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Politics and the Supreme Court: The Need for Ideological Balance

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I. INTRODUCTION

This Article is part of a larger project that I have undertaken for several years on the importance of ideologically-balanced government. Our political system suffers from multiple "winner-take-all" features that disenfranchise many, and sometimes a majority of, Americans.[1]

In a book and article,[2] I considered the problem of winner-take-all politics in the context of the executive branch. When we give all of the immense executive power to a single person from a single political party, we cause three serious and related harms—we deny meaningful representation in the development of national policy to half the public, we fuel partisan polarization as the party out of power fights to regain control of the Oval Office, and we increase the risk of ill-advised public policies. Better decisions are made when they are based on a diversity of perspectives.

The problem of winner-take-all politics is not as serious on the Supreme Court as in the White House. The Court typically includes a mix of conservative and liberal Justices. But the ability of a conservative or liberal majority to impose its perspective

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[1] In a typical election, the losing candidate may win close to half the vote, but still end up with nothing to show for it. Whoever gets the most votes wins all of the power of the office at stake. And in most U.S. legislative bodies, the majority party can pass its preferred bills despite opposition from the minority party.

[2] *See* DAVID ORENTLICHER, TWO PRESIDENTS ARE BETTER THAN ONE: THE CASE FOR A BIPARTISAN EXECUTIVE BRANCH (2013) [hereinafter ORENTLICHER, TWO PRESIDENTS]; David Orentlicher, *Political Dysfunction and the Election of Donald Trump: Problems of the U.S. Constitution's Presidency*, 50 IND. L. REV. 247 (2016). Several paragraphs of this article are drawn from the book and article.

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creates the same kinds of problems as a single executive who imposes a conservative or liberal perspective. Members of the public who share the perspective of the Court minority lack meaningful representation on many important issues, the judicial appointment process has become highly politicized as each side fights for a Court majority, and we increase the risk of ill-advised decisions.

Accordingly, I argue in this Article for a Supreme Court that functions on an ideologically balanced basis.[3] With ideological balance, the Court would provide meaningful representation to all, it would defuse the politicization of judicial appointments, and it would make wiser decisions. On the relevant metrics, a Court with ideological balance is superior to a Court that brings an ideological bias to its work. Indeed, 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 popular sentiment.

II. THE RATIONALE FOR IDEOLOGICAL BALANCE ON THE SUPREME COURT

When all of its seats are filled, the Supreme Court operates with either a conservative or liberal majority.[4] As a result, on politically controversial issues, the Court majority is able to impose its preferences on the entire country. These one-sided decisions leave the losing side—often half or more of the public—without a voice in the shaping of constitutional policy. That half of the public lacks meaningful

[3] In my proposal for bringing ideological balance to the executive branch, I observed that one of the virtues of doing so would be to bring ideological balance to the Supreme Court. ORENTLICHER, TWO PRESIDENTS, *supra* note 2, at 27–31.

[4] This is not to say that a majority consistently sides with the conservative or liberal position. "Swing Justices" such as Justice Anthony Kennedy can cross over to the minority now and then, as Justice Kennedy has done on cases involving discrimination on the basis of sexual orientation. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996).

In recent years, the conservative-liberal split has lined up with partisan politics. For most of the Court's history, there were conservative Justices who had been appointed by Democratic presidents, and liberal Justices who had been appointed by Republican presidents. Since 2010, the Justices in the liberal wing of the Court all were nominated by Democratic presidents, and the Justices in the conservative wing all were nominated by Republican presidents. Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301 (2016).

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representation on the critical judicial decisions that define the extent of governmental power and the breadth of a person's constitutional rights.

To be sure, if Justices merely acted like umpires, doing something akin to the calling of balls and strikes, as suggested by Chief Justice John Roberts in his confirmation hearings,[5] a Justice's political philosophy would not matter. But of course, a Justice's political philosophy does matter.[6] Otherwise, Republican Senators would have considered 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.[7] A conservative majority will render different decisions on environmental regulation, reproductive rights, 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 political spectrum, our system denies genuine representation for the other side of the political spectrum. And that is fundamentally unfair in a constitutional system based on the principle of representation for all.

It is especially unfair because political views should not carry the same weight in the courts as in Congress or the White House. While there are important arguments for giving the political majority greater power than the political minority in the legislative and executive branches,[8] those arguments do not carry over to the judicial branch. Justices and judges are authorized to decide based on legal principle, not based on popular preferences.

The unfairness is compounded by the fact that one side can lack meaningful representation for long periods of time. We generally trust majority rule because the composition of the majority will vary from one decision to another. One may lose on a foreign policy question but prevail on a domestic policy question. Over the long haul, each person will win many times even if not most of the time. But, majority rule becomes unfair when some people are persistently in the minority, always losing

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[5] *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).

[6] LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 103 (2013).

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

[8] While I agree that one can make important normative arguments for majority rule, I also believe that one can make stronger arguments for the sharing of power between the majority and minority, especially when the public is fairly evenly divided in a two-party system, as is the case in the United States.

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out. As Justice Byron White wrote, the Constitution is violated when "a particular group has been . . . denied its chance to effectively influence the political process."[9] At the Supreme Court, with its lifelong tenure for Justices, the minority can be effectively denied its ability to influence key judicial decisions for many years.[10]

Denying meaningful representation also compromises the credibility of the judiciary. When guaranteed a fair process, people are likely more willing to accept decisions that do not go their way. But without a voice, the losing side becomes more inclined toward resistance.

With ideological balance, the Court would respond to the problem of non-representation by giving voice to both sides of the political spectrum. Conservatives and liberals alike could always be sure that Supreme Court decisions take into account their perspectives.

Ideological balance also would defuse the partisan maneuvering that plagues the judicial appointment process. While partisan confirmation battles are not new, the judicial appointment process has become persistently and increasingly partisan for both Supreme Court Justices and lower federal court judges since Democrats blocked Republican President Ronald Reagan's nomination of Judge Robert Bork to the Supreme Court in 1987.[11] When power is divided between a Democratic president and a Republican Senate, or a Republican president and a Democratic Senate, many nominees are denied a hearing before the Senate Judiciary Committee, or the Committee votes against sending nominations to the floor for a vote.[12] Moreover, even when a judge or Justice is approved by the Senate, the process may stretch out over months or years. Because of the partisan barriers to appointment, a

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[9] Davis v. Bandemer, 478 U.S. 109, 132–33 (1986). This concern about persistent denial of influence in the political process provides a key reason for courts to invoke the Equal Protection Clause to protect people against discrimination. David Orentlicher, *Discrimination Out of Dismissiveness: The Example of Infertility*, 85 IND. L.J. 143, 147–51 (2010).

