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SUPREME COURT REFORM: DESIRABLE—AND CONSTITUTIONALLY REQUIRED

DAVID ORENTLICHER*

As decisions by—and appointments to—the Supreme Court have become increasingly divisive,¹ many observers have renewed calls for reform.² For example, we could replace lifetime tenure with non-renewable terms of eighteen years, such that one term ends every two years.³ That way, less would be at stake with each nomination, Justices could not time their retirements for partisan reasons, and appointments would be divided more evenly between Democratic and Republican presidents. Or we could establish a non-partisan, judicial nominating commission.⁴

Concerns about the Supreme Court are not new, but increasing political polarization and partisan maneuvering over the two most recent Court appointments have accentuated tensions. With the legitimacy of the Court at

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1. While the U.S. Senate approved the appointment of Justice Anthony Kennedy by a 97-0 vote, his successor, Justice Brett Kavanaugh, squeaked by on a vote of 50-48. Similarly, the Senate approved Justice Antonin Scalia by a vote of 98-0, while the vote on his successor, Justice Neil Gorsuch, was 54-45. *Supreme Court Nominations: present-1789*, U.S. SENATE, <https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Oct. 20, 2018).

2. I have previously discussed the desirability of ideological balance on the Supreme Court in David Orentlicher, *Politics and the Supreme Court: The Need for Ideological Balance*, 79 U. PITT. L. REV. 411 (2018), and DAVID ORENTLICHER, TWO PRESIDENTS ARE BETTER THAN ONE: THE CASE FOR A BIPARTISAN EXECUTIVE 27-31 (2013).

3. See generally ROGER C. CRAMTON & PAUL D. CARRINGTON, REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (2006).

4. Many states have judicial nominating commissions, though they tend to be partisan since the governor appoints many of the commission members. See, e.g., IND. CONST. art. VII, § 9; KAN. CONST. art. III, § 5(e).

stake, reform to depoliticize the Court seems essential. And whichever reform is promoted, it is generally assumed that implementation would require a constitutional amendment, legislation, or a change in Senate rules.

But the conventional wisdom is wrong. There is a sound argument to be made that Supreme Court reform is constitutionally required.⁵

DUE PROCESS AND IDEOLOGICAL BALANCE

With Justice Brett Kavanaugh's appointment to the Supreme Court, it seems pretty clear that President Donald Trump and Senate Republicans have been able to solidify a staunchly conservative majority on the Court. In all likelihood, this new majority will stake out firmly conservative positions on a range of critical issues, including voting rights, reproductive rights, and corporate rights. With a second Trump nominee on the bench, the Supreme Court will bring a strong ideological bias to its decision making. While that is highly controversial, it is one of the features of our judicial appointment process. As is often said, elections have consequences.

Or should they when it comes to the judicial branch? We ought to consider the constitutional implications of ideological bias on the Supreme Court. In particular, principles of due process and the framers' original intent provide good reason to think that neither a conservative nor liberal Court majority should be able to impose its views on the country.

A. IDEOLOGICAL BIAS AND DUE PROCESS

The Due Process Clause promises litigants that they will receive an impartial hearing before a neutral court.⁶ And a neutral court decides cases without any personal, political, or other bias.⁷ With a fifth strongly conservative Justice on the Supreme Court, it is not a neutral court. Any party promoting a liberal viewpoint before the Justices will not be able to count on a fair shot at prevailing.⁸

To be sure, if Justices merely acted like umpires, doing something akin

5. The logic of my argument also would apply to the circuit courts of appeal, as well as state appellate courts.

6. Martin H. Redish & Jennifer Aronoff, *The Real Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and the Dangers of Popular Constitutionalism*, 56 WM. & MARY L. REV. 1, 34, 36–37 (2014).

7. Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 499–509 (2013).

8. Likewise, if a fifth liberal Justice had joined the Court, parties promoting a conservative viewpoint would not be able to count on a fair shot at prevailing.

to the calling of balls and strikes, as suggested by Chief Justice John Roberts in his confirmation hearings,⁹ a Justice's political philosophy would not matter. But of course, a Justice's political philosophy does matter.¹⁰ Otherwise, Republican Senators would have considered Judge Merrick Garland's nomination to the Supreme Court in 2016, and other nominations also would not fail because of partisan opposition. Some Justices take more conservative positions, while others take more liberal positions.¹¹ A conservative majority will render different decisions on environmental regulation, consumer protection, or voting rights than will a liberal majority. When Court decisions reflect the philosophical leanings of the Justices, and decisions can be determined by one side of the ideological spectrum, our system denies an impartial hearing to parties on the other side of the ideological spectrum. And that is fundamentally unfair in a constitutional system that promises litigants due process in court.

