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OPINION SPECIALIZATION

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In accord with traditions celebrating the generalist judge, the federal judiciary has consistently resisted proposals for specialized courts. Outward support for specialization, if it exists at all, is confined to narrow exceptions such as bankruptcy and tax.

The romantic image of the generalist, however, is not without its costs. It deprives the judiciary of potential expertise, which could be extremely useful in cases involving complex doctrines and specialized knowledge. It also undermines efficiency, a goal that is difficult to ignore in an era of crowded dockets and overworked jurists. Indeed, many state courts have increasingly turned to specialization or a subject-matter rotation system for these reasons, yet the federal judiciary remains unflinching.

But is it really? Despite the frequent rhetoric against specialization, an empirical look at opinion assignments in the federal courts of appeals from 1995-2005 reveals "opinion specialization" to be an unmistakable part of everyday judicial practice. In short, the generalist judge is largely a myth. But while some may deplore this subversion of a long cherished judicial value, the development may indeed be a beneficial one. As it turns out, opinion specialization may actually achieve many of the benefits of specialized courts without incurring their costs.

Studying Opinion Assignment

One way of studying judicial attitudes toward specialization is to observe if judges become specialists when given the chance. Random case assignment eliminates most such opportunities, but the process of opinion assignment provides a rare instance in which federal circuit judges can specialize in certain subjects.

To construct the dataset used in this study, I combined the Federal Judicial Center's well-known Federal Courts database and a database extract generously provided by Thomson West. The resulting dataset included all opinions written between 1995 and 2005 in the United States Courts of Appeals for all circuits except the Federal Circuit. To detect instances of specialization, I modeled the number of expected opinions that a judge should write in each subject area given that judge's caseload and the circuit's overall docket patterns. The expected frequencies were then compared against the actual frequencies using Pearson (standardized) residuals.

The figures below graphically summarize the most likely instances of specialization in the First, Seventh, and DC Circuit. Each horizontal line represents a subject matter, or in the case of the DC Circuit, an agency being reviewed. Each dot represents a judge-subject pairing. For purposes of the study, residuals with absolute values above three were defined to indicate instances of specialization, with positive values showing preference and negative values showing aversion.

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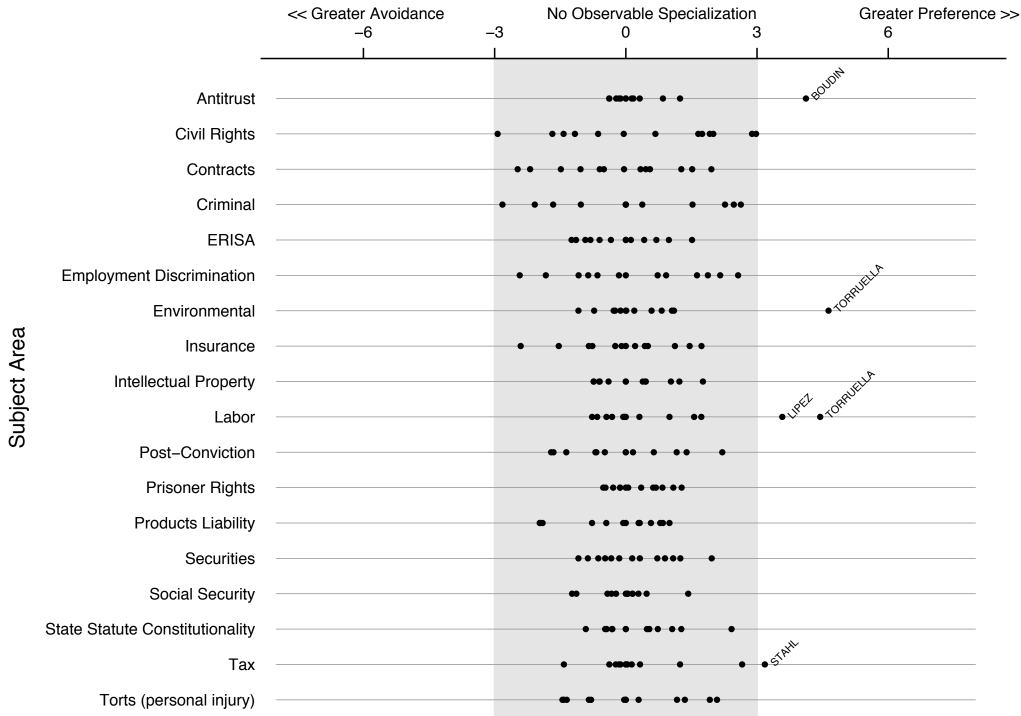

