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Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court[*]

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Theory: Supreme Court opinion authors make strategic calculations about the need to craft opinions that are acceptable to their colleagues on the bench.
Hypotheses: The willingness of justices to accommodate their colleagues depends upon the size and ideological makeup of the majority conference coalition and the number of suggestions and threats issued by their colleagues. These strategic considerations are important even after controlling for a series of nonstrategic factors, such as case complexity.
Method: To examine the extent of accommodation in Supreme Court cases, we examine the number of draft opinions circulated by the majority opinion author. We use a Generalized Event Count model to determine whether strategic or nonstrategic efforts influence the amount of accommodation that occurs.
Results: We show that accommodation is influenced strongly by strategic concerns—including the size of the majority conference coalition, the ideological distance of the author from the majority coalition, the ideological heterogeneity of the conference majority coalition, and the positions taken by majority coalition members and by nonstrategic factors, including the author's workload and the complexity of a case.

Because outcomes on the Supreme Court depend upon forging a majority coalition that, for most cases, must consist of at least five justices, judicial scholars have long believed that Court opinions reflect the need to accommodate other justices through bargaining and compromise as well as each justice's pursuit of an individual policy agenda. This view of strategic behavior on the Court was first explored by Murphy in his pathbreaking *Ele-*

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ments of Judicial Strategy (1964). Murphy argued that Supreme Court justices recognize that their opinions influence public policy and thus can act strategically to have the Court's opinions more closely conform to their policy preferences. To achieve this objective, justices must, at a minimum, take into account the choices made by their colleagues. This may ultimately lead justices to negotiate, bargain, and compromise, as suggested by Murphy and others.

The principal empirical support for Murphy's strategic conception of the Court is provided by journalistic and historical accounts of Supreme Court decision-making (Cooper 1995; Schwartz 1985, 1988, 1990, 1996; Simon 1995; Woodward and Armstrong 1979). Scholars such as Murphy (1964) have attempted to test claims that justices act strategically, but they have generally relied upon case studies whose generalizability is questionable (Epstein and Knight 1995).[1] Indeed, few systematic studies have explored the nature of such interdependent behavior, with tests of strategic interaction primarily limited to studies of voting fluidity (Dorff and Brenner 1992; Howard 1968; Maltzman and Wahlbeck 1996a). Although these studies show that a justice's decision to change his or her vote between the initial conference on a case's merits and the release of the final opinion occurs in response to the nature of the opinions circulated, they also demonstrate that voting fluidity is relatively rare. During the Burger Court, for example, justices changed their vote only 7.5% of the time (Maltzman and Wahlbeck 1996a).

Although voting fluidity represents one form of strategic action, it is not the only, or even the most important, indicator of strategic behavior on the Court.[2] Instead, the circulation of majority opinion drafts and the responses of other justices to these drafts best capture the interdependency of the Court's decision process.[3] As Schwartz explains, "It is in the give-and-take of views following circulation of the draft opinion that the language of the final opinion is developed" (1996, 58). Chief Justice Rehnquist echoed this view: "There must be an effort to get an opinion for at least a majority of the Court in every case where that is possible. . . . To accomplish this, some give and take is inevitable, and doctrinal purity may be muddied in the process" (Rehnquist 1992, 270). In other words, to achieve their policy

[1]One notable exception is Perry (1991, chap. 6), who interviewed justices and their clerks to establish that although bargaining and negotiating are rare on certiorari decisions, they occur during the opinion-writing process.

[2]Of course, vote changes can be explained as a function of sincere behavior, as well as strategic behavior (Palmer 1990). Maltzman and Wahlbeck (1996a) found that fluidity results from uncertainty about the cases and institutional considerations.

[3]Spriggs, Maltzman, and Wahlbeck (1996) found that individual justices who voted with the conference majority take an action, other than sending a simple letter to join the majority opinion, about one quarter of the time. This provides some empirical support for Schwartz's and Rehnquist's claim that give and take occurs regularly on the Court.

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objectives, it may be necessary for majority opinion authors to act strategically, taking the choices of other justices into consideration when crafting opinions of the Court.

Because of the compromising and negotiating that occur during the opinion-writing process, Epstein and Knight (1995) interpret the revision of the majority opinion and the circulation of multiple drafts as an indicator of the strategic behavior of justices. The number of majority opinion drafts circulated in a case represents the majority opinion author's efforts to accommodate other justices. The justices themselves recognize that the circulation of multiple draft opinions is an indication of the amount of bargaining that takes place among the justices. Brennan once remarked that "Before everyone has finally made up his mind a constant interchange among us . . . continues while we hammer out the final form of the opinion. I had one case during the past Term in which I circulated 10 printed drafts before one was approved as the Court opinion" (Brennan 1960, 405; see also Stewart 1977, 162). Likewise, one justice's comments to Perry suggest that justices view multiple drafts as a necessary step in the process of accommodation.

> Perry: When you are writing an opinion, you send around drafts and another justice says, drop this section or drop that section—
>
> Justice: [Interrupting] Clearly, and that's something we ought to do. In fact in ____ v. ____, which I wrote, I was checking once and I noticed that there were over twenty circulations, and for many cases there are a half dozen or more circulations (Perry 1991, 145).

We study the process of bargaining and accommodation on the Supreme Court by examining the number of majority opinion drafts circulated in every case where a majority opinion assignment was made or a signed opinion was released during the Burger Court (1969–85 terms). By identifying the strategic conditions that lead majority opinion authors to circulate multiple drafts of an opinion and by taking into account other factors that might also affect a justice's decision to recirculate, we identify conditions that promote bargaining and accommodation on the Court. The results lend support for a model of Supreme Court decision-making that recognizes the confluence of policy preferences, strategic concerns, and other nonstrategic constraints on the choices justices make.

