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MALTHUS AND THE COURT OF APPEALS: ANOTHER FORMER CLERK LOOKS AT THE PROPOSED NINTH CIRCUIT SPLIT

Aaron H. Caplan

Abstract: This Article argues that current proposals to split the Ninth Circuit are unnecessary and would be detrimental to judges, law clerks, lawyers, and litigants. Larger circuits offer various benefits, many of them arising from the diversity of cases and judicial personalities on the bench. Splitting the Ninth Circuit would not bring the benefits proponents predict.

Like Jennifer Spreng, I served as a law clerk to a Ninth Circuit judge. But unlike her, I believe that for the foreseeable future, splitting the Ninth Circuit is unnecessary and harmful. The arguments currently being raised in support of splitting the Ninth Circuit resemble Thomas Malthus’s famous warning that the Earth’s human population would rapidly exceed the planet’s carrying capacity, resulting in famine, disease, war, and social chaos.¹ Malthus may have been correct that there could come a point at which population will exceed resources, but he was famously wrong about how soon that dreaded moment would arrive. The same can be said for worries that an intermediate appellate court of twenty-eight active judges is too big to serve the public interest.²

My experience as a law clerk to a Ninth Circuit judge³ leads me to believe that for the foreseeable future, splitting the Ninth Circuit is unnecessary and harmful. Jennifer Spreng’s experience as a Ninth Circuit

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2. Former Chief Judge James R. Browning observed the same syndrome, although it struck him and others as a parallel to de Tocqueville rather than Malthus:
   As the Ninth Circuit grew from 3 judges to 7, from 7 to 9, 9 to 13, 13 to 23, and 23 to 28, there were those who were sure the court had reached the maximum practicable size before the new judges arrived. In each case, that prediction turned out to be wrong. As Professor Wright said as to similar remarks in the Second Circuit in 1950: “When we made those comments, we were illustrating in striking fashion de Tocqueville’s admonition against confusing the familiar with the necessary.”
clerk leads her to the opposite conclusion. This difference of opinion between two former law clerks demonstrates the limited value of personal anecdotes for policymaking. Opposing anecdotes can always be found, leaving decisionmakers at an impasse. Ties are best broken by reference to objective data, if it is available in an intelligible form and collected in a reliable manner. At the same time, statistics mean little if they are not linked to a qualitative understanding of the world they purport to describe. This makes it risky to ignore responsibly prepared history, within which the anecdote has its place. In that spirit, this Article offers my own anecdotes as counterpoint to Spreng’s. The reader may decide whose if any of them should affect the questions currently being considered by the Commission on Structural Alternatives for the Federal Courts of Appeals (the Commission).

Work of this sort is more subject than most to influence by conscious or unconscious authorial bias, so a few initial disclosures are in order. Along with two gifted and likable co-clerks, I worked in the chambers of Judge Fletcher during 1991 and 1992. As a law student, I interviewed with ten or so federal judges and their staffs (inside and outside the Ninth Circuit), which revealed much about the differences in judges’ work habits. As a clerk, I read innumerable Ninth Circuit opinions in draft and final form, followed the e-mail correspondence among the judges and


5. Even self-identified populists should not reject empirical studies out of hand simply because they are empirical studies. See id. at 882 (suggesting that empirical surveys are something other than “the evidence of our own eyes”).

6. The Commission has received testimony on the subject of a Ninth Circuit split from judges, attorneys, and scholars, most of which has been posted on the Commission’s website, <http://app.comm.uscourts.gov>. As this Article went to press in October 1998, the Commission released a tentative draft version of its report to Congress. See Commission on Structural Alternatives for the Federal Courts of Appeals, Tentative Draft Report (Oct. 1998) (visited Oct. 10, 1998) <http://app.comm.uscourts.gov/report/appstruc.pdf>. The Commission appears to have accepted the Malthusian thesis, and it has identified the number of judges it considers the maximum for an optimally effective court of appeals: 17 (with a strong preference for fewer). Id. at 27, 66. The Commission’s draft does not explain why 17 is the magic number, but it may have been derived from the Commission’s national survey of federal judges, in which 72.3% expressed the opinion that the maximum functional court size is between 10 and 18 members. Id. at 27 n.66. Some 22% of surveyed judges selected a higher maximum number or rejected the concept of a Malthusian limit altogether. Id. This segment presumably includes the large majority of judges in the Ninth Circuit who testified against a circuit split—and who are (not at all coincidentally) the judges within the survey who have actually served on a noticeably larger circuit. For the reasons explained in the body of this Article, I believe Congress should view the Malthusian portion of the Commission’s report critically.
attended monthly brown bag lunches with judges visiting from other cities. Although this Article is advertised as a clerk's eye view, my opinions have unavoidably been affected by my subsequent experiences as a litigator for Perkins Coie, a large general practice firm based in Seattle, where I have advised or represented clients with legal questions arising in all the states of the proposed northwest circuit. I have also worked on a handful of cases before the Ninth Circuit, including death penalty cases.7

A few other disclaimers are useful to compare fairly Spreng's clerkship experiences with my own. First, I clerked during 1991 and 1992, Spreng during 1996 and 1997. All but three of the active and senior judges on the court during her term were on the bench during mine, so for the most part we observed the same people at work. During my year, however, all the authorized active judgeships were filled, whereas by Spreng's year, as few as eighteen active judges on the court struggled to do the work of twenty-eight.8 To the extent Spreng observed problems on the court that I did not, they likely resulted from the circuit having too few judges rather than too many. For example, I saw nothing that I would have termed an ongoing "collegiality problem," but years of chronic overwork may have shortened tempers in moments of stress. I saw very few judges sitting by designation from other circuits that could have contributed to a "reckonability problem," but this is now a regular method to fill temporarily an empty seat on a panel. Both problems would be alleviated by untying the tourniquet squeezing shut the stream of judicial appointments.

Second, judges have great freedom in how they structure their chambers and assign work to their clerks. Some judges involve their clerks in reviewing en banc calls or motions calendars, while others do not. Some let their clerks read most of the judicial e-mail, while others do not. The judge's enormous discretion in setting up chambers might create very different clerk's eye views of the circuit as a whole.

Spreng allocates to me the burden of justifying the maintenance of the current Ninth Circuit,9 and Part I of this Article challenges her reasons

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7. Shortly after writing this Article, I joined the staff of the American Civil Liberties Union of Washington (ACLU-WA). The ACLU-WA has taken no position on a Ninth Circuit split. The views expressed here are my own and might not be shared by any of my current or former employers.
8. See Roster of Judges, 967 F.2d XII-XIII; Roster of Judges, 117 F.3d XII-XIII.
9. Spreng, supra note 4, at 881.
for doing so. Parts II and III take up that burden, with Part IV offering some concluding thoughts.

I. ALLOCATING THE BURDEN OF PERSUASION

As a general proposition, I disagree that proponents of the status quo must prove its superiority to a proposed novelty. Congress and the Commission may not face any formally enunciated burden of persuasion in evaluating proposals for change, but they do face the law of inertia and the traditions of parliamentary procedure. Like most sane people do when conducting their daily affairs, legislators satisfy themselves that change will be not just equal to the status quo, but in some way better. Spreng argues that even if the policy arguments for and against a circuit split were of equal weight, popular opinion would tip the balance:

[T]he United States is a democracy. If the people of several northwestern states want a separate circuit, that support states a prima facie case in favor of a split. It does not matter if their reasons seem "silly."

Majoritarian arguments like these should be used sparingly when they are directed to the federal courts. To begin with, the United States is not a democracy but a representative democracy where legislators are expected to exercise judgment, not simply wield the rubber stamp. The United States is also a representative democracy with an independent Article III judiciary responsible for enforcing the least democratic and least majoritarian portion of the Constitution, the Bill of Rights.

