

EQUITY IN SUPREME COURT OPINION ASSIGNMENT

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ABSTRACT: When the Chief Justice of the Supreme Court votes with the majority, he assigns the writing of the majority opinion to a particular Justice. The Chief Justice is expected to distribute the opportunity evenly among the Associate Justices. This article develops a new method for measuring distributional equality, applies it to a 41-year period extending across four chief justiceships, and finds that assigners adhere to the norm of equal distribution. Even so, we demonstrate that the equal assignment norm does not preclude assigners from behaving strategically, and we find evidence of such behavior in the Burger and Rehnquist Courts.

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Scholars agree that the norm of equal distribution characterizes the assignment of the task of writing majority opinions in the Supreme Court.¹

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1. See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); Saul Brenner, *Strategic Choice and Opinion Assignment on the U.S. Supreme Court: A Reexamination*, 35 W. POL. Q. 204 (1982); Sue Davis, *Power on the Court: Chief Justice Rehnquist's Opinion Assignments*, 74 *JUDICATURE* 66 (1990); Forrest Maltzman & Paul J. Wahlbeck, *May It Please the Chief?: Opinion Assignments in the Rehnquist Court*, 40 *AM. J. POL. SCI.* 421 (1996); Gregory J. Rathjen, *Policy Goals, Strategic Choices, and Majority Opinion*

Assigning an opinion to one Justice rather than another has serious ramifications, as the assignee presents the Court's reasoning and conclusions to the public, the lower courts, and the public officials charged with enforcing the decision. Previous studies of opinion assignment have examined the number of signed opinions of the Court² each Justice wrote during the Court's annual Term. This article shows that this measure has various inadequacies, formulates an alternative, and applies and evaluates that alternative. We begin by describing and explaining our procedures for determining assigners and assignees.

I. THE ASSIGNMENT PROCESS

The rule governing the assignment of opinions for the Court is unequivocal. The Chief Justice makes the assignment if he votes with the majority at the conference vote on the merits.³ If the Chief Justice is not among the majority, the most senior Associate Justice in the majority assigns the opinion.⁴ But the Justices' assignment sheets and supplementary memoranda provide better indications of who made the assignments than the voting records.⁵ Most such memoranda are sent from the Chief Justice and indicate any change in the assignee of a given case.⁶ Associate Justices who make assignments also circulate memoranda to all Justices identifying their assignees. Our source of these data for the Burger and Rehnquist Courts is the assignment files provided Justice Brennan by the Chief Justice. For the Vinson and Warren Courts, we use the assignment sheets prepared by the Chief Justice.⁷

II. INADEQUACIES OF THE EXISTING MEASURE

Neither the conference vote on the merits of a case nor the final report vote necessarily reveals who made the assignment. Imponderables when using the final vote include whether the ostensible assigner who specially concurs—i.e., agrees with the Court's decision but not its opinion—was a member of the conference vote coalition. Reference to the assignment sheets indicates that such

Assignments in the U.S. Supreme Court: A Replication, 18 AM. J. POL. SCI. 713 (1974); David W. Rohde, *Policy Goals, Strategic Choice and Majority Opinion Assignments in the U.S. Supreme Court*, 16 MIDWEST J. POL. SCI. 652 (1972); Elliot E. Slotnick, *The Chief Justice and Self-Assignment of Majority Opinions: A Research Note*, 31 W. POL. Q. 219 (1978); Harold J. Spaeth, *Distributive Justice: Majority Opinion Assignments in the Burger Court*, 67 JUDICATURE 299 (1984); S. Sydney Ulmer, *The Use of Power on the Supreme Court: The Opinion Assignments of Earl Warren, 1953-1960*, 19 J. PUB. L. 49 (1970).

2. Judgments of the Court are also included in the Justices' totals. Opinions of the Court require the concurrence of a majority of the participating Justices; judgments do not. Hence, though it is the prevailing opinion, it lacks the authoritative quality of a signed opinion of the Court.

3. This situation arises about 80% of the time. HAROLD J. SPAETH, UNITED STATES SUPREME COURT JUDICIAL DATABASE, 1953-1998 TERMS (1998).

