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Supermajority Rules and the Judicial  
Confirmation Process

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# Supermajority Rules and the Judicial Confirmation Process

John McGinnis and Michael B. Rappaport

## Abstract

In this paper we assess the effect of possible supermajority rules on the now contentious Senate confirmation process for judges. We deploy a formula for evaluating supermajority rules that we have developed in other papers. First, we consider a sixty-vote rule in the Senate for the confirmation of federal judges - an explicit version of the supermajority norm that may be emerging from the filibuster. While we briefly discuss how such a rule would affect the project of maximizing the number of originalist judges, for the most part we evaluate the rule on the realist assumption that judges will pursue their own political and policy preferences. The case for applying an appropriately framed supermajority confirmation rule to Supreme Court justices has some merit, because these justices have substantial power to entrench new norms that would otherwise have to go through the stringent supermajoritarian process of constitutional amendment. The most substantial costs of the rule are holdout costs, which are likely to be particularly high at the beginning of the rule's operation. These costs could be reduced if the change to the supermajority rule were itself a product of bipartisan agreement applicable to a future President. We caution that a supermajority rule initiated through filibuster by one party is likely not to be beneficial because the holdout costs would be very high as the first Presidents attempted to prevent the new rule from sticking. In contrast, for lower federal courts, we think the supermajority confirmation rule is a mistake. Lower court justices lack the ability to make substantial constitutional entrenchments without support from the Supreme Court. Moreover, the thousand judges of the lower courts offer a real possibility of beneficial jurisprudential diversity that can improve judicial output. A supermajority rule would decrease such diversity. Second, we consider the use of a committee supermajority rule to require the chairman of the Senate judiciary committee to hold hearings on nominees unless a substantial supermajority of committees' members were opposed.

This rule would end the practice that has developed in both parties of denying hearings to well qualified nominees and assure fairer discussion and deliberation.

# SUPERMAJORITY RULES AND THE JUDICIAL CONFIRMATION PROCESS

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## SUPERMAJORITY RULES AND THE JUDICIAL CONFIRMATION PROCESS

By John O. McGinnis\* & Michael B. Rappaport\*\*

In this essay we consider the policy wisdom of two possible uses of supermajority rules to improve the confirmation process and the quality of judges appointed through that process. We first look at an express Senate rule that would require a supermajority for confirmation of judicial nominees. For instance, the rule might require a supermajority of sixty votes.<sup>1</sup> As we discuss below, an implicit Senate supermajority rule for judicial confirmations may in fact already be emerging through the use of the filibuster.

We provide the first comprehensive calculus to assess the costs and benefits of an express Senate supermajority rule for confirmations, using a formula for evaluating supermajority rules which we have advanced elsewhere.<sup>2</sup> In our previous work, we have argued for more stringent supermajority

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<sup>1</sup>The rule could be adopted either as a legislative rule or as a constitutional amendment. A constitutional amendment would provide the rule with greater permanence. Thus, if a supermajority rule is beneficial, a constitutional amendment would furnish the better foundation for the rule.

<sup>2</sup> See, e.g., John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 418-422 (2003); John O. McGinnis & Michael B. Rappaport, *The Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 728-743 (2002); John O. McGinnis & Michael Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MY. L. REV. 365, 399- 441 (1999).

rules in a variety of contexts to improve political governance.<sup>3</sup> Nevertheless, we do not believe that supermajority rules are always beneficial.

In this case, the beneficence of an express Senate supermajority rule for confirmations is a difficult question, involving many subtle considerations and depending both on assumptions about the nature of jurisprudence and the level of judges— Supreme Court or lower federal courts— to whom it would be applied. On the realist assumption that judges essentially vote their preferences on constitutional issues, we believe that an express Senate supermajority rule for confirmations of Supreme Court Justices would probably be beneficial in the long term but only if the rule itself was adopted by a bipartisan consensus and applied prospectively to future Presidents. In contrast, if one believes that the goal of appointing justices who will adhere as closely as possible to the original understanding of the Constitution is desirable and possible, a supermajority rule would probably not be beneficial in current circumstances because supermajority rules encourage appointments with bipartisan support and one party is generally opposed to originalism.

