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Liberalism Triumphant? Ideology and the En Banc Process in the Ninth Circuit Court of Appeals

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Liberalism Triumphant?
Ideology and the En Banc Process
in the Ninth Circuit Court of Appeals

Arthur D. Hellman*

Contents

Introduction 2
I. The Political Composition of the Ninth Circuit Court of Appeals, 1977-2022 8
II. En Banc Balloting: A Window into Ideology 12
A. The En Banc Process in the Ninth Circuit 13
B. The En Banc Ballot Database 19
III. Identifying "Ideological Direction" 20
IV. Ideology and En Banc Review: The Results of the Study 24
A. Constitutional Criminal Procedure 26
1. Cases in which en banc rehearing was granted 28
2. Cases in which en banc rehearing was denied 34
3. Conclusion 40
B. Immigration Appeals 41
C. Labor and Employment Law 46
D. Federal Criminal Law and Procedure 50
E. Other Civil Liberties Claims: Traditional Polarity 52
F. Freedom of Expression 58
1. Traditional-alignment cases 61
2. Reverse-polarity cases 64

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3. First Amendment fluidity 68
G. Reverse Polarity Issues 70
1. Affirmative action 71
2. Personal jurisdiction 73
3. Free exercise of religion 75
4. The Takings Clause 80
5. The Second Amendment 84
6. The overall picture 88
H. "Economic Liberalism" Cases 89
V. Gauging the Liberalism of the Ninth Circuit 95
A. Judges, Ideology, and Political Affiliation 96
B. A Nuanced and Selective Liberalism 98
Conclusion 102

Introduction

There are two things that everyone knows about the Ninth Circuit Court of Appeals: it is very large, and it is very liberal. But common knowledge is sometimes wrong.[1] Is that the case here?

About the first point there can be no dispute. The Ninth Circuit Court of Appeals has 29 authorized judgeships, almost twice as many as the second-largest court.[2] Its caseload exceeds that of the First, Second, and Third Circuits combined.[3] In 2020, its judges decided more than one-fifth of the appeals considered by all twelve regional circuits.[4]

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[1] A research paper recently released by the Federal Reserve begins: "Mainstream economics is replete with ideas that 'everyone knows' to be true, but that are actually arrant nonsense." See Greg Ib, *Is Fed's Inflation View Built on Sand? A Staffer Suggests So, Stirring Debate About Economics*, Wall St. J., Oct. 14, 2021 at A2 (quoting Federal Reserve research paper).

[2] See 28 U.S.C. § 44. The next-largest court is the Fifth Circuit, with 17 authorized judgeships.

[3] See Administrative Office of U.S. Courts, Judicial Business 2020, Tbl. B.

[4] Id. Tbl. B-10.

The Ninth Circuit – the geographic unit of judicial governance and administration – also stands out for its size.[5] It includes California and eight other states, and it embraces 20% of the country's population. No other circuit comes close to those numbers.[6]

But what about the second point – the liberalism? Certainly there is much to support the characterization. Forty years ago, President Jimmy Carter, a Democrat, appointed 15 of the 23 judges on the Ninth Circuit Court of Appeals.[7] Those judges were predominantly liberal, and some were extremely liberal. The effect was to create a court that was widely regarded as a liberal court, especially in comparison to the Supreme Court. For example, in 1984, the Wall Street Journal published a story aptly summarized by its headline: "Judicial Mavericks: Ninth Circuit's Judges Frequently Run Afoul of the Supreme Court – Most of Them are Liberals Named by Jimmy Carter and Are Often Reversed – Ideological Clash 'Inevitable.'"[8] In the same year, the Los Angeles Times noted that after the Carter appointments, the Ninth Circuit "was suddenly perceived by many court observers as liberal."[9] A year later, Newsweek magazine reported on efforts by the

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[5] The role of the circuit as an organ of governance is oven overlooked. For discussion of that role, see Doris Marie Provine, *Governing the Ungovernable: The Theory and Practice of Governance in the Ninth Circuit*, in Restructuring Justice 247-80 (Arthur D. Hellman ed. 1990). In this Article, I shall use "Ninth Circuit" as a shorthand to refer to the Ninth Circuit Court of Appeals.

[6] For detailed statistics, see *The Case for Restructuring the Ninth Circuit: An Inevitable Response to an Unavoidable Problem: Hearing on Oversight of the Structure of the Federal Courts Before the Subcomm. on Oversight, Agency Action, Federal Rights and Federal Courts of the S. Comm. on the Judiciary*, 115th Cong. (2018) (written testimony of Diarmuid F. O'Scannlain, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).

[7] Ten of the 15 appointments were to new positions created by the Omnibus Judgeship Act of 1978, Public Law 95-486; the others filled vacancies. See infra Part II. The 1978 Act created a total of 35 appellate judgeships, all of which were filled by President Carter during his remaining two years in office.

[8] James B. Stewart, *Judicial Mavericks: Ninth Circuit's Judges Frequently Run Afoul of the Supreme Court – Most of Them are Liberals Named by Jimmy Carter and Are Often Reversed – Ideological Clash 'Inevitable*, Wall St. J., Dec. 19, 1984 (available on NEXIS).

[9] William Overend, *9th Circuit – "Court of Last Resort*," Los Angeles Times, Dec. 23, 1984.

Reagan administration "to help change the liberal cast of the Ninth Circuit appeals court."[10]

The perception was not confined to the media. The Wall Street Journal story quoted University of California Law Professor William A. Fletcher, the son of a Ninth Circuit judge who would later be appointed to the court himself: "The Ninth Circuit is probably the most liberal court of appeals in the country."[11] Ninth Circuit Chief Judge James R. Browning, appointed to the court by President Kennedy in 1961, commented: "As a result of the addition of the new judges during President Carter's administration, a rather conservative court of appeals was converted into a rather liberal one."[12]

Although all of the Carter judges have died or taken senior status, the pattern of dominance by appointees of Democratic Presidents has continued in the Ninth Circuit for all but nine of the ensuing years. And research has shown that across a wide variety of issues, judges appointed by Democratic Presidents reach systematically more liberal results than those produced by Republican appointees.[13] Thus it is not surprising that the perception of the Ninth Circuit as a liberal court has continued to this day. For example, a *New York Times* story published in March 2020 described the Ninth Circuit as "a reliably liberal appeals court" that "has long issued rulings favorable to liberal causes."[14]

Not everyone agrees with the characterization, however. Almost twenty years ago, Professor (now Dean) Erwin Chemerinsky, a prominent liberal academic, published an article with the title "The Myth of the Liberal Ninth Circuit."[15] Professor Chemerinsky

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[10] Aric Press, *Judging the Judges*, Newsweek, Oct. 14, 1985, at 73 (available on NEXIS).

[11] See Stewart, supra note 8.

[12] Annual Judicial Conference, Second Judicial Circuit of the United States, 106 F.R.D. 103, 161 (1984) (remarks of Judge James R. Browning).

[13] See infra note 26 and accompanying text.

[14] Rebecca R. Ruiz et al., *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. Times, Mar. 14, 2020, at xx.

[15] Erwin Chemerinsky, *The Myth of the Liberal Ninth Circuit*, 37 Loyola of L.A. L. Rev. 1 (2003).

acknowledged that "the media constantly generalizes and portrays the Ninth Circuit as a liberal court out of the mainstream." But, he said, "[b]y any measure, this is simply wrong."[16] More recently, an experienced Ninth Circuit practitioner said that "impressions" of a "heavily left-wing ideological court" were "probably off" in the past and are "certainly not [accurate] now."[17] Another lawyer, echoing Professor Chemerinsky's comment, saw the "story" of the liberal Ninth Circuit as "a little bit more myth than reality."[18]

So the lines of debate are clearly drawn. But until now, no one has empirically tested whether the Ninth Circuit is indeed the liberal bastion that it is reputed to be. That is the task undertaken by this Article. The Article draws on a unique database that includes case information not readily available in any public source.

The focus of the study is the court's en banc process. But analyzing the ideological orientation of the Ninth Circuit using that approach presents a special challenge. For all of the other circuits, it makes sense to look at the outcomes of the cases that are *heard* en banc, because all of the active judges take part in en banc decisions. But in the Ninth Circuit, en banc cases are heard and decided by a *limited* en banc court (LEBC) composed of the chief judge and ten judges selected at random from among the other 28 active judges.[19] The only judicial activity that involves the participation of all of the court's active judges is the vote on *whether to grant* en banc rehearing – typically, of a case already decided by a three-judge panel.[20] If the common perception is correct, the study should show that the court has used the en banc process to produce predominately liberal case outcomes.

The accuracy of the perception is of considerably more than academic interest. Judges appointed by President Donald J. Trump may have moved the court in a more centrist direction, but the election

[16] Id. at 20.

[17] Jack Karp, *Reversals of 9th Cir. at High Court Last Term Show a Pattern*, Law360, July 28, 2021 (quoting attorney Ben Feuer).

[18] Id. (quoting attorney Mark Kressel).

[19] See infra Part II.A.

[20] In a small number of cases, the judges vote on en banc rehearing before a panel has issued its decision. See id.

of Joe Biden as President in 2020 assures that dominance by Democratic appointees will continue at least for the immediate future. And irrespective of what the future holds, the ideological orientation of the Ninth Circuit is a matter with immense practical consequences. Although much attention has focused on the Ninth Circuit's supposedly high reversal rate in the United States Supreme Court,[21] the reality is that the Supreme Court reviews only a tiny fraction of the Ninth Circuit's decisions. Indeed, the total number of cases from all circuits heard by the Supreme Court rarely rises much above 60 per Term.[22] Thus, on a vast array of federal issues, the law that controls is the law of the circuit. If liberal jurisprudence has held sway in the Ninth Circuit, this hegemony has significant consequences for governmental powers, for individual liberties, and for entrepreneurial freedom in one-fifth of the nation. Moreover, the effects sometimes extend beyond circuit boundaries; when venue rules are flexible, Ninth Circuit law can become the national law.[23]

This study of en banc balloting will also illuminate two other aspects of adjudication in the federal courts of appeals. First, it will enable us to gain unique insights into the content of judicial ideology today. Judges have complete discretion in deciding whether to call for a vote on rehearing en banc. They are not limited to the cases to which they have been assigned on three-judge panels; they can choose any case, constrained only by the broad criteria of FRAP 35(a).[24] Moreover, if the call fails, the judges have the option of publishing a dissent from denial. By studying en banc activity, we can identify the issues that

[21] See, e.g., Diarmuid F. O'Scannlain, *A Decade of Reversal: The Ninth Circuit's Record in the Supreme Court Through October Term 2010*, 87 Notre Dame L. Rev. 2165 (2012);

[22] See, e.g., *The Supreme Court – The Statistics*, 135 Harv. L. Rev. 491, 500 (2021) (in 2020 Term, 57 cases from all courts of appeals decided with full opinions).

[23] See, e.g., Petition for Certiorari at 23, Intel Corp. Investment Policy Committee v. Sulyma, 140 S. Ct. 768 (2020) ("plaintiffs' attorneys seeking to file nationwide class actions will no doubt see the advantage in the Ninth Circuit's timeliness rule."); Petition for Certiorari at 31, Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019) ("after this decision it seems unlikely that an antitrust class action against the major ecommerce companies would be filed anywhere other than the Ninth Circuit.")

[24] See infra Part II.A.

the judges see as important and the kinds of decisions that they see as so wrong as to require correction by an en banc court.

The study will illuminate both sides of the ideological divide. Even when Democratic appointees enjoyed a substantial majority on the Ninth Circuit, there was always a cohort of judges who were ready, willing, and able to argue vigorously for the conservative position. Particularly telling are the dissents from denial of en banc rehearing written or joined by the conservative judges. Those dissents constitute a kind of shadow jurisprudence paralleling the court's binding precedent.

Second, a recently published article by Professors Neal Devins and Allison Orr Larsen argues that "today's en banc review" has been "weaponized" – that "the judges vote in blocs aligned by the party of the President who appointed them and use en banc review to reverse panels composed of members from the other team."[25] But their study examines only the cases in which en banc rehearing was granted. This Article draws on a unique database that includes failed en banc calls as well as those that were successful. By studying both grants and denials, we can more accurately determine whether en banc review has been "weaponized."

The article proceeds as follows. Part I briefly traces the political composition of the Ninth Circuit Court of Appeals from the Carter era to the present, emphasizing the shifts in the ratio of Democratic to Republican appointees. Part II describes the operation of the Ninth Circuit's en banc process and explains why study of the court's votes on whether to rehear panel decisions en banc is the best way of gaining insight into the court's ideological orientation. Part III outlines the method used in this study to classify the "ideological direction" of the panel decisions that have been the subject of en banc balloting. The classifications largely track those initially adopted by political scientists in the 1950s and 1960s, with one major adjustment: the analysis includes a discussion of "reverse polarity" issues – those where support for a civil liberties claim is regarded as the conservative rather than the liberal position.

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[25] Neal Devins & Allison Orr Larson, *Weaponizing En Banc*, 96 N.Y.U. L. Rev. 1373, 1373 (2021).

With the framework thus established, the core of the article addresses the question "Is the Ninth Circuit truly a liberal court?" It does so by studying the results of en banc balloting over the 23-year period from 1998 through 2020. Uninterruptedly during that period, Democratic appointees constituted a majority of the active judges; for much of that time, Democratic appointees outnumbered Republican appointees by a ratio of 2 to 1. If the Ninth Circuit is indeed a liberal court, the data should show the active judges using their en banc prerogatives to reject conservative panel decisions while preserving those that support a liberal jurisprudence.

The results of the study can be summarized briefly. The Ninth Circuit *is* a liberal court, but its liberalism is more nuanced and selective than the conventional depictions suggest. In en banc balloting, the liberal position prevails more often than not – but the conservative side is not shut out. Moreover, when we look separately at the different kinds of issues that generated en banc calls, we find a wide variation in the *extent* to which the court used the en banc process to produce liberal outcomes.

I. The Political Composition of the Ninth Circuit Court of Appeals, 1977-2022

This article is about ideology – in particular, ideology as reflected in appellate judicial decisions. Extensive research has shown that judicial ideology is correlated to a strong degree with the political party of the appointing President: across a wide variety of issues, judges appointed by Democratic Presidents reach systematically more liberal results than those produced by Republican appointees.[26] It will

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[26] See, e.g., CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 19 (2006) ("in a number of areas, there is strong evidence of ideological voting in the sense that Democratic appointees are far more likely to vote in the stereotypically liberal direction than are Republican appointees."); see also LEE EPSTEIN, WILLIAM M. LANDES, & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES 168, 175 (2013) [hereinafter Epstein et al., Behavior]; Nancy Staudt, Lee Epstein & Peter Wiedenbeck, *The Ideological Component of Judging in the Taxing Context*, 84 Wash. U. L. Rev. 1797, 1806 (2006) (summarizing prior studies). As will be seen, this study provides further evidence of the correlation between ideology and political affiliation.

therefore be useful to trace the political composition of the Ninth Circuit Court of Appeals over the course of recent decades.[27]

The modern history of the Ninth Circuit begins with the presidency of Jimmy Carter. When Carter, a Democrat, took office in January 1977, the Ninth Circuit was a 13-judge court with 11 active judges and two vacancies. All but three of the active judges had been appointed by Republican Presidents (Nixon and Ford). Before the year was over, President Carter appointed two judges to fill the vacancies.

In October 1978, Congress passed an omnibus judgeship bill creating 10 new positions for the Ninth Circuit.[28] Over the next two years, President Carter appointed judges for all of those new positions. He also appointed three judges to fill vacancies that opened up during his term in office, for a total of 15 appointments to the now 23-judge court. One appointee of President John F. Kennedy, Chief Judge James R. Browning, remained as an active judge; the court thus had 16 Democratic appointees and 7 appointed by Republican Presidents.

That was the situation when Ronald Reagan, a Republican, defeated Carter in the 1980 presidential election. Reagan did not make his first appointment to the Ninth Circuit until early 1984, when a Republican appointee retired. Later in 1984, Congress passed an omnibus judgeship bill that added five new seats to the Ninth Circuit, making it a court of 28 judgeships.[29] Reagan – reelected in 1984 – appointed judges for all five of the new positions. Reagan also filled four new vacancies, including two created by retirements of Democratic appointees.[30] The upshot is that by 1986, the court was evenly divided between Republican and Democratic appointees, with 13 of each and two vacancies. And in 1989, when Reagan left office, the court had a one-judge Republican majority (14-13).

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[27] I am indebted to Sally Bingham of the Ninth Circuit Headquarters Library and Rollins Emerson, Court of Appeals Archivist, for assistance in compiling in the data reported in this Part. Any errors in presentation or interpretation are mine. Unless otherwise noted, the data were calculated as of October 1 in each year.

[28] Pub. L. No. 95-486, § 6, 92 Stat. 1633 (1978).

[29] Pub. L. No. 98-353, Title II, 98 Stat. 333 (1984).

[30] Three Carter appointees retired in 1986, but one of the vacancies was not filled until George H.W. Bush was President.

Reagan was succeeded as President by George H.W. Bush, also a Republican. Bush served a single term. He filled the single vacancy on the court; he also replaced three Republican appointees. But there was only one retirement by a Democratic appointee during his presidency, and that was after the 1992 election, too late for Bush to fill the vacancy.[31] When Bush left office in January 1993, the court had a three-judge Republican majority (15-12).

Bush was defeated by Bill Clinton in the 1992 election. During Clinton's first term as President, he appointed only three judges to the Ninth Circuit; all three replaced Carter judges. Meanwhile, the court experienced an unprecedented wave of retirements. In the 22 months from March 1995 through January 1997, seven judges took senior status. One vacancy remained from 1994; thus, when Clinton took the oath for his second term, there were eight vacancies on the 28-judge court. Four of the seats had been occupied by appointees of Democratic Presidents, four by Republican appointees. The timing of the retirements was such that toward the end of Clinton's first term, Republican nominees enjoyed their largest majority in two decades; in 1995, Republican appointees outnumbered Democratic appointees, 15 to 9.

Of course, with Clinton's reelection in 1996, the Republican majority could not last, and it did not.[32] Over the course of four years, Clinton filled all but one of the vacancies that existed at the time of his second inauguration. He also filled three new vacancies created by the retirement of Republican appointees. By 1998, Democratic appointees were again a majority on the Ninth Circuit Court of Appeals.

In total, Clinton appointed 14 judges to the Ninth Circuit – only one fewer than Carter. And when he left office in January 2001, the Democratic majority was even larger than it was at the end of Carter's

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[31] In fact, there were no retirements by Democratic appointees from mid-1986 through late 1992. The number of Democratic appointees remained at 13, and the political ratio depended entirely on retirements by Republican appointees and the timing of their replacements by Presidents Reagan and Bush.

[32] There were two additional retirements by Republican appointees in the months following Clinton's second inauguration in January 1997. As a result, for a five-month period between September 1997 and February 1998, the court had only 18 active judges, evenly divided between Republican and Democratic appointees.

term: the Ninth Circuit had 25 active judges, only seven of whom had been appointed by Republican Presidents. To be sure, one of the Clinton judges was a Republican: Richard C. Tallman was placed on the court as part of a deal with Republicans in the Senate.[33] So the effective ratio was 17 to 8 – still more than a two-to-one advantage for the Democrat-appointed contingent.

George W. Bush, a Republican, took office in 2001. Although, like Clinton, he served two terms as President, he made only half as many appointments to the Ninth Circuit – a total of seven. And four of those replaced appointees of Republican Presidents. Thus – still counting Judge Tallman as a Republican – when Bush left office in January 2009, Democratic appointees enjoyed a three-judge majority on the court (15 to 12).

Bush was succeeded in 2009 by Barack Obama, a Democrat. Like Bush, Obama served for two terms, and like Bush, Obama made seven appointments to the Ninth Circuit. He replaced three judges who had been appointed by Republican Presidents and three who had been appointed by Democrats; he also had the opportunity to fill a new position created for the Ninth Circuit by an Act of Congress in 2007.[34] In April 2014, with the appointment of Michelle Friedland, the Ninth Circuit had its full complement of judges for the first time in more than 20 years. Only nine of those judges had been appointed by Republican Presidents; counting Judge Tallman as a Republican, the Democratic appointees constituted a majority of 19 on the 29-judge court.

But change was in the offing – and, for the first time in the court's modern history, the circumstances favored the Republicans. Judge Harry Pregerson, one of the court's most liberal judges, took senior status in December 2015.[35] Three other judges – two Republican

[33] See John Roemer, *Let's Make a Deal*, Daily J. (S.F.), Mar. 9, 2012) (noting that "in exchange for William Fletcher's getting a robe, Clinton would nominate a Republican to another vacant circuit seat").

[34] Court Security Improvement Act of 2007, Pub. L. No. 110-177 § 509 (2008). The Act took one seat away from the D.C. Circuit.

[35] President Obama nominated District Judge Lucy H. Koh to fill the Pregerson vacancy, but the Republican-controlled Senate did not act on the nomination. Judge Koh was renominated by President Biden in 2021. She was confirmed and took her seat on the Ninth Circuit in December 2021.

appointees and one appointed by President Clinton – announced their retirement effective late in 2016. And, of course, in November 2016 Donald J. Trump, a Republican, was elected President.

When Trump took office in January 2017, the court had 25 active judges – 18 Democratic appointees, including Judge Tallman, and seven judges appointed by Republican Presidents. There were four vacancies. Over the next three years, four more judges – three Republican appointees and Judge Tallman – also took senior status. Two other seats opened up unexpectedly. In December 2017, Judge Alex Kozinski, a Republican appointee whose votes were often idiosyncratic, resigned when he was accused of sexual harassment by several women. Three months later, Judge Stephen Reinhardt, the "liberal lion," died suddenly.

Although Trump got off to a slow start in filling Ninth Circuit vacancies, he soon made up for lost time. By January 2020, the court was once again at full strength, with 16 Democratic appointees (nine named by Clinton, seven by Obama) and 13 Republican appointees (three appointed by G.W. Bush and ten by Trump). We must go back to 1996 – almost 25 years earlier – to find a time when there were as many as 13 Republican appointees on the Ninth Circuit. But Democratic appointees still constituted a majority of the court, as they had done without interruption for the preceding 22 years.

With Trump's defeat by Joe Biden in the 2020 election, there will be no additional Republican appointees for at least the next three years. And if one or more of the G.W. Bush appointees retires, the size of the Democratic majority will increase once again.[36]

II. En Banc Balloting: A Window into Ideology

The preceding account shows that for most of the last 40 years the Ninth Circuit has had a majority of judges who were appointed by Democratic Presidents. Starting in 1998, dominance by Democratic appointees has been unbroken. And judges appointed by Democratic Presidents tend to reach more liberal results than those produced by

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[36] As of April 1, 2022, the ratio remained at 16 to 13. President Biden appointed four new judges; all of them replaced appointees of President Clinton who took senior status.

Republican appointees.[37] But of course that generalization does not prove that the *Ninth Circuit* has been a liberal court. To test that proposition, one must consider not who the judges *are*, but what the judges *do*. In this study, I examine how the judges have voted on whether to rehear panel decisions en banc. This aspect of the en banc process is, in Justice Holmes's phrase, the "point of contact – the place where the boy [gets] his fingers pinched."[38] Studying the outcomes of that process is the best way of gaining insight into the ideological orientation of the court.

In this Part, I explain why that is so. I also describe the unique en banc ballot database that I used to carry out the research reported in this Article.

A. The En Banc Process in the Ninth Circuit

In the Ninth Circuit, as in the other courts of appeals, cases are ordinarily heard and decided by randomly composed panels of three judges.[39] These panels will always include at least one active judge of the Ninth Circuit;[40] they may also include Ninth Circuit senior judges as well as visiting judges from district courts and courts of appeals throughout the country.[41] Panel decisions are binding on later panels unless overruled by the Supreme Court or by the Ninth Circuit sitting en banc.[42]

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[37] See supra note 26.

[38] Letter from Oliver Wendell Holmes to Felix Frankfurter, Dec. 19, 1915, in Robert M. Mennel & Christine L. Compston, Holmes and Frankfurter: Their Correspondence, 1912-1934 at 40 (1996).

[39] *See generally* Judith A. McKenna, Laural L. Hooper, & Mary Clark, Case Management Procedures in the Federal Courts of Appeals (Federal Judicial Center 2000).

[40] See 9th Cir. General Order 3.2(a).

[41] For a detailed examination of the role of visiting judges, see Stephen L. Wasby, Borrowed Judges: Visitors in the U.S. Courts of Appeals (2018).

[42] See, e.g., United States v. Adkins, 883 F.3d 1207, 1214 (9th Cir. 2018) ("we are bound to follow prior precedent unless it is overruled by this Court sitting en banc or by the Supreme Court").

As this last observation suggests, Congress has also authorized the court of appeals to hear or rehear cases "before the court [en] banc."[43] En banc rehearing will be granted if a majority of the nonrecused active judges vote to do so.[44] In other circuits, the en banc court consists of all active judges.[45] The Ninth Circuit, acting under the authority of a 1978 statute, convenes a "limited en banc court" (LEBC) composed of the chief judge and ten other judges selected at random for each case.[46]

There are two ways of initiating the process that can lead to rehearing by a limited en banc court.[47] The party who lost at the panel level may file a petition for rehearing en banc (PFREB).[48] The petition is circulated to all active judges and to senior judges who have chosen to participate in the process. In the overwhelming majority of cases, no judge calls for rehearing, and the panel's disposition becomes final.[49]

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[43] 28 U.S.C. § 46(c) (1998). The statute uses the spelling "in banc," as did the Federal Rules of Appellate Procedure until the 1998 revision.

[44] Id; see also Fed. R. App. Proc. 35(a).

