2006

Section 9: Miscellaneous

Institute of Bill of Rights Law at the William & Mary Law School

IX. MISCELLANEOUS

In This Section:

Also this Term: Other Cases from the 2006-07 Term

BP Am. Prod. Co. v. Watson p. 550

Global Crossing, Inc. v. Metrophones, Inc. p. 550

James v. United States p. 551

Ledbetter v. Goodyear Tire and Rubber Co., Inc. p. 551

Marrama v. Citizens Bank of MA p. 552

MedImmune, Inc. v. Genentech, Inc. p. 552

Norfolk Southern Railway Co. v. Sorrell p. 553

Osborn v. Haley p. 553

U.S. v. Resendiz-Ponce p. 554

Wallace v. City of Chicago p. 554

Watters v. Wachovia Bank p. 554

Other:

"Exploring the Myths About the Ninth Circuit" p. 556
Stephen J. Wermiel

BP Amoco Production Co. v. Watson

(05-669)

Ruling Below: (*Amoco Production Co. v. Watson*, 410 F.3d 722 (D.C., 2005). *cert granted* 126 S. Ct. 1768; 74 U.S.L.W. 3584 [2006]).

Under the Mineral Leasing Act, plaintiff must pay royalties to the government for gas extracted from leased lands. Plaintiff deducted the cost of removing carbon dioxide from the gas it was extracting from the royalties it paid, although the lease required them to do so for free. Plaintiff claims that the statute of limitations prevents the Department of the Interior from collected the additional royalties, while the DOI claims the statute of limitations does not apply here because the suit was not an action for money damages.

Question Presented: Whether—contrary to the decision below but consistent with decisions of the Tenth and Federal Circuits—the limitations period in 28 U.S.C. § 2415(a) applies to federal agency orders requiring the payment of money claimed under a lease or other agreement.

Global Crossing, Inc. v. Metrophones, Inc.

(05-705)

Ruling Below: (*Metrophones Telecommunications, Inc. v. Global Crossing*, 423 F.3d 1056 (9th Cir. 2005), *cert granted* 126 S. Ct. 1329, 74 U.S.L.W. 3471 [2006]).

Metrophones sued Global Crossing, a long distance telephone service, for violating the Communications Act, claiming that Global had not reimbursed Metrophones for use of its pay phones. Global's customers used a toll-free number to access the long distance service from a payphone and did not pay Metrophones for use of the payphone. Global claims that Metrophones does not have a private right to sue for damages under the Communications Act, but the Ninth Circuit, deferring to the FCC's interpretation of the statute, held that Metrophones may sue.

Question Presented: Whether 47 U.S.C. § 201(b) of the Communications Act of 1934 creates a private right of action for a provider of payphone services to sue a long distance carrier for alleged violations of the FCC's regulations concerning compensation for coinless payphone calls.

James v. United States

(05-9264)

Ruling Below: (*U.S. v. James*, 430 F.3d 1150 (11th Cir. 2005)., *cert granted* 165 L. Ed. 2d 894, 74 U.S.L.W. 3685 [2006]).

James plead guilty to possession of a firearm by a convicted felon, and the government sought to increase his sentence under the Armed Career Criminal Act (ACCA), under which the government can increase sentences if the criminal has three prior convictions for serious drug offenses or violent felonies. The district court did not increase his sentence, holding that an attempted burglary did not count as a violent crime under the ACCA. The 11th Circuit determined that a drug trafficking conviction was a serious offense and that an attempted burglary could count towards a violent felony, and increased James' sentence under the ACCA.

Question Presented: Whether the Eleventh Circuit erred by holding that all convictions in Florida for attempted burglary qualify as a violent felony under 18 U.S.C. § 924(e), creating a circuit conflict on the issue.

Ledbetter v. Goodyear Tire and Rubber Co., Inc.

(05-1074)

Ruling Below: (*Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, 421 F.3d 1169 (11th Cir. 2005)., *cert granted* 74 U.S.L.W. 3720 [2006]).

