THE MAKING OF U.S. SUPREME COURT MAJORITY OPINIONS

By

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ABSTRACT

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Upon deciding a case, the Supreme Court issues an opinion that contains both a dichotomous judgment and a lengthy rationale justifying its decision. The arguments made in the opinion determine the scope of public policy and have broad impacts on the political system. Yet precisely how the members of the Court interact to produce the content of the policy contained within the majority opinion remains shrouded in mystery. This dissertation investigates the causes and consequences of bargaining and accommodation dynamics in the creation of U.S. Supreme Court majority opinions, arguing that, though they are constrained by contextual and institutional factors, certain justices are pivotal players in the creation of public law. It provides an empirical micro-foundation of judicial behavior to inform theories of intra-court bargaining and it reveals hidden aspects of the Supreme Court's opinion writing process. Focusing on the Burger Court (1969-1985), the project draws evidence from an original dataset that combines drafts of majority opinions with private memoranda the justices use to communicate after oral arguments and before the public release of the Court's opinion.

It begins by introducing the motivation for the study and by detailing the collection and coding of the original data, which are then used to provide the analyses in the rest of the dissertation. The project presents three theoretically related, but empirically independent, essays to examine the dynamic opinion writing process. Throughout the work, novel data reveal previously unknown aspects of the behind-the-scenes negotiations between Supreme Court justices. Content analysis of the justices' internal bargaining memoranda reveal the topics and extent of justices' engagement with one another and the strategies employed as bargaining members attempt to influence the collegial development of the Court's opinion.

Building on existing research, this dissertation theorizes that justices who sit in key median positions – of the entire Court and of the winning coalition – are most likely to influence the shape and scope of the legal rule contained in the majority opinion. It presents additional predictions about the constraining influence of institutional and contextual features. The evidence suggests that while opinion authors are largely amenable to their colleagues, contrary to popular discourse, it is not the Court's "swing justice" that is principally influential, but rather that the median member of the majority coalition holds particular sway in the development of the opinion. Median members of the winning coalitions are more likely to succeed in persuading the author to make changes to opinion drafts and are less likely to face requests from other justices when they write the majority opinion. Conversely, the findings show that when the Court's median justice writes the majority opinion, the other members of the winning coalition are more likely to write separate concurring opinions without prior engagement. While these pivotal players are certainly influential, the evidence shows that the success of a justice's attempts to persuade the opinion author to alter the majority opinion depends mainly on the content of the negotiation as well as the tone or frame of the request, and that past cooperation has a sizable impact on a justice's willingness to engage with the author during the crafting of the opinion. The dissertation further investigates what happens when compromises cannot be struck between the author and a bargaining justice, and finds evidence that it has consequences for the final output of the Court by occasionally sparking the publication of concurring opinions.

For Jonathan

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This dissertation would not exist without the many people who generously gave of their time, wisdom, and resources throughout my Ph.D. education. I owe a debt of my deepest gratitude to each of these people who contributed to my intellectual growth and the development of this project in ways both large and small.

Ryan Black taught a class and changed the trajectory of my career. It is impossible to capture how fortunate I am to have found an incredible mentor who, so early in his own career, invested such energy into guiding the way I think about research. Every student should be so lucky. Ryan's intellectual curiosity and passion for rigorous, thoughtful scholarship remains an inspiration. I simply cannot thank him enough for what he has done for me and for my research. It was in his classroom in the fall of 2010 that I discovered a passion for judicial politics and the seed for this dissertation was planted. With his encouragement, I attended the Empirical Implications of Theoretical Models Institute hosted by the Harris School at the University of Chicago in 2011. It was there that this idea began to take root, and I thank the incredible teachers and seminar participants who challenged my thinking and gave me important insights into the foundations of this project.

The Department of Political Science at Michigan State University provided a stimulating environment and I am grateful for the intellectual and financial support that made this project possible. Chuck Ostrom has had a tremendous impact on how I approach research design and answer theoretical questions, and I thank him for his consistent encouragement throughout. Melinda Gann Hall's experience with data collection proved to set realistic expectations and I'm indebted to her advice. Early discussions with Reggie Sheehan helped focus the project and clarify my questions.

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financial support I received from a Corey Research Enrichment Fund Award and the Michigan State University Department of Political Science Merit Fellowship. I gratefully acknowledge the assistance of Andrew Goldstein, Kaitlin Griswold, Sarah Prather, Elle Ross, and Adrianna Simonelli for the collection of the original data from the private papers of former Supreme Court justices housed in the Library of Congress in Washington, DC. I also thank the reference librarians in the Manuscript Reading Room at the Library of Congress for their steadfast efforts and assistance. I further thank Kaitlin, Elle, and Adrianna for staying on as research assistants to content analyze and code all of the bargaining memoranda, matching these documents with changes in majority opinion drafts. Likewise, this research would not be possible without the publicly available Supreme Court Opinion Writing Database provided by Paul Wahlbeck, Jim Spriggs, and Forrest Maltzman, who also graciously shared their replication data. I am particularly grateful to Jim Spriggs who shared the replication files to aid in the statistical analyses presented in this work.

I am fortunate to have amassed a very smart group of colleagues and friends, many of whom have had a hand in influencing my work whether they were aware of it or not. Ian Cook offered insightful comments at various stages and provided a good sounding board for many of my half-baked ideas and Melanie Bowers offered support in a myriad of ways when I needed it most. I am particularly indebted to Dominik Duell, who provided help with statistical models and graphics at clutch moments. Dominik tolerated my many (many, many) questions and consistently walked through various arguments to identify logical flaws. Throughout its numerous iterations, he read pieces of this project and it always came out stronger after his careful criticism. Dominik's encouragement not to lose the forest for the trees helped keep me on track, and I am eternally grateful for his steadfast belief in this work.

Beyond my advisors and colleagues, I have benefitted from the guidance and feedback from a number of people at professional conferences. Early versions of Chapters 2 and 4 were presented at the annual meetings of Midwest Political Science Association (2013, 2014), the American Political Science Association (2013), and the Western Political Science Association (2015) and I am especially thankful to the discussants – Sara Benesh, Cliff Carrubba, Chuck Cameron, and Steve

Kautz – who offered constructive criticism and to the audience members who asked questions that frequently clarified my own thinking about the results.

While these intellectual and financial supports were essential to the completion of this dissertation, I owe my sincerest thanks to the network of family and friends who have kept me grounded and reminded me of what is truly important in life. My generous friends – Kelli, Lindsey, and Carleen, among so many other intelligent and strong women – let me "talk out loud" about my work and brought wine, laughter, and wisdom to enrich my world all the while. While my dad was not alive to see me grow into adulthood, his voice continues to remind me that "can't never will," which has encouraged me in an indescribable way throughout this process. My mom walked miles and miles with me around a lake and through the woods and fields in Northern Michigan, asking probing questions about my work, empathizing with every failure, and celebrating each success. I would have been lost without her constant support. My little brother, Jonathan, showed up in Washington, DC to help with data collection when I ran out of money and has offered countless late-night counseling sessions as I doubted my ability to finish this thing. My older brother, Kevin, and his hilarious children gave me welcome distractions and brought me back to my roots.

My husband, Lucas, and my sweet dog, Jake, punctuated my Ph.D. education and this dissertation work with incredible adventures. I appreciate Luke's boundless patience as I hibernated in my office, thinking, coding, analyzing and writing. His words of affirmation and numerous acts of kindness throughout this process simultaneously kept me buoyed and anchored. Though he didn't make it to the end, of all those who saw me through this, Jake was my most constant companion, laying at my feet and always ready to run and play when I needed a break. Not only would this project not have come to fruition without this network, but my life would have been far less magical.

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CHAPTER 1

INTRODUCTION

1.1 Behind the Scenes: Bargaining over Opinion Content

In 1968, Congress passed a landmark piece of legislation known as the Fair Housing Act. A central part of this policy outlawed the discriminatory practice of racial "steering," a tactic used by real estate brokers to manipulate the housing market by guiding prospective home buyers exclusively to houses in neighborhoods already populated by the buyer's racial or ethnic group. Seven years after its passage, a group of residents in the Chicago suburb of Bellwood believed that two Chicago real estate brokerage firms continued the now-illegal practice of steering potential home buyers to certain parts of their village on the basis of race. This suspicion led a group of six racially diverse individuals, four from the suspected "target" area and two racial minority members from adjacent neighborhoods both within and outside the Village limits, to pose as interested clients, engaging the services of the two brokerage firms. While the inquiries were merely a rouse, the six individuals alleged that the firms did, in fact, steer them to different areas of Bellwood on the basis of race. Citing economic and social injury, the group filed a discrimination suit in the District Court for Northern Illinois. The District Court determined that, since the individuals were merely testers and not actual home buyers, any discrimination injury was indirect at best and, adopting legal reasoning from a similar case in the Ninth Circuit Court, held that the individuals lacked standing to sue. The Court of Appeals for the Seventh Circuit disagreed with the legal reasoning offered by the Ninth Circuit and declared that even indirect victims of housing discrimination were entitled to sue under specific provisions of the Act.

The case landed on the Supreme Court docket in 1978, where a conference vote established a 7-to-2 majority, affirming the lower court's holding with regards to injury and broadly interpreting the legislative intent of the Fair Housing Act to determine that the individuals *within* the alleged

target area did indeed have standing to file suit in federal court. As a member of the initial conference majority, Chief Justice Burger assigned the Court's opinion to Justice Lewis Powell, who, in turn, circulated the first draft of the opinion in February 1979. The median member of the Court, Justice Harry Blackmun, readily agreed to Powell's proposed majority opinion, casting a vote to join the very first draft without delay. Though their acquiescence came more slowly than Blackmun's, two other members of the majority coalition, the Chief and Justice Thurgood Marshall, also ultimately joined Powell's opinion without an active attempt to sway the content contained therein.

However, the three remaining members of the Court's majority coalition actively engaged with Powell, requesting specific, substantive changes be made to the opinion. In particular, these members of the Court's majority quibbled about the inclusion of Footnote 24 (Footnote 25 in the publicly released opinion), which distinguished between the six individual respondents in the case, separating the four target area residents from the two non-residents. In the initial opinion, Powell sought to affirm the Seventh Circuit's ruling in favor of the four Bellwood residents, but to reverse the standing decision for the two non-residents since no harm or injury was alleged outside of the target neighborhood. The first challenge to Powell's legal reasoning came from Justice Byron White, the median member of the Court's majority coalition in this particular case, just four days after the initial majority draft circulation. In his response memo, White indicated that he was "quite satisfied with [the] opinion in this case with the exception of note 24." He expressed his belief that "the considerations giving Article III standing to the village also give sufficient substance to the allegations of specific injury" from non-residents. It was White's view that Powell's opinion was too restrictive: just because the non-resident members of the group had not alleged specific social or economic harm did not mean that they *couldn't* do so. In a memo dated six days later, Justice William Brennan pushed this point further, suggesting that since the suit alleged harm only in the target area, the standing issue for those residing outside of that specific neighborhood was not a question before the Court and requested that Powell make it clear that the Court's opinion did not establish whether such persons have standing to sue under the relevant provision of the Fair Housing Act. Finally, on the same day that Brennan circulated his request, Justice John Paul

Stevens lobbied Powell to "simply omit n. 24."

Throughout the opinion writing process, Justice Powell sought to incorporate the substantive requests made by both Justices White and Brennan, but he elected not to adopt Stevens' most preferred outcome, refusing to delete the footnote entirely. In the final opinion, Powell maintained a distinction between the respondents, but adopted White's request and did not create precedent to define a legal rule to distinguish among the respondents. Instead, he reached a compromise with Brennan and took his suggestion to remand the question to the lower court. Though Powell retained control of the opinion, through an interactive negotiation, the content of the majority decision reflects the views of other members of the majority coalition.

This short case study, which also provides the motivation for the first empirical investigation in the next chapter, highlights heretofore unanswerable questions about the opinion writing process. In particular, Powell adopted two of the three substantive requests made by his colleagues, indicating that members of the majority coalition have the power to persuade the assigned opinion author to alter the content of the opinion. Moreover, as this anecdote reveals, precisely whose views are incorporated into the Court's opinions may be surprising. In this case, while Powell hastily adopted the suggestion proffered by the majority coalition median member (White), the slightly right-of-center Justice Powell also actively engaged in the negotiation process with an ideologically extreme liberal member (Brennan), while virtually ignoring the views of a more proximate ideological ally (Stevens). Because the Court's opinions determine the scope of public policy and thus have far reaching implications, whether certain members of the Court are more influential than others in determining legal policy has long been a topic of interest for judicial scholars and legal experts alike. Consequently, a vast literature has grown to examine the factors that influence the Court's opinion (see, e.g., Epstein and Knight 1998; Maltzman, Spriggs and Wahlbeck 2000). Yet precisely how the members of the Court interact to produce the *content* of the policy contained within the majority opinion remains shrouded in mystery.

As the strategic model of judicial decision-making has gained traction in recent years, there has been a clear push to move beyond the simple disposition of the case (i.e., the decision to affirm

or reverse the lower court's decision) to try understand the content of the opinions. Despite this evident shift in emphasis, to date, extant scholarship largely fails to actually examine the content of bargaining requests or the degrees of accommodation. Ultimately, by ignoring content, I argue that imprecise proxy measures for the likelihood of accommodation may serve to undermine what we think we know about the opinion writing process. By utilizing original data to examine the iterative changes in majority opinion drafts, this dissertation begins to open the black box and look into the opinion writing process, uncovering if and how certain members of the Court shape judicial policy.[1] Combining these original opinion data with existing data from the treasure trove that is the Supreme Court Opinion Writing Database (Wahlbeck, Spriggs and Maltzman 2009), it is possible to examine whose expressed preferences are incorporated into the body of the opinion and whose demands languish unanswered. Through content analysis of the bargaining memos directed to the opinion author, this analysis sheds light on the distinctive types of changes sought. Finally, I seek to understand the consequences of an opinion author's choice *not* to accommodate his or her colleagues. Specifically, I seek to answer several fundamental questions: (1) Which member(s) of the court influences the scope and shape of the majority opinion? (2) What do justices bargain about and what types of requests are accommodated by the opinion author? (3) When, or under what conditions, does such accommodation occur? (4) What motivates a justice to seek changes from the author in the first place? And, finally, (5) When an author opts not to accommodate her colleague, how does this breakdown in the negotiation process affect the Court's output?

1.2 The Opinion Writing Process

Following oral argument, one of the only public components of a case, Supreme Court justices meet in private conference to establish the dispositional majority coalition. After they have pro-

[1] Clark and Lauderdale (2010) introduce a measure that allows scholars to estimate the ideological location of opinions, providing deeper insight into its content. Unlike Clark and Lauderdale, I am concerned not with the *final* ideological location of the majority opinion, but I seek to understand how institutional and collegial factors push or pull the opinion *throughout* the negotiations between the justices.

vided individual assessments of the arguments, the justices vote in descending order of seniority to determine the majority view of the Court. These non-binding conference votes are useful to establish the expected winning and dissenting coalitions, but previous research reveals that there is occasionally movement from the first vote to the public release of the Court's decision (e.g., Brenner 1995; Maltzman and Wahlbeck 1996).

The senior member of each tentative coalition assigns one of the justices to write an opinion for that alliance. Regardless of his tenure on the Court, the chief justice is always considered to be the most senior (Schwartz 1993) and is responsible for the opinion assignment when he votes with the majority. If the chief finds himself in the dissenting coalition, the next most senior associate justice – defined by length of service – is responsible for making the opinion assignment (Segal and Spaeth 1993). Presumably, it is the job of the assigned majority opinion author to summarize the views of the winning coalition by describing the legal rationale behind the dispositional vote.

Although the majority opinion author has the primary responsibility to draft the opinion, in order to set national policy and to bind lower courts to its decision, the author must necessarily obtain the signatures of at least four other members of the bench. Because non-authoring justices must choose to endorse the opinion (or not), there is a clear avenue for these actors to try to influence the scope and direction of the majority opinion. As the motivating example at the outset illustrates, the majority opinion of the Supreme Court may often be an amalgamation of numerous justices' views or voices.

After the initial opinion assignment is made during conference, nothing happens in a case until the majority opinion author circulates a first draft of the decision. Once that initial draft is circulated, however, the justices may distribute separate opinions or to engage in directly with the author to negotiate over the content contained therein. Justice William Brennan described the process, writing "Before everyone has finally made up his mind [there is] a constant interchange among us... while we hammer out the final form of the opinion" (Brennan 1960, 405, as quoted in Maltzman, Spriggs, and Wahlbeck 2000, 9-10). It is the primary aim of this dissertation to understand how this behind-the-scenes engagement molds the content of the Court's majority opinion

and how it contributes to the creation of separate concurring opinions.

1.3 Why Majority Opinion Content Matters

The arguments made in the majority opinion are steeped in the nuance of law and have the power to affect decision-making in lower courts, to alter the reach of public policy, and to influence the private behavior of individual citizens. Lawyers pour over Court opinions to advise clients, legal scholars dissect its language to understand the law, and politicians employ Court decisions to shape their own agendas. American citizens grapple with the consequences of Supreme Court opinions as policies shift and change under the justices' interpretation of what the law is. The arguments, rationales, and words contained in the Court's opinions are thus of critical importance. But where do they come from? How is the law made as it passes through the chambers of nine unelected justices? How do the justices work (or fail to work) together to settle important legal questions?

Adherents to the textbook political science approach to judicial decision-making focus on the dispositional votes of the members of the Court to suggest that behavior is a sincere reflection of individual policy preferences (Segal and Spaeth 1993). At the most basic level, this approach emphasizes that justices are unhindered by electoral pressure and are relatively unconstrained by the other branches of government and are thus free "to base their decisions *solely* upon personal policy preferences" (Rohde and Spaeth 1976, 72, emphasis added). It is now commonplace to suggest that justices are simply ideological actors and to ascribe their behavior accordingly.

Despite widespread support for the attitudinal model (see, e.g., Rohde and Spaeth 1976; Segal and Cover 1989; Segal and Spaeth 1993, 2002), law scholars have long lamented the fact that these early empirical studies glaze over the actual content of the Court's opinions. Contrary to attitudinal models, the legal approach has long theorized that case outcomes are a result of case facts and established law and precedent (Levi 1949; Mendelson 1963). Although the legal and attitudinal approaches appear to be completely divergent, even the staunchest supporters of the attitudinal model concede that the language of opinions matters. Take, for example, Rohde and

Spaeth (1976) who acknowledge that the Court's power comes from its opinion, writing, "It is the majority opinion which lays down the broad constitutional and legal principles that govern the decision in the case before the Court, which are theoretically binding on lower courts in all similar cases, and which establish precedents for future decisions of the Court."

Since Court opinions are especially important in the American political system, within the last two decades, judicial scholars have shifted focus to go beyond the study of dispositional outcomes. The strategic model advanced by Epstein and Knight (1998) and Maltzman, Spriggs and Wahlbeck (2000), among others, argues that while justices are driven primarily by their policy preferences, legal factors (case facts and precedent), institutional rules and norms, and collegial characteristics affect decision-making on the highest court in the land. Digging beyond the votes, studies in this vein suggest that the members of the Court are not as unconstrained as we once believed (e.g., Clark 2011). The surge in scholarship that seeks to understand how opinions are made have begun to reveal the bargaining process (Wahlbeck, Spriggs and Maltzman 1998; Spriggs, Maltzman and Wahlbeck 1999; Maltzman, Spriggs and Wahlbeck 2000), the sources of opinion content (Corley, Collins and Calvin 2011), and the final ideological location of majority opinion (Clark and Lauderdale 2010; Carrubba et al. 2012). While these are notable advances, the ultimate goal has not yet been achieved. That is, scholars have not yet been able to "explain[] the actual content of Court opinions" (Maltzman, Spriggs and Wahlbeck 2000, 154).

The most significant limitation to our understanding of the mechanisms which produce the opinion of the Court has been the unavailability of a measure of accommodation. Without access to the behind-the-scenes negotiations that take place after oral argument, it has not been possible to ascertain either the content of the intra-Court negotiation or to determine which requests for change the opinion author elects to incorporate into the Court's majority opinion. In this dissertation project, I redress this data deficiency through the collection of original data that explicitly reveal the full negotiation process leading to the publication of the majority opinion.

In the following section, I provide a description of the data collection and coding procedure. The final section provides a summary of the individual chapters of the dissertation.

1.4 Data Collection and Coding Procedure

This dissertation serves two purposes: It first illuminates the behind-the-scenes development of Court opinions through the use of novel data. Second, the data generated for this project will have implications for future scholarship far beyond the scope of the immediate project. These new data will be made publicly available to provide complete documentation for all aspects of opinion development on the U.S. Supreme Court from 1969-1985.

1.4.1 Data Collection

The most comprehensive work on the opinion writing process attempts to account for collegial and institutional factors using proxy measures for an author's accommodation decision. For example, Wahlbeck, Spriggs and Maltzman (1998) suggest that the sheer volume of drafts circulated by the assigned opinion writer is evidence of attempts to incorporate colleagues' preferences. In later work, Maltzman, Spriggs and Wahlbeck (2000) employ event history analysis, using time as a proxy for accommodation. These approaches are plausible approximations of the bargaining process, but they fail to account for whether actual changes were made to the majority opinion. Since the outcome of this secretive exchange determines law and legal policy, it is vital that we understand how the collaborative effort of the justices influences the shape of the Court's majority opinion.

Prior scholarship implemented coarse measures of accommodation quite simply because the data to account for changes to opinion content did not exist. To overcome the data deficiency that limited past analyses, I spent three months in the archives at the Library of Congress in the fall of 2012, collecting original data that explicitly reveal the full negotiation process leading to the publication of the majority opinion. Working alongside five undergraduate research assistants, I photographed every single page of every single majority opinion draft for 17 terms. We documented nearly 150,000 pages of archival material, which, together, allow me to peel back the curtain of secrecy to determine if and how the majority opinion changes when justices engage with

the opinion author.

I combine these novel data with the raw archival images housed in the Supreme Court Opinion Writing Database, which provides documentation of the bargaining memoranda that the justices sent to the opinion author for all cases from the 1969 to 1985 term (Wahlbeck, Spriggs and Maltzman 2009). My dataset is comprised of 6,542 majority opinion drafts circulated across 2,305 cases. Active bargaining or engagement is observable in approximately 50 percent of the cases. Among these cases, the data reveal nearly 5,000 unique requests addressed to the opinion author. I analyzed and coded the identity of the responding justice and the content of each request fielded by the majority opinion author.[2]

My research assistants and I invested 450 hours in the archival data collection process and have spent more than 3,000 person-hours transcribing and coding these data. The data collection and coding processes were funded primarily by the a National Science Foundation Dissertation Improvement Grant (No. SES-1228458) with additional support from a Corey Research Enrichment Fund Award and the Michigan State University Department of Political Science Merit Fellowship.

1.4.2 Coding Procedure

As a key to understanding the bargaining dynamics and its influence on the language contained within the Supreme Court's majority opinion, I needed to ascertain the content of every request justices solicited through engagement with the assigned opinion author. To that end, I read every single bargaining memorandum and coded for three distinct types of requests: minor revisions, legal changes, and policy changes. The majority of these requests (45 percent) focus on substantive challenges to the application and treatment of precedent in the opinion. A second type of request, comprising 10 percent of all bargaining statements, ask the opinion author to somehow alter the

[2]The empirical chapters to follow exclude data from October Terms 1969 and 1970 since the Court altered its internal docketing mechanism, raising the concern that memoranda from these early cases are missing. There are no other reasons to suspect that these terms are substantially different from the rest of the years included in the analysis.

opinion's policy content. The remaining requests ask the author to make non-substantive (i.e., word choice, grammatical, or clarification) modifications to the Court's majority opinion.

After establishing these three major categories based on insights from extant scholarship, and inspired by Bryan and Johnson (2012), I used an organic approach, drawn from a random sample of 250 cases, to develop a comprehensive – yet relatively parsimonious – subcategorization of each type of request. That is to say, I developed a new subcategory for each new type of request encountered in the data. This ensured both that my coding strategy was not only theoretically derived, but also sufficiently detailed to overcome challenges of inter-coder subjectivity. Requests for minor revisions ask the opinion author to make slight, non-substantive changes (i.e., word choice or grammatical alterations) to the opinion. Bargaining statements that ask for legal or policy change, however, ask the author to substantively alter the opinion content. Requests for legal change focus on the application and treatment of precedent, while policy changes challenge the scope of law settled in the Court's opinion.

The memos that the justices circulate to the opinion author contain different types of information or requests. The aim here is to distinguish between the types of requests contained in what I call "bargaining statements" or "bargaining memos." Together with three research assistants, I coded each bargaining statement at the *request* level, rather than at the document/memo level. This means that every request serves as a single observation (i.e., a single memo that seeks five distinct changes to the majority opinion would count as five observations).

For each request, then, we coded the bargaining content using the scheme presented below. The percent of each bargaining type is included in parentheses before the description of the content.

1.4.2.1 Bargaining Statement Types

Minor Revisions

- **1** – (4.83%) Writing (i.e., sentence construction or word choice) or grammatical suggestion
- **2** – (15.79%) Insert or delete non-controversial text; these requests are more substantial than

the minor revisions of the preceding category, but still should not substantively change the legal or policy implications of the decision

- **3** – (12.22%) Clarify section of opinion
- **4** – (13.76%) Alter the opinion so it reflects the participation, or lack thereof, of the bargaining justice. These typically take the form of "Please show me as having taken no part in the decision in these cases." It also includes requests where a justice says (s)he only agrees with certain sections of the opinion and other similar requests.
- **5** – (1.63%) Minor discrepancy of fact that the justice requests clarification or alternation, but does not change the policy or legal outcome of the case
- **6** – (0.51%) Indication for draft preference (e.g., when multiple drafts are in circulation, a justice says (s)he prefers Draft 2 over Draft 3)

Legal Changes

- **7** – (2.43%) Expand the legal rule developed in the case (or elaborate on a particular section of the current case)
- **8** – (6.79%) Limit or make the legal rule (or a specific point or application) more narrow
- **9** – (2.03%) Expand or strengthen interpretation of cited precedent
- **10** – (4.65%) Limit or distinguish interpretation of precedent in the opinion
- **11** – (4.28%) Add/cite additional precedent or statute
- **12** – (4.59%) Remove a citation to precedent or statute
- **13** – (1.17%) Challenge constitutional interpretation, where the bargaining justice takes a broader or more inclusive view of the Constitution than does the opinion author

- **14** – (2.76%) Challenge constitutional interpretation, where the bargaining justices takes a narrower or more restrictive view of the Constitution
- **15** – (10.37%) Request a change to the legal question answered by the opinion (i.e., avoid a legal issue or settle an additional question)
- **16** – (1.26%) Clarify instructions for lower courts and/or Congress

Policy Changes

- **17** – (5.07%) Change the case disposition; including asking that the cased be dismissed as improvidently grant (DIG), vacated and remanded (GVR), or summarily decided
- **18** – (0.40%) Consider and address a hypothetical related to the legal question
- **19** – (2.62%) Broaden, strengthen, or clarify the discussion of policy consequences
- **20** – (0.90%) Change the discussion of jurisdiction
- **21** – (0.22%) Significant discrepancy of fact *or* of lower court opinion that *broadens* the policy outcome or consequences in the case (i.e., the Court expands reach of opinion by more broadly reading a lower court decision)
- **22** – (0.31%) Significant discrepancy of fact *or* of lower court opinion that *limits* the policy outcome or consequences in the case (i.e., the Court narrows reach of opinion by more restrictively reading a lower court decision)
- **23** – (1.41%) Request the application of a different legal or Constitutional standard altogether (that is, a request not to alter the current standard, but to use a completely different approach to answer the legal question(s) at hand)

Each distinct category makes up only a small percentage of the total. As Figure 1.1 illustrates, some categories make more frequent appearances than others. Of requests for minor revisions, a

majority of statements ask the author to simply insert or delete text that does not substantially alter the meaning of the opinion.

