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## POLITICAL DYSFUNCTION AND CONSTITUTIONAL STRUCTURE

David Orentlicher<sup>1</sup>

MICHELLE BELCO AND BRANDON ROTTINGHAUS, *THE DUAL EXECUTIVE: UNILATERAL ORDERS IN A SEPARATED AND SHARED POWER SYSTEM* (STANFORD UNIVERSITY PRESS 2017). PP. 256. HARDCOVER \$65.

RICHARD A. POSNER, *THE FEDERAL JUDICIARY: STRENGTHS AND WEAKNESSES* (HARVARD UNIVERSITY PRESS 2017). PP. 464. HARDCOVER \$35.

MARTIN H. REDISH, *JUDICIAL INDEPENDENCE AND THE AMERICAN CONSTITUTION: A DEMOCRATIC PARADOX* (STANFORD UNIVERSITY PRESS 2017). PP. 272. HARDCOVER \$55.

### INTRODUCTION

Our political system is failing us. Public trust in the national government has plummeted,<sup>2</sup> partisan conflict and gridlock have intensified,<sup>3</sup> and extremist views are gaining traction.<sup>4</sup> We have a president who is more interested in fueling the flames than in putting them out. As dysfunction in Washington increases, many observers fault our constitutional structure. Clearly, things are neither working well, nor working as intended by the founding fathers.<sup>5</sup>

But there is disagreement about the nature of the problem, or even whether there is a problem at all. As some observers point out, our economy is thriving, and our system of checks and balances ultimately contains rogue elected officials, as in the case of President

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1. Cobeaga Law Firm Professor, UNLV William S. Boyd School of Law. MD, JD, Harvard University. I am grateful for the comments of Judy Failer and the editorial assistance of the *Tulsa Law Review* editors.

2. *Public Trust in Government: 1958-2017*, PEW RESEARCH CENTER (Dec. 14, 2017), <http://www.people-press.org/2017/12/14/public-trust-in-government-1958-2017/>.

3. NOLAN McCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 1, 175 (2006).

4. David French, *On Extremism, Left and White*, NAT'L REV. (May 30, 2017), <https://www.nationalreview.com/2017/05/political-violence-extremism-portland-muslim-woman-left-right-alt-right/>.

5. The Framers did not want partisan factions to be able to gain control of governmental power, as can happen for either the Democratic or Republican Party. DAVID ORENTLICHER, *TWO PRESIDENTS ARE BETTER THAN ONE: THE CASE FOR A BIPARTISAN EXECUTIVE* 100-03 (2013).

Richard Nixon and Watergate. Sure, there is much dysfunction in Washington, but politics is messy, as in the sausage-making analogy,<sup>6</sup> and alternative constitutional systems could be much worse.

Other observers argue that it's a serious problem when the minority can too easily thwart the majority. In this view, the constitutional structure fails because of the many ways that a political minority can obstruct—or gain control of—the political process. The Electoral College allows for the selection of presidents who receive fewer popular votes than their opponents,<sup>7</sup> and U.S. Senators from the twenty-six smallest states can form a majority even though they represent only eighteen percent of the U.S. population.<sup>8</sup> A powerful special interest, such as the National Rifle Association, can block legislative reforms favored by most of the public. The minority also can employ filibusters or other legislative veto points in the U.S. Senate, field successful nominees in gerrymandered congressional districts, or spend vast amounts of money on candidates or ballot initiatives. In addition, the political minority might suppress voter eligibility and turnout enough to prevail in elections.

To repair our constitutional structure, many observers would have us reinforce majority rule by denying the minority its ability to frustrate the public's will. Thus, for example, advocates for a stronger majority have pursued litigation and promoted state constitutional reform to address the problem of partisan gerrymanders. Last year, challenges to partisan gerrymanders reached the U.S. Supreme Court from Maryland, North Carolina, and Wisconsin,<sup>9</sup> the Pennsylvania Supreme Court required a redraw of its state's congressional districts,<sup>10</sup> and voters in five states cast ballots on referenda to curb partisan gerrymandering.<sup>11</sup> Some reformers want more sweeping reform. They go so far as to urge adoption of a British-like parliamentary model in which the majority party

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6. According to John Godfrey Saxe, "Laws, like sausages, cease to inspire respect in proportion as we know how they are made." Fred R. Shapiro, *Familiar Words from Unfamiliar Speakers*, N.Y. TIMES July 20, 2008, at MM16.

7. Many presidents have received less than fifty percent of the popular vote, and some have received fewer votes than their major party opponent. ORENTLICHER, *supra* note 5, at 172; Steven Porter, *Clinton Wins US Popular Vote by Widest Margin of Any Losing Presidential Candidate*, CHRISTIAN SCIENCE MONITOR (Dec. 22, 2016), <https://www.csmonitor.com/USA/Politics/2016/1222/Clinton-wins-US-popular-vote-by-widest-margin-of-any-losing-presidential-candidate>.

8. David Wasserman, *Why Even a Blue Wave Could Have Limited Gains*, N.Y. TIMES (Aug. 20, 2018), <https://www.nytimes.com/2018/08/20/opinion/midterms-democrats-republicans-blue-wave.html>.

9. *Compare* Gill v. Whitford, 138 S. Ct. 1916 (2018) (remanding to a Wisconsin district court to allow plaintiffs to argue for standing), and Rucho v. Common Cause, 138 S. Ct. 2679 (2018) (remanded to a North Carolina district court for full consideration of standing issue), with Benisek v. Lamone, 138 S. Ct. 1942 (2018) (upholding the denial of a preliminary injunction in Maryland). The Maryland and North Carolina cases will be heard again by the Court in 2019. Adam Liptak, *Two Gerrymandering Cases Added to the Docket*, N.Y. TIMES Jan. 4, 2019, at A13.