Ledbetter sued the tire company alleging sex discrimination under Title VII of the Civil Rights Act that resulted in her being paid less than male coworkers over a 19 year career and was awarded $360,000 in damages. Goodyear appealed, noting that a plaintiff is required to file a complaint within 180 days of an allegedly discriminatory decision. Since Goodyear periodically reviews employee salaries, on appeal the court held that Ledbetter could only recover damages for pay periods for which she could prove intentional discrimination that were within the statute of limitations. Because Ledbetter could not prove intentional discrimination for the periods during the statute of limitations, she could not recover damages.

Question Presented: Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.

Marrama v. Citizens Bank of MA

(05-996)

Ruling Below: (*In re Marrama,* 430 F.3d 474 (1st Cir. 2005)., *cert granted* 165 L. Ed. 2d 894; 74 U.S.L.W. 3685 [2006]).

Marrama filed for Chapter 7 bankruptcy, and claimed that a trust that he owned had no value, when in fact he had transferred real estate worth $85,000 into that trust. Marrama later moved to convert his filing into a chapter 13 bankruptcy so he could maintain control over the asset. Citizens Bank, one of his creditors, argued that he should not be able to convert his filing since he had filed in bad faith by attempting to conceal an asset. The bankruptcy court denied Marrama's conversion and the First Circuit upheld, holding that since the goal of the bankruptcy court is to prevent abuse of the bankruptcy system, the court could deny conversions for bad faith.

Question Presented: Whether the right to convert a chapter 7 bankruptcy case to another chapter can be denied notwithstanding the plain language of the statute and the legislative history.

MedImmune, Inc. v. Genentech, Inc.

(05-608)

Ruling Below: (*MedImmune, Inc. v. Genentech, Inc.*, 427 F.3d 958 (Fed. Cir. 2005)., *cert granted* 126 S. Ct. 1329; 74 U.S.L.W. 3471 [2006]).

MedImmune sued Genentech for declaratory judgment that a patent that MedImmune was licensing from Genetech was invalid or unenforceable after Genentech settled a patent dispute over that patent with a separate company. The district court granted Genentech's motion to dismiss the matter for failing to meet the "actual controversy" requirement of Article III, since MedImmune was still paying Genentech royalties under the licensing agreement, and therefore was not in danger of being sued by Genentech for breach of the agreement.

Question Presented: Does Article Ill's grant of jurisdiction of "all Cases . . . arising under . . . the Laws of the United States," implemented in the "actual controversy" requirement of the Declaratory Judgment Act, 28 U.S.C. § 2201(a), require a patent licensee to refuse to pay royalties and commit material breach of the license agreement before suing to declare the patent invalid, unenforceable or not infringed?

Norfolk Southern Railway Co. v. Sorrell

(05-746)

Ruling Below: (*Sorrell v. Norfolk Southern Ry. Co.,* 170 S.W.3d 35 (Mo.App. E.D.,2005)., *cert granted* 126 S. Ct. 2018; 74 U.S.L.W. 3639 [2006]).

Sorrell, an employee of Norfolk Southern, sued the company under the Federal Employers Liability Act for compensation for injuries he received while attempting to avoid another Norfolk Southern truck on a narrow road. Norfolk Southern claims that under the FELA, the same standard of negligence must be applied to both parties, and therefore Sorrell's damages must be decreased by the amount of his own negligence. The court held that the contributory negligence standard only required them to decrease damages by the amount that the plaintiff's negligence directly caused the damage and awarded Sorrell $1.5 million.

Question Presented: Whether the court below erred in determining-in conflict with this Court and multiple courts of appeals-that the causation standard for employee contributory negligence under the Federal Employers Liability Act ("FELA ") differs from the causation standard for railroad negligence.

Osborn v. Haley

(05-593)

Ruling Below: (*Osborn v. Haley*, 422 F.3d 359 (6th Cir., 2005)., *cert granted* 165 L. Ed. 2d 894; 74 U.S.L.W. 3685 [2006]).