I also question the factual premise for allocating away the burden of persuasion: that the public at large actually cares about the issue. To be sure, some senators have formed opinions on the subject, but I see little evidence that many of their constituents have. With the exception of the

10. Id.


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occasional high profile case, the actions of judges are rarely the topic of water cooler conversation. Judicial administration—as opposed to judicial decisions in individual cases—is discussed even less, even at law firm water coolers. My hunch is that if asked, most residents of Ninth Circuit states would have no opinion about a circuit split, and a large portion of those expressing views one way or the other would be making up an answer to please the interviewer.

Spreng supports her belief that the public wants to split the Ninth Circuit largely on anecdotes about the reaction of some Alaskans to the Ninth Circuit’s decision in *Alaska ex rel. Yukon Flats School District v. Native Village of Venetie.* I say “some Alaskans” because at least one group of Alaskans thought this decision was absolutely correct: the winners. But let us accept Spreng’s assumption that a majority of Alaskans disagreed with the decision. Would this mean that a majority of Alaskans agree with the views expressed by the editorial writer from the *Fairbanks Daily News-Miner,* that the panel of Ninth Circuit judges deciding the case misinterpreted the law because they reside out of state?

It is a common reaction, upon hearing a judicial result with which one disagrees, to criticize the decisionmaker for whatever reasons come to mind. Think of the explanations advanced in newspapers, ballparks, and taverns around the country as to why the juries in the first Rodney King trial, O.J. Simpson’s criminal trial, or the McDonald’s hot coffee trial did what they did. They were starstruck. They were racist. They hated corporations. They hated the police. They loved the police. They wanted to go home. They were just plain stupid. Some of these explanations might be wholly or partially correct, but their truth, if any, requires more than that the explanations sound plausible at first hearing or that they have been advanced by one or more observers. Explaining the Ninth Circuit’s *Venetie* decision by reference to the judges’ out-of-state residence falls into the same pattern. Indeed, if Spreng were correct that

14. The panel consisting of Judges Dorothy W. Nelson (author of the majority opinion), James R. Browning (concurring), and Ferdinand F. Fernandez (concurring separately) is not strictly speaking a Californian one. *Venetie,* 101 F.3d at 1289. Judge Browning was born and educated in Montana, and he established his chambers in San Francisco only because court rules in effect at the time of his 1961 nomination required him to do so. The Federal Reporter for many years listed him as the judge from Great Falls, Montana, a listing that did not cease until the publication of 658 F.2d in 1981.
the people of Alaska believe it is fundamentally wrong for non-Alaskans to interpret the law in Alaskan cases, then the same objections should have been raised when the case went to the U.S. Supreme Court, which has never contained a single Alaskan, and has not had a Pacific Northwesterner since William O. Douglas retired. But the legitimacy of the non-Alaskan Supreme Court appears not to have been questioned when it issued its more likable decision.¹⁵

The Alaskans who disagreed with the Venetie panel would not have been any happier if the judges had been drawn from Seattle, Portland, Boise, or Billings—or even Alaska. Consider the tale of U.S. District Court Judge George Boldt, who ruled in 1974 that native tribes had a right under federal treaty to harvest half the salmon caught in Puget Sound.¹⁶ Some of the Washingtonians who disagreed with his decision created a tremendous uproar, and as usual the enmity was directed at the decisionmaker. Judge Boldt was burned in effigy,¹⁷ and the ruling became known not under its captioned name, United States v. Washington, but simply as “the Boldt decision.”¹⁸ Alas for his detractors, Judge Boldt could not be criticized for foreignness: the unpopular judge sat in the Western District of Washington.¹⁹ Nor could circuit court size or panel dynamics be to blame: in the district court, judges sit in panels of one. When the tribes sought a similar entitlement to a portion of the Puget Sound shellfish harvest in 1989, the litigation was popularly known as “Boldt II.”²⁰ The case was tried to U.S. District Judge Edward Rafeedie of the Central District of California, who sat by designation.²¹ When the decision arrived, at least one critic seized the available cudgel of Judge Rafeedie’s visitor status, and complained that the decision resulted from “a Looney Toon judge in Los Angeles who has no

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understanding of the impact. He hops on a jet to come up here for a quick tour and walks away.\footnote{22} Spreng may have a point about the importance of the public’s acceptance of judicial decisions. Procedural due process cases recognize that respect for the rule of law is best cultivated when the government acts in a manner “generating the feeling, so important to a popular government, that justice has been done.”\footnote{23} To the extent litigants believe that appellate judges from their home states are more likely to do justice than appellate judges from other states, they may be more willing to swallow the bitter medicine of a loss when it is delivered by a local. But I disagree that litigants believe this. As an attorney, I have never had clients express a preference for appellate judges who reside locally. Instead, they have expressed a preference for judges likely to rule in their favor. These are not the same thing.

Attorneys counsel their clients that the best way to obtain a good outcome is to have the facts and the law on their side. Beyond that, litigants understandably hope for a judge who brings to the bench some extra reasons for seeing things their way. This makes the litigant’s first preference the judge who is a blood relative or who owes the litigant money. Sadly, these judges are recused, and the appeal will be decided by strangers. The next preference among the strangers is for judges whose track record of published opinions implies a judicial philosophy favorable to the litigant’s position.\footnote{24} For this reason, the Ninth Circuit—like all circuits—requires that briefs be submitted before the panels are disclosed,\footnote{25} so that litigants cannot butter up a particular panel by heavily citing panel members’ own opinions. The next preference is for judges who are smart and fair. (Since most litigants are convinced of the wisdom and justice of their position, they assume that wise and just judges will be convinced too.) The final preference is for judges who


\footnote{24} Strictly speaking, a litigant hopes for a judge who has ruled favorably in cases directly on point (with the corollary that no litigant hopes for a judge who has ruled adversely in such cases). But if the earlier case is truly on all fours, it becomes binding precedent to be applied as a matter of law by all judges. It is for this reason I speak of “judicial philosophy,” intending it to mean the general pattern (if any) formed by a judge’s decisions in analogous but not dispositive cases.

\footnote{25} See Fed. R. App. P. 31(a) (setting briefing schedule); 9th Cir. R. E(3) (disclosing panel members).
have at least heard cases arising from the same industry. The hope is that even if the panel is dumb and partial instead of smart and fair, at least they will have seen in some other case how the law is supposed to work in the industry and may have learned something from the experience despite themselves. For example, a given judge in an “Icebox” Twelfth Circuit would be more likely to have heard cases involving North Pacific salmon generally than would a given judge in the larger Ninth Circuit.  

Here, at the very bottom of the ladder of client preference, is a judicial characteristic that might correlate with local residence. But not necessarily. Familiarity with an industry does not ensure that the judge will share your view of the industry, rather than your opponent’s. One’s opponent is no doubt equally familiar with the territory, but horribly wrong on the merits. Because opposing parties from the same area will disagree with each other, Spreng errs when she refers to the view of “average Alaskans” as if there were only one.  

Also troubling is the unstated assumption that a judiciary prone to side with the local party (or the local majority) is a better judiciary, with its corollary that we should structure the courts of appeals to facilitate as much localism as possible. The framers provided for an independent judiciary to avoid just such tendencies, and the Ninth Circuit has gone on record as an institution that rejects appeals to presumed regional bias.  

