Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks

Mitu Gulati[*] *&*
Veronica Sanchez[*]

I. INTRODUCTION 1143

II. THE LIKELY SUPERSTARS 1147
A. *THE TYPE OF OPINION* 1148
B. *THE JUDGES WHO ARE LIKELY TO WRITE THESE OPINIONS* 1150
C. *THE ACADEMIC DISCIPLINE LIKELY TO DOMINATE* 1152

III. CASEBOOK DATA 1153
A. *DATA COLLECTION PROCEDURES* 1153
B. *DESCRIBING THE DATA* 1154
C. *ACADEMIC BACKGROUNDS* 1161
D. *CIRCUIT PUBLICATION RATES* 1169
E. *DIFFERENTIAL DOCKETS* 1174
F. *GIANTS OF THE PAST* 1179

IV. EXPLAINING THE DOMINANCE OF THE CHICAGO SCHOOL 1181
A. *THE SKEW TOWARDS CHICAGO* 1184

---

[*] Professor of Law, University of California at Los Angeles; Visiting Professor of Law and Sloan Fellow, Georgetown University Law Center (2001–2002).

[*] Law Clerk, Ninth Circuit Court of Appeals. We are grateful to the numerous law teachers and judges around the country who shared their views on casebooks with us. Unfortunately, there are too many to name them all. For comments on drafts, we are indebted to Rick Abel, Ian Ayres, Steve Bainbridge, Jeff Bauman, Dan Bussel, Devon Carbado, Steve Choi, Jesse Dukemenier, John Goldberg, Prea Gulati, Ken Klee, William Klein, Kim Krawiec, William Landes, Mark Lemley, Robert Rasmussen, Rick Sander, David Skeel, Michael Solimine, Clyde Spillenger, Randall Thomas, Eugene Volokh, William Warren, David Wilkins, and Steve Yeazell. The project began with a suggestion from David Charny and we wish that he could have been here to see it come to fruition. Robert Sockloskie, Lorenzo Alvarado, and Peter Pham provided us with invaluable assistance on the data. Laura Russell provided us with a superb analysis of Posner's opinion writing. Finally, this project would have gone nowhere without the assistance of Linda Carr O'Connor and the wonderful librarians at the UCLA Law School.

B. LOGISTIC REGRESSION 1185
1. The Independent Variables 1186
2. Regression Results 1187
C. SURVEY RESULTS 1189

V. ADDITIONAL DATA 1193
A. INVOCATION DATA 1193
B. STUDENT NOTES 1201

VI. CONCLUSION: GIANTS AND PYGMIES 1205

APPENDIX I: OPINIONS IN CASEBOOKS 1208

APPENDIX II: OLD REGRESSION RESULTS 1212

I. INTRODUCTION

Two goals are thought to be primary in law teaching. The first is to teach students how to "think like lawyers."[1] The second is to convey the substantive law.[2] Since law in the United States is primarily taught through the analysis of appellate cases,[3] the textbooks for law courses tend to be compilations of edited cases. Casebook editors presumably select the cases that will serve as the best tools to achieve these two goals. Every year, there are tens of thousands of appellate opinions issued by hundreds of state and federal judges which cover the same or similar issues. Of these opinions, only a miniscule fraction find their way into the casebooks. Yet, despite the vast numbers of judges issuing opinions, it does not take more than a year in law school before law students start recognizing the names of certain judges.

There are, of course, the Justices on the U.S. Supreme Court, whose names every law student knows. Many of the opinions of these Justices find their way into the casebooks simply because the Supreme Court is the final word on particular issues. For example, any Supreme Court opinion on insider trading is likely to find a spot in every major Securities Law casebook. Supreme Court Justices, therefore, often become casebook stars purely by virtue of their position on the Court.[4] The true casebook "superstars," however, are those judges on the lower courts whose opinions appear so frequently in casebooks that they generate immediate student recognition.

With these lower court opinions, there is genuine competition for entry into the casebooks. There is little doubt that these superstars exist. When asked, most law students can reel off the names of some of the stars; Friendly, Hand, Posner, and Easterbrook are among the judges that students become familiar with within a few months of law school. More importantly, these judges' analytical methods and views of the substantive law—not just their names—become more familiar to students. In fact, the views of these judges dominate and define the legal "canon."[5]

---

1. *See, e.g.*, Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 20 (1996).

2. *See, e.g.*, Stephen J. Shapiro, *Teaching First-Year Civil Procedure and Other Introductory Courses by the Problem Method*, 34 CREIGHTON L. REV. 245, 247 (2000) (discussing professors' teaching goals).

3. There is voluminous literature on the case method and the problems with it. *See generally* Anthony G. Amsterdam, *Clinical Legal Education: A 21st-Century Perspective*, 34 J. LEGAL EDUC. 612 (1984) (describing and questioning the efficacy of the case method that dominates the legal academy); Janeen Kerper, *Creative Problem Solving and the Case Method: A Marvelous Adventure in Which Winnie the Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351, 352 (1998) (same); Michael A. Mogill, *Dialing for Discourse: The Search for the 'Ever After'*, 36 WILLAMETTE L. REV. 1, 3 (2000) (same).

4. For a study on the influence of Supreme Court cases, see generally Beverly Clair Cook, *Measuring the Significance of U.S. Supreme Court Decisions*, 55 J. POL. 1127 (1993).

5. For discussions of the legal canon—the set of core materials or authoritative texts—see

Despite the central role that cases play in the education of lawyers, the academy has paid little attention to the processes by which some judges have their opinions selected more often for inclusion in casebooks and the outcomes of these processes.[6] There has been discussion among scholars about the creation of the legal "canon," that is, the set of cases (and other materials) that are generally accepted as authoritative in any given academic area. That discussion, however, has largely focused on the cases themselves, and not on the judges who write them.[7] Just as cases such as *Palsgraf v. Long Island Railroad*,[8] *United States v. Carroll Towing*,[9] and *Meinhard v. Salmon*,[10] become part of the canon, so too have judges such as Cardozo and Hand become canon definers—people who have had dramatic influence on the creation of the canon. There have been few attempts to answer the most pressing question: Why, of all the contemporary federal circuit court judges, have the opinions of Judge A and not Judge B found their way into the casebooks in the greatest numbers?[11]

A skeptic might retort that the answer is simple. It is the opinions that contain the best articulations of the law and legal thinking (or at least those that serve as the best teaching tools) that are selected. That is probably why students perceive these judges as stars. Even if that were all, it is worth going beyond anecdote to examine which judges' opinions are picked by casebook authors and why they are selected.

An analysis of the casebook market suggests that there is likely to be a "superstar" or disproportionate representation effect. The superstar effect is one that occurs in product markets where there is little or no additional cost

---

J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998); Katherine M. Franke, *Homosexuals, Torts, and Dangerous Things*, 106 YALE L.J. 2661 (1997); Francis J. Mootz, III, *Legal Classics: After Deconstructing the Canon*, 72 N.C. L. REV. 977 (1984); Judith Resnick, *Constructing the Canon*, 2 YALE J.L. & HUMAN. 221 (1984); Symposium, *Do We Have a Legal Canon?*, 43 J. LEGAL EDUC. 1 (1993).

6. A recent exception is an article by Judge Kozinski. Alex Kozinski, *Who Gives a Hoot About Legal Scholarship?*, 37 HOUS. L. REV. 295, 301–02 (2000).

7. *See* John E. Finn & Donald P. Kommers, *A Comparative Constitutional Law Canon*, 17 CONST. COMMENT. 219, 224 (2000) (discussing the canon of constitutional law in the context of cases); Sanford Levinson, *Why the Canon Should Be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 241–45 (2000) (arguing for the inclusion of *Downes v. Bidwell* and the more general saga of American expansionism into the various canons of American constitutional law).

8. 248 N.Y. 339 (1928) (Cardozo, J.).

9. 159 F.2d 169 (2d Cir. 1947) (Hand, J.).

10. 164 N.E. 545 (N.Y. 1928) (Cardozo, J.).

11. One of the few explicit discussions along these lines is by Judge Posner. *See generally* RICHARD A POSNER, CARDOZO: A STUDY IN REPUTATION (1990). Among the other papers that are related, but not directly on point, are Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. 1379 (1995) (comparing Posner and Cardozo opinions in contracts casebooks) and Margaret V. Sachs, *Judge Friendly and the Law of Securities Regulation: The Creation of a Judicial Reputation*, 50 SMU L. REV. 777 (1997) (documenting Judge Friendly's dramatic influence on the law of securities regulation).

attached to using the best product. In such a market, even if the best product is only slightly preferable to the next best product, the majority of consumers will use the best product. To the extent that there are network externalities,[12] the dominance of the best product is exacerbated.[13]

Examples from sports are the easiest; often, one or two people in a sport earn huge incomes and capture the lion's share of attention and endorsement deals. The bulk of the players who are extremely good (some, even extraordinary) get little in comparison to the superstars. The key characteristic of a superstar effect is that the differences in earnings and attention between the superstars and the others far outstrips the differences in talent.[14] Thus, Tiger Woods is a superstar in golf, Shaquille O'Neal is a superstar in basketball, and Sachin Tendulkar is a superstar in cricket.

In the casebook market, the products are individual cases. Imagine that the topic in question is a common one, for example, the standard of review of a district court's findings of fact in a criminal case—a topic on which almost every federal judge is likely to have written an opinion. If the opinions of one judge on that topic are better for casebook purposes than those of all other judges, then the bulk of casebook authors are likely to use the opinions of that judge. Thus, one might have a situation where eighty percent of the casebooks contain an opinion by this judge, even though her opinions are only ten percent "better" (according to casebook authors) than those of the next judge. If the best opinion on fiduciary duties is that by Cardozo, then it costs nothing extra for a casebook editor to use that opinion as opposed to one by some other judge. The point is that in markets where more people using the best product does not result in extra costs, a disproportionate amount of the market share is likely to go to the best product.

Furthermore, there is a network externality at work. As a particular judge's opinions on a topic become widely used, knowledge develops about that judge which law professors (who select casebooks to assign to their captive audiences) can use in discussing that judge's cases. For example,

---

12.

> The advantages generated as networks increase in size are referred to as "network externalities" . . . [and] pose significant barriers to entry by new networks. A new network is unlikely to succeed unless it can demonstrate, both to potential members and to consumers, that it can obtain enough members to achieve the same economies of scale as an incumbent network.

Thomas A. Piraino, *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 898–99 (1999).

13. The primary authority cited to is Sherwin Rosen, *The Economics of Superstars*, 71 AM. ECON. REV. 845 (1981). It is interesting to note that Posner's biography of Cardozo, where Posner looks at Cardozo's influence on the casebooks, also contains a discussion of superstar theory. *See* POSNER, *supra* note 11, at 84 (describing Cardozo's superstardom).

14. *See, e.g.*, Bruno S. Frey, *Superstar Museums: An Economic Analysis*, 22 J. CULTURAL ECON. 113, 117 (1998).

professors can use lore about judges like Cardozo, Hand, and Friendly to liven up their discussions of the cases. Indeed, as a particular case gets used more often, lore develops about that case that makes it easier to teach.

Finally, because students and law professors typically use the same case to learn a particular doctrine, a common basis for discussing a subject develops. For example, if one lawyer is discussing the topic of fiduciary duties owed by partners or joint venturers with another lawyer, it helps to use Cardozo's decision in *Meinhard v. Salmon*[15] since the odds are that the other lawyer read that case in her law school Corporations or Business Associations course.

This article proffers that data on casebooks reveal a similar superstar effect in legal education, particularly in regard to the selection of cases for casebooks and student journal notes. The opinions of a few judges, the superstars, are disproportionately represented while the opinions of others—even those that are close in quality—are ignored. This effect is likely to be most salient with respect to topics and subject areas on which most, if not all, judges have written opinions.

Why care about the superstar effect? Different judges use different methods of analysis to tackle cases, and those methods of analysis are equally valid. The superstar effect results in one method of analysis being disproportionately represented in casebooks and hence dominating the education of law students. This is a problem for at least two reasons. First, the best cases for casebooks are not necessarily the best cases for students to learn legal analysis. Casebook editors choose cases based on what law teachers like best and not necessarily what provides students with the best exposure to modes of analysis. The market for casebooks may be highly competitive, but the market for law students is not. If it is true, as many have suggested, that law professors primarily care about their theoretical scholarship and little about the realities of practice, the cases that find their way into casebooks will be those that serve the law professors' research and writing purposes. Second, for students to be effective lawyers they must learn how to argue with and against lawyers and judges who use different methods of analysis. Privileging one method of analysis is not likely to serve students well. Furthermore, it is important to note that no single method of analysis is best. "Best" is a relative term that varies depending upon the case, the judge, and the facts. The cases used in casebooks are the "best" cases according to casebook authors, whose primary goal is to market the casebook, not to ensure that the casebooks contain diverse methods of analysis.

An example should help illustrate the point. Two judges who emerge as today's casebook superstars are Richard Posner and Frank Easterbrook.[16]

---

15. 164 N.E. at 546.

16. *See, e.g.*, James R. Hackney, Jr., *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory*, 15 L. & HIST. REV. 275, 322 (1997) (discussing the

They are both exponents of what is often referred to as "Chicago School" Law and Economics. This method of analysis is the dominant mode of analyzing cases for no more than a handful of judges. Furthermore, lawyers, law professors, and judges do not all agree that the Chicago School is the best method for analyzing cases.[17] Indeed, there are many that find this method of analysis problematic.[18] Yet, because the particular nature of the market allows for this superstar effect, the Posner and Easterbrook brand of analysis ends up having a disproportionate influence on legal education.

The remainder of this article proceeds in five parts. Section II posits a framework for our hypothesis by outlining (a) the type of opinion that casebook editors are inclined to select for inclusion in casebooks; (b) the characteristics of judges who write such opinions; and (c) why the aforementioned factors favor casebook superstars from one particular academic discipline—the Chicago School of Law and Economics. Section III describes data compiled from a study we conducted on federal appellate court opinions published in casebooks. Specifically, we examined 300 casebooks employed by professors in U.S. law schools over a one-year period, and counted the number of appellate court opinions contained in them. We correlated this information by circuit and prior profession and discuss the significance of these factors. We also address the implications related to differing circuit dockets and explore parallels between a present superstar—Judge Posner—with one from the past—Judge Cardozo. Section IV reports the results of a set of simple statistical analysis of the data. Section V explores the superstar phenomenon through two different perspectives: (a) parallels in invocation numbers, and (b) the influence of superstars as indicated in student-written law journal articles. Section VI concludes with a discussion of implications.

II. THE LIKELY SUPERSTARS

The relevant consumers in the market for casebooks are law professors. They decide which casebooks to assign to their students. Students, for the

---

historical complexity of neoclassical economics and the role that certain individuals, such as Posner, had in revolutionizing tort law theory).

17. *See* James Ryerson, *The Outrageous Pragmatism of Judge Richard Posner*, LINGUA FRANCA, May–June 2000, at 26 (describing the law and economics movement pioneered by Judge Posner and the criticism the movement has received).

18. For examples of articles critical of the type of analysis most closely associated with Posner and Easterbrook, see generally Jules L. Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to the Law*, 1984 ETHICS 649; Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 23 (1989); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1489 (1998); Robin Paul Malloy, *Is Law and Economics Moral? Humanistic Economics and a Classical Liberal Critique of Posner's Economic Analysis*, 24 VAL. U. L. REV. 147 (1990); Frank I. Michelman, *Norms and Normativity in the Economic Theory of the Law*, 62 MINN. L. REV. 1015 (1978); Jeanne L. Schroeder, *Rationality in Law and Economics Scholarship*, 79 OR. L. REV. 147, 158 (2000).

most part, have no choice of casebooks. Professors may consider student views, but these student views will likely be only one of many factors professors consider in choosing a casebook.[19] Whatever those factors are, however, it is likely that casebooks will be geared towards satisfying law professors because of the active market in casebooks.[20] Casebook editors must compete to provide the compilations of cases that best suit the needs of the largest number of law professors. Identifying who the judicial superstars in the casebooks are likely to be, therefore, will be a function of what types of cases best suit the needs of law professors.

A. THE TYPE OF OPINION

What makes for a good teaching case from a professor's perspective? The simple answer is a case that serves as an effective tool to engage students, generate discussion, convey information about the substantive doctrine, and teach students how to think through legal problems.[21] A threshold question in picking a case is whether it has a clear and concise statement of the facts.[22] If the case is clear in describing the parties involved and their dispute, the problem is framed well. Once the problem has been set up, the professor can engage the students in a discussion of how the dispute should be resolved. The court's analysis of the problem serves as a foil for the students and professor to discuss and criticize. In discussing the case, it helps if the court has set out a clear analytical framework for its analysis so that readers can both understand how the court reached its conclusions and work through the implications of the court's method of analysis for a variety of other hypothetical scenarios. A clear and concise set of facts and a clear and simple theoretical framework, therefore, are the basic requirements for a "teaching" case.

The most teachable cases frequently extend beyond the basic requirements. For example, a controversial or innovative method of analysis enlivens class discussion. Irreverence on the part of the judge vis-à-vis conventional methods of analysis helps, as does a judge with a sense of humor. Furthermore, whether a case is a good teaching tool is not solely dependent upon a "correct" analysis or outcome, and sometimes the best

19. On the matter of picking casebooks, see Myron Moskovitz, *On Writing a Casebook*, 23 SEATTLE U. L. REV. 1019, 1023–1027 (2000) (setting forth the factors considered when selecting a casebook); *cf.* Jerome A. Barron, *Capturing the Canon*, 17 CONST. COMMENT. 349, 354 (2000) (describing the process of evolution of a constitutional law casebook and noting the consideration of student reactions).

20. *Compare* Moskovitz, *supra* note 19, at 1021 (noting the tightness of the casebook market), *with* E. Allan Farnsworth, *Casebooks and Scholarship: Confessions of an American Opinion Clipper*, 42 SW. L.J. 903, 904 (1988) (noting the abundance of contracts casebooks).

21. *See* Moskovitz, *supra* note 19, at 1023–27 (discussing the selection of cases for casebooks).

22. *Id.* at 1027.

teaching cases are ones with which the professor does not agree.[23] The key from the professor's perspective is whether the case provides a good basis for discussion.[24] The important point for purposes of our discussion is that the factors that make a case the best for teaching purposes are often different from the factors that determine whether the opinion is the best at providing the correct legal analysis and outcome.

The preceding discussion raises a question: If cases are being used primarily as a basis for discussion, and the method of analysis privileged in the classroom discussion is that of the professor and not of the judge who wrote the opinion, why does it matter if one judge's opinions are overrepresented? After all, if the particular judge's method of analysis represents the viewpoint of a lunatic fringe, won't this be made clear by the professor? The problem with such an assumption is that it places too much faith in the persuasive power of the professor and the attentiveness of the student. The argument may work if the judge is an obscure judge with whom the students are not familiar. However, if the students are familiar with the judge's opinions, and those arguments are clearer and easier to follow than the professor's, the professor begins to look like the one on the lunatic fringe.[25] The lunatic fringe example is extreme, but the point is that the professor and the case provide competing paradigms and the professor's view does not necessarily win. Further, students may receive conflicting viewpoints from their professors regarding the quality of the opinions written by certain judges. A contracts professor may tell her students that Learned Hand was not a very good judge, while a torts professor may suggest the converse. Which viewpoint prevails will likely depend on the relationship the professor has with his or her students.

