# SUPREME COURT REVERSALS OF THE NINTH CIRCUIT

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The controversy over the Ninth Circuit's reversal rate illustrates several features of interest in the functioning of appellate courts. In this Article, I explore the arguments behind the possible sources of the Ninth Circuit's reversal rate, and the relationship between those sources and how scholars view the behavior of court of appeals judges. In short, an ideological explanation of the reversal rate for the Ninth Circuit (or, by extension, any other circuit) suggests that those who view court of appeals judges as motivated by their policy preferences offers the most compelling explanation of the Ninth Circuit's high reversal rate. If, however, there is a relationship between the size of a circuit and the number of cases the Supreme Court reverses, then those who argue that court of appeals judges are sensitive to efforts to make good law (but fail due to circuit size) may have a more compelling argument. Ultimately, of course, neither vision of appellate judging exists exclusive of the other, but understanding the relative role of these factors may facilitate a better understanding of the decisionmaking of court of appeals judges.

## I. THE REVERSAL RATE OF THE NINTH CIRCUIT AND POSSIBLE EXPLANATIONS

Over the past fifty years, the Ninth Circuit, the largest circuit court in the country, has been reversed by the U.S. Supreme Court an average of 10.78 times per term. The next closest circuit, the Fifth Circuit, which is also the second largest circuit, was reversed an average of 7.42 times. The frequency of the Ninth Circuit's reversals has been even greater in recent times: over the past twenty-one Supreme Court terms (since the Fifth Circuit was split), the Ninth Circuit has been reversed an average of 14.48 times, with the next closest circuit (the "new" Fifth) reversed 5.14 times per term over the same time period. This disparity grows even greater if one considers that the Supreme Court's caseload has been decreasing steadily since the late 1980s. Figure 1 plots the number of reversals per term for the Ninth Circuit (a three-year moving average), as well as the proportion of

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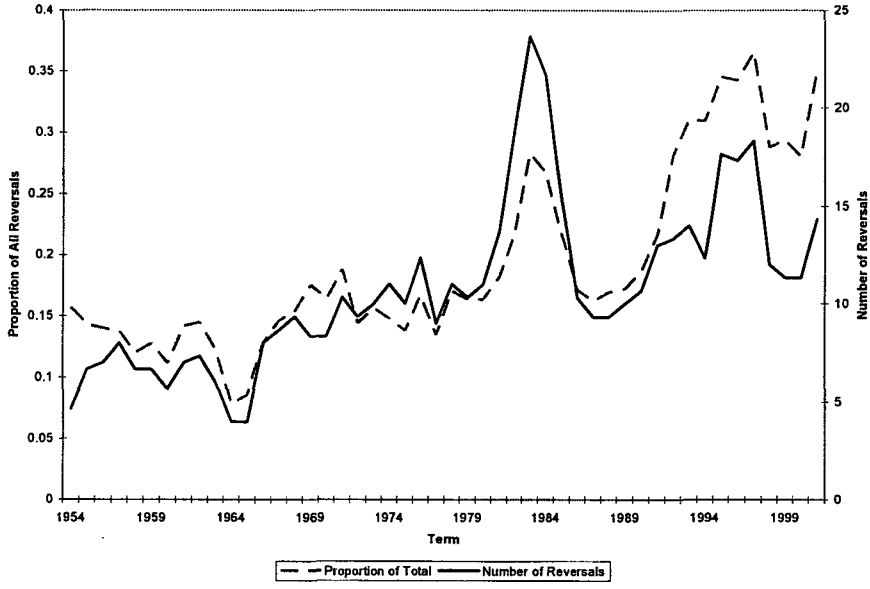
Supreme Court reversals that come from Ninth Circuit decisions. Even using a moving average, one can observe the familiar "spikes" in Ninth Circuit reversal frequencies in the 1983 and 1996 terms.[1]

**Figure 1: Reversals of the Ninth Circuit, 1953–2002**




While the reversal rate itself may be sufficient cause for concern, criticism of the Ninth Circuit also focuses on the frequency with which the reversal by the Supreme Court is unanimous. Taking the subset of cases used to calculate Figure 1 that were decided by eight-to-zero, eight-to-one, and nine-to-zero votes (allowing for lone dissents), it is also clear that the number of unanimous and nearly unanimous reversals for the Ninth Circuit is astonishingly high; the Ninth Circuit's proportion of lopsided reversals is greater than its proportion of reversals decided by a closer vote.