My experience corroborates their statement. During my clerkship year, a panel was asked to consider whether a request for attorney’s fees in a bankruptcy case had been properly denied. The attorney, who lived in the midwest and not in the Ninth Circuit, evidently felt that the only reason he could have lost below was that he had been home-towned by those crazy west coast bankruptcy judges. He was not going to let it happen again. His first priority at oral argument was to seize the home court advantage, explaining to the judges the many and deep connections he had to their states. He went on for nearly two minutes about his service at a navy base in Washington state, his daughter’s rewarding college

26. The record and the briefs should fulfill this educational role for judges new to the topic. Even so, the possibility that local appellate judges might be exposed to helpful evidence outside the record is another argument, albeit an illegitimate one, in favor of preferring local judges. I have never heard a litigant express this hope, which makes sense given that local appellate judges might be exposed to harmful evidence outside the record as well.

27. See Spreng, supra note 4, at 933.

experiences in Los Angeles, and his many fond memories from family vacations to San Francisco. The panel was visibly embarrassed and insulted by the attorney's assumption that they were geographically biased. A panel member finally cut him off and suggested he begin addressing the merits. The panel ultimately ruled in the attorney's favor, despite his gaffe and his out-of-circuit address.

It is at best debatable whether there exists a groundswell of popular dissatisfaction with the current size of the Ninth Circuit. Thus, public opinion cannot be the basis for shifting the burden of persuasion from the supporters of a split to the supporters of the status quo.

II. A BIGGER CIRCUIT IS BETTER

A. Fewer Circuits Mean Fewer Circuit Splits

This Part offers reasons why all things being equal, bigger circuits are better. In a perfect world there would be no intermediate courts of appeals. Indeed, in the founders' day, there were thirteen trial courts and a six-member Supreme Court. This structure accommodated at least two interests: (1) it provided an appeal to correct erroneous decisions, and (2) it provided uniformity of decision from a single court of last resort. The intermediate courts of appeals were created when the population and case load of the country had grown to the point where the mere mortals on the Supreme Court could not hear every appeal. Through a series of enactments, the U.S. Court of Appeals was created to address the appellate function for all cases, with the Supreme Court gradually limiting its docket to those cases where a decision might enhance nationwide uniformity. Thus, arranging the court of appeals into multiple separate circuits arose not because of any intrinsic benefit of such a system, but as a concession to human and technological limitations. Among the human barriers was the limit on the number of cases a judge could comprehend and rule upon in a reasonable amount of


30. To date, there has not been any recognition of a federal constitutional right to an appeal, although the Supreme Court has ruled that where an appeal is offered, it must comport with due process. See Douglas v. California, 372 U.S. 353 (1963).

time. Among the technological barriers were the difficulties in transporting judges or counsel over large distances, and the absence of communications technologies that could substitute for such travel.\footnote{32}{While I disagree with judicial Malthusians that the Ninth Circuit is near the limit on the number of judges per circuit, I have sympathy for those who argue that we are at or near the limit on the number of cases a given judge (or panel of three judges) can decide responsibly. The limit may be further away than we think, however. Just as new agricultural technology increased the carrying capacity of the earth in ways Malthus could not imagine, new technology may continue to increase the carrying capacity of each judge. Past technologies that have done this include the triage of cases by staff attorneys who refer the simplest cases to screening panels; the bench memo pool that allows judges on a panel to share the research of law clerks in other chambers; time limits on oral argument; grouping related cases on a single calendar; writing shorter, unpublished memorandum decisions for cases that break no new ground; and the general increases in office productivity that come from word processing and e-mail. Other currently undeveloped technologies—such as video conferencing, electronic transmission of district court records, or oral rendering of appellate decisions—may increase the case per judge ratio even further.} At best, then, multiple circuits within an intermediate court of appeals are a necessary evil.

The greatest danger posed by multiple circuits is a lack of uniformity in the law. Under the federalist model, states may experiment as "little laboratories of democracy" with different statutes, common law, and administrative policies. The federal courts, by contrast, should not. It is quite different for Maine and Florida to enact materially differing rules than to have the First and Eleventh Circuits reach materially differing interpretations of a single federal statute that applies to residents of both Maine and Florida. If such a circuit split is not resolved, the federal courts taken as a whole have committed the moral equivalent of an equal protection violation.

Even if the new Twelfth Circuit were to adopt pre-split Ninth Circuit law as binding precedent, statutes enacted or legal doctrines developed post-split would eventually result in different rules of law. The job of maintaining uniform case law along the west coast would simply be kicked upstairs from the Ninth and Twelfth Circuits to the Supreme Court (if it chose to undertake the task).\footnote{33}{Under its certiorari jurisdiction, the Supreme Court can opt not to resolve a circuit split and need not explain its reasons. See, e.g., Beaulieu v. United States, 497 U.S. 1038 (1990) (White, J., dissenting from denial of certiorari) (decrying Court’s failure to accept review of some 48 "sufficiently crystallized" inter-circuit conflicts during term).} Spreng may argue that since we are at present stuck with multiple circuit courts, adding one more would not be the end of the world.\footnote{34}{Spreng, supra note 4, at 945.} One of her arguments in favor of an Icebox Circuit split, however, is the ease with which it would permit...
further division of the remaining Ninth.\textsuperscript{35} As nationwide appellate caseloads continue to grow, the logic of "what's one more circuit" has no logical stopping point: other circuits would be split and re-split ad infinitum. At the moment, there is a court charged with maintaining consistency within the Pacific Rim jurisdictions. Even those who believe the Ninth Circuit could do a better job of achieving uniformity ought not lightly abandon that goal altogether.

B. Legal Research in an Icebox

The only thing worse than legal research is legal research in a jurisdiction with insufficient case law. The discovery that no binding authority exists within the jurisdiction triggers the dreaded nationwide search for persuasive out-of-jurisdiction authority. While some attorneys may forego the effort, perhaps relishing the freedom to argue any plausible interpretation they wish of the unconstrued law, their clients would be better served if counsel could locate something in the way of outside authority on which the wary judge could peg a favorable decision.\textsuperscript{36} As a law clerk, I much preferred the one state search to the fifty state search. Judges prefer it too, because it makes their own research and decisionmaking much simpler.\textsuperscript{37} For clients, research in a jurisdiction with a rich body of case law will cost less and produce a higher level of confidence that the judge will agree with its results than the multi-jurisdiction alternative. As a practitioner, I find Ninth Circuit research a blessed relief because it is very likely to produce one or more cases on point. If not, it will at least generate one case approximately on point, creating a toehold from which further research may proceed. Even if a new Twelfth Circuit were created that adopted the pre-split case law of the Ninth Circuit (as the Eleventh Circuit did when it split from the Fifth), areas where the new circuit's law was thinly developed would soon appear as a result of new statutes or new legal theories.

The need for well-developed case law is especially important when issues of first impression arise. Because of the size of the Ninth Circuit, these cases tend to occur when Congress enacts a new statute or the bar

\begin{footnotes}
\item[35] Id. at 891.
\item[36] So much the better if one's outside authority can be dubbed "the majority view," "the American rule," or "the modern approach."
\item[37] Chief Judge Procter Hug has identified well-developed case law as a benefit of a large circuit. See Testimony of Chief Judge Hug to the Commission (visited July 26, 1998) <http://app.comm.uscourts.gov/hearings/sanfran/0529HUG.htm> [hereinafter Hug Testimony].
\end{footnotes}
develops a new legal theory, rather than from the random chance that a
given fact pattern has not occurred in the circuit before. Given the sheer
size of its population, and the fact that cases decided by any three-judge
panel become the law of the entire circuit, 38 clients and counsel in the
Ninth Circuit currently have their questions of first impression decided
relatively quickly. By virtue of the proposed Twelfth Circuit's smaller
population, it might be years before an issue of first impression is
decided, leaving citizens in limbo in the meantime.