On realist assumptions about judging, the best argument for an express Senate supermajority rule for Supreme Court confirmations is that it tempers the countermajoritarian difficulty that has grown more acute as justices have generated a large body of precedent that has departed from the original understanding of the Constitution. A supermajority rule would require that justices empowered to entrench new principles through judicial amendments of the Constitution must enjoy a substantial consensus of support before they can take office. Because of this consensus, the decisions of such

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<sup>3</sup> See *Supermajority Rules as a Constitutional Solution*, supra note x, at 422-424.

judges would enjoy greater legitimacy and would be less likely to systematically subvert majoritarian values. On the other hand, supermajority rules may lead to holdout and substantial delays in the Supreme Court nomination process. The delays could result in nominations being held up through elections, creating referenda on particular nominees and unduly politicizing the selection process.

To help reduce these holdout costs, the adoption of a confirmation supermajority rule should occur by a consensus of the parties and be applied prospectively to a President whose identity was not known when the rule was adopted. If one party initiates a new supermajority rule through a unilateral decision to filibuster nominees of the President of the opposing party, the holdout costs are likely to be very high. This transition to a supermajority confirmation rule would generate high holdouts costs because the first Presidents operating under a novel and contested rule would be unlikely to change their behavior in response to an emerging supermajority norm. Thus, a supermajority rule applied without consensus would provoke bitter fights and lengthy delays. It would also create agency costs initially as a filibuster may be used to confuse the public about the real objectives of the filibustering majority.<sup>4</sup>

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<sup>4</sup> In a series of articles we have already set out our position on the constitutionality of legislative supermajority rules. See John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483 (1995); John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327, 341 (1997); John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003). Briefly stated, our position is that each House of Congress has authority to pass legislative supermajority rules. But a majority of each House must retain the authority to repeal these rules, thus preventing a majority from entrenching its views against change. According to this view, the filibuster rule is constitutional except for that portion of the rule that allows changes in the filibuster to themselves be filibustered, thus threatening ultimate majority control over the content of legislative rule. See *Symmetric Entrenchment* at 407-408.



We do not believe that applying an express supermajority rule to the confirmation of lower federal court judges would be beneficial in any event, because the countermajoritarian difficulty is less acute with lower court judges and because there is a positive benefit to diversity in jurisprudential approaches that a lower federal judiciary installed by majority rule would likely provide. First, the countermajoritarian power of lower court judges is limited by Supreme Court precedent. Second, because there are more judges appointed to the lower courts, as a whole they are more likely to be representative of the broad spectrum of jurisprudential opinion than the Supreme Court where a few appointments can make dramatic shifts in jurisprudence. The jurisprudential diversity potentially offered by the lower courts can itself be a mechanism of judicial restraint and the development of the law. A supermajority confirmation rule would unduly narrow the jurisprudential diversity that can be obtained among the thousand lower court federal judges.

Second, we also consider the possible use of a supermajority rule at the committee level to address a different practice that has also become more prevalent in the confirmation process— the refusal of the Senate judiciary committee chairman to hold timely hearings on the President’s nominees. This supermajority rule would require that the Senate Judiciary Committee provide a hearing for judges nominated by the President unless a substantial supermajority of Senators on the committee agreed to block a hearing. We believe that the case for the committee supermajority rule is strong because decisions by the committee chairman or majority party to block hearings for judges harms the public by making the judicial confirmation process less visible to the public and rewarding special interest groups of the right and left.

## I. Senate Supermajority Rule for Confirmations

## A. *Two threshold issues*

### 1. The Rise of the Filibuster in Judicial Nominations

Recent disputes over President George W. Bush's judicial nominees suggest that the Senate's filibuster rule may now be employed to impose an ad hoc supermajority rule on judicial nominees.<sup>5</sup> Certainly, according to the ironclad rule of legislative politics that what goes around comes around, if Democrats filibuster the nominees of Republican presidents, Republicans will filibuster the nominees of Democratic Presidents when they have the opportunity.<sup>6</sup> While at the moment such filibusters are the subject of partisan wrangling, this essay attempts to step back from the political charges and countercharges. It ignores the identity of the parties controlling the White House and the Senate and asks whether a supermajority rule for confirmations would constitute a good reform for the appointments process regardless of the vagaries of party control.