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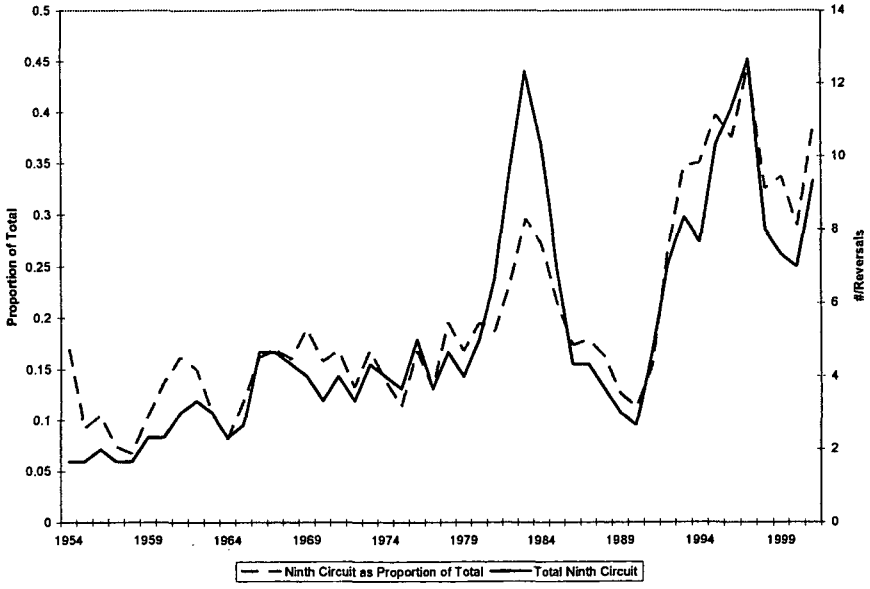
1. A three-year moving average calculates the average reversal rate for any three-year period, so the moving average for 1987 is the average of the number of cases reversed in the 1986, 1987, and 1988 terms. The data used in this Article is drawn from THE S. SIDNEY ULMER PROJECT, U.S. SUPREME COURT DATABASES, http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm (last visited Aug. 15, 2005) [hereinafter U.S. SUPREME COURT DATABASES]. The database is compiled and maintained by Harold Spaeth and is supported by several grants from the National Science Foundation. For further discussion of the 1983 and 1996 terms of the Supreme Court, see Marybeth Herald, *Reversed, Vacated and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405 (1998).

**Figure 2: Unanimous Reversals of the Ninth Circuit, 1953–2002**




Even if one accounts for the workload of the Ninth Circuit, the frequency with which the Ninth is reversed is a statistical anomaly.[2] Recent congressional reviews of the Ninth Circuit effectively highlight the different possible explanations of the frequency of reversals of Ninth Circuit cases. The first attempt, which culminated in the report of the Commission on Structural Alternatives for the Federal Courts of Appeals,[3] focused on the impact of the circuit's size on its ability to maintain uniform law within the circuit.[4] The Ninth Circuit, with twenty-eight authorized judgeships, has eleven more judgeships than the next largest circuit (the Fifth) and has two more judgeships than the Fifth Circuit did at the time it was split into two circuits.[5]

According to the most common line of argument, the source of the Ninth Circuit's high reversal rate is not just size but the inadequacy of devices the Ninth

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2. *See* Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711, 718 (2000). *But see* Jerome Farris, *The Ninth Circuit—Most Maligned Circuit in the Country—Fact or Fiction?*, 58 OHIO ST. L.J. 1465 (1997).

3. The report is also known as the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals. An archived version of the report is available at http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf [hereinafter COMM'N ON STRUCTURAL ALTERNATIVES].

4. *See id.*

5. *See* Fed. Judicial Ctr., History of the Federal Judiciary, http://www.fjc.gov/public/home.nsf (last visited Apr. 1, 2006).

Circuit employs to maintain uniformity of panel decisions. Federal law permits circuits with more than fifteen active judges to use a limited en banc procedure, which means that en banc review is not handled by all of the active judges but by a subset of the active judges.[6] This process may not leave any of the judges from the panel decision on the en banc panel. The Ninth Circuit is the only circuit that employs this device. Criticism of the Ninth Circuit focuses on the inability of the limited en banc to act as an effective substitute for full en banc review.[7] Justice Scalia summarized the thrust of this argument when he said that there is a "disproportionate segment of [the Supreme] Court's discretionary docket that is consistently devoted to reviewing Ninth Circuit judgments, and to reversing them by lop-sided margins, [which] suggests that [the limited en banc] error reduction function is not being performed effectively."[8]

The argument that the Ninth Circuit also experiences more summary reversals than any other circuit has been documented by Judge Richard Posner. Judge Posner studied the relationship between circuit size and the frequency with which a circuit is reversed. He concluded that a positive relationship did, in fact, exist.[9] Of interest, the Ninth Circuit's rate of summary reversal exceeded even what its size would predict.[10] There are several possible explanations for Posner's results, including ideological disagreement between the Supreme Court and the Ninth Circuit, but his analysis substantiates the core of one of the most common arguments about the source of the Ninth Circuit's high reversal rate.[11]