We have concluded that the "best" opinions are clear, concise, fully theorized, innovative, irreverent, placed in historical context, illustrative, and humorous. These are not the characteristics of the typical appellate court opinion.[26] Given the institutional and workload constraints on appellate judges today, this fact is not surprising. Thus, appellate judges who wish to write opinions that serve as attractive teaching tools must be able to

---

23. *Id.*

24. The icing on the cake is some additional fact about the case (such as an anecdote about the judge or the litigants) that can be added to provide context to the discussion.

25. Plus, with second and third year students, there is the problem that many of these students may not even be in class. *See* Mitu Gulati et al., *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235 (2001).

26. For discussions of opinion styles, see generally WILLIAM DOMNARSKI, IN THE OPINION OF THE COURT (1996); RICHARD A. POSNER, LAW AND LITERATURE (2d ed. 1998); Robert F. Blomquist, *Playing on Words: Judge Richard A. Posner's Appellate Opinions, 1981–82—Ruminations on Sexy Judicial Opinion Style During an Extraordinary Rookie Season*, 68 U. CIN. L. REV. 651 (2000) (discussing Posner's opinions). On opinions in the securities area in particular, see Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does Boundedly): Rules of Thumb in Securities Fraud Opinions*, EMORY L.J. (forthcoming 2002).

overcome these constraints. Who those judges are, in turn, will be a function of both the constraints faced by appellate judges, and the likelihood that any judge or group of judges will be inclined to overcome them.

B. THE JUDGES WHO ARE LIKELY TO WRITE THESE OPINIONS

There are at least two sets of institutional constraints at play with respect to the judges in our sample. First, judges on the federal courts of appeals face an overwhelming workload. Second, judging has institutional norms. As to workload, the overload in the courts has been well documented.[27] The heavy workload makes it difficult for judges to provide well-reasoned and published opinions in every case (or, at least, every case that meets the criteria for a published opinion). As a result, judges delegate much of the opinion writing responsibility to law clerks.[28] The judges themselves become managers and editors.

Law clerks, for the most part, are recent law school graduates. The market for clerkships is highly competitive; federal appellate clerks are typically the top graduates of the elite law schools. However, they are still recent graduates with little or no practice experience.[29] As a result, the clerks are likely to compensate for their lack of experience and judgment with lengthy, careful, and detailed opinions that are filled with citations to support even basic propositions. Clarity and conciseness fall by the wayside. It is unlikely that clerks will infuse opinions with theory, context, humor, and innovation. These are, for the most part, the characteristics that an author gives his or her own writing. The clerks, even in the unlikely event that they have the ability to infuse their own writing with these characteristics, are writing for someone else.[30]

---

27. The Federal Judicial Center reported that in the thirty-year period between 1958 and 1988, the number of civil cases terminated on the merits by the court of appeals increased 577% from an annual figure of 2831 to 19,178. Patricia M. Wald, *Calendars, Collegiality, and Other Intangibles on the Courts of Appeals, in* THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY 171 (Cynthia Harrison & Russell R. Wheeler eds., 1989). In a more recent study of the federal courts of appeals, the Commission on Structural Alternatives for the Federal Courts of Appeals issued its final report for the President and Congress on December 18, 1998. The Commission concluded that the appellate courts are experiencing a "docket growth that has 'transformed them into different judicial entities from what they were at mid-century'" and predicted that the workload demands on judges will only increase in the future. Carl Tobias, *Appellate Study Panel Issues Final Report*, 1 J. APP. PRAC. & PROCESS 409, 410 (Summer 1999) (quoting COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT ix (Dec. 1998)).

28. A number of commentators have noted the widespread practice of delegating much of the task of drafting opinions to law clerks. *See* DOMNARSKI, *supra* note 26, at 42 (citing materials); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 102–19 (1985). A collection of short articles and interviews on the subject can be found at the web site for "The Long Term View" at http://www.mslaw.edu/longterm31.htm (including interviews on the subject with Richard Posner and Alex Kozinski).

29. *See supra* note 26 (discussing opinion styles).

30. For a discussion of how the incentives operating on clerks can influence the types of

The second set of constraints involves the institutional norms of judging. Appellate courts are small insular groups, whose members must work together repeatedly and over a long period of time. In such a setting, it is likely that the group's internal social norms will be an important, if not a primary, constraint on the members of the group.[31] Appellate judging in the federal courts is generally a conservative endeavor. One of the most important institutional norms of this endeavor is that judges defer to precedent.[32] Advances in, and alterations to, the law are typically incremental. The task of judging is not characterized by innovation and the creation of new theoretical frameworks. Indeed, such behavior is disfavored and thought to be inconsistent with the institutional norm of deference to precedent. Even if an individual judge was able to surpass the workload constraints and was inclined to come up with new theories and innovative ways of analyzing problems, such behavior would likely be disapproved of and squashed by the other judges. Hence, the judge either has to be able to alter the court's norms or be willing to incur the costs of disapproval. If the latter costs are significant—as we believe them to be—the casebook stars will be those few who have the ability to redefine court norms. Put differently, these are the judges who play the game so well that they redefine its rules.[33]

The foregoing suggests that the judges who dominate in the casebook world will have relatively unique characteristics. Assuming that the "best" casebook opinions are clear, concise, innovative, and humorous, then the authors of such casebook opinions are likely to delegate less to their law clerks and write a significant portion of their opinions themselves. These judges are likely to be highly adept and skilled at writing. Plus, they are likely to have dominant personalities that can overcome and perhaps even alter the internal social norms of their courts. But even if there are such judges, how inclined are they going to be to overcome the constraints?

The majority of judges are unlikely to compete for entry into the casebooks. Federal appellate judges, for the most part, are former practicing lawyers.[34] Indeed, despite the political nature of the appointments process, it is safe to say that many of these judges are highly skilled lawyers. Highly skilled lawyers, almost by definition, are ones who work well within the existing system, a conservative system defined by deference to precedent.

---

opinions they draft in the securities area, see Bainbridge & Gulati, *supra* note 26.

31. *See* Evan H. Caminker, *Sincere and Strategic Voting on Multimember Courts*, 97 MICH. L. REV. 2297, 2298–2380 (1999) (discussing the importance of norms in the judicial context); Mitu Gulati & Catherine M.A. McCauliff, *On Not Making Law*, 61 LAW & CONTEMP. PROBS. 156, 156–207 (1998) (same).

32. On the importance of the norm of stare decisis, see Jack Knight & Lee Epstein, *The Norm of* Stare Decisis, 40 AM. J. POL. SCI. 1018, 1033 (1996) (buttressing this assertion).

33. *See generally* ALAN C. HUTCHINSON, IT'S ALL IN THE GAME: A NONFOUNDATIONALIST ACCOUNT OF LAW AND ADJUDICATION (2000) (using the analogy to a game to describe the judging process).

34. *See infra* Table II.

These lawyers are unlikely to value creative, irreverent, heavily theorized, and innovative opinion writing. There are, however, a small group of judges who are former academics (or perhaps are lawyers who retained an academic inclination). For them, creativity, innovativeness, and the willingness to challenge existing paradigms are valued traits. These are also probably the only judges who care enough about the academic audience to try to write the type of opinions that would appeal to them.[35] Consequently, there is likely to be only a small group of judges who will write the kinds of opinions that might make them superstars in the casebook world.

C. THE ACADEMIC DISCIPLINE LIKELY TO DOMINATE

The final question to ask is: Are judges from certain academic disciplines more likely to dominate the casebooks than others? In particular, is the "Chicago School" of Law and Economics likely to dominate?[36]

Law and Economics, in its Chicago School form, has a number of characteristics that predict its dominance in the casebook world.[37] The field is characterized by the use of simple, clear, and concise models to describe complex phenomena.[38] The models tend to be applicable to a wide variety of hypothetical situations and testable with empirical evidence.[39] Moreover,

---

35. In a speech given at the University of Houston Law Center, Judge Kozinski expressed his opinion that casebooks play a key role in the development of the law and admitted that he thinks casebooks are so important that "once in a while, I write an opinion precisely for the purpose of getting into one." Kozinski, *supra* note 6, at 296.

36. We cannot claim that this hypothesis arose entirely independently of the data. Prior to embarking on this study, our own law school experiences had suggested to us that there were a number of Posner and Easterbrook opinions in the casebooks. We were aware that Posner and Easterbrook were two of the leading lights of the Chicago School of Law and Economics. What we did not know at the time was whether our initial impressions were a function of our idiosyncratic backgrounds (such as the law schools that we attended or the types of classes and teachers we gravitated towards) or whether there was a generalizable phenomenon at work.

37. Although the Chicago School is the dominant school of Law and Economics, it is by no means the only one. *See, e.g.*, Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 994 (1990). Indeed, it has been suggested that there might even be a "new" Chicago School. *See* Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 661–91 (1998) (discussing the differences between the Old Chicago School and the New Chicago School; the latter taking an approach to regulation that focuses on regulators other than the law).

38. *See* John C. Moorhouse et al., *Law & Economics and Tort Law: A Survey of Scholarly Opinion*, 62 ALB. L. REV. 667, 695 (1998) (noting that the "intellectual strength of law and economics, and of economics more generally, is at least in part attributable to the ability to use a startlingly simple model of how the world works to provide great explanatory power").

39. The appeal of the overly simple models used by the adherents of the Chicago School has been noted by a number of critics of the discipline. *See, e.g.*, Martha A. Fineman, *A Legal (and Otherwise) Realist Response to "Sex as Contract,"* 4 COLUM. J. GENDER & L. 128, 142 (1994); Lawrence E. Mitchell, *The Cult of Efficiency*, 71 TEX. L. REV. 217, 224 (1992) (reviewing FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991)). Among the prominent critics of Law and Economics is Anthony Kronman, who has written prominent articles in the field. Kronman explains that part of the danger with Law and

the assumptions are generally clear enough that they can be discussed and criticized. For law professors, whether or not inclined to support or critique the analysis, these opinions make wonderful teaching tools. This contrasts with the opinions that are likely to be written by adherents of disciplines such as Philosophy, Critical Legal Studies, Postmodern Theory, Humanistic Theory, Sociology, Anthropology, and Behavioral Theory, for example. Relative to the Chicago School, these fields either don't lend themselves to modeling, or their models are too complex and difficult to handle.

The nature of the casebook market creates conditions likely to produce a superstar effect where the opinions of a few judges disproportionately dominate the discourse. Based on the institutional characteristics of both legal academia and the federal appellate courts, further predictions include:

(i) the characteristics of the opinions most likely to find their way into the casebooks will include clarity, conciseness, innovative analysis, a theoretical framework, historical context, irreverence, and humor;

(ii) the judges most likely to write these opinions will be those who (a) write a significant portion of their opinions themselves, (b) are able to alter the social norms of their courts enough to write such opinions, and (c) have an academic background (or strong academic inclinations);

(iii) the academic judges most likely to emerge as superstars will be those whose specific academic disciplines lend themselves to providing the teaching tools that professors prefer the most.

III. CASEBOOK DATA

A. DATA COLLECTION PROCEDURES

The primary data consist of the cases in 300 casebooks that were in use in U.S. law schools from June 1999 to May 2000.[40] We counted the number of opinions by federal circuit court judges who were active during the period from August 1995 to August 1997 in the 300 casebooks.[41] There is a time

---

Economics is that it purports to be scientific and to have the ability to explain everything on the basis of one or two overarching principles. *See* ANTHONY T. KRONMAN, THE LOST LAWYER 226–30, 245–48, 261–63 (1993). That danger, he says, is particularly salient with respect to students. *See id*; *see also* Transcript, *The Second Drinker Forum for Excellence in the Law*, 42 WAYNE L. REV. 115, 150 (1995). For a response to Kronman's criticisms of Law and Economics, see Thomas S. Ulen, *The Prudence of Law and Economics: Why More Economics Is Better*, 26 CUMB. L. REV. 773, 774 (1995–96). As an aside, it is worth noting that Kronman is also critical of Critical Legal Studies on similar grounds. *Id.* at 776.

40. A list of the casebooks studied is on file with the *Iowa Law Review*.

41. The sample of judges is restricted to active judges in order to compare judges within the same circuit in terms of the number of cases that they see. All active judges within the same circuit see roughly the same number of cases. With senior judges, however, the number of cases that a judge sees can vary significantly (usually depending on the load that the particular judge

difference between the period for which we looked at casebooks and the period for which we calculated our sample of active judges, because it generally takes at least twelve to eighteen months after publication for an opinion to find its way into the casebooks. An opinion is unlikely to attract attention twenty-four months after publication. To allow for the possibility of piggybacking (where casebook editors notice that another casebook has used a particular opinion with success and decide to include it also), we allowed for a thirty-three month gap between the end of the period for the judge sample and the end of the period for the casebook sample.

The sample of casebooks included as many casebooks in use as possible during the period from June 1999 to May 2000. We obtained lists of existing casebooks from both major and minor publishers and attempted to track down as many of the books as possible.[42] While counting cases, we looked only at cases for which the editors used at least a page from the opinion. Short note cases, therefore, were not counted, because our goal was to look beyond the holdings to whether particular judges dominated the casebooks on account of their styles and methods of discussion and analysis.

Finally, for a case published in multiple casebooks, we counted it as many times as it appeared in the casebooks (except with revised editions). This was done because the goal was to obtain a measure of judicial influence and dominance. If a case was in three casebooks, it possessed three times more influence than if it was only in one casebook. A more precise measure of influence could have been obtained by weighing the casebooks according to the number of students who were using the book.[43] Unfortunately, we were unable to obtain use numbers on a significant fraction of the casebooks in the sample.

B. DESCRIBING THE DATA

Column Three of Table I contains the total number of cases in casebooks for each of the 133 judges. Column Two of Table I adjusts the numbers in Column Three by the number of years that the particular judge has been on the bench to identify a mean for cases published in casebooks

---

decides to undertake). Readers who have a high level of familiarity with the federal bench may recognize that there are a couple of judges who were active during the period that we identify who are not included in the sample, specifically, Judge M.B. Briscoe (10th Circuit). The exclusion of these judges was a result of some minor errors in the data that we identified at a late stage of the editorial process. These data points were not outliers, however, and do not alter the results.

42. Where we had examined casebooks early in our sample period and supplements were later issued, we corrected the earlier data by adding the new cases.

43. If casebooks containing a large number of Judge A's opinions are not used in large quantities by students in law schools across the country, then Judge A's influence is limited. Judge A's opinions may predominate in the casebook, but few students would be exposed to Judge A's writing style and method of analysis. This limits Judge A's potential to affect law students' method of analysis and approach to legal problems.

per year by each judge. The following features of the data stand out. First, the data is skewed towards the low end. Most judges in the sample have no more than a handful of opinions in casebooks. At one extreme, ten judges have zero opinions published in casebooks. Including those judges, close to 45% have fewer than five opinions, and approximately 44% have more than five, but fewer than ten opinions. The striking numbers, however, are at the high end of the distribution. There, Judges Posner, Easterbrook, and Winter have 118, 56, and 35 opinions, respectively.

The differential in terms of total influence on the casebooks between Posner and almost all the other judges is staggering. Posner has more than ten times the number of opinions in casebooks than almost 90% of the judges in the sample. Since it is unlikely that Posner's opinions are ten times better than those of 90% of the judiciary, this suggests a superstar effect.[44] Second, the data on totals is skewed by circuit as well. At the low end, the Eleventh, Tenth, and First Circuits have 18, 20, and 24 opinions, respectively. At the high end, the Seventh Circuit has 249 opinions. The only circuit that has anything close to the Seventh Circuit's numbers is the Ninth Circuit with 133 opinions. The rest of the circuits have numbers in roughly the 45 to 75 opinion range. The Seventh Circuit's high numbers are, of course, largely driven by the numbers for Posner and Easterbrook, but a number of the other judges on that circuit have numbers that would be high on any other circuit (specifically, Judges Coffey, Cummings, Flaum, and Wood). The disparity in terms of circuit data suggests at least the possibility that there might be different norms or cultures of opinion writing that are at play in the different circuits.[45]

These discrepancies diminish somewhat when one corrects the numbers for years on the bench and number of judges on a circuit. On the first skew relating to individual judge numbers, the overall skew diminishes and so does the distance between Posner, Easterbrook, Winter, and the others. Nevertheless, the gap between these three judges and the majority of others remains large. In terms of opinions entering casebooks per year, approximately 30% of the judges publish 0.25 opinions or fewer. They publish, on average, less than one opinion in a single casebook every four years. Another 30% are in the 0.25 to 0.5 range; they publish an opinion in a casebook every two to four years. Another 22% are in the 0.5 to 1.0 range. At the high end, 16% are in the 1.0 and above range; they have at least one opinion entering the casebooks per year. Finally, at the extreme high end, the numbers for Posner, Easterbrook, and Winter, are at 6.94, 4.92, and 2.13, respectively. In other words, Posner has almost seven opinions enter

44. The numbers for Easterbrook and Winter also look extraordinarily high when Posner's publications are factored out.

45. For example, the Third Circuit made extensive use of the without-comment disposition from 1989 to 1996. Gulati & McCauliff, *supra* note 31, at 158 (discussing the differences in the norms that exist among circuits' publication practices).

the casebooks every year, and Easterbrook contributes almost five a year. Easterbrook and Posner have more opinions entering casebooks in a single year than do most judges for their entire careers. In sum, the adjustment for years on the bench reduces, but still leaves the superstar hypothesis intact.

Similarly, the average number of opinions published per year by all judges in the circuit leaves the social norm/culture differential hypothesis (for circuits) intact. The one significant change is that the First Circuit (the smallest circuit) moves from the bottom of the distribution to the middle. At the low end are the Tenth and Eleventh Circuits, with averages of 0.17 and 0.15, respectively. The First, Third, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits are in the middle with averages in the 0.28 to 0.66 range. At the high end are the D.C. Circuit and the Second Circuit, each with an average of 0.76. The Seventh Circuit is the outlier with an average of 1.82. Even if Easterbrook and Posner were removed from the average total number of opinions published in casebooks per year, the Seventh Circuit's average would still be the highest at 0.80 per year, supporting the hypothesis that the Seventh Circuit may have an opinion-writing culture which encourages publication in casebooks. It is also noteworthy that while Winter's 2.13 remains high (the fourth highest in the sample), the third spot overall in terms of per year entry into the casebooks is taken by Diane Wood (at 3.00), another Seventh Circuit judge (although a relatively recent appointment).

