Stanford Law Review

Volume 78 June 2026

ARTICLE

Commission Quorums

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Abstract. Multimember commissions are a central feature of the modern administrative state. Yet a growing number have lost their legal authority to function—not through statutory repeal or defunding, but because they lack a quorum. In many cases, these quorum losses stem from the President's assertion of a broad removal power, which causes vacancies in the commission's membership. Quorum losses lead to agency inaction, prevent the executive branch from ensuring faithful execution of the laws, and threaten the constitutional rights of individuals who appear before adjudicatory commissions.

This Article presents an empirical study of quorum rules in multimember commissions. It traces how commissions lose their quorums, explores the consequences of quorum loss for administrative governance and individual rights, and analyzes the legal rules that govern when—and whether—a diminished commission may act.

This Article makes three contributions. Doctrinally, it explains the body of common law that governs the transaction of business in multimember institutions and shows that courts have inconsistently applied these principles in the administrative law context. Empirically, it draws on original data to illustrate variation in the quorum and voting requirements within seventy-six multimember commissions. Normatively, the Article raises questions about the ways in which quorum losses may impact the ability of the executive branch to fulfill its constitutional and statutory responsibilities. We urge the application of common-law quorum and voting defaults in the face of statutory silence to preserve the deliberate structures Congress designed. We also contend that presidential removals that destroy a quorum may be unconstitutional if they frustrate the executive's duty to faithfully execute the laws, and we call for relaxation of exhaustion requirements when agency inaction deprives individuals of judicial review. The Article concludes with recommendations for how Congress should restructure statutory quorum requirements.

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Introduction

In March 2025, the Merit Systems Protection Board (MSPB)—the three-member commission that resolves employment disputes between federal employees and their agencies—lost its quorum after one member retired[1] and another was removed without cause by President Trump[2] in violation of the MSPB's statute.[3] With only one remaining member, the MSPB could not adjudicate employment disputes[4]—even as the Trump Administration removed thousands of federal employees from their positions.[5]

This is not the first time that quorum problems have rendered the MSPB incapable of adjudicating claims brought by federal employees. The agency lacked a quorum for five years between 2017 and 2022 due to the Senate's delay in confirming both President Trump and President Biden's nominees.[6] Although federal employees have a constitutional right to a hearing in the case of their removal,[7] the MSPB's lack of a quorum effectively prevented them from exercising this right. The federal courts offered no immediate remedy. The Court of Appeals for the Federal Circuit prohibited employees from filing claims in federal court without first exhausting their remedies before the MSPB,

1. Press Release, U.S. Merit Sys. Prot. Bd., Member Raymond A. Limon Retiring (Feb. 28, 2025), https://perma.cc/T9XK-LJA7 (announcing Raymond Limon's retirement on February 28, 2025, the last day of his term); Carten Cordell, *Labor Board Member Retires, Leaving a Razor-Thin Quorum*, GOV'T EXEC. (Feb. 28, 2025), https://perma.cc/5653-BLVC (describing how Limon's retirement left the MSPB's quorum "on a knife's edge"). The MSPB's statute technically permitted Limon to remain for an additional year. *See* 5 U.S.C. § 1202(c) (authorizing members to serve up to one additional year after the expiration of their terms).

2. *See* Eric Katz, *Trump Fires One-Third of Federal Employee Appeals Board*, GOV'T EXEC. (updated Feb. 11, 2025, 3:38 PM), https://perma.cc/8AN6-G7VM.

3. *See* 5 U.S.C. § 1202(d) (providing removal protections for MSPB members).

4. *See* U.S. Merit Sys. Prot. Bd., Frequently Asked Questions About the Lack of Quorum Period and Restoration of the Full Board 2-3 (2023), https://perma.cc/K8XS-DT3Z (describing limited functionality of the inquorate MSPB).

5. *See* Nick Bednar, *Trump's Dismantling of the Government Hurts Due Process*, LAWFARE (Mar. 4, 2025, 2:00 PM), https://perma.cc/44GH-A5DD (explaining the consequences of an inquorate MSPB for employees removed during the Trump Administration).

6. *See* Nicole Ogrysko, *Lack of Quorum Hits 3-Year Mark at MSPB, with No Clear End in Sight*, FED. NEWS NETWORK (Jan. 24, 2020, 11:31 AM), https://perma.cc/823T-VPQU (summarizing confirmation delays during the first Trump Administration); Eric Katz, *Federal Employee Appeals Board Still Has Years of Work Ahead to Cut Through Its Record Backlog*, GOV'T EXEC. (Dec. 20, 2022), https://perma.cc/N67U-KAJT (reflecting that the MSPB's quorum was restored in March 2022).

7. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542-44 (1985) (holding that public employees have a due process right to a hearing prior to termination of their employment); Stone v. FDIC, 179 F.3d 1368, 1375 (Fed. Cir. 1999) (applying the holding in *Loudermill* to the federal statutory employment scheme).

describing the loss of a quorum as a "temporary circumstance" rather than a "structural defect."[8]

Like many other agencies within the administrative state, Congress structured the MSPB as a multimember commission.[9] Multimember commissions such as the Federal Communications Commission (FCC)[10] and the Federal Trade Commission (FTC)[11] are defined by the appointment of multiple commissioners who jointly exercise the authority delegated to them by Congress.[12] Commissions vary greatly in size, structure, and function. Most of these commissions operate independently from the cabinet departments and historically have been more insulated from presidential control.[13] A few, such as the Federal Energy Regulatory Commission (FERC) and the Council on Environmental Quality (CEQ), exhibit less independence from the President.[14] Some commissions are widely recognized by the public, such as the Federal Reserve Board.[15] Others, such as the Marine Mammal Commission or the Barry Goldwater Scholarship Foundation, are more obscure.

Multimember commissions trace their origins to the Progressive Era.[16] Congress believed that the deliberation of numerous experts and insulation from partisan politics would foster the development of expertise and apolitical

8. Rodriguez v. Dep't of Veterans Affs., 8 F.4th 1290, 1309 (Fed. Cir. 2021). The Federal Circuit has jurisdiction to review decisions of the MSPB. *See* 5 U.S.C. § 7703(b)(1)(A).

9. *See* JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 45 & n.166 (2d ed. 2018) (listing sixty-eight multimember agencies and subunits with members of a board or commission who are nominated by the President and confirmed by the Senate); 5 U.S.C. § 1201 ("The Merit Systems Protection Board is composed of 3 members appointed by the President, by and with the advice and consent of the Senate . . . .").

10. *See* SELIN & LEWIS, *supra* note 9, at 45.

11. *See id.*

12. We use the phrase "commission" throughout to refer to multimember commissions. We distinguish these multimember commissions from single-headed agencies. *See infra* Part I.

13. *See* SELIN & LEWIS, *supra* note 9, at 42-48 (defining "independent agencies," then listing multimember commissions and whether they are located outside the executive departments).

14. *See id.* at 46 (listing FERC as within the executive department); 42 U.S.C. § 4342 (establishing the CEQ as a multimember commission in the executive department).

15. *See* Lydia Saad, *Postal Service Still Americans' Favorite Federal Agency*, GALLUP (May 13, 2019), https://perma.cc/52TT-GHZ6 (showing 95% of survey respondents as having some opinion on the Federal Reserve Board's performance); Carola C. Binder & Christina P. Skinner, *The Legitimacy of the Federal Reserve*, 28 STAN. J.L. BUS. & FIN. 1, 32 (2023) (showing that between 73% and 79% of survey respondents were able to correctly identify the chair of the Federal Reserve).

16. Prior to that era, Congress at times vested decisionmaking power in commissions that reported to the President. *See* Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403, § 2 (1883) (codified as amended at 5 U.S.C. §§ 632-633, 635) (creating the United States Civil Service Commission).

decisionmaking.[17] The structures that govern these commissions reflect those goals. Among the most thoroughly studied structures are statutory provisions prohibiting the President from removing members except for negligence, inefficiency, or malfeasance.[18] Scholars have also examined provisions that require the President to balance the partisan makeup of the commission's membership.[19] A central feature of commissions' collective decisionmaking, however, has received little attention: the quorum.[20]

Multimember institutions, including Congress, the Supreme Court, and commissions, require quorums.[21] Quorums are procedural rules that determine

17. *See* Neal Devins & David E. Lewis, *The Independent Agency Myth*, 108 CORN. L. REV. 1305, 1316-19 (2023) (surveying Progressive-Era beliefs about agency design).

18. *See, e.g.*, Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756, 1761-62 (2023) (using originalism to address whether the President may remove officers and whether Congress may constrain the removal power); Andrea Scoseria Katz & Noah A. Rosenblum, *Becoming the Administrator-in-Chief:* Myers *and the Progressive Presidency*, 123 COLUM. L. REV. 2153, 2159-61 (2023) (arguing that the Supreme Court's current interpretation of *Myers v. United States*, 272 U.S. 52 (1926) as supporting unitary executive theory is erroneous).

19. *See, e.g.*, Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9, 14 (2018) (finding that partisan-balancing requirements meaningfully shape the ideological composition of commissions).

20. Studies of quorums have often focused on the rules pertaining to a single agency rather than a systematic study of the variation across agencies. For studies devoted exclusively to quorums, see generally Catherine L. Fisk, *The Role of the Judiciary When the Agency Confirmation Process Stalls: Thoughts on the Two-Member NLRB and the Questions the Supreme Court Should Have, but Didn't, Address in* New Process Steel, L.P. v. NLRB, 5 FIU L. REV. 593 (2010); Kelli Ann Kleisinger & Richard A. Bales, *The Validity of the Two-Member NLRB*, 6 SETON HALL CIR. REV. 261 (2010); Matthew D. Moderson, *The National Labor Relations Board After* New Process Steel*: The Case for Amending Quorum Requirements Under the National Labor Relations Act*, 80 UMKC L. REV. 463 (2011); and Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. MICH. J.L. REFORM 103 (2018). *See also* Ryan J. Levan, Note, *Do We Have a Quorum?: Anticipating Agency Vacancies and the Prospect for Judicial Remedy*, 48 COLUM. J.L. & SOC. PROBS. 181 (2015) (discussing how Congress and agencies react when anticipating quorum losses and the judicial remedies to the problems resulting from quorum losses). To the extent scholars have discussed agency quorums more broadly, they have generally done so to further other arguments about presidential control over independent agencies. *See* Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 603-06 (2021) (arguing that the President can engage in structural deregulation to diminish the capacity of agencies); Devins & Lewis, *supra* note 17, at 1359-62 (explaining that the President can manufacture quorum losses as a means of "neutering . . . disfavored independent agencies"); Ganesh Sitaraman & Ariel Dobkin, *The Choice Between Single Director Agencies and Multimember Commissions*, 71 ADMIN. L. REV. 719, 727 (2019) (raising quorum requirements as a consideration in the debate over single-member versus multimember commissions); Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1182-87 (2000) (cataloging quorum requirements as a feature of commissions).

21. *See, e.g.*, U.S. CONST. art. I, § 5, cl. 1 (specifying that "a Majority of each [House] shall constitute a Quorum to do Business" in Congress); SUP. CT. R. 4 ("Six Members of the [U.S. Supreme] Court constitute a quorum.").

what portion of an institution's membership must be present for it to act.[22] At common law, a simple majority of members constituted a quorum, and a majority of members present at the meeting could vote to exercise the institution's authority.[23] Quorums help prevent a minority of members from making decisions that a majority would reject, minimizing decisional "errors" that may occur when members are absent. At the same time, quorums limit institutions from exercising their powers during periods of vacancies. In the case of commissions, quorum absences threaten the faithful execution of law and the constitutional and statutory rights owed to individuals who appear before them.

Patterns of commissions losing their quorums illustrate the need for a comprehensive study of quorums in commissions. Within the first six months of the Trump Administration, the Equal Employment Opportunity Commission (EEOC), FCC, Federal Election Commission (FEC), MSPB, National Labor Relations Board (NLRB), and Tennessee Valley Authority, among other commissions, all lost their quorums.[24] In many cases, the losses were attributable to President Trump's assertion of the power to remove commissioners.[25] Some of these agencies have inoculated themselves against quorum losses by relaxing their procedural regulations or empowering lone members to act on behalf of the whole.[26] The Consumer Product Safety Commission (CPSC), for example, has temporarily evaded the loss of its quorum thanks to its unique statute.[27]

Doctrinal changes could increase the likelihood that commissions will lose their quorums. The Supreme Court has signaled that it is likely to overturn *Humphrey's Executor v. United States*,[28] striking down statutory removal protections as unconstitutional.[29] Such a ruling would give the President greater authority to remove commissioners, making it more difficult for commissions to maintain stable membership and preserve their decisionmaking capacity. The

22. *Quorum*, MERRIAM-WEBSTER, https://perma.cc/FH4L-2V6C (archived Feb. 15, 2026).

23. *See infra* Part II.B.

24. *See infra* Table 1 (listing inquorate commissions from the period of January 2025 through October 2025).

25. *See infra* Table 1 (identifying commissions that lost their quorums due to removal of a commissioner by the President).

26. *See, e.g.*, Erich Wagner, *MSPB to Update Rules to Make Operations Smoother Without a Quorum*, GOV'T EXEC. (Sept. 6, 2024), https://perma.cc/PZF8-5PU7.

27. *See* 15 U.S.C. § 2053(d) (providing that "if there are only two members serving on the [CPSC] because of vacancies in the Commission, two members shall constitute a quorum for the six month period beginning on the date of the vacancy which caused the number of Commission members to decline to two").

28. 295 U.S. 602, 628 (1935) (upholding removal protections for FTC Commissioners).

29. *See* Trump v. Wilcox, 145 S. Ct. 1415, 1416 (2025) ("Because the Constitution vests the executive power in the President, he may remove without cause executive officers who exercise that power on his behalf, subject to narrow exceptions recognized by our precedents." (citation omitted)).

extent to which a given commission is affected by these changes, however, depends on its quorum rules.

This Article makes three contributions—doctrinal, descriptive, and normative—to our understanding of quorums and administrative governance. Doctrinally, Part II examines the common-law principles governing quorums and considers their application in the context of commissions. These principles largely stem from the actions of legislative bodies, municipal corporations, and private corporations.[30] Specifically, the case law governing these institutions and treatises discussing those cases articulate default rules that apply in the absence of specific procedures to the contrary.[31] In administrative law, however, courts have been inconsistent as to when and whether common-law rules should apply to commissions that lack quorum and voting rules within their organic statutes.[32]

Descriptively, Part III explores variation in commissions' quorum requirements. At times, Congress and commissions have adopted specific quorum and voting rules.[33] Using new data from seventy-six commissions, this Article compares the statutory and regulatory provisions governing such rules in these agencies. We find that Congress adopts quorum and voting rules similar to those found at common law.[34] Yet almost half of the commissions lack any such rules in their organic statutes.[35] Confronted with statutory silence, commissions have adopted regulations to give themselves flexibility to transact business during vacancies.[36] The mismatch between congressional and commission preferences suggests that Congress prefers quorum rules that facilitate deliberation, whereas commissions prefer rules that protect continued functionality during vacancies.

This empirical analysis also surveys preventive and protective structures designed to limit the frequency and impact of quorum losses. Preventive structures reduce the likelihood that commissions lose their quorums by, for example, allowing commissioners to continue service past the expiration of their terms.[37] Protective structures allow commissions to exercise limited

30. *See* United States v. Ballin, 144 U.S. 1, 7 (1892) ("[M]ost of the decisions [involving quorum requirements] have been in respect to the actions of trustees and directors of a private corporation, or of the minor legislative bodies which represent and act for cities and other municipal corporations; but the principle is the same.").

31. *See infra* Part II.B.

32. *See infra* Part II.C.

33. *See infra* Part III.A.

34. *See infra* Part III.A.

35. *See infra* Part III.A.

36. *See infra* Part III.A.2.

37. *See infra* Part III.B.1.

authority during the absence of a quorum.[38] Although Congress often includes preventive structures within commissions' organic statutes, most protective structures are adopted by the commissions themselves.[39] These findings raise questions about whether commission-enacted procedural rules interfere with the collective decisionmaking process designed by Congress.

Normatively, Part IV offers recommendations for how courts and Congress should refashion administrative law doctrine in light of other doctrinal changes, particularly to the removal power. We recommend that courts apply common-law rules when organic statutes are silent or ambiguous on proper procedures. This would protect against countermajoritarian and decisional errors that result when commissions exercise authority without a quorum, and is consistent with Congress's own imposition of similar requirements.[40] We also argue that courts should apply common-law rules to prohibit commissions from adopting regulations that evade these quorum rules without explicit statutory authorization.

Although Congress holds the power to design agencies,[41] quorum requirements create tensions with existing legal principles: Exhaustion and channeling requirements prevent inquorate commissions from vindicating litigants' constitutional rights.[42] Accordingly, we argue that relaxing these exhaustion requirements is necessary and consistent with a longer-term trend of increasing the availability of judicial review of agency action.[43] Likewise, unfettered expansion of the President's removal power may frustrate the President's constitutional obligations. Although the Constitution vests the executive power in the President,[44] it also obliges them to "take Care that the Laws be faithfully executed,"[45] including those executed on their behalf by commissions. If exercised without limitation, the removal power enables the President to incapacitate commissions by eliminating their quorums, thereby impeding the execution of law. We argue that the Constitution necessarily requires that commissions remain capable of implementing the law and, therefore, prevents the President from destroying a commission's quorum. Finally, we provide recommendations to Congress relating to the drafting of quorum requirements.

38. *See infra* Part III.B.2.

39. *See infra* Parts III.B.-.C.

40. *See infra* Part III.A.

41. *See* E. Garrett West, Note, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 171 (2018) (describing Congress's power over office creation and its limitations).

42. *See infra* Part IV.B.

43. *See infra* Part IV.B.

44. U.S. CONST. art. II, § 1.

45. U.S. CONST. art. II, § 3.

I. Quorum Losses

Congress delegates authority to federal agencies to take advantage of their expertise.[46] It has the constitutional power to design these agencies and impose various structural requirements.[47] Most agencies are nested within a hierarchy of larger units, such as the Census Bureau within the Department of Commerce, and are led by a single officer appointed by the President.[48] The President resides at the top of this hierarchy and directs the actions of these agencies—especially the cabinet departments. At times, however, Congress has chosen to create and delegate power to multimember commissions with greater independence.[49]

Congress's choice between a single-headed structure and a multimember structure has significant consequences for governance. Single-headed agencies have clearer lines of responsibility, allowing a single presidential appointee needing Senate confirmation (PAS appointee) to dictate policy throughout the institution.[50] The President usually has the authority to remove this appointee at will.[51] At times, this position may become vacant due to removal by the President or delays in nomination or confirmation.[52] While agency performance tends to decline during vacancies,[53] the Federal Vacancies Reform Act (Vacancies Act) allows the President to temporarily appoint acting officials to exercise the legal authority that the PAS appointee otherwise would, ensuring

46. *See* Sean Gailmard, *Expertise, Subversion, and Bureaucratic Discretion*, 18 J.L. ECON. & ORG. 536, 536 (2002) ("Delegation is often a concession to expertise . . . .").

47. *See* West, *supra* note 41, at 177 ("[T]he Necessary and Proper Clause gives sweeping authority to Congress to structure the other branches of the federal government . . . .").

48. *See* SELIN & LEWIS, *supra* note 9, at 35-38 (identifying that many agencies are placed within a larger departmental structure).

49. Not all multimember commissions, however, enjoy greater independence from the President. The Council of Economic Advisers and the CEQ are multimember commissions that reside within the Executive Office of the President. SELIN & LEWIS, *supra* note 9, at 21 tbl.1. We discuss multimember commissions generally, but we note when this independence matters for our analysis.

50. Sitaraman & Dobkin, *supra* note 20, at 723.

51. *See* Collins v. Yellen, 141 S. Ct. 1761, 1787 (2021) ("[T]he Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer." (quoting Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2205 (2020) (internal quotation marks omitted))).

52. *See infra* Part I.B.

53. *See* Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 935-50 (2009) ("The absence of appointed agency leaders fosters agency inaction."); Christopher Piper & David E. Lewis, *Do Vacancies Hurt Federal Agency Performance?*, 33 J. PUB. ADMIN. RSCH. & THEORY 313, 324 (2023); Mark D. Richardson, Christopher Piper & David E. Lewis, *Measuring the Impact of Appointee Vacancies on US Federal Agency Performance*, 87 J. POL. 680, 693 (2025).

single-headed agencies continue to execute the laws entrusted to them by Congress.[54]

The central difference between single-headed and multimember agencies is that multimember agencies engage in collective decisionmaking. Commissions comprise between three and twenty-seven commissioners.[55] Most (but not all) commissioners are PAS appointees,[56] and they share equal responsibility in exercising their commissions' legal authority.[57] The presence of multiple commissioners allows for the "accommodation of diverse or extreme views through the compromise inherent in the process of collegial decisionmaking,"[58] and viewpoint diversity generates disagreement on how commissions should exercise their authority.

Congress has structured commissions to ensure that their deliberations consider a range of expertise, experiences, and viewpoints. Commissioners frequently enjoy fixed terms extending beyond a four-year presidential term, meaning commissions' memberships often include appointees from multiple presidential administrations.[59] Many statutes prohibit the President from removing commissioners appointed by their predecessors except for cause, limiting the disruption that presidential transitions tend to bring to single-headed agencies.[60] Even when the President can appoint a new commissioner, Congress often imposes additional requirements on *whom* the President may

54. *See generally* Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 627-31 (2020) (providing a primer on the Vacancies Act).

55. *See* 16 U.S.C. § 1401(b)(1) (providing that three members comprise the Marine Mammal Commission); 20 U.S.C. § 957(b) (providing that twenty-seven members comprise the National Council for the Humanities); *see also* Nicholas R. Bednar & Todd Phillips, Commission Quorums_Data Analysis.R, at 2.1 (providing statistical analysis for all data in this Article) (on file with the *Stanford Law Review*) [hereinafter Replication].

56. *Cf. infra* notes 320-31 and accompanying text (describing variation in appointment structures).

57. Of course, the chair often has greater administrative responsibilities over the commission, and those responsibilities are consequential for agenda setting. *See generally* Todd Phillips, *Commission Chairs*, 40 YALE J. ON REGUL. 277 (2023) (describing the role of commission chairs).

58. Breger & Edles, *supra* note 20, at 1113; *see also* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORN. L. REV. 769, 794 (2013) (positing that commissions "can foster more deliberative decision making"); Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 696 (2013) ("[A] multimember board allows for a representation of divergent interests in a way that a single decisionmaker simply cannot.").

59. For examples of statutes prohibiting granting extended terms of years, see 42 U.S.C. § 7412(r)(6)(B); and *id.* § 1975(c).