Because it is unfair for litigants to have their cases decided by an ideologically-biased court, other countries have designed their highest courts so decisions do not reflect only one side of the philosophical spectrum. Arguably, due process requires something similar for the Supreme Court.

A strong view of due process would demand ideological moderation for each Justice, an approach taken in some European countries. In Germany, for example, nominees to the Constitutional Court must receive a two-thirds vote of approval and therefore must appeal to legislators on both sides of the partisan aisle.¹² Instead of getting judges who are either strongly conservative or liberal, German litigants get judges who are moderate. Like Germany, Portugal and Spain require supermajority votes for appointments to their constitutional courts.¹³ So we might say that due process requires restoration of a strong filibuster rule in the Senate or a strong supermajority on final voting for judicial nominations. That would force presidents to nominate Justices acceptable to both conservatives and liberals.¹⁴

9. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005).

10. LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 103 (2013).

11. Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1491 (2007).

12. GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* 83 (2005); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 669 (2000).

13. John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1682 (2004).

14. This approach would be especially valuable at the district court level, where there is a single judge deciding cases.

A less demanding view of due process would focus on overall balance on the Court rather than on the ideologies of individual Justices. While there are different ways to achieve overall balance,¹⁵ the simplest path for the Supreme Court would be to follow the example of a number of countries. In many European nations, high court decisions are made by consensus, or at least a supermajority vote, so Justices on both sides of the ideological spectrum have to support the courts' opinions.¹⁶ The U.S. Supreme Court itself observed a norm of consensual decision-making for most of its history. Until 1941, the Justices typically spoke unanimously.¹⁷ Only about 8% of cases included a dissenting opinion. Now, one or more Justices dissent in about 60% of rulings.¹⁸ Chief Justice John Roberts has pushed for greater consensus on the Court,¹⁹ saying that the court functions best "when it can deliver one clear and focused opinion."²⁰

An advantage of this path to ideological balance is that it allows for a greater range of perspectives among the different Justices. Instead of nine relatively moderate Justices, we would get a mix of conservative and liberal Justices. And that would make for a stronger decision making process. Studies on group decision making demonstrate that better outcomes result when the decision makers bring a range of viewpoints to the table.²¹ Accordingly, I discuss this path to ideological balance in the remainder of this essay.

How large should a supermajority be? Since there may be times when six Justices are either conservative or liberal, it probably would be necessary to require more than a two-thirds supermajority to ensure that decisions always reflect the perspectives of both sides of the philosophical divide. We could require at least a 7-2 vote or even decision-making by consensus of the

15. Orentlicher, *supra* note 2, at 417–23.

16. EUROPEAN PARLIAMENT, DISSENTING OPINIONS IN THE SUPREME COURTS OF THE MEMBER STATES (2012), <http://www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf>

17. Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 771 (2015).

18. *Id.* at 776–77.

19. Hope Yen, *Roberts Seeks Greater Consensus on Court*, WASH. POST (May 21, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/21/AR2006052100678.html>.

20. Geoffrey R. Stone, *Chief Justice Roberts and the Role of the Supreme Court*, HUFFINGTON POST (May 25, 2011), https://www.huffingtonpost.com/geoffrey-r-stone/chief-justice-roberts-and_b_40277.html.

21. ALAN BLINDER, *THE QUIET REVOLUTION: CENTRAL BANKING GOES MODERN* 43 (2004); SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* 2–3 (2007); Lu Hong & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 PROC. NAT'L ACAD. SCI. 16385 (2004).

entire Court.

B. IDEOLOGICAL BIAS AND ORIGINAL INTENT

What would the framers think about this? On one hand, they did not include in Article III of the Constitution a requirement for ideological balance on the Supreme Court. On the other hand, they did not reject ideological balance. Moreover, they recognized the need to amend the Constitution with a Bill of Rights that includes the Due Process Clause's guarantee of impartial courts.

The framers' intent is consistent with this essay's due process analysis. With ideological balance, the Supreme Court would be more faithful to the framers' design for our constitutional system. The Founding Fathers worried greatly about "factions" pursuing their self-interest to the detriment of the overall public good. Accordingly, the constitutional drafters devised a system that they thought would block factional control of the national government.²² But the framers did not anticipate the extent to which political parties would form dominant factions that could gain command of government power. For example, the framers did not anticipate how partisan ties between presidents and members of Congress would limit the legislative branch's checking and balancing of the executive branch.²³ Similarly, the framers did not expect—nor did they want—a Supreme Court that would reflect the views of only one side of the ideological spectrum. Indeed, when Alexander Hamilton explained the Constitution's appointment provisions in *The Federalist Papers*, he emphasized the need to avoid nominations that reflect partiality instead of the overall public interest.²⁴

The Due Process Clause and original intent both support ideological balance on the Supreme Court. As discussed in the next section, Supreme Court precedent is consistent with such a requirement.