[10] Since Clarence Thomas succeeded Thurgood Marshall in 1991, there has not been a majority of liberal Justices on the Court. *See* Erwin Chemerinsky, *The Rise of Federalism*, 25-MAR L.A. LAW. 27, 27 (2002).

[11] *See* Devins & Baum, *supra* note 4; Gary L. McDowell, *Bork Was the Beginning: Constitutional Moralism and the Politics of Federal Judicial Selection*, 39 U. RICH. L. REV. 809 (2005).

[12] *See id.*; *see also* Philip Rucker & Robert Barnes, *As Obama's nominees languish in GOP Senate, Trump to inherit more than 100 court vacancies*, CHI. TRIB. (Dec. 25, 2016), http://www.chicagotribune.com/news/nationworld/politics/ct-trump-court-vacancies-20161225-story.html (discussing Democratic President Barack Obama's nominations slowing to a crawl when a Republican-led Senate took over in 2015, including infamously denying Judge Merrick Garland a hearing to replace deceased Justice Antonin Scalia in 2016).

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president might never make nominations for some open seats during the president's term.

Statistics from the administration of Bill Clinton are illustrative. In his first two years of office, Democrats controlled a majority of seats in the Senate, and the Judiciary Committee held hearings on more than 90% of Clinton's nominees. Republicans regained control of the Senate in November 1994, and the Judiciary Committee held hearings on 74%, 79% and 47% of Clinton nominees over the subsequent two-year segments of Clinton's eight years in office.[13]

With ideological balance on the Court, where neither party could gain a majority, there would be no payoff from partisan obstruction. Blocking appointments would not increase a party's ability to impose its political philosophy. Accordingly, Supreme Court vacancies would be filled more swiftly.

With ideological balance, the Court also would generate wiser decisions. Conservative and liberal Justices bring different perspectives about the balance between state and federal power, government power and individual liberties, and corporate power and consumer rights. We all benefit when legal rules reflect the perspectives of both sides of the ideological spectrum rather than the views of one side. Neither side has a monopoly on the truth; both sides have their policy blind spots. Conservative Justices can steer their liberal counterparts away from misguided decisions and toward desirable decisions, and liberal Justices can do the same for their conservative partners. In other words, with ideological balance, the Court would find a middle ground between conservative and liberal viewpoints and generate better decisions overall.

Even for those who think their side of the philosophical divide is the correct side, they should prefer a Court with ideological balance. Suppose one is conservative and believes that conservative majorities issue better decisions. Since American voters are nearly evenly split between Democratic and Republican voters, one can expect conservative majorities roughly half of the time and liberal majorities the other half of the time. For the conservative voter, half of the decisions over time would be good and half would be bad. Because the harm from bad decisions can be much greater than the benefit from good decisions (consider the difference between losing one's wealth from bad investments and increasing one's wealth from good

[13] LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 205 (2005).

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investments), one would be better off overall with decisions that always are balanced between conservative and liberal viewpoints.

Finally, with ideological balance, the Court would be more faithful to the framers' intentions for our constitutional system. The founding fathers worried greatly about narrowly-interested "factions" pursuing their self-interest to the detriment of the overall public good. Accordingly, the constitutional drafters designed a system that they thought would block factional control of the national government.[14] But the framers did not anticipate the extent to which political parties would form powerful factions that could gain control of government power. For example, the framers did not anticipate how partisan ties between presidents and members of Congress would overcome the intended checking and balancing roles that the executive and legislative branches would play.[15] Similarly, the framers did not expect—nor did they want—a Supreme Court that would reflect the views of only one side of the political spectrum. Because the constitutional design has failed to ensure the framers' desired ideological balance, reform is needed now.

But, one might ask, is there always a middle ground to be found? Isn't there either a right to an abortion or not a right to abortion? Isn't there either a right to bear arms or not?

Even in such cases, Justices can compromise, and in fact they often have, especially when the resolution of controversial issues is driven by relatively moderate, "swing" Justices. For both abortion and guns, the Court has recognized a right but also given the government power to regulate the right. States can encourage women to choose childbirth over abortion, they can require a 24-hour waiting period before the procedure is performed, and they can require parental notification before a minor's abortion (as long as minors can bypass parental notification by going to court).[16] In the case of the right to bear arms, the government can require rigorous background checks for gun purchasers and limit the firepower of guns that can be sold.[17]

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[14] GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 18–21 (7th ed. 2013).

[15] Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006). When the president comes from the same party as the congressional majority, the executive and legislative branches reinforce, rather than restrain, each other.

[16] Planned Parenthood v. Casey, 505 U.S. 833, 881–85, 899–900 (1992).

[17] *See* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

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The European approach to the judiciary also indicates that a middle ground always can be found. Specialized constitutional courts are responsible for constitutional decisions in European countries.[18] The Justices on those courts typically are moderate and operate on the basis of consensus, with dissenting opinions rare and in some countries nonexistent.[19]

III. ACHIEVING IDEOLOGICAL BALANCE

How would we generate ideological balance on the Supreme Court? We could seek a Court made up of Justices each of whom is politically moderate, as is typical for the European constitutional courts. That could be achieved by ensuring that all nominees secure the support of both Democratic and Republican elected officials.

Alternatively, we could seek a Court that has an overall ideological balance between conservative and liberal Justices, similar to New Jersey's practice for its state supreme court.[20] To achieve an overall balance, there could be an even number of Justices, with half reserved for Democratic nominees and half reserved for Republican nominees.[21] With this approach, we would make permanent the balance on the Court that existed between the death of Justice Antonin Scalia in February 2016 and the appointment of Justice Neil Gorsuch in April 2017, with its 4-4 split between conservative and liberal Justices.

A third approach would be to seek ideologically balanced *decisions* rather than ideologically balanced *Justices* or an ideologically balanced *Court*. For example, we could require the Court to issue decisions that are supported by a supermajority of Justices, as on the Nebraska and North Dakota Supreme Courts.[22] Or to be even more

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[18] John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1676–78 (2004). For non-constitutional cases, other courts are available. *Id.*

[19] *Id.* at 1678, 1692–93, 1702.