As a predictive matter, it seems quite possible that the final equilibrium of the current confirmation controversies will result in the informal supermajority requirement that nominees get sixty votes for confirmation. The recent history of the confirmation process suggests that each side ratchets up its use of the rules to frustrate the other side in an escalating game of retaliation: each party believes the other is guilty of worse obstruction than that other party has actually thrown up and thus engages in more a comprehensive form of obstruction at its next opportunity. Thus, even if the Democrats are now only

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<sup>5</sup>Gerald Walpin, *Take Obstructionism Out of the Judicial Nominations Confirmation Process*, 8 TEX. REV. L. & POL. 89, 100 (2003) (discussing the recent use of the filibuster to block judicial nominees with a majority vote).

<sup>6</sup> For instance, when Democrats pressed for investigation of President George H. W. Bush under the independent counsel statute, Republicans later pressed for investigation of President Bill Clinton under the same statute.

selectively filibustering nominees, at some time in the near future a party may well apply a systematic, if implicit, sixty vote requirement.

We say implicit because the party in opposition to the President would not even try to filibuster nominees who could clearly get sixty votes. Thus, formally, many nominees would continue to be subject to a majority vote without having to surmount a filibuster, but functionally only nominees that could receive sixty votes would be confirmed.

We dispose of one argument about the merits of a supermajority rule immediately by considering a Senate supermajority rule of a more ideal type than the filibuster. One defect of the filibuster is that its form permits Senators to say they are voting against a nominee because they want more debate and deliberation rather than to oppose the confirmation per se. In almost all cases of judicial nominees any such contention would be false.

For instance, Democratic Senators have been filibustering for the most part because they are sure that the nominee should never be confirmed. This aspect of the filibuster raises the information costs to some members of the public of knowing what are their Senators' true positions.<sup>7</sup> The filibuster thus increases agency costs and will make the filibustering Senators actions less likely to reflect the popular views of their electorate.<sup>8</sup>

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<sup>7</sup> Voters have extremely low knowledge levels about politics. See Ilya Somin, Voter Ignorance and the Democratic Idea 12 CRITICAL REV. 313 (1998). Most voters do not understand the "rules of the game." See MICHAEL X. DELLI CARPINI & SCOT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTER 69-70 (1996). Accordingly, it is relatively easy for politicians to hide what they are really doing through use of procedural devices like the filibuster.

<sup>8</sup> For a discussion of the importance of agency costs in permitting legislators to act in a manner that does not reflect the public interest, see John O. McGinnis & Ilya Somin, *Federalism v. States' Rights: A Defense of Judicial Review in a Federal System*, (forthcoming Northwestern 2004).

Of course, we are not saying that all of the public would be misled by the true nature of filibuster's objective. But much of the public is inattentive to politics and is thus easily confused.<sup>9</sup> Politics operates by winning over (or at least not losing) the marginal voter and thus confusing even a relatively small number of voters can have an effect.<sup>10</sup> Thus, if a confirmation supermajority rule were advisable, it should take an expressly substantive form so that the public would know that any outcome determinate vote on a nomination proceeded on the merits.

## 2. The Mild Supermajoritarian Effect of the Current Confirmation Rules.

Before considering the merits of an express Senate supermajority rule for judicial confirmations we here show that the Appointments Clause already imposes a structure on the confirmation process that has the effect of a mild supermajority rule, because the President and a majority of the Senate must agree before any nominee is confirmed.<sup>11</sup> The President and the Senate may often have somewhat different views because of the different circumstances of their election. First, the President and a majority of the Senate are elected at different times: the electorate may have changed its voting patterns in the interim.<sup>12</sup> Second, the President and the Senate are elected by different kinds of popular majorities, the

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<sup>9</sup> See *supra* note x.

