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Expertise and Opinion Assignment on the Courts of Appeals: A Preliminary Investigation

Jonathan Remy Nash

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EXPERTISE AND OPINION ASSIGNMENT ON THE
COURTS OF APPEALS: A PRELIMINARY INVESTIGATION

*Jonathan Remy Nash**

Abstract

This Article examines the role of expertise in judicial opinion assignment and offers four contributions: First, this Article develops a general theory of opinion assignment on multimember courts. Second, this Article uses that theory to predict how expertise might influence opinion assignment. Third, because the theory advanced in this Article suggests that the courts of appeals are far more likely to witness experience-based opinion assignment than is the Supreme Court, this Article contributes to an understanding of opinion assignment practices in this understudied area. Fourth, this Article identifies two settings in which the theory this Article advances should have observable implications, and this Article proceeds to test those implications empirically. It finds that, in the years following the initial adoption of the Sentencing Guidelines, circuit judges who were Sentencing Commissioners were more likely to have assigned to them opinions raising sentencing issues. It also finds that circuit judges who previously served as bankruptcy judges were more likely to have bankruptcy cases assigned to them. The Guidelines setting, moreover, allows for a natural experiment, in that we can test whether judges who served as Commissioners saw disproportionate levels of opinion assignment in criminal cases before the Guidelines took effect; it turns out, consistent with the theory, that they did not.

* Professor of Law, Emory University School of Law. For helpful discussions and comments on earlier drafts, I am grateful to Tom Clark, John de Figueiredo, the Honorable Frank Easterbrook, Lee Epstein, Lee Fennell, Victor Fleischer, Abbe Gluck, William Hubbard, Dennis Hutchinson, David Kwok, William Landes, Leandra Lederman, Wayne Logan, Wendy Martinek, William Page, Rafael Pardo, the Honorable Richard Posner, Mark Seidenfeld, Joanna Shepherd, Alexander Volokh, participants in a graduate political science seminar on “Institutions,” and two anonymous reviewers. I also benefited from comments by participants in presentations at the University of Chicago Law School Workshop on Judicial Behavior; at faculty colloquia at Emory University School of Law, the Florida State University College of Law and the University of Florida Levin College of Law; at the annual meeting of the Midwest Political Science Association (especially the comments of Betheny Blackstone, who served as commentator on the paper); at the annual meeting of the International Society for New Institutional Economics at the University of Southern California School of Law; at the annual meeting of the Canadian Law and Economics Association at the University of Toronto Faculty of Law; and at the annual meeting of the Midwestern Law and Economics Association at the Indiana University-Bloomington School of Law.

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INTRODUCTION

Commentators generally accept that, notwithstanding the norm of equalizing workload among judges on multimember courts,¹ it is at least sometimes the case that some judges will tend to write more opinions in particular subject matter areas than others. Yet the assignment of opinions on the basis of expertise, especially on the federal courts of appeals, is undertheorized and understudied. The existing literature is lacking in several ways.

First, the existing literature falls short on offering a clear conceptualization of judicial expertise. In particular, it often fails to distinguish clearly between, and indeed often conflates, “expertise” and “opinion specialization.”² In fact, the two concepts are quite different.³ Expertise is the product of training and experience. While expertise conceivably might result from the continued writing of judicial opinions in an area, it is much more likely to have arisen by virtue of some experience the judge enjoyed before joining the court (or extrajudicial experience engaged in during judicial service). In short, expertise puts a judge at a comparative advantage to draft an opinion because the other judges on the court are unlikely to have it.⁴

1. Commentators acknowledge the strength of this norm. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 367–68 (2002); FORREST MALTZMAN ET AL., *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* 37 (2000). Sometimes the attempt to equalize workloads goes beyond simple case numbers to other attributes, such as case difficulty. See, e.g., JUDITH A. MCKENNA ET AL., *FED. JUDICIAL CTR., CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS* 18 (2000) (“Some courts have their staffs try to distribute cases across panels to equalize judicial workloads, either based on staff assessments of case difficulty or according to case type to give each panel a range of matters.”); MALTZMAN ET AL., *supra*, at 22 (noting the importance of case difficulty on workloads). Judge Posner explains that “the Supreme Court is more flexible than the courts of appeals” with respect to the equal workload norm. RICHARD A. POSNER, *OVERCOMING LAW* 124 (1995).

2. See, e.g., SEGAL & SPAETH, *supra* note 1, at 378–81; David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 J. LEGAL STUD. 371, 382 (1999) (studying prestige and influence of judges, and noting that “there is no reason why prestige should not *derive from* expertise” (emphasis added)).

3. See Isaac Unah & Christopher Wall, *The Effects of Subject-Matter Expertise in the U.S. Supreme Court* 9–10 (Apr. 1–3, 2011) (unpublished manuscript) (on file with author) (critiquing this approach). Unah & Wall’s paper is an exception in this regard.

4. In one of the settings examined in this Article, two circuit judges served as Commissioners of the United States Sentencing Commission when that Commission drafted the Federal Sentencing Guidelines. Although these judges served as Commissioners contemporaneously while serving as circuit judges, their understanding of the Guidelines was something other circuit judges were unlikely to have. In the other setting, several circuit judges served as federal bankruptcy judges before being elevated to the circuit. Once again, the understanding these judges had of bankruptcy law and litigation was unlikely to be shared by other judges on the circuit court.

An opinion assignor might assign opinions in a subject area to someone not because the assignee has any expertise, but because he enjoys working in that subject area.⁵ Conversely, a judge might find himself the recipient of numerous opinion assignments in an area if it is an opinion area that no judge on the court likes⁶ or if the assignor does not like him.⁷ Political scientists Jeffrey Segal and Harold Spaeth suggest that “[t]o characterize such justices as specialists seems a misnomer.”⁸ However, they do not explain how to identify issue specialization when it *does* occur. Further, their tests for specialization focus, nonetheless, on the frequency with which Justices author opinions in particular areas.⁹

Like Segal and Spaeth, many other commentators also test for issue specialization simply by looking at the frequency with which a judge writes opinions in particular areas.¹⁰ Even stranger than this is the approach taken by Professors Forrest Maltzman, James Spriggs, and Paul Wahlbeck: While they hypothesize that a judge’s expertise may lead to greater opinion assignment in that area,¹¹ curiously, they measure “expertise” by reference to the number of cases in which a

5. Saul Brenner & Harold J. Spaeth, *Issue Specialization in Majority Opinion Assignment on the Burger Court*, 39 W. POL. Q. 520, 520 (1986).

6. See, e.g., Erik M. Jensen, *Of Crud and Dogs: An Updated Collection of Quotations in Support of the Proposition that the Supreme Court Does Not Devote the Greatest Care and Attention to Our Exciting Area of the Law; or Something the Tax Notes Editors Might Use to Fill Up a Little Space in That Odd Week when Calvin Johnson Has Nothing to Print*, 58 TAX NOTES 1257 (1993).

7. See, e.g., SEGAL & SPAETH, *supra* note 1, at 378 (“Given the norm of equal distribution and assigners’ policy preferences, it makes perfect sense to assign unattractive cases to one’s ideological opponents.”); BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 190 (1979) (noting that Justice Blackmun “felt that he had suffered” under Chief Justice Burger’s reign, in part by virtue of having received “more than his share of tax . . . cases”).

8. SEGAL & SPAETH, *supra* note 1, at 379.

9. See *id.* at 379–80; see also JONATHAN MATTHEW COHEN, *INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS* 48–49 (2002) (noting that expertise can arise from prior experience and from drafting opinions in an area); Saul Brenner, *Issue Specialization as a Variable in Opinion Assignment on the U.S. Supreme Court*, 46 J. POL. 1217, 1218 (1984) (noting that, while “[i]t is not unreasonable to assume that a justice” who is assigned a disproportionate number of opinions in an area “might have been selected because he possessed special expertise on that issue or that the experience of writing numerous opinions facilitates the development of expertise,” “the conclusions of this investigation are not dependent upon either of these two assumptions”).

10. See, e.g., Burton M. Atkins, *Opinion Assignments on the United States Courts of Appeals: The Question of Issue Specialization*, 27 W. POL. Q. 409, 409 (1974); Brenner, *supra* note 9, at 1218; Brenner & Spaeth, *supra* note 5, at 520; Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 519 (2008).

11. See MALTZMAN ET AL., *supra* note 1, at 38.

Justice wrote a dissent or concurrence in a particular area.¹² Measures of specialization such as these may capture some opinion assignment based on actual expertise. It may also be the case, however, that over time, opinion specialization begets expertise.¹³ But a judge well may have developed an expertise before ascending to the bench or, as this Article will point out, may develop an expertise while serving as a judge but while engaging in nonjudicial activities. Measuring specialization will capture this, but it will also capture (i) the “early days” of specialization that might one day generate expertise, (ii) judges’ preference to write opinions in an area bearing no relationship to any expertise, and (iii) areas in which judges disfavored by assignors are compelled to write opinions.

A second shortcoming of most of the extant opinion assignment literature is that it examines only the Supreme Court. Only three commentators have looked at court of appeals opinion assignment practices with respect to specialization, let alone expertise.¹⁴ The focus on the Supreme Court misses the vast bulk of cases handled by the courts of appeals that never reach the Court.¹⁵

Third, the limits of the existing research have stunted efforts to theorize about the causal mechanisms that might motivate opinion assignments to experts in a field. To be sure, commentators have noted

12. *See id.* at 43–44.

13. *See, e.g.,* SEGAL & SPAETH, *supra* note 1, at 379 (“[S]pecialization may facilitate the development of judicial expertise”); Brenner, *supra* note 9, at 1218 (“It is not unreasonable to assume that . . . the experience of writing numerous opinions facilitates the development of expertise.”). The extent to which this is the case likely varies with both the accessibility of the area of law and also with the judicial structure. Professor Isaac Unah argues that specialized courts (such as the Federal Circuit) provide their judges with an opportunity to develop expertise:

[T]hese judges gain substantive expertise over time by serving in a court that concentrates its decision making on a small set of statutorily defined policy niches. This narrow focus in turn engenders for the judges a kind of task repetitiveness and repeated exposure to congruent case stimuli that is absent in traditional courts. Because of this defining feature of specialized courts, judges are able to learn quickly and to adapt to their tasks by “thinking by doing.” This allows specialized court judges to anticipate problems and design solutions even before the problems are brought to court.

Isaac Unah, *Specialized Courts of Appeals’ Review of Bureaucratic Actions and the Politics of Protectionism*, 50 POL. RES. Q. 851, 858 (1997).

14. *See* J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM 250–55 (1981) (finding sporadic evidence of specialization on three circuits); Atkins, *supra* note 10, at 409–10 (finding evidence of opinion specialization on the courts of appeals); Cheng, *supra* note 10, at 540, 548 (finding considerable evidence of specialization).

15. *See* Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261, 265 (2006) (noting the general problem of deriving too many lessons from studies focused on the Supreme Court).

in passing the efficiency benefits that specialization—with expertise—offers.¹⁶ However, they have not endeavored to explain with any precision exactly when, and to what extent expertise will influence opinion assignment. Professors Jeffrey Lax and Charles Cameron laudably elucidate that expertise should factor into the calculus of the costs of opinion writing.¹⁷ In the end, however, they—like Professor Saul Brenner,¹⁸ Segal and Spaeth—present expertise as an adjunct to ideology, as something that might play a marginal role in choosing an assignee among judges already in a majority coalition.¹⁹ Part of the problem here is the second shortcoming noted above—the almost complete failure of scholars to look beyond the Supreme Court. To the extent that courts of appeals are more constrained by law and less free to act attitudinally,²⁰ perhaps the theories, and hence the findings, applicable to the Supreme Court do not extend well to the courts of appeals.²¹

Fourth, as a result of the general failure to offer a systematic theory of the role of expertise in judicial opinion assignment, commentators often do not formulate predictive hypotheses or draw useful conclusions with regard to expertise. Expertise is unscientifically discovered after the fact as an explanation for cherry-picked observations. Dr. Burton Atkins, Professor W.J. Howard, Jr., and Professor Edward Cheng identify areas of specialization of various circuit judges, but they identify them based upon the disproportionate number of opinions the judges draft. The perceived expertise is a result of opinion assignments, rather than the impetus for opinion assignments.²² For example, only after discovering that Judge Wilkins wrote “an overwhelming number” of criminal case opinions does Professor Cheng proffer the explanation—nowhere previously hypothesized—that Judge Wilkins “was chairman of the United States Sentencing Commission.”²³ Years

16. See, e.g., Cheng, *supra* note 10, at 524–25.

17. See Jeffrey R. Lax & Charles M. Cameron, *Bargaining and Opinion Assignment on the US Supreme Court*, 23 J.L. ECON. & ORG. 276, 282 (2007).

18. See Brenner, *supra* note 9, at 1221 (“[T]his study has shown that Warren tended to select as issue specialists justices who had the same or similar ideological views as himself.”).

19. See SEGAL & SPAETH, *supra* note 1, at 372–73, 378–79.

20. See Friedman, *supra* note 15, at 265.

21. See Cheng, *supra* note 10, at 529–30; see also POSNER, *supra* note 1, at 143–44 (arguing that Supreme Court Justices may work harder per case than a court of appeals judge).

22. See, e.g., Cheng, *supra* note 10, at 541 (noting amorphously that “many of the specific instances of specialization make intuitive sense based on the judges’ backgrounds”).

23. *Id.*; see also *id.* at 542 (noting that expertise “easily explains the three greatest instances of specialization” on the D.C. Circuit). Cheng also suggests that Judge Wilkins’s experience as a United States Sentencing Commissioner helps to explain the disproportionate number of opinions in *postconviction* challenges that he wrote. See *id.* at 541. It is unclear why

earlier, both Professor Atkins and Professor Howard offered similar after-the-fact, experience-based justifications for a small fraction of their specialization findings.²⁴

This Article seeks to fill some of these gaps in the existing literature. First, this Article develops a general theory of opinion assignment on multimember courts. Second, this Article uses that theory to predict how expertise might influence opinion assignment. Third, in elucidating this theory, this Article introduces a factor besides efficiency that might motivate experience-based opinion assignment: the enhanced reputation of the judge and the court on which he or she sits. Fourth, this Article identifies settings in which the theory this Article advances should have observable implications, and then proceeds to test those implications. Fifth, because the theory this Article describes suggests that the courts of appeals are far more likely to witness experience-based opinion assignment than is the Supreme Court, this Article contributes to research on opinion assignment practices in this understudied area.

This Article tests the theory of expertise-driven opinion assignment in two different settings using original datasets. The first setting is the assignment of cases under the United States Sentencing Guidelines on court of appeals panels that included judges who served as Commissioners on the Sentencing Commission that drafted the Guidelines: Judge William W. Wilkins, Jr., of the United States Court of Appeals for the Fourth Circuit, who served as the first Commission Chair; and Judge (later Justice) Stephen Breyer of the United States Court of Appeals for the First Circuit who served as a Commissioner.²⁵ The Sentencing Guidelines provide a felicitous setting in which to study opinion assignment. The introduction of the Guidelines in late 1987 provided an exogenous shock to the federal criminal legal landscape. No judges had experience applying the Guidelines. A few judges, however, had served on the Sentencing Commission that drafted the Guidelines at Congress's behest. Judge Wilkins served as the original Chair of the Commission. He held that position when the original

this would be so, since (i) virtually all of these would have been challenges to underlying *state law* convictions, and (ii) almost all the claims raised would have been constitutional in nature.

24. See Atkins, *supra* note 10, at 417 (discussing Second Circuit Judge Hays's specialization in labor cases); *id.* at 418 & n.16 (discussing Fourth Circuit Chief Judge Sobeloff's specialization in racial, criminal due process, and labor relations cases); HOWARD, *supra* note 14, at 253 ("Exploiting his expertise in admiralty, [Fifth Circuit Judge] Brown alone wrote 75 percent of the opinions when eligible in marine personal injuries.").

25. *Former Commissioner Information*, U.S. SENT'G COMM'N, http://www.ussc.gov/About_the_Commission/About_the_Commissioners/Former_Commissioners.cfm (last visited Aug. 25, 2014).

I refer in the text to "Judge Breyer" rather than "Justice Breyer" when referring to the time period of the study.

Guidelines were drafted and promulgated, and he remained in the role for the first few years of the Guidelines' applicability, through 1994.²⁶ Judge Breyer served as Commissioner from 1985 to 1989. For at least the first few years of the Guidelines' applicability, then, Judge Wilkins and Judge Breyer had what almost no other judges,²⁷ even fewer other appellate judges, and no other judge on the Fourth or First Circuits, had—expertise with the Sentencing Guidelines. Moreover, that expertise would have had no bearing in terms of cases, and therefore opinion assignments, before the advent of the Guidelines. The prediction is that their expertise led to Guidelines cases being assigned to them at higher rates than normal. The data generally validate this prediction.

The Guidelines setting is also felicitous in that it allows for a valuable natural experiment. Expertise with the Guidelines became useful only once the Guidelines took effect. But the Guidelines became effective while the judges in question were already on the bench. Thus, the Guidelines setting provides a rare example of an expertise that, because of an exogenous shock, became useful while the judges were already members of the judiciary. This allows us to examine opinion assignment in criminal cases *both before and after* the expertise became valuable. If the disproportionate opinion assignment observed *after* the Guidelines became effective were an artifact of something other than the judges' expertise—for example, perhaps the judges had an affinity for criminal law cases—then we should observe similar disproportionate opinion assignment in criminal cases *before* the Guidelines took effect. On the other hand, if expertise is really driving the result after the Guidelines became effective, then we should not observe disproportionate opinion assignment before the Guidelines took effect. In the end, consistent with the expertise theory, the data reviewed in this Article reveal no disproportionate opinion assignment before the Guidelines became effective.

The other setting in which this Article tests the theory is the assignment of bankruptcy cases on court of appeals panels that included judges who previously served as federal bankruptcy judges. Bankruptcy cases provide a useful setting in which to study opinion assignment. Bankruptcy law is complex and technical, and has not been found to invite substantial ideological voting. Moreover, very few circuit judges

26. See David M. Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons from Republican Judicial Appointees in the Guidelines Era*, 79 U. COLO. L. REV. 1, 2 n.1 (2008) (noting Judge Wilkins's appointment and tenure).

27. One other federal judge was among the initial appointments to the Sentencing Commission: George E. MacKinnon, a senior judge of the District of Columbia Circuit, serving from 1985 to 1991. See *Former Commissioner Information*, *supra* note 25.

could offer the expertise one can obtain only from prior service as a bankruptcy judge.

This Article makes four broad contributions through its analysis. First, it offers a theory of the role of expertise in opinion assignment. Second, it offers empirical evidence in support of aspects of the theory. Third, it operates on a nuanced understanding of expertise rather than, as other studies have approached the subject, on the extent of past opinion writing in an area. Fourth, it offers empirical evidence, in two settings, of expertise-based opinion assignment.

This Article proceeds as follows: Part I offers a utility-based model of opinion assignment. Part II then relies upon that model to derive an understanding of how expertise might influence opinion assignment. Part III describes the two settings in which this Article looks for observed implications of that theory. It looks at the assignment of federal criminal appeals and Sentencing Guidelines appeals to circuit judges who worked as Commissioners on the Sentencing Commission that drafted the Guidelines. It also looks at the assignment of bankruptcy appeals to circuit judges with prior experience as federal bankruptcy judges. Part IV describes the empirical data that this Article gathered and the analysis that this Article undertakes to test the theory advanced in Part I. Part V discusses the results and suggests some implications.

I. A UTILITY-BASED MODEL OF OPINION ASSIGNMENT

This Part offers a utility-based model of opinion assignment (a more formal model appears in Appendix A) and begins by considering courts in general, with no restriction on the type of case before the court. This Part highlights three factors—the time it takes to draft an opinion, the legal value of the opinion, and the ideological value of the opinion—that assigning judges are likely to consider in making opinion assignments. This Article then refines the model by considering settings involving particular types of courts hearing particular types of cases where the last factor, ideology, is less likely to play a role.

This Article assumes that, in every case, court rules allocate to a judge on the panel hearing the case²⁸ the power to assign to one member²⁹ of the majority coalition for disposition of the case

28. This is almost always, but not universally, the case. *See infra* note 86 and accompanying text (noting one source that asserts that the U.S. Court of Appeals for the Sixth Circuit at one point employed a random method for opinion assignments, and another that asserts that some assigning judges rely at least in part on random distribution).

29. It is possible that multiple judges will share opinion-writing responsibility. *E.g.*, *Michigan v. EPA*, 213 F.3d 663, 669 & n.* (D.C. Cir. 2000) (per curiam) (noting that, while the opinion was filed “PER CURIAM,” “Judge Williams wrote Parts I.B–C and II.B; Judge Sentelle

(including, possibly, the judge with the assignment power) responsibility to draft the opinion in the case.³⁰ The only assumed restriction on assigning opinions to judges is the expectation that each judge will draft roughly the same number of opinions.³¹

An assigning judge will select an assignee judge with an eye to the utility that the opinion drafted by that judge will provide. An opinion will vary (depending on which judge authored it) in the costs and benefits it offers in terms of (i) the effort it takes the authoring judge to prepare the opinion (“opinion effort”), (ii) legal legitimacy and reputation (“legal value”), and (iii) ideological legitimacy and reputation (“ideological value”). Assigning judges will estimate their utility from some combination of these factors and also from the reaction of the assigning judges’ colleagues (including the assignee³²) to the choice of assignee. Each assigning judge presumably weights the factors differently.

One would expect assigning judges—and indeed all judges on the court—to have homogenous views on two of the factors: opinion effort and legal value. Whether because the court’s interest and the judges’

wrote Parts I.A, II.A, II.C, and III.A; Judge Rogers wrote Parts III.B and IV”). Moreover, even if one judge bears primary responsibility for an opinion, other judges who have heard the case (and perhaps even other judges on the court who have not heard the case) may have input into the opinion. *See, e.g.*, Jonathan Remy Nash, *A Context-Sensitive Voting Protocol Paradigm for Multimember Courts*, 56 STAN. L. REV. 75, 124 (2003). Still, the simplifying assumption of a single author is justified insofar as in most cases a single judge will have primary opinion-writing responsibility, and that judge will contribute far more work than any other judges to the final majority opinion.

30. This assumption places the assignment of opinion-drafting responsibility squarely within the court’s policy, rather than purely dispositional, function. *See* Charles M. Cameron & Lewis A. Kornhauser, *Modeling Collegial Courts (3): Adjudication Equilibria 5–6* (N.Y. Univ. Pub. Law & Legal Research Paper Series, Paper No. 09-39, 2009) (distinguishing between a court’s dispositional and its policy preferences and functions). Recent scholarship confirms the importance of policy outcomes to judges and courts. *See* Deborah Beim et al., *Policy and Disposition Coalitions on the Supreme Court of the United States 1* (Oct. 23, 2010) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1641542.

31. This is a simplifying assumption. The norm of parity may sometimes call for rough equality of workload, not precise numbers of opinions. Thus, for example, one judge might receive fewer opinion assignments than another judge if the cases for which the first judge receives assignments are more complicated than those for which the second judge receives assignments. *See, e.g.*, COHEN, *supra* note 9, at 72 (explaining the practice on the Ninth Circuit of weighting cases by number of issues raised and then assigning fewer cases with more issues to panels). This Article assumes that either the norm calls for rough equality in numbers of assignments, or more or less equally, that in the long run numbers of cases represent a rough proxy for workload.

