
CIVIL PROCEDURE — QUORUM REQUIREMENTS — FIFTH CIRCUIT LEAVES PANEL DECISION VACATED UPON LOSS OF EN BANC QUORUM. — *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010) (en banc).

Quorum requirements have long been employed “to prevent matters from being concluded in a hasty manner, or agreed to by so small a number of the members, as not to command a due and proper respect.”¹ But where recusals threaten a court’s ability to convene a quorum, the court faces the difficult task of balancing quorum requirements with the due process interests of impartiality and access to judicial review.² Recently, in *Comer v. Murphy Oil USA*,³ the Fifth Circuit held that when a court of appeals loses its quorum after granting a rehearing en banc, it lacks the power to reinstate the panel decision it can no longer rehear — even if that means affirming a district court opinion that the panel reversed.⁴ In so holding, the Fifth Circuit unnecessarily applied formalistic logic at the expense of common sense justice and the very interests that quorum requirements are intended to protect.

On September 20, 2005, a putative class of residents and property owners from the Mississippi Gulf Coast brought suit against oil and energy companies for allegedly contributing to global warming and thereby “add[ing] to the ferocity of Hurricane Katrina.”⁵ Two years and many motions later, the U.S. District Court for the Southern District of Mississippi dismissed the case, concluding that the questions at the heart of the complaint were political and not justiciable.⁶

The plaintiffs filed a timely appeal, and a panel of the Fifth Circuit reversed and remanded.⁷ Writing for the panel, Judge Dennis⁸ held that the plaintiffs satisfied the relevant standing requirements for most

¹ LUTHER S. CUSHING, *RULES OF PROCEEDING AND DEBATE IN DELIBERATIVE ASSEMBLIES* 17 (Boston, Thompson, Brown & Co. 1874).

² See, e.g., *United States v. Will*, 449 U.S. 200, 212–16 (1980) (discussing the need to reconcile the interest in judicial impartiality with the duty to hear and decide cases).

³ 607 F.3d 1049 (5th Cir. 2010) (en banc).

⁴ See *id.* at 1055; *Comer v. Murphy Oil USA*, 585 F.3d 855, 880 (5th Cir. 2009), *vacated*, 607 F.3d 1049 (reversing district court’s opinion).

⁵ *Comer*, 585 F.3d at 859; Class Action Complaint for Damages and Declaratory Relief, *Comer v. Murphy Oil USA, Inc.*, No. 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), 2005 WL 2913765. Originally the plaintiffs brought suit against insurance companies, but they later amended their complaint to name oil and coal companies as defendants instead. See Third Amended Class Action Complaint, *Comer*, 2007 WL 6942285 (No. 1:05-CV-00436-LTS-RHW), 2006 WL 1474089.

⁶ *Comer*, 585 F.3d at 860 n.2; *Comer*, 2007 WL 6942285 (granting motion to dismiss).

⁷ *Comer*, 585 F.3d at 860. Though it reversed and remanded on several claims, the panel also affirmed the dismissal of the plaintiffs’ unjust enrichment, civil conspiracy, and fraudulent misrepresentation claims. *Id.* at 879–80.

⁸ Judge Dennis was joined by Judge Stewart.

of their claims.⁹ Moreover, because the plaintiffs' claims did "not present any specific question . . . exclusively committed by law to the discretion of the legislative or executive branch,"¹⁰ they were justiciable — any political implications of the case notwithstanding.¹¹

Judge Davis concurred, agreeing that the plaintiffs both had standing to bring the suit and presented a justiciable controversy.¹² Although Judge Davis thought the suit should ultimately have been dismissed for failure to state a claim, he concluded that the panel soundly exercised its discretion not to reach that issue.¹³

The defendants petitioned for a rehearing en banc, and a bare quorum¹⁴ — nine of the circuit's sixteen judges¹⁵ — voted 6–3 to rehear the case.¹⁶ Their order vacated the panel's decision.¹⁷ Before the en banc court could conduct the rehearing, however, an additional judge recused herself, leaving only eight judges qualified to hear the case.¹⁸

Five of the eight judges issued a per curiam order dismissing the case.¹⁹ They reasoned that the eight remaining judges did not constitute a quorum and thus were not "authorized to transact judicial business."²⁰ Nevertheless, the subquorum majority went on to "state the facts" and "to apply the established rules to those facts," concluding that the case should be dismissed.²¹ Although the court had to dismiss the case, it disclaimed the power to reinstate the panel decision.²² The majority reached this conclusion by ruling out each of the alternatives suggested by the dissents. First, the court reasoned it could not appoint a judge from another circuit to sit by designation, because Fifth

⁹ *Comer*, 585 F.3d at 862–69.

