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## En Banc Revisited

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# ESSAY

## EN BANC REVISITED

*Michael Abramowicz\**

*Legal commentators have proposed a variety of solutions to the perceived problems of the U.S. courts of appeals, from splitting large circuits to assuring partisan balance in panel decisions. They have always assumed, however, that judges from a particular appellate court should have sole responsibility for creating the law of that circuit, except when caseload pressures make it necessary to borrow visiting judges. In this Essay, Professor Abramowicz proposes using visiting judges in a more important role: en banc decision-making. Under this proposal, en banc decisions for one circuit would be made entirely by courts of appeals judges randomly selected from other circuits. In addition to increasing the likelihood that any given decision is more likely to be that which a majority of all courts of appeals judges would make, visiting en banc panels would allow for optimization of the number of judges participating in en banc and for generalist review of specialized courts. After assessing these benefits and some possible costs of the proposal, Professor Abramowicz advances a more general case for majoritarian judicial decisionmaking.*

### INTRODUCTION

Commentators have long debated whether law is just politics by another name.<sup>1</sup> Legal scholars, however, have done little to consider the debate's implications. If Benjamin Cardozo was correct in proclaiming that judicial lawmaking is "one of the existing realities of life,"<sup>2</sup> then is

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1. The controversy is perhaps best exemplified by the Hart-Fuller debate about whether law and morality are and can be separate. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593, 612-15 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *Harv. L. Rev.* 630, 631-32 (1958). The debate on the desirability and possibility of separating law and politics remains lively. See, e.g., Robert H. Bork, *The Tempting of America* 2 (1990) ("Those who would politicize the law offer the public, and the judiciary, the temptation of results without regard to democratic legitimacy."); Morton J. Horwitz, *The Transformation of American Law, 1780-1860*, at 254-56 (1977) (identifying "[t]he desire to separate law and politics" as "a central aspiration of the American legal profession" and maintaining that this ideal is unattainable); Christina Gleason, *Law and Politics Theory and Judicial Interpretation of Legislative Intent: Looking at Deference Through a Critical Lens in Able v. United States*, 21 *Women's Rts. L. Rep.* 1, 2 (1999) (arguing "that law and politics are inherently intertwined realms that cannot and should not be segregated for fear of the manifest injustice that results").

2. Benjamin N. Cardozo, *The Nature of the Judicial Process* 10 (1921).

our existing adjudicative process adequate to this part of the judicial task? Christopher Peters has taken a first step toward answering this question, arguing that judicial lawmaking is not inherently undemocratic, particularly if it proceeds in the case-by-case fashion associated with the common law.<sup>3</sup> His inquiry, however, is concerned with the legitimacy of judicial lawmaking, rather than with how the judiciary itself should be structured.<sup>4</sup> The structure of legislative decisionmaking receives great attention, but legal commentators rarely consider how judicial structure might affect the quality of decisionmaking.<sup>5</sup>

In this Essay, I aim to initiate such a discussion by evaluating a concrete problem that scholars have examined: structural reform of the U.S. courts of appeals.<sup>6</sup> I will refocus the existing dialogue, however, by worrying about how courts should be structured given the assumption that judicial decisions, whether or not they are ever properly labeled "political," are indeed genuine *decisions*. Sometimes decisions are among competing, incommensurate values,<sup>7</sup> while at other times decisions may depend on difficult estimates in the face of vast empirical uncertainty.<sup>8</sup> Regardless, if it is possible to speak of a particular decision as "correct" or "incor-

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3. See Christopher J. Peters, *Adjudication as Representation*, 97 *Colum. L. Rev.* 312, 320 (1997).

4. Central to Peters's claim of democratic legitimacy is that litigants are bound only by decisions that are reached in processes in which individuals with interests aligned with theirs participated, a type of representation that he calls "interest representation." *Id.* at 347. For Peters, actual or virtual participation in the judicial decisionmaking process is adequate, even if the representatives have no role in actually making the decision binding the subsequent parties. Peters may be right that litigant participation meaningfully frames judicial decisionmaking. See, e.g., *id.* at 353 (conceding that the judge plays a role in litigation, but stating that "it is far from the autonomous, dictatorial one that it is so often assumed to be"). Nonetheless, the actual decision, given the evidence and arguments presented, is a judicial one, particularly in appellate courts. Unlike Peters, I am concerned with ensuring that the decisionmakers are themselves representative.

5. William Eskridge and John Ferejohn, for example, have modeled the bicameral structure of Congress, arguing that this structure "push[es] policy away from extreme preferences." William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 *Geo. L.J.* 523, 532 (1992). Yet there is little scholarship evaluating whether the structure of the judiciary has a similar effect. But cf. Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems*, 46 *Case W. Res. L. Rev.* 961, 1002-03 (1996) (suggesting that the common law may be more efficient than legislatures at solving certain problems because it effectively requires unanimity).

6. For discussion of scholars' approaches, see *infra* Part I.

7. That choices may be among incommensurate values does not mean that any decision will do. See, e.g., Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 *Mich. L. Rev.* 779, 780 (1994) (clarifying that claims of incommensurability "are emphatically not meant to deny the existence of grounds for evaluating private and public choices").

8. These may not be distinguishable situations, as the phenomenon of incommensurability may simply be an informational problem. See Leo Katz, *Incommensurable Choices and the Problem of Moral Ignorance*, 146 *U. Pa. L. Rev.* 1465, 1466-68 (1998).

rect," the structure of the judiciary plausibly might affect which label applies to a particular decision and how many "correct" and "incorrect" decisions are produced.

Of course, I cannot in this space develop a comprehensive substantive theory of what makes a decision "correct" or "incorrect."<sup>9</sup> But I can offer a suitable working definition. Just as we structure legislatures around majoritarian principles, so too, I will argue, should we seek to ensure that when a panel reaches a decision, it is the decision that a majority of all judges on the courts of appeals would reach if given adequate time to consider the issue.<sup>10</sup> A decision is thus "correct" if it is the hypothetical majoritarian one. Just because judges balance different considerations from legislators, considering values such as *stare decisis* and choosing among approaches to interpretation, does not mean that majoritarianism is less important in the judicial sphere. Yet it is not a goal that the legal academy has embraced, let alone one that scholars have debated how to achieve.

I hope to remedy at least this scholarly neglect by proposing a simple institutional mechanism that would lead to more "correct" decisions in the sense of my working, majoritarian definition: When a circuit sits en banc, the members of the court should not be judges of that circuit, but a sample of judges from other circuits.<sup>11</sup> For example, two or three times a year, a group of appellate judges from outside the Second Circuit would consider petitions for en banc rehearing of decisions by panels within the circuit. After selecting which cases to hear, the judges would meet, presumably in New York, and the visiting en banc court's decisions would be binding on the Second Circuit in the same way as a Second Circuit en banc decision ordinarily would be.

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9. For an attempt at such a theory, see Ronald Dworkin, *Law's Empire* (1986). But see Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 *Harv. L. Rev.* 730, 730-31 (2000) ("The unavoidable impression left by Dworkin's account was that it would take a judge like Hercules to wrest coherence from the chaotic mass of modern law. And the obvious criticism of Dworkin was that Hercules, of course, does not exist.").

10. See *infra* Part III.A. I address only binary decisions, recognizing the potential problems with assuming that a "plurality" decision is the best one, given the pathologies of public choice. See generally Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 *Harv. L. Rev.* 802 (1982), reprinted in Maxwell L. Stearns, *Public Choice and Public Law* 418, 427 (1997) (providing an overview of the applicability of public choice to legal theory).

11. Judge Wallace's proposal for a "national en banc court" at first seems similar to mine. See J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 *Cal. L. Rev.* 913, 936-37 (1983). As in my proposal, such a court would consist of a sample of judges from the various courts of appeals. There are two key differences, however. First, Wallace's court would be convened only to decide an actual intercircuit conflict upon vote of the Supreme Court or a majority of the circuits, a cumbersome procedure. Second, a decision of this court would be binding precedent on all circuits, not just the circuit in which the case originated. This proposal may well be superior to the alternative of a National Court of Appeals. See *infra* Part I.A.2. But it would not provide routinely for the possibility of outside review of panel decisions.

There are three principal considerations underlying this proposal. The first two are that visiting en banc panels will be more representative of the totality of appellate judges than regional ones and that outside review is likely to be less susceptible to extraneous considerations than internal review. The third, and most surprising and significant, is that judges might make better decisions when the identities of those who will review the decisions are unknown. My proposal will provide incentives to craft opinions that appeal to judges in general rather than to a particular group of judges who may be quite different from the broader group.

I will develop the argument as follows. Part I considers alternative approaches to solving the perceived problems of the courts of appeals. In Part II, I present the proposal for visiting en banc panels, elaborating the above discussion, describing some additional benefits of the proposal, and suggesting some ways that the proposal might be extended. Finally, Part III defends explicitly the normative premise underlying the proposal. While the analysis in Part I hints toward the conclusion that majoritarian decisionmaking is desirable, and Part II accepts this and assumes that this is a goal, Part III presents a simple case for the proposition that we should seek to structure the courts of appeals to ensure that cases are decided as the majority would decide them. It also counters arguments that diversity in decisionmaking might have significant benefits.

## I. PROPOSALS TO REFORM THE COURTS OF APPEALS

The U.S. courts of appeals in recent years have been the target of two seemingly very different criticisms. The first criticism is that the courts of appeals have been unable to cope with an ever-increasing caseload.<sup>12</sup> Congress has responded by providing for more judgeships,<sup>13</sup> but the

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12. See, e.g., Hon. Roger J. Miner, Book Review, 46 *Cath. U. L. Rev.* 1189, 1189 (1997) (reviewing Richard A. Posner, *The Federal Courts: Challenge and Reform* (1996) [hereinafter Posner, *Federal Courts*]) (arguing, contrary to Posner, that the federal courts are in crisis, with the caseload having an “adverse effect on the quality of justice”). Complaints about caseload increases are nothing new. See, e.g., Maurice Rosenberg, *Court Congestion: Status, Causes, and Proposed Remedies*, in *The Courts, the Public, and the Law Explosion* 29, 31 (Harry W. Jones ed., 1965) (discussing the recurrent problems of court congestion and the lack of effective remedies).

13. See Federal Judgeship Act of 1990, Pub. L. No. 101-650, tit. II, 104 Stat. 5089 (codified as amended in scattered sections of 28 U.S.C.); see also Administrative Office of the U.S. Courts, *Additional Judgeships Authorized by Judgeship Acts* (last modified Mar. 23, 2000) <<http://www.uscourts.gov/history/tablec.pdf>> (on file with the *Columbia Law Review*). Commentators have long suggested that the increase in the number of judgeships is a response to increasing caseloads. See, e.g., Kenneth W. Starr, *The Supreme Court and the Federal Judicial System*, 42 *Case W. Res. L. Rev.* 1209, 1211–12 (1992) (“It is a truism that there has been an explosion in the caseload . . . and at the same time a considerable expansion of the size of the judiciary itself. . . . The driving reason for that expansion has been, of course, the expansion in the caseload itself . . . .”). John De Figueiredo and Emerson Tiller have shown empirically that increasing caseload is a factor, but not the only consideration, motivating Congress to create new judgeships. See John M. De Figueiredo

caseload has grown even faster.<sup>14</sup> Critics have complained that appellate courts now often seem more like appellate factories,<sup>15</sup> with curtailed opportunities for oral argument<sup>16</sup> and many cases resolved in nonprecedential orders.<sup>17</sup> Increasing the number of judgeships seems like an attractive solution to some,<sup>18</sup> but not to others, who worry that a dramatic increase would further depersonalize the courts.<sup>19</sup>

The second criticism is that decisions of the courts of appeals are excessively ideological.<sup>20</sup> A number of scholars have shown that judicial ideology, even when crudely measured by political affiliation, is a statisti-

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& Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 *J.L. & Econ.* 435, 439 (1996).

14. The number of appeals filed has risen exponentially in the past 60 years, and the Administrative Office has forecast a four-fold increase in total appeals filed over the next 20. See Administrative Office of the U.S. Courts, *Long Range Plan for the Federal Courts* 156 (1995) <<http://www.uscourts.gov/lrp>> (on file with the *Columbia Law Review*) [hereinafter *Long Range Plan*]. Recently, the number of appeals has dropped slightly. See Leonidas Ralph Meacham, Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts: 1999 Caseload Highlights* 13 (1999) <<http://www.uscourts.gov/judbus1999/99highlights.pdf>> (on file with the *Columbia Law Review*) (reporting a three percent drop in appeals filings from the previous year, excluding original proceedings). This dip is probably aberrational.

15. The increase in caseload has resulted in a wide variety of what Thomas Baker calls "intramural reforms" to process appellate cases more expeditiously. See Thomas E. Baker, *An Assessment of Past Extramural Reforms of the U.S. Courts of Appeals*, 28 *Ga. L. Rev.* 863, 864 (1994) ("New internal operating procedures, screening and inventorying, the nonargument calendar, dispositions without opinion, larger numbers of staff attorneys and law clerks, and other related court-initiated reforms have allowed the courts of appeals to cope with the large increases in the numbers of appeals over the last generation.").

16. For discussion of whether oral argument is necessary, compare Stanley Mosk, *In Defense of Oral Argument*, 1 *J. Appellate Prac. & Process* 25, 26-27 (1999) (expounding the importance of oral argument at the appellate level), with Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 *Iowa L. Rev.* 1, 32-33 (1986) (advocating a reduction in appellate oral argument).

17. See, e.g., Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 *Am. U. L. Rev.* 757, 802 (1995) (discussing the dangers of unpublished decisions).

18. See, e.g., Stephen Reinhardt, *Too Few Judges, Too Many Cases*, 79 *A.B.A. J.*, Jan. 1993, at 52, 53 (proposing that Congress double the size of the courts of appeals). See generally Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 *Wis. L. Rev.* 11, 45-49 (summarizing arguments for and against adding judgeships).

19. See, e.g., Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 *Judicature* 187, 187-88 (1993) (discussing the negative impact of increasing the number of judgeships); see also Jon O. Newman, *Are 1,000 Federal Judges Enough? Yes. More Would Dilute the Quality*, *N.Y. Times*, May 17, 1993, at A17 (same).

