Michigan Law Review

Volume 120 | Issue 3

2021

Vacatur Pending En Banc Review

Ruby Emberling

University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Courts Commons](#), and the [Litigation Commons](#)

Recommended Citation

Ruby Emberling, *Vacatur Pending En Banc Review*, 120 MICH. L. REV. 505 (2021).

Available at: <https://repository.law.umich.edu/mlr/vol120/iss3/4>

<https://doi.org/10.36644/mlr.120.3.vacatur>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NOTE

VACATUR PENDING EN BANC REVIEW

Ruby Emberling*

When a case becomes moot on appeal, as when the parties settle, two primary Supreme Court cases guide the appellate court's decision about whether to vacate the lower-court opinion. The Court has said that vacatur, an equitable remedy, promotes fairness to parties who were not responsible for the mootness because it erases adverse legal outcomes the litigants were prevented from appealing. Beyond this, vacatur is inadvisable since it eliminates precedential decisions and harms the judiciary's efficiency and legitimacy. Yet this doctrinal order has not been uniformly brought to bear on the highly similar question of whether to vacate when a case becomes moot pending en banc review. Instead, courts have varied in their approach. Some adhere to the two primary cases, others distinguish them by referring to the unique characteristics of en banc review, and many simply vacate without justification. This Note calls attention to a little-discussed set of procedural doctrines and rules that carry the power to decimate important pieces of decisional law without justification. It offers an account of how existing doctrine fits in the en banc context, highlighting the pitfalls for judicial efficiency and legitimacy of failing to acknowledge that fit. Ultimately, it proposes revising the Federal Rules of Appellate Procedure to clarify judicial confusion on this point.

TABLE OF CONTENTS

INTRODUCTION.....	506
I. MOOTNESS, VACATUR, AND THE ROLE OF EN BANC REVIEW	510
A. Mootness in General.....	510
B. The Equitable Grant of Vacatur After Mootness	511
C. History and Purpose of En Banc Review.....	516
D. Doctrinal Incoherence in Vacatur Pending En Banc Review and Automatic Vacatur.....	520
II. BONNER MALL'S ANALYSIS AND EN BANC REVIEW:	

* J.D. Candidate, May 2022, University of Michigan Law School. Thank you to Professor Maureen Carroll for her invaluable guidance and feedback throughout the writing process and to Professors Edward Cooper and Evan Caminker for their insightful comments. I am immensely grateful for the work done by the *Michigan Law Review* Volume 120 editors, and in particular for the support of the Notes Office and Kate Markey. Finally, thank you to my friends and family for their endless encouragement and to Madeleine for making the otherwise cloistered experience of writing during the pandemic an enjoyable one.

	DISTINCTIONS WITHOUT A DIFFERENCE.....	523
A.	Bonner Mall's <i>Equitable Analysis Does Not Vary in En Banc Review</i>	523
B.	<i>Three Unpersuasive Distinguishing Arguments</i>	526
	1. Self-Review Versus Appellate Review	526
	2. Jurisdictional Limits on Issuing the Mandate.....	530
	3. Greater Cause for Concern About Decisional Validity ...	532
III.	STAKES AND SOLUTIONS	536
A.	<i>Unexplained Departures from Bonner Mall's Policy Priorities</i>	536
	1. Reasoned Decisionmaking and Judicial Legitimacy	537
	2. Upholding <i>Bonner Mall's</i> Protections for Precedent ...	539
B.	<i>Revisions to Rule 35 and Other Alternatives</i>	541
	CONCLUSION	544

INTRODUCTION

In *Gary B. v. Whitmer*, a Sixth Circuit panel ruled that the Fourteenth Amendment's Due Process Clause guaranteed a right to access to literacy.¹ This was hailed as “groundbreaking” precedent for education rights.² However, an obscure set of procedural rules concerning vacatur diminished *Gary B.*'s revolutionary effect.

The plaintiffs in *Gary B.* were students who attended some of Detroit's lowest-performing public schools, which “serve almost exclusively low-income children of color.”³ The students sued Michigan's governor over shocking school conditions entirely un conducive to learning, including “missing or unqualified teachers, physically dangerous facilities, and inadequate books and materials.”⁴ Though the Supreme Court had rejected the existence of a “broad, general right to education” protected by the Constitution, it left open whether a minimally adequate education was protected.⁵ The Sixth Circuit

1. 957 F.3d 616, 648 (6th Cir.), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020).

2. Mark Walsh, *Full Federal Appeals Court Urged to Reconsider Panel's Right-to-Literacy Ruling*, EDUC. WEEK (May 8, 2020), <https://www.edweek.org/education/full-federal-appeals-court-urged-to-reconsider-panels-right-to-literacy-ruling/2020/05> [perma.cc/NQU2-BKC6].

3. *Gary B.*, 957 F.3d at 620–21 (quoting Complaint at 1, *Gary B. v. Snyder*, 329 F. Supp. 3d 344 (E.D. Mich. 2018) (No. 16-cv-13292)).

4. *Id.* at 620. Without a right to access to literacy, these conditions are not subject to any viable legal challenge, leaving students in poorly funded public schools without legal recourse. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35–37 (1973) (holding that no constitutional cause of action exists for inadequate school funding).

5. *Gary B.*, 957 F.3d at 644.

panel held that it was.⁶ Although it was a welcome outcome for many, critics of the opinion argued that it departed from long-standing limitations on substantive due process doctrine⁷ and wrongly imposed federal control onto a traditionally state-run activity.⁸ Commentators predicted that the decision was on its way to reversal in light of this opposition.⁹ But before any further judicial action took place, the parties settled.¹⁰ In exchange for a release of liability for all defendants, the plaintiffs secured \$3 million in emergency funds for the Detroit Public Schools and Governor Whitmer's promise to propose further legislation on the topic. Additionally, Governor Whitmer pledged to consider recommendations made by a task force on improving literacy programming in the district.¹¹

The full Sixth Circuit then decided to take the case up en banc, likely in order to address the hotly contested legal issues in the case.¹² But the order came six days after the court was notified of the settlement,¹³ an event that the court later found had mooted the proceedings, rendering a decision on the merits impermissible.¹⁴ Thus, the en banc court dismissed the case.¹⁵

6. *Id.* at 655.

7. *See id.* at 663–65 (Murphy, J., dissenting) (arguing that substantive due process rights are negative rights, i.e., rights *from*, not rights *to*). *But see id.* at 656–57 (majority opinion) (arguing that cases recognizing a right to marriage exemplify that substantive due process rights can be affirmative).

8. *See* Allison R. Donahue, *A Landmark Literacy Suit Was Settled. But Republicans Won a 2nd Look in Court.*, MICH. ADVANCE (May 21, 2020, 5:09 AM), <https://www.michiganadvance.com/blog/a-landmark-literacy-suit-was-settled-but-republicans-won-a-2nd-look-in-court> [perma.cc/MR9H-2VYZ] (reporting the Republican-led Michigan legislature's motion to intervene in the case).

9. *A.C. v. Raimondo*, 494 F. Supp. 3d 170, 193 (D.R.I. 2020) (“[I]ts fate, most likely, if it had been heard *en banc* or eventually by the Supreme Court, was to be overturned . . .”), *appeal docketed sub nom. A.C. v. McKee*, No. 20-2082 (1st Cir. argued Nov. 1, 2021).

10. Appellants’ Motion to Dismiss the Case as Moot at 6, *Gary B.*, 957 F.3d 616 (No. 18-1855).

11. *Id.* at 10–12.

12. *See Gary B. v. Whitmer*, 958 F.3d 1216 (6th Cir. 2020) (en banc) (ordering en banc rehearing on May 19, 2020). En banc review entails all active judges on a circuit hearing a case and deciding it together, except in the Ninth Circuit, where only eleven judges sit en banc at a time. *Compare, e.g.*, 6TH CIR. I.O.P. 35(c), *with* 9TH CIR. R. 35-3.

13. Letter to the Court at 1, *Gary B.*, 957 F.3d 616 (No. 18-1855) (communicating a finalized settlement to the court on May 13, 2020). A question presented by the timeline of events in *Gary B.* is at what point a settlement is final for purposes of mootness; another is whether the court must be notified for this to be the case. For contrasting holdings on these questions, compare *Versata Software, Inc. v. Callidus Software, Inc.*, 780 F.3d 1134 (Fed. Cir. 2015), with *In re Link_A_Media Devices Corp.*, 449 F. App’x 946 (Fed. Cir. 2011).

14. *Gary B. v. Whitmer*, No. 18-1855, 2020 U.S. App. LEXIS 18312, at *10 (6th Cir. June 10, 2020). When a case becomes moot, courts cannot hand down a ruling on the case’s merits. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013); *see also infra* Section I.A. But a court may issue orders necessary for disposing of the moot case. *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 21–22 (1994).

15. *Gary B.*, 2020 U.S. App. LEXIS 18312, at *10.

The post-mootness dismissal of *Gary B.* was an unremarkable bit of judicial housekeeping. But in taking the case en banc, the court applied a local circuit rule that automatically vacated the panel's ruling,¹⁶ nullifying its binding precedential effect and producing a result in tension with well-established law regarding vacatur.¹⁷ In other words, the outcome went beyond judicial housekeeping. Although those who would have reversed the panel opinion on the legal merits were stymied by mootness, they nonetheless achieved their desired result by procedural means. This Note takes issue with procedural maneuvering of this sort, both because it is doctrinally suspect and because the appearance of politically motivated judicial action that it creates is potentially delegitimizing.

Like dismissal, vacatur is not a merits decision, so as a jurisdictional matter it remains available even after a case has become moot. But unlike dismissal, vacatur is an equitable remedy, warranted only by the need to set right some injustice.¹⁸ The Supreme Court has distinguished "happenstance" mootness—where the parties are not responsible for the mootness—from other types of mootness. Under *United States v. Munsingwear*, if "happenstance" mootness arises while a case is on appeal, the higher court must vacate the previous ruling.¹⁹ The purpose of this rule is to ensure that the losing party does not suffer adverse legal consequences it was unable to challenge on appeal.²⁰ But when a settlement or some other event within the losing party's control moots a case, *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership* generally prohibits vacatur because a party that voluntarily forfeits appeal suffers no injustice.²¹

The *Munsingwear* and *Bonner Mall* vacatur rules are well established, but uncertain and relatively unexamined in at least one respect: their applicability to cases that become moot pending en banc review, as opposed to appellate review.²² This confusion was on full display in *Gary B.* The en banc court neither acknowledged its automatic vacatur of the panel in its later order dismissing the case as moot nor restored the panel's opinion.²³ Instead, the court either tacitly or unwittingly allowed the circuit's local rule to do the work of vacatur without addressing *Bonner Mall*'s effect on the outcome. In the few post-*Bonner Mall* cases directly addressing vacatur of cases mooted pending

16. *Gary B.*, 958 F.3d at 1216; 6TH CIR. R. 35(b) ("A decision to grant rehearing en banc vacates the previous opinion and judgment of the court . . .").

17. Vacatur may be cited to as persuasive precedent, but according to black letter law, vacatur otherwise eliminates precedential value. Jill E. Fisch, *The Vanishing Precedent: Eduardo Meets Vacatur*, 70 NOTRE DAME L. REV. 325, 330 (1994).

18. *Bonner Mall*, 513 U.S. at 26.

19. 340 U.S. 36, 39–40 (1950).

20. *See id.*

21. 513 U.S. at 25–26, 29.

22. *See infra* Section I.D.

23. *Gary B. v. Whitmer*, No. 18-1855, 2020 U.S. App. LEXIS 18312, at *10 (6th Cir. June 10, 2020).

en banc review, including *Animal Legal Defense Fund v. Veneman* and *Washington v. Trump*, the courts appear divided and unsure. The Ninth Circuit vacated a panel ruling in *Veneman* when non-happenstance mootness arose before en banc review was complete.²⁴ However, the same circuit declined to vacate in *Washington v. Trump* when non-happenstance mootness arose after panel disposition but before en banc review was ordered.²⁵ Both decisions drew vehement dissents.²⁶

Two immediate questions come to mind after a review of these cases. First, how should the courts resolve the dispute about whether and how *Bonner Mall* applies to the en banc process? Second, is there any way for courts to answer that question when cases like *Gary B.* are disposed of through an automatic-vacatur procedure unaccompanied by any reasoning? In sum, both an unsettled legal principle and a procedural flaw perpetuate uncertainty by allowing courts to evade the *Bonner Mall* question in en banc review.²⁷

The self-reinforcing nature of these problems may be illuminated through analogy. To borrow Chief Justice Roberts's famous confirmation hearing line, one can imagine the courts as umpires.²⁸ It is one problem if different umpires disagree about the size of the strike zone. Presumably, players can find out what kind of strike zone a particular umpire adheres to and adjust their strategy accordingly. Umpires themselves may decide upon a preferred strike zone based on observing the practices of other umpires, a process that would tend to produce consensus on the correct strike zone. It would be an entirely different problem if, in addition, Major League Baseball allowed umpires to call strikeouts without having called each pitch a ball or strike in the first place. Batters, unsure about the umpire's strike zone, would not know when to take a chance on a high or low pitch. And crucially, umpires would not be able to assess how their practices stack up, entrenching the inconsistency among them.

The analogy also demonstrates the serious problem automatic vacatur poses for judicial legitimacy. Without calls on each pitch, umpires' decisions would be inscrutable, unpredictable, and possibly corrupt, because it is impossible to place faith in referees who offer no explanations for their ultimate decisions. Similarly, in *Gary B.*, it is possible that the court believed *Bonner Mall* did not apply to en banc review. But it is equally likely that the court either did not consider the issue at all or disregarded *Bonner Mall* in service of making a decision based on an intuition about the merits of the case—a

24. 490 F.3d 725, 726 (9th Cir. 2007) (en banc).

25. 858 F.3d 1168, 1168 (9th Cir. 2017) (en banc).

26. See *Washington*, 858 F.3d at 1174–85 (Bybee, J., dissenting); *Veneman*, 490 F.3d at 729–35 (Thomas, J., dissenting).

27. See *infra* Section I.D for an explanation of the various circuits' local rules concerning automatic vacatur.

28. See, e.g., Jennifer Finney Boylan, Opinion, *Getting Beyond Balls and Strikes*, N.Y. TIMES (Oct. 23, 2018), <https://www.nytimes.com/2018/10/23/opinion/getting-beyond-balls-and-strikes.html> [perma.cc/PFV5-VCD3].

decision arguably foreclosed by mootness. Without calls on the balls and strikes, it is difficult to trust the judicial reasoning behind the outcome.

This Note considers whether federal courts may vacate a panel's decision because non-happenstance mootness has arisen while en banc review is still possible.²⁹ Part I provides an overview of the law of mootness on appeal, surveys debates about the role and purpose of en banc review, and reviews the current state of judicial decisions on vacatur pending en banc review. Part II argues that *Bonner Mall* applies in the en banc context and rebuts several arguments for distinguishing en banc review. Part III highlights the implications of judicial uncertainty and inconsistency on the issue and proposes reforming Federal Rule of Appellate Procedure 35 to clarify the correct approach to en banc vacatur.

