

# THE MAJORITY THAT WASN'T: STARE DECISIS, MAJORITY RULE, AND THE MISCHIEF OF QUORUM REQUIREMENTS

*Jonathan Remy Nash*\*

## ABSTRACT

*In this Article, I consider the question of precedential value in settings in which a case is decided by a majority of judges hearing a case but less than a majority of judges authorized to decide the case—a situation I refer to as a “minority majority.” In analyzing the question of treatment of minority majorities, the Article makes three broad contributions to the literature. First, it disaggregates the requirements that undergird the notion that a court opinion receive precedential effect into three categories: quorum requirements, action requirements, and voting rule requirements. The Article’s second broad contribution is its normative analysis of the precedent question. The Article identifies two categories of plausible responses to the problem. First, one might increase the stringency of the requirements that fall under the first two categories—that is, quorum and action requirements—in order to minimize possible minority-majority cases. Second, one might address the problem by varying the precedential effect of cases decided by minority majorities. Specifically, one might accord them “full” precedential effect, no precedential effect, narrow precedential effect, or limited precedential effect. The Article argues for having lower courts afford narrow and limited precedential effect to minority-majority decisions issued by higher courts. It also calls for further examination of the underexplored option of*

---

\* Professor of Law, Emory University School of Law. The author was Visiting Professor of Law at the University of Chicago Law School for the 2007–2008 academic year, and until 2008 was Robert C. Cudd Professor of Environmental Law at Tulane Law School.

For helpful discussions and suggestions, I am grateful to Adeno Addis, Michael Collins, Onnig Dombalagian, Michael Eber, Lee Fennell, Jacob Gersen, Clifford Goodstein, Samuel Jordan, Saul Levmore, John McGinnis, Rafael Pardo, Eric Posner, Gerald Rosenberg, Jed Handelsman Shugerman, Maxwell Stearns, and Seth Barrett Tillman. I also benefited from comments I received from participants at a presentation at the annual meeting of the Canadian Law and Economics Association, from participants at a faculty workshop at Tulane Law School, and from participants in a seminar on “Courts, Judges, and Voting” at the University of Chicago Law School during the fall 2007 quarter. Kenneth Leonczyk, Brandon Morris, and Raymond Waid provided excellent research assistance.

*having minority-majority decisions issued by a court not subsequently bind that court at all. The third contribution that the Article makes is to use the discussion of the normative question to shed light on broader issues. These include the legitimacy of courts; the relationship between legitimacy and stare decisis; the proper breadth of court opinions and holdings; questions of institutional choice as to who should decide how these questions are resolved; and the importance of judicial minimalism.*

INTRODUCTION .....	832
I. MAJORITY RULE, QUORUM REQUIREMENTS, AND THEIR INTERPLAY .....	838
A. <i>Threshold Requirements to Issuing a Decision</i> .....	838
1. <i>Quorum Requirements</i> .....	839
2. <i>Requirements to Take Actions with Respect to Cases</i> .....	846
B. <i>Voting Rule Requirements</i> .....	849
1. <i>Resolution of Cases</i> .....	850
2. <i>Requirements for Stare Decisis Effect</i> .....	854
II. MINORITY MAJORITIES .....	859
A. <i>Understanding the Problem</i> .....	859
B. <i>Solving the Minority-Majority Problem</i> .....	869
C. <i>The Normative Question: What to Do About Minority-Majority Cases</i> .....	874
D. <i>Institutional Choice</i> .....	886
CONCLUSION .....	887

## INTRODUCTION

Consider the following situation: Two of nine Justices do not hear or vote upon the disposition of a case pending before the United States Supreme Court (because of illness, recusal, or vacancies on the Court). In accordance with the governing statute,<sup>1</sup> the case is decided by a properly constituted quorum of seven Justices,<sup>1</sup> with four Justices constituting a majority. How much precedential value should accrue to the Court's decision?

---

<sup>1</sup> 28 U.S.C. § 1 (2006) ("The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.").

Courts have differed in their answers to this question. Consider the views of a state supreme court, and subsequently the Supreme Court itself, with respect to the Supreme Court's 1972 decision in *Fuentes v. Shevin*.<sup>2</sup> There, the Court held unconstitutional Florida and Pennsylvania statutes that authorized repossession by creditors of sold goods without judicial order, approval, or participation.<sup>3</sup> The case was decided with only seven Justices participating.<sup>4</sup> The majority opinion attracted a mere four Justices; three Justices dissented.<sup>5</sup>

Later that year, the Arizona Supreme Court declined to follow *Fuentes*.<sup>6</sup> The majority explained that it was "reluctant to declare unconstitutional Arizona statutes based upon a decision by less than a clear majority."<sup>7</sup>

<sup>2</sup> 407 U.S. 67 (1972).

<sup>3</sup> *Id.* at 96–97.

<sup>4</sup> Justices Powell and Rehnquist had yet to take their seats when *Fuentes* was argued, and neither participated in the consideration or resolution of the case. *Id.* at 97; *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 635 n.8 (1974) (Stewart, J., dissenting).

<sup>5</sup> The majority opinion was authored by Justice Stewart and joined by Justices Douglas, Brennan, and Marshall. Justice White's dissent was joined by Chief Justice Burger and Justice Blackmun. *Fuentes*, 407 U.S. at 97 (White, J., dissenting).

<sup>6</sup> See *Roofing Wholesale Co. v. Palmer*, 502 P.2d 1327, 1329–30 (Ariz. 1972) (expressing reluctance to follow Supreme Court precedent when there are doubts as to whether an opinion would stand if the full Court had heard the case).

<sup>7</sup> *Id.* More broadly, the state supreme court majority explained:

The petitioner . . . asserts that because two justices did not participate in this opinion the four man opinion is clearly not a majority opinion, is advisory only, and therefore not binding upon this court. Admittedly, were we convinced that the four man majority of the United States Supreme Court in *Fuentes* would become at least a five man majority when the two judges who did not participate in the particular case are called up to participate in a similar question, we would then be inclined to follow the decision as set down in *Fuentes*. When, however, we have doubts that once the full court hears the case that the opinion will stand, we are reluctant to declare unconstitutional Arizona statutes based upon a decision by less than a clear majority.

*Id.* (internal citations omitted).

The court proceeded to uphold the state statute at issue, despite *Fuentes*, explaining:

We do not believe . . . that it is unreasonable to ask that before we are required to declare unconstitutional statutes enacted by our legislature with the resulting chaos to an important part of our commercial and contract law, that the United States Supreme Court speak with at least a majority voice on the subject.

*Id.* at 1331; see also *id.* (Hays, C.J., concurring) ("In this case, we really ask for a clearer command [from the U.S. Supreme Court] before we declare an established law of our state unconstitutional and disrupt the business and legal practices of our community.").

Compare *State ex rel. Williams v. Berrey*, 492 S.W.2d 731, 736 (Mo. 1973) (Seiler, J., concurring in result) ("[I]n my opinion, we are bound by *Fuentes v. Shevin*. Its force as a final and binding decision of the Supreme Court of the United States is not lessened by its being handed down by seven justices instead of nine."), with *id.* at 737 (Henley, J., dissenting) ("The principal opinion relies in part upon *Fuentes*, thus indicating that that case is binding on this court. I am not satisfied that we are bound by it. *Fuentes* was

In 1974, two years after *Fuentes*, the Supreme Court in *Mitchell v. W.T. Grant Co.* again considered the constitutionality of a state statute that authorized repossession by creditors of sold property.<sup>8</sup> This time, five Justices voted to uphold the constitutionality of the Louisiana statute at issue; four Justices dissented.<sup>9</sup>

The Court in *Mitchell* did *not* suggest that the fact that *Fuentes* was decided by merely a four-Justice majority rendered it either a nullity for stare decisis purposes, or even less of a precedent. Rather, the Court distinguished *Fuentes* factually and legally, relying substantially on the fact that the Louisiana statute called for greater judicial involvement than had the Florida and Pennsylvania statutes invalidated in *Fuentes*.<sup>10</sup>

---

decided by seven of the nine judges of that court, with only four, less than a majority of all judges constituting that court, joining in the decision, and three dissenting therefrom. . . . The Supreme Court of Arizona recently declined to follow *Fuentes* . . . . I agree fully with what was said by the Supreme Court of Arizona and the concurring opinion of its Chief Justice.”)

<sup>8</sup> 416 U.S. 600 (1974).

<sup>9</sup> Justice White, who had written the dissent in *Fuentes*, wrote the majority opinion in *Mitchell*; Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist joined the majority opinion. Justice Stewart, who had written the majority opinion in *Fuentes*, dissented. Justices Douglas and Marshall joined Justice Stewart’s dissent. Justice Brennan wrote simply that the Court’s opinion in *Fuentes* “requires reversal of the judgment of the Supreme Court of Louisiana,” which had upheld the state statute against constitutional challenge. *Id.* at 636 (Brennan, J., dissenting).

<sup>10</sup> *See id.* at 615–18 (majority opinion) (distinguishing the result from *Fuentes*).

Justice Powell, concurring, concluded that *Mitchell* in fact overruled *Fuentes*. *Id.* at 623 (Powell, J., concurring). He did not, however, suggest that *Fuentes* was more susceptible to overruling because the majority there numbered only four. Rather, he stated that “[n]arrower grounds existed for invalidating the replevin statutes” in *Fuentes*, *id.* at 624, and proceeded to elucidate differences between the Florida and Pennsylvania statutes in *Fuentes* and the Louisiana statute in *Mitchell*. *Id.* at 625–27.

Beneath the surface, one might discover some suggestions on the part of the majority that *Fuentes* was not entitled to “full” stare decisis effect. For example, the *Mitchell* majority noted that earlier cases approving prejudgment attachment without notice, hearing, or judicial order had been approved by the Court “unanimously,” *id.* at 613 (majority opinion), and that a state supreme court case to that effect had been affirmed by the Court “without opinion.” *Id.* at 614. If they are relevant at all, however, these emphases by the majority in *Mitchell* tend to suggest that if *Fuentes* was entitled to less precedential effect than usual, it was not because it attracted only four majority votes, but rather because earlier precedent to the contrary was well-settled and widely supported, while the recent precedent (including, presumably, cases other than *Fuentes*) had been decided by more closely divided votes.

It is only Justice Stewart’s dissenting opinion, written on behalf of himself and two of the other three dissenting Justices, which suggests otherwise. Like Justice Powell, Justice Stewart asserted that the majority had overruled *Fuentes*. *Id.* at 635 (Stewart, J., dissenting). Finding no jurisprudential justification for overruling the two-year-old decision, Justice Stewart commented that the “only perceivable change that has occurred since *Fuentes* is in the makeup of this Court.” *Id.*; *see id.* at 635 n.8 (“Although Mr. Justice Powell and Mr. Justice Rehnquist were Members of the Court at the time that *Fuentes v. Shevin* was announced, they were not Members of the Court when that case was argued, and they did not participate in its ‘consideration or decision.’” (quoting *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972))).

The approach taken by the Court in *Mitchell*—that a decision rendered by a four-Justice majority is no different on that ground from any other majority decision—was not always the approach used by the Court. In the 1870s *Legal Tender Cases*,<sup>11</sup> the Court declined to follow its earlier decision in *Hepburn v. Griswold*<sup>12</sup>—decided only the previous Term—at least in part on the ground that it had been “decided by a divided court, and by a court having a less number of judges than the law then in existence provided this court shall have.”<sup>13</sup> Earlier still in the eighteenth century, the Court avoided the issue by refusing to decide cases on constitutional matters when less than a majority of the whole Court would concur in a dispositive opinion.<sup>14</sup> And, several years after *Mitchell*, Justice Stevens concurred in a majority opinion that distinguished an earlier 4–3 decision by the Court, explaining that “[b]ecause only four Justices . . . joined the [earlier] opinion, I do not believe it should be read as having made a substantial change in settled law.”<sup>15</sup>

In this Article, I consider the question of precedential value in settings, such as these, in which a case is decided by a majority of judges hearing a case but less than a majority of judges authorized to decide the case<sup>16</sup>—a situation I refer to as a “minority majority.” While it might be said that minority majorities may in fact occur under relatively limited circumstances,<sup>17</sup> the issue remains of substantial importance. For one thing, multiple health-related absences and vacancies on courts<sup>18</sup> may take place in fits and spurts.<sup>19</sup>

---

<sup>11</sup> 79 U.S. (12 Wall.) 457 (1870).

<sup>12</sup> 75 U.S. (8 Wall.) 603 (1869).

<sup>13</sup> *Legal Tender Cases*, 79 U.S. (12 Wall.) at 553–54.

<sup>14</sup> See *infra* notes 59–60 and accompanying text (regarding quorum requirements in cases with constitutional issues).

<sup>15</sup> *Montana v. United States*, 450 U.S. 544, 568 (1981) (Stevens, J., concurring); see *infra* text accompanying note 164 (regarding number of presiding Justices and constitutional decisions).

<sup>16</sup> In the case where the court sits en banc (as opposed to in panels composed of fewer than all the judges on the court), this reduces simply to the situation in which the cases are decided by a majority of judges sitting, but less than a majority of seats on the court.

<sup>17</sup> The problem may arise only in cases in which not all the judges authorized to sit on the court are called upon to render a decision and, on most courts, will involve a deficit of at least two judges. In this sense, the problem may arise only in limited circumstances.

<sup>18</sup> In contrast, recusals may be relatively uncommon (especially recusal of two judges)—perhaps precisely because judges are aware of the risks to the judicial institution that may result from recusal. See, e.g., Ryan Black & Lee Epstein, *Recusals and the “Problem” of an Equally Divided Supreme Court*, 7 J. APP. PRAC. & PROCESS 75, 84–94 (2005) (arguing that U.S. Supreme Court Justices are loathe to recuse themselves because of the risk that the remaining eight Justices will split evenly on an outcome, and showing that recusal rates have declined over time); cf. Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657, 661–65 (1996) (arguing that the disqualification of a single Justice significantly decreases the chance that four votes can be had to grant certiorari). Professors Black and Epstein conclude not that equally divided Court determinations are unproblematic, but rather that the problem is

Especially given the low number of cases on the Supreme Court's docket<sup>20</sup> and the difficulty in predicting which cases may loom large in the future as precedent,<sup>21</sup> the question raised by the precedential value of decisions decided by a minority majority is larger than the statistical frequency with which such cases occur. Further, the problem can arise on lower courts as well as high courts, and in state judiciaries as well as the federal judiciary. Moreover, commentators have recently noted that increases in the risk of terror-related attacks may render the government in general<sup>22</sup>—and courts in particular<sup>23</sup>—with fewer personnel than normal for extended periods of time. Beyond this, the issues of what constitutes a court, and what representation of court

---

cabined because recusals are relatively infrequent. Black & Epstein, *supra*, at 87–93; *see also* Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913, 915–16 (2004) (memorandum of Scalia, J.) (declining to recuse himself, in part because of the risk that his recusal could result in an equally divided Court).

<sup>19</sup> *See* Roofing Wholesale Co. v. Palmer, 502 P.2d 1327, 1332 (Ariz. 1972) (Struckmeyer, J., dissenting) (“During the same term, October 1971, that *Fuentes v. Shevin*, was handed down, eleven other opinions of the United States Supreme Court were decided by a four-member majority.” (internal citations omitted)).

Consider also the close proximity in time between Justice O'Connor's retirement announcement and the passing of Chief Justice Rehnquist. Justice O'Connor ultimately agreed to remain on the Court until her replacement was confirmed. *See* David D. Kirkpatrick, *Bush to Meet with Senators over Second Vacancy on Court*, N.Y. TIMES, Sept. 17, 2005, at A1.

<sup>20</sup> *See, e.g.*, Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1368 (2006) (“[T]he Supreme Court's docket has shrunk from 146 signed opinions during Chief Justice Rehnquist's first year occupying the Court's center seat to just 74 signed opinions during his final year.”); Erwin Chemerinsky, *The Incredible Shrinking Docket*, TRIAL, Mar. 2007, at 64 (“Last year, the Supreme Court issued only 69 decisions with signed opinions—the smallest number it has produced since before the Civil War. This year, the Court will decide even fewer cases . . . . In the 1980s, the Court was regularly deciding 150 cases a year. During its 1991 October term, the Court issued 117 signed opinions. Now it's deciding half that number.”).

<sup>21</sup> Among the cases decided by a 4–3 vote during the same 1971 Term as *Fuentes* (with Justices Powell and Rehnquist again not participating) was *Sierra Club v. Morton*, 405 U.S. 727 (1972), a major case on the question of federal court standing. *See also* Roofing Wholesale Co., 502 P.2d at 1332 (Struckmeyer, J., dissenting) (“In 1920, the leading case of *United States v. United States Steel Corp.*, 251 U.S. 417, was decided by a four-member majority.” (internal citations omitted)); Paul Carrington, *The Supreme Court: The Problem of Minority Decisions*, 44 A.B.A. J. 137, 137 (1958) (identifying nineteen cases “during the last eight terms of the Supreme Court . . . [in which] decisions were reached with opinions rendered, . . . less than nine Justices participated and those Justices who did participate were evenly or almost evenly divided,” and noting that “[t]hese nineteen cases involved many highly important precedent-creating issues”).

<sup>22</sup> *See, e.g.*, Lloyd N. Cutler, *The Continuity of Government*, 53 CATH. U. L. REV. 943 (2004); Paul Taylor, *Proposals to Prevent Discontinuity in Government and Preserve the Right to Elected Representation*, 54 SYRACUSE L. REV. 435, 447–55 (2004); John Bryan Williams, *How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress*, 48 WM. & MARY L. REV. 1025 (2006).

<sup>23</sup> *See* Randolph Moss & Edward Siskel, *The Least Vulnerable Branch: Ensuring the Continuity of the Supreme Court*, 53 CATH. U. L. REV. 1015, 1019–28 (2004) (arguing that, while numerous vacancies on the Court alone might be tolerable for some period of time, the risk that a terrorist attack might debilitate the Senate, the Executive branch, or both is very real, and might leave the country without a functioning Court for an extended period).

membership is necessary to bind later panels of the court and lower courts, go directly to fundamental questions of judicial legitimacy itself.

In analyzing the question of treatment of minority majorities, the Article makes three broad contributions to the literature. First, the Article disaggregates the requirements that undergird the notion that a court opinion receive precedential effect. The first category of requirements consists of quorum requirements. A quorum requirement answers the question of how many judges are necessary for the court, officially, to take any action at all. The second category consists of prerequisites for the court to take certain actions—which I shall refer to as “action requirements.” An example is the requirement, discussed above and applied by the Supreme Court in the early eighteenth century, that at least a majority of the whole Court concurs in a decision on a constitutional matter before an opinion could issue. A modern example is the “rule of four,” which the Court employs to decide whether to grant certiorari petitions. The last two categories of requirements consist of rules governing when, and to what extent, a court opinion counts as the opinion of the court, and is entitled to precedential effect. These requirements generally reduce to simple “majority rule,” although with some important wrinkles, as we shall see below.

The Article’s second broad contribution is its normative analysis of the precedent question. The Article identifies two categories of plausible responses to the problem. First, one might increase the stringency of the requirements that fall under the first two categories—that is, quorum and action requirements—in order to minimize the frequency of minority-majority cases. A second, more workable option is to address the problem by varying the precedential effect of cases decided by minority majorities. Specifically, one might accord them full precedential effect, no precedential effect, narrow precedential effect, or limited precedential effect. Here, the Article argues that minority-majority decisions should be given narrow and limited precedential weight. It also argues that the notion of having a court give its own earlier minority-majority decisions no weight is undervalued and underexplored.

The third contribution the Article makes is to use the discussion of the normative question on broader issues. These include the legitimacy of courts; the relationship between legitimacy and *stare decisis*; the proper breadth of court opinions and holdings; questions of institutional choice as to who should decide how these questions are resolved; and the importance of judicial minimalism.

