

# STRATEGIC PASSING AND OPINION ASSIGNMENT ON THE BURGER COURT\*

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*Previous research indicates that U.S. Supreme Court justices who are likely to control opinion assignments may withhold votes in an initial round of conference voting in circumstances that suggest that this behavior has strategic origins. Specifically, scholars have suggested that justices may pass in conference voting to gain control over the opinion assignment. This study extends this literature by developing a theory of the relationship between strategic passing in a conference vote and opinion assignment, which is assessed through a quantitative analysis of opinion assignments made by Chief Justice Burger. Specifically, we argue that justices selected to write opinions by those who have passed to strategically join a majority will be more ideologically peripheral compared to the majority coalition as a whole than justices who are assigned to write opinions following conference votes cast in order of seniority. Consistent with this theory, we find that Chief Justice Burger, indeed, made opinion assignments that diverged more strongly from the ideological composition of the Court's majority when he passed in conference compared with opinion assignments he made when he voted in order of seniority.*

While Supreme Court justices typically cast conference votes on the merits beginning with the chief justice and proceeding through the associate justices in order of seniority, justices may also “pass” or reserve their vote in the initial discussion of the case in conference until other justices have revealed their own votes. Such behavior has been a prominent topic in popular journalistic accounts of the Court’s inner workings, particularly among descriptions of the Court during the tenure of Chief Justice Warren Burger, which often emphasize his frequent refusal to cast votes in order of seniority. For example, Thomas (1979) reports that “Burger ha[d], at times, held back or switched his vote to keep control over the opinion assignment. . . . Indeed, a Justice once joked that ‘on Burger’s tombstone . . . should be carved the inscription: I think I’ll pass for the moment’” (p. 3; see also Woodward and Armstrong, 1979).

These accounts of strategic passing by justices who may leverage their position as chief justice to secure the right to assign an opinion have also drawn scholarly attention. In particular, Johnson, Spriggs, and Wahlbeck (2005) show that justices are apt to pass in the initial conference vote in circumstances that strongly suggest strategic behavior, particularly in cases with close votes where the majority coalition is not easily predictable in advance and in salient cases where the costs of losing an opinion

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assignment opportunity by chance may be high. Yet, despite an increased understanding of the circumstances under which a justice may fail to cast an initial conference vote, we have no systematic evidence that passing is followed by strategic opinion assignment. In other words, extant research on conference voting has proceeded on the untested assumption—validated only by journalistic accounts and well-worn anecdotes—that senior justices pass to influence the opinion assignment process.

In this article, we investigate the foundations of strategic passing by analyzing the relationship between an assigning justice passing during the conference vote and the justice's choice in opinion assignment. We proceed by developing a theory of the consequences of strategic passing for opinion assignment on the United States Supreme Court. We argue that an assigning justice who passes in an initial conference vote is likely to assign the opinion to a justice who is more ideologically moderate relative to the emergent majority coalition than in other cases for which the same justice controls the opinion assignment. We then test this theory by examining the behavior of Chief Justice Burger. Our results support our theory of strategic passing, as well as impressionistic accounts of Chief Justice Burger's strategic behavior in conference voting, showing that Chief Justice Burger made opinion assignments that diverged more strongly from the ideological composition of the Court's majority (in the predicted direction) when he passed in conference compared with opinion assignments he made when he voted in order of seniority. Though our empirical analysis is limited to the behavior of Chief Justice Burger, our results suggest that chief justices more generally may reserve their votes strategically in conference to control opinion assignments.

## COLLEGIAL DECISION MAKING AND THE JUDICIAL CONTEXT

Much scholarship supports the view that Supreme Court justices act as strategic policy makers who pursue decisions and written opinions that, as nearly as possible, reflect their policy preferences (e.g., Maltzman, Spriggs, and Wahlbeck, 2000; Murphy, 1964). Indeed, opportunities for strategic behavior emerge at many points in the Court's decision process, such as granting certiorari (Brenner and Krohl, 1989; Caldeira, Wright, and Zorn, 1999), casting initial conference votes (Epstein and Knight, 1998), and writing opinions (Maltzman, Spriggs, and Wahlbeck, 2000; Maltzman and Wahlbeck, 1996a, 2004).

