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The Changing Course: The Use of Precedent in the District of Columbia Circuit

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I. Introduction

First, let me extricate myself from that impossible title in the program. "Morality, Equity, Comity and Sodality in the D.C. Circuit." Oh, my. Obviously judges who accept speaking invitations a year ahead are like Scarlett O'Hara; they'll think about it tomorrow. All I can say is that at the time I probably thought it provided a lot of maneuvering room. But in T.S. Eliot's words, "Between the idea And the reality, Between the motion And the act, Falls the Shadow."1 For the past month or so, I have been grappling with the shadow. As a result, what I am going to talk about tonight are some of the problems an appellate judge faces, in making and changing law in one of our busiest and most controversial circuits, at a time of transition for both the court and the country.

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* Chief Judge, United States Court of Appeals for the District of Columbia Circuit.
** This paper was delivered, in a slightly different form, as the Thirty-Fifth Cleveland-Marshall Fund Lecture.
I would like to begin with a little recent history about the D.C. Circuit. When I was appointed by President Carter in 1979, I was not only the first woman to serve on the court, but the first new appointee in ten years, junior to three Nixon appointees (JJ. Robb, MacKinnon and Wilkey), and five Kennedy and Johnson appointees (JJ. Wright, McGowan, Leventhal, Tamm and Robinson). Judge Bazelon, a towering figure on the court for over 30 years, had just taken senior status. Within less than a year, I was followed by three more Carter appointees (JJ. Mikva, Edwards and Ruth B. Ginsburg) and one of my colleagues died unexpectedly (J. Leventhal). During the next five years, three more judges took senior status (JJ. McGowan, Robb and MacKinnon), another died (J. Tamm), one retired to become an ambassador (J. Wilkey), and a twelfth judge was authorized. Since 1983, President Reagan has appointed eight new judges to the court (JJ. Bork, Scalia, Starr, Silberman, Buckley, Williams, D. H. Ginsburg and Santele). Justice Scalia was, of course, subsequently appointed by President Reagan to serve on the United States Supreme Court. Thus, in my seven and one-half year tenure, the court has gone from nine to twelve judges, only one who was there when I came is still active. Eleven new appointments have been made, and there have been three Chief Judges. Last summer, a relative stripling, I became the fourth.

The flow of membership in the D.C. Circuit during this period has been more like what one would expect in Congress, with elections every few years, or in the Executive; shifting its key policymakers with every administration. It surely cannot be what the Framers of the Constitution had in mind when they gave federal judges life tenure. Hamilton called the tenure guarantee “the best expedient which can be devised in any government to secure a steady, upright and impartial administration of the laws.” Yet, in recent years federal courts have been turning over at a dizzying rate, which plainly impacts the steadiness of judicial action. Law is regularly being made, unmade, and remade.

A recent article by my colleague Judge Edwards uses a series of computer runs from the court’s 1983 term to make out a statistical case that our members mostly agree with each other and do not fall into predictable “conservative,” “liberal,” or even “moderate,” voting blocks; labels that the press so dearly loves to pin on us. I agree that our votes

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3 The frontpiece of a recent Federal Reporter shows that 112 of the 155 active circuit judges, and 403 of the 554 active district court judges have been appointed since 1977. Thus, 2 Presidents are responsible for over 70% of the current active federal district court and court of appeals judges. Between 1970 and early 1985 there were a total of 46 resignations by federal district and appellate judges. Jay, The World According to Judge Posner, 73 GEO. L.J. 1507, 1516 n.66 (1985) (reviewing R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985)).
4 See Edwards, Public Misperceptions Concerning the “Politics” of Judging: Dispelling
in a large number of cases, particularly administrative law cases, do not so easily typecast us. I do, however, think that in the high visibility cases, involving controversial social or "moral" issues, our differences in judicial philosophy, on the proper role of the courts in a democratic society, do emerge front and center. I also believe that some judges have definite "agendas" for changing the law in certain areas, such as restricting access to the federal courts, and that they diligently pursue these agendas at every opportunity. It is clear that important aspects of our circuit jurisprudence are changing with our changing membership. How this happens on a day-to-day and case-by-case basis in a circuit court of appeal, and how active or restrained a role an appellate judge legitimately plays in accelerating or resisting change, is the real subject of my remarks tonight. In preparation, I have reviewed our cases for the 1984-85 "term" and will use that time period for the most part to make my points.

II. THE JUDGE IN CIRCUIT

A. Circuit Precedent: Changing It

One commentator has described "[t]he majesty of judicial decisionmaking [as being] the accommodation of change within a framework of stability. Our society requires both, and asks of judges a sensitive accommodation of the two." During periods when the court's membership changes rapidly and new members bring new ideologies and philosophies to their judicial role, we look to a life-tenured judiciary to apply past precedent to curb too rapid change, and to maintain the stability of the law. But the use of precedent in circuit court jurisprudence leaves much room for judgment, and it is this process on which I want particularly to focus today.

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Some Myths About the D.C. Circuit, 56 U. Colo. L. Rev. 619 (1985). Judge Edwards found that in the 1983-84 term of our court, more than 94% of the D.C. Circuit's decisions were without dissent. Id. at 629. By contrast, only 25% of the Supreme Court's decisions for the same period were unanimous. Id. at 630.

Similarly, my colleague Judge Ruth Bader Ginsburg points out that the D.C. Circuit's 94% rate of unanimity is slightly below the national average of 96%. See Ginsburg, The Obligation to Reason Why, 37 U. Fla. L. Rev. 205, 212 nn. 35-36 (1985).

In fiscal year 1985, (July 1, 1984 to June 30, 1985) 71% of the new cases filed in the circuit involved direct review of agency action or civil appeals from district court decisions involving the government as a party; 20% of the cases involved private civil action, and 4% were criminal appeals. Administrative Office of the United States Courts, Federal Court Management Statistics 1985 2 (1985)[hereinafter COURT STATISTICS].

See supra note 5. During the fiscal year 1985 our court issued 300 published opinions.

Theoretically, of course, circuit judges are bound by circuit precedent until it is overruled either by the circuit court itself, sitting en banc, or by the Supreme Court. Indeed, we are fond of pointing this out in defense of our opinions when we do follow circuit precedent. In practice, however, it is not quite that tidy and all precedent is not fungible. Our court turns out around 300 printed opinions a year and our body of circuit precedent contains tens of thousands of opinions. Inevitably, they are not all consistent. Some may seem outdated or running counter to more recent cases.

9 In Northern Natural Gas Co. v. FERC, 780 F.2d 59, 63 (D.C. Cir. 1985), for example, the court noted that:

It may be true that the consequences of this holding, in the present case and in many others, will be to compel the Commission to reject innovative certification proposals that benefit some customers while leaving others at least no worse off. But since that is always the effect of Panhandle [Eastern Pipeline Co. v. FERC, 513 F.2d 1120 (D.C. Cir. 1979), cert. denied, 449 U.S. 889 (1980)], it is an argument for overruling the case rather than interpreting it. Whatever its merits, Panhandle is the law of this circuit, and we are required to follow it unless and until it is reversed by the court en banc.

Subsequently, the court voted to en banc the “Panhandle issue.” 780 F.2d 64 (D.C. Cir. 1986). See also Barnes v. Kline, 759 F.2d 21, 40 (D.C. Cir. 1985), (Judge McGowan, writing for the majority, pointing out that Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), which Judge Bork attacked in his dissent, will remain the law of the circuit until en banced, and that Congressmen, therefore, had standing to challenged President pocket veto), vacated as moot sub nom. Burke v. Barnes, 107 S. Ct. 734 (1987).

10 See supra note 6. In the 12 month period ending June 30, 1985, the D.C. Circuit published 300 opinions. However, our output is on the low side. According to the Annual Report of the Administrative Office, during that twelve month period we disposed of 489 appeals, the lowest of all circuits. The Ninth Circuit disposed of over 2,000; the Fifth, 1700; the Eleventh 1800; and the Sixth 1700. COURT STATISTICS, supra note 5, at 26. Several of these circuits have roughly the same number of judges as does D.C.; the common wisdom is that our cases are much more complex. As the Federal Judicial Center concluded:

The results of the study demonstrate that the administrative agency cases, and to a slightly less extent, the U.S. civil cases, often confront the D.C. Circuit with massive sets of material for judicial action. Agency cases involve, on the average, five lawyers and five briefs. They are more likely than other case types to involve an intervenor or amicus brief, long aggregate records on appeal, and protected, motion-filled postdisposition periods.


11 In Aluminum Co. of Am. v. FCC, 761 F.2d 746 (D.C. Cir. 1985), for example, Judge Scalia lamented that “[w]e need not resolve here the apparent conflict in the expression of our cases on the question whether in the course of an appeal for an agency decision applying a rule to a specific set of facts, we may entertain a challenge to the rule itself after the jurisdictional deadline for direct review of the rule has expired.” Id. at 751 (citing two 1977 cases in conflict).

Justice Stevens has explained, in the content of Supreme Court decisionmaking that “as the body of precedent continues to grow year after year, the likelihood that doctrinal inconsistency may force the Court to reject one precedent in favor of another must likewise increase.” Stevens, supra note 8, at 4.
jurisprudential trends in the circuit\textsuperscript{12} or in the Supreme Court.\textsuperscript{13} Sometimes, different lines of precedent based on quite different premises coexist uneasily for years without actually colliding, and the judges will follow those precedents which they like best.\textsuperscript{14} Ultimately, however, an occasion arises where a precedent directly conflicts with the way a judge wishes to decide a case and she is confronted with a more direct dilemma.

1. When to En Banc

When a judge finds precedent dead set against the way she thinks the case should go, she usually accedes to it, albeit reluctantly.\textsuperscript{15} Sometimes,

\textsuperscript{12} See e.g., Reynolds Metal Co. v. FERC, 777 F.2d 760, 763 (D.C. Cir. 1985)(Scalia, J.)("a prior decision of this court—albeit much earlier than the clear pronouncements of [recent cases] . . . allowed mandamus for the very reason here requested. . . . If the intervening cases left any doubt that that decision has been limited to its particular facts, the present opinion should eliminate it").

\textsuperscript{13} See e.g., California Human Dev. Corp. v. Brock, 762 F.2d 1044, 1052 (D.C. Cir. 1985)(Scalia, J., concurring)(taking majority to task for citing pre-Heckler v. Chaney, 470 U.S. 821 (1985) circuit precedent to show that there was law to apply in reviewing the agency's allocation of appropriated funds under the International Trade Protections Act).

\textsuperscript{14} A classic example of this is the conflict between the circuit's opinions in Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); and Action for Children's Television ("ACT") v. FCC, 564 F.2d 458 (D.C. Cir. 1984). In Home Box Office, issued on March 25, 1977, the court laid down strict rules regarding agency treatment of ex parte contracts during informal rulemaking that involves competitive interests. Nonetheless, when the ACT panel issued its opinion on an almost identical problem five months later, it refused to apply the teachings of Home Box Office. Technically, the ACT panel explained that it was simply not applying the Home Box Office rule retroactively "inasmuch as it constitutes a clear departure from established law." ACT, 564 F.2d at 474. But, the panel made clear that its misgivings about the Home Box Office rule went much deeper. "If we go as far as Home Box Office does in its ex parte ruling . . . why not go further to require the decisionmaker to summarize and make available . . . their evening ruminations? . . . [w]hy not administer a lie detector test . . . ?" ACT at 477.

Indeed, the polarity of the two opinions was so extreme, that the Administrative Conferences commissioned Professor Nathanson to draft a report on the whole subject matter. See Nathanson, Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings, 30 Ad. L. Rev. 377 (1978). In the long run, however, the dust usually settles and the court adopts one or another, or sometimes a middle approach. See Sierra Club v. Costle, 657 F.2d 298, 402 (D.C. Cir. 1981)("Later decisions of this court . . . have declined to apply Home Box Office to informal rulemaking of the general policymaking involved here.").

\textsuperscript{15} See e.g., Synar v. United States, 626 F. Supp. 1374, 1381 n. 7 (D.D.C.)(three judge court)(granting standing to Congressman to challenge constitutionality of Gramm-Rudman-Hollings Act, and explaining that while "[T]wo judges of the Court of Appeals, including a member of the present panel, have expressed disagreement with [congressional standing] . . . it has . . . been adopted by several panels of the Court of Appeals and is the law of this Circuit"), aff'd sub. nom. Bowsher v. Synar, 106 S. Ct. 3181 (1986); Copper & Brass Fabricators Council, Inc. v. Department of the Treasury, 679 F.2d 951, 963 (D.C. Cir. 1982)(Ginsburg, J., concurring)(questioning validity of circuit precedent, but in view of the clarity of its relevance, adhering to it). But see Crockett v. Regan, 720 F.2d 1355, 1357 (D.C. Cir. 1983)(Bork, J., concurring)"I do not consider myself bound by the panel
however, she is so unhappy with the status quo, that she feels she must strike a blow for change. She may acknowledge that circuit law points in one direction but argue that the direction is no longer true. She may point out that the Supreme Court has intimated or even ruled that the precedent is wrong, or that our own more recent precedent suggests premises or considerations different from those on which the old precedent was based. Or, the judge may state her own reasons for being dissatisfied with what was until now clear circuit precedent and urge a change.