Part I of the Article elucidates the four categories of requirements that underlie the ultimate question of whether, and to what extent, a court's decision is entitled to precedential effect. Part II turns to the setting of minority majorities. It explains why minority-majority decisions may be problematic and describes various responses to the problem. It then provides a normative analysis of how best to deal with minority-majority decisions. It concludes with a discussion of institutional choice in the setting of minority-majority decisions.

## I. MAJORITY RULE, QUORUM REQUIREMENTS, AND THEIR INTERPLAY

In this Part, I unpack the process by which a court generates precedent. In section A, I consider the threshold requirements that must be cleared before a court may decide a case and issue an opinion. In section B, I turn to the question of the applicable voting rule, deciding cases, and the precedential effects of those decisions.

### A. *Threshold Requirements to Issuing a Decision*

To understand exactly how courts operate and create precedent, it is helpful to identify two threshold questions:

(1) What is the minimum requirement for the court to transact business?

(2) What is the minimum requirement for the court to act, e.g., to issue a decision?

The answers to these questions vary among court systems, and often over time even within a court system.<sup>24</sup> Additionally, these answers are sometimes found in constitutions and statutes, and sometimes are not written but are derived from the common law or are otherwise judicially created. That said, it is possible to summarize the general categories of requirements that respond to each question.

---

<sup>24</sup> For example, Table 1 *infra* sets out the quorum requirements that Congress has established for the Supreme Court over time. *But cf.* Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154, 1155 (2006) ("The constitutional and statutory rules governing the Court—the number of its members, their terms of tenure, the voting and quorum rules that govern their actions, and so on—have in most cases remained unchanged, at least since Reconstruction, and in some cases since the first Judiciary Act of 1789.").

Essentially, the quorum is the minimum number of judges required for the court legally to “transact business.” Many court systems impose no additional requirement beyond the quorum requirement for courts to issue decisions. Some, however, impose a requirement that a minimum number of judges concur in a decision, and some impose such a requirement for decisions that fall into a particular subject matter. I refer to such requirements as “action requirements.” I explore each of these questions, and responses, in turn in the following subsections.

### 1. *Quorum Requirements*

The size of courts—and the number of judges who are to sit as panels of the court—is set by constitution, statute,<sup>25</sup> or some combination thereof. As a general matter, all the judges of a court will hear a case.<sup>26</sup> It may happen, however, that a judge’s health or other personal situation precludes a judge from hearing a case. Alternatively, judges may recuse themselves from hearing and deciding cases, and political machinations may produce prolonged court vacancies. This raises the question of the minimum number of judges who may transact business (e.g., to hear cases or to decide which cases to hear) for the court.

Absent some sort of minimum quorum requirement, it would seem that a single judge conceivably could render judgment for an entire court.<sup>27</sup> Quorum

---

<sup>25</sup> *E.g.*, 28 U.S.C. § 1 (2006) (setting the current size of the U.S. Supreme Court at nine: one Chief Justice and eight Associate Justices).

<sup>26</sup> Some courts may sit in panels, in which case the number of judges who sit on the panel is set. *E.g.*, *id.* § 46(b).

<sup>27</sup> Because of the quorum requirement, a single Justice cannot issue an opinion for the U.S. Supreme Court. *See, e.g.*, *Locks v. Commanding Gen., Sixth Army*, 89 S. Ct. 31, 32 (1968) (Douglas, J.) (“[A]part from granting stays, arranging bail, and providing for other ancillary relief, an individual Justice of this Court has no power to dispose of cases on the merits.”). Consider, however, the action taken by Justice Powell, as Circuit Justice, in *Barnstone v. University of Houston*, 446 U.S. 1318 (1980) (Powell, Circuit J.). There, an applicant sought relief from an order of the Fifth Circuit vacating the district court’s temporary restraining order. Justice Powell explained:

Although applicant requests that the Court grant certiorari and reverse the judgment of the Court of Appeals, in purpose and effect applicant is requesting that the order of that court be vacated, thereby reinstating the temporary restraining order of the District Court. Such a request normally comes to me as Circuit Justice. Although I may have considered referring this to the entire Court, a quorum is not present. I therefore exercise my authority as Circuit Justice to rule on applicant’s application.

Upon consideration of the papers, I deny the application.

I have consulted informally with each of my Brethren who was present at the Court when these papers arrived late this afternoon. Although no other Justice has participated in the drafting

requirements, however, set a lower limit for the number of judges out of which a majority may be drawn. Put succinctly, the quorum requirement sets the minimum number of judges who are empowered to sit as a court and, among other things, resolve cases.

Quorum requirements are commonplace for governing bodies, from corporations' boards of directors to legislative bodies.<sup>28</sup> "A group of members of a corporate board or a legislature smaller than the required quorum has no power to act for the corporate entity. The moment its number reaches the quorum level, however, the group has the power to make decisions and take actions that are binding on the entire body."<sup>29</sup>

Luther Cushing, a nineteenth-century expert at parliamentary procedure, explained that quorum requirements "prevent matters from being concluded in a hasty manner, or agreed to by so small a number of the members as not to

---

of this order, I am authorized to state that each of the three whom I consulted would vote to deny this application. Of course, this action should not be taken as expressing a view on the merits of the questions raised in this case.

*Id.* at 1318–19; *see also* *Mountain States Tel. & Tel. Co. v. People ex rel. Wilson*, 190 P. 513, 520 (Colo. 1920) (Scott, J., dissenting) (criticizing the majority for citing *Commonwealth v. Mathues*, 59 A. 961 (Pa. 1904), in which a lone judge out of a high court of seven "assumed to and did pronounce the decision of the court[,] . . . cit[ing] no authority for his unprecedented and arbitrary act [and] . . . not even refer[ring] to the Constitution or statutes of his state, from which he must have derived his authority if he had any"); Michael J. Mazza, *A New Look at an Old Debate: Life Tenure and the Article III Judge*, 39 GONZ. L. REV. 131, 157 (2003–2004) ("To address this problem [of the same district judge who presided over a trial also convening the appellate court and resolving the appeal], the 1869 Act provided that any two of the sitting judges—whether that pair included a Supreme Court justice, circuit judge, or district judge—constituted a quorum.").

<sup>28</sup> *See* Williams, *supra* note 22, at 1032 ("The purpose of a quorum requirement in any corporate body, from a board of directors to a state or federal legislature, is to ensure that a certain number of members are present before a body can transact business.").

In contrast, notably, there are generally no quorum requirements for some of the most important occasions of voting in our polity: elections by the general public of people to public office. Here, then, election by minority majority is entirely possible, and indeed is quite common.

<sup>29</sup> *Id.*; *see also* BLACK'S LAW DICTIONARY 1284 (8th ed. 2004) (defining "quorum" as the "minimum number of members (usually a majority of all the members) who must be present for a deliberative assembly to legally transact business"). Legislators may on occasion use a quorum requirement as a way to preclude the legislature from taking certain actions. *See* Robert H. Freilich et al., *The Freilich Report 2003–04: The Supreme Court in an Age of Secrecy and Fear*, 36 URB. LAW. 583, 604 (2004) (describing how Democratic state legislators in Texas fled the state in an attempt to deny Republicans a quorum to affect redistricting); *see also* James C. Ho, *Ensuring the Continuity of Government in Times of Crisis: An Analysis of the Ongoing Debate in Congress*, 53 CATH. U. L. REV. 1049, 1065 (2004) ("At the Constitutional Convention, proponents and opponents of the quorum rule alike understood that by ensuring a minority of members could not exercise the powers of Congress, the majority quorum requirement effectively empowered states to shut down Congress by refusing to select and send representatives. Alexander Hamilton specifically acknowledged this possibility in *Federalist 59*." (footnote omitted)).

command a due and proper respect.”<sup>30</sup> Cushing’s brief statement suggests no fewer than three goals that quorum requirements can be said to further. First, requiring some minimum number of participants serves to encourage deliberation and collegiality among the participants.<sup>31</sup> Second, quorum requirements ensure that some minimum number of actors will vote, which increases the probability that the result reached by those who do participate is the same result that would have been reached were all the members of the body to have participated.<sup>32</sup> Third, quorum requirements affirm the legitimacy of the decision reached, the decision-making process, and the body itself.<sup>33</sup>

---

<sup>30</sup> LUTHER S. CUSHING, *RULES OF PROCEEDING AND DEBATE IN DELIBERATIVE ASSEMBLIES* 20 (Boston, Thompson, Brown & Co., rev. ed. 1879).

<sup>31</sup> On the importance of deliberation to judicial decision making on multimember courts, see Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 *YALE L.J.* 82, 100–02 (1986). On the importance of collegiality, see Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 *VA. L. REV.* 1335, 1358–62 (1998); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 *U. PA. L. REV.* 1639 (2003) [hereinafter Edwards, *The Effects of Collegiality*].

<sup>32</sup> See, e.g., Williams, *supra* note 22, at 1033 (“The purpose of a quorum requirement is to ensure that the probability the body will reach a ‘correct decision’ will never drop below a certain level.”); Dan S. Felsenthal, *Averting the Quorum Paradox*, 36 *BEHAV. SCI.* 57, 57 (1991) (“Underlying the requirement for a quorum is the intuitive assumption that the larger the quorum the higher will be the probability that the voting body will reach a ‘correct decision,’ i.e., the same decision that would have been reached if the body were fully assembled.”). In fact, increasing the quorum requirement will not uniformly increase the probability that the decision reached will be the same decision that the entire body would have reached. See *id.* at 60 (establishing this for situations in which majority rule governs); *id.* at 61–62 (reaching same conclusion in which supermajority rule governs). For example, under majority rule, the probability will decrease where the increase in the number of participants results in an even number of participants. Thus, Professor Felsenthal argues that, regardless of the applicable quorum requirement, where majority rule governs, the probability will be maximized where any ties that result from an even number of participants are broken randomly. See *id.* at 60–61.

<sup>33</sup> Professors Lewis Kornhauser and Lawrence Sager explain:

We understand that the author of the majority opinion writes, not for herself, but for the Court. While the author and other members of the majority clearly endorse both the outcome in the case and the rationale, the opinion does not necessarily correspond to the opinion she would write were she the sole member of a single-judge court. Put differently, the author of the majority states: “For the following reasons, *we* decide this case this way,” rather than “I decide this case this way.” As a consequence, the majority opinion does not necessarily state the author’s view of what legal regime would be best, all things considered. The author of the majority opinion may hold personal views that differ in some respect from the views articulated in the majority opinion. For example, a Justice who believes that the death penalty, regardless of how administered, is unconstitutional, may appropriately base a majority opinion striking down a capital punishment statute on significantly more narrow grounds.

Even a Justice who dissents from the outcome or the rationale typically acknowledges her respect for the majority, who, by virtue of its preponderance of numbers, acts for the Court. Thus, a dissenting Justice often styles her disagreement in the case before her as a disagreement with the “Court,” not with the “majority.” The exceptions to this rhetorical practice may bespeak a special degree of disagreement, or signal a special disrespect.

The common law recognized the importance of quorum requirements, and established a presumptive quorum requirement equal to a majority of the members of a body.<sup>34</sup> When drafting the U.S. Constitution, the Founders decided to include a quorum requirement for the two houses of the federal legislature. Section 5 of Article I provides that “a Majority of each [house] shall constitute a Quorum to do Business.”<sup>35</sup>

With respect to the federal judiciary, in contrast, the Constitution is silent. Here, Congress has established quorum requirements for the federal courts.<sup>36</sup>

---

Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 7–8 (1993) (footnotes omitted).

<sup>34</sup> See Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1182 (2000) (describing the default common law quorum rule). In his *Second Treatise on Government*, John Locke argued that “the act of the majority passes for the act of the whole.” Williams, *supra* note 22, at 1034 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 142 (Ian Shapiro ed., 2003) (1690)); see also *id.* at 1048 (noting Thomas Jefferson’s explanation that “under normal circumstances the Virginia assembly operated under a majority quorum requirement, but had recently lowered its quorum number to forty members in the face of the ‘present dangerous invasion’” (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1784), reprinted in THOMAS JEFFERSON: WRITINGS 251 (Merrill D. Peterson ed., 1984))).

<sup>35</sup> U.S. CONST., art. I, § 5, cl. 1. In fact, the Framers considered, and rejected, proposals for both submajority and supermajority quorum rules. See Williams, *supra* note 22, at 1037–56.

The Civil War and the accompanying secession of states raised questions about the proper scope of congressional quorum rules. See David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1176 & n.231 (2006). For an argument that congressional quorums were properly met for enactment of the post-Civil War constitutional amendments, even with the exclusion of southern states, see John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 378 n.11 (2001).

Today the houses of Congress use a definition of quorum that is more lenient than the constitutional standard. See, e.g., John C. Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 CATH. U. L. REV. 993, 1013 (2004) (“The House has historically defined its quorum more leniently than the Constitution’s definition, which requires a majority of the body. Currently, House precedents hold that a quorum is a majority of those ‘chosen, sworn and living.’” (footnote omitted)); see also Ho, *supra* note 29, at 1067.

<sup>36</sup> Quorum requirements are also very relevant to federal agencies. “Agency quorum and voting requirements are established by statute or, in the absence of a statutory provision, by agency regulation or tradition.” Breger & Edles, *supra* note 34, at 1182. “Absent a statutory provision, . . . most multi-member federal agencies follow the common law ‘majority of the quorum’ rule, which means that a quorum is needed before the agency may act, but only a majority of the quorum is needed for action once a quorum is constituted.” *Id.*

Quorum requirements have combined with transparency requirements to achieve some arguably undesirable results. Sunshine laws generally require that official meetings at which agencies transact business be part of the public record. This requirement may create an incentive for agency commissioners to decline to gather informally in numbers in excess of the applicable quorum requirement, lest the gathering retroactively be deemed an official meeting. See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 922 (2006) (“Scholars have long known that governmental bodies will shift decision-making processes in response to open government requirements. . . . Thus, for example, members of a legislative or regulatory body subject to open meetings and public records laws may communicate with each other or meet by means (such as by person-to-person oral communications or in less than a quorum) such that the ‘information’ they produce falls

Table 1 summarizes how Congress has varied the size of the Supreme Court, and the quorum requirement, over time. Under current statutory authority, the quorum for the nine-member Supreme Court is set at six.<sup>37</sup> Thus, at present, the statutory quorum requirement exceeds the level called for by the common law.<sup>38</sup> This was not always true; for example, from 1837 to 1863 the Court by statute also consisted of nine Justices, but with a mere five-Justice quorum requirement.<sup>39</sup>

---

outside the ambit of applicable state transparency requirements.” (footnote omitted)). The problem has arisen under the federal Sunshine Act. *See, e.g.,* Randolph May, *Reforming the Sunshine Act*, 49 ADMIN. L. REV. 415, 417 (1997) (“Unable to deliberate together in private, agency members resort to communicating with each other in writing, through staff, or in one-on-one meetings with other members (assuming the agency has more than three members so that even one-on-one meetings are allowable).”); Special Committee, Administrative Conference of the United States, *Report & Recommendation by the Special Committee to Review the Government in the Sunshine Act*, 49 ADMIN. L. REV. 421, 422–23 (1997) (“[E]xtensive and credible testimony that the restrictions imposed by the Act have had the effect of not only diminishing discussions on the merits of issues before agencies, but also preventing debate concerning agency priorities and the establishment of agency agendas, even though such discussions of a preliminary nature may not technically constitute a ‘meeting’ otherwise required to be held in public under the Act.” (footnotes omitted)). The problem also has arisen under state law analogs. *See, e.g.,* Fenster, *supra*, at 922 n.161.

<sup>37</sup> *See* 28 U.S.C. § 1 (2006). The six-Justice quorum requirement is repeated in Supreme Court Rule 4(2). In the event that a minimum quorum of the Court is not available, Congress has provided by statute that

if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.

28 U.S.C. § 2109; *see, e.g.,* Haig v. Bissonette, 485 U.S. 264 (1988) (per curiam affirmance under § 2109). Interestingly, after a lull of several years in invocation of § 2109, the Court invoked it three times during the course of the 2007–2008 Term of Court. *See* Am. Isuzu Motors, Inc. v. Ntsebeza, 128 S. Ct. 2424 (2008); Awala v. Five U.S. Supreme Court Justices, 128 S. Ct. 947 (2008); Sibley v. Breyer, 128 S. Ct. 514 (2007). A *New York Times* editorial characterized it as a “big embarrassment” that “financial and personal conflicts affecting four Supreme Court justices left the court without a quorum” in the *Ntsebeza* case. Editorial, *Court Without a Quorum*, N.Y. TIMES, May 18, 2008, at WK11. The paper urged the Justices to have their assets managed professionally so as to minimize the likelihood of recusal. *See id.*; *see also* Bernie Becker, *Justices List Their Assets; Wide Range of Wealth*, N.Y. TIMES, June 7, 2008, at A12 (“The annual disclosures by the court’s nine members also show that at least two of them significantly decreased their stock holdings, at a time when several have recused themselves from cases because of the potential for conflicts of interest.”).

<sup>38</sup> *E.g.,* Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 646 n.17 (2002) (“By setting a supermajority quorum requirement, Congress not only prevents binding precedent from being established by three Justices in a three to two decision, but also prevents even a unanimous majority of the Court from acting in a five to zero decision.”).

Note that it is also possible to allow quorum requirements to fall below the common law majority standard. For example, the Delaware Business Code permits corporations to set a quorum requirement as low as one-third for corporate boards of directors. DEL. CODE ANN. tit. 8, § 141(b) (2007); *see* Williams, *supra* note 22, at 1036.

<sup>39</sup> *See* Act of Mar. 3, 1837, ch. 34, 5 Stat. 176.

**Table 1: Supreme Court Membership and Quorum Requirements over Time**

Year(s)	Number of Seats on Court	Quorum Requirement
1789–1801 <sup>40</sup>	6	4
1801–1802 <sup>41</sup>	6 <sup>42</sup>	4
1802–1807 <sup>43</sup>	6	4
1807–1837 <sup>44</sup>	7	4 <sup>45</sup>
1837–1863 <sup>46</sup>	9	5
1863–1866 <sup>47</sup>	10	6
1866–1869 <sup>48</sup>	9, 8 <sup>49</sup>	6 <sup>50</sup>
1869–present <sup>51</sup>	9	6

The quorum requirement for panels of courts of appeals and en banc sittings of courts of appeals is set statutorily as “[a] majority of the number of judges authorized to constitute a court or panel thereof.”<sup>52</sup> Thus Congress has adopted the common law quorum rule for use by the federal courts of appeals.

<sup>40</sup> See Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73.

<sup>41</sup> See Act of Feb. 13, 1801, ch. 4, §§ 1, 3, 2 Stat. 89.

<sup>42</sup> The 1801 Act directed that the Court would reduce its complement from six to five Justices upon the retirement or death of a sitting Justice. See *id.* § 3. This did not occur, however, until after the 1801 Act was repealed by the Act of Mar. 8, 1802, 2 Stat. 132, which restored the permanent number of Court seats to six.

<sup>43</sup> See Act of Apr. 29, 1802, ch. 31, 2 Stat. 156.

<sup>44</sup> See Act of Feb. 24, 1807, ch. 16, § 5, 2 Stat. 420, 421.

<sup>45</sup> In fact, the 1807 Act did not specify a quorum. Instead, Congress simply “carried over the previous quorum of four.” *To Change the Quorum of the Supreme Court of the United States: Hearing on H.R. 2808 Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 78th Cong. 4 (1943) (statement of Charles Warren). Because four—the majority, and also the quorum, of the previous six-member Court—was also the majority of the new seven-member Court, “there was no necessity to change th[e] [quorum] provision.” *Id.* However, “apparently, in order to be perfectly certain on the subject, there was an amendatory act dealing with some other provisions as to the Court, passed in 1829, when the Court was still seven, and in that they specifically said that four should constitute a quorum.” *Id.*

<sup>46</sup> See Act of Mar. 3, 1837, ch. 34, 5 Stat. 176.

