Is a 4-3 Decision of the United States Supreme Court the "Supreme Law of the Land"?

Thomas M. Burke

Follow this and additional works at: https://ir.law.fsu.edu/lr

Part of the Law Commons

Recommended Citation
https://ir.law.fsu.edu/lr/vol2/iss2/4

This Note is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.
NOTE

IS A 4-3 DECISION OF THE UNITED STATES SUPREME COURT THE "SUPREME LAW OF THE LAND"?

On November 15, 1972, in Roofing Wholesale Company v. Palmer, the Supreme Court of Arizona declined to be bound by the United States Supreme Court's holding in Fuentes v. Shevin. The Arizona court based its rejection of the Fuentes precedent on the ground that Fuentes had not been decided by a majority of the entire United States Supreme Court. Although the Arizona court attempted to support its decision with case authority, it is apparent that the opinion turned on the fact that only four Justices comprised the Fuentes majority.

The vote in Fuentes was 4-3. This split was the result of the fact that the Court had opened its October 1971 term with only seven Justices sitting. Justices Black and Harlan had retired during the 1971 recess and their successors, Justices Powell and Rehnquist, were not seated until January 7, 1972. During this period the Court considered 75 cases. A total of 12 cases, including Fuentes, were decided by a four-member majority. Although 54 opinions were issued after January 7, Justices Powell and Rehnquist participated only in those cases that were reargued after they had been seated.

The Arizona Supreme Court's decision in Roofing Wholesale is important for two reasons. First, the Arizona court rejected an important

3. 502 P.2d at 1331.
4. See 502 P.2d at 1329, the court stating:
   Were we convinced that the four man majority of the United States Supreme Court in Fuentes, supra, would become at least a five man majority when the two judges who did not participate in the particular case are called upon to participate in a similar question, we would then be inclined to follow the decision as set down in Fuentes, supra.
5. Justices Powell and Rehnquist were nominated on October 27, 1971, confirmed on December 6 and 10, 1971, respectively, and were seated on January 7, 1972. 404 U.S. at iv.
7. See the tabulated summary of cases, 40 U.S.L.W. at 3293-96 (U.S. Dec. 28, 1971).
United States Supreme Court decision that has had a substantial impact on the law in the area of procedural due process.\(^9\) Secondly, and of more importance for the focus of this note, the action of the Arizona Supreme Court appears unsupportable by precedent or logic. In fact, the court's decision strikes at the basis of the federal judicial system by undermining the supremacy clause\(^9\) and eroding the concept of stare decisis. In view of the United States Supreme Court's past\(^{11}\) and continued\(^12\) issuance of minority decisions, the adoption of the Arizona court's lead by other state supreme courts could seriously affect the functioning of the judicial system at both state and federal levels.

I. THE Roofing Wholesale Case

Incident to an action on an express open account contract for the direct payment of money, the petitioner, Roofing Wholesale Company, requested the clerk of the Superior Court of Maricopa County, Arizona, to issue a writ of attachment and writ of garnishment pursuant to the relevant Arizona statutes.\(^3\) When the clerk refused to take the requested action the petitioner sought a writ of mandamus to compel the issuance of the writs of attachment and garnishment. The apparent reason for the clerk's refusal to issue the requested writs was the decision of the United States Supreme Court in *Fuentes v. Shevin.*\(^4\) In *Fuentes* the replevin statutes of Florida and Pennsylvania were held violative of the fourteenth amendment due process clause because each allowed a person's chattels to be replevied without affording prior personal notice and an opportunity to be heard.\(^5\)

On the petition for the writ of mandamus the Arizona Supreme

---

9. *Fuentes* held that prejudgment replevin statutes that failed to provide for meaningful prior notice and an opportunity to be heard were a deprivation of property without due process of law in violation of the fourteenth amendment. *Fuentes v. Shevin,* 407 U.S. 67, 80-93 (1972). The Court reached this result even though full title to the goods remained in the seller, and the buyers had signed sales contracts permitting the seller to repossess the merchandise upon buyer's default. The Court stated that the buyers had sufficient possessory interests in the merchandise to invoke procedural due process safeguards. *Id.* at 86-87.

10. U.S. CONST. art. VI, which provides in part:

   This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

11. See note 81 and accompanying text infra.

12. See note 6 supra, listing the twelve minority decisions of the October 1971 term.


15. See note 9 supra.
Court declined to be bound by the 4-3 decision in *Fuentes*, because "we are reluctant to declare unconstitutional Arizona statutes based upon a decision by less than a clear majority" of the United States Supreme Court. Additionally, the Arizona court did 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.

The *Roofing Wholesale* court attempted to support its holding with several case authorities; however, examination of the cited cases reveals that the purported authorities furnish tenuous support, at best, for the court's decision. The first authority, *United States v. Pink*, involved (in part) the precedential value of a decision by an equally divided Court. In *Pink* the respondent sought to have the writ of certiorari from the Supreme Court dismissed as improvidently granted, since the same issues had been decided in a previous case. The Court, speaking through Justice Douglas, held that the previous case was not determinative of the issues because it had been decided by an equally divided Court. Such a decision has no precedential value for other cases, despite the fact that it is an adjudication on the merits for the parties involved. The second authority, *Frischer & Co. v. Bakelite Corp.*, concerned an attack on a decision of the United States Tariff Commission, an administrative body with no judicial authority. In *Frischer & Co.*, the Court of Customs and Patent Appeals held that a quorum of a body may act for the body, and a decision for the body may be rendered by a simple majority of the quorum. In dicta, however, the court appeared to recognize an exception to this rule in the case of courts: "[A] clear majority of all the legally constituted members thereof shall concur or no valid judgment may be entered except such as may follow no decision." In the third authority, *FTC v. Flotill Products*, Justice Brennan examined the support for the contention, made in the *Frischer & Co.*

---

17. *Id.* at 1331.
20. 315 U.S. at 216.
22. *Id.* at 254.
23. *Id.* at 255.
case, that courts are excepted from the concept that a quorum may act for a body and that a simple majority of the quorum may make determinative decisions for the body. He concluded that only one of the nine authorities cited to support this exception was on point. That case was an 1846 decision\(^25\) which cited no authority for holding: "[T]he concurrence of a majority of the whole number [is] necessary to the validity of [the court's] action."\(^26\) In other words, there seems to be little or no support for the exception to the quorum rule as offered by the customs and patent court. Lastly, the Arizona court cited *Cain v. Commonwealth*\(^27\) and *State v. Reese.*\(^28\) These two cases concerned state criminal prosecutions for the exhibition and possession of obscene material. The state courts involved, struggling with the United States Supreme Court's opinions on obscenity, declined to apply holdings of the Supreme Court subsequent to the case of *Roth v. United States.*\(^29\) Both state courts held that the later cases urged by appellants were not determinative of the issue before them because of the inability of the Supreme Court Justices to agree on the reasoning of their opinions, although a majority of the Court concurred in the result of each case.\(^30\)

In summary, it seems clear that the authorities relied upon by the Arizona Supreme Court do not support the contention that a decision of the United States Supreme Court is not binding upon the states unless decided by a "clear majority" of the Court. The *Pink* case is clearly not apposite because it concerns decisions by an equally divided court. The *Frischer & Co.* case, a questionable decision by the Court of Customs and Patent Appeals, seems too weak a precedent to be determinative of United States Supreme Court procedure. This is particularly apparent since the third authority, *FTC v. Flotill Products,* is a statement by a Supreme Court Justice effectively neutralizing the contentions made in the *Frischer & Co.* case. Finally, there is no doubt that the *Fuentes* opinion clearly expresses the view of the prevailing majority, since there are no concurring opinions that differ from the "Opinion of the Court," as is common in obscenity cases.\(^31\)

---


\(^{26}\) 389 U.S. at 184 n.7.