Given her strongly-held views, in what procedural form can the judge express them? She can protest, point out the precedent's deficiencies, advance a better alternative, document support for it, and finally, albeit regretfully, follow the precedent. Or she can strongly dissent and let it go at that. But in my experience, judges, however "restrained" in theory, are often not content to let it go at that. Sua sponte, or at the instigation of a litigant, they vote to en banc the case and overrule the bothersome precedent.

There may, however, be pragmatic reasons why an obviously frustrated judge will not follow the en banc route. First, en bancs on a ten to twelve-judge court normally take an inordinate time to schedule, let alone decide. Almost invariably, at least on our court, they produce multiple opinions and postpone disposition of the case for months, decision in [two recent cases, since they] purported to change the law . . . in this circuit without submitting the issue to the full court."), cert. denied, 104 S. Ct. 3533 (1984).

16 See e.g., Barnes v. Kline, 759 F.2d 21, 41-42 (D.C. Cir. 1985)(Bork, J., dissenting)("With a constitutional insouciance impressive to behold, various panels of this court, without approval of the full court, have assumed that we have jurisdiction to entertain lawsuits about governmental powers brought by congressmen against Congress or by Congressmen against the President. That jurisdiction floats in midair. Any foundations it may once have been thought to possess have long since been swept away by the Supreme Court."), vacated as moot sub nom. Burke v. Barnes, 107 S. Ct. 734 (1987). See also supra nn. 9 & 15.

17 See Ashley Enter. Ltd. v. Weitzman, Dym & Assoc., 780 F.2d 1043 (D.C. Cir. 1986)(Edwards, J., concurring)(a case decided by the circuit in 1974 "represents an unexplicable and unwarranted divergence from established case law in this Court . . . an aberrant judgment that is flatly wrong . . . no attorney would be well advised to rely on [it]").

18 See cases cited supra note 15.

19 This is likely to happen when our circuit is in the minority on an issue that other circuits have decided differently. Two recent en banc decisions in the circuit are illustrative: Foster v. U.S., 783 F.2d 1087 (D.C. Cir. 1986)(en banc)(adopting "waiver rule" whereby defendant who unsuccessfully moves for judgment of acquittal under Fed. R. Crim. P. 29, and in the course of presenting his defense further implicates himself, has no right to appellate review of the Rule 29 motion based only on the evidence the government had introduced at the time of the motion); Church of Scientology v. IRS, 792 F.2d 153 (D.C. Cir. 1986)(en banc)(relation of FOIA to IRS confidentiality statutes), cert. granted, 107 S. Ct. 947 (1987). Panel members in the course of these decisions decided that the current circuit position on certain key issues was wrong and should be reviewed en banc.
sometimes years. As a result, en bancs are not undertaken lightly; the initiating judge must feel deeply that circuit jurisprudence is significantly threatened to call for an en banc. In the words of my colleague Judge Mikva:

Law differs from some other human endeavors ... in its inhospiatability to constant revision. ... For a host of familiar reasons, it is important that legal disputes, once settled by the courts, generally stay settled. In the ordinary run of things, judges promote neither justice nor the general welfare by rehearsing old arguments whenever they feel a tinge of uncertainty. Absent exceptional circumstances ... courts [should] avoid redeciding old controversies; we are as likely to mess things up as we are to straighten things out.

That said, there are judges, (fortunately only a few) who, as a point of honor, seek to en banc every case they lost at the panel stage. But most judges are content to reinforce their original panel dissents with a symbolic vote for rehearing by the panel, and to ration their en banc votes carefully.

20 For instance, there was an average period of almost one year in the last three en banc decisions between argument and disposition compared to an average 3.9 months for a published panel opinion.

21 See supra note 16. In 1984, the D.C. Circuit received 244 petitions for rehearing en banc, roughly 47% of our decided cases. National Classification Comm. v. United States, 765 F.2d 164, 172 n.1, 174 (D.C. Cir. 1985)(Separate Statement of Wald J.). Yet, during that period a rehearing en banc was granted in only five (2.4%) of the requested cases.


23 See e.g., Noxell Corp. v. Firehouse No. 1 Bar-B-Que Restaurant, 774 F.2d 1180 (D.C. Cir. 1985)(Statement of Judge Wald pertaining to her reasons for not calling for en banc consideration, which citing the infrequency of trademark litigation in circuit and already extremely limited judicial resources). Even when panels deny rehearing they often make minor changes sua sponte. One of our judges on occasion issues lengthy responses defending the original decision against the arguments raised by the petition for rehearing. See e.g., Utah Power & Light Co. v. ICC, 764 F.2d 865 (D.C. Cir. 1985) (MacKinnon, J.) (eleven page response); Tavoulareas v. Washington Post, 763 F.2d 1472 (D.C. Cir. 1985)(MacKinnon, J.) (nine page statement denying petition to panel for rehearing). The legal status of such supplemental statements as precedent is dubious, especially where all of the panel majority do not subscribe.

There is yet another technique for limiting possible readings of a panel opinion. In King v. Palmer, No. 84-5750, (D.C. Cir. Feb. 18, 1986), a majority of the court subscribed to Judge Bork’s Statement accompanying a denial of the suggestion for rehearing en banc, on the ground that:

Rehearing of [the question whether Title VII affords a claim for relief for sex-based discrimination to a woman who alleges that she was denied a promotion in favor of another woman who had a sexual relationship with their supervisor] en banc would be inappropriate because no party challenged that application of Title VII on appeal, and the issue was not briefed or argued to the panel. Indeed, the
More critically, the judge may not have the votes to en banc the precedent, and denial of an en banc will only strengthen its authority. In that case, reluctantly concurring or strongly dissenting, he may determinedly aim his opinion towards the Supreme Court which he believes to be more receptive to change than his own court. This is a time-honored technique. My old boss, Judge Jerome Frank, in the Second Circuit, successfully used it many times. In our circuit, a judge's well-documented plea for change may also find fertile ground in Congress. With prodding from litigants and their Washington lawyers, Congress will sometimes legislate our opinions out of existence by amending the laws we have "misinterpreted." Finally, by ventilating

losing parties' petition for rehearing and suggestion of rehearing en banc again did not raise that issue. Because the point was not before the panel on appeal, there is no occasion to address the issue en banc and we regard the question as entirely open should it arise in a future case.

Id.


25 See R. GLENNON, JEROME FRANK: ICONOCLAST AS REFORMER 178-79 (Cornell Press, 1985)(Frank often criticized the effects of the precedents he said he was compelled to follow). For instance, in U.S. v. Roth, 237 F.2d 796 (2d Cir. 1956), aff'd, 354 U.S. 476 (1957), he followed earlier precedent on obscenity but fastidiously pinpointed what he perceived as constitutional problems posed by those decisions under the First Amendment. R. GLENNON, supra at 111-12, 178-79.

26 See, e.g., American Fed. of Gov't Employees v. FLRA, 778 F.2d 850, 860 n.17 (D.C. Cir. 1985)("If the reality has changed since [Congress' enactment of the statute], it is up to Congress-not the courts-to modify the statute").


Another example is Congress' reaction to the split between the circuits in interpreting the interplay between the Freedom of Information Act and the Privacy Act. In "proposing legislation to clarify and restore the law on this point," the Committee specifically rejected the interpretation set forth in the decisions of the Fifth and
his contrary views, a judge may contribute to an ongoing dialogue in the
treatises or law reviews, or even influence another circuit to reconsider
the same issue. Any or all of these motivations may explain a judge’s
attack upon circuit precedent even when he does not call for an en banc.
My experience, however, is that the most serious attacks on circuit
precedents generally involve an attempt to en banc the case. This makes sense, for there is something troublesome about simulta-
neously following and savaging a circuit precedent. Although it may be
viewed as merely planting the seeds for a future harvest when member-
ship on the court changes, the tactic has a definite destabilizing effect on
circuit jurisprudence. The precedent that has been attacked remains
alive but wounded; perceptive litigants will henceforth argue that the
precedent is in disrepute and must be confined to its precise facts. The
precedent is tarnished in the eyes of judges and litigants. The court, over
time, may reflexively distinguish it or begin to ignore it.

Broadside attacks on existing precedents also tend to highlight doctrin-
and ideological splits in the court and invite cynical observations
from litigants and commentators about different law emanating from
different panels. For all these reasons, I believe it generally preferable,
for a judge who feels an important precedent is wrong, to bite the bullet
and try to get it overruled by an en banc. If she prevails, the circuit

Seventh Circuits, in the new Justice Department regulations, and in the amended
Department regulations, and in the amended OMB guidelines. The understand-
ing of the relationship between the two laws that was found to be applicable in
Greentree v. U.S. Customs Service, 674 F.2d 74 (D.C. Cir. 1982) and Porter v.
Department of Justice, 717 F.2d 787 (3rd Cir. 1983) . . . is reflective of the
congressional intent when the Privacy Act was passed.

Similarly, after the D.C. Circuit held that the Nuclear Regulatory Commission could not
make an operating license immediately effective in the face of an outstanding hearing
request even if it had determined that the Amendment involved “no significant hazard
consideration,” Sholly v. NRC, 651 F.2d 780 (D.C. Cir. 1980), vacated, 459 U.S. 1194 (1983),
Congress changed the statute to reject that reading. Pub. L. No. 97-415 § 12, 96 Stat. 2067,

Often judges, like prophets unheeded in their own circuit, are more persuasive
elsewhere. See, e.g., Santistevan v. Loveridge, 732 F.2d 116, 119-120 (10th Cir. 1984)(adopt-
ing analysis used by Wald, J., concurring in Lawrence v. Acree, 665 F.2d 1319 (D.C. Cir.

In Brown v. United States, 742 F.2d 1498 (D.C. Cir. 1984)(en banc), cert. denied, 105
S. Ct. 2153 (1985), the court dealt with the question of whether the District of Columbia’s
six month notice of claims requirement applies to 28 U.S.C. § 1983 and other federal
damage claims against the District. While the Brown appeal was pending, another panel of
the court decided McClam v. Barry, 687 F.2d 366 (D.C. Cir. 1983), which held that the local
time limit did apply to federal damage actions. Given the clarity of the precedent, the Brown
panel, including Judge Wright, affirmed the dismissal of the damage claims. 704 F.2d 1293.
Yet, unhappy with the McClam precedent, the full court granted rehearing en banc, and in
an opinion authored by Judge Wright, overruled McClam.
jurisprudence is cleared of the underbrush of discredited precedents. Thus, a two-tiered jurisprudence consisting of “good” and “bad” precedent is avoided. If she fails, the precedent will have been rehabilitated at least for the moment.

Traditionally in our courts of appeals, the en banc process has been utilized to test the correctness of new precedents, as soon as they are issued. What is novel in our circuit right now, perhaps more than in any other circuit, is the increasing resort to en bancs to overrule venerable, heretofore respected circuit precedents. The shift is plainly a symptom of the rapidly changing makeup of the court. 29

The final dilemma of a conscientious judge seeking to en banc a distasteful precedent occurs either when he fails to muster a majority of the court for the en banc rehearing 30 or, worse yet, if he manages an en

29 For instance, in 1986 two of our en bancs involved attempts to change precedents that were several years old. See supra note 19.

Between 1971 and 1979 there were a total of 61 en bancs in the circuit, an average of between seven to eight per year. It was a turbulent decade (eight of those en bancs were Watergate-related), but the court’s membership remained stable during that entire period. In the last seven terms, 1980-87, we have heard or are scheduled to hear 49 en bancs, certainly not a precipitous rise overall. Note, however, that thirty-two of those forty-nine en bancs arose in the last four years. Last term alone (1985-86), we heard nine en bancs. Furthermore, the most recent en bancs have sharply divided the court. See infra note 32.

Rehearing en banc “is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.” Fed. R. App. P. 35(a). At times, however, a judge may feel that although the issue is not of momentous importance for circuit law, the result is so unjust to the litigants that she calls for an en banc to flag the case for colleagues or the public. This tension between justice for individual litigants and maintenance of the integrity of circuit law pervades many aspects of a judge’s daily labors.

30 There is a mini-en banc device known as the Irons footnote (Irons v. Diamond, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981)) in our court which has become appreciably more popular in the last year or two. Because only a full en banc court can overrule a panel opinion and because some obsolete or unpopular precedents are just not important enough to elevate to full scale briefing and en banc argument treatment, a panel may draft an opinion overruling a prior precedent and circulate it to the full court, highlighting what it is doing. If the court agrees, it will then be noted in the opinion that the former precedent is no longer valid. The Irons footnote treatment is supposedly reserved for minor annoyances in circuit precedents and in the last few years, it has been used frequently. E.g., Telecommunications Research and Action Center v. FCC, 750 F.2d 70, 75 n.24 (D.C. Cir. 1984); Commodity Futures Trading Commission v. Nahas, 738 F.2d 487, 496 n.19 (D.C. Cir. 1984); Hobson v. Wilson, 737 F.2d 1, 16 n.46 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 1843 (1985); Londrigan v. FBI, 722 F.2d 840, 845 n.6 (D.C. Cir. 1983).

On a few occasions, however, the full court decided that the issue was important enough to merit full en banc treatment (briefs and argument) rather than a quick pass. Oddly enough we are still undecided whether it takes only a majority of the court to authorize an Irons footnote or whether any objecting judge can send the case to a regular en banc procedure. Since no law or rule requires that an en banc be briefed or argued, it is probably
banc but the vote on the merits goes against her. The question then becomes whether she should take her jurisprudential lumps and withdraw or continue the attack in future opinions. Most judges have a healthy sense of when "enough is enough" so that, having made their position clear, they do not become perennial irritants to their colleagues. But some are indefatigable and nothing is likely to silence their most profoundly-held convictions. Whether successful or unsuccessful in en bancing their target precedents, they maintain their stand sufficient to get a majority of judges, although collegiality suggests not going that route if any significant number disagree.