Osborn, a private contractor working for the US Forest Service, sued Haley, a Forest Service employee, alleging that Haley influenced Osborn's employer to fire her. The United States certified that Haley was acting within the scope of his employment and invoked the Westfall Act, which grants immunity to government employees for torts within the scope of their employment, and removed the suit to federal court. Osborn alleged that Haley's actions were not within the scope of his employment, and the district court accepted this allegation and remanded the case to state court. On appeal the 6th Circuit held that the allegations should not have been automatically accepted, and that a federal court cannot remand a matter involving the Westfall Act to a state court, since the Act raises a federal question.

Questions Presented: 1. Whether the Westfall Act authorizes the Attorney General to certify that the employee was acting within the scope of his office or employment at the time of the incident solely by denying that such incident occurred at all.
2. Whether the Westfall Act forbids a district court to remand an action to state court upon concluding that the Attorney General's purported certification was not authorized by the Act.

U.S. v. Resendiz-Ponce

(05-998)

Ruling Below: (*U.S. v. Resendiz-Ponce*, 425 F.3d 729 (9th Cir., 2005)., *cert granted* 126 S. Ct. 1776; 74 U.S.L.W. 3584 [2006]).

Resendiz-Ponce was convicted of attempting to reenter the US after being deported. He moved to dismiss the indictment because it did not allege the element of an overt act on his part, which is an element of a criminal indictment required by prior case law. The court of appeals held that the lack of an overt act in the indictment was not a harmless error and was cause to dismiss the indictment.

Question Presented: Whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error.

Wallace v. City of Chicago

(05-1240)

Ruling Below: (*Wallace v. City of Chi.* , 440 F.3d 421 (7th Cir., 2006)., *cert granted* 126 S. Ct. 1776; 74 U.S.L.W. 3584 [2006]).

Wallace was arrested and convicted of first degree murder, then the Illinois Appellate Court found that his arrest had been without probable cause and he was granted a new trial. Wallace later sued the city and two detectives for false arrest, and the city argued that his claim was barred by the statute of limitations. The Seventh Circuit Court upheld Chicago's motion for summary judgment, holding that Wallace would have needed to sue within two years of his arrest to meet the statute of limitations.

Question Presented: When does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment accrue when the fruits of the search were introduced in the claimant's criminal trial and he was convicted?

Watters v. Wachovia Bank

(05-1342)

Ruling Below: (*Wachovia Bank v. Watters*, 431 F.3d 556 (6th Cir. 2005)., *cert granted* 165 L. Ed. 2D 915; 74 U.S.L.W. 3702 [2006]).

Wachovia Mortgage registered under Michigan law to make mortgage loans in that state, and later merged with Wachovia Bank, a national bank. Wachovia Mortgage surrendered its lending registration in Michigan, and was told by the state that it could no longer conduct lending there. Wachovia sued Watters, Commissioner of the Michigan Office of Insurance and Financial Services, seeking a declaration that Michigan is preempted from regulating national banks by the National Bank Act, and an injunction preventing Michigan from stopping its lending in the state. The district court and the Sixth Circuit upheld Wachovia's motion for summary judgment.

Questions Presented: 1. 12 USC § 484(a) of the National Bank Act limits visitorial powers over "national banks" except as authorized by federal law. National banks are defined and created under the National Bank Act. State-chartered nonbank operating subsidiaries of national banks are created under State corporate law. The Comptroller of the Currency, by Rule 12 CFR 7.4006, made 12 USC § 484(a) equally applicable to State-chartered nonbank "operating subsidiaries" of national banks. Is the interpretation of the Comptroller of the Currency that 12 CFR 7.4006 preempts Michigan's laws regulating mortgage lending as applied to State chartered nonbank operating subsidiaries, entitled to judicial deference under Chevron USA, Inc v Natural Resources Defense Council?
2. A national bank has been declared to be a national corporation in Guthrie v Harkness. 12 CFR 7.4006 treats a State-chartered nonbank operating subsidiary of a national bank as equivalent to a national bank and, thus, as a national corporation. The Tenth Amendment to the United States Constitution is violated to the extent a statute permits the conversion of State corporations into federal ones in contravention of the laws of the place of their creation. Hopkins v Federal Savings & Loan Ass'n v Cleary. Does 12 CFR 7.4006, by equating a State-chartered nonbank operating subsidiary with a national bank for purposes of federal preemption of State regulation, violate the Tenth Amendment to the United States Constitution?