The Interdependency of Judicial Choice

A strategic model suggests that justices pursue their policy objectives within constraints established by their colleagues and the institutional setting. As Rohde and Spaeth argue, the majority opinion author "is not, however, a free agent who can simply write the opinion to satisfy solely his own preferences" (1976, 172). As a result, justices do not allow their sincere policy pref-

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erences to dictate their actions. Instead, they bargain and compromise to achieve a result that, given the decision-making setting, is as close as possible to their preferred outcome. It is this interdependency of choice that is the essence of Murphy's strategic explanation of the opinion-writing process.

One of the most important and enduring actions a justice can undertake is to write a majority opinion. Opinions contain legal rules that establish referents for future behavior and thus have an impact beyond the parties in the litigation (Knight 1993; Spriggs 1996). For this reason, justices relish the opportunity to be assigned a majority opinion (Rehnquist 1987, 296) and attempt to frame legal rules that most closely match their policy preferences (Wahlbeck 1997). In other words, justices care not just about the direction of the outcome, but also about the content of the opinions that accompany the Court's rulings.

Although opinion authors clearly have a disproportionate influence over the final opinion, they cannot act unilaterally. The author's choices regarding the opinion's legal reasoning are, in part, structured by the choices of other justices. After circulating an opinion draft, the author commonly receives comments and suggestions. Chief Justice William Rehnquist explains, "If a justice agrees with the general import of the draft, but wishes changes to be made in it before joining, a letter to that effect will be sent . . ." (1987, 302).

The papers of retired justices provide numerous examples of instances in which justices have requested that majority opinion authors make changes to their draft opinions. These requests often state conditions that must be met before a justice will join an opinion. As Justice Potter Stewart once told Justice Hugo Black, "I would be willing to join your opinion, if you would be receptive to two additions . . ." (Stewart 1969). Similarly, Justice Byron White wrote Justice William Brennan, "if you would consider a minor change or two, I shall join you" (White 1989). Justice Brennan likewise wrote Chief Justice Rehnquist "I am in almost complete agreement with your draft opinion. Before joining, however, I would ask that you make two small changes" (Brennan 1989a).

A strategic justice who has been assigned the majority opinion will recognize that it is sometimes rational to yield on some issues in order to maintain control of the opinion (Epstein and Knight 1995; Murphy 1964; Perry 1991; Schwartz 1996). Indeed, a justice informed Perry that:

> We don't negotiate, we accommodate. And this is a perfectly appropriate and good procedure because this is a court of nine people and it is our responsibility to have an opinion of the Court—a unanimous opinion if possible when the Court can come up with one. And so it is good to have this accommodation, and attempts to accommodate (Perry 1991, 144–5).

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A memo from Justice Brennan to Justice Thurgood Marshall explaining a majority opinion draft that Brennan wrote in *Pennsylvania* v. *Muniz* (1990) highlights the type of tradeoff that a strategic justice must make:

> Had my draft opinion suggested that no such exception [to *Miranda*] existed, at least five if not more would have written separately to disagree, and I would have had no control over the breadth of the exception they would create. I made the *strategic* [emphasis added] judgment, therefore, to concede the existence of an exception but to use my control over the opinion to define the exception as narrowly as possible. . . . As you will recall, Sandra forced my hand . . . (Brennan 1990).

Justice Potter Stewart also penned the following to the conference: "I have restructured this opinion somewhat, in an effort to meet the difficulties expressed respectively by John Harlan and Bill Brennan" (Stewart 1970). The changes reflected in subsequent drafts often have the desired effect of enticing a justice to join the opinion. This phenomenon is illustrated by a letter from Justice Brennan to Justice Sandra Day O'Connor: "Thank you very much for the changes in the above. Please join me" (Brennan 1989b).

Our principal argument is that the choices majority opinion authors make are, at least in part, a function of the choices made by other justices. Justices pursue their own policy objectives, but they are also constrained by their colleagues. Of course, certain nonstrategic factors may also affect the circulation of majority opinion drafts. In the analyses reported below, we control for a variety of these nonstrategic factors in order to determine the relative influence of bargaining on the circulation of majority opinion drafts.

Strategic Determinants of Accommodation

Decision-making on the Court is a collective enterprise among the justices and, as a result, justices' choices are interdependent. The actions and decisions of one justice are, in other words, affected by the positions adopted by his or her colleagues. Opinion authors' decisions about the content of majority opinions are therefore in part a function of the choices made by other justices on the Court. We examine the influence of several strategic considerations on the likelihood of an opinion author accommodating his or her colleagues.