4. SEGAL & SPAETH, *supra* note 1, at 261-62.

5. See *infra* Part II.

6. The developments that prompt such changes are noted *infra* Part II.

7. All are housed in the Library of Congress.

persons usually are excluded from the majority vote coalition, but not always. For example, the Justice initially assigned to write the opinion of the Court sometimes ends up specially concurring—agreeing with the Court’s decision but not its opinion. The actual assignment sheets indicate that the authors of concurring opinions occasionally are part of the majority coalition recorded at the final vote. Relying on the merits vote also can be problematic, for the Justices occasionally change sides between this vote and the final one. These changes can cause a break-up of the original vote coalition,⁸ or, more commonly, the departure of the assigner from the original vote coalition. Some assignment sheets, for example, show that an Associate Justice assigned certain cases, while the voting reports show the Chief Justice as a member of the majority opinion coalition.⁹

Furthermore, assigners sometimes make mistakes.¹⁰ For example, Justice White once advised Chief Justice Burger that “I appreciate having the opportunity to see the light, but my notes show that I was in the minority. . . . Someone else should perhaps take this one.”¹¹

The assignment sheets and accompanying memos also indicate that the Court occasionally disregards its assignment rule. Thus, although only Justice Scalia had less seniority, Justice O’Connor assigned *Boos v. Barry*¹² to herself. With only Justices Scalia and Kennedy junior, she self-assigned *Penry v. Lynaugh*.¹³ Justice Stevens, sixth in seniority, assigned *Tompkins v. Texas*,¹⁴ and Justice Blackmun, fifth in seniority, assigned *Allegheny County v. ACLU*.¹⁵ Justices Brennan and White jointly assigned *Missouri v. Jenkins*.¹⁶

8. During the 1956–1967 Terms, 16% of the cases in which one or more of the Justices changed his vote between the conference and the publication of the decision transformed an original minority into a majority. Brenner, *supra* note 1, at 204.

9. *E.g.*, *Fusari v. Steinberg*, 419 U.S. 379 (1975); *Chapman v. Meier*, 420 U.S. 1 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

10. In a memorandum at the start of the 1976 Term, Justice Stewart informed Chief Justice Burger that he would self-assign two cases “rather than inflict them upon any of my colleagues” given “my dismal track record as an assigner.” Potter Stewart, *Memorandum to the Chief Justice*, in WILLIAM J. BRENNAN’S ASSIGNMENT BOOKS (1976). As evidence of this record, the memorandum referred to *United States v. Glaxo Group Ltd.*, 410 U.S. 52 (1973), in which Justice White wrote the opinion for a six-member majority, with Justices Stewart, Rehnquist, and Blackmun dissenting.

11. Byron R. White, *Memorandum to the Chief Justice*, in WILLIAM J. BRENNAN’S ASSIGNMENT BOOKS (1976) (*referring to Ingraham v. Wright*, 430 U.S. 651 (1977)).

12. In 1980, Justice Marshall wrote the Chief Justice as follows: “You have assigned me the above opinion. Will you please remember that one day last week I told you I would appreciate not getting this opinion because the lawyer for the winning side . . . was a former law clerk of mine.” Thurgood Marshall, *Memorandum to the Chief Justice*, in WILLIAM J. BRENNAN’S ASSIGNMENT BOOKS (1981). The assignment sheets also occasionally omit an assignment altogether, as in *United States v. Eichman*, 496 U.S. 310 (1990).

12. 485 U.S. 312 (1988).

13. 492 U.S. 302 (1989).

14. 490 U.S. 754 (1989). No majority opinion resulted because of a tied vote. Justice O’Connor did not participate.

15. 492 U.S. 573 (1989).

16. 495 U.S. 33 (1990).

Apportionment of opinions among the Justices also produces irregularities, requiring close attention not only to the assignment sheets, but also to the vote reports. Efforts to achieve an equal distribution are more complicated than the literature indicates.¹⁷ The Chief Justice assigns the vast majority of opinions, but equal distribution also depends on assignments from Associate Justices. A petulant Burger memorandum documents the difficulty: "Just as I was about to send the current assignments out, I received Bill Brennan's assignments of cases. This requires me to do a total and complete revision, and it will not be out today."¹⁸

Vote changes also upset the appletart. After referring to several cases with uncast votes, Chief Justice Burger wrote: "I am not in a position to make these final assignments until all votes are firmly in hand. Even one change has a 'domino' impact on all other assignments—especially at this time of the Term!"¹⁹