¹⁰ *Id.* at 869.

¹¹ *Id.* at 869–70.

¹² *Id.* at 880 (Davis, J., specially concurring).

¹³ *Id.*

¹⁴ The term "quorum" here is used, as defined by the en banc majority in *Comer*, to mean the majority of judges in regular active service on the circuit. *Comer*, 607 F.3d at 1054.

¹⁵ The Fifth Circuit has seventeen authorized regular active service judgeships, 28 U.S.C. § 44(a) (2006 & Supp. III 2009), but at the time *Comer* was decided there were only sixteen regular active service judges on the circuit, due to an unfilled vacancy. See *Comer*, 607 F.3d at 1065–66 (Dennis, J., dissenting). The remaining seven judges had recused themselves. *Comer v. Murphy Oil USA*, 598 F.3d 208, 210 n.1 (5th Cir. 2010).

¹⁶ *Comer*, 607 F.3d at 1055 (Davis, J., dissenting).

¹⁷ *Id.*; see also 5TH CIR. R. 41.3; *Thompson v. Connick*, 578 F.3d 293, 293 (5th Cir. 2009) (en banc).

¹⁸ *Comer*, 607 F.3d at 1053–54. Although the court did not explain the reason for the large number of recusals, one reporter suggested that the judges may have owned shares of the defendants' stock. See Ann Woolner, *BP, Big Oil Get Big Win from Judges not Judging*, BLOOMBERG (June 3, 2010, 9:00 PM EST), <http://www.bloomberg.com/news/2010-06-04/bp-big-oil-get-big-win-from-judges-not-judging-ann-woolner.html>.

¹⁹ *Comer*, 607 F.3d at 1055.

²⁰ *Id.* at 1054.

²¹ *Id.*

²² *Id.* at 1055.

Circuit precedent “precluded” the option.²³ Second, the court refused to declare that a quorum existed under federal rules, because Congress had defined “quorum” as “a majority of the judges of the entire court . . . and not as a body of the non-recused judges of the court, however few.”²⁴ Third, the court could not permit a disqualified judge to sit under the rule of necessity because that doctrine is a recourse of last resort and the plaintiffs had the option to petition the Supreme Court to hear the case.²⁵ Fourth, the court could not “dis-enbanc” the case and reinstate the panel decision because the subquorum majority lacked the “authority to rewrite the established rules of the Fifth Circuit.”²⁶ Finally, the court declined to hold the case in abeyance until the vacancy on the circuit was filled because acquiring a quorum was not a certainty and because any long-term delay “*should be avoided at all costs.*”²⁷

Judge Davis dissented,²⁸ taking issue with the court’s rigid application of Fifth Circuit Rule 41.3.²⁹ He argued that the rule, which vacates panel decisions by default when the court grants a rehearing en banc, was merely “a provisional, practical rule” that “was never designed to apply . . . where the court . . . loses its quorum and the en banc court never considers the appeal on its merits.”³⁰ This application of the rule had “the effect of depriving appellants of their right to an appeal.”³¹ Judge Davis also noted the majority’s inconsistency in disclaiming the power to construe Fifth Circuit Rule 41.3 flexibly, yet purporting to “have the authority to dismiss the appeal.”³² Finally, he argued that the court should have requested a judge from another circuit to sit by designation as a last resort to fill the quorum.³³

²³ *Id.* at 1054. The majority pointed to *United States v. Nixon*, 827 F.2d 1019 (5th Cir. 1987), which held that neither appointing senior judges to sit by designation under 28 U.S.C. § 294(c) nor requesting the Chief Justice of the United States to assign judges from another circuit under 28 U.S.C. § 291(a) was an appropriate method to acquire an en banc quorum. *Id.* at 1021–22.

²⁴ *Comer*, 607 F.3d at 1054. Federal law defines “quorum” as “[a] majority of the number of judges authorized to constitute a court” and “in banc” court as “all circuit judges in regular active service.” 28 U.S.C. § 46(c), (d) (2006). The statute contemplates an exception, giving courts of appeals with more than fifteen active judges the power to adopt local rules with different en banc requirements, *id.* § 46(c); Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (1978), but the Fifth Circuit has not exercised this authority, *see* 5TH CIR. R. 35.6.