[45] Senior judges may sit on the en banc court if they served as a member of the panel that decided the case. *See id.*

[46] For background on the 1978 legislation, see Arthur D. Hellman, *Deciding Who Decides: Understanding the Realities of Judicial Reform*, 15 Law & Soc. Inquiry 343, 346-51 (1990). For a detailed account of the deliberations that led to the establishment of the limited en banc court, see Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, *in* Restructuring Justice 62-70 (Arthur D. Hellman ed., 1990) [hereinafter Hellman, *Maintaining Consistency*]. For an 18-month period in 2006-07 the size of the LEBC was increased to 15 judges. See John Roemer, *Kozinski's 9th Circuit Jumps Into the En Banc Business*, Daily J., Apr. 3, 2008 (noting that court returned to 11-judge LEBC in 2007).

[47] For more detailed descriptions of the en banc process, see Hellman, Maintaining Consistency, supra note 46, at 70-73; Stephen L. Wasby, *The Supreme Court and Courts of Appeals En Bancs*, 33 McGeorge L. Rev. 17, 19-33 (2001). Slight changes have been made in the Ninth Circuit's process over the years, but the basic framework has remained.

[48] Until the 1998 amendments to the Federal Rules of Appellate Procedure, litigants filed a petition for rehearing with a "suggestion" for rehearing en banc. For convenience, I will use the current terminology even though a few of the cases discussed in this Article were governed by the pre-1998 version of the rule.

[49] See United States Courts, Ninth Circuit Annual Report 2020 at 60 (reporting that from 2016 to 2020 the number of PFREBs filed annually ranged from 810 to 955; the number of en banc ballots sent to the judges ranged from 17 to 33), AnnualReport2020.pdf (uscourts.gov).

But if any judge calls for a vote, the en banc balloting process will begin with an exchange of memoranda supporting or opposing en banc rehearing. Sometimes only one or two memoranda are circulated; other cases generate a lengthy back-and-forth or draw comments from multiple judges.[50]

In the alternative, a judge may call for a vote even though no party has requested it. The process is similar, except that ordinarily the exchange of memoranda will not begin until after the parties have been asked to state their position on whether rehearing should be granted.[51]

When the exchange of memoranda has been completed, a vote will be held, and if a majority of the nonrecused active judges agree to rehearing, the chief judge will enter an order taking the case en banc. Two other things will happen immediately: the panel decision will be vacated and deprived of precedential status,[52] and a limited en banc court will be chosen, with ten names drawn at random from among the eligible judges.[53] Thereafter, the LEBC will control all proceedings in the case. Unless some event occurs that moots the controversy, the LEBC will issue a new opinion. Research has shown that in a substantial majority of cases, the LEBC reaches a different result from that of the panel.[54]

Rule 35 of the Federal Rules of Appellate Procedure sets forth the criteria for en banc rehearing: rehearing may be ordered when en banc

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[50] See Hellman, *Maintaining Consistency*, supra note 46, at 72; Stephen L. Wasby, *Why Sit En Banc?* 63 Hastings L.J. 747, 749 (2012). Professor Wasby's article includes extensive quotations from these en banc memoranda.

[51] See 9th Cir. General Order 5.4(c)(3).

[52] See, e.g., Marinelarena v. Barr, 930 F.3d 1039, 1044 n. 3 (9th Cir. 2019) (en banc) (noting that "[t]he order granting rehearing en banc effectively vacated the three-judge panel opinion").

[53] Eligible judges are: (a) all active judges who are not recused and (b) senior judges who were members of the panel and who elected to have their names placed in the draw. See [9th] Cir. Advisory Committee Note to Rules 35-1 to 35-3, Federal Rules of Appellate Procedure, Ninth Circuit Rules, Circuit Advisory Committee Notes (uscourts.gov). The chief judge always sits on the LEBC unless recused.

[54] 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, 456 (2000) (49 cases out of 65) [hereinafter Hellman, *Getting It Right*].

consideration "is necessary to secure or maintain uniformity of the court's decisions" or where "the proceeding involves a question of exceptional importance." However, prior research has shown that, in practice, judges generally vote for en banc rehearing because they "do not like the panel's ruling."[55] Consistent with that finding, the memoranda in support of rehearing "almost invariably argue that the panel opinion is erroneous."[56] Many of the arguments align with familiar liberal or conservative themes.[57]

That is not to say that judges ignore Rule 35's criterion of "importance." On the contrary, judges generally vote in favor of en banc rehearing only when they believe both that the panel ruling is very wrong *and* that the decision has a significance beyond that of the ordinary appeal, either as precedent or because of its practical consequences.[58] But even if perception of panel error is not a *sufficient* justification for a "yes" vote, it is generally *necessary*.[59]

This description shows why study of the en banc process can tell us so much about the ideological orientation of the Ninth Circuit. En banc balloting involves the participation of all of the court's active judges.[60] When those judges vote on an en banc call, they are deciding

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[55] Wasby, supra note 50, at 757. See also Hellman, *Getting It Right*, supra note 54, at 455 (except in rare situations, "judges who vote for en banc rehearing generally believe that the panel decision is wrong, or at least that it is open to serious question").

[56] Hellman, *Getting It Right*, supra note 54, at 455 n. 104. "This is so even when one or more supporting memoranda also assert that the opinion creates an intracircuit conflict." Id. Professor Wasby provides numerous examples of the different ways in which judges, in memoranda supporting en banc rehearing, argue, in substance, that the panel "got it *very* wrong." Wasby, supra note 50, at 757-64.

[57] This can be seen in published dissents from denial of rehearing en banc, many of which are quoted in this Article. Those dissents are generally based on the memoranda circulated within the court. See infra text accompanying note 66. Professor Wasby's article also provides examples. See Wasby, supra note 50, passim.

[58] See Arthur D. Hellman, *"The Law of the Circuit" Revisited: What Role for Majority Rule?* 32 S. Ill. L.J. 625, 635-39 (2008).

[59] The discussion here is limited to cases in which a three-judge panel has already issued a decision. See text infra for discussion of other cases.

[60] To be sure, judges sometimes refrain from voting. But except in death penalty cases, failure to vote is considered a "no" vote. See 9th Cir. General Orders 5.5(b).

whether to allow the panel opinion to stand as the law of the circuit or to convene a different (and larger) group of judges who will consider the case afresh – and who probably will reach a different result.[61] In casting their votes, the judges give heavy weight to their view of the correctness of the panel ruling. By comparing how liberal and conservative panel decisions fare at the hands of the full array of active judges, we can determine whether the Ninth Circuit deserves the "liberal" label that has so often been attached to it.

There are, to be sure, other ways in which one might try to determine whether the Ninth Circuit is a liberal court. In particular, one might look at the decisions made by the court sitting en banc. That approach would make sense in other circuits, where the en banc court consists of all active judges. But as already noted, in the Ninth Circuit, en banc cases are heard by a "*limited* en banc court" consisting of the chief judge and 10 other judges selected at random. The only decision made by the full complement of active judges is the determination whether to *take* a case en banc. Examining the results of en banc balloting is therefore the most reliable method for assessing the ideology of the court as a whole.[62]

Of course, that does not mean that study of LEBC outcomes cannot contribute to our understanding of the Ninth Circuit's ideological orientation. It certainly can. In this Article I shall provide extensive data on what happened in the cases where the en banc call was successful.[63]

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[61] See supra note 54.

[62] Assessing ideology by looking at the en banc decisions themselves is also more difficult, as examples in Part IV will illustrate. A case may present multiple issues with different outcomes. The court may reach a result that is intermediate among those available. Or the court may be fragmented, with no single position commanding a majority. In contrast, the vote on taking a case en banc is a binary choice – thumbs up or thumbs down for rehearing the panel decision.

[63] Other methods of assessing the liberalism of the Ninth Circuit would involve comparing Ninth Circuit outcomes in particular classes of cases with outcomes in other circuits. For example, do aliens seeking asylum win a higher percentage of appeals in the Ninth Circuit than elsewhere? Pursuing research along those lines would be a resource-intensive undertaking, and the results might not be convincing. Not only would you have to look at multiple areas of the law; you would have to consider circuit-specific variables that might affect the pattern of case outcomes.

Four other aspects of the en banc process deserve mention. First, judges may call for a vote on en banc rehearing before a panel has issued its decision. Typically, this occurs when the panel members discover a conflict in the court's precedents; the panel itself issues the en banc call.[64] Since the full court in these cases is not voting on a disposition already reached by a three-judge panel, this class of cases will be treated only briefly in this Article.

Second, when an en banc call fails, the General Orders provide that "the panel shall resume control of the case and no further en banc action is required."[65] Nevertheless, one or more of the judges who voted in favor of en banc reconsideration may publish an opinion dissenting from the denial of rehearing. And judges who voted against rehearing may publish opinions defending the panel ruling. These opinions are generally based on the internal memoranda that were circulated before the vote, and they provide further confirmation that the vote on rehearing is heavily influenced by the judges' view of the correctness of the panel decision.[66]

Third, the General Orders provide that after the LEBC has rendered its decision, a party may file a petition for rehearing by the full court, and a judge may request a vote on full-court rehearing.[67] In more than four decades under the LEBC regime, there have been only eight cases in which a judge has made such a request. All of the calls

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[64] See, e.g., United States v. Gasca-Ruiz, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc) (noting that three-judge panel sua sponte called for rehearing en banc to resolve intracircuit conflict over proper standard of review of district court's application of Sentencing Guidelines to particular facts).

[65] See 9th Cir. General Order 5.5(c).

[66] See, e.g., Biel v. St. James School, 926 F.3d 1238 (9th Cir. 2019) (R. Nelson, J., dissenting from denial of rehearing en banc) ("In this case, five different amici … urge this court to correct its legal error."), panel decision revd sub nom. Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Americans for Prosperity Foundation v. Becerra, 910 F.3d 1177 (9th Cir. 2019) (Ikuta, J., dissenting from denial of rehearing en banc) ("In reaching [its] conclusion, the panel made crucial factual and legal errors"), panel decision revd sub nom. Americans for Prosperity Foundation v. Bonta, 141 S. Ct. 2373 (2021). See also infra Part IV (quoting extensively from dissents from denial of rehearing).

[67] 9th Cir. General Orders 5.8.

have failed. Four of the calls sought rehearing of a liberal decision by the LEBC;[68] four challenged a conservative decision.[69]

Finally, a word about the role of senior judges in the en banc process. Senior judges cannot vote on an en banc call, nor can they write or join a dissent from the denial of rehearing en banc. However, they can request a vote on whether to rehear a case en banc, and if the vote fails they can publish opinions "respecting" the denial.[70]

B. The En Banc Ballot Database

Notwithstanding the importance of the process to the court, little information about en banc activity has been made available to the public. The annual reports of the Administrative Office of United States Courts include information about the number of cases *decided* by an en banc court, but those numbers have not always been reliable. In 2009, the annual report of the Ninth Circuit provided raw numbers, going back to 1996, for en banc ballots circulated, grants of rehearing after a vote, and denials after a vote.[71] Successive annual reports have continued to include those numbers, but no other information.

As for the cases themselves, orders granting en banc rehearing are published, as are opinions of the en banc court. But until 2018, if the vote failed and there was neither an opinion dissenting from denial of rehearing nor an amendment to the panel opinion, the fact that a vote was taken would not be announced, and the public would ordinarily

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[68] See, e.g., Compassion in Dying v. State of Washington, 85 F.3d 1440 (9th Cir. 1996) (O'Scannlain, J., dissenting from denial of full-court rehearing). The Supreme Court later reversed the LEBC decision sub nom. Washington v. Glucksberg, 521 U.S. 702 (1997).

[69] See, e.g., Abebe v. Holder, 577 F.3d 1113 (9th Cir. 2009) (Berzon, J., dissenting from denial of full-court rehearing).

[70] See, e.g., In re Volkswagen "Clean Diesel" Marketing, etc. Litigation, 13 F.4th 990 (9th Cir.2021) (noting that senior judge requested vote); Kennedy v. Bremerton Sch. Dist, 4 F.4th 910, 930 n.1 (9th Cir. 2021) (opinion of O'Scannlain, J.) (noting that under court's general orders, senior judges "may participate in discussions of en banc proceedings").

[71] United States Courts, Ninth Circuit Annual Report 2009, at 44, AnnualReport2009.pdf (uscourts.gov)

have no way of knowing that the case had been the subject of a ballot.[72] Even today – in contrast to the practice in some other circuits[73] – orders denying rehearing after a ballot do not reveal the actual tally of votes, let alone identify how each judge voted.[74]

In part through my work on various court projects, I acquired materials that I used to compile a database of en banc ballot cases from 1974 to the present. That database, which I believe to be substantially complete, enabled me to carry out the research reported in this Article.[75]

III. Identifying "Ideological Direction"

This study examines the role of ideology in en banc activity in the Ninth Circuit. To pursue that inquiry, it is necessary to classify the "ideological direction" of the panel decisions that were the subject of en banc ballots. That is, was the panel decision liberal or conservative – or perhaps something else?

For many, probably most, issues of federal law, there is widespread agreement as to what constitutes the "liberal" or the "conservative" position. For example, in 2013, three prominent scholars of judicial behavior summarized some of the "conventional

[72] The orders denying rehearing were sometimes available on PACER, but those who wished to learn about them had no way of finding the orders without searching the dockets for individual cases. If the losing party sought Supreme Court review, the order would be included in the appendix to the certiorari petition.

[73] See, e.g., Ramirez v. Guadarrama, 2 F.4th 506 (5th Cir. 2021) (listing judges who voted for and against en banc rehearing); United States v. Johnson, 833 Fed. Appx. 522 (4th Cir. 2021) (listing judges who voted for and against en banc rehearing); Hildreth v. Butler, 971 F.3d 645 (7th Cir. 2020) (listing judges who voted to grant rehearing en banc); Barnes v. Security Life of Denver Ins. Co., 953 F.3d 704 (10th Cir. 2020) (listing judges who voted to grant en banc rehearing).

[74] The late Judge Stephen Reinhardt repeatedly argued that this information should be made public. See, e.g., Spears v. Stewart, 283 F.3d 992, 997 (9th Cir. 2002) (Reinhardt, J., dissenting from denial of rehearing en banc) ("the public has a right to know how close the vote was and how each of us exercised our judicial responsibilities").

[75] I am grateful to Staff Attorney Paul Keller of the Ninth Circuit Court of Appeals for providing some of the case information that I used to compile the database.

understandings" of the terms "liberal" and "conservative" in the context of judicial votes and decisions.[76] They wrote:

> "Liberal" votes [include] those in favor of defendants in criminal cases; of women and minorities in civil rights cases; of individuals in suits against the government in First Amendment, privacy, and due process cases; of unions and individuals over businesses; and of government over businesses. "Conservative" votes are the reverse.[77]

Ninth Circuit Judge Stephen Reinhardt sketched a similar approach in an article published in 1997.[78] Judge Reinhardt set out to answer the question, "what is a liberal judge?" Making clear that he included himself in the category, he wrote:

> Liberal judges believe in a generous or expansive interpretation of the Bill of Rights. … We believe that the Founding Fathers used broad general principles to describe our rights, terms such as "due process of law," "life, liberty, and property," "unreasonable search and seizure," "freedom of speech," because they were determined not to enact a narrow, rigid code that would bind and limit generations to come. …
>
> Liberal judges tend to take very seriously the idea that the Constitution protects the rights of individuals against arbitrary and oppressive state action, as well as the rights of minorities against a tyrannical majority. …

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[76] Epstein et al., Behavior, supra note 26, at 76; Professor Epstein and her colleagues were discussing the ideological coding in the U.S. Supreme Court Database originally created by Professor Harold Spaeth. See Arthur D. Hellman, *The Supreme Court's Two Constitutions: A First Look at the "Reverse Polarity" Cases*, 82 U. Pitt. L. Rev. 273, 286-87 (2020) [hereinafter Hellman, *Reverse Polarity*].

[77] Epstein et al., Behavior, supra note 26, at 76. The authors questioned some of the Database classifications of individual cases, id. at 76-77, but they appear to have generally accepted the "conventional understandings" of what "liberal" and "conservative" mean when applied to judicial decisions or votes. However, they rejected Spaeth's treatment of two types of civil liberties cases – those involving commercial speech and those involving requirements of "accountability in campaign spending." Id. at 150. For discussion of these issue areas, see Hellman, *Reverse Polarity*, supra note 76, at 306-11.

[78] Stephen Reinhardt, *Liberal Judges*, Fed. Law, Feb. 1997, at 46.

> [Laws and voter initiatives] must be strictly tested against the limitations and guaranties contained in the Constitution.[79]

Although Judge Reinhardt was describing liberal *judges*, his analysis necessarily incorporated a definition of liberal judicial *decisions*. For example, liberal decisions are those that reflect "a generous or expansive interpretation of the Bill of Rights" and eschew narrow or rigid readings of "broad general principles" such as "due process of law" and "freedom of speech."

Judge Reinhardt also identified some "nonconstitutional areas where you can spot the liberal judge at work."[80] The liberal judge, he said, more readily rules in favor of "the injured worker or the disabled individual" rather than the insurance company or employer or government agency. Liberal judges "are frequently a fairly soft touch" for aliens seeking asylum. "In all types of cases, including tax cases, you're more likely to find the liberal judge voting for the individual while his conservative colleagues tend to uphold the position advocated by the government."[81]

The descriptions in the 2013 book and Judge Reinhardt's article would probably suffice to classify the ideological direction of most of the panel decisions that were the subject of en banc ballots in the Ninth Circuit. Most – but not all. As I have described elsewhere, there is mounting evidence that the traditional assumptions about the liberal-conservative divide are incorrect or at best incomplete.[82] In at least some areas of constitutional law, the traditional characterizations have been reversed. Across a wide variety of constitutional issues, support for claims under the Bill of Rights or the Reconstruction Amendments

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[79] Reinhardt, supra note 78, at 47-48. Judge Reinhardt did signal, albeit obliquely, one departure from this general approach. He said that liberal judges "sometimes have trouble interpreting [the post-Civil War constitutional] amendments as barriers to minority advancement." The implication is that liberal judges do not apply "strict[]" tests to government programs that they regard as promoting affirmative action for minorities. For discussion, see Hellman, *Reverse Polarity*, supra note 76, at 304-06; infra Part IV.G.1.

[80] Reinhardt, supra note 78, at 48.

[81] Id.

[82] Hellman, *Reverse Polarity*, supra note 76.

is now regarded as the conservative position. I refer to these as reverse polarity issues.

Apart from reverse polarity, for purposes of this study I wanted to rely as much as possible on objective criteria and to use transparent methods that could be replicated by other scholars. To that end, I used a modified version of the case classification system that I developed initially for studies of the Supreme Court and later used for studies of the federal appellate courts (particularly the Ninth Circuit).[83] That system is built upon three key elements:

- Four broad (macro) issue categories, each corresponding to one of the major functions of the federal courts in the life and law of America, and rank-ordered to reflect the hierarchy in the legal effect of decisions in each area. The categories are: civil liberties, federalism and separation of powers, general federal law, and federal jurisdiction and procedure.[84]
- Particularized (micro) issue categories defined by reference to the source of authority for the legal rule in dispute – for example, a clause in the Bill of Rights or a statutory scheme like Title VII.
- Polarity (plus/minus) codes that are keyed to the issue and describe case outcomes, with a "plus" signifying that the court ruled in favor of the claim or defense based on the source of the legal rule in dispute.

Those studies, however, did not consider ideology. To classify the ideological direction of the panel decisions that were the subject of an en banc ballot, I proceeded incrementally. I began by analyzing the cases in subject matter areas characterized by two features: (a) the traditional ideological alignment is well established, and (b) ideological direction coincides with issue polarity. For example, on issues of constitutional criminal procedure, a decision favoring the constitutional

[83] See, e.g., Arthur D. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 Harv. L. Rev. 1709, 1716, 1737-89 (1978).

[84] In this Article, the terms "civil liberties," "civil rights," and "individual rights" will be used interchangeably to refer to the first category.

claim is liberal; a decision rejecting the claim is conservative. This method, without more, enabled me to determine the ideological direction of at least two-thirds of the panel decisions in the study.

Based on that work, I was also able to identify liberal and conservative *blocs* among the judges on the Ninth Circuit Court of Appeals. Using that information – along with earlier studies of judicial behavior and information about the positions taken by the liberal and conservative blocs on the United States Supreme Court during the last quarter-century – I ascertained the ideological direction of panel decisions on other issues of federal law.[85]

Overwhelmingly, the classifications used in this Article conform to the "conventional understandings" of liberal and conservative positions sketched above. Debatable classifications will be discussed in connection with particular issues or cases.[86]

IV. Ideology and En Banc Review: The Results of the Study

As already noted, prior research has shown that judges generally vote for en banc rehearing because they "do not like the panel's ruling."[87] If the Ninth Circuit is indeed the liberal bastion that it is reputed to be, this liberal stance should be reflected in the operation of the en banc balloting process. The members of the liberal majority would use their numerical advantage to push the law in a liberal direction. They would do this in two principal ways. They would *grant* en banc rehearing of panel decisions that reached conservative outcomes. They would *deny* rehearing when conservative judges challenged panel decisions that reached liberal outcomes. This study tests whether that is what has happened.

The study encompasses the period from 1998 through 2020. For the entirety of that period, Democratic appointees constituted a

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[85] The information on ideological positions in the Supreme Court was taken from Hellman, *Reverse Polarity*, supra note 76, and LAWRENCE BAUM, IDEOLOGY IN THE SUPREME COURT (2017).

[86] For a more detailed exposition of the method, see Arthur D. Hellman, *Mapping the Ideological Divide in the Federal Courts: A Legal and Empirical Approach for an Era of Shifting Alignments* (forthcoming).

[87] See supra note 55 and accompanying text.

majority of the active judges; for much of that time, Democratic appointees outnumbered Republican appointees by a ratio of 2 to 1.[88] The Ninth is the only one of the federal judicial circuits that has had a majority of Democratic appointees throughout the twenty-first century.

In the 23 years of the study period, there were more than 800 cases in which the active judges voted on an en banc call.[89] However, in about 35 cases the call came from the panel before the panel had issued its opinion. By definition, these are not cases in which the full court is considering the merits of the panel's decision. Moreover, the reason for the call generally is that the panel has identified an apparent conflict in circuit precedents.[90] Judges might well vote in favor of en banc hearing irrespective of their view of the merits. These cases are therefore excluded from the study group, leaving about 780 cases in which the full court voted on whether to rehear a decision by a three-judge panel.[91]

Even when the judges are voting on whether to rehear a panel decision, not all cases implicate ideology. Intellectual property disputes, for example, generally do not.[92] Nor do many cases involving civil procedure or bankruptcy law issues. Rather than pick and choose among cases, I decided to limit the study to two large categories that offered the best prospect of shedding light on the Ninth Circuit's

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[88] For one month at the start of 1998, the court was evenly divided between Republican and Democratic appointees. See supra note 32.

[89] This number may not reflect all of the cases in which the court voted on en banc rehearing. As noted in Part II, until 2018, if the vote failed and there was neither an opinion dissenting from denial of rehearing nor an amendment to the panel opinion, the fact that a vote was taken would not be announced, and the public would ordinarily have no way of knowing that the case had been the subject of a ballot. See supra Part II-B. I believe that the database I have compiled includes substantially all of the cases in which an en banc ballot took place. Out of caution, the numbers in this paragraph of text are given as an approximation.

[90] See supra note 64 and accompanying text.

[91] In one case, the panel requested en banc hearing after issuing its opinion, and the issue decided by the LEBC was one that did not exist at the time the panel ruled. See Summerlin v. Stewart, 341 F.3d 1082, 1092 (9th Cir. 2003) (en banc). That case is also excluded from the study because the request did not call into question the correctness of the panel's decision.

[92] See infra note 392 and accompanying text.

ideological orientation with a minimum of disputation over method: (a) civil liberties cases and (b) areas of statutory law in which ideological direction can generally be readily classified through simple objective criteria.

This does mean that some cases with clear ideological valence were excluded from the study. But their number was small, and any gain in understanding would have been outweighed by the need to make and explain judgments not only about ideological direction but also about how cases are to be grouped.[93] In the end, the study group included more than 90% of the en banc calls targeting panel decisions – more than 700 cases.

To determine what the votes in these cases tell us about the ideological orientation of the Ninth Circuit, I begin with four areas in which the "conventional understandings" of the liberal and the conservative position are especially well established. I then turn to areas in which category boundaries or ideological alignments may require some discussion.

A. Constitutional Criminal Procedure

The largest single component of the Ninth Circuit's en banc balloting docket – about 30% of the total – consists of cases involving issues of constitutional criminal procedure. This category includes the rights of criminal defendants, limitations on police practices, and the availability of federal habeas corpus for state prisoners.[94] Most of the cases involve claims under the Bill of Rights or the Fourteenth Amendment's Due Process Clause; some involve procedural issues, particularly those generated by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the federal habeas corpus statute. The disputes arise primarily in three different contexts: federal criminal prosecutions, civil rights actions under section 1983 or *Bivens*, and federal collateral challenges to state convictions.

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[93] The excluded cases were of two kinds. First, there were the issue areas in which many or most decisions lack ideological valence. Second, there were the cases involving federalism or separation of powers and not implicating "economic liberalism." On "economic liberalism," see infra Part IV.H.

[94] The category includes all Fourth Amendment cases, whether or not the particular search or seizure was carried out for purposes of law enforcement.

The cases in this group are important in their own right; they also serve as a useful starting-point for examining the ideological valence of the en banc process during the study period. That is so because there is no area of federal law in which the traditional ideological alignment is more firmly established than constitutional criminal procedure. This can be seen most readily in the work of the United States Supreme Court. In the quarter century starting in 1994, the Court considered more than 300 cases of this kind; there were only four in which the constitutional claim received more support from conservative Justices than from the liberals.[95] Thus, "on the broad range of issues ranging from searches and seizures to the administration of the death penalty, support for the constitutional claim remains the liberal, not the conservative, position."