32. A judge could be pleased with receiving the opinion assignment in the case, or she might prefer if another judge had been assigned the task. *See supra* text accompanying notes 5–6.

interests align with the general interest of the court, or even if only out of their fiduciary responsibilities, one would expect assigning judges to prefer, all else equal, to minimize the depletion of resources imposed by the time and effort it takes to prepare the opinion.³³

For similar reasons, one would expect assigning judges—and judges on the court in general—to seek, all else equal, to maximize legal value benefits.³⁴ These benefits offer the judges the opportunity to establish, or build upon, the perception—among other judges, the legal community, the other branches of government, and the public-at-large—that the court is worthy of the powers vested in it and that it makes just, law-based decisions.³⁵ They also may enhance the court’s and the judges’ reputation for legal quality.³⁶ Legal reputation benefits

33. See COHEN, *supra* note 9, at 5–6 (recognizing the pressures that time constraints impose on courts of appeals). The idea that courts have limited resources is consistent with the notion that courts have external limitations on resources. See Matt Spitzer & Eric Talley, *Judicial Auditing*, 29 J. LEGAL STUD. 649, 654 n.15 (2000) (discussing judicial auditing costs, and noting that at the least they constitute opportunity costs to the reviewing court); Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1610 (1995) (discussing the assumption of resource constraint on courts). But the idea that courts have limited resources may also be consistent with the notion that judges simply choose to limit their input in order to maximize their own leisure. See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 11, 20–21 (1993).

34. While one can conceive of an opinion that affirmatively detracts from legal legitimacy—say, if the opinion stated bluntly that ideological ends justified an outcome notwithstanding legal precedent—this Article assumes that norms and institutional constraints governing judicial behavior virtually eliminate such circumstances. See Kornhauser, *supra* note 33, at 1606 (taking as a baseline assumption in developing the economic theory of stare decisis that “the ‘judicial team’ seeks to maximize the expected number of ‘correct’ answers subject to its resource constraint”); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 746–47 (1982) (discussing how judges belong to an “interpretive community” that subscribes to the rule of law).

35. See Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1055–56 (1995) (explaining that self-respect and the respect of others are important motivating stimuli for judges and “[j]udges generally gain respect from a craft orientation” that “preserves consistency and predictability in the law”); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1729–32, 1747–50 (1997) (positing, and finding empirical evidence, that circuit judges are less likely to vote ideologically in statutory administrative cases than procedural ones, whether because Supreme Court review of the former type of case is more likely or because the legal standards for procedural challenges are more malleable than for statutory challenges); Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 973 (2009) (noting that it is well established that “the Court has an incentive to protect its institutional legitimacy by avoiding institutional confrontations and acts on that incentive”). For discussion of legitimacy in the context of expertise, see *infra* Subsection II.A.2.

36. See Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 129–30 (1983) (explaining that judges seek prestige from lawyers and litigants who appear

may be especially useful if a court seeks to have other courts assess its own legal abilities more favorably.

Assigning judges—and judges generally—are likely to have far more heterogeneous views on ideological value. Whether a judge derives benefit or suffers cost from having a choice of assignee depends upon whether the judge’s and assignee’s ideologies align.³⁷

In sum, if two of the relevant factors—opinion effort and legal value—dominate, then one would expect the choice of assignee to remain fairly constant across assignor judges. The next two Sections identify particular types of cases, and then courts, for which this is likely to be the case.

A. *Opinion Assignment and Case Type*

Consider two broad categories of cases: cases in ideologically charged subject-matter areas that raise politically salient issues,³⁸ and cases in areas—often areas governed by complex codes³⁹—that are largely lacking in ideological controversy that do not raise salient issues.⁴⁰ (This Article refers to the latter, if somewhat imprecisely, as

before them); *cf.* POSNER, *supra* note 1, at 141 (noting that, in general, a “more talented judge is more likely to obtain a greater reputation”). For discussion of reputation in the context of expertise, see *infra* Subsection II.A.3.

37. Assuming there is alignment, a judge might appreciate the opportunity to ensconce an ideologically satisfactory holding in a case. *Cf.* Revesz, *supra* note 35, at 1747–50 (finding empirical evidence of ideological voting on the D.C. Circuit in certain types of cases). If enough judges on the court are of like ideological mind, there might be seen a benefit in establishing a general ideological reputation for the court.

38. *See, e.g.,* Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 309–10 (2004) (noting that some areas of law “by general agreement, are ideologically contested,” while suggesting that other areas involve cases that are “apparently nonideological”); *cf.* Richard L. Pacelle, Jr., *The Dynamics and Determinants of Agenda Change in the Rehnquist Court*, in CONTEMPLATING COURTS 251, 252 (Lee Epstein ed., 1995) (distinguishing between cases of low interest heard by the Court out of duty to resolve lower court conflicts, and cases of high interest heard because of subject matter); Lori Hausegger & Lawrence Baum, *Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation*, 43 AM. J. POL. SCI. 162, 171, 183 (1999) (discussing Pacelle’s analysis of high- and low-interest cases that are separated by subject matter lines).

39. This is not to say that highly technical areas are devoid of ideology (nor to say that ideologically charged areas are uncomplicated). *See, e.g.,* Banks Miller & Brett Curry, *Expertise, Experience, and Ideology on Specialized Courts: The Case of the Court of Appeals for the Federal Circuit*, 43 LAW & SOC’Y REV. 839, 842 (2009) (showing that judicial decision-making in patent law cases on the Federal Circuit “can be ideological”). The point is only that, all else equal, greater legal complexity may tend to mute ideological tendencies.

40. *See* LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES* 126, 136 (2013) (discussing low-ideology cases); Jonathan Remy Nash & Rafael I. Pardo, *Does Ideology Matter in Bankruptcy? Voting Behavior on the Courts of Appeals*, 53 WM. & MARY L. REV. 919, 919 (2012) (finding no evidence of ideological voting among circuit judges in bankruptcy cases

“nonideological cases.”) Cases in the first category are likely to produce values of the various weighting factors that vary greatly across judges. Ideologically minded judges will be likely to weight the ideological value factor highly—although whether a judge weights these factors positively or negatively will depend upon whether the judge is of like, or opposite, ideology to the authoring judge. Also, there may be judges who tend to be less ideological and tend to believe that cases (even ideologically charged ones) ought to be decided in accord with the rule of law. These judges may assign comparatively little weight to ideological value and instead may give more weight to legal value. These differences will, in turn, also feed vastly different utilities for the other judges on the court as to the assignee choice.

In contrast, one can rationally expect the weighting of factors to be more uniform across judges with respect to cases that fall within the second category—i.e., cases in nonideological areas that do not raise salient issues. Here, even ideological judges are likely to weight ideological value far less than they do legal value. Indeed, even if judges disagree as to the outcome that “the law” dictates or suggests, they are likely to agree that the case should be decided in accordance with governing law.

B. *Opinion Assignment and Court Type*

Just as case type may affect the weights judges assign to the various factors, court type may have a similar effect. Let us consider two types of courts. One is a court that understands its mission as, and devotes considerable resources to, correcting errors made by courts below. The other is a court that understands its mission in large part as identifying and resolving controversial and divisive issues. These two case types have representatives in most U.S. jurisdictions: for example, the federal courts of appeals are largely error-correcting courts, while the Supreme Court is a paradigmatic agenda-setting court.⁴¹ This Section argues that several institutional features that typically distinguish error-correcting courts from agenda-setting courts make error-correcting courts much more likely to be more concerned with legal values and less concerned with ideology than agenda-setting courts.

involving discharges of debt). *But see* Jonathan Remy Nash & Rafael I. Pardo, *Rethinking the Principal-Agent Theory of Judging*, 99 IOWA L. REV. 331, 347 (2013) [hereinafter *Principal-Agent Theory*] (finding evidence of ideological voting by circuit judges in a subset of debt dischargeability cases).

41. *See* Ruth Bader Ginsburg, *Workways of the Supreme Court*, 25 T. JEFFERSON L. REV. 517, 517 (2003) (“For correction of errors made in particular cases, we rely largely on the federal courts of appeals For the most part, the Supreme Court will consider for review only cases presenting what we call deep splits—questions on which other courts . . . have strongly disagreed.”).

1. Whether the Court Selects the Cases It Hears

An agenda-setting court, such as the U.S. Supreme Court, is more likely to select the cases that it wishes to decide. This leaves such a court free to focus on cases that raise issues that are most pressing and important to society. The odds are that many such cases will be ideologically divisive, with error correction being displaced.⁴²

In contrast, an error-correcting court is usually one that hears cases where litigants have a right of appeal. As such, one might expect that many of the cases that reach such a court will be more straightforward and less ideologically divisive. It is also likely that such a court will have a larger number of cases on its docket.

2. Whether the Court Hears Most Cases in Panels

An agenda-setting court is more likely to hear cases en banc (or at least in panels that include comparatively larger numbers of the total complement of judges).⁴³ This means that opinion assignment is likely to vest in the same judges repeatedly. Moreover, insofar as the assigning judge will always hail from the majority coalition, the subset of assigning judges is likely to be much smaller than it would be on courts that hear a substantial number of cases in panels. For example, Segal and Spaeth found that the Chief Justice assigned the vast majority of cases, with the senior-most Associate Justice assigning a much smaller, but still the next largest, chunk after that.⁴⁴

In contrast, a court that hears a substantial number of cases in panels is more likely to have more of its judges assigning opinions,⁴⁵ to the extent that only a judge on the panel has at least some of that

42. See *id.*; Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 272 (2006) (arguing that the Court eschews error correction in favor of resolving conflicts and settling issues of national importance); see also EPSTEIN ET AL., *supra* note 40, at 8 (noting that cases that reach the Supreme Court tend to be ideologically charged and legally indeterminate); *cf. id.* at 168, 181–82 (presenting evidence that courts of appeals generally behave less ideologically than does the Supreme Court).

43. See Charles M. Cameron & Lewis A. Kornhauser, *Appeals Mechanisms, Litigant Selection, and the Structure of Judicial Hierarchies*, in INSTITUTIONAL GAMES AND THE U.S. SUPREME COURT 173, 178, 191 (James R. Rogers et al. eds., 2006).

44. See SEGAL & SPAETH, *supra* note 1, at 361–62; accord Forrest Maltzman & Paul J. Wahlbeck, *May It Please the Chief? Opinion Assignments in the Rehnquist Court*, 40 AM. J. POL. SCI. 421, 429 (1996) (finding that Chief Justice Rehnquist was in the majority, and therefore assigned the opinion, in 316 of 398 cases argued during the 1987–1989 Terms of Court).

45. See Cheng, *supra* note 10, at 528–30 (noting that the Supreme Court has an “arguably more top-down assignment process” than do the federal courts of appeals).

authority.⁴⁶ The rotation of panel membership necessarily dilutes the chief judge's assignment power.⁴⁷ The fact that some judges who sometimes are responsible for assigning opinions are other times on the receiving end⁴⁸ may chasten at least some from overemphasizing ideology in opinion assignment.

3. Whether the Court Regularly Decides Cases Unanimously

To the extent that (as described above) an agenda-setting court hears more ideologically divisive cases and staffs more judges on typical appeals, one would expect the judges to disagree more on the proper rule and resolution in each case. Thus, one would expect more concurrences and dissents.⁴⁹ This may mean that ideology may trump expertise in selecting the opinion author.

One would expect more unanimous decisions on error-correcting courts. That will mean that ideology is more likely to take a back seat to legal considerations in terms of opinion assignment.⁵⁰ Indeed, the collegiality that unanimous decision-making fosters⁵¹ may spread beyond pure cases of error correction to more inherently ideological cases.

4. How the Court's Chief Judge Is Selected

Another institutional feature that varies with whether a court is predominantly error correcting or agenda setting—and that affects the likely weighting of legal value—is the method of selection of the chief judge of the court (to the extent that the chief judge handles opinion assignments). Commentators have noted that chief judges may have an impact on the ideology of the courts they sit on, but that they also have

46. See *infra* notes 86, 167, and accompanying text (noting instances where judges who are not part of the panel enjoy at least technical assignment power).

47. See HOWARD, *supra* note 14, at 247.

48. Indeed, some judges may find themselves as senior judge on some panels and junior judge on other panels.

49. Also, as Judge Posner notes, the costs of dissent rise as the size of the panel shrinks. See POSNER, *supra* note 1, at 123–24.

50. See Atkins, *supra* note 10, at 413 (“Since only minimal overt conflict exists on courts of appeals, there is little apparent need to gear opinion assignments toward those political ends.” (footnote omitted)).

51. See Ahmed E. Taha, *How Panels Affect Judges: Evidence from United States District Courts*, 39 U. RICH. L. REV. 1235, 1238 (2005) (noting the link between judicial collegiality and unanimous opinions). For a discussion of the benefits of collegiality in the judicial decision-making process, see Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1644–45 (2003) (emphasizing the value of collegiality on multimember courts); COHEN, *supra* note 9, at 12–13, 162–65 (discussing the role, and presence, of collegiality on courts of appeals).

an institutional role—to ensure that opinion assignments are doled out equivalently across members of the court.⁵² An agenda-setting court is more likely to have a chief judge who is politically appointed.⁵³ For example, the President, with the advice and consent of the Senate, appoints the Chief Justice of the United States, who may in fact be junior in service to every other Supreme Court Justice. Once appointed, the Chief Justice can be removed only for good cause; his term otherwise expires only upon his retirement or death.

In contrast, a judge becomes chief judge of a federal appellate court purely by virtue of having the most years of service on that court and being below a certain age; such positions, moreover, are time limited. One would expect that the more influence ideology has in how a chief judge comes to his or her position, the more he or she will take ideology seriously in setting the court's agenda, a consideration which will likely extend to the tool of opinion assignment. In contrast, a chief judge who ascends to his or her position by virtue of institutional rule will be more likely to see his or her charge as less ideological.⁵⁴ Such a judge is accordingly more likely to see error correction as the court's mission, and thus, is more likely to rely on expertise in opinion assignment.⁵⁵ Moreover, since a chief judge of a circuit will always have that position by virtue of seniority on the court, one would expect that judge to have had the chance to develop collegial relationships with many of his or her fellow judges, which might also temper ideological-based opinion assignments.⁵⁶

In sum, when a non-ideological case is pending before an error-correcting court, an assignor will draw the greatest utility from an assignee choice that both minimizes the time necessary to prepare the opinion and also maximizes legal value benefits. As the next Part explains, expertise-based opinion assignment fits this bill.

II. THE UTILITY OF EXPERTISE-BASED OPINION ASSIGNMENT

The previous Part explained that, at least in the setting of error-correcting courts hearing nonideological cases, assigning judges will assign cases with an eye toward both minimizing the court resources

52. See, e.g., MALTZMAN ET AL., *supra* note 1, at 37–38.

53. See Edwards, *supra* note 51, at 1677–78 (noting that the judicial appointment process drives an emphasis on “ideological commitment” over collegiality concerns).

54. See *id.* at 1678 (noting anecdotally that judges appointed through the ideological appointment process tended to feel “committed to the political party that ensured the appointment” and then incorporate that ideology into their adjudicatory decisions).

55. See *id.* at 1678–89.

56. See generally *id.* at 1643–45 (discussing the development and effects of collegiality in the context of the federal circuit courts).

devoted to drafting the opinion and maximizing the legal benefits that the court will ultimately draw from the finished opinion. Section II.A elucidates three benefits that expertise-based opinion assignment offers—efficiency benefits, legitimacy benefits, and reputation benefits. Section II.B refines the analysis by exploring the supply of, and demand for, expertise in opinion writing. Finally, Section II.C explains, in light of the first two Sections, how courts of appeals deciding cases that raise more technical than ideologically divisive issues are a prime location in which to find expertise-based opinion assignment.

A. *The Benefits of Expertise-Based Opinion Assignment*

In this section, I survey three types of benefits to which expertise-based opinion assignment will typically give rise: efficiency benefits, legitimacy benefits, and reputational benefits.

1. Efficiency Benefits

Efficiency benefits may arise with respect to both the court's current docket and its prospective docket. First, a judge with expertise in an area can presumably write an opinion with less effort than a colleague who lacks that expertise. Opinion specialization thus saves the court (and the judges) effort in dispensing with its current docket.⁵⁷

Second, the rule of precedent may empower courts to deploy expert judges to reduce their docket going forward. A judge with expertise may, more readily than a nonexpert judge, decisively dispose of an issue.⁵⁸ For example, the judge may feel more comfortable announcing—and her copanelists may feel more comfortable allowing her to announce—a more sweeping rule. Decisive opinions may allow future panels of the court to more efficiently address other cases that raise similar issues. Indeed, a decisive opinion may even discourage future litigants from raising an issue, thus reducing the court's future docket.⁵⁹ An expert judge might expend the same effort as a judge

57. See WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 39 (1964) (noting that the logic behind specialization is predicated on notions of economy); Atkins, *supra* note 10, at 413 (“[A] system of task specialization would be in conformity with the trend set by any organization beset by increasing work loads.”); Cheng, *supra* note 10, at 549 (noting that specialization promotes judicial efficiency and therefore may “alleviate some of the excess caseload problems facing the federal courts”). *But see* Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 849 (2012) (questioning the scope of the efficiency benefits of judicial specialization).

58. Cheng, *supra* note 10, at 549 (noting that opinions written by experts are likely to be more accurate, enjoy more legitimacy, and be more efficient).

59. I do not mean to say that such outcomes are always, or even ever normatively desirable, only that an efficiency benefit might obtain. The efficiency benefit might actually exact a cost on the court's legitimacy. As Brenner and Spaeth have argued:

without expertise, and yield an opinion that resolves more legal questions, thus reducing the effort needed to resolve cases in the future.

2. Legitimacy Benefits

Legitimacy benefits offer a court the opportunity to establish, or build upon, the perception—among other judges, the legal community, the other branches of government, and the public-at-large—that it is worthy of the powers vested in it and that it makes just, law-based decisions.⁶⁰ Having an expert judge draft opinions in his or her area of expertise will tend to increase⁶¹ the court’s legitimacy and the legitimacy of its decisions.⁶²

[T]he Court’s specialist in a given issue area might too readily influence the non-specialists. As a consequence, the decision handed down by the Court and the majority opinion which justifies the doctrine might not reflect the considered judgment of all members of the majority, but rather, the judgment of the Court’s specialist.

Brenner & Spaeth, *supra* note 5, at 520. The legitimacy cost might outweigh the efficiency benefit. Still, a court might opt for expertise-based opinion assignment based on its own (possibly incorrect) balancing of the benefits and costs.

60. See *supra* note 35 and accompanying text.

61. Opinion assignment based on expertise also might reduce a court’s legitimacy. A court’s legitimacy is impaired when it is not seen as adhering to established judicial norms. See, e.g., Leandra Lederman, *Tax Appeal: A Proposal to Make the United States Tax Court More Judicial*, 85 WASH. U. L. REV. 1195, 1198–99 (2008). While it was not always the case, see generally J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1044–65 (2000), discussing “panel packing” by the Fifth Circuit in the late 1950s and early 1960s in civil rights cases, it is today the norm (at least in theory) to assemble random panels of judges and to assign cases to panels randomly, see *infra* note 67. By analogy, one can argue that assignment of opinions to particular judges based upon expertise is normatively undesirable. See, e.g., Chi. Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673, 706 (1994) (“The main problem with having the presiding judge assign cases arises from the perception that certain judges have areas of expertise. A judge with a strong interest in a subject matter will assign to himself, or be assigned, a disproportionate number of cases in that area.”); 5TH CIR. I.O.P. 34 (“Judges do not specialize. Assignments are made to equalize the workload of the entire session.”); 11TH CIR. I.O.P. 34(15) (same).

Still, the norm against such assignments in the context of judicial expertise may be weaker than the norm in favor of random assignment of cases to judges: The unenacted Blind Justice Act of 1999, S. 1484, 106th Cong. § 2, which would have statutorily mandated random assignment of circuit judges to panels (and district judges to cases), included a specific exception allowing for assignment of judges to cases based on judicial expertise.

62. See Atkins, *supra* note 10, at 410 (noting that specializing case assignments develops “expertise that may enhance the credibility and legitimacy of the decisions”). One way that expertise may enhance legitimacy is by limiting the number of reversals that a court incurs. See Charles M. Cameron et al., *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court’s Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 102 (2000) (“Frequent

3. Reputation Benefits

Commentators have not, to date, focused upon reputation benefits that courts may garner from having experts write opinions in their areas of expertise. Reputation benefits offer a court the chance to establish itself as a leader in a particular area of law.⁶³ Even to the extent that the court is not directly competing with other courts for litigants,⁶⁴ a court that has an expert judge elucidating an area of law may find itself relied upon by other courts that face similar issues.⁶⁵ In this way, the court's influence may grow.⁶⁶

reversals bring the derision of colleagues and a decline in professional status.”). It has been said that “[w]hen the Supreme Court has little interest in a technically demanding area (such as admiralty or patent law), . . . the Court will largely or entirely abandon the area.” *Id.* at 108. The intuition is that, in these types of areas, the Supreme Court—which is more politically oriented than its subordinates—is more likely to believe that there is an objectively “correct” answer. *See* Nash, *supra* note 29, at 112–13 n.130 (2003) (noting debate over whether the Condorcet Jury Theorem is properly applicable in the context of appellate court panels based on whether or not there exist “right” answers to legal questions).

Even granting that the Supreme Court focuses on ideologically charged areas and cases, however, the Court still may not let lower court cases stand when it believes that the lower court has not actually reached that correct answer. *See* Cameron & Kornhauser, *supra* note 43, at 178–79; *see also* C. Scott Hemphill, *Deciding Who Decides Intellectual Property Appeals*, 19 *FED. CIR. B.J.* 379, 381 (2010) (“In recent years, the Court has become an increasingly aggressive reviewer of Federal Circuit patent lawmaking.”). *But see* Shapiro, *supra* note 42, at 278 (“Along with the trend towards an almost exclusively discretionary docket came the Court’s attempt to define its role not as the court of last resort for unhappy litigants, but as a forum to resolve issues of broader concern.”).

In this sense, expert opinion authorship may convince the Court that the court below reached the correct conclusion. This might be because the expert’s opinion is convincing, or because the Court is more likely to defer to the reasoning of an expert. Thus, the likelihood of reversal may be reduced, and as a corollary, the legitimacy of the lower court may be enhanced. Note that this reasoning should not be read to discount the possibility that legitimacy benefits might inhere even when an area of law is politicized. To the contrary, as this Article discusses below, an expert might be able to draw legitimacy even while deciding a case ideologically by infusing the opinion with expert language that cloaks the ideology. *See infra* note 71 and accompanying text.

63. A judge’s expertise might enable him or her to develop a reputation in an area at a comparative cost advantage to judges without that expertise. *See, e.g.*, Klein & Morrisroe, *supra* note 2, at 381–82 (“While we have no reason to doubt that Judge Wilkins is highly regarded by his colleagues, it is clear that his leading score [for citation of his opinions] is attributable largely to his service as chair of the United States Sentencing Commission.”).

64. *See* Todd J. Zywicki, *Is Forum Shopping Corrupting America’s Bankruptcy Courts?*, 94 *GEO. L.J.* 1141 (2006).

65. *See* Cheng, *supra* note 10, at 549 (noting that opinions written by judges with expertise—especially in highly specialized areas of law—enjoy greater legitimacy and, in turn, deference from others).

66. It is debatable whether circuits have reputations beyond the reputations of the individual judges. *Compare* DAVID E. KLEIN, *MAKING LAW IN THE UNITED STATES COURTS OF APPEALS* 91–93 (2002) (finding little evidence of circuit reputations in interviews with circuit

B. *The Likelihood of Expertise-Based Opinion Assignment*

Two broad considerations will affect the likelihood of expertise-based opinion assignment. The first is the supply of expertise for opinion-writing purposes—i.e., the frequency with which cases arise in which an expert might realistically be assigned to draft the opinions. The second is the demand for expertise-based opinion assignment—i.e., the extent to which a court is motivated in fact to assign an expert to draft an opinion when it is able.

