

4-2022

Judicial Consensus: Why the Supreme Court Should Decide Its Cases Unanimously

David Orentlicher

Follow this and additional works at: https://opencommons.uconn.edu/law_review



Part of the [Courts Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Orentlicher, David, "Judicial Consensus: Why the Supreme Court Should Decide Its Cases Unanimously" (2022). *Connecticut Law Review*. 523.

https://opencommons.uconn.edu/law_review/523

CONNECTICUT LAW REVIEW

VOLUME 54

APRIL 2022

NUMBER 2

Article

Judicial Consensus: Why the Supreme Court Should Decide Its Cases Unanimously

DAVID ORENTLICHER

Like Congress and other deliberative bodies, the Supreme Court decides its cases by majority vote. If at least five of the nine Justices come to an agreement, their view prevails. But why is that the case? Majority voting for the Court is not spelled out in the Constitution, a federal statute, or Supreme Court rules.

Nor it is obvious that the Court should decide by a majority vote. When the public votes on a ballot measure, it typically makes sense to follow the majority. The general will of the electorate ought to govern. But judicial decisions are not supposed to reflect popular sentiment. Rather, they must respect the rule of law. Thus, on many matters, courts override the preferences of the majority to protect the rights of the minority.

Moreover, juries in the United States decide their cases unanimously. As the Supreme Court has recognized, it is important for jury decisions to emerge from a deliberative process that represents the views of the entire community.

For the same reasons why it is important for juries to decide cases unanimously, so is it important for the Supreme Court, as well as other appellate courts, to decide cases unanimously. In particular, unanimous decisions would be better decisions, and they would be fairer decisions. They would be better because they would take into account a broader range of relevant perspectives, and they would be fairer because they would reflect the views of both sides of the ideological spectrum.

Deciding cases by consensus would not be new for the Supreme Court. For most of its history, it operated under a norm of consensus, with dissenting opinions written infrequently.

This Article will make several points, which have gone almost entirely unrecognized to date: (1) Majority voting does not make sense on an appellate court, (2) majority voting on an appellate court violates principles of due process, and (3) unanimous decisions promote the quality and fairness of judicial decision-making by ensuring that decisions reflect a broad range of perspectives. In addition, (4) unanimous decision-making is more faithful than majority voting to the original intent of the Framers, (5) it is consistent with Supreme Court precedent, and (6) the experience of the Supreme Court, juries, and other decision-making bodies indicates that a rule of unanimity would work well.

ARTICLE CONTENTS

INTRODUCTION.....	305
I. THE VIRTUES OF UNANIMOUS DECISION-MAKING	308
II. JUDICIAL UNANIMITY AND THE DUE PROCESS CLAUSE.....	317
III. JUDICIAL UNANIMITY AND ORIGINAL INTENT.....	325
IV. JUDICIAL UNANIMITY AND SUPREME COURT PRECEDENT	328
V. MAJORITY RULE LACKS NORMATIVE JUSTIFICATION	330
VI. POTENTIAL CONCERNS WITH JUDICIAL UNANIMITY	331
CONCLUSION	344



Judicial Consensus: Why the Supreme Court Should Decide Its Cases Unanimously

DAVID ORENTLICHER *

INTRODUCTION

Like Congress and other deliberative bodies, the Supreme Court decides its cases by majority vote.¹ If at least five of the nine Justices come to an agreement, their view prevails.

But why is that the case? Majority voting for the Court is not spelled out in the Constitution, a federal statute, or Supreme Court rules.

Nor it is obvious that the Court should decide by a majority vote. When the public votes on a ballot measure, it typically makes sense to follow the majority.² The general will of the electorate ought to govern. But judicial decisions are not supposed to reflect popular sentiment. Rather, they must respect the rule of law. Thus, on many matters, courts override the preferences of the majority to protect the rights of the minority.

Moreover, majority voting on the Supreme Court exacerbates the polarized politics that plague the United States. When a conservative or liberal majority can impose its views on the country, it gives each side of the ideological spectrum even greater incentive to fight for control of the Oval Office and the Senate so that side can control the judicial appointment process. Or elected officials might manipulate the appointment process to ensure a Court majority for its side, as when U.S. Senate Majority Leader Mitch McConnell blocked the appointment of Merrick Garland in 2016 and

* Judge Jack and Lulu Lehman Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. MD, JD, Harvard University. I am grateful for comments by Peter Bayer; Eve Hanan; Michael Miller; G. Michael Parsons; Ronald Krotoszynski; Barry Solaiman; Samuel Thumma; Robin Fretwell Wilson; and participants at the Sixth Annual ACS Constitutional Law Scholars Forum (2021); the 2020 Global Conference on Constitution-Making and Constitutional Change, University of Texas at Austin School of Law; the Tenth Annual Constitutional Law Colloquium, Loyola University Chicago School of Law (2019); and the 2019 conference on Dignity, Tradition, & Constitutional Due Process: Competing Judicial Paradigms, University of Nevada, Las Vegas, William S. Boyd School of Law. I also am grateful for the research assistance of Jacqueline Alvarez, Youngwoo Ban, Lena Rieke, and Greer Sullivan and the editorial assistance of Marla Katz, Kaylee Navarra, and Katie McKeon.

¹ To be sure, the U.S. Senate employs a filibuster rule that requires a sixty-vote supermajority to end debate on a legislative proposal. *About Filibusters and Cloture*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/filibusters-cloture.htm> (last visited Nov. 26, 2021). However, the vote on adoption requires only a simple majority. *About Voting*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/voting.htm> (last visited Nov. 26, 2021).

² I say “typically” because, as I later observe, majorities may need to be restrained from abusing their power.

fast-tracked the nomination of Justice Amy Coney Barrett just before the 2020 presidential election.³

One side's manipulation invites retaliation by the other side, further aggravating partisan conflict. When Justice Barrett was nominated and appointed, many on the left proposed expansion of the Court in the event that the 2020 elections resulted in a Democratic president and a Democratic majority in the Senate.⁴ And after Democrats eliminated the filibuster for lower court nominees in 2013,⁵ Republicans eliminated the filibuster for Supreme Court nominees in 2017.⁶

One might observe that the Framers of the Constitution identified the kinds of voting that require more than a simple majority. For example, supermajority votes are needed for approval of treaties by the Senate,⁷ ratification of constitutional amendments by the states,⁸ or conviction of government officials by the Senate on charges of impeachment.⁹ Arguably, if the Constitution does not explicitly require a supermajority, a simple majority is sufficient.

But under this view, juries could decide cases by a simple majority, and they cannot. The Constitution does not address voting rules for juries. Moreover, in 1789, Congress rejected a draft of the Sixth Amendment that included a requirement of unanimity for juries.¹⁰ Nevertheless, the Supreme Court has held that the right to a jury trial under the Sixth and Seventh Amendments includes a right to a unanimous jury in federal criminal and civil cases.¹¹ The Court also has required juror unanimity in state criminal trials under the Sixth Amendment,¹² and states generally require unanimous

³ Justice Ruth Bader Ginsburg died on September 18, 2020, and the Senate confirmed Justice Barrett on October 26, 2020. Carl Hulse, *How Mitch McConnell Delivered Justice Amy Coney Barrett's Rapid Confirmation*, N.Y. TIMES, <https://www.nytimes.com/2020/10/27/us/mcconnell-barrett-confirmation.html> (Nov. 3, 2020).

⁴ See, e.g., E.J. Dionne Jr., *Enlarging the Supreme Court Is the Only Answer to the Right's Judicial Radicalism*, WASH. POST (Oct. 25, 2020, 7:00 AM), https://www.washingtonpost.com/opinions/the-high-cost-of-confirming-amy-coney-barrett/2020/10/24/8d5a236a-156f-11eb-bc10-40b25382f1be_story.html (advocating for the expansion of the Court's size as a "remedy to conservative court-packing"). Senate Democrats also would have to eliminate or waive the filibuster rule to pass legislation expanding the Court. Sydney Ember & Astead W. Herndon, *End the Filibuster? Pack the Court? The Left Is Pushing Biden*, N.Y. TIMES, <https://www.nytimes.com/2020/09/28/us/politics/democrats-filibuster-supreme-court-biden.html> (Oct. 12, 2020).

⁵ The filibuster also was eliminated for nominations to executive branch positions. Jeremy W. Peters, *Senate Vote Curbs Filibuster Power to Stall Nominees*, N.Y. TIMES, Nov. 22, 2013, at A1.

⁶ Matt Flegenheimer, *Republicans Gut Filibuster Rule to Lift Gorsuch*, N.Y. TIMES, Apr. 7, 2017, at A1.

⁷ Two-thirds support is required. U.S. CONST. art. II, § 2.

⁸ Three-fourths of the states must approve a constitutional amendment. *Id.* art. V. In addition, supermajorities of two-thirds are required to propose amendments. *Id.*

⁹ Two-thirds of the Senate must vote to convict on impeachment charges. *Id.* art. I, § 3.

¹⁰ *Apodaca v. Oregon*, 406 U.S. 404, 409 (1972).

¹¹ *Andres v. United States*, 333 U.S. 740, 748 (1948).

¹² *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394–95 (2020).

or supermajority votes in civil trials.¹³ Similarly, the Court could conclude that it must decide its cases unanimously to meet the Due Process Clause's requirement of impartial judging.

As I will argue in this Article, for many of the reasons why it is important for juries to decide cases unanimously, so is it important for the Supreme Court, as well as other appellate courts, to decide cases unanimously. In particular, unanimous decisions would be better decisions, and they would be fairer decisions. They would be better because they would take into account a broader range of relevant perspectives, and they would be fairer because they would reflect the views of both sides of the ideological spectrum.

Deciding cases by consensus would not be new for the Supreme Court.¹⁴ For most of its history, it operated under a norm of consensus, with dissenting opinions being written infrequently.¹⁵ There also is useful precedent for unanimous decision-making from Europe. In France, Belgium, Italy, and other countries, there is a practice of "apparent unanimity," in which the high courts issue a single opinion, with no dissenting opinions, and without disclosing the votes of the justices.¹⁶ While this practice does not require a unanimous vote,¹⁷ it does lead to decisions that take into account the views of all justices on the courts. And as mentioned, state criminal and federal civil and criminal juries in the United States must issue unanimous verdicts.

This Article will make several points, which have gone almost entirely unrecognized to date:¹⁸ (1) Majority voting does not make sense on an appellate

¹³ The Court has neither accepted nor rejected a unanimity requirement for state civil juries, per incorporation. For civil trials, states tend to require unanimity or supermajorities of three-fourths or five-sixths. In addition, a small number of states allow decisions by a simple majority. BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., STATE CT. ORG. 2004 233–37 tbl.42 (2004), <https://bjs.ojp.gov/content/pub/pdf/sco04.pdf>.

¹⁴ This Article uses the terms "unanimous" decisions and "consensus" decisions interchangeably.

¹⁵ See *infra* Part II.

¹⁶ ROSA RAFFAELLI, EUR. PARLIAMENT, DISSENTING OPINIONS IN THE SUPREME COURTS OF THE MEMBER STATES 17–18 (2012), <http://www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf>.

¹⁷ In Belgium, for example, a majority vote is sufficient to decide a case. J. Lyn Entrikin, *Global Judicial Transparency Norms: A Peek Behind the Robes in a Whole New World—A Look at Global "Democratizing" Trends in Judicial Opinion-Issuing Practices*, 18 WASH. U. GLOB. STUD. L. REV. 55, 96 (2019). In Austria, a majority vote generally is sufficient, but unanimity is required for some constitutional issues. *Id.* at 95. Similarly, Germany supplements majority voting with a supermajority requirement on some matters. Katalin Kelemen, *Dissenting Opinions in Constitutional Courts*, 14 GERMAN L.J. 1345, 1361 (2013).

¹⁸ There are occasional articles discussing the appropriateness of majority voting on courts. See, e.g., Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692, 1694–1701 (2014) (examining the rationales for majority voting on courts); Guha Krishnamurthi, *For Judicial Majoritarianism*, 22 U. PA. J. CONST. L. 1201, 1211–21 (2020) (defending majority voting on courts). There also is a more common debate on whether separation of powers principles require supermajority voting when the Supreme Court invalidates legislation. See, e.g., Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73 (2003) (exploring the arguments regarding a supermajority rule for invalidating federal

court, (2) majority voting on an appellate court violates principles of due process, and (3) unanimous decisions promote the quality and fairness of judicial decision-making by ensuring that decisions reflect a broad range of perspectives. In addition, (4) unanimous decision-making is more faithful than majority voting to the original intent of the Framers, (5) it is consistent with Supreme Court precedent, and (6) the experience of the Supreme Court, juries, and other decision-making bodies indicates that a rule of unanimity would work well.¹⁹

I. THE VIRTUES OF UNANIMOUS DECISION-MAKING

The question of majority versus unanimous voting connects to the question of how many Justices should sit on the Supreme Court. Just as the Constitution does not prescribe a voting rule for the Court, it does not speak to the number of Justices. Article III simply states, “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”²⁰

With the Constitution silent on the number of Justices, Congress has decided that matter, initially in the Judiciary Act of 1789, and later in subsequent acts. The Supreme Court started with a bench of six, and over the years has varied in size from five to ten Justices, ultimately settling on its current number of nine in 1869.²¹ According to statute, the Supreme Court “shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.”²²

Why nine Justices? Why not just one Justice? If the role of the Supreme Court is, in the words of Chief Justice John Marshall, “to say what the law is,”²³ rather than to represent the preferences of the public, one intelligent and well-trained Justice should be sufficient. Someone with sharp analytical skills and keen judgment. Say a Marshall (John or Thurgood), a Louis Brandeis, or a Sandra Day O’Connor. If we can rely on a single judge at the trial court level, why not at the Supreme Court, too?

statutes). Another proposal would require a supermajority or unanimous vote of the Justices to deny a petition for certiorari. G. Michael Parsons, *Contingent Design & the Court Reform Debate*, 23 U. PA. J. CONST. L. 795, 839–42 (2021).

