Sitting One Out: Strategic Recusal on the Supreme Court

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*It takes five votes to decide a case before the Supreme Court. But what has seemingly escaped broad attention is that, because of the Supreme Court's statutorily defined quorum requirement, it actually requires **six** Justices to hear a case. As a consequence, if four Justices cannot for some reason hear a case, then the Supreme Court too is powerless to hear it.*

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Since the drafting of this Article, Justice Ruth Bader Ginsburg passed away. Among her myriad admirable roles, Justice Ginsburg was a tireless advocate for the oppressed and a titan of the judiciary. Her loss is deeply felt by so many, across all partisan and jurisprudential divides.

The Article was drafted assuming that the Court had a strength of nine Justices, with at least four Justices who would cohere as a minority. The passing of Justice Ginsburg results in the Court presently having only eight members. Notwithstanding, on an eight-member Court, a three-Justice minority could employ the sitting-out tactic, because the quorum rule requires six sitting Justices. In the event that Justice Ginsburg is replaced, and no other Justice is willing to form part of a four-Justice minority, then the sitting-out tactic must wait another day.

Nevertheless, the sitting-out tactic is yet another reminder that, in our complex democracy, there are surprising weapons and shields for the so-called "weak." These tools not only register dissent—they can also marshal power to protect the oppressed and to safeguard our democratic commitments. In the face of perilous government action, we must continue to search and mine for these tools.

In this Article, I provide the first comprehensive analysis of how a four-Justice minority can and should utilize the quorum requirement—which I term "sitting out." As a matter of how the law operates, I first show that under the right conditions, a four-Justice minority facing an oppositional five-Justice majority can effectively sit out to significantly improve the chances of obtaining a favorable result. At best, the four-Justice minority can ensure a favorable result in the lower courts remains in force. And even if unsuccessful in stopping an unfavorable decision, the four-Justice minority can deny that decision the imprimatur of the Supreme Court.

As a normative matter, I contend that sitting out has the potential to cause substantial disruption to our judicial and government institutions and thus set out sufficient conditions for its use: A four-Justice minority would be justified in sitting out cases involving a fundamental right and grave harm that would impact the character and identity of the nation, where there is a significant chance that the Supreme Court will render an obviously incorrect decision and sitting out could probabilistically halt that decision. Finally, in support of this sufficiency framework, I proffer two hypothetical examples: opposing race-based internment and opposing election manipulation and theft.

INTRODUCTION

Five members of the Supreme Court have decided some of the most important questions facing our polity: the legalization of gay marriage,[1] the right to unionize,[2] the limits of campaign finance,[3] the extent to which firearms can be regulated,[4] the right to abortion,[5] and the outcome of a presidential election.[6]

1. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
2. Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, 138 S. Ct. 2448 (2018).
3. Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).
4. District of Columbia v. Heller, 554 U.S. 570 (2008).
5. Webster v. Reproductive Health Services, 492 U.S. 490 (1989).
6. Bush v. Gore, 531 U.S. 98 (2000).

More recently, a 5–4 decision from the Supreme Court forced Wisconsin citizens who failed to receive a timely absentee ballot by no fault of their own to appear in person in order to vote in the primary election during the COVID-19 global pandemic.[7] These ideologically fractured decisions implicating core rights have continually raised concerns about the judiciary's power and role in deciding key questions for our polity.[8]

What has seemingly escaped broad attention is that *six* Justices are required to hear these cases. Deciding a case doesn't take six Justices' *votes*. But it does take their *participation.* As provided in 28 U.S.C. § 1, "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*."[9] Though left undefined by Title 28, the plain meaning of "quorum" is "the number [] of officers or members of a body that when duly assembled is legally competent to transact business."[10] Thus, without six Justices present, the High Court is not competent to make legally valid determinations.[11] Further, 28 U.S.C. § 2109, entitled "Quorum of Supreme Court justices absent," explains what happens in the absence of a quorum:

> "[I]f 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."[12]

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7. Republican National Committee v. Democratic National Committee, 589 U.S. ___ (2020).

8. *See, e.g.*, Guha Krishnamurthi, *For Judicial Majoritarianism*, 22 U. PENN. J. CON. LAW (forthcoming 2020) (explaining the concerns about the use of majority voting on apex courts and stating the case for its use); Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692, 1695 (2014); Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 893–94 (2003); Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1442–43 (2009); Tracey E. George & Chris Guthrie, *"The Threes": Re-Imagining Supreme Court Decisionmaking*, 61 VAND. L. REV. 1825, 1825–27 (2008); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, VOX, Sept. 6, 2018 (updated Oct. 10, 2018), https://www.vox.com/the-bigidea/2018/9/6/17827786/kavanaugh-vote-supreme-court-packing [https://perma.cc/SH36-CVCD].

9. 28 U.S.C. § 1 (emphasis added).

10. MERRIAM-WEBSTER DICTIONARY; *see also* BLACK'S LAW DICTIONARY (11th ed. 2019) (relevantly defining "quorum" as "[t]he smallest number of people who must be present at a meeting so that official decisions can be made. . . .")

11. The Fifth Circuit encountered a loss of a quorum when a Judge recused themselves from the case. The Circuit Court dismissed the en banc, holding, "Upon this recusal, this en banc court lost its quorum. Absent a quorum, no court is authorized to transact judicial business." Comer v. Murphy Oil USA, 607 F.3d 1049, 1054 (5th Cir. 2010).

12. Direct appeals, which are relatively rare, are handled under a different procedure, by which cases may be heard by the governing Circuit "court either sitting in banc or specially constituted and composed of the three circuit judges senior in commission who are able to sit," as ordered by the Chief Justice. 28 U.S.C. § 2109.

The upshot is that if four Justices are unable to sit for any reason, then, as a matter of statute, the Supreme Court is powerless to render a decision and the lower court decision stands.

