

Bridging Societal Divides through Governance Design

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Introduction¹

The U.S. system of governance seems to be in crisis. Public trust in the national government has plummeted, partisan conflict and gridlock have intensified, and extremist views are gaining traction. As political dysfunction increases, many observers fault the constitutional structure.

Some argue that the constitutional design fails because of the many ways that a political minority can obstruct—or gain control of—the political process. The minority can employ filibusters in the U.S. Senate,² field successful nominees in gerrymandered legislative districts, or spend vast amounts of money on candidates or ballot initiatives. The political minority also might suppress voter turnout or send its nominee to the White House by prevailing in the Electoral College.

This paper discusses an important alternative view—the problem is not that the minority exercises too much power; rather the governance problem lies in giving too *little* power to the minority.³ The U.S. political system has many “winner-take-all” features that fuel partisan conflict. For example, whoever prevails in the battle for the presidency gains one hundred percent of the executive power even if the victor triumphs by the barest of margins. This denies meaningful representation to half of the public in the most important policymaking office in the world, and as a result, it invites levels of competition and conflict that are intense, excessive, and harmful to social welfare. Winner-take-all politics also dominates elections for Congress and a judiciary where major decisions can be decided by a conservative or liberal majority.

¹ This paper builds on discussions in David Orentlicher, *Two Presidents Are Better Than One: The Case for a Bipartisan Executive Branch* (2013); David Orentlicher, *Political Dysfunction and the Election of Donald Trump: Problems of the U.S. Constitution’s Presidency*, 50 *Ind. L. Rev.* 247 (2016); and David Orentlicher, *Politics and the Supreme Court: The Need for Ideological Balance*, 79 *U. Pitt. L. Rev.* 411 (2018). It draws much of its inspiration from the consociational democracy thinking of Arend Lijphart.

² Under the filibuster rule, a supermajority of 60 out of 100 senators is required to end debate on a bill, which effectively means that 60 senators are needed to pass a bill.

³ While the focus of this paper is on the United States, its logic would apply in other countries.

To address winner-take-all politics, we should look across the Atlantic to countries where governance reflects the perspectives of all, particularly 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. If we want to bridge societal divides, we need to ensure that everyone's voice is represented in the halls of power. Or to put it another way, a system based on winner-take-all politics is a system designed to maximize incentives for partisan conflict. A system built on the sharing of power across partisan lines, on the other hand, is a system designed to maximize incentives for cooperation.

The Problem of Winner-Take-All Politics

For the most part, the United States relies on a winner-take-all system of politics. Presidents and governors exercise all of the executive power, whether they receive a bare majority or a landslide share of the vote. Similarly, the majority party in Congress or a state assembly generally controls the legislative power (though there are notable exceptions, such as when the filibuster rule in the U.S. Senate or supermajority voting rules in state legislatures give the minority party a say in the making of decisions).

Winner-take-all politics extends to the judicial branch as well. Supreme courts at the state or federal level will have either a conservative or liberal majority of justices, and the majority can impose its perspective when deciding the outcome of cases (with rare exceptions in some state supreme courts⁴).

⁴ In Nebraska and North Dakota, the state supreme courts can declare legislation unconstitutional only by supermajority vote. Neb. Const. art. V, § 2; N.D. Const. art. VI, §§ 2, 4.

Winner-take-all politics promotes dysfunction in several ways. Most importantly, it denies meaningful representation to the minority, which can approach half of the public in a closely divided country such as the United States. Everyone should have a voice in the setting of public policy, but winner-take-all politics prevents that from happening. Currently, conservative views are well represented in the White House and the U.S. Supreme Court, but liberal views are not. Similarly, liberal views are well represented in the U.S. House, but conservative views are not. Because of the filibuster rule in the U.S. Senate, both conservative and liberal views have influence on many legislative matters, but only conservative views count on votes not subject to the filibuster rule, such as judicial appointments and major bills that can proceed through the budget “reconciliation” process.⁵

In addition, winner-take-all politics encourages conflict rather than cooperation. Voters need reasons to prefer one side over the other, and that means that candidates and elected officials have to emphasize their differences instead of their shared views. Rather than acknowledging the large areas of common ground, candidates and elected officials highlight the smaller areas of divergence. Thus, for example, the positions of candidates and lawmakers on abortion are far more polarized than those of the public.⁶

Moreover, because elections are an all-or-nothing affair, candidates, elected officials, and parties compete fiercely for victory. They will do whatever it takes to win, whether that means launching “negative” attack ads that distort an opponent’s positions, misrepresenting their own positions or accomplishments, giving undue influence to wealthy donors, trying to suppress

⁵ Both the Patient Protection and Affordable Care Act of 2010 and the Tax Cuts and Jobs Act of 2017 passed through reconciliation, the most important legislation passed under Presidents Obama and Trump.

