Should Justices Ever Switch Votes?: *Miller v. Albright* in Social Choice Perspective

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This article will consider the implications of a rare, but conceptually significant, phenomenon in Supreme Court decision making. The Supreme Court has occasionally issued opinions in which the justices' own assessments of the relationships between and among identified dispositive issues, and the votes cast by the individual justices over those issues, demonstrate a logical voting path leading to the dissenting result. In an even rarer group of just three known cases, one or more justices has attempted to avoid the undesirable consequence of a Supreme Court ruling that is in a significant sense at odds with itself by conceding to a contrary majority on one dispositive issue, thus joining as part of a majority on the remaining dispositive issue or issues. This form of vote switching produces its own anomaly, albeit one that affects the internal logic of the opinion of the vote-switching justice, rather than one that affects the aggregate relationship between the underlying issue resolutions and the judgment for the Court as a whole. The justice who concedes to a contrary majority avoids the anomaly of an

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HeinOnline -- 7 Sup. Ct. Econ. Rev. 87 1999

opinion in which the justices' collective resolution of identified dispositive issues leads to the opposite holding, but does so by casting a judgment vote that is inconsistent with the internal logic of his own opinion.

By evaluating the Supreme Court's most recent voting-anomaly case, one which did not produce a vote switch, namely Miller v. Albright, *this article will consider first, the conditions that give rise to the voting anomaly, and second, the conditions under which we could predict that individual justices would or would not be inclined to concede to a contrary majority on an underlying dispositive issue. This article develops a model, based upon the theory of social choice, which helps to distinguish the characteristics that underlie those rare cases which have produced vote switches from those underlying the more common, but still infrequent overall, cases in which in spite of a voting anomaly, no justice has chosen to switch his vote. The article concludes with some insights into why, despite the presence of a voting anomaly, such a vote switch did not occur in Miller itself.*

TABLE OF CONTENTS

HeinOnline -- 7 Sup. Ct. Econ. Rev. 88 1999

This article will consider the implications of a rare, but conceptually significant, phenomenon in Supreme Court decision making. The Supreme Court has occasionally issued opinions in which the justices' own assessments of the relationships between and among identified dispositive issues, and the votes cast by the individual justices over those issues, demonstrate a logical voting path leading to the dissenting result. In an even rarer group of just three known cases, one or more justices has attempted to avoid the undesirable consequence of a Supreme Court ruling that is in a significant sense

HeinOnline -- 7 Sup. Ct. Econ. Rev. 89 1999

at odds with itself by conceding to a contrary majority on one dispositive issue, thus joining as part of a majority on the remaining dispositive issue or issues. This form of vote switching produces its own anomaly, albeit one that affects the internal logic of the opinion of the vote-switching justice, rather than one that affects the aggregate relationship between the underlying issue resolutions and the judgment for the Court as a whole. The justice who concedes to a contrary majority avoids the anomaly of an opinion in which the justices' collective resolution of identified dispositive issues leads to the opposite holding, but does so by casting a judgment vote that is inconsistent with the internal logic of his own opinion.

The practice of vote switching has received relatively little scholarly attention. With just a single exception,[1] the attention it has received has been a byproduct of scholarly inquiries into the normative question whether the Court would achieve more rational, consistent, or coherent, doctrine in cases that generate a voting anomaly of the sort described above if it regularly, or even occasionally, allowed the collective resolution of the underlying issues to control the Court's outcome, rather than the collective votes on the outcome itself.[2] While that literature is relevant to the question addressed here, it remains distinct.[3] By evaluating the Supreme Court's most

[1] Thus far, only one article has been written that is principally focused upon vote switching itself. See John M. Rogers, *"I Vote This Way Because I'm Wrong": The Supreme Court Justice as Epimenides*, 79 Ky L J 439 (1991) ("Rogers, *Epimenides*"). In this important article, Professor Rogers demonstrates that by the time of its publication, there had been only three cases in which one or more justices switched his vote to avoid the anomaly described in the text. Professor Rogers further considers whether vote switching is normatively defensible, and concludes that it is not.

[2] See, for example, David G. Post and Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multimember Panels*, 80 Georgetown L J 743 (1992) ("Post and Salop, *Rowing Against the Tidewater*") (arguing that the Supreme Court should regularly employ issue voting); Lewis A. Kornhauser and Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 Cal L Rev 1 (1993) (arguing that the Supreme Court should choose issue or outcome voting by majority vote on a case-by-case basis when a voting anomaly arises); John M. Rogers, *"Issue Voting" by Multimember Appellate Courts: A Response to Some Radical Proposals*, 49 Vand L Rev 997 (1996) (arguing against issue voting proposals on ground that they would increase problem of doctrinal indeterminacy and undermine integrity of rule of law); David G. Post and Steven C. Salop, *Issues and Outcomes, Guidance, and Indeterminacy: A Reply to Professor John Rogers and Others*, 49 Vand L Rev 1069, 1079 (1996) (providing further defense of issue voting proposal); Maxwell L. Stearns, *How Outcome Voting Promotes Principled Issue Identification: A Reply to Professor John Rogers and Others*, 49 Vand L Rev 1045 (1996) (arguing against issue voting proposals based upon insights drawn from social choice).

[3] For another related article, see David A. Skeel, Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 Va L Rev 127 (1997) (employing social choice analysis to consider the implications of the unanimity norm in the Delaware Supreme Court).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 90 1999

recent voting-anomaly case, one that did not produce a vote switch, namely *Miller v. Albright*,[4] this article will consider, first, the conditions that give rise to the voting anomaly, and second, the conditions under which we could predict that individual justices would or would not be inclined to concede to a contrary majority on an underlying dispositive issue. This article develops a model, based upon the theory of social choice, which helps to distinguish the characteristics underlying those rare cases that have produced vote switches from those underlying the more common, but still infrequent overall, cases in which despite the presence of a voting anomaly, no justice has chosen to switch his vote.

The analysis proceeds in three steps. Following a description of *Miller* in part I, part II sets out three case paradigms, which will help to identify the conditions under which a *Miller*-like voting anomaly has the potential to arise. Of the three paradigms—cases with a unidimensional issue spectrum; cases with a multidimensional issue spectrum and symmetrical preferences; and cases with a multidimensional issue spectrum and asymmetrical preferences—only the final category has the potential to generate a voting anomaly in which the majority resolutions of identified dispositive issues produces a logical voting path leading to the dissenting result. Part II further evaluates each paradigm based upon the relevant social choice criteria to determine whether it is capable of generating a voting cycle. Part III then introduces several cases that fall into the final, and problematic, paradigm, some of which have resulted in a vote switch, and others of which have not. That part expands upon the social choice model introduced in part II to identify the conditions that likely give rise to decisions by individual justices to concede to a contrary majority resolution on an underlying dispositive issue. The article concludes with some insights into why, despite the presence of a voting anomaly, such a vote switch did not occur in *Miller* itself.

I. MILLER V. ALBRIGHT: DIVERGENCE OF ISSUES AND OUTCOMES IN CHALLENGE TO THE IMMIGRATION AND NATURALIZATION ACT

In *Miller v. Albright*,[5] the Supreme Court considered a Fifth Amendment Due Process challenge to a provision of the Immigration and Naturalization Act (INA) that imposed different requirements upon the citizen father and citizen mother of a foreign-born illegitimate

[4] 118 S Ct 1428 (1998).
[5] Id.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 91 1999

child as a precondition to conferring citizenship status on the child when the other parent is not a U.S. citizen. Petitioner, Lorelyn Penero Miller, was born out of wedlock on June 20, 1970, in the Philippines to a U.S. citizen father and a Filipino mother. Under the challenged INA provision, petitioner's father was required to undertake certain affirmative steps before petitioner reached the age of twenty-one, as a precondition to petitioner's receiving U.S. citizenship. Had her mother, instead, been the U.S. citizen, petitioner would automatically have received citizenship status from the time of her birth.

The *Miller* Court produced five separate opinions, three opinions of two justices each, which together denied petitioner's claim to citizenship, and two opinions each joined by the three dissenting justices, who would have struck down the challenged INA provision and thus conferred citizenship upon petitioner. While six of the nine justices voted to deny petitioner relief, tallying the justices' votes on each of the underlying dispositive issues produces a logical progression leading to the dissenting result.

Under the challenged INA provision, a child born out of wedlock to a U.S. citizen father and a non-U.S. citizen mother outside the U.S. can acquire citizenship only if the father formalizes his relationship with the child before the child reaches the age of twenty-one.[6] Congress amended the challenged statutory provision in 1986, lowering the age for formalizing the relationship between a father and his illegitimate foreign-born child to eighteen,[7] and imposing several additional preconditions to receiving citizenship.[8] In his opinion

[6] See id at 1432 n 3 (Stevens, announcing the judgment of the Court).

[7] See id (noting that while in 1986, the INA was amended to change the age from twenty-one to eighteen, petitioner, who was born prior to 1986, "[fell] within a narrow age bracket whose members may elect to have the pre-amendment law apply.").

[8] As cited by the Court, the amended statute provides that:

"Citizenship of such persons is established if:

'(1) a blood relationship between the person and the father is established by clear and convincing evidence,

(2) the father had the nationality of the United States at the time of the person's birth,

(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

(4) while the person is under the age of 18 years

(A) the person is legitimized under the law of the person's residence or domicile,

(B) the father acknowledges paternity of the person in writing under oath, or

(C) the paternity of the person is established by adjudication in a competent court.' "

Id at 1435 (citing 8 USC § 1409(a) (as amended 1986)) (Stevens, announcing the judgment of the Court).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 92 1999

issuing the Court's judgment (joined by Chief Justice Rehnquist), however, Justice Stevens explained that petitioner's status was to be determined according to the pre-amendment version of the statute. Under the relevant pre-amendment provision, petitioner only needed to obtain "formal proof of paternity by age [twenty-one], either through legitimation, written acknowledgment by the father under oath, or adjudication by a competent court."[9]

Petitioner's father, Charlie Miller ("Miller"), served in the U.S. Air Force, where he was stationed in the Philippines at the time his daughter was conceived.[10] After his tour of duty, Miller returned to the United States, where he resided in Texas.[11] Miller apparently had little if any contact with his daughter until she reached adulthood.[12] In November 1991, shortly after she turned twenty-one, petitioner filed an application for registration as a U.S. citizen with the State Department, which was denied in March 1992.[13] Miller then filed a petition in a Texas state court in 1992 to formalize his relationship with his daughter, which was granted in July 1992.[14] After her father obtained the paternity decree, petitioner reapplied for citizenship with the state department, but her second application was denied on the ground that her father had failed to formalize his relationship with her before she had reached the age of eighteen, as required by the amended statute.[15] In his opinion announcing the judgment for the Court, Justice Stevens noted that while petitioner fell within the narrow window allowing the formalization to occur prior to her twenty-first birthday, she had nevertheless failed to satisfy even this more relaxed statutory requirement in a timely fashion.[16]

In 1993, petitioner and her father filed a federal suit in Texas against the Secretary of State, alleging that the INA's differing treatment of citizen fathers and citizen mothers violated Mr. Miller's rights under the equal protection component of the Fifth Amend-

[9] *Miller*, 118 S Ct at 1436.

[10] See id at 1432-33.

[11] See id.

[12] See id ("[Miller] never married petitioner's father, and there is no evidence that he was in the Philippines at the time of petitioner's birth or that he ever returned there after his tour of duty"); id at 1439 ("Mr. Miller and petitioner both failed to take any steps to establish a legal relationship with each other before petitioner's 21st birthday, and there is no indication in the record that they had any contact whatsoever before she applied for a United States passport.").

[13] See id at 1433.

[14] See id.

[15] See id.

[16] See id at 1433 n 3.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 93 1999

ment due process clause.[17] The District Court dismissed Miller from the case on the ground that he lacked standing to raise the due process claim, meaning that the court determined that the daughter, rather than the father, was the real party of interest in the suit.[18] Without Mr. Miller, the only Texas citizen who was a party to the suit, venue was no longer proper, and the suit therefore could not proceed in Texas.[19] The Texas court thus transferred the case to the United States District Court for the District of Columbia.[20] That court then dismissed the suit on the ground that, even if the challenged provision of the INA violated due process, the Constitution expressly confers the authority over naturalization to Congress. As a result, the court concluded that the federal courts lack the authority to redress petitioner's claimed injury, and thus to confer citizenship, except pursuant to the terms of a federal statute.[21]

In a split panel decision, the United States Court of Appeals for the District of Columbia Circuit affirmed the dismissal on different grounds than those relied upon in the District Court. The appeals court began by rejecting the government's challenge to petitioner's standing, reasoning that if petitioner succeeded on the merits of her claim, the court would then hold that she was already a citizen pursuant to other provisions of the INA. On the merits, however, the court reasoned that because citizen mothers and citizen fathers were not similarly situated in this context, the appropriate test was rational basis scrutiny. Under that standard, the court concluded that the scheme rationally furthered the government's legitimate interest in fostering the child's ties with the United States.[22]

The Supreme Court granted certiorari to resolve whether the challenged INA provision violates the Fifth Amendment Due Process Clause. As stated above, the Supreme Court badly splintered in

[17] Beginning with *Bolling v Sharpe*, 347 US 497 (1954), the Supreme Court has construed the Fifth Amendment Due Process Clause to include an equal protection component. Because the Fourteenth Amendment equal protection clause applies only to the states, following *Brown v Board of Education of Topeka*, 347 US 483 (1954), the *Bolling* Court employed the Fifth Amendment Due Process clause to end legalized segregation of public schools in the District of Columbia, which were regulated under federal, rather than state, law. This maneuver avoided the anomaly that Congressionally controlled schools could continue race-based segregation, while state public schools could not. Inspired by the earlier doctrine of incorporation, through which the Supreme Court construed the Fourteenth Amendment Due Process Clause to apply the substantive provisions of the Bill of Rights to the states, the doctrine established in *Bolling* has became known as "reverse incorporation."

[18] See *Miller*, 118 S Ct at 1433.

[19] Id.

[20] Id.

[21] Id.

[22] See id. at 1433-34.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 94 1999

resolving this question, producing a total of five separate opinions. In three opinions, a majority of six justices provided three entirely different rationales for denying petitioner's claim to U.S. citizenship. The remaining three justices joined the two dissenting opinions, each voting to strike the statute down, and thus to confer citizenship status upon petitioner.

A. Justice Stevens's Opinion Announcing the Judgment for the Court

In his opinion announcing the Court's judgment, joined only by Chief Justice Rehnquist, Justice Stevens identified three underlying issues that he deemed critical to the outcome of the case: (1) Does petitioner have standing to raise her father's Fifth Amendment Due Process Clause challenge to § 1409(a) of the INA?[23]; (2) Does the Court's general standard of review governing sex-based classifications, namely heightened scrutiny (also referred to as intermediate scrutiny) apply, or does a more relaxed standard apply, given that the statute is premised upon real differences between citizen mothers and citizen fathers as it relates to raising foreign born illegitimate children?[24]; and (3) Is the chosen standard satisfied in this

[23] See id at 1436. As explained below, Stevens also considered and rejected petitioner's independent challenge to the statute, arising from her own status as a foreign-born illegitimate daughter of a United States citizen father.

[24] Although Justice Stevens never articulates the relevant test for assessing the gender-based distinction drawn in the challenged INA provision, he does question whether heightened scrutiny applies in this context. See id. at 1437 n 11. When discussing petitioner's independent challenge arising from her status as the foreign born illegitimate daughter of a citizen father in section IV of his opinion, Stevens employs a mixture of characterizations drawn from both rational basis scrutiny and heightened scrutiny, see, for example, id at 1440 ("[w]e are convinced not only that strong governmental interests justify the additional requirement imposed on children of citizen fathers, but also that the particular means used in § 1409(a)(4) are well tailored to serve those interests"); id at 1439 ("It was surely reasonable when the INA was enacted in 1952, and remains equally reasonable today, for Congress to condition the award of citizenship to such children on an act that demonstrates, at a minimum, the possibility that those who become citizens will develop ties with this country—a requirement that performs a meaningful purpose for citizen fathers but normally would be superfluous for citizen mothers."). In contrast, in discussing the gender-based challenge, Stevens reasons that the "gender equality principle" at issue in those cases in which discrimination "is merely the accidental byproduct of a traditional way of thinking about females," id at 1441 (internal quotations omitted), "is only indirectly involved in this case." Id. Stevens fails to articulate which standard applies and inquires only whether Congress has devised a relevant gender-based distinction. Thus, Stevens reasons that "[n]one of the premises on which the statutory classification is grounded can be fairly characterized as an accidental byproduct of a traditional way of thinking about members of either sex. The biological differences

HeinOnline -- 7 Sup. Ct. Econ. Rev. 95 1999

case?[25] Justice Scalia (joined only by Justice Thomas) concurred in the judgment without addressing the merits of the underlying challenge, and therefore declined to reach the second and third issues. The remaining justices agreed to Justice Stevens's formulation of the case issues, although they expressed vigorous disagreement as to how those issues should be resolved.

Justice Stevens quickly dispensed with the challenge to petitioner's standing. To analyze that issue, Stevens distinguished two due process claims that petitioner raised in her challenge to the INA. With respect to petitioner's own claim, as opposed to that of her father, Stevens concluded that she had standing, given that she was seeking a judgment that would affirm "her preexisting citizenship rather than grant her rights that she does not now possess."[26] With respect to her father's claim, Stevens also concluded that petitioner had standing, given that "her claim relies heavily on the proposition that her citizen father should have the same right to transmit citizenship as would a citizen mother."[27]

As a general matter, Stevens observed, the Court applies heightened scrutiny in cases presenting challenges to statutes that are based upon "overbroad stereotypes about the relative abilities of men and women."[28] In this case, however, Stevens reasoned that the challenged provision of the INA was not based upon overbroad generalizations about men and woman, but rather, was based upon real differences between them.[29] Since mothers, but not fathers, are inevitably aware of the birth of an illegitimate child, and since moth-

between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands." Id at 1442. This part of Stevens's opinion can be read in either of two ways. First, Stevens might be suggesting that real differences satisfy the heightened scrutiny test, albeit one that is more relaxed than the "skeptical scrutiny" embraced in *United States v Virginia*, 518 US 515, 531 (1996). See *Miller*, 118 S Ct at 1437 n 11 (declining to apply *Virginia* standard for heightened scrutiny). Second, consistently with the intuition embraced by the United States Court of Appeals for the District of Columbia Circuit, he might be suggesting that, when a gender-based statutory distinction is founded upon real differences, the relevant test is rational basis scrutiny, under which the Court will inquire only whether Congress embraced a relevant distinction. The argument in the remainder of this part applies whichever reading one finds more persuasive. Under either reading, Stevens (joined by Rehnquist), appears as part of a minority applying a more relaxed standard than heightened scrutiny as embraced by the *Virginia* Court, and as part of a minority concluding that his chosen standard is satisfied in this case.

[25] See id at 1432.

[26] Id at 1436.

[27] Id at 1436.

[28] Id at 1437; see also id n 11.