\(^{27}\) 437 S.W.2d 769 (Ky. 1969).

\(^{28}\) 222 So. 2d 732 (Fla. 1969).

\(^{29}\) 354 U.S. 476 (1957).

\(^{30}\) The authorities cited by the appellants in each case as establishing a more liberal standard for obscenity than *Roth* are marked by various concurring and dissenting opinions, leaving the opinion of the Court, in some cases, to be joined in by only three Justices. See 222 So. 2d at 737 (concurring opinion).

\(^{31}\) Cf. 437 S.W.2d at 771; 222 So. 2d at 734.
II. CRITICISM OF Roofing Wholesale

The Arizona decision squarely presents the question whether a decision of the United States Supreme Court should or must reflect the opinion of a majority of the full Court. In order to answer the question it is helpful to consider the history of the legislation and rules that have governed the Court's operation. An examination of that history and the actual practice of the Court in modern times seems to refute the conclusion reached in Roofing Wholesale. The sparse authority relied on by the Arizona court is virtually overwhelmed by the support for the proposition that a decision reached by a majority of the quorum is a binding precedent and the "supreme Law of the Land" within the meaning of the Constitution.

A. History of the Supreme Court Quorum Rule

As the following table indicates, the quorum of the Supreme Court has been a subject of congressional legislation on several occasions since the passage of the Judiciary Act of 1789.32

<table>
<thead>
<tr>
<th>STATUTE</th>
<th>DATE</th>
<th>NUMBER OF JUSTICES</th>
<th>QUORUM PRESCRIBED</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Stat. 73 (1789)</td>
<td>Sept. 24, 1789</td>
<td>6</td>
<td>4</td>
</tr>
<tr>
<td>2 Stat. 89 (1801)</td>
<td>Feb. 13, 1801</td>
<td>5</td>
<td>no mention33</td>
</tr>
<tr>
<td>2 Stat. 421 (1807)</td>
<td>Feb. 24, 1807</td>
<td>7</td>
<td>no mention34</td>
</tr>
<tr>
<td>4 Stat. 332 (1829)</td>
<td>Jan. 21, 1829</td>
<td>no mention35</td>
<td>4</td>
</tr>
<tr>
<td>14 Stat. 209 (1866)</td>
<td>July 23, 1866</td>
<td>7</td>
<td>4</td>
</tr>
<tr>
<td>16 Stat. 44 (1869)</td>
<td>Apr. 10, 1869</td>
<td>9</td>
<td>6</td>
</tr>
<tr>
<td>36 Stat. 1152 (1911)</td>
<td>Mar. 3, 1911</td>
<td>9</td>
<td>6</td>
</tr>
</tbody>
</table>

32. Table and notes 33-35 were derived from Note, The Problem of the Supreme Court Quorum, 12 GEO. WASH. L. REV. 175 (1944).
33. Act of Feb. 13, 1801, ch. 4, § 1, 2 Stat. 89. No mention is made of a quorum, but attendance of the Court is specified as follows: "[I]f four of the said justices shall not attend within ten days after the times thereby appointed for the commencement of the said sessions respectively, the said court shall be continued over till the next stated session thereof."
34. Act of Feb. 24, 1807, ch. 16, § 5, 2 Stat. 421. There is no provision for attendance or a quorum, the Act simply stating: "[T]he supreme court of the United States shall hereafter consist of a chief justice, and six associate justices, any law to [the] contrary notwithstanding."
35. Act of January 21, 1829, ch. 12, § 2, 4 Stat. 332. "That if it shall happen, during any term of the said Supreme Court, . . . less than the number of four shall assemble,
The current statute, which has remained essentially the same since the Judiciary Act of 1869, is contained in Title 28, United States Code, Judiciary and Judicial Procedure: "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 will constitute a quorum." The current rule concerning the absence of a quorum is: "In the absence of a quorum, on any day appointed for holding a session of the court, the justices attending (or, if no justice is present, the clerk or a deputy clerk) may adjourn the court until there is a quorum.

An examination of the quorum statutes indicates that, at least until 1869, Congress followed the common law rule in setting a quorum equal to a simple majority. The Judiciary Act of 1869, which re-established a Court of nine, set the quorum at six, one more than a simple majority. Why the quorum was changed is unclear because the Act was apparently the result of various political forces at work during the Reconstruction era.

One of the more significant factors affecting the passage of the 1869 Act was the political maneuvering concerning the case of *Ex parte McCardle*. McCardle had been arrested for violation of the Reconstruction Acts in 1867 and was scheduled for trial before a military tribunal. He sought a writ of habeas corpus in the federal circuit court, and, when relief was denied, appealed to the Supreme Court pursuant to the federal habeas corpus statute. Oral arguments were heard on March 2-4 and 9, 1869, but while the Court was deliberating Congress, by the Act of March 27, 1868, repealed the portion of the Habeas Corpus Act of 1867 that had allowed a direct appeal to the United States Supreme Court. The Court adjourned on April 6, 1868, continuing *McCardle* and other Reconstruction cases until the following term.

The judge or judges so assembling shall have authority to adjourn said court... until a quorum shall attend.”

The fear that the Court was inclined to hold all or part of the Reconstruction Acts unconstitutional prompted Congress to take the theretofore unprecedented step of removing from the Court appellate jurisdiction over a case that already had been submitted and argued. What is significant to the instant inquiry, however, is that the removal of appellate jurisdiction was not the only device contemplated by the Congress to limit judicial review of the Reconstruction Acts. A bill was introduced in the Senate in December 1867, which would have reduced the quorum of the Supreme Court from six to five. At the same time, the Court, in response to the Judiciary Act of 1866, was in the process of reducing its membership from ten members, with a quorum of six, to seven members with a quorum of four. Thus the bill, if passed, would have required five Justices, one more than a simple majority, to conduct business. This bill was amended in the House Judiciary Committee to provide that no act of Congress could be held invalid without the concurrence of at least two-thirds of all the members of the Court. An additional House amendment that would have required Supreme Court unanimity in order to invalidate congressional legislation failed. The House then returned the amended bill to the Senate Judiciary Committee where it languished while another bill, defining the Reconstruction Acts as political in nature, was introduced in the Senate. Apparently the bill was intended to render the courts constitutionally incompetent to question the validity of the Acts. However, the new Senate bill never came to fruition. Instead, the House acted by attaching an amendment to Senate Bill 213, a bill permitting the Supreme Court to review judgments under the internal revenue laws. The House amendment precluded the Supreme Court from hearing direct appeals of habeas corpus writs by removing habeas corpus from the jurisdiction of the Supreme Court.