<sup>47</sup> See Act of Mar. 3, 1863, ch. 100, 12 Stat. 794.

<sup>48</sup> See Judiciary Act of 1866, ch. 210, 14 Stat. 209. The Act of 1866 provided that no vacancies were to be filled until there were only seven Justices, at which point any four of them would constitute a quorum. Only two vacancies arose while the Act remained in effect, however, so that the Court only fell to a level of eight Justices, of which six constituted a quorum pursuant to the 1863 Act. Before the number of Justices could fall any further, the Judiciary Act of 1869 (otherwise known as the Circuit Judges Act), ch. 22, 16 Stat. 44, restored the size of the Court to nine and set the quorum at six.

<sup>49</sup> Judiciary Act of 1866, ch. 210, 14 Stat. 209.

<sup>50</sup> *Id.*

<sup>51</sup> See Judiciary Act of 1869, ch. 22, 16 Stat. 44 (now codified in pertinent part in 28 U.S.C. § 1 (2006)).

<sup>52</sup> 28 U.S.C. § 46(c). An en banc sitting of a federal court of appeals generally consists of all active circuit judges plus any senior circuit judges from that circuit on the original panel hearing of the case. *Id.* A special rule, however, allows courts of appeals with more than fifteen active judges to proceed with en banc hearings with fewer than all the active judges of the court, as prescribed by circuit rule. See *id.*; Pub. L. No.

With a few exceptions,<sup>53</sup> state courts generally have followed, and continue to follow, the common law rule.<sup>54</sup> Some states do not have explicit quorum requirements; instead, they use action requirements<sup>55</sup>—that is, they establish a minimum number of judges necessary for each court to issue opinions—to give rise to an effective quorum requirement. For example, while California state law does not explicitly provide for a supreme court quorum, the state constitution requires as a prerequisite for judgment the “[c]oncurrence of 4

---

95-486, § 6, 92 Stat. 1629, 1633.(1978). The Ninth Circuit—which is presently statutorily authorized to consist of 28 active circuit judges, see 28 U.S.C. § 44(a) (and currently consists of 26 active circuit judges, see *The Judges of This Court in Order of Seniority*, <http://www.ca9.uscourts.gov/information/> (follow “Seniority List” hyperlink) (last visited Nov. 15, 2008))—has taken up this invitation, and by circuit rule allows for en banc hearings with only fifteen active circuit judges, drawn by lot (plus any senior circuit judges who sat on the original panel hearing of the case). 9TH CIR. R. 35-3. The rule provides that “[i]f a judge whose name is drawn for a particular en banc court is disqualified, recused, or knows that he or she will be unable to sit . . . , the judge will immediately notify the Chief Judge who will direct the Clerk to draw a replacement judge by lot.” *Id.* Thus, en banc hearings should ordinarily consist of no fewer than fifteen active circuit judges; still, presumably, § 46(b) applies to set the quorum requirement at “[a] majority of the number of judges authorized to constitute a court,” or eight. If the minimum size of an en banc court is eight judges, then a majority of that number—i.e., five judges of the twenty-eight seats on the court—is the minimum majority required to issue an opinion for the en banc court. (The rule does provide for an escape valve of sorts, allowing the court to “order a rehearing by the full court following a hearing or rehearing en banc.” *Id.* See also *In re Amendment to Fla. Rule of Appellate Procedure 9.331(b)*, 646 So. 2d 730, 731 (Fla. 1994) (Anstead, J., dissenting) (“Under the amendment adopted today, a five-judge division of a fifteen-judge court will be able to exercise en banc authority for the entire court. Actually, three judges in the five-judge division will have the authority to control an en banc decision.”).

<sup>53</sup> Florida sets a quorum requirement of five justices out of the seven justices on the state supreme court. See FLA. CONST., art. V, § 3.

One outlier case is *Johnson v. State ex rel. Brannon*, in which the state supreme court explained that, insofar as “[t]he law, organizing the Inferior Court, constitutes five justices[,] . . . [w]e hold the concurrence of a majority of the whole number necessary to the validity of their action.” 1 Ga. 271, 274 (1846).

<sup>54</sup> They have done so, however, as a matter of constitutional provision, statute, or rule. *E.g.*, GA. CONST., art. VI, § 6, ¶ 1 (setting the number of justices on the state supreme court as nine, and providing that “[a] majority shall be necessary to hear and determine cases”); ILL. CONST., art. VI, § 3 (setting size of state supreme court at seven, and quorum at four); IND. CONST., art., 7, § 2 (providing that “a majority” of supreme court justices “shall form a quorum”); KY. CONST. § 110 (“A majority of the Justices of the Supreme Court shall constitute a quorum for the transaction of business.”); IND. CODE § 33-24-1-1 (2004) (setting the size of the state supreme court at five, and the quorum at three); IOWA CODE § 602.4101 (2007) (setting the size of the state supreme court at seven, and providing that “[a] majority of the justices sitting constitutes a quorum, but fewer than three justices is not a quorum”). Judicial quorum requirements are not ordinarily left to courts to decide as a matter of common law. *Cf.* Logan Scott Stafford, *Judicial Coup d’Etat: Mandamus, Quo Warranto and the Original Jurisdiction of the Supreme Court of Arkansas*, 20 U. ARK. LITTLE ROCK L.J. 891, 963-64 (1998) (discussing how, after earlier three state constitutions had “provided that any two of the three supreme court justices constituted a quorum,” the drafters of the 1868 state constitution “[i]nexplicably . . . added two justices to the court but failed to address how many of the five justices had to present in order for the court to conduct business,” and how confusion reigned thereafter as to whether the court could function in the absence of a single justice).

<sup>55</sup> See *infra* Part I.A.2.

judges present at the argument” of the case;<sup>56</sup> this prerequisite sets an effective quorum requirement of four judges, because a group of fewer than four judges can never issue a judgment in a case.

## 2. *Requirements to Take Actions with Respect to Cases*

It goes without saying that an applicable quorum requirement sets a minimum bar for taking actions with respect to cases: If the quorum requirement is not met, then the court cannot conduct business and, *a fortiori*, cannot render decisions.

Some courts have requirements in excess of the quorum requirement, however. For example, the Illinois Constitution establishes a seven-member state supreme court, of which “[f]our Judges constitute a quorum and the concurrence of four is necessary for a decision.”<sup>57</sup> Thus, while five Illinois Supreme Court justices constitute a quorum, an opinion that garners only three of the five could not be issued as an opinion of the court.<sup>58</sup>

Other courts have, or have had, similar requirements that are applicable only to cases that fall within particular subject-matter areas—usually constitutional law. For example, for a time in the 1800s, the U.S. Supreme Court had a “practice”—grounded in neither the Constitution nor statute<sup>59</sup>—of “not (except in cases of absolute necessity) . . . deliver[ing] any judgment in

---

<sup>56</sup> CAL. CONST., art. VI, § 2.

<sup>57</sup> ILL. CONST., art. VI, § 3.

<sup>58</sup> See *Getschow v. Commonwealth Edison Co.*, 459 N.E.2d 1332, 1332 (Ill. 1984) (per curiam) (“In this case a judge of this court has recused himself and the remaining members of the court are divided in their views of the case . . . so that the constitutionally required concurrence of four judges cannot be secured. . . . Under these circumstances, we shall let stand . . . the judgment of the Appellate Court . . . .” (citation omitted)).

The Supreme Court has held that 28 U.S.C. § 46(b) “requires the inclusion of at least three judges [on a federal court of appeals panel] in the first instance,” *Nguyen v. United States*, 539 U.S. 69, 82 (2003), and that, accordingly, “although the two Article III judges who took part in the decision of petitioners’ appeals would have constituted a quorum if the original panel had been properly created, it is at least highly doubtful whether they had any authority to serve by themselves as a panel.” *Id.* at 83. The Court proceeded to hold that the mere fact that a quorum of two circuit judges sit on a panel does not cure the impropriety of the third judge on the panel not being an Article III judge. See *id.* at 82–83 (explaining that, even though “settled law permits a quorum [of two] to proceed to judgment when one member of the panel dies or is disqualified . . . , the statutory authority for courts of appeals to sit in panels, 28 U.S.C. § 46(b), requires the inclusion of at least three judges in the first instance”).

<sup>59</sup> For a modern statement to this effect, see *FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 184 n.7 (1967) (“Congress has prescribed a quorum of six Justices for this Court but has not provided how many of the quorum can act for the Court.”).

cases where constitutional questions are involved, unless four judges concur, thus making the decision that of a majority of the whole court.”<sup>60</sup>

While the Supreme Court no longer requires a higher number of concurrences for cases raising constitutional questions,<sup>61</sup> it does in some situations require a minimum number of Justices to concur in order to take certain actions in respect of the case. The most prominent of these rules is the so-called “rule of four,” under which four Justices must vote affirmatively in order for a petition for certiorari to be granted.<sup>62</sup> Thus, at least four Justices must concur before the Court may hear most cases.

---

<sup>60</sup> *Briscoe v. Commonwealth’s Bank of Ky.*, 33 U.S. (8 Pet.) 118, 122 (1834). In *Briscoe*, because “four judges [did] not concur in opinion as to the constitutional questions” raised, the Court directed the cases at bar “to be reargued at the next term, under the expectation that a larger number of the judges may then be present.” *Id.* The Court took matters a step farther in *Mayor of N.Y. v. Miln*, indicating that it did not matter whether in fact four Justices concurred on constitutional matters, stating: “The court cannot know whether there will be a full court during the term, but as the court is now composed, the constitutional cases will not be taken up.” 34 U.S. (9 Pet.) 85, 85 (1835). (The Court at the time consisted of six Justices. *See id.* at 85 n.a.)

This is no longer the Court’s practice. *See* Recent Case, *Supremacy Clause—State Court Is Not Bound by 4–3 Decision of United States Supreme Court: Roofing Wholesale Co. v. Palmer*, 86 HARV. L. REV. 1307, 1314 & n.50 (1973) (suggesting that the Supreme Court “might well reexamine the wisdom of declaring a statute unconstitutional by a vote of less than a majority of its full membership,” but not advocating a return to the practice of “refusing even to *hear* a constitutional case if the full Court is not present”).

<sup>61</sup> *Cf.* *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601-616-19 (1975) (Blackmun, J., dissenting) (criticizing the Court in *Fuentes* for doing “violence to Mr. Chief Justice Marshall’s wise assurance that the practice of the Court ‘except in cases of absolute necessity’ is not to decide a constitutional question unless there is a majority ‘of the whole court’” (internal citations omitted)).

<sup>62</sup> *See generally* Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1068–1109 (1988) (discussing the emergence of the rule of four and its impact on the Court’s substantive decisions). On the history of the “rule of four,” see Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1674–90 (2000); Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 978–88 (1957); John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 10–14 (1983). For a description by the Supreme Court of the rule of four, see *Rice v. Sioux City Mem’l Park Cemetery*, 349 U.S. 70, 74 (1955) (explaining that “certiorari was granted, according to our practice, because at least four members of the Court” viewed certiorari as warranted).

The Court applies a similar “rule of four” to determine whether cases on the Court’s appeals docket should be fully briefed and argued. *E.g.*, *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959) (memorandum of Brennan, J.); Revesz & Karlan, *supra*, at 1110 n.173. The Court applies a “rule of three” to hold a case pending disposition of another case. *E.g.*, *Watson v. Butler*, 483 U.S. 1037, 1038 (1987) (Brennan & Marshall, JJ., dissenting); Revesz & Karlan, *supra*, at 1111. The Court applies a majority rule to dismiss previously granted certiorari petitions as improvidently granted. *See id.* at 1082.

An action requirement that extends beyond a mere quorum for federal courts of appeals panels is the requirement that the panel initially be composed of three Article III judges, even if judgment is ultimately rendered (because of illness, for example) by only two judges. *See supra* note 58 (discussing *Nguyen v. United States*).

There are three aspects of action requirements that are worthy of note. First, an action requirement can be a majority requirement—such as the old Court practice not to issue opinions in constitutional cases absent the agreement of Justices equaling a majority of seats on the Court—or a submajority requirement,<sup>63</sup> such as the “rule of four.” Conceivably, an action requirement could take the form as well of a supermajority rule.<sup>64</sup>

Second, the requirement need not be, but generally is, engrafted upon, and works in tandem with, a quorum requirement.<sup>65</sup> For example, the rule of four is superimposed upon the Court’s quorum requirement. Thus, certiorari could not be granted even though four Justices so cast votes if a quorum were not present.

Third, the requirements could, but generally do not, vary with the number of Justices actually available to act. Thus, for example, the rule of four could be relaxed to, say, a “rule of two or three” where fewer than nine Justices are available to vote on a certiorari petition.<sup>66</sup> It seems, however, that such relaxation does not ordinarily (if ever) occur,<sup>67</sup> nor does it seem to occur at the

---

<sup>63</sup> For general discussion of submajority voting rules, see Adrian Vermeule, *Submajority Rules: Forcing Accountability upon Majorities*, 13 J. POL. PHIL. 74 (2005).

<sup>64</sup> In some sense, a submajority rule that functions as a hurdle to one outcome also functions as a supermajority hurdle to the opposite outcome. Thus, just as the rule of four empowers four of nine Supreme Court Justices to grant a petition for certiorari, so too does it empower six Justices to deny it. See Kornhauser & Sager, *supra* note 31, at 99 (“[T]he rules ‘Four votes are required to grant certiorari’ and ‘Six votes are required to defeat certiorari’ on a nine-judge court are distinguished only by the impact of abstentions.”).

As I explain below, Evan Caminker and Jed Shugerman have suggested that the Court adopt supermajority rules to effectuate deference to Congress on the constitutionality of statutes, while Jacob Gersen and Adrian Vermeule have made a similar suggestion to effectuate deference to agencies on interpretations of law. I also explain, however, that these voting rule proposals are not action requirements, in that they simply would establish the voting rule needed to reach a result; they would not be prerequisites to the Court’s taking any action at all. See *infra* note 75.

<sup>65</sup> This is subject to the exception that a few states have action requirements but no quorum requirements. In these circumstances, the action requirement establishes an effective quorum requirement. See *supra* notes 53–56 and accompanying text.

<sup>66</sup> Lubet, *supra* note 18, at 662 n.26 (“Nothing apart from self-restraint prevents the [C]ourt from granting review on the basis of three votes, or even two.”); Stevens, *supra* note 62, at 14–21 (treating the rule of four as a judge-made rule that may be entitled to stare decisis deference).

<sup>67</sup> Lubet, *supra* note 18, at 662 (“No provision reduces th[e] requirement of four [or] makes any other adjustment when a Justice is disqualified.” (footnotes omitted)).

Existing caselaw makes clear that the votes of four Justices are still required even when only eight Justices sit. See, e.g., *Gregory v. Town of Pittsfield*, 470 U.S. 1018, 1018–23 (1985); see also *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959) (memorandum of Brennan, J.) (indicating that the rule of four that governs whether to grant a full briefing and oral argument to a case pending on the Court’s appeal docket applies as well in a case in which only eight of nine Justices participate in the decision).

state court level.<sup>68</sup> This has important ramifications for the percolation of issues to the Supreme Court and state high courts, as I discuss below.<sup>69</sup>

### B. Voting Rule Requirements

Assuming that (i) a court meets the quorum requirement and (ii) the court meets whatever additional requirements may be in place to issue a decision, the next question that arises is the choice of voting rule that will govern.<sup>70</sup>

---

Whether four votes still are required when only seven (or six) Justices sit is less clear. Justice Douglas stated in his capacity as Circuit Justice and also in an address to a bar association that three votes would suffice. See *Pryor v. United States*, 404 U.S. 1242, 1243 (1971) (Douglas, Circuit J.) (“Three out of seven are enough to grant a petition for certiorari.”); William O. Douglas, *Managing the Docket of the Supreme Court of the United States*, 25 REC. ASS’N BAR CITY N.Y. 279, 298 (1970). Yet the Court has subsequently denied certiorari over the dissents of three Justices with seven Justices participating. See, e.g., *Lewis v. Adamson*, 497 U.S. 1031 (1990); *Del. State Bd. of Educ. v. Evans*, 434 U.S. 880 (1977). Dean Revesz and Professor Karlan explain:

Justice Douglas’s papers reveal that in 1969, when the Court was operating with only eight Justices as a result of the resignation of Justice Abe Fortas, it held cases in which three Justices had voted to grant certiorari pending a possible fourth vote by Justice Fortas’s replacement. But it did not grant certiorari based only on three votes. It is not clear whether three out of seven votes are sufficient to grant certiorari.

Revesz & Karlan, *supra* note 62, at 1071 n.9 (citation omitted). The two major federal procedural treatises are similarly inconclusive, see 22 DREW S. DAYS, III, MOORE’S FEDERAL PRACTICE § 405.03[2][a][vii][A] (3d ed. 2008); 16B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4004.2 (3d ed. 2007), although Wright, Miller, and Cooper argue that, “[s]o long as the Rule of Four persists, it should mean that three votes are sufficient at least when only seven justices pass on the petition.” *Id.*

I consider below the wisdom of reducing the rule of four (or an analogous rule for courts consisting of more or less than nine judges) in connection with the question of how much stare decisis effect court decisions are to be given. See *infra* text accompanying notes 181–87.

<sup>68</sup> See, e.g., *Dean v. Bondurant*, 193 S.W.3d 744, 746 (Ky. 2006) (“In order for a motion for discretionary review to be granted by the Kentucky Supreme Court, the movant must receive at least four votes. The four-vote requirement remains, regardless of whether six or seven justices actually hear the case. Thus the recusing justice is effectively casting a vote against the petitioning party.”).

<sup>69</sup> See *infra* text accompanying notes 181–87.

<sup>70</sup> Action requirements—which I categorize as a prerequisite for issuing a decision—may themselves be constituted as voting rules. Indeed, the rule of four for granting certiorari petitions is one such example. See *supra* note 62 and accompanying text. I distinguish action requirements from voting rules that apply in resolving cases in that the former simply apply to decide whether the Court will act with respect to the particular case. As such, a failure to meet an applicable action requirement means that the court will take no action and that, accordingly, the status quo will continue to prevail. In other words, the rule of four renders the status quo a “favored state” that only four affirmative votes will allow the Court to disturb. (Even if one contends that the decision to leave intact the status quo is in some sense an affirmative “resolution” of a case, see Jonathan Remy Nash, *A Context-Sensitive Voting Protocol Paradigm for Multimember Courts*, 56 STAN. L. REV. 75, 106 & n.110 (2003), the fact remains that the action requirement determines the choice between “favored” status quo state and the possibility of altering the status quo.) Cf. Kornhauser & Sager, *supra* note

Multimember courts in the common law tradition have resolved matters on majority grounds as a longstanding matter. This applies to two aspects of a court's function: the resolution of the pending case and the reasoning. I focus on the resolution of cases in the next subsection, and on precedential value in the subsection thereafter.

### 1. Resolution of Cases

Majority rule is as old<sup>71</sup> as it is widespread.<sup>72</sup> There is debate over whether the Constitution, by expressly identifying settings in which supermajority votes are required and otherwise remaining silent as to applicable voting rules, implicitly requires the use of majority rule unless expressly provided otherwise.<sup>73</sup> Be that as it may, courts in the United States (and beyond) have almost always employed majority rule.<sup>74</sup> Resolution of cases—that is, whether

---

31, at 99 (explaining that the introduction of a favored state makes a submajority rule workable, and citing the rule of four as an example).

<sup>71</sup> See Brett W. King, *Deconstructing Gordon and Contingent Legislative Authority: The Constitutionality of Supermajority Rules*, 6 U. CHI. L. SCH. ROUNDTABLE 133, 181–82 (1999) (“Simple majority rule is the historical rule followed in almost all cases for hundreds of years . . . .”); *id.* at 180 (noting that, at the time of the constitutional convention, “almost all decisions in legislative bodies such as the British Parliament and Colonial assemblies were taken by majority vote”); Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 974–75 (1989) (noting that Orestes’ fate at trial in Aeschylus’ play *Eumenides* is decided by majority vote).