60. For examples of statutes prohibiting the President from removing commissioners except for cause, see 5 U.S.C. § 7104(b); 46 U.S.C. § 46101(b)(5); and 15 U.S.C. § 41.

appoint—many statutes require the President to balance the partisan makeup of the commission's membership.[61]

Collective decisionmaking presents several design challenges. First, institutions need *quorum rules* to determine the minimum number of members who must be present for institutions to transact business. These rules determine how should an institution proceed—if at all—when commissioners are absent or seats are vacant. Second, institutions need *voting rules* that explain how members' preferences are aggregated to reach final decisions. These rules determine whether a body's majority vote carries a motion or when a supermajority or unanimity is required in order to take action.

Although quorums protect collective decisionmaking, they may also prevent commissions from exercising their full authority for a simple reason: When commissions lose their quorums, they may not act. The primary reason this happens is vacancies. With a few notable exceptions,[62] the Vacancies Act does not apply to members of commissions, and therefore acting officials may not fill empty seats while the commission awaits confirmation of a new member.[63] Consequently, vacancies have greater consequences for commissions than single-headed agencies.

This Part introduces the problem that quorums pose for commissions and their independence.[64] It begins by surveying the rise in quorum losses since the start of the second Trump Administration. It then describes *why* commissions lose their quorums and the consequences of quorum losses.

A. A Survey of Quorum Losses

Quorum rules have gained more attention since the start of the second Trump Administration. Table 1 lists the commissions that lacked a quorum for at least one month since the start of the Administration as of October 7, 2025. Entries with a single date indicate that the commission remained inquorate as of October 7, 2025.

61. For examples of partisan-balancing provisions, see 20 U.S.C. § 2004(b)(1)(C); 49 U.S.C. § 24302(a)(3); and 20 U.S.C. § 4703(b)(3).

62. These exceptions mostly relate to ex officio members. We discuss ex officio members more thoroughly in Part III below.

63. *See* 5 U.S.C. § 3349c.

64. For research calling into question the independence of these commissions, see, for example, Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 459 (2008); Devins & Lewis, *supra* note 17, at 1309-10; and Cass R. Sunstein & Adrian Vermeule, *Presidential Review: The President's Statutory Authority over Independent Agencies*, 109 GEO. L.J. 637, 638-40 (2021).

Table 1

Commissions Without Quorums, January-October 7, 2025

Commission	Dates Without Quorum	Immediate Cause
Defense Nuclear Facilities Safety Board	01/31/2025	Resignation[65]
Equal Employment Opportunity Commission+	01/27/2025*	Removal[66]
Export-Import Bank of the United States	01/20/2025-02/28/2025	Term Expiration[67]
Federal Communications Commission+	06/06/2025	Resignation[68]
Federal Election Commission+	04/30/2025	Resignation[69]
Federal Service Impasses Panel	01/2025	Removal[70]
Inter-American Foundation	02/24/2025*	Removal[71]

65. Press Release, Def. Nuclear Facilities Safety Bd., DNFSB Announces Loss of a Quorum and Leadership Transition (Feb. 3, 2025), https://perma.cc/B9LD-JCDR.

66. Evandro C. Gigante, Keisha-Ann G. Gray, Steven J. Pearlman & Laura M. Fant, Proskauer Rose LLP, *EEOC, Like NLRB, Lacks Quorum, Stalling Rulemaking Under New Administration*, NAT'L L. REV. (Jan. 30, 2025), https://perma.cc/ZZ2P-PZWT.

67. DANIEL F. RUNDE, CTR. FOR STRATEGIC & INT'L STUD., THE U.S. EXIM BANK IN AN AGE OF GREAT POWER COMPETITION 1 (2024), https://perma.cc/76RW-T7FL (identifying that three of the four board members then serving had terms expiring on January 20, 2025); Press Release, Exp.-Imp. Bank of the U.S., President Trump Strengthens Export-Import Bank of the United States, Supports U.S. Jobs by Establishing Board Quorum Through Acting Appointments (Feb. 28, 2025), https://perma.cc/Y4EL-MB4Y.

68. Lauren Feiner, *There Are Only Two Commissioners Left at the FCC*, VERGE (June 7, 2025, 6:00 AM PDT), https://perma.cc/6MGE-RFJN.

69. Jessica Piper, *Departure on FEC Hobbles the Election Enforcement Agency*, POLITICO (Apr. 30, 2025, 12:15 PM EDT), https://perma.cc/WB5R-SX5U.

70. *Compare The Federal Service Impasses Panel Biographies*, FLRA, https://perma.cc/US4C-VM3W (archiving the site on Jan. 27, 2025) (showing all positions filled), *with The Federal Service Impasses Panel Biographies*, FLRA, https://perma.cc/G5R5-J8L8 (archiving the site on Feb. 16, 2025) (showing all positions vacant). For a discussion on the removal of Impasses Panel members by prior administrations, see Association of Administrative Law Judges' Motion for Preliminary Injunction at 1, *Ass'n of Admin. L. Judges v. Fed. Serv. Impasses Panel*, 2021 WL 1999547 (D.D.C. May 19, 2021) (No. 20-cv-01026), ECF No. 5.

71. *See* Complaint at 2, 15-16, Aviel v. Gor, 780 F. Supp. 3d 1 (D.D.C. 2025) (No. 25-cv-00778), ECF No. 1 [hereinafter Aviel Complaint]; *see also* Aviel v. Gor, No. 25-5105, 2025 WL 1600446, at *1 (D.C. Cir. June 5, 2025) (considering the removal of the CEO).

Internal Revenue Service Oversight Board	11/2013	Term Expiration[72]
Merit Systems Protection Board	03/28/2025*	Removal[73]
National Association of Registered Agents and Brokers	01/12/2025	No Appointees Since Creation[74]
National Labor Relations Board+	03/28/2025*	Removal[75]
Occupational Safety & Health Review Commission	04/27/2023	Term Expiration[76]
Tennessee Valley Authority	04/01/2025	Removal[77]
U.S. African Development Foundation	02/24/2025*	Removal[78]
U.S. Institute of Peace	03/14/2025*	Removal[79]

Note: A plus sign (+) indicates that the commission is classified as a major commission.[80] An asterisk (*) indicates that the removal of members of the

72. *See* TREASURY INSPECTOR GEN. FOR TAX ADMIN., NO. 2016-IE-R005, SEVERAL CHANGES SOUGHT BY THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998 REMAIN A CHALLENGE 7-8 (2016), https://perma.cc/33U9-RSLD.

73. *See* Cordell, *supra* note 1 (describing that Raymond Limon's retirement left the MSPB's quorum "on a knife's edge"); Trump v. Wilcox, 145 S. Ct. 1415, 1416 (2025) (granting a stay of enforcement of an order that would have permitted fired MSPB Member Cathy Harris to retain her position, leading to a loss of quorum).

74. *National Association of Registered Agents and Brokers (NARAB)*, WHOLESALE & SPECIALTY INS. ASS'N, https://perma.cc/VYX2-NBWA (archived Feb. 25, 2026).

75. *See Wilcox*, 145 S. Ct. at 1416 (granting a stay of enforcement of an order that would have also permitted NLRB Member Gwynne Wilcox to retain her position, leading to a loss of quorum).

76. *See* John D. Surma, *New Challenges Loom for OSHA and OSHRC amid Quorum Issues, Potential ALJ Removals, and Recent Supreme Court Jurisprudence*, OGLETREE DEAKINS (Feb. 26, 2025), https://perma.cc/ANY2-RWV4.

77. Tennessee Valley Authority, Quarterly Report (Form 10-Q), at 59 (July 28, 2025), https://perma.cc/WV45-SU3F.

78. Brehm v. Marocco, 786 F. Supp. 3d 179, 181-82 (D.D.C. 2025).

79. U.S. Inst. of Peace v. Jackson, 783 F. Supp. 3d 316, 331 (D.D.C. 2025).

80. Throughout, we use the definition of "major" commission offered by Devins and Lewis, which they adopted from the National Science Foundation's *Independent Regulatory Commissioner Data Base*. *See* Devins & Lewis, *supra* note 17, at 1325-26 (citing THE INDEP. REGUL. COMM'R DATA BASE, https://perma.cc/W65Y-AYDW (archived Feb. 26, 2026)). Devins and Lewis's definition includes the following major commissions: (1) the Board of Governors of the Federal Reserve, (2) the Commodity Futures Trading Commission, (3) the CPSC, (4) the EEOC, (5) the FCC, (6) the FEC, (7) FERC, (8) the FTC, (9) the NLRB, (10) the National Transportation Safety Board, (11) the Nuclear Regulatory Commission, and (12) the Securities and Exchange Commission. Devins & Lewis, *supra* note 17, at 1325, 1327 tbl.1.

commission has been subject to litigation.[81] The presence of a quorum has fluctuated depending on the current state of litigation.

Fifteen commissions appear in Table 1. They are not insignificant. Four major commissions—the EEOC, FCC, FEC, and NLRB—have lost their quorums, leaving sizeable portions of election law,[82] labor and employment law,[83] telecommunications law,[84] and nuclear safety[85] hampered in both enforcement and execution.

Yet these problems are not new. Three other commissions have lacked a quorum across multiple presidential administrations.[86] Of those, one has *never* had the appointees needed to form a quorum,[87] and another has lacked a quorum

81. For the complaints in these lawsuits, see Complaint for Declaratory and Injunctive Relief at 1, Samuels v. Trump, No. 25-cv-01069 (D.D.C. Apr. 9, 2025), ECF No. 1 (the EEOC); Complaint for Declaratory and Injunctive Relief at 1, Wilcox v. Trump, 775 F. Supp. 3d 215 (D.D.C. 2025) (No. 25-cv-00334), ECF No. 1 (the NLRB); Complaint for Declaratory and Injunctive Relief at 2, Harris v. Bessent, 775 F. Supp. 3d 164 (D.D.C. 2025) (No. 25-cv-00412), ECF No. 1 (the MSPB); Aviel Complaint, *supra* note 71, at 2, (Inter-American Foundation); Complaint for Declaratory and Injunctive Relief at 2-3, Brehm v. Marocco, 786 F. Supp. 3d 179 (D.D.C. 2025) (No. 25-cv-00660), 2025 WL 724572 (the U.S. African Development Foundation); and Complaint for Declaratory and Injunctive Relief at 3, U.S. Inst. of Peace v. Jackson, 783 F. Supp. 3d 316 (D.D.C. 2025) (No. 25-cv-00804), 2025 WL 863072 [hereinafter U.S. Inst. of Peace Complaint] (the U.S. Institute of Peace).

82. *See* Piper, *supra* note 69 ("The [FEC] is paralyzed without a quorum and cannot vote on things like the outcomes of investigations, citing committees for campaign finance violations, and issuing advisory opinions or guidance for campaigns.").

83. *See* Bednar, *supra* note 5 (describing how an inquorate MSPB leaves fired federal employees in "limbo").

84. *See* Randy J. Stine, *Without a Quorum, Major FCC Actions Are Likely Delayed*, RADIOWORLD (June 10, 2025), https://perma.cc/H7FV-CGWU (stating that "big decisions, rulemaking proceedings and approvals of larger mergers and acquisitions likely will be on hold" while the FCC lacks a quorum).

85. U.S. GOV'T ACCOUNTABILITY OFF., GAO-25-107948, DEFENSE NUCLEAR FACILITIES SAFETY BOARD: OPPORTUNITIES EXIST TO FURTHER IMPROVE MANAGEMENT AND PLANNING 13 (2025), https://perma.cc/K24B-9UF3 ("DNFSB officials told us that functioning without a quorum poses some programmatic risk to DNFSB's ability to execute its mission. After operating without a quorum for 1 year, the agency would essentially be able to offer only non-binding advice to DOE, according to DNFSB's enabling statute. Officials said that technical staff would continue their work, but the Board would not be able to issue recommendations to DOE or hold hearings.").

86. *See supra* Table 1 (listing the Occupational Safety & Health Review Commission, the National Association of Registered Agent and Brokers, and the Internal Revenue Service Oversight Board as lacking quorums before January 20, 2025).

87. *See Questions and Answers: Implementation of National Association of Registered Agents and Brokers (NARAB)*, WHOLESALE & SPECIALTY INS. ASS'N, https://perma.cc/2YXV-3CXM (archived Feb. 26, 2026) ("Prior to the end of his administration, President Obama nominated 10 of the 13 NARAB Board of Director positions; however, the Senate Banking Committee did not act on the nominations prior to the end of the 114th Congress and the nominations eventually died. Neither President Trump in his first

footnote continued on next page

for over a decade.[88] To some degree, Table 1 obscures the frequency with which some of these commissions lose their quorums. The recent loss of the quorum at the MSPB follows another five-year period in which the Commission lacked *any* board members.[89]

Table 1 also obscures the nuances inherent in quorum and voting rules. Vacancies do not impact commissions equally. Congress and commissions have adopted various structures designed to prevent commissions from losing their quorums. For example, in May 2025, President Trump removed three of the five members of the CPSC,[90] which requires a simple majority of statutorily authorized members (three) to form a quorum.[91] Congress, however, enacted a provision allowing the CPSC to temporarily operate without a quorum due to a cycle of the Commission losing its quorum over a period of several years.[92] Variation in quorum rules raises questions about which rules are most likely to render commissions dysfunctional.

In many instances, however, commissions have taken matters into their own hands. The National Credit Union Administration (NCUA) issued a statement interpreting its statute as permitting a single member to act as a quorum after President Trump removed all but one member.[93] Other agencies have amended their quorum rules in anticipation of vacancies that may result in the loss of quorum. For example, in 2017, the Board of Governors for the Federal Reserve relaxed its quorum rules because it had recently experienced prolonged periods of numerous vacancies.[94]

In sum, quorum loss is neither rare nor confined to marginal institutions. Persistent vacancies, uneven statutory rules, and agency workarounds reveal a

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term nor President Biden sent nominations to the Senate Banking Committee during their terms.").

88. BRYAN HICKMAN & PETE SEPP, NAT'L TAXPAYERS UNION FOUND., SHAPING A FUTURE OF FAIRNESS: PROPOSALS TO SAFEGUARD AND STRENGTHEN TAXPAYER RIGHTS 7 (2024), https://perma.cc/S8UP-DKKZ ("In 1998, the IRS Restructuring and Reform Act established the IRS Oversight Board to provide expert guidance in overseeing the IRS, but it has been suspended since 2015 due to lack of quorum.").

89. *See supra* notes 1-8 and accompanying text.

90. Bardia Sergent, *Recent Developments at the Consumer Product Safety Commission: Potential Changes and Implications*, GREENBERG TRAURIG (June 18, 2025), https://perma.cc/Y6LY-XLGL.

91. *See* 15 U.S.C. § 2053(d).

92. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 202(a), 122 Stat. 3016, 3039 (codified as amended at 15 U.S.C. § 2053 note); S. REP. NO. 110-265, at 12, 28 (2008), https://perma.cc/CQ4Z-QT3U.

93. *NCUA Releases Staff Message on the Current NCUA Board*, NAT'L CREDIT UNION ADMIN. (Apr. 18, 2025), https://perma.cc/Y2S2-7R7X ("It is the NCUA's long-held view that a single Board Member constitutes a quorum when there are no other Board Members.").

94. *See* Rules of Organization, 82 Fed. Reg. 55496, 55496 (Nov. 22, 2017) (to be codified at 12 C.F.R. pt. 265).

structural challenge in the design of multimember commissions. Quorum loss is not an occasional inconvenience, but a recurring governance problem that implicates congressional design, the presidential removal power, and administrative law doctrine.

B. Why Commissions Lose Their Quorums

Commissions become inquorate in two ways: recusals and vacancies. In some instances, sitting commissioners may fail to attend meetings or vote on agenda items. For example, prior to 2005, the FTC's quorum rule required the presence of three of five members to transact business.[95] Frequent recusals by the then-Chairperson caused the Commission to lower its quorum rule to require only "[a] majority of the members of the Commission in office and not recused from participating in a matter."[96] Commissioners may also exploit quorum rules to prevent the commission from adopting policies that conflict with their preferences.[97] For example, rumors during the first Trump Administration suggested that the lone Democratic appointee of the FCC would resign to frustrate the agency's efforts to repeal its net-neutrality regulations.[98] Absent resignation, however, recusals only result in quorum losses for individual actions. Vacancies are the more common way in which commissions lose their quorums for an extended period of time.

1. The expiration of fixed terms

Most organic statutes impose fixed terms of years on commissioners. The consequences of expired terms vary across commissions. Some statutes require commissioners with expired terms to vacate office immediately.[99] Others contain "holdover" provisions that allow such commissioners to serve for additional periods of time, or until their successors are nominated and confirmed.[100] But even when statutes permit commissioners to remain in office

95. 16 C.F.R. § 4.14 (2004).

96. Quorums, 70 Fed. Reg. 53296, 53297 (Sept. 8, 2005) (to be codified at 16 C.F.R. pt. 4); *see* ALM Staff, *FTC Recusals Create Complications*, LAW.COM (Oct. 4, 2005, 12:00 AM), https://perma.cc/3A6N-LWNT.

97. *Cf.* Peverill Squire, *Quorum Exploitation in the American Legislative Experience*, 27 STUD. AM. POL. DEV. 142, 148-49 (2013) (explaining how members of Congress have exploited quorum rules to avoid voting on controversial topics).

98. *See FCC Quorum Politics*, POLITICO (May 30, 2017), https://perma.cc/E8VQ-A97W.

99. *See, e.g.*, 29 U.S.C. § 153 (lacking holdover language for NLRB members).

100. *See, e.g.*, 7 U.S.C. § 2(a)(2) (providing that a Commodity Futures Trading Commission commissioner serves "for a term of five years and until his successor is appointed and has qualified, except that he shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office"). Some statutes do not place a limitation on how long an official can serve in a holdover capacity.
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beyond the expiration of their terms, some members choose to resign immediately.[101] Although the expiration of a commissioner's term is one way that vacancies emerge on commissions, commissioners have begun leaving their positions earlier than the full length of their terms.[102]

2. Resignations

Resignations, which frequently reflect political tides, can also result in vacancies. Members of independent agencies often resign from commissions as a matter of custom following the election of a President of the opposing party.[103] Other members may resign for various reasons. In the first several months of 2025, for example, the Commodity Futures Trading Commission (CFTC) dropped from a full five members to a single member after four commissioners resigned in quick succession.[104] It appears that the former chairman preferred not serving over serving as an associate commissioner,[105] two Democratic

See, e.g., 12 U.S.C. § 1812(c)(3) (providing that Federal Deposit Insurance Corporation members "may continue to serve after the expiration of the term of office to which such member was appointed until a successor has been appointed and qualified").

101. For example, Raymond Limon of the MSPB resigned following the expiration of his term even though the Civil Service Reform Act of 1978 would have allowed him to remain in office for an additional year. *See* Cordell, *supra* note 1; 5 U.S.C. § 1202(b)-(c) (allowing a one-year holdover for MSPB commissioners).

102. *See* Brian D. Feinstein & David Zaring, *Disappearing Commissioners*, 109 IOWA L. REV. 1041, 1061-67 (2024) (illustrating that the length of service for associate commissioners has declined over time).

103. Datla & Revesz, *supra* note 58, at 821 & n.293.

104. We note, however, that the CFTC's rules theoretically permit it to operate with a single member. *See* 17 C.F.R. § 200.41 (2025) ("A quorum of the Commission shall consist of three members; provided, however, that if the number of Commissioners in office is less than three, a quorum shall consist of the number of members in office . . . .").

105. *See Chairman Rostin Behnam Announces Departure from CFTC*, COMMODITY FUTURES TRADING COMM'N (Jan. 7, 2025), https://perma.cc/X24S-6PS5. When the President designates a new chair of the CFTC, the individual continues as a Commissioner for the remainder of the underlying statutory term. *See* 7 U.S.C. § 2(a)(2)(B) ("At any time, the President may appoint, by and with the advice and consent of the Senate, a different Chairman, and the Commissioner previously appointed as Chairman may complete that Commissioner's term as a Commissioner.").

commissioners preferred academia over serving in the minority,[106] and one Republican commissioner preferred lobbying over serving in the majority.[107]

3. Removals

The President may cause commissions to lose their quorums by removing members. Some statutes allow the President to remove commissioners at will, while others permit removal only for inefficiency, neglect, or malfeasance.[108] Historically, the Supreme Court has upheld these removal protections. In *Humphrey's Executor v. United States*, the Supreme Court held that Congress could protect FTC commissioners from removal because they exercise "quasi legislative or quasi judicial powers."[109] Likewise, in *Wiener v. United States*, the Court held that the President could not remove a commissioner of an adjudicatory commission because "no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it."[110]

Recent Supreme Court precedent has chipped away at this longstanding precedent. In *Free Enterprise Fund v. PCAOB*, the Court stated that "the Constitution has been understood to empower the President to keep [principal] officers accountable—by removing them from office, if necessary."[111] The Court expanded upon this principle in *Seila Law v. CFPB*, holding that the President must have the authority to remove any head of a single-director agency that wields "substantial executive power."[112] Still, it carefully affirmed *Humphrey's Executor*'s central holding that Congress may "give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that perform[s] legislative and judicial functions and [i]s said not to exercise any

106. *See Statement of Commissioner Kristin N. Johnson on Her Departure from the CFTC*, COMMODITY FUTURES TRADING COMM'N (May 21, 2025), https://perma.cc/3X9J-LCUJ; *Commissioner Christy Goldsmith Romero Announces Departure from CFTC*, COMMODITY FUTURES TRADING COMM'N (May 16, 2025), https://perma.cc/C2MM-KL2Y; Jessica Corso, *CFTC May Be Hobbled as Another Member Announces Exit*, LAW360 (May 16. 2025, 9:48 PM EDT), https://perma.cc/8V78-N54P ("Goldsmith Romero told Law360 Friday that she will be joining the faculty at Georgetown University Law Center.").

107. *See* Hannah Lang, *CFTC Commissioner to Join Blockchain Association as CEO*, REUTERS (May 14, 2025, 3:25 PM PDT), https://perma.cc/6J4Q-PC4E.

108. *Compare* 5 U.S.C. § 7119(c)(3) ("Any member of the Panel may be removed by the President."), *with* 29 U.S.C. § 153(a) ("Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.").

109. 295 U.S. 602, 628 (1935).

110. 357 U.S. 349, 356 (1958).

111. 561 U.S. 477, 483 (2010).

112. 140 S. Ct. 2183, 2199-2200 (2020).

executive power."[113] Following President Trump's decision to remove officials at the MPSB, NLRB, and FTC, however, the Court began to suggest that the removal protections for these commissions unconstitutionally interfered with the President's removal power.[114] The Court's decisions suggest that *Humphrey's Executor* may be on its last legs.