Figure 1: Subject Matter Specialization, 1st Circuit, 1995-2005

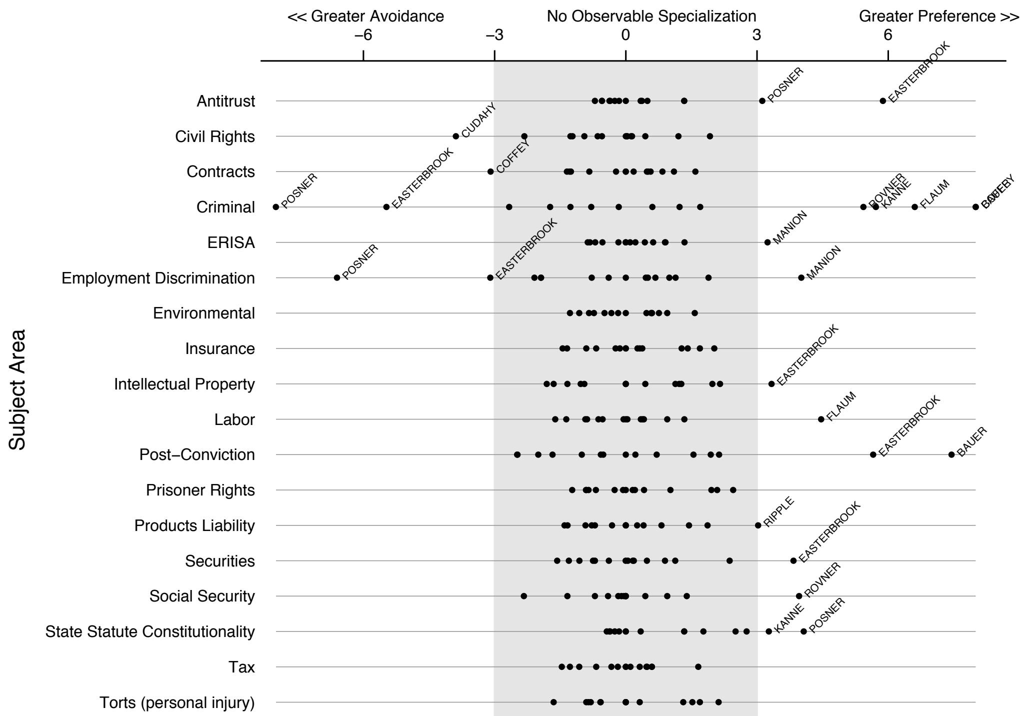

Figure 2: Subject Matter Specialization, 7th Circuit, 1995-2005

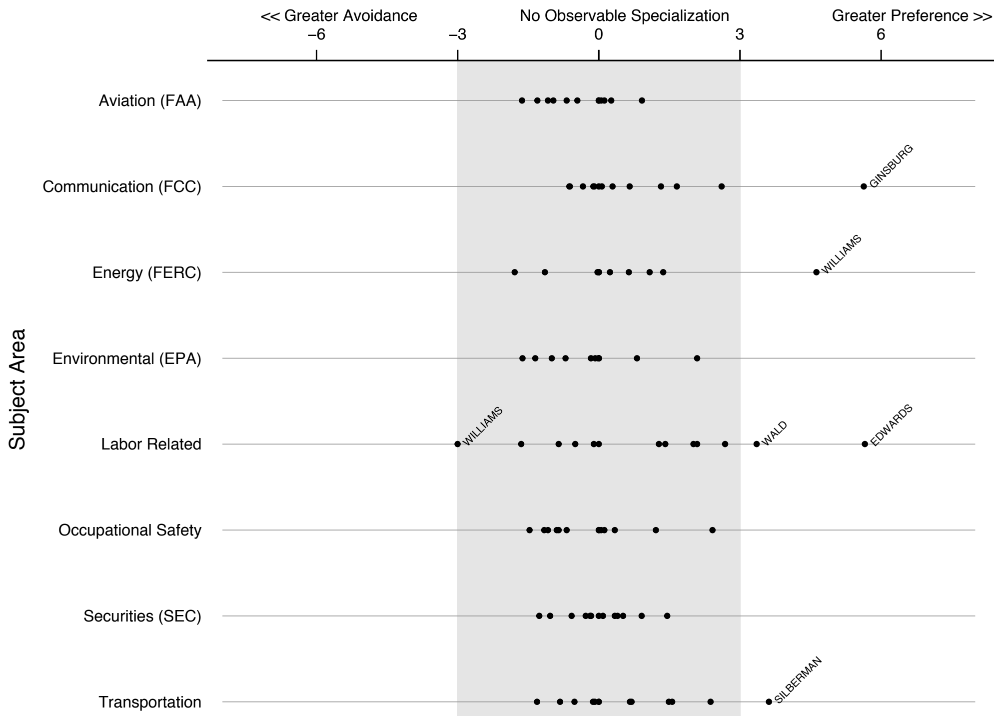

Figure 3: Agency Specialization, D.C. Circuit, 1995-2005

Many Judges Specialize

As the graphs show, specialization appears to be alive and well in the federal appellate judiciary. Opinion assignments are not randomly distributed, and frequently the rate at certain judges write in a subject area is highly disproportionate to their colleagues.

One important question is whether these results might occur purely as a matter of chance. After all, with so many judge-subject pairings, some statistical outliers are inevitable. A number of reasons, however, suggest that some non-random phenomenon is at work. For one, statistical simulations suggest that under random opinion assignment conditions, residuals greater than 3.0 are exceedingly rare. For example, for the Seventh Circuit under random assignment, we statistically expect to see less than two residuals greater than 3.0. Instead, Figure 2 shows twenty-four such instances.