When the third session of the 40th Congress convened in December 1868, the general feeling prevailed that the threat posed to the Recon-

43. See C. Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion 1864-88 Part One 437-92 (The Oliver Wendell Holmes Devise Vol. 6, 1971); Note, supra note 32, at 178-79.
44. S.163, 40th Cong., 2d Sess. (1867).
47. S.213, 40th Cong., 2d Sess. (1867).
48. Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44 (passed over Presidential veto).
struction Acts by the McCardle tempest had passed. The Court had adjourned without rendering a decision in the McCardle case and was not expected to challenge Congress the following term by contesting the statute obliterating the Supreme Court’s jurisdiction of habeas corpus appeals.\(^{49}\) In an apparent gesture of solicitude, Congress passed the Judiciary Act of 1869.\(^{50}\) This legislation increased the Court to nine members, relieved the Justices of some of the burden of trial work by creating the office of Circuit Judge and allowed any federal judge who had held his commission for at least ten years to retire with full salary at the age of seventy.\(^{51}\) The Act also established the quorum for the new nine-man Court at six, one more than a simple majority. The debate on the provision providing for a quorum of six is so sparse\(^{52}\) that it does not facilitate inquiry into Congress’ intent. But, regardless of what Congress intended, the primary effect of this portion of the Act, which endures to the present day, has been to require that more Justices be involved in each case than might otherwise be necessary at common law. At least two-thirds of the full Court must hear every case. A majority of four is needed to carry a quorum of six, whereas a majority of three, merely one-third of the Court, could decide a case with the common law quorum of five.\(^{53}\) It is not clear why Congress decided to set the quorum of the Supreme Court at six rather than at the common law requirement of a simple majority. The statutory history of the 1869 legislation does not indicate, however, that Congress intended any other deviation from the common law concept of quorum. Therefore, since the new statute did not place any express limitations on that quorum’s ability to act for the Court, Congress must have intended that the common law rule—a majority of the quorum may act for the Court—should apply. This interpretation of the quorum portion of the Judiciary Act is in accord with the familiar rule of statutory construction that statutes in derogation of the common law are to be strictly construed.\(^{54}\) Thus it would seem that the Arizona court’s action is in conflict with the intent of Congress in enacting the Judiciary Act of 1869.

\(^{49}\) See C. Fairman, supra note 43, at 487. See also note 42 supra.

\(^{50}\) Act of April 10, 1869, ch. 22, 16 Stat. 44.


\(^{52}\) Cong. Globe, 41st Cong., 1st Sess. 216, 239, 341, 574-76 (1869). Three Senators commented on the proposed quorum, two favoring the common law majority of five and one dismissing its importance to the bill, six Justices usually being available to participate in a given case.

\(^{53}\) See Note, supra note 32, at 180-81.

\(^{54}\) For a general explanation of this rule, see 50 Am. Jur. Statutes § 345 (1944) and cases cited therein. The historical perspective and an excellent discussion of the rule is contained in Pound, Common Law and Legislation, 21 Harv. L. Rev. 383 (1908).
If Congress had intended to change the common law rules governing the majority of the quorum's ability to act for the whole Court, the Act would have expressly stated that intent, as was the case when the quorum was changed from five to six. Moreover, attempts by Congress to determine legislatively the precedential value of Supreme Court opinions may well conflict with the separation of powers doctrine. Article III of the Constitution vests the judicial power of the United States in the Supreme Court and the lower federal courts. Therefore, the most apposite authority on the precedential value of minority decisions must come from the Court itself.

B. Rules Imposed by the Court Upon Itself

Although the size of the Court and its quorum to conduct business had been the subject of legislation since 1789, it was not until 1834 that the Court formulated rules concerning its own decision-making abilities. In the companion cases of *Briscoe v. Commonwealth's Bank* and *City of New York v. Miln*, Chief Justice Marshall announced:

The practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court. These two cases involved, respectively, the establishment of a state bank and the regulation of navigation by the State of New York—two areas that Chief Justice Marshall had always considered within the distinct province of the federal government. At the time these cases were before the Supreme Court, which was then composed of seven Justices, only six members were sitting. Justice Johnson was too ill to attend. As a result of Johnson's absence, the Court was equally divided. A tie vote would have affirmed the state court decisions that had upheld the legislation which Marshall found objectionable. Thus the rule requiring four Justices' concurrence in constitutional cases, imposed upon the Supreme Court by Marshall, effectively prevented consideration of those two cases that year.

When *Briscoe* and *Miln* were presented for argument the following term (1835), the Court once again was sitting with only six members.

55. *33 U.S.* (8 Pet.) 118 (1834).
56. *Id.* at 122.
57. D. Loth, *Chief Justice* 374-76 (1949). "At this term [1834] two cases were argued which he thought might upset two of his cherished principles—the constitutional bar against States issuing any kind of bills of credit and the exclusive right of Congress to legislate on navigation . . . ." *Id.* at 374.
These six Justices, however, were not the same six who had split evenly on *Briscoe* and *Miln* during the previous term. Justice Wayne had replaced Justice Johnson, whose illness had proved fatal; that same year, Justice Duval retired, and it was his retirement that produced the vacancy on the bench when the two cases were again presented. These changes in Court membership forced Marshall to revise and restate the rule that had successfully postponed consideration of the two cases the previous term: "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." In fact, the changes in personnel put the Chief Justice on the losing end of a 4-2 split to uphold the lower courts. Nonetheless, he persisted in his attempt to thwart a decision in the cases. It could be suggested that Chief Justice Marshall formulated this rule to vindicate his personal political beliefs; regardless of his motivations, however, it is sufficient to say that Marshall's concept of federalism passed away with him on July 6, 1835. The Court's 1837 decisions in *Briscoe* and *Miln*, favorable to the states, became the landmark of Chief Justice Taney's tenure. Marshall's rules, however, retained some vitality through the Civil War, and were mentioned in *The Legal Tender Cases*. These cases overruled *Hepburn v. Griswold*, a 4-3 decision invalidating the Legal Tender Act of 1862—an act essential to the financing of the Civil War. Whatever vitality remained in the rules was dissipated after *The Legal Tender Cases*, and the modern demise of Marshall's rules can be illustrated by the incidence of minority decisions in the period from 1945 through 1971.