The Ninth Circuit has been exhorted by the Supreme Court to increase its use of the en banc procedure to resolve panel errors and avoid Supreme Court reversal. Professor Stephen Wasby, however, found that, despite the Court's desire for the Ninth Circuit to use the limited en banc more frequently, the Court itself is not necessarily any more likely to affirm Ninth Circuit cases decided en banc than cases decided by panel decision.[12] Ninth Circuit cases decided en banc fared better at the Supreme Court before the adoption of the limited en banc procedure, but the total number of cases makes generalization about the effectiveness of en banc hearings difficult. Speaking about the circuits more generally, however, Wasby noted that "there is little evidence that the Supreme Court, in either its outcomes or

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6. *See* Pub. L. No. 95-486, § 6, 92. Stat. 1633 (1978); *see also* 9TH CIR. R. 35-3. The Ninth Circuit has traditionally used eleven judges (the chief judge and ten other randomly selected judges) for the limited en banc, but recently embarked on an experiment where it will use fifteen judges (the chief judge and fourteen others) for the limited en banc. Justin Scheck, *9th Circuit to Put 15 Judges on En Banc Panels*, RECORDER (S.F.), Oct. 4, 2005, at 1.

7. *See* Pamela Ann Rymer, *The "Limited" En Banc: Half Full, or Half Empty?*, 48 ARIZ. L. REV. 317 (2006).

8. ANTONIN SCALIA, SUBMITTED TESTIMONY TO THE COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS (1998), *available at* http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/Scalia1.pdf.

9. *See* Posner, *supra* note 2, at 716.

10. *Id.* at 719.

11. *See id.*

12. *See* Stephen L. Wasby, *The Supreme Court and Courts of Appeals En Bancs*, 33 MCGEORGE L. REV. 17 (2001).

opinions, cuts the United States Courts of Appeals much slack for having decided cases en banc."[13]

Professor Arthur Hellman directly tested the proposition that the high reversal rate of the Ninth Circuit is due to the absence of an effective internal mechanism to reverse errant panel decisions before they make it to the Supreme Court.[14] Hellman compared Ninth Circuit decisions reversed by the Supreme Court between 1994 and 1998 to the cases decided en banc in the same time period.[15] He concluded that the fault for the reversal rate does not appear to lie with the failure of the en banc process.[16] He noted that "there is a wide gap between the Supreme Court's perception of the Ninth Circuit panel decisions that are both wrong and important and the perception of the Ninth Circuit's own judges."[17] Hellman suggested that the source of this perceptual gap is ideological disagreement between the Ninth Circuit decision and the intention of the Supreme Court.[18]

This highlights the second argument for the frequency of reversals of the Ninth Circuit: ideological disagreement between the Supreme Court and the Ninth Circuit—in particular, persistent Ninth Circuit liberalism in the presence of increasing Supreme Court conservatism. The undercurrent of ideological disagreement has strengthened—due in part to the Ninth Circuit's unpopular *Newdow* decision[19]—and it remains the focus of most assessments of the Ninth Circuit. Although critical press coverage of the Ninth Circuit often focuses on a few cases or judges, the Ninth Circuit is liberal on a broader level. Between 1990 and 1996, the Ninth Circuit reached the liberal outcome[20] 41.2% of the time, a

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13. *Id.* at 73.

14. *See* Arthur D. Hellman, *Getting it Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U.C. DAVIS L. REV. 425 (2000); *see also* Herald, *supra* note 1.

15. *See* Hellman, *supra* note 14.

16. *Id.*

17. *Id.* at 444. Of course, the decision to rehear a case en banc is handled the same way as in other circuits—with all active judges (and panel senior judges) having the opportunity to vote on whether a case should be taken en banc.