[29] See id at 1438.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 96 1999

ers, but not fathers, are almost invariably involved in the child's upbringing, Stevens inquired only whether Congress had devised a relevant distinction between citizen mothers and citizen fathers for purposes of the INA's naturalization requirements. With respect to petitioner's own claim, Stevens concluded that her challenge failed even under the heightened scrutiny test. Specifically, Stevens identified the following three objectives as "strong governmental interests" that the challenged provision was "well tailored to serve": (1) deterring fraud in citizenship claims; (2) encouraging a healthy relationship between the child and the U.S. citizen parent; and (3) fostering ties between the foreign born child and the United States.[30] Thus, Justice Stevens voted to sustain the challenge INA provision against both of petitioner's challenges.

B. Justice O'Connor's Opinion Concurring in the Judgment

In an opinion concurring in the judgment, Justice O'Connor, joined only by Justice Kennedy, began by articulating a basic principle of standing, namely the presumption against allowing one person to litigate the claim of another. Justice O'Connor stated: "This Court has long applied a presumption against allowing third-party standing as a prudential limitation on the exercise of federal jurisdiction."[31] By "prudential," Justice O'Connor meant that Congress has the constitutional authority to overcome the presumption against third-party standing by statute, thus creating the power in specified individuals to enforce the rights of others.[32] Justice O'Connor reasoned that, while petitioner also presented a due process challenge to the INA provision on her own behalf, petitioner's stronger due process challenge rested with her father because it was based upon the statute's sex-based distinction for naturalizing illegitimate children born outside the United States between U.S. citizen fathers and U.S. citi-

[30] See id at 1440.

[31] Id at 1442 (O'Connor, concurring in the judgment).

[32] For examples of cases in which the Supreme Court has allowed liberal standing based upon the Fair Housing Act, see *Havens Realty Corp. v Coleman*, 455 US 363, 373-74 (1982); *Gladstone, Realtors v Village of Bellwood*, 441 US 91, 109-15 (1979); *Village of Arlington Heights v Metropolitan Hous. Dev. Corp.*, 429 US 252, 264 (1977); *Trafficante v Metropolitan Life Ins. Co.*, 409 US 205, 212 (1972). See also Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence* 144 U Pa L Rev 309, 391 (1995) ("Stearns, *Historical Evidence*") (collecting authorities); David A. Logan, *Standing to Sue: A Proposed Separation-of-Powers Analysis*, 1984 Wis L Rev 37, 64-81 (same). For a discussion of how Justices O'Connor and Kennedy have analyzed Congressional grants of standing in cases prior to *Miller*, see note 191 below, and cases cited therein.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 97 1999

zen mothers.[33] O'Connor further recognized that the Court has generally allowed an exception to its presumptive rule against third-party standing when the person raising the legal challenge has a sufficiently concrete interest, demonstrates a close relationship with the person whose rights have been violated, and further demonstrates that the person whose rights have been violated has been substantially hindered in his efforts to raise his own claim.[34] Justice O'Connor declined to apply that exception in *Miller*, however, because, regardless of the close legal relationship between petitioner and her father, her father did not face a substantial hindrance in the pursuit of his own due process claim. Instead, he had simply declined to appeal his dismissal from the suit originally filed in the United States District Court for the Eastern District of Texas.[35] Because she concluded that petitioner lacked standing to raise her father's due process challenge, O'Connor limited herself to considering petitioner's own constitutional challenge, which did not involve a statutory sex-based distinction. Thus, O'Connor stated:

> Although petitioner cannot raise her father's equal protection rights, she may raise her own. . . . Her challenge, however, triggers only rational basis scrutiny. . . . Given that petitioner cannot raise a claim of discrimination triggering heightened scrutiny, she can argue only that § 1409 irrationally discriminates between illegitimate children of citizen fathers and citizen mothers. Although I do not share Justice Stevens' assessment that the [challenged INA] provision withstands heightened scrutiny, . . . I believe it passes rational scrutiny for the reasons he gives for sustaining it under the higher standard. It is unlikely, in my opinion, that any gender classifications based on stereotypes can survive heightened scrutiny, but under

[33] See *Miller*, 118 S Ct at 1442 ("Contrary to this prudential rule, the Court recognizes that petitioner has standing to raise an equal protection challenge to 8 USC § 1409. The statute, however, accords differential treatment to fathers and mothers, not to sons and daughters.").

[34] See id at 1443. In fact, Justice O'Connor effectively raised the standard for vindicating the claim of another under this exception, as previously articulated in *Powers v Ohio*, 499 US 400, 411 (1991), from "some hindrance," see id at 411, to "substantial hindrance." See *Miller*, 118 S Ct at 1443 (O'Connor, concurring in the judgment). As a result, in his separate concurrence, Justice Scalia stated that while he would have agreed with Justice O'Connor's decision to deny petitioner standing to raise her father's claim as an original matter, the Court's standing precedents, which had afforded third party standing in similar circumstances even with a lesser hindrance, prevented him from doing so in *Miller*. See *Miller*, 118 US at 1447 n 1 (Scalia, concurring in the judgment).

[35] See id at 1444.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 98 1999

> rational scrutiny, a statute may be defended based on generalized classifications unsupported by empirical evidence. . . . This is particularly true when the classification is adopted with reference to immigration, an area where Congress frequently must base its decisions on generalizations about groups of people.[36]

As set out more fully below, and as both dissenting opinions observed, O'Connor's analysis strongly suggests that had she reached the opposite conclusion on the issue of standing, thus addressing the merits of the father's underlying due process claim, she would then have applied heightened scrutiny and voted to strike down the challenged INA provision, with the effect of conferring citizenship status upon petitioner.

C. Justice Scalia's Opinion Concurring in the Judgment

In his opinion concurring in the judgment, joined only by Justice Thomas, Justice Scalia also addressed the issue of standing. But rather than addressing the relevant standard of review and whether that standard was met, Scalia disposed of the case by resolving an altogether different issue: Even assuming that the challenged INA provision is unconstitutional, do the federal courts have the authority to strike down an allegedly unconstitutional provision of a naturalization statute and then apply the now-revised statute to confer citizenship, when the congressionally mandated provisions for naturalization had not been met?[37] Justice Scalia concluded that the answer to that question was no, and therefore that separation-of-powers prevented the Court from affording petitioner relief without regard to the merits of the underlying constitutional challenge raised by petitioner on her own behalf or on behalf of her father.[38]

On the preliminary issue of standing, Justice Scalia noted that, if he were addressing the question absent binding precedent, he would have agreed with Justice O'Connor and voted to deny standing.[39] But he went on to note that, in prior cases, the Court had conferred standing upon claimants who had a close relationship with the people whose claims they were raising, even when those third parties had suffered far less of a hindrance than Mr. Miller had in this case.[40] Scalia further noted that, because petitioner was ultimately pursuing

[36] Id at 1445-46.
[37] See id at 1447 (Scalia, concurring in the judgment).
[38] See id.
[39] See id at 1447 n 1.
[40] See id.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 99 1999

her own claim to citizenship, she was entitled to standing as "the least awkward challenger."[41]

Scalia then resolved the question whether federal courts have the power to confer citizenship other than pursuant to a congressionally enacted statute. He did so through a strict textualist application of the Constitution. Scalia began by noting that under Article I, which states that "[t]he Congress shall have Power . . . To establish an uniform Rule of Naturalization . . . ,"[42] persons can acquire citizenship only through birth or naturalization.[43] Because petitioner was not U.S. born, Scalia reasoned that, to gain citizenship status, petitioner needed to establish full compliance with a congressionally enacted statute setting out the requirements for naturalization. Scalia suggested that the Court may be able to correct the State Department's factual error respecting compliance with the INA because the Court would thereby confer citizenship consistently with the terms of a federal statute, and thus would not thwart congressional exclusivity to determine the requirements for naturalization.[44] But Scalia reasoned that a federal court lacks the authority to correct even an apparent constitutional defect in a naturalization statute and then confer citizenship based upon a judicially-amended version.[45] Having concluded that the Court lacks the power to confer citizenship, Justice Scalia declined to address the merits of petitioner's due process claim.[46]

D. The Dissenting Opinions of Justices Ginsburg and Breyer

Of the remaining justices, Justices Ginsburg and Breyer wrote dissenting opinions joined by all three dissenters, including Justice Souter. For the most part, the two dissents took substantially similar views of the critical underlying issues. As a result, I will treat the two opinions together.

Justice Breyer began by concluding that petitioner had standing to assert her father's due process claim because she had an injury in fact, she had a special relationship with her father, and her father suffered some hindrance in the pursuit of his own claim.[47] In addition, both

[41] See id.

[42] Id at 1446 (citing US Const, Art I, § 8, cl 4).

[43] See id (Scalia, concurring in the judgment).

[44] See id.

[45] See id at 1447.

[46] Id at 1449 ("In sum, this is not a case in which we have the power to remedy the alleged equal protection violation by either expanding or limiting the benefits conferred so as to deny or grant them equally to all.").

[47] See id at 1456 (Breyer, dissenting).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 100 1999

Justices Ginsburg and Breyer determined that in evaluating petitioner's claim and that of her father, the relevant test was heightened scrutiny, under which the challenged provision, which each concluded was based upon antiquated sex-based stereotypes, could not survive.[48] Justice Ginsburg noted that under Supreme Court case law, it is not sufficient that those assumptions underlying a sex-based statute are generally true.[49] Instead, she observed, "the Court has rejected official actions that classify unnecessarily and overbroadly by gender when more accurate and impartial functional lines can be drawn."[50] Justice Breyer expressed a similar intuition in suggesting that a scheme distinguishing the caretaker from the non-caretaker parent could achieve the same statutory objectives without resting upon sex-based stereotype, even if that stereotype generally characterizes most cases.[51]

More importantly, both Justices Ginsburg and Breyer went on to note, based upon the discussion in Justice O'Connor's concurring

[48] See id at 1449-50, 1454 (Ginsburg, dissenting); id at 1445, 1457, 1458; (Breyer, dissenting).

[49] See id at 1454 (Ginsburg, dissenting).

[50] Id at 1450.

[51] See id at 1461 (Breyer, dissenting). One interesting difference between the dissenting opinions was Justice Breyer's repeated characterization of Justice O'Connor's opinion stating that rational basis scrutiny applied to petitioner's own claim, and of Justice Stevens's opinion suggesting that a relaxed version of heightened scrutiny or rational basis scrutiny applied to the gender-based discrimination claim, as embracing a "specially lenient," standard of review, and words to similar effect. See id at 1458 (describing rational basis scrutiny as "specially lenient"); id at 1460 (asserting that rational basis is an "unusually lenient constitutional standard of review," and that heightened scrutiny is an "undiluted equal protection standard."). Breyer contrasted the application of rational basis scrutiny in this case with the many contexts in which the Court has traditionally applied a more exacting standard, in the form of either intermediate or strict scrutiny. See id at 1460. The characterization "specially lenient" to describe rational basis scrutiny is remarkable in that it implies a fundamentally different baseline of analysis for constitutional challenges than has traditionally been applied. If rational basis is "specially lenient," that suggests that one of the two stricter standards—intermediate or strict scrutiny—is, for Justice Breyer, the conventional, or presumptive, standard of review in cases presenting constitutional challenges. But, of course, the choice of standard of review is ultimately no more than a presumption in favor of, or against, the constitutionality of a challenged statute. See Maxwell L. Stearns, *Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making* ch 1 (forthcoming University of Michigan Press) ("Stearns, *Constitutional Process*"). The difficulty with Breyer's characterization is that it implies that, in all cases raising constitutional challenges to underlying statutes, the presumptive rule would be *against* constitutionality, with the burden on the government to establish otherwise. Only in narrow and so far undefined circumstances would the Court apply the "specially lenient" rational basis test, under which the court presumes in favor of the constitutionality of the challenged law. This approach would have the potential to dramatically alter the landscape of constitutional adjudication.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 101 1999

opinion, that a majority of the Court appeared to agree that, on the merits, the challenged INA provision should have been struck down. Thus, Justice Ginsburg stated:

> As JUSTICE O'CONNOR's opinion makes plain, distinctions based upon gender trigger heightened scrutiny and "[i]t is unlikely . . . that any gender classifications based on stereotypes can survive heightened scrutiny."[52]

And after noting that he would have applied heightened scrutiny to both petitioner's own claim and to that of her father, Justice Breyer went on to observe:

> Regardless, like JUSTICE O'CONNOR, I "do not share," and thus I believe a Court majority does not share, "JUSTICE STEVENS' assessment that the provision withstands heightened scrutiny." . . . I also agree with JUSTICE O'CONNOR that "[i]t is unlikely" that "gender classifications based on stereotypes can survive heightened scrutiny," . . . a view shared by at least five members of the Court.[53]

E. A Breakdown of the Five Miller Opinions

Table 1 breaks down the five opinions in *Miller*, based upon each of the identified dispositive issues:

[52] *Miller*, 118 S Ct at 1450 (Ginsburg, dissenting) (quoting, in part, Justice O'Connor's concurring opinion).

[53] Id at 1457-58 (Breyer, dissenting) (same). It is worth noting an additional debate between Justices Scalia and Breyer. Recall that Justice Scalia concluded that even if the challenged INA provision were unconstitutional, the Court could not strike the defective provision and confer citizenship based upon the remaining provisions. Justice Breyer challenged that assumption by quoting a severability provision in the INA, which states:

> If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Miller, 118 S Ct at 1464 (Breyer, dissenting) (quoting a note following 8 USC § 1101, p. 38, "Separability"). Justice Scalia responded, claiming that Justice Breyer's reliance upon a general severability provision was misplaced. Scalia argued that "the specific governs the general" and that the "question of severance turns on whether the provisions are inseparable by virtue of inherent character . . . which must be gleaned from the structure and nature of the Act." See id at 1448 (Scalia, concurring in the judgment) (internal quotations omitted). For the reasons set out in the more detailed analysis of Justice Scalia's concurring opinion, see Part I.C above, Justice Scalia concluded that the inherent character of the challenged INA provision rendered the allegedly unconstitutional conditions for naturalization not severable from those which would remain if the challenged provisions were struck.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 102 1999

Table 1. Miller v. Albright: Detailed Analysis

	(A) Does petitioner have standing?	(B) Should the Court apply heightened scrutiny rather than a more relaxed standard?	(C) Does statute fail under the chosen standard?	(D) Can the Court grant citizenship without violating separation-of-powers?	Outcome vote
(1) Stevens (Rehnquist)	yes	no	no	does not reach	deny relief
(2) O'Connor (Kennedy)	no	yes	yes	does not reach	deny relief
(3) Scalia (Thomas)	yes	does not reach	does not reach	no	deny relief
(4, 5) Ginsburg, Breyer (Souter)	yes	yes	yes	yes	grant relief
Issue Vote (Hypothetical)	yes (7-to-2)	yes (five-to-four)	yes (five-to-four)	yes (seven-to-two)	*grant relief (five-to-four)*
Outcome Vote (actual)					deny relief (six-to-three)

Table 1 employs the following conventions. It includes all four issues which are identified as dispositive in one or more of the five opinions. It also indicates when a justice failed to reach a given issue or issues. For consistency, each of the four issues is stated such that a "yes" response favors petitioner and a "no" response favors the government. The following implicit assumption is fully consistent with all five of the opinions: To confer relief upon petitioner, each justice must either answer yes to questions A, B, and C, without reaching D, or answer yes to all questions including D. The collective response to these questions means that means that (A) petitioner has standing; (B) the relevant test is intermediate scrutiny; (C) the chosen standard of review is not satisfied; and (D) separation-of-powers does not bar relief.[54] The bolded line between Justices Scalia and Ginsburg separates those who vote consistently with the case judgment from those who vote in dissent. The remaining bolded lines separate the Court's hypothetical resolutions of issues A through D, all in petitioner's favor (or in the case of issue D, at least not against petitioner), from the Court's collective judgment denying petitioner relief.

[54] In Table 4, Part II.C.3 below, I will later demonstrate that it is possible, and for purposes of the social choice analysis to follow beneficial, to collapse the relevant issues in the case to two and to further combine the five camps of justices into three. This simplification, which does not change the analysis, reveals the requisite features for a voting anomaly, namely multidimensionality and asymmetry.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 103 1999

The analysis thus far reveals that while separate explicit majorities on issues A, B, and C, and an implicit majority on issue D, all rule in petitioner's favor, a separate majority of the Court, composed of Justices' Stevens, O'Connor, and Scalia and those who join their opinions, vote to deny relief. The next part employs social choice theory to reveal the conditions under which this type of voting anomaly can and cannot arise and then revisits *Miller*, with a more simplified table, based upon the social choice model, that highlights those conditions.

II. A SOCIAL CHOICE ANALYSIS OF SUPREME COURT PLURALITY OPINIONS

This part introduces the necessary social choice framework with which to determine the presence or absence of the conditions that are conducive to a *Miller*-type voting anomaly. After presenting the basic social choice framework, I will then introduce three case paradigms, which together illustrate the limited circumstances under which this type of anomaly is capable of being generated.

A. A Brief Introduction to Social Choice[55]

While modern social choice theory finds its origins in the path-breaking works of Duncan Black,[56] and Kenneth Arrow,[57] the foundational insight underlying much of social choice theory dates substantially farther back to an essay written in 1785. In his famous essay, the French philosopher and mathematician, The Marquis de Condorcet, identified the conditions in collective decision making that give rise to the phenomenon of cycling, and the limited circumstances in which this phenomenon undermines meaningful collective choice.[58] To illustrate, assume that three persons are selecting

[55] For a more detailed introduction to and analysis of social choice, see Maxwell L. Stearns, *Public Choice and Public Law: Readings and Commentary* 255-473 (Anderson, 1997) (collecting articles applying social choice to public law and providing critical commentary).

[56] Duncan Black, *The Theory of Committees and Elections* 175 (Cambridge, 1958) ("Black, *Theory of Committees*").

[57] Kenneth Arrow, *Social Choice and Individual Values* (Yale, 2d ed 1963).

[58] See Iain McLean & Arnold B. Urken, *Did Jefferson or Madison Understand Condorcet's Theory of Social Choice?*, 73 Pub Choice 445, 446 (1992) ("Condorcet's standing as the principal founder of social choice rests largely, but not entirely, on his *Essai sur l'application de l'analyse a la probabilite des decisions rendues a la pluralite des voix* of 1785. . . . This work investigates the logical relationship between voting procedures and collective outcomes").

HeinOnline -- 7 Sup. Ct. Econ. Rev. 104 1999

among three options, A, B and C, where the options represent virtually anything, and where none of the options has first choice majority support. Further imagine that the three participants are the only persons involved in making the collective choice, or alternatively, that each person represents a constituency such that any two constituencies combine to produce a simple majority.[59] Further imagine that through a candid discussion, the three participants discover not only the absence of a first choice winner, but also that each participant ranks his preferences over the three options ordinally as follows: Person 1: ABC; Person 2: BCA; and Person 3: CAB. The identified sets of ordinal rankings of the three options represent a paradigmatic case of cyclical preferences.

If the group were to employ unlimited binary comparisons to select an outcome, and if the participants voted sincerely, it would discover an intransitivity, such that separate majorities prefer A to B and B to C, but C to A. The Condorcet paradox thus reveals that a minimal criterion of individual rationality, namely transitivity, cannot be assumed for groups. And notice that the group's preferences reveal an intransitivity through unlimited binary comparisons even assuming that each member's preferences are fully transitive. This phenomenon is referred to as the Condorcet paradox, or simply the voting paradox.