### C. Supreme Court Minority Decisions

In the 26-year period from the October 1945 term through the

---

59. J. LOTH, *CHIEF JUSTICE* 374 (1949), stating: "For a time . . . the Chief Justice was able to supply with his own ingenuity the place of his failing associates."
60. *Id.* at 375, 382.
63. "The Taney Court granted to the states much more autonomy in commerce . . . The decisions rendered often acted as a moderating force, that is, a grant of local police power, between the extreme nationalism of Marshall and Story and the equally extreme sectionalism of the old Republican states' rights men." Gatell, *Roger B. Taney*, in *The Justices of the United States Supreme Court 1789-1969*, 642 (L. Friedman & F. Israel eds. 1969).
64. "We are not accustomed to hear . . . [cases involving constitutional issues] in the absence of a full court, if it can be avoided." 79 U.S. (12 Wall.) 457, 554 (1872).
65. 75 U.S. (8 Wall.) 603 (1870).
October 1971 term, the Court has decided a total of 57 cases by minority votes. Unless the opinion in the case was also a "plurality opinion," each minority decision has been announced as and styled the "Opinion of the Court." "Plurality" opinions that are also minority decisions have been treated in the same manner as plurality opinions decided by a full Court. In general, minority decisions are caused by a vacancy or vacancies on the Court or by a Justice's excusing himself from participation in a case. Ordinarily, the reporter of decisions does not indicate the reason why a particular Justice excuses himself from a case, nor do the Justices normally set forth the reasons for their own non-participation in any particular case. With two exceptions, long vacancies were not common in the 1945-70 period. The first vacancy occurred in 1945, when the Court sat the entire term with eight Justices because Justice Jackson was in Nuremberg, Germany, involved in the post-World War II war crimes trials. The second extended vacancy was caused by Justice Fortas' resignation on May 14, 1969. His place on the bench was not filled until Justice Blackmun was seated on June 9, 1970. Hence, the Court sat the greater portion of the October 1969 term with only eight Justices. Shorter vacancies occurred after the deaths of Chief Justice Stone and Justice

67. For a summary of the cases by type, see note 81 infra.
68. When a majority of the Court reaches a particular decision, but there is no unanimity of rationale for that decision, the opinion with which most concurring Justices agree is a "plurality opinion."
72. See, e.g., 353 U.S. at 608, 351 U.S. at 404.
73. While the Justices normally do not explain a disqualification, it is sometimes necessary to explain a refusal to disqualify. See Memorandum of Mr. Justice Rehnquist, 409 U.S. 824 (1972), explaining his refusal to excuse himself from consideration of Laird v. Tatum, 408 U.S. 1 (1972), and denying the motion that he do so.
74. 326 U.S. at iv.
76. 395 U.S. at iii.
77. 398 U.S. at iv.
78. Chief Justice Stone died April 22, 1946. 327 U.S. at iii. Chief Justice Vinson was not seated until June 24, 1946. 329 U.S. at iii.
Jackson. As noted, during the 1971 term extended vacancies befell the Court prior to Justices Powell's and Rehnquist's confirmations.

Since the close of the World War, the Court's minority decisions have occurred in virtually every area of the law and have had serious effects on large classes of citizens. Minority decisions have sustained the sentence of death on two occasions; resulted in the federal government's accession to off-shore oil revenues, to the financial detriment of the State of Texas; announced new rules for "standing to sue"; and, as previously mentioned, declared unconstitutional replevin

79. Justice Jackson died on October 8, 1954. 348 U.S. at iv. Justice Harlan was not seated until March 28, 1955. Id.
80. See note 5 supra.
An examination and comparison of the Court's minority decisions in constitutional cases reveals that *Fuentes v. Shevin* has had the most significant effect on the largest group of people. The charge account


86. The six constitutional cases decided between 1945 and 1970 by minority vote reached into many areas but did not produce significant changes in American society. In *Kenneecott Copper Corp. v. State Tax Comm’n*, 327 U.S. 573, 579-80 (1946), the Court affirmed the constitutionally rooted doctrine that a non-resident may not sue a state in federal court without the consent of the state. In *Beck v. Washington*, 369 U.S. 541 (1962), the petitioner failed to carry the burden of showing that his grand jury indictment and trial violated the due process and equal protection clauses of the fourteenth amendment. The Court affirmed the conviction of a witness before a congressional committee who refused to answer questions but declined to invoke the fifth amendment privilege against self-incrimination. Additionally, the Court rejected the railroad’s argument that Pennsylvania could not differentiate between railroads having tracks totally within the state and those having some portion of their total trackage without the state. The Court applied the “rational basis” standard and found that Pennsylvania’s action was not violative of the equal protection clause of the fourteenth amendment. *Id*. at 618. The “speech or debate” clause of the Constitution, art. I, § 6, was the subject of litigation in *United States v. Johnson*, 383 U.S. 169 (1966). In affirming the lower court’s reversal of Johnson’s conviction for violation of a conflict of interest statute, the Court held that the “speech or debate” clause of the Constitution forecloses judicial inquiry both into the motives of a congressman in making a particular speech and into the content of the speech. *Id*. at 184-85.

The Court decided five constitutional cases by minority votes in the October 1971 term. *Richardson v. Belcher*, 404 U.S. 78 (1971), reversed a decision holding that a section of the Social Security Act, 42 U.S.C. § 424(a) (1970), which provided for a reduction in social security payments if the recipient was also receiving workmen’s compen-
and time sales contract have become an integral part of American commercial life and are subject to regulation in almost every state. 87

The magnitude of the issue involved, however, cannot by itself justify the court's refusal in Roofing Wholesale to abide by a United States Supreme Court decision that the Court, 88 as well as Congress, 89

sation benefits, was violative of the due process clause of the fifth amendment. 404 U.S. at 84. In upholding the challenged section of the Social Security Act, the Court applied the traditional "legitimate goal—rational classification to achieve the goal" standard. In Schilb v. Kuebel, 404 U.S. 357 (1971), the appellant utilized the class action device to challenge the Illinois bail statutes as violative of fourteenth amendment due process and equal protection. In affirming dismissal of the complaint by the court below, the Court indicated that the Illinois bail system provided a rational basis for the discrimination between those who post full bond and pay no administrative charge and those who pay only 10% of the required bond and are subjected to a 1% retention charge. Id. at 367-71. The petitioner in Lego v. Twomey, 404 U.S. 477 (1972), challenged his conviction for armed robbery, and urged the Court to hold that in hearings concerning the voluntariness of a confession, the applicable standard for determining voluntariness was one of "beyond a reasonable doubt" as opposed to "the preponderance of the evidence." Petitioner also urged that if the judge ruled adversely to him, he was entitled to submit the voluntariness issue to the jury for a de novo determination. The Court rejected both arguments, holding that the voluntariness hearing required by the Court's decision in Jackson v. Denno, 378 U.S. 368 (1964), was intended solely to prevent the use of coerced confessions in violation of due process of law and was not intended to pass upon the confession's truth or falsity. As a result, a standard of preponderance of the evidence regarding voluntariness is not violative of the mandate of In re Winship, 397 U.S. 358 (1970), which requires proof beyond a reasonable doubt to support a conviction. Additionally, the Court held that the rule in Duncan v. Louisiana, 391 U.S. 145 (1968), which the petitioner urged permitted him to raise the question of voluntariness anew to the jury, did not change the rule that requires the judge, not the jury, to determine the admissibility of evidence. 404 U.S. at 490. The loyalty oath required of all public employees in Massachusetts was upheld in Cole v. Richardson, 405 U.S. 676 (1972). Following a remand of the original appeal, the Court held that the clause under attack—"oppose the overthrow"— was not designed to require any specific action in any actual or hypothetical situation, but to obtain a commitment from public employees to follow constitutional processes. Id. at 683-84. In Fuentes v. Shevin, 407 U.S. 67 (1972), the Court held that the prejudgment replevin of chattels pursuant to a state statute that failed to provide for meaningful prior notice and an opportunity to be heard was a deprivation of property without due process of law in violation of the fourteenth amendment. Id. at 80-93. See note 9 supra.