The aggregation and disaggregation of docket numbers adds to the complications. A single assignment of two or three docket numbers may appear in the reports as three separate citations, and as such, three assignments. For example, the 1974 decisions, *Pell v. Procnier*,²⁰ *Procnier v. Hillery*,²¹ and *Saxbe v. Washington Post Co.*,²² intended as a single assignment, ended as two separate opinions by Justice Stewart. Conversely, multiple assignments sometimes collapse into a single citation.²³ Per curiam assignments, which do not count toward equal distribution, sometimes result in signed opinions.²⁴ The reverse also occurs.²⁵

III. AN ALTERNATIVE APPROACH

To avoid these complicating factors, we can focus on the point where the assigner controls selection: the periodic assignment days.²⁶ The Chief Justice

17. See Maltzman & Wahlbeck, *supra* note 1; Elliot E. Slotnick, *Who Speaks for the Court?: Majority Opinion Assignment from Taft to Burger*, 23 AM. J. POL. SCI. 60 (1979); Spaeth, *supra* note 1. "With respect to the assignments, it is a particularly difficult matter at this time of year, since it is the last opportunity to strike a balance for all the Brethren. For that reason, in those cases in which I am in the majority, I will not undertake to make the assignments until after all the other cases are decided in Conference." Mem. of Burger to Douglas, April 25, 1974.

18. Warren E. Burger, *Memorandum to the Conference*, in WILLIAM J. BRENNAN'S ASSIGNMENT BOOKS (Library of Congress ed. 1977).

19. Warren E. Burger, *Memorandum to the Conference*, in WILLIAM J. BRENNAN'S ASSIGNMENT BOOKS (Library of Congress ed. 1978).

20. 417 U.S. 817 (1974).

21. 417 U.S. 817 (1974).

22. 417 U.S. 843 (1974).

23. Companion cases, necessitating a single author as well as separate citations, also upset the distributional balance of an assignment day. For instance, the four separately decided reapportionment cases that Chief Justice Warren assigned to himself on November 26, 1963, comprised one-third of that day's total.

24. *E.g.*, *Fuller v. Oregon*, 417 U.S. 40 (1974); *Van Lare v. Hurley*, 421 U.S. 338 (1975).

25. *E.g.*, *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980).

26. An assignee's retention of an opinion depends on the continuation of the majority coalition.

compiles an “assignment sheet” for each assignment day that lists the assignees and the name of the assigning Justice. Typically, eight such sheets—one per month—are prepared and circulated per Term.²⁷ Scattered assignments that supplement these sheets are counted with the pertinent sheet.²⁸

Assignments are made during the week in which oral argument occurs. The clerk of the Court schedules these arguments.²⁹ The number of assignments made per assignment date typically ranges from ten to twenty. Although the assignments made on any given day include those of Associate Justices, they are otherwise uncontaminated by developments beyond the Chief’s control. Hence, using assignment dates rather than the aggregate number per Term should enable one to determine more precisely the extent to which the norm of equal distribution controls assignments.³⁰ In particular, we calculate equality of distribution by dividing the total number of assignments (A), excluding those assigned as per curiam opinions, by the number of participating Justices (J). Regardless of whether all nine Justices are available for assignment, only one apportionment achieves equal distribution:

$$A/J = ErX$$

where X is the remainder resulting from the division; X is zero when A is divisible by J, and the remaining number of assignments when it is not. If the number is divisible without remainder (X=0), each Justice receives the same number of assignments. Any Justice whose total number of assignments does not fit perfectly into this pattern is scored as deviating by that number. Thus, if 13

If it breaks up, a new assignment is made from among the new coalition’s membership. However, the original assignee retains the opinion almost 60 percent of the time. See Saul Brenner & Harold J. Spaeth, *Majority Opinion Assignments and the Maintenance of the Original Coalition on the Warren Court*, 32 AM. J. POL. SCI. 72, 80 (1988).

Here, when reassignments occurred within three days of the original assignment, we ignore the original assignment and count only the second assignment; reassignments occurring at later times are counted as two separate assignments. Only 116 assignments (4% of all assignments) fell into the latter category.

27. In many Terms two assignment sheets are prepared during October. Rarely does one that postdates the Warren Court carry a February date.