The influence an individual justice can exert over the Court's decisions and its opinions varies across the opinion development process and with the justice's role in producing the opinion (Maltzman, Spriggs, and Wahlbeck, 2000:8). The justice with perhaps the greatest influence over the Court's written opinion in a particular case is the majority opinion author. Under the rules of the Court, the opinion writer is responsible for circulating the first draft of an opinion. Though the final opinion may reflect the incorporation of suggestions and requests from other members, this responsibility gives the writer a special measure of control by allowing the justice to choose which issues to address and which issues to ignore. This enables the justice to shepherd an opinion as close to the justice's policy preference as possible (Rohde and

Spaeth, 1976; Riker, 1986; Hammond, 1986; Maltzman, Spriggs, and Wahlbeck, 2000).

By extension, the justice who assigns opinion-writing duties is also substantially influential over the policy that emerges from the Court. The power of opinion assignment is widely acknowledged as an important mechanism by which justices can control the policy outputs and the agenda of the Court (Maltzman and Wahlbeck, 1996a, 2004; Spriggs, Matlzman, and Wahlbeck, 1999; Maltzman, Spriggs, and Wahlbeck, 2000; Johnson, Spriggs, and Wahlbeck, 2005). Scholars speculate that the assigner can use this influence to affect the final opinion by strategically assigning the opinion to an ideologically proximate justice. By doing so, the justice can maximize gains from a policy change or at least minimize the expected policy loss resulting from an unfavorable outcome (Danelski, 1968; Johnson, Spriggs, and Wahlbeck, 2000).

According to the Supreme Court's rules and practices, the chief justice is responsible for assigning the majority opinion if in the majority coalition; otherwise, the responsibility falls to the most senior justice of the majority. Empirical analyses of chief justices' opinion assignment choices demonstrate that opinion assignments are principally influenced by administrative and contextual factors, which largely reflect concerns about efficiency and legal proficiency. For instance, several studies emphasize that chief justices' opinion assignments reflect attempts to ensure an equal distribution of labor across justices (Baum, 1997; Brenner and Palmer, 1988; Matlzman and Wahlbeck, 1996a; Maltzman, Spriggs, and Wahlbeck, 2000; Spaeth, 1984). Similarly, chief justices may attempt to steer opinion assignments to justices based on areas of substantive legal expertise, allowing justices to write in the areas they know best, improving the quality of opinions and the speed with which they are produced (e.g., Brenner, 1984, 1985; Brenner and Spaeth, 1986; Brenner and Palmer, 1988; Maltzman, Spriggs, and Wahlbeck, 2000).

Above and beyond these administrative considerations in the opinion assignment process, the literature also suggests that chief justices, and senior associate justices, may use their opinion assignment authority to influence the political content of decisions by assigning opinions to themselves and their ideological allies on the Court under some circumstances (Ulmer, 1970; Rohde, 1972; Rohde and Spaeth, 1976; Segal and Spaeth, 1993). This ideological motivation is said to be greatest in salient cases, in which the policy outcome is even more significant (Slotnick, 1978; Brenner, 1993). Although the literature strongly suggests that these political dynamics play a marginal and conditional role in the opinions ultimately produced by the Court, manipulating the Supreme Court's opinions—and, by extension, their policy implications—still provides strategic justices with an important tool with which to pull substantive results closer to their preferred outcome and powerfully influence the external legal, political, and policy environments.

Because of the importance of opinion assignment, scholars argue that justices, principally the chief justice, may engage in strategic behavior at conference to gain control of the opinion assignment (Johnson, Spriggs, and Wahlbeck, 2000). The most

obvious manifestation of this behavior would be a justice who sincerely agrees with the minority voting with a majority to assign the case to a writer more sympathetic to his or her policy preferences than the writer likely to be chosen by the senior justice in the sincere majority. However, the ability to vote strategically in conference may be constrained by the Court's voting procedures. In particular, the norm of the chief voting first with the other justices following in order of seniority limits the ability of the justices most likely to assign the opinion to vote with full information of their colleagues' positions. In particular, the chief justice, voting first, cannot know with certainty how his colleagues will cast their ballots, limiting his ability to act optimally.

Chief justices, however, are not strictly constrained by this norm of casting the first ballot in conference. The chief justice, and any other justice, may "pass" in conference voting, reserving his vote in the initial discussion of the case until other justices have revealed their voting intentions. This action allows the passing justice to gain additional information about the other justices' preferences, enables him to join a majority with greater certainty, and, in the case of the chief, assign the majority opinion. In other words, "when the Chief is uncertain about the final outcome of the case, he can pass [at conference] in order to view his colleagues' votes. This behavior will help him determine which vote (reverse or affirm) will allow him to assign the majority opinion" (Johnson, Spriggs, and Wahlbeck, 2005:351). Thus, the chief justice may reinforce the strict institutional prerogative for opinion assignment by acting strategically in conference to vote with more complete information (see also Woodward and Armstrong, 1979; Epstein and Knight, 1998).