1. Supply of Expertise

Several factors determine a court's available supply of judges with relevant expertise to draft opinions.

a. Frequency with Which the Area of Law Arises on the Court's Docket

The frequency with which cases in an area of law come before the court affects the frequency with which an expert in the area might be assigned to draft court opinions to the extent that not all judges on the court hear all cases. If cases in an area of law appear sporadically on the court's docket, then it may be that the expert judge is rarely (or never) on the panel when an issue in that area arises.⁶⁷

b. The Position on the Court of the Judge with Expertise

Consider next the position on the court of the judge with expertise. If the judge is the chief judge of the court, he may be limited in his

judges), with Michael E. Solimine, *Judicial Stratification and the Reputations of the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 1331, 1339–50 (2005) (canvassing literature to identify various ways to measure a circuit's reputation). I do not purport to resolve this debate here. If a judge develops a reputation as an expert in an area of law, the circuit, along with the judge, will reap the benefit of that expertise. The circuit will receive an additional benefit to the extent that, as a consequence, its influence grows even through opinions authored by other judges and in areas beyond the heart of the judge's expertise.

67. Though it is not required by law, courts today generally assign judges to panels, and panels to cases, randomly. COHEN, *supra* note 9, at 72; see MCKENNA ET AL., FED. JUDICIAL CTR., *supra* note 1, at 101 (With minor exceptions, "assignment of cases to panels is random and is separate from the assignment of judges to panels. The independent assignment of cases to panels is to ensure that particular judges do not receive—or appear to receive—a disproportionate share of particular case types"); Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1606 n.26 (2000); Brown & Lee, *supra* note 61, at 1041.

Matthew Hall has questioned empirically the random assignment of cases to panels. See Matthew Hall, *Randomness Reconsidered: Modeling Random Judicial Assignment in the U.S. Courts of Appeals*, 7 J. EMPIRICAL LEGAL STUD. 574, 575 (2010). The Article tests, and generally confirms, random assignment on the data this Article collected. See *infra* Subsection IV.A.3.

freedom to take full advantage of that expertise. The chief judge may be reluctant to assign himself a disproportionate share of a particular type of case for fear of the institutional message it might send.⁶⁸ The chief judge also may feel constrained by the requirement of equal distributions not to self-assign excessively.⁶⁹

The expertise of a senior circuit judge may also not be fully exploited. Many circuit judges who have taken senior status hear far fewer cases than their active colleagues. Their relative unavailability may force other judges to confront major issues in the senior circuit judge's field of expertise.⁷⁰

2. Demand for Expertise-Based Opinion Assignment

Similar to the supply of expertise, several factors affect the extent to which a court will benefit from, and therefore 'demand', expertise-based opinion assignment.

a. Area of Law in Which the Expertise Lies

First, the more difficult the expertise is to replicate, the more valuable it will be. Thus, all else equal, expertise in a more technically complicated area will be more valuable.⁷¹ Along similar lines, expertise

68. MALTZMAN ET. AL., *supra* note 1, at 37.

69. *See id.* at 37–38. For additional factors assigning judges may consider when opting not to self-assign, see Lax & Cameron, *supra* note 17, at 293 (offering more instrumental reasons for a Chief Justice not to self-assign).

70. The same is likely to be true of district judges, and other judges from other courts who sit “by designation” on court of appeals panels from time to time. In addition, it is less likely that expert opinions by a judge from one court sitting by designation on another court would inure to the general benefit of the second court.

71. *See, e.g.*, DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 135 (1988) (noting that Judge David Dyer possessed “expertise in two high specialized areas of law, admiralty and aviation,” and as a result of this expertise, Judge Dyer “continued to respond to the court’s request to fashion opinions on tedious, complex admiralty cases” long after he graduated to senior judge); Robert M. Howard, *Comparing the Decision Making of Specialized Courts and General Courts: An Exploration of Tax Decisions*, 26 JUST. SYS. J. 135, 136 (2005) (“Tax cases often involve technically complex issues calling for significant judicial discretion in interpretation. The evaluation of such claims usually demands expertise in the policy area.”); Brenner & Spaeth, *supra* note 5, at 520 (“Some areas of the law are particularly complex (e.g., tax law) and it is more efficient to assign those areas to specialists.”).

It may be that the technical nature of an area of law in fact invites those who are versed in the area to couch ideology in seemingly legalistic reasoning:

[B]ecause tax policy is complex, judges of general jurisdiction courts need to rely more on litigants, lawyers, the IRS, and other courts for the meaning and proper construction of the Internal Revenue Code; this reliance on outside interpretation will restrict the use of ideology in the rulings by the district court

in a relatively new area of law—such as a statutory or regulatory scheme—will also be valuable, at least in the short-term.⁷² On the other hand, when any judge can easily obtain expertise in an area of law, expertise in that area is of less value. In particular, expertise that can readily be gained simply by hearing cases in an area is of less value than deeper expertise that cannot be thus obtained.⁷³

Second, the more uncommon expertise in that area of law is, the more valuable is a particular judge's expertise. Thus, an individual judge's expertise in an area is more important the less it is shared by other judges on the court.⁷⁴ Put another way, the more judges who share an expertise, the less important a role expertise will play in assigning opinions among judges.

judges. Tax court judges' expertise, and the concomitant lack of reliance on others, means that the tax court judges have *greater* freedom to use their ideology in their rulings.

Howard, *supra*, at 141; *cf.* Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1745 (2003) (noting that state high courts may have a particularly good opportunity to decide cases with bias against out-of-state residents by embedding that bias in obscure statements of state law). To whatever extent that may be the case, that is not inconsistent with my point: A court may assign cases in a field to Judge *X*, an expert in that field, on the assumption that Judge *X* decides those cases based on her expertise, when in fact Judge *X*'s opinions and decisions are ideologically driven. Still, the fact remains that the court's decision to assign the cases to Judge *X* is based upon considerations of expertise, and Judge *X*'s expertise enables her to hide her ideology such that the court views those opinions and decisions to be expertly (and not ideologically) decided even after the fact.

72. See KLEIN, *supra* note 66, at 75–78 (finding that judicial rules announced by experts—although with the term defined by reference to prior opinion writing in the area—fared better in subsequent cases than did opinions announced by nonexperts).

73. It seems dubious that, simply from hearing cases in an area, one can gain expertise as deep as one would get from practicing in the area as a lawyer or participating in drafting the law as a legislator or regulator. See RICHARD A. POSNER, *HOW JUDGES THINK* 205 (2008) (“No judge of [a non-specialty] court can be an expert in more than a small fraction of the fields of law that generate the appeals that he must decide, or can devote enough time to an individual case to make himself, if only for the moment (knowledge obtained by cramming is quickly forgotten), an expert in the field out of which the case arises.”). *But see* COHEN, *supra* note 9, at 49 (suggesting that a judge can gain expertise during their tenure by learning the law for each case over which they preside). To the extent that one can gain *some* expertise that way, that expertise reduces, at least somewhat, the value of the expert judge.

74. Note the implication for whether the court is a generalist or specialist court. To be sure, one of the benefits of having a court specialize in a particular area of law is to have judges who are experts in, or become experts in, that area of law. Howard, *supra* note 71, at 136 (“Expertise is a significant benefit of a specialized court.”). Still, the value of each judge's expertise is reduced by virtue of the substitutability of judges.

b. Frequency with Which the Area of Law Arises on the Court's Docket

The frequency with which the area of law (in which a judge has expertise) arises on the court's dockets implicates both the frequency with which the court has the opportunity to assign opinions in the area to an expert (as discussed above), and also the demand for that expert to draft opinions in the area. There is reason to suspect that expertise-based assignment does not always increase as an area in which a judge has expertise arises more frequently on the court's docket. Given the random assignment of cases to judges on appeals courts, an expert might never have the opportunity to hear a case in the area of his or her expertise if the area of law arises with extreme infrequency. Thus, if an area of law makes infrequent appearances in court cases, expertise in that area will not provide much in the way of efficiency benefits, let alone legitimacy or reputation benefits.

On the other hand, if an area of law arises with great frequency, then (i) it is more likely that other judges will have the opportunity to develop their own expertise in the area, and, more importantly (ii) it is more likely that nonexpert judges may often have to resolve issues before the expert judge has an opportunity to resolve them. More generally, the more heterogeneous a court's docket, the greater the demand for an individual judge's expertise. Opinion specialization matters more where one judge's expertise in an area frees other judges from having to decide, at least in the first instance, challenging issues in that area.⁷⁵ If the court specializes in cases in that area, the efficiency benefits from opinion specialization tend to dissipate. It is also more likely that more judges on a court that specialize in a particular area will possess similar expertise.⁷⁶

A second point is whether the area in which a judge's expertise lies arises mostly in conjunction with other issues from other areas of law, or whether it more often appears as the central focus of the cases. An expertise in an area that arises frequently but in conjunction with issues

75. See O'URPHY, *supra* note 57, at 39.

76. See *supra* note 9 and accompanying text. Professor Daniel Meador argues against classifying courts as "generalist" or "specialist" based upon the court's defined subject matter jurisdiction. Instead, he suggests that one must examine the scope of cases that the court actually is called upon to decide. See Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 611–15 (1989). The validity of this point notwithstanding, it still seems that judges are usually appointed to courts that are traditionally seen as specialist (not in the sense that Meador means) based upon their special expertise. And, in contrast, judges are not usually appointed to courts that are seen as generalist based upon special expertise. Indeed, it seems that prior expertise is hardly a prerequisite for appointment to the regional courts of appeals.

from other areas of law is less valuable than expertise that can be deployed frequently to resolve entire cases. For example, a judge who was involved in redrafting the Federal Rules of Evidence might find that demand for that expertise is dispersed over cases that arise under a large number of distinct areas of law, many of which may be quite unfamiliar to the judge.

c. Status of the Court Within the Broader Judiciary

The extent to which the court is accepted within the broader judiciary will affect the extent of the court's demand for legitimacy benefits. These benefits are less important the more a court is already accepted and respected. As an example, non-Article III judges and courts are typically thought to be in greater need of legitimization than are their Article III counterparts.⁷⁷ It is probably also the case that older, more established courts need less legitimization than comparatively newer courts.⁷⁸

d. Frequency with Which the Area of Law Arises on Other Courts

The frequency with which the area of law comes before *other* courts affects the demand for expertise by determining the opportunity for establishing a reputation. A judge on the Fourth Circuit may have an expertise in pneumoconiosis ("black lung" condition afflicting coal miners), but it is likely that the extent of any inter-court benefit would extend in large measure only to the Sixth Circuit, since the vast bulk of those cases arise in the Fourth and Sixth Circuits.

77. See POSNER, *supra* note 1, at 118; Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 77 (1997) ("The federal judges opposed the creation of more independent bankruptcy courts, because (1) they would lose their appointment power over bankruptcy judges, and thus one of *their* main patronage opportunities, and (2) their status would be diluted through the vast increase in the number of federal judicial positions."); Judith Resnik, "*Uncle Sam Modernizes His Justice*": *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 682–84 (2002) (arguing in favor of Article III judges self-consciously blurring the line between Article III and non-Article III judges and tribunals in the face of the reality that non-Article III adjudication is becoming more and more critical, but also noting the hurdles to the distinction actually disappearing).

78. See, e.g., Rochelle Cooper Dreyfuss, *In Search of Institutional Identity: The Federal Circuit Comes of Age*, 23 BERKELEY TECH. L.J. 787, 823 (2008) (noting that "[t]he first-generation jurists [on the Federal Circuit] were right to establish the bona fides of the court and avoid attention" and arguing that "the court is now fully established," so that "there is no longer a need for the court to take defensive positions or to maintain a low profile;" indeed, "[n]ow that the court is mature, it is time to press its position as a tribunal with special expertise and to fulfill its role as the near-final authority in patent matters").

e. Whether the Court Has Coequal Sister Courts

A final factor that affects the demand for a judge's expertise is whether the court has coequal sister courts. The more courts of equal level in the hierarchy, the more valuable we might expect a judge's expertise to be. The more courts there are at the same level, the more reputation offers a court the means to differentiate itself from its sister courts.

This may play out in two ways. First, some courts face actual competition for litigants.⁷⁹ It may be possible that a court with an expert judge can attract litigants by having that judge announce rules and decide cases in her area of expertise.

Second, even if courts do not actually compete for litigants—where, for example, the choice of which court of appeals hears an appeal is based not upon the choice of litigants but upon geography—the existence of sister courts who are hearing similar issues may still create an opportunity for a court to establish itself as an expert in a particular area to which other courts will cite. Thus, for example, the Eighth Circuit may look to the expert opinions of Judge Posner on the Seventh Circuit in deciding antitrust cases.⁸⁰ It is also possible that, to the extent that the Eighth Circuit has yet to resolve an issue that Judge Posner on the Seventh Circuit has addressed, a district court in the Eighth Circuit may rely upon decisions of the Seventh Circuit in reaching its decision. Note, moreover, that the district court's reliance upon the Seventh Circuit's decisions may in turn influence the Eighth Circuit when *it* eventually faces the issue. In this way, a court that has a judge who is an expert in a field becomes an asset that bolsters that court's reputation.

C. Likely Settings of Expertise-Based Opinion Assignment

The last section identified two general factors that may predict the likelihood of expertise-based opinion assignment: the nature of the court, and the type of subject matter. With respect to court type, expertise-based opinion assignment should be more likely on a court that (i) hears various types of cases, (ii) hears cases in relatively small panels, (iii) is predominantly an error-correcting court, (iv) has a chief judge who serves in that role not by virtue of ideology, (v) spreads responsibility for opinion assignment to various judges, and (vi) has a number of sister courts of equal and lesser rank in the judicial hierarchy. A moment's reflection confirms that the regional federal courts of

79. See Isaac DiIanni, *The Role of Competition in the Market for Adjudication*, 18 SUP. CT. ECON. REV. 203, 211–12 (2012).

80. See KLEIN, *supra* note 66, at 93–96.

appeals meet these criteria.⁸¹ Courts of appeals are predominantly error-correcting courts. The chief judge serves by virtue of a number of objective factors, most importantly his or her seniority on the court.⁸² Appeals are almost always heard in panels of three judges. The circuit courts hear all appeals brought to them, and drafting opinions is a time-consuming matter for circuit judges.⁸³ The circuit courts' large workload⁸⁴ makes efficiency benefits very attractive.⁸⁵

Though there is variation from circuit to circuit, courts of appeals, to some degree, vest opinion assignment authority with the panel's presiding judge.⁸⁶ The presiding judge on a panel will be either the

81. *But see* Unah & Wall, *supra* note 3, at 24 (finding evidence that expertise is a statistically significant predictor of opinion assignment at the Supreme Court).

82. *See* 28 U.S.C. § 45(a) (2006).

83. *See, e.g.*, Letter from Alex Kozinski, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, to Samuel A. Alito, Jr., Chairman, Advisory Comm. on Appellate Rules, at 9 (Jan. 16, 2004).

84. *See, e.g.*, COHEN, *supra* note 9, at 6–8 (noting the precipitous increase in the federal courts of appeals).

85. *See* Cheng, *supra* note 10, at 524–25 (noting that efficiency is a goal most “difficult to dismiss” given the burgeoning caseloads).

86. *See id.* at 527 n.35. Some courts empower the presiding judge to assign opinions even in cases where he or she is not part of the majority coalition. *See id.* (noting that several circuits' rules seem to allow this, and noting an email from Judge Richard Posner affirming that “the Seventh Circuit allows the presiding judge to assign majority opinions even if he or she is in dissent”). The Fourth Circuit vests opinion assignment authority in the chief judge, based upon the recommendation of the presiding judge. *See* 4TH CIR. I.O.P. 36.1. *But see infra* note 167 (questioning the extent to which the presiding judge's recommendation is overridden in practice).

Some courts—perhaps most notably the Ninth Circuit—use a system of shared bench memorandum that effectively alters the opinion assignment sequence. Traditionally, circuit judges have had their law clerks prepare a bench memorandum for each case that they hear, and therefore each member on a panel of three judges will have had his or her clerks prepare a separate bench memorandum. Under a shared system, the presiding judge assigns one judge on the panel the responsibility of preparing a bench memorandum for the entire panel for each case. COHEN, *supra* note 9, at 94–95 (describing the practice); Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. REV. 431, 433 (1986) (“Generally, each judge's staff prepares one or two bench memoranda for each day's sitting.”); Stephen L. Wasby, *Clerking for an Appellate Judge: A Close Look*, 5 SETON HALL CIRCUIT REV. 19, 52–53 (2008) (discussing the Ninth Circuit's practice); *see also* Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 J. APP. PRAC. & PROCESS 7, 14 (1999) (noting that D.C. Circuit panels do not typically share bench memoranda, but that in “monster cases . . . we usually divide up the bench memoranda between chambers”). Typically, unless the judge who had the responsibility to prepare the memorandum for the panel is not part of the majority disposing of the case, that judge will then accede to opinion drafting responsibilities. *See* COHEN, *supra* note 9, at 73 (“[W]hile the opinion-writing responsibility is separate from the responsibility for drafting bench memoranda, judges rarely split those two responsibilities in practice.”). In the end, however, this practice still leaves the assigning judge free to consider factors like expertise, just like a judge making the initial assignment after oral argument. *Cf. id.*

(i) Circuit Justice, (ii) if the Circuit Justice is not part of the panel, the circuit's chief judge, or (iii) if the chief judge also is not part of the panel, the presiding judge⁸⁷—the active circuit judge with the lengthiest service on the court.⁸⁸ Opinion assignment is thus not restricted to a small number of judges on the court.⁸⁹

Finally, there are many circuit courts, and many district courts within each circuit. There is thus an opportunity for a small number of circuits to differentiate themselves by featuring opinions in an area authored by experts.

If the practices of the courts of appeals are logical places in which to look for expertise-based opinion assignment, what areas of law might be especially good places to look? Broadly speaking, expertise-based opinion assignment will be more likely for subject matters that are (i) novel or technical, and (ii) that arise with fair frequency both in the court on which the expert sits and in other courts. One such area might be securities regulation. This is a complex area of law where expertise would substantially reduce opinion-preparation time and would also enhance the issuing court's legitimacy and reputation. Indeed, an existing study confirms this notion. Professor Margaret Sachs finds that Judge Henry Friendly was assigned a vastly disproportionate number of

(explaining that one judge reports sometimes being asked to identify those cases for which his law clerks would be most interested in writing bench memoranda).

One source indicates that the Sixth Circuit uses a random opinion assignment system:

In the Sixth Circuit, majority opinions are assigned on a rotating schedule rather than by the senior (or chief) judge on the panel. In the event that the judge whose turn it is to author the "majority" opinion is not actually in the majority, the opinion he writes becomes his individual dissent.

VIRGINIA A. HETTINGER ET AL., *JUDGING ON A COLLEGIAL COURT* 133 n.3 (2006). Another source indicates that some presiding judges assign responsibility for drafting bench memoranda for the panel in advance of oral argument—and therefore effectively in most cases end up assigning responsibility for opinion drafting as well—randomly. *See* COHEN, *supra* note 9, at 73.

87. *See* 28 U.S.C. § 45(b).

88. *See id.* ("[Besides the chief judge, o]ther circuit judges of the court in regular active service shall have precedence and preside according to the seniority of their commissions."). Congress enacted this provision to eliminate attempts by senior circuit judges to retain opinion assignment authority after assuming senior status. *See* HOWARD, *supra* note 14, at 247 n.w.

89. *See supra* note 86 and accompanying text; *see also* HOWARD, *supra* note 14, at 247 ("[P]anel rotation and seniority diffuse the power to assign."); Stephen J. Choi & G. Mitu Gulati, *Trading Votes for Reasoning: Covering in Judicial Opinions*, 81 S. CAL. L. REV. 735, 749 (2008) ("[U]nlike the Supreme Court, which has control over its docket, the assignment power itself is not as important to the circuit courts because the courts sit in panels, and there is generally a large docket that needs to be shared. Thus, judges are forced to cooperate, and the importance of hierarchy is diminished.").

securities regulation opinions during his tenure on the Second Circuit.⁹⁰ Professor Sachs attributes this result at least in part to the fact that Judge Friendly was one of only two circuit judges who served on a (nonjudicial) panel that sought, ultimately without success, to redraft the federal securities laws.⁹¹ Professor Sachs notes that “his connection with the [project] likely enhanced his standing as a securities expert among his Second Circuit colleagues,” which “in turn probably increased the number of important securities opinions that he was assigned to write.”⁹² Finally, Sachs argues that Judge Friendly’s reputation among the federal judiciary was enhanced by virtue of the fact that the Second Circuit, which had been the nation’s premiere federal commercial court, was beginning a period where it would dominate federal appellate court output of securities law opinions.⁹³

The theory suggests several testable hypotheses. First, one would expect to observe heightened assignment of cases to judges with an expertise in a relatively nonideological area.

Hypothesis 1: A circuit judge with expertise in a relatively nonideological area will be assigned opinion assignment responsibility in a disproportionate share of cases in that area.

Second, one would expect a judge’s expertise to influence opinion assignment only at a time when the court actually hears cases that raise issues in the area of expertise. If the expertise does not enhance the legal reasoning necessary to the resolution of cases, then one would not expect it to result in the disproportionate assignment of opinions.

Hypothesis 2: A circuit judge with expertise in a relatively nonideological area will be assigned opinion responsibility in a disproportionate share of cases in that area only when the expertise is relevant to the decision of cases.

Third, one would expect expertise to be more valuable, and therefore expect to see more expertise-based opinion assignment, in cases that raise more, rather than fewer, issues of law in the area in question.

90. See Margaret V. Sachs, *Judge Friendly and the Law of Securities Regulation: The Creation of a Judicial Reputation*, 50 SMU L. REV. 777, 809–10 (1997).

91. See *id.* at 794.

92. *Id.* at 795; see also *id.* at 813 (“Presiding judges probably assigned Judge Friendly a disproportionate share of securities opinions for three reasons: he was (1) interested in securities regulation; (2) an expert in the subject area; and (3) senior to many of his colleagues at a relatively early stage of his judicial career.”).

93. See *id.* at 791–93.

Hypothesis 3: A circuit judge with expertise in a relatively nonideological area will be assigned responsibility to write an even more disproportionate share of opinions in cases that raise more issues of law in the area in question.

Fourth, to the extent that opinion assignment in nonideological cases is based more on expertise than on politics, one would expect the political leanings of judges to play a comparatively minor role in the assignment of opinions.

Hypothesis 4: A circuit judge with expertise in a relatively nonideological area will be assigned a disproportionate share of opinions in those cases, regardless of the party of the president who appointed the assigning judge.

Fifth, along similar lines, one would expect expertise to overcome years of judicial service in the assignment of opinions in relatively nonideological cases.

Hypothesis 5: A circuit judge with expertise in a relatively nonideological area will be assigned a disproportionate share of opinions in those cases, even if he or she is not the assigning judge, and regardless of whether he or she is the middle or junior member of the majority coalition.

III. TWO SETTINGS FOR EMPIRICAL ANALYSIS: SENTENCING GUIDELINES AND BANKRUPTCY

This Part describes the two settings tested in Part IV for observable implications of the theory of expertise-based opinion assignment advanced in Parts I and II. The first setting is the assignment of opinions in appeals from convictions for federal crimes—particularly those implicating the United States Sentencing Guidelines—to circuit judges who served as Commissioners on the Sentencing Commission when the Guidelines were drafted.⁹⁴ The second setting is the assignment of bankruptcy opinions to circuit judges who previously served as federal bankruptcy judges.