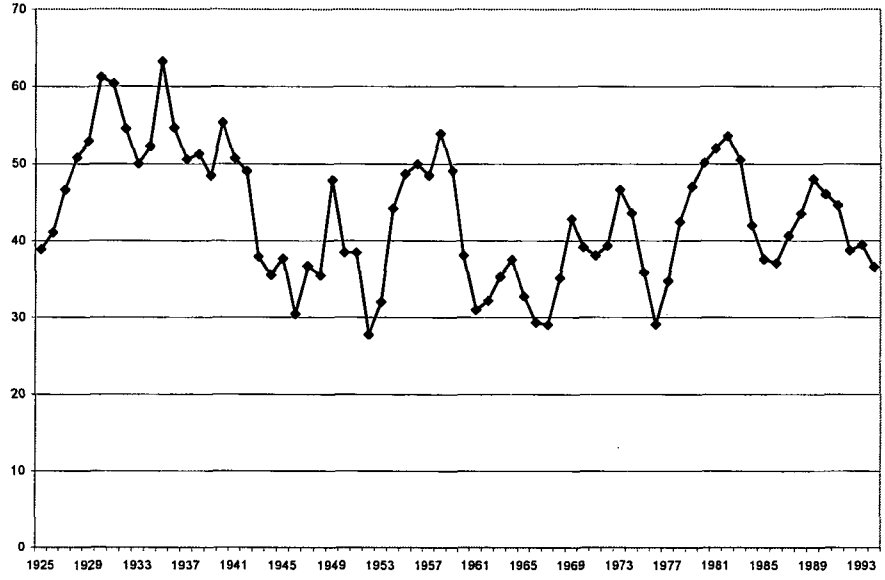
18. *Id.*

19. Newdow v. U.S. Cong., 328 F.3d 466 (9th Cir. 2003), *rev'd sub nom* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004). From the perspective of the Ninth Circuit, *Newdow* is notable because of the press coverage and controversy it generated. A small sampling of journalistic accounts of the Ninth Circuit's reversal rate includes: Vikram David Amar, *Lower Court Obedience and the Ninth Circuit*, 7 GREEN BAG 2D 315 (2004); Susan Blake & Charles Hobson, *Judging the Courts: The Ninth Circuit Strikes Out*, S.F. CHRON., July 29, 2003, at A19; Bob Egelko, *Ninth Circuit Gets a Bad Rap as Wacky, Rogue Court*, S.F. CHRON., July 28, 2002, at D3; Martin Kasindorf, *The Court Conservatives Hate*, USA TODAY, Feb. 7, 2003, at 3A; Collin Levey, *Split Decision: Another Reason to Divide the Ninth Circuit*, SLATE, Nov. 19, 2003, http://www.slate.com/id/2091417/; Dahlia Lithwick, *Fun with* Bush v. Gore*: The 9th Circuit Moons the Supreme Court*, SLATE, Sept. 17, 2003, http://www.slate.com/id/2088554/.

20. A liberal decision, according to the Codebook for the Court of Appeals database, includes several categories. Generally speaking, liberal decisions favor the underdog at the expense of the upperdog. For example, criminal decisions that favor the defendant, civil rights decisions that favor people who claim their civil rights were violated (with the exception of reverse discrimination cases), prolabor (union, worker) decisions, and

proportion neared only by the Second (39.9%) and the District of Columbia (39.2%) Circuits. By comparison, the Fifth, Seventh, and Eighth Circuits all rendered liberal decisions less than 23% of the time. The liberalism of the Ninth Circuit is not particularly new: since reaching a low point of 26.9% in 1978, it has only once dropped as low as 30%.[21]

**Figure 3: Percent Of Ninth Circuit Decisions that Were Liberal, 1925–1996 (3-Year Moving Average)**




Interestingly, despite persistent criticism of the Ninth Circuit, very little systematic analysis of the source of the Ninth Circuit's reversal rate, controlling for ideological differences, has been conducted, a void this Article seeks to fill. Using data on reversals of the circuits since 1980, this Article attempts to sort through the competing explanations for the Ninth Circuit's high reversal rate.

The debate over the Ninth Circuit's reversal rate often reflects the broader controversy over the forces that influence the behavior of court of appeals judges. While one aspect of the debate over the motivations of court of appeals judges is the extent to which judges engage in sincere or sophisticated behavior, such a

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proeconomic underdog decisions are coded as liberal decisions. THE S. SIDNEY ULMER PROJECT, THE U.S. COURTS OF APPEALS DATABASE 91–99, http://www.as.uky.edu/polisci/ulmerproject/appctdata.htm (last visited Apr. 19, 2006) [hereinafter COURTS OF APPEALS DATABASE].