10. League of Women Voters v. Commonwealth, 178 A.3d 737 (Pa. 2018).

11. Ohio voters approved the state's proposal in the May 2018 primary. Michael Wines, *Are Voting Districts Drawn Unfairly? States Are Letting Voters Decide*, N.Y. TIMES July 23, 2018, at A11. Voters in Colorado, Michigan, Missouri, and Utah approved their states' initiatives in November 2018. Robert Gherke, *Passing Prop. 4 Was a Step Toward Better Government, but Now Voters Have to Hold Leaders Accountable*, SALT LAKE TRIB. (Nov. 24, 2018), <https://www.sltrib.com/news/politics/2018/11/24/gehrke-passing-prop-was/>; Katie Zezima & Emily Wax-Thibodeaux, *National Voters Are Stripping Partisan Redistricting Power from Politicians in Anti-gerrymandering Efforts*, WASH. POST (Nov. 7, 2018), [https://www.washingtonpost.com/national/voters-are-stripping-partisan-redistricting-power-from-politicians-in-anti-gerrymandering-efforts/2018/11/07/2a239a5e-e1d9-11e8-b759-3d88a5ce9e19\\_story.html?utm\\_term=.e4f4482c53fe](https://www.washingtonpost.com/national/voters-are-stripping-partisan-redistricting-power-from-politicians-in-anti-gerrymandering-efforts/2018/11/07/2a239a5e-e1d9-11e8-b759-3d88a5ce9e19_story.html?utm_term=.e4f4482c53fe).

exercises the executive and legislative powers jointly, and in which a new majority can bring down the government immediately rather than waiting for the next election cycle to do so.<sup>12</sup>

In an important alternative view, the problem is not that the minority exercises too much power; rather the problem with our constitutional system lies in giving too *little* power to the minority.<sup>13</sup> The U.S. political system has many “winner-take-all” features, especially with the high stakes election for the presidency. Whoever prevails in the battle for the White House gains one hundred percent of the executive power even if the victor triumphs by the barest of margins. Our winner-take-all system denies meaningful representation to half of the public in the most important policymaking office in the world, and as a result, we invite levels of competition and conflict that are intense, excessive, and harmful to social welfare.<sup>14</sup> Campaigns for the Oval Office are bitter and costly, and they are followed by obstructionist tactics from the losing party so it can retake the presidency.<sup>15</sup> During the Obama administration, Republican members of Congress pursued a policy of obstruction to regain power, and Democratic legislators generally line up against President Trump’s initiatives.<sup>16</sup> Similarly, the Tea Party formed within weeks of President Obama’s inauguration,<sup>17</sup> and the Resistance began before President Trump took office.<sup>18</sup> Instead of a system where elected officials seek common ground to promote the overall public good, they give higher priority to their battle for power.

Winner-take-all politics suffers from another serious defect. When policy is made on the basis of only one side’s perspective, ill-advised decisions are much more likely. Studies of decision making demonstrate that better outcomes emerge when policies are based on a diversity of viewpoints.<sup>19</sup>

Winner-take-all politics also infects the judicial branch. Although the Supreme Court typically includes a mix of conservative and liberal Justices, one side or the other will enjoy a majority, and the ability of a conservative or liberal majority to impose its perspective creates the same kinds of problems as a single executive who imposes a Democratic or Republican perspective. Members of the public who share the views of the Court minority lack meaningful representation on many important issues, the judicial appointment process has become highly politicized as each side fights for a Court majority,

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12. JAMES L. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* 18–20 (Rev. ed. 1992) (citing advocates for a parliamentary system while urging more incremental reforms).

13. David Fontana, *Government in Opposition*, 119 *YALE L.J.* 548 (2009); David Orentlicher, *Political Dysfunction and the Election of Donald Trump: Problems of the U.S. Constitution’s Presidency*, 50 *IND. L. REV.* 247, 255–62 (2016).

14. ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY: HOW MORE AND MORE AMERICANS COMPETE FOR EVER FEWER AND BIGGER PRIZES, ENCOURAGING ECONOMIC WASTE, INCOME INEQUALITY, AND AN IMPOVERISHED CULTURAL LIFE* 4 (1995).

15. ORENTLICHER, *supra* note 5, at 2, 96–97.

16. Some members of Congress will break with their party to vote their district or state. For example, Senator Joe Manchin from West Virginia often votes with President Trump. *Tracking Congress in the Age of Trump*, FIVETHIRTYEIGHT (Oct. 10, 2018), <https://projects.fivethirtyeight.com/congress-trump-score/joe-manchin-iii/>.

17. Michael Ray, *Tea Party Movement*, *ENCYCLOPAEDIA BRITANNICA*, <https://www.britannica.com/topic/Tea-Party-movement> (last updated Oct. 5, 2018).

18. Tim Dickinson, *Meet the Leaders of the Trump Resistance*, *ROLLING STONE* (Jan. 13, 2017), <https://www.rollingstone.com/politics/politics-features/meet-the-leaders-of-the-trump-resistance-124691/>.

