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Going En Banc

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Abstract

This Article examines the law of en banc review in the federal courts of appeals. It explores key doctrinal questions and advances a theory that maintains the primacy of three-judge panels by focusing the en banc process on a specialized set of institutional tasks.

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INTRODUCTION

In 2022, the Supreme Court of the United States denied certiorari in *Shoop v. Cunningham*.[1] The case, which came from the Sixth Circuit Court of Appeals, involved a habeas corpus petition based on juror bias during a criminal trial.[2] That the Supreme Court denied certiorari in *Shoop* is unremarkable; the Justices grant only a small fraction of the petitions they receive.[3] Nor is it unusual that the Court declined to explain its decision; that, too, is consistent with the Court's customary practice.[4]

Other aspects of the case were peculiar. Justice Clarence Thomas, joined by Justices Samuel Alito and Neil Gorsuch, published an opinion dissenting from the Court's order.[5] Dissenting from the denial of certiorari is an unusual step customarily reserved for matters of unique importance.[6] Even

1. 143 S. Ct. 37, 37 (2022).

2. *Id.* (Thomas, J., dissenting).

3. *See* SUP. CT. OF THE U.S., STATEMENT OF THE COURT REGARDING THE CODE OF CONDUCT 11 (2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [https://perma.cc/FR32-HU8T] (noting that "[t]he Court receives approximately 5,000 to 6,000 petitions for writs of certiorari each year").

4. *See, e.g.*, SUP. CT. OF THE U.S., ORDER LIST PUBLISHED JAN. 13, 2025, https://www.supremecourt.gov/orders/courtorders/011325zor_5425.pdf [https://perma.cc/2NUP-MNC2].

5. *See Shoop*, 143 S. Ct. at 37 (Thomas, J., dissenting).

6. *See Opinions Relating to Orders - 2022*, SUP. CT. OF THE U.S., http://www.supremecourt.gov/opinions/relatingtoorders/22 [https://perma.cc/GM7W-99AG] (identifying 21 cases from October Term 2022 that

more notable was Justice Thomas's discussion of the Sixth Circuit. The Sixth Circuit's opinion in *Shoop* was issued by a three-judge panel.[7] The other Sixth Circuit judges did not participate in the case.[8] Though the off-panel judges could have voted to rehear the case en banc, they opted not to do so.[9] To Justice Thomas, that choice amounted to a dereliction of duty.[10] In his view, the Sixth Circuit had become too permissive of mishandled habeas claims.[11] Had the off-panel judges been less complacent, they would have gone en banc to override their wayward colleagues. Justice Thomas recognized that "reluctance in deploying en banc review is understandable."[12] But, he added, "only to a point."[13]

Now, the obvious question: to *what* point?

This Article explores the dynamics of en banc review and offers an account of when going en banc is justified—and when it is not.

* * *

Though en banc review in the federal circuits is nothing new,[14] recent years have witnessed an outpouring of scholarly interest in en banc practices and their interaction with matters

included a published dissent from the denial of certiorari). During October Term 2022, the Supreme Court denied certiorari in over 4,000 cases. *The Statistics*, 137 HARV. L. REV. 490, 498 (2023).

7. *See* Cunningham v. Shoop, 23 F.4th 636, 643 (6th Cir. 2022).

8. *Id.*

9. *See* Cunningham v. Shoop, No. 11-3005, 2022 WL 1072876, at *1 (6th Cir. Mar. 28, 2022) (noting that after circulation of the petition for rehearing en banc to the full court, no judge requested a vote).

10. *Shoop*, 143 S. Ct. at 44 (Thomas, J., dissenting).

11. *See id.* at 44–45.

12. *Id.* at 45.

13. *Id.* For a recent counterpoint, see Johnson v. Vandergriff, 143 S. Ct. 2551, 2553 & n.2 (2023) (Sotomayor, J., dissenting from the denial of application for stay and denial of certiorari) (suggesting that a circuit court was unduly aggressive in going en banc to vacate the panel's decision in a habeas case).

14. The current statutory foundation for en banc review is 28 U.S.C. § 46(c). The Supreme Court previously recognized the availability of en banc review under a predecessor statute. *See* Textile Mills Secs. Corp. v. Comm'r, 314 U.S. 326, 334–35 n.14 (1941).

of judicial culture, methodology, and ideology.[15] The pivotal question is easy enough to state: what are the criteria that must be met to warrant en banc rehearing? As one judge recently put it, that question is "evergreen."[16]

In examining the nature and operation of en banc review, the starting point is the structure of the federal judiciary. Congress created thirteen circuit courts of appeals, of which twelve are regional and the other, the Court of Appeals for the Federal Circuit, is charged with resolving cases involving certain types of claims.[17] These days, it is uncommon for all the appellate judges in a circuit to work on the same case. Unlike the Supreme Court, whose cases generally engage the participation of all nine Justices, the circuits tend to operate through subdivisions.[18] Most decisions are the product of three-judge panels, which can include senior judges, district court judges, or visiting judges alongside active appellate judges.[19] Each panel acts on behalf of its court.[20]

Once in a while—and the length of that while varies from circuit to circuit[21]—the judges of an appellate court hear a case

15. *See, e.g.*, Allison Orr Larsen & Neal Devins, *Circuit Personalities*, 108 VA. L. REV. 1315, 1317–18 (2022) [hereinafter Larsen & Devins, *Circuit Personalities*] (describing how each federal appellate court has its own "distinct local rules and customs"); Arthur D. Hellman, *Liberalism Triumphant? Ideology and the En Banc Process in the Ninth Circuit Court of Appeals*, 31 WM. & MARY BILL RTS. J. 1, 5 (2022); Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1378 (2021) [hereinafter Devins & Larsen, *Weaponizing En Banc*].

16. Keohane v. Fla. Dep't of Corr. Sec'y, 981 F.3d 994, 996 (11th Cir. 2020) (Pryor, C.J., statement respecting the denial of rehearing en banc).

17. *See* 28 U.S.C. § 1295 (providing for appellate jurisdiction over cases involving, among other things, patent law).

18. *See* John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 517 (2000) ("[T]he Justices of the Supreme Court always sit all together, the judges of the courts of appeals sometimes do, and the judges of the district courts almost never do."). Supreme Court Justices occasionally recuse themselves, leaving fewer than nine Justices to resolve a case. *See* 28 U.S.C. § 455 (identifying reasons for disqualification). Additionally, individual Justices may handle, at least initially, emergency requests that arise in their assigned circuits. *See* EUGENE GRESSMAN, KENNETH S. GELLER, STEPHEN M. SHAPIRO, TIMOTHY S. BISHOP & EDWARD A. HARTNETT, SUPREME COURT PRACTICE 849–50 (9th ed. 2007).

19. U.S. DEP'T OF JUST., INTRODUCTION TO THE FEDERAL COURT SYSTEM, https://www.justice.gov/usao/justice-101/federal-courts [https://perma.cc/L32W-VTKW].

20. *See* 28 U.S.C. § 46(c) ("Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered . . . .").

21. *See* Larsen & Devins, *Circuit Personalities*, *supra* note 15, at 1330 (summarizing en banc rates by circuit); *id.* (describing certain circuits as "not shy about calendaring" en banc sittings and others as "more hesitant to go en banc").

en banc.[22] By majority vote, a circuit's active judges choose to convene as a whole.[23] The launching pad for the en banc process was Federal Rule of Appellate Procedure 35, which was recently revised and transferred to Rule 40.[24] Rule 40 provides some guidance about the availability and use of en banc proceedings, including in the face of conflicts between or within circuits.[25] It also makes clear that judges should invoke the en banc process sparingly.[26] Beyond that, and outside of rare circumstances when Congress has provided for en banc hearings by enacting a targeted statute,[27] the judges of each circuit exercise discretion in determining how to utilize the en banc process.

In the days when the circuit courts of appeals had small memberships, there was little need to distinguish between the view of a panel and the view of the court en banc. As Congress created additional circuit judgeships and en banc proceedings drew increased attention, the initial question was not whether a panel could resolve a case on behalf of the court as a whole; it was whether consideration by the entire court was permissible.[28] The Supreme Court answered in the affirmative,[29] and Congress underscored the point with a statute explicitly authorizing en banc review.[30] Still, resolution

22. En banc review refers to hearing a case "in full court," which is to say "[w]ith all judges present and participating." *En banc*, BLACK'S LAW DICTIONARY (11th ed. 2019).

23. *See* FED. R. APP. P. 40(c). Due to its large membership, the Ninth Circuit customarily goes en banc using panels of eleven judges. *See* 9TH CIR. R. 35-3. On the advantages and disadvantages of this approach, see Pamela Ann Rymer, *The "Limited" En Banc: Half Full, or Half Empty?*, 48 ARIZ. L. REV. 317, 319–20 (2006).

24. *See* FED. R. APP. P. 35 (2023) (transferred 2024) ("En Banc Determination"); Memorandum from John D. Bates, Chair, Comm. on Rules of Prac. & Proc. of the Jud. Conf. of the U.S. to Scott S. Harris, Clerk, Sup. Ct. of the U.S. 1–2 (Oct. 23, 2023), https://www.uscourts.gov/sites/default/files/advisory_committee_on_appellate_rules_-_dec_2023.pdf [https://perma.cc/RN3X-CR2P]; *id.* at 19 (noting that "[t]he amendment preserves the existing criteria and voting protocols for ordering rehearing en banc"). *See generally* FED. R. APP. P. 40.

25. *See* FED. R. APP. P. 40(b).

26. *See* FED. R. APP. P. 40(a).

27. *See, e.g.*, 52 U.S.C. § 30110 (dealing with constitutional challenges to provisions of the Federal Election Campaign Act).

28. *See infra* Section I.A.

29. *See* Textile Mills Secs. Corp. v. Comm'r, 314 U.S. 326, 333–35 (1941) (recognizing the power of circuit courts to sit en banc).

30. *See* 28 U.S.C. § 46(c) (providing for en banc hearing or rehearing).

by three-judge panels has remained the default.[31] Going en banc is "the exception, not the rule."[32]

Notwithstanding the availability of en banc review, the circuits are united in their understanding that a three-judge panel is authorized to resolve a dispute and to issue a decision that presumptively binds every other judge on the court.[33] The practice of restricting one panel's ability to overrule another is an adjunct of this authority: constraining today's panel validates the work of yesterday's.[34] Rule 40 continues to reflect the centrality of panel decisions by making clear that en banc review should be saved for rare occasions.[35] Panel opinions are more than attempts at persuading off-panel judges to accept the decisions of their on-panel colleagues. Rather, the panel speaks *for* the court and *as* the court.[36]

Within the federal framework, the en banc court plays a specialized role. This role is instrumental in the face of an intracircuit split.[37] When an en banc court addresses a fracture within its circuit, it performs a task for which three-judge panels are ill-suited.[38] Without some tribunal to resolve intracircuit squabbles, the prospect of dueling judicial edicts would put litigants and other stakeholders in a precarious

31. *See id.* (describing adjudication by three-judge panels as the default); W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 256 (1953) (recognizing the "tradition of three-judge courts").

32. United States v. Am.-Foreign S.S. Corp., 363 U.S. 685, 689 (1960); *see also id.* (noting that en banc courts "are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit").

33. *See* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 492 (2016). On the history of this practice, see Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 795–96 (2012) (stating that the practice of requiring panels to follow circuit precedent took shape in the middle of the twentieth century and "was solidified through the 1970s"); Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1066 (2003) (suggesting that "no-panel-overruling rules appear to have surfaced only in the last fifty years"); John B. Oakley, *Precedent in the Federal Courts of Appeals: An Endangered or Invasive Species?*, 8 J. APP. PRAC. & PROCESS 123, 127 (2006) (describing the rule of "intra-circuit, horizontal stare decisis" as "largely a product of the past thirty years' mounting caseloads").

34. *Cf.* Barrett, *supra* note 33, at 1018 n.22 (discussing the relationship between stare decisis and the presumption against panel overruling and concluding that "[t]he 'no panel overruling' rule, like stare decisis generally, is a means by which the courts order the exercise of the judicial power so as to maintain stability in the law").

35. *See* FED. R. APP. P. 40(a).

36. Textile Mills Secs. Corp. v. Comm'r, 314 U.S. 326, 332–33 (1941).

37. Larsen & Devins, *Circuit Personalities, supra* note 15, at 1384.

38. *Id.* at 1383–84.

position. Designating the en banc court as the final word on intracircuit splits solves this problem.[39] Additionally, when a thorny legal question has caused a rift between circuits, the very act of assembling en banc can provide expressive value and promote norms of uniformity, comity, and intercircuit collegiality. Enlisting a court's entire membership in the decision to break from a sister circuit is a means of showing respect for the latter, to the good of the whole.

The situation is different when an en banc court convenes primarily because it disagrees with the three-judge panel on the merits.[40] In that situation, the en banc court performs a task within the purview of the panel itself. The en banc court stacks its decision atop the three-judge panel's own opinion, often after considerable delay and at considerable expense. The rationale for incurring these costs is that the majority of off-panel judges believe that the panel was mistaken. Yet it is doubtful whether the slender reed of disagreement can support the weight of en banc review. It is possible that enlisting off-panel judges in the decision-making process leads to enhanced accuracy,[41] but that claim is debatable.[42] So, too, is the argument that panel decisions should reflect the views of the court's membership as a whole.[43] Nor is en banc review necessary as a disciplinary

39. On procedural mechanisms for soliciting the perspectives of off-panel judges without a formal en banc proceeding, see *infra* Section I.E.

40. *See, e.g.*, Stephen L. Wasby, *Why Sit En Banc?*, 63 HASTINGS L.J. 747, 757 (2012) (noting, in the course of studying en banc proceedings in the Ninth Circuit, that "[t]he most likely reason for rehearing en banc is that judges do not like the panel's ruling"); Hellman, *supra* note 15, at 15 ("[J]udges generally vote in favor of en banc rehearing only when they believe both that the panel ruling is very wrong *and* that the decision has a significance beyond that of the ordinary appeal, either as precedent or because of its practical consequences.").