TABLE I
OPINIONS IN CASEBOOKS

JUDGE	AVERAGE PER YEAR	OPINIONS IN CASEBOOKS
D.C. Cir.		
H. Edwards	1.62	14
D. Ginsburg	0.54	7
K. Henderson	1.14	6
A.R. Randolph	0.57	4
J. Rogers	0.33	3
D. Sentelle	0.4	5
L. Silberman	1	12
D. Tatel	0.66	2
P. Wald	0.77	16
S. Williams	0.63	8
TOTAL	7.66	77
AVERAGE	0.77	7.7
1st Cir.		
M. Boudin	0.8	4
S. Lynch	1.5	4
B. Selya	0.45	8
N. Stahl	0.2	1
J. Torruella	0.38	7
TOTAL	3.33	24
AVERAGE	0.67	4.8
2d Cir.		
J. Cabranes	0.33	1
G. Calabresi	0.33	2
D. Jacobs	0.66	3
P. Leval	0.75	3
A. Kearse	0.88	17
J. McLaughlin	1.14	8
F. Parker	0	0
J. Walker	0.63	6
R. Winter	2.13	35
TOTAL	6.85	75
AVERAGE	0.76	8.33
3d Cir.		
S. Alito	0.57	4

JUDGE	AVERAGE PER YEAR	OPINIONS IN CASEBOOKS
E. Becker	1	18
R. Cowen	0.7	8
M. Greenberg	0.3	3
T. Mckee	0	0
T. Lewis	0.4	3
C. Mansmann	0	1
R. Nygaard	0	0
J. Roth	0.5	4
A. Scirica	0.3	3
D. Sloviter	0.44	8
W. Stapleton	0.66	9
TOTAL	4.87	61
AVERAGE	0.41	5.08
4th Cir.		
S. Ervin	0.41	8
C. Hamilton	0.16	1
K. Hall	0.19	4
J.M. Luttig	0.16	1
M.B. Michael	0.5	2
D. Motz	0.67	2
F. Murnaghan	0.11	2
P. Niemeyer	0.71	6
D. Russell	0.09	3
H.E. Widener	0.4	10
K. Williams	0.8	4
W. Wilkins	0.27	3
J.H. Wilkinson	0.42	7
TOTAL	4.89	53
AVERAGE	0.38	4.08
5th Cir.		
R. Barksdale	0	1
F. Benavides	0	0
W.E. Davis	0.29	5
H. DeMoss	0	0
J. Duhe	0.11	2
E. Garza	0.83	5
P. Higginbotham	0.6	9
E.G. Jolly	0.53	10
E. Jones	0.08	1
C. King	0.17	4

JUDGE	AVERAGE PER YEAR	OPINIONS IN CASEBOOKS
R. Parker	0	0
H. Politz	0.11	2
J. Smith	0.9	11
C. Stewart	0.33	1
J. Wiener	0.29	2
TOTAL	4.24	53
AVERAGE	0.28	3.53
6th Cir.		
A. Batchelder	0.33	2
D. Boggs	0.55	6
M.C. Daughtery	0.5	2
C. Kennedy	0.28	8
B. Martin	0.33	7
G. Merritt	0.6	12
K.N. Moore	1.5	3
D. Nelson	0.08	1
A. Norris	0.09	2
J. Ryan	0.25	3
E. Siler	0.17	1
R. Suhrheinrich	0	0
TOTAL	4.68	47
AVERAGE	0.39	3.92
7th Cir.		
J. Coffey	0.6	11
W. Cummings	0.61	22
F. Easterbrook	4.92	56
J. Flaum	0.93	15
M. Kanne	0.3	6
D. Manion	0.27	3
R. Posner	6.94	118
K. Ripple	0.5	7
I. Rovner	0.2	2
D. Wood	3	9
TOTAL	18.27	249
AVERAGE	1.83	24.9
8th Cir.		
R. Arnold	0.53	11
M. Arnold	0.4	2
C.A. Beam	0.4	4

JUDGE	AVERAGE PER YEAR	OPINIONS IN CASEBOOKS
P. Bowman	0.43	7
G. Fagg	0.06	1
D. Hansen	0.5	3
J. Loken	0.29	2
T. McMillian	0.42	8
D. Murphy	1.33	4
R. Wollman	0.5	8
TOTAL	4.86	50
AVERAGE	0.49	5
9th Cir.		
J. Browning	0.39	15
M. Brunetti	0.33	4
F. Fernandez	0.25	3
B. Fletcher	0.5	11
C.H. Hall	0.54	7
M. Hawkins	0.67	2
P. Hug	0.3	6
A. Kleinfeld	0.67	4
A. Kozinski	0.95	15
T.G. Nelson	1.43	10
H. Pregerson	0.5	9
D. O'Scannlain	0.45	6
S. Reinhardt	0.88	15
P.A. Rymer	0.13	1
M. Schroeder	0.33	7
S. Trott	0.56	6
D. Thompson	0.92	12
TOTAL	9.8	133
AVERAGE	0.58	7.82
10th Cir.		
S. Anderson	0.25	4
B. Baldock	0.08	1
W. Brorby	0.44	5
D. Ebel	0	0
R. Henry	0.33	1
P. Kelly	0.4	2
C. Lucero	0	0
J. Porfilio	0	0
S. Seymour	0.28	6
D. Tacha	0.08	1

JUDGE	AVERAGE PER YEAR	OPINIONS IN CASEBOOKS
TOTAL	1.86	20
AVERAGE	0.17	1.82
11th Cir.		
R.L. Anderson	0.22	6
R. Barkett	0.33	1
S. Birch	0.14	1
S. Black	0	0
E. Carnes	0.2	1
E. Cox	0.11	2
J. Dubina	0.14	1
J.L. Edmondson	0.18	2
J. Hatchett	0	0
G. Tjoflat	0.18	4
TOTAL	1.5	18
AVERAGE	0.15	1.8

C. ACADEMIC BACKGROUNDS

Table II lists the judges by total number of opinions in casebooks and their primary prior professions.[46] This data suggests a relationship between academia and casebook entry rate. The correlation is best indicated by the judges with the highest casebook entry rates. As Table II(a) sets out, there are seven judges in the sample who have annual casebook entry rates of 1.5 or more. Of these seven judges, only one, Sandra Lynch, does not have academia as her primary prior profession.[47] Overall, fewer than 10% of the judges in our sample were previously employed primarily as academics.[48]

This correlation between a background in academia and success in entering the casebooks (at least at the top end) makes sense given that former academics are likely to be most attuned to (a) the factors that will attract the attention of casebook editors, and (b) tailoring their opinions to ensure attention from the academic audience.

46. By "primary" we mean the profession held before being appointed to the circuit.

47. Sandra Lynch was a partner at Foley, Hoag & Eliot before being appointed to the bench in 1995, ALMANAC OF THE FEDERAL JUDICIARY (2001).

48. 13 out of 133.

TABLE II
OPINIONS PUBLISHED IN CASEBOOKS AND
PRIMARY PRIOR PROFESSIONS OF JUDGES

JUDGE	PRIMARY PRIOR PROFESSION	OPINIONS IN CASEBOOKS
D.C. Cir.		
H. Edwards	Professor	14
D. Ginsburg	Asst. Atty. General/DOJ	7
K. Henderson	Dist. Judge	6
A.R. Randolph	Private Practice	4
J. Rogers	Dist. Judge	3
D. Sentelle	Dist. Judge	5
L. Silberman	Private Practice	12
D. Tatel	Private Practice	2
P. Wald	Asst. Atty. General/DOJ	16
S. Williams	Professor	8
1st Cir.		
M. Boudin	Dist. Judge	4
S. Lynch	Private Practice	4
B. Selya	Dist. Judge	8
N. Stahl	Private Practice	1
J. Torruella	Dist. Judge	7
2d Cir.		
J. Cabranes	Dist. Judge	1
G. Calabresi	Professor	2
D. Jacobs	Private Practice	3
P. Leval	Dist. Judge	3
A. Kearse	Private Practice	17
J. McLaughlin	Dist. Judge	8
F. Parker	Dist. Judge	0
J. Walker	Dist. Judge	6
R. Winter	Professor	35
3d Cir.		
S. Alito	U.S. Atty.	4
E. Becker	Dist. Judge	18
R. Cowen	Magistrate/Dist. Judge	8
M. Greenberg	Judge	3
T. Mckee	Judge	0

JUDGE	PRIMARY PRIOR PROFESSION	OPINIONS IN CASEBOOKS
T. Lewis	Asst. U.S. Atty.	3
C. Mansmann	Professor	1
R. Nygaard	Judge	0
J. Roth	Dist. Judge	4
A. Scirica	Dist. Judge	3
D. Sloviter	Professor	8
W. Stapleton	Dist. Judge	9
4th Cir.		
S. Ervin	Judge	8
C. Hamilton	Private Practice	1
K. Hall	Judge/Dist. Judge	4
J.M. Luttig	Legal Counsel/DOJ	1
M.B. Michael	Private Practice	2
D. Motz	Asst. Atty. General/Maryland	2
F. Murnaghan	Private Practice	2
P. Niemeyer	Private Practice	6
D. Russell	Dist. Judge	3
H.E. Widener	Private Practice	10
K. Williams	Private Practice	4
W. Wilkins	Dist. Judge	3
J.H. Wilkinson	Professor	7
5th Cir.		
R. Barksdale	Private Practice	1
F. Benavides	Private Practice	0
W.E. Davis	Private Practice	5
H. DeMoss	Private Practice	0
J. Duhe	Private Practice	2
E. Garza	Private Practice	5
P. Higginbotham	Dist. Judge	9
E.G. Jolly	Private Practice	10
E. Jones	Private Practice	1
C. King	Private Practice	4
R. Parker	Private Practice	0
H. Politz	Private Practice	2
J. Smith	Private Practice	11
C. Stewart	Dist. Judge	1
J. Wiener	Private Practice	2
6th Cir.		
A. Batchelder	Dist. Judge	2

JUDGE	PRIMARY PRIOR PROFESSION	OPINIONS IN CASEBOOKS
D. Boggs	Atty. for Various Gov't Dep'ts	6
M.C. Daughtery	Judge/Justice	2
C. Kennedy	Judge	8
B. Martin	U.S. Atty./Judge	7
G. Merritt	City Atty./ U.S. Dist. Atty	12
K.N. Moore	Professor	3
D. Nelson	Private Practice	1
A. Norris	Private Practice	2
J. Ryan	Judge/Justice	3
E. Siler	Dist. Judge	1
R. Suhrheinrich	Private Practice	0
7th Cir.		
J. Coffey	Judge/Justice	11
W. Cummings	U.S. Atty. Gen./Solicitor Gen.	22
F. Easterbrook	Professor	56
J. Flaum	Asst. State Atty./Atty. Gen./U.S. Atty.	15
M. Kanne	Judge/Dist. Judge	6
D. Manion	Private Practice	3
R. Posner	Professor	118
K. Ripple	Professor	7
I. Rovner	Dist. Judge	2
D. Wood	Professor	9
8th Cir.		
R. Arnold	Private Practice	11
M. Arnold	Professor/Dist. Judge	2
C.A. Beam	Private Practice	4
P. Bowman	Professor	7
G. Fagg	Judge	1
D. Hansen	Judge/Dist. Judge	3
J. Loken	Private Practice	2
T. McMillian	Judge	8
D. Murphy	Judge/Dist. Judge	4
R. Wollman	Judge/Dist. Judge	8
9th Cir.		
J. Browning	Atty./DOJ	15
M. Brunetti	Private Practice	4
F. Fernandez	Private Practice	3
B. Fletcher	Private Practice	11

JUDGE	PRIMARY PRIOR PROFESSION	OPINIONS IN CASEBOOKS
C.H. Hall	Judge/Dist. Judge	7
M. Hawkins	Private Practice	2
P. Hug	Private Practice	6
A. Kleinfeld	Private Practice	4
A. Kozinski	Atty. for Various Gov't Dep'ts/ Judge	15
T.G. Nelson	Private Practice	10
H. Pregerson	Judge/Dist. Judge	9
D. O'Scannlain	Private Practice	6
S. Reinhardt	Private Practice	15
P.A. Rymer	Private Practice	1
M. Schroeder	Judge	7
S. Trott	D.A./U.S. Atty./Asst. Atty. Gen.-DOJ	6
D. Thompson	Private Practice	12
10th Cir.		
S. Anderson	Private Practice	4
B. Baldock	Private Practice	1
W. Brorby	Private Practice	5
D. Ebel	Private Practice	0
R. Henry	Atty. Gen./State Rep. of Oklahoma	1
P. Kelly	Private Practice	2
C. Lucero	Private Practice	0
J. Porfilio	Judge/Dist. Judge	0
S. Seymour	Private Practice	6
D. Tacha	Professor	1
11th Cir.		
R.L. Anderson	Private Practice	6
R. Barkett	Judge/Justice	1
S. Birch	Private Practice	1
S. Black	Judge/Dist. Judge	0
E. Carnes	Asst. Atty. Gen./Alabama	1
E. Cox	Private Practice	2
J. Dubina	Magistrate/Dist. Judge	1
J.L. Edmondson	Private Practice	2
J. Hatchett	Magistrate/Justice	0
G. Tjoflat	Judge/Dist. Judge	4

TABLE II(a)

Name	Casebook Entry Rate	Primary Prior Profession
R. Posner (7th Cir.)	6.94	Professor
F. Easterbrook (7th Cir.)	4.92	Professor
D. Wood (7th Cir.)	3.00	Professor
R. Winter (2d Cir.)	2.13	Professor
H. Edwards (D.C. Cir.)	1.62	Professor
K. Moore (8th Cir.)	1.50	Professor
S. Lynch (1st Cir.)	1.50	Private Practice

The judges at the top of Table II(a) share a number of characteristics. The top three on the list, in addition to being former academics on the Seventh Circuit, are former University of Chicago professors. The two most dominant judges, Posner and Easterbrook, are among the most prominent proponents of the Chicago School of Law and Economics. This phenomenon raises the possibility that casebook editors find opinions influenced by the Chicago School particularly appealing. Wood, the next on the list, was a former Antitrust professor at the University of Chicago. While Wood, a Clinton appointee, is not considered by most to be a Chicago School adherent in the Posner and Easterbrook sense, her presence at the University of Chicago suggests that she was influenced by the Chicago School.[49] Winter, the fourth person on the list, is a former Yale academic. Despite his Yale background, many commentators consider Winter to be close in philosophy to the Chicago brand of Law and Economics espoused by Easterbrook and Posner.[50]

As noted in Section I, the hypothesis that the Chicago School's approach to economics, if used effectively, is likely to dominate the casebook market, has some plausibility. Proponents of this field tend to use simple, clear, and concise models. The models are easy to use in analyzing a variety of otherwise complex problems. On the flip side, the models are often

49. *See* John Flynn Rooney, *New 7th Circuit Judge Seen as "More Liberal Member,"* CHI. DAILY L. BULL., July 3, 1995, at 1 (comparing Wood's views to those of Posner and Easterbrook); *cf. Top Tier Antitrust Staff Takes Shape*, D.O.J. ALERT, August 16, 1993, at 6 (describing Wood as not of the "Chicago School," but as accepting many of its tenets).

50. *See, e.g.*, Demetrios G. Kaouris, *Is Delaware Still a Haven for Incorporation?*, 20 DEL. J. CORP. L. 965, 967 n.14 (1995) (referring to Posner, Easterbrook, and Winter as part of the "free marketeers" or "Chicago School"); William E. Kovacic, *Judicial Appointments and the Future of Antitrust Policy*, ANTITRUST, Summer 1993, at 8, 9 (referring to Easterbrook, Posner, and Winter as conservative Law and Economics scholars). What Posner, Easterbrook, and Winter also have in common is that they were all Reagan appointees. James G. Wilson, *Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook, and Winter*, 40 U. MIAMI L. REV. 1171, 1172 (1986).

dramatic oversimplifications of reality.[51] They are often based on implausible assumptions about human behavior and market dynamics.[52] The key argument for explaining this dominance is the appeal of the Chicago School (especially as a teaching tool for students) in providing clear and easy to understand models that produce answers. In contrast to the Chicago School, the competing fields—Critical Legal Studies, Postmodern Theory, Feminist Theory, and even the other versions of Law and Economics, for example—tend to be complex, less persuasive, and do not lend themselves easily to the generation of answers to legal problems.

The data, however, reveal discrepancies in the hypothesis. First, to the extent the hypothesis is that an academic background is likely to predict success in entering the casebooks,[53] there is the question of the numbers on Judges Guido Calabresi, Morris Arnold, and Stephen Williams.[54] All three were prominent and well-regarded academics.[55] Yet, as Table II(b) demonstrates, their casebook entry numbers are on the low side.

TABLE II(b)

NAME	CASEBOOK ENTRY RATE	PRIMARY PRIOR PROFESSION
G. Calabresi (2d Cir.)	0.33	Professor
M. Arnold (8th Cir.)	0.40	Professor
S. Williams (D.C. Cir.)	0.63	Professor

Moreover, Calabresi and Williams are proponents of the Law and Economics field.[56] Indeed, Calabresi's reputation in academia rivals that of Posner.[57] One possible explanation is that the Yale/progressive brand of Law

51. *See supra* notes 38–39.

52. *Id.*

53. Here, we presume that a stronger academic background predicts more success.

54. Examples of articles by Judges Arnold and Williams include Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in a Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); Morris S. Arnold, *Fourteenth-Century Promises*, 35 CAMBRIDGE L.J. 31 (1976); Stephen F. Williams, *Deregulatory Takings and Breach of the Regulatory Contract: A Comment*, 71 N.Y.U. L. REV. 1000 (1996); Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3 (1983).

55. Guido Calabresi was a professor and dean at the Yale Law School; Morris Arnold was a professor and dean at the University of Pennsylvania School of Law; Stephen Williams was a professor at the University of Colorado School of Law. 2 ALMANAC OF THE FEDERAL JUDICIARY (2001).

56. *See* Ulen, *supra* note 39, at 800–10 (including Calabresi and Williams in the list of current appellate judges who are leading proponents of Law and Economics).

57. *See* Francesco Parisi, *Review Essay: Palgrave on Law and Economics*, 20 INT'L REV. L. & ECON. 395, 396–98 (2000) (noting that Calabresi and Posner are among the ten academics—

and Economics analysis used by Calabresi is significantly different from the Chicago/conservative version espoused by Posner and Easterbrook.[58] Our barefoot empiricism in terms of looking at opinions and talking to casebook editors suggests that at least part of the reason for the low Calabresi numbers is that his opinions (and academic articles) are high on the scale of nuance and complexity and low on the scale of easy applicability. In contrast to the opinions written by Posner and Easterbrook, the Calabresi opinions do not appear to serve as attractive teaching tools.[59]

It is not clear that Calabresi's lack of success in the casebooks can be explained by his brand of Law and Economics. After all, Williams' brand of Law and Economics is closer to that of Posner and Easterbrook, but his casebook entry rate also does not come close to theirs. It may be, therefore, that driving the success of Posner and Easterbrook's opinions is not only their brand of Law and Economics, but also the skill with which they use it—the fact that they are skilled writers whose opinions rank among the highest on the scales of criteria such as humor, irreverence, and originality.

An additional factor that makes us reluctant to view these results as more than mildly suggestive is the difference in academic stature among those on the list. Posner and Easterbrook are world-renowned academics. Of the others, only Calabresi compares in stature (and he has not been on the bench long). It is difficult to conclude, therefore, that it is the use of the Chicago School's Law and Economics that has led to the Posner-Easterbrook domination in the casebooks. Instead, their domination might be explained by the fact that they are the only academic superstars playing in the judicial arena. To properly test the hypothesis that their brand of Law and

---

four legal scholars and six economists—who are profiled in *The New Palgrave* as "founding fathers" of Law and Economics).

58. *See, e.g.*, George L. Priest, *Henry Manne and the Market Measure of Intellectual Influence*, 50 CASE W. RES. L. REV. 325, 328–30 (1999) (describing the decade-long Calabresi-Posner debate over the importance of efficiency as a value and characterizing the debate as one between the "Chicagoan" and the "Yalie" or alternatively that between the "conservative" and the "ultra liberal"); *cf.* Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 174 n.282 (2000) (setting out a rough political scale and placing Posner, along with others such as Fried and Epstein, to the right of Fuller and placing Calabresi, along with others such as Jon Hanson and Christine Jolls, to the left of Fuller); Gerald B. Wetlaufer, *Systems of Belief in American Law: A View from Century's End*, 49 AM. U. L. REV. 1, 37–38 (1999) (dividing the schools of Law and Economics into "Chicago" (conservative, reductionist, and including Posner and Easterbrook and strong proponents) and "Not so Chicago" (progressive, not so reductionist, and including Calabresi, Rose-Ackerman, Williamson, and Hovenkamp)). For a recent article that, among other things, discusses and contrasts a Posner opinion on the ADA with one by Calabresi, see Jeffrey O. Cooper, *Interpreting the Americans with Disabilities Act: The Trials of Textualism and the Practical Limits of Practical Reason*, 74 TUL. L. REV. 1207 (2000).