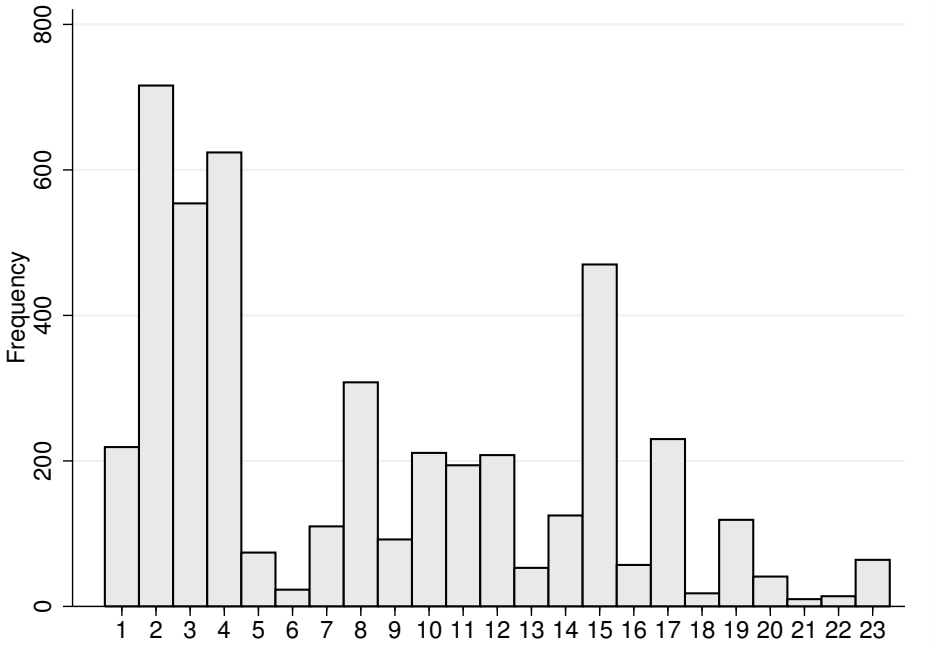

Figure 1.1 Absolute frequency of each bargaining request by type.

The modal category in among requests focused on altering the legal content of the opinion are those which seek to limit or more narrowly tailor the interpretation of the legal rule developed in the immediate case. However, the categories that deal with treatment of precedent compromise a sizable proportion of requests sent to the majority opinion author. Bargaining statements aimed to distinguish the current legal rule from established precedent make nearly an equal appearance as bargaining memos requesting the author add or remove an additional citation to precedent or statute.

Quite unexpectedly, the most frequently occurring policy change bargaining statements include requests to either change the case disposition or apply an entirely different legal rationale, while negotiation over interpretation of fact or lower court opinions constitute an inconsequential proportion of all bargaining statements.

Using the tripartite categorization, the next chapter examines these data at the justice-level.

1.4.2.2 Bargaining Strategy

While the dissertation aims to uncover the content of the negotiations relating to the development of its legal rule, I am also interested in whether certain bargaining techniques are more successful (or in what circumstances different approaches are most efficacious). As such, my assistants and I coded the "tone" used for each request. The schema presented below captures how a justice frames his or her request, building from non-threatening to the most severe type of threat:
Request Tone

- **1** – (41.94%) Friendly/neutral suggestion; this is an *unconditional* join with a request attached
- **2** – (28.00%) Suggestion/request without explicit threat; more ambiguous than unconditional join
- **3** – (16.39%) Will join *only* if accommodated, but nature of the threat is unclear (i.e., the justice doesn't say what the consequence will be otherwise)
- **4** – (10.75%) Will author or join a separate, concurring opinion if not accommodated
- **5** – (2.93%) Will defect and dissent if not accommodated

The empirical chapters explore the impact of a justice's strategy on both the author's decision to adopt requests and on a bargaining justice's decision to retaliate when not accommodated. The descriptive illustration in Figure 1.2 reveals that justices most often frame their suggestions in friendly language. In fact, as the degree of hostility goes up, the proportion of requests using those strategies plummets.

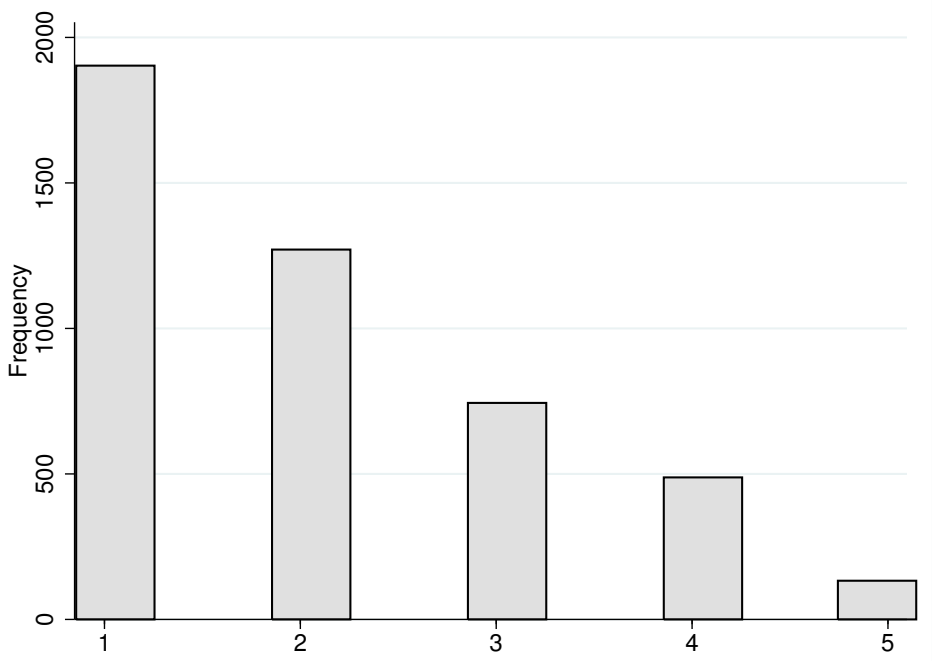

Figure 1.2 Absolute frequency of each bargaining strategy by type.

1.4.2.3 Identifying Accommodation

To determine who the opinion author accommodates, what types of requests are met with acquiesce, and when changes are more likely to occur, I created a direct measure of accommodation in three steps: First, I converted the JPEG images of the majority opinion drafts to searchable text files using optical character recognition (OCR) software. Second, I determined the changes in each circulated draft. To do this, I follow the path of other studies (Black and Owens 2012; Corley 2008; Corley, Collins and Calvin 2011) and use the common plagiarism software WCopyFind to reveal the overlap between two or more documents. This method allows me to identify the location and magnitude of the changes from the initial draft to each subsequent circulation of the opinion. Third, I connected the change in the opinion with the explicit requests contained in memoranda from the other justices by merging the opinion draft data with information from the Supreme Court Opinion Writing Database. This approach creates dyads of the opinion author and each responding justice at the request level for each case, allowing for the creation of a unique binary dependent variable used in the primary empirical contribution of this dissertation.

Armed with novel data for analysis, I turn now to describing the individual chapters that comprise the dissertation.

1.5 Summary of Chapters

The overarching goal of this dissertation is to provide an empirical micro-foundation of judicial behavior to inform theories of intra-court bargaining and to improve our understanding of the Supreme Court's opinion writing process.

The new data collected for this project provide the core for empirical analysis in the remaining chapters, which can be read as theoretically related, but empirically independent essays. *Compromise and Control in the Collegial Development of U.S. Supreme Court Majority Opinions*, Chapter 2, investigates an author's decision to accommodate his or her colleagues. The next chapter, *(Dis)Engagement in the Supreme Court's Opinion Writing Process* steps back to consider how a justice's decision to engage with the majority opinion author in the first instance shapes the bargaining process and the output of the Court. The fourth and final substantive chapter, *Concurring Opinions in a Fractured Majority*, analyzes what happens when negotiation between the author and her colleagues goes awry. In these chapters, research design and results are preceded by theory sections that provide predictions that aim to guide the interpretation of results. A fifth chapter provides a brief conclusion to connect the central findings and point to possible avenues for further research.

In *Compromise and Control in the Collegial Development of U.S. Supreme Court Majority Opinions*, I provide an empirical test to determine which members of the Court are actually influential in shaping the content of the opinion by examining an authoring justice's decision to alter the majority opinion as a result of that negotiation. My results suggest that while opinion authors are largely amenable to their colleagues, contrary to popular discourse, it is not the Court's "swing justice" that is principally influential, but rather that the median member of the majority coalition holds particular sway in the development of the opinion. This result confirms recent theoretical re-

finements to models of judicial bargaining. More importantly, I find that the success of a justice's attempts to persuade the opinion author to alter the majority opinion depends mainly on the content of the negotiation as well as the tone or frame of the request. In particular, opinion authors are easily persuaded to adopt suggestions for minor revisions to improve the clarity of the opinion and, to a lesser degree, are responsive to requests to alter the legal justification provided in the opinion. By contrast, requests to change the policy implications or to modify breadth of law settled in the Court's opinion are met with the most hostility by opinion authors and are less frequently adopted. I also find that how justices frame their requests affects the likelihood that the author revises the opinion. When a bargaining request carries either an explicit or implicit threat to the stability of the majority coalition, the opinion author becomes especially active in the negotiation process and works to appease the bargaining justice.

In the second substantive chapter, *(Dis)Engagement in the Supreme Court's Opinion Writing Process*, I trace a justice's initial decision to engage – or not – with assigned opinion author. Here I dissect a justice's response to the initial majority opinion draft where a justice may opt to join it entirely, negotiate with the author to make changes, or write a concurring opinion from the outset. I again find evidence that the median member of the majority coalition holds an influential position in crafting the Court's opinion. The others members are less likely to request alterations to the opinion when such a justice is the assigned author. Though the author's identity may suppress bargaining activity, the results reveal that the single greatest predictor of a justice's willingness to engage with the author is the degree of cooperation between the justice and the author. When a justice and the author have a high degree of cooperation, a justice is far less likely to ask the author to make changes to the Court's opinion. Additionally, case and contextual factors play a greater role in a potential bargainer's decision-making calculus. Justices are more likely to engage with the author when the case is legally complex, but freshman justices are least likely to bargain across the board. This paper pushes the question further to consider how "disengaged" justices react to the majority opinion. I find that when the Court's median authors the opinion, a justice is less likely to request changes, but is far more likely to pen a separate concurring opinion. Similarly, justices are

more apt to forgo bargaining to write separately in legally complex cases and as their ideological distance from the mean of the majority coalition grows. Justices are more likely to simply ask for changes without taking the step to write a concurring opinion as the winning margin increases. Finally, I find that justices who are experts in a particular issue area are more likely to engage with the majority opinion author than justices lacking in specialized knowledge.

In the third investigative chapter, *Concurring Opinions in a Fractured Majority*, I consider the reversed relationship between the opinion author and the other justices on the Court. Combining text analysis software with content analysis of the written exchanges between justices, I descriptively analyze the consequences of failed or incomplete negotiation. Contrary to expectation, my research finds that negotiation content is not the singular predictor of concurring opinion behavior. Rather, in line with intuition derived from theories of bargaining and cooperation, I find that justices are more apt to author or join a separate opinion when the engaged justice has employed a strategy that invokes a more hostile tone during negotiation with the majority opinion author. That is, concurrences are more likely to emerge if a justice threatened the majority opinion author during the bargaining process. Despite the fact that the bargaining justice threatens the stability of the majority coalition, the opinion author risks a fractured majority and refuses to appease her colleague in favor of maintaining greater control of the opinion content. Although bargaining justices work to make their threats credible, this gamble is frequently worth the risk as the failure to placate a colleague's request for change to the majority opinion results in retaliatory action in only a fraction of cases. In short, the data suggest there is a general reluctance to author concurring opinions to highlight instances of non-accommodation.

The final chapter concludes by reviewing my central arguments and findings. Acknowledging the limitations of the dissertation project, the conclusion points to possible approaches for future scholarship. In particular, the results presented in the latter essays raise new puzzles and suggest clear avenues for avenues for research. For example, taken together, the research presented here suggests that a next logical step is to examine the downstream consequences of failed negotiation during the opinion writing process by considering the effects of concurring opinions

on compliance in the lower federal appellate courts. To date, empirical evidence suggests that a justice is more likely to write a concurring opinion as the ideological distance from the majority coalition median increases. Descriptive data reveal concurrences on *both* sides of the coalitional median, raising an unexplained quandary concerning the influence of concurrences as a signal to lower courts: if the median member of the Court authors a concurrence in a precedent-setting case, it signals that median is not entirely satisfied with the legal rule established in the majority opinion. Lower courts, then, have a choice to faithfully execute the legal rule and risk unfavorable review by the Supreme Court or to adopt the legal rule most preferred by the median member of the Supreme Court by announcing a decision that is at least partially inconsistent with the Court's majority opinion. In future research, building on insights from this dissertation project, I will explicitly consider concurrences as strategic behavior, rather than simply as expressive actions, and I utilize a simple spatial model to demonstrate how such a pattern might encourage noncompliance from a lower court, allowing exploitation of coalitional divisions among members of the Supreme Court.

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CHAPTER 2

COMPROMISE AND CONTROL IN THE COLLEGIAL DEVELOPMENT OF U.S. SUPREME COURT MAJORITY OPINIONS

2.1 Chapter Abstract

The arguments contained within Supreme Court majority opinions determine law and wield authority to alter the scope of public policy. Existing research presents competing hypotheses about bargaining power on the Court, with many models predicting convergence to the preferences of a single median member, while others suggest that the opinion author herself retains significant control. Despite these conflicting predictions, data to disentangle individual member influence have remained elusive. In this chapter, I redress this deficiency by presenting evidence from a novel dataset comprised of each majority opinion draft circulated among members of the U.S. Supreme Court during the Burger Court era. I create a direct measure of accommodation on the Court that matches bargaining actions with changes in the content of the majority opinion drafts. My results suggest that while opinion authors are largely amenable to their colleagues, the median member of the majority coalition holds particular sway in the development of the opinion by influencing when a justice negotiates and by affecting an author's decision to adopt a change. I further show that the content and tone of the bargaining request influences the likelihood of accommodation.

2.2 Introduction

Arguments made in the majority opinion are steeped in the nuance of law and have the power to affect decision-making in lower courts, to alter the reach of public policy, and to influence the private behavior of individual citizens. For an opinion to have precedential authority, at least five members of the Court must sign onto a single opinion, opening the door for active bargaining between the opinion author and other members of the Court. Yet precisely how the collegial

Court produces the *content* of the policy contained within the majority opinion remains shrouded in mystery because the opinion writing process is secretive. Competing theoretical expectations suggest that different members of the Court – simply because of their relative ideological positions – are more likely to see their policy preferences translated into law. This chapter presents original archival data that opens the black box to provide a systematic empirical exploration into the intra-Court bargaining process. I find that the median member of the majority coalition has particular sway in the development of the Court's opinion, and, more importantly, that the success of a justice's attempts to persuade the opinion author to alter the majority opinion depends mainly on the content of the negotiation as well as the tone or frame of the request.

The scholarly literature has offered three distinct answers about which member of the Court has the most influence over the content or direction of the majority opinion. *Median justice* theories equate the Supreme Court to a legislature and contend that the legal rule will reflect the ideal point of the Court's median member (Epstein et al. 2005; Hammond, Bonneau and Sheehan 2005; Martin, Quinn and Epstein 2005; Schwartz 1992). In contrast, other theories focus on the role of the opinion author and either posit an *author monopoly* outcome, where the legal rule reflects the preference of the author (Hammond, Bonneau and Sheehan 2005), or a less determinant *author influence* outcome, where the legal rule partly reflects the views of the author (Lax and Cameron 2007). Finally, by emphasizing the distinct role of the dispositional vote, more recent theoretical approaches focus on the unique institutional features of the Court and assert that content of the opinion most frequently converges to the views of *median member of the majority coalition* (Carrubba et al. 2012). My findings largely support the last account and provide evidence of how the median member of the majority coalition arrives at this position of power.

While each of these theoretical models yields predictions about the outcome of intra-Court bargaining, direct empirical evidence has not followed suit and it has not been feasible to determine who matters in the development of the majority opinion or under what circumstances we may see varying degrees of influence. Using the private papers of justices that served during the Burger Court era allows me to peel back the curtain of secrecy that enshrouds the opinion writing process

and, in doing so, reveals a vibrant negotiation process between the opinion author and the other members of the Court. Take, for example, the 1978 case of *Gladstone, Realtors, et al. v. Village of Bellwood*, where the Court was asked to settle a question of standing under the federal Fair Housing Act. After oral argument, the conference vote suggested an easy dispositional decision, establishing a 7-to-2 majority that essentially affirmed the lower court's decision which broadly interpreted the intent of the federal legislation as it applied to standing in anti-discrimination suits. Chief Justice Burger, a member of the majority, assigned the Court's opinion to Justice Powell, who, in turn, circulated the first draft of the opinion in February 1979. The median member of the Court, Justice Blackmun, agreed to Powell's proposed majority opinion, casting a vote to join the very first draft without delay. Though their acquiescence came more slowly than Blackmun's, two other members of the majority coalition, Burger and Justice Marshall, also joined Powell's opinion without attempting to get Powell to edit the draft's content.

However, the three remaining members of the Court's majority coalition actively engaged with Powell, requesting specific, substantive changes be made to the opinion. In particular, these members of the Court's majority quibbled about the inclusion of a single footnote, which drew a distinction between some of the respondents in the case. In the initial opinion, Powell sought to affirm the Court of Appeals ruling in favor of only some of the respondents, but to reverse the standing decision for others. The first challenge to Powell's legal reasoning came from Justice White, the median member of the Court's majority coalition in this particular case, just four days after the initial majority draft circulation. In his response memo, White indicated that he was "quite satisfied with [the] opinion in this case with the exception of [the footnote]." It was White's view that Powell's opinion was too restrictive. In a memo dated six days later, Justice Brennan pushed this point further, suggesting that the standing issue for those other individuals was not a question before the Court and requested that Powell make it clear that the Court's opinion did not establish whether such persons have standing to sue. Finally, on the same day that Brennan circulated his request, Justice John Paul Stevens lobbied Powell to "simply omit" the footnote.

Over the course of three additional majority drafts, Justice Powell sought to incorporate

the substantive requests made by both Justices White and Brennan, while entirely disregarding Stevens' most preferred outcome by his refusal to remove the footnote entirely. In the final opinion, Powell maintained his distinction between the respondents, but adopted White's request and did not offer a prescriptive, hard and fast legal rule to distinguish among the respondents. Instead, he modified Brennan's request and remanded the question to the lower court. The final opinion content is a direct culmination of negotiation and compromise.

This particular example raises important questions about the opinion-writing process. In particular, though the *median justice* (Blackmun) readily signed onto his opinion, Justice Powell adopted two of the three substantive requests made by his colleagues, suggesting that the opinion author is amenable to alter the content of the opinion at the behest of his colleagues and undermining the idea of an almighty *author monopoly*. Moreover, precisely whose views are incorporated into the Court's opinions may be surprising. In this case, while Powell hastily adopted a suggestion from the *majority coalition median member* (White), the slightly right-of-center Powell also actively engaged in the negotiation process with an ideologically extreme liberal member (Brennan), while virtually ignoring the views of a more proximate ideological ally (Stevens). More critically, however, the single footnote opened the door for further litigation and shifted the scope of the Court's opinion. In particular, rather than affirming the lower court in part and reversing in part, and therefore establishing national precedent on the standing issue, the Supreme Court ducked a potentially sticky issue and remanded the case back to the lower court.

Clearly, then, the Court's opinions – sometimes single footnotes – have far reaching implications for American society. In this chapter, I utilize original data on the changes in majority opinion drafts to understand how the members of a collegial court arrive at a joint opinion to set legal policy. More specifically, I use content analysis of the bargaining memoranda directed to majority opinion authors to shed light on the distinctive types of changes sought. I then trace the treatment of these requests through the iterative opinion writing process. Such an approach makes it is possible to examine whose requests are incorporated into the Court's opinion and whose are not. Simply stated, I analyze which member(s) of the court are *influential in bargaining* with the

majority opinion author, which authors are *able to be influenced*, what *types of requests are accommodated* by the author, and, finally, when, or *under what conditions*, accommodation occurs.

I begin by briefly tracing the opinion writing process that takes place behind the closed doors of the Marble Palace in Section 2.3. Next, in Section 3.4, I present established theories about which justices control the content of the Court's majority opinion and generate hypotheses to examine the conditions under which authors decide to accommodate their colleagues. I then explain the data and measurement in Section 2.5 before presenting the results from empirical analyses in Section 3.5. Section 3.6 concludes with a discussion of the results.

2.3 The Opinion Writing Process

After the Supreme Court hears oral argument in a case, the justices meet in private conference to establish the dispositional majority coalition. During this conference, in descending order of seniority, the justices discuss their individual understanding of the case and cast initial, non-binding votes to determine the majority view of the Court. Importantly, while these votes establish a tentative winning coalition, the votes in conference are not irrevocable. Indeed, extant scholarship shows that there is fluidity from these first votes to the release of the Court's signed opinions (e.g., Brenner 1995; Maltzman and Wahlbeck 1996). After oral argument, then, the justices have the opportunity to convey their opinions, but have ample opportunity to refine these views throughout the opinion writing process.

Once the initial majority and dissenting coalitions are established, the most senior member of each coalition assigns one of the justices to write an opinion for the Court. As the most senior member of the Court, if the chief justice votes with the majority, the opinion assignment falls on his shoulders (Schwartz 1993). In the event that the chief justice is in the minority, the most senior associate justice is responsible for making the opinion assignment (Segal and Spaeth 1993). The assigned opinion author is tasked with articulating the Court's legal rationale to justify its decision in the case and, upon doing so, (s)he circulates an initial draft of the majority opinion.

While this seems to be a tremendous amount of power in the hands of a single justice, for an opinion to have precedential authority, at least five members of the Court must sign onto a single opinion. This opens the door for active bargaining between the opinion author and other members of the Court. That is, after the justices receive a draft of the majority opinion, they may choose to attempt to persuade the opinion author to alter the content of the opinion. As the *Gladstone* example reveals, the final output of the Court may very well be a product of negotiation and collaboration.

Out of deference to the assigned majority opinion author, the other justices typically wait for the author to circulate a first draft of the Court's opinion before they offer any competing concurring or dissenting opinions. Once the initial draft is circulated, however, the justices are free to circulate separate opinions or to engage in bargaining with the author. In the words of Justice William Brennan: "Before everyone has finally made up his mind [there is] a constant interchange among us... while we hammer out the final form of the opinion" (Brennan 1960, 405, as quoted in Maltzman, Spriggs, and Wahlbeck 2000, 9-10). I turn now to theory to examine how this "constant interchange" molds the final output contained in the Court's signed opinion.

2.4 Theory and Hypotheses

More than half of a century of political science scholarship relies on the basic assumption that justices are motivated by a desire to see their policy preferences translated into law and that this motivation drives the behavior that we observe during the opinion writing process. Building on that basic premise, I examine how justices – simply on account of their ideological or collegial position on the Court – influence the likelihood that their views are incorporated into the Court's majority opinion. I further consider how the content and tone of the bargaining interaction between the author and her colleagues affects the final draft of the Court's opinion. Finally, I examine how other institutional, contextual, and political factors influence the production of the law.

2.4.1 Justice Power and Opinion Control

There are three distinct formal theories that predict the final ideological location of Supreme Court majority opinions, two of which rely on the ideological location of the justices and one that examines the unique role the assigned author plays. Each of these theories yields different hypotheses about which member(s) of control the content of the Court's opinion.

The predominant model of Supreme Court decision-making is the so-called *median justice* theory, which takes its formal roots from the median voter theorem (Black 1958). The historical dominance of this model is unsurprising because its simplicity is intuitively appealing: to maintain a stable coalition and set precedent, the policy preference of the median justice wields great power since his or her vote is necessary to achieve a simple majority. Scholars contend that when we assume a uni-dimensional policy space where justices have single peaked preferences, the majority opinion of the Court will be written at the ideal point of the median justice (Epstein et al. 2005; Hammond, Bonneau and Sheehan 2005; Martin, Quinn and Epstein 2005; Schwartz 1992). According to this theory, I expect that

> **Influential Median Justice:** *the median justice will wield greater power over opinion content than her colleagues, whether she is the author or a member of the Court's majority coalition.*

More specifically, the median justice theory suggests that an author should be especially keen to accommodate requests from the median member of the Court. At the same time, if the median justice is the assigned author, this theory indicates that the justices should be less likely to cede control and less likely to accommodate requests from her colleagues.

Arguing that median justice models are based on theories of the legislature, which assumes a two-party system with majoritarian rule, Anderson and Tahk (2007) suggest a more applicable model accounts for institutional features unique to the Court. Their approach permits other justices to offer competing opinions. While the model still predicts convergence to a median, it is no longer the median of the Court that wields inordinate influence, but rather the median of the particular le-

gal issue. Similarly, Carrubba et al. (2012) consider the role concurring opinions play in shaping the policy output of the Court. This model predicts that, in most cases, the majority opinion will converge to the ideal point of the *median member of the majority coalition*. This theory, then, predicts that

> **Influential Median Member of Majority Coalition:** *the median member of the majority coalition should hold particular control over the opinion's content*.

In particular, if and when the median member of the majority coalition opts to engage in bargaining with the author, the author should be more accommodating to her requests than she would otherwise be. Similarly, if the the median member of the majority coalition is the assigned author, she may be less willing the accommodate bargaining requests.