21. *See infra* Figure 3, which is based on cases in the COURTS OF APPEALS DATABASE, *supra* note 20.

debate assumes that judges' decisions are motivated by their policy preferences.[22] The decisions that court of appeals judges make may instead be influenced by attempts to make "good law," or by a sincere application of legal doctrine.[23] Court of appeals judges may be affected by their desire to make good law more than Supreme Court Justices. Judges may seek to create good law to maximize efficiency. Consistent law, even though it may contradict judges' policy preferences, makes judging easier and increases the consistency of results for litigants. Increased efficiency may be particularly appealing to court of appeals judges, who face ever-increasing workload pressures. Making good law may also be accomplished by seeking accurate interpretation of the law.[24]

Many of the same people who argue that the source of the Ninth Circuit's reversal rate is its size discount the role of ideology in judicial decisionmaking. Frank Cross and Emerson Tiller contend that "much of the [legal] scholarship simply assumes the sincere application of legal doctrine without considering the possibility that it may at times be nothing more than a convenient rationalization for political decisionmaking."[25] Despite widespread acknowledgment that ideological disagreement may explain the Ninth Circuit's high reversal rate, the leading quantitative analysis fails to model ideology in any way.[26] This stands in contrast to the political science literature, which has, for at least forty years, recognized the role of ideology in the behavior of court of appeals judges.[27] The reversal rate of the Ninth Circuit offers an opportunity to explore the relative impact of policy preferences and the desire to make good law on the behavior of court of appeals judges.

## II. HYPOTHESES

Models of judicial behavior, then, suggest that judges are motivated by some combination of a desire to make good law and to make policy that agrees with their ideological preferences. If judges seek to make good law, then their ability to do so may be hampered by the administrative structure within which they operate—busier, larger circuits will be reversed more often because judges have less time to focus on getting the correct result in a case. If judges are motivated by ideological preferences, then reversal by the Supreme Court will be a product of

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22. Sincere behavior is behavior that reflects a judge's policy preferences without concern for the ultimate outcome. Sophisticated behavior is that which takes into account the need for judges to build majorities, avoid reversal en banc, and avoid reversal by the Supreme Court. For a recent example of how these behaviors might differ, see Virginia A. Hettinger, Stefanie A. Lindquist & Wendy L. Martinek, *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AM. J. POL. SCI. 123, 125 (2004).

23. *See* LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 58–60 (1997); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2156 (1998).

24. BAUM, *supra* note 23, at 58–60.

25. Cross & Tiller, *supra* note 23, at 2156.

26. Posner, *supra* note 2.

27. Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals, 1961–1964*, 60 AM. POL. SCI. REV. 374 (1966).

ideological disagreement between lower and higher court. These explanations are not mutually exclusive: circuit size and workload, as well as ideological disagreement, are potential sources of a circuit's reversal rate. Multivariate analysis should allow us to test which factors truly influence the number of cases the Supreme Court reverses from any circuit in a given term. Before detailing my approach, it is clear that the notions of size and ideology require clear definitions and appropriate measures to accompany those definitions.

### *A. Hypothesis 1: The larger the size of a circuit, the more reversals it will experience in a given term.*

The argument surrounding the relationship between size and number of reversals is actually twofold. First, and most straightforward, larger circuits decide more cases, creating more candidates for reversals than smaller circuits. Second, critics have argued that a lack of internal consistency within a large circuit will cause higher reversal rates.[28] With twenty-eight authorized judgeships, several senior judges (twenty-three as of December 31, 2004),[29] and numerous visiting judges, the Ninth Circuit may simply be too large to achieve consistency in its decisions. The debate over the split of the Fifth Circuit rested, in part, on the issue of circuit size: the operation of a twenty-four-judge en banc session proved to be the catalyst for the split of the Fifth Circuit.[30]

### *B. Hypothesis 2: The greater the ideological distance between a circuit and the Supreme Court, the more reversals it will experience in a given term.*

If one believes that justices and judges are committed to enacting their policy preferences in cases they decide, then one would expect that ideological distance would explain the frequency of reversals that a circuit experiences. Ideological agreement or disagreement would not be affected by the size of the circuit. Given the appointment process for federal judges, judges who staff the circuits tend to reflect the politics of the regions they represent: the Fourth and Fifth Circuits span states that are historically more conservative than the First and Second Circuits, for example. While some circuits undoubtedly encompass more heterogeneous political areas than others, there appear to be reasonably distinct ideological identities associated with the circuits over time. The general proposition that court of appeals judges are influenced by their policy preferences is strongly supported by the political science literature,[31] though some judges dispute such a characterization.

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28. *See, e.g.*, COMM'N ON STRUCTURAL ALTERNATIVES, *supra* note 3, at 34–35, 40 & 51; SCALIA, *supra* note 8; Posner, *supra* note 2, at 712.

29. *See* United States Court of Appeals for the Ninth Circuit, Home Page, http://www.ca9.uscourts.gov/ (last visited Sept. 5, 2005) (click on List of 9th Circuit Judges).

30. DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 230–37 (1988). At the time, the Fifth Circuit had twenty-six authorized judgeships, and two seats were vacant.

31. *See* Goldman, *supra* note 27, at 382–83. *But see* Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998).