<sup>10</sup> In the long run if filibustering of judges becomes the norm, everyone will understand filibuster to be simply a tool of opposition as by the 1950s almost everyone understood Southern Senators' filibustering of civil rights legislation to be indistinguishable from unyielding opposition. But short run effects matter, particularly because the transition to a supermajority rule disadvantages the party that happens to hold the Presidency and the initial confusion occasioned by the filibuster rule may increase that disadvantage by enabling the opposition to cloak their true objectives.

<sup>11</sup> As we have noted before at John O. McGinnis & Michael B. Rappaport, *The Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 716 n. 48 (2002).

<sup>12</sup> *Id.* at 715-716.

Senate by majorities in the several states and the President by the electoral college, which better, albeit still imperfectly, reflects the wishes of the national popular majority.<sup>13</sup> Third, voters may consider different issues salient when selecting the President and their Senators, because these officeholders have different responsibilities.<sup>14</sup> For instance, the President is both Commander in Chief and largely responsible for the conduct of foreign policy.

Thus, the President and the Senate majority at any point may differ in their preferences for Supreme Court justices. A justice might obtain the support of one institution but not the other. To obtain the support of both, a justice will often need additional support from voters— the kind of support required by a supermajority rule.<sup>15</sup> This point is most dramatically evident when the President and the Senate are under the control of different political parties, but holds true even when the same party controls both institutions, as the divergent views of the current President and Senate on issues such as transportation spending attest.<sup>16</sup> Thus, the question posed by the growing use of the filibuster is not whether a supermajoritarian confirmation process would be beneficial, but whether a more stringent supermajoritarian process provided by an express Senate confirmation rule would be even more

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<sup>13</sup> *Id.* at 715.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 714 (discussing manner in which obtaining majority support in two differently elected institutions requires more than majority electoral support).

<sup>16</sup> Marty Coyne, *Transportation Talks, Other Factors Delay WRDA Bill Until June*, ENVIRONMENT AND ENERGY DAILY, May 18, 2004, at Water Resources Col. 10 No. 9 (available at LEXIS) (discusses the stalemate between the White House and Congress over funding distribution in the current highway bill).

beneficial.<sup>17</sup>

## *B. The Benefits of an Express Supermajority Rule for the Confirmation of Judges*

### 1. The Cost Benefit Framework for Analyzing Supermajority Rules

We have previously advanced a formula for assessing the desirability of such a supermajority rule by measuring its benefits and costs. The potential benefits lie in the capacity of supermajority rule to improve the overall net benefits of government action. It can achieve this goal because government action that enjoys a more substantial consensus is likely to prove better than government action that does not.<sup>18</sup> The improvement in quality alone, however, does not guarantee an improvement in net benefits because the supermajority also decreases the quantity of government action. Thus a supermajority rule will be beneficial only if the improvement in quality outweighs any benefits that may be lost from the reduction in quantity.

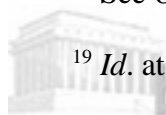
Even if a supermajority rule meets this test, it may not be beneficial because a supermajority rule generates additional costs. The first cost is the additional decisionmaking time required for government officials to make a decision on the government action subject to a supermajority rule.<sup>19</sup> On occasion, this additional time can be quite substantial because officials will use the additional support required by the rule to engage in strategic delay. When officials use delay for strategic reasons we often term this

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<sup>17</sup> The Framers considered and rejected a two-thirds supermajority requirement for confirmation of judges. See Max Farrand, 2 Records of the Constitutional Convention 2 id . at 38, 44.

<sup>18</sup> See *Our Supermajoritarian Constitution* at 731-734.

<sup>19</sup> *Id.* at 745.



kind of delay “holdout costs.”<sup>20</sup> Second, the supermajority rule may induce government to take another kind of action not subject to the supermajority rule as a substitute for the action blocked by the supermajority rule. If this substitute action imposes net costs on society we call this kind of cost a substitution cost.