Contrary to models that predict convergence to a median, other models give the majority opinion author varying degrees of control over opinion content. In particular, Hammond, Bonneau and Sheehan (2005) propose an *author monopoly* model that suggests policy is a function of the preferences of the opinion writer and the Court median. This model relies on strict – and unrealistic – assumptions, proposing both fixed policy alternatives and that the members of the Court willingly cede "complete control of the Court's agenda to the majority opinion writer" (Hammond, Bonneau and Sheehan 2005, 111). Conversely, Lax and Cameron (2007) develop a model of *author influence*. Specifically, they contend that circulating a competing opinion is costly in terms of legal quality (defined as persuasiveness, clarity, and craftsmanship). As a result, the content of the opinion is influenced by characteristics of the assigning justice, the assignee, the potential counterwriter, and the characteristics of the case. Given the multiplicity of intervening factors in the model, there is no one single predicted outcome across large numbers of cases.

In short, the literature posits competing hypotheses about the most influential members on the Court, with many models predicting convergence to a single median member of some type. Other approaches suggest that the opinion author has some degree of control over the opinion content.

2.4.2 Content of Requests and the Likelihood of Accommodation

The theories of author influence suggest that the assigned author has an important role in first defining the content of the Court's opinion. Yet when the first draft is circulated and the door opens to negotiation, the justices may work together to craft the final legal rule. Intuitively, we might expect that the likelihood that a justice is able to influence the language or content of the majority opinion depends in no small part on precisely what it is that the justice is asking the author to do. In other words, it is the content of the request that determines the magnitude of change necessary for the author to adequately accommodate the responding justice. The content of the request, then, functions as a signal of the divergence between the legal policy explicated by the opinion author and the most preferred outcome of the responding justice. Additionally, identifying the content of the request illuminates the possibility for strategic interaction between the members of the collegial court. If, for example, the bargaining memos are largely comprised of requests to clarify or subtly alter language or to fix grammatical errors within the opinion draft, it would suggest that the opinion author has significant ability to control the policy content. Conversely, if the bargaining memos predominantly attempt to persuade the author to modify a legal argument, or to rely on alternative and/or additional precedents, or to adopt a different outcome altogether, then the evidence would be suggestive of a struggle for control over the legal and ideological position of the opinion.

Because minor changes to grammar and word choice are relatively easy to implement with a low opportunity cost for the opinion author, I expect that

> **Content 1:** *opinion authors will be more likely to accommodate minor revision requests compared to requests for substantive legal or policy changes*.

Put differently, changes to either the policy or to the legal rule contained within the opinion are both harder for the author to implement and more directly an affront to the views of the author explicated in the opinion draft. As such, I expect that these requests are less likely to be accommodated than suggestions for minor changes. I argue that a further distinction may be made between

legal and policy requests. While legal requests might be mired in ideological interpretation, at least at face value, such requests are dressed in the guise of trying to establish the correct interpretation of law. Thus, I expect

> **Content 2:** *opinion authors will be least likely to accommodate requests that seek to alter the scope or interpretation of policy.*

Additionally, I expect that how much, the quantity or the sheer *number of requests*, a colleague asks for will influence the author's willingness to accommodate. If a justice asks the author to make multiple revisions, it substantially adds to the author's workload. More importantly, perhaps, the author may fear that accommodating multiple requests from one colleague may alienate other members of the majority coalition and will therefore be more reluctant to significantly revise the opinion draft. As a result, I hypothesize

> **Content 3:** *opinion authors will be less likely to accommodate as the number of requests increases.*

2.4.3 Means of Persuasion

Once a justice makes the decision to engage with the opinion author, undoubtedly she hopes to induce the author to adopt her request for change. By the very nature of the institutional rule, for a majority opinion to bind lower courts and set national precedent, at least five members of the Court must sign onto the majority opinion. This provides bargaining justices with an important tool to engender accommodation. An opinion author must balance her desire to keep the opinion as close to her preferred outcome as possible with the need to secure at least four additional votes. This suggests that, especially in minimum winning coalitions (discussed in greater detail below), an author may be amenable to alter the opinion at the behest of her colleagues. This should be particularly true when a bargaining justice in some way indicates that her vote is up for grabs.

Notably, bargaining justices have multiple tools of persuasion at their disposal. The most

obvious, perhaps, is to threaten to retract the non-binding conference vote from the majority coalition and to defect to the dissent, thereby weakening the effect of precedent (Fowler et al. 2007). However, as Carrubba et al. (2012) argue, even if the justices disagree about the legal rule, defections from the dispositional vote are extraordinarily rare. In most cases, to defect entirely, a justice would have to switch from a vote to affirm a lower court's decision to reverse it. So while this is a strong-armed tactic available to the justices, it might not be the most credible. A more credible means to persuade the opinion author may be to signal a willingness to write or join a separate concurring opinion. Although concurrences do not cause the same degree of damage to the longevity of precedent as do dissents (Hansford and Spriggs 2006; Fowler et al. 2007), it serves to publicly display disagreement on the Court. Simply put, "a justice must learn not only how to put pressure on his colleagues but how to gauge what amounts of pressure are sufficient to be 'effective' and what amounts will overshoot the mark and alienate another judge" (Murphy 1964, as quoted in Maltzman, Spriggs, and Wahlbeck 2000, 62). I expect that

> **Persuasive Threats:** *justices that deploy threats are more likely to get their views incorporated into the majority opinion than justices that elect to request a change without indicating a consequence for failed accommodation*.

2.4.4 Additional Collegial and Contextual Constraints

Current literature points to additional collegial, contextual, and political variables that might influence the propensity of a justice to seek changes from the opinion author and, in turn, influence the author's decision to adopt or reject that request. Not only does theory suggest that opinion authors might be cognizant of the ideological or collegial position the a bargainer occupies, but it is nearly axiomatic in political science to assume that the ideological distance between the bargaining duo undoubtedly affects behavior (e.g., Segal and Spaeth 1993). That is, theoretically speaking, a justice who is ideologically opposed to the assigned author has the most to gain if she throws her hat

into the negotiation ring and succeeds in getting her preferences translated into law. Conversely, opinion authors will be more reticent to adopt requests from ideological opponents, who may seek to pull the opinion further from their ideal point. I expect, then, that

> **Ideological Distance:** *an author's willingness to accommodate will decrease as the ideological distance between the author and bargaining justice increases.*

As the embodiment of personal policy preferences, ideological divergence provides an indicator of how closely aligned the author is with her colleagues. Importantly, however, the justices are also long-term colleagues. That is, the justices serve together term after term and theories of reciprocity or cooperation suggest that it should not be surprising to see a tit-for-tat strategy emerge in such an environment. In their seminal work on the collegial court, Maltzman, Spriggs and Wahlbeck (2000) find evidence that past cooperation significantly affects the way justices interact. As Murphy (1964, 53) suggests, past cooperation between justices can "build up a reservoir of good will for later use" (as quoted in Maltzman, Spriggs and Wahlbeck (2000, 73)). As a result, I expect that

> **Cooperation:** *when usual allies seek changes from an opinion author, the author will be more willing to accommodate the request.*

Beyond the collegial relationship, justices are affected by the context that surrounds the case. The institutional "Rule of Five" suggests that an individual justice's influence over the content of opinion may depend on the size of the winning coalition (Murphy 1964; Rohde 1972; Wahlbeck, Spriggs and Maltzman 1998; Maltzman, Spriggs and Wahlbeck 2000). In minimum winning coalitions, where the majority was established by five non-binding votes at conference, the majority opinion author cannot afford to lose a single vote. With this increased leverage, I expect that

Coalition Size: *majority opinion authors will be motivated to appease the requests from their colleagues when the majority coalition is smaller.*

Just as justices cannot control the institutional rules that govern precedent-setting authority, so too justices are held to a fixed term, creating a unique workflow environment. The Supreme Court's annual term runs from October to June. Thus, cases that are argued early in the term have months before the justices need to produce a signed opinion. On the contrary, when a case is argued in March, the justices have only three short months to produce a judgment and settle the law. Moreover, as the term progresses, the caseload begins to pile up. As Justice Powell wrote to instruct his law clerks, "As we move deeper into the Term, say from and after February, the number of opinions circulated by each Chamber multiplies, and the problem of keeping abreast is a serious one" (as quoted in Maltzman, Spriggs and Wahlbeck (2000, 75)). In their various works, Wahlbeck, Spriggs and Maltzman (1998), Spriggs, Maltzman and Wahlbeck (1999), and Maltzman, Spriggs and Wahlbeck (2000) demonstrate that justices' workload significantly affects bargaining activity. It follows that

Workload: *opinion authors will be less willing to revise the majority opinion to accommodate their colleagues as their workload grows.*

An accumulation of evidence suggests that not all cases are of equal importance to the justices (Epstein and Segal 2000; Maltzman, Spriggs and Wahlbeck 2000; Unah and Hancock 2006; Black, Sorenson and Johnson 2013). Black, Sorenson and Johnson (2013) suggest that justices signal that some cases matter more to them individually during oral argument by engaging more actively during oral argument. Furthermore, justices are not immune from the larger societal context and are cognizant of when the media or the public is tuned into the Court's decision. The members of the Court know that the legal and policy consequences of some cases are simply more important than others. Yet the prediction for the author's response in such cases is not obvious. On one hand, the authoring justice will be highly motivated to keep control of the opinion so as to not lose authorship of a critical case. But, on the other hand, in salient cases, I expect that

Salience: *the author's own policy preferences are more thoroughly entrenched in salient, lessening the likelihood of accommodation*.

At the individual justice level, prior studies suggest that justice expertise and case complexity affect the opinion writing process (e.g., Brenner 1984; Brenner and Palmer 1988; Maltzman, Spriggs and Wahlbeck 2000), leading to additional hypotheses:

Expertise: *Authors will be more likely to heed requests from justices with greater expertise on a particular issue*.

Beyond personal experience with an issue, some cases are simply more complicated than are others. I expect that

Case Complexity: *in cases where multiple legal issues are at play, the opinion is more likely to be a product of active dialogue between the author and the other members of the majority coalition*.

Finally, the literature suggests that new or freshman justices may take time to acclimate to the procedures of the Court (Hagle 1993; Brenner and Hagle 1996; Maltzman, Spriggs and Wahlbeck 2000; Wahlbeck, Spriggs and Maltzman 1998), which suggests that

Freshman Author: *freshman justices may be more deferential to their colleagues and, subsequently, more likely to accommodate requests*.

2.5 Data and Measurement

In this section, I describe the failure of existing empirical approaches to test these theories to establish the need for a new empirical investigation into the specificity of intra-Court bargaining.

2.5.1 Quantifying Influence: Connecting *Who* Matters with *How* They Matter

To determine who matters and to understand precisely how they matter, it is necessary to examine the development of the majority opinion itself. One significant limitation to our understanding of the mechanisms which produce the opinion of the Court has been the unavailability of a measure of accommodation. Despite concrete theoretical predictions, it has not yet been empirically established which members of the Court sway the content of the opinion. The most comprehensive work on accommodation by the opinion author attempts to account for collegial and institutional factors using relatively coarse measures of accommodation. In their original test, Wahlbeck, Spriggs and Maltzman (1998) suggest that the sheer volume of drafts circulated by the assigned opinion writer is evidence of attempts to incorporate colleagues' preferences. In later work, the same authors employ event history analysis, using time as a proxy for accommodation (Maltzman, Spriggs and Wahlbeck 2000). These approaches are reasonable approximations of the bargaining process, but they are wholly incomplete. The opinion-writing stage is quite literally when Supreme Court justices determine what the law is, when the legal rule is continually shaped and refined through active negotiation, and when debate over a single footnote can take weeks to resolve. The end result is an opinion that captures the nuances and complexity of law and policy. By focusing on aggregate patterns of opinion writing, previous empirical approaches provide an overly broad generalization of the development of the majority opinion. That is, to fully understand the evolution of law and to understand the final ideological location of Court opinions, we must first understand the intricacies of the opinion-writing process.

Limited by data availability, the coarse proxy measures – draft volume and time – glaze over the dyadic bargaining dynamic and fail to actually capture when accommodation occurs. While the data limitations are problematic, they are not insurmountable. To redress the data deficiency that has plagued past analyses, I collected original data that explicitly reveal this process. Specifically, by acquiring copies of each majority opinion draft circulated during the opinion writing stage on the U.S. Supreme Court during the Burger Court era, I am able to determine how the majority opin-

ion is altered throughout the negotiations with other members of the Court. These data complement the extensive Supreme Court Opinion Writing Database (Wahlbeck, Spriggs and Maltzman 2009), which contains information on all memoranda and opinion drafts that the Supreme Court justices circulated to their colleagues between the 1969 and 1985 terms.[1] While this existing database contributes valuable insight into the negotiation process by providing data on attempts by justices to influence the content of the opinion through written memoranda, it lacks details on the circulation of opinions, accounting only for the number of drafts.

To merge the new majority opinion draft data with the existing Supreme Court Opinion Writing Database, I conducted a content analysis of the raw data and read each circulated bargaining memo addressed to the opinion author where the memo author posed an explicit suggestion or request to change the circulated majority opinion draft. I then traced the treatment of that request through each iteration of the majority opinion.[2] This approach allows me to determine the substantive content and tone of each request and to directly identify if and when that request is addressed by the opinion author. During the course of the Burger Court, a total of 6,542 majority opinion drafts were circulated across 2,305 unique cases, with an average of 2.8 drafts per case. There were 1,960 cases decided by majority opinion from October Term 1971 through the close of

[1]The empirical analysis drops the 1969 and 1970 terms. Prior to 1971, Supreme Court cases did not follow a consistent docketing scheme. As a result, cases that were carried from one term to the next were re-docketed as wholly new cases, making it infeasible to trace treatment of requests from one draft to another since the case was essentially "restarted." The Court adopted a consistent docketing scheme for the rest of the Burger Court era, which is the focus of this analysis.

[2]Like the bargaining memoranda data obtained from the Supreme Court Opinion Writing Database (Wahlbeck, Spriggs and Maltzman 2009), the opinion draft data come from case files contained within the private papers of former justices, including: Hugo L. Black (Library of Congress), William O. Douglas (Library of Congress), John M. Harlan (Princeton University), William J. Brennan, Jr. (Library of Congress), Thurgood Marshall (Library of Congress), Harry A. Blackmun (Library of Congress), Lewis F. Powell (Washington & Lee University), and William H. Rehnquist (Stanford University). More than 80 percent of the documents contained within the Burger Court Opinion Writing Database are located in the Library of Congress. In addition to these files, the papers of Byron R. White (Library of Congress), released in April 2012, proved to be an invaluable resource. Indeed, more thant 95% of the majority opinion data were found in the papers of Justices White and Brennan.

October Term 1985, yet we observe active bargaining in just over 50 percent of the total, or only 1,031 cases. The bargaining in these cases yields a total 3,946 unique requests addressed to the opinion author, which equates to approximately four requests or suggestions for each case decided in these terms.[3]

These novel data allow me to examine three key aspects of the bargaining process during the opinion writing stage that have thus far been unknown: (1) the substance or content of the memo authors' request to change the majority opinion, (2) the tone or strategy deployed by the responding justices in these requests, and, (3) whether the opinion author accommodated the suggestion and altered the Court's majority opinion accordingly.

2.5.1.1 What Justices Want: The Content of Bargaining Memoranda

The first intervening variable of interest is the *content* of the bargainer's request. To that end, I read every single bargaining memoranda and coded for three distinct types of requests: minor revisions, legal changes, and policy changes.[4] Requests for minor revisions ask the opinion author to make slight, non-substantive changes (i.e., word choice or grammatical alterations) to the opinion. Bargaining statements that ask for legal or policy change, however, ask the author to substantively alter the opinion content. Requests for legal change focus on the application and treatment of precedent, while policy changes challenge the scope of law settled in the Court's opinion.

As the aggregate data presented in Table 2.1 make clear, requests for minor revisions comprise a sizable 44 percent of all requests to alter the majority opinion content. The precise content

[3]The amount of bargaining varies quite dramatically across the sample cases, ranging from one unique request to 26 requests in a single case. Because bargaining memos could contain more than a single request, the unit of analysis is the request rather than the memo.

[4]After establishing these three major categories based on insights from extant scholarship, and inspired by Bryan and Johnson (2012), I used an organic approach, drawn from a random sample of 250 cases, to develop a comprehensive – yet parsimonious – subcategorization of each type of request. That is to say, I developed a new subcategory for each new type of request encountered in the data. This ensured both that my coding strategy was not only theoretically derived, but also sufficiently detailed to overcome challenges of inter-coder subjectivity.

of these memos range from small word choice and grammatical suggestions to larger requests that ask the author to clarify a section or to more carefully define key legal concepts. What these requests have in common, however, is that they are devoid of legal or ideological overtones. Such requests are simply aimed at improving the quality, clarity, and accuracy of the Court's majority opinion.

Request Content	Frequency	Percent
Minor Revisions	1,756	44.5
Legal Change	1,772	44.9
Policy Change	418	10.6
Total	3,946	100.00

Table 2.1 Aggregate-level request content

Consider, for example, *Gilmore v. City of Montgomery* (1974), a civil rights case concerning the exclusive use of city parks by segregated private groups. Justice Blackmun, the assigned opinion author, fielded bargaining maneuvers both large and small from several of his colleagues. Justice Rehnquist was particularly active in this case, requesting numerous minor revisions. In addition to asking Blackmun to add an emphatic "significantly" to highlight the city's de jure promotion of segregation, Rehnquist writes:

> I am indeed loath to suggest corrections to an acknowledged master of English usage, but since it has been said that even Homer nodded, I offer the following:
> (a) Would not the deletion of the word "that" in the third line of the first paragraph make the sentence more grammatical?
> (b) In the sentence beginning with the word "moreover" in the second paragraph on the first page, does "assume" come closer than "overlook"?

Although this category of request is not an attempt to alter the legal policy of the opinion (and is therefore not strategic), it is not to discount its potential importance as such collegial collab-

oration may serve to strengthen the opinion, which could, in turn, influence downstream treatment of the precedent set in the case.

Unlike requests for minor revisions, legal changes are substantive requests that would alter the legal implications of the Court's majority opinion. Comprising a critical mass – 45 percent – of all requests, this is the most oft-used bargaining chip. These types of requests often entail an appeal to precedent: requesting that a particular precedent-setting case be added or removed, questioning how the opinion author interprets the precedent, or pushing the author to reconsider how precedent is used as a legal basis to justify points in the opinion. Other legal requests might appeal to decisions made in the lower court, sometimes drawing explicitly from the district or circuit court opinions. In short, these types of requests would affect the legal impact of the case.

Consider, again, the case of *Gilmore v. City of Montgomery*. Unlike Rehnquist's requests for minor revisions, Brennan issues a six page missive that includes numerous concrete legal requests. He argues, for example, that Blackmun "might properly follow the reasoning" of *Green v. County School Board of New Kent County*, a de jure segregation case decided by the Court just six years prior. Similarly, Justice White questions Blackmun's reliance on *Moose Lodge No. 107 v. Irvis* as controlling precedent in this case, arguing, "I don't think Moose Lodge necessarily controls. The question there concerned the significance of the grant of a license as part of a regulatory program. No public subsidy was involved [...]." Each of these requests challenged Blackmun to reconsider the interpretation and relevance of precedent and carries notable legal ramifications.

Due to the preeminence of the attitudinal model in judicial decision-making, it might come as a surprise that requests for legal change far outweigh the number of policy requests. Yet, this is fully in line with recent work that provides evidence that justices are not solely policy-driven actors, but are instead frequently (and sometimes critically) constrained by law (see, e.g., Bailey and Maltzman 2008; Hansford and Spriggs 2006; Richards and Kritzer 2002). Taken at face value, these data seem to suggest that Supreme Court justices actually do care to "get it right," and frequently proffer legal requests and ask the opinion author to consider alternative treatments of the law.

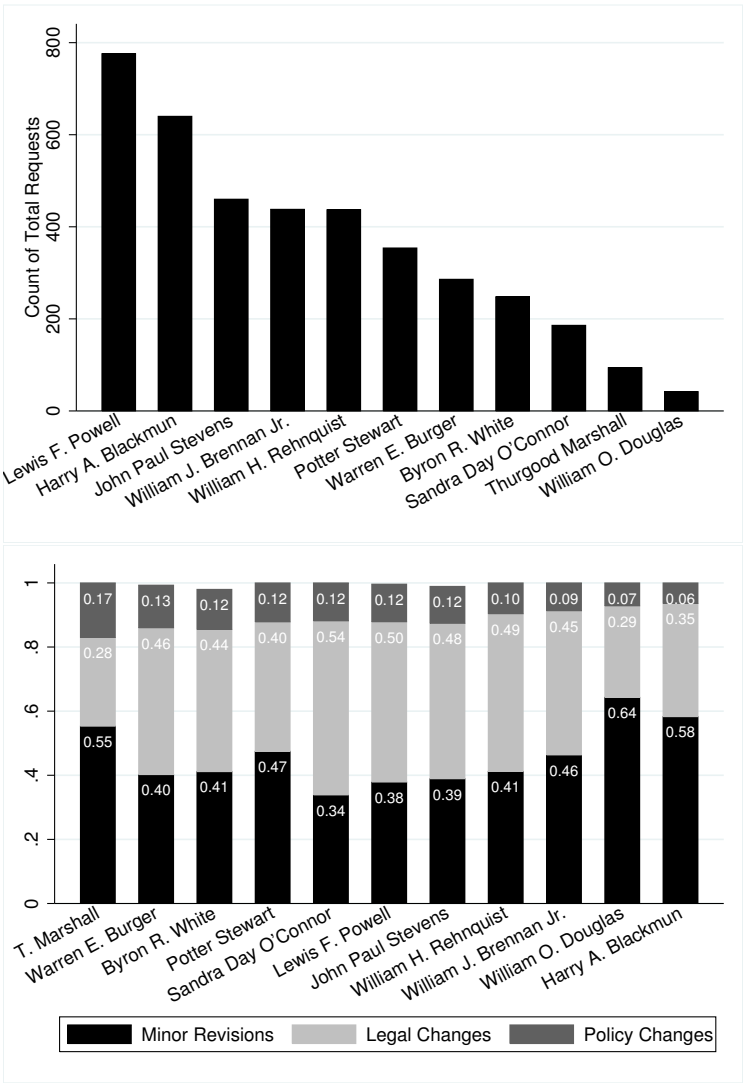

Figure 2.1 Bar plots of bargaining frequency and type by justice

Bar plots of the bargaining frequency by responding justice (top) and the proportion of requests by type (bottom).

Finally, the remaining 10 percent of requests ask the author to substantively change the policy content of the Court's opinion. This request type is qualitatively the most diverse. These types of requests might ask the opinion author to consider a different hypothetical related to the legal question, to change the scope of the opinion (i.e., to establish limits or bounds), or to somehow reconsider the disposition of the case (i.e., asking that the cased be dismissed as improvidently granted (DIG), vacated and remanded, or summarily decided in lieu of a full-blown opinion). Finally, these requests might raise questions about the interpretation of actual legislation or statute

at hand. In addition to his request that Blackmun reconsider the legal precedent in *Gilmore*, White suggests an alternative disposition to the case, noting that while he is "agreeable to the remand", he would "prefer to affirm the District Court". Policy requests tend to be ideological by nature and thus heighten the stakes in the negotiation process. In *Gilmore*, Blackmun chose not to accommodate White's requests and, in turn, White authored a separate opinion to express his views.

Interestingly, while the aggregate data paint a picture of the overall bargaining behavior of the justices, Figure 2.1 illustrates that disaggregating requests by individual justices reveals sizable variation both in the sheer volume of requests circulated by each justice and in the composition of those inquiries. Though the distribution of request type largely follows the aggregate pattern of the Court as a whole, Justice Powell is the most prolific bargainer, followed closely by Blackmun, while the majority of the other justices participate at nearly half the rate. At the other end of the spectrum, Justice Marshall rarely engaged in the bargaining process and, when he chose to do so, opted more frequently to request minor editorial revisions.[5]

2.5.1.2 How Justices (attempt to) Persuade the Opinion Author to Change

Just as there are differences in the types of requests made to the opinion author, so too are there observable differences across justices in the tactics used in negotiation with the opinion author. In their works on intra-court bargaining, Maltzman, Spriggs and Wahlbeck (2000) and Wahlbeck, Spriggs and Maltzman (1998) argue that Supreme Court justices are more apt to comply with colleagues demands and suggestions if the request carries an associated threat to the stability of the majority coalition. However, because this work implements only proxy measures for accommodation, it is possible that these previous findings either overstate or underestimate the strategic advantage of threatening the opinion author.

[5]Note that Justice Douglas left the Court and was replaced by Justice Stevens in the 1975 term and, thus, only appears in four of the 15 terms considered here. Similarly, Justice O'Connor replaced outgoing Justice Stewart in 1981 and appears only in the last few terms. This helps account for the lesser frequency of requests reported in this analysis.

Following the established intuition, I adopt a similar, though slightly more nuanced, measure to account for the *tone* of the requests and speak to the tools of persuasion the justices employ throughout the opinion writing process. Though it closely mirrors the approach deployed in the literature, rather than assess the overall tone of each bargaining memo, I measure the tone at the request-level, which allows a bargainer to utilize various means of persuasion in a single document. In particular, I measure tone by distinguishing between friendly or neutral suggestions and more ominous threats. I coded tone on a three point scale, from non-threatening to the most severe type of threat.[6]

I consider the tone to be *friendly* or neutral if the justice makes a request but also joins the author's draft of the majority opinion. In a 1973 memo to Chief Justice Burger, the assigned author in *Levitt v. Committee for Public Education*, Justice Powell joins the majority opinion, but entreats Burger to modify the content. He writes: "Please join me in your opinion. I have noted the comments suggesting deletion [... and] I would be quite content to see this omitted, although - certainly from my viewpoint - I agree with the substance of the view you express." Powell goes on to suggest that if Burger wishes to keep the section, he may wish to revise it to clarify the Court's position. Powell goes so far as to re-write the paragraph for Burger to consider. Yet it is clear that even if Burger elects not to accommodate Powell's requests, Powell will join the majority.

Not only did the Chief face a suggestion with unequivocal support from Powell in this case, but Burger also received memoranda with varying degrees of hostility as his other colleagues sought changes. For example, Justice Brennan thought that the opinion went too far in its holding, which could be remedied by the removal of a single sentence. He writes: "Thus, I would much prefer a change in the above-quoted sentence so as to eliminate this suggestion. With such an alteration, I would be happy to join your opinion." In such an *ambiguous* request, Brennan makes it clear that he will only join the majority if Burger accommodates his request, but he fails to note the consequence of non-accommodation.