In addition to writing about the voting paradox, Condorcet further recognized the limited conditions under which that paradox arises. He did so by proposing a solution to collective decision making in the absence of a first choice majority candidate that applies in some but not all cases. Condorcet proposed that, in the absence of a first choice majority candidate among three or more options, the option that could defeat all others in a direct comparison should be selected as the best.[60] To illustrate, assume that while the preferences of Persons 1 and 2 remain unchanged, Person 3 now ranks his ordinal preferences CBA, rather than CAB. In this case, unlimited binary

[59] While it is easiest to conceive of the three constituencies as equal-sized, as implied in the text, that assumption is unnecessarily simplified. Provided that any two of the three groups can combine to produce a simple majority, it is possible to hypothesize a voting cycle depending upon the participants' ordinal rankings.

[60] See H.P. Young, *Condorcet's Theory of Voting*, 82 Am Pol Sci Rev 1231, 1239 ("Condorcet proposed that whenever a candidate obtains a simple majority over every other candidate, then that candidate is presumptively the 'best.' This decision rule is now known as a 'Condorcet's criterion,' and such a candidate (if it exists) is a 'Condorcet winner' or a 'majority candidate.' ") (citations omitted). See also Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 Yale L J 1219, 1253 (1994) ("Stearns, *The Misguided Renaissance*") (describing Condorcet criterion and collecting authorities).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 105 1999

comparisons reveal that B defeats both options A and C. As a result, there is no cycle. B is referred to as a Condorcet winner and rules that ensure that available Condorcet winners prevail are described as satisfying the Condorcet criterion.

Before proceeding with some case illustrations that demonstrate the significance of the voting paradox and the Condorcet criterion, a couple of general comments will be helpful. While the ability to ensure that available Condorcet winners prevail is almost universally regarded as a litmus test for evaluating the rationality of collective decision making, the criterion itself suffers two notable defects. First, depending upon the aggregation of collective preferences, there might not always be a Condorcet winner. In the first hypothetical, for example, with preferences ABC, BCA, and CAB, unlimited binary comparisons revealed an intransitivity, such that no single option defeated all others in direct comparisons. Second, the criterion is conditioned solely upon *ordinal* rankings, and thus does not register the intensity with which members hold their preferences. Using the same list of preferences, it is possible, for example, that only person 3 cares very much about the underlying issue. If so, persons 1 and 2 might be willing to select C, which they rank third and second, respectively, but which person 3 ranks first, in exchange for the support of person 3 on some other matter. Thus, through logrolling, members of Congress have the means with which to render many potential cycles inconsequential by registering intensities of preference.[61]

In addition to considering the limitations of the Condorcet criterion, it is important to consider the problems associated with rules that ensure that available Condorcet winners prevail. The most significant set of rules in this category, namely Condorcet-producing rules, select their outcomes based upon simple majority rule over all potential pairwise comparisons. To ensure that if a Condorcet winner is available it will prevail, Condorcet-producing rules require at least the same number of pairwise comparisons as options.[62] The difficulty is that because such rules require that every binary comparison be considered, including most notably a comparison between

[61] In the language of Arrow's Theorem, logrolling violates Independence of Irrelevant Alternatives. See Part II.A (describing Arrow's Theorem).

[62] See William H. Riker, *The Paradox of Voting and Congressional Rules for Voting on Amendments*, 52 Am Pol Sci Rev 349, 354 (1958) ("Riker, *The Paradox of Voting*") (explaining need for number of pairwise votes equal to the number of options to ensure that Condorcet winner, if available, will prevail, and demonstrating non-Condorcet-producing rules that limit permissible number of amendments in Congress). See also Stearns, *The Misguided Renaissance* at 1264-65 n 17 (collecting authorities) (cited in note 60).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 106 1999

the initially defeated option and the victor in the final round, Condorcet-producing rules result in a cycle when no Condorcet winner is available.[63] In contrast, when the decisional rule restricts the number of pairwise contests relative to the number of options, then, depending upon the participants' preference structures, the substantive outcomes will depend upon the order in which options are considered.[64] In the language of social choice, limiting the number of votes relative to the number of options produces "path dependence."[65] Thus, in the preceding example, direct binary comparisons, with only the following two votes, reveal that A defeats B and C defeats A, suggesting that C should be regarded as the best outcome. Only by resurrecting option B, which was defeated in round 1, and pitting it against option C, the victor in round 2, is the collective intransitivity, or cycle, revealed.[66] In fact, if we assume that people

[63] A second category of rules, which I have referred to as Condorcet-consistent, ensures that available Condorcet winners prevail, but does so without producing a cycle when there is no Condorcet winner. Such rules impose a criterion that is broader than, but that includes, the Condorcet criterion. One example is Duncan Black's famous minimax rule. Under this rule, all participants vote on all conceivable pairwise comparisons over all options. The winner is that option for which the worst binary comparison, after subtracting the number of votes the winning option received from the number of votes the losing option received, is least negative. See Black, *Theory of Committees* at 175 (cited in note 56). If there is a Condorcet winner, that option will not receive any negative scores, given that no option can defeat a Condorcet winner in a direct pairwise comparison. As a result, that option will prevail. If there is a cycle, however, every option will receive a negative score in at least one pairwise comparison. Unlike Condorcet-producing rules, however, which would simply result in a cycle, the minimax rule will identify as the winner that option whose worst negative score is the least negative. For an informative discussion of Condorcet-consistent rules, including the minimax rule, see generally T. Nicolaus Tideman, *Collective Choice and Voting* ch 13 at 43 (unpublished manuscript on file with author). For a discussion of the problems of administrative complexity and strategic identification of issues that such rules would pose if employed in Supreme Court decision making, see Stearns, *Constitutional Process* chs 2 & 3 (cited in note 51).

[64] See Riker, *The Paradox of Voting* at 354 (cited in note 70); Stearns, *The Misguided Renaissance* at 1264-65 n 171 (cited in note 62).

[65] See Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 Cal L Rev 1309, 1329-50 (1996) (describing phenomenon of path dependence, providing illustrations, and collecting authorities).

[66] It is worth noting that collective intransitivity is not precisely synonymous with cycling. Collective intransitivity is a necessary, but insufficient, condition to cycling. While cycling might suggest, at least to some, endless indecision and indeterminacy, indeterminacy can quite easily be avoided even with collective intransitivity by, for example, a rule that limits the number of binary comparisons relative to the number of options. Collective intransitivity therefore might not manifest itself in the form of a cycle. Generally, it is more intuitive therefore to characterize the voting anomaly as the product of collective intransitivity, rather than of cycling, given that the Supreme Court does not engage in unlimited binary comparisons in deciding

HeinOnline -- 7 Sup. Ct. Econ. Rev. 107 1999

vote sincerely based upon their actual preferences,[67] then given the preference structures in that example, a rule permitting only two votes for these three options would allow the person setting the order of votes to achieve any desired outcome. In the language of social choice, the person given this authority is referred to as an "agenda setter" and the authority she is given is referred to as "agenda-setting authority." Simply ensuring that the one option that would defeat the agenda-setter's first choice is defeated in the first direct pairwise comparison, the agenda setter will produce a voting path leading to her first choice.[68]

Finally, it is important to consider the relationship between the Condorcet paradox and Arrow's Theorem. Arrow's Theorem holds that no collective decision making body can simultaneously ensure collectively rational—meaning transitive—outcomes, while also meeting four conditions that Arrow considered essential to fair collective decision-making. The theorem, which can best be understood as a generalization of the Condorcet paradox,[69] proves that no institution that seeks to ensure transitivity can also satisfy the following four conditions:[70] (1) *Range*: when three or more people are choosing from among three options, the decisional rule must select as its universal outcome the option that is consistent with the members' ordinal rankings over those options in any conceivable order; (2) *Independence of irrelevant alternatives*: whatever vote aggregation procedure is employed, it takes account only of the voters' rankings

cases. For a more detailed analysis of the Court's decision-making rules and how they avoid cycling, see Stearns, *Constitutional Process*, chapters 3 (describing decision-making rules in individual cases), and chapter 4 (describing decision-making rules in multiple cases over time) (cited in note 51).

[67] As explained above in note 61 and below in note 70, in the technical language of social choice, the example in the text assumes that the participants adhere to the Independence of Irrelevant Alternatives criterion from Arrow's Theorem.

[68] We have already seen the path based upon two votes over three options leading to C. If, instead, the agenda setter most prefers option A, she would first present B versus C (B wins), then B versus A (A wins). Option C, the sole option that would defeat A in a direct pairwise contest was defeated in the first round. And if the agenda-setter most preferred option B, she would first present C versus A (C wins), and then present C versus B (B wins). Option A, the sole option that would defeat option B in a pairwise contest, was defeated in the first round.

[69] William H. Riker, *Liberalism Against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* 116 (1982) (positing that Arrow's Theorem is "a generalization of the paradox of voting").

[70] In the discussion in the text, following Dennis Mueller, I am employing William Vickrey's simplified presentation of Arrow's revised proof. See Dennis Mueller, *Public Choice II* 386 (Cambridge, 1989). For a detailed discussion and analysis of the relationship between Vickrey's simplified proof and Arrow's original and revised proofs, see Stearns, *Constitutional Process* ch 2 (cited in note 51).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 108 1999

of options under consideration and not any information about their preferences over other options; (3) *Unanimity*: if a change from the status quo to an alternate state will improve the position of at least a single participant without harming anyone else, the decision making body must so move; and (4) *Nondictatorship*: the group cannot consistently vindicate the preferences of a group member against the contrary will of the group as a whole.

The discussion of the case paradigms that follow will demonstrate that the Supreme Court generally adheres to both transitivity, or at least the appearance of transitivity, and the remaining Arrow's fairness conditions, with the exception of range. That is to say, the Supreme Court's case decision making rules have the effect of preventing the justices from implicitly ranking the underlying rationales offered in the various opinions in a given case in any conceivable order. In deciding individual cases, the Supreme Court employs two combined rules. In every case, the Court employs outcome voting, which is neither Condorcet-producing nor Condorcet-consistent[71], but which for all practical purposes ensures a collective outcome.[72] And in its cases decided by a judgment, the Court employs the narrowest grounds doctrine to identify which opinion states the Court's holding.[73] The combined effect of outcome voting and the narrowest grounds rule is to significantly limit strategic interactions among the justices by encouraging them to write opinions that will garner the necessary majority support to create a precedent or, failing that, will represent the Court's median, or Condorcet winning position.[74] With that brief introduction to social choice, we are now ready to develop a taxonomy of Supreme Court decisions.

B. A Macro-Taxonomy of Supreme Court Decisions

At the outset, we can divide Supreme Court decisions into four general categories, of which only one proves relevant in analyzing the *Miller*-like voting anomaly. The categories are: (A) unanimous decisions, (B) non-unanimous majority decisions, (C) plurality opinions (or decisions issued by a judgment), and (D) three-judgment cases. With a rare exception involving non-unanimous majority opin-

[71] See note 63 above (discussing Condorcet-consistent rules).

[72] See below in Part II.B and note 76 for the one exception, which involves cases that present three potential judgments—affirm, reverse, or remand—and thus in which it is possible for the Court to lack a majority favoring one of those potential judgments.

[73] See Part II.C.1.a below (discussing *Marks v United States*, 430 US 188 (1977), and the narrowest-grounds doctrine, which that case announced).

[74] See generally Stearns, *Constitutional Process* ch 3 (cited in note 51).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 109 1999

ions,[75] the potential for intransitive collective preferences over underlying rationales can arise only in the last two categories, of which category C proves the most important.

When the Court issues a unanimous decision, category A, there is no possibility of collective intransitivity given that the entire Court has agreed to a single rationale leading to the Court's selected outcome. The Court therefore lacks three options from which the justices can choose. When the Court issues a non-unanimous majority opinion, category B, in contrast, it is possible that justices who decline to join that opinion might produce as many as four additional opinions. Even so, such cases rarely present a social choice problem given that five or more justices have selected a first-choice majority candidate. The most obvious case category for cycling involves category D, when the Court must select among three potential judgments—affirm, reverse, or remand. As a practical matter, however, this category has proved largely inconsequential. In virtually every case in which no single judgment has first choice majority support, one or more justices who preferred a more extreme judgment as a first choice solved the potential impasse by switching his vote to a remand, thereby producing a majority for a single judgment.[76]

C. A Micro-Taxonomy of Supreme Court Plurality Opinions

The sole remaining category, plurality opinion cases (or cases decided by a judgment), are most significant from a preference aggregation, or social choice, perspective. In addition, such cases are most critical

[75] See note 126 below (explaining that actual vote-switch cases, as opposed to multi-dimensional/asymmetrical cases which have the potential to produce a vote switch but did not, fall into category B).

[76] See *Bragdon v Abbott*, 118 S Ct 2196, 2213 (1998) (Stevens, concurring) (casting vote to remand rather than to affirm to produce majority judgment); *Pennsylvania v Muniz*, 496 US 582, 608 (1990) (Rehnquist, concurring in part, concurring in the judgment in part, and dissenting in part) (casting vote to vacate and remand, rather than to reverse, to produce a majority judgment); *Connecticut v Johnson*, 460 US 73, 89-90 (1983) (Stevens, concurring) (casting vote to affirm, rather than to dismiss certiorari, to produce majority judgment); *Maryland Casualty Co. v Cushing*, 347 US 409, 423 (1954) (plurality opinion) (breaking deadlock by voting to remand, rather than to reverse, consistent with concurring opinion); *Klapprott v United States*, 335 US 601, 619 (1949) (Rutledge, concurring) (breaking deadlock by voting to remand, rather than to reverse, consistent with plurality opinion); *Von Moltke v Gillies*, 332 US 708, 726-27 (1948) (plurality opinion) (observing that two concurring justices have agreed to break deadlock by voting with plurality to remand, rather than voting to reverse); *Screws v United States*, 325 US 91, 134 (1945) (Rutledge, concurring) (switching vote to remand to allow disposition and observing that "[s]talemate should not prevail for any reason, however compelling, in a criminal cause or, if avoidable, in any other.").

HeinOnline -- 7 Sup. Ct. Econ. Rev. 110 1999

in evaluating the conditions under which vote switching is most- or least-likely to occur. As I will now demonstrate, within this case category there are three paradigms: cases with a unidimensional issue spectrum; cases with a multidimensional issue spectrum and symmetrical preferences; and cases with a multidimensional issue spectrum and asymmetrical preferences. Together, these three paradigms embrace every conceivable case in this category. The remainder of this part presents one case within each paradigm and demonstrates why the potential for collective intransitivity, and thus for significant problems in collective preference aggregation, arises only in the third. The next part further subdivides the cases falling into the final paradigm into two types,[77] those in which the justices have, and have not, engaged in vote switching.

1. Plurality Opinions with a Single-Issue Dimension: *Marks v. United States*

The first paradigm is best illustrated by the 1977 decision, *Marks v. United States*.[78] In *Marks*, Justice Powell considered a Fifth Amendment due process challenge by petitioners convicted of distributing obscene materials. The conviction was based upon a jury instruction modeled on an obscenity decision that relaxed the conditions under which the state (and presumably the federal government as well) could prosecute and that had been issued after the underlying criminal activity took place. Petitioners had engaged in their criminal activities between the time that the Supreme Court issued *Memoirs v. Massachusetts*,[79] a plurality decision that embraced a relatively strict standard for state prosecutions, and the time it issued *Miller v. California*,[80] which embraced a more relaxed standard for such prosecutions. Prior to both *Memoirs* and *Miller*, the Court had decided the standard for punishable obscenity in *Roth v. United States*.[81] The *Roth* Court articulated the following test for obscenity prosecutions: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."[82]

[77] This discussion includes the three known category B cases which, but for the vote switches they produced, would have been multidimensional asymmetrical category C cases.

[78] 430 US 188 (1977).

[79] 383 US 413 (1966).

[80] 413 US 15 (1973).

[81] 354 US 476 (1957).

[82] *Marks*, 430 US at 193 (quoting *Roth*, 354 US at 489).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 111 1999

In *Memoirs*, a plurality of three justices, Justices Brennan and Fortas and Chief Justice Warren, set out a stricter standard for obscenity prosecutions, stating that "three elements must coalesce" before material can be deemed beyond the protection of the first amendment on the ground that it is obscene:

> [I]t must be established that (a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[83]

This opinion raised the *Roth* standard for punishable obscenity by adding prongs (b) and (c). As Justice Powell, writing for the *Miller* Court, later observed, prong (c) of *Memoirs*, requiring that the material be "utterly without redeeming social value," imposed upon the prosecutor "a burden virtually impossible to discharge under our criminal standards of proof."[84] In an opinion concurring in the judgment in *Memoirs*, Justices Black and Douglas adhered to their "well-known position that the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity."[85] In a brief opinion concurring in the judgment, Justice Stewart incorporated by reference his belief that only "hard-core pornography" may be suppressed as obscene consistent with the First Amendment, as previously expressed in his dissenting opinion in *Ginzburg v. United States*.[86] There were three separate dissents. Justices Clark and White adhered to the statement of obscenity articulated in *Roth*.[87] Justice Harlan expressed the view, which he had articulated in *Roth*, that, while the hard-core pornography standard articulated by Stewart is appropriate when the First Amendment is applied to the federal government, the First Amendment requires only that states "apply criteria rationally related to the accepted notion of obscenity."[88]

[83] *Memoirs*, 383 US at 418.

[84] *Miller*, 413 US at 22

[85] *Marks*, 430 US at 193 (discussing *Memoirs* concurrence).

[86] *Memoirs*, 383 US at 421 (Stewart, concurring in the reversal for reasons stated in his dissent in *Ginzburg v United States*, 383 US 463, 499 (1966)).

[87] *Memoirs*, 383 US at 443 (Clark, dissenting); id at 460-61 (White, dissenting).

[88] Id at 454-56 (Harlan, dissenting) ("My premise is that in the area of obscenity the Constitution does not bind the States and the Federal government in precisely the same fashion.").

HeinOnline -- 7 Sup. Ct. Econ. Rev. 112 1999

Finally, in *Miller*, a majority of the Supreme Court, in an opinion by Chief Justice Burger, redefined the standard for punishable obscenity as follows:

> The basic guidelines for the trier of fact must be: (a) whether the "average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[89]

The *Miller* Court added: "[w]e do not adopt as a constitutional standard the *utterly* without redeeming social value test of [*Memoirs*]."[90]

To summarize, before *Marks*, the Supreme Court issued three relevant decisions concerning the definition of prescribable obscenity. In *Roth* in 1957, the Supreme Court defined obscenity based upon whether, applying "contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." In *Memoirs* in 1966, the Supreme Court issued the fractured panel decision that Justice Powell then construed in *Marks*. A minority in the *Memoirs* dissent continued to adhere to *Roth* or an even more relaxed rational basis standard. A concurrence of two stated that no materials may be proscribed as obscene under the First Amendment. A concurrence of one stated that only hardcore pornography may be proscribed as obscene consistently with the First Amendment. And a plurality of three added two requirements beyond *Roth*, including most importantly that the material be utterly without redeeming social value to be proscribed as obscene. Finally, in *Miller* in 1973, the Court expressly rejected the *Memoirs* plurality's "utterly without redeeming social value" standard in favor of a refined version of *Roth*.

