793-94 (1993). Critical nominations—where there is a one-member partisan split on the Court, a partisan deadlock, or an attempt to establish a new partisan majority—result in a 42% rejection rate, whereas the rejection rate for all other nominations is 15%. *Id.* at 798.

207. Krehbiel, *supra* note 203, at 234; Rohde & Shepsle, *supra* note 203, at 676.

208. Krehbiel, *supra* note 203, at 234; *see also* LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT 137-40 (2005).

diluting or strengthening the swing's power, depending on their approval or disapproval of the extant median. To accomplish this, they need only appoint Justices who will be ideologically proximate or distant to the swing Justice.

Looking at Figure 15 allows us to imagine how the next set of appointers might approach the task. Suppose, for example, that by 2009 a Democratic President and Senate were in place, and a Justice to the median's (Kennedy's) left departed. Were this to occur, the political branches would find themselves in the not-so-atypical position of being unable to move the median. Assuming they prefer a far more liberal Justice than Kennedy, they will make an appointment to his left, which would leave Kennedy in the center seat.[209]

But how far to the left should they go? Barack Obama may be tempted to tap a liberal, say, a Justice akin to Ruth Bader Ginsburg or even Abe Fortas.[210] Our study counsels against this strategy—it will have no impact on who occupies the center seat, nor will it work to weaken Kennedy's influence or, relatedly, induce more moderate decisions. Actually, it could have the opposite effect—both of consolidating Kennedy's power and making it less enticing for him to join the liberal coalition, if only occasionally.

Better, according to our study, would be a concerted effort to dilute Justice Kennedy's power by appointing a more centrist liberal—by our data,[211] a Johnnie B. Rawlinson[212] or a Ken Salazar.[213] Either would have had the effect of filling the wide gap between Kennedy and the three remaining liberals, as we show in the top panel of Figure 15. Of course, because Kennedy would be closer to Rawlinson (or Salazar) and the other conservatives than to the three liberals, he would continue to side more often with those to his right. But at the same time a more centrist appointment would serve to dilute Kennedy's super status by reducing the gap and perhaps increasing the overlap; it would also

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209. What if a Justice to the right of Kennedy departed under a Democratic regime? Any appointment to the left of Breyer would place Breyer in the center seat. As a result, five-to-four majorities (which would include the new appointee and Breyer) would ensure mostly liberal outcomes.

210. We base this on a comparison of Obama's (-0.343) Common Space scores and Justice Fortas's (-0.404) and Justice Ginsburg's (-0.429) mean Judicial Common Space scores. Obama is to the right of Fortas and Ginsburg, but only marginally so. Keith Poole's Common Space scores are available at http://www.voteview.com/DWNL.htm. Lee Epstein, Andrew D. Martin, Jeffrey A. Segal and Chad Westerland's Judicial Common Space scores are available at http://epstein.law.northwestern.edu/research/JCS.html. *See also* Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007).

211. Our data are the Judicial Common Space scores. Epstein et al., *supra* note 210. Rawlinson's score is -0.24 and Salazar's is -0.22.

212. Judge, U.S. Court of Appeals for the Ninth Circuit.

213. U.S. senator (D-Colo.). We selected Rawlinson and Salazar as exemplars because their Judicial Common Space scores are readily available, Epstein et al., *supra* note 210, and because their names appear on at least one prominent list of possible Supreme Court nominees. Posting of Tom Goldstein to SCOTUSblog, *The Democratic (Not So) Short List*, http://www.scotusblog.com/wp/the-democratic-not-so-short-list/ (July 12, 2007, 11:12 EST).

work to induce him to join the liberals on occasion, assuming some accommodation.[214]