As this discussion suggests, assessing the beneficence of a supermajority rule requires the assessment of many factors. Moreover, many of its effects may be themselves complex and subtle. Here we will confine ourselves to evaluating the main effects.

## 2. Improving the Quality of Judges Under a Supermajority Confirmation Rule

An express Senate supermajority rule would have two effects. First, it would prevent “mere majority appointments,” i.e., those nominees who could obtain only a majority in the Senate but not the requisite supermajority. Second, it would also encourage appointments that would not have been made under majority rule, because the President would change the nature of his nominations in the shadow of the new rules of the confirmation game. Once these new candidates are nominated some will be confirmed and others will not be. Let us call the confirmed nominees— those new candidates that are both nominated by the President and confirmed by the Senate-- “elicited appointments” because they are elicited by the supermajority rule. Thus, a Senate supermajority would work an improvement only if the quality of those elicited appointments is better than the mere majority appointments.<sup>21</sup> We measure the quality of the appointments by the quality of the resulting decisions of the judiciary as a whole. As

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<sup>20</sup> *Id.*

<sup>21</sup> The original appointees that could gain a supermajority under either majority or supermajority rule do not make any difference to the calculus because they would have become judges under either kind of confirmation rule. See *Symmetric Entrenchment*, *supra* note x, at 421-422.

we show later, a supermajority rule's direct improvements on the quality of judges does not assure that the rule is beneficial. We must also consider holdout and substitution costs and their indirect effects on judicial quality.

Thus, let us consider this question in terms of two theories of judicial interpretation: 1) interpretivism and, in particular, originalism, and 2) realism or other non-interpretivist theories where judges enjoy substantial discretion in making its decision according to their policy preferences. These are obviously simplified models of how judges decide cases but such simple models can help us evaluate the consequences of a supermajority rule for confirmations.

a. Originalism— First, let us assume our goal is to generate the largest possible number of originalist decisions. In this section we consider whether a supermajority rule might help achieve this goal by producing more originalist judges than majority rule. The strongest, albeit no longer compelling, argument for using a supermajority rule to achieve this objective is that originalism commands a mild consensus among the public but is opposed by special interests, because the original constitution interferes with their rent seeking. As a result, special interests try to engineer Supreme Court appointments that will gut the original provisions. Because a supermajority rule raises the transaction costs for special interests more than it interferes with action approved by a popular consensus, it might well move appointments somewhat in the direction of nominees who embrace originalism.

The provisions of the original constitution often constrain special interests. For instance, the enumerated powers sustain a competitive federalism that restrains the leverage of special interest groups. In this system, states have the authority to establish most social and economic policy, while the power of national majorities acting through the federal government is largely limited to keeping open the avenue of



trade and investment.<sup>22</sup> This structure constrains special interests because if they gain too many rents from a particular state, investment and people can exit.<sup>23</sup> Other provisions, from bicameralism to the First Amendment, can also be seen as interest group restraining provisions.<sup>24</sup>

But constitutional provisions do not make special interests disappear and thus it is predictable that special interests will attempt to eviscerate the constitutional provisions that stand between them and successful rent seeking. One way they can do so is to use their substantial leverage to get the President and the Senate to nominate and confirm judges who have an interpretation of the Constitution more friendly to special interests.

A supermajority rule might obstruct such a strategy because it raises the costs to special interests of successfully lobbying for the confirmation of their preferred judges. First, the confirming coalition must obtain the votes of a greater number of Senators to obtain confirmation of candidates friendly to their interests. Second, it must obtain the additional votes from a proportionately smaller group. Third, since those most sympathetic to confirming the judge compose the majority, the special interest must obtain these votes from a less sympathetic group. All of these considerations raise the price of confirmation to special interest groups.

Originalist judges, in contrast, would not be as likely to be stopped by a supermajority rule if there were even a modest consensus in favor of originalist judges. This assumption could be true if either

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<sup>22</sup> *Supermajority Rules as a Constitutional Solution*, supra note x, at 385-386.