In the 23 years of the Ninth Circuit study, 234 panel decisions involving issues of constitutional criminal procedure were the subject of en banc ballots. (See Table 1.) Of these, 131 were cases in which the panel ruled adversely to the constitutional claim, either directly or on procedural grounds. Those decisions were classified as "conservative." The other cases (excluding one that resisted categorization) were deemed "liberal"; the ruling supported the constitutional claim.[96]

Of the 131 en banc calls generated by a conservative panel decision, 71 were successful, for a grant rate of 54%. Of the 102 calls generated by a liberal panel decision, only 34 were successful, for a grant rate of 34%. To put it another way, an en banc call challenging a conservative panel decision had a better than even chance of succeeding. If the panel decision was liberal, the odds were two to one against success.

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[95] See Hellman, *Reverse Polarity*, supra note 76, at 330-33.

[96] The case that resisted characterization is United States v. Enas, 204 F.3d 915 (9th Cir. 2000), on reh'g en banc 255 F.3d 662 (9th Cir. 2001). The panel decision rejected the defendant's double jeopardy claim. Ordinarily, that holding would be classified as conservative. But the decision was grounded in a broad construction of "the inherent sovereign power of [Indian] tribes." 204 F.3d at 920. Rulings favorable to tribal power are regarded as liberal. Moreover, the panel was composed of three very liberal judges (Harry Pregerson and William A. Fletcher of the Ninth Circuit, joined by Myron Bright of the Eighth Circuit). Taking all of this into account, I declined to classify the ideological direction of the panel opinion. But Enas was the only constitutional-criminal case to present that dilemma.

Table 1
En Banc Ballots: Constitutional Criminal Procedure

	Total	Granted	Denied	Percent Granted
Conservative Panel Decision	131	71	60	54%
Liberal Panel Decision	102	34	68	33%
Other Panel Decision	1	1	0	100%
Total	234	106	128	45%

The conspicuously higher success rate for en banc calls challenging conservative panel decisions supports the hypothesis that the Ninth Circuit is a *predominantly* liberal court. At the same time, the data strongly refute the idea that the Ninth Circuit is a "*reliably* liberal" court.[97] A substantial number of liberal panel decisions were reheard by an en banc court, and almost half of the conservative panel decisions were allowed to stand when the en banc call failed.

Those are the broad findings. A more granular look at the en banc balloting cases is now in order, starting with the cases in which the en banc call was successful.

1. Cases in which en banc rehearing was granted

The successful en banc calls included 71 cases in which the panel decision favored the conservative side and 34 with a panel decision that was liberal. I begin with the cases in which the full court voted to rehear a *conservative* panel decision. These cases spanned the range of constitutional issues, but three areas of federal law accounted for almost two-thirds of the total. There were 17 cases on Fourth Amendment rights, 12 on the right to counsel under the Sixth Amendment, and 15 that involved various aspects of the federal habeas corpus statutes.[98]

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[97] See supra text accompanying note 14 (quoting the New York Times).

[98] Lists of the cases included in the various categories discussed in this Article are on file with the author. In the interest of saving space, I have generally not identified the cases constituting the categories, except where no more than two or three were involved.

The grant of en banc rehearing is of course an intermediate step; the LEBC must then hear and decide the case. Although this Article does not focus on the work of the LEBC, I did collect basic information about whether the LEBC decision resulted in a modification of the disposition reached by the panel. This analysis reveals that in 39 of the 71 cases, en banc rehearing resulted in a reversal of ideological direction: a conservative panel decision was replaced by a liberal en banc ruling. Thus, where the panel affirmed a conviction, the LEBC reversed it.[99] Where the panel denied relief to a habeas petitioner, the LEBC granted it.[100] Where the panel affirmed the dismissal of a § 1983 claim, the LEBC allowed the case to go forward.[101]

These are the cases that most strongly support the characterization of the Ninth Circuit as a liberal court. Yet even as to these cases, the evidence is more equivocal than the reversals of ideological direction by the LEBC, in isolation, might suggest. During the period of the study, the Supreme Court was quite hospitable to certiorari petitions filed by governments and government officials seeking to overturn liberal decisions on criminal justice issues.[102] But in 15 of the 39 cases – about two-fifths – the losing government party did not even seek review by the High Court. In 14 cases the governmental party's certiorari petition was denied. The Court granted review in only 8 of the 36 cases. Six were reversed; in the other two, the en banc decision was affirmed in whole or in substantial part.[103] In one

[99] E.g., United States v. Velarde-Gomez, 224 F.3d 1062 (9th Cir. 2000), on reh'g en banc, 269 F.3d 1023 (9th Cir. 2001).

[100] E.g., Chein v. Shumsky, 323 F.3d 748 (9th Cir. 2003), on rehearing en banc, 373 F.3d 978 (9th Cir. 2004).

[101] E.g., Gonzalez v. City of Anaheim, 715 F.3d 766 (9th Cir. 2013), on rehearing en banc, 747 F.3d 789 (9th Cir. 2014).

[102] See, e.g., Robert M. Yablon, *Justice Sotomayor and the Supreme Court's Certiorari Process*, 123 Yale L.J. F. 551, 562 (2014) (noting the "steady trickle of cases" in which "the Court has been granting certiorari and summarily reversing decisions favorable to criminal defendants and habeas petitioners").

[103] The reversals were Glebe v. Frost, 574 U.S. 21 (2014) (summary reversal); Messerschmidt v. Millender, 565 U.S. 535 (2012); Cullen v. Pinholser, 563 U.S. 170 (2011); Harrington v. Richter, 562 U.S. 86 (2011); Schriro v. Landrigan, 550 U.S. 465 (2007); and Brown v. Payton, 544 U.S. 133 (2005). The affirmances were City of Los Angeles v. Patel, 576 U.S. 409 (2015); and Safford Unif. Sch. Dist. No. 1 v. Redding,

additional case the Supreme Court GVR'd for reconsideration in light of an intervening decision, the LEBC adhered to its liberal ruling, and certiorari was denied.[104] Based on this record, one might conclude that the outliers here generally were not the liberal en banc rulings but the conservative panel decisions that were vacated upon the grant of en banc rehearing. But even if that conclusion is correct, what we see here does exemplify the Ninth Circuit's using the en banc process to thwart conservative panel outcomes.

In a majority of the remaining cases with a conservative outcome in the panel, the LEBC decision, although not entirely reversing the ideological direction of the panel ruling, tempered the holding so that it was less conservative. For example:

- In a § 1983 action, the panel held that police use of a Taser did not constitute excessive force under the Fourth Amendment; the LEBC held that the plaintiff sufficiently alleged an excessive force claim, but that the defendant officers were protected by qualified immunity.[105]

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557 U.S. 364 (2009) (affirming on Fourth Amendment issue but reversing denial of qualified immunity).

[104] See Sessoms v. Grounds, 776 F.3d 615 (9th Cir. 2015) (en banc) (on remand), cert. denied, 577 U.S. 913 (2015). In a second GVR of a liberal LEBC decision, the LEBC remanded the case to the three-judge panel, which ruled against the defendant. See United States v. Briones, 1 F.4th 1204 (9th Cir. 2021) (en banc) (remanding to three-judge panel), on remand, 18 F.4th 1170 (2021) (affirming sentence of life without possibility of parole). *Briones* is noteworthy in that the dissent from the conservative panel opinion was authored by Judge Diarmuid F. O'Scannlain, the leader of the court's conservative wing. See United States v. Briones, 890 F.3d 811, 822 (9th Cir. 2018) (O'Scannlain, J., dissenting); see infra Part IV.A.2.

For a general discussion of GVRs, see Arthur D. Hellman, *"Granted, Vacated, and Remanded" – Shedding Light on a Dark Corner of Supreme Court Practice*, 67 Judicature 389 (1984); Stephen L. Wasby, *Case Consolidation and GVRs in the Supreme Court*, 53 U. Pac. L. Rev. 83 (2021).

[105] See Brooks v. City of Seattle, 599 F.3d 1018 (9th Cir. 2010), on rehearing en banc sub nom. Mattos v. Agarano, 661 F.3d 433 (9th Cir. 2011).

- In a criminal case, the panel held that a jury instruction did not violate due process; the LEBC held that the instruction violated due process, but that the violation was harmless error.[106]

- In another criminal case, the panel held that border patrol agents had reasonable suspicion to stop the defendants' vehicles; the LEBC agreed with that ultimate conclusion but overruled precedents holding that Hispanic appearance could be considered as a factor even in the absence of "particularized, individual suspicion."[107]

- In a prisoner case, the panel held that a claim challenging prison disciplinary proceedings was not cognizable under the federal habeas statute; the LEBC endorsed that conclusion but allowed the district court to construe the habeas petition as pleading a cause of action under § 1983.[108]

In 13 cases the LEBC, like the panel, reached a conservative outcome.[109] In six of these the LEBC was sharply divided, suggesting that but for the luck of the draw the en banc ruling might have been liberal rather than conservative.[110]

The cases discussed thus far conform to the stereotype of the Ninth Circuit: conservative panel rulings were vacated upon the grant of rehearing en banc. Although the randomly chosen members of the

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[106] See United States v. Smith, 520 F.3d 1097 (9th Cir. 2008), on rehearing en banc, 561 F.3d 934 (2009). Five judges would have held that the error was not harmless. See 561 F.3d at 942 (Berzon, J., dissenting).

[107] See United States v. Montero-Camargo, 177 F.3d 1113 (9th Cir. 1999), on rehearing en banc, 208 F.3d 1122 (9th Cir. 2000); see id. at 1131-35 & n.22.

[108] Nettles v. Grounds, 788 F.3d 992 (9th Cir. 2015), on rehearing en banc, 830 F.3d 992 (9th Cir. 2016). Five judges would have allowed the prisoner to pursue his habeas claim. See 830 F.3d at 938 (Berzon, J., dissenting).

[109] In two cases the LEBC did not decide the merits of any issue resolved by the three-judge panel.

[110] E.g., Dickens v. Ryan, 740 F.3d 1302 (9th Cir. 2014) (en banc) (6-5 decision) (on habeas corpus, rejecting challenge to imposition of death penalty); Murdoch v. Castro, 609 F.3d 983 (9th Cir. 2010) (en banc) (6-5 decision) (on habeas corpus, rejecting Confrontation Clause claim); Fields v. Brown, 503 F.3d 755 (9th Cir. 2007) (en banc) (9-6 decision) (on habeas corpus, rejecting challenge to death sentence based on juror misconduct).

LEBC did not always reach a liberal result, the votes of the full court favored the liberal side.

Of greater interest are the 34 *liberal* panel decisions that the full court voted to rehear en banc. As with the conservative panel decisions, Fourth Amendment issues held pride of place; they accounted for 11 of the cases. Seven cases involved the right to counsel. No other issue gave rise to more than three of the en banc calls.

Two things stand out about these cases. First, many of the panel opinions were authored by the Ninth Circuit's most liberal judges. Second, in 70% of the cases (24 out of 34), rehearing by the LEBC resulted in a conservative outcome, reversing the ideological direction of the panel decision. And in half of the remaining cases, the LEBC decision tempered the liberalism of the panel in one way or another. Here are some examples of the first pattern.

In *Lambright v. Stewart*, Judge Stephen Reinhardt, joined by Judge Warren J. Ferguson, held that two capital defendants were deprived of their constitutional rights when the Arizona trial court used "dual juries" (one for each of them) in a single trial.[111] The full court granted en banc rehearing, and the LEBC rejected the constitutional claim on a 10-1 vote, with only Judge Reinhardt dissenting.[112]

In another capital habeas case, Judge Reinhardt joined Judge Sidney R. Thomas in holding that the defendant was denied his right to the effective assistance of counsel at the penalty stage.[113] The LEBC, with only Judge Thomas dissenting, found that the petitioner was not entitled to habeas relief on any of his claims.[114]

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[111] Lambright v. Stewart, 167 F.3d 477 (9th Cir. 1999). Judge David R. Thompson, a Republican appointee, dissented.

[112] Lambright v. Stewart, 191 F.3d 1181 (9th Cir. 1999) (en banc). Judge Ferguson was not a member of the LEBC, but five Democratic appointees joined the majority opinion.

[113] Mann v. Ryan, 774 F.3d 1203 (9th Cir 2014).

[114] Mann v. Ryan, 828 F.3d 1143 (9th Cir. 2016). Two Democrat-appointed judges concluded that counsel's performance was deficient but that the errors were not prejudicial. Id. at 1173 (Christen, J., joined by Berzon, J., concurring in part and dissenting in part). Five other Democratic appointees joined the LEBC opinion in full.

In a § 1983 case, Judge Reinhardt joined Judge A. Wallace Tashima in allowing a plaintiff to pursue an excessive force claim based on a city's policy of training its police dogs to "bite and hold" individuals.[115] By a vote of 10 to 1, the LEBC held that the suit was properly dismissed.[116] Judge Thomas was again the only dissenter.

During the brief period when the LEBC was expanded from 11 to 15, a liberal panel decision was rejected by a vote of 14 to 1. The panel majority, composed of Judges Ferguson and Harry Pregerson, had set aside a death sentence on habeas corpus.[117] The LEBC dismissed the appeal on the ground that the prisoner had validly waived further proceedings.[118] Judge Pregerson was the only dissenter.

This is not to say that when the en banc court repudiated a liberal panel decision, it invariably did so by a lopsided margin. For instance, in *United States v. Kincade*, Judge Reinhardt, joined by Judge Richard A. Paez, held that the forced extraction of blood from parolees for DNA analysis violates the Fourth Amendment.[119] The LEBC found no constitutional violation, but the vote was 6 to 5, with no opinion commanding a majority.[120]

In half of the remaining cases, the LEBC, although not outright rejecting the panel's liberal holding, moved in a more conservative direction. For example, in *Robinson v. Solano County*, the panel held that the plaintiff raised a jury question as to whether officers' use of force was reasonable and that the officers were not protected by qualified immunity.[121] The LEBC agreed that the plaintiff adequately

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[115] Lowry v. City of San Diego, 818 F.3d 840 (9th Cir. 2016).

[116] Lowry v. City of San Diego, 858 F.3d 1248 (9th Cir. 2017) (en banc). Judge Clifton, the panel dissenter, wrote the court opinion.

[117] Comer v. Schriro, 463 F.3d 934 (9th Cir. 2006).

[118] Comer v. Schriro, 480 F.3d 960 (9th Cir. 2007) (en banc).

[119] United States v. Kincade, 345 F.3d 1095 (9th Cir. 2003).

[120] United States v. Kincade, 379 F.3d 813 (9th Cir. 2004) (en banc).

[121] Robinson v. Solano County, 218 F.3d 1030 (9th Cir. 2000). The panel was composed of two judges appointed by President Carter, Betty B. Fletcher and William C. Canby.

alleged a violation of his Fourth Amendment rights but held that the officers were entitled to qualified immunity.[122]

There were only five cases in which the LEBC, like the panel, reached a liberal outcome. The evidence thus shows that in the realm of constitutional criminal procedure, the en banc process has served, in part, as a device though which the full court checks some of the most extreme manifestations of liberal jurisprudence by Ninth Circuit judges. That is not what would happen in a "reliably liberal" appellate court.[123]

2. Cases in which en banc rehearing was denied

I turn now to the failed en banc calls. There were 60 failed calls targeting conservative panel decisions and 68 that targeted liberal panel rulings. To put it another way, there were almost as many failed calls from the liberal side of the court as there were from the conservative side.[124]

This near-equivalence will probably come as a surprise even to those who follow the Ninth Circuit closely. That is so for three reasons. First, almost half of the failed calls from the liberal side were not memorialized in a published order. They were completely invisible to the public, thus giving a misleading impression of the overall pattern of en banc balloting.[125] Second, only 20 of the failed calls from the liberal side generated published dissents, compared with 53 from the conservative side. A published dissent, often with strong and colorful language, draws attention in a way that a simple order does not. Third, none of the cases was reviewed on the merits by the Supreme Court.[126]

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[122] Robinson v. Solano County,278 F.3d 1007 (9th Cir. 2001) (en banc).

[123] See supra note 14 and accompanying text (quoting the New York Times).

[124] I refer to calls from the liberal or conservative *side* rather than to calls from liberal or conservative *judges*. At this stage in the inquiry, there is no need to rely on characterizations of the ideology of the judges. And although most of the judges who participated extensively in the en banc debates can easily be labeled as liberal or conservative, there is one prominent exception, former judge Alex Kozinski.

[125] Starting in 2018, the court has published all orders denying rehearing en banc after a vote. But that was not the practice for almost the entirety of the study period. See supra Part II.B.

[126] Two panel decisions were GVR'd for reconsideration in light of an intervening Supreme Court decision. In both cases, the panel on remand adhered to

As will be seen, this record contrasts sharply with what happened in the cases with dissents from the conservative side.

What were the cases in which, contrary to the stereotype, the conservative position prevailed in the vote of the full Ninth Circuit? The largest group was composed of habeas cases challenging imposition of the death penalty under the Eighth Amendment. There were 15 such cases, augmented by 6 in which the petitioner argued that the death sentence was tainted by ineffective assistance of counsel in violation of the Sixth Amendment. Eleven cases raised Fourth Amendment issues, and seven involved procedural questions under the federal habeas corpus statute.

The published dissents from the denial of rehearing in these cases, although relatively few in number, provide some of the best information available about the issues that matter most to liberal judges. And by highlighting the positions that failed to persuade a majority of the court, they reveal the limits of the Ninth Circuit's liberalism.[127] For example:

- In *United States v. Ziegler*, the panel held that the defendant's employer validly consented to a search of the defendant's office and business computer.[128] Eleven judges dissented from the denial of en banc rehearing. They joined in an opinion by Judge William A. Fletcher saying that it was "preposterous to conclude … that an employer's policy of remote electronic monitoring of its employees' computer use" constituted "consent to law

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its ruling rejecting the constitutional claim. See United States v. Pineda-Moreno, 617 F.3d 1120 (9th Cir. 2010) (order denying rehearing en banc over dissent), vacated, 565 U.S. 1189 (2013), on remand, 688 F.3d 1087 (9th Cir. 2012) (affirming denial of suppression motion); Kleve v. Hill, 202 F.3d 1155 (9th Cir. 2000) (order denying rehearing en banc over dissent), vacated, 531 U.S. 1108 (2001), on remand, 243 F.3d 1149 (9th Cir. 2001) (denying habeas corpus)..

[127] In one case the panel reversed its pro-government decision after the denial of rehearing en banc and also the denial of certiorari by the Supreme Court. This was because an intervening en banc ruling in another case had undercut the panel's rationale. See Poyson v. Ryan, 879 F.3d 875 (9th Cir. 2018) (on panel rehearing); see id. at 897 (Ikuta, J., concurring) (asserting that en banc decision was wrong but recognizing that it was binding on the panel).

[128] United States v. Ziegler, 474 F.3d 1184 (9th Cir. 2007).

enforcement to conduct a physical search for a computer in the employee's locked private office."[129]

- In *United States v. Ortiz-Hernandez*, the panel affirmed the suppression of wrongfully obtained fingerprint exemplars but held that the government could compel a new set of exemplars.[130] Nine judges, in an opinion by Judge Richard A. Paez, objected that the latter ruling "render[ed] the exclusionary rule meaningless when applied to fingerprint evidence" and would "promote disrespect for the law and disdain for the judicial process."[131]

- In *Sanchez v. County of San Diego*, the panel rejected a Fourth Amendment challenge to a program of warrantless visits to the homes of public assistance recipients.[132] Judge Pregerson, joined by six other Democratic appointees, argued that "allowing [the panel] opinion to stand is an assault on our country's poor as we require them to give up their rights of privacy in exchange for essential public assistance."[133]

- In *Stokley v. Ryan*, the panel allowed an execution to go forward.[134] Ten judges dissented from the denial of en banc rehearing, with seven arguing in an opinion by Judge Reinhardt that "[t]he panel's hastily-reached decision, without adequate

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[129] United States v. Ziegler, 497 F.3d 890, 897 (9th Cir. 2007) (W. Fletcher, J., dissenting from denial of en banc rehearing). All of the judges joining the dissent were Democratic appointees except for Judge Kozinski.

[130] United States v. Ortiz-Hernandez, 427 F.3d 567 (9th Cir. 2005).

[131] United States v. Ortiz-Hernandez, 441 F.3d 1061, 1069 (9th Cir. 2006) (Paez, J., dissenting from denial of rehearing en banc). All of the judges were Democratic appointees.

[132] Sanchez v. County of San Diego,464 F.3d 916 (9th Cir. 2006).

[133] Sanchez v. County of San Diego, 483 F.3d 965 (9th Cir. 2007) (Pregerson, J, dissenting from denial of rehearing en banc). Judge Kozinski dissented separately; he did not join Judge Pregerson's opinion. See id. at 969.

[134] Stokley v Ryan, 705 F.3d 401 (9th Cir. 2012).

briefing … is simply inconsistent with the Supreme Court's precedents ….”[135]

- In *Cooper v. Brown*, another death penalty case, 11 judges dissented from denial of en banc rehearing.[136] Judge W. Fletcher opened his dissent with the words: “The State of California may be about to execute an innocent man.”[137] His dissent extended over more than 50 pages of the Federal Reporter. Judge Reinhardt noted in his separate dissent that “the vote [was] extremely close, closer than the list of dissenters would suggest.”[138]

Cases like these, along with the larger number without a published dissent, show that arguments for liberal outcomes, even when voiced by fellow judges, do not always carry the day in the Ninth Circuit’s en banc balloting. Diehard liberals like Judge Pregerson and Judge Reinhardt may have personified the Ninth Circuit in the public mind, but their position on the ideological spectrum was not the court’s.

Failed en banc calls from the conservative side were only slightly more numerous than those from the liberal side, but they had much greater visibility and far greater prominence. Only 11 of the 68 cases were not memorialized in a published order. And in all but 4 of the other cases there was a published dissent from denial.

The most remarkable fact about these failed calls is that 27 of the panel decisions – more than one-third of the total – were reviewed by the Supreme Court, and all but three of those were reversed.[139] This

[135] Stokley v Ryan, 704 F.3d 1010, 1012 9th Cir. 2012) (Reinhardt, J., dissenting from denial of rehearing en banc).

[136] Cooper v. Brown, 565 F.3d 581 (9th Cir. 2009).

[137] Id. at 581 (W. Fletcher, J., dissenting from denial of rehearing en banc).

[138] Id. at 636 (Reinhardt, J., dissenting from denial of rehearing en banc). The Ninth Circuit was then a court of 27 active judges, so 14 votes would have been required to grant en banc rehearing.

[139] Even in the one case that I have counted as an exception, the Court rejected much of the Ninth Circuit’s reasoning. See Carey v. Saffold, 536 U.S. 214 (2002). Two additional decisions, consolidated for review, are pending at this writing after the grant of certiorari. See Shinn v. Ramirez, 141 S. Ct. 2620 (2021), granting cert. to 971 F.3d 1116 (9th Cir. 2020) (denying rehearing en banc over dissent by eight judges).

tally includes nine decisions that were reversed summarily on the certiorari papers. Six other cases were GVR'd by the Supreme Court. Four resulted in an about-face by the panel after the remand.[140] In the two cases where the panel adhered to its position after the GVR, the Supreme Court later reversed – in one instance, summarily.[141] Another case was overruled by the Supreme Court when the state challenged it in a later certiorari petition.[142] This record contrasts sharply with that of the failed calls from the liberal side; as already noted, the Supreme Court reviewed none of those cases.

All but five of the Supreme Court reversals came in cases in which the order denying rehearing en banc was accompanied by a dissenting opinion. That is not a coincidence. Conservative judges on the Ninth Circuit are well aware that the Supreme Court pays attention to their dissents from denial of rehearing. A decade ago, Judge Diarmuid F. O'Scannlain, the leader of the Ninth Circuit's conservative cohort,

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[140] See Thompson v. Runnels, 705 F.3d 1089 (9th Cir. 2013) (on remand from Supreme Court, rejecting habeas challenge to admission of confessions); Schad v. Ryan, 671 F.3d 708 (9th Cir. 2011) (on remand from Supreme Court, affirming denial of habeas relief in capital case); United States v. Gonzalez, 450 Fed. Appx. 662 (9th Cir. 2011) (on remand from Supreme Court, affirming denial of Fourth Amendment suppression motion); Rodis v. City & Cty of San Francisco, 558 F.3d 964 (9th Cir. 2009) (on remand from Supreme Court, reversing denial of qualified immunity). In one additional case, the panel changed course after the Supreme Court reversed a panel decision not involving an en banc vote. See Gaston v. Palmer, 447 F.3d 1165 (9th Cir. 2006) (affirming dismissal of habeas petition as time-barred); compare Gaston v. Palmer, 417 F.3d 1050 (9th Cir. 2005) (O'Scannlain, J., dissenting from denial of rehearing en banc).

[141] The account in the text greatly simplifies the long and tortured history that preceded the summary reversal. See Cavazos v. Smith, 565 U.S. 1, 9 (2011) (per curiam) (stating that after each of two GVRs, "the panel persisted in its course, reinstating its judgment without seriously confronting the significance of the cases called to its attention."). For the dissent from denial of en banc rehearing, see Smith v. Mitchell, 453 F.3d 1203 (9th Cir. 2006).

The other GVR case also had a long and tortured history, with the reversal coming after a separate dissent from denial of rehearing en banc. See Ayers v. Belmontes, 549 U.S. 7, 10-11 (2007) (summarizing habeas history).

[142] See Swarthout v. Cooke, 562 U.S.216 (2011) (per curiam); compare Pearson v. Muntz, 625 F.3d 539 541 (9th Cir. 2010) (Ikuta, J., dissenting from denial of en banc rehearing). The state did not file a certiorari petition in Pearson.

described these "dissentals"[143] as an internal mechanism "which can alert the Justices to Ninth Circuit error and act as a stabilizing force for the rule of law."[144] Analyzing the statistics, he explained why he was "inclined to believe that efforts within the Ninth Circuit to dissent from ill-founded denials of rehearing en banc are not for naught." He urged his colleagues to expand "the community of dissental writing on the Ninth Circuit" and to "coordinat[e] dissental authorship to maximize their necessitated output."