Figure 15. Appointment Scenarios Under (1) a Democratic President and Senate and a Departure to the Left of Justice Kennedy and (2) a Republican President and Senate and a Departure to the Right of Justice Kennedy[215]
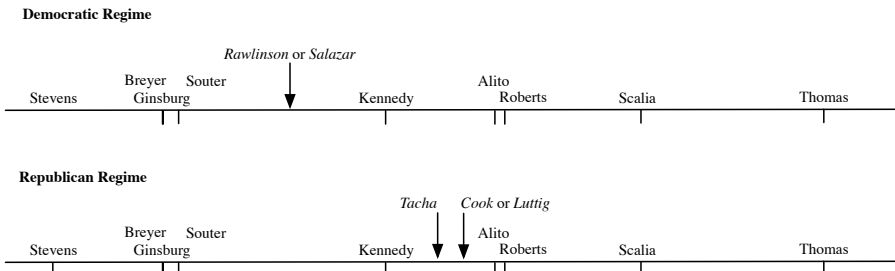
Now suppose the Republicans swept into office in 2008, led by new President John McCain. If he is among the conservatives that rue the vast power that Justice Kennedy now has,[216] he could avoid making the mistake that his predecessor did. Rather than appointing Roberts and Alito, who thus far have been almost ideologically indistinguishable, President Bush should have appointed only one of them, together with a more centrist justice. This would have had the effect of filling the wide gap between Kennedy and Alito/Roberts.

The new Republican regime could rectify this. Should a Justice to the right of Kennedy depart,[217] and should President McCain make a nomination on his

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214. A caveat, however theoretical, is in order: If a Justice actively and strategically sought to maintain (super) median status, an attempt to dilute his or her power could backfire. Filling the gap to the median's left could induce the median to move right in an effort to maintain the maximum possible remaining gap.

215. The locations of the possible nominees are based on their Judicial Common Space scores. *See supra* note 210.

216. *See, e.g.*, Joan Biskupic, *Justice Kennedy Takes Significant Spot in the Center: He Wields Crucial Tiebreaking Vote in Supreme Court*, USA TODAY, May 11, 2007, at 2A ("Through the years, Kennedy has angered justices and politicians, both conservative and liberal."); Jason DeParle, *In Battle to Pick Next Justice, Right Says Avoid a Kennedy*, N.Y. TIMES, June 27, 2005, at A1 ("For more than a decade, Justice Kennedy has infuriated the right . . . ."); Dana Milbank, *And the Verdict on Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A3 (noting that some conservative leaders believe that "Kennedy . . . should be impeached, or worse").

McCain's (Poole) Nominate score of 0.287 puts him to the right of Justice Kennedy and, actually, quite close to Scalia's 2006 Term ideal point estimate.

217. What if a Justice to the left of Kennedy retires under a Republican regime?

own ideal point (which is quite close to Scalia's),[218] Kennedy would not only return to the seat of power; he would continue his reign as a super median as well. On the other hand, were McCain to bridge the gap between Kennedy and Alito, the new Justice could effectively dilute Kennedy's power.[219] Among the viable Republican nominees fitting this description, as we show in the bottom panel of Figure 15, are Deborah L. Cook,[220] and J. Michael Luttig,[221] though both may still be too close to the Alito/Roberts pairing to dilute Kennedy's power sufficiently. Better yet may be Judge Deanell Reece Tacha,[222] who is more proximate to Kennedy.[223]

In offering this proposal, several caveats are in order. First, given the difficulty of moving the median, our analysis provides an alternative for a President contemplating an appointment that cannot replace the Court's center but could nonetheless weaken his or her power. So, naturally, if the new President has a chance to move the median, this would presumably take precedence over diluting the swing's power, and the President should take this step. Similarly, if the President can expect to move the median in a future appointment, dilution may be a secondary concern.

Second, we assume that Presidents care about more than simply shaping immediate case outcomes. If a future President McCain or Obama only wants to achieve a preferred case outcome, now or in the future, he should attempt to

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Because Roberts's and Alito's ideal points are so close together, our analysis suggests that a Republican President, operating with a Republican Senate, could appoint a nominee at his exact preference, without concern of producing an overly powerful median.

218. *See supra* note 216.

219. We should note that here we propose appointing a more centrist Justice than may suit McCain. But diluting the median's power is not always conditional on appointing centrist judges to divide the gap. Imagine if Vice President Gore had won the presidency in 2000—would Justice Kennedy still have emerged as a super median? Had a Democratic regime replaced Justice O'Connor and Chief Justice Rehnquist, if even one of those vacancies had been filled by a judge with preferences lying anywhere on the spectrum to the left of Kennedy, Kennedy would not be the median at all; Breyer would have become the median. But Breyer would not have been a super median; the extent of the overlap between Breyer, Ginsburg, and Souter's distributions would have rendered Breyer a median of only modest power. (And if both new Justices were to the left of Breyer, Ginsburg, or one of the new Justices, would have become the median.)