This is in stark contrast to Justice Douglas's memoranda in the same case, which carried

[6]I also used a 5-point scale and the results are robust to this alternative specification.

an explicit *threat* of consequence if his demands went unanswered. In particular, Douglas sought to persuade Burger by employing a threat to the cohesiveness of the majority coalition, writing, "I would prefer to keep our holdings as narrow as possible. If, however, you keep the opinion[] in its present form, please note at the end of each: Mr. Justice Douglas concurs in the result." In short, the tone is said to be a threat if the bargaining justice in any way signifies that the she may take further action if her request is not accommodated by the majority opinion author. Most frequently, threats indicate that the bargaining justice may circulate a concurrence, join someone else's opinion, or otherwise signals that her "vote" for the majority opinion isn't a stable or secure one.

Finally, because these data are coded at the request level rather than that of the entire memoranda, there are instances when a bargaining justice switches tone – asking for a minor change, for example, very nicely, but then demanding a legal change with more force.

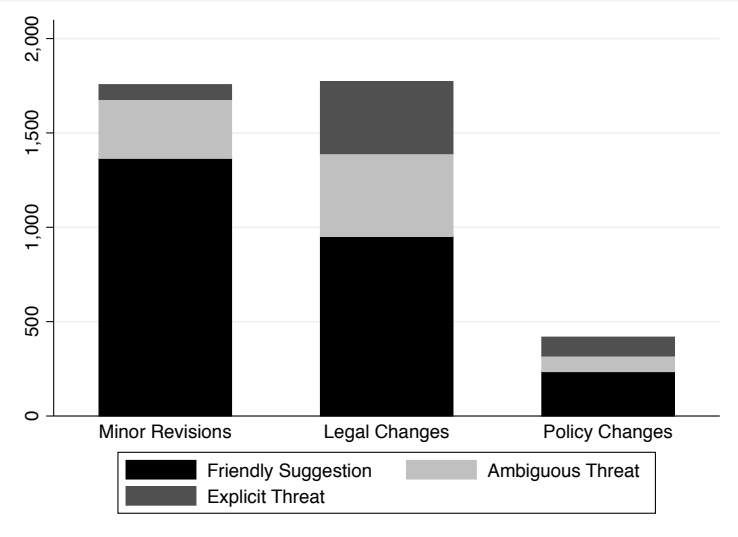

Figure 2.2 Stacked bar plots of request content by tone.

As shown in Figure 2.2, the justices are far more likely to adopt a friendly or neutral tone when appealing to the opinion author. In fact, nearly two thirds of all requests – 65 percent – are of a collegial nature. Just over 20 percent of appeals addressed to the author employ an ambiguous threat, while the remaining 15 percent invoke an explicit threat to the stability or cohesiveness of

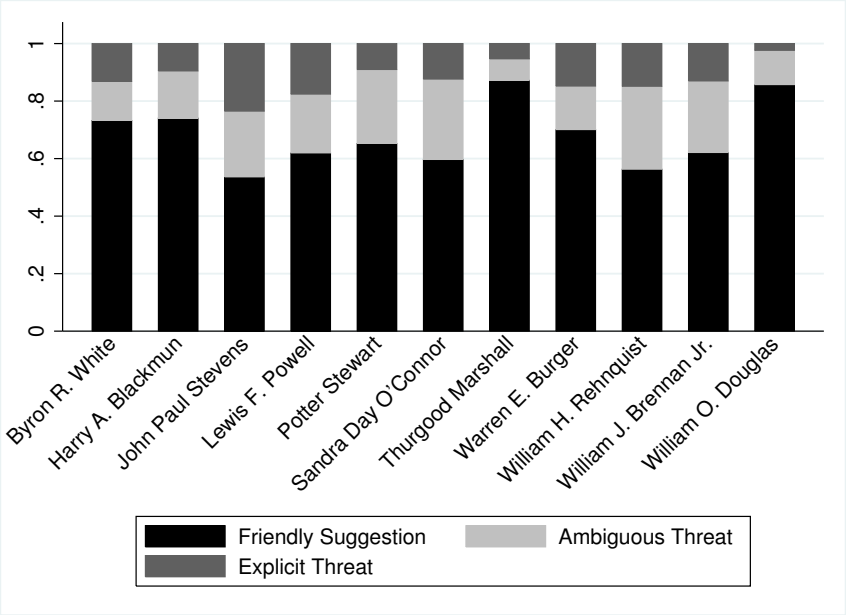

Figure 2.3 Bar plot of the relative frequency of the tone bargaining justices employ.

the majority coalition. Despite the propensity for justices to remain affable, we see that justices are more inclined to invoke a hostile, explicitly threatening tone when that justice requests a legal or policy change in the opinion. We observe that 22 percent of requests for a legal change are accompanied by an explicit threat to the majority coalition. Similarly, when a justice requests a policy change, she is more likely to indicate that her vote is up for grabs. Nearly 25 percent of policy requests are framed as explicit threats. As previously noted, these tend to be the most contentious requests; still, however, roughly three quarters of these policy requests strike an ambiguous or friendly tone. Unsurprisingly, in only the rarest of cases – less than five percent – do threats accompany requests for minor revisions.[7]

Despite the fact that the requests for accommodation are overwhelmingly positive in tone, Figure 2.3 illustrates that some justices – like Justices Stevens and Rehnquist – are more prone to strike a threatening tone than others. For example, while Stevens uses a heavy hand and attaches

[7]Any threat that accompanies a minor request is, of course, unexpected. However, these oddities occur when a request for a minor revision accompanies a request for a policy change and the entire tone of the bargaining memo is hostile. In such a case, the bargainer indicates that she will only join the opinion if all of her demands are met.

either an ambiguous or explicit threat to roughly 46 percent of his requests, infrequent bargainer Justice Marshall sits at the other extreme, apparently more reticent to threaten the stability of the majority coalition, deploying this tactic in only 12 percent of his requests. More frequent bargainers like Justice Blackmun sit somewhere in the middle, deploying a hostile tone in approximately 25 percent of their requests.

2.5.1.3 When Opinion Authors Accommodate: A Direct Measure

Despite their pathbreaking work in this area, current scholarship offers only an indirect measure of accommodation (Maltzman, Spriggs and Wahlbeck 2000; Wahlbeck, Spriggs and Maltzman 1998). By accounting for the sheer number of drafts circulated or the amount of time that has lapsed, such measurement techniques necessarily fail to capture which requests are actually incorporated into the opinion. At the most basic level, these proxy measures miss the iterative and interactive process of the majority opinion development as multiple requests can be sent to the author between drafts. Additionally, the author must balance a desire to accommodate one member with the preferences of the other members of the majority coalition.

Take, for example, the majority opinion issued for *United States v. Generes* (1971), a rather technical federal income tax refund suit that asked the Court to determine the appropriate standard to apply to the motivation of the taxpayer, a shareholder and employee of the company, at the time a bad debt is incurred. After circulating a first draft of the majority opinion, Justice Brennan actively tried to bargain with Justice Blackmun, who had been assigned the opinion. According to the memo Brennan circulated to the entire conference, he indicated his willingness to join the majority opinion, agreeing that the opinion identified the appropriate standard, but that he would prefer the final section of the opinion be abandoned in favor of remanding the case to the lower court for a retrial. Justice White seconded Brennan's suggestion and threatened a concurrence if Blackmun did not remand the case for retrial. In subsequent circulations of the majority opinion, Blackmun struggled to maintain a cohesive majority coalition, noting continual discord from from both White and Brennan. In private memorandum, Blackmun even indicated a willingness to

follow Brennan's suggestion. However, Justices Stewart, Burger, and Marshall preferred the text in the original opinion and did not support the move for a retrial. To maintain control of the opinion, then, Blackmun decided *not* to accommodate Brennan and White, favoring to hold the votes of the other members of the majority coalition. As a result, White published a concurrence, which Brennan joined.

Generes highlights several important features about the role collegial and institutional factors play in shaping the content contained in the majority opinion. Specifically, it demonstrates the emergence of a concurrence when the opinion author refused to accommodate the requests of his colleagues. Moreover, the concurrence "stole" a vote from the majority coalition. While Brennan said he preferred a retrial, he indicated his agreement with the majority opinion until a concurrence was circulated. In this case, because he had the support of a plurality of members on the majority coalition, the publication of a concurrence actually allowed Blackmun to keep the majority opinion closer to his own ideal policy preference.

It is precisely this type of nuance that a *direct* measure of accommodation is able to capture. To create such a measure, there are two necessary steps. The first is to determine the changes in each circulated draft. To do this, I follow Corley (2008), Corley, Collins and Calvin (2011) and Black and Owens (2012) and utilize WCopyFind, a free plagiarism software that determines the overlap between two or more documents. This method allows me to identify the location and magnitude of the changes from the initial draft to each subsequent circulation of the opinion. However, simply determining the location and calculating the magnitude of the change is insufficient to measure how the opinion moves due to external influences. The second step, then, is to connect the change in the opinion with the explicit requests contained in memoranda from the other justices by merging the opinion draft data with information from the Burger Court Opinion Writing Database. This approach creates a dyad(s) between the opinion author and each responding justice at the request level for each case, allowing for the creation of a unique binary dependent variable.

Figure 2.4 contains descriptive data about the volume of bargaining activity faced by each author and the subsequent rate of accommodation by opinion author. What is readily apparent is

that some justices, such as Burger and Powell, encountered significantly more bargaining activity than Justices Stewart and Douglas, for instance. While this disparity may seem puzzling, there several potential explanations for this pattern. First, the data presented here are limited to October Terms 1971-1985. The four justices that were faced with the lowest overall levels of bargaining all appear in the data for a limited number of terms.[8] Second, though he authored more than his share of the Court's opinions (12 percent during the period), Chief Justice Burger was a member of the majority coalition in the vast majority of cases, and thusly responsible for more than 86 percent of all majority opinion assignments. Like Burger, Justice Powell authored nearly 12 percent of the Court's opinions in the terms under consideration here, which may again begin to address why we see more raw bargaining activity. While the descriptive data begin to tell a story, it isn't possible to systematically assess the differences we observe.

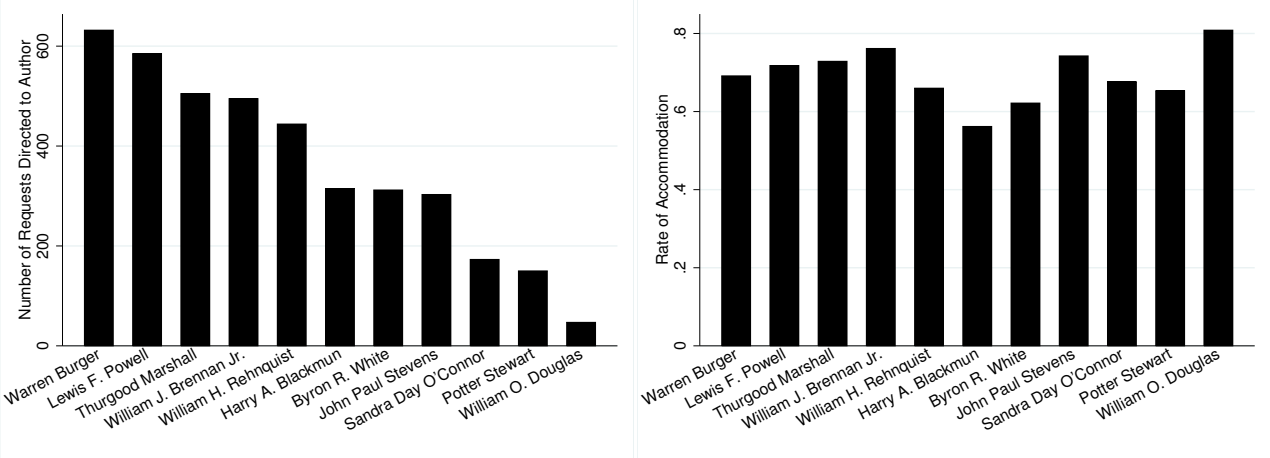

Figure 2.4 Bar plots of the number of requests fielded by opinion authors and justices' accommodation rates

Bar plots of the total number of requests fielded by individual majority opinion authors (left) and the rate at which each justice accommodates requests (right).

Despite the questions raised by the different levels of bargaining present for the various opinion authors, the most fascinating conclusion from Figure 2.4 is that there is no real discernible

[8]Recall that Justice Stevens filled Douglas' seat in 1975 and O'Connor replaced Stewart in 1981.

ideological or institutional pattern in the rates of accommodation. The rate of accommodation by the Chief Justice, for example, is virtually indistinguishable from that of Justice Marshall, who represented the opposite ideological extreme and was only infrequently a member of the majority coalition. It is tempting to speculate that the Court's ideological medians – namely Blackmun (the median for two of the fifteen terms), Stewart (two term median), and White (the Court's most frequent median, occupying the position in eight terms) – are less likely to accommodate than are their non-median counterparts. But Justice Powell, the Court's median in three terms, does not fit the pattern. In short, the descriptive rate of accommodation raise more questions than it answers.

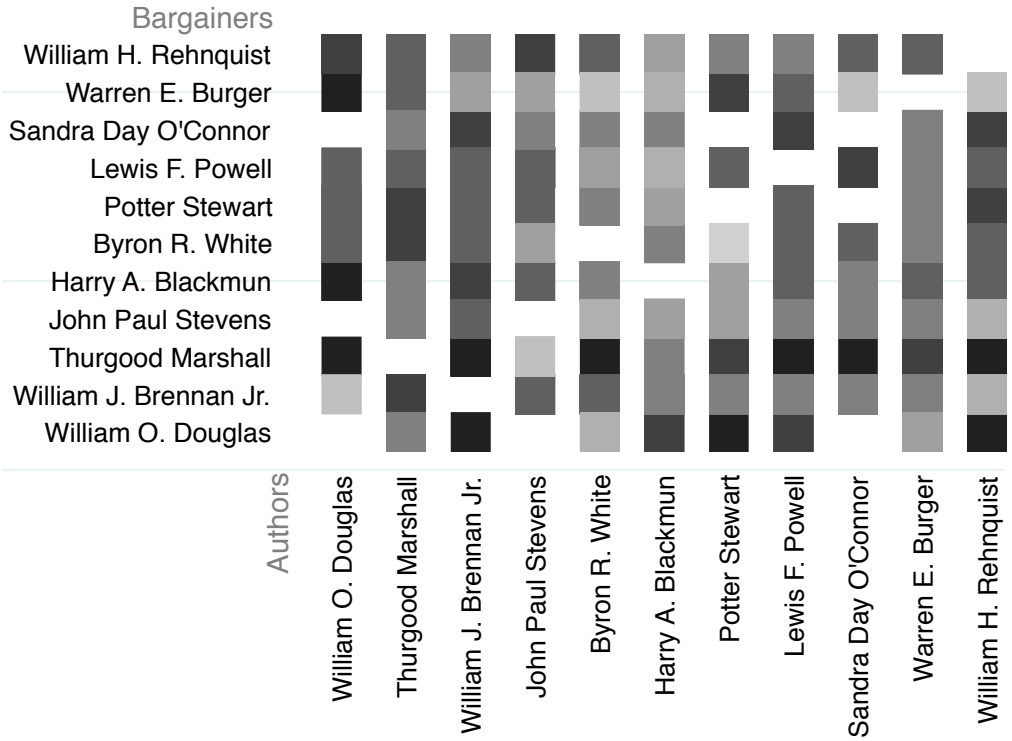

Figure 2.5 Accommodate rate by author-bargaining justice dyad

Plot of accommodation rate by author-bargaining justice dyad. Darker squares indicate higher rates of accommodation. On both axes, the justices are ideologically ordered from least to most conservative.

Although the aggregate rates of accommodation fail to provide noteworthy variations or patterns in accommodation, Figure 2.5 illustrates a closer look at the individual-level author-bargainer dyads, revealing intriguing descriptive relationships. Particularly, it appears that there

are not systematic patterns of accommodation between justices. Take for example, Justices Brennan and Rehnquist, ideological opponents anchoring either pole of the spectrum. Brennan and Rehnquist display very different accommodation behavior. In particular, when he is writes for the majority, Brennan is especially amenable to requests made by his ideological allies, incorporating all of suggestions proffered by stalwart liberal Justices Douglas and Marshall, but he is least likely to adopt requests made by ideological opponents. As the Court's most conservative member, Rehnquist, on the other hand, is keen to accommodate requests made by ideological opponents and appears to work to appease the median members of the Court as well. He is less likely, however, to adopt changes made by his closest ideological ally. When he is the majority opinion author, Rehnquist denies approximately 75 percent of the changes Chief Justice Burger requests. The more moderate Justice Stewart offers similarly puzzling rates of accommodation; he is especially responsive to requests made by members at both ends of the ideological spectrum, but is less amenable to requests by other moderates, like Justice White. Chief Justice Burger appears to be the most even-handed; his accommodation rates vary little across the board.

2.5.2 Measurement of Explanatory Variables

The key intervening variable of interest is the bargaining justice's position on the Court. As developed in the preceding section, theory points to several members of the Court that might wield inordinate influence in the shape of the majority opinion. If true, we should expect that these justices are more influential in bargaining with the opinion author. Conversely, if the author maintains control of the majority opinion, the author's relative position on the Court should affect when accommodation occurs. The first set of models predict the median member of the Court to be most powerful (Hammond, Bonneau and Sheehan 2005; Martin, Quinn and Epstein 2005). Following standard practice by using the Martin-Quinn dynamic ideology scores, a dichotomous variable, *Bargainer is Court Median* is coded as 1 if a responding justice is the median of the Court and

0 otherwise (Martin and Quinn 2002).[9] More recent scholarship suggests the median of the majority coalition determines the content of the majority opinion (Carrubba et al. 2012; Clark and Lauderdale 2010). After examining the initial coalitions established at the conference vote, I code *Bargainer is the Median of the Majority Coalition (MoMC)* as 1 when a particular justice occupies this position and 0 otherwise.[10] Because there is theoretical disagreement about the degree of control that rests in the hands of the opinion author herself, using the same measurement strategy, I include dichotomous variables to capture *Author is Court Median* and *Author is MoMC*.

To account for the ubiquitous influence of ideology, I include two indicators.[11] The first measures the *ideological distance* between the bargainer and opinion author, which is simply the absolute value of the difference between the justices' Martin-Quinn ideology scores (Martin and Quinn 2002). To provide a sense of ideological dispersion within the winning majority coalition, I provide a measure of *coalition heterogeneity* where greater scores indicate greater variance within the majority coalition.

To tap into how reciprocity or *cooperation* affects the negotiation process, I use the measure developed by Maltzman, Spriggs and Wahlbeck (2000, 79), which captures "the percentage of time that the author joined a separate opinion written by the justice in the previous term."

Because not all cases are created equal and we may reasonably expect that justices care more about some cases than others, I implement several measures to proxy justice engagement. The first two measure case salience. To capture *political salience*, I derive term-specific averages of

[9]Justice White held the median position most frequently, occupying the seat from OT1971-174 and again from OT1980-1983. Justice Stewart was the Court's median in OT1975 and 1976 before Blackmun took the center position in 1977 and 1978. Powell occupied the median position in the remaining October Terms: 1979, 1984, and 1985.

[10]Other scholars suggest that the median member shifts based on the legal issue (Anderson and Tahk 2007). Because no ideology scores currently exist at the issue-level, it is not currently possible to directly test the implications from the model.

[11]The measurement of many of the collegial and institutional factors come largely from the various works from Maltzman, Spriggs, and Wahlbeck (1998, 1999, 2000). The authors generously provided replication data for their studies and I was able to fill in the gaps where their data fell short. As a result, my measurement scheme draws directly on the ones employed in these studies.

amicus curiae participation. For each case a z-score measures the volume of amicus participation relative to the average of all cases in that term. *Legal salience*, on the other hand, is a dummy variable that flags cases where precedent is overturned or substantially altered (Spaeth 1994). At the individual level, I employ the Maltzman, Spriggs, and Wahlbeck opinion ratio by issue area to account for justice *expertise*. To tap into *case complexity*, I again follow Wahlbeck, Spriggs and Maltzman (1998) and combine three indicators that together signal that multiple legal issues are at play in a case. Derived from Spaeth (1994), the resultant single factor with an eigenvalue greater than one is generated by the number of issues raised, the number of legal provisions relevant to the case, and the post-hoc number of opinions that a case generates.

To determine institutional and practical constraints, *winning margin* is measured as the absolute value of votes needed to maintain the majority coalition and the actual number of votes received, *workload* accounts for the number of open opinion assignments for each justice, for *end-of-term* denotes the number of days left in the Court's typical term (i.e., the number of days until the last day of June), and *freshman author* is a dichotomous measure that captures justices who have served less than two full years on the Court.[12]

2.6 Results

The opinion author's decision to accommodate is a binary dependent variable, so I estimate a logistic regression model. Recall that the unit of analysis is at the request level. Thus, for each case opinion, there are multiple dyads, representing every request and response for each bargaining justice and the corresponding opinion author. If a justice engages in multiple rounds of bargaining with the opinion author, or if the justice sends a lengthy memo to the author containing multiple requests, the same dyad appears multiple times within the given case. Because the independence

[12]Note that there were only two replacements in the dataset. Justice Stevens was a freshman justice in the 1975 and 1976 terms and Justice O'Connor served as a freshman in 1981 and 1982.

assumption is violated, robust standard errors are clustered at the case level.[13] The results of the model offer support for both models of median member influence: opinion authors of all ideological stripes are systematically more responsive to requests from the median member of the majority coalition, but the identity of the author matters too. I find that when the author is the median of the entire Court, she is less likely to alter the opinion. More importantly, however, I find that the content and tone of the negotiation are powerful predictors of how the opinion changes throughout the negotiation process. The parameter estimates for this model are found in Table 2.2 and the average marginal effects for all statistically significant intervening variables are illustrated in Figure 2.6.

As shown in Figure 2.7, holding all other variables at their mean or modal values, I find that when a revision request is proffered by a non-coalition median justice, there is an estimated a 0.70 probability that the justice is successfully accommodated. That probability jumps to 0.77 – a 10 percent increase – when the median of the majority coalition asks for a substantive change in the majority opinion.

Yet the median member of the majority coalition theory is not the only theory of opinion control to gain traction here. Indeed, the results suggest that the position of the majority opinion author remains relevant. In particular, when the assigned author is the median of the entire Court, the likelihood a request is met with acquiescence declines by roughly 13% from an estimated 0.71 probability to an estimated 0.62 probability.

Contrary to my expectation, how much – the sheer magnitude of change required – is requested does not significantly reduce an author's willingness to adopt changes requested by her colleagues. The content of negotiation, on the other hand, significantly influences an author's willingness to alter the majority opinion. The evidence suggests that while *who* makes the request and *to whom* the request is sent is indicative of the likelihood of accommodation, the *what* and *how* matter, too. In particular, all else equal, compared to requests for legal changes in the opinion (the omitted category) requests for minor revisions increases the probability of accommodation

[13]The results are robust to various specifications, including clustering by bargaining or authoring justice.

Constant	0.808
	(0.209)
Bargainer is MoMC	0.344*
	(0.169)
Bargainer is Court Median	−0.054
	(0.101)
Author is MoMC	0.106
	(0.091)
Author is Court Median	−0.428*
	(0.180)
Minor Revision Request	1.262*
	(0.115)
Policy Change Request	−0.284*
	(0.071)
Number of Requests	0.072
	(0.065)
Friendly Tone	−0.057
	(0.160)
Threatening Tone	1.102*
	(0.098)
Ideological Distance	0.005
	(0.003)
Coalition Heterogeneity	−0.004
	(0.005)
Cooperation	0.513
	(0.471)
Political Salience	−0.033*
	(0.011)
Legal Salience	−0.535*
	(0.070)
Expertise	0.039
	(0.043)
Case Complexity	0.129
	(0.061)
Winning Margin	−0.098*
	(0.023)
Workload	−0.023*
	(0.009)
End-of-Term	0.000
	(0.000)
Freshman Author	0.075
	(0.148)
Observations	3,949
$\log L$	−2346.64

Table 2.2 Logit model of majority opinion author's decision to accommodate

Logit model of majority opinion author's decision to accommodate. Robust standard errors clustered at the case level are reported in parentheses. * denotes $p < 0.05$ (two-tailed test).

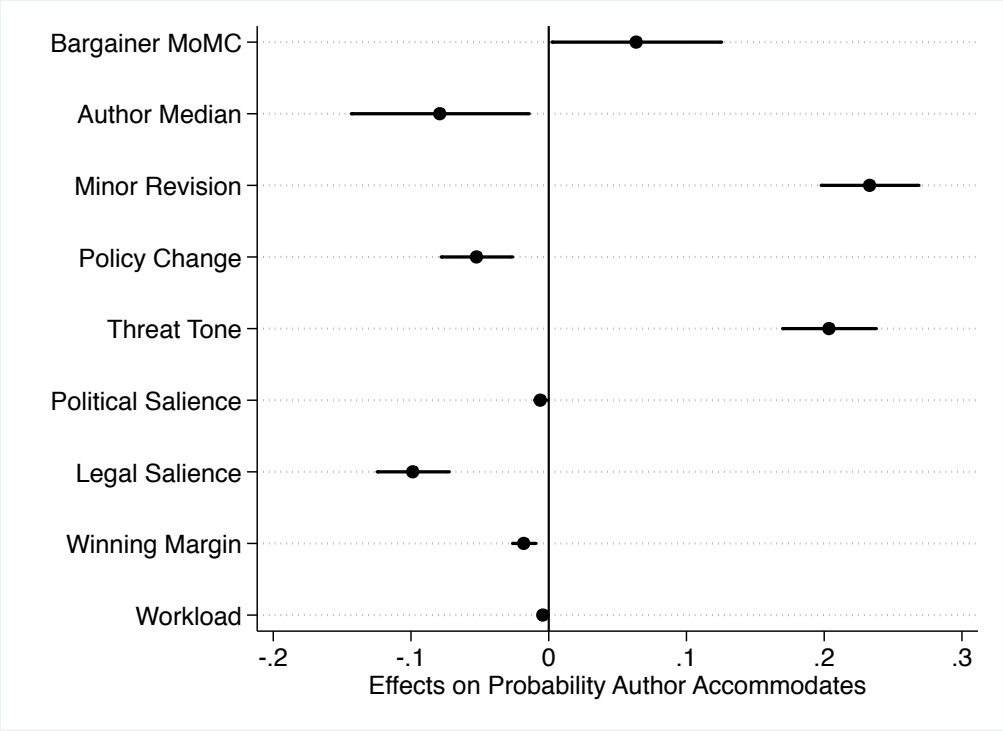

Figure 2.6 Average marginal effects for statistically significant variables on the probability of accommodation

Average marginal effects for all statistically significant variables on the probability the majority opinion author accommodates her colleagues and makes changes to opinion draft. Baseline predicted probability is 0.720. Whiskers represent 95% confidence intervals. All variables held at mean or median values, as appropriate.

by 0.26 – from a predicted 0.55 probability to a 0.81 probability – and the likelihood of accommodation leaps to more than a four in five chance that the opinion author adopts the suggestion of her colleague. Alternately, as expected, the results indicate that requests for policy change are indeed more controversial than are requests for legal changes. When a bargainer lobbies the author to make substantive policy changes, the probability of accommodation drops from a predicted probability of 0.71 to 0.65, nearly a 10 percent decrease.