A rising number of *Irons* footnotes is another signal of a changing jurisprudence. There is a danger, surfaced by two recent cases that started out as *Irons* footnotes and ended up as fully briefed and argued en bancs, that a court will not fully recognize the import of what it is doing without going the advocacy route, and will change meaningful precedents too casually. See supra note 19.

It is also possible for a merits panel to overrule a prior decision by the motions panel in the very same case. Motion decisions, unless they announce otherwise or are issued as published decisions are considered preliminary. See, e.g., Asarco v. FERC, 777 F.2d 764, 773 n.6 (D.C. Cir. 1985). ("The disposition of motions panels may of course be reexamined during the merit panel's indepth consideration of the case.").

Sometimes, too, a judge's gripe is with the *doctrine* developed—not the *result* in a case, and although a court could en banc a case solely for its rationale, it is seldom likely to do so. In this regard, Judge Bork's crusade to abolish the doctrine of equitable discretion in assessing Congressmen's standing from our jurisprudence is instructive. In his thirty page dissent in *Barnes v. Kline*, 759 F.2d 21, 41-71 (D.C. Cir. 1985) (Bork, J., dissenting), vacated as moot sub nom. *Burke v. Barnes*, 107 S. Ct. 734 (1987), he chronicled the history of his own as well as the circuit's alleged past mistakes in recognizing the standing of Congressmen who claim dilution of their official authority. He argued for a doctrine that rejects any standing of members of one branch of government to go to court to protect their official authority under statutes or the Constitution. In so doing, he repudiated his own earlier concurrence in *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1982), cert. denied 104 S. Ct. 91 (1983), in which he argued based on past circuit precedent, for a rationale that would permit standing only for total abrogation of a Congressman's vote. He also confessed to endorsing the equitable discretion doctrine in *American Fed. of Gov't Employees v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982), but attributed it to oversight due to the emergency nature of the case. *Barnes*, 759 F.2d at 44 n.2 ("the opinion was released one day after the oral argument."). Judge Bork concurred in the result in *Vander Jagt* and *Pierce*, he had not previously asked for an en banc, pointing out that *Barnes* was the first case in which the misbegotten doctrine affected the result. "Unlike those [cases] in which similar protests have been lodged, the error in analysis [in this case] produces an error in result." 759 F.2d 41.

The prime example of this is, of course, Justices Brennan's and Marshall's practice of dissenting whenever the Supreme Court upholds a death penalty sentence, or denies certiorari in a case imposing the death penalty: "Adhering to our view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U.S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in these cases." See, e.g., *Booker v. Wainwright*, 106 S. Ct. 339 (1985); *Yates v. South Carolina*, 462 U.S. 1124 (1983).
inside and outside the court. Doggedly, often artfully, but nonetheless relentlessly, they press their colleagues.32

Perhaps the most effective antidote against profligate en bancing is the very human desire of judges to coexist in peace. Apart from the inordinate demands on the time and resources of judges, en bancs heighten tensions on the court. No judge likes to have her opinions en banced, and although she may expect it from those with whom she frequently disagrees, she may resent it from usual allies. Some judges do indeed regard a vote in favor of en bancing their cases as tantamount to betrayal. Especially on a divided court, we are thus tempted occasionally to rationalize voting against an en banc of one of our colleagues's opinions for purposes of collegiality ("It's not that important, I can distinguish the opinion in the future if I have to"). Perhaps too, we fear that the fate of our own future opinions may be implicated in a weakening of collegial bonds. A cursory study of close en banc votes suggests judges here fall more readily into recognizable voting blocs than Judge Edwards' survey of panel voting.

This is not by any means always true.33 For myself, I have found that the force of these subjective concerns can be resisted; the integrity of the circuit's law is my paramount concern. I have also learned that judges' regard for their colleagues survive individual case differences, even en banc votes. And in fact a judge's early expression of anxiety or disagree-

32 For examples of this type of practice in the D.C. Circuit, see Vinson v. Taylor, 760 F.2d 1330, 1333 n.7 (D.C. Cir.) (Bork, Scalia, and Starr, JJ., dissenting from denial of rehearing en banc) ("The artificiality of the approach we have taken [to include sexual harrassment in the definition of Title VII discrimination] appears from the decisions of this circuit . . . the court has held [that] bisexual harassment, however blatant and however offensive and disturbing, is legally permissible . . . If it is proper to classify harrassment as discrimination . . . that decision at least demands adjustment in subsidiary doctrines."). The panel's decision was subsequently affirmed by the Supreme Court. Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986). see also Del Mfg. Co. v. United States, 723 F.2d 980, 989 (D.C. Cir. 1983)(Wald, J., dissenting)("Even if the main battle has been lost . . . in this circuit, the wiping up operations performed by the present ruling are unnecessarily thorough to my thinking.")

Sometimes even victory in the Supreme Court does not ease the committed judge's burden. For example, since his dissent in Chaney v. Heckler, 718 F.2d 1174 (D.C. Cir. 1983), rev'd 105 S. Ct. 1649 (1985), which was vindicated in the Supreme Court, Judge Scalia has had mixed results in his effort to advance his theory of the unreviewability of some areas of agency discretion. Compare International Union, United Automobile, Aerospace and Agricultural Implement Workers v. Donovan, 746 F.2d 855 (D.C. Cir.) (successfully applying doctrine in a decision issued before the Supreme Court's decision in Chaney to bar review of Department of Labor's refusal to pay training costs under the Trade Act of 1974), cert. denied, 106 S. Ct. 81 (1985), with California Human Dev. Corp. v. Brock, 762 F.2d 1044, 1052-53 (D.C. Cir. 1985)(Scalia, J., concurring)(arguing that in a post-Chaney case the majority should hold that agency's allocation of funds is committed to agency discretion by law).

33 See, e.g., Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir.) (J.J. Wright, Tamm, Wilkey, Ginsburg, Bork, Scalia and Starr voting not to en banc case that found no constitutional right to homosexual conduct in military), reh'g and reh'g en banc denied, 746 F.2d 1579 (1984).
ment with a respected colleague's opinion may alert her to the imminent danger of an en banc and provoke a change in the panel opinion itself that makes a vote for an banc ultimately unnecessary. On at least two occasions, I have myself extensively modified a panel opinion because I took seriously the early warnings of sympathetic colleagues. Furthermore, even if an en banc does materialize, it is usually preferable to being reversed by the Supreme Court, since en banc in one's court is a process over which one retains some control through participation in the ultimate consensus or at least the accommodation of that consensus to one's dissent.

En bancing remains the most direct and the most legitimate way to overrule a bad precedent. But it is not always possible, given the posture of the case, the makeup of the court, or the limited energies of its members which hold down the number of en bancs each year to less than a dozen. In a time of transition, such as the D.C. Circuit is now enduring, we can expect mounting discontent with old circuit law, which is unlikely to level off as long as revisionist judges have realistic hopes of convincing

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A recent case demonstrates, however, that a modification of a panel opinion can have quite an opposite effect. In Jersey Central Power & Light Co. v. FERC, 730 F.2d 816 (D.C. Cir. 1984), Judge Bork held, for a unanimous panel, that FERC was not duty bound under the circumstances of that case to hold hearings to investigate a utility's allegation that the rate FERC had set for it was unconstitutionally confiscatory. The utility's suggestion for rehearing en banc was denied, and in fact no member of the court voted to en banc the case. The panel, however, concluding that the utility "presented persuasive new arguments suggesting that the [panel opinion] was in error" decided to issue a new opinion. Jersey Central Power & Light Co. v. FERC, 768 F.2d 1500, 1501 (D.C. Cir.), vacated, 776 F.2d 364 (D.C. Cir. 1985). This time a majority of the panel, over a strenuous dissent by Judge Mikva, held that FERC was in fact required to hold a hearing on the utility's allegations. Judge Mikva began his nine page dissent by proclaiming that "[t]his case demonstrates the importance of leaving well enough alone." Id. at 1505. On October 18, 1985, the court decided to vacate the second panel opinion and rehear the case en banc. The full court concluded, with four judges dissenting that FERC's summary rejection of the utility's claims was inconsistent with "controlling precedent of the Supreme Court and of this court," and therefore vacated the Commission's decision and remanded for a hearing. No. 82-2004, slip op. at 4 (D.C. Cir. Feb. 3, 1987)(en banc).

35 In virtually all of the en banc opinions issued in the 1984-85 term, there were sprightly exchanges between the majority and minority positions, and the majority opinions were clearly influenced by the dissents. See e.g., Brown v. United States, 742 F.2d 1498 (D.C. Cir. 1984)(en banc)(seven to four decision), cert. denied, 471 U.S. 1073 (1985); Ollman v. Evans, 750 F.2d 970 (1984)(en banc)(seven separate opinions), cert. denied, 471 U.S. 1127 (1985).

36 Several times, cases en banced have become moot before decision. See, e.g., Gott v. Walters, 756 F.2d 902 (D.C. Cir.), vacated, 791 F.2d 972 (D.C. Cir. 1985). In such a case, of course, the original panel decision has already been vacated so that the jurisprudence reflects at least the tentative majority opinion that it was vulnerable. Of course, en bancs occasionally do affirm the original panel opinion.
new colleagues, converting swing votes, or persuading the Supreme Court or Congress. It remains to be seen whether such an activist attitude toward changing precedent will prove to be ultimately good or bad for our substantive jurisprudence. Time, however, is likely to counteract its temporarily destabilizing effects. As the majority of the court supporting a particular point of view enlarges, it becomes easier to deal with problem precedents by using full scale en bancs, the so-called Irons footnotes\(^3\) (our mini-en bancs accomplished by vote without briefing or argument), or by distinguishing them away. Thus, eventually the pendulum swings back toward a more stable—if different—body of circuit precedent. In the interim, though, the tides of jurisprudential battle, reflected not only in en banc rulings of the court, but in frequent attacks upon precedent in panel concurrences and dissents, will continue to shift with the shifting membership of the court.

2. When to Distinguish or Limit a Precedent

Thus far I have discussed the situation where circuit precedent controls. Much more frequent, however, is the situation where there are no “red cow” cases squarely on point, but rather only cases that indicate circuit approval of a certain approach to certain issues, an acceptance of certain premises, or sometimes a mode of analysis that logically applies to the instant case even though it requires some extension of an old precedent to new facts. Here there is obviously much greater room for judges to maneuver around old law. I'm sure it is no surprise that opinions by certain judges in particular areas of the law are studiously evaded by certain other judges within the same circuit. The old theory that pursuing legislative history is like looking over a crowd and picking out your friends, carries over to precedent-searching in the West reporter system. Reasoning by analogy—the lifeblood of appellate law—gives judges space for selecting the cases they like or selecting out the cases they don't. Many opinions of yesterday, whose tone or spirit are not acceptable to newer judges today, can be ignored, or distinguished away if not precisely on point. This sorting out process is generally healthy, because courts, like other social institutions, reflect the passions, convictions, even the obsessions of their time. As the times, and the state of our collective knowledge and experience change, rationales that once reflected prevailing wisdom lose force.

A primary example of this is Judge Wright's landmark opinion last year in *Quincy Cable TV*,\(^3\) invalidating the FCC's “must carry” rules that required cable TV stations to carry local TV programming. Invoking the first amendment, the panel found that the rule's rationale, based

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\(^3\) See supra note 30.

\(^3\) *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 2889 (1986).
upon the scarcity of TV outlets no longer has a "place in evaluating
government regulation of cable television" due to the proliferation of
new outlets that now permit relatively free access to the airwaves. The
FCC's "collective instinct" that "must carry" rules were essential to
preserve local programming did not merit deference, given changed times
and advanced technologies. As a post-script, the panel's decision was
enthusiastically welcomed by that agency which sought neither rehear-
ing en banc nor certiorari.

Every judge wants to exorcise some past cases, believing them no
longer valid in today's context. In general, the older the precedent, the
more acceptable this selective process. But nowadays in our court, this
kind of "cabining in" sometimes occurs surprisingly soon after issuance of
the opinion. Unpopular precedent will be distinguished away or "lim-
ited to its facts" in its infancy with severe doubts left as to its ability to
survive.

Courts have always reasoned by analogy to past precedent or distin-
guished it. Judges honestly differ about whether the facts distinguishing
one case from another, despite common principles, are material enough to
justify or even dictate a different result. But when judges are engaged

39 Id. at 1449.
40 Id. at 1457-58.
41 See supra notes 17 and 19 and accompanying text.
42 In Samuels v. D.C., 770 F.2d 184, 201 n.14 (D.C. Cir. 1985), for example, the court
pulled back from the doctrine that the Housing Act gives an implied right of action or third
party beneficiary standing to tenants for violation by landlords. In so doing, the court was
forced to draw fine distinctions between the case before it and the circuit's quite recent
decision recognizing third party beneficiary standing in Ashton v. Pierce, 716 F.2d 56 (D.C.
Cir.), modified, 720 F.2d 70 (D.C. Cir. 1983).