28. On a handful of occasions an assignment occurs too many days distant to be included in the succeeding assignment day. For example, Justice Douglas assigned the opinion in *Lefkowitz v. Newsome*, 420 U.S. 283 (1975), to Justice Stewart on December 30, 1974, but the next assignment day was January 27, 1975. We exclude the isolated assignments that occur weeks after the regular assignment days. These exclusions appear to slightly skew our results away from distributional equality. Thus, Justice Stewart was the only underassigned Justice on the assignment day following his receipt of *Lefkowitz*.

29. ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 575–76 (7th ed. 1993).

30. Since the best way to measure equality in assignment is by assignment day, earlier studies using some measure of workload have erred. See Maltzman & Wahlbeck, *supra* note 1, at 421. These studies not only use the individual case as their unit of analysis, but also include workload as an independent variable. This clearly contaminates results as equity is an assignment day consideration, not a cumulative one. In addition, the prevalence of this equity as a consideration in assignment, as we demonstrate here, also suggests a lack of variance and further contaminates analysis. This variable masks other factors that influence assignments.

opinions are distributed as follows among nine Justices—A=3; B, C, and D=2; E, F, and G=1; and H and I=0—A, H, and I are deviant. A is overassigned two cases, and H and I are underassigned one, since the most equitable division of 13 among nine Justices is for five to receive one assignment and four to receive two.

Of course, equality as measured in this way does not preclude assigners from behaving strategically, for example, by favoring ideological confreres by giving them the cases of greatest importance.³¹ Furthermore, when $X > 0$, the Chief Justice in assigning the remaining cases can prefer Justices attitudinally aligned with himself.

IV. THE IMPACT OF EQUAL DISTRIBUTION ON ASSIGNMENT

Table 1 contains a listing, by Term, of the deviation of each assignment from that assignment day's most equal distribution. These data display a remarkable level of distributional equality. Overall, 2,300 of 2,891 assignments (79.6%) reflect a perfectly equal distribution. Another 471 assignments (16.3 percent) are but a single assignment removed from perfect equity. Thus, 95.8% do not deviate by more than a single assignment from parity. At the other extreme, only six assignments (2.1%) deviated from that day's most equal distribution by three assignments. Over the approximately 300 assignment dates under consideration here (300 assignment days including 2,891 assignments in the total data set or approximately 10 assignments per assignment day), the assigner never deviated from perfect equity by more than three assignments. Clearly, equal distribution powerfully constrains the assignment behavior of all assigners.

Table 1. Deviation of Assignments per Assignment Day from Distributional Equality (by Term)

Term	Deviation from Mode					% 0	N
	0	1	2	3	4		
Vinson Court							
1950	48	12	3			76.2	63
1951	59	11	1	1		81.9	72
1952	<u>60</u>	<u>11</u>	<u>1</u>	<u>-</u>		<u>83.3</u>	<u>72</u>
total	167	34	5	1		80.7	207

31. Indeed, the Justices expect the Chief Justice to disproportionately assign salient cases to himself. Slotnick, *supra* note 15; Spaeth, *supra* note 1.

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Term	Deviation from Mode					% 0	N
	0	1	2	3	4		
Warren Court							
1953	74	6	1			91.4	81
1954	41	11	6			70.7	58
1955	62	18	1			76.5	81
1956	61	19	2			74.4	82
1957	68	19	3			75.6	90
1958	67	11	3			82.7	81
1959	64	12	5			79.0	81
1960	46	28	7			56.8	81
1961	47	8	3			81.0	58
1962	55	13	4			76.4	72
1963	81	6	2	1		90.0	90
1964	51	18	2	1		70.8	72
1965	45	22	5			62.5	72
1966	39	19	5			61.9	63
1967	43	16	4			68.3	63
1968	<u>47</u>	<u>12</u>	<u>4</u>	<u>-</u>		<u>74.6</u>	<u>63</u>
total	891	238	58	2		75.2	1188
Burger Court							
1969	67	14	7			76.1	88
1970	45	18	9			62.5	72
1971	47	17	7	2		64.4	73
1972	46	15	2			73.0	63
1973	64	8				88.9	72
1974	51	7	1			86.4	59
1975	47	12	1			78.3	60
1976	49	11	3			77.8	63
1977	58	11	3			80.6	72
1978	60	2				96.8	62
1979	48	14	1			76.2	63
1980	64	6	2			88.9	72
1981	66	5	1			91.7	72
1982	57	13	2			79.2	72
1983	49	11	3			77.8	63
1984	57	10	3			81.4	70
1985	<u>51</u>	<u>15</u>	<u>6</u>	<u>-</u>		<u>70.8</u>	<u>72</u>
total	926	189	50	3		79.3	1168