41. *See, e.g.*, Brian T. Fitzpatrick, *Many Minds, Many MDL Judges*, 84 LAW & CONTEMP. PROBS. 107, 109–13 (2021) (summarizing Marquis de Condorcet's Jury Theorem as demonstrating that under certain conditions, "the more people we ask a question, the greater the chance the majority of them will select the correct answer"). On the various grounds for questioning or challenging "many-minds" arguments as applied to legal analysis, see generally Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 2–3 (2009).

42. *See* Fitzpatrick, *supra* note 41, at 114.

43. *See, e.g.*, Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981–1990*, 59 GEO. WASH. L. REV. 1008, 1009 (1991) (describing "panel error" as "divergence from the views of the majority of the circuit judges"); W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 270 (1953) (Frankfurter, J., concurring) (contending that en banc review is "indicated whenever it seems likely that a majority of all the active judges would reach a different result than the panel assigned to hear a case or which has heard it"); *cf.* Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L.

device, for there are alternative safeguards that protect against the perpetuation of grievous error by idiosyncratic panels. If a panel deviates from the approach taken by another circuit—or if the sequence is reversed, and another circuit deviates from the panel's approach—the resulting split provides an independent reason to go en banc. And there is always the Supreme Court, which possesses the ultimate authority to rectify mistaken interpretations of federal law.[44] Given these backstops, the en banc court need not, and ought not, think of itself as a varsity-level version of the junior-varsity panel.

En banc review remains valuable for resolving intracircuit splits. It can also serve important functions in responding to intercircuit conflicts and in updating circuit law that stands in tension with Supreme Court precedent. But when the motivation for going en banc is disagreement with the panel's interpretation, the case for rehearing is considerably weaker. Absent a split, Rule 40 limits en banc review to questions of "exceptional importance."[45] A workable theory of en banc review should ensure that *exceptional* really means *exceptional*.

This Article begins in Part I by examining the conceptual foundations of en banc review and the legal principles that guide its exercise. Part II analyzes the various considerations that are bound up with the decision to go en banc, ranging from relatively uncontroversial values such as uniformity to more debatable considerations such as compatibility with the views of off-panel judges. Part III develops competing theoretical accounts of en banc review. The pivotal distinction, Part III explains, is the characterization of a three-judge panel as an authoritative instantiation of the court to which it belongs, as opposed to a subordinate tribunal whose small membership diminishes the gravity of its edicts.

The Article concludes that the former account—which treats three-judge panels as central and genuinely authoritative—is

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REV. 1600, 1602 (2000) (advancing a proposal based on achieving results consistent with the views of a majority of all judges on the courts of appeals); Lacy v. Gardino, 791 F.2d 980, 985 (1st Cir. 1986) (coupling a discussion of "strict adherence to prior circuit precedent" with recognition of the "error-correcting function" of the en banc court); Fitzpatrick, *supra* note 41, at 113 (distinguishing "correct" legal decisions from "representative" legal decisions).

44. *See* Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 98 F.4th 646, 649 (5th Cir. 2024) (Willett, J., concurring in the denial of rehearing en banc) (observing, in the course of opposing en banc reconsideration, that "the panel opinion need not be the last word").

45. CHIEF JUSTICE JOHN G. ROBERTS, AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE, H.R. Doc. No. 118-127, at 10 (2024).

sound as a theoretical matter and consistent with the structure of the federal judiciary. Irrespective of one's agreement with this conclusion, the Article constructs a framework for analyzing en banc review that is equally available to those who favor going en banc frequently and those who would reserve going en banc for the rarest of cases.

I. THE LAW OF EN BANC

There is widespread agreement that a three-judge panel's decision generally binds future three-judge panels.[46] And there is no doubt that en banc review is legally valid, though neither is there any doubt that Congress intended for en banc rehearing to be extraordinary.[47] By comparison, some features of en banc practice are more complex, such as the array of alternatives with which circuits have experimented to facilitate courtwide deliberation without the costs of formal rehearing.

This Part examines the law of en banc review. It distills six guiding principles:

- The authority to go en banc is guided by positive legal rules.
- En banc review is reserved for extraordinary cases.
- En banc hearings can occur before or after decision by a three-judge panel.
- A circuit can go en banc to resolve the entirety of an appeal or to answer a specific question.
- En banc rehearing is not the only way for a circuit to invite input from off-panel judges or to overrule a panel decision.
- Voting to go en banc can either replace or supplement deference to precedent via the doctrine of stare decisis.

A. *En Banc Review Is Governed by Legal Rules*

Regional circuits are nearly as old as the federal judiciary itself, tracing back to the Judiciary Act of 1789.[48] But a century

46. *See, e.g.*, Thomas B. Bennett, *There is No Such Thing as Circuit Law*, 107 MINN. L. REV. 1681, 1696–97 (2023) (noting that the "rule of horizontal stare decisis require[s] that the decisions of panels of a court of appeals bind all later panels of the same court").

47. *See* 28 U.S.C. § 46(c) ("Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered . . . .").

48. *See* Bennett, *supra* note 46, at 1687 (citing the Judiciary Act of 1789 as giving "birth to the idea of regional judicial circuits").

would pass between the Act's passage and the circuits' assumption of something akin to their current form.[49] In 1891, Congress established the circuit courts of appeals.[50] Those courts were to "consist of three judges" drawn from the Chief Justice of the United States, an assigned Associate Justice, and circuit and district judges.[51] Congress eventually recast the courts' staffing model to rely on dedicated appellate judges.[52]

The circuit courts of appeals heard cases in panels of three.[53] This remained true even as circuits saw their membership increase.[54] By 1940, a question had arisen as to whether a circuit could break from the three-judge custom by assembling all its judges to hear a case.[55] The Third Circuit said yes, based on its interpretation of the governing statutes as well as its observation that when a three-judge panel holds a view at odds with the majority of the court's judges, "it is advisable that the whole court have the opportunity . . . to hear and decide the question."[56] The Ninth Circuit held otherwise, advancing a

49. On the redesign of the circuit courts in the nineteenth and early twentieth centuries, see Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 221–25 (1999).

50. *See* Evarts Act, Pub. L. No. 51-517, 26 Stat. 826, 826–27 (1891); *see also* Devins & Larsen, *Weaponizing En Banc*, *supra* note 15, at 1383 (noting the creation of intermediate appellate courts in 1891); Marin K. Levy, *Visiting Judges*, 107 CALIF. L. REV. 67, 83 (2019) (describing the creation of "a new tier of intermediate appellate courts"); Edward Surrency, *A History of Federal Courts*, 28 MO. L. REV. 214, 233 (1963) (discussing the 1891 legislation as establishing the circuit courts of appeals as venues for appellate litigation).

51. *See* Evarts Act, Pub. L. No. 51-517, 26 Stat. 826, 826 (1891); *see also* Textile Mills Secs. Corp. v. Comm'r, 314 U.S. 326, 328–29 (1941) ("[I]t is apparent that the newly created circuit court of appeals was to be composed of only three judges who were to be drawn from the three existing groups of judges—the circuit justice, the circuit judges, and the district judges." (footnote omitted)).

52. *See Textile Mills Secs. Corp.*, 314 U.S. at 329–30 (explaining how federal legislation in the early twentieth century gave circuit judges primary responsibility within the circuit courts of appeals).

53. *See, e.g.*, Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1, 7 (2015) ("It has been the practice of the federal courts of appeals for well over a century to hear cases in panels of three judges.").

54. *See* George, *supra* note 49, at 224–25.

55. Comm'r v. Textile Mills Secs. Corp., 117 F.2d 62, 69 (3d Cir. 1940) (en banc), *aff'd* 314 U.S. 326 (1941).

56. *Id.* at 70–71; *see also* Albert Branson Maris, *Hearing and Rehearing Cases In Banc*, 14 F.R.D. 91, 96 (1954) (noting, on behalf of the judges of the Third Circuit, the value of enabling the "majority of its judges always to control and thereby to secure uniformity and continuity in its decisions").

competing reading of the statutes.[57] The Supreme Court resolved the split in *Textile Mills Securities Corp. v. Commissioner*, concluding that en banc proceedings were indeed lawful.[58] The Court interpreted the statutory language that each circuit court of appeals "shall consist of three judges"[59] as referring to a "permissible complement of judges," not as specifying the only valid configuration.[60] The Court also observed that en banc review offers functional benefits by providing a means of avoiding intracircuit conflicts.[61]

Seven years after *Textile Mills*, Congress expressly authorized en banc hearings in the circuit courts.[62] Attention turned to how en banc proceedings would be invoked and utilized.[63] The Supreme Court responded by making clear that litigating before an en banc court is a privilege, not a right.[64] The power to assemble en banc is just that—a power belonging to the circuits.[65] The judicial prerogative to convene en banc does not authorize parties to displace the conventional practice of resolution by three-judge panels.[66] To the contrary, Congress sought to "preserv[e] the 'tradition' of three-judge courts," even as it validated en banc review at each circuit's election.[67]

When the Federal Rules of Appellate Procedure took effect in 1968, they included Rule 35, directed at en banc (or "in banc")

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57. *See* Lang's Est. v. Comm'r, 97 F.2d 867, 869 (9th Cir. 1938) (concluding that because "no more than three judges may sit in the Circuit Court of Appeals, there is no method of hearing or rehearing by a larger number").

58. *See also* Textile Mills Secs. Corp. v. Comm'r, 314 U.S. 326, 333–34 (1941).

59. 28 U.S.C. § 212 (1940) (repealed 1982).

60. *Textile Mills Secs. Corp.*, 314 U.S. at 333–34.

61. *See id.* at 335.

62. Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869, 871.

63. *See* Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29, 34 (1988) ("Section 46(c) as enacted in 1948 provides only a procedural framework for en banc decisions; no substantive guidelines were set out to identify *which* cases deserved en banc treatment.").

64. W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 250 (1953).

65. *Id.*; *see also id.* (noting that section 46(c) "neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing *en banc*"); Keohane v. Fla. Dep't of Corr. Sec'y, 981 F.3d 994, 995–96 (11th Cir. 2020) (Pryor, J., statement respecting the denial of rehearing en banc) (discussing the discretion that courts of appeals exercise in deciding whether to go en banc).

66. *See W. Pac. RR. Corp.*, 345 U.S. at 250 ("In our view, § 46 (c) is not addressed to litigants. It is addressed to the Court of Appeals. . . . It vests in the court the power to order hearings *en banc*.").

67. *Id.* at 256.

review.[68] The function of the Rule has remained the same, even with the transfer of its contents to Rule 40. Rule 40 provides that a majority of active, non-disqualified circuit judges may authorize hearing or rehearing en banc.[69] It sets forth the procedural requirements for seeking en banc consideration.[70] And it announces the criteria for going en banc,[71] to which we turn in Part II. En banc review thus has become an established component of federal practice, governed by legal rules notwithstanding the abiding need for judicial discretion.

B. *En Banc Review Is Exceptional*

The fact that going en banc has clear legal authorization does not mean it is the norm. Rule 40 instructs that "rehearing en banc is not favored."[72] The Supreme Court made the same point in an early discussion of en banc review, recognizing that "*[e]n banc* courts are the exception, not the rule."[73] Three-judge panels generally carry out the appellate work of the circuit. Only in "extraordinary circumstances" does the en banc court intervene.[74]

Pursuant to Rule 40, en banc review may be justified by procedural considerations such as conflicts within or between circuits or with decisions of the U.S. Supreme Court, or by substantive considerations in cases involving "questions of

68. FED. R. APP. P. 35(a) (2023) (transferred 2024). On the process for creating federal rules, see Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103–04 (2002).

69. *See* FED. R. APP. P. 40(c). Circuits retain the authority to allow senior circuit judges to participate in discussions of the en banc–worthiness of cases, even though senior judges do not vote on the ultimate decision to go en banc. *See, e.g.*, Johnson v. City of Grants Pass, 72 F.4th 868, 924 n.1 (9th Cir. 2023) (O'Scannlain, J., respecting the denial of rehearing en banc) (noting the Ninth Circuit's adoption of such a practice).

70. *See* FED. R. APP. P. 40(d). Circuits have added their own gloss in the form of local rules. *See, e.g.*, 9TH CIR. R. 35-1 (dealing with procedural matters associated with en banc review); *cf.* Solimine, *supra* note 63, at 34–35 (characterizing local circuit rules as "largely replicat[ing] the language" regarding en banc review in the Federal Rules of Appellate Procedure and not offering "greater specificity regarding the substantive criteria").

71. *See* FED. R. APP. P. 40(b)(2).

72. FED. R. APP. P. 40(a).

73. *See* United States v. Am.-Foreign S.S. Corp., 363 U.S. 685, 689 (1960).

74. *Id.* The aims of en banc review, the Supreme Court observed, are to pursue "uniformity and continuity" in circuit decisions and to ensure that "the active circuit judges shall determine the major doctrinal trends of the future for their court." *Id.* at 689–90.

exceptional importance."[75] These criteria inform local rules like the Sixth Circuit's Internal Operating Procedure 35, which reserves en banc review for "precedent-setting error[s] of exceptional public importance" or "opinion[s] that directly conflict[] with Supreme Court or Sixth Circuit precedent."[76]

The takeaway is simple yet significant: The work of the circuits continues to be done primarily by three-judge panels.[77] There must be a special reason to depart from that norm.

C. *En Banc Review Can Happen Earlier or Later*

Most of the time, en banc review becomes a viable option only after resolution of a case by a three-judge panel.[78] Once the panel issues its opinion, a party may file a petition for en banc rehearing, or the court may order en banc rehearing *sua sponte*.[79]

When deciding whether to review a case en banc, the court's membership will deliberate via an internal exchange of views.[80] Following a judge's call for a poll of her colleagues, the court

75. FED. R. APP. P. 40(b)(2)(B)–(D).

76. 6TH CIR. I.O.P. 35(a).

77. Some circuits utilize staff attorneys or other personnel for the initial screening of appeals to address questions such as whether jurisdiction is obviously lacking and whether oral argument is necessary. *See* Rachel Brown, Jade Ford, Sahrula Kubie, Katrin Marquez, Bennett Ostdiek & Abbe R. Gluck, *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 CORNELL L. REV. 1, 76 (2021) (describing this practice).