C. Bigger Circuits Have More Diverse Case Loads

The nickname "Icebox Circuit" should raise a red flag because it
suggests that the new circuit would be dominated by certain categories of
cases instead of the full gamut of litigation brought before federal courts
nationally. Following its split, the new Fifth Circuit (consisting of only
Texas, Louisiana, and Mississippi) came to be known as "The Oil and
Gas Circuit." 39 Even though that circuit has since diversified into oil, gas,
and lethal injections, 40 a heavy diet of relatively few staples is unhealthy
for any court. The current Ninth Circuit decides an immense variety of
cases, including entertainment law from Los Angeles, computer and
biotechnology law from San Francisco and Seattle, mining and grazing
law from Montana and Idaho, territorial law from the Northern Marianas
and Guam, maritime law from the coastal states, water law from the
desert states, immigration law from the border states, and any criminal
law you could possibly imagine. It even hears cases involving oil, gas,
and lethal injections. 41 Its caseload cannot be pigeonholed; it is an
American circuit.

It would not benefit the citizens of the Northwest to turn their federal
court of appeals into a "Timber, Salmon, and Tribal Lands Circuit," as

38. See United States v. Gay, 967 F.2d 322, 327 (9th Cir. 1992).

39. See Thomas E. Baker, On Redrawing Circuit Boundaries—Why the Proposal to Divide the
United States Court of Appeals for the Ninth Circuit Is Not Such a Good Idea, 22 Ariz. St. L.J. 917,

40. See Sam Howe Verhoek, Texas Wasting No Time with Executions: State on Schedule to Kill 8
Convicted Murderers this Month by Lethal Injection, Milwaukee J. & Sentinel, May 25, 1997,
available in 1997 WL 4796215.

41. See, e.g., Poland v. Stewart, 117 F.3d 1094, 1104 (9th Cir. 1997) (constitutionality of
lethal injection); White v. Atlantic Richfield Co., 945 F.2d 1130 (9th Cir. 1991) (validity of oil
and gas lease).
some have suggested the Twelfth Circuit would become. The danger of judges facing a comparatively unvaried case load is most readily apparent for litigants whose cases fall outside the circuit’s habitual boundaries. Their panel might consist of judges who have never encountered the area of the law before. As noted above, it may increase a litigant’s respect for a judge’s rulings if the judge has had at least some exposure to the litigant’s general type of case. A judge with a few years experience in the Ninth Circuit, with its fantastically diverse case load, is more likely to have some prior experience with any given genus of cases than a judge of similar seniority in a smaller circuit.

Variations on this argument have been raised in favor of a circuit split, as with the critics of the Ninth Circuit’s Venetie decision who argued that the Alaska Native Claims Settlement Act was poorly interpreted because out-of-state judges deal with it irregularly. It is true that a northwest circuit split might result in a body of judges more familiar with this particular statute, but at the cost of reducing these judges’ familiarity with other areas of the law. Over the long run, there will be more areas of the law in a smaller circuit in which the judges have had no previous experience than there will be in a larger and more diverse circuit. Redrawing circuit boundaries to ensure that a particular statute becomes the circuit’s bread and butter will inevitably shortchange litigants with claims arising in other substantive areas, such as the Alaskan with an intellectual property case who might benefit from a panel whose judges have heard a few cases arising from the movie or recording industries in California.

At the same time, a judge’s familiarity with an area of the law reaches a point of diminishing returns. For litigants presenting garden variety appeals, the temptation for the judge who sees little else is to decide the case on auto-pilot. I encountered this syndrome myself during a single year as a judicial clerk. My last month on the court required me to write a bench memo about a drug bust at an airport that seemed suspiciously familiar to the drug bust at the train station I had seen during my second month. So I cut and pasted—call it stare decisis. My attitude toward the two cases differed starkly: the second one received enough thought and

42. My argument in this section—that a wider variety of cases results in better judging—does not require that the Twelfth Circuit’s case load be as limited as this nickname implies, or even that it be less varied than found in other comparably sized circuits. What matters is whether it would be less varied than the current Ninth, which would be true almost by definition.

43. See Spreng, supra note 4, at 953–35; see also Twelfth Court Warranted, supra note 13, at A-4.
attention (I hope), but less than the first. I was less inclined to consult the original record and more inclined to skim. I felt as if I already knew the answer before doing the research. These are natural tendencies, and even worthwhile ones when they contribute to efficiency. But extended too far, they could result in bored and rote judging. Upon his resignation, Judge Robert Bork was reported to have cheered “Free at last!” at being released from the highly technical regulatory cases that dominate the D.C. Circuit’s case load.44 The bored judge does not give each case individualized attention, and instead enforces blanket rules of thumb that only the most extreme variation from standard fact patterns can outweigh: the arresting officer did/did not have probable cause to arrest; the alleged trademark infringement is/is not likely to cause consumer confusion; the governmental interest in restricting speech is/is not compelling.

The quality of judging will improve if the judges routinely encounter a greater variety of questions. Analogizing across doctrines is a standard mode of judicial decisionmaking and a helpful cross-check that one is reaching a sound decision. Lessons learned in death penalty cases help judges understand assisted suicide cases,45 just as abortion cases inform medical marijuana cases,46 and so on. It is not enough to nominate broadminded, intellectually sharp judges. We must keep them that way after they are confirmed. One method judges use to keep alert is to rotate their law clerks, because one always learns by teaching. The combination of a judge already up to speed on an issue plus a clerk struggling to get there results in more knowledge than the judge would have alone. Another institutional method to avoid judicial boredom is to ensure a diverse case load, which a large circuit will likely accomplish simply by virtue of its size.

For much the same reason, the reduced case load of the proposed Icebox Circuit would result in fewer clerkship applications from law schools outside the circuit. When my classmates and I applied for clerkships, the Fifth Circuit’s reputation as “The Oil and Gas Circuit”47 made it seem a less appealing place to work than the smorgasbord Ninth Circuit. Correspondingly fewer of us applied to Fifth Circuit judges. Those Ninth Circuit judges whose chambers are in cities that are rightly

47. See supra note 39 and accompanying text.
or wrongly perceived as unglamorous—Fairbanks, Boise, Billings, Reno—benefit in the hiring process by offering applicants the chance to clerk on the nation’s largest circuit. Without that draw, the judges of the proposed Twelfth Circuit will likely receive fewer applications from those law students who are most sought after, such as editors of major law reviews. Note that I say “sought after” rather than “qualified.” There are more than enough qualified law school graduates every year to fill the three or four clerkships allotted to each judge, which should make the absence from the applicant pool of a few law review editors a minor point—but perhaps it is not to the judges in the Twelfth Circuit. 48

III. A NINTH CIRCUIT SPLIT WOULD NOT BRING THE PROMISED BENEFITS

Part II of this Article sang the praises of larger circuits assuming all things being equal. This Part examines whether things would be equal as regards judicial workload, collegiality, and other selected topics. In my view, many of the problems perceived by Spreng or other proponents of splitting the Ninth Circuit either do not exist (as with the “cocoon problem”) or would not be affected by a circuit split if they did (as with the reversal rate of the current Ninth Circuit judges by the current Supreme Court justices). 49 Splitting the circuit is no better as a remedy for the circuit’s current or future problems than cannibalism was a remedy for overpopulation on the British Isles. 50

A. Workload

I agree with Spreng that reducing the workload per judge would lead to more reflection, more precise writing, and a better rested judiciary, all of which are beneficial. 51 I also agree with her that splitting the circuit would not, by itself, have any impact on the number of regularly calendared cases per judge, but that it could reduce the number of hours

48. Oddly enough, some of them compete to recruit these misguided souls, despite the warped priorities the credential signifies. See, e.g., Alex Kozinski, Confessions of a Bad Apple, 100 Yale L.J. 1707, 1708 (1991); Patricia M. Wald, Selecting Law Clerks, 89 Mich. L. Rev. 152, 154–55 (1990).
49. See, e.g., Spreng, supra note 4, at 899–900, 924–27.
50. See Jonathan Swift, A Modest Proposal for Preventing the Children of Poor People from Being a Burthen to Their Parents of the County, and for Making Them Beneficial to the Publick (Weaver Bickerton 1730).
51. Spreng, supra note 4, at 893–95.
spent on en banc activity.\textsuperscript{52} We differ, however, on whether reducing en banc activity as the method for reducing total workload is either needed or desirable.