<sup>72</sup> *E.g.*, HENRY M. ROBERT, *ROBERT’S RULES OF ORDER NEWLY REVISED* 3 (1970) (“The basic principle of decision in a deliberative assembly is that . . . a proposition must be adopted by a *majority vote* . . . .”); ALICE STURGIS, *STANDARD CODE OF PARLIAMENTARY PROCEDURE* 8–10 (4th ed., rev. 2001) (identifying as one of six basic principles underlying parliamentary law the notion that “[t]he majority vote decides”); King, *supra* note 71, at 181–82 (“Simple majority rule . . . is the default rule in all legislative bodies, and is part of the intellectual foundation of American democracy.”).

The U.S. Constitution provides for the use of supermajority rules in limited circumstances. For an overview and defense of the use of such rules, see, for example, John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002). Legislative rules also sometimes establish supermajority requirements, such as the cloture rule for ending a filibuster. This requirement has recently risen in importance in the context of judicial confirmations. See, e.g., Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168, 2187–89 (2006). For discussion and a defense, see John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Judicial Confirmation Process*, 26 CARDOZO L. REV. 543 (2005) [hereinafter McGinnis & Rappaport, *Supermajority Rules*].

<sup>73</sup> Compare Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1591 n.154 (2000), with Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 988 & n.535 (2003) (contesting Paulsen’s argument, at least as applied to the federal judiciary).

<sup>74</sup> See Saul Levmore, *More Than Mere Majorities*, 2000 UTAH L. REV. 759, 765 (“[T]here is almost universal convergence on the requirement of an absolute majority coalition for . . . ‘disposition,’ or the immediate, enforceable result affecting the litigants.”).

In the rare case in which the appellate court judges tie as to the proper outcome, the lower court’s opinion is deemed to be affirmed by the equally divided court. *E.g.*, Hartnett, *supra* note 38, at 652 (noting

the appellate court will affirm, reverse, remand, or vacate the lower court's judgment—is almost always decided by a majority of sitting judges.<sup>75</sup> Even when judges are unable to form a majority as to the rationale of a decision, there will generally be a majority to resolve the case.<sup>76</sup> Indeed, when sincere

---

the “principle” that “applies generally in multimember bodies” that “the body cannot take any affirmative action based on a tie”). The rule for ties effectively arises out of the requirement that a majority resolve a case: Because affirmative action on a case requires a majority, the court “cannot take any affirmative action based on a tie.” *Id.*; see also *Cochran v. Commonwealth*, 521 S.E.2d 287, 288–89 (Va. 1999) (interpreting statute directing that “[i]n all cases decided by the court en banc, the concurrence of at least a majority of the judges sitting shall be required to reverse a judgment, in whole or in part,” to mean that a tie en banc vote properly results in an affirmance of the court below, even if the original court of appeals panel voted to reverse the court below). As I discuss below, affirmances by an equally divided court are of no precedential value. See *infra* note 76.

<sup>75</sup> Currently two states—Nebraska and North Dakota—have constitutional requirements for the invalidation of statutes on state constitutional grounds by the state supreme court. See Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73, 91–93 (2003). For discussion of the experience of Ohio, which had such a requirement from 1912 through 1968, see Jonathan L. Entin, *Judicial Supermajorities and the Validity of Statutes: How Mapp Became a Fourth Amendment Landmark Instead of a First Amendment Footnote*, 52 CASE W. RES. L. REV. 441 (2001). For discussion of how consideration of quorum requirements affected the drafting of the Ohio state constitutional supermajority requirement as well as its implementation, see *id.* at 446, 449 and *id.* at 458, 461, respectively.

Over the years, there have been numerous congressional proposals—none of them successful—to impose a supermajority requirement on the Supreme Court for invalidating statutes on constitutional grounds. See Shugerman, *supra* note 73, at 998–1001 (reviewing such proposals). Recently, Professors Caminker and Shugerman have each advanced such proposals—whether by means of a congressional statute or by unilateral Court action—as a response to what they perceive to be a decrease in deference on the part of Justices to the presumed constitutionality of congressional statutes. See Caminker, *supra*; Shugerman, *supra* note 73. Professors Gersen and Vermeule have argued that judicial deference to administrative agencies, as called for under the landmark case of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), should be implemented by means of a voting rule. Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676 (2007).

Note that proposals such as these differ from the Court's practice in the early nineteenth century of refusing to issue opinions in constitutional cases when fewer than a majority of Justices authorized to hear cases concurred in the judgment, see *supra* notes 59–60 and accompanying text. The latter type of requirement limits the Court's ability to act at all in the face of a constitutional challenge; as such, I categorize it as an action requirement. A requirement of a supermajority to invalidate a statute as unconstitutional, in contrast, is not a prerequisite to the court's taking action; presumably, if a court fails to generate a supermajority, then the result is not that no action is taken, but rather that the statute is held to be constitutional.

<sup>76</sup> See generally Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 THEORETICAL INQUIRIES L. 87 (2002) (discussing how appellate courts are willing to accept plurality decisions regarding the precedential message of a case though they tend to insist on simple majorities for resolution purposes).

The vote of an equally divided court is deemed to affirm the lower court's ruling on the ground that a majority is needed to disturb the status quo. Such an affirmance does not constitute a ruling on the merits. See, e.g., *Neil v. Biggers*, 409 U.S. 188, 191–92 (1972) (stating that an affirmance by equally divided Court was neither a ruling on the merits nor was it entitled to precedential effect, and accordingly did not preclude a subsequent petition for habeas corpus relief on the same grounds).

voting by Supreme Court Justices would not generate a majority as to disposition, the practice—required neither by Constitution, statute, nor even by a majority of sitting Justices—is for one Justice to change his or her vote to provide such a majority.<sup>77</sup>

Commentators have identified several justifications for courts' widespread reliance upon majority rule.<sup>78</sup> First, unlike submajority and supermajority rules,<sup>79</sup> majority rule will be uniquely decisive between two alternatives.<sup>80</sup> This is often the case for appellate courts, which frequently decide between affirming and reversing a lower court's decision. However, this is not always the case,<sup>81</sup> and when the court is asked to choose among more than two alternatives, the virtue of majority rule—that it selects the single, correct outcome—becomes inapplicable.<sup>82</sup> Nonetheless, majority rule remains of

<sup>77</sup> See H. Ron Davidson, *The Mechanics of Judicial Vote Switching*, 38 SUFFOLK U. L. REV. 17, 17–19 (2004) (arguing that this rule from *Screws v. United States*, 325 U.S. 91 (1945), is without adequate justification). Because there is no statute or rule—or even anything as broad as a Court practice—that a majority on resolution is required before the Court will decide a case, I do not categorize the *Screws* practice as an action requirement.

<sup>78</sup> *But cf.* JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 81–82 (1962) (noting that “on a priori grounds there is nothing in the analysis that points to any uniqueness in the rule that requires a simple majority to be decisive,” and that “[a]n alternative, and much more plausible, explanation for the predominant role that majority rule has achieved in modern democratic theorizing may be found when we consider that most of this theory has been developed in noneconomic, nonindividualistic, nonpositivistic terms”).

<sup>79</sup> Professors Kornhauser and Sager explain:

If one adopts a sub-majority rule, the court could reach two or more outcomes simultaneously, and these could be starkly contradictory in nature. For all super-majority rules, the court could fail to reach any outcome at all. . . .

In practice, sub- and super-majority rules are made workable by the addition of favored or default states. Where sub-majority rules are at play, typically one outcome is favored, in the sense that it would be adopted if it receives  $k$  votes, whether or not some other outcome also receives  $k$ . . . . Where super-majority rules are at play, one outcome is the default state, in the sense that if no other outcome receives  $k$  votes the default state will prevail. . . .

Favored and default states make sub- and super-majority rules decisive.

Kornhauser & Sager, *supra* note 31, at 99. The “rule of four,” applicable to granting certiorari petitions, is an example of a submajority rule that is made decisive by the designation of a “favored state”: that the petition be granted. See *supra* note 62 and accompanying text.

<sup>80</sup> See Kornhauser & Sager, *supra* note 31, at 99 (“Where there are only two possible outcomes, simple majority rule emerges as uniquely decisive; it alone always identifies a single, correct outcome.”).

<sup>81</sup> Consider the appellate court that must decide among affirming, reversing, or vacating a lower court's decision, or Dean Levmore's example of a court that must decide among granting no relief, injunctive relief, or monetary relief. See Levmore, *supra* note 76, at 99.

<sup>82</sup> See Kornhauser & Sager, *supra* note 31, at 99 (“But when we allow more than two possible outcomes, this property of majority rule disappears.”). The Jury Theorem might extend some of its predictive power to plurality votes over more than two options. See Levmore, *supra* note 76, at 118–19 (explaining how the Jury Theorem can yield the correct answer); Maxwell L. Stearns, *The Condorcet Jury Theorem and Judicial*

value: To the extent that one outcome in fact is preferable to every other outcome—i.e., it would defeat each alternative in a series of pairwise majority votes—majority rule is a rule that will always select this so-called “Condorcet winner.”<sup>83</sup>

Second, majority rule tends to foster deliberation. It does this by empowering no voter over any other, and favoring no outcome over any other.<sup>84</sup> At the same time, Dean Levmore notes, supermajority rule also might encourage useful deliberation in certain settings. For example, where voters know

that a simple majority will prevail, then—especially if the issue before them is one that falls easily into a choice between two options—they might impatiently rush to vote. A rule requiring a supermajority decision might in this way encourage deliberation, which . . . might raise the probability of the group getting the matter right.<sup>85</sup>

However, Dean Levmore goes on to observe that this view “avoids the question of why a group whose members are intent on getting something right would unwisely rush to a simple majority vote. If deliberation improves the chance of correctness, then we should expect uncorrupted groups to deliberate when there is expected benefit from deliberation.”<sup>86</sup> It would seem that judicial reliance upon majority rule thus accords with the general perception that judges seek to resolve questions correctly and at least at some level rise above politics<sup>87</sup> (even to the extent that this is not the reality<sup>88</sup>).

*Decisionmaking: A Reply to Saul Levmore*, 3 THEORETICAL INQUIRIES L. 125, 131–32 (2002) (illustrating how the Jury Theorem can provide a “bump” to distinguish the correct option from a choice of several). This extension, however, is of greater use in settings, such as questions of precedent, where there often are more than two options from which to choose. See *infra* text accompanying notes 101–02.

<sup>83</sup> See Maxwell L. Stearns, *Should Justices Ever Switch Votes?: Miller v. Albright in Social Choice Perspective*, 7 SUP. CT. ECON. REV. 87, 105–06 (1999). The “Condorcet winner” is so named “because Condorcet posited that whenever such a winner is available, it should prevail.” Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1253 (1994).

The “correct” or “preferable” answer is the “Condorcet winner.” For this reason, majority rule is a “Condorcet-producing rule.”

<sup>84</sup> Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73, 86 (1996); see also *supra* note 79; cf. Gersen & Vermeule, *supra* note 75, at 709–10 (arguing that “neutrality should be rejected” where *Chevron* mandates that courts give deference to agency interpretations).

<sup>85</sup> Levmore, *supra* note 76, at 90.

<sup>86</sup> *Id.*

<sup>87</sup> See Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1747–52 (2008) (identifying factors of ideal appellate review, including the application of the Condorcet Jury Theorem). To the extent that this is not accurate, then the Condorcet Jury Theorem may be inapplicable. See *infra* note 88.

Third, the Condorcet Jury Theorem predicts that “where each voter has more than an even chance of being right on some matter, then the more voters we have the closer we get to a probability of 1.0 of getting the matter right by abiding by a majority vote.”<sup>89</sup> While the fact that more than a majority of voters opts for one option in a given situation may lend even more credence to the view that that option is the correct one,<sup>90</sup> the Jury Theorem does not—and should not—itsself impose a supermajority requirement. As Dean Levmore explains, “The danger of a supermajority requirement is that it may pass up right answers by allowing the minority to prevail, and the minority is, by assumption, less likely to be ‘right’ than is the majority.”<sup>91</sup>

## 2. *Requirements for Stare Decisis Effect*

The previous subsection made clear the dominance of, and justification for, the use of majority rule to resolve cases. This subsection examines the voting rules applicable to determining the rationale, and precedential value, of a court decision.

The rationale for a court’s ruling is important to the litigants, and may also be important to lower courts on remand. In addition, future litigants and courts

---

<sup>88</sup> Cf. Nash, *supra* note 72, at 2203 (arguing that, to the extent that public perception of an apolitical judiciary is inaccurate, it might be desirable to remove the veneer).

<sup>89</sup> Saul Levmore, *Conjunction and Aggregation*, 99 MICH. L. REV. 723, 734 (2001); Levmore, *supra* note 76, at 88–89 (explaining that a simple majority gives a high probability that the answer will be correct).

One can question the application of the Jury Theorem to multimember courts. First, one might ask whether decisions of law can always, often, or ever be categorized as “correct.” See Nash & Pardo, *supra* note 87, at 1770–71, and the authorities cited therein. Second, one might ask whether the availability—indeed, the desirability—of deliberation among judges implicates the applicability of the Jury Theorem to the setting of multimember courts. The traditional Jury Theorem applies in the absence of deliberation—i.e., its proof rests only on the assumption that each voter has a greater than 50% likelihood of voting for the correct answer. See Levmore, *supra* note 76, at 90 (“A Jury Theorem purist might say that the simple result is ruined if voters are given the opportunity to influence one another (as with certain kinds of vote trading), to exhibit herd mentality, or to otherwise allow their own assessments and self-esteem to interfere with the value of numerosity.”). At the same time, one can see the availability of deliberation presumably enhancing the Jury Theorem’s prediction. See *id.* (noting that “deliberation has potential value on the Theorem’s own terms” in that it “might reveal the presence of expertise, in which case each voter is no longer to be regarded as equally likely to be right”).

<sup>90</sup> The logic dictates that the more voters choose a particular option, the more likely it is that convergence toward that option is the result of the probability (by assumption more likely than not for each voter) that voters are accurately voting for the correct option as opposed to chance.

<sup>91</sup> Levmore, *supra* note 76, at 89; cf. Gersen & Vermeule, *supra* note 75, at 710–12 (arguing that the Jury Theorem “supports the expansion of the group whose views are aggregated to include agency officials,” and that, because the supermajority voting rule they propose “in effect does just that,” the rule is consistent with the Jury Theorem).

may look to other courts that have faced similar issues.<sup>92</sup> Opinions of other courts may have persuasive value to later courts. Further, thanks to the doctrine of stare decisis, decisions of courts may actually bind later courts faced with similar legal issues. Under so-called horizontal stare decisis, a court is presumptively bound by decisions issued by earlier incarnations of that court.<sup>93</sup> Under vertical stare decisis, lower courts are bound by pronouncements of superior courts.<sup>94</sup>

The general rule is that an opinion will not enjoy precedential value unless at least a majority of judges join it.<sup>95</sup> The justifications mirror those applicable to reliance upon majority rule for disposition of cases.<sup>96</sup>

The rules governing precedent in cases with no majority opinion are consistent with the general rule. While tie votes are deemed to affirm the court decision below,<sup>97</sup> they give rise to no precedential holding.<sup>98</sup> This is consistent with the prerequisite of a majority for precedential value: Affording a court decision precedential value recognizes the decision as an affirmative court action. But an affirmative court action requires a majority,<sup>99</sup> and insofar as a

---

<sup>92</sup> See Nash, *supra* note 70, at 87 (noting that both litigants and nonlitigants are concerned with the outcomes and reasoning of previous court decisions).

<sup>93</sup> Nash & Pardo, *supra* note 87, at 1750.

<sup>94</sup> *Id.*; Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994) (providing an extended analysis and critique of vertical stare decisis).

<sup>95</sup> The rule is most often stated when the absence of a majority precludes precedential effect. See, e.g., *Hertz v. Woodman*, 218 U.S. 205, 213–14 (1910) (“[A]n affirmance by an equally divided court is as between the parties a conclusive determination and adjudication of the matter adjudged, but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts.”).

That a majority opinion is entitled to precedential effect, however, does not mean that opinions that attract greater than a bare majority of judges do not enjoy additional precedential gravitas. To the contrary, the Supreme Court has indicated that it may take less for the Court to overrule opinions issued by bare majorities. See *infra* note 174 and accompanying text. The fact remains, however, that the minimum requirement for an opinion to enjoy precedential value is that it attract a majority of judges.

<sup>96</sup> See *supra* text accompanying notes 74–75.

<sup>97</sup> See *supra* note 76 and accompanying text.

<sup>98</sup> See, e.g., William L. Reynolds & Gordon G. Young, *Equal Divisions in the Supreme Court: History, Problems, and Proposals*, 62 N.C. L. REV. 29, 34 (1983) (explaining that equal divisions are to have no precedential effect). On the murky historical origins of the rule, see *id.* at 33–35.

<sup>99</sup> See, e.g., Davidson, *supra* note 77, at 33–34 (explaining that failure to achieve a majority with the U.S. Supreme Court results in no action); Hartnett, *supra* note 38, at 652 (noting the “principle” that “applies generally in multimember bodies” is that “the body cannot take any affirmative action based on a tie”); see also Michael Coenen, Comment, *Deadlock in the Court: How the Supreme Court Should Resolve Ties in Original Jurisdiction Cases*, 118 YALE L.J. (forthcoming 2008) (arguing that, when a tie vote occurs in an original jurisdiction case, the decision should be one that does not disrupt the status quo).

tie bespeaks the absence of a majority, a tie decision is entitled to no precedential effect.<sup>100</sup>

The rules governing the precedential effect of Supreme Court cases where resolution attracts a majority but there are only reasoning pluralities have evolved over time. Still, these rules have retained fealty to the general requirement of a majority. Historically, federal courts did not accord Supreme Court plurality opinions any precedential effect,<sup>101</sup> which is consistent with the view that the absence of a majority (here, on rationale) precludes precedential effect. The modern Court, in contrast, has instructed subsequent courts to look for the “narrowest” ground common to the various camps of Justices that compose the majority for disposition.<sup>102</sup> This is once again—albeit in a different sense—consistent with the notion that the creation of binding precedent turns on the presence of a majority.

Many courts add an additional requirement for a majority decision to acquire stare decisis weight: The decision must be published.<sup>103</sup> Unpublished decisions, by court rule, are not accorded precedential value and technically may not be cited.<sup>104</sup>

---

<sup>100</sup> Some states have enacted provisions that allow a state intermediate court judge to sit by designation on the supreme court to avoid the prospect of a tie vote. See generally Edward A. Hartnett, *Ties in the Supreme Court of New Jersey*, 32 SETON HALL L. REV. 735 (2003) (discussing a New Jersey constitutional provision for temporary assignments). The Supreme Court of Canada employs a similar mechanism. See Abimbola A. Olowofoyeku, *Regulating Supreme Court Recusals*, 2006 SING. J. LEGAL STUD. 60, 82 (2006); see also Entin, *supra* note 75, at 461 (quoting SIXTH REPORT OF THE JUDICIAL COUNCIL OF OHIO TO THE GENERAL ASSEMBLY OF OHIO 17 (1943)) (noting that Ohio changed regimes in 1944 to allow court of appeals judges to sit by designation on the Ohio Supreme Court to avoid ties, and also to avoid “plac[ing] an ‘unfair burden’ on appellants challenging the validity of statutes, particularly when more than one justice did not participate”).

<sup>101</sup> Levmore, *supra* note 76, at 96–97.

<sup>102</sup> See *id.* at 97 (describing the *Marks* doctrine). For an interesting discussion of how courts might determine precedent in settings where common reasoning between pluralities and dissenting opinions may render murky application of the *Marks* doctrine, see Michael L. Eber, Comment, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 207 (2008).