OTHER

"Exploring the Myths About the Ninth Circuit"

Arizona Law Review
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Stephen J. Wermiel

[Excerpt:]
When the U.S. Court of Appeals for the Ninth Circuit issued its original ruling invalidating the Pledge of Allegiance in 2002, the decision provoked a flood of thoughtful commentary and debate in newspapers and academic journals. It also produced another type of reaction, reflected in the remarks of Speaker of the U.S. House of Representatives Dennis Hastert (Republican, Ill.), who said, "Obviously, the liberal Court in San Francisco has gotten this one wrong."

Hastert's comment is just one example of a perception held by many politicians, legal commentators, and journalists that the country's largest court of appeals—it covers nine states and two territories, and presently has twenty-eight active judges authorized and twenty-three senior judges—is a bastion of liberalism run amok. In its most persistent form, this perception holds that the Ninth Circuit is so out of control that the Supreme Court of the United States must devote considerable time and energy to reining in the judges and correcting their decisions.

* * *

This Essay suggests that the Ninth Circuit suffers less from a genuine runaway tendency toward renegade judicial decisionmaking and more from a bandwagon effect of political criticism perpetuated by media commentary. Moreover, the sometimes breathless fascination with Supreme Court reversals of Ninth Circuit decisions, as if to suggest revelation of an important new trend, reflects a very short memory. Precisely the same controversy occurred in the early 1980s, coinciding roughly with the discovery by young Reagan Administration conservatives that they could gain political mileage out of calling attention to the frequency of Ninth Circuit reversals by the Supreme Court. The controversy was substantial at the time. As Harvard Law School Professor Laurence Tribe suggested in the Los Angeles Times with respect to the 1980s controversy, "The rate at which that court's decisions were reversed by the Supreme Court last term has no genuine significance, and certainly does not prove there was any attempt by the Supreme Court to 'discipline' the 9th Circuit's judges."

I. THE CONTROVERSY

The premise at the core of the controversy is that judges of the Ninth Circuit march to their own frequently liberal beat, do not heed the rulings of the Supreme Court, and are out of step with the High Court's direction. This premise manifests itself in two ways:

One manifestation is that legal scholars and

media and political commentators follow the Supreme Court's reversal rates of the various circuits with a statistical fascination equaled only in fantasy baseball leagues. This results in dissemination of numbers showing frequent reversal of the Ninth Circuit and a corresponding assumption that the numbers establish the premise: frequent reversals must mean a liberal, out-of-step circuit being reminded by the Supreme Court that the Justices are in charge. The reversal rates lead to a number of observations:

First, the Ninth Circuit has been at the high end of reversal rates, not just over the past decade, but over the past thirty years. In some years, the Ninth Circuit's reversal rate has far exceeded the norm. In the 1984 term, the Supreme Court reversed the Ninth Circuit twenty-seven times in twenty-eight cases. In the 1996 term, the Supreme Court reversed the Ninth Circuit ninety-five percent of the time.

Second, more recently, the Ninth Circuit's reversal rate has not been out of line with the other circuits; but Ninth Circuit cases have represented a disproportionate share of the Supreme Court's argument docket, and unanimous reversals have been disproportionately high.

Third, the Ninth Circuit is not alone in experiencing high reversal rates, but it has had more bad years than some other circuits. The Ninth Circuit has also carried more of the burden of negative commentary, although other circuits, for example, the Fifth, have experienced some similar box-score analysis.