19. ORENTLICHER, *supra* note 5, at 146–48.

and we increase the risk of ill-advised decisions.<sup>20</sup>

To address winner-take-all politics, rather than looking to the U.K. as a model, we should look to Switzerland, where power is shared across partisan lines, and elected officials from both sides of the political spectrum have a say in the making of governmental policy.<sup>21</sup> And we are seeing some interest in Congress in a more bipartisan ethic. For example, a “Problem Solvers Caucus” of Republican and Democratic members of the House is promoting reforms that would make for a more bipartisan process in their chamber.<sup>22</sup>

Or maybe the real problem is the development of the “imperial presidency.”<sup>23</sup> Over many decades, presidents have accumulated considerable power, both through congressional delegation and presidential pushing of boundaries. Thus, for example, even though the Constitution assigns to Congress the power to declare war,<sup>24</sup> multiple presidents have committed our military to battle without congressional authorization.<sup>25</sup> And even though the Constitution assigns to Congress the power to “regulate commerce with foreign nations,”<sup>26</sup> President Trump imposed tariffs on Canada, China, and other countries in 2018.<sup>27</sup> Critics of the imperial presidency urge Congress and the Supreme Court to restore an appropriate balance of power in the national government.<sup>28</sup>

This essay reviews three books that analyze different features of the U.S. political system. Where do they come down on the problems with our constitutional structure? Would they reinforce the majority, enhance the power of the minority, reduce presidential power, or do something else?

In the *Dual Executive*, Michelle Belco and Brandon Rottinghaus study executive authority and consider the question whether presidents exercise their authority without sufficient constraint.<sup>29</sup> Do we really have a problem of an imperial presidency?<sup>30</sup> Belco and Rottinghaus conclude that existing checks and balances are adequate to protect the public interest.

In *The Federal Judiciary*, Richard Posner targets a number of problems with the judicial branch, and he has many ideas to improve the way judges judge.<sup>31</sup> But when it

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20. David Orentlicher, *Politics and the Supreme Court: The Need for Ideological Balance*, 79 U. PITT. L. REV. 411, 411–12 (2018). Congress has been insulated to an important extent from winner-take-all politics because of the filibuster rule in the Senate. While one party can exercise control in the House with a bare majority of seats, control of the legislative process in the Senate requires a supermajority of 60 to break filibusters. Until recently, the minority party in the Senate also could mount filibusters in response to judicial nominations.

21. ORENTLICHER, *supra* note 5, at 116–18.

22. Melanie Zanona, *Problem Solvers Caucus Has a Vision: A Bipartisan House*, THE HILL (July 24, 2018), <http://thehill.com/homenews/house/398700-problem-solvers-caucus-has-a-vision-a-bipartisan-house>.

23. Arthur M. Schlesinger, Jr. coined the term “imperial presidency” during the Nixon Administration, and popularized it in a book. See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973).

24. U.S. CONST., art. I, § 8, cl. 11.

25. ORENTLICHER, *supra* note 5, at 55.

26. U.S. CONST., art. I, § 8, cl. 3.

27. Ana Swanson, *U.S. to Put Tariffs on Its Key Allies, Risking Reprisal*, N.Y. TIMES May 31, 2018, at A1.

28. ORENTLICHER, *supra* note 5, at 76, 80.

29. See MICHELLE BELCO & BRANDON ROTTINGHAUS, *THE DUAL EXECUTIVE: UNILATERAL ORDERS IN A SEPARATED AND SHARED POWER SYSTEM* (2017).

30. *Id.* at xiii.

31. See RICHARD A. POSNER, *THE FEDERAL JUDICIARY: STRENGTHS AND WEAKNESSES* (2017).

comes to constitutional failures, he generally trusts the Supreme Court to make needed adjustments through its ability to interpret the Constitution in light of contemporary realities.

In *Judicial Independence and the American Constitution*, Martin Redish also would rely on the Supreme Court's authority to interpret the Constitution, and he suggests some specific ways for the Court to reinforce its ability to exercise its checking and balancing role.<sup>32</sup>

#### UNILATERAL EXERCISES OF PRESIDENTIAL POWER

In their book, Belco and Rottinghaus explore two concerns about the U.S. political system—first, the use of executive orders by presidents to act unilaterally and upset the balance of power between the White House and Capitol Hill,<sup>33</sup> and second, how partisan politics influences the extent to which presidents act independently.<sup>34</sup>

The book brings original empirical evidence to bear on the use of executive orders, and it looks at the factors that might influence the extent to which presidents use their executive powers to shape national policy on their own and the extent to which they work more collaboratively with Congress. As the authors observe, intuition, anecdotal examples, and previous research suggest a number of expectations. For example, one would predict that presidents are more likely to act independently when Congress is controlled by the other party and assumes an obstructive posture. When President Obama was unable to persuade Congress to enact immigration reform, he adopted his DACA and DAPA programs over the objections of the House Republican majority.<sup>35</sup> On the other hand, presidents are more likely to work in conjunction with Congress when Capitol Hill is controlled by their own party, and the executive and legislative branches are able and willing to work collegially. After Congress passed the Affordable Care Act, President Obama used his executive order power to implement provisions of the Act.<sup>36</sup>

Overall, several significant findings emerge, some as one would predict, and others not so expected. First, when legislation gives presidents broad discretion to act, they take advantage of it, as with decisions about natural resources and public lands. Between 1891 and 1906, after passage of the Forest Reserve Act of 1891, successive presidents established national forests on eighty million acres of land.<sup>37</sup> Presidents also have exercised their broad authority under the 1906 Antiquities Act to designate national monuments, with more than 125 such designations since the Act's enactment.<sup>38</sup>

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32. See MARTIN H. REDISH, *JUDICIAL INDEPENDENCE AND THE AMERICAN CONSTITUTION: A DEMOCRATIC PARADOX* (2017).