20. This criticism is not directed at the courts of appeals alone. Proponents of the "attitudinal model" argue that most Supreme Court cases are decided primarily on ideological bases. See Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* 64-69 (1993). For an excellent critical evaluation of the attitudinal model, see Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 *Nw. U. L. Rev.* 251, 279-311 (1997).

cally significant predictor of case outcomes.<sup>21</sup> This observation, though somewhat controversial,<sup>22</sup> is hardly surprising. Even if judges are not consciously seeking to advance their political agendas, law is indeterminate,<sup>23</sup> and a judge who is liberal or conservative cannot always escape her personal philosophy in balancing competing arguments.<sup>24</sup> This may

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21. See, e.g., Robert A. Carp & C.K. Rowland, *Policymaking and Politics in the Federal District Courts* 51–83 (1983) (describing the ideological impact presidents can have on decisions of judges they appoint); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 *Yale L.J.* 2155, 2175 (1998) [hereinafter, Cross & Tiller, *Judicial Partisanship*] (finding that party affiliation of judges on the D.C. Circuit influences outcomes of cases); Malcolm M. Feeley, *Another Look at the "Party Variable" in Judicial Decision-Making: An Analysis of the Michigan Supreme Court*, 4 *Polity* 91, 99 (1971) (demonstrating that party affiliation of Michigan Supreme Court judges influences their decision-making); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 *Am. Pol. Sci. Rev.* 491, 504–05 (1975) (finding party affiliation of judges to impact decision making greatly); Stuart S. Nagel, *Judicial Backgrounds and Criminal Cases*, 53 *J. Crim. L. Criminology & Police Sci.* 333, 334–35 (1962) (presenting evidence that "on the bipartisan supreme courts Democratic and Republican judges do differ from one another in deciding criminal cases"); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 *Va. L. Rev.* 1717, 1766–72 (1997) (suggesting that D.C. Circuit judges employ a "strategically ideological approach to judging"); Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 *U. Chi. L. Rev.* 1073, 1171–81 (1992) (finding party affiliation to affect judges' rulings on the lack-of-interest defense in Title VII cases); Donald R. Songer & Sue Davis, *The Impact of Party and Region on Voting Decisions in the United States Courts of Appeals, 1955–1986*, 43 *W. Pol. Q.* 317, 322–29 (1990) (presenting statistical evidence showing party affiliation's impact on judges' voting behavior in appeals courts); Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 *J.L. Econ. & Org.* 349, 368–69 (1999) [hereinafter Tiller & Spiller, *Strategic Instruments*] (describing how a court could insulate its rulings from review by higher courts with opposing ideology).

22. See Harry T. Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 *U. Colo. L. Rev.* 619, 621–22 (1985) (critiquing the view of courts as "essentially political bodies").

23. As Ken Kress persuasively argues, this means only that many legal questions can be answered in different ways, not that law can never provide correct answers or reasons to think that some answers are better than others. See Ken Kress, *Legal Indeterminacy*, 77 *Cal. L. Rev.* 283, 283–85, 336–37 (1989).

24. Someone who does not believe that ideology matters at all must be puzzled by those who worry about the effect that a particular presidential election would have on the judiciary. See, e.g., Stuart Taylor, Jr., *The Supremes in the Dock: The High Court's Balance of Power May Turn Into a Hot Issue*, *Newsweek*, Apr. 10, 2000, at 48 (speculating on how the next president's Supreme Court appointments could reshape the law). Surely the power to select judges does not invite attention solely because one presidential candidate might be more skilled than another at identifying talented judicial candidates, independent of philosophy. And while personal philosophy and judicial philosophy may be separable, surely there is a correlation between them, as those who are politically liberal are more likely to become liberals on the bench than those who are politically conservative, and vice versa. Moreover, concern about the politics of judicial nominees is nothing new. See generally Sheldon Goldman, *Picking Federal Judges: Lower Court Selection From Roosevelt Through Reagan* 7–9 (1997) (surveying concerns of early presidents about political beliefs of their judicial nominees).

be unavoidable, but what is perhaps more troubling is that entire circuits seem to have ideological casts, with the liberal Ninth Circuit and the conservative Fourth Circuit currently perceived as being on opposite sides of the spectrum.<sup>25</sup>

These two criticisms have been made largely independently, but they are conceptually linked. The essence of the first criticism is that the courts of appeals have a "big numbers" problem. There either will be too many cases for panels to devote adequate attention to each one, or too many judges to maintain the coherence and integrity of the courts of appeals. The second criticism, meanwhile, amounts to a "small numbers" problem. Because only three judges decide the vast majority of appeals, the outcome of many will depend on the happenstance of which judges are on a particular panel<sup>26</sup> and in which circuit a particular suit is brought.<sup>27</sup> The small numbers problem thus exists because of the big numbers problem. Given the large caseload, each case must be assigned to a panel that represents a small subset of the courts of appeals, but the decision of one randomly selected panel might be different from that of another.

Both criticisms suggest that as courts and caseloads become bigger, it is increasingly difficult to identify a particular decision as "a decision of the U.S. courts of appeals." Technically, of course, every decision is labeled as emanating from one of the circuits of the courts of appeals, but decisions may seem to be more the product of some bureaucratic process than the reasoned conclusions of a known group of individuals. There is a large enough number of judges that the institutional identity of the courts of appeals, and even of individual circuits, is ever more independent of the identities of individual judges, who emerge as the machine's cogs (albeit powerful and thoughtful ones) rather than as the machine itself. So large is the machine that some lawyers doubt whether particular

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25. See, e.g., Linda Greenhouse, *Justices, Criticizing Appeals Court, Restore a Death Sentence*, N.Y. Times, Apr. 30, 1998, at A22 ("The Ninth Circuit . . . remains the country's most liberal appeals court . . ."); Brooke A. Masters, *4th Circuit Pushing to Right*, Wash. Post, Dec. 19, 1999, at C1 (describing the Fourth Circuit as perhaps "the most conservative in the country"); Larry O'Dell, *This Court is a 'Supreme' Challenge*, Charleston Gazette, Apr. 18, 2000 ("[T]he 4th U.S. Circuit Court of Appeals has gained a reputation as the most boldly conservative appellate circuit in the nation.").

26. Three-judge panels are generally assigned cases through random selection. See, e.g., 3d Cir. Internal Operating Proc. 1.1 ("[F]ully briefed cases are randomly assigned . . . to a three-judge panel . . ."). Random assignment, however, is not required by statute. See 28 U.S.C. § 46 (1994).

27. Venue may be proper in more than one circuit. For example, administrative law cases may be filed in either the D.C. Circuit or in some other circuit. See generally Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. Chi. L. Rev. 976, 998-99 (1982). Moreover, even if the law provides for only one circuit in which a particular suit might be brought, this lack of ambiguity does not necessarily make the decisionmaking process any less random. Rules can be both clear and arbitrary.



opinions speak for the judge listed as the author,<sup>28</sup> let alone for the panel, let alone for the circuit, let alone for the courts of appeals as a whole, let alone as the voice of the "judicial Power."<sup>29</sup>

This Part assesses existing proposals responding to criticisms that the courts of appeals are either unable to cope with their caseloads or are excessively ideological. I hope to show that although some of the proposals have merit, none is likely to provide an adequate answer even to the specific problems at which it aims. At the same time, the analysis of the limits of the proposals may help point the way toward a solution.

#### A. *Proposals to Accommodate Caseload*

This section will survey two types of possible structural responses to the increase in the size of the federal judiciary. The first is to split circuits, and the second is to create an additional tier of circuit courts, either below or above the existing circuits. Both of these approaches are responses to the prospect that increasing caseloads will heighten inconsistency among decisionmakers. But each is limited by attacking inconsistency for inconsistency's sake. Inconsistency is problematic not only because it might lead to confusion in structuring commercial transactions or other arrangements, but also because its existence means that at least one court has not arrived at the best answer to a particular legal question.<sup>30</sup>

1. *Splitting Circuits.* — The most obvious structural response to the increasing number of judges and cases in the federal appellate courts would be to split bloated circuits, such as the Ninth Circuit, into two or more pieces. This approach has a historical pedigree, most recently with the 1981 split of the Fifth Circuit into the independent Fifth and Eleventh Circuits.<sup>31</sup> If splitting a circuit has any effect at all on whether a randomly selected panel decision is more or less likely to be what the

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28. The alternative possibility is that the opinion speaks only for a law clerk or staff attorney. See, e.g., Posner, *Federal Courts*, supra note 12, at 143–57 (documenting and assessing the rise of law clerks and staff attorneys); Nadine J. Wichern, Comment, *A Court of Clerks, Not of Men: Serving Justice in the Media Age*, 49 *DePaul L. Rev.* 621, 628–41 (1999) (discussing the role of law clerks in drafting judicial opinions).

29. U.S. Const. art. III, §§ 1, 2.

30. Inconsistency, moreover, probably cannot be completely eliminated. Arthur Hellman has persuasively argued, with the aid of an empirical test, that no existing structural reform proposal is likely to eliminate the unpredictability of appellate adjudication. Even where the law is clear, it may be unclear how the law applies to various factual situations, and different judges are likely to take different positions. See Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 *U. Pitt. L. Rev.* 1029, 1107 (1999).

31. For discussions of the Fifth Circuit split, see Deborah J. Barrow & Thomas G. Walker, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform* 246 (1988) (studying political interactions between appellate courts and other branches of government through the lens of the Fifth Circuit split); Robert A. Ainsworth, Jr., *Fifth Circuit Court of Appeals Reorganization Act of 1980*, 1981 *B.Y.U. L. Rev.* 523, 532–33 (describing background and passage of the Fifth Circuit Court of Appeals

majority of all U.S. courts of appeals judges would have decided, the effect is likely to be negative. Smaller groups of judges are inherently less likely to be representative than larger groups. In addition, judges are not randomly assigned to circuits,<sup>32</sup> and, all else being equal, two judges are at least marginally more likely to be similar in any given respect if they are on the same circuit than if they are on a different one. En banc decisions will thus be quirkiest in a smaller circuit, and judges may emulate this quirkiness in writing panel opinions.

Smaller circuits would also allow for more unrestrained decisionmaking. The smaller the group, the more intense the relationship between any two members of the group, and thus the more difficult it may be for one judge to evaluate another's work objectively, either when sitting on a panel with that judge or when evaluating that judge's opinion in response to a suggestion for rehearing en banc. In addition, it is easier for a judge to count votes on a small circuit than on a large one and thus to know what she can get away with. Besides, a judge can count on herself and the panel member who agreed with her, and these two votes are a larger percentage of a majority in a small circuit than in a large one.

Nor will splitting circuits be successful in eliminating inconsistent and unpredictable decisionmaking. It is of course true that fewer direct conflicts will occur when there are fewer binding precedents, just as fewer cars will crash into one another when other vehicles are prevented from traveling on a particular highway.<sup>33</sup> Any instance of intracircuit conflict avoided by a split, however, is necessarily an instance of intercircuit conflict created. Indeed, the amount of intercircuit conflict created will be greater than the amount of intracircuit conflict avoided, because splitting a circuit frees panels in one of the new circuits from having to attempt to achieve consistency with the panels of the other.

Meanwhile, even if it is possible to predict what some particular judges will do,<sup>34</sup> it will be difficult to predict with confidence what deci-

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Reorganization Act); Burke Marshall, Book Review, 63 *Tul. L. Rev.* 1241, 1246-47 (1989) (reviewing Barrow & Walker, *supra*).

32. This is in part because of the considerable role that individual senators may have in controlling appointments in their states. See generally Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 *Harv. J.L. & Pub. Pol'y* 467, 529-31 (1998) (discussing the practice of senatorial courtesy).

33. It is possible, however, to exaggerate the number of conflicts that will arise in a large circuit and the significance of such conflicts. See Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 *U. Chi. L. Rev.* 541, 574-94 (1989) (demonstrating that direct circuit conflicts in the Ninth Circuit are both rare and unlikely to affect primary activity).

34. Evan Osborne has recently shown that the U.S. legal system is highly predictable, in the sense that pretrial predictions account for a great deal of the variance in outcomes. See Evan Osborne, *Courts as Casinos? An Empirical Investigation of Randomness and Efficiency in Civil Litigation*, 28 *J. Legal Stud.* 187, 202-03 (1999). This does not, however, mean that individual appeals are predictable.

sion a panel of three randomly selected judges will reach.<sup>35</sup> If there are just two judges in a circuit whose resolutions of a particular issue are unpredictable, then, because those two judges might be on the same panel, the decision of the circuit as a whole is unpredictable.<sup>36</sup> Moreover, whatever predictability benefits are achieved by virtue of having a "known bench"<sup>37</sup> are likely to be dwarfed by the costs of having less binding precedent. The greater the number of cases previously decided, the greater the predictability of the law.<sup>38</sup> Because a smaller circuit will decide fewer Fourth Amendment cases than a larger one, for example, that area of law will be less predictable than it would be in the absence of a circuit split.<sup>39</sup>

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35. On a court with seven judges, there are 35 different permutations of three-judge panels.

36. If a circuit reheard all cases en banc in which the panel reached a decision contrary to what the en banc division would reach, this residual unpredictability might be eliminated. It is implausible, however, that nearly so much en banc review would occur. See Leonidas Ralph Mecham, Administrative Office of the U.S. Courts, Judicial Business of the United States Courts: 1999 Annual Report of the Director 47 tbl.S-1 (1999) <<http://www.uscourts.gov/judbus1999/s01sep99.pdf>> (on file with the *Columbia Law Review*) (providing statistics on the frequency of en banc review). If all cases in which there might be an inconsistency were reviewed, much of the advantage of hearing cases in three-judge panels would be lost.

37. Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 48 (1998) <<http://www.app.com.uscourts.gov>> (on file with the *Columbia Law Review*) [hereinafter Final Report]; see also *infra* note 86.

38. The effect may be relatively small. See, e.g., Hellman, *supra* note 30, at 1085–88 (showing that a rule that made panel decisions binding on all circuits would not greatly increase predictability). Nonetheless, given the large number of combinations of three-judge panels even in a relatively small court, see *supra* note 35, it seems unlikely that the increase in predictability attributable to less diverse personality in a smaller court would be greater than the decrease in predictability attributable to a massive reduction in the quantity of binding precedent. Like Hellman, I suspect that structural decisions will have little effect on predictability. See Hellman, *supra* note 30, at 1107. Part of the basis for this suspicion is that in every appellate case not settled, a party that lost presumably believed it had a chance of winning. If larger circuits' law were less predictable, then they would hear disproportionately more cases than smaller circuits. A preliminary glance at the data suggests that they do not. Compare Mecham, *supra* note 36, at 102–04 tbl.B-3A (counting appeals), with *id.* at 130–32 tbl.C (counting total civil district court cases). My calculations show that the Ninth Circuit has a civil appeals rate of 14.7%, making it quite average, as the other circuits' rates vary from 10.3% to 18.6%.

39. A counterargument would be that it is the existence of precedents that makes the law predictable, rather than any binding force that these precedents have on decisionmakers. Cf. William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. Legal Stud. 235, 236 (1979) (suggesting that the production of precedents by the courts is a positive externality). On this theory, judges in a particular division could still examine the decisions of other divisions, and the accumulated wisdom of those decisions would make the judges' decisions predictable. Indeed, the decisions of any given circuit have only a trivial effect on the predictability of law on this theory, because even a division with no binding precedent could look to the law of other circuits for guidance. While the mere writing of opinions may marginally increase predictability, if a merely persuasive authority is so convincing that it makes an outcome predictable, then that outcome would be similarly predictable if the same argument were developed in a brief.