¹⁹ While I will focus on the U.S. Supreme Court in this Article, the arguments in favor of unanimous decisions also apply to other courts of appeal, such as federal intermediate courts of appeal, state supreme courts, and state intermediate courts of appeal. Also, while this Article proposes a unanimous vote for the Court’s decisions, it does not propose a change in the four-vote requirement to grant certiorari. Given the substantial reduction in the Court’s docket over time, Ryan J. Owens & David A. Simon, *Explaining the Supreme Court’s Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1228–29 (2012), it would not be prudent to raise the threshold for the Court to accept new cases. Rather, it might make sense to lower the threshold. Parsons, *supra* note 18, at 837.

²⁰ U.S. CONST. art. III, § 1.

²¹ Changes in the Court’s composition reflected both partisan considerations and the desire to have a Justice preside over each judicial circuit. F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645, 664–69 (2009).

²² 28 U.S.C. § 1.

²³ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Perhaps, one might observe, even the wisest persons benefit from sounding boards and devil's advocates. It is important to test out one's theories on other people, who can identify potential weaknesses.

But a single Justice can do that without other Justices. Dialogue with lawyers at oral argument or discussion with law clerks can provide sufficient input, as can briefs from the parties and amici and commentaries in law reviews, op-ed pages, or blogs. A single Justice could turn to a group of experienced judicial clerks before rendering decisions, just as a single president turns to advisers for guidance before issuing policy directives. We have nine Justices because we want multiple people *deciding*, not just advising.

This takes us to the question why we want multiple people deciding. The analogy of the jury is useful in providing an answer.

In requiring unanimous juries, the Supreme Court has identified a few key considerations. We should have a fair cross-section of the community participate in the decision-making process, and the members of the jury should reach a consensus decision after careful deliberation.²⁴ These considerations also apply to decisions by the Supreme Court. It is important to have Justices with a range of backgrounds and ideological perspectives who reach a consensus decision after careful deliberation.

The benefits of collective, consensus decision-making after careful deliberation are well recognized by deliberative democracy theory. When people come together for a thoughtful and reasoned exchange of ideas and arguments, they become more aware of the strengths and weaknesses of the opinions of others, as well as of their own views.²⁵ As a result, they make better decisions.²⁶

Accordingly, collective decision-making has long been commended, dating at least as far back as ancient Greece. For example, in *Politics*, Aristotle wrote in favor of political control by the many collectively, rather than by the few best, in a society.²⁷

A concrete example will be useful—say, whether the Due Process Clause of the Constitution protects a right to medical aid in dying (i.e., a right to physician-assisted suicide).²⁸

²⁴ *Apodaca v. Oregon*, 406 U.S. 404, 410–11 (1972). While the Supreme Court has required jury pools to represent a fair cross-section of the community, it has not extended that requirement to the juries themselves. *Holland v. Illinois*, 493 U.S. 474, 478 (1990).

²⁵ AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 42 (1996).

²⁶ *Id.* at 43; Maya Sen, *Courting Deliberation: An Essay on Deliberative Democracy in the American Judicial System*, 27 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 303, 307–08 (2013). As Sen observes, the current practice of majority voting on the Supreme Court discourages the kind of deliberation that deliberative democracy envisions. *Id.* at 321–23.

²⁷ ARISTOTLE, *Book Three: Definition and Division of Regime*, in *THE POLITICS OF ARISTOTLE* 112 (Peter L. Phillips Simpson trans. & ed., 1997). See also Daniela Cammack, *Aristotle on the Virtue of the Multitude*, 41 *POL. THEORY* 175, 185–186 (2013) (observing that Aristotle, Xenophon, Aesop, and Demosthenes all wrote about the benefits of collective action).

²⁸ In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Court declined to recognize a constitutional right, but with more and more states legalizing aid in dying, the issue is likely to come

In considering this question, a number of factors are relevant. On one hand, patients might choose aid in dying to bring relief from intolerable suffering. Or maybe they ask for a lethal dose of medication, not to use immediately, but to ensure that if suffering does become intolerable, they will possess the means to gain relief. On the other hand, the state has an important interest in preserving life and also in preventing aid in dying when the patient's request is compromised by diminished decision-making capacity.²⁹

In determining whether there should be a right to aid in dying, courts have to weigh these factors, together with other relevant factors, and inevitably different Justices will come to different conclusions. Some will place greater weight on concerns about suffering or individual autonomy, while others will place greater weight on concerns about compromised decision-making or the sanctity of life. In an ideal world, we could determine how the balance among competing factors should come out, and therefore, which Justice's reasoning and conclusions were correct.

In our actual world, there is no clear answer on how the balance should play out. Experts can differ as to the meaning of the Due Process Clause and how it weighs competing interests. Accordingly, a group of Justices will bring justifiably different understandings to the aid-in-dying question, and they will strike the balance among the different interests in different places. In other words, we have no good basis for favoring one Justice's analysis over another's.³⁰ Rather, we need to take into account each Justice's views.

We all benefit when legal rules reflect the perspectives of both sides of the ideological spectrum. Neither side has a monopoly on the truth; both sides have their policy blind spots. Justices on the right can steer their liberal counterparts away from misguided decisions and toward desirable decisions. Justices on the left can do the same for their conservative colleagues.³¹

While unanimous voting ensures due consideration of all of the Justices' perspectives, majority voting allows the Court to decide cases without giving regard to all of the Justices. One side of the ideological spectrum can impose its views to the exclusion of alternative perspectives.

Or to put it another way, the collective wisdom of the full group is superior to that of a single Justice or a mere majority of Justices.³² Better

back to the Court. In some countries, such as Canada, medical aid in dying includes both physician-assisted suicide and euthanasia. David Orentlicher, *International Perspectives on Physician Assistance in Dying*, HASTINGS CTR. REP., Nov.–Dec. 2016, at 6.

²⁹ *Glucksberg*, 521 U.S. at 728–31. For further discussion of the arguments in favor of and in opposition to a right to aid in dying, see DAVID ORENTLICHER, *MATTERS OF LIFE AND DEATH: MAKING MORAL THEORY WORK IN MEDICAL ETHICS AND THE LAW* 24–80 (2001).

³⁰ As legal realism has shown, there is ample evidence of the lack of clear answers to many legal questions.

³¹ AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 11–12 (2004).

³² Jeffrey Abramson, *Four Models of Jury Democracy*, 90 CHI.-KENT L. REV. 861, 884 (2015).

that the Court base its holdings on the understandings of all of the Justices rather than on views that are particular to only some of the Justices.

Considering the Court's decision-making process from the perspective of interpretive theory leads to the same result. In deciding constitutional cases, for example, the Justices could invoke the original intent of the Framers, or they could rely on an evolving understanding of the constitutional text. Using different theories of interpretation often will yield different results, and we lack a clear basis for preferring one interpretation over the other.³³

Or even if we could agree on a single theory of constitutional interpretation, different Justices still will reach different conclusions in many cases. For example, in the *District of Columbia v. Heller*³⁴ gun rights case, both the majority opinion authored by Justice Antonin Scalia and a dissenting opinion authored by Justice John Paul Stevens cited original intent as the basis for their understandings of the Second Amendment's right to keep and bear arms.³⁵

Other perspectives on judicial decision-making also favor consensus decision-making. For example, legal judgment reflects a number of personal qualities, including intelligence, wisdom, courage, and temperance,³⁶ and some Justices will be strong in some of those qualities, but not others. Consensus judicial decisions draw on the strengths of all of the Justices. By way of analogy, voters commonly wish they could elect a president with the best qualities of each of the different candidates.

Empirical evidence supports the view that a group decision by nine Justices will be sounder than would decisions by a single Justice or a simple majority of Justices. For example, studies on decision-making demonstrate that better outcomes result when the decisions are made by a group of persons who come to the table with different strategies for deciding. In a study that looked at this question, researchers found that a group of good problem solvers who employ a diversity of problem-solving approaches can outperform a group of problem solvers whose problem-solving skills are stronger but who employ problem-solving approaches that are alike.³⁷ Overall, "heterogeneous groups outperform homogeneous groups on tasks requiring creative problem solving and innovation, because the expression of alternative perspectives can lead to novel insights."³⁸

³³ Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1051–52 (2006).

³⁴ 554 U.S. 570 (2008).

³⁵ *Id.* at 574–603; *id.* at 637–38, 640–52 (Stevens, J., dissenting).

³⁶ Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centred Theory of Judging*, 34 METAPHILOSOPHY 178, 189–94 (2003).

³⁷ 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).

³⁸ Deborah H. Gruenfeld et al., *Group Composition and Decision Making: How Member Familiarity and Information Distribution Affect Process and Performance*, 67 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1, 4 (1996).

This last point is worth emphasizing. When people with different perspectives make decisions together, they can identify solutions that none of them acting alone would have recognized. Their different ideas can combine to identify new approaches.³⁹ Thus, rather than merely splitting their differences, they can discover win-win outcomes that make for better overall results.⁴⁰

Similarly, when a group of Justices decides a case, the quality of their decision-making is better when the Justices bring different perspectives to the table than when they are like-minded.⁴¹ We are better off with Justices who have different theories of constitutional interpretation, such as originalism and living constitutionalism, than Justices who all subscribe to the same theory of judging. We also are better off with Justices who have different ideological leanings, different life experiences, and different races and sexes, than with Justices who share similar ideological predispositions, life experiences, races, and sexes.⁴²

If decisions are better made when they are made by people with different perspectives, then it doesn't make sense for the Supreme Court to decide by a majority vote. Majority voting allows for decisions based on a narrower rather than broader range of perspectives, thereby diminishing the quality of the decisions. It is incoherent to value a diversity of perspectives and then employ a decision-making process that frequently disregards a major part of that diversity. During the Court's 2019 term, for example, Justice Sonia Sotomayor dissented in 28% of the Court's cases, with a 44% dissent rate when the Court was not unanimous.⁴³ In those cases, the Court's decisions lacked the perspective of its only minority female member. Similarly, Justice Clarence Thomas also dissented in 28% of cases and 44% of cases when the Court was not unanimous.⁴⁴ In those cases, the Court's decisions lacked the perspective of its only minority male member. No other Justice's voice was excluded as often as were those of Sotomayor and Thomas,⁴⁵ and, with five

³⁹ SCOTT E. PAGE, *THE DIVERSITY BONUS: HOW GREAT TEAMS PAY OFF IN THE KNOWLEDGE ECONOMY* 93–95 (2017).

⁴⁰ See generally Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

⁴¹ See Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes*, 36 AM. J. POL. SCI. 617, 627 (1992) (observing that the Court makes better decisions when the Justices come from different schools of thought).

⁴² PAGE, *supra* note 39, at 115–16.

⁴³ *Frequency in the Majority*, SCOTUSBLOG, <https://www.scotusblog.com/wp-content/uploads/2020/07/Frequency-in-majority-7.20.20.pdf> (last visited Nov. 26, 2021) (providing data from the October 2019 term). That is, when one looks at cases decided by an 8-1, 7-2, 6-3, or 5-4 vote, Justice Sotomayor dissented 44% of the time. *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* During the Court's 2020 term, the dissent rates changed somewhat. Justice Sotomayor was still the most frequent dissenter, in 31% of all cases and in 55% of non-unanimous cases. *Frequency in the Majority*, SCOTUSBLOG, <https://www.scotusblog.com/wp-content/uploads/2021/07/Frequency-7.2.21.pdf> (last visited Nov. 28, 2021) (providing data from the 2020 term). Justice Thomas was still the

white male Justices on the Court, it was impossible for the Court to render a decision that lacked the perspective of a white male Justice. Incorporating minority viewpoints is an important reason why studies of juries find that the unanimous jury is preferable to the non-unanimous jury.⁴⁶

Indeed, empirical research has repeatedly shown that unanimity fosters more extensive and considered jury deliberations.⁴⁷ When unanimity is required, juries have more “robust discussions,” while supermajority juries are more focused on which verdict they should reach.⁴⁸ As a result, the non-unanimous juries tend to end their deliberations soon after the supermajority secures enough votes to settle on a verdict.⁴⁹ In addition, unanimous juries are more thorough in their evaluations of the evidence and the law, and mock jurors deciding under a unanimity rule take more time for their deliberations, discuss more issues, and are more satisfied with their final verdicts.⁵⁰

Importantly, when juries must decide unanimously, the majority gives greater consideration to minority viewpoints. Those in the minority participate more in the jury’s deliberations, and their perspectives play a greater role in shaping the jury’s decision.⁵¹

We see the same benefits of consensus decision-making on European constitutional courts. At the U.S. Supreme Court, Justices meet in conference after a week of oral arguments to vote on cases and assign opinions for drafting. All of the Justices present their thoughts, but there is little deliberation during the conferences. As Justice Scalia observed about the practices of the Court, “To call our discussion of a case a conference is really something of a misnomer. It’s much more a statement of the views of

most frequent dissenter among conservative Justices, in 19% of all cases and in 30% of non-unanimous cases. *Id.* But, Justices Elena Kagan and Stephen Breyer dissented at higher rates than Justice Thomas, with Justice Kagan dissenting at 25% and 45%, respectively, and with Justice Breyer dissenting at 24% and 42%, respectively. *Id.* During the 2018 term, Justices Thomas and Neil Gorsuch dissented the most, both in 28% of all cases and in 45% of non-unanimous cases. *Frequency in the Majority*, SCOTUSBLOG, https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_30_19-18.pdf (last visited Nov. 28, 2021) (providing data from the 2018 term). Justices Sotomayor and Ruth Bader Ginsburg were the next most frequent dissenters, both at 24% and 39%, respectively. *Id.*

⁴⁶ Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 204–05 (2006). Non-unanimous juries are permitted in state civil courts; until the Supreme Court’s 2020 decision in *Ramos v. Louisiana*, states were permitted to use non-unanimous criminal juries, with Oregon being the last state to allow non-unanimous verdicts. 140 S. Ct. 1390, 1394–95 (2020).