43 Sometimes backing away from recent precedent is unavoidable due to intervening
events. This is especially true in diversity cases where the job of the federal courts is to
follow state law. See, e.g., Norwood v. Marrocco, 780 F.2d 110 (D.C. Cir. 1986)(recent
decision of District of Columbia Court which took away precedential effect of previous D.C.
Circuit opinion interpreting D.C. law); Eli Lilly & Co. v. Home Ins. Co., 764 F.2d 876 (D.C.
Cir. 1985)(certifying question of asbestos insurer's liability to Indiana court despite circuit
precedent on precise point because it had become clear that pattern of State court decisions
had changed since earlier decision).

At times the change necessitating reevaluation is legislative. In Trailways Lines, Inc. v.
ICC, 766 F.2d 1537 (D.C. Cir. 1985), for example, Judge Starr held that an earlier precedent
requiring the ICC to conduct a study of the implications for bus competition before awarding
new courses, Trailways, Inc. v. ICC, 673 F.2d 514 (D.C. Cir. 1982), was no longer relevant
precedent, reasoning that the intervening passage of the Bus Regulatory Reform Act did
away with the necessity for the study since the legislation did not require it. Trailways, 766
F.2d at 1543.

44 One example of this kind of legitimate difference appeared in Reuber v. United
217 (D.C. Cir. 1980), had refused to permit an action under Bivens v. Six Unknown Named
Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)(conspiracy to have federal
officials disclose information obtained in violation of the Constitution), against a newspaper
in more than a neutral inquiry into the present application of past precedent, the process tends to lose objectivity and the result to be dictated by personal reactions. Within our circuit, it is generally easy to tell when a distinction expresses principled disapproval or a simple distaste of the earlier case.

Thus, in United States v. Steele, a ruling, I hasten to add, from which I dissented, and in which rehearing en banc was subsequently granted with remand to the Commission in view of its charged function, the majority invalidated a longstanding practice of the FCC to extend preferential treatment to woman owner-managers of FM stations in comparative license proceedings. An analogous preference for minorities in license proceedings had been upheld by the court only months before and certiorari denied. The FCC's underlying rationale in both cases was that it was in the "public interest" to promote diversity of programming through diversity of ownership. The Steele panel, however, finding the FCC's rationale for the minority preference "more than a little implausible," declined to extend the rule to women on grounds that: "[W]hatever the merit of these assumptions as applied to cohesive ethnic cultures, it simply is not reasonable to expect that granting preferences to women will increase programming diversity." I draw attention to the original panel opinion, not to reargue the merits which subsequent events have superceded, but to illustrate how disapproving judges may seek to freeze recent precedent in its tracks, and significantly to

that had allegedly conspired with government officials to infringe the plaintiff's civil rights. The Reuber panel, with a separate concurrence by Judge Bork, distinguished Zerilli on the basis that it held that no action was available in light of the "special factor" analysis laid down by Bivens to guide whether cases should give rise to constitutional torts. Judge Bork and I found no special factors counselling hesitation in this case, but Judge Starr dissented, finding that there was no material difference in our case from Zerilli.

45 Steele v. FCC, 770 F.2d 1192 (D.C. Cir.), vacated, No. 84-1176, slip op. (D.C. Cir. Oct. 31, 1985). After rehearing en banc was granted, the FCC filed a motion for remand stating that it had changed its position since its initial decision in Steele and that it no longer believed it could constitutionally grant a racial or gender-based preference in comparative licensing proceedings. The FCC's motion was granted and the case remanded to the Commission for further consideration.

46 See Id. at 1198-99.
47 See Id. at 1199.
48 I pointed out in my dissent that "[t]he view that such factors as race, sex or national origin, which the individual is powerless to change, could not be a basis for awarding a merit enhancement was expressed by several judges on the court . . . but this view failed to prevail [in TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir.1973), cert. denied, 419 U.S. 986 (1974)]. Steele, 770 F.2d 1203, 1206 (Wald J., dissenting). The fact that this view failed in TV 9 apparently presents no obstacle in the majority's view, to once again asserting it as support for the conclusion that the Commission may not award merit on the basis of female ownership and participation. . . ." Id.

TV9 had been only recently invoked and validated in West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 1392 (1985).
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undermine its rationale. Unsettling as I find this practice, it is no isolated event. Steele-type occurrences are likely to recur in any fast changing and sharply divided court.

3. The Invitational Dissent

In attacking precedent, a dissenter traditionally has a freer hand, since he is not making law, only criticizing the law that has already been made. His real audience is the rest of the court, Congress, or the Supreme Court. Seven of the ten D.C. Circuit panel opinions which the Supreme Court

49 As my dissent in Steele pointed out, there was no dispute that women were underrepresented in radio station ownership. In addition, several reports of the U.S. Civil Rights Commission had documented that "Women were most often portrayed as sex symbols, wives or mothers," in "jiggly shows." Sexism was particularly rampant in the media's portrayal of women in commercials, "[w]omen never leave the kitchen. They are in there day and night."

The point of increasing ownership and participation of underrepresented groups, such as minorities and women, is not to get some specific preordained women's programming or black programming, but to ensure that the varying viewpoints, perspectives, and issues of distinct relevance to these groups are fairly represented in the media. As the majority quite correctly states, women are not uniform in their choices of lifestyle, or their political, social or moral beliefs but, I submit, neither are blacks. The point is not that these groups have some cohesive, collective viewpoint. Certainly Phyllis Schafly and Eleanor Smeal differ on most issues related to women; what they share, however, is their awareness that women as a group are currently facing critical issues. The nexus between diversity of control and diversity of content concerns such things as the selection of topics for coverage in news, editorials, and programming, the emphasis accorded to the issues, and the fairness with which the issues are presented, as well as, the consideration given to the manner in which various groups are portrayed in the media.

Steele, 770 F.2d at 1208-09 (Wald, J., dissenting).

50 The FCC's behavior in the Steele case merits comment. Despite the fact that the panel opinion rested on the FCC's lack of statutory authority to grant a female preference, the FCC did not ask for rehearing. In fact, a leading industry journal reported that the "Commission had been content to have the [female] preference killed" and a "Commission official said... the agency is willing to live with the [panel] decision." Appeals Court Grants Hearing of Women's Preference Issue in FM Grant, Broadcasting, Nov. 11, 1985, at 74-75. Several women's organizations did, however, petition for, and succeed in achieving rehearing en banc.

Of course, the government clearly knows how to fight hard when it wishes to. In Schor v. Commodities Future Trading Comm'n, 740 F.2d 1262 (D.C. Cir. 1984), for example, a panel initially held that the CFTC was without power to resolve common law counterclaims in regulated brokerage accounts. They then sought certiorari which the Supreme Court granted in order to vacate the case in light of Thomas v. Union Carbide Agricultural Products Corp., 105 S. Ct. 3325 (1985). On remand, the panel reissued its original decision. 770 F.2d 211 (D.C. Cir. 1985). The government again sought certiorari which was again granted, and the Supreme Court reversed. 106 S. Ct. 3245 (1986).

51 There is no question that a forceful dissent significantly enhances the prospects of obtaining an en banc or certiorari. Where the panel has been unanimous, other members of
Court reversed in the 1984-85 term, had dissents whose reasoning was adopted in varying degrees by a majority of the Supreme Court.\textsuperscript{52} In the 1985-86 Court term, at least one judge dissented from the original panel opinion or from the denial of en banc in eight of the eleven cases granted certiorari.\textsuperscript{53}

Making the case for change in a dissenting opinion has decided the court with an opposing view frequently fill the gap by writing statements to accompany the denial of rehearing en banc. See e.g., Goldman v. Weinberger, 739 F.2d 657 (D.C. Cir. 1984) (JJ. Ginsburg, Scalia, and Starr, dissenting from the denial of rehearing en banc)(panel unanimously held that the military had the right to forbid the captain from wearing a yarmulke while on duty). The panel's decision was subsequently affirmed by the Supreme Court. 106 S. Ct. 1319 (1986). Although statistics show that 94 percent of our decisions are unanimous at the panel level, see supra note 4, the most controversial and visible decisions almost always have dissents. Further, I have been informed that a sharp dissent provides useful fodder for the disappointed litigants when they seek relief in Congress. See supra note 26. Additionally, it is not at all uncommon to see a dissenter singled out for recognition in Supreme Court opinions. See, e.g., Heckler v. Chaney, 470 U.S. 821, 827 (1985), rev'g 718 F.2d 1174 (D.C. Cir. 1983).


The three cases in which the Supreme Court reversed unanimous panels of this court were: Lorion v. NRC, 470 U.S. 729 (1985), rev'g 712 F.2d 1472 (D.C. Cir. 1983); Johnson v. Bechtel, 467 U.S. 925 (1984), rev'g 717 F.2d 574 (D.C. Cir. 1983); ITT World Communications v. FCC, 466 U.S. 463 (1984), rev'g 699 F.2d 1219 (D.C. Cir. 1983).

advantages. Foremost, a judge can write her dissent just the way she wants; she need not defer to a colleague's sensibilities in order to gain a needed vote. The dissenter can thus be an unabashed advocate. Unfortunately, too many dissents take advantage of that license, freely using hyperbole and distortion in challenging the majority. A most difficult endeavor, incidentally, is to turn a dissent into a majority opinion on those rare and satisfying occasions where the judge wins the dialectic battle and persuades the swing member of the panel, or the author of the draft original majority opinion, or even the en banc court. The responsibility of formulating law for the circuit demands a different tone, the conciliation of differing viewpoints, and the approval of other judges, in contrast to the heady independence of dissent-writing.

The invitational dissent is, of course, not judicial news. The great circuit court dissenters, Learned Hand, Jerome Frank and David Bazelon have always played a "John the Baptist" role in the evolution of the law. In times of transition, dissents can be expected to increase until the tide has emphatically turned. The frequency of dissents also reflects the confidence of the dissenters that they, not the circuit majority, are truly in tune with the Supreme Court.

In our court, dissents come in all sizes and shapes. A dissent may be a protest that the majority is not following circuit law, or a declaration that the law has to be changed. Today, the dissents in our court tilt sharply towards change. Some judges with agendas for change engage in lengthy dissents that propose a new interpretation of past precedent or new doctrine not based on any precedent, looking beyond our court to the

54 Sometimes it takes a dissenter a long time to establish his point. Robert Glennon's biography of Jerome Frank recounts the saga of one such dissent which the Judge wrote during my clerkship, United States v. On Lee, 193 F.2d 306 (2d Cir. 1951) (arguing against the panel's reaffirmation of the "physical penetration test" in the Fourth Amendment). On the first round, the Supreme Court took the case and affirmed the majority. United States v. On Lee, 343 U.S. 747 (1952). Yet, Frank's dissent provided the fodder for additional dissents by Justices Frankfurter and Burton. Frank's dissent also became the basis for a later majority opinion by Justice Stewart in a different case: Silverman v. United States, 365 U.S. 505 (1961). Further, Justice Brennan also used it in a dissent asking for the overruling of the main precedent. Lopez v. United States, 373 U.S. 427 (1963). Brennan's opinion in turn became the basis for overruling the line of precedent in a still later case. Katz v. United States, 389 U.S. 347 (1967). See generally R. Glennon, supra note 25, at 181-82. Similarly, in the area of harmless error, Frank dissented six times before the Supreme Court finally took a case and upheld his position. See id. at 186-87.

55 In 1983, the court issued three hundred and fourteen published opinions, nineteen of which (six percent) had accompanying dissents. In 1984, the court issued three hundred and thirty-two published opinions, twenty-eight of which (eight percent) had accompanying dissents. In 1985, the court issued three hundred published opinions, twenty-five of which (eight percent) had accompanying dissents.
Supreme Court for vindication. Chaney v. Heckler is a recent and notable example of such a successful dissenting strategy. Judge Scalia’s dissent from the original panel opinion failed by one vote to gain en banc rehearing, but was cited favorably several times in the Supreme Court’s reversal of the panel.

4. Raising Issues Sua Sponte

Ordinarily, appellate courts will not consider an issue that the parties do not raise at trial. However, judges may raise jurisdictional issues sua sponte even when the parties—often intentionally—do not. Many of these jurisdictional issues involving access to courts and judicial review are today priority items for judges who are prepared to forge new doctrine even without the help of the parties. Threshold access issues such as standing, ripeness, finality, reviewability, political question, and sovereign immunity are the issues most often raised sua sponte by our judges. In several critical cases, the party who would benefit from invocation of such doctrines—usually the government—not only has failed to raise them, but has expressly declined to do so.

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58 Sometimes a court will consider and decide an issue raised not by the parties but by an amicus curiae or intervenor. See, e.g., Doe v. DiGenova, 779 F.2d 74, 92 (D.C. Cir. 1985)(Starr, J., concurring)(pointing out that the parties had pursued the case on an irrelevant statutory issue and “it was only with the arrival of a very helpful amicus brief [from the ACLU] in this court that the light suddenly dawned”); California Ass’n for the Physically Handicapped v. FCC, 778 F.2d 823, 827 (D.C. Cir. 1985)(Wald, J., dissenting)(intervenor raised standing issue on which appeal was decided).
59 On several occasions our court has emphasized that it is not bound by a party's decision not to raise an argument. See, e.g., Brown v. United States, 742 F.2d 1498, 1510 n.1 (D.C. Cir. 1984)(en banc)(Bork, J., dissenting)(on appeal counsel for the District abandoned a statutory argument raised below: “I do not believe that I am bound by those representations. Counsel were not abandoning a claim but rather a legal justification for a claim.”), cert. denied, 471 U.S. 1073 (1985).