We do not know if Ninth Circuit judges have coordinated their dissents, but they have continued to write them, and many have been vindicated by the Supreme Court. In the 2020 Term alone, the Court reversed seven panel decisions that drew dissents from denial of en ban rehearing. One of these involved constitutional criminal procedure.[145]

Two types of cases feature prominently in the dissents from the conservative side – and also in the Supreme Court reversals. First, there are habeas cases in which the panel granted relief to a state prisoner notwithstanding the strictures of AEDPA. For example, in a 2019 habeas case, twelve judges joined a dissent by Judge Carlos Bea accusing the panel majority of "re-writing AEDPA entirely to institute the federal habeas court as a mere second state appellate court of state law error review."[146] The Supreme Court summarily reversed, saying that the panel "exceeded its authority in rejecting [the state court's] determination, which was not so obviously wrong as to be 'beyond any possibility for fairminded disagreement.'"[147] Second, there are § 1983 cases in which the panel denied qualified immunity to defendants acting under color state law. In one such proceeding, Judge Sandra S. Ikuta began her dissent by saying, "The panel opinion that we let stand

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[143] See Alex Kozinski, *I Say Dissental, You Say Concurral*, 121 Yale L.J. Online 601 (2012). I do not like this coinage, but it can be a handy shorthand.

[144] O'Scannlain, supra note 21, at 2177.

[145] See Shinn v. Kayer, 141 S. Ct. 517 (2020), discussed infra text accompanying notes 146-147.

[146] Kayer v. Ryan, 944 F.3d 1147, 1157 (9th Cir. 2019) (Bea, J., dissenting from denial of rehearing en banc) (punctuation altered).

[147] Shinn v. Kayer, 141 S. Ct. 517, 526 (2020) (per curiam). Justices Breyer, Sotomayor, and Kagan dissented without opinion.

today directly contravenes the Supreme Court's repeated directive not to frame clearly established law in excessive force cases at too high a level of generality."[148] The Supreme Court agreed and reversed summarily.[149]

3. Conclusion

Dissents like those I have just quoted, and the Supreme Court reversals that often follow, receive extensive attention in legal media and widely read blogs.[150] This coverage reinforces the perception that the Ninth Circuit is an out-of-control liberal court that routinely flouts Supreme Court precedents, particularly those that limit the authority of federal courts to intervene in state criminal justice processes. There is some validity to that perception, but the findings summarized in the preceding pages tell us that the overall picture is more nuanced. Some liberal panel decisions are rejected by the Ninth Circuit itself when the full court votes on rehearing en banc. And some conservative panel decisions remain good law when the en banc call fails.

In the realm of constitutional criminal procedure, then, the Ninth Circuit emerges as a predominantly liberal court – but also a court in which the most liberal judges do not always prevail. The next step is to determine whether that is also true of other areas in which an ideological divide can be clearly identified.

Before pursuing that inquiry, one other point deserves mention. The dissents from denial of rehearing on issues of constitutional criminal procedure confirm the strong correlation between ideology and the party of the appointing President. The dissents from the liberal side were overwhelmingly written and joined by appointees of Democratic Presidents Carter, Clinton, and Obama. Only two Republican appointees wrote or joined any of those dissents: Judge Alex Kozinski and Judge Andrew Kleinfeld. The dissents from the conservative side

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[148] Hughes v. Kisela, 862 F.3d 775, 791 (9th Cir. 2016) (Ikuta, J., dissenting from denial of rehearing en banc).

[149] Kisela v. Hughes, 138 S. Ct. 1148 (2018) (per curiam). Justice Sotomayor, joined by Justice Ginsburg, dissented.

[150] See, e.g., Karp, supra note 17; Ed Whelan, *Congrats, Judge Ikuta!*, Bench Memos, July 1, 2021, https://www.nationalreview.com/bench-memos/congrats-judge-ikuta/.

were overwhelmingly written and joined by appointees of Republican Presidents. The most prominent exception was Judge Richard Tallman, who as noted earlier was appointed by President Clinton as part of a deal with a Republican Senator.[151] Judge Tallman joined all but a handful of the dissents from the conservative side. Judge Ronald Gould, another Clinton appointee, joined roughly one out of three. Two other Clinton appointees, Judges Margaret McKeown and Susan Graber, joined on rare occasions, as did Judge John Owens, appointed by President Obama. But with those few exceptions, ideology and political affiliation coincided.

By the same token, the constitutional criminal procedure cases enable us to provisionally identify liberal and conservative blocs among the judges on the Ninth Circuit. The liberal bloc includes Judges Pregerson, Reinhardt, Thomas, W. Fletcher,[152] Paez, and Berzon.[153] The conservative bloc includes Judges O'Scannlain, Tallman, Callahan, Bea, and Ikuta.

B. Immigration Appeals

Immigration cases occupy a special position for the Ninth Circuit Court of Appeals. "Historically, the Ninth Circuit has usually received about half of the immigration cases filed in the country."[154] In the early years of the twenty-first century, immigration appeals comprised a remarkable 45% of the Ninth Circuit's docket.[155] Today the proportion is almost one-third.[156]

In his profile of "liberal judges," Judge Reinhardt explained how judicial ideology plays out in immigration cases. Liberal judges, he said,

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[151] See supra note 33 and accompanying text.

[152] Ninth Circuit opinions continue to refer to Judge "W. Fletcher," and I will follow the same practice.

[153] Here and elsewhere, judges are listed in the order of seniority.

[154] Cathy Catterson, *Changes in Appellate Caseload and Its Processing*, 48 Ariz. L. Rev. 287, 297 (2006).

[155] Id.

[156] United States Courts, Ninth Circuit Annual Report 2020 at 60, AnnualReport2020.pdf (uscourts.gov). The figure in the Report includes "other agency matters," but these are relatively few in number.

"are frequently a fairly soft touch [for aliens seeking asylum], while conservatives are more likely to defer to the often harsh, mechanical rulings of the Board of Immigration Appeals."[157] This description accords with the manner in which political scientists have analyzed immigration cases generally for more than half a century: a vote in favor of the alien is characterized as liberal, while a vote in favor of the government is deemed conservative.[158]

The ideological divide in the Ninth Circuit on immigration cases is deep-seated and longstanding. As Judge Reinhardt's comment suggests, the divide is reflected most prominently in disagreement over the role of courts in reviewing administrative determinations regarding asylum, removal, and other proceedings under the immigration laws. Some years ago, in a series of interviews with the late Professor Stephen L. Wasby, members of the court cast a revealing light on the nature and origin of this disagreement.[159] According to these interviews, some judges, "out of exasperation or conviction," have come to accept the perception of the judiciary as having "a transcendent role as between the three branches of government." Others, while perhaps acknowledging that the Immigration and Naturalization Service (now the U.S. Citizenship and Immigration Services) is not a paragon among agencies, insist that it is not the judicial role to reverse every miscarriage of justice. "Fundamental [differences] as to the rationality and fairness [of the] immigration laws;" different visions of heaven; the "dogmatic" versus the "humane" approach to the language of the statute: these were among the thoughts voiced by the judges to explain the variations in outcomes in the court's decisions.

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[157] Reinhardt, supra note 78, at 48.

[158] See, e.g,, S. Sidney Ulmer, *Quantitative Analysis of Judicial Processes: Some Practical and Theoretical Applications*, 28 Law & Contemp. Problems 164, 167 (1963).

[159] These interviews were conducted by Professor Wasby, of the Department of Political Science at the State University of New York at Albany, in the spring and early summer of 1986. Only the responses, not the names of the judges, were provided to me. I am grateful to Professor Wasby for permission to use this material. The comments were previously published in Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 21 Ariz. St. L. J. 915, 973-74 (1991).

In the course of the study period, immigration cases generated 100 en banc calls directed to panel decisions.[160] (See Table 2.) Sixty-one of these targeted rulings that were conservative, i.e. adverse to the alien; the other 39 targeted decisions favoring the alien. Of the 61 calls challenging a conservative panel decision, 33 were successful, for a grant rate of 54% – exactly the same percentage as for issues of constitutional criminal procedure. Of the 39 calls targeting liberal panel decisions, only 15 were successful, for a grant rate of 38%. That is slightly higher than the grant rate of 34% in the constitutional criminal procedure realm, but substantially lower than the grant rate for conservative panel decisions.

Table 2
En Banc Ballots: Immigration Cases

	Total	Granted	Denied	Percent Granted
Conservative Panel Decision	61	33	28	54%
Liberal Panel Decision	39	15	24	38%
Total	100	48	52	48%

There was thus a total of 48 immigration cases in which en banc rehearing was granted. All but 15 were cases in which the panel had ruled in favor of the government. And in 23 of the 33 cases the panel's ruling in favor of the government was replaced by an LEBC decision favoring the alien. For example, in *Borja v. INS*, the panel opinion by Judge O'Scannlain rejected an alien's claim for asylum; the LEBC found that the claim was meritorious.[161] In *Navarro-Lopez v. Gonzales*, the panel held that an alien's state criminal conviction involved a crime of moral turpitude, rendering him ineligible for cancellation of removal; the LEBC found that the conviction was not disqualifying.[162] Two

[160] The vast majority of these cases involved application or interpretation of immigration statutes and regulations, but there were a few in which the court considered whether to grant relief on constitutional grounds.

[161] See Borja v. INS, 139 F.3d 1251 (9th Cir. 1998), on rehearing en banc, 175 F.3d 727 (9th Cir. 1999).

[162] See Navarro-Lopez v. Gonzales. 455 F.3d 1055 (9th Cir. 2006), on rehearing en banc, 503 F.3d 1063 (9th Cir. 2007).

additional LEBC decisions tempered the panel's conservative holding.[163]

No such clear-cut pattern is found in the 15 cases where the en banc call was directed to a liberal panel opinion.[164] What stands out, though, as that as with the constitutional criminal procedure cases, the en banc process sometimes functioned as a device through which the full court could check perceived excesses of liberal jurisprudence. For example, in *Ledezma-Cosino v. Lynch*, Judge Reinhardt, joined by a visiting judge, held that Congress acted unconstitutionally when it excluded from eligibility for cancellation of removal anyone who has been a "habitual drunkard" during the relevant period.[165] The LEBC rejected that holding by a vote of 9 to 2, with the dissenters arguing only for a remand based on statutory interpretation.[166] There were only three cases in which the LEBC, like the panel, reached a liberal result.

This brings us to the 52 immigration cases in which the en banc call failed. In contrast to the criminal constitutional realm, conservative panel decisions that were allowed to stand slightly outnumbered the liberal rulings – 28 for the former, 24 for the latter. And there were almost as many dissentals from the liberal side as from the conservative side – 11 versus 12. For example, in one case involving removal based on a prior felony conviction, 12 judges dissented from the denial of rehearing of a panel decision that Judge Reinhardt described as "not only contrary to well-established precedent but …

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[163] See Ceron v. Holder, 747 F.3d 773 (9th Cir.2014) (en banc) (remanding for BIA to consider whether alien's conviction categorically constituted crime of moral turpitude); Andrieu v. Reno, 253 F.3d 477 (9th Cir. 2001) (en banc) (denying relief to alien but rejecting Government's interpretation of statute).

[164] In three of the 15 cases the LEBC dismissed without reaching the merits. In one case the LEBC suspended proceedings to await a Supreme Court decision; the Supreme Court then resolved the issue in accordance with the panel's ruling. See Lopez v. Garland, 998 F.3d 851 (9th Cir. 2021) (en banc) (citing Niz-Chavez v. Garland, 141 S. Ct. 1474 (2021)).

[165] Ledezma-Cosino v. Lynch, 819 F.3d 1070 (9th Cir. 2016). Judge Richard Clifton dissented. (The alien also sought voluntary departure.)

[166] Ledezma-Cosino v. Lynch, 857 F.3d 1042 (9th Cir. 2017) (en banc).

manifestly unjust."[167] And five judges protested a panel ruling that in their view "shut the courthouse doors" on alien children seeking counsel in removal proceedings.[168]

To be sure, there was also strong language in dissentals from the conservative side. Nine judges joined an opinion that accused the panel majority of "a feat of interpretive creativity" that "transgressed the clear limits of our constitutional jurisdiction."[169] In another case, ten judges joined a dissent arguing that "the panel's artful evasion of the REAL ID Act is nothing short of an outright arrogation of the agency's statutory duty as trier of fact.[170]

In the latter case, the Supreme Court reversed the panel decision.[171] But that was the only instance in which the Court reversed a liberal panel decision that was the subject of a failed en banc call. Two other cases were GVR'd for reconsideration in light of an intervening decision.[172] And one liberal ruling was essentially affirmed.[173]

It may seem surprising that cert petitions were filed in only four of the 24 cases in which the liberal panel decision was allowed to stand.

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[167] Nunes v. Ashcroft, 375 F.3d 810, 817 (9th Cir. 2004) (Reinhardt, J., dissenting from denial of rehearing en banc); see id. at 811 (Tashima, J., dissenting from denial of rehearing en banc).

[168] J. E. F.M. v. Whitaker, 908 F.3d 1157, 1159 (9th Cir. 2018) (Berzon, J., dissenting from denial of en banc rehearing).

[169] Ramadan v. Keisler, 504 F.3d 973, 973-74 (9th Cir. 2007) (O"Scannlain, J., dissenting from denial of rehearing en banc).

[170] Ming Dai v. Barr, 940 F.3d 1143, 1150 (9th Cir. 2019) (Callahan, J., dissenting from denial of rehearing en banc).

[171] Garland v. Ming Dai, 141 S. Ct. 1669 (2021).

[172] See Penuliar v. Gonzales, 435 F.3d 961 (9th Cir. 2006) (denying rehearing en banc), vacated, 549 U.S. 1078 (2007); Tchoukhrova v. Gonzales, 430 F.3d 1222 (9th Cir.2005) (Kozinski, J., dissenting from denial of rehearing en banc), vacated, 549 U.S. 801 (2006). In Penuliar, the panel on remand adhered to its decision in favor of the alien. See Penuliar v. Mukasey, 528 F.3d 603 (9th Cir. 2008). In Tchoukhrova the docket shows that the parties settled.

[173] See Ma v. Reno, 208 F.3d 815 (9th Cir. 2000), vacated sub nom. Zavydas v. Davis, 533 U.S. 678 (2002) (agreeing with Ninth Circuit's interpretation of statute). The order denying rehearing en banc after a vote can be found in the certiorari petition.

The losing party was the United States Government, and the Solicitor General has a very high success rate for the petitions he or she files.[174] It is a possible inference that the SG decided that the cases were just not important enough to seek further review. Indeed, in at least two cases the SG asked for, and received, additional time in which to file a cert petition – but no petition was filed.[175]

The immigration cases thus reinforce the conclusion suggested by the constitutional criminal procedure cases: the Ninth Circuit is a *predominantly* liberal court, but it is not a *reliably* liberal court. In some important cases the most liberal judges were on the losing side. That group includes one of the rare instances in which judges sought rehearing by the full court after the LEBC decision.[176] And in some of the cases in which the liberals prevailed, the stakes may not have been high.

Finally, there is another similarity between the immigration cases and the constitutional criminal procedure cases: ideology correlates closely with the political party of the appointing President. Dissents from denial of rehearing from the liberal side were overwhelmingly written and joined by appointees of Democratic Presidents; dissents from the conservative side almost invariably come from Republican appointees.

C. Labor and Employment Law

In studies of judicial ideology, labor and employment law occupies a prominent place, in large part because there is universal agreement

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[174] See Corinna Barrett Lain, *Soft Supremacy*, 58 Wm. & Mary L. Rev. 1609, 1631 (2017) (noting that "[t]he Supreme Court grants a whopping 70 percent of the Solicitor General's certiorari requests – as opposed to 5 percent generally, and 21 percent for the specialty Supreme Court bar").

[175] See Lopez-Rodriguez v. Holder, 560 F.3d 1098 (9th Cir. 2009) (Bea, J., dissenting from denial of rehearing en banc); Ramadan v. Keisler, 504 F.3d 973 (9th Cir. 2007) (O'Scannlain, J., dissenting from denial of rehearing en banc). The applications for extension of time can be found on the Supreme Court's public docket.

[176] See Abebe v. Holder, 577 F.3d 1113, 1113 (9th Cir. 2009) (Berzon, J., dissenting from denial of full-court rehearing) ("If ever a case merited full court en banc consideration, this one did."). Six judges joined the dissent – Judges Pregerson, Reinhardt, Thomas, Kim A. Wardlaw, W. Fletcher, and Paez.

on how decisions and votes are to be characterized: a decision or vote in favor of an employee or a union is classified as liberal, while a decision or vote in favor of an employer is classified as conservative.[177] Although workplace cases do not loom large in the Ninth Circuit's en banc activity, they thus warrant separate consideration here.[178]

During the period of the study there were 43 en banc calls targeting panel decisions in workplace disputes – 25 from the liberal side, 16 from the conservative side, and two calls (one successful, one not) that resist ideological classification.[179] (See Table 3.) Of the 25 calls from the liberal side, 19 resulted in en banc rehearing – a success rate of 76%, far higher than the counterpart rate for constitutional criminal procedure or immigration cases. Of the 16 calls from the conservative side, 5 were successful, for a grant rate of 31%, slightly lower than in the other two areas of law.

Table 3
En Banc Ballots: Labor and Employment Law

	Total	Granted	Denied	Percent Granted
Conservative Panel Decision	25	19	6	76%
Liberal Panel Decision	16	5	11	31%
Other Panel Decision	2	1	1	50%
Total	43	25	18	58%

Two things stand out about the successful en banc calls. First, in 14 of the 19 cases in which a conservative panel decision was reheard en banc, the outcome changed; the employee or the union prevailed in

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[177] See, e.g., Brian S. Clarke, *ObamaCourts?: The Impact of Judicial Nominations on Court Ideology*, 30 J. L. & Pol. 191, 202-03 (2014)

[178] Workplace litigation is a subset of what a pioneering scholar of judicial ideology referred to as "economic liberalism." For discussion of other economic liberalism cases, see infra Part IV.H.

[179] See Price v. Stevedoring Services of Am., 697 F.3d 820 (9th Cir. 2012) (en banc) (overruling precedents extending Chevron deference to litigating positions of Director of Office of Workers' Compensation Programs); Staton v. Boeing Co,, 327 F.3d 938 (9th Cir. 2003) (rejecting settlement agreement in employment discrimination class action lawsuit).

the LEBC.[180] Second, in none of the five cases in which a liberal decision was reheard did the employee suffer an unequivocal defeat. In four of the five cases, the LEBC ruling, although less favorable to the employee than the panel decision, nevertheless allowed the claim to go forward.[181]

The fifth case, involving a high-profile Title VII suit, is of particular interest. In *Dukes v. Wal-Mart, Inc.*, a divided panel approved what the Supreme Court later called "one of the most expansive class actions ever."[182] The full court voted to take the case en banc, very likely because a majority of the judges agreed with the panel dissent that the class certification was seriously flawed and should never have been allowed.[183] But thanks to the luck of the draw, the LEBC, by vote of 6 to 5, essentially ratified the panel's decision.[184]

In workplace litigation we thus find an area of law in which the pattern of en banc voting conforms closely to what one would expect of a reliably liberal court. When an en banc call targets a panel ruling rejecting claims by an employee or a union, the call generally succeeds, and the outcome is generally reversed. When the panel ruling favors the employee or union, the ruling generally stands, perhaps with some tempering if en banc rehearing is granted.

A similar pattern can be seen in the handful of cases – five in all – in which the question was whether federal labor law preempted claims under state law. There were four cases in which employers or their

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[180] See, e.g., Marsh v. J. Alexander's LLC, 869 F.3d 1108 (9th Cir. 2017) (Ikuta, J.), on rehearing en banc, 905 F.3d 610 (9th Cir. 2018) (tip credit under Fair Labor Standards Act); Costa v. Desert Palace, Inc., 238 F.3d 1056 (9th Cir. 2001), on rehearing en banc, 299 F.3d 838 (9th Cir. 2002) (mixed-motive instruction in Title VII case).

[181] E.g., Bates v. UPS, Inc., 511 F.3d 974 (9th Cir. 2007) (en banc) (suit by hearing-impaired drivers under Americans with Disabilities Act).

[182] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 342 (2011); see Dukes v. Wal-Mart Stores, Inc., 509 F.3d 1168 (9th Cir. 2007).

[183] See 509 F.3d at 1200 (Kleinfeld, J., dissenting) ("This class certification violates the requirements of Rule 23. It sacrifices the rights of women injured by sex discrimination. And it violates Wal–Mart's constitutional rights."),

[184] Dukes v. Wal-Mart Stores, Inc.,603 F.3d 571 (9th Cir. 2010) (en banc), rev'd, 564 U.S. 338 (2011).

representatives argued for preemption. In three of them, the panel accepted the argument. In all three, the court granted en banc rehearing; the LEBC then reversed the panel outcome and ruled in favor of the employee or union position.[185] In the fourth case, the panel rejected the employer position, and rehearing en banc was denied.[186] Eight judges (seven Republican appointees and Judge Tallman) joined the dissental.[187]

The fifth case was the only one in which the liberal position did not prevail. An insurer sued an employee for reimbursement of benefits paid to the employee under a health insurance plan selected by his employer. The employee argued that the claim was preempted by ERISA, but the panel found no preemption.[188] The en banc call failed, with six judges (all Democratic appointees) joining a dissental.[189]

One final note. Although there were not many dissents from denial of rehearing en banc in the workplace cases, those that were filed reflect alignments similar to those in the constitutional criminal procedure and immigration cases. Dissents from the liberal side were joined exclusively by Democratic appointees. Dissents from the conservative side were joined overwhelmingly by Republican appointees.

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[185] See Alaska Airlines Inc. v. Schurke, 846 F.3d 1081 (9th Cir. 2017), on rehearing en banc, 898 F.3d 904 (9th Cir. 2018) (state family leave law and Railway Labor Act); Chamber of Commerce v. Lockyer, 422 F.3d 973 (9th Cir. 2005), on rehearing en banc, 463 F.3d 1076 (9th Cir. 2006) (state limit on employer speech and National Labor Relations Act); Cramer v. Consol. Freightways, Inc., 209 F.3d 1122 (9th Cir. 2000), on rehearing en banc, 255 F.3d 683 (9th Cir. 2001) (invasion of privacy by employer and Labor Management Relations Act).

[186] Golden Gate Restaurant Ass'n v. City & Cty of San Francisco, 558 F.3d 1000 (9th Cir. 2009).

[187] Id. at 1004 (M. Smith., J., dissenting from denial of rehearing en banc) (arguing that city ordinance upheld by panel "flouts the mandate of national uniformity in the area of employer-provided healthcare that underlies the enactment of ERISA").

[188] Providence Health Plan v. McDowell, 361 F.3d 1243 (9th Cir. 2004).

[189] Providence Health Plan v. McDowell, 385 F.3d (9th Cir. 2004) (Thomas, J., dissenting from denial of rehearing en banc).

D. Federal Criminal Law and Procedure

Another major component of the Ninth Circuit's en banc balloting docket encompasses issues of criminal law and procedure not directly implicating rights under the Constitution. The cases involve such questions as the elements of, and defenses to, federal crimes; the application of sentencing statutes and Guidelines; and the procedural rights of criminal defendants under federal statutes and Federal Rules of Criminal Procedure.

The traditional ideological alignment reflected in the constitutional-criminal cases generally applies here as well: a vote for the defendant is a liberal vote, and a vote for the government is a conservative vote. That is one of the "conventional understandings" of the ideological divide,[190] and this particular aspect is reinforced by a study of Supreme Court voting patterns published by Professor Ward Farnsworth at the end of the Rehnquist Court.[191] Professor Farnsworth separately tallied the Justices' votes in constitutional and non-constitutional criminal cases.[192] He found that the Justices of that era could be divided into two groups – five "hawks" (conservatives) and four "doves" (liberals) – and that there was "a large drop-off between the last of the [hawks] and the first of the [doves]."[193] The "hawks" voted for the government in more than 70% of the non-unanimous cases, whether constitutional or non-constitutional; none of the four "doves" went above 50%.[194]

There is one difference between the constitutional and the non-constitutional cases, however: in the latter, the choice of rule is sometimes neutral as between the defendant and the government. In

[190] See supra notes 76-77 and accompanying text.

[191] Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court's Criminal Docket*, 104 Mich. L. Rev. 67 (2005).

[192] Professor Farnsworth's classification differed from mine in one respect: he classified cases on the availability of habeas corpus for state prisoners as statutory cases. That does not affect the point discussed here.

[193] Farnsworth, supra note 191, at 74-75.

[194] Id. at 69 & Chart 1.

this study, three cases – all reheard en banc – were excluded from the analysis on that basis.[195]

With those cases put to one side, the number of en banc calls directed to panel decisions was 86. The calls were almost evenly split between conservative and liberal panel decisions – 44 from the former, 42 from the latter. (See Table 4.) And in sharp contrast to the criminal justice cases involving constitutional claims, the grant rates for the two groups were not far apart: 26 of 44 or 59% from conservative decisions and 22 of 42 or 52% from liberal decisions.

Table 4
En Banc Ballots: Federal Criminal Law and Procedure

	Total	Granted	Denied	Percent Granted
Conservative Panel Decision	44	26	18	59%
Liberal Panel Decision	42	22	20	52%
Other Panel Decision	3	3	0	100%
Total	89	51	38	57%

A review of the cases in the latter group does not reveal any patterns that explain why the proportion is so high relative to the counterpart constitutional sphere. One possibility is that in the realm of criminal justice in the Ninth Circuit the non-constitutional cases simply do not implicate the ideological divide to the same degree as the constitutional cases do. To test this hypothesis, we can look at the cases in which judges dissented from the denial of en banc rehearing.