2. *Adding Tiers.* — The Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by former Justice Byron R. White, recently proposed that the Ninth Circuit be divided vertically rather than horizontally.<sup>40</sup> Under this proposal, the Ninth Circuit would be divided into three geographically based “divisions,” including, for example, the Southern Division, which would include the Districts of Arizona and Central and Southern California.<sup>41</sup> Though some administrative functions of the Ninth Circuit would be centralized,<sup>42</sup> each division would in essence operate as a separate circuit with its own en banc court. The proposal also would create a “Circuit Division,” composed of thirteen judges from the circuit, “whose sole mission would be to resolve conflicting decisions between the regional divisions.”<sup>43</sup>

The Commission stressed that “large appellate units have difficulty developing and maintaining consistent and coherent law.”<sup>44</sup> If there were a smaller number of judges in an “appellate unit,” the Commission argued, there would be fewer cases with which any given decision might conflict. The creation of the Circuit Division, meanwhile, would ensure consistency among the divisions.<sup>45</sup> In addition, the Commission claimed that “[d]ecisions should . . . become more predictable because a divisional arrangement that creates smaller, more stable groups of reviewers will allow district judges to know better who will be reviewing their decisions, and lawyers to know better the judges who will be deciding their cases.”<sup>46</sup>

This alleged coherence and predictability come at a price: the creation of an additional level of review.<sup>47</sup> The coherence and predictability benefits, moreover, may be illusory. Just as splitting circuits only substitutes intercircuit for intracircuit conflict, dividing circuits reduces intradivisional conflict only at the expense of interdivisional conflict. Similarly, the small size of divisions would lead to less binding precedent and thus less predictability. Of course, the Circuit Division would be available to eliminate conflicts, but this function could be accomplished also by an en banc panel without dividing the circuit.<sup>48</sup> That the Circuit Division

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40. See Final Report, *supra* note 37, at 40–47.

41. See *id.*

42. See *id.* at 46–47.

43. *Id.* at 45. The 13 judges would include the Chief Judge and four judges from each of the three divisions. See *id.*

44. *Id.* at 47.

45. See *id.* at 48–49.

46. *Id.* at 48.

47. “[I]f the Ninth Circuit were the only circuit to implement these changes, litigants in the Ninth Circuit would have to go through one more layer of judicial review than would litigants in other circuits before reaching the Supreme Court.” Recent Cases, 113 *Harv. L. Rev.* 822, 825 (2000).

48. Note that under the Commission’s proposal, the Circuit Division’s membership would change annually, as members would serve three-year, staggered terms. See Final Report, *supra* note 37, at 45 (asserting that this would provide for “continuity of membership, along with gradual rotation”, a contradiction in terms). Given the relatively

would be reviewing interdivisional conflicts rather than inconsistencies among panel decisions makes no difference at all.

An alternative would be to create a new tier above the existing circuit courts. Indeed, one of the oldest proposals for managing the increased caseload of the appellate courts is to create a National Court of Appeals.<sup>49</sup> The purpose of such a court would be to resolve intercircuit conflicts,<sup>50</sup> as well as, in some versions, help manage the certiorari docket of the Supreme Court.<sup>51</sup> This proposal is all but dead,<sup>52</sup> in part because one of its primary motivations was to alleviate caseload pressure on the Supreme Court, which has managed to whittle its docket on its own.<sup>53</sup> The proposal is nonetheless worth considering as a theoretical matter, particularly because adding additional tiers above the circuit level may come to seem more attractive as the caseload and size of the circuit courts continues to grow.

This proposal, however, does not demand detailed analysis, for its flaws are quite similar to those of the proposed break-up of the Ninth Circuit. On one hand, the composition of a single National Court of Appeals consisting of a small number of judges would be less regional than

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small number of en banc decisions in a particular year, however, this personnel continuity is unlikely to be greater than in the Ninth Circuit's existing approach, which is to convene en banc panels consisting of a randomly chosen ten judges plus the Chief Judge. See *infra* note 97 and accompanying text. If continuity in membership were particularly important, this benefit could be achieved through appointments to the en banc panel in the same manner as proposed for the Circuit Division.

49. See Federal Judicial Ctr., Report of the Study Group on the Caseload of the Supreme Court 47-48 (1972) (proposing the creation of a National Court of Appeals); see also Edward Dumbauld, A National Court of Appeals, 29 Geo. L.J. 461, 468 (1941) (arguing for a National Court of Appeals). Arguments against the National Court of Appeals include William H. Alsop, A Policy Assessment of the National Court of Appeals, 25 Hastings L.J. 1313, 1347-49 (1974); Charles L. Black, Jr., The National Court of Appeals: An Unwise Proposal, 83 Yale L.J. 883, 885-94 (1974); and William J. Brennan, Jr., The National Court of Appeals: Another Dissent, 40 U. Chi. L. Rev. 473, 475-76 (1973). For a current critique, see Dragich, *supra* note 18, at 49-52.

50. See, e.g., Warren E. Burger, Annual Report on the State of the Judiciary, 69 A.B.A. J., Apr. 1983, at 442, 442 (calling on Congress to establish a "panel to resolve intercircuit conflicts").

51. See generally Samuel Estreicher & John E. Sexton, A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study, 59 N.Y.U. L. Rev. 681, 690-92 (1984) (reviewing the debate over the proposition that the National Court of Appeals would have improved the Supreme Court's "performance of its essential constitutional and judicial functions").

52. The Administrative Conference's most recent long range plan rejects the proposal and similar ones. See Long Range Plan, *supra* note 14, at 46. The Conference asserted that "[c]urrent empirical data on the number, frequency, tolerability, and persistence of unresolved intercircuit conflicts (i.e., those not heard by the Supreme Court) indicate that intercircuit inconsistency is not a problem that now calls for change." *Id.*

53. In the October 1988 term, the Supreme Court granted review for 223 cases on its appellate docket, or 10.4%. See The Supreme Court, 1988 Term, 103 Harv. L. Rev. 394, 398 tbl.II (1989). Ten years later, in the October 1998 Term, the Supreme Court granted review of 72 cases on its appellate docket, or just 3.5%. See The Supreme Court, 1998 Term, 113 Harv. L. Rev. 400, 407 tbl.II(b) (1999).

the composition of any lower court of appeals. On the other hand, because of its small size, the court's composition would not necessarily mirror the composition of the broader courts of appeals. Accidents of timing could lead to a statistically aberrant number of Republicans versus Democrats on the court, or, party labels aside, an aberrant number of judges on any side of a particular issue. In addition, the composition of the National Court of Appeals would differ significantly from that of the Supreme Court, leading to the possibility that the National Court of Appeals and the Supreme Court might tug the law in different directions. Adding layers of review, in short, would not necessarily improve decision-making. It would merely prolong it and shift power from one group of judges to an equally fallible group designated as hierarchically superior.

### B. *Proposals to Neutralize Ideology*

1. *Clearer Substantive Law.* — A tempting approach to avoiding ideologically-based decisionmaking is to minimize opportunities for judicial discretion. Perhaps there are some areas of law in which judicially crafted standards and balancing tests might give way to bright-line rules,<sup>54</sup> and perhaps Congress might learn to draft statutes more clearly to minimize the number of ambiguities.<sup>55</sup> Ultimately, though, such a project can accomplish only so much. No matter how diligently legislators, administrative agencies, and judges attempt to make themselves clear, it is never possible to anticipate the full range of questions that will arise in a particular legal regime. There will always be statutory gaps and hard cases.

To be sure, law could be more rule-like, but this would not necessarily make the law better. The point of rules is to prevent some factors from being considered, so a rule may dictate one result even when the background justifications for the rule would dictate another.<sup>56</sup> The choice between rules and standards is thus a tradeoff of incongruities. Application of a rule will not always be equivalent to what a majority of a large group of judges would decide in particular cases if there were no rule. But application of a standard by a subset of a group of judges will

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54. Justice Scalia is a prominent expositor of the position that law should be more rule-like. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1176-83 (1989). For a critique of the view that judges can apply neutral principles, see Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781, 806-21 (1983).

55. See, e.g., Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 Harv. J. on Legis. 123, 133-36, 154-63, 171-73 (1992) (discussing various approaches to reducing ambiguities in statutes).

56. This is fundamental to Frederick Schauer's account of rules. See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 47-52 (1991) (explaining how rules are entrenched generalizations). The result is that rule-based decisionmaking is necessarily suboptimal, though it still may be a superior decisionmaking procedure to one that does not involve rules. See *id.* at 100-02.

also not be equivalent to what a majority of the entire group would decide, because subsets may not be representative.<sup>57</sup> Even the best rule may thus be inferior to a standard, if the goal is to treat cases as often as possible as most judges would believe they ideally should be treated.

2. *Split Panels.* — It is thus understandable that, until recently, no scholars have suggested any concrete means of reducing the effect of ideology in decisionmaking. In a July 1999 essay in the *Columbia Law Review*, however, Professors Emerson Tiller and Frank Cross, both positive political theorists who have worked to measure and analyze the impact of ideology and strategy on decisionmaking,<sup>58</sup> recognized that a structural mechanism might reduce the amount of ideological decisionmaking.<sup>59</sup> In particular, Tiller and Cross noted that three-judge panels are most likely to decide cases ideologically when all three judges are members of the same political party.<sup>60</sup> The inevitability of decisionmaking by panels, they recognized, does not mean that politically unified panels are likewise

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57. Schauer observes that one reason that a decisionmaker might follow a rule, rather than consider what outcome background justifications would demand, is because the decisionmaker “may have prudential epistemic reasons for doubting her own decision-making capacities compared to those of the rule-maker.” *Id.* at 125. Schauer does not focus on the role of rules in constraining decisionmakers to whom are delegated certain decisionmaking tasks by a larger group concerned that the individual decisionmakers might place different weight on the background justifications than the group as a whole would. He does emphasize, however, that establishing rules may decrease the possibility of “error” by decisionmakers, see *id.* at 143–45, and that rules may effectively serve to allocate power among judges and others, see *id.* at 158–62.

58. See, e.g., Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 *S. Cal. L. Rev.* 741, 745–46 (2000) (stating that empirical work suggests that Justices “use legal analysis as post-hoc rationalization for preferred policies”); Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 *Int’l Rev. L. & Econ.* 503, 505–19 (1996) (developing a rational choice framework for understanding Congress’ reversals of Supreme Court decisions); Emerson H. Tiller, *Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making*, 14 *J.L. Econ. & Org.* 114, 132–33 (1998) (arguing that courts may affect agency policymaking by reviewing agency processes; Tiller & Spiller, *Strategic Instruments*, *supra* note 21, at 369–70 (describing how agencies and courts use rulemaking, guidelines, and policy statements in decisionmaking); Frank B. Cross, *The Justices of Strategy*, 48 *Duke L.J.* 511, 531–47 (1998) [hereinafter Cross, *The Justices of Strategy*] (reviewing Lee Epstein & Jack Knight, *The Choices Justices Make* (1998)) (noting shortcomings in political science research in judicial decisionmaking).

59. See Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 *Colum. L. Rev.* 215, 226–34 (1999) [hereinafter Tiller & Cross, *A Modest Proposal*].

60. See *id.* at 215 n.1 (citing Cross & Tiller, *Judicial Partisanship*, *supra* note 21, at 2168–72). They also noted that at certain times, the probability of a politically unified panel in a particular circuit may be quite high. See *id.* at 228 tbl.4 (showing that in 1992, in the First, Second, Third, Fifth, and Eighth Circuits, there was between a 54% and 77% chance of drawing a panel composed of all Republicans).

inevitable.<sup>61</sup> They thus proposed that every panel contain at least one Democrat and one Republican.<sup>62</sup>

This proposal would help reduce the variability of panel decision-making, but only somewhat. Tiller and Cross persuasively argue that if one of the majority party judges is more moderate than the other, then that individual “may be able to forge a more centrist outcome with the weaker ideologue from the majority party coalition, thereby moderating against extreme partisan outcomes.”<sup>63</sup> Tiller and Cross, however, do not claim that the difference between politically divided and politically unified panels is large. Rather, in their study of panels’ decisions regarding whether to defer to or strike down an administrative agency decision in applying the *Chevron* doctrine, Tiller and Cross conclude that “it is 17% less likely that the court will defer when it is unified than when it is split 2-1.”<sup>64</sup> It is pointless to debate whether this is a lot or a little; it is surely

61. See *id.* at 215–18.

62. Tiller & Cross point out that this would be easy to implement:

[W]hen assigning three-judge panels to cases, the court clerk would first divide the circuit members by appointing president. The clerk would then randomly select one representative from each party and assign those judges to the case. Then all the judges who were not selected would be placed together, irrespective of party, and the third judge would be randomly selected from this group.

*Id.* at 233. Tiller and Cross acknowledge that their proposal might cause an unbalanced workload when fewer than one-third of the judges in a particular circuit are of the minority party, but they suggest that “[t]his problem could be resolved by using senior status judges from that party, or by having district court judges of that party sit by designation.” *Id.*

63. *Id.* at 228. Challenging this argument, Judge Patricia Wald argues that “a judge will not always hew to the party line, however defined.” Patricia M. Wald, A Response to Tiller and Cross, 99 Colum. L. Rev. 235, 239 (1999). As a critique of the merits of the proposal, this argument is weak, because the proposal depends only on some correlation between party membership and ideology. See Emerson H. Tiller & Frank B. Cross, A Modest Reply to Judge Wald, 99 Colum. L. Rev. 262, 263–64 (1999) [hereinafter Tiller & Cross, Modest Reply] (making this point in rebuttal). Of course judges, or at least federal judges, are not looking to party leaders to see how they should vote for the good of the party. But Republicans tend to be more conservative than Democrats, and, at least on some issues, liberal judges will tend to see things differently from more conservative judges. One need not look further than the Supreme Court for convincing verification of such a tendency. In recent years, many cases have been decided with a familiar 5 to 4 split. See *The Supreme Court, 1998 Term*, *supra* note 53, at 405 tbl.I (showing that in seven of 16 decisions decided by a 5 to 4 margin, the same alignment of Justices Rehnquist, O’Connor, Scalia, Kennedy, and Thomas prevailed, and that in an additional eight, no more than one justice from each side defected).

64. Cross & Tiller, *Judicial Partisanship*, *supra* note 21, at 2171. Cross and Tiller state that when a panel defers to the agency, it is “follow[ing]” the *Chevron* doctrine. See *id.* at 2173 fig.2. This terminology is misleading, since *Chevron* requires judges to reject agency decisions that are clearly inconsistent with the statute. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). Judge Wald criticizes Tiller and Cross for this:

I suspect that what Tiller and Cross have discovered is not mass lawlessness by the D.C. Circuit’s Republican appointees, but some individualized facets of the judicial styles of the small group of Republicans in their sample whose opinion-



enough to merit concern,<sup>65</sup> but not enough to justify the conclusion that panels will resolve cases as a majority of all courts of appeals judges would resolve them.<sup>66</sup>

Tiller and Cross explain that the principal advantage of mixed panels is what they refer to as a “whistleblower” effect.<sup>67</sup> “The idea here,” they explain, “is that if the partisan majority members were to manipulate or ignore doctrine, the minority member would expose them through a dissent.”<sup>68</sup> Judges might be willing to indulge bad reasoning if they can be confident that no one will call them on it,<sup>69</sup> or they might even trade

writing idiosyncrasies would naturally show up more strongly in a pool of unified panels than in a pool of mixed panels.