I. MOOTNESS, VACATUR, AND THE ROLE OF EN BANC REVIEW

This Part lays the groundwork for considering whether and when appellate courts should vacate a panel opinion in a case mooted pending en banc review. Section I.A briefly discusses mootness in general. Section I.B turns to the equitable remedy of vacatur and explores how the two leading cases on vacatur and mootness, *Munsingwear* and *Bonner Mall*, weigh the private and public interests both for and against vacatur. To preface how these competing interests play out in the en banc context, Section I.C delves into the purposes and policy of en banc review. Last, Section I.D surveys current judicial commentary on vacatur pending en banc review and the interaction between current doctrine and local rules directing automatic vacatur in advance of en banc rehearing.

A. Mootness in General

Article III and principles of justiciability create jurisdictional limitations on federal courts that confine those courts to the resolution of disputes rather than exposition of the law untethered to a case or controversy.³⁰ One such jurisdictional limitation is mootness.³¹ The Supreme Court has explained that mootness exists where the parties no longer have a "concrete interest, however small, in the outcome of the litigation," making it "impossible for a court to

29. This set of conditions captures the full range of scenarios in which *Bonner Mall* arguably applies but has not been recognized as controlling.

30. U.S. CONST. art. III, § 2; *Mills v. Green*, 159 U.S. 651, 653 (1895) ("The duty of this court . . . is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue . . ."). See generally Corey C. Watson, Comment, *Mootness and the Constitution*, 86 NW. U. L. REV. 143 (1991).

31. It is contested whether mootness is a strict constitutional limitation, as opposed to a prudential limitation merely derived from Article III. For discussion of this debate, see Watson, *supra* note 30, at 150, and Cynthia Chen, Note, *Predicated on a Misconception: Analyzing the Problems with the Mootness by Unaccepted Offer Theory*, 48 COLUM. J.L. & SOC. PROBS. 501, 508 (2015).

grant any effectual relief.”³² For example, in *Gary B.*, the settlement mooted the case because the parties had resolved their dispute via contract, making the court’s resolution of the legal issue irrelevant to them.³³

Nevertheless, Article III does not impose an absolute bar to judicial action in a moot case. As Justice Scalia wrote in *Bonner Mall*, although mootness doctrine prohibits disposition on the merits of a case, it does not “prescribe such paralysis” as to prevent the court from disposing of the case “as justice may require.”³⁴ Scalia observed that, without the ability to make decisions “reasonably ancillary to the primary, dispute-deciding function” of the judiciary, courts would not be able to determine whether they lacked jurisdiction in the first place, causing a perverse result.³⁵ *Bonner Mall* recognizes several such ancillary determinations, including vacatur, a topic the next section will address.³⁶

B. The Equitable Grant of Vacatur After Mootness

If a court with appellate jurisdiction accepts an appeal and the case is mooted before the court renders a decision on the merits, then the court must decide whether to vacate the lower-court decision. An “extraordinary remedy,” vacatur must be justified by an equitable weighing of the consequences for all parties and the public as a whole.³⁷ The equitable considerations concerning vacatur following mootness have been the subject of significant judicial explication, particularly in *Munsingwear*, *Karcher v. May*, and *Bonner Mall*. The cases distinguish between various types of mootness: happenstance mootness, mutual voluntary mootness, and mootness caused by unilateral action.³⁸ As explained below, the equitable analysis varies depending on the category of mootness in play.

In *Munsingwear*, mootness arose by “happenstance” when the government amended the regulatory price controls challenged by the plaintiff after the district court’s decision but before an appellate decision.³⁹ Happenstance

32. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Knox v. SEIU*, Loc. 1000, 567 U.S. 298, 307–08 (2012)).

33. See Appellants’ Motion to Dismiss the Case as Moot, *supra* note 10, at 2.

34. *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 21 (1994) (quoting *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 677 (1944)).

35. *Id.* at 22 (quoting *Chandler v. Jud. Council*, 398 U.S. 74, 111 (1970) (Harlan, J., concurring in denial of writ)).

36. *Id.* at 21. These judicial actions are authorized by federal statute. 28 U.S.C. § 2106.

37. *Bonner Mall*, 513 U.S. at 26; see also Andrew S. Tulumello, Case Comment, *Shopping for Legal Precedent Through Settlement-Related Vacatur*, 1 HARV. NEGOT. L. REV. 213, 217 (1996).

38. See Tulumello, *supra* note 37, at 217–18; Robert Scott Lewis, Recent Decision, *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership: Settlement Conditioned on Vacatur?*, 47 ALA. L. REV. 883, 888–91 (1996).

39. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 37, 40 (1950).

mootness can stem from changes in the law of this kind,⁴⁰ as well as from other unpredictable events like the death of a party.⁴¹ In sum, happenstance mootness is mootness caused by anything outside the parties' control.⁴² The *Munsingwear* Court determined that the mootness not only justified vacatur but compelled it. Observing that vacatur was typical practice of federal courts in cases moot on appeal, the Court also found that the practice was equitable based on two primary policy concerns. First, courts should "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences" adverse to the party that lost below.⁴³ This imperative is based on promoting fairness to the parties. Happenstance mootness frustrates a litigant's right to full review of their case, which can be harmful because of preclusive effects or because of adverse precedent if the party is a repeat player. *Munsingwear* indicated that such harm should be remedied by wiping the slate clean. Second, courts should vacate in order to "clear[] the path for future relitigation."⁴⁴ This rationale is based on a concern about creating a clear and correct body of law. Cases artificially halted before corrective appellate review takes place may suffer from legal flaws.⁴⁵ Thus, in *Munsingwear*, the Court aligned vacatur with party interests as well as the public interest in forming a clear and accurate body of law.⁴⁶

The Court first addressed the proper vacatur procedure in instances of non-happenstance mootness in *Karcher v. May*. In *Karcher*, the losing party—the defendant—unilaterally mooted the case after the court of appeals rendered a decision but before the defendant filed a petition for certiorari.⁴⁷ The defendant was the New Jersey legislature, which had undergone a party leadership change and refused to continue defending the statute at issue, mooting the case.⁴⁸ The Court held that this kind of mootness, unlike the happenstance mootness in *Munsingwear*, did not justify vacatur because the losing party below essentially "declined to pursue its appeal."⁴⁹ Thus, under the equitable

40. E.g., *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020); *United States v. Alaska S.S. Co.*, 253 U.S. 113, 115–16 (1920).

41. E.g., *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988); *Dove v. United States*, 423 U.S. 325 (1976).

42. *Lewis*, *supra* note 38, at 889–90.

43. *Munsingwear*, 340 U.S. at 41.

44. *Id.* at 40.

45. *See id.*

46. *See id.* at 40–41.

47. *Karcher v. May*, 484 U.S. 72, 76 (1987). The case was a First Amendment challenge to a New Jersey statute requiring public schools to observe a period of silence at the beginning of the day. The plaintiffs successfully argued in the district court and court of appeals that the statute had a religious purpose violative of the Establishment Clause. *Id.* at 74–76.

48. *Id.* at 76, 81.

49. *Id.* at 83.

analysis of *Munsingwear*, unilateral mootness justifies vacatur when the *prevailing* party acts to foreclose appellate review but not when the *losing* party does so.⁵⁰

Bonner Mall, a bankruptcy case, built on *Karcher* by addressing another variant of non-happenstance mootness—mutual voluntary mootness—which usually takes the form of settlement. After the Supreme Court granted certiorari, the case became moot because the parties stipulated to a restructuring plan.⁵¹ Holding that vacatur was inappropriate, the Court explained that, like unilateral action of the losing party, mutual mootness did not justify vacatur unless “exceptional circumstances” counseled otherwise.⁵²

Bonner Mall also laid out the policy considerations exempting mutual mootness from the general *Munsingwear* rule. The Court first explained that, where mootness results from a mutual agreement, the party who lost below “voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur.”⁵³ Any adverse legal consequences stemming from the lower-court opinion would be consequences to which the parties had agreed by waiving their opportunity to appeal.⁵⁴ For the Court, this analysis formed the “primary basis” for denying vacatur: without a fairness issue at stake, equitable vacatur finds scarce justification based on the interests of the litigants.⁵⁵

Aside from the issue of fairness to private parties, the Court explained how public interests also weighed against equitable vacatur following mutual mootness. First, *Bonner Mall* described a substantial public interest in the preservation of precedential rulings that militates in favor of a rule against

50. *Id.* The rule prevents gamesmanship. Consider *Washington v. Trump*. If the circuit court upheld a version of the travel ban and the Trump administration subsequently changed its policy, the plaintiffs would have been saddled with negative Ninth Circuit precedent with no way to challenge it further, all due to maneuvering by the government. See 858 F.3d 1168, 1168 (9th Cir. 2017) (en banc); see also *Tafas v. Kappos*, 586 F.3d 1369, 1371 (Fed. Cir. 2009) (en banc) (declining to vacate a district-court opinion where the government rescinded the rule at issue but had lost in the district court).

51. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 20 (1994).

52. *Id.* at 29. The Court clarified that the exceptional-circumstances exception is not a broad escape hatch. Specifically, the Court noted that party consent to vacatur would not generally qualify as an exceptional circumstance because it “neither diminishes the voluntariness of the abandonment of review nor alters any of the policy considerations” underlying the decision. *Id.* For a discussion of situations in which lower courts have invoked the exception, such as trademark cases where vacatur is essential for facilitating settlement, see Paul A. Avron, *A Primer on Vacatur of a Prior Court Order as Part of a Settlement Agreement*, *Recent Case Law*, FED. LAW., Mar. 2017, at 10, 12–16.

53. *Bonner Mall*, 513 U.S. at 25.

54. For instance, in *Gary B.*, Michigan governor Gretchen Whitmer exchanged her willingness to allow establishment of a fundamental right to access to literacy, which would potentially give rise to new legal challenges, for an end to the litigation at hand. See Letter to the Court, *supra* note 13.

55. *Bonner Mall*, 513 U.S. at 28.

vacatur. The Court stated that precedent is “presumptively correct and valuable” rather than “the property of private litigants.”⁵⁶ This reflects the Court’s view that precedent is the public’s guide to judicial decisionmaking and that unnecessary destruction of those guideposts does a disservice to the public.⁵⁷ Indeed, preserving precedent set in cases settled pending appeal (a fairly common occurrence) advances a host of benefits often invoked in justification of stare decisis: efficiency, consistency, predictability, and judicial legitimacy.⁵⁸

Gary B. provides a useful example of how eradication of precedent through vacatur may affect the public. Most directly, had the panel decision not been vacated, it would have been binding on other Sixth Circuit courts.⁵⁹ Future litigants would have benefited from the clarity the decision brought to a murky and confusing set of precedents regarding the right to access to literacy.⁶⁰ The Sixth Circuit will likely have to confront the question anew at some point, creating inefficiency. Additionally, the opinion could have persuaded courts outside the Sixth Circuit to recognize a fundamental right to access to literacy in order to avoid an intercircuit conflict, producing efficiency and predictability across the judicial system.⁶¹ For instance, shortly after vacatur of the *Gary B.* panel decision, the District of Rhode Island issued an opinion in a very similar case.⁶² Distinguishing *Gary B.*, the court wrote that even if a fundamental right to access to literacy existed, the plaintiffs could not extend that principle to a right to civics education, the topic of the case at hand.⁶³ If

56. *Id.* at 26.

57. It is reasonable to ask whether the value of vacated precedent is diminished thoroughly enough to justify this aspect of the Court’s concern. See generally Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143 (2006) (examining increased use of vacated precedents). Section III.B considers in detail whether liberalizing the use of vacated precedent as persuasive authority would represent a promising reform for counteracting the effects of unwarranted en banc vacatur.

58. See Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1630 (2020) (articulating the policies underlying stare decisis). Critiques of depublishing cases provide a useful analogy for understanding the adverse consequences wrought by needless vacatur because such unpublished cases occupy a similarly nonprecedential space. Commentators have decried depublishment as inefficient, confusing to litigants, and harmful to the development of consistent law. See, e.g., Sarah E. Ricks, *The Perils of Unpublished Non-precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit*, 81 WASH. L. REV. 217, 222 (2006) (documenting doctrinal confusion in areas of the law rife with unpublished opinions).

59. 6TH CIR. R. 32.1(b).

60. See *Gary B. v. Whitmer*, 957 F.3d 616, 648 (6th Cir.) (noting that the “education cases above” provide “guidance but no answers” on the question of a fundamental right to access to literacy), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020).

61. As discussed *infra* in Section I.C., Federal Rule of Appellate Procedure 35 indicates that one of the justifications for taking a case en banc is to avoid a circuit split, indicating that courts generally prefer to maintain intercircuit consistency. See also *In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987) (“The federal courts spread across the country owe respect to each other’s efforts and should strive to avoid conflicts . . .”).

62. *A.C. v. Raimondo*, 494 F. Supp. 3d 170, 197 (D.R.I. 2020), *appeal docketed sub nom. A.C. v. McKee*, No. 20-2082 (1st Cir. argued Nov. 1, 2021).

63. *Id.* at 192–93.

such a distinguishing argument had not been available, the court indicated it would have ruled contrary to *Gary B.*⁶⁴ But it is possible that had *Gary B.* been the official law of the Sixth Circuit, the District of Rhode Island would have done otherwise in the interest of maintaining intercircuit consistency, since the court also recognized that there was “much to admire” about the opinion.⁶⁵

Beyond the public interest in preserving precedent, the *Bonner Mall* Court articulated a second reason to believe the public interest would typically counsel against vacatur: the need to treat lower-court judgments as “presumptively correct.”⁶⁶ The Court doubled down on this idea by asserting that the lower-court opinion should be preserved even when the likelihood of reversal on appeal is greater than the likelihood of affirmance.⁶⁷ This part of the opinion sounds in efficiency concerns. Without the presumption of correctness, a vast portion of judicial opinions would not merit precedential status because they are not fully reviewed, which would dramatically undercut the efficiency of judicial review. *Bonner Mall*’s show of faith in lower courts is also crucial for legitimacy reasons. Because the overwhelming majority of claims are disposed of by lower courts,⁶⁸ the public must trust them to faithfully apply the law.⁶⁹ Like *Munsingwear*, *Bonner Mall* seeks to promote healthy development of the law by emphasizing the role of precedent. But unlike *Munsingwear*, the decision prioritizes preserving law over the concern that unreviewed lower-court rulings may contain legal defects.