Although the number of *failed calls* from the liberal side almost equaled the number from the conservative side (18 for the former, 20 for the latter), dissenting *opinions* on the conservative side were far more numerous – 15 compared to six. And for the most part the judges

[195] See United States v. Bacon, 979 F.3d 766 (9th Cir. 2020) (en banc) (overruling circuit precedent on remedy on appeal for district court error in admitting or excluding expert testimony); United States v. Carty, 520 F.3d 984 (9th Cir. 2008) (en banc) (rejecting appellate presumption of reasonableness for sentences imposed within the Guidelines range); United States v. Reyna-Tapia, 328 F.3d 1114 (9th Cir. 2003) (en banc) (delineating permissible role for magistrate judges in conducting plea colloquies under Rule 11 of Federal Rules of Criminal Procedure).

who wrote or joined the dissentals were the same judges who wrote or joined dissentals on constitutional criminal procedure, and on the same side. It thus appears that, as in the Supreme Court,[196] a hawk is a hawk whether the issue is constitutional or statutory, and so with the doves.

There is another piece of evidence that may be relevant here. This study focuses on en banc calls that target decisions by three-judge panels. But in this segment of the docket there was a disproportionate number of cases in which the court granted en banc rehearing at the behest of a panel before a decision was issued – ten, compared with four on constitutional criminal procedure issues.[197] This may suggest that on statutory issues affecting the treatment of criminal defendants, the judges place a particularly high value on uniformity within the circuit and may sometimes vote to grant en banc rehearing of panel decisions even if they do not think the panel "got it wrong." But whatever the explanation, the conclusion cannot be gainsaid: if one were to look at this segment of the docket alone, the perception of the Ninth Circuit as a reliably liberal court would find little support.

E. Other Civil Liberties Claims: Traditional Polarity

In the domain of civil liberties, criminal procedure is by far the largest area in which the traditional ideological alignment continues to hold sway, but it is certainly not the only one. On equal protection issues, for example (except for challenges to affirmative action programs), a decision supporting the constitutional claim is a liberal decision.[198] So too with claims under the Establishment Clause, claims grounded in substantive due process, and claims by prisoners and detainees under the Eighth Amendment and the Due Process clauses. So too with claims under federal statutes designed to implement Fourteenth and Fifteenth Amendment rights – statutes like the Voting Rights Act and the Fair Housing Act.

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[196] See supra note 194 and accompanying text.

[197] Recall that there were 234 en banc calls challenging panel decisions on constitutional criminal procedure issues, compared with 89 in this group.

[198] For discussion of affirmative action cases, see infra Part IV.G.

During the period of the study, 70 panel decisions involving issues of this kind were the subject of en banc ballots. (See Table 5.) These included 29 in which the panel reached a conservative result and 41 in which the result was liberal.[199] Of the 29 calls generated by a conservative decision, 18 were successful, for a grant rate of 62%. Of the 41 calls prompted by a liberal decision, only 11 succeeded, for a grant rate of 27%.[200] Thus, in this sector of the docket the grant rate for conservative decisions was somewhat higher than in the constitutional criminal procedure cases; the grant rate for liberal decisions was somewhat lower. At the same time, we do not see the strong preference for liberal outcomes manifested in the realm of labor and employment law.

Table 5
En Banc Ballots: Other Civil Liberties Claims: Traditional Polarity

	Total	Granted	Denied	Percent Granted
Conservative Panel Decision	29	18	11	62%
Liberal Panel Decision	41	11	30	27%
Total	70	29	41	41%

The cases ranged widely in the realm of civil liberties, but one issue that looms large in national discussions of judicial ideology barely registered in the Ninth Circuit's en banc debates – the issue of abortion. There were only two en banc calls directed to panel decisions that considered the constitutionality of state or federal abortion laws. Both cases arose early in the study period, and both involved Arizona

[199] The latter included one reverse polarity case. See infra note 200.

[200] The liberal decisions that were reheard en banc included one case in which the panel rejected a claim under the Establishment Clause. This was Catholic League for Religious and Civil Rights v. City & County of San Francisco, 567 F.3d 595 (9th Cir. 2009). Plaintiffs, who were "Catholics and a Catholic advocacy group," challenged "an official [city] resolution denouncing their church and doctrines of their religion." See Catholic League for Religious and Civil Rights v. City & County of San Francisco, 624 F.3d 1043, 1046-47 (9th Cir. 2010) (en banc). On rehearing en banc, the only support for the constitutional claim came from conservative judges. See id. at 1046, 1053-60 (opinion of Kleinfeld, J.). I therefore classified the case as one reflecting reverse polarity.

statutes regulating access to abortion by minors. Both calls failed. In the first case, the panel held the statute unconstitutional.[201] Judge O'Scannlain, dissenting from the denial of rehearing, accused the panel of committing "a lawless assault on a legitimate exercise in democratic government."[202] Only two other judges joined his opinion. Arizona then enacted a new statute, and a divided panel rejected a facial challenge to its validity.[203] A judge called for en banc rehearing, but rehearing was denied without a published dissent or notation.[204]

In the years that followed, three-judge panels decided seven other cases involving challenges to abortion regulations. Every one of them ruled unanimously in favor of the constitutional claim.[205] None of the decisions generated an en banc call.

It may seem anomalous that members of the conservative cohort, who frequently challenged liberal panel decisions sustaining other constitutional claims, acquiesced when panels struck down laws regulating abortion. But in two cases that might otherwise have prompted an en banc call, the losing government officials did not seek rehearing in the Ninth Circuit but rather went directly to the Supreme Court.[206] Indeed, after 2004, there was not a single government PFREB in an abortion case. That might seem even more anomalous, but a

[201] Planned Parenthood of S. Ariz. v. Lawall, 180 F.3d 1022 (9th Cir. 1999).

[202] Planned Parenthood of S. Ariz. v. Lawall, 193 F.3d 1042, 1047 (9th Cir. 1999) (O'Scannlain, J., dissenting from denial of rehearing en banc). Judge O'Scannlain argued that the case was controlled by the Supreme Court's decision in Hodgson v. Minnesota, 497 U.S. 417 (1990). Id. at 1044-45.

[203] Planned Parenthood of S. Ariz. v. Lawall, 307 F.3d 783 (9th Cir. 2002).

[204] See 2003 case list (on file with author).

[205] Most of the decisions ruled that the plaintiff was entitled to a preliminary injunction against enforcement of the law. E.g., Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905 (9th Cir. 2014). One reversed a district court decision granting summary judgment to the state. Tucson Women's Clinic v. Eden, 379 F.3d 531 (9th Cir. 2004).

[206] See Planned Parenthood Fed. of Am., Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2007) (holding federal Partial Birth Abortion Act unconstitutional), rev'd sub nom. Gonzales v. Carhart, 550 U.S. 124 (2007); Planned Parenthood Ariz., Inc., v. Humble, 753 F.3d 905, 914 (9th Cir. 2014) (acknowledging disagreement with other circuits over proper approach to "undue burden" test), cert. denied, 574 U.S. 1060 (2004).

possible clue can be found in an opinion by Judge Kleinfeld concurring in a decision that invalidated an Arizona law that "prohibit[ed] abortion beginning at twenty weeks gestation, before the fetus is viable."[207] Judge Kleinfeld had joined Judge O'Scannlain's dissental in the Arizona case on minors' access to abortion, and here he thought that the state had good arguments in support of the statute.[208] But those arguments could not carry the day, because the Supreme Court had "spoke[n] clearly … as to the current state of the law," particularly with respect to the "undue burden" test.[209] State officials and other Ninth Circuit judges may have similarly believed that Supreme Court precedents left little room for lower courts to uphold the challenged state abortion laws.[210]

As for the cases that did generate en banc activity, two patterns deserve mention. One involves cases in which the en banc call was successful; the other, cases in which the call failed.

First, once again we see the full court using the en banc process to rein in perceived excesses of liberal jurisprudence. Here are some examples.

- A panel composed of Judges Pregerson, Thomas, and Paez invoked the Equal Protection Clause to require California to delay an impending election on recalling Governor Gray Davis.[211] Within days, the full court voted to rehear the case en

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[207] Isaacson v. Horne, 716 F.3d 1213, 1217 (9th Cir. 2013).

[208] See id. at 1231-32 (Kleinfeld, J., concurring).

[209] Id. at 1233-34. The case in which Judge O'Scannlain wrote the dissental did not involve the undue burden test but rather a distinct line of precedents on judicial bypass provisions.

[210] The Fifth Circuit read the Supreme Court precedents differently. See, e.g., Whole Women's Health v. Lakey, 780 F.3d 285, 297 (5th Cir. 2014) (rejecting balancing test used by Ninth Circuit). Initially, a divided Supreme Court agreed with the Ninth Circuit, see Whole Women's Health v. Hellerstedt, 579 U.S. 582, 607-08 (2016) (rejecting Fifth Circuit's approach), but in a later decision five Justices repudiated that position, see June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2182 (2020) (Kavanaugh, J., dissenting) (summarizing opinions).

[211] Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 882 (9th Cir. 2003).

banc, and the LEBC unanimously allowed the election to go forward as scheduled.[212]

- A divided panel, in an opinion by Judge Reinhardt, held that delays in providing mental health care to veterans violated the Due Process Clause of the Fifth Amendment.[213] After the court granted rehearing en banc, the LEBC rejected the veterans' constitutional claims by a vote of 10 to 1.[214]

- A visiting judge, joined by Judge Reinhardt, held that "the right to procreate survives incarceration," and that a prisoner could proceed with his substantive due process claim of a right to mail his semen from prison so that his wife could be artificially inseminated.[215] Rehearing en banc was granted, and the en banc court, by a vote of 6 to 5, rejected the claim, stating unequivocally that "the right to procreate is fundamentally inconsistent with incarceration."[216]

To be sure, cases like these were a minority of the en banc grants in these areas of the law. A larger number conformed to the expected pattern: a conservative panel decision was replaced by a liberal en banc ruling.[217] But both sets of cases must be considered in assessing where the Ninth Circuit stands on the ideological spectrum.

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[212] Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914 (9th Cir. 2003) (en banc). None of the panel judges was selected for the en banc court. Nor were Judges W. Fletcher or Berzon. Judge Reinhardt was recused.

When the composition of the LEBC was announced, Judge Pregerson correctly predicted that his decision would be repudiated. He told a reporter, "You know who's on the [en banc] panel, right? Do you think it's going to have much of a chance of surviving? I wouldn't bet on it." See Henry Weinstein, *Court to Reconsider Delay of Recall Vote*, L.A. Times, Sept. 20, 2003.

[213] Veterans for Common Sense v. Shinseki, 644 F.3d 845 (9th Cir. 2011).

[214] Veterans for Common Sense v. Shinseki, 678 F.3d 1018 (9th Cir. 2012) (en banc). Judge Mary M. Schroeder dissented from one of the LEBC's jurisdictional holdings. See id. at 1037 (Schroeder, J., dissenting).

[215] Gerber v. Hickman, 264 F.3d 882, 884 (9th Cir. 2001). Judge Barry Silverman, a Clinton appointee, dissented.

[216] Gerber v. Hickman, 291 F.3d 617, 619 (9th Cir. 2002) (en banc).

[217] See, e.g., Democratic Nat'l Comm. v. Hobbs, 904 F.3d 686 (9th Cir. 2018), on rehearing en banc, 948 F.3d 989 (9th Cir. 2020), rev'd sub nom. Brnovich v. DNC,

Second, dissentals from the conservative side generally did *not* lead to Supreme Court review and reversal. There were dissents from denial of rehearing in 27 of the 30 cases in which the unsuccessful en banc call challenged a liberal panel decision. Certiorari petitions were filed in 20 of the 27 cases, but only seven were granted. The Supreme Court reversed six panel decisions; however, in three of them the reversal was on procedural grounds, not the ground argued by the dissental.[218] Two additional cases were GVR'd. In one, the panel retreated from one portion of its ruling;[219] in the other, the panel reversed course entirely.[220]

Meanwhile, the Court denied review in other cases with liberal outcomes notwithstanding dissentals that attacked the panel decisions in near-apocalyptic terms. For example:

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141 S. Ct. 2321 (2021) (Voting Rights Act); Lopez-Valenzuela v. City of Maricopa, 719 F.3d 1054 (9th Cir. 2013), on rehearing en banc, 770 F.3d 772 (9th Cir. 2014) (substantive due process rights of illegal aliens).

[218] Compare Perry v. Brown, 681 F.3d 1065 (9th Cir. 2012) (O'Scannlain, J., dissenting from denial of rehearing en banc) (attacking panel's decision holding California's Proposition 8 unconstitutional under the Equal Protection Clause), with Hollingsworth v. Perry, 570 U.S. 693 (2013) (holding that panel lacked jurisdiction to consider appeal); compare Winn v. Arizona Christian Sch. Tuition Org., 586 F.3d 649, 658 (9th Cir. 2009) (O'Scannlain, J., dissenting from denial of rehearing en banc) (disputing panel's holding that educational tax credit program violated Establishment Clause), with Arizona Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011) (holding that plaintiffs lacked standing to challenge program); compare Newdow v. U.S. Congress, 328 F.3d 466, 473 (9th Cir. 2003) (O'Scannlain, J., dissenting from denial of rehearing en banc) (rejecting panel's conclusion that voluntary recitation of the Pledge of Allegiance in public school violates the Establishment Clause), with Elk Grove Unif. Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (reversing panel on ground that plaintiff lacked prudential standing).

[219] See Conn v. City of Reno, 658 F.3d 897 (9th Cir. 2011). The panel reinstated the sections of its opinion finding a constitutional violation and denying qualified immunity – rulings that were harshly criticized by the dissental. See Conn v. City of Reno, 591 F.3d 1081, 1085 (9th Cir. 2010) (Kozinski, J., dissenting from denial of rehearing en banc). The panel repudiated only the portions allowing the claim of municipal liability to go forward.

[220] See Phillips v. Hust, 588 F.3d 652 (9th Cir. 2009); compare Phillips v. Hust, 507 F.3d 1171 (9th Cir. 2007) (Kozinski, J., dissenting from denial of rehearing en banc).

- "This is a dark day for the Voting Rights Act. … The panel … misinterprets the evidence, flouts our voting rights precedent and tramples settled circuit law pertaining to summary judgment, all in an effort to give felons the right to vote."[221]
- "The panel's opinion in these consolidated cases invents an entirely unprecedented theory of actionable government discrimination: sinister intent in the enactment of facially neutral legislation can generate civil liability without evidence of discriminatory effect."[222]
- The panel's holding "has begun wreaking havoc on local governments, residents, and businesses throughout our circuit," and its opinion "shackles the hands of public officials trying to redress the serious societal concern of homelessness."[223]

Attacks like these reinforce the perception of the Ninth Circuit as an out-of-the-mainstream liberal court that recklessly expands individual rights without regard to precedent or consequences. But the denials of certiorari, while not to be taken as expressions of approval, suggest that the Supreme Court did not share the dissenters' view of the import of the panel decisions. And when we consider also the cases in which Ninth Circuit judges used the en banc process to dislodge liberal panel opinions, the overall picture that emerges is of a court that is predominantly, perhaps even strongly, liberal – but also one in which the conservative side is not shut out.

F. Freedom of Expression

In the Warren Court era and for decades thereafter, the ideological valence of freedom of expression closely tracked that of constitutional

[221] Farrakhan v. State of Washington, 359 F.3d 1116, 1116 (9th Cir.) (Kozinski, J., dissenting from denial of rehearing en banc), cert. denied, 543 U.S. 934 (2004).

[222] Pacific Shore Properties, LLC, v. City of Newport Beach, 746 F.3d 936 (9th Cir. 2014) (O'Scannlain, J, dissenting from denial of rehearing en banc), cert. denied, 574 U.S. 974 (2014).

[223] Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019) (M. Smith, J., dissenting from denial of rehearing en banc), cert. denied, 140 S. Ct. 674 (2019).

criminal procedure.[224] A decision or vote in favor of the constitutional claim was liberal; a decision or vote against the claim was conservative. As late as 1997, Judge Reinhardt, in defining the credo of a liberal judge, stated unequivocally that "[l]iberal judges believe in a generous or expansive interpretation of the Bill of Rights," and he specified "freedom of speech," without qualification, as one of the rights to be given an expansive interpretation.[225]

Today, classification is much more difficult. Increasingly, and in a variety of contexts, protection of free speech is regarded as the conservative, not the liberal, position.[226] This shift has come about primarily because the Supreme Court, over the last quarter-century, has handed down an array of decisions in which the constitutional claim has received more support from conservative Justices than from the liberals.[227] In an article published in 2020, I used the term "reverse polarity" to characterize this phenomenon.[228] Based on an analysis of the Court's decisions, I identified four areas of First Amendment law that reflect reverse polarity currently and two others that might do so in the future.[229]

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[224] On the latter, see supra Part IV.A. In this Article, I shall refer interchangeably to "freedom of expression" and "freedom of speech." Both terms encompass the First Amendment's' guarantees of "the freedom of speech, [and] of the press; … the right of the people peaceably to assemble, and [the right] to petition the Government for a redress of grievances."

[225] Reinhardt, supra note 78, at 47; see also LaVine v. Blaine Sch. Dist., 279 F.3d 719, 720 (9th Cir. 2002) (Reinhardt, J., dissenting from denial of rehearing en banc) (stating that "First Amendment judicial scrutiny should now be at its height [for] any … person who disapproves of one or more of our nation's officials or policies for any reason whatsoever").

[226] See Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. Times, June 30, 2018 (citing commentators on both sides of the ideological divide); see also Joel M. Gora, *Free Speech Still Matters*, 87 Brook. L. Rev. 195, 200 (2021) (noting "sea change shift in the support for free speech").

[227] Prominent examples include Americans for Prosperity Fdn. v. Bonta, 141 S. Ct. 2373 (2021); Janus v. AFCSME, 138 S. Ct. 2448 (2018); NIFLA v. Becerra, 138 S. Ct. 2361 (2018); and Citizens United v. FEC, 558 U.S. 310 (2010).

[228] Hellman, *Reverse Polarity*, supra note 76. The phenomenon is not limited to free speech. See infra Part IV.G.

[229] See Hellman, *Reverse Polarity*, supra note 76, at 306-16, 320-28.

Because of this development, determining whether the Ninth Circuit used the en banc process to promote liberal outcomes in the realm of free speech presents a special challenge. In contrast to the areas previously discussed, there is often a question about which outcome should be deemed "liberal." For this study, to determine the ideological direction of the First Amendment panel decisions that were the subject of an en banc ballot, I used a three-step approach. I started with the presumption – consistent with the traditional alignment – that a decision in favor of the constitutional claim is a liberal decision; a decision against the claim is conservative. Next, I looked to the positions taken by the liberal and conservative blocs on the Supreme Court over the past quarter-century, as detailed in the 2020 article. If the case involved one of the reverse polarity issues – for example, campaign finance regulation – I took that as strong evidence that support for the constitutional claim is now the conservative position. Finally, I considered the identity of the Ninth Circuit judges on opposing sides in the particular case.

In this final stage, I drew on the analysis in the preceding pages of issues that reflect the traditional ideological alignment. That analysis shows, first, that ideology correlates strongly with the party of the appointing President; and second, that the same judges generally stake out positions on one side or the other of the ideological divide irrespective of the issue. Based on those findings, I was able to identify liberal and conservative blocs on the Ninth Circuit. And if a First Amendment claim received more support from the conservative bloc than from the liberals, I could generally classify the case as one involving reverse polarity. In more personal terms, if a case pitted Judge Reinhardt against Judge O'Scannlain, it is fair to say (in the absence of contrary evidence) that the position taken by Judge Reinhardt is the liberal position, while the position taken by Judge O'Scannlain is the conservative position.

This method did not yield answers for all cases. If there was some evidence suggesting a departure from the traditional alignment but also contrary evidence, or if the judges did not divide on liberal-conservative lines, I generally refrained from characterizing the ideological direction of the panel decision or the en banc call.

During the period of the study, 59 panel opinions on freedom of expression were the subject of an en banc ballot. (See Table 6.) Analysis reveals that the patterns were quite different from any of the other areas discussed thus far.

Table 6
En Banc Ballots: Freedom of Expression

		Total	Granted	Denied	Percent Granted
Traditional alignment	38				
Conservative Panel Decision		27	8	19	30%
Liberal Panel Decision		11	2	9	18%
Reverse polarity	15				
Conservative Panel Decision		6	3	3	50%
Liberal Panel Decision		9	1	8	11%
Other Panel Decision	6		4	2	67%
Total	59		18	41	31%

1. Traditional-alignment cases

I begin with the cases in which there is no evidence to suggest anything other than the traditional ideological alignment. There were 38 such cases – about two-thirds of the total. In 27 cases, the panel decision was conservative, i.e. it rejected the First Amendment claim. Only eight of those calls were successful, for a grant rate of 30%. That is little more than half the grant rate for conservative panel decisions on issues of constitutional criminal procedure.

In five of the eight cases in which rehearing was granted, the LEBC reversed the panel outcome and sustained the First Amendment claim. For example, two LEBC decisions struck down city ordinances regulating expressive activity on public property.[230] Another overruled

[230] See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 956 (9th Cir. 2011) (en banc) (invalidating ordinance prohibiting solicitation of business, employment, or contributions on streets and highways); Berger v, City of Seattle, 569 F.3d 1029 (9th Cir. 2009) (en banc) (rejecting several rules promulgated by city to regulate the behavior of street performers at a public park and entertainment complex).

a precedent limiting the First Amendment rights of public employees.[231] One case rejected the First Amendment claim by a vote of 6 to 5;[232] two appeals were mooted.

Ten of the 19 failed calls targeting conservative decisions generated dissentals. The judges who wrote or joined these dissentals were overwhelmingly appointees of Democratic Presidents, but Judge Kozinski wrote or joined five of them. The dissents typically argued that the panel decision flouted Supreme Court precedent protecting freedom of speech. Here are three examples, all joined by Judges Pregerson and Reinhardt, among others:

- "This is the case that put the Cult Awareness Network out of business and silenced its message. It is a bitter object lesson in the dangers of ignoring the Supreme Court's pronouncement in *NAACP v. Claiborne Hardware Co*."[233]
- "The panel's decision is in square conflict with the very Supreme Court precedent upon which it relies, and will permit administrators to impede parties seeking to engage in First Amendment-protected activity on private property."[234]

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[231] Dahlia v. Rodriguez, 735 F.3d 1060 (9th Cir. 2013) (en banc). The other LEBC decisions that reversed conservative panel outcomes were United States v. Swisher, 811 F.3d 299 (9th Cir. 2016) (en banc) (striking down federal statute that criminalized the unauthorized wearing of military medals); and Norse v. City of Santa Cruz, 629 F.3d 944 (9th Cir. 2010) (en banc) (reversing sua sponte grant of summary judgment against individual who was ejected from city council meeting and arrested after giving the council a silent Nazi salute). The statute struck down in Swisher was amended after the events giving rise to the case; that probably explains why the Solicitor General did not seek Supreme Court review.

[232] Villegas v. City of Gilroy, 541 F.3d 950 (9th Cir. 2008) (en banc) (holding that motorcycle club members who were expelled from garlic festival in city park for violating festival's dress code failed to show state action).

[233] Scott v. Ross, 151 F.3d 1247, 1248 (1998) (Kozinski, J., dissenting from denial of rehearing en banc) (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)). Judge Kozinski and Judge Kleinfeld were the only Republican-appointed judges to join the dissental.

[234] Southern Oregon Barter Fair v. Jackson Cty., 401 F.3d 1124, 1124 (9th Cir. 2005) (Berzon, J., dissenting from denial of rehearing en banc).

- "In [two] cases, the [Supreme] Court laid out strict rules that the government must follow [before turning what would otherwise be protected First Amendment speech into criminal conduct], yet the designation in this case complies [with] neither [case]."[235]

In 11 cases the en banc call targeted a panel decision that would be characterized as liberal in the traditional typology. Only two such calls were successful. In one, the LEBC rejected the claim;[236] in the other, the appeal was dismissed without a decision by the LEBC.[237] As for the denials, six were accompanied by dissentals; overwhelmingly, these were written and joined by Republican appointees. These dissents emphasized practical consequences as well as precedent. For example:

- "[The panel] decision hamstrings Secret Service agents, who must now choose between ensuring the safety of the President and subjecting themselves to First Amendment liability."[238]
- "In adopting an unprecedented view of the First Amendment and labeling it "serious" …, the panel has erected another hurdle to carrying out valid death penalties…."[239]
- "[I]n a wonderful display of why federal judges should not be running jails, the majority dismisses out of hand many practical

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[235] United States v. Afshari, 446 F.3d 915, 916 (9th Cir. 2006) (Kozinski, J., dissenting from denial of rehearing en banc).

[236] See Mauro v. Arpaio, 188 F.3d 1054 (9th Cir. 1999) (en banc) (upholding jail policy prohibiting inmates from possessing "sexually explicit material").

[237] See Bernstein v. United States, 176 F.3d 1132 (9th Cir.) (affirming judgment enjoining enforcement of federal regulations that limited plaintiff's ability to distribute encryption software), rehearing granted, 192 F.3d 1308 (9th Cir. 1999). The appeal was dismissed before the rehearing took place because the government announced plans to issue new regulations. See 2004 WL 838163 at *2 n. 2 (N.D. Cal. Apr. 19, 2004).

[238] Moss v. U.S. Secret Service, 711 F.3d 941, 954 (9th Cir. 2013) (O'Scannlain, J., dissenting from denial of rehearing en banc). The panel decision was reversed by the Supreme Court sub nom. Wood v. Moss, 572 U.S. 744 (2014).

[239] Wood v. Ryan, 759 F.3d 1056, 1105 (9th Cir. 2014) (Callahan, J., dissenting from denial of rehearing en banc). The Supreme Court in effect reversed the panel order. 573 U.S. 976 (2014).

> concerns that will arise from requiring jails to distribute an unknown quantity of unsolicited mail."[240]

Looking only at the traditional-alignment cases, one would conclude that the en banc process operated to promote a liberal jurisprudence – but only in a modest way. Five of the seven cases that were decided on the merits by an en banc court ruled in favor of the First Amendment claim. But the grant rate was low for both liberal and conservative panel decisions.

2. Reverse-polarity cases

The First Amendment en banc calls also included 15 cases involving reverse polarity issues. In six, the panel decision sustained the constitutional claim; in nine, the claim was rejected.