Wald, *supra* note 63, at 244. Whether judges’ decisions amount to “mass lawlessness,” however, is not the point. Cf. Tiller & Cross, *Modest Reply*, *supra* note 63, at 262 (noting that it does not matter whether judicial actions are conscious or unconscious). What I consider to be the ultimate point is that different judges will decide many cases differently, and the more similar judges are, the greater the chance they will decide a particular case in a manner different from how the majority would decide it.

65. More precisely, it matters as long as the effect is not merely a product of statistical chance. The finding was significant at the 0.10 level, but not at the 0.05 level. See Cross & Tiller, *Judicial Partisanship*, *supra* note 21, at 2170 tbl.2.

66. Even with the Tiller and Cross system, there is still a substantial probability that a panel decision will differ from what the decision of a circuit as a whole would be. Suppose what seems to make the strongest possible case for the Tiller and Cross approach, that there is some issue on which political affiliation correlates perfectly with how judges would vote on a particular issue. Ensuring that there are divided panels would actually decrease the probability that a particular case would be decided in accordance with the majority position. This may seem counterintuitive, but the reduction in all-majority panels attributable to their proposal more than offsets the reduction in all-minority panels. Suppose, for example, that an 11-judge circuit has six Republicans and five Democrats, all of whom will necessarily vote the party line. If a three-judge panel is randomly selected, the probability that a majority of Republicans will control is  $(5 \cdot {}_6C_2 + {}_6C_3) / {}_{11}C_3 = 95/165$  (that is, the total number of panels with two or three Republicans divided by the total number of panels, where  ${}_xC_y$  represents the number of combinations possible in selecting  $y$  objects from  $x$  possibilities), or about 58%. If first a Republican and a Democrat are selected, then there are nine judges left, of whom five are Republicans, so the chance that a Republican is selected is  $5/9$ , or about 56%.

67. See Tiller & Cross, *A Modest Proposal*, *supra* note 59, at 228–32; Cross & Tiller, *Judicial Partisanship*, *supra* note 21, at 2169–74.

68. Tiller & Cross, *A Modest Proposal*, *supra* note 59, at 228–29.

69. If a three-judge panel consists of one judge who feels strongly about an issue and two judges who do not, the uninterested judges might sign on to the passionate judge’s opinion regardless of whether they agree. As Judge Posner acknowledges:

Even in a three-judge panel, provided that at least one judge has a strong opinion on the proper outcome of the case, or even that a law clerk of one judge has a strong opinion on the matter, the other judges, if not terribly interested in the case, may simply cast their vote with the ‘opinionated’ judge.

Richard A. Posner, *Overcoming Law* 123 (1995). A majority may thus give in even to a whistleblower with whom they disagree. For the whistleblower effect to be strongest, there must be two opinionated judges who lean to opposite sides of an issue.

votes across cases.<sup>70</sup> Similarly, mere exposure to counterarguments may save judges from casting votes that they might otherwise have cast in partial ignorance.<sup>71</sup> No matter what the party composition of a panel, however, there may be relatively few cases in which the whistleblower effect is likely to matter. After all, few opinions generate dissents at all.<sup>72</sup> Moreover, the specter of partisan decisionmaking is merely one aspect of a broader problem: that a particular panel will see an issue differently from most judges, whether its view is ideological or not. Ideological decisionmaking is just one form of nonmajoritarian decisionmaking. Ideally, there would be a more comprehensive means of “whistleblowing” on judges who make decisions that others would not reach after full consideration of cases. That is what my proposal seeks to provide.

## II. THE PROPOSAL FOR VISITING EN BANC PANELS

So far, I have shown that existing reform proposals are unlikely, by themselves, to provide adequate answers to the problems associated with increasing caseloads and the impact of ideology on judging. The problem, in short, is that scholars have focused primarily on guiding cases to the judges they consider most likely to make good decisions. These efforts may be important, but no matter how many judges make up a circuit, no matter how many tiers to the courts of appeal, and no matter

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70. For a normative assessment of whether vote trading and other forms of judicial compromise are justifiable, see Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 Mich. L. Rev. 2297, 2323–33 (1999).

71. Tiller and Cross allude to this aspect, which is likely to be less significant in cases that are well-briefed, but downplay it by their use of the word “whistleblower.” See Tiller & Cross, *Modest Reply*, *supra* note 63, at 267 (agreeing with Judge Wald that a would-be dissenter sometimes might cause members of a majority to rethink a particular issue); see also *id.* at 262 (clarifying that “by whistleblowing we did not mean blatant confrontation among the members of a panel”). Judge Harry Edwards criticizes Tiller and Cross for ignoring the possibility that their effect might be attributable to what he calls “collegiality.” Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 Va. L. Rev. 1335, 1357–59 (1998); see also *id.* at 1358 (“In . . . a collegial deliberative process, we would expect to find that the presumed political views of different judges push the outcome towards the center of the spectrum (where there is a spectrum).”). In my view, this is ultimately a question of semantics, and if “collegiality” is good, it may be desirable to induce more of it. Perhaps Tiller and Cross’s critics on the bench feel accused by the findings that political affiliation is predictive of decisionmaking. To me, these are important not because they somehow make judicial decisionmaking suspect, but simply because they prove that different people will approach cases differently, an observation with which Judge Edwards might well agree. See, e.g., *id.* at 1360–61 (“It is inevitable and probably salutary that judges’ different professional and life experiences have some bearing on how they initially confront various problems that come before them.”). If different judges sometimes see the world and decide cases differently, then worrying about whether individual three-judge panels are representative is a worthwhile endeavor.

72. In the first four months of 2000, for example, the courts of appeals issued a total of 8452 decisions listed on Westlaw, of which only 219 included dissents, yielding a dissent rate of 2.6%. Search of Westlaw, CTA database (Aug. 25, 2000). In part, of course, the low dissent rate may be because it is the credible threat of a dissent, not an actual one, that is important.

what proxies we use to achieve moderate decisionmaking, individual cases will still be decided by small numbers of judges, and those judges might make decisions that are different from what judges generally would decide. The challenge, I will argue, is to craft a mechanism that will increase the incentives that individual judges have to decide cases as judges generally would decide them, and correct at least some cases in which judges have failed to do so.

En banc review is the most logical building block for such a mechanism, because it already serves these functions to some extent. Moreover, the practice reflects the simple insight that providing for the possibility of review by a broad group of judges may be more effective in achieving majoritarian decisionmaking than any *ex ante* steering mechanism could be. A simple reform would be to have more en banc review, for example, by making it easier for judges to trigger the mechanism.<sup>73</sup> Although I am sympathetic to the notion that we should have more en banc review,<sup>74</sup> I believe that it is more important to reform en banc structurally. Existing en banc review may be too embedded in the politics of individual circuits to be an effective mechanism of discipline. I do not question that judges take en banc review seriously and perform their tasks of reviewing one another conscientiously, but there is at least the possibility that collegiality might hinder review,<sup>75</sup> or that review might hinder collegiality.<sup>76</sup> More significantly, even if a circuit is able to enforce its will consistently, there is little guarantee that it will be enforcing the views of the broader appellate judiciary.

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73. See, e.g., Comment, *In Banc Procedures in the United States Courts of Appeals*, 43 *Fordham L. Rev.* 401, 420 (1974) (maintaining that a tie vote should be sufficient to trigger en banc treatment). Interestingly, different circuits use different approaches in calculating how many votes are required to take a case en banc. See generally James J. Wheaton, Note, *Playing with Numbers: Determining the Majority of Judges Required to Grant En Banc Sitings in the United States Courts of Appeals*, 70 *Va. L. Rev.* 1505, 1511-20 (1984) (exploring different possible definitions of "majority").

74. See *infra* note 109 and accompanying text.

75. Recognizing that collegiality in the informal sense of the word might lead to hesitance among judges to offer useful criticisms of one another's positions, some have defined collegiality as including open-minded debate. See, e.g., Hon. Richard J. Cardamone, *How an Expanding Caseload Impacts Federal Appellate Procedures*, 65 *Brook. L. Rev.* 281, 282-83 (1999) (describing collegiality as "give-and-take"). Though an atmosphere of friendly criticism is possible and may well be the norm, my point is simply that friendliness also can produce reluctance to critique and overrule.

76. At least some commentators believe that en banc review as currently practiced may have adverse effects on collegiality. See, e.g., William C. Rooklidge & Matthew F. Weil, *En Banc Review, Horror Pleni, and the Resolution of Patent Law Conflicts*, 40 *Santa Clara L. Rev.* 787, 795 (2000) ("Judges being human, en banc cases can cause friction between the judges on the Federal Circuit. No judge wants his or her opinions subjected to en banc review, and some regard a colleague's vote for en banc review of one of their cases as tantamount to betrayal.") (internal quotation marks omitted).

*A. The Proposal*

If my proposal were enacted, en banc review would work something like this:<sup>77</sup> Each circuit would schedule en banc review at some frequency, perhaps twice a year. The various circuits would attempt to hold these reviews simultaneously for scheduling convenience. Judges in active service would be randomly assigned to participate in en banc panels about as often. A judge would never participate in such panels for his own circuit.<sup>78</sup> Each en banc panel would include judges from most if not all of the other circuits. Suggestions for rehearing en banc would be routed well in advance to the judges on this panel, who would be allowed to send memoranda to one another discussing whether particular cases should be reviewed. The judges would vote whether to hear individual cases, and if a majority voted to hear a case, judges would then vote whether to hear it with or without oral argument. For cases with oral argument, the government would pay to fly the judges to the particular circuit whose cases they are reviewing, or, if the technology is seen as an acceptable alternative, videoconferencing could be used.<sup>79</sup> After conference or further debate-by-memorandum, the seniormost judge on the en banc panel would assign the writing of the opinion, as is traditional.<sup>80</sup> The final opinion would indicate the membership of the en banc panel and include all the votes.

I have now offered enough hints about the existing problems of the courts of appeals that making an affirmative case for the proposal is quite straightforward. The proposal to enact visiting en bancs is a modest one, not just in a Swiftian sense, and it cannot of course solve everything. It is, however, surprisingly responsive to both of the criticisms of the courts of appeals discussed above.<sup>81</sup> If an oppressive caseload leads judges into

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77. I am flexible about many of the details, including the frequency of review, whether larger circuits should be subject to more frequent review, whether the selection of judges would be completely random or whether judges might be allowed to express some preferences as to which circuits they would review, how far in advance judges would receive suggestions for rehearing en banc, whether cases should be heard in the circuit being reviewed even where that location is inconvenient for most members of the panel, and whether there should be an alternative method of selecting who writes the opinion.

78. A judge also would not participate in en banc panels for a circuit in which she had served as a visiting judge sufficiently recently that one of her own decisions might be subject to en banc review. See, e.g., 28 U.S.C. § 291 (1994) (providing for circuit judges to sit by designation in other circuits). The existence of visiting judges refutes any suggestion that visiting en bancs would be unconstitutional. For an interesting analysis of the effect of visiting judges, see generally Tracey George, *Seen But Not Heard: Visiting Judges on U.S. Courts of Appeals 12–30* (Feb. 25, 2000) (unpublished manuscript, on file with author).

79. For an argument that videoconferencing may alleviate logistical problems associated with large circuits, see Mike Tonsing, *Videoconferencing Could Provide an Unexpected Answer in the Dialogue Over Whether to Split the Ninth Circuit*, *Fed. Law.*, Aug. 1998, at 18.

80. For a discussion of some of the strategic consequences of this practice, see Cross, *The Justices of Strategy*, *supra* note 58, at 517–19.

81. See *supra* notes 14–29 and accompanying text.

carelessness, en banc decisionmaking already provides some assurance of review. In the absence of concern that a reversal<sup>82</sup> might offend an immediate colleague, an en banc court might be more willing to catch mistakes or reconsider decisions that are incompletely reasoned. In addition, because visiting en bancs would include representative cross-sections of judges nationally, en banc decisionmaking would be less ideological.<sup>83</sup>

Using visiting en bancs will ensure that panel decisions are subject to a form of outside review, rather than review by judges' immediate colleagues.<sup>84</sup> Although judges more than most people are able to make and accept constructive criticism, outside review can only strengthen the integrity of the judicial decisionmaking environment. Judges may be able to place aside personal politics the majority of the time in en banc decisionmaking, perhaps even in cases in which they have written the majority panel opinion, but certainly it cannot hurt to avoid the discomfort of internal review altogether.<sup>85</sup> To be sure, collegiality might interfere with objectivity even on national en banc panels, but the effect seems likely to

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82. Technically, en banc decisions do not reverse panel decisions. Rather, the decision to grant en banc review vacates a panel decision, and the subsequent opinion affirms, reverses, or vacates the decisions of the district court. See 4th Cir. R. 35(c). This is relevant only in that an evenly divided court affirms the decision of the district court, not the decision of the panel, if those are inconsistent. See, e.g., *United States v. Cerceda*, 172 F.3d 806, 811–12 (11th Cir. 1999) (affirming the district court's opinion where the en banc court was equally divided). The terminology of "reversal" is in any event useful.

83. Some commentators have criticized en banc decisionmaking in particular as too ideological. See, e.g., Christopher P. Banks, *The Politics of En Banc Review in the "Mini-Supreme Court,"* 13 *J.L. & Pol.* 377, 377 (1997) (noting impact of partisan politics on en banc decisions); Note, *The Politics of En Banc Review*, 102 *Harv. L. Rev.* 864, 865 (1989) (criticizing ideology's influence in en banc review). But see Michael E. Solimine, *Ideology and En Banc Review*, 67 *N.C. L. Rev.* 29, 62–64 (1988) (disputing assertions that appointees of President Reagan were particularly likely to use en banc as an ideological tool). Perhaps the problem is not the influence of ideology per se, but that en banc courts may be imposing quite unrepresentative ideologies on panel decisions.

84. This system of outside review bears some resemblance to the scientific system of peer review. See generally Thomas O. McGarity, *Peer Review in Awarding Federal Grants in Arts and Sciences*, 9 *High Tech. L.J.* 1, 2–7 (1994) (describing systems of peer review and emphasizing that peer review helps avoid the influence of favoritism and conflicts of interests on decisionmaking). It is not identical, of course, in that review would not be "blind" (though it presumably could be if this were deemed desirable). Blindness, though, is just one way of producing independent decisionmaking. Distance is another, and judges are presumably more able to evaluate their more distant colleagues' work objectively than they are the work of judges with whom they must work everyday. This will likely lead to more exacting en banc review, though some judges might be eager to show up some of their immediate colleagues.