220. Judge, U.S. Court of Appeals for the Sixth Circuit.

221. Former Judge on U.S. Court of Appeals for the Fourth Circuit, currently General Counsel for the Boeing Company. We highlight Cook and Luttig for the same reasons we use Salazar and Rawlinson: their Judicial Common Space scores are readily available, Epstein et al., *supra* note 210, and their names appear on at least one prominent list of possible Supreme Court nominees. *See* Joseph Curl, *Bush Urges Quick Confirmation to Court*, WASH. TIMES, July 17, 2005, at A2; Posting of Tom Goldstein to SCOTUSblog, *The Republican (Not So) Short List*, http://www.scotusblog.com/wp/the-republican-not-so-short-list-2/#more-5773 (July 23, 2007, 16:17 EST).

222. Judge, U.S. Court of Appeals for the Tenth Circuit.

223. On the other hand, her age may be a factor. Born in 1946, she is older than Cook (1952) and Luttig (1954).

appoint a Justice at his exact ideal point. But Presidents may also care about shaping the law through judicial opinions and the rationales used to justify those opinions, along with the potential such rationales have to affect future precedent. In that case, Presidents will care about whether a powerful median, such as Kennedy, consistently writes important majority opinions. Our study has shown that powerful medians are considerably more likely to author opinions in major cases. Thus, a President who seeks to dilute Kennedy's power would be well advised to fill the vacancy with a Justice who shares his ideological leanings, but who may well be more moderate than the President, and so can fill the wide gap between Kennedy and the Justice closest to the President's actual ideological position.[224]

Our advice also applies if Presidents are not all that concerned with the law but do care about how their nominees fare: whether their justices are influential, and whether they get public attention (by writing opinions in prominent cases, for example). Especially if the President anticipates the opportunity to fill further judicial vacancies, his future prospects may depend on whether his last appointment is seen as a strong jurist. Appointing a Justice who shares the existing median's propensity to vote in the majority and author important opinions may make it a little easier to gain confirmation for the next nominee. For example, if President McCain's judicial appointment was a moderate conservative, to the right of Kennedy but left of Alito, she could be expected to be second only to Kennedy in her chances of authoring important major cases. That would allow her to write an opinion that moves the law slightly to the right. This, in turn, would make it easier to move the law even further to the right, if a McCain-dominated Court eventually came to pass.

In the alternative, if President Obama replaced a retiring Justice Ginsburg or Justice Souter with a moderate liberal—someone to the left of Kennedy but to the right of Breyer—that nominee would be the median member in a 7-2 coalition that excluded Justices Thomas and Scalia. Under those conditions, the Obama appointee would have a good chance of writing the opinion, and so also of attaining public recognition in a salient case, not to mention moving the law a little to the left.

These are particularly interesting scenarios given the current political climate. But it is the more general point that we want to emphasize: instead of undertaking the near-quixotic task of moving the median, Presidents and senators may be better off focusing their efforts on strengthening or diluting the power of the swing, according to their preferences.

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224. To the extent that Justices prefer to join the majority opinion rather than dissent or concur, the writer of the potential majority opinion should have some leeway to shape the law in her preferred direction, by leveraging that preference to join. This could explain why concurrences have gone up as the number of cases the Court takes has decreased—with fewer cases, the preference to join the majority is lower, as Justices have more time to write separately.

Accomplishing this requires a concentration not simply on the potential median, but on the position of the other Justices, too—though with a final caveat. Our advice to appointers is limited when the gap is already very small and the overlap very large. For a Court with an already crowded center, it would be nearly impossible for a super median to emerge, regardless of the ideological leaning of the replacement Justice. Such was the case in 1965 (see Figure 1). Back then, the addition of a liberal Justice would have rendered Justice Black the median, a conservative appointment would have moved Justice White into the median position, and a moderate candidate herself could have become the pivot. But any of these three possibilities would have created a weak median, due to the overlap among Justices Black, White, Stewart, and Harlan. The power of the nominating President and the confirming Senate to shape the power of the median Justice is limited in such a scenario.