[20] In New Jersey, three seats are reserved for Democrats, three for Republicans, and the affiliation of the seventh justice is determined by the governor when the seventh seat opens up. John B. Wefing, *The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism*, 29 RUTGERS L.J. 701, 715–16 (1998).

[21] ARTHUR T. VANDERBILT, THE CHALLENGE OF LAW REFORM 33 (1955); David Orentlicher, *Make the Supreme Court's 4-4 Split Permanent*, ZÓCALO PUB. SQUARE (June 25, 2016), http://www.zocalopublicsquare.org/2016/06/24/make-supreme-courts-4-4-split-permanent/ideas/nexus/; Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547 (2018).

[22] In Nebraska, the Supreme Court can declare legislation unconstitutional only with the concurrence of at least five of the court's seven judges. NEB. CONST. art. V, § 2. In North Dakota, four out of the five

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confident of ideological balance, we could require the Court to operate on the basis of consensus. Some constitutional courts in Europe seek ideological balance by requiring both the appointment of moderate Justices and the making of decisions on the basis of consensus.[23]

I will discuss the three approaches separately and then consider the advantages and disadvantages for each.

A. Ideologically Balanced Justices

Under this reform, the goal would be to appoint Justices who are philosophically moderate rather than strongly conservative or liberal in their judicial philosophy.[24] In European countries, this is accomplished by requiring approval of nominees by a supermajority vote and therefore by elected officials on both sides of the political aisle.[25] In Germany, for example, nominees to the Constitutional Court must receive a two-thirds vote of approval, so must appeal to legislators across the ideological spectrum.[26] We have had something like that in the United States, with

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Supreme Court justices must agree before legislation can be deemed unconstitutional. N.D. CONST. art. VI, §§ 2, 4.

[23] Ferejohn & Pasquino, *supra* note 18, at 1681, 1692–93.

[24] While there may be some Justices who truly lie in the middle of the political spectrum, most will come to the bench with either conservative or liberal leanings. By "moderate" Justices, I mean Justices whose conservative or liberal leanings are mild rather than strong.

[25] Ferejohn & Pasquino, *supra* note 18, at 1681.

[26] 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). The German model has developed a number of features to reduce partisan battles over nominees. As indicated, the requirement of a two-thirds vote for approval prevents the majority party from imposing its preferences. To further avoid conflict over individual nominees, the major parties have agreed to an even allocation of seats between themselves with a smaller number of seats for the minor parties. Thus, if a Social Democrat judge steps down, the Social Democrats identify a replacement. Uwe Kischel, *Party, Pope, and Politics? The Election of German Constitutional Court Justices in Comparative Perspective*, 11 INT'L J. CONST. L. 962, 964–65 (2013). But even though the seats are allocated by party, each nominee still must secure broad support. As a result, the German court does not have the kind of strongly ideological members seen on the Supreme Court of the United States. CHRISTINE LANDFRIED, CONSTITUTIONAL REVIEW AND LEGISLATION IN THE FEDERAL REPUBLIC OF GERMANY, *in* CONST. REV. & LEGIS. 147, 148 (Christine Landfried ed., 1988); VANBERG, *supra*, at 83; Ackerman, *supra*, at 669; Ferejohn & Pasquino, *supra* note 18, at 1702 n.131; Telephone interview with Frank Emmert, Professor, Indiana University Robert H. McKinney School of Law (Apr. 24, 2017). With its allocation of judicial seats, the German Court operates as a hybrid of a court with ideologically moderate judges and an overall ideological balance.

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Supreme Court nominees being subjected to the filibuster rule,[27] but the minority party did not exercise its filibuster power on a regular basis to force nomination of moderate candidates. And when it did, the majority party eliminated the filibuster rule, in 2013 for lower court nominees,[28] and again in 2017 for Supreme Court nominees.[29] Perhaps a requirement of approval by a two-thirds vote of the Senate would result in a process more like that in Germany, with its nomination of relatively moderate judges.

A second way to ensure nomination of moderate Justices would be for the Senate to exercise its advisory role for judicial nominations[30] and create a judicial nominating commission with an equal number of Senate Democrats and Senate Republicans.[31] For each judicial opening, the commission could recommend a small number of potential nominees to the president. Such a system would generate moderate nominees because strongly conservative nominees would be unacceptable to the Democratic members of the commission, and strongly liberal nominees would be unacceptable to the Republican members of the commission. More appointees would be like Byron White in their moderation and fewer like William Brennan or Antonin Scalia at one end or the other of the ideological spectrum.[32]

Of course, presidents already look to the Senate for guidance in their nomination of lower court judges. Often, presidents defer to the recommendations of a state's senators; in Wisconsin, the process has been formalized with a nominating commission that makes recommendations to the state's senators.[33] In addition, some

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[27] While Senate actions typically require majority support for passage, a motion to close debate (cloture) required a 60-vote majority. Opponents could block adoption of a bill or approval of a presidential nominee as long as they had 41 votes to block a cloture motion through a filibuster. CHRISTOPHER DAVIS, CONG. RESEARCH SERV., 98-425, INVOKING CLOTURE IN THE SENATE 1 (2017).

[28] Jeremy W. Peters, *Senate Vote Curbs Filibuster Power to Stall Nominees*, N.Y. TIMES, Nov. 22, 2013, at A1. The Senate also eliminated the filibuster for executive branch appointments. *Id.*

[29] Matt Flegenheimer, *Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch*, N.Y. TIMES, Apr. 6, 2017, at A1.

[30] U.S. CONST. art. II, § 2 (describing the presidential power to appoint Supreme Court Justices and other federal judges with the "advice and consent of the Senate").

[31] Such a commission might include the Senate Majority Leader, the Senate Minority Leader, the Senate Judiciary Committee chair, and the ranking minority member of the Senate Judiciary Committee.

[32] Epstein et al., *Ideological Drift*, *supra* note 7, at 1491–93.

[33] *Federal Nominating Commission*, STATE BAR OF WIS., http://www.wisbar.org/aboutus/government relations/pages/federal-nominating-commission.aspx (last visited Jan. 18, 2018).

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states rely on nominating commissions for appointments to their courts of appeal and supreme courts.