Term	Deviation from Mode					% 0	N
	0	1	2	3	4		
Rehnquist Court							
1986	59	2	2			93.7	63
1987	67					100.0	67
1988	72					100.0	72
1989	61	2				96.8	63
1990	<u>57</u>	<u>5</u>	<u>1</u>			<u>90.5</u>	<u>63</u>
total	316	9	3			96.3	328
GRAND							
TOTAL	2300	471	114	6		79.6	2891

The Rehnquist Court fares best with 96.3% of its assignments fitting a pattern of perfectly equal distribution. Three adjacent Terms, 1987–1989, two at 100% equity, beat the remaining 38 Terms we analyze. The other two Rehnquist Terms rank fifth and eighth overall. The overall percentage of equity for the other three Courts varies little. In the Vinson Court 80.7% of the assignments were made equitably; the Burger Court, 79.3%; and the Warren Court, 75.2%. In only six Terms (four Warren, two Burger) did the assigners attain less than 70% equality.

There is no correlation between the amount of deviation and the number of assignments made on any given assignment day. Few assignments as frequently produce disproportionate deviation as do days when more than 20 opinions are assigned, and vice-versa. Neither, as Table 2 shows, do the number of deviations appreciably increase at the end of the Term. There are approximately as many Terms with more deviations as with fewer deviations on the last two assignment days of the Term. Nor do the number of assignments themselves increase at the end of a Term. The final two assignment days of the three Vinson Court Terms generated barely half the assignments of the overall Term average. On the Warren and Rehnquist Courts, end of Term assignments slightly exceed these Courts' overall average, while the Burger Court averaged slightly less. Clearly, neither of the end of Term variables—number of assignments distributed per assignment day or deviation from equal distribution—produces a systematically significant effect.

Table 2. Assignments and Their Deviation from Equity per Assignment Day and at the End of Term

Term	Average Number of Assignments		Average Deviation	
	Per Assignment Day	Final Two Assignment Days	Per Assignment Day	Final Two Assignment Days
Vinson Court				
1950	12.0	5.0	2.1	0.0
1951	11.1	6.5	1.6	2.0
1952	<u>13.1</u>	<u>8.0</u>	<u>1.5</u>	<u>2.0</u>
Average	12.1	6.5	1.7	1.3
Warren Court				
1953	7.2	3.5	0.8	0.0
1954	10.0	9.0	2.4	4.0
1955	9.4	11.0	2.1	1.0
1956	10.3	17.0	2.3	5.0
1957	10.3	6.0	2.2	1.0
1958	11.4	14.0	1.6	2.0
1959	10.9	9.0	1.9	1.5
1960	12.9	12.0	3.9	4.0
1961	11.4	17.0	1.5	2.0
1962	13.5	19.5	2.1	2.5
1963	10.8	7.5	0.9	0.0
1964	12.0	9.0	2.6	3.0
1965	12.8	11.5	3.4	4.0
1966	15.6	15.5	3.4	3.5
1967	16.6	21.0	2.7	3.0
1968	<u>16.1</u>	<u>15.0</u>	<u>2.3</u>	<u>4.0</u>
Average	12.0	12.3	2.3	2.5

Term	Average Number of Assignments		Average Deviation	
	Per Assignment Day	Final Two Assignment Days	Per Assignment Day	Final Two Assignment Days
Burger Court				
1969	9.5	8.5	1.9	3.0
1970	15.3	9.0	3.4	2.5
1971	15.1	11.5	2.9	5.0
1972	18.0	13.5	2.4	3.0
1973	14.6	12.5	1.0	1.0
1974	16.7	18.0	1.1	1.0
1975	19.4	20.5	1.9	3.0
1976	17.9	19.5	2.0	3.5
1977	17.1	19.0	1.8	2.5
1978	18.6	19.0	0.3	0.0
1979	16.0	17.5	1.9	3.5
1980	15.1	12.5	1.0	1.0
1981	17.6	22.5	0.8	2.0
1982	19.5	22.5	1.9	1.0
1983	21.9	24.0	1.8	3.0
1984	17.9	21.0	1.6	3.0
1985	<u>19.0</u>	<u>24.0</u>	<u>2.6</u>	<u>3.0</u>
Average	17.0	16.4	1.8	2.4
Rehnquist Court				
1986	21.7	22.5	0.6	2.0
1987	19.3	22.0	0.0	0.0
1988	17.0	19.0	0.0	0.0
1989	18.6	15.0	0.3	1.0
1990	<u>17.0</u>	<u>17.0</u>	<u>0.9</u>	<u>1.0</u>
Average	18.8	19.9	0.3	0.8