Finally, some decisions of the Ninth Circuit take on a liberal notoriety that is hard to escape. Among these are the ruling striking down the California three-strikes law and the Pledge ruling. The second way the premise is manifested is that the image generated by the repetition of the statistics takes on a life of its own in the news media and in legal commentary, so that the runaway liberal court becomes a recurring theme used to explain legal developments that may have no connection to this image. Commentary on important rulings is sometimes filtered through the prism of a runaway court, rather than considering decisions on their merits. Debatable but plausible rulings, albeit controversial, become products of the scofflaw liberal judges of the Ninth Circuit.

This Essay first examines some Ninth Circuit cases to raise questions about the image of a conservative Supreme Court regularly correcting renegade liberal judges. Next, the Essay examines some of the commentary to demonstrate how it perpetuates the premise of the Ninth Circuit as out of control.

The identification of judges in this Essay by the President who appointed them is intended as a proxy for whether they may be likely to be liberal or conservative. The point of this identification is not to reduce the federal judiciary to partisan labels. Rather, it is intended as a measure of how likely it is that decisions by particular judges should be considered part of a trend of liberal jurists disregarding the mandate of the Supreme Court.

II. THE CASES

The difficulty with the statistical analysis is that it suggests an image that is much more complex and nuanced than the numbers can demonstrate. Even in the years of the Ninth Circuit's worst records in the Supreme

Court, the relationship between the two courts has never been a monolithic one capable of a single explanation or transmitting a single message. While anecdotal evidence is all that this Essay has to offer, the anecdotes do demonstrate a number of important internal differences that the statistics do not. Of course, anecdotes alone do not allow us to be comprehensive in our conclusions.

The anecdotal themes include:

First, some Supreme Court reversals of the Ninth Circuit involve cases of first impression; the two courts may have reached different results, but the Ninth Circuit only became wrong because the Supreme Court subsequently took a different view.

Second, while there are many examples of unanimous reversal of the Ninth Circuit, there are also many cases in which the Supreme Court vote was five-to-four; once again, the Ninth Circuit may have been wrong, but the Supreme Court vote indicates that the decision was close.

Third, some reversals of Ninth Circuit opinions involve panel opinions written by judges appointed by Republican Presidents Ronald Reagan, George H.W. Bush, or George W. Bush; therefore, it is erroneous to claim that the reversals all fall on decisions by judges appointed by Democratic Presidents Jimmy Carter or Bill Clinton.

Fourth, even when the panel opinion was written by a Democratic judicial appointee, many of the reversals occur in cases in which the panel included judges appointed by Republican Presidents.

Finally, when the Supreme Court reverses the Ninth Circuit in intercircuit conflict cases, the Ninth Circuit's position was sometimes shared by other circuits.

There are numerous examples to illustrate these points, and no attempt was made here to be exhaustive or to quantify the cases in each category. Rather, the point is that even a sampling of examples is sufficient to suggest what is missing from much statistical analysis in this field.

A. First Impression

* * *

There are more recent examples of cases of first impression. In its 2004 Term, the Supreme Court reversed the Ninth Circuit's ruling in *Raich v. Ashcroft*, in which the circuit panel had ruled that the state's allowance of the use of marijuana for local medicinal purposes was beyond the regulation of Congress under the Commerce Clause of the U.S. Constitution. The novel question was resolved in a panel opinion by Judge Harry Pregerson, appointed to U.S. District Court by President Johnson and elevated to the Ninth Circuit by President Carter. The Supreme Court reversed, six-to-three, ruling that the Commerce Clause provided ample authority for application of the federal Controlled Substances Act to restrict state-approved use of medical marijuana. Yet far from being an example of a rogue, liberal court being pulled back by a conservative one, the panel arguably made a good faith effort to apply the federalism rulings of the Rehnquist Court, only to be reversed by a Supreme Court majority seeking to limit the scope of the Court's new federalism jurisprudence. The majority opinion was written by Justice John Paul Stevens, and the dissent by Justice Sandra Day O'Connor, who made clear that the

Ninth Circuit had followed the correct analysis, at least from the standpoint of those responsible for the Supreme Court's principal federalism decisions.