In Gott v. Walters, 756 F.2d 902 (D.C. Cir. 1985), vacated and reh’g en banc granted, 791 F.2d 172 (D.C. Cir. 1985), the government had not claimed that the Veteran’s Act, 38 U.S.C. § 211 (1982) precluded review of the issue decided below, i.e., whether certain action constituted a rule so as to require notice and comment. On appeal, however, the panel majority consisting of Judges Bork and Scalia decided that it did: “The only issue we find it necessary to resolve is whether the statutory preclusion of review of Veteran’s Act decisions . . . applies to this case.” Id. 756 F.2d at 902. I dissented citing the government’s testimony in Congress indicating that it did not interpret its enabling Act to preclude review of rules. My dissent labelled the rationale “rank judicial interference with a reasonable statutory interpretation agreed upon by both political branches of government.” Id. at 929 (Wald, J., dissenting). The case was en banced. Before argument, however, the parties stipulated to a dismissal based on legislation passed by Congress that would provide for a remedy for the nuclear blast veterans.
A court is, of course, completely within its authority in raising a jurisdictional issue on its own. The novelty of some recent cases is, however, that *sua sponte* review may be used to change or extend the law and to enunciate new principles beyond the present confines of circuit precedent. In the 1984-85 term, we saw at least a dozen such judge-initiatives, all directed toward cutting off access or review.60

It only takes a few such cases to convince the parties—especially the government—that in all close cases it should raise jurisdictional issues to avoid embarrassment. Never risk waiving them to get to the merits.

In *Barnes* v. *Kline*, 759 F.2d 21 (D.C. Cir. 1985), the government argued that members of the Senate and House did have standing to challenge the pocket veto in question. Judge Bork dissenting, however, remonstrated with the government for its concession. "By conceding the standing issue appellees endanger a constitutional principle far more momentous than the scope of the pocket veto power." *Id.* at 42 n.1 (Bork, J., dissenting), *vacated as moot sub nom.* *Burke* v. *Barnes*, 107 S. Ct. 734 (1987). It is noteworthy that in their brief answering the Congressional suit against the Gramm-Rudman-Hollings Act, the government adopted the Bork theory announced in his *Barnes* dissent that neither Congressmen nor even the House or Senate as a body have standing to challenge any injury to their official power or authority from another branch. Washington Post, Dec. 31, 1985, at 1, col. 3.

Another example of judges raising issues *sua sponte* is *Northrop Corp.* v. *McDonnell Douglas Corp.*, 751 F.2d 395 (D.C. Cir. 1984) where Judge Scalia raised, at oral argument, the issue of whether the government had validly waived its sovereign immunity so as to be subject to discovery in a third party suit under the Federal Rules of Civil Procedure. *Id.* at 398 n.2. The parties were asked to submit supplementary briefs and the case was delayed until they were considered. Both parties argued that sovereign immunity did not apply and the case proceeded on its original course. The Circuit court explained:

> Since at least 1965 . . . this court has assumed the nonapplicability of sovereign immunity to such a subpoena [citations omitted]. [Sovereign immunity] is a doctrine 'rooted in history' . . . whose application depends much more upon tradition than logical analysis . . . [and there is] no cause in the present case to upset a steady course of precedent by attempting to graft onto discovery law a broad doctrine of sovereign immunity.

*Id.*

60 See, e.g., *American Fed. Gov't Employees* v. *O'Connor*, 747 F.2d 748 (D.C. Cir. 1984)(Ginsburg, J.), *cert. denied*, 106 S. Ct. 279 (1985). But see *id.* at 758-59 (Mikva, J., dissenting) ("employees throughout the nation will effectively be barred from participation in neutrally conducted voter registration drives sponsored by AFGE or NTEU . . . [r]ights which may be exercised only by risking unemployment . . . are hollow things indeed"); *American Trucking Ass'n.*, Inc. v. *ICC*, 747 F.2d 787, 790 (D.C. Cir. 1984)(court raised and relied upon ripeness grounds, explaining that "our own ability to decide intelligently and our own confidence that we are expending our resources in resolving a dispute that has substance, are proximately affected.")

In *Maryland People's Counsel* v. *FERC*, 760 F.2d 318 (D.C. Cir. 1985), the court *sua sponte* raised supplementary briefing on the issue of whether the Maryland People's Counsel could represent consumers in challenging a FERC order. A decision by Judge Scalia ultimately decided that since the Supreme Court had not yet read federalism concerns into "core" standing requirements and since the citizens interests were "concrete" enough there was standing. Although many court decisions in the past had recognized the standing of such state consumer agencies, Judge Scalia explained there had been "no case allowing state standing with specific discussion of the issue. . . ." *Id.* at 322.
These access issues gain prominence in the court's jurisprudence, and judges' jurisprudential agendas are advanced.

But where the court resorts too casually to *sua sponte* review, there may be troubling side effects. The risk of court intervention may distort the appellant's litigation tactics and pressure the government into raising close questions it wants to avoid. And the court may find itself deciding questions without the benefit of briefing from the parties—not infrequently involving standing and ripeness doctrines dependent on facts or procedures outside the court's knowledge. Indeed, on occasion, our court, after much post-*sua sponte* agonizing, has finally decided there is jurisdiction, as probably the agency, in determining not to raise the question, had already decided. None of this is by way of suggesting that Article III courts, bound by the case or controversy limitation, should ignore jurisdictional doubts, even if the parties have not raised them. It does, however, suggest that revisionist judges should exercise restraint in deciding whether to advance their agendas by this technique. Nonetheless, juridical protectionism is definitely on the march. Raising and deciding issues *sua sponte* has become a favored technique for restricting access to our court.

This may reflect an important confluence of philosophy and pragmatism. We recently encountered a dramatic upswing in cases filed in our circuit. To be candid, we were amassing a frightening backlog. Our judges expanded their sittings but everyone felt the pressure. In such a climate, increased resort to front-end dismissals is inevitable.

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61 Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring) ("All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part . . . to an idea which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the power of an unelected, unrepresentative judiciary in our kind of government.")., cert. denied, 104 S. Ct. 91 (1984).

62 The number of new appeals filed in the circuit skyrocketed from one thousand three hundred and thirty-seven during fiscal year 1984 to two thousand one hundred and fourteen in fiscal year 1985, for an amazing increase of fifty-eight percent. **COURT STATISTICS, supra note 5, at 2.**

63 Other doctrines involving access to a full-scale trial seem currently to be in flux. For example, the Supreme Court recently reviewed two cases from our circuit involving the standards for summary judgment. In one, the Court held that summary judgment may be granted to a defendant who offers no proof at all to rebut the plaintiff's allegations on a material issue on which the plaintiff has the ultimate burden at trial, *i.e.*, exposure to the defendant's asbestos product. Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986), rev'g Catrett v. Johns-Manville, 756 F.2d 181 (D.C. Cir. 1985). Judge Bork had dissented from the majority opinion on the ground that summary judgment in the absence of any support by the movant "undermines the traditional authority of trial judges to grant summary judgment in meritless cases" where the plaintiff has no admissible evidence on an essential element of his case. 756 F.2d at 187 (Bork, J., dissenting). In the second case, the Supreme Court reversed a unanimous decision written by Judge Scalia which held that the "clear and convincing" evidence of malice requirement in a public figure libel case applies to the...
sive caseloads make judges less tolerant of counsels' lapses, less prone to overlook technical waivers, less likely to search for the substantive needle in a haphazardly built haystack. 64 If hard cases make bad law, too many cases may produce, if not bad decisionmaking, at least irritated judging. I have perceived an escalating impatience on the part of our judges with substantively weak or repetitive motions and marginal appeals. 65 There is a growing inclination too to take a hard line on standing, ripeness, res judicata, issue preclusion and even political questions. 66

64 The D.C. Circuit, like other circuits, has "enjoyed" the favors of the perennial pro se litigants. Recently, it has begun to crack down on frivolous or repetitive pro se motions by requiring a leave to file. See Urban v. United Nations, 768 F.2d 1497 (D.C. Cir. 1985).

Urban filed twenty-eight appeals in the first three months of 1985 which all shared "common attributes: irrationality, incoherence and a complete lack of any substantive allegations over which the court might maintain jurisdiction." Citing his residency in the milkyway galaxy as the grounds for jurisdiction, Mr. Urban sought, inter alia, an emergency stay of President Reagan's second inauguration. Id. at 1499.

65 The circuit has also begun to impose sanctions on appellants bringing frivolous appeals. See, e.g., American Security Vanlines, Inc. v. Gallagher, 782 F.2d 1056, 1056-57 (D.C. Cir. 1986):

We affirm and, on our own motion direct appellant and attorney for appellant to pay the costs and counsel fees reasonably incurred by appellees. ... [Appellant] offers no tenable argument for disturbing the careful adjudication of this case by the district court. In the main, he repeats implausible, far fetched, or tardily-raised objections answered with thoroughgoing clarity in the district court's memorandum.

At the other end of the spectrum, a panel recently issued a strong warning to industry appellants who raise casual stay motions asserting "irreparable harm" solely on "unsubstantiated and speculative allegations of recoverable economic injury." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 672 (D.C. Cir. 1985)("The filing of these motions ... has been an abuse of the judicial process and has wasted the time and resources of the court.") But see Sills v. Bureau of Prisons, 761 F.2d 792 (D.C. Cir. 1985)(reversing district court's summary dismissal of prisoners' claim to access to military law materials for his suit.)

66 Located in Washington, the circuit has more than its share of "hot" issues. Last year, many suits to enjoin government officials' alleged violations of domestic and international law were dismissed as "political questions", or on other grounds of nonjusticiability. See, e.g., Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985)(aid to Contras in Nicaragua); Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985)(suit to declare invasion of Grenada a violation of Congress' constitutional power to declare war held moot); Flynt v. Weinberger, 762 F.2d 134 (D.C. Cir. 1985)(challenge to White House decision to limit press coverage of Grenada invasion held moot). But see American Cetacean Soc'y v. Baldridge, 768 F.2d 426 (D.C. Cir. 1985)(no dismissal despite a dissenting view that the Secretary's decision whether to certify another country as in violation of whaling treaty is a political question), rev'd sub nom. Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 2860 (1986).
5. The Unpublished Opinion

Perhaps the most frustrating way courts deal with unpopular precedent is by evading the precedent in a judgment without opinion or in an unpublished memorandum. Since such a judgement or memorandum is not precedent and cannot be cited to the court in future cases, judges may be tempted to use either tactic to arrive at what they think is the right result without openly confronting or explaining away hostile precedent or creating an intracircuit conflict. Our Advisory Committee, composed of lawyers who practice in the court, recently conducted a survey of our unpublished opinions over a six month period in 1983 and concluded that 40 percent of the decisions arguably should have been published under the court’s governing criteria. As caseloads rise, overburdened courts have an understandable tendency to dispose of more cases via this covert route. Because they are rarely en banced or

67 D.C. Cir. R. App. P. 8(f) states: "Unpublished orders, including explanatory memorandum of this Court, are not to be cited in briefs or memoranda of counsel as precedents. However, counsel may refer to such orders and memoranda for such purposes as application of the doctrines of res judicata, collateral estoppel, and law of the case, which turn on the binding effect of the judgment and not on its quality as precedent."


Specifically, it is argued that unpublished opinions result in less carefully prepared or soundly reasoned opinions; reduce judicial accountability; increase the risk of nonuniformity; allow difficult issues to be swept under the carpet; and result in a body of "secret law" practically inaccessible to many lawyers. Furthermore, there is no uniformly enforced practice or guidelines for making the publication decision, hence judges exercise considerable discretion in deciding when an opinion should be published, i.e., when an opinion will become law. Wald, The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge?, 42 Md. L. Rev. 766, 781-84 (1983); Ginsburg, supra note 4, at 214.


The revised plan adopted in 1973 states that an opinion will be published if one of the following criteria is satisfied:

a. it establishes a rule of law on a point of first impression for the court, or alters or modifies a rule of law previously announced;

b. it involves a legal issue of unusual or continuing public interest;

c. it criticizes existing law;

d. it is considered a significant contribution to legal literature, e.g., through historical resolution of an apparent conflict in opinions, by furnishing an analysis of the rationale and policy or content of a rule of law;

e. it applies an established rule of law to a factual situation significantly different from that in published cases.

Id. (quoting Plan for Publication of Opinions (Apr. 17, 1973)).

70 According to statistics compiled by the Clerk’s Office and the Circuit Executive,
appealed to the Supreme Court71 (after all, in the words of Carl Sandburg there is seldom enough for a mouse to fasten a tooth in)72 such decisions provide an easy device for ignoring precedent or too casually distinguishing it away. The Advisory Subcommittee’s report warned that:

the court’s unpublished opinion-no citation doctrine renders the doctrine of stare decisis ineffective as a safeguard against unprincipled judicial decisionmaking. If the need ever arises for the court to resolve a case in a way that it would prefer to ignore in issuing future decisions, the no citation rule gives it the power to do so.73

Newly revised criteria now say that we should publish an opinion whenever “it alters, modifies, or significantly clarifies a rule of law previously announced by the court” or “criticizes or questions within the court . . . .”74 But the judges themselves are the only monitors of how

roughly one-third to one-half of this court’s decisions each year are disposed of by order of judgment alone or accompanied by a brief unpublished and uncitable memorandum. In statistical year 1982 (July 1, 1981 to June 30, 1982), fifty-one percent of this court’s six hundred and twenty-seven decisions were unpublished as compared to thirty-two point eight percent of this court’s five hundred and thirty-three decisions in statistical year 1984. National Classification Comm. v. United States, 765 F.2d 164, 172 n.1 (D.C. Cir. 1985)(separate statement of Wald, J.).