In a time of constitutional hardball, the Supreme Court's quorum requirement raises the questions of how and whether a tactic of strategic recusal—or "sitting out"—can be effectively employed by a four-Justice minority and whether utilizing such a tactic would be appropriate.[13]

This Article argues that "sitting out" can be used effectively by the four-Justice minority. There is a significant chance that sitting out a case would allow the four-Justice minority to affirm the lower-court decision below. Even if the majority employs responsive hardball tactics, or constitutional chaos ensues, sitting out still may have an important impact in undercutting the legal force of any resulting decision.

Consequently, in an appropriate case, there may be a plausible justification for Justices strategically sitting out. Make no mistake, "sitting out" is a hardball tactic and there are good reasons to refrain from using it as a matter of course. It may threaten significant fallout in terms of the legitimacy of the judiciary and our political institutions.[14] As such, it is exceptional. But in cases of serious importance that implicate core constitutional and human rights, sitting out provides a four-Justice minority with one tool to stop and effectively reverse a decision from the Supreme Court that might effectuate grave harm.

This Article does not aim to set out necessary conditions for the tactic's use.[15] As a matter of sufficiency, this Article contends that in cases threatening grave harm involving the right to liberty *simpliciter*, like with race-based internment, or the right to vote, like with election manipulation and theft, a four-Justice minority would be plausibly justified in employing the tactic. Additionally, this Article argues that depending on the state of affairs with respect to norm-breaking, a four-Justice minority may be justified in sitting out, even in more standard cases.

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13. For ease, I sometimes refer to the four-Justice minority as "the minority" and the five-Justice majority as "the majority."

14. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004); Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 921 (2018); Joshua Braver, *Court Packing: An American Tradition?*, 62 B.C. L. REV. (forthcoming 2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3483927 [https://perma.cc/4T4V-HMAK] (discussing constitutional hardball).

15. The question of what conditions would necessitate the tactic's use, or indeed other forms of constitutional norm-bending and -breaking, is highly controversial at the levels of both legal identification and factual identification. In particular, there are countervailing judicial duties which some may believe to be so substantial and weighty that their violation cannot be made mandatory. The Article leaves that question open, instead arguing that the violation of these duties is permissible when countermanded with the appropriate conditions, including serious harm to the identity of the nation.

I.
THE EFFECTIVENESS OF "SITTING OUT"

The basic idea of "sitting out" is simple enough: A bloc of four Justices can decide to sit out a case and therefore deprive the Supreme Court of its quorum to decide that case. The actual exercise of "sitting out" may in practice take different forms: The Justices may inform the Chief Justice that they will not participate in that case; they may submit that they are recused with no explanation; they may submit that they are recused with an explanation; or they may just be absent. Thereafter, because of the lack of quorum required by 28 U.S.C. § 2109 ("Section 2109"), the Supreme Court would make a determination whether the case could be decided next term or affirm the Circuit Court's decision, as it would if equally divided on the issue. Since the strategy could obviously be employed again in the next term—assuming the same Court makeup—the statutory language directs the Supreme Court to affirm the decision below, since the case could "not be heard and determined at the next ensuing term."[16]

The history of the provision is instructive: Until 1869, the Court's quorum requirement—like most quorum requirements—simply required a majority of the Court to be present.[17] The first time Congress imposed a quorum requirement on the Supreme Court in excess of a majority was in the Judiciary Act of 1869, when Congress increased the membership of the Court from seven to nine members while increasing the quorum requirement from four to six.[18]

Congress intentionally did this to alter the decision-making of the Court. Specifically, shortly after the Civil War, Congress was concerned that the Supreme Court intended to strike down the Reconstruction laws. Newspaper commentary of the time expressed Congress's extreme distrust of the Supreme Court. For instance, the New-York-based newspaper *The Independent*, known for its support for abolitionism and women's suffrage, informed its readers that "[t]his Congress will not brook opposition from the Court in political matters. The safety of the Nation demands the Congressional Reconstruction shall be successful; and if the Court interferes, the Court will go to the wall."[19]

In 1868, Congress passed a far-reaching bill requiring a two-thirds vote of the Court to invalidate a federal law.[20] Rep. Robert Schenck of Ohio captured the congressional mood when he declared, "I hold it to be not only my right, but

16. As discussed *infra*, the interpretation of this provision could be subject to a contrary interpretation as a matter of hardball.

17. H.E. Cunningham, *The Problem of the Supreme Court Quorum*, 12 GEO. WASH. L. REV. 175, 177 (1944).

18. 16 Stat. 44 (1869); Cunningham, *supra* note 17, at 177 (tracing the size and quorum requirements).

19. Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service-and Disservice-1789-1992*, 142 U. PA. L. REV. 333, 376 (1993) (quoting 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 477 (1922)).

20. Cunningham, *supra* note 17, at 177.

my duty as a Representative of the people, to clip the wings of that [C]ourt."[21] President Andrew Johnson let the bill lapse, and in its wake, Congress passed the Judiciary Act of 1869. In addition to increasing the size of the Court, the Judiciary Act of 1869 upped the quorum requirement from a simple majority of justices to six. Given its prior attempt at reining in the Court and the quorum requirement's ultimate inclusion despite the objection of some congressmen, Congress clearly intended the quorum requirement to help protect us from a Supreme Court run amok.[22]

To assess the efficacy of denying the Court a quorum, it is important to define what counts as a "successful" outcome for the four-Justice minority that refuses to sit for a particular case. Sitting out would be successfully employed by the minority if it could stop a decision of the Supreme Court that the minority disfavored, for example, because they believed it to be extremely harmful or obviously wrong. Nevertheless, in the appropriate case, even if ultimately unsuccessful, it may be justifiable for the minority to employ the tactic, if it provides the minority with a significant chance of success.

Because the strategy ultimately deprives the Supreme Court of its decision power, sitting out can only be used effectively if the minority who would sit out prefers the underlying decision (or state of affairs). The prototypical situation involves a Circuit Court decision that the minority prefers to the likely decision of the Supreme Court.[23] If the minority disfavored the Circuit Court's decision, then sitting out would be of little avail since the decision below would prevail.[24] That is not to say that the rhetorical exercise would not be worth engaging in—such a move might further important expressive purposes like condemnation of a decision—but it would not be "successful," as I have defined that term.