Bonner Mall also took care to define the scope of its applicability to certain other procedural contexts where mutual mootness may arise. In addition to cases becoming moot after a grant of certiorari, as was the case in *Bonner Mall*, the rule explicitly applies to any case mooted by mutual action pending appeal, including cases on appeal from district courts and cases in which certiorari has not yet been granted or denied.⁷⁰ The Court also seemingly narrowed the applicability of the rule to appellate review by phrasing the question presented as follows: “whether *appellate courts* in the federal system should vacate civil judgments of *subordinate courts* in cases that are settled after *appeal* is filed or

64. *Id.* (“[*Gary B.*]’s fate . . . was to be overturned for the reasons explained above and in the equally well-reasoned dissenting opinion . . .”).

65. *Id.* at 175, 193.

66. *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 26 (1994).

67. *Id.* at 28. The rate of reversal in the courts of appeals is dramatically lower than the rate of reversal by the Supreme Court. Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 246 (1999) (“Courts of appeals reverse only about twenty percent of the cases they review, compared with a reversal rate of sixty to sixty-five percent for the Supreme Court.”).

68. Between October 1, 2019, and September 30, 2020, 544,460 cases were filed in the federal district courts and 48,190 were filed in the courts of appeals. *Table JCI—U.S. Federal Courts Judicial Business*, U.S. CTS. (Sept. 30, 2020), <https://www.uscourts.gov/statistics/table/jci/judicial-business/2020/09/30> [perma.cc/ZM3P-SQTK].

69. See George, *supra* note 67, at 246 (suggesting the legitimacy of panel decisions depends on litigant perceptions about panels’ ability to make determinations without en banc review).

70. *Bonner Mall*, 513 U.S. at 28.

certiorari sought.”⁷¹ On its face, this framing might not appear to include en banc review. En banc review is termed “rehearing” rather than “appeal,”⁷² and a panel may be considered a subset of the same judicial body as an en banc court, rather than a lower court in relation to it. Given this terminological mismatch, it is no surprise that courts are unsure about how *Bonner Mall* does or should apply to cases mooted pending en banc review.⁷³ Terminology aside, to assess whether *Bonner Mall*’s reasoning applies to en banc review, it is necessary to understand how en banc review functions and what it is designed to achieve.

C. History and Purpose of En Banc Review

En banc rehearing, much like appellate review, simultaneously aims to create lasting, consistent judicial guidance and an accurate set of precedents. While most agree that en banc review serves a vital role in promoting efficiency and consistency, disagreement persists about how frequently en banc courts ought to correct panel errors. That debate informs this Note’s later analysis of whether en banc review contains distinguishing features that justify departure from *Bonner Mall*’s no-vacatur rule.⁷⁴

The history of en banc review reveals a majoritarian purpose, namely that of enforcing a circuit’s majority view on any given case.⁷⁵ En banc review sprang up as a result of the expansion of the federal courts of appeals, which were originally composed of only three judges per circuit.⁷⁶ As caseloads grew in the early twentieth century, Congress added judgeships to the circuit courts.⁷⁷ This prompted some judges to call for a mechanism for full court review to preserve majority control over developing law,⁷⁸ a procedure retroactively endorsed by the Supreme Court in *Textile Mills*.⁷⁹

Yet the purposes articulated in *Textile Mills* were not those of majority control but those of efficiency, promotion of consistent law, and finality of

71. *Id.* at 19 (emphases added).

72. FED. R. APP. P. 35.

73. *See infra* Section III.A.

74. *See infra* Section II.B.

75. *See* FED. R. APP. P. 35.

76. *See* Richard S. Arnold, *Why Judges Don’t Like Petitions for Rehearing*, 3 J. APP. PRAC. & PROCESS 29, 30–32 (2001); George, *supra* note 67, at 221–25.

77. George, *supra* note 67, at 227.

78. *Id.*

79. *Textile Mills Sec. Corp. v. Comm’r*, 314 U.S. 326, 333–35 (1941). En banc review was not explicitly authorized by the judicial code, but the Court reasoned that it was allowed by the statute’s text. *Id.* Several years later, the Court clarified that en banc review was not guaranteed as of right. *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 270 (1953). The *Textile Mills* decision was codified in the Judicial Code of 1948, Act of June 25, 1948, ch. 646, 62 Stat. 869, 871 (codified as amended at 28 U.S.C. § 46(c)), and later in Rule 35 of the Federal Rules of Appellate Procedure, first enacted in 1967. Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1, 5 n.19 (1997).

judgments in the courts of appeals.⁸⁰ These purposes underlie Federal Rule of Appellate Procedure 35, which sets the current standard for when a circuit may rehear a case en banc. First, Rule 35 dictates that en banc review is “not favored,”⁸¹ indicating a policy of leaving the bulk of judicial work to panels for efficiency’s sake despite the potentially countermajoritarian effects of doing so. The only situations justifying rehearing are those in which en banc review enforces “uniformity of the court’s decisions”⁸² or allows the full court to address a question “of exceptional importance.”⁸³ The former prong encompasses uniformity within the circuit, as well as conformity with Supreme Court precedent.⁸⁴ The latter category is somewhat vague, but the rule specifies that cases creating or contributing to intercircuit inconsistency are generally ones of exceptional importance.⁸⁵

With respect to finality, en banc review is thought of as a way to reduce the Supreme Court’s caseload by managing inconsistency at the circuit level, preempting the need for certiorari.⁸⁶ Indeed, Rule 35’s focus on advancing consistency closely mirrors the role and purpose of Supreme Court review reflected in Supreme Court Rule 10.⁸⁷ The claim that en banc courts perform a kind of quasi-Supreme Court review gains force as grants of certiorari become

80. *Textile Mills*, 314 U.S. at 334–35 (“[T]he result reached makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases.” (footnote omitted)).

81. FED. R. APP. P. 35(a).

82. FED. R. APP. P. 35(a)(1).

83. FED. R. APP. P. 35(a)(2).

84. FED. R. APP. P. 35(b)(1)(A). There is some variation amongst the circuits’ local rules on these criteria. For instance, the Ninth Circuit rule seems to reject intracircuit conflict as a reason to grant review. Alexandra Sadinsky, Note, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 FORDHAM L. REV. 2001, 2018–21 (2014).

85. FED. R. APP. P. 35(b)(1)(B). Otherwise, the rule and commentary provide no further guidance about what qualifies as “exceptional importance.” See Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29, 56–59 (1988) (setting out proposed factors to make the analysis more objective).

86. See, e.g., FED. R. APP. P. 35 advisory committee’s note to 1998 amendment (noting that “an en banc proceeding provides a safeguard against unnecessary intercircuit conflicts,” which is important in light of how long it takes the Supreme Court to resolve circuit splits); Stephen L. Wasby, *The Supreme Court and Courts of Appeals En Bancs*, 33 MCGEORGE L. REV. 17, 30 (2001) (“For cases in which the justices would be likely to be asked to consider a panel’s ruling, an en banc hearing might resolve the case and make Supreme Court review unnecessary.”). Indeed, Chief Justice Burger went so far as to advocate for a rule that the en banc court *must* rehear any case in which the panel decision created intercircuit conflict in order to help reduce the Supreme Court’s caseload. See Wasby, *supra*, at 28.

87. While Rule 10 grants more flexibility and discretion in granting certiorari, it identifies similar “compelling reasons” for the Court to hear a case. Specifically, Rule 10 emphasizes inter-circuit conflicts and conflicts between courts of appeals and state supreme courts, as well as the existence of an “important question of federal law.” SUP. CT. R. 10(a), (c); see also Solimine, *supra* note 85, at 51 (calling the then-analogous Supreme Court rule “remarkably similar” to Rule 35’s selection criteria).

more infrequent, leaving a major portion of significant cases and inconsistencies to the lower courts.⁸⁸ Thus, the current approach to en banc review has moved away from the historically rooted majority-rule rationale in favor of a focus on efficiency, consistency, and finality, as indicated in Rule 35.

At the same time, the desire among circuit judges to exert a majoritarian influence over panel decisions has also found support. Indeed, full courts often use en banc review to correct “errors” committed by panels, in addition to using the device to promote consistency and head off Supreme Court review.⁸⁹ But jurists and scholars are split on the question of how vigorously en banc courts should police for correctness. On one side are a group we might call “majoritarians,” who believe that en banc review is a mechanism for ensuring that as many opinions as possible reflect the judicial understanding of the entire circuit.⁹⁰ On the other side are proponents of the “panel autonomy” approach, who seek to minimize en banc review aimed at error correction.⁹¹

Behind the majoritarian view is a conception of the panel as an agent of the full circuit.⁹² Majoritarians believe that the legitimacy of the circuit’s law, created primarily by panels, depends on the ability of the full court to police for errors.⁹³ In this way, error correction is a quasi-Supreme Court function because it minimizes the number of cases requiring Supreme Court attention.⁹⁴ Cognizant of the costs of review, majoritarians maintain that en banc

88. Christopher P. Banks, *The Politics of En Banc Review in the “Mini-Supreme Court,”* 13 J.L. & POL. 377, 378 (1997) (“[T]he en banc process is significant because a vast majority of circuit court decisions are denied review by the United States Supreme Court As a result, the intermediate appellate court becomes, in effect, the ‘court of last resort’ for most federal litigants . . .”).

89. See, e.g., *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 555, 561 (9th Cir. 2019) (en banc) (holding the panel had committed reversible error because it had incorrectly applied class certification law); *Gilbert v. United States*, 640 F.3d 1293, 1302, 1312 (11th Cir. 2011) (en banc) (correcting a panel’s error). But see Solimine, *supra* note 85, at 48 (noting inconsistency in the case law and scholarship about whether “mere disagreement” with a panel’s decision is sufficient reason to rehear en banc).

90. E.g., Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981–1990*, 59 GEO. WASH. L. REV. 1008, 1011, 1034 (1991) (expressing a preference for panel decisions to come “as close as possible” to reflecting “the views of the court as a whole”).

91. Arthur D. Hellman, “*The Law of the Circuit*” Revisited: *What Role for Majority Rule?*, 32 S. ILL. U. L.J. 625, 625–26, 629–31 (2008) (describing the split).

92. See Ginsburg & Falk, *supra* note 90, at 1012 (“Delegating to a panel the responsibility for an initial decision does not relieve the full court of its own responsibility for the ultimate decision in the case.”).

93. *Id.* at 1013.

94. This issue took center stage in a late-1990s effort to reform the Ninth Circuit because the circuit’s size was perceived as preventing it from adequately supervising panel decisions for correctness. Arthur D. Hellman, *Getting it Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U.C. DAVIS L. REV. 425, 426–27 (2000). Supporting a structural change, Justice Scalia wrote that “the function of en banc hearings . . . is not only to eliminate intra-circuit conflicts, but also to correct and deter panel opinions that are pretty clearly wrong.” Letter from Justice Antonin Scalia to Justice Byron R. White (Aug. 21, 1998), in *Review of the Report by the Commission on Structural Alternatives for the Federal Courts of Appeals Regarding the Ninth Circuit and the Ninth Circuit Reorganization Act: Hearing on S. 253 Before the S.*

review is only necessary when the graveness of the error outweighs the time and resources such review incurs.⁹⁵

By contrast, supporters of panel autonomy prioritize the efficiency of panel independence, its benefits for circuit legitimacy, and the positive effects of the countermajoritarian influence of panels. First, they contend that the benefits of correcting most errors are not worth the vast expenditure of resources involved in asking large groups of judges in the circuit to rehear a case.⁹⁶ In fact, some assert that the bigger the error, the worse the tradeoff, because the common law process is adept at weakening especially aberrant opinions.⁹⁷ Additionally, while majoritarians suggest that frequent en banc review augments panel legitimacy, proponents of panel autonomy flip that argument, asserting that frequent review engenders doubt about the correctness of panel decisions as a whole.⁹⁸ Finally, former Ninth Circuit chief judge James Browning has argued that panel autonomy gives a measure of “breathing room for the minority,” creating a pluralistic structure which allows for a diversity of viewpoints in the circuit’s law.⁹⁹ On this account, minority contributions create long-term jurisprudential stability because changes in the political composition of a circuit do not necessarily portend dramatic shifts in the law.¹⁰⁰ The panel-autonomy approach does not argue against all error correction, but it construes Rule 35 narrowly to discourage review of decisions based on mere disagreement within the circuit.¹⁰¹

Comm. on the Judiciary, 106th Cong. 72, 72 (1999) (statement of Hon. Pamela Ann Rymer, Circuit J., U.S. Court of Appeals for the Ninth Circuit). To support his view that the Ninth Circuit had failed to carry out this function, Justice Scalia cited the “disproportionate segment” of the Court’s docket devoted to reversing erroneous Ninth Circuit panel rulings. *Id.*

95. Hellman, *supra* note 91, at 629.

96. The Second Circuit has notoriously eschewed extensive en banc review in a “longstanding tradition of general deference to panel adjudication.” *Ricci v. DeStafano*, 530 F.3d 88, 89 (2d Cir. 2008) (en banc) (Katzman, J., concurring). Former chief judge of the Second Circuit Irving Kaufman has explained that, as a result, the Second Circuit has been able to “manage [its] case load efficiently” and “generate[] certainty, finality and respect for [its] panel opinions.” Hon. Irving R. Kaufman, Remarks at the Annual Judicial Conference of the Second Judicial Circuit of the United States (Sept. 13, 1984), in 106 F.R.D. 103, 159 (1985).

97. Arthur Hellman explains that those in favor of panel autonomy “believe that the best corrective for aberrant panels decisions generally will not be found in immediate en banc review, but in the evolutionary processes of law over time.” Hellman, *supra* note 94, at 453. This is the case because “the more aberrant a decision, the more likely it is that other panels will be able to distinguish it in a credible and cogent way.” Hellman, *supra* note 91, at 637. Such normalization is especially effective where opinions have broad applicability because panels address the issue more frequently. *Id.*

98. See Kaufman, *supra* note 96, at 159.

99. *Id.* at 161–62.

100. *Id.* at 161.

101. *Id.* at 162; see also Phil Zarone, *Agenda Setting in the Courts of Appeals: The Effect of Ideology on En Banc Rehearings*, 2 J. APP. PRAC. & PROCESS 157, 165–66 (2000) (arguing that a strict textual application of Rule 35 may preclude routine correction of panel decisions, depending on how capaciously one reads “exceptional importance”).

In sum, en banc review aims to achieve judicial efficiency, consistency, and legitimacy, as well as accuracy in circuit law. This last function may compete with the preceding ones, and commentators are divided on how to balance the various interests in question.

D. *Doctrinal Incoherence in Vacatur Pending En Banc Review and Automatic Vacatur*

With the preceding background on mootness, vacatur, and en banc review concluded, the intersection of those topics in the realm of mootness pending en banc review¹⁰² comes into view. As such, this Section completes the table-setting by surveying what has already been said about this procedural posture and what remains troublingly unsaid about it. Finally, this Section suggests that automatic vacatur of panel opinions following a grant of en banc review, a procedure contained in many circuits' local rules, may explain how and why courts have remained quiet on the subject.