The President has two different incentives to remove commissioners. When a commission's membership leans in favor of the opposite party, the President may create vacancies to appoint commissioners from their party. Alternatively, when the President fundamentally disagrees with the policies implemented by the commission, they may remove commissioners for the express purpose of destroying the quorum and perhaps the agency itself. Indeed, President Trump has removed the Commissioners of the African Development Foundation, the Inter-American Foundation, and the Institute of Peace pursuant to his plan to eliminate these agencies.[115] As we discuss in Part IV below, the ability of the President to destroy quorums prevents commissions from executing the laws enacted by Congress.

4. Nomination and confirmation delays

For most commissions, the absence of a quorum will persist until the President nominates and the Senate confirms enough commissioners to fill these vacancies. On average, presidents take longer to nominate individuals to commissions compared to single-headed agencies.[116] In some cases, this may be because they have strategic incentives to leave positions vacant.[117] A President who ideologically opposes the mission of a particular commission may decide not to nominate commissioners, depriving the commission of the quorum needed to operate. During his first term, President Trump vowed to eliminate

113. *Id.* at 2199.

114. Trump v. Wilcox, 145 S. Ct. 1415, 1416 (2025) ("Because the Constitution vests the executive power in the President, he may remove without cause executive officers who exercise that power on his behalf, subject to narrow exceptions recognized by our precedents." (citation omitted)); Trump v. Slaughter, Nos. 25-332 & 25A264, 2025 WL 2692050 (U.S. Sept. 22, 2025) (mem.) (directing the parties to brief and argue whether *Humphrey's Executor* should be overruled).

115. *See* Aviel Complaint, *supra* note 71, at 2 (alleging that the Trump Administration removed Inter-American Foundation board members and installed someone who is in the process of "destroy[ing]" the agency); Brehm Complaint, *supra* note 81, at 2-3 (same for the U.S. African Development Foundation); U.S. Inst. of Peace Complaint, *supra* note 81, at 3 (same for the U.S. Institute of Peace).

116. *See* Nicholas R. Bednar & David E. Lewis, *Presidential Investment in the Administrative State*, 118 AM. POL. SCI. REV. 442, 449 tbl.2 (2024) (presenting statistical results showing that commissions are far less likely to receive nominations compared to other agencies).

117. Christina M. Kinane, *Control Without Confirmation: The Politics of Vacancies in Presidential Appointments*, 115 AM. POL. SCI. REV. 599, 612 (2021).

the Chemical Safety and Hazard Investigation Board and therefore refused to appoint commissioners and restore its quorum.[118]

Even when the President has chosen a nominee, confirmation delays can prevent the restoration of a quorum. Confirmation delays have increased exponentially over the last century,[119] and nominations to commissions have much higher failure rates compared to those of other agencies.[120] Toward the end of President Obama's second term, the Senate stopped confirming many of his nominees.[121] As terms expired and commissioners retired, more commissions became at risk of losing their quorums.

Theoretically, the President could use recess appointments to fill commissions temporarily.[122] But two legal and political limitations reduce the likelihood that a quorum could be meaningfully restored through recess appointments. First, the U.S. Constitution does not permit commissioners serving recess appointments to remain in office after the expiration of the subsequent session of Congress.[123] In one instance, the NLRB lost its quorum for over two years after two recess appointments expired.[124] Second, the Senate has not permitted recess appointments since 2012.[125] Consequently, the possibility of recess appointments provides little relief for commissions suffering from the loss of a quorum.

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118. Alexia Fernández Campbell, *A Small Federal Agency Focused on Preventing Industrial Disasters Is on Life Support. Trump Wants It Gone.*, CTR. FOR PUB. INTEGRITY (July 28, 2020), https://perma.cc/K3PP-VKAA.

119. *See* Devins & Lewis, *supra* note 64, at 474 fig.4.

120. *See* Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645, 1652 (2015).

121. *See* Seung Min Kim & Burgess Everett, *Angry GOP Senate Freezes out Obama Nominees*, POLITICO (Oct. 14, 2015, 5:06 AM EDT), https://perma.cc/7GW7-BKVC.

122. *See* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1490 (2005) (explaining that the modern understanding of presidential power encompasses the ability to make recess appointments to "*any* office").

123. U.S. CONST. art. II, § 2, cl. 3.

124. *See* New Process Steel, L.P. v. NLRB, 560 U.S. 674, 676-78 (2010) (describing the events).

125. HENRY B. HOGUE, CONG. RSCH. SERV., R42329, RECESS APPOINTMENTS MADE BY PRESIDENT BARACK OBAMA 14-15 (2017), https://perma.cc/WV5R-MRQQ; Eugenia E. Pierson, Kevin O'Neill, Janice Bashford, Sonja Nesbit & Mickayla A. Stogsdill, *What Are Recess Appointments, and Will President-Elect Trump Bring Them Back?*, ARNOLD & PORTER (Nov. 20, 2024), https://perma.cc/26LJ-MVR9 ("Since the Supreme Court's 2014 *Noel Canning v. NLRB* decision, the Senate's strategic use of pro forma sessions have blocked Presidents Barack Obama, Donald Trump, and Joe Biden from the conditions needed to make recess appointments." (footnote omitted)).

C. Consequences of Vacancies and Quorum Losses

Vacancies affect all agencies—not just commissions.[126] They may cause inaction, confusion among civil servants, decreased legitimacy, and poor performance.[127] At the same time, vacancies may present an opportunity for the President to select more competent and better qualified appointees.[128] Overall, however, scholars view the costs of vacancies as likely outweighing any potential benefits.[129] These costs are exacerbated in the context of commissions, though the degree to which individual commissions are affected by vacancies depends on whether they possess protective structures that allow them to act without a quorum.[130]

1. Agency inaction

First and foremost, the loss of a quorum causes inaction. The absence of a quorum prevents most commissions from transacting business. Inquorate commissions cannot promulgate regulations, bring enforcement actions, or adjudicate disputes. Because the Vacancies Act does not apply to most commissioners, the President may not appoint an acting official to ensure that the commission remains capable of exercising its full authority.[131]

Organic statutes generally assign the authority to promulgate regulations to the commission as a whole and require the vote of a quorum to proceed with the regulation.[132] In many cases, commissions are prohibited from delegating their rulemaking authority to officers or staff.[133] For example, the National Indian Gaming Commission (NIGC) may not delegate its authority to adopt

126. *See* O'Connell, *supra* note 53, at 935-50; Piper & Lewis, *supra* note 53, at 324 tbl.2; Richardson et al., *supra* note 53, at 693.

127. O'Connell, *supra* note 53, at 986-87.

128. *Id.* at 946-47.

129. *See, e.g.*, *id.* at 951.

130. *See infra* Part III.B.

131. *See* 5 U.S.C. § 3349c(1) (specifying that the Vacancies Act does not apply to "any member who is appointed by the President . . . to any board, commission, or similar entity that (A) is composed of multiple members; and (B) governs an independent establishment or Government corporation").

132. *See, e.g.*, 52 U.S.C. § 30106(c) (requiring an affirmative majority vote of the members of the FEC in order to promulgate a regulation).

133. *See, e.g.*, *id.* (prohibiting FEC members from delegating their votes on rulemaking matters).

regulations or establish rates for gaming.[134] Accordingly, quorum losses ossify rulemaking by stymieing the promulgation of new rules.[135]

Quorums also affect adjudication and the ability of individuals to seek judicial review in the federal courts. Individuals appearing before adjudicatory commissions typically must exhaust all administrative remedies before seeking judicial review.[136] During an inquorate period, administrative law judges and administrative judges may continue to issue initial decisions, but if commissions themselves are required to approve the initial decision before it can be reviewed in federal court and the commissions are inquorate, litigants may wait years before receiving relief from either the agency or federal court.[137] From January 2017 to March 2022, for example, the MSPB's lack of a quorum produced a backlog of 3,800 cases, leaving federal employees waiting years for justice.[138]

2. Reliance on subdelegated authority

The absence of commissioners does not necessarily bring all commission activities to a standstill; many commissions employ hundreds of employees who remain during the absence of a quorum.[139] In many cases, commissions have delegated authority to staff to exercise the powers of the commission, including during inquorate periods.[140] The Supreme Court has suggested that these delegations remain valid so long as they were made before the commission lost its quorum.[141]

Subdelegations may raise a variety of normative concerns. First, absent an express prohibition in the commission's organic statute, civil servants may make substantive policy, adjudicatory, or enforcement decisions without meaningful oversight from political appointees, potentially reducing democratic responsiveness.[142] Second, commissioners sometimes delegate

134. 25 U.S.C. § 2706(a)(2)-(3).

135. For a broad discussion of ossification in the rulemaking context, see generally Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387-96 (1992); and Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to* Testing the Ossification Thesis, 80 GEO. WASH. L. REV. 1493, 1494 (2012).

136. *See infra* Part IV.B (explaining exhaustion and channeling).

137. *See infra* Part IV.B (discussing these consequences).

138. U.S. Merit Sys. Prot. Bd., *supra* note 4, at 1-2.

139. *Cf.* Nicholas Ryan Bednar, *Bureaucratic Autonomy and the Policymaking Capacity of United States Agencies, 1998-2021*, 12 POL. SCI. RSCH. & METHODS 652, 658 fig.1 (2024) (illustrating level of employment within large independent commissions).

140. *See* Brian D. Feinstein & Jennifer Nou, *Submerged Independent Agencies*, 171 U. PA. L. REV. 945, 949 (2023).

141. *See* New Process Steel, L.P. v. NLRB, 560 U.S. 674, 684 n.4 (2010) (explaining that commissions' "prior delegations of authority to nongroup members" may remain even when the commission itself is inquorate).

142. *See* Feinstein & Nou, *supra* note 140, at 949-52, 1010.

authority through less transparent means, placing subdelegations in informal guidance documents like staff manuals or internal records.[143] The lack of transparency makes it difficult for Congress to conduct oversight and for the public to know which powers are retained by an inquorate commission. Finally, ambiguous delegations can create uncertainty for staff about what powers remain available and what functions should continue during an inquorate period.

3. Undermined accountability

Vacancies undermine democratic accountability and legitimacy in two ways. First, they sever the connection between the commission and the public. In all agencies, accountability comes from the selection of leaders by democratically elected figures.[144] When protective structures permit a commission's officers and employees to exercise its authority without a quorum, the commission loses its primary source of democratic accountability. The continued operation of an agency without politically appointed leadership raises questions about the degree to which agency operations comport with the will of the people.

Second, Congress ostensibly designed commissions to *enhance* legitimacy by structuring these commissions in ways that require a diverse membership and ensure that relevant stakeholders have a say in commission decisionmaking.[145] Vacancies in these positions deprive the remaining commissioners of the viewpoint diversity that Congress has sought to enshrine within commissions.

4. Potential benefits of vacancies

Vacancies may represent opportunities to improve commission governance, but these opportunities present serious tradeoffs. In theory, the President could use extended vacancies to identify experienced and competent leaders to reinvigorate commissions and improve their performance.[146] But commissions often present unique political difficulties compared to single-headed agencies. The Senate confirmation process has often required the President to nominate multiple commissioners in "batches" because opposition-party Senators tend to withhold support for the President's nominees until the President nominates a party loyalist to an opposition-party position.[147] Perhaps to balance out these opposition-party commissioners, presidents tend to focus

143. *See id.* at 980.

144. *See* Christopher Li, *Indirect Accountability of Political Appointees*, 33 J. THEORETICAL POL. 383, 384 (2021).

145. *See infra* Part III.C.

146. O'Connell, *supra* note 53, at 946-47.

147. Devins & Lewis, *supra* note 64, at 489-90 (describing the drivers of batching).

more on loyalty (and less on competency and experience) when appointing officials to commission positions reserved for their party than when appointing officials to single-headed agencies.[148] Consequently, the empirical literature suggests that presidents do not meaningfully use vacancies as an opportunity to improve performance, but rather as an opportunity to increase their control over the commission.

In theory, the absence of a quorum may also result in more expert-driven policy outcomes through one of two mechanisms. First, empirical evidence shows that political appointees are less effective managers of agencies than career civil servants.[149] Yet even if career employees exhibit greater competence than appointed commissioners, they often lack the legal authority needed to take major actions.[150] Accordingly, extended periods of inaction may exacerbate existing policy problems or cause new ones.

Second, the absence of a quorum may protect the deliberative process by ensuring that any remaining commissioners do not take actions that would otherwise represent minority views. In other words, an inquorate commission unable to act may be more desirable than an active, partially constituted commission with homogeneous views. Actions taken by inquorate commissions are less likely to embody the deliberative balance and diversity of viewpoint that the multimember structure was designed to promote.

We acknowledge that vacancies may also serve political ends. Anne Joseph O'Connell has argued that "vacancies may foster symbolic inaction that generates political benefits," noting that "when President Reagan left vacancies at more liberal agencies, he generated support from his conservative base."[151] We assume, however, that Congress—and the Constitution—intended for agencies to faithfully execute its laws and policies. Accordingly, we dismiss the fact that the incumbent administration may receive *political* benefits as irrelevant to our analysis. Overall, we conclude that vacancies and quorum losses pose a threat to the system of governance envisioned by the Congress that enacted the organic statute.

II. The Common Law of Quorums

For centuries, multimember institutions have needed to balance vacancies and absenteeism with the value of collective decisionmaking. Litigants have

148. *See* George A. Krause & Anne Joseph O'Connell, *Loyalty-Competence Trade-Offs for Top U.S. Federal Bureaucratic Leaders in the Administrative Presidency Era*, 49 PRESIDENTIAL STUD. Q. 527, 542 (2019) (empirically illustrating the preference for loyalty for same-party appointees to commissions).

149. *See* David E. Lewis, *Testing Pendleton's Premise: Do Political Appointees Make Worse Bureaucrats?*, 69 J. POL. 1073, 1086 (2007).

150. *See supra* notes 131-41 and accompanying text.

151. O'Connell, *supra* note 53, at 949 (footnotes omitted).

challenged actions taken by inquorate institutions, prompting courts to develop a common law of quorums. This common law developed in multiple contexts, including courts, legislatures, municipalities, and private corporations. Courts have occasionally—but not always—applied common-law rules to commissions. Inconsistent application of common law to multimember agencies has made it difficult to assess what quorum and voting rules apply in the wake of statutory and regulatory silence.

A. The Goals of Quorums

Quorum rules determine what portion of the institution's membership must be present in order to make decisions. The Latin word *quorum* means "of whom" and traces its usage to the commissions granted to justices of the peace by the King of England.[152] The determination of felonies required the presence of at least two or more justices, one of whom was required to be a "justice[] of the quorum."[153] The commission of the justices read, "We have assigned you, and every two or more of you, *quorum aliquem vestrum*, A, B, C, D, etc., *unum esse volumus*,—i.e., *of whom* we will that any of you, A, B or C, etc., shall be one."[154] Effectively, the commission made it necessary that certain named individuals be present when hearing and deciding cases. Today, an institution's quorum rules could require a small fraction of the members,[155] a majority of members, all members, or some other number.

Understanding the problems that quorum requirements seek to resolve requires first understanding the principle of majority decisionmaking.[156] This ancient principle holds that a body should not be ruled by its minority.[157] In John Locke's *Second Treatise of Government*, he explains that when individuals

152. *Quorum*, MERRIAM-WEBSTER, https://perma.cc/5ZKG-NHWD (archived Feb. 26, 2026); 1 WILLIAM BLACKSTONE, COMMENTARIES *352.

153. *Id.*

154. LUTHER S. CUSHING, MANUAL OF PARLIAMENTARY PRACTICE: RULES OF PROCEEDING AND DEBATE IN DELIBERATIVE ASSEMBLIES 21 (1914); *see also* Jack L. Landau, *On Legislative Quorum Requirements and Efforts to Enforce Them: Oregon's Ballot Measure 113*, 60 WILLAMETTE L. REV. 1, 3 (2023) (explaining that this language could mean something akin to "justices of the peace, *of whom* four shall be required to constitute a legally sufficient bench").

155. For example, 40 out of 650 seats constitutes a quorum for the U.K. House of Commons. *See* ERSKINE MAY'S TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT ¶ 20.59 (David Natzler & Mark Hutton eds., 25th ed. 2019), https://perma.cc/S7AS-MUXS (archived Feb. 27, 2026); *House of Commons*, U.K. PARLIAMENT, https://perma.cc/DB8T-6STY (archived Feb. 27, 2026).

156. *See* HANNAH ARENDT, ON REVOLUTION 164 (1963) (describing the difference between majority decision and majority rule).

157. *See* John Gilbert Heinberg, *History of the Majority Principle*, 20 AM. POL. SCI. REV. 52, 55 (1926) ("The members of the Peloponnesian League had an agreement to decide according to the majority principle.").

"have so consented to make one community or government," they have consented to a system whereby "the majority have a right to act and conclude the rest."[158] Democratic theorists often view decisions arrived at through majority decisionmaking as more "correct" and more representative of the governed.[159]

Majoritarian institutions must balance three risks to collective decisionmaking: countermajoritarian errors, deliberative errors, and absenteeism. When an institution acts despite a high number of absent members, it risks a countermajoritarian error, wherein its decision conflicts with the preferences of a majority of its members.[160] Consider a five-member commission. Suppose three members favor Option A and two members prefer Option B. If all members attend a vote, Option A wins. But if only the two supporters of Option B and one supporter of Option A attend, Option B prevails—even though most members favor Option A. In this way, absences can allow a minority to impose its preferences on the majority, which raises concerns of legitimacy.

An institution that acts despite a high number of absent members may also produce a deliberative error, wherein the ultimate decision reflects a homogeneous set of preferences rather than a compromise of diverse preferences.[161] A heterogeneous body is more likely to produce less polarized and more pluralistic compromises when deliberation includes the different perspectives brought by the membership.[162] This is particularly true in institutions that select members based on diversity of thought or experiences. For example, the Architectural and Transportation Barriers Compliance Board—a multimember commission that develops accessibility standards for compliance with the Americans with Disabilities Act—requires the President to

158. JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 95 (C. B. Macpherson ed. 1980) (1690) (emphasis omitted).

159. *See* Mathias Risse, *Arguing for Majority Rule*, 12 J. POL. PHIL. 41, 44-45 (2004). For additional arguments about majority decisionmaking, see generally JEREMY WALDRON, THE DIGNITY OF LEGISLATION 124-26 (1999).

160. John Bryan Williams, *How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress*, 48 WM. & MARY L. REV. 1025, 1032-33 (2006). This is roughly equivalent to Adrian Vermeule's "outcome error," defined as "any difference between the outcomes that the legislature would produce with full attendance and the outcomes it would produce with a bare quorum present." Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 404 (2004) (emphasis omitted).

161. Vermeule, *supra* note 160, at 404-05.

162. *See* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 109 (2000) (explaining that heterogeneity can "ensure that when [policy] shifts are occurring, it is not because of arbitrary or illegitimate constraints on the available range of arguments").

fill seven of its twenty-five positions with individuals with disabilities.[163] The absence of these seven members may result in decisions that fail to consider the perspectives of individuals with disabilities.

Although requiring unanimous attendance prevents countermajoritarian and deliberative errors, such a requirement may also impose costs. As the size of a body increases, it becomes increasingly likely that at least one member will be absent at any given time due to illness, recusal, travel, or other circumstances. If quorum rules require full attendance, the body may be rendered incapable of action. Relatedly, unanimous attendance requirements may produce countermajoritarian errors by allowing a minority of members to prevent the commission from acting. If our hypothetical five-member institution required the presence of all members, the two members in the minority could prevent the majority from exercising their will by refusing to attend certain meetings.

Quorum rules exist to balance the risks of decisional errors against the risks of dysfunction. They minimize decisional errors by ensuring that a sufficiently large portion of the membership participates in decisionmaking while nevertheless allowing the institution to transact business despite some absences.[164]

B. Common-Law Default Rules

Because courts have frequently been asked to adjudicate disputes when deliberative bodies' quorum rules are absent or ambiguous, they have developed common-law defaults regarding how many members constitute a quorum, how quorums account for vacancies, what voting rules are, and who decides the rules. This Subpart reviews the treatment of these questions.

1. How many members constitute a quorum?

Under common-law principles, a deliberative body has a quorum and may transact business when a simple majority of members is present.[165] Take, for example, the 1886 case *Heiskell v. Mayor of Baltimore*.[166] The Maryland General Assembly repealed a statutory provision defining a quorum of the Baltimore

163. 29 U.S.C. § 792(a)(1)(A) ("Thirteen members shall be appointed by the President from among members of the general public of whom at least a majority shall be individuals with disabilities.").

164. Landau, *supra* note 154, at 3-4.

165. United States v. Ballin, 144 U.S. 1, 6 (1892) ("[T]he general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body."); 2 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 9:9 (West 2024) ("A majority of the entire board of directors constitutes a quorum for the purpose of transacting business unless a greater or lesser number is required by statute, the corporation's charter, or its bylaws." (footnotes omitted)).

166. 4 A. 116 (Md. 1886).

City Council as two-thirds of its members.[167] When an act of the Council was challenged on the grounds that two-thirds of the members were not present, the Court of Appeals of Maryland explained that when "the statute law creating [an entity] is silent as to what shall constitute a legal assembly, the common law . . . is well settled that the majority of the members-elect shall constitute the legal body."[168] To ensure that majorities cannot be strategically assembled to abuse an absent minority, common-law principles also require members to be given notice of meetings and hearings.[169]

Proposals for smaller quorums have often fared poorly. Today, the Constitution provides that a "Majority of each [chamber of Congress] shall constitute a Quorum to do Business."[170] During the debates at the Constitutional Convention in 1787, some delegates called for a lower-than-majority quorum on the grounds that, if a majority were required to act, "great delay might happen in business" as it could be difficult for members to arrive due to constraints on travel.[171] Others convincingly explained that it "would be dangerous to the distant parts to allow a small number of members . . . to make laws" just because they were closer to the seat of government.[172] Nevertheless, *Robert's Rules of Order*, which is "designed as a manual to be adopted by organizations or assemblies as their parliamentary authority," acknowledges a "relatively small quorum" may be required in order for some bodies to effectively conduct business, and therefore the quorum "should be as large a number of members as can reasonably be depended on to be present at any meeting."[173]

The majority quorum serves the goals of collective decisionmaking well. It allows members opportunities to persuade their colleagues and enables majorities to impose their will. Moreover, a majority quorum "represents a balance between the ease of decision making and the need for representation and legitimacy."[174] Countermajoritarian and deliberative errors are less likely to

167. *Id.* at 118.

168. *Id.* at 119 (emphasis omitted).

169. *See* 59 AM. JUR. 2D *Parliamentary Law* § 13 (West 2025) ("It is generally necessary that there be a duly noticed meeting or hearing, attended by a quorum of qualified voters, that a question be put to the meeting in an orderly fashion, and that a vote be taken and recorded for or against the proposition, showing whether or not it has been carried by the requisite majority.").

