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Expertise and Judicial Opinion Assignment on the Courts of Appeals

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This Paper examines the role of expertise in judicial opinion assignment and offers three contributions. First, I develop a general theory of opinion assignment on multimember courts. Second, I use that theory to predict how expertise might influence opinion assignment. Third, the Paper identifies a setting in which the theory the Paper advances should have observable implications, and the paper proceeds to test those implications empirically: It finds that, in the years following the initial adoption of the Sentencing Guidelines, judges who were Sentencing Commissioners were more likely to have opinions raising sentencing issues assigned to them. Fourth, because the theory advanced in the Paper suggests that the courts of appeals are far more likely to witness experience-based opinion assignment than is the Supreme Court, the Paper contributes to an understanding of opinion assignment practices in this under-studied area.

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I. 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 under-theorized 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] An opinion assignor might assign opinions in a subject area to someone not because he or she has any expertise, but because the assignee "likes" that subject area.[4] Conversely, a judge might find himself the recipient of numerous opinion assignments in an area if it is an opinion area no one on the court likes[5] and the assignor does not

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[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, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, 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, LAURAL L. HOOPER & MARY CLARK, 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."); *see also* 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. *See also* David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 J. LEG. 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 on the U.S. Supreme Court* (paper presented at Midwest Political Science Association 2011 annual meeting) 9-10 (critiquing this approach). Unah & Wall's paper is an exception in this regard.

[4] Saul Brenner & Harold J. Spaeth, *Issue Specialization in Majority Opinion Assignment on the Burger Court*, 39 W. POL. Q. 520, 521 (1986).

[5] *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).

like him.[6] Political scientists Jeffrey Segal and Harold Spaeth suggest that "[t]o characterize such justices as specialists seems a misnomer."[7] However they do not explain how to identify issue specialization when it *does* occur. Further, their tests for specialization nonetheless focus on the frequency with which Justices author opinions in particular areas.[8]

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.[9] Even stranger than this is the approach taken by Forrest Maltzman, James Spriggs, and Paul Wahlbeck: While they hypothesize that a judge's expertise may lead to greater opinion assignment in that area,[10] they curiously measure "expertise" by reference to the number of cases in which a justice wrote a dissent or concurrence in a particular area.[11] Measures of specialization, such as these, may capture some opinion assignment based on actual expertise. It may also be the case that, over time, opinion specialization begets expertise.[12] But a judge well may have developed an expertise before

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[6] *See, e.g.*, SEGAL & SPAETH, *supra* note 1, at 378 ("Given the norm of equal distribution of assigners' policy preferences, it makes perfect sense to assign unattractive cases to one's ideological opponents."); Bob Woodward & Scott Armstrong, THE BRETHREN: INSIDE THE SUPREME COURT 224 (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).

[7] SEGAL & SPAETH, *supra* note 1, at 379.

[8] *See id.* at 379-80; *see also* Saul Brenner, *Issue Specialization in Opinion Assignment on the U.S. Supreme Court*, 46 J. POL. 1217, 1218 (1984) (noting that, while "it 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"); 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).

[9] *See* Burton M. Atkins, *Opinion Assignments on the United States Courts of Appeals: The Question of Issue Specialization*, 27 W. POL. Q. 409 (1974); Brenner, *supra* note 8; Brenner & Spaeth, *supra* note 4; Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519 (2008).

[10] *See* MALTZMAN ET AL., *supra* note 1, at 38.

[11] *See id.* at 43-44.

[12] *See, e.g.*, SEGAL & SPAETH, *supra* note 1, at 379 ("[S]pecialization may facilitate the development of judicial expertise . . . ."); Brenner, *supra* note 8, at 1218 (same).

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. 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 experience over time by serving on 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

ascending to the bench or, as we shall see here, may develop an expertise while serving as a judge but while engaging in non-judicial 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.[13] The focus on the Supreme Court misses the vast bulk of cases handled by the courts of appeals that never reach the Court.[14]

Third, the limits of the existing research have stunted efforts to theorize the causal mechanisms that might motivate opinion assignments to experts in a field. To be sure, commentators have noted in passing the efficiency benefits that specialization—with expertise—offers.[15] However, they have not endeavored to explain with any precision exactly when and to what extent expertise will influence opinion assignment. Jeffrey Lax and Charles Cameron laudably elucidate that expertise should factor into the calculus of the costs of opinion writing.[16] In the end, however, they, like Saul Brenner[17] and Segal and Spaeth, present expertise as an adjunct to ideology, something that might play a marginal role in choosing an assignee among judges already in a majority coalition. 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,[18] it may

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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).

[13] *See* Atkins, *supra* note 9 (finding evidence of opinion specialization on the courts of appeals); W. J. HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 250-55 (1981) (finding sporadic evidence of specialization on three circuits); Cheng, *supra* note 9 (finding considerable evidence of specialization).

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

[15] *See, e.g.*, Cheng, *supra* note 9, at 524.

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

[17] *See* Brenner, *supra* note 8, 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.").

[18] *See* Friedman, *supra* note 14, at 265.

well be that the theories, and hence the findings, applicable to the Supreme Court do not extend well to the courts of appeals.[19]

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, regarding expertise. Expertise is unscientifically discovered after the fact as an explanation for cherry-picked observations. Burton Atkins, W. J. Howard, Jr., and Edward Cheng identify areas of specialization of various circuit judges, but they identify them based upon the disproportionate number of opinions that they draft. Expertise follows opinion assignment, rather than vice versa.[20] For example, only after discovering that Judge Wilkins wrote "an overwhelming number" of criminal cases opinions does Cheng proffer the explanation—nowhere previously hypothesized—that Wilkins "was chairman of the United States Sentencing Commission."[21] Years earlier, both Atkins and Howard offered similar after-the-fact experience-based justifications for a small fraction of their specialization findings.[22]

In this Paper, I seek to fill some of these gaps in the existing literature. First, I develop a general theory of opinion assignment on multimember courts. Second, I use that theory to predict how expertise might influence opinion assignment. Third, in elucidating this theory, I introduce 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, I identify a setting in which the theory I advance should have observable implications, and I proceed to test those implications. Fifth, because the theory I describe suggests that the courts of appeals are far more likely to witness experience-based opinion assignment than is the Supreme Court, the Paper contributes to opinion assignment practices in this under-studied area.

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[19] *See* Cheng, *supra* note 9, at 529-30; *see also* POSNER, *supra* note 1, at 143-44 (suggesting that court of appeals judges are as a general matter lazier than Supreme Court Justices).

[20] *See* Cheng, *supra* note 9, at 541 (noting amorphously that "many of the specific instances of specialization make intuitive sense based on the judges' backgrounds").

[21] *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' experience as a Commissioner helps to explain the disproportionate number of opinions in *postconviction* challenges that he wrote. *See id.* at 541. It is unclear why 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.

[22] *See* Atkins, *supra* note 9, at 541 (discussion of Second Circuit Judge Hays' specialization in labor cases), 542 & n.418 (discussion of Fourth Circuit Chief Judge Sobeloff's specialization in racial, criminal due process, and labor relations cases); HOWARD, *supra* note 13, at 253 ("Exploiting his expertise in admiralty, [Fifth Circuit Judge] Brown alone wrote 75 percent of the opinions when eligible in marine personal injuries.").

I test the theory of expertise-driven opinion assignment on 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. 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, served on the Sentencing Commission that drafted the Guidelines at Congress's behest. Judge Wilkins served as the original Chair of the Commission. He was Chair when the original Guidelines were drafted and promulgated, and he remained in the role for the first few years of the Guidelines' applicability, through 1994. 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,[23] 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 been of no bearing in terms of cases, and therefore opinion assignments, before the advent of the Guidelines. The prediction is that that expertise led to Guidelines cases being assigned to them at higher rates than normal. The data generally validate this prediction.

The paper makes three broad contributions. 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 based upon a nuanced understanding of expertise, not, as have other studies, based upon the extent of past opinion writing in an area.

The Paper proceeds as follows. Part II offers a utility-based model of opinion assignment. Part III then relies upon that model to derive an understanding of how expertise might influence opinion assignment. Part IV describes the various components of the setting in which I look for observed implications of that theory: it elucidates the history and workings of the Sentencing Guidelines, and the experiences of Judges Wilkins and Breyer with them, as well as the workings of opinion assignments on the Fourth and First Circuits. Part V describes the empirical data that I gathered and the analysis that I undertook to test the theory advanced in Part II. Part VI discusses the results, and suggests implications. Part VII concludes with possible paths for future research.

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[23] 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, served from 1985 to 1991. *See* http://www.ussc.gov/general/Oldcomms.htm.

II. A UTILITY-BASED MODEL OF OPINION ASSIGNMENT

In this Part, I offer a utility-based model of opinion assignment. I develop the model for general application, across types of courts and cases. While I develop the model to have general application, I rely on it here principally to explain how, for certain types of cases heard by certain types of courts, the maximization condition the model provides is the same across assigning judges. Thus, after developing the model, I then use the model to predict settings—i.e., types of courts and cases—that are most likely to benefit from, and therefore to rely upon, expertise-based 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 that consist 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.[24]

Consider a court C. Let J denote the set of m judges who sit on C; $J = \{j_1, j_2, j_3, \ldots, j_m\}$.

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 the prepare the opinion, legal legitimacy and reputation, and ideological legitimacy and reputation—to the court.

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[24] 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 8, at 72 (explaining practice on Ninth Circuit of weighting cases by number of issues raised and then assigning fewer cases with more issues to panels). I assume that either the norm calls for rough equality in numbers of assignments, or equally that in the long run numbers of cases represent a rough proxy for workload.

The time it takes the authoring judge to prepare the opinion imposes a cost on the court by depleting its limited resources.[25] The time will be a function of the authoring judge: $t(j^*)$.[26]

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; and/or it may inure to the court's benefit by emphasizing its ideological take.

Legal value 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.[27] They also may enhance

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[25] *See, e.g.*, COHEN, *supra* note 8, at 5-6 (recognizing the pressures that time constraints impose on courts of appeals).

The idea that courts have limited resources is consistent with either (i) the notion that courts have exogenous limits on resources, Matt Spitzer & Eric Talley, *Judicial Auditing*. 29 J. LEG. 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 assumption of resource constraint on court), or 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 as Everybody Else)*, 3 SUP. CT. ECON. REV. 1 (1993).

[26] This is a simplifying assumption. It is possible that multiple judges will share opinion-writing responsibility. *E.g.*, Michigan v. U.S. EPA, 213 F.3d 663 (D.C. Cir. 2000) (noting that, while the opinion was filed "PER CURIAM," "Judge Williams wrote Parts I.B-C and II.B; Judge Sentelle 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 is justified insofar as in most case 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.

[27] *See* Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1052-62 (1995) (explaining that "[j]udges generally gain respect from a craft orientation"); *see also* 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 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

the court's reputation for legal quality.[28] Legal reputation benefits may be especially useful if a court seeks to have other courts assess the court's legal abilities more favorably. Let the legal value benefits offered by judge j^* drafting the opinion in case c be represented by $L(j^*)$.[29] Generally speaking, an opinion of greater legal quality will offer the court legal value benefits.

Ideological value benefits are similar to their legal counterparts, but they deal in a different currency. They offer a court the opportunity to establish, or build upon, the perception that it makes decisions based on ideology.[30] They also may be especially useful if a court seeks to have other courts recognize the court's ideological leanings. Let the ideological value benefits offered by judge j^* drafting the opinion in case c be represented by $I(j^*)$.[31] Generally speaking, an opinion of greater ideological suasion will offer the court ideological value benefits.[32]

Now let us consider the utility that a judge—say without loss of generality j_1—gets from having j^* author the opinion in c. This utility will include a

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institutional confrontations and acts on that incentive"). For discussion of legitimacy in the context of expertise, see *infra* Part III.A.2.

[28] *See* Robert 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 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* Part III.A.3.

[29] I assume that legal value is either positive or zero. While one can conceive of an opinion that affirmatively detracts from legal legitimacy—say, if an opinion stated bluntly that ideological ends justified an outcome notwithstanding legal precedent—I assume that norms and institutional constraints governing judicial behavior virtually eliminate such circumstances. *See* Kornhauser, *supra* note 25, at 1606 (taking as a baseline assumption in developing economic theory of stare decisis that "the 'judicial team' seeks to answer 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).

[30] *See, e.g.*, Revesz, *supra* note 27, at 1747-50 (finding empirical evidence of ideological voting in certain types of cases).

[31] Unlike legal legitimacy and legal reputation—which I assume is either positive or zero, i.e., either existent or not, *see supra* note 29—I assume that ideological legitimacy and ideological reputation may be positive, negative, or zero. I thus assume a unidimensional, but bidirectional, measure of ideology. Without loss of generality, I assume that an opinion that leans conservative will have positive ideological legitimacy and reputation. Because, as I explain below, the model assumes that judges weight the importance of each factor, a liberal judge presumably would weight conservative ideology negatively, and thus assign ideological legitimacy and reputation *costs* to a conservative-leaning opinion.

[32] For example, dialogue at a recent debate among Republican Presidential aspirants suggests that the United States Court of Appeals for the Ninth Circuit has a reputation for liberal decision-making. *See* Jeff Zeleny & Jim Rutenberg, *As Romney Steps Cautiously, Gingrich Duels with Others*, N.Y. TIMES, Dec. 16, 2011, at A1.

combination of these five values. Each judge, however, is likely to weigh the factors differently. Accordingly, for judge j_1, the utility of having judge j^* will depend upon

$$-\gamma_1(j_1)t(j^*) + \gamma_2(j_1)L(j^*) + \gamma_3(j_1)I(j^*),$$

where γ_1, γ_2, and γ_3 measure the relative weights that j_1 assigns to each cost/benefit with respect to case c.