B. An Ideologically Balanced Court

Under this reform, there would be an even number of Justices, say eight, ten, twelve, or more,[34] and the seats would be evenly divided between conservative and liberal seats. If a conservative seat opened, the new Justice would be chosen from a pool of conservative candidates, and if a liberal seat opened, the new Justice would be chosen from a pool of liberal candidates.

The model of judicial nominating commissions could be used to identify the pool of candidates. Instead of a single bipartisan nominating commission favoring moderate nominees, there could be two nominating commissions, one for conservative appointments and the other for liberal appointments. One commission could include the Senate Majority Leader and the chair of the Senate Judiciary Committee; the other commission could include the Senate Minority Leader and the ranking minority member of the Senate Judiciary Committee.[35] When a conservative seat opened up, the Republican nominating commission could recommend potential nominees to the president, and when a liberal seat opened up, the Democratic nominating commission could recommend potential nominees to the president.

Note a key advantage of linking the ideology of appointments to the nominators rather than the nominees. If a Democratic president is obliged to nominate a conservative Justice, or a Republican president to nominate for a liberal seat, we would have to worry about efforts by presidents to game the system. The Democratic president might seek a liberal Republican for a conservative seat, and a Republican president might seek a conservative Democrat for a liberal seat. By linking ideology to the elected officials with nominating authority, we can rely on the officials' self-interest to achieve the desired ideological balance. The Republican nominating commission would be careful to identify conservative candidates, and the Democratic nominating commission would be careful to identify liberal candidates.[36]

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[34] Research on jury size suggests that a 12-person Court would be superior to a Court with fewer members. Alisa Smith & Michael J. Saks, *The Case for Overturning* Williams v. Florida *and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 FLA. L. REV. 441, 463–68 (2008).

[35] Thus, one of the nominating commissions would have Democratic members while the other commission would have Republican members.

[36] Linking ideology to the nominators also avoids First Amendment problems. If the nominees must have a specific political affiliation (e.g., Democrat or Republican), then any candidate with a different or no political affiliation would automatically be rejected. A federal district court has held that to be

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Of course, elected officials might try to game a system with equal numbers of conservative and liberal Justices by blocking the other side from filling an open seat. For example, if a conservative Justice stepped down, and Democrats held a majority in the Senate, they might deny a hearing to a new nominee, preserving a majority of liberal Justices. To prevent that kind of gaming, the law could require recusal of a liberal Justice until the open seat was filled[37] so all cases would be decided by an evenly balanced Court. Recusal would be desirable in other situations to maintain an even balance among Justices participating in decisions. For example, if a Justice had to recuse in a particular case because of a personal conflict of interest, we would want a judge from the other side of the political spectrum to recuse for that case.

Elected officials also might try to game the system by forcing the other side to nominate relatively moderate Justices. For example, a Republican Senate might try to block a Democratic president's effort to appoint a strongly liberal Justice. To avoid that problem, reform could eliminate Senate confirmation and require the president to choose among candidates identified by the nominating commissions. Some states have similar approaches for appointments to their state supreme courts, with participation by the governor and a judicial commission. In Indiana, the governor must choose from a group of candidates proposed by a judicial nominating commission.[38] In California, a judicial appointments commission must approve the governor's nominee to the state supreme court.[39] Neither state requires a legislative vote.

Imposing a balance between liberals and conservatives on the Supreme Court may seem odd, but something similar has been done in New Jersey for many years. Under a 70-year tradition, Democrats and Republicans each hold three of the New Jersey Supreme Court's seven seats, with the Governor's party getting a fourth seat when the seventh seat opens up.[40] That way, both sides of the ideological divide

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unconstitutional on First Amendment grounds. Adams v. Carney, 2018 WL 3105113 (D. Del. June 25, 2018).

[37] The liberal Justices could take turns recusing themselves so each would miss a similar number of cases.

[38] IND. CONST. art. VII, § 10.

[39] CAL. CONST. art. VI, § 16(d)(2).

[40] John B. Wefing, *Two Cheers for the Appointment System*, 56 WAYNE L. REV. 583, 597–98 (2010). Even before the 1947 New Jersey Constitution created the current seven-member state supreme court, New Jersey had a longstanding tradition of a bipartisan judiciary. *Id.*; VANDERBILT, *supra* note 21, at 32–33. Delaware has a similar system per its state constitution. There must be at least two Democrats and two Republicans on the five-member court. DEL. CONST. art. IV, § 3 (requiring that "three of the five Justices of the Supreme Court in office at the same time, shall be of one major political party, and two of said Justices shall be of the other major political party"). *But see Adams*, 2018 WL 3105113 (invoking the First

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always have at least three of the seven seats. And this division of power has worked very well. Legal scholars have measured the extent to which the decisions of a supreme court in one state influence the decisions of supreme courts in other states. The New Jersey Supreme Court regularly ranks as one of the most influential.[41] In 1976, for example, the New Jersey Supreme Court led the way in recognizing the right to make medical decisions at the end of life in the landmark *Quinlan* case.[42]

It also would not be novel to have an even number of Justices on the Supreme Court. While an odd number of Justices is the more common approach for high courts, it is by no means the only approach. For example, the constitutional courts in Germany and Spain have sixteen and twelve judges, respectively.[43] Similarly, Austria's constitutional court has twenty judges, and Belgium's has twelve.[44] I will address later the concern that an even ideological balance would result in too much gridlock.

C. Ideologically Balanced Decisions

Under this reform, decisions would require support from at least a supermajority of Justices or perhaps the full Court. With the current nine-Justice Court, a cohort of at least six Justices would constitute a supermajority needed to

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Amendment to strike down Delaware's allocation of judicial seats on the ground that a person's political affiliation should not disqualify the person from consideration for judicial positions). Also, U.S. Senators Jacob Javits (R-NY) and Daniel Moynihan (D-NY) worked out their own allocation of judicial nominations by party that was continued between Moynihan and U.S. Senator Alfonse D'Amato (R-NY). The senator whose party controlled the White House would get three out of four nominations. Kirk Johnson, *The Street Fighter and the Professor; Moynihan and D'Amato: A Loyal Pair*, N.Y. TIMES (Mar. 15, 1993), http://www.nytimes.com/ 1993/03/15/nyregion/the-street-fighter-and-the-professor-moynihan-and-d-amato-a-loyal-pair.html.