33. BELCO & ROTTINGHAUS, *supra* note 29, at 8–9.

34. *Id.* at 13.

35. *Id.* at 3, 56. Under DACA (Deferred Action for Childhood Arrivals), the Department of Homeland Security (DHS) exercises its discretion to not deport undocumented immigrants with respect to those who entered the United States when they were younger than age 16 and satisfied several measures of good conduct. *Batalla Vidal v. Duke*, 295 F. Supp. 3d 127, 137 (E.D. N.Y. 2017). Under DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents), DHS stays deportation for certain parents of U.S. citizens and lawful permanent residents. *Id.* at 138.

36. BELCO & ROTTINGHAUS, *supra* note 29, at 4–5.

37. *Id.* at 38.

38. *Id.* at 40, 48, 139.

Second, presidents are more likely to act independently on matters of foreign policy than on matters of domestic policy.<sup>39</sup> Indeed, starting with the Korean War, presidents more often than not have launched military interventions without congressional authorization, as with Presidents Clinton in Bosnia, Obama in Libya, and Trump in Syria.<sup>40</sup>

The data are less clear when it comes to whether presidents make unilateral policy decisions during the earlier or later years of their terms in office. While one might expect presidents to act more independently as they reach the end of their terms, the evidence is mixed. Sometimes they do, other times they do not.<sup>41</sup> But once presidents reach the very end of their tenure in office, they are more likely to act independently.<sup>42</sup>

The data also present a mixed picture when it comes to ideological differences between the president and Congress. As mentioned, one would expect presidents to act more independently as the strength of the opposing party in Congress grows. If a Republican president faces Democratic majorities in the House and/or Senate, it will be very difficult to advance a policy agenda via the legislative process. Therefore, independent action via executive orders should increase. However, things are more nuanced than this simple relationship between partisan opposition and independent action. If the opposition has a strong and united majority in Congress, its ability to push back on the president, or seize the policy making initiative, can deter independent action designed to bypass the legislative branch. Hence, the authors not only consider the partisan affiliation of the congressional majority but also its strength and cohesiveness. Is the congressional majority small and fragmented and therefore in a weaker position to block presidential preferences (or implement its own preferences), or is it large and unified, and therefore in a stronger position to impose its will?<sup>43</sup>

In studying the connection between presidential independence and ideological differences with Congress, Belco and Rottinghaus found inconsistent evidence. For example, when presidents employ executive orders to achieve their policy goals before Congress has a chance to act on an issue, presidents are more likely to strike as the ideological distance increases between the president and the Senate filibuster pivot<sup>44</sup> or when the parties are ideologically fragmented and therefore less able to muster majorities to pass bills.<sup>45</sup> These findings make sense. In both cases, presidents are more likely to achieve their goals through unilateral action than through legislation. On the other hand, presidents are less likely to move first as polarization in the House and Senate increases.<sup>46</sup> This result seems surprising since a more polarized Congress should make for a more

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39. BELCO & ROTTINGHAUS, *supra* note 29, at 37–38.

40. ORENTLICHER, *supra* note 5, at 55; Charlie Savage, *Was Missile Attack on Syria Illegal? Explaining Presidential War Powers*, N.Y. TIMES Apr. 7, 2017, at A11.

41. BELCO & ROTTINGHAUS, *supra* note 29, at 108, 134, 162.

42. *Id.* at 162.

43. *Id.* at 71–73.

44. *Id.* at 113. Since a filibuster can block legislative action, bills often need support from sixty Senators rather than a simple majority. The Senate filibuster pivot refers to the ideology of the Senator who would be 60th in terms of ideological distance from the president.

45. BELCO & ROTTINGHAUS, *supra* note 29, at 113–17.

46. *Id.* at 113.

gridlocked Congress, and we would expect presidents to turn to independent action.<sup>47</sup>

Even more surprising is that the data flip once the legislative process is underway. If a president does not like the direction in which a bill is headed, the president might try to preempt the legislation with a unilateral policy. Thus, for example, when President Reagan disliked a bill that would have imposed sanctions on South Africa, he issued an executive order establishing policy on the matter.<sup>48</sup> In this context, presidents are not more likely to preempt Congress when the parties are ideologically fragmented and they are less likely to do so as the ideological distance increases with the Senate filibuster pivot. But presidents are more likely to preempt when the parties are polarized.<sup>49</sup> Why executive interest in collaboration would change once the legislative process progresses is not clear. Perhaps there are important factors that are not being measured.

Overall, what do we learn from the quantitative analysis? In exercising their unilateral powers, presidents clearly are sensitive to their political and constitutional constraints.<sup>50</sup> They often work collaboratively with Congress, and they often invoke their statutory authority rather than their constitutional authority.<sup>51</sup> Still, quantitative analyses cannot give us a complete picture. Do presidents draw the right balance between collaborative and independent action? When they act independently, are they acting wisely? Are they respecting their constitutional limits? For example, were President Obama's immigration orders and President Trump's bombing of Syria constitutional?

To answer these questions, complementary qualitative research is important. It is easy to envision very different reasons for independent presidential action. For example, a president's policy might be legally accomplished through either legislation or executive order, and the president would prefer a legislative path to insulate the policy from reversal by a later administration.<sup>52</sup> But if legislation is not feasible, then the president would use an executive order, and that would be legitimate.

An alternative scenario comes out differently. Suppose a president's policy could be accomplished legally only through legislation, and again, it's not a feasible route. If the president tried to implement the policy through an executive order, that would not be legitimate. Critics have argued that President Obama's DAPA order fell into this category,<sup>53</sup> while supporters view it as an example of action that could have been accomplished by legislation or executive order.