⁶ Nate Cohn, Politicians Draw Clear Lines on Abortion. Their Parties Are Not So Unified, N.Y. Times, June 8, 2019.

voting by the other side's supporters, or welcoming assistance from governments unfriendly to the United States. As Frank and Cook have observed, high-stakes, winner-take-all contests generate especially intense and excessive levels of competition.⁷

The high levels of conflict extend beyond the campaigns to the governing process. For example, when executives try to enact their agendas, legislators from the other party are inclined to obstruct in the hope that by discrediting the president or governor, their party can regain the executive branch and capture more legislative seats at upcoming elections. Legislators from the executive's party, on the other hand, are inclined to support the president or governor's agenda in order to enhance the executive's and their own standing. The best predictor of a member of Congress' votes is the member's party affiliation.

Winner-take-all politics also suffers from sub-optimal decision-making. As studies on decision-making indicate,⁸ better policies are chosen when they emerge from a deliberative process among people who bring a range of perspectives to the table. No one person or political philosophy has all of the answers. But when one side can control the policy-making process, it can ignore the virtues of the other side and ignore its own blind spots. It is for good reason that we say, "two heads are better than one."

Not surprisingly, then, the constitutional drafters reserved policy making for multiple-person bodies such as Congress and the Supreme Court. Or as Woodrow Wilson wrote, "The whole

⁷ Robert H. Frank and 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* (1995).

⁸ Orentlicher, *Two Presidents*, *supra* note 1, at 145-150.

purpose of democracy is that we may hold counsel with one another, so as not to depend upon the understanding of one [person].”⁹

If winner-take-all politics breeds political dysfunction, we can remedy the problem by requiring the sharing of power across partisan lines.

The Virtues of Power Sharing

If power is shared by the majority and minority, the political system would function much more effectively.

Critically, all citizens would enjoy meaningful representation. For example, instead of having a single executive representing the views of one side of the aisle, we could have a collective executive representing both sides of the aisle. Switzerland provides a useful example. The Swiss executive comprises a seven-member cabinet (the Federal Council), and the seven seats are allocated among the four major parties. Importantly, decisions are made by consensus, with resort to a majority vote only in exceptional cases. Thus, all sides have a say in policy-making, rather than allowing a coalition majority to determine public policies. Similarly, by having supermajority voting rules, such as the filibuster rule, in legislative bodies, legislative action would reflect both conservative and liberal perspectives.

We don’t ordinarily think about representation on courts, but we do value the due process concept of judicial neutrality. And when a conservative or liberal majority can determine the outcome of cases, we do not have a neutral court. Ensuring balance between conservative and liberal jurists would make for neutral courts.

⁹ Woodrow Wilson, *The New Freedom: A Call for the Emancipation of the Generous Energies of a People* 72 (1961).

By promoting representation for all, power sharing also would defuse partisan conflict. There would be much less to be gained by fighting over power, and much more to be gained by cooperation. For neither side could achieve its goals without working with the other side. The Senate filibuster rule provides a useful illustration. Since a minority of 41 can block passage of a bill, members of the majority have a strong incentive to work with the minority, and they often have done so to pass major legislation. Democratic Senator Ted Kennedy collaborated with Republican Senator Orrin Hatch to expand health care coverage for children, Democratic Senator Russ Feingold collaborated with Republican Senator John McCain to reform campaign finance law, and Democratic Senator Lister Hill collaborated with Republican Senator Harold Burton to provide funding for hospital construction.

Power sharing also would promote better policy-making. When one political view drives the decision-making process, it can promote its views excessively. With both sides of the aisle participating, policy would follow much more of a stable, middle-of-the-road path.

Concerns about Power Sharing

It often is thought that power sharing arrangements encourage gridlock, and it is true that the many “veto points” in the U.S. constitutional system can stymie action.¹⁰ But that simply tells us that some power sharing arrangements are less desirable than others. If power sharing were always bad, we would give all government powers to a single elected official. The key is to distinguish power sharing arrangements that are effective from those that are not.