[41] Wefing, *supra* note 20, at 701–02; Jake Dear & Edward W. Jessen, *"Followed Rates" and Leading State Cases, 1940-2005*, 41 U.C. DAVIS L. REV. 683, 697 (2007).

[42] *In re* Quinlan, 355 A.2d 647 (N.J. 1976). As indicated, the requirement of a 2/3 majority for approval in Germany has led to a system in which seats on the Constitutional Court are assigned in a balanced way by party affiliation. Kischel, *supra* note 26, at 964–65.

[43] Ferejohn & Pasquino, *supra* note 18, at 1681–82. The German Court is divided into two 8-judge Senates, one of which handles claims involving constitutional rights, the other of which handles other claims, including matters of government structure and most issues relating to the European Union. Rudolf Streinz, *The Role of the German Federal Constitutional Court Law and Politics*, 31 RITSUMEIKAN L. REV. 95, 97 (2014).

[44] *World Factbook*, C.I.A., https://www.cia.gov/library/publications/the-world-factbook/fields/2094.html (last visited Jan. 18, 2018).

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render a decision. By requiring a supermajority of Justices, decisions would typically need support from at least one Justice on each side of the ideological spectrum.[45]

How large should the 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. Likely, it would make most sense to require decision making by consensus of the entire Court.

While concerns might arise about the ability of a Court to operate effectively when it can render decisions only by supermajority vote, we know from the experience in Nebraska, North Dakota, and Europe that high courts can function well with supermajority voting, including decision making based on consensus.

Of course, decision by consensus should be easier on courts whose judges generally are politically moderate, as with the European constitutional courts. But we also have an important example of decision making by consensus when the decision makers bring different ideological perspectives to the table—the Swiss Federal Council. The Federal Council exercises the executive power in Switzerland in a consensual manner, and it includes seven members who represent the major political parties in the country.[46]

The comparison with European courts raises an important question. Supermajority voting exists in Europe, but it does so in a system where only the constitutional court can decide constitutional questions. In the United States, where lower courts also decide constitutional questions, there may be a greater risk that supermajority voting on the Supreme Court would result in deadlock on particular issues, leaving more issues to be decided by circuit courts of appeal. In the next section, I will explain why this is not likely to happen.

IV. CHOOSING AMONG THE DIFFERENT PATHS TO IDEOLOGICAL BALANCE

With three potential paths to ideological balance, is one preferable to the others? Each approach has some advantages and disadvantages. On balance, a combination of approaches makes the most sense.

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[45] A supermajority requirement is an implicit feature of a Court evenly split between conservative and liberal Justices—the ideologically balanced Court discussed in the previous section. If there are four conservative and four liberal Justices, for example, a supermajority of five Justices (62.5%) would be needed to render a decision.

[46] ORENTLICHER, TWO PRESIDENTS, *supra* note 2, at 116–18.

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A. Ideologically Balanced Justices

Basing reform on a goal of making ideologically moderate appointments carries the key advantage of being applicable not only to appellate courts but to district courts as well. The Supreme Court leaves many issues to be decided by the circuit courts of appeal, which in turn may leave issues to be decided by the trial courts. For such issues, ideological balance would not be achieved if balance were incorporated only into the higher courts.

And politically moderate appointments would be especially valuable at the district court level, where there is only one judge deciding each case. It would be fairer to litigants overall to have their claims resolved by a moderate judge rather than by a conservative or liberal judge. A conservative judge's philosophical leanings may favor one side of a contest, while a liberal judge's leanings may favor the other side. A moderate judge is least likely to reach decisions that favor one side or the other because of the judge's philosophical perspective.[47]

Ideologically moderate appointments are also beneficial because lawyers aspiring to the bench would not need to become politically active with one party or the other in order to improve their chances of appointment.

There are a few disadvantages to a policy based on ideologically moderate appointments. First, at the appellate level, courts would bring a narrower range of judicial views to their deliberations. In general, diversity of perspectives fosters better decision making.[48] An appellate court that includes strongly conservative and liberal members would approach its decisions with a greater range of viewpoints than would a court filled with only moderate appointees.

Second, while Justices or judges might be seen as moderate when appointed, they may become more conservative or liberal over time—the "ideological drift" phenomenon. At some times, drift might result in a relatively conservative court, while at other times, it might result in a relatively liberal court.

Finally, it would take time to fully implement this reform. As Justices or judges step down from the appellate bench, they could be replaced by moderate appointees. But for many years, higher courts will have a mix of conservative, liberal, and moderate Justices or judges, and the mix could lean either conservative or liberal overall.

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[47] Alternatively, district courts could be staffed by multiple judges, as currently happens in cases involving a constitutional challenge to legislative redistricting. 28 U.S.C. § 2284. I am grateful to Vicki Jackson for this point.

[48] ORENTLICHER, TWO PRESIDENTS, *supra* note 2, at 148–49.

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B. Ideologically Balanced Courts

Having ideologically balanced courts—courts with even numbers of conservative and liberal Justices or judges—addresses the ideological diversity problem of a system whose Justices and judges all are philosophically moderate. An ideologically balanced court can include a wide range of perspectives among its members.

In addition, implementation could be achieved quickly by increasing the number of seats on courts that lack an ideological balance currently. In the case of the Supreme Court, for example, with its 5-4 conservative majority, increasing the size of the Court by one liberal Justice would allow for rapid balance.

One might worry that an evenly divided court could deadlock with some frequency. However, it is unlikely to do so. To be sure, the Supreme Court punted on a number of key cases when it had a 4-4 conservative-liberal balance between Justice Scalia's death and Justice Gorsuch's appointment. Punting is an attractive option when the 4-4 balance is temporary, as it was then—but punting is not so tempting when the division of power is permanent. If the Justices knew that there always would be an even sharing of power, they could not delay their rulings in the hope that they would later be able to secure a majority for their views.

In addition to lacking an incentive to punt, Justices on an evenly-divided Court would have a strong incentive to find the middle 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 important legal questions. Accordingly, they would come to accommodations that would allow them to issue meaningful decisions.

We got a sense of that with the 4-4 Court after Justice Scalia's death. The Justices did more compromising because each side realized it could do its job only by working with the other side.[49] With a permanent ideological balance, the incentives for compromise would be even greater.