Spreng's estimate that each judge and each clerk spends ten hours per week on en banc matters strikes me as drastically overstated.\textsuperscript{53} Judges have a great deal of control over the time spent on en banc matters. The process begins when a three-judge panel issues an opinion.\textsuperscript{54} At this stage, some judges review each published decision, in part to familiarize themselves with the circuit's law, and in part to identify opinions that might merit en banc review. Once a judge of the circuit decides to call for a vote on whether to take a case en banc—either sua sponte or, as is more typical, at the suggestion of the losing party—the en banc coordinator asks the prevailing party to submit a brief.\textsuperscript{55} Once that brief is received, the interested judges have a fixed period of time to send each other e-mails debating the merits.\textsuperscript{56} These are ordinarily the judges calling for the en banc vote and the author of the challenged opinion, but all judges may express their thoughts. After the debate period, the judges have a fixed period of time to cast their e-mail ballots.\textsuperscript{57}

A judge who fears "drowning in en bancs"\textsuperscript{58} has many techniques available at each stage of the process to minimize the workload associated with them. Most judges ensure that either they or their clerks review all the circuit's published opinions within thirty days, but judges could legitimately choose not to, preferring instead to familiarize themselves with the circuit's law on a topic when called upon to do so through assigned cases.\textsuperscript{59} No judge is required to call for an en banc vote, either sua sponte or upon a party's suggestion, or to contribute to the e-mail discussions once a vote is called. It is not very time consuming to cast an informed vote: read the opinion, the parties' short briefs in favor of and in opposition to en banc rehearing, and the string of e-mails from colleagues on the subject, then vote yea or nay (abstention counts as a

\textsuperscript{52} \textit{Id.} at Part III.A.3.

\textsuperscript{53} \textit{Id.} at 898.

\textsuperscript{54} For process, see generally Fed. R. App. P. 35.

\textsuperscript{55} Fed. R. App. P. 35; 9th Cir. R. 35-1 to 35-3 (including Circuit Advisory Committee Notes).

\textsuperscript{56} See \textit{supra} note 55.

\textsuperscript{57} See \textit{supra} note 55.

\textsuperscript{58} Spreng, \textit{supra} note 4, at Part III.A.3.

nay). No written explanation for one's vote is required, nor is one allowed in the balloting itself. If one's personal threshold for finding a case en banc worthy is sufficiently high (or low), the decision could be made with little soul searching or additional research. At the extreme, taking senior status removes one from the obligation to cast en banc votes entirely. Some judges have chosen to go senior earlier or later in their careers depending largely on how much they enjoy en banc activity.

A conscientious judge might object that shortcuts like these are an unsuitable response to an oversized workload, and depending on one's views of what constitutes the judge's duty, the criticism may be justified. It would be best if all judges' schedules permitted them to remain fully engaged with all aspects of the en banc process (if desired) as well as with all aspects of deciding calendared cases. But which part of a judge's workload should be pruned to reach this condition? Spreng would reduce the en banc workload per judge by splitting the circuit. Because en banc activity is good for the court, I would reduce the non-en banc workload.

As Spreng notes, the en banc mechanism creates a healthy incentive for judges to write decisions that accurately state the law, avoid provocative dicta, and do not push the facts of a case into the service of legal theories they cannot support. The chief benefits of en banc activity are those advertised: ensuring uniformity of law within the circuit and, wherever possible, with decisions of other circuits. The controversy, if any, arises over the remaining category of cases suitable

60. Fed. R. App. P. 35(a) (stating that en banc requires majority of active judges, rather than majority of judges voting).

61. Fed. R. App. P. 35(a) (noting that en banc decision rests on vote of majority of judges "who are in regular active service").

62. The Commission appears to agree that en banc activity is desirable in and of itself, citing the likelihood that more cases would be reheard en banc as a major benefit of its proposal. Tentative Draft Report, supra note 6, at 27, 43-44.

Splitting the circuit would have the adverse result of increasing the total number of hours judges spend on administrative tasks other than judging. Two circuits require two chief judges, two en banc coordinators, two death penalty coordinators, and two organizers of judicial conferences and law clerk orientation. Spreng correctly notes that each of these jobs is somewhat more time consuming in the Ninth Circuit than it would be in either a post-split Ninth or Twelfth, but the total number of hours spent by post-split judges on these non-judicial chores would be greatly increased, perhaps doubled. See Spreng, supra note 4, at 904-05. The economies of scale are easiest to see for conference organizing. The hard part is setting the agenda and lining up the speakers. The number of conference attendees is largely irrelevant. The types of work that increase with numbers (plane reservations, meals, and so on) are likely to be delegated to staff in any event.

63. Spreng, supra note 4, at 898-99.

64. Fed. R. App. P. 35(a)(1); 9th Cir. R. 35-1.
for en banc review—where the issue is just too important and the panel opinion is just too wrong. The decision to call for an en banc vote in these cases is necessarily subjective, causing some judges and observers to complain that off-panel judges call for votes on such cases too frequently. It would be a bigger concern if too few worthy cases were subject to en banc calls rather than too many. Because cases in this category do not create different rules of law between circuits, the Supreme Court is disinclined to grant certiorari. It is simple enough for a judge who believes an en banc call is superfluous to stay out of the e-mail fray and then vote no when the time comes. This pattern, if used by enough judges, will raise the bar for en banc calls generally. Whatever one thinks is the optimum number of en banc calls, the decision should not be unduly influenced by the effect rehearing would have on personal workload. Reducing the number of calendared cases per judge would reduce the incentive against taking cases en banc overwork can create.

To these benefits of en banc review identified by court rule, I would add another: the en banc process is the best part of the job. As Chief Judge Hug has testified, “I have found the careful preparation, the discussion, and the insightful analysis of the judges on the en banc court to be some of the most stimulating and inspiring work our court does.” The same goes for the decision to take cases en banc. Just as a diverse case load keeps judges engaged, so does the heightened discourse that occurs in the en banc process. For the judges that participate or observe, the debates exercise the mind and get the juices flowing. They force the judges to examine first principles and remember why they wanted to be lawyers and judges initially. The confidential e-mail exchanges allow judges to write and think in ways their published opinions do not. En banc debates are an occasion to test theories, explore consequences, and ruminate on the judge’s role in the constitutional system. Spreng laments that judges have insufficient opportunity to get to know each other, but to reduce en banc activity is to reduce the occasion where such interaction happens the most.