71 See generally Reynolds & Richman, The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 COLUM. L. REV. 1167, 1203 (1978)(discussing reasons why unpublished opinions are less likely to be reviewed by the Supreme Court).


73 SUBCOMMITTEE REPORT, supra note 69, at 24.

74 An opinion, memorandum, or other statement explaining the basis for the Court’s action in issuing an order or judgment shall be published if it meets one or more of the following criteria:

1. with regard to a substantial issue it resolves, it is a case of first impression or the first case to present the issue in this Circuit;
2. it alters, modifies, or significantly clarifies a rule of law previously announced by the Court;
3. it calls attention to an existing rule of law that appears to have been generally overlooked;
4. it criticizes or questions existing law;
5. it resolves an apparent conflict in decisions within the Circuit or creates a conflict with another Circuit;
6. it reverses an agency or district court decision, or affirms a decision of the district court upon grounds different from those set forth in the district court’s published opinion; or
7. it warrants publication in light of other factors that give it general public interest.

113 DAILY WASH. L. REP. 539, 541-2 (March 19, 1985)(quoting proposed D.C. Cir. R. APP. P. 13(b)).
faithfully those criteria are applied. Although the report admitted that "we did not find a single unpublished opinion that on its face criticized existing law or resolved conflicts in opinions," the potential of conflict between published and unpublished opinions is plainly there. In fact, the D.C. Circuit's use of these dispositions is low compared to other circuits—under 50%—but with the pressure of rising caseloads, we can expect that rate to rise. Withal, they cannot change circuit law and so are unlikely to become a major vehicle for aggressive law reformers.

**B. Resisting Change**

The push for change does not go unchallenged. At all times, there are judges on the court who resist. These days, the resisters are probably slipping into the minority. When that happens, the ideological tilt of the court's majority makes itself felt throughout the process. The spectre of being reversed en banc overhangs the judges' position on the panel decision. Even when the random selection from among 12 active and several senior or visiting judges produces a panel of two or even three defiant judges, the panel's rationale, sometimes even its result, emerges in the shadow of an en banc. Often this means judicial "punting" if you will. The panel will avoid constitutional issues or decide a controversial case on the narrowest factual ground, remand on a procedural ground so as to avoid outright endorsement or rejection of a substantive legal doctrine with which it is uncomfortable. Judges will generally resist

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75 See, National Classification Comm. v. ICC, 765 F.2d 164 (D.C. Cir. 1985)(separate statement of Wald, J. criticizing the use of an unpublished opinion to decide a novel question of statutory interpretation which, although not precedent, was res judicata for an organizational litigant); "[i]t is imperative that we scrutinize our selection of those cases to be disposed of without reasons and without precedential effect ever more carefully so as to avoid confusion, repetition, nonuniformity, and even skepticism about the way we do our job." Id. at 175.

76 Subcommittee Report, supra note 69, at 44-45. For a recent publication summing up all of the circuits' practices on use of unpublished decisions, see Federal Judicial Center, Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals (FJC Staff Paper 1985).

77 See e.g., Karriem v. Barry, 743 F.2d 30 (D.C. Cir. 1984)(remand for factual inquiries necessary before deciding a constitutional question whether a minister must sign a government "volunteer" agreement before being allowed to perform religious services for prison inmates); Hastings v. Judicial Conference, 770 F.2d 1093 (D.C. Cir. 1985)("principle of constitutional avoidance" invoked to postpone deciding separation powers and due process challenge to ongoing disciplinary proceedings against federal judge), cert. denied, 106 S. Ct. 3272 (1986); Community for Creative Non-Violence v. Hess, 745 F.2d 697 (D.C. Cir. 1984)("attenuation of controversy" doctrine called for exercise of discretion of judicial authority to forego a decision on individuals' constitutional claims that their religious beliefs prohibited their rising when a judge enters courtroom); cf. McCalpin v. Durant, 766 F.2d 535, 537 (D.C. Cir. 1985)("With the political branches engaged in these thrusts and parries, we did not rush to judgment.") (In McCalpin judgment on a challenge to a series of
announcing any broad new principle unless there is a chance that it may be hospitably received in the Supreme Court. Where a circuit majority is clearly in sync with the Supreme Court majority, a dissent may be only a quixotic exercise. Obvious as this fact of judicial life is, I often hear older Washington lawyers lamenting the dearth nowadays of ringing declarations of liberal principle, the great leaps across judicial frontiers that characterized the D.C. Circuit in the late sixties and early seventies. They forget that those decisions were made within the safe harbor of a sympathetic Supreme Court. The hard truth is that many of those once-dramatic precedents totter within our circuit today.

But the question may well be asked—how valid is it for a judge to factor in the risk of an en banc when she decides how to rule in a case or even how to frame the issues on which to rule? I know judges who insist that they are impervious to such concerns, ruling and writing exactly as they believe, damn the consequences. Perhaps, because I believe ours is not a heroic era, I remain a bit skeptical. Certainly some judges weigh the practical considerations more lightly than others. But, any judge writing a panel opinion has to capture a second-desirably a third—vote for any opinion he writes. And in cases where there is a dissent, an enormous amount of time may be consumed as draft panel opinions and dissents shuttle back and forth among the panelists. Often this exchange results in a more temperate position than taken in the majority's first draft. The search for consensus is a vital part of the dynamics of any decisionmaking body. Since a panel of a circuit court is exercising the delegated power of the entire court, subject to ultimate review by the entire court, it is proper in my view, and certainly strategically wise, for a panel to take account of what the full court assembled might decide en banc and to cast its decision in a way that it believes would survive that review.

The judge's calculus gets more complicated, however, when she writes not just to anticipate and survive an en banc but to stave off an en banc on a critical issue, to temporize in the hope that as members of the court change in the future, her side may ultimately triumph. Most judges, of course, are not strangers to the rough in-fighting of private practice, government, or legislatures; they have maneuvered in and out of countless tight spots. But are these tactics appropriate on an appellate court?

The answer is not "Yes or No", but "More or Less". So long as there are alternative rationales that can dispose of the case in a principled way, why may a judge not choose the "passive virtue" of postponing a major substantive law decision? Often a worthy appellant will proffer a

recent appointments to the Legal Services Corporation Board of Directors was postponed for several years until mooted by permanent appointments confirmed by the Senate).
number of grounds for reversal, just as a worthy appellee will offer multiple grounds for affirmance. The agency decision on appeal may be challenged as unconstitutional, beyond statutory authority, lacking evidence in the record or just plain arbitrary and capricious. It may be defended on grounds that the appeal was not timely, or that the decision was reasonable, authorized, and constitutional. If the court feels reversal is warranted, a determination that the agency action was arbitrary and capricious, if available, is usually the least threatening to the agency, since on remand it can do whatever it wants if it makes a proper record and explains itself sufficiently.\(^7\)\(^8\) If the court finds that the agency has not even met the Administrative Procedure Act requirements of a reasoned analysis, it need not rule on constitutional or even statutory grounds. An agency is not so likely to appeal such a decision—whereas a judicial limitation on its statutory power or the constitutionality of its actions is generally regarded more seriously since it takes congressional action to remedy.\(^7\)\(^9\)

There may, however, be times when the uncertainty and genuine public injury that a non-decision on an important legal issue produces, makes it morally wrong to dodge. Refusing to decide a critical issue on the merits can at times produce a political logjam; the executive and legislative branches will not or cannot move to resolve the underlying dispute until the court does.\(^8\)\(^0\) Then, too, one judge does not the judiciary

\(^7\) See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 S. Ct. 837 (1984)(mandating considerable deference to administrative agency's constructions of statutes). Since *Chevron*, the courts seem to have focused less on the ultimate reasonableness of the agency's action, and more on whether the agency has satisfied its duty to explain its reasoning. See, e.g., *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 150-56 (D.C. Cir. 1984)(*Chevron* affords an agency-wide latitude in the "reasonable accommodation of conflicting policies which are central to agency's care by the statute," agency's failure to provide any analysis of its financial justification, however, for requiring phase-in of mandatory pre-retirement vesting of pension benefits under ERISA proved fatal). See also *Delmarva Power & Light v. FERC*, 770 F.2d 1131, 1140 (D.C. Cir. 1985)(*FERC's requirements for selective annualization constitute an unexplained departure from controlling precedent: "We find it impossible to discern in the pronouncements of the Commission itself...a test for determining when selective annualization will be allowed"); *Maryland Peoples Council v. FERC*, 761 F.2d 768, 779 (D.C. Cir. 1985)(an experiment must be "reasonable," including the articulation of a reason to believe more good than harm will come of it).

\(^8\) See supra note 50.

\(^9\) Robbins v. Reagan, 780 F.2d 37 (D.C. Cir. 1985), is in this category. Until the court ruled whether or not the federal government could close a shelter for the homeless run by the plaintiffs' organization, or whether the federal government must provide money for its renovation, the District of Columbia Government, the plaintiffs, and the federal government were uncertain in which direction to move. After we ruled that the shelter could be closed, the political branches had no excuse to remain inert, and they subsequently moved not only to postpone the closing but to make emergency repairs to the disputed shelter. *Id.*
make, and even if I manage to evade an important substantive issue, my colleagues on the next panel, or in another circuit may not be so reticent.

Although conscious choices to avoid confrontations are often legitimate, the process may make bad law. In a court where jurisdiction is mandatory there is a limit to how long or how often a judge may fairly resist changing trends in the law that have the support of a majority of her court and of the Supreme Court. Yet even then a responsible dissent may play an important function in moderating an extreme majority stance, in forcing the majority to confront consequences of their ruling they may not have contemplated, in exposing vulnerable reasoning, in pointing out that change in circuit law has actually taken place.

III. THE APPELLATE JUDGE AND THE SUPREME COURT

A. Circuit Court-Supreme Court Relationships

The Supreme Court and circuit courts are symbiotically bonded to one another. The relationship runs both ways; it is not confined to the Supreme Court’s role in guiding lower federal courts in their interpretation of the law. The work of the Supreme Court, especially when it is deciding novel issues or changing course in an important area of the law draws heavily on the work of perceptive, and even visionary, lower court judges to frame vital issues, document the need for their resolution or clarification, and develop rationales to justify one solution or reform over another.

The Supreme Court most frequently makes new law or reaffirms old law in the course of reviewing circuit court decisions. The opinions in the court below by and large set the terms of debate for the Justices, and structure the arguments for counsel. As Justice Douglas once remarked of Jerome Frank: “We Supreme Court Justices can only be grateful that Judge Frank explored a problem ahead of us. For this search usually left the clues to the answer we seek.”

Of course, at particular times, certain courts and certain judges appear to enjoy greater favor than others in the eyes of the Supreme Court, as reflected in affirmances or, more frequently, denials of certiorari in cases they write and reversals of cases in which they dissent. In the 1984-85 term, I must tell you, our circuit was reversed by the Supreme Court in 100% of the cases that reached the court (10 out of 10). In 7 of

81 R. Glennon, supra note 25, at 174 (quoting Douglas, Jerome N. Frank, 10 J. Legal Ed. 1, 6 (1957)). The Supreme Court reversed nineteen cases in which Frank dissented from the circuit court opinion. Id. at 164-92.

82 Glennon recounts the letter from Justice Harlan to Learned Hand: “May I say that when you read in Monday’s New York Times ‘Certiorari Denied’ to one of your cases, then despite the usual teachings, what the notation really means is ‘Judgement Affirmed.’” R. Glennon, supra note 25, at 172-73 (citing M. Schick, Learned Hand’s Court 331 n.72 (1970)).
those reversals, there was a dissent below. As a rule, the dissenter claimed the circuit had not faithfully followed Supreme Court precedent, but on occasion a confident dissenting judge derides or faults Supreme Court precedent plainly inviting the Court, on certiorari, to rethink the validity of that precedent. This is hardly a novel tactic; eminent circuit judges of the past have said they felt responsible to probe "pronounced new doctrinal trends" in Supreme Court rulings to ascertain whether a precedent had been "implicitly" overruled.

Judges out of sync with the current Supreme Court, on the other hand, tend to follow much the same pattern that they do with an inhospitable majority on their own court: keep their decisions fact-bound, advance no new or startling principles of law, do their best to bring their decisions within secure Supreme Court precedent. Since the Supreme Court has a limited capacity to hear cases, and can take at most a half dozen or so

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83 See supra note 52. The Supreme Court grants a higher rate of certiorari petitions from the D.C. Circuit and reverses it more often than any other court. See Note, Disagreement in D.C.: The Relationship Between the D.C. Circuit and its Implications for a National Court of Appeals, 59 N.Y.U. L. Rev. 1048, 1049-50 (1984)(from 1980-83 the Court granted certiorari in eighteen point seven percent of petitions from the D.C. Circuit as compared to a national average of six point six percent. During that same period, the Court affirmed the D.C. Circuit only ten point four percent of the time, as compared with a national average of thirty-nine point two percent). Notwithstanding the greater percentage of petitions for certiorari granted to cases from the D.C. Circuit, there is "no evidence that the D.C. Circuit does not apply relevant Supreme Court precedent in good faith, but the D.C. Circuit's answers to questions that remain genuinely controversial under those precedents, are likely to be guided in part by ideological views that differ significantly from those of the Supreme Court." Id. at 1060.