The tone or frame of the request also affects the likelihood of accommodation. Compared to ambiguous or neutral requests, the omitted baseline category, friendly suggestions are not statistically different. But when a bargaining justice threatens the stability of the majority coalition, the probability of accommodation increases from a predicted baseline probability of 0.731 to a 0.89

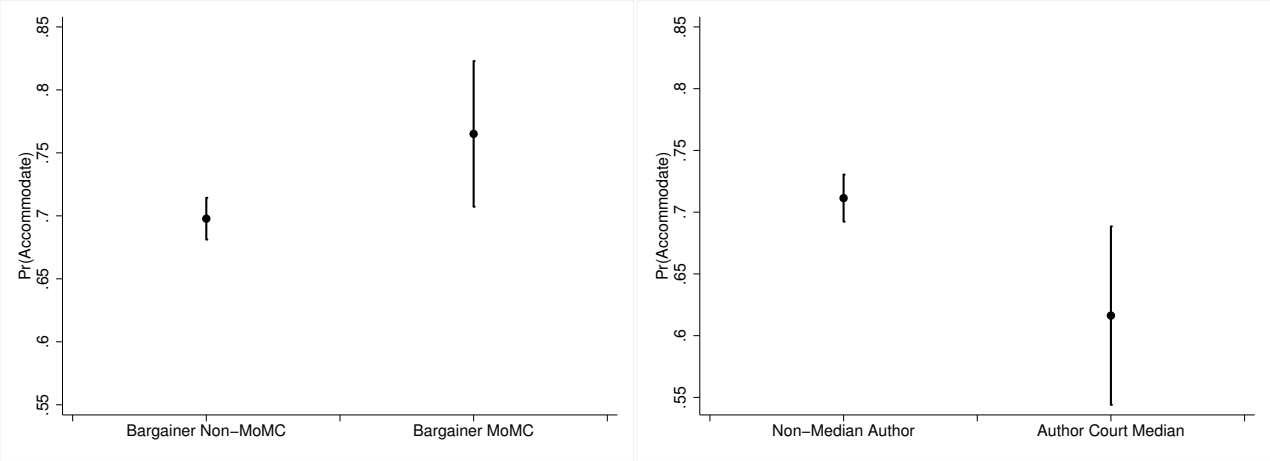

Figure 2.7 Predicted probability an author accommodates when the bargainer is the MoMC or when the author is the Court median

Predicted probability an opinion author adopts a change at the behest of her colleague, conditional on whether the bargainer is the median of the majority coalition (left panel) or whether the author holds the median position of the Court (left panel). The black circle is the point estimate and the whiskers represent the 95% simulated confidence interval around that estimate. All other variables are held at their mean or modal values, as appropriate.

probability, resulting in nearly a 90 percent chance that the request will be accommodated. That is, the results indicate that it may be beneficial for bargainers to employ the use of threats in particularly compelling requests as such threats result in about a 22 percent increase in the likelihood of accommodation.

The case specific indicators that achieve statistical significance in the model largely support expectations derived from the literature, though several variables fail to achieve statistical significance while others challenge the results from prior approaches that study the author's accommodation decision. For example, unlike the results presented by Maltzman, Spriggs and Wahlbeck (2000), I find that case complexity does not significantly influence the author's decision to adopt those requests. Conversely, salience – both political and legal – affects the likelihood an author accepts the changes sought by colleagues, but in the opposite direction. Using time as a proxy for accommodation, Maltzman, Spriggs and Wahlbeck (2000) argue that authors appear to be more willing to accommodate their colleagues in salient cases. I find the opposite relationship exists;

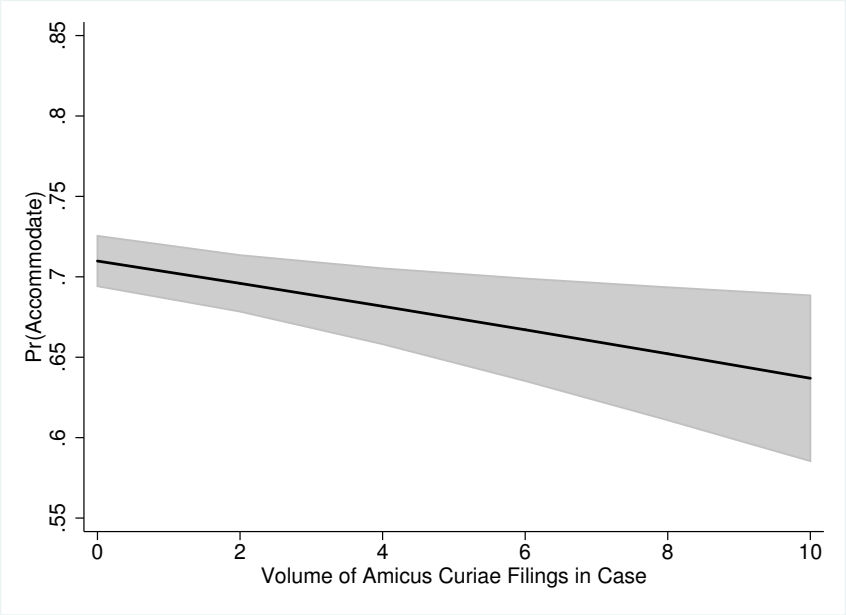

Figure 2.8 Predicted probability of accommodation contingent on the degree of amicus participation

Predicted probability of accommodation contingent on the degree of amicus participation. Thick black line represents point estimates and the shaded gray region depicts the 95% simulated confidence interval around that estimate. All other variables are held and their mean or modal values, as appropriate.

Figure 2.8 illustrates that when political salience is held to its average level of amicus participation, I estimate a 0.71 predicted probability that the author accommodates a request. This falls to an estimated 0.64 probability when more amicus briefs are filed.[14] Legal salience has a similar effect on the likelihood a request is incorporated in a majority opinion draft. The estimated probability of successful accommodation drops by more than 17 percent from a 0.72 to 0.60, when the Court overturns or substantially alters precedent. Together, these variables suggest that authors are far less likely to alter the opinion in important cases.

Other contextual factors behave as expected and shape the probability that an opinion author adapts the majority opinion to reflect the requests of her coalition members. At a unanimous or near-unanimous decision, determined during the conference held following oral argument, the

[14]The upper bound of the volume of amicus brief filings is actually 50 more briefs than the average. However, 99 percent of all cases fall within the range simulated in Figure 2.8.

author accommodates at a 0.66 predicted probability. When dispositional vote outcome is unclear and the author needs to attract at least one additional vote to secure a winning majority, the predicted probability increases to more than 0.77, a relative change of 18 percent. In the most unclear of cases, where no majority has been established and an author attempts to recruit colleagues to establish a majority coalition after the conference vote, the a bargainer has even greater chances of success: I estimate a 0.81 probability that an author accommodates a request in such a case.

The author's workload, too, has a sizable impact on the opinion writer's willingness to draft a new opinion to incorporate the suggestions from the other justices. When an author has nothing else in the pipeline and is working entirely on the majority opinion at hand, I estimate a 0.74 probability that a request will be adopted. Yet as an author's workload increases, the probability of accommodation decrease. At the sample maximum, when an authoring justice is juggling 20 open opinions of any kind, the predicted probability drops to 0.64, about a 15 percent decrease.

2.7 Discussion and Conclusion

While important inroads have been made into opening the black box of the Court's opinion writing process in the past two decades, theoretical questions about the bargaining and negotiation process between Supreme Court justices remain. To date, scholars have provided only indirect evidence that opinion authors function as strategic actors, selectively choosing when to accommodate the preferences of her colleagues. This analysis picks up where the original examination left off by using original data to analyze the actual content of the bargaining memos and to directly connect these requests to changes made in circulated majority opinion drafts. Through the creation of a new measure of accommodation, we are better able to determine whose views are incorporated into the Court's opinion and to understand the content of debate or negotiation between the justices.

Formal theories of opinion control seek to predict the final ideological location of the Court's majority opinion based on the strategically advantageous position of certain members of the nation's highest bench. This chapter does not attempt to place the opinion in ideological space,

but instead borrows insights from those theories to understand when and why certain justices ought to be more influential in shaping law. I find support for two separate models that posit competing hypotheses: one that suggests the median of the Court will retain control and the other that contends that the opinion will reflect the position of the median of the majority coalition. The results suggest that both medians are influential players in the collegial game. In particular, as bargainers, median members of the majority coalition are the most successful in seeing their views translated into law, while the Court's median member, as the opinion author, is less likely to negotiate over opinion content.

By dissecting the author-bargainer dyad, explicitly accounting for the author's decision to alter the majority opinion at the request of the other members of the Court, this chapter provides a bridge between the theoretical and empirical accounts of the opinion writing process and quantifies influence on the collegial Court. Though the "swing justice" is not any more likely to see her views translated into law when she bargains with the opinion author, when she is the assigned majority opinion author, the evidence suggests this median member may exert more control over the opinion content. To understand how a median author arrives at this position of power, I re-estimated the statistical model to examine the interactive effect between the median author and the size of the winning coalition. I find that, as the author, the median effect is especially noteworthy in contentious cases. While non-median justices are *more* likely to adopt changes from their colleagues to attract votes for the final opinion when a clear majority has not been established at conference, I estimate that median justices are *less* willing to do the same. This suggests that when the post-oral argument conference vote is unclear and the median member of the Court offers a majority opinion, she may recognize her strategic position as the Court's swing justice, writing an opinion closest to her own ideal point without the need to compromise. In other words, the other justices are not able to offer viable competing opinions in a fractured majority and the median's preferences are especially relevant. In fact, the interaction effect reveals that when the dispositional vote is clear and a majority (even a simple majority) is established, the median author's behavior is virtually indistinguishable from non-median authors.

Notably, when the swing justice is not the author, her influence over the majority opinion seems to disappear. In other words, the Court's median is no more likely to influence the author than non-median justices. Conversely, the results reveal that the median member of the majority coalition is in a particularly advantageous position and is more likely to be accommodated, regardless of the identity of the majority opinion author. In short, the results speak to both theories of opinion control: median members of the majority coalition are particularly powerful in determining the content of the Court's majority opinion, but the median of the Court exerts greater influence over the opinion when the majority coalition is not determined prior to the circulation of a majority opinion.

Beyond the creation of a direct measure of accommodation that allows us to critically assess justice influence on the published opinion, this work makes several contributions. For example, the findings both challenge and support extant scholarship that suggest an important role for institutional, interpersonal, and contextual factors. While some explanatory variables – like workload – are similar to the results reported by Maltzman, Spriggs and Wahlbeck (2000), Spriggs, Maltzman and Wahlbeck (1999), and Wahlbeck, Spriggs and Maltzman (1998), there are important differences. For instance, these previous studies find a far greater ideological influence in the accommodation decision than this analysis suggests. I would argue that by focusing on the number of drafts or the limited time frame from the first to last drafts likely overemphasized these considerations. Ideology may have served as a proxy for justices' positions of power, which then fails to have an independent effect when these factors are explicitly accounted for. In short, a more nuanced approach to incorporating the actual content of request sheds new light on the strategic interactions between the justices during the opinion writing stage.

While the results of this analysis support strategic models of accommodation – after all, authors *are* more likely to accommodate requests from certain members, especially in salient cases – it also reveals the collaborative nature of majority opinion development. Both the descriptive data and results from the statistical analysis highlight the collegial and (mostly) friendly dynamic present between the opinion author and her colleagues. The especially high rates of accommoda-

tion reveal that opinion authors are largely amenable to suggestions from other members of the majority coalition, particularly those that serve to strengthen the opinion through minor revisions and by refining the treatment and application of the law through legal suggestions.

The descriptive data tell us that justices are typically quite friendly when they appeal to the opinion author. Yet the empirical results reveal that a justice is even more likely to secure the changes she wishes to see to the opinion if she deploys a hostile tone and threatens to upset the stability of the majority coalition. This raises a puzzle for future research: what makes threats such an effective tool of persuasion? Or, what happens if a bargaining justice is not accommodated? One persistent account suggests that concurrences are frequently a result of the author's failure to negotiate with members of the majority coalition, but this assertion demands evaluation and is a topic I revisit in Chapter 4.

Despite its contributions, this analysis is not without its limitations. Because I rely exclusively on data from the Burger Court era, excluding the earliest terms (1969-1970), the data are limited to one chief justice who made the majority of opinion assignments. There was also little turnover during this period, limiting the number of freshman justices. As the private papers of more justices become available, future work will speak to the generalizability of the results by extending to the Rehnquist Court and beyond.

Ultimately, however, the findings presented here advance our understanding of how justices on a collegial court interact to reach a decision that commands the votes of the majority of the Court by illustrating for the first time which members of the Court are more likely to succeed in negotiations with the opinion author, which authors are most persuadable, and by uncovering evidence that power is attributed not only to the content of the request but to the bargainer's willingness to disrupt the unity of the majority coalition by threatening to circulate or join a separate opinion.

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CHAPTER 3

(DIS)ENGAGEMENT IN THE SUPREME COURT'S OPINION WRITING PROCESS

3.1 Chapter Abstract

This chapter takes a step back to consider a justice's initial decision to engage – or not – with assigned opinion author. It dissects a justice's response to the initial majority opinion draft where a justice may opt to join it entirely, negotiate with the author to make changes, or write a concurring opinion from the outset. I again find evidence that the median member of the majority coalition holds an influential position in crafting the Court's opinion. The others members are less likely to offer competing opinions when such a justice is the assigned author. Though the author's identity may influence bargaining activity, the results reveal that the single greatest predictor of a justice's willingness to engage with the author is the degree of cooperation between the justice and the author. When a justice and the author have a high degree of cooperation, a justice is far less likely to ask the author to make changes to the Court's opinion. Additionally, case and contextual factors play a greater role in a potential bargainer's decision-making calculus. Justices are more likely to engage with the author when the case is legally complex, but freshman justices are least likely to bargain across the board. This paper pushes the question further to consider how "disengaged" justices react to the majority opinion. I find that when the Court's median authors the opinion, a justice is less likely to request changes, but is far more likely to pen a separate concurring opinion. Similarly, justices are more apt to forgo bargaining to write separately in legally complex cases and as their ideological distance from the mean of the majority coalition grows. Justices are more likely to simply ask for changes without taking the step to write a concurring opinion as the winning margin increases. Finally, I find that justices who are experts in a particular issue area are more likely to engage with the majority opinion author than justices lacking in specialized knowledge.

3.2 Introduction

In *Parham v. J.R.* (1979), the United States Supreme Court confronted a legal battle that weighed the rights of children against parental authority in the decision to commit a minor child to a mental institution while attempting to discern the interest of the state and of the appropriate role for judicial oversight. As is clear from their private conference notes and papers, the justices were wary about wading into such a complex and emotionally charged case. After the initial post-oral argument conference, no clear majority coalition had been formed and Chief Justice Burger proposed that they set re-argument for the "murky" case that included an "inadequate opinion" from the lower district court. When that suggestion failed to gain traction, a preliminary vote generated an initial winning coalition and Burger assigned the Court's majority opinion to himself.

Burger's opinion quickly gained the support of Justice Blackmun, the Court's median member, as well as securing votes from Justices White and Rehnquist. However, Justice Powell, the median member of the majority coalition, opted to engage directly with Burger to try to influence the scope of the Court's opinion. In his first bargaining memo to Burger, he writes: "As you have the responsibility for the Court opinion, I would like to find common ground if this is possible. I could not join your present draft, although (apart from some of the dicta that no doubt you intend to condense or discard), I hope we are not irreconcilably apart.... [I] will await your second draft in the hope that I could join all or some parts of your opinion."

The Chief took Powell's suggestions seriously and circulated a second draft of the opinion, attaching a note to Powell to say that he "made changes in an effort to accommodate your views," while articulating which of Powell's requests went unanswered in the most recent draft. Powell was not satisfied and tried to make his arguments about the state's interest once again. Burger pushed back, claiming that to accommodate Powell completely meant that he was "losing other votes" and if Powell could not join the opinion fully, Burger would "have no choice but to return to [his] basic position." In other words, Burger threatened to remove the placating changes contained in the second opinion draft unless Powell would get on board. Notably, however, Burger's assertion

that other justices were jumping ship rang hollow. In his private papers, Powell questioned which justices were changing their votes and there is no record in any of the justices' private papers that any of the other votes were fluid. Powell engaged with Burger again, this time using his own majority opinion in a different case (*Bellotti v. Baird* (1979)), to highlight what he believed to be inconsistency in the development of a legal rule. He made pointed suggestions concerning specific sentences and included language that would assuage his concerns. Burger accommodated these requests and Powell finally signed onto the majority opinion without further negotiation.

Unlike the other justices in the majority coalition, Justice Stewart neither joined the opinion at the outset nor did he attempt to influence Burger through direct engagement. Instead, Stewart seemed to recognize that his views were so fundamentally distinct from Burger's that he opted to immediately write a concurring opinion to spell out his views in the case. Like Powell, Stewart found himself in the ideological center of the winning coalition. Yet, unlike Powell, he disagreed with the legal rule articulated in the Court's controlling opinion. In the end, he concurred only in judgment and did not sign onto the majority opinion beyond the dispositional vote.

Why did Powell opt to engage Burger while Stewart wrote separately? Would Burger have worked to accommodate Stewart if he had made a different choice? Are there specific case or justice characteristics that affect the decision to bargain? How might this choice influence the majority opinion author's accommodation decision? Perhaps there are some justices, like notorious and loquacious Justice Powell, who always make trouble. Or, perhaps, bargaining boils down to the strategic positional power of a particular justice (i.e., those who occupy key median positions or who are ideologically proximate/extreme to the assigned author). In this chapter I go back to the beginning of the bargaining process and, in Section 3.3, consider anecdotally why it may matter who decides to bargain. Next, in Section 3.4, I present hypotheses on when and why justices engage in bargaining with the opinion author. I then present the results from empirical analyses in Section 3.5. Section 3.6 concludes with a discussion of the results.

3.3 Selection Effects

When Supreme Court justices meet in conference upon the conclusion of oral argument in a case, they establish non-binding majority and dissenting coalitions. The most senior member of the winning coalition selects an author to write an opinion to reflect the will of the majority. The justices disperse to their separate chambers and nothing happens in a case until the author circulates a draft of the majority opinion. As the previous chapter established, the initial circulation of a draft of the majority opinion frequently kickstarts a vibrant exchange between the author and the responding justices.

Notably, after receipt of the opinion draft, the other members of the Court must respond to the author and they have several viable alternatives. The most obvious, and least relevant for purposes of this paper, is to simply disagree with the disposition and the opinion by authoring or joining the dissenting coalition. But members of the majority coalition are not powerless. While they may opt to simply join the Court's opinion – sending a "joinder" memorandum to the author – they might seek to change the content of the opinion by engaging directly with the author. Alternately, responding justices might forgo the bargaining process all together by immediately authoring a separate concurring opinion.

The previous chapter focused entirely on the author's response to the requests proffered by members of the majority coalition and revealed that authors are largely amenable to changes suggested by their colleagues. This raises a puzzling question: given the high rate of accommodation, why don't justices engage in more bargaining? There are several plausible explanations for this observation. First, it suggests there may be a selection effect at play. In other words, a responding justice might only opt to engage with the author if she expects her request has a high probability of affecting change. Second, the depressed bargaining rate might suggest that there are case- or justice-specific factors that are correlated with bargaining and accommodation. For example, perhaps the results of the previous chapter are driven by the propensity of certain justices – again, like Powell – to send bargaining memoranda. Finally, rather than engage directly with the author,

the responding justice might opt to simply author a separate opinion right off the bat without first trying to alter the content of the Court's majority opinion.

These explanations deserve further scrutiny because if there are case or justice specific factors at play during the responding justice's decision to engage with the majority opinion author, it indicates that a majority opinion author's decision to accommodate requests from her colleagues is contingent upon the responding justices' choice to engage in the first place. That is, it is critical to establish if troubling patterns emerge at the bargaining stage to suggest a bias in the author's accommodation decision.

Moreover, as *Parham v. J.R.* (1979) illustrates, it seems that there are fundamentally different mechanisms at work when a justices decides to neither join the Court's opinion nor engages with the opinion author in hope of securing a change to the legally binding majority opinion. It is easy – or easier – to understand why a justice would simply join the majority opinion without engaging with the author if she fully agrees with the first draft of the Court's opinion, but it is not yet clear why a justice would forgo negotiation in favor of immediately writing separately. Since the option to write separately exists, it might be that the bargaining activity we observe is fundamentally skewed. For example, the last chapter found that justices were most typically collegial and friendly in their suggestions to the majority opinion author. This might be driven by the fact that the most contentious disagreements never make it to the bargaining stage; they are captured, instead, in separate concurring opinions. This paper attempts to tease out the factors that drive the decision to bargain relative to the other choices available to the members of the Court after the initial circulation of the majority opinion. In doing so, I seek to explain what patterns we should expect to see in a justice's decision to bargain instead of join or write separately.

3.4 Determinants of the Propensity to Bargain

3.4.1 Positional Bargaining Power

While the primary purpose of theories of opinion control aim to predict the final ideological location of the Supreme Court's majority opinion, they provide a lens to examine what we ought to expect to see *before* the decision is ever published. Indeed, these theories suggest competing patterns about which justices are expected to participate in the bargaining process. In this section, I draw from two theories of opinion control to develop hypotheses concerning a justice's initial response to the circulation of the majority opinion by the assigned author.

The *median justice* model posits that the Court's opinion will reflect the preferences of the justice who is fortunate enough to occupy the mid-point on the justices' combined ideological continuum. This has important implications for bargaining and concurring opinion behavior. Assuming justices have single peaked preferences in a uni-dimensional policy space, the median justice model shows that the majority opinion will converge to the ideal point of the median justice (Epstein et al. 2005; Hammond, Bonneau and Sheehan 2005; Martin, Quinn and Epstein 2005; Schwartz 1992). Namely, if the author is the Court's median member, it suggests that the author ought to be freer to write the majority opinion at or near her ideal point. Indeed, the previous chapter found evidence that when the Court's median authors the opinion, she is less likely to accommodate her colleagues, which suggests that there might, in fact, be greater power for the justice in this key strategic position.

If the median justice wields inordinate power over the legal rule developed in the Court's majority opinion, it could send an important signal to the other justices. In particular, this theory suggests that responding justices should recognize that they are unlikely to affect change in the content of the controlling opinion. As a result, this model lends the prediction that

Powerful Median Author: *in instances of disagreement, a responding justice will be less likely to engage in negotiation with the majority opinion author and will be more likely to immediately write a separate concurring opinion when the median justice is the assigned author.*

While the median justice model gives a framework for how potential bargainers weigh the decision to engage when the author occupies the key position, it also suggests directionality for how the median justice – should she be a non-authoring justice in the majority coalition – ought to respond. In particular, this theory suggests that, in anticipation of accommodation,

Powerful Median Bargainer: *the median justice should be more likely to engage in bargaining with the opinion author, all else equal.*

In short, the justices in the majority coalition are likely to consider both the author's power relative to the other members of the Court as well as their own strategic bargaining position.

A second approach generates similar predictions, but argues that the key player in a judicial bargaining game is not the median of the entire bench. Instead, the most powerful justice in crafting the majority opinion is the *median member of the majority coalition* (MoMC). Unlike the median justice model, scholars who ascribe to this theory incorporate the institutional structures unique to the Supreme Court. In particular, Anderson and Tahk (2007) and Carrubba et al. (2012) argue that because justices are free to pen separate opinions, the bench is not beholden to the single peaked preference of the median justice. Contending that the dispositional vote is stable and that justices are able to express their distinct preferences in concurrences, this model lends a new perspective to the bargaining process. I hypothesize that

Powerful MoMC Author: *when the median member of the majority coalition is the assigned author, a responding justice will be less likely to engage in negotiation.*

Similarly, the MoMC should recognize her strategic advantage, so I predict

Powerful MoMC Bargainer: *the median justice of the majority coalition should be more likely to engage in bargaining with the opinion author, all else equal.*

Yet there is another implication of this theory is markedly different from the median justice model. Prior evidence suggests that the chief justice's opinion assignment decision is contingent on case context, where he is more likely to assign the opinion to an ideologically moderate justice in minimum winning coalitions (Maltzman and Wahlbeck 1996; Maltzman, Spriggs and Wahlbeck 2000). As a result, this might increase the propensity of responding justices to eschew bargaining in favor of writing separately, as I predict in the *powerful median author* hypothesis. In short, when the Court's author is located at the ideological center, this suggests that there may be more disagreement in the ideological wings. To one side of the author, the dissenting coalition articulates its disagreement and, to the other, I expect an increase in concurring opinion behavior. More formally, I expect

Divergence from the Median: *when the median member of the majority coalition writes the Court's opinion, a justice will be less likely to write a concurring opinion.*

Put differently, when the median member of the majority coalition authors an opinion, the expectation from the second model posits convergence to a non-median ideological outcome (i.e., the final ideological location of the legal rule will be to the left or to the right of the Court's median). The resultant legal rule, then, should inherently be ideologically more proximate to the ideal point of more of the members of the winning coalition and depress the likelihood that a justice will pen a concurrence as a first response to the opinion. On the contrary, when the median of the entire bench writes the majority opinion, I anticipate this will increase the likelihood that a responding justice will forgo bargaining in favor of writing separately at the outset.

3.4.2 Context, Politics, and Collegiality

Established literature suggests that context matters. Specifically, there are vital institutional, collegial, and political factors that could motivate or constrain a justice's response to the first circulation of the majority opinion draft. As in the previous chapter, the variables that might influence the author's decision to accommodate requests for her colleagues are the same variables that should direct the responses of the other members of the majority. For example, in both instances, the potential bargainer and the opinion author must both acknowledge their strategic position relative to one another and the other justices. And in both cases, more than half a century of political science scholarship finds that the *ideological distance* between the bargaining duo undoubtedly affects behavior (e.g., Segal and Spaeth 1993). That is, theoretically speaking, a justice who is ideologically opposed to the assigned author has the most to gain if she throws her hat into the negotiation ring and succeeds in getting her preferences translated into law. On the other hand, justices that occupy the furthest ideological positions from the author should recognize that they are unlikely to succeed in negotiations with the author. Therefore, I expect

> **Ideological Distance 1:** *a justice will be more likely to write a concurrence than to bargain as ideological distance increases.*

Conversely,

> **Ideological Distance 2:** *a justice will be more likely to join the majority opinion without bargaining as ideological distance decreases.*

Ideological distance captures one key aspect of the relationship between a potential bargainer and the author, but theories of reciprocity suggest that because justices serve years – often decades – together, there is ample opportunity for these individuals to form alliances and to develop trust and cooperation. On the other hand, justices have the opportunity to penalize defectors through tit-for-tat strategies. Maltzman, Spriggs and Wahlbeck (2000) find evidence that past cooperation significantly affects the likelihood that a justice will seek changes from the opinion author.