59. It should be noted, however, that at least a couple of the casebook editors with whom we spoke about this question were of the view that Calabresi's relatively low casebook numbers (at least in comparison to Posner and Easterbrook) were due to his relatively recent appointment.

Economics explains their casebook domination, we would need to compare them against superstars of comparable stature from other academic traditions who are also judges. The fact that there are only a few counterweights of comparable stature in the judiciary, such as Duncan Kennedy, Starold KohKimberle Crenshaw, Catherine McKinnon, and Martha Fineman, is a point we return to in the conclusion.

D. CIRCUIT PUBLICATION RATES

It is plausible to expect that circuit publication rates would be positively correlated to casebook entry rates.[60] Other things being equal, publishing more opinions should result in more opportunities to enter the casebooks. But that assumes the criteria for publication are uniform across the circuits.[61] An alternate and equally plausible view might be that the low publishing circuits are spending more of their resources crafting a small number of high quality opinions, as opposed to a large number of mediocre ones. In other words, this second view would posit a negative correlation between casebook entry rates and publication rates. A review of the data, however, reveals neither correlation.

At first glance, it appears that the first hypothesis (the positive correlation) is correct. Table III juxtaposes the casebook data with that on individual judge opinion publication numbers measured over the August 1995 to August 1997 period. The Seventh Circuit dominates once again. Among the top four publishers are Posner (first) and Easterbrook (fourth). Other things equal, that makes sense, because a higher volume of opinions creates a higher likelihood of having opinions that will attract the attention of casebook editors. At the other end, judges on the Eleventh Circuit have publication rates and casebook entry rates that are among the lowest.

Further examination, however, suggests that the link between publication rates and casebook entry is, at best, weak. The other circuits with high opinion publication numbers are the Eighth Circuit and the First Circuit, neither of which has high casebook entry numbers. For example, Judge Wollman on the Eighth Circuit has the second highest publication rate in the country, but a casebook entry rate of only 0.50 per year. A similar observation holds for Arlen Beam, Morris Arnold, James Loken, and Pasco Bowman, who all have opinion publication numbers that are among the highest in the sample (120, 109, 117, 101), but casebook entry rates that are at the low end (0.40, 0.40, 0.29, 0.43).

---

60. In discussing publication rates, we refer to published decisions by the courts and do not consider the Westlaw or LEXIS practice of "publishing" unpublished opinions.

61. *See* Gulati & McCauliff, *supra* note 31, at 205 (listing some examples of different publication norms that have developed across the circuits).

TABLE III
TOTAL NUMBER OF OPINIONS AND OPINIONS PUBLISHED IN CASEBOOKS

JUDGE	TOTAL OPINIONS (1995–1997)	OPINIONS IN CASEBOOKS
D.C. Cir.		
H. Edwards	60	14
D. Ginsburg	70	7
K. Henderson	59	6
A.R. Randolph	52	4
J. Rogers	60	3
D. Sentelle	67	5
L. Silberman	62	12
D. Tatel	67	2
P. Wald	82	16
S. Williams	57	8
1st Cir.		
M. Boudin	71	4
S. Lynch	78	4
B. Selya	99	8
N. Stahl	62	1
J. Torruella	89	7
2d Cir.		
J. Cabranes	44	1
G. Calabresi	51	2
D. Jacobs	72	3
P. Leval	47	3
A. Kearse	71	17
J. McLaughlin	49	8
F. Parker	50	0
J. Walker	67	6
R. Winter	75	35
3d Cir.		
S. Alito	44.	4
E. Becker	59	18
R. Cowen	44	8
M. Greenberg	52	3
T. Mckee	30	0

JUDGE	TOTAL OPINIONS (1995–1997)	OPINIONS IN CASEBOOKS
T. Lewis	32.	3
C. Mansmann	35	1
R. Nygaard	40	0
J. Roth	39	4
A. Scirica	38	3
D. Sloviter	46	8
W. Stapleton	49	9
4th Cir.		
S. Ervin	44	8
C. Hamilton	39	1
K. Hall	52	4
J.M. Luttig	50	1
M.B. Michael	39	2
D. Motz	54	2
F. Murnaghan	65	2
P. Niemeyer	69	6
D. Russell	32	3
H.E. Widener	39	10
K. Williams	38	4
W. Wilkins	47	3
J. H. Wilkinson	74	7
5th Cir.		
R. Barksdale	31	1
F. Benavides	76	0
W.E. Davis	38	5
H. DeMoss	64	0
J. Duhe	61	2
E. Garza	81	5
P. Higginbotham	65	9
E.G. Jolly	55	10
E. Jones	49	1
C. King	20	4
R. Parker	73	0
H. Politz	73	2
J. Smith	81	11
C. Stewart	65	1
J. Wiener	61	2

JUDGE	TOTAL OPINIONS (1995–1997)	OPINIONS IN CASEBOOKS
6th Cir.		
A. Batchelder	34	2
D. Boggs	71	6
M.C. Daughtery	19	2
C. Kennedy	82	8
B. Martin	58	7
G. Merritt	66	12
K.N. Moore	75	3
D. Nelson	59	1
A. Norris	37	2
J. Ryan	53	3
E. Siler	30	1
R. Suhrheinrich	24	0
7th Cir.		
J. Coffey	107	11
W. Cummings	89	22
F. Easterbrook	131	56
J. Flaum	141	15
M. Kanne	107	6
D. Manion	100	3
R. Posner	185	118
K. Ripple	136	7
I. Rovner	112	2
D. Wood	100	9
8th Cir.		
R. Arnold	98	11
M. Arnold	109	2
C.A. Beam	120	4
P. Bowman	101	7
G. Fagg	70	1
D. Hansen	100	3
J. Loken	117	2
T. McMillian	100	8
D. Murphy	82	4
R. Wollman	135	8
9th Cir.		
J. Browning	8	15

JUDGE	TOTAL OPINIONS (1995–1997)	OPINIONS IN CASEBOOKS
M. Brunetti	54	4
F. Fernandez	60	3
B. Fletcher	80	11
C.H. Hall	50	7
M. Hawkins	46	2
P. Hug	45	6
A. Kleinfeld	66	4
A. Kozinski	60	15
T.G. Nelson	59	10
H. Pregerson	57	9
D. O'Scannlain	84	6
S. Reinhardt	82	15
P.A. Rymer	53	1
M. Schroeder	54	7
S. Trott	63	6
D. Thompson	79	12
10th Cir.		
S. Anderson	45	4
B. Baldock	52	1
W. Brorby	85	5
D. Ebel	77	0
R. Henry	53	1
P. Kelly	63	2
C. Lucero	37	0
J. Porfilio	32	0
S. Seymour	50	6
D. Tacha	58	1
11th Cir.		
R.L. Anderson	36	6
R. Barkett	55	1
S. Birch	52	1
S. Black	23	0
E. Carnes	44	1
E. Cox	26	2
J. Dubina	32	1
J.L. Edmondson	42	2
J. Hatchett	39	0
G. Tjoflat	40	4

In sum, comparing the total number of opinions with the number of opinions published in casebooks provides little in terms of direct explanation. Both sets of numbers, however, do have what appear to be strong "circuit effects" in common. In other words, the publication data support the hypothesis that individual circuit norms are an important determinant of the kind of opinions that judges write.

E. DIFFERENTIAL DOCKETS

An observation often made about law school teaching is that it focuses largely on "hard" cases.[62] For our purposes, that raises the question of whether the differences in casebook entry numbers can be explained by different numbers of hard cases within the circuit courts. If the publication criteria used by the circuits were uniform, the number of published opinions would provide one measure of the fraction of hard cases. As noted above, however, the individual circuit publication rates appear to be driven more by differential norms about what types of cases deserve published opinions than by differences in the types of cases that a circuit sees. In addition, as discussed earlier, it is well recognized that the federal courts have seen an explosion in their caseloads.[63] The large number of cases, in turn, suggests that each judge is likely to have a more than adequate number of hard cases before her. If anything, the problem that judges face is how to write opinions for the large number of cases that cannot be disposed of through summary dispositions.

Despite the general explosion in cases, there remain certain specific subject areas where cases are either scarce (reducing the casebook editor's choices) or there is a significant docket disproportion (one circuit hears such a large percentage of the cases in the area that its judges write most of the opinions and thus become experts). In these areas, it is likely that a circuit's docket will have some explanatory power with respect to the number of casebook entries. Even here, however, there is a caveat. Because the primary articulated goal of legal education is to teach students to "think like lawyers," there is generally no obligation to cover specific and narrow topics. Hence, to the extent a circuit's docket has explanatory significance, it is likely to be only in areas wherein (a) there is an expertise effect and/or a scarcity of cases, and (b) the relevant courses are upper year courses where professors feel a greater obligation to cover specific substantive topics.

Table IV contains the casebook entry circuit totals by subject. Two things stand out. First, the Seventh Circuit dominates in all but a handful of areas. Second, those areas in which the Seventh Circuit does not dominate

62. *See, e.g.*, Joel K. Goldstein, *The Legal Duty and Learning About Rules: A Case Study*, 44 ST. LOUIS U. L.J. 1333, 1334 (1993) (noting the traditional focus on hard cases).

63. *See supra* note 27 (citing materials on the subject).

are either areas in which some other circuit has a dominant docket, or ones in which the casebooks do not use many federal circuit court cases. The three areas where another circuit's dominance stands out are Administrative Law (D.C. Circuit), Environmental Law (D.C. Circuit), and Immigration Law (9th Circuit). As anyone familiar with the federal circuit courts will recognize, the domination correlates with the fact that the circuits in question have among the largest dockets in these areas.[64]

TABLE IV
TOTALS BY SUBJECT PER CIRCUIT

Circuit / Subject Areas	Administrative Law	Animals & the Law	Anti-Trust	Corporations	Partnership	Civil Procedure	Communications Law	Civil Rights	Criminal Procedure	Constitutional Law	Community Property	Conflict of Laws	Contracts	Criminal Law	Employment Law	Election Law	Environmental Law	Evidence	Family Law
D.C.	14	5	1	2	5	4	1	0	2	1	0	2	1	0	1	0	13	3	0
1st	0	0	0	1	2	1	0	0	3	0	0	1	0	0	3	0	3	0	0
2d	0	0	4	17	4	3	2	0	5	0	0	0	6	1	1	0	2	4	0
3d	1	0	3	2	3	5	5	0	5	0	0	0	1	2	3	0	0	3	0
4th	2	0	0	4	2	5	3	0	3	0	0	2	7	0	3	0	5	4	0
5th	1	0	0	1	2	4	5	0	1	0	0	0	2	1	8	0	9	2	2
6th	2	0	0	8	4	4	4	0	1	0	0	0	1	2	2	0	2	0	4
7th	*7*	*2*	*14*	*23*	*11*	*8*	*13*	*0*	*14*	*2*	*0*	*0*	*42*	*8*	*17*	*1*	*1*	*5*	*4*
8th	0	0	3	5	2	4	5	0	2	0	0	0	0	1	5	3	1	1	1
9th	5	1	9	5	4	5	7	0	2	1	2	2	8	11	11	0	6	3	1
10th	1	0	0	0	1	1	7	0	0	0	0	0	4	0	2	0	1	1	0
11th	1	0	0	1	1	1	0	0	1	0	0	0	2	0	5	1	1	0	0
Total	34	8	34	69	41	45	52	0	39	4	2	7	71	26	61	5	44	26	12

64. Recent docket statistics on the federal circuit courts are available at *Judicial Business of the United States Courts 2000, at* http://www.uscourts.gov/judbus2000 (last visited May 2, 2002) (on file with the Iowa Law Review). In addition, the D.C. Circuit's expertise (in part, as a result of its docket) in the Administrative Law area (and derivatively, in the Environmental Law area) has been noted by numerous commentators. *See, e.g.*, John F. Belcaster, *The D.C. Circuit's Use of the* Chevron *Test: Constructing a Positive Theory of Judicial Obedience and Disobedience*, 44 ADMIN. L. REV. 745, 748 (1992) (stating that the D.C. Circuit's Administrative Law jurisprudence is unique); Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 623 (1994) (stating that the D.C. Circuit has decided a number of significant Environmental Law cases). For mention of the Ninth Circuit's large immigration docket, see 1999 ANNUAL REPORT OF THE 9TH CIRCUIT 40–41.

Circuit / Subject Areas	Federal Courts	Gender & Law	Health Law	Immigration Law	Intl. Human Rights	Intellectual Property	Labor Law	Native Am. & the Law	Non Profits	Property	Race & the Law	Remedies	Securities Law	Sexual Orient. & the Law	Telecomm Law & Policy	Tax	Torts	Wills	Total
D.C.	0	1	1	0	0	1	4	0	1	0	0	1	4	2	0	0	5	0	*75*
1st	0	1	1	2	0	0	0	0	0	0	0	3	1	0	0	0	1	1	*24*
2d	0	1	2	1	1	6	0	0	0	1	0	1	7	0	0	7	0	0	*76*
3d	0	0	6	1	0	1	0	0	1	2	0	6	3	0	0	7	1	0	*61*
4th	0	3	0	0	0	0	1	0	0	0	0	4	3	1	0	1	0	0	*53*
5th	0	1	3	1	0	0	0	0	0	0	0	2	1	1	0	4	2	0	*53*
6th	0	1	2	0	0	2	0	0	0	0	0	3	2	0	0	2	1	0	*47*
7th	*0*	*10*	*10*	*0*	*0*	*5*	*0*	*0*	*2*	*3*	*0*	*13*	*9*	*1*	*0*	*9*	*22*	*0*	*256*
8th	0	4	0	1	0	1	0	0	0	1	0	1	3	1	0	1	4	0	*50*
9th	0	3	5	14	0	6	0	0	0	0	0	4	7	1	0	9	2	0	*134*
10th	0	0	0	0	0	0	0	0	1	1	0	0	2	0	0	0	1	0	*20*
11th	0	0	1	0	0	0	0	0	0	1	0	1	0	0	0	1	0	0	*18*
Total	0	25	31	20	1	22	5	0	5	9	0	39	42	7	0	41	39	1	867

There is nothing particularly remarkable about the Seventh Circuit's docket.[65] In a sense, it is the ordinariness of the Seventh Circuit's caseload that makes its dominance extraordinary. It is worth examining the Seventh Circuit's subject area numbers and those of Posner and Easterbrook in greater detail.

65. *See* at *Judicial Business of the United States Courts 2000, at* http://www.uscourts.gov /judbus2000 (last visited May 2, 2002) (on file with the Iowa Law Review) (listing docket statistics for the Seventh Circuit).

TABLE V
TOTAL OPINIONS BY SUBJECT IN THE SEVENTH CIRCUIT

Subject Areas / Judge	Administrative Law	Animals & the Law	Anti-trust	Corporations	Partnership	Civil Procedure	Communications Law	Civil Rights	Criminal Procedure	Constitutional Law	Community Property	Conflict of Laws	Contracts	Criminal Law	Employment Law	Election Law	Environmental Law	Evidence	Family Law
7th Cir. (249)																			
J. Coffey	0	0	0	0	0	0	1	0	2	0	0	0	1	0	3	0	0	0	1
W. Cummings	1	0	1	0	0	0	2	0	0	0	0	0	4	1	4	0	0	0	0
F. Easterbrook	*1*	*0*	*3*	*13*	*4*	*2*	*4*	*0*	*4*	*2*	*0*	*0*	*7*	*1*	*2*	*1*	*0*	*1*	*0*
J. Flaum	0	1	0	1	0	0	2	0	3	0	0	0	0	3	0	0	1	0	0
M. Kanne	0	0	0	2	0	2	0	0	0	0	0	0	1	0	0	0	0	0	0
D. Manion	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
R. Posner	*5*	*1*	*10*	*5*	*6*	*4*	*4*	*0*	*2*	*0*	*0*	*0*	*26*	*2*	*8*	*0*	*0*	*3*	*2*
K. Ripple	0	0	0	1	0	0	0	0	2	0	0	0	0	1	0	0	0	1	1
I. Rovner	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0
D. Wood	0	0	0	1	1	0	0	0	1	0	0	0	2	0	0	0	0	0	0

Subject Areas / Judge	Federal Courts	Gender & Law	Health Law	Immigration Law	Intl. Human Rights	Intellectual Property	Labor Law	Native America & the Law	Non Profits	Property	Race & the Law	Remedies	Securities Law	Sexual Orient. & the Law	Telecomm. Law & Policy	Tax	Torts	Wills	Total
7th Cir. (249)																			
J. Coffey	0	0	1	0	0	1	0	0	0	0	0	0	1	0	0	0	0	0	11
W. Cummings	0	2	1	0	0	2	0	0	0	1	0	1	0	0	0	2	0	0	22
F. Easterbrook	*0*	*5*	*4*	*0*	*0*	*0*	*0*	*0*	*0*	*0*	*0*	*0*	*3*	*1*	*0*	*0*	*8*	*0*	*66*
J. Flaum	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	1	1	0	15
M. Kanne	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	6
D. Manion	0	0	1	0	0	0	0	0	0	0	0	0	1	0	0	0	1	0	3
R. Posner	*0*	*2*	*2*	*0*	*0*	*1*	*0*	*0*	*2*	*2*	*0*	*10*	*3*	*0*	*0*	*6*	*12*	*0*	*118*
K. Ripple	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	7
I. Rovner	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
D. Wood	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	6

Table V demonstrates that Posner and Easterbrook have their largest number of casebook opinions in two categories of subjects: the first year courses (specifically Torts and Contracts) and the upper level business courses (Antitrust, Corporations, Partnership, Commercial Law, Employment Law, Tax, and Securities Law). Given the status of Posner and Easterbrook as intellectual giants in the field of Law and Economics, this makes sense. Torts and Contracts are the two first year subjects where economic analysis has been most influential. Among the upper year courses, the same is true for the business courses. There is, therefore, what one might call a specialization effect. In other words, Posner and Easterbrook have their greatest impact in the areas where economics has had its greatest impact.[66]

Posner and Easterbrook's numbers in Torts and Contracts are also interesting for another reason. These are basic subjects in which almost every judge tackles a significant number of cases, and therefore there is likely to be a wide range of judicial opinions from which to choose. These are the quintessential first year courses that focus on teaching students how to "think like a lawyer." It is here, where the casebook editors have perhaps the greatest selection of judges from which to choose, that the Posner–Esterbrook–Seventh Circuit dominance is the greatest. In Contracts, the casebooks contain 42 opinions from the Seventh Circuit (26 Posner, 7 Easterbrook), as compared to 29 from all the other circuits combined. In Torts, the Seventh Circuit provides 22 opinions (12 Posner, 8 Easterbrook), as compared to 17 from the other ten circuits combined. The fact that the Seventh Circuit's domination is at its highest level in the most general subjects is relevant to the superstar hypothesis. It is in these areas, because of the reasons articulated above, that it is most plausible to think of cases by different judges as fungible products. When fungible products cost the same there is most likely to be a dominance because everyone chooses the "best" product.