### *C. Hypothesis 3: The more ideologically heterogeneous a circuit is, the more reversals it will experience in a given term.*

The relationship between ideological distance and reversal frequency may extend beyond the distance between the Supreme Court and each circuit court. Some circuits have more ideological diversity than others, which increases the prospect of generating panel decisions that may not accurately reflect the ideology of the circuit. These outlier panels (liberal or conservative) may be the panels creating the decisions that the Supreme Court ultimately chooses to reverse.[32] More diverse circuits may create a more varied product, and the frequency with which the circuit is reversed may be a function of ideological diversity *within* a circuit in addition to ideological disagreements *among* the circuits.

## III. METHODS AND DATA

The dependent variable for this analysis is the number of cases in which a circuit is reversed in a given Supreme Court term. Data were collected on how often each circuit was reversed by the Supreme Court for each Supreme Court term between 1980 and 2002. A relatively broad definition of reversal is utilized, including as reversals cases where the Supreme Court affirmed in part and reversed in part, as well as cases where the lower court decision was vacated and remanded. Cases where the Court "GVRed" (granted, vacated, and remanded) were not included in the analysis. The data come from the U.S. Supreme Court Database.[33] The circuit-term is the unit of analysis.

Measuring the relevant circuit features—the independent variables—is not as straightforward as it may appear. For example, there are several components of a circuit's size that may be relevant. Circuits vary widely in population, geographical territory covered, number of filings (in district courts and in the courts of appeals), workload, and judgeships. Some circuits decide many more cases per judge than others, and the circuits vary widely in internal practices, which may be designed to cope with the stresses created by the caseload of the circuit. Using workload-based measures, then, may distort the relevant features of size across the circuits. Using judge-based measures pose the same problems. Circuits vary considerably in the number of vacancies (and the amount of time those vacancies persist) and also differ substantially in their use of visiting and senior judges. Finally, using broader measures of size—area covered by a circuit, population, etc.—may not accurately reflect the work the courts do in that circuit. Population and area, in particular, would effectively eliminate analysis of the D.C. Circuit Court of Appeals.

Any of the possible measures of circuit size, then, may underestimate the true work of one circuit while overestimating the work of another. Faced with several imperfect choices, circuit size is measured using the number of authorized judgeships in a given circuit in a given year. Although this number may have an imperfect relation to the workload of a circuit, it is relatively easy to track

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32. *See* Steven R. Van Winkle, Three-Judge Panels and Strategic Behavior on the United States Courts of Appeals 34 (1996) (paper presented at the Conference on the Scientific Study of Judicial Politics, on file with the Author).

33. U.S. SUPREME COURT DATABASES, *supra* note 1.

(compared to, say, judges in active service, which can vary over the course of a year) and likely reflects one of the concerns about large circuits—that the judges who serve are unlikely to work with their colleagues on a frequent basis, given the nature of panel assignments.[34]

Ideological distance is also a difficult concept to measure. While leaving the details to previous work,[35] a brief discussion may prove helpful. The ideology of the Supreme Court is treated as the ideal point of the median justice of the Supreme Court, that is, the point on a liberal-conservative spectrum where a person would most prefer to locate policy, given no constraints. To measure the ideology of court of appeals judges on the same dimension, I use the ideal points of the President and senator(s) involved in the nomination of the court of appeals judge.[36] Under senatorial courtesy, court of appeals judges take the ideal point of the senator (the average of the two home-state senators if they are both of the President's party). In the absence of senatorial courtesy, court of appeals judges take the ideal point of the appointing President.[37] Once the ideal point of each court of appeals judge is calculated, the circuit median is used to calculate the distance from the Supreme Court. In addition to the variables discussed above, the number of merits terminations in the circuit is also included to control for the simple possibility that circuits might experience more reversals simply because they decide more cases.[38]

## IV. RESULTS

If circuit size influences the number of reversals a circuit experiences, then we would expect a positive, significant relationship between the number of judges a circuit has and the number of reversals a circuit experiences. Instead, my

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34. *See Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003, Reorganization of the 9th Judicial Circuit: Hearing on H.R. 2723 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. (2003) (statements of Arthur Hellman, Professor of Law, Univ. of Pittsburgh Sch. of Law, and Alex Kozinski, Circuit Judge, Ninth Circuit Court of Appeals). To assess the possibility of a nonlinear effect, I include the number of judgeships squared.

35. *See* Kevin M. Scott, *Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges*, 40 LAW & SOC'Y REV. 163 (2006).