85. Even if judges' decisions on the merits are immune to personal feelings, a judge might hesitate before writing a memorandum attacking the decision of two or three colleagues to urge that the decision be revisited. Such a memorandum is likely to invite vigorous defenses from judges in the panel majority, who are likely to vote against rehearing, making the battle an uphill one. See, e.g., Jon O. Newman, *In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 *Brook. L. Rev.* 365, 379 (1984) ("The in banc poll request normally elicits from the author of the panel majority opinion a substantial memorandum in opposition to rehearing.").

be smaller given that judges would meet less commonly with colleagues from other circuits and that judges from the circuit being reviewed would not be members of the en banc panel reviewing their work.

The importance of en banc decisionmaking, however, cannot be measured just by assessing those cases in which en banc review is granted. Much more important is how en banc review affects panel decisionmaking. The mere prospect of en banc review may discipline decisions of members of three-judge panels, leading them to write opinions that are less likely to diverge from the anticipated median viewpoint of an en banc panel. The vital question is whether this discipline is more effective when judges on panels know who their en banc reviewers will be or when they do not.<sup>86</sup> In my view, an unknown court is superior, because panel members will then have to write opinions that will pass muster with typical judges, rather than with a known sample of judges who might be atypical. Of course, some judges may not care about being reversed even by a visiting en banc panel, but visiting en banc panels should at least be more effective than current en banc courts at inducing majoritarian panel decisionmaking.

1. *Precedential Consistency.* — Before proceeding, I should confront two significant arguments against the proposal. Each of these arguments accepts the value of majoritarian decisionmaking, but insists that visiting en banc panels might have negative consequences. The first of these arguments is that visiting en banc panels might produce considerable volatility within circuits. Because the composition of the en banc panel would change from case to case, the law might change frequently as well, as one en banc panel overrules its predecessor. More litigants might believe that they have a chance of prevailing en banc even when prior en banc authority is directly contrary to their position, because they might happen to draw a different set of judges.

This argument wrongly assumes that an en banc overruling of a prior en banc decision would be inherently problematic. Such overruling, however, would serve essentially the same purpose as a circuit split: showing the Supreme Court that there is substantial disagreement among judges on an issue. An en banc overruling of a prior en banc decision is no more problematic than an en banc overruling of a prior panel decision, since both types of prior decisions control in the absence of en banc rehearing. Litigants in one circuit cannot rely on the en banc decision of another circuit, and the uncertainty faced by litigants who cannot rely on the en banc decision of their own circuit is not significantly greater. Un-

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86. Many commentators have long assumed that a "known bench" is superior to an unknown one. See, e.g., Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 34-35 (1960) (discussing "known bench" as a stabilizing aspect of appellate courts); see also *supra* text accompanying note 37. This assumption, however, has never been adequately defended. It may be that lower court judges prefer a known bench because that minimizes the prospect of their decisions' being reversed, but this does not mean that a known bench is socially beneficial.

less an en banc decision is to fix a rule for all time, the uncertainty attributable to visiting en banc panels is no different from the uncertainty that already exists.

This argument's more significant flaw is that it assumes that decisional stability is primarily a function of personnel stability. Courts, however, are not consistent simply because the same judges hear cases repeatedly.<sup>87</sup> They are consistent because judges value *stare decisis*. Even the Supreme Court, which does not see itself as strictly bound to its prior decisions, ordinarily defers to them, even when no current members of the Court participated in the earlier decision.<sup>88</sup> Judges recognize the importance of reliance interests,<sup>89</sup> and they also may believe that fairness requires that current litigants in a particular circuit be treated in the same way as past litigants in that circuit.<sup>90</sup> En banc panels are thus likely to refuse to hear cases previously resolved by en banc panels of the same circuit, and even when they do reconsider issues, they will recognize that they are not writing on blank slates. And if judges' own appreciation of *stare decisis* were insufficient, the problem easily could be resolved by procedural rules preventing en banc panels from overruling prior en banc panels in the absence of intervening Supreme Court decisions.

2. *Ownership.* — The second argument against the proposal is that enactment of visiting en banc panels would decrease the sense of ownership that judges have in the law of their circuit. This argument has psychological and practical dimensions. The psychological claim is that being part of a group that controls the law of a circuit is satisfying, and that enactment of visiting en banc panels would alienate judges, who then might shirk their institutional responsibilities, including panel decisions.<sup>91</sup> Any such psychological effect seems likely to be small, and, more

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87. Kornhauser and Sager show that a court can be consistent, though its jurisprudence may not be deeply coherent, even if its members have different beliefs and values. See Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 *Yale L.J.* 82, 102–15 (1986). This analysis, however, assumes that the entire court hears all cases, so consistency will be harder to achieve when many decisions are panel decisions. Even if only en banc decisions are considered, a circuit may not be entirely consistent, because the membership of en banc panels changes over time, and individual judges may change their mind on particular issues.

88. For a list of cases in which the Supreme Court has overruled earlier decisions, see Amy L. Padden, Note, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After Payne v. Tennessee*, 82 *Geo. L.J.* 1689, 1726 app. I (1994).

89. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (stating that “[c]onsiderations in favor of *stare decisis* are at their acme” when reliance interests are at stake).

90. But see Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 *Yale L.J.* 2031, 2038 (1996) (arguing that such equality concerns fail to justify *stare decisis*).

91. This claim might be grounded in the sociological literature addressing small group behavior, which is evaluated in Marvin E. Shaw, *An Overview of Small Group Behavior*, in *Psychological Foundations of Organizational Behavior* 358, 365 (Barry M. Staw ed., 1977).

importantly, there may be offsetting effects. Visiting en bancs might stimulate a friendly competition among different circuits to write opinions that are upheld by judges on their fellow circuits, leading judges to put more care into panel opinions. In addition, participation in visiting en banc panels might provide engagement in a national legal community that would substitute for circuit solidarity. In any event, the judges likely to dislike the system most are those who write the least majoritarian decisions, precisely the judges whom the proposal targets.

The practical dimension is that judges within a circuit have greater incentive to monitor circuit law for cases that might be en banc-worthy than judges outside the circuit.<sup>92</sup> In approximately three-quarters of recent en banc cases, however, a member of the panel wrote a dissenting opinion,<sup>93</sup> which would provide a strong signal to outside reviewers that a case might be en banc-worthy. It is possible that more judges would write dissents if visiting en banc panels were enacted. For example, a liberal Fourth Circuit judge might be more motivated to write a dissent against a conservative decision given the increased possibility of en banc reversal. Because dissents perform an informational function, highlighting arguments that others might not have considered, this would be a welcome development. In addition, because authoring a visiting en banc opinion might be prestigious, judges participating in such panels might scrutinize panel decisions to find problematic ones in the hope of being assigned the ultimate opinion.

### B. *Additional Benefits*

The primary purpose of my central proposal is to make decisionmaking by panels more representative of the decisions that a broad spectrum of judges would reach. There are, however, significant additional advantages.

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92. An additional practical argument is that because judges would not have to live under the rule of a particular en banc opinion, they might be more careless in writing it. En banc opinions would still be high profile, or perhaps even higher profile than before, and judges would thus still have considerable incentive to be careful. Indeed, the argument ultimately might point the other way. Perhaps judges who have to live under a particular regime will take their own interests too much into account, for example by being biased in favor of bright-line rules relative to balancing tests, even if they believe balancing tests to be preferable for society as a whole. Judges who will not be directly affected by a decision will take into account the effects on the judiciary, but will not necessarily give disproportionate attention to these concerns.

93. See Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 Wash. L. Rev. 213, 259–60 (1999) [hereinafter *George, Dynamics and Determinants*] (providing this data for a sample of cases from the Second, Fourth, and Eighth Circuits).



1. *Optimally Sized En Banc Panels.* — A prominent argument against adding judges to the courts of appeals is that increasing the number of judges makes deliberation more difficult.<sup>94</sup> Judge Posner explains:

Although court of appeals judges sit in panels of three, the full court must . . . maintain a credible threat to rehear a case en banc if the panel deviates from the law of the circuit. The threat loses much of its credibility when the number of judges reaches the level, conventionally taken to be nine, beyond which the deliberations of a court come increasingly to resemble those of a legislature.<sup>95</sup>

In most circuits, all judges in active service participate in en banc cases,<sup>96</sup> and enacting my proposal would free Congress to pick the number it finds optimal.

Using visiting en banc panels is not the only way to achieve optimally sized en banc panels, but it is likely the most practical. The Ninth Circuit randomly selects eleven-judge en banc panels from within the Circuit.<sup>97</sup> Though this alleviates the problem of unwieldy decisionmaking, such en banc panels are likely to be less representative of the U.S. courts of appeals at large than en banc panels drawn at random from all the courts of appeals. At the same time, these panels do not necessarily represent even the views of the Ninth Circuit as a whole.<sup>98</sup> Once the dubious advantage of enforcing a “law of the circuit” is lost by using eleven-judge panels, it is

94. See, e.g., Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542, 584 (1969) (“Twenty judges cannot conduct a meaningful hearing, nor can they effectively deliberate.”). This argument is not entirely persuasive. Legislatures, after all, deliberate with far greater numbers, and it seems conceivable that large courts could find ways of conducting (and ending) deliberation in an efficient way.

95. Posner, *Federal Courts*, supra note 12, at 133. I have questioned the notion that enforcing a “law of the circuit” (as opposed to law of the circuits more generally) is desirable, a question that Judge Posner does not consider.

96. See, e.g., 28 U.S.C. § 46(c) (1994) (providing that, with some exceptions “[a] court in banc shall consist of all circuit judges in regular active service”).

97. These panels always include the chief judge of the Circuit. See 9th Cir. R. 35-3 (providing that in the absence of the chief judge, for example because of recusal, an additional judge shall be chosen and the senior active judge shall preside). In theory, the court as a whole can rehear en banc a decision of an eleven-judge en banc panel, see *id.*, but this has never occurred. See *Compassion In Dying v. Washington*, 85 F.3d 1440, 1441 (9th Cir. 1996) (O’Scannlain, J., dissenting from order rejecting request for rehearing en banc by the full court); search of WESTLAW, CTA9 database (Aug. 28, 2000).

98. Judge Posner criticizes the Ninth Circuit practice for this reason. He argues that a three-judge panel that “goes against what it knows to be the current majority view of the court as a whole, knows that being reversed en banc will depend on the luck of the draw,” thus making three-judge panels “less constrained by the threat of being reversed en banc than a panel in another circuit would be.” Posner, *Federal Courts*, supra note 12, at 137. Posner also reports that “Ninth Circuit lawyers say (but not for attribution!) that more often than in any other federal court of appeals the composition of the panel determines the outcome of the appeal.” *Id.* This is a flawed argument. Given the infrequency of en banc review, an en banc reversal will almost always be unlikely, so being reversed en banc will always depend on the luck of the draw. The best way for a judge to avoid en banc

difficult to defend including only judges from the circuit rather than judges from other courts of appeals. Thus, as the Ninth Circuit arrangement becomes more common, the case for my proposal will become stronger.

2. *Improvement of Specialized Courts.* — The proposal would also allay concerns about specialized federal courts of appeals. Specialized courts initially seem to provide a promising, partial solution to the increase in caseload of the courts nationally. Yet, they have been subject to several criticisms, most notably by Judge Posner. The first is that work on specialized courts might be “monotonous,” lacking the diversity of subject matter that otherwise compensates for the “monastic” routine of appellate judicial life,<sup>99</sup> and this might lower the quality of those who can be recruited to join the appellate ranks.<sup>100</sup> My proposal would mitigate this criticism by adding some spice to the specialized appellate judge’s activities, the chance to participate in en banc panels for other circuits. Such participation would also help nurture a “generalist” legal perspective in specialists.<sup>101</sup>

More important than the participation by specialist judges in generalist en banc, though, would be the participation by generalist judges in specialized en banc review. Judge Posner’s most significant criticism of specialized courts is that such courts are more likely to become ideologically charged. Creation of specialized courts would highlight fundamental disagreements among specialists in particular areas and result in the ascendancy of one view over another minority view purely on the basis of appointment numbers.<sup>102</sup> At the same time, all members of a specialized

reversal in the Ninth Circuit will be to write a noncontroversial opinion. Randomness therefore may make judges less likely to write quirky opinions.

99. Posner, *Federal Courts*, supra note 12, at 249. Posner ultimately “put[s] little weight . . . on the matter of job satisfaction through diversity of caseload.” *Id.* As he recognizes, some judges might prefer a lack of caseload diversity, and moving some types of cases that appellate judges do not enjoy to specialized appellate tribunals might make the generalist tribunals more appealing. See also Paul M. Bator, *The Judicial Universe of Judge Richard Posner*, 52 *U. Chi. L. Rev.* 1146, 1155 (1985) (reviewing Richard A. Posner, *The Federalist Courts* (1985)) (“[M]aking the job of federal judge somewhat less grand . . . will attract people who are more deeply interested in particular subjects and less interested in running everything.”). Perhaps even more significantly, even if the subject matter of a particular court is uniform, the legal issues can be quite diverse.

100. Potentially compensating for this, Posner recognizes, is that “[a] person who does only one job may perform better than an abler person who divides his time among several jobs none of which he learns to do really well.” Posner, *Federal Courts*, supra note 12, at 250.

101. See, e.g., Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 *Iowa L. Rev.* 1297, 1389 (1986) (“A legal generalist brings to the bench a greater ability to analogize to other areas of the law, to find solutions in those areas, and to approach specific problems with fewer preconceptions.”); Diane P. Wood, *Generalist Judges in a Specialized World*, 50 *SMU L. Rev.* 1755, 1767–68 (1997) (arguing that generalization provides greater accountability and greater insight in seeing common threads across areas of law).

102. Judge Posner articulates this concern by imagining an antitrust appellate court:

court might agree on some fundamental issues on which generalist judges would disagree, not necessarily because the specialists are right, but because membership on a specialized court might make a judge more likely to believe that the legal regime being overseen is thus particularly important to protect and strengthen.<sup>103</sup> This tendency may be accentuated by the influence of interest groups on the appointments process.<sup>104</sup>

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Antitrust theorists notoriously are divided over the goals of antitrust law—over whether that law is designed and should be interpreted to promote social or political values having to do with decentralizing economic power and equalizing the distribution of wealth or whether the law should merely foster the efficient allocation of resources. . . . A “camp” is more likely to gain the upper hand in a specialized court than in the entire federal court system or even in one circuit. Not only would most appointments to a specialized antitrust court be made from the camps; but experts are more sensitive to swings in professional opinion than an outsider, a generalist, would be. The appearance of uniform policy that would result from domination of the specialized court by one of the contending factions in antitrust policy would be an illusion; a turn of the political wheel would bring another of the warring camps into temporary ascendancy.