It seems apparent from the foregoing case summaries that the Fuentes decision is the most significant of the constitutional cases decided by minority vote. The dissenting Justices in Fuentes based their opinion on what they considered the improvident actions of the majority in raising serious questions about the statutes governing secured transactions in almost all the states. 407 U.S. at 97. The Court denied the petition for rehearing. 409 U.S. 902 (1972). Since they had not heard the case on the merits, Justices Powell and Rehnquist followed the tradition of not participating in the consideration of the petition. See id.; R. Stern & E. Gressman, Supreme Court Practice § 15.6 (4th ed. 1969).

88. See notes 97 & 98 and accompanying text infra.
89. See notes 49-54 and accompanying text supra.
intended to be binding. Such an action flies in the face of the well-established judicial doctrine, set out in *Martin v. Hunter’s Lessee*, that recognizes "the importance, and even the necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution."\(^9\) Furthermore, the Court itself seems to favor reargument of some cases before the full Court when the issues considered are of particular significance.\(^9\) Therefore, the Supreme Court’s refusal to grant a rehearing in *Fuentes*\(^9\) must be taken as a dispositive indication that the Supreme Court considered the issue raised in that case resolved, despite its importance.

Of the 45 minority decisions in the 1945-70 period, only six cases involved constitutional issues.\(^9\) In contrast, five of the twelve minority decisions during the October 1971 term required constitutional interpretation.\(^9\) The larger number of constitutional cases in 1971 can be accounted for by the significant increase in the Court’s case load\(^9\) and by the holdover influence of the Warren Court, which was noted for its propensity to liberally utilize constitutional interpretation.\(^8\) Regardless of the cause of the increase, however, the total incidence of minority decisions since 1945, and particularly during the first half of the October 1971 term, clearly indicates that the Court has ignored Marshall’s rule of 1834 in both non-constitutional (an area in which it never applied) and constitutional cases. Instead, the Supreme Court has rendered several less-than-majority decisions when presented with constitutional questions. Moreover, on those occasions when the Court has announced a decision that has limited precedential value (for example, when the vote in a case is equally divided), the Court’s procedure has been to indicate that its decision in such a case is not a precedent.\(^7\) Thus it would seem that by not indicating any of its less-

---

91. Two of the three cases reargued after Justices Powell and Rehnquist were seated involved significant issues of constitutional rights afforded criminal defendants. See Argeresinger v. Hamlin, 407 U.S. 25 (1972); Kirby v. Illinois, 406 U.S. 682 (1972). Additionally, the “Abortion Cases” were originally argued on December 13, 1971 before seven Justices but redocketed by the Court for reargument before the full bench. Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).
93. See note 81 supra.
95. The Court had 1,460 cases on its docket in the 1945 term; 4,202 cases in the 1969 term. Kurland, supra note 75, at 2.
96. Id. at 5.
than-majority decisions to be of limited precedential value the Supreme Court has manifested its belief that those decisions are the "supreme Law of the Land." In other words, if the Supreme Court had intended that less-than-majority decisions were to have limited precedential value, the opinions in those cases would have so indicated. Recognition by the Court of the precedential value of its own minority decisions is further evidence that the Supreme Court views less-than-majority decisions as authoritative precedents. Several state courts, including those of Arizona, have also accepted other minority decisions as binding precedents. In the final analysis, there appears to be no historical precedent for Arizona's rejection of what would seem to be a binding United States Supreme Court precedent.


99. Minority United States Supreme Court cases were cited as precedents in the following state court cases:


D. Policy Reasons Favoring the Acceptance of Minority Decisions

The factors favoring the acceptance of minority decisions as binding precedents include principles deeply rooted within the judicial system. The doctrine of stare decisis, which ensures stability and predictability in the law,\(^\text{100}\) obviously is impaired when lower courts ignore decisions of the Supreme Court simply because of the magnitude of the majority. The situation in Arizona is a clear illustration of the problem. In *Western Coach Corp. v. Shreve*\(^\text{101}\) the federal district court for Arizona applied *Fuentes* to the Arizona replevin statutes and found those statutes unconstitutional. Therefore, the subsequent decision by the Arizona Supreme Court in *Roofing Wholesale* makes the rights of Arizona defendants dependent upon the forum in which they are required to defend. This predicament is further compounded by the fact that other states, including some of Arizona's neighbors,\(^\text{102}\) have followed the *Fuentes* precedent. If all lower courts were to accept the

---


Roofing Wholesale rationale then every minority decision by the Supreme Court could result in varying acceptance of such a decision among the different jurisdictions. Minority decisions would place the legal issues involved in a state of limbo, and, since the Court grants petitions for rehearing in only extraordinary circumstances, it could be a significant period of time before the same issues would again be presented to the full Court for resolution. The interim period would be one of instability and uncertainty, exactly the situation the doctrine of stare decisis is intended to ameliorate. Such a state of affairs runs against the grain of a national judicial policy intended to promote "uniformity of decisions." Furthermore, if minority decisions bind lower courts only when those courts choose to be bound, the Supreme Court's consideration of cases like Fuentes has been a waste of judicial time and effort. Certainly, the Supreme Court neither sanctions nor encourages the squandering of its own decision-making efforts; therefore, it is difficult to understand why the Arizona Supreme Court is ready to do so.