Accordingly, I expect that

> **Cooperation:** *justices will be more likely to join the majority opinion without bargaining if they have a history of cooperation*.

Case context may also shape bargaining behavior. The institutional "Rule of Five" suggests that an individual justice's influence over the content of opinion may depend on the *size of the winning coalition*. In minimum winning coalitions, where the majority was established by five non-binding votes at conference, the majority opinion author cannot afford to lose a single vote (Murphy 1964; Rohde 1972; Wahlbeck, Spriggs and Maltzman 1998; Maltzman, Spriggs and Wahlbeck 2000). With this increased leverage, I expect that

> **Coalition Size 1:** *responding justices will be more likely to bargain when the winning margin is small, all else equal*.

However, coalition size may also be an indicator of the unification of the majority coalition. I expect, then, that

> **Coalition Size 2:** *as coalition size increases, responding justices will less likely to write concurring opinions as a first response to the majority opinion draft*.

The Supreme Court's annual term runs from October to June, which implies that cases argued early in the term have greater time for deliberation and revision than cases later in the term. In their various works, Wahlbeck, Spriggs and Maltzman (1998), Spriggs, Maltzman and Wahlbeck (1999), and Maltzman, Spriggs and Wahlbeck (2000) demonstrate that justices' *workload* significantly affects bargaining activity. It follows that

> **Workload:** *justices will be more likely to simply join the majority opinion without as their workload grows or the term end approaches*.

As noted in the previous chapter, there is a critical mass of evidence that suggests that not all cases are of equal importance to the justices (Epstein and Segal 2000; Maltzman, Spriggs and

Wahlbeck 2000; Unah and Hancock 2006; Black, Sorenson and Johnson 2013). Black, Sorenson and Johnson (2013) suggest that justices signal that some cases matter more to them individually during oral argument by engaging more actively during oral argument. Furthermore, justices are not immune from the larger societal context and are cognizant of when the media or the public is tuned into the Court's decision. The members of the Court know that the legal and policy consequences of some cases are simply more important than others. I expect, as Maltzman, Spriggs and Wahlbeck (2000, 74) predict, that "[i]f a justice views a case as relatively unimportant, he or she is more likely to resist paying the personal and workload costs associated with responding to the author." The theoretical prediction is relatively clear. I expect that as

> **Case Salience:** *if the case is of greater importance, the justices will be more inclined to try to influence the direction of the Court's majority opinion through engagement with the author.*

At the individual justice level, prior studies suggest that justice *expertise* and *case complexity* affect the opinion writing process (e.g., Brenner 1984; Brenner and Palmer 1988; Maltzman, Spriggs and Wahlbeck 2000). Justices with a personal interest or experience with the law in a given issue area may be more likely to engage with the author. More importantly, perhaps, justices with issue expertise might have more technical or specialized knowledge about a case and believe that it is their responsibility to strengthen the majority opinion. Formally, I hypothesize

> **Expertise:** *justices will be more likely to bargain if they possess expertise in a given case*.

Case complexity generates less clear expectations. On one hand, it might be reasonable to expect that justices would negotiate more carefully over the myriad of legal issues raised in especially sticky cases. Yet, on the other hand, complex cases might generate a spike a concurring opinions since there could be different viable avenues for answering the question at hand. As such, I anticipate that

Case Complexity: *justices will be less likely to simply join the majority opinion as the complexity of a case increases*.

Finally, we might expect that other justice-level characteristics affect the likelihood that a justice engages in the bargaining process. Extant theoretical and empirical literature suggests that new or freshman justices may take time to acclimate to the procedures of the Court (Hagle 1993; Brenner and Hagle 1996; Maltzman, Spriggs and Wahlbeck 2000; Wahlbeck, Spriggs and Maltzman 1998). Theory suggests that justices new to the Court will take time to adjust to the inner-working of the Court and might then be more reticent to engage in the bargaining process, which indicates that

Freshman Author: *freshman justices may be more deferential to their colleagues and, subsequently, more likely to simply join the majority without bargaining*.

3.5 Results: The Decision to Bargain

3.5.1 Data and Measurement

This chapter relies largely on the same data and measurements presented in Chapter 2, with several key differences. The bargaining data come primarily from the Supreme Court Opinion Writing Database (Wahlbeck, Spriggs and Maltzman 2009), which contains archival documentation of all bargaining memoranda circulated after oral arguments and before the public release of the decision.[1] However, unlike previous treatments of the bargaining stage (Maltzman, Spriggs and Wahlbeck 2000; Wahlbeck, Spriggs and Maltzman 1998), I do not count all memoranda equally.

[1]These data are again limited to October Terms 1971 through 1985 and come from case files contained within the private papers of former justices, including: Hugo L. Black (Library of Congress), William O. Douglas (Library of Congress), John M. Harlan (Princeton University), William J. Brennan, Jr. (Library of Congress), Thurgood Marshall (Library of Congress), Harry A. Blackmun (Library of Congress), Lewis F. Powell (Washington & Lee University), and William H. Rehnquist (Stanford University).

Prior studies did not examine the content of these memos, while I codified each memo according to categories developed in a comprehensive content analysis. I then isolated only statements that actually solicited changes to the majority opinion draft and eliminated dissenting coalition content. The analysis centers on a case-level (not request-level) decision.

As previously noted, bargaining only occurs in approximately half of all cases decided by majority opinion. This raises an important question: what types of cases become subject to negotiation? Thus, this analysis aims to uncover what motivates members of the majority coalition to negotiate in the first place. The dependent variable in the model presented below comes, in part, from Justice Brennan's docket sheets, which records which justices vote with the majority during the post-oral argument conference. The tripartite dependent variable takes on three distinct values to capture the three choices available to a responding justice. First, a justice might elect to simply join the majority opinion. Of the 9,867 initial responses to the first draft of the majority opinion over the 1,960 unique cases in the dataset, approximately 80 percent of the responses were simple "joinder" statements. In such a response, a justice signals her willingness to join the opinion as written. In a second choice available to responding justices, comprising 12 percent of first responses, justices may elect to engage in bargaining with the author. The last available option for responding justices is to forgo negotiation in favor of writing separately from the outset, which constitutes the remaining 8 percent.[2]

The decision to bargain is influenced by similar factors as the author's accommodation decision. The model of the bargaining stage, therefore, includes many of the same explanatory

[2]The dependent variable here focuses on members of the majority coalition rather than the entire Court for two reasons: (1) Intuitively, I expect that members of the majority coalition have more at stake in shaping the content of the Court's opinion to reflect their preferences. That is, these are the justices that agree with the dispositional outcome in the conference vote and their final votes are key to final published opinion. On the contrary, members of the dispositional dissent work together to author a separate opinion and reasonably expect that they will have little influence on the majority opinion. (2) Observationally, from the content analysis of the bargaining memoranda, we see that indeed when dissenters engage with the majority opinion author it is for one of two primary reasons. The first is to provide non-substantive suggestions for minor revisions and the second is to explain the dissent as it relates to the majority opinion.

variables as defined in the previous chapter.

The key intervening variable of interest is once again the bargaining and authoring justices' positions on the Court. Once again, to determine the strategic position of key players, I use the Martin-Quinn dynamic ideology scores (Martin and Quinn 2002) to create a dichotomous variable for *Bargainer is Court Median* (coded as 1 if a responding justice is the median of the Court and 0 otherwise). I use Brennan's docket sheets to determine the initial coalitions established at the conference vote, and code *Bargainer is the Median of the Majority Coalition (MoMC)* as 1 when a particular justice occupies this position and 0 otherwise. If the majority coalition is an even number, my coding strategy allows for two median members. I use the same measurement strategies to include dichotomous variables to capture *Author is Court Median* and *Author is MoMC*.

To account for the ubiquitous influence of ideology, I include two indicators.[3] The first measures the *ideological distance* between the bargainer and opinion author, which is simply the absolute value of the difference between the justices' Martin-Quinn ideology scores (Martin and Quinn 2002).

In this account, I include a second indicator designed to capture a bargainer's extremity from the other members of the majority coalition. *Coalition distance* measures the potential bargainer's absolute ideological distance from the issue specific ideological average of the majority coalition (excluding the author), so that the score increases as the justice moves further from the average.[4]

Once again *cooperation* is measured by "the percentage of time that the author joined a separate opinion written by the justice in the previous term." (Maltzman, Spriggs and Wahlbeck

[3]The measurement strategy of many of the collegial and institutional factors come from the various works from Maltzman, Spriggs, and Wahlbeck (1998, 1999, 2000). The authors generously provided replication data for their studies and I was able to fill in the gaps where their data fell short. As a result, my measurement scheme draws directly on the ones employed in these studies.

[4]The issue specific averages come from the 12 issue areas identified by Spaeth (1994). In the accommodation model, I utilize a different indicator to tap into the same concept, accounting for the dispersion or *coalition heterogeneity* where greater scores indicate greater variance within the majority coalition.

2000, 79). Additionally, for this analysis, I calculated the average *rate of prior accommodation*, measured by the proportion of requests accommodated in the previous term, by majority opinion author for each justice.[5] The latter measure is included in the bargaining model as a means to tap into justice learning. That is, I expect that justices develop rational expectations about the likelihood of accommodation based on their past experience with that author. If, for example, a justice is rarely accommodated by an author, she may be less likely to invest in the negotiation process than she otherwise would be.

The rest of the variables are a one-to-one match with the previous chapter, so I only summarize them here. I use the Wahlbeck, Spriggs and Maltzman (1998) measure of *political salience* that derives term-specific averages of amicus curiae participation and places each case relative to that average (i.e., above average suggests a case is more salient). *Legal salience* is a simple dummy variable that flags cases where precedent is overturned or substantially altered (Spaeth 1994). At the individual level, I employ the Maltzman, Spriggs and Wahlbeck (2000) opinion ratio by issue area to account for justice *expertise*. To tap into *legal case complexity*, I again follow Wahlbeck, Spriggs and Maltzman (1998) and combine three indicators that together signal that multiple legal issues are at play in a case.

Winning margin is again measured as the absolute value of votes needed to maintain the majority coalition and the actual number of votes received, *workload* accounts for the number of open opinion assignments for each justice, *end-of-term* denotes the number of days left in the Court's term, and *freshman author* is a dichotomous measure that captures justices who have served less than two full years on the Court.

[5] I calculated this rate using various specifications, ranging from the previous term to three or five terms averages, to the proportion of all previous terms. The results are robust to all specifications and the variable never obtains statistical significance.

3.5.2 Model and Results

The dependent variable in this case contains multiple nominal categories, so I estimate a multinomial logit. Since this models the likelihood that a response will be chosen compared to another alternative, which serves as the reference category, it produces two sets of estimates.[6] Because I am most interested in what drives a justice's decision to engage with the opinion author, as opposed to simply going-along-to-get-along by joining the majority outright or to immediately penning a concurrence, I use "bargain" as the comparison group.[7] I test for statistical significance using robust standard errors clustered on justice.[8] The results from the multinomial model provide evidence that potential bargainers consider the author's strategic position, and that that collegial and institutional factors are the critical drivers of a justice's decision to engage with the opinion author. The parameter estimates from the model are reported in Table 3.1 and Figures 3.1 and 3.2 present the average marginal effects for all statistically significant variables.

Standing alone, an examination of the covariates in the first outcome – to join the majority – suggests that there are very few important justice, case, or contextual variables that drive the bargaining decision, which, in turn, alleviates the concern for selection effects in the previous chapter. For example, while ideological distance between the potential bargainer and the assigned majority opinion author is statistically significant, as Figure 3.1 illustrates, the substantive impact is small. When all variables are held at their mean or modal values, the probability a justice

[6]Multinomial logit model depends on the assumption of the independence of irrelevant alternatives (IIA), which means that a justice's decision to bargain instead of join should not be influenced by her ability to write a concurrence. While this raises concern because a justice could later decide to write separately (or change from writing separately to bargaining or joining, or any number of combinations therein), the Hausman and Small-Hsiao tests provide evidence that, in the initial response decision, the IIA assumption is satisfied.

[7]While the coefficients change, it is arbitrary which category serves as the baseline. The inferences are identical when using either "join" or "write concurrence" as the reference category.

[8]Each justice appears in these data multiple times, but only makes a single bargaining decision in any given case. To control for the possibility that the error term of one justice's decision is correlated with the residuals subsequent decisions, it is theoretically most appropriate to cluster on bargainer identity.

joins the opinion without negotiation stands at nearly 0.8. The sign of the explanatory variable is as expected: as ideological distance increases, a justice is statistically significantly less likely to join the opinion. Yet, again, this does not change the expected outcome in a meaningful sense. Workload, too, while statistically significant is substantively inconsequential.

Prior cooperation, measured as the frequency that a justice joined a separate opinion by the author in the previous term, is a powerful predictor of a justice's decision to join instead of bargain with the author. Indeed, as past cooperation increases, a justice becomes far less likely to engage in bargaining and is almost certain to join the majority opinion after the first circulation.

Figure 3.1 also reveals that legal salience decreases the likelihood a justice will simply join, thereby increasing the probability that a justice engages with the majority opinion author, while freshman justices are apparently reticent to bargain. When a potential bargainer is in her first two years on the bench, the likelihood that she joins jumps from 80 percent to nearly 90 percent.

Figure 3.2 presents more compelling evidence that there are, indeed, critical collegial, contextual, and case factors that motivate a justice's decision to engage in the bargaining process. The results lend support to both the median justice model and the median justice of the majority coalition model. As I predicted in the Powerful Median Author hypothesis, the results confirm that a justice is less likely to bargain and more likely to write a concurrence as a first response when the Court's median is tasked with authoring the majority opinion. While the predicted values are small, the relative increase here is substantial. The likelihood that a justice writes a concurrence when a non-median justice pens the decision stands at 7 percent. But when the median writes the majority opinion, this jumps to almost 15 percent, more than doubling the chance that a justice will opt to write separately.

The sign and impact is reversed when the author is the median member of the majority coalition. Indeed, compared to the decision to bargain, a justice is now less likely to write a concurring opinion. The probability drops by a facially slim 0.035, but effectively reduces the probability a justice elects to write a concurrence from 0.08 to 0.04, cutting the expected probability in half.

Variable	*Join*	*Write Concurrence*
Constant	1.994*	-1.224*
	(0.370)	(0.630)
Bargainer is MoMC	-0.098	-0.388
	(0.137)	(0.246)
Bargainer is Court Median	0.120	0.341
	(0.177)	(0.305)
Author is MoMC	0.085	-0.745*
	(0.170)	(0.296)
Author is Court Median	0.193	1.061*
	(0.208)	(0.296)
Ideological Distance	-0.017*	-0.001
	(0.003)	(0.006)
Coalition Distance	0.002	0.074*
	(0.007)	(0.010)
Cooperation	1.123*	-1.409
	(0.525)	(0.975)
Past Rate of Accommodation	-0.033	0.222
	(0.403)	(0.683)
Political Salience	0.004	0.032
	(0.020)	(0.032)
Legal Salience	-0.420*	-0.459*
	(0.151)	(0.270)
Expertise	-0.039	-0.225*
	(0.058)	(0.106)
Legal Complexity	-0.019	0.290*
	(0.058)	(0.087)
Winning Margin	-0.001	-0.279*
	(0.040)	(0.068)
Workload	-0.029*	-0.059*
	(0.015)	(0.027)
End-of-Term	-0.000	0.000
	(0.000)	(0.001)
Freshman Justice	0.427*	-0.232
	(0.214)	(0.411)
Observations	9,867	
$\log L$	-1667.23	

Table 3.1 Multinomial logit model of majority coalition member's decision to bargain

Multinomial logit model of majority coalition member's decision to bargain. Robust standard errors clustered on bargaining justice in the data are reported in parentheses. * denotes $p < 0.10$ (two-tailed test).

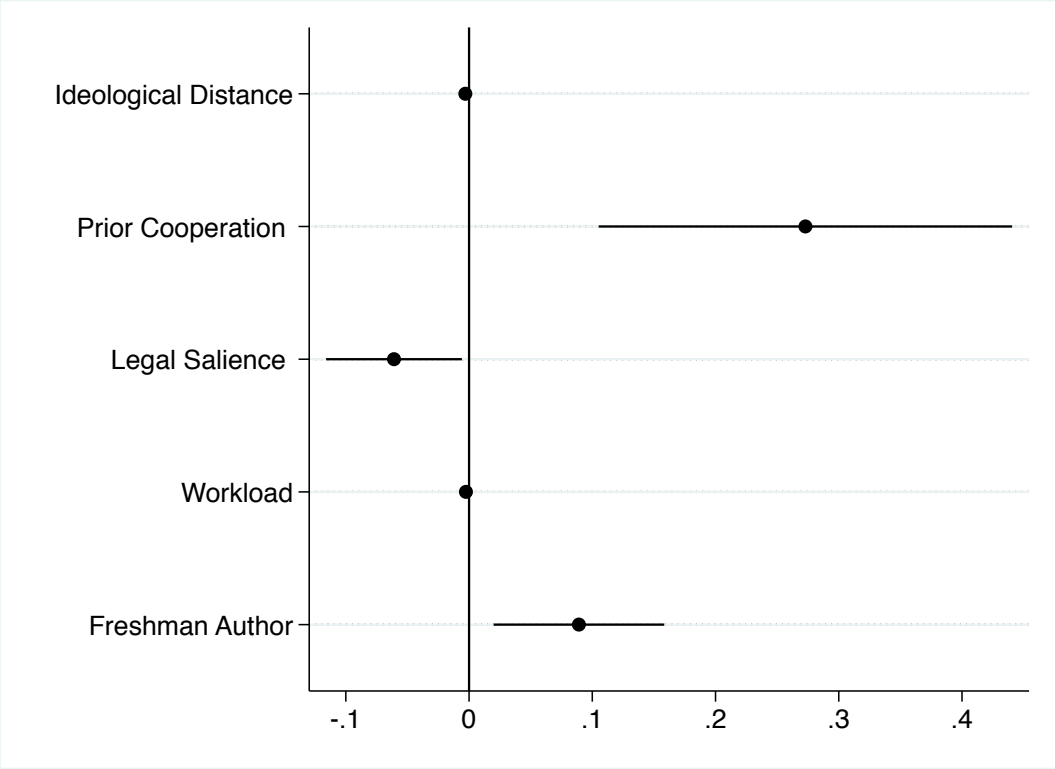

Figure 3.1 Average marginal effects for statistically significant variables on the probability of joining the majority opinion

Average marginal effects for all statistically significant variables on the probability of joining the majority opinion without bargaining. Baseline predicted probability is 0.764. Whiskers represent 95% confidence intervals. All variables held at mean or median values, as appropriate.

Several other collegial factors are worth highlighting. While ideological distance is substantively insignificant when in the decision to join or bargain, ideological considerations surface in a different way in the second set of parameters. While the distance between the author and potential bargainer remains insignificant, as a justice grows more ideologically extreme from the average of the winning coalition, the justice is slightly more likely to write a concurring opinion. On the other hand, as the expertise hypothesis predicted, justices who have specialized knowledge about a case or an area or law are less likely to write separately and more likely to make suggestions to the opinion author. The expected probability drops a modest 0.01, from 0.08 to 0.07.

Compared to the decision to bargain, legal complexity increases the probability that a jus-

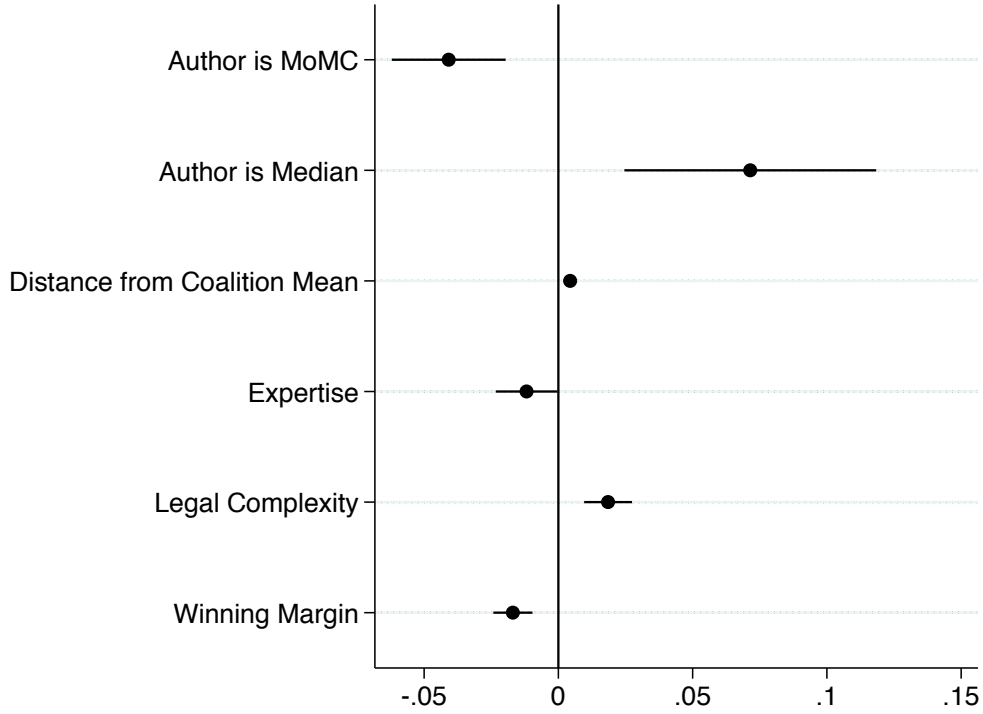

Figure 3.2 Average marginal effects for all statistically significant variables on the probability of writing a concurrence without first bargaining

Average marginal effects for all statistically significant variables on the probability of writing a concurrence without first bargaining. Baseline predicted probability is 0.087. Whiskers represent 95% confidence intervals. All variables held at mean or median values, as appropriate.

tice will simply skip straight to writing a separate concurrence. As a case becomes increasingly complex, the likelihood that a justice writes a concurrence without first attempting to persuade the author to make changes jumps to above 10 percent. Finally, the size of the winning coalition confirms expectations; as the winning coalition grows, a justice is less likely to write separately.

3.6 Discussion and Conclusion

This chapter sought to unpack the first stage of the iterative opinion writing process by revealing how justices respond to the first draft of the majority opinion. It was motivated by a desire to understand the different choices available to the members of the majority coalition to ascertain

whether this separate case-level decision affected the majority opinion author's behavior in crafting the Court's decision. I find that, as in the author's decision to accommodation requests from the bench, responding justices are strategic actors. In particular, the author's strategic positional advantage relative to the other members of the majority coalition effects bargaining behavior. Unlike previous attempts to discern the mechanisms that motivate bargaining behavior (Maltzman, Spriggs and Wahlbeck 2000; Wahlbeck, Spriggs and Maltzman 1998), I find little evidence for several specific contextual indicators and limited effects for several others.

By incorporating insight from game theoretic models to derive empirical implications, for the first time, the justices' relative bargaining power was put to the test. The results show that a potential bargainer is unlikely to consider his or her own positional power in the decision to engage. That is, in the justice's first response to the circulated majority opinion draft, there is not evidence to support either the median justice or the median of the majority coalition model. This is true whether a justice elects to join, to bargain, or to write separately. The justices occupying key strategic seats are no more or less likely to do one or the other.

Yet, the results provide strong evidence that potential bargainers do consider the *author's* pivotal position, lending support to both theories of opinion power. Additionally, this gives limited support to scholarship that predicts the author retains a measure of control over the content and location of the legal rule developed in the majority opinion (Hammond, Bonneau and Sheehan 2005; Lax and Cameron 2007). I find that justices are more likely to forgo bargaining and are less likely to simply join the majority when the author is the median member of the Supreme Court. As I expected, when the opinion is located in the ideological center, the author faces greater fracturing of the opinion through dissents and concurrences. By contrast, when the median member of the majority coalition authors the opinion, it is closer to the ideal policy preferences of more members of the majority coalition, and separate opinion writing is effectively diminished. This result aligns with the patterns of concurrences noted in Carrubba et al. (2012). It remains a fascinating result that merits further study. In particular, future research might examine the differences in content of concurrences that arise when various pivotal actors occupy the authorship. For example, when the

median justice writes the opinion, are the concurring opinions (especially those written without prior engagement with the author) more ideologically extreme? What consequences do these opinions carry for lower court interpretation of and compliance with precedent? Does it change when the median of the majority coalition authors the opinion and the concurrences are, presumably, both more extreme *and* more moderate?

Beyond the pivotal position of authoring justices, I find ideological considerations influence bargaining behavior. Justices ideologically proximate to the author are most apt to simply join the opinion without bargaining, while engagement increases as distance grows. As an actor becomes increasingly extreme relative to the rest of the majority coalition, the propensity to forgo bargaining and write separately increases. Because the strategic advantage of pivotal players is explicitly modeled and captures a substantial degree of ideological influence, these parameters are markedly less pronounced than previous approaches.

Unlike the previous chapter which found no evidence for reciprocity in an author's decision to work with her colleagues, previous cooperation plays a starring role in the decision to engage. It is the single largest predictor that a justice will join the majority opinion without an attempt to alter its content.

Like Maltzman, Spriggs and Wahlbeck (2000) and Wahlbeck, Spriggs and Maltzman (1998), I find that certain case-level variables systematically influence bargaining behavior. While political salience fails to achieve statistical significance, the results confirm expectations that case complexity and case salience dictate a justice's decision to engage in the bargaining process. More specifically, as the case becomes increasingly complex, justices are less likely to bargain and more likely to write concurring opinions. In especially complex cases, at the sample maximum, I estimate that the probability a justice will write separate is nearly 20 percent. Although this is remarkable, given the rarity of writing separately as a first response, it is not entirely surprising given that the content analysis of bargaining memoranda reveals that justices are most occupied with discussions of legal issues. However, a word of caution is an order: because most cases (72 percent) in the sample are not legally complex, the results provide greater confidence for the predicted probability at the

lower bound than the upper bound (where only a fraction of one percent of cases are classified).

The legal salience of the case also leads to systematic changes in bargaining behavior. While both sets of parameter estimates are statistically significant, legal salience is only substantively meaningful in that it marginally decreases a justice's willingness to join the opinion outright. Confirming the evidence presented in the previous chapter, justices are more likely to engage in collegial development of the majority opinion in legally salient cases.

Other measures of the unification of the nation's highest bench also suggest particular types of (dis)engagement. Specifically, in accordance with one of the coalition size hypotheses, as the winning margin grows, a justice is significantly less like to offer a concurring opinion as an initial response to the majority opinion draft. Quite unexpectedly, and as a clear departure from established literature, the size of the winning coalition does not seem to increase the propensity to bargain over the decision to disengage and join the opinion outright.