Beyond this, j_1's own utility arising directly from j^*'s authorship aside, j_1 may be concerned about how judges *other than* judge j_1 (including j^*[33]) 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_1: $s(j_1, j^*)$. There is also a weight, γ_4, that j_1 attaches to that factor.

Then the utility drawn by j_1 from having j^* author the opinion in case c is

$$u(j_1, j^*) = -\gamma_1(j_1)t(j^*) + \gamma_2(j_1)L(j^*) + \gamma_3(j_1)I(j^*) + \gamma_4 s(j_1, j^*)$$

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

$$u(j_k, j^*) = -\gamma_1 t(j^*) + \gamma_2 L(j^*) + \gamma_3 I(j^*) + \gamma_4 s(j_k, j^*)$$

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:

$$u(c_1, j_k, j^*) = -\gamma_1(c_i, j_k)t(j^*) + \gamma_2(c_1, j_k)L(j^*) + \gamma_3(c_1, j_k)I(j^*) + \gamma_4(c_1, j_k)\, s(c_1, j_k, j^*),$$

and

$$u(c_2, j_k, j^*) = -\gamma_1(c_2, j_k)t(j^*) + \gamma_2(c_2, j_k)L(j^*) + \gamma_3(c_2, j_k)I(j^*) + \gamma_4 s(c_2, j_k, j^*).$$

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; $D = \{c_1, c_2, c_3, \ldots, c_n\}$. Then:

$$u(c_i, j_k, j^*) = -\gamma_1(c_i, j_k)t(j^*) + \gamma_2(c_i, j_k)L(j^*) + \gamma_3(c_i, j_k)I(j^*) + \gamma_4 s(c_i, j_k, j^*)$$

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[33] 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 4-5 and accompanying text.

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 $A^{-1}(j_l)$ represents the set of all cases for which the assignment function A assigns to judge j_l to write the opinion. The institutional constraint is that each judge must bear responsibility for approximately the same number of opinions, i.e., that $| A^{-1}(j_i)| \approx$ m/n.

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 almost universally the case,[34] 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. Practically, then, responsibility for the assignment of drafting the opinion in most cases falls to one of two Justices—the Chief Justice and next-most-senior (or maybe most senior of

[34] *See infra* note 78 (noting one source that asserts that the United States 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).

opposition bloc).[35] For simplicity, assume it's just the two 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 "her 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 "his 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 or her utility under "his or her 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,

$$\max_{j_k \in r} \sum_{c_i \in R^{-1}(j_k)} -\gamma_1(c_i, j_k)t(A(c_i)) + \gamma_2(c_i, j_k)L(A(c_i)) + \gamma_3(c_i, j_k)I(A(c_i)) + \gamma_4 s(c_i, j_k, A(c_i)). \quad (1)$$

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. Introducing panels to the model is not overly complicated. The determination of the assignment function A works substantially as above, and relies upon the same maximization requirements.[36]

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[35] *See infra* note 41 and accompanying text.

[36] 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 x J x J (subject to the condition that subject to the condition $j_1 \neq j_2 \neq j_3 \neq j_1$): $P(c_i) = \{P_1(c_i), P_2(c_i), P_3(c_i)\}$. One judge on the panel—usually the senior-most judge (with the chief judge de facto having

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. Consider two broad categories of cases: cases in ideologically-charged subject matter areas that raise politically salient issues,[37] and cases in areas that are largely lacking in ideological controversy that do not raise salient issues.[38] (I refer to the latter, if somewhat imprecisely, as "non-ideological cases.") Cases in the first category 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 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 themselves 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 cases that fall within the second category—i.e., cases in non-ideological areas that do not raise salient issues. Here, even ideological judges are likely to weight the ideological factor far less than they do

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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.

[37] *See, e.g.*, Cass R. Sunstein, David Schkade, & Lisa Michelle Ellman, *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 are dominated by cases that are "apparently nonideological"); *cf.* Richard L. Pacelle, Jr., *The Dynamics and Determinants of Agenda Change in the Rehnquist Court*, *in* CONTEMPLATING COURTS (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) (same).

[38] *See* Nash & Pardo, 53 WM. & MARY L. REV. (forthcoming 2012) (finding no evidence of ideological voting among circuit judges in bankruptcy cases involving discharges of debt). To be sure, some types of courts may have more non-ideological cases on their dockets than do other types of courts. *See infra* Part II.C.

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, still they are likely to agree that the case should be decided in accordance with governing law.) As a simplifying 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 of the legal factor— γ_1 and γ_2—will be substantially the same across judges. Finally, I assume—again unlike for cases that fall within the first category—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 and Court Type

Just as case type may affect the weights judges assign to the various factors, so too may court type have such an effect. Here I consider two types 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.

I will argue 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. There are two reasons for this. First, one institutional feature typical to agenda-setting courts—they select the cases that form their docket—makes them more likely to hear more ideological cases: True to their mission, agenda-setting courts can be expected to exercise that control to select more cases in more ideologically-charged areas that raise salient issues. In contrast, error-correcting courts—which typically accept all cases that litigants bring before them—are more likely to have larger portions of their dockets devoted to cases calling for simple error correction.

Second, the remaining error-correcting courts' remaining distinctive institutional features—they hear most cases in panels, they decide most cases unanimously, and the chief judge is determined by objective law rather than political mechanism—render judges on error-correcting courts more inclined to resolve cases on legal grounds, regardless of the ideological content of the cases before them.

1. Whether the Court Selects the Cases It Hears

An agenda-setting court, such as the United States 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.[39]

In contrast, an error-correcting court is usually one that hears cases where litigants have a right of appeal. As such, one might expect 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).[40] This means that opinion assignment is likely to vest in the same judges over and over. 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 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.[41]

In contrast, a court that hears substantial numbers of cases in panels is more likely to have more of its judges assigning opinions[42] (to the extent that only

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[39] *See* Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271 (2006) (arguing that the Court eschews error correction, in favor of resolving conflicts and settling issues of national importance).

[40] *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 178, 191 (JAMES R. ROGERS, ROY B. FLEMING & JON R. BOND, eds. 2006).

[41] *See* SEGAL & SPAETH, *supra* note 1, at 361-62; *see also* Forest 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).

[42] *See* Cheng, *supra* note 9, at 530 (noting that the Supreme Court has an "arguably more top-down assignment process" than do the federal courts of appeals).

a judge on the panel has at least some of that authority[43]). The rotation of panel membership necessarily dilutes the chief judge's assignment power.[44] The fact that some judges who sometimes are responsible for assigning opinions are other times on the receiving end[45] 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.[46] 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.[47] Indeed, the collegiality that unanimous decision-making fosters[48] may spread beyond pure cases of error correction to more inherently ideological cases.

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[43] *See infra* notes 124-126 and accompanying text (noting instances where judges not part of the panel enjoy at least technical assignment power).

[44] *See* HOWARD, *supra* note 13, at 247.

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

[46] 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.

[47] *See* Atkins, *supra* note 9, 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."); *cf.* Stephen J. Choi & G. Mitu Gulati, *Trading Votes for Reasoning: Covering in Judicial Opinions*. 81 S. CAL. L. REV. 735 (2008) (arguing that ideological disagreement within court of appeals panels is more likely to affect choice of citations within the final opinion than to decision as to whether to dissent).

[48] *Cf.* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003) (emphasizing the value of collegiality on multimember courts); COHEN, *supra* note 8, at 12-13, 162-65 (discussing the role, and presence, of collegiality on courts of appeals).

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 had, but that they also have an institutional role—for example, to ensure that opinion assignments are doled out equivalently across members of the court.[49] An agenda-setting court is more likely to have a chief judge who is politically appointed. 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; and the Chief Justice can only be removed for good cause, his term otherwise expiring only upon his retirement or death.

In contrast, a judge becomes chief judge of his or her courts of appeals 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 that ideology influences 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. 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. 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.[50]

D. Opinion Assignment in Non-Ideological Cases on Error-Correcting Courts

The foregoing suggests several aspects of condition (1) that likely will hold when an error-correcting court decides a predominantly non-ideological 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.

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[49] *See, e.g.*, MALTZMAN ET AL., *supra* note 1, at 37-38.
[50] *See generally* Edwards, *supra* note 48.

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 $\gamma_4(c_1, j_k)s(c_1, j_k, j^*)$ will be constant for any given assigning judge j_k and cases within a category, no matter which judge receives the opinion assignment.[51]

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

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

where K_1, K_2, and K_3 are constants, and r' is the set of judges who assign the opinion in all non-ideological cases. (The institutional parity-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 I explain in the next Part, expertise-based opinion assignment will fit this bill.

III. THE UTILITY OF EXPERTISE-BASED OPINION ASSIGNMENT

I explained in the previous Part that, at least in the setting of error-correcting courts hearing non-ideological cases, assigning judges will assign cases with an eye toward both minimizing the court resources devoted to drafting the opinion—$t(j^*)$—and maximizing the legal benefits—$L(j^*)$—that the court will ultimately draw from the finished opinion. In Part III.A, I elucidate three benefits that expertise-based opinion assignment offers—efficiency benefits, legitimacy benefits, and reputation benefits. In Part III.B, I refine the analysis by exploring the supply of, and demand for, expertise in opinion writing. Finally, in Section III.C, I draw together the preceding Sections by explaining how courts of appeals deciding cases that raise issues that are more technical than ideologically divisive are a primary candidate in which to find expertise-based opinion assignment.

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[51] 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 infra* note 61 and accompanying text.

A. The Benefits of Expertise-Based Opinion Assignment

Expertise-based opinion assignment offers efficiency benefits that will tend to make $t(j^*)$ very small, and it also will offer two benefits—legitimacy benefits and reputation benefits—that will tend to make $L(j^*)$ very large.

1. Efficiency Benefits

Efficiency benefits may arise with respect both to the court's current docket and to 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.[52]

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 non-expert judge, decisively dispose of an issue: For example, the judge may feel more comfortable announcing—and her co-panelists may feel more comfortable allowing her to announce—a more sweeping rule. Decisive opinions may allow future panels of the court to address other cases that raise similar issues more efficiently. Indeed, a decisive opinion may even discourage future litigants from raising an issue in the future, thus reducing the court's future docket (all else being equal).[53]

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[52] *See* Atkins, *supra* note 9, at 413 ("[A] system of task specialization would be in conformity with the trend set by any organization beset by increasing work loads."); WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 39 (1964); *cf.* Cameron & Kornhauser, *supra* note 40 (noting that, even under a conception of the judicial hierarchy under which all judges work toward the same goals, "error is inevitable in a world with resource constraints (and, possibly, . . . variable degrees of judicial skill"). *But see* Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, WASH. U. L. REV. (forthcoming 2012) (questioning the scope of the efficiency benefits of judicial specialization).

[53] I do not here mean to say that such outcomes are always, sometimes, or ever normatively desirable, only that an efficiency benefit might obtain. Indeed, the efficiency benefit might exact a cost on the court's legitimacy. *See* Brenner & Spaeth, *supra* note 4, at 520 ("[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."). 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.

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.[54] Having an expert judge draft opinions in his or her area of expertise will tend to increase[55] the court's legitimacy and the legitimacy of its decisions.[56]

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[54] *See supra* note 27.

[55] Opinion assignment based on expertise also might be seen to reduce a court's legitimacy. A court's legitimacy is impaired when it is not seen to be adhering to established judicial norms. *See, e.g.*, Leandra Lederman, *Tax Appeal: A Proposal to Make the U.S. Tax Court More Judicial*, 85 WASH. U. L. REV. 1195 (2008). While it was not always the case—*see* 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 to assemble random panels of judges and to assign cases to panels randomly, *see infra* note 60. By analogy, one can argue that assignment of opinions to particular judges based upon expertise is normatively undesirable. *See, e.g.*, Chicago 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. R. 34 I.O.P. (providing that "[j]udges do not specialize" and that "[a]ssignments are made to equalize the workload of the entire session"); 11th Cir. R. 36 I.O.P. 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. (1999)—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.

[56] *See* Atkins, *supra* note 9, at 410 (noting that "expertise . . . may enhance the credibility and legitimacy of the decision").

One way that expertise may enhance legitimacy is by limiting the number of reversals that a court incurs. *See* Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 102 (2000) ("Frequent 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 Court—which is more politically-oriented than its subordinates—is more likely to believe that there is an objectively "correct" answer. *See* Jonathan Remy Nash, *A Context-Sensitive Voting Protocol Paradigm for Multimember Courts*. 56 STAN. L. REV. 75, 112 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 "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

3. Reputation Benefits

Commentators have to date not 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.[57] Even to the extent that the court is not directly competing with other courts for litigants,[58] a court that has an expert judge elucidating an area of law may find itself relied upon by other courts that face similar issues. In this way, the court's influence may grow.[59]

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reached that correct answer. *See* Cameron & Kornhauser, *supra* note 40; *see also* C. Scott Hemphill, *Deciding Who Decides Intellectual Property Appeals*, 19 FED. CIR. BAR 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 39. In this sense, expert opinion authorship may convince the Court that the court below reached the correct conclusion—whether because the expert's opinion is convincing, or because the Court is more likely to defer to the reasoning of an expert—and thus reduce the likelihood of reversal and as a corollary enhance the legitimacy of the lower court.

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 I discuss below, *see infra* note 66 and accompanying text, 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.

[57] Without suggesting that expert judges are not "talented" in other senses, it does seem that a judge's expertise might enable him or her to develop a reputation in area at a comparative cost advantage to judges without that expertise. *Cf.* 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 [in terms of citation of his opinions] is attributable largely to his service as chair of the United States Sentencing Commission.").

[58] *See* Todd J. Zywicki, *Is Forum Shopping Corrupting America's Bankruptcy Courts?*, 94 GEO. L.J. 1141 (2006).

[59] It is debatable whether circuits have reputations beyond the reputations of the individual judges. *Compare, e.g.*, 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 judges) *with* Michael E. Solimine, *Judicial Stratification and the Reputations of the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 1331, 1339-45, 1347-50 (2005) (canvassing literature to identify various ways to measure a circuit's reputation). I do not purport to resolve the 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 in opinions authored by other judges and in areas beyond the heart of the judge's expertise.