<sup>103</sup> For discussion of the considerations that underlie this determination, see Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67 (2004).

<sup>104</sup> Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 944–45 (1989). While unpublished opinions are supposed to be reserved for use in cases in which the holdings are unexceptional, that is not always the case in practice. See, e.g., Patricia M. Wald, *Changing Course: The Use of Precedent in the District of Columbia Circuit*, 34 CLEV. ST. L. REV. 477, 500 (1986) (“Perhaps the most frustrating way courts deal with unpopular precedent is by evading the precedent in a judgment without opinion or in an unpublished memorandum.”).

Whether the practice of disallowing precedential value (other than for res judicata purposes) is constitutional recently proved to be quite controversial. Compare *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 2000) (“[W]e conclude that [the local circuit rule], insofar as it would allow us to avoid the

Another wrinkle that many courts—including the federal courts of appeals and many high courts (though not the U.S. Supreme Court<sup>105</sup>)—add is reliance upon panels of judges that constitute less than the full complement of the court in question. Thus, for example, federal courts of appeals generally sit in panels of three. The power of the three-judge panel in some ways exceeds what one normally understands as *stare decisis* weight<sup>106</sup>: No subsequent three-judge panel of the court is empowered to overrule an earlier holding of a three-judge panel.<sup>107</sup> The court *en banc*, however, is free to overrule earlier panel holdings

---

precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional.”), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc), with *Hart v. Massanari*, 266 F.3d 1155, 1160 (9th Cir. 2001) (“We believe that *Anastasoff* overstates the case.”). See also Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004) (criticizing practices of unpublication, depublishing, and stipulated withdrawal of judicial opinions). See generally Symposium, *Have We Ceased to Be a Common Law Country?: A Conversation on Unpublished, Depublished, Withdrawn and Per Curiam Opinions*, 62 WASH. & LEE L. REV. 1429 (2005); Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROC. 473 (2003).

Historically, many courts had rules that forbade the citation of unpublished opinions in court filings. See, e.g., *Robel*, *supra*, at 945–46. The *Federal Rules of Appellate Procedure* were amended in 2006 to preclude such barriers with respect to newly issued unpublished decisions. See FED. R. APP. P. 32.1(a) (2006) (“A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like; and (ii) issued on or after January 1, 2007.”).

<sup>105</sup> For proposals that the U.S. Supreme Court sit in panels to hear some cases, see Tracey E. George & Chris Guthrie, “*The Threes*”: *Re-Imagining Supreme Court Decisionmaking*, 61 VAND. L. REV. 1825 (2008); Roger J. Miner, *Federal Court Reform Should Start at the Top*, 77 JUDICATURE 104, 108 (1993).

<sup>106</sup> Cf. *Cent. Pines Land Co. v. United States*, 274 F.3d 881, 893 (5th Cir. 2001) (“It is well-established in this circuit that one panel of this Court may not overrule another. While easily confused with traditional *stare decisis*, ‘our rule that one panel cannot overturn another serves a somewhat different purpose of institutional orderliness.’” (quoting *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 425–26 (5th Cir. 1987))).

<sup>107</sup> See, e.g., *id.* (citations omitted).

Sometimes, even despite judges’ best efforts, a later court of appeals panel decision conflicts with an earlier one. See Wald, *supra* note 104, at 480 (“Inevitably, [courts of appeals decisions] are not all consistent.”). In that event, the general rule is that, in spite of the latter decision, the rule announced in the earlier decision remains binding: “[A]s to conflicts between panel opinions, application of the basic rule that one panel cannot overrule another requires a panel to follow the earlier of the conflicting opinions.” *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc). For discussion and justification, see *id.* at 332–34. But see *Graham v. Contract Transp., Inc.*, 220 F.3d 910, 914 (8th Cir. 2000) (“When faced with conflicting precedents we are free to choose which line of cases to follow . . .”).

Note that some courts of appeals “permit[] a panel to overrule a prior decision of the court if the panel first circulates its opinion to the entire court and, depending on the circuit, either no judge objects, or a majority of judges do not vote to hear the case en banc.” Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1483 n.270 (2005) (citations omitted). In effect, the involvement of all judges on the court makes it apt to describe these sorts of practices as “‘mini’ en banc proceedings.” See, e.g., Wald, *supra* note 104, at 486 n.30 (describing the practice in the District of Columbia Circuit). See generally Steven Bennett & Christine Pembroke, “*Mini*” *In Banc Proceedings: A Survey of Circuit Practices*, 34 CLEV. ST. L. REV. 531 (1986).

(as well as earlier en banc holdings).<sup>108</sup> (Presumably, the en banc court may afford some stare decisis weight to earlier panel and en banc holdings.<sup>109</sup>)

At a minimum, then, a majority is a prerequisite for precedential effect.<sup>110</sup> But the fact that a majority is a prerequisite for precedential value does not end matters. The question remains: majority of what? The answer to this question is generally a majority of sitting judges.<sup>111</sup> But what if recusals, court vacancies, or illness reduce the number of sitting judges, such that the majority of sitting judges is less than the majority of the full court? Is a decision issued by such a majority—a “minority majority”—due precedential respect? I turn to this question in Part II.

---

<sup>108</sup> See, e.g., *In re Bentz Metal Prods. Co.*, 253 F.3d 283, 285 (7th Cir. 2001) (en banc) (“It is well-established that on rehearing *en banc*, the full court may, and sometimes does, overrule a decision reached earlier by a three-judge panel in a separate case.”); *Bolden v. S.E. Pa. Transp. Auth.*, 953 F.2d 807, 813 (3d Cir. 1991) (en banc) (to same effect, citing a court internal operating rule); see also VA. CODE ANN. § 17.1-402(D) (2007) (authorizing en banc state court of appeals to “overrule any previous decision by any panel or of the full court”); *Armstrong v. Commonwealth*, 562 S.E.2d 139, 144 (Va. 2002) (overruling by court of appeals of earlier panel decision did not violate criminal defendant’s due process rights). For more discussion, see *infra* text accompanying notes 132–37.

A grant of rehearing en banc vacates, and renders without precedential value, any decision in the case issued by a panel of the court. E.g., *Johnson v. K Mart Corp.*, 273 F.3d 1035, 1070 (11th Cir. 2001) (announcing rehearing en banc); *Alvarado v. Bd. of Tr. of Montgomery Cmty. Col.*, 848 F.2d 457, 459 (4th Cir. 1988) (decision to grant en banc review results in vacation of panel opinion, and renders panel opinion devoid of precedential value); see also Wald, *supra* note 104, at 484 (noting that a judge who is on the losing end of a panel decision may not seek en banc hearing because “the judge may not have the votes to en banc the precedent, and denial of an en banc [request] will only strengthen [the precedent’s] authority” (footnote omitted)).

<sup>109</sup> See *Bolden*, 953 F.2d at 813 (“Because we are sitting *in banc* in this case, we are not bound by [panel] precedents in the same way that a panel would be bound. Instead, we are constrained only to the degree counselled by principles of stare decisis.” (internal citation omitted)); *infra* note 135 and accompanying text.

<sup>110</sup> That a decision is worthy of precedential effect does not resolve the difficult question of how much precedential effect is due. For example, one has to decide whether the decision should be construed narrowly or broadly, cf. *infra* notes 169–70 and accompanying text (discussing judicial minimalism), and to what extent a particular statement is holding or dicta, see Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005) (providing a framework for determining whether a proposition is a holding or dicta). For an exposition of the difficulties in designing, and implementing, a general rule of stare decisis (at least as to constitutional issues), see David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929 (2008).

<sup>111</sup> For courts that authorize panels of less than the full complement of judges to decide cases, the relevant majority is a majority of judges on the panel.

## II. MINORITY MAJORITIES

In Part I, I elucidated that a court may decide a case where the relevant quorum and action requirements are met. The court's decision is, as a general matter, decided by majority, as are the precedential effects of that decision. Taking these points together, this means that a majority of a minimal quorum should suffice to give rise to precedential effect.

What if, however, as a result of recusals, illness, or vacancies, the majority of sitting judges numbers less than a majority of the full court? For example, if two U.S. Supreme Court Justices are unavailable, then a majority of seven—that is, four Justices—is all that is required for a majority; yet, four is less than the five Justices that constitute the minimal majority of the full Court, such that the four Justices can be said to constitute a “minority majority.”

In this Part, I consider the question of precedential effect of cases decided by a minority majority. In section A, I elucidate situations in which cases might be decided by minority majorities, and I explain why such settings might be problematic. In section B, I set out various solutions to the problem. One type of solution is to institute rules that minimize (or eliminate) the occurrence of minority majorities. A second type of solution is to vary the precedential weight that minority-majority decisions are accorded. In section C, I consider, normatively, what the best strategies are for dealing with minority majorities. I argue that, for horizontal stare decisis purposes, minority-majority decisions should either not be binding or should only enjoy limited and narrow precedential power; for vertical stare decisis, minority-majority decisions should not be read broadly. Last, in section D, I address questions of institutional choice: Which institutions—the legislature, the courts by rule, or the courts by case holdings—are empowered, and best positioned, to address the problem of minority majorities?

### A. *Understanding the Problem*

A case is decided by a minority majority when it is decided by a majority of sitting judges, yet (because of vacancies, recusals, or both) the majority

numbers less than a majority of the full court (or, in the case of a panel, the number of judges who ordinarily constitute such a panel).<sup>112</sup>

The first step is to understand the range of cases within which minority majorities might occur. The minimum possible group out of which a majority might be drawn is a quorum.<sup>113</sup> Thus, for the U.S. Supreme Court, the smallest possible majority is four out of a quorum of six.<sup>114</sup> For a court of equal size using the common law quorum requirement—and thus for the Supreme Court of Canada<sup>115</sup> and most nine-member state supreme courts—the quorum would be five, and so the minimal majority would be three of five for a common law court of equal size. Table 2 summarizes, for various courts and typical court structures, the total number of judges, the number of judges ordinarily required for a majority, the quorum requirement, and the minimum number of judges allowed for a majority—what I call the “minimum majority.”

---

<sup>112</sup> A slightly different question can arise in the legislative setting, where a legislator can be present—and therefore count toward determining whether the relevant quorum requirement is met—yet choose simply not to cast a vote. See, e.g., Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided, and Why INS v. Chadha Was Wrongly Reasoned*, 83 TEX. L. REV. 1265, 1290 n.64, 1312 n.101, 1354 n.195 (2005) (arguing that the requirement that a constitutional amendment be passed by two-thirds of each house of the federal legislature may be met where 51 of the 100 members of the Senate are present, but the final vote is 1–0). It seems that the issue would never arise in the judicial setting insofar as judges assigned to a case who are not recused see themselves as having a duty to cast a vote. See, e.g., Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2367 n.189 (1999) (“There appears to be an unwritten convention that, unless recused, a Justice may not vote to ‘abstain’ on grounds of either incertitude or equipoise.”).

<sup>113</sup> 20 AM. JUR. 2D *Courts* § 138 (2005) (“For an opinion to have stare decisis effect, at least a majority of the members of the court must have joined the opinion. However, a majority may be of a quorum, rather than of all the sitting judges.”).

For courts that do not have explicit quorum requirements but do have action requirements, as explained above, see *supra* text accompanying notes 55–56, the action requirement functions as an effective quorum requirement.

<sup>114</sup> E.g., Caminker, *supra* note 112, at 2315 n.49 (“Technically, the Court needs a majority of a ‘quorum’ of six to decide a case, so it takes at least four Justices (of seven sitting) to construct a majority-disposition or majority-opinion coalition.”).

<sup>115</sup> The quorum for Canada’s Supreme Court, which currently consists of nine justices, is five—in accordance with the common law rule—although the quorum was five even when the complement of that court numbered fewer than nine. See J.T. Irvine, *The Case of the Evenly Divided Court*, 64 SASKATCHEWAN L. REV. 219, 221–22 (2001); see also *id.* at 228 (“Although the quorum for the Court is normally five judges, the *Supreme Court Act* permits a quorum of four judges, if the parties consent.”).

**Table 2: Comparison of Court Size, and Quorum and Majority Requirements, for Various Courts and Court Structures**

<b>Court</b>	<b>Total Number of Judges</b>	<b>Minimum Majority of Whole Court</b>	<b>Quorum Requirement</b>	<b>Minimum Majority of Quorum</b>
U.S. Supreme Court	9	5	6	4
Typical Federal Court of Appeals Panel	3	2	2	2 <sup>116</sup>
Typical Federal Court of Appeals En Banc	Variable	Majority of judges on en banc court	Majority of judges on en banc court	Majority of Quorum
Typical Ninth Circuit En Banc <sup>117</sup>	15	8	8	5
Supreme Court of Canada	9	5	5	3
Typical Nine-Justice State Supreme Court	9	5	5	3
Typical Seven-Justice State Supreme Court	7	4	4	3
Typical Five-Justice State Supreme Court	5	3	3	2

Table 3 sets out the minimum-majority requirements for courts, composed of different numbers of judges, that rely upon the common law quorum rule. Note that all courts with more than three judges run the risk of having cases decided by minority majorities. Indeed, note that the difference between the minimum majority of the whole court and the minimum majority with a simple quorum, as reflected in the last column, can be as low as zero but gets progressively larger as the size of the court increases. This means that, especially as the court size increases, the greater the number of majorities that

---

<sup>116</sup> Note, however, that, even if a quorum of two judges may ultimately decide a case, three judges must constitute the original panel pursuant to statute. *See supra* note 58 and accompanying text (describing this requirement, and characterizing it as an action requirement).

<sup>117</sup> *See supra* note 52.

will satisfy the minimum quorum requirement but are less than the majority of the whole court.

**Table 3: Comparison of Minimum Majorities Required for Courts with Common Law Quorum Requirements**<sup>118</sup>

Court Size	Quorum	Minimum Majority of Whole Court	Minimum Majority with Simple Quorum	Difference Between Minimum Majorities of Whole Court and with Simple Quorum
13	7	7	4	3
12	7	7	4	3
11	6	6	4	2
10	6	6	4	2
9	5	5	3	2
8	5	5	3	2
7	4	4	3	1
6	4	4	3	1
5	3	3	2	1
4	3	3	2	1
3	2	2	2	0
2	2	2	2	0

<sup>118</sup> Generally, the numbers in the table depend upon the remainder when the court size is divided by 4 (mathematically, the equivalent of the number “mod 4”). Every possible court size can be represented by  $4N$ ,  $4N + 1$ ,  $4N + 2$ , or  $4N + 3$ , where  $N$  is some positive integer. Given that, the general table looks as follows:

Court Size	Quorum	Minimum Majority of Whole Court	Minimum Majority with Simple Quorum	Difference Between Minimum Majorities of Whole Court and with Simple Quorum
$4N + 3$	$2N + 2$	$2N + 2$	$N + 2$	$N$
$4N + 2$	$2N + 2$	$2N + 2$	$N + 2$	$N$
$4N + 1$	$2N + 1$	$2N + 1$	$N + 1$	$N$
$4N$	$2N + 1$	$2N + 1$	$N + 1$	$N$

Thus, as the size of the court increases, the difference in minimum majority size will also increase, at a rate approximately one-quarter the rate of increase in the court size.

Why are decisions by minority majorities problematic? The reasons mirror the justifications for instituting quorum requirements. It bears noting at the outset that these concerns arise, to some degree, any time less than the full complement of a court decides a case. The situation of a case decided by a minority majority is especially problematic, however, because of the possibility that missing members of the court—or, in the case of court vacancies, the possibility that those who might join the court—might act in some way to change the outcome of the case. This, in turn, to some extent undermines the legitimacy of the outcome in the case, and perhaps also of the court itself.

Let us focus, then, on the outcome of the case. First, in all minority-majority cases lurks the simple possibility that “additional” judges would have voted such that the majority decision would not have carried the day. Because a minority majority constitutes less than a majority of the full court, the votes of the additional judges could, at least in theory, combine with the actual dissenting judges to form a majority of the full court.

Second, consider deliberation and reflection. The absence of some members of a court may make deliberation less plentiful. It also may affect the content of the deliberation that does take place. Both these factors may affect the outcome of the case.

Third, consider the notion of representation on the court. In legislatures, the logic that the diminished legislature will be likely often to reach the same result as it would have in full is supported by the large size of the legislature to begin with. The absence of a few legislators is likely to have far less of an impact on a legislature, however, than is the absence of a few judges (or even one judge) on a court of much smaller size.<sup>119</sup>

Moreover, the identities of those who are present to vote may mean that certain interests are overrepresented, and in turn that other interests are underrepresented. While we generally do not think of courts as representative bodies, this may occur in a couple of ways. First, consider representativeness of varied ideological viewpoints.<sup>120</sup> There are courts whose judges are elected,

---

<sup>119</sup> *But cf.* FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 5 (1994) (stating that en banc courts “resemble a small legislature more than a court”).

<sup>120</sup> The balance of representation between ideologies that espouse activist judging and those that do not may be of particular importance. Indeed, some argue that activist judges’ votes will tend to decide more cases, even where all the judges on a court cast votes. Joseph Isenbergh, *Activists Vote Twice*, 70 U. CHI. L. REV. 159 (2003); *cf.* Wald, *supra* note 104, at 479 (“During periods when the court’s membership changes rapidly and

in which case the absence of a judge may reflect the absence of a particular ideology. Ideological diminishment may also occur on appointed courts: Here, changes in the executive and legislative branches over time may tend to secure judges with different ideologies, such that the absence of a judge may reduce or silence a particular ideology. Indeed, if court vacancies arise, the political branches may actively work to keep the court membership depleted, depending upon the current composition of the court and the political orientation of the executive and legislative branches.<sup>121</sup> Second, some courts elect, or call for appointment of, judges on a geographical basis.<sup>122</sup> On such courts, then, the absence of a judge means the absence of representation of a particular geographic area.

Fourth, consider that the outcome of a case on appeal consists not only of the technical affirmance, reversal, or other disposition of the lower court's decision, but also of the reasoning that the court employs. In other words, a majority of a court with diminished membership may vote for the same disposition of the lower court as would the court of full complement, yet the reasoning provided by the majority of the diminished court may differ from what would have been the reasoning of the majority of the full court. In

---

new members bring new ideologies and philosophies to their judicial role, we look to a life-tenured judiciary to apply past precedent to curb too rapid change, and to maintain the stability of the law." (footnote omitted)).

<sup>121</sup> For a general discussion of the politicization of the federal judicial nomination process, see Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667 (2003). For discussion of recent examples of such escalations, see, for example, *id.* at 668–69 (discussing Senate Judiciary Committee's rejection of Charles Pickering's nomination to the U.S. Court of Appeals for the Fifth Circuit); McGinnis & Rappaport, *Supermajority Rules*, *supra* note 72, at 545–48 (noting use of filibuster by Democrats to block former President George W. Bush's appointments); Nash, *supra* note 72, at 2187–89 (recounting Democrats' rejection of Miguel Estrada's nomination for the U.S. Court of Appeals for the District of Columbia and of Harriet Miers's nomination to the U.S. Supreme Court).

<sup>122</sup> For example, the Illinois Constitution calls for judges to be appointed with an eye to geographic diversity, *see* ILL. CONST. art. VI, § 3 ("The Supreme Court shall consist of seven Judges. Three shall be selected from the First Judicial District and one from each of the other Judicial Districts."), while Louisiana elects its supreme court justices on a geographic basis, *see* LA. REV. STAT. ANN. § 13:101 (1999) (dividing the state into supreme court electoral districts). *See also* FLA. CONST. art. V, § 3 ("Of the seven justices, each appellate district shall have at least one justice elected or appointed from the district to the supreme court who is a resident of the district at the time of the original appointment or election."). For an argument that the U.S. Supreme Court should be a demographically representative body, see Angela Onwuachi-Willig, *Representative Government, Representative Court? The Supreme Court as a Representative Body*, 90 MINN. L. REV. 1252 (2006).