Finally, the results point to institutional factors as modest constraints on bargaining activity. Contrary to expectations, workload actually appears to *increase* a justice's willingness to request changes to the opinion draft rather than passively join. Yet, to reiterate, while this is statistically significant, the expectation changes very little. The marginal effects of these contextual variables on the probability that a justice bargains are virtually indistinguishable, even at the upper and lower levels contained in the sample. In opposition to my hypothesis, there is also no evidence to suggest that justices are any more or less likely to bargain as the end of term draws near. As expected, freshman justices are less likely to solicit changes from the author and more likely to passively join the majority opinion.

Taken together, the results suggest that the decision to engage shapes the outcome of negotiation between an author and a bargaining justice. Because justices have an opportunity to voice their own views through concurring opinions, and because justices elect to do so with increasing frequency when the author occupies a pivotal position (the median), when the case is especially complex, and when the justice is more ideologically removed from the rest of the winning coalition, it is likely that the opinion author is shielded from the most fundamentally divergent views.

Moreover, since past cooperation is a strong determinant of a justice's willingness to join the majority without negotiation, it is likely that authoring justices deal primarily with requests that seek to change the majority at the periphery. The step back to examine a justice's initial decision to engage offers critical insight into why, precisely, the rate of accommodation by opinion authors is so remarkably high and, simultaneously, offers an explanation for why we do not see more bargaining.

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CHAPTER 4

CONCURRING OPINIONS IN A FRACTURED MAJORITY

4.1 Chapter Abstract

Existing research presents competing hypotheses about bargaining power on the Court, with many models predicting convergence to the preferences of a single median member, while others suggest that the opinion author herself retains significant control. While these models are useful to understand the final ideological location of the Court's majority opinion, one feature frequently overlooked in the literature is the occurrence of concurring opinions, which allow justices to articulate their distinct views. These separate opinions have become commonplace in Court decisions as roughly 40 percent of all majority opinions are accompanied by at least one concurrence. The first two substantive chapters established that majority opinion authors are largely amenable to requests from their colleagues, but that these compromises might be an artifact of the ability of majority coalition justices to simply write separately when disagreement runs too deep. Yet, I find that less than half of all concurrences are written without first engaging in negotiation with the majority opinion author. The remaining concurrences, then, result after the assigned author and the majority coalition member fail to strike a bargain. In this chapter, I explore what happens when intra-Court bargaining collapses. Descriptive data suggest that justices are more likely to write or join concurring opinions when the tone of exchange with the majority opinion author is hostile. My initial results suggest that the type of concurrence – and its subsequent challenge to the authority of the majority opinion – may be influenced by the breakdown during the intra-Court bargaining process.

4.2 Introduction

In 1982, the U.S. Supreme Court confronted an obscenity challenge that tested the limits of the First Amendment. The case arose when a New York City bookseller sold two films to undercover police officers that contained footage of underage boys engaging in sexual activity. The store owner, Paul Ferber, was convicted under the New York obscenity law that made it illegal for an individual to "promote[...] any performance which includes sexual conduct by a child less than sixteen years of age." Ferber appealed his conviction, which was overturned by the New York Court of Appeals on the grounds that the law was overbroad and could, unintentionally, ban non-obscene materials that had some scientific or social value. The Supreme Court disagreed with the Court of Appeals and unanimously upheld New York's obscenity law, arguing that the state had a vested interest in protecting children from sexual exploitation and that all instances of child pornography were outside of the bounds of protection provided by the First Amendment.

Simply taking the Court's unanimous decision at face value would suggest that the justices were in agreement about the scope of the First Amendment and the Constitutionality of the law in New York. However, a closer look at the opinion shows that while the dispositional vote was indeed unanimous, the Court was divided about the scope of the legal rule. Justice White delivered the opinion of the Court and was joined in full by only Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor. While she agreed with White's legal rational, O'Connor took the additional step to file a concurring opinion to "stress that the Court does not hold that New York must except 'material with serious literary, scientific or educational value' [...It] merely holds that, even if the First Amendment shelters such material, New York's current statute is not sufficiently overboard" (*Ferber v. New York* (1982)). Justice Brennan, joined by Justice Marshall, filed a special concurrence in which he agreed with the disposition, but offered entirely different legal justification. Like Brennan, Justice Stevens filed an opinion concurring only in the judgment while articulating his own views concerning First Amendment obscenity standards. Finally, Justice Blackmun noted that he, too, concurred only in the judgment, but he opted not to explain why.

A look into the justices' private papers reveals a rich history in the opinion development in this case. Notably, Justices Brennan, Marshall, Blackmun, and Stevens were all initially in the dissenting coalition. Yet after Byron White circulated the first draft of the Court's majority opinion, Brennan wrote to his colleagues stating: "I advised you on March 30 that I'd undertake the dissent in the above. Now, however, that I've read Byron's circulation, I'm inclined to think that he is right both on the merits and the overbreadth question." Ultimately, he decided to concur in the judgment while providing a separate opinion detailing his views. Justice Marshall, Brennan's most frequent ally, joined this separate opinion. Though they were persuaded by White's opinion, neither justice solicited changes from White, opting to write separately without bargaining. Justices Stevens and Blackmun took a similar tact: changing their votes and filing concurring opinions without engaging with White over the content of the majority opinion.

This behavior is in stark contrast to the other justices in the majority coalition. The Chief Justice and Justice Powell immediately joined White's majority opinion, but Justices Rehnquist and O'Connor engaged directly with White in the development of the Court's opinion. O'Connor acknowledged that White had circulated a "persuasive opinion" but she remained "troubled by the exception for visual depictions that have serious literary, artistic, political, or scientific value. The points you make on pp. 8-15 [...] have the same force no matter the 'value' of the depiction. In addition, an exception for pictures with serious literary, artistic, political or scientific value will require the courts to make just the sort of content-based distinctions the First Amendment abhors. [...It] is unnecessary to create this exception in order to protect legitimate works that are unlikely to harm children." O'Connor's memo provided additional details to support her argument and she requested that White eliminate the exception for materials that "have serious value, stressing instead the need to define categories of prohibited conduct."

Rehnquist penned his own two-page bargaining memorandum to White, noting the "same area of concern" as the issues flagged by O'Connor. He indicated that he, too, would like "to see this requirement [for serious literary, artistic, political or scientific value] eliminated altogether from the test." Rehnquist provided White with specific changes to troubling language that would

alleviate his concerns and concluded that "other than the points made above, I am more than happy to join the draft as written."

Before he even received the second memo from Rehnquist, White set out to address O'Connor's concerns. In a letter sent to the entire conference, he wrote back to her to indicate that he "crossed this bridge in the course of preparing the circulating draft, but I am perfectly willing to reconsider. I am recirculating eliminating the..." paragraphs that were particularly troublesome to her. He continued, "This may satisfy a good deal of your concern, although it may make the draft considerably less attractive in other quarters." White, then, sought to accommodate most of O'Connor's requests, which in turn also addressed the issues raised by Rehnquist, while arguing that he thought it impossible "to avoid case-by-case adjudications that will be content-oriented, any more than it is possible to avoid such cases in the obscenity context under *Miller* and *Paris Adult*."[1]

White's revision was enough to pacify Rehnquist, who subsequently joined the opinion. O'Connor, on the other hand, was not satisfied. She wrote to White again, stating, "I continue to be troubled by the concerns expressed in my letter to you. I, therefore, plan to circulate a brief partial concurrence which simply reserves joining you as to the exception for works of serious social value." Through multiple iterations of her concurrence, O'Connor modified the language so that her opinion was "not inconsistent" with the majority views, but instead put particular emphasis on a certain point.

Ferber v. New York (1982) is illustrative of several key features of Supreme Court bargaining dynamics. First, it shows the different *types* of concurrences published by justices. At the most general level, a concurring opinion is a separate written statement in which a justice agrees with the disposition and, frequently, some or all of the legal justification provided in the majority opinion, but the justice elects to provide "his views for the case or his reasons for concurring" (Black

[1] *Miller v. California* (1973) was a landmark case decided 10 years earlier in which the Court defined obscenity as anything that was "utterly without socially redeeming value" or that lacks "serious literary, artistic, political or scientific value." In this decision, the Court's majority developed a three-prong test for lower courts to establish whether this standard had indeed been violated. Decided the same year as *Miller*, *Paris Adult Theatre v. Slaton* (1973) upheld a state's injunction against showing obscene films in public movie theaters, even if viewers were all consenting adults.

1991, 200). There are further distinctions, however, between regular and special concurrences. In the former, as shown by Justice O'Connor in *Ferber*, a justice agrees with the majority's decision and (most of) the justification, but elects to express her views separately. The latter, special concurrences, are like the ones written by Justices Brennan, Stevens, and Blackmun whereby the justice agrees *only* with the dispositional vote and does not subscribe to the legal rule. Second, it shows the variation in the length and breadth of concurring opinions. Blackmun, for example, noted his concurrence without justification, while all of the other justices authored several pages of text to support their arguments. Third, the concurring opinions underscore that even "unanimous" decisions are sometimes more divisive than they appear on the surface. Fourth, it reveals that some concurrences result without engagement between the majority opinion author and another member of the majority coalition (as was the case with Brennan, Stevens, and Blackmun) while other concurrences result after an author fails to fully accommodate the views of a bargaining justice (like O'Connor).

As Maveety (2005, 139) observes, "concurring voices produce the legal debate that furthers the intellectual development of the law on the Supreme Court." The views articulated in these separate opinions can have meaningful impacts on the interpretation of precedent by lower courts, it can influence agenda setting and policy-making in Congress, and can impact the debate about legal rules in the legal community. Because of their potential to have long lasting impacts, understanding where concurrences come from is an important first step in understanding precisely how these opinions affect the broader political world.

In the last chapter, I found that justices are more likely to write concurrences without first engaging with the assigned majority opinion author when the Supreme Court's median member authors the majority opinion, when the justice is further from the ideological mean of the winning coalition, when the decision is especially contentious and decided by a minimum winning (5-4) vote, and when the case is particularly complex and raises a larger number of legal issues. The decision to forgo bargaining is illuminating; it suggests that justices recognize that sometimes the divisions with the rest of the majority coalition, or at the very least the assigned author, are so

fundamental that it is more efficient to simply write separately than to try to persuade the author to make changes to the majority opinion. Yet, I find that the decision to write separately from the outset explains approximately 45 percent of all concurring opinions. The remaining 55 percent, then, result *after* a justice has engaged with the majority opinion by requesting changes to the Court's decision. In this paper, I seek to understand the factors that motivate a justice to write separately after first having engaged with the author.

This chapter proceeds as follows: in Section 4.3, I provide anecdotal evidence to illustrate justices responses to a majority opinion author's decision not to adopt some or all of the requests offered during the bargaining stage. Section 4.4 offers a typology to account for the diversity within separate opinions. Section 4.5 presents data to show which justices write separately and analyzes the conditions under which concurring opinions appear. Section 4.6 concludes with a discussion of the results and provides avenues for further research into this little understood phenomenon.

4.3 Responses to the Majority Opinion Author's Refusal to Accommodate

Taken together, as established in the previous chapters, the descriptive data and statistical models reveal that authors work hard to foster a collegial spirit in the drafting of the Court's majority opinion. By the time it is released to the public, majority opinions are most frequently a collaborative effort, having undergone significant revisions as the author adopts substantive requests from the other members of the majority coalition. Yet despite the fact that the accommodation rate stands at an average of nearly 70 percent, almost a third of requests go unanswered by the majority opinion author. This raises an important question: What happens when a justice is *not* accommodated? One persistent account suggests that concurrences are frequently a result of the author's failure to negotiate with members of the majority coalition.

The notion that concurrences result from the failure of the author to incorporate a colleague's demands is certainly not new. Indeed, more than fifty years ago, Murphy (1964) argued that a justice has two tools at his or her disposal to sanction the opinion author: changing votes or

authoring a separate opinion. In her examination of concurring opinions on the Supreme Court, Corley (2010, 41) begins to address this very question, noting that if a "justice is accommodated, the justice will silently join the majority opinion; however, if the justice is not accommodated, the justice may write or join a concurrence." Providing a qualitative analysis, Corley uses the private papers of Justices Blackmun and Marshall to explore bargaining and accommodation from 1986-1989. She finds evidence that Blackmun and Marshall actively incorporated suggestions from other members of the Court in the opinions they authored. However, when they refused to do so, it frequently spurred the bargaining justice to write or sign onto a concurring opinion.

This qualitative assessment gains additional traction here. Indeed, as was the case in *United States v. Generes* (1971), Blackmun traded his most preferred outcome to maintain control of the majority opinion. As he fought for control in this mundane federal income tax case, fissures split the majority coalition. Blackmun fielded requests from every member of the majority coalition and as he sought to accommodate some (particularly those from Brennan and White), he risked the votes of the other members of the majority coalition. To regain control, Blackmun accommodated Stewart, Burger, and Marshall, and, as a result, Brennan wrote a concurrence that challenged the policy implications of the decision. In this case, the concurrence was very clearly a direct result of non-accommodation. Had Blackmun been able to incorporate the myriad of requests from the other members of the majority coalition, no concurring opinion would have been published. In other words, none of the justices had written separately without first trying their hands at shifting the direction of the Court's majority opinion.

Likewise, the Court's majority found itself to be significantly fractured in *Nixon v. Fitzgerald*, an especially contentious case from 1981 that asked the Court to determine the scope of the President's immunity. From the outset, though he had the power of opinion assignment and elected to appoint Justice Powell to the task, the Chief Justice sought to forcefully strong arm his views into the majority opinion. In no fewer than five separate bargaining requests, Burger made it clear that he wouldn't hesitate to pull his vote from the narrow (5-4) dispositional majority coalition, especially if Powell went too far addressing the concerns of Justice Byron White. In his response

to Powell's first majority opinion draft, Burger promptly responded: "Put 'hard,' your choice is my vote or Byron's!" While Powell and White ultimately ended in opposing coalitions, Burger continued to worry that Powell was too concerned with White's perspective. After the circulation of the fifth majority opinion draft, Burger tried his hand again, writing, "Let Byron 'rant' on this point but don't fall into the trap of answering him and rendering the opinion unacceptable to me."

Powell recognized he was walking a tightrope and sought to placate the Chief without losing any more votes (and hence losing the ability to set precedent altogether). Throughout the opinion writing process, Powell dealt with requests from every member of the Court as the majority coalition shifted under his feet. Facing continual pressure from the Chief and seeking to secure the fifth critical vote, Powell worked even harder to accommodate requests from his colleagues, eventually personally appealing to Justice O'Connor to explain why he adopted one request from Burger and to ask for her support:

> I have accepted your two suggested sentences as explanations of the opinion's approach to the questions presented. [...] The last sentence has been added to make clear that our holding fairly can be called 'constitutional' – a matter of great concern to the Chief Justice. As perhaps you sense, I am anxious to conclude work on this opinion – but only with a Court. [...] I particularly appreciate your interest and support, and your suggestions have been constructive. I very much hope you will renew your join... it is necessary to have a solid Court.

Ultimately, Powell's efforts to balance the requests of his colleagues paid off and he secured a minimum winning coalition. Despite his persistent badgering, Powell chose not to incorporate Burger's requests to the fullest extent. Thus, while Burger still had a hand in shaping the Court's majority opinion, some of his requests fell on deaf ears. As a result, Burger issued a concurring opinion to clarify his position and to suggest that the Court had not gone far enough in establishing the Constitutional question.

This example is notable not only because it again serves to illustrate the complexity of the

iterative opinion writing process. But it encapsulates the duality of threatening the stability of the majority coalition. On one hand, Powell most certainly actively engaged in the negotiation process with the Chief Justice, incorporating many of his suggestions into the Court's majority opinion. Yet, Powell would not be bullied into accepting a position with which he did not agree. Burger, then, had a choice to make: If his threats were to carry any weight, he ought to write a concurring opinion to sanction Powell's refusal to accommodate.

I turn now to investigate the circumstances under which members of the Court choose to bring their disagreements with the Court's majority to light by taking the additional step to publish a concurring opinion.

4.4 Separate Opinions and Types of Concurrences

As in the previous chapters, I use original majority opinion draft data together with the bargaining memoranda contained within the Supreme Court Opinion Writing Database to tease out the downstream consequences of non-accommodation. After reading each request posed to the majority opinion author, I ascertained whether the author accepted this request and changed the majority opinion.[2] While the bargaining memoranda and majority opinion drafts shed light on the negotiation process during the opinion writing stage, it fails to reveal the consequences of the breakdown in negotiation between the author and the responding justice.

To determine how a bargainer proceeds after an author fails to accommodate her request, using Lexis, I collected every written opinion (majority, concurring, and dissenting) published during the Burger Court. For this analysis, I isolated the instances of failed or incomplete accom-

[2]Like the bargaining memoranda data obtained from the Supreme Court Opinion Writing Database (Wahlbeck, Spriggs and Maltzman 2009), the opinion draft data come from case files contained within the private papers of former justices, including: Hugo L. Black (Library of Congress), William O. Douglas (Library of Congress), John M. Harlan (Princeton University), William J. Brennan, Jr. (Library of Congress), Thurgood Marshall (Library of Congress), Harry A. Blackmun (Library of Congress), Lewis F. Powell (Washington & Lee University), and William H. Rehnquist (Stanford University).

modation and traced the subsequent action – or lack thereof – of the justice whose request went unanswered. I then selected a random 3-term sample (October Terms 1978, 1983, and 1984) to determine what happened when an author decided against incorporating a change proffered by another member of the majority coalition. There are 431 cases decided during these terms, but we observe active bargaining in less than 60 percent of the total, or only 242 cases. This sample yields a total 753 unique requests addressed to the opinion author, which equates to approximately three requests or suggestions for each case decided in these terms.

In this sample, 220 bargaining requests were not accommodated. Yet the slighted justices opted to fracture the majority coalition by writing or joining a concurring opinion in fewer than half of these instances; in only 90 observations did the responding justice elect to express the views that were not accommodated by the majority opinion author by joining or writing a concurrence. In one instance, a justice actually reversed his support of the majority opinion and switched his dispositional vote to sign a dissenting opinion. Interestingly, while the slighted justices only pursued retaliatory action in 40 percent of the cases of failed or incomplete negotiation, the descriptive data suggest that the failure to compromise does indeed increase the propensity for a justice to author or join a separate opinion. In the terms under consideration, there were 124 separate concurrences written; fully 70 written in direct response to the majority opinion author's refusal to adopt a suggestion.

In addition to merely assessing whether or not these justices authored or joined separate opinions, to systematically assess the impact of the concurring opinions and to determine how deeply the bargainer split with the Court's majority, I followed Corley (2010) and conducted a content analysis of these separate opinions. Using the typology derived from Witkin (1977) and Ray (1990), I coded the concurrences into six defined categories:

> (1) An *expansive concurrence* attempts to broaden or add to scope of the legal rule explicated in the majority opinion. In such a concurrence, the author expresses belief that the Court should have done more or gone further.

(2) A *limiting concurrence* is the opposite of the expansive in that the authoring justice wishes to restrict the Court's opinion in some way. In this type of concurrence, the justice thinks some parts of the majority's opinion were unnecessary or that the Court went too far in its reasoning.

(3) An *emphatic concurrence* serves as a vehicle for a justice to clarify or expound upon a particular point articulated in the majority opinion, without seeking to substantively change the interpretation of precedent.

(4) In a *reluctant concurrence*, on the other hand, the authoring justice makes his displeasure with the Court's majority well known. In this type, the justice explains that she has only joined the Court's majority because she felt compelled to do so by precedent or – perhaps ironically – to allow the Court to speak with a unified voice on an important legal issue.

(5) A *doctrinal concurrence* is what we typically refer to as a Special Concurrence, where a concurring justice agrees with the outcome in the case, but not the legal justification in the Court's majority opinion. These concurrences tend to be longer and look more like traditional opinions since the authoring justice offers her own, alternate justification for the decision. And, finally,

(6) An *unnecessary concurrence* is, as its name implies, an opportunity for a justice to simply state her agreement with the majority, without offering any further explanation of why her views diverge from the published opinion.

As shown in Figure 4.1, 40 percent of all concurrences are emphatic in nature, doing little to affect the interpretation and application of the Court's opinion. Yet, together, doctrinal and limiting concurrences, both which challenge the legal rule established in the majority opinion also make up a critical mass of the concurrences that result of a breakdown in the negotiation process, comprising another 40 percent. Fewer than 10 percent of concurrence seek to expand the reach of the Court's opinion and just over 10 percent provide no additional insight. There were no instances

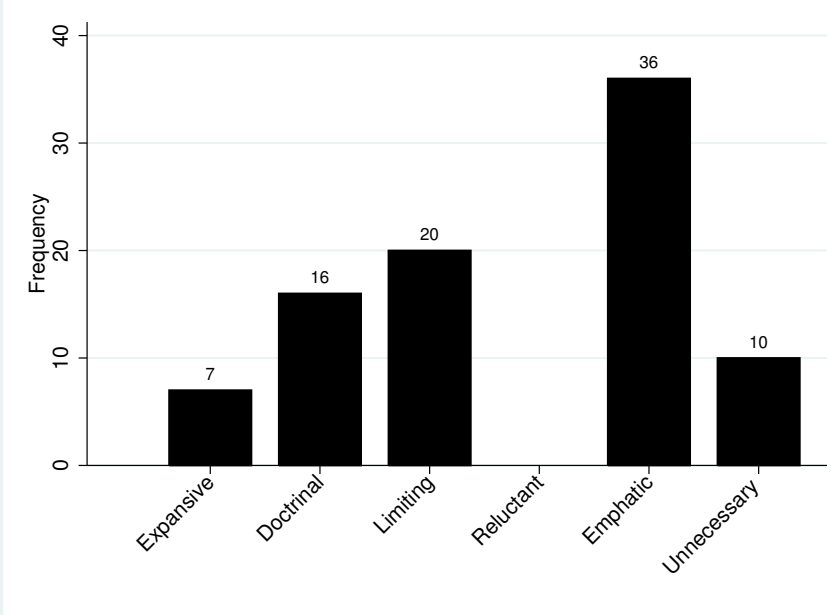

Figure 4.1 Bar plot of the relative frequency of the concurrence by type.

of reluctant concurrences in this sample.

4.5 Conditions that Increased Likelihood of Concurring Opinions

4.5.1 When Concurrences Emerge: Types of Requests

Recall that bargaining justices pursue retaliatory action by writing a separate opinion less than half of the time when the majority opinion author refuses to accommodate. In some cases, a bargaining justice might opt not to write a concurrence because the request was inconsequential or not significant enough to merit a separate opinion. Indeed, there are many examples where justices make a suggestion and indicate from the outset that they will join the opinion even if they are not accommodated. Such was the case in Rehnquist's bargaining memorandum to White in *New York v. Ferber* (1982). Rehnquist took issue with White's "use of the [word] 'works'" and suggested that the opinion language be changed to reflect a more tailored description of child pornography. He goes on to note, however, "I am perfectly willing to leave it to your judgment as to whether it is possible or desirable to obtain a majority for that proposition." Rehnquist requested a change that

White did not adopt, but Rehnquist joined without further delay anyway.

In other cases, however, sometimes a justice expresses a desire to write separately, but chooses not to for the good of the majority opinion. Such was the case in *United States Railroad Retirement Board v. Fritz* (1980) when the Court argued that the legislature needed only pass the rational basis test in its establishment of social and economic acts. Rehnquist was tasked with authoring the majority opinion and Powell immediately sought sizable changes. While Rehnquist adopted some of Powell's requests, he refused to alter the opinion to reflect all of Powell's suggestions. Powell wrote a two page memo to articulate his displeasure with the outcome, but ultimately decided to "join [Rehnquist's] opinion to assure that you have a Court." In no small part, Powell was motivated to join the majority without writing separately because Rehnquist had expressed fear that lower courts would "pick and choose" among relevant precedents if Powell published a separate opinion.

Thus, although justices have motivation not to write separately, it is abundantly clear that there are cases where justices take the additional step to pen a concurrence. Just as the content of a bargaining request influences the likelihood of accommodation, it is reasonable to expect that some types of requests matter more to a bargaining justice, providing the justice with heightened motivation to write or join a concurring opinion if her views are not adequately addressed by the majority opinion. Recall the three broad categories of request types defined in the preceding chapters: minor revisions ask the author to clarify language or make other non-substantive changes to the opinion, requests for legal change deal explicitly with Constitutional or statutory provisions, while requests for policy change express concerns for implementation, interpretation, and the scope of the legal rule.

As presented in Chapter 2, the data reveal that majority opinion authors are less likely to adopt suggestions for policy change and most likely to incorporate minor revisions at the behest of their colleagues. If the content of the request functions as a signal of the divergence between the legal policy explicated by the opinion author and the most preferred outcome of the responding justice, we should correspondingly expect that a bargaining justice is more willing to invest the

time and effort into authoring a separate opinion when the justice seeks changes to the policy implications of the Court's majority opinion. As Figure 4.2 reveals, justices are far more likely to author a separate opinion when their policy concerns are not alleviated by the majority opinion author. Oddly, nearly 25 percent of concurring opinions occur after a majority opinion author refuses to adopt a suggestion for a minor revision.

This puzzling finding is somewhat reconciled through an examination of what type of concurrence results in each instance. Minor revisions typically request clarity or suggest emphasis on a particular concept. Accordingly, as the righthand panel of Figure 4.2 shows, when minor revisions are ignored by the opinion author, the resultant concurrence is either unnecessary and adds no further substance to the Court's published opinion, emphatic in that is highlights key text without disagreeing with the majority opinion, or, in a small minority of cases, it seeks to expand a particular aspect of the legal rule. In the three cases where a minor change was not adopted and a doctrinal concurrence was the "result," the separate opinion has nothing to do with the requested change. Instead, these are the rare instances where a justice both bargains and writes separately, nearly in conjunction with one another.