78. *See, e.g.*, Range v. Att'y Gen. U.S., 69 F.4th 96, 99 (3rd Cir. 2023) (en banc) (rehearing en banc following panel decision), *vacated sub nom.* Garland v. Range, 144 S. Ct. 2706 (2024); Rogers v. Mays, 69 F.4th 381, 387 (6th Cir. 2023) (en banc) (same); Al-Hela v. Biden, 66 F.4th 217, 221 (D.C. Cir. 2023) (en banc) (plurality opinion) (same); Alfred v. Garland, 64 F.4th 1025, 1029 (9th Cir. 2023) (en banc) (same); Bobby R. Baldock, Joel M. Carson III & Bryston C. Gallegos, *Strategic Considerations for Going En Banc in the Tenth Circuit*, 100 DENV. L. REV. 325, 328 (2023) (observing that en banc petitions usually follow a three-judge panel's decision).

79. *See* FED. R. APP. P. 40(c); Kipp v. Davis, 986 F.3d 1281, 1282 (9th Cir. 2021) ("A judge of this court sua sponte requested a vote on whether to rehear this case en banc."); United States v. Padilla, 415 F.3d 211, 215 (1st Cir. 2005) (en banc) (noting the court's sua sponte order withdrawing part of the panel opinion and granting rehearing en banc); 4TH CIR. R. 35(b) ("A poll on whether to rehear a case en banc may be requested, with or without a petition, by an active judge of the Court or by a senior or visiting judge who sat on the panel that decided the case originally.").

80. *See, e.g.*, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT GENERAL ORDER 5.4(c)(1) (instructing that a judge who calls for a vote to rehear a case en banc "shall forward a memorandum setting forth reasons"); *id.* at 5.5(a) ("Any judge may circulate memoranda in response to an en banc call."). For analysis of this process as it operates in the Ninth Circuit, see Wasby, *supra* note 40, at 748 (2012) (describing the role of off-panel judges in generating support for en banc petitions).

will go en banc if reconsideration is supported by a majority of non-disqualified, active judges.[81] The order granting en banc rehearing may (but need not) vacate or withdraw the opinion of the three-judge panel.[82] Eventually, the en banc court hears the case, deliberates, and issues its decision.

En banc review can also occur before a three-judge panel issues an opinion.[83] The federal rules indicate as much by

81. FED. R. APP. P. 40(c). If the circuit denies en banc rehearing, the parties' remaining option is to request review by the Supreme Court. Litigants may file a petition for certiorari in the Supreme Court without seeking en banc rehearing in the relevant circuit, though a grant of en banc rehearing or a dissent from denial of rehearing en banc may attract the Justices' attention. *See* Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 195–96 (2001) (examining the effect of en banc review on the Supreme Court's decision to grant certiorari); *cf.* Cassano v. Shoop, 10 F.4th 695, 704 (6th Cir. 2021) (Thapar, J., dissenting from the denial of rehearing en banc) ("Our court has been corrected for similar errors before. . . . Unfortunately, we need to be reminded once again."). For a related discussion of the connection between published dissents and en banc rehearing, see generally Deborah Beim, Alexander V. Hirsch & Jonathan P. Kastellec, *Signaling and Counter-Signaling in the Judicial Hierarchy: An Empirical Analysis of* En Banc *Review*, 60 AM. J. POL. SCI. 490 (2016).

82. *See, e.g.*, United States v. Minor, 49 F.4th 22, 22 (1st Cir. 2022) (following the "customary practice" of withdrawing the panel opinion and vacating the panel's judgment upon granting a petition for rehearing en banc); Rudisill v. McDonough, No. 2020-1637, 2022 WL 320680, at *1 (Fed. Cir. Feb. 3, 2022) (vacating the panel opinion upon granting a petition for rehearing en banc); Hope v. Comm'r of Ind. Dep't of Corr., 9 F.4th 513, 523 (7th Cir. 2021) (noting that the panel opinion was vacated once the petition for en banc rehearing was granted); Andrews v. Davis, 888 F.3d 1020, 1020 (9th Cir. 2018) (noting, in ordering rehearing en banc, that "[t]he three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit"); *In re* Wild, 967 F.3d 1285, 1285 (11th Cir. 2020) (ordering rehearing en banc and vacating the panel's opinion). *But cf.* United States v. Perez, 116 F.3d 840, 843 n.2 (9th Cir. 1997) (en banc) ("Although we took the entire case en banc, the only issue that concerns us is the jury instructions . . . . The rest of the panel opinion is not affected by our en banc review, and is not withdrawn.").

83. *See, e.g.*, United States. v. Lopez, 484 F.3d 1186, 1188 (9th Cir. 2007) (en banc) (explaining that the court "took this case en banc without a three-judge panel decision"); Bristol Reg'l Women's Ctr., P.C. v. Slatery, 993 F.3d 489, 489 (6th Cir. 2021) (en banc) (granting a petition for initial hearing en banc); *cf.* Wise v. Circosta, 978 F.3d 93, 118 (4th Cir. 2020) (en banc) (Niemeyer, J., dissenting) (criticizing the court's approach where "[t]he panel considered the case assigned to it and promptly exchanged votes on the outcome," but "the dissenting judge immediately initiated an en banc vote before the panel could even circulate its views to the entire court, let alone to the public").

For an historical perspective on conducting en banc hearings before issuance of the panel's decision, see Maris, *supra* note 56, at 94 (discussing the occurrence of "rehearings in banc which are ordered after a case has been heard by a panel and a draft opinion has been prepared and circulated among the judges but not yet filed").

authorizing the filing of a petition for initial hearing en banc.[84] And just as courts possess the power to review a case en banc *sua sponte* following issuance of the panel's opinion, they also possess *sua sponte* authority to hear a case en banc in the first instance.[85]

The legal standard for going en banc does not depend on whether a three-judge panel has already opined.[86] Some judges, however, have expressed skepticism about initial hearings en banc as circumventing the conventional process of three-judge adjudication.[87]

D. *En Banc Courts Can Resolve Entire Appeals or Specific Issues*

When a court convenes en banc, conceptual uncertainty can attend the question of what, exactly, it is convening to do. The judges might be gathering en banc to answer the specific question that has generated an intracircuit or intercircuit split or otherwise proved vexing enough to command their collective attention. Understood in this way, en banc review resembles the U.S. Supreme Court's grant of certiorari on particular questions[88] or a state supreme court's response to a certified question.[89]

The circuits frequently take a different approach, rehearing the entire case rather than limiting their review to specific elements.[90] Yet it remains within the power of the en banc court

84. *See* FED. R. APP. P. 40(g).

85. *See, e.g.*, Moore v. United States, 66 F.4th 990, 991 (Fed. Cir. 2023) (en banc) (mem.) (per curiam) ("[A] majority of the judges who are in regular active service voted for sua sponte en banc consideration.").

86. *See* FED. R. APP. P. 40(g).

87. *See Bristol Reg'l Women's Ctr., P.C.*, 993 F.3d at 490 (Moore, J., dissenting from the grant of initial hearing en banc) (criticizing the decision to hear a case en banc without consideration by a three-judge panel).

88. *See* GRESSMAN, GELLER, SHAPIRO, BISHOP & HARTNETT, *supra* note 18, at 459 n.98 (remarking upon this practice); *cf.* Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There A Place for Certification?*, 78 GEO. WASH. L. REV. 1310, 1323 (2010) (discussing, and placing in historical context, the options of "resolving only the certified question or calling for the record in order to decide 'the whole matter in controversy'").

89. *See*, *e.g.*, Brown v. City of Houston, 660 S.W.3d 749, 752 (Tex. 2023) (answering a question about Texas law that was certified by the Fifth Circuit).

90. *See, e.g.*, Summerlin v. Stewart, 309 F.3d 1193, 1193 (9th Cir. 2002) ("[W]hen a case is heard or reheard *en banc*, the *en banc* panel assumes jurisdiction over the entire case."); *cf.* Wasby, *supra* note 40, at 751–52 (describing correspondence among Ninth Circuit judges relating to whether the en banc process could be limited to specific issues).

to "choose to limit the issues it considers."[91] Circuits sometimes direct the litigants' attention to certain matters, much like the Supreme Court occasionally reformulates the questions presented in petitions for certiorari or asks the parties for supplemental briefing on items that pique the Justices' interest.[92] These types of litigation-shaping devices support a conception of the en banc court as serving a distinct function as compared with the three-judge panels that decide appeals in the ordinary course.

E. *Going En Banc Isn't the Only Way to Reconsider Circuit Law*

Circuits have attempted to replicate certain features of en banc review without incurring all the costs. Some courts have identified a relatively wide range of circumstances in which a three-judge panel can overrule a prior panel's decision, obviating the need for en banc review in many cases. Other courts have devised mechanisms for soliciting input from or seeking approval by off-panel judges without initiating formal en banc proceedings.

1. Authorized Three-Judge Overrulings

Three-judge panels are bound by prior decisions from their circuit, whether those decisions were issued by prior panels or the en banc court.[93] This rule, which does not extend to decisions from other circuits,[94] is best understood as reflecting

91. *Id.*; GARNER ET AL., *supra* note 33, at 505 (noting the en banc court's authority to "limit its consideration in advance to a specific issue"); Baldock, Carson, & Gallegos, *supra* note 78, at 330 (explaining the Tenth Circuit's practice of going en banc to rehear "*cases*" rather than "specific issues," but noting that the court "may limit the rehearing to particular issues or leave parts of the initial opinion intact, or both").

92. *See, e.g.*, *In re* Wild, 994 F.3d 1244, 1251 (11th Cir. 2021) (en banc) (noting that the court, after voting to rehear the case en banc, instructed the parties to address two specific questions); *cf.* Citizens United v. Fed. Election Comm'n, 557 U.S. 932, 932 (2009) (mem.) (directing the parties to file supplemental briefs addressing the propriety of overruling certain precedents).

93. *See* GARNER ET AL., *supra* note 33, at 492.

94. *See, e.g.*, Colby v. J.C. Penney Co., 811 F.2d 1119, 1123 (7th Cir. 1987) (distinguishing "most respectful consideration" from "automatic deference" to decisions from other circuits); *cf.* Rebecca Hanner White, *Time for a New Approach: Why the Judiciary Should Disregard the 'Law of the Circuit' When Confronting Nonacquiesence by the National Labor Relations Board*, 69 N.C. L. REV. 639, 672 (1991) (describing the persuasive, nonbinding nature of intercircuit precedent); Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY.

a prudential judgment that one panel's attempt to override another is inappropriate given the judges' similar position and rank.[95] This prudential characterization helps to explain the set of cases in which, notwithstanding the general rule, circuits recognize a panel's authority to reconsider circuit law.[96]

The most prominent exception to the prohibition against panel overrulings flows from the relationship between the circuits and the Supreme Court. A three-judge panel is not bound by a circuit opinion that conflicts with an intervening Supreme Court decision.[97] Some circuits also recognize the possibility of departing from circuit law based on its incompatibility with a *prior* Supreme Court opinion.[98] That practice, though, is less widespread than the recognition of subsequent Supreme Court opinions as occasions for reconsidering panel precedent, even in the absence of an en banc hearing.[99]

Though the circuits accept the power of three-judge panels to revise circuit law in light of Supreme Court precedent, there

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L. REV. 535, 566 (2010) (describing the rule of "intrapanel accord" as "solidif[ying] the law of the circuit by requiring greater deference to decisions of other panels within the same circuit than to panel (or even en banc) decisions of other circuits").

95. *See* Payne v. Taslimi, 998 F.3d 648, 654 (4th Cir. 2021) (describing the horizontal bindingness of panel opinions as reflecting a "prudential judgment" made on a "categorical" basis); McMellon v. United States, 387 F.3d 329, 334 (4th Cir. 2004) (en banc) ("While we recognize that a three-judge panel has the statutory and constitutional power to overrule the decision of another three-judge panel, we believe that, as a matter of prudence, a three-judge panel of this court should not exercise that power.").

96. *See* GARNER ET AL., *supra* note 33, at 38 ("[A] panel may depart from or overrule an earlier panel's decision when it has been repudiated or undermined by later controlling authority, such as a statute, an intervening Supreme Court decision, or an en banc decision.").

97. *See, e.g.*, *In re* One2One Commc'ns, LLC, 805 F.3d 428, 433 (3d Cir. 2015) ("This Court may only decline to follow a prior decision of our Court without the necessity of an en banc decision when the prior decision conflicts with a Supreme Court decision.").

98. *See* Garcia v. Gateway Hotel L.P., 82 F.4th 750, 760 (9th Cir. 2023) (recognizing the three-judge panel's authority to overrule circuit precedent that post-dated the relevant Supreme Court decision, where the circuit precedent relied on prior circuit law and did not discuss the effect of the Supreme Court's decision); Tucker v. Phyfer, 819 F.2d 1030, 1035 n.7 (11th Cir. 1987) (declining to follow panel precedent based on two Supreme Court cases that were not "called to the attention" of the earlier panel).

99. *See* Wasby, supra note 40, at 768–69.

are differences in how they define the extent of that power.[100] Some circuits demand a clear conflict with the Supreme Court's case law to justify departing from panel precedent.[101] Others set a lower bar, asking whether a Supreme Court opinion "undermines or casts doubt on the earlier panel decision."[102] Such doubt might arise even if the opinion's holding is not "precisely on point."[103] Notwithstanding these varying descriptions of the point at which overruling becomes justified, the basic takeaway is the same: the obligation to follow circuit law yields in the face of a contrary edict from the Supreme Court.[104]

This practice reflects the logic behind the doctrine of vertical precedent, whereby Supreme Court decisions constrain lower federal courts.[105] The lower courts are charged with following the decisions of the Supreme Court, the latter being hierarchically superior.[106] If the Supreme Court has not resolved an issue, it is up for debate whether the circuits should reach their own judgments or, rather, do their best to predict the Supreme Court's eventual resolution.[107] In all events, there

100. *See* Mead, *supra* note 33, at 797 n.74 (discussing variations among circuits as to "how much the earlier decision must be undermined before it can be overruled"); *cf.* Amy E. Sloan, *The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 FORDHAM L. REV. 713, 720 (2009) (observing that some circuits "invoke a corollary to the intervening-authority exception that applies when later superior authority that is not directly on point legitimately calls into question a subsidiary tribunal's prior opinion").