The optional acceptance of minority Supreme Court decisions would also encourage "forum shopping," an evil condemned and curtailed by the Supreme Court in Erie R.R. v. Tompkins and Hanna v. Plumer. Litigants dissatisfied with a minority Supreme Court decision may well be induced to seek a forum that they believe would reject the objectionable decision. Thus a plaintiff could deprive a defendant of his constitutional rights by choosing a forum that rejects a minority Supreme Court decision. To permit litigants to speculate on the varying precedential weight that lower courts will attach to minority Supreme Court opinions could have only a deleterious effect on the stability of the law. Yet, the Arizona court's decision was in part prompted by reluctance to bring "chaos" to an important area of commercial law. It is difficult to understand how

103. A motion for rehearing is normally only granted when one of the Justices who heard the case originally expresses serious misgivings about his position on the merits. See Ambler v. Whipple, 90 U.S. (23 Wall.) 278, 281-82 (1874); U.S. Supr. Cr. R. 58(1).
105. 304 U.S. 64 (1938).
107. For an excellent example of the evil of "forum shopping" see Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928), a decision made possible by the rule in Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). Swift was overruled by Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
108. The court expressed displeasure with the prospect of "chaos to an important part of our commercial and contract law" that allegedly would result from declaring the state statute unconstitutional. 502 P.2d at 1331. Additionally, the court did not desire to "disrupt the business and legal practices of our community." 502 P.2d at 1331 (Hays, C.J., concurring).
the Roofing Wholesale decision can be viewed as anything but disruptive, particularly since the Arizona commercial community was already in the process of adapting to Fuentes as applied to the Arizona replevin statutes by the federal court in Western Coach Corp. v. Shreve.109 Moreover, if the full Supreme Court adheres to Fuentes in later decisions, then the Arizona court's attempt to promote stability in the commercial community will have been an exercise in futility.

The Roofing Wholesale case seems to hinge in large part on the Arizona court's attempt to second guess the votes of the new Justices who were to fill the vacancies that caused the 4-3 split in Fuentes. The majority expressed doubt that "once the full court hears the case that the opinion will stand."110 The unsettling effects of engaging in a "study of personalities"111 as a method of case decision should be avoided. Such speculation is particularly inappropriate where the nominee has not been confirmed by the Senate.112 Moreover, since it is possible for different "interpreters" to take opposite positions on the Supreme Court's disposition of a particular issue, the uneven application of federal and constitutional law could generate significant disparities on issues that should be treated uniformly. Permitting speculation concerning the alleged predilections of the Court gives rise to the inference that the Court is deciding constitutional cases by personal preference or political philosophy, a factor that could seriously undermine public confidence in the judiciary. The mere appearance of partiality, like the appearance of impropriety,113 should be avoided by a member of the judiciary. The general rule, to which the Arizona Supreme Court made itself an exception, is for lower courts to avoid any speculation on how the Supreme Court would decide a case should it be submitted for redetermination.114

Finally, the Roofing Wholesale rationale is inconsistent with the principles embodied in the supremacy clause of the Constitution115 because, by rejecting Fuentes, the Arizona court has taken upon itself authority to define the precedential value of a Supreme Court decision.

110. 502 P.2d at 1329-30.
112. See note 5 supra. This is particularly true since two other nominees of President Nixon failed to be confirmed by the Senate.
113. There are numerous cases that urge judges to avoid the appearance of partiality or bias as well as the exhibition of prejudice. See, e.g., Texaco, Inc. v. Chandler, 354 F.2d 655, 657 (10th Cir. 1965), cert. denied, 383 U.S. 936 (1966); Rapp v. Van Dusen, 350 F.2d 806, 812 (3d Cir. 1965).
115. U.S. CONST. art. VI.
The supremacy clause and article III of the Constitution clearly preclude such an assumption of power by a state court. There is specific language in article VI which binds the judges of state courts to the Constitution and laws made pursuant to it; moreover, article III vests "the judicial Power of the United States . . . in one supreme Court." Put another way, the Arizona Supreme Court has "no right" to question the decision of the United States Supreme Court when that decision is rendered by a majority of the legally defined quorum.

In an effort to ascertain the opinions of the judiciary in other states with regard to 4-3 United States Supreme Court decisions, this author conducted an informal survey of state supreme court justices. The survey indicated that there is little danger of the Roofing Wholesale rationale gaining widespread acceptance among the many state supreme courts. Over 82 percent of the justices responding to the questionnaire expressed disagreement with the Arizona court's position. These state justices presumably share the same concerns that the Arizona court had for the stability of local "contract and commercial law"; nevertheless, the great majority of the state justices disagreed with the Arizona decision, which contravened the supremacy clause and diminished the stature of a United States Supreme Court pronouncement on a constitutional issue.

Additionally, numerous justices of state supreme courts dispute the contention that a state may decline to follow a United States Supreme Court decision, regardless of the reason put forth to justify the action. In summary, it appears that the action of the Arizona Supreme Court was without foundation in history or precedent.

III. THE ADVISABILITY OF FEDERAL ACTION TO ENSURE THAT SUPREME COURT DECISIONS REPRESENT THE VOTE OF THE MAJORITY OF THE FULL COURT

The role of the Supreme Court in American jurisprudence is the

116. "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." U.S. Const. art. VI.
117. See 502 P.2d at 1331 (Lockwood, J., dissenting).
118. Questionnaires were sent to the justices of 49 state supreme courts, a total of 312 justices (Arizona excepted for obvious reasons). A total of 75 completed replies were received, representing 24% of the incumbent justices from 31 states. Thirteen states did not respond at all, and five states expressed a desire to state their views on the subject when presented a traditional "case or controversy." The author wishes to express his sincere appreciation to each of the state justices who participated in the survey, and especially to those who made specific additional comments on the various issues raised.
119. 502 P.2d at 1331.
major consideration governing whether the Court should, as a matter of policy, decline to consider a constitutional case when it is impossible for a majority of the whole bench to agree on the decision. The decision in any Supreme Court case clarifies and resolves issues of public importance in addition to settling the dispute among the parties involved. Acceptance of the Court's decision by the nation, however, is in part contingent upon the public's confidence in the Court's credibility as an institution. It would seem that the decisions may well gain a greater degree of public approbation if an opinion of the Court represents the view of a majority of the Justices rather than of a majority of the smallest number legally required to conduct business. Moreover, as the apex of the judicial pyramid, it is important that the Court foster and promote amiable relations between the federal and state governments through its decisions. The Roofing Wholesale case is an excellent illustration of the fact that minority decisions declaring a state statute unconstitutional do not generate support for the Court's actions or promote amiable federal-state relations to the same extent majority decisions might.\textsuperscript{120}

The informal survey conducted by questionnaire of state supreme court justices was primarily intended to elicit their opinions on various proposed methods to eliminate or reduce minority decisions by the Supreme Court.\textsuperscript{121} Since a state court had rejected Fuentes, and since the state courts of last resort must routinely apply the decisions of the Supreme Court, the state justices' opinions were considered particularly relevant to the general problem of minority decisions. A response was received from approximately 25 percent of the 312 incumbent state justices contacted. The responding justices represent 31 states.\textsuperscript{122} Therefore, it would seem that a representative cross section of judicial thinking was obtained.

One question presented to the state justices was whether Marshall's rule of 1834\textsuperscript{123} should be adhered to by the present Court. This rule

---

\textsuperscript{120} The Congress, recognizing the strain in federal-state relations that might occur when a state law is invalidated by a federal court, requires a three-judge panel to convene before enjoining enforcement of a state statute. \textit{See} 28 U.S.C. § 2281 (1970).

\textsuperscript{121} Another objective was to determine the reaction of the state justices to the rejection of Fuentes.

\textsuperscript{122} \textit{See} note 118 \textit{supra}.