²⁵ *Comer*, 607 F.3d at 1054.

²⁶ *Id.* (referring to 5TH CIR. R. 41.3).

²⁷ *Id.* at 1054–55 (quoting 16AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3981.3, at 448 (4th ed. 2008) (emphasis added)).

²⁸ Judge Davis was joined by Judge Stewart.

²⁹ *Comer*, 607 F.3d at 1055 (Davis, J., dissenting).

³⁰ *Id.*

³¹ *Id.* at 1056; *see also* 28 U.S.C. § 1291 (2006) (permitting appeals as of right from all final decisions of federal district courts).

³² *Comer*, 607 F.3d at 1056 (Davis, J., dissenting).

³³ *Id.*

Judge Dennis also dissented, characterizing the majority's order as a "default on [the court's] absolute duty to hear and decide an appeal of right."³⁴ While he largely agreed with Judge Davis's dissent, Judge Dennis argued that the eight qualified judges did constitute a quorum.³⁵ He reasoned that the statutory definition of an en banc court should be read to exclude disqualified judges.³⁶ Even if the court lacked a quorum, however, Judge Dennis thought that to dismiss the appeal and to leave the panel decision vacated would be to abstain impermissibly from exercising the court's mandatory jurisdiction.³⁷ He identified three doctrinal routes to satisfy the court's obligation to hear appeals of right: invoking the rule of necessity to permit an otherwise disqualified judge to sit on the appeal,³⁸ filling the quorum with a judge from another circuit,³⁹ and holding the case in abeyance until the court acquired a quorum.⁴⁰

Although the majority correctly found that it lacked a quorum,⁴¹ it was wrong to conclude that its only option was to dismiss the case, leaving the panel decision vacated and affirming the judgment of the district court. First, as both dissents suggested, the court had to transact judicial business to dispose of the case, whether or not it had the authority to do so.⁴² Choosing to dismiss the appeal is no less "transact[ing] judicial business"⁴³ than choosing to hold the case in abeyance or to return jurisdiction over the appeal to the panel. Second, courts without a quorum can and do transact limited judicial business, such as disposing of cases they cannot decide on the merits in an orderly and just fashion.⁴⁴ Third, the court could have employed the rule of

³⁴ *Id.* (Dennis, J., dissenting).

³⁵ *Id.* at 1057 n.2.

³⁶ *Id.* at 1058–59. Under this definition of an en banc court, five judges would constitute a quorum, as they would supply a majority of the eight judges qualified to sit on the appeal. See *supra* note 24 for the text of the relevant statute.

³⁷ *Comer*, 607 F.3d at 1059 (Dennis, J., dissenting).

³⁸ *Id.* at 1061–64.

³⁹ *Id.* at 1064–65.

⁴⁰ *Id.* at 1065–66.

⁴¹ Judge Dennis's creative reading notwithstanding, the plain text of § 46(c) defines an en banc court to include all circuit judges in regular active service — whether or not they are qualified to sit on a particular case. See 28 U.S.C. § 46(c) (2006). As a quorum requires a majority of the en banc court, *id.* § 46(d), eight judges on a court of sixteen does not suffice. This understanding of an en banc quorum comports with the purposes of quorum requirements — to ensure an adequate deliberation, to increase the probability that the result of a vote is as close as possible to the result the entire body would have reached, and to "affirm the legitimacy of the decision reached, the decision-making process, and the body itself." Jonathan Remy Nash, *The Majority that Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements*, 58 EMORY L.J. 831, 841 (2009).

⁴² See *Comer*, 607 F.3d at 1056 (Davis, J., dissenting); *id.* (Dennis, J., dissenting).

⁴³ *Id.* at 1054 (majority opinion) (disclaiming the authority to "transact judicial business").

⁴⁴ See 28 U.S.C. § 2109 (requiring a subquorum majority of the Supreme Court to affirm the lower court decision if the Court believes it will not acquire a quorum by the following Term and,

necessity, as Judge Dennis suggested, to ensure that it had a quorum to act. The majority's reasoning unnecessarily tied the court's hands, leaving the court ill-equipped to handle similar situations in the future and, in the name of respecting quorum requirements, subverting the very interests those requirements were intended to protect.