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[49] Patrick Marley, *Justice Elena Kagan Says Court Had to Reach More Consensus after Antonin Scalia's Death*, MILWAUKEE J. SENTINEL (Sept. 8, 2017), http://www.jsonline.com/story/news/politics/2017/09/08/justice-elena-kagan-says-court-had-reach-more-consensus-after-antonin-scalias-death/646125001/.

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Another source of data on the impact of an even number of Justices indicates that deadlock would not be a significant problem. As with the 4-4 Court in 2016-17, the Court from time to time operates with an even number of Justices, sometimes because of a vacant seat on the Court, other times because of illness or recusal. In a study of the 1319 cases in which a tie could have occurred between the 1946 and 2003 terms of the Court, researchers found that a tie vote occurred less than 6% of the time.[50]

The experience with juries also suggests that evenly balanced 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. Moreover, juries reach their unanimous decisions in a setting that allows for less compromise than does a decision by an appellate court. A criminal jury must acquit or convict.[51]

Game theory provides further reason to believe that balanced courts would find middle ground regularly. Game theory can identify the kinds of relationships that are likely to encourage cooperative rather than oppositional strategies. An evenly balanced court would incorporate key elements of cooperative relationships. For example, when individuals have an ongoing relationship with frequent and repeated interactions, as with members of an appellate court, they are much more likely to 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 and judges 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 appellate court Justices or judges, except perhaps with Chief Justices or Judges. The extra authority of a Chief Justice or Judge may not be that important, but if it is, we could make the Chief's role a rotating position, much as the members of the Swiss Federal Council rotate through the position of president so they remain true equals in the Swiss executive branch.[52]

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

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

[52] ORENTLICHER, TWO PRESIDENTS, *supra* note 2, at 116. Justices on some state supreme courts rotate through the chief's seat on a routine basis. *See, e.g.*, Missouri Courts, Supreme Court Judges, at https://www.courts.mo.gov/page.jsp?id=133 (describing a tradition on the Missouri Supreme Court of

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There are some disadvantages to a policy of ideologically balanced courts. Ideological diversity with an overall ideological balance only works for appellate courts where there are multiple judges or Justices. A single district court judge cannot bring ideological diversity to the bench. In addition, as with a system favoring moderate appointments, the approach of overall ideological balance suffers from the problem of ideological drift. Judges or Justices nominated because of their conservative leanings may take more liberal positions than expected, as happened with Harry Blackmun and David Souter. Similarly, appointees chose for their liberal viewpoints may vote in a more conservative fashion than expected, as happened with John Harlan and Potter Stewart.[53]

C. Ideologically Balanced Decisions

Requiring ideologically balanced decisions through strong supermajority voting would be the simplest reform. Since decisions would require support from both sides of the ideological spectrum, we would generally get a diversity of perspectives without having to change the method of nomination and appointment for the Supreme Court or the circuit courts of appeals.

Supermajority voting also addresses the problem of ideological drift. Even with Republican appointees becoming more liberal or Democratic appointees becoming more conservative, decisions still would require support from both conservatives and liberals. And supermajority voting can be implemented immediately, without any lag time.

Supermajority voting fits in well with constitutional principle. To the extent that an appellate court overrides a federal legislative or executive act, it is overriding the majority will. Requiring a supermajority to override protects the principle of majority rule against judicial overreach. Federal courts do not exercise the same level of deference to state legislative or executive actions, but in those cases, courts are interpreting the Constitution and effectively amending our understanding of the Constitution. Accordingly, it makes sense for courts to do so by supermajority rule, just as amendments to the Constitution require supermajority support from Congress and the states.[54]

There are two key drawbacks to supermajority voting. While it would make the appointment process less politicized than it currently stands, it would not defuse the

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elections for chief justice "on a rotating basis by a vote of all seven Supreme Court judges to a two-year term").

[53] Epstein et al., *Ideological Drift*, *supra* note 7, at 1492.

[54] U.S. CONST. art. V (requiring two-thirds support in the House and Senate to propose an amendment and three-fourths support among the states to ratify an amendment).

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politics of appointments entirely. Even with supermajority voting, it would matter whether the majority of Justices or judges were conservative or liberal. And supermajority voting would not address the problem of ideological imbalance at the district court level.

D. Finding the Ideal Reform

On balance, we probably would do best with a mix of reforms. At the district court level, where a single judge decides, we should ensure the appointment of ideologically moderate judges so neither side of the political spectrum is favored when judges render their decisions. As mentioned, that could be accomplished through the use of a bipartisan judicial nominating commission.

At the circuit court and Supreme Court levels, reform should be based on a combination of all three reforms. To realize the benefits of decision making that results from a diversity of perspectives, we would want to ensure that court rulings reflect a range of political viewpoints among the different Justices or judges.[55] An even balance between conservative and liberal Justices or judges and strong supermajority voting each can provide that diversity. In addition, the two reforms bring separate important advantages. The even balance would fully defuse the politicization of the appointment process, while supermajority voting would only partially do so,[56] and strong supermajority voting would compensate for the problem of ideological drift that can occur with Justices or judges on a court that is supposed to have an even balance of ideologies.[57]

Including some politically moderate judges or Justices would be valuable to further increase the diversity of perspectives on appellate courts. It would be desirable to cover the full range of perspectives rather than just those on each end of

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[55] I have focused on ideological diversity because of the strong influence of political perspective on judicial decision making. Should we also adopt policies to achieve similar balance among Justices or judges on racial, ethnic or gender lines? On one hand, concerns about representation and voice are important for all persons. On the other hand, the empirical evidence suggests that a person's political affiliation may be much more important than other group identifications for their views on matters of public policy. For example, women voters care much more about the political party than about the sex of candidates for political office. Kathleen Dolan, *Gender Stereotypes, Candidate Evaluations, and Voting for Women Candidates: What Really Matters?*, 67 POL. RES. Q. 96, 98, 104 (2016). Thus, female Democrats are much more likely to vote for male Democrats than for female Republicans, and female Republicans are much more likely to vote for Republican men than for female Democrats. *Id.* Perhaps it would make sense to ensure ideological diversity on the courts as a first step and then consider whether further changes would be desirable to promote other kinds of diversity.

[56] *See supra*, at Sec. IV.B.

[57] *See id.*

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the spectrum. In addition, the politically moderate judges or Justices could be drawn from the district courts and bring with them their experience at the trial court level.