\textsuperscript{123} The rule was announced in the companion cases of Briscoe v. Commonwealth's Bank and City of New York v. Miln, 33 U.S. (8 Pet.) 118 (1834). No attempt is made to advocate the utilization of Marshall's 1835 rule, requiring a full Court to hear constitutional cases. \textit{See} notes 57-59 and accompanying text \textit{supra}. The resulting delay could cause serious problems for a Court which may already have too heavy a caseload. \textit{See} \textit{Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court} (1972).
required the Court to defer decisions in constitutional cases (except in cases of urgent necessity) until a majority of the full Court could concur in the opinion. The purely pragmatic consideration of the Court's caseload may militate against the deferral of this type of case, however, because constitutional cases comprise a significant portion of the litigation before the Court. For example, the seven-man Court in the first half of the October 1971 term considered 75 cases, 39 of which raised constitutional issues. Moreover, the nomination and confirmation of Justices recently has taken a significant amount of time; therefore, it seems questionable whether the Court should, as a matter of policy, defer decision on half of its docket while awaiting the seating of new members. Indeed, the Court may be abnegating its role as arbiter and interpreter of the Constitution if it postpones decisions on the most important aspect of its work for a substantial period of time. On the other hand, if constitutional cases were deferred the state courts would be assured that a majority of the full Supreme Court had concurred in each decision when the constitutional cases were finally decided. Accordingly, it is not surprising to find that 62 percent of the state justices preferred that the Court abstain from decision in a constitutional case unless a majority vote would be possible. Apparently, the state justices felt they would suffer no hardship from the deferral of such cases. In response to the suggestion that Marshall's rule be extended to every case considered by the Supreme Court, 69 percent of the state justices disagreed, citing the possible immobilization of the Court by unexpected vacancies. In the final analysis, however, it is possible that adherence to Marshall's rule would result in a serious backlog in the Court's docket, whereas the benefits such a procedure could secure are largely immeasurable and intangible. In 25 years there have been 57 minority decisions, and only one has been seriously challenged because of the magnitude of the Court's vote. Thus it seems difficult to make a case for the advisability of deferring decision on approximately half the Court's

124. See 40 U.S.L.W. 3293 (U.S. Dec. 28, 1971) for a summary of the cases decided by the seven-man Court in the first half of the October 1971 term.

125. Three and one-half months elapsed from the time Justices Harlan and Black retired until Justices Powell and Rehnquist were seated. See 404 U.S. at iv.

126. The thrust of the Freund proposal, to create a National Court of Appeals, inferior to the Supreme Court, is to free the Court for the consideration of the most significant cases. American Bar Association, Creation of New National Court of Appeals is Proposed by Blue-Ribbon Study Group, 59 A.B.A.J. 139, 142 (1973).

127. The only relief would occur where the Court could not seat a quorum. In that instance, the statute allowing transfer to the originating circuit for final adjudication would become effective. See 28 U.S.C. § 2109 (1970).
docket. The possibility of extended delay seems to outweigh whatever benefits the rule might accomplish.

Rather than maintain an informal guide to decision-making, as embodied in Marshall's rule of 1834, Congress could amend the current quorum rule, or the Court could adopt a formal rule specifying the minimum number of justices needed to concur in a given decision. Many states have explicit constitutional or statutory provisions requiring the concurrence of a specified number of supreme court justices in order to decide a case. Congress at one time did consider imposing on the Supreme Court a unanimous voting requirement in order to invalidate Congressional legislation, but that requirement was proposed when fear was rampant that the Court would invalidate the controversial Reconstruction Acts. More rational reflection on legislation that attempts to place voting requirements on the Supreme Court's ability to act certainly raises separation of powers considerations. Congress' ability to regulate Supreme Court procedure would seem to be limited to increasing or decreasing the number of Justices on the bench and setting the quorum. There is historical precedent for legislation in both of these areas. Of course, by raising the quorum Congress could ensure that a majority of the full Court would concur in each case. However, this type of legislation could immobilize the Court. If the number of Justices remains at nine, Congress would have to mandate a quorum of all the Justices before it could be assured that five members would concur in every decision. The disadvantages of a quorum requirement of nine are obvious.

The Court itself would seem to be the best source of any changes in its own decision-making procedures. In the past the Court has prescribed voting rules for particular situations, but, since The Legal

---


130. See, e.g., CAL. CONST. art VI, § 2; FLA. CONST. art. V, § 3; ILL. CONST. art. VI, § 3; KAN. CONST. art. 3, § 2; LA. CONST. art. 7, § 4; NEV. CONST. art. 6, § 2; N.Y. CONST. art. VI, § 2; OKLA. CONST. art. VII, § 3; S.D. CONST. art. V, § 7; TENN. CONST. art. VI, § 2; TEX. CONST. art. V, § 2; UTAH CONST. art. VIII, § 2; VA. CONST. art. VI, § 2; WASH. CONST. art. IV, § 2; WYO. CONST. art. 5, § 5; ALA. CODE tit. 13, § 14 (Cum. Supp. 1971); ARK. STAT. ANN. § 22-206 (1962); ORE. REV. STAT. § 2.111 (1959).


132. In disbarment proceedings, the concurrence of a majority of participating Justices is required before a lawyer will be disbarred. U.S. Sup. Ct. R. 8. A case will not be reheard unless a majority of the original participants concur in the motion. U.S. Sup. Ct. R. 58.
Tender Cases were decided, the Court has not imposed upon itself a
general rule requiring concurrence of a minimum number in each
case. This omission must be construed as indicative of the Court’s
satisfaction with the current quorum rule, which does not specify
that a minimum number of Justices concur. Furthermore, establish-
ing Marshall’s rule by statute or by formal rule of practice would not
alleviate the real problems raised by the deferral of significant
numbers of cases. Such a rule could restrict the Court’s freedom of
action in managing its docket, in direct contravention of the policy
underlying the Court’s certiorari jurisdiction.133

By the overwhelming majority of 75 percent to 25 percent, the
state justices disapproved the idea of congressional action requiring a
minimum number of Justices to concur in each case. The state justices
also demonstrated only grudging approval of a minimum-concurrence
rule imposed upon itself by the Court, 53 percent to 47 percent. Many
state justices indicated that they would consider legislation requiring
concurrence of a certain number of Justices an interference with the
judicial process, and these justices often expressed dissatisfaction with
the applicable provisions in their own states.