170. U.S. CONST. art. I, § 5, cl. 1.

171. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 251 (Max Farrand ed., 1911).

172. *Id.* at 251-52.

173. HENRY M. ROBERT, ROBERT'S RULES OF ORDER, at xxv, 340-41 (Sarah Corbin Robert ed., 9th ed. 1990) (1876). In one survey, researchers found that a majority (81%) of the most populated cities in Wisconsin use *Robert's Rules*. Daniel Foth, *Getting to Good Meetings—Local Government Meeting Rules and the Chair's Role*, MUNICIPALITY, Dec. 2019, at 26.

174. Landau, *supra* note 154, at 4; *see also* ROBERT, *supra* note 173, at 20 ("The requirement of a quorum is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons.").

occur in this situation because a majority of the membership must participate in the transaction of business.[175] Simultaneously, a majority quorum leaves space for absences. A majority quorum rule is sufficiently flexible to prevent a minority from blocking action through intentional absenteeism, but sufficiently stringent to promote meaningful deliberation.[176]

2. How does the quorum account for vacancies?

Majority quorums raise an additional question: A majority of what? One can envision two possible interpretations of the default rule. Under a *fixed-numerosity quorum*, the same number of members is always required for a quorum regardless of how many members are in office. The quorum is met by the presence of an absolute majority of authorized members, vacancies notwithstanding. Under this interpretation, five members must always be present for a nine-member body to transact business—even when only seven members are in office. By contrast, under an *appointed-majority quorum*, the number of members required depends on the number of members currently appointed to office. The quorum is met by the presence of a majority of currently appointed members. In our example, the nine-member body could transact business with only five members in office so long as three members are present.

Contemporary treatises disagree as to whether "majority" should be interpreted to require a fixed-numerosity quorum or an appointed-majority quorum. *Corpus Juris Secundum* explains that "the majority of the remaining members will suffice for a quorum" when there are vacancies.[177] By contrast, *McQuillin* explains that "the whole number entitled to membership must be counted and not merely the remaining members."[178] Case law also splits on the appropriate interpretation of "majority" in this context.[179]

Although public-law authorities diverge in their treatment of quorums, corporate-law principles have remained consistent: A quorum is a majority of the entire board, including vacancies.[180] This principle has been codified by both

175. *See* NAT'L CONF. OF STATE LEGISLATURES, MASON'S MANUAL OF LEGISLATIVE PROCEDURE § 49 (rev. ed. 2000).

176. *See* Vermeule, *supra* note 160, at 403-05; *see also id.* at 403 (noting that "where the underlying voting rule is enactment by simple majority, there will be strong pressure to adopt a majority quorum requirement as well").

177. 67A C.J.S. *Parliamentary Law* § 5 (West 2025).

178. 4 MCQUILLIN: THE LAW OF MUNICIPAL CORPORATIONS § 13:40 (3d ed. West 2025).

179. *See* 59 AM. JUR. 2D *Parliamentary Law* § 10 (West 2025).

180. *See* 2 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 421 (West 2025); 2 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 9:9 (West 2024); Pennington v. George W. Pennington Sons, 148 P. 947, 948 (Cal. Dist. Ct. App. 1915) ("A quorum is a majority of the entire board as it would be constituted if all the vacancies

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the Delaware state legislature and the Model Business Corporations Act (MBCA).[181] The MBCA provides that "a quorum of a board of directors consists of a majority of the number of directors specified in or fixed in accordance with the articles of incorporation or bylaws," unless otherwise specified.[182]

The benefits of fixed-numerosity quorums are easily deducible: They incentivize bodies to be fully constituted, therefore receiving the benefits that come from the deliberation of multiple viewpoints.[183] When members represent disparate stakeholders, their participation results in more representative outcomes,[184] and the existence of dissenting voices may alert interested parties to malfeasance or other inappropriate activities of the majority.[185]

Yet fixed-numerosity quorums may impose substantial costs. During periods of vacancies, fixed-numerosity quorums prevent the remaining members from accomplishing the goals for which the bodies were created (such as enacting laws and managing business). Fixed-numerosity quorums are less onerous in the corporate setting because corporate law also allows sitting directors to fill vacancies when the board lacks a quorum[186]—a feature notably absent from federal commissions.[187] Without the ability to fill vacancies quickly, fixed-numerosity quorums may render the institution dysfunctional. Appointed-majority quorums, on the other hand, allow bodies to continue acting despite a high number of vacancies because their thresholds adjust depending on the number of members in office.

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were filled . . . ." (quoting 10 SEYMOUR D. THOMPSON, CYCLOPEDIA OF LAW AND PROCEDURE 778 (William Mack & Howard P. Nash eds., 1904))).

181. *See* DEL. CODE ANN. tit. 8, § 141(b) (2025) ("A majority of the *total number* of directors shall constitute a quorum for the transaction of business unless the certificate of incorporation or the bylaws require a greater number." (emphasis added)); MODEL BUS. CORP. ACT § 8.24(a) (A.B.A. 2025).

182. MODEL BUS. CORP. ACT § 8.24(a) (A.B.A. 2025).

183. *See* McCracken v. City of San Francisco, 16 Cal. 591, 604 (1860) (explaining that for a body where the members vote to fill open spots, vacancies should "give[] no additional power to those who are left, and consequently put[] them under no temptation to leave the vacancies unfilled").

184. *See* Lu Hong & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 PROCS. NAT'L ACAD. SCIS. 16385, 16385 (2004).

185. *See* Sharon B. Jacobs, *Administrative Dissents*, 59 WM. & MARY L. REV. 541, 588-91 (2017).

186. *See, e.g.*, MODEL BUS. CORP. ACT § 8.10(a)(2) (A.B.A. 2025) ("Unless the articles of incorporation provide otherwise, if a vacancy occurs on a board of directors . . . the board of directors may fill the vacancy . . . .").

187. *See supra* Part I.

3. What are the voting rules?

Related issues arise in determining whether a motion has enough affirmative votes to pass. Voting rules could require fixed numerosity, such that motions pass with only a specified number of affirmative votes. They could also require appointed majorities to vote in favor of motions. Alternatively, bodies could use *present-majority voting*, wherein motions pass if a majority of those present at a meeting vote in favor.

Parliamentary law and corporate law exhibit greater consistency in voting rules than quorum rules. *Corpus Juris Secundum* states the default rule: "Where a quorum is present, a vote of the majority of those present is sufficient for a valid action, and a majority means the number greater than half of any total."[188] For purposes of Congress, the Supreme Court has held that "when a quorum is present, the act of a majority of the quorum is the act of the body."[189]

Present-majority voting can have the odd effect of allowing a minority of members to dictate the actions of the body in the absence of some number of members of the majority. Nevertheless, these problems only arise if members of the majority are unwilling to attend or participate in meetings. If members participate when they understand that their opinion is outcome determinative, then present-majority voting preserves flexibility and meaningful deliberation so long as it is paired with an appropriate quorum rule.

4. Who decides the quorum and voting rules?

Common-law rules are preempted when statutes, charters, or bylaws contain explicit rules allowing policymakers to determine the rules that should apply in various situations.[190] Treatises are replete with explanations for interpreting particular phrasing choices. When a provision provides for a fixed number of members, the quorum requires that number.[191] When it requires a majority of the body, vacancies are not omitted.[192] When it says a quorum is a

188. 67A C.J.S. *Parliamentary Law* § 5 (West 2025). For similar language across contexts and sources, see, for example, 59 AM. JUR. 2D *Parliamentary Law* § 9 (West 2025); 2 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 421 (West 2025); and 4 MCQUILLIN: THE LAW OF MUNICIPAL CORPORATIONS § 13:43 (3d ed. West 2025).

189. United States v. Ballin, 144 U.S. 1, 6 (1892).

190. *See id.* (explaining that default principles apply unless "the terms of the organic act under which the body is assembled have prescribed specific limitations").

191. *See, e.g.*, 67A C.J.S. *Parliamentary Law* § 5 (West 2025) ("Whenever the number required to constitute a quorum is fixed by statute or other rule, a diminution in the number of members of the body will not change the number necessary for a quorum.").

192. *See, e.g.*, 59 AM. JUR. 2D *Parliamentary Law* § 10 (West 2025) ("Vacancies cannot be deducted in ascertaining a quorum where a village charter provides that a majority of the council is necessary for a quorum."); 2 EUGENE MCQUILLIN, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 596 (1911) ("[W]here the act must be done by a distinct

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majority of those elected, a contemporary treatise provides that vacant seats are not considered, while older treatises provide that they are.[193] When it provides for a quorum of "actual members," though, vacancies are excluded.[194]

Common-law principles hold that bodies may set their own quorum rules only if explicitly authorized to do so by statute or charter.[195] *McQuillin* explains that, "[w]here the law is silent on the subject the common law rule will prevail and cannot be changed by the council."[196] Similarly, *American Jurisprudence* provides that the default rule "can be changed only by general law or charter, not by internal rule," and notes that the body cannot change the default "even when the body in question is given general rule-making powers."[197] That is, bodies must abide by the common-law defaults unless given *explicit* authority to enact quorum rules.

The requirement that bodies cannot override rules found in their statutes or charters is logical—statutory law must be followed. That bodies cannot override common-law rules has a less satisfactory explanation. For municipalities created under state law, courts have historically explained that the common law is *law*, and, as just discussed, must be followed.[198] In *Heiskell*, for

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proportion . . . 'of all of the members of the council,' it is manifest that the law should be construed by counting the whole membership of the body in question." (quoting Atkins v. Phillips, 8 So. 429, 430 (Fla. 1890))).

193. *Contrast* 4 MCQUILLIN: THE LAW OF MUNICIPAL CORPORATIONS § 13:40 (West 2025) (explaining that "where the charter provided that a majority of those elected should constitute a quorum, and . . . . where the council consisted of eight members and the mayor, and the terms of four expired, three was held a valid quorum to fill vacancies"), *with* 2 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 530 (1911) ("[*A*]*lthough there may be vacancies* in the council resulting from death or resignation, the vacant memberships must be included in determining the number of 'members elected' . . . .").

194. 59 AM. JUR. 2D *Parliamentary Law* § 10 (West 2025) ("[A] corporate bylaw may authorize a quorum fixed by the actual members of a board, excluding vacancies from the basic number established for that board.").

195. Commission-set quorum requirements may not contravene those imposed by higher authorities. *See* 5 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2013 (West 2025) ("A bylaw providing what shall constitute a quorum is invalid if in conflict with the provisions of a statute on the subject, and yields to the statute . . . ." (footnote omitted)); 4 MCQUILLIN: THE LAW OF MUNICIPAL CORPORATIONS § 13:39 (West 2025) ("Where the statute or charter prescribes the number that shall constitute a quorum, it cannot be changed by the body.").

196. 4 MCQUILLIN: THE LAW OF MUNICIPAL CORPORATIONS § 13:38 (West 2025).

197. 59 AM. JUR. 2D *Parliamentary Law* § 9 (West 2025).

198. *See, e.g.*, DILLON, *supra* note 193, § 521 ("[T]he quorum fixed by law, whether *under the principles of the common law* or by express statutory provision, cannot be altered by the action of the common council without express statutory authority, and . . . a general power conferred upon the council to settle its rules of procedure does not authorize it to declare that any number other than that fixed by the common law or by statute shall constitute a quorum.") (emphasis added and omitted). *See generally* Ford W. Hall, *The*

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example, the Maryland court explained that if the body's charter is silent, "the *common law* fixes the *majority* as the *legal body*, [and] the case of the appellant is at an end. For the body itself to attempt to fix a greater number is for the body to attempt to change a rule of the common law."[199] Prohibiting institutions from setting their own quorum and voting rules prevents them from adopting provisions that bypass majoritarian requirements and defeat the goals of deliberation and collective decisionmaking.

C. Common-Law Defaults and Commissions

A threshold question concerns whether the above common-law principles should apply to federal government commissions at all. In *Flotill Products, Inc. v. FTC*, for example, the Ninth Circuit suggested that "decisions dealing with town meetings and city councils" were "inapposite" in determining which rule governed "a statutorily created administrative tribunal like the Federal Trade Commission."[200] In reversing the Ninth Circuit, the Supreme Court endorsed—but did not mandate—the FTC's decision to apply the "almost universally accepted common-law rule" that "in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body."[201] In a series of opinions stretching back to 1979, the Department of Justice's Office of Legal Counsel (OLC) has explained that "[i]n the absence of any specific statutory language [to the contrary], we look[] to the general principles of corporate common law to inform our decision."[202] As recently as 2022, the OLC referred to these opinions and a treatise on corporate law to interpret the Federal Deposit Insurance Corporation's bylaws.[203]

In other cases, however, courts have read statutes differently from the common law. In *Assure Competitive Transportation, Inc. v. United States*, the Seventh Circuit was asked to interpret a provision of the Interstate Commerce Act providing that "[a] majority of the Interstate Commerce Commission . . . is a

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Common Law: An Account of its Reception in the United States, 4 VAND. L. REV. 791 (1951) (discussing how courts in the United States came to adopt the common law as law).

199. Heiskell v. Mayor of Baltimore, 4 A. 116, 119 (Md. 1886); *see also* Barnert v. Mayor of Paterson, 6 A. 15, 18 (N.J. 1886) (explaining that the board's power "to establish its own rules of procedure" was not "designed to confer upon the board the adoption of a rule changing either the general law or any special provision in the charter").

200. 358 F.2d 224, 229 (9th Cir. 1966), *rev'd* 389 U.S. 179 (1967).

201. *Flotill Prods.*, 389 U.S. at 183.

202. Auth. of the Advisory Bd. for Cuba Broad. to Act in the Absence of a Presidentially Designated Chairperson, 24 Op. O.L.C. 24, 27 (2000) (citing Reorganization Plan No. 3 of 1947 § 2 (5 U.S.C. app. at 130-31); Reorganization Plan No. 6 of 1961 (5 U.S.C. app.), 3 Op. O.L.C. 283, 284 (1979)).

203. *See* Auth. of a Majority of the FDIC Bd. to Present Items for Vote & Decision, 2022 WL 4113734, at *3-5 (O.L.C. July 29, 2022).

quorum for the transaction of business."[204] Rejecting the common law's fixed-numerosity rule, the court held that "a majority of the Commissioners *actually in office* constitutes a quorum."[205] In particular, it held the Act's quorum provision should be read in conjunction with a provision providing that "[a] vacancy in the membership of the Commission does not impair the right of the remaining members to exercise all of the powers of the Commission."[206] The Tenth Circuit reached a similar conclusion.[207]

Consistent with the principle that clear statutory text supersedes default rules, the Supreme Court has prevented commissions from exercising their authority when they lack their statutorily mandated quorums. The NLRB's statute has a fixed-numerosity quorum, requiring three of its five members to be present to transact business.[208] At the same time, its statute allows the Board to "delegate to any group of three or more members any or all of the powers which it may itself exercise," two of whom would constitute a quorum.[209] In 2007, with only three Senate-confirmed members, including one whose term was about to expire, the NLRB delegated all its authorities to the three remaining members.[210] This action, the agency argued, allowed the two remaining members to transact business even after the third member's term expired.[211]

In *New Process Steel, L.P. v. NLRB*, the Supreme Court held that the NLRB's delegation of authority violated the organic statute's quorum rules.[212] Writing for the majority, Justice Stevens explained that the statute required the subgroup to maintain a membership of three members while it exercised the Board's authority because a contrary reading would render the statute's quorum rules insignificant:

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204. 629 F.2d 467, 472 (7th Cir. 1980) (quoting 49 U.S.C. § 10306(a) (1976)).

205. *Assure Competitive Transp., Inc.*, 629 F.2d at 473 (emphasis added).

206. *Id.* at 472 (quoting 49 U.S.C. § 10301(e) (1976)); *id.* at 473 ("It is undisputed that the vacancy section vests in a Commission with fewer than eleven members the full power of a Commission of eleven. From the explicit language of that provision, we are persuaded that Congress intended those Commissioners in office, however many there are, to be 'the Commission' for all purposes." (citation omitted)).

207. *See* Union Pac. R.R. Co. v. United States, 637 F.2d 764, 766 (10th Cir. 1981) ("49 U.S.C. § 10301(e) provides that a vacancy in the membership of the Commission does not impair the right of the remaining members to exercise all the powers of the Commission. The Commission, the United States, and Nevada Power all argue that four members of the Commission constitute a majority of the six persons on the Commission as of the date that the decision was filed, and, therefore, a valid quorum of the Commission participated in the decision. We agree.").

208. 29 U.S.C. § 153(b).

209. *Id.*

210. New Process Steel, L.P. v. NLRB, 560 U.S. 674, 676-77 (2010).

211. *Id.* at 677.

212. *Id.* at 683.

> Under the Government's approach, it would satisfy the statute for the Board to include a third member in the group for only one minute before her term expires; the approach gives no meaningful effect to the command implicit in both the delegation clause and the Board quorum requirement that the Board's full power be vested in no fewer than three members. Hence, while the Government's reading of the delegation clause is textually permissible in a narrow sense, it is structurally implausible, as it would render two of [the statute]'s provisions functionally void.[213]

Moreover, Justice Stevens noted that, "if Congress had intended to authorize two members alone to act for the Board on an ongoing basis, it could have said so in straightforward language."[214] Indeed, the agency's organic statute previously contained a two-member quorum provision that Congress had replaced when it increased the size of the Board.[215] "The Rube Goldberg-style delegation mechanism employed by the Board," the Court wrote, seemed "to contravene the three-member Board quorum."[216]

As we discuss in Part III, however, many commissions lack any quorum rules in their organic statutes.[217] In the parliamentary and corporate contexts, statutory silence prevents bodies from adopting quorum and voting rules that depart from common-law defaults. But courts have reached the opposite conclusion in the context of federal agencies. In *Flotill Products*, for example, the Supreme Court stated that the FTC was "justified in adhering to [the] common-law rule" and that, if Congress objected to the FTC's use of the common-law rule, it "would have at some time addressed itself to the question during the more than half century of the Commission's existence."[218] Yet the Court did not state that statutory silence *required* the FTC to adopt the common-law default rules. Indeed, in amending its quorum rules in 2005, the FTC explained that *Flotill Products* did "not prevent the adoption of a different quorum rule."[219]

Rather than apply the common-law defaults, judges have concluded that Congress's grants of authority to agencies to organize themselves allow them to set quorum and voting rules. The D.C. Circuit explained in *Falcon Trading Group v. SEC* that "[i]f not otherwise constrained by statute, an agency sufficiently empowered by its enabling legislation may create its own quorum

213. *Id.* at 681.

214. *Id.* at 682.

215. *Contrast* 29 U.S.C. § 153(b) (1946) (providing that "*two* members of the Board shall, at all times, constitute a quorum" (emphasis added)), *with* 29 U.S.C. § 153(b) (1952) (providing that "*three* members of the Board shall, at all times, constitute a quorum" (emphasis added)).

216. *New Process Steel*, 560 U.S. at 682.

217. *See infra* Part III.A.2.

218. *FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 184, 189 (1967).

219. Quorums, 70 Fed. Reg. 53296, 53296 (Sept. 8, 2005) (to be codified at 16 C.F.R. pt. 4).

rule."[220] In that case, the Securities and Exchange Commission (SEC) relied on its "power to make such rules and regulations as may be necessary or appropriate" to enact a rule providing that "if the number of Commissioners in office is less than three, a quorum shall consist of the number of members in office."[221] The court explained that the statute's "broad grant must be read to include authority to determine how many members constitute a quorum of the Commission," and "[b]ecause that authority is not countermanded elsewhere by Congress," the quorum rule was permissible.[222]

Courts have also interpreted statutes in ways that allow agencies to exercise authority absent a quorum. Prior to the Supreme Court's contrary decision in *New Process Steel*, five circuits and the OLC had concluded that the NLRB's delegation of authority overrode the statute's quorum rule.[223] The First Circuit, for example, examined additional statutory language that states, "A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board."[224] The court concluded that the delegation to the remaining two members was textually permissible in light of congressional intent that vacancies would not prevent the remaining members from exercising the Board's authority.[225] Relatedly, the D.C. Circuit in *Railroad Yardmasters of America v. Harris* affirmed the National Mediation Board's delegation of authority to a single board member[226] despite the Railway Labor Act's explicit statement that "[t]wo of the members in office shall constitute a quorum."[227] As the court explained:

> We have concluded that a single member of the National Mediation Board may act for the Board pursuant to a validly issued delegation order that is narrowly tailored to prevent the temporary occurrence of two vacancies from completely disabling the Board. We believe that our conclusion is compelled by a close reading of the

220. 102 F.3d 579, 582 (D.C. Cir. 1996).

221. *Id.* (first quoting 15 U.S.C. § 78w(a)(1); and then quoting 17 C.F.R. § 200.41 (1995)).

222. *Id.*; *see also* SEC v. Feminella, 947 F. Supp. 722, 727 (S.D.N.Y. 1996) ("The Court finds that the SEC's quorum rule merely prescribes order and formality in the Commission's functioning and does not produce decisions that are substantively different from those that an alternative rule might produce.").

223. *See* Ne. Land Servs., Ltd. v. NLRB, 560 F.3d 36, 41 (1st Cir. 2009), *vacated*, 561 U.S. 1021 (2010); Snell Island SNF LLC v. NLRB, 568 F.3d 410, 424 (2d Cir. 2009), *vacated*, 561 U.S. 1021 (2010); Narricot Indus., L.P. v. NLRB, 587 F.3d 654, 660 (4th Cir. 2009), *abrogated by* New Process Steel, L.P. v. NLRB, 560 U.S. 674 (2010); New Process Steel, L.P. v. NLRB, 564 F.3d 840, 845-46 (7th Cir. 2009), *rev'd*, 560 U.S. 674 (2010); Teamsters Loc. Union No. 523 v. NLRB, 590 F.3d 849, 852 (10th Cir. 2009), *vacated*, 562 U.S. 801 (2010); NLRB Quorum Requirements, 27 Op. O.L.C. 82, 82 (2003).

224. *Ne. Land Servs.*, 560 F.3d at 41 (quoting 29 U.S.C. § 153(b)).

225. *See id.*

226. *See* 721 F.2d 1332, 1344 (D.C. Cir. 1983).

227. 45 U.S.C. § 154.