As stated above, the *Marks* petitioners had engaged in criminal activities between the time of *Memoirs* and the time of *Miller*, but were convicted based upon a jury instruction modeled on the *Miller* definition of obscenity.[91] The district court rejected petitioners' argument that the jury instruction modeled on *Miller* violated their Fifth Amendment due process rights by allowing conviction based upon an obscenity formula that was announced after the acts giving rise

[89] *Miller*, 413 US at 24 (internal citations ommitted).
[90] Id (emphasis added and internal quotations omitted).
[91] See *Marks*, 430 US at 191.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 113 1999

to their prosecution, and that cast a "wider net than *Memoirs*," by which "petitioners charted their course of conduct."[92] Writing for the *Marks* Court, Justice Powell explained that for the petitioners to succeed, they had to demonstrate both that the *Memoirs* plurality announced the Court's holding and that, following *Memoirs*, *Miller* stated a new rule of law.[93] Like the district court, the court of appeals in *Marks* rejected the argument that *Miller* "unforeseeably expanded the reach of the federal obscenity statutes beyond what was punishable under *Memoirs*."[94] Because the standards announced by the *Memoirs* plurality never commanded the support of more than a minority of three justices at one time, the sixth circuit, in a split panel decision, determined that "*Memoirs* never became the law."[95] As Powell explained, applying this reasoning, the issue in *Marks* would have been whether *Miller* significantly altered the obscenity standard articulated in *Roth*, which he agreed it did not.[96] But Powell went on to state:

> [W]e think that the basic premise for this line of reasoning is faulty. When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . ."[97]

Applying the narrowest-grounds rule, it was easy to determine that the plurality opinion announced the holding. Justices Black and Douglas would have prevented criminalizing any conduct on grounds that the material in question was proscribable obscenity and Justice Stewart would only have permitted hard-core pornography to be proscribed as obscene. The Brennan plurality opinion, in contrast, struck down the conviction but would have permitted upholding a broader range of state and federal statutes proscribing materials as obscene. Thus, while the plurality struck down the conviction, it did

[92] See id. Petitioners' argument was analogous to one arising under the *ex post* facto clause, US Const Art I, § 9, cl 3 ("No Bill of Attainder or ex post facto Law shall be passed.") which, although only applying to legislation, prohibits the retroactive criminalization of conduct. By analogy, in *Bouie v City of Columbia*, 378 US 347 (1964), the Court had extended the same protection under the Fourteenth Amendment Due Process Clause to strike down a conviction based upon an unanticipated judicial enlargement of a statute applied retroactively.

[93] See *Marks*, 430 US at 190-91.

[94] Id at 192.

[95] Id.

[96] See id at 192-93.

[97] Id at 193 (quoting, in part, *Gregg v Georgia*, 428 US 153, 169 n 15 (1976)).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 114 1999

so on the narrowest-grounds. Indeed, Powell observed that, except for the Sixth Circuit, every federal court of appeals that had considered the question had so read *Memoirs*. Powell went on to conclude that "Memoirs therefore was the law," and that "Miller did not simply clarify Roth; it marked a significant departure from Memoirs," by "expand[ing] criminal liability" relative to the *Memoirs*' "utterly without redeeming social value" standard for proscribable obscenity.[98]

The following table, which outlines the various opinions in *Memoirs*, will help us to analyze Justice Powell's *Marks* analysis:

Table 2. *Memoirs* Obscenity Standard under *Marks* Narrowest-Grounds Doctrine

(A) Douglas & Black (concurring)	(B) Stewart (concurring)	(C) Brennan, Fortas, and Warren (plurality)	(D) Clark, Harlan, and White (dissenting)
No proscribable obscenity	Hard-core pornography only as proscribable obscenity	"Utterly without redeeming social value" standard for proscribable obscenity	*Roth* standard (Clark and White) or rational basis test (Harlan) for proscribable obscenity
Broad protection of obscenity			Narrow protection of obscenity

Table 2 reveals a unidimensional issue spectrum in *Memoirs*. Under the *Marks* formulation, Justice Powell has employed the intuition that we could derive a consensus position that has the Court's implicit support as a dominant second choice by plotting the published opinions in *Memoirs* along a unidimensional continuum, from broadest to narrowest protection of obscenity. In Table 2, I have included a bolded vertical line to separate those opinions that are, and are not, consistent with the case outcome, to the left and right respectively, and thus that are, and are not, eligible for holding status under the narrowest-grounds rule. Dissenting opinions can still be plotted based upon the breadth or narrowness of the proposed holding. Indeed, while I have combined the three dissenting opinions, I could have placed the Harlan opinion further to the right than the other two, given that he would have afforded states broader powers to regulate obscenity than under the *Roth* test, which Clark and White embraced. The reason that the opinions for Clark, Harlan, and White became dissents is that the potential protections that each would have afforded for obscenity were, contrary to a majority

[98] *Marks*, 430 US at 194.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 115 1999

of the Court, too narrow to include relief for Marks on the facts of the case.

Assuming that all the participants agree that the sole issue in the case is the breadth of First Amendment obscenity protection, then, using Table 2, it is fairly easy to locate the median, or Condorcet-winning, candidate. We can label each of the opinions in the order in which they appear in the Table 2, A (Douglas), B (Stewart), C (Brennan), and D (White). Implicit in the assertion of a unidimensional continuum is the premise that, if forced to choose among each of the remaining opinions, those writing or joining the opinions at the outer edge would most prefer the one closest to them and least prefer the one farthest from them.[99] The presentation is simplified by treating all three dissents as one, represented by Justice White. While both the Douglas and Stewart opinions are included in Table 3, since both are eligible for holding status under *Marks*, the following analysis simplifies by treating the Douglas and Stewart opinions as a single opinion A/B, representing three justices.[100] Based upon the above assumption, the ordinal rankings of the A/B camp are A/B, C, D. The ordinal rankings of the D camp are D,C,A/B. The ordinal rankings of the C camp are irrelevant because the result is the same whether they are C, A/B,D or C,D,A/B. If the only options available are A/B, C, and D, then option C is the Condorcet winner.

The analysis illustrates two important propositions. First, it shows that the narrowest-grounds rule is best understood as an application of the Condorcet criterion to Supreme Court decision making. Second, it shows that in fractured panel cases, even those presenting a unidimensional issue spectrum, the logic of the narrowest-grounds doctrine is necessarily premised upon the implicit ordinal ranking of the justices over a minimum of three alternative rationales in the case. The narrowest-grounds doctrine selects the Brennan rationale as dominant even though, as with the Condorcet criterion itself, it is not the first choice majority candidate. The rule implicitly assumes that those in the wings would prefer the median position over the opposite wing, producing the following aggregate ordinal

[99] To state this differently, asserting that the wings would prefer the opposite wing to the middle position implies that in fact the issue spectrum is multidimensional. For a formal illustration of this proposition, see Stearns, *Constitutional Process* ch 2 (cited in note 51) (demonstrating that multipeaked preferences within a unidimensional issue spectrum can be translated into unipeaked preferences within a multidimensional issue spectrum). For a more detailed analysis of the relationship between between the median voter theorem and the narrowest-grounds doctrine, see id ch 3.

[100] This eases exposition by creating three camps, any two of which contain the requisite five votes for a majority. Otherwise, Stewart, a one-justice camp, could join the plurality or dissent and still be in a minority.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 116 1999

rankings, where the bracketed entries are in the alternative: A/B,C,D; D,C,A/B; and C[A/B,D or D,A/B]. While *Memoirs* presented a binary choice on the outcome, it nevertheless presented no fewer than three underlying rationales, and thus had the potential for a collective intransitivity. In *Memoirs* the collective intransitivity was not realized precisely because of the single-issue dimension, which ensured the dominance of the median position. The next two examples introduce in succession each of the two necessary criteria for intuiting cycling majorities in Supreme Court decision making.

2. Supreme Court Decision Making with Two Dimensions and Symmetrical Preferences: *Regents of the University of California v. Bakke*

Now consider *Regents of the University of California v. Bakke*,[101] which is likely Justice Powell's most famous opinion issuing a judgment for the Court. In *Bakke*, the Supreme Court considered a challenge to the University of California at Davis School of Medicine's affirmative action program. The school had an entering class with 100 seats, of which it set aside 16 for minorities.[102] Bakke, who had been rejected twice in his application to the medical school, sued, claiming that, as a non-minority, his inability to compete for all 100 seats, rather than for just 84 seats, violated his rights under the Fourteenth Amendment equal protection clause.[103]

While *Bakke* produced several opinions, for the following analysis we need only consider the three principal opinions. Justice Brennan, writing for himself and three others, would have applied intermediate scrutiny,[104] and would further have held that the school's effort to remedy the present effects of past discrimination was sufficient to sustain the school's affirmative action program. Justice Stevens, writing for himself plus three others, would have avoided addressing the equal protection issue altogether. Instead, Stevens concluded that race-conscious measures employed by state universities violate § 601 of Title VI of the Civil Rights Act of 1964.[105] Finally, Justice Powell, writing only for himself but delivering the judgment of the Court, determined that the case presented two issues: first, whether

[101] 438 US 265 (1978).

[102] Id at 275.

[103] Id at 277.

[104] Id at 361-62 (Brennan, concurring in the judgment in part and dissenting in part).

[105] Id at 412 (Stevens, concurring in the judgment in part and dissenting in part) (citing § 601 of the Civil Rights Act of 1964, 42 USC § 2000d).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 117 1999

the Fourteenth Amendment equal protection clause or Title VI of the Civil Rights Act of 1964, prevented a state university from using race as a factor in its admissions decisions; and, second, if not, whether the University of California School of Medicine at Davis nonetheless used race in an impermissible manner.[106]

Powell concluded that the medical school could consider race in admissions, but that it could not do so for the school's stated purpose of remedying the present effects of past discrimination.[107] Instead, the school could use race to promote diversity within the student body.[108] The relevant portions of the Powell opinion concluding that the equal protection clause did not altogether preclude the state medical school from considering race were joined by Brennan, plus the three justices who joined Brennan's separate opinion.[109] The relevant portions of the Powell opinion striking down the Davis program's use of race to set aside a prescribed number of seats for minorities were joined by Stevens, plus the three justices who joined Stevens's separate opinion. Only Justice Powell accepted what for him proved to be a dispositive distinction between the use of race as a plus factor and the use of race to set aside a given number of seats.[110]

In his split opinion for the Court, Powell determined that, while Davis could not use race to set aside a particular number of seats from which non-minorities could be altogether excluded, state universities could use race in the manner employed by Harvard University, as one factor among many in its admissions decisions.[111] Powell considered it critical that, unlike Davis, Harvard did not segregate its admissions files by race, but rather considered all files, minority and non-minority, as part of the same process.[112] Justice Powell also considered the justifications that would allow a state institution of higher learning to employ a race-conscious measure. While Brennan accepted the argument that Davis's use of race was intended to further societal remediation in countering the present effects of past discrimination,[113] Justice Powell flatly rejected remediation as

[106] Id at 281-82, 287-88, 305-06 (Powell, announcing the judgment for the Court).

[107] Id at 307-10.

[108] Id at 311-12.

[109] Id at 272.

[110] Id at 316-20.

[111] Id.

[112] Id at 317. Indeed, Justice Powell was so enamored of the Harvard affirmative action program that he appended to his opinion a copy of that plan, in which race was used as a plus factor to be considered along with numerous other variables in the University's admissions decisions. Id at 316, 321-23.

[113] Id at 362 (Brennan, concurring in the judgment in part and dissenting in part).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 118 1999

beyond the competence of the Board of Regents.[114] Powell concluded that, because the Board of Regents was not a policy maker, it lacked the institutional competence with which to make the requisite findings either to identify past discriminatory practices or to tailor a remedy aimed at curbing any such practices that it did identify.[115] Instead, Justice Powell posited that, if appropriately tailored, *e.g.*, like the Harvard plan, a state university could employ race, as one factor among many, as a compelling interest in promoting a diverse student body.[116]

No justice joined either the part of the Powell opinion concluding that diversity was a compelling state interest, sufficient to allow the state to employ a race conscious measure without violating equal protection, or the part concluding that, in contrast with the Harvard plan which had used race as one factor among many, the Davis plan was constitutionally infirm because it was not narrowly tailored. Justice Stevens had no need to reach these issues, since he concluded that the use of race by a state institution violated a federal statute.[117] And in Justice Brennan's separate opinion he eschewed any distinction between the Harvard and Davis plans.[118]

The following table depicts the two-dimensional issue spectrum in *Bakke* and the positions of each of the three camps along those two dimensions:

Table 3. Board of Regents of the University of California v. Bakke

	State can consider race	State cannot consider race
State properly considered race	(A) Brennan (plus 3)	
State did not properly consider race	(B) Powell	(C) Stevens (plus 3)

Table 3 identifies the two issue dimensions in *Bakke*: first, whether a state could consider race at all in its admissions decisions; and, second, whether the University of California at Davis had employed race in a constitutionally permissible manner. Table 3, depicting *Bakke*, differs from Table 2, depicting *Memoirs*, in that the presence of a second issue dimension increases the plausibility of intuiting a collective intransitivity in which one of the Court's wings would

[114] Id at 307-10 (Powell, announcing the judgment for the Court).
[115] Id.
[116] Id at 314-15.
[117] Id at 412 (Stevens, concurring in the judgment in part and dissenting in part).
[118] Id at 379 (Brennan, concurring in the judgment in part and dissenting in part).

prefer the position embraced by the opposite wing on one or more issues, or on the outcome, to that of the apparent middle position. Thus, the case reveals that eight of the nine justices rejected what for Justice Powell proved a dispositive distinction between the Davis and Harvard plans. In fact, however, social choice theory reveals why, even with the issue dimensionality expanded relative to *Memoirs*, the requisite criteria for a cycle are lacking in this case. To see why, notice that camps A and C in Table 3, represented by Brennan and Stevens respectively, identify the same issues but reach opposite resolutions on both of those issues. Moreover, the opposite resolutions on both issues leads each camp to precisely opposite results. In contrast, the Powell position, represented by B, contains one issue resolution in common with each of the alternatives A and C. In addition, Justice Powell's holding for the Court provides each side with a partial victory. Consistent with the Brennan position, states are permitted to continue the use of race in admissions. Consistent with the Stevens position, Davis cannot continue to employ race as it had, in the form of a set aside. A cycle seems implausible in *Bakke* because for either the Brennan or Stevens camps to rank the other ahead of the Powell position ordinally, they would have to accept opposite resolutions on both underlying issues and an opposite holding as a second choice over a seeming intermediate position that affords a partial but incomplete victory in the form of a favorable resolution on one issue and on one part of the two-part holding.

One additional mechanism for underscoring the apparent dominance of the Powell position is to consider whether the case presents a voting paradox along the lines of that present in *Miller v. Albright*. To do so, consider the necessary preconditions to an opposite holding, namely sustaining the Davis plan against the equal protection challenge. Consistent with all three opinions, we can derive the following premise: The plan can be sustained only if the state is permitted to employ race and if Davis has used race in a constitutionally permissible manner. The upper left box is bolded because it alone satisfies both of the necessary and sufficient preconditions to an opposite holding, namely sustaining the Davis plan. Notice, however, that the Court has apparent majority support for only one of the necessary propositions. While the Brennan and Powell camps form a majority to support the proposition that Davis can employ race, the Brennan camp stands alone as a minority supporting the proposition that Davis had used race in a constitutionally acceptable manner. The absence of the conditions creating a voting paradox is fully consistent with identifying Powell's position as dominant, even though the issue spectrum evinces more than a single dimension.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 120 1999

Indeed, as the following discussion, which revisits *Miller*, will demonstrate, only when both of the necessary and sufficient conditions for a voting anomaly arise is it plausible to intuit a collective intransitivity over underlying rationales.

3. Supreme Court Cases with Two Dimensions and Asymmetrical Preferences: *Miller v. Albright* Revisited

Recall that Table 1 summarized the five *Miller* opinions based upon each of the four issues that one or more of the writing justices deemed dispositive in their analyses. We now have the framework with which to simplify the presentation of *Miller* in a manner that highlights the essential conditions to both the voting paradox and the possible underlying cycle. While the five camps of justices raised four potentially dispositive issues—standing, the choice of substantive test, whether that test is satisfied, and separation of powers—the following analysis simplifies the presentation by reducing the number of voting camps to three and the number of dispositive issues to two. Without undermining the presentation of the anomaly that *Miller* represents, the simplification allows us to consider the relationship of *Miller* to both *Memoirs* and *Bakke*.

In *Miller*, all of the justices who concluded that the relevant test was heightened scrutiny concluded that the test was not met and all of the justices who decided that the relevant test was a more relaxed standard concluded that the test was met. The choice of test, therefore, was dispositive for those justices who addressed the merits of the underlying claim such that that selecting heightened scrutiny is equivalent to holding that the test is not met, while selecting a more relaxed standard is equivalent to holding that the test is met. Issues B and C in Table 1 (representing issues 2 and 3 in Stevens's opinion delivering the judgment for the Court) therefore can now be combined.

Recall that only Justice Scalia (joined by Justice Thomas) addressed the issue whether separation of powers prevented the Court from conferring petitioner's requested relief even if the challenged INA provision were held to violate the Fifth Amendment due process clause. Justice Scalia concluded that petitioner had standing to raise her own claim and that of her father. He provided no indication, however, that had he resolved the separation-of-powers issue in petitioner's favor, thus addressing the merits of the remaining issues, he would have ruled for petitioner on the outcome. We can therefore further simplify the presentation by assuming that, had Justice Scalia addressed the remaining issues, he would still have

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ruled against petitioner, meaning that he would have selected a more relaxed standard than heightened scrutiny and would have determined that the challenged provision of the INA satisfies the chosen standard.[119] Based upon that assumption, I can further collapse the separation-of-powers issue into the issue concerning the choice of substantive test. Table 4 now presents *Miller* based upon the two issue dimensions that remain.

Table 4. Miller v. Albright Revisited

	Petitioner lacks standing	Petitioner has standing
Relaxed Standard of Review		(A) Stevens, Rehnquist, *Scalia, Thomas*
Heightened Scrutiny	(C) O'Connor, Kennedy	(B) Ginsburg, Breyer, Souter

Having simplified the number of issue dimensions to two, we can now place each of the camps of justices into one of three of the boxes in the four-box matrix represented in Table 4. Two groups of justices take position A, which represents the upper right box. Justice Stevens (joined by Rehnquist) concludes that petitioner has standing and that the relevant test is more relaxed than heightened scrutiny (which implies that the test is met). Justice Scalia (joined by Thomas) also concludes that petitioner has standing, but resolves the case on separation-of-powers grounds. The italics indicate that, while Justice Scalia took a different approach, his analysis is functionally equivalent to selecting a more relaxed standard of review than heightened scrutiny (again implying that the test is met). Justices Ginsburg, Breyer, and Souter conclude that petitioner has standing and that the relevant test is heightened scrutiny (which implies that the test

[119] Alternatively, one can defend the assumption on the grounds that it is more conservative than the alternative. I do not mean this in an ideological sense. Instead, by conservative I mean a set of conditions that render the possibility of a cycle *less likely* to occur. Had I assumed the opposite, namely that if Scalia addressed the merits he would have applied heightened scrutiny and voted to strike the challenged INA provision down, that would have provided me with two independent bases for intuiting cyclical preferences in *Miller*: one involving Justice O'Connor (joined by Kennedy), and another involving Justice Scalia (joined by Thomas). Under this assumption, both O'Connor and Scalia (and those joining their opinions) would have achieved the opposite outcome vote had they reached the underlying merits, which they avoided based upon their standing and separation-of-powers analyses, respectively. To illustrate the voting anomaly, I do not need to make this assumption with respect to Scalia who, in contrast with Justice O'Connor, gave no indication that he would have switched his vote under these conditions. Thus, I have made a set of assumptions that operate against the possibility of a cycle based upon his vote.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 122 1999

is not met). Finally, Justice O'Connor (joined by Kennedy) concludes that petitioner lacks standing to raise her father's due process challenge, but that if she had standing, the relevant test would be heightened scrutiny (which implies that the test would not be met).