84 See, e.g., Paralyzed Veterans v. CAB, 752 F.2d 694 (D.C. Cir. 1985)(JJ. Bork, Scalia, and Starr, dissenting from the denial of rehearing en banc)(charging that the panel opinion conflicts with Grove City College v. Bell, 465 U.S. 555 (1984), and North Haven v. Bell, 456 U.S. 512 (1982), in that it ignores the "program specific" scope of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), and adopts an "institution-wide approach which the Court rejected), rev'd, 106 S. Ct. 2705 (1986). (The original panel acknowledged that Grove City applied 504 to "any program or activity receiving federal financial assistance," but held that airline's activity encompasses necessary use of airports and possibly controllers).

85 My colleagues take differing views on the propriety of this course of action. Cf. Dronenburg v. Zech, 746 F.2d 1579, 1581 n.1 (D.C. Cir. 1984)(Statement of Ginsburg, J.)("In my view, lower court judges are not obliged to cede to the law reviews exclusive responsibility for indicating a need for, and proposing the direction of "Further enlightenment for Higher Authority" (quoting United States v. Martino, 664 F.2d 860, 881 (2d Cir. 1981)(Oakes, J., concurring)) with Dronenburg, Id. at 1584 (Statement of Starr, J.)("It is not the province of the lower federal courts to chide the Supreme Court for decisions that, in the considered view of federal judges, may be ill-reasoned or misguided").

86 See R. GLENNON, supra note 25, at 177. But see FAIC Sec., Inc. v. Federal Home Loan Bank Board, 768 F.2d 352, 360 (D.C. Cir. 1985)(Scalia, J.)("It may be that recent dictum foreshadows a change in what seems to have been the prior law-or a clarification . . . however, the change or clarification has not yet arrived, and we feel constrained to follow the holdings [of earlier cases]").
USE OF PRECEDENT

cases a year from the 300 or so issued by the circuit, they can hope by these strategies to enjoy benign neglect from on high.

B. Interpretation of Supreme Court Precedent

Circuit courts frequently enlighten the meaning of Supreme Court precedent, decide whether precedent should be applied in a particular case, and extend or limit precedent in new situations. The way in which circuit judges apply Supreme Court precedent shapes the course of circuit law itself. One recent, much-publicized case in our court shows how erratically judges defer to Supreme Court precedents. Because the case involved a highly charged social and moral issue, it offers a striking illustration of judges' philosophies at work.

1. Dronenburg v. Zech: Overreaching or Underreaching Precedent

In August of 1984, a three-judge panel of our court issued an instantly controversial decision, in Dronenburg v. Zech, upholding the Navy's administrative discharge of a 27-year-old petty officer for consensual homosexual conduct on a Navy base. The Navy regulation at issue declared that any member who engaged in homosexual acts shall "normally" be discharged, because "[t]he presence of such a member in a military environment seriously impairs combat readiness, efficiency, security, and morale." No comparable sanction was attached to hetero-


88 See, e.g., White House Vigil v. Clark, 746 F.2d 1518, 1544 (D.C. Cir. 1984)(Wald, J., concurring in part and dissenting in part)(expressing "disagreement with the insistent theme in the majority opinion implying that the Supreme Court's recent decisions have changed the character or the mood of appropriate judicial scrutiny for time, place and manner restrictions").


91 741 F.2d 1388, reh'g en banc denied, 746 F.2d 1579 (D.C. Cir. 1984).
sexual conduct, which in general was to be considered on a case-by-case basis as a possible ground for disciplinary measures.\footnote{741 F.2d at 1389 n.1 (quoting SEC/NAV Instruction 1900.9C promulgated Jan. 20, 1978). Relevant Navy regulations permitted retention of a member who had engaged in homosexual conduct if, among other conditions, the member engaged in such conduct on a single occasion and did not profess or demonstrate a proclivity to repeat the conduct. The Secretary of the Navy also “retained the power to keep a person in service despite homosexual conduct on an ad hoc basis for reasons of military necessity.” \textit{Id.}}

Dronenburg claimed that the Navy's regulation violated his constitutional rights to privacy and to equal protection of the laws. Judge Bork, writing for the panel, first noted that in 1976 the Supreme Court, in \textit{Doe v. Commonwealth's Attorney},\footnote{425 U.S. 901 (1976)(mem. op.), affg 403 F. Supp. 1199 (E.D. Va. 1975).} summarily affirmed a district court judgment upholding a state criminal statute forbidding homosexual conduct.\footnote{\textit{Dronenburg}, 741 F.2d at 1391-92.} Strongly suggesting that it was bound by that precedent, the panel nevertheless went on to consider Dronenburg's claim on the merits. After reviewing a succession of Supreme Court cases in which the Court had upheld a constitutional right to privacy for marriage, contraception, and abortion, the panel decided that there was no comparable constitutional right to engage in homosexual conduct.\footnote{\textit{Id.} at 1391-97. Some might say that the holding was considerably more expansive than the case required. The Supreme Court has held that regulations governing members of the military may sometimes make distinctions on grounds that would be unconstitutional if applied to civilians. \textit{E.g.}, \textit{Rostker v. Goldberg}, 453 U.S. 57 (1981). Thus, all the panel needed to decide was whether the military could discharge a member for homosexual conduct, not whether any person has under any circumstances a constitutionally protected right to engage in homosexual conduct. It was this allegedly unnecessary breadth that prompted the judges dissenting from the denial of rehearing en banc to comment that the panel opinion demonstrated a lack of judicial restraint. The responsibility of an appellate court to guide lower courts is often in tension with its duty to decide constitutional cases on the narrowest possible ground.}

The panel's technique in \textit{Dronenburg} was straightforward: it stated the results of the privacy cases, announced that the opinions offered no general principle to account for those results, and refused to apply the cases beyond their facts. The panel stated that some interpretations of the earlier privacy cases might encompass a right to private, consensual homosexual conduct and some might not. In the end, it simply declared that lower federal courts should leave to the Supreme Court the task of inferring “new” constitutional rights by analogy to the decided cases. By a 6-5 vote the full court denied rehearing en banc. The dissenting judges, of which I was one, argued, that the constitutional right of privacy was firmly established in the Supreme Court's cases, and that the panel had not made a conscientious effort to interpret and apply that right, whatever the result. Instead of trying to give the right of privacy a coherent shape, the dissenters stated, the panel had given it the narrow-
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est possible scope, making the Supreme Court's decisions appear as disconnected fragments rather than a consistently evolving doctrine.96

Nine months later, in Hardwick v. Bowers,97 a panel of the Eleventh Circuit was confronted with a constitutional attack on a Georgia statute making private consensual homosexual conduct between adults a crime. Examining the same line of cases discussed in Dronenburg, the Hardwick circuit panel found that the right to engage in private homosexual conduct was not distinguishable in principle from the right to sexual autonomy in intimate heterosexual relationships, including those outside marriage, which the Supreme Court had held protected in privacy decisions.98 Although the Hardwick holding was subsequently reversed by the Supreme Court holding the Georgia statute to be constitutional, the strong dissenting opinions, echoed the circuit panel's reasoning based on the Court's prior privacy decisions.

In literal terms, the Dronenburg and Hardwick circuit panels dealt with different issues: the Dronenburg panel decided whether the Navy could discharge an officer for homosexual acts committed by a naval officer in barracks, while the Hardwick panel decided whether a state may make homosexual acts voluntarily committed by adults in the home a crime. But the circuits reached plainly irreconcilable answers to the question whether homosexual conduct is ever constitutionally protected, and in that fundamental sense they did conflict. On the surface, the two circuit courts simply disagreed on the effect to be given the Supreme Court's summary affirmance in Doe v. Commonwealth and on whether there was a consistent theme running through the Supreme Court's privacy cases.99 On reflection, however the disagreements unfold into a...

97 760 F.2d 1202 (11th Cir. 1985), rev'd 106 S. Ct. 2841 (1986).
98 Id. at 1208-12. Paradoxical as it may seem, our prior cases thus establish that a State may not prohibit sodomy within 'the sacred precincts of marital bedrooms,' Griswold v. Connecticut, 381 U.S. 479, 485 (1965), or, indeed, between unmarried heterosexual adults. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). In all events, it is perfectly clear that the State of Georgia may not totally prohibit the conduct proscribed by statute.
106 S. Ct. at 2845 (Blackmun, J., dissenting).

The majority opinion disagreed and held that the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy, rebutting the claim that any kind of sexual conduct between consenting adults is constitutionally insulated from state proscription. Id. at 2842-45.

99 The Supreme Court specifically noted that the Eleventh Circuit's holding in this case was contrary to judgments rendered in other court of appeals. Hardwick, 106 S. Ct. at 2842. See, e.g., Baker v. Wade, 769 F.2d 289, reh'g denied, 774 F.2d 1285 (5th Cir. 1985)(en banc)(holding that the summary affirmance in Doe is binding on the court and that a statute prohibiting deviate sexual intercourse does not offend the Constitution); Dronenburg, 741 F.2d 1338, reh'g denied, 746 F.2d 1579 (1986).
wider conflict over the relationship between the lower courts and the Supreme Court in the development of constitutional law.

Dronenburg and Hardwick show how very differently circuit judges interpret Supreme Court privacy decisions. The Dronenburg panel held that there was no conclusive constitutional right to be let alone from government regulation: courts need a much more discriminating principle and the Supreme Court has only touched upon, but never explicitly outlined, the contours of that principle.

The Hardwick panel, in contrast, was able to perceive the contours in a line of decisions from Griswold v. Connecticut to Roe v. Wade: The

Dronenburg and Hardwick both showed understandable bemusement over the meaning of Doe. Each panel dutifully acknowledged that summary affirmances by the Supreme Court are binding on the lower courts. But the Supreme Court's own instructions on this point are a model of careful ambiguity:

As Mr. Justice Brennan once observed, [v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case... The District Court should have followed the Second Circuit's advise, ... that unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise; and, later... that the lower courts are bound by summary decisions by this Court 'until such time as the court informs [them] that [they] are not.'


Justice Brennan later commented that before Hicks, members of the Court "assumed that summary dispositions without opinion did not have the same precedential force as decisions rendered with opinion after plenary consideration—indeed it was properly perceived that behind our summary dispositions of appeals lie many of the same considerations that account for denials of certiorari." Sidle v. Majors, 429 U.S. 945, 946 (1976)(Brennan, J., dissenting from the denial of certiorari). See also Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913, 913 (1976) (Brennan, J., dissenting from denial of certiorari). The care with which the Court considers decisions to affirm or, in cases coming from state courts, to dismiss for want of a substantial federal question, may have changed in the wake of Hicks. Nonetheless, reflections like these, coupled with the fact that the Court takes summary action without oral argument or full briefing, leads to understandable skepticism about the depth in which the Court goes into such cases.

Two further caveats are relevant to Doe. First, summary dispositions are binding "only to 'the precise issues presented and necessarily decided by those actions.'" Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 499 (1981)(quoting Mandel v. Bradley, 432 U.S. 173, 176 (1977)(per curiam)), and they do not necessarily adopt the reasoning of the lower court. Second, "[s]ummary actions... should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." Mandel v. Bradley, 432 U.S. at 176.

Doe teeters precariously on the edge of all these rules. First, the plaintiffs in Doe apparently did not show any real likelihood that the challenged statute might be enforced against them. There is, therefore, a very substantial argument that they lacked standing to bring suit. The Dronenburg panel commented that "those plaintiffs may have lacked standing, but the majority of the three-judge district court placed its decision squarely on the constitutionality of the statute, and the Supreme Court's summary affirmation gives no
state may not prohibit access to contraceptives or even abortions outright, and may regulate abortions only in accordance with substantial indication that the Court proceeded upon any other rationale." Dronenburg, 741 F.2d at 1392.

In light of the Supreme Court's repeated insistence that summary affirmances "affirm the judgment but not necessarily the reasoning by which it was reached," Mandel, 432 U.S. at 176 (quoting Fusari v. Steinberg, 419 U.S. 379, 391 (1975)(Burger, C.J., concurring)(footnote omitted); cf. Barnes v. Kline, 759 F.2d 21, 66 (D.C. Cir. 1985)(Bork, J., dissenting)("no basis for using an unexplained case as the reason for creating a general rule of standing for all branches and members of branches to assert their legal rights directly against one another"), Dronenburg's guess that the Supreme Court did not consider the standing question is not an altogether satisfying basis for decision.

Aside from serious questions concerning the Doe summary affirmation, there is also the Court's admonitions that summary affirmances bind lower courts only until the Court informs them that they do not or until doctrinal developments indicate otherwise. In Carey v. Population Serv. Int'l, 431 U.S. 678 (1977), the Supreme Court pointedly observed that "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." Id. at 688 n.5 (quoting Carey, 431 U.S. at 694, n.17 (brackets in original).

In dissent, Justice Rehnquist could not "let pass without comment" the majority's observation. Citing Doe, he argued that "the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been 'definitely' established." Id. at 718, n.2. Curiously, the Court in Dronenburg, seemed to rely exclusively on Justice Rehnquist's dissent as opposed to the majority's suggestion in Carey.