> plain words of the statute and is fully consistent with the legislative history and the purposes of the Act.[228]

Indeed, the court noted that "[a]ny other general rule would impose an undue burden on the administrative process."[229] Other cases have reached similar conclusions about the permissibility of delegations to fewer than a quorum.[230]

Moreover, the Supreme Court itself in *New Process Steel* acknowledged that *prior* delegations of authority to officers and employees of the Commission remain valid during the absence of a quorum.[231] Both the Fourth Circuit and the D.C. Circuit have interpreted the Supreme Court's decision as permitting employees within the NLRB to continue to exercise delegated authority without oversight of a quorum of members.[232] Courts have rejected the idea that these delegations terminate upon the loss of the quorum.[233]

To summarize, there is no single throughline in federal courts' decisions about commissions' quorum rules. The Supreme Court has recently explained that commissions must follow quorum rules set by Congress,[234] and the Warren Court explained nearly six decades ago that agencies are "justified" in adhering to common-law rules.[235] But the courts of appeals have generally concluded that commissions need not follow common-law rules and may use their authority to enact procedural rules to protect and preserve their quorums.

III. Statutory and Regulatory Quorum Requirements

Congress has fashioned a variety of quorum and voting rules to govern decisionmaking in commissions, as have agencies in many instances in which statute is silent. Variation in these rules enables us to explore how Congress and commissions have structured their rules.

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228. *R.R. Yardmasters of Am.*, 721 F.2d at 1344.

229. *Id.* at 1343.

230. *See* Earnest v. Moseley, 426 F.2d 466, 469 (10th Cir. 1970); EEOC v. Joseph Horne Co., 607 F.2d 1075, 1076 (4th Cir. 1979), *rev'd on other grounds sub nom.*, EEOC v. Assoc'd Dry Goods Corp., 449 U.S. 590 (1981).

231. New Process Steel, L.P. v. NLRB, 560 U.S. 674, 684 n.4 (2010) ("Our conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel. The latter implicates a separate question that our decision does not address.").

232. NLRB v. Bluefield Hosp. Co., 821 F.3d 534, 543 (4th Cir. 2016); SSC Mystic Operating Co. v. NLRB, 801 F.3d 302, 308 (D.C. Cir. 2015).

233. Overstreet *ex rel.* NLRB v. El Paso Disposal, L.P., 625 F.3d 844, 853-54 (5th Cir. 2010), *abrogated on other grounds by* Starbucks Corp. v. McKinney, 144 S. Ct. 1570 (2024); Osthus v. Whitesell Corp., 639 F.3d 841, 844 (8th Cir. 2011).

234. *New Process Steel*, 560 U.S. at 681-82 (interpreting the NLRB's organic statute to preserve the quorum requirements).

235. FTC v. Flotill Prods., Inc., 389 U.S. 179, 184 (1967).

We introduce a new dataset of seventy-six commissions' quorum and voting rules.[236] Other empirical research has focused on either a limited set of commissions[237] or only those requirements contained within commissions' organic statutes.[238] Our dataset expands these efforts by examining both the commissions' governing statutes and regulations. Examining procedural regulations proves important because, as explained above, courts have generally allowed commissions to adopt their own quorum and voting rules when confronted with statutory silence.[239] Our online appendix provides complete citations to all statutory and regulatory provisions discussed here, and our replication files produce the figures and statistics.[240]

We explore variation across two different dimensions. First, quorum and voting rules may vary based on the importance of the commission. We examine the quorum and voting rules within the subset of twelve major commissions.[241] Second, quorum and voting rules may have different implications depending on the tasks performed by the commission. We divide the commissions into three types: adjudicatory, regulatory, and executive.[242] Adjudicatory commissions (n = 8),[243] such as the MSPB and the Federal Labor Relations Authority, adjudicate cases brought by or against other agencies. Regulatory commissions (n = 20),[244] such as the CFTC and SEC, govern private entities by issuing substantive regulations while simultaneously enforcing and adjudicating violations of statutory law. Finally, executive commissions (n = 48)[245] engage in neither rulemaking nor adjudication, but provide services to private actors or other government institutions.

This Part begins by surveying the statutes and procedural rules governing commissions. It then examines protective and preventive structures designed to limit the effects of vacancies on commission operations. It concludes with a brief discussion on the ways that Congress and commissions have sought to protect against deliberative errors. Our analysis reveals that Congress prefers rules that

236. A complete list of the commissions can be found in the Appendix. *See generally* Nicholas R. Bednar & Todd Phillips, *Commission Quorums: Appendix*, 78 STAN. L. REV.1125 app. 1 (2026) [hereinafter Appendix].

237. *See, e.g.*, Breger & Edles, *supra* note 20, at 1114 n.6 (studying thirty-two multimember agencies).

238. *See, e.g.*, SELIN & LEWIS, *supra* note 48, at 5-6, 45 tbl.4 (examining quorum requirements within governing statutes).

239. *See supra* notes 220-22 and accompanying text.

240. *See generally* Appendix, *supra* note 236 (cataloguing citations for all seventy-six commissions); Replication, *supra* note 55 (producing all statistics and figures).

241. *See supra* note 80 and accompanying text; Replication, *supra* note 55, at 3.2.

242. *See* Phillips, *supra* note 57, at 295 tbl.1 (organizing commissions by type).

243. *See* Replication, *supra* note 55, at 3.3.

244. *See id.* at 3.4.

245. *See id.* at 3.5.

protect majoritarianism and deliberative decisionmaking, often imposing the common-law defaults in organic statutes. Predictably, though, commissions tend to adopt rules that preserve flexibility and their abilities to act during inquorate periods.

A. Quorum and Voting Rules

We begin our analysis by examining the quorum and voting rules that govern commissions.

1. Statutory quorum rules

Congress often specifies the quorum rules that govern within commissions. In forty-one commissions (53.9%), Congress has imposed *some* sort of quorum rule by statute.[246] Major commissions are equally likely (58.3%) to have a statute-based quorum rule as nonmajor commissions (53.1%).[247] Likewise, adjudicatory (62.5%),[248] regulatory (50%),[249] and executive (54.2%)[250] commissions are all roughly equal in their likelihood of having a statute-based rule.

The data uncover three archetypal quorum rules that govern commissions. Table 2 summarizes these rules, which vary in whether they allow commissions to operate when they fall below a majority of statutorily authorized members.

Table 2

Archetypes of Quorum Rules

Fixed-Numerosity Quorum	Requires a specific number of members or an absolute majority of statutorily authorized members to be present at the meeting, regardless of the commission's size or vacancies within its membership
Appointed-Majority Quorum	Requires a majority of currently appointed members to be present at the meeting
Unspecified-Majority Quorum	Requires a "majority" of members without specifying whether it means currently appointed members or the number of members fixed by statute

Consistent with the common-law defaults that govern in corporate law, Congress has imposed fixed-numerosity quorums on twenty-eight commissions

246. *See id.* at 4.1; Appendix, *supra* note 236, at Part II.

247. *See* Replication, *supra* note 55, at 4.2, 4.3; Appendix, *supra* note 236, at Part II.

248. *See* Replication, *supra* note 55, at 4.4; Appendix, *supra* note 236, at Part II.

249. *See* Replication, *supra* note 55, at 4.5; Appendix, *supra* note 236, at Part II.

250. *See* Replication, *supra* note 55, at 4.6; Appendix, *supra* note 236, at Part II.

(36.8%).[251] Vacancies are more likely to cause a quorum loss in commissions with fixed-numerosity quorums because the required number of commissioners does not change based on the number of members currently in office. For example, the EEOC's organic statute specifies that three members constitute a quorum.[252] Accordingly, the Commission lost its quorum in January 2025 when President Trump removed two of its four remaining commissioners.[253]

The difficulty of satisfying fixed-numerosity quorums depends on the proportion of members required to transact business. Among the twenty-eight commissions with statutory, fixed-numerosity quorums, twenty-five (89.3%) require a simple majority.[254] The three deviations illustrate Congress's ability to adjust the rules to enable agencies to more easily transact business. Both the Board of Regents for the Smithsonian Institution and the Federal Crop Insurance Corporation require slightly less than simple majorities to transact business.[255] The Federal Mine Safety and Health Review Commission (FMSHRC) has five members,[256] but because Congress intended for it to adjudicate cases in panels of three, its quorum rule requires two members for each panel.[257] This unique requirement makes sense in larger adjudicatory bodies, such as the FMSHRC, NLRB, and courts of appeals, where a subset of members decides cases. Importantly, no statute requires a supermajority to transact regular business. As we discuss in Subpart III.A.3 below, however, commissions' voting rules sometimes require supermajorities, effectively imposing more rigorous quorum requirements for certain actions.

Fixed-numerosity quorums are the predominant quorum requirement across all subsets of commissions we examined. Among the seven major commissions with statute-based quorums, six (85.7%) have a fixed-numerosity quorum.[258] Significant majorities of adjudicatory (80%)[259] and regulatory (70%)[260] commissions with statutory quorum rules use fixed-numerosity

251. *See* Replication, *supra* note 55, at 4.7; Appendix, *supra* note 236, at Part II.

252. 42 U.S.C. § 2000e-4(c).

253. *See* Gigante et al., *supra* note 66.

254. *See* Replication, *supra* note 55, at 4.8; Appendix, *supra* note 236, at Part II.

255. The Board of Regents for the Smithsonian Institution has seventeen voting members, but only requires a quorum of eight members. *See* 20 U.S.C. § 42(a); 20 U.S.C. § 44 ("[A]t any meeting of the board, eight shall constitute a quorum to do business."). The Federal Crop Insurance Corporation has nine voting members, but only requires a quorum of four members. *See* 7 U.S.C. § 1505(a)(2)(B)-(G); *id.* § 1505(b).

256. *See* 30 U.S.C. § 823(a).

257. *See* 30 U.S.C. § 823(c) ("The Commission is authorized to delegate to any group of three or more members any or all of the powers of the Commission, except that two members shall constitute a quorum of any group designated pursuant to this paragraph.").

258. *See* Replication, *supra* note 55, at 4.9; Appendix, *supra* note 236, at Part II.

259. *See* Replication, *supra* note 55, at 4.10; Appendix, *supra* note 236, at Part II.

260. *See* Replication, *supra* note 55, at 4.11; Appendix, *supra* note 236, at Part II.

quorums. Executive commissions with statutory quorums (65.4%) exhibit slightly greater variation in their rules.[261] Overall, these data suggest a strong congressional preference for fixed-numerosity quorums regardless of the tasks performed by the commission.

By contrast, only four commissions (5.3%) have an appointed-majority quorum imposed by their statute.[262] For example, the statute of the International Trade Commission provides, "A majority of the commissioners in office shall constitute a quorum, but the Commission may function notwithstanding vacancies."[263] Three of these commissions are executive commissions; the other is an adjudicatory commission.[264]

Appointed-majority quorums raise questions about the extent to which Congress intended for a single member to exercise a commission's authority. Textually, a single member would constitute "[a] majority of the commissioners in office" for purposes of a quorum.[265] Yet by creating a commission and not a single-headed agency, Congress seems to have intended for these agencies to act through a deliberative process of more than one member. Even so, at least one commission with an appointed-majority quorum has interpreted its statute as allowing a single member to exercise its authority.[266]

In other cases, statutes require majorities to transact business but fail to specify whether they mean majorities of members as fixed by statute (fixed-numerosity quorums) or majorities of members currently in office (appointed-majority quorums). The statutes governing eight commissions (10.5%) have unspecified majority quorums.[267] Interpreting these statutes as fixed-numerosity quorums would be consistent with corporate-law principles.[268] Interpreting them as appointed-majority quorums would be consistent with the Seventh Circuit's decision in *Assure Competitive Transportation*.[269]

Agency regulations do not provide meaningful insights into the meaning of "majority." Only two commissions with unspecified-majority quorums have

261. *See* Replication, *supra* note 55, at 4.12; Appendix, *supra* note 236, at Part II.

262. *See* Replication, *supra* note 55, at 4.13; Appendix, *supra* note 236, at Part II.

263. 19 U.S.C. § 1330(c)(6).

264. *See* Replication, *supra* note 55, at 4.16-4.17; Appendix, *supra* note 236, at Part II.

265. *See, e.g.*, 19 U.S.C. § 1330(c)(6).

266. *See* Memorandum from Catherine C. Cook, Gen. Couns., R.R. Ret. Bd., to Glen L. Bower, Chairman of the Bd., R.R. Ret. Bd. (May 12, 1992), https://perma.cc/67NA-CFRA (concluding that a single member "is legally empowered to exercise all Board functions except for approving certain rules or regulations and for making appellate decisions with respect to annuities or other benefits").

267. *See* Replication, *supra* note 55, at 4.14; Appendix, *supra* note 236, at Part II.

268. *See supra* Part II.B.

269. *See* Assure Competitive Transp., Inc. v. United States, 629 F.2d 467, 473 (7th Cir. 1980) (holding that "a majority of the Commissioners *actually in office* constitutes a quorum" (emphasis added)).

codified quorum rules. The Millennium Challenge Corporation's rule parrots the language of the statute.[270] By contrast, the Commodity Credit Corporation adopted a fixed-numerosity requirement within its bylaws, requiring a simple majority of members fixed by statute to transact business.[271] Overall, the data themselves provide little evidence of how courts should interpret unspecified majority quorums.

Congress has imposed only one quorum rule that does not fit neatly within these archetypes. The CPSC's statute provides that three members of the five-member body constitute a quorum, effectively imposing a fixed-numerosity quorum.[272] If only two commissioners are in office, however, they form a quorum for the six-month period following the departure of the third commissioner.[273] This quorum rule provides the Commission with a grace period, allowing it to operate while awaiting confirmation of additional commissioners.

This analysis yields two principal findings: First, Congress varies commissions' quorum rules. Some of these variations, such as CPSC's quorum rule, reflect Congress's acknowledgement that commissions may face periods where vacancies threaten the commission's ability to transact business. Second, Congress has a weak preference for fixed-numerosity quorums *when* it chooses to impose quorum rules at all. Of the forty-one commissions with statutory quorum rules, twenty-eight (68.3%) have a fixed-numerosity quorum.[274] Yet this statistic describes Congress's preference only when it expressly imposes a quorum rule. In almost half of the commissions, Congress has not imposed *any* quorum rules, leaving the agencies or the courts to fill in the gaps.

2. Regulatory quorum rules

Thirty-five commissions (46.1%) lack any mention of quorum rules within their statutes.[275] Some organic statutes explicitly instruct agencies to adopt such rules. For example, the statute governing the Architectural and Transportation

270. *Compare* 22 U.S.C. § 7703(c)(6) ("A majority of the members of the Board shall constitute a quorum . . . ."), *with* 22 C.F.R. § 1300.5(a) (2025) (same).

271. COMMODITY CREDIT CORP., BYLAWS OF THE CORPORATION ¶ 5 (2022), https://perma.cc/NHX5-BQ4G.

272. *See* 15 U.S.C. § 2053(d) ("[T]hree members of the Commission shall constitute a quorum for the transaction of business, except that if there are only three members serving on the Commission because of vacancies in the Commission, two members of the Commission shall constitute a quorum for the transaction of business, and if there are only two members serving on the Commission because of vacancies in the Commission, two members shall constitute a quorum for the six month period beginning on the date of the vacancy which caused the number of Commission members to decline to two.").

273. *Id.*

274. *See* Replication, *supra* note 55, at 4.15; Appendix, *supra* note 236, at Part II.

275. *See* Replication, *supra* note 55, at 5.1; Appendix, *supra* note 236, at Part II.

Barriers Compliance Board provides, "The bylaws shall include quorum requirements."[276] Other statutes, however, say nothing about whether the agencies should adopt quorum rules.

Curiously, we were unable to find *any* quorum rules for twelve of the thirty-five commissions (34.3%) without statutory quorum rules.[277] This finding may have several explanations. First, some commissions may have quorum rules but do not publicly disclose them. Although we submitted requests to all commissions for procedural rules, some commissions have not responded. Second, some commissions have voting rules that effectively operate as quorum rules. For example, the three-member MSPB's voting rules require two members to agree on a decision when exercising its appellate authority.[278] Nevertheless, seven commissions lack (or do not publicly disclose) both quorum and voting rules.[279]

Our analysis of statutory quorum rules suggests that Congress has a weak preference for more rigorous rules. By contrast, commissions seem to prefer more flexible quorum rules that allow them to operate with vacancies. Nine commissions without statutory quorum rules (25.7%) have adopted an appointed-majority quorum,[280] and six (17.1%) have adopted an unspecified majority quorum.[281] Only six commissions (17.1%) have a fixed-numerosity quorum.[282] Two other commissions (5.7%)—the Legal Services Corporation and the Federal Home Loan Mortgage Corporation—have more complicated quorum rules that impose a floor on the minimum number of members that must be present to transact business, but otherwise use an appointed-majority quorum.[283]

It is easy to understand why commissions favor greater flexibility. Losing a quorum disrupts their proceedings and can spawn backlogs that debilitate them

276. 29 U.S.C. § 792(a)(6)(B).

277. *See* Replication, *supra* note 55, at 5.2; Appendix, *supra* note 236, at Part II.

278. *See* 5 C.F.R. § 1200.3(a)-(b) (2025).

279. *See* Replication, *supra* note 55, at 5.3; Appendix, *supra* note 236, at Part II.

280. *See* Replication, *supra* note 55, at 5.4; Appendix, *supra* note 235, at Part II.

281. *See* Replication, *supra* note 55, at 5.5; Appendix, *supra* note 235, at Part II.

282. *See* Replication, *supra* note 55, at 5.6; Appendix, *supra* note 235, at Part II.

283. *See* Replication, *supra* note 55, at 5.7; BY-LAWS OF THE LEGAL SERVICES CORPORATION § 4.06(a) (2014), https://perma.cc/5RHY-Y2HA ("At each meeting of the Board, the presence of a majority of the Directors then in office, but in no event fewer than four (4) Directors, shall constitute a quorum for the transaction of business."); BYLAWS OF THE FEDERAL HOME LOAN MORTGAGE CORPORATION § 4.10 (2025), https://perma.cc/K6GE-DYNU ("At any meeting of the Board of Directors, a quorum shall consist of the greater of (i) one-third of the fixed number of directors or the prescribed number within a variable range of directors, as applicable, or (ii) a majority of the directors then in office.").

for years on end.[284] Qualitatively, the preference for flexibility appears in recent rulemakings aimed at combatting the loss of a quorum. Following a five-year inquorate period, a fully constituted MSPB amended its regulations to make it easier for a single member or its staff to perform certain functions in the absence of a quorum.[285] Similarly, the Board of Governors of the Federal Reserve System relaxed its quorum rules because "the Board has had to operate with fewer than five members on several occasions" in the last decade.[286] To explain the change, the Board stated it "ha[d] determined that substantial vacancies present administrative and logistical challenges that make it difficult to conduct routine business and efficiently manage operations."[287]

Considering both statutory and regulatory quorum rules, Figure 1 illustrates the distribution of quorum requirements that govern commissions.

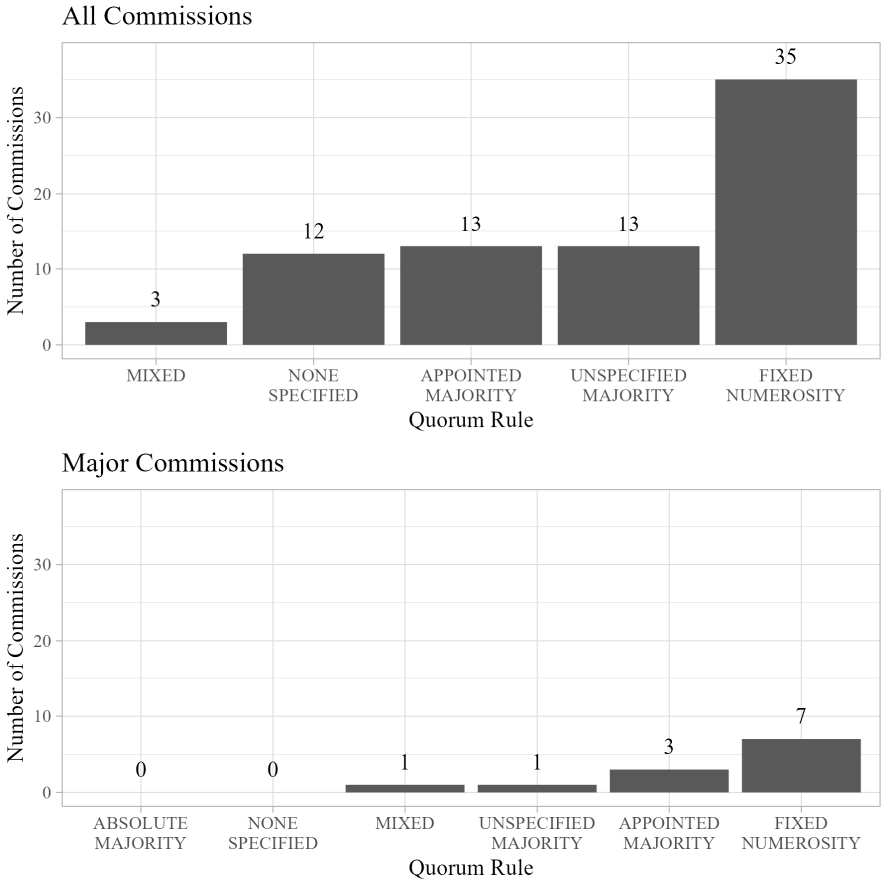
284. *See, e.g.*, Katz, *supra* note 6 ("[I]t would take MSPB five years to address the backlog before it could even get to the cases that will have built up in the meantime.").

285. Organization and Procedures, 89 Fed. Reg. 72957, 72957 (Sept. 9, 2024) (codified at 5 C.F.R. § 1200.3).

286. Rules of Organization, 82 Fed. Reg. 55496, 55496 (Nov. 22, 2017) (formerly codified at 12 C.F.R. § 265).

287. *Id.*

Figure 1
Distribution of Quorum Rules



3. Voting rules

Quorum rules and voting rules operate together. A commission without a specified quorum rule may, in fact, have a de facto quorum requirement imposed by its voting rules. For example, the Election Assistance Commission has no quorum rule, but its statute imposes fixed-numerosity voting, meaning it cannot transact business without the approval of at least three members.[288]

Table 3 summarizes the archetypal voting rules that we observe within the data. Unlike quorum rules, Congress less frequently imposes voting rules on commissions. Congress has specified voting rules for only twenty-two

288. 52 U.S.C. § 20928.

commissions (28.9%).[289] Consistent with the common law, present-majority voting is the most common voting rule adopted by Congress. Among the twenty-two commissions with statutory voting rules, nine commissions (40.9%) have present-majority voting.[290] With five commissions (22.7%), fixed-numerosity voting is Congress's second-most popular voting rule.[291]

Table 3

Archetypes of Voting Rules

Fixed-Numerosity Voting	Requires a specific number of members or an absolute majority of statutorily authorized members to vote in favor of a particular action
Appointed-Majority Voting	Requires a majority of currently appointed members to vote in favor of a particular action
Present-Majority Voting	Requires a majority of those present at the meeting to adopt a proposal
Unspecified-Majority Voting	Requires a "majority" of members without specifying whether it means currently appointed members or the number of members fixed by statute

The choice between fixed-numerosity voting and present-majority voting has implications for majoritarianism within commissions. To illustrate these implications, consider the rules governing the NIGC and the Nuclear Regulatory Commission (NRC). Both commissions have fixed-numerosity quorums: The NIGC requires two of its three members to transact business,[292] and the NRC requires three of its five members.[293] The NIGC uses fixed-numerosity voting and requires two members to approve any action, meaning its action always reflects the majority preference of the Commission.[294] By contrast, the NRC uses present-majority voting, allowing two members to

289. *See* Replication, *supra* note 55, at 6.1; Appendix, *supra* note 236, at Part II.