Of course, assessing the constitutionality of White House policy can be challenging—the lines between legitimate and illegitimate presidential action are hotly contested. Nevertheless, not all executive orders will fall close to the line, so a qualitative analysis would be informative.

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47. BELCO & ROTTINGHAUS, *supra* note 29, at 113.

48. *Id.* at 126.

49. *Id.* at 137–39.

50. *Id.* at 175, 180.

51. *Id.* at 75–76.

52. BELCO & ROTTINGHAUS, *supra* note 29, at 179.

53. The U.S. Court of Appeals for the Fifth Circuit deemed it unconstitutional. *See Texas v. United States*, 809 F.3d 134 (5th Cir. 2015). The U.S. Supreme Court deadlocked 4-4 on the question. *See United States v. Texas*, 136 S. Ct. 2271, 2272 (2016).



## THE JUDICIAL BRANCH IN THE CONSTITUTIONAL ORDER

While Belco and Rottinghaus look at presidential power in the constitutional structure, the other two books focus on the role of the judiciary. And in both cases, a key goal for the authors is to ensure that the judiciary can effectively play its checking and balancing role.

*On judging*

Richard Posner's book, *The Federal Judiciary*, covers considerable ground. After decades on the bench, he has many useful things to say about what judges do well and what they do not do so well. And he also has valuable things to say about many of the academic debates on the judicial process.

In particular, Posner is frank about the way he decided cases. The approach of a Posnerian judge is "not to worry initially about doctrine, precedent, and the other conventional materials of legal analysis, but instead to try to figure out the sensible solution to the problem or problems presented by the case."<sup>54</sup> If the sensible solution is not blocked by an authoritative Supreme Court precedent or some other binding authority, the Posnerian judge goes with the sensible solution.<sup>55</sup> Why, writes Posner, should judges look "backwards" at precedent, text, or legislative history that reflect the context of their times and that could not anticipate the future? Judges should render the decision that is best for today's society.<sup>56</sup> In this approach, precedent, text, and drafting history can be marshalled to support the court's decision, but they do not dictate the outcome.<sup>57</sup>

This is not only the preferred way of deciding for Posner, in his view, it's inevitable. Text and drafting history simply cannot provide sufficient guidance. As he illustrates with the First Amendment, it's not possible to deduce the Supreme Court's free speech doctrine from the Constitution's prohibition on laws that abridge the freedom of speech. While Congress "shall make no law" limiting the right to speak, lots of laws do so, including laws against defamation, child pornography, threats to inflict harm, copyright infringements, etc.<sup>58</sup> And exactly what counts as speech? Should we include other kinds of communication, such as music and art (yes, says Posner) or the burning of flags or books (maybe not, writes Posner).<sup>59</sup> The process of constitutional "interpretation" requires judges to create law in much the same way that they have created the common law.<sup>60</sup> In the end, judges decide cases based on their political leanings and other philosophical attitudes because they have no choice.<sup>61</sup> In other words, Posner is a legal realist.

All of this makes good sense, and Posner bolsters his analysis with perceptive critiques of alternative theories.<sup>62</sup> But he doesn't always follow through on the

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54. POSNER, *supra* note 31, at 80.

55. *Id.*

56. *Id.* at 82.

57. *Id.*

58. *Id.*

59. POSNER, *supra* note 31, at 82.

60. *Id.* at 87-88.

61. *Id.* at 87-88, 148-50.

62. *See id.* at 98-112.

implications of a process of judging that is heavily driven by the political leanings of the judges. For if the judicial branch is supposed to rise above politics, how can it do so when the Supreme Court will usually have either a conservative or liberal majority and favor either conservative or liberal positions? Other countries take steps to ensure ideological balance in the decisions of their courts.<sup>63</sup> In Posner's view, it is impossible to depoliticize judging, so we should aim for higher quality appointments to the judiciary and better training of law students.<sup>64</sup> For the most part, Posner has faith in the current constitutional structure<sup>65</sup> and believes that a more effective judiciary will provide the necessary check on the executive and legislative branches. We just need to have better qualified appointees who do a better job of judging and managing court operations. Posner does, however, endorse one constitutional change that would address the ideological bias on the Supreme Court. He likes the idea of requiring approval of Supreme Court nominees by a two-thirds vote rather than a simple majority. That way, nominees would have to appeal to senators on both sides of the aisle.<sup>66</sup>

As mentioned, Posner covers a lot of ground. He discusses important concerns such as judicial ethics and judicial diversity. On the ethics, he worries about judges who retain investments in individual stocks rather than switching to mutual funds<sup>67</sup> or who plagiarize—that is, they use language from briefs in their opinions without attribution.<sup>68</sup> With regard to diversity, he would like to see more judges with practice backgrounds, with training in the sciences and social sciences, and with political or business experience.<sup>69</sup>

Posner believes that legislatures should decriminalize almost all drug use,<sup>70</sup> that jurors and judges should ignore witness demeanor cues because of their unreliability,<sup>71</sup> and that trial courts should make greater use of neutral experts.<sup>72</sup> He also thinks that appellate court judges who lack experience as a trial court judge should periodically preside over trials, as he did.<sup>73</sup> He critiques the length of prison sentences and limits on the right to habeas corpus,<sup>74</sup> the various standards of appellate review that often obfuscate more than illuminate,<sup>75</sup> and the quality of judicial opinion writing (too verbose, too much legalese).<sup>76</sup>

Other targets include class action settlements that reward the class' lawyers much more than the members of the class,<sup>77</sup> forum-selection and mandatory arbitration clauses

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63. Orentlicher, *supra* note 20, at 417-18.