Little judicial discussion of en banc vacatur exists, and what does exist only scratches the surface of the doctrinal questions at play. *Veneman* and *Washington v. Trump* are the two best examples of a fulsome debate on the issue, but they are marked by judicial division and leave many questions unanswered. In *Veneman*, a Ninth Circuit case vacated pending en banc disposition, a concurrence argued that vacatur was justified in light of the differences between en banc and other appellate review, while a dissent contended that the differences in question were insignificant.¹⁰³ Ten years later, in *Washington v. Trump*, an en banc court of the Ninth Circuit cited *Bonner Mall* in declining to vacate a panel's refusal to stay an injunction against the Trump administration's first travel ban order.¹⁰⁴ The case became moot pending en banc consideration due to the Trump administration's change to the travel ban policy.¹⁰⁵ Vehement dissenters ignored *Bonner Mall*'s no-vacatur

102. An important framing note is that mootness pending en banc review encompasses several somewhat distinct procedural postures. In the first scenario, "pending en banc consideration," mootness arises after panel disposition but before en banc review has been requested by a party (or by any judge on the circuit *sua sponte*). See FED. R. APP. P. 35 advisory committee's note (stating that the rule "does not affect the power of a court of appeals to initiate in banc hearings *sua sponte*"). In the second scenario, "pending Rule 35 decision," mootness occurs after a petition for rehearing following the panel's disposition is filed (or after *sua sponte* consideration has begun). In the last scenario, "pending en banc disposition," mootness arises after the court has ordered en banc rehearing but before the en banc court decides the case. These scenarios are collectively referred to using the catchall term "pending en banc review" when distinguishing between them is not relevant to the point at hand.

103. *Animal Legal Def. Fund v. Veneman*, 490 F.3d 725, 726, 728 (Bybee, J., concurring); *id.* at 730 (Thomas, J., dissenting).

104. *Washington v. Trump*, 858 F.3d 1168, 1168 (9th Cir.), *denying reh'g en banc* to 847 F.3d 1151 (9th Cir. 2017) (per curiam).

105. See Exec. Order No. 13,780, 3 C.F.R. 301 (2018); *Trump v. Hawaii*, 138 S. Ct. 2392, 2403–04 (2018). The government then moved to dismiss their appeal in *Washington v. Trump* on March 8, voluntarily mooted the case. 858 F.3d at 1168.

rule, citing “an obligation to correct our own errors.”¹⁰⁶ Even if these two Ninth Circuit cases are reconcilable,¹⁰⁷ there is significant disagreement about the holding in each and little in-depth discussion of their possible differences. Particularly in *Washington v. Trump*, the court was divided on the question of vacatur along political lines, and the opinions suggested the real dispute centered on the merits rather than the applicability of *Bonner Mall*.¹⁰⁸

Other cases involving en banc vacatur demonstrate more serious inattention to the issue. For instance, in *Tafas v. Kappos*, an en banc court of the Federal Circuit applied the *Bonner Mall* rule when faced with a motion to vacate a district-court opinion.¹⁰⁹ However, it did not discuss whether *Bonner Mall* would require reinstatement of the panel decision in the case, which had been automatically vacated when the court took up the case en banc.¹¹⁰ Cases like *Gary B.* and *Tafas*, neither of which even consider how vacatur operates in the en banc context, are the norm. In short, this doctrine is a mess, and it often receives short shrift.

Automatic-vacatur rules, which this Note describes more fully below, enable courts to avoid serious, reasoned consideration of the doctrinal questions posed in these cases. Automatic vacatur carried out before a case becomes moot diminishes the need to address the propriety of vacating a panel opinion. This was the case in *Tafas*, where leaving the panel opinion vacated was the status quo.¹¹¹ More strikingly, these rules can be employed to vacate without providing reasoned justification at any point when en banc review is still possible. For instance, the court’s decision in *Gary B.* to rehear the case en banc when it was already moot accomplished post-mootness vacatur without meaningful judicial consideration.¹¹² Thus, automatic vacatur enables courts

106. *Washington v. Trump*, 858 F.3d at 1174–78 (Bybee, J., dissenting). Judge Bybee indicated the court either had free-floating discretion under *Bonner Mall* and *Munsingwear* to vacate, or that, in the alternative, it was possible to shoehorn vacatur into *Bonner Mall*’s narrow exception for “extraordinary circumstances.” *Id.* at 1177.

107. A concurrence in *Washington v. Trump* distinguished *Veneman* by noting that case was mooted pending en banc disposition, whereas the case at hand was mooted pending en banc consideration. *Id.* at 1169–70 (Berzon, J., concurring).

108. Compare *Washington v. Trump*, 858 F.3d at 1168 (Reinhardt, J., concurring) (indicating agreement with the panel’s decision to “vigorously protect[] the constitutional rights of all”), and *id.* at 1169 (Berzon, J., concurring) (expressing “full confidence in the panel’s decision” and disapproving of “the merits commentary in the dissents”), with *id.* at 1171 (Kozinski, J., dissenting) (“I write separately to highlight two peculiar features of the panel’s opinion.”), and *id.* at 1175 (Bybee, J., dissenting) (“I dissent from our failure to correct the panel’s manifest error.”), and *id.* at 1185 (Bea, J., dissenting) (“I write separately to emphasize a serious error in the panel’s conclusion . . .”).

109. 586 F.3d 1369, 1371 (Fed. Cir. 2009) (en banc).

110. *Tafas v. Doll*, 559 F.3d 1345 (Fed. Cir.), vacated en banc, 328 F. App’x 658 (Fed. Cir. 2009). The same was true in *Staley v. Harris County*, 485 F.3d 305 (5th Cir. 2007), dismissing appeal from 332 F. Supp. 2d 1030 (S.D. Tex. 2004).

111. See *infra* note 120 and accompanying text.

112. See *supra* notes 12–17 and accompanying text.

to disregard *Bonner Mall* in the en banc setting across a range of procedural postures because courts can order en banc review post-mootness.¹¹³

Importantly, the Federal Rules of Appellate Procedure do not even address automatic vacatur, let alone dictate it.¹¹⁴ Nevertheless, several circuits employ local automatic-vacatur rules, which direct that the presumptive effect of granting en banc review is to wipe the slate clean, preparing the circuit to rule anew. The local rules concerning vacatur following a decision to take a case en banc can be roughly categorized into three groups. First are the rules which *require* vacatur upon a grant of en banc rehearing without caveat or qualification. The Third, Fourth, Sixth, and Seventh Circuits all adhere to rules of this nature.¹¹⁵ The Ninth Circuit stands somewhat apart from this group in that it does not vacate panel decisions, but automatically deems them nonprecedential upon grant of en banc rehearing.¹¹⁶ Second are the rules which require vacatur as a default but allow for deviation in individual cases. The First, Fifth, and Eleventh Circuits abide by such rules.¹¹⁷ Third are the rules, adopted by both the D.C. Circuit and the Tenth Circuit, which require that the panel's judgment—but not its opinion—be vacated unless otherwise specified.¹¹⁸ The Second, Eighth, and Federal Circuits have no rules on automatic vacatur: while the Second Circuit seems to follow no established vacatur practice,¹¹⁹ the Eighth and Federal Circuits appear to vacate as a matter of course, thus engaging in de facto automatic vacatur.¹²⁰ What all these rules have in common is that they do not require explanation. To vacate the panel's decision, en banc courts need only include a citation to the rule in question (if

113. This Note does not take a position on whether this is jurisdictionally appropriate but only points out that it has happened before, as in *Gary B.* One reason we might want courts to be able to take cases en banc post-mootness is to promote efficiency when the mootness itself is questionable, allowing the en banc court to consider mootness and the merits—if applicable—at the same time. Further examination would be necessary to address the question fully.

114. See FED. R. APP. P. 35.

115. 3D CIR. I.O.P. 9.5.9; 4TH CIR. R. 35(c); 6TH CIR. R. 35(b); 7TH CIR. I.O.P. 5(e).

116. 9TH CIR. G.O. 5.5(d). The difference may be illusory. See *Animal Legal Def. Fund v. Veneman*, 490 F.3d 725, 727 (9th Cir. 2007) (en banc) (calling the difference between nonprecedential status and vacatur “minuscule”).

117. 1ST CIR. I.O.P. X(D); 5TH CIR. R. 41.3; 11TH CIR. R. 35-10.

118. 10TH CIR. R. 35.6; D.C. CIR. R. 35(d). This regime creates a somewhat odd situation in the case of a panel opinion reaching the correct outcome through flawed reasoning, as was the case in *United States v. Graham*. See 824 F.3d 421 (4th Cir. 2016) (en banc).

119. See, e.g., *Zarda v. Altitude Express, Inc.*, No. 15-3775, 2017 U.S. App. LEXIS 13127 (2d Cir. May 25, 2017). This fact comports with the Second Circuit's unique approach to en banc review. The circuit very rarely hears cases en banc, showing a greater degree of deference to panels. See *supra* note 96.

120. See, e.g., *Minn. Citizens Concerned for Life, Inc., v. Swanson*, No. 10-3126, 2011 U.S. App. LEXIS 26399 (8th Cir. July 12, 2011), *vacating en banc* 640 F.3d 304 (8th Cir. 2011); *United States v. Andis*, No. 01-1272, 2002 U.S. App. LEXIS 5944 (8th Cir. Apr. 2, 2002), *vacating en banc* 277 F.3d 284 (8th Cir. 2002); *Kirkendall v. Dep't of the Army*, 159 F. App'x 193 (Fed. Cir. 2006), *vacating en banc* 412 F.3d 1273 (Fed. Cir. 2005); *NantKwest, Inc. v. Matal*, 869 F.3d 1327 (Fed. Cir.), *vacating en banc* 860 F.3d 1352 (Fed. Cir. 2017).

it exists),¹²¹ and if the case becomes moot while under en banc review, the rules do not require giving any thought to reinstating the panel opinion.¹²²

Federal Rule of Appellate Procedure 47(a)(1) empowers the circuits to create local rules that fill out details left unclear by the federal rules.¹²³ But the local rules must be consistent with the rules enacted by Congress.¹²⁴ While the federal rules are presumptively valid and a federal rule has never been struck down, the local rules, which are not enacted by Congress, are more commonly invalidated.¹²⁵ In fact, local rules expanding on Rule 35 have previously been called into question.¹²⁶ Local rules are also vulnerable to constitutional challenges.¹²⁷ Thus, although local circuit rules provide for automatic vacatur, they are not supported by unassailable authority. With this background established, this Note examines whether compelling reasons exist to deviate from *Bonner Mall* in the en banc setting.

II. *BONNER MALL*'S ANALYSIS AND EN BANC REVIEW: DISTINCTIONS WITHOUT A DIFFERENCE

The question addressed in this Part is whether *Bonner Mall* should be read to govern scenarios in which a case is settled pending en banc review. Section II.A argues that because *Bonner Mall*'s equitable rationale is not altered by the particularities of the en banc setting, the case should be read to apply to en banc review despite it not stating so outright. Section II.B reviews several arguments distinguishing mootness pending en banc review from the scenarios discussed in *Bonner Mall* and concludes that they fall short.

A. *Bonner Mall*'s Equitable Analysis Does Not Vary in En Banc Review

Bonner Mall recognizes that vacatur, like other equitable remedies, should only be granted to remedy some injustice. It applied that concept to the category of cases involving mootness pending appeal, although as a general matter

121. See, e.g., Gary B. v. Whitmer, 958 F.3d 1216 (6th Cir. 2020) (en banc).

122. Only the Fifth Circuit's rules include any mention of possible reinstatement, which occurs when the court has voted to rehear a case en banc but then cannot come to a conclusion on it. In that scenario, the panel decision is reinstated but rendered nonprecedential. See 5TH CIR. R. 41.3.

123. FED. R. APP. P. 47(a)(1).

124. *Id.*

125. Matthew J. Dowd, *Rule 36 Decisions at the Federal Circuit: Statutory Authority*, 21 VAND. J. ENT. & TECH. L. 857, 868 (2019).

126. See, e.g., *United States v. Samuels*, 808 F.2d 1298, 1299 (8th Cir. 1987) (en banc) (Lay, C.J., concurring) (suggesting that Eighth Circuit's rule allowing a judge to request rehearing en banc sua sponte is inconsistent with Rule 35, which provides only for a "party" to seek such rehearing).

127. A prominent example of one such challenge came in *Anastasoff v. United States*, where the Eighth Circuit determined that its circuit rule allowing for the designation of cases as unpublished, and therefore nonprecedential, was an unconstitutional use of the "judicial power" under Article III. 223 F.3d 898, 899 (8th Cir. 2000). Ultimately, the Federal Rules were amended to partially account for this concern by requiring circuits to allow citation to unpublished cases. See Sullivan, *supra* note 57, at 1164 (noting the adoption of Rule 32.1).

it is still true that some case-by-case determination is necessary to answer the question of whether injustice will result from foregoing vacatur. This Section argues that as a baseline matter, neither private injustice nor public benefit—the two justifications *Bonner Mall* gives for post-mootness vacatur—warrant vacatur in the en banc context any more than they do in the contexts addressed directly in *Bonner Mall*. Performing the equitable balancing of interests reveals that differences between en banc review and Supreme Court review, the subject of *Bonner Mall* itself, are minimal. In fact, they are less significant than the differences between Supreme Court review and initial appellate review, to which the *Bonner Mall* rule explicitly applies. Thus, *Bonner Mall* should be read to extend to mootness pending en banc review despite the opinion's silence on the subject.

With respect to the private injustice that typically justifies vacatur in moot cases—namely, legal consequences the losing party was unfairly prevented from challenging—en banc review is no different from other forms of appellate review. Regardless of whether a party settles pending review by a panel, en banc court, or the Supreme Court, a settling party waives the right to further consideration of the case and accepts any attendant legal consequences.¹²⁸ To be sure, when the parties settle after a decision to rehear en banc accompanied by automatic vacatur, they probably settle with the understanding that the panel decision will not stand. Frustration of that expectation might constitute an injustice.¹²⁹ But this argument assumes that allowing automatic vacatur or leaving vacatur in place post-mootness is appropriate. The parties' expectations should not be based on an unexamined practice inconsistent with law in the first place.

Some forms of mootness pending en banc review are less likely to result in private injustice than mootness pending initial appellate review because en banc review is discretionary. The private interest in the vacatur of an adverse lower-court opinion is strongest when a party has a right to appellate review because such review is certain to occur if sought.¹³⁰ By contrast, the rarity of Supreme Court and en banc review means that an appellate opinion in a case mooted by settlement would have likely stood even if a party petitioned for higher review. The argument that appellate review as of right is different than discretionary appellate review for purposes of vacatur was popular before the ruling in *Bonner Mall*¹³¹ and was occasionally referred to even after *Bonner*

128. See *supra* notes 53–54 and accompanying text.

129. Conversely, vacating a case mooted pending en banc consideration, as the dissenters sought to do in *Washington v. Trump*, see 858 F.3d 1168, 1177–78 (9th Cir. 2017) (en banc) (Bybee, J., dissenting), might upset party expectations that the panel ruling would stand.