How would it look to combine all three reforms? A number of combinations could work. I'll provide one example. For the Supreme Court, Congress could increase the number of seats to twelve and designate four seats for conservative Justices, four for liberal Justices, and four for politically moderate Justices. A Republican nominating commission could identify candidates for the conservative seats, a Democratic nominating commission for the liberal seats, and the two nominating commissions could come together as a bipartisan commission to identify candidates for the moderate seats. Supermajority voting could be included by requiring support for Court decisions by all twelve Justices, or at least a supermajority of ten Justices. With a minimum of ten for the supermajority, at least two Justices would have to come from each of the three ideological blocs.

Another approach would be to try the different models in different states. We rely on the states to test out innovative public policies through their role as laboratories of experimentation.[58] As mentioned, New Jersey already has adopted for its highest court something similar to the model of a court with overall ideological balance. Importantly, amendments to the Constitution typically emerge from models developed by states.[59]

V. IS THERE A DOWNSIDE TO IDEOLOGICAL BALANCE?

We might worry that a requirement of ideological balance and the need for compromise would preclude decisions that bring major change to the country. Courts often are viewed as engines of social reform. Would change come slowly and only in small steps?

Of course, incremental change can be a virtue. By making limited rather than expansive changes, courts reduce the risk of causing great harm from erroneous decisions.[60] Proceeding in small steps allows courts to test their theories carefully and maximize the likelihood that they are taking legal doctrine in the right direction. In addition, by proceeding at an incremental pace on important issues, courts promote discussion and deliberation by the public and its elected officials on those

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[58] New State Ice v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[59] AKHIL AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 467 (2012).

[60] CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 4 (2001).

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issues and the opportunity for meaningful participation in the decision making process.[61] Sweeping decisions short-circuit the democratic process and can provoke stiff resistance and a backlash that compromise the very principles that the courts were trying to advance and leave those principles with weaker recognition in the end.[62]

But even if major change is important, the Supreme Court's history demonstrates that Justices and judges from different sides of the ideological spectrum can come together to issue path breaking decisions. In fact, many of the Court's landmark decisions enjoyed broad support among the Justices. When the Court struck down segregated schools in *Brown v. Board of Education*, the vote was unanimous.[63] Similarly, *Roe v. Wade* was decided by a 7-2 vote.[64] On many issues, conservatives and liberals agree. Indeed, it is often said that people agree 80% of the time and disagree 20% of the time. Ideological balance would drive courts toward the 80% common ground and away from the 20% where perspectives differ.

Moreover, as Gerald Rosenberg has observed, the Supreme Court plays a more limited role in implementing social reform than is commonly assumed. There are important structural constraints on the effectiveness of the courts. As Alexander Hamilton wrote in Federalist 78, the judicial branch is the "weakest" branch because it controls neither the "sword or the purse" and must rely instead on the other branches of government to carry out its decisions.[65] With these and other constraints (e.g., the political pressures that the president and Congress can exert on courts), judicially-driven social reform generally requires that political, social and economic change already have begun. It also requires substantial support for reform from the president and Congress.[66]

Thus, for example, the Supreme Court's 1954 school desegregation decision in *Brown v. Board of Education* did not result in any real integration of southern schools

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[61] *Id.*; Barry McDonald, *Eight Justices Are Enough*, N.Y. TIMES, May 26, 2016, at A23.

[62] Lincoln Caplan, *Ginsburg's* Roe v. Wade *Blind Spot*, N.Y. TIMES (May 13, 2013), https://takingnote.blogs.nytimes.com/2013/05/13/ginsburgs-roe-v-wade-blindspot; Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 381–82 (1985).

[63] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[64] Roe v. Wade, 410 U.S. 113 (1973).

[65] THE FEDERALIST NO. 78 (Alexander Hamilton).

[66] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE 35–36 (2d ed. 2008).

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for a decade. National, state, and local political leaders, as well as the public, did not provide support for—and indeed often opposed—the integration of schools. Ten years after *Brown*, a number of factors allowed the decision to have an impact in the South. Congress passed the Civil Rights Acts of 1964 and the Elementary and Secondary Education Act of 1965, the U.S. Department of Health, Education and Welfare exercised its authority under the two Acts to shape school policies, and public sentiment had shifted. As a result, the decision in *Brown* and subsequent judicial decisions were able to desegregate southern public schools.[67]

The lesson from *Brown* and other key cases is that courts can play an important role in social reform, but they cannot do so when they try to implement policies that go significantly against the grain of existing social norms. Rather, they must work in tandem with prevailing political and social currents. Supreme Court Justices generally recognize this reality. While they felt comfortable issuing their opinion in *Brown* by a unanimous vote that included conservatives Felix Frankfurter and Sherman Minton, the Justices declined to override bans on interracial marriage two years later in *Naim v. Naim*.[68] Instead, they waited until the *Loving*[69] case in 1967 when public sentiment was more receptive to a decision on behalf of mixed-race couples.[70]

Even what is perhaps the Court's most controversial modern opinion, *Roe v. Wade*, came at a point when public support for a right to abortion was strong enough, with a majority of Americans reporting that they supported a right in at least some circumstances.[71] Moreover, states had started to liberalize their abortion statutes, and a decision in favor of abortion rights could attract broad support among the Justices. The *Roe* Court's seven-Justice majority included conservatives Warren Burger, Lewis Powell, and Potter Stewart.[72]

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[67] *Id.* at 51–54, 74–104. To be sure, the decision in *Brown* did lead quickly to integration in the border states between the northern and southern United States. *Id.* at 50–51.

[68] Naim v. Naim, 350 U.S. 985 (1956).

[69] Loving v. Virginia, 388 U.S. 1 (1967).

[70] Sanford Levinson, *Compromise and Constitutionalism*, 38 PEPP. L. REV. 821, 832–34 (2011).

[71] Lydia Saad, *Public Opinion About Abortion—An In-depth Review*, GALLUP (Jan. 22, 2002), http://www.gallup.com/poll/9904/public-opinion-about-abortion-indepth-review.aspx.