64. POSNER, *supra* note 31, at 150.

65. *Id.* at 165.

66. *Id.* at 215. This reform would follow a common European approach and could easily be extended to the lower courts. Orentlicher, *supra* note 20, at 417, 424.

67. POSNER, *supra* note 31, at 210-11.

68. *Id.* at 98.

69. *Id.* at 214.

70. *Id.* at 298.

71. *Id.* at 287-88.

72. POSNER, *supra* note 31, at 283-86.

73. *Id.* at 280-81.

74. *Id.* at 293-297, 420-26.

75. *See id.* at 239-73.

76. *See id.* at 223-26.

77. POSNER, *supra* note 31, at 363-70.

in agreements between businesses and individual consumers,<sup>78</sup> and the excessive attention paid to citation formatting and the time it wastes for law review members who spend more time on adherence to *Bluebook* rules than to the substance of the articles they edit.<sup>79</sup> Posner also dislikes insincere paeans to legal luminaries, as with the effusive encomiums upon Justice Antonin Scalia's death.<sup>80</sup>

Of course, breadth can come at the expense of depth. For many of his topics, Posner provides a quick take rather than an extended analysis.

#### *Judicial checking and balancing*

While Posner's book focuses on judicial practice, Martin Redish writes in *Judicial Independence and the American Constitution* about the importance of judicial review and its critical role in our constitutional structure. As he observes, our constitutional democracy rests primarily on a representative government that is accountable to voters through regular elections.<sup>81</sup> But the U.S. constitutional system also relies on a politically unaccountable judicial branch to protect the public from a tyrannical majority.<sup>82</sup> How, then, do we ensure that the judiciary is sufficiently insulated from the political process? How should the courts interpret key constitutional provisions to ensure that the judiciary can fulfill its checking function? Redish provides answers to these questions in the remainder of the book. In doing so, he provides important solutions to serious concerns, in particular his constitutional argument for greater independence of state court judges. His book would be even stronger if he pursued his own logic more fully.

The book takes on four issues about the judiciary's role in the constitutional structure. Two are related to the question of judicial independence, and two to how the judiciary should play its checking role. I'll start with the two chapters on judicial independence.

In one of these chapters, Redish considers how we should balance the need for an independent judiciary with the need to discipline or remove judges who cannot or will not carry out their duties responsibly.<sup>83</sup> Although Article II of the Constitution specifies the same "Treason, Bribery, or other high Crimes and Misdemeanors" standard for impeachment for judges as for presidents and other officials, Redish argues that Article III's protections for judicial independence should be interpreted to require a narrower class of impeachable offenses for judges than for other officials.<sup>84</sup> In another chapter, he argues that under the Due Process Clause, the tenure of a state court judge cannot depend on the will of the voters, that like federal court judges, state court judges must be given lifetime tenure, or at least fixed, nonrenewable terms in office.<sup>85</sup> I will discuss this chapter at greater length because I think it is his most important chapter.

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78. POSNER, *supra* note 31, at 362–63, 370–71.

79. *Id.* at 46–49, 221–23.

80. *Id.* at 65–70, 95–98.

81. REDISH, *supra* note 32, at 22.

82. *See id.* at 21–23.

83. REDISH, *supra* note 32, at 77–109.

84. *See id.* at 93–97.

85. *See id.* at 110–38.

Redish's other two issues are about the proper execution of the judiciary's checking role. In one chapter, he argues that courts should invoke the Due Process Clause to override the Article I power of the federal government to suspend the writ of habeas corpus in cases involving rebellion or invasion.<sup>86</sup> This is an interesting argument and offers an important way to ensure that civil liberties are protected during national security emergencies. In another chapter, Redish argues that courts should override laws when Congress has deceived the public about the actual effect of the legislation and therefore compromised the ability of voters to hold elected officials accountable for their actions.<sup>87</sup> For example, a law might promise a particular substantive result, but the legislature might undermine its promise through manipulation of procedural rules. Redish uses the *Michael H. v. Gerald D.*<sup>88</sup> case to illustrate the concern. While the California legislature wrote a law protecting the rights of biological parents, it also adopted an evidentiary presumption of paternity for husbands of biological mothers, which could defeat paternity rights for biological fathers.<sup>89</sup> Voters were not likely to appreciate how the procedural rule compromised the announced substantive right. As Redish recognizes, there are problems with this theory since the text of all laws is a matter of the public record.<sup>90</sup>

As I've indicated, I think the chapter on judicial tenure is Redish's most valuable chapter because it has something important to say about the problem of ideologically biased courts. Courts are supposed to decide cases based on neutral principles of law rather than ideological preferences, but as discussed, it's inevitable that judges will be influenced by their philosophical beliefs. While we cannot find nonideological judges, we can at least strive for courts in which neither side of the philosophical spectrum exerts undue influence. However, as Redish observes, the potential for undue influence is unavoidable when judges must go before the voters to retain their offices. A judge in a conservative state or local jurisdiction might be turned out of office because of decisions deemed too liberal, and a judge in a liberal jurisdiction might be turned out of office because of decisions deemed too conservative.<sup>91</sup> As judges are weighing the equities in the cases they decide, we don't want them taking into account the significance of their decisions for their continued employment. And as Redish argues, it's not only bad policy, it's also unconstitutional. For the Due Process Clause promises litigants that they will receive a fair trial before a neutral decision maker.<sup>92</sup>

This is a very smart argument and a very important argument. The judiciary cannot fulfill its checking role if it is subject to the same political pressures that face officials in the executive and legislative branches. The constitutional framers addressed that problem for federal judges by giving them lifetime tenure, and Redish shows how principles of due

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86. REDISH, *supra* note 32, at 166–98.