67. Hug Testimony, supra note 37.
68. Spreng, supra note 4, at 923-24.
B. Collegiality

Spreng acknowledges that the current crop of Ninth Circuit judges are "remarkably charming," devoted to their work, and genuinely interested in making the court a pleasant place to work. She also examines selected opinions that she says are not examples of a lack of collegiality. Allow me, then, to state the logical conclusion: there is no "collegiality problem" in the Ninth Circuit, and certainly not one that has anything to do with size. During my tenure, the judges of the circuit treated each other as well as any twenty-eight unrelated adults one could imagine (and perhaps a little better than twenty-eight related ones). It appeared to me that, for the most part, the judges of the circuit genuinely liked and respected each other. If that was not the case, they hid it well.

This is no happy accident. The judicial selection process and life tenure are structural features that contribute to the court's overall collegial relations. The role of life tenure in fostering collegial relations is fairly obvious. Appellate court judges are chained to each for the remainder of their professional lives, and quite frequently their natural ones. A rational judge will therefore not dish out worse treatment than he or she is willing to receive. There is a subjective element in this of course: the thick-skinned judge is more willing to act antagonistically than the thin-skinned one, but this would be the case even on a circuit with as few as two judges. On the rare occasions I saw where an internal court communication seemed too personal for comfort, one or more judges (ordinarily those outside the center of the dispute) would send e-mails reminding their colleagues that they were, after all, still friends who owed it to each other to check their adversarial impulses. These mollifying messages tended to be the last word in the exchange. This suggests that the base line is one of collegiality rather than its opposite; if the judges did not value their friendships, there would be no point in sending such messages.

It is true (as Spreng suggests in her discussion of "face time") that the frequency with which one meets a colleague may affect the interpersonal dynamic for the better, in part because it hastens the day of

69. Id. at 924.
70. Id. at text accompanying n.177.
71. Id. at 922–24.
payback for uncollegial behavior. Before adopting a circuit split to accomplish this end, however, one might ask whether a twenty-eight member, life-tenured court contains too many personalities to treat as colleagues. It takes a very dour view of human nature to suppose that a group this size is destined to act uncollegially. For federal judges, the nomination process selects personality traits that virtually guarantee this will not be the case.

One of my favorite questions for judges was how they got their jobs. Many were former litigators, some former business attorneys, and others former judges, members of Congress, or executive branch officials. Despite their differences, one overriding similarity revealed itself whenever the discussion turned to the mechanics of securing the nomination: they were all better than average politicians. Many had been directly involved in politics as office holders or party executives. Many were friends with senators, governors, or presidents, or at least could get these people to return their calls. Even those who claimed they had been plucked from obscurity on the strength of their intellect and judicial temperament had done what was necessary to cultivate a reputation for intellect and judicial temperament. At the very least, they knew how to interview well in front of the Justice Department (which is known to ask references whether a judicial candidate is too obnoxious to inflict on life-tenured colleagues), the President, and the Senate. You don’t get to be a federal judge without being an operator.

People like these are quite able to work a room of twenty-eight. When they were lawyers, these judges routinely maneuvered among a much larger population of law firm colleagues, opposing counsel, members of bar committees, clients, potential clients, judges, and so on. When they were professors, they mastered faculty politics within their universities and with colleagues in their disciplines from other universities, and taught hundreds if not thousands of students. Given the sheer number of people with whom the judges ably worked before joining the bench, it is a piece of cake for them to learn and adapt to their colleagues’

72. Robert Axelrod, The Evolution of Cooperation 129 (1984). Axelrod argues that cooperation will be fostered in a system that "increases the shadow of the future," and one way this can occur is by making interactions among the parties more durable or more frequent. Id. Life tenure is as durable as it gets since the likelihood of running into a given judge someday before you retire is very high. The best way to increase the frequency for judicial contact, especially social contact, would be to reinstitute the court rule requiring Ninth Circuit judges to maintain their chambers in the same city. The current proposals for splitting the Ninth Circuit (including Spreng’s, see Spreng, supra note 4, at Part II.B.5) do not require this—a serious omission if collegiality is the goal.
personalities. (Even the clerks got pretty good at it, and we were only there a year.) There is an added incentive for judges to do so: they deeply value their audience of fellow judges, for they are each others’ best and sometimes only substitute for the many and varied community ties they had to restrict upon taking the bench. They would be lonely in a smaller court. In testimony before the Commission on Structural Alternatives, former Chief Judge Browning recalled the reason for ending an earlier experiment establishing northern and southern regional units within the Ninth Circuit: the judges felt that the arrangement interfered with established working relationships and offered less opportunity for interaction and consideration of a wide range of cases. One judge noted that the experiment created a “pervasive feeling that collegiality on the court was fast being dissipated.”

The role of e-mail in fostering collegiality should not be overlooked. Because judges’ chambers are not centralized (and would not be under the proposed split), much judicial communication is electronic. Drafts of opinions, and comments upon them, are circulated within three-judge panels on the court’s internal network. So are the courtwide debates on en banc rehearing and occasionally musings on topics of general interest. While no one would mistake these e-mails for the jokes, gripes, and Top Ten lists other office workers exchange, the Ninth Circuit e-mails allow judges a respite from the formal judicial voice. They can be extremely revealing of their authors’ personalities. Following some of these written conversations as a clerk, it was easy to see who favored the scholarly argument, who was concerned about the impact a decision would have on trial courts, who knew how to tell a good story, and who was inscrutable. E-mail communication is a vital link in a decentralized court and facilitates collegial relations.

What of the examples Spreng offers of Ninth Circuit opinions brimming with bitterness, invective, and dirty laundry? To begin with, most judges of the Ninth Circuit used to be practicing lawyers, a profession where no matter what you say or do, someone else is being

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73. Although the need for contact among a decent-sized group of peers was not a stated basis for her testimony opposing a circuit split, Judge Schroeder’s comment is consistent with it: “Before joining the Circuit Court, I was a Judge on the Arizona Court of Appeals for Division I, which at that time had nine judges. I treasure the relationships I had there, but I have no desire to return to a small appellate court.” Testimony of Judge Mary M. Schroeder to the Commission (visited July 26, 1998) <http://app.comm.uscourts.gov/hearings/sanfran/0529SCHR.htm>.

74. Testimony of James R. Browning, supra note 2.

75. See Spreng, supra note 4, at 913–22.
paid to disagree with you. Years of exposure to this breeds a high tolerance for disagreement. The language in the cited cases is positively courtly compared to the exchanges attorneys are accustomed to hearing in negotiations, depositions, and court. Judicial canons of respect for litigants also make it preferable for a judge to direct criticism to other judges rather than to the parties. Readers of these opinions should not confuse strongly held opinions about the law for personal dislike.

Furthermore, the cases Spreng cites are isolated exceptions to the typical Ninth Circuit decision, which would be a unanimous ruling of a three judge panel. Even more important is the strong emotional content of the cases: assisted suicide, affirmative action, and the death penalty. The cases Spreng cites may prove little other than the old saying that hard cases make bad law. At the same time, we may take some pride that the judges ruling on these issues care so obviously and deeply about reaching the right results for the right reasons (although they differ on what those might be). It would be a greater problem if the judges of the Ninth Circuit did not express strong views on these topics. Neurologist Antonio Damasio argues that because the regions of the brain responsible for reasoning appear to be the same regions that generate emotions, it is impossible to reason properly in the absence of emotions. Only a disconnected judiciary could approach these cases without some emotional reaction. I would even argue that a judiciary that remained wholly dispassionate in the face of these disputes ought not be trusted, because it plainly has trouble telling abstraction from reality.