In this context, it is also illustrative to look at the subject area distribution of opinions of the third judge on the casebook total list. Recall that Judge Winter, like Posner and Easterbrook, uses an economic approach to analyzing cases. Like Posner and Easterbrook, Winter was a professor at an elite academic institution (Yale), where he was prominent for his work in the area of business law. Winter has a high number of opinions in the casebooks for upper year business courses. Therefore, Winter's numbers reflect a specialization effect similar to that of Posner and Easterbrook. His numbers differ from those of Posner and Easterbrook in the first year subjects of Torts and Contracts. The casebooks contain only a few opinions by Winter in these subjects. With Winter, therefore, there appears to be a

66. Of course, there is something of a chicken and egg problem here because part of the impact of economics on these fields has been a result of Posner and Easterbrook's influence.

specialization effect, but not a significant superstar effect.

In sum, the data by subject area suggest two things. First, there appears to be a docket effect in the casebook data, but it occurs only in circumstances where one circuit hears a large share of cases in a single subject area. Second, the data suggest a specialization effect with respect to Posner, Easterbrook, and Winter, where the bulk of their opinions is in areas where their academic backgrounds are especially applicable. The fact that Posner and Easterbrook have their largest numbers in two of the most general subject areas provides support for the superstar hypothesis with respect to them.

F. GIANTS OF THE PAST

The Torts and Contracts numbers also provide the basis for a comparison between Posner and Easterbrook and some of the judicial giants of the past. These giants of the past—Cardozo, Friendly, and Hand—are recognized judging stars and, to the extent a superstar effect were at play, it would presumptively apply to them. A comparison of their casebook numbers for basic courses with those of Posner and Easterbrook should provide one measure of determining whether a superstar effect is at play. Of course, given the very different contexts in which the different judges operated, the comparison is prima facie problematic. Still, the numbers are interesting. Table VI contains Torts and Contracts numbers for five judges: Posner, Easterbrook, Cardozo, Friendly, and Hand.

TABLE VI
POSNER, EASTERBROOK, AND GIANTS OF THE PAST

JUDGE	TORTS	CONTRACTS
F. Easterbrook	7	8
R. Posner	12	26
B. Cardozo	17	20
H. Friendly	12	1
L. Hand	6	3

The casebook numbers for these giants of the past (for Torts and Contracts together) are higher than those of any judges in our sample except for Posner and Easterbrook. In fact, Posner and Easterbrook appear to be playing at the same level as the giants of the past, especially considering that both Posner and Easterbrook are likely to be on the bench for many more years.

On a different note, it is also striking that the most dramatic numbers are those of Cardozo (17 Torts, 20 Contracts) and Posner (12 Torts, 26

Contracts).[67] First, these numbers dwarf the others. Second, there is a link between the two judges. Posner, some years ago, wrote a biography of Cardozo entitled "A Study in Reputation."[68] In it, Posner noted Cardozo's prominence in the academic world and observed that Cardozo appeared to consciously focus on writing for the academic audience.[69] As indicated by his writings, Posner has also thought a great deal about opinion writing, influence, and citations.[70] To the extent one conceives of judging as a game or competition where the goal is intellectual dominance—and the "game" conception is one that Posner himself advanced[71]—it seems that Posner has come a long way towards not only figuring out the rules of the game, but also winning it.

Before proceeding, we have a final note on Posner. Conversations that we have had with judges and academics suggest that the Seventh Circuit was long considered an unremarkable circuit in terms of its work product. Things appear to have dramatically changed when Posner was appointed to the bench. Lore is that Posner felt the workload he was given in terms of publication assignments was inadequate and requested additional work from Chief Judge Cummings. Circuit norms, however, mandate that all judges tackle the same number of cases.[72] The story is that while Posner's request was refused, his willingness to do more in terms of writing more opinions of publishable quality succeeded in altering the norms of the circuit so that everyone else was encouraged to produce higher quality work as well. While there is not as much lore about Easterbrook as there is about Posner,[73] it is

---

67. We acknowledge that there are at least three differences that make the comparison between Posner's casebook numbers and those of Cardozo problematic. First, Cardozo had his judicial career many decades prior to Posner. Among other things, this means that they likely faced sets of casebook editors with radically different philosophies (Law and Economics was not a major movement in legal academia in Cardozo's time). Second, Cardozo spent most of his judicial career in the state court system (followed by a stint on the U.S. Supreme Court), whereas Posner has spent his entire judicial career on a federal circuit court of appeals. Even in today's terms, this translates to starkly different caseloads. Third, the Cardozo opinions that appear in today's casebooks are the ones that have stood the test of time. In contrast, we do not yet know whether the Posner opinions will have staying power. *See generally* ANDREW L. KAUFMAN, CARDOZO (1998).

68. *See generally* POSNER, *supra* note 11.

69. *Id.* at 132-34. On this point, see also Lawrence Baum, THE PUZZLE OF JUDICIAL BEHAVIOR 47 (1997) (noting that Cardozo "cultivated the good opinion of academics").

70. *See* POSNER, *supra* note 11; *see generally* Richard A. Posner, *An Economic Analysis of the Use of Citations in the Law*, 2 AMER. L. & ECON. REV. 381 (2000) [hereinafter Posner, *Economic Analysis*; Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 535–40 (1994).

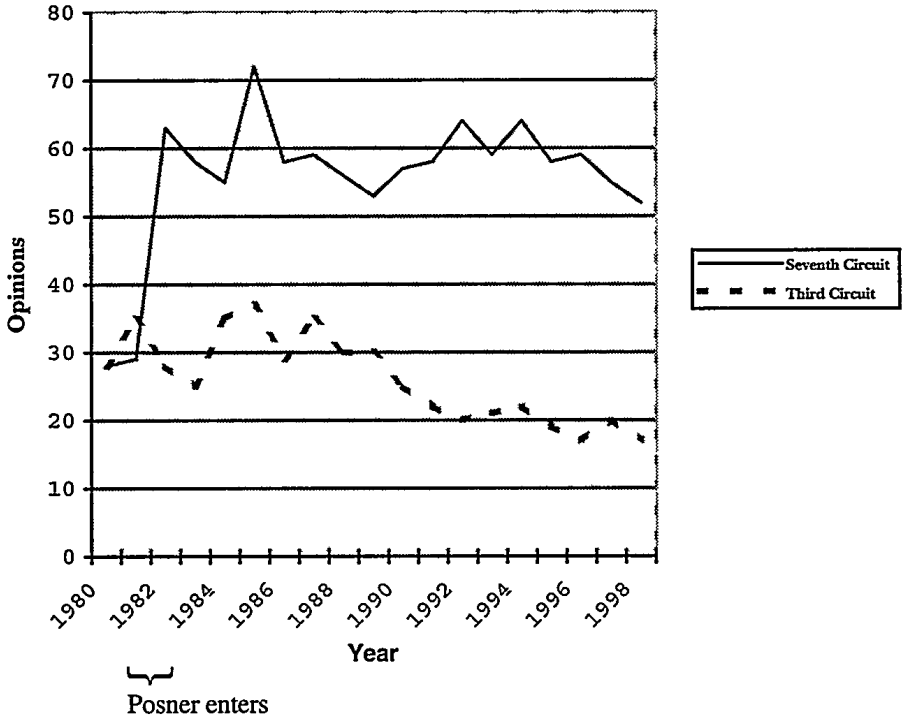
71. *See* Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 634 (2000) (discussing Richard A. Posner, *What Do Judges Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1994)).

72. To the extent that differences are allowed, they surface in how judges write, issue an unpublished memorandum, or dispose of the case with an order.

73. The lore on Posner has reached the level that he is now the subject of profiles in

likely that his appointment to the bench served to further alter the circuit's norms in the direction that Posner had pushed them. Of course, this is all in the way of lore that we were not able to verify. What we were able to do, however, was calculate the average active judge opinion publication rates on the Seventh Circuit before and after Posner was appointed to the bench. As a basis for comparison, we also plotted the average active judge opinion publication numbers for the Third Circuit (another circuit that has an unremarkable docket). The dramatic 1981–1982 upward spike in the Seventh Circuit numbers matches Posner's appointment, hence lending some plausibility to the lore.

Average Number of Active Judge Majority Opinions (3rd & 7th Circuits)



IV. EXPLAINING THE DOMINANCE OF THE CHICAGO SCHOOL

Thus far, our analysis has been based largely on eyeballing the data. In this section, we subject the data to simple statistical tests and report the

magazines like *The New Yorker*. *See* Larissa MacFarquhar, *The Bench Burner: How Did a Judge with Such Subversive Ideas Become a Leading Influence on American Legal Opinion?*, THE NEW YORKER, Dec. 10, 2001, at 78.

results of a survey asking fifty law professors what factors explain Posner and Easterbrook's dominance in the casebooks.

A superstar phenomenon exists when a small number of people dominate a single field. In the economics literature, scholars differentiate between a talent-driven superstar effect and a consumer-driven one. The talent-driven effect exists where small differences in talent are magnified with the result being that those at the top disproportionately dominate.[74] This effect is caused by a combination of demand and supply side effects. On the demand side, lesser quality is a poor substitute for better quality.[75] In the terms of our casebook study, casebook editors always prefer to use the "best" opinion because opinions are imperfect substitutes for each other. Therefore, the demand side condition is met. On the supply side, the marginal cost of output is constant or increasing very slowly in the relevant demand region.[76] In our terms, the high quality opinion can be used by multiple consumers with little (or no) extra cost for each additional user.[77] Stated differently, the value of an opinion in one casebook is not diminished by the fact that other casebooks have used it because there is no diminishing marginal utility. Indeed, the value probably increases because of reputational and familiarity effects. With Posner and Easterbrook's opinions, if one assumes that their opinions are of higher quality, the supply side conditions for producing a skew in the distribution are easily met.[78]

Subsequent to the articulation of the explanation for disparity based on talent or quality, commentators have proposed alternate explanations based on non-talent factors for how such skews might arise.[79] These commentators hypothesized that dramatic disproportions in earnings and influence might arise among producers of equal talent (in fields such as entertainment and music) as a result of non-quality factors such as style, charisma, sex, race, or

---

74. Rosen, *supra* note 13, at 846. *See generally* Glenn MacDonald, *The Economics of Rising Stars*, 78 AM. ECON. REV. 155 (1988) (discussing the talent-driven effect). Rosen's work built on ALFRED MARSHALL, PRINCIPLES OF ECONOMICS (8th ed. 1947). For a recent treatment of the superstar phenomenon and its possible applications, see *The Wages of Stardom: Law and the Winner-Take-All Society: A Debate*, 6 U. CHI. L. SCH. ROUNDTABLE 1 (1999) (reporting on a debate involving Cass Sunstein, Robert Frank, Sherwin Rosen, and Kevin Murphy).

75. *See generally* Raymond A.K. Cox & Gregory A. Falls, *The Phenomenon of the Superstar: An Empirical Study of Golf*, 24 J. ECON. 39 (1998).

76. *See generally* William A. Hamlen, Jr., *Superstardom in Popular Music: Empirical Evidence*, 73 REV. ECON. & STAT. 729 (1991).

77. In the music industry or sports industry, this is usually explained by the effect of technology. The same product can be multiplied many times over with little extra cost. *See generally* Frey, *supra* note 14, at 117. With judicial cases, this condition is met trivially.

78. Posner himself discusses the superstar effect (both the Rosen talent-based (1981) and the Adler consumer-driven (1985) types) in the context of explaining why a skew or dominance in citation rates can arise. *See* Posner, *Economic Analysis*, supra note 70, at 389, 395; *see also* William Landes & Richard Posner, *Citations: Age, Fame, and the Web*, 29 J. LEGAL STUD. 319, 319 (2000) (finding a greater superstar effect for celebrities than for academics).

79. *See generally* Moshe Adler, *Stardom and Talent*, 75 AM. ECON. REV. 208 (1985).

good looks.[80] For such factors to cause disparities, the field must be one in which consumption requires knowledge.[81] Where an ability to discuss a product with others is a key element in determining the value of the product, consumers might minimize their search costs by choosing the most popular product.[82] In the casebook arena, one might imagine casebook editors minimizing search costs by choosing cases from the most popular judge. More specifically, in the case of Posner and Easterbrook, casebook editors might reason that their consumers (primarily professors and secondarily students) will prefer the opinions of these judges because they have already (through prior use) become familiar with their mode of analysis (i.e., the Chicago School).

In terms of a model, all one needs to produce the initial condition of slightly greater familiarity on the part of consumers is some non-quality reason for a large number of casebook editors to choose Posner and Easterbrook's opinions in the hypothetical first round of choices (where everyone is producing opinions of equal quality).[83] For example, one might hypothesize that Posner and Easterbrook's opinions were selected more in the first round because of their political viewpoints, or because they were outrageous, or more humorous, or because casebook editors knew the authors' names from encounters at academic conferences. There are a variety of plausible reasons not based on quality for Posner and Easterbrook to have an advantage in the first round. It is also plausible that the casebook area is one in which having more knowledgeable discussants is valuable. The desire of casebook editors to minimize search costs might also produce a disproportionate effect in the distribution.

Finally, there are two other explanations for skews that are, in a sense, extreme hypotheses. First, there is the pure talent explanation, which is that there is no magnification effect and that the entire skew is a differential of talent or quality between the superstar and the others. For example, one might say that Michael Jordan earns fifty times as much as the next best basketball player because he is fifty times as skilled. There is no magnification effect; the disparity is all merit. Second, there is the pure randomness explanation, which is that one person wins the first round out of luck (which would not even include factors such as style) and then, by

---

80. *See* William A. Hamlen, Jr., *Variety and Superstardom in Popular Music*, 32 ECON. INQUIRY 395, 396 (1994); *see also* Kee H. Chung & Raymond A.K. Cox, *A Stochastic Model of Superstardom: An Application of the Yule Distribution*, 76 REV. ECON. & STAT. 771 (1994); Kee H. Chung & Raymond A.K. Cox, *Consumer Behavior and Superstardom*, 27 J. SOCIO-ECON. 263, 264 (1998) [hereinafter Chung & Cox, *Consumer Behavior*].

81. *See* Cox & Falls, *supra* note 75, at 39–40.

82. *See id.* at 40.

83. *See* Chung & Cox, *Consumer Behavior*, *supra* note 80, at 267–68; Hamlen, *supra* note 80, at 396.

virtue of the advantage of having won the first round (a lock-in effect), keeps winning.

Assuming the existence of a skew, determining its causes becomes important because it informs normative judgments about the disparity. To the extent that a skew is all talent, i.e., the reason that Posner and Easterbrook have ten or twenty or thirty times the number of opinions in casebooks than do other judges is because their opinions are that many times better, many would likely see the disparity in the casebook data as a good thing. However, to the extent that the skew is a function of a small difference in quality being magnified many times over because of a lock-in effect in the market, the skew begins to appear problematic. If the disproportionate effect is a function of factors not related to quality such as style (assuming that style can be separated from quality), the skew is even more problematic. Finally, the most problematic situation is where the dominance is entirely a function of luck or randomness.

This section proceeds in two parts. Part A describes statistical measure of skewness to measure the skews in the casebook data. Part B describes the results of a logistic regression and a survey of law professors to examine the possible causes of the skew in the casebook data.

A. THE SKEW TOWARDS CHICAGO

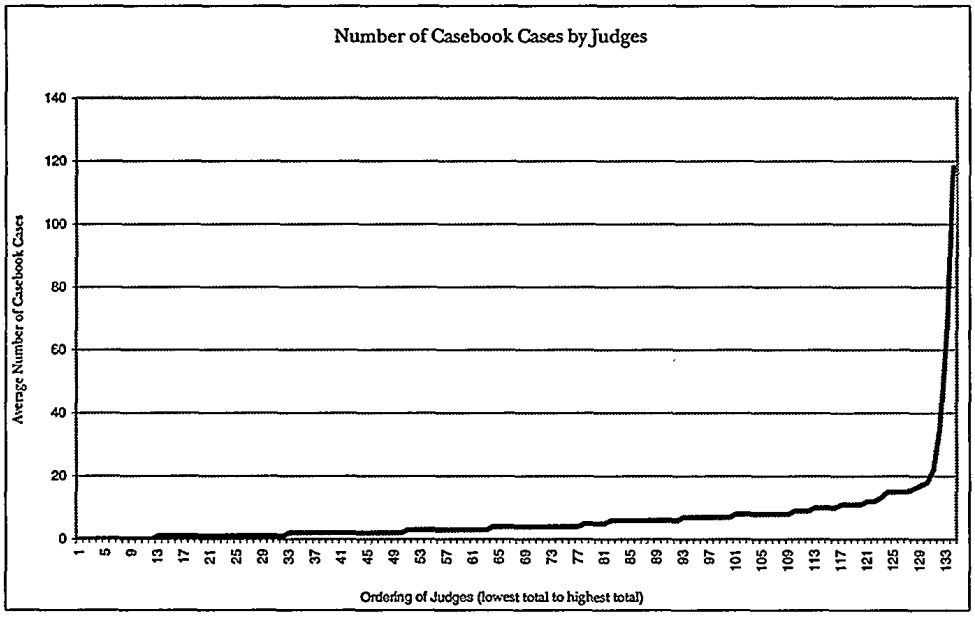
The simplest way to view the degree of skew in casebooks is to plot the data. The graph that follows plots data on the factor Total Number of Cases in Casebooks. This plot demonstrates a skew in the distribution. The bulk of the judges are clustered at the low end of the distribution, with less than twenty opinions in casebooks, followed by a sharp increase in the curve reaching over one hundred.

Table VII reports the measure of skewness and the probability level at which a normal distribution is rejected. In addition to the casebook data numbers, we also report the skewness numbers for three other measures of judicial influence. These non-casebook measures relate to (a) other judges, and (b) students. These measures are invocation rates (the number of times a judge is cited by name by another judge) and student note rates (the number of student notes/comments that discuss a particular judge's opinions in detail). They are discussed in detail in the following section. It is interesting to note that the normal distribution hypothesis is rejected at the 0.0001 probability level for all five of the measures.[84]

84. A recent article on citations to legal scholars suggests that an equivalent skew is present for that variable as well (with the data on Posner again doing most of the skewing). *See* Fred R. Shapiro, *The Most Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 424 tbl.6 (2000) (stating that Posner has the highest number of cites (nearly 8000) and the numbers drop very quickly (Dworkin is next with approximately 4500), albeit at what appears to be a decreasing rate).

TABLE VII
SKEWNESS AND P-VALUE FOR TEST OF NON-NORMALITY

VARIABLE	SKEWNESS	P-VALUE
Total Number of Casebook Cases	6.94	.0001
Average Number of Casebook Cases	5.38	.0001
Invocation in the Text of Opinion	1.41	.0001
Invocation in a Parenthetical	6.42	.0001
Student Notes	2.37	.0001



B. LOGISTIC REGRESSION

Given the non-normal distribution and the hypothesis being tested (which is essentially a yes or no hypothesis about whether or not someone is a star), we employed a simple logistic regression measurement to predict stardom.[85] We chose five independent variables—years on the bench, eliteness of law school attended, whether or not a judge's primary prior

85. On the topic of regressions where the variables are qualitative, truncated, or censored, see G.S. MADALLA, LIMITED-DEPENDENT AND QUALITATIVE VARIABLES IN ECONOMETRICS (1983).

profession was in the academy, percentage of dissents, and whether or not a judge was on the Seventh Circuit—to predict the top ten percent of producers of casebook opinions in our sample. In running the regression, we assigned the judges in the top ten percent a value of 1 and all others a value of 0. Using a model with the variables listed below, we attempted to predict into which of the two categories (1 or 0, star or non-star) each judge would fall.