290. *See* Replication, *supra* note 55, at 6.2; Appendix, *supra* note 236, at Part II.

291. *See* Replication, *supra* note 55, at 6.3; Appendix, *supra* note 236, at Part II. Among the remaining commissions with statutory voting rules, three (13%) have appointed-majority voting, three (13%) have unspecified majority voting, and three (13%) others have more complicated voting rules. *See* Replication, *supra* note 55, at 6.4-6.6; Appendix, *supra* note 236, at Part II.

292. 25 U.S.C. § 2704(b)(1) ("The Commission shall be composed of three full-time members . . . ."); *id.* § 2704(d) ("Two members of the Commission, at least one of which is the Chairman or Vice Chairman, shall constitute a quorum.").

293. 42 U.S.C. § 5841(a)(1) ("[T]he Nuclear Regulatory Commission . . . shall be composed of five members . . . . The Chairman (or the Acting Chairman in the absence of the Chairman) shall preside at all meetings of the Commission and a quorum for the transaction of business shall consist of at least three members present.").

294. For examples of provisions requiring the NIGC to act with two members, see 25 U.S.C. § 2706(a)(3)-(5).

exercise the Commission's authority in the event that only three commissioners appear at a meeting.[295]

Occasionally, Congress has imposed more complicated voting rules, especially when it demands that commissions act by supermajority. For example, the Board of Governors of the Federal Reserve System requires a supermajority of five members to take certain actions.[296] Yet Congress has included a safe harbor for situations in which the Board lacks five members, allowing it to act upon the unanimous vote of all Governors in office.[297]

Ultimately, statutory silence has allowed many commissions to adopt their own voting rules. As one might expect, commissions prefer present-majority voting to preserve flexibility. Among the fifty-three commissions without statute-based voting rules, nineteen (35.2%) have adopted present-majority voting.[298] Only four (7.4%) have adopted fixed-numerosity voting.[299] Two (3.7%) have adopted appointed-majority voting.[300] Surprisingly, most commissions (53.7%) have adopted no formal rules explaining their voting procedures.[301] While these agencies likely have customary procedures, the absence of any formal rules explaining those procedures to the public makes it difficult to assess whether these commissions have permissibly exercised their authority.

295. 42 U.S.C. § 5841(a)(1) ("Action of the Commission shall be determined by a majority vote of the members present.").

296. *See, e.g.*, 12 U.S.C. § 248(b); *id.* § 343(3)(A); *id.* § 461(b)(4)(A); *see also id.* § 241 (establishing the Federal Reserve Board as a seven-member entity).

297. *Id.* § 248(r)(1) ("Any action that this chapter provides may be taken only upon the affirmative vote of 5 members of the Board may be taken upon the unanimous vote of all members then in office if there are fewer than 5 members in office at the time of the action.").

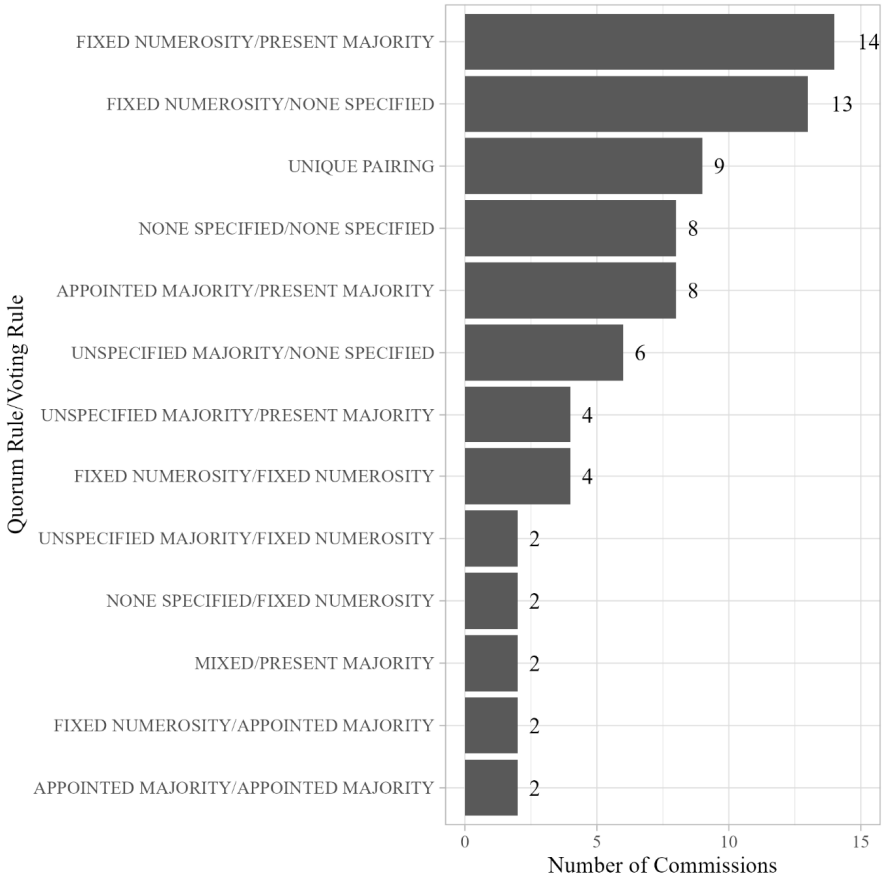
298. *See* Replication, *supra* note 55, at 6.7; Appendix, *supra* note 236, at Part II.

299. *See* Replication, *supra* note 55, at 6.8; Appendix, *supra* note 236, at Part II.

300. *See* Replication, *supra* note 55, at 6.9; Appendix, *supra* note 236, at Part II.

301. *See* Replication, *supra* note 55, at 6.10; Appendix, *supra* note 236, at Part II.

Figure 2
Quorum Rule and Voting Rule Pairings



Examining quorum and voting rules together provides insights into the structure of the modal commission.[302] Figure 2 examines pairings of quorum and voting rules across the dataset, revealing significant variation in the rules used by commissions. Nine commissions (11.8%) have a quorum and voting rule pairing shared by no other commission;[303] for example, only the Foreign Claims Settlement Commission has a fixed-numerosity quorum rule and an unspecified-majority voting rule.[304] Yet some broader trends emerge despite this variation. First, the modal commission has relatively rigorous quorum

302. The mode is the "most frequently occurring value in a set of observations." B.S. EVERITT & A. SKRONDAL, THE CAMBRIDGE DICTIONARY OF STATISTICS 281 (4th ed. 2010).

303. *See* Replication, *supra* note 55, at 6.15; Appendix, *supra* note 236, at Part II.

304. Reorganization Plan No. 1 of 1954, 19 Fed. Reg. 3985 (July 1, 1954); 22 U.S.C. § 1623(b).

rules; thirty-five commissions (46.1%) use a fixed-numerosity quorum.[305] Second, the modal commission has relatively flexible voting rules; thirty-four commissions (44.7%) use either present-majority voting or appointed-majority voting.[306] Fourteen commissions (18.4%) use the equivalent of common-law rules (that is, a fixed-numerosity quorum rule and a present majority voting rule).[307]

The common-law rules, however, present a threshold problem for commissions in an era in which removals and confirmation delays have become common. Present majority voting—the most common voting rule—ensures commissions are capable of voting *once they form a quorum*. Vacancies, however, threaten to render commissions inquorate.

B. Preventive Structures and Protective Structures

Two additional structures increase or decrease the risks associated with vacancies. *Preventive structures* reduce the likelihood that commissions lose their quorums. These structures revolve around the appointment, nomination, and removal of members. Relatedly, *protective structures* allow agencies to exercise some authority while inquorate. Both preventive and protective structures are designed to combat absenteeism and vacancies. The commissions in our sample exhibit nine different preventive and protective structures.

1. Preventive structures

Preventive structures reduce the likelihood that a commission experiences a vacancy that would cause the loss of a quorum. These structures work by reducing the incentives or ability for single actors (for example, the President, their appointees,[308] or other actors[309]) to control commissions' memberships, and by preventing vacancies from occurring in the first instance. Table 4 describes the five preventive structures identified by our sample.

305. *See* Replication, *supra* note 55, at 6.12; Appendix, *supra* note 236, at Part II.

306. *See* Replication, *supra* note 55, at 6.13; Appendix, *supra* note 236, at Part II.

307. *See* Replication, *supra* note 55, at 6.14; Appendix, *supra* note 236, at Part II.

308. *See, e.g.*, 25 U.S.C. § 2704(b)(1)(B) (providing for the appointment of two of the NIGC's members by the Secretary of the Interior).

309. *See, e.g.*, 20 U.S.C. § 4703(b)(1)-(2) (providing for the appointment of four members of the Barry Goldwater Foundation's board by congressional leaders).

Table 4
Preventive Structures

Holdover	The ability of members to serve after the expiration of their term while awaiting confirmation of their successor
Removal Protections	The prohibition of removal of members without cause
Ex Officio Members	The presence of ex officio members on the commission
Diverse Appointments	The appointment of members by various actors
Time Length on Vacancies	The requirement that vacancies be filled within a fixed period of time

Two preventive structures are especially important in limiting commissions' quorum losses. First, holdover provisions relate to the ability of members to serve past the expiration of their terms pending confirmation of their successors, helping prevent quorum losses due to lapses in nominations and confirmations. Fifty-eight commissions (76.3%) have statutes containing holdover provisions.[310] Twenty-five commissions (43.1%) have limited holdover provisions, which are restricted to a specific length of time.[311] For example, CPSC commissioners are allowed to serve for a maximum of one year beyond their term.[312] Conversely, thirty-three commissions have broad holdover provisions (56.9%)[313] allowing for indefinite continuation of service until a successor is appointed.[314]

The second structure relates to the President's ability to remove commissioners at will. For over a century, the central feature of independent commissions has been removal protections. Twenty-seven commissions (35.5%) have statutes that impose for-cause removal protections.[315] Notably, members of six adjudicatory commissions enjoy removal protections.[316] Only one adjudicatory agency—the Federal Service Impasses Board—has a statute explicitly providing that the President may remove its members.[317] As the Supreme Court suggested in *Wiener*, the relatively high rate of removal protections in these commissions may reflect an intent to protect the

310. *See* Replication, *supra* note 55, at 7.1; Appendix, *supra* note 236, at Part II.

311. *See* Replication, *supra* note 55, at 7.2; Appendix, *supra* note 236, at Part II.

312. 15 U.S.C. § 2053(b)(2).

313. *See* Replication, *supra* note 55, at 7.3; Appendix, *supra* note 236, at Part II.

314. *See, e.g.*, 5 U.S.C. § 595(b) (Administrative Conference of the United States); 49 U.S.C. § 24302(a)(3) (Amtrak Board of Directors); 20 U.S.C. § 4703(c)(1)(C) (Barry Goldwater Foundation Board).

315. *See* Replication, *supra* note 55, at 7.4; Appendix, *supra* note 236, at Part II.

316. *See* Replication, *supra* note 55, at 7.5; Appendix, *supra* note 236, at Part II.

317. 5 U.S.C. § 7119(c)(3) ("Any member of the Panel may be removed by the President.").

independence of commissions with adjudicatory functions.[318] Eleven regulatory commissions have removal protections.[319]

Three additional preventive structures affect the appointment of commissioners and the willingness of the President to delay nominations. We consider these structures important, but weaker than either holdover provisions or removal protections.

On average, the President exercises the greatest control over commissions because Congress most often charges the President with appointing commissioners. For example, the President appoints all five members to the SEC.[320] Other commissions, however, have ex officio members who serve on a commission by virtue of holding another office. For example, a majority of the nine members of the International Development Finance Corporation are ex officio members.[321] Every President is likely to appoint three of these members—the Secretaries of State, Treasury, and Commerce.[322] Twenty commissions (26.3%) have at least one ex officio member,[323] and ex officio members comprise a simple majority of six commissions (7.9%).[324] Some commissions have ex officio members who are not selected by the President. The Board of Regents for the Smithsonian Institution includes, for example, the Vice President of the United States and the Chief Justice of the Supreme Court.[325]

The presence of ex officio members decreases the likelihood that commissions will become inquorate. Some ex officio positions, such as the Secretary of the Treasury, are unlikely to remain vacant for a meaningful period of time. Moreover, ex officio membership allows for limited application of the Vacancies Act in the commission context. The Act applies to the heads of executive agencies, meaning acting officials will take these ex officio positions during vacancies.[326] For example, the Secretaries of Commerce, State, and the Treasury are all covered by the Vacancies Act and, therefore, acting officials

318. *See* Wiener v. United States, 357 U.S. 349, 356 (1958) (finding no presidential removal power for members of the War Claims Commission in part because of legislative intent to shield the adjudicatory power of the Commission from the President).

319. *See* Replication, *supra* note 55, at 7.6; Appendix, *supra* note 236, at Part II.

320. 15 U.S.C. § 78d(a).

321. *See* 22 U.S.C. § 9613(b)(2)(A)-(B).

322. *See id.*

323. *See* Replication, *supra* note 55, at 7.7; Appendix, *supra* note 236, at Part II.

324. *See* Replication, *supra* note 55, at 7.8; Appendix, *supra* note 236, at Part II.

325. 20 U.S.C. § 42(a).

326. *See* Federal Vacancies Reform Act of 1998, Pub. L. No. 105-277, sec. 151, § 3345, 112 Stat. 2681, 2681 (codified as amended at 5 U.S.C. § 3345(a)) (providing for acting officials when "an officer of an Executive agency . . . whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office").

would fill their positions on the Board of the International Development Finance Corporation.[327]

A separate structure involves diversifying who appoints commissioners. Fourteen commissions (18.4%) have at least one commissioner appointed by someone other than the President.[328] For example, shareholders of the National Consumer Cooperative Bank appoint twelve of its fifteen members.[329] The Speaker of the House of Representatives appoints two members of the Social Security Advisory Board, and the President pro tempore of the Senate appoints two other members.[330] Diversification of appointing authority helps ensure that at least some seats may be filled if a single individual, such as the President, refuses to fill vacancies. In eight commissions (10.5%), a majority of commissioners are appointed by someone other than the President.[331]

A different preventive structure prevents vacancies from lasting too long by (in theory) imposing time limits on the selection of members. For example, the Defense Nuclear Facilities Safety Board's (DNFSB) organic statute requires the President to nominate new members within 180 days of a vacancy.[332] If the President fails to meet that deadline, they must provide the Senate with an explanation for why a nomination was not submitted and a plan for submitting a nomination.[333] Four commissions (5.3%) impose some sort of time limit on vacancies.[334] Although these limits establish a congressional expectation that the President will make timely nominations, they lack any meaningful enforcement mechanism.

Figure 3 illustrates the distribution of preventive structures across commissions. The distribution looks roughly the same for major commissions

327. 22 U.S.C. § 9613(b)(2)(B) (designating these Secretaries as board members); 5 U.S.C. § 3345(a) (authorizing the use of acting officials for these Secretaries).

328. *See* Replication, *supra* note 55, at 7.9; Appendix, *supra* note 236, at Part II. For the purposes of this statistic, we do not include ex officio members appointed by someone other than the President.

329. 12 U.S.C. § 3013(b)(2).

330. 42 U.S.C. § 903(c)(1)(C) ("2 members (each member from a different political party) shall be appointed by the Speaker of the House of Representatives, with the advice of the Chairman and the Ranking Minority Member of the House Committee on Ways and Means."); *id.* § 903(c)(1)(B) ("2 members (each member from a different political party) shall be appointed by the President pro tempore of the Senate with the advice of the Chairman and the Ranking Minority Member of the Senate Committee on Finance.").

331. *See* Replication, *supra* note 55, at 7.10; Appendix, *supra* note 236, at Part II.

332. 42 U.S.C. § 2286(d)(4)(A) ("Not later than 180 days after the expiration of the term of a member of the Board, the President shall (i) submit to the Senate the nomination of an individual to fill the vacancy; or (ii) submit to the Committee on Armed Services of the Senate a report that includes (I) a description of the reasons the President did not submit such a nomination; and (II) a plan for submitting such a nomination during the 90-day period following the submission of the report." (citation modified)).

333. *Id.*

334. *See* Replication, *supra* note 55, at 7.11; Appendix, *supra* note 236, at Part II.

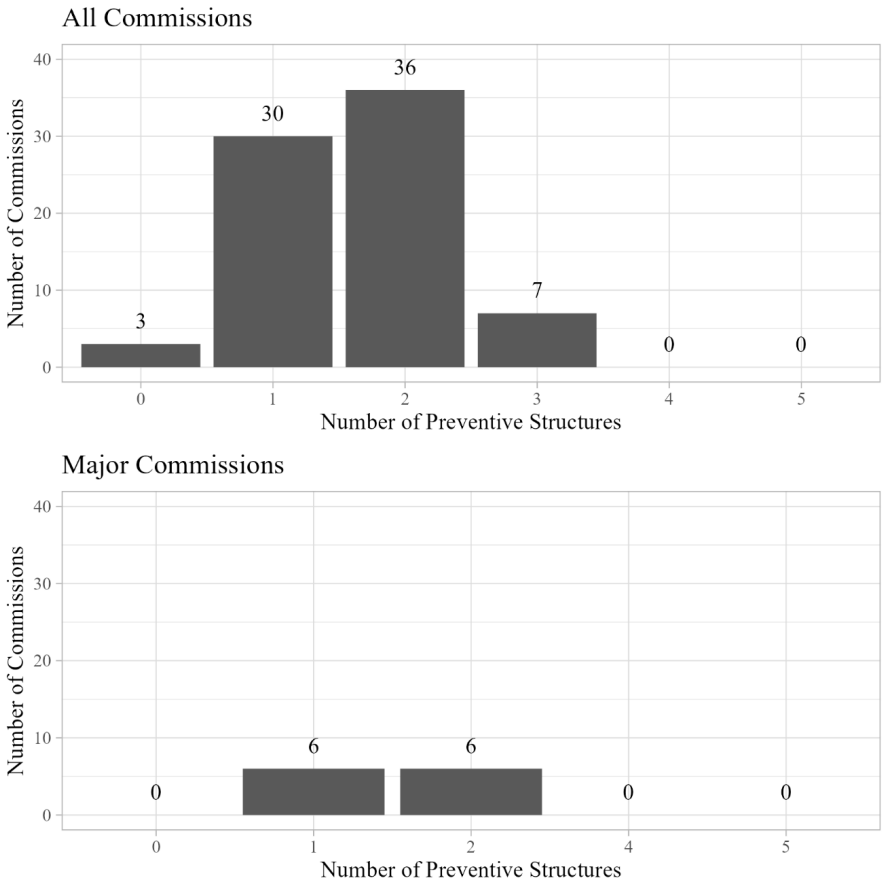
and nonmajor commissions. No commission exhibits more than any three of these structures. Over half of the commissions (56.6%) have at least two preventive structures.[335] The modal agency has a holdover provision and removal protections. Only three commissions (3.9%) have no preventive structures.[336] Two of those—the Council of Economic Advisers and the CEQ—arguably must have no preventive structures since they are located within the Executive Office of the President and exist to provide the President with domestic policy advice.[337]

335. *See* Replication, *supra* note 55, at 7.13; Appendix, *supra* note 236, at Part II.

336. *See* Replication, *supra* note 55, at 7.14; Appendix, *supra* note 236, at Part II.

337. *See* 15 U.S.C. § 1023(a)(1) ("There is created in the Executive Office of the President a Council of Economic Advisers . . . ."); *id.* § 1023(c) (describing the Council of Economic Advisers' duties to advise the President on economic matters); 42 U.S.C. § 4342 ("There is created in the Executive Office of the President a Council on Environmental Quality . . . ."); *id.* § 4344 (describing the Council on Environmental Quality's duties to advise the President on policies related to the "conservation, social, economic, health, and other requirements and goals of the Nation").

Figure 3
Distribution of Preventive Structures



2. Protective structures

Unlike preventive structures, protective structures enable commissions to exercise authority during inquorate periods. These structures often work by empowering commissions' remaining members to exercise at least some of their authority. Table 5 describes four protective structures that preserve commissions' powers in the event that they lack a quorum.

Table 5
Protective Structures

Nonimpairment Provisions	Statutory provisions specifying that vacancies do not impair the function of the commission
Actions During Vacancies	Statutory provisions or procedural rules specifying that the commission may take certain actions when it lacks a quorum due to vacancies
Actions During Emergencies	Statutory provisions or procedural rules specifying that the commission may take certain actions when it lacks a quorum due to emergencies
Delegation	Statutory provisions or procedural rules authorizing the commission to delegate its authority to individual commissioners, staff, or other actors

First, Congress has authored statutory provisions specifying that vacancies do not impair the ability of other members to exercise the authority of their commissions. For example, the CFTC's statute states, "A vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission."[338] Nineteen commissions (25%) have similar provisions.[339] Both courts and commissions have interpreted nonimpairment provisions as providing greater flexibility to commissions in delegating authority and adopting rules that allow remaining commissioners to take certain actions absent quorums.[340] In *New Process Steel*, however, the Supreme Court held that the NLRB's nonimpairment provision did not allow two members to exercise authority delegated to a panel of three members once the Commission lost its quorum, calling into question the extent to which nonimpairment provisions meaningfully allow inquorate commissions to exercise their authority.[341]

Second, twelve commissions (15.7%) have statutory or regulatory provisions that expressly authorize commissions to act without quorums.[342] These provisions vary considerably in their form and the degree of power offered. For example, the FTC's regulations specify that it "delegates its functions, subject to certain limitations, when no quorum is available for the transaction of business."[343] When at least one FTC commissioner remains, that

338. 7 U.S.C. § 2(a)(3).

339. *See* Replication, *supra* note 55, at 8.1; Appendix, *supra* note 236, at Part II.

340. *See supra* notes 204-06 and accompanying text.

341. New Process Steel, L.P., v. NLRB, 560 U.S. 674, 679 (2010).

342. *See* Replication, *supra* note 55, at 8.2; Appendix, *supra* note 236, at Part II.