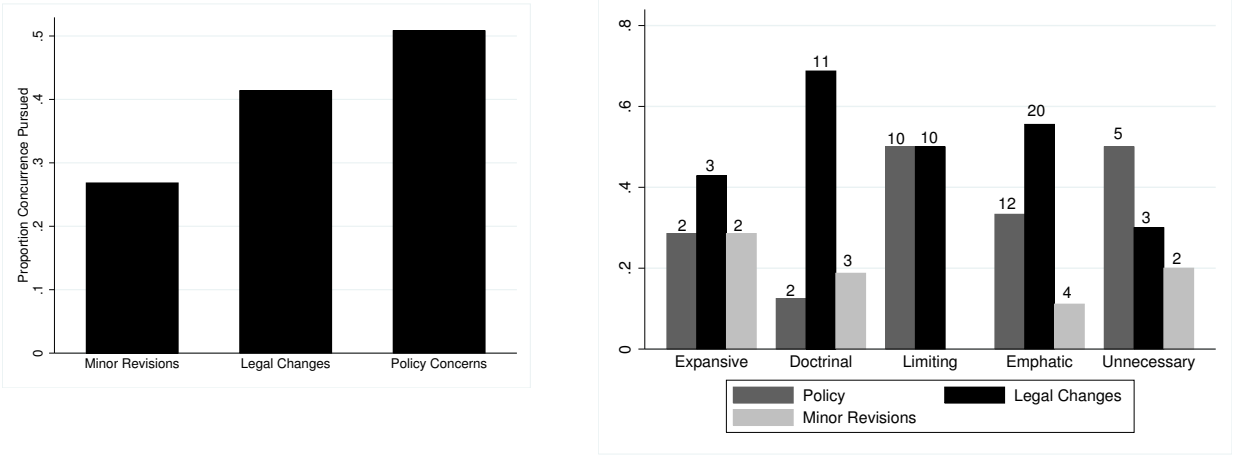

Figure 4.2 Bar plots of proportion of concurrences resulting from different types of bargaining requests

Bar plots of the proportion a bargaining justice joined or wrote a concurring opinion by type of bargaining request (left) and proportion of type of concurrence written by request content (right).

More than a third of all concurring opinions that are written after an initial attempt to negotiate with the opinion author are emphatic in nature. This is a striking pattern since it indicates that, most commonly, these concurrences do not seek to limit or alter the interpretation of precedent. Instead, these concurrences are most often expressive in nature and provide an opportunity for a justice to publicly clarify which aspects of an opinion she views as most vital. Less than a quarter of concurrences in these cases seek to limit the reach of precedent set by the majority, while less than 10 percent express a preference for a broader application of the legal rule. Another 10 percent are unnecessary and contribute little to our understanding of the individual justice's reasoning or to the development of law.

Doctrinal concurrences make up the remaining category and offer the most distinct pattern of judicial behavior. Most strikingly, and least surprisingly, doctrinal concurrences are primarily a result of fundamental disagreements between majority opinion authors and bargaining justices regarding the interpretation of law. Doctrinal concurrences are those in which the justices disagree about the legal rule, so it follows that when majority opinion authors refuse to make legal changes concerning Constitutional interpretation, for example, justices are driven to write special concurrences that explain a different legal rationale to justify the disposition in a case.

4.5.2 When Concurrences Emerge: Strategy of Negotiation

While failure to accommodate a request clearly does not translate immediately into a publicly fractured majority through the circulation and publication of a concurring opinion, Figure 4.3 reveals that Justice Powell was right to be concerned in *Nixon* when Chief Justice Burger continually threatened the stability of the majority coalition. It is abundantly clear that when justices threaten to retaliate against non-compliant majority opinion authors, they follow-up.

The large gray bar in Figure 4.3 provides a proportional disaggregation of failed accommodation by bargaining justice. There are eleven justices serving in the three terms randomly selected for analysis and there is sizable variation in the proportion of requests unmet by the majority opinion author. While this disparity may seem puzzling at first blush, there several potential

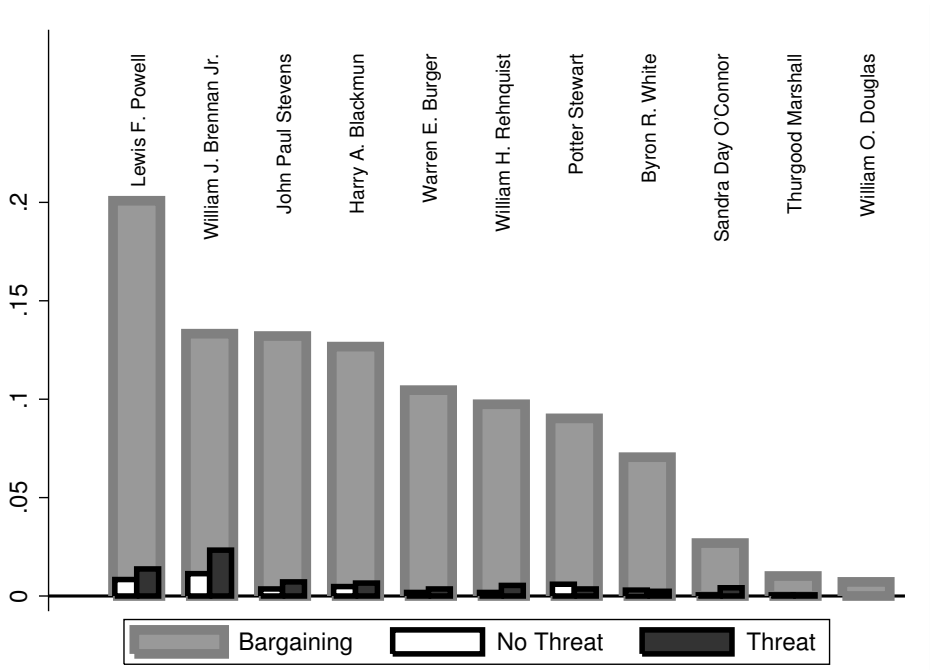

Figure 4.3 Nested bar plot of distribution of failed accommodation by justice and resultant concurring opinion action

Nested bar plot where the large gray bars provide the distribution of failed accommodation by bargaining justice. The small nested bars are shares of the large bars. The small bars depict the rate at which justices take a concurring opinion action when they threatened to do so (black bar) during the opinion writing stage and when they did not provide such an advance warning (white bar).

explanations for this pattern. First, the data presented here are drawn from only three terms. Justice O'Connor joined the Court in 1981, replacing outgoing Stewart. Thus, in the current sample, I capture behavior for Stewart in only a single term. As a freshman justice on the Court, O'Connor exhibited greater restraint in the opinion writing process (Hagle 1993; Brenner and Hagle 1996; Maltzman, Spriggs and Wahlbeck 2000; Wahlbeck, Spriggs and Maltzman 1998) and was less likely to engage in bargaining in the first place. As ideological extreme members, Marshall and Douglas were rarely in the majority coalition and thus infrequently engaged directly with the opinion author.

The smaller white and black bars are shares of the large gray bar and depict the rates at which each justice wrote a concurrence when they threatened to do so if not accommodated (black

bar) and when they wrote a concurrence with no advance warning (white bar). These shares look small simply because a single concurrence accounts for several instances of non-accommodation within a single bargainer-author dyad. What is most interesting is that while no justice sought retaliation against uncompromising majority opinion authors more than two thirds of the time, if a justice threatened to go public with their disagreement with the Court's majority, they were not launching blank missiles. This pattern is consistent for every justice in the sample. For instance, Marshall *never* authored or joined a separate opinion unless he threatened to do so first and Justices Stevens and Rehnquist followed through with their threats with remarkable consistency.

These descriptive data indicate that, although a breakdown in the negotiation process influences the cohesiveness of the Court's published opinions writ large, justices are far more apt to author or join a separate opinion when the tone of negotiation with the majority opinion author is exceptionally hostile.

4.6 Discussion and Conclusion

This chapter attempts to discern where and why concurring opinions originate. Adding evidence to the qualitative assessment provided by Corley (2010), I find that more than half of all concurring opinions are a consequence of a failed negotiations between a bargaining justice and a majority opinion author. I push the analysis further by bringing data to shed light on both the types of requests that most frequently provoke a concurrence and the resultant type of concurring opinion. I find that most concurrences that stem from failed negotiation do little to affect the interpretation of precedent set by the Court's majority opinion, though legal and policy disagreements are more likely to lead to concurrences that provide an additional perspective for lower courts, Congress, and the legal community. The data show that not only are justices more keen to pursue separate opinion writing when they have substantive disagreements, but that the tone of the negotiation matters. When a justice threatens to write separately if they are not accommodated, they are more likely to follow through than they otherwise would be.

However, this poses a new puzzle: some justices, like Brennan and Chief Justice Burger, invoke threats frequently in their bargaining memoranda and yet follow through less than half the time. In game-theoretic terms, this is exactly what should be expected. If a threat is credible, the activity that gives rise to the threat should change, and there should be no need for actually carrying the threat out. Of course, in the imperfect real world someone might not take a threat as credible, and ignore the threat, in which case the justice should probably act, if he/she ever wants her threats to be taken seriously. That is, it is necessary for justices to act on *some* threats, but they should not have to in every instance. Accordingly, threatening behavior without a following enactment of the threat should be the normal observed pattern.

The data are too limited to fully understand the dynamics at work. In future research, I aim to examine the ratio of threats to actual follow-through. If someone has to keep acting on their threats, that would seem to be evidence that either the person being threatened (in this case, the majority opinion author) does not believe the threat is credible, or that person believes they can absorb the "cost" of having the threat carried out. In other words, this means that either the person doing the threatening is weak (the cost of the follow through by that justice is low), or the person being threatened is very strong (again, in that they believe they can withstand the "cost" of defection). Is the ratio of threats/action higher for Chief Justices? What about the median justice or the median member of the majority coalition? Are there trends over time for a specific justice's credibility? It would also be informative to look at justice learning over time. Does the frequency of threats – and threats carried out – decrease as justices update their beliefs about their colleagues credibility? How does this affect the bargaining dynamics between specific sets of actors? The sample provides a first glimpse into the behind-the-scenes mechanisms at work, but future research should extend our understanding. Additionally, it would be interesting to compare the differences in concurrences that are immediately drafted without first engaging in bargaining with the opinion author (as in Chapter 3) and those that result from non-accommodation (as seen in this chapter).

While this analysis is limited, it still provides important insights into the downstream consequences of the opinion writing bargaining process by revealing patterns of behavior in the behind-

the-scenes bargaining game. In particular, I find that when justices request a change that would alter the policy implications of the majority opinion and the author refuses to adopt the request, the engaged justice is more likely to write separately. While a separate opinion results on average in 40 percent of all unaccommodated requests, when policy negotiations fail, concurrences result in more than 50 percent of cases. Notably, and perhaps unexpectedly, unaccommodated policy requests do not frequently result in doctrinal concurrences. Instead, these types of requests are more likely to generate limiting concurrences that restrict the application of the legal rule defined by the majority opinion or emphatic concurrences that merely emphasize a particular aspect of the Court's opinion. Only four in ten unanswered challenges to the majority opinion author's interpretation of precedent, statutory regulations, or Constitutional provisions, conversely, generate separate opinions, but these failures in negotiation are more likely to result in doctrinal concurrences whereby the bargaining justice opts to endorse only the majority's dispositional decision while providing an entirely different legal rationale for reaching the same conclusion.

To be clear, despite the content of engagement the bargaining memorandum, when a majority opinion author fails or refuses to accommodate her colleague, if a justice pursues retaliatory action as Murphy (1964) predicts, the most likely outcome is an emphatic concurrence which neither seeks to limit or expand the reach of the Court's majority opinion. Indeed, when negotiation over content is unsuccessful, we are most likely to observe concurring opinions like Justice O'Connor's in *Ferber v. New York* (1982) that are expressly not at odds with the majority opinion and serve primarily as a vehicle for dissatisfied justices to clarify their position relative to the majority coalition.

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CHAPTER 5

CONCLUSION

5.1 The Secretive Creation of U.S. Supreme Court Majority Opinions

When he was a visitor to the United States in the early 19th Century, de Tocqueville (1835) famously observed that "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." Almost 200 years later, that still seems to hold true. In a fundamental way, courts are at the center of American life (McGuire 2012). The judiciary plays a foundational role in policy concerns ranging from domestic issues, like parental and gender rights, to tax and labor disputes, to criminal cases, to immigration and environmental regulation, to, recently, resolving questions of terrorism. In recent terms, together with complex issues like campaign finance regulation and questions about the extent of separation between the church and state, major social issues like affirmative action, reproductive rights protection, and marriage equality have appeared on the docket of the U.S. Supreme Court. This, of course, is just a small sampling of the issues that come before the top court in the United States.

Particularly at the highest levels of the judicial system, where justices have greater discretion in decision making, the court plays a major role in shaping public policy. Because the Supreme Court has such an important influence on American political life, it is imperative to understand how the Court operates, and how nine life-tenured, unelected members of the bench make decisions. Yet essentially until the publication of *The Collegial Game* (Maltzman, Spriggs and Wahlbeck 2000), most political science research focused on explaining justices dispositional votes while entirely disregarding the actual output or content of the Court's opinion (e.g., Rohde and Spaeth 1976; Segal and Cover 1989; Segal and Spaeth 1993, 2002). The introduction of the strategic model (e.g. Epstein and Knight 1998) generated a push for social scientists to take seriously how justices' policy preferences are constrained by institutional and case characteristics, legal precedent, and

other collegial factors unique to the Supreme Court. For the last two decades, then, many scholars have responded by investigating the processes through which these political actors create public law (Wahlbeck, Spriggs and Maltzman 1998; Spriggs, Maltzman and Wahlbeck 1999; Maltzman, Spriggs and Wahlbeck 2000) through an examination of things like the sources of opinion content (Corley, Collins and Calvin 2011) and by mapping the final ideological location of majority opinions (Clark and Lauderdale 2010; Carrubba et al. 2012; Lauderdale and Clark 2015). These studies have undoubtedly contributed to increased understanding of the mechanisms that drive judicial behavior, yet in the final paragraph of their seminal work, Maltzman, Spriggs and Wahlbeck (2000, 154) acknowledge, "[I]t is important to note that we have not made the final step: explaining the actual content of Court opinions. This task we leave to the future."

It is precisely this call that my research seeks to answer. In this dissertation, I create a comprehensive dataset that expands the Supreme Court Opinion Writing Database (Wahlbeck, Spriggs and Maltzman 2009) to provide archival documentation of all behind-the-scenes engagement between the justices, including each page of every majority opinion draft circulated to the conference during the Burger Court era (1969-1985). For the first time, it is possible to open the black box of the Court's secretive negotiations to plainly examine the opinion writing process, uncovering if and how certain members of the Court shape judicial policy. My research combines text analysis software with hand coding of bargaining memoranda and subsequent accommodation, enabling me to show whose expressed preferences are incorporated into the opinion by matching explicit negotiation or request actions with changes in the content of the majority opinion drafts. Comprehensive content analysis of bargaining memoranda reveal both the content of the negotiation and how justices frame their requests. Combining these novel data with information on institutional features, justice characteristics, and case factors, my analyses provides new insight into the development of legal opinions. By providing an unprecedented look into the opinion writing process, my work furthers our understanding of the collegial interactions that produce the Court's opinion. Additionally, my work considers both the context that generates specific negotiation dynamics and assesses the impact of an author's decision not to modify the majority opinion.

5.2 Discerning Judicial Influence

The data amassed for this project not only allows for a novel investigation into the collegial development of Supreme Court majority opinions by precisely accounting for the content of negotiations and tracing the treatment of each request through the iterative writing process, but it also departs from existing scholarship by deriving new empirical implications from divergent theories of judicial influence. In a key sense, my approach bridges formal theoretic models that predict the ideological outcome of Court opinions to empirical scholarship that has focused on institutional, case, and collegial factors that influence the opinion writing process.

The examination of the opinion writing process was motivated by theoretical models that offer competing predictions about the outcome of the legal rule contained in the majority opinion. The median justice model contends that the legal rule will reflect the preferences of the centermost justice (Epstein et al. 2005; Hammond, Bonneau and Sheehan 2005; Martin, Quinn and Epstein 2005; Schwartz 1992). It is not a stretch to assume, consequently, that the median justice will wield inordinate power in the development of the opinion, both in the author's treatment of requests sought from engaged colleagues and in a potential bargaining justice's initial response to the majority opinion draft. Borrowing from this model, I anticipated that median authors should recognize their strategic position and would be less likely to alter the opinion. On the other hand, if the median justice opts to bargain when (s)he is not the majority author, I expected the opinion writer to work harder to accommodate her requests. It followed that the median justice might recognize her power relative to the other justices and actually be more engaged in negotiation with the author than other justices.

A second model argues that because dispositional votes are quite consistently fixed, the legal rule in the majority opinion shifts to reflect preferences of the median member of the majority coalition (Carrubba et al. 2012). Like the implications from the median justice model, I derived hypotheses that pointed to a particularly influential role for this pivotal actor. In short, if this model is a more accurate depiction of the creation of the majority's legal opinion, I anticipated

evidence would amass to highlight a unique strategic advantage that would impact both an author's accommodation decision and a justice's choice to engage with the writer in the first place.

I situated these hypotheses within models that contained numerous controls for alternative explanations that have borne fruitful results in previous works (e.g. Maltzman, Spriggs and Wahlbeck 2000; Spriggs, Maltzman and Wahlbeck 1999; Wahlbeck, Spriggs and Maltzman 1998). While less rigorously theoretically derived, these variables plausibly capture critical constraints to a justice's propensity to act. For example, accounting for a justice's workload or the nearness to the end of the Court's term are real-world factors that I expected would depress bargaining activity and/or an author's willingness to make yet another change to the majority opinion. I anticipated that the legal and political importance of the case would increase bargaining, but might cause an author to be less willing to adopt requests. As the theories of judicial influence point to power relative to the other actors, I likewise expected that past cooperative or otherwise reciprocal relationships between justices would constrain and shape behavior. As a result, in addition to the key intervening variables, the models in Chapters 2 and 3 are specified to include a host of contextual variables.

5.3 Major Findings

From a descriptive standpoint, my research provides insight into the sometimes spirited behind-the-scenes exchange between the justices during the opinion writing process. I show that justices engage in lively negotiations over legal content, but are also concerned with the clarity of the language contained in the majority opinion. Only infrequently do justices explicitly disagree about the policy implications of a particular opinion. Moreover, the content analysis of bargaining memos indicate a high degree of deference and respect for the author. Most frequently, requests directed to the author are friendly, neutral, and respectful. By and large, justices are reticent to threaten the stability of the majority coalition.

The empirical analysis in Chapter 2 reveals that while authors are keen to adopt the bulk of

suggestions offered by other justices, the type and tone of requests are the most critical predictors of an author's willingness to accommodate. Suggestions for minor revisions are almost always adopted, while the relatively rare requests to alter the scope of policy in the legal rule are most often ignored. The results reveal that despite the justices' seemingly natural affinity for niceness, threatening to join or author a concurring opinion almost always spurs the majority writer into acquiesce.

The evidence presented the first two substantive chapters (2 and 3) indicate that when we account for both the content of the exchange and for the pivotal position of the bargaining-authoring justice dyad, the influence of institutional, case, and contextual variables are less pronounced than previous research suggests (with one notable exception: my research reveals that past cooperation is the most important determinant of a justice's decision to engage in negotiation with the majority opinion author). Yet I do not find overwhelming evidence for just one model of justice influence. Instead, the results point to important patterns for both the median of the entire Court and the median member of the majority coalition.

In Chapter 3, I find that when the author is the median of the majority, she is less likely to receive requests for change from the other members of the Court's dispositional majority coalition. Instead, responding justices are more likely to forgo engagement with the author and instead opt to write a concurring opinion from the outset. This effect is reversed when the median member of the majority coalition writes the opinion for the Court: responding justices are less likely to write separately and more likely to engage directly with the author. Because this justice occupies the middle of the coalition, regardless of its ideological dispersion or heterogeneity, it may be that the author simply offers an opinion that is ideologically more proximate to a greater number of justices in the winning coalition and separate opinion writing plummets as a result.

While Chapter 3 reveals that these pivotal players are no more or less likely to engage with the opinion author than other justices, Chapter 2 provides evidence that when the median member of the majority coalition asks for changes to the content of the legal justification, she's more likely to succeed in seeing her views translated into law. This does not hold true for the median of the

entire bench, however. Instead I find that the median justice leads to alternate interesting patterns in the accommodation decision. Notably, though the "swing justice" is not a particularly powerful bargainer, when she is the author, the results show that the median is more reticent to change the opinion content. In short, I find evidence to support the conjecture that there may be multiple pivotal players on in the U.S. Supreme Court with unusual influence on the institutional output. While median authors are less apt to alter the legal rule, this author also spurs more separate opinion writing right from the outset. When they author the majority opinion, median members of the majority coalition depress the immediate circulation of separate competing opinions and, as bargainers, these actors are especially persuasive during the opinion writing stage.

By dissecting the author-bargainer dyad, explicitly accounting for the author's decision to alter the majority opinion at the request of the other members of the Court, Chapter 4 provides a look into when and why the majority coalition fractures after an author elects not to modify the opinion content after fielding a request from an engaged justice. I find that threats might be especially persuasive (as discussed in Chapter 2) because bargaining justices are more likely to write separately if they've first indicated a willingness to do so if the author does not change the majority opinion. Yet the descriptive evidence presented in this chapter suggests that justices only take the additional step to publicly note internal discord in a minority of cases when the author refuses to accommodate requests and, most frequently, the resultant separate opinions do little to inflict harm on the majority decision.

5.4 Limitations

Although the research design employed in each chapter attempts to utilize appropriate statistical modeling techniques to reflect the various stages of the opinion writing process, the analyses are not without limitations. In Chapter 2, the iterative accommodation decision is effectively reduced to a binary choice. This modeling decision resulted from the observation that most changes to the opinion drafts were not subsequently altered or removed in future drafts. That is, once an author

accommodated a request, the accommodation decision stood firm in all but the rarest instances. In other words, accommodated requests for change were removed from the opinion in fewer than one percent of all instances. Additionally, I found that, like game theoretic bargaining models predict, nearly 95 percent of bargaining ended in the first period. That is, justices rarely extended the bargaining game beyond the initial memorandum regardless of the author's accommodation decision.

The approach in Chapter 3 to examine majority coalition members' initial reaction to the first majority opinion draft similarly eschews away from the iterative nature the process. Again, this was purposeful to determine the propensity of justices' willingness to engage in bargaining instead of simply joining the majority or writing separately, but it certainly misses nuance. In particular, while occasionally justices opted first to join the opinion, they were spurred to bargain after seeing the reactions of other actors.

Both Chapters 3 and 4 examine separate opinion writing behavior, yet the results are not yet comparable to one another. Taken together, I find that more than half of all concurring opinions are written after a justice first engages in bargaining with the majority opinion author. This means that a sizable minority of separate opinions are written without prior engagement, as I find in Chapter 3. While I can point to systematic factors that motivate a justice to write separately from the outset – e.g., the case raises numerous legal issues, the justice is ideological removed from the rest of the winning coalition, or the median justice is tasked with authoring the Court's opinion – the analysis is too limited to ascertain whether these types of concurrences differ in content from the separate opinions that result from a breakdown in the exchange between the bargainer-author dyad. Indeed, the current results in Chapter 3 provide no insight into the content of these concurrences whatsoever. Conversely, Chapter 4 codifies the type of concurring opinion that stems from non-accommodation. However, since this analysis is limited to three randomly selected terms it provides only limited, largely qualitative insight into justice learning and the effectiveness of threats over time, for example.

Finally, due to data availability, the entire project is limited to cases decided during the

Burger Court, which had infrequent turnover in personnel. The stability of membership may reduce the leverage of certain collegial characteristics – like that of the freshman justice – and it does not allow for an examination of chief justice effects. The comprehensiveness of the dataset to include every case decided by majority opinion ensures that this particular Court heard almost every issue that *any* Court might face, and I am confident the results are generalizable beyond the period under consideration, but as the private papers of the Rehnquist Court are released, it will be informative to note what, if any, differences exist in style and substance.

5.5 Avenues for Future Research

The previous section suggests that it would be valuable to simply extend the analysis of concurring opinions that result at two disparate stages during the opinion writing process: in the absence of bargaining and after the failure of a bargainer to achieve satisfactory compromise with the majority opinion author. A descriptive analysis would shed light on whether the types of concurrences that result in these stages are substantively different from one another. This in and of itself would be illuminating, but together my research suggests that we know little of what concurring opinions actually accomplish. To date, theoretical and empirical studies of these separate opinions treat the behavior as merely expressive action (e.g., Carrubba et al. 2012; Corley 2010). Yet I find that the mere threat of a separate opinion is often enough to induce action on behalf of the opinion author and extant work suggests that concurring opinions might influence compliance among the lower courts (Hansford and Spriggs 2006). This evidence points to the need for a new theory of concurring opinions: given that they are costly to write and their occurrence does not have legally binding impact on the instant case, why exactly do justices elect to write separately?

In future research, I plan to examine the *immediate* benefits of publishing a concurring opinion and explain the potential for concurring opinions to offer *future* benefits. When the bargaining period ends and a responding justice has made little headway with the author, the results of my current analysis lend support to the notion that a justice might gain immediate expressive

benefit from going public with her individual perspective. Again, the modal category indicates that many of these concurrences are emphatic in nature and do little to alter the interpretation of the majority's legal rule. On the other hand, two thirds of concurrences *do* seek to offer a different interpretation of the case and might therefore provide an important signal to lower courts concerning the preferences of the justices on the current Court as well as providing an avenue for non-compliance when there is membership replacement.

For example, current empirical evidence suggests that a justice is more likely to write a concurring opinion as the ideological distance from the majority coalition median increases (Carrubba et al. 2012). Descriptive data reveal concurrences on *both* sides of the coalitional median, raising an unexplained quandary concerning the influence of concurrences as a signal to lower courts: if the median member of the Court authors a concurrence in a precedent-setting case, it signals that median is not entirely satisfied with the legal rule established in the majority opinion. Lower courts, then, have a choice to faithfully execute the legal rule and risk unfavorable review by the Supreme Court or to adopt the legal rule most preferred by the median member of the Supreme Court by announcing a decision that is at least partially inconsistent with the Court's majority opinion but would likely garner the support of the Court's median and all of the justices in the dissent. As a result, we would expect to see incremental movement away from the holding in the majority decision.

To animate this puzzle, consider *Roe v. Wade* (1973), one of the most famous decisions to come out of the Burger Court. In this 7-2 dispositional decision, the majority of the Court endorsed Justice Blackmun's majority opinion that centered on the Constitution's implied right to privacy and established a three tier approach to balance a woman's right to choose with the state's legitimate concern for maternal and fetal protection. Moderate Justice Stewart offered a concurring opinion in this case to note his belief that the legal rule overstepped since it dealt with legislation not yet before the Court. He countered by pointing out that there is a legitimate state interest and that these objectives are "amply sufficient to permit a State to regulate abortions as it does other surgical procedures, and perhaps sufficient to permit a State to regulate abortions more

stringently or even to prohibit them in the late stages of pregnancy." While Blackmun's opinion ought to have had the force of law and Stewart's ought not, the last forty years of abortion rulings have chipped away at the majority's opinion in *Roe* and have instead more faithfully adhered to Stewart's concurrence, discarding the three tier approach, and consistently upholding regulations and restrictions to abortion access.

Put plainly, concurring opinions may give lower courts alternative interpretations of the legal rule that eventually replace or at least substantially affect the implementation of the majority opinion. Future work should develop a formal theoretic-approach to evaluate the role of concurring opinions within the judicial hierarchy.

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