⁴⁷ Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCH. PUB. POL’Y & L. 622, 669 (2001); Diamond, Rose & Murphy, *supra* note 46, at 229.

⁴⁸ Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 DEL. L. REV. 1, 24–25 (2001).

⁴⁹ Devine et al., *supra* note 47, at 669.

⁵⁰ *Id.*

⁵¹ Valerie P. Hans, *Deliberation and Dissent: 12 Angry Men Versus the Empirical Reality of Juries*, 82 CHI.-KENT L. REV. 579, 587 (2007).

each of the nine Justices.”⁵² In contrast, their European counterparts discuss cases at greater length, sometimes for days of argument and persuasion, to reach a consensus decision.⁵³

One might ask whether the experience with juries carries over to judicial benches. There are significant differences between trial juries and appellate benches. Still, we can be confident about the benefits of consensus decision-making from the European experience. Just as unanimous juries deliberate longer and give greater consideration to minority viewpoints, so do European constitutional courts.

Moreover, the similarities between juries and judges are much more important than the differences. Consider, for example, the question whether the original intent of the Second Amendment supports an individual right to keep and bear arms. In deciding that question in *Heller*, the Justices examined a body of evidence, including the legislative history, public understandings of the Second Amendment’s text, and understandings of late eighteenth century and early nineteenth century legal experts.⁵⁴ The Justices then decided whether that evidence pointed to an individual right or a right of militias.⁵⁵ Similarly, juries in criminal cases have to consider a body of evidence and decide whether that evidence points to the defendant’s innocence or guilt.

Justices and jurors both have to apply legal standards to the facts of a case. The Supreme Court might have to decide what the drafters of a constitutional or statutory provision intended by their words, and jurors might have to decide what parties to a contract intended by their words. Similarly, Justices or jurors might have to decide whether evidence of a physician’s conduct constitutes negligence and whether the patient was harmed as a result. As Jeffrey Abramson has observed, juries decide matters that are a hybrid of law and fact.⁵⁶ Accordingly, we can safely conclude that just as unanimity improves decision-making on juries, it will do so on appellate courts.

In addition, the differences between juries and courts strengthen the argument for unanimous decisions by courts. While juries and courts both decide questions of fact and law, jury decisions are more fact-based and therefore more demonstrably accurate or inaccurate. Scientific analysis, for example, can reliably identify the father of a child in a paternity dispute. Scientific analysis cannot, however, tell us how to balance concerns about the sanctity of life with the autonomy of a patient who desires aid in dying.

⁵² EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT 285 (1999).

⁵³ John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1693–94 (2004).

⁵⁴ *District of Columbia v. Heller*, 554 U.S. 570, 581–610 (2008).

⁵⁵ *Id.*

⁵⁶ Abramson, *supra* note 32, at 877–78.

If we reject majority decisions by juries even when those decisions are substantially fact-based, then it makes sense to reject majority decisions by courts for decisions that are more subjective in nature and therefore about which reasonable people will differ.

While the jury principle of unanimity fits well with judicial decision-making, the majority principle for legislative bodies or elections does not. When elections are held, all voters are eligible to cast a ballot. When legislators assemble, they represent all members of the jurisdiction. Accordingly, majority voting ensures that each member of the relevant constituency is given equal weight. But appellate courts are not representative bodies, nor are they supposed to be. Thus, the Supreme Court might have a two-thirds majority of conservative or liberal Justices at the same time that the public is evenly divided between conservative and liberal viewpoints. The goal of a court is not to reflect the majority but to implement guiding legal principles. And as discussed, that is best accomplished by ensuring that decisions are based on a broad range of perspectives rather than the perspectives of one side of the ideological spectrum.

Decisions that are representative of the full court have another important virtue: they have greater legitimacy.⁵⁷ When critical issues can be decided by a 5-4 Court, the losing side can easily feel that the decisions are based on ideology rather than the law. Consider in this regard the Court's controversial 5-4 decision in *Bush v. Gore*⁵⁸ that decided the 2000 presidential election in favor of George W. Bush.⁵⁹ In that case, the majority was composed of the conservative wing of the Court, with the minority comprising the liberal wing of the Court. Many members of the public concluded that the conservative Justices sided with Bush because he was the more conservative candidate.⁶⁰ Concern about legitimacy is a key reason why Chief Justices, such as John Marshall, adopted a norm of unanimous decisions on the U.S. Supreme Court in past years and why multiple European high courts operate with a norm of decisions without dissent today.⁶¹

⁵⁷ PAMELA C. CORLEY, AMY STEIGERWALT & ARTEMUS WARD, *THE PUZZLE OF UNANIMITY: CONSENSUS ON THE UNITED STATES SUPREME COURT* 7–10 (2013).

⁵⁸ 531 U.S. 98 (2000).

⁵⁹ See Laurence H. Tribe, *The Unbearable Wrongness of Bush v. Gore*, 19 CONST. COMMENT. 571, 574–76 (2002) (“[B]y December 2000 the Court’s stock of political and moral capital sufficed to enable it in essence to dictate the succession to the presidency, through the agency of the electoral college, [to] the candidate[,] [George W. Bush] with half a million fewer popular votes nationally than his opponent[,] [Al Gore] . . .”).

⁶⁰ *Id.* at 576, 602.

⁶¹ RAFFAELLI, *supra* note 16, at 10–11; JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 292–93 (1996). To be sure, it is important not to overstate the legitimacy argument. Some research suggests limits to its relevance. According to one study, for example, on issues of high salience, where people generally have settled views, it may not matter whether the Court decides by a 9-0 or 5-4 vote. Michael F. Salamone, *Judicial Consensus and Public Opinion: Conditional Response to Supreme Court Majority Size*, 67 POL. RSCH. Q. 320, 332 (2014). However, on issues of low salience, for which

The legitimacy concern applies not only to how decisions are viewed by the public, but also how they are viewed by lower courts. When the Supreme Court decides a case with dissenting opinions, or with concurring opinions that disagree with the reasoning of the majority, lower courts are less likely to follow the Court's decision.⁶²

One might wonder whether a requirement of unanimity goes too far in compensating for the problems with majority voting on courts. One Justice with an idiosyncratic view could block the entire Court from resolving a legal question.⁶³ Should we prefer a supermajority vote over a unanimous vote?

Supermajority voting does not ensure ideological balance. As the experience with non-unanimous juries indicates, even supermajorities can reject minority perspectives.

In addition, we need not worry about a requirement of unanimity. Justices are carefully screened before nomination for their training, experience, and perspectives, and the vetting process excludes candidates with views that are too extreme and not adequately based on an understanding of the U.S. legal system.⁶⁴ Justices come to the bench with more in common than members of many juries.⁶⁵ For example, eight of the nine current Justices attended Harvard or Yale for law school.⁶⁶ More

most people may not have settled views, the size of the Court's majority may matter more. *Id.* In addition, on some issues, a divided opinion may actually promote legitimacy by demonstrating that both sides of the issue were heard by the Justices or by indicating the presence of sympathetic Justices on the Court. *Id.* See also Kelemen, *supra* note 17, at 1356 (observing that the publication of dissents can promote legitimacy via greater transparency).

But note that it is difficult to separate public views about legitimacy from public views about the content of the Court's decisions. For example, when the Court issues more liberal decisions, its approval rises among Democrats and falls among Republicans. Conversely, when the Court issues more conservative decisions, Republicans become more approving and Democrats become less approving. In 2015, for example, after the Court recognized same-sex marriage and upheld the Affordable Care Act, Democratic approval rose to 76% while Republican approval dropped to 18%. Jeffrey M. Jones, *Republicans' Approval of Supreme Court Sinks to 18%*, GALLUP (July 16, 2015), <https://news.gallup.com/poll/184160/republicans-approval-supreme-court-sinks.aspx>. In contrast, in 2021, after a term with a mix of conservative and liberal decisions, 51% of both Democrats and Republicans (and 46% of independents) expressed approval. Jeffrey M. Jones, *Supreme Court Job Approval Dips Below 50%*, GALLUP (July 28, 2021), <https://news.gallup.com/poll/352895/supreme-court-job-approval-dips-below.aspx>. These survey results support the view that a requirement of unanimity would result in similar levels of approval across party lines.

⁶² PAMELA C. CORLEY, CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT 77–78, 85 (2010); Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POLS. 534, 546 (2002).

⁶³ Melissa Schwartzberg, *Voting the General Will: Rousseau on Decision Rules*, 36 POL. THEORY 403, 404–05 (2008).

⁶⁴ BARRY J. McMILLION, CONG. RSCH. SERV., R44235, SUPREME COURT APPOINTMENT PROCESS: PRESIDENT'S SELECTION OF A NOMINEE 8–10, 14–15 (2021).

⁶⁵ I am grateful to Howard Watts for pointing out this comparison.

⁶⁶ Ilana Kowarski, *Where Supreme Court Justices Earned Law Degrees*, U.S. NEWS & WORLD REP. (Nov. 5, 2020), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/where-supreme-court-justices-earned-law-degrees>.

importantly, principles of game theory provide reassurance that each Justice would choose cooperation over gridlock. As discussed in Part VI of this Article, when people must work with a group of peers on a frequent basis to decide matters, they realize that they are better off developing collegial rather than oppositional relationships.⁶⁷

Unanimous decisions also help mitigate an important concern with group decision-making—the “groupthink” problem. As Irving Janis has written, an excessive tendency toward uniform thinking by members of a group can lead to defective decision-making and ill-fated decisions.⁶⁸ Important examples include the Kennedy administration’s decision to authorize the Bay of Pigs invasion of Cuba and the Johnson administration’s escalation of the Vietnam War.⁶⁹ While research has not validated aspects of Janis’ theory,⁷⁰ we do need to address the pitfalls of group decision-making, and one valuable way to do that is to broaden the diversity of group members. Diversity increases the likelihood of good decisions and reduces the chances that groups will fall into the trap of groupthink or other decision-making errors.⁷¹ Accordingly, unanimous decisions made by Justices who diverge in their perspectives will generally do a better job of avoiding decision-making failures than will decisions made by a majority of Justices who are like-minded in their views.

I have explained how unanimous voting yields better results than majority voting on courts. Unanimity also is required to satisfy principles of due process.

II. JUDICIAL UNANIMITY AND THE DUE PROCESS CLAUSE

When the Constitution provides its fundamental guarantee of due process, it promises individuals that they will receive an impartial hearing before a neutral court.⁷² And a neutral court decides cases without any personal, political, or other partiality.⁷³

⁶⁷ See *infra* notes 193–198 and accompanying discussion.

⁶⁸ IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* vii, 9 (2d ed. 1982).

⁶⁹ *Id.* at 31–32, 98–101. See also *1961–1968: The Presidencies of John F. Kennedy and Lyndon B. Johnson*, U.S. DEP’T OF STATE: OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1961-1968/foreword> (last visited Sept. 22, 2021) (providing background on the Bay of Pigs invasion and the escalation of the Vietnam War).

⁷⁰ CASS R. SUNSTEIN & REID HASTIE, *WISER: GETTING BEYOND GROUPTHINK TO MAKE GROUPS SMARTER* 6–7 (2015).

⁷¹ *Id.* at 143, 146–48.

⁷² 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).

⁷³ Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 499–509 (2013).

But the Supreme Court is not a neutral court. It has either a conservative or liberal majority of Justices, and overall, that makes for either a conservative or liberal predilection.⁷⁴ When a court has a liberal majority, parties promoting a conservative viewpoint are disadvantaged. Similarly, when a court has a conservative majority, parties promoting a liberal viewpoint are disadvantaged.

To be sure, if judging entailed a purely objective application of legal rules and principles to the facts, a Justice's ideology would not matter. But, as discussed in the previous section and as empirical evidence demonstrates, a Justice's ideology does matter.⁷⁵ Some Justices take more conservative positions, while others take more liberal positions.⁷⁶ A conservative majority will render different decisions on campaign finance, environmental regulation, or religious freedom than will a liberal majority. When the Court's decisions reflect the philosophical leanings of the Justices, and decisions can be determined by a majority on one side of the ideological spectrum, our judicial 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 skewed court, due process requires reforms to ensure that decisions by the Supreme Court reflect both sides of the ideological spectrum. Scholars and others have proposed a number of approaches to bring ideological balance to the Court, including changes in the judicial appointment process.⁷⁷

The simplest path to ideological balance would start with the Court rendering its decisions unanimously. That way, Justices on both sides of the ideological spectrum would have to support the Court's opinions. When a

⁷⁴ LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 103 (2013).

⁷⁵ *Id.*

⁷⁶ Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1491–92 (2007).

⁷⁷ See, e.g., Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 181–205 (2019) (supporting either (1) an expansion of the Court to include all judges on the U.S. Courts of Appeal with randomly chosen panels of nine serving for two weeks at a time and no more than five members of a panel having been appointed by a Democratic or Republican president or (2) a fifteen-Justice Court with five Justices affiliated with the Democratic Party, five affiliated with the Republican Party, and five chosen by the ten party-affiliated Justices); David Orentlicher, *Politics and the Supreme Court: The Need for Ideological Balance*, 79 U. PITT. L. REV. 411, 423–29, 432–34 (2018) [hereinafter Orentlicher, *Ideological Balance*] (proposing ideological balance via expansion of the Court to include four Justices chosen by a Democratic nominating committee, four by a Republican nominating committee, and four by a joint Democratic-Republican nominating committee, and a supermajority requirement of ten votes so that at least two Justices from each of the three blocs would have to agree on every decision); Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547, 553–56 (2018) (arguing for a Court with four Justices affiliated with the Democratic Party and four affiliated with the Republican Party).

majority can write the Court's opinions, then minority perspectives can be excluded. For many critical issues, the Court's majority can impose its perspective on the country, leaving the minority perspective unrepresented.