First, the majority drew a false distinction between transacting judicial business and dismissing the case. As both dissents noted, choosing to dismiss the appeal is no less "judicial business" than choosing to hold it in abeyance or to return jurisdiction to the panel.⁴⁵ Although the majority did not explain its reasoning, judging from the parties' letter briefs,⁴⁶ it likely adopted the logic of the "non-disruption" rule. This rule is based on the premise that, without a majority to support a given action, courts should return a case to the status quo.⁴⁷ For instance, when an en banc court is equally divided, it will affirm the decision of the district court and leave any panel decision vacated.⁴⁸ The rule makes sense because, with an evenly divided court, any disposition of the case — including a return to the status quo — is equally supported by the merits. Thus, the non-disruption rule provides as good a method as any to resolve the tie.⁴⁹

But the logic of that situation does not apply here. In *Comer*, the court lacked power not because it was divided on the merits, but because it lost its quorum. Returning *Comer* to the "status quo," as the en banc court understood it, required vacating the *only* appellate deci-

by implication, permitting the Court to hold the case if it anticipates acquiring a quorum); *see, e.g.*, *N. Am. Co. v. SEC*, 320 U.S. 708, 708–09 (1943) (per curiam) (holding the appeal until the Court acquired a quorum).

⁴⁵ Judge Davis noted the "inexplicable disconnect between" the majority's lack of authority to interpret Fifth Circuit Rule 41.3 flexibly and its "authority to dismiss the appeal." *Comer*, 607 F.3d at 1056 (Davis, J., dissenting). Judge Dennis likewise attacked the majority's claim that it was "merely stating the facts and 'apply[ing] the established rules to those facts,'" calling the dismissal a "fully informed choice." *Id.* (Dennis, J., dissenting) (alteration in original). Moreover, as an analytical matter, the distinction between the state's — or the court's — action or inaction is itself suspect. *See, e.g.*, Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 789 (2004) (discussing the "analytic incoherence of the state action concept").

⁴⁶ *See, e.g.*, Defendants' Letter Brief of May 12, 2010 at 12, *Comer*, 607 F.3d 1049 (No. 07-60756) (arguing that the practice of equally divided en banc courts affirming the district court decision should control here). In addition to the letter briefs, the court's reasoning — that absent the power to act, the panel decision should remain vacated — follows the logic of the non-disruption rule as applied to equally divided en banc courts.

⁴⁷ *See, e.g.*, Michael Coenen, Comment, *Original Jurisdiction Deadlocks*, 118 YALE L.J. 1003, 1007–08 (2009) ("It is a common rule of voting that, absent exceptional conditions, a multimember body must have the support of a majority of its members in order to take action." (citing HENRY M. ROBERT ET AL., ROBERT'S RULES OF ORDER § 44, at 392 (10th ed. 2000))).

⁴⁸ *E.g.*, *United States v. McFarland*, 311 F.3d 376, 377 (5th Cir. 2002) (en banc) (per curiam); *Griffin v. Martin*, 795 F.2d 22, 22 (4th Cir. 1986) (en banc); *Drake Bakeries Inc. v. Local 50, Am. Bakery & Confectionery Workers Int'l*, 294 F.2d 399, 400 (2d Cir. 1961) (en banc) (per curiam).

⁴⁹ *See* 16AA WRIGHT, *supra* note 27, § 3981.3, at 447 n.7.

sion on the merits of the underlying dispute.⁵⁰ Thus, while the non-disruption rule is neutral with respect to the merits, the *Comer* solution directly contravened the merits. Moreover, because the “status quo” effectively eliminated the appellants’ appeal as of right, their due process interest in the appeal also weighed against *Comer*’s solution.⁵¹ Finally, the non-disruption rule is applied in predetermined situations,⁵² but *Comer*’s novelty precluded the use of a predetermined rule.⁵³ The lack of a clear default resolution to the court’s loss of a quorum undercuts the majority’s claim that affirming the district court was its only option. The *Comer* court chose to return the appeal to its status before the court lost its quorum. But without a predetermined rule, the court could just as plausibly have returned the appeal to its status before the en banc court granted a rehearing. Application of the non-disruption rule here was not a foregone conclusion, and adopting that rule required engaging in quintessentially judicial business.

Second, the court did have the power to transact limited judicial business, its lack of a quorum notwithstanding. Although there is a general consensus that courts cannot act without a quorum,⁵⁴ individual circuit judges⁵⁵ and Supreme Court Justices in chambers⁵⁶ can and do conduct limited judicial business.⁵⁷ For instance, subquorum bodies have exercised or implicitly acknowledged their authority to extend filing deadlines,⁵⁸ arrange bail or grant stays,⁵⁹ issue extraordinary

⁵⁰ See *Comer*, 607 F.3d at 1057 (Dennis, J., dissenting).