For a hybrid of ideological and geographical representation, consider the Judiciary Act of 1837, 5 Stat. 176, which "divided the nation into nine circuits, five of them consisting exclusively of slave states." Eric T. Dean, Jr., *Reassessing Dred Scott: The Possibilities of Federal Power in the Antebellum Context*, 60 U. CIN. L. REV. 713, 736 n.72 (1992). Insofar as "[e]ach of the nine Supreme Court justices was appointed from a respective circuit," this meant that "at least five of the nine justices would be from slave states." *Id.*

particular, it is logical to expect the grounds for a decision to become narrower as it becomes necessary to attract more judges in order to constitute a majority. Thus, in general, one would expect a majority joined only by four judges to be broader than a decision joined by five.<sup>123</sup> In this sense, the ability of a minority majority to issue a decision may affect the scope of the court's mandate on remand—and, importantly, its precedential effect—even if the disposition is technically no different than it would have been had a standard majority of the full court issued the decision.

Fifth, consider that path dependence may further increase the gulf between a full court and a diminished court. Most high courts of jurisdictions enjoy discretion over their docket. This means that the evolutionary path the law takes will depend upon which cases the high court chooses to hear. Most high courts' dockets are formed at least in part from cases chosen using some action requirement akin to the Supreme Court's rule of four.<sup>124</sup> If the threshold for the relevant action requirement does not change as the court's complement is reduced—e.g., if the requirement for granting a petition for writ of certiorari is not reduced below four—then it stands to reason that the court will hear fewer cases than it would were the court fully staffed, because it will take a larger percentage of the available judges to grant discretionary review.<sup>125</sup> Put another way, it is likely that there will be cases that the court with a full complement would have heard that the diminished court will be unable to muster enough votes to hear. As a result, the very evolution of the law—that is, which issues are heard and how they are determined—may change.

One solution to this problem (which I discuss below<sup>126</sup>) is to reduce the threshold for granting discretionary review—for example, one might reduce the rule of four to a rule of three when fewer than nine or eight Justices are

---

<sup>123</sup> As Chief Justice Roberts has explained, “The broader the agreement among the justices, the more likely it is a decision on the narrowest possible grounds.” John G. Roberts, Jr., Commencement Address at Georgetown University Law Center (May 21, 2006), <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=144>; see also Samuel P. Jordan, *Irregular Panels*, 60 ALA. L. REV. (forthcoming 2009) (manuscript at 21), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1268315](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1268315). Professor Jordan also argues, in the context of constituting federal court of appeals panels, that additional judges might dissent. See *id.* (manuscript at 20–21). Though dissents can play an important role in determining the scope, precedential value, and vitality of Supreme Court decisions, their role in these respects is surely more important at the level of the courts of appeals.

<sup>124</sup> See, e.g., Gerald B. Cope, Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with Those of the Other States and the Federal System*, 45 FLA. L. REV. 21, 109–30, app. C (1993).

<sup>125</sup> Note that 4/8 (0.5) is greater than 4/9 (0.444) and 4/7 (0.571) is greater than 4/9 (0.444).

<sup>126</sup> See *infra* notes 181–88 and accompanying text.

available on a case.<sup>127</sup> This, however, will often have the opposite result: More cases will be heard than if the full complement of the court were available. For example, because three out of seven Justices is a lower threshold than four out of nine,<sup>128</sup> a rule of three in such cases might admit more cases to the Court's docket than would the typical rule of four for the full nine-member Court.

Whether the threshold for exercising discretion to hear cases is relaxed or not, it is likely that the high court's docket will in some way change if the full complement of the court is not available to vote. This is likely to be especially problematic if the reduction is the result of persisting court vacancies. Indeed, in such cases, one might expect litigants to try to game the system by calculating that some cases may be easier to be heard under such circumstances.<sup>129</sup>

Beyond the simple point that some cases in fact may have been decided differently—or that the universe of cases decided may have been changed—the mere perception that these changes may have occurred will tend to undermine the legitimacy of the court. Beyond this, the decision of cases—and especially the creation of precedent—by less than majorities of the full court may seem illegitimate,<sup>130</sup> especially if the practice were to become more common.<sup>131</sup>

A final point is that the bulk of these problems are of greater concern in terms of precedential effect. If the result in a case was different than it otherwise would have been (or if a court decided a case that it otherwise would not have), but the result affected only the actual litigants in that case, then the effect of the decision—and any accompanying affront to the court's legitimacy—would be quite cabined. However, if the court's decision has precedential effect—therefore binding lower courts and even the court that

---

<sup>127</sup> See *supra* note 67 and accompanying text.

<sup>128</sup> Note that 3/7 (0.429) is less than 4/9 (0.444).

<sup>129</sup> Cf. Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995) (arguing that standing rules have developed, and are desirable, because they make it difficult for ideologically motivated plaintiffs to manipulate courts' dockets opportunistically); see also Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 348, 396 (1995) (drawing on historical evidence and caselaw to bolster this point).

<sup>130</sup> See Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of Bush v. Gore*, 54 VAND. L. REV. 1849, 1939–40 (2001) (arguing that the Court used the per curiam opinion in *Bush v. Gore*, 531 U.S. 98 (2000), to mask internal disagreement among the bare majority in favor of reversing the Florida Supreme Court, for the reason that having a presidential election resolved by less than a majority of the Justices would be unseemly and raise questions of legitimacy).

<sup>131</sup> See, e.g., THOMAS G. HANSFORD & JAMES F. SPRIGGS II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* 19 (2006) (“[O]ne of the most important functions of *stare decisis* is fostering the legitimacy of the judiciary as an institution and the legitimacy of specific court decisions.”).

issued the decision—then the effect of the decision—and the affront to the court's legitimacy—will be far more pernicious.

Before turning to possible solutions to the minority majority “problem,” it is important to examine how decisions by panels of a court—majorities of which will almost always constitute minority majorities of the entire court, even where all the judges on the panel agree—are not problematic in the myriad ways that other minority-majority decision making tends to be. The key distinction is that with panel decision making, though the remaining judges on the court do not participate directly, they retain a supervisory role. This supervision manifests itself in three ways. First, as discussed above, the parties—or the court *sua sponte*—may choose to hear any case *en banc*.<sup>132</sup> If this happens, the decision of the panel is revoked; indeed, it thereafter lacks any precedential value.<sup>133</sup> More generally, *en banc* courts enjoy the freedom to overturn any prior panel precedent.<sup>134</sup> While in theory *en banc* courts also remain free to reverse prior *en banc* decisions,<sup>135</sup> it seems to some that *en banc* decisions enjoy greater *stare decisis* weight.<sup>136</sup> Given the rarity of *en banc*

---

<sup>132</sup> An *en banc* hearing may even take place before a panel decision is ever issued, on the basis of the draft opinion that is circulated to the entire court. *See, e.g.*, *United States v. Floresca*, 38 F.3d 706, 708 (4th Cir. 1994) (*en banc*) (“The parties filed briefs and argued before a panel of this court. Prior to the issuance of a decision, however, a majority of the court voted to rehear the case *en banc*.”); Peter Michael Madden, Comment, *In Banc Procedures in the United States Courts of Appeals*, 43 *FORDHAM L. REV.* 401, 409 (1974) (describing the advantages of calling a hearing *en banc* before a decision is published).

Note that in courts such as the Ninth Circuit, where even *en banc* review consists of less than the entire complement of judges on the court, provision exists for subsequent “full court” review. *See supra* note 52 (discussing the number of judges that could sit on a panel, and when a panel of all circuit judges would be appropriate).

<sup>133</sup> *See supra* note 108 (discussing a court's ability to overrule earlier panel holdings).

<sup>134</sup> *See supra* note 108 and accompanying text; *see also* *United States v. Martorano*, 620 F.2d 912, 920 (1st Cir. 1980) (rejecting argument that, because “one three-judge panel is not authorized to overrule another,” three-judge *en banc* court could not overrule original panel decision). *But see* *Robertson Oil Co. v. Phillips Petroleum Co.*, 14 F.3d 373, 376 & n.5 (8th Cir. 1993) (*en banc*) (stating that where court of appeals denied rehearing *en banc* with respect to two prior panel decisions but granted it after a third decision, the “only issue” properly before the *en banc* court was the propriety of the district court's latest decision; other issues were properly not reheard under the doctrine of “the law of the case which a majority of the judges of this court so firmly endorsed in our order denying rehearing *en banc*”).

<sup>135</sup> *See, e.g.*, *Armstrong v. McAlpin*, 625 F.2d 433, 435 (2d Cir. 1980) (*en banc*) (overruling prior *en banc* holding on ground that it proved impracticable), *rev'd*, 449 U.S. 1106 (1981).

<sup>136</sup> *See, e.g.*, Madden, *supra* note 132, at 409 (“While it always remains a possibility that the outvoted [en banc] minority might try to circumvent the majority, this is less likely in the face of the more authoritative in banc precedent than it would be where there were merely precedential panel decisions.”); James J. Wheaton, Note, *Playing with Numbers: Determining the Majority of Judges Required to Grant En Banc Sitings in the United States Courts of Appeals*, 70 *VA. L. REV.* 1505, 1529 (1984) (“Because the holdings of three-judge panels may be viewed as less authoritative and perhaps non-binding for subsequent panel decisions, the *en banc* hearing or rehearing arguably creates a stronger precedent for later panel decisions.”); *cf.* *United States v.*

review,<sup>137</sup> however, one needs to consider as well other reasons that panels do not stray far from what the entirety of the court would accept.

Second, on some courts that operate through panels, all the judges on the court will read (or at least have the opportunity to read) all panel opinions before they are issued.<sup>138</sup> Apart from enabling judges to flag cases for en banc review, this gives judges the opportunity to bring suggestions to the attention of the members of the panel. Panel members may be willing to modify their opinions in light of these suggestions, whether out of fear of en banc review, out of a sense of collegiality, or both.

Third, the shadow of possible en banc review, and of having one's colleagues read the panel decision—combined with motivations of collegiality—may tend to moderate the content of panel decisions in the first instance. As Professors Cooper and Berman explain:

A three-judge panel that confronts a novel or important legal issue probably should be quite reticent about establishing a definitive precedent before other judges can have some input. Such reticence might be based in a circuit judge's general disinclination to speak for and to bind fellow judges before having some inkling for their views, or based in a circuit judge's candid appreciation that colleagues may be more knowledgeable or familiar with a particular legal issue.

---

Am.-Foreign S.S. Corp., 363 U.S. 685, 689–90 (1960) (interpreting judicial code to hold that circuit judge who retired at time of decision by en banc court could not participate in decision even though he participated, before retirement, in the original panel decision, and noting that the result allowed active circuit judges to use en banc court to achieve orderly judicial administration and finality of decisions); Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1621 (2000) (predicting that, under proposal for composing en banc courts out of judges from multiple circuits, “[e]n banc panels are . . . likely to refuse to hear cases previously resolved by en banc panels of the same circuit, and even when they do reconsider issues, they will recognize that they are not writing on blank slates”); Christopher P. Banks, *The Politics of En Banc Review in the “Mini-Supreme Court,”* 13 J.L. & POL. 377, 406 (1997) (relying upon a survey of the subsequent case history of en banc decisions by the District of Columbia Circuit to support the proposition that “the Supreme Court, in the vast majority of cases, does not disturb the outcome reached by the courts of appeals sitting en banc”).

<sup>137</sup> E.g., *Walters v. Moore-McCormack Lines, Inc.*, 312 F.2d 893, 893–94 (2d Cir. 1963) (statement of Lumbard, C.J.).

<sup>138</sup> E.g., James S. Casebolt, *Procedures and Policies of the Colorado Court of Appeals*, 24 COLO. LAW. 2105, 2110 (1995) (“[E]ach judge [on the court] must . . . review all draft opinions, proposed for publication.”); cf. Charles R. Wilson, *How Opinions Are Developed in the United States Court of Appeals for the Eleventh Circuit*, 32 STETSON L. REV. 247, 267 n.107 (2003) (“The members of the Court who are not members of the three-judge panel will not review a proposed opinion before it is filed with the Court, except in special cases in which the panel may determine that such review is necessary. Members of the Court will, however, receive a copy of the opinion before it is issued as a slip opinion by West Publishing Company.” (citation omitted)).

Accordingly, when a particular panel is forced to confront a consequential legal issue in a less-than-ideal context, the case for consciously avoiding the issuance of a firm and conclusive legal decision becomes especially compelling.<sup>139</sup>

In short, then, panel decisions do not raise the same concerns as do other settings in which minority-majority decisions occur. In other settings, the absence of other members of the court to supervise the minority majority exacerbates the problem. In the next section, I consider steps that might be taken to ameliorate the problem.

### *B. Solving the Minority-Majority Problem*

Tables 2 and 3 made clear that larger courts are (at least, if one assumes an equal likelihood of illness, recusals, and vacancies) more likely to have cases decided by minority majorities. What, if anything, can be done about it?

The possible strategies can be seen to fall into two categories. First, one might implement rules that are likely to minimize occurrences of minority majorities. An increase in the quorum rule is one such solution. Congress has taken such an approach in respect of the Supreme Court by defining the quorum in excess of the common law quorum requirement.<sup>140</sup> As a result, three Justices—who would constitute a majority of the common law quorum of five out of a court of nine judges—cannot issue a majority opinion. Instead, it takes four Justices to constitute a minority majority of the Supreme Court—only one less than the minimum majority of the entire Court.<sup>141</sup>

Alternatively, one might reduce the size of the court, insofar as larger courts are more likely to give rise to minority-majority decisions.<sup>142</sup> The

---

<sup>139</sup> Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 *BROOK. L. REV.* 685, 723 (2001).

<sup>140</sup> Whether this was Congress's intent is open to debate. The esteemed Supreme Court historian Charles Warren has suggested that Congress's action in setting the Court size at nine but the quorum requirement at six—in excess of the common law standard—was inadvertent: "It would seem that the provision for six was simply copied from the act of 1863—when the court was to consist of ten—without any consideration of the fact that while six was a majority of ten it was more than a majority of nine." Charles Warren, Letter to the Editor, *Quorum of Court: Number Needed Has Changed Not Infrequently*, *N.Y. TIMES*, Dec. 20, 1942, at E9. *But cf.* H.E. Cunningham, Note, *The Problem of the Supreme Court Quorum*, 12 *GEO. WASH. L. REV.* 175, 180–81 (1943) ("[I]t may be inferred that Congress . . . determined to increase the quorum to the end that all questions . . . would receive the attention of at least two-thirds of the Court . . . . However, there is room for differing judgments on this interpretation of the intent of . . . Congress . . .").

<sup>141</sup> *See, e.g.,* *Davis v. Bandemer*, 478 U.S. 109, 112 (1986) (controlling decision issued by a four-Justice minority majority).

<sup>142</sup> *See supra* tbl.3 and note 106.

problem here is that several factors—such as the Condorcet Jury Theorem,<sup>143</sup> the representative nature of courts,<sup>144</sup> and to some degree collegiality<sup>145</sup>—argue against major reductions in court size.

One also might introduce action requirements that restrict the ability of the Court to proceed, even if a quorum is present, if a more robust majority cannot be found. For example, the Supreme Court might revive its old prohibition against issuing decisions, at least in constitutional cases, where at least five Justices do not concur in the result.

The problem with these types of solutions is that vacancies, recusals, and illness are inevitable. Minority majorities could be eliminated if quorum requirements were set high enough. The problem is that a relatively small number of absences would paralyze the court.<sup>146</sup> More generally, one can minimize the possible occurrence of minority-majority decisions only at the expense of rendering the court unable to act in more and more circumstances. But commentators have observed that the politicization of the judiciary may lead to more protracted battles between the executive and legislative branches over judicial appointments,<sup>147</sup> which may mean that courts have to subsist with vacancies for extended periods of time. Additionally, commentators have noted that the specter of terrorism raises similar prospects.<sup>148</sup> In short, the notion of eliminating, or even substantially limiting, the possible occurrence of minority-majority decisions seems unwise.<sup>149</sup>

---

<sup>143</sup> See *supra* notes 79–83 and accompanying text (discussing the Condorcet Jury Theorem).

<sup>144</sup> See *supra* notes 119–21 and accompanying text (proposing how courts can be considered to have a representative nature).

<sup>145</sup> See *supra* note 31 and accompanying text. Judge Edwards, however, has argued that too many judges can frustrate efforts to foster collegiality. See Edwards, *The Effects of Collegiality*, *supra* note 31, at 1674–75 (“I have always believed that it is easier to achieve collegiality on a court with twelve members than on one with twenty or thirty.”); see also *supra* notes 119–32 (noting Judge Coffin’s observation that en banc courts “resemble a small legislature more than a court”).

<sup>146</sup> See *supra* notes 17–22 and accompanying text (discussing reasons for potential judicial vacancies).

<sup>147</sup> See *supra* note 121 and accompanying text (noting how the judicial appointments process has become dominated by political interests in recent years).

<sup>148</sup> See Moss & Siskel, *supra* note 23, at 1039–41 (calling upon Congress to enact a statute reducing the Supreme Court’s quorum requirement under particular circumstances); *supra* notes 22–23 and accompanying text (discussing how terrorism could potentially influence judicial activity).

<sup>149</sup> One might try to ameliorate the problem of minority majorities by having a procedure that authorized judges from other courts to sit on the court in such cases. Some states use such a procedure to avoid the problem of an evenly divided court. See *supra* note 100 (noting such procedures in New Jersey, Ohio, and Canada). (A constitutional amendment would presumably be required to effect such a change at the level of the U.S. Supreme Court.)

Unlike tie votes, however, a court with depleted numbers may persist over time. The use of “stand-in” judges may render judicial decision making less predictable. This is especially problematic for high courts that

A final consideration applies to courts that maintain discretionary dockets: Should the action requirement by which cases are selected for appeal change when less than the full complement of judges is available? To put the point in terms applicable to the U.S. Supreme Court, should the rule of four by which certiorari is granted<sup>150</sup> be reduced when two Justices are recused?<sup>151</sup> On the one hand, continuing to require four votes to approve a grant of certiorari review may act as a prophylactic guard against the possibility of minority-majority decisions being handed down: The fewer the cases a seven-Justice Court can hear, the fewer the number of cases in which a minority-majority decision might occur.

On the other hand, such a rule would be overbroad: Its effect would sweep far wider than the policy goal. It might bar from consideration by a seven-Justice Court cases that would not have been decided by four-Justice majorities—i.e., cases that would be decided by five-, six-, and unanimous seven-Justice majorities. More problematically, it might keep the Court from deciding pressing issues. In general, the choice of gatekeeper rule will have an effect upon the collection of cases, and legal issues, that the Court will hear.<sup>152</sup>

In the end, then, it seems that some minority-majority decisions (or at least the possibility of some such decisions) are inevitable. The level at which one chooses to set the quorum requirement, and applicable action requirements, determines how many minority-majority decisions one is ready to tolerate.

Accepting the inevitability of minority-majority decisions, a second possible tack is to focus on the precedential effect of those decisions. As I noted above, the pernicious effects of minority-majority decisions are

---

often decide matters of first impression, and are free not to follow lower court precedent. Indeed, the use of stand-in judges might create additional incentives for those with the power to appoint judges to employ delaying tactics.

One also might try to limit the length of time that lower courts' minority-majority decisions persist by having the high court consider whether the lower court decision was a minority-majority decision in deciding whether to grant review. Thus, for example, the U.S. Supreme Court could announce that the fact that a lower court decision was issued by a minority majority would weigh favorably toward a grant of certiorari review. Cf. Nash, *supra* note 70, at 157–58 (arguing that Supreme Court should be more willing to grant review of lower court decisions that give rise to a doctrinal paradox). In some sense, the fact that the Supreme Court has proven more likely to review panel decisions by federal courts of appeals rather than en banc decisions, *see supra* note 136, is consistent with this notion.

<sup>150</sup> See *supra* note 62 and accompanying text (discussing the rule of four).