<sup>23</sup> *Id.*

<sup>24</sup> See *Our Supermajoritarian Constitution* at 771-72 (bicameralism as a restraint on public interest groups).

one of two conditions hold. First, the public could be sympathetic to the principles that the Constitution embodies and thus want to confirm such nominees. One might think that this assumption would certainly have held early in the republic because citizens had recently enacted the Constitution with supermajoritarian support.<sup>25</sup>

Second, even apart from adherence to the principles embodied in the Constitution, the public might believe that originalism is the right interpretative methodology. When constitutional issues of great magnitude are engaged in the public sphere, the public has shown at least a default inclination towards originalism in the absence of obvious precedent to the contrary.<sup>26</sup> Thus, one might expect that originalist judges would be better represented than others, other things being equal, among elicited appointments and less represented among mere majority appointments that can be easily engineered by special interests. At best, we acknowledge that this effect would be a small one, because the political commitments of the public on many key issues may easily trump their commitment to originalism which, as a mechanism of constitutional interpretation, is unlikely to stir the passions equal to those involved in substantive issues of public policy.

One other problem for this argument for supermajority rules is that it would seem much more powerful at a time when the Constitution remained a document whose operation largely followed its

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<sup>25</sup> See *Our Supermajoritarian Constitution*, at 767 (forces that led to adoption of Constitution would have vested interest in its maintenance).

<sup>26</sup> See John O. McGinnis, *Impeachable Defenses*, Pol'y Rev., June-July 1999 (showing scholars' testimony before Congress is often originalist, although the scholars profess nonoriginalist theories in their academic work).



original meaning. In our era, the interpretation of the Constitution has often, and in some cases radically, departed from its original meaning. For instance, the system of constitutional federalism has largely been eviscerated.<sup>27</sup> Even if the public has some inclination to originalism in issues without strong precedent, like impeachment, it does not follow that they will be willing to follow the originalists in upsetting the status quo. The interest groups for whose benefit these non-originalist precedents operate would portray such nominees as outside the mainstream and a supermajority hurdle for confirmation might well make their job of obstruction easier.

Thus, from an originalist perspective the Constitution might have benefitted somewhat from a confirmation supermajority rule applied continuously in its early days. It is much more problematic today when such a supermajority rule may tend to lock in a nonoriginalist status quo. Analogously, the tricameral requirements for the enactment of legislation, requirements which themselves had a mild supermajoritarian effect, operated more beneficially at the beginning of the republic because few bad laws had been passed.<sup>28</sup> Today, this mild supermajority rule may operate to frustrate good laws repealing excessive regulation that may characterize status quo.<sup>29</sup>

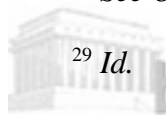
One other powerful objection to the notion that a supermajority rule will generate more originalist decisions is that our parties now seem to be divided on originalism, with the Republican party

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<sup>27</sup> *Supermajority Rules as a Constitutional Solution* at 391-394 (discussing decline of federalism).

<sup>28</sup> *See Our Supmajoritarian Constitution* at 772.

<sup>29</sup> *Id.*



much more sympathetic to originalism and the Democratic party opposed.<sup>30</sup> If, as we argue in the next section, a supermajority rule creates pressures for bipartisan appointments, the effect of a supermajority rule may be to eliminate both “extreme” originalists and extreme nonoriginalists. Over time this may well make originalism a less consequential judicial philosophy as there may be less purely originalist decisions to point to as positive exemplars of this jurisprudence. Concretely, under a supermajority rule we would be much less likely to get any justices like Antonin Scalia and Clarence Thomas who keep the flame of a pure originalist jurisprudence alive.

b. Realism Given the course of constitutional law over the last seventy years, it may well be thought impossible to revive an originalist jurisprudence. Thus, we also address the beneficence of a supermajority rule in a world that has given up on reviving originalism.