⁵¹ See *id.* at 1056.

⁵² See, e.g., Coenen, *supra* note 47, at 1007 (advocating the adoption of a *predetermined* decisional rule, instead of ad hoc solutions, to more fairly resolve original jurisdiction deadlocks).

⁵³ By the same token, any subsequent applications of *Comer*’s rule would be predetermined.

⁵⁴ See, e.g., *Nguyen v. United States*, 539 U.S. 69, 82 n.14 (2003) (“[Q]uorum . . . means such a number of the members of the court as may legally transact judicial business.” (second alteration in original) (quoting *Tobin v. Ramey*, 206 F.2d 505, 507 (5th Cir. 1953)) (internal quotation marks omitted)); *Nash*, *supra* note 41, at 840.

⁵⁵ See, e.g., *In re McKenzie*, 180 U.S. 536, 551 (1901) (approving the issuance of a writ of supersedeas by a single circuit judge).

⁵⁶ The powers of subquorum bodies of the Supreme Court are not necessarily equivalent to those of circuit courts. Nevertheless, the quorum requirements of both courts operate analogously. Indeed, Congress has used the same word, “quorum,” without elaboration, to define the number of judges without which neither the Supreme Court nor the circuit courts can “transact judicial business.” See 28 U.S.C. § 1 (2006); *id.* § 46(d); *Nguyen*, 539 U.S. at 82 n.14. The power of the Supreme Court and its Justices to act without a quorum thus sheds light on the power of circuit courts and their judges to do likewise.

⁵⁷ For an overview of the powers of individual Justices to act without a quorum, see generally Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159 (2008); Frank Felleman & John C. Wright, Jr., Note, *The Powers of the Supreme Court Justice Acting in an Individual Capacity*, 112 U. PA. L. REV. 981 (1964).

⁵⁸ 28 U.S.C. § 2101(c); SUP. CT. R. 30.1.

⁵⁹ See, e.g., 28 U.S.C. § 2101(f); FED. R. APP. P. 8(a)(2); *Neb. Press Ass’n v. Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, J., opinion in chambers).

writs,⁶⁰ deny petitions for certiorari,⁶¹ vacate the stays of lower courts,⁶² and dispose of cases that cannot be heard for lack of a quorum.⁶³ Add to that list the power, acknowledged by the *Comer* court, to dismiss an appeal within its mandatory jurisdiction.⁶⁴ To be sure, most of these powers derive from statutes or court rules, which might suggest that Congress contemplated them as exceptions to otherwise watertight quorum requirements. But none of these statutes indicate that they codify an exception to the rule.⁶⁵ More importantly, certain powers, such as vacating the stays of lower courts, are merely assumed by judges.⁶⁶ These powers suggest that Congress and the courts have developed a set of actions sufficiently “ancillary” not to require a quorum.⁶⁷ Although the scope of these ancillary powers is not clear, they provide a basis upon which the *Comer* court could have crafted a resolution sensitive both to its limited authority to hear the merits of the case and to the appellants’ due process interest in their appeal as of right.⁶⁸

Third, as the dissents suggested, the court could have invoked the rule of necessity to avoid inadvertently reversing the only appellate decision on the merits.⁶⁹ The *Comer* majority refused to invoke the rule of necessity because the opportunity to petition the Supreme Court for a writ of certiorari would permit the parties to have their appeal heard

⁶⁰ See, e.g., 28 U.S.C. § 1651(b); *Lenhard v. Wolff*, 443 U.S. 1306, 1306–07 (1979) (Rehnquist, J., opinion in chambers).

⁶¹ See, e.g., *Barnstone v. Univ. of Hous.*, 446 U.S. 1318, 1318–19 (1980) (Powell, J., opinion in chambers).

⁶² See, e.g., *Holtzman v. Schlesinger*, 414 U.S. 1316, 1320 (1973) (Douglas, J., opinion in chambers).

⁶³ See 28 U.S.C. § 2109.

⁶⁴ See *Comer*, 607 F.3d at 1055; *id.* at 1056 (Davis, J., dissenting).