Posner, *Federal Courts*, supra note 12, at 251. This argument is subject to at least two potential counterarguments. First, if there are policy cleavages, it may be preferable to have them resolved consistently than to have one panel resolve them one way and another panel resolve them another way, when presented with two separate legal issues that both depend ultimately on the same deep question. But see Cass Sunstein, *Foreword: Leaving Things Undecided*, 110 *Harv. L. Rev.* 4, 20–21 (1996) (arguing for undertheorized judicial decisionmaking). Second, even if changes in such a court’s composition mean that any uniformity achieved is temporary, even temporary uniformity may be useful. If uniformity is important because it makes decisions predictable, then revolution may be preferable to evolution. Sudden, abrupt changes in policy can still leave the law quite predictable, except for cases already in progress at the time of the transition. Cf. Nicholas L. Georgakopoulos, *Predictability and Legal Evolution*, 17 *Int’l Rev. L. & Econ.* 475, 475–76 (1997) (discussing the effects of common law and civil law decisionmaking on predictability).

103. The example Judge Posner offers is of the Federal Circuit. Even before its creation, there was a “deep cleavage . . . between those who believed that patent protection should be construed generously to create additional incentives to technological innovation and those who believed that patent protection should be narrowly construed to promote competition.” Posner, *Federal Courts*, supra note 12, at 252. Someone who sits on a patent court might be more likely than a generalist judge to think patent protection is important and thus to interpret it expansively.

104. Judge Posner explains:

[A] specialized court can be controlled by the executive and legislative branches of government more effectively than a generalist court. It is easier to predict how judges will decide cases in their specialty than how they will decide cases across the board. If courts are specialized, therefore, the officials who appoint judges will be better able to use the appointments process to shape the court . . . .

*Id.* at 254. “The specialist,” Judge Posner concludes, “is likely to be more faithful to the current goals of a program than the generalist because he is more effectively screened for his sympathy for those goals and is in any event more likely to identify with them.” *Id.* at 256.

Review by the Supreme Court partially alleviates both of these concerns,<sup>105</sup> but the Court's inability to hear more than occasional appeals from specialized courts<sup>106</sup> means that its role in guiding specialized appellate courts is necessarily limited.<sup>107</sup> If generalist review of specialized courts is in fact desirable, then using generalist judges to conduct specialized courts' en banc proceedings would help substantially. En banc panels easily could hear enough cases that specialized courts would not be able simply to ignore the prospect of generalist review. Specialized court panels, in turn, might try to adopt a generalist perspective even when not directly constrained by en banc precedent, for fear of frequent reversals. With generalist review of specialized courts, bare specialized circuit majorities will not necessarily be able to elevate their ideological preferences to circuit law, and circuits as a whole will find it difficult to embrace views that generalist judges would reject.

### C. Possible Extensions

The proposal that I have developed would change the en banc process in only one way, albeit in a significant way. Like the other proposals to reform decisionmaking in the courts of appeals discussed in Part I, this proposal is incomplete, as no reform could lead to the "correct" decision being made in every case. No combination of reforms can achieve this either, but it is useful to consider what other changes might complement the proposal I have offered. Each of the following proposals is, like the principal proposal, designed to increase the probability that any given decision by a three-judge panel or an en banc panel is consistent with what a majority of all appellate judges would do. One might reject these

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105. See, e.g., *Dickinson v. Zurko*, 527 U.S. 150, 152 (1999) (overruling a unanimous Federal Circuit en banc opinion that held that the Federal Circuit could review the Patent and Trademark Office using a standard less deferential than that supplied by the Administrative Procedure Act); *United States v. Haggard Apparel Co.*, 526 U.S. 380, 383 (1999) (holding that the Federal Circuit erred in concluding that Customs Service regulations were not subject to *Chevron* deference). My point is not that the Supreme Court is necessarily correct, but that its decisions often moderate the biases that specialized courts are perceived to have, and that the Supreme Court is likely to place more weight on generally applicable legal authorities.

106. As of this writing, the Supreme Court has reviewed 28 Federal Circuit cases on the merits, reversing in 15, vacating in 3, and affirming in 10. Search of WESTLAW, SCT database (Sept. 5, 2000) (figures derived from search for cases containing "Federal Circuit" in synopsis and identifying relevance and disposition of each).

107. The D.C. Circuit, Justice Scalia once argued, has effectively disobeyed the Supreme Court by construing Supreme Court administrative law cases narrowly. See Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 359-66. Such disobedience, of course, is not overt, as the D.C. Circuit always has purported to be following the Supreme Court's decisions. But narrow interpretations can last a long time when a reviewing court will consider a particular issue only once in a number of years, and even once the Court does reject a line of authority, that case too may be read narrowly.

changes and still embrace my central proposal, but I believe that they would be salutary additions to it.

1. *Random Review.* — One change would be to have some panel decisions reviewed at random. The central proposal by itself would lead to more en banc review only if, as I think is probable, judges would be more likely to question decisions as outside reviewers than as reviewers of their immediate colleagues.<sup>108</sup> In my view, though, it would be worthwhile to divert additional judicial resources to en banc review through random selection of additional cases to hear.<sup>109</sup> This is a pragmatic judgment about scarcity, informed only by my sense that the existing rate of en banc review is so low that the marginal gains in disciplining panel decisionmaking by adding more cases would be high.

The justification for *random* selection of some cases, whether or not the total en banc docket is increased, is that there are many cases in which the chance of en banc review,<sup>110</sup> let alone review by the Supreme Court,<sup>111</sup> is effectively zero, regardless of which side the panel takes. Many of these cases, of course, will be easy, and en banc panels would likely dispose of them without oral argument or even significant discussion. Overall, the costs of such review will surely exceed the benefits of improved justice in any particular case. This analysis overlooks, however, the benefits of establishing a principle that any decision might be reviewed. Such a principle might lead judges to take more care with routine cases, since it would be embarrassing to be reversed on one, particularly if the panel's treatment of the issues was cursory. More significantly, it would provide at least a partial answer to those who complain that the

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108. See *supra* text accompanying notes 74–77 (stressing that the proposal would not necessarily lead to more en banc review)

109. See, e.g., Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. Pitt. L. Rev. 805, 819–29 (1993) (enumerating benefits of en banc review).

110. Some en banc cases do involve surprisingly esoteric issues. Tracey George, for example, cites the “unremarkable” contract interpretation case of *Hardester v. Lincoln National Life Insurance Co.*, 52 F.3d 70 (4th Cir. 1995) (en banc), which held that breast cancer is not a “pre-existing” condition within the meaning of a group health insurance plan. George, *Dynamics and Determinants*, *supra* note 93, at 215. Surely, though, there are many run-of-the-mill cases involving subject matter for which the chance of en banc review is vanishingly small. Some ERISA cases or admiralty issues may be sufficiently controversial that they could be the subject of en banc review, but some cases, like those involving the interpretation of a federal regulation that has never been cited before and may never be cited again, are not. Some such cases could be difficult, in the sense that different panels might reach different results, but not important enough to the future development of the law that they would be viable candidates for en banc review as currently practiced, regardless of the correctness of the panel holding.

111. The Supreme Court may be more willing than en banc panels to review decisions that were originally unpublished or summary. Usually, this occurs when a panel follows binding circuit precedent conflicting with that of another circuit. See, e.g., *Sims v. Apfel*, 120 S. Ct. 2080, 2083 (2000) (reviewing unpublished Fifth Circuit opinions at odds with those of other circuits).

courts of appeals resolve many cases with virtually no consideration,<sup>112</sup> and it would assure litigants that three-judge panels do not have unfettered power. In my view, this would even merit reducing the number of cases selected by judges for en banc review (for example, by increasing the number of votes required to hear a case en banc), if such a tradeoff were necessary.

An interesting variant on this proposed extension would be to select some cases for review before opinions are published and to withhold these opinions from the en banc panel. Once the en banc court ruled, the earlier opinion could be released. This approach would make it possible to determine how often a panel would reach the same result as a larger, en banc panel that presumably would devote more collective time and care to considering the question. The answer to this question might have implications for future possible reforms to en banc review. If the courts almost always reach the same answer independently, then perhaps en banc review is generally not all that important,<sup>113</sup> while if there were frequent disagreements, this might suggest that more extensive review would be desirable. I suspect that some will find such experimentation distasteful,<sup>114</sup> but it would be academically useful and cause little if any harm.

2. *Blind Review.* — Another plausible modification is to keep the identities of the judges selected for an en banc panel secret, at least until cases are actually selected for argument. After parties filed suggestions for en banc review, the judges to constitute the visiting en banc panel would be permitted to exchange anonymous correspondence concerning whether a particular case is en banc-worthy.<sup>115</sup> Judges would then vote on whether cases should be heard, and only after these votes were submitted would the names of the judges selected be revealed. On occasion,

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112. See, e.g., Dragich, *supra* note 17, at 760 (arguing that appeals courts currently overvalue efficiency concerns).

113. Of course, it could also be that they reach the same answer because judges on panels recognize that their decisions might be reviewed en banc.

114. Perhaps some would argue that this is inappropriate unless litigants give "informed consent." But this type of experimentation is not akin to attempting an unproven surgical procedure. A decision by an en banc panel is not an untested legal procedure. Cf. Frank W.S.M. Verheggen & Frans C.B. van Wijmen, *Myth and Reality of Informed Consent in Clinical Trials*, 16 *Med. & L.* 53, 64-65 (1997) (arguing that informed consent requirements in medical contexts should be stricter where experimental procedures are involved).

115. Judges could communicate about cases for which review was requested via an internet forum. Judges could be assigned usernames like "Judge1," "Judge2," and so on. An interesting question is whether outsiders should have access to such forums. The argument that judges might shy away from candor were they subject to the public spotlight would not be as strong if communications were anonymous. Cf. Benjamin S. Duval, Jr., *The Occasions of Secrecy*, 47 *U. Pitt. L. Rev.* 579, 669 (1986) (suggesting that the desire to encourage "a candid interchange of information and views" explains the secrecy of judicial deliberation). Allowing public participation would turn the exchange of memoranda into a virtual extended oral argument.

judges might be able to guess the author of correspondence or might hear in casual conversation that another colleague is scheduled for a particular en banc, but a presumption of secrecy would prevent judges from knowing the entire composition of the en banc panel when deciding whether to accept cases.

The advantage of this system is that it would prevent judges from voting to hear cases en banc simply because they believe that they would have the votes to achieve a particular result. Though en banc panels are likely to be more representative than individual circuits because they are randomly selected,<sup>116</sup> an individual en banc panel might still be unrepresentative. A judge familiar with the views of colleagues nationwide might calculate whether to recommend en banc review on the basis of a predicted vote count. The en banc court's docket might counterproductively include cases specifically because the en banc panel is likely to adopt a position different from the majority one. This may happen already with en banc review, but blind review is not possible within the current en banc system, since everyone knows who will sit on an en banc case. Adoption of my central proposal might make it possible to change this.

3. *Representative Review.* — It might be possible to achieve even more representativeness by applying some version of Tiller and Cross's proposal to en banc decisionmaking.<sup>117</sup> For example, en banc panels might be picked in such a way that the balance of Republicans and Democrats is as close as possible to their representation in the appellate judiciary as a whole.<sup>118</sup> The argument for forcing balance is both weaker and stronger in the en banc context. It is weaker in that there is less of a need for a "whistleblower";<sup>119</sup> the relatively large size of the en banc court and the prominence of en banc decisions make it more likely that significant counterarguments to a majority's position will be raised. It is stronger, though, in that it is easier to achieve representativeness by political proxies in an eleven-judge court than in a three-judge panel. A panel with six judges from one party and five from the other is likely to have individuals with strong feelings on both sides of a controversial issue, as well as moderates whose votes will ultimately be the deciding ones.<sup>120</sup>

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116. But see *infra* Part II.C.3 (suggesting that en banc panels be selected so that they are politically representative).

117. See *supra* Part I.B.2.

118. Alternatively, and perhaps somewhat more controversially, they might be picked in such a way as to approximate the representation of Democrats and Republicans in the electorate or in Congress. This might, however, strengthen arguments that forcing representative panels is unconstitutional. See Wald, *supra* note 63, at 256–60 (offering separation of powers and due process arguments to that effect).

119. See *supra* notes 67–72 and accompanying text (discussing the thesis that having a whistleblower on a panel makes it more difficult for the majority to ignore the law).

120. This seems much less likely in an en banc panel consisting, for example, of three judges of one party and eight of another. If the judiciary as a whole consists 55% of members of one party and 45% members of the other, the probability of randomly

## III. THE NORMATIVE CASE FOR MAJORITARIAN DECISIONMAKING

My proposal is driven by the desire to ensure, as much as possible, that courts of appeals decisions will reflect what a majority of all judges would do. So far, though, I have simply assumed that majoritarianism is desirable. Though a full philosophical defense may be beyond the scope of this Essay, in this Part, I offer an affirmative case for majoritarian decisionmaking and then consider various counterarguments to the proposal suggested in Part II. Each of these counterarguments suggests that even if majoritarian decisionmaking is desirable in theory, there might be some practical benefit to having a circuit's law reflect a minority position.

A. *Presenting the Affirmative Case*

A standard realist attack on any attempt to improve legal decisionmaking is that there is no such thing as a "right" or "wrong" answer to many legal problems,<sup>121</sup> and I do not disagree. But this objection should not lead us to conclude that any answer is just as good as any other. There is a reason that when one judge differs from the other two members of a three-judge panel, the one judge's decision is a mere dissent while the majority's decision becomes the law, and it is not just a matter of convention.<sup>122</sup> For the same reason that any individual person is more likely to be "right" than "wrong" in picking between two possible answers to a particular problem,<sup>123</sup> the majority of a collective decisionmaking

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drawing an eleven-judge court with eight or more judges from one political party is 25%. (There is a 19% chance of drawing eight or more judges from the majority party, and a 6% chance of drawing eight or more judges from the minority party.) This is a substantial enough percentage that Tiller and Cross's reform might be worthwhile.

121. Or, at the least, we behave as if decisionmaking is not entirely futile, instead of responding to the possibility of radical skepticism by not deciding at all. "Even if convinced that there are no reasons for believing or doing anything, we still must decide how to live our lives; we still must decide how to act. These decisions are generated by information obtained from an individual's inner and outer environments." Robert Justin Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 *Cornell L. Rev.* 811, 823 (1990).

122. Cf. Luis Fuentes-Rohwer, *The Emptiness of Majority Rule*, 1 *Mich. J. Race & L.* 195, 259 (1996) (acknowledging that "nobody would dare to propose as democratic a system where minorities rule over majorities"). There are other possible solutions, such as awarding two-thirds damages when one judge recommends awarding no damages at all. See generally Michael Abramowicz, *A Compromise Approach to Compromise Verdicts*, 89 *Cal. L. Rev.* (forthcoming Jan. 2001) (discussing the possibility of responding to uncertainty with compromise verdicts of partial damages).