The voting anomaly—and the possibility of a lurking cycle—becomes clear when we consider the necessary and sufficient conditions for achieving the opposite holding, namely striking down the challenged INA provision. With the exception of Justices Scalia and Thomas, all justices implicitly assume that if petitioner has standing to raise her father's challenge, and if the relevant test is heightened scrutiny, the challenged INA provision should be struck down. The bolded lower right box represents those justices who agree to both conditions necessary to ruling in petitioner's favor. A majority agrees with each of those preconditions to striking down the statute. The Stevens, Scalia, and Ginsburg camps (totaling seven justices) agree that petitioner has standing to raise her father's claim, and the O'Connor and Ginsburg camps (totaling 5 justices) agree that the appropriate test is heightened scrutiny, which is not met. However, a separate majority, composed of the Stevens, Scalia, and O'Connor camps (totaling 6 justices) votes to deny petitioner her requested relief. In contrast with *Memoirs* and *Bakke*, depicted in Tables 2 and 3, *Miller* as depicted in Table 4 reveals the anomaly that on an issue-by-issue basis, separate majorities support a resolution of each underlying dispositive issue in a manner that, when aggregated, leads to the dissenting result. And yet, because only a minority of justices, those in the bolded lower right box, agree to both necessary and sufficient conditions to striking the provision down, the Court ruled against the petitioner.

Two questions now arise. First, what are the conditions that distinguish *Miller* from the prior cases? And second, under what conditions would we expect justices confronted with a *Miller*-like paradox to avoid the result of a case in which separate majorities on identified dispositive issues produce a logical voting path leading to the dissenting result by conceding to a contrary majority and thus switching their outcome votes? The remainder of this part answers the first question. The next part expands upon the social choice model presented here to answer the second.

D. A Social Choice Analysis of Miller: Identifying the Necessary and Sufficient Conditions for a Voting Paradox

The critical distinction between *Miller* and the previously discussed cases is that *Miller* presents issues and judicial preferences that reveal both multidimensionality and asymmetry. In *Memoirs*, because the

HeinOnline -- 7 Sup. Ct. Econ. Rev. 123 1999

case presented only a single-issue dimension, no voting paradox was possible. Those who would prefer a more extreme position represented by the Court's wings would necessarily prefer the median position, represented by the Brennan position, over the opposite extreme position. In contrast, while *Bakke* expanded the issue dimensionality to two, the symmetrical nature of the preferences in each camp also rendered the presence of a cycle implausible. The Brennan and Stevens camp resolved both dispositive issues in precisely opposite fashion, and further voted in opposite fashion on the outcome. In contrast, the Powell opinion provided a partially favorable issue resolution and statement of the holding to each side. While the presence of two issue dimensions prevents a formal characterization of Powell's opinion as standing in the median position, the opinion nevertheless possesses all of the characteristic features of a dominant, Condorcet winner. As a result, it appears improbable that if confronted with the need to rank ordinally the remaining rationales of the justices, that either the Brennan or Stevens camps would prefer each other over the apparently dominant Powell position. It is for that very reason that the Powell opinion announced the Court's judgment and was rightly regarded as representing a stable outcome even though none of the remaining nine justices adhered to his stated distinction between the Harvard and Davis affirmative action programs.

Now reconsider the breakdown of the three principal camps in *Miller* presented in Table 4. Like *Bakke*, the case presents two issue dimensions, rendering a cycle more plausible than in *Memoirs*. The critical question then becomes how to distinguish *Miller* from *Bakke*. Unlike *Bakke*, where the opposite issue resolutions by the Brennan and Stevens camps produced opposite results, and thus symmetrical preferences, in *Miller*, the opposite issue resolutions by the O'Connor and Stevens camps produces precisely *the same result*, and thus asymmetrical preferences. Thus, while O'Connor would deny standing but apply heightened scrutiny (implying that the test is not met), and while Stevens would confer standing but apply a more relaxed standard of review (implying that the test is met), both camps vote to deny petitioner's requested relief. Now consider the dissenting opinions. Justices Ginsburg and Breyer vote to grant petitioner standing and to apply heightened scrutiny (implying that the test is not met). While the Stevens and O'Connor camps are opposite on both dispositive issues, on one issue, standing, the Ginsburg/Breyer camp is closer to the Stevens camp, and on the other issue, the choice of substantive test, the Ginsburg/Breyer camp is closer to the O'Connor camp.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 124 1999

The Supreme Court does not formally employ an issue-voting regime,[120] which would allow the justices to rank ordinally their preferences over the three available rationales.[121] Instead, it employs outcome voting, which requires a binding and unconditional vote on judgment coupled with a preferred statement of the rationale. Therefore, we cannot know with certainty whether the preferences in *Miller* would actually generate a cycle. We can, however, recognize that *Miller* contains a collective intransitivity, which is a necessary precondition to a voting cycle. Specifically, because the rationales embraced by the Stevens and O'Connor camps are opposite, albeit leading to the same result, there is no reason to assume that the justices in one of those camps would necessarily prefer the opposite rationale leading to the same outcome to an intermediate rationale leading to the opposite outcome.[122] Recall that what makes the Powell position stable in *Bakke* is that it is closer on one of two issues to both the Brennan and Stevens camps than the Brennan or Stevens camps are to each other. The same reasoning applies in Miller, with one critical exception. While the Ginsburg/Breyer rationale is closer on one of the underlying dispositive issues to the Stevens and O'Connor camps than those camps are to each other, the outcome that the Ginsburg/Breyer camp chooses is opposite that of both camps. Again, we cannot know whether the Stevens or O'Connor camp would prefer a closer rationale leading to the opposite outcome to a farther rationale leading to the same outcome as a second choice. But if one of the two camps does take this position, then we can readily formalize *Miller* into a Condorcet paradox.

To illustrate, assume that Justice O'Connor (joined by Kennedy) reasons that, if forced to choose among the remaining two options as a second choice, she would prefer the Ginsburg/Breyer position because this would send a clear signal that sex-based distinctions premised upon overbroad characterizations about men and women will not survive constitutional scrutiny. If so, her preferences are CBA. Further assume that Justices Ginsburg and Breyer reason that,

[120] See note 2 above, and cites therein, for a scholarly debate on issue voting's merits or lack thereof.

[121] In the language of social choice, such a regime would adhere to range. See Part II.A above (defining range).

[122] Indeed, the cases discussed in Part III reveal that particular justices have on three occasions expressed just this intuition by conceding one issue and thus changing their outcome vote based upon their resolution of another issue. This demonstrates that they rank an intermediate rationale, which resolves one issue in their favor, but leads to an opposite judgment, ahead of an opposite rationale, which resolves both underlying issues in opposite fashion, but leads to the same judgment.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 125 1999

while they strongly disagree with both the O'Connor and Stevens analyses and outcomes, they are more concerned about denying standing than they are about the substantive legal test. If so, their preferences are BAC. Finally, assume that Justice Stevens is more concerned about denying petitioner relief than he is with the dispositive rationale. If so, his ordinal rankings are ACB. These, of course, are paradigmatic cyclical preferences. One can posit a cycle in the reverse direction as well. Assume that Justice O'Connor is more concerned about denying petitioner relief than with the choice of dispositive rationale. If so, her preferences are CAB. Further assume that Justice Stevens is more concerned with ensuring that qualified persons receive standing than with whether this particular litigant is denied relief and with whether the test applied in this unusual case is heightened scrutiny. If so, his preferences are ABC. Finally, assume that Justices Ginsburg and Breyer are more concerned with the choice of substantive test than with the question of standing. If so, their preferences are BCA. Again, these are paradigmatic cyclical preferences.[123]

Recall that by operation of the narrowest-grounds rule, the holdings in both *Memoirs* and *Bakke* are stated in opinions that do not have majority support as a first choice. Instead, the Court's decision making rule for cases decided by a judgment is premised upon certain assumptions about how the justices would generally rank ordinally three or more available alternative rationales in such cases. In cases decided by a judgment with multidimensional and asymmetrical preferences, outcome voting effectively prevents those ordinal rankings over available issue resolutions, which would generate a voting cycle.[124] To illustrate, let us identify the problematic ordinal rankings in each of the two hypotheticals described above for *Miller*. In the first hypothetical, O'Connor prefers the rationale embraced by Ginsburg and Breyer, leading to the opposite result, over that of Stevens, leading to the same result. In the second, Stevens prefers the Ginsburg/Breyer rationales, leading to the opposite result, to the

[123] While one might object to the assumptions needed to generate the two sets of cyclical preferences set out in the text, the objection will not bear scrutiny. In the two cycling hypotheticals, I have generated both conceivable ordinal rankings for each voting camp over the two alternatives represented in the remaining opinions. Of course, it is possible that two camps might select the same second choice, thus avoiding the cycle. But to generate that stable outcome, one must make assumptions about individual preferences that are no more or less obvious than those needed to generate either of the hypothetical intransitivities in the text.

[124] As stated above, the rule thus relaxes range, which permits the decision-makers to rank the available options in any order they choose. See Part II.A above.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 126 1999

O'Connor rationale, leading to the same result. In effect, outcome voting prevents this form of contingent expression of underlying issue resolutions. It does so by effectively requiring the justices to vote on the judgment and to produce, or sign onto, a written opinion, which provides an internally consistent rationale. By internal consistency, I mean a rationale that resolves identified dispositive issues in a manner that is consistent with the chosen judgment. Outcome voting thus prevents the expression of outcomes that are contingent upon whether the justice's preferred rationale dominates for the Court as a whole, as opposed to a rationale that resolves the dispositive issues in opposite fashion but nevertheless achieves the same judgment. While the Supreme Court's case decision making rule necessarily depends upon an implied ordinal ranking over available alternatives, it also effectively eschews potential ordinal rankings that express the outcome vote in contingent form.[125]

E. Summary

The analysis thus far has established three important propositions. First, it demonstrates that in fractured panel cases presenting a binary judgment choice, affirm or reverse, and in which underlying dispositive issues reveal a unidimensional spectrum, the Court's choice as to which opinion expresses the holding necessarily depends upon the justices' implied ordinal ranking over a potential of three or more rationales. Second, while unidimensional issue spectrum cases can present three or more rationales, the possibility of cycling majorities is avoided unless the issue spectrum is expanded. Otherwise the median position within the unidimensional issue spectrum will necessarily represent a dominant, Condorcet-winning, outcome. Third, while expanding dimensionality increases the possibility of cycling majorities, cycling is only conceivable in a narrow subset of multidimensional cases, those in which the collective resolutions of dispositive issues reveal an asymmetry such that the opposite resolutions of dispositive issues lead to the same outcome. In this limited context of cases with a multidimensional issue spectrum coupled with asymmetry it is plausible to intuit that one or more of the camps voting consistently with the majority on the judgment would rank second a rationale that produces the dissenting result and rank third an

[125] While the ordinal rankings of the Ginsburg/Breyer camp in both hypotheticals ranks second a rationale leading to the opposite result, the ranking is not contingent. There is no available second-choice rationale for those in dissent that would lead to the same outcome.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 127 1999

opposite resolution of both underlying issues leading to the same result. Within the four principal categories of Supreme Court decisions—unanimous decisions, non-unanimous majority decisions, plurality decisions, and three-judgment decisions—the possibility of cycling therefore has the meaningful potential to be realized in a small subset of plurality decision cases.[126] As in *Miller*, that subset shares the characteristic features of multidimensionality and asymmetry.

The question now arises under what conditions would we expect justices to attempt to avoid the resulting anomaly by switching votes on one underlying dispositive issue, thus joining as part of a majority on the remaining dispositive issue or issues. The next part introduces a group of cases that fall into the multidimensional/asymmetrical category, some of which have produced vote switches and others of which, like *Miller*, have not. I will then expand upon the model developed in this part to identify the conditions that have and have not led to vote switching. Finally, I will offer some insights into why, despite the presence of such conditions in *Miller*, Justices O'Connor and Kennedy did not concede standing to the clear contrary majority on that issue, and thus switch their votes based upon their analyses of petitioner's underlying challenge.

III. MULTIDIMENSIONAL/ASYMMETRICAL SUPREME COURT CASES THAT HAVE AND HAVE NOT PRODUCED VOTE SWITCHES

While *Miller* represents a small subset of cases presenting multidimensional and asymmetrical preferences, it does not stand alone.[127] This part introduces five additional cases that fall into this category. Three produced a decision by one or more of the justices to switch votes, thus conceding to a contrary majority on one of the underlying dispositive issues. Two, like *Miller*, did not produce a vote switch. After reviewing the cases, I will then expand upon the model set

[126] It is important to note one caveat to the assertion in the text. When a collective intransitivity is realized and when it produces a vote switch, the case is then resolved by a majority opinion (or, as seen in the examples discussed in part III.A below, a combination of separate majority opinions). While such cases are thus conducive to intransitive collective preferences, the vote switch avoids the anomaly.

[127] In addition to the cases that I will set out in detail in this Part, I will identify lower federal court cases that have applied these and other such precedents in cases where only one of the issues giving rise to the voting anomaly is presented in note 189 below.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 128 1999

out in part II to explain the conditions under which we would predict a vote switch and further offer some insights into why no vote switch occurred in *Miller*.

In three cases presenting a *Miller*-type voting anomaly, one or more Supreme Court justices was unwilling to accept the case result that followed from a strict application of outcome voting. Instead, these justices deferred to their colleagues' collective determination on an underlying dispositive issue, and thus voted for a different outcome than that which followed from the internal logic of their own opinions. In each case, the vote switches changed the Court's ultimate holding. Each case represents an exception to the outcome voting/narrowest-grounds doctrine regime in that, as a result of the vote switches, the outcome for the Court as a whole was determined partly by the justices' majority determination on an underlying issue rather than by each justice's outcome vote following strictly from the internal logic of his or her own resolution of dispositive issues.

A. Voting Anomaly Cases Producing Vote Switches

1. Pennsylvania v. Union Gas, Co.

The most recent vote-switch case, *Pennsylvania v. Union Gas, Co.*,[128] is particularly noteworthy in that the Supreme Court overturned it in *Seminole Tribe of Florida v. Florida*,[129] in part because of the presence of the voting anomaly that generated the vote switch. *Union Gas* presented two issues. First, does the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"),[130] as amended by the Superfund Amendments and Reauthorization Act of 1986,[131] permit a federal court damages action against a state? Second, assuming the statute authorizes such lawsuits, is it constitutional under the commerce clause or, instead, does Congress lack the authority to authorize such damages actions against a state under the Eleventh Amendment? The Court produced five separate opinions. In parts I and II of his opinion for the Court (joined by Marshall, Blackmun, Stevens, and Scalia), Justice Brennan concluded that the language of CERCLA permits lawsuits against states for damages in federal court.[132] In part III of his opinion for a

[128] 491 US 1 (1989).
[129] 517 US 44 (1996).
[130] 42 USC § 9601 et seq.
[131] Pub L No 99-499, 100 Stat 1613 (1986).
[132] See *Union* Gas, 491 US at 13-15, 19-20.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 129 1999

plurality (joined by Marshall, Blackmun, and Stevens), Brennan further concluded that allowing such suits does not exceed Congress's commerce clause powers. In a separate opinion, Justice Scalia stated that CERCLA permits such suits but, in a part joined by Rehnquist, O'Connor, and Kennedy, also concluded that such suits violate the commerce clause.[133] Justice White, in an opinion joined in part by Rehnquist, O'Connor, and Kennedy, stated that he did not agree that the language of CERCLA permits such suits. In another part of his opinion, written for only himself, Justice White went on to state:

> My view on the statutory issue has not prevailed, however; a majority of the Court has ruled that the statute, as amended, plainly intended to abrogate the immunity of the States from suit in the federal courts. I accept that judgment. This brings me to the question whether Congress has the constitutional power to abrogate the State's immunity. In that respect, I agree with the conclusion reached by Justice Brennan in Part III of his opinion, that Congress has the authority under Article I to abrogate Eleventh Amendment immunity of the State, although I do not agree with much of his reasoning.[134]

In addition to these opinions, Justices Stevens and O'Connor wrote separate concurring and dissenting opinions, respectively, which do not alter the essential voting line-up.

To simplify, the following table presents the four major voting blocs in the case. Brennan (plus Marshall, Blackmun, and Stevens) determined that CERCLA authorizes damage suits in federal court and that the statute is constitutional. Scalia determined that CERCLA authorizes damage suits in federal court, but that the statute is unconstitutional. White determined that CERCLA does not authorize damage suits in federal court, but, based upon his acceptance of the contrary majority ruling that it does authorize such suits, further determined that authorizing such suits is constitutional. Finally, Rehnquist, O'Connor, and Kennedy determined that CERCLA does not authorize damage suits in federal court and that, if it did, it would be unconstitutional. All justices implicitly agreed that if the statute permitted damages suits and if permitting such suits were constitutional, the result would have been to affirm, thus allowing the damages suit to proceed. They further agreed that if either the statute did not allow such suits or if the statute,

[133] See id at 29-30, 39-41 (Scalia, concurring in part and dissenting in part).
[134] Id at 56 (White, concurring in the judgment in part and dissenting in part).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 130 1999

construed to allow such suits, were unconstitutional, then the result would be to reverse. The following table summarizes the above discussion.

Table 5. Pennsylvania v. Union Gas Co.

	Statute authorizes suit	Statute does not authorize suit
Allowing suit does not violate commerce clause	Brennan, Marshall, Blackmun, Stevens	*White* (moves left)
Allowing suit violates commerce clause	Scalia	Rehnquist, O'Connor, Kennedy

Table 5 reveals the two-dimensional issue spectrum with potentially asymmetrical preferences in *Union Gas*. The bolded box contains the minority of justices who agree to the necessary and sufficient conditions to affirming the lower court ruling, which allowed a damage suit to proceed against a state under CERCLA. To reach this result, a majority had to determine both that the statute authorized suit against the states and that such authorization does not violate the commerce clause. Absent Justice White's decision to resolve the constitutional issue, even though the reasoning of his own opinion rendered that unnecessary, *Union Gas* would have presented a *Miller*-like voting anomaly. Separate majorities would have determined that the statute authorizes suit (the upper left and lower left boxes) and that authorizing suit does not violate the commerce clause (the upper left and upper right boxes), but the Court would have reversed because only a minority (the upper left box) agreed to both prerequisites to affirming. The italics and parenthetical entry indicate that by switching his vote, Justice White effectively placed himself in the upper left box, thus voting to affirm and to allow the suit to proceed, even though the internal logic of his opinion should have led to the opposite result. Had he not done so, the case would have presented asymmetrical preferences, meaning that Justices White and Scalia would have reached opposite resolutions on both identified dispositive issues, but would have reached the same outcome, namely preventing the damages action from proceeding.