[72] Roe v. Wade, 410 U.S. 113 (1973). The two dissenting Justices, William Rehnquist and Byron White, came from the Court's conservative wing. *Id.*

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When the Court fails to reflect public sentiment, it can trigger backlash. The *Kelo* eminent domain case provides a useful illustration. In that case, the Court upheld the ability of governments to exercise their power of eminent domain and seize the property of homeowners for privately-operated economic development.[73] Public anger erupted quickly, and it led states across the country to pass statutes curtailing the eminent domain power. Within five years of the *Kelo* decision, forty-three states had revised their eminent domain statutes to make them more restrictive.[74]

In short, requiring ideological balance probably will not have a significant effect on the likelihood that the Supreme Court or courts of appeal will champion social reform. However, ideological balance will promote the key benefits that winner-take-all politics lack—broad representation for the public in the decision-making process and wiser decisions. In addition, requiring ideological balance will defuse what has become a drawn out and highly partisan judicial selection process.

VI. IMPLEMENTING REFORM

If we want to ensure ideologically balanced Justices, courts, or decisions, how would that be accomplished? Can it happen by statute, would a constitutional amendment be required, or are there other paths to adoption?

A. Ideologically Balanced Justices

As mentioned earlier, we could ensure ideologically balanced or moderate appointments in at least a couple of ways. We could follow the European approach and require that any appointment be approved by a supermajority of the Senate. Alternatively, the Senate could create a bipartisan judicial nominating commission that would recommend potential nominees acceptable to both parties.

There are no bars to the Senate creating a judicial nominating commission as a way to meet its Article II, Section 2 responsibility to provide "advice" to the President for judicial appointments, and the Senate could make clear that it would consent only to nominees recommended by its commission. However, since the Constitution rests nominating authority with the President, the Senate could not

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[73] Kelo v. City of New London, 545 U.S. 469, 489–90 (2005).

[74] *Five Years After* Kelo: *The Sweeping Backlash Against One of the Supreme Court's Most-Despised Decisions*, INST. FOR JUSTICE 3 (June 2010), http://ij.org/wp-content/uploads/2015/08/kelo5year_ann-white_paper.pdf.

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directly require the president to abide by its recommendations. For that, a constitutional amendment would be needed.

As to requiring a supermajority vote for approval, that probably would require a constitutional amendment. Since the Constitution specifies supermajority votes for some responses by the Senate to presidential action, as with ratification of a proposed treaty or overriding of presidential vetoes,[75] adoption of a supermajority vote rule for judicial nominations by the Senate would be viewed as an encroachment on presidential authority and therefore a violation of the separation of powers. But the Senate could exercise its Article 1, Section 5 power to determine the rules of its proceedings and use a filibuster rule to effectively require a supermajority vote.[76] Until this year, 60 votes were needed to close debate on a Supreme Court nomination. The cloture rule could be modified to require 67 votes, and if it were employed strictly, could ensure that any nomination would have the support of both Democrats and Republicans.[77]

B. Ideologically Balanced Courts

Since Congress has authority to determine the number of Justices on the Supreme Court and the number of judges on the circuit courts of appeal,[78] legislation could set the number of seats on each appellate court at an even number.

As mentioned earlier, we could ensure a 50-50 split between conservative and liberal Justices or judges by creating two judicial nominating commissions, one with Democratic Senators, and the other with Republican Senators. The analysis for adopting the two commissions parallels that for the single judicial nominating commission for moderate Justices or judges. The Senate could exercise its advisory role on judicial nominations to establish the commissions, and it could exercise its consenting role to make clear that it would approve only those nominees recommended by its commissions. However, a constitutional amendment would be needed to require the president to select nominees from the commissions' recommendations. A constitutional amendment also would be needed to eliminate Senate confirmation so as to prevent a Senate majority from blocking the ideological nominees of a president from the other party.

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[75] U.S. CONST. art. II, § 2; *id.* art. I, § 7.

[76] WALTER OLESZEK, CONG. RESEARCH SERV., 98-779 GOV, SUPER-MAJORITY VOTES IN THE SENATE (2010).

[77] As mentioned earlier, the Senate majority can discard a cloture rule giving it less stability than a statute or constitutional amendment.

[78] ELIZABETH R. BAZAN, JOHNNY KILLIAN & KENNETH R. THOMAS, CONG. RESEARCH SERV., RL32926, CONGRESSIONAL AUTHORITY OVER THE FEDERAL COURTS 2 (2005).

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C. *Ideologically Balanced Decisions*

Per constitutional text, Congress seems to have the power to enact legislation imposing a supermajority voting requirement on the Supreme Court. According to Article III, Section 2, of the Constitution, the Supreme Court exercises its appellate jurisdiction "under such regulations as the Congress shall make." And the Judiciary Act of 1789 includes many regulations for the federal judiciary.

The main argument against a legislated supermajority requirement would rest on principles of the separation of powers. If Congress can require a supermajority vote instead of a simple majority, it can better insulate its actions from judicial review. On the other hand, one could argue that constitutional challenges should have to persuade more than a mere majority of Justices. As the Supreme Court regularly observes, legislation passed by Congress carries a strong presumption of constitutionality.[79]

The Supreme Court and the courts of appeals could adopt a policy of consensual decision making on their own. Chief Justice John Roberts has promoted a norm of decision making based on broad agreement,[80] and European constitutional courts have developed policies of consensual decision making on their own. The Supreme Court observed a norm of consensual decision making for most of its history.[81] Until 1941, the Justices typically spoke unanimously—dissents were written in only about 8% of cases. Now, one or more Justices dissent in about 60% of cases.[82]

VII. CONCLUSION

It is difficult to defend the current process for selecting Supreme Court Justices. Allowing one side of the ideological divide to gain majority control of the Court treats the minority unfairly, exacerbates political polarization, and increases the chances of unwise decisions. The system is broken and only getting worse, as

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[79] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 384 (1989) (observing that the Court should strike down an act of Congress only "for the most compelling constitutional reasons"); United States v. Watson, 423 U.S. 411, 416 (1976) (citing the "strong presumption of constitutionality due to an Act of Congress"). *See also* Gillian E. Metzger & Trevor W. Morrison, *The Presumption of Constitutionality and the Individual Mandate*, 81 FORDHAM L. REV. 1715, 1729–30 (2013) (discussing the existence of the presumption absent the implication of an individual's fundamental rights).

[80] 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.

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

[82] *Id.* at 776–77.

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reflected in the divisive battles to fill Justice Antonin Scalia's and Justice Anthony Kennedy's seats.

To fix the judicial appointment process, we need incentives for cooperation rather than incentives for conflict. By replacing winner-take-all politics with ideological balance, we can do much to make the Supreme Court—and the lower courts—operate in a fairer, more conciliatory, and wiser fashion.

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