123. If we do not accept this premise, then the entire enterprise of judging is essentially a waste of time, and legal scholarship even more so. It is possible (though unlikely) that the only disputes that actually are heard by judges are the most difficult ones, so that any particular judge is no more likely to arrive at a correct answer than an incorrect one on a particular problem. Cf. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. Legal Stud.* 1 (1984) (arguing that suits that are litigated may not be representative). Even if this were true, the legal system should probably still assume that the judge's answer is more likely to be correct than incorrect, to ensure that the easy cases are still resolved correctly in settlements.



body is more likely to have picked the better answer than the worse one. The pervasiveness of disagreement in law makes majoritarianism no less important, as long as we believe that legal decisionmaking is not entirely futile. Indeed, disagreement may make majoritarianism even more important, for it suggests that legal decisions may not be so different from legislative decisions after all. If some judicial decisions reduce to a choice between competing values, then it is important that this choice not be the preference of just one individual. The preference of a majority of judges might not be the same as that of a majority of the people, but the same is true of legislative decisionmaking. The best that can be achieved is for a decision to be the choice that a majority of those designated to make the choice would pick.

Those who remain unpersuaded that majoritarianism in legal decisionmaking is desirable should ask whether they would support a legal system that worked as follows: After each member of a three-judge panel wrote an opinion or signed onto another judge's opinion, a computer would randomly pick one of the judges.<sup>124</sup> That judge's opinion would then control the outcome of the case and become binding precedent, even if the other two members of the panel disagreed with that judge's view. This would be a functional legal system, but it would place less value than the existing system on ensuring that a particular legal system is majoritarian.<sup>125</sup> If this system seems foolish, it must be because the mere

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124. Jeremy Waldron has noted the possibility of using a randomization procedure to resolve disagreement, but has rejected it on the ground that such a procedure denies the equality of each judge's vote. See Jeremy Waldron, *Deliberation, Disagreement, and Voting*, in *Deliberative Democracy and Human Rights* 210, 223 (Harold Hongju Koh & Ronald C. Slye eds., 1999):

We could, for example, toss a coin when the justices disagree. But such a procedure would be objectionable precisely because it did not take the fact that at least one justice was in favor of a given decision as a reason for going with that decision rather than the alternative.

Waldron also provides the following useful demonstration that majoritarianism is in fact a value in judicial decisionmaking:

Is it in fact our practice to abandon the principle of majority rule when an issue is shifted from popular or representative decision-making to the courts? The answer is clearly no. The principle of majority rule remains as the fundamental basis for settling disagreement about the merits of an issue among the members of a given court. . . . The difference, when an issue is shifted from legislature to court or from referendum to court, is a difference of constituency, not a difference of decision method. We stick with the principle of majority rule; only now it is applied to a decision-making body of nine individuals, rather than a body of hundreds (in the case of a legislature) or millions (in the case of a popular initiative).

Id. at 215.

125. Those who would endorse this change should ask whether they would embrace also a system in which the computer randomly picked with equal probability either the dissenting opinion or the opinion endorsed by two judges. If even this seems attractive, they should ask whether they would endorse a system that automatically would result in the adoption of the dissenting opinion (assuming there were some way of ensuring that judges did not game the system by voting against their true views). The true skeptic of the value

fact that two judges supported one position and just one judge supported the other makes the former position seem more attractive. But this is an appeal to the value of majoritarianism.

The "majority rules" approach to resolving disagreement among judges is thus a salutary and largely uncontroversial structural choice. That does not necessarily mean, however, that we have solved the problem of judicial structure. The majority of one panel, after all, might reach a different result than a majority of another, especially on difficult questions.<sup>126</sup> The practical problem is that it is infeasible for all U.S. courts of appeals judges to hear every case. Hence, the collective delegates decisionmaking to small numbers of judges who may have minority positions on particular issues.<sup>127</sup> Larger panels, however, are more likely to decide cases as the majority would resolve them.<sup>128</sup> This is the simple logic of Condorcet's famous Jury Theorem,<sup>129</sup> and if it makes sense for

of majoritarian decisionmaking should at least be indifferent toward the adoption of these systems.

126. Madison worried about a similar challenge in the design of legislative institutions: "[T]he smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression." The Federalist No. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961). Judicial independence may make "oppression" less of a concern, but the danger that a majority of three judges will be able to effect a result that a majority of the broader body would reject is analogous.

127. Tracey George usefully places panels in a principal-agency framework:

Organization theory applied to the relationship between the en banc court and the three-judge panels begins with the premise that the court and panels have entered into an implicit but incomplete agency agreement (known as a "relational contract"). The principal-agent construct situates the circuit court as the principal authorizing the panel as agent to act on its behalf. The circuit bench delegates the resolution of some cases to a given panel. The panel has limited discretion to resolve the disputes assigned to it.

George, *Dynamics and Determinants*, supra note 93, at 245. George, however, does not consider that an individual circuit's en banc court itself might be considered the agent of the courts of appeals.

128. Lewis Kornhauser and Lawrence Sager make this point well in arguing that larger panels are more likely to reach the correct result than smaller ones:

[W]e may consider each judge's decision as the draw of a single marble from a bag with marbles of two colors (white for a correct decision, blue for an incorrect decision), mixed in proportion to the likelihood of any judge's choosing the correct outcome. Adding judges simply adds draws (with replacement); as long as the proportion of white marbles in the bag exceeds 1/2, the more draws there are, the more likely it becomes that more than half of the marbles drawn will be colored white or "correct." The fact that there are more judges on a panel thus implies that the panel is more accurate, i.e., more likely to reach the correct decision.

Kornhauser & Sager, supra note 87, at 97-98.

129. For discussions of the theorem, see Nicholas R. Miller, *Information, Electorates, and Democracy: Some Extensions and Interpretations of the Condorcet Jury Theorem*, in *Information Pooling and Group Decision Making* 173, 175-77 (Bernard Grofman & Guillermo Owen eds., 1986); Bernard Grofman, *Judgmental Competence of Individuals and Groups in a Dichotomous Choice Situation: Is a Majority of Heads Better Than One?*,

juries, it makes sense for judges too. The point can be seen most clearly by considering extremes. If all judges on the courts of appeals consider a particular case, then the resulting majority decision will by definition be that of the majority of all judges, but if just one judge is selected to resolve that case, the judge might not produce the same decision.

A knee-jerk response to this observation therefore would be to structure the courts of appeals explicitly like a legislature, with all judges voting on all cases. There are obvious problems with this approach. The rules that guide legislatures leave them free not to resolve contested issues, but leaving cases undecided is not a feasible option for a judiciary.<sup>130</sup> Even if it were possible to adopt voting rules that would force resolution of all cases, adjudication is not just about reaching correct outcomes, but about providing reasons for decisions.<sup>131</sup> So it probably makes sense to have big legislatures and small courts.<sup>132</sup> The norms of adjudication, moreover, make small courts less dangerous than small legislatures,<sup>133</sup> preventing the out-and-out self-interest that we tolerate or encourage in legislatures.<sup>134</sup> In addition, the existence of Supreme Court review may give judges considerable pause before they elevate their more idiosyncratic opinions into law.

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6 J. Math. Soc. 47, 48–52 (1978); cf. Kenneth O. May, A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision, 20 *Econometrica* 680, 682 (1952) (proving that only majority rule conforms to four specified formal requirements).

130. The courts can, of course, leave *issues* undecided. See generally Cass R. Sunstein, The Supreme Court, 1995 Term—Forward: Leaving Things Undecided, 110 *Harv. L. Rev.* 4, 6–7 (1996).

131. One reason for this is that giving reasons for actions entails some commitment to particular resolutions of future decisions, and such commitment may be more appropriate in adjudicative than in legislative bodies. See Frederick Schauer, Giving Reasons, 47 *Stan. L. Rev.* 633, 656–59 (1995) (equating “giving reasons” with committing, which may be desirable).

132. Jeremy Waldron has provided an excellent account of the justification for having large legislatures. See Jeremy Waldron, *Legislation by Assembly* 1–22 (2000) (unpublished manuscript, on file with *Columbia Law Review*). He explains:

For all its black robes and leather-bound splendor, the character of the judicial process is not something one can credibly invoke as the basis for a respectful response to a good faith challenge to the morality of a legal decision. By contrast, an appeal to the procedures of a legislative assembly—with all the major views in the community actively represented by their most forceful advocates—is a respectful response to the challenge.

*Id.* at 21.

133. Cf. The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing for long judicial terms because the judiciary is the weakest department).

134. Whether we tolerate or encourage it depends on whether we adopt a republican or liberal perspective. See generally Richard H. Fallon, Jr., What Is Republicanism, and Is It Worth Reviving?, 102 *Harv. L. Rev.* 1695, 1703–15 (1989) (comparing “the Republican Revival” to historical republicanism and contemporary liberalism); Morton J. Horwitz, Republicanism and Liberalism in American Constitutional Thought, 29 *Wm. & Mary L. Rev.* 57, 65–67 (1987) (describing republicanism as emanating “from an objective conception of the public interest” and liberalism as deriving from “individual self-interest”).

Nonetheless, once we accept the existence of legitimate legal disagreement, we must also recognize that leaving many decisions to individual panels means that many issues will not be resolved in the same way a majority would decide them. In many cases, judges could probably rule for either party and produce an opinion highly likely to survive Supreme Court review. And so a panel may endorse a position that, though not absurd, would probably not command assent from a majority of all appellate judges. This may not pose an obstacle to democratic legitimacy, as any decisionmaking system will have imperfections. If, however, a structural change to the adjudicative process could produce more majoritarian decisionmaking, then it might be democratically preferable, assuming it does not sacrifice important elements of the judicial process.

One of those important elements is the practice of dissent, which permits the articulation of minority opinions. Debate and dissent may be important in allowing the judiciary to correct errors and improve policy over time. Sometimes, the majority in hindsight will prove wrong, either famously, as in the case of historical atrocities like slavery, or because of simple errors in logic or perception on issues far more routine. If it were possible to predict these instances, then we could selectively discard majoritarianism, but of course it isn't. Perhaps every real and armchair judge believes that he can predict the future tides of public opinion and jurisprudence, but there is no objective way in the present to identify the best prognosticator.<sup>135</sup> Maintaining debate is important, but it does not require that minority views be selected at random for enshrinement into law.

I use the word "minority" to refer to the outnumbered group on a particular issue, but I must acknowledge the other, related sense of the word. We may be particularly concerned with the welfare of certain minority groups, such as African-Americans, and with the prospect that fostering majoritarian decisionmaking would lead, as Lani Guinier and others have feared, to a "tyranny of the majority."<sup>136</sup> Guinier has intimated that perhaps legal decisionmaking ought to work according to the principle intuitively embraced by her young son, that of "taking turns,"<sup>137</sup> and indeed this is what our existing system of appellate review achieves. Yet not even Guinier argues that decisionmaking responsibilities should be channeled to individual decisionmakers at random.<sup>138</sup> That, after all,

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135. Richard Primus has argued persuasively that vindicated dissents become the majority position solely because of events after the dissents are written, not because of anything in the dissents themselves. See Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 *Duke L.J.* 243, 247 (1998) ("The canonicity of a dissent is not a function of the dissent itself but of the later court or courts that redeem it and make it canonical.").

136. Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* 3 (1994).

137. *Id.* at 1-5.

138. Rather, she is concerned with ensuring that minority groups are able to receive adequate representation. See *id.* at 119-56.

could as easily lead to an advocate of limited government deciding a civil-rights case as it could lead to someone with whom she would more likely agree deciding it. Perhaps a flaw of majoritarianism is that minorities with deeply felt preferences and beliefs may lose to a majority with weak preferences, and for this problem, my current proposal offers no logrolling solution. But there is no reason to think that a minority group will benefit more from having one of its members decide every tenth case than it will from having every case decided according to the majority view, which, one should hope, would take the interests of the minority group into account.

I must also acknowledge that I have used the words “majority” and “minority” in a limited sense, to refer to the members of a particular decisionmaking body, the courts of appeals, rather than the members of society at large, or even the entire federal judiciary. The majority of judges on the courts of appeals may have different views on some issues from the majority of members of the Supreme Court or the majority of members of Congress. Perhaps the Fourth Circuit is the better representative of the courts of appeals, and it would be a loss for the Fourth Circuit to have to move towards the others. Underlying this logic, however, is the recognition that decisionmaking bodies may be imperfectly representative. But unrepresentativeness will be greater with smaller bodies than with larger ones, so a consistent policy of visiting *en banc* panels should be an overall improvement. Presumably, courts of appeals judges may factor the possibility of Supreme Court review or legislative reversal into their decisionmaking, but the question is still what decision to make given these review mechanisms. All I maintain is that the courts of appeals as a whole are a better baseline for providing an answer than any individual panel or circuit.

The solution that I have proposed, of course, can only take us one small step toward the hypothetical ideal world in which judges resolved all cases as the majority would resolve them. My purpose, though, is not simply to provide incentives in a narrowly economic sense, but to inculcate a norm that judges should seek to decide cases as most judges would decide them.<sup>139</sup> In our judicial culture, an identification of a jurist as a “liberal judge” or a “conservative judge” is not necessarily an epithet. My premise is that we would be better off if judges approached cases by asking themselves how a majority of their fellows, given full information and adequate time for reflection, would resolve them. Differently stated, judges ought not act as voters pointing to the arguments that they personally find most persuasive, but as statesmen assessing which arguments

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139. In the terminology of Cass Sunstein, I am acting as a “norm entrepreneur,” both by maintaining that judicial moderation should be seen as an ideal and by suggesting an institutional change that might inculcate this norm. See Cass R. Sunstein, *Free Markets and Social Justice* 48 (1997).

would be appealing to judges generally.<sup>140</sup> Perhaps enacting a structural reform that would give judges practical incentives to place their own perspectives aside ultimately would bring about a beneficial shift in judges' views of their roles.

## B. Addressing Counterarguments

1. *Regionalism.* — In discussing proposals to split and divide circuits, I noted that an ostensible goal of such proposals is to promote consistency,<sup>141</sup> a goal that the partial homogenization of the law through visiting en banc panels would help achieve. Perhaps the real goal of proposals to split and divide circuits, however, is not to achieve consistency across the circuit at all. Indeed, it might be the reverse, to allow different law for different regions. The Commission on Structural Alternatives for the Federal Courts of Appeals suggested that “the divisional structure respects and heightens the regional character deemed a desirable feature of the federal intermediate appellate system.”<sup>142</sup> More directly stated, courts covering relatively small, homogeneous areas are likely to be more ideologically compatible with the residents of those areas than are courts with jurisdiction over larger areas. Though the Commission mostly skirts the issue,<sup>143</sup> concerns about ideological compatibility between area and judiciary helped drive proposals to split the Ninth Circuit.<sup>144</sup>

The desire to have inconsistent interdivisional or intercircuit law that respects regional variability at first seems entirely consistent with the federal system. After all, one justification for having fifty states, not to mention countless municipalities, is that this structure allows for the law to vary from place to place in accordance with the differing political views

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140. I use the term “statesmen” to allude to Anthony T. Kronman’s defense of the lawyer-statesman. See Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 109 (1993). Kronman is skeptical of the promise of what he calls “scientific law reform,” see *id.* at 17–23, and therefore may be skeptical of proposals to tweak the judicial system. Nonetheless, he might applaud the proposal for having the indirect effect of promoting the lawyer-statesman ideal. The lawyer-statesman recognizes that political choices are often between incommensurate goods and therefore makes choices in order to maintain community cohesion. See *id.* at 88–93.