With the general benefits of expertise-based opinion assignment thus made clear, I turn in the next Section to a fuller exposition of exactly when opinion assignment to experts is likely to be most attractive.

B. The Likelihood of Expertise-Based Opinion Assignment

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

1. Supply of Expertise

The supply of expertise will depend on the frequency with which opportunities arise to assign an expert judge an opinion in her area of expertise. Expertise-based opinion assignment can only occur when a case arises that raises an issue within the field of expertise of a judge on the panel. Thus, the supply of expertise will vary with two factors: the frequency with which cases in the area of expertise come before the court; and the judicial position of the expert judge on the court on which he or she sits.

a. Frequency with which the area of law arises on the court's docket

The frequency with which the area of law comes 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 an area of law appears 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.[60]

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[60] Though it is not required by law, courts today generally assign judges to panels, and panels to cases, randomly. *See* COHEN, *supra* note 8, at 72; Michael Abramowicz , *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1606 n.26 (2000); Brown & Lee, *supra* note 55; MCKENNA ET AL., *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.").

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 or she may be limited in his or her freedom to take full advantage of that expertise. The chief judge may be reticent to assign himself or herself a disproportionate share of a particular type of case for fear of the institutional message it might send. The chief judge also may feel constrained by the requirement of equal distributions not to self-assign excessively.[61]

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.[62]

2. Demand for Expertise-Based Opinion Assignment

The demand for expertise-based opinion assignment will vary with several factors. The first set of factors—the nature of the area of law in which the expertise lies, the frequency with which the area of law arises on the docket of the court on which the judge sits, the primary responsibility of the court (i.e., whether the court is predominantly an error corrector or an agenda-setter), and the court's institutional features—mostly (though not entirely) implicate efficiency benefits. The next factor—the nature of the court's position within the broader judiciary—relates mostly to legitimacy benefits. And the last factor—the frequency with which the area of law arises on *other* courts—is mostly relevant to calculating reputation benefits.

a. Area of law in which the expertise lies

Demand for expertise-based opinion assignment will depend in part on the area of law in which the expertise lies. First, to the extent that an area of law is complex and/or boring (at least to other judges), the demand for the help of a judge with expertise who is willing to take on opinions in that area increases.[63]

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[61] *See* MALTZMAN ET AL., *supra* note 1, at 37-38; *but cf.* Lax & Cameron, *supra* note 16, at 293 (offering more instrumental reasons for a Chief Justice not to self-assign).

[62] The same is likely to be true of district judges, and other judges from other courts who sit "by designation" on panels of a 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.

[63] *See supra* note 22; *cf.* Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's*

Note that each of these factors is likely to affect the importance of ideology in resolving a case: The need to engage technical and complex rules will make achieving an ideological outcome more costly, and the fact that an area is simply not interesting suggests that it is at least somewhat less ideologically charged.[64]

Second, the more uncommon expertise in that area of law is, the more valuable is a particular judge's expertise. Thus, an individual's judge's expertise in an area is more important the less it is duplicated by other judges on the court.[65] Put another way, the more judges who share an expertise, the less important a role expertise will play in assigning opinions among judges.

Third, 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.[66] Along similar lines, expertise in a relatively new area of

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Certiorari Decisions, 94 AM. POL. SCI. REV. 101, 108 (2000) ("When 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.").

[64] 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 L. & SOC'Y REV. 839 (2009) (finding evidence of ideological voting in patent cases on the Federal Circuit). The point is only that, all else equal, greater legal complexity may tend to mute ideological tendencies. *See* Nash & Pardo, *supra* note 38.

[65] 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. Robert M. Howard, *Comparing the Decision Making of Specialized Courts and General Courts: An Exploration of Tax Decisions*, 26 JUS. SYS. J. 135, 136 (2005) ("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.

[66] *See, e.g.*, *id.* ("Tax cases often involve technically complex issues . . . . The evaluation of such claims usually demands expertise in the policy area."); Brenner & Spaeth, *supra* note 4, 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."); DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 135-36 (1988) (noting Judge David Dyer's "expertise in two high specialized areas of law, admiralty and aviation," and explaining that, as a result, "[l]ong after Judge Dyer took senior status, he continued to respond to the court's request to fashion opinions on tedious, complex admiralty cases").

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. *See, e.g.*, Howard, *supra* note 65, at 141 ("[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 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."); *cf.* Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88

law—such as a statutory or regulatory scheme—will be valuable, at least in the short-term.[67] On the other hand, expertise in an area is of less value when other judges can easily obtain similar expertise simply by handling cases in that area. 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.[68]

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 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

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CORNELL L. REV. 1672, 1745 (2003) (noting that state high courts may have a particular 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.

[67] KLEIN, *supra* note 59, 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 non-experts).

[68] I am 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. *Cf.* 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 cf.* COHEN, *supra* note 8, at 49 (suggesting that a judge can gain expertise in that way). Still, to the extent that one can gain *some* expertise that way, that expertise reduces, at least somewhat, the value of the expertise of a judge who obtained the expertise through practice or drafting.

expertise in the area (though the ease with which this might happen will depend on the complexity of the area of law, as I discussed above), and, more importantly, (ii) it becomes more likely that non-expert 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 will be the demand for an individual judge's expertise. Opinion specialization matters more where one judge's expertise in an area frees up other judges from having to decide (at least in the first instance) challenging issues in that area. 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 specializes in an area will possess similar expertise.[69]

A second point is whether the area in which a judge's expertise lies arises with frequency 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 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 reputation benefits, and especially for legitimacy benefits. The benefits are less important the more a court is already accepted and respected. As an example, non-Article III judges and courts are typically in greater seen need of legitimization than are their Article III counterparts.[70] It is probably also the case that comparatively newer courts are more in need of legitimization than are older, more established ones.[71]

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[69] *See supra* note 8.

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, 612-15 (1989). The validity of this point notwithstanding, it still seems that judges are usually appointed to courts that are traditionally seen as specialist (i.e., 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.

[70] *See, e.g.*, 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

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" cases 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.

e. Whether the court has co-equal sister courts

A final factor that affects the demand for a judge's expertise is whether the court has co-equal sister courts. All else equal, 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 a chance to differentiation itself from its sister courts.

This may play out in two ways. First, some courts face actual competition for litigants. Here, one might think that a court with an expert judge can attract litigants by having that judge announce rules and decide cases in his or her area of expertise.[72]

Second, even if courts do not actually compete for litigants—for example, the choice of which court of appeals hears an appeal is based not upon the choice of litigants but upon geography—still the existence of sister courts who are hearing similar issues creates an opportunity for a court to establish itself as an

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opportunities, and (2) their status would be diluted through the vast increase in the number of federal judicial positions."); *cf.* 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, 679-84 (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 that actually happening).

[71] *E.g.*, Rochelle Cooper Dreyfus, *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"; "[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").

[72] Competition for litigants sometimes occurs between expert and non-expert courts. For example, litigants may bring tax cases before either the specialized U.S. Tax Court, the semi-specialized U.S. Court of Federal Claims, or the general district courts. *See also* Zywicki, *supra* note 58 (noting possibility of choice of forum in bankruptcy cases).

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.[73] It is also possible that, to the extent that the Eighth Circuit has yet to resolve an issue but Judge Posner on the Seventh Circuit has, 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 the court's reputation.

C. Likely Settings of Expertise-Based Opinion Assignment

In this Section, I use the theoretical analysis in the preceding Section to identify settings where expertise-based opinion assignment will be more likely to occur. I conclude, in particular, that the regional federal courts of appeals are more likely, as compared to the Supreme Court, to engage in the practice.[74] I also conclude that areas of law with novel legal issues, but few ideological overtones, will be more likely to see 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 appeals meet these criteria. 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.[75] Appeals are almost always heard in panels of three judges. They hear all appeals brought to them, and drafting opinions is a time-consuming matter for circuit judges.[76] The circuit courts' large workload[77] makes efficiency benefits very attractive.

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[73] *See* KLEIN, *supra* note 59, at 93-96; *cf.* Cameron & Kornhauser, *supra* note 40, at 177 (discussing how an agency conception of judicial hierarchy seeks to induce compliance by encouraging structured competition among lower-court judges); POSNER, *supra* note 68, at 147-49 (discussing rankings of judges).

[74] *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).

[75] *See* 28 U.S.C. § 45(a).

[76] *See, e.g.*, Letter from Judge Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit, to Judge Samuel A. Alito, Chairman, Advisory Committee on Appellate Rules 9 (2004).

[77] *See, e.g.*, COHEN, *supra* note 8, at 6-8; Choi & Gulati, *supra* note 47, at 749.

Though there is variation from circuit to circuit, court of appeals to some degree vest opinion assignment authority with the panel's presiding judge.[78] The presiding judge on a panel will be either the (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 judge[79]—that is the active circuit judge

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[78] *See* Cheng, *supra* note 9, 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 circuit's rules seem to allow this, and noting 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. R. 36.1 I.O.P. *But see infra* text accompanying note 125 (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. While circuit judges have traditionally 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, for each case the presiding judges assigns one judge on the panel the responsibility of preparing a bench memorandum for the entire panel. *See* COHEN, *supra* note 8, at 94-95 (describing the practice); Stephen L. Wasby, *Clerking for an Appellate Judge: A Close Look*, 5 SETON HALL CIR. REV. 19, 52-53 (2008) (discussing the Ninth Circuit's practice) (noting 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."); *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 8, 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.* at 73 (explaining that one judge reports sometimes being asked to identify those 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. *See* VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, JUDGING ON A COLLEGIAL COURT 133 n.3 (2006) ("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."). Another source indicates that some presiding judges assign responsibility for drafting bench memoranda—and therefore effectively in most cases for opinion drafting as well, *see supra*—randomly. *See* COHEN, *supra* note 8, at 73.

[79] *See* 28 U.S.C. § 45(b).

with the lengthiest service on the court.[80] Opinion assignment is thus not restricted to a small number of judges on the court.[81]

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 novel and/or technical, and that arise with fair frequency on both the court on which the expert sits and on other courts. One such area might be securities regulation—a complex area of law with respect to which expertise would both substantially reduce opinion-preparation time and also enhance the issuing court's legitimacy and reputation. And, indeed, a preexisting study confirms this notion. Margaret Sachs finds that Judge Henry Friendly was assigned a vastly disproportionate number of securities regulation opinions during his tenure on the Second Circuit.[82] She attributes this result at least in part to the fact that Judge Friendly served—one of only two circuit judges to serve—on a (non-judicial) panel that sought, ultimately without success, to redraft the federal securities laws,[83] and 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."[84] Finally, Sachs argues that Friendly's reputation among the federal judiciary writ large was enhanced by virtue of the fact that the Second Circuit, which had been the nation's premiere federal commercial court, was moving to a period where it would dominate federal appellate court output of securities law opinions.[85]

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[80] *See id.* (Other than 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."). This provision was enacted to eliminate attempts by senior circuit judges to retain opinion assignment authority after assuming senior status. *See* HOWARD, *supra* note 13, at 247 n.w.

[81] *See supra* Part II.C.2; HOWARD, *supra* note 13, at 247 ("[P]anel rotation and seniority diffuse the power to assign."); Choi & Gulati, *supra* note 47, at 749 ("[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.").

[82] *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 (1996).

[83] *See id.* at 794.

[84] *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.").

[85] *See id.* at 791-73.

In this Paper, I suggest that another area of law—application of the federal Sentencing Guidelines—provides another likely place in which to find expertise-based opinion assignment. The Sentencing Guidelines provide a fertile ground for exploring the role of expertise in opinion assignment for two reasons. First, there was a period of time during which Guidelines cases were likely to be largely non-ideological. Some commentators have suggested 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,[86] the predominant issue facing courts of appeals was whether the Guidelines were constitutional, an issue that invited ideological debate.[87] And, there was a period after the basic workings of the Guidelines had been fleshed out,[88] during which the courts of appeals faced issues such as whether the trial courts had exercised their discretion properly in choosing a sentence length within a range[89]—an issue that might divide judges along ideological lines.[90] 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.[91]

Second, federal criminal sentencing is an area where an exogenous shock introduced a novel, technical area of law, and an area in which very few sitting judges had expertise. Indeed, as I explain in detail below, only two sitting circuit judges were members of the Sentencing Commission that drafted the Guidelines.[92]

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[86] *Mistretta v. United States*, 488 U.S. 361 (1989).

[87] *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 (1998).

[88] *See, e.g.*, 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, 35 (2007) (noting that "the permissibility of certain grounds for downward departures became clearer in the early 1990s").

[89] 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 infra* note 97 and accompanying text.

[90] *See* Schanzenbach &Tiller, *supra* note 88, 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 distant from the sentencing district judge).

[91] *See id.* (noting, with respect to 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.").

[92] *See infra* note 108 and accompanying text.

Examining opinion assignment in criminal cases before and after the advent of the Guidelines allows for the rare opportunity to study the effect that gaining relevant expertise has on opinion assignment practices.

In the next Part, I explicate the Sentencing Guidelines and generate hypotheses governing opinion assignment that should be true if the theory I have advanced holds. Then, in Part V, I elucidate the empirical tests I ran in order to test these hypotheses.

IV. THE SENTENCING GUIDELINES AND THE COMMISSIONERS

In this Part, I describe the setting in which I will look in Part V for observable implications of the theory of expertise-based opinion assignment that I advanced in Parts II and III. That setting is the assignment of opinions in appeals from convictions for federal crimes—and particularly issues arising under the United States Sentencing Guidelines—to circuit judges who served as Commissioners on the Sentencing Commission when the Guidelines were drafted. I first describe the Sentencing Guidelines, and explain why they present an area of law ripe for expertise-based opinion assignment. I then offer brief biographies of two men—William W. Wilkins, Jr., and Stephen G. Breyer, who served as both Commissioners during the Guidelines drafting process and also as circuit judges during the early years of the Guidelines' applicability.[93] Finally, based upon those biographies, I develop hypotheses the veracity of which I will examine empirically in the succeeding Part.