A. *The Sentencing Guidelines and the Commissioners*

This Section first describes the Sentencing Guidelines and explains why they present an area of law well suited to expertise-based opinion assignment. This Section then offers brief biographies of two men—William W. Wilkins, Jr., and Stephen G. Breyer—who each served both

94. Cf. Unah & Wall, *supra* note 3, at 16–20 (measuring expertise of Supreme Court Justices based upon credentials, experience, and track record).

as Commissioners during the Guidelines drafting process and also as circuit judges during the early years of the Guidelines' applicability.

1. The Guidelines

The assignment of opinions under the federal Sentencing Guidelines to experts who helped draft the Guidelines is an especially felicitous area in which to conduct such an investigation. First, the advent of the Guidelines constituted an exogenous shock. Before their effective date, the sentencing system in federal court (and, for that matter, in state courts) looked entirely different. Second, once the Guidelines took effect, Guidelines cases flooded the federal courts. Third, only two active circuit judges served on the commission that drafted those Guidelines; their expertise was thus very unique.

Prior to the advent of the Guidelines, the sentencing system in federal court looked entirely different. Absent statutory mandates, district judges were largely free to impose sentences as they saw fit following conviction.⁹⁵ Frustrated with what it saw as needless discontinuity in sentencing, Congress decided to make a fundamental change to the system. The Sentencing Reform Act of 1984⁹⁶ (the "Act") established the United States Sentencing Commission (the "Commission"). The Commission consists of seven voting members, appointed by the President with the advice and consent of the Senate.⁹⁷ The Commission was charged with drafting, and later amending, sentencing guidelines in accordance with the broad mandate of Congress, as expressed in the Act, for use by federal district judges in criminal matters.⁹⁸ The Sentencing Guidelines initially went into effect on November 1, 1987.⁹⁹

An initial question that dogged the Guidelines was whether Congress's delegation to the Commission ran afoul of constitutional separation of powers principles. The Supreme Court answered that question in the negative in its 1989 decision in *Mistretta v. United*

95. See Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 79 n.156 (1995) (noting Congress passed the Sentencing Reform Act in part to respond to the "tremendous discretion accorded to district judges in the criminal sentencing process").

96. Pub. L. No. 98-473, 98 Stat. 1837, 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

97. See *An Overview of the United States Sentencing Commission*, U.S. SENT'G COMM'N 3, http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf (last visited Aug. 25, 2014).

98. See *id.* at 1; Max M. Schanzenbach & Emerson H. Tiller, *Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J.L. ECON. & ORG. 24, 26 (2006).

99. *An Overview of the United States Sentencing Commission*, *supra* note 97, at 2.

States.¹⁰⁰ Many years later, in 2005, the Court in *United States v. Booker*¹⁰¹ held that the Guidelines had to be interpreted as merely advisory, and not binding on district courts, in order to be constitutional.¹⁰² After *Booker*, courts of appeals review sentences meted out by district courts only for their reasonableness in light of the Guidelines.¹⁰³ During the intervening period, however, the Guidelines were mandatorily applied in all federal district courts, with appeals lying to the courts of appeals.¹⁰⁴

The Guidelines instituted a bureaucratic scheme that vests far less discretion in trial judges.¹⁰⁵ Broadly speaking, the Guidelines call for the sentencing judge to identify two numerical dimensions for each criminal defendant to be sentenced: the offense level and the criminal history category.¹⁰⁶ The crime for which the defendant has been convicted sets the “base offense level.”¹⁰⁷ Levels are then added or subtracted based upon various factors, such as whether a gun was used to effectuate the crime (addition) and whether the defendant accepts responsibility for his or her actions (subtraction).¹⁰⁸ The criminal history category is determined by reference to the prior criminal offenses committed by the defendant.¹⁰⁹ The Guidelines provide a grid that, given various combinations and ranges of offense level and criminal history category, produces a sentencing range.¹¹⁰ Under congressional statute, a sentencing judge can depart from the sentencing range produced by rigid application of the Guidelines if there is an “aggravating or mitigating circumstance of a kind, or to a degree, not

100. 488 U.S. 361, 380–84 (1989).

101. 543 U.S. 220 (2005).

102. *Id.* at 226–27 (Stevens, J., delivering opinion of the Court in part); *see also id.* at 245 (Breyer, J., delivering the opinion of the Court in part) (finding unconstitutional “the provision of the federal sentencing statute that made the Guidelines mandatory”). In two decisions earlier in the decade—*Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004)—the Court had held state sentencing schemes unconstitutional to the extent that they allowed a trial judge, and not juries, to find facts used to enhance sentences beyond the maximum provided by statute. The *Booker* Court saw the earlier cases as mandating the conclusion that binding federal Sentencing Guidelines were similarly unconstitutional. *Booker*, 543 U.S. at 226–27 (Stevens, J., delivering the opinion of the Court in part).

103. *See Booker*, 543 U.S. at 259–62 (discussing the reasonableness standard).

104. *Id.* at 233, 260.

105. *See Schanzenbach & Tiller*, *supra* note 98, at 26.

106. *See id.* at 26 (noting the variables included in the judge’s post-conviction sentencing calculus).

107. *See U.S. SENTENCING GUIDELINES MANUAL* ch. 2 introductory cmt. (2013).

108. *See Schanzenbach & Tiller*, *supra* note 98, at 27 (noting that base levels can be adjusted by adding or subtracting “offense-level points”).

109. *Id.* at 26 n.5.

110. *Id.* at 26.

adequately taken into consideration by the Sentencing Commission in formulating the [G]uidelines.”¹¹¹

The federal courts of appeals’ application of the Sentencing Guidelines provides an excellent setting in which to examine expertise-based opinion assignment. As an initial matter, as discussed above in Section II.C, one would expect expertise-based opinion assignment to be at least somewhat common on the regional courts of appeals.

The Guidelines themselves, at least early on, were an area ripe for expertise-based opinion assignment. First, given the novelty of the Guidelines scheme, no judge—trial or appellate—had judicial experience with the Guidelines prior to their effective date.¹¹² The few judges who had experience with them were those members of the Sentencing Commission who drafted the initial Guidelines. Those judges, then, had significant expertise that none of their fellow judges had.

Second, the Guidelines are fairly technical.¹¹³ As noted above, the Guidelines scheme introduced elements more familiar to administrative law than criminal law. The Guidelines issues that came before the courts, at least early on, were less likely to be ideologically charged.¹¹⁴

111. 18 U.S.C. § 3553(b)(1) (2012). In 1994, the Commission elucidated that factors “not ordinarily” relevant to sentencing could justify a departure from the ordinary Guideline sentencing range if those factors removed the case from the Guidelines’ “heartland.” U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 & cmt. (2013) (policy statement).

112. Only a few states had sentencing guidelines regimes before the advent of the federal system. And the few that did, differed from the federal approach, particularly in that they did not constrain trial judges’ discretion at sentencing. Moreover, even those states that implemented guidelines programs in the wake of the federal program eschewed the federal model in favor of the preexisting state programs. *See generally* Kay A. Knapp & Denis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. DAVIS L. REV. 679, 679–80 (1992) (explaining that states generally rejected guidelines resembling federal efforts).

113. *See* Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715, 718 (2008) (noting that the Guidelines’ regulations “rival the tax code in length”); Stephen Breyer, *Justice Breyer: Federal Sentencing Guidelines Revisited*, CRIM. JUST., Spring 1999, at 32 (recognizing the “important criticism . . . that the guidelines are simply too long and too complicated”).

114. *See, e.g.*, EPSTEIN ET AL., *supra* note 40, at 241–53 (finding limited evidence of ideology influencing sentencing decisions, even post-*Booker*); Breyer, *supra* note 113, at 28 (noting that Congress acted “in bipartisan fashion” in creating the Commission and calling for the introduction of sentencing guidelines); Schanzenbach & Tiller, *supra* note 113, at 715 n.4 (“Senator Edward Kennedy was a sponsor of the Sentencing Reform Act, and President Reagan enthusiastically signed the legislation.”); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 266 (1993).

This is not to say that Guidelines issues are devoid of ideological content. To the contrary, criminal law is an area where commentators have found strong evidence of ideological voting on the courts of appeals. *See, e.g.*, CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL?* 17–19 (2006). More specifically, Professors Gregory Sisk, Michael Heise, and Andrew Morriss found

Third, Guidelines issues certainly arise with enough frequency to make them valuable. Criminal cases occupy a large portion of the courts of appeals' dockets.¹¹⁵ Moreover, the advent of the Guidelines invited more attorneys to raise sentencing issues. The Constitution guarantees criminal defendants the services of legal counsel, and government-provided attorneys represent a substantial number of criminal defendants.¹¹⁶ In addition, appeal to the court of appeals is as of right.¹¹⁷

that the votes cast by district judges on the question of whether the Guidelines were constitutional prior to the Supreme Court's clarifying decision in *Mistretta*, were influenced by the party of the President who appointed the judges. See Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1403 (1998). Further, Professors Max Schanzenbach and Emerson Tiller have amassed empirical evidence that district courts tend to choose a method for departing from a Guideline range (whether upward or downward) that is more insulated from appellate review—i.e., that is subject to more deferential review by the court of appeals—when the court of appeals to which the appeal would lie is more ideologically distant from the sentencing district judge. See Schanzenbach & Tiller, *supra* note 98, at 32–33; Schanzenbach & Tiller, *supra* note 113, at 725. (It is important to note, however, that Schanzenbach and Tiller present no empirical evidence that in fact the courts of appeals engage in ideological voting in Guidelines cases; their data consist of sentences imposed by district judges, not the disposition of those sentences on appeal.)

In the study here, I choose to consider cases decided during the time period from 1990–93 in part because support for the Guidelines was more ideologically uniform (as the quotation in the text indicates), and because presumably early cases were more likely to raise questions about how the Guidelines were technically supposed to function, as opposed to issues about the choice of sentence within the rules of the Guidelines (which might invite more ideological debate). Cf. Sisk et al., *supra*, at 1407–09 (collecting data during 1988, before the Supreme Court's *Mistretta* decision was handed down in early 1989); Schanzenbach & Tiller, *supra* note 98, at 35 (“We begin with 1992 because the Guidelines were upheld by the Supreme Court in 1989 and the permissibility of certain grounds for downward departures became clearer in the early 1990s.”).

To be sure, there was hardly unanimous support for the Guidelines. Indeed, a large number of federal judges—including many district judges and appellate judges who had served as district judges—opposed the Guidelines on the ground that it reduced the discretionary authority of district judges. See, e.g., Richard T. Boylan, *Do the Sentencing Guidelines Influence the Retirement Decisions of Federal Judges?*, 33 J. LEGAL STUD. 231, 235 (2004); Knapp & Hauptly, *supra* note 112, at 679 & n.1 (1992); Stith & Koh, *supra*, at 281. There is no evidence, however, nor does the literature suggest, that this opposition in any way correlated with ideology.

115. For example, for the twelve-month period ending March 31, 2013, there were 12,674 federal criminal appeals on the dockets of the various regional federal courts of appeal; this constituted 29.68% of the courts' total docket of 42,709 appeals. *U.S. Courts of Appeals—Nature of Suit or Offense in Cases Arising from the U.S. District Courts*, U.S. COURTS, <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/B07Mar13.pdf> (last visited Aug. 26, 2014).

Note, moreover, that sentencing is a part even of criminal cases where the defendant pleads guilty, whether because of a plea bargain or otherwise. See Schanzenbach & Tiller, *supra* note 98, at 28.

116. Morris B. Hoffman et al., *An Empirical Study of Public Defender Effectiveness: Self-Selection by the “Marginally Indigent,”* 3 OHIO ST. J. CRIM. L. 223, 223, 238 (2005).

As a result, many attorneys appealing clients' criminal convictions look for issues to raise that will not be completely meritless. The advent of the Guidelines provided attorneys with a number of arguments that were novel and at least colorable. Moreover, Guidelines issues very often were (and still are) substantial portions of criminal cases; often Guidelines issues dominated the questions raised in appeals.¹¹⁸

Fourth, Guidelines issues arise across the regional circuit courts of appeals. Thus, the opportunity for a court with an expert judge in this area to reap reputation benefits was ripe.

Fifth, even to the extent that the frequency with which Guidelines issues arise would allow other judges to develop some expertise in the area, the novelty of the Guidelines gave judges with Commission experience at least some expertise advantage vis-à-vis other judges for some period of time.

Finally, it is possible to identify a period of time during which Guidelines cases were likely to be largely nonideological. The empirical study of Guidelines cases focuses on this period. Some commentators suggest that decision-making under the Guidelines had ideological elements during two time periods. From their initial promulgation in 1987 until the Supreme Court ruled the Guidelines constitutional in 1989,¹¹⁹ the predominant issue facing courts of appeals was whether the Guidelines were constitutional, an issue that invited ideological debate.¹²⁰ Then, after the basic workings of the Guidelines had been fleshed out,¹²¹ the courts of appeals faced issues such as whether the trial courts had exercised their discretion properly in choosing a sentence length within the proper range.¹²² This, too, was an issue that

117. See Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 161–62 (1995) (noting that while “the right to appeal has not explicitly been recognized as a federal constitutional right,” the right to appeal is a “sacrosanct” notion that is a “de facto part” of the American judicial system).

118. See Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1100 (2001) (advancing sentencing as one of the most important components of criminal litigation).

119. *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

120. See Sisk, Heise & Morriss, *supra* note 114, at 1381–82.

121. See Schanzenbach & Tiller, *supra* note 98, at 35 (noting that “the permissibility of certain grounds for downward departures became clearer in the early 1990s”).

122. See Schanzenbach & Tiller, *supra* note 113, at 719–20 (noting that the Supreme Court in a 1996 case required appellate courts to review a district court's deviation from the Guidelines under the abuse of discretion standard, increasing the trial court's risk of reversal). This period ended in 2005 with the Supreme Court in *United States v. Booker*, 543 U.S. 220 (2005), ultimately holding mandatory application of the Guidelines to be unconstitutional. See *supra* notes 101–102 and accompanying text.

might divide judges along ideological lines.¹²³ In between these periods, however—starting in 1989 and into the mid-1990s—was a period during which the courts of appeals, now assured of the Guidelines’ constitutionality, struggled instead with exactly how the Guidelines worked. The questions raised during this period were largely legal and technocratic; they were less likely to raise ideologically charged issues.¹²⁴

2. Backgrounds of Judge Wilkins and Judge Breyer

When the Sentencing Commission drafted the original Guidelines, William Wilkins—a Fourth Circuit Judge at the time—served as Chair, and Stephen Breyer—then a First Circuit judge—served as a Commissioner.¹²⁵

After graduating from the University of South Carolina School of Law in 1967, Judge Wilkins clerked for a Fourth Circuit judge, worked as a legal assistant for Senator Strom Thurmond, and worked in private practice.¹²⁶ From 1974–1981, he served as a state solicitor in South Carolina.¹²⁷

In 1981, President Ronald Reagan appointed Wilkins as a United

123. See Schanzenbach & Tiller, *supra* note 98, at 35 (presenting empirical evidence, beginning with decisions rendered in 1992, that district courts tend to choose a method for departing from a Guideline range (whether upward or downward) that is more insulated from appellate review—i.e., that is subject to more deferential review by the court of appeals—when the court of appeals to which the appeal would lie is more ideologically opposed to the sentencing district judge).

124. See *id.* (noting, with respect to a study presenting empirical evidence of ideological decision-making by district courts in sentencing cases, that “[w]e begin with 1992 because the Guidelines were upheld by the Supreme Court in 1989 and the permissibility of certain grounds for downward departures became clearer in the early 1990s”).

125. Stith & Koh, *supra* note 114, at 236 n.81 (noting Judge Wilkins’s chairmanship); Breyer, *supra* note 113, at 28 (noting that Justice Breyer served as an original member of the sentencing commission from 1985 to 1989 under Chairman Wilkins). George E. MacKinnon, then a Senior Circuit Judge on the District of Columbia Circuit, served as a Commissioner during that time. See David Binder, *George E. MacKinnon, 89, Dies; Was Appeals Judge for 25 Years*, N.Y. TIMES (May 3, 1995), <http://www.nytimes.com/1995/05/03/obituaries/george-e-mackinnon-89-dies-was-appeals-judge-for-25-years.html>; *Former Commissioner Information*, *supra* note 25. Judge MacKinnon sat on only fourteen panels during the time period that this Article studied; none was an appeal of a federal conviction. Most of the cases were special cases dedicated to challenges to the independent counsel law then in effect. Since Judge MacKinnon did not have the opportunity to author opinions in Guidelines cases, this Article leaves him out of the study.

126. *Biographical Directory of Federal Judges: Wilkins, William Walker*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2586&cid=999&ctype=na&instat=na> (last visited Aug. 26, 2014).

127. *Id.*

States District Judge for the District of South Carolina.¹²⁸ In 1986, President Reagan elevated Judge Wilkins to the United States Court of Appeals for the Fourth Circuit.¹²⁹ Prior to that, in 1985, the President appointed Wilkins to another position: Chair of the newly formed United States Sentencing Commission.¹³⁰ He served in that capacity until 1994.¹³¹

After his tenure on the Sentencing Commission, Wilkins remained a circuit judge. He served as the Fourth Circuit's Chief Judge from 2003 to 2007.¹³² He assumed senior status in 2007 and, in 2008, retired from the bench and joined a private practice.¹³³

After graduating from Harvard Law School in 1964, Justice Breyer served as law clerk to Supreme Court Justice Arthur Goldberg.¹³⁴ After a two-year period working in the Justice Department in the area of antitrust, he was a faculty member at Harvard Law School from 1967–1994 (with a joint appointment at the Kennedy School of Government from 1977–1980), where a major area of expertise was administrative law.¹³⁵ Breyer served as an assistant special prosecutor in the Watergate prosecutions, special counsel to the Administrative Practices Subcommittee of the Senate Judiciary Committee from 1974–1975, and chief counsel to the Senate Judiciary Committee from 1979–1980.¹³⁶

In 1980, President Jimmy Carter appointed Breyer as a United States Circuit Judge for the First Circuit.¹³⁷ In 1985, President Reagan appointed Breyer as a Commissioner on the Sentencing Commission; he served in that capacity until 1989.¹³⁸ In 1990, Breyer became Chief Judge of the First Circuit. He remained Chief Judge until President Bill Clinton appointed him to the Supreme Court in 1994.¹³⁹

While Judge Wilkins had considerable experience in criminal litigation before ascending to the bench, he had no prior experience with respect to the Federal Sentencing Guidelines; indeed, he could have had

128. *Id.*

129. *Id.*

130. *See id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Biographical Directory of Federal Judges: Breyer, Stephen Gerald*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=255&cid=999&ctype=na&instat=na> (last visited Aug. 25, 2014) [hereinafter *Judge Breyer Biography*].

135. *Id.* Justice Breyer is, even today a coauthor on one of the leading administrative law casebooks: STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* (7th ed. 2011).

136. *Judge Breyer Biography*, *supra* note 134.

137. *Id.*

138. *Id.*

139. *Id.*

none. As a Commissioner responsible for drafting those Guidelines, he became one of the few people, let alone judges, most familiar with them when they took effect. While Judge Breyer lacked substantial prior criminal law experience, his experience with the Guidelines was similarly unique.¹⁴⁰

B. Bankruptcy Cases and Former Federal Bankruptcy Judges

Bankruptcy law is an especially apt area of law in which to initially test the theory of expertise outlined in the previous Section. Consider how well court of appeals bankruptcy cases map onto the paradigmatic types of cases where, according to Section II.C, one should expect to find expertise-based opinion assignment. As an initial matter, courts of appeals are likely settings for expertise-based opinion assignment. In general, circuit judges have no particular expertise in bankruptcy.

140. Of course, Judge Wilkins's and Judge Breyer's expertise would only be valuable if that very expertise did not compel them to recuse themselves in Sentencing Guideline cases. In effect, this amounts to an all-or-nothing proposition: Blanket recusal would mean hearing no Guidelines cases; rejection of blanket recusal leaves the court free to deploy the judge to handle many such cases.

Over the years, courts have rejected the argument that blanket recusal is mandated for judges who have served or are serving as Commissioners. See *United States v. Wright*, 873 F.2d 437, 445–47 (1st Cir. 1989) (Breyer, J., writing separately) (rejecting blanket recusal, but accepting that recusal might be appropriate in individual cases, depending upon the issues raised); *United States v. Glick*, 946 F.2d 335, 336–37 (4th Cir. 1991) (writing for the majority, Judge Wilkins noted that the three-judge panel unanimously rejected a recusal argument).

Interestingly, in its unreported decision in *United States v. McLellan*, the Eleventh Circuit held that a district judge—selected for the Commission while a U.S. Attorney, but subsequently appointed to the bench—should have recused herself in a case where the defendant challenged the function of the Sentencing Commission. See *In re United States*, 60 F.3d 729, 730 (11th Cir. 1995) (discussing the unpublished opinion of the court in *United States v. McLellan*, No. 93-8177 (11th Cir. June 30, 1994)). The case was thereafter remanded, with further proceedings before a different district judge. *Id.* When the case reached the Eleventh Circuit again, the second panel expressly limited the recusal holding to the case at hand:

We emphatically disavow . . . any intention to adopt in this published opinion the prior *McLellan* opinion's holding on the recusal issue. While that holding may be law of the case insofar as this panel is concerned, because the prior *McLellan* opinion was unpublished, its holding on the recusal issue is not law of this circuit and will not be binding on any future panel in a case involving a different defendant.

Id. at 731 n.2.

Judge Wilkins did recuse himself in the Guidelines case of *United States v. Carroll*, 3 F.3d 98, 99 n.* (4th Cir. 1993). In *Carroll*, the government argued that the Commission had exceeded its authority in promulgating certain Guidelines. *Id.* at 101–02. For discussion and critique of the Guidelines recusal issue, see Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 WM. & MARY L. REV. 417, 437–40 (1997).

Moreover, bankruptcy is an area of law where expertise is likely, according to the theory, to be an important consideration in opinion assignment. First, bankruptcy cases in general seem to fall within the rubric of “nonideological cases.” Commentators have long questioned whether the ideological pressures found to influence judicial voting in other areas extend to bankruptcy.¹⁴¹ In a recent empirical study, Rafael Pardo and I searched in vain for evidence of ideological voting by court of appeals judges in bankruptcy cases.¹⁴²

Second, bankruptcy is both substantively and procedurally distinct as an area of law. On substance, bankruptcy proceedings are guided by a “Bankruptcy Code” (the “Code”), which occupies its own title of the United States Code. The Code is complex, and many of its provisions are technical.¹⁴³ Further, the Code and the Federal Rules of Bankruptcy Procedure provide for various procedures unique to bankruptcy.

Moreover, federal bankruptcy litigation occurs within a unique judicial hierarchy, depicted in Figure 1.¹⁴⁴ Congress has seen fit to create bankruptcy courts as “unit[s]” of the various federal district courts.¹⁴⁵ While Congress has technically left it to the discretion of the

141. See, e.g., SUNSTEIN ET AL., *supra* note 114, at 16 (“Might ideological voting and panel effects be found in apparently nonideological cases involving, for example, bankruptcy, torts, and civil procedure?”); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 842 (2008) (“Many areas of law remain entirely unstudied in the standard terms, including, for example, antitrust, intellectual property, and bankruptcy. It would be useful to know in which areas of law and under what circumstances the judicial personality has the greatest (and the least) influence on decisions.”).

142. See *Principal-Agent Theory*, *supra* note 40, at 334–35 (noting that the empirical analysis produced no evidence that ideology influenced voting behavior by bankruptcy judges).