1. The Independent Variables

Apart from the fact that these five variables were measurable, we employed them for the following reasons:

Years on the Bench: The number of years that judges in the sample have been on the bench varies. In terms of total numbers of opinions in casebooks, we assumed that length of time on the bench (which would result in more opinions written) would result in more opinions in casebooks.

Law School Eliteness: The vast majority of law faculty members tend to have attended a handful of elite institutions.[86] Although a significant number of circuit judges have also attended elite institutions, there is no similar skew.[87] Hence, we hypothesize that these largely elite educated law professors prefer to use cases written by judges who write in a style characteristic of those elite institutions—high on theory and low on practicality.[88]

Professor: We hypothesize that judges who had been law professors would be more likely to write the kinds of opinions that casebook editors (who are almost all law professors themselves) would find attractive.

Percentage of Dissents: Judges differ in the rates at which they dissent.[89] We hypothesized that there is something significant about judges who dissent more. Specifically, judges who are willing to take the extra time and effort to write a dissent are likely to be the ones who have clear views that vary from the norm. Furthermore, the willingness to expose oneself to

86. *See* Robert J. Borthwick & Jordan R. Schau, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 MICH. J. L. REFORM 191, 231 tbl.30 (1991) (reporting that over 85% of the professors at the seven most highly ranked schools received their J.D. degrees from one of those schools).

87. Given that being a circuit judge is among the most prestigious activities for a lawyer (and many, if not most, law professors would jump at the opportunity to be a circuit judge), it is interesting that less than 40% of the judges in our sample attended one of the top seven law schools.

88. At least, this is the claim made by a number of commentators. *See generally* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (discussing the difference between legal theory and practice); Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705 (1998) (same).

89. *See* Gulati & McCauliff, *supra* note 31, at 214–19, tbl.VII (listing the number of dissents of various circuit court judges).

criticism in a separate opinion suggests a confidence in one's views and abilities. The hypothesis, then, is that judges who dissent more are also likely to be the ones whose majority opinions would find greater favor with casebook editors.

Seventh Circuit: The Seventh Circuit appears to have developed a culture of hard work (or at least a high publication volume) that is different from the other circuits.[90] This culture appears to have been initiated by Posner because his appointment to the bench correlates with a dramatic increase in the Seventh Circuit's publication rates.[91] We hypothesized that the change in culture that Posner brought about was not only an increase in the volume of opinions, but also a change in the type of opinions. Given Posner's academic background, his entry to the judiciary may have resulted in a norm shift where the Seventh Circuit began writing more academically-oriented opinions.

2. Regression Results

The fit index, the Somer's D, is approximately eighty-nine percent. This is highly significant, but the result is deceptive because of the low number of participants (N) and the instability of the model. The instability suggests that the results should be read with caution because they are likely to change a great deal with even minor changes in the model. This is largely driven by the low N. However, the model was not meant to demonstrate a clear causal connection. Nor was it meant to become a final model to predict the "superstars" (indeed, in looking at the top ten percent, as opposed to only the top two, we are predicting the larger category of stars). Instead, the model is intended to show that stardom can be predicted using the right demographic and individual variables. In other words, stardom is not random.

Caveats aside, the regression results report all five of the independent variables to be statistically significant. As hypothesized, coefficients for Years on the Bench, Professor, Law School Eliteness, Seventh Circuit, and Percentage of Dissents, are all positive. For years on the bench, the relationship is obvious; more years on the bench means more opinions and greater opportunity to enter the casebooks. The other relationships are more interesting; background as an academic, the eliteness of the law school that the judge attended, the Seventh Circuit effect, and the percentage of one's opinions that are dissents are all independently significant as

90. *See id.* at 157 (discussing the Third Circuit's past use of the "Judgment Order," or without-comment disposition, and analyzing whether avoiding a published opinion in some of the harder cases may be in the interest of justice).

91. For discussion of how leaders can alter norms, see Robert C. Ellickson, The Evolution of Social Norms: A Perspective From the Legal Academy (July 1, 1999) (unpublished manuscript, on file with authors); *see also* Ann Carlson, *Recycling Norms*, 89 CAL. L. REV. 1231 (2001).

explanatory variables. The inevitable question is whether these results are entirely driven by the high Posner and Easterbrook casebook numbers. This is where one of the benefits of using the logistic procedure comes into play. The regressions are run in a way that the skew in the dependent variable does not disproportionately drive the results (as noted, the judges in the top ten percent are scored as a 1, and the others are scored as a 0).

TABLE VIII
LOGISTIC REGRESSION RESULTS

VARIABLE	DF	PARAMETER ESTIMATE	STANDARD ERROR	WALD CHI-SQUARE	PR > CHI-SQUARE	STANDARDIZED ESTIMATE
INTERCEPT	1	*-5.00*	*1.58*	*10.07*	*0.0015*	
YEARS ON BENCH	1	0.34	0.10	10.29	0.0013	1.165
PROFESSOR	1	1.96	1.16	2.85	0.0912	0.344
LENA (MEASURE OF LAW SCH. ELITENESS)	1	2.44	0.92	7.00	0.0082	-1.221
SEVENTH CIRCUIT	1	4.08	1.75	5.40	0.0202	0.597
% DISSENTS	1	5.32	2.75	3.74	0.0530	0.400

N=132

FIT INDEXES: SOMER=S D=0.891; GAMMA=0.892

This model was not intended to predict the superstars, however. The superstars, after all, are Posner and Easterbrook, and not the entire top 10% of casebook entrants that the model revealed. Apart from the low N, the model was severely constrained by the set of variables that we could measure and use as independent variables. A number of variables we discussed at the outset that were likely to be the most important in producing casebook superstars—innovativeness, a clear and fully formed theoretical perspective, humor, clarity, etc.—were ones not amenable to measurement and were not used as independent variables in the regression. Finally, the absence of any pure quality independent variable in the predictive model indicates that stardom is not solely based on quality (although quality may play a role).[92]

92. The structure of the logistic regression where the top 10% are scored as a 1 and the others as a 0 is such that it loses valuable information on the actual casebook numbers. For that reason, a number of colleagues suggested that we run and report the results of a least squares regression. Here, instead of having a yes/no dependent variable, one has a continuous dependent variable. In other words, there is a gradation and not just a clear cut star/non-star distinction. The problem with the least squares regression, however, is that it assumes a normal distribution and the dependent variable here is clearly not normal. That problem can be ameliorated somewhat by running a log regression. For interested readers, the results of both regressions are reported in the Appendix II. For both the ordinary regression and the log regression, there remains a strikingly good fit (with R square numbers above 0.35 in both

C. SURVEY RESULTS

A key element of the superstar hypothesis is the existence of a magnification effect. Even though the difference in quality between the Posner and Easterbrook opinions and those of the others is only x, the frequency with which their opinions appear in casebooks compared to those of other judges is larger than x (i.e., n times x, where $n > 1$). How large the magnification effect is, in turn, is a function of the characteristics of the market. A problem in our analysis of the casebook data, however, is that it does not give us a measure of quality differentials. Posner and Easterbrook have many more opinions in casebooks than other judges in the sample, but there is no variable or regression that can show that the Posner and Easterbrook opinions are x or y percent better than the opinions of others. Our claim that there is a superstar effect at play, therefore, rests on (a) demonstrating that there is a large skew, and (b) describing the characteristics of the market that suggest that there is likely to be a superstar effect at play.

Assuming that a superstar effect is operating, a question arises about the type of superstar effect. Is the effect one where the pre-magnification differences have to do with quality (the Rosen effect), or with matters such as luck or style (the Adler effect)?[93] Once again, however, there is a measurement problem. How does one determine whether the difference between opinions has to do with quality, luck, or style? We concluded that the only way to answer this question was to survey those who were familiar with the opinions in question: law professors. While we did not have the resources to conduct the type of survey that would provide a rigorous treatment of this question, we did conduct a survey of fifty of our colleagues. With the caveat that the results of our barefoot empiricism should be read as no more than mildly suggestive, the methodology and results are reported below.

We asked each of the fifty law professors we surveyed whether they were surprised by the finding that Posner and Easterbrook had more cases in casebooks than any of the other judges in the sample. Virtually everyone was not surprised (90% or 45/50). The professors surveyed were largely from

---

cases). In terms of the individual variables, Years on the Bench, Eliteness of Law School Attended, and the Seventh Circuit, all remain significant at the 0.05 level in both regressions. The Percentage of Dissents variable, however, is not significant in either regression and the Background in Academia variable is not significant in the log regression.

93. Rosen argued that the superstar phenomenon arises because small differences in talent result in disproportionate differences in rewards whenever the conditions for a superstar market—poor product substitutes and a constant or nearly constant marginal cost of output—are present. Rosen, *supra* note 13. Subsequent economists, however, have attributed the superstar effect not to differential talent, but to attempts by consumers to minimize search costs. *See, e.g.*, Adler, *supra* note 79, at 212. Under this theory, large differences in success could hold even among individuals with equal talent. *Id.*

UCLA (thirty out of the fifty were faculty members at the UCLA School of Law) and the remaining twenty were from a variety of other law schools around the country. Hence, there is a West Coast or, more specifically, a UCLA bias. We asked the respondents to evaluate the following sixteen factors in terms of their power to explain the higher annual casebook entry rates of Posner and Easterbrook.[94]

TABLE IX
SURVEY RESULTS: THE FACTORS IN TERMS OF THEIR POWER TO EXPLAIN THE HIGHER ANNUAL CASEBOOK ENTRY RATES FOR POSNER AND EASTERBROOK

FACTOR	MEAN	STANDARD DEVIATION
Lots of Friends Who Are Casebook Editors and Users	2.37	(1.11)
Innovative Perspectives	*4.00*	(0.89)
Respect for the Seventh Circuit (i.e., a circuit effect)	2.14	(1.10)
Length of Time on the Bench	2.42	(0.83)
Opinion Publication Rates	3.37	(1.13)
Dissent Rates	2.12	(1.09)
Law School Attended (Posner: Harvard; Easterbrook: Chicago)	1.90	(1.01)
Primary Prior Profession (both were professors)	3.53	(0.97)
Use of Law & Economics	*4.29*	(0.88)
Use of Footnotes (or lack thereof)	1.73	(0.83)
Use of Humor	3.25	(1.18)
Analytical Depth of Discussion	*4.24*	(0.81)
Well-Articulated Facts	3.24	(1.21)
Clarity	*4.10*	(0.94)
Good Hypotheticals	3.06	(1.12)
Overall Reputation	*4.20*	(0.92)

Table IX reports the survey results. In the discussion, the "quality" factors are distinguished from the others. "Quality" refers to the quality of a judicial opinion with regard to its value for inclusion in a casebook, as independent from other characteristics such as the personal characteristics of individual judges. Broadly speaking, the distinction being drawn is between opinion characteristics and characteristics of the individual judges, and not between high quality and low quality in the ordinary sense. Additionally, these factors are aimed specifically at examining the reasons for the high rate of inclusion of Posner and Easterbrook opinions; in a broader survey relating to all judges, we would not, for example, list Use of

94. Measurements were based on a 1 to 5 scale, where 1=No Relevance, 3=Marginal Relevance, and 5=High Relevance.

Law and Economics as a quality factor. There are eight factors that relate to opinion quality: Innovativeness, Analytical Depth, Clarity, Well-Articulated Facts, Good Hypotheticals, Use of Law and Economics, Use of Humor, and Use of Footnotes. The other eight factors relate to the characteristics of the judges: Lots of Friends Who Edit Casebooks, Length of Time on the Bench, Respect for the Seventh Circuit, Law School Attended, Opinion Publication Rates, Overall Reputations, Primary Prior Profession and Dissent Rates. Before proceeding, readers should note that some of the "quality" factors are less indicative of quality than others and one can argue whether other factors have been properly categorized as non-quality.

The five factors receiving the top scores (above 4) were: Use of Law and Economics, Analytical Depth, Overall Reputations, and Innovative Perspectives. Of these five, four relate to the opinions themselves. Only one of these is a non-quality characteristic of the judge's opinions—the Overall Reputations of Posner and Easterbrook. In the next category of importance (scores between 3 and 4), there were five factors: Primary Prior Profession, Use of Humor, Well-Articulated Facts, Publication Rates and Good Hypotheticals. Here, we have two non-quality factors, Primary Prior Profession and Publication Rates, and three quality factors that essentially have to do with writing styles. In sum, the professors in the survey appear to see a multiplicity of factors at work in causing the high entry rates of Posner and Easterbrook into the casebooks. The majority of these factors are related to quality, but there are a number of non-quality factors that are thought to be at work as well. In terms of the superstar hypothesis, the data suggest that both types of superstar magnification effects are at play, i.e., the Rosen talent-driven effect and the Adler consumer-driven search effect (not based on quality). [95]

Before proceeding, it is worth noting two sets of comments made by the survey respondents. The surveys were individually distributed, and almost every respondent had comments and criticisms about both the survey and the project. One set of comments was with respect to explanatory factors

95. As an aside, the Use of Footnotes (or lack thereof) factor receives the lowest score of all the factors. This is a factor that Posner himself has talked about—his opinions having few or no footnotes—as being a characteristic that might be important in categorizing opinions. For example, Posner has hypothesized that judge-written opinions are likely to have fewer footnotes than those written by clerks, and hence command greater authority with other judges. On Posner's dislike of footnotes in judicial opinions, see David Margolick, *The Footnote in Judicial Opinions: A Weather Vane of High Court Philosophy?*, N.Y. TIMES, Jan. 4, 1991, at B14 (quoting Judge Posner). The streamlined and footnote-less nature of Posner's opinions has also been pointed out by commentators analyzing Posner's opinion writing style. *See* Blomquist, *supra* note 26, at 683-735. The fact that the law professors do not rank the number of footnotes (or lack thereof) as important, however, does not mean that Posner is wrong vis-à-vis casebook editors. This is true because Posner's argument is one that uses the presence of footnotes as a proxy for other style factors. Absent those other style factors, footnotes might show up as important (at least on a regression, if not on a survey). *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 148 (1996).

that we had omitted. The three factors that were mentioned (each by at least two respondents) were (1) Outrageousness, (2) Sarcasm, and (3) Political Views. In our mind, Outrageousness is close to Innovativeness (the idea is that non-standard views are more fun to teach), but at least a few of the respondents thought that it better captured what made Posner and Easterbrook opinions attractive as teaching tools.[96] Similarly, some respondents thought that Sarcasm, even though close to Humor, better captured the Posner and Easterbrook style. As for the third factor, we did not include Political Views because of the assumption that most law professors are far to the left of Posner and Easterbrook, and therefore political views would not be a positive factor in inducing casebook editors to include their opinions.[97] At least a couple of respondents, however, thought that our assumption about professorial political viewpoints was incorrect.[98]

The second comment that a number of the survey respondents made had to do with a possible problem in conflating Posner and Easterbrook. As these respondents correctly noted, there are significant differences in their judicial philosophies. For example, Posner is more of a pragmatist and Easterbrook is more of a textualist. This point is valid, and conflating the two requires some explanation. The reason we conflated the opinions of the two judges is because, despite their differences, they strongly complement each other's opinions. In other words, the presence of Posner opinions makes it easier for Easterbrook opinions to enter casebooks, and vice versa. The reason for this hypothesis is that, differences in judicial philosophy aside, they are both writing from a particular theoretical framework—the Chicago School of Law and Economics. Posner and Easterbrook may disagree (and they occasionally do), but the disagreements occur within a shared framework. Once students and faculty (and judges) become familiar with that framework, it becomes easier to use and understand other opinions

96. In a recent article, Judge Kozinski says that one way for a judge to get casebook editors to include his opinions is to write them with a high degree of "flair and passion" because what law professors are looking for are cases that will produce a good classroom discussion. Kozinski, *supra* note 6, at 301-02. Although Kozinski does not explicitly say that "outrageousness" will get one's opinions into the casebooks, that is a characteristic that is likely to satisfy the "good classroom discussion" criteria.

97. *See* Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765, 780 n.54 (1998) (reporting that 10% of law faculty members report themselves to be conservative, approximately 15% say that they are middle-of-the-road, and the remaining 75% see themselves as moderately to strongly liberal).

98. These respondents may be correct. The dominance of Posner and Easterbrook is surprising if one considers politics. Both Posner and Easterbrook are Republican appointees whose brand of analysis is closely linked in the minds of many conservative political positions. Because casebook editors are targeting a more liberal audience, one might expect such editors to primarily choose cases by liberal judges, for example, Guido Calabresi, who is a Democratic appointee and well-liked by many. However, Calabresi's casebook numbers are nowhere near those of Posner and Easterbrook. It therefore appears that political affiliation, at least with respect to Posner and Easterbrook, is not a barrier.

with similar conceptual assumptions. Indeed, in the context of the same framework, the disagreements likely make their opinions (both sets) even more attractive.[99] In terms of almost all of the other important factors of casebook selection—clarity, use of humor, good facts, hypotheticals, innovativeness—Posner and Easterbrook are remarkably similar in that their opinions have these characteristics. Although there are differences in their judicial philosophies and their opinions, they are similar in terms of the factors that result in effective production of influence, and these similarities are significant enough to explain their complimentary entry into the casebooks.[100]

V. ADDITIONAL DATA

A. INVOCATION DATA

One measure of the respect accorded to judges used increasingly is the rate at which their names are invoked by other judges.[101] As a matter of standard citation practice, when judges cite to opinions by other judges, they do not mention the name of the author. On rare occasions, however, the name of the judge is invoked, either in the text (a "textual invocation") or in a parenthetical following a cite (a "parenthetical invocation"). The lack of an obligation to cite by name suggests that the invocation is an explicit acknowledgment of special respect accorded to the judge being invoked.[102]

The point can be stated in purely instrumental terms. One can interpret invocations by name as the invoking judge saying something along the lines of: "The case I am citing is especially authoritative for the following proposition because it was authored by famous/wise Judge X."[103] Once

99. *Cf.* Kozinski, *supra* note 6, at 301–02 (describing how an opinion of his has entered the casebooks, in significant part, because the discussion in it sits in stark contrast to a particular Traynor opinion that is standard fare in contracts casebooks, hence making for good discussions in class).

100. *Cf.* Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. U. L. REV. 1409, 1410–11 (2000) (finding the textualist–pragmatist divide between Posner and Easterbrook to be remarkably unimportant in determining case outcomes).

101. *See* Mita Bhattacharya & Russell Smyth, *The Determinants of Judicial Prestige and Influence: Some Empirical Evidence from the High Court of Australia*, 30 J. LEGAL STUD. 223, 224 (2001) (using "judicial citation to investigate the determinants of judicial influence"); David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 J. LEGAL STUD. 371, 372 (1999) (same).

102. A rare exception is when there is a split of opinion on the panel and the majority cites to an opinion by the dissenting judge and invokes the dissenter by name to show that the dissenter's position is inconsistent with precedent that he or she authored. Similarly, the dissent might cite to prior opinions by members of the majority and invoke them by name to show the same.

103. For a discussion and empirical test of what has been referred to as "Legitimacy Theory," i.e., the theory that judges cite to certain non-binding materials as a method of adding legitimacy to what they are saying, see Robert J. Hume, Mere Words? The Supreme Court's Use

again, citation by name suggests a special respect for the invoked judge. In sum, unlike citation rates (that are the measures most often used to measure influence and prestige rates),[104] to the extent a judge has a high invocation rate, one can be fairly certain that he or she is accorded a high amount of respect.