Finally, assume that I am wrong; assume an irreconcilable rift has arisen among the Ninth Circuit judges; and, that this has impaired their decisionmaking. A circuit split would not help matters. If Spreng witnessed uncollegial behavior during her clerkship, it could not have resulted from the size of the circuit. During my clerkship year the court had its full complement of twenty-eight active judges and no collegiality problem, contrasted with eighteen judges during her supposedly fractious clerkship year. Rancor has at times been reported within appellate

76. Joke stolen from Professor David Kairys, Temple University School of Law.
77. Spreng, supra note 4, at 913–21.
79. See supra note 8 and accompanying text.
courts with as few as nine or twelve members. I have no idea why the instigator judges on these courts choose to foul their nests, but because it sometimes happens, their unlucky colleagues would be wise to wish for a larger court. It is easier to get along with someone you can’t stand if you don’t have to do it too often.

C. Mini-legislature

The accusation of “legislating from the bench” has become a common term of abuse. I do not see this as a problem in the Ninth Circuit, where virtually every judge has at least once—either with regret or with glee—written words to the effect that “this argument is better addressed to the legislature.” Instead of the standard charge that judges are usurping the legislative policymaking role, Spreng contends that the inner mindset of judges on large courts improperly mirrors that of legislators. The problem, Spreng says, is that because the court is so big, judges see themselves as autonomous actors with no obligation to reason with their colleagues. As a result, she argues that judges resort instead to legislative behavior like horse trading, bloc voting, and publication of too many unnecessary dissenting or concurring opinions.

I have a number of objections to this as a description of the Ninth Circuit. The epistemological objection: only judges are allowed to observe conferences after oral argument where the judges first debate and decide cases, so it is unclear how anyone—including a law clerk—could have observed supposedly legislative behavior occurring there. The historical objection: the tradition of the published judicial dissent predates that of the congressional minority report, which suggests that legislators issuing them are acting judicially, not that judges issuing dissents are acting legislatively. The constitutional objection: the Article III case or controversy requirement forces judges to act locally while thinking globally, reducing their ability to issue quasi-legislative edicts

80. The twelve-member D.C. Circuit has been the site of numerous famous personality clashes, including one that reputedly degenerated into threats of physical violence. See Neil Lewis, Presiding as Ideas Clash in Capital Appeals Court, N.Y. Times, Feb. 1, 1991, at B4. The nine-member Supreme Court of Washington has recently been criticized for “sarcasm” and “backbiting” among its members. Neil Modie, Effectiveness of Volatile State High Court a Matter of Opinion, Seattle Post-Intelligencer, Aug. 31, 1998, at A1.

81. Spreng, supra note 4, at 927–32.

82. Id.

83. Id.
even if they wanted to. The pragmatic objection: neither Spreng nor those she cites describe any cases where the alleged legislative mindset either did or could result in incorrect or poorly reasoned opinions.

Even if one accepted the description of the Ninth Circuit as a mini-legislature, a circuit split would have no influence on these supposed legislative tendencies. The vast majority of Ninth Circuit cases are decided in panels of three, and this would remain the case in the new Twelfth Circuit. The limited en banc procedure reduces the number of Ninth Circuit judges deliberating on a single en banc appeal to eleven. Apart from the court rulemaking process, the only time where Ninth Circuit judges act in a group large enough to be called a mini-legislature is when they vote whether to take a case en banc, a decision that in and of itself has no precedential value. Even Thompson v. Calderon, which publicly discussed the circumstances surrounding a vote to take a case en banc, was decided by an eleven-judge panel after the vote was over. If twenty-eight judges form a mini-legislature, it doesn’t convene very often.

At the same time, those having a legislative mindset would have ample opportunity to exercise it on a much smaller court, so splitting the Ninth Circuit is no cure. Three judges is all it takes to create such familiar political dynamics as the swing vote or the alliance. Only each judge’s individual integrity prevents the deciding vote in a two-one decision from being cast on unsavory grounds like repaying a favor or storing one for the future. If the problem exists on a three-judge panel, it could certainly infect the dynamics of any court larger than that, including the proposed Twelfth Circuit. Indeed, many of the supposed symptoms of a mini-legislature can be found on nine-member courts. There is no way for the non-clairvoyant to know, but Spreng’s description of the judge who elects not to reason but instead simply casts lots with another judge of similar views could be said to apply to the strongly correlated votes of Supreme Court Justices Antonin Scalia and

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84. 9th Cir. R. 35-3.
87. 9th Cir. R. 36-1, 36-3.
88. See 120 F.3d 1045, 1048–51 (9th Cir. 1997), rev’d, 118 S. Ct. 1489 (1998).
89. Spreng, supra note 4, at 931.
Clarence Thomas. The nine-member Supreme Court of Washington has been criticized for publishing too many separate opinions, a supposed symptom of excessive size. Furthermore, the U.S. Supreme Court is known to engage in just the sort of dealmaking that Spreng decries, most famously in Brown v. Board of Education, where Chief Justice Warren changed, added, or subtracted language in the opinion to secure a unanimous ruling.

The objection that appellate judges ought not make deals runs counter to the collegial ideal, which facilitates "the mutual accommodations that underlie sound judicial decisions." The principled reason for allowing courts of appeals to reverse trial courts comes not from the fact that appellate judges are smarter, but that they sit in groups of three or more where their decisions may benefit from debate and, yes, compromise. As Justice Souter has said, "judges are supposed to influence each other, and they do." Any outside observer would be hard pressed to distinguish the desirable situation of judges reasoning with each other from the undesirable situation of judges bargaining with each other.

D. Predictability and Reckonability

I reject the critics' premise that the Ninth Circuit is materially harder to predict than any other intermediate court of appeals, and the related suggestion that two smaller circuits would necessarily be more "reckonable." My main disagreement is with the assumption that any case decided by a judge other than oneself could ever be predictable. If it exists, the truly predictable case will settle before trial. This means that by definition, the only cases a court of appeals ever hears are those where the parties were unable to jointly reckon what the jury or the trial judge

91. Modic, supra note 80 (noting that earlier courts “didn’t have this phenomenon of everyone wanting their particular point of view being set out”).
93. Spreng, supra note 4, at 921 (quoting Judge Wilkinson).
94. See, e.g., United States v. McConney, 728 F.2d 1195, 1201 (9th Cir. 1984) (en banc).
96. Spreng, supra note 4, at 909.
97. Trial court judges often behave in ways litigators cannot fathom. The fact that parties and their counsel are frequently unable to successfully predict the actions of a trial judge (sitting on a panel of one) calls into question Judge Tjoflat’s statement that “[i]f you have three judges on a court of appeals, the law is stable.” Spreng, supra note 4, at 906 (quoting Judge Tjoflat).
would do with the case. Furthermore, because intermediate courts of appeals are constrained to follow Supreme Court precedent, they are infinitely easier to predict than a high court that has the luxury of reversing itself in the ordinary course of business.98

Various witnesses have cited to the Commission the studies showing that no more internal inconsistencies exist within Ninth Circuit law than any other circuit.99 It is useful to ask in this regard what sort of cases one is trying to predict: those that require clarification of a legal rule, or fact specific cases that hinge on the application of law to facts. In my experience, the Ninth Circuit is positively scrupulous about keeping its rules clear, and it acts speedily to correct irreconcilable statements of law on the rare occasions where they appear. For example, my clerkship year saw a three-judge panel request en banc hearing sua sponte when they discovered prior to oral argument that two conflicting lines of decision had crept into existence as to whether bank robbery was a per se crime of "dishonesty" within the meaning of Federal Rule of Evidence 609(a)(2).100 The en banc call passed, and the rule for the circuit was established with little fuss by a unanimous eleven-judge panel.101 Both parties, meanwhile, had opposed rehearing en banc, arguing instead that their preferred line of cases was controlling. The court did not adopt this expedient.