In three of the cases in the first group, the en banc call was successful, and in each the LEBC reversed the panel outcome and upheld the regulation. The cases involved a disclosure requirement related to ballot initiatives,[241] religious speech on public property,[242] and a ban on public issue and political advertisements on public broadcast stations.[243]

Two of the en banc calls that failed to dislodge decisions sustaining free-speech claims implicated even more directly the Supreme Court's reverse-polarity jurisprudence.[244] In one, a divided panel struck down a

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[240] Hrdlicka v. Reniff, 656 F.3d 942, 947 (9th Cir. 2011) (O'Scannlain, J., dissenting from denial of rehearing en banc).

[241] See Chula Vista Citizens for Jobs and Fair Competition v. Norris, 755 F,3d 671 (9th Cir. 2014) (O'Scannlain, J.), on rehearing en banc, 782 F.3d 520 (9th Cir. 2015).

[242] See Gentala v. City of Tucson, 213 F.3d 1055 (9th Cir. 2000), on rehearing en banc, 244 F.3d 1065 (9th Cir. 2001). The LEBC held that the free-speech claim was properly rejected based on the Establishment Clause. 244 F.3d at 1067.

[243] See Minority Television Project, Inc. v. FCC, 676 F.3d 869 (9th Cir. 2012) (Bea, J.), on rehearing en banc, 736 F.3d 1192 (9th Cir. 2013).

[244] The third case, in which a liberal judge voted to reject the First Amendment claim, can be viewed as implicating "economic liberalism." See McDermott v. Ampersand Publishing Co., 593 F.3d 950, 953 (9th Cir. 2010) (denying injunction sought by NLRB "in support of union activity aimed at obtaining editorial control" because it "pose[d] a threat of violating the rights of [the newspaper] under the First Amendment; id. at 966 (Hawkins, J., dissenting) (arguing that "[t]he injunction

state law that prohibited direct corporate expenditures in ballot initiative campaigns.[245] In the other, the panel held, over the dissent of Judge Berzon, that a public high school violated a student's First Amendment rights by denying her Bible club the same rights and benefits as other student clubs in the district.[246]

The more numerous cases were those in which the panel rejected the First Amendment claim. In that group, only one en banc call was successful. The case involved what the dissenting judge called "the flip side" of a Supreme Court reverse polarity decision.[247] The LEBC ended up remanding to the three-judge panel without ruling on the merits.[248]

In the other eight cases the en banc call failed; in all eight, Republican-appointed judges (sometimes joined by Judge Tallman) filed opinions dissenting from the denial of rehearing.[249] These

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addresses terms and conditions of employment, and it leaves the [newspaper's] right to publish its desired content entirely intact"). For discussion of economic liberalism, see infra Part IV.H.

[245] Montana Chamber of Commerce v. Argenbright, 226 F.3d 1049 (9th Cir. 2000). The order denying rehearing en banc can be found in the certiorari petition. Compare Citizens United v. FEC, 558 U.S. 310 (2010).

[246] Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002). The panel majority also rejected the school's argument that allowing access would violate the Establishment Clause. Id. at 1092-94. Compare Good News Club v. Milford Central Sch., 533 U.S. 98 (2001).

[247] See Jerry Beeman & Pharm. Services, Inc. v. Anthem Prescription Mgmt, LLC, 652 F.3d 1085, 1111 (9th Cir. 2013) (Wardlaw, J., dissenting) (citing Sorrell v. IMS Health, 564 U.S. 552 (2011)).

[248] Jerry Beeman & Pharm. Services, Inc. v. Anthem Prescription Mgmt, LLC, 741 F.3d 29 (9th Cir. 2014) (en banc).

[249] In one instance the opinion challenging the panel decision was filed when the case returned to the Ninth Circuit in a later stage of the litigation. See Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 930 (9th Cir. 2021) (opinion of O'Scannlain, J., respecting denial of rehearing en banc) (arguing that panel decision "obliterates … constitutional protections" for public school teachers and coaches). The study group case was Kennedy v. Bremerton Sch. Dist., 869 F.3d 813 (9th Cir. 2017) (rejecting First Amendment claim by public high school football coach who was fired for engaging in prayer on football field immediately after games), rehearing en banc denied, 880 F.3d 1097 (9th Cir. 2018). In January 2022 the Supreme Court granted certiorari in the case. 142 S. Ct. 857 (2022).

dissentals add to our understanding of the new liberal-conservative divide on freedom of speech.

The cases ranged widely over First Amendment issues.[250] Here I will highlight four in which five or more judges joined the dissental.

- *Lair v. Motl*.[251] A divided panel upheld a state law limiting the amount of money that individuals, political action committees, and political parties may contribute to candidates for state office. Judge Ikuta, dissenting from denial of rehearing en banc, argued that the panel flouted Supreme Court precedent requiring the state to "present evidence of actual or apparent quid pro quo corruption" before limiting contributions.[252]

- *Harper v. Poway Unified School District*.[253] A public high school permitted the Gay-Straight Alliance, a student group, to hold a "Day of Silence" at the school. The next day, school officials prohibited a student from wearing a T-shirt with messages that the officials believed addressed homosexual students in "a derogatory manner."[254] The panel, in an opinion by Judge Reinhardt, held that the school did not violate the student's

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[250] In addition to the Kennedy case discussed supra note 249 and the decisions discussed in text, the cases are: Dariano v. Morgan Hill Unif. Sch. Dist., 767 F.3d 764, 766 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing en banc) (stating that panel decision "condon[es] the suppression of free speech by some students because *other students* might have reacted violently"); Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing en banc) (arguing that panel decision enables legislature to "avoid First Amendment judicial scrutiny by defining disfavored talk as 'conduct'"); and Truth v. Kent Sch. Dist., 551 F.3d 850, 851 (9th Cir. 2008) (Bea, J., dissenting from denial of rehearing en banc) (arguing that the panel majority "confus[es] the school's viewpoint-neutral right to limit speech in a limited public forum with a necessarily viewpoint-affecting regulation of the right freely to associate to express one's views").

[251] 873 F.3d 1170 (9th Cir. 2017).

[252] Lair v. Motl, 889 F.3d 571, 577 (9th Cir. 2018) (Ikuta, J., dissenting from denial of rehearing en banc), cert. denied, 139 S. Ct. 916 (2019).

[253] 445 F.3d 1166 (9th Cir. 2006).

[254] Id. at 1172 (summarizing principal's comments to student). The T-shirt read, "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" handwritten on the front, and "HOMOSEXUALITY IS SHAMEFUL" handwritten on the back. See id. at 1170-71.

First Amendment rights. Judge O'Scannlain and four other judges dissented from the denial of rehearing en banc, arguing that the panel decision "permit[s] school administrators to engage in viewpoint discrimination on the basis of a student's newly promulgated right to be free from certain offensive speech."[255]

- *Faith Center Evangelistic Center Ministries v. Glover.*[256] A county made its public library meeting rooms available to non-profit groups during operating hours, but denied access to an evangelical Christian church seeking to conduct, among other activities, religious worship services. The panel, in an opinion by Judge Paez, reversed the district court's grant of a preliminary injunction. Seven judges joined Judge Bybee's dissent arguing that the panel decision "ratifies viewpoint-based discrimination" and "privileg[es] some religious groups over others."[257]

- *Americans for Prosperity Foundation v. Becerra.*[258] The state attorney general required nonprofit organizations that solicited tax-deductible contributions in the state to disclose the names and addresses of their largest contributors. The panel rejected the organizations' claim that the requirement violated their right to freedom of association. Judge Ikuta, in a dissental joined by four other judges, insisted that the panel decision "eviscerates the First Amendment protections long-established

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[255] Harper v. Poway Unified School District, 455 F.3d 1052, 1054 (9th Cir. 2006) (O'Scannlain, J., dissenting from denial of rehearing en banc). Judge Reinhardt defended the panel decision, arguing that "it is surely not beyond the authority of local school boards to attempt to protect young minority students against verbal persecution." Id. at 1053 (Reinhardt, J., concurring in denial of rehearing en banc). The Supreme Court vacated the panel opinion with directions to dismiss the appeal as moot. 549 U.S. 1262 (2007).

[256] 462 F.3d 1194 (9th Cir. 2006).

[257] Faith Center Evangelistic Center Ministries v. Glover, 480 F.3d 891, 901 (9th Cir. 2007) (Bybee, J., dissenting from denial of rehearing en banc), cert. denied, 552 U.S. 822 (2007).

[258] Americans for Prosperity Foundation v. Becerra, 903 F.3d 1000 (9th Cir. 2018).

> by the Supreme Court" and "puts anyone with controversial views at risk."[259]

The most striking aspect of these cases is that dissentals from the conservative side protesting panel decisions that *rejected* First Amendment claims actually outnumbered those challenging decisions that *sustained* First Amendment claims (eight versus six). As will be seen, these cases are part of a broader and important development in American constitutional law: the embrace of a robust rights-protective jurisprudence by conservative judges and scholars.[260]

3. First Amendment fluidity

The emergence of reverse polarity is not the only reason why the realm of free speech presents a special challenge in determining whether the Ninth Circuit used the en banc process to promote liberal outcomes. In addition to the 15 reverse-polarity cases, there were six cases – four grants and two denials – in which I could not confidently characterize the ideological direction of the panel decision.

The most interesting of these is *Planned Parenthood v. American Coalition of Life Activists*.[261] A jury awarded more than $100,000,000 in damages to abortion providers whose names and addresses were posted on a website by anti-abortion activists. The panel, in a unanimous opinion by Judge Kozinski, applied the Supreme Court decision in *Claiborne Hardware*[262] and found that the jury award violated the First Amendment.[263] Rehearing en banc was granted, and the LEBC, by a vote of 6 to 5, rejected the First Amendment claim under the "true threat" exception to protected speech.[264] Five of the majority judges

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[259] Americans for Prosperity Foundation v. Becerra, 919 F.3d 1177, 1187 (9th Cir. 2019) (Ikuta, J., dissenting from denial of rehearing en banc). The Supreme Court reversed sub nom. Americans for Prosperity Foundation v. Bonta, 141 S. Ct. 2373 (2021).

[260] See infra Part IV.G.

[261] Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 244 F.3d 1007 (9th Cir. 2001).

[262] NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

[263] The other members of the panel were Judge Kleinfeld and a visiting judge.

[264] Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (en banc).

were Democratic appointees. The dissenters included Judge Reinhardt and Judge Berzon, two prominent members of the liberal bloc, and also Judge O'Scannlain, the leader of the conservative cohort.[265]

If the panel decision stood alone, I would simply classify it as a liberal ruling in the traditional mold. But the lineup in the en banc court casts the case in a different light. I recognize, of course, that "conservative [judges] often render [or join] so-called liberal opinions, and *vice versa*."[266] In this study, however, the object is to determine whether a *group* of judges has acted in a particular way. When there is disagreement and fragmentation within the group in a particular case, as there is here, the case loses its probative value for the inquiry.

Three cases involved commercial speech, and one involved judicial campaign speech. Both are reverse-polarity issues in the Supreme Court,[267] but the alignments in the Ninth Circuit followed different patterns. In the realm of commercial speech, members of the conservative bloc voted to support the First Amendment claims, but so did members of the liberal cohort.[268] When judicial campaign speech was at issue, the panel judges' positions reflected the traditional ideological alignment, not reverse polarity.[269]

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[265] The other dissenters were Judge Kozinski and Judge Kleinfeld, Republican appointees who sometimes voted on the liberal side in en banc ballot cases that reflected traditional polarity.

[266] See Ray A. Brown, *Police Power – Legislation for Health and Personal Safety*, 42 Harv. L. Rev. 866, 869 (1929); see also Hellman, *Reverse Polarity*, supra note 76, at 299-300.

[267] See Hellman, *Reverse Polarity*, supra note 76, at 308-11, 315-16.

[268] See, e.g., Am. Beverage Assn. v. City of San Francisco, 871 F.3d 884 (9th Cir. 2017) (Ikuta, J.) (sustaining challenge to ordinance requiring health warnings on advertisements for certain sugar-sweetened beverages), on rehearing en banc, 916 F.3d 749 (9th Cir. 2019) (reaching same result) (unanimous decision).

[269] See Wolfson v. Concannon, 750 F.3d 1145 (9th Cir. 2014) (Paez, J., joined by Berzon, J.) (holding that several provisions of the Arizona Code of Judicial Conduct unconstitutionally restricted the speech of non-judge candidates); id. at 1167 (Tallman, J., dissenting in part) (arguing that three of the rules were constitutional). The court granted en banc rehearing, but before the en banc argument, the Supreme Court handed down a decision that all members of the LEBC, including Judge Berzon, agreed foreclosed the constitutional claims. Wolfson v. Concannon, 811 F.3d 1176 (9th Cir. 2016) (en banc).

One case was sui generis. The panel held that a public high school did not violate a student's First Amendment rights when it "emergency expelled" him based on a poem he wrote about school shootings.[270] Judge Reinhardt, the "liberal lion," dissented from the denial of rehearing en banc, agreeing with another dissental that the school had punished the student for protected speech.[271] The complication is that the panel opinion upholding the suspension was joined by a "liberal lioness" of the Ninth Circuit, Judge Betty Binns Fletcher.[272] With no public information about the position of other judges, it is impossible to say whether the denial of rehearing resulted in a liberal outcome.

Putting those cases aside, we are left with 53 cases for consideration. As already noted, analysis limited to the 38 cases reflecting the traditional ideological alignment suggested that the en banc process operated in a modest way to promote a liberal jurisprudence on free-speech issues. But in 11 of the 15 reverse polarity cases, the process ended with rejection of the constitutional claim – i.e., the liberal position prevailed. Thus, overall, the push in a liberal direction was more than modest.

G. Reverse Polarity Issues

In the realm of freedom of expression, as the preceding section has shown, we find both reverse polarity and the traditional ideological alignment, depending on the particular issue. But in some other areas of civil rights litigation, reverse polarity is now the dominant pattern, at least in the United States Supreme Court.[273] Here I look at the Ninth Circuit's en balloting on five constitutional claims that my study of the Supreme Court identified as reverse polarity issues: affirmative action, personal jurisdiction, the free exercise of religion, the Takings

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[270] LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001).

[271] LaVine v. Blaine Sch. Dist., 279 F.3d 719, 720 (9th Cir. 2002) (Reinhardt, J., dissenting from denial of rehearing en banc); see id. at 725-26 (Kleinfeld, J., dissenting from denial of rehearing en banc).

[272] See John Roemer, *Liberal legal lioness known for being bold, vigorous*, Daily Journal (S.F.), Oct. 24, 2012, at 1.

[273] See Hellman, *Reverse Polarity*, supra note 76.

Clause, and the Second Amendment. Because the concept is so novel, I consider each of the issues separately.

1. Affirmative action

Only two cases challenging affirmative action programs under the Equal Protection Clause were the subject of en banc ballots in the 23 years of the study. The first was *Monterey Mechanical Co. v. Wilson*.[274] The case was initially heard by a panel composed of three Republican appointees including Judge O'Scannlain. The panel held that a California statute "setting goals for ethnic and sex characteristics of construction subcontractors" violated the Constitution.[275] There was a sua sponte call for en banc rehearing, but it failed to receive a majority.[276] Judge Reinhardt filed a passionate dissent, attacking the panel for "striking down a benign governmental outreach program that is intended to ensure a modicum of fairness to minorities and women."[277]

A few years later, a divided panel held that Seattle's use of a "racial tiebreaker" to choose among student applicants for admission to "the City's most popular public high schools" violated "the equal protection mandate of the Fourteenth Amendment."[278] The opinion was by Judge O'Scannlain. This time the en banc call was successful, and the LEBC upheld the Seattle program by a vote of 7 to 4.[279] On certiorari, the Supreme Court reversed, with all four liberal Justices dissenting.[280]

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[274] 125 F.3d 702 (9th Cir. 1997).

[275] Id. at 703.

[276] Monterey Mechanical Co. v. Wilson, 138 F.3d 1270 (9th Cir. 1998).

[277] Id. at 1273 (Reinhardt, J., dissenting from denial of rehearing en banc). Judges Pregerson and Tashima joined the dissent, and Judge Hawkins dissented separately. Judge Reinhardt had signaled his position a year earlier in his article defining the "liberal judge." See supra note 79.

[278] Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 377 F.3d 949, 953, 988 (9th Cir. 2004).

[279] Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 426 F.3d 1162 (9th Cir. 2005).

[280] Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

Also relevant here is a rare example of a *statutory* reverse polarity case. In *Doe v. Kamehameha Schools*, a private school in Hawaii that received no federal funds effectively restricted admission "to those descended from the Hawaiian race."[281] The panel majority, composed of two Republican appointees, held that the school's policy, "premised upon an express racial classification," violated 42 U.S.C. 1981, the modern descendant of the Civil Rights Act of 1866.[282] The full court granted en band rehearing, and the LEBC rejected the statutory challenge.[283] The vote was 8 to 7; the dissenters included Judge O'Scannlain and all other participating members of the court's conservative bloc.[284]

The lineups in these cases leave no doubt that affirmative action has the same ideological valence in the Ninth Circuit as it does in the Supreme Court; as Professor Lawrence Baum has put it, "support for affirmative action and similar programs is seen as a liberal position."[285] But the question here is whether the Ninth Circuit has used the en banc process to promote that position. Even including *Doe*, there were only three cases in the 23-year period. What we know is that in the two most recent cases, the liberal position prevailed both in the en banc ballot and in the LEBC decision. And in *Monterey Mechanical*, there is strong evidence that, at the time of the en banc vote, Democratic appointees did *not* constitute a majority of the court.[286]

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[281] Doe v. Kamehameha Schools, 416 F.3d 1025 (9th Cir. 2005).

[282] Id. at 1030.

[283] Doe v. Kamehameha Schools, 470 F.3d 827 (9th Cir. 2006) (en banc).

[284] The plaintiffs filed a certiorari petition in the Supreme Court, but the parties stipulated to a dismissal. See Doe v. Kamehameha Schools, 550 U.S. 931 (2007).

[285] Baum, supra note 85, at 166 (punctuation altered). Professor Baum was speaking generally about "political elites," but that group includes Supreme Court Justices.

[286] The evidence is found in Judge Reinhardt's dissental in that case. Seeking an "explanation … for allowing an opinion that is wholly without legal merit to become the law of the circuit," Judge Reinhardt noted that "we now have only 18 active judges when we should have 28." Monterey Mechanical, 138 F.3d at 1279 & n. 15. The dissental was issued on March 9, 1998, by which time the court had 19 active judges. The en banc vote must have been taken earlier – and at a time when the court was evenly divided between Republican and Democratic appointees, with nine of each. See supra note 32.

2. Personal jurisdiction

Personal jurisdiction might seem like an odd bedfellow for traditional civil rights issues like freedom of speech and freedom of religion. But the Supreme Court has emphasized that the requirement of personal jurisdiction in civil suits flows from the Due Process Clause of the Fourteenth Amendment, and that the requirement "recognizes and protects an *individual liberty interest*."[287] That "liberty interest" has generally received more support from conservative Justices than from the liberals, making it a reverse polarity issue.[288]

Four cases on personal jurisdiction were the subject of en banc ballots during the period of the study. In two cases the panel rejected the due process claim, a judge called for an en banc vote, and the call failed. Dissentals joined by members of the conservative bloc were filed in both cases. In *Bauman v. DaimlerChrysler Corp.*, Judge O'Scannlain argued that "the panel drastically expands the reach of personal jurisdiction beyond all constitutional bounds."[289] In *Fiore v. Walden*, Judge O'Scannlain denounced the panel opinion in similar terms;[290] a dissent by Judge Margaret McKeown accused the panel majority of endorsing a "virtually limitless expansion of personal jurisdiction [that] runs afoul of both due process guarantees and Supreme Court

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Judge Reinhardt's comment is noteworthy in another respect. It is hard to understand how Judge Reinhardt would have thought that the vacancies were part of the explanation for the denial of rehearing unless he believed that judges appointed by President Clinton would have voted in favor of the en banc call. And one can see why he might have thought that; two of the three Clinton appointees on the court at the time of the vote did write or join dissentals.

[287] Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) (emphasis added). See also Daimler AG v. Bauman, 571 U.S. 117, 126 (2014) (emphasizing centrality of the conception of "fair play and substantial justice" to jurisdictional analysis).

[288] See Hellman, *Reverse Polarity*, supra note 76, at 303-04.

[289] Bauman v. DaimlerChrysler Corp., 676 F.3d 774, 775 (9th Cir. 2011) (O'Scannlain, J., dissenting from denial of rehearing en banc).

[290] Fiore v. Walden, 688 F.3d 558, 562 (O'Scannlain, J., dissenting from denial of rehearing en banc).

precedent."[291] Both panel decisions were reversed by the Supreme Court.[292]

The other two cases are each sui generis. Both were decided initially by the same panel, and in both the court granted en banc rehearing. In one, the panel rejected the due process claim.[293] The LEBC found that the action had been rendered moot by a settlement, and it did not decide "the important issues of personal jurisdiction originally raised by [the] appeal."[294] In the other case, the panel held that the foreign defendants were not subject to personal jurisdiction.[295] On rehearing en banc, the LEBC fractured. Eight judges, disagreeing with the panel's determination, found that personal jurisdiction was proper, but three of them concluded that the dispute was not ripe. Their votes, together with the three votes rejecting personal jurisdiction, resulted in a dismissal of the action.[296]

The grant of en banc rehearing in the case that became moot shows that balloting by the full court does not always promote liberal outcomes in this area of the law.[297] Still, it is impossible not to be struck by the parallel trajectories in *Bauman* and *Fiore*. In both cases, the panel reached a liberal result; Judge O'Scannlain (and, in *Fiore*, Judge McKeown) insisted that the panel decision "violated due process guarantees;"[298] a majority of the full court voted against en banc

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[291] Id. at 568 (McKeown, J., dissenting from denial of rehearing en banc).

[292] See Daimler AG v. Bauman, 571 U.S. 117 (2014); Walden v. Fiore, 571 U.S. 277 (2014).

[293] Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072 (9th Cir. 2003).

[294] Gator.com Corp. v. L.L. Bean, Inc., 398 F.3d 1125 (9th Cir. 2005) (en banc).

[295] Yahoo! Inc. v. La Ligue Contra le Racisme et L'Antisemitisme, 379 F.3d 1120 (9th Cir. 2004).

[296] Yahoo! Inc. v. La Ligue Contra le Racisme et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006) (en banc).

[297] The case involving foreign defendants does seem to fit the expected paradigm. To be sure, the conservative panel result was supported by two liberal judges (Ferguson and Tashima). However, the full court voted to grant rehearing, and in the LEBC, a majority of the liberal judges rejected the panel's conclusion that the exercise of jurisdiction was improper.

[298] Fiore, 688 F.3d at 568 (McKeown, J., dissenting from denial of rehearing en banc; see also Bauman, 676 F.3d at 777 (O'Scannlain, J., dissenting from denial of

rehearing; but the arguments that failed to persuade the Ninth Circuit's judges persuaded the Supreme Court to grant certiorari and reverse.[299]

3. Free exercise of religion

When governmental practices are challenged as violating the Establishment Clause, the traditional ideological alignment continues to hold sway: a decision supporting the constitutional claim is a liberal decision, and a decision rejecting the claim is conservative.[300] In the Warren and Burger Court eras, that was also true of claims challenging government practices under the Free Exercise Clause.[301]

Not so in the Roberts Court. Today, support for free exercise claims is regarded as the conservative position, to the point where liberal commentators speak of "the weaponization of the Free Exercise Clause"[302] and accuse the Court's conservative majority of engaging in "Free Exercise Lochnerism."[303]

What about the Ninth Circuit Court of Appeals? During the period of the study, nine Free Exercise cases were the subject of en banc ballots. Detailed analysis is required to determine how the liberal and conservative cohorts viewed the issues and whether the liberal position generally prevailed.[304]

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rehearing en banc) (noting "the bedrock concerns of fundamental fairness that underpin Supreme Court due process jurisprudence").

299 We do not have the memoranda circulated to the court in advance of the votes on the en banc calls, but as noted in Part II, the internal memoranda generally provide the basis for the published opinions dissenting from denial of rehearing.

300 See, e.g., Town of Greece v. Galloway, 572 U.S. 565 (2014); see also Baum, supra note 85, at 172.

301 See Hellman, *Reverse Polarity*, supra note 76, at 316-17.

302 See Howard Gillman & Erwin Chemerinsky, *The Weaponization of the Free Exercise Clause*, The Atlantic, Sept. 18, 2020. https://www.theatlantic.com/ideas/archive/2020/09/weaponization-free-exercise-clause/616373/.

303 See Elizabeth Sepper, *Free Exercise Lochnerism*, 115 Colum. L. Rev. 1453 (2015).

304 One case, involving the Religious Freedom Restoration Act, "pit[ted] the federal government's efforts to save the bald eagle from extinction against the bird's profound significance to Native spirituality." United States v. Antoine, 318 F.3d 919,

Only one of the nine cases unquestionably reflected traditional polarity – and the liberal position did not prevail. In *Rich v. Woodford*, early in the study period, a capital defendant filed an emergency motion seeking to take part in a sweat lodge ceremony prior to his execution. The district court denied the motion, and a Ninth Circuit panel affirmed.[305] A judge made a sua sponte call for an en banc vote, but a majority did not vote for rehearing. Judge Reinhardt, joined by three other judges, dissented, arguing that "neither the Constitution nor human decency permits us to deny a condemned man his last rites based on the implausible security concerns advanced by the state."[306]

Three cases early in the study period anticipated reverse polarity decisions by the Supreme Court. In *Thomas v. Anchorage Equal Rights Commission*, Alaska housing laws prohibited apartment owners from refusing to rent to unmarried couples.[307] The panel majority, in an opinion by Judge O'Scannlain, held that the Free Exercise Clause precluded the state from enforcing the laws against landlords, like the plaintiffs, whose refusal was based on religious reasons.[308] Judge Michael Daly Hawkins, a Clinton appointee, dissented. He challenged the majority's constitutional holding; he also insisted that the case was not ripe for judicial decision.[309] The full court granted en banc rehearing, and the LEBC unanimously held that the action should be

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920 (9th Cir. 2003) (rehearing en banc denied). It is debatable which side is the liberal position. The case is therefore excluded from the analysis that follows.