Table 3 examines the possibility of strategic assignments. The proportions are obtained by summing for each Justice *i* and each assignment *j*, the difference between the most equitable number of assignments made *E* and the number actually made *A*:

$$\sum_{ij} (E_{ij} - A_{ij})$$

Thus, for example, on the eleven assignment days during the first Term of the Burger Court in 1969, Justice Marshall received the equitable number of assignments on five days, was one below on three, one above on two, and two

above on one. This produces a net of one extra assignment. We follow this same procedure for each of the other 16 Terms of the Burger Court on which Justice Marshall served to find a net of - 10 assignments for the 17 Terms, an average of -.59 per Term.

Table 3. Cumulative Number of Deviations from the Most Equal Distribution of Assignments per Assignment Day per Justice per Term

Justice	Court			
	Vinson	Warren	Burger	Rehnquist
Black	3.33[10/3]	0.25[4/16]	3.50[7/2]	
Blackmun			-0.75[- 12/16]	-1.00[- 5/5]
Brennan		0.00[0/13]	-0.35[- 6/17]	1.20[5/4]
Burger			0.76[13/17]	
Burton	-2.33[- 7/3]	-2.60[- 13/5]		
Clark	-0.33[- 1/3]	1.43[20/14]		
Douglas	1.67[5/3]	1.13[18/16]	-1.29[- 7/5.43]	
Fortas		-0.75[- 3/4]		
Frankfurter	-1.33[- 4/3]	-0.22[- 2/9]		
Goldberg		-1.00[- 3/3]		
Harlan		-0.46[- 7/15]	-0.50[10/2]	
Jackson	-1.00[- 3/3]	1.00[1/1]		
Kennedy				-0.59[- 2/3.4]
Marshall		0.50[1/2]	-0.59[- 10/17]	0.00[0/5]
Minton	-1.00[- 3/3]	-2.33[- 7/3]		
O'Connor			0.20[1/5]	1.80[9/5]
Powell			0.76[11/14.5]	4.00[4/1]
Reed	0.67[2/3]	-0.86[- 3/3.5]		
Rehnquist			1.72[25/14.5]	0.80[4/5]
Scalia				0.00[0/5]
Souter				-3.00[- 3/1]
Stevens			-0.48[- 5/10.5]	0.80[4/5]
Stewart		-0.18[- 2/11]	0.83[10/12]	
Vinson	-0.67[- 2/3]			
Warren		-0.69[- 11/16]		
White		-0.42[- 3/7.14]	1.53[26/17]	3.40[17/5]
Whittaker		-1.60[- 8/5]		

The overall distribution of assignments among the Justices also does not vary much, especially on the Vinson and Warren Courts. Only four of the nine Vinson Court Justices deviated by more than one assignment per Term, along with five of the sixteen Warren Court Justices. Moreover, this minimal imbalance occurs randomly for the Vinson and Warren Courts but not for the Burger and Rehnquist Courts.

On the Vinson Court, only the two liberals, Justices Douglas (+1.67) and Black (+3.33), were appreciably favored, Black largely because of self-assignment. Least favored was Justice Burton, a sluggish writer³² who was shortchanged an average of 2.33 opinions per year. Chief Justice Vinson neither favored himself nor his fellow conservatives, Justices Minton, Clark, Jackson, and Frankfurter. Except for Justices Black, Burton, and Douglas, Term deviations did not exceed a per Term average of more than 1.33 opinions. Thus, the Vinson Court assignments appear nonstrategic.