B. Closely Divided Supreme Court

There is no shortage of examples in which reversal of the Ninth Circuit was by a deeply divided Supreme Court. While these cases statistically count as reversals, they suggest that the issues are close or that they predictably bring out the fault line of ideological divide. This was the case in *Lockyer v. Andrade*, the Supreme Court decision in favor of the California "three strikes" law. The Supreme Court's reversal of the Ninth Circuit was by a five-to-four vote and fell along ideological lines. Did this mean the lower court was out of line? Perhaps it seemed that way to five members of the Supreme Court, but not to the other four. With the Court so divided and Justice O'Connor casting the deciding vote and writing the majority opinion, it is hard to say that this counts as an example of a runaway circuit court opinion.

C. Decisions Authored by Republican Appointees

There are also cases in which the reversal pattern does not fit the model for controversy of liberal judges reversed by conservative justices. In *Lingle v. Chevron U.S.A.*, the Supreme Court reversed the Ninth Circuit unanimously, but in doing so rejected the use of an established test to determine whether a Hawaii law was a regulatory taking of private property. The Hawaii law limited the rent an oil company may charge a dealer that leases a gas station owned by the company. The panel opinion, which applied the existing test that a regulation may be a taking if it "does not substantially advance legitimate state interests," was written by Judge Robert Beezer, appointed to the Ninth Circuit by President Reagan. One of the two panel members appointed by Democratic Presidents, Judge William Fletcher, wrote a dissent. The Supreme Court opinion, written by Justice O'Connor, reversed Judge Beezer but did not adopt Judge Fletcher's dissent. This hardly stands as a cause for alarm about a circuit that needs to be carefully watched.

D. Republican Appointees Voting with Majority

There is also a group of cases in which the panel opinion was written by a judge appointed by a Democratic President. In these cases, there is more cause to scrutinize whether liberal judges are simply out of step with the more conservative superintendency of the law by the Supreme Court. Yet invariably this category, too, contains cases that reflect a complexity not developed by statistical analysis. This is most true when the panel includes one or more judges appointed by Republican Presidents who join the Court's opinion.

Consider *McNeil v. Middleton*, a unanimous Ninth Circuit panel ruling ordering a U.S. District Court to grant a habeas corpus petition in a second-degree murder case in which the panel said a woman was deprived of the ability to mount a defense and to have a fair trial. The Supreme Court unanimously and summarily reversed the panel, without briefing or oral argument. While the opinion was written by an appointee of President Clinton, Judge Richard Paez, it was joined in full by Judge Beezer, a Reagan appointee, and by Judge Ferdinand Fernandez, who was named to the U.S. District Court by President Reagan and elevated to the circuit by the first President Bush. It is fair to say

that liberal judges are sometimes criticized for being too sympathetic to habeas claims, but in this instance, the habeas claims were accepted not only by Judge Paez but also by two Republican appointees as well.

E. Circuit Splits

Finally, there is a category of rulings in which the Ninth Circuit was reversed but was in agreement with the positions of one or more of its sister circuits. There are numerous instances of this. An example illustrates the point that the Supreme Court could just as easily have used the rulings of other circuits to reverse at another time, and it may be little more than a coincidence that a Ninth Circuit case was chosen. In *United States v. Martinez-Salazar*, the Ninth Circuit had found a Fifth Amendment due process violation when a judge refused to dismiss a juror for cause in a criminal case, the defendant used a peremptory challenge against the juror, and the defendant ran out of peremptory strikes. The panel opinion was written by Judge Michael Daly Hawkins, an appointee of President Clinton; it was joined by Judge Stephen Reinhardt, an appointee of President Carter and a frequent target for criticism of the Ninth Circuit. Judge Pamela Rymer, a U.S. District Court appointee of President Reagan, elevated to the Ninth Circuit by the first President Bush, dissented. The Supreme Court unanimously reversed the Ninth Circuit in an opinion written by Justice Ruth Bader Ginsburg, who specifically noted that the First and Fifth Circuits had adopted a position that shared the Ninth Circuit's view, while the Tenth and Eleventh Circuits38 disagreed with the Ninth. The Supreme Court, then, could have handled this issue in a case from another circuit; had it done so, the case would not have been reflected in the Ninth Circuit's reversal rates.