[305] Neither the district court ruling nor the appellate affirmance was published. The public docket reveals that the panel members were Judge Pregerson (who joined the dissent from denial of en banc rehearing), Judge Andrew Kleinfeld, and Judge Michael Daly Hawkins.

[306] Rich v. Woodford, 210 F.3d 961, 961 (9th Cir. 2000) (Reinhardt, J., dissenting from denial of rehearing en banc).

[307] Thomas v. Anchorage Equal Rights Commission, 165 F.3d 692 (9th Cir. 1999).

[308] Id. at 718. Compare Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

[309] 165 F.3d at 718 (Hawkins, J., dissenting) (arguing that majority's approach "ought to alarm any serious student of judicial restraint").

dismissed as premature.[310] The LEBC thus did not rule on the free exercise question.

In *KDM v. Reedsport School District*, the plaintiff was a "child with disabilities" entitled to special services under federal and state law.[311] The school district was willing to provide the services to KDM, but not at the sectarian school that he attended, because a state regulation restricted the provision of services to "religiously neutral setting[s]."[312] The panel majority, in an opinion joined by Judge Hawkins, found no free exercise violation. Judge O'Scannlain, dissenting from the denial of rehearing en banc, argued that "a law that is *non-neutral on its face,* like the Oregon regulation at issue here, triggers strict (and almost always fatal) scrutiny – even in the absence of extrinsic evidence suggesting that the law was the result of anti-religious bigotry or animus."[313]

The third case was *Davey v. Locke*.[314] Davey applied for and received a state-funded "Promise Scholarship" for attendance at an accredited college. The state then denied him the scholarship solely because he was pursuing a degree in devotional theology. The panel majority held that the denial violated the Free Exercise Clause. Judge Margaret M. McKeown, a Clinton appointee, dissented. A judge requested a vote on en banc rehearing, but the vote failed.[315] No

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[310] Thomas v. Anchorage Equal Rights Commission, 220 F.3d 1134 (9th Cir. 2000) (en banc). Judge O'Scannlain concurred, stating that the en banc opinion "commendably reshapes this circuit's overly permissive jurisprudence of ripeness and standing by tightening the requirements for bringing lawsuits." Id. at 1142 (O'Scannlain, J., concurring).

[311] KDM v. Reedsport School District, 196 F.3d 1046 (9th Cir. 1999).

[312] Id. at 1048. Compare Espinoza v. Montana Dept. of Revenue, 140 S. Ct. 2246 (2020).

[313] KDM v. Reedsport School District, 210 F.3d 1098, 1099 (9th Cir. 2000) (O'Scannlain, J., dissenting from denial of rehearing en banc).

[314] 299 F.3d 748 (9th Cir. 2002).

[315] The order is not published, but it is available in the appendix to the certiorari petition in the Supreme Court.

dissental was published; however, the Supreme Court reversed the panel decision over the dissent of the two most conservative Justices.[316]

The other four cases all involved variants on a single issue – the "ministerial exception" to state and federal employment laws.[317] The cases extend over almost the entire span of the study period, starting with *Bollard v. California Province of the Society of Jesus*.[318] The panel, in an opinion by Judge W. Fletcher, held that the ministerial exception did not bar a novice's sexual harassment claim against the Jesuit religious order. Four judges, including Judge O'Scannlain, dissented from the denial of rehearing en banc, arguing that the panel decision "narrow[ed] the ministerial exception nearly to the point of extinction."[319]

Bollard was followed a few years later by the similar case of *Elvig v. Calvin Presbyterian Church*.[320] Again the panel held that the ministerial exception did not bar a sexual harassment claim. This time six judges, including Judge O'Scannlain, dissented from denial of rehearing en banc.[321] Judge W. Fletcher, although not a member of the panel, defended the panel decision as "consistent with the constitutional underpinnings of the ministerial exception."[322]

In neither *Ballard* nor *Elvig* did the court announce a test for determining whether an employee is a "minister" under the ministerial exception. A panel attempted that task in 2010 in *Alcazar v. Corporation of the Catholic Bishop of Seattle*.[323] Applying the test, the

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[316] Locke v. Davey, 540 U.S. 712 (2004); see id. at 726 (Scalia, J., joined by Thomas, J., dissenting). This was one of the few cases in which the Supreme Court reversed a Ninth Circuit decision with a conservative outcome.

[317] The ministerial exception is grounded in both the Free Exercise Clause and the Establishment Clause, but commentators generally put it in the "free exercise" category, and I follow suit. See, e.g., Gillman & Chemerinsky, supra note 302.

[318] 196 F.3d 940 (9th Cir. 1999).

[319] Bollard v. California Province of the Society of Jesus, 211 F.3d 1331, 1331 (2000) (Wardlaw, J., dissenting from denial of rehearing en banc).

[320] 375 F.3d 951 (9th Cir. 2004).

[321] Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 798 (9th Cir. 2005) (Kleinfeld, J., dissenting from denial of rehearing en banc).

[322] Id. at 790 (W. Fletcher, J., concurring in denial of rehearing en banc).

[323] 598 F.3d 668 (9th Cir. 2010).

panel found that the exception barred the plaintiff's claim under the state minimum wage act. The full court granted rehearing en banc. The LEBC unanimously found that the plaintiff was a minister "under any reasonable interpretation of the exception."[324] It vacated the panel's effort to announce a test but did not formulate one of its own.

It was not until 2012 that the Supreme Court, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[325] finally confirmed the existence of the ministerial exception. The Court held that the exception applied in the case before it, but it gave little guidance as to how the exception would apply in other cases.

Six years later, in *Biel v. St. James School*, a Ninth Circuit panel held that the exception did not bar a suit under the Americans with Disabilities Act by a fifth grade teacher at a Catholic school.[326] Eight judges – all appointed by Republican Presidents – dissented from the denial of rehearing en banc. They argued that the panel's decision "embrace[d] the narrowest construction of the First Amendment's 'ministerial exception' and split[] from the consensus of our sister circuits that the employee's ministerial function should be the key focus."[327] The Supreme Court granted certiorari and reversed, with two liberal Justices dissenting.[328]

Two conclusions emerge from this account. First, when there was disagreement within the court, the free exercise claim generally received more support from members of the conservative cohort than from members of the liberal bloc. (The sweat lodge case is the one clear exception.) Judge O'Scannlain in particular championed a robust interpretation of the clause's protections. So it is fair to say that in the Ninth Circuit as in the Supreme Court, free exercise controversies in

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[324] Alcazar v. Corporation of the Catholic Bishop of Seattle, 627 F.3d 1288, 1290 (9th Cir. 2010) (en banc).

[325] 565 U.S. 171 (2012).

[326] Biel v. St. James School, 911 F.3d 603 (9th Cir. 2018).

[327] Biel v. St. James School, 926 F.3d 1238, 1239 (9th Cir. 2019) (R. Nelson, J., dissenting from denial of rehearing en banc).

[328] See Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); id. at 2017 (Sotomayor, J., joined by Ginsburg, J., dissenting)..

the twenty-first century have generally reflected reverse polarity rather than the traditional alignment.

Second, taking into account both the en banc balloting and the decisions by the LEBCs, we generally do *not* find an aggressive effort to promote liberal outcomes. In *Rich* and in *Davey* the conservative position prevailed in the vote on rehearing. In the two cases that did go en banc – *Thomas* and *Alcazar* – the LEBC declined to rule on the controversial questions on which the panel had issued conservative decisions. Only in the area of the ministerial exception did the full court resist efforts from the conservative side to strengthen the Free Exercise Clause as a limitation on governmental power.[329]

4. The Takings Clause

In 1994, Chief Justice Rehnquist, in an opinion of the Court from which all four liberal Justices dissented, declared: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in … comparable circumstances."[330] A quarter-century later, his successor, Chief Justice Roberts, invoked that language in overruling a precedent that obstructed the litigation of takings claims in federal court.[331] Overruling was necessary, he said, to "restor[e] takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights."[332] Again the four liberal Justices – three of whom were not on the Court at the time of the earlier decision – dissented.[333]

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[329] Subsequent to the study period, the court rejected an en banc call from the conservative side in a free exercise case growing out of the COVID-19 pandemic. A public school district implemented a vaccine mandate for its students and denied a request for a religious exemption. A divided three-judge panel found no constitutional violation. Ten judges – all appointed by Republican Presidents – dissented from the denial of rehearing. See Doe v. San Diego Unif. Sch. Dist., 22 F.4th 1099, 1100, 1114, 1115 (9th Cir. 2022) (opinions of Bumatay, Bress, & Forrest, JJ., dissenting from denial of en banc rehearing).

[330] Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).

[331] Knick v. Township of Scott, 139 S. Ct. 2162, 2169 (2019).

[332] Id. at 2170.

[333] Id. at 2180 (Kagan, J., dissenting).

As these cases illustrate, the Takings Clause is a reverse-polarity issue in the Supreme Court.[334] The same holds true in the Ninth Circuit: in en banc proceedings, takings claims are generally supported by members of the conservative bloc and rejected by members of the liberal cohort. And with one difficult-to-classify exception, the liberal position has invariably prevailed.

Six Takings Clause cases were the subject of en banc ballots during the period of the study. In three of the cases, the panel rejected the takings claim. In all three, the en banc call failed to receive a majority, and members of the conservative bloc wrote or joined dissents from the denial of rehearing.

The first case, early in the study period, involved a challenge to a temporary planning moratorium enacted by the Tahoe Regional Planning Agency. The panel, in an opinion by Judge Reinhardt, held that the moratorium did not effect either a categorical taking or a regulatory taking under *Penn Central*.[335] Six Republican-appointed judges, including Judge O'Scannlain, joined a dissental arguing that "[t]he panel's desire to ease local governance does not justify approving means that violate rights secured by the Fifth Amendment as authoritatively interpreted by the Supreme Court.[336] The Supreme Court granted certiorari and affirmed, with three of the conservative Justices dissenting.[337]

The other two cases were decided toward the end of the study period. In *Cedar Point Nursery v. Shiroma*, plaintiffs challenged a state regulation that allowed union organizers to enter agricultural employer worksites under specified circumstances.[338] The panel, in an opinion by

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[334] See Hellman, *Reverse Polarity*, supra note 76, at 301-03; see also Baum, supra note 85, at 130-61.

[335] Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764 (9th Cir. 2000).

[336] Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 228 F.3d 998, 1003 (9th Cir. 2000) (Kozinski, J., dissenting from denial of rehearing en banc).

[337] Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,, 535 U.S. 302 (2002); see id. at 343 (Rehnquist, C.J., dissenting).

[338] Cedar Point Nursery v. Shiroma, 923 F.3d 524 (9th Cir. 2018).

Judge Paez joined by Judge W. Fletcher, rejected the plaintiffs' claim that the regulation amounted to a per se taking in that it allowed a permanent physical invasion of their property.[339] The dissental by Judge Ikuta, joined by seven other Republican appointees, insisted that the state had appropriated an easement, thus effecting a permanent physical occupation and a per se taking.[340] The Supreme Court granted certiorari and reversed, with the three liberal Justices dissenting.[341]

Judge Daniel Collins, newly appointed by President Trump, wrote the dissental in *Pakdel v. City & County of San Francisco*.[342] Plaintiffs contended that the city's lifetime lease requirement protecting tenants in a condominium conversion was an unconstitutional regulatory taking. The panel held that the takings claim was not ripe because the plaintiffs had not obtained a final decision regarding the application of the rule to their unit.[343] The dissental argued that the panel had imposed an impermissible exhaustion requirement in the guise of mandating finality.[344] The Supreme Court agreed; it reversed summarily and without dissent.[345]

There were also three cases in which the panel sustained the takings claim. In two of them, the court granted en banc rehearing and the LEBC rejected the claim. One case involved a challenge to Washington State's Interest on Lawyers' Trust Account (IOLTA) program. The panel held that the program effected a per se taking, and it remanded the case to the district court to determine the "just

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[339] Id. at 534. Judge Edward Leavy, a Republican appointee, dissented.

[340] Cedar Point Nursery v. Shiroma, 956 F.3d 1162 (9th Cir. 2020) (Ikuta, J., dissenting from denial of rehearing en banc). Judges Paez and Fletcher responded to the dissental, asserting that "the argument advanced by Judge Ikuta fundamentally misapprehends existing Supreme Court authority."). Id. at 1163 (Paez, J., concurring in denial of rehearing en banc).

[341] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021); see id. at 2081 (Breyer, J., dissenting).

[342] 977 F.3d 928 (9th Cir. 2020) (Collins, J., dissenting from denial of rehearing en banc).

[343] Pakdel v. City & County of San Francisco, 952 F.3d 1157 (9th Cir. 2020).

[344] Pakdel, 977 F.3d at 929.

[345] Pakdel v. City & County of San Francisco, 141 S. Ct. 2226 (2021).

compensation" that was due.[346] The LEBC concluded that "even if the IOLTA program constituted a taking of … private property, there would be no Fifth Amendment violation because the value of [plaintiffs'] just compensation is nil."[347] The Supreme Court affirmed, with four of the five conservative Justices dissenting.[348]

The second case involved a challenge to a mobile home rent control ordinance. The panel agreed with the plaintiffs that "the ordinance, which effect[ed] a transfer of nearly 90 percent of the property value from mobile home park owners to mobile home tenants, constitute[d] a regulatory taking" for which just compensation was required.[349] The LEBC held that the plaintiffs had no viable claim under the Takings Clause.[350]

That brings us to the final case, *Fowler v. Guerin*. The panel, in an opinion joined by Judge Ikuta, held that state public school teachers stated a claim under the Takings Clause because the state failed to pay *daily* interest on funds held in interest-bearing accounts as part of the state retirement system.[351] In contrast to the other two cases upholding Takings Clause claims, here the en banc call failed. The dissental argued that the panel "created a Fifth Amendment property right no court has ever recognized" and that the "decision [was] wholly untethered to the text of the Fifth Amendment."[352]

What is striking here is that the challenge to the panel decision came not from the liberal side of the court but from two of the judges

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[346] Washington Legal Fdn. v. Legal Fdn. of Wash., 236 F.3d 1097 (9th Cir. 2001).

[347] Washington Legal Fdn. v. Legal Fdn. of Wash., 271 F.3d 835, 864 (9th Cir. 2001) (en banc).

[348] Brown v. Legal Fdn. of Wash., 538 U.S. 216 (2003). As so often happened during that era, it was the vote of Justice O'Connor that produced a liberal outcome. See, e.g., Grutter v. Bollinger, 539 U.S. 306 (2003); McConnell v. FEC, 540 U.S. 93 (2003).

[349] Guggenheim v. City of Goleta, 582 F.3d 996, 999 (9th Cir. 2009); see id. at 1034 (remanding for determination of just compensation).

[350] Guggenheim v. City of Goleta, 638 F.3d 1111 (9th Cir. 2010) (en banc).

[351] Fowler v. Guerin, 899 F.3d 1112 (9th Cir. 2018).

[352] Fowler v. Guerin, 918 F.3d 644, 645-46 (9th Cir. 2019) (Bennett, J., dissenting from denial of rehearing en banc).

newly appointed by President Trump – judges who often joined other Republican-appointed judges in dissentals in other cases.[353] No member of the liberal cohort joined this dissental. In that light, I have refrained from characterizing the ideological direction of the Fowler panel decision.[354]

In any event, *Fowler* is an outlier. In all five of the other Takings Clause cases that were the subject of an en banc ballot, the liberal position prevailed and the takings claim was rejected.

5. The Second Amendment

If any area of constitutional litigation can stand as the epitome of reverse polarity, it is the Second Amendment. In the Supreme Court, the right to keep and bear arms receives strong support from the conservative Justices, while the liberal Justices vote to uphold governmental regulation.[355] And the division within the Court, as Professor Baum has written, reflects "the liberal-conservative division on gun policy questions in the elite world as a whole."[356]

In the Ninth Circuit, too, the Second Amendment is a reverse polarity issue. More strikingly, there is no other issue on which the Ninth Circuit has more consistently used the en banc process to produce liberal outcomes. When a panel decision *sustaining* a Second Amendment claim is the subject of an en banc ballot, the call is successful, and the LEBC votes to uphold the law or regulation. When a panel decision *rejecting* the claim is the subject of the ballot, the en banc call (with one possible exception) fails.

The story begins with *Silveira v. Lockyer*, decided in 2002.[357] The panel, in an opinion by Judge Reinhardt, rejected the position that "the

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[353] For example, Judge R. Nelson joined the dissentals in Cedar Point Nursery and Pakdel. Judge Bennett joined the dissentals in Ming Dai v. Barr, 940 F.3d 1143 (9th Cir. 2019), discussed supra text accompanying note 170; and Biel v. St. James School, 926 F.3d 1238 (9th Cir. 2019), discussed supra text accompanying note 327, among many other cases.

[354] The Supreme Court denied certiorari. Guerin v. Fowler, 140 S. Ct. 390 (2019).

[355] See Hellman, *Reverse Polarity*, supra note 76, at 319.

[356] Baum, supra note 85, at 113.

[357] Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002).

Second Amendment establishes an individual right to possess arms."[358] A judge called for a vote on the petition for rehearing en banc, but the vote failed.[359] Six judges dissented from the denial of rehearing.[360] The dissenters included Judge Pregerson, who agreed with the panel's decision to uphold the challenged law but disputed the panel's interpretation of the Second Amendment as protecting only a collective right.[361] This was the only time in any of the en banc proceedings that any member of the court's liberal bloc expressed sympathy for Second Amendment rights.[362]

While the PFREB in *Silveira* was pending, the case of *Nordyke v. King* came before another panel.[363] That panel, bound by circuit precedent, reiterated the position that the Second Amendment "offers no protection for the individual's right to bear arms."[364] But the panel doubted the correctness of that position and called for en banc rehearing to reconsider it. This call too failed, with five judges dissenting from the denial of rehearing.[365]

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[358] Id. at 1065.

[359] Silveira v. Lockyer, 328 F.3d 567 (9th Cir. 2003).

[360] The principal dissent was by Judge Kleinfeld. See id. at 570 (Kleinfeld, J., dissenting from denial of rehearing en banc). Judges Pregerson, Kozinski, and Gould also filed opinions. See id. at 568, 502.

[361] Id. at 568 (Pregerson, J., dissenting). Judge Gould was the only other Democratic appointee who dissented.

[362] In Peruta v. County of San Diego, 824 F.3d 919 (9th Cir. 2016) (en banc), discussed infra note 379, Judge Pregerson joined the LEBC opinion rejecting the Second Amendment claim.

[363] Nordyke v. King, 319 F.3d 1185 (9th Cir. 2003) (Nordyke I). As will be seen, the *Nordyke* litigation extended over several years and generated numerous opinions and three separate en banc ballots. The numbering here is limited to the dispositions with opinions that are discussed in this Article.

[364] Id. at 1191. The binding precedent, in the panel's view, was not *Silveira* but an earlier decision, Hickman v. Block, 81 F.3d 98 (9th Cir. 1996). Indeed, the panel chastised the *Silveira* panel for reconsidering the issue decided by Hickman and engaging in an "exposition of the conflicting interpretations of the Second Amendment [that] was both unpersuasive and, even more importantly, unnecessary." Id. at 1192 n.4.

[365] Nordyke v. King, 364 F.3d 1025, 1026 (9th Cir. 2004) (Gould, J., dissenting from denial of rehearing en banc) (Nordyke II)

In 2008, in *District of Columbia v. Heller*, the Supreme Court rejected the Ninth Circuit's view and held that the Second Amendment does protect an individual right to bear arms.[366] A year later, a new iteration of the *Nordyke* case returned to the same panel.[367] The panel, in an opinion by Judge O'Scannlain, decided two questions. First, it held that the Second Amendment applies to the states through the Fourteenth Amendment.[368] Second, the panel rejected the plaintiffs' challenge to a county ordinance that effectively prohibited gun shows on government property.[369]

Neither party requested rehearing en banc, but a judge called for a vote, and a majority voted to rehear the case.[370] Almost certainly, the purpose of rehearing was to reconsider the panel's holding that the Second Amendment is applicable to the states.[371] That reconsideration proved unnecessary, however, because in *McDonald v. City of Chicago*, the Supreme Court resolved the question in accordance with the panel decision.[372] The LEBC then remanded the case to the three-judge panel, which articulated a level of scrutiny and allowed the plaintiffs to amend their complaint to show a Second Amendment violation.[373]

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[366] District of Columbia v. Heller, 554 U.S. 570 (2008).

[367] Nordyke v. King, 563 F.3d 439 (9th Cir. 2009) (Nordyke III).

[368] Id. at 446-57.

[369] Id. at 457-63.

[370] Nordyke v. King, 575 F.3d 890 (9th Cir. 2009).

[371] It is theoretically possible that the en banc call was directed to the panel's holding rejecting the challenge to the county ordinance, but I view that possibility as extremely remote. The panel opinion was by Judge O'Scannlain, a stalwart defender of Second Amendment rights. It is most unlikely that a majority of the active Ninth Circuit judges voted for rehearing to revive a claim that Judge O'Scannlain viewed as without merit. Moreover, the county, in its response to the court's request for an expression of views on the en banc call, argued that the panel's discussion of incorporation was dictum and that rehearing would be appropriate if the court saw a risk that the "dictum" would be treated as holding. See Appellees' Brief Regarding Rehearing En Banc, Dkt. No. 07-15763, at 3 (June 6, 2009).

[372] McDonald v. City of Chicago, 561 U.S. 742 (2010).

[373] Nordyke v. King, 644 F.3d 676 (9th Cir. 2011) (Nordyke IV).

Again Judge O'Scannlain wrote for the panel; here he applied what he called a "substantial burden framework."[374]

This time the plaintiffs filed a petition for rehearing en banc. A judge requested a vote, and a majority of the full court voted to rehear the case.[375] Although the thrust of the PFREB was that the panel should have applied strict scrutiny to the Second Amendment claim, it is hard to believe that the full court granted rehearing because the judges agreed with the plaintiffs that that very demanding standard should be the law of the circuit. It is far more likely that a majority agreed with the panel concurrence that the approach adopted by the panel majority would lead courts to overturn some "[p]rudent measured arms restrictions for public safety."[376]

In the end, the LEBC determined that there was no need to resolve the question of the level of scrutiny; relying on concessions by the county that gave the plaintiffs pretty much all they wanted, the LEBC affirmed the district court's dismissal of the Second Amendment claim.[377] Four members of the court's conservative bloc, in an opinion by Judge O'Scannlain, concurred only in the judgment; they endorsed the standard adopted by the panel majority.[378]

The remainder of the story is quickly told. From 2012, when the LEBC handed down its final opinion in the *Nordyke* litigation, through 2020, Second Amendment issues were the subject of five en banc calls. In four cases (including one companion case), the panel ruled in favor of the Second Amendment claim, the full court granted reheating en banc, and the LEBC upheld the government regulation.[379] That was also the

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[374] Id. at 784.

[375] Nordyke v. King, 664 F.3d 774 (9th Cir. 2011). The order states only that a majority of the nonrecused judges voted to grant en banc rehearing; in conformity with the court's usual practice, it does not say that the PFREB was granted.

[376] Nordyke IV, 644 F.3d at 799 (Gould, J., concurring).

[377] Nordyke v. King, 681 F.3d 1041 (9th Cir. 2012) (Nordyke V).

[378] Id. at 1045 (O'Scannlain, J., concurring in judgment).

[379] See, in chronological order, Peruta v. Cnty. of San Diego, 742 F.3d 1144 (9th Cir. 2014) (O'Scannlain, J.), on reh'g en banc, 824 F.3d 919 (9th Cir. 2016) (good cause requirement to carry concealed weapon); Richards v. Prieto, 560 Fed. App'x 681 (9th Cir. 2014), on reh'g en banc, 824 F.3d 919 (9th Cir. 2016) (same); Teixeira v. Cnty. of Alameda, 822 F.3d 1047 (9th Cir. 2016) (O'Scannlain, J.), on reh'g en banc,

sequence in *Duncan v. Bonta*, the only Second Amendment en banc call in 2021.[380] In the fifth case, the panel rejected the Second Amendment claim and the en banc call failed, with eight judges dissenting from the denial of rehearing.[381]

In all, there were nine occasions on which Second Amendment issues were the subject of an en banc ballot during the period of the study, with one more in 2021. Every one of the cases ended with the rejection of the Second Amendment claim and the upholding of the challenged law or regulation.[382]

6. The overall picture

Table 7 summarizes the numbers for the reverse polarity issues taken together. It presents a remarkable picture. In no other class of cases – not even labor and employment law[383] – did the en banc process serve more thoroughly to produce liberal outcomes. Liberal and conservative panel decisions were almost equal in numbers – 13 of the former, 15 of the latter. But only one of the en banc calls targeting a liberal decision was successful, and that was a case on personal jurisdiction – hardly a central element of liberal ideology.[384] In contrast, rehearing was granted to 12 of the panel decisions with a conservative outcome. The disparity between the grant rates in the two groups of

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873 F.3d 670 (9th Cir. 2017) (limit on location of gun stores); Young v. Hawaii, 896 F.3d 1044 (9th Cir. 2018) (O'Scannlain, J.), on reh'g en banc, 992 F.3d 765 (9th Cir. 2021) (right to carry firearm openly for self defense outside home).

[380] See Duncan v. Becerra, 970 F.3d 1133 (9th Cir. 2020), on rehearing en banc sub nom. Duncan v. Bonta, 19 F.4th 1087 (9th Cir. 2021) (ban on large-capacity magazines).

[381] Mai v. United States, 974 F.3d 1082 (9th Cir. 2020); see id. at 1083 (Bumatay, J., dissenting from denial of rehearing en banc).