C. IDEOLOGICAL BIAS AND SUPREME COURT PRECEDENT

In previous cases, the Supreme Court has observed that constitutional concerns are not raised when a judge favors one or another ideological view.²⁵ Anyone with the appropriate training and experience for the judiciary will have opinions on important legal issues. According to the Court, due

22. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 18–21 (7th ed. 2013).

23. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313, 2323–24 (2006).

24. THE FEDERALIST NO. 76 (Alexander Hamilton).

25. The Court's opinion in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), provides a nice summary of the Court's discussions of the topic.

process prohibits judicial bias against a party to a proceeding, not bias against a legal view that the party might advocate.²⁶

But there are important reasons to distinguish Court discussions of the issue. First, these discussions were dicta. The question whether it is impermissible for an appellate court to have an overall ideological bias has not been decided by the Court. Rather, it has come up in cases addressing other issues of judicial neutrality. In *Republican Party of Minnesota v. White*, for example, the issue before the Court was whether a state could prohibit judicial candidates from announcing their positions on issues that might come before them if elected.²⁷ In another case, *Tumey v. Ohio*, the issue before the Court was whether judges could have a financial stake in the outcome of their decisions.²⁸

Second, the Court's reasoning is consistent with a due process argument against a Court that has an overall ideological bias. In *Republican Party of Minnesota*, the Justices discussed the kinds of personal biases that should disqualify a judge, and the Court wrote that a judge's ideological bias is not disqualifying in the way that a personal financial bias is disqualifying. It took that view in *Republican Party of Minnesota* and earlier cases because anyone who has the experience and training that would be desirable in a judge will inevitably develop an ideological bias.²⁹ But the fact that we must accept individual judges with ideological leanings does not prevent us from ensuring an overall ideological balance on the Court. Under a fair reading of the Constitution, litigants ought to be able to ensure that their cases are decided in an ideologically-balanced way.

In addition, it is difficult to identify a good reason for permitting the Court to function with a majority on one side or the other of the ideological spectrum. While we can point to the principle of majority rule to justify partisan control in the executive or legislative branches, popular majorities do not deserve special recognition in a judicial branch that should be guided by legal principle rather than prevailing sentiment.

26. *Id.* at 777–78.

27. *Id.* at 768. The Court held that the prohibition violated the First Amendment. *Id.* at 788.

28. *Tumey v. Ohio*, 273 U.S. 510, 514–15 (1927). The Court held that the judges' financial interests violated due process. *Id.* at 534.

29. *Republican Party of Minnesota*, 536 U.S. at 777–78.

D. POTENTIAL CONCERNS WITH A REQUIREMENT OF IDEOLOGICAL
BALANCE

In general, concerns about cost, efficiency, and fairness have limited policies to address judicial bias.³⁰ For example, one solution to judicial bias is recusal of the biased judge. But if reasons for recusal are not strictly limited, litigants might clog the courts with baseless recusal motions,³¹ and lawyers might exploit the rules to game the system in favor of their clients.³² Supreme Court Justices also have resisted strict recusal rules on the ground that there is no one who can step in for the disqualified Justice.³³ A supermajority requirement avoids the problems raised by judicial disqualification. It addresses bias not by removing partial Justices, but by counterbalancing their partialities.

Still, one might worry that a supermajority requirement would lead the Court to deadlock with some frequency and leave too many issues to be decided by the lower courts. However, a few considerations indicate that it is unlikely to do so. First, the Justices would have a strong incentive to find common ground. Supreme Court Justices want to leave their imprint on the law—after spending years, if not decades, maneuvering for a Court appointment and having reached the pinnacle of the judiciary, they would be driven by their desire to leave an important judicial legacy. If the Justices spent their years on the Court bogged down in gridlock, they would not be able to issue key decisions that would allow them to make a difference in resolving critical legal questions. Accordingly, they would come to accommodations that would allow them to issue important decisions.

Empirical evidence supports this prediction. High courts operate successfully under a supermajority requirement in other countries. In addition, the U.S. Supreme Court has effectively operated under a supermajority requirement from time to time. On a number of occasions, the Court has heard cases with only eight members and therefore has needed a 62.5% supermajority (5/8) to reach a decision. Sometimes this happens when a seat is temporarily unfilled; other times when Justices take ill or have to recuse themselves.³⁴ In a study of the 1,319 cases in which a tie could have

30. Geyh, *supra* note 7, at 514–15.

31. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 890–91, 899–900 (2009) (Roberts C.J., dissenting).

32. *Id.* at 903 (Scalia, J., dissenting).