36. An ideal point is the point in issue space where a person would most prefer policy to be located. In most cases, that issue space can be reduced to a single liberal–conservative dimension and can be estimated using that individual's observed behavior (roll-call votes taken by members of Congress and public positions taken on Supreme Court cases (via the Solicitor General) or on legislation by Presidents.) *See generally* Michael Bailey & Kelly H. Chang, *Comparing Presidents, Senators, and Justices: Interinstitutional Preference Estimation*, 17 J.L. ECON. & ORG. 477 (2001).

37. This approach follows that used in Micheal W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623 (2001). However, to insure ideal points across institutions are the same, I use the ideal point estimates calculated in Bailey & Chang, *supra* note 36.

38. To control for the autocorrelation (the possibility that a variable is correlated with itself over successive time intervals), I include the number of times a circuit was reversed in the *previous* term, and I correct the standard errors for the panel nature of the data. Full statistical results are on file with the Author.

analysis indicates that the larger the circuit, the *fewer* reversals a circuit is expected to experience. This suggests that the experience of the Ninth Circuit cannot properly be attributed to the number of judges on the circuit. By contrast, there is a significant, and positive relationship between the ideological distance between the circuit median and the Supreme Court: the greater the distance between the circuit and the Supreme Court, the more reversals it can expect to experience.

Finally, contrary to the hypothesized relationship, more ideologically heterogeneous circuits are reversed *less* often than those that are more ideologically homogeneous. From one perspective, this finding is quite surprising: circuits that have more ideological diversity should be those which have a wide variety of outcomes, and create more candidates for Supreme Court reversal. This result suggests that, controlling for ideological distance (and circuit size), the Supreme Court accords more respect to circuits with greater diversity. From the perspective of potential signals sent to the Supreme Court, ideologically diverse circuits may benefit. The Fourth and Fifth Circuit Courts of Appeals, the most ideologically homogeneous of the twelve circuits, lack the balance that more diverse circuits might have and may occasionally be reversed by a conservative Supreme Court after going too far in the conservative direction. The Ninth Circuit, however, will issue a substantial number of conservative decisions in addition to the liberal decisions it issues at a greater rate than any other circuit. This may actually help *reduce* the number of times the Ninth Circuit is reversed.[39] Though this Article does not explicitly address the issue of splitting the Ninth Circuit, doing so would certainly reduce the ideological heterogeneity of any successor circuits, and the results presented here suggest that doing so would increase the reversal rate of the new circuits.

Table 1 presents the predicted number of reversals for the twelve circuit courts of appeals (the Federal Circuit, given its unique status and caseload, is excluded from this analysis.)

**Table 1: Predicted Number of Reversals by Circuit**

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|---|---|
| First Circuit | 1.40 |
| Second Circuit | 3.92 |
| Third Circuit | 3.29 |
| Fourth Circuit | 4.34 |
| Fifth Circuit | 5.51 |

39. See, for example, the Fourth Circuit's decision in *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999), which held that a federal statute, 18 U.S.C. § 3501 (1994), determined admissibility of confessions in federal court, not *Miranda v. Arizona*, 384 U.S. 436 (1966). The Supreme Court reversed in *Dickerson v. United States*, 530 U.S. 428 (2000).

| | |
|---|---|
| Sixth Circuit | 4.65 |
| Seventh Circuit | 3.59 |
| Eighth Circuit | 4.14 |
| Ninth Circuit | 13.84 |
| Tenth Circuit | 2.59 |
| Eleventh Circuit | 4.05 |
| D.C. Circuit | 3.90 |

Cell entries are predicted counts. For each of the independent variables, the value is set at the circuit mean over the 1980–2002 interval.

For each circuit, the values of the independent variables were set at their circuit means over the time period. The model predicts that the Ninth Circuit should average 13.84 reversals per term, nearly three times as many as any other circuit in a given term. Interestingly, the Ninth Circuit's predicted number of reversals is significantly greater than that for any other circuit, even after controlling for circuit size, ideological distance, ideological heterogeneity, and circuit workload. That is, these factors do not fully explain the Ninth Circuit's anomalous reversal rate.

## V. ANOTHER ELEMENT: THE LIMITED EN BANC

Generally speaking, the hypotheses that receive the most support are those that suggest that the Ninth Circuit's high reversal tally are a product of its ideological distance from the Supreme Court and not a product of its size. In short, there appears ample evidence to support the conclusion that ideological distance from the Supreme Court is positively related to the frequency with which the Supreme Court reverses the circuit. However, my analysis indicates that the size of a circuit is not strongly related to the frequency of reversal.[40] Rather, a circuit's ideological distance and heterogeneity are important predictors of its reversal rates, hypotheses that are strongly supported by the data.