B. *Litigating Before the Court*

But, of course, that is not the scenario today's political actors confront. There is now a super median in Kennedy, and it is not only the President and senators who must contend with this fact. Attorneys must as well, and they are. The extent to which they are now accommodating Justice Kennedy—whether in their briefs or oral arguments—is also quite well documented. Consider, for example, commentary on *Boumediene v. Bush*,[225] which asked the Court to determine whether the federal courts have jurisdiction to hear cases brought by Guantanamo Bay detainees. Writing about the briefs in the case, Kathleen Sullivan deemed them "love letters to Justice Kennedy."[226] Linda Greenhouse concurred. After oral arguments she observed, "Justice Kennedy, presumed to hold the balance in this case, was the focus of much attention by both sides." She further noted, "The significance of the eventual ruling . . . may depend on how far Justice Anthony M. Kennedy is willing to go in joining an opinion that will in all likelihood be joined by Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer."[227] She was right.[228]

That attorneys have lavished so much attention on Justice Kennedy is understandable. When there is a super median, or at least a very powerful median who commands a large area of dominance at the center of the Court, advocates have little practical option other than to shape their advocacy as "love letters" to the median Justice. For most cases, such a swing will exert

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225. 128 S. Ct. 2229 (2008).

226. Robert Barnes, *Justices Weigh Courts' Role in Detainee Cases*, WASH. POST, Dec. 5, 2007, at A20.

227. Linda Greenhouse, *Justices Ready to Answer Detainee Rights Question*, N.Y. TIMES, Dec. 6, 2007, at A32.

228. In *Boumediene*, Kennedy delivered the opinion of the Court for a minimum-winning majority of five. *See Boumediene*, 128 S. Ct. 2229.

considerable control over the dispute's resolution, as well as the opinion's rationale. And so advocates only have a chance of success if they can persuade the super median of the soundness of their case.

Far more viable options emerge, however, when the median is closely surrounded by other Justices—that is, when the gap between the median and the closest Justices is small or the overlap is large. Under such circumstances, the potential exists for shaping Court outcomes by following an approach less focused on the median and more scattershot.

To see why, recall that when the center of the Court is compressed, a range of different majorities could form with or without the median. In 1991, for instance, even a six-to-three conservative coalition—consisting of Justices Thomas, Scalia, Rehnquist, Kennedy, O'Connor, and White—could easily have formed and excluded the median, Justice Souter (see Figure 2). Similarly, Justices Stevens, Blackmun, White, O'Connor, and Kennedy could have coalesced without Justice Souter. In short, the same forces that rendered Souter a weak median—a small gap and a large overlap—provide advocates with a range of options in structuring their arguments so as to garner a majority.

This knowledge could enable advocates to maintain a majority, despite the presence of a median opposed to their arguments for idiosyncratic reasons—a conservative who personally opposes capital punishment or a liberal who is pro-life. The variance we observe in the Justices' distributions could simply result from minor differences in ideological preferences across issues. Much more likely, however, is differentiation in an individual Justice's positions based on more general factors. The two most well-recognized influences that can sway a Justice from her ideological preference are interpretive methodology and the federal-state divide. Scholars have developed some evidence that each of these factors shape judicial decision making, potentially creating different dividing lines on an issue.[229] That is, despite existing scholarship showing that one dimension can largely explain judicial decisions in the aggregate,[230] it is possible that in any specific case or issue, two or more dimensions can be salient. Even in congressional scholarship, where analysts have more firmly established the proposition that one dimension is all that is required to meaningfully array legislators ideologically,[231] at times a second dimension such as race can add predictive power to a specific issue.[232]

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229. *See* Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503 (1996); Baird & Jacobi, *supra* note 60.

230. *See supra* note 34.

231. *See, e.g.*, Poole, *supra* note 34, at 435.

232. *See, e.g.*, KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING 5 (1997) ("For most of American history, the structure is indeed one-dimensional . . . . A second continuum was most important during two periods when the race issue was central to American politics.").

As for the courts, Spiller and Tiller argue that when judicial methodological rules and policy outcomes are at odds, even outcome-oriented Justices may vote contrary to their substantive policy preferences. They cite the example of *TVA v. Hill*,[233] which concerned the application of the Endangered Species Act to the snail darter, under threat from a dam project on the Little Tennessee River. There, a conservative, presumably pro-development Court voted to stop the development because the plain meaning of the statute was unambiguous.[234] Similarly, Baird and Jacobi argue that federalism can constitute the basis for Justices voting contrary to their substantive policy preferences.[235] In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[236] for example, the conservative majority—Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas—refused to enforce claims of patent infringement against the states, despite the fact that conservative Justices usually vote strongly in favor of intellectual property claims.[237] The reason for this unusual outcome was that the conservative majority upheld the state's claim that its Eleventh Amendment immunity from suit had been improperly waived by Congress.[238] If interpretive mode or federalism can prompt one Justice to decide a case differently, then these factors can potentially constitute the basis for an alternative majority coalition to form.