Additionally, the makeup of the government's other branches may make sitting out ineffective. For example, if a political party holds a veto-proof majority in Congress or holds both houses and the presidency, and that party disagrees with the minority view on the case, then sitting out would be

21. Field Van Tassel, *supra* note 19, at 376 (quoting 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 475 (1922)).

22. *See* Cunningham, *supra* note 17, at 177.

23. When I say "preference," I am thinking of legal preference, not personal preference. I mean a decision that the Justices believe to be correct or more correct. Indeed, it might be that the Justices think the lower court decision is incorrect, but that it could have been worse, and so they are content to protect that decision.

This also assumes that the minority can predict what the majority would hold. That may be difficult, but the minority may be able at least to predict the decisions probabilistically, which would figure into the calculus of potential harms.

24. Sitting out when the decision below is unfavorable to the four-Justice minority would have the result of denying precedential effect to the case in other jurisdictions. But for that to matter, there must be at some time be a favorable decision for the four-Justice minority.

ineffective because this party could simply change the quorum requirement or increase the number of Justices on the Court.[25]

Beyond these applicability limitations, there are other relevant constitutional doctrines governing judicial duties. Moreover, since sitting out is a species of constitutional hardball, other constitutional players may respond with their own hardball tactics. The most potent challenges to the use of the sitting-out tactic are (a) the application of Section 2109; (b) the "duty to sit" and "rule of necessity"; and (c) a failure by parties and the other branches to heed orders of the Court. Though all three present significant obstacles, they ultimately fail to neutralize the potential effectiveness of the "sitting out" tactic.

A. The Application of Section 2109

Under the current structure of the Supreme Court, if a four-Justice minority chooses to sit out after a petition for certiorari has been granted, the Court lacks a quorum to decide the case. In that situation, Section 2109 provides that the Court must make a determination whether "the case cannot be heard and determined at the next ensuing term."[26] The majority could hold on to the case, hoping for turnover in the Court, legislative change, or simply to delay any further progress in the matter. An example of such delay arose in *North American Company v. Securities and Exchange Commission*, where the Supreme Court, facing a lack of a quorum, held the case in a special docket with the hope that Congress would change the quorum requirement.[27] That did not happen, but Chief Justice Stone then un-recused himself to establish a quorum so that the case could be heard.

As shown by *North American Company*, simply holding on to a case is a somewhat wishful maneuver insofar as it aims to produce any result. The delay is employed with the implicit hope that an act of God—specifically, the retirement or death of a Justice—or an act of the legislature will fix the problem. Neither is a result to bet on.

Insofar as delay itself is supposed to solve the majority's problem, it depends critically on what the lower court did and will do with the case. The Supreme Court's grant of the petition for certiorari in a particular case does not

25. Given our political polarization in this moment, such electoral results may seem unlikely. However, wave elections where one party achieves major gains can happen and thus the Article notes this possibility in the interest of completeness.

26. The statute requires that the "qualified Justices" make the determination. Cases applying the provision, involving recusals of more than members of the Court, have interpreted "qualified" to mean Justices who have not recused themselves. *See, e.g.*, Missud v. Court of Appeals of California, First Appellate Dist., 136 S. Ct. 329 (2015); Smith v. Thomas, 562 U.S. 1267 (2011); Sibley v. Alito, 559 U.S. 965 (2010); Henderson v. Sony Pictures, 561 U.S. 1020 (2010). However, the five-Justice majority could do this even if "qualified Justice" is interpreted to include all of the Justices, of course.

27. 320 U.S. 708, 708 (1943); Comer v. Murphy Oil USA, 607 F.3d 1049, 1065 (5th Cir. 2010) (discussing *North American Company v. Securities and Exchange Commission* (citing John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 626 & nn. 82–84 (1947))).

automatically vacate the decision below. That is the province of the lower court, which may or may not grant the stay, in its discretion. If the lower court did not grant the stay, then the act of delay will not help the majority.[28] If the lower court granted the stay, then pursuant to Federal Rule of Appellate Procedure 41 ("Rule 41"), the issuance of the mandate is stayed until resolution of the Supreme Court's proceedings.[29] However, even the most dutiful of lower courts may at some point grow impatient with a case that is simply held by the Supreme Court for dilatory purposes or for purposes of de facto decision-making not contemplated by the statute. Indeed, courts already sometimes stay the mandate with an explicit deadline where the requested relief is time sensitive.[30] Thus, the lower court could preemptively stay the mandate with a deadline, or it could simply issue its mandate due to timeliness concerns. Such a maneuver would be reflective of the idea that "justice too long delayed is justice denied."[31]

If the lower court issued its mandate, it would arguably be in violation of the text of Rule 41, which requires that the "stay continues until the Supreme Court's final disposition." At the same time, if the Supreme Court held on to a case indefinitely, that arguably would be against the text of Section 2109. One arguable violation of a statute may beget another.[32] In any event, if the lower court did issue such mandate, the Supreme Court could object. However, if the minority continued to withhold its presence, the Court would have little recourse due to the lack of a quorum.[33] Nevertheless, responsive hardball tactics by the

28. In the ordinary case, if the Circuit Court refused to stay its mandate, the Supreme Court could obviously act to require the Circuit Court's mandate stayed. But the minority's ability to deny the quorum stops that response.

29. FED. R. APP. P. 41(d)(B)(2).

30. This occurred in the Remain-in-Mexico case before the Ninth Circuit, *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020). There, asylum seekers and advocacy organizations sough to enjoin the Department of Homeland Security from implementing Migrant Protection Protocols (MPP), which generally required non-Mexican asylum seekers arriving at the southern border to return to Mexico during adjudication of their asylum applications. *Id.* at 1073–75. The district court granted nationwide injunctive relief. *Id.* The Ninth Circuit thereafter affirmed. *Id.* at 1095. The government then moved to stay the order pending disposition of petition for certiorari to the Supreme Court. Innovation Law Lab v. Wolf, 951 F.3d 986, 987 (9th Cir. 2020). In a separate order, the Ninth Circuit granted in part and denied in part the government's request for a stay: It granted the stay insofar as the injunction applied to jurisdictions outside the Ninth Circuit and denied the stay with respect to the Ninth Circuit. *Id.* at 991. Moreover, the Ninth Circuit's stay came with a deadline for the Supreme Court to take action; if the Court did not act within a week, the injunctive relief would be implemented. *Id.*

31. Martin Luther King Jr., Letter from Birmingham Jail (1963).

32. *See, e.g.*, Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 921 (2018) (cataloging historical acts of constitutional hardball, many of which were publicly justified as responsive maneuvers).