Here, too, the example of the jury is illustrative. For the Court to be impartial, this Article argues, it should issue decisions that reflect the views of Justices from both sides of the ideological spectrum. Similarly, in defining the meaning of an impartial jury, the Court has required that jurors be drawn from a fair cross-section of the community.⁷⁸ As the Court also has noted, the due process standards for jury size and jury voting reflect the goal of group deliberation undertaken by a jury that is representative of the community.⁷⁹ Too small a jury prevents a sufficiently diverse jury, and as discussed above, majority voting discourages thorough deliberation and denies consideration of minority viewpoints.

As mentioned, the Supreme Court itself observed a norm of consensual decision-making for most of its history. During its initial years, the Court followed the British practice of opinions issued seriatim (separately) by each Justice. But that approach made it difficult for lawyers, lower court judges, and the public to know what the Court actually held.⁸⁰ This made for "a weak and divided Court unable to assert any real authority."⁸¹ As a result, Chief Justice Oliver Ellsworth tried to increase the Court's power by introducing the idea of a single opinion for the Court.⁸² While Ellsworth was unsuccessful, his successor, Chief Justice Marshall, institutionalized a policy of unanimous decisions, so the Court could speak with a unified voice. Instead of each Justice authoring an individual decision to be presented seriatim, the Justices agreed on a consensus position.⁸³ During Marshall's first four years as chief, all of the Court's opinions were issued for the Court as a whole, with one concurring opinion and no dissenting opinions.⁸⁴ In Marshall's overall tenure as Chief Justice, dissents were

⁷⁸ Taylor v. Louisiana, 419 U.S. 522, 526–27 (1975).

⁷⁹ Williams v. Florida, 399 U.S. 78, 100 (1970).

⁸⁰ M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 308.

⁸¹ *Id.*

⁸² *Id.* at 310. Ellsworth presided from 1796 to 1800. NCC Staff, *The Most Underrated Founding Father: Oliver Ellsworth?*, NAT'L CONST. CTR. (Apr. 29, 2021), <https://constitutioncenter.org/blog/the-most-underrated-founding-father-oliver-ellsworth>.

⁸³ Henderson, *supra* note 80, at 310, 313.

⁸⁴ Sandra Day O'Connor, *William Howard Taft and the Importance of Unanimity*, 28 J. SUP. CT. HIST. 157, 157–59 (2003). Scholars differ on the question of authorship. In one view, opinions were authored by an anonymous Justice and issued under the name of Chief Justice Marshall because he announced the opinions. Henderson, *supra* note 80, at 313; 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15*, at 382-387 (1981). In another view, Marshall both authored and delivered the opinions issued under his name. O'Connor, *supra*, at 159; KATALIN KELEMAN, *JUDICIAL DISSENT IN EUROPEAN CONSTITUTIONAL COURTS: A COMPARATIVE AND LEGAL PERSPECTIVE* 59 (2018).

written in around 6% of cases.⁸⁵ The norm of consensus was maintained by later Chief Justices such that until 1941, the Justices typically spoke unanimously. From 1801 through 1940, only about 8% of cases included a dissenting opinion.⁸⁶

The norm against dissent was so strong that it was incorporated in the American Bar Association's Canons of Judicial Ethics in 1924.⁸⁷ From then until 1972, according to the Canons, it was of "high importance" that judges or Justices on courts of last resort "use effort and self-restraint to promote solidarity of conclusion."⁸⁸

Importantly when single opinions were the norm, Justices on both sides would move toward the other side to reach a consensus. The lead Justices would shape their opinions to secure broad support from their colleagues. Robert Post has discussed an illustrative example from an opinion by Chief Justice William H. Taft in a 1929 case, *Wisconsin v. Illinois*.⁸⁹ As Post describes it, Taft had expended considerable effort on an opinion to advance "a very broad theory of federal commerce power that he fervently supported. But in order to attain unanimity he agreed to censor his own views"⁹⁰ In a letter to a fellow Justice, Taft wrote,

I worked all summer on the constitutional part of the opinion . . . and satisfied myself completely by an examination of the briefs and the authorities on the subject, [but in the end, the opinion represented] a real sacrifice of personal preference [I]t is the duty of us all to control our personal preferences to the main object of the Court.⁹¹

This was not the only example for Taft. As Post writes, Taft "was willing to go to extraordinary lengths to modify his own opinions to reach out to others."⁹²

⁸⁵ Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 776, 778 (2015). Another calculation puts the dissent rate under Marshall at 4%. Henderson, *supra* note 80, at 323.

⁸⁶ Sunstein, *supra* note 85, at 771, 776.

⁸⁷ Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1284 (2001).

⁸⁸ CANONS OF JUD. ETHICS Canon 19 (AM. BAR ASS'N 1924), reprinted in LISA L. MILORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE 137* (1992). See also Post, *supra* note 87, at 1284 & n.55 (discussing Canon 19).

⁸⁹ 278 U.S. 367 (1929). The case involved a challenge by Wisconsin and other states regarding the amount of water withdrawn by Illinois and the city of Chicago from Lake Michigan. *Id.* at 399. The opinion addressed Commerce Clause issues related to congressional power to regulate withdrawal of water by the states. *Id.* at 375.

⁹⁰ Post, *supra* note 87, at 1312.

⁹¹ Letter from William Howard Taft to Pierce Butler (Jan. 7, 1929) (on file with the Library of Congress).

⁹² Post, *supra* note 87, at 1312. See also Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 917–20 (2003) (discussing Taft's efforts at achieving consensus).

With their reshaping of opinions to broaden their majority, drafting Justices were able to encourage their Court colleagues in the minority to join them. Indeed, the minority Justices regularly changed their votes from opposition to agreement to forge consensus. An important study in this regard compared the votes of the Justices taken at their post-oral argument conferences with the final votes of the Justices over a fourteen-year period under Chief Justice Morrison Waite.⁹³ During that time in the late 1800s, the rate of dissenting final votes was only 9%. But the dissent rate for conference votes was 40%.⁹⁴ While non-unanimous votes often became unanimous, there was little movement in the opposite direction. When the conference vote was unanimous, the final vote was unanimous 98.8% of the time.⁹⁵

The Taft Court produced similar data. Of 1,028 cases that were decided unanimously with published opinions, only 58% were unanimous in conference. The other 42% of cases included cases in which a Justice changed a dissenting conference vote (30%) or an uncertain vote (12%).⁹⁶

And the move from the minority to the majority did not result from movement in areas of law that might seem less contentious. Rather, movement occurred across all subject matters. For example, among the civil liberties cases that had a non-unanimous vote in conference in the Waite Court study, 60% became unanimous on final vote.⁹⁷

Perhaps the most famous example of movement by majority and minority to reach consensus occurred after the Court abandoned its norm of consensus. While the norm no longer prevailed, Chief Justice Earl Warren recognized the importance of unanimity in critical cases and therefore turned a 6-3 majority into a 9-0 majority for the Court in *Brown v. Board of Education of Topeka*.⁹⁸

Movement by both the majority and minority to common ground also occurs in European countries whose highest courts do not allow dissents.⁹⁹

⁹³ Lee Epstein, Jeffrey A. Segal & Harold J. Spaeth, *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362, 363, 365–69 (2001). The researchers were able to conduct the study because they had access to Chief Justice Waite's docket books for cases between 1874 and 1887. *Id.* at 363.

⁹⁴ *Id.* at 366.

⁹⁵ *Id.*

⁹⁶ Post, *supra* note 87, at 1332–33.

⁹⁷ Epstein, Segal & Spaeth, *supra* note 93, at 367.

⁹⁸ 347 U.S. 483 (1954); S. Sidney Ulmer, *Earl Warren and the Brown Decision*, 33 J. POL. 689, 696–700 (1971). In *Brown*, the Court declared segregated schools unconstitutional. *Brown*, 347 U.S. at 495. Before the *Brown* case was reargued under Chief Justice Warren, the preliminary vote on *Brown*, under Chief Justice Frederick Moore Vinson, was 4-5. Ulmer, *supra*, at 691–92. See also Michael J. Klarman, *Brown at 50*, 90 VA. L. REV. 1613, 1613–14 (2004) (reviewing history of Court deliberations in *Brown*).

⁹⁹ See RAFFAELLI, *supra* note 16, at 11 (observing that “in many systems where separate opinions are forbidden, and most notably in the CJEU, the decision-making process is a truly collegiate one, and all judges cooperate in the drafting of the final decision”). The CJEU refers to the Court of Justice of the European Union. *Id.* at 5. See also François Luchaire & Georges Vedel, *La transposition des opinions dissidentes en France est-elle souhaitable? “Contre”: le point de vue de deux anciens membres du*

John Ferejohn and Pasquale Pasquino provide an illustrative example from Italy. The Italian Constitutional Court considered a statute that made it impossible to sue or prosecute the five highest public officials in Italy. Initially, by an 8-7 vote, the court's justices deemed the law unconstitutional and required a constitutional amendment to enable the law. To persuade the minority to join the court's opinion, the majority still deemed the law unconstitutional but held that it could be revised to satisfy constitutional requirements without the need for a constitutional amendment.¹⁰⁰

In short, the historical record illustrates a critical point. Under a norm of consensus, the U.S. Supreme Court did not simply follow the majority position, with the minority giving an unqualified acquiescence. Rather, Justices on both sides of the ideological spectrum moved toward their counterparts to fashion an opinion onto which all could sign. The norm of consensus did much to promote the due process principle of a judicial process that lacks an ideological bias and instead reflects both sides of the ideological spectrum.

And as discussed earlier,¹⁰¹ the need to find consensus does not simply cause Justices to split their differences. Rather, when people with different perspectives make decisions together, they can identify win-win solutions that none of them acting alone would have recognized.

In contrast to its earlier norm of unanimity, consensus on the Court today occurs less than half of the time—during the past decade, one or more Justices dissented in 54% of rulings.¹⁰² Chief Justice John Roberts spoke wisely when he observed that greater consensus on the Court is desirable and that the Court functions best “when it can deliver one clear and focused opinion.”¹⁰³ More importantly, decision-making by consensus would bring the Court into conformity with the constitutional requirement of due process.

Due process is important not only for the litigants before a court but also for the public generally. This is especially the case when the Court decides issues of great moment and that go to the heart of our representative system of government, such as the question of political gerrymandering. For these questions, it is critical that the public feel that the Court reaches its decisions fairly.

Conseil constitutionnel [Is the Transposition of Dissenting Opinions in France Desirable? “Against”: The Point of View of Two Former Members of the Constitutional Council], CAHIERS DU CONSEIL CONSTITUTIONNEL (July 2000), <https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/la-transposition-des-opinions-dissidentes-en-france-est-elle-souhaitable-contre-le-point-de-vue-de> (observing that “the absence of dissenting opinions facilitates consensus”).

¹⁰⁰ Ferejohn & Pasquino, *supra* note 53, at 1693–94 n.98.

¹⁰¹ See *supra* text accompanying notes 38–40.

¹⁰² *Unanimous Cases*, SCOTUSBLOG, <https://www.scotusblog.com/wp-content/uploads/2021/07/Unanimous-7.2.21.pdf> (last visited Feb. 16, 2022). Between 1941 and 2013, the dissent rate averaged around 60%. Sunstein, *supra* note 85, at 780.

¹⁰³ Reynolds Holding, *In Defense of a Divided Court*, TIME (Feb. 15, 2007), <http://content.time.com/time/subscriber/article/0,33009,1590461-1,00.html>.

But concerns about the role of judicial ideology have markedly increased in recent years. A majority of Americans once expressed strong confidence in the Court. According to a July 2021 Gallup poll, only 36% do now.¹⁰⁴ By ensuring ideological balance, a requirement of unanimity would do much to restore public faith in the Court's decision-making process. As a corollary, it also would do much to defuse the highly contentious nature of judicial appointments. If people on both sides of the ideological spectrum knew their views would be reflected in Court decisions, they would not have to fight so hard over appointments to the Court.

In addition to ensuring better decisions and a fairer process, decision-making by consensus provides other important benefits. For example, unanimous decision-making ensures greater stability in the law. When the Supreme Court can decide cases by a majority vote, changes in the composition of the Court can lead to major changes in the Court's jurisprudence. With unanimous decision-making, legal doctrine will develop along a steadier path.

Unanimous decisions also provide greater clarity. With a single, consensus opinion, the Court would abandon not only the practice of dissenting opinions, but also the practice of concurring opinions. When the majority issues multiple opinions explaining its decision, it can be difficult for lower courts, public officials, lawyers, and the public to know exactly what the Court held.¹⁰⁵

The proliferation of concurring and dissenting opinions also has raised concerns about judicial grandstanding.¹⁰⁶ When Justices stake out their own positions rather than speaking with a single voice, they can elevate their public profiles to the point of attaining celebrity status.¹⁰⁷ That kind of prominence can entice Justices to concur or dissent for self-interested reasons.¹⁰⁸

It is often said that concurring and dissenting opinions are important because they provide a road map to future majority opinions.¹⁰⁹ But road maps for future majority opinions can be found in court filings and academic and other commentary. Justices also can indicate future evolution of the law through their questions at oral argument. More importantly, as mentioned,

¹⁰⁴ Megan Brennan, *Americans' Confidence in Major U.S. Institutions Dips*, GALLUP (July 14, 2021), <https://news.gallup.com/poll/352316/americans-confidence-major-institutions-dips.aspx>.