The first calculation a strategic justice makes stems from the author's need to hold together a majority of the Court, that is, the conference decision coalition. An author with a fragile decision coalition should be more amenable to suggestions from colleagues. Indeed, it is precisely this phenomenon that apparently motivated Brennan to accommodate O'Connor in *Pennsylvania* v. *Muniz* (1990) and led Chief Justice Rehnquist to exclaim,

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"The willingness to accommodate on the part of the author of the opinion is directly proportional to the number of votes supporting the majority result at conference . . . if the result at conference was reached by a unanimous or a lopsided vote, a critic who wishes substantial changes in the opinion has less leverage" (Rehnquist 1987, 302). Rehnquist's comment suggests:

> *Hypothesis 1: The likelihood of the majority opinion author accommodating colleagues is inversely related to the size of the majority conference coalition.*

The need for the majority opinion author to moderate his or her views depends upon the acceptability of those views to the majority coalition. When the author's views are acceptable to the coalition, there is little need for accommodation. In contrast, when the author's preferred outcome is more distant from that favored by the majority coalition, the author must make a greater effort to accommodate other coalition members. Therefore:

> *Hypothesis 2: Opinion authors who are ideologically distant from the majority coalition on whose behalf they are writing will make a greater effort to accommodate their colleagues.*

The ideological composition of the supporting coalition also affects the willingness of opinion authors to adjust their opinions. If the majority is particularly heterogeneous, then the opinion author will probably have greater difficulty persuading the coalition members to adopt his or her legal reasoning. Thus:

> *Hypothesis 3: The more ideologically heterogeneous the conference majority coalition, the more likely the author will accommodate other justices.*

We also expect the magnitude of bargaining in the majority coalition to affect the scope of accommodation. As Brennan (1960), Rehnquist (1987), Perry (1991) and Schwartz (1996) show, justices see a causal relationship between suggestions and changes in the draft opinion. As justices make suggestions about the majority opinion, more accommodation is likely to occur. Still, all suggestions are not equal. For instance, the bargaining strength of the suggesting justice may influence the likelihood that accommodations will follow. If a justice makes it clear that he or she will join the majority only if certain suggestions are incorporated in the draft, such suggestions should carry extra weight and, thus, provoke a greater effort at accommodation. Two hypotheses follow:

> *Hypothesis 4: The larger the number of letters from justices in the conference majority coalition that make suggestions or voice concerns about an opinion, the greater the accommodation.*

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Hypothesis 5: The larger the number of letters from conference majority coalition members making threats (explicit statements that joining an opinion is contingent upon changes), the greater the accommodation.

After an opinion is circulated, justices do not have to "join" the opinion or make suggestions. One tactic that justices regularly use is to inform the justice who drafted the opinion that they are unwilling to join the opinion until subsequent majority opinion drafts or nonmajority opinions are circulated. Normally, justices who voted with the majority at conference "will join [the majority opinion] without waiting for circulation of the dissent" (Rehnquist 1987, 303). Thus, an opinion author may interpret such a "wait" statement as a strategic move to entice more concessions. It follows that:

Hypothesis 6: The effort to accommodate will increase as the number of letters from majority coalition members stating that they are going "to wait" before deciding to join the opinion rises.

Nevertheless, the majority opinion author should not be expected to respond to every suggestion. Although Brennan, in *Pennsylvania* v. *Muniz* (1990), clearly made the strategic calculation to accommodate changes O'Connor insisted upon, opinion authors also refuse to accommodate their colleagues. For example, in one case Justice Marshall, who was authoring the majority opinion, decided that, "Since seven of us agree, my current plan is not to make the change suggested in the Chief's ultimatum" (Marshall 1985). A suggestion or statement from a justice who voted with the minority at conference, and is thus likely to dissent, is likely to be discounted by the majority opinion author. Consistent with this idea is Brennan's observation that after circulating a draft majority opinion, the author's particular concern is "whether those who voted with him are still of his view and what they have to say about his proposed opinion" (Brennan 1960, 405). According to Brennan, opinion authors are more concerned about accommodating the views of a majority coalition member than those of a dissenter. Thus:

Hypothesis 7: A larger volume of suggestions from justices in the minority conference coalition is unlikely to lead to greater efforts at accommodation.

Hypothesis 8: The effort to accommodate is not related to the number of letters from minority conference coalition members informing the majority opinion author that they will wait before making a final choice.

Nonstrategic Influences on Accommodation

Nonstrategic factors that stem from characteristics of either the case or the opinion author can also account for the variation in the amount of ac-

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commodation that occurs. Circulating a new draft in order to accommodate one's colleagues requires an investment of time and energy on the part of the majority opinion author. Because all justices "operate under one intensely practical constraint—time" (Ginsburg 1990, 141) the willingness of an opinion author to accommodate colleagues is in part a function of the amount of work that the justice has pending and the time available to complete that work. When a justice has many majority opinions waiting to be written or as the Court approaches the end of its term, we expect greater reluctance to write another draft.

Hypothesis 9 : The willingness of a justice to accommodate his peers with a new draft is inversely proportional to the justice's outstanding workload.

Hypothesis 10 : In cases argued towards the end of the Court's term, justices are less likely to respond to the concerns of colleagues.

An author's need to engage in accommodation may also depend upon the nature of the case. Because the likelihood that the majority opinion author has dealt successfully with all pertinent concerns in the initial draft is diminished if a case is particularly complex, we expect:

Hypothesis 11 : Complex cases will require additional efforts at accommodation.

Likewise, we expect authors to make a greater effort to accommodate their colleagues' concerns in cases that are particularly important (Epstein and Knight 1995). Due to their possible impact, important cases are likely to promote more give-and-take among the justices.

Hypothesis 12 : More important cases will require additional efforts at accommodation.