343. 16 C.F.R. § 0.7(b) (2025).

commissioner exercises the delegated authority.[344] When no commissioners remain, the FTC's general counsel exercises the delegated authority after consulting with other FTC officials.[345] By contrast, the MSPB permits a much narrower exercise of power by remaining members, only allowing them to facilitate settlement agreements between employees and agencies.[346]

Most of these rules were enacted by commissions themselves—Congress has only enacted such provisions in three statutes. The organic statute for the DNFSB specifies that the chairperson and one other member may exercise the powers of the Board until the earlier of the restoration of a quorum or one year.[347] The absence of a quorum at the Export-Import Bank results in the convening of a temporary board comprised mostly of ex officio members.[348] Finally, the Board of Governors of the Federal Reserve System may act unanimously without a quorum on some actions so long as two members are in office.[349] In all three of these cases, however, the commission must have at least *some* members to continue its functions.

Similarly, eleven commissions (14.4%) have regulations that enable them to take specific actions when they lack quorums due to emergencies.[350] For example, the Corporation for Public Broadcasting's bylaws specify that "a majority of the surviving members of the Board of Directors" constitutes a quorum following a "catastrophe."[351] Commissions, not Congress, have enacted all of these rules.

Finally, thirty-three commissions (43.4%) have statutory provisions or procedural rules explicitly authorizing them to delegate some or all of their authorities to individual commissioners, staff, or other actors.[352] The extent of subdelegation permitted by these provisions varies across commissions. Some provisions allow delegations only to the chairperson or subsets of members;[353]

344. *See id.*

345. *See id.*

346. *See* 5 C.F.R. § 1200.3(c) (2025) (allowing the remaining Board member to refer the matter to an administrative judge or other official for consideration of issues related to settlement).

347. 42 U.S.C. § 2286(e)(2); *id.* § 2286(e)(5)(B).

348. *See* 12 U.S.C. § 635a(c)(6)(B)(i).

349. *Id.* § 248(r)(2)(A).

350. *See* Replication, *supra* note 55, at 8.3; Appendix, *supra* note 236, at Part II.

351. CORP. FOR PUB. BROAD., BY-LAWS OF THE CORPORATION FOR PUBLIC BROADCASTING § 2.10 (2025).

352. *See* Replication, *supra* note 55, at 8.4; Appendix, *supra* note 236, at Part II. We do not count provisions authorizing the chairperson to delegate the powers of the chair to other members.

353. *See, e.g.*, 5 U.S.C. § 595(c)(15) (delegating the Administrative Conference of the United States's authority to the chairperson); 29 U.S.C. § 153(b) (delegating some of the NLRB's functions to regional directors).

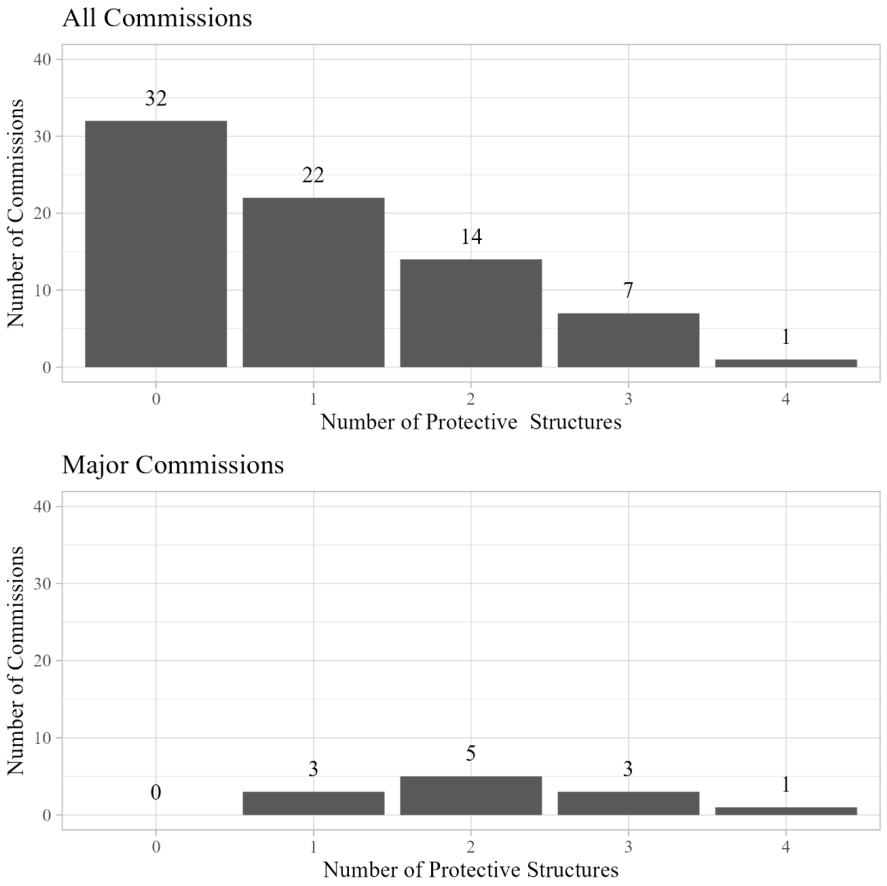
others permit delegations to officers and staff.[354] This statistic, however, undercounts the number of agencies that, in practice, delegate authority to their staff or individual commissioners.

Figure 4 illustrates the distribution of protective structures across commissions. Thirty-two commissions (42.1%) lack any protective structures and, as discussed, many that do exist were adopted by the commissions themselves.[355] Protective structures are far less common than preventive structures, suggesting that Congress has a general preference for preventing vacancies rather than empowering commissions to act without a quorum.

354. *See, e.g.*, BY-LAWS OF THE BARRY GOLDWATER SCHOLARSHIP AND EXCELLENCE IN EDUCATION FOUNDATION § 3.02; 15 U.S.C. §§ 714h, 2076(b)(9) (on file with authors).

355. *See* Replication, *supra* note 55, at 8.6; Appendix, *supra* note 236, at Part II.

Figure 4
Distribution of Protective Structures



C. Protection Against Deliberative Errors

Our attention thus far has been fixed on the likelihood and prevention of vacancies. Yet quorums also exist to protect against deliberative errors. When commissions operate without a majority, these errors increase in likelihood. Several structures protect against deliberative errors.

The most notable structure designed to avoid deliberative errors is partisan balancing. Partisan balancing prohibits the President (or another actor charged with appointing members) from appointing a certain number of members from the same party. Forty-six commissions (60.5%) have partisan-balancing requirements.[356] While partisan-balancing requirements are the most common

356. *See* Replication, *supra* note 55, at 9.1; Appendix, *supra* note 236, at Part II.

method of ensuring that commissioners bring different perspectives, some commissions have bespoke appointment requirements tailored to the functions or clientele of the commission. Members of the Board of Governors for the Federal Reserve System must come from different geographical areas.[357] At least half of the public members of the Architectural and Transportation Barriers Compliance Board must be individuals with disabilities.[358] These requirements are designed to prevent deliberative errors by ensuring that the commissions' memberships reflect their regulated communities. In doing so, they also lend legitimacy to the commissions' authority.

Few commissions incorporate these requirements into their quorum rules, but six commissions (7.9%) explicitly require the presence of certain members to form a quorum or approve a measure.[359] For example, the quorum for the Architectural and Transportation Barriers Compliance Board must include at least seven public members.[360] Only the FEC has explicitly incorporated partisan-balancing requirements into its quorum or voting rules—when it has fewer than four members, any action must receive the approval of at least two members from different political parties.[361]

Rules aimed at protecting against deliberative errors are double-edged swords. On the one hand, these rules protect the deliberative process envisioned by Congress and ensure that deliberations elicit the viewpoints that Congress deems important. On the other hand, these provisions may increase the likelihood that a commission lacks the "right" members to exercise its authority even when the commission otherwise satisfies its quorum's numerosity requirements.

* * *

Our analysis produces several broad findings. First, the rules chosen by Congress and commissions differ in the sorts of problems they address. Congress favors rules that avoid countermajoritarian and deliberative errors by ensuring sufficiently large numbers of members are present before commissions transact

357. 12 U.S.C. § 241.

358. 29 U.S.C. § 792(a)(1)(A).

359. *See* Replication, *supra* note 55, at 9.2; Appendix, *supra* note 236, at Part II.

360. *See* 29 U.S.C. § 792(a)(6)(B) ("The quorum requirements shall provide that (i) a proxy may not be counted for purposes of establishing a quorum, and (ii) not less than half the members required for a quorum shall be members of the general public appointed under paragraph (1)(A)."); 36 C.F.R.§ 1151.6(j) (2024) (requiring thirteen members for a quorum).

361. *See* FEC, RULES OF PROCEDURE OF THE FEDERAL ELECTION COMMISSION PURSUANT TO 2 U.S.C. 473C(E), at L(4) (2007), https://perma.cc/5W4L-7JCW ("[I]f such majority comprises exclusively the affirmative votes of Members affiliated with the same political party (or Members whose positions are aligned for the purpose of nomination by the President), the motion or appeal shall be deemed not approved.").

business.[362] It has adopted structures that increase viewpoint diversity within the commission's membership, such as appointment qualifications, fixed terms, and removal protections. Overall, Congress has designed commissions in ways that mirror common-law principles.

By contrast, commissions prefer rules that preserve their authority when vacancies arise. They adopt more flexible rules and create structures designed to allow commissions to exercise some authority during inquorate periods.[363] Although these divergent approaches make sense in light of the actors' respective goals, they raise significant questions about whether commissions faithfully implement the collective decisionmaking procedures adopted by the Congress that enacted the organic statute.

Second, Congress has demonstrated that it understands how to depart from the standard rules provided by common law. Although it requires a majority of commissions to use rules similar to those provided by common law, Congress understands how to specify alternative rules when it prefers.[364] Congress also understands how to incorporate a variety of preventive and protective structures in statutes. The prevalence of preventive structures suggests that Congress aims to prevent commissions from losing their quorum requirements, whereas the dearth of protective structures suggests that it neither expects nor wants commissions to operate without a quorum.

Third, a significant number of commissions have no publicly available quorum or voting rules.[365] While each commission may have a customary understanding of its practice, the absence of these rules makes it difficult for the public and courts to assess whether a commission has lawfully exercised its authority. When called upon to identify rules where they do not exist, courts must develop a set of default rules that govern in the absence of specific rules.

IV. Normative Analysis of Quorum Requirements

This final Part provides a normative analysis of commission structure. We argue that courts should interpret statutory silence regarding quorum and

362. *Compare supra* note 160 and accompanying text (describing countermajoritarian errors), *with supra* notes 258-61 and accompanying text (showing a strong congressional preference for fixed-numerosity quorums).

363. *See supra* notes 280-87 (discussing commissions' preference for more flexible quorum rules); *supra* Part III.B.1 (discussing commissions' adoption of preventive structures).

364. *See supra* notes 262-66, 272-273 and accompanying text (describing the adoption of statutory quorum rules that depart from the common-law defaults).

365. This insight comes from our experience of sending Freedom of Information Act requests to agencies that did not publish their statutory requirements. Some agencies, such as the Barry Goldwater Scholarship and Excellence in Education Foundation, provided their bylaws and procedural rules when requested. *See* Appendix, *supra* note 236, at Part II. Other agencies, such as the CEQ, informed us that they had no records related to their quorum or voting rules. *See* Appendix, *supra* note 236, at Part II.

voting rules as instructing agencies to abide by common-law rules. Further, general grants of rulemaking authority should not be interpreted as authorizing commissions to write quorum rules themselves. We acknowledge, however, that this approach may increase the likelihood that some commissions lose their quorums. In light of this concern, we argue that courts should modify their approach to exhaustion and the removal power to better comply with congressional intent and the Constitution. Finally, we offer recommendations to Congress on structuring statutory quorum and voting rules.

A. Interpreting Quorum Requirements and Their Absences

When Congress has enacted statutory quorum requirements for commissions or has authorized commissions to promulgate their own, courts should, of course, defer to those determinations. However, Congress often codified ambiguous statutory quorum rules or fails to provide any rule at all. Of the commissions examined in Part III, eight have organic statutes with ambiguous quorum rules, and thirty-five have organic statutes that lack any mention of quorum rules.[366] Courts should interpret these statutes in accordance with the common law of quorums:

(1) The presence of a simple majority of members constitutes a quorum.

(2) This majority is based on the total number of positions, vacancies notwithstanding.

(3) Congress must explicitly authorize commissions to establish their own quorum rules. A mere delegation of general rulemaking authority does not confer authority to adopt quorum rules that depart from these common-law principles.[367]

Quorums are necessary for multimember bodies' functioning.[368] Statutory silence requires courts to develop standards for evaluating whether a commission exercised its authority pursuant to a quorum.[369] While all judges

366. Appendix, *supra* note 236, at Part II.

367. *See supra* Part II.B.

368. *See supra* notes 21-23 and accompanying text.

369. We acknowledge that imposing quorum requirements on agencies may run afoul of the traditional principle that courts may not impose upon agencies procedures not envisioned by the Administrative Procedure Act. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 524 (1978). *Vermont Yankee* poses the greatest problem for organic statutes that are wholly silent on quorum requirements. Nevertheless, our proposed solution is still important for interpreting statutes that impose ambiguous quorum requirements. *See supra* note 267 and accompanying text (noting the presence of unspecified majority quorums in eight commissions).

begin statutory interpretation with the text,[370] statutory silence requires the use of alternative interpretive tools to ascertain meaning.[371]

Common law provides one source of meaning. Courts presume that Congress legislates against the backdrop of common law and does not silently deviate from common-law principles.[372] Empirically, the use of common law to fill gaps in statutes enjoys support from judges across the interpretive spectrum.[373] Common law's importance is even more pronounced in the administrative law context.[374] According to Emily Bremer, "common law doctrines provide crucial components of the administrative state's unwritten constitution," even though these doctrines do not appear in the texts of the Administrative Procedure Act or the agencies' organic statutes.[375] Some scholars argue that administrative common law has developed separately and untethered from the statutory texts that govern the administrative state.[376] Although the

370. Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1169 (2021) ("We begin with the text.").

371. *See* Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1447 (2017) ("[E]ven if one pursues a robust, de novo-like analysis of statutory text, history, and purpose, some statutory questions simply do not have answers that can be derived through common law reasoning."); Brett M. Kavanaugh, Book Review, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2135 (2016) ("[J]udges should follow clear text where it leads. At the same time, when the text of the statute is ambiguous rather than clear, judges may resort to a variety of canons of construction.").

372. *See* United States v. Texas, 507 U.S. 529, 534 (1993) (stating that courts should interpret statutes with "a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident" (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952))); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318-20 (2012) (describing the presumption against change in common law and the canon of imputed common-law meaning).

373. *See* Anita S. Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV. 608, 627 (2022).

374. *See* Kenneth Culp Davis, *Administrative Common Law and the* Vermont Yankee *Opinion*, 1980 UTAH L. REV. 3, 3 ("Most administrative law is judge-made law, and most judge-made administrative law is administrative common law.").

375. Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1245 (2014).

376. *See, e.g.*, Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1311 (2012) ("Current administrative law doctrines often have little connection to what a reasonable legislator would have understood the relevant APA terms to mean when the APA was adopted in 1946, and the Court does not generally base its doctrinal requirements on the congressional aims underlying specific statutes."); Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 3 (2011). *But see* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 115 (1998) (arguing that the "administrative common law of judicial review . . . is being replaced . . . by doctrine grounded in the judicial review provisions of the APA and other statutes").

Administrative Procedure Act defines "rule making"[377] and "adjudication,"[378] for example, courts used two cases decided thirty years before its passage to distinguish between these two forms of agency action.[379]

Consistent with the assumption underlying these canons, the empirical analysis in Part III demonstrates that Congress often adopts structures that comport with common-law principles.[380] Congress's regular adoption of fixed-numerosity quorums within commissions' organic statutes reveals a preference for the procedural rules embraced by common law.[381]

Common-law rules also further the purpose of multimember commissions. Congress creates multimember bodies to encourage deliberation and consensus among sets of varied stakeholders, believing deliberation is necessary to preserve the credibility and expertise of these agencies.[382] For example, one Senate report made clear that senators expected the future FTC's "decisions, coming from a board of several persons, [to] be more readily accepted as impartial and well considered."[383] Congress also frequently imposes qualifications on commissions' members so that certain viewpoints will be represented and to "ensure that no single political interest dominates regulatory policy,"[384] including partisan balance, geographic representation, and expertise requirements.[385]

Common-law rules promote the purpose of multimember commissions by ensuring that, at minimum, multiple commissioners deliberate before acting. Under an appointed-majority quorum, commissions become single-headed agencies when a single commissioner remains, preventing deliberation among multiple experts with different viewpoints. But Congress creates multimember commissions to foster deliberation. Courts should therefore further that

377. 5 U.S.C. § 551(5).

378. *Id.* § 551(7).

379. *See, e.g.*, United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 244-45 (1973) (citing Londoner v. Denver, 210 U.S. 373 (1908); Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915)).

380. *See supra* Part III.A.

381. *See supra* Part III.A.1.

382. *See* Devins & Lewis, *supra* note 17, at 1318-19 (describing these values as driving agency design decisions).

383. S. REP. NO. 63-597, at 11 (1914).

384. Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 611 (2010).

385. *See* Feinstein & Hemel, *supra* note 19, at 18 (describing how legislators expected that partisan-balance requirements "would make agencies less prone to partisan bias and more likely to act on the basis of expertise"); *see, e.g.*, 12 U.S.C. § 241 (providing that "not more than one [Federal Reserve Governor] shall be selected from any one Federal Reserve district"); 26 U.S.C. § 7802(b)(2)(A) (expecting membership of the Internal Revenue Service Oversight Board to have experience in "management of large service organizations," "customer service," and "federal tax laws," among others).

objective by ensuring such deliberation actually takes place among multiple commissioners.

One plausible interpretation of statutory silence is that Congress intends for the relevant commission to enact its own quorum rules. Perhaps. However, Congress has explicitly instructed some commissions to adopt quorum rules,[386] suggesting that "where Congress has intended to" authorize such rulemakings, "it has done so clearly and expressly."[387] Moreover, at common law, institutions were not permitted to craft their own quorum rules absent express authority.[388] Even if Congress intended for commissions to craft their own rules, a significant number of agencies lack any quorum or voting rules for a court to consider. Default rules are still necessary for these sorts of cases.

The strongest reason for courts to view commissions' self-adopted rules skeptically is that commissions often adopt flexible procedures that undermine deliberation. The divergent approaches between Congress and the commissions raise concerns about whether commissions' own procedures are consistent with the design of multimember commissions, further justifying why commissions should not have the authority to promulgate their own quorum and voting rules absent specific delegations from Congress.

We acknowledge that these default rules could prevent commissions from executing the laws enacted by Congress. Rulemakings could become ossified when quorums prevent the commission from addressing changing circumstances. Litigants appearing before adjudicatory agencies may find themselves without any decision or relief. Statutory violations could go unpunished.

We believe, however, that the benefits of these rules outweigh the costs. First, as mentioned, Congress has created these bodies as multimember agencies. While tradeoffs certainly exist between multimember and single-headed agencies,[389] courts should honor Congress's policy judgment with respect to these tradeoffs and adopt rules that require deliberation among a majority of commissioners before they act.

Second, fixed-numerosity quorums may limit the willingness of the President to exercise their removal power in a way that causes the loss of a quorum. Presidents often succeed at controlling independent commissions through the appointment of commissioners and selection of the chair.[390] Yet a quorum must still be present for these commissions to deliver on the President's

386. *See, e.g.*, 29 U.S.C. § 792(a)(6)(A)-(B).

387. FCC v. NextWave Pers. Commc'ns Inc., 537 U.S. 293, 302 (2003).

388. *See supra* notes 195-97 and accompanying text.

389. *See supra* notes 50-63 and accompanying text.

390. *See* Nicholas R. Bednar, *Presidential Control and Administrative Capacity*, 77 STAN. L. REV. 823, 877-78 (2025); Devins & Lewis, *supra* note 17, at 1333-34; Phillips, *supra* note 57, at 309-13.

policy goals. Requiring a majority of the statutorily authorized membership places the onus on the President and the Senate to either expedite consideration of appointees or allow the commission to temporarily cease operations. We address situations where the President intentionally seeks to render commissions inquorate below.[391]

Finally, we see limited downsides to the common-law rules. Commissions may be unable to engage in rulemaking, but rigorous quorum rules ensure that new or existing regulations are not rewritten without deliberative process. Commissions may be unable to bring enforcement actions, but many violations of law have alternative venues for redress. For example, both the Department of Justice and the FTC may enforce antitrust laws, and states have their own regulations prohibiting monopolistic or unfair trade practices.[392] We address the downsides and how to rectify them below.

We recognize that adhering to these common-law principles is inconsistent with the precedent of various circuits.[393] However, courts generally made these precedents without fully considering the issues or examining the rationales for common-law default rules,[394] and the Supreme Court has made several statements consistent with these defaults while never ruling directly on the issue.[395] To that end, contrary circuit court precedents deserve to be revisited.

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391. *See infra* Parts IV.B-.C.

392. *See generally* Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 676-725 (2003) (surveying mechanisms of enforcing antitrust law).

393. *See supra* Part II.C.

394. *See, e.g.*, Falcon Trading Grp., Ltd. v. SEC, 102 F.3d 579, 582, 582 n.3 (D.C. Cir. 1996) (ruling that "[i]f not otherwise constrained by statute, an agency sufficiently empowered by its enabling legislation may create its own quorum rule," based only on the "broad [statutory] grant" of power to the agency to make rules "as may be necessary or appropriate," and the fact that the agency's rule was "not countermanded elsewhere by Congress," and was "prudent" given the circumstances at the time of promulgation); LaPeyre v. FTC, 366 F.2d 117, 122 (5th Cir. 1966) (citing only to other cases in explaining that the FTC's quorum rule was "within the Commission's power to make" and "wholly valid"); Earnest v. Moseley, 426 F.2d 466, 469 (10th Cir. 1970) (upholding an eight-member board's delegations to three-member panels because "[t]o too narrowly circumscribe the authority of the Board to establish its own internal procedures and effectively distribute its work load would impose an undue burden on the Board and, indeed, the entire parole system").

395. *See, e.g.*, United States v. Ballin, 144 U.S. 1, 6 (1892) ("[T]he general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body . . . . except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations."); FTC v. Flotill Prods., Inc., 389 U.S. 179, 183 (1967) ("The almost universally accepted common-law rule is the precise converse—that is, in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body."); New Process Steel, L.P. v. NLRB, 560 U.S. 674, 681 (2010) ("[I]f Congress had intended to authorize two members alone to act for the Board on an ongoing basis, it could have said so in straightforward language.").

B. Adjudication and Lost Quorums

Common-law rules increase the likelihood that commissions may occasionally cease to function. In the context of rulemaking and enforcement, we view this as unfortunate, but believe it reflects Congress's preference that commissions act with a quorum. Yet some commissions—such as the MSPB, FMSHRC, and NLRB—provide individuals with their only opportunity to vindicate their constitutional and statutory rights by requiring those agencies to adjudicate claims before they may be heard in court.