The harder cases—even when presented to single judges—are those where the legal test is fact specific by design. Numerous multi-factor balancing tests occur where bright line tests would not be sufficiently sensitive to the variety of human experience. For cases of this sort, it means little to say that two decisions are "in conflict" if they agree on the applicable legal standards.102 In any event, predicting the result of such a

100. See United States v. Brackeen, 969 F.2d 827 (9th Cir. 1992) (en banc).
101. Id.
Malthus and the Ninth Circuit

case is fairly easy on appeal: the standard of review will ordinarily mean that the panel will affirm.\(^\text{103}\)

It may be true that “outlier” judges predisposed to haul the law towards their edges of the bell curve are an enemy of predictability.\(^\text{104}\) However, I question whether they will have any less effect on a small circuit. The opportunity to act on one’s outlier opinions will arise less often in a circuit with more judges. A Ninth Circuit judge who wishes, for example, to greatly restrict the application of \textit{Roe v. Wade} within the circuit might not be drawn for the panel that hears the case presenting the issue. If this judge’s views are truly outlying, his or her call for en banc rehearing of the decision of the panel that did decide the case will not attract a majority. On a smaller circuit where each judge hears a larger proportion of the court’s total case load, the outlier judge is more likely be assigned platform for atypical views. In addition, it takes at most two judges on a panel to create an outlier opinion, and that two-judge majority might consist of only one true outlier judge, joined by another who is convinced to go along for the ride. Similarly, the outlier judge in a small circuit needs to win fewer converts to take a case en banc or form a majority once there.

Spreng suggests that Ninth Circuit panels are “structurally prone to becoming independent operators because of weak institutional constraints.”\(^\text{105}\) It is difficult to see what extra constraints would be created by splitting the circuit. All federal circuit judges face the same limits to their authority: two judges on the panel can form a majority and force the outlier into dissent; the remaining active judges can take the case en banc if the outlier finds an ally; the Supreme Court can reverse; and, if the outlier judge engages in high crimes and misdemeanors, Congress can impeach. The same constraints would remain in a divided circuit, with the only difference being the substitution of a full en banc for the limited en banc panel.

The composition of the en banc panel appears to be the extra constraint Spreng seeks, but it would only have an effect if the decisions of limited en banc panels were accorded less respect than full court en

\(^{103}\) At a brown bag lunch held during my clerkship year, Justice Kennedy pointed out that Ninth Circuit opinions tend to belabor standards of review, but perhaps there is good reason.

\(^{104}\) Spreng, \textit{supra} note 4, at 909–11.

\(^{105}\) \textit{Id.} at 911.
banc decisions. I have no comparable experience as a clerk on other circuits, but it is hard to imagine any other court holding its full court en banc decisions in higher esteem than the Ninth Circuit holds its limited en banc decisions. The rule of thumb for drafting opinions was to always cite en banc cases where possible, because they connote extra weight. En banc decisions were less likely than three-judge panel decisions to be treated as if they were limited to their facts. Judge’s e-mails contained frequent statements along the lines of: “we went to the trouble of taking that issue en banc in Smith v. Jones, and I’m not about to reopen it here.” Spreng’s assertion that a Ninth Circuit en banc is a mere “expanded panel” contradicts my personal experience. It also has little meaning as a proposition of law, because the decision of any panel, even a limited one, is binding authority for the entire circuit.

E. Geographical Polarization

Judicial biographies are not persuasive evidence of an underlying incompatibility between the northern and southern portions of the Ninth Circuit. Spreng observes that the current active judges from northwest states are, to her tastes, a more well-rounded selection than their counterparts from the south. She concludes that they will continue to be so in the future, on the express assumption that these eight people are representative of the pool of potential judges from the northwest generally. These are big extrapolations from tiny samples. While I share Spreng’s belief that the bench should be diverse in terms of life experiences as well as demographics, splitting the circuit would not effect that goal. As with law clerks, the number of qualified judicial candidates far exceeds the number of available positions. Whatever one’s standards, it would be very easy for the President and Senate to fill a newly split Twelfth Circuit with nothing but lousy judges. It would be equally possible to fill an unsplit Ninth Circuit with excellent ones, even if it were to grow to twice its current size.

106. Id. The Commission’s tentative draft report also intimates disapproval of the limited en banc concept, although it stops short of linking dissatisfaction with Ninth Circuit en banc procedures to the size of the limited en banc panel. Tentative Draft Report, supra note 6, at 43 & n.92.
107. Spreng, supra note 4, at 908.
109. Spreng, supra note 4, at 937–42.
110. Id.
111. Id. at 938–41.
Leaving these difficulties aside, let us assume that the Pacific Northwest and the rest of the Ninth Circuit do have distinct legal cultures. If there are differences worth talking about, they will eventually result in different rules of law—circuit splits—which the Supreme Court will need to resolve, effectively squelching one rule or the other. This makes splitting the circuit an ineffective mechanism for ensuring that the supposedly different northwestern legal ethic becomes law. A larger question is whether this is a valid goal at all in a system dedicated to the enforcement of uniform federal law. If it were reasonable to argue that non-Alaskan judges should not interpret a federal statute having application in Alaska, then it would also mean that the ninety-eight non-Alaskan Senators and 434 non-Alaskan Representatives had no business voting on the bill and the non-Alaskan President had no business signing it into law. “Geographical polarization” is a better argument for seceding from the Union than it is for splitting the Ninth Circuit.

IV. CONCLUSION

The current debate over the structure of the Ninth Circuit comes when the judiciary has been made a more visible topic for campaign rhetoric. Denunciations of individual judges and individual decisions are on the rise, as is the influence of campaign money in state judicial elections. What is surprising is that attacks on federal judges have not been more common over time, because judges make such perfect targets. They are already guaranteed to have angered the losing half of the litigants who have appeared before them. Canons of judicial conduct make judges disinclined to defend themselves. Because removing judges from office is difficult, the voters are unlikely to blame a candidate for not making much headway against the judicial menace. As long as the candidate does not do anything rash (like impeach), federal judges will remain available for further demonization in elections to come.

112. Id. at 932-36.


While the controversy over the size of the Ninth Circuit may be motivated in part by concerns over its operations, resolving the controversy will inevitably involve a choice about power. Splitting the circuit will increase the "advise and consent" power of northwestern senators who would be able to advise and consent with regard to a greater proportion of the judges in their circuit. Keeping the circuit intact maintains the power of the Ninth Circuit's judges, who would remain authorities for eleven jurisdictions instead of six or five. One might approach the question by asking whether splitting the circuit results in the best allocation of power between the court and the senate. Although there is no reliable method to quantify power into readily comparable units, swapping a large amount of existing judicial power for a rather modest gain in senatorial advise and consent power is likely a poor trade for the public as a whole. It would require that the judges endure separation from friendships developed over decades, a less varied case load, and membership in a less vigorous legal debating society. These losses have adverse public impact because they impair decisionmaking. The public interest is more aligned with the judiciary's interest than the senate's. Of course, one hopes that Congress will make its decision without reference to these considerations, instead focusing on the empirical question the Commission is currently addressing: What structure will provide the best justice?

This suggests a final reason to favor the views of the great majority of Ninth Circuit judges rather than the views of some northwestern senators. Because they live in the court, judges are in a better position to evaluate the matter. They are even better positioned than their clerks.

115. The best clue that a split would enhance senatorial power is that the bills to divide the Ninth Circuit tend to arise in the Senate, rather than the House of Representatives. See Conrad Bums, Dividing the Ninth Circuit Court of Appeals: A Process Long Overdue, 57 Mont. L. Rev. 245, 247-49, 253 (1996). If the court's operations were truly causing a problem of general importance to the people of the circuit, the bills to remedy it could originate in either chamber.