101. *See* Or. Nat. Desert Ass'n v. U.S. Forest Serv., 550 F.3d 778, 782 (9th Cir. 2008) (asking whether the relevant Supreme Court decisions are "closely on point"); NLRB v. Datapoint Corp., 642 F.2d 123, 129 (5th Cir. 1981) (asking whether the relevant Supreme Court decisions are "clearly contrary" to panel precedent).

102. United States v. Villareal-Amarillas, 562 F.3d 892, 898 n.4 (8th Cir. 2009) (quoting K.C. 1986 LP v. Reade Mfg., 472 F.3d 1009, 1022 (8th Cir. 2007)).

103. Ne. Ohio Coal. for the Homeless v. Husted, 831 F.3d 686, 720–21 (6th Cir. 2016).

104. *See* Karns v. Shanahan, 879 F.3d 504, 514 (3rd Cir. 2018) (recognizing a panel's duty to apply the Supreme Court's case law where it conflicts with circuit precedent).

105. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 US. 477, 484 (1989) (discussing the federal courts' duty to adhere to decisions of the Supreme Court).

106. *See* JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL DEPARTMENT OF THE UNITED STATES 41 (2009) ("[T]he Framers' very conception of a unitary and hierarchical, rather than a plural and horizontal, judiciary presupposed a duty on the part of lower courts to obey their superior.").

107. *See* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 8–22 (1994) (analyzing

is no uncertainty as to the role of the lower courts when the Supreme Court has resolved a contested issue. Once the Justices have issued their decision, the circuits may not depart from it.[108] If circuit law goes in one direction and the Supreme Court goes in another, the next three-judge panel to confront the issue can right the ship.

The First Circuit has gone further, allowing three-judge panels to overrule circuit law in light of considerations such as conflicting authority from other circuits.[109] The possibility of departing from precedent based on such "collateral authority" is reserved for exceptional circumstances,[110] with the inquiry focused on whether there is a "sound reason for believing that the former panel, in light of fresh developments, would change its collective mind."[111] Circuits have also recognized that subsequent interpretations of state law by state courts can justify the reconsideration of circuit precedent.[112] Practices such as these demonstrate that while going en banc remains the most salient mechanism for reconsidering circuit law, it is far from the only mechanism.

2. Interlude: A Word on Precedential Scope

It is worth emphasizing that circuit precedent is binding—and, thus, entitled to presumptive deference—only if it is on

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these approaches); *cf.* Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 849 (1993) (discussing the operation of vertical precedent and noting an implicit, positivistic recognition of "political pedigree rather than intellectual cogency" as legal authority). On the role of distinctive institutional characteristics as informing the allocation of decision-making authority between the Supreme Court and the lower federal courts, see Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 22–23 (2009).

108. *See Rodriguez de Quijas*, 490 U.S. at 484.

109. *See* Sanchez v. United States, 740 F.3d 47, 56 (1st Cir. 2014) (recognizing the prospect of deviating from circuit law based on subsequent authority that is "not directly controlling"); San Juan Cable LLC v. P.R. Tel. Co., 612 F.3d 25, 34 (1st Cir. 2010) (noting that panels are not relieved of their duty to follow circuit law by "mere disagreement by a coequal court with a panel decision"); GARNER ET AL., *supra* note 33, at 492 (describing the First Circuit's "watered-down law-of-the-circuit doctrine" while recognizing that its impact is confined to narrow circumstances).

110. Metcalf & Eddy, Inc. v. P.R. Aqueduct & Sewer Auth., 945 F.2d 10, 12–13 (1st Cir. 1991), *rev'd on other grounds*, P.R. Aqueduct & Sewar Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993).

111. Williams v. Ashland Eng. Co., 45 F.3d 588, 592 (1st Cir. 1995), *abrogated in part on other grounds by* Carpenters Loc. Union No. 26 v. U.S. Fid. & Guar. Co., 215 F.3d 136 (1st Cir. 2000).

112. *See* Rutherford v. Columbia Gas, 575 F.3d 616, 619 (6th Cir. 2009).

point. Whether a decision is on point depends on its scope of applicability.[113] Construing a precedent's scope begins with separating its binding holding from its extraneous dicta.[114] In courts such as the D.C. Circuit, a three-judge panel is permitted to reject statements in prior decisions that the current panel deems to be dicta,[115] though the panel may poll its colleagues if it wishes.[116] In the Ninth Circuit, by contrast, even the dicta of one panel can bind future panels.[117] The Ninth Circuit's practice accords deference only to "[w]ell-reasoned dicta,"[118] though judicial critics have noted that "the line between well-reasoned dicta and not-well-reasoned dicta seems to lie largely in the eye of the beholder."[119] Relatedly, the circuits differ in the extent to which they treat dicta from the Supreme Court as effectively binding as opposed to genuinely advisory.[120]

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113. *See* RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 70–91 (2017) (analyzing the determination of precedential scope).

114. *See id.* at 73–81 (discussing principles for defining the scope of precedent).

115. *See* D.C. CIR., POLICY STATEMENT ON *EN BANC* ENDORSEMENT OF PANEL DECISIONS 2–3 (1996) [hereinafter D.C. CIR., POLICY STATEMENT] (recognizing a panel's authority to "determine that a statement in a prior decision was *dictum*, not requiring *en banc* action to reject").

116. *See id.* at 1 (noting the suitability of polling off-panel judges before issuing an opinion that "reject[s] a prior statement of law which, although arguably dictum, warrants express rejection to avoid future confusion"); U.S. Dep't of Navy v. Fed. Labor Rels. Auth., 952 F.2d 1434, 1439 n.5 (D.C. Cir. 1992) (describing the panel's circulation of an opinion that "might be viewed as inconsistent with some of the *dicta*" in circuit precedent).

117. *See* Barapind v. Enomoto, 400 F.3d 744, 750–51 (9th Cir. 2005) (en banc) (per curiam) (explaining that binding circuit law includes statements on issues "presented for review," irrespective of whether the statements were "in some technical sense 'necessary' to our disposition of the case"); *see also* Stein v. Kaiser Foundation Health Plan, Inc., 115 F.4th 1244, 1247–54 (9th Cir. 2024) (Forrest, J., concurring) (explaining and criticizing the "dicta-is-binding rule").

118. Li v. Holder, 738 F.3d 1160, 1164 n.2 (9th Cir. 2013).

119. Ford v. Peery, 9 F.4th 1086, 1087 n.2 (9th Cir. 2021) (VanDyke, J., dissenting from the denial of rehearing en banc); *see also* United States v. Files, 63 F.4th 920, 929 (11th Cir. 2023) (describing the Ninth Circuit's approach as "far-reaching" and inconsistent with Eleventh Circuit law); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1251 (2006) (criticizing the Ninth Circuit's approach as "without constitutional justification").

120. *Compare* Manning v. Caldwell, 930 F.3d 264, 281 (4th Cir. 2019) (en banc) ("[W]e routinely afford substantial, if not controlling deference to dicta from the Supreme Court."), *and* Morrow v. Balaski, 719 F.3d 160, 195 (3d Cir. 2013) (en banc) ("[W]e do not lightly ignore Supreme Court *dicta*."), *with* Grutter v. Bollinger, 288 F.3d 732, 787 (6th Cir. 2002) (en banc) (Boggs, J., dissenting) ("[T]he holding/dicta distinction demands that we consider binding only that which was necessary to resolve the question before the [Supreme] Court."). *See also* Leval, *supra* note 119,

These debates over precedential scope are unsurprising given the stakes.[121] How a court answers questions about the scope of precedent is just as important as how it determines whether there is a sufficient basis for revising circuit law.

3. Polling the Court

Rather than authorizing three-judge panels to update circuit precedent of their own accord, circuits sometimes enlist the collective wisdom of off-panel judges without going en banc.[122] Consider the Seventh Circuit's Rule 40(e), which allows a three-judge panel to "overrule a prior decision" so long as it circulates its proposed opinion to all the circuit's active judges and a majority declines to vote for en banc review.[123] By invoking Rule 40(e), Seventh Circuit panels essentially ask off-panel judges for permission to alter circuit law.[124] The D.C. Circuit has a

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at 1274 (rejecting the view that "lower courts must treat the dicta of the Supreme Court as controlling"); KOZEL, *supra* note 113, at 81–83 (describing various approaches to interpreting Supreme Court precedent in the lower federal courts).

121. *See, e.g.*, *Files*, 63 F.4th at 926 (analyzing the scope of panel precedent in light of principles such as the bindingness of alternative holdings); Am. Meat Inst. v. USDA, 746 F.3d 1065, 1072–73, 1073 n.1 (D.C. Cir. 2014) (declining to follow passages that the panel believed were not "correctly construed as holdings" while recognizing that "reasonable judges" may view the issue differently and urging rehearing en banc to resolve the matter), *vacated en banc*, No. 13-5281, 2014 WL 2619836 (D.C. Cir. Apr. 4, 2014); Payne v. Taslimi, 998 F.3d 648, 655 (4th Cir. 2021) (construing the scope of precedent based on whether a statement was necessary to the outcome of the decision).

122. *See* Devins & Larsen, *Weaponizing En Banc, supra* note 15, at 1422 ("[N]ine of the thirteen circuits have adopted some form of the 'mini en banc' procedure."); Sloan, *supra* note 100, at 726–27 (describing differences between the circuits regarding their use of procedural alternatives to en banc review); Comment, *The En Banc Procedures of the United States Courts of Appeals*, 21 U. CHI. L. REV. 447, 452 (1954) [hereinafter U Chi. Comment, *Procedures*] (describing circuits in which panels consult off-panel judges); Maris, *supra* note 56, at 93 (describing the Third Circuit's practice of circulating draft opinions to off-panel judges); Alexandra Sadinsky, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 FORDHAM L. REV. 2001, 2025 (2014) (noting the Seventh Circuit's use of an "informal en banc procedure" in 1969); Jed Glickstein, *A Fresh Look at Seventh Circuit Rule 40(e)*, THE CIR. RIDER: THE J. OF THE SEVENTH CIR. BAR ASS'N, April 2018, at 48.

123. *See* 7TH CIR. R. 40(e); *cf.* Michael S. Kanne, *The "Non-Banc En Banc": Seventh Circuit Rule 40(e) and the Law of the Circuit*, 32 S. ILL. U. L.J. 611, 611–15 (2008) (providing a brief overview of Rule 40(e)). Notwithstanding Rule 40(e), the Seventh Circuit continues to convene en banc in some cases. *See, e.g.*, Hope v. Comm'r of Ind. Dep't of Corrs., 9 F.4th 513 (7th Cir. 2021) (en banc).

124. *See* Kanne, *supra* note 123, at 622–23 (noting the expedience and flexibility provided by Rule 40(e)); *see, e.g.*, Hadzi-Tanovic v. Johnson, 62 F.4th 394, 408 n.4 (7th Cir. 2023) (describing the Rule 40(e) process); *see also* 7TH CIR. R. 40(e)

comparable practice of prepublication circulation to off-panel judges in cases where "action by the court *en banc* may be called for."[125] Prior circulation allows off-panel judges to give their stamp of approval if the panel thinks it necessary to change course.[126]

Beyond the Seventh Circuit and the D.C. Circuit, courts such as the Second Circuit also employ procedural mechanisms to notify off-panel judges of the panel's intention to depart from circuit law.[127] And the Third Circuit requires the circulation of all draft precedential opinions to off-panel judges, as does the Tenth Circuit.[128]

These devices expand the authority of later panels to revise the work of earlier ones, subject to the consent of off-panel judges. Though some judges and commentators have criticized the use of alternatives to en banc review as insufficiently formal and deliberative in certain circumstances, the practice endures.[129]

(explaining that Rule 40(e) is not limited to overrulings and that it can be employed in the creation of a circuit split, among other situations).

125. D.C. CIR., POLICY STATEMENT, *supra* note 115, at 1.

126. *See id.* ("Upon obtaining the agreement of the court, the panel shall announce the *en banc* court's endorsement of its decision as in the past, by means of a footnote citing *Irons v. Diamond*[, 670 F.2d 265 (D.C. Cir. 1981)].").

127. *See, e.g.*, United States v. Brutus, 505 F.3d 80, 87 n.5 (2d Cir. 2007) (noting that the panel "circulated this opinion to all active members of this court before filing"); Larsen & Devins, *Circuit Personalities, supra* note 15, at 1330–32 (describing the circuits' respective approaches to departing from circuit law in the absence of formal en banc proceedings).

128. *See* 3D CIR. I.O.P. 5.5.4 (2023); Brown, Ford, Kubie, Marquez, Ostdiek & Gluck, *supra* note 77, at 77 (observing that, in the Tenth Circuit, opinions are circulated to the full court before publication).

129. *See In re* Sealed Case No. 97-3112, 181 F.3d 128, 146 n.5 (D.C. Cir. 1999) (Henderson, J., concurring) (criticizing the D.C. Circuit's use of its *Irons* footnote procedure as having "evolved from an expedient device to reconcile inconsistent circuit holdings into a summary method of overruling unambiguous circuit precedent, without any of the safeguards or formalities attending the en banc process"); Sloan, *supra* note 100, at 745 (finding that it "is simply unclear when a case merits formal en banc review and when one merits informal en banc review"). Judge Michael S. Kanne has considered these criticisms with respect to the Seventh Circuit's Rule 40(e) and found them unconvincing. *See* Kanne, *supra* note 123, at 622 ("[I]t cannot be suggested that the judges do a disservice to either precedent or the doctrine of *stare decisis* by addressing an issue without an *en banc* hearing, as they have access to the fully briefed and argued issues before them.").