On several occasions commentators have proposed that judges from
the circuit courts of appeals be seated on the Supreme Court in order
to provide a full bench in every case.134 Nevertheless, the language pre-
scribing the composition of the Court has remained unchanged since
the Judiciary Act of 1869,135 and support for the transfer of lower
court judges to the Supreme Court has never been sufficient to make
the proposition law. The current proposal for the revision of Title 28,
United States Code, Judiciary and Judicial Procedure, contains no
provision for the temporary seating of other federal judges on the
Supreme Court in the case of vacancies.136 Notwithstanding the long
history of “one supreme Court,” 56 percent of the state justices re-
sponding to the survey favored congressional legislation providing for
temporary seatings of judges from the circuit courts of appeals. Such
a result is apparently consistent with the state justices’ preference for
deferral of constitutional cases until a majority vote of the full Court
is possible and with their predilection toward a rule of the Court
specifying a minimum number of Justices that must concur in a given
case. Additionally, many states have constitutional or statutory pro-

134. See, e.g., Carrington, *The Supreme Court: The Problem of Minority Decisions*,
44 A.B.A.J. 137, 140 (1958); Andrews, *Decisions by Minority Court*, 18 Fla. B.J. 238,
240 (1944); Note, *supra* note 32, at 187-88.
135. See pp. 316-20 *supra*.
visions that provide for the temporary seating of lower court judges or other qualified persons on the bench of the state's highest court.\textsuperscript{137} Such provisions ensure that a full court consider any case and that a majority vote is always possible. The state justices evidently approve of these provisions. Moreover, there seem to be no formal barriers to the implementation of such a replacement procedure at the Supreme Court level because, in terms of appointment to office, there is no statutory distinction between Supreme Court Justices and other federal judges. While differing factors may affect the selection and nomination process, the appointment of each federal judge is consented to by the Senate.\textsuperscript{138} Therefore, ostensibly all federal judges are legally qualified to serve on the Supreme Court.

The proposal to seat judges from the courts of appeals on the Supreme Court, like any plan to alter the composition or procedures of the Court, must be considered in light of the Court's unique place in American society. In addition to assuring uniformity of federal law, the Court defines and vindicates rights guaranteed by the Constitution and ensures maintenance of the constitutional distribution of powers within the federal union. Placing lower federal court judges on the bench could hinder the Court's performance of its role by diluting the respect accorded to the Justices because of their unique stature among the judiciary. Furthermore, just as pragmatic considerations of case load may make it impossible for the Court to defer constitutional cases until a majority vote of the full Court is possible, it is also likely that considerations of human logistics may make attempts to establish a plan to seat other federal judges on the Court equally impossible. Unfilled vacancies on the federal bench are a continuing


If each individual nominated for a seat on the circuit court of appeals could someday sit on the Supreme Court, the confirmation process could be interminably delayed. The possibility that a circuit court of appeals judge could sit on the Supreme Court might induce Congress to insist on a more thorough and searching examination of each nominee; it is possible that the nomination/confirmation apparatus would then bog down of its own weight.

The desired standard of a full Court would necessitate a significant amount of judicial transfer in order to deliberate a small number of cases. Of the 57 cases decided by 4-3 votes in the Court's 1945 through 1971 terms, only 11 required constitutional interpretation. Of the 39 constitutional cases considered by the seven-man Court in the October 1971 forum, only five were decided by minority vote. Thus in many cases circuit judges could be called up to fill vacancies on the bench, but their votes would not be necessary to decide the case by a majority. In other words, five regular Supreme Court Justices could agree, and, therefore, the circuit judges' vote would be unnecessary. The argument in favor of the present system posed by the practical considerations of the Court docket and human logistics, however, probably would not convince the Roofing Wholesale court that it is unfeasible to require a majority vote of the Justices in every Supreme Court case. If the supremacy clause of the Constitution failed to dissuade the Arizona Supreme Court from rejecting Fuentes, it would seem that purely pragmatic reasons would be equally futile.

The most significant changes that would result from seating circuit judges on the Court probably would be unmeasurable. As a collegial body, the Court's decisions are influenced by the interplay of concepts and ideas in a confidential conference. It is likely that the Justices establish a certain rapport among themselves, which facilitates the conduct of the Court's work. The introduction of "strangers" into the Court's internal proceedings could seriously disrupt the long-term functioning of the Court, especially since the interruptions would occur randomly and on a continuing basis. There would not be "one supreme Court" but an infinite number, varying with the random absences of the Justices. Even if such occurrences are constitutionally

140. Over six weeks were consumed in the confirmation process for Justices Powell and Rehnquist. See 404 U.S. at iv.
141. See notes 6 & 81 supra.
142. See note 124 supra.
143. See note 6 supra.
permissible, the stability and predictability in the law embodied in the doctrine of stare decisis would surely suffer. Moreover, the evils of case analysis by speculation on the judges' personalities could be compounded where one or more of the judges in a case is an "unknown quantity." Even if a particular substitute Justice's judicial temperament could be accurately estimated from past opinions, the pressure of being elevated to the nation's highest tribunal could affect previously developed attitudes. In summary, a practice of seating lower federal court judges on the Supreme Court for temporary service might raise more difficulties than it would resolve.

IV. CONCLUSION

The rejection of a minority decision of the United States Supreme Court by one state has raised the question of whether the Court or Congress should act to ensure that a majority of the full Court decides each case presented to it. The Court's quorum has been regulated by Congress since the Judiciary Act of 1789. Congress' latest pronouncement preserves an organization of the Court that is now over one hundred years old. The Court is required to consider each case with at least two-thirds (six) of the Justices sitting, one more than a simple majority. Neither the Congress nor the Court has, in modern times, imposed a restriction upon the decision-making ability of the Court by requiring a minimum number of Justices to concur in a given case.

It has often been suggested that federal judges or retired Justices be seated on the Court when excusals or temporary vacancies occur, to provide a full bench and to avoid minority decisions. Congress has taken affirmative action to provide for disposition of a case when a quorum cannot be obtained, but that solution involves transfer of the case to a lower court, not the seating of other federal judges on the Supreme Court. If implemented, proposals to elevate federal court judges or to call upon former Supreme Court Justices would enable the majority of a full Court to resolve any issue before it. But the

145. The concept of a "fluid" Supreme Court, where there is never a guarantee that the same nine Justices will consider any two cases, seems inimical to the language of article III. One commentator, objecting to the Freund report's recommendation of a National Court of Appeals, interprets "one supreme Court" to mean one unit of nine Justices. See Gressman, The National Court of Appeals: A Dissent, 59 A.B.A.J. 253, 255 (1973). If that one unit has a changing cast of characters, it becomes not one, but many, Supreme Courts. That the Court is attributed the personality of the Justices is evident. See generally Kurland, supra note 75.


alleged benefits of stability in the law, and the policy favoring the nation's highest Court speaking only with a majority voice, could be eroded by the detrimental effect of allowing numerous individuals, who only temporarily share the unique burden of the Court's role in American jurisprudence, to participate in the Court's decisions. Additionally, the administrative problems of the nomination and appointment of federal judges would be greatly increased, as would the logistical problem of ensuring that an adequate number of judges would be prepared and available to sit on the Court as the need might arise. In view of the federal judiciary's increasing workload, it is highly probable that such proposals would generate additional weighty problems while purporting to solve others. The question posed by the Arizona court in Roofing Wholesale was answered when the Supreme Court announced: "The constitution of the United States is the supreme law of the land, and binds every forum, whether it derives its authority from a State or from the United States."148 This principle must remain intact, whether announced by the full Court or by the majority of a bare quorum.

THOMAS M. BURKE