By switching his vote, Justice White defied the general outcome voting rule under which he is effectively precluded from expressing his preferred case resolution in a form that is contingent upon which rationale predominates for the Court as a whole. While we cannot

HeinOnline -- 7 Sup. Ct. Econ. Rev. 131 1999

know with certainty why he failed to follow this rule, it seems apparent that he was unwilling to take the chance that the precedent would be construed in a manner opposite his preferred rationale on both issues. While his first choice was to reverse on the ground that CERCLA did not authorize the damage action against a state, his last choice was to reverse on the ground that, although CERCLA did authorize such suit, it could not do so constitutionally. As a result, he opted for an opposite outcome, which demanded that he concede the statutory construction issue, thus concluding that the statute authorized suit, in order to then hold that allowing the suit was constitutional. This is precisely the type of unacceptable ordinal ranking over combined issue resolutions that outcome voting, in the ordinary case, holds off limits.[135]

In a detailed analysis of over one-hundred-and-fifty Supreme Court decisions which he identified as potentially conducive to vote switching, Professor Rogers concluded that Justice White's vote switch, which he criticized, was nearly unprecedented.[136] Rogers determined that, with the exception of one case before, and one after, *Union Gas*, each discussed below, individual Supreme Court justices voted against the reasoned conclusion that follows from the internal logic of their own opinions only when the Court lacked a majority for one of three potential judgments: affirm, reverse, or remand.[137]

Overturning *Union Gas* for the *Seminole Tribe* majority, Chief Justice Rehnquist observed:

> In the five years since it was decided, *Union Gas* has proven to be a solitary departure from established law [on the power of Congress to waive state sovereign immunity]. . . . Reconsidering the decision in *Union Gas*, we conclude that none of

[135] See Part II.C above (providing illustrations based upon *Miller* hypothetical). See also Stearns, *Constitutional Process* ch 3 (cited in note 51).

[136] See Rogers, *Epimenides*, (cited in note 1). Professor Rogers employed a substantially different taxonomy in identifying and in analyzing Supreme Court cases than that presented in this article. Rogers, who focused primarily but not exclusively on plurality opinions, considered cases that presented multiple issues without addressing whether the articulated issues could be cast along a unidimensional or multidimensional spectrum or whether the aggregate issue resolutions produced symmetry or asymmetry, as those characteristics are employed here. The social choice analysis set out in this article helps to narrow considerably the relevant class of cases in which vote switching is plausible to those that possess the characteristic features of multidimensionality and asymmetry.

[137] Recall that in this category of cases, the justices have universally avoided the resulting indeterminacy through a vote switch from a more extreme position toward the remand. See note 76 (collecting cases).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 132 1999

> the policies underlying *stare decisis* require our continuing adherence to its holding. The decision has, since its issuance, been of questionable precedential value, largely because a majority of the Court expressly disagreed with the rationale of the plurality.[138]

There are no fewer than three ways that one can read this excerpt from Chief Justice Rehnquist's opinion. It is important to consider these possible readings because doing so will enable us to better understand whether the overruling of *Union Gas* was attributable to factors that the social choice model reveals, to an ideological or attitudinal shift on the Supreme Court, or to a combination of the two. At the same time, the analysis will help us to better understand the nature and implications of vote switching for Supreme Court decision making. First, Rehnquist's opinion might be construed to suggest that in voting anomaly cases, future Supreme Courts will apply a relaxed stare decisis analysis to allow the resolution of underlying issues when the foundation for a collective intransitivity is no longer present. If so, the conclusion would appear to have much to commend it as a matter of policy. After all, when the Court's collective preferences are intransitive, there is no solution to the problem of how to aggregate such preferences in a rational and fair manner. While outcome voting ensures a collective resolution even in such cases, relaxing stare decisis allows the Court to extricate itself from an inevitably problematic resolution of the issues that such a case produces.

Second, Rehnquist could be asserting that the difficulty in *Union Gas* has nothing to do with the voting anomaly, but rather arises because Justice White expressed disagreement with the part of the Brennan opinion that he joined, and that led to the decision to sustain CERCLA against constitutional attack. Thus viewed, Rehnquist might be focusing on a single-issue dimension represented along the vertical axis in Table 5, in which Justice Brennan concludes that Congress can abrogate state sovereign immunity, Rehnquist concludes the opposite, and White joins Brennan on the result, with reservations but with no independent rationale.[139] If so, Rehnquist's opinion could be construed to suggest an unwillingness to presume that Justice Brennan's opinion states the holding when it is possible, for example, that had Justice White stated the bases

[138] *Seminole Tribe*, 517 US 66.

[139] I am indebted to Evan Caminker for suggesting this reading of Justice Rehnquist's opinion.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 133 1999

for his reservations in joining Justice Brennan on the result, he might have offered an alternative rationale that resolved the case on narrower grounds.

Finally, in stating that the *Union Gas* "majority . . . expressly disagreed with the rationale of the plurality," Chief Justice Rehnquist might be including both Justice White and Justice Scalia, who disagreed with what otherwise would have been a plurality (the bolded upper left box in Table 5) on two separate and independent bases, over which they were split. If by conceding on the question of statutory interpretation, Justice White intended to signal agreement on the essential point that Congress has the power to abrogate state sovereign immunity, then there existed a majority, represented by Justice Brennan's plurality of four plus Justice White's concurrence, on that issue. In this alternative reading, for Rehnquist to claim that a majority disagreed with the Brennan analysis, he would have had to include in his majority Justice Scalia, who disagreed with Brennan on an issue of statutory construction, which had no bearing on the constitutional issue presented in *Seminole Tribe*. As explained below, under this reading, the decision to overrule is solely a function of ideology or attitudes rather than of any voting anomaly.[140]

[140] Thus viewed, the analysis in the text might appear to closely mirror the work of attitudinal scholars, who argue that Supreme Court outcomes are best understood as the product of the judicial ideologies, or attitudes. For an excellent introduction and overview of attitudinal theory, see generally Jeffery A. Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model* (1993) ("Segal and Spaeth, *Attitudinal Model*"). One critical difference between the social choice analysis offered here and an attitudinal analysis is that the former is less concerned with specific case outcomes, for example, the overruling of *Union Gas* in *Seminole Tribe*, than with the implications of such outcomes for the Supreme Court's collective decision-making processes. For example, whether or not the *Seminole Tribe* Court was motivated by attitudinal concerns in overruling *Union Gas*, social choice reveals that *Seminole Tribe* might have produced a stable decision-making rule if the case is interpreted to justify a relaxed application of stare decisis when the underlying precedent is the product of a voting anomaly. For a more detailed discussion of the relationship between social choice and attitudinal analyses of the Supreme Court, see Stearns, *Constitutional Process* ch 3 (cited in note 51). Another critical difference is that attitudinal theory generally depends on the assumption of a single dimensional issue spectrum, usually cast in liberal-to-conservative terms. In contrast, social choice analysis focuses upon the implications of multiple issue dimensions within judicial decisions and coalition structures within the Supreme Court that sometimes defy the characterization of liberal to conservative. For a more detailed discussion and analysis of the implications of multidimensionality on Supreme Court decision-making, see generally Stearns, *Constitutional Process* (cited in note 51).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 134 1999

While it is difficult to determine which of these readings of *Seminole Tribe* is most persuasive, the voting lineup in *Seminole Tribe* itself might appear to lend preliminary support to an attitudinal explanation. And yet, as explained below, the social choice model developed here combines with an attitudinal analysis to provide a more comprehensive understanding of the implications of the vote switching practice seen in *Union Gas*, the overruling of that decision in *Seminole Tribe*, and most importantly, the nature of the Supreme Court's decision making processes that transcend shifting judicial ideologies.

In *Seminole Tribe*, the Chief Justice was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. In his *Union Gas* dissent, which embraced a rationale opposite Justice Brennan's opinion for the Court on *both* underlying issues, the Chief Justice was joined by Justices O'Connor and Kennedy (appearing in the lower right box in Table 5). While Justice Scalia (appearing in the lower left box) concluded in *Union Gas* that Congress intended to abrogate state sovereign immunity, he agreed with the Chief Justice that Congress lacked the authority to do so. The critical fifth vote for overruling *Union Gas* came from Justice Thomas, who succeeded Justice Marshall. While Justice Marshall joined the Brennan plurality opinion in *Union Gas* (appearing in the upper left box), Justice Thomas instead joined the Chief Justice in ruling that Congress lacks the constitutional authority to overcome state sovereign immunity. So viewed, the Court's decision to overturn *Union Gas* in *Seminole Tribe* might be explained on straightforward ideological grounds, resulting from a critical change in Court personnel, namely the replacement of Justice Marshall, a dedicated liberal, with Justice Thomas, an equally dedicated conservative. As stated above, however, by combining this attitudinal insight with a social choice analysis, we can enrich our understanding of the dynamics of Supreme Court decision making. Whether or not the overruling was initially motivated by attitudinal concerns, the decision making practice produced by this overruling might well remain a stable solution to an intractable problem of how to treat a precedent at least partly caused by aggregating collective preferences in a Court that had multidimensional and asymmetrical preferences.

The issue remains whether we can identify the conditions that gave rise to Justice White's decision to switch his vote in *Union Gas*. To answer that question, it will be helpful to briefly consider two additional vote switch cases, and then to compare the results with those in *Miller*, *Kassel*, and *Tidewater*, in which no such vote switches occurred.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 135 1999

2. Arizona v. Fulminante

In the later decision, *Arizona v. Fulminante*,[141] Justice Kennedy engaged in a vote switch similar to that of Justice White in *Union Gas*, even though Kennedy later declined to do so in *Miller*. *Fulminante* presented two arguments in his capital murder appeal: (1) the second of two confessions introduced at trial was coerced; and (2) admitting the coerced confession was not harmless error. The case produced three separate opinions. In part II of his opinion (joined in relevant part by Marshall, Blackmun, Stevens, and Scalia), Justice White announced the judgment of the Court that the confession was, in fact, coerced.[142] In part III of his opinion, White (joined by Marshall, Blackmun, and Stevens) rejected any application of harmless error analysis in cases involving coerced confessions.[143] Because the five remaining justices chose to apply harmless error analysis, in part IV of his opinion, White (joined by Marshall, Blackmun, Stevens, and Kennedy), further determined that admitting the coerced confession was not harmless error.[144] In part II of Rehnquist's opinion (joined by O'Connor, Kennedy, Souter, and Scalia), the Chief Justice announced the judgment of the Court that harmless error analysis applies in cases involving the admission of coerced confessions.[145] In part I of his opinion (joined by O'Connor, Kennedy, and Souter), Rehnquist determined that the relevant confession was not coerced,[146] and in part III of his opinion (joined by O'Connor and Scalia), Rehnquist determined that the admission of the relevant confession was harmless error.[147] Finally, Justice Kennedy, in a separate opinion, stated that he agreed with Chief Justice Rehnquist that the relevant confession was not coerced and that the trial court therefore did not err in admitting it.[148] Kennedy also stated that he

[141] 499 US 279 (1991).

[142] See id at 287-88 (White, for the Court).

[143] See id at 288-89, 295 (White, dissenting as to the holding that the harmless error analysis applies to coerced confessions).

[144] Part I of White's opinion, which discussed the case facts, was joined by Marshall, Blackmun, Stevens, Scalia, and Kennedy. See id at 282-85. While White reached an issue, whether admitting the confession was harmless error, even though he had determined that harmless error analysis should not apply, this does not create the same type of vote switch anomaly that he produced in *Union Gas* or that Kennedy produced in this case. White's analysis of harmless error simply provided an alternative basis for the same holding, not the basis for a different holding.

[145] See id at 310-12 (Rehnquist, for the Court).

[146] See id at 305-06 (Rehnquist, dissenting).

[147] See id at 312.

[148] See id at 313 (Kennedy, concurring in the judgment).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 136 1999

agreed with Rehnquist that harmless error analysis does apply in the case of coerced confessions. Finally, Kennedy, echoing Justice White's approach in *Union Gas*, went on to state:

> The same majority of the Court does not agree on the three issues presented by the trial court's determination to admit Fulminante's first confession: whether the confession was inadmissible because coerced; whether harmless-error analysis is appropriate; and if so whether any error was harmless here. My own view that the confession was not coerced does not command a majority.
>
> In the interests of providing a clear mandate to the Arizona Supreme Court in this capital case, I deem it proper to accept in the case now before us the holding of five Justices that the confession was coerced and inadmissible. I agree with a majority of the Court that admission of the confession could not be harmless error when viewed in light of all the other evidence; and so I concur in the judgment to affirm the ruling of the Arizona Supreme Court.[149]

To summarize, *Fulminante* presented five different voting blocs. Justice White (joined by Marshall, Blackmun, and Stevens) determined that the confession was coerced, that harmless error does not apply, and that if it did apply, the admission of the confession was not harmless. Justice Scalia determined that the confession was coerced, that harmless error analysis does apply, and that the admission was harmless error. Justice Kennedy determined that the confession was not coerced, that harmless error analysis does not apply, but that if it did apply, the admission would not be harmless error. Justice Rehnquist (joined by O'Connor) determined that the confession was not coerced, that harmless error analysis applies, and that the admission was harmless error. Finally, Justice Souter reached the same conclusions on the first two issues, without reaching the third. Presumably all of the justices agreed that *if* the confession was not coerced (or was voluntary) and *if either* harmless error analysis does not apply *or*, if it does apply, the admission is not harmless, then the result is to reverse the conviction. To sustain the conviction, therefore, the Court needed to determine *either* that the confession was voluntary *or* that, if coerced, harmless error analysis applied *and* the admission was not harmless error. The following table summarizes the above discussion.

[149] Id at 313-14.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 137 1999

Table 6. Arizona v. Fulminante: Detailed Analysis

	Issue A: Was confession voluntary?	Issue B: Does harmless error analysis apply to coerced confessions?	Issue C: If so, was admission harmless error?	Preferred ruling
White, Marshall, Blackmun, Stevens (total 4)	*no*	*no*	*no*	reverse conviction
Kennedy (for 1)	*yes*	*yes*	*no*	*(affirm conviction)*
Scalia (for 1)	*no*	*yes*	*yes*	affirm conviction
Rehnquist and O'Connor (total 2)	*yes*	*yes*	*yes*	affirm conviction
Souter (for 1)	*yes*	*yes*	did not reach	affirm conviction
Outcome vote (hypothetical)				*affirm (5 to 4)*
Issue Vote (actual)	*no* (5 to 4)	*yes* (5 to 4)	*no* (5 to 3, one abstaining)	reverse (5 to 4)

To simplify the presentation, Table 6 presents each of the three issues, A, B, and C, such that a "no" benefits Fulminante, thus favoring reversal of the conviction, and a "yes" benefits the state, thus favoring affirmance. Based upon the foregoing analysis, to reverse the conviction, the Court must answer "no" to both A *and* to *either* B *or* C. To affirm, the Court needs to answer "yes" *either* to A *or* to *both* B *and* C. As before,[150] the bolded line between Kennedy and Scalia separates those justices who vote consistently with the case outcome from those who vote in dissent. While Justice Kennedy is listed as voting to affirm, the italics indicate that this outcome follows from the internal logic of his opinion, but that by conceding to a contrary majority, he instead joined the majority in voting to reverse. Table 6 presents another case with multidimensional and asymmetrical preferences. Because the presence of three issues complicates the presentation, we will now simplify Table 6 by eliminating the one issue for which there is a clear majority resolution, namely that harmless error analysis applies in the case of coerced confessions. The two remaining issues, then, are whether the confession was coerced and whether its admission was harmless error.

[150] See Table 1, Part I.E above (providing analysis of *Miller*).

Table 7 now presents the simplified analysis of *Fulminante*, which highlights the asymmetrical nature the underlying preferences:

Table 7. Arizona v. Fulminante: Summary Analysis

	Confession was coerced	Confession was not coerced
Admission was not harmless error	White, Marshall, Blackmun, Stevens	*Kennedy* (moves left)
Admission was harmless error	Scalia	Rehnquist and O'Connor; Souter (does not reach harmless error issue)[151]

In this presentation, the bolded box represents those justices who agree to both propositions necessary to reversing the condition, namely that the confession was coerced and that admitting the confession was not harmless error. A separate majority agrees to each of those underlying issues, with those in the upper left and upper right boxes concluding that the admission was not harmless error, and those in the upper and lower left boxes agreeing that the confession was coerced. Only the minority of justices in the bolded box agree to both propositions. But for Justice Kennedy's decision to concede the factual question whether the confession was coerced, the result would then have been to affirm the conviction with the justices in the upper right, lower left, and lower right boxes forming a majority of five to deny relief. Table 7 demonstrates that the voting anomaly in this case, like those in *Miller* and *Union Gas*, follows directly from the combination of multidimensionality and asymmetry. In this case, Justices Scalia and Kennedy resolve both issues in opposite fashion and, but for Kennedy's vote switch, would have achieved the same result, namely affirming the conviction.

3. United States v. Vuitch

The final case in this category, *United States v. Vuitch*,[152] involved the question whether the Supreme Court should affirm a conviction for performing abortions under a federal statute that applied only in

[151] Although Justice Souter did not reach the issue whether the admission of the confession was harmless error, I have placed him in the lower right box. I have done so on the ground this assumption operates against the creation of an intransitivity. See note 119 above (explaining same intuition in discussing the placement of Justice Scalia in *Miller* in Table 5).

[152] 402 US 62 (1971).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 139 1999

the District of Columbia. The district court dismissed the indictment on the ground that the statute was unconstitutionally vague and the government appealed under a statute that allowed direct appeals to the Supreme Court from cases striking down federal statutes on constitutional grounds.[153] The Supreme Court, in five opinions, distilled the case to two issues. First, does the Supreme Court have direct appellate jurisdiction under the relevant federal statute, given that the underlying statute applies only in the District of Columbia?[154] Second, if so, is the statute unconstitutionally vague? If the answer to either issue was yes, then the result should have been to affirm the dismissal.[155] The only way to reverse the dismissal was to find that the Supreme Court had jurisdiction and that the statute was not unconstitutionally vague.

Justice Black issued a two-part opinion, each joined by a different group of justices. In part I, for a majority including Chief Justice Burger and Justices Douglas, Stewart, and White, Justice Black concluded that the Supreme Court had jurisdiction. In part II, for a separate majority including Chief Justice Burger and Justices Harlan, White, and Blackmun, Justice Black concluded that the statute was not unconstitutionally vague.[156] In dissent, Justice Douglas (joined by Stewart) joined part I of the Black opinion, but, for reasons that differed from those embraced in the district court, held that the underlying criminal statute was unconstitutional.[157] In an opinion joined by Justices Brennan, Marshall, and Blackmun, Justice Harlan determined that the Supreme Court lacked jurisdiction, thus dissenting to part I of Black's plurality opinion.[158] While that opinion provided a basis for dissent, Justices Blackmun and Harlan instead determined that the majority disposition in part I of Justice Black's opinion (for five justices) on the jurisdictional question was binding.[159] Blackmun and Harlan thus reached the second issue in the case, joining part II of Black's plurality opinion, and voted to reverse.[160] Because *Vuitch* presented only two issues, we can immediately identify the conditions that give rise to the voting anomaly.