¹⁰ Legislative proposals can be voted down in committee, on the floor of the originating house, in committee or on the floor of the other house, in the conference committee convened to reconcile House and Senate versions of a bill, or when the conference committee version returns to the two houses for final approval. Bills that pass both houses are subject to a presidential veto, and bills that are enacted are subject to judicial override.

In fact, properly-designed power sharing arrangements would do much to defuse partisan conflict and promote more effective policy-making. For example, if Democrats and Republicans were to share power as equals, such that neither could gain the upper hand, then the incentives for partisan conflict would greatly change. The parties would still compete to promote their ideas, but they no longer would engage in conflict purely to gain power. Rather, in a world in which they could not increase their amount of power, they would focus on fulfilling their responsibilities as elected officials, and that would require cooperation with their colleagues on the other side of the aisle. And to the extent that elected officials would pursue their self-interest, they would still act cooperatively in order to burnish their legacy of accomplishments.

Even if candidates or elected officials wanted to play the partisan game, their constituents wouldn't support them in doing so. Voters welcome obstruction and conflict when they lack representation and are looking for ways to ensure that their voices are heard. Thus, for example, protest movements, such as the Republican Tea Party in 2009 and the Democratic Resistance in 2016, develop in parties that have lost their hold on political power. When both sides of the aisle are represented in a power-sharing regime, then voters want their elected officials to solve problems by taking action.

How we could design effective power-sharing arrangements is the topic of the next section.

Mechanics of Power Sharing

As mentioned, Switzerland provides a useful model for power sharing in the executive branch. The Swiss Federal Council allocates its seven seats to the four major political parties, and the councilors make decisions on the basis of consensus (with rare exceptions). The Swiss also reserve seats for the French and Italian ethnic minorities. As a result, a very high percentage of

the Swiss are represented in executive branch decision-making. For the United States, with its two major parties, a two-person executive branch might be sufficient, as long as the co-presidents decided on the basis of consensus.

For legislatures, the requirement of a supermajority vote for legislative action, as with the U.S. Senate filibuster, would ensure representation from both sides of the partisan aisle. Because one party at times holds 60 percent of the House or Senate's seats in the United States, a two-thirds majority might be needed.

For constitutional or supreme courts (as well as lower appellate courts), countries and U.S. states have developed a number of practices to ensure that judicial power is shared across philosophical lines. In Germany, for example, nominees to the Constitutional Court must receive a two-thirds vote of approval, so must appeal to legislators across the ideological spectrum.¹¹ In a number of European countries, constitutional court decisions are made unanimously,¹² thereby requiring support from justices across the ideological spectrum. Or consider the model of the American jury. Typically, a 12-person jury must reach its verdicts unanimously. As the Supreme Court has observed, principles of due process require deliberations by a fair cross-section of the community

¹¹ The German model has developed a number of features to reduce partisan battles over nominees. As indicated, the requirement of a two-thirds vote for approval prevents the majority party from imposing its preferences. To further avoid conflict over individual nominees, the major parties have agreed to an even allocation of seats between themselves with a smaller number of seats for the minor parties. Thus, if a Social Democrat judge steps down, the Social Democrats identify a replacement. Uwe Kischel, Party, Pope, and Politics? The Election of German Constitutional Court Justices in Comparative Perspective, 11 *Int'l J. Const. L.* 962, 964–65 (2013).

¹² European Parliament, Dissenting Opinions in the Supreme Courts of the Member States 17 (2012), <http://www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf>

that result in a consensus decision. And the requirement of a unanimous verdict rarely results in deadlock. Hung juries occur only about 6 percent of the time.¹³

Conclusion

Modern democracies are based on a principle of citizen representation, yet winner-take-all and other majoritarian systems regularly deny meaningful representation to much—often half—of the public. This is fundamentally unfair and provides sufficient reason to require arrangements in which power is shared between the majority and minority parties.

In addition, power sharing would provide other important benefits. It would defuse partisan conflict, and it would foster better decision making.

Mere majority rule makes sense when the composition of the majority changes from one decision to another. In such contexts, individuals will win sometimes and lose at other times. But when party affiliations mean that the composition of the majority is stable over time, then individuals either win all of the time or lose all of the time. That result is inconsistent with principles of equal treatment under the law.¹⁴

¹³ David Orentlicher, *Supreme Court Reform: Desirable—and Constitutionally Required*, 92 S. Cal. L. Rev Postscript P29, P36 (2018).

¹⁴ *Davis v. Bandemer*, 478 U.S. 109, 132–33 (1986).