Data and Methods

As we discussed above, justices and scholars alike see the number of drafts as a reasonable, albeit imperfect, measure of the extent to which the majority author accommodates his or her colleagues. Thus, we use the number of draft majority opinions circulated for each of the 2,295 cases where a majority opinion assignment was made or a signed opinion was released during the Burger Court (1969–85 terms) as our dependent variable (see Epstein and Knight 1995, 26).[4] To obtain the data, we relied upon the circulation

[4]If a *per curiam* opinion or memorandum is assigned and ultimately a signed opinion is released, we included the case in our study. In 51 of the 2,295 cases (2.2%) included in our analysis, more than one justice circulated majority opinions. In most of these cases, this occurred because of a shift in the majority. Obviously, this has the potential of inflating the number of majority opinion

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records maintained by Justice William Brennan and available in his papers at the Library of Congress. For every case, these records provide a listing of all majority opinion drafts, nonmajority opinion drafts, and letters and memoranda written by every member of the Court and circulated to the conference.[5] Data drawn from Brennan's circulation records are highly reliable.[6]

Because our dependent variable is a count of the number of majority opinion drafts, an event count model is the appropriate statistical estimation strategy (King 1988). A Poisson regression model is the simplest and most commonly employed event count model, but it assumes that the probability of an event occurring at any instant is constant. Contrary to that assumption, the circulation of one draft inevitably influences the need for a second draft to be circulated. Accordingly, a Poisson model of the number of drafts would lead to underdispersion, and is thus inappropriate. Instead, we utilize King's generalized event count model (GEC), which incorporates a stochastic component that captures underdispersion (King 1989a; King and Signorino 1996). The model's functional form is the following:

$$E(Y_i) = \lambda_i = \exp(x_i\beta),$$

where $E(Y_i)$ equals the number of majority opinion drafts circulated in a case, and $x_i\beta$ represents the set of independent variables (King 1989a).

The event count model assumes that the length of each observation period is equal (see King 1989b, 50). If this assumption is violated, one con-

drafts circulated. To control for this, we limited our analysis to the number of draft opinions circulated by the final author. Because some of these authors circulated draft concurrences or dissents before they gained a majority, we counted concurrences and dissents circulated by the final majority opinion author as drafts. Also, in these cases, to identify the conference majority coalition, we determine which justices supported the author's position at conference.

[5]As Epstein and Knight (1995, 29–30) note, scholars can not obtain all private memoranda that may have been circulated between two justices but not sent to the entire conference. These memos are excluded from our analysis as Brennan's circulation records do not record them prior to the 1982 term; they are not systematically recorded until the 1983 term. The private memos listed in Brennan's circulation records, moreover, only include those written by or sent to Brennan. While including private memoranda would obviously introduce substantial bias since they are only recorded for Brennan, it is important to note that excluding such memoranda has the possible effect of underestimating the amount of strategic action that occurs.

Occasionally towards the end of the term, the Court's print shop becomes inundated with draft opinions as justices, who traditionally circulate typeset drafts, rush to complete their work. When this occurs, some justices may send a memo to the other justices informing them of forthcoming changes in the opinion or a typewriter-generated draft. As Brennan's circulation records includes these typed drafts, our count includes these as well as the usual typeset drafts.

[6]To assess the reliability of the data, a set of coders independently coded two randomly selected terms. The interagreement between coders ranged between 93.3% and 98.7%. The kappa indicates that this intercoder agreement is significantly different from the level of agreement that we might expect by chance.

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trols for it by including the natural log of the elapsed time during each observation period (see Cameron and Trivedi 1996). In our analysis, each observation consists of the number of majority opinion drafts circulated in the case. Obviously, the length of the opinion-writing process varies across cases. We control for this by including the natural log of the amount of time that elapses from the day the opinion was assigned to the day on which the final draft opinion was circulated.[7]

Independent Variables

Winning Margin. To test the hypothesis that the willingness of the opinion author to accommodate his or her colleagues is proportional to the size of the conference majority, we used the original docket books of Justice Brennan to identify the vote of each justice and to calculate the size of the winning conference coalition.[8] In particular, we subtracted the number of votes needed to form a winning coalition from the number of justices who voted with the author.[9]

Author Distance. To assess the ideological distance between the majority opinion author and the original coalition, we calculated an issue-specific compatibility score between the author and the majority conference coalition for every case. This score is determined by using original conference data, Spaeth's (1994) 12 substantive value groups, and the percentage of cases in which each justice voted for the liberal outcome (Epstein et al. 1994, Table 6–1).[10] The score is computed by taking the absolute value of the difference between the majority opinion author's value-specific liberalism and the mean liberalism of remaining members of the

[7]We determined the day an opinion was assigned on the basis of the original assignment sheets contained in Justice Brennan's papers, and the day the last draft was circulated was based upon Justice Brennan's circulation records.

[8]The justices' docket books, and especially Justice Brennan's, provide a highly reliable record of how justices voted at the initial conference on a case's merits (Maltzman and Wahlbeck 1996b).

[9]There are several cases in which there was not a clear majority supporting one position at conference. For instance, in 112 cases, only a plurality favored the dominant position, the Court was equally divided, or the assigned author was a member of the conference minority. In these cases, the margin variable takes on a negative value to reflect the author's need to attract additional votes before gaining a majority.

[10]Spaeth (1994) identified 13 value groups. His thirteenth group consists of miscellaneous cases. Of the 2,307 cases where an assignment was made or a signed opinion released during the Burger Court, 10 were placed by Spaeth in the thirteenth category. Because of the ambiguous nature of this value area, we dropped from our analysis these 10 cases. We also dropped two cases that are not included in Spaeth's *United States Supreme Court Judicial Database* because, although they were argued and drafts were circulated, the cases were rescheduled for argument the following term, but no opinion was released. For 155 of the 2,295 cases included in our study, Spaeth attributed the case to two of the value categories. In these instances, we assumed each justice's ideological score is the average of the two value areas.