In addition to the textual and parenthetical invocations when a majority opinion of a judge is cited, there is a third invocation variable as well. This is the invocation of a judge (once again, in a parenthetical) when the opinion being cited is a dissent or a concurrence. Here, the invocation is less of a measure of respect because it is standard citation practice to specifically mention the name of the judge when a dissent or concurrence is cited. Despite this practice, this device of invocation is also a measure of respect (albeit a lesser one) because it is rare for judges on circuit courts to cite to dissents or concurrences by other circuit judges as authority. This makes sense because it is the majority view that won out on that other case. Judges will cite dissents and concurrences, however, when the reputation of the single dissenting/concurring judge is such that his or her reputational value provides authority. The measure here is imperfect, because a judge may also cite to dissents and concurrences to demonstrate an alternate view (and one that the writing judge disagrees with and may even be ridiculing), but it is our contention that the majority of dissent and concurrence cites are the result of the extra respect accorded to the writing judge.

Furthermore, the invocation rate protects against bias that might exist in the citation data as a result of the use of law clerks in the opinion-writing process. It is no secret that most judges make extensive use of their law clerks in the opinion-writing process. Even if judges draft the opinion, it is likely that clerks do the bulk of the citation work. Hence, the choice of whom to cite is likely to be a function of the biases that affect the law clerk. Given that students are fed a steady diet of Posner and Easterbrook opinions in law school, it should come as no surprise to find these same students citing more frequently to the opinions of these judges when they are clerks. With invocations, however, one can be fairly certain that the writing judge will either intentionally invoke another judge or learn that her law clerk has (even if it is the clerk who drafts the opinion), because invocations are rare and a clear signal of respect. Hence, if a clerk accords special respect to either Kozinski or Reinhardt (to pick two prominent judges who have

---

of Corroboratory Evidence to Encourage Compliance, Paper Presented at the 2001 Annual Meeting of the Midwest Political Science Association (on file with authors).

104. *See* Bhattacharya & Smyth, *supra* note 101, at 224. For articles using citations to opinions to measure influence (i.e., citations irrespective of invocations), see Montgomery N. Kosma, *Measuring the Influence of Supreme Court Justices*, 27 J. LEGAL STUD. 333 (1998); William M. Landes et al., *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271 (1998); Peter McCormick, *The Supreme Court Cites the Supreme Court: Follow-up Citation on the Supreme Court of Canada, 1989–1993*, 33 OSGOODE HALL L.J. 453 (1996).

differing and often controversial views) in his or her draft opinion, it is likely that the judge in question will notice the invocation and have something to say about it. Invocation rates are, therefore, a more accurate measure of the respect that judges accord to each other than are citation rates.[105]

Table X contains the invocation data for the judges in our sample as measured in terms of how much the judges in the sample invoke *each other.* Invocation numbers were counted for these judges (for their careers on the appellate bench) up to June 2000, and were counted with respect to their opinions alone (and not any academic or other articles that they may have written). The numbers in the columns are Invocations in the Text, Invocations in Parentheticals for Dissents or Concurrences, Invocations in Parentheticals for Majority Opinions, and Total Invocations.

TABLE X
INVOCATION RATES

JUDGE	INVOKED IN TEXT	INVOKED IN PARENTHETICAL (FOR DISSENTING/ CONCURRING)	INVOKED IN PARENTHETICAL (FOR MAJORITY OPINION)	TOTAL BY JUDGE
D.C. Cir.				
H. Edwards	7	15	1	23
D. Ginsburg	2	4	2	8
K. Henderson	1	4	0	5
A.R. Randolph	0	1	0	1
J. Rogers	0	0	1	1
D. Sentelle	2	1	1	4
L. Silberman	5	15	0	20
D. Tatel	0	4	0	4
P. Wald	11	13	6	30
S. Williams	1	4	3	8
TOTAL				104

105. To the extent one were to compare judges across pure influence rates, there might be a problem in looking at invocation rates alone (as opposed to both invocation rates and ordinary citation rates), because invocation rates likely measure only the high end of the respect spectrum. Our hypothesis is that these judges at the top get invoked frequently and the rest are rarely invoked at all. That, in terms of measuring relative amounts of influence, can create a misleading impression if the regular opinion citation rates are more evenly distributed across judges. Put differently, what cross-judge invocation rates measure is not influence, but a kind of heightened authority or influence. It is the kind of authority that one either has or does not have. There is unlikely to be the kind of continuum that there might be with regular citation rates. That is not a problem here, however, because our focus is explicitly on testing the high end disproportionate influence effect, i.e., the superstar phenomenon.

JUDGE	INVOKED IN TEXT	INVOKED IN PARENTHETICAL (FOR DISSENTING/ CONCURRING)	INVOKED IN PARENTHETICAL (FOR MAJORITY OPINION)	TOTAL BY JUDGE
1st Cir.				
M. Boudin	7	1	0	8
S. Lynch	0	0	0	0
B. Selya	13	4	1	18
N. Stahl	2	4	1	7
J. Torruella	1	5	3	9
TOTAL				42
2d Cir.				
J. Cabranes	5	1	3	9
G. Calabresi	2	3	2	7
D. Jacobs	1	0	0	1
P. Leval	2	0	0	2
A. Kearse	4	4	0	8
J. McLaughlin	1	0	0	1
F. Parker	1	1	0	2
J. Walker	3	4	0	7
R. Winter	11	12	4	27
TOTAL				64
3d Cir.				
S. Alito	2	6	0	8
E. Becker	18	21	4	43
R. Cowen	1	1	0	2
M. Greenberg	1	0	1	1
T. Mckee	0	0	0	0
T. Lewis	0	1	0	1
C. Mansmann	2	9	1	12
R. Nygaard	2	4	0	6
J. Roth	0	0	0	0
A. Scirica	0	5	0	5
D. Sloviter	2	8	0	10
W. Stapleton	1	5	0	6
TOTAL				94
4th Cir.				
S. Ervin	0	2	0	2
C. Hamilton	2	1	0	3

JUDGE	INVOKED IN TEXT	INVOKED IN PARENTHETICAL (FOR DISSENTING/ CONCURRING)	INVOKED IN PARENTHETICAL (FOR MAJORITY OPINION)	TOTAL BY JUDGE
K. Hall	1	8	2	11
J.M. Luttig	2	6	0	8
M.B. Michael	1	0	0	1
D. Motz	1	4	0	5
F. Murnaghan	4	2	2	8
P. Niemeyer	4	2	1	7
D. Russell	0	0	0	0
H.E. Widener	3	6	2	11
K. Williams	0	1	0	1
W. Wilkins	1	0	2	3
J.H. Wilkinson	5	7	1	13
TOTAL				73
5th Cir.				
R. Barksdale	0	1	0	1
F. Benavides	0	0	0	0
W.E. Davis	0	1	0	1
H. DeMoss	0	3	0	3
J. Duhe	0	2	0	2
E. Garza	1	2	0	3
P. Higginbotham	15	8	2	25
E.G. Jolly	2	5	0	7
E. Jones	0	7	1	8
C. King	0	2	0	2
R. Parker	0	2	0	2
H. Politz	3	1	1	5
J. Smith	0	4	0	4
C. Stewart	0	0	0	0
J. Wiener	1	0	0	1
TOTAL				64
6th Cir.				
A. Batchelder	0	4	0	4
D. Boggs	1	6	4	11
M.C. Daughtery	0	1	0	1
C. Kennedy	0	4	0	4
B. Martin	2	0	0	2
G. Merritt	10	13	1	24
K.N. Moore	0	0	0	0

JUDGE	INVOKED IN TEXT	INVOKED IN PARENTHETICAL (FOR DISSENTING/ CONCURRING)	INVOKED IN PARENTHETICAL (FOR MAJORITY OPINION)	TOTAL BY JUDGE
D. Nelson	0	5	0	5
A. Norris	0	5	0	5
J. Ryan	2	1	0	3
E. Siler	1	1	0	2
R. Suhrheinrich	0	0	0	0
TOTAL				61
7th Cir.				
J. Coffey	0	2	1	3
W. Cummings	1	1	0	2
F. Easterbrook	45	39	14	98
J. Flaum	5	4	0	9
M. Kanne	1	0	0	1
D. Manion	0	5	0	5
R. Posner	122	14	42	178
K. Ripple	4	11	1	16
I. Rovner	0	5	0	5
D. Wood	2	3	1	6
TOTAL				323
8th Cir.				
R. Arnold	0	0	0	0
M. Arnold	0	1	0	1
C.A. Beam	0	0	0	0
P. Bowman	0	0	0	0
G. Fagg	0	0	0	0
D. Hansen	0	0	0	0
J. Loken	0	0	0	0
T. McMillian	0	0	0	0
D. Murphy	0	0	0	0
R. Wollman	0	1	0	1
TOTAL				2
9th Cir.				
J. Browning	2	1	1	4
M. Brunetti	0	3	0	3
F. Fernandez	1	5	0	6
B. Fletcher	3	5	0	8
C.H. Hall	2	7	0	9

JUDGE	INVOKED IN TEXT	INVOKED IN PARENTHETICAL (FOR DISSENTING/ CONCURRING)	INVOKED IN PARENTHETICAL (FOR MAJORITY OPINION)	TOTAL BY JUDGE
M. Hawkins	0	0	1	1
P. Hug	0	2	0	2
A. Kleinfeld	0	1	0	1
A. Kozinski	7	37	4	48
T.G. Nelson	1	5	0	6
H. Pregerson	0	2	0	2
D. O'Scannlain	2	3	1	6
S. Reinhardt	1	14	6	21
P.A. Rymer	0	5	1	6
M. Schroeder	4	3	1	8
S. Trott	0	3	1	4
D. Thompson	0	0	0	0
TOTAL				135
10th Cir.				
S. Anderson	0	1	0	1
B. Baldock	1	1	0	2
W. Brorby	0	1	0	1
D. Ebel	1	3	0	4
R. Henry	0	0	0	0
P. Kelly	0	1	0	1
C. Lucero	0	1	0	1
J. Porfilio	0	1	0	1
S. Seymour	0	1	0	1
D. Tacha	1	1	0	2
TOTAL				14
11th Cir.				
R.L. Anderson	0	0	0	0
R. Barkett	0	2	0	2
S. Birch	1	1	0	2
S. Black	0	2	0	2
E. Carnes	1	1	0	2
E. Cox	0	4	0	4
J. Dubina	0	0	0	0
J.E. Edmondson	0	2	0	2
J. Hatchett	0	3	0	3
G. Tjoflat	5	13	0	18
TOTAL				35
GRAND TOTAL				1012

The distribution of invocation data is similar to that on casebooks—Posner and Easterbrook receive the bulk of invocations. Most judges are seldom invoked—89 of the 133 in the sample were invoked five times or less. Twenty-six were invoked between six and ten times, and eighteen were invoked more than ten times. Of those final eighteen, the two highest were Posner and Easterbrook, whose invocation numbers are 178 and 98 respectively. An indication of how far ahead Posner and Easterbrook are is that the next highest judge, Kozinski, had 48 invocations, and, as Table XI shows, the numbers drop quickly. Moreover, going back to Table X, the majority of Kozinski's numbers were primarily of the weakest form of invocation (37 out of 48 are of the weak Dissent/Concurrence form), meaning that the judge was invoked because a dissent or concurrence has been cited as opposed to an invocation on a majority opinion. With Posner and Easterbrook, the majority of their invocations were of the strong Textual/Parenthetical form (for Posner, only 14 out of the 178 invocations are of the weak form).

TABLE XI
TOP TEN IN TERMS OF INVOCATIONS

NAME	CIRCUIT	INVOCATION NUMBERS
R. Posner	7th	178
F. Easterbrook	7th	98
A. Kozinski	9th	48
E. Becker	3d	42
P. Wald	D.C.	30
R. Winter	2d	27
R. Higginbotham	5th	25
G. Merritt	6th	24
H. Edwards	D.C.	23
S. Reinhardt	9th	21

Four aspects of the invocation data results merit attention. First, the skew suggests a superstar effect in terms of reputations. As with the casebook data, the conditions are such that one would expect this type of effect. A judge choosing to support a claim in her opinion by invoking a particular judge by name (i.e., using the latter judge's name as a signal of extra authority) does not incur any additional cost if she uses Judge A's opinion as opposed to Judge B's opinion. Given that fact, she will always choose to invoke the judge with the higher reputational value, regardless of the minimal difference that may exist in reputational value. This disproportionate *invocation* will result in enhancing the reputation of the invoked judge and will convert the *slight* initial difference in *reputational status* into a *disproportionate* one.

Second, the two superstars in terms of reputation among other judges—Posner and Easterbrook—are the same two superstars in terms of law school casebooks. At least at the top—and with a superstar distribution it is the top that matters—there appears to be little distinction between what the academy values and what the judiciary values.

Third, the invocation data suggest a small circuit effect at the low end. There are circuits whose judges are almost never invoked; most obviously the Eighth and the Tenth Circuits (and to a lesser extent, the Eleventh Circuit). On the other end, the numbers for the Seventh Circuit are, once again, higher than those of any other circuit. However, this is driven primarily by the Posner and Easterbrook numbers. Overall, the circuit effect appears to be smaller here than it is with publication rates and casebook numbers. Where circuits have higher invocation numbers, those numbers appear to be largely driven by a few individual judges, as opposed to any overall circuit effect. This makes sense to the extent that reputational value, unlike publication rates and casebook-worthy opinion writing rates, is less susceptible to circuit norms or culture effects. Reputation (at least star reputation), after all, is much more of a relative measure. Only a few people have it, and they tend to have it because others do not.

Fourth, and finally, the fact that the casebook superstars are also the invocation superstars suggests an extra value to familiarizing students with these particular judges. If these are the judges whose opinions have the greatest persuasive value for other judges, then an ability to use the opinions of these judges will serve students well when they are arguing cases.

B. STUDENT NOTES

The dominance of Posner and Easterbrook in the casebook arena suggests a possibility that they have a disproportionate influence on law students. One way to measure this is to examine the choices that students make in terms of which opinions to focus on in writing student articles.[106] There are two related reasons why one might expect an effect here. First, to the extent that students are fed a diet of Posner and Easterbrook and their Chicago style analysis, they learn both this mode of analysis and how to critique it. Second, many of the factors that make Posner and Easterbrook opinions attractive to casebook editors—innovativeness, clarity, the use of a generalizable theoretical framework, etc.—are also likely to make their opinions attractive to students writing articles. To measure this variable, we reviewed student notes and comments published in the law reviews of the top thirty law schools (as measured by the 2000 *U.S. News & World Report*

106. Student notes are at best an imperfect measure of judicial influence since they tend to be written by a small and non-random group of students (i.e., those who work on the law reviews). Further, a substantial number of these articles are highly critical of the cases being analyzed. On this latter point, however, it is probably the case that the process of engaging and criticizing a framework is the best way to learn how to use it.

rankings) between 1995 and 1999 to determine how often opinions by judges in our sample were discussed. The criterion for counting a note or comment was that it include a substantial discussion or analysis of a case written by one of the judges in our sample.[107] Before proceeding, there are three factors that should be noted about the data. First, a few law reviews contained a disproportionate number of notes and comments that met our criteria (Harvard, Yale, North Carolina). Second, the North Carolina data contains a bias towards the Fourth Circuit in that all twenty-four of the case notes there analyzed cases by judges from the Fourth Circuit. Third, Posner and Easterbrook's home law review, the *University of Chicago Law Review*, only accounted for six of the 206 cases that were substantially discussed in the law reviews sampled.

TABLE XII
STUDENT ARTICLES DISCUSSING CASES

JUDGE	JUDGE TOTALS	CIRCUIT TOTALS
D.C. Cir.		
H. Edwards	2	
D. Ginsburg	4	
K. Henderson	0	
A.R. Randolph	0	
J. Rogers	0	
D. Sentelle	0	
L. Silberman	6	
D. Tatel	0	
P. Wald	2	
S. Williams	5	19
1st Cir.		
M. Boudin	3	
S. Lynch	2	
B. Selya	2	
N. Stahl	2	
J. Torruella	2	11
2d Cir.		
J. Cabranes	2	
G. Calabresi	1	
D. Jacobs	1	
P. Leval	1	
A. Kearse	1	
J. McLaughlin	0	
F. Parker	2	
J. Walker	1	
R. Winter	6	15
3d Cir.		
S. Alito	0	
E. Becker	2	
R. Cowen	2	
M. Greenberg	0	
T. Mckee	3	
T. Lewis	2	

107. "Substantial" was defined as a discussion of one law review page or more.

JUDGE	JUDGE TOTALS	CIRCUIT TOTALS
C. Mansmann	3	
R. Nygaard	0	
J. Roth	0	
A. Scirica	0	
D. Sloviter	3	
W. Stapleton	1	16
4th Cir.		
S. Ervin	3	
C. Hamilton	1	
K. Hall	1	
J.M. Luttig	7	
M.B. Michael	0	
D. Motz	2	
F. Murnaghan	1	
P. Niemeyer	4	
D. Russell	4	
H.E. Widener	6	
K. Williams	5	
W. Wilkins	2	
J.H. Wilkinson	6	42
5th Cir.		
R. Barksdale	0	
F. Benavides	0	
W.E. Davis	1	
H. DeMoss	1	
J. Duhe	0	
E. Garza	0	
P. Higginbotham	4	
E.G. Jolly	3	
E. Jones	1	
C. King	0	
R. Parker	0	
H. Politz	0	
J. Smith	4	
C. Stewart	0	
J. Wiener	2	16
6th Cir.		
A. Batchelder	0	
D. Boggs	0	
M.C. Daughtery	0	
C. Kennedy	1	
B. Martin	1	
G. Merritt	1	
K.N. Moore	0	
D. Nelson	0	
A. Norris	2	
J. Ryan	0	
E. Siler	0	
R. Suhrheinrich	1	6
7th Cir.		
J. Coffey	0	
W. Cummings	3	
F. Easterbrook	13	
J. Flaum	0	
M. Kanne	3	
D. Manion	0	
R. Posner	11	
K. Ripple	1	
I. Rovner	2	
D. Wood	0	33
8th Cir.		
R. Arnold	0	
M. Arnold	1	
C.A. Beam	1	
P. Bowman	4	
G. Fagg	0	
D. Hansen	3	
J. Loken	0	
T. McMillian	2	
D. Murphy	0	
R. Wollman	1	12
9th Cir.		
J. Browning	0	
M. Brunetti	1	
F. Fernandez	1	
B. Fletcher	1	

JUDGE	JUDGE TOTALS	CIRCUIT TOTALS
C.H. Hall	0	
M. Hawkins	0	
P. Hug	1	
A. Kleinfeld	0	
A. Kozinski	4	
T.G. Nelson	2	
H. Pregerson	1	
D. O'Scannlain	4	
S. Reinhardt	4	
P.A. Rymer	0	
M. Schroeder	2	
S. Trott	0	
D. Thompson	0	21
10th Cir.		
S. Anderson	2	
B. Baldock	1	
W. Brorby	0	
D. Ebel	1	
R. Henry	0	
P. Kelly	0	
C. Lucero	0	
J. Porfilio	0	
S. Seymour	0	
D. Tacha	0	4
11th Cir.		
R.L. Anderson	1	
R. Barkett	0	
S. Birch	3	
S. Black	0	
E. Carnes	1	
E. Cox	0	
J. Dubina	0	
J.L. Edmondson	2	
J. Hatchett	0	
G. Tjoflat	5	12
TOTALS		206

Table XII contains the student note totals. Posner and Easterbrook stand out as the only two judges who have had more than ten cases discussed in detail in student articles. Fifty-four of the 133 judges had zero opinions analyzed, another sixty-nine had between one and four analyzed, and only ten had five or more. The data suggests that the casebook bias is translating into a student article bias.

