Marshalling the Court:
Bargaining and Accommodation on the U.S. Supreme Court

Replication Documentation

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Introduction

Drftajps.dat is an ASCII file containing data used in "Marshalling the Court: Bargaining and Accommodation on the Supreme Court," which appeared in *The American Journal of Political Science*. The variables in the data set are ordered in the following way: the dependent variable appears first and then each independent variable appears as listed in Table 2 of our article.

To obtain most of the data, we relied upon the circulation records maintained by Justice William Brennan and available in his papers at the Library of Congress. We have included the circulation sheet for *Hensley v. Eckerhart* (1983) in Figure 1. 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. Any missing data were located using Justice Brennan's, Justice Douglas', or Justice Marshall's case files. As noted below, we also derived some of our indicators from Spaeth (1994) and Epstein et al. (1994).

Private Memoranda

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, are only those written by or sent to Brennan. Thus, the data used in this article include memos that were circulated to the conference.

To ensure that we only coded memos that went to the whole conference, we adopted the following protocols: (1) if a reply was sent by Brennan to a particular justice (including the opinion author), then we looked at the case file to see if it went to the whole conference; and (2) if the sheet said a reply was sent to Brennan (and perhaps others, too) then we looked to see if it went to the whole conference. Generally speaking, an entry on Brennan's circulation records went to the whole conference if it does not designate to whom it was being sent or if it reads: "to [majority opinion author's initials]." A memo is usually private (only between one or several justices) if it says "to Brennan only" (or it may be from Brennan and to some other justice only).

An example of a private memorandum is Justice Brennan's May 10, 1983 letter to Justice Stevens in Figure 1.

Dependent Variable

We used 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 (1969-1985 terms) as our dependent variable.[1] We coded majority opinion circulations in the following way: (1) we counted all circulations listed at the top of the circulation sheet under the heading "circulated;" (2) we also looked at all memos/possible draft opinions listed under the majority opinion author's name under "replies." If it was a draft opinion (sometimes ascertained by going to Justice Brennan's case files) that was not included under "circulated" then we counted it as a draft majority opinion. For example, the circulation sheet for *Hensley v. Eckerhart* (1983) shows that four drafts were circulated (see the Figure 1). There are no further entries for the author, Justice Lewis Powell, on the circulation sheet.

Independent Variables

Winning Margin. We used the original docket books (not the circulation sheets) of Justice Brennan to identify the vote of each justice and to calculate the size of the winning conference coalition.[2] In particular, we subtracted the number of votes needed to form a winning coalition from the number of justices who voted with the author.[3] The vote in *Hensley v. Eckerhart*, reflected in Figure 1, was five justices to vacate and four justices to affirm. Thus,

[1]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 percent) 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 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 determined which justices supported the author's position at conference.

[2]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). There are discrepancies occasionally between the docket books and the circulation sheets. The circulation sheet appears to be transcribed from Justice Brennan's docket book as on rare occasion it refers one to the docket book because of a confusing conference vote. Also, the vote noted on the circulation sheet reflects changes in positions as justice's initials are crossed out and retyped to indicate a second position. Thus, we prefer to use the Brennan's original conference record contained in the docket book.

[3]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.

winning margin takes the value of zero since five votes were required to secure a majority and five justices supported the majority position at conference.

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) twelve substantive value groups, and the percentage of cases in which each justice voted for the liberal outcome (Epstein et al. 1994, Table 6-1).[4] 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 majority coalition.[5] 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. In *Hensley v. Eckerhart*, for example, Spaeth (1994) identifies attorneys as the value evoked by the case. According to Epstein et al. (1994), Justice Powell's liberalism in attorney cases was 36.7, compared to a mean among other justices in the conference majority of about 31.9. Thus, author distance is about 4.8.

Heterogeneity. 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. This score is based upon the twelve substantive value groups identified by Spaeth (1994). For each of these twelve 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. The issue-specific ideology scores of the justices in the conference majority (excluding Justice Powell) in *Hensley v. Eckerhart* were 39.4 (Burger), 36.8 (White), 24.5 (Rehnquist), and 27.0 (O'Connor). The standard deviation of this coalition's ideology is about 7.3.

Majority Suggestions and Threats. 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

[4]Spaeth (1994) identified thirteen 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 13th 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.

[5]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 expertise, length of service, workload, and propensity to circulate variables for these four cases.

every case. From these records, we counted for each case the number of letters that were written by a member of the majority conference coalition and that contained a suggestion about how to change the majority opinion.[6] The following examples are representative of entries on Justice Brennan's circulation records: "wants part __ [of majority opinion] deleted;" "not satisfied"; "troubled;" "has problems"; "has concerns"; "memo with suggestion." In Figure 1, Justice Brennan's memo of December 22, 1982 is a suggestion. As apparent from this entry, Justice Brennan sometimes used an abbreviation or shorthand to represent a type of memorandum.