Returning to the phenomenon that initially motivated this research, the high reversal rate of the Ninth Circuit, the data analysis presented here offers some opportunities to assess the source. First, it does not seem fair to argue that the frequency of reversal of a circuit can be tied directly to the size of the circuit. The unique characteristics of each circuit obviate the argument that the Ninth Circuit's frequency of reversal is related solely to its size. Larger circuits tend to be reversed

40. Although Judge Posner did find a positive relationship between circuit size and the number of summary reversals, his analysis did not account for ideological distance or heterogeneity. *See* Posner, *supra* note 2.

more often than smaller circuits, but the circuit-to-circuit variation denies simply relying on the Ninth Circuit's size as an explanation for its reversal rate. At the same time, it is clear that the high reversal rate of the Ninth Circuit transcends the circuit's ideological composition. Ideological distance is positively related to the number of reversals each circuit experiences, but there remains an independent effect for the Ninth Circuit beyond both size and ideological distance from the Supreme Court.

Beyond factors related to circuit size, workload, ideological distance, and ideological dispersion, the Ninth Circuit's reversal rate still exceeds that of other circuits. The characteristic that distinguishes the Ninth from the other circuits—its use of the limited en banc procedure—may explain some of this variance. The relationship between the limited en banc and reversal rate is a difficult hypothesis to test rigorously because no other circuit uses the procedure. This does not mean that conjecture is the only option. I compared the Ninth Circuit before the implementation of the limited en banc with the circuit's rulings after the procedure was implemented. If the limited en banc has an independent, positive effect on the frequency of reversals, then that may explain some of the differences between the Ninth Circuit and the rest of the circuits. I replicated the models in Table 1, looking solely at the Ninth Circuit between 1953 and 2002 to see if, once controls were implemented for increasing circuit size and ideological distance, the limited en banc procedure increased the number of Ninth Circuit decisions the Supreme Court reversed.

For this analysis, caseload is dropped because those data are only available between 1980, the year the limited en banc was implemented, and the present. The analysis shows that the number of judgeships is a significant predictor of the number of lopsided reversals, but this may be picking up some of the growth in caseload that occurs along the same trend as the growth in judgeships. The limited en banc procedure has a strong positive impact on the frequency of reversal of the Ninth Circuit. This finding supports Justice Scalia's argument that the limited en banc fails to catch cases it should, forcing the Supreme Court to step in.[41] These results also support the argument that the Supreme Court has looked less favorably on limited en banc decisions than they did on full en banc reviews before 1980.[42] That this effect persists in the presence of controls for growing circuit size and fluctuations in ideological distance and circuit heterogeneity is particularly interesting.

The substantive effects of the limited en banc for the Ninth Circuit are impressive. The predicted impact of the limited en banc on the number of reversals is 9.96 reversals per term. No other factor has a substantive effect that even comes close to that importance. These results strongly support the conclusion that the adoption of the limited en banc procedure has had an effect on the frequency with which the Ninth Circuit is reversed. It is not circuit size itself that appears to be related to the number of reversals, but the mechanisms the Ninth Circuit has adopted to deal with the circuit growth.

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41. *See* SCALIA, *supra* note 8.
42. *See* Wasby, *supra* note 12.

There is another factor of interest here. Previous work has speculated that one of the functions of en banc review is to correct erroneous panel decisions, but it is difficult to square this proposition with the finding that the Supreme Court is more likely to review cases decided en banc.[43] The adoption of the limited en banc has increased the number of reversals the Ninth Circuit experiences, suggesting that error correction is one of the functions of en banc review (and the limited procedure, as Justice Scalia suggests, fails to accomplish this task). But en banc may also occur in more interesting cases—the kind of cases the Supreme Court is also more likely to hear—and this effect may trump the efforts by the courts of appeals to correct erroneous decisions. My results support, but do not directly test, this proposition.

## CONCLUSION

The implications of this research extend beyond an understanding of the sources of the Ninth Circuit's reversal rate. As suggested earlier, there appears to be a continuing divide between how those in legal academia and those in political science view the Ninth Circuit and, more broadly, how both view the nature of judicial decisionmaking. In a way, both perspectives offer some insight to the source of the Ninth Circuit's high reversal rate: it is not the size of the Ninth Circuit itself, but the procedures the circuit has implemented to cope with its increased size that influence the frequency of reversal by the Supreme Court. At the same time, there is a persistent effect of both ideological distance (positive) and ideological heterogeneity (negative) on the frequency with which any circuit is reversed. This suggests that there is a continuing role for models of judicial decisionmaking that see judges as motivated by their policy preferences, as well as for models that view judges as concerned about "getting it right," regardless of their ideological predispositions. Future research should continue to integrate these two perspectives and not shy away from using the Ninth Circuit (and the other circuits) as resources for understanding the influences on judicial decisionmaking.

43. Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 197–98 (2001).