33. Things could be further complicated by the district court's prerogative. In particular, if the district court refuses to effectuate the Circuit Court's holding, there may be another constitutional question of what result may obtain. Other actors, including law enforcement officials, may have the unenviable task of which orders to follow. This may reveal that some level of obedience or agreement with the Circuit Court is needed from the district court to effectuate the sitting-out tactic.

Additionally, I do not think the analysis is changed by consideration of the certiorari stage instead of the merits stage. The Circuit Court's order staying the mandate, per Rule 41(d)(B)(2), is triggered by the filing of the petition for certiorari. Thus, even if the four-Justice minority sat out prior

majority, such as holding on to the case for an indefinite period, could require further action by the lower court for the "sitting out" tactic to produce a successful result for the minority.

B. The Duty to Sit and the Rule of Necessity

An additional argument against the sitting-out tactic comes from the observation that members of the judiciary have a "duty to sit." Arising from the common law, with roots in Blackstonian England, that duty requires a Justice to take all efforts to hear a case where *not* disqualified.[34] This duty is considered as strong as a Justice's duty to recuse when disqualified.[35] Thus, the strategy to oppose sitting out is to cast the minority's opting to sit out as a derogation of their fundamental judicial duty.

The effectiveness of this approach for the majority may depend on how the minority Justices proceed to sit out. If the minority Justices simply state that they will not participate, the duty to sit would seem to at least formally prevail. However, the outcome may be different if the minority Justices recuse themselves. In such a case, we must look to 28 U.S.C. § 455 ("Section 455"), which defines the statutory duty to recuse for members of the judiciary. It reads in relevant part:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
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> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .
>
> (e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.[36]

From the perspective of an objective observer, it would be difficult to question whether a Justice has properly self-recused. The statute does not mince words: A Justice "shall also disqualify" themselves if they have a "personal bias or prejudice concerning a party."[37] Any Justice could credibly and plausibly say

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to the granting of certiorari, the five-Justice majority could continue to hold on to the case without denying certiorari, and the Circuit Court would be required by Rule 41 to stay its mandate.

34. Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 826 (2009); Laird v. Tatum, 409 U.S. 824, 837 (1972).

35. *Laird*, 409 U.S. at 837.

36. 28 U.S.C. § 455.

37. *Id.*

in a particular instance that the circumstances of the case and the nature of the parties are such that they cannot decide the case without the infection of personal bias or prejudice. That is, at core, a personal determination. A representation by a Justice that these grounds require their recusal might be disingenuous, but that would be extremely difficult, if not impossible, to prove. For example, Chief Justice Roberts has emphasized that this is a personal decision for each Justice.[38] Of course, the fact that the minority Justices would employ the recusal tactic together might be indicative of a collusive and disingenuous—and therefore potentially improper—strategy. Regardless, each minority Justice could plausibly and credibly affirm that they have a basis to recuse, and this would be difficult to challenge.[39]

If the majority fails to prevent sitting out by asserting a Justice's duty to sit, it may appeal to the Rule of Necessity. That judicially crafted doctrine prescribes that "although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise."[40] Thus, the argument against the sitting-out tactic would be that at least one of the minority Justices must, out of "necessity," sit on the case and hear it. Yet, not everyone must see it that way. A minority Justice could reasonably say that the Rule of Necessity does not supersede the statutory requirement of Section 455[41] or that the Justice simply will not contravene their own oath to impartiality. This leads to a stalemate of sorts.

Since these are amorphous norms anyhow, questions arise as to what formal mechanisms the majority may have at its disposal. Put another way, even if a minority Justice acknowledges that they are breaking important norms, what recourse does the majority have?

First, there is the possibility of impeaching one or more of the minority Justices. And in such a case where Justices could be impeached, the minority cannot use the sitting-out tactic effectively, as we observed above. Practically, it is a seeming nonstarter given the stringent requirements of impeachment. Moreover, impeachment is only useful to invalidate the sitting-out tactic if it is

38. John G. Roberts, Jr., 2011 Year-End Report on the Federal Judiciary, *available at* https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf (discussing recusal).

39. There is some question of whether 28 U.S.C. § 455 applies to the Supreme Court Justices. I need not resolve that controversy, however, because it would be reasonable for a sitting-out Justice to believe it did not apply or believe that the same principles underlying the statute—but not necessarily the statute itself—govern the Justices' behavior.

The recusing Justices might or might not publicly state their reasons for using the sitting-out tactic. However, in order to minimize the chance for retaliatory measures or the appearance of wrongdoing, it likely makes most sense for them to remain publicly silent about their reasons.

40. United States v. Will, 449 U.S. 200, 213 (1980) (quoting F. POLLACK, A FIRST BOOK OF JURISPRUDENCE 270 (6th ed. 1929)).

41. In *Will*, the Supreme Court held that 28 U.S.C. § 455 did not overrule the standing of the Rule of Necessity, *id.* at 217, but any Justice could disagree with that reasoning, especially as to the satisfaction of their own oath.

accompanied with the power to reappoint Justices, because otherwise the Supreme Court would be permanently deprived of its quorum.