¹⁰⁵ Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 148–150 (1990).

¹⁰⁶ Meg Penrose, *Goodbye to Concurring Opinions*, 15 DUKE J. CONST. L. & PUB. POL'Y 25, 41 (2020).

¹⁰⁷ Consider in this regard the “Notorious RBG” and the opera, *Scalia/Ginsburg*.

¹⁰⁸ RAFFAELLI, *supra* note 16, at 10. Concern about judicial grandstanding has led Suzanna Sherry to argue for the elimination of concurring or dissenting opinions and the issuance of a single opinion by the Court without disclosure of the author or the votes of the Justices. Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 182 (2020). While Sherry would not require a unanimous opinion, as this Article proposes, she does think the elimination of concurring and dissenting opinions would lead to “more compromise and collaboration.” *Id.* at 201.

¹⁰⁹ Thomas B. Bennett et al., *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817, 820 (2018).

consensus decisions do not create as great a need for change over time. It is precisely because a majority on one side of the ideological spectrum can impose its views that there is pressure for revisiting the issue and following the logic of dissenting opinions.

While there are other ways to promote judicial neutrality, a practice of unanimous decision-making has important advantages. It can be implemented by the Justices as a matter of Court rule, as in the past, rather than through legislation or constitutional amendment.

Moreover, it provides a more reliable guarantee of ideological balance than do other proposals. For example, while reform could set the number of Justices at an even number with half the seats reserved for conservative appointments and half for liberal appointments,¹¹⁰ ideological balance could be disrupted if one of the Justices changed ideological perspective, as has happened with Justices in the past¹¹¹ (by way of the “ideological drift” phenomenon).¹¹²

Other proposals also fall short in terms of ideological balance. For example, it has been common to recommend that the Court’s composition change more frequently, for example, by having fixed terms of eighteen years rather than life tenure.¹¹³ Or we might have a rotating bench of nine Justices, with federal appellate and district court judges eligible for service, and each bench of nine presiding for a matter of weeks or months.¹¹⁴ Still, with either of these approaches, for any given case, there would be a majority of Justices with either a conservative or liberal predilection. Indeed, any proposal that retains majority voting will lack ideological balance on many cases.¹¹⁵

In addition, proposals to deviate from a bench with lifetime tenure can exacerbate rather than defuse ideological polarization. As discussed later in the section on game theory,¹¹⁶ consensus decision-making is more likely when people have frequent and regular interactions with each other on an indefinite time horizon.

This is not to entirely reject other proposals for reform. Many of them would reinforce the benefits of unanimous decision-making. For example, if appointments to the Court were evenly divided between conservative and liberal Justices, that would enhance ideological balance.

¹¹⁰ Orentlicher, *Ideological Balance*, *supra* note 77, at 420–22; Segall, *supra* note 77, at 553–56.

¹¹¹ Orentlicher, *Ideological Balance*, *supra* note 77, at 427.

¹¹² Epstein et al., *supra* note 76, at 1486–87.

¹¹³ Epps & Sitaraman, *supra* note 77, at 173 (discussing term limit proposals by other writers).

¹¹⁴ *Id.* at 181–84; John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541, 541 (1999).

¹¹⁵ Epps and Sitaraman suggest a supermajority of 6-3 for the Court to declare a federal statute (and possibly a state statute) unconstitutional, Epps & Sitaraman, *supra* note 77, at 182, but sometimes there will be six conservative or liberal Justices, and 5-4 majorities would be possible in non-constitutional cases.

¹¹⁶ See *infra* text accompanying notes 193–195.

But it still would be important to require unanimous decision-making to ensure that all decisions reflect both sides of the ideological divide. In other words, unanimity is a necessary reform that can be supplemented with other reforms. And because unanimous decision-making can be implemented by the Court on its own, while other reforms would require legislation or a constitutional amendment, it would be important to start the process of reform by requiring unanimous decisions.

The German Constitutional Court provides a useful example of consensus-based decisions supplemented by other policies. While dissenting opinions are permitted, they are discouraged, and they are written infrequently. Consensus is the norm in Germany.¹¹⁷ An important factor in promoting consensus lies in the appointment process. The court's justices must secure approval by a two-thirds vote of the legislators, and this excludes nominees with extreme opinions in favor of more moderate nominees who are more closely aligned in their perspectives.¹¹⁸

In sum, the due process principle of a neutral court demands an ideologically balanced court, and unanimous decision-making provides that kind of balance. Moreover, the Supreme Court's experience in the past with a norm of consensus demonstrates that the Court could function effectively with a requirement of unanimity. As mentioned, Part VI will consider in greater detail why the Court would function effectively with a requirement of unanimity.

III. JUDICIAL UNANIMITY 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—Article III is silent on the question. Moreover, the Framers 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 more consistent with unanimous decision-making than with majority decision-making on the Court. While the Constitution does not speak to judicial decision-making, the Framers were well aware of how high courts decided cases in England and the colonial states. There were two models for decision-making. First was the *seriatim* model, which the Supreme Court initially adopted, in which each Justice issued an opinion.

¹¹⁷ Pasquale Pasquino, *How Constitutional Courts Make Decisions* 10 (Sept. 2016) (unpublished manuscript) (available at http://www.law.nyu.edu/sites/default/files/upload_documents/9-28%20%20Pasquino%20-Kumm-Weiler%20Colloquium.%20.pdf).

¹¹⁸ *Id.* at 2–3; *Structure*, BUNDESVERFASSUNGSGERICHT, https://www.bundesverfassungsgericht.de/EN/Das-Gericht/Organisation/organisation_node.html (last visited Sept. 19, 2021). As I have suggested, I prefer reforms other than Germany's two-thirds vote for judicial appointments to supplement a requirement of unanimity. It would be better to have Justices bring a wider, rather than narrower, range of perspectives to the Supreme Court bench. Orentlicher, *Ideological Balance*, *supra* note 77, at 424.

This was the predominant model both in England and the colonies and had a long pedigree in England, dating back to the time of William the Conqueror in the eleventh century.¹¹⁹ Most likely, the Framers assumed the Justices of their new Supreme Court would decide cases seriatim.

But as discussed, when each Justice issues an opinion, it can be difficult to discern a rule of law. So, some British and American courts went in the other direction, as the Supreme Court did under Chief Justice Marshall, and decided cases with a single opinion for the court. A notable example in England was the King's Bench in England between 1756 and 1788 under Lord Chief Justice William Murray, known as Lord Mansfield.¹²⁰ The Virginia Supreme Court, then known as the Court of Appeals, also experimented with a single decision of the court when Edmund Pendleton served as chief judge from 1778–1803.¹²¹

What is important about both of these models, seriatim opinions or single opinions, is that each Justice has an equal voice in shaping the Court's decision. With seriatim opinions, they all speak separately, while with single opinions, they all speak together. Majority decisions, on the other hand, often exclude the views of some of the Justices and as many as four of the nine on the bench. A requirement of unanimity would once again ensure that all of the Justices have a voice in the Court's opinions.

With unanimous opinions and their ideological balance, the Court also would be more faithful to the Framers' basic design for our constitutional system. The Founding Fathers worried greatly about "factions" pursuing their self-interest to the detriment of the overall public good and the interests of the minority. Accordingly, the constitutional drafters devised a system that they thought would contain the influence of factions.¹²² For example, *Federalist No. 10* discussed how the nature of a national government could mitigate factional conflict.¹²³ Narrow factions thrive most in small, homogeneous constituencies in which it is more feasible for a parochial interest to represent majority sentiment. In large, heterogeneous constituencies, on the other hand, narrowly focused factions find it difficult to attract broad support for their views. Large republics like the United States generate a great variety of interests and factions, and that would prevent a single faction from substituting its preferences for the common good or disregarding the rights of the minority.¹²⁴ As James Madison wrote in *Federalist No. 10*, as the size of a nation expands:

¹¹⁹ Henderson, *supra* note 80, at 292.

¹²⁰ *Id.* at 292–94.

¹²¹ *Id.* at 304.

¹²² GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 15–17 (7th ed. 2013).

¹²³ THE FEDERALIST NO. 10, at 53 (James Madison) (Modern Library ed., 1941).

¹²⁴ *Id.* at 58, 60–61.

[Y]ou take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.¹²⁵

In addition, by having a representative democracy instead of a pure democracy modeled on the town meeting where all citizens have a vote, the new country could rely on its legislators to promote the public good. As discussed in *Federalist No. 10*, the Constitution's system of representation would "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of Justice will be least likely to sacrifice it to temporary or partial considerations."¹²⁶

These two factors—a large republic and a select body of elected officials—would further combine to protect against factional influence. Elected officials with larger constituencies would become less attached to local, parochial interests and more devoted to the good of the nation.¹²⁷ Relatedly, legislators would ensure that public policy reflects the interests of both the majority and minority.¹²⁸

The Framers supplemented these safeguards with an additional protection against factional dominance. *Federalist No. 51* spoke to the remedy for situations in which factions overcome the obstacles of large, heterogeneous constituencies and are able to gain political power.¹²⁹ By dividing the national government's power among three branches and pitting the interests of one branch against the interests of the other branches, the Constitution would ensure that the anti-social efforts of factions in one branch of government could be checked by the other branches of the national government.¹³⁰

Just as the Framers wanted legislators to promote the welfare of all rather than the interests of some, so did they want a judiciary that would rise above faction. The Framers did not expect—nor did they desire—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 *Federalist No. 76*, he emphasized the need to avoid nominations that reflect partiality instead of the overall public interest.¹³¹

¹²⁵ *Id.* at 61.

¹²⁶ *Id.* at 59.

¹²⁷ *Id.* at 59–60.

¹²⁸ Norman A. Graebner, *Government Without Consensus*, 54 VA. Q. REV. 648, 657 (1978).

¹²⁹ THE FEDERALIST NO. 51, at 339 (Alexander Hamilton or James Madison) (Modern Library ed., 1941).

¹³⁰ *Id.* (discussed in STONE ET AL., *supra* note 122, at 21).

¹³¹ THE FEDERALIST NO. 76, at 491, 494–95 (Alexander Hamilton) (Modern Library ed., 1941). The discussion of the appointment provisions applied to nominations for all offices.

The increasing politicization of Supreme Court nominations illustrates the Framers' concerns about factional activity. When a bare majority of five Justices can determine the path of the law, the stakes are high with each new appointment to the Court, and interest groups on both sides of the political aisle wage aggressive campaigns to support or oppose the President's nominees.

Over time, the battle over Court appointments has become increasingly divisive. While the U.S. Senate approved the appointment of Justice Scalia by a vote of 98-0 in 1986, his successor, Justice Neil Gorsuch, reached the Court on a 54-45 vote in 2017. Similarly, the Senate approved Justice Ruth Bader Ginsburg by a vote of 96-3 in 1993, while her successor, Justice Barrett, squeaked by on a vote of 52-48 in 2020.¹³²

Partisan opposition can be especially fierce when the appointment will decide whether the Court has a conservative or liberal majority. Thus, when Democratic President Barack Obama nominated U.S. Court of Appeals Judge Merrick Garland to a Court left with a 4-4 ideological balance after the death of Justice Scalia in 2016, the Republican-controlled Senate blocked the appointment by denying a committee hearing or floor vote.¹³³ Ultimately, the strategy paid off when the election of President Donald Trump gave Republicans the chance to restore a conservative majority on the Court with the appointment of Justice Gorsuch.

If decisions were issued unanimously, then there would be much less at stake with each appointment. No longer could each side of the ideological spectrum hope to control the Court's direction by securing a majority of like-minded Justices on the bench. The factional battle over judicial appointments that the Framers feared would be much defused.

The Due Process Clause and original intent both support ideological balance on the Court. As discussed in the next section, the Court's precedents are consistent with such a requirement.

IV. JUDICIAL UNANIMITY AND SUPREME COURT PRECEDENT

The Supreme Court has not considered the question of an appellate court's ideological skew. Rather, the Court has addressed concerns about a single judge's ideological preferences. In its cases, the Court has observed that constitutional problems do not arise when a judge favors one or another ideological view.¹³⁴ Anyone with the appropriate training and experience for the judiciary will have opinions on important legal issues. According to the

¹³² *Supreme Court Nominations (1789-Present)*, U.S. SENATE, <https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Dec. 10, 2021).

¹³³ Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NPR (June 29, 2018, 5:00 AM), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now>.

¹³⁴ 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.

Court, due process prohibits partiality toward a party to a proceeding, not partiality toward a legal view that the party might advocate.¹³⁵

But there are important reasons to distinguish Court discussions of the issue. As indicated, the Court has not decided the question whether an appellate court must exhibit overall ideological balance. Rather, the Court has considered the question of partiality for individual judges. Moreover, it has done so in cases addressing other issues of judicial neutrality. In other words, its observations on ideological partiality are dicta not essential to the holdings of the Court. 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.¹³⁶ In another case, *Tumey v. Ohio*,¹³⁷ the issue before the Court was whether judges could have a financial stake in the outcome of their decisions.¹³⁸

Further, the Court's reasoning in those and other cases is consistent with a due process argument in favor of a Court that decides cases in an ideologically balanced way. In *Republican Party of Minnesota*, the Justices discussed the kinds of partialities that should disqualify a judge, and the Court wrote that a judge's ideological predilection is not disqualifying in the way that a personal financial interest is disqualifying.¹³⁹ 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 leaning.¹⁴⁰ And as discussed earlier, there is much benefit to having a bench of Justices with a range of ideological perspectives. But the fact that we have individual Justices 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's holdings to be decided by a majority on one side or the other of the ideological spectrum. While we can point to the principle of majority rule to justify conservative or liberal 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. There is no good normative argument for majority rule on the

¹³⁵ *Id.* at 775–78.