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majority coalition.[11] Thus, if the writer is located at the mean, the author distance is zero. The more the author is ideologically unrepresentative of the majority coalition, the higher the score.

Heterogeneity. To assess Hypothesis 3, which leads us to expect more drafts when the majority coalition is ideologically heterogeneous, we calculated the standard deviation for the majority coalition's issue-specific ideology in a case. Once again, we excluded the author from the majority coalition for the purpose of calculating this score. We identified the majority coalition from Justice Brennan's docket books.[12] This score is based upon the 12 substantive value groups identified by Spaeth (1994). For each of these 12 areas, we calculated the percentage of cases in which each justice voted for the liberal outcome (Epstein et al. 1994, Table 6–1). Greater variance in the conference coalition's ideology produces a larger positive score.

Majority Suggestions and Threats. We anticipate that opinion authors will circulate a larger number of drafts as the number of suggestions by members of the majority coalition increase. Court custom is for suggestions to be passed along to the writer in a letter (Rehnquist 1987, 302), and, at least since the Burger Court, justices exchange their views almost exclusively in writing (Schwartz 1996, 7). A copy of these letters is usually sent to the entire conference, and Brennan's circulation records detail these letters for every case. From these records, we counted for each case the number of letters that were written by a member of the majority and that contained a suggestion about how to change the majority opinion.[13] We also determined whether any letter explicitly made the suggestion a condition for joining the opinion or threatened to join another opinion if a suggestion was not followed. These counts serve as the basis for two independent variables. The first consists of the number of letters with suggestions without a precondition or threat. During the Burger Court, 392 of these letters were circulated. The second variable consists of the number of letters with both a suggestion and a precondition or threat. Three hundred eighteen of these were circulated during the Burger Court. Hypothesis 5 suggests that the majority opinion author will view letters stating explicit preconditions or threats more seriously than letters simply containing a suggestion. During the Burger Court, a letter with a suggestion of some kind was circulated in 458 of the cases (20.0%).

[11]In four cases, the opinion was written by a three-justice team. In these cases, we used the median justice's ideology. We also used this corrective in creating our workload and propensity to circulate variables for these four cases.

[12]The reason for identifying the majority coalition on the basis of original docket books is that this is the coalition that the majority author was originally trying to represent.

[13]For a few of the 2,295 cases, Brennan's circulation records were missing. For these few cases, we went through a justice's case files (preferably Brennan's) to recreate the record.

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Majority Wait. Occasionally, a justice will send the author of the majority opinion a letter that says that he or she is currently unable to join the opinion and is waiting for other opinions, subsequent drafts, and the like. If the justice sending the letter is a member of the majority coalition, hypothesis 6 leads us to expect that the majority opinion author will view such notification as an indication that the draft opinion might not be acceptable to someone originally anticipated to be a supporter. As the number of these "wait" letters increases, we expect a larger number of majority opinion drafts to be circulated. To test for this relationship, we counted the number of letters in each case written by a member of the majority that informed the majority author that he or she was going to "wait." During the Burger Court, 397 such letters were sent on 307 cases (13.4%).

Minority Suggestions. Hypothesis 7 argues that suggestions from members of the minority will not provoke the majority author into circulating a new draft. To test this, we counted the number of such letters from dissenters. During the Burger Court, majority opinion authors received 122 letters containing suggestions from dissenters in 101 cases (4.4%).[14]

Minority Wait. Similarly, we do not expect the majority author to view a "wait" notification from a probable dissenter in the same light as such a notification from a justice who voted with the majority at conference. Since dissenting opinions are "usually circulated weeks, and often months, after the majority opinion is circulated" (Rehnquist 1987, 303), such letters are little more than a courtesy, and a common one at that: during the Burger Court 729 of them were sent in 519 cases (22.6%).

Author Workload. The measure of each author's workload is the number of majority opinions each justice was working on the day he or she was assigned a particular case. To determine the day an author was assigned a case, we relied upon the original assignment sheets circulated to the Court by the Chief Justice.[15] These assignment sheets, which specify the justice to whom

[14]Of the 122 suggestions by dissenters, 68 contained an explicit threat. For example, a letter may have said "Unless section __ of the opinion is dropped, I will join Justice X's dissent." While the author is likely to take such a threat from a majority member coalition more seriously than a simple suggestion, a threat from someone who is expected to sign a dissent anyway should not be taken more seriously than a suggestion. Accordingly, we counted these 68 letters simply as suggestions, rather than suggestions with explicit statements.

[15]In eight cases, the original opinion assignment was not noted on the assignment sheet. In these cases, we instead used the date of oral argument, which was identified by Spaeth (1994) or on Lexis. In 131 of the 2,295 cases, a justice was assigned the opinion, but the opinion was reassigned before any drafts were circulated or the author lost the opinion in the writing phase. For these cases, we relied on the assignment sheets and memos in William Brennan's case files for indications of a formal reassignment date. If the case was not formally reassigned, we used the date of the subsequent author's first majority draft to identify when the previous author stopped working on a case. In particular, we assumed that the previous author's last day on the case was one day earlier than the day the subsequent author circulated his or her first majority opinion draft.

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each case is assigned and the date of the assignment, are located in Justice Brennan's papers. If an author had not yet circulated the final draft of an opinion, we assume that he or she was working on the opinion. This measure is a count of the number of majority opinions on which the majority opinion author was working when the case was assigned.