Second, the Justices in the majority could "reject" the recusal. The majority Justices could assert, based perhaps on their suspicions, that such recusals are simply unlawful in light of the duty to sit and the Rule of Necessity and choose to treat one or more of the minority Justices as sitting for the case, even if they refuse to participate.[42]

Such a rejection of the recusal would contradict the plain meaning of 28 U.S.C. § 1, because if the sitting-out Justices are in fact absent, there can be no quorum. Suppose, for example, that the minority Justices submit recusals, explain their basis in accord with Section 455, do not attend any proceedings, and leave D.C. If the majority could simply declare a quorum satisfied in such a circumstance, the statute would be rendered meaningless.[43]

To this, the majority may assent. The majority could contend that neither 28 U.S.C. § 1 nor Section 455 bind the Supreme Court, as the Court is a creation of the Constitution and thus Congress's authority to so limit the Court is restricted. The fact that the Court has followed these statutes is just a matter of comity or practice.[44] This would be a drastic departure from our understanding of the authority through which the Court is created and structured, because Congress has defined the number of Justices on the Court and it seems clear that neither the Court nor the President could change that without Congress's consent.

Ultimately, whether through the aforementioned statutory or constitutional justifications or otherwise, the majority might just do as it pleases to reject the recusals. Not much can be done by the minority as a formal matter.[45]

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42. I thank Mark Tushnet for pressing this point.

One potential response to that is for the four minority Justices to recuse themselves from any determination on whether they are in fact recused. That actually makes good sense, since they are truly the subject of that determination. But since we are talking about hardball, the majority Justices could simply reject one or more of the recusals again, into a regress.

43. However, the Court does seem to decide a number of minor matters, like attorney admissions and releasing decided orders to the public, without a quorum. Jack Meltzer, *The Quorum Rule*, 23 GREEN BAG 2D 103, 110 (2020). Nevertheless, this is likely done without objection of the absent Justices, and there is no example of the Supreme Court forging on without a quorum in deciding a merits case.

44. I thank Mark Tushnet for bringing my attention to this point. *See also* Cunningham, *supra* note 17, at 177 (suggesting that the quorum requirement in excess of a majority required may be unconstitutional, as it could be seen as Congress "infringing upon the judicial power vested by the Constitution in the Supreme Court").

45. But it is important to recognize that this counter-maneuver is not costless to the majority of the Supreme Court in that it threatens to further undermine the Court. However, given that the majority is in power, and "sitting out" may be rare, it is not obviously in the majority's interest to sacrifice the Court for a particular case where the minority sits out. That involves a separate calculus for the majority. The majority and minority are not equally positioned, obviously, so there may be cases in which it is worthwhile for the minority to sit out but not worthwhile for the majority to employ any countermeasures. *See* Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEX. L. REV. 485, 533 (2016) (discussing the potential calculus in engaging in norm violation).

Importantly, however, it is unclear whether such a decision—unmoored from statutory authority and our constitutional practice—would carry the force of law. Thus, even in a situation where sitting out does not obtain the minority's preferred result, sitting out may force the majority to further degrade any decision by contradicting statutory authority. And that may increase the chances that the Supreme Court's decision does not effectuate its result.

C. Failure to Heed

As previewed in the prior section, the most serious threat to employing the sitting-out tactic is extralegal: What happens if the parties and the enforcing governmental entities are so repulsed or angered by the sitting-out tactic (or believe that the public can be convinced into adopting this opposition) that they do not recognize use of sitting out as carrying the force of law and refuse to comply?

As before, this may render sitting out ineffective. True as Hamilton warned, the judiciary is the "weakest branch."[46] The judiciary cannot guarantee any results alone, without sufficient support in the political branches. As we saw before, for the sitting-out tactic to be effective, the other branches cannot be totally held by a party adverse to the four-Justice minority. Where the tactic might be effective in the first instance, there may be levers in the other branches to help effectuate the ultimate decision from the judiciary.

Accordingly, it may be that the specter of strategic recusal is so unpalatable that the judiciary's commands lose their gravity, both with the other branches and the public. However, given our various experiences with norm-breaking that tests our collective constitutional mettle, it is unclear whether and why this act of sitting out would be uniquely chaotic and damaging. A bloc of Justices "sitting out" is seemingly comparable to myriad other "unprecedented" norm violations. For example, the Republican-led Senate refused to vote on the Supreme Court nomination of Judge Merrick B. Garland for 293 days, in derogation of its duty to take up the nomination.[47] Of course, Senate Republicans perhaps did not see their actions that way, but subjective relativism is a directionless street. The four-Justice minority might simply proffer that their refusal to sit and hear a case is analogous.

From time to time, the public also becomes aware of the deployment of little-known procedural rules to frustrate majoritarian preferences in the

46. FEDERALIST NO. 78.

47. Jess Bravin, *President Obama's Supreme Court Nomination of Merrick Garland Expires*, WALL ST. J. (Jan. 3, 2017), https://www.wsj.com/articles/president-obamas-supreme-court-nomination-of-merrick-garland-expires-1483463952 [https://perma.cc/W25F-CBJQ].

legislative process, including filibustering[48] and legislative quorum-dodging.[49] That the judiciary might utilize such tactics is not obviously beyond the public's imagination or tolerance. Indeed, the public is well-acquainted with "unprecedented" changes to legislative norms, including with the supposed "nuclear option" of eliminating the filibuster for judicial nominees.[50] After faint hue and cry, the political process regularly returns to normal following such changes, with very little instability to the continued function of the institutions.[51] With respect to decision-making itself, the Roberts Court has shown itself ready to dispense with the time-honored doctrine of stare decisis,[52] with one Justice calling for its abrogation[53] and others acting like it has been abrogated.[54]

It should be no surprise that if some pillars of our constitutional house wobble or give way, others will too. Consequently, it is not apparent that the public would find the contravention of the duty to sit beyond the pale. Moreover, as with so many procedural norms, how the public reacts to the violation of the duty to sit may also depend on the context—here, the merits of the underlying case.

Nevertheless, even where the public or other branches of government are unfazed by use of the sitting-out tactic, the minority's sitting out would ensure the majority's preferred decision does not carry the imprimatur of the Supreme Court and thus may degrade the legal force of that decision.

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48. *See generally* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997); Tonja Jacobi & Jeff VanDam, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate*, 47 U.C. DAVIS L. REV. 261 (2013); Alex Tausanovitch & Sam Berger, *The Impact of the Filibuster on Federal Policymaking*, CTR. FOR AM. PROGRESS (Dec. 5, 2019), https://www.americanprogress.org/issues/democracy/reports/2019/12/05/478199/impact-filibuster-federal-policymaking/ [https://perma.cc/GN9J-6VQE].