A. The Sentencing Guidelines

The area in which I have decided to test initially the theory of expertise I have outlined above—the assignment of opinions under the federal Sentencing Guidelines to experts who helped to 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 court) 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. District judges were largely free (absent specific statutory directive) to impose sentences as they saw fit following conviction. Frustrated with what it saw as needless disuniformity in sentencing, Congress decided to make a fundamental change to the system. The Sentencing Reform

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[93] *See* Unah & Wall, *supra* note 3, at 16-20 (measuring expertise of Supreme Court Justices based upon credentials, experience, and track record).

Act of 1984 (the "Act")[94] 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. The Commission was charged with drafting (and later amending) sentencing guidelines for federal district judges to use in criminal matters. The sentencing guidelines initially went into effect on November 1, 1987. 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.[95]

The Guidelines first took effect on November 1, 1987. An initial question that dogged the Guidelines was whether Congress's delegation to the Commission ran afoul of constitutional 'separation of powers' principles. The Court answered that question in the negative in its 1989 decision in *Mistretta v. United States*.[96] Many years later, in 2005, the Court in *United States v. Booker*[97] held that the Guidelines had to be interpreted as merely advisory, and not binding on district courts, for them to be constitutionally valid.[98] After *Booker*, courts of appeals review sentences meted out by district court only for their reasonableness in light of the Guidelines. During the intervening period, however, the Guidelines were mandatorily applied in all federal district courts, with appeals lying to the courts of appeals.

The Guidelines instituted a bureaucratic scheme that vests far less discretion in trial judges.[99] 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. The crime for which the defendant has been convicted sets the "base offense level."[100] Levels then are 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). The criminal history category is determined by reference to the prior criminal offenses committed by the defendant.[101] The Guidelines provide a grid that, given various

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[94] Pub. L. No. 98-473, ch. II, 98 Stat. 1837, 1987, codified as amended at 18 U.S.C. § 3551 et seq. & 28 U.S.C. § 991 et seq.

[95] *See* http://www.ussc.gov/general/USSC_Overview_200906.pdf; Schanzenbach & Tiller, *supra* note 88, at 26.

[96] 488 U.S. 361 (1989).

[97] 543 U.S. 220 (2005).

[98] 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.

[99] *See* Schanzenbach & Tiller, *supra* note 88, at 26-30.

[100] *See* U.S.S.G. §§ 2A1.1-3E1.1.

[101] *See* Schanzenbach & Tiller, *supra* note 88, at 26 & n.5.

combinations of ranges of (i) offense level and (ii) criminal history category, produces a sentencing range. 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 adequately taken into consideration by the Sentencing Commission in formulating the Guidelines."[102]

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

The Guidelines themselves were, at least early on, an area ripe for expertise-based opinion assignment. First, given the novelty of the Guidelines scheme, no judge—whether trial or appellate judges—had judicial experience with the Guidelines prior to their effective date.[103] The few judges who had experience with them were those members of the Sentencing Commission who drafted the initial Guidelines. Those judges, then, had a significant expertise that none of their fellow judges had.

Second, the Guidelines are fairly technical.[104] 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.[105]

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[102] 18 U.S.C. § 3553(b).

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 Guidelines' "heartland." U.S.S.G. § 5K2.0 (policy statement).

[103] 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, in particular in that they did not constrain trial judges' discretion at sentencing. Moreover, even states that implemented guidelines programs in the wake of the federal program eschewed the federal model in favor of the pre-existing 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).

[104] *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 "rival the tax code in length"); Stephen Breyer, *Justice Stephen Breyer: Federal Sentencing Guidelines Revisited*, 14 CRIM. JUST. 28, 32 (1999) (recognizing the "important criticism . . . that the guidelines are simply too long and too complicated").

[105] *See, e.g.*, Breyer, *supra* note 104, 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 104, 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*

Third, Guidelines issues certainly arise with enough frequency to make them valuable. Criminal cases occupy a large portion of the courts of appeals' dockets.[106] Moreover, the advent of the Guidelines invited more attorneys to

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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, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006). More specifically, Gregory Sisk, Michael Heise, and Andrew Morriss found that the votes cast by district judges before the Supreme Court's clarifying decision in *Mistretta* on whether the question of whether the Guidelines were constitutional was influenced by the party of the President who appointed the judges. *See* Sisk et al., *supra* note 87. And Max Schanzenbach & 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 88; Schanzenbach & Tiller, *supra* note 104. (I note, however, that Schanzenbach & Tiller present no 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 1990-1993 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* note 87, at 1407-09 (collecting data during 1988, before the Supreme Court's *Mistretta* decision was handed down in early 1989); Schanzenbach &Tiller, *supra* note 88, 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. LEG. STUD. 231, 235 (2004); Kay A. Knapp & Denis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. DAVIS LAW REVIEW 679, 679 & n.1 (1992); *see also* Stith & Koh, *supra*, at 281. There is no evidence, however, nor does the literature suggest, that this opposition in any way correlated with ideology.

[106] For example, there were 13,710 federal criminal appeals on the dockets of the various regional federal courts of appeal; this constituted 23.74% of the courts' total docket of 57,740 appeals. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 5 (2010).

raise sentencing issues. The Constitution guarantees criminal defendants the services of legal counsel, and a substantial number of criminal defendants are represented by government-provided attorneys. In addition, appeal to the court of appeals is as of right. 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.[107]

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

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

B. Backgrounds of Judge Wilkins and Judge Breyer

When the Sentencing Commission drafted the original Guidelines, William W. Wilkins, Jr.—then a Fourth Circuit Judge—served as Chair, and Stephen G. Breyer—then a First Circuit Judge—served as a Commissioner.[108] I discuss the background and judicial positions of each of these judges; as we shall see, there is reason to expect Judge Wilkins to be a greater recipient of expertise-based opinion assignment than Judge Breyer.

1. Judge Wilkins' Professional Experience

After graduating from law school in 1967, William W. Wilkins, Jr. clerked for a Fourth Circuit judge, worked as a legal assistant, for Senator Strom

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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 88, at 28.

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

[108] George E. MacKinnon, then a Senior Circuit Judge on the District of Columbia Circuit, served as a Commissioner during that time. *See supra* note 23. Judge MacKinnon sat on only 14 panels during the time period that I 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, I leave him out of the study.

Thurmond, and worked in private practice. From 1974-1981, he served as a state prosecutor in South Carolina.

In 1981, President Ronald Reagan appointed Wilkins as a United States District Judge for the District of South Carolina. In 1986, President Reagan elevated Judge Wilkins to the United States Court of Appeals for the Fourth Circuit. Prior to that, in 1985, the President appointed Wilkins to another position: Chair of the newly-formed United States Sentencing Commission. He would continue to serve in that capacity until 1994.

After his tenure on the Sentencing Commission, Wilkins remained as a circuit judge. He served as the Fourth Circuit's Chief Judge from 2003 to 2007. He assumed senior status in 2007 and, in 2008, retired from the bench and joined a private practice.[109]

2. Judge Breyer's Professional Experience

After graduation from law school in 1964, Stephen G. Breyer served as law clerk to Supreme Court Justice Arthur Goldberg. After a two-year stint working in the Justice Department in the area of antitrust, he was a faculty member at Harvard Law School from 1967-1980 (with a joint appointment at the Kennedy School of Government from 1977-1980), where a major area of expertise was administrative law.[110] Breyer served as an assistant special prosecutor in the Watergate prosecutions, and as special counsel to the Administrative Practices Subcommittee of the Senate Judiciary Committee from 1979-1980.

In 1980, President Jimmy Carter appointed Breyer as a United States Circuit Judge for the First Circuit. In 1985, President Reagan appointed Breyer as a Commissioner on the Sentencing Commission, in which capacity he would serve until 1989. In 1990, Breyer became Chief Judge of the First Circuit. He remained as Chief Judge until President Bill Clinton appointed Breyer to the Supreme Court in 1994.[111]

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While Judge Wilkins had considerable experience in criminal litigation before ascending to the bench, he had no experience with respect to the federal Sentencing Guidelines; indeed, he could have had none. As someone primarily

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[109] http://www.fjc.gov/servlet/nGetInfo?jid=2586&cid=999&ctype=na&instate=na.

[110] Justice Breyer is (even today) a co-author on one of the leading administrative law casebooks: STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN, & ADRIAN VERMEULE, ADMINISTRATIVE LAW AND REGULATORY POLICY: CASES AND MATERIALS (6th ed. 2006).

[111] http://www.fjc.gov/servlet/nGetInfo?jid=255&cid=999&ctype=na&instate=na.

responsible for drafting those Guidelines, he was, moreover, one of the few people, let alone judges, most familiar with them when they took effect. And, while Judge Breyer lacked substantial prior criminal law experience, his experience with the Guidelines was similarly unique.[112]

C. Hypotheses

As Sentencing Commissioners during the drafting of the Guidelines, Judges Wilkins and Breyer had expertise in the Guidelines. If the theory here is correct, one would expect that expertise to have an impact on opinion assignments. I translate this general expectation in several hypotheses.

First, one would expect to observe heightened assignment of Guidelines cases to Judges Wilkins and Breyer. An initial set of hypotheses operationalizes that expectation.

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[112] Of course, Judge Wilkins' 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) (separate opinion of Breyer, J., 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) (opinion for the court by Wilkins, J., noting that the three-judge panel unanimously rejected recusal argument).

Interestingly, in its unreported decision in *United States v. McLellan*, 28 F.3d 117 (11th Cir. June 30, 1994) (tbl.), 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. The case was thereafter remanded, with further proceedings before a different district judge. 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.

In re United States, 60 F.3d 729, 731 n.2 (11th Cir. 1995).

Judge Wilkins did recuse himself in the Guidelines case of *United States v. Carroll*, 3 F.3d 98 (4th Cir. 1993). Among the arguments in the case was one asserting that the Commission had exceeded its authority in promulgating certain Guidelines.

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 (1997).

> *Hypothesis 1A*: A judge who served as a commissioner will be assigned[113] a disproportionate share of opinions in federal criminal cases.
>
> *Hypothesis 1B*: A judge who served as a commissioner will be assigned a disproportionate share of opinions in Sentencing Guidelines cases.
>
> *Hypothesis 1C*: A judge who served as a commissioner will be assigned a more disproportionate share of opinions in federal criminal cases after the Sentencing Guidelines take effect than before.

Second, one would expect that, when a judge gains relevant expertise *while already on the bench*, he or she will see a greater number of opinions in the area of expertise assigned to him or her *after gaining that expertise*.

> *Hypothesis 2*: A judge who served as a commissioner will be assigned a more disproportionate share of opinions in federal criminal cases after the Sentencing Guidelines take effect than before.

Hypothesis 2 is designed to exploit the natural experiment to which the introduction of the Sentencing Guidelines gave rise. Whereas judges usually gain relevant experience prior to ascending to the bench, the Sentencing Guidelines is a rare setting in which judges gained experience while already serving. It therefore offers a unique opportunity to compare assignment rates before and after the experience was gained, in order to allow inference as to the effect of the experience on opinion assignment practice.

Third, to the extent that opinion assignment in Guidelines 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. A third group of hypotheses enunciates this expectation.

> *Hypothesis 3A*: A judge who served as a commissioner will be assigned a disproportionate share of opinions in federal criminal cases by assigning judges, regardless of the party of the president who appointed the assigning judge.
>
> *Hypothesis 3B*: A judge who served as a commissioner will be assigned a disproportionate share of opinions in Sentencing Guidelines cases by assigning judges, regardless of the party of the president who appointed the assigning judge.

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[113] Note that, with respect to time period applicable for most hypotheses, Judge Breyer was Chief Judge of the First Circuit. In that capacity, he enjoyed the assignment power on all panels on which he sat. There is one exception: In comparing the frequency with which Judge Breyer wrote opinions before and after the advent of the Guidelines, Hypothesis 2 implicates a time period before Judge Breyer became chief judge.

Fourth, along similar lines, one would expect expertise to overcome years of judicial service in the assignment of Guidelines opinions. The final set of hypotheses gives voice to this expectation.

> *Hypothesis 4A*: A judge who served as a commissioner will be assigned a disproportionate share of opinions in federal criminal cases, even if he is not the assigning judge, and regardless of whether he is the middle or junior member of the majority coalition.
>
> *Hypothesis 4B*: A judge who served as a commissioner will be assigned a disproportionate share of opinions in Sentencing Guidelines cases, even if he is not the assigning judge, and regardless of whether he is the middle or junior member of the majority coalition.

V. EMPIRICAL ANALYSIS

In this Part, I describe my empirical analysis. In Section A, I describe the methodology by which I assembled two new primary datasets—one for Judge Wilkins and another for Judge Breyer—and the coding of variables. In Section B, I turn to whether the evidence supports the hypotheses I laid out at the end of Part III.

A. Methodology

1. *Primary Datasets*[114]

Judge Wilkins.—I sought to identify 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, 1991, 1992, and 1993,[115] in which (i) Judge Wilkins served on the panel, and (ii) a signed majority opinion was filed with (iii) Judge Wilkins as part of that majority. I searched Westlaw's "federal criminal justice" database[116] with Boolean searches designed to identify these cases.

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[114] As I explain below, I collected additional data to test various hypotheses.

[115] 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. 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. (One state habeas case was argued at the end of 1988 and still fell within the dataset.)

[116] Westlaw's FCJ-CS database "has cases from all federal courts relating to criminal acts and the investigation, prosecution, and punishment of crimes."