As such, advocates should look to the position of every Justice on the Court, and consider whether, given their estimates of the gap and the overlap, they are limited to persuading the median, or whether they might be able to coalesce an alternative majority. When the median is weak, litigators have more options in terms of structuring their arguments and influencing outcomes. In contrast, when the swing is strong, Presidents and senators have greater opportunities to shape the power of the median and, ultimately, to influence outcomes. The key to both sets of analyses is the gap and the overlap, and

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233. 437 U.S. 153 (1978).

234. Spiller and Tiller argue that the Court did this safe in the knowledge that Congress would override its decision. Spiller & Tiller, *supra* note 229, at 511-14.

235. Baird & Jacobi, *supra* note 60, at 1.

236. 527 U.S. 627 (1999).

237. *See* Matthew Sag, Tonja Jacobi & Maxim Sytch, *Ideology and Exceptionalism in Intellectual Property—An Empirical Study*, 97 CAL. L. REV. (forthcoming June 2009).

238. For analysis and other examples of "disordered voting," that is, coalitions of Justices that cross a typical ideological divide, see Paul H. Edelman et al., *Measuring Deviations from Expected Voting Patterns on Collegial Courts* (Vanderbilt Law and Economics Working Paper No. 07-31, 2007), *available at* http://ssrn.com/abstract=998297. Examples include *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184, 195-98 (1964) (Brennan, J., joined by Warren, Black, Clark & Goldberg, JJ.) (finding Alabama liable for suit under the Federal Employers' Liability Act, due to state waiver of immunity from suit); *see id.* at 198 (White, Douglas, Harlan & Stewart, JJ., dissenting) (arguing that absent an express state waiver, the statute should not be applicable).

knowing whether the Court houses a super median.[239]

<div align="center">CONCLUSION</div>

Just as understanding the relative weight of precedents and statutes can inform litigation strategies and decisions over Supreme Court nominees, so it goes with median Justices. When swings are powerful, super even, not only do they hold the decisive vote in close cases; they also have the power to shape doctrine by authoring opinions in especially important suits. Hence, knowing whether the Court houses a dominant median should inform the kinds of arguments attorneys develop in order to garner a majority. Likewise, policy makers seeking to influence the direction and content of the Court's decisions should contemplate the strength of the Justice who occupies the center seat. By identifying nominees who are proximate (or distant) to the existing swing, they have the opportunity to shape median power and, in turn, the detail of precedent.

Seen in this way, predicting whether a new appointee will give way to a super median is crucial to all actors seeking to influence the future contours of the law. Happily, making this determination is no daunting venture because dominant swings seem to be a product of their environment, and not their personal attributes. To be sure, some commentators have suggested that certain types of Justices are prone to being especially strong or weak by virtue of their personality, methodological approach, or even background characteristics.[240] But our analysis suggests quite the opposite: because median power is less about the inherent traits of the Court's pivot—whoever she might be—than about the proximity of the other Justices, a weak median can morph into a dominant swing in the matter of a year. Conversely, attaining super median status in one Term hardly guarantees holding that title indefinitely: a reduction in the gap or an increase in the overlap can be like kryptonite to the powers of a super median.

It follows from this fact—that super medians are not born but emerge from their circumstances—that efforts to distinguish Justices who are swings in name only from those who are dominant is a task with meaning. This is as true for lawyers seeking to present compelling arguments as it is for Presidents and

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239. For more on this point, see *infra* Conclusion.

240. *See, e.g.*, JAN CRAWFORD GREENBURG, SUPREME CONFLICT (2007) (suggesting that the Justices' personal attributes help or hinder their ability to attract votes for their opinions); JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA (2006) (recounting how personalities and personal rivalries have transformed the law); Lithwick, *supra* note 127, at B1. We leave it to others to conduct explicit tests of the argument that the Justices' biographies themselves do not determine super status. But the fact that Justices swing in and out of super median status seems to us to provide strong evidence consistent with—if not entirely proof positive of—the claim that median power is not inherent to judicial personality or experience.

senators intent on moving the Court and for commentators hoping to illuminate the creation of legal doctrine.