49. *See, e.g.*, Phil Gast, *Wisconsin legislators aren't the first to walk out, leave town*, CNN (Feb. 18, 2011), https://www.cnn.com/2011/POLITICS/02/18/awol.legislators/index.html [https://perma.cc/7ZXJ-MJ45].

50. *See, e.g.*, Li Zhou, *Senate Republicans have officially gone "nuclear" in order to confirm more Trump judges*, VOX (Apr. 3, 2019), https://www.vox.com/2019/4/2/18286991/senate-republicans-nuclear-option-rules [https://perma.cc/F4MX-BVNF].

51. Moreover, there are numerous instances of constitutional hardball coming from both parties. As Joseph Fishkin and David Pozen observe, there have been government shutdowns; "voting wars" to restrict voter access; increased partisan gerrymandering; increased use of filibusters, "holds," and pro forma sessions to block legislation and nominations; threatened default on the national debt; the threat of court packing and court restructure; and the increased exercise of executive privilege and presidential signing statements, among others. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 930–35 (2018).

52. *See, e.g.*, Erwin Chemerinsky, *Does precedent matter to conservative justices on the Roberts Court?*, ABAJOURNAL (June 27, 2019), https://www.abajournal.com/news/article/chemerinsky-precedent-matters-little-to-conservatives-on-the-roberts-court [https://perma.cc/GEG3-984R].

53. *See, e.g.*, Allen v. Cooper, No. 18-877, 2020 WL 1325815, at *9 (U.S. Mar. 23, 2020) (Thomas, J., concurring).

54. I consider the analogy to *stare decisis* particularly relevant because I think there is a strong parallel between the respect for one's peers that the duty to sit implicates and the respect for the prior Justices that *stare decisis* implicates. I thank Shayak Sarkar for helping me crystallize this thought.

Consequently, sitting out could be an effective strategy for the minority. At best, a minority could utilize it to halt a majority of the Supreme Court from reversing a lower court decision that the minority prefers. Even if sitting out does not directly result in a successful result for the minority, it may degrade and weaken the majority's decision and thus enhance the chances that the majority's decision will not carry the force of law or be implemented.[55]

II.
JUSTIFYING "SITTING OUT"

As discussed in Part I, sitting out can be an effective strategy in a particular case where the minority wants to either preserve the lower court's decision or cast doubt on the validity of the majority's decision. This strategy is not foolproof because the majority has constitutional ripostes available. However, all things considered, "sitting out" provides a significant chance of success and thus can be used effectively.

At the same time, sitting out carries a grave risk of significant fallout and may engender constitutional chaos. Specifically, the Supreme Court and judiciary themselves may suffer from dysfunction because of the allegedly unprecedented violation of norms. More broadly, the judiciary may face diminished legitimacy with the other political branches, which in turn might refuse to follow the judiciary's orders. Concomitantly, the judiciary may lose legitimacy with the public. The "least dangerous" branch[56] may be rendered inert, and that may spur more direct confrontation between the other branches due to the absence of a legitimate arbitrator.

These are risks, not certainties. As discussed, it is not clear that sitting out is so different in kind from other extant examples of political and constitutional hardball. Other branches have engaged in this kind of political gamesmanship, including with respect to the structure of the Court. There is statutory evidence that the quorum rule was designed by Congress as a backstop device to allow four Justices in the minority to stop the Court from taking potentially detrimental actions.[57] And the Court, and its majorities, have proven that time-honored norms are not inviolable when the appropriate case arises.[58]

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55. Even if never used, understanding the existence and potency of the tactic can also change the calculus of decision making on the Court. The fact that a minority could sit out, and thereby potentially cause damage to the institutions of the Court and the judiciary may moderate the decision making of the majority.

56. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986).

57. *See supra* note 22 and accompanying text.

58. Most relevantly, the Supreme Court may depart from stare decisis in some particular case and overturn a prior decision, even when the decision is strongly relied upon by the public. That happens when the Court has decided that there is a "special justification" for departure and revision. Payne v. Tennessee, 501 U.S. 808, 842 (1991) (Rehnquist, C.J.). However, these departures from stare decisis have become more common, raising the question of whether stare decisis itself is doctrinally *terra firma*

Above, I considered how those risks may bear on the effective use of the strategy. However, the risks of fallout and constitutional chaos are heavy and bear not only on whether sitting out is effective—those risks persist even if sitting out is employed successfully. By employing the tactic, a constitutional battle could be won at the expense of creating a war. Thus, there is a separate question of whether the minority should ever employ such a tactic in light of the risks.

A. A Sufficiency Test for the Tactic

Given the serious risks to the judiciary and the republic itself, it seems clear that sitting out is not meant for just any Supreme Court case. Because sitting out threatens significant fallout, it should be restricted to singular or rare use. Thus, sitting out is most appropriately conceived as a last-ditch option.

The idea that sitting out should be used only as a last resort is surely debatable: If the consensus is that it is simply another common instance of norm violation, then perhaps it can be used more commonly. And even if sitting out is considered grave, there will certainly be disagreements on what kinds of cases and controversies merit the tactic's use. Accordingly, I offer a set of sufficient, but not necessary, conditions for sitting out.

At a high level, the calculus governing whether to sit out includes the importance of the result, the relevance of the case to a fundamental right, the merits of the case itself, prior norm violations in the case and more generally, the impacts of sitting out on a judicial decision, the existence of potential alternative actions, the pull of the duties of a Justice, and the impact on the judiciary and other political institutions. These factors are meant to be viewed capaciously and are drawn from the importance of the particular decision, the systemic relationships between the Court and other institutions, the systemic relationships within the Court, and the relevant institutional interests of the Justices *qua* Justices.

In light of this, I contend that sitting out is plausibly justified under the following conditions:

1) a case relates to a fundamental right (like the right to liberty *simpliciter* or the right to vote);
2) the correct result is obvious and a contrary result lacks legal merit;
3) an incorrect decision from the Supreme Court would cause an extremely damaging, unjust result that jeopardizes the structure, function, or character of the republic, and there is a significant chance that there will be an incorrect decision from the Supreme Court;

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or merely an observation about the ideologies of a majority of the Justices. *See supra* note 53 and accompanying text.