<sup>151</sup> For a discussion of existing law on this point, see *supra* notes 66–69 and accompanying text. For normative analysis, see *infra* text accompanying notes 182–89.

<sup>152</sup> See *infra* text accompanying notes 183–89 (discussing the rules).

amplified most greatly by their value as precedent.<sup>153</sup> The effects may be mitigated, then, by limiting the precedential weight that such decisions are accorded.

Consider various precedential schemes that courts and commentators have variously recommended or employed with respect to minority-majority decisions. First, one might say that the “normal” rules of stare decisis<sup>154</sup> apply to minority-majority decisions.<sup>155</sup>

Second, one might accord minority-majority decisions no stare decisis value. Such decisions would then be binding simply upon the actual litigants, and upon the courts directly below on remand (like a tie vote).<sup>156</sup> Some lower courts have interpreted the binding effect of Supreme Court minority-majority

---

<sup>153</sup> See *supra* text accompanying notes 129–32 (explaining the increased concern resulting from precedential effect).

<sup>154</sup> See *infra* note 169 and accompanying text (discussing how “normal” weight means simply that a minority-majority decision is afforded the same weight as a like case that is *not* decided by a minority majority).

<sup>155</sup> See, e.g., *United States v. Martorano*, 620 F.2d 912, 920 (1st Cir. 1980) (holding that majority of two votes, not three, was necessary for en banc review where Congress had authorized four seats on the court, but there were only three judges in active service); *Commonwealth v. Mason*, 322 A.2d 357, 358 (Pa. 1974) (“Whatever the effects of an opinion supported by less than a majority of those justices participating may be, there can be no doubt that when a majority of those justices participating join in the opinion, it becomes binding precedent on the courts of Pennsylvania.”); cf. *Arnold v. E. Air Lines, Inc.*, 712 F.2d 899, 901 (4th Cir. 1983) (en banc) (explaining that with ten active judges on court, “[t]he vote of five members *for*, four *against*, and one member *disqualified*, and hence not voting, which had previously taken place, constituted a determination by a majority of the circuit judges who are in regular active service ordering rehearing *en banc*”).

Professor Cappalli questions whether the court in *Mason* in fact held that decisions of a majority that falls below a majority of seats on the court are binding on the Pennsylvania Supreme Court, or simply on lower courts. He thus questions whether the court in *Mason* held as it did “because it thought [earlier precedent of the Pennsylvania Supreme Court] was correctly decided and not because of any binding force of the precedent.” Richard B. Cappalli, *What Is Authority? Creation and Use of Case Law by Pennsylvania’s Appellate Courts*, 72 TEMP. L. REV. 303, 343 (1999). This seems unlikely given both (i) the *Mason* court’s reference to precedent being binding on “the courts of Pennsylvania” (despite a subsequent reference to a particular case being binding “on the Court of Common Pleas of Mifflin County and on the Superior Court,” *Mason*, 322 A.2d at 358), and (ii) the absence of any real examination or endorsement of the reasoning in the earlier case. Moreover, Chief Justice Jones’s concurring and dissenting opinion specifically advances the argument, indicating that the majority in *Mason* rejected that approach. *Id.* at 359 (Jones, C.J., concurring and dissenting) (“I agree with the majority that our [earlier] decision . . . was binding on the Court of Common Pleas of Mifflin County and that it was binding on the Superior Court. The decision, however, is *not binding* upon this Court.”).

<sup>156</sup> See, e.g., *Whiting v. Town of W. Point*, 14 S.E. 698, 700 (Va. 1892) (holding that a decision of a five-Justice Supreme Court rendered by a quorum of three and in which only two Justices joined “is not ‘a precedent’ under the rule of *stare decisis*”).

decisions this way,<sup>157</sup> and at least one commentator assumes this to be the case.<sup>158</sup>

Third, one might view minority-majority decisions as fully binding upon lower courts, but not upon the court that issued the opinion.<sup>159</sup>

Fourth, one might see minority-majority decisions as having some, moderately diminished precedential value.<sup>160</sup> For example, a court might decide that minority-majority decisions might be more readily overruled than

<sup>157</sup> See *supra* notes 6–7 and accompanying text (discussing the Arizona Supreme Court's decision in *Roofing Wholesale Co. v. Palmer*, 502 P.2d 1327 (Ariz. 1972), not to follow *Fuentes v. Shevin*, 407 U.S. 67 (1972), a case that the U.S. Supreme Court had recently decided by the count of 4–3).

<sup>158</sup> Professor Frickey evidently believes this to be the case. In elucidating issues confronted by the Supreme Court in the case of *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979)—a follow-up on the then-recent affirmative action decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)—Frickey explains:

The voting setting in *Weber* was further complicated by the fact that two Justices—Powell, the swing Justice in *Bakke*, and Stevens, one of the members of the group voting to strike down the admissions plan in *Bakke* because it violated the norm of color blindness—did not participate in the *Weber* case. . . . The seven Justices left to decide the *Weber* case constituted a quorum of the Supreme Court, but any opinion joined by fewer than five of them would not constitute a majority opinion subject to the full authority of stare decisis, the doctrine of precedent. Of these seven remaining Justices, four were the four pro-affirmative action Justices in *Bakke*, and the other three had all voted to invalidate the admissions plan in *Bakke* as inconsistent with Title VI. The most likely result, one would have predicted, was a largely Pyrrhic, four-to-three victory for Kaiser and the Steelworkers, denying *Weber*'s challenge, but leaving for another day and case the ultimate resolution of the controversy concerning the applicability of Title VII to racial quotas in private employment.

Philip P. Frickey, *Wisdom on Weber*, 74 TUL. L. REV. 1169, 1175–76 (2000). (Ultimately, these concerns did not come to pass, as the Court resolved the case by a vote of 5–2. *Id.* at 1176–77.) See also HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS OR THE SCIENCE OF CASELAW 135 (1912) (“When . . . the judgment may . . . be cast by a minority of the court[,] . . . although such a judgment is as binding on the parties concerned, and on the inferior courts of the same system, as a unanimous opinion would have been, yet it is generally regarded as of less weight and value as a precedent.”).

<sup>159</sup> This was the view taken by the Chief Justice of the Pennsylvania Supreme Court, see *Mason*, 322 A.2d at 359 (Jones, C.J., concurring and dissenting) (asserting that, while an earlier decision that was endorsed by a minority majority is binding on lower courts, “[t]he decision . . . is *not binding* upon this Court”), if not the majority of the court. See also *supra* note 155 (arguing that stare decisis applies to minority-majority decisions).

The Michigan Supreme Court also has concluded that “a decision rendered by less than four justices who nevertheless constitute a majority of a legally constituted quorum is binding on the Court of Appeals and the trial courts.” *Negri v. Slotkin*, 244 N.W.2d 98, 98 (Mich. 1976). The court in *Negri* explicitly declined to address the question of whether such a decision also binds in any way the Michigan Supreme Court. See *id.* at 100 (“We limit our decision to the question before us, namely are lower courts bound by majority decisions of this Court of less than four justices.”).

<sup>160</sup> See *supra* notes 11–13 and accompanying text (discussing the Supreme Court's decision in the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870), overruling *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1869)).

another case decided by a full majority, all other things being equal. Or, a high court might decide that established precedent may not be overruled by a minority-majority decision.<sup>161</sup> Finally, courts might ascribe different precedential weight according to the reason for the reduction in court complement: the fact that two Justices recused themselves may mean that the issue in question readily might arise again so that little harm likely would result from delaying definitive resolution of the issue, while the persistence of vacancies on the Court might make it more important for minority-majority decisions to have binding effect.

*C. The Normative Question: What to Do About Minority-Majority Cases*

In this section, I consider the normative question of what to do about minority-majority decisions. In doing so, I evaluate strategies of the two types discussed in the previous section. I argue that steps should be taken both to limit the occurrence of minority-majority cases, and also—to the extent that their occurrence is to some degree inevitable—to limit their precedential reach.

Consider first the question of limiting the occurrence of cases decided by minority majorities. As discussed above, the larger the size of the court, the more likely it is that a bare majority quorum rule will result in minority-majority decisions.<sup>162</sup> Especially for larger courts, then, it is desirable to have the quorum requirement in excess of the bare majority of court size. It may also make sense to require some diversity of representation to the extent that the court is designed to consist of members from distinct geographic regions.<sup>163</sup>

Another desirable strategy would be to impose an action requirement that precludes the issuance of opinions absent the concurrence of a majority of judges authorized to sit on the court.<sup>164</sup> It should be noted, however, that this

---

<sup>161</sup> See *supra* note 15 and accompanying text (discussing how Justice Stevens's reasoning in his concurring opinion in *Montana v. United States*, 450 U.S. 544, 568 (1981), puts a diminished value on a minority-majority decision); see also Cappalli, *supra* note 155, at 343–48 (describing a sequence of cases at the end of which “three of five justices [on the Pennsylvania Supreme Court] overruled a five-year old precedent that was decided by a full court without dissent,” but defending the three-judge majority's action on the ground that “the two relevant [supreme court] precedents . . . badly conflicted in rationale” (footnote omitted)).

<sup>162</sup> See *supra* tbl.3 and accompanying text (showing how the size of the court increases the possibility of a minority decision).

<sup>163</sup> See *supra* note 122 and accompanying text (discussing the election of judges based on geography).

<sup>164</sup> For example, this would call for the Supreme Court to revive its old practice of not issuing decisions in constitutional cases absent the concurrence of a majority of judges authorized to sit on the Court.

strategy might delay—beyond the imposition of the quorum requirement—a court in addressing important legal issues.

I turn now to evaluate the various possible precedential rules from a normative perspective. To do so, it is important to have in place a normative framework. First, adherence to precedent enhances the legitimacy of the court in question.<sup>165</sup> As such, consistency of a precedential rule for minority-majority decisions is normatively desirable. Second, ensconcing erroneous rules is normatively undesirable.<sup>166</sup> Relatedly, even if erroneous rules are not entirely ensconced, such that “correct” rules will ultimately be reached, it is undesirable to have to expend more judicial resources to get to those “correct” results. All this weighs in favor of less binding precedential rules, especially where the “correctness” of a ruling is uncertain. Finally, finality is a virtue: it fosters reliability and predictability.<sup>167</sup> Thus, delay in definitively resolving questions of law is normatively undesirable. This is especially the case for high courts, whose job it is to clarify legal confusion; indeed, such courts often select cases precisely for this purpose. Insofar as nonbinding decisions do not definitively resolve legal questions, this consideration weighs in favor of more binding precedential rules.

I evaluate precedential rules for minority-majority cases along two axes: precedential weight for the court that issued the decision, and precedential weight for lower courts. I begin with precedential weight of a court on that

---

<sup>165</sup> See, e.g., Nash & Pardo, *supra* note 87, at 1773–74 (“[A] court may cite to another court’s decision not so much to explain the basis for its decision as to justify that decision, thus making the ‘primary function’ of citations one of ‘legitimation.’”).

<sup>166</sup> See Jonathan Remy Nash, *The Uneasy Case for Transjurisdictional Adjudication*, 94 VA. L. REV. 1869, 1918 (2008) (noting the “problematic situation of an initial court decision that turns out to be ill-advised yet binding on all other courts”); Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-Erie World*, 46 WM. & MARY L. REV. 1399, 1422 (2005) (“The existence of parallel, non-intersecting lines of authority means that a blockage or error in one will not affect the other.”).

<sup>167</sup> See, e.g., *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992) (“[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability . . . ; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation . . . ; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine . . . ; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification . . . .” (citations omitted)). For a critique of the Court’s reliance upon the supposed “nonworkability” of prior precedent to overrule that precedent, see Lauren Vicki Stark, Note, *The Unworkable Unworkability Test*, 80 N.Y.U. L. REV. 1665 (2005).

court's own future holdings, i.e., so-called horizontal stare decisis. I consider five possible rules:

- Rule I-A: Full precedential weight: the same precedential weight as accorded a like case *not* decided by a minority majority.
- Rule I-B: Limited precedential weight: precedential weight, but more easily overruled than a like case *not* decided by a minority majority.
- Rule I-C: Narrow precedential weight: precedential weight, but to be interpreted more narrowly than a case *not* decided by a minority majority.
- Rule I-D: Limited and narrow precedential weight: precedential weight, but (i) more easily overruled than a like case *not* decided by a minority majority, and (ii) to be interpreted more narrowly than a case *not* decided by a minority majority.
- Rule I-E: No precedential weight.

In keeping with the normative framework I set out above,<sup>168</sup> I measure the rules against three potential problems: (1) the extent to which the rule raises questions about the legitimacy of the court system, (2) the possibility that the rule will give rise to error costs and the unnecessary expenditure of judicial resources, and (3) the extent to which the rule will likely delay the high court in resolving definitively questions of law. Table 4 summarizes the results.

---

<sup>168</sup> See *supra* text accompanying notes 165–67 (discussing the normative framework).

**Table 4: Normative Analysis of Possible Horizontal Stare Decisis Rules for Minority-Majority Cases**

Rule:			Problem:		
	Stare Decisis Effect?	Interpretations?	Legitimacy	Delay	Error Costs/Wasted Resources
<b>I-A</b>	Full	Broad	No problem	No problem	Problem
<b>I-B</b>	Full	Narrow	Marginal problem	Marginal problem	Moderate problem
<b>I-C</b>	Limited	Broad	Marginal problem	Marginal problem	Moderate problem
<b>I-D</b>	Limited	Narrow	Marginal problem	Marginal problem	Mild problem
<b>I-E</b>	None	—	Moderate problem	Fair problem	Mild problem

Consider first Rule I-A—“full precedential weight”—under which a minority-majority decision is accorded the same weight as a like case that is *not* decided by a minority majority.<sup>169</sup> Rule I-A is not at all problematic in terms of a court’s legitimacy in issuing decisions that are not entitled to precedential weight. Nor is there a problem in terms of any delay in announcing definitive answers to important legal questions.

There is, however, a potential problem with respect to Rule I-A’s refusal to allow minority-majority decisions, all other things being equal, to be more easily overruled. Minority-majority decisions will be enconced, with the problem being that a minority of the full court can substantially bind later decisions of the court.

There is also a potential problem with respect to Rule I-A’s assumption that minority-majority decisions will be interpreted by subsequent courts as broadly as decisions handed down by standard majorities. As noted above, minority-majority decisions may tend to be broader than decisions issued by a standard majority (or majorities in excess thereof).<sup>170</sup> Professor Sunstein has argued that there is virtue in deciding cases modestly, without reaching out to decide

<sup>169</sup> The moniker “full precedential weight” thus does not mean that the case can never be overruled. It simply may be overruled as readily as (and no more easily than) a like case that was not decided by a minority majority.

<sup>170</sup> See *supra* note 123 and accompanying text (explaining that the broader support among justices is often a result of narrower grounds for a decision).

more than the cases themselves demand.<sup>171</sup> But that goal will be frustrated if broader minority-majority decisions are afforded full precedential weight.<sup>172</sup> And the problem will be further exacerbated if those decisions are no more easily overruled than any other decisions.

Rule I-B addresses the first of these concerns by directing that minority-majority decisions be given limited precedential weight. Under this rule, for example, a Supreme Court decision handed down by a four-Justice majority would be more easily overruled than the same decision handed down by a greater majority. In other words, it would be more susceptible to being overruled simply by virtue of the fact that it garnered a majority of merely four votes. The rule would also somewhat mitigate the problem of broad minority-majority decisions holding sway by rendering minority-majority decisions easier to overrule.

Such a rule might be seen somewhat to impinge upon the courts' legitimacy—insofar as courts would be seen to be issuing decisions without full precedential weight—but at most only in a minor way. Moreover, courts even now issue decisions that do not enjoy full precedential weight.<sup>173</sup> At the same time, the U.S. Supreme Court has at times indicated that cases that are decided by closer margins are more susceptible to being overruled than are

---

<sup>171</sup> Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 16–21, 30–33 (1996) [hereinafter Sunstein, *Foreword*] (discussing the circumstances under which judicial minimalism and maximalism are appropriate); see also Cass Sunstein, *The Minimalist*, L.A. TIMES, May 25, 2006, at B11 (“[N]arrow rulings help to promote a key goal of societies that are both diverse and free: to make agreement possible where agreement is necessary, while also making agreement unnecessary where agreement is not possible.”). See generally CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). Professor Sunstein has also explained the value of judicial minimalism in terms of options for the future, where the merits of minimalism turn upon the value of the option purchased:

Narrow judicial rulings, of the sort celebrated by judicial minimalists, can be understood as a way of “buying” an option, or at least “paying” a certain amount in return for flexibility. Judges who leave things undecided and who focus their rulings on the facts of particular cases are in a sense forcing themselves, and society as a whole, to purchase an option in return for flexibility in the resolution of subsequent problems. Whether that option is worthwhile depends on its price and the benefits that it provides.

Cass R. Sunstein, *Irreversible and Catastrophic*, 91 CORNELL L. REV. 841, 858 (2006) (footnote omitted). For a critique of Justice O'Connor's judicial minimalistic approach, see Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899 (2006).

<sup>172</sup> See Sunstein, *Foreword*, *supra* note 171, at 25–28 (discussing the connection between stare decisis and minimalist jurisprudence).

<sup>173</sup> See *supra* note 104 and accompanying text (explaining that unpublished decisions are not given full precedential weight); see also *infra* text accompanying notes 174, 176–78 (discussing situations where the precedential value of a decision is diminished).

cases decided by wider margins.<sup>174</sup> If having a case decided by a narrower margin constitutes a “strike” against the case’s stare decisis weight—and presumably is deemed not to infringe substantially upon the Court’s legitimacy—then it would seem no more of a problem to deem it a “strike” against a case that it was decided by a minority majority.<sup>175</sup>

A rule of limited precedential weight also would delay the court’s ability to address some pressing legal issues. Again, however, this effect would be limited and be felt only at the margins.

Rule I-C addresses the second concern with Rule I-A—that broad minority-majority decisions would be broadly controlling—by calling for narrow precedential effect for minority-majority decisions. To the extent that the rule rendered the perception of courts as less legitimate, or delayed the courts in addressing pressing legal issues, such effects would be at worst minor.

Rule I-D—limited and narrow precedential weight for minority-majority decisions—combines Rules I-B and I-C, and thus addresses both concerns raised by Rule I-A. It also would introduce the negative effects, minor though they may be, of both the rules that constitute it.

Last, Rule I-E would direct that minority-majority decisions be given no precedential weight. Such a rule clearly would introduce a potential delay in courts’ addressing pressing legal matters. Another issue is whether the

---

<sup>174</sup> See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 829 (1991) (justifying the overruling of earlier Supreme Court decisions in part on the ground that they were decided by “the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions”); cf. Michel Rosenfeld, *Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court*, 4 INT’L J. CONST. L. 618, 639 (2006) (noting that a 5–4 U.S. Supreme Court decision is “a binding opinion without seeming authoritarian,” and discussing an example of the Court overruling an earlier controversial decision decided by 5–4 vote). But see Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 113 (1991) (“It would disrupt our legal system severely for anyone on or off the Court to treat a 5–4 vote with a vigorous dissent as a rule of law entitled to less respect from the Court and other government decisionmakers than any of the Court’s other constitutional law decisions.”).

The High Court of Australia seems to afford full weight to narrowly decided decisions. If ever there were a case that the Court would have had a strong incentive to overrule on that ground, it would seem to be *Commonwealth v. Tasmania*, more commonly known as the *Tasmanian Dam Case*, 158 C.L.R. 1 (1983), a 4–3 decision that generated considerable political and social controversy. See generally Leslie Zines, *The Tasmanian Dam Case*, in AUSTRALIAN CONSTITUTIONAL LANDMARKS 262 (H.P. Lee & George Winterton eds., 2003). In spite of the “political and social pressures and passions that resulted from it,” the case has “stood up well over the years.” *Id.* at 278. (I am grateful to Keith Kendall for this reference.)

<sup>175</sup> One might argue that cases decided by 4–2 and especially 4–3 margins are already more susceptible to being overruled simply by virtue of the narrow margin of their decisions. One also might argue, however, that such cases deserve a second stare decisis “strike.”

legitimacy of the court would be impugned by the practice of issuing decisions that would not have full stare decisis effect. One need only point to the widespread practice among federal courts of appeals to issue so-called unpublished opinions that are explicitly denied precedential effect.<sup>176</sup> While this practice has generated considerable academic debate and some have argued that the practice does indeed tend to undermine the courts' legitimacy,<sup>177</sup> the practice has elicited little public hue and cry, perhaps though because the practice is not widely understood among the public. It may be that such a practice would be more problematic for a judicial system's high court, which is designed not (like the federal courts of appeals) to decide all cases appealed to it, but rather definitively to resolve issues of particular importance. Another response is that courts—including the Supreme Court—already issue tie decisions that are simply “affirmed by an equally divided court” and entitled to no precedential weight.<sup>178</sup> Why could not courts similarly issue decisions that affirm or reverse (or render some other disposition) “by an insufficiently constituted majority,” that also would not be entitled to precedential effect?<sup>179</sup>

Reviewing the options, it seems that, unless the concern over delays in courts addressing pressing legal issues is great, Rule I-D is preferable to Rules I-B and I-C, with Rule I-A—full precedential weight for minority-majority decisions—requiring too much deference to minority-majority decisions. Rule I-E—which would offer minority-majority decisions no precedential weight—would clearly exacerbate delays in issues being definitively resolved. But for that, however, the rule is fairly attractive and, perhaps surprisingly, seems

---

<sup>176</sup> See generally *supra* note 104 and accompanying text.

<sup>177</sup> See, e.g., Symposium, *supra* note 104.

<sup>178</sup> See *supra* note 76. The absence of precedent is even more acute when the court of appeals votes to hear a case en banc and then produces a tie vote. The grant of en banc review renders the original panel decision devoid of precedential weight, see *supra* notes 108, 133 and accompanying text, while the tie en banc vote precludes affording the en banc court any precedential weight. See, e.g., *Henderson v. Fort Worth Indep. Sch. Dist.*, 584 F.2d 115, 116 (5th Cir. 1978) (en banc) (“A petition for rehearing *en banc* was granted, which effectively vacates the panel opinion as a citable precedent. With the panel opinion vacated, the *en banc* court has reached an even division as to the issues raised on appeal. Thus, the district court is affirmed by operation of law, and the decision of the court of appeals has no precedential value.”); *Dasher v. Stripling*, 714 F.2d 1084, 1084 (11th Cir. 1983) (en banc) (“This Court took the case en banc, which resulted in the panel opinion being vacated. The judges of the en banc court are equally divided on the proper disposition of this case. Therefore, the judgment of the district court is affirmed as a matter of law, and this decision of the Court of Appeals has no precedential value.”).

<sup>179</sup> Cf. Caminker, *supra* note 112, at 2315 n.51 (outlining the possibility that perhaps judgment impasses should be treated the same way that equal divisions are treated, by creating a rule of “affirmed by a deadlocked Court”).

workable in light of the existing treatment of tie votes. To be sure, there is, a priori at least, little reason to expect there to be substantially more minority-majority decisions than decisions rendered by tie vote. At the least, the notion of affording minority-majority decisions no precedential weight is underexplored.

Beyond this, note that it might be possible to vary the choice of rule according to the circumstances under which the court vacancies arise. For example, one could imagine the Court announcing that it would follow Rule I-E in a case where vacancies were entirely or largely the result of recusals and the issues raised were likely to recur—meaning that the Court would soon again have a chance to resolve the issue definitively such that delay costs would be low—but Rule I-D in cases where vacancies are seen as likely to persist, the issue is less likely to arise again soon, or both.

I turn now to the treatment of minority-majority court precedent issued by lower courts, i.e., the question of vertical stare decisis. Consider these five possible rules:

- Rule II-A: Full precedential weight: the same precedential weight as accorded a like case *not* decided by a minority majority.
- Rule II-B: Limited precedential weight: precedential weight, but more justifiably not followed than a like case *not* decided by a minority majority.
- Rule II-C: Narrow precedential weight: precedential weight, but to be interpreted more narrowly than a case *not* decided by a minority majority.
- Rule II-D: Limited and narrow precedential weight: precedential weight, but (i) more justifiably not followed than a like case *not* decided by a minority majority, and (ii) to be interpreted more narrowly than a case *not* decided by a minority majority.
- Rule II-E: No precedential weight.

I assume that it would be inappropriate, and would render the judicial system illegitimate, for the high court to be more tightly bound by a minority-

majority decision than lower courts.<sup>180</sup> Thus, for example, if the high court follows Rule I-A, I-B, I-C, or I-D, then the lower courts could not adopt Rule II-E; Rule II-E is appropriate (though not necessary) only if the high court has adopted Rule I-E.

Beyond that constraint, I consider the following factors in evaluating possible lower court rules: (a) the extent to which the rule raises questions about the legitimacy of the court system, and (b) the possibility that the rule will give rise to error costs and the unnecessary expenditure of judicial resources.<sup>181</sup> Table 5 summarizes the analysis.

**Table 5: Normative Analysis of Possible Vertical Stare Decisis Rules for Minority-Majority Cases**

Rule:			Problem:	
	Stare Decisis Effect?	Interpretations?	Legitimacy	Error Costs/Wasted Resources
<b>II-A</b>	Full	Broad	Slight problem	Problem
<b>II-B</b>	Full	Narrow	No problem	Slight problem
<b>II-C</b>	Limited	Broad	Problem	Problem
<b>II-D</b>	Limited	Narrow	Problem	Slight problem
<b>II-E</b>	None	—	Large problem	Problem

Consider first Rule II-A. While giving full stare decisis effect to decisions of a high court will not be seen as illegitimate, the notion of giving broad interpretations to minority-majority decisions might be somewhat problematic.

---

<sup>180</sup> The United States Court of Appeals for the Ninth Circuit has explained:

A district judge may not respectfully (or disrespectfully) disagree with his learned colleagues on his own court of appeals who have ruled on a controlling legal issue, or with Supreme Court Justices writing for a majority of the Court. Binding authority within this regime cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point is the law. If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect. Binding authority must be followed unless and until overruled by a body competent to do so.

Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001) (footnote omitted). The court further noted that “[t]he same practice is followed in the state courts as well.” *Id.* at 1170 n.24.

<sup>181</sup> While delay in issuing decisions could be a major cost for a high court—and thus for the choice among Rules I-A, I-B, I-C, I-D, and I-E—it is of less import for intermediate appellate courts—and thus for the choice among Rules II-A, II-B, II-C, II-D, and II-E.

Following minority-majority decisions, and especially interpreting them broadly, might give rise to substantial error costs.

Rule II-B improves upon Rule II-A by calling for narrow interpretations of minority-majority decisions. Rule II-B seems more legitimate, and to give rise to fewer error costs, than does Rule II-A.

Rules II-C and II-D call for only limited stare decisis effect to be given by lower courts to high court minority-majority decisions. The problem here is legitimacy: It may be seen as illegitimate for lower courts to decline to follow duly issued high court majority decisions, even if they are issued by minority majorities. Rule II-D improves slightly upon Rule II-C on the error cost front by calling only for narrow interpretations of such rulings. Neither rule, however, seems optimal.

Rule II-E is especially problematic. First, the notion that lower courts might be free not to follow some high court decisions—even those issued by minority majorities—raises legitimacy concerns. Second, a lack of obligation to follow these decisions at all might well give rise to substantial error costs. (As above, however, one could imagine a “choice of precedential weight” rule that invoked Rule II-E in a case where high court vacancies were entirely or largely the result of recusals and the issue raised is seen as likely to arise again soon.)

At the end of the day, then, Rule II-B seems optimal. However, insofar as (as I explained above) lower courts ought not to be less bound by high court decisions than the high court itself, Rule II-B is only a viable option if the high court does not adopt Rule I-A (which requires the high court to give full precedential effect and broad interpretations to high court minority-majority decisions). The optimal combination of rules would seem to be Rule I-D or I-E, and Rule II-B.

The final question of rules relates to the high court’s rule for selecting cases for its discretionary docket. Assume that, with a full complement, the high court requires the affirmative vote of  $x$  of its judges to grant discretionary review. We may consider two variations to this rule in the context of a depleted bench:

Rule III-A: Court still requires  $x$  votes to grant discretionary review.

Rule III-B: Court requires  $y$  votes, where  $y < x$ , to grant discretionary review.

For example, then, in the case of the U.S. Supreme Court, Rule III-A would retain the “rule of four” even in the face of a depleted bench, while Rule III-B would reduce the four-vote requirement for at least some depleted benches.<sup>182</sup>

The problem that the choice of rules in this area addresses is path dependence with respect to cases that percolate up to the high court.<sup>183</sup> If the rule governing grants of discretionary review remains equally stringent—i.e., the case of Rule III-A—then the court may grant review in fewer cases. Rule III-A may thus be said to be underinclusive.<sup>184</sup> In contrast, if the rule governing grants of discretionary review is rendered less stringent—i.e., the case of Rule III-B—then the court may grant review in more cases. Rule III-B may thus be said to be overinclusive.<sup>185</sup> This is summarized in Table 6. Note, moreover, that each of these problems may become larger over time to the extent that evolution of law is path dependent.<sup>186</sup>

---

<sup>182</sup> The rule might be different, for example, for a nine-person Supreme Court where seven, as opposed to eight, Justices are sitting.

Somewhat analogous to the question of whether recusals should affect the number of Supreme Court Justices required to grant a certiorari petition is the question of whether recused circuit judges should be included in the total number of active circuit judges of whom a majority is required to grant en banc review. If recused circuit judges are counted yet (by virtue of their recusal) cannot vote, then the voting rule effectively will count the recused judges as voting *against* en banc review. See, e.g., Howard J. Bashman, *Recused Federal Appellate Judges Should Not Be Counted as Voting Against Petitions for Rehearing En Banc*, LEGAL INTELLIGENCER, Apr. 9, 2001, <http://www.hjbashman.com/resources-articles-04-09-01.htm>. A 2005 amendment to the *Federal Rules of Appellate Procedure* resolved the ambiguity—and a circuit split—determining that the majority required is of “circuit judges who are in regular active service and who are not disqualified.” FED. R. APP. P. 35(a).

<sup>183</sup> See Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 710–22 (1984) (describing content of Supreme Court docket, and critiquing the method by which the Court’s docket was then determined).

<sup>184</sup> See Gersen & Vermeule, *supra* note 75, at 687 (“If a submajority rule such as the Rule of Four produces too few grants of certiorari, a Rule of Three might be adopted instead.”).

<sup>185</sup> Note that the change in the ratio of the number of votes required for discretionary review to the number of judges available may not be large. For example, the difference between 4/9 and 3/7 is only 1/63. Even a small difference could have some effect where the number of cases for which review is sought is large enough. Moreover, the mere fact that the ratios are almost the same does not mean that the number of cases selected for review will be almost the same. Rather, that question will depend upon the views of the judges who remain available to vote. For example, say that the Supreme Court consists of six liberal Justices and three conservative Justices, and that the Justices tend to vote in blocs. Assume further that two liberal Justices must recuse themselves from a series of cases. It is quite possible that the three conservative Justices will vote to grant discretionary review in those cases, whereas they would not have had that power were the full Court membership available to vote.

<sup>186</sup> See *supra* text accompanying note 124.

**Table 6: Normative Analysis of Action Requirement to Grant Discretionary Review for Depleted Courts**

<b>Rule:</b>	<b>Effect on Court's Docket as Compared to Fully Staffed Court:</b>
III-A: Maintain same action requirement	Underinclusive
III-B: Reduce action requirement	Overinclusive

Note that the extent of the problem of path dependence turns upon the choice of rules governing the precedential weight of minority-majority decisions both for the high court itself and lower courts. The more binding minority-majority decisions are, the more problematic it is for additional cases to be heard by the court and potentially decided by minority majorities.<sup>187</sup> Insofar as the choices of Rule I-D or I-E, and Rule II-B, are designed to mitigate some of the effects of broad precedential weight, overinclusiveness—that is, Rule III-B—becomes less of a problem.<sup>188</sup>

At the same time, there is another option that may be even more satisfactory, by adding in an additional hurdle, even while reducing the number of votes required to grant discretionary review on a reduced bench. For example, one can conceive of a regime under which discretionary review is granted with fewer votes than would be required were the full bench available, provided that the relevant state or federal solicitor general joins the request for discretionary review.<sup>189</sup>

---

<sup>187</sup> It might also serve as an invitation for greater strategic voting on certiorari petitions. Cf. Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 391 (2004) (arguing that Justices' jurisprudential considerations in considering certiorari petitions differ from their concerns in resolving cases on the merits). For a normative evaluation of strategic voting on the part of judges, see generally Caminker, *supra* note 112.

<sup>188</sup> See Luby, *supra* note 18, at 670 ("The current rigid insistence on four votes . . . seems to be more a response to the pressures of an increasing caseload rather than the product of principle.").

<sup>189</sup> Cf. MITCHEL DE S. -O. -L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 47 (2004) (discussing, under the French civil justice system, the role of the "magistrat" known as the "Advocate General," and that "[s]tructurally, . . . the Advocate General occupies a privileged, intermediate position between the parties and the court").

One might argue that the views of the Solicitor General are already taken into account by Justices in their votes on certiorari petitions. One also might argue that such a rule would give rise to separation of powers concerns if it were implemented by Congress. See *infra* notes 191–92 and accompanying text.

#### D. Institutional Choice

A final question in setting forth the possible treatment—and the desirable treatment—of minority-majority decisions is that of institutional choice. Which branch, or branches, of government can decide on the proper treatment? I consider that question in this section.

One might, at first blush, think that decisions as to stare decisis effect fall solely within the province of the courts.<sup>190</sup> However, as several commentators have observed, the legislature's unquestioned authority to set quorum requirements makes clear that it has some authority in the area.<sup>191</sup> Indeed, perhaps even greater latent authority rests with the legislature.<sup>192</sup>

---

<sup>190</sup> See, e.g., *McMellon v. United States*, 387 F.3d 329, 334 (4th Cir. 2004) (en banc) (“recogniz[ing] that a three-judge panel has the statutory and constitutional power to overrule the decision of another three-judge panel,” although concluding that, “as a matter of prudence, a three-judge panel of this court should not exercise that power”); *Arnold v. E. Air Lines, Inc.*, 712 F.2d 899, 901–02 (4th Cir. 1983) (en banc) (Murnaghan, J.) (noting “suggestion” in Supreme Court jurisprudence that circuit courts might be allowed “by rule to select, as a quorum for purposes of ascertaining a majority, when votes on suggestions for hearings or rehearings *en banc* are taken, either (a) all judges in regular active service, including those disqualified for the purposes of the particular case or (b) all judges otherwise in regular active service who are not, for the purposes of the particular case, disqualified from participating in any way”); cf. *Hart v. Massanari*, 266 F.3d 1155, 1160–61 (9th Cir. 2001) (“The judicial power clause, by contrast, has never before been thought to encompass a constitutional limitation on how courts conduct their business,” including “one aspect of the way federal courts do business—the way they issue opinions . . .”).

<sup>191</sup> For the proposition that congressional power to control the quorum implies authority to set rules of stare decisis, see John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 540–41 n.110 (2000) (“While a rule of precedent inevitably has some effects on doctrine, causing some cases to come out as they otherwise would not, such effects cannot mean that Congress lacks the power to adopt such a rule. The quorum rule for the Supreme Court . . . also can have that effect.”); cf. Hartnett, *supra* note 38, at 646–47 n.17 (“The quorum statute is a neglected example of the breadth of congressional power to make all laws necessary and proper for carrying into execution the judicial power.”). For example, it seems likely that Congress could by statute reinstitute the Supreme Court’s old action requirement of having a majority of judges authorized to sit on the Court concur in an opinion on a constitutional matter before the opinion could issue. Cf. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction’s Political Court*, 91 GEO. L.J. 1, 24 (2002) (noting that, in 1868, “[t]he Chicago Tribune supported [having Congress] fix[] the number of judges necessary to decide constitutional cases”).

<sup>192</sup> See Harrison, *supra* note 191; Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191 (2001); Paulsen, *supra* note 73; see also 28 U.S.C. § 2254(d)(1) (2006) (directing that federal courts not grant relief to state habeas petitioners “with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”); *Bonner v. City of Pritchard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (recognizing that, though it did not do so, Congress had the power to set the rules of precedent for the new Eleventh Circuit when that circuit was created by dividing the old Fifth Circuit); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946) (endorsing the reasoning of the Second Circuit in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), in

One could take the argument further and argue that, by setting the quorum requirement, the legislature establishes an “on/off switch” for precedent, below which the courts simply cannot decline to give precedential effect. Such an argument, however, is belied by the Supreme Court’s old action requirement of having a majority of judges authorized to sit on the Court concur in an opinion on a constitutional matter before the opinion could issue; if the Court can decline to act at all even if the legislative quorum requirement is met, then surely the Court can act but decline to give its decision full, or any, precedential effect. In the end, the answer seems to be that the judiciary and legislature share authority to determine *stare decisis* rules in this regard.

A similar answer seems to obtain for the related question of the rules governing discretionary review for high courts. Justice Stevens has argued, in an academic setting, that the rule of four is an instance of federal common law.<sup>193</sup> Presumably, then, the Court could alter the rule of its own accord. At the same time, the Court enjoys discretionary control over its docket in part because of promises made by the Justices to Congress regarding the use of the rule of four.<sup>194</sup> Moreover, if the rule of four is federal common law, then Congress could alter it even if the Court chose not to. Once again, the answer seems to be an amalgam of power in this area.

## CONCLUSION

In this Article, I have argued for closer examination of minority-majority judicial decisions. Minority-majority decisions raise concerns about the legitimacy of the court system. The problem is exacerbated when such decisions are accorded precedential weight.

I have identified two broad strategies for containing the problem of minority-majority decisions. One strategy involves court structure, and calls for either increasing quorum requirements or decreasing court size. The problem with this type of strategy is that it constrains freedom in designing the judiciary by taking desirable quorum and court size options off the table.

---

part on the ground that the Second Circuit definitively decided the case under congressional statute in the absence of a quorum on the Supreme Court and those circumstances “add to its weight as a precedent”).

<sup>193</sup> See Stevens, *supra* note 62, at 14 (“The rule that four affirmative votes are sufficient to grant certiorari has . . . seldom, if ever, been questioned.”)

<sup>194</sup> See Hartnett, *supra* note 62, at 1705 (“Effectively, then, the Court had achieved absolute and arbitrary discretion over the bulk of its docket.”).

These concerns are heightened in times at which there is perceived to be an increased threat to the polity and its institutions.

The second broad strategy involves choices about the precedential effect of minority-majority decisions. Here, I have argued that an attractive option is for courts to afford limited and narrow interpretations to prior precedents issued by minority majorities. I have also argued that the option of affording such decisions no precedential weight is undervalued and underexplored. It seems that concerns of legitimacy have been relied upon to dismiss this notion, but the power of this argument is overstated: If it is so vital that every opinion have precedential weight, then one must question the current practice of issuing opinions that, because of a tie vote, lack precedential effect, and also the current practice of issuing nonbinding, unpublished opinions.

For lower courts seeking to determine how much weight to give minority-majority opinions issued by higher courts, I have argued that at the least those opinions should be given as much weight as the higher court itself would give such opinions. More generally, I have suggested that affording them narrow, limited precedential effect is an attractive option.

Last, I have argued that perhaps the rule used by high courts to select cases for their discretionary dockets should be relaxed where judges are recused or otherwise absent. To the extent that too few judges might then decide upon the composition of the court's docket, the views of the representative of the executive branch might be given some weight.