End of Term. If a case was assigned after March 1, it is coded as 1; otherwise 0.

Case Complexity. Although numerous measures of case complexity exist, none fully captures the concept. Thus, we measured case complexity by combining three indicators, all of which were derived from Spaeth (1994). The first measure is the number of issues raised by the case. The second is the number of legal provisions relevant to a case. The third is the number of opinions published in a case. Factor analysis of these three indicators produced a single factor with an eigenvalue of greater than one. We used each case's factor score as a measure of complexity.

Case Salience. As an indicator of case salience, we used the Epstein et al. (1994, Table 2–10) list of landmark cases.[16] One hundred forty-two of the cases included in our data set (6.2%) are contained on the list. If a case is included on the list, it is coded as 1, otherwise 0.

In addition to these independent variables, idiosyncratic, personal factors may also account for the differences amongst the justices. In particular, some justices may simply prefer to circulate their work more frequently than other justices. To control for such variation, we included in our model a variable to tap the propensity of each justice to circulate drafts. To calculate this variable, we determined on a term-by-term basis the mean number of concurring and dissenting draft opinions the opinion author circulated in every case.[17]

Findings

Table 1 provides an overview of the circulation of majority drafts. During the Burger Court, the average majority opinion author circulated 2.8 drafts prior to publication.[18] Although multiple circulations were common,

[16]For a discussion of methodological issues pertaining to assessing case significance, see Cook (1993).

[17]Since our data set contains many observations for individual justices, it is possible that the residual for a particular justice's accommodation in one case is correlated with the residual for that justice in another case. This variable also controls for that possibility.

[18]Epstein and Knight (1995, 34) report that for a sample composed of 157 cases from the 1983 term and of 123 important cases that were decided during other Burger Court terms, an average of 3.2 drafts were circulated. Our lower figure reflects the fact that their sample contains a disproportionate share of important cases and that these cases tend to result in slightly more drafts (Epstein and Knight 1995).

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Table 1. Circulation of Majority Opinion Drafts

Number of Drafts	Frequency	Percent
0	2	0.1
1	255	11.1
2	779	33.9
3	687	29.9
4	336	14.6
5	146	6.4
6	57	2.5
7	22	1.0
8	10	0.4
14	1	0.0
Total	2,295	100.1

there was considerable variability. Of the 2,295 cases, 255 (11.1%) had only one draft circulated, 779 (33.9%) had two drafts circulated, and 1,259 (54.9%) had three or more drafts circulated.[19]

Table 2 presents the estimated coefficients and standard errors for a GEC model predicting the number of drafts circulated.[20] The statistically significant log-likelihood ratio allows us to reject the null hypothesis that each of our independent variables, except the constant, is equal to zero. The model correctly predicts 37.6% of the cases. Compared with randomly predicting the number of drafts that are circulated, the proportional reduction in error associated with the model is 17.5%.[21] To assess the substantive impact of the statistically significant independent variables reported in Table 2, we ran several simulations of the likelihood that a justice would circulate additional drafts. By holding all independent variables constant except one, the

[19]Although formal opinion assignments were made, in two cases no drafts were circulated. One of these cases (*United States* v. *Koecher* 1986) involved a finding of civil contempt of an alleged spy for another nation. After the assignment was made and prior to the first draft, the United States government traded the spy, rendering the case moot. In the other case (*Dewey* v. *Reynolds Metals* 1971), eight justices participated and the Court was initially divided 5–3. After receiving the majority opinion assignment, but prior to circulating any drafts, Justice Marshall switched his vote. The case was immediately affirmed by an equally divided Court. The inclusion of these two cases does not affect our findings or the dispersion parameter.

[20]Diagnostic tests establish that multicollinearity poses no threat to these estimates.

[21]We use tau, rather than lambda, as our proportional-reduction-of-error statistic. Goodman and Kruskal's tau is preferable to lambda, which simply compares the number of prediction errors from the model with the number of errors that would result from always predicting the modal category. Goodman and Kruskal's tau accounts for the distribution of cases across categories by computing expected errors that would result from randomly assigning cases to the different categories (Sigelman 1984, 78–9).

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Table 2. Generalized Event Count Model of Majority Opinion Draft Circulations

Variables	Estimates	Standard Error
Constant	–0.145 *	0.080
Strategic Influences		
Winning Margin	–0.045 ***	0.006
Author Distance	0.002 **	0.001
Coalition Heterogeneity	0.005 ***	0.001
Majority Suggestions	0.066 ***	0.015
Majority Threats	0.107 ***	0.013
Majority Waits	0.048 **	0.017
Minority Suggestions	0.021	0.029
Minority Waits	0.002	0.013
Nonstrategic Influences		
Workload	–0.018 ***	0.004
End of Term	–0.025	0.021
Case Complexity	0.058 ***	0.008
Case Salience	0.031	0.036
Control Variables		
Propensity to Circulate	0.498 ***	0.056
Exposure Time	0.242 ***	0.016
Gamma	–0.602 ***	0.015
(Reparameterized Dispersion)	0.548	
Number of Cases	2,295	
Log-Likelihood	760.0627 ***	
Percent Correctly Predicted	37.6%	
Reduction of Error	17.5%	

*$p < .05$ (one-tail test); **$p < .01$ (one-tail test); ***$p < .001$ (one-tail test).

results in Table 3 show how each independent variable affects the likelihood that additional drafts are circulated.[22]

The expectation that the circulation of new draft opinions reflects strategic calculations about the need to accommodate fellow justices is strongly supported. Indeed, the findings are consistent with all eight strategic accom-

[22]The benchmark is the expected number of draft circulations when the value of each variable was set at its mean or, in the case of a dichotomous variable (case salience and end of term), at its modal category. The author distance value was calculated for a justice who is aligned with the coalition he or she is writing on behalf of. The values for an author who is "distant" assumes that the author was most distant from the other members of the conference majority (63.275). For Coalition Heterogeneity, we fixed a homogeneous coalition at the lowest value of 0 and set a heterogeneous conference coalition at the maximum value of 34.561. For case complexity, the complexity score was alternatively set at the highest complexity score for any of the 2,295 cases in our data set (factor value of 7.26), or at the minimum observed factor value (–.92).