The search generated 97 cases.[117] I read these cases to identify the federal criminal cases.[118] That left 69 cases—all appeals of federal criminal convictions—on which my 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. This is summarized in Table 1.

TABLE 1.—Three-judge panels in federal criminal cases with Judge Wilkins that generated signed opinions, by year.

Year	All Panels Including Judge Wilkins	Panels in which Judge Wilkins was Part of the Majority Coalition
1990	21	20
1991	17	16
1992	16	16
1993	15	15
Total	**69**	**67**

The Wilkins dataset includes 67 federal criminal appeals cases in which Judge Wilkins could have been assigned to author the majority opinion. Of those, 41 were authored by Judge Wilkins. Table 2 breaks these out by year. Of the 67 federal criminal appeals, 42 cases raised Guidelines issues. Of those 42 cases, Judge Wilkins wrote the opinions in 30 cases. Table 3 breaks these cases out by year. Figure 1 depicts the propensity for Judge Wilkins to write opinions in federal criminal cases, and especially in appeals implicating the Guidelines.

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[117] The first search was 'pr("fourth circuit") & wilkins & da(1990 1991 1992 1993) % curiam'. The search yielded 100 cases, of which 6 were en banc decisions or decisions denying rehearing en banc, and 10 were decided by panels on which Judge Wilkins did not sit. Excluding these 16 cases yielded 84 cases.

Because the first search excluded signed opinions where the court (or a concurrence or dissent) 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 32 documents. Of those, 16 were unsigned per curiam opinions, 1 was a panel that did not include Judge Wilkins (with one issue having been decided by the court en banc), and 2 were orders announcing the denial of a petition for en banc review (with, interestingly, Judge Wilkins dissenting in both cases). The exclusion of these 19 cases left 13 cases to be added to the general pool. Thus, the dataset consists of 97 cases.

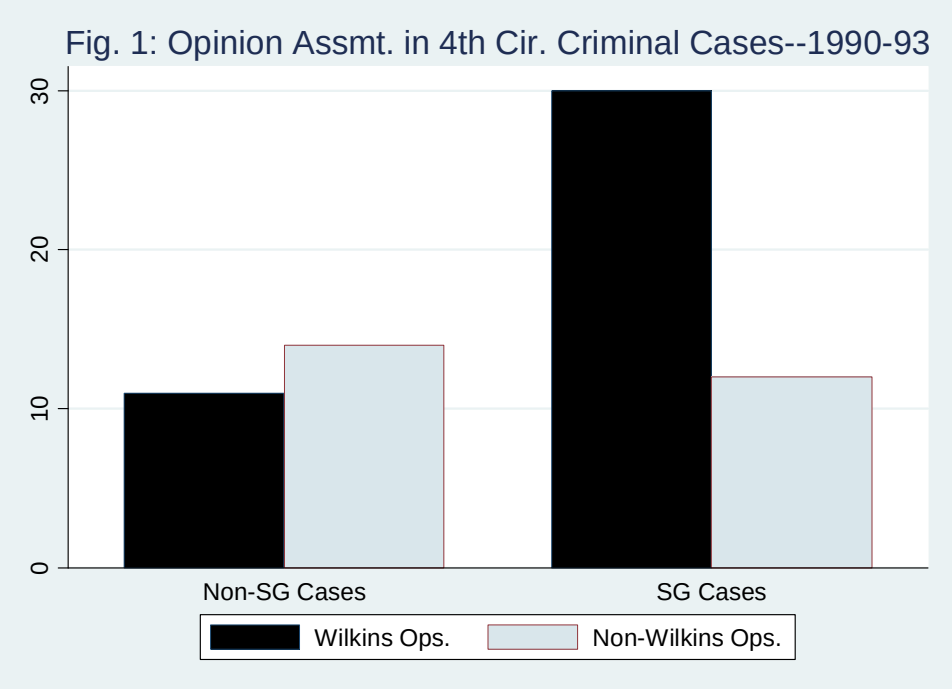
[118] I excluded the two section 2255 (federal habeas) cases in the dataset. Both involve convictions that predate the Sentencing Guidelines. No other type of case could have raised a Sentencing Guideline issue.

TABLE 2: Federal criminal cases where Judge Wilkins was part of the majority, by year.

Year	Number of Cases	Number of Opinions Authored by Judge Wilkins	Percentage of Cases in which Judge Wilkins Authored the Opinion
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 3: Sentencing Guidelines cases where Judge Wilkins was part of the majority, by year.

Year	Number of Cases	Number of Opinions Authored by Judge Wilkins	Percentage of Cases in which Judge Wilkins Authored the Opinion
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%**



Judge Breyer.—Along similar lines, I sought to identify 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 with (iii) Judge Breyer as part of that majority.

The Westlaw search generated 244 cases.[119] I read these cases to identify federal criminal cases.[120] That left 165 cases 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 4.

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[119] The first search was 'pr("first circuit") & breyer & da(1990 1991 1992 1993) % curiam'. The search yielded 194 cases, of which 3 were en banc decisions or decisions denying rehearing en banc, and 7 were decided by panels on which Judge Wilkins did not sit (including, interestingly, 5 cases that cited a Hofstra Law Review article on the Guidelines authored by Judge Breyer, and 1 case that cited a Guidelines opinion authored by Judge Breyer). There was also 1 case that was withdrawn by the court (with an amended opinion that replaced it included in the database). Excluding these 8 cases yielded 186 cases.

Because the first search excluded signed opinions where the court (or a concurrence or dissent) 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("first circuit") & breyer & da(1990 1991 1992 1993) & curiam /s ("u.s." "s.ct." "f.2d" "f.3d")'. The second search yielded 102 documents. Of those, 40 were unsigned per curiam opinions, 2 were decisions by the court en banc, 1 was a denial of en banc review, and 1 was a panel that did not include Judge Breyer but that announced at the end the denial of en banc review. The exclusion of these 44 cases left 58 cases to be added to the general pool. Thus, the dataset consists of 244 cases.

[120] I excluded the two section 2255 (federal habeas) cases in the dataset. Both involve convictions that predate the Sentencing Guidelines. I included (i) 1 case involving pretrial release, (ii) 1 case involving supervised release, (iii) 2 cases involving parole violations, (iv) 1 case involving probation violations, (v) 1 case questioning pretrial the admissibility of statements made to a prosecutor and investigator, (vi) 2 appeals of suppression rulings, and (vi) 1 case where a defendant advanced a Double Jeopardy argument before a second trial commenced. I also included 2 appeals involving petitions for writs of coram nobis; although petitions for such writs are hardly part of the typical criminal process—indeed, in 1 of the 2 cases, the petition postdated a request for section 2255 relief—I reasoned that the writ can be used to justify an appeal in a criminal case necessary for substantial justice to result. All the remaining cases were standard appeals of federal criminal convictions. No other type of case could have raised a Sentencing Guideline issue.

TABLE 4: Three-judge panels in federal criminal cases with Judge Breyer that generated signed opinions, by year.

Year	All Panels Including Judge Breyer	Panels in which Judge Breyer was Part of the Majority Coalition
1990	44	43
1991	55	55
1992	36	36
1993	30	30
Total	**165**	**164**

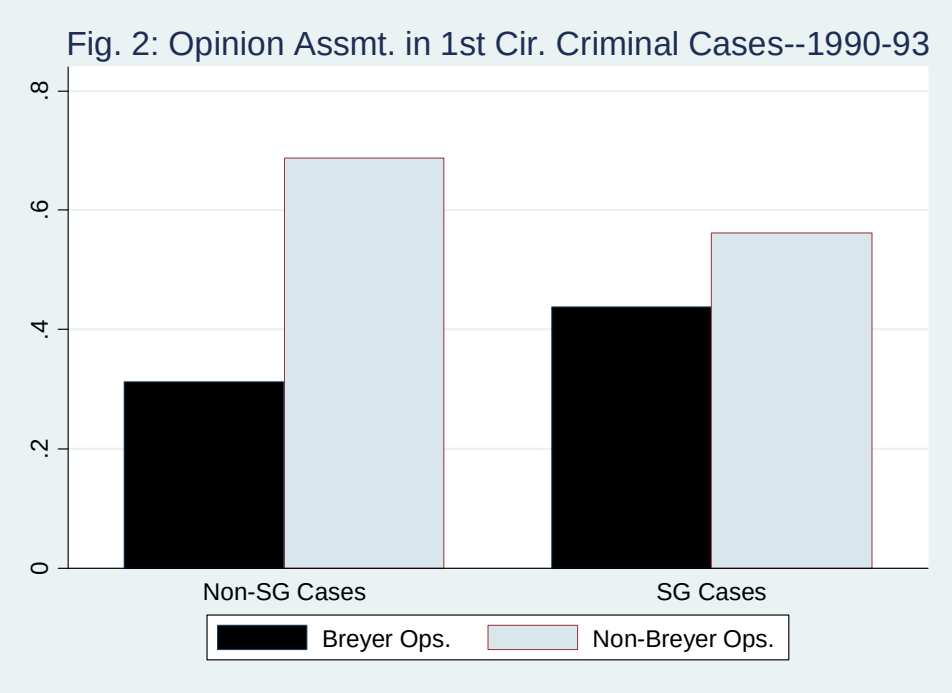
The Breyer dataset includes 164 federal criminal cases in which Judge Breyer could have been assigned to author the majority opinion. Of those, 61 were authored by Judge Breyer. Table 3 breaks these out by year. Of the 164 federal criminal cases, 75 cases raised Guidelines issues. Of those 75 cases, Judge Breyer wrote the opinions in 34 cases. Tables 5 and 6 breaks these cases out by year. Figure 2 presents these data graphically.

TABLE 5: Federal criminal cases where Judge Breyer was part of the majority, by year.

Year	Number of Cases	Number of Opinions Authored by Judge Breyer	Percentage of Cases in which Judge Breyer Authored the Opinion
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 6: Sentencing Guidelines cases where Judge Breyer was part of the majority, by year.

Year	Number of Cases	Number of Opinions Authored by Judge Breyer	Percentage of Cases in which Judge Breyer Authored the Opinion
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%**



2. Coding

Dependent variable.—I coded each case as to whether Judge Wilkins or Judge Breyer, respectively, was or was not the author of the majority opinion.

Independent variables.

Panel and judge features.[121]—I coded each case as to the following variables:

- the three members of the panel, and the position of seniority on the panel that each enjoyed;[122]

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[121] I obtained all biographical information with respect to all judges from the Federal Judicial Center's online "Biographical Directory of Federal Judges," available at http://www.fjc.gov/history/home.nsf/page/judges.html.

[122] In so doing, I follow the order in which the opinion presents the panel. For the Fourth Circuit, this uniformly means that the first judge listed is either a Supreme Court Justice, or the circuit's chief judge, or the most senior active judge on the panel; followed by other active circuit judges in order of seniority, and then senior Fourth Circuit judges, circuit judges (whether active or senior) from other circuits who are sitting by designation, and then district judges (and judges from other courts) sitting by designation.

The First Circuit generally diverges from the Fourth Circuit's approach by putting listing senior circuit judges (from the First Circuit and even from other circuits) before active circuit judges (other than the chief judge). In a few cases, however, the First Circuit

- Who the assigning judge was. I coded the senior member of the majority coalition as the assigning judge.[123]

With respect to the First Circuit dataset, this coding protocol was straightforward. In all but 6 cases, Judge Breyer, as chief judge, had assignment power. In the remaining cases, the presiding circuit judge joined the majority coalition and therefore enjoyed assignment power.

The Fourth Circuit proved more complicated. First, Fourth Circuit internal rules empower the Chief Judge to make assignments upon the

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follows the Fourth Circuit's approach. The variation in the First Circuit's approach, and any variation between the circuits, was immaterial here: In all but 6 cases, Judge Breyer was chief judge and therefore the most senior member of the panel, and in the few cases where he was not, the senior-most judge joined the majority and therefore retained assignment authority.

[123] 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 supra* note 78. 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 supra* note 78.

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) (book review of COHEN, *supra* note 8) (describing, based on Cohen's discussion, the preparation of a single bench memorandum for shared use by a panel as an "the increasingly common practice in several circuits"), *with* Don Songer, *Book review, Jonathan Matthew Cohen, Inside Appellate Courts: The Impact of Court Organization on Judicial Decision Making in the United States Courts of Appeals*, 12 L. & POL. BOOK REV. 373, 375 (2002) (criticizing Cohen for creating the impression that the practice is more widespread than it really is; 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"); Wald, *supra* note 78, 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. BAR J. 112, 114 (2007) (article by First Circuit judge discussing opinion assignment process on the First Circuit in a manner that seems inconsistent with prior assignment of a single bench memorandum for the panel), and my personal experience as a law clerk to 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 78.

recommendations of the "presiding judge" of each panel.[124] 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."[125]

Second, the Fourth Circuit rule technically gives the presiding judge and chief judge the power even to assign opinions when the presiding judge is not part of the majority.[126] Still, in the four cases where the presiding judge did not join the majority opinion,[127] I coded the senior-most in the majority coalition as the assigning judge: Even if Fourth Circuit 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.

Third, a few cases identified retired Supreme Court Justice Lewis Powell as presiding over a panel, even though technically the statutory definition of "presiding judge" is restricted to the assigned Circuit Justice. Still, I coded Justice Powell as the presiding judge, reasoning that the other members of the panel would defer to Justice Powell.

- The political party of the President who appointed the assigning judge to the court of appeals ("0" for Democrat, "1" for Republican).[128]

- The identity of the judge who wrote the majority opinion in the case.

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[124] *See* 28 U.S.C. § 45(b) (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.").

[125] Cheng, *supra* note 9, at 530 n.53.

[126] *See id.* at 527 n.35 (noting that several circuit's rules seem to allow this, and noting 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").