Anecdotal evidence indicates that chief justices, especially Chief Justice Burger, have frequently engaged in this type of strategic behavior. In one case, *Thermtron Products Inc. v. Hermansdorfer* (1975), related by Woodward and Armstrong (1979), Chief Justice Burger announced that he "would vote" to affirm a federal district court's decision to return the case to a state court because of time constraints on the federal court, a position joined by Justices Stewart and Rehnquist. Finding himself the senior associate justice in the majority, Justice Brennan attempted to assign the opinion to Justice White. At that point Justice Burger interrupted and announced he had, in fact, not cast a firm vote during the discussion of the case, drawing a distinction between casting a vote and his tentative statement that he "would vote" to affirm. Continuing, Chief Justice Burger announced he was casting a firm vote to reverse the district court judge, assuming the right to assign the opinion himself. This was hardly an isolated incident on the Burger Court. According to Woodward and Armstrong (1979), Justice Brennan felt Burger would attempt to manipulate the opinion assignment at least once in each conference by passing or switching his votes after the other judges had cast theirs. Justice Brennan referred to these as Burger's "phony votes" (Woodward and Armstrong, 1979:496; see also Thomas, 1979).

Building on these assertions, Johnson, Spriggs, and Wahlbeck (2005) examine the passing behavior of justices at conference. Using data derived from Justice Powell's papers, they demonstrate that the chief justice and senior associate justices are more

likely to pass when there is greater uncertainty surrounding the final vote. Specifically, these justices are more likely to pass when their ideological distance from the median is uncertain, when the preferences of the other justices on an issue are ambiguous, and when the vote to grant certiorari leads to uncertainty on the outcome of the case. Further, the authors find that justices are more likely to pass when the case is more salient and, thus, the outcome has more political importance. They also find that other associate justices, who are unlikely to control the opinion assignment, do not appear to pass for strategic reasons. The authors infer that justices pass to gain control over the assignment of the majority opinion. The authors support this claim by demonstrating that when Chief Justice Burger passed at conference he was significantly more likely to assign the majority opinion and was significantly more likely to vote with a liberal majority.

This inference is intuitively appealing, but we know of no extant research that tests the influence of passing on the opinion assignment. While existing evidence indicates the circumstances under which justices are likely to reserve their votes in conference, it offers no expectations about, or evidence of, the *consequences* of passing for opinion assignment. We extend previous research by reviewing the Court's conference-voting procedures and developing a testable prediction about the consequences of passing for opinion assignment.

### OPINION ASSIGNMENT UNDER STRATEGIC PASSING

Supreme Court conference discussions and voting may be thought of as the ordinal revelation of each justice's policy preferences, beginning with the chief justice and proceeding through the rest of the Court's membership in order of seniority. In turn, each justice discusses his or her view of each case and concludes by announcing a directional vote, i.e., a decision to reverse or affirm. From these directional announcements, a majority is delineated.

Once a majority coalition is identified, the chief justice or, should the chief fail to join the majority, the senior associate justice among the majority, selects one of their number to write an opinion that reflects the directional attitude of the majority. Though the draft opinion produced by the writer almost invariably reflects the directional consensus of the majority coalition, it is more than a statement of the majority's directional preferences. The draft opinion is a proposal for a precise policy position to be adopted by the Court. Until this stage, the justices' votes have only indicated a direction of endorsed change, and so the opinion writer has the power to steer the opinion to a particular legal or political outcome so long as it satisfies the majority's directional preferences.

As discussed earlier, this preliminary draft is subject to revision at the behest of other members of the majority, who may threaten to write competing opinions, or even dissent, if accommodations are not made. Thus, opinion writers may often craft opinions that diverge somewhat from their true policy preferences to ensure continued support for their opinions (Epstein and Knight, 1998; Spriggs, Maltzman, and

Wahlbeck, 1999). Nonetheless, writing separately is costly in time and resources, as well as in personal and political capital, so opinion writers do possess significant discretion to incorporate their policy preferences. This potential control over the policy output gives rise to the strategic pass.

The strategic pass allows the chief justice to ensure the ability to assign an opinion *whatever directional majority may emerge*. To the extent that strategic passing is a low-cost activity, senior justices, particularly the chief justice, might make use of it frequently to preserve their prerogative to make an opinion assignment whatever majority may form. However, like so many other aspects of judicial behavior, passing in conference likely imposes nontrivial costs on justices, who are perceived to manipulate conference procedures to secure assignment power. Thus, passing is most likely to be observed in cases where predicting the membership of the majority coalition is difficult and the policy gains associated with ensuring opinion assignment power justify the costs involved with passing. As Johnson, Spriggs, and Wahlbeck (2005) indicate, justices pass in the initial conference vote in precisely such strategically reasonable circumstances, particularly in cases with close votes where the majority coalition is not easily predictable in advance and in salient cases where the costs of losing an opinion assignment opportunity by chance may be high.

Again, the missing piece in the strategic-passing puzzle is determining whether and to what extent opinion assignments made by justices who have passed strategically differ from opinion assignments made by justices who have made assignments following a “firm” conference vote. One such difference that may emerge is that an assignment made by a justice who passes, and who strategically joins a directional coalition opposite his personal preferences, may be to a justice more ideologically close to the assigner’s sincere preferences than would have been assigned had the assigner voted sincerely with the minority. For example, if a conservative chief justice were to pass in an initial conference vote and ultimately join a liberal majority reversing a lower-court ruling, we expect that that the chief would assign the opinion to a relatively conservative member of the majority coalition. Presumably, this choice would minimize the distance between the proposed policy (the opinion draft) and the chief’s sincere preferences in a policy space, given the constraint of constructing an opinion that reverses the lower court’s action. Conversely, opinion assignments made by sincere members of majority coalitions are, on average, likely to reflect the aggregated preferences of those majorities.

In any particular case, of course, opinion assignments may be made to relatively central or relatively peripheral members of a majority coalition for a variety of political or contextual reasons (e.g., Maltzman, Spriggs, and Wahlbeck, 2000). Since the primary factor in opinion assignment is concern for Court efficiency, over a large set of cases sincere opinion assignments ought to reflect a general tendency toward centrality with respect to the majority coalition’s members’ views rather than any specific ideological bias. Thus, if passing is strategic attempt to gain control over opinion assignment, in cases where an assigning justice passes, we expect the justice to assign

opinions to those who are more peripheral to the emergent majority coalition and more central relative to the Court as a whole than in other cases the justice might assign. This expectation can be subjected to empirical scrutiny.

## DATA AND METHODS

Our principal task is to assess the ideological “location” or preferences of the opinion author selected by a justice in relation to the preferences of the majority coalition. Our theory suggests that this relative location is a function of the chief justice’s strategic decision to pass in an initial round of conference voting conditional on the ideological composition of the conference majority as a whole. In particular, we have argued that opinion assignments made by a justice following a strategic pass in the conference vote will be more ideologically peripheral (i.e., less ideologically extreme ) relative to the emergent majority coalition than assignments in other cases the justice might assign made after a more typical conference vote.

To assess this expectation, we examine the opinion assignment behavior of Chief Justice Warren Burger using data from Johnson, Spriggs, and Wahlbeck (2005), which identify instances in which justices passed in the initial conference vote. Drawing on the papers of Justice Lewis Powell, the data consist of a random sample of Supreme Court cases from 1971 to 1985. We employ a subset of those cases, specifically those orally argued cases that produced signed opinions and in which Chief Justice Burger made an opinion assignment.<sup>1</sup> The resulting data cover 750 cases, which appeared before the Court in the 1971-85 terms and in which Chief Justice Burger passed 78 times during the initial conference vote.<sup>2</sup>

Our approach is straightforward. We use ordinary least squares (OLS) to estimate the ideology of the assigned opinion writer as a function of the mean ideological position of the majority coalition’s members, Chief Justice Burger’s decision to pass or not in the initial conference vote before making an opinion assignment, and an interaction between the two. The critical tests of our theory are associated with the estimated effects of the majority coalition’s ideology, the indicator of Chief Justice Burger’s passing behavior, and the interaction between the majority coalition’s ideology and Chief Justice’s Burger’s passing. First, the ideological tenor of Chief Justice Burger’s opinion assignments should correspond with the ideology of the majority coalition. Thus, we expect a positive association between the majority’s ideology and the

<sup>1</sup> Using Spaeth’s Supreme Court Database (2006) codes, we include cases for which ANALU=0 and DEC\_TYPE=1. We also exclude cases for which justices’ votes were not clearly specified; i.e., we exclude the small number of cases for which VOTEQ=1.

<sup>2</sup> Of course, focusing on a single justice limits the generalizability of our findings. However, journalistic accounts of the Court’s workings suggest that Burger provides a “most likely case” test of the theory. If we fail to find support for our theory in Burger’s behavior, we can fairly strongly conclude that passing is not related to strategic opinion assignment, at least as we have conceptualized it. On the other hand, if we find support for the theory, then we have likely identified the outer limits of the effects of strategic passing for opinion assignment, which would also suggest a need for further inquiry to establish if other chief justices behave similarly.

ideology of the assigned opinion writer. Second, we expect that strategic passing should be associated with divergence from this baseline pattern. Following a pass in the initial conference vote, an assigning justice should make opinion assignments that are more ideologically peripheral (i.e., politically moderate) relative to the majority as a whole compared with assignments made when the assigning justice is a “sincere” member of the majority. Thus, our theory predicts that the effect of the chief passing will be positive while the interaction between passing and the ideology of the majority coalition should be negative (and have a larger absolute value than the positive effect associated with passing *per se*). This latter effect would represent the attenuated influence of the majority coalitions’ ideology on opinion assignments made by a justice who has joined the majority by strategically passing in a conference vote, while the former would represent a “correction” for opinion assignments made on the low (conservative) side of the ideological scale.<sup>3</sup>

We measure the justice’s ideological positions with Segal-Cover ideology scores (Segal and Cover, 1989; see also Segal et al., 1995), which are a widely used indicator of Supreme Court justice’s ideologies derived from coding newspaper editorials discussing each justice’s confirmation. We rescale these scores to facilitate the interpretation of our results so that 0 indicates the most conservative value and 1 indicates the most liberal value. Chief Justice Burger’s behavior is represented by a dummy variable that is coded 1 to represent passing in an initial conference vote and 0 in other cases.

In addition to a baseline model of the ideology of opinion authors that includes only the ideology of the majority coalition, Chief Justice Burger’s passing behavior, and the interaction of the two, we estimate a second model, including statistical controls for a variety of political and strategic factors that may also influence opinion assignments. First, we expect that the size of the majority coalition may constrain Chief Justice Burger’s ability to select the writer who best reflects his policy preferences. Thus, we control for decisions that are unanimous—which should offer an opinion assigner the most initial latitude in selecting an opinion writer—and those for which the majority is a minimum winning coalition—for which the majority coalition’s opinion should be most constraining for the opinion assigner. Thus, we also include a control for the interaction of the minimum-winning-coalition indicator and the ideology of the majority coalition. We expect that (conservative) Chief Justice Burger will use

<sup>3</sup> To clarify this prediction, consider opinion assignments made to majority coalitions at the most conservative and liberal poles of the 0 to 1 policy space we construct. If the chief justice passes and strategically joins a majority that has formed at the conservative (low) end of the policy space, we would expect that the chief would select an opinion author more liberal than the majority as a whole. Conversely, if the chief justice passes and strategically joins a majority that has formed at the liberal (high) end of the policy space, we would expect that the chief would select an opinion author more conservative than the majority as a whole. For the statistical model to predict this outcome, it must show a positive effect on ideology (opinion writers are near their majority coalition), a positive effect on passing *per se* (opinion authors are more liberal than majorities that form with mean ideologies near zero), and a negative effect associated with the interaction of the two that is larger in absolute value than the effect of passing alone (opinion authors are more conservative than majorities that form with mean ideologies near one).

the discretion that accompanies unanimous opinions to select opinion writers who are, on average, more conservative than the Court as a whole. Conversely, we expect that the presence of a minimum winning coalition will increase the constraint of the majority coalition's ideology for opinion assignment, yielding a positive coefficient for the minimum winning coalition-majority coalition ideology interaction term.

Finally, we control for the political and legal salience of the cases considered in the data. As Johnson, Spriggs, and Wahlbeck (2005) note, the decision to pass in a conference vote is linked to the political and legal salience of the case at hand. It is plausible that opinion assignments in these high-profile cases may systematically differ from assignments made in cases that receive less attention from the public, the bar, or other political elites. In particular, important or salient cases provide heightened incentives for Supreme Court justices to use their institutional prerogatives and the dynamics of a collegial court to move case outcomes and opinions toward their preferred policy positions. Thus, to whatever extent passing is a function of salience, differences in opinion assignment arising from variance in case salience may confound inference we draw from modeling the effects of passing alone. Specifically, we expect that increased legal or political salience will entice Chief Justice Burger to make relatively conservative opinion assignments. However, this effect should be offset by the ideology of the majority coalition, who might be expected to be especially watchful for political manipulation of decisions and opinions in high-profile cases. Thus, we control for both legal and political salience, modeling the opinion writer's ideology as a function of the number of amicus briefs filed in the case (standardized against the number of amicus briefs filed in all cases during each term of the court; see Johnson, Spriggs, and Wahlbeck, 2005; Maltzman, Spriggs, and Wahlbeck, 2000)<sup>4</sup> and whether the case's decision was announced on the front page of the *New York Times* (Epstein and Segal, 2000). Because these effects may vary as a function of the ideological content of the cases involved, we also model interactions between these two salience variables and the ideology of the majority coalition.

## RESULTS

The model estimates are presented in Table 1.<sup>5</sup> The results conform to our theory of opinion assignment under strategic passing. In particular, the data show that the opinion assignments made by Chief Justice Burger following his passing during the initial round of conference voting vary systematically from opinion assignments made when

<sup>4</sup> The standardized amicus score is calculated by subtracting the mean number of amicus briefs filed in all cases during a term of the court from the number in a particular case and dividing the remainder by the standard deviation of the number of amicus briefs filed in all cases during that term.

<sup>5</sup> Breush-Pagan tests for heteroskedasticity indicate significant evidence for rejecting the null hypothesis of constant error variance in both the base model ( $\chi^2=50.98$ ;  $p<0.05$ ) and the control model ( $\chi^2=46.55$ ;  $p<0.05$ ). Visual inspection of the models' residuals indicates that this results, at least in part, from temporal clustering of errors. Thus, we estimate robust standard errors additionally corrected for clustering within the various natural courts from which data were drawn.

Table 1  
Models of Opinion Author Ideology

Predictors (Expected Sign)	Base Model	Control Model
Majority Coalition Ideology (Liberalism)(+)	1.06* (0.06)	1.17* (0.07)
Burger Passed (+)	0.18* (0.06)	0.18* (0.05)
Pass-Majority Coalition Ideology Interaction (-)	-0.34* (0.10)	-0.34* (0.10)
Minimum Winning Coalition (MWC) (+/-)		-0.06 (0.05)
MWC-Majority Coalition Ideology Interaction (+)		0.61 (0.33)
Unanimous Decision (-)		-0.02 (0.02)
Amicus Participation (-)		0.01 (0.02)
Amicus-Majority Coalition Ideology Interaction (+)		-0.01 (0.04)
The <i>New York Times</i> , Page 1 (-)		-0.20* (0.07)
NYT-Majority Coalition Ideology Interaction (+)		0.35 (0.17)
Constant	-0.06 (0.03)	-0.02 (0.02)
N	750	750
R <sup>2</sup>	0.09	0.11
√MSE	0.33	0.33

**Note:** OLS estimates (cluster-corrected standard errors in parentheses).

\* $p < 0.05$  (One-tailed tests where directional hypotheses are indicated; two-tailed tests otherwise).

he did not pass and that these differences are consistent with strategic accounts of his passing behavior. These results hold in both the base model and the control model.

First, as a baseline, our results show that the ideological position of a majority coalition is strongly associated with the ideology of an opinion author selected by Chief Justice Burger. Indeed, the mapping predicted between the two is very nearly one-to-one in both models we estimated. Specifically, the ideology of the majority coalition significantly and positively predicts the ideology of the assigned opinion writer. The coefficient of the majority's ideology is 1.05 in the base model and 1.16 in the control

model. In both cases, the models predict that, on average, Chief Justice Burger selects opinion writers whose ideology closely matches the mean ideological position of the majority coalition as a whole.

However, our model estimates also show that opinion assignments made after Chief Justice Burger had passed during an initial conference vote vary significantly, though marginally, from this baseline pattern. Specifically, the combination of a significant positive effect estimated for passing in the conference vote and a significant negative effect estimated for the interaction between passing and the ideology of the majority coalition—in both the base and control models—show that opinion assignments made by Chief Justice Burger following a pass in an initial round of conference voting are more ideologically moderate (compared to the majorities as a whole) than opinion assignments made after a firm conference vote. The influence of these combined effects on opinion assignments made by Chief Justice Burger is illustrated in Figure 1, which shows the predicted ideological position of an opinion author as the mean ideological position of the majority coalition moves from zero (the most conservative position in the scale) to one (the most liberal position).<sup>6</sup> The gray line indicates the predicted location of an opinion author when Chief Justice Burger has not passed in an initial conference vote; the black line indicates the predicted ideology of an opinion author when Chief Justice Burger has passed. The dotted lines show the estimates' 95 percent confidence intervals.<sup>7</sup>

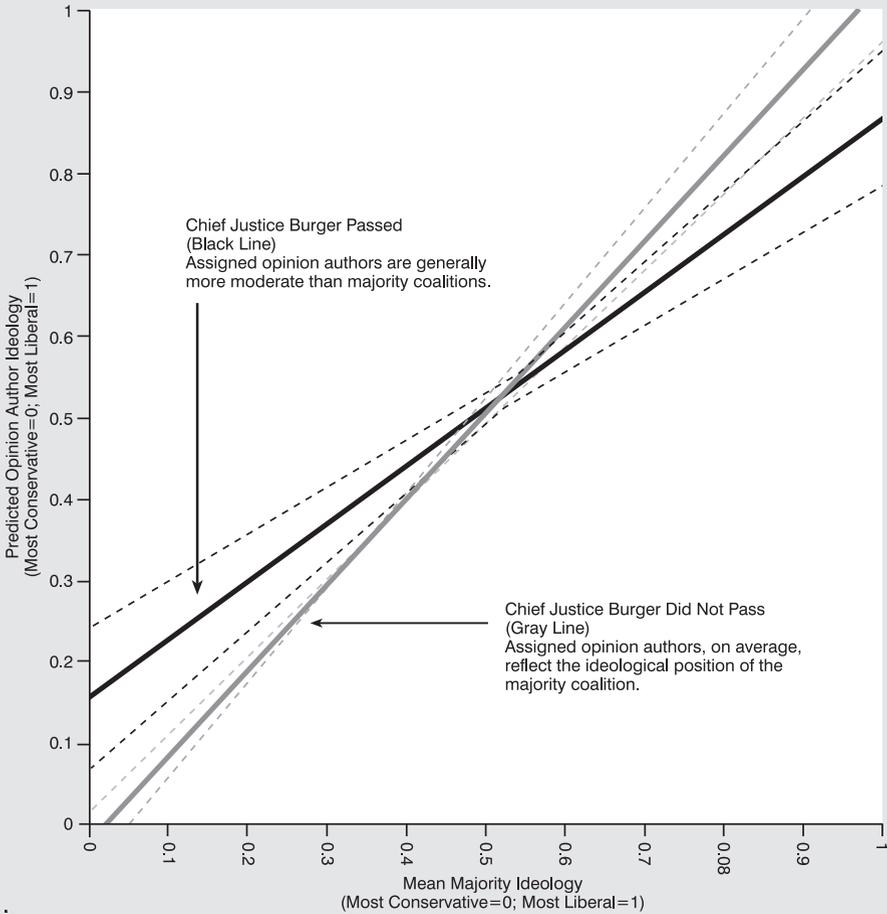
As a point of departure, the gray line shows the predicted correspondence between the ideology of the majority coalition and the assigned opinion writer. The data show that, on average, Chief Justice Burger selected opinion writers who matched the average ideological position of majority coalition members. As the majority coalition became more liberal, the model estimates indicate that Chief Justice Burger's opinion assignments became correspondingly more liberal.

Estimates of the ideological position of opinion authors selected after Chief Justice Burger passed in a conference vote, however, indicate a somewhat different story. While the pattern of the ideological tenor of these opinion assignments is still dominated by the composition of the majority coalition, the model indicates that Chief Justice Burger diverged from his ordinary opinion assignment behavior in cases in which he passed. In particular, the model shows that opinion assignments made following a pass in a conference vote are more ideologically moderate relative to majority coalitions than opinion assignments made during a firm conference vote. The predicted difference between assignments made when Chief Justice Burger has passed and those made when he has cast a firm vote are largest when majority coalitions are most extreme and, obviously, become smaller as the majority coalitions themselves become

<sup>6</sup> Predictions are based on estimates from the base model reported in Table 1.

<sup>7</sup> Predicted values and confidence intervals were produced with CLARIFY (King, Tomz, and Wittenberg, 2000; Tomz, Wittenberg, and King, 2001)

**Figure 1**  
**Predicted Effects of Chief Justice Burger’s Strategic Passing Behavior**  
**(Base Model)**



**Note:** Dashed lines show 95 percent confidence intervals.

more moderate. For example, the model predicts that the difference between a passing assignment and a firm vote assignment is 0.18 (roughly the ideological difference between William O. Douglas and Sandra Day O’Connor on the rescaled Segal-Cover index) when the majority coalition has a mean ideology of zero, but the predicted difference is only 0.05 (about the difference between William Rehnquist and Warren Burger) when the majority coalition’s ideology is set to its observed mean, 0.38.

## DISCUSSION

The literature on the behavior of opinion assigners on the U.S. Supreme Court emphasizes the extent to which the selection of opinion writers is dominated by administrative considerations rather than political gamesmanship (e.g., Maltzman, Wahlbeck, and Spriggs, 2000). Yet scholars have also shown that the chief justice and senior associate justices may make use of their prerogative to assign opinions to marginally influence the ideological tenor of the Court's opinions and, further, that strategic passing during conference votes corresponds with circumstances that suggest strategic antecedents for failing to cast a firm conference vote (Maltzman, Wahlbeck, and Spriggs, 2000; Johnson, Spriggs, and Wahlbeck, 2005). The results we report help close the circle presented by extent scholarship by demonstrating that passing during an initial conference vote is followed by patterns of opinion assignment that differ significantly from assignments made after typical conference votes, at least in the case of Chief Justice Burger.

Nevertheless, the predicted effects of strategic passing are quite modest through most of the observed range of the data. This indicates that Chief Justice Burger and all potential opinion assigners were (and are) strongly constrained by administrative concerns and by the ideological composition of majority coalitions. The chief justice's ability to pass in a conference vote and preserve the option of strategically joining a majority coalition to control the opinion assignment process provides some opportunity to moderate the behavior of majorities that might form at the ideological extremes of the Court. Although the estimated effects of this strategic behavior are marginal—even for an aggressive “passer” like Chief Justice Burger—passing represents one of the few opportunities available to chief justices to leverage the institutional prerogatives of their office into actual influence over the Supreme Court's decisions and written opinions. Moreover, these results are consistent with strategic theories of Chief Justice Burger's behavior in casting conference votes and making opinion assignments, and in the linkages between the two, and generally confirm historical and journalistic accounts of his management of the Supreme Court.

Again, these core results and the substantive interpretations that follow from them are similar across both the base model and the control model. However, the control model does provide some additional insight into the processes that governed the selection of opinion authors by Chief Justice Burger. First, the control model estimates provide no significant evidence that either the presence of a minimum winning coalition or a unanimous Court influenced Chief Justice Burger's opinion assignments. However, we observe that opinion assignments made in politically salient cases—those covered on page 1 of the *New York Times*—were more conservative than those made in less salient cases. The magnitude of the predicted effect, 0.20, indicates an ideological shift of a degree comparable to the ideological distance between John Paul Stevens and William Rehnquist. This indicates that, all else held equal, Chief Justice Burger tended to choose opinion writers closer to his conservative side of the ideological spectrum when the political stakes were high. In contrast, the model does not provide

significant evidence of changes in patterns of opinion assignment related to legal salience, measured by amicus participation.

## CONCLUSIONS

In this article we develop and test a theory of the consequences of passing and sophisticated voting on opinion assignment for the United States Supreme Court by examining the behavior of Chief Justice Burger to augment previous studies of strategic passing behavior in conference voting. We find that Chief Justice Burger, indeed, made opinion assignments that diverged more strongly from the ideological composition of the Court's majority when he passed in conference compared with opinion assignments he made when he voted in order of seniority. These results provide evidence that justices who engage in strategically motivated passing behavior can take advantage of the Court's institutional flexibility to assign opinions to more ideologically compatible justices. Broadly, this finding supports the widely presumed link between strategic passing, sophisticated voting, and opinion assignment, indicating that, when the chief passes, he does so strategically to control the opinion assignment process. These results also provide specific support for well-known anecdotal claims about the strategic behavior of Chief Justice Burger.

However, we recognize that our empirical focus on Chief Justice Burger is somewhat limiting. On the one hand, we are confident that our results provide an accurate description of his behavior in office and establish the possibility and (perhaps) the limits of the strategic manipulation of conference voting to control the opinion assignment process. In other words, we show that chief justices can use passing to achieve important strategic goals in the opinion assignment phase of decision making, and we have some sense of how large an effect can be obtained by a chief justice who aggressively employs this institutional tool. On the other hand, historical and journalistic accounts of the behavior of other chief justices suggest that Warren Burger may have been unique in the extent to which he used his prerogative to pass to control opinion assignment. Thus, in practice, other chief justices may not be as assertive in using this particular institutional arrangement. This suggests that the outer limit of the effects of passing may be substantively modest.

Nonetheless, by providing evidence of the relationship between passing at conference and opinion assignment, we are able to provide a more complete picture of the strategic interaction of the justices and the overall decision-making process on the Supreme Court. Understanding the effects of strategic passing provides greater insight into the motivations behind the passing behavior itself and the dynamics of conference voting behavior in general. In turn, this provides additional insight into the justices' ability to take strategic advantage of their institutional prerogatives to shape the Court's decisions to match their own personal policy attitudes as closely as possible. **jsj**

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