87. *See id.* at 139–65. He derives his argument from an interpretation of the Supreme Court's decision in *United States v. Klein*, 80 U.S. 128 (1872). *See also* REDISH, *supra* note 32, at 145–49. If it sounds as if the book is a collection of essays, that's probably because each of the chapters grew out of previously published articles. *See, e.g., id.* at 207, 218, 223, 230, 238, 243.

88. 491 U.S. 110 (1989).

89. REDISH, *supra* note 32, at 155.

90. *Id.* at 159–60.

91. Redish cites as examples that a judge “may be reluctant to side with unpopular litigants or uphold controversial rights out of fear of sparking voter discontent.” *Id.* at 115.

92. *Id.* at 113.

process demand similar protections for state judiciaries.<sup>93</sup>

But Redish doesn't take his logic far enough. Even though federal judges have lifetime tenure, the federal courts still suffer from ideological bias. And that's because the appointment process also matters. Redish considers the appointment process and concludes that we needn't worry because judges' sense of gratitude for their appointments does not raise serious concerns about their neutrality. As he reminds us, once federal justices or judges are appointed, offending their nominators by their decisions does not jeopardize their jobs, and there are many examples of Supreme Court Justices who cast votes different from those expected by their nominating presidents.<sup>94</sup> But even if we shouldn't worry that gratitude to their nominators will sway judges, we should worry that their ideological bias will sway them. If you're promoting a liberal viewpoint before today's Supreme Court, it's difficult to feel that you're getting a fair shot, and under Redish's analysis, this should be a serious due process problem. A court that has a conservative or liberal bias is not a neutral court.

What can we do about this problem? A number of states and European countries offer important answers. As I've discussed in a recent article,<sup>95</sup> there are three models for bringing ideological balance to the judiciary. In one approach, judges would need to be approved by both sides of the political spectrum. For example, in Germany, members of the German Constitutional Court need support from a supermajority of the legislature and therefore both sides of the political aisle. Instead of having some judges that are conservative and others liberal, all judges would bring moderate views to the bench. This is the reform that Posner endorses.<sup>96</sup>

In a second approach, we would strive for ideological balance by having an equal number of conservative and liberal judges. For example, the Senate majority leaders could be given responsibility for filling half the seats, and the Senate minority leaders the other half. Delaware and New Jersey do something similar on their state supreme courts. In both states, one political party cannot fill more than a bare minimum of the seats (four out of seven in New Jersey, and three out of five in Delaware)<sup>97</sup>. The German political parties have implemented their country's supermajority requirement for approval by designating seats by political party. The supermajority requirement ensures that the parties choose justices acceptable to both sides of the political aisle.

In a third approach, we could require that courts decide cases by consensus or at least a supermajority vote, so justices or judges on both sides of the ideological spectrum would have to support the courts' decisions. This approach is common on the European constitutional courts, sometimes by law, more often by custom.<sup>98</sup> North Dakota and

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93. Either lifetime tenure or fixed, non-renewable terms of office would work. REDISH, *supra* note 32, at 128.

94. *Id.* at 126.

95. Orentlicher, *supra* note 20, at 417–18. The remainder of this section draws on this article.

96. POSNER, *supra* note 31, at 215.

97. In New Jersey, this happens by long-standing custom and in Delaware per the state constitution. John B. Wefing, *Two Cheers for the Appointment System*, 56 WAYNE L. REV. 583, 597–98 (2010); DEL. CONST., art. IV, § 3. The Delaware approach raises serious First Amendment problems since it restricts eligibility for appointment to candidates affiliated with either the Democratic or Republican Party. Consequently, it has been deemed unconstitutional. *Adams v. Carney*, 2018 WL 2411219, Case No. 17-181-MPT (D. Del. May 23, 2018).

98. EUROPEAN PARLIAMENT, *DISSIDENTING OPINIONS IN THE SUPREME COURTS OF THE MEMBER STATES* 17–20 (2012), <http://www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423AT>

Nebraska also employ this path to ideological balance. The North Dakota Supreme Court can declare a legislative enactment unconstitutional only with the support of at least four out of the five justices.<sup>99</sup> In Nebraska, five out of seven justices are needed to hold a legislative act unconstitutional.<sup>100</sup> In my article, I discuss how the three models can be combined to provide ideological balance not only for supreme courts but also intermediate courts of appeal and trial courts.<sup>101</sup>

In theory, one also might achieve ideological balance through the use of a nonpartisan or bipartisan judicial nominating commission. For example, in many states, a nominating commission screens candidates and submits a “short list” to the governor, who then selects one of the candidates to serve. In practice, these commissions tend to act in a partisan fashion, primarily because the governor appoints many of the commission members. In Indiana, for example, the governor appoints three of the seven commission members.<sup>102</sup> In Kansas, the governor appoints four of the nine commission members.<sup>103</sup> But one could create an ideologically balanced process. For example, the state senate majority leader could appoint half of the commission members, the state senate minority leader the other half, and the commission could operate by consensus in choosing among the candidates.

It is generally assumed that legislation or a constitutional amendment would be required for any changes in the federal judicial appointment process, but Redish’s discussion suggests otherwise. Under his analysis, courts could hold that the current appointment process violates due process and that it must be replaced by a process that would generate ideologically neutral courts.<sup>104</sup>

#### THE ROLE OF CONSTITUTIONAL REVISION

All three books provide important insights, but they all seem too confident in the existing constitutional structure. None of the books sees much of a role for constitutional amendment.