[127] In *United States v. Golden*, 898 F.2d 148, 1990 WL 26902 (4th Cir. Feb. 15, 1990) (unpublished), Judge Widener (a Republican) dissented, leaving Judge Murnaghan (a Democrat) as the senior-most member of the majority. In *United States v. Lambey*, 949 F.2d 133 (4th Cir. 1991), Judge Widener dissented, leaving Judge Wilkins as the senior-most member of the majority. In *United States v. Gilliam*, 987 F.2d 1009 (4th Cir. 1993), Judge Widener again dissented, this time leaving Judge Wilkinson as the senior-most member of the majority. Finally, in *United States v. Goins*, 11 F.3d 441 (4th Cir. 1993), Judge Murnaghan concurred, leaving Judge Wilkins as the senior-most member of the majority. All four of these cases were appeals from federal convictions; only *Gilliam* raised any Guidelines issues.

[128] There are more precise measures of a judge's ideology, but given the limited number of judges who served as senior judge in these cases, I chose simply to use the party of the appointing president.

When Justice Powell (retired from the United States Supreme Court) sat on a panel, I entered the code "1" because Justice Powell was appointed to the Court by President Nixon.

- The political party of the President who appointed the opinion writer to the court of appeals.

- With respect to the Wilkins dataset, whether no Republican other than Judge Wilkins sat on the panel (i.e., whether Democrats constituted a majority of the panel); and with respect to the Breyer dataset, whether no Democrat other than Judge Breyer sat on the panel (i.e., whether Republicans constituted a majority of the panel).

- With respect to the Wilkins dataset, whether (besides Judge Wilkins) another federal district judge or former federal district judge sat on the panel; and with respect to the Breyer dataset, whether any federal district judge or former federal district judge sat on the panel.

- With respect to the Wilkins dataset, whether (besides Judge Wilkins) another former prosecutor (whether state or federal) sat on the panel; with respect to the Breyer dataset, whether any former prosecutor (whether state or federal) sat on the panel.

Case features.—I first coded each case as to whether or not the case involved the appeal of a federal criminal conviction.[129] For the 67 Wilkins cases and 164 Breyer cases that did, I then coded whether or not the case raised any[130] Sentencing Guideline issue.[131]

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[129] There were two section 2255 (federal habeas) cases in the dataset. Both involve convictions that predate the Sentencing Guidelines. No other type of case could have raised a Sentencing Guideline issue.

[130] I also coded each case for the proportion of the opinion that addressed the Guidelines. I did this in two ways. First, I took the proportion of West headnotes that mentioned the Guidelines to the total number of West headnotes. Second, I took the proportion of subparts of the opinion (i.e., parts of the opinion set off from one another, by numbers or letters)—other than the introduction, statement of facts, and conclusion—that mentioned the Guidelines to the total number of subparts. (The two measures correlate 81.14% of the time.) Neither variable had a statistically significant effect on the dependent variable in any run of the logistic regression.

[131] One might object that whether a case raises a Guidelines issue poses a problem of "post-treatment bias," because only after the opinion is assigned is it drafted, and only after it is drafted can one know for sure whether the opinion will in fact discuss a Guidelines issues. In theory, whether or not an opinion raises the Guidelines is determined in some sense only after the opinion is authored. In some cases, at least, the author could conceivably choose to address only non-Guidelines issues. Sticking to the Fourth Circuit (since Judge Breyer was predominantly the assignor in the First Circuit cases at which I look), perhaps assigning judges did not knowingly assign to Judge Wilkins cases raising Guidelines issues; instead, perhaps Judge Wilkins had a penchant, once an opinion was assigned to him that raised a multitude of issues (including some Guidelines issues), to be sure to address the Guidelines issues in his opinions. There are three responses to this problem that suggest the measure has pre-treatment validity.

First, an opinion author is realistically constrained (with limited exceptions) by the issues that the court below decided and that the parties have raised on appeal. To be sure,

B. Results and Analysis

1. Hypotheses 1A and 1B—Assignment of Opinions in Federal Criminal Cases and Sentencing Guidelines Cases to the Commissioners

I tested the statistical significance of the predominant assignment of opinions to Judge Wilkins, and to Judge Breyer, in three ways—using a binomial test, using a chi-squared test, and by fitting a logistic regression.

Beginning with the Wilkins dataset, I first used a binomial test 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 cases in which he could have written the opinion[132]—or 41

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especially when faced with a multitude of issues, an opinion author may choose to address some more than—or even to the exclusion of—others. But an opinion author essentially cannot address Guidelines issues when none are raised (other than in dicta), and he or she would have a hard time avoiding substantial discussion of the Guidelines when the parties' arguments focus on them. In this sense, the extent to which an opinion will address the Guidelines is somewhat determined before the opinion is drafted.

Second, at the conference following oral argument in a case, the judges on the panel discuss the case. An opinion author must presumably remain at least somewhat true to that discussion or risk that the other judges will not sign on to his or her opinion. To the extent that this factor constrains opinion writers to pre-assignment understandings of what the opinion would contain, the post-treatment bias argument is misplaced.

Third, even if the preceding arguments are not completely convincing, one must say that Judge Wilkins' colleagues at least at some point "knew what they were getting" with Judge Wilkins. Once it became evident that Judge Wilkins had a penchant for the Guidelines, prospective assignors could reasonably anticipate that, were they to assign a case with Guidelines issues to Judge Wilkins, the resulting opinion would in fact address many, if not all, of those issues. In this sense, too, then, the measure is not entirely post-treatment. And, to the extent that Judge Wilkins is seen to author more opinions that focus more on Guidelines issues as compared to other judges, that measure is meaningful. Although it may not measure what the case itself was objectively about, it would seem to measure what reasonable assignors would anticipate what the opinion, as authored by Judge Wilkins (or other authors), would consist of.

Fourth, review of the briefs in cases in the Breyer dataset (Westlaw does not make enough briefs for the cases in the Wilkins dataset for meaningful analysis) confirms that an opinion will generally discuss the Guidelines where the parties raise the Guidelines in their briefs. In only 3 of 58 cases did the briefs raise the Guidelines where the resulting opinion did not. And in only 3 of 54 cases did an opinion raise the Guidelines where the underlying briefs did not.

[132] *See* Atkins, *supra* note 9, at 415-16 (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 and was therefore eligible to write an opinion for the court"); SEGAL & SPAETH, *supra* note 1, at 367 ("The equality to which the norm refers is absolute

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.[133] Similarly, the assignment to Judge Wilkins of the opinion in 30 of 42 Guidelines cases 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.[134]

Second, I compared (i) the ratio of the number of (three-judge panel) federal criminal, 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 decided in 1991 in which Judge Wilkins sat on the panel.

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.[135] Together, the two searches yielded 53 total opinions. Judge Wilkins authored 22 of those 53 opinions.[136]

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 according to 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.) Table 7 summarizes the data and results.

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equality, not that which is conditioned on the frequency with which any given justice is a member of the conference vote coalition.").

[133] $p < 0.01$ in both cases.

[134] Again, $p < 0.01$ in both cases.

[135] The first search was 'da(1991) & wilkins % curiam'. It yielded 66 documents. Of those, 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.

[136] Specifically, I identified all opinions generated by both searches where Judge Wilkins authored the opinion. Of the 51 cases generated by the first search, 20 were authored by Judge Wilkins; of the 2 cases the second search produced, both were authored by Judge Wilkins.

TABLE 7: Chi-squared test for Fourth Circuit opinions decided in 1991 (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 [$p < 0.02$].

A similar test confirms that the assignment rate to Judge Wilkins in Guidelines differs, with statistical significance, from the rate in cases overall. This is summarized in Table 8.

TABLE 8: Chi-squared test for Fourth Circuit opinions decided in 1991 (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 [$p < 0.01$].

I also used a logistic regression to see whether other variables might explain the assignment of cases to Judge Wilkins. I used the dataset of federal criminal cases in which Judge Wilkins sat on the panel and joined the majority opinion. The dependent variable was whether or not Judge Wilkins was assigned the opinion in a case. The independent variable of interest was whether or not the case was a Guidelines case. Other independent variables were whether or not the opinion was published, whether or not the assigning judge was appointed by a Republican president, whether or not the panel was majority Democratic (i.e., whether or not Judge Wilkins was the only Republican appointee), whether or not there was a current district judge or another former district judge on the panel, and whether or not there was another former prosecutor on the panel. Only the primary independent variable—whether or not the case raised Guidelines issues—

was a statistically significant predictor of whether Judge Wilkins would be the assignee.[137]

TABLE 9: Logistic regression of assignment of opinion responsibility to Judge Wilkins in federal criminal cases, 1990-1993.

Variable	Odds Ratio	Standard Error	p-Value
Sentencing guidelines case?	3.434	1.923	0.028**
Published opinion?	2.919	3.019	0.300
Assigning judge a Republican?	0.742	0.461	0.631
Majority Democratic panel?	0.949	0.985	0.960
Another current or former district judge on the panel?	1.112	0.645	0.855
Another former prosecutor on the panel?	0.716	0.796	0.764

N = 67. Log likelihood = -41.630515. Pseudo-R^2 = 0.0697. * p < 0.1. ** p < 0.05. *** p < 0.01.

The odds ratio indicates that the fact that a case was a Guidelines case made the odds of Judge Wilkins writing the opinion 3.43 times higher (with a 95% confidence interval of [1.15, 10.289]). Put another way, holding the other variables constant, having a Sentencing Guidelines case increased the odds of Judge Wilkins writing the opinion by 243%.

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 opinion—or 61 of 165 cases 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.[138] However, the assignment to Judge Breyer of the opinion in 34 of 75 Guidelines cases in which he could have written the opinion *does* differ, with statistical significance, from the expected outcome of one-third.[139]

I next compared (i) the ratio of the number of (three-judge panel) federal criminal, 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

[137] $p < 0.01$.
[138] $p > 0.32$.
[139] $p < 0.04$.

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.

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.[140] Together, the two searches yielded 135 total opinions. Judge Breyer authored 43 of those 135 opinions.[141]

I then performed a chi-squared test to determine whether the opinion assignment rate to Judge Breyer in appeals from federal convictions was different, with statistical significance, from the overall rate according to which Judge Breyer was assigned opinions to draft. (Here, in keeping with the idea that, according to workload norms, Judge Breyer should be expected ultimately to receive 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.) Table 10 summarizes the data and results, which have statistical significance, although only at the 10% level.

TABLE 10: Chi-squared test for First Circuit opinions decided in 1991 (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 [$p < 0.10$].

A similar test confirms that the assignment rate to Judge Breyer in Guidelines differs, with strong statistical significance, from the rate in cases overall. This is summarized in Table 11.

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[140] The first search was 'da(1991) & breyer % curiam'. It yielded 119 documents. Of those, Judge Breyer did not sit on the panel in 3 cases, 4 cases were decided en banc, and 2 case was decided by unsigned "Order of the Court" (but picked up because they were not denominated "per curiam". Eliminating those 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.

[141] Of the 110 cases generated by the first search, 38 were authored by Judge Breyer; of the 35 cases the second search produced, 5 were authored by Judge Breyer.

TABLE 11: Chi-squared test for First Circuit opinions decided in 1991 (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 = 6.71 [$p < 0.01$].

I also used a logistic regression to see whether other variables might explain the assignment of cases to Judge Breyer. I used the dataset of federal criminal cases in which Judge Breyer sat on the panel and joined the majority opinion. The dependent variable was whether or not Judge Breyer was assigned the opinion in a case. The independent variable of interest was whether or not the case was a Guidelines case. Other independent variables were whether or not the panel was majority Republican (i.e., whether or not Judge Breyer was the only Democrat appointee), and whether or not there was another former prosecutor on the panel.[142] Only the primary independent variable—whether or not the case raised Guidelines issues—was a statistically significant predictor of whether Judge Breyer would be the assignee. These results are presented in Table 12.

TABLE 12: Logistic regression of assignment of opinion responsibility to Judge Breyer in federal criminal cases, 1990-1993.

Variable	Odds Ratio	Standard Error	p-Value
Sentencing guidelines case?	1.772	0.604	0.093*
Majority Republican panel?	1.241	0.422	0.526
Former prosecutor on the panel?	0.726	0.276	0.4000

N = 153. Log likelihood = -99.189306. Pseudo-R^2 = 0.0182. * p < 0.1. ** p < 0.05. *** p < 0.01.

The odds ratio indicates that the fact that a case was a Guidelines case made the odds of Judge Breyer writing the opinion 1.77 times higher (with a 95% confidence interval of [0.9082849, 3.457491]). Put another way, holding the other variables constant, having a Sentencing Guidelines case increased the odds of Judge Breyer writing the opinion by 77%.

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[142] Another plausible control variable—whether or not there was a current district judge or a former district judge on the panel—was present in every case in the dataset. And only 2 of the 164 cases were unpublished.

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

Having found evidence of disproportionate opinion assignment to both Judges Wilkins and Breyer, I turn to the question of whether that disparity existed in the assignment of federal criminal cases prior to the advent of the Guidelines. Hypothesis 2 suggests that the heightened levels of opinions assignments in federal criminal cases is a function of the advent of the Guidelines. 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.[143] Judge Wilkins wrote the opinion in 6 of the 14—or 42.86%— federal criminal appeals where he sat on the panel that were decided in 1988. I note that this rate is substantially below the comparable rate of 41 (59.42%) of 69 cases during the period 1990-1993. (If one includes only cases where Judge Wilkins was part of the majority, the relevant comparison is between 41(61.19%) of 67 cases in 1990-1993, versus 6 (46.15%) of 13 cases in 1988.)

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.[144] A chi-squared test (with results summarized in Table 13) confirms

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[143] Both searches were conducted in FCJ-CS. The first search was 'pr("fourth circuit") & wilkins & da(1988) % curiam'. This yielded 31 cases. I eliminated 7 en banc cases, 1 case where Judge Wilkins' name appears solely because of a failed vote for en banc review, 1 case where Judge Wilkins served as the trial judge, and 1 case where a person on a legal team had the surname "Wilkins." Of the remaining 21 cases, another 8 were not federal criminal appeals. (One was a § 2255 petition.) That left 13 federal criminal appeals heard by three-judge panels that included Judge Wilkins. (Judge Wilkins dissented in one of those cases, and otherwise was in the majority.) Of those, Judge Wilkins wrote the opinion in 5 of the 13 cases.