¹³⁶ *Id.* at 768. The Court held that the prohibition violated the First Amendment. *Id.* at 788.

¹³⁷ 273 U.S. 510 (1927).

¹³⁸ *Id.* at 514–15. The Court held that the judge's financial interests violated due process. *Id.* at 535. The Court also required recusal of a judge when deciding a case that involved the interests of a person who spent an extraordinary amount of money (\$3 million) to support the election of the judge, mostly through independent expenditures. *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 872 (2009).

¹³⁹ 536 U.S. at 775–78.

¹⁴⁰ *Id.* at 777–78.

Supreme Court or other courts of appeal. I will take up this argument in more detail in the next section.

V. MAJORITY RULE LACKS NORMATIVE JUSTIFICATION

As Jeremy Waldron has observed, majority decision-making is generally assumed to be appropriate on courts, and the question of its propriety has attracted little attention.¹⁴¹ But when one considers the arguments in favor of majority rule, they come up short.

For example, proponents of majority decision-making argue that the majority is more likely to be correct than the minority. This is accurate as far as it goes, but it ultimately fails to justify majority decision-making by appellate courts. For just as a majority is more likely to be correct than a minority, so are a unanimous Court's decisions more likely to be correct than those of a simple majority.¹⁴² If one believes that there is a right answer that the Justices can discover, then unanimous decision-making should be preferred to majority decision-making.

There is a more important argument in favor of unanimity. As indicated before, there generally is no "right" answer for important legal questions. The best answer is the answer that reflects the full range of perspectives. Consider in this respect the previous example of a right to aid in dying. If one prizes self-determination, then one might conclude that a right to aid in dying is the better policy. Similarly, if one prizes the preservation of life, one might say that a ban on aid in dying is the better policy. But when both values are important, the best policy will be the policy that reflects both values rather than simply vindicating the value that has majority support.

Or consider the contrast between an election and a judicial decision. When voters go to the polls, they typically face a binary choice—either a Democrat or Republican will win.¹⁴³ In such situations, the argument for majority voting makes sense. If only one side can win, going with the majority is most consistent with each vote counting equally. But Supreme Court decisions do not involve binary choices where only one side can win. Rather, the Court can choose among options that reflect the concerns of both

¹⁴¹ Waldron, *supra* note 18. While Waldron questioned the principle of majority rule on the Supreme Court, he did not, in the end, recommend its abandonment. *Id.* at 1730.

¹⁴² Bernard Grofman & Scott L. Feld, *Rousseau's General Will: A Condorcetian Perspective*, 82 AM. POL. SCI. REV. 567, 571 (1988). Of course, requiring unanimous decisions increases the risk of no decisions, so the advantage of accuracy might be outweighed by the disadvantage of failing to reach a decision at all. As I discuss, the experience of juries, of the Supreme Court before 1941, and of contemporary high courts in European countries, as well as principles of game theory, all indicate that a requirement of unanimity would not prevent the Court from deciding cases.

¹⁴³ In some races, there will be independent or third-party candidates. Still, the voter must choose just one candidate. See generally *3rd-Party Candidates Play a Role in U.S. Elections*, SHAREAMERICA (Apr. 30, 2020), <https://share.america.gov/3rd-party-candidates-play-role-in-u-s-elections/> (discussing the role of independent and third-party candidates in presidential elections).

sides of the ideological spectrum. With abortion, for example, a very conservative Court might reject a right absent a threat to the pregnant patient's life. A very liberal Court might permit abortion freely until birth. And a Court of conservatives and liberals can recognize a right that better reflects both the interest in individual autonomy and the interest in the preservation of life. In other words, the Court does not have to make a binary choice between a right and no right; rather, it decides how broad or narrow the right will be. Instead of allowing abortion until birth when it recognized a constitutional right, the Court allowed abortion until viability.¹⁴⁴ Instead of permitting minors to obtain abortions on their own, the Court allowed states to require parental consent (with a judicial bypass option).¹⁴⁵ When dealing with Supreme Court decisions, the best way to ensure that the views of all Justices are taken into account is to fashion a decision that all of the Justices can support.

Proponents of majority decision-making also tout its efficiency.¹⁴⁶ It is easier to assemble a majority of five than a consensus of nine. In this view, a requirement of unanimity would result in too much gridlock and not enough cases being decided. In his defense of simple majority decisions, Guha Krishnamurthi cites the problem of gridlock as the key deficiency of supermajority voting rules. As he observes, under such a regime, when the Justices would reach supermajority decisions, they would operate quite effectively. But when they would fail to reach a decision, a lower court or someone else would end up deciding the issue, and that makes for a less desirable process.¹⁴⁷

Critics of consensus decision-making overestimate the problem of gridlock. It is not a significant problem with juries and their requirement of unanimous decisions. Nor is it a problem for high courts in other countries or for the Supreme Court under its previous norm of consensus before 1941. Moreover, when one considers principles of game theory, it becomes clear that gridlock would not be a significant problem for the Court today either. I take up the concern about gridlock in more detail in the next section of this Article.

VI. POTENTIAL CONCERNS WITH JUDICIAL UNANIMITY

In general, concerns about cost, efficiency, and fairness have limited policies to address judicial partiality.¹⁴⁸ For example, one solution is recusal

¹⁴⁴ *Roe v. Wade*, 410 U.S. 113, 163 (1973).

¹⁴⁵ *Bellotti v. Baird*, 443 U.S. 622, 643–44 (1979).

¹⁴⁶ Waldron, *supra* note 18, at 1710–12 (describing and rejecting the efficiency argument). *See also* Krishnamurthi, *supra* note 18, at 1231, 1236 (observing that majority decision rules are efficient and supermajority rules are not in terms of how quickly decisions can be reached and how likely it is that decisions will be reached).

¹⁴⁷ Krishnamurthi, *supra* note 18, at 1236, 1256–57.

¹⁴⁸ Geyh, *supra* note 73, at 514–15.

of the partial judge. But if reasons for recusal are not strictly limited, litigants might clog the courts with baseless recusal motions,¹⁴⁹ and lawyers might exploit the rules to game the system in favor of their clients.¹⁵⁰ Members of the Court also have worried about strict recusal rules because there is no one who can step in for a disqualified Justice.¹⁵¹ And if the concern is ideological partiality, all Justices would have to recuse.

A requirement of unanimity avoids the concerns raised by judicial disqualification or other remedies. Unanimous decision-making promotes impartiality not by removing partial Justices, but by counterbalancing their partialities. Moreover, its implementation would be simple—it can be adopted by the Court on its own without the need for legislation, executive action, or constitutional amendment. Indeed, this Article argues that the Court is obligated by the Due Process Clause to adopt a requirement of unanimity, supplemented by other reforms, to ensure ideological balance.

Still, one might worry that a unanimity requirement would lead the Court to deadlock with some frequency and leave too many issues to be decided by the lower courts.¹⁵² As veto points theory instructs, the greater the number of decision-makers with a veto power, the less likely that changes in policy will occur.¹⁵³ It is generally easier to secure the agreement of two officials than that of three or more.¹⁵⁴ If unanimous decisions are required, the Court would potentially have nine veto players.

The potential for gridlock is not a sufficient reason to override principles of due process. Juries have as many as twelve veto players, and the potential for a hung jury does not create a sufficient basis for relaxing the requirement of a unanimous jury in criminal or federal civil cases. In addition, limiting veto points on the Court comes at a substantial price—not having decisions made by Justices with different perspectives, experiences, ethnicities, races, and sexes.

Several considerations indicate that the problem of deadlock will be small and therefore that the benefits of unanimity would far outweigh its costs. First, as veto points theory recognizes, the number of veto players is not the only significant factor—so is the congruence of the veto players’

¹⁴⁹ *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 890–91, 899–900 (2009) (Roberts, C.J., dissenting).

¹⁵⁰ *Id.* at 903 (Scalia, J., dissenting).

¹⁵¹ Gabriel D. Serbulea, Comment, *Due Process and Judicial Disqualification: The Need for Reform*, 38 PEPP. L. REV. 1109, 1136–38 (2011). For a comprehensive consideration of recusal at the Supreme Court, see LOUIS J. VIRELLI, III, *DISQUALIFYING THE HIGH COURT: SUPREME COURT RECUSAL AND THE CONSTITUTION* (2016).

¹⁵² Under this proposal, a failure of the Court to reach a decision would leave the lower court decision in effect, as does an inability for the Court to decide a case currently.

¹⁵³ George Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25 BRIT. J. POL. SCI. 289, 305–08 (1995).

¹⁵⁴ *Id.* at 295–96.

views.¹⁵⁵ Replacing Justice Anthony Kennedy with Justice Brett Kavanaugh did not have a practical effect on the ability of the current Court to reach consensus decisions since Justice Kavanaugh's perspectives lie within the ideological range already determined by Justice Sotomayor on the left and Justice Thomas on the right.¹⁵⁶ If an opinion would be conservative enough for Justice Thomas, odds are it would be conservative enough for Justice Kavanaugh. Functionally under a requirement of unanimity, a Court of nine will generally have only two true veto players, though the identities of those players will vary somewhat from case to case.¹⁵⁷

In addition, the Court has an obligation to resolve critical legal questions, and we can expect Justices to fulfill the duties of their position. As Justice Elena Kagan observed when the Court had a 4-4 ideological split between the death of Justice Scalia and the appointment of Justice Gorsuch, the Justices had a greater need to find common ground, and they worked harder to do so.¹⁵⁸ To be sure, the Court also punted on some cases, deferring consideration until a ninth Justice was appointed.¹⁵⁹ But the option of deferring consideration offers little potential for gain when decisions must be reached unanimously. In those circumstances, there would not be any looming changes in the Court's composition that would allow one or the other side of the ideological divide to gain control. In short, while the Court's discretion to deny certiorari would allow it to abstain from deciding hard cases, its essential constitutional role would discourage abstention.

Similarly, the self-interest of the Justices would reinforce their fidelity to their judicial responsibilities. The Justices would have a strong personal 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 legal profession, 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

¹⁵⁵ *Id.* at 308–11.

¹⁵⁶ Amelia Thomson-DeVeaux, *The Supreme Court Might Have Three Swing Justices Now*, FIVETHIRTYEIGHT (July 2, 2019, 6:00 AM), <https://fivethirtyeight.com/features/the-supreme-court-might-have-three-swing-justices-now/>.

¹⁵⁷ For example, while Justice Scalia voted with the other conservative Justices on most issues, he voted with the more liberal Justices on Fourth Amendment issues. Sonia Sotomayor, *Tribute, A Tribute to Justice Scalia*, 126 YALE L.J. 1609, 1610 (2017). In those cases, Justice Scalia was not a veto player on the conservative side of the Court's ideological range.

¹⁵⁸ Patrick Marley, *Justice Elena Kagan Says Court Had to Reach More Consensus After Antonin Scalia's Death*, MILWAUKEE J. SENTINEL, <http://www.jsonline.com/story/news/politics/2017/09/08/justice-elena-kagan-says-court-had-reach-more-consensus-after-antonin-scalias-death/646125001/> (Sept. 8, 2017, 7:19 PM).

¹⁵⁹ See May Mon Post, *Justice Scalia's Death Throws SCOTUS Term into Turmoil*, JDSUPRA (Aug. 8, 2016), <https://www.jdsupra.com/legalnews/justice-scalia-s-death-throws-scotus-78633/> (describing instances in which the Court deferred consideration after Justice Scalia's death).

them to make a difference in resolving major legal questions. Accordingly, they would come to accommodations that would let them decide cases.

Moreover, decision-makers adjust their behavior to their decision-making rules. As the discussion of jury deliberations indicates, when a simple majority can prevail, people tend to look for simple majority positions.¹⁶⁰ On the other hand, when unanimity is required, people will look for positions that can generate consensus. Consider, for example, the Court's decision in *Brown v. Board of Education*.¹⁶¹ After the initial oral argument, the Justices voted, at their private conference, to allow separate schools for Black and white students. But with a re-argument and the replacement of Chief Justice Fred Vinson, the Justices split 6-3 against separate schools. While the case could have been decided along those lines, Chief Justice Earl Warren believed it important that the Court strike down school segregation unanimously, and he was able to achieve that goal by writing a consensus-driven opinion.¹⁶²

Or consider how a norm of consensus operates in the Quaker community. As an ethnography of Quaker decision-making observes, the process rests on a principle of "unity," in which members of the faith community meet together on equal footing to identify resolutions to which all members can subscribe: "This does not mean that everyone has to completely agree with every aspect of the decision, but it does mean that everyone must feel it right to let the decision go ahead."¹⁶³

Of course, what is "right" for Quakers is based on what is right "in the light of God's guidance."¹⁶⁴ For a secular court, what is right would depend on considerations of legal principle, public welfare, and other important values. What is critical for Quakers' decision-making, however, is not that they seek unity according to God's guidance, but that they are committed to finding unity.

The Quaker business meetings are premised on the assumption that each person has a valuable perspective and that all perspectives should be given careful consideration. To be sure, this does not mean that all views must be accepted—the goal is to come to a good decision—but it does mean that all views should be taken seriously.¹⁶⁵

During the meetings, as the Friends share their perspectives, a Clerk is tasked with identifying a "sense of the meeting" and drafting a resolution (the meeting "minute") which all can support.¹⁶⁶ The Quaker approach "can achieve a unity which incorporates the minority position."¹⁶⁷ As the

¹⁶⁰ See *supra* text accompanying notes 47–50.