33. Gabriel Serbulea, *Due Process and Judicial Disqualification: The Need for Reform*, 38 PEPP. L. REV. 1109, 1136–38 (2011).

34. There also have been periods when the Court had an even number of Justices. For most of the period between 1789 and 1807, the Court had six members. *Why Does the Supreme Court Have Nine Justices?*, CONST. DAILY (July 6, 2018), <https://constitutioncenter.org/blog/why-does-the-supreme-court>

occurred between the 1946 and 2003 terms of the Court, researchers found that a tie vote occurred less than 6% of the time.³⁵ And, of course, a number of landmark decisions have been decided by a supermajority vote. A 9-0 Court issued its opinion in *Brown v. Board of Education*,³⁶ a 7-2 Court issued its opinion in *Roe v. Wade*,³⁷ and a 4-0 Court issued its opinion in *Marbury v. Madison*.³⁸

The experience with juries also suggests that supermajority courts would reach decisions regularly. Criminal court juries typically have twelve members, and they usually have to reach unanimous decisions. Hung juries occur, but not very often.³⁹ Moreover, juries reach their unanimous decisions in a setting that allows for less compromise than does a decision by the Supreme Court. A criminal jury must acquit or convict.⁴⁰ The example of juries is important for a second reason. I have argued that to be impartial, the Court should issue decisions that reflect the views of Justices from both sides of the ideological spectrum.⁴¹ Similarly, in defining the meaning of an impartial jury, the Supreme Court has required that jurors be drawn from a fair cross-section of the community.⁴²

Game theory provides further reason to believe that the Court would find middle ground regularly under a supermajority requirement. Game theory can identify the kinds of relationships that are likely to encourage cooperative rather than oppositional strategies.⁴³ The Supreme Court includes important elements of cooperative relationships. For example, when individuals have an ongoing relationship with frequent and repeated interactions, as with members of the Court, they are much more likely to

-have-nine-justices.

35. Ryan Black & Lee Epstein, *Recusals and the "Problem" of an Equally Divided Supreme Court*, 7 J. APP. PRACT. & PROC. 75, 85–86 (2005).

36. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

37. *Roe v. Wade*, 410 U.S. 113 (1973).

38. *Marbury v. Madison*, 5 U.S. 137 (1803). The *Marbury* Court had six Justices, but two did not take part because of illness.

39. Studies suggest an average hung jury rate of around 6% nationwide. PAULA L. HANNAFORD-AGOR ET AL., ARE HUNG JURIES A PROBLEM?: EXECUTIVE SUMMARY 2 (2002), <https://www.ncjrs.gov/pdffiles1/nij/grants/199372.pdf>.

40. In some cases, juries can compromise if they have the option of convicting on a less serious charge.

41. See *supra* notes 9–21 and accompanying text.

42. *Taylor v. Louisiana*, 429 U.S. 522, 526–27 (1975).

43. ROBERT AXELROD, THE EVOLUTION OF COOPERATION 124–32 (1984); ITZHAK GILBOA, RATIONAL CHOICE 100–01 (2010); Ming Zeng & Xiao-Ping Chen, *Achieving Cooperation in Multiparty Alliances: A Social Dilemma Approach to Partnership Management*, 28 ACAD. MGMT. REV. 587 *passim* (2003).

choose cooperation with each other than when they have a one-shot relationship. Cooperation is also more likely in relationships with an indefinite time horizon, as with Justices who have lifetime appointments, than when there is a finite time horizon. Finally, cooperation is more common among individuals who come to their relationship with equal status and authority. That is true about Supreme Court Justices, except perhaps with Chief Justices. The extra authority of a Chief Justice may not be that important, but if it is, we could make the Chief's role a rotating position, as is the case with some state supreme courts.⁴⁴

CONCLUSION

There is much dissatisfaction among Supreme Court observers with the Court and its appointment process. And as the Court's decisions and appointment process have become increasingly divisive, public approval of the Supreme Court has declined. A majority of Americans once expressed strong confidence in the court. According to a July 2018 Gallup poll, only 37% do now.⁴⁵ Reforming the Supreme Court would do much to restore public faith in the Court. And it also would bring the Court into conformity with the requirements of due process.

44. See, e.g., *Supreme Court Judges*, MO. CTS. <https://www.courts.mo.gov/page.jsp?id=133> (last visited Nov. 8, 2018) (“[T]he chief justice typically is elected on a rotating basis by a vote of all seven Supreme Court judges to a two-year term.”). Or consider a model from Switzerland. The members of the Swiss Federal Council rotate through the position of president so they remain true equals in the Swiss executive branch.

45. Megan Brennan, *Confidence in Supreme Court Modest, but Steady*, GALLUP (July 2, 2018), <https://news.gallup.com/poll/236408/confidence-supreme-court-modest-steady.aspx>.