Existing precedent requires individuals to exhaust all administrative remedies before an adjudicatory commission prior to seeking review in federal court. In *Thunder Basin Coal Co. v. Reich*, the Supreme Court concluded that the existence of a statutory-review scheme deprived district courts of subject-matter jurisdiction over claims related to the jurisdiction of the agency.[396] *Thunder Basin* extended the exhaustion of claims beyond those envisioned by the operative statutes and required individuals to "channel" related claims through the agency on the notion that parties could eventually seek review of the adjudicator's decision in federal court.[397] In the ideal scenario, exhaustion and channeling requirements would allow adjudicatory agencies to use their expertise in building records and crafting decisions, rather than relying on generalist federal courts to resolve a dispute.

But exhaustion and channeling requirements pose hurdles in a world where adjudicatory agencies lose their quorums with greater frequency. Functionally, the absence of a quorum precludes individuals from obtaining review in federal court. When the commission adjudicates disputes involving life, liberty, or property, individuals are left incapable of vindicating their constitutional right to due process. The MSPB illustrates this problem. Most career civil servants have a property interest in their continued employment and, therefore, are entitled to due process before being removed from their positions.[398] The MSPB has authority to hear disputes between career civil servants and the federal government.[399] An administrative judge builds a record and issues an initial

396. 510 U.S. 200, 202 (1994).

397. *See* Bennett v. U.S. SEC, 844 F.3d 174, 183 n.7 (4th Cir. 2016) ("We agree with our sister circuits [who] have addressed the matter that meaningful judicial review is the most important factor in the *Thunder Basin* analysis.").

398. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985) (holding that civil servants who could not be removed except for "misfeasance, malfeasance, or nonfeasance in office" had a property interest in continued employment (quoting OHIO REV. CODE ANN. § 124.34(A) (West 2023))); 5 U.S.C. § 7513(a)("[A]n agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.").

399. *See* 5 U.S.C. § 1204(a)(1); *id.* § 7701(a) ("An employee . . . may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation.").

decision.[400] If neither the agency nor the employee appeals that decision to the Board, it becomes final and appealable to the Federal Circuit.[401] If either party, however, appeals the decision to the Board, the employee must wait for the Board's final order before appealing.[402]

The Supreme Court has held that Congress intended to strip district courts of their jurisdiction in cases involving federal employment and to require employees to exhaust all claims before the MSPB.[403] Accordingly, the Federal Circuit rejected efforts by employees to move their claims to federal court during the five-year period in which the MSPB was without a quorum because the absence of a quorum was "a temporary circumstance, not a structural defect resulting from statutory limitations on Board review of administrative judges' initial decisions."[404]

The Federal Circuit's reasoning presents an idealized view of exhaustion and channeling divorced from current administrative realities. For example, the President often lacks sufficient incentives to nominate individuals to commissions.[405] Even when the President nominates someone to fill a vacancy, delays in the confirmation process can prevent the restoration of a quorum. Moreover, the President may intentionally deprive commissions of quorums to advance their own policy objectives. The loss of the MSPB's quorum in 2025 coincided with the Trump Administration's effort to remove thousands of federal employees, and has so far prevented those employees from obtaining relief.[406]

Exhaustion and channeling requirements cause significant harm during inquorate periods. Not only does delay weaken evidentiary records as witnesses forget key facts or leave federal employment,[407] but it also deprives employees of meaningful hearings and leads many to forego exercising their constitutional

400. *See* 5 U.S.C. § 7701(b)(1). Although an administrative judge usually hears the dispute, administrative law judges hear disputes in rare cases. *How a Hearing Is Conducted*, U.S. MERIT SYS. PROT. BD., https://perma.cc/6VJX-ZF8E (archived Mar. 1, 2026).

401. *See* 5 U.S.C. § 7701(e) (describing finality); *id.* § 7703(a)(1) ("Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.").

402. *See* 5 U.S.C. § 7701(e).

403. *See* Elgin v. Dep't of the Treasury, 567 U.S. 1, 10-11 (2012); United States v. Fausto, 484 U.S. 439, 443, 452 (1988).

404. Rodriguez v. Dep't of Veterans Affs., 8 F.4th 1290, 1309 (Fed. Cir. 2021).

405. *See* Bednar & Lewis, *supra* note 116, at 449 & tbl.2 (showing that agency commissions took longer on average to receive a nomination from the President).

406. Bednar, *supra* note 5.

407. Natalie Alms, *Merit Systems Protection Board Passes 5-Year Mark Without a Quorum*, GOV'T EXEC. (Jan. 12, 2022), https://perma.cc/5YTX-V7SW ("Cases die, at least from an evidentiary standpoint. Witnesses forget things, etc. . . . . If we're successful in a petition for review and we want to go to a hearing, who knows whether all of our witnesses will still be in the government.").

rights.[408] Even if administrative judges issue decisions in favor of the employees, agency appeals to the Board may prevent employees from returning to their position until a quorum is regained.[409]

A recent Fourth Circuit decision calls into question the Federal Circuit's reasoning. In *National Ass'n of Immigration Judges v. Owen*, the court determined that employees did not have a meaningful opportunity to obtain judicial review under *Thunder Basin* because the MSPB lacked a quorum.[410] The court's reasoning is worth quoting at length:

> To maintain Congress' intent, the MSPB and Special Counsel must function such that they fulfill their roles prescribed by the [Civil Service Reform Act (CSRA)]. If, for example, the Senate-confirmed roles in the MSPB and Special Counsel go unfilled, or if the agencies fail to perform their duties such that covered employees' claims are not adequately processed, then the framework of the CSRA would be thwarted. Either situation would defeat congressional intent, as Congress enacted the CSRA for the express purpose that the merit system function and that claims be addressed adequately and efficiently. If claims are not so processed, of course, then turning to the MSPB or Special Counsel through the CSRA would be futile.[411]

The court went on to say that the removal of the MSPB's chair and the Board's lack of quorum raised "serious questions as to whether the CSRA's adjudicatory scheme continues to function as intended."[412]

Courts should reconsider how exhaustion and channeling requirements apply to inquorate commissions. Recognition that quorum losses deprive individuals of a right to a meaningful hearing and judicial review comports with broader trends in administrative law. In *Ross v. Blake*, for example, the Supreme Court held that prisoners were not required to exhaust administrative remedies under the Prison Litigation Reform Act if those remedies were not actually "available."[413] The Court held that "an administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide

408. *Id.* (quoting one attorney saying, "It's going to be years before we get decisions on petitions for review, to the point where the firm has essentially stopped filing them").

409. 5 U.S.C. § 7701(b)(2)(A) (providing that the employing agency may prohibit the employee from returning to work pending appeal if it determines that "the return or presence of such an employee or applicant is unduly disruptive"); *id.* § 7701(b)(2)(B) ("If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).").

410. 139 F.4th 293, 311 (4th Cir. 2025).

411. *Id.* at 305.

412. *Id.*

413. 578 U.S. 632, 642 (2016); *see also* Richard J. Pierce, Jr., *Decision About Immigration Judges May Change the Game*, REG. REV. (June 30, 2025), https://perma.cc/LW8B-7JYH (analogizing the Fourth Circuit's decision in *National Ass'n of Immigration Judges* to *Ross*).

any relief to aggrieved inmates."[414] Although *Ross* concerned the statutory meaning of "available" administrative remedies,[415] its logic extends to *Thunder Basin*'s discussion of what it means to foreclose judicial review.

Likewise, exhaustion requirements have often been analogized to the doctrine of primary jurisdiction, which allows courts to dismiss a case when an agency has exclusive statutory jurisdiction because "the agency's specialized expertise makes it a preferable forum for resolving the issue."[416] Over the last two decades, however, courts have shied away from the doctrine of primary jurisdiction, favoring a balancing test to determine whether the benefit of the agency's expertise outweighs the cost of delay.[417] Relaxing *Thunder Basin* due to the delay caused by the loss of a commission's quorum would better preserve parties' rights and comport with the trend toward greater access to judicial review.

Thus far, we have addressed the narrow context in which parties face a deprivation of their constitutional due process rights absent judicial review. Congress clearly cannot structure adjudicatory agencies in a way that deprives individuals of their constitutional rights. However, the absence of a quorum may also leave some parties unable to vindicate their statutory rights. For example, the NLRB adjudicates disputes between labor unions and employers under the National Labor Relations Act (NLRA), and its lack of a quorum prevents the Board from deciding these cases.[418] More critically, the Supreme Court has concluded that the NLRA preempts state labor laws,[419] such that there is no opportunity for relief when the NLRB is frozen. In situations such as this where the federal government has preempted state law, the President may stymie a whole area of law by reducing the commission's membership below a quorum. We imagine there are many possible solutions in such situations, but we leave extended discussion on this topic to another day.

We wholeheartedly, however, reject the idea that courts should permit protective structures allowing agencies to exercise rulemaking authority in the absence of a quorum. Congress itself has rarely adopted these structures. It delegates rulemaking authority to commissions on the theory that deliberation

414. *Ross*, 578 U.S. at 643.

415. *Id.* at 635.

416. KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.1 (7th ed. Wolters Kluwer 2025).

417. *See, e.g.*, Alpharma, Inc. v. Pennfield Oil Co., 411 F.3d 934, 939 (8th Cir. 2005); U.S. Pub. Int. Rsch. Grp. v. Atl. Salmon of Me., LLC, 339 F.3d 23, 34 (1st Cir. 2003); Nat'l Commc'ns Ass'n v. Am. Tel. & Tel. Co., 46 F.3d 220, 223 (2d Cir. 1995).

418. Matt Bruenig, *How the NLRB Works Without a Quorum*, NLRB EDGE (Jan. 29, 2025), https://perma.cc/PVS6-VAVU.

419. *See* S.D. Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959); Lodge 76 v. Wis. Emp. Rels. Comm'n, 427 U.S. 132, 149 (1976).

and collective decisionmaking improve policy outcomes.[420] But while a loss of a quorum may frustrate the ability of the agency to exercise its policymaking authority and faithfully execute the laws enacted by Congress, it should not interfere with the vindication of constitutional or statutory rights.

C. Quorums and the President's Removal Power

The inability of commissions to execute the law raises questions about the scope of the President's removal power vis-à-vis commissions. The Supreme Court has grounded the President's removal power in Article II's Vesting and Take Care Clauses, which provide that "[t]he executive Power shall be vested in a President" who shall "take Care that the Laws be faithfully executed."[421] The authority for this proposition is the Constitution's Vesting and Take Care Clauses, which provide that "[t]he executive Power shall be vested in a President" who "shall take Care that the Laws be faithfully executed."[422] As the Court describes it, all executive power belongs to the President, and "[b]ecause no single person could fulfill that responsibility alone, the Framers expected that the President would rely on subordinate officers for assistance."[423] To that end, "the Constitution gives the President 'the authority to remove those who assist him in carrying out his duties.'"[424] Since the Court decided *Humphrey's Executor* in 1935, Congress has been permitted to "create expert agencies led by a group of principal officers removable by the President only for good cause."[425] Recently, however, the Court has indicated that it is poised to overturn this precedent.[426]

In the debate over the President's removal powers, scholars have identified significant problems with the Court's removal jurisprudence.[427] While most

420. *See supra* note 58 and accompanying text.

421. *See* Trump v. Wilcox, 145 S. Ct. 1415, 1416 (2025) ("Because the Constitution vests the executive power in the President, he may remove without cause executive officers who exercise that power on his behalf, subject to narrow exceptions recognized by our precedents . . . ." (citation omitted)).

422. U.S. CONST. art. II, § 1, cl. 1; *id.* § 3.

423. Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2191 (2020).

424. *Id.* (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513-14 (2010)).

425. *Id.* at 2192 (emphasis omitted) (citing Humphrey's Ex'r v. United States, 295 U.S. 602 (1935)).

426. *See* Trump v. Wilcox, 145 S. Ct. 1415, 1416 (2025) (staying orders enjoining the President's removal of members of the MSPB and NLRB).

427. *See, e.g.*, David M. Driesen, *Making Appointment the Means of Presidential Removal of Officers of the United States*, 26 LEWIS & CLARK L. REV. 315, 320 (2022) (examining "the relationship between appointment and removal, which scholars and the Supreme Court generally treat as separate matters"); Ronald J. Krotoszynski, Jr. & Atticus DeProspo, *Squaring a Circle: Advice and Consent, Faithful Execution, and the Vacancies Reform Act*, 55 GA. L. REV. 731, 734-35 (2021) (explaining that "through expedient, successive acting appointments, a President may never have to obtain the Senate's consent to persons

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scholarship has focused on the Founders' intent and historic practices,[428] we add to this discussion by noting that unfettered removal authority can, when applied to commissions, result in decisional and countermajoritarian errors, as well as the failed execution of law.

First, the removal power increases the likelihood that a minority of homogeneous voices acts on behalf of the commission.[429] Congress created multimember commissions to ensure that decisions were made after deliberation by experts with multiple viewpoints.[430] The removal power empowers the President to remove dissenting voices and allow only those individuals who agree with their agenda to remain. In many cases, an aggressive approach to the removal power would defeat partisan-balancing requirements. For example, in removing commissioners, President Trump has targeted Democratic commissioners, allowing Republican commissioners to remain in place.[431] It is reasonable to assume that Democratic presidents would pursue a similar strategy, as evidenced by President Biden's removal of Republican officials from the Administrative Conference of the United States.[432] To the extent that any of these voices are missing from a commission's decisionmaking processes, countermajoritarian and deliberative errors may arise.

Second, the President's removal of commissioners may prevent the commission from transacting business, preventing the enforcement of law. These consequences are apparent from our discussion of the MSPB and NLRB above. When vacancies are already present on a commission, even a single removal may render the commission inquorate. Inquorate commissions cannot transact business—meaning they cannot promulgate regulations, resolve

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serving in a principal office within the Executive Branch," which "negates the Appointments Clause").

428. *See, e.g.*, Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753, 755 (2023) (challenging "the historical foundation for a series of major Supreme Court precedents, both old and new, concerning presidential removal"); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 5 (2021) ("[This Article] refutes the conventional interpretation of removal provisions as 'protections' . . . . Rather, it shows that the default runs in the other direction—against removal, not for it."); Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1, 3 (2020) (using evidence from the First Congress to argue that removal protections are constitutional).

429. *See supra* Part II.A.

430. *See supra* notes 58-61 and accompanying text.

431. *See supra* notes 1-5 and accompanying text.

432. *See* Matthew Choi, *Trump Appointee Sues Biden over Alleged Ouster from Advisory Board*, POLITICO (Feb. 3, 2021, 9:34 PM EST), https://perma.cc/D7DF-6XQA.

disputes, bring enforcement actions, or otherwise perform the duties assigned to them by Congress.[433]

The removal power derives, in part, from the President's obligation to "take Care that the Laws be faithfully executed."[434] The removal power poses less of a risk to the faithful execution of law in single-headed agencies since the Vacancies Act ensures that an acting official remains capable of exercising the agency's authority. The loss of a quorum within a commission, however, prevents it from executing the law, effectively undermining Congress's intent that enacted legislation be given effect. Given the derivation of the removal power from the Take Care Clause, courts should prohibit any use of the removal power that would prevent the laws from being executed.[435]

We see two options for developing removal jurisprudence as applied to multimember agencies. The first is to simply apply statutes as written, enforcing removal protections and interpreting commissions' fixed terms as preventing removal during that period except when statutes explicitly authorize it. Although this option is consistent with historical practice and congressional intent,[436] we acknowledge the jurisprudential tides make this an unlikely reality.[437] A more moderate option is to allow removals only when they would not lead to quorum losses.[438] Courts could enjoin a removal when it would cause

433. Although many commissions' staff have been delegated authority to undertake certain activities, it is unlikely that staff can make use of all authorities granted to their commissions by statute, as some delegations retain certain authorities for use by presidentially appointed policymakers. *See, e.g.*, FED. DEPOSIT INS. CORP., DELEGATIONS OF AUTHORITY—FILINGS (2024), https://perma.cc/4HVR-TWAL (identifying certain actions as "Reserved to Board").

434. U.S. CONST. art. II, § 3; Trump v. Wilcox, 145 S. Ct. 1415, 1416 (2025).

435. *See* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1875-77 (2015) (explaining the mandatory nature of presidential oversight of federal agencies).

436. *See* Manners & Menand, *supra* note 428, at 18-27.

437. *See* Kennedy v. Braidwood Mgmt. Inc., 145 S. Ct. 2427, 2449 (2025) (explaining that Congress must "speak clearly if it wishes to insulate officers from at-will removal").

438. We briefly mention two other possible, but unlikely, options. The first would be for the President to replace commissions via the confirmation of another individual, though the Supreme Court only has allowed for such an occurrence when authorized by statute. *See* Katz & Rosenblum, *supra* note 18, at 2202-10 (discussing cases involving a statute that authorized the suspension of certain officers only upon the Senate's confirmation of their successors). The second is to allow private plaintiffs to obtain court-ordered mandamus relief when quorums are lacking: that is, to allow courts to order the President (or the President and the Senate) to fill vacancies. Although one district court in the 1970s hinted at this possibility, courts more recently have indicated that equitable relief of any sort against the President is unavailable. *Contrast* Minn. Chippewa Tribe v. Carlucci, 358 F. Supp. 973, 976 (D.D.C. 1973) (indicating that suits might be successful in compelling the President to appoint members of the National Advisory Council on Indian Education), *with* Newdow v. Roberts, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief." (citation omitted)), *and* Harris v. Bessent,
footnote continued on next page

a commission to lose its quorum. To effectuate removal, the President would be required to nominate, and the Senate would be required to confirm, an appointee to replace the commissioner the President seeks to remove. This option ensures that the President would still be permitted to remove officials who would execute the law in a manner contrary to their views while enforcing the President's duties under the Take Care Clause and preventing the President from removing commissioners solely for the purpose of debilitating the commission.

D. Recommendations for Congress

Whereas the above Subparts have provided recommendations for the judiciary, this Subpart provides recommendations to Congress relating to drafting quorum requirements at multimember agencies.

Some of the problems addressed throughout this Article stem from congressional silence. Congress should consider enacting legislation to codify its preferred quorum and voting rules, either as an amendment to the Administrative Procedure Act (APA) or on a statute-by-statute basis. If Congress agrees with our view about the prudence of the three common-law principles,[439] it should amend Section 555 of the APA to include the following:

> (f) In the absence of specific statutory language to the contrary, governmental boards, commissions, corporations, or similar entities that are composed of multiple members may conduct business only in the presence of a quorum.
>
> (1) A quorum consists of the majority of the total number of seats created by law regardless of vacancies.
>
> (2) At any meeting with a quorum present, a majority of the members in attendance is required to approve any matter requiring a vote.

The above language creates default rules based on the common law for multimember commissions but would not supersede more specific quorum and voting provisions already in existence.

Congress should also consider enacting legislation to establish default protective structures for all commissions. The inapplicability of the Vacancies Act to commissions makes sense in light of Congress's effort to promote independence within these agencies, but it increases the likelihood that commissions experience the loss of a quorum. Limited holdover provisions have marginal value in an era where the nomination and confirmation process of PAS commissioners can take years.

We argue that Congress should draw inspiration from the statute of the DNFSB by allowing limited holdovers in the ordinary course but broad

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Nos. 25-5037, 25-5055 & 25-5057, 2025 WL 1021435, at *6 (D.C. Cir. Apr. 7, 2025) (Rao, J., dissenting) ("It is extremely doubtful that mandamus could issue against the President.").

439. *See supra* Part IV.A.

holdovers when the expiration of a member's term would result in the loss of a quorum. Ordinarily, members of the DNFSB are not permitted to serve beyond the expiration of their term.[440] When a member's departure results in a lost quorum, however, the member may continue to serve as long as necessary to maintain the quorum.[441]

These proposals address the risk of absenteeism but do not engage as thoroughly with the risk of deliberative errors. Congress has sought to address deliberative errors by imposing qualification requirements on members to ensure certain viewpoints are represented in commissions' decisionmaking.[442] Yet the ability of the President to remove these commissioners raises questions about the continued vitality of these qualification requirements. Congress should consider amending quorum rules to require the presence of certain members with particular qualifications for a quorum to be met. As Part III above illustrates, these sorts of requirements are relatively rare,[443] but expanding their use would preserve deliberation among the viewpoints Congress considers important.

Congress should be careful in the implementation of such requirements. Requirements that members with certain viewpoints be included in quorums would allow those individuals to stymie votes by simply refusing to attend meetings. Congress may be fine with this outcome in some instances but not others. For example, it may be appropriate that the Access Board's quorum rule authorizes it to issue accessibility guidelines and standards only with the attendance of its public members,[444] thus allowing those members to prevent promulgation by refusing to attend meetings, but it may not be appropriate for regulatory or adjudicatory bodies that provide binding rules and orders. One option is to provide that quorums are not met unless certain positions are filled, regardless of whether those individuals are present when the commission transacts business. Consider a hypothetical commission with a partisan-balancing requirement. Congress could enact the following provision: "A quorum consists of three members. The Commission shall be deemed to lack a quorum unless the current membership of the Commission includes at least two members from different political parties."

Finally, Congress should consider explicitly authorizing litigants with cases before inquorate commissions to bring their cases to Article III courts. As we discuss in Parts IV.B and IV.C above, it is unlawful for the President to prevent statutes from being enforced by removing or refusing to appoint officials such

440. *See* 42 U.S.C. § 2286(d)(3)(B).

441. *Id.*

442. *See supra* notes 163, 357-61 and accompanying text.

443. *See supra* notes 359-61 and accompanying text.

444. *See supra* notes 358-60 and accompanying text.

that the administering agencies lack quorums.[445] Although we think there are ways for courts to obtain this result, we believe Congress should explicitly provide access to judicial review when commissions lose their quorums. If Congress wishes to enact an escape valve, we recommend that it amend 5 U.S.C. § 554(d) and 5 U.S.C. § 704 to provide that decisions of administrative law judges or administrative judges become final if their commissions lose their quorums.

Conclusion

Multimember commissions exist to facilitate deliberation and collective decisionmaking. Quorum rules are necessary to ensure that commissions transact business according to these principles. Although once obscure, quorum rules have become essential to everyday governance because of the Supreme Court's willingness to expand the President's removal power. Inquorate commissions jeopardize the faithful execution of law, the constitutional and statutory rights of individuals, and democratic accountability. This Article provides legal, empirical, and normative evidence for understanding the essential role of quorum rules to agency design. By illustrating the importance of quorum rules, this Article seeks to ensure that commissions remain capable of the deliberative decisionmaking that Congress intended.

445. *See supra* notes 406, 419, 427-33 and accompanying text.