⁶⁵ See 28 U.S.C. § 2109; *id.* § 2101(c), (f). Moreover, some of these statutes merely codified — and did not create — exceptions to quorum requirements. For example, subquorum majorities of the Supreme Court held cases over in anticipation of acquiring a quorum before Congress established the plenary authority to do so by enacting 28 U.S.C. § 2109 in 1948. See, e.g., *N. Am. Co. v. SEC*, 320 U.S. 708, 708–09 (1943) (per curiam).

⁶⁶ See *Nash*, *supra* note 41, at 839 n.27 (collecting examples of individual judges and Justices acting beyond the scope of their statutorily authorized powers).

⁶⁷ See *Locks v. Commanding Gen., Sixth Army*, 89 S. Ct. 31, 32 (1968) (Douglas, J., opinion in chambers) (describing the relief a Circuit Justice can provide without a quorum).

⁶⁸ For instance, the court could have interpreted Fifth Circuit Rule 41.3 not to apply in this situation, as Judge Davis suggested. See *Comer*, 607 F.3d at 1056 (Davis, J., dissenting).

⁶⁹ See *Comer*, 607 F.3d at 1057 (Dennis, J., dissenting). The majority was reasonable to reject the dissent’s suggestion to fill its quorum by requesting the Chief Justice to appoint a judge from a different circuit to sit by designation, pursuant to 28 U.S.C. § 291. Congress has defined an en banc court to include only “circuit judges [of the circuit] in regular active service” and certain senior judges in situations not applicable to this case. 28 U.S.C. § 46(c). Appointing a judge in regular active service on another circuit would not satisfy the above statutory definition of an en banc court, nor should it. One of the purposes of limiting the membership of an en banc court is to permit the regular active service judges on a given circuit to have control over the doctrinal trends of the circuit. See *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 690 (1960).

without a disqualified judge having to sit.⁷⁰ But the majority was too quick to dismiss the option of invoking the rule merely because the Fifth Circuit is not a court of last resort.⁷¹ The rule of necessity functions to preserve litigants' *right* to present their questions before a court.⁷² The threat of replacing an appeal as a matter of right with the opportunity for a less-than-one-percent chance of plenary review by the Supreme Court⁷³ seems to fall squarely within the ambit of the interests the rule of necessity is intended to protect.⁷⁴ Moreover, the countervailing interest in impartiality rings hollow when the alternative to the rule of necessity is simply to ignore considerations of justice altogether. One imperfectly impartial judge on a panel of nine is less objectionable than eight impartial judges, if the former configuration grapples with the merits of the case in good faith while the latter disposes of the case without regard to its merits.

By unnecessarily rejecting its authority to perform ancillary judicial functions without a quorum and to acquire a quorum through the rule of necessity, the Fifth Circuit facilitated the very situation that quorum and recusal rules were designed to prevent: one judge, sufficiently interested to recuse herself, determined the outcome of the appeal. Moreover, *Comer's* holding, to the extent it has precedential value,⁷⁵ creates a rule of decision that compromises the ability of judges to recuse themselves in the future, given the predictable and dispositive effect one recusal can have on the outcome of a case. *Comer's* problematic result should serve as a cautionary tale for courts and legislatures, both to adopt predetermined rules to handle future situations like *Comer* sensibly,⁷⁶ and to reconsider the logic of supposedly formal constraints on judicial power.⁷⁷

⁷⁰ See *Comer*, 607 F.3d at 1054.

⁷¹ See *id.* at 1063 (Dennis, J., dissenting).

⁷² See *United States v. Will*, 449 U.S. 200, 213–15 (1980).

⁷³ See David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 241 (2009).

⁷⁴ *But cf.* Thomas McKeivitt, Note, *The Rule of Necessity: Is Judicial Non-Disqualification Really Necessary?*, 24 HOFSTRA L. REV. 817 (1996) (acknowledging the value of the rule of necessity in protecting the rights of litigants to bring cases before the courts but arguing that the rule should be reduced in scope to protect the impartiality of judges).

⁷⁵ Under the majority's reasoning, the order of a (powerless) court should have no precedential value, but no quorum could ever face this situation to establish a contrary holding. Moreover, subsequent courts may follow *Comer* for the sake of consistency, if not *stare decisis*.

⁷⁶ *Cf.* Coenen, *supra* note 47, at 1007 (arguing for the implementation of predetermined rules to resolve original jurisdiction deadlocks in the Supreme Court).

⁷⁷ *Cf.* Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1906–07 (2008) (arguing that textualist judges consistently read statutes to constrain jurisdiction, even when the text would support a broader grant of jurisdiction).