143. See, e.g., Bradley M. Elbein, *An Obscure Revolution: The Liability of Professionals in Bankruptcy*, 48 S.C. L. REV. 743, 745 n.9 (1997) (“[Unlike o]ther complex statutes,” the “Bankruptcy Code consists of a thick volume of exceptions to a set of general rules never explicitly and positively expressed by the statute itself but implicitly understood by practitioners.”).

144. It should be noted that appellate review of a bankruptcy court’s decision can involve direct appeal from the bankruptcy court to the court of appeals, with the effect of bypassing the first tier of intermediate appellate review—the district court or the Bankruptcy Appellate Panel (BAP). An appeal may proceed directly to the court of appeals pursuant to a certification procedure if one of the following circumstances exists: (i) the appeal involves a question of law unresolved by the court of appeals for the circuit or by the Supreme Court; (ii) the appeal involves a matter of public importance; (iii) the appeal involves a question of law requiring resolution of conflicting decisions; or (iv) the appeal may materially advance the progress of the case or proceeding in which the appeal is taken. 28 U.S.C. § 158(d)(2)(A) (2006). For a detailed discussion of the use of this appellate path, see Laura B. Bartell, *The Appeal of Direct Appeal—Use of the New 28 U.S.C. §158(d)(2)*, 84 AM. BANKR. L.J. 145 (2010) and Lindsey Freeman, Comment, *BAPCPA and Bankruptcy Direct Appeals: The Impact of Procedural Uncertainty on Predictable Precedent*, 159 U. PA. L. REV. 543 (2011).

145. See 28 U.S.C. § 151.

district courts to decide whether to refer bankruptcy cases in the first instance to the bankruptcy courts,¹⁴⁶ in practice every federal district has a standing order that sends all bankruptcy cases to the bankruptcy court within the district for initial proceedings.¹⁴⁷

Bankruptcy judges staff the bankruptcy courts. These non-Article III judges are appointed for fourteen-year terms by the judges of the court of appeals for the circuit in which the district in question lies.¹⁴⁸

Bankruptcy judges may enter final judgments with respect to “core proceedings,” which constitute the heart of bankruptcy issues.¹⁴⁹ Appeal from a final judgment in a core proceeding is ordinarily made to the federal district court. However, the Judicial Code authorizes—indeed urges—circuits to create bankruptcy appellate panels (BAPs)—tribunals consisting of bankruptcy judges to hear appeals from the bankruptcy courts in the circuit.¹⁵⁰ In circuits that have them—currently the First, Sixth, Eighth, Ninth, and Tenth Circuits¹⁵¹—litigants appealing a bankruptcy court judgment have the option of having their appeal heard by either the district court or a three-judge BAP panel; both litigants must consent to have an appeal heard by the BAP.¹⁵² Whether this initial appeal is heard by the district court or the BAP, a second appeal as of right lies to the court of appeals, with discretionary review by the Supreme Court possible thereafter.¹⁵³

146. *See id.* § 157(a).

147. Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1756 (2008).

148. 28 U.S.C. § 152(a)(1); *see also id.* § 152(a)(3) (“Whenever a majority of the judges of any court of appeals cannot agree upon the appointment of a bankruptcy judge, the chief judge of such court shall make such appointment.”).

149. *See id.* § 157(b)(1). Bankruptcy courts may also hear, but not enter final judgments in, “a proceeding that is not a core proceeding but that is otherwise related to a case under title 11.” *Id.* § 157(c)(1). Bankruptcy courts’ findings in non-core proceedings are reviewable de novo by the district courts. *Id.*

150. *See id.* § 158(b)(1).

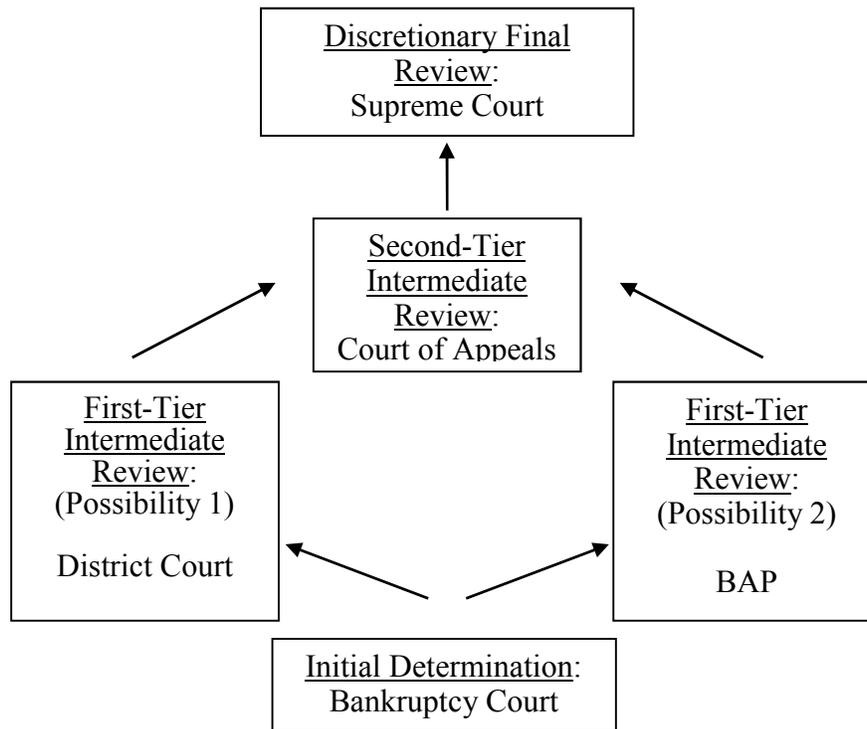
151. Nash & Pardo, *supra* note 147, at 1757.

152. *See id.* at 1757–58 (describing the appeals process for adjudications made by bankruptcy courts). The judges of a federal district may vote to not participate in the BAP. 28 U.S.C. § 158(b)(6). If the judges for a district so vote, then all bankruptcy court appeals from that district must be heard by the district court, notwithstanding the existence of a BAP. *Id.* § 158(a).

BAP judges are selected judges by, and for terms set by, each circuit’s judicial council. BAP judges continue to hear cases as trial judges in addition to their BAP responsibilities. *See id.* § 158(b)(1); Judith A. McKenna & Elizabeth C. Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 AM. BANKR. L.J. 625, 632, 661 (2002); Thomas E. Carlson, *The Case for Bankruptcy Appellate Panels*, 1990 BYU L. REV. 545, 558.

153. Nash & Pardo, *supra* note 147, at 1757–58.

FIGURE 1
BANKRUPTCY APPELLATE STRUCTURE FOR CORE PROCEEDINGS



A third reason expertise is likely in bankruptcy law is that few circuit judges have experience in the area, let alone in deciding bankruptcy cases as bankruptcy judges. As described below, this Article identified only six circuit judges who ever served as bankruptcy judges (one of whom was appointed to the court of appeals only in September of 2011).

Fourth, bankruptcy issues certainly arise with enough frequency to make them valuable. Bankruptcy cases occupy a large portion of the courts of appeals' dockets.

Fifth, bankruptcy issues arise across the regional circuit courts of appeals. Thus, there is plenty of opportunity for a court with a judge with bankruptcy expertise to reap reputation benefits.

This Article's empirical analysis seeks to identify all federal circuit

judges who had prior experience as federal bankruptcy judges by conducting a search of Federal Judicial Center data on federal judges¹⁵⁴ for the term “bankruptcy.”

Six circuit judges met the criterion: Judge Conrad K. Cyr of the First Circuit (who, while serving as a bankruptcy judge, also served as chief judge of the original First Circuit BAP¹⁵⁵); Judges Alice M. Batchelder, R. Guy Cole, and Bernice B. Donald of the Sixth Circuit; Judge Michael J. Melloy of the Eighth Circuit; and Judge John C. Porfilio of the Tenth Circuit.¹⁵⁶ (Table B1 in Appendix B summarizes the pertinent information.) Because Judge Donald was appointed to the circuit only in September of 2011,¹⁵⁷ empirical analysis concerned the remaining five judges.

IV. EMPIRICAL ANALYSIS

This Part describes my empirical analysis. Section IV.A describes the methodology by which I assembled three new primary datasets—one for Judge Wilkins, one for Judge Breyer, and a third covering former bankruptcy judges—and the coding of variables. Section IV.B explores whether the evidence supports the hypotheses laid out at the end of Part III.

A. Methodology

1. Primary Datasets¹⁵⁸

Judge Wilkins—I compiled the Wilkins dataset by identifying all criminal law cases decided by three-judge panels of the United States Court of Appeals for the Fourth Circuit during the calendar years 1990,

154. The data is available at *Biographical Directory of Federal Judges, 1789-Present*, FED. JUD. CTR., <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Aug. 25, 2014).

155. *Biographical Directory of Federal Judges: Cyr, Conrad Keefe*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=552&cid=999&ctype=na&instat=na> (last visited Aug. 25, 2014) [hereinafter *Judge Cyr Biography*]. Congress originally authorized the federal circuits to create BAPs under the 1978 Bankruptcy Reform Act. 8 WILLIAM L. NORTON, JR. & WILLIAM L. NORTON III, *NORTON BANKRUPTCY LAW AND PRACTICE* § 170:6 (3d ed. 2014). Two circuits—the First and the Ninth—accepted this invitation. The First Circuit disbanded its BAP in the wake of the Supreme Court’s decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87–88 (1982), which found the judicial organization provisions of the Bankruptcy Reform Act to be unconstitutional. The First Circuit only reconstituted the BAP in the 1990s. See Nash & Pardo, *supra* note 147, at 1779 n.122.

156. Until January 8, 1996, Judge Porfilio served under the name John P. Moore. For ease of exposition, I refer to the judge simply as Judge Porfilio.

157. *Biographical Directory of Federal Judges: Donald, Bernice Bouie*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=631&cid=999&ctype=na&instat=na> (last visited Aug. 25, 2014).

158. As I explain below, I collected additional data to test various hypotheses.

1991, 1992, and 1993,¹⁵⁹ in which (i) Judge Wilkins served on the panel, and (ii) a signed majority opinion was filed (iii) with Judge Wilkins as part of that majority. I identified these cases by using Boolean searches of Westlaw's "federal criminal justice" database.¹⁶⁰

The search generated 97 cases.¹⁶¹ Sixty-nine of those cases were appeals of federal criminal convictions—on which the analysis focuses. Only 5 of those cases were unpublished; this is consistent with the notion that unpublished opinions are usually unsigned per curiam opinions. Of the 69 cases, Judge Wilkins did not join the majority in two.

The Wilkins dataset includes 67 federal criminal appeals cases in which Judge Wilkins could have been assigned to author the majority opinion. Of those, Judge Wilkins authored 41. Of the 67 federal criminal appeals, 42 cases raised Guidelines issues. Of those 42 cases, Judge Wilkins wrote the opinions in 30 cases. Tables B2 and B3 in Appendix B break out these cases by year.

Judge Breyer—Along similar lines, I compiled the Breyer dataset by identifying all criminal law cases decided by three-judge panels of the United States Court of Appeals for the First Circuit during the calendar years 1990, 1991, 1992, and 1993, in which (i) Judge Breyer served on the panel, and (ii) a signed majority opinion was filed (iii) with Judge Breyer as part of that majority.

The Westlaw search generated 244 cases,¹⁶² of which 165 were

159. I began searching with 1990 since the Supreme Court upheld the constitutionality of the Commission and its Guidelines (at least as a matter of legislative delegation and separation of powers) in its January 18, 1989 decision in *Mistretta v. United States*, 488 U.S. 361, 412 (1989). While cases decided in 1990 (or later) conceivably could have been argued while the constitutionality of the Guidelines remained an open issue, in fact the earliest Fourth Circuit case raising a Sentencing Guideline issue was argued on October 5, 1989. *United States v. Jones*, 907 F.2d 456, 456, 457 (4th Cir. 1990) (discussing defendant-appellants' argument that the district court incorrectly applied the federal Sentencing Guidelines). One state habeas case was argued at the end of 1988 and still fell within the dataset. *McDougall v. Dixon*, 921 F.2d 518 (4th Cir. 1990) (argued Dec. 9, 1988).

160. Westlaw's FCJ-CS database "includes federal cases that relate to criminal acts and the investigation, prosecution, and punishment of crimes." *Practice Area Fundamentals: Criminal Law Fundamentals*, WESTLAW, <http://lscontent.westlaw.com/images/content/CrimLaw10.pdf> (last visited Aug. 25, 2014).

161. The first search was: pr("fourth circuit") & wilkins & da(1990 1991 1992 1993) % curiam. The search yielded 84 cases where Judge Wilkins was part of a three-judge panel. Because the first search excluded signed opinions where an opinion cited another case and indicated that that decision was "per curiam," I performed a second search to correct for the first search's underinclusion: pr("fourth circuit") & wilkins & da(1990 1991 1992 1993) & curiam /s ("u.s." "s.ct." "f.2d" "f.3d"). The second search yielded 13 more cases.

162. The first search was: pr("first circuit") & breyer & da(1990 1991 1992 1993) % curiam. The search yielded 186 cases where Judge Breyer was part of a three-judge panel. Because the first search excluded signed opinions where an opinion cited another case and

criminal appeals—on which my analysis focuses. Only 2 of those cases were unpublished. Of the 165 cases, Judge Breyer did not join the majority opinion in 1 (pretrial release) case. In the end, then, there were 164 federal criminal cases in which Judge Breyer could have been assigned the majority opinion; Judge Breyer made the opinion assignment in all but 6 of those cases (and in all but 1 of the 75 Guidelines cases within that number). A breakdown of the number of cases per year appears in Table B5 in Appendix B.

The Breyer dataset includes 164 federal criminal cases in which Judge Breyer could have been assigned to author the majority opinion. Of those, Judge Breyer authored 61. Of the 164 federal criminal cases, 75 cases raised Guidelines issues. Of those 75 cases, Judge Breyer wrote the opinions in 34 cases. Tables B4 and B5 in Appendix B break out these cases by year.

Former federal bankruptcy judges—I collected bankruptcy cases that were decided through February of 2012. For Judges Cyr, Melloy, and Porfilio, I performed searches in the Westlaw databases containing bankruptcy cases from the relevant circuit.¹⁶³ I searched for all three-judge panel cases¹⁶⁴ that contained the word “bankruptcy,”¹⁶⁵ and in which the judge in question was a member of the majority coalition. I included all cases that originated in the bankruptcy courts; I also included other cases that actually raised issues of bankruptcy law.¹⁶⁶ I included only signed opinions. In addition, I excluded cases in which someone who had been a bankruptcy judge but at the time was only a district judge (i.e., the judge had yet to be appointed to the circuit) sat on a court of appeals case by designation.

For the Sixth Circuit—on which two former bankruptcy judges sat during the relevant time period—I used a very similar approach. Here, however, I included cases where a former bankruptcy judge was not part of the majority, *provided that* the other former bankruptcy judge was part of the majority.

indicated that that decision was “per curiam,” I performed a second search to correct for the first search’s underinclusion: pr(“first circuit”) & breyer & da(1990 1991 1992 1993) & curiam /s (“u.s.” “s.ct.” “f.2d” “f.3d”). The second search yielded 58 additional cases.

163. For example, for Judge Cyr—who serves on the First Circuit—the relevant database was “FBKR-CS1.”

164. I did not include “en banc” cases; I did include cases that were originally designated to be heard by three-judge panels, but where one of the original panel members (other than the former bankruptcy judge) dropped out (for example, because of recusal or illness), leaving the cases to be decided by panels of two judges.

165. The Westlaw bankruptcy databases include some cases that raise issues of liquidation but not federal bankruptcy law.

166. For example, I included criminal cases in which the defendant had been convicted of bankruptcy fraud, provided that the appeal raised an issue of bankruptcy law.

Table B6 in Appendix B provides summary data on the number of cases in which a former bankruptcy judge was part of the majority coalition and in which a signed opinion was issued, and the number (and percentage) of those cases in which the former bankruptcy judge wrote the opinion. This information is provided both by circuit and cumulatively.

2. Coding

The bankruptcy datasets include all federal bankruptcy cases in which one of the former bankruptcy judges was part of the majority panel coalition. The Guidelines datasets include all appeals from federal convictions where either Judge Wilkins or Judge Breyer (depending upon the circuit) was part of the majority panel coalition. For the Guidelines datasets, I coded each case to indicate whether the case involved the appeal of a federal criminal conviction. The 67 Wilkins cases and 164 Breyer cases that did I then coded to indicate whether the case raised any Sentencing Guideline issue.

For each of the cases in each of the datasets (i.e., both the Guidelines and bankruptcy datasets), I coded: (i) the case name, citation, and date of decision, (ii) the identities of the judges in the majority, (iii) the identity of the judge who had opinion assignment responsibility,¹⁶⁷

167. I coded the senior member of the majority coalition as the assigning judge. *See* 28 U.S.C. § 45(b) (2006) (specifying that, after the chief judge, “[o]ther circuit judges of the court in regular active service shall have precedence and preside according to the seniority of their commissions”); *see, e.g.*, 6TH CIR. I.O.P. 32.1(a)(1) (“The presiding judge [on the panel] assigns opinion-writing responsibility.”); 8TH CIR. I.O.P. IV.A (“The presiding judge on the panel assigns each case for preparation of a signed opinion, per curiam opinion, or a dispositive order.”).

There are three bases on which one might object to my coding protocol. None of these ultimately provides enough of a reason to vary from the protocol. First, some court rules (such as those quoted earlier in this footnote) technically give the presiding judge and chief judge the power to assign opinions even when the presiding judge is not part of the majority. *See* Cheng, *supra* note 10, at 527 n.35 (noting that several circuits’ rules seem to allow this, and noting an email from Judge Richard Posner confirming that “the Seventh Circuit allows the presiding judge to assign majority opinions even if he or she is in dissent”). Still, in the few cases where the presiding judge did not join the majority opinion, I coded the senior-most in the majority coalition as the assigning judge: Even if some courts’ rules technically empower the presiding judge to recommend assignments in such cases, I reason that the presiding judge will be unlikely not to recommend assigning the opinion to the next-senior-most judge if in fact that judge wants to write the opinion.

Second, some courts give the chief judge some opinion assignment power even if the chief judge is not in the majority or indeed even on the panel. For example, Fourth Circuit internal rules empower the chief judge to make assignments upon the recommendations of the “presiding judge” of each panel. *Id.* at 530 n.53. In practice, however, the power given to the chief judge may be largely symbolic: “anecdotally, the prerogative of the chief judge is rarely if ever exercised.” *Id.*

(iv) the party of the President who appointed the judge who had opinion assignment responsibility, (v) the identity of the judge who drafted the opinion, (v) whether the opinion was a published opinion, (vi) the number of West headnotes in the case that pertained to the area of expertise—i.e., the Guidelines or bankruptcy, as appropriate (“Guidelines Headnotes” or “Bankruptcy Headnotes”), and (vii) the ratio of the number of West headnotes in the case that pertained to bankruptcy to the total number of West headnotes (“Guidelines Headnote Ratio” or “Bankruptcy Headnote Ratio”).

I coded a few additional variables for the Guidelines datasets. With respect to the Wilkins dataset, I coded whether Democrats constituted a majority of the panel; whether (besides Judge Wilkins) another federal district judge or former federal district judge sat on the panel; and whether (besides Judge Wilkins) another former prosecutor sat on the panel. With respect to the Breyer dataset, I coded whether Republicans constituted a majority of the panel; whether any federal district judge or former federal district judge sat on the panel; and whether any former prosecutor sat on the panel.

Third, some courts of appeals have shifted to a system where the assigning judge assigns two responsibilities in a case: first, responsibility for drafting a bench memorandum that all judges who will hear the case share and, second, responsibility for drafting the opinion in the case. *See* COHEN, *supra* note 9, at 72–73. Though the assigning judge may theoretically assign the two responsibilities to different judges, in practice this is rarely the case (except where the judge responsible for the bench memorandum is not part of the majority coalition). *See id.*

Commentators are divided over the extent to which the practice of shared bench memoranda is growing (if not widespread). Compare Maxwell L. Stearns, *Appellate Courts Inside and Out*, 101 MICH. L. REV. 1764, 1766 (2003) (reviewing COHEN, *supra* note 9) (describing, based on Cohen’s discussion, the preparation of a single bench memorandum for shared use by a panel as “the increasingly common practice in several circuits”), with Don Songer, Book Review, 12 L. & POL. BOOK REV. 373, 375 (2002) (reviewing COHEN, *supra* note 9) (criticizing Cohen for creating the impression that the practice is more widespread than it really is, and noting that Songer’s “own interviews suggest that this sharing of a bench memo is not used in the First, Third, or Tenth Circuits,” and “[s]o rather than being a common practice, this procedure may be largely limited to the Ninth Circuit”), and Wald, *supra* note 86, at 14 (noting the use of the practice on the D.C. Circuit only for “monster cases”).

This debate does not affect my coding protocol. First, there is commentary indicating that the First Circuit does not employ the practice. *See* Songer, *supra*, at 375; Kermit Lipez, *Judges and Their Law Clerks: Some Reflections*, 22 ME. B.J. 112, 114 (2007) (discussing the opinion assignment process on the First Circuit in a manner that seems inconsistent with prior assignment of a single bench memorandum for the panel). My personal experience as a law clerk for a Fourth Circuit judge during part of the period under study here indicates that the Fourth Circuit did not employ the practice. Second, and more important, even if the system were in use and assigning judges usually assigned opinions to the judges to whom they had previously assigned responsibility to draft bench memoranda, similar incentives would guide assigning judges to consider the same criteria—including whether or not the assignee judges had expertise—in making assignments of bench memoranda. *See supra* note 86.

The key dependent variable for all datasets was whether a judge with the relevant expertise—either a Sentencing Commissioner or a former bankruptcy judge—authored the opinion in the case.

3. Random Assignment of Opinions

Before proceeding further, a discussion of random assignment of opinions is necessary. My research design assumes that the cases in the dataset represent a random sample of Guidelines and bankruptcy cases that came before the courts of appeals in question. While the common belief is that courts of appeals assign cases and judges to panels at random,¹⁶⁸ Professor Matthew Hall has questioned the extent to which court of appeals cases are in fact randomly assigned to panels.¹⁶⁹ The results of my study are subject to some question if a circuit did not randomly assign Guidelines or bankruptcy cases to panels (and judges).

I sought to dispel this concern by collecting original datasets, consisting of *all* bankruptcy cases—whether per curiam or signed, and no matter who served on the panel—issued by each circuit during a calendar year shortly after the former bankruptcy judge’s appointment to the circuit. To evaluate Judge Wilkins’s service, I collected all federal criminal cases—and, necessarily contained within that group, all Guidelines cases—decided by the Fourth Circuit in 1990.¹⁷⁰

With respect to the bankruptcy cases, for each circuit, I used a binomial test to determine whether the former bankruptcy judge was disproportionately represented on panels hearing bankruptcy cases.¹⁷¹

168. See, e.g., Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 259 (1995) (describing the standard belief that federal courts randomly assign cases to judges); COHEN, *supra* note 9, at 73.

169. See Hall, *supra* note 67, at 585.

170. Although I have not tested random assignment with respect to Judge Breyer in Guidelines cases, I did test random assignment in bankruptcy cases on the First Circuit in 1993, a year covered by my Guidelines study.

171. To determine the expected proportion, I first determined the number, m , of non-senior circuit judges (including the former bankruptcy judge) during the year in question. Since (as the data bear out) some panels include two non-senior circuit judges plus one other judge (whether a senior circuit judge, or a district judge or judge from another circuit sitting by designation), I set $(m + 1)$ as the total pool of available judges. Then the number of possible combinations of non-senior circuit judges on panels is $F = {}_{(m+1)}C_3$, while the number of possible combinations of two-judge contingents of which a lone former bankruptcy judge may possibly be a part is $E = {}_mC_2$. Thus, the expected ratio of panels on which any one judge should sit if assignment is random is:

Table B7 in Appendix B presents the results. The Sixth Circuit data regarding Judge Batchelder from both 1994 and 1998 suggests that we should reject the null hypothesis of random distribution of cases to panels. The other results are entirely consistent with random assignment of cases. The data from assignment of Fourth Circuit federal criminal and Guidelines appeals to Judge Wilkins—presented in Table B8 in Appendix B—are also entirely consistent with random assignment of cases to judges and panels.