[153] Id at 62-64 (Black, for a plurality).

[154] Id at 64.

[155] Id at 67.

[156] Id at 64-65, 72-73 (Black, for the Court).

[157] Id at 74, 80 (Douglas, dissenting).

[158] Id at 93-96 (Harlan, dissenting as to jurisdiction).

[159] Id at 93 (Harlan, dissenting as to jurisdiction); id at 97-98 (Blackmun, dissenting as to jurisdiction).

[160] Id at 96 (Harlan, dissenting as to jurisdiction); id at 98 (opinion of Blackmun, dissenting as to jurisdiction).

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Table 8. United States v. Vuitch

	S. Ct. has jurisdiction	S. Ct. lacks jurisdiction
Statute is not unconstitutionally vague	Black, Burger, and White	Brennan and Marshall (do not reach vagueness issue); *Harlan and Blackmun* (both move left)
Statute is unconstitutionally vague	Douglas and Stewart (unconstitutional for independent reasons)	

As in the prior cases in this part, *Fulminante* reveals two issue dimensions with asymmetrical preferences, giving rise to the voting anomaly. All justices implicitly agree that to reverse the dismissal of the indictment, the Supreme Court must have jurisdiction and the statute must not be unconstitutionally vague. Separate majorities agree to both of the necessary and sufficient conditions to achieving that result. Those in the upper left and lower left boxes conclude that the Supreme Court has jurisdiction, and those in the upper left and upper right boxes forming a majority conclude that the statute is not unconstitutionally vague. But for the Harlan and Blackmun vote switches on the jurisdictional question, however, the result would have been instead to affirm the dismissal of the indictment, given that only a minority of justices, those in the bolded box, agreed to both of these necessary and sufficient conditions to reversing. As before, the anomaly results from the presence of multi-dimensional and asymmetrical preferences. Justices Brennan and Marshall did not reach the vagueness issue. Justices Douglas and Stewart on the one hand, and Justices Harlan and Blackmun on the other, however, addressed both underlying issues in the case and reached precisely opposite results. Most importantly, but for the Harlan and Blackmun vote switches, these two camps would have achieved the same result, namely to affirm the dismissal of the indictment.

We have identified the conditions under which the voting anomaly arises and reviewed the efforts of individual justices in particular cases to avoid the resulting conflict of a Court whose holding is at odds with the justices' collective resolutions of identified dispositive issues. We must now consider two more voting anomaly cases in which no justice switched his vote. After reviewing these cases, we can then expand upon the social choice model by identifying the conditions that give rise to a decision by a justice to switch or not switch his vote based upon the contrary majority resolution of an underlying dispositive issue.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 141 1999

B. Voting Anomaly Cases that did not Produce Vote Switches

1. Kassel v. Consolidated Freightways Corp.

We will begin with *Kassel v. Consolidated Freightways Corp.*,[161] which presented the question whether an Iowa statute that prohibited the use of 65-foot twin trailers in state, with exceptions benefiting in-state trucking interests, violated the dormant commerce clause. The statute's legislative history demonstrated that the law had the intended effect of making it more costly for out-of-state truckers to operate by forcing them to alter their rigs before entering Iowa or to travel around the state.[162] The statute thereby saved the wear and tear on state highways.[163]

The *Kassel* Court produced three opinions: a plurality of four by Justice Powell, a concurrence for two by Justice Brennan, and a dissent for three by Justice Rehnquist. The three writing justices distilled the case to two issues. First, is the appropriate substantive test the lenient rational basis test, or the somewhat more stringent balancing test under which the court independently weighs the law's alleged safety benefits against the burden it imposes on interstate commerce? Second, whatever the substantive test, can evidence in support of justifications for the statute not considered by the Iowa legislature be introduced at trial? Justice Powell, joined by Justices White, Blackmun, and Stevens, voted to strike down the statute, concluding that the relevant test was the balancing test and that the state's attorneys could introduce evidence at trial to support novel justifications for the statute not considered by the Iowa legislature.[164] Justice Brennan, joined by Justice Marshall, also voted to strike down the statute, concluding that the relevant test was the rational basis test, but that the trial court could consider only evidence actually used to support justifications that the Iowa legislature considered.[165] Brennan concluded that the legislative history evinced a protectionist motive, and that the statute was therefore *per se* unconstitutional, even applying the

[161] 450 US 662 (1981).

[162] Id at 677 (Powell, for a plurality); id at 681 (Brennan, concurring in the judgment).

[163] Such protectionist legislation is antithetical to the commerce clause, which states: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes. . . ." US Const Art I, § 8, cl 3. Although stated in the form of a grant of regulatory power to Congress, the clause has consistently been interpreted to prevent state legislation that impinges upon the national market. See, for example, *City of Philadelphia v New Jersey*, 437 US 617 (1978); *Hunt v Washington State Apple Advertising Commission*, 432 US 333 (1977); *Gibbons v Ogden*, 22 US (9 Wheat) 1 (1824).

[164] See *Kassel*, 450 US at 678-79 (Powell, for a plurality).

[165] Id at 680-81 (Brennan, concurring).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 142 1999

rational basis test.[166] Finally, Justice Rehnquist, joined by Chief Justice Burger and Justice Stewart, voted in dissent to uphold the statute, concluding that the relevant test was rational basis and that the state's lawyers could introduce evidence supporting novel justifications at trial.[167] The following table, which presents the two issue dimensions in *Kassel*, summarizes the justices' positions:

Table 9. Kassel v. Consolidated Freightways Corp.

	Rational Basis	Balancing Test
Admit novel evidence	Rehnquist, Burger, Stewart	Powell, White, Blackmun, Stevens
Exclude novel evidence	Brennan, Marshall	

The opinions reveal that two conditions were both necessary, but neither alone sufficient, to sustain the Iowa statute. Based upon all three opinions, the justices implicitly agreed that if the relevant test were rational basis, the lowest level of scrutiny, and if trial lawyers were free to introduce more, rather than less, evidence with which to find a rational basis, the result would be to uphold the statute. The bolded upper left box represents the minority of justices who agree to those conditions. If *either* the relevant test were the more stringent balancing test *or* if the state were not permitted to introduce arguments other than those considered by the Iowa legislature (given that all of the actual supporting justifications evinced a protectionist motive), then the result would be to strike down the Iowa statute. Table 9 reveals the voting anomaly in *Kassel*. One majority, composed of those in the upper left and upper right boxes, representing the Rehnquist and Powell camps, concludes that the trial court should be permitted to consider novel trial evidence, and another majority, composed of those in the upper left and lower left boxes, representing the Rehnquist and Brennan camps, concludes that the trial court should apply the rational basis test, leading to the logical outcome that the statute should be upheld. However, a separate majority composed of the Powell and Brennan camps, in the upper right and lower left boxes respectively, voted to strike down the statute on the ground that only one of the two necessary conditions for sustaining it were met. As before, the anomaly arises because the Powell and Brennan camps resolved both underlying dispositive issues in precisely opposite fashion, but voted for the same judgment.

[166] Id at 681.

[167] Id at 689-91, 702 (Rehnquist, dissenting).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 143 1999

Like *Miller, Kassel* therefore involves multidimensionality and asymmetry, but with no vote switch.

2. National Mutual Insurance Co. v. Tidewater Transfer Co.

We will now consider one final case with two issue dimensions and asymmetrical preferences. In *National Mutual Insurance Co. v. Tidewater Transfer Co.*,[168] the Supreme Court addressed the constitutionality of a federal statute granting diversity jurisdiction to federal district courts in cases between a citizen of a state and a citizen of the District of Columbia. The case presented four separate opinions: a plurality of three, written by Justice Jackson; a concurrence for two, written by Justice Rutledge; and two separate dissents for two each, written by Justices Vinson and Frankfurter. The *Tidewater* justices distilled the case to two major issues. First, under Article III, is a citizen of the District of Columbia a citizen of a state? Second, does Article I provide Congress with the power to confer jurisdiction upon federal courts beyond the limits of Article III?[169] All of the writing justices implicitly agreed that the federal statute is constitutional if the answer to *either* issues A *or* B is yes. The statute is unconstitutional only if the answers to both questions are no, meaning that a negative response to each question is a necessary, but insufficient, condition, to striking down the jurisdiction-conferring statute.

For a plurality, Justice Jackson, joined by Black and Burton, concluded that Chief Justice John Marshall's holding in *Hepburn & Dundas v. Ellzay*,[170] that citizens of the District of Columbia are not citizens of a state under Article III is binding,[171] but that Congress is not limited by Article III in conferring jurisdictional authority upon the federal courts.[172] Instead, Congress, pursuant to Article I, can confer additional responsibilities upon federal courts generally, as it has with those sitting in the District of Columbia, even if doing so extends beyond Article III's diversity requirement.[173] Thus, Justice Jackson determined that the answer to issue A was no, but that the answer to issue B was yes. In concurrence, Justice Rutledge, joined by Murphy, determined that, while *Hepburn* held that citizens of

[168] 337 US 582 (1949).

[169] See id at 586-88, 589-90 (Jackson, for the plurality); id at 606-07 (Rutledge, concurring); id at 627, 645 (Vinson, dissenting); id at 648-49, 652-53 (Frankfurter, dissenting).

[170] 2 Cranch 445 (1805).

[171] *Tidewater*, 337 US 586-88 (Jackson, for a plurality).

[172] Id at 591.

[173] Id 337 US at 591-92, 600 (plurality).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 144 1999

the District of Columbia were not citizens of a state for purposes of Article III diversity jurisdiction,[174] *Hepburn* should be overruled because it produces an unfair result not dictated by an original understanding of the purpose of the Article III diversity requirement.[175] Rutledge further determined that Article I does not provide Congress with general jurisdiction-granting power beyond the limits set out in Article III.[176] Justice Rutledge therefore determined that the answer to issue A was yes, but that the answer to issue B was no. Writing in dissent, Justice Vinson, joined by Douglas, concluded that, while Article I provides jurisdiction-granting authority to federal courts in the District of Columbia, Article III sets out the jurisdiction-granting limits for all other federal courts.[177] In addition, based upon the need for a strict interpretation in this context, Vinson determined that Article III's express language, which limits federal diversity jurisdiction to cases between citizens of different states, was controlling.[178] Finally, writing a separate dissent, Justice Frankfurter, joined by Reed, agreed that for federal courts outside of the District of Columbia the jurisdiction-granting limits are set by Article III, not by Article I.[179] Frankfurter also determined that, based upon the contemporaneous interpretation by John Marshall and others and the need for a consistent application of the word "State" as used throughout the Constitution, federal diversity jurisdiction must be limited to cases between citizens of different states.[180]

The following table summarizes the positions of the justices and reveals the *Tidewater* voting anomaly:

Table 10. National Mut. Ins. Co. v. Tidewater Transfer Co.

	D.C. citizens are not state citizens for diversity purposes	D.C. citizens are state citizens for diversity purposes
Congress is limited by Art. III in conferring jurisdiction	Vinson, Douglas; Frankfurter, Reed	Rutledge, Murphy
Congress is not limited by Art III in conferring jurisdiction	Jackson, Black, Burton	

[174] Id at 606 (Rutledge, concurring) (citing *Hepburn*, 2 Cranch 445).
[175] Id at 617-18, 625 (Rutledge, concurring).
[176] Id at 615.
[177] Id at 638-40 (Vinson, dissenting).
[178] Id at 643.
[179] Id at 648-52 (Frankfurter, dissenting).
[180] Id at 653-55.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 145 1999

In this case, the bolded upper left box indicates the two necessary and sufficient conditions for striking down the jurisdiction-granting statute, namely that D.C. citizens are not state citizens for diversity purposes and that Congress is limited by Article III in conferring jurisdiction. Separate majorities conclude that D.C. citizens are not state citizens for purposes of diversity jurisdiction (the upper left and lower left boxes) and that Congress is limited to Article III in conferring jurisdiction upon the federal courts (the upper left and upper right boxes), leading to the logical outcome that the statute should be struck down. But only a minority of the Court, appearing in the bolded box, accepts both necessary and sufficient propositions leading to that result. A separate majority composed of the Rutledge (upper right) and Jackson (lower left) camps therefore succeeded in upholding the statute on the ground that one of the two necessary preconditions to striking it down is not met. As before, the anomaly arises because while the Rutledge and Jackson camps resolve both dispositive issues in opposite fashion, they achieve the same result, namely upholding the statute.

We have now analyzed a total of six cases with multidimensionality and asymmetry, three of which—*Union Gas*, *Fulminante*, and *Vuitch*—produced vote switches, and three of which—*Miller*, *Kassel*, and *Tidewater*—did not.[181] We can now expand upon the social choice framework set out in part II, in an effort to identify the conditions that give rise to vote switches and to explain the failure of Justices O'Connor and Kennedy to concede standing, and thus to switch their votes, in *Miller*.

C. Distinguishing the Vote-Switch and Non-Vote-Switch Cases

There are two possible means of reconciling the decisions of individual justices to switch votes in *Union Gas*, *Fulminante*, and *Vuitch* with the failure of individual justices to do so in *Miller*, *Kassel*, and *Tidewater*. One explanation focuses on the importance of the underlying issue resolution or holding that would be suppressed absent the vote switch. Consider for example the substantive issues in *Kassel* and *Tidewater*, which did not generate vote switches. In *Kassel*, the voting anomaly produced the result that a majority of the Court voted to strike down a state law that infringed upon commerce, even though a majority on each of the two underlying issues concluded that relevant evidence supported a finding that

[181] See note 189 below for lower court applications of additional Supreme Court cases that fall into the latter category.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 146 1999

there was a rational basis to support the law. In *Tidewater*, the voting anomaly produced the result that a majority permitted diversity jurisdiction in federal court between a D.C. citizen and a citizen of a state, even though a majority of the Court determined that Article III limited diversity to citizens of different states and that Congress's power to confer such jurisdiction derived solely from Article III. I do not want to suggest that these cases, and the issues that they present, are unimportant. *Kassel* presents an important question about the power of states to regulate their own affairs without undue federal judicial interference and *Tidewater* presents an important question about the integrity of constitutional interpretation. But one could argue that *Kassel* and *Tidewater* implicate concerns of a somewhat different magnitude of importance than those underlying *Union Gas*, *Fulminante*, and *Vuitch*.

In *Union Gas*, had Justice White failed to switch his vote, the enforcement mechanism under a federal environmental statute would have been effectively nullified even though a majority determined that the provision anticipated the mechanism and that the mechanism was constitutional. While the Court later reached an opposite merits determination in overruling *Union Gas* in *Seminole Tribe*, that does not demonstrate that Justice White erred in concluding against striking down the statute, given the expressed viewpoints of the then-deciding Court. In *Fulminante*, a man would have been executed based upon a confession admitted at trial even though a majority of the Court determined that the confession was coerced and that its admission was not harmless error. And in *Vuitch*, Justices Harlan and Blackmun deferred to the collective judgment of a majority on a question of the Court's own jurisdiction, where failing to do so would have left in place a district court ruling with which they disagreed, striking down a Congressional statute.[182]

[182] One post-*Vuitch* vote switch might further edify our understanding of that case. In *Darden v Wainwright*, 473 US 927 (1985), Darden was scheduled for execution on September 4, 1985 and petitioned the Supreme Court for a stay of execution, which was denied, five to four, with Powell in the majority. Later the same day, Darden asked the Court, instead, to consider the previously filed papers as a petition for writ of certiorari, which the four justices who dissented from the stay denial granted. See id at 928. Under Supreme Court rules, the grant of a writ of certiorari does not operate as its own stay. See Robert L. Stern, Eugene Gressman, and Stephen M. Shapiro, *Supreme Court Practice* § 17.10, at 674 (BNA, 6th ed 1986); see also Richard L. Revesz and Pamela S. Karlan, *Nonmajority Rules in the Supreme Court*, 136 U Pa L Rev 1067, 1074-75 (1988) ("Revesz & Karlan, *Nonmajority Rules*"). And, in contrast with a petition for writ of certiorari, which is subject to the rule of four, petitions for a stay of execution require majority approval. See Stern, *Supreme Court Practice* at 674; Revesz and Karlan, *Nonmajority Rules* at 1075. In a second vote on the stay petition, Powell switched his vote, thus preventing the anomaly that the

HeinOnline -- 7 Sup. Ct. Econ. Rev. 147 1999

The difficulty with this type of explanation, however, is its apparent tautological quality. We can only know that the underlying issues are important because the vote-switching justices went out of their way to reach those issues.[183] Moreover, and perhaps more importantly, this analysis renders the vote switches in *Union Gas*, *Fulminante*, and *Vuitch* potentially difficult to reconcile with the absence of a vote switch in *Miller*, given that case sustained a sex-based distinction in the context of denying a woman her claimed citizenship status.

A better explanation, I will now argue, is grounded in social choice. This explanation turns on the relationship between and among the underlying case issues. In each of the cases generating a vote switch, the conceded issue can be characterized as a gateway issue, meaning an issue that possesses two characteristic features. First, the ultimate resolution of the gateway issue is essential to deciding whether or not to address the remaining substantive issue or issues. Second, the analytical framework employed in resolving the gateway issue is not inextricably linked with the analytical framework employed in the resolution of the remaining substantive issue or issues. Thus, in *Union Gas*, Justice White conceded to a contrary majority resolution on an issue of statutory construction which, unless resolved in favor of the power to regulate, would have obviated the need to reach a question of constitutionality. In *Fulminante*, Justice Kennedy conceded to a contrary majority resolution on the factual question whether a confession was coerced which, unless resolved in favor of the petitioner, would have obviated the need to reach either of the issues related to harmless error analysis. And in *Vuitch*, Justices Blackmun and Harlan conceded to a contrary majority resolution on whether the Supreme Court had appellate jurisdiction which, unless resolved in favor of jurisdiction would have obviated the need

grant of certiorari would have been futile. Both the Harlan and Blackmun vote switches in *Vuitch* and the Powell vote switch in *Darden* suggest that when the requisite number of justices make a collective judgment that the Court as a whole should decide a case, that determination is different in kind than those affecting collective determinations on the merits of an underlying substantive issue. See also Revesz and Karlan, *Nonmajority Rules* (discussing "the duty to preserve jurisdiction").

[183] This reveals one of the criticisms often leveled against attitudinal theory, namely that we can only know judicial attitudes as they are revealed in the very opinions in which we are attempting to use the theory as a vehicle for prediction. For an analysis and response to this criticism, see Segal and Spaeth, *Attitudinal Model* at 361 (cited in note 140) (positing that "[t]he most damning criticism of the attitudinal model in earlier days was that it employed circular reasoning inasmuch as the attitudes used to explain the justices' votes are based on these self same votes," and identifying three "separate and independent ways" to corroborate judicial ideology).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 148 1999

to address whether a federal criminal statute was unconstitutionally vague. While the resolution of each gateway issue in a particular manner was essential to deciding whether to reach the remaining issue or issues in these cases, the analytical framework employed in resolving each gateway issue was independent of that employed in resolving the remaining issue or issues. The vote switching justice might have chosen to concede to a contrary majority on the logically antecedent issue given, first, the analytical independence of the issues giving rise to the collective intransitivity and second, the precedential importance to the vote-switching justice of the logically subsequent issue relative to that of the logically antecedent issue.