F. *Voting to Go En Banc Can Supplement or Supplant the Doctrine of Stare Decisis*

Outside of the exceptional situations discussed in the previous Section, the en banc process is the customary vehicle for changing circuit law. This function brings en banc review into dialogue with the doctrine of stare decisis, the fundamental principle that counsels adherence to settled law.[130]

In managing the relationship between stare decisis and en banc review, the threshold question is whether voting to go en banc should effectively displace the doctrine of stare decisis such that the en banc panel reviews the question presented as if it were one of first impression. On this understanding, the very process of going en banc discharges any duty of fidelity to existing law.[131] Hence the Seventh Circuit's depiction of the role of the en banc court as determining "what the correct rule of law is now in light of the Supreme Court's authoritative interpretations, not what someone thought it meant one, ten, or twenty years ago."[132]

Alternatively, stare decisis might discourage departures from precedent even after a court votes to go en banc. Circuits commonly describe stare decisis as relevant during en banc review, sometimes by invoking the Supreme Court's explanations of what the doctrine entails.[133] Consider the references by multiple circuits to the need for a "special justification" for overruling beyond the belief that a decision was incorrect.[134] There is an added wrinkle in that en banc

130. *See* KOZEL, *supra* note 113, at 19–25 (summarizing the doctrine of stare decisis).

131. For a conceptually related argument that addresses mechanisms for promoting deference in the context of administrative law, see Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 681 (2007) (comparing doctrines that require individual judges to defer to prior decisions with structural solutions, such as voting rules, that can pursue similar ends).

132. Hively v. Ivy Tech. Cmty. Coll. of Ind., 853 F.3d 339, 350 (7th Cir. 2017) (en banc).

133. *See, e.g.*, Riccio v. Sentry Credit, Inc., 954 F.3d 582, 590 (3d Cir. 2020) (en banc) (citing the Supreme Court's discussions of stare decisis); Lightning Ballast Control LLC v. Philips Elecs. N. Am. Corp., 744 F.3d 1272, 1281–82 (Fed. Cir. 2014) (en banc) (same), *vacated on other grounds sub nom.* Lighting Ballast Control LLC v. Univ. Lighting Techs, Inc., 574 U.S. 1133 (2015); United States v. Burwell, 690 F.3d 500, 504 (D.C. Cir. 2012) (en banc) (same); Coats v. Penrod Drilling Co., 61 F.3d 1113, 1137 (5th Cir. 1995) (en banc) (same).

134. For the Supreme Court's insistence on a "special justification" for overruling, see, for example, Allen v. Cooper, 589 U.S. 248, 259 (2020); Dickerson v. United States, 530 U.S. 428, 443 (2000). For the use of similar language in the

courts confront two different types of "horizontal" precedents: decisions from three-judge panels and decisions from prior en banc courts.[135] The case law reflects less engagement with this distinction than one might expect, but several circuits have indicated that en banc opinions carry greater weight for purposes of stare decisis.[136]

In Section III.A, I return to the relationship between stare decisis and en banc review. For now, the key takeaway is that references to stare decisis—and the attendant need for a special justification before departing from precedent—reinforce the gravity of disrupting settled law.

II. THE CASE FOR, AND AGAINST, EN BANC REVIEW

Like Rule 35 before it, Rule 40 offers general guidance about the standard for going en banc but leaves much for the circuits to work out in deciding which cases are en banc-worthy. This Part analyzes the leading arguments for and against en banc review, which implicate everything from operational concerns about delay and expense to foundational assumptions about the structure of the federal judiciary.

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circuits, see, for example, Chambers v. District of Columbia, 35 F.4th 870, 879 (D.C. Cir. 2022) (en banc); *Riccio*, 954 F.3d at 591; Theile v. Michigan, 891 F.3d 240, 243 (6th Cir. 2018); *Lightning Ballast Control LLC*, 744 F.3d at 1282; Arecibo Cmty. Health Care, Inc. v. Commonwealth of Puerto Rico, 270 F.3d 17, 22–23 (1st Cir. 2001).

135. On the distinction between horizontal and vertical precedent, see KOZEL, *supra* note 113, at 19–20.

136. *See Riccio*, 954 F.3d at 591 ("[P]rior en banc decisions carry more stare decisis weight than prior panel decisions."); McKinney v. Pate, 20 F.3d 1550, 1565 n.21 (11th Cir. 1994) (en banc) (noting that because "this is the first time this court sitting en banc has addressed this issue," the "implications of *stare decisis* are less weighty than if we were overturning a precedent established by the court en banc"); *Lightning Ballast Control LLC*, 744 F.3d at 1282 ("The principles and policies of *stare decisis* operate with full force where . . . the en banc court is considering overturning its own en banc precedent."); *cf.* Harrison, *supra* note 18 (raising the question of "whether a panel opinion has any precedential force at all when an issue it decided is presented to the court en banc"); GARNER ET AL., *supra* note 33, at 38–39 ("When sitting en banc, a circuit court follows the principle of horizontal precedents issued in prior en banc decisions in the same way that the U.S. Supreme Court does regarding its prior decisions."); Critical Mass Energy Project v. Nuclear Regul. Comm'n, 975 F.2d 871, 875–76 (D.C. Cir. 1992) (en banc) (applying stare decisis to a three-judge panel opinion that had been followed by several other circuits). *But cf. id.* at 881 (Randolph, J., concurring) (cautioning that the court was not asked to resolve "how much weight an *en banc* court should give to a recent ruling, made by a single panel, not yet interpreted, and applied by several subsequent panels").

A. *Efficiency*

En banc rehearing is costly and time-consuming, which is part of the reason why going en banc is an extraordinary step.[137] Rehearing by an en banc court may entail additional briefing, another round of argument, and the diversion of judges' attention from their existing caseload.[138] Moreover, even if most judges ultimately vote against going en banc, the very process of evaluating the en banc–worthiness of a case can require the investment of considerable time and energy.[139] And granting en banc rehearing likely means protracting the parties' dispute.[140]

None of this is to say that en banc proceedings are unwarranted as a categorical matter. Judges just need to make sure the game is worth the candle.

B. *Consistency and Coherence*

Rule 40 provides that parties may seek en banc review based on conflict between a panel opinion and a decision within the circuit, a decision from another circuit, or a decision from the U.S. Supreme Court.[141] These categories of conflict rest on distinct theoretical foundations and warrant separate analysis.

1. Intracircuit Conflict

When a three-judge panel issues an opinion that conflicts with, or stands in significant tension with, the extant law of the circuit, the utility of en banc review is evident. Without the prospect of en banc resolution, it would be unclear whether district courts and future three-judge panels should follow the earlier decision or the later one.[142] If the later decision were controlling, the notion of a binding law of the circuit would be difficult to sustain, for any future panel could revise the law of its own accord. And if the prior decision were treated as binding, notwithstanding the later panel's deviation, the legitimacy of the subsequent panel's decision would be cast into doubt.

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137. *See, e.g.*, Bartlett *ex rel.* Neuman v. Bowen, 824 F.2d 1240, 1242 (D.C. Cir. 1987) (Edwards, J., concurring in the denials of rehearing en banc) (emphasizing the costliness of en banc proceedings).

138. *Id.* at 1243.

139. *See id.* at 1242.

140. *See id.* at 1243.

141. FED. R. APP. P. 40(b)(2).

142. *See, e.g.*, McMellon v. United States, 387 F.3d 329, 333 (4th Cir. 2004) (en banc) (noting that the "earliest opinion controls" absent an overruling by "an intervening opinion from this court sitting *en banc* or the Supreme Court").

En banc review provides a solution to this institutional problem by designating a body whose pronouncements will be the law of the land unless and until the Supreme Court intercedes. By convening en banc, the judges of a circuit can furnish an authoritative statement of the governing rule. In so doing, they render the law of the circuit more ascertainable and coherent. They also clarify the binding law of the circuit going forward, enhancing the efficiency of adjudication as well as the stability of the legal backdrop.[143] These benefits explain why the preservation of intracircuit uniformity remains the paradigmatic justification for going en banc. As Justice Felix Frankfurter wrote in 1953, the resolution of intracircuit conflicts is "the dominant concern" of the en banc process.[144]

2. Intercircuit Conflict

The propriety of going en banc to preserve uniformity among the circuits is well-established as a matter of law.[145] Nevertheless, the underlying theory is more complicated than is the case for going en banc to eliminate intracircuit splits. The problems with intracircuit conflicts are clear enough. If two opinions pronounce the law of the circuit in different ways, the content of the governing rule is uncertain—as is the appropriate course of conduct for future panels and district courts that are asked to apply the rule.

When we shift our focus to conflicts between circuits, the argument for intervention by the en banc court takes a different shape. One rationale for going en banc is grounded in comity: norms of collegiality warrant a circuit's assembling en banc when it disagrees with the judges of a coequal court.[146] Framed in this way, en banc proceedings provide expressive value by

143. *See* FedEx Home Delivery v. NLRB, 849 F.3d 1123, 1127 (D.C. Cir. 2017) (contending that the "law-of-the-circuit doctrine . . . ensures stability, consistency, and evenhandedness in circuit law").

144. W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 270 (1953) (Frankfurter, J., concurring); *accord* Judah I. Labovitz, *En Banc Procedure in the Federal Courts of Appeals*, 111 U. PA. L. REV. 220, 231 (1962) ("The purpose of en banc rehearings is not panel supervision but resolution of panel conflict.").

145. *See* GARNER ET AL., *supra* note 33, at 498–500 (recognizing intercircuit conflict as a basis for en banc review).

146. *Cf.* Air Line Pilots Ass'n Int'l. v. E. Air Lines, Inc., 863 F.2d 891, 925–26 (D.C. Cir. 1988) (Starr, J., concurring in the denial of rehearing en banc) (noting that departing from another circuit's decision requires careful consideration due in part to "respect for our judicial colleagues elsewhere," but declining to support en banc rehearing where the panel opinion "treats fully and candidly the contrary views" of the other circuits to have opined on the issue).

enforcing the gravity of one circuit's disagreement with the considered judgment of another and by emphasizing that the several circuits are part of a cohesive, national system of federal adjudication. This vision reflects the logic of Article III, which indicates that the same "judicial Power of the United States" is vested in every inferior federal court.[147] The point is not simply that circuit judges should be attuned to their disagreements with colleagues on other courts, but also that such disagreements should arise and persist only after deliberation by the court's full membership.

The Advisory Committee Notes to the federal rules explain that an "intercircuit conflict may present a question of 'exceptional importance' because of the costs . . . on the system as a whole, in addition to the significance of the issues involved."[148] The Committee's observation injects into the analysis the type of substantive considerations to which we turn in the next Subsection. The state of play among the circuits is also a relevant factor. In the face of published disagreement between multiple circuits, a decision by yet another circuit that lines up on one side of the debate provides little reason to incur the costs of en banc review. Along similar lines, and as the Fourth Circuit has observed, it is "rarely appropriate to overrule circuit precedent just to move from one side of a conflict to another."[149] The stronger argument for going en banc arises when a court is poised either to create or to eliminate an intercircuit split.[150]

This analysis informs the wisdom of going en banc under a variety of conditions. If a circuit split existed before the relevant three-judge panel issued its opinion, and if the panel opinion agrees with the other circuits to have addressed the issue, going en banc is unnecessary unless there is reason to believe that a novel line of argumentation will emerge. If, by comparison, the panel decision under review is responsible for creating or

147. U.S. CONST. art. III, § 1.

148. FED. R. APP. P. 35 advisory committee's note to 1998 amendment.

149. United States v. Corner, 598 F.3d 411, 414 (7th Cir. 2010) (en banc); *see also* Trompler, Inc. v. NLRB, 338 F.3d 747, 753 (7th Cir. 2003) (Easterbrook, J., concurring) ("Restless movement from one side of this conflict to another will not make it go away.").

150. *See, e.g.*, Yoshikawa v. Seguirant, 74 F.4th 1042, 1047 (9th Cir. 2023) (en banc) (revising circuit law to align with the positions of other circuits and the tenor of recent Supreme Court precedent); Stinnie v. Holcomb, 77 F.4th 200, 203 (4th Cir. 2023) (en banc) (revising circuit law to align with the position of "[e]very other circuit to consider the issue"), *cert. granted sub nom.* Lackey v. Stinnie, 144 S. Ct. 1390 (2024) (mem.).

perpetuating a split that would disappear if the decision came out differently, the value of intercircuit uniformity may justify convening the en banc court.

3. Supreme Court Conflict

Section I.E explained how the circuits can dispense with the need for en banc review by authorizing three-judge panels to update circuit law in light of intervening Supreme Court decisions.[151] Even so, Rule 40 indicates that a conflict with Supreme Court precedent can justify en banc review should a circuit decide that convening its judges is the better course.[152]

Whether a decision is consistent with Supreme Court case law is frequently up for debate. It is the rare panel opinion that flatly disregards the Supreme Court's unequivocal commands, so the disputes that do arise tend to involve some nuance.[153] Moreover, the Supreme Court's pronouncements can sometimes be ambiguous or ambivalent, making it difficult to distinguish bona fide conflicts from plausible interpretations.[154] While there is no doubt about a circuit's authority to go en banc to ensure that its cases comply with the Justices' instructions, these complexities suggest the need for care in identifying conflicts—lest commonplace disagreements over a decision's merits be dressed in the trappings of lower-court resistance to Supreme Court edicts.

C. *Accuracy*

It seems difficult to dispute that judges will tend to look more critically at opinions whose logic they find wanting. The inevitability of such a tendency does not resolve whether, and when, off-panel judges' disagreement with a panel opinion is reason enough to initiate the en banc process.

One argument for "merits-based en banc review"[155] depends on assumptions about the benefits of resolution by a court's full

151. *See supra* Section I.E.1.

152. *See* FED. R. APP. P. 40(b)(2)(B).

153. *See, e.g.*, United States v. Brown, 77 F.4th 301, 301 (4th Cir. 2023) (Heytens, J., concerning the denial of rehearing en banc) (recognizing ambiguity as to whether a decision of the Supreme Court directly applied to the facts at hand), *vacated*, 144 S. Ct. 2712 (2024).

154. *See id.* at 302 (concluding that en banc review was unwarranted where the relevant "disagreement stems from deep tension within the Supreme Court's precedent").