Beyond random assignment of cases to judges, Professor Hall's research indicates that certain combinations of judges on panels are more, or less, likely to issue per curiam opinions.¹⁷² Accordingly, I examined whether the presence of a former bankruptcy judge—or Judge Wilkins—on a panel changed the likelihood of the panel issuing a per curiam decision.

With respect to the bankruptcy cases, with one exception, the data—summarized in Table B9 in Appendix B—are clear across the circuits that there is no statistically significant change in the likelihood of having per curiam opinions issue. The one outlier is the percentage of opinions decided per curiam in 1998 when Judge Batchelder sat on the panel. Interestingly, however, this result goes in the opposite direction of that which strategic application of the theory here would suggest. One might expect that Judge Batchelder, as an expert in bankruptcy, would tend to issue *more* signed bankruptcy opinions than would an average judge, yet the 1998 data indicate that her presence on a panel resulted in fewer than average signed bankruptcy opinions.

With respect to the Wilkins dataset, the data—summarized in Table B10 in Appendix B—indicate that the inclusion of Judge Wilkins on a panel clearly had no effect on the rate at which per curiam opinions were issued in federal criminal appeals. In contrast, having Judge Wilkins on a Guidelines panel *reduced*, with statistical significance, the likelihood of a per curiam decision. Thus, the finding I describe below that shows Judge Wilkins receiving disproportionate opinion assignments in Guidelines cases may be due in part—but not

$$\frac{E}{F} = \frac{{}_m C_2}{{}_{(m+1)} C_3} = \frac{\frac{m!}{2!(m-2)!}}{\frac{(m+1)!}{3!(m-2)!}} = \frac{3}{m+1}$$

It is this ratio that is reflected in the 5th column of Tables B7 and B8 in Appendix B.

172. Professor Hall's data reflect that some panel combinations were more likely than others to issue unpublished opinions, *see* Hall, *supra* note 67, at 579, and unpublished opinions, which tend to be per curiam.

entirely¹⁷³—to Judge Wilkins’s penchant to issue signed opinions in those cases.¹⁷⁴ Note, however, that assigning judges reasonably would have known of this tendency, and presumably would have assigned opinions to Judge Wilkins anticipating that he might be inclined to issue signed opinions in Guidelines cases.¹⁷⁵ Moreover, while the effect on efficiency is unclear, having Judge Wilkins issue signed opinions would certainly offer the Fourth Circuit legitimacy and reputation benefits.¹⁷⁶ Thus, the disproportionate issuance of signed opinions by Judge Wilkins in Guidelines cases is broadly consistent with the theory I advance above in Parts I and II.

In sum, the data generally support the random assignment of cases to judges. They also indicate that the presence of a judge with relevant expertise on the panel did not, as a general matter, affect with statistical significance the rate at which decisions were rendered per curiam. Moreover, to the extent there is reason to doubt random assignment—in particular of bankruptcy cases to Sixth Circuit judges who were previously bankruptcy judges—the data show that, if anything, these judges received *fewer, not more*, opinion assignments in bankruptcy cases; this helps dispel the notion that, to the extent there was nonrandom assignment, it was done to increase the ability of judges with expertise to author opinions. On these findings, the next Section describes the empirical tests of the hypotheses.

173. Consider that, while the difference between the rate at which Judge Wilkins, and the general rate at which the Fourth Circuit, issued per curiam opinions is statistically significant, the substantive difference—62.50% versus 74.71%—is not large. To put it in context, consider that in the 1990 dataset Judge Wilkins wrote 10 of the 15 signed opinions issued when he was on a Guidelines panel. If those panels had issued per curiam opinions at the rate generally observed on the Fourth Circuit in Guidelines cases, then Wilkins’s panels would have generated only around 10 signed opinions instead of 15. Assuming that all 5 of the opinions that would now be per curiam were in fact written by Judge Wilkins, it still would be the case that Judge Wilkins would have authored 5 of the 10 signed opinions. That 50.00% authorship rate is still far in excess of the 33.33% rate one would expect with random opinion assignment, thus indicating that the disproportionate rate at which Judge Wilkins wrote Guidelines opinions results from more than just his penchant to issue signed opinions.

174. Cf. Stephen L. Wasby et al., *The Per Curiam Opinion: Its Nature and Functions*, 76 JUDICATURE 29, 31 (1992) (explaining that the decision to issue an opinion per curiam is made by the judge assigned to write the opinion).

175. In the 1990 dataset, Judge Wilkins was *never* the assigning judge in a Guidelines case.

176. See Cheng, *supra* note 10, at 549 (noting that opinions delivered by expert judges are likely to garner more legitimacy).

B. Results and Analysis

1. Hypothesis 1—Disproportionate Assignment of Opinions to Judges with Expertise

Beginning with the Wilkins dataset, I first used a binomial test¹⁷⁷ to assess the likelihood that the extent to which Judge Wilkins was assigned cases was simply the result of chance. The assignment to Judge Wilkins of the opinion in 41 of 67 federal criminal cases¹⁷⁸ in which he could have written the opinion¹⁷⁹—or 41 of 69 cases if one includes the two cases where Judge Wilkins was on the panel but not in the majority—differs, with statistical significance, from the expected outcome, based upon truly random assignment, that Judge Wilkins would be assigned the opinion in one-third of all cases.¹⁸⁰ Similarly, the assignment to Judge Wilkins of the opinion in 30 of 42 Guidelines cases¹⁸¹ in which he could have written the opinion—or 30 of 43 cases if one includes the lone such case where Judge Wilkins was on the panel but not in the majority—differs, with statistical significance, from the expected outcome of one-third.¹⁸²

Second, I compared (i) the ratio of the number of (three-judge panel) federal criminal cases and Guidelines cases decided in 1991 in which Judge Wilkins wrote the opinion for the court to the total number of (three-judge panel) cases decided in 1991 in which Judge Wilkins sat on the panel, with (ii) the ratio of the number of (three-judge panel) cases (of all subject matters) decided in 1991 in which Judge Wilkins wrote the opinion for the court to the total number of (three-judge panel) cases

177. In keeping with other studies of opinion assignment, I do not employ regression analysis here. While the dichotomy between whether or not a judge is assigned to write an opinion may suggest use of logistic regressions, in fact that would not be appropriate: A logistic regression would assume that the null hypothesis is that a judge is not assigned an opinion when expertise is absent, when the equal workload norm suggests instead that a judge without expertise should receive around one-third of opinion assignments in the absence of expertise. The norm also means that even a judge *with expertise* in an area is highly unlikely to receive responsibility to write the opinion in *all* cases in that area, again an outcome not contemplated by a logistic regression.

178. See *infra* Appendix B, Table B2.

179. See Atkins, *supra* note 10, at 414–15 (using as the basis of analysis for each judge “the ratio of the number of opinions written to the number of times that the judge participated in the majority decision and was therefore eligible to write an opinion for the court”). See generally SEGAL & SPAETH, *supra* note 1, at 367 (“The equality to which the norm refers is absolute equality, not that which is conditioned on the frequency with which any given justice is a member of the conference vote coalition.”).

180. $p < 0.01$ in both cases.

181. See *infra* Appendix B, Table B3.

182. Again, $p < 0.01$ in both cases.

decided in 1991 in which Judge Wilkins sat on the panel.¹⁸³

Similar to the searches used to isolate the criminal justice cases in which Judge Wilkins participated, I used two Westlaw searches in the “CTA4” database (which contains all Fourth Circuit opinions) to find all 1991 Fourth Circuit cases in which Judge Wilkins participated and that yielded a signed majority opinion.¹⁸⁴ Together, the two searches yielded 53 total opinions. Judge Wilkins authored 22 of those 53 opinions.

I then performed a chi-squared test to determine whether the opinion assignment rate to Judge Wilkins in appeals from federal convictions was different, with statistical significance, from the overall rate at which Judge Wilkins was assigned opinions to draft. (Here, in keeping with the idea that, according to workload norms, Judge Wilkins should be expected ultimately to receive approximately one-third of all cases in which he sat on the panel, I included cases where Judge Wilkins was not part of the majority coalition.) Panel A of Table B11 in Appendix B summarizes the data and results.

A similar test confirms that the assignment rate to Judge Wilkins in Guidelines cases differs, with statistical significance, from the rate in cases overall. This is summarized in Panel B of Table B11 in Appendix B.

I also compared the assignment of both federal criminal appeals and Guidelines cases to Judge Wilkins when Judge Wilkins was the only Republican appointee on the panel, whether there was a current district judge or another former district judge on the panel, and whether there was another former prosecutor on the panel.¹⁸⁵ None of these factors had any statistically significant effect on the disproportionate rate at which Judge Wilkins was assigned federal criminal appeals and Guidelines cases.

I performed similar analyses on the Breyer database. I first used a binomial test to assess the likelihood that the extent to which Judge Breyer was assigned cases was simply the result of chance. The assignment to Judge Breyer of the opinion in 61 of 164 federal criminal cases in which he could have written the opinion¹⁸⁶ (or 61 of 165 cases

183. See *infra* Appendix B, Table B11.

184. The first search was: da(1991) & wilkins % curiam. It yielded 66 documents. Of those cases, Judge Wilkins did not sit on the panel in 4 cases, 10 cases were decided en banc, and 1 case was decided per curiam (and was pulled up because of the misspelling “curium”). Eliminating those 15 cases left 51 cases.

The second search was: da(1991) & wilkins & curiam /s “u.s.” “s.ct.” “f.2d” “f.3d”. It yielded 6 documents, 2 of which were en banc cases and 2 of which were per curiam opinions, thus leaving 2 additional opinions.

185. See *infra* Appendix B, Table B22.

186. See *infra* Appendix B, Table B4.

if one includes the lone case where Judge Breyer was on the panel but not in the majority) does not differ with statistical significance from the expected outcome, based upon truly random assignment, that Judge Breyer would be assigned the opinion in one-third of all cases.¹⁸⁷ However, the assignment to Judge Breyer of the opinion in 34 of 75 Guidelines cases in which he could have written the opinion¹⁸⁸ *does* differ, with statistical significance, from the expected outcome of one-third.¹⁸⁹

I next compared (i) the ratio of the number of (three-judge panel) federal criminal cases and Guidelines cases decided in 1991 in which Judge Breyer wrote the opinion for the court to the total number of (three-judge panel) cases decided in 1991 in which Judge Breyer sat on the panel, with (ii) the ratio of the number of (three-judge panel) cases (of all subject matters) decided in 1991 in which Judge Breyer wrote the opinion for the court to the total number of (three-judge panel) cases decided in 1991 in which Judge Breyer sat on the panel.¹⁹⁰

I again used two Westlaw searches—this time in the “CTA1” database (which contains all First Circuit opinions)—to find all 1991 First Circuit cases in which Judge Breyer participated and that yielded a signed majority opinion.¹⁹¹ Together, the two searches yielded 135 total opinions. Judge Breyer authored 43 of those 135 opinions.¹⁹²

I then performed a chi-squared test to determine whether the rate of opinion assignment to Judge Breyer in appeals from federal convictions was different, with statistical significance, from the overall rate at which Judge Breyer was assigned opinions to draft. In keeping with the idea that, according to workload norms, Judge Breyer should be expected ultimately to be assigned approximately one-third of all cases in which he sat on the panel, I included cases where Judge Breyer was not part of the majority coalition. Panel A of Table B12 in Appendix B summarizes the data and results, which have statistical significance, although only at the 10% level.¹⁹³

187. $p > 0.32$.

188. See *infra* Appendix B, Table B5.

189. $p < 0.04$.

190. See *infra* Appendix B, Table B12.

191. The first search was: da(1991) & breyer % curiam. It yielded 119 documents. Of those cases, Judge Breyer did not sit on the panel in 3 cases, 4 cases were decided en banc, and 2 cases were decided by unsigned “Order of the Court.” These 2 cases were picked up because they were not denominated “per curiam.” Eliminating these 9 cases left 110 cases.

The second search was: da(1991) & breyer & curiam /s “u.s.” “s.ct.” “f.2d”. It yielded 35 additional opinions.

192. See *infra* Appendix B, Table B12.

193. *Id.*

A similar test confirms that the assignment rate to Judge Breyer in Guidelines cases differs, with strong statistical significance, from the rate in cases overall. This is summarized in Panel B of Table B12 in Appendix B.

I also compared the assignment of both federal criminal appeals and Guidelines cases to Judge Breyer when Judge Breyer was the only Democrat appointee on the panel, and whether there was another former prosecutor on the panel.¹⁹⁴ Neither of these factors had any statistically significant effect on the disproportionate rate at which Judge Breyer was assigned federal criminal appeals and Guidelines cases.

I tested the statistical significance of the predominant assignment of opinions to former bankruptcy judges using a binomial test. The results, set forth in Table B13 in Appendix B, make clear that former bankruptcy judges have received opinion assignments in bankruptcy cases in excess of the 33.33% of the time that would be expected if opinion assignment were random. The results are highly statistically significant for opinion assignment on the First, Eighth, and Tenth Circuits, and across the circuits cumulatively, surveying the First, Sixth, Eighth, and Tenth Circuits.¹⁹⁵

Because of the presence (for at least part of the time under study) of two former bankruptcy judges on its bench, the Sixth Circuit results are more complicated. Table B14 in Appendix B presents results when we consider the judges separately and counts all cases where that judge was in the majority. This count includes cases where both former bankruptcy judges, Judge Batchelder and Judge Cole, were part of the majority coalition; Judge Cole received the opinion assignment in all 4 of these cases. Judge Cole's assignment rate is different, with statistical significance, from what one would expect under random assignment; Judge Batchelder's rate was not statistically significant, though it approaches significance at the 10% level.¹⁹⁶

The results are slightly different if we continue to consider the judges separately but count only those cases where one judge, and not the other, was in the majority—if we eliminate from both tallies, the 4 cases where both judges were part of the majority. (It may make sense to count this way in order to avoid cases where former bankruptcy judges have a cumulative two-thirds chance of receiving the opinion assignment.) As Table B15 in Appendix B indicates, Judge Batchelder's number after this adjustment is significant at the 10% level, while Judge

194. Another plausible control variable—whether or not there was a current district judge or a former district judge on the panel—was positive in every case in the dataset. And only two of the 164 cases were unpublished.

195. *See infra* Appendix B, Table B13.

196. *See infra* Appendix B, Table B14.

Cole—having lost 4 opinion assignments—now only approaches significance at that level.¹⁹⁷

Finally, we may tally the results across the Sixth Circuit in two ways. First, we include all cases in the dataset; this is reflected in the top row of Table B16 in Appendix B. The bottom row excludes the 4 cases where both former bankruptcy judges were part of the majority coalition.¹⁹⁸ The results are statistically significant either way.

When we aggregate all the cases across circuits, the predominant assignment of cases to former bankruptcy judges differs, with statistical significance, from what we would expect were random assignment at work. This is shown in the last row of Table B13 in Appendix B. In short, while the picture in the Sixth Circuit is not as clear, still the overall bankruptcy data provide substantial support for Hypothesis 1, as do the Guidelines data.

2. Hypothesis 2—Effect of Introduction of Guidelines on Assignment of Opinions

Hypothesis 2 suggests that the heightened levels of opinion assignment to a judge with expertise in the relevant area are a result of that judge having that expertise. In other words, Hypothesis 2 suggests that, if we could somehow observe a version of the judge without that expertise but the same in all other respects, we would not observe heightened levels of opinion assignment. Ordinarily it is not possible to observe two versions of the same judge—one with relevant expertise and the other without. In the setting of the assignment of federal criminal appeals to the Sentencing Commissioner, however, we do have such an opportunity. I previously found evidence of disproportionate opinion assignment to both Judges Wilkins and Breyer. I now investigate whether that disparity existed in the assignment of federal criminal cases prior to the advent of the Guidelines. I do this by examining a time period *before the application of the Guidelines*, at which point Guidelines expertise would have been rather useless for court cases. For comparison with post-Guidelines assignment rates, I rely upon the year 1988 (bearing in mind that the Guidelines did not take effect until Nov. 1, 1987, and no Guidelines cases reached the Fourth Circuit until 1989). Again, I used two searches in the FCJ-CS library to find all appeals from federal convictions in which Judge Wilkins participated as a panel member.¹⁹⁹ Where he sat on the panel,

197. See *infra* Appendix B, Table B15.

198. See *infra* Appendix B, Table B16.

199. Both searches were conducted in FCJ-CS. The first search was: pr(“fourth circuit”) & wilkins & da(1988) % curiam. It yielded 13 federal criminal appeals heard by three-judge panels that included Judge Wilkins. Judge Wilkins wrote the opinion in 5 of those cases.

Judge Wilkins wrote the opinion in 6 of the 14 federal criminal appeals (42.86%) where he sat on the panel that were decided in 1988.²⁰⁰ I note that this rate is substantially below the comparable rate of 41 of 69 cases (59.42%) during the period 1990–1993.²⁰¹

I then used two searches to identify all Fourth Circuit cases decided by signed opinion in 1988 (in all subject-matter areas) where Judge Wilkins sat on the panel.²⁰² A Fisher’s exact test (with results summarized in Table B17 in Appendix B) confirms that, unlike the result in 1991 (presented in Panel A of Table B11 in Appendix B), the rate at which Judge Wilkins was assigned opinions in federal criminal cases was not different, with statistical significance, from the overall rate at which he was assigned opinions.²⁰³ (Here, as above, I include all cases where Judge Wilkins was on the panel, whether or not he was part of the majority coalition.) This provides strong support for Hypothesis 2.

I similarly test whether the heightened assignment of federal criminal opinions to Judge Breyer is an artifact of the advent of the Guidelines. For comparison with post-Guidelines assignment rates, I again rely upon the year 1988. Again, I used two searches in the FCJ-CS library to find all appeals from federal convictions in which Judge Breyer participated as a panel member.²⁰⁴ Judge Breyer wrote the opinion in 8 of the 32 signed federal criminal appeals (25.00%) where he sat on the panel that were decided in 1988.²⁰⁵ I note that this rate is substantially below the comparable rate of 61 out of 164 cases (37.20%) for the period 1990–1993.²⁰⁶

I then searched for all First Circuit cases (in all subject-matter areas) decided by signed opinion in 1988 where Judge Breyer sat on the

The second search was: pr(“fourth circuit”) & da(1988) & wilkins & curiam /s “u.s.” “s.ct.” “f.2d”. It yielded 1 case. Judge Wilkins wrote the opinion in that case.

200. See *infra* Appendix B, Table B17.

201. See *infra* Appendix B, Table B2.

202. Both searches were conducted in CTA4. The first search was: da(1988) & wilkins % curiam. It produced 72 cases. Judge Wilkins wrote the opinion in 21 of those cases.

The second search was: da(1988) & wilkins & curiam /s “u.s.” “s.ct.” “f.2d”. It yielded 3 cases. Judge Wilkins wrote the opinion in 2 of those cases.

203. See *infra* Appendix B, Table B17.

204. Both searches were conducted in FCJ-CS. The first search was: pr(“first circuit”) & breyer & da(1988) % curiam. It yielded 28 cases. Judge Breyer wrote the opinion in 7 of those cases.

The second search was: pr(“first circuit”) & da(1988) & breyer & curiam /s “u.s.” “s.ct.” “f.2d”. It yielded 4 federal criminal cases that produced signed opinions; 1 was authored by Judge Breyer.

205. See *infra* Appendix B, Table B18.

206. See *infra* Appendix B, Table B4.

panel.²⁰⁷ A chi-squared test (with results summarized in Table B18 in Appendix B) confirms that Judge Breyer was not assigned opinions in federal criminal cases at a rate that differed, with statistical significance, from his overall assignment rate. This result differs substantially from the analogous and statistically significant result obtained from 1991 (see Panel A of Table B12), and thus provides support for Hypothesis 2.

3. Hypothesis 3—Effect of Extent of Legal Issues Raising Expertise on Assignment of Opinions

Having found evidence of disproportionate opinion assignment to judges with relevant expertise in both the Guidelines and bankruptcy arenas, I turn to the question of whether that disparity grows when the number of legal issues going to a judge's expertise, and the ratio of such legal issues to total issues in a case, gets larger. I look for statistical significance in the rate at which cases are assigned to the expert judge based upon the ratio of headnotes that correspond with the expert's field to those that do not—that is, Guidelines headnotes ratio or Bankruptcy headnote ratio, as the case may be.²⁰⁸ In all settings, I group cases by whether the relevant headnote ratio is (i) less than or equal to one-third, (ii) greater than one-third but less than or equal to two-thirds, or (iii) greater than two-thirds.

Two of the three datasets provide support for Hypothesis 3. The Wilkins dataset provides the weakest support. As summarized in Table B19 in Appendix B, 8 of 9 cases (88.9%) with a Guidelines headnote ratio of one-third or less, 6 of 8 cases (75.0%) with a ratio of more than one-third and two-thirds or less, and 16 of 25 (64.0%) cases with a ratio in excess of two-thirds were assigned to Judge Wilkins. There is no statistically significant difference in the assignment rate.

The Breyer dataset tells a different story. As summarized in Table B20 in Appendix B, while only 6 of 20 cases (30.0%) with a Guidelines headnote ratio of one-third or less and 8 of 22 cases (36.4%) with a ratio of more than one-third and two-thirds or less were assigned to Judge Breyer, 20 of 33 (60.6%) cases with a ratio in excess of two-thirds were assigned to Judge Breyer. The difference in assignment rate is statistically significant.

The results for the bankruptcy datasets, presented in Table B21 in Appendix B, also support Hypothesis 3. While only 20 of 57 cases

207. Both searches were conducted in CTA1. The first search was: da(1988) & breyer % curiam. It produced 102 cases. Judge Breyer wrote the opinion in 33 of those cases.

The second search was: da(1988) & breyer & curiam /s "u.s." "s.ct." "f.2d". It yielded 17 cases; Judge Breyer wrote the opinion in 4 of those cases.

208. West provides headnotes for all published decisions, and in recent years for some unpublished decisions as well.

(35.1%) with a Bankruptcy headnote ratio of one-third or less were assigned to former bankruptcy judges, 28 of 50 cases (56.0%) with a ratio of more than one-third and up to two-thirds were assigned to expert judges, and 135 of 238 cases (56.7%) with a ratio of more than two-thirds wind up in the hands of experts. Again, the difference is statistically significant.

Overall, then, the data indicate substantial, but not unequivocal, support for Hypothesis 3.

4. Hypothesis 4—Party Affiliation and Assignment of Opinions

I turn now to examine the effect of party affiliation on opinion assignment. In the context of the Guidelines cases, I perform the empirical testing solely on the Wilkins data because Judge Breyer was Chief Judge in nearly all the cases in the Breyer database and therefore was responsible for nearly all opinion assignments. The results are presented in Table B22 in Appendix B. For both federal criminal cases and Guidelines cases, assignment rates remain, with statistical significance, similarly disproportionate.²⁰⁹ In addition, there is no statistical significance between the rate at which judges appointed by Democratic presidents, as opposed to judges appointed by Republican presidents, assign opinions to Judge Wilkins.²¹⁰ Thus, as the theory predicts, the null hypothesis—that opinion assignment rates do not vary with statistical significance depending upon whether the assigning judge was appointed by a Democratic or Republican president—cannot be rejected.