[382] In 2022, a panel composed of three Republican-appointed judges held that a California county violated the Second Amendment during the Covid pandemic by issuing a series of closure orders that "wholly prevented law-abiding citizens in the County from realizing their right to keep and bear arms." McDougall v. Cnty. of Ventura, 23 F.4th 1095, 1099 (9th Cir 2022). The full court quickly granted en banc rehearing and vacated the panel decision. 26 F.4th 1016 (9th Cir. 2022). The case is pending at this writing.

[383] See supra Part IV.C.

[384] See supra notes 293-294 and accompanying text.

cases – 8% versus 80% – is greater than that of any group encountered thus far. Moreover, in all of the cases that were taken en banc, the conservative ruling was repudiated in whole or in part.

Table 7
En Banc Ballots: Reverse Polarity Cases

	Total	Granted	Denied	Percent Granted
Conservative Panel Decision	15	12	3	80%
Liberal Panel Decision	13	1	12	8%
Other Panel Decision	2	0	2	0%
Total	30	13	17	43%

To be sure, the total number of cases is small. And all but a few involved one of three areas of law– the free exercise of religion, the Takings Clause, and the Second Amendment. Nevertheless, it is impossible not to be struck by the contrast between the comparative grant rates here and those seen in areas of constitutional law that reflect the traditional ideological alignment – 33% versus 54% in constitutional criminal procedure and 27% versus 62% on other issues. (See Table 1 and Table 5.) To put it another way, liberal ideology manifested itself more strongly in *resisting* individual rights claims supported by *conservatives* than in *advancing* the claims supported by *liberals*.[385]

H. "Economic Liberalism" Cases

More than 50 years ago, Professor Glendon Schubert, one of the pioneers in the study of judicial ideology, published his landmark book *The Judicial Mind*. In it, he separately identified the characteristics of "political liberalism" and "economic liberalism."[386] "Political liberalism" centered on civil liberties cases.[387] To define "economic liberalism," Schubert "grouped together sets of cases which involved disputes

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[385] That was also the pattern, albeit to a lesser degree, on First Amendment issues. See supra Table 6.

[386] GLENDON SCHUBERT, THE JUDICIAL MIND 99 (1965).

[387] Id. at 101.

between unions and employers; governmental regulation of business activities; fiscal claims of workers against employers; and disputes between small businessmen and their large corporate competitors."[388] Liberal decisions "would support the claims of the economically underprivileged, while the conservative would stand pat and resist economic change that would benefit the have-nots."[389] For example, "the economic liberal would uphold the fiscal claims of injured workers (or their widows); he would support unions …; [and] he would support government regulation of business."

The landscape of federal law has changed considerably since Schubert wrote, but the ideological alignments of economic liberalism remain pretty much as he described them. I have already discussed one large area of law within this category – labor and employment.[390] The other cases fall into five groups.

First, there are private civil suits under federal statutes such as the Sherman Act, the securities acts, and the Americans with Disabilities Act (ADA). In these cases, a decision favoring the plaintiff is a liberal decision; a decision favoring the defendant is conservative.[391] Intellectual property cases, which typically do not have any ideological valence, are excluded.[392]

The second group encompasses business regulation cases to which the Federal Government is a party. These involve many of the same statutes as the private suits, but with the Government rather than a private party seeking to enforce the Congressional directive. Here, a

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[388] Id. at 127.

[389] Id. at 128. It is curious that by using this tendentious language ("the conservative would stand pat …") Schubert makes clear that his own sympathies were with the liberals. Nevertheless, no one would disagree that economic liberals support claims of injured workers, government regulation of business, etc.

[390] See supra Part IV.C

[391] Some of the statutes, like the ADA, implicate non-economic as well as economic concerns, but their ideological valence is the same, so it makes sense to include them.

[392] See Epstein et al., Behavior, supra note 26, at 150 (noting that Judge Posner, after reviewing the Spaeth database classifications, "tended to find" intellectual property cases "impossible to classify ideologically").

decision favoring the Government is a liberal decision; a decision favoring the party challenging the regulation is conservative.[393]

This definition excludes cases to which the Government is a party in its capacity as sovereign rather than as a regulator. We have already encountered two large sets of these cases outside the realm of "economic liberalism": immigration appeals and criminal prosecutions.[394] In both, of course, a decision favoring the Government is classified as *conservative* – the reverse of the alignment in the regulatory cases. That is also the alignment in many other Government-as-sovereign cases – for example, those involving FOIA or Social Security disability claims. Recall, too, Judge Reinhardt's comment that "[i]n all types of cases, including tax cases, you're more likely to find the liberal judge voting for the individual while his conservative colleagues tend to uphold the position advocated by the government."[395]

Here, though, there is a complication. Judge Reinhardt's typology accords with "conventional understandings" if we limit it, as he did, to cases in which the Government as sovereign is engaged in litigation with an *individual*. But if the party opposing the Government is not an individual, ideological classification becomes more fraught. Consider, for example, the failed en banc call in *Altera Corp. v. CIR*.[396] This was a tax case in which the Government's adversary was a corporation challenging a regulation governing cost-sharing among related entities. I doubt that Judge Reinhardt would view a decision favoring the Government as conservative.[397]

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[393] There are occasional cases in which a private party sues the Government to prod an agency to enforce a statute. E.g., LULAC v. Wheeler, 922 F.3d 443 (9th Cir. 2019) (en banc). Consistent with the general approach that traces back to Schubert's work, a decision favoring the Government in such a case would be classified as conservative.

[394] See supra Part IV.B & IV.D.

[395] See supra note 81 and accompanying text.

[396] 941 F.3d 1200 (9th Cir. 2019) (M. Smith, J., dissenting from denial of rehearing en banc)

[397] The panel opinion in *Altera Corp.* was joined by three Democratic appointees; the dissent was joined by three Republican appointees. For that reason – and

It turns out, however, that *Altera Corp*. is an outlier, and Judge Reinhardt's typology fits very well with the general run of government-as-sovereign cases that were the subject of en banc ballots during the study period. Indeed, many of the cases closely resemble those in the first group, except that the plaintiff is seeking relief from the Government rather than from a private party.

The analysis thus far has been limited to cases in which a party asserts rights under *federal* law. But from an ideological perspective, economic liberalism is also implicated when one party asserts rights under a *state* law regulating economic activity and the question is whether that claim is nullified or limited by federalism-based doctrines, notably preemption. To classify the ideological direction of panel decisions of that kind, I looked through to the underlying state regulation and hypothesized a federal court decision implementing the regulation. If that decision would be classified as liberal – for example, if it favored a personal injury plaintiff over the manufacturer of an allegedly defective product – a decision finding preemption would be conservative; a decision rejecting preemption and sustaining the state-law claim would be liberal.[398]

Finally, it makes sense to include one subset of the "federal courts" segment of the docket in which there is an ideological divide that directly implicates economic liberalism: jurisdiction and procedure in class actions. Decisions supporting the class action are classified as liberal; decisions limiting class actions are classified as conservative.[399]

Overall, the concept of "economic liberalism" used here is somewhat broader than Schubert's (putting aside the separate treatment of workplace litigation). But it accords with Judge Reinhardt's typology for "nonconstitutional areas," and in all but a

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because the issue implicates government regulation of business – I characterized the panel outcome as liberal.

[398] Disputes involving preemption by federal labor law have been excluded from consideration here; those were discussed in connection with the workplace litigation cases. See supra Part IV.C.

[399] See Scott Dodson, *Book Review*, 54 Law & Soc. Rev. 522, 522 (2020) ("The battle lines across society and politics are clear and entrenched: liberals love class actions and conservatives hate them.").

handful of cases the ideological alignments are easily determined in accordance with "conventional understandings."

With the category thus defined, in the 23 years of the study there were 83 en banc calls directed to panel opinions on "economic liberalism" issues. (See Table 8.) This number is probably smaller than one would expect. Notwithstanding the vast swath of regulatory and sovereign activity covered, there are fewer cases in this group than in immigration law alone. Important areas of federal law – including antitrust, securities regulation, Social Security, and communications – contributed no more than two or three cases each.

Table 8
En Banc Ballots: "Economic Liberalism" Cases

	Total	Granted	Denied	Percent Granted
Conservative Panel Decision	40	20	20	50%
Liberal Panel Decision	37	13	24	35%
Other Panel Decision	6	3	3	50%
Total	83	36	47	43%

What about ideology? Two failed calls resisted ideological classification, and four other calls (three of them successful) lacked ideological valence. The remaining calls were almost evenly divided ideologically – 40 that targeted conservative panel decisions and 37 that targeted liberal decisions. But the grant rates were very different. When the panel decision was conservative, exactly half of the calls were successful; for liberal panel decisions the odds were almost two to one against success.

The percentages here closely track those seen in the benchmark area of constitutional criminal procedure.[400] By the same token, the divergence between the two grant rates is much smaller than that found in labor and employment law, even though the latter is a subset of economic liberalism.[401]

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[400] See supra Part IV.A and Table 1.

[401] See supra Part IV.C. and Table 3.

By far the largest area represented is environmental law, which accounted for 17 en banc ballots. That preeminence is not surprising; the Ninth Circuit hears a disproportionate number of environmental cases,[402] and the court's environmental decisions have generated much controversy.[403]

Most of the environmental cases on the en banc ballot docket involved challenges to Federal Government action based on statutes such as the National Environmental Policy Act (NEPA) and the Clean Water Act (CWA). Typically the plaintiffs were environmental organizations, and a decision supporting the claim is characterized as liberal.[404]

Nine of the en banc calls targeted panel decisions that reached conservative outcomes, and four of these were successful, for a grant rate of 44%. In all four cases the LEBC ruled in favor of the environmental claim.[405] In none of those cases did the Government seek Supreme Court review.[406]

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[402] See Christopher Warshaw & Gregory E. Wannier, *Business as Usual - Analyzing the Development of Environmental Standing Doctrine since 1976*, 5 Harv. L.& Pol'y Rev. 289, 300 (2011) (noting that Ninth and D.C. Circuits "accounted for over half of all environmental cases brought in the appellate courts over the past thirty-five years").

[403] See, e.g., Neil A. Lewis, *Western Senators Are Pushing to Break Up Circuit Court*, N.Y. Times, Sept. 1, 1997 (discussing legislation to divide the Ninth Circuit and quoting Montana Senator as calling for judges who are more sensitive to "how we manage our own resources").

[404] See Michael S. Kang & Joanna M. Shepard, *The Long Shadow of Bush v. Gore: Judicial Partisanship in Election Cases*, 68 Stan. L. Rev. 1411, 1434 n. 110 (2016) (noting that liberal single-issue groups include those associated with "pro-environmental policy").

[405] See, e.g., Wilderness Soc. v. United States Fish & Wildlife Serv., 353 F.3d 1051 (9th Cir. 2003) (en banc), as amended, 360 F.3d 1374 (9th Cir. 2004) (holding that grant of permit for salmon enhancement project violated Wilderness Act).

[406] In one case the Government declined to defend the challenged policy and did not participate in the court of appeals proceedings. See Organized Village of Kake v. USDA, 795 F.3d 956, 963 (9th Cir. 2015) (en banc).

Seven en banc calls questioned liberal outcomes.[407] Three of these were successful, for a grant rate of 43%. Two of the LEBC decisions reversed the panel outcome, but in the third case the LEBC, like the panel, ordered the EPA to act in accordance with the petitioners' requests.[408] Two of the unsuccessful calls prompted dissentals from members of the conservative bloc; in both instances the Supreme Court reversed the panel decision.[409]

Overall, the environmental cases reflect no more than a modest skew in the liberal direction. In that respect, the cases are not representative of the economic liberalism group generally; if we remove them from the calculations, the grant rates are somewhat higher for conservative panel decisions (52%) and somewhat lower for liberal panel decisions (33%).

One final note. Of the 24 failed calls that targeted liberal panel decisions, 17 (including the two environmental cases already mentioned) gave rise to dissentals; and of those, nine were followed by Supreme Court review and reversal. So although the issues are very different, the patterns of activity closely resemble those seen in the constitutional criminal procedure cases.

V. Gauging the Liberalism of the Ninth Circuit

For almost the entirety of the period studied in this Article, Judge Stephen Reinhardt was the "liberal face" of the Ninth Circuit.[410] To those on both sides of the ideological divide, he "embodied the liberal jurisprudence that [the Ninth Circuit Court of Appeals] developed in

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[407] One case resisted characterization. See Anderson v. Evans, 371 F.3d 475 (9th Cir. 2004) (conservation groups on one side; Indian tribe on the other).

[408] The latter was LULAC v. Wheeler, 922 F.3d 443 (9th Cir. 2019) (en banc).

[409] See United States v. Burlington N. Ry., 520 F.3d 918, 952 (9th Cir. 2008) (Bea, J., dissenting from denial of rehearing en banc), rev'd, 556 U.S. 599 (2009); Defenders of Wildlife v. EPA, 450 F.3d 394, 395 (9th Cir. 2006) (Kozinski, J., dissenting from denial of rehearing en banc), panel decision rev'd sub nom. Nat'l Assn. of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007). In the latter case the four liberal Justices dissented. See id. at 673 (Stevens, J., dissenting).

[410] Maura Dolan, *Stephen Reinhardt, 'Liberal Lion' of the 9th Circuit, Dies at 87*, L.A. Times, Mar. 30, 2018. Judge Reinhardt was appointed to the Ninth Circuit by President Carter in 1980 and died in March 2018. See id.

the decades following [President Carter's] appointments."[411] Yet Judge Reinhardt himself did not share the widespread perception of the Ninth Circuit as a liberal court. "Anyone who can count," he said in 2006, "can tell you the Ninth Circuit is not a liberal circuit. There are many more conservative than liberal judges on the court."[412]

This study points to a different conclusion: the Ninth Circuit *is* a liberal court. But the study also shows that the liberalism of the Ninth Circuit is more nuanced and selective than the conventional depictions would lead one to expect. Before explaining why that is so, it will be useful to say something about the conservative and liberal blocs on the Ninth Circuit.

A. Judges, Ideology, and Political Affiliation

For more than a quarter-century – a period that ended with the death of Justice Ruth Bader Ginsburg in 2020 – the United States Supreme Court was composed of a liberal bloc of four Justices and a conservative bloc of five.[413] Although the membership of the two blocs changed from time to time as new Justices joined the Court, the alignment remained the same.

This study shows that during roughly that same period, the Ninth Circuit also had liberal and conservative blocs. But the parallel is not exact. All of the Supreme Court Justices could be assigned to one bloc or the other; that is not true of the Ninth Circuit judges. Instead, what we find are two cohorts of judges, together comprising about two-thirds of the court, who actively engaged in the public aspects of the en banc process – in particular, opinions dissenting from or concurring in the denial of en banc rehearing. The other judges cast votes and may have written internal memoranda, but they cannot readily be assigned to

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[411] Nicholas Sonnenburg, *'Liberal lion' defined 9th Circuit's progressive jurisprudence*, Los Angeles Daily Journal, Mar. 30, 2018, at 1.

[412] Kenneth Ofgang, *Ninth Circuit Split Inevitable, Tashima Tells Gathering*, Metro. News-Enterprise, Oct. 30, 2006.

[413] See Hellman, *Reverse Polarity*, supra note 76, at 295-300 & Figure 1.

one ideological bloc or the other based on public information about en banc activity.[414]

Two things stand out about the Ninth Circuit blocs. The first is that the two blocs retained their distinct identities across the wide range of issues that generated en banc calls, with almost no crossover from one to the other. For example, here are the judges who joined dissentals supporting the conservative position in cases representing four different areas of federal law:

- *Right to counsel and habeas corpus*. Dissenting: Judges O'Scannlain, Gould, Tallman, Bybee, Callahan, Bea, M. Smith, Ikuta, N.R. Smith, and Owens.[415]
- *Asylum for aliens*. Dissenting: Judges Kozinski, O'Scannlain, Kleinfeld, Tallman, Bybee, Callahan, Bea, M. Smith, and Ikuta.[416]
- *Fair Labor Standards Act*. Dissenting: Judges Kozinski, O'Scannlain, Gould, Tallman, Bybee, Callahan, Bea, M. Smith, Ikuta, and N.R. Smith.[417]
- *Personal jurisdiction*. Dissenting: Judges O'Scannlain, Tallman, Bybee, Callahan, Bea, M. Smith, Ikuta, and N.R. Smith.[418]

And here is a sampling of dissentals from the liberal side of the court:

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[414] It may be possible to assign some of those judges to one bloc or the other based on their votes and opinions in panel cases, but that would require an enormous research undertaking.

[415] Hardy v. Chappell, 849 F.3d 803 (9th Cir. 2016) (Bea, J., dissenting from denial of en banc rehearing).

[416] Ramadan v. Keisler, 504 F.3d 973 (9th Cir. 2007) (O'Scannlain, J., dissenting from denial of rehearing en banc).

[417] Or. Restaurant & Lodging Assn. v. Perez, 843 F.3d 355 (9th Cir. 2016) (O'Scannlain, J., dissenting from denial of rehearing en banc).

[418] Bauman v. DaimlerChrysler Corp., 676 F.3d 774, 775 (9th Cir. 2011) (O'Scannlain, J., dissenting from denial of rehearing en banc).

- *Jury voir dire and habeas*. Dissenting: Judges Pregerson, Reinhardt, Thomas, Wardlaw, W. Fletcher, Fisher, Paez, Berzon, and Rawlinson.[419]
- *Issue preclusion in immigration cases*. Dissenting: Judges Pregerson, Reinhardt. Hawkins, Tashima, Thomas, McKeown, Wardlaw, W. Fletcher, Fisher, Gould, Paez, and Berzon.[420]
- *Expert testimony in Title VII case*. Dissenting: Judges Pregerson, Reinhardt, Hawkins, Tashima, Thomas, McKeown, Wardlaw, W. Fletcher, Fisher, Paez, and Berzon.[421]

Second, there is a strong correlation between ideology and political affiliation, generally defined by the party of the appointing President. Dissentals from the conservative side were overwhelmingly written and joined by judges appointed by Republican Presidents; those judges were often joined by Judge Richard Tallman, a Republican appointed by President Clinton.[422] Dissentals from the liberal side were overwhelmingly written and joined by appointees of Democratic Presidents. Former Judge Alex Kozinski was the only Republican appointee who frequently joined dissentals challenging conservative panel decisions.

B. A Nuanced and Selective Liberalism

Each of the two groups of judges who frequently wrote or joined dissentals constituted about one-third of the active judges; thus, neither group could secure a majority for en banc rehearing without the support of other members of the court. We do not know how individual judges voted, but we do know the outcome of the ballots. Table 9 summarizes the data on grants and denials in the eight classes of cases

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[419] Williams v. Woodford, 396 F.3d 1059 (9th Cir. 2005) (Rawlinson, J., dissenting from denial of rehearing en banc).

[420] Nunes v. Ashcroft, 375 F.3d 810, 811 (9th Cir. 2004) (Tashima, J., dissenting from denial of rehearing en banc).

[421] Mukhtar v. Cal. State Univ., 319 F.3d 1073, 1075 (9th Cir. 2003) (Reinhardt, J., dissenting from denial of rehearing en banc).

[422] See supra note 33 and accompanying text.

discussed in detail in the preceding pages.[423] Here I outline some conclusions drawn both from the numbers and from a review of the cases.

Table 9
En Banc Ballots: Panel Decisions, 1998-2020

Type of Case	Number			Percent Granted	
	Total	Conservative Panel Decision	Liberal Panel Decision	Conservative Panel Decision	Liberal Panel Decision
Constitutional Criminal Procedure	234	131	102	54%	33%
Immigration Cases	100	61	39	54%	38%
Labor and Employment Law	43	25	16	76%	31%
Federal Criminal Law and Procedure	89	44	42	59%	52%
Other Civil Liberties Claims: Traditional Polarity	70	29	41	62%	27%
Freedom of Expression	59	33	20	33%	15%
Reverse Polarity Cases	30	15	13	80%	8%
"Economic Liberalism" Cases	83	40	37	50%	35%

1. The Ninth Circuit is a *predominantly* liberal court, but it is not a *reliably* liberal court. In all eight classes of cases studied, the success

[423] As noted at the start of Part IV, these eight classes of cases accounted for more than 90% of the en banc ballots directed to panel opinions during the 23 years of the study.

rate for en banc calls that targeted conservative panel decisions was higher than the rate for calls that targeted liberal decisions. But in almost all of the groups, a substantial number of conservative panel decisions were allowed to stand. And some liberal panel decisions were dislodged by the vote of the full court.

Indeed, a recurring theme is that the full court sometimes used the en banc process to check the most extreme manifestations of liberal jurisprudence. The California gubernatorial recall case of 2003 is the most prominent example, but there are others.[424] This probably explains why Judge Reinhardt insisted that "the Ninth Circuit is not a liberal circuit." He vividly remembered the liberal panel decisions that he wrote or supported, only to see them set at naught when the full court granted rehearing.

But cases of that kind were the exception rather than the rule. More often than not, the en banc ballot process did promote liberal outcomes.

2. When we look separately at the different kinds of issues that generated en banc calls, we find a wide variation in the *extent* to which the court used the en banc process to produce liberal outcomes. These disparities, although not supporting Judge Reinhardt's characterization, show that the liberalism of the Ninth Circuit is both nuanced and to some degree selective.

At one extreme is the Second Amendment. In every one of the Second Amendment cases that was the subject of an en banc ballot, the liberal position – rejection of the constitutional claim – ultimately prevailed. The skew was almost as great on Takings Clause claims, another reverse polarity issue, although the number of cases was small.

Among issues that reflect traditional polarity, the liberal skew was most pronounced in the realm of workplace litigation. When we include the cases involving preemption by federal labor law, the predominance of liberal outcomes is even greater than the numbers in the table suggest.

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[424] On the California recall case, see supra Part IV.E.

At the other end of the spectrum are issues of federal criminal law and procedure not directly implicating the Constitution. There the two grant rates almost approach parity.

Freedom of expression cases are sui generis. The overall grant rate for en banc calls from the liberal side is only 33% – much lower than that for any of the other classes of cases – but for the small number of reverse polarity cases it is 50%. Consistent with the overall pattern, en banc calls from the conservative side fared worse in both groups.

3. The findings of the study shed light on the phenomenon that Professors Devins and Larsen refer to as "weaponizing en banc."[425] The authors use the phrase to denote a "team mentality" whereby judges on the courts of appeals "vote in blocs aligned by the party of the President who appointed them and use en banc review to reverse panels composed of members from the other team."[426]

As already noted, membership in a partisan "team" correlates closely with ideology. But what we see in the Ninth Circuit, as detailed in the preceding pages, is something more subtle and contingent than the "weaponization" that concerns Professors Devins and Larsen. Some issue areas – the Second Amendment, the Takings Clause, and perhaps workplace law – do exemplify what looks like weaponization. But those are exceptions. Elsewhere, the liberal side prevailed more often than not, but the conservative side was not shut out.

In this connection, it is possible that the Ninth Circuit's unique use of the *limited* en banc court has served as something of a check on the ability – and perhaps the inclination – of the ideological majority to "weaponize" the en banc process. This may happen in two ways. First, when the liberal majority votes in favor of en banc rehearing of a conservative panel decision, the luck of the draw may result in a ruling by the LEBC that substantially ratifies the panel ruling.[427] Second, the members of the liberal majority may sometimes be reluctant to vote for en banc rehearing of a conservative panel decision for the very reason

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[425] Devins & Larsen, supra note 25.

[426] Id. at 1373.

[427] Research has shown that the LEBC *usually* reaches the opposite result from the panel, but that does not *always* happen. See supra note 54 and accompanying text.

that – unlike their counterparts in other circuits – they do not know who will be sitting on the en banc court.[428]

4. From the mid-1980s to the present, the perception of the Ninth Circuit as a very liberal court has been fueled by the court's record of reversals in the Supreme Court.[429] That is because, overwhelmingly, the reversals have come in cases where the Ninth Circuit had reached a liberal result.[430] More recently, the idea has gained further traction from the now-familiar sequence of dissental by members of the Ninth Circuit's conservative cohort followed by review and reversal in the Supreme Court.[431]

This study shows, however, that cases following that path are only part of the story. In other cases, the Supreme Court denies review notwithstanding a fiery dissental from the conservative side. Or a liberal panel opinion is the subject of a successful en banc call, and the LEBC reaches a conservative result. Or a conservative panel opinion is superseded by a liberal ruling by the LEBC – but Supreme Court review is denied or not even sought. All of these sequences have made their appearance in this Article, and all must be taken into account in considering what the Supreme Court's actions (or inactions) tell us about the ideological orientation of the Ninth Circuit.

Conclusion

The conventional wisdom is not wrong. Contrary to Judge Reinhardt's assertion, the Ninth Circuit *is* a liberal court. But it is understandable that Judge Reinhardt would see things differently, because the court as a whole is not as liberal as he was. A majority of his colleagues might agree, in general terms, with the positions that he

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[428] See Maura Dolan, *Rapid changes strain the 9th Circuit; Trump's 10 picks have begun to shift court's longtime liberal bent and stirred criticism from veteran judges*, L.A. Times, Feb. 22, 2020 (available on NEXIS) (attributing to judges the view that "even now Democratic appointees are likely to be more reluctant to ask for 11-judge panels to review conservative decisions because the larger en banc panels, chosen randomly, might be dominated by Republicans").

[429] See, e.g., Stewart, supra note 8.

[430] See, e.g., Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, and the Congress*, 77 Or. L. Rev. 405, 410 (1998).

[431] See supra note 150 and accompanying text.

ascribed to "liberal judges," but that does not necessarily mean that they would vote for a liberal outcome on every en banc ballot or indeed on every close panel decision. On the contrary, the study shows that it was not uncommon for liberal icons like Judge Reinhardt and Judge Pregerson to find themselves on the losing side of en banc votes.

Today, President Biden is remaking the Ninth Circuit with a young new generation of Democratic appointees. A few years from now, it will be time for another examination of ideology and the en banc process in the Ninth Circuit Court of Appeals.