The second search was 'pr("fourth circuit") & da(1988) & wilkins & curiam /s "u.s." "s.ct." "f.2d"'. It yielded 4 cases. One was an en banc case, one was a § 2254 case, and one was decided per curiam. The remaining case was an appeal from a federal criminal conviction; the opinion was authored by Judge Wilkins.

In total, then, Judge Wilkins authored the opinion in 6 of 14 cases.

[144] Both searches were conducted in CTA4. The first search, 'da(1988) & wilkins % curiam', produced 88 documents. Of those, 10 were decided en banc, 3 were cases where Judge Wilkins' named appeared only by virtue of a failed en banc vote, 1 was a case where Judge Wilkins served as trial judge, 1 was a case where a party's name was "Wilkins," and 1 was a case where a person on the legal team was named "Wilkins." That left 72 cases. (Judge Wilkins was in the majority in all but 4 of the cases; he concurred in 1 case, dissented in 1 case, and concurred in part and dissented in part in 2 cases.) Judge Wilkins wrote the opinion in 21 of the 72 cases.

that, unlike the result in 1991, 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. (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.

TABLE 13: Chi-squared test for Fourth Circuit opinions decided in 1988 (federal criminal cases).

	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

Chi-Square = 1.21 [$p > 0.27$].

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 (bearing in mind that the Guidelines did not take effect until Nov. 1, 1987, and Guidelines cases largely did not reach the First Circuit until 1989). 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.[145] Judge Breyer wrote the opinion in 8 of the 32—or 25.00%—signed federal criminal appeals where he sat on the panel that were decided in 1988. I note that this rate is substantially below the comparable rate of 61 (36.97%) out of 165 cases for the

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The second search was 'da(1988) & wilkins & curiam /s "u.s." "s.ct." "f.2d"'. It yielded 7 documents. Of those, 1 was an en banc opinion, 1 was a denial of a petition for en banc rehearing, and 2 were per curiam opinions. This left 3 cases; Judge Wilkins wrote the opinion in 2 of those cases.

In total, then, the searches identified 75 total cases, with Judge Wilkins authoring the opinion in 23 of those cases.

[145] Both searches were conducted in FCJ-CS. The first search was 'pr("first circuit") & breyer & da(1988) % curiam'. This yielded 37 cases. I eliminated the 9 cases that were not federal criminal appeals (including one en banc cases). That left 28 cases. Judge Breyer was in the majority in all those cases; he wrote the opinion in 7 of the 28 cases.

The second search was 'pr("first circuit") & da(1988) & breyer & curiam /s "u.s." "s.ct." "f.2d"'. It yielded 7 cases. Three were not federal criminal cases (and 1 of those was decided en banc). The remaining 4 cases produced signed opinions in federal criminal cases; 1 was authored by Judge Breyer (who also dissented in 1 of the cases).

In total, then, Judge Breyer authored the opinion in 8 of 32 cases.

period 1990-1993 (or, if one restricts the comparison to cases where Judge Breyer was part of the majority, 8 (25.81%) of 31 cases in 1988 versus 61 (37.20%) out of 164 cases during 1990-1993).

I then searched for all First Circuit cases decided by signed opinion in 1988 (in all subject-matter areas) where Judge Breyer sat on the panel.[146] A chi-squared test (with results summarized in Table 14) 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—statistically significant—result obtained from 1991 (see Table 10), and thus provides support for Hypothesis 2.

TABLE 14: Chi-squared test for First Circuit opinions decided in 1988 (federal criminal cases).

	Federal Criminal Cases	**Cases other than Federal Criminal Cases**	**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 [$p > 0.38$].

3. Hypotheses 3A and 3B—Party Affiliation and Assignment of Opinions

I turn now to examine the effect of party affiliation on opinion assignment. Because Judge Breyer was Chief Judge in nearly all the cases in the

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[146] Both searches were conducted in CTA1. The first search, 'da(1988) & breyer % curiam', produced 108 documents. Of those, 1 was decided en banc, 4 were unsigned opinions (2 denominated "Order of the Court" and 2 denominated "Memorandum and Order"), and 1 was a case where Judge Breyer was not on the panel; the last case was pulled up because it cites to an earlier opinion authored by (as noted by the latter opinion) Judge Breyer and also to an administrative law casebook co-authored by Judge Breyer. That left 102 cases. (Judge Breyer was in the majority in all but 4 of the cases; he concurred in 2 case and dissented in 2 cases.) Judge Breyer wrote the opinion in 33 of the 102 cases.

The second search was 'da(1988) & breyer & curiam /s "u.s." "s.ct." "f.2d"'. It yielded 19 documents. Of those, 2 were per curiam opinions. This left 17 cases; Judge Breyer wrote the opinion in 4 of those cases (and dissented in 1).

In total, then, the searches identified 119 total cases, with Judge Breyer authoring the opinion in 37 of those cases.

Breyer database and therefore was responsible for nearly all opinion assignments, I perform the empirical testing here solely in the Wilkins database.

Of the 67 appeals from federal convictions, opinions in 30 of those cases were assigned by Judges appointed by Democrats; of those, 18 were assigned to Judge Wilkins. Of the 37 cases assigned by judges appointed by Republicans, 23 were assigned to Judge Wilkins. The data are summarized in Table 15.

TABLE 15: Opinion assignment in federal criminal cases by party of President who appointed the assigning judge.

	Cases Assigned by Judges Appointed by Democratic Presidents		**Cases Assigned by Judges Appointed by Republican Presidents**		**TOTAL**
Assignee Judge	**Number of Cases**	**Percentage of Cases[147]**	**Number of Cases**	**Percentage of Cases**	
Assignee Judges Appointed by Democratic Presidents					
Butzner	0	0.00%	3	8.11%	3
Ervin	4	13.33%	0	0.00%	4
Heaney	1	3.33%	0	0.00%	1
Michael, D.J.	0	0.00%	1	2.70%	1
Murnaghan	2	6.67%	0	0.00%	2
Sprouse	2	6.67%	0	0.00%	2
Williams, D.J.	0	0.00%	1	2.70%	1
Total	9	--	5	--	14
Assignee Judges Appointed by Republican Presidents					
Luttig	0	0.00%	2	5.41%	2
Hilton, D.J.	1	3.33%	0	0.00%	1
Morgan, D.J.	1	3.33%	0	0.00%	1
Niemeyer	0	0.00%	1	2.70%	1
Widener	0	0.00%	1	2.70%	1
Wilkins	18	60.00%	23	62.16%	41
Wilkinson	1	3.33%	5	13.51%	6
Total	21	--	32	--	53
Grand Total	30	100.00%	37	100.00%	67

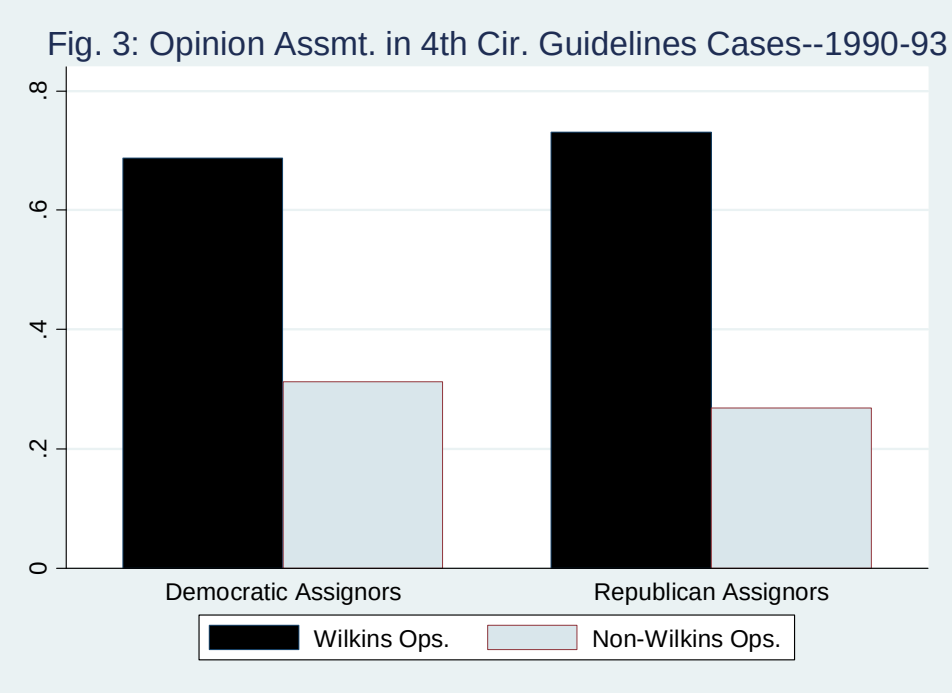
Of the 42 Guidelines cases, 30 were assigned to Judge Wilkins. Of those 42 cases, 16 were assigned by Judges appointed by Democrats; of those, 11 were assigned to Judge Wilkins. Of the 26 cases assigned by judges appointed by Republicans, 19 were assigned to Judge Wilkins. This is reflected in Table 16. Figure 3 summarizes the data in Table 16 graphically.

[147] Percentages in the table are percentages of all cases assigned by judges appointed by presidents of one party to all judges (regardless of political party of the appointing president). Thus, the table reflects that Judge Wilkins was assigned 60.00% of all Sentencing Guideline cases assigned by judges appointed by Democratic Presidents, and 62.16% of all Sentencing Guideline cases assigned by judges appointed by Republican Presidents (in cases in which he was on the panel).

TABLE 16: Opinion assignment in Guidelines cases by party of President who appointed the assigning judge.

	Cases Assigned by Judges Appointed by Democratic Presidents		**Cases Assigned by Judges Appointed by Republican Presidents**		**TOTAL**
Assignee Judge	**Number of Cases**	**Percentage of Cases[148]**	**Number of Cases**	**Percentage of Cases**	
Assignee Judges Appointed by Democratic Presidents					
Butzner	0	0.00%	3	11.54%	3
Ervin	1	6.25%	0	0.00%	1
Heaney	1	6.25%	0	0.00%	1
Michael, D.J.	0	0.00%	1	3.85%	1
Sprouse	1	6.25%	0	0.00%	1
Total	3	--	4	--	7
Assignee Judges Appointed by Republican Presidents					
Morgan, D.J.	1	6.25%	0	0.00%	1
Widener	0	0.00%	1	3.85%	1
Wilkins	11	68.75%	19	73.08%	30
Wilkinson	1	6.25%	2	7.69%	3
Total	13	--	22	--	35
Grand Total	16	100.00%	26	100.00%	42

[148] Percentages in the table are percentages of all cases assigned by judges appointed by presidents of one party to all judges (regardless of political party of the appointing president). Thus, the table reflects that Judge Wilkins was assigned 68.75% of all Sentencing Guideline cases assigned by judges appointed by Democratic Presidents, and 73.08% of all Sentencing Guideline cases assigned by judges appointed by Republican Presidents (in cases in which he was on the panel).



Also relevant to the question of whether political affiliation affects opinion assignment is the extent to which Judge Wilkins is assigned opinion even where he is the lone judge appointed by a Republican President on the panel, i.e., where the panel is majority Democratic. In the 6 such federal criminal cases, Judge Wilkins wrote the opinion in 4 of them. And, of the 4 Guidelines cases that meet the criterion, the opinion was assigned to Judge Wilkins in 3 of them. Interestingly, in all 6 of these criminal appeals (and therefore also in all 4 Guidelines cases), the assigning judge was appointed by a Democratic President, i.e., the assigning judge was not Judge Wilkins. Tables 17 and 18 summarize these data.

TABLE 17: Opinion assignment in federal criminal cases heard by a Democratic-majority panel (including Judge Wilkins).

Assignee Judge	Number of Cases	Percentage of Cases
Assignee Judges Appointed by Democratic Presidents		
Heaney	1	16.67%
Sprouse	1	16.67%
Assignee Judges Appointed by Republican Presidents		
Wilkins	4	66.67%
Total	**6**	**100.00%**

TABLE 18: Opinion assignment in Sentencing Guideline cases heard by a Democratic-majority panel (including Judge Wilkins).

Assignee Judge	Number of Cases	Percentage of Cases
Assignee Judges Appointed by Democratic Presidents		
Heaney	1	25.00%
Assignee Judges Appointed by Republican Presidents		
Wilkins	3	75.00%
Total	**4**	**100.00%**

These data provide support for Hypotheses 3A and 3B. In addition, the logistic regression reported in Table 9 did not find the party of the President who appointed the assigning judge to be a statistically significant predictor of whether Judge Wilkins received opinion assignments. While this result does not mean that the party of the President who appointed the assigning judge *is not* a statistically significant predictor of whether Judge Wilkins received opinion assignments, the inability to reject the null hypothesis is surely consistent with Hypothesis 3B.

4. Hypotheses 4A and 4B—Assignment of Cases and Judicial Panel Rank

The next couple of hypotheses suggest that the hierarchical position in the majority coalition of a judge who served as a commissioner should not substantially affect opinion assignment rates. As with Hypotheses 3A and 3B, I restrict the analysis here to the Wilkins database, insofar as Judge Breyer was Chief Judge in almost all the cases in the Breyer database, and therefore was almost always the ranking judge.

I begin with cases where Judge Wilkins assigned the opinion, i.e., where Judge Wilkins was either the senior member of the panel or the second most senior member in cases where the senior member was not part of the majority coalition.[149] Judge Wilkins self-assigned the opinion in 2 of 6 appeals from federal convictions, and in 1 of 2 Guidelines cases. Tables 19 and 20 present these data.