¹⁶¹ 347 U.S. 483 (1954).

¹⁶² Ulmer, *supra* note 98, at 691–700.

¹⁶³ ANTHONY BRADNEY & FIONA COWNIE, *LIVING WITHOUT LAW: AN ETHNOGRAPHY OF QUAKER DECISION-MAKING, DISPUTE AVOIDANCE AND DISPUTE RESOLUTION* 71 (2000).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 73.

¹⁶⁶ *Id.* at 75, 77.

¹⁶⁷ *Id.* at 80.

ethnographers concluded, “there are in the end no deep divisions, no winners and losers in the conventional sense. . . . It is a method which assumes ownership of the decision by all who are present.”¹⁶⁸

This last point is critical in terms of the ability of a group to reach consensus. As principles of dispute resolution recognize, people need to be involved in the process of reaching a decision for them to make the accommodations necessary for a consensual outcome.¹⁶⁹ Under a rule of unanimity, all nine Justices would participate in the decision-making process, and that would give them all the kind of stake in the process that makes consensual decision-making work.

Or to put it another way, consensus decision-making promotes healthy competition among different viewpoints, while the ability to secure majority control of the Court invites hypercompetitive behavior that can stifle the give and take important to civil discourse and attainment of the common good.¹⁷⁰

Consensus decision-making also has been a hallmark of Native American indigenous communities. As Kahente Horn-Miller has written, such a process is designed to engage all members of the community who rely on “calm deliberation, respect for diverse views, and substantial agreement” to reach a resolution that is “in the best interests of the community and not only themselves as individuals.”¹⁷¹

And this is not surprising. Recall the earlier point that when people from different perspectives make decisions together, they are more likely to come to novel insights and win-win outcomes.¹⁷²

Other empirical evidence supports this Article’s view that Justices can decide their cases unanimously. Most importantly, as discussed, the Supreme Court operated under a norm of consensus for most of its history. The Court not only can decide cases unanimously, it once did so more than 90% of the time, even when not required to.¹⁷³

This experience reflects the fact that there always will be common ground on which the majority and minority can settle. Indeed, even with a majority decision-making rule, Justices often seek common ground. Thus, for example, the *Roe* Court did not reject a right to abortion, nor did it

¹⁶⁸ *Id.*

¹⁶⁹ ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 27 (Bruce Patton ed., 2d ed. 1991).

¹⁷⁰ Michael Miller & Samuel A. Thumma, *It’s Not Heads or Tails: Should SCOTUS Have an Even or Odd Number of Justices?*, 31 S. CAL. INTERDISC. L.J. (forthcoming) (manuscript at 68) (available at <https://gould.usc.edu/why/students/orgs/ilj/assets/docs/31-1-Thumma.pdf>) (citing Karen Homey, *Culture and Neurosis*, 1 AM SOC. REV. 221 (1936)).

¹⁷¹ Kahente Horn-Miller, *What Does Indigenous Participatory Democracy Look Like? Kahnawà:ke’s Community Decision Making Process*, 18 REV. CONST. STUD. 111, 115–16 (2013).

¹⁷² See *supra* text accompanying notes 38–40. For other important examples of consensus-based decision-making in governmental and non-governmental bodies, see Philippe Urfalino, *The Rule of Non-Opposition: Opening Up Decision-Making by Consensus*, 22 J. POL. PHIL. 320, 322–24 (2014).

¹⁷³ See discussion *supra* Part II.

recognize a right to abortion until birth. It reached a position that recognized interests on both sides of the issue, with a right only until viability. Similarly, in *Heller*, the Court neither rejected an individual right to keep and bear arms, nor did it recognize an unlimited right to possess and carry guns. As the majority wrote:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.¹⁷⁴

While the *Heller* Court was divided by 5-4, there is good reason to think that the four dissenting Justices—and dissenting Justices in other cases—would have been more amenable to joining the majority on a Court required to find consensus. As discussed, when courts issue consensus decisions, the majority works with the minority to fashion an opinion onto which all can sign.

That the Court will decide cases regularly under a requirement of unanimity provides reassurance on another concern. One might worry that if the Court adopts a unanimity rule now, it would preserve the current ideological bias of its decisions. According to this concern, some Justices would block new decisions in order to preserve their preferred precedents. But as discussed, we can be confident that the Justices will decide cases, that they will meet their judicial responsibility to resolve critical legal questions. And the consensus that emerges will be the same whether the revised or overridden precedent was more conservative or more liberal than the new decision.

For the same reason, we need not worry that a unanimous Court would lead to a structural bias in favor of the currently dominant political philosophy. According to this line of reasoning, the difficulties in reaching a unanimous decision would lead the Court to become a less active Court, leaving more legislative or executive actions intact. For a red federal or state government, that would mean fewer conservative laws being struck down, and for a blue federal or state government, there would be fewer liberal laws struck down. Here, too, the commitment of the Court to its judicial responsibilities would prevent abdication, and again, it would reach the same consensus whether it was considering a conservative law or a liberal law.

Historical data are consistent with the view that a unanimous decision rule would not lead to a less active Court. While not dispositive, the Court's caseload over time is instructive. As Cass Sunstein found, a key factor in the Court's abandonment of its norm of consensus was the ascent to Chief Justice of Associate Justice Harlan Fiske Stone in 1941. In contrast to his

¹⁷⁴ *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

predecessors who believed it important for the Court to speak with one voice, Stone encouraged the expression of dissenting and concurring viewpoints.¹⁷⁵ If consensus decision-making invites judicial restraint, then one would expect the Court to have decided more cases after 1941 than beforehand. In fact, there was little change in the immediate years after 1941, and starting in 1947, there was actually a substantial decline in the number of cases decided, a decline that lasted until 1970.¹⁷⁶ More specifically, from 1927 to 1946, the median number of signed decisions was 149.5.¹⁷⁷ Between 1947 and 1970, the median dropped to 99, rising to 129 in the several years after 1970.¹⁷⁸ It appears that, just as Chief Justice Stone influenced the Court's decision-making norm, his successors influenced the Court's workload.¹⁷⁹ And importantly, the Court's degree of activity did not seem to reflect whether or not it operated under a norm of consensus.

One also might wonder whether the changes on the Court or the political environment that led to the abandonment of the norm of consensus would preclude a restoration of that norm. Sunstein's careful analysis of the Court's change in practice is reassuring. As mentioned, he concluded that Chief Justice Stone drove the elimination of the norm.¹⁸⁰ If the Court could decide on its own to jettison its norm of consensus, the Court can decide on its own to bring the norm back.¹⁸¹

Other scholars have suggested other factors in the departure from consensus, but those potential contributors seem much less important or consistent with a return to consensus decisions. For example, scholars have pointed to the almost complete turnover in the Court's membership between 1937 and 1941.¹⁸² The new Justices may have been much less receptive to a norm of consensus. But as Sunstein observes, Felix Frankfurter, Hugo Black, William Douglas, and other new Justices adhered to the norm of consensus for the years between their appointments and 1941.¹⁸³ And even if the departure from consensus was driven by multiple Justices rather than

¹⁷⁵ Sunstein, *supra* note 85, at 790–94. See also Thomas G. Walker, Lee Epstein & William J. Dixon, *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361, 384 (1988) (attributing “much of the responsibility” for abandoning the norm of consensus “to the leadership of Harlan Fiske Stone”).

¹⁷⁶ Arthur D. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1711, 1730–32 (1978).

¹⁷⁷ *Id.* at 1730. It makes sense to start around 1927 because Congress gave the Court much greater discretion to decline cases under the Judiciary Act of 1925.

¹⁷⁸ *Id.* at 1730–31.

¹⁷⁹ *Id.* at 1733–34.

¹⁸⁰ Sunstein, *supra* note 85, at 790–94, 816.

¹⁸¹ A study of consensus on the Supreme Court of Canada also found that the degree of consensus depended to a considerable extent on the preferences of the Court's Chief Justices. Emmett Macfarlane, *Consensus and Unanimity at the Supreme Court of Canada*, 52 SUP. CT. L. REV. 379, 409–10 (2010).

¹⁸² CORLEY, STEIGERWALT & WARD, *supra* note 57, at 18–22.

¹⁸³ *Id.*; Sunstein, *supra* note 85, at 793–94. Still, the new Justices may have facilitated abandonment of the norm of consensus by being receptive to such a change in Court practice. *Id.* at 816.

just Chief Justice Stone, the current Justices could come together today and agree to decide their cases unanimously.

Pamela Corley and colleagues have cited the Judiciary Act of 1925's grant of discretion to the Court over its docket, but that change does not connect well with the change in the norm of consensus. After 1925, the Court could decline certiorari for a large number of uncontroversial cases that previously had taken up much of the Court's attention.¹⁸⁴ With fewer uncontroversial cases, one would expect the percentage of non-unanimous cases to go up significantly, even if the total number of non-unanimous cases did not change. But the departure from consensus didn't occur until 1941, well after the increase in Court discretion.¹⁸⁵ In addition, a study of the Taft Court found that the Justices were just as likely to reach consensus on their discretionary docket as on their mandatory docket.¹⁸⁶

That restoring a norm of consensus is feasible also is suggested by other examples. Consider in this regard the overseas experience. As mentioned, high courts in a number of European countries issue a single opinion without dissents or concurrences. While unanimity is not required, the requirement of a single opinion leads the judges in these countries, including France, Italy, and Belgium, to seek consensus as much as possible.¹⁸⁷ Judges taking the minority view are more likely to participate in the court's deliberations. On these courts, "the decision-making process is a truly collegiate one, and all judges cooperate in the drafting of the final decision."¹⁸⁸ In Italy, for example, a member of the court drafts an opinion that "is examined and discussed by the other members, and only when the agreement of the whole court is reached does the draft become the opinion of the court."¹⁸⁹

Juries in the United States provide a clear example of effective decision-making by consensus. Criminal court juries typically have twelve members, and they have to reach unanimous decisions.¹⁹⁰ Hung juries occur,

¹⁸⁴ CORLEY, STEIGERWALT & WARD, *supra* note 57, at 23–24.

¹⁸⁵ Sunstein, *supra* note 85, at 795–96.

¹⁸⁶ Shugerman, *supra* note 92, at 918.

¹⁸⁷ RAFFAELLI, *supra* note 16, at 17–20.

¹⁸⁸ *Id.* at 11.

¹⁸⁹ Michele Taruffo & Massimo La Torre, *Precedent in Italy*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 141, 145 (D. Neil MacCormick & Robert S. Summers eds., 1997). European constitutional courts differ in other ways from the U.S. Supreme Court. For example, they typically only decide constitutional matters, and they have exclusive jurisdiction on those matters. They also issue advisory opinions, generally decide matters without oral argument, and maintain the secrecy of their deliberations and votes. See Entrikin, *supra* note 17, at 83 (discussing advisory opinions); Ferejohn & Pasquino, *supra* note 53, at 1677–78 (discussing secrecy and lack of oral argument); Kelemen, *supra* note 17, at 1362–63 (discussing secrecy).

¹⁹⁰ Robert Black, *Ramos v. Louisiana: Does the 14th Amendment Require Unanimous Jury Verdicts?*, NAT'L CONST. CTR.: INTERACTIVE CONST. (Oct. 9, 2019), <https://constitutioncenter.org/interactive-constitution/blog/ramos-v-louisiana-does-the-14th-amendment-require-unanimous-jury-verdicts>.

but not very often.¹⁹¹ Moreover, juries reach their unanimous decisions in a setting that allows for less common ground than does a decision by a judicial bench. A criminal jury must acquit or convict.¹⁹²

Of course, requirements for juror unanimity reflect the gravity of the decisions at stake. Whether a jury convicts or acquits has enormous consequences for a criminal defendant. Just as much is at stake with the Supreme Court. Its decisions can have the same consequences for defendants when it hears criminal appeals. Other constitutional decisions also can have profound consequences for the parties and the public generally.

Game theory provides further reason to believe that the Court would find common ground regularly under a supermajority requirement. Game theory can identify the kinds of relationships that are likely to encourage cooperative rather than oppositional strategies.¹⁹³ 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 choose cooperation with each other than when they have a one-shot relationship.¹⁹⁴ 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.¹⁹⁵

The equal status of Justices is particularly important. Unlike Congress, where legislators can employ their veto points and other strategies to improve their chances for preserving or gaining the power of the majority, Justices on a Court that requires unanimous decision-making cannot create a power

¹⁹¹ Studies suggest an average hung jury rate of around 6% nationwide. PAULA L. HANNAFORD-AGOR ET AL., NAT'L CTR. FOR STATE CTS., ARE HUNG JURIES A PROBLEM?: EXECUTIVE SUMMARY 2 (2002).

¹⁹² In some cases, juries can find common ground by convicting on less serious charges. James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV. 1, 6 (1995).

¹⁹³ ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 124–26 (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, 587 (2003).

¹⁹⁴ FISHER & URY, *supra* note 169, at 37.

¹⁹⁵ See, e.g., *Supreme Court Judges*, MO. CTS., <https://www.courts.mo.gov/page.jsp?id=133> (last visited Sept. 21, 2021) (describing a tradition on the Missouri Supreme Court of elections for chief justice “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. DAVID ORENTLICHER, *TWO PRESIDENTS ARE BETTER THAN ONE: THE CASE FOR A BIPARTISAN EXECUTIVE BRANCH* 116 (2013).

imbalance. Game theory principles make it unsurprising that the Supreme Court once was able to observe a norm of consensus decision-making.