130. See *Humphreys v. DEA*, 105 F.3d 112, 115 (3d Cir. 1996) (“Because the Supreme Court’s review of appellate court decisions is, for the most part, discretionary, the Court’s failure to vacate judgment in a moot case ordinarily will not deprive a losing party of a review on the merits to which it is entitled.” (quoting *Finberg v. Sullivan*, 658 F.2d 93, 96 (3d Cir. 1981) (en banc))).

131. See, e.g., Kipp D. Snider, *The Vacatur Remedy for Cases Becoming Moot upon Appeal: In Search of a Workable Solution for the Federal Courts*, 60 GEO. WASH. L. REV. 1642, 1673–74 (1992) (proposing, based on the dissenting opinion in *Clarke v. United States*, 915 F.2d 699 (D.C.

Mall held that initial appellate review was covered by the no-vacatur rule.¹³² The Court's rejection of the argument notwithstanding, en banc review fits the *Bonner Mall* mold even better than initial appellate review.¹³³ This suggests the private interest in vacatur is weakest in cases mooted pending en banc consideration and Rule 35 decisions, although further review is certainly frustrated in cases mooted pending en banc disposition.

If there is no private injustice in vacatur pending en banc review beyond that at play in initial appellate and Supreme Court review, the only question is whether any public interest in post-mootness vacatur is heightened in the en banc context. *Bonner Mall* identifies preservation of precedent as the main public interest served by the no-vacatur rule.¹³⁴ While district-court opinions may have some meaningful precedential influence,¹³⁵ binding precedent has a more tangible impact on the law of a circuit. Indeed, most circuits abide by norms or rules preventing a panel from overruling another panel's decision.¹³⁶ In those circuits, panel decisions are ostensibly binding on all courts except the en banc court. As such, the public interest in preserving precedent is stronger in en banc review than in one of the contexts explicitly contemplated by *Bonner Mall*. Both en banc review's discretionary nature and the precedential value of panel decisions, then, militate for a no-vacatur default rule in the en banc context.

Although *Bonner Mall* did not mention en banc review in its decision, the only circuit-court case cited in *Bonner Mall*'s discussion of vacatur following mutual mootness involved mootness pending en banc consideration,¹³⁷ as did

Cir. 1990) (en banc), that the determinative factor in granting vacatur should be whether further appellate review would have been granted).

132. *Humphreys*, 105 F.3d at 115; *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 28 (1994).

133. In fact, en banc review is rarer than a grant of certiorari, so in this narrow sense, en banc review fits the mold better than the paradigmatic application. Take 2010 as a representative year: en banc rehearing occurred at a rate of approximately 0.15%, while Supreme Court review was taken in 1.15% of petitions. See Sadinsky, *supra* note 84, at 2015 (explaining that in 2010 only 45 out of 30,914 appellate cases were heard en banc across the circuits); *Statistics as of June 29, 2011*, J. SUP. CT. U.S., Oct. Term 2010, at II, <https://www.supremecourt.gov/orders/journal/jnl10.pdf> [perma.cc/P58L-9E77] (reporting that 90 out of 7,857 petitions for certiorari filed in the 2010 term were granted). The extremely low rate of en banc rehearing reflects in part that the denominator in the calculation is all cases decided on appeal, since the en banc court—unlike the Supreme Court—can order rehearing sua sponte.

134. *Bonner Mall*, 513 U.S. at 26.

135. See Gardner, *supra* note 58, at 1629–37 (arguing that the principles of stare decisis often justify “horizontal” citation by district courts).

136. Amy E. Sloan, *The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 *FORDHAM L. REV.* 713, 718–19, 719 nn.29–30 (2009) (citing cases and local rules demonstrating that “[e]very circuit follows the law of the circuit rule”).

137. See *Bonner Mall*, 513 U.S. at 28; *Mfrs. Hanover Tr. Co. v. Yanakas*, 11 F.3d 381, 382 (2d Cir. 1993).

Karcher v. May, which featured prominently in the opinion.¹³⁸ It is also telling that scholarship on the subject in the run up to *Bonner Mall* assumed that any rule the Court set out in that case would apply to en banc vacation of panel decisions.¹³⁹ Thus, no solid negative inference can be drawn from the opinion, particularly given the congruence between *Bonner Mall*'s reasoning and the preceding analysis of the equities in en banc review.

B. Three Unpersuasive Distinguishing Arguments

Despite the strong affirmative case that *Bonner Mall* extends to cases mooted pending en banc review discussed in the previous Section, some judges and commentators have concluded that it does not. In what little ink has been spilled on whether *Bonner Mall* applies to en banc vacatur,¹⁴⁰ judges and scholars have relied on several unique features of en banc review to distinguish the no-vacatur rule. First, some have argued that en banc courts conduct internal self-review, not appellate review. Second, some have contended that an en banc court that leaves a panel opinion in place post-mootness violates the constraints of Article III by letting the mandate issue¹⁴¹ on a moot case. Third, others have maintained that a decision to rehear en banc carries with it serious doubts about the validity of the panel opinion, justifying vacatur in cases mooted pending en banc disposition. These arguments suggest that deviation from the no-vacatur rule in the en banc-review context makes sense because en banc courts are particularly well positioned to correct errors. This Section contends that each of these arguments falls short.

1. Self-Review Versus Appellate Review

The first argument distinguishing *Bonner Mall* in the en banc review context fails because it is based on a misleading description of en banc review, one that would not justify deviating from the no-vacatur rule even if it were accurate. This argument, which we might call the "self-review distinction," begins with the observation that appellate courts review lower-court opinions while en banc courts supersede opinions issued by their colleagues. In *Veneman*, Judge Bybee of the Ninth Circuit took a stand against en banc adherence to

138. See *Bonner Mall*, 513 U.S. at 26. In *Karcher v. May*, mootness arose after circuit-court disposition but before the petition for certiorari that brought the case to the Court was filed, meaning that en banc review was still possible when the case was moot. 484 U.S. 72, 76 (1987).

139. See Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1483 (1994) ("[A]t issue in *Bonner Mall* is the interrelationship between the pendency of a case (on appeal, on petition for rehearing en banc, on cert.) and settlement." (emphasis added)); Snider, *supra* note 131, at 1674–75 (proposing a vacatur framework "developed for any procedural posture whereby cases become moot during the appellate process in the federal courts" and explaining applicability in en banc review).

140. See *supra* notes 106–110 and accompanying text.

141. The mandate is a procedural device that transfers jurisdiction between district and circuit courts. See discussion *infra* Section II.B.2.

Bonner Mall based on this reasoning.¹⁴² Later in *Washington v. Trump*, Judge Bybee argued that even if *Bonner Mall* did apply, the circuit's "obligation to correct [its] own errors" is an exceptional circumstance exempting en banc review from the no-vacatur rule.¹⁴³ In other words, he contends that internal quality control is different from quality control from on high. Judge Bybee's reasoning has minimal significance as to whether *Bonner Mall* applies because en banc courts do not perform a meaningfully different kind of review than other appellate courts, particularly the Supreme Court. And even if they did, it would not matter because self-review does not support a permissive approach to vacatur in other contexts.

First, characterizing en banc review as self-review obscures its hierarchical function. The debate about panel autonomy surveyed in Section I.C concerns just how much control the en banc court should exert over its subsidiary components, suggesting a hierarchical structure involving control by a superior judicial body.¹⁴⁴ Further, actual self-review of panel opinions is available in the form of panel rehearing.¹⁴⁵ Notably, a petition for panel rehearing requires the petitioner to explain what the panel originally "overlooked or misapprehended,"¹⁴⁶ while petitions for en banc rehearing need not contain such details.¹⁴⁷ The unwritten principle is that true self-review only changes the outcome when the original decisionmakers see things differently or discover new information. By contrast, hierarchical review may change the outcome even if the original decisionmakers have not changed their minds because new decisionmakers have a controlling vote. To be sure, members of the panel most often have a say in the en banc ruling,¹⁴⁸ and their adherence to their original stance may matter in the final vote. But since only one circuit

142. *Animal Legal Def. Fund v. Veneman*, 490 F.3d 725, 727–28 (9th Cir. 2007) (en banc) (Bybee, J., concurring).

143. *Washington v. Trump*, 858 F.3d 1168, 1174 (9th Cir. 2017) (en banc) (Bybee, J., dissenting).

144. See *supra* notes 90–91 and accompanying text. Inherent in this debate is agreement on the fact of en banc control, even if disagreement persists on the prudence of using that control frequently.

145. FED. R. APP. P. 40.

146. *Id.* at 40(a)(2).

147. *Id.* at 35(b) (requiring that petitioners for en banc review state either why the panel decision conflicts with circuit or Supreme Court precedent or involves a question of exceptional importance). The Appellate Rules Committee has recently suggested it may abrogate Rule 35 and fold it into Rule 40 to reduce litigant confusion regarding simultaneous petitions for panel and en banc rehearing. But this change would not collapse the different standards for obtaining panel versus en banc rehearing. ADVISORY COMM. ON APP. RULES, APRIL 2021 AGENDA BOOK 125–31 (2021), https://www.uscourts.gov/sites/default/files/appellate_agenda_book_spring_2021_final.pdf [perma.cc/8YC4-SQWF]. Thanks to Professor Edward Cooper for bringing this possible change to my attention.

148. See, e.g., 1ST CIR. R. 35.0(a)(2)(A) (directing that the en banc court be composed of all active judges on the circuit, as well as any senior judge who sat on the panel in the case); 2D CIR. I.O.P. 35.1(c) (same). A district-court judge sitting as a visiting judge on a panel may be an exception, although this scenario is not mentioned explicitly in the rules. See *id.*

is small enough for the original three-judge panel to be possibly determinative of the outcome on rehearing,¹⁴⁹ only panel rehearing is truly self-review, while en banc rehearing more closely resembles hierarchical review. Finally, the hierarchical nature of en banc rehearing is evidenced by the previously noted rule, operative in most or all circuits, that panels may not contradict precedent created by other panels while the en banc court can.¹⁵⁰ This power to supersede indicates that en banc courts exist on a higher tier of the judicial process than panels.

Second, that en banc rulings supersede panel opinions rather than reverse them does not support the self-review distinction. Judge Bybee's observation that en banc courts review district-court opinions rather than panel opinions because the latter are supplanted by en banc disposition¹⁵¹ is a formalistic distinction that does little work. Technically, the Supreme Court reviews a circuit court's findings and affirms or reverses that opinion rather than the district court's findings. But descriptively, such review operates the same as en banc review because it addresses legal issues de novo and defers to the district court's findings of fact.¹⁵² The Court is not bound by the legal or factual determinations of the court of appeals, just as the en banc court is not bound by the panel decision.¹⁵³

Third, even in procedural postures involving undeniable self-review, courts have made no claim to unlimited ability to vacate post-mootness. For instance, in *United States v. Flute*, a panel reviewing its own decision post-mootness held that vacatur was not appropriate.¹⁵⁴ Similarly, the Supreme Court has no established rule or practice of vacating its prior decision when it decides to rehear a case, and in at least some instances, it has not done so.¹⁵⁵

149. The First Circuit is the smallest circuit, with only six active judgeships. 28 U.S.C. § 44. Whether a three-judge panel can determine the outcome of an en banc rehearing depends on the participation of any eligible senior judges and the panel's unanimity.

150. See *supra* note 136.

151. *Animal Legal Def. Fund v. Veneman*, 490 F.3d 725, 728 (9th Cir. 2007) (en banc) (Bybee, J., concurring) ("We do not affirm or reverse the panel; rather, we review the judgment of the lower court.").

152. See, e.g., *Anderson v. Bessemer City*, 470 U.S. 564, 577 (1985) (reversing Fourth Circuit's determination that the trial court's finding of facts were clearly erroneous "[b]ased on our own reading of the record").

153. The discussion of the aims of en banc review in Section I.C confirms that en banc courts are generally charged with the quasi-appellate function of maintaining consistency and accuracy, one that in many ways mirrors exactly the kind of review conducted by the Supreme Court. See *supra* notes 86–88 and accompanying text; Solimine, *supra* note 85, at 41 (comparing en banc review and appellate review generally).

154. 951 F.3d 908, 910 (8th Cir. 2020) (citing *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71–72 (1997) (citing *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994))).

155. Compare *Boumediene v. Bush*, 551 U.S. 1160, 1161 (2007) (reversing prior denial of certiorari and vacating prior order at the same time), with *Kinsella v. Krueger*, 352 U.S. 901, 901–02 (1956) (granting rehearing but not vacating prior order). Although the Supreme Court has vacated an opinion in a case settled pending Supreme Court rehearing at least once, it did not

As such, even court action accurately described as self-review does not universally distinguish otherwise applicable vacatur rules.

Cast as an assertion that en banc courts have a unique need and entitlement to correct the circuit court's own errors, Judge Bybee's distinction warrants further consideration. The idea is that because en banc review is a means of majority control and a useful tool for error correction, en banc vacatur serves the public interest when deployed in those ways.¹⁵⁶ Even accepting that majoritarian control and intensive correction of panel errors are legitimate aims of en banc review,¹⁵⁷ it is untrue that the en banc setting presents an especially strong case for vacatur on those bases. The Supreme Court is similarly poised to serve the public interest by vacating post-mootness to correct errors and maintain control over the judiciary.

Like en banc courts, the Supreme Court maintains an efficient and legitimate judiciary by exerting control over the judicial bodies that act as its agents.¹⁵⁸ This is largely the same interest that forms the basis of the majoritarian claim to en banc control over panel decisions.¹⁵⁹ To the extent that agent fidelity varies according to how often a principal can exert control over the agent, the Supreme Court may have a stronger incentive to correct errors than en banc courts do because the Supreme Court has fewer opportunities to reprimand appellate courts. This is primarily the case because the Court's caseload is highly restricted. The nine justices cannot feasibly respond to as high a proportion of cases as a circuit sitting en banc can, where the labor of flagging cases for review, drafting opinions, and participating in oral argument can be divided between more judges.¹⁶⁰ The Court also has less control over the cases it hears because the litigants must appeal for certiorari to be granted.¹⁶¹ Thus,

express a general rule in that pre-*Bonner Mall* decision. See *Stewart v. S. Ry. Co.*, 315 U.S. 784 (1942) (per curiam).

156. Dissenting in *Veneman*, Judge Thomas noted that "there is no principled distinction to be drawn between" en banc and appellate review because *Bonner Mall* did not hold that "vacatur is an 'extraordinary remedy' only some of the time." *Veneman*, 490 F.3d at 730 (Thomas, J., dissenting) (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994)). In other words, vacatur is an equitable doctrine even when employed in the course of a court's self-review. Judge Thomas is correct, but a charitable reading of Judge Bybee's argument is that the equitable calculus simply comes out differently in en banc review.