In short, a fair-minded survey of the arguments for and against the binding force of Doe led to no clear result. In light of the Carey footnote, Doe could reasonably be held not to control. But that is not the purpose in explicating this litany of cases. Analysis of this ongoing scenario serves to demonstrate how seemingly technical questions about the binding effect of a summary affirmation dissolve under scrutiny into difficult yet unavoidable problems of substance. At every turn, lower court judges must use their own judgment to determine when a technical or procedural escape hatch is valid by attempting to discern, from complex interfaces, the propriety of using ambiguous summary affirmances to decide, or perhaps evade, difficult questions of constitutional law.

I do not suggest that judges manipulate cases by expanding the reasoning in some, while contracting the reasoning in others—all in an effort to get to the result they were determined to reach anyway. Rather, the solving of difficult cases often requires that a judge reconcile or balance legal principles in apparent conflict. For example, if a judge thought that Roe v. Wade, "properly read," expounded a broad right to sexual autonomy, and that Carey and subsequent cases confirmed that right, the judge would be inclined to interpret Doe consistently with that thesis—either as grounded on standing or as implicitly overruled by Carey. Such a decision would not be attributable solely to personal preference or result-orientation. Instead, it would emanate from the judge's obligation to view the law as a coherent whole, to the extent possible. If, on the other hand, a judge thought that the foundations of Roe v. Wade reflect a tradition of respect for marriage and personal decisions about childbearing, then that judge would doubtlessly be more willing to see Doe as a decision on the merits.

In this manner, the perceived binding effect of Doe on lower court judges depended, in part, on whether they believed Doe was decided correctly to begin with. In one sense, that realization is troubling: whether Doe was binding should have been the threshold question before a lower court judge considering the merits, yet the answer to the threshold question turned out to involve the merits. In another sense, however, this close relationship between form and substance is reassuring. If our jurisprudence is one of principle, then judges owed litigants an articulated explanation of the principles expounded in the Supreme Court's
constitutional restrictions. The state may not prohibit persons of different races from marrying one another, and may not criminalize an adult's private possession, in the home, of sexually explicit material, including material that if publicly sold could constitutionally be banned as obscene. Thus, the Circuit panel reasoned, the protected status of private consensual adult homosexual conduct sequentially followed. The Supreme Court, however, ultimately rejected the panel's analogies, stating: "None of the rights in those [prior] cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case." 1

Dronenburg, perhaps more than any other case in the circuit so far, unveiled fundamental ideological differences about the role of judges in interpreting Supreme Court precedent in the context of conflicts between individual autonomy and community morality. By limiting the extension of past precedent which a majority panel dislikes and which it feels (in this case, correctly) a current Supreme Court might also refuse to extend, judges can mightily change the tone of circuit hospitality to constitutional rights arguments. The word travels quickly and where choice is possible, plaintiffs will try their luck elsewhere.

When a Supreme Court precedent squarely decides an issue presented to a lower court, that court has no principled choice other than to follow the Supreme Court's lead. Inevitably, when lower court judges consider the precedential force of a relevant but not obviously controlling case, including a case in the Supreme Court, they think about whether the case was right on the merits. By this I do not mean that judges manipulate the cases, expanding the reasoning in some and contracting the reasoning in others, all in an effort to get to the result they were determined to reach anyway. I mean that solving hard cases often requires a judge to reconcile or balance legal principles in apparent conflict, and he cannot escape the infusion into such decisions of his most basic notions of jurisprudence, fairness and justice.

2. Chaney v. Heckler: Embracing New Precedent

In contrast to the reluctance of the Dronenburg panel, the eagerness with which some panels of the court may embrace and extend a welcome

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privacy decisions and why until the Supreme Court decided the issue in Hardwick, those principles either did or did not prohibit laws indiscriminately prohibiting all homosexual conduct. The Supreme Court in Doe refused to provide such an explanation. The Dronenburg panel held, in the alternative, that it need not provide any explanation because Doe was binding and that it could not give any explanation because the Supreme Court's decisions were incoherent. Neither of these approaches was altogether satisfactory without a more serious effort to understand the principles underlying the privacy cases.

101 Hardwick, 106 S. Ct. at 2844.
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precedent is illustrated by the follow-up of Heckler v. Chaney, a divided decision in our court, subsequently reversed by the Supreme Court, largely on the basis of Judge Scalia’s dissent. In Chaney, prison inmates sentenced to be executed by lethal drug injection asked the Court to order the Food and Drug Administration to ban the states’ use of the drugs. The FDA Commissioner had refused to take the requested action, deeming it not the best use of his discretionary enforcement authority. Our court held that the FDA erred. On certiorari the Supreme Court reversed, holding that FDA’s refusal was unreviewable under the Administrative Procedure Act. Given the myriad of factors that go into an agency’s decision whether to initiate enforcement action, so analogous to traditional prosecutorial discretion, the Court held that the APA provision precluding review of “agency action committed to agency discretion by law” applied.

Since Chaney came down on March 20, 1984, it has been argued by the government as a precedent for nonreviewability in a wide variety of situations ranging from refusal to appoint counsel for an ex-government official sued in her personal capacity, to closing a shelter for the homeless in the District. Plainly sympathetic, some panels of the Court have begun to respond generously; others, less enthusiastic about its

103 Falkowski v. EEOC, 764 F.2d 907 (D.C. Cir. 1985), petition for reh’g denied. 783 F.2d 252 (D.C. Cir. 1986). The case was remanded by the Supreme Court which had vacated the earlier panel opinion, 719 F.2d 470 (D.C. Cir. 1983), in light of Chaney, 105 S. Ct. 1649 (1985). See Department of Justice v. Falkowski, 105 S. Ct. 1860 (1985). The court, on remand, held that the government’s contention that the nonmandatory language of the regulations that gave it unreviewable discretion were “sufficient to overcome the presumption of reviewability.” 764 F.2d at 911. The court explained that the issue of payment of attorney’s fees for government officials was “admittedly less similar to the historically protected exercise of prosecutorial discretion than . . . the decision . . . to bring an action to enforce a statute” Id. Nonetheless, it determined that “Equally important to the Supreme Court’s decision . . . were the superiority of the agency as a decision maker on the questions at issue and the absence of any congressional pronouncements cabining the agency’s discretion. Because of the applicability of these two latter grounds to this case, DoJ’s action is unreviewable.” Id.

Most recently, the Falkowski panel issued a statement in respect to denial of the petition for rehearing which emphasized that it was not adopting the Chaney presumption of nonreviewability: “Here we conclude simply that some of the factors that led the Chaney Court to establish a presumption of unreviewability for agency enforcement decisions convince us that any presumption of reviewability of representation decisions has been rebutted.” 783 F.2d 252 (D.C. Cir. 1986).
104 For example, in Robbins v. Reagan, 780 F.2d 37, 44-46 (D.C. Cir. 1985), the court rejected the government’s argument for nonreviewability, holding instead that Chaney created an extremely narrow exception to the general presumption of reviewability. Furthermore, the government’s rescission of its commitment to fund the shelter for the homeless was not determined to be within the narrow exception.
implications for judicial review, have set about trying to keep it securely tied to its prosecutorial origins.

*Chaney* is a precedent which, on its face, applies only to enforcement choices. Yet the broad language of the Court about why enforcement choices should not be reviewed, why deference should be given to agency expertise and to the agency’s decision on how to deploy its limited resources, apply as well to other kinds of agency policymaking. Judges, who think the federal courts are reviewing too many decisions, read *Chaney* broadly as a signal to move forcefully to cut off review where Congress’ directions to the agency are arguably vague or general.\(^{105}\) On the other hand, those judges more hospitable to judicial review of agency action register concern that taken too far, *Chaney* not only will cut off review of substantive legal issues and policies that inevitably take resource allocations into consideration, but will also permit agencies to insulate pure statutory interpretations about what a law means by dressing them up in the guise of enforcement decisions.\(^{106}\) In our circuit right now, judges are walking a tightrope between these polar views of *Chaney*.\(^{107}\)

It is, of course, naive to believe that Supreme Court Justices signing on to a decision have the foresight to anticipate every possible ramification of the decision or of the decision’s language. To an important extent, the Justices rely on the lower courts to interpret their precedents in a

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105 See Robbins v. Reagan, 780 F.2d 37, 57-58 (D.C. Cir. 1985)(Bork, J., dissenting) (“In this case, the substantive statute provides no standing to govern appellant’s challenge... If there is law to apply simply because a statute contains criteria that are in no way relevant to the complaint made, the subject matter jurisdiction of federal courts is greatly expanded.”).

106 The court recently dealt with this problem in International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Brock, 783 F.2d 237 (D.C. Cir. 1986). The government argued that *Chaney* barred review of all aspects of its nonenforcement decision—even those aspects announcing new, substantive interpretations of the governing statute. The court rejected the government’s argument because of the far reaching effects of the enforcement decisions. Ultimately, the court held that the announced interpretations were reviewable. In so holding, the court pointed out that “it seems almost ludicrous to suggest that there is ‘no law to apply’ in reviewing whether an agency has reasonably interpreted a law.” Id. at 246 (emphasis in original).

107 In Schering Corp. v. Heckler, 779 F.2d 683 (D.C. Cir. 1985), for example, a drug manufacturer and the FDA reached a settlement agreement under which the FDA would take no action against the manufacturer for a specified period. Although the competitor filing the suit alleged that the agreement had the effect of *de facto* approval of the drug, the court held that the settlement “merely embodies a legitimate exercise of enforcement discretion,” and was thus unreviewable under *Chaney*. Id. at 686. Recognizing the potential of this holding for shielding all settlements—no matter how extreme—from judicial review, the court explained that it was not holding that “any agency settlement with a potential regulatee, whatever its terms, is unreviewable under *Chaney*.” Id. (emphasis in original). Yet, the court did not elaborate on factors which would serve as the basis for its formulation of a distinction.
reasoned manner.\textsuperscript{108} Thus, in \textit{Falkowski v. EEOC}, the panel, effectively though not explicitly, extended \textit{Chaney}'s presumption of nonreviewability in enforcement decisions to an agency's decision not to provide counsel for an official sued in her official capacity. While it recognized that the two cases were not strictly analogous, it concluded that since some of the concerns evinced by the Supreme Court in \textit{Chaney} applied, \textit{Chaney} controlled. The \textit{Dronenburg} panel had taken a long line of cases and read any conceivable principle out of it. In contrast, the \textit{Falkowski} panel took a single precedent and read a broad, expansive principle into it.

IV. Conclusion

It is apparent that precedent—even Supreme Court precedent—is what the courts make of it. Judges often refuse to expand precedent for which they lack sympathy and enthusiastically enlarge precedent they like. I would submit, however, that lower court judges have a responsibility in construing Supreme Court precedent to look behind the holdings of individual cases and ask "why," to determine whether a discernible, coherent principle emerges that deserves application to a new fact situation. But they have a duty, too, not to apply rationales or dicta in Supreme Court precedent profligately to new situations simply because the words fit. Certainly lower courts must follow Supreme Court precedent unless they are convinced that new doctrinal trends render an old precedent obsolete. The same is true in circuit precedent. Often the two problems intersect and a judge must decide if intervening Supreme Court law has rendered circuit precedent no longer viable.\textsuperscript{109}

\textsuperscript{108} At this point, it is worthwhile to spell out how this seemingly abstract discussion relates to the way in which advocates should shape their arguments before a circuit court. Without unduly belittling the role of circuit precedent, it should be obvious that reliance on the existence of helpful precedent will not always be enough to carry the day. \textit{Stare decisis} does create a presumption—but it is quite rebuttable. Judges have the ability to use precedent in a myriad of ways. This ability, when coupled with the judge's omnipresent duty to reconsider precedent they no longer consider correct, present the advocate with the burden of demonstrating that the principle embodied in the precedents is indeed the best way of dealing with the problem before the court.

When dealing with Supreme Court precedent, the advocate can usually be quite secure if she can point to a case, or better yet, cases that control. Even then, however, an aggressive circuit panel may decide to treat the precedent in a manner that is not readily perceived by all as consistent with the principles embodied in it. Thus, even when a Supreme Court case seems on point, the advocate should resist the temptation to rely solely on what she thinks the law is, but should give the judges the benefit of the advocate's view of what the law should be.

\textsuperscript{109} For example, the D.C. Circuit is currently wrestling with the question of the extent to which the Supreme Court's decision in \textit{Bush v. Lucas}, 462 U.S. 367 (1983), undercuts a line of cases in the circuit allowing \textit{Bivens} damages in actions by civil service employees.
In all these endeavors, judges have fine lines to draw between advancing their own legal agendas and maintaining the stability of circuit law.\textsuperscript{10} According to one commentator: "Judicial decisions do make policy. We all know that, but they do so within decisions of the past as obligatory starting points—even if they end up disavowing one or more of those decisions."\textsuperscript{11}

Although a judge’s personal philosophy will shape the lines he draws, “the effect should be felt at the margins of decisionmaking within...
institutionally constrained behavior." The appointment of a new majority of judges in a circuit in only a few years can strain that accommodation. Under such circumstances, normal tensions increase. I think it is too early to say yet how well we or other courts similarly situated will contain them. Justice Holmes' position was that "the proper derivation of general principles in both common and constitutional law . . . arise gradually, in the emergence of a consensus from a multitude of particularized prior decisions." As they enter the judicial system, new judges, however impatient or different in ideology from their predecessors, should be acutely aware how dependent the future stability and integrity of the law is upon the restraint that Holmes counsels.

112 Bennett, supra note 7, at 221.