In the use of all of these anecdotes, there is a modest goal: to demonstrate that the reversal rate of the Ninth Circuit is made up of different component parts that are far more subtle and nuanced, and perhaps incapable of a single explanation, than statistical studies are able to show. Judges of all ideological stripes get reversed by a Supreme Court moving in different directions, most often conservative, but sometimes more moderate.

III. THE COMMENTARY

It is difficult to document and assess the effect of a bandwagon of commentary. However, some useful observations are possible. The fascination in the news media with the record of the various courts of appeals and voting patterns may be traced to the early 1980s when President Reagan began to populate those courts with more conservative judges to join the moderate-to-liberal jurists placed on the bench by President Carter. As the circuits began to reflect the presence of conservatives, the media began to write about the circuits. This was reflected in a May 1983 series in the National Law Journal. At the time, Reagan had not yet placed any judges on the Ninth Circuit, but one article had a prescient quality:

> Finally, it comes down to politics. For example, the 9th Circuit has (23) judges—most appointed by Democrats and none appointed by President Reagan. The Supreme Court has nine justices—seven of whom were appointed by Republican presidents. "It's a matter of personnel," said Johns Hopkins' Professor [J. Woodford] Howard. But, he added, "It can change very quickly."

By the fall of 1984, the Knight-Ridder newspapers carried a report on the opening of the Supreme Court term by reporter Aaron Epstein, who described the Court's decision to review an antipornography law from the state of Washington. He noted that the law "was ruled unconstitutional by the liberal Ninth Circuit U.S. Court of Appeals in California, the most overruled appellate tribunal in the nation during the last Supreme Court term."

That is just one instance of the link between the liberal Ninth Circuit and the reversal rate being tied together and published, but it is significant for two reasons. First, it shows the connection between ideology and reversal rate being made in media commentary, although no information was offered to provide support for the connection. Second, this discussion of the image of the Ninth Circuit took place more than twenty years ago and seemed to have been almost entirely forgotten when, a decade later, a new generation of commentary about Ninth Circuit reversals burst on the scene as if it were a newly discovered phenomenon.

By 1985, the National Law Journal began to publish an end-of-the-term Supreme Court Review, which included a box score on the record of the circuits and of state courts in the Supreme Court. This continued to focus attention on reversal rates and on the Ninth Circuit's record, although that record seemed to fluctuate substantially.

* * *

By the time the pattern of Supreme Court treatment of the Ninth Circuit appeared to change, beginning in 2002, some commentary suggested that there were lasting residual effects. In the last several years the Ninth Circuit's reversal rate has been right at about the average, overall reversal rate. However, cases from the Ninth Circuit have made up a substantial and disproportionately large fraction of the Supreme Court's argued docket, as much as one-third of the roughly seventy-five cases argued each term.

This new phenomenon has evoked a number of possible explanations. One in particular, suggested by University of Pittsburgh Law School Professor Arthur Hellman, is cause for concern. An article in 2004 in The Recorder, a California legal newspaper and news service, reported, "'You have to wonder whether the [Supreme Court] law clerks don't take a special look at 9th cases,' said Hellman, who closely follows the 9th Circuit. It's like a 'self-reinforcing phenomenon because they've taken so many in the past that it becomes the focus of attention,' he speculated."

CONCLUSION

In a sense this last observation completes the cycle. Having been branded with a reputation for reversals and an image for runaway liberalism, the Ninth Circuit's decisions may now be subject to even closer scrutiny. This is so, regardless of whether the reputation was ever supported by fact or was merely a product of politics, bandwagons, and overemphasis of statistics.

The Ninth Circuit may in fact have been the most liberal circuit during the past twenty-five years. However, before the reputation of the circuit and its members is sullied by being mocked as too liberal and out of control, an effort should be made to move beyond a quantitative analysis that is necessarily detached from an examination of

values and content. Any evaluation of the circuit should be based on the substance and nature of its rulings, not simply on a box score.