157. The extent to which en banc courts should act as error correctors is not universally agreed upon. See *supra* notes 90–91 and accompanying text.

158. Susan B. Haire, Stefanie A. Lindquist & Donald R. Songer, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC'Y REV. 143, 161 (2003) (finding empirical evidence that circuits more frequently scrutinized by the Supreme Court reverse district-court opinions more frequently in order to conform their rulings to the Court's preferences). This comparison could be repeated with respect to initial appellate review, in which similar agency principles operate and the need to correct errors exists. *Id.* at 144–45.

159. See George, *supra* note 67, at 244–46 (explaining principal-agent dynamics between en banc courts and panels).

160. Other than the First Circuit, which has six, every circuit has at least eleven judgeships authorized by Congress. 28 U.S.C. § 44.

161. Even when petitions for certiorari come before the Supreme Court, lower courts may craft their opinions to exploit the Court's reliance on certain signals of cert-worthiness and avoid

opportunities to impose control are more significant for the Supreme Court, and yet, by adhering to *Bonner Mall*, the Court relinquishes that interest in order to promote the public interest in preserving precedent.

The Supreme Court would also serve the public interest by vacating whenever error seemed to be afoot. Common wisdom holds that the Supreme Court does not deal in error correction¹⁶² and it is certainly not as well positioned to make frequent corrections given its restricted caseload. But this does not mean the Court cannot correct errors when it chooses to do so. It would be more accurate to say, as the Court's rules implicitly do, that review to correct an error occurs "rarely" but is nonetheless within the Court's jurisdiction.¹⁶³ Crucially, when the Supreme Court does engage in corrective action, *Bonner Mall* still binds its decisions.¹⁶⁴ Moreover, it would be odd to conclude that en banc courts have a stronger entitlement to correcting errors when the Supreme Court ultimately defines what constitutes error. In fact, an empirical study has shown that en banc courts are reversed by the Supreme Court more frequently than panel decisions left untouched by an en banc court, indicating that en banc self-correction may not result in a truly correct outcome.¹⁶⁵

In sum, en banc review operates more like hierarchical review than self-review. Even if it did not, actual self-review does not warrant exception from the no-vacatur rule in general, let alone in en banc review in particular, where there is no particularly heightened need for error correction or majority control as compared to other appellate review.

2. Jurisdictional Limits on Issuing the Mandate

Other opponents of a no-vacatur rule in the en banc context contend that an en banc court violates Article III jurisdictional limitations by allowing the mandate to issue on a moot case. The mandate is a procedural device that acts like a baton passed between the district and appellate courts to determine which court has jurisdiction at any given time.¹⁶⁶ It is issued by the court's clerk along with the opinion in the case as a means of transferring jurisdiction

review, demonstrating that the Court's ability to police lower courts is fairly constrained. See Marla Brooke Tusk, Note, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202, 1216 (2003).

162. E.g., Hellman, *supra* note 94, at 442.

163. SUP. CT. R. 10; see also *Thomas v. Am. Home Prods., Inc.*, 519 U.S. 913, 914 (1996) (Scalia, J., concurring) (contending that Rule 10 does not place limitations on the Court's authority to hear a case); Hellman, *supra* note 94, at 430 (explaining that multiple members of the Court explicitly acknowledged its role in error correction when supporting calls to reform the Ninth Circuit).

164. See *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1994) (stating the rule unqualifiedly).

165. Wasby, *supra* note 86, at 66. Although this trend likely evinces selection effects in that cases taken en banc often pose challenging legal questions susceptible to diverging conclusions, it at least suggests that en banc courts are not always successful error correctors.

166. 16AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & CATHERINE T. STRUVE, *FEDERAL PRACTICE AND PROCEDURE* § 3987, at 699–703 (5th ed. 2020).

back to the district court, and it consists of a certified copy of the judgment, the opinion, and directions regarding costs.¹⁶⁷ When a panel renders its decision, that decision is not considered final until the mandate has issued.¹⁶⁸ During the pendency of the mandate, the panel or en banc court may revise the panel opinion or entirely rewrite it.¹⁶⁹ Consideration of petitions or sua sponte calls for en banc review stop the clock for returning the case to the district court.¹⁷⁰ Likewise, issuance of the mandate is suspended for the remainder of en banc proceedings, as well as for any Supreme Court review.¹⁷¹

Some view issuance of the mandate as a quasi-substantive event that would run afoul of jurisdictional limitations if undertaken post-mootness. Relying explicitly on this logic, Judge Widener dissented from the Fourth Circuit's decision in *Clipper v. Takoma Park* not to vacate a case mooted pending Rule 35 decision.¹⁷² Likewise, the Eleventh Circuit explained that when settlement takes place prior to issuance of the mandate, the panel decision is not final and thus properly vacated.¹⁷³ This reasoning also seems to have motivated the Fifth Circuit's ruling in *Smith v. Texaco, Inc.*¹⁷⁴ Because a party moved to dismiss its appeal pending en banc disposition, the panel concluded that it had to withdraw its own opinion, as the clerk could not simultaneously enter an order of dismissal and the panel opinion along with the mandate.¹⁷⁵

In contrast, a strong contingent of judges has indicated that the mandate's import is more procedural than substantive, belying the concern with jurisdictional restrictions.¹⁷⁶ This is the more compelling view. Several features of the mandate suggest that it represents judicial housekeeping rather than something akin to a merits decision. First, issuing a mandate is not a discretionary or judgment-based action, but is instead a routine ministerial function carried out as a matter of course.¹⁷⁷ Second, a panel's decision may be cited as

167. *Id.*; 4TH CIR. I.O.P. 41.1; 8TH CIR. I.O.P. app. A-9.

168. FED. R. APP. P. 41(c) advisory committee's note to 1998 amendment.

169. See WRIGHT ET AL., *supra* note 166.

170. FED. R. APP. P. 41(b). A party has fourteen days after entry of a panel judgment to request en banc rehearing, and the mandate issues seven days after expiration of that time. FED. R. APP. P. 35(c), 40(a), 41(b).

171. FED. R. APP. P. 41(b), (d).

172. 898 F.2d 18, 19 (4th Cir. 1989) (Widener, J., dissenting). He asserted that the court lacked jurisdiction "to do anything other than withdraw its decision and opinion and vacate the judgment below" and equated letting the panel decision go into effect with the en banc court rehearing the moot case on the merits. *Clipper*, 898 F.2d at 19 (Widener, J., dissenting).

173. *Flagship Marine Servs., Inc. v. Belcher Towing Co.*, 23 F.3d 341, 342 (11th Cir. 1994).

174. See 281 F.3d 477, 478 (5th Cir. 2002).

175. *Smith*, 281 F.3d at 478.

176. *United States v. Flute*, 951 F.3d 908 (8th Cir. 2020) (citing *Bastien v. Off. of Senator Ben Nighthorse Campbell*, 409 F.3d 1234, 1235 (10th Cir. 2005), and *In re Grand Jury Investigation*, 399 F.3d 527, 529 n.1 (2d Cir. 2005)).

177. FED. R. APP. P. 41(b) (stating that the mandate "must issue" after the allotted time period). The rules in several circuits specify that issuing the mandate is the purview of the clerk, who does not have authority to make merits decisions. *E.g.*, 4TH CIR. I.O.P. 41.1; 8TH CIR. I.O.P.

binding authority before the mandate issues.¹⁷⁸ The citation may be less forceful because the opinion can be edited or replaced by an en banc or panel rehearing, but the pre-mandate onset of legal authority indicates that the mandate itself does not bestow legal effect on a panel opinion.

The strongest formulation of the argument that the mandate creates special considerations in the en banc context, like that of the self-review claim, is that the en banc court has some heightened entitlement to or interest in reviewing its panels' decisions because they belong to the same judicial body. Typically, the circuit has a chance to revise its decision prior to issuance of the mandate.¹⁷⁹ Allowing issuance might therefore be characterized as substantive en banc approval of the panel decision by omission of edits.

If this were an accurate picture of how the mandate operates, the argument would carry more weight. But given the rate at which en banc review occurs,¹⁸⁰ inferring the circuit's approval from its silence would be a distortion of reality. It would be practically infeasible for the entire circuit to seriously consider every panel decision before issuance of the mandate.¹⁸¹ Thus, it would be inaccurate to portray the mandate as a device of substantive review rather than a procedural tool. Moreover, issuing the mandate post-mootness does not give rise to jurisdictional problems since the mandate operates as a procedural device rather than a merits decision.¹⁸²

3. Greater Cause for Concern About Decisional Validity

A final argument against the no-vacatur rule in the en banc context contends that because a decision to rehear a case en banc suggests concerns about the validity of the panel opinion, mootness pending en banc *disposition* in particular warrants vacatur. This theory was the subject of cursory commentary in Wright and Miller's *Federal Practice and Procedure*,¹⁸³ the only secondary

app. A-9; see also *Clarke v. United States*, 915 F.2d 699, 716 (D.C. Cir. 1990) (Edwards, J., dissenting) (“[O]ur issuance of the mandate is wholly separate from our consideration of the merits . . .”).

178. *In re Zermeno-Gomez*, 868 F.3d 1048, 1052–53 (9th Cir. 2017) (“[U]ntil the mandate has issued, a published decision by a panel of this court is subject to modification, withdrawal, or reversal. . . . [A] published decision constitutes binding authority and must be followed unless and until it is overruled by a body competent to do so.”).

179. *Carver v. Lehman*, 558 F.3d 869, 878–79 (9th Cir. 2009) (“Until the mandate has issued, opinions can be, and regularly are, amended . . .”).

180. See *supra* note 133 (explaining that en banc courts hear 0.15% of cases decided on appeal).

181. Further, even a vote against en banc rehearing cannot be taken as indication of agreement with the panel. For instance, majoritarians who favor correcting erroneous panel decisions more frequently recognize that, for efficiency's sake, not every case can be reexamined. See *supra* notes 90–91 and accompanying text.

182. Vacatur may cross the line into merits territory depending on the circumstances of its use. See *infra* notes 201–206 and accompanying text.

183. 13C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3533.10.2, at 622–23 (3d ed. 2008). The authors argue the rarity of en banc review suggests it is undertaken when error may be afoot, justifying deviation from the no-vacatur default rule. See *id.*

work to directly consider the issue of *Bonner Mall*'s applicability to en banc review. The theory also underlies multiple decisions.¹⁸⁴

There are two primary reasons to think that the panel decision in a case taken up en banc is likely faulty. First is the high rate at which en banc courts supersede¹⁸⁵ panel decisions. One study found that rate to be approximately 75 percent, a higher reversal rate than the Supreme Court's, which typically falls between 60 and 70 percent.¹⁸⁶ The higher the reversal rate, the better a vote to rehear works as a proxy for panel error. Second is the en banc voting procedure. En banc review requires a majority vote,¹⁸⁷ while the Supreme Court can grant certiorari with only four of nine votes.¹⁸⁸ This means a vote to rehear en banc is more likely than a grant of certiorari to signal that a coalition exists to reverse.

Neither observation justifies departure from *Bonner Mall* in cases mooted pending en banc disposition for three reasons. First, both require disregarding *Bonner Mall*'s suggestion that vacating post-mootness as a "prophylactic against legal error" would exceed the judicial power.¹⁸⁹ The Court reasoned that it would be inappropriate to vacate purely based on "assumptions about the merits" in moot cases, where the court has no constitutional authority to make merits determinations.¹⁹⁰ Specifically, *Bonner Mall* rejected the assertion that because the Supreme Court reverses over half of the cases it hears, vacatur would serve the public interest by preemptively correcting errors.¹⁹¹ The

184. See *Washington v. Trump*, 858 F.3d 1168, 1169–70 (9th Cir. 2017) (en banc) (Berzon, J., concurring) (distinguishing *Veneman*, which held vacatur was appropriate, on the grounds that rehearing had already been granted in *Veneman*); *Marc Dev., Inc. v. FDIC*, 12 F.3d 948, 949 (10th Cir. 1993) (en banc) (vacating a panel opinion when settlement occurred after rehearing was granted); *Okla. Radio Assocs. v. FDIC*, 3 F.3d 1436 (10th Cir. 1993) (denying vacatur of case settled before a grant of rehearing). None of these decisions cited the *Federal Practice and Procedure* argument, nor have any cases cited this particular passage in the treatise.

185. "Superseding" better describes the outcome when an en banc court disagrees with a panel, but here the term is used semi-interchangeably with "reversal" because the rate of Supreme Court reversal and en banc superseding are sometimes discussed together.

186. Compare George, *supra* note 67, at 246 (explaining that the Supreme Court reverses at a rate between 60 and 65 percent), and *SCOTUS Case Reversal Rates (2007–Present)*, BALLOTPEDIA, [https://ballotpedia.org/SCOTUS_case_reversal_rates_\(2007_-_Present\)](https://ballotpedia.org/SCOTUS_case_reversal_rates_(2007_-_Present)) [perma.cc/F7J7-BCGF] (determining that, across the 2007–2019 terms, the average rate of reversal was 70.1 percent), with Hellman, *supra* note 94, at 456 (finding the rate of superseding in the Ninth Circuit from 1994 to 1999 was approximately 75 percent).

187. FED. R. APP. P. 35(a).

188. No written rule governs this practice, and the origins of the so-called "rule of four" are obscure. Nevertheless, it remains the official practice of the Supreme Court. See generally Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975 (1957); James F. Fagan, Jr., *When Does Four of a Kind Beat a Full House? The Rise, Fall and Replacement of the Rule of Four*, 25 NEW ENG. L. REV. 1101 (1991).

189. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 27 (1994).

190. *Id.*

191. *Id.* The Court reasoned that it would be inappropriate to "dispos[e] of cases, whose merits are beyond judicial power to consider, on the basis of judicial estimates regarding their merits." *Id.* at 28.

Court's logic extended even to cases "more likely to be overturned and hence presumptively less valid" than cases considered by the Supreme Court.¹⁹² Thus, distinguishing en banc review based on its reversal rate and voting procedure would, per *Bonner Mall*, violate jurisdictional limitations because these proxies give rise to speculative assumptions about the merits of the panel decision. This is the case despite en banc review's higher reversal rate.

Second, even if an extremely high reversal rate eradicated *Bonner Mall*'s jurisdictional concerns, line-drawing problems would plague any attempt to determine when the reversal rate is high enough to warrant vacatur. *Bonner Mall* admits of no exception to its jurisdictional logic for opinions carrying more decisive markers of invalidity. However, it could be argued that a reversal rate might be so high that the decision to rehear the case acts as a de facto merits decision. In such circumstances, vacatur based on that decision would be warranted. Indeed, if an en banc court had a 100 percent reversal rate, vacatur would look more like judicial housekeeping than a quasi-merits decision. But that is not the reality.¹⁹³

So the question remains: how high is high enough? *Bonner Mall* held that the reversal rate of the Supreme Court, which has varied between approximately 60 and 70 percent each term since 2007,¹⁹⁴ did not cut it. What about 75 percent? Depending on a numerical reversal rate creates a classic and indeterminate line-drawing problem. The rule would also be unworkable from the perspective of consistency since reversal rates vary across years, circuits, the procedural posture of the case, whether a plaintiff or defendant is appealing, and so on.¹⁹⁵ Under a reversal-rate test, it would be impossible to identify the magic number, let alone the appropriate way to divide the universe of decisions into units for consideration. The Court's rejection of such an approach in *Bonner Mall* acknowledges that the line is hard to draw and even harder to administer.