The results for the combined bankruptcy dataset are presented in Table B23 in Appendix B. Again, in any setting, the null hypothesis—that opinion assignment rates do not vary with statistical significance depending upon whether the assigning judge was appointed by a Democratic or Republican president—cannot be rejected. Assignment rates generally remain disproportionate regardless of whether a Democratic or Republican appointee has opinion assignment responsibility.

Notably, all but one of the judges under study—Judge Cole—were appointed by Republican presidents. To gain further insight into the role of party affiliation, I reverse the “polarity” of Judge Cole’s assignors and ask not whether an assignor was appointed by a Democratic or Republican president, but whether the assignor was appointed by a judge who was appointed by a president of the same party as the president who appointed the former bankruptcy judge to the circuit.

209. *See infra* Appendix B, Table B22.

210. *Id.*

Across all circuits, former bankruptcy judges author 54 of 105 opinions (51.43%) where the assigning judge was appointed by a president different from the party of the president who appointed the authoring judge, and 129 of 240 opinions (53.75%) in cases where the assigning judge was appointed by a president different from the party of the president who appointed the authoring judge. The results still do not divulge any statistically significant difference in opinion assignment rates.²¹¹

In summary, the results yielded do not refute Hypothesis 4.

5. Hypothesis 5—Assignment of Cases and Judicial Panel Rank

The final hypothesis suggests that the hierarchical position, within the majority coalition, of a judge with relevant expertise should not substantially affect opinion assignment rates. I test the hypothesis in the context of the Wilkins dataset²¹² and the bankruptcy dataset.

The results for the Wilkins dataset, broken down for federal criminal appeals and Guidelines cases, are presented in Table B24 in Appendix B. The rate at which Judge Wilkins self-assigns criminal appeals is exactly what one would expect in the abstract: one-third.²¹³ This can be explained by the fact that judges may be more reluctant to self-assign.²¹⁴ Overall, moreover, Judge Wilkins receives opinion assignments in federal criminal appeals and Guidelines cases at rates different—with statistical significance—from the otherwise expected one-third regardless of hierarchical position, and the rates do not vary from one another, with statistical significance, depending upon hierarchical position.²¹⁵

The results for the bankruptcy dataset are presented in Table B25 in Appendix B.²¹⁶ Consistent with the hypothesis, disproportionate opinion assignment persists, for the most part, regardless of the hierarchical position of the expert judge. Moreover, we are again unable, in any setting, to reject the null hypothesis that opinion assignment rates do not vary with a former bankruptcy judge's hierarchical position on a judicial panel.

In short, the support for Hypothesis 5 is fairly strong.

211. Chi-squared test $p = 0.691$.

212. Because Judge Breyer was Chief Judge for almost every case in the Breyer database, he was almost always the senior member of every panel.

213. See *infra* Appendix B, Table B24.

214. See *supra* note 69 and accompanying text.

215. See *infra* Appendix B, Table B24.

216. In the event that a judge in the senior-most or middle position on the panel was not part of the majority, I adjusted the rank of the other judges accordingly.

V. DISCUSSION AND IMPLICATIONS

The conclusions in the preceding Part provide support for the hypotheses laid out at the end of Part II. First, judges with expertise generally receive a disproportionate share of opinion assignments. Second, the natural experiment provided by the Guidelines allows us to conclude that acquiring relevant expertise does indeed result in more frequent opinion assignment. Third, the presence in a case of many issues going to a judge's expertise—or the presence of a greater proportion of such issues to the total number of issues raised in the case—generally increases the likelihood that that judge will draft the opinion. Fourth, the ideological differences of the assigning judge and an expert judge generally do not reduce the disproportionate assignment of cases to the expert judge. And, fifth, expert judges receive disproportionately more opinion assignments regardless of the hierarchical position they fill on three-judge panels.

The Sixth Circuit bankruptcy case data—and especially the data involving Judge Batchelder—are the most difficult for the theory. It bears emphasizing, as well, that the Sixth Circuit was the one court that empirical testing seemed to suggest might not have been randomly assigning bankruptcy opinions.²¹⁷ However, it is also important to bear in mind that, if the Sixth Circuit were using nonrandom assignment to channel more bankruptcy cases to panels where a former bankruptcy judge could author the opinion, then one would expect the proportion of opinions in such bankruptcy cases authored by former bankruptcy judges to be *higher* than the expected one-third. Yet the data indicate that the proportion is sometimes not significantly different from one-third. This suggests that, if there is nonrandom assignment of cases, it is not done to allow more opinion-writing by expert judges.

Despite the general support for the notion that judges with expertise receive heightened levels of opinion assignment, the data show that there is considerable heterogeneity across circuits and judges in the treatment of expert judges. In the bankruptcy context, Judge Cyr authors a far greater percentage of bankruptcy case opinions than does any other former bankruptcy judge.²¹⁸ Perhaps this is because Judge Cyr's expertise outstrips the other former bankruptcy judges' expertise in unique and valuable ways. Even before serving as a bankruptcy judge,

217. See discussion *supra* Subsection IV.A.3. The Sixth Circuit has not been immune from controversy regarding random assignment of cases to panels in recent years. See Tracey E. George & Albert H. Yoon, *Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging*, 61 VAND. L. REV. 1, 2–4 (2008) (noting the Sixth Circuit controversy surrounding allegations that the chief judge manipulated the assignment process and deviated from random assignment).

218. See *infra* Appendix B, Table B23.

Judge Cyr served as a bankruptcy referee under the old pre-Bankruptcy Code “Bankruptcy Act of 1898” era.²¹⁹ In addition, he served as chief judge of the original First Circuit BAP.²²⁰ No other bankruptcy judge later elevated to the circuit can lay claim to anything approaching that level of experience.

In the Guidelines context, the expertise that Judge Wilkins and Judge Breyer both enjoyed seems to manifest itself in terms of opinion assignment in slightly different ways. As borne out by both binomial and chi-squared tests, Judge Wilkins received a statistically disproportionate number of opinions in federal criminal cases, and even more so in Guidelines cases when he sat on the panel in such cases.²²¹ With respect to Judge Breyer, the binomial test did not indicate that the higher assignment rate in federal criminal cases was statistically significant.²²² However, the chi-squared test did find statistical significance, and both the binomial and chi-squared tests confirm the statistical significance of the disproportionate rate at which Judge Breyer was assigned opinions in Guidelines cases.²²³ With respect to both federal criminal and Guidelines cases, Judge Wilkins received a higher proportion of opinion assignments than did Judge Breyer.²²⁴

This result is broadly consistent with Judge Wilkins’s more extensive experience in general criminal law. As a Commissioner who participated in the drafting of the original Guidelines, Judge Breyer also had experience that few other judges could claim. At the same time, there are reasons to temper, at least as compared to Judge Wilkins, our expectations about the frequency of opinion assignment to Judge Breyer. For one thing, during the entire period of the study, Judge Breyer was the chief judge of the First Circuit. That means that, in every case, he held the prerogative to assign opinions. As chief judge, Judge Breyer may have been concerned about the appearance of assigning too many opinions in an area to himself, and also about the effect of such self-assignment on the court’s legitimacy. Second, Judge Breyer does not have as strong a background in criminal law as does Judge Wilkins.²²⁵ Rather, Judge Breyer seems to have brought an

219. See *Judge Cyr Biography*, *supra* note 155.

220. See *id.*; *supra* note 155 and accompanying text (noting Judge Cyr served as chief judge of the original First Circuit BAP).

221. See discussion *supra* Subsection IV.B.1.

222. See discussion *supra* Subsection IV.B.1.

223. See discussion *supra* Subsection IV.B.1.

224. See *infra* Appendix B, Tables B2–B5.

225. As noted above, Judge Breyer served briefly as counsel in the Watergate prosecutions, but this pales in comparison to Judge Wilkins’s extensive experience in criminal law before ascending to the bench.

administrative law expertise to bear on the Guidelines.²²⁶ But many Guidelines cases are likely also to raise unrelated issues of criminal law. Judge Breyer's lack of a general criminal law expertise might have deterred him from taking on such cases, for fear that expertise that would help him deal with part of the case would not help him with the rest of the case at all,²²⁷ the efficiency benefit would indeed be limited. In the end, then, that Judge Breyer's expertise was restricted more to the Guidelines squares nicely with Judge Breyer being assigned opinions at a lower rate than Judge Wilkins, and also with his being more likely to write the opinion in cases with larger proportions of Guidelines headnotes.

The validation of the various hypotheses offers strong support for the theoretical explanation for expertise-based opinion assignment advanced in Parts I and II. No alternate explanation satisfies all the observations here as well as the proffered theory does. For example, one might suggest that the high rate of assignment of opinions in Guidelines appeals to Judge Wilkins is in part due to Judge Wilkins's prosecutorial experience.²²⁸ Two points belie this explanation. First, the data do not suggest that district judges who had prosecutorial experience were substantially more likely to be assigned Guidelines opinions. Second, the power of this explanation is undercut by the comparatively low rate at which Judge Wilkins was assigned criminal cases before the advent of the Guidelines,²²⁹ despite the prosecutorial experience he had, even then.

With respect to Judge Breyer, one might turn to Professor Tracey George's scholarship finding that circuit judges with prior legal academic experience tend to be assigned more cases than their colleagues.²³⁰ But the suggestion that this explains the higher rates at which Judge Breyer is assigned Guidelines cases is undercut²³¹ by both

226. *See supra* note 135 and accompanying text (noting Justice Breyer's expertise in administrative law).

227. *See supra* Subsection II.B.2.b (arguing that expertise is more valuable when it arises in a case where it can be used to dispose of all the issues in the case).

228. *See supra* note 127 and accompanying text (noting Judge Wilkins's experience as solicitor in South Carolina). Judge M. Blane Michael also had such experience, but was appointed to the Fourth Circuit only at the tail end of the time period studied. *See Biographical Directory of Federal Judges: Michael, M. Blane*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1632&cid=999&ctype=na&instate=na> (last visited Aug. 26, 2014) (noting that Judge Michael began serving on the Fourth Circuit in 1993).

229. *See infra* Appendix B, Table B17.

230. *See* Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 41–42, 50–54 (2001) (contending legal academics' "individualistic approach to judging should increase their inclination to write signed, published opinions").

231. Also suggestive that it is Judge Breyer's Sentencing Commission experience, and not his academic experience, that explains the results here is the finding that a judge's prior

(i) the fact that the study here looked at *proportions* of cases in which opinions were assigned, not absolute numbers; and (ii) the fact that the rate at which Judge Breyer was assigned opinions in federal criminal cases increased once the Guidelines were effective.²³²

One might argue that expert judges penned large numbers of cases in their areas of expertise not because of expertise in the area, but because of plain *interest* in the area (perhaps combined with other judges' lack of interest in the area).²³³ While this explanation may have some validity, it leaves open the question as to why, for example, other judges with prosecutorial experience would not have similar interest in handling Guidelines cases. It is also hard to believe that assigning judges, even if they did "award" cases to satisfy certain judges' "interests," did not take into account the potential benefits from having experts draft opinions.

The results here have implications for other scholarship on specialization and opinion assignment, and on judicial review of the Sentencing Guidelines. First, the high rate at which Judge Wilkins was assigned opinions in federal criminal cases is consistent with Professor Cheng's finding about Judge Wilkins' strong specialization in criminal law cases.²³⁴ Indeed, Professor Cheng's measure of Judge Wilkins' affinity for federal criminal cases was the highest among all circuit judges for any subject in his study.²³⁵ However, the findings here draw into question whether a similar study conducted before the Guidelines took effect (Professor Cheng's study spanned the years 1995–2005) would have produced a similar result.

Second, that the data here indicate that political affiliations did not play a significant role in opinion assignment in Guidelines cases draws into question the need to ensure partisan balance in Guidelines cases. Based upon their finding that district judges tend to apply their

experience as a law professor was not likely to affect how she ruled on the constitutionality of the Guidelines pre-*Mistretta*. Sisk et al., *supra* note 114, at 1479–80. Extrapolating from this, it seems unlikely that Judge Breyer, as a former law professor, assigned Guidelines opinions to himself in order to secure particular policy outcomes.

232. With respect to Judge Breyer, at least some of this effect may be because only after the Guidelines took effect was Judge Breyer the chief judge, and thus empowered to assign the opinion in every case in which he participated.

233. See Cheng, *supra* note 10, at 527 (“[T]he assigning judge may distribute opinions based on the panel members’ special expertise *or interest*.” (emphasis added)).

234. See *id.* at 541 (noting Judge Wilkins’s “overwhelming” number of criminal and postconviction opinions).

235. See *id.* at 564 (providing empirical data demonstrating that Judge Wilkins’s specialization rate vis-à-vis other judges). Judge Posner received a higher absolute score for criminal law, but that score was negative in sign, which indicated Judge Posner’s aversion to criminal law cases. See *id.* at 565.

discretion under the Guidelines with an eye to the ideology of the circuit to which their decision would be appealed.²³⁶ Professors Max Schanzenbach and Emerson Tiller suggest institutionalizing ideological diversity “for every sentencing event by ensuring that for any criminal sentencing the lower court and higher court not share a uniform political (partisan) orientation.”²³⁷ To be sure, the instant study looks at opinion assignment in Guidelines cases, not the extent to which voting is ideological. In addition, the study here looks at the time period largely before the time period that Professors Schanzenbach and Tiller studied, a time period that includes years that they do not study because of the large technical issues that remained outstanding.²³⁸ Still, the findings here certainly do not provide any additional reason to believe that it is important to mandate partisan balance in Guidelines cases.

CONCLUSION

This Article provides a theory for expertise-based assignment of judicial opinions. It has tested that theory, with success, in the context of the assignment of federal criminal and Sentencing Guidelines cases to expert judges who drafted those Guidelines, and also in the context of the assignment of bankruptcy cases to judges who previously served as federal bankruptcy judges.

In future research, I plan to expand this research in three ways. First, I hope to investigate additional observable implications of the expertise-based theory of opinion assignment advanced here. For example, the theory predicts that the court will garner reputation benefits through the assignment of opinions in that area to experts. One way that reputation benefit might manifest itself is through citation of those expertly drafted opinions by other courts. Indeed, David Klein and Darby Morrisroe have found that Judge Wilkins’s and, to a lesser extent, Judge Breyer’s opinions are cited rather extensively, and they speculate that this is the result of the judges’ Guidelines experience.²³⁹ I hope to investigate the issue more methodically, with an eye to the reputation theory enunciated here. I also hope to look at judicial citations of other writings by these judges—writings other than opinions—in the area of the Guidelines.

Second, I plan to further test the theory in other settings. It would be interesting, in particular, to investigate settings where expertise-based

236. See Schanzenbach & Tiller, *supra* note 98, at 32–33.

237. Schanzenbach & Tiller, *supra* note 113, at 744–45.

238. See Schanzenbach & Tiller, *supra* note 98, at 35 (“We begin with 1992 because the Guidelines were upheld by the Supreme Court in 1989 and the permissibility of certain grounds for departures became clearer in the early 1990s.”).

239. See Klein & Morrisroe, *supra* note 2, at 381–82.

assignment might compete more directly with ideological interests.

Finally, the theory of expertise-based opinion assignment advanced here is but the first step in a broader theoretical understanding of the factors that influence judicial opinion assignment. I plan to advance such an understanding in future work.

APPENDIX A: A FORMAL UTILITY-BASED MODEL OF OPINION ASSIGNMENT

A. *The Basic Model*

I develop a utility-based model of opinion assignment. I begin with a simple court that hears a case en banc, and has an exogenous determination as to who drafts the opinion in the case. I build up to a court that has a docket of cases, and a generalized rule for determining who enjoys the prerogative to assign responsibility for drafting the opinion in each case. I also allow for courts that hear cases in panels consisting of less than the entire complement of judges. Where a docket of cases is to be assigned, I assume a court norm that expects each to draft roughly the same number of opinions.

Consider a court C . Let J denote the set of m judges who sit on C ;

$$J = \{j_1, j_2, j_3, \dots, j_m\}.$$

Let us begin with a very basic example: The court, which hears all cases en banc, has heard a case c . One of the judges—say j^* —will write the opinion in the case. Each judge brings different experiential and ideological backgrounds to the table. Accordingly, depending on which judge drafts the opinion in c , the opinion will offer varying costs and benefits—in terms of the time it takes to prepare the opinion, legal legitimacy and reputation, and ideological legitimacy and reputation—to the court.

The time it takes the authoring judge to prepare the opinion imposes a cost on the court by depleting its limited resources. The time will be a function of the authoring judge: $t(j^*)$.

The time that a judge spends drafting an opinion is an expenditure of a resource. Presumably, the court hopes to recoup something for that investment (or at least minimize any loss) by virtue of the quality of the resulting opinion. An opinion may inure to a court's benefit by emphasizing the court's legal acumen and skill; it may also inure to the court's benefit by emphasizing the court's ideological stance.

Let the legal value benefits offered by judge j^* drafting the opinion in case c be represented by $L(j^*)$. Let the ideological value benefits offered by judge j^* drafting the opinion in case c be represented by $I(j^*)$.

Now let us consider the utility that a judge—say without loss of generality j_l —gets from having j^* author the opinion in c . This utility will include a combination of these five values. Each judge, however, is likely to weigh the factors differently. Accordingly, for judge j_l , the utility of having judge j^* draft the opinion will depend upon

$$-\gamma_1(j_l)t(j^*) + \gamma_2(j_l)L(j^*) + \gamma_3(j_l)I(j^*),$$

where γ_1 , γ_2 , and γ_3 measure the relative weights that j_l assigns to each cost/benefit with respect to case c .

Beyond this, j_l 's own utility arising directly from j^* 's authorship aside, j_l may be concerned about how judges *other than* judge j_l (including j^{240}) will react to j^* 's authorship. Having judge j^* write the opinion in c will provide utility of various levels to the various judges on the court. The judges may have a view on whether the associated costs and benefits are desirable. And, quite apart from that, they may have a view on whether j^* is happy writing the opinion and on whether they would have preferred writing the opinion themselves. Call this utility s ; s is also a function of j^* , as well as of j_l : $s(j_l, j^*)$. There is also a weight, γ_4 , that j_l attaches to that factor.

Then the utility drawn by j_l from having j^* author the opinion in case c is

$$u(j_l, j^*) = -\gamma_1(j_l)t(j^*) + \gamma_2(j_l)L(j^*) + \gamma_3(j_l)I(j^*) + \gamma_4s(j_l, j^*).$$

More generally, for any judge j_k and j^* (both elements of J),

$$u(j_k, j^*) = -\gamma_1t(j^*) + \gamma_2L(j^*) + \gamma_3I(j^*) + \gamma_4s(j_k, j^*).$$

The various weighting factors γ_r are functions of j_k .

Now say that the court considers two cases c_1 and c_2 . Now the γ_r are functions not only of j_k , but also of the case:

$$u(c_1, j_k, j^*) = -\gamma_1(c_1, j_k)t(j^*) + \gamma_2(c_1, j_k)L(j^*) + \gamma_3(c_1, j_k)I(j^*) + \gamma_4s(c_1, j_k, j^*),$$

and

$$u(c_2, j_k, j^*) = -\gamma_1(c_2, j_k)t(j^*) + \gamma_2(c_2, j_k)L(j^*) + \gamma_3(c_2, j_k)I(j^*) + \gamma_4s(c_2, j_k, j^*).$$

More generally, say now that the court has a docket of n cases. Let D represent C 's docket—that is, the set of n cases currently pending before C ; $D = \{c_1, c_2, c_3, \dots, c_n\}$. Then:

240. Judge j^* could be pleased with receiving the opinion assignment in the case, or she might prefer it if another judge had gotten the task. *See supra* notes 5–6 and accompanying text.

$$u(c_i, j_k, j^*) = -\gamma_1(c_i, j_k)t(j^*) + \gamma_2(c_i, j_k)L(j^*) + \gamma_3(c_i, j_k)I(j^*) + \gamma_4s(c_i, j_k, j^*)$$

We may imagine an “assignment function” that maps uniquely from D to J . $A: D \rightarrow J$. A maps each case c_i to the judge—say j^* —who will write the opinion in c_i : $A(c_i) = j^*$. Then, from the perspective of judge j_k , the total utility across all cases in $c_i \in D$ is

$$U(j_k) = \sum_{c_i \in D} u(c_i, j_k, A(c_i))$$

If judge j_k is the assigning judge for all cases $c_i \in D$, then j_k should assign cases—and in so doing define the function A —such that her utility is maximized. However, she must do so subject to the institutional constraint of approximate parity in number of cases assigned to each judge. Let A^{-1} be the inverse of the assignment function A . Then $A^{-1}(j_i)$ represents the set of all cases for which the assignment function A assigns to judge j_i to write the opinion. The institutional constraint is that each judge must bear responsibility for approximately the same number of opinions, i.e., that $|A^{-1}(j_i)| \approx n/m$.

Now say that responsibility for opinion assignment is not vested in a single judge j_k . For example, on many courts—including the Supreme Court—responsibility for opinion assignment lies with the senior ranking judge who belongs to the majority coalition, with the chief judge having the highest rank by virtue of that position. Let R be the function that determines the right to assign the opinion-writing responsibility in all cases. Like A , $R: D \rightarrow J$. For any case c_i , R returns the judge, say j' , who has the power to choose who drafts the opinion in c_i .

I assume, as it is almost universally the case, that the function R is set by court rule, and therefore for model purposes is exogenously given. Because the function R determines who assigns responsibility for drafting opinions in all cases on the court’s docket, it in effect determines the assignment function A . A couple of examples will illustrate the point.

For the Supreme Court, opinion assignment rests with the senior-most Justice in the majority coalition—with the Chief Justice de facto the senior-most Justice whenever he or she is part of that coalition.²⁴¹ Practically, then, responsibility for the assignment of drafting the opinion in most cases falls to one of two Justices—the Chief Justice and

241. See SEGAL & SPAETH *supra* note 1, at 368 (discussing the Supreme Court opinion assignment process).

next-most-senior (or maybe most senior of the opposition bloc). For simplicity, we may initially assume that assignment falls just to two judges— j_1 and j_2 . Let $R^1(j_k)$ denote the set of all cases $c_i \in D$, such that $R(c_i) = j_k$. Then j_1 and j_2 together determine the assignment function A . Judge j_1 will define “his part” of the utility function so as to maximize

$$\max \sum_{c_i \in R^1(j_1)} u(c_i, j_1, A(c_i)).$$

And Judge j_2 will define “her part” of the utility function so as to maximize

$$\max \sum_{c_i \in R^1(j_2)} u(c_i, j_2, A(c_i)).$$

Both judges’ assignments remain subject to the overall approximate parity constraint.

More generally, say that more than two judges are responsible for assigning opinion drafting responsibilities for cases on the docket. Let r denote that subset of judges who enjoy opinion assignment responsibility with respect to at least one case on the docket, i.e., $r \subseteq J$ such that $j_k \in r \Leftrightarrow j_k \in R(D)$.