If we abandon fidelity to the original understanding as a metric by which to evaluate constitutional decisions, it becomes harder to evaluate what makes a constitutional decision beneficial or detrimental. Nevertheless, if we take a realist view of judging, a supermajority rule will have three beneficial effects: it will lead to more moderate justices, possibly improve the quality of justices and temper the countermajoritarian difficulty. A supermajority rule will tend to elicit consensus nominees with bipartisan support. It will eliminate nominees with “extreme views” on constitutional law and

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<sup>30</sup> Cf. Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 648 (1990) (“Conservative constitutionalists ... tend to advocate originalism, judicial restraint, or both as guiding principles of constitutional adjudication. Progressives, by contrast, argue that constitutional interpretation should be in some sense “open,” ...: that the Constitution is always open to multiple interpretations, which *at least* include interpretations capable of facilitating progressive causes and policies.”)



encourage the appointment of nominees with views closer to that of the median legislator (and thus the median voter) on constitutional decisionmaking. Because such nominees will be more likely to render decisions reflecting popular consensus about the context of constitutional law, the role will bolster the legitimacy of the court, at least as realists would define legitimacy in terms of public acceptance.

Second, the rule will also have the advantage of tempering the countermajoritarian difficulty. While median Senators may well want judges who will strike down legislation on some occasions, they are unlikely to favor judges who will systematically invalidate federal legislation or state legislation when the ideological profile of state legislators is not dissimilar to the federal legislators.<sup>31</sup> Third, the rule will modestly improve the quality of nominees when the quality is measured by noncontroversial traditional criteria, such as legal credentials and moral probity.

It is fairly easy to see why on realist assumptions a supermajority rule will result in nominees with more moderate views on constitutional law where moderation is defined as possessing views closer to the median legislator. Votes on judicial nominees seem to elicit a high degree of party solidarity and thus we can simplify our model by suggesting that each party, Republican and Democrat, has a median viewpoint on constitutional law. Under majority rule, the persons supported by a majority of the Senate will have a tendency to reflect the median view of the majority party.<sup>32</sup> In the usual circumstance where

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<sup>31</sup> A supermajority confirmation rule may thus still result in Supreme Court judges who strike down many decisions of states with preferences that are different from those of the median federal legislator.

<sup>32</sup> Because the President has the power of nomination, the influence of the Senate will only be one factor on the constitutional view of the nominee. But under either majority or supermajority rule, the President will be responsible for the nomination. Thus, the relevant issue here is how the Senate's influence will differ depending on its voting rule.

no party commands a supermajority, the bipartisan consensus enforced by the supermajority rule will tend to generate nominees with views between the medians of the parties and thus more moderate views on constitutional law.

Identifying the content of moderation in constitutional law is itself a quite complex matter. One element bearing on moderation is the substantive content of constitutional law, such as whether the Constitution contains a right to abortion. Another element certainly includes cross cutting jurisprudential issues such as respect for precedent. In both substantive and jurisprudential matters we would expect movement toward the views of the median legislator, although in jurisprudential matters of relatively low political salience legislators' views themselves may be relatively undeveloped, allowing substantial slack to nominees.

Insofar as legislators represent the constitutional views of their constituents, the movement of judicial nominees to the views of the median legislator should increase the acceptance and perceived legitimacy of Supreme Court judicial decisions. Again the analysis of legitimacy is wholly realist: the supermajority rule would not necessarily move constitutional law toward a correctness, where correctness is defined by any given jurisprudential theory. Indeed, insofar as citizens lack an understanding of anything resembling constitutional theory and possess constitutional views substantially related to policy and political considerations, a supermajority rule may render constitutional law even less coherent from a theoretical point of view. What it gains in legitimacy from the public it may lose in respect from constitutional theorists but that is a tradeoff that may be acceptable to all but constitutional theorists.

A supermajority rule would also likely improve the quality of justices in terms of credentials and character. Assume that a President would nominate a candidate who was as close to the ideological

extreme as a supermajority of the Senate would confirm. The President would be more likely to choose candidates with outstanding intellectual credentials as well as reputation for probity and thoughtfulness because they would be more likely to be confirmed. