

“THE LAW OF THE CIRCUIT” REVISITED: WHAT ROLE FOR MAJORITY RULE?

Arthur D. Hellman*

Two features define the ordinary course of adjudication in the federal courts of appeals. First, cases are heard and decided by panels of three judges selected at random from among a larger number of eligible judges. Second, decisions of those panels are binding on later panels unless overruled by the Supreme Court or by the court of appeals sitting en banc.

One consequence of these arrangements is that binding circuit law can be established by a panel whose views do not represent the views of a majority of the circuit’s active judges. To be sure, a majority of the active judges can always vote for rehearing en banc. But en banc rehearings place heavy demands on judges’ time, and they delay the disposition of appeals. No court of appeals grants en banc rehearing in more than a tiny fraction of the cases decided on the merits. In all other cases, the panel decision stands as the last word within the circuit, even if a majority of active judges would have reached a contrary result.

It is easy to see why this state of affairs would arouse concern within the legal community. The principle of majority rule is deeply embedded in American institutions and indeed in popular consciousness. And the stakes are high. In earlier times, “the law of the circuit” did not matter all that much, because we could assume that important issues of federal law would be resolved by the United States Supreme Court. But today, with the Supreme Court taking fewer than eighty cases a year from all federal and state courts, that assumption no longer holds.¹ Thus, the decision of a three-judge panel is likely to retain its status as binding precedent within the circuit for an extended period of time, perhaps for as long as the issue remains relevant.

Two prominent appellate judges have offered competing perspectives on the prospect of minority control of circuit law on an important issue. Former Chief Judge Douglas H. Ginsburg of the District of Columbia Circuit has endorsed the premise that “the majority should rule.”² The premise is

* Professor of Law and Sally Ann Semenko Endowed Chair, University of Pittsburgh School of Law.

1. See Arthur D. Hellman, *The Shrunk Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403 (1997). In the 2007 Term the Court heard only seventy cases, including one within its original jurisdiction. One of the appellate cases was dismissed by stipulation of the parties after argument, leaving a plenary docket of sixty-nine cases.
2. Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981–1990*, 59 GEO. WASH. L. REV. 1008, 1034 (1991).

grounded on the conception of the three-judge panel as “the *agent* of the full court.”³ This means that “the decisions of the panels ideally should reflect the views of the court as a whole, or where that is not possible because the court is divided, come as close as possible to that ideal by reflecting the views of a majority of the court.” By the same token, “if a majority [of the active judges] . . . believe that the panel almost surely has erred, then that is properly reason enough to trigger en banc review.”

This also appears to have been the position of the Commission on Structural Alternatives for the Federal Courts of Appeals, known as the White Commission after its chairman, the late Supreme Court Justice Byron White. In explaining the virtues of its most controversial structural recommendation, the Commission emphasized that, under its proposed approach, “issues of exceptional importance will be determined by all of the judges for whom the decision speaks.”⁴

In contrast, former Chief Judge James R. Browning of the Ninth Circuit has championed an approach that he refers to as “panel autonomy.”⁵ In his view, “it is not the purpose of the en banc process to assure that cases are decided in the way the majority of the whole court would have decided them.” He explains:

[This approach] would undercut the basic statutory direction that the court is to function in three-judge panels. It would diminish the sense of responsibility of three-judge panels. It would limit the opportunity for a minority of the court to contribute to the development of the law, and in the long run would undermine the stability of the court.

Thus, “[i]t is not a ground for en banc review that the majority of the court disagrees with a panel result.” Rather, intervention by the majority is warranted only “to deal with conflicts between panels or to consider cases of truly exceptional importance.”

Taking these competing perspectives as its starting-point, this article examines the role of majority rule in the development and application of the law within the federal judicial circuits.⁶ The analysis is in three parts. Part I clears away some underbrush and narrows the focus of the inquiry. Part II

3. *Id.* at 1011 (emphasis added).

4. Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 51 (1998).

5. Annual Judicial Conference, Second Judicial Circuit of the United States, 106 F.R.D. 103, 162 (1984) (remarks of Judge James R. Browning) [hereinafter Browning Remarks].

6. The article is not a comprehensive examination of en banc practice. For a good introduction, see Stephen L. Wasby, *The Supreme Court and the Courts of Appeals En Bancs*, 33 MCGEORGE L. REV. 17, 19–36 (2001).

takes up an aspect of majority rule that Judge Ginsburg ignores—the political aspect. Part III points to some specific circumstances in which the majority of active judges should be particularly willing to correct a panel decision that they believe is erroneous.

I. NARROWING THE FOCUS OF DISPUTE: EN BANC REVIEW IN CONTEXT

The framework for considering the role of majority rule in the federal courts of appeals is established by statute and by Enabling Act rule. The statute is section 46(c) of Title 28, and it provides: “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 by a majority of the circuit judges of the circuit who are in regular active service.” This statutory directive is supplemented by Rule 35 of the Federal Rules of Appellate Procedure (FRAP), which states: “An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions; or (2) the proceeding involves a question of exceptional importance.”

These provisions make clear that hearing and decision by three-judge panels are the norm, and that en banc hearing should occur only rarely. How rarely? That is the subject of the disagreement between Judge Ginsburg and Judge Browning. But the scope of the disagreement is narrower than some of the judges’ rhetoric might suggest.

First, for the great bulk of court of appeals cases, the debate over the importance of majority rule is completely irrelevant, because the outcome will be the same no matter which judges sit on the panel that hears the case. Almost fifty years ago, Judge Henry J. Friendly observed that the majority—probably the vast majority—of cases in his court (the Second Circuit Court of Appeals) could be decided only one way, since “the law and its application alike are plain.”⁷ Today, the percentage is even higher. To begin with, 40% or more of all federal appeals are filed by pro se litigants.⁸ Most of

7. Henry J. Friendly, *Reactions of a Lawyer-Newly Become Judge*, 71 YALE L. J. 218, 222 (1961) (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 164 (1921)). Judge Friendly was quoting Judge Cardozo’s description of the work of the New York Court of Appeals, but the context makes clear that he believed that the characterization was also applicable to his own court.

8. See, e.g., 2006 Judicial Business of the United States Courts, tbl. B-9, <http://www.uscourts.gov/judbus2006/contents.html> (43% of appeals filed in SY 2006). In the Fourth Circuit, more than half of the appeals were pro se cases. *Id.*

these pro se cases raise arguments that are foreclosed by precedent or otherwise without merit if not actually frivolous. Hundreds, perhaps thousands, of additional appeals challenge criminal convictions or sentences on grounds that are plainly insubstantial. Indeed, in 2007, one court of appeals—the Fifth Circuit—issued more than 900 dispositions that used identical language to reject “arguments that are foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).”⁹ In cases like these, the outcome plainly does not depend on which judges sit on the panel, and no judge would even consider the possibility of en banc review under any standard.

At the other end of the spectrum, there is little disagreement that en banc hearing is appropriate when two or more panel decisions have created conflict or disarray in the law of the circuit. The “uniformity” criterion of FRAP 35 comes into play in three kinds of situations, each involving a somewhat different dynamic within the court. First, a litigant or the three-judge panel assigned to a case may discover an existing conflict between decisions of previous panels.¹⁰ Indeed, if the conflict is identified early enough in the appellate process, the three-judge panel may call for an initial hearing en banc rather than issuing its own decision.¹¹ Second, a newly issued panel opinion may create a conflict with a published precedent of the circuit.¹² Such conflicts may be identified by a petition for rehearing en banc or by an off-panel judge. As one might expect, judges will often disagree about whether a particular decision does create a conflict. But none are likely to challenge the appropriateness of en banc review when a conflict does exist. Finally, en banc review may be warranted when members of the court identify two or more circuit decisions that can be reconciled on their facts but that include

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9. See, e.g., *United States v. Moreno-Garza*, 259 F. App'x 636 (5th Cir. 2007) (Reavley, Barksdale, & Garza, JJ.); *United States v. Corona-Robles*, 239 F. App'x 912 (5th Cir. 2007) (DeMoss, Dennis, & Owen, JJ.); *United States v. Ramos-Gonzalez*, 234 F. App'x 274 (5th Cir. 2007) (Jolly, Clement, & Owen, JJ.); *United States v. Perez-Gil*, 224 F. App'x 407 (5th Cir. 2007) (Jones, Higginbotham, & Clement, JJ.); *United States v. Trevino-Davila*, 222 F. App'x 278 (5th Cir. 2007) (King, Wiener, & Owen, JJ.); *United States v. Duron-Moreno*, 217 F. App'x 332, 5th Cir. 2007) (Reavley, Jolly, & Benavides, JJ.).
 10. By way of example: in *United States v. Castillo*, 464 F.3d 988 (9th Cir. 2006), the panel majority relied on one line of circuit precedent; the dissent rested on another—but acknowledged that “our cases are not entirely consistent.” *Id.* at 992 (Bybee, J. dissenting). The full court granted rehearing en banc and overruled the decisions that the panel majority had embraced. *United States v. Jacobo Castillo*, 496 F.3d 947 (9th Cir. 2007).
 11. For example, in *United States v. Lopez*, 484 F.3d 1186 (9th Cir. 2007) (en banc), the court “took [the] case en banc without a three-judge panel decision in order to bring consistency to our circuit law with respect to the scope and meaning of the pertinent provisions of” a federal statute. *Id.* at 1188. The court overruled two of its decisions. *Id.* at 1200 n. 17.
 12. For discussion of one such case, see Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 567 n.99 (1989).

language or reasoning that creates confusion or uncertainty in the law of the circuit.¹³

The extent to which en banc hearings are needed to maintain uniformity within the circuit will depend on other practices and procedures followed by the particular court. Of particular interest here is the Seventh Circuit’s practice under Circuit Rule 40(e), described by Judge Kanne in his contribution to this symposium.¹⁴ Under Rule 40(e), a panel may directly overrule a prior decision if the panel circulates a draft opinion to all active judges and “a majority of them do not vote to rehear en banc the issue of whether the [new] position should be adopted.” The District of Columbia Circuit and the Second Circuit occasionally follow a similar practice, albeit without formal authorization by rule. In other circuits, en banc review is the device used to restore or maintain consistency among panel decisions.

When we put aside the cases at the two ends of the spectrum—the appeals that can come out only one way and the intracircuit conflicts—what is left? What is left is a substantial number of appeals whose outcome is not foreclosed and which could be decided either way without creating a conflict with circuit precedent. But not all such cases are plausible candidates for en banc review. En banc review is a real possibility only when two further conditions are satisfied: the panel decision has importance—practical or precedential—beyond that of the ordinary appeal; and the panel appears to have decided the case wrongly from the perspective of the active judges. When both of these circumstances exist, a choice between the competing philosophies of Judge Ginsburg and Judge Browning may well determine whether en banc review will in fact be granted.

I do not want to overstate the difference between the two approaches. Judge Ginsburg appears to acknowledge that it not necessary for the majority to review every panel decision that a majority may believe to be erroneous; rather, the question is whether the apparent error “is grave enough to warrant the cost of correction.”¹⁵ And Judge Browning voted for en banc review in some cases that did not appear to present intracircuit conflicts or issues of “exceptional importance.”¹⁶ But even if there are only a handful of cases in

13. For example, in *Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007) (en banc), the court noted that “[t]he confusion in our precedents [on the meaning of an associated-in-fact enterprise under RICO] has caused difficulties for the district courts in this circuit.” *Id.* at 550. The court took the case en banc “to correct and clarify our case law.” *Id.* at 549.

14. 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 (2008).

15. Ginsburg & Falk, *supra* note 2, at 1041.

16. I am grateful to Professor Stephen L. Wasby for providing data on Judge Browning’s votes on en banc calls during the years 1982 through 1985.

which the choice between the competing philosophies will determine judges' votes on an en banc call, those will be, almost by definition, cases whose outcomes matter. Sometimes the panel decision, if allowed to stand, will establish a precedent that will require judges to decide other cases on the basis of a legal rule that they would have rejected if they had sat on the panel. Or the consequences may be more immediate: the decision will require governmental or private actors to alter the course of action that they would otherwise follow.

II. MAJORITY RULE: THE POLITICAL ASPECT

Judge Ginsburg's article is a scholarly and detailed treatment of its subject. He outlines the history of en banc review starting with the creation of the courts of appeals in 1891, and (in an appendix) he gives a detailed account of all cases that the D.C. Circuit voted to hear en banc during the period 1981–1991. But there is one striking omission from his discussion. Throughout, he treats “the majority” as an abstraction. He appears to assume that “the majority” is composed of the active judges who just happen to agree on the proper outcome of a particular case—and who just happen to outnumber the active judges who take the opposing view.

Judge Browning provides a very different perspective on majority rule. His analysis rests on two propositions. First, at any given time the “majority” in a court of appeals will be composed of judges appointed either by Republican Presidents or by Democratic Presidents. Second, judges appointed by Republican Presidents will share “ideological roots” that differ from those of Democratic appointees; as a consequence, a Republican-dominated majority will tend to decide cases one way, and a Democratic-dominated majority will tend to decide cases the other way. Judge Browning provides a remarkably candid account of how these propositions played out on his own court:

Fifteen of the 23 judges of our court of appeals were appointed by President Carter over a three-year period. Seven of the remaining eight were appointed by Republican administrations. Quite understandably, political leaders seek to select judges who share their point of view. As a result of the addition of the new judges during President Carter's administration, a rather conservative court of appeals was converted into a rather liberal one.

This year [1984], President Reagan appointed one judge to our court. He may appoint three more by January 1. If he is reelected, he will appoint two more for sure and possibly as many as five, including three to fill vacancies that are likely to occur as active judges qualify for senior status. In short,

President Reagan may appoint a total of eight judges to our court in the next two [sic] years. If he does that, the ideological majority will shift again.¹⁷

Based on this analysis, Judge Browning concluded that frequent use of en banc rehearing to foster majority rule will tend to produce a “loss of institutional stability, because periodic shifts in the ideological roots of the majority may produce sharp and unsettling shifts in the law.”¹⁸

Judge Browning’s first point can hardly be questioned. Commentator Ed Whelan has helpfully summarized the alignments in the regional circuits as of January 1, 2008:¹⁹

Of the 12 regional appeals courts, five (Fifth, Seventh, Eighth, Tenth, and D.C.) currently have substantial majorities of Republican appointees, three (First, Sixth, and Eleventh) have narrow majorities of Republican appointees, two (Third and Fourth²⁰) are tied, one (Second) has a narrow majority of Democratic appointees, and one (Ninth) has a substantial majority of Democratic appointees.

But the Republican domination of eight out of twelve circuits could easily change if a Democrat is elected as President in 2009 and reelected in 2013:

[Even the circuits] with a substantial majority of Republican appointees could be expected to swing Democratic with a Democratic president over the next eight years. For example, the Fifth Circuit currently has twelve Republican appointees versus four Democratic appointees. But eight of those twelve were appointed by President Reagan, and six of those eight range in age from 70 to 79 (and one of George H.W. Bush’s appointees is also in his 70s). If those six are replaced by Democratic appointees, the Fifth Circuit would swing to a 10–6 majority of Democratic appointees.²¹

17. Browning Remarks, *supra* note 5, at 161. In fact, President Reagan appointed a total of ten judges to the Ninth Circuit Court of Appeals during his two terms, but this was possible only because Congress created five new judgeships for the court in 1984. President George H.W. Bush appointed four judges, and the court had a Republican majority for about a decade, until President Clinton’s second term.

18. *Id.* at 162.

19. Ed Whelan, *Viewing Judicial Confirmations Through Rose-Colored Glasses?*, NATIONAL REVIEW ONLINE (blog entry Jan. 3, 2008), <http://bench.nationalreview.com/>.

20. “Like the Federal Judicial Center database, I’m counting Roger Gregory, who was recess-appointed by President Clinton and then, in an act of unrequited generosity, appointed to a lifetime position by President Bush, as a Democratic appointee.” *Id.* n.*.

21. *Id.*

Judge Browning's second proposition—that appointees of Republican Presidents tend to vote differently than Democratic appointees—may not be self-evident, but it is supported by a large body of empirical research. Indeed, the academic researchers generally use the same pair of labels that Judge Browning did; they characterize decisions as “liberal” or conservative.” In brief, “decisions supportive of ‘underdogs’ such as civil rights claimants, the criminally accused, unions, and so forth, are liberal, while conservative decisions include pro-business, pro-government, pro-employer, pro-creditor, and other outcomes favoring the ‘haves’ over the ‘have-nots.’”²² Three scholars have recently summarized the empirical research on the link between the party of the appointing President and a judge's votes:

Numerous researchers have investigated the hypothesis that Republican-appointed judges reach systematically more conservative outcomes than those produced by Democratic appointees. Defining “liberal” and “conservative” outcomes in the manner described above, the researchers have obtained results that are consistent and robust in the civil rights and liberties context. Sunstein, Schkade, and Ellman find that politics as measured by the party of the appointing President explains voting behavior in abortion cases as well as those involving capital punishment; Staudt finds a relationship in cases involving constitutional challenges to government spending on religious activities; Rowland and Carp uncover a strong relationship in race discrimination and religion cases; Cross and Tiller find a relationship in environmental law controversies; Gates and Cohen find Republican-appointed Justices are far more likely to vote against the plaintiff in racial equality cases; Aliotta finds a correlation in the context of equal protection claims; and the list goes on and on.²³

To be sure, the authors acknowledge that scholars “find no relationship between political preferences and voting behavior” in economic controversies.²⁴ But they suggest that this may be the result of “questionable characterizations” of case outcomes resulting from overly simplistic coding rules.²⁵ In any event, the numerous issues that do fit the pattern are more than sufficient not only to support Judge Browning's second proposition but also to underscore how much is at stake if he is persuasive in the conclusion he draws.

22. Nancy Staudt, Lee Epstein & Peter Wiedenbeck, *The Ideological Component of Judging in the Taxing Context*, 84 WASH. U. L. REV. 1797, 1801 (2006).

23. *Id.* at 1806 (footnotes omitted).

24. *Id.* at 1807.

25. *Id.* at 1813.

Judge Browning’s fear is that overly aggressive use of the en banc power by a court of appeals majority may produce “sharp and unsettling shifts in the law” within the circuit as control shifts from one party’s appointees to the other’s. We need not look far to find an example of precisely this phenomenon. The National Labor Relations Board (NLRB) is composed of five members who are appointed by the President for staggered terms of five years. Over the last four decades, the course of adjudication by the Board has been marked by frequent reversals of precedent as majority control has shifted from appointees of one President to appointees of a new President of the opposite party.²⁶ The “Kennedy Board” overruled decisions of the “Eisenhower Board;” the “Nixon Board” overruled the “Kennedy Board,” and so to the present, with the George W. Bush Board overturning decisions of the Clinton Board.²⁷ Robert J. Battista, who served as chairman of the NLRB until late 2007, recently presented a candid and illuminating account of this process:

[Changes in the law] can come about because of social and economic developments, or because of differing perceptions of what is right and just.

...

With respect to the differing perceptions, it must be recognized that Congress established an agency whose Members would serve relatively short and staggered terms. Obviously, the Board majority would reflect, to some degree, the governing philosophy of the appointing President. Purists may gnash their teeth at this, but it was part of the congressional design.

This is not to say that Congress intended that one party would blindly overrule the precedents of the other party. [All] holdings must be within the fundamental principles set out in the Act, and all changes must be explained. The Board is an administrative agency, charged with not only an interpretative, but a policy-making role. It is not an Article III court and thus the doctrine of stare decisis does not strictly apply. However, all responsible Members recognize the value of having stability, predictability, and certainty

26. See Arthur D. Hellman, *Getting It Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U.C. DAVIS L. REV. 425, 466 n. 150 (2000).

27. See, e.g., Charles J. Morris, *The Case for Unitary Enforcement of Federal Labor Law—Concerning a Specialized Article III Court and the Reorganization of Existing Agencies*, 26 SW. L.J. 471, 477 (1972) (noting “tendency for certain Board policies to make pendulum-type swings which reflect shifts in national political administrations); Samuel Estreicher, *Policy Oscillation at the Labor Board; A Plea for Rulemaking*, 37 ADMIN. L. J. 163, 163–66 n. 1 (1985) (listing 37 decisions by “Reagan Board” overruling precedents); Michael D. Goldhaber, *Is NLRB in a Pro-Labor Mood?*, NAT’L L.J., Oct. 9, 2000, at B1 (noting that Board, controlled by Democrats, issued 22 decisions overruling precedent in two-year period); Special Report, 176 LRR 330, 333 (2005) (reporting observation by NLRB member that Board “has reversed precedent in about eight or nine cases” since Republican appointees became a majority).

in the law. But, if a Member honestly believes that a prior precedent no longer makes sense, and that a change would be within the fundamental principles described above, he/she can vote to change the law. To be sure, the values of *stare decisis* counsel against an onslaught of changes. But prudently exercised, change is proper and indeed was envisioned by Congress.²⁸

There is some ambivalence in this description, but the overall thrust is clear. Although Chairman Battista acknowledges that the Board “is not an Article III court and thus [that] the doctrine of *stare decisis* does not strictly apply,” he also emphasizes “the value of having stability, predictability, and certainty in the law.” Nevertheless, he points out that “the structure set up by Congress” invariably and properly leads to “changes in the law” when a newly constituted majority votes in accordance with “the philosophic views of the President” who appointed the members.²⁹

I am not suggesting that aggressive use of *en banc* review by the federal courts of appeals would lead to overruling of precedents or repudiation of doctrine on the scale seen in the NLRB. The courts of appeals *are* Article III courts, and the doctrine of *stare decisis* *does* apply. But I do believe that zealous application of the “panel as agent” theory espoused by Judge Ginsburg could result in a dynamic similar to that described by Chairman Battista. Consider Judge Ginsburg’s elaboration of the agency theory:

Under this approach, the full court is obliged to ensure (to the extent practical) that each case is correctly decided. Delegating to a panel the responsibility for an initial decision does not relieve the full court of its own responsibility for the ultimate decision in the case. Accordingly, nonpanelists should not shrink (again, to the extent practical) from correcting a panel error, even if the case is important only to the parties—that is, it sets no significant precedent for the court.³⁰

Presumably off-panel judges should be even less reluctant to “correct[] a panel error” when the decision does “set[] a significant precedent for the court.” And they could justify their approach by saying, somewhat as Chairman Battista does in the NLRB context, that “the structure set up by [the Constitution]” invariably and properly leads to “changes in the law” when a

28. Robert J. Battista, *The NLRB at 70: Its Past and Its Future*, 58th NYU Annual Conference on Labor (May 20, 2005) http://www.nlr.gov/nrb/press/releases/chairman_052005_nyu_speech.pdf.

29. *See, id.* at 14 (“a Board majority will generally reflect the philosophic views of the President” who appointed the members).

30. Ginsburg & Falk, *supra* note 2, at 1011–12.

newly constituted majority votes in accordance with “the philosophic views of the President” who appointed the judges.³¹

Of course, as Judge Ginsburg recognizes, practical considerations limit the number of panel decisions that the full court can review. But, apart from practical considerations, he believes that the full court “can and should convene en banc whenever the majority believes that an error is grave enough to warrant the cost of correction, regardless of whether the case would fall under a neutral category of exceptional importance.”³² Whole-hearted embrace of that position could easily lead to the “sharp and unsettling shifts in the law” that Judge Browning warns against.

It is noteworthy that court of appeals majorities have generally exercised restraint in seizing cases from three-judge panels even when appointees of one party enjoy strong numerical dominance within the circuit. One exception was the Fourth Circuit for a brief period in the mid-1990s; the conservative judges who constituted the court’s majority made vigorous use of their power to overturn liberal panel decisions.³³ (A similar phenomenon could be seen in the Fifth Circuit.) But the pattern became less prominent toward the end of the decade, and even before the conservatives lost their hold on the court they apparently decided that greater restraint was in order.

III. EN BANC REVIEW AND CORRECTION OF PANEL ERROR

In arguing for a robust role for en banc review, Judge Ginsburg emphasizes the principle that “the majority should rule.”³⁴ Based on the concerns expressed by Judge Browning, I would be reluctant to give such heavy weight to the principle of majority control or to the “panel as agent” theory that underlies it. Still, I must acknowledge that the principle of majority rule resonates deeply with Americans, even in the context of appellate adjudication. In any event, there is another line of justification that points in the same direction. Specifically, en banc review will often be warranted to combat the perception (and indeed the reality) that the fateful consequences of

31. Judge (now Chief Judge) Alex Kozinski of the Ninth Circuit has explicitly linked judges’ voting behavior with the philosophies of the Presidents who appointed them. He said: “[Federal] judges are appointed by the President, at least in part because of ideology, and I see nothing wrong with relying on ideology to some extent in deciding cases that have no clear legal answer.” Alex Kozinski & Fred Bernstein, *Clerkship Politics*, GREEN BAG, Autumn 1998 at 57, 61. Judge Kozinski was careful to add: “It’s when you are moved by ideology to ignore the law in order to reach a result you like that you step out of bounds.”

32. Ginsburg & Falk, *supra* note 2, at 1041.

33. See Phil Zarone, *Agenda Setting in the Courts of Appeals: The Effect of Ideology on En Banc Rehearings*, 2 J. APP. PRAC. & PROCESS 157 (2000).

34. See Ginsberg & Falk *supra* note 2, at 1034.

a court decision have come about simply because of “the luck of the draw” in the assignment of the case to a particular panel. It is useful to look separately at panel decisions that are important as precedent and those that stand out because of their immediate practical consequences.

As already noted, in the absence of a threat to intracircuit uniformity, FRAP 35 states that en banc review should be granted only when the case presents “a question of exceptional importance.” From the standpoint of the system of precedent, “exceptional importance” depends on two factors: first, the number of pending or future cases in which the decision might be invoked; and, second, the extent to which the decision is likely to control outcomes.

The first factor is illustrated by a recent Sixth Circuit case in which a dissenting opinion joined by four judges expressed “befuddlement” at the majority’s vote to grant en banc rehearing.³⁵ The dissent argued that the parties’ briefs pointed only to “a rather pedestrian disagreement” as to whether a state habeas petitioner “had offered sufficient evidence to establish a tacit agreement” between the prosecution and a key witness that would trigger the prosecutor’s disclosure obligations under *Brady v. Maryland*.³⁶ The en banc majority responded that the panel decision “would create a new definition of *Brady* material and a new legal rule broadly applicable in federal criminal prosecutions as well as *habeas* proceedings.”³⁷ Thus, if the panel decision remained as binding precedent, “the impact would be enormous.”³⁸

The en banc majority may well have been correct in its estimate of the number of cases in which the panel’s decision might be invoked as precedent. As the opinion emphasized, “prosecutors . . . frequently use cooperating witnesses in criminal trials,” and often these witnesses will receive some sort of favorable treatment after the trial even in the absence of an explicit agreement.³⁹ But that does not necessarily mean that the panel decision would have the “enormous” impact that the majority foresaw. Under our system of precedent, no case stands alone.⁴⁰ The *Bell* ruling would be read against the background of existing case law on *Brady* disclosure obligations—and the *Bell* decision’s contribution would be determined not by the *Bell* panel but by later

35. *Bell v. Bell*, 512 F.3d 223, 250 (6th Cir. 2008) (en banc) (Moore, J., dissenting). A fifth judge agreed that en banc rehearing was improvidently granted.

36. 373 U.S. 83 (1963).

37. *Bell*, 512 F.3d at 231 n.2.

38. *Id.*

39. *Id.* at 234 n.6.

40. Or as famously said by Karl Llewellyn (complete with exclamation point), “no case can have a meaning by itself!” KARL LLEWELLYN, *THE BRAMBLE BUSH* 48 (Oceana Publications, Inc. 1960) (1930).

panels.⁴¹ Further, the more aberrant a decision, the more likely it is that other panels will be able to distinguish it in a credible and cogent way, particularly by putting it in the context of other relevant precedents of the circuit and of the Supreme Court. Thus, no matter how broadly the panel wrote its opinion, the ruling would not be the last word within the circuit. On the contrary, in all likelihood the decision would wind up as no more than one small thread in the court’s elaborately woven Brady jurisprudence.⁴²

Does this mean that the Sixth Circuit majority was wrong in voting to grant en banc rehearing in *Bell*? Not necessarily. As the majority saw the case, the panel decision would have opened the door to numerous Brady claims that would otherwise be dismissed—and that should be dismissed. Under those circumstances, there is some economy in correcting the panel’s error immediately rather than awaiting the evolutionary processes of law over time. But it is also true that the broad applicability of the precedent would have meant that other panels would have had the opportunity to qualify or limit the panel’s rule sooner rather than later.

The cost-benefit calculus is very different when a panel decision is important not as precedent but because of its immediate practical consequences. In that context, the concern that robust enforcement of majority rule will lead to “sharp and unsettling shifts in the law” becomes irrelevant. Nor can it be argued that en banc review is unnecessary because the decision, though aberrant, will be cabined over time. By definition, the consequences flow from the court’s judgment, not the rationale or doctrine that supports it. The evolutionary processes of law over time will do nothing to mitigate those consequences. For these reasons, I believe that the active judges should readily grant en banc rehearing if they believe that the consequences are undesirable and the decision erroneous.

Even in this setting, not all panel decisions stand on the same footing. I believe that two kinds of panel decisions deserve particularly close scrutiny by off-panel judges: those that interfere with the outcome of democratic processes and those that would impose significant burdens on a major actor in the private sector. When such decisions appear to be the product of “the luck

41. To draw again on Llewellyn, “the true rule of [a] case” is “what it will be made to stand for by another later court,” because a court “[can] decide only what was before it,” and a later court can decide that the dispute before the earlier court “called . . . for the application of a much narrower rule” than the earlier court thought. *Id.* at 53.

42. In 2007, the Ninth Circuit granted en banc rehearing in a fact-specific Brady case where the panel found no constitutional violation. *Compare* *United States v. Jernigan*, 451 F.3d 1027 (9th Cir. 2006) (2–1 decision affirming conviction), with *United States v. Jernigan*, 492 F.3d 1050 (9th Cir. 2007) (en banc) (13–2 decision reversing conviction). Nothing in the en banc majority opinion suggests that the case had any precedential importance, and indeed the facts were quite unusual.

of the draw,” the effect is to convey the impression that momentous consequences have been required not by the rule of law but by the caprices of men. Even if a majority of the active judges ultimately decide that the panel was correct, the ruling will have a legitimacy that the panel’s decision lacks.⁴³

A good illustration of the first category is the Ninth Circuit panel decision that enjoined the state of California from carrying out a special election—scheduled in accordance with the state’s constitution—to recall Governor Gray Davis.⁴⁴ The panel opinion was issued on a Monday morning. On Friday of the same week, the active judges voted to rehear the case en banc. The case was argued orally the following Monday, and on the very next day the en banc court issued its unanimous decision that allowed the election to go forward as scheduled.⁴⁵ It is unfortunate that the aberrant panel ruling caused even temporary disruption of the democratic process in California, but the full court’s speedy action minimized the harm and exemplified the proper functioning of the en banc procedure.⁴⁶

The second category is illustrated by another Ninth Circuit case, *Dukes v. Wal-Mart, Inc.*⁴⁷ The district court certified a Title VII class action putatively brought on behalf of all current and former female Wal-Mart employees, “both salaried and hourly, with a range of positions, who are or were employed at one or more of Wal-Mart’s 3,400 stores across the country.”⁴⁸ The class was estimated to exceed 1.5 million individuals, and the complaint sought billions of dollars in monetary relief. The complaint also asked the court to issue an injunction requiring Wal-Mart to make “fundamental changes to the manner in which [it] makes its pay and promotions decisions nationwide.”⁴⁹ A two-judge panel majority affirmed the

43. I recognize that concerns about “the luck of the draw” may also be aroused by routine decisions whose consequences are modest. But the higher stakes and the higher visibility of the kinds of cases discussed in the text make the threat to legitimacy more potent.

44. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882 (9th Cir. 2003).

45. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (en banc).

46. A similar case is *Padilla v. Lever*, 429 F. 3d 910 (9th Cir. 2005). A divided three-judge panel interpreted a provision of the Voting Rights Act as requiring that recall petitions—petitions initiated, circulated and paid for by private proponents of a recall—must be provided to voters in certain minority languages as well as in English. The panel majority was composed of one circuit judge and one district judge sitting by designation. The dissenting judge—a Jimmy Carter appointee—pointed out the “perverse” consequences of the panel majority’s ruling: “rather than opening the electoral process in accord with the intent of the Voting Rights Act, [the decision would] have a tendency to close it.” *Id.* at 924–25 (Canby, J., dissenting). The en banc court rejected the panel holding by a vote of 14 to 1, with only the author of the panel decision in dissent. *Padilla v. Lever*, 463 F. 3d 1046 (9th Cir. 2006) (en banc).

47. 509 F.3d 1168 (9th Cir. 2007) (as amended).

48. *Id.* at 1177.

49. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 171 (N.D. Cal. 2004).

class certification over a powerful dissent asserting that the district court’s order “violates Rule 23, likely deprives many women who have been discriminated against of the money they are entitled to, and deprives Wal-Mart of its constitutional rights to jury trial and due process of law.”⁵⁰

There can be no doubt that if the suit is allowed to proceed, the effect on a major national corporation would be enormous—far greater than the effect on criminal prosecutions of the panel decision in the Bell habeas case. Wal-Mart has asked the Ninth Circuit to rehear the Dukes case en banc. The Ninth Circuit should do so, because the far-reaching consequences of the panel decision should not be imposed on Wal-Mart—and on the national economy—based on the random selection of Judges Pregerson and Hawkins for the three-judge panel.⁵¹ In this respect the decision is the private-sector counterpart to the California recall case.

IV. CONCLUSION

The choice between the competing views of majority rule is not, of course, the only factor that will determine how a judge votes on whether to grant en banc rehearing in a particular case. For example, a judge might vote “no” on the theory that the case is “obviously” destined for the Supreme Court and that en banc review will only delay final resolution of the issue.⁵² Unique considerations may come into play in the Ninth Circuit, where en banc cases are heard and decided by a subset of the judges who vote on rehearing.⁵³ En banc review is rare enough in all circuits that it is simply not possible to isolate the effect of any particular variable, let alone to make valid cross-circuit comparisons. My purpose here has not been to analyze whether en banc practices conform to one theory or the other but rather to establish a framework that will help scholars to assess what the courts have done and perhaps assist judges in shaping their own approach to voting on en banc calls.

Judge Browning is persuasive in arguing that as long as a new decision does not conflict with binding precedent, three-judge panels should be given

50. *Dukes*, 509 F.3d at 1193 (Kleinfeld, J., dissenting).

51. Judge Pregerson was also the author of the panel opinion in *Padilla v. Lever*, discussed *supra* note 46, and was the senior judge on the three-judge panel that ordered a halt to the California gubernatorial recall election.

52. For discussion of this point, see Wasby, *supra* note 6, at 33–36. I put “obviously” in quotation marks because the Supreme Court does not always act in accordance with judges’ expectations.

53. All active judges are entitled to vote on whether to rehear a case en banc, but if a majority votes in the affirmative, the case will be heard by a “limited en banc court” composed of the chief judge and ten judges chosen at random from among the other active judges. See 9th Cir. Local R. 35–3 (as amended July 1, 2007); Hellman, *supra* note 26, at 435.

wide leeway to resolve legal issues on which there is no controlling authority. When only precedential importance is at stake, aberrant decisions can generally be cabined over time without great harm to the system. Moreover, aggressive use of majority power risks creating a pattern of “sharp and unsettling shifts in the law” as Republican majorities take over from Democratic majorities and vice versa.

In contrast, en 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. Rehearing by a larger number of judges will help to assure that the judiciary is not overstepping the modest role it should play in a society governed through representative democracy and committed to the protection of private property and individual enterprise.