Then each judge in r will assign cases—and thus define the overall assignment function A —so as to maximize his utility under “his portion” of the assignment function. In other words, the assignment function will be defined—subject to institutional constraint—as the function that achieves the following maxima:

$$\max_{j_k \in r} \sum_{c_i \in R^1(j_k)} u(c_i, j_k, A(c_i)),$$

or in expanded form,

$$\max_{j_k \in r} \sum_{c_i \in R^1(j_k)} -\gamma_1(c_i, j_k)t(A(c_i)) + \gamma_2(c_i, j_k)L(A(c_i)) + \gamma_3(c_i, j_k)I(A(c_i)) + \gamma_4s(c_i, j_k, A(c_i)). \quad (1)$$

To this point, I have assumed that the court C hears all cases en banc. In fact, many courts—including federal courts of appeals—hear cases in panels.²⁴² Introducing panels to the model is not overly

242. See Robert M. Howard & David C. Nixon, *Local Control of the Bureaucracy: Federal*

complicated. The determination of the assignment function A works substantially as above, and relies upon the same maximization requirements.²⁴³

B. *Opinion Assignment and Case Type*

Now let us think about categories of cases, and how they might impact the maximization requirements that define the assignment function. Ideological cases are likely to produce values of the various weighting factors (the γ_r) that vary greatly across judges. Ideologically minded judges will be likely to weight the ideological value factor heavily—although whether a judge weights these factors positively or negatively will depend upon whether the judge is of like, or opposite, ideology to the authoring judge. Also, there may be judges who tend to be less ideological, and to believe that cases (even ideologically charged ones) ought to be decided in accord with the rule of law. These judges may assign comparatively little weight to the ideological factor, and instead may give more weight to the legal factor. These differences will, in turn, also feed vastly different values for s —the feelings of the other judges on the court.

In contrast, one can rationally expect the weighting of factors to be more uniform across judges with respect to nonideological cases—i.e., cases in nonideological areas that do not raise salient issues. Here, even ideological judges are likely to weight the ideological factor far less than they do the legal factor. In addition, to the extent that the legal factor dominates, it seems that these cases will appeal to judges of all stripes as cases that ought to be decided with common weight for the legal factor. (Indeed, even if judges disagree as to the outcome that “the law” dictates or suggests, they are still likely to agree that the case should be decided in accordance with governing law.) As a simplifying

Appeals Courts, Ideology, and the Internal Revenue Service, 13 WASH. U. J.L. & POL’Y 233, 242–43 (2003) (“[F]ederal courts of appeals typically hear cases in randomly assigned three-judge panels.”).

243. Consider federal courts of appeals that typically hear cases in panels of three judges who are selected at random. The function P maps cases onto $J \times J \times J$: $P(c_i) = \{P_1(c_i), P_2(c_i), P_3(c_i)\}$. One judge on the panel—usually the senior-most judge (with the chief judge de facto having the most seniority if he or she is on the panel)—assigns the opinion, and the recipient must be a panel member. Thus, R and A now map not from $D \rightarrow J$, but from

$$D \rightarrow \bigcup_{c_i \in D} P(c_i).$$

The same maximization conditions define the assignment function A as in the non-panel setting. Once again, r is the set of judges who enjoy opinion assignment responsibility in at least one case on the court’s docket, and $R^{-1}(j_k)$ is the set of all cases as to which judge j_k enjoys such responsibility.

assumption, I assume that, at least in cases that fall squarely within this category, the weight of the ideological factor— γ_3 —will be zero. I also assume that the weight of time taken to draft the opinion in the case and the weight of the legal factor— γ_1 and γ_2 —will be substantially the same across judges. Finally, I assume—again unlike for ideological cases—that s will also be uniform across all judges, i.e., that, insofar as feelings about authorship are likely to be largely homogenous, so too will be the value of judges' reactions to having a particular judge author the opinion in the case.

C. Opinion Assignment in Nonideological Cases on Error-Correcting Courts

There are several aspects of condition (1) that likely will hold when an error-correcting court decides a predominantly nonideological case. I make several simplifying assumptions to allow conclusions to be more easily drawn.

First, there is a strong likelihood that γ_3 —the weight judges assign to ideological benefit—will be very small. I assume it will be zero.

Second, the weights judges assign to the time it takes to draft an opinion and to the legal benefit an opinion will offer— γ_1 and γ_2 —will likely be largely uniform across assigning judges, at least with respect to categories of like cases. I assume that they will be the same, i.e., that they will be constants.

Last, it will also likely be the case that s —the aggregate utility of the judges *other than* the assigning judge—will not vary substantially. I assume that it will not vary at all. Thus, even if different assigning judges weight other judges' utility differently, i.e., have different values for γ_4 , the product $\gamma_4(c_l, j_k)s(c_l, j_k, j^*)$ will be constant for any given assigning judge j_k and cases within a category. It will not matter which judge receives the opinion assignment.²⁴⁴

These conclusions—as amplified by the simplifying assumptions—allow a reduction in the maxima requirement (1) that defines the court's assignment function in these cases thus:

$$\max_{j_k \in r'} \sum_{c_l \in R^{-1}(j_k)} -K_1 t(A(c_l)) + K_2 L(A(c_l)) + K_3,$$

where K_1 , K_2 , and K_3 are constants, and r' is the set of judges who assign the opinion in all nonideological cases. The institutional parity-

244. One exception to this might arise if the judge to whom a certain kind of case would tend to be assigned is also the assigning judge—for example, if the judge with expertise in a relevant area is also the chief judge, and therefore always enjoys the opinion-assignment prerogative. See *supra* note 69 and accompanying text.

of-opinion-assignment requirement continues to apply.

If that is true, then a choice by j_k to assign case c_i to judge j^* that tends both to make $t(j^*)$ very small and also to make $L(j^*)$ very large will contribute toward achieving the desired maximum. As explained in Section II.A, expertise-based opinion assignment will fit this bill.

APPENDIX B: EMPIRICAL RESULTS

Note: For all tables, * denotes $p < 0.10$, ** denotes $p < 0.05$, and *** denotes $p < 0.01$.

TABLE B1: Circuit Judges with Prior Experience as Bankruptcy Judges

Cir.	Name of Judge	Years in Service as Bankruptcy Judge	Appointed to Court of Appeals by President	Dates of Service as Circuit Judge	Senior Circuit Judge Status Taken as of:
1	Conrad K. Cyr	1973–1981 ²⁴⁵	G. H.W. Bush	11/20/1989–Present	1/31/1997
6	Alice M. Batchelder	1983–1985 ²⁴⁶	G. H.W. Bush	12/2/1991–Present	--
6	R. Guy Cole, Jr.	1987–1993 ²⁴⁷	W. Clinton	12/26/1995–Present	--
6	Bernice B. Donald	1988–1995 ²⁴⁸	B. Obama	9/8/2011–Present	--
8	Michael J. Melloy	1986–1992 ²⁴⁹	G.W. Bush	2/14/2002–Present	--
10	John C. Porfilio	1975–1982 ²⁵⁰	R. Reagan	5/10/1985–Present	10/15/1999

245. Judge Cyr's years as a bankruptcy judge includes years—prior to the 1978 Bankruptcy Reform Act—when bankruptcy judges were called “bankruptcy referees.” During 1980 and 1981, he also served as chief judge of the First Circuit's bankruptcy appellate panel. *See supra* notes 219–220 and accompanying text. Judge Cyr also served as a federal district judge from 1981 to 1989. *See Judge Cyr Biography, supra* note 155.

246. Judge Batchelder also served as a federal district judge from 1985 to 1992. *Biographical Directory of Federal Judges: Batchelder, Alice Moore*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=116&cid=999&ctype=na&instate=na> (last visited Apr. 2, 2014).

247. *Biographical Directory of Federal Judges: Cole, R[ansley] Guy Jr.*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=473&cid=999&ctype=na&instate=na> (last visited Apr. 2, 2014).

248. Judge Donald also served as a federal district judge from 1995 to 2011. *Biographical Directory of Federal Judges: Donald, Bernice Bouie*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=631&cid=999&ctype=na&instate=na> (last visited Apr. 2, 2014).

249. Judge Melloy also served as a federal district judge from 1992 to 2002. *Biographical Directory of Federal Judges: Melloy, Michael Joseph*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1616&cid=999&ctype=na&instate=na> (last visited Apr. 2, 2014).

250. Judge Porfilio (then known as Judge Moore) also served as a federal district judge from 1982 to 1985. *Biographical Directory of Federal Judges: Porfilio, John Carbone*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1915&cid=999&ctype=na&instate=na> (last visited Apr. 2, 2014).

TABLE B2: Federal Criminal Cases Where Judge Wilkins Was Part of the Majority, by Year

Year	Number of Cases	Number (Percentage) of Opinions Authored by Judge Wilkins
1990	20	12 (60.00)
1991	16	11 (68.75)
1992	16	11 (68.75)
1993	15	7 (46.67)
Total	67	41 (61.19)

TABLE B3: Sentencing Guidelines Cases Where Judge Wilkins Was Part of the Majority, by Year

Year	Number of Cases	Number (Percentage) of Opinions Authored by Judge Wilkins
1990	15	10 (66.67)
1991	11	9 (81.82)
1992	9	7 (77.78)
1993	7	4 (57.14)
Total	42	30 (71.43)

TABLE B4: Federal Criminal Cases Where Judge Breyer Was Part of the Majority, by Year

Year	Number of Cases	Number (Percentage) of Opinions Authored by Judge Breyer
1990	43	13 (30.23)
1991	55	22 (40.00)
1992	36	14 (38.89)
1993	30	12 (40.00)
Total	164	61 (37.20)

TABLE B5: Sentencing Guidelines Cases Where Judge Breyer Was Part of the Majority, by Year

Year	Number of Cases	Number (Percentage) of Opinions Authored by Judge Breyer
1990	14	6 (42.86)
1991	24	13 (54.17)
1992	17	7 (41.18)
1993	20	8 (40.00)
Total	75	34 (45.33)

TABLE B6: Summary of Data Collected in Primary Bankruptcy Databases

Circuit	Total Number of Cases	Number (Percentage) of Cases in which a Former Bankruptcy Judge Wrote the Majority Opinion
1	64	49 (76.56)
6	121	53 (43.80)
8	21	13 (61.90)
10	139	68 (48.92)
Total	345	183 (53.04)

TABLE B7: Results of Tests for Disproportionate Assignment of Cases to Former Bankruptcy Judges

Circuit	Year	Number of Non-Senior Circuit Judges	Number of Bankr. Cases	Expected Ratio of Cases Where a Judge is on the Panel: Total Number of Cases	Judge in Question	Actual Number of Cases Where Judge in Question is on Panel	Actual Ratio of Cases Where a Judge is on the Panel: Total Number of Cases	p-value from Binomial Test
1	1993	6	28	0.429	Cyr	14	0.538	0.283
6	1994	15 ²⁵¹	23	0.188	Batchelder	9	0.391	0.019*
6	1998	13	44	0.214	Batchelder	15	0.341	0.036*
8	2005	10	20	0.273	Cole	11	0.250	0.335
10	1988	10	16	0.273	Melloy	5	0.250	0.673
					Porfilio	5	0.313	0.453

251. I included as a non-senior judge Ralph Guy, who assumed senior status on September 1, 1994. *Biographical Directory of Federal Judges: Guy, Ralph B. Jr.*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=931&cid=999&ctype=na&instate=na> (last visited Apr. 2, 2014).

TABLE B8: Results of Tests for Disproportionate Assignment of Cases to Judge Wilkins

Year	Number of Non-Senior Circuit Judges	Number of Cases	Expected Ratio of Cases Where a Judge is on the Panel: Total Number of Cases	Actual Number of Cases Where Judge in Question is on Panel	Actual Ratio of Cases Where a Judge is on the Panel: Total Number of Cases	p-value from Binomial Test
1990	10 ²⁵²	426 federal criminal appeals	0.273	112	0.263	0.697
1990	10	174 Guidelines appeals	0.273	40	0.230	0.915

252. I did not include Judge Niemeyer, who became a circuit judge on August 7, 1990. *Biographical Directory of Federal Judges: Niemeyer, Paul Victor*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1766&cid=999&ctype=na&instate=na> (last visited Apr. 2, 2014).

TABLE B9: Results of Tests for Disproportionate Issuance of Per Curiam Opinions When former Bankruptcy Judge Was on Panel

Cir.	Year	No. of Bankr. Cases	No. (%age) of Bankr. Cases Decided Per Curiam	Judge in Question	No. of Cases Where Judge in Question is on Panel	No. (%age) of Cases Where Judge in Question is Decided Per Curiam	p-value
1	1993	28	8 (28.57)	Cyr	14	5 (35.71)	0.678 ²⁵³
6	1994	23	13 (56.52)	Batchelder	9	6 (66.67)	0.669 ²⁵⁴
6	1998	44	19 (43.18)	Batchelder	15	10 (66.67)	0.024 ^{**255}
				Cole	11	4 (36.36)	0.731 ²⁵⁶
8	2005	20	9 (45.00)	Melloy	5	2 (0.400)	1.000 ²⁵⁷
10	1988	16	3 (18.75)	Porfilio	5	1 (0.200)	1.000 ²⁵⁸

253. Fisher's exact test.
 254. Fisher's exact test.
 255. Chi-squared test.
 256. Fisher's exact test.
 257. Fisher's exact test.
 258. Fisher's exact test.

TABLE B10: Results of Tests for Disproportionate Issuance of Per Curiam Opinions When Judge Wilkins Was on Panel

Year	No. of Cases	No. (%age) of Cases Decided Per Curiam	Number of Cases Where Judge in Question is on Panel	Number (%age) of Cases Where Judge in Question is on Panel Decided Per Curiam	p-value
1990	426 federal criminal appeals	348 (81.69)	112	91 (81.25)	0.888 ²⁵⁹
1990	174 Guidelines appeals	130 (74.71)	40	25 (62.50)	0.043 ²⁶⁰

TABLE B11: Assignment of All Fourth Circuit Cases Decided in 1991 Where Judge Wilkins Was on the Panel

Panel A: Comparing Federal Criminal Cases

	Appeals from Federal Convictions	Cases Other than Appeals from Federal Convictions	Total
Cases in which Judge Wilkins was assigned the opinion	11	11	22
Cases in which Judge Wilkins was not assigned the opinion	6	25	31
Total	17	36	53

Chi-Square = 5.54 [$p = 0.019$].

Panel B: Comparing Guidelines Cases

	Guidelines Cases	Non-Guidelines Cases	Total
Cases in which Judge Wilkins was assigned the opinion	9	13	22
Cases in which Judge Wilkins was not assigned the opinion	3	28	31
Total	12	41	53

Chi-Square = 7.17 [$p = 0.007$].

259. Chi-squared test.

260. Chi-squared test.

TABLE B12: Assignment of All First Circuit Opinions Decided in 1991

Panel A: Comparing Federal Criminal Cases

	Appeals from Federal Convictions	Cases Other than Appeals from Federal Convictions	Total
Cases in which Judge Breyer was assigned the opinion	22	21	43
Cases in which Judge Breyer was not assigned the opinion	33	59	92
Total	55	80	135

Chi-Square = 2.84 [$p = 0.092$].

Panel B: Comparing Guidelines Cases

	Guidelines Cases	Non-Guidelines Cases	Total
Cases in which Judge Breyer was assigned the opinion	13	30	43
Cases in which Judge Breyer was not assigned the opinion	11	81	92
Total	24	111	135

Chi-Square = 6.70 [$p = 0.010$].

TABLE B13: Assignment of Opinions to Former Bankruptcy Judges

Circuit	Total Number of Cases	Number (Percentage) of Cases in which a Former Bankruptcy Judge Wrote the Majority Opinion	p-value from Binomial Test
1	64	49 (76.56)	< 0.01***
6	121	53 (43.80)	0.11
8	21	13 (61.90)	< 0.01***
10	139	68 (48.92)	< 0.01***
Total	345	183 (53.04)	< 0.01***

TABLE B14: Assignment of Opinions to Former Bankruptcy Judges on the Sixth Circuit (counting any cases where at least one former bankruptcy judge Was in the majority)

Judge	Total Number of Cases Where Judge in Question Was the Lone Former Bankruptcy Judge	Number (Percentage) of Cases in which the Judge Wrote the Majority Opinion	p-value from Binomial Test
Batchelder	76	30 (39.47)	0.16
Cole	49	23 (46.94)	0.03**

TABLE B15: Assignment of Opinions to Former Bankruptcy Judges on the Sixth Circuit (counting any cases where at most one former bankruptcy judge was in the majority)

Judge	Total Number of Cases Where Judge in Question Was the Lone Former Bankruptcy Judge in the Majority	Number (Percentage) of Cases in which the Judge Wrote the Majority Opinion	p-value from Binomial Test
Batchelder	72	30 (41.67)	0.08*
Cole	45	19 (42.22)	0.13

TABLE B16: Assignment of Opinions to Former Bankruptcy Judges on the Sixth Circuit (Cumulative)

Cases Included:	Total Number of Cases Where Judge in Question Was the Lone Former Bankruptcy Judge in the Majority	Number (Percentage) of Cases in which the Judge Wrote the Majority Opinion	p-value from Binomial Test
All cases	121	53 (43.81)	0.01***
All cases, except those where both judges were in the majority	117	47 (41.88)	0.03**

TABLE B17: Assignment of All Fourth Circuit Opinions Decided in 1988 Where Judge Wilkins Was on the Panel

	Appeals from Federal Convictions	Cases other than Appeals from Federal Convictions	Total
Cases in which Judge Wilkins was assigned the opinion	6	17	23
Cases in which Judge Wilkins was not assigned the opinion	8	44	52
Total	14	61	75

Fisher's exact: $p = 0.339$.

TABLE B18: Assignment of all First Circuit Opinions Decided in 1988 Where Judge Breyer Was on the Panel

	Appeals from Federal Convictions	Cases other than Appeals from Federal Convictions	Total
Cases in which Judge Breyer was assigned the opinion	8	29	37
Cases in which Judge Breyer was not assigned the opinion	24	58	82
Total	32	87	119

Chi-Square = 0.76 [$p = 0.384$].

TABLE B19: Assignment of Guidelines Opinions to Judge Wilkins, According to Guidelines Headnote Ratio

	Ratio \leq 0.3333	0.3333 < Ratio \leq 0.6667	0.6667 < Ratio	Total
Cases in which Judge Wilkins was assigned the opinion	8	6	16	30
Cases in which Judge Wilkins was not assigned the opinion	1	2	9	12
Total	9	8	25	42

Fisher's exact: $p = 0.411$.

TABLE B20: Assignment of Guidelines Opinions to Judge Breyer, According to Guidelines Headnote Ratio

	Ratio ≤ 0.3333	$0.3333 < \text{Ratio} \leq 0.6667$	$0.6667 < \text{Ratio}$	Total
Cases in which Judge Breyer was assigned the opinion	6	8	20	34
Cases in which Judge Breyer was not assigned the opinion	14	14	13	41
Total	20	22	33	75

Chi-squared = 5.7177 [$p = 0.057^*$].

TABLE B21: Assignment of Bankruptcy Opinions to Former Bankruptcy Judges, According to Bankruptcy Headnote Ratio

	Ratio ≤ 0.3333	$0.3333 < \text{Ratio} \leq 0.6667$	$0.6667 < \text{Ratio}$	Total
Cases in which a former Bankruptcy Judge was assigned the opinion	20	28	135	183
Cases in which Judge Breyer was not assigned the opinion	37	22	103	162
Total	57	50	238	345

Chi-squared = 8.8472 [$p = 0.012^{**}$].

TABLE B22: Assignment of Opinions in Federal Criminal Cases, and Guidelines Cases, to Judge Wilkins, Broken Down by Party of the President who Appointed the Assigning Judge

Type of Cases	Cases Assigned by Judges Appointed by Democratic Presidents			Cases Assigned by Judges Appointed by Republican Presidents			p-value
	Total Cases Assigned	No. (%age) of Cases Assigned to Judge Wilkins	p-value from Binomial Test	Total Cases Assigned	No. (%age) of Cases Assigned to Judge Wilkins	p-value from Binomial Test	
Federal Criminal Cases	30	18 (60.00)	< 0.01***	32	23 (62.16)	< 0.01***	0.857 ²⁶¹
Guidelines Cases	16	11 (68.75)	< 0.01***	26	19 (73.08)	< 0.01***	0.515 ²⁶²

261. Chi-squared test.

262. Fisher's exact test.

TABLE B23: Assignment of Opinions to Former Bankruptcy Judges, Broken Down by Party of the President who Appointed the Assigning Judge

Judge	Cases Assigned by Judges Appointed by Democratic Presidents			Cases Assigned by Judges Appointed by Republican Presidents			p-value
	Total Cases Assigned	No. (%age) of Cases Assigned to a Former Bankruptcy Judge	p-value from Binomial Test	Total Cases Assigned	No. (%age) of Cases Assigned to a Former Bankruptcy Judge	p-value from Binomial Test	
Cyr	11	7 (63.64)	0.038*	53	42 (79.25)	< 0.01***	0.27 ²⁶³
Batchelder	21	7 (33.33)	0.580	55	23 (41.82)	0.117	0.50 ²⁶⁴
Cole	33	14 (42.42)	0.176	16	9 (56.25)	0.050**	0.36 ²⁶⁵
Melloy	1	1 (100.00)	0.0333	20	12 (60.00)	0.013**	1.00 ²⁶⁶
Porfilio	59	32 (54.24)	< 0.01***	80	36 (45.00)	0.020**	0.28 ²⁶⁷
Total	125	61 (41.19)	< 0.01***	224	122 (55.20)	< 0.01***	0.28 ²⁶⁸

263. Fisher's exact test.
 264. Chi-squared test.
 265. Chi-squared test.
 266. Fisher's exact test.
 267. Chi-squared test.
 268. Chi-squared test.

Table B24:
Assignment of Opinions to Judge Wilkins, Broken Down by Hierarchical Panel Position

Type of Case	Total Cases Where Judge Wilkins was Senior-Most	No. (%age) Where Judge Wilkins was Senior-Most and Self-Assigned	p-value for Binomial test of Senior-Most Opinion Assignments	Total Cases where Judge Wilkins was Middle Judge	No. (%age) where Judge Wilkins was Middle Judge and Wrote Opinion	P-value for Binomial test of Middle Judge Opinion Assignments	Total Cases where Judge Wilkins was Junior-Most	No. (%age) where Judge Wilkins was Junior-Most and Wrote Opinion	p-value for Binomial test of Junior-Most Opinion Assignments	p-value for Fisher's Exact Test for Opinion Assignment Across Panel Hierarchies
Fed. Crim. Cases	6	2 (33.33)	0.65	49	32 (65.31)	<0.01	12	7 (58.33)	0.07	0.34
Guidelines Cases	2	1 (50.00)	0.56	32	23 (71.88)	<0.01	8	6 (75.00)	0.02	0.084

TABLE B25: Assignment of Opinions to Former Bankruptcy Judges, Broken Down by Hierarchical Panel Position

Cir	Total Cases where Former Bankr. Judge was Senior-Most	No. (%age) of Cases where Former Bankr. Judge was Senior-Most and Self-Assigned	p-value for Binomial test of Senior-Most Opinion Assmts	Total Cases where Former Bankr. Judge was Middle Judge	No. (%age) of Cases where Former Bankr. Judge was Middle Judge and Wrote Opinion	p-value for Binomial test of Middle Judge Opinion Assmts	Total Cases where Former Bankr. Judge was Junior-Most	No. (%age) of Cases where Former Bankr. Judge was Junior-Most and Wrote Opinion	p-value for Binomial test of Junior-Most Opinion Assmts	p-value for Chi-Squared Test for Opinion Assmt. Across Panel Hierarchies
1	11	7 (63.64)	<0.01	31	22 (70.97)	<0.01	22	20 (90.91)	<0.01	0.12
6	34	18 (52.94)	<0.01	65	24 (36.92)	0.22	22	11 (50.00)	0.03	0.25
8	6	5 (83.33)	<0.01	8	5 (62.50)	0.02	7	3 (42.86)	0.17	0.38
10	59	29 (49.15)	<0.01	73	35 (47.95)	<0.01	7	4 (57.14)	0.05	0.96
Total	110	59 (53.64)	<0.01	177	84 (48.00)	<0.01	58	38 (64.29)	<0.01	0.50