Lastly, although en banc voting procedure may also suggest that the vote approximates a pre-mootness merits determination, the existence of alternative reasons to vote for rehearing undermines that conclusion. The argument would go that, regardless of the reversal rate, en banc voting procedure means that a vote to rehear is tantamount to a merits decision. Instead of identifying a magic reversal rate, this approach would assess whether the vote to rehear en banc is a good proxy for reversal based on the kind of decisionmaking happening at the voting stage. If it were true that judges decide to rehear en banc solely based on their views of the merits of a panel decision, the fact that en banc procedure requires a majority vote would indeed create a stronger case for vacatur than does a grant of certiorari. But this is not the case.

192. *Id.*

193. *See supra* note 186.

194. *See SCOTUS Case Reversal Rates (2007–Present)*, *supra* note 186.

195. *See supra* note 186 and accompanying text (showing the Supreme Court's reversal rates varying from year to year and circuit to circuit); Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 48 HOUS. L. REV. 993, 997–99 (2012) (finding empirical evidence of this kind of variance in Texas courts).

No matter how it is done, peering behind a vote to rehear in an effort to find substantive meaning fails because a vote to rehear en banc is not always a vote to correct a bad decision.¹⁹⁶ To be sure, dissents from denials of en banc rehearing often argue rehearing was appropriate because the panel's opinion was incorrect, indicating that votes do sometimes approximate merits decisions.¹⁹⁷ However, other possible meanings proliferate. Rule 35 dictates that a vote to rehear can be driven by an interest in promoting consistency within the circuit's law, meaning that a case may be taken up to confirm it is correct despite conflicting with other circuit law.¹⁹⁸ A vote might also indicate a desire to split from another circuit only in a full-court decision, even if the panel is correct.¹⁹⁹ Further, it would be difficult to discern when a decision to rehear is based on a belief about panel error because en banc courts need not provide reasons for rehearing, and concurring judges who provide reasoning do not speak for the full circuit's motivations.²⁰⁰

Even when error correction is the driving force behind a vote to rehear a case, initial views do not always predict an ultimate outcome, making the vote a poor proxy for invalidity. En banc review allows for further briefing and argument that may change a judge's mind.²⁰¹ A closer look may also change a judge's mind, as Justice Breyer and other judges have explained about their own processes of reaching a determination.²⁰² Thus, a vote to rehear should be considered a decision to look further into the case's merits rather than a quasi-merits decision.

196. And because a vote against rehearing does not necessarily indicate faith in the panel decision's merits, using a vote to rehear as a proxy for panel validity may get it wrong in both directions. For a discussion of why a no vote does not equate to actual approval, see Solimine, *supra* note 85, at 57.

197. See, e.g., *Oliver v. Sec'y of Health & Hum. Servs.*, 911 F.3d 1381, 1381 (Fed. Cir. 2019) (en banc) (Newman, J., dissenting) (arguing that the panel decision was "legally and scientifically incorrect"); *Tanvir v. Tanzin*, 915 F.3d 898, 901 (2d Cir. 2019) (en banc) (Jacobs, J., dissenting) ("[T]he panel's reasoning fails as a matter of law and logic and runs counter to clear Supreme Court guidance . . .").

198. This probably represents a small proportion of the relevant cases since there is a strong norm preventing panels from overruling other panels. See *supra* note 136 and accompanying text.

199. Rule 35 would support such a reason for en banc rehearing, as the advisory committee notes indicate that intercircuit consistency is one factor in favor of making a case one of "exceptional importance." See *supra* note 85 and accompanying text.

200. Solimine, *supra* note 85, at 69 (lamenting that lack of explicit reasoning justifying en banc rehearing makes it difficult to analyze trends in this area).

201. E.g., 11TH CIR. R. 35-7, 35-8 (requiring a new briefing schedule and providing for amicus briefing in cases reheard en banc).

202. Hellman, *supra* note 94, at 462 (citing a speech in which Justice Breyer stated that thinking a case through for final determination often yields an understanding "very different" than the one he began with); see also *Gilbert v. United States*, 640 F.3d 1293, 1324 (11th Cir. 2011) (en banc) (Dubina, C.J., concurring specially) ("Even though I initially agreed with the panel opinion, I now concur fully in the well-reasoned majority opinion and write separately to emphasize that after studying the issue further and having the benefit of en banc oral argument and briefing, I am persuaded . . .").

This Note does not argue that there could never be a case where vacatur pending en banc review is justified due to “extraordinary circumstances,” nor does it argue that concerns about decisional validity in a specific case could not constitute such circumstances.²⁰³ This Note only maintains that an order to rehear en banc does not, on its own, reach the level of an extraordinary circumstance. One might contend, for instance, that a panel decision admitting to introducing a novel legal rule, as in *Gary B.*, or in a more extreme example, one admitting to conflicting with valid Supreme Court precedent, would justify an exception to the no-vacatur rule when combined with an order to rehear en banc. It is worth noting that rulings invoking the extraordinary-circumstance exception to vacate a district-court opinion typically do not focus on decisional validity but rather on the need to stimulate settlement where vacatur is extremely important to one party.²⁰⁴ Nevertheless, concerns about decisional validity are far from frivolous and may warrant exceptions in particular cases or kinds of cases. This Note leaves identifying the principles to guide case-by-case analysis in this area for another day.

In sum, distinctions based on self-review, issuance of the mandate, and greater likelihood of erroneous decisions fall short of distinguishing vacatur pending en banc review from vacatur pending appeal generally. As such, en banc vacatur should not be exempted as a class from the *Bonner Mall* no-vacatur rule.

III. STAKES AND SOLUTIONS

The foregoing discussion illuminates that the current state of vacatur doctrine in the en banc setting is out of step with the prevailing framework. This poses problems for judicial legitimacy and other judicial policy aims that *Bonner Mall* sought to promote, like protecting precedent. This Part explains these problems and offers a solution: a revision to the Federal Rules of Appellate Procedure that brings en banc vacatur in line with vacatur doctrine as a whole.

A. *Unexplained Departures from Bonner Mall’s Policy Priorities*

Despite the foregoing demonstration of *Bonner Mall*’s neat application to en banc decisions, courts have on the whole displayed little awareness of or interest in the topic and have taken inconsistent approaches to it, a tendency entrenched by local automatic-vacatur rules.²⁰⁵ The implications of this judicial inconsistency and silence come in two buckets. First is the harm to judicial legitimacy, resulting from sparse reasoning and the apparent influence of political preferences on vacatur outcomes. Second is that the policies to which *Bonner Mall* sought to give effect are undermined by courts’ failure to fully apply the doctrine.

203. See *supra* note 52.

204. See *supra* note 52.

205. See *supra* notes 115–122 and accompanying text.

1. Reasoned Decisionmaking and Judicial Legitimacy

The current judicial approach to en banc vacatur is riddled with inconsistency, confusion, and omitted reasoning—trends exacerbated by automatic-vacatur rules. In turn, the distinct lack of reasoning given in en banc vacatur decisions harms judicial legitimacy and credibility on the topic. This is particularly true when unexplained decisions appear politically motivated. Reasoned decisionmaking is an important function of judicial work. Scholarship on the importance of this practice has identified several of its “virtues,” including improved decisional quality, efficiency, consistency, accountability, constrained decisionmakers, and strengthened legitimacy.²⁰⁶ Recently, the Supreme Court’s “shadow docket”—its diet of cases decided summarily and without oral argument—has become a subject of public consternation in part because the Court does not explain most of its summary decisions.²⁰⁷ How courts decide when a case ought to be taken en banc has also drawn criticism for lack of reasoning.²⁰⁸ One proposal for disciplining the use of the en banc procedure regardless of mootness would have judges explain why a case is one of “exceptional importance” in an effort to give shape to the considerations referred to in that vague inquiry.²⁰⁹

Similarly, current vacatur doctrine violates the best practice of reasoned decisionmaking, which raises legitimacy concerns.²¹⁰ Recall Chief Justice Roberts’s umpire analogy.²¹¹ Judicial reasoning, like calling balls and strikes, facilitates trust in the adjudicative process because it explains differing outcomes. Without those calls, the contours of the inconsistency between cases like *Gary*

206. E.g., Ashley S. Deeks, *Secret Reason-Giving*, 129 YALE L.J. 612, 627–34 (2020); Merritt E. McAlister, “Downright Indifference”: Examining Unpublished Decisions in the Federal Courts of Appeals, 118 MICH. L. REV. 533, 583 (2020) (“[R]eason-giving shows litigants respect, allows for meaningful participation, and demonstrates the decisionmaker’s independence and trustworthiness.”).

207. See Mark Walsh, *The Supreme Court’s ‘Shadow Docket’ Is Drawing Increasing Scrutiny*, A.B.A. J. (Aug. 20, 2020, 8:20 AM), <https://www.abajournal.com/web/article/scotus-shadow-docket-draws-increasing-scrutiny> [perma.cc/FU3X-RCB7]; Steve Vladek, *The Supreme Court’s Most Partisan Decisions Are Flying Under the Radar*, SLATE (Aug. 11, 2020, 12:12 PM), <https://slate.com/news-and-politics/2020/08/supreme-court-shadow-docket.html> [perma.cc/8EXQ-Y6CW] (expressing concern with the uptick in unreasoned, highly divided cases decided during the Trump administration).

208. Solimine, *supra* note 85, at 60–61.

209. *Id.*

210. It may be true that a technical issue of this nature does not typically draw public concern. But when high profile cases like *Gary B.* and *Washington v. Trump* are at issue, as they often are when en banc review is involved, there is a heightened need to adhere to the letter of jurisdictional and procedural rules and provide reasons for deviating from possibly applicable precedents like *Bonner Mall*. See *Fialka-Feldman v. Oakland Univ. Bd. of Trs.*, 639 F.3d 711, 715 (6th Cir. 2011) (“Matters of great public interest are precisely the kinds of issues that demand the federal courts to be most vigilant in this area—vigilant that the powers they exercise are powers the Constitution gives them . . .”).

211. See *supra* note 28 and accompanying text.

B., *Veneman*, and *Washington v. Trump* are obscured, producing skepticism about judicial process and motives.

These legitimacy concerns are heightened when the unexplained decisions defy judicial common sense or otherwise hint at improper judicial motivation. In the context of the shadow docket, commentators have noted the Court's apparently politically motivated double standards in using the docket to reverse certain errors but not others,²¹² and its occasional disregard for jurisdictional constraints like mootness.²¹³ Both varieties of concerning outcomes exist in cases involving en banc vacatur. For one, judges' political leanings, as gauged by the party of their appointing President,²¹⁴ appear closely linked to the outcomes in cases like *Gary B.* and *Washington v. Trump*. In those two cases, the judges' positions on vacatur correlated with their views on the merits of highly contentious panel decisions with political ramifications.²¹⁵ This observation tracks with recent research noting a surge in political use of the en banc mechanism as a whole.²¹⁶

212. See, e.g., Will Baude, *The Supreme Court's Double Standard for Qualified Immunity Cases*, REASON: VOLOKH CONSPIRACY (Apr. 24, 2017, 2:06 PM), <https://reason.com/volokh/2017/04/24/the-supreme-courts-double-standard> [perma.cc/PUF7-KE4G] (observing asymmetry in the Court's willingness to grant summary reversal of erroneous grants of qualified immunity in comparison to erroneous denials of the same). As political tides have turned against qualified immunity, the court's asymmetric summary reversals have seemingly responded in kind. See Joanna Schwartz, *The Supreme Court Is Giving Lower Courts a Subtle Hint to Rein in Police Misconduct*, ATLANTIC (Mar. 4, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/the-supreme-courts-message-on-police-misconduct-is-changing/618193> [perma.cc/L93J-WE4H] (describing two recent qualified-immunity cases on the shadow docket that bucked the prior trend).

213. Dahlia Lithwick, *Amy Coney Barrett Is Already Putting Her Mark on the Supreme Court*, SLATE (Dec. 22, 2020, 11:52 AM), <https://slate.com/news-and-politics/2020/12/religious-liberty-supreme-court-amy-coney-barrett-coronavirus-shadow-docket.html> [perma.cc/EZP9-Q4FR] (noting with concern that many of the highly political cases regarding COVID-19 restrictions decided in favor of religious liberty on the Court's shadow docket were likely moot).

214. This is a common proxy indicator used by those doing empirical work on en banc review. E.g., Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. (forthcoming 2021) (manuscript at 5 n.12), <https://doi.org/10.2139/ssrn.3782576>.

215. The five judges who dissented in *Washington v. Trump* (Judges Kozinski, Bybee, Callahan, Bea, and Ikuta), calling for vacatur of a decision unfavorable to a Republican administration, were all Republican-appointed, while the two who penned concurrences (Judges Reinhardt and Berzon) were appointed by Democrats. In *Gary B.*, Michigan's Republican-led legislature moved to intervene to fight against the plaintiffs' educational equality claims. See Donahue, *supra* note 8. The Sixth Circuit took the case en banc, which triggered automatic vacatur of the plaintiffs' previous win. Although the vote tally on rehearing en banc was not reported, a majority of the judges on the Sixth Circuit are Republican-appointed. The picture is less clear in *Veneman*, where vacatur of a panel decision favorable to animal rights was at issue. While those in dissent from vacatur (Judges Thomas, Hawkins, McKeown, Wardlaw, Gould, and Fisher) were all Democrat-appointed, and those who wrote or joined the concurrence (Judges Bybee and Callahan) were both Republican-appointed, the en banc court was majority Democrat-appointed, so the pro-vacatur outcome demonstrates some straying from political lines, albeit in a less controversial case.

216. See Devins & Larsen, *supra* note 214 (manuscript at 8) (reporting empirical finding that a statistically significant spike in "partisan" en banc usage took place in 2018–2020).

Additionally, the current regime at times leads en banc courts to treat the district-court and panel opinions in a case inconsistently. In *Tafas*, for instance, the en banc court refused to vacate the district-court opinion, citing *Bonner Mall*, but allowed the panel's opinion in the case to remain vacated.²¹⁷ The panel partially reversed the district-court opinion,²¹⁸ yet the circuit allowed the district-court opinion to stand in spite of concerns about *its* validity²¹⁹ while disallowing the panel's opinion from having effect.²²⁰ The same thing occurred in *Gary B.*: the district court declined to recognize a fundamental right in the education realm, and that opinion stood following vacatur of the panel opinion.²²¹ That result created an appearance of political motivation on the part of the en banc court because it aligned with the preferences of the Michigan legislature's conservatives.²²² These outcomes, largely unsupported by judicial reasoning, inspire confidence neither in the accuracy of these courts' decisions nor in their impartiality.