4) the use of the tactic could probabilistically stop that, and there is no plausible alternative that has as good a chance of success.

This is true *even if* employing the sitting-out tactic is contrary to core judicial duties and would surely and irrevocably damage the judiciary or other institutions. It may ultimately be a choice between two evils, but when one of the evils is so grave and challenges the identity of the republic, the choice of the lesser evil is at least justified and perhaps mandatory.

At the same time, there may be scenarios where sitting out does not incur damage to the judiciary or other institutions. That may be because there is a prevalence of norm-breaking and constitutional hardball, of which sitting out is seen as just another instance.[59] In such cases, it may be that sitting out is also justified when condition (3) is not present: Absent a threat to the judiciary's legitimacy, the use of sitting out may be warranted even in cases that stand to do less than extreme damage if decided incorrectly. The one great caveat is that when there is significant norm breakdown and constitutional hardball, this concomitantly lessens the chances that any hardball tactic such as sitting out will be successful, especially given the majority's various options for responding.

Whether such claims seem plausible will likely depend on individual moral commitments. For example, if one views a judge's duty to sit as operating categorically, then any violation of that duty would be unjustifiable. I think that such a view is implausible, but such implausibility can be hard to recognize in the abstract. To concretize, consider two scenarios where sitting out would be plausibly justified under the first set of conditions, dealing with the right to liberty *simpliciter* and the right to vote.[60]

B. Race-Based Internment

Suppose the President decides to intern individuals on the basis of race, based on the view that members of a particular race pose a "danger" to society

59. There is also the possibility that Justices sit out due to exacting adherence to procedural rules and norms. For example, one can imagine Justices being very particular about ensuring that cases percolate in the lower courts before the Supreme Court takes them up, or refusing to hear a case that is moot or not the product of a circuit split. These Justices may believe that the Court's hearing of such cases is in itself a violation of power that must be reined in. More systemically, Justices may think sitting out is justified because the judiciary should often defer to the political branches. For purposes of my analysis, I subsume these possibilities into condition (2) that "the correct result is obvious and a contrary result lacks legal merit." I am inclined to think that these positions do not satisfy condition (2) in our constitutional order. I thank Shayak Sarkar for this insight.

60. At the moment, I leave untouched the potential scenario of norm breakdown and pervasive constitutional hardball that might not require a grave case, because I do not believe our constitutional order has descended to that level and am uncertain what would trigger that situation to take hold.

I also acknowledge that these are extreme examples. Some might suggest that even greater tactics are justified in extreme scenarios and that this therefore tells us little about the contours of sitting out. As I stated, I aimed to detail sufficient conditions, but there may very well be less extreme examples in which sitting out is justified. But given that sitting out is unprecedented, I think it is important to set out a constitutional baseline demonstrating that the tactic has place in our constitutional order—even if that is at the moment confined to grave cases. I thank Alon Harel for raising this concern.

at large. It goes without saying that such a view cannot have any merit or basis in truth, but potential bases of such erroneous thinking may be that members of that race are "impure" in some sense or that they have foreign allegiance and inherently bear animus towards others.[61] Moreover, suppose the President has succeeded in convincing a significant percentage of the population that this is appropriate, with some undecideds and a significant number firmly against the proposal. Let us also assume that internment will carry a significant increase in the chance of death of all those interned, but that a significant percentage of the greater public is ignorant of or indifferent to this fact.

Congress, for its part, is divided on the issue along party lines. With respect to the party breakdown, let us assume that one party holds each house with a slim majority, such that impeachment or counter-legislation is not feasible. On the particular issue, for the most part, those in the President's party support the President, either because they agree with the action or for personal, prudential reasons. Those in the opposition party reject the President's actions, either for moral or personal, prudential reasons. The case is litigated in federal court, and panel and en banc opinions in both the district and circuit courts hold that the President's actions are unconstitutional. The case is then presented to the U.S. Supreme Court. It becomes apparent—perhaps based on the results and trajectory of prior cases, insider knowledge, or other information—that there is a significant chance that five Justices are inclined to support the President's internment plan and that four Justices oppose it. If the case proceeds through its normal course, a 5–4 vote will ensue, allowing the President to intern members of the designated race with the devastating consequences that would follow.

Here, I contend that the minority Justices have a plausible justification to employ the sitting-out tactic. That seems fairly obvious by appeal to our legal and moral intuitions. But the proffered sufficient conditions bear that out as well:

1) The case is of obvious extreme importance and it relates to a core liberty: The very right to be free from deprivations of life and liberty without due process of law.
2) Holding that race-based internment is acceptable is obviously wrong on the merits. Thus, the minority could easily think that a decision upholding racial internment lacks any legal or moral merit.[62]

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61. *See generally*, Ernesto Verdeja, *Review: Genocide: Clarifying Concepts and Causes of Cruelty*, 72 REV. POL. 513 (2010); BEN KIERNAN, BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR (2007); MARK LEVENE: GENOCIDE IN THE AGE OF THE NATION STATE (2005); Korematsu v. United States, 323 U.S. 214 (1944).