155. *See* Mitts v. Bagley, 626 F.3d 366, 371 (6th Cir. 2010) (Sutton, J., concurring in the denial of rehearing en banc) (using this term).

complement. At the most rudimentary level, the theory is something like the more minds, the better, at least when it comes to the relatively small number of judges who make up the several circuits.[156] Yet we ought not assume that the en banc court will reach better results simply by virtue of its larger size. Here's Judge Learned Hand, poking a bit of fun at the use of en banc review by the Third Circuit:

> I cannot but admire [the Chief Judge's] device of having all the judges of a Circuit sit together; it so much increases the certainty of the result. For example, [in one Third Circuit case] your vote is four to three, when it might have been only two to one.[157]

A related justification for going en banc pertains to representation rather than accuracy per se. Imagine a circuit comprised of ten active judges. A legal issue arises during a criminal prosecution, and eight of the judges would be inclined to decide the issue in favor of the government. The remaining two judges would decide in favor of the defendant. Given this distribution of perspectives, the view of "the circuit" overwhelmingly supports the government's position. But the three-judge panel to which the case is assigned conceivably could include the two judges who disagree with the government.[158] Assuming that neither the circuit nor the Supreme Court has previously addressed the issue, we would expect the panel decision to deviate from the view of the majority of circuit judges.

The question is whether the resulting decision is *mistaken* in any meaningful sense such that en banc review could enhance the accuracy or authority of the circuit's decision-making.[159]

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156. *See* Ginsburg & Falk, *supra* note 43, at 1036 (suggesting that the structure of the federal judiciary reflects the assumption that "a proposition to which more judges subscribe is thought to be more likely correct than one to which fewer judges subscribe"). At some point, the marginal gains of inviting more judicial cooks into the appellate kitchen are too small to justify the added administrative burden—which may explain the Ninth Circuit's customary practice of enlisting a subset of active judges rather than the court's full active membership when going en banc. *See* 9TH CIR. R. 35-3.

157. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 442 (2011).

158. On the process for selecting three-judge panels in the circuits, see generally Marin K. Levy, *Panel Assignments in the Federal Courts of Appeals*, 103 CORNELL L. REV. 65 (2017).

159. *See, e.g.*, Ginsburg & Falk, *supra* note 43, at 1011–12 (defending a view of the three-judge panel as "the agent of the full court, deputed to hear and to determine cases in conformity with the law as the full court views it"); Maris, *supra* note 56, at

The answer depends on one's conception of the three-judge panel and its relationship with the circuit as a whole. We return to that issue in Part III, but first, we need to introduce two additional factors that can affect the en banc calculus.

D. *Magnitude*

Rule 40 refers to "questions of exceptional importance" as potentially justifying en banc review.[160] The notion that en banc review might be suitable for cases of elevated significance is nothing new.[161] Notwithstanding his recognition of intracircuit conflicts as central cases for the en banc court, Justice Frankfurter noted in 1953 that going en banc may also be appropriate where "the amount involved is stupendous or . . . the issues are intricate enough to invoke the pooled wisdom of the circuit."[162]

With these inclinations in mind, we can plot a case's magnitude on two axes. The first is breadth: some cases raise issues that promise to affect many people.[163] The second is depth: some cases, even if relatively narrow in their purview, carry profound consequences for those whom they affect.[164] The decision to go en banc in the absence of a conflict depends on these factors, as well as whether off-panel judges agree with the panel's resolution on the merits.[165] A court might vote to go en banc in a significant case even if most judges believe that the panel got it right. In other cases, though, we would expect the

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96 ("A decision of a controversial question made by a majority of all the judges of the court in banc obviously has much greater authority than a decision by two concurring judges of a panel of three which all the other five judges of the court might consider quite erroneous."). *But cf. id.* at 97 (adding that "in the ordinary case the judgment of three will be the same as the judgment of" the circuit's remaining judges, making "the hearing of ordinary cases by a panel of three . . . preferable").

160. FED. R. APP. P. 40(b)(2)(D).

161. *See, e.g.*, W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 270 (1953) (Frankfurter, J., concurring).

162. *Id.* at 270–71.

163. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 10–14 (1999).

164. *See id.* These subcategories bear some resemblance to Professor Cass Sunstein's classification of Supreme Court opinions based on their breadth and depth, though Professor Sunstein's focus is modes of judicial reasoning and exposition. *Id.*

165. *Cf.* Arthur D. Hellman, *"The Law of the Circuit" Revisited: What Role for Majority Rule?*, 32 SO. ILL. UNIV. L.J. 625, 634–36 (2008) (depicting the designation of "exceptional importance" as based on "the number of pending or future cases in which the decision might be invoked" and "the extent to which the decision is likely to control outcomes").

en banc calculus to draw on a combination of accuracy and magnitude, with the most resonant argument for en banc review emerging when an issue is momentous and the panel's resolution is (in the view of the en banc majority) mistaken.

E. *Relationships*

En banc review affects relationships among circuit judges. As Judge Harry T. Edwards observed, "for the appellate system to function, judges on a circuit court must trust one another and have faith in the work of their colleagues."[166]

Still, there remains a place for the en banc court. The critical factor is the basis for en banc review. A court that goes en banc to resolve an intracircuit conflict does not diminish the role of three-judge panels. Rather, it performs an institutional function for which panels are ill-equipped.[167] Much the same is true of going en banc to depart from the considered view of another circuit.[168] Effects on judicial relationships become greater cause for concern when off-panel judges vote to go en banc primarily because they disagree with the panel's rationale—which is the phenomenon to which we now turn.

III. THE NATURE OF PANEL PRECEDENT

Operating alongside the arguments for and against en banc review are dueling conceptions of three-judge panels. Are panel opinions essentially a first cut, durable only insofar as off-panel judges are willing to tolerate them? Or does the panel's decision warrant some degree of deference, above and beyond its persuasiveness, from off-panel judges?

A. *Panels as Provisional*

No court treats decisions from other circuits as absolutely binding.[169] Rather, courts endorse out-of-circuit decisions only

166. Bartlett *ex rel.* Neuman v. Bowen, 824 F.2d 1240, 1244 (D.C. Cir. 1987) (Edwards, J., concurring in the denial of rehearing en banc); *see also W. Pac. R.R. Corp.*, 345 U.S. at 273 (Jackson, J., dissenting) ("Delay, cost, and uncertainty . . . are each increased by an additional appeal to a hybrid intermediate court."); Air Line Pilots Ass'n, Int'l v. E. Air Lines, Inc., 863 F.2d 891, 925 (D.C. Cir. 1988) (Ginsburg, J., concurring in the denial of rehearing en banc) (remarking upon the "drain on judicial resources" and the "expense and delay for the litigants" associated with en banc rehearing "of a freshly-decided case").

167. *See supra* Section II.B.1.

168. *See supra* Section II.B.2.

169. *See, e.g.*, Iverson v. United States, 973 F.3d 843, 847 (8th Cir. 2020).

to the extent that their reasoning is persuasive.[170] Perhaps off-panel judges should adopt a similar mindset when deciding whether opinions from their own circuit warrant reconsideration by the en banc court. At least in the significant, hotly contested disputes, a panel's decision would survive only if enough off-panel judges were to agree with it (or perceive case-specific obstacles to en banc review).

Driving this account is a view of three-judge panel decisions as provisional. The ultimate expositor of circuit law, unless and until the Supreme Court intervenes, is the en banc court.[171] The underlying theory is not that any individual judge is less qualified than others; circuit judges "share the same title, pay, and terms of office," and other judges sitting by designation are Article III appointees in their own right.[172] The rationale, rather, is that the panel is lesser by virtue of numerosity. And not just lesser, but structurally incapable of issuing a decision that constrains off-panel judges who are inclined to disagree with the panel's reasoning. Many decisions of three-judge panels will become the law of the land because off-panel judges generally agree with them. Other decisions will persist because the underlying issues are not salient enough to draw the court's collective attention.[173] When those conditions do not obtain—that is, when the panel's decision incorrectly resolves a significant issue—the role of the en banc court is to vacate the panel decision and replace it with a sound, and authoritative, edict. Three-judge panels are coequal, but the majority rules.[174]

This conception of the relationship between the three-judge panel and the en-banc court bears some similarities to a weak theory of stare decisis. The basic argument is that the duty of today's court is to get the law right.[175] Precedents that today's

170. *See, e.g.*, *id.* (describing opinions from other circuits as "persuasive authority").

171. *Id.* at 1374.

172. Mitts v. Bagley, 626 F.3d 366, 370 (6th Cir. 2010); *see also* Levy, *supra* note 158, at 99–100 (discussing the intercircuit assignment of visiting judges). Even if one has concerns about the frequency with which federal judges sit by designation, that issue is exogenous to the exercise of en banc review. Put differently, if the current practice of sitting by designation has problems, en banc review provides an underinclusive, expensive, and non-systematic solution.

173. Bartlett *ex rel.* Neuman v. Bowen, 824 F.2d 1240, 1244 (D.C. Cir. 1987).

174. *Cf.* N.C. Utils. Comm'n v. F.C.C., 552 F.2d 1036, 1045 (4th Cir. 1977) (depicting three-judge panels as coequal tribunals "subject to reversal" by the en banc court).

175. *See* Gamble v. United States, 587 U.S. 678, 718 (2019) (Thomas, J., concurring) ("When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it.").

judges view as incorrect should be overturned. Though the precedents have legal effect until their overruling, they do not constrain subsequent judges who possess the power to renounce them.[176]

It is unsurprising that Justice Thomas, who recently urged the Sixth Circuit to be more aggressive in using the en banc process to supervise three-judge panels, is also the Supreme Court's most outspoken critic of stare decisis.[177] The position that panel opinions should endure only to the extent that they are persuasive to off-panel colleagues reflects a paramount commitment to getting the law right in the view of the majority of circuit judges. That theory implies willingness to jettison a panel's opinion if it deviates from what other judges deem to be correct, just as a weak doctrine of stare decisis supports the overruling of precedent if today's court is inclined to innovate.[178]

B. *Panels as Primary*

Pursuant to statute, three-judge panels are authorized to resolve "cases and controversies" that arise in the federal courts.[179] Panels are drawn mainly from the circuit's active appellate judges, though they can also include retired judges, district court judges, and visiting judges sitting by designation.[180] Whatever their composition, three-judge panels issue judgments with binding force.[181] In this way, the three-judge panel exercises a power resembling that of the assembled judges en banc. Of course, a three-judge panel ordinarily cannot

176. *See id.* at 719.

177. *Compare* Shoop v. Cunningham, 143 S. Ct. 37, 44–45 (2022) (Thomas, J., dissenting from the denial of certiorari), *with Gamble*, 587 U.S. at 712 (Thomas, J., concurring) (endorsing a view of stare decisis that accords deference to precedent only in limited situations).

178. *See Gamble*, 587 U.S. at 711 (Thomas, J., concurring) (contending that the Supreme Court may not "elevate[] demonstrably erroneous decisions . . . over the text of the Constitution and other duly enacted federal law" via the doctrine of stare decisis); *cf.* Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 290 (2005) (arguing that any "theory of stare decisis that permits precedent decisions to have genuine decision-altering weight" effectively "corrupts the otherwise 'pure' constitutional decision-making process").

179. 28 U.S.C. § 46(b).

180. 28 U.S.C. § 292(a).

181. *See, e.g.*, United States. v. Taylor, 752 F.3d 254, 256–57 (2nd Cir. 2014) (Cabranes, J., dissenting from the order denying rehearing en banc) (noting the Second Circuit's practice of deferring to panel decisions "whether or not the judges of the Court agree with the panel's disposition of the matter before it").

overrule a prior panel's decision.[182] Far from impugning the power of three-judge panels, this limitation reflects the reality that if today's panel is empowered to articulate the law of the circuit, tomorrow's panel must be constrained by past decisions. If three-judge panels were not bound to respect each other's work, each panel's authority would be contingent and unreliable, and the stability of the legal landscape would be compromised.[183]

On this account, panel decisions are not simply provisional in their expositions of circuit law, nor do panels act as mere agents of the full court.[184] Litigants present their arguments to the circuit court of appeals, as comprised at any moment by three judges who speak with genuine authority. It follows that a decision's en-banc-worthiness should be assessed based on metrics apart from mere disapproval by off-panel judges—judges to whom, after all, the case was not assigned.[185]

There is also the matter of respect for one's fellow judges and humility in one's own conclusions.[186] It is no small matter to inform one's colleagues that, despite their extensive consideration and due deliberation, they flubbed it.[187] Again, the similarities to the doctrine of stare decisis are evident.[188] The en banc process adds a wrinkle in that the decision being revisited often was issued just a short time ago. In discussions of stare decisis, familiar reasons for departing from precedent include factual changes since the relevant decision's

182. There are exceptions, such as when an opinion is inconsistent with Supreme Court precedent or when the panel employs a procedural device to seek approval from off-panel judges to revise circuit law. *See supra* Section I.E.1.

183. Hellman, *supra* note 165, at 640.

184. *See id.* at 626.

185. *Cf. id.* at 639–40 ("[A]s long as a new decision does not conflict with binding precedent, three-judge panels should be given wide leeway to resolve legal issues on which there is no controlling authority."). *But cf. id.* at 640 ("[E]n banc review can easily be justified when a panel decision interferes with the outcome of democratic processes or imposes substantial burdens on a major actor in the private sector.").

186. *See* Issa v. Bradshaw, 910 F.3d 872, 877 (6th Cir. 2018) (Sutton, J., concurring in the denial of rehearing en banc) ("The trust implicit in delegating authority to three-judge panels to resolve cases as they see them would not mean much if the delegation lasted only as long as they resolved the cases correctly as others see them."). On judicial humility as a justification for deference to precedent, see KOZEL, *supra* note 113, at 38–40.

187. *See Issa*, 910 F.3d at 873 (Sutton, J., concurring in the denial of rehearing en banc) (noting the "recurring tension between deciding cases correctly and delegating decision-making authority to three-judge panels of the court").

188. *See supra* Sections I.F, III.A.

issuance.[189] That justification is off the board when en banc review immediately follows a three-judge panel's resolution of a case of first impression. Absent an intracircuit or intercircuit conflict, the most likely reason for vacating an opinion issued a few days, weeks, or months ago is that the panel was mistaken on the law. This basis for override complicates the claim that panel opinions are genuinely authoritative.[190]

The circuits occupy a single level of the judicial hierarchy, residing between district courts and the Supreme Court. There is no intermediate bifurcation that elevates en banc courts above three-judge panels.[191] Rather, the tribunal charged with checking the work of three-judge panels is the Supreme Court.[192] That Court's rules expressly contemplate intervention when a court of appeals has "departed from the accepted and usual course of judicial proceedings" or "decided an important question of federal law that has not been, but should be, settled by" the Justices.[193] An en banc court that acts as a roving auditor not only duplicates the work of the panels but also occupies a role assigned to the Justices.[194] That approach to en banc review stands in contrast to one that focuses on intracircuit and intercircuit as the primary indications that en banc reconsideration may be warranted.