In contrast, in *Kassel*, the underlying issues of whether the lower court could consider evidence in support of the statute beyond that considered by the enacting legislature, and whether the relevant test in evaluating a commerce clause challenge was the balancing test or the rational basis test, were inextricably linked to resolving whether a state law impinging upon a national market violates the dormant commerce clause.[184] And in *Tidewater*, the issues whether the District of Columbia is a state for purposes of Article III and whether Congress has the power to go beyond Article III in conferring jurisdiction upon federal courts also exist at the same level of construing federal court jurisdiction under Article III. In neither case was the resolution of one issue a logical predicate to the decision to address or not to address the other issue. In addition, the analytical frameworks for resolving the issues in both cases are not fully independent.

[184] While one might view the evidentiary question as a gateway issue, that characterization does not bear scrutiny in this context. *Kassel* is not a case in which the evidence question logically precedes a substantive issue of constitutional law. For Justice Brennan, the issue of constitutionality involved, first and foremost, the issue of which justifications in support of the law the enacting legislature considered. Brennan consistently embraced the position that, regardless of substantive test, lower courts could consider only the enacting legislature's actual justifications. However, with the exception of *United States v Virginia*, 116 S Ct 2264 (1996) (Ginsburg, for a majority) (concluding that in the context of an equal protection challenge to a sex-based classification benefiting men, the state could only defend with an actual legislative purpose), his position generally did not command majority support. For an earlier case in which Brennan embraced this position, see *Michael M. v Sonoma County Superior Court*, 450 US 464, 1214 n 2, 1217 (1981) (Brennan, dissenting) (rejecting majority rationale that sex-specific statutory rape law furthers an important governmental interest by "roughly 'equaliz[ing]' the deterrents of the sexes," in part on the ground that "the historical development of [the statute] demonstrates that the law was initially enacted on the premise that young women, in contrast to young men, were to be deemed legally incapable of consenting to an act of sexual intercourse," and because "[female] chastity was considered particularly precious. . . .").

HeinOnline -- 7 Sup. Ct. Econ. Rev. 149 1999

Under this analysis, the critical distinction is not whether a case involves a conceptually antecedent issue such as jurisdiction, standing, or a factual issue, rather than a logically subsequent issue of constitutional law. Rather, it is whether the case presents two issues operating at different levels. The intuition that a justice is more likely to concede an issue at one level to reach an issue at another level is bolstered by an additional distinguishing characteristic between those multidimensional and asymmetrical cases that produced a vote switch—*Union Gas*, *Fulminante*, and *Vuitch*—and those that did not—*Miller*, *Kassel*, and *Tidewater*. Notice that in each vote-switch case, the gateway issue was decided by a majority in a single opinion.[185] In contrast, in the cases that did not produce vote switches, the separate majorities on each issue that produced a logical voting path leading to the dissent were composed of justices over several opinions, including some in dissent.[186] At first glance, this might appear to provide an independent rationale for distinguishing the vote-switching from the non vote-switching cases. A more persuasive reading, I would suggest, is that the combination of issue resolutions within a single opinion or across multiple opinions is either the fortuitous product of how issues are initially conceived or how opinions are assigned, or is the product of strategic opinion writing. Either way, the resolution of one issue within a single opinion or across multiple opinions carries no significant normative content as the basis for the decision to concede or not to concede that issue to a contrary majority in a voting anomaly case.

To illustrate the potential fortuity of whether an issue is resolved in one opinion, reconsider *Miller v. Albright*. If *Miller* had been

[185] See *Union Gas*, 491 US at 13-15, 19-20 (Brennan, for a majority) (concluding that CERCLA authorizes damages suits against states); *Fulminante*, 499 US at 287-88 (White, for a majority) (concluding that the confession was coerced); *Vuitch*, 402 US at 64-65, 72-73 (Black, for a majority) (concluding that the Supreme Court had jurisdiction in this case).

[186] See Part II.C.3 (explaining that in *Miller*, Justices Stevens, Scalia, Ginsburg and Breyer, and those who joined their opinions, formed a majority to find that petitioner had standing, and that Justices O'Connor, Ginsburg, and Breyer, and those who joined their opinions, formed a majority to apply heightened scrutiny and to strike down the challenged INA provision on the merits); Part III.B.1 (explaining that in *Kassel*, Justices Brennan and Rehnquist, and those who joined their opinions, formed a majority to apply rational basis scrutiny, and Justices Powell and Rehnquist, and those who joined their opinions, formed a majority to admit novel evidence); Part III.B.2 (explaining that in *Tidewater*, Justices Jackson, Vinson, and Frankfurter, and those who joined their opinions, concluded that citizens of the District of Columbia are not citizens of the United States for diversity purposes, and Justices Rutledge, Vinson, and Frankfurter, and those who joined their opinions, concluded that Congress is limited by Article III in conferring jurisdiction upon the federal courts).

HeinOnline -- 7 Sup. Ct. Econ. Rev. 150 1999

conceived initially as neatly presenting the issues of standing and the choice and application of the substantive test for the underlying due process challenge,[187] then it would have been easy to imagine Justice Stevens writing a two-part opinion. The first part, holding that petitioner has standing, would have been joined by seven justices out of nine, excluding only O'Connor and Kennedy. The second part, concluding that the relevant test was more relaxed than heightened scrutiny (namely whether Congress had drawn a relevant distinction given the real differences between citizen mothers and citizen fathers as it relates to foreign born illegitimate children), would have commanded the support of only himself and Chief Justice Rehnquist. One can further imagine Justice Ginsburg, as part of the majority on part I of our hypothetical *Miller* opinion, then drafting a separate opinion, seeking majority support, which would hold that the relevant test is heightened scrutiny, under which the challenged INA provision fails. Had this occurred, the case would have been structurally identical to the vote-switch cases, *Union Gas, Fulminante, and Vuitch*. In this hypothetical *Miller* opinion, a single contrary majority opinion on standing would have presented an obvious opportunity for Justices O'Connor and Kennedy to concede that issue. This would turn Ginsburg's potential dissenting opinion on the choice and application of substantive test (joined only by Breyer and Souter), into a majority opinion (joined also by O'Connor and Kennedy). Notice also that, had this occurred, the case would not have been decided by a judgment, but rather by two separately authored majority opinions. Alternatively, the fact that *Miller* was not so structured might have been a deliberate strategy to prevent such a voting path from emerging.[188] From the perspective of aggregating collective preferences,

[187] At a minimum, the question for which the Court granted the writ certiorari did not make this division of issues immediately apparent. That question was:

> Is the distinction in 8 USC § 1409 between "illegitimate" children of United States citizen mothers and "illegitimate" children of United States citizen fathers a violation of the Fifth Amendment to the United States Constitution?

Miller, 118 S Ct at 1434.

[188] It is noteworthy that Justice Stevens resolved the issue of standing in part III of his opinion, in which he also stated:

> [T]he only issue presented by the facts of this case is whether the requirement in § 1409(a)(4)—that children born out of wedlock to citizen fathers, but not citizen mothers, obtain formal proof of paternity by age 18 [which he later explained was 21], either through legitimation, written acknowledgment by the father under oath, or adjudication by a competent Court —violates the Fifth Amendment.

Id at 1436. This statement provided the analytical foundation for parts IV and V of Stevens's opinion in which he applied a relaxed standard of review than heightened

HeinOnline -- 7 Sup. Ct. Econ. Rev. 151 1999

however, there is no difference between the majority resolution of a given issue in a single opinion or over multiple opinions. As applied to *Miller*, for example, whether in one opinion or in several, seven out of nine justices rejected Justice O'Connor's conclusion that petitioner lacked standing to raise her father's challenge. Indeed, several lower federal courts have embraced just this intuition in construing Supreme Court voting anomaly opinions in cases that presented only one of the underlying issues.[189]

We can now intuit why those justices who switched their votes in multidimensional asymmetrical cases might have done so. When the issues exist at different levels, as evidenced in part by majority coalescence in a single opinion resolving one issue, the voting anomaly might be of relatively minor conceptual significance.[190] But for the fortuitous combination of issues that the case happens to present,

scrutiny as applied in *United States v Virginia*, 518 US 515 (1996). Justice Stevens thus failed to structure his opinion in a manner that naturally would have invited the dissenting justices to join one part in an effort to forge a clear majority on the issue of standing.

[189] Professors David Post and Steven Salop and Professor John Rogers have identified several cases in which lower federal courts have tallied the votes across opinions when presented with one of the underlying issues from a Supreme Court voting anomaly case. See Rogers, *Epimenides* at 1008 (collecting cases) (cited in note 1); Post and Salop, *Rowing Against the Tidewater*, (same) (cited in note 2). For cases taking this approach with respect to *Tidewater*, see *Detres v Lions Building Corp.*, 234 F2d 596 (7th Cir 1956) (applying the Jackson plurality and Rutledge concurring opinions in *Tidewater* to uphold statute creating diversity jurisdiction with citizens of the Territory of Puerto Rico and of a state); *Siegmund v General Commodities Corp.*, 175 F2d 952 (9th Cir 1949) (applying same analysis to uphold statute creating diversity jurisdiction with citizens of the Territory of Hawaii and of a state); *Greene v Teffeteller*, 90 F Supp 387 (ED Tenn 1950) (applying *Tidewater* result in a challenge to post-*Tidewater* jurisdiction-granting statute for citizens of the District of Columbia and of states, in which the word " 'states', as used in [the relevant] section, includes * * * the District of Columbia."). For other cases taking the same general approach, see *Service Oil, Inc. v North Dakota*, 479 NW2d 815 (ND 1992) (applying *American Trucking Ass'ns., Inc. v Smith*, 496 US 167 (1990)); *Banco Nacional de Cuba v Chase Manhattan Bank*, 658 F2d 875 (2d Cir 1981) (applying *First Nat'l City Bank v Banco Nacional de Cuba (Citibank I)*, 406 US 759 (1972)).

[190] Recall from the discussion of the Condorcet criterion, Part II.A above, that some cycles are of relatively minor conceptual significance when intensities of preference are taken into account. The general means of accounting for preference intensities within legislatures, for example, is to relax independence of irrelevant alternatives, and thus to invite commodification of preference through logrolling. However, the analysis in the text suggests that, within the Supreme Court, a justice who perceives an underlying agreement on an important issue dimension, can to a limited extent register intensity of preference by conceding to a contrary majority along an alternative issue dimension.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 152 1999

a majority agrees on how to frame and resolve an underlying substantive constitutional question. When, in contrast, the two issues arise at the same level, vote switching is unlikely because the justices genuinely disagree how to resolve, or even define, the same substantive issue of law. And, as suggested above, this kind of disagreement can arise with respect to a conceptually antecedent issue such as jurisdiction, standing, or a factual issue, and with respect to any logically subsequent issue of constitutional law. This kind of disagreement, which is capable of generating a voting anomaly, but which fails to produce a vote switch, is less likely, however, when the multidimensionality and asymmetry arises from combined issues from both levels. At a minimum, this theory explains *Union Gas*, *Fulminante*, *Vuitch*, *Kassel*, and *Tidewater*.

Again, however, *Miller* appears somewhat difficult to reconcile with these other cases. Justices O'Connor and Kennedy could readily have conceded standing, a logically antecedent issue, to address the constitutional challenge to the Immigration and Naturalization Act, a logically subsequent substantive issue of constitutional law. And notice also that the analytical framework employed to resolve the question of standing is fully independent of that employed to resolve the issue of which level of scrutiny applies, and to determine what the result under the chosen standard would be. This might appear especially troublesome in the case of Justice Kennedy, given that he switched votes in *Fulminante*, but along with Justice O'Connor, declined to do so in *Miller*. It therefore appears that combining issues from different issue levels is a necessary, but insufficient, condition for a vote switch.

While *Miller* clearly presented issues at two levels, we can now identify three countervailing concerns that might have counseled against conceding standing. First, Justices Kennedy and O'Connor might have been concerned that the right claimed in *Miller* by the child who was conceived overseas by a U.S. citizen father and a non-U.S. citizen mother was not vested, and concluded that it was up to Congress to determine the conditions under which claims to U.S. citizenship vests. Thus, even if Kennedy and O'Connor believed that the statute was unconstitutional, they might also have insisted that the challenge be presented only according to terms set out in a federal statute. Under this analysis, Justices O'Connor and Kennedy determined that petitioner was not allowed to raise her constitutional challenge because the relevant statute did not expressly provide her with standing. So viewed, the standing analysis offered by Kennedy and O'Connor might be closely linked with Justice Scalia's conclusion that separation of powers prevents a federal court from

HeinOnline -- 7 Sup. Ct. Econ. Rev. 153 1999

conferring citizenship upon the daughter even if she succeeded on the merits of her constitutional challenge.[191] Notice that in this analysis, the standing issue is not a gateway issue for Justices O'Connor and Kennedy as that term is defined above,[192] because the analytical framework used to resolve standing is not fully independent of that used to resolve the issues that remain.

Second, Justices O'Connor and Kennedy might have been influenced by *Seminole Tribe*, in which a majority of the Court reversed *Union Gas* in part as a result of Justice White's vote switch, and did so *after* Kennedy's vote switch in *Fulminante*. To the extent that *Seminole Tribe* constitutes a precedent on the processes of Supreme

[191] It is worth noting that this analysis is consistent with the independent views of standing expressed in separate opinions by Justices O'Connor and Kennedy. Thus, in her majority opinion in *Allen v Wright*, 468 US 737 (1984), and in joining the Blackmun dissent in *Lujan v Defenders of Wildlife*, 504 US 555 (1992), Justice O'Connor clarified that, for her, the lynchpin of standing was separation-of-powers and the desire to protect the power of Congress to monitor the executive branch as it saw fit. Thus, in Justice Blackmun's *Lujan* dissent, which O'Connor joined, he stated:

> In fact, the principal effect of foreclosing judicial enforcement of such procedures [as the citizen suit provision of the Endangered Species Act] is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates.

Id at 602 (Blackmun, dissenting). Critically, for O'Connor, the power of Congress to monitor the executive branch as it sees fit includes the power to confer standing broadly by statute.

Justice Kennedy has not gone as far as O'Connor in his willingness to afford Congress unlimited reign to confer standing. Nevertheless, in his *Lujan* concurrence, Kennedy suggested that he would afford Congress greater latitude in conferring standing than would Justice Scalia, who authored the majority opinion (which Kennedy also joined except as to part III.B, which involved the question of redressability). In his majority opinion, Justice Scalia strongly suggested that for Congress to confer standing it must establish to the Court's satisfaction a common law analogue to the underlying injury. In contrast, Justice Kennedy stated:

> In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. . . . In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.

Id at 580 (Kennedy, concurring). The opinions of both Justices O'Connor and Kennedy are consistent with the argument in the text that, had Congress conferred standing to challenge specific provisions of the INA on constitutional grounds, they would likely have afforded petitioner standing to raise her father's due process challenge, but that absent such a statutory grant, they will deny standing. For a more detailed analysis of *Lujan* and the justices' differing views of Congressional standing, see Stearns, Constitutional Process ch 6 (cited in note 51); Stearns, *Historical Evidence* at 449-59 (cited in note 32).

[192] See text accompanying note 184.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 154 1999

Court decision making, it likely stands for the proposition that holdings produced as a result of a vote switch will have only limited stare decisis value. It appears less plausible that *Seminole Tribe* stands for the proposition that individual justices cannot switch their votes, thus conceding to a contrary majority on a logically antecedent issue, given that the Court lacks any apparent mechanism with which to enforce such a rule. Nonetheless, it is possible that Justices O'Connor and Kennedy viewed *Seminole Tribe* as a criticism of the practice of vote switching and chose to exercise caution in *Miller* as a result.[193]

Finally, Justices O'Connor and Kennedy might not have switched their votes because the *Miller* opinion, whether fortuitously or deliberately, did not produce a single opinion in which a majority of the justices resolved the question of standing against them. As a result, the opinion structure might have played down the two different levels at which standing and the underlying merits of the constitutional challenge would ordinarily be seen to operate. If so, this might further support the intuition that those justices who voted to deny relief were more concerned with the outcome than they were with which rationale dominated in support of that outcome.

In closing, it is important to remember that this article has developed an economic model that is helpful in explaining institutional behavior generally but not necessarily the behavior or predilections of individual justices in every case. With that caveat, the social choice model fares quite well in placing *Miller* in an edifying economic perspective. Finally, social choice places all the multidimen-

[193] One can, of course, only speculate as to the future effect on vote switching of the overruling of *Union Gas* in *Seminole Tribe*. On the one hand, if the disinclination of Justices O'Connor and Kennedy to concede standing in *Miller* was attributable to this overruling, as suggested in the text, then we might expect further deterrence of vote switching in the future, at least by these, often swing, justices. On the other hand, vote switching is only relevant in those rare multidimensional and asymmetrical cases, which tend to cut across, or defy, traditional ideological coalitions on the Court. The disinclination of Justices O'Connor and Kennedy to switch votes might therefore have little bearing on the decisions of other justices in future cases. The likelihood that a justice will switch his or her vote is a function of the perceived precedential value to that justice of a favorable resolution of the logically subsequent issue. It is even possible that a potential vote-switching justice would find *Seminole Tribe* to be a mild source of encouragement on the ground that vote switching will provide a temporary favorable ruling on a logically subsequent issue without unduly binding the Court to that result, as evidenced by the relaxed application of stare decisis. If so, this might bolster the intuition that, regardless of the initial motivation for the overruling of *Union Gas* in *Seminole Tribe*, the effect might be to establish a relatively stable custom regarding the stare decisis effect of multidimensional and assymetrical cases generally, or at least those producing a vote switch.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 155 1999

sional asymmetrical cases within a broader perspective, which reveals the limited circumstances in which the Supreme Court confronts a substantial problem in collective preference aggregation.

IV. CONCLUSION

This article has employed the theory of social choice to explore the implications of a rare, but important, phenomenon in Supreme Court decision making, namely cases in which separate majorities on underlying dispositive issues produce a logical voting path leading to the dissenting result. I began by devising a taxonomy of cases that reveals the limited conditions in which this type of voting anomaly is capable of arising. Within the relevant grouping in which a collective intransivity has the potential to occur, I then divided the cases into those in which one or more justices switched their votes, thus conceding to a contrary majority on an underlying issue, and those like *Miller*, in which no justice switched his vote. Finally, I offered some insights into why vote switching has and has not occurred in the identified cases. While voting anomaly cases remain rare in Supreme Court decision making, I believe that exploring this phenomenon through the lens of social choice has achieved two goals. First, it has revealed that analyzing specific Supreme Court case outcomes is substantially furthered by considering the collective nature of the Court's decision making processes. Second, it has revealed the power of social choice to explain the dynamics of decision making within that important institution. Hopefully this article will encourage others who are interested both in the Supreme Court and in law and economics to consider the implications of social choice in their future work.

HeinOnline -- 7 Sup. Ct. Econ. Rev. 156 1999