Belco and Rottinghaus reject the view that the accumulation of executive power has upset the balance of power between the President and Congress. Presidents, they conclude, exercise sufficient restraint when considering independent action,<sup>105</sup> whether because of public opinion, the desire to achieve their policy goals through legislation rather than a

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99. N.D. CONST. art. VI, §§ 2, 4.

100. NEB. CONST. art. V, § 2. In applying their supermajority rules only to invalidations of legislation, North Dakota and Nebraska reflect concerns about separation of powers primarily and ideological balance secondarily. Applying supermajority rules to all judicial decisions does more to promote ideological balance.

101. Orentlicher, *supra* note 20, at 428–29.

102. IND. CONST. art. VII, § 9. Attorneys admitted to the Indiana bar elect three members, and a member of the Indiana Supreme Court, usually the Chief Justice, completes the commission. *Id.*

103. Attorneys licensed to practice in the state elect the other five members. KAN. CONST. art. III, § 5(e). More precisely, the governor appoints one member of the commission for each of the state’s congressional districts, and the attorneys elect the same number plus one. *Id.*

104. For an argument that the Due Process Clause requires ideologically balanced courts, see David Orentlicher, *Supreme Court Reform: Desirable—and Constitutionally Required*, 92 S. CAL. L. REV. POSTSCRIPT 29 (2018).

105. One wonders whether the Trump presidency would affect their view.

more easily reversed executive order, or limits set by Congress in its legislation or through its oversight.<sup>106</sup> Whether or not Belco and Rottinghaus are correct cannot be determined from their data. As mentioned, we would need to supplement their quantitative data with qualitative analysis.

Posner spends little time on potential constitutional reforms. In his view, “the Supreme Court can be counted on to ward off” harms to the country from perceived defects in the Constitution, as the Court has “been doing for the last two hundred odd years.”<sup>107</sup> In this view, the Supreme Court’s authority to interpret the Constitution in light of changing circumstances allows it to make the Constitution work properly.<sup>108</sup> But Posner neglects some important counter-examples. Consider in this regard the Court’s infamous *Dred Scott* decision,<sup>109</sup> and the need for the 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Amendments to the Constitution to address slavery and other forms of racial discrimination.

All of Redish’s ideas are tied to how the Supreme Court should more effectively promote the existing constitutional system by remaining faithful to the judiciary’s role in the constitutional structure and the requirements of the constitutional text, such as prescribed by Article III and the Due Process Clause. He works within the bounds of the current Constitution rather than considering how it might be improved. Thus, for example, when he asks whether the judicial appointment process violates principles of due process because of gratitude judges might feel toward their appointers, Redish observes that it is implicit in Article III’s very structure—the “gold standard” for protecting judicial independence—that such gratitude does not violate due process.<sup>110</sup> Or when he considers whether various kinds of congressional retaliation would count as unconstitutional threats to judicial independence, he tethers his analysis to the protections for judicial salary and tenure in Article III or other provisions in the Constitution’s text, particularly the Due Process Clause.<sup>111</sup> But in a book on the importance of the judiciary’s role as a check on the majority, there is a glaring gap. Many scholars do not think the Supreme Court has fulfilled its checking and balancing role.<sup>112</sup> In their view, the judiciary has given presidents too much freedom to act in excess of the executive’s constitutional authority. Redish does not engage this important debate.

While all three books suggest little in the way of constitutional change, it is not difficult to identify ways in which the Constitution could be improved. Indeed, it would be very surprising if the framers had written a document that does not need updating. As Posner writes, the framers “were not clairvoyant.”<sup>113</sup>

Why the reluctance to embrace constitutional revision? Posner provides one answer. As he reminds us, Thomas Jefferson worried about the tendency of people to “look at

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106. BELCO & ROTTINGHAUS, *supra* note 29, at 175–80.

107. POSNER, *supra* note 31, at 165.

108. *Id.*

109. *Dred Scott v. Sandford*, 60 U.S. 393, 395–96 (1857) (holding that slaves were property and not citizens of the United States).

110. REDISH, *supra* note 32, at 125–26. This point seems inconsistent with his habeas corpus argument. Why should the Due Process Clause be allowed to trump the Article I power to suspend habeas corpus but not the Article II process for appointing judges?

111. REDISH, *supra* note 32, at 105.

112. ORENTLICHER, *supra* note 5, at 61–62, 79.

113. POSNER, *supra* note 31, at 87.

constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched.”<sup>114</sup> Feasibility concerns also are important. It is much more difficult to navigate the constitutional amendment process than to persuade a majority of justices on the Supreme Court to implement constitutional change through its interpretive authority.

Might observers underestimate the potential for constitutional revision? It’s a difficult process to be sure, but the skepticism can be self-fulfilling. If proposals for constitutional change are automatically met with doubt, they don’t get a fair shot at approval. More importantly, constitutional amendments are much more achievable at the state level, and a state-by-state strategy can eventually lead to sufficient support for revision at the national level. Indeed, the drafters of the Constitution or its amendments traditionally have looked to state constitutions for guidance. Important examples include the Bill of Rights, 14<sup>th</sup> Amendment protections, and the right of women to vote.<sup>115</sup>

Whatever the hurdles to constitutional change, the need for reform is critical. Our current political system is plagued by inadequate representation for half of the public, too much partisan conflict, and a failed regime of checks and balances. The important question is not whether to change the Constitution but how to change it.

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114. *Id.* at 108.

115. See AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 467 (2012).