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189. *See* Ramos v. Louisiana, 590 U.S. 83, 121 (2020) (Kavanaugh, J., concurring in part) (identifying these and other factors as relevant to the stare decisis analysis); KOZEL, *supra* note 113, at 110–14 (discussing the components of the doctrine of stare decisis).

190. *Cf.* Bell v. Bell, 512 F.3d 223, 251 (6th Cir. 2008) (en banc) (Moore, J., dissenting) ("We do not convene en banc to exercise plenary review over panel decisions.").

191. ANNUAL JUDICIAL CONFERENCE: SECOND JUDICIAL CIRCUIT OF THE UNITED STATES, 106 F.R.D. 103, 162 (1985) (statement of Hon. James R. Browning) (observing that it "was not Congress' intention" to establish the en banc court as "another level of appellate review for correction of errors"); *id.* at 157 (statement of Hon. Irving R. Kaufman) (noting that grants of en banc rehearing can "telegraph[]" the message that "decisions reached by three-judge panels are not final but represent merely one step on an elongated appellate ladder"); *cf.* Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 426 (1987) (noting that utilization of the en banc process has led to the creation of "four levels to the federal judiciary," but "only three ranks of judges").

192. SUP. CT. R. 10(a), (c).

193. *Id.*

194. *See* George, *supra* note 49, at 218 (suggesting that en banc review may "undermine a basic tenet of our intermediate appellate system" by casting doubt on the ability of panels to "represent[] and act[] on behalf of the whole court"); Baldock, Carson & Gallegos, *supra* note 78, at 338 (contending that "the merits of the case are not the central concern" in prompting en banc review).

IV. EN BANC REVIEW IN A WORLD OF PANEL PRIMACY

Defining the province of en banc review requires defining the universe of cases that are genuinely exceptional.[195] This Part develops a theory of en banc review that is configured for a federal appellate structure founded on the primacy of three-judge panels. The theory reflects two assumptions about the operation of the federal courts. First, it assumes that the Supreme Court has capacity to oversee the lower courts through grants of certiorari or summary reversals—a claim that strikes me as sound, particularly in an era when the Court is deciding sixty to seventy cases per year.[196]

Second, my proposal assumes that appellate judges possess equal insight and ability. In reality, there are variations in the capabilities of different judges, just as there are variations in the capabilities of members of any profession. But the organization of the federal circuits is based on the premise that those differences are immaterial to the pursuit of justice and that circuit judges are similarly situated and similarly capable. We ought to analyze the en banc process in light of these principles. If we are deeply worried about the deficiencies of appellate judges, our system requires a dramatic overhaul.[197] If, by comparison, we are generally comfortable with the systems we have in place to ensure that appellate judges are

195. *See, e.g.*, United States v. Dix, 69 F.4th 149, 153–54 (4th Cir. 2023) (King, J., dissenting from the denial of rehearing en banc) (deeming as exceptionally important a case involving an extended prison sentence and issues of due process); Brandt v. Rutledge, No. 21-2875, 2022 WL 16957734, at *1 (8th Cir. Nov. 16, 2022) (Stras, J., dissenting from the denial of rehearing en banc) (deeming as exceptionally important a case that "draws a major piece of [state] legislation into doubt and recognizes what amounts to a new suspect class"); Kipp v. Davis, 986 F.3d 1281, 1285 (9th Cir. 2021) (Paez, J., concurring in the denial of rehearing en banc) (contending that a case involving "the application of a settled legal standard to a set of facts" did not warrant en banc review); Calzone v. Summers, 942 F.3d 415, 429 (8th Cir. 2019) (Colloton, J., dissenting) (discussing the criteria that bear on a case's importance as including the likelihood of affecting other cases, the significance to the parties and to the legal process, and the impact on the work of the relevant circuit); *cf.* Williams v. Kincaid, 50 F.4th 429, 432 (4th Cir. 2022) (Quattlebaum, J., dissenting from the denial of rehearing en banc) (criticizing the court's failure to go en banc to reconsider "a novel and far-reaching interpretation of an influential federal statute" despite the fact that the court "will sit en banc to review fact-based decisions of district courts and immigration judges").

196. *See* SUP. CT. OF THE U.S., *supra* note 3.

197. *Cf.* W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 270 (1953) (Frankfurter, J., concurring) ("If petitions for rehearing were justified, except in rare instances, it would bespeak serious defects in the work of the courts of appeals, an assumption which must be rejected.").

competent and capable, the province of the en banc court should reflect that perception.

A. *Bona Fide Conflict*

The quintessential case for en banc review is one that generates an intracircuit split. Coequal panels generally are prohibited from overruling one another.[198] In the face of intracircuit conflict, we need some arbiter who can settle matters with finality. En banc courts, being familiar with the nuances and implications of their circuit's law, are well-equipped to play this role. At the same time, respect for one's judicial colleagues—and acknowledgment of the role of three-judge panels in handling the lion's share of federal appeals—requires maintaining a "high standard" for what constitutes a split.[199] When a three-judge panel has identified, discussed, and distinguished a precedent, off-panel judges should be reluctant to displace the panel's conclusion that there is no conflict. Without some degree of deference, the seeds of en banc review would be sown wherever off-panel judges interpreted a precedent differently from their on-panel colleagues, challenging the notion of en banc rehearing as an extraordinary measure.

The rationale for en banc review is more tenuous when a conflict arises *between* circuits rather than within a circuit, especially given the Supreme Court's willingness to resolve circuit splits.[200] As a matter of positive law, however, Rule 40 provides unequivocal authority for going en banc based on intercircuit conflict.[201] Moreover, en banc review to address a circuit split can create value by expressing a commitment to intercircuit collegiality. The very formality of the process reflects an understanding that disagreeing with one's colleagues, even across circuit lines, is not a matter to be taken lightly. Court-wide consideration of issues that have divided the circuits also reinforces the value of uniformity in the

198. For exceptions to this rule, see *supra* Section I.E.

199. Rodriguez v. AT&T Mobility Servs. LLC, 728 F.3d 975, 979 (9th Cir. 2013) (quoting Lair v. Bullock, 697 F.3d 1200, 1207 (9th Cir. 2012)); *see also id.* (acknowledging that a three-judge panel may reexamine panel decisions that are "'clearly irreconcilable' with the reasoning or theory of intervening higher authority" (quoting Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003) (en banc))).

200. *See* GRESSMAN, GELLER, SHAPIRO, BISHOP & HARTNETT GRESSMAN, *supra* note 18, at 242–43 (discussing the importance of circuit splits to the Supreme Court's selection of cases).

201. *See* FED. R. APP. P. 40(b)(2)(C).

interpretation of federal law.[202] Ultimately, then, there is a powerful argument for en banc review in the presence of conflict, whether that conflict involves decisions within a circuit or across circuits.

As for conflicts between a circuit and the Supreme Court, Rule 40 once again authorizes en banc review in those circumstances.[203] Yet off-panel judges must be careful not to find a conflict behind every panel opinion with which they disagree.[204] A panel decision that cannot be reconciled with the Supreme Court's case law is one thing; a panel decision that off-panel judges find dubious on the merits is something else entirely.

B. *Disagreement*

Dissenting opinions are part of life and part of judging. Every dissent breaks from the majority's decision in some respect. Even so, there is no doubt about the state of the law; the majority is the body that speaks for the court.

The en banc process can elevate dissent to another level of salience, empowering off-panel judges to channel their disagreement with the panel into official action with law-altering effect. Whether such action is justified depends on whether circuit law ought to reflect the impressions of the majority of the panel or rather the majority of the circuit.[205]

Going en banc based on disapproval of a panel's decision implies that en banc courts speak with a degree of authority that panels do not. The idea is that when it comes to issues of significant controversy, complexity, or magnitude, panel decisions should reflect the view of the circuit majority.[206] Otherwise, the risk arises that a few judges might put the stamp of their circuit on decisions that most of their colleagues would denounce. En banc review acts as a safeguard, allowing off-panel judges to respond to "outliers"[207] and "errant

202. *See supra* Section II.B; FED. R. APP. P. 35 advisory committee's note to 1998 amendment (discussing the use of en banc review to address intercircuit conflicts in pursuit of institutional ends such as uniformity).

203. *See* FED. R. APP. P. 40(b)(2)(B).

204. *See supra* Section II.B.3.

205. *See supra* Section III.A.

206. *See supra* Section III.A.

207. Tom S. Clark, *A Principal-Agent Theory of En Banc Review*, 25 J. L. ECON. & ORG. 55, 57 (2009).

panels."[208] It ensures that panels fulfill their role as "agent[s] of the full court"[209] and that the path of precedent is not diverted by "'the luck of the draw' in the assignment of the case to a particular panel."[210]

A related argument posits that giving three (or two) judges the authority to bind their off-panel colleagues presupposes the ability of those off-panel colleagues to exercise meaningful review.[211] The Third Circuit made this point in 1940 in defending its power to sit en banc, reasoning that "[c]ommon sense and sound practice dictate that the five judges of this court should be in a position to decide the principles of law and practice to which the court is to be committed."[212] On this account, three-judge panels operate not so much as the "court" itself but as a delegate whose recommendations become genuinely authoritative only if off-panel judges decline to intervene.[213]

The problem with this argument is that the ordinary course of federal adjudication entails resolution of appeals via panels of three.[214] No litigant has the right to a decision that accords with the opinion of off-panel judges. The fact that a litigant might have fared better with a different panel carries no more weight than the fact that the litigant might have fared better in a different circuit. Within the federal appellate system, the assigned three-judge panel *is* the court.[215] Preserving "panel autonomy" requires empowering on-panel judges to interpret the law according to their best understanding, without being beholden to the interpretive commitments of their off-panel colleagues.[216] Absent binding precedent from the circuit or the Supreme Court, the panel's job is to do the best it can in

208. Michael W. Giles, Thomas G. Walker & Christopher Zorn, *Setting a Judicial Agenda: The Decision to Grant En Banc Review in the U.S. Courts of Appeals*, 68 J. OF POLS. 852, 864 (2006).

209. Ginsburg & Falk, *supra* note 43, at 1011.

210. Hellman, *supra* note 165, at 635–36.

211. Comm'r v. Textile Mills Secs. Corp., 117 F.2d 62, 71 (3rd Cir. 1940) (en banc).

212. *Id.*

213. *Id.* at 70.

214. 28 U.S.C. § 46(b).

215. *See* U Chi Comment, *Procedures*, *supra* note 122, at 450 (noting that "the panel is not a fragment of the court; it is the court with respect to a particular case"). *But see id.* at 454 (defending the practice of going en banc "to avoid a decision which would not represent the view of the entire court").

216. ANNUAL JUDICIAL CONFERENCE: SECOND JUDICIAL CIRCUIT OF THE UNITED STATES, *supra* note 191, at 161–62 (statement of Hon. James R. Browning); Hellman, *supra* note 165, at 626.

furnishing an accurate interpretation of the law.[217] The en banc court supports the work of panels primarily by resolving internal splits and by establishing the position of the circuit in instances of intercircuit conflict.[218] Disagreement with the panel's decision is not enough to spring the en banc court into action.[219]

The province of en banc review must also take account of the role of the Supreme Court. In light of the Justices' power to rectify mistaken panel decisions, there is little need for en banc courts to pursue that end.[220] And even if the Supreme Court ordinarily is not inclined to engage in error correction,[221] a

217. Arthur D. Hellman, *Getting It Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals,* 34 U.C. DAVIS. L. REV. 425, 453 (2000).

218. *See id.* at 430, 453, 464.

219. *See* Keohane v. Fla. Dep't of Corr. Sec'y, 981 F.3d 994, 1003 (11th Cir. 2020) (Newsom, J., concurring in the denial of rehearing en banc) (explaining that the Eleventh Circuit's rules foreclose en banc review when "the worst that can be said of the panel opinion is that it 'misappli[ed the] correct precedent to the facts of the case'" (quoting 11TH CIR. R. 35-3)); Mitchell v. JCG Indus., Inc., 753 F.3d 695, 699 (7th Cir. 2014) (Posner, J., concurring in denial of rehearing en banc) ("It should go without saying that mere disagreement with a decision by a panel of the court is not a sufficient ground for rehearing en banc."); Baldock, Carson & Gallegos, *supra* note 78, at 335 (observing, based on the experience of the Tenth Circuit, that "mere disagreement with a panel's decision is not a sufficient reason to grant full court review").

220. The Supreme Court exercises discretion over whether and when to resolve circuit splits. The Court frequently allows issues to "percolate" in the lower courts before the Justices enter the fray. On the phenomenon of percolation and its relationship to certiorari, see Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363, 371 (2021); *cf.* Abramowicz, *supra* note 43, at 1638–39 (noting the potential benefits of percolation for Supreme Court decision-making); Carrington, *supra* note 191, at 427 ("[T]he rhetoric celebrating the circuits as little laboratories or percolators is seriously overborne.").

Some have suggested that going en banc may prove counterproductive in certain cases by delaying presentation of a question to the Supreme Court for ultimate resolution. *See* United States v. Taylor, 752 F.3d 254, 256–57 (2d Cir. 2014) (Cabranes, J., dissenting from the order denying rehearing en banc) (describing this argument); *cf.* Mitts v. Bagley, 626 F.3d 366, 371 (6th Cir. 2010) (Sutton, J., concurring in the denial of rehearing en banc) (observing that the denial of "merits-based en banc review" can imply that "[s]ometimes there is nothing wrong with letting the United States Supreme Court decide whether a decision is correct and, if not, whether it is worthy of correction"). *But cf.* Solimine, *supra* note 63, at 57 (suggesting that the high number of petitions for certiorari filed in the Supreme Court calls into question the argument for "shift[ing] en banc responsibility to the Supreme Court").