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Table 3. Simulation of Expected Number of Majority Opinion Draft Circulation

Characteristics	Expected Number of Drafts
Benchmark	2.8
Margin	
Need One Vote	3.1
Minimum Winning Coalition	3.0
Two Vote Cushion	2.7
Four Vote Cushion	2.5
Author Distance	
Aligned with Coalition Ideology	2.7
Distant from Coalition Ideology	3.1
Coalition Heterogeneity	
Homogeneous Conference Coalition	2.6
Heterogeneous Conference Coalition	3.0
Majority Suggestions	
No Suggestions	2.7
Three Suggestions	3.3
Six Suggestions	4.0
Majority Threats	
No Threats	2.8
Three Threats	3.8
Six Threats	5.2
Majority Waits	
No Wait Statements	2.7
One Wait Statement	2.9
Three Wait Statements	3.2
Five Wait Statements	3.5
Workload	
No Cases	2.9
Seven Cases	2.6
Fourteen Cases	2.3
Case Complexity	
Easy Case	2.6
Difficult Case	4.2

modation hypotheses. Consistent with hypothesis 1, the winning margin coefficient is statistically significant and in the predicted direction. As Table 3 shows, controlling for the effects of the other predictors in the model, opinion authors are expected to write 20.0% more drafts if they are writing on behalf of a minimum winning coalition than if they are writing on behalf of a unanimous bench. Such a finding highlights the strategic nature of the

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opinion-circulation process. The willingness of a majority opinion author to accommodate his or her colleagues appears to be conditioned by the extent to which the author needs the continued support of justices who were part of his or her conference coalition.

The statistically significant author distance coefficient supports hypothesis 2, indicating that the more ideologically distant an author is from the majority coalition, the greater the number of draft opinions he or she is likely to circulate. According to the simulation, if an author is ideologically at the mean of the majority coalition, 2.7 drafts are circulated, but if an author is ideologically distant from the core of the majority coalition, 3.1 drafts are required. This represents a 14.8% increase in the expected number of drafts. Supportive of hypothesis 3, the positive coefficient for coalition heterogeneity indicates that majority opinion authors are more accommodating when the conference coalition is less cohesive. Compared to when the Court is cohesive, majority opinion authors are likely to circulate 15.4% more drafts when the conference coalition is heterogeneous.

According to hypotheses 4, 5, and 6, the author's decision to circulate drafts is shaped by the actions of other members of the original coalition. The results of our model bear out hypothesis 4, which ties the number of drafts to the number of changes requested by members of the majority coalition. The simulation shows that in the absence of letters from other members of the majority coalition, 2.7 majority draft opinions are likely to be circulated; in contrast, if three letters with suggestions are received by the opinion author, 3.3 draft opinions are written, and if six letters with suggestions are received, 4.0 draft opinions result. According to hypothesis 5, opinion authors are particularly responsive to suggestions accompanied by an explicit threat. The fact that the coefficient for suggestions that contain threats is larger than the coefficient for suggestions without threats demonstrates that the inclusion of threats enhances a justice's leverage with the majority opinion author. If three explicit threats are sent to the author, we expect 15.2% more drafts than if three nonthreatening suggestions are sent instead. In the interest of retaining the original coalition, justices apparently respond to colleagues' threats not to join the opinion unless their suggestions are incorporated in a new draft. Similarly, consistent with hypothesis 6, opinion authors are more likely to revise their opinions when members of the majority coalition inform them that they are going to await further developments. The simulation shows that whereas an opinion with three wait statement results in 3.2 drafts, no wait statements yields 2.7 drafts.

Although majority opinion authors clearly respond to implicit and explicit suggestions and threats from members of the majority coalition, hypotheses 7 and 8 predicted that they would not necessarily respond to suggestions, threats, and wait statements from those justices who had

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previously announced their intention to dissent. The lack of statistical significance for the minority suggest and minority wait coefficients is consistent with both of these hypotheses.[23] There is little evidence that majority opinion authors systematically take into account the views of members of the minority conference coalition in deciding whether to circulate a new draft opinion.

While our central concern rests with the strategic interdependencies between majority opinion authors and their colleagues on the Court, we also recognize that nonstrategic factors may affect the circulation of draft opinions. In fact, we find that case characteristics affect the number of revisions that a majority author circulates. Consistent with hypothesis 9, the estimate for the workload variable indicates that the heavier an opinion author's workload, the less likely he or she is to circulate a new draft opinion. When a justice is working on seven majority opinions, compared to an empty workload, the expected number of drafts decreases by 11.5%. The estimate for the end of term variable, however, is not significant, failing to provide support for hypothesis 10.[24] The eleventh hypothesis—that more drafts would be circulated in complex cases than in relatively straightforward ones—is supported, but the statistical insignificance of the case salience coefficient contradicts hypothesis 12: more important cases do not seem to provoke extra efforts at accommodation.