In addition, many of the specific instances of specialization make intuitive sense based on the judges' backgrounds. For example, Judge Michael Boudin of the First Circuit, a former deputy assistant U.S. attorney general in the Antitrust Division of the Department of Justice, writes a disproportionate number of antitrust cases. Judge Frank Easterbrook of the Seventh Circuit, known for his academic work in antitrust and corporate law, appears to specialize in antitrust and securities regulation. On the DC Circuit, Judge Harry Edwards, who was a labor law scholar and arbitrator, specializes in labor cases. Judge Douglas Ginsburg, who specializes in Federal Communications Commission (FCC) cases, is a long-time author of a casebook on telecommunications law, and Judge Stephen Williams, who specializes in Federal Energy Regulatory Commission (FERC) cases, is formerly an oil and gas law professor.

The explanation for these specialization patterns is likely an amalgam of factors, including individual preferences (both conscious and unconscious), internal court dynamics, and

caseload pressures. Experts may prefer cases in their fields of choice not only because they are more interesting, but also because they can write opinions more efficiently and with less concern about errors. Similarly, non-experts may be willing to defer given that specialized subjects may appear less interesting, more time-consuming, and rife with potential pitfalls.

A Loophole or a Keeper?

Should we be concerned about opinion specialization? The structure of the federal courts exhibits the longstanding preference for generalist judges, and opinion specialization clearly runs counter to that spirit. However, one perhaps should not be too quick to end the apparent loophole though randomized opinion assignments or other measures. Circuit judges, after all, are experience and intelligent actors, and their chosen practices thus deserve careful consideration.

The core of the debate is whether the benefits of specialization outweigh the costs. As mentioned previously, specialization increases judicial expertise, improving efficiency and accuracy. On the flip side, specialized courts past and present have often highlighted the considerable drawbacks of specialization, including the danger of special interest capture, a tendency toward complex or arcane doctrines, and a loss of judicial prestige.

In this debate over specialization, however, opinion specialization offers an intriguing compromise. It of course captures many of the benefits of specialization. Whenever a "specialist" writes an opinion, the parties and the circuit's jurisprudence benefit from the specialist's expertise. Besides being more efficient, the specialist is more like to produce opinions that are more consistent with the existing legal framework, and he may be better positioned to solve problems more creatively. At the same time, the opinion may enjoy greater legitimacy, since parties may give greater deference to a judge who "understands" the stakes and complexities in a field or industry. Even when a specialist is not writing the opinion, other judges can benefit from the specialist's perspective (if on the same panel), or at minimum from a more coherent and well-developed body of precedent.

At the same time, because opinion specialization operates informally and flexibly, it minimizes many of the known drawbacks of more formal specialization schemes. With no formal and exclusive concentration of cases, interest groups have far less incentive to become enmeshed in the appointments process. Judges are less likely to develop tunnel vision, because they continue to handle diversified dockets and are required to both write and vote in areas outside their expertise. Finally, because judges can experiment with greater or less specialization depending on individual preference, opinion specialization mutes concerns about repetitive caseloads and a loss of prestige.

That said, opinion specialization does have potential dangers. If non-expert judges become too deferential to their expert colleagues, the result could be anathema to the right of appeal, which is partly to protect litigants from the potentially arbitrary decisions of a single judge. An even more serious problem is the potential bias that may arise because specialties are self-selected. For example, some of the study results suggest a possible correlation between specializing in criminal law and being a former prosecutor. If judges without a criminal law background avoid writing criminal law opinions, and former defense attorneys seldom become judges because of electoral politics, then in essence only former prosecutors will direct the future of criminal law.

Some of these problems can be (or are already) addressed by the nature of the panel system or by judicial norms and procedures. However, an understanding of the actual

ramifications of opinion specialization needs to be fleshed out in further examinations of this subject.

A Possible Mechanism for Reform

On a final note, it bears mentioning that beyond merely a quirky practice among a subset of judges, opinion specialization offers a new avenue of reform for those who have long argued for specialized courts. For proponents of specialization, the most important attribute of opinion specialization is that it is modest. It does not require a radical restructuring of the federal courts or an act of Congress. Instead, it can develop informally and incrementally through everyday judicial practice, a critical advantage whenever actors are wedded to the status quo. Faced with enormous caseloads and increasingly complex cases in specialized areas, judges will opt for opinion specialization simply because it is a convenient and useful way for the judiciary to help itself.

Whether solution or affliction, opinion specialization reveals an unexplored tension in federal judiciary. Circuit judges appear to be more conflicted on the issue of specialization than the frequent posturing might initially suggest. Exposing this fault line will hopefully encourage judges and commentators to reexamine their attitudes toward specialization. After all, archetypes like the generalist judge are powerful mental images that constrain the imagination. Dispelling the myth may therefore liberate jurists and reformers alike from their traditional boxes.