Indeed, game theory principles already foster an important degree of cooperation among the Justices. As Neal Devins and Lawrence Baum have written, the highly interactive nature of an appellate bench encourages a norm of collegiality among Justices or judges, and while divided decisions are not uncommon, unanimous decisions are the most common result.¹⁹⁶ Over the past decade, for example, 46% of the Supreme Court's merits decisions were 9-0.¹⁹⁷ The next highest percentage was for 5-4 decisions, and those accounted for 20% of decisions.¹⁹⁸

Consensus-based decision-making also works well in non-governmental settings. As discussed, the Quaker business meeting relies on a principle of unity. The American Medical Association's Council on Ethical and Judicial Affairs (the "Council") also provides a useful example. The Council develops guidelines for physicians on the full range of ethical questions in medical practice, including genetic testing, end-of-life decisions, organ transplantation, and conflicts of interest.¹⁹⁹ The Council also hears appeals of disciplinary proceedings against physicians by state and other medical societies.²⁰⁰ The Council has nine members who reach all of their decisions by consensus.²⁰¹ Under its requirement of unanimity, the Council has been able to decide its appeals and issue a comprehensive ethics code that includes guidelines on many controversial matters.²⁰²

For example, the Council has endorsed a pilot program to test financial incentives for organ donations,²⁰³ rejected physician participation in capital punishment,²⁰⁴ and issued guidelines for the ethical use of fetal tissue for

¹⁹⁶ NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* 53–54 (2019).

¹⁹⁷ *Unanimous Cases*, *supra* note 102.

¹⁹⁸ *Merits Cases by Vote Split*, SCOTUSBLOG, <https://www.scotusblog.com/wp-content/uploads/2020/07/Merits-cases-by-vote-split-7.20.20.pdf> (last visited Dec. 3, 2021).

¹⁹⁹ See *Council on Ethical & Judicial Affairs (CEJA) Reports by Year*, AM. MED. ASS'N, <https://www.ama-assn.org/councils/council-ethical-judicial-affairs/council-ethical-judicial-affairs-ceja-reports-year> (last visited Sept. 21, 2021) (listing reports issued by the Council).

²⁰⁰ *Judicial Function of the Council on Ethical & Judicial Affairs (CEJA)*, AM. MED. ASS'N, <https://www.ama-assn.org/councils/council-ethical-judicial-affairs/judicial-function-council-ethical-judicial-affairs-ceja> (last visited Sept. 22, 2021).

²⁰¹ *Members of the Council on Ethical & Judicial Affairs (CEJA)*, AM. MED. ASS'N, <https://www.ama-assn.org/councils/council-ethical-judicial-affairs/members-council-ethical-judicial-affairs-ceja> (last visited Sept. 22, 2021); *Governing Rules of the Council on Ethical and Judicial Affairs (CEJA)*, AM. MED. ASS'N, <https://www.ama-assn.org/councils/council-ethical-judicial-affairs/governin-g-rules-council-ethical-and-judicial-affairs-ceja> (last visited Sept. 22, 2021).

²⁰² James L. Madara, *Letter of Introduction*, in *CODE OF MEDICAL ETHICS* (AM. MED. ASS'N 2017).

²⁰³ Council on Ethical & Jud. Affs., Am. Med. Ass'n, *Financial Incentives for Organ Procurement: Ethical Aspects of Future Contracts for Cadaveric Donors*, 155 ARCHIVES INTERNAL MED. 581, 588 (1995).

²⁰⁴ Council on Ethical & Jud. Affs., Am. Med. Ass'n, *Physician Participation in Capital Punishment*, 270 J. AM. MED. ASS'N 365, 368 (1993).

transplantation or research.²⁰⁵ Even though people generally, and Council members specifically, have strong and divergent views on these issues, the Council was able to forge a consensus.

One might wonder whether decision-making by consensus on the Supreme Court really would yield ideologically diverse decisions. If all Justices were either conservative or liberal, then even unanimous decisions would reflect one side of the ideological spectrum. To some degree, this is a theoretical rather than practical concern. The Martin-Quinn scores that have measured the ideological leanings of Justices since 1937 have found a mix of conservative and liberal Justices throughout the entire eight-decade period.²⁰⁶ Still, to the extent that we have to worry whether decision-making by consensus will ensure ideological balance, the answer is to supplement a requirement of unanimity with other reforms to ensure ideological diversity among the members of the Court.

The analogy to the jury is useful here as well. It is essential for juries to decide their cases unanimously. And it also is important to supplement that requirement with measures to promote jury diversity. Thus, for example, peremptory strikes may not be used in a racially-biased manner, and courts have revised the way they fill their jury pools to increase the diversity of potential jurors.

If the Court decided all of its cases by consensus, what would that mean for the role of the judiciary in deciding cases? Courts often are viewed as engines of social reform. If the Justices had to find common ground, would the Supreme Court change from a leader of social change into a follower of social change that is championed by the president or Congress?

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.²⁰⁷ Proceeding in smaller 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 issues and the opportunity for meaningful participation in the decision-making process.²⁰⁸ Sweeping decisions short-circuit the democratic process and can provoke stiff resistance and a backlash that compromise the very principles that the courts

²⁰⁵ Council on Sci. Affs. & Council on Ethical and Jud. Affs., *Medical Applications of Fetal Tissue Transplantation*, 263 J. AM. MED. ASS'N 565, 568–69 (1990).

²⁰⁶ Nate Silver, *Supreme Court May Be Most Conservative in Modern History*, FIVETHIRTYEIGHT (Mar. 29, 2012, 8:06 PM), <https://fivethirtyeight.com/features/supreme-court-may-be-most-conservative-in-modern-history/>.

²⁰⁷ CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 4 (1999).

²⁰⁸ *Id.*; Barry P. McDonald, *Eight Justices Are Enough*, N.Y. TIMES (May 26, 2016), <https://www.nytimes.com/2016/06/26/opinion/eight-justices-are-enough.html>.

were trying to advance and leave those principles with weaker recognition in the end.²⁰⁹

But even when major change is important, the Supreme Court's history demonstrates that Justices from different sides of the ideological spectrum can come together to issue pathbreaking decisions in appropriate circumstances. In fact, many of the Court's landmark decisions enjoyed broad support among the Justices. When the Court struck down segregated schools in *Brown*,²¹⁰ and bans on interracial marriage in *Loving v. Virginia*,²¹¹ the vote was unanimous.²¹² The Court also was unanimous in recognizing the right to counsel for criminal defendants in *Gideon v. Wainwright*,²¹³ limiting presidential executive privilege in *United States v. Nixon*,²¹⁴ and establishing First Amendment limits on defamation suits in *New York Times v. Sullivan*.²¹⁵ Even what is perhaps the Court's most controversial modern opinion, *Roe v. Wade*, enjoyed strong support on both sides of the ideological spectrum. In *Roe*, the Court's 7-2 majority included conservatives Warren Burger, Lewis Powell, and Potter Stewart.²¹⁶

These kinds of decisions are not surprising. Recall the earlier point that when people with different perspectives make decisions together, they can identify solutions that none of them acting alone would have recognized. Rather than merely splitting their differences, they can discover win-win outcomes that make for better overall results.²¹⁷

²⁰⁹ Lincoln Caplan, *Ginsburg's Roe v. Wade Blind Spot*, N.Y. TIMES: TAKING NOTE (May 13, 2013, 2:58 PM), <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). See also *Kelo v. City of New London*, 545 U.S. 469, 472, 484 (2005) (upholding the ability of governments to exercise their power of eminent domain and seize homeowners' property for privately operated economic development). After the Supreme Court decided *Kelo*, public anger erupted quickly, and it led states across the country to pass statutes curtailing the eminent domain power. Iiya Somin, *Opinion: The Political and Judicial Reaction to Kelo*, WASH. POST (June 4, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-kelo/>. Within five years of the *Kelo* decision, forty-three states revised their eminent domain statutes to make them more restrictive. *Five Years After Kelo: The Sweeping Backlash Against One of the Supreme Court's Most-Despised Decisions*, INST. FOR JUST. (June 2010), <https://ij.org/report/five-years-after-kelo/>.

²¹⁰ 347 U.S. 483, 495 (1954).

²¹¹ 388 U.S. 1, 12 (1967).

²¹² *Brown*, 347 U.S. at 495; *Loving*, 388 U.S. at 12.

²¹³ 372 U.S. 335, 344 (1963)

²¹⁴ 418 U.S. 683, 713 (1974)

²¹⁵ 376 U.S. 254, 292 (1964).

²¹⁶ *Roe v. Wade*, 410 U.S. 113, 115 (1973). The two dissenting Justices, William Rehnquist and Byron White, came from the Court's conservative wing. See Linda Greenhouse, *Byron R. White, Supreme Court Justice for 31 Years, Dies at 84*, N.Y. TIMES (Apr. 15, 2002) ("When he retired after 31 years on the court, he was the last veteran of the liberal era of Chief Justice Earl Warren. But despite his status then as the court's sole remaining Democrat, he was in many ways more at home in the conservative era of Chief Justice William H. Rehnquist.").

²¹⁷ See *supra* text accompanying notes 25–26, 38–40.

Of course, not all landmark cases have been decided unanimously or with only one or two dissenters, as with the Court's 5-4 decision on the constitutional right to same-sex marriage.²¹⁸ Under a requirement of consensus, would such landmarks be blocked?

The answer to that question likely turns on whether the majority drew from both sides of the ideological spectrum, as in *Roe*. In such cases, as suggested by the Court's experience under its past norm of consensus,²¹⁹ we can expect a unanimous Court to preserve the majority's general position, with movement on both sides to find common ground. Consider in this regard *Brown*. When the Court decided *Brown* by a 9-0 vote, rather than by a 6-3 vote,²²⁰ it maintained the majority's rejection of segregation in schools while making other changes in the Court's opinion to reach consensus.²²¹ Similarly, with same-sex marriage, since the majority included the more liberal members of the Court plus the conservative Justice Kennedy, a unanimous Court likely would have recognized a fundamental right while making other changes to secure the agreement of the full Court.²²²

In contrast, for 5-4 decisions that split on ideological lines, a requirement of unanimity might have led to a different outcome, especially if consensus decision-making were supplemented with other reforms to promote ideological balance. Examples of such decisions include *Shelby County v. Holder*²²³ and *Citizens United v. Federal Elections Commission*.²²⁴

²¹⁸ *Obergefell v. Hodges*, 576 U.S. 644, 644, 648 (2015).

²¹⁹ See *supra* text accompanying notes 89–98.

²²⁰ See *supra* text accompanying note 162.

²²¹ The initial majority of six included liberal Justices Warren and William O. Douglas, as well as conservative Justices Harold Hitz Burton and Sherman Minton. See Ulmer, *supra* note 98, at 696–97 (listing the six Justices in the majority) and Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POLITICAL ANALYSIS 134, 146 (2002) (identifying whether individual Justices were relatively conservative or liberal).

²²² This prediction is supported by the fact that the Court solidified protections for the LGBTQ+ community in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the case in which the Court held that the federal civil rights act's prohibition of discrimination on the basis of sex in employment includes discrimination on the basis of sexual orientation. Notably, while Chief Justice Roberts dissented on the right to same-sex marriage, *Obergefell*, 576 U.S. at 686–713 (Roberts, C.J., dissenting), he joined the majority in *Bostock*, so that case was decided 6-3 rather than 5-4 as in *Obergefell*. *Bostock*, 140 S. Ct. at 1736.

In another example of a 5-4 decision whose majority drew from both sides of the ideological spectrum, the Court rejected criminal prosecutions for the burning of a U.S. flag. *Texas v. Johnson*, 491 U.S. 397 (1989).

²²³ 570 U.S. 529 (2013).

²²⁴ 558 U.S. 310 (2010). In both *Holder* and *Citizens United*, all of the conservative Justices were in the majority, and all of the liberal Justices were in the minority. Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit*, N.Y. TIMES, Jan. 21, 2010, at A1; Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES (June 25, 2013), <https://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html>. In *Holder*, the Court blocked enforcement of Section 5 of the Voting Rights Act, which had required preclearance of changes in voting rules in jurisdictions that had a history of

A unanimity rule also would insulate ideologically diverse decisions from being overturned by a majority from just one side of the ideological spectrum. For example, the right to abortion would have been much more secure after the appointments of Justices Gorsuch, Kavanaugh, and Barrett if the Court decided its cases unanimously.

In short, requiring consensus probably would have only a limited effect on the likelihood that the Court would champion social reform. At the same time, it would provide a fairer process for litigants, promote a more deliberative and sounder decision-making process, and greatly reduce the political maneuvering that has made for a drawn-out and highly partisan judicial selection process.

CONCLUSION

While the Supreme Court's norm of deciding cases by majority vote dates back more than 75 years, close examination demonstrates that it lacks grounding in legal principle or empirical value. As the principle of due process recognizes, it is important not only that a court reach good decisions, but also that it make its decisions in a neutral fashion. With unanimous decision-making, the Supreme Court can best satisfy both goals. It would reach better decisions and do so in an impartial way.²²⁵

voting discrimination. 570 U.S. at 556–57. In *Citizens United*, the Court struck down election spending restrictions for corporations and other outside groups. 558 U.S. at 319, 372.

Miranda v. Arizona, 384 U.S. 436 (1966), on unconstitutional police interrogation, comes close to a 5-4 decision with all liberals in the majority. But conservative Justice Tom Clark concurred in part and dissented in part. He preferred a totality of the circumstances approach under the Due Process Clause rather than a blanket requirement of *Miranda* warnings per the privilege against self-incrimination. *Id.* at 503 (Clark, J., dissenting in part). See also Martin & Quinn, *supra* note 221, at 146 (identifying Clark as moderately conservative).

²²⁵ As mentioned earlier, *supra* note 19, the arguments in favor of judicial consensus also apply to other courts of appeal, such as federal intermediate courts of appeal and state supreme and intermediate courts of appeal.