[149] In only 1 appeal from a federal conviction did Judge Wilkins gain opinion-assignment authority though only the second senior-most judge on the panel: In *United States v. Lambey*, 949 F.2d 133 (4th Cir. 1991), Judge Widener dissented, leaving Judge Wilkins as the senior-most member of the majority, and in *United States v. Goins*, 11 F.3d 441 (4th Cir. 1993), Judge Murnaghan concurred, leaving Judge Wilkins as the senior-most member of the majority. The opinion in *Lambey* was assigned to Judge Niemeyer, and the opinion in *Goins* was assigned to Judge Luttig. Neither case raised any Guidelines issue.

TABLE 19: Assignees in federal criminal cases where the opinion was assigned by Judge Wilkins.

Assignee	Number of cases	Percentage of cases
Assignee Judge Appointed by Democratic Presidents		
Michael, U.S.D.J.	1	16.67%
Assignee Judge Appointed by Republican Presidents		
Luttig	2	33.33%
Niemeyer	1	16.67%
Wilkins	2	33.33%
Total	**6**	**100.00%**

TABLE 20: Assignees in Guidelines cases where the opinion was assigned by Judge Wilkins.

Assignee	Number of cases	Percentage of cases
Assignee Judge Appointed by Democratic Presidents		
Michael, U.S.D.J.	1	50.00%
Assignee Judge Appointed by Republican Presidents		
Wilkins	1	50.00%
Total	**2**	**100.00%**

I next explore assignment where Judge Wilkins was the second senior-most judge on the panel. (Here, Judge Wilkins had no opinion assignment power.) There were 49 such federal criminal cases;[150] Judge Wilkins wrote the opinion in 32 of them. Of the 32 such Guidelines cases,[151] Judge Wilkins wrote the opinion in 23. These results are reflected in Tables 21 and 22.

[150] There were 48 cases where Judge Wilkins was second senior-most judge on the panel. I subtract the two cases—*Lambey* and *Goins*—where he was the senior member of the majority coalition, *see supra* note 149. I also add in three cases where, though Judge Wilkins was the junior judge on the panel, a judge senior to him was not part of the majority coalition. In *United States v. Gordon*, 895 F.2d 932 (4th Cir. 1990), Judge Murnaghan, the second senior-most judge on the panel, dissented. Justice Powell (whom I treat as the assigning judge, *see supra* p. 46 [check]) assigned the opinion to Judge Wilkins. In *United States v. Golden*, 898 F.2d 148, 1990 WL 26902 (4th Cir. Feb. 15, 1990) (unpublished), Judge Widener dissented; Judge Murnaghan assigned the opinion to Judge Wilkins. In *United States v. Gilliam*, 987 F.2d 1009 (4th Cir. 1993), Judge Widener again dissented; Judge Wilkinson assigned the opinion to Judge Wilkins.

[151] There were 30 Guidelines cases where Judge Wilkins was the second senior-most judge on the panel. Neither of the 2 cases where Judge Wilkins acceded to opinion assignment responsibility was a Guidelines case. Of the three appeals from federal convictions where Judge Wilkins was junior-most judge on the panel another judge did not join the majority, two of them—*Gordon* and *Gilliam*—are Guidelines cases, with Judge Wilkins writing the opinion in both of them.

TABLE 21: Assignees in federal criminal cases where Judge Wilkins was second senior-most judge in the majority.

Assignee	Number of cases	Percentage of cases
Assignee Judge Appointed by Democratic Presidents		
Butzner	3	6.12%
Ervin	3	6.12%
Heaney	1	2.04%
Murnaghan	2	4.08%
Sprouse	2	4.08%
Williams, U.S.D.J.	1	2.04%
Assignee Judge Appointed by Republican Presidents		
Hilton, U.S.D.J.	1	33.33%
Morgan, U.S.D.J.	1	16.67%
Wilkins	32	65.31%
Wilkinson	3	6.12%
Total	**49**	**100.00%**

TABLE 22: Assignees in Guidelines cases where Judge Wilkins was second senior-most judge in the majority.

Assignee	Number of cases	Percentage of cases
Assignee Judge Appointed by Democratic Presidents		
Butzner	3	9.38%
Ervin	1	3.13%
Heaney	1	3.13%
Sprouse	1	3.13%
Assignee Judge Appointed by Republican Presidents		
Morgan, U.S.D.J.	1	3.13%
Wilkins	23	71.88%
Wilkinson	2	6.12%
Total	**32**	**100.00%**

Finally, consider cases where Judge Wilkins was the junior-most judge on the panel. Of the appeals from federal convictions, 12 meet this criterion.[152] Judge Wilkins wrote the opinion in 7 of those cases. And, Judge Wilkins wrote the opinion in 6 of 8 such Guidelines cases.[153] Tables 23 and 24 present these data.

[152] Judge Wilkins was the junior judge on the panel in 15 cases. In 3 cases, however, a more senior judge did not join the majority.

[153] Judge Wilkins was the junior judge on the panel in 10 cases. In 2 cases, however, a more senior judge did not join the majority.

TABLE 23: Assignees in federal criminal cases where Judge Wilkins was third-ranking judge in the majority.

Assignee	Number of cases	Percentage of cases
Assignee Judge Appointed by Democratic Presidents		
Ervin	1	8.33%
Assignee Judge Appointed by Republican Presidents		
Widener	1	8.33%
Wilkins	7	58.33%
Wilkinson	3	25.00%
Total	**12**	**100.00%**

TABLE 24: Assignees in Guidelines cases where Judge Wilkins was third-ranking judge in the majority.

Assignee	Number of cases	Percentage of cases
Assignee Judge Appointed by Democratic Presidents		
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Assignee Judge Appointed by Republican Presidents		
Widener	1	12.50%
Wilkins	6	75.00%
Wilkinson	1	12.50%
Total	**8**	**100.00%**

These data provide fair support for Hypotheses 4A and 4B. Indeed, assignment to Judge Wilkins is highest where Judge Wilkins did not have the prerogative to assign.

Logistic regressions provide results that are consistent with Hypothesis 4B. I reran the logistic regression in the previous Section—with whether Judge Wilkins was assigned the opinion as the dependent variable—now with whether Judge Wilkins enjoyed the right to assign the opinion as an additional independent variable. As reflected in Table 25, the additional independent variable was not a statistically significant predictor of whether Judge Wilkins was assigned the opinion.

TABLE 25: Logistic regression of assignment of opinion responsibility to Judge Wilkins in federal criminal cases, 1990-1993.

Variable	Odds Ratio	Standard Error	p-Value
Sentencing guidelines case?	3.011	1.730	0.055*
Published opinion?	2.941	3.027	0.295
Assigning judge a Republican?	0.929	0.610	0.910
Majority Democratic panel?	0.962	0.990	0.970
Another current or former district judge on the panel?	1.015	0.606	0.981
Another former prosecutor on the panel?	0.747	0.829	0.793
Judge Wilkins assigning judge?	0.345	0.346	0.289

N = 67. Log likelihood = -41.050369. Pseudo-R^2 = 0.0826. * p < 0.1. ** p < 0.05. *** p < 0.01.

I then ran another logistic regression, this one including only the 61 cases where Judge Wilkins did *not* enjoy the opinion assignment prerogative. This time, the additional independent variable was whether or not Judge Wilkins was the third (as opposed to the second) ranking judge. Once again, as reflected in Table 26, the additional variable did not predict opinion assignment to Judge Wilkins with statistical significance.

TABLE 26: Logistic regression of assignment of opinion responsibility to Judge Wilkins in federal criminal cases where Judge Wilkins did not have opinion assignment prerogative, 1990-1993.

Variable	Odds Ratio	Standard Error	p-Value
Sentencing guidelines case?	3.025	1.839	0.069*
Published opinion?	2.888	2.981	0.304
Assigning judge a Republican?	0.955	0.647	0.946
Majority Democratic panel?	0.981	1.021	0.985
Another current or former district judge on the panel?	1.074	0.690	0.911
Another former prosecutor on the panel?	0.683	0.768	0.735
Judge Wilkins third ranking judge?	0.704	0.497	0.620

N = 61. Log likelihood = -37.275852. Pseudo-R^2 = 0.0653. * p < 0.1. ** p < 0.05. *** p < 0.01.

Again, the logistic regression results do not confirm that Judge Wilkins' rank is *not* a statistically significant predictor of whether Judge Wilkins received

an opinion assignment. However, the inability to reject the null hypothesis is certainly consistent with Hypothesis 4B.

VI. DISCUSSION AND IMPLICATIONS

The conclusions in the preceding Part provide support for the hypotheses laid out at the end of Part IV.

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. With respect to Judge Breyer, the binomial test did not indicate that the higher assignment rate in federal criminal cases was statistically significant. 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. With respect to both federal criminal and Guidelines cases, Judge Wilkins received a higher proportion of opinion assignments than did Judge Breyer.

This result is broadly consistent with Judge Wilkins' 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 had. 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 enjoyed the prerogative of opinion assignment.[154] 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.[155] Rather, Judge Breyer seems to have brought an administrative law expertise to bear on the Guidelines.[156] 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

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[154] That prerogative would have been superseded were the Circuit Justice for the First Circuit to have sat on a panel with Judge Breyer—and might have been superseded had any Supreme Court Justice, even a retired one, sat on a panel with him—but there were no such cases.

[155] As noted above, Justice Breyer served briefly as counsel in the Watergate prosecutions, but this pales in comparison to Judge Wilkins' extensive experience in criminal law before ascending to the bench.

[156] *See supra* note 110 and accompanying text (noting Justice Breyer's expertise in administrative law).

all;[157] 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 him being assigned cases at a lower rate than Judge Wilkins, and with the effect of expertise truly becoming observable in the context of Guidelines cases.

The data clearly indicate that neither Judge Breyer nor Judge Wilkins was assigned federal criminal cases at a statistically significant disproportionate rate prior to the advent of the Guidelines.[158] This further bolsters the theory's prediction that the Guidelines fueled the assignment of opinions in this area to these Commissioners.

Finally, the data provide support for the notion that the assignment of federal criminal and Guidelines cases to Judge Wilkins was robust regardless of the party of the President who appointed the assigning judge, and regardless of the hierarchical position Judge Wilkins enjoyed on the panels. The regression analyses also do not point to political considerations as predictive of opinion assignment in Guidelines cases.

No alternate explanation satisfies all the observations here as well as does the proffered theory. One might suggest that the high rate of assignment to Judge Wilkins is in part because Judge Wilkins was for most of the time period studied the only Fourth Circuit judge with prosecutorial experience.[159] This explanation is belied by two points. First, the data do not suggest that district judges who had prosecutorial experience were substantially more likely to be assigned Guidelines opinions; indeed, a regression analysis found this variable not to be statistically significant. 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 (despite the prosecutorial experience he had even then).

With respect to Judge Breyer, one might turn to George's finding that circuit judges with prior legal academic experience tend to be assigned more cases than their colleagues. But the suggestion that this explains the higher rates at which Judge Breyer is assigned Guidelines cases is undercut by both the fact that the study here looked at *proportions* of cases in which opinions were assigned, not absolute numbers; and the fact that the rate at which Judge Breyer was assigned opinions in federal criminal cases increased once the Guidelines were effective.[160]

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[157] *See supra* pp. 26-27 [check] (observing that expertise is more valuable when it arises in a case where it can be used to dispose of the entire case).

[158] 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.

[159] Judge Michael also had such experience, but was appointed to the Fourth Circuit only at the tail end of the time period studied.

[160] Also suggestive that it is Judge Breyer's Sentencing Commission experience, and not his academic experience, that explains the results here is the finding of Sisk et al.,

One might argue that Judges Wilkins and Breyer penned large numbers of Guidelines cases 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).[161] While this explanation may have some validity, it leaves open the question as to why other judges with prosecutorial experience would not have similar interest in handling such 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 benefits that could be reaped from having experts draft opinions.

The high rate at which Judge Wilkins was assigned opinions in federal criminal cases is consistent with Cheng's finding about Judge Wilkins' strong specialization in criminal law cases. Indeed, Cheng's measure of Judge Wilkins' affinity for federal criminal cases was the highest among all circuit judges for any subject in his study.[162] However, the findings here draw into question whether a similar study conducted before the Guidelines took effect (Cheng's study was over the years 1995-2005) would have produced a similar result.

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 discretion under the Guidelines with an eye to the ideology of the circuit to which their decision would be appealed, Max Schanzenbach and Emerson Tiller suggest mandating ideological diversity by requiring that, "for every sentencing event by ensuring that for any criminal sentencing the lower court and higher court not share a uniform (partisan) orientation."[163] 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 Schanzenbach and Tiller studied, a time period that includes years that they do not study because of the large technical issues that remained outstanding.[164] Still, the findings here certainly do not provide any additional reason to believe that it is important to mandate partisan balance in Guidelines cases.

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supra note 87, at 1479-80, that a judge's prior experience as a law professor was not likely to affect how she ruled on the constitutionality of the Guidelines pre-*Mistretta*. 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.

[161] *Cf.* Cheng, *supra* note 9, at 527 ("[T]he assigning judge may distribute opinions based on the panel members' special expertise *or* interest." (emphasis added)).

[162] *See id.* at 564. 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.

[163] Schanzenbach & Tiller, *supra* 104, at 744-45.

[164] *See* Schanzenbach & Tiller, *supra* note 88, 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.").

VII. CONCLUSION

This Paper has provided 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.

In future research, I hope first to close the loop on the Guidelines story. The theory predicts that the court will garner reputation benefits through the assignment of opinions in that area to experts. One way that 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' and, to a lesser extent, Judge Breyer's opinions are cited rather extensively, and they speculate that this is the result of their Guidelines experience.[165] 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 writings by these judges, other than opinions, in the area of the Guidelines.

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

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[165] *See* Klein & Morrisroe, *supra* note 2, at 381-82.