141. See *supra* text accompanying notes 44–46.

142. Final Report, *supra* note 37, at 49.

143. The Commission explicitly disavowed any intention to “restructure courts . . . because of particular judicial decisions or particular judges,” emphasizing that “decisions about judicial structure and circuit alignment should be based on objective and principled considerations of sound judicial administration.” *Id.* at 6. The Commission also stated that it did not agree with the implication “that only judges from the region can get the law right.” *Id.* at 52. This statement dichotomizes “right” and “wrong” decisions in a way that is seemingly inconsistent with the notion that what is right for one region (and to most judges in that region) might be wrong for another.

144. See, e.g., Ken Miller, Lance: Idaho Should Change Courts, *Idaho Statesman*, Oct. 11, 1999, at 1A (describing Idaho Attorney General’s attempt to remove Idaho from Ninth Circuit).

and needs of the residents of the states.<sup>145</sup> Perhaps more saliently, state supreme courts are permitted to adopt their own interpretations of state constitutional provisions, even where those provisions seem to track provisions in the U.S. Constitution.<sup>146</sup> Similarly, it might seem appropriate that where a federal statute (or the federal common law) is ambiguous, a more conservative region should receive a more conservative resolution of the ambiguity than a more liberal region.<sup>147</sup>

This perspective becomes much less attractive, however, once it is emphasized that it is *federal* law that is being interpreted. Suppose, for example, that Montana-based federal judges are more suspicious of the IRS in federal tax cases than are California-based federal judges. While it is appropriate for Montana to impose lower state taxes than California, it does not seem fair for Montana taxpayers to receive a more generous federal tax jurisprudence than California taxpayers. Federal law is different in kind from local law:<sup>148</sup> Much of federal law defines individuals' rights and responsibilities with respect to the federal government, or with respect to individuals who may be from other regions of the country. These are not issues for which the idiosyncratic preferences of residents or judges in a particular region should affect the outcome.

The strength of the Commission's view is this: its versatility. Although the decision of whether one division should follow the law of another initially lies within that division, the Ninth Circuit as a whole, acting through the Circuit Division, ultimately may decide whether such inconsistency is desirable, tolerable, or unacceptable. This accommodation of the competing values of regional and national law is hardly ideal, however. The Circuit Division, after all, may be more representative of the Ninth Circuit than any division constructed within that Circuit, but it still is not national. Indeed, relative to the nation as a whole, the Ninth Cir-

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145. As Larry Kramer argues, "The whole point of federalism (or at least the best reason to care about it) is that, because preferences for governmental policy are unevenly distributed among the states and regions of the nation, more people can be satisfied by decentralized decisionmaking." Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *Colum. L. Rev.* 215, 222 (2000).

146. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1040-44 (1983) (discussing scope of the "independent state ground" rule).

147. I do not mean to imply that liberal-conservative is the only relevant axis along which regions may differ. Ideological differences may be regionally based in other ways as well. Perhaps, one might argue, more agrarian areas should be entitled to a jurisprudence that is friendlier to agrarian peoples, while urban areas might benefit from a different type of jurisprudence. Cf. Duncan Kennedy, *Strategizing Strategic Behavior in Legal Interpretation*, 1996 *Utah L. Rev.* 785, 786 (1996) (offering a definition of "ideology" and implying that liberalism and conservatism are only two ideologies that judges might adopt).

148. The line, of course, is blurry, but the Supreme Court's recent eagerness to police it means that there will be few issues of federal law in which no one outside of a particular region has a plausible interest in the resolution of the controversy. For a recent articulation of the local/national distinction, see *United States v. Morrison*, 120 S. Ct. 1740, 1754 (2000), which reiterated that "[t]he Constitution requires a distinction between what is truly national and what is truly local."

cuit might well be as regional with respect to many legal issues as any division within it.

What is needed is some way to ensure that, whatever happens to the Ninth Circuit, circuit law neither bears too much of a regional flavor when judges nationally would view such distinctiveness unfavorably, nor is forced to be consistent with a national policy when regionalization would be appropriate. My proposal achieves this: Ordinarily, visiting en banc panels would tend to decrease regional influences on decisionmaking. Judges, however, would be free not to hear a case, or to defer to the panel decision,<sup>149</sup> because they feel that the issue is one in which it is appropriate for regional preferences to control and that the panel decision reflects such preferences. This might not happen often, but that is an argument against en banc decisionmaking only if circuit judges could be expected systematically to undervalue regional decisionmaking.

2. *Percolation.* — A second argument against the proposal also denies the homogenization of the law that visiting en banc panels might effect. This argument focuses not on accommodation of regional preferences, but on the benefits of having diverse approaches to legal issues nationwide.<sup>150</sup> For Supreme Court decisionmaking to be effective, the argument goes, issues must percolate in the lower federal courts.<sup>151</sup> If

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149. This would be tantamount to a decision by the Supreme Court to dismiss a writ of certiorari as improvidently granted. See, e.g., *New York v. Uplinger*, 467 U.S. 246, 249 (1984).

150. See, e.g., Black, *supra* note 49, at 898 (“Many . . . [conflicts] can be endured and sometimes perhaps ought to be endured while judges and scholars observe the respective workings out in practice of the conflicting rules . . . .”); see also Wallace, *supra* note 11, at 928–32 (discussing pros and cons of intercircuit conflicts). This argument is different from that made by advocates of “competitive federalism.” See generally Thomas R. Dye, *American Federalism: Competition Among Governments 175–99* (1990) (describing competitive federalism as the expression of contrasting social values); William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 *Geo. L.J.* 201, 207–19 (1997) (analyzing the economic theory underlying federalism); Jonathan Rodden & Susan Rose-Ackerman, *Does Federalism Preserve Markets?*, 83 *Va. L. Rev.* 1521, 1530 (1997) (noting that competitive federalism analogizes political competition to private market competition); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 *Yale L.J.* 2359, 2365–72 (1998) (suggesting state and federal securities regulators should have equal authority, and companies should choose between them); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416, 419–20 (1956) (presenting the seminal analysis of competitive federalism). Competitive federalism is possible only where regulated entities can choose the jurisdiction that will regulate them. Having diverse circuit law, in most cases, would not produce a race to the top (or to the bottom), because there is no mechanism akin to natural selection to ensure that the stronger legal regimes survive.

151. See, e.g., Estreicher & Sexton, *supra* note 51, at 699 (“[T]he mere existence of a conflict does not warrant Supreme Court intervention unless the costs created by the conflict outweigh the beneficial effects of further percolation.”); see also *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (“It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.”). But see Paul M. Bator, *What Is Wrong with the Supreme*



every circuit develops the same solution to a problem, the Supreme Court will never receive the benefit of conflicting circuit decisions, and Supreme Court decisions may suffer as a result. If visiting en banc panels achieve uniformity only at the expense of the quality of Supreme Court decisionmaking, the price may be too high.

The goal of my proposal, however, is not uniformity per se: The adoption of the proposal would not eliminate intercircuit conflicts. Rather, the goal is simply to have relatively large, objective, and representative groups decide some issues. Such groups might still disagree with one another on particularly close cases, and panel decisions that are not reviewed would still produce some conflicts. If the proposal is enacted, to be sure, the number of conflicts would be less. But the Supreme Court has plenty of conflicts from which to choose anyway.<sup>152</sup> My proposal would tend to steer the Court toward the most difficult legal questions, those on which moderates disagree, rather than those in which a very small number of judges dare to take an extremist position. For those who believe in judicial minimalism, this should be a positive development.<sup>153</sup>

Moreover, if the number of direct circuit conflicts did fall precipitously, the Supreme Court could change the criteria by which it selects cases to review.<sup>154</sup> A circuit split is only the most prominent basis for Supreme Court review on certiorari.<sup>155</sup> If the justices felt after enactment of the proposal that the Supreme Court was no longer hearing a significant number of cases for which Supreme Court review would be helpful, it could decide to hear cases presenting important issues of federal law about which the lower courts have expressed considerable disagreement, regardless of whether such disagreement was manifested in a direct legal conflict. For example, the Court might decide to consider a dispute in

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Court?, 51 U. Pitt. L. Rev. 673, 689 (1990) (asserting that "percolation exacts important and painful costs" but acknowledging its benefits); Justice William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 Fla. St. U. L. Rev. 1, 11 (1986) ("[T]hat it is actually desirable to allow important questions of federal law to 'percolate' in the lower courts for a few years before the Supreme Court takes them on seems to me a very strange suggestion."); Todd J. Tiberi, Comment, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procastination?*, 54 U. Pitt. L. Rev. 861, 882-91 (1993) (performing a study showing no demonstrable improvement in decisionmaking in Supreme Court cases in which there has been greater percolation in the lower federal courts).

152. See Floyd Feeney, *Conflicts Involving Federal Law: A Review of Cases Presented to the Supreme Court, in Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change* app. B at 93, 106 (1975), reprinted in 67 F.R.D. 195 app. B at 301, 318 (concluding that the Supreme Court fails to review about 60 conflicts annually). But see Estreicher & Sexton, *supra* note 51, at 697-700 (disputing Feeney's analysis).

153. See generally Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 10-19 (1999) (arguing for "democracy-forcing minimalism").

154. Judge Weis gives much the same answer to a similar objection to his proposal to eliminate circuits altogether in favor of a single, national circuit. See Joseph F. Weis, Jr., *Disconnecting the Overloaded Circuits—A Plug for a Unified Court of Appeals*, 39 St. Louis U. L.J. 455, 471-72 (1995).

155. See Sup. Ct. R. 10.

which three circuits had ruled the same way, but did so over dissents attracting a large number of lower court judges.

3. *Experimentation.* — If the purpose of percolation is simply to ensure that the Supreme Court has in hand arguments both for and against a particular position, then such a change in review rules would solve the problem. One might argue, however, that what the Court sometimes needs is the experience of different circuits living under different rules. For example, the justices might care about the workability of different solutions, and actual experience by those seeking to comply with rules of different circuits may be better than mere speculation. Such experimentation also may be useful to Congress or even to state legislatures.

If experimentation is really a significant concern,<sup>156</sup> though, it is one that en banc panels might explicitly support. An en banc panel might decide not to follow the rule of another circuit simply to create a conflict.<sup>157</sup> The court might justify such a decision by noting that the context was one in which a natural experiment would be particularly useful. If it seems that this would not happen much, it is only because judges do not highly value such experiments. Perhaps judges undervalue experimentation, but attempts to persuade judges that such experimentation would be useful seem more likely to produce judicious use of this tool than a structural mechanism that automatically creates an experiment given disagreement, even if the experiment is unlikely to produce useful data.

#### CONCLUSION

The transformation of the courts of appeals is not a sudden development, and the days when Supreme Court justices rode circuit are irretrievably lost. Perhaps some of the mystique of the courts is gone too.<sup>158</sup> My aim has not been to turn back the clock, or even to resolve the existing debates about the future of the courts of appeals. Rather, I have tried to show that it might be possible to restore to them institutional

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156. I am skeptical that this is important to the Court. On occasion, the Court does conclude that a decision it previously rendered has turned out to be unworkable. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) (finding the doctrine of *National League of Cities v. Usery*, 426 U.S. 833 (1976), to be unworkable). I have been unable, however, to find a case in which the Court has explicitly compared the workability or desirability of different lower court approaches to an issue by examining those courts' experiences with the issue.

157. This would flip the common practice by which a circuit shows some deference to the judgment of a sister circuit. See, e.g., *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979) (explaining that such deference is in the interest of intercircuit uniformity). A circuit adopting a position specifically to create a conflict would effectively be following a principle of antideference.

158. This may not be lamentable. See Richard A. Posner, *Professionalisms*, 40 *Ariz. L. Rev.* 1, 3 (1998) (suggesting that "professional mystique" may be a means by which a profession with shaky claims to superior knowledge seeks to secure its societal position); Erwin Chemerinsky, *It's Good to Put a Human Face on a God-Like Role*, *L.A. Times*, Nov. 16, 1994, at B7 (arguing that it is important to recognize the fallibility of judges).

coherence, regardless of whether Congress adds judgeships or how Congress reconfigures circuits. The challenge, in my view, is not simply to find an optimal hierarchy of review, or to figure out how to divide or consolidate circuits. It is to temper the disconnect between any given decision and the courts as a whole. By making the identity of reviewing judges unpredictable, visiting en banc would help accomplish this and, ironically, improve the predictability of the law itself.

The proposal, moreover, seems sufficiently modest to be politically palatable. By stressing the virtue of moderation, the proposal may be attractive both to conservatives eager to police the Ninth Circuit and liberals eager to rein in the Fourth. I suspect, however, that there is one significant group that will not like the proposal: federal judges. Enactment of visiting en banc panels would result in more intensive review of their work, not to mention more travel. More significantly, while academics have been unconcerned about ensuring democratically defensible judicial lawmaking, judges may be even less troubled by the prospect that outcomes may depend in part on panel selection.<sup>159</sup> And so, the proposal ironically might seem to fail its own test: approval by a majority of federal appellate judges.<sup>160</sup> My immediate goal, however, is not to achieve swift enactment of the proposal, but to challenge the academy's indifference to the goal of achieving majoritarian judicial decisionmaking.

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159. See, e.g., Edwards, *supra* note 22, at 619–20 (defending the predictability of judicial outcomes based on panel composition); Newman, *supra* note 85, at 382–85 (defending the rarity of en banc decisionmaking in the Second Circuit); Wald, *supra* note 63, at 251–53 (implying that judges' backgrounds impact outcomes). Reform proposals that judges have offered would not lead to routine scrutiny of judicial work. See generally Wallace, *supra* note 11, at 936–37 (proposing a national en banc court); Weis, *supra* note 154, at 466 (proposing consolidation of all circuits).

160. Of course, my proposal does not attempt to supplant legislative decisionmaking with decisionmaking by the hypothetical median judge, but simply to ensure majoritarian decisionmaking on legal questions as to which the legislature has not directly spoken, as well as majoritarian assessments of whether the legislature has spoken. A legislature therefore might legitimately enact judicial reforms over judicial opposition, although federal judges may represent a powerful interest group that makes such reform unlikely. See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 *Harv. L. Rev.* 924, 949–55 (2000) (arguing that the federal judiciary has functioned as a powerful interest group).