221. *See, e.g.*, Andrus v. Texas, 142 S. Ct. 1866, 1879 (2022) (Sotomayor, J., dissenting from the denial of certiorari) (recognizing the Supreme Court's general practice of declining to engage in error correction while noting that error correction can be justified in cases of extraordinary importance).

deeply flawed panel opinion is likely to find disfavor in other circuits, leading to a split and offering a salient way of catching the Justices' attention.[222] To be sure, the Supreme Court is limited in its capacity to decide cases.[223] But so are the circuits.[224]

Finally, embracing en banc review based on disagreement alone could alter the structure of the federal judiciary by rendering three-judge panels effectively inferior to en banc courts. The Constitution makes clear that federal courts are hierarchically inferior to the nation's "one supreme Court."[225] There is no comparable hook for elevating en banc courts to a "fourth tier"[226] of the judiciary that looms above three-judge panels. Nor is it inherent in the nature of the en banc court to act as hall monitor. As Justice Robert Jackson observed some eighty years ago, "Rehearings *en banc* are not appropriate where the effect is simply to interpose another review by an enlarged Court of Appeals between decision by a conventional three-judge court and petition to [the Supreme] Court."[227]

C. *Exceptional Importance*

Though courts should be reluctant to go en banc based on mere disagreement with a panel's conclusion, Rule 40 leaves the door open for en banc review to answer "questions of

222. *See* GRESSMAN, GELLER, SHAPIRO, BISHOP & HARTNETT, *supra* note 18, at 242 (discussing the relevance of circuit splits to the Supreme Court's exercise of its certiorari power).

223. In a 1998 letter regarding the operation of the federal courts, Justice Sandra Day O'Connor depicted en banc review as a mechanism for "correct[ing] panel errors within the circuit that are likely to otherwise come before the Supreme Court." *Review of the Report by the Commission on Structural Alternatives for the Federal Courts of Appeals Regarding the Ninth Circuit and the Ninth Circuit Reorganization Act: Hearing on S.B. 253 Before the Subcomm. on Admin. Oversight of the S. Comm. on the Judiciary*, 106th Cong. 70–71 (1999) (letter from Hon. Sandra Day O'Connor to Hon. Byron R. White, Chair, Comm'n on Structured Alternatives for the Fed. Cts. of Appeals). Similarly, Justice Ruth Bader Ginsburg wondered in 2002 whether the Second Circuit "is a bit too resistant to en banc rehearing" in cases where it is an outlier among circuits. JUDICIAL CONFERENCE OF THE SECOND CIRCUIT, 221 F.R.D. 38, 223 (2002) (remarks by Hon. Ruth Bader Ginsburg).

224. *See* Wasby, *supra* note 40, at 790 (quoting Judge Alfred Goodwin of the Ninth Circuit stating that "I was never convinced that a court taking 80 cases a year was so overworked that we had a public duty to hold en bancs to lighten their burden" (citing Steve Albert, *The Ninth Circuit's Secret Ballot*, RECORDER 1 (S.F.), Mar. 3, 1995, at 1)).

225. U.S. CONST. art III. § 1.

226. Carrington, *supra* note 220, at 427.

227. W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 273 (1953) (Jackson, J., dissenting).

exceptional importance."[228] In determining what makes an issue exceptional, the Supreme Court's doctrine of stare decisis proves instructive.[229] The Justices possess the authority to overrule their prior decisions, just as en banc courts possess the power to overrule prior decisions within the circuit.[230] Yet the Supreme Court urges circumspection in the reconsideration of precedent—as do the circuits.[231] Authority to overrule exists alongside a norm of deference designed to foster judicial impersonality and promote the rule of law.[232] Justice Antonin Scalia once recognized that stare decisis would be "no doctrine at all" if precedents were subject to overruling based purely on disapproval by today's Justices.[233] Similar considerations should guide the utilization of en banc review. In a world where interpretive quarrels are commonplace, it takes more than disagreement to make a case exceptional.

Of course, an opinion's problematic reasoning can contribute to its overruling, and flawed reasoning likewise can influence the choice to go en banc.[234] A legal rule's harmful consequences

228. *See* FED. R. APP. P. 40(b)(2)(D).

229. On the relationship between stare decisis and en banc rehearing, see *supra* Section I.F.

230. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 341 (2022) (Kavanaugh, J., concurring) ("[*S*]*tare decisis* is not absolute, and indeed cannot be absolute"); Fast v. Sch. Dist. of City of Ladue, 728 F.2d 1030, 1034 (8th Cir. 1984) (en banc) ("We have both the power and the right, in appropriate cases, to overrule panel opinions.").

231. *See, e.g.*, Gamble v. United States, 587 U.S. 678, 691 (2019) (describing the importance of stare decisis); *Fast*, 728 F.2d at 1034 ("[The power to overrule] should be exercised sparingly and with great caution . . . .").

232. *See, e.g.*, Michigan v. Bay Mills Indian Comm., 572 U.S. 782, 798 (2014) (calling stare decisis a "foundation stone of the rule of law"); KOZEL, *supra* note 113, at 41–44 (describing the commitment to stare decisis as driven in significant part by ideals of judicial impersonality and the rule of law); *cf. Dobbs*, 597 U.S. at 264 (recognizing, in the course of overruling precedent, that stare decisis "contributes to the actual and perceived integrity of the judicial process" (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991))).

233. Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment); *accord* Kisor v. Wilkie, 588 U.S. 558, 587 (2019) (observing that overruling precedent requires more than a conclusion that the precedent was decided incorrectly). Along similar lines, the Seventh Circuit has explained that "if the fact that a court considers one of its previous decisions to be incorrect is a sufficient ground for overruling it, then stare decisis is out the window." Tate v. Showboat Marina Casino P'ship, 431 F.3d 580, 582 (7th Cir. 2005).

234. *See* Ramos v. Louisiana, 590 U.S. 83, 121 (2020) (Kavanaugh, J., concurring in part) (interpreting the Supreme Court's case law on stare decisis as asking whether the precedent under review is "not just wrong, but grievously or egregiously wrong").

can also inform the judicial calculus in both contexts.[235] But the watchword is caution. A precedent is subject to overruling by the Supreme Court or rehearing by an en banc court only if it is genuinely extraordinary in its implications and effects.[236] To keep en banc review within its proper bounds, off-panel judges must fight the impulse to characterize every incorrect decision as exceptional. As Judge Edwards put it, "[O]ne judge's case of 'exceptional importance' is another judge's 'routine or run-of-the-mill' case . . . ."[237]

There is no algorithm that defines the universe of decisions whose substance and reasoning justify going en banc in the absence of a fracture between courts.[238] But there are principles that can guide the inquiry.

1. Breadth of Impact

Broad decisions address issues that promise to arise again and again.[239] Professor Michael Solimine refers to such decisions as involving "law creation," whereby courts "formulate legal principles" that are "likely to recur in many cases."[240] Pleading requirements and standards of review are salient examples.[241] Likewise, an issue might have wide impact within a given circuit due to the nature of its docket.[242] The D.C. Circuit, for example, commonly grapples with matters of administrative law, giving those issues heightened

235. *See id.* at 122 (describing the relevance of whether the precedent under review has "caused significant negative jurisprudential or real-world consequences").

236. *See* United States v. Lamon, 893 F.3d 369, 372 (7th Cir. 2018) (per curiam) (explaining that "disagreement with a prior holding" does not justify overruling precedent).

237. Bartlett *ex rel.* Neuman v. Bowen, 824 F.2d 1240, 1243 (D.C. Cir. 1987) (Edwards, J., concurring in the denial of rehearing en banc).

238. *See* Keohane v. Fla. Dep't of Corr. Sec'y, 981 F.3d 994, 996 (11th Cir. 2020) (Pryor, J., statement respecting the denial of rehearing en banc) ("Because en banc review is both discretionary and disfavored, reasonable minds can differ about whether it is appropriate in a particular case.").

239. *See, e.g.*, Issa v. Bradshaw, 910 F.3d 872, 877 (6th Cir. 2018) (Sutton, J., concurring in the denial of rehearing en banc) (explaining a vote against en banc review based on the limited number of cases in which the relevant issue was likely to arise).

240. Solimine, *supra* note 63, at 56.

241. *See* GARNER ET AL., *supra* note 33, at 502–03.

242. *See* Solimine, *supra* note 63, at 58.

resonance.[243] All else equal, the broader the decision, the stronger the case for en banc review.

2. Depth of Impact

The depth of decisional impact focuses on the significance of ramifications for each affected case rather than the sheer number of cases affected. The designation of a decision as extraordinary on this dimension is contingent and subjective, informed by each judge's view of which consequences are legally relevant and how acutely those consequences are likely to be felt. One judge might conclude that cases involving, say, unlawful police searches have such a profound impact on the integrity of the subsequent trial that going en banc is warranted. Another judge might ascribe exceptional significance to cases involving gun rights, or the freedom of speech, or abortion, or racial discrimination. Unlike procedural elements such as pleading standards, which have wide-ranging relevance irrespective of the substantive issues raised, the depth of decisional impact is inextricably linked with the subject matter of the claims.

This dynamic exacerbates the risks associated with going en banc due to the perceived severity of decisional consequences.[244] To the extent that the en banc process becomes enmeshed in philosophical debates between judges of different interpretive schools, it could disrupt the primacy of panel adjudication and embolden en banc courts to insist on adherence to the interpretive preferences of today's circuit majority.[245] Given that elected officials seek to appoint judges who exhibit particular interpretive tendencies, such an approach to en banc rehearing could create the appearance of political jockeying

243. *See id.*; *cf.* Bartlett v. Bowen, 824 F.2d 1240, 1246 (D.C. Cir. 1987) (Silberman, J., concurring in the denial of rehearing en banc) (arguing that the en banc process should focus on matters of import to the D.C. Circuit, including intracircuit conflicts and issues "with an unusually significant impact on the work of the Circuit"). On the distinction between importance to a circuit and importance to the public, see GARNER ET AL., *supra* note 33, at 504–05.

244. *See* Solimine, *supra* note 63, at 59 (arguing that "[e]ven if a case is particularly compelling for the litigants, involves large sums of money, or seems especially interesting or noteworthy to the judge, these factors *alone*" do not resolve the question whether to go en banc because "[o]therwise . . . the judge's personal agenda will be projected upon" the decision).

245. For expression of concern along these lines, see Duncan v. Bonta, 19 F.4th 1087, 1165 (9th Cir. 2021) (en banc) (VanDyke, J., dissenting) ("In those few instances where a panel of our court has *granted* Second Amendment relief, we have *without fail* taken the case en banc to reverse that ruling.").

over questions that are legal in nature.[246] The proper response is profound judicial reluctance to deem cases to be extraordinary, lest too many cases end up rising to that level. If *exceptional* is truly to mean *exceptional*, judges who are deciding whether to go en banc must grade on a curve.[247]

3. Scope of Precedent

A high bar for en banc review pairs best with a circumscribed approach to construing the scope of panel precedent.[248] As noted above, the circuits vary in how they determine which components of a panel's opinion are binding and which are not. Some circuits limit the binding effect of panel opinions to their essential components, while others are inclined to treat even ancillary statements as authoritative.[249] The former approach should prevail if a court restricts the domain of en banc review along the lines I have sketched. Without such an accommodation, three-judge panels would possess too much power to create durable legal principles that are not directly connected to the facts of the cases before them.[250]

This is not to suggest that future panels should "distinguish to death" opinions whose rules and rationales are closely linked with the facts that gave rise to the underlying dispute.[251] The need for considered judgment remains an essential part of defining the scope of precedent.[252] Still, there are legal principles that govern the interpretation of precedent, the most important of which is also the most basic: an opinion's rule will apply to similar sets of facts, but judges must bear in mind that

246. *Cf.* Devins & Larsen, *Weaponizing En Banc*, *supra* note 15, at 1436–37 (summarizing the authors' findings regarding the role of political considerations in the en banc process); Hellman, *supra* note 165, at 633 (discussing the argument that frequent en banc rehearing provides an avenue for doctrinal shifts driven by political ideology).

247. *See* Baldock, Carson & Gallegos, *supra* note 78, at 334 ("Virtually all attorneys and their clients think their case is exceptionally important, but that does not necessarily mean the case has broad importance for the court or the public at large.").

248. On the scope of precedent, see KOZEL, *supra* note 113, at 70–91.

249. *See supra* Section I.E.2.

250. *See generally* Leval, *supra* note 119 (describing the inclusion of extraneous statements in opinions).

251. On the phenomenon of "distinguish[ing] to death," see Arthur D. Hellman, *The View from the Trenches: A Report on the Breakout Sessions at the 2005 National Conference on Appellate Justice*, 8 J. APP. PRAC. & PROCESS 141, 168 (2006).

252. *See* KOZEL, *supra* note 113, at 157–60 (describing the interpretation of precedent in the federal courts).

the authority of any panel ultimately derives from, and is limited by, the case before it.[253]

D. *Procedural Alternatives*

Procedural alternatives to en banc review, such as the Seventh Circuit's Rule 40(e), require separate consideration insofar as they empower a three-judge panel to decide whether to solicit advice from off-panel colleagues.[254] When a three-judge panel voluntarily consults the court's full membership before issuing an opinion, the panel does nothing to undermine its own role. But when off-panel judges resuscitate a case of their own accord based on disagreement with the panel's decision, the situation is markedly different. Such an action amounts to the exercise of supervisory authority predicated upon merits-based concerns. Overrides of that sort must be cabined if the structure of the federal judiciary, with its reliance on three-judge panels as the primary adjudicators of appeals, is to remain intact.

CONCLUSION

En banc courts are vast in power but limited in purview. The argument for en banc review is strongest in the face of a conflict among panels or between courts. Absent a conflict, judges should be reluctant to go en banc based on disapproval of a panel's conclusion. Disagreement alone isn't enough to rev up the engine of en banc review, for the en banc tribunal is something other than a "hybrid intermediate court."[255] Off-panel judges should invoke the en banc process sparingly, and only after careful consideration of the economic, relational, and structural consequences. It is the rare case that warrants en banc review and the rarest of the rare that does so in the absence of a conflict.

253. *See* U.S. CONST. art. III, § 2 (enumerating the "Cases" and "Controversies" to which the federal judicial power extends).

254. *See* 7TH CIR. R. 40(e); *supra* Section I.E.3.

255. W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 273 (1953) (Jackson, J., dissenting).