The Warren Court pattern is similar. Most deviant are three Justices who served only briefly: Justices Whittaker, Minton, and Burton. Justice Minton's underassignments all came in his final Term and may have resulted from the lengthy illness that forced his retirement.³³ Justice Burton's thirteen underassignments made him again the least favored Justice. Justice Whittaker, who retired after five years on the advice of his physician because of physical exhaustion,³⁴ averaged 1.6 assignments less than the norm per Term. No other Justice was underassigned more than one opinion per Term. Chief Justice Warren underassigned himself almost identically to Vinson: -0.69 and -0.67, respectively. The single most favored Warren Court Justice was Justice Clark, at +1.43, followed by Justice Douglas at +1.13. Given that Clark was ideologically most distant from Warren on most, if not all, issues dealing with freedom and equality, his preferential treatment is inapposite to the liberal orientation of Warren's Court, especially when one notes that half of Clark's twenty overassignments occurred during his last three Terms (1964-1966), when liberalism was peaking. Moreover, not only did Warren not appreciably favor himself, neither did Black, the senior associate during all of Warren's chief justiceship (+.25). Other liberals were also disfavored: Brennan (.00), Fortas (-.75), and Goldberg (-1.00). Furthermore, some nonliberals were less disfavored than the underassigned liberals: Frankfurter -.22, White -.42, and Harlan -.46.

The apparently random distribution of assignments in the Vinson and Warren Courts does not characterize the Burger and Rehnquist Courts. Assigners can achieve numerical parity while pursuing strategic goals. Thus, on the conservative Burger Court, the five reputedly liberal Justices all received negative scores, notwithstanding that two of them functioned as senior associates: Douglas in the 1970-1974 Terms (-1.29) and Brennan in the 1975-1985 Terms (-0.35). Joining them were Marshall at -0.59, who achieved a net loss of four in 1971 and 1983 and three in 1984; Stevens -0.48; and Blackmun -0.75. Justice Blackmun fell into disfavor concomitant with his ideological separation from the Chief Justice. He was underassigned two opinions in the 1982 and 1983 Terms and four in

32. SPAETH, *supra* note 3.

33. N.E.H. Hull, *Minton, Sherman*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 552 (Kermit L. Hall et al. eds., 1992).

34. Eric A. Chiappinelli, *Whittaker, Charles Evans*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES*, *supra* note 33, at 930.

1985. By contrast, the Justices on the other side of the ideological fence all received positive scores, except for the briefly serving Harlan, who was underassigned one opinion in his two Terms (-0.50). Chief Justice Burger, unlike his two predecessors, gave himself more than his share, +0.76. Justices Stewart and Powell received similar proportions, +0.83 and +0.76, respectively. Most substantially favored (other than Black who served only during Burger's first two years) were White (+1.53) and Rehnquist (+1.72).³⁵ Justice Rehnquist never received less than an equal share in any Term.

To an even greater extent than his predecessor, Chief Justice Rehnquist has maintained numerical equality while effecting an ideological strategy. He egregiously favored Justice White, +3.40, providing him with four extra assignments in 1986, 1987, and 1988, two in 1989, and three in 1990. Chief Justice Rehnquist also overassigned Justice O'Connor, +1.80, along with himself, +0.80. Surprisingly perhaps, the conservative Justices Scalia and Kennedy did not receive favorable treatment, scoring 0.00 and -0.59, respectively. Justice Stevens did better than an ideological strategy would suggest, +0.80, while Justice Marshall could have been expected to do worse than perfect equality. Justice Brennan received a positive score, +1.20, but only because of self-assignment.



The results of our analysis of the per term assignment ratios across the four Courts demonstrate that although assigners—primarily the Chief Justices—achieve remarkably even distributions of opinions, they are able to pursue strategic objectives, particularly those of an attitudinal sort. Thus, achieving parity did not preclude assigners from favoring those who are ideologically most like themselves. Other strategic objectives are also possible. Equal distribution does not preclude disproportionately parceling salient assignments to preferred recipients or assigning opinions to Justices most vital to the continued existence of winning coalitions. Such variables might explain why an assigner chooses one Justice over another. We leave to another day the construction of a more sophisticated model that might explain the patterns of assigners' preferences that are consistent with equal distribution.

35. As Table 3 shows, Justice Rehnquist, whom Chief Justice Burger most favored, was followed by Justice White. When Justice Rehnquist became Chief Justice, he most favored Justice White (+3.40), except for Justice Powell (+4.00) during Justice Powell's single Term on the Rehnquist Court.