2. Upholding *Bonner Mall*'s Protections for Precedent

Another problematic result of inconsistent application of *Bonner Mall* in the en banc setting is failure to uphold the policy ends prioritized by *Bonner Mall*: preserving precedent and preventing its manipulation by litigants. Because *Bonner Mall* has not been uniformly applied to cases mooted pending en banc review, precedential decisions can be eliminated if the parties choose to settle while en banc review is still possible.²²³ This subverts the goal of *Bonner Mall* by creating a clear path for litigants to eradicate precedent.

Further, *Bonner Mall* stated that no exception to the no-vacatur rule exists when the parties agree to vacatur in the settlement, a practice sometimes called "consensual vacatur."²²⁴ In the debate over the benefits of consensual vacatur as an incentive to settle, *Bonner Mall* took a stance against private parties using settlement to manipulate precedential law.²²⁵ Thus, failing to enforce the *Bonner*

217. *Tafas v. Kappos*, 586 F.3d 1369, 1371 (Fed. Cir. 2009) (en banc).

218. *Tafas v. Doll*, 559 F.3d 1345, 1364 (Fed. Cir.), *vacated en banc*, 328 F. App'x 658 (Fed. Cir. 2009).

219. *Id.* at 1359.

220. In *Staley v. Harris County*, a procedurally similar case, the court explicitly cited the fact that the panel had affirmed the district court in its decision not to vacate the district-court opinion, showing awareness of the incongruity of vacating a panel decision while refusing to vacate the district-court opinion. 485 F.3d 305, 313 (5th Cir. 2007) (en banc).

221. *Gary B. v. Snyder*, 329 F. Supp. 3d 344, 366 (E.D. Mich. 2018), *aff'd in part, rev'd in part sub nom.* *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020) (dismissing the case without reinstating the panel opinion or vacating the district-court opinion).

222. See *supra* note 215.

223. See *supra* Section I.D (describing the different procedural scenarios).

224. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26, 29 (1994) (making clear that precedent is not the "property" of the litigants).

225. On one side of this debate are those who assert that consensual vacatur allows rich, repeat litigants to systematically "buy" vacatur of adverse opinions, thus distorting the shape of

Mall rule in cases mooted pending en banc review undermines the Court's effort to prevent parties from using vacatur to shape precedent in their favor.

Even those who would object to *Bonner Mall*'s position on consensual vacatur because it may discourage settlement should not be in favor of the current approach. Unresolved doctrine itself inhibits settlement because uncertainty about outcomes often results in the parties valuing the claim differently, making it less likely they will reach a mutually satisfactory agreement.²²⁶ The paucity of guidance regarding en banc vacatur prevents the parties from calculating risks associated with various settlement strategies.

Consider the settlement situation in *Gary B.* Assuming the defendants preferred vacatur of the panel opinion and the plaintiffs did not, the plaintiffs might have been convinced to compromise on certain demands in exchange for a speedy resolution which would avoid the automatic-vacatur order accompanying the circuit's decision to take the case up en banc. But the law is unclear on whether that automatic-vacatur order must be reversed when settlement-related mootness subsequently arises. Given the uncertainty, the parties may take divergent views of the law, thus valuing a swift settlement differently and creating a barrier to mutual agreement.

Additionally, if courts resolved the current inconsistency by agreeing that *Bonner Mall* does not apply to en banc review, that doctrinal anomaly would still exacerbate the problem of parties manipulating precedent. Parties seeking to effect a consensual vacatur would know to settle after panel disposition but before en banc disposition, as the contexts in which *Bonner Mall* applies do not allow for such agreements. And sophisticated litigants might catch their adversaries unaware by settling after petitioning for en banc review, securing vacatur without mutual consent to that outcome. Worse, a party could obtain vacatur without settling by carrying out the court's order. For instance, a party could pay what they owe based on the judgment or drop criminal charges, thereby mooting the case before the mandate issues.²²⁷ Consequently, litigants

the law in their favor. On the other are those who argue that consensual vacatur promotes settlement—a desirable and efficient outcome—by acting as a valuable bargaining chip. For overviews and various perspectives, see Tulumello, *supra* note 37, at 217–22; Fisch, *supra* note 17, at 332–60; Resnik, *supra* note 139; Eugene R. Anderson, Mark Garbowski & Daniel J. Healy, *Out of the Frying Pan and into the Fire: The Emergence of Depublication in the Wake of Vacatur*, 4 J. APP. PRAC. & PROCESS 475 (2002). The efficiency of the practice is also contested, as consensual vacatur would seem to disincentivize settling before trial because the parties might view adverse precedent as avoidable via settlement later on. Fisch, *supra* note 17, at 337.

226. Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 875–77 (2007).

227. This concern was the basis of a Ninth Circuit panel's reluctance to vacate its own decision when mootness arose prior to issuance of the mandate. See *United States v. Payton*, 593 F.3d 881, 883 (9th Cir. 2010); see also *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 163–64 (2016) (citing cases where defendants successfully mooted claims unilaterally by paying the unpaid taxes at issue in the case).

would be incentivized to file petitions for en banc review more frequently, a result contrary to efficiency aims.²²⁸

Judicial inconsistency and silence regarding *Bonner Mall*'s role in en banc review creates efficiency problems, opportunities for parties to manipulate precedent, and situations in which court actions appear politically motivated or otherwise suspect. Ultimately, this harms judicial legitimacy. Considered in combination with the argument laid out in Part II that en banc review does not meaningfully differ from other appellate contexts, these conclusions counsel in favor of adopting a clear rule—specifically, the *Bonner Mall* rule.

B. Revisions to Rule 35 and Other Alternatives

The solution to this little-discussed doctrinal problem appears relatively simple: courts should recognize the limitations of *Bonner Mall* when vacating a panel decision pending en banc review. This Section proposes a revision to Federal Rule of Appellate Procedure 35 that would facilitate this change. This revision is preferable to an alternative reform—recognizing vacated opinions as precedential—because that proposal would dilute the force of vacatur where it is deployed as a useful and legitimate equitable remedy.

This Note proposes adding a subsection to Federal Rule of Appellate Procedure 35²²⁹ that would read as follows:

Where settlement or unilateral action of the losing party moots a case before issuance of the mandate, whether an en banc petition has not been filed, is pending, was rejected, or en banc rehearing has already been ordered but not completed, the court shall not vacate the panel's decision unless extraordinary circumstances demand it. If the court previously vacated the panel's decision in anticipation of en banc rehearing, the court shall reinstate it unless extraordinary circumstances demand otherwise.

This proposal mirrors the rule set out in *Bonner Mall* instead of simply referencing it, because the case only directly addresses settlement and not other types of unilateral mootness.²³⁰ The rule is written to cover all manner of procedural scenarios pending en banc review, reflecting Section II.B's contention that the arguments distinguishing certain procedural postures are not persuasive. It is specific and directive rather than simply requiring judicial reasoning on en banc vacatur because such an approach would likely result in slower and less complete reform.²³¹

228. Circuits are already inundated with en banc petitions, to the displeasure of circuit judges. See Arnold, *supra* note 76, at 29.

229. As previously noted, the Appellate Rules Committee is currently considering abrogating Rule 35 and moving its contents to Rule 40. ADVISORY COMM. ON APP. RULES, *supra* note 147, at 125–31. This change may serve as an opportunity to adjust Rule 35 according to my proposal.

230. See *supra* notes 51–52 and accompanying text.

231. One reason for this is that certain factual scenarios implicating the doctrine rarely arise. Vacatur of cases mooted pending en banc disposition is particularly uncommon given the rarity of en banc review itself. See *supra* note 133.

The proposed language does not require circuits to abandon automatic vacatur. The practice of automatic vacatur is of questionable validity because it is unclear what injustice it remedies.²³² But it does not on its own cause problems related to reasoned decisionmaking or judicial legitimacy because courts can reinstate vacated panel decisions.²³³ As such, only post-mootness automatic vacatur, as in *Gary B.*, would be barred by the new rule. However, automatic vacatur *before* mootness arises would be treated as temporary, as the rule instructs courts to reinstate vacated precedent once mootness comes about. This approach comports with the assumption underlying automatic vacatur, namely that the panel decision will be replaced with an en banc one.²³⁴ When that assumption no longer holds, the vacatur should be reversed in keeping with the interest in preserving precedent.

The Rule 35 revision this Note proposes is preferable to another possible reform—elevating the precedential value of vacated opinions—that holds some appeal but is ultimately flawed. According to black letter law, vacated decisions have absolutely no precedential value.²³⁵ Yet vacated cases are regularly cited for their persuasive value, just as district-court opinions or scholarly articles are.²³⁶ In fact, empirical work has suggested that citation to vacated cases has increased in recent years.²³⁷ Some contend that, in light of this development, one way to satisfy *Bonner Mall's* insistence on preserving precedent is to reconsider or redefine what is precedential and legitimize citations to cases vacated pending en banc review. The authors of *Federal Practice and Procedure* have endorsed this approach as a promising workaround by noting the distinction between vacating a judgment and an opinion.²³⁸

232. See *supra* note 37 and accompanying text.

233. One could argue that automatic vacatur prevents citation to likely erroneous decisions in the interim between panel and en banc determinations. But because similar concerns about premature citation govern when certiorari is granted but the Court has not yet ruled, and are likely offset by professional norms regarding notation of case status in any case, it is difficult to see why this would merit such a drastic response in the en banc context. See Sullivan, *supra* note 57, at 1187–96 (investigating prevalence of citation to vacated decisions by searching for the term “vacated on other grounds” on Lexis).

234. See *Animal Legal Def. Fund v. Veneman*, 490 F.3d 725, 734 (9th Cir. 2007) (en banc) (Thomas, J., dissenting) (explaining the assumption that an automatically vacated panel decision will be replaced).

235. See *County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979) (“Of necessity our decision ‘vacating the judgment of the Court of Appeals deprives that court’s opinion of precedential effect . . .’” (quoting *O’Connor v. Donaldson*, 422 U.S. 563, 578 n.12 (1975) (Burger, C.J., concurring))); Fisch, *supra* note 17, at 330.

236. Michael D. Moberly, *This Is Unprecedented: Examining the Impact of Vacated State Appellate Court Opinions*, 13 J. APP. PRAC. & PROCESS 231, 233 & n.17, 243 n.72, 251 n.138, 253–57 (2012).

237. See Sullivan, *supra* note 57, at 1188–90.

238. WRIGHT ET AL., *supra* note 183 (“To the extent that courts are worried about preserving the precedential value of an opinion, they need only decide that the precedential weight of an opinion rendered on deciding a still-living case is not undercut by subsequent vacation of the judgment upon settlement.”).

To be sure, elevating the precedential status of vacated opinions would promote certain efficiencies. Encouraging citation to such cases would make use of the courts' work in writing the vacated opinions and would add to the body of judicial reasoning future courts may call on in resolving legal questions.²³⁹ Similar claims are made about citation to district-court opinions, which is said to stimulate fulsome judicial discussion and promote consistency and legitimacy.²⁴⁰

Despite these advantages, the reform would be problematic because it would make vacatur a less effective equitable remedy in some contexts. Vacatur addresses a valid fairness issue by eradicating the precedential effects of a case when a party had no control over the mootness that prevented further appeal.²⁴¹ Allowing unfettered citation to vacated opinions would undercut the *Munsingwear* doctrine by rendering vacatur meaningless. Although carving out *Bonner Mall* cases for this treatment might counteract that outcome, it would be nearly impossible to decipher why a given opinion was vacated because courts currently do not explain the basis for vacatur.²⁴² Thus, no workable method of elevating only certain vacated opinions is available.

Additionally, any efficiencies from adopting the precedential-status approach would be outweighed by the inefficiencies it would likely produce. The potential difficulties are illustrated by the uncertain precedential value of unpublished opinions. Because nonbinding appellate opinions may diverge from binding case law, citing those nonbinding opinions as persuasive precedent can create doctrinal inconsistency.²⁴³ Such divergences create litigant uncertainty about the legal merits of a case, which tends to result in fewer settlements.²⁴⁴ So too, citation to vacated opinions may cause may cause inconsistency to proliferate in circuit law, increasing confusion and discouraging settlement. Additionally, the profession is already prone to misusing nonbinding precedent by analogizing badly and overstating the weight of the

239. While one might counter that simply allowing citation to vacated opinions as persuasive precedent does not restore the binding precedential status of the opinion, binding and persuasive precedent are not entirely distinct categories but points on a spectrum of judicial deference to preceding legal reasoning. Fisch, *supra* note 17, at 346–47. On this account, because binding precedent may nevertheless be distinguished or narrowed to its facts, the true value of precedent is in its persuasive content. Promoting citation to vacated cases would restore their ability to persuade, just as binding cases do.

240. Gardner, *supra* note 58, at 1624 (“There are good reasons for such citations [to non-binding precedents], including judicial economy, epistemic development, consistency, legitimacy, and the development of peer relationships.”).

241. See *supra* notes 42–43 and accompanying text.

242. See Lewis, *supra* note 38, at 887.

243. Ricks, *supra* note 58, at 222 (“While issuing nonprecedential opinions is often defended on efficiency grounds, doctrinal inconsistency between a circuit’s precedential and nonprecedential opinions undercuts that rationale because doctrinal divergences may lead plaintiffs and defendants to value cases differently—potentially leading to more litigation, fewer settlements, and additional adjudication.”).

244. See *supra* note 226 and accompanying text.

authority.²⁴⁵ By allowing citation to vacated opinions with murky authoritative status, the precedential-status reform would compound that tendency and further muddle the law.

In sum, this Note's proposal is the most promising reform because it gives courts an explicit rule to follow. Instead of creating a workaround that would produce only confusion, this reform would immediately clarify the applicability of *Bonner Mall* and impose its limitations on en banc vacatur.

CONCLUSION

The remedial effects of vacatur are reserved for situations involving private injustice or harm to the public, a set of cases that does not typically include those mooted due to settlement pending appeal or en banc review. Mixed judicial stances on en banc vacatur are unjustified by the existent distinguishing arguments and artificially perpetuated by local automatic-vacatur rules. The Federal Rules of Appellate Procedure can be amended to give clear guidance against vacating cases that are mooted by settlement while en banc review is pending. Such a reform would preserve the precedential status of important panel opinions and promote associated policy aims. It would also bolster judicial legitimacy by removing the appearance of unreasoned and politically motivated decisionmaking. In highly political cases like *Gary B.* and *Washington v. Trump*, courts must have clear doctrinal guidelines to keep judicial work tied to the relevant legal considerations rather than unrelated political commitments. Revising Rule 35 to affirm that en banc vacatur is more than mere judicial housekeeping would represent a step in that direction.

245. See Gardner, *supra* note 58, at 1624–25.