Discussion

Few activities of the members of the United States Supreme Court are more important than the crafting of a majority opinion. It is the legal rule articulated in the majority opinion, not just the disposition of a particular case, that serves as guide for other branches of government, the lower courts, and even the general public (Spriggs 1996). Although relatively little systematic work has been done on how opinions are constructed, it seems reasonable to assert that the process is interdependent. The justices themselves (Brennan 1960; Rehnquist 1987) and scholars who have studied the opinion-formation process (Epstein and Knight 1995; Murphy 1964; Schwartz 1990, 1996)

[23]Our ability to accept hypotheses 7 and 8 require us to minimize Type II errors. In other words, we want to minimize the probability that we will accept the null hypothesis when it is false. While the standard .05 significance level is conservative in rejecting null hypotheses when one suspects it is false, it is not conservative when testing a hypothesis of no difference (Blalock 1979, 161). Indeed, the standard test would bias our results in favor of hypotheses 7 and 8. Thus, one needs to use an alpha that is significantly higher than the traditional .05 level. Blalock (1979, 161) advocates a test in the .10 to .30 range. Our model leads to alpha levels of .24 for our minority suggestion and .43 for minority wait variables. Thus, we are confident in accepting hypotheses 7 and 8.

[24]We tested whether this finding is sensitive to our specification of March 1 as the end of the term. However, when we used April 1 and May 1 as alternative dates, there was no change in our findings.

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argue that opinion authors are constrained by their colleagues. Even Harold Spaeth, the scholar most closely associated with the attitudinal model, acknowledges that "opinion coalitions and opinion writing may be a matter where nonattitudinal variables operate" (Spaeth 1995, 314). Our analysis makes clear that opinion authors are not unconstrained actors who are free to act on their own policy preferences. Opinion authors' actions are shaped by the interplay of their own policy preferences and the actions of their colleagues.

A strategic explanation provides a good, though certainly not a complete, account of the number of drafts in circulation. Indeed, our findings support all eight strategic choice hypotheses we offered. Our analysis of majority opinion writing on the Burger Court has revealed that an author's willingness to accommodate his or her colleagues depends in large part upon the author's need to maintain the decision coalition. As a result, the author's willingness to accommodate depends upon the size and heterogeneity of the conference decision coalition, which are a good indicator of how hard it is to hold together a winning coalition. In addition to circulating more drafts when the majority coalition is likely to be fragile, opinion authors circulate more when they are ideologically distant from the coalition for which they are writing. This likely occurs because it takes time for an ideologically extreme author to identify a position close to his or her own preferences that is still acceptable to the majority coalition.

Bargaining statements made by other members of the Court also influence the circulation of opinions. Most notably, when members of the majority conference coalition sent letters making suggestions, presenting threats, or expressing their desire to wait, the number of opinion drafts that are circulated increases. Although a strategic author is likely to be concerned with threats and suggestions from members of the majority, we did not anticipate and did not find support for a parallel effect for letters from members of the conference minority. This ineffectual use of letters from members of the minority is not only consistent with claims made by Brennan (1960, 405) and Rehnquist (1987, 302), but also suggests that a strategic justice who wishes to influence the majority opinion has an incentive to join the majority.

Although our principal focus was on strategic interdependencies in the opinion-writing process, we also controlled for the effect of nonstrategic factors. The data support only two of the four nonstrategic hypotheses (not including the two control variables). Justices who are working on numerous majority opinions appear to be more reluctant to circulate additional drafts than those working on relatively few opinions, and on more complex cases opinion authors consistently circulate more drafts.

Our finding that additional drafts are not circulated in salient cases is both surprising and contradicts the findings of Epstein and Knight (1995).

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This difference apparently stems from the multivariate character of our analysis. When, like Epstein and Knight (1995), we undertake a simple comparison of the number of draft opinions in salient and nonsalient cases, we find that important cases do indeed generate additional drafts.[25] When other relevant factors are held constant in our multivariate model, though, this significant difference fades to insignificance.

Our results show that opinion authors are constrained by their need to maintain a decision coalition comprised of a majority of the Court. Of course, opinion authors normally pursue the additional goal of building an opinion coalition that consists of a majority of the Court. Decisions of the Court that are based upon a majority opinion play a more prominent role in shaping the law. Although our focus has been on the dynamics of maintaining a majority decision coalition, we suspect that opinion authors strategically craft opinions that will result in both a decision and opinion that the majority find acceptable. Further work on the dynamics of the opinion-writing process can better test this expectation.

Thirty years after the publication of Murphy's *Elements of Judicial Strategy*, Epstein and Knight (1995) argue that our understanding of the Court would be enhanced if scholars would return to the sort of rational choice model that Murphy articulated. A strategic justice, like all rational actors, makes calculations based upon both his or her own preferences and the actions of other actors. Indeed, Murphy explicitly argued that the actions of any particular justice are constrained by his or her expectations of how his or her brethren are likely to respond. The results reported here suggest that both Murphy (1964) and Epstein and Knight (1995) are correct: the wording and scope of final majority opinions are contingent on more than simply the policy preferences of the author. The amount of accommodation, as represented by the number of majority opinion drafts, depends, in large measure, upon the process of bargaining among majority coalition members.

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[25]For the 142 salient cases decided during the Burger Court, there was an average of 3.3 draft opinions. For the 2,153 nonsalient cases, there was an average of 2.8 drafts circulated. This difference is significant at the .0001 level.

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