62. Despite how obvious this seems today, the Court failed to realize this when it considered *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). There, the Court upheld the internment of "all persons of Japanese ancestry, including aliens and non-aliens" during World War II. *Id.* at 223–24; *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2423, 201 L. Ed. 2d 775 (2018) (Roberts, C.J.) ("The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been

> 3) A 5–4 vote upholding racial internment would clearly engender great harm, namely the infringement of interned peoples' liberty rights and potentially their lives. Moreover, it would undermine the bedrock moral principles to which the country is, or claims, to be committed.
>
> 4) And it is possible that the use of the sitting-out tactic could avoid that result, because it could reinforce the Circuit Court's decision invalidating the President's internment plan. Of course, the judiciary's word and this particular Circuit Court's order may not be the end of the story. Other circuits may weigh in and reach contrary holdings. The President may disregard the order, either by decrying the use of the tactic or by refusing to be constrained by the judiciary at all. There may end up being an inter-branch war between the President and Congress. One cannot discount these possibilities and one need not ignore them to justify sitting out. By denying the President the imprimatur of the Supreme Court, the sitting-out tactic may significantly increase the chances that the internment plan is not executed. We can also stipulate that this is a last-ditch effort in that the minority Justices know that the other Justices are unpersuadable on this issue.[63]

Although the minority would be plausibly justified in sitting out in this situation, doing so may arguably violate their duties, as we have seen. The minority would also be denying the litigants their due process rights to have a hearing (although one side might not protest). One response in favor of the minority's actions is that sitting out should just be seen as a technical maneuver and another form of decision-making. However, even if the minority Justices were violating their obligations, the minority Justices could plausibly contend that these judicial obligations are outweighed by the obligation to avoid the devastating results of a legally impermissible decision.

On the more systemic concerns, the minority Justices could similarly respond that the risks of constitutional and societal chaos are outweighed by the horrors of internment. It may be that the Justices employing this tactic would

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overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'" (internal citations omitted)).

The Supreme Court may have further opportunity to demonstrate whether it fully understands the "obvious" illegality of internment, as the Trump administration has aggressively pursued a family separation policy in immigration that has resulted in the cruel, immoral, and unjust detention of children in deplorable conditions. *See generally* Mariela Olivares, *The Rise of Zero Tolerance and the Demise of Family*, 36 GA. ST. U. L. REV. 287 (2020) (detailing the Trump immigration "zero tolerance" policy); Mari J. Matsuda, *This Is (Not) Who We Are:* Korematsu*, Constitutional Interpretation, and National Identity*, 128 YALE L.J. FORUM 657 (2019) (raising the constitutional concerns with the Trump immigration policies).

63. One might suggest an alternative available to the four-Justice minority: They could deliver a stern, impassioned dissent. That may be, but I think it is implausible that such a dissent would have as good a chance of altering the result as would the employment of the sitting-out tactic.

undermine the public's confidence in the judiciary, create internal strife in the Supreme Court and judiciary, and cause turmoil in the other governmental institutions. Those are monumental consequences, but the risk can still be justified by the need to avoid race-based internment and the resultant consequences. One could plausibly ask, "What use is there in upholding a society that would allow race-based internment in these circumstances? If there must be turmoil to avoid this result, then there shall be turmoil."

C. Election Manipulation and Theft

This example of a situation in which sitting out is plausibly justified concerns a core right of liberty to political beings: the right to vote. Suppose the President believes that the election is too important to lose and is thus committed to winning it at all costs. As such, the President, with most of his party in tow, commits to ensuring an electoral win through a host of eleventh-hour reforms. Among other things, in key battleground states, the President directs that vote-by-mail and absentee ballots be curbed on the frivolous basis that such voting is unconstitutional; that polling places be moved or shuttered and voting hours reduced for arbitrary and patently unlawful reasons; and that law enforcement officers, military, and citizens who support the President surround polling locations with arms for the true purpose of voter intimidation.[64] Like with the example of internment, the greater public is divided, but because this concerns voting, the reaction is less extreme, with many simply unconcerned about the reforms relating to a future voting date. Congress again is divided as before: One party holds each house with a slim majority such that impeachment or legislation is not possible, while the opposition party rejects the President's actions. As has happened before, in one particular state that may determine the outcome of the election, the case is litigated in federal court. The district and circuit courts hold that the President's actions are state and federal statutory and constitutional violations. The minority reads the tea leaves and believes that the majority will approve of the President's actions and cannot be moved on the matter.

Here, too, the minority Justices have a plausible justification to sit out. Applying the criteria:

1) The case is of obvious extreme importance, as it could decide the Presidential election and it relates to a core right of voting.
2) The eleventh-hour reforms—the frivolous limitation of vote-by-mail and absentee voting, the arbitrary shuttering of polling places, and voter intimidation—are illegal, on state and federal statutory and constitutional grounds. Consequently, the minority could find that a decision upholding the President's

64. *See generally, e.g.*, RICHARD L. HASEN, ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY (2020) (describing various potential election manipulation techniques); Richard L. Hasen, *The 2016 U.S. Voting Wars: From Bad to Worse*, 26 WM. & MARY BILL RTS. J. 629 (2018).

actions lack legal merit.

3) Thus, a 5–4 vote upholding the President's actions to steal the election would clearly engender great harm, namely the infringement of peoples' voting rights and a challenge to the legitimacy of the very democratic republic. Here too, the minority may have knowledge that the majority would approve of the President's actions.

4) It is also possible that the use of the sitting-out tactic could avoid that result by empowering the Circuit Court's invalidation of the President's actions. Like before, sitting out may be ineffectual, especially because the President and his state confederates may disregard the judiciary, but there may be at least some hope in this hypothetical tenuous democracy that the judiciary's resulting order carries the force of law. And again, it is assumed plausibly that this is the only hope that the minority has to protect the right to vote.

Just as before, sitting out may involve a derogation of judicial duty in failing to hear cases and failing to safeguard the due process rights of a litigant. It may also sow chaos in the political branches. Nevertheless, it may be justified. It is a question of balancing the interests and there is at minimum a plausible justification that sitting out is justified to stop the President from stealing an election.

CONCLUSION

This Article has proposed that the quorum requirement of the Supreme Court may be operationalized by a minority of Justices to stop the Court from rendering a decision. It then argued that the tactic of sitting out may be effective in obtaining the minority's preferred result, either by enforcing or empowering a lower court decision or by denying the majority's preferred result the imprimatur of the Supreme Court. Sitting out may be norm-breaking; it may contribute to constitutional tumult and a loss of legitimacy for the Court. But those consequences can be outweighed in the appropriately grave case, like with race-based internment or election theft.

The Court is our last line of defense in safeguarding the most critical of our rights. The Justices have a duty to ensure the Court fulfills this role. As a consequence, operationalizing the quorum requirement by sitting out must be part of the Justices' tool kit, even though we will hopefully never see a case in which it must be used.