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. The following are illustrative of entries in Justice Brennan's circulation records: " join if. . ."; "can't join, and if changes are not made will write separately"; "agree if change is made"; "join if change is made"; "will join if suggestion is met."

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 and eighteen of these were circulated during the Burger Court. During the Burger Court, a letter with a suggestion of some kind from a majority coalition justice was circulated in 458 of the cases (20.0%).

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. Examples from Justice Brennan's circulation records include: "will await the dissent"; "await further writing"; "will await other's reaction."; "await Justice X's concurrence."

Justice Blackmun's memo of January 5, 1983, and Justice Stevens of January 6, 1983, in Figure 1 are wait statements (both state they are waiting for Justice Brennan's writing). 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. We counted the number of letters from dissenters making suggestions or threats using the same rules applied to Majority Suggestions. During the Burger

[6]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. Also, as discussed in footnote 1 if more than one justice circulated a majority opinion we treated the final opinion author as the majority opinion author. We therefore treat those justices voting with the final opinion author at conference as majority coalition justices.

Court, majority opinion authors received 122 letters containing suggestions from dissenters in 101 cases (4.4%).[7]

Minority Wait. We also counted the number of minority members stating their intention to wait, using the same criteria listed under Majority Wait. 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.[8] These assignment sheets, which specify the justice to whom 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. On November 15, 1982, the day on which *Hensley v. Eckerhart* was assigned to him, Justice Powell had received previously two majority opinion assignments in which he had not circulated his final draft. Both of these cases, *Bowen v. U.S. Postal Service* (1983) and *Pillsbury v. Conboy* (1983), were assigned on October 11, 1982. The final draft opinions, however, were not circulated until December 29, 1982 and January 5, 1983, respectively.

End of Term. If a case was assigned on or after March 1, it is coded as 1; otherwise 0. As noted above, *Hensley v. Eckerhart* was assigned to Justice Powell on November 15, 1982. Thus, the end-of-term variable takes the value of zero.

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 released in a case. Factor analysis of these three indicators produced a

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[7]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.

[8]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.

single factor with an eigenvalue of greater than one. We used each case's factor score as a measure of complexity. According to Spaeth (1994), *Hensley v. Eckerhart* raised a single issue (attorney's fees), invoked one legal provision (Civil Rights Attorney's Fees Awards), and generated separate opinions by Chief Justice Burger and Justice Brennan.

Case Salience. As an indicator of case salience, we used the Epstein et al. (1994, Table 2-10) list of landmark cases. One hundred and 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. As *Hensley v. Eckerhart* is not included in this list of landmark decisions, landmark equals zero.

Propensity to Circulate. To control for justice-specific effects, we included in our model a variable to tap the propensity of each justice to circulate draft opinions. 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. Concurring and dissenting opinion drafts, as we noted earlier, are recorded on Justice Brennan's circulation sheets. In *Hensley v. Eckerhart*, Chief Justice Burger circulated a concurring opinion draft on January 4, 1983, while Justice Brennan circulated an opinion that concurred in part and dissented in part on April 29, May 11, and May 15.

No. 81-1244, Hensley v. Eckerhart

Argued: November 3, 1982 Announced: 5-16-83

Assigned: Powell, J. Date: 11-15-82

Vote: Affirm: WJB, TM, HAB, JPS

~~Reverse~~: Vacate: WEB, BRW, LFP, WHR, SOC

Pass:

No Vote:

Out:

Circulated:	Date:	Print:
	12-15-82	1
	1-6-83	2
	4-1-83	3
	5-12-83	4

Replies:	Date:	Print:	Remarks:
The Chief Justice:	12/23/82		Concur
	1/4/83	1	Thru
	5-12-83		Joined
Justice Brennan:	12/27/82		Memo re opp
	1/5/83		Concur
	4-29-83	1	Concurring in pt & dissenting in part
	5-10-83		Letter to CJ
	5-11-83	2	Concurring in pt & dissenting in pt
	5-13-83	3	
Justice White:	12/27/82		Agree

Replies:	Date:	Print:	Remarks:
Justice Marshall:			5-2-83 Joined WJB's dissent
Justice Blackmun:	4/8/83		to avoid WJB's
	5-2-83		Joined WJB's dissent
Justice Powell:			
Justice Rehnquist:	4/14/83		Agree
Justice Stevens:	4/4/83		Vote is that
	4/6/83		Dismiss the WJB's
	5-2-83		In WJB's dissent
	5-10-83		Joined WJB's Opn.
Justice O'Connor	4/14/83		Agree