Table XIII depicts the top ten judges in terms of student article numbers. As noted, Posner and Easterbrook sit at the top. There are four Fourth Circuit judges, which is a result of the University of North Carolina Law Review's practice of focusing on cases from the Fourth Circuit. The remaining four spots are taken by Judges Silberman, Winter, Williams, and Tjoflat. Winter and Williams, as noted earlier, are both former academics whose philosophies resemble those of the Chicago School of Law and Economics.

TABLE XIII
TEN MOST CITED JUDGES IN STUDENT ARTICLES

NAME	CIRCUIT	TOTAL
F. Easterbrook	7th	13
R. Posner	7th	11
J. Luttig	4th	7
J.H. Wilkinson	4th	6
L. Silberman	D. C.	6
R. Winter	2d	6
H.E. Widener	4th	6
K. Williams	4th	5
S. Williams	D. C.	5
G. Tjoflat	11th	5

An interesting aspect of the student article data not visible in Table XIII is a skew in judicial influence in an area that the casebook data did not measure. That area is Constitutional Law. The norm with Constitutional Law casebooks is to focus almost exclusively on Supreme Court opinions. Hence, our survey of Constitutional Law casebooks turned up almost no opinions by the judges in our sample. Student articles, however, turn out to be primarily about Constitutional Law cases (104 of the 206 cases were Constitutional Law cases; the next most studied area was Civil Procedure, with 20 cases). The fact that Posner and Easterbrook outdo the others even here—an area not typically associated with Law and Economics—is a further indication of their dominance.

VI. CONCLUSION: GIANTS AND PYGMIES

Skewed distributions of earnings or influence are not unusual. We see them everyday. They are perhaps most visible in areas such as the music industry, the movie industry, and professional sports. The question is whether the presence of such disparities in the realm of judicial influence should bother us.

At first glance it may not seem troubling that the opinions of certain judges consistently beat out those of others for casebook entry. In the marketplace of judicial ideas, it seems efficient for the better ideas to gain prominence, and for the lesser ones to be ignored. However, there are at least three problems with this line of reasoning.

First, even assuming a difference in quality, the disparate rate with which some judge's opinions are published in casebooks suggests that the difference in influence exceeds the difference in quality. For example, assuming arguendo that Posner and Easterbrook's Chicago School–oriented

opinions are twice as good as those of the next best appellate judge may result in their having ten times as many opinions in casebooks as that next best judge. To the extent that the socially optimal mix of ideas—especially in terms of what students are exposed to—is a diversified portfolio of viewpoints (as opposed to being 90% Chicago style Law and Economics and 10% everything else), the disparity presents a problem.

Second, it is not clear that the Posner-Easterbrook dominance is purely a result of the superiority of their ideas. While their opinions may be of a higher quality than those of the vast majority of appellate judges, an alternative and supplementary explanation is that Posner and Easterbrook's dominance results from the ways they present ideas and make them easy to use. For example, both of their arguments tend to fit within a single larger theoretical framework that itself provides for easy applicability to a variety of areas. For students looking for ways to make sense of complex realities, the Posner and Easterbrook framework is likely to have considerable appeal. The problem is that much of the ease in understanding and applying Chicago School ideas comes from simplifying assumptions that are not always visible. Further, as some have argued, this particular set of ideas tends to be biased in favor of reaffirming the status quo (which, in and of itself, may be appealing to many). Hence, it may be a combination of bounded rationality and cognitive biases that encourage the choice of Posner and Easterbrook opinions rather than higher quality.

Third, the ideas of Posner and Easterbrook compete in the restricted universe of the federal judiciary. It would be one thing if their ideas were competing for attention with those of similar abilities to articulate competing viewpoints of people like Cass Sunstein, Ian Ayres, Kimberle Crenshaw, Duncan Kennedy, Bruce Ackerman, Akhil Amar, Kathleen Sullivan, and many others. These others—intellectual heavyweights who might be capable of producing ideas in a form and volume that make them appealing to consumers in the same way that Posner's and Easterbrook's are—are not a part of the restricted universe in which Posner and Easterbrook now compete. In sum, the problem is that Posner and Easterbrook are giants in a world where entry to other giants is severely restricted.

Assuming that the dominance of Posner and Easterbrook is a problem, what are possible solutions? One possible solution (at least for the future) is to make sure that these types of intellectual giants are not put on the bench. But that is akin to cutting off the nose to spite the face. Unlike some, we do not think there is anything inherently problematic about the use of economics in law. Posner and Easterbrook have used economics to provide the rest of us with new insights and perspectives in a number of areas of the law.

We propose that other giants who can offer alternative and competing perspectives be introduced into the federal judiciary. In the debates

surrounding the recent presidential election, there has been much discussion over future judicial appointments. That discussion has focused almost exclusively on the Supreme Court and, in particular, on what will happen regarding abortion. That is important, but it is ridiculous that the entire focus of discussion about judicial appointments centers on one issue. Democrats might do well to notice that Reagan's appointment of Posner and Easterbrook may have done much more to advance and entrench conservative viewpoints in the law than have the appointments of Scalia and Thomas to the Supreme Court.[108] The Democrats are fortunate that neither Posner nor Easterbrook turned out to be the conservative ideologue that many feared they (and especially Posner) would be. That said, the fact remains that former President Clinton and the Democrats failed to use their opportunity to appoint adequate counterweights.[109] It will be interesting to see what President Bush does with his opportunity.[110]

This study has only scratched the surface on the subject of selection of materials for casebooks. More importantly, there are a number of additional pieces of data that could shed further light on the superstar effect and whether it exists with respect to Posner and Easterbrook.

First, federal appellate judges account for only a small percentage of the cases in most casebooks. The bulk of the cases are written by state and U.S. Supreme Court Justices. Even with the dominance of Posner and Easterbrook within the federal circuit court arena, most casebooks only contain a few Posner and Easterbrook opinions. This hardly translates into the hegemony of Law and Economics. Indeed, in a field like corporate law, where the Delaware state courts are often the primary source of authority, it may well be that the real casebook superstars are judges like Chancellor William Allen.

Second, today's casebooks often contain a great deal of non-case material. Included in this material are excerpts from academic articles. It is possible that fields like Feminist Theory, Critical Legal Studies, and Law and Sociology enter the casebooks in this form, and there may well be "article superstars" from these fields whose ideas effectively compete with the Posner

108. On the rightward skew of judicial power that has resulted from strong Republican appointees and relatively weak or centrist Democratic appointees, see Cass R. Sunstein, *Tilting the Scales Rightward*, N.Y. TIMES, April 26, 2001, Op-Ed at A23 ("Conservative judges, in the[ ] lower courts, many appointed by President Reagan, are determining the current direction of the judiciary.").

109. Many Democrats blame the Republican senators for their aggression in blocking Democratic nominees. *Id.*

110. Within his first set of nominations is that of Michael McConnell to the Tenth Circuit, a professor at the University of Utah. Although not thought of as a Chicago Law and Economics scholar, McConnell is a conservative former University of Chicago professor. *See* Naftali Bendavid, *Bush Boldly Pushes First Batch for Bench*, CHIC. TRIB., May 10, 2001, *available at* 2001 WL 4071546 (discussing McConnell's "staunchly conservative" stance regarding separation of church and state).

and Easterbrook ideas in the notes.

Third, we do not know whether the Posner and Easterbrook opinions will have staying power. The Cardozo, Hand, and Traynor opinions we see in today's casebooks are ones that have survived numerous editions. The question is whether the Posner and Easterbrook opinions will survive this casebook revision process.

To the extent that this article is valuable, we hope that a significant portion of that value is in terms of encouraging further research on the subject of judicial influence in casebooks.

APPENDIX I: OPINIONS IN CASEBOOKS

KEY

Admin—Administrative Law
Animals &—Animals and the Law
Antrst—Antitrust
Corps—Corporations
Ptnrshp—Partnership
CivPro—Civil Procedure
Comm—Communications Law
CivRt—Civil Rights
CrimPro—Criminal Procedure
Con—Constitutional Law
CmPrp—Community Property
Conflws—Conflicts of Laws
KS—Contracts
Crim—Criminal Law
Emp—Employment Law
Elect.—Election Law
Env—Envionmental Law
Evid—Evidence
Fam—Family Law
FDcls—Federal Courts
Gend &—Gender & the Law
Health—Health Law
Immg—Immigration Law
Int.H.Rts.—International Human Rights
IP—Intellectual Property
Lab—Labor Law
N.Amer.—Native America & the Law
N-Profits—Non Profits
Prop—Property
Race &—Race & the Law
Rmdies—Remedies
Sec—Securities Law
SxOt.&—Sexual Orientation and the Law
TC&P—Telecommunications Law & Policy
Tax—Tax
Tort—Torts
Wills—Wills

Appendix

Table XIV
Opinions in Casebooks

JUDGE	Admin*	Animals &	Antrst.*	Corps.	Ptnrshp.	Civ.Pro	Comm.*	Civ.Rts.	CrimPro	Con*	CrmPrp	ConLaws	Ke	Crim	Emp.	Elect.*	Env.*	Evid.	Fam.*	F.D. Cts	Gen'l. &	Health*	Immg*	Int.H.Rts	IP	Lab.	N.Amer*	N-Profits	Prop	Race&	Rmdies	Sec.*	Sx.Ob.&	TCL&P	Tax	Tort	Wills	T/Yrs.	Total
D.C.Cir.(74)																																						
H. Edwards	4				1		1		1			1					2					1				1										2		1.63	13
D. Ginsburg	1			1		2									1			1													1					0.64	7
K. Henderson	1				2												2														1					0.86	6
A. Randolph		1															3																				0.57	4
J. Rogers													1				1																		1		1	3
D. Sentelle		2																							1						1				1		0.5	5
L. Silberman	1			1		1			1	1								1			1					2					1	2					0.83	10
D. Tatel																	1										1										0.67	2
P. Wald	4	2				1											4	1								1									1		0.89	16
S. Williams	3		1		2							1																			1						0.73	8
1st Cir.(24)																																						
M. Boudin																	1					1	1													1	0.8	4
S. Lynch					2										1						1																2	4
B. Selya				1					1						1		2														2	1					0.73	8
N. Stahl																							1														0.2	1
J. Torruella						1			2			1			1																1					1	0.54	7
2d Cir.(75)																																						
J. Cabranes					1																																0.33	1
G. Calabresi				1											1																						0.67	2
D. Jacobs				1																												2					0.6	3
P. Leval				1		1												1																			0.75	3
A. Kearse			1	3		1			1				4								1		1		1										4		0.94	17
J. McLaughlin				1	1		1		2									1														2					1.14	8
F. Parker																																					0	0
J. Walker				2																		1			3												0.75	6
R. Winter			3	8	2	1	1		2				2	1			2	2				1			2				1		1	3			3		2.33	35
3d Cir.(61)																																						
S. Alito	1				1	1																	1														0.57	4
E. Becker			1	1		1	3						1		1			2											1		3	3			1		1.13	18
R. Cowen															1			1										1			1				4		0.8	8
M. Greenberg				1					1																										1		0.3	3
T. Mckee																																					0	0
T. Lewis									1													2															0.6	3
C. Mansmann															1																						0 08	1
R. Nygaard																																					0	0
J. Roth						2	2																														0.67	4
A. Scirica			1		1																	1															0.3	3
D. Sloviter									1					2								1			1				1		2						0.44	8
W. Stapleton			1		1	1			2													2													2		0.75	9
4th Cir. (53)																																						
S. Ervin				1		1			1				1		1			1								1					1						0.47	8
C. Hamilton					1																																0.17	1
K. Hall	1					1						1					1																				0.19	4
J.Luttig																																1					0.17	1
M. Michael																	1				1																0.33	2
D. Motz							1																												1		0 67	2

JUDGE	Admin*	Animals &*	Antrst.*	Corps.	Ptnrshp.	Civ Pro	Comm.*	Civ Rts.	CrmPro	Con*	CmPrp	Cont.lws	Ks	Crim	Emp.	Elect.*	Env*	Evid.	Fam.*	F.D. Cts	Gend. &*	Health*	Immg*	Int.H.Rts	IP	Lab.	N.Amer.*	N-Profits	Prop	Race&*	Rmdies	Sec.*	Sx.Ot.&*	TCL&P	Tax	Tort	Wills	T/Yrs.	Total
F. Murnaghan													1					1																				0.11	2
P. Niemeyer				1		2			1												2																	0.86	6
D. Russell				1									1				1																					0.12	3
H. Widener					1		1					1	4				1	1													1							0.4	10
K. Williams	1						1																								1	1						0.8	4
W. Wilkins						1												1															1					0.27	3
J. Wilkinson				1					1						2		1														1	1						0.5	7
5th Cir. (53)																																							
R. Barksdale																																1						0.14	1
F. Benavides																																						0	0
W. Davis						1	1								1							1													1			0.36	5
H. DeMoss																																						0	0
J. Duhe									1									1																				0.22	2
E. Garza							1						1										1												2			0.83	5
R. Higginbotham					1	1								1	1		1	1													1					2		0.6	9
E. Jolly				1			2								3		2		2																			0.67	10
E. Jones																																			1			0.08	1
C. King	1												1									1									1							0.22	4
R. Parker																																						0	0
H. Politz						1									1																							0.11	2
J. Smith						1	1								2		6				1																	1.1	11
C. Stewart																																	1					0.33	1
J. Wiener					1																	1																0.29	2
6th Cir. (47)																																							
A. Batchelder					1												1																					0.33	2
D. Boggs																			2		1	1									2							0.55	6
M. Daughtery														1					1																			0.5	2
C. Kennedy				2		2	2										1		1																			0.44	8
B. Martin	1						1							1											1						1				1	1		0.39	7
G. Merritt				5	2				1				1									1										2						0.6	12
K. Moore						1									1																				1			1.5	3
D. Nelson	1																																					0.83	1
A. Norris				1											1																							0.18	2
J. Ryan					1		1																		1													0.25	3
E. Siler						1																																0.17	1
R. Suhrheinrich																																						0	0
7th Cir.(254)																																							
J. Coffey							1		2				1		3				1			1			1							1						0.73	11
W. Cummings	1		1				2						4	1	4						2	1			2				1		1				2			0.71	22
F.Easterbrook	1		3	13	4	2	4		4	2			7	1	2	1		1			5	4										3	1			8		5.33	64
J. Flaum		1		1			2		3					3			1								1						1				1	1		1.07	15
M. Kanne				2		2							1																			1						0.43	6
D. Manion																						1										1				1		0.27	3
R. Posner	5	1	10	5	6	4	4		2				26	2	8			3	2		2	2			1			2	2		10	3			6	12		7.38	118
K. Ripple				1					2					1				1	1		1																	0.58	7
I. Rovner													1									1																0.4	2
D. Wood				1	1				1				2																		1							3	6
8th Cir. (50)																																							
R. Arnold				3	1		2		1							1							1								1					1		0.65	11
M. Arnold						1									1																							0.4	2
C. Beam				1											1																	2						0.4	4
P. Bowman				1		2										1									1											2		0.5	7
G. Fagg																																				1		0.07	1

JUDGE	Admin*	Animals &*	Antrst.*	Corps.	Pdrshp.	Civ Pro	Comm.*	Civ.Rts.	CrmPro	Con*	CrnPrp	Conf.Lws	Ks	Crim	Emp.	Elect.*	Env*	Evid.	Fam.*	F.G. Cts	Gend. &*	Health*	Immg*	Int.H.Rts	IP	Lab.	N.Amer*	N-Profits	Prop	Race&*	Rmdies	Sec.*	Sx.Dt.&*	TCL&P	Tax	Tort	Wills	1/Yrs.	Total
D. Hanson					1									1	1																							0.5	3
J. Loken																			1																1			0.23	2
T. McMillan			3				1									1	1				2																	0.42	8
D. Murphy						1												1											1				1					1.33	4
R. Wollman							2		1						2						2											1						0.67	8
9th Cir (133)																																							
J. Browning			1		1		1						1	5	1						1		2		1						1							0.39	15
M. Brunetti			1			2																											1					0.33	4
F. Fernandez				1											1																	1						0.38	3
B. Fletcher	1		1				1						1					1				1	2		1							2						0.61	11
C. Hall							1							1				1					1									3						0.54	7
M. Hawkins																						1													1			0.67	2
P. Hug	1					1			1														1												1	1		0.3	6
A. Kleinfeld	1				1																1														1			0.67	4
A. Kozinski			1	2	1		1		1				4	2			1					1										1						1.25	15
T. Nelson	1		1	1		1						1			1						1		2												1			1.43	10
H. Pregerson			2										1				1								3						1				1			0.5	9
D. O'Scannlain			1			1											1																		2	1		0.55	6
S. Reinhardt	1		1	1			1			1			1	1	1								6								1				1			0.88	15
P. Rymer																									1													0.13	1
M. Schroeder															2		3														1				1			0.39	7
S. Trott					1										3							1	1															0.67	6
D. Thompson		1					2				2	1		1	2			1	1			1																1	12
10th Cir.(21)																																							
S. Anderson	1						2																													1		0.33	4
B. Baldock													1																									0.08	1
M. Hawkins																																						0	0
W. Brorby							2										1												1			1						0.56	5
D. Ebel															1																							0.11	1
R. Henry					1																																	0.33	1
P. Kelly						1									1																							0.4	2
C. Lucero																																						0	0
J. Porfilio																																						0	0
S. Seymour							3										1											1				1						0.33	6
D. Tacha																		1																				0.08	1
11th Cir.(16)																																							
R. Anderson	1					1							1		2	1																						0.33	6
R. Barkett															1																							0.33	1
S. Birch													1																									0.14	1
S. Black																																						0	0
E. Carnes																	1																					0.2	1
E. Cox				1											1																							0.22	2
J. Dubina									1																													0.14	1
J.Edmondson					1										1																							0.18	2
J. Hatchett																																						0	0
G. Tjoflat																						1							1		1				1			0.18	4
TOTALS	34	8	34	69	41	45	52	0	39	4	2	7	71	25	61	5	45	26	12	0	25	31	20	0	22	5	0	5	9	9	39	42	39	0	41	39	1		

APPENDIX II

OLS REGRESSION RESULTS—CASEBOOK REGRESSION

Variable	DF	Parameter Estimate	Standard Error	Wald Chi-Square	Pr > Chi-Square
INTERCEPT	*1*	*3.74*	*3.03*	*1.24*	*0.2191*
YEARS ON BENCH	1	0.47	0.14	3.39	0.0009
PROFESSOR	1	9.20	2.90	3.17	0.0019
LENA (measure of Law School eliteness)	1	2.15	0.98	-2.19	0.0307
SEVENTH CIRCUIT	1	16.43	3.44	4.77	0.0001
% DISSENTS	1	-0.23	6.51	-0.03	0.9723

R-Square = .3573

OLS REGRESSION USING LOG TRANSFORMATION OF CASEBOOK NUMBERS

Variable	DF	Parameter Estimate	Standard Error	Wald Chi-Square	Pr > Chi-Square
INTERCEPT	*1*	*0.88*	*0.24*	*3.64*	*0.0004*
YEARS ON BENCH	1	0.07	0.01	6.42	0.0001
PROFESSOR	1	0.37	0.23	1.65	0.1027
LENA (measure of Law School eliteness)	1	0.17	0.08	-2.17	0.0323
SEVENTH CIRCUIT	1	0.85	0.27	3.18	0.0019
% DISSENTS	1	-0.05	0.51	-0.09	0.9291

R-Square = .3814