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The Majority That Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements

Jonathan Remy Nash[†]

In this Paper, 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 Paper 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 Paper’s second broad contribution is its normative analysis of the precedent question. The Paper 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 Paper argues that affording narrow and limited precedential effect may be desirable, and that affording no precedential effect on the court that issued the decision is an underexamined option. The third contribution that the Paper 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; and questions of institutional choice as to who should decide how these questions are resolved; and the importance of judicial minimalism.

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I. 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 governing statute, the case is decided by a properly constituted quorum of seven Justices,¹ with four Justices constituting a majority. How much precedential value should accrue to the Court's decision?

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

Later that year, the Arizona Supreme Court declined to follow *Fuentes*.⁵ The majority explained that it was "reluctant to declare unconstitutional Arizona statutes based upon a decision by less than a clear majority."⁶

¹ 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.").

² 407 U.S. 67 (1972).

³ Justices Powell and Rehnquist had yet to take their seats when the *Fuentes* case 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).

⁴ 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. *See Fuentes*, 407 U.S. at 97 (White, J., dissenting).

⁵ *See Roofing Wholesale Co. v. Palmer*, 502 P.2d 1327, 1329-30 (Ariz. 1972).

⁶ *Id.* at 1330. 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. at 1329-30. 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 Roofing Wholesale Co.*, 502 P.2d at 1331 (Hays, Ch. J., concurring) ("In this case, we really ask for a clearer command [from the United States Supreme Court] before we declare an established law of our state unconstitutional and disrupt the business and legal practices of our community.").

Compare also *State ex rel. Williams v. Berry*, 492 S.W.2d 731, 736 (Mo. 1973) (Seiler, J., concurring in result) ("In my opinion, we are bound by *Fuentes v. Shevin*. Its force as a final and binding decision of the Supreme Court 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 decided by seven of the nine

In 1974, two years after *Fuentes*, the Supreme Court in *Mitchell v. W. T. Grant Co.*⁷ again considered the constitutionality of a state statute that authorized repossession by creditors of sold property. This time, five Justices voted to uphold the constitutionality of the Louisiana statute at issue; four Justices dissented.⁸

The Court in *Mitchell* did *not* suggest that the fact that the *Fuentes* majority was joined by only four Justices 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*.⁹

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 1870’s *Legal Tender Cases*,¹⁰ the Court

judges of th[e Supreme] [C]ourt, 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.”).

⁷ 416 U.S. 600.

⁸ 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. Justices 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.

⁹ See *id.* at 615-18.

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 (Powell, J., concurring), and proceeded to elucidate differences between the Florida and Pennsylvania statutes in *Fuentes* and the Louisiana statute in *Mitchell*, see *id.* at 625-27 (Powell, J., concurring).

One might discover beneath the surface 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, 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, that suggests otherwise. Like Justice Powell, Justice Stewart asserted that the majority had overruled *Fuentes*. See *id.* at 635 (Stewart, J., dissenting). Finding no jurisprudential justification for overruling the two-year old decision, Justice Stewart commented that “[t]he only perceivable change that has occurred since *Fuentes* is in the makeup of this Court.” *Id.* (Stewart, J., dissenting); see *id.* at 635 n.8 (Stewart, J., dissenting) (“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.’”).

¹⁰ 79 U.S. 457 (1870)

declined to follow its earlier decision in *Hepburn v. Griswold*¹¹—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.”¹² 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.¹³ 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.”¹⁴

In this Paper, I consider the question of precedential value in settings, such as these, where a case is decided by a majority of judges hearing a case but less than a majority of judges authorized to decide the case¹⁵—a situation I refer to as a “minority majority.” That minority majorities may in fact occur under relatively limited circumstances¹⁶ hardly renders the question of how to deal with them unworthy of examination. For one thing, multiple health-related absences and vacancies on courts¹⁷ may take place in fits and spurts.¹⁸ Especially given the low number of cases on the Supreme Court’s docket¹⁹ and the difficulty in predicting which cases may loom large in

¹¹ 75 U.S. 603 (1869).

¹² 79 U.S. 457, 553-54 (1870).

¹³ See *infra* notes 47-48 and accompanying text.

¹⁴ *Montana v. United States*, 450 U.S. 544, 568 (1981) (Stevens, J., concurring); see *infra* text accompanying note 142.

¹⁵ 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 where the cases is decided by a majority of judges sitting, but less than a majority of seats on the court.

¹⁶ The problem may arise only in cases in not all the judges authorized to sit on the court are called upon to render a decision and, on most courts, will involve a “deficiency” of at least two judges. In this sense, the problem may arise only in limited circumstances.

¹⁷ In contrast, recusals may consistently be relatively uncommon (especially so 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 Supreme Court Justices are loathe to recuse themselves because of the risk that the remaining eight Justices will split evenly on 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). Thus, Professors Black and Epstein conclude not that equally divided Court determinations are unproblematic, but rather than the problem is cabined because recusals are relatively infrequent. See Black & Epstein, *supra*, at 87-93. See also *Cheney v. United States District Court*, 541 U.S. 913, 915-16 (2004) (Scalia, J., mem.) (declining to recuse himself, in part because of the risk that his recusal could result in an equally divided Court).

¹⁸ See *Roofing Wholesale Co.*, 502 P.2d at 1332 (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.”).

¹⁹ See, e.g., Erwin Chemerinsky, *The Incredible Shrinking Docket*, 43 TRIAL 64, 64 (2007) (“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.”); Kenneth W. Starr, *The Supreme Court and its Shrinking*

future as precedent,²⁰ 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. Moreover, commentators have recently noted that increases in the risk of terror-related attacks may render the government in general²¹—and courts in particular²²—with fewer personnel than normal for extended periods of time. Beyond this, the issues of what constitutes a court, and what representation of court 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 Paper makes three broad contributions to the literature. First, the Paper 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 on a court must there be for the court, officially, to take any action at all? The second category consists of prerequisites for the Court to take certain actions—to which I shall refer 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 concur in a decision on a constitutional matter before an opinion could issue. A modern example is the “rule-of-four” that the Court employs to decide whether to grant certiorari petitions. The last two categories of requirements consists 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 Paper’s second broad contribution is its normative analysis of the precedent question. The Paper identifies two categories of plausible responses to the problem.

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.”).

²⁰ 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 *Roofing Wholesale Co.*, 502 P.2d at 1332 (Struckmeyer, J., dissenting) (noting that, “[i]n 1920, the leading case of *United States v. United States Steel Corp.*, 251 U.S. 417, . . . was decided by a four-member majority”); see also Paul Carrington, *The Problem of Minority Decisions*, 44 A.B.A. J. 137, 137 (1958) (identifying 19 cases “from the last eight terms of the Supreme Court . . . [in which] decisions were reached with opinions rendered, . . . in which 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”).

²¹ See, e.g., 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); Paul Taylor, *Proposals to Prevent Discontinuity in Government and Preserve the Right to Elected Representation*, 54 SYRACUSE L. REV. 435, 447-55 (2004); Symposium on Ensuring the Continuity of Government in Times of Crisis, 53 CATH. U. L. REV. 943 (2004).

²² 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 terror attack might debilitate as well the Senate, the Executive branch, or both is very real, and might leave the country without a functioning Court for an extended period).

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.

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 Paper argues that minority majority decisions be given narrow, 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 that the Paper 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; and questions of institutional choice as to who should decide how these questions are resolved; and the importance of judicial minimalism.

Part II of the Paper 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 III 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.

II. 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 with court system, and often over time even within a court system.²³ Additionally, these answers are sometimes found in constitutions, sometimes in statutes, and sometimes are not written but are derived from the common law or otherwise judicially created. That said, it is possible to summarize the general categories of requirements that respond to each question.

Essentially, quorum requirements set the minimum threshold for a court to transact business. The quorum is the minimal number of judges required for the court legally to “transact business.”

Many court systems impose no additional requirement beyond the quorum 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,²⁴ or some combination thereof. As a general matter, all the judges of a court will hear a case.²⁵ 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

²³ 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.”).

²⁴ *E.g.*, 28 U.S.C. § 1 (2006) (setting the current size of the United States Supreme Court at nine: one Chief Justice and eight Associate Justices).

²⁵ 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).

judges who may transact business—e.g., to hear cases or to decide which cases to hear—for the court.

Absent some sort of minimal quorum requirement, it would seem that a single judge conceivably could render judgment for an entire court.²⁶ Quorum 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.²⁷ "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."²⁸

²⁶ Because of the quorum requirement, a single Justice cannot issue an opinion for the United States Supreme Court. See, e.g., *Locks v. Commanding General, Sixth Army*, 89 S. Ct. 31, 32 (1968) (Douglas, Circuit Justice) ("[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. 318 (1980) (Powell, Circuit Justice). 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 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.*, 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 (2002-03) ("To address th[e] 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.").

²⁷ See Williams, *supra* note 21, 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.").

It is interesting to note that 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.

²⁸ *Id.* See also BLACK'S LAW DICTIONARY ____ (8th ed. 2004) (defining "quorum" as "[t]he minimum number of members (usu. 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

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 command a due and proper respect.”²⁹ Cushing’s brief statement suggests no fewer than three goals that quorum requirements can be said to further. First, requiring some minimal number of participants serves to encourage deliberation and collegiality among the participants.³⁰ Second, a quorum requirement ensures that some minimal 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.³¹ Third, quorum requirements affirm the legitimacy of the decision reached, the decisionmaking process, and of the body itself.³²

the legislature from taking certain actions. See, e.g., See Robert H. Freilich, Ryan M. Manies & Corey J. Mertes, *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 effect 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) (footnote omitted) (“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”)

²⁹ LUTHER S. CUSHING, RULES OF PROCEEDING AND DEBATE IN DELIBERATIVE ASSEMBLIES 27 (5th ed. 1899).

³⁰ On the importance of deliberation to judicial decisionmaking 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, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003) [hereinafter Edwards, *The Effects of Collegiality*]; Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1358-62 (1998).

³¹ See, e.g., Williams, *supra* note 21, 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 Felsenthal, *supra*, at 60 (establishing this for situations where majority rule governs); *id.* at 61-62 (reaching same conclusion where supermajority rule governs). For example, where majority rule governs, 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.

³² 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,

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.³³ When drafting the United States Constitution, the Founders decided to include in it 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.”³⁴

With respect to the federal judiciary, in contrast, the Constitution is silent. Here, Congress has acted to establish quorum requirements for the federal courts.³⁵ Table 1

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.

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

³³ 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). 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 21, at 1033 (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*, in WRITINGS 251 (MERRILL D. PETERSON ed., 1984) (1781- 82))).

³⁴ U.S. CONST., art. I, § 5, cl. 1. In fact, the Framers considered, and rejected, proposals for both submajority and supermajority quorum rules. For discussion, see Williams, *supra* note 21, at 1037-56.

The Civil War and the accompanying secession of states raised questions about the proper scope of congressional quorum rules. For discussion, 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 28, at 1067.

³⁵ 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 33, 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 may create a disincentive against agency commissioners declining 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-

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.³⁶ Thus, at present, the statutory quorum requirement exceeds the level called for by the common law.³⁷ 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.

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 outside the ambit of applicable state transparency requirements.”). 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 U.S., Report & Recommendation by the Special Committee to Review the Government in the Sunshine Act, 49 ADMIN. L. REV. 421, 422-23 (1997) (citing “extensive 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)). It also has arisen under state law analogs. *See, e.g., Fenster, supra*, at 922 n.161.

³⁶ *See* 28 U.S.C. § 1 (2006). The six-Justice quorum requirement is repeated in Supreme Court Rule 4(2).

In the event that an appeal as of right (from a district court) lies to the Supreme Court and a minimal 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 (2006). *See, e.g., Haig v. Bissonette*, 485 U.S. 264 (1988) (per curiam affirmance under section 2109).

³⁷ *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 1/3 for corporate boards of directors. Williams, *supra* note 21, at 1036.

Table 1 – Supreme Court Membership and Quorum Requirements Over Time

Year(s)	Number of Seats on Court	Quorum Requirement
1789-1801	6	4
1801-1802	5	4
1802-1807	6	4
1807-1837	7	4 ³⁸
1837-1863	9	5
1863-1866	10	6
1866-1869 ³⁹	9/8	6
1869-present	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.”⁴⁰ Thus has Congress adopted the common law quorum rule for use by the federal courts of appeals.

³⁸ In fact, the 1807 Act did not specify a quorum. Instead, they simply “carried over the previous quorum of four.” Hearings before Subcomm. No. 4 of the Comm. of the Judiciary of the House of Rep. on H.R. 2808, 78th Cong., 1st Sess. 4 (1943) (statement of Charles Warren). Since 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.*

³⁹ 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, however, so that the Court only fell to a level of eight Justices, of which six constituted a quorum pursuant to the 1863 Act.

⁴⁰ 28 U.S.C. § 46(d) (2006).

An en banc sitting of a federal court of appeals generally consists of all active circuit judges plus, in addition, any senior circuit judges from that circuit on the original panel hearing of the case to be heard en banc. *Id.* § 46(c). A special rule, however, allows courts of appeals with more than 15 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. 95-486, § 6, 92 Stat. 1629, 1633, 95th Cong., 2nd Sess. (Oct. 20, 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 List of Ninth Circuit Judges by Senior Status*, <http://www.ca9.uscourts.gov/ca9/Documents.nsf/174376a6245fda7888256ce5007d5470/0dbdee40d48f66408825683c0058477e?OpenDocument> (last updated July 9, 2006))—has taken up this invitation, and by circuit rule allows for en banc hearings with only 15 active circuit judges, drawn by lot (plus, in addition, any senior circuit judges who sat on the original panel hearing of the case to be heard en banc). 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 15 active circuit judges; still, presumably, section 46(b) applies to set the quorum requirement at “[a] majority of the number of judges authorized to constitute a court,” or 8. If the minimum size of an en banc court is eight judges, then a majority of that number—i.e., 5 judges of the 28 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. R. App. P. 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.”).

With a few exceptions,⁴¹ state courts generally have followed, and continue to follow, the common law rule.⁴² Some states do not have explicit quorum requirements; instead, they use what I term “action requirements”⁴³—that is, they establish a minimum number of judges necessary for the court to issue an opinion—to give 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 judges present at the argument” of the case⁴⁴; this sets an effective quorum requirement of four judges, since there is no way that a group of fewer than four judges can ever issue a judgment in a case.

⁴¹ 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 of Ga. ex rel. Brannon*, 1 Ga. 271, ____ (1846), where 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.”

⁴² They have done so, however, as a matter of constitutional provision, statute or rule. *E.g.*, GA. CONST., art. VI, § 6, ¶ I (setting the number of justices on the state supreme court as seven, 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”); IND. STAT. § 642.4101 (setting the size of the state supreme court at five, and the quorum at three); IA. STAT. § 602.4101 (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”); KY. CONST. § 110 (“A majority of the Justices of the Supreme Court shall constitute a quorum for the transaction of business.”). 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 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, as a result, confusion reigned as to whether the court could function in the absence of a single justice, even after the state legislature tried to clarify matters by statute).

⁴³ See *infra* Part II.A.2.

⁴⁴ CAL. CONST., art. VI, § 2.

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.”⁴⁵ 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.⁴⁶

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 United States Supreme Court had a “practice”—grounded in neither the Constitution nor statute⁴⁷—of “not (except in cases of absolute necessity) . . . deliver[ing] any judgment in cases where constitutional questions are involved, unless four judges concur, thus making the decision that of a majority of the whole court.”⁴⁸

⁴⁵ ILL. CONST., art. VI, § 3.

⁴⁶ See *Getschow v. Commonwealth Edison Co.*, 459 N.E.2d 1332 (Ill. 1984) (“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 . . .”).

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 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 is improper where the third judge on the panel is not 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.”).

⁴⁷ For a modern statement to this effect, see *FTC v. Flotill Products, 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.”).

⁴⁸ *Briscoe v. Commonwealth’s Bank of the State of Ky.*, 33 U.S. 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 & 1315 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

While the Supreme Court no longer requires a higher number of concurrences for cases raising constitutional questions, it does in some situations require minimal numbers of Justice 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.⁴⁹ Thus, at least four Justices must concur before the Court may hear most cases.

There are three aspects of action requirements that are worthy of note. First, such a 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 requirement⁵⁰—such as the “rule of four.” Conceivably, an action requirement could take the form as well of a supermajority rule.⁵¹

advocating a return to the practice of “refusing to *hear* a constitutional case if the full Court is not present”).

⁴⁹ See generally Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1068-1109 (1988). 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); John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 10-14 (1983); Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 978-88 (1957). For a description by the Supreme Court itself 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. See *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959) (Brennan, J., mem.); Revesz & Karlan, *supra*, at 1110 n.173. The Court applies a “rule of three” to hold a case pending disposition of another case. See *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 Revesz & Karlan, *supra*, 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) only by two judges. See *supra* note 46 (discussing *Nguyen v. United States*).

⁵⁰ For general discussion of submajority voting rules, see Adrian Vermeule, *Submajority Rules: Forcing Accountability upon Majorities* (unpublished manuscript; SSRN # 495569).

⁵¹ 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 30, 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 taking any action at all. See *infra* note 62.

Second, the requirement need not be, but is generally, engrafted upon, and works in tandem with, a quorum requirement.⁵² 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 judges 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.⁵³ It seems, however, that such relaxation does not ordinarily (if ever) occur,⁵⁴ nor does it seem to occur at the state court level.⁵⁵ This has important ramifications for the percolation of issues to the Supreme Court and state high courts, as I discuss below.⁵⁶

⁵² 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 43-44 and accompanying text.

⁵³ Lubet, *supra* note 17, 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 49, at 14-21 (treating the “rule of four” as a judge-made rule that may be entitled to stare decisis deference).

⁵⁴ *See id.* 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 where 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) (Brennan, J., mem.) (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 where only eight of nine Justices participate in decision).

Whether four votes still are required where 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 Justice) (“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. OF THE ASS’N OF THE BAR OF THE CITY OF 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); Delaware 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 49, at 1071 n.9. The two major federal procedural treatises are similarly inconclusive, *see* Drew S. Days, III, 22 MOORE’S FEDERAL PRACTICE – CIVIL § 405.03[2][a][vii][A] (2007); Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4004.2 (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 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* the text accompanying notes 160-166.

⁵⁵ *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.”).

⁵⁶ *See infra* text accompanying notes 161-166.

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.⁵⁷ 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 old⁵⁸ as it is widespread.⁵⁹ There is debate over whether, by expressly identifying settings in which supermajority votes are required and otherwise remaining silent as to applicable voting rules, the Constitution implicitly requires the use of majority rule under expressly provided otherwise.⁶⁰ Be that as it may, courts in the

⁵⁷ 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 49 and accompanying text. I distinguish action requirements from voting rules that apply in resolving cases in that the former simply apply to decide whether or not 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 30, at 99 (explaining that the introduction of a favored state makes a submajority rule workable, and citing the “rule of four” as an example).

⁵⁸ *See* Saul Levmore, *Parliamentary Law, Majority Decision Making, and the Voting Paradox*, 75 VA. L. REV. 971, 975 (1989) (noting that Orestes’ fate at trial in Aeschylus’ play *Eumenides* is decided by majority vote); 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”).

⁵⁹ *E.g.*, H. 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*.”); A. STURGIS, STURGIS STANDARD CODE OF PARLIAMENTARY PROCEDURE 3-8 (1950) (identifying as one of eleven basic principles underlying parliamentary law the notion that “[t]he vote of the majority decides”); King, *supra* note 58, 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 does provide for the use of supermajority rules in limited circumstances. For an overview, and a 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 rules. The requirement of a supermajority to stop a filibuster is one such example; it 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*].

⁶⁰ Compare Michael Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1591 n.134 (2000) with Jed Handelsman

United States (and beyond) have almost always employed majority rule.⁶¹ Resolution of cases—that is, whether the appellate court will affirm, reverse, remand, or vacate the lower court’s judgment—is almost always decided by a majority of sitting judges.⁶² Even where judges are unable to form a majority as to the rationale of a decision, there will generally be a majority to resolve the case.⁶³ Indeed, where sincere voting by

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).

⁶¹ 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 judges on an appellate court 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 37, at 652 (noting 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: Since 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 In 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 63.

⁶² 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 for the Supreme Court to invalidate statutes on constitutional grounds. See Shugerman, *supra* note 60, at 998-1001 (reviewing such proposals). Recently, Professor Caminker and Professor 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 60. And 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. See Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676 (2007) (calling for implementation of *Chevron* deference by requiring a supermajority Supreme Court or court of appeals vote in order to invalidate an agency interpretation of law).

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 47-48 and accompanying text. The latter type of requirement limits the ability of the Court 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 vote to invalidate a statute as unconstitutional, in contrast, is not a prerequisite to the court 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.

⁶³ See generally Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 THEORETICAL INQUIRIES IN L. 87 (2002).

Supreme Court Justices would not generate a majority as to disposition, the practice—required neither by Constitution, statute, nor even at any point by a majority of sitting Justices—is for one Justice to change his or her vote so as to provide such a majority.⁶⁴

Commentators have identified several justifications for courts' widespread reliance upon majority rule.⁶⁵ First, unlike submajority and supermajority rules,⁶⁶ majority rule will be uniquely decisive as between two alternatives.⁶⁷ This is often the case for appellate courts, which frequently decide between affirming and reversing a lower court's decision. However, it is not always the case,⁶⁸ 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.⁶⁹ Nonetheless, majority rule remains of value: To the extent that one outcome in fact is preferable to every other outcome—

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) (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).

⁶⁴ *See* H. Ron Davidson, *The Mechanics of Judicial Vote Switching*, 38 SUFFOLK U. L. REV. 17, 17-19 (2004). (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.)

⁶⁵ *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”)

⁶⁶ 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 30, 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 49 and accompanying text.

⁶⁷ *See* Kornhauser & Sager, *supra* note 30, at 99 (“Where there are only two possible outcomes, simple majority rule emerges as uniquely decisive; it alone always identifies a single, correct outcome. But when we allow more than two possible outcomes, this property of majority rule disappears.”).

⁶⁸ 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 63, at 99.

⁶⁹ *See supra* note 67. The Jury Theorem might extend some of its predictive power to plurality votes over more than two options. *See* Levmore, *supra* note 63, at 118-19; Maxwell L. Stearns, *The Condorcet Jury Theorem and Judicial Decisionmaking: A Reply to Saul Levmore*, 3 THEORETICAL INQUIRIES IN L., 125, 131-32 (2002). 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* the text accompanying notes 87-88.

i.e., would defeat each other outcome in a series of pairwise majority votes—majority rule is the one rule that will always select this so-called “Condorcet winner.”⁷⁰

Second, majority rule tends to foster deliberation. It does this by empowering no voter over any other, and favoring no outcome over any other.⁷¹ 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.⁷²

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.” 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 politics⁷³ (even to the extent that this is not the reality⁷⁴).

Third, the Condorcet Jury Theorem predicts that, “[w]here 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 (simple) majority vote.”⁷⁵ 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

⁷⁰ See Levmore, *supra* note 58, at 988. For this reason, majority rule is a “Condorcet-producing rule.”

⁷¹ Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73, 86 (1996); see also *supra* note 66. Cf. Gersen & Vermeule, *supra* note 62, at 709-10 (arguing that “neutrality should be rejected” where *Chevron* mandates that deference be given to agency interpretations).

⁷² Levmore, *supra* note 63, at 90.

⁷³ See Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into the Perceived Quality of Appellate Review*, 61 VAND. L. REV. (forthcoming 2008) (setting out reasons why judges and courts seek to reach “correct” results). To the extent that this is not accurate, then the Condorcet Jury Theorem may be inapplicable. See *infra* note 75.

⁷⁴ Cf. Nash, *supra* note 59, at 2203 (arguing that, to the extent that public perception of an apolitical judiciary is inaccurate, it might be desirable to remove the veneer).

⁷⁵ Saul Levmore, *Conjunction and Aggregation*, 99 MICH. L. REV. 723, 735 (2001).

The application of the Jury Theorem to multimember courts can be questioned. First, one might ask whether decisions of law can always, often, or ever be categorized as “correct.” See Nash & Pardo, *supra* note 73, 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 percent likelihood of voting for the correct answer. See Levmore, *supra* note 63, 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 as 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”).

one,⁷⁶ 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.”⁷⁷

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. In this Subsection, I examine the voting rules applicable to determining the rationale, and precedential value, of a court decision.

The rationale for a court’s ruling is of importance to the litigants, and may also be important to lower courts on remand. In addition, future litigants and courts may look to other courts that have faced similar issues.⁷⁸ Opinions of other courts may be of persuasive value to later courts. Further, thanks to the doctrine of stare decisis, decisions of courts may actually bind in some sense 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.⁷⁹ Under vertical stare decisis, lower courts are bound by pronouncements of superior courts.⁸⁰

The general rule is that an opinion will not enjoy precedential value unless at least a majority of judges join it.⁸¹ The justifications mirror those applicable to reliance upon majority rule for disposition of cases.⁸²

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,⁸³

⁷⁶ The logic would be that, the more voters who vote for a particular option, the less likely it is that the convergence toward that option is the result of chance as opposed to the probability (by assumption more likely than not for each voter) that voters are accurately voting for the correct option.

⁷⁷ Levmore, *supra* note 63, at 89; *cf.* Gersen & Vermeule, *supra* note 62, 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).

⁷⁸ See Nash, *supra* note 57, at 86-87.

⁷⁹ See Nash & Pardo, *supra* note 73, at ____.

⁸⁰ See *id.* at ____; 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).

⁸¹ 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 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 152 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.

⁸² See *supra* the text accompanying notes 61-62.

⁸³ See *supra* note 63 and accompanying text.

they give rise to no precedential holding.⁸⁴ 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 majority⁸⁵ and, insofar as a tie bespeaks the absence of a majority, a tie decision is entitled to no precedential effect.⁸⁶

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,⁸⁷ 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 that subsequent courts should look for the “narrowest” ground common to the various camps of Justices that compose the majority for disposition.⁸⁸ 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.⁸⁹ Unpublished decisions, by court rule, are not accorded precedential value and in fact technically may not be cited.⁹⁰

⁸⁴ 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). On the murky historical origins of the rule, see *id.* at 33-35.

⁸⁵ See, e.g., Hartnett, *supra* note 37, at 652 (noting the “principle” that “applies generally in multimember bodies” that “the body cannot take any affirmative action based on a tie”); Davidson, *supra* note 64, at 33-34.

⁸⁶ Some states have enacted provisions that allow a state intermediate court judge to sit by designation on the supreme court in order 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 to this effect). See also Entin, *supra* note 62, at 461 (quoting SIXTH REPORT OF THE JUDICIAL COUNCIL OF OHIO TO THE GENERAL ASSEMBLY OF OHIO 17 (1943)) (noting that Ohio changed regime in 1944 to allow court of appeals judge to sit by designation on 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”).

⁸⁷ Levmore, *supra* note 63, at 96-97.

⁸⁸ See *id.* at 97 (describing the *Marks* doctrine).

⁸⁹ 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).

⁹⁰ See 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). 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.) (“[W]e conclude that [the local circuit rule], insofar as it would allow us to avoid the 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 (2000) (en banc), with *Hart v. Massanari*, 266 F.3d 1155, 1160 (9th Cir. 2001) (“We believe that *Anastasoff* overstates the case.”). 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). See also Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN.

Another wrinkle that many courts—including the federal courts of appeals and many supreme courts (though not the United States Supreme Court)—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.⁹¹ No subsequent three-judge panel of the court is empowered to overrule an earlier holding of a three-judge panel.⁹² The court *en banc*, however, is free to overrule earlier panel holdings (as well as earlier *en banc* holdings).⁹³ (Presumably, the *en banc* court may afford some *stare decisis* weight to earlier panel and *en banc* holdings.⁹⁴)

L. REV. 1435 (2004) (criticizing practices of unpublication, depublication, and stipulated withdrawal of judicial opinions).

Historically, many courts had court rules that forbade the citation of unpublished opinions in court filings. *See, e.g.,* Robel, *supra* note 90, 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) (“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.”).

⁹¹ *Cf.* Cent. Pines Land Co. v. United States, 274 F.3d 881, 893 (5th Cir. 2001) (“While easily confused with traditional *stare decisis*, ‘our rule that one panel cannot overturn another serves a somewhat different purpose of institutional orderliness.’”).

⁹² *See, e.g., id.*

In the event that a later court of appeals panel decision conflicts with an earlier one, 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, 332-33 (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 generally* Steven Bennett & Christine Pembroke, “Mini” *In Banc* Proceedings: A Survey of Circuit Practices, 34 CLEV. ST. L. REV. 531 (1986).

⁹³ *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. Penn. Transportation 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) (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, 143-44 (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* the text accompanying notes 114-116.

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 Trustees of Montgomery Comm. Coll.*, 848 F.2d 457, 459-60 (4th Cir. 1988) (decision to grant *en banc* review results in vacation of panel opinion, and renders panel opinion devoid of precedential value).

⁹⁴ *See Bolden*, 953 F.2d at 813 (“Because we are setting *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

At a minimum, then, a majority is a prerequisite for precedential effect.⁹⁵ 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.⁹⁶ 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? It is this question to which I turn in the next Part.

III. MINORITY MAJORITIES

In the previous Part, 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, however, if, as a result of recusals, illness, or vacancies, a majority of sitting judges numbers less than a majority of the full court? For example, if two United States 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

the degree counseled by principles of stare decisis.” (citation omitted)); *infra* note 116 and accompanying text.

⁹⁵ That a decision is worthy of precedential effect does not resolve the difficult questions 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 148-149 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). 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).

⁹⁶ 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.

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 occurs when it is decided by a majority of sitting judges, yet (because of vacancies and recusals) 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).

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.⁹⁷ Thus, for the United States Supreme Court, the smallest possible majority is a majority 4 out of a quorum of 6.⁹⁸ For a court of equal size using the common law quorum requirement—and thus for the Supreme Court of Canada and most nine-member state supreme courts—the quorum would be 5, and so the minimal majority would be 3 of 5 for 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 a “minimum majority.”

⁹⁷ 20 AM. JUR. (Courts) § 159 (“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 don’t have explicit quorum requirements but do have action requirements, as explained above, *see supra* the text accompanying notes 43-44, the action requirement functions as an effective quorum requirement.

⁹⁸ *E.g.*, Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2315 n.49 (1999) (“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.”).

TABLE 2: Number of judges, number of judges for ordinary majority, quorum requirement, and minimum number of judges for majority, for various courts and court structures.

Court	Total Number of Judges	Minimum Majority of Whole Court	Quorum Requirement	Minimum Majority of Quorum
U.S. Supreme Court	9	5	6	4
Typical Federal Court of Appeals Panel	3	2	2	2 ⁹⁹
Typical En Banc Federal Court of Appeals	Variable	Majority of judges on en banc court	Majority of judges on en banc court	Majority of Quorum
Typical Ninth Circuit En Banc¹⁰⁰	15	8	8	5
Supreme Court of Canada	9	5	5	3
Typical 9-Justice State Supreme Court	9	5	5	3
Typical 7-Justice State Supreme Court	7	4	4	3
Typical 5-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 will satisfy the minimum quorum requirement but are less than the majority of the whole court.

⁹⁹ 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 46 and accompanying text (describing this requirement, and characterizing it as an action requirement).

¹⁰⁰ *See supra* note 40.

Table 3—Comparison of minimum majorities required for courts with common law quorum requirements¹⁰¹

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

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: Since 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.

¹⁰¹ 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 $\frac{1}{4}$ the rate of increase in the court size.

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.¹⁰²

Moreover, the presence 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.¹⁰³ There are courts whose judges are elected, 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.¹⁰⁴ Second, some courts elect, or call for appointment of judges, on a geographical basis.¹⁰⁵ 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 court 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

¹⁰² *But cf.* FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 5 (1994) (En banc courts “resemble a small legislature more than a court.”).

¹⁰³ The balance of representation between ideologies that espouse activist judging and those that do not may be of particular importance. Indeed, there are those who argue that activist judges' votes will tend to decide more cases, even where all the judges on a court cast votes. See Joseph Isenbergh, *Activists Vote Twice*, 70 U. CHI. L. REV. 159 (2003).

¹⁰⁴ 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; McGinnis & Rappaport, *Supermajority Rules*, *supra* note 59, at 545-48; Nash, *supra* note 59, at 2187-89.

¹⁰⁵ 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 supreme court justices on a geographic basis, see LA. REV. STAT. § 13-101 (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 United States 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).

full complement, yet the reasoning provided by the majority may differ. In 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.¹⁰⁶ 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, and choose to hear cases using some action requirement akin to the Supreme Court's "rule of four." 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, since it will take a larger percentage of the available judges to grant discretionary review.¹⁰⁷ 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.

One solution to this problem (that I discuss below¹⁰⁸) is to reduce the threshold for granting discretionary review—for example, one might reduce the "rule of four" to a "rule of three" where fewer than nine or eight Justices are available on a case.¹⁰⁹ This, however, will often have the opposite result: More cases will be heard than if the full complement of the court will available. For example, since three out of seven Justices is a lower threshold than four out of eight,¹¹⁰ 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.

One way or another, then—i.e., 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 court vacancies that persist. 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.¹¹¹

¹⁰⁶ 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, Commencement Address at Georgetown University Law Center (May 21, 2006).

¹⁰⁷ Note that $4/8 > 4/9$ and $4/7 > 4/9$.

¹⁰⁸ See *infra* notes 160-166 and accompanying text.

¹⁰⁹ See *supra* note 54 and accompanying text.

¹¹⁰ Note that $3/7 < 4/9$.

¹¹¹ 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 opportunistically to manipulate courts' dockets); see also Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309 (1995) (drawing on historical evidence and caselaw to bolster this point).

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, especially if the practice were to become more common.

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—and therefore binds lower courts and even the court that 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 decisionmaking tends to be. The key distinction is that, with panel decisionmaking, 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.¹¹² If this happens, the decision of the panel is revoked; indeed, it thereafter lacks any precedential value.¹¹³ More generally, en banc courts enjoy the freedom to overturn any prior panel precedent.¹¹⁴ While in theory en banc courts also remain free to reverse prior en banc decisions,¹¹⁵ it seems to some that en banc decisions enjoy greater stare decisis

¹¹² 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 (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).

Note that on 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 40.

¹¹³ *See supra* note 93.

¹¹⁴ *See supra* note 93 and accompanying text. *See also* *United States v. Martorano*, 620 F.2d 912, 920 (1st Cir. 1980) (rejecting argument that, since “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) (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 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”).

¹¹⁵ *See, e.g.*, *Armstrong v. McAlpin*, 625 F.2d 433, 435 (2d Cir. 1980) (en banc court overrules prior en banc holding on ground that it proved impracticable), *rev’d*, 449 U.S. 1106 (1981).

weight.¹¹⁶ Given the rarity of en banc review,¹¹⁷ 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.¹¹⁸ 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

¹¹⁶ See, e.g., James J. Wheaton, Note, *Playing with Numbers: Determining the Majority of Judges Required to Grant En Banc Sitzings 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."); Madden, Comment, *supra* note 111, 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."). Cf. *United States v. American-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); 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"); 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.").

¹¹⁷ E.g., *Walters v. Moore-McCormack Lines, Inc.*, 312 F.2d 893, 893-94 (2d Cir. 1963) (statement of Lumbard, C.J.).

¹¹⁸ 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)).

judge's candid appreciation that colleagues may be more knowledgeable or familiar with a particular legal issue. 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.¹¹⁹

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 make 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.¹²⁰ As a result, three Justices—which would be 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 minimal majority of the entire Court.

Alternatively, one might reduce the size of the court, insofar as larger courts are more likely to give rise to minority majority decisions.¹²¹ The problem here is that several factors—such as the Condorcet Jury Theorem,¹²² the representative nature of courts,¹²³ and to some degree collegiality¹²⁴—argue against major reductions in court size.

¹¹⁹ Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOKLYN L. REV. 685, 723 (2001).

¹²⁰ 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 the . . . Congress.").

¹²¹ See *supra* tbl. 3 & n.101.

¹²² See *supra* 66-70 and accompanying text.

¹²³ See *supra* 102-104 and accompanying text.

¹²⁴ See *supra* p. 30. Judge Edwards, however, has argued that too many judges can frustrate efforts to foster collegiality. See Edwards, *The Effects of Collegiality*, *supra* note 30, at 1674-75; see also *supra* note

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. 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,¹²⁵ which may mean that courts may have to subsist with vacancies for extended periods of time. Additionally, commentators have noted that the specter of terrorism raises similar prospects.¹²⁶ In short, the notion of eliminating, or even substantially limiting, the possible occurrence of minority majority decisions seems unwise.¹²⁷

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 United States Supreme Court, should the “rule of four” by which certiorari is granted¹²⁸ be reduced when two Justices are recused?¹²⁹ On the one hand, allowing fewer Justices’

112 (noting Judge Coffin’s observation that en banc courts “resemble a small legislature more than a court”).

¹²⁵ See *supra* note 104 and accompanying text.

¹²⁶ See *supra* notes 21-22 and accompanying text; Moss & Siskel, *supra* note 22, at 1039-41 (calling upon Congress to enact a statute reducing the Supreme Court’s quorum requirement under particular circumstances).

¹²⁷ 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 86. (A constitutional amendment would presumably be required to effect such a change at the level of the United States Supreme Court.)

Unlike tie votes, however, a court with depleted numbers may persist over time. The use of “stand-in” judges may render judicial decisionmaking less predictable. This is especially problematic for high courts that often decide matters of first impression, and are free not to follow of 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 United States 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 57, 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 116, is consistent with this notion.

¹²⁸ See *supra* note 49 and accompanying text.

¹²⁹ For a discussion of existing law on this point, see *supra* notes 53-56 and accompanying text. For normative analysis, see *infra* the text accompanying notes 160-166.

votes to approve a grant of certiorari review may act as a prosthetic 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. It might also bar cases from consideration by a seven-Justice Court that would not have been decided by four-Justice majorities—i.e., cases with 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.¹³⁰

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 amplified most greatly by their value as precedent.¹³¹ The effects may be limited, 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 decisis¹³² apply to minority majority decisions.¹³³

¹³⁰ See *infra* the text accompanying notes 161-166.

¹³¹ See *supra* p. 30.

¹³² As I discuss below, “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. See *infra* note 147 and accompanying text.

¹³³ See, e.g., *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. Eastern Air Lines, Inc.* 712 F.2d 899, 901 (4th Cir. 1983) (en banc) (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*.”); See *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 court, but there were only three judges in active service).

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 TEMPLE 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

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).¹³⁴ Some lower courts have interpreted the binding effect of Supreme Court minority majority decisions this way,¹³⁵ and at least one commentator assumes this to be the case.¹³⁶

Third, one might view minority majority decisions as fully binding upon lower courts, but not upon the court that issued the opinion.¹³⁷

subsequent reference to a particular case being binding “on the Court of Common Pleas of Mifflin County and on the Supreme Court,” 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’ concurring and dissenting opinion specifically advances the argument, indicating that the majority in *Mason* rejected that approach. *See 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 Supreme Court. The decision, however, is not binding upon this Court.”).

¹³⁴ *See, e.g.,* *Whiting v. Town of West Point*, 14 S.E. 698, 700 (Va. 1892) (holding that a decision of a five-justices 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*”).

¹³⁵ *See supra* notes 5-6 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 United States Supreme Court had recently decided by the count of four-to-three).

¹³⁶ 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)—he 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) (footnote omitted). (Ultimately, these concerns did not come to pass, as the Court resolved the case by a vote of five-to-two. *See id.* at 1176-77.)

¹³⁷ 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 supra* note 133.

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.”).

Fourth, one might see minority majority decisions as of some, moderately diminished precedential value.¹³⁸ For example, a court might decide that minority majority decisions might be more readily overruled than 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.¹³⁹ 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 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 decisions.¹⁴⁰ Especially for larger courts, then, it is desirable to have quorum requirement in excess of 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.¹⁴¹

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.¹⁴² It should be noted, however, that this 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,

¹³⁸ See *supra* notes 10-12 and accompanying text (discussing the Supreme Court's decision in the *Legal Tender Cases*, 79 U.S. 457 (1870), overruling *Hepburn v. Griswold*, 75 U.S. 603 (1869)).

¹³⁹ Consider Justice Stevens' reasoning in *Montana v. United States*, 450 U.S. 544, 568 (1981) (Stevens, J., concurring), discussed at *supra* note 14 and accompanying text. See also Cappalli, *supra* note 133, at 343-48 (footnote omitted) (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").

¹⁴⁰ See *supra* tbl. 3 and accompanying text.

¹⁴¹ See *supra* note 105 and accompanying text.

¹⁴² 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.

adherence to precedent enhances the legitimacy of the court in question.¹⁴³ As such, consistency of a precedential rule for minority majority decisions is normatively desirable. Second, ensconcing erroneous rules is normatively undesirable.¹⁴⁴ 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.¹⁴⁵ Thus, delay in definitely 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 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.

¹⁴³ See, e.g., Nash & Pardo, *supra* note 73, at ____.

¹⁴⁴ See Jonathan Remy Nash, *The Uneasy Case for Transjurisdictional Adjudication*, 94 VA. L. REV. (forthcoming 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.”).

¹⁴⁵ 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 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).

Rule I-E: No precedential weight.

In keeping with the normative framework I set out above,¹⁴⁶ I measure the rules against three potential problems: (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; and (c) the extent to which the rule will likely delay the high court in resolving definitively questions of law. Table 4 summarizes the results.

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
I-A	Full	Broad	No problem.	No problem.	Problem.
I-B	Full	Narrow	Marginal problem.	Marginal problem.	Moderate problem.
I-C	Limited	Broad	Marginal problem.	Marginal problem.	Moderate problem.
I-D	Limited	Narrow	Marginal problem.	Marginal problem.	Mild problem.
I-E	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.¹⁴⁷ 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 ensconced, 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).¹⁴⁸ Professor Sunstein has argued that there is virtue in deciding cases modestly, without reaching out to decide more than the cases themselves demand.¹⁴⁹ But that goal will be frustrated if broader minority majority decisions are

¹⁴⁶ See *supra* the text accompanying notes 143-145.

¹⁴⁷ 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.

¹⁴⁸ See *supra* note 106 and accompanying text.

¹⁴⁹ See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 16-21 (1996) [hereinafter Sunstein, *Foreword*]; *id.* at 30-33 (discussing the circumstances under which judicial minimalism and maximalism are appropriate); Cass Sunstein, *The Minimalist*, L.A. TIMES, May 25, 2006, at ____ (“[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

afforded full precedential weight.¹⁵⁰ 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 majority of four Justices 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 (although as I discuss above, courts do that even now¹⁵¹)—but at most only in a minor way. Moreover, courts even now issue decisions that do not enjoy full precedential weight. 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 cases decided by wider margins.¹⁵² If having a case decided by a narrower margin constitutes a

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).

¹⁵⁰ See Sunstein, *Foreword*, *supra* note 149, at 25-28 (discussing the connection between stare decisis and minimalist jurisprudence).

¹⁵¹ See *supra* note 90 and accompanying text; see also *infra* the text accompanying notes 152, and 154-156.

¹⁵² See, e.g., *Payne v. Tenn.*, 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 Decision Making 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.)

“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.¹⁵³

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 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.¹⁵⁴ While this practice has generated considerable academic debate and some have argued that the practice does indeed tend to undermine the courts’ legitimacy,¹⁵⁵ 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 to definitively resolve issues of particular importance. Another response is that courts—including the Supreme Court—issue tie decisions that are simply “affirmed by an equally divided court” and entitled to no precedential weight.¹⁵⁶ Why could not courts similarly issue decisions that

¹⁵³ 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 decision. One also might argue, however, that such cases deserve a second stare decisis “strike.”

¹⁵⁴ See generally *supra* note 90 and accompanying text.

¹⁵⁵ See, e.g., Symposium, *supra* note 90.

¹⁵⁶ See *supra* note 63.

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 93, 113, 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 Independent School District*, 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

affirm or reverse (or render some other disposition) “by an insufficiently constituted majority,” that also would not be entitled to precedential effect?¹⁵⁷

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 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 issue 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 and/or the issue less likely to arise again soon.

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.

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.”).

¹⁵⁷ Cf. Caminker, *supra* note 98, 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”).

I assume that it would be inappropriate, and render the judicial system illegitimate, for the high court to be more tightly bound by a minority majority decision than lower courts.¹⁵⁸ 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 courts 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.¹⁵⁹ 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
II-A	Full	Broad	Slight problem	Problem
II-B	Full	Narrow	No problem	Slight problem
II-C	Limited	Broad	Problem	Problem
II-D	Limited	Narrow	Problem	Slight problem
II-E	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. 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

¹⁵⁸ 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.

¹⁵⁹ 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.

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 is 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 United States 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.¹⁶⁰

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.¹⁶¹ If the rule governing grants of

¹⁶⁰ 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. 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).

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.¹⁶² 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.¹⁶³ This is summarized in Table 6.

Table 6: Normative analysis of action requirement to grant discretionary review for depleted courts.

Rule:	Effect on court's docket as compared to fully-staffed court:
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.¹⁶⁴ Insofar as the choices of Rules 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.¹⁶⁵

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.¹⁶⁶

¹⁶¹ 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 (1984) (describing content of Supreme Court docket, and critiquing the method by which the Court's docket was then determined).

¹⁶² See Gersen & Vermeule, *supra* note 62, 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.”).

¹⁶³ It is unlikely to be the same because of both (1) chance as to the number of absences in any given case, and (2) the fact that it is nearly impossible to get the same ratio for most existing court sizes.

¹⁶⁴ 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 (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 98.

¹⁶⁵ See Lubet, *supra* note 17, 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.”).

¹⁶⁶ Cf. Mitchel de S. -O. -I'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 Generally,” 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 168-169 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.¹⁶⁷ 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.¹⁶⁸ Indeed perhaps even greater latent authority rests with the legislature.¹⁶⁹

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

¹⁶⁷ 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. Eastern Air Lines, Inc.* 712 F.2d 899, 901 (4th Cir. 1983) (en banc) (Murnaghan, J.) (noting “suggestion” in Supreme Court jurisprudence” that circuit court 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 . . .”).

¹⁶⁸ 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 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 49, at 646 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.”).

¹⁶⁹ See Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535 (2000); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503 (2000); Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191 (2001). See also *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 Am.*, 148 F.2d 416 (2d Cir. 1945), in 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 precedent”); 28 U.S.C. § 2254(d)(1) (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).

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.¹⁷⁰ 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.”¹⁷¹ 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.

IV. CONCLUSION

In this Paper, 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. 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 non-binding, 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 at least 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.

¹⁷⁰ See Stevens, *supra* note 49.

¹⁷¹ See generally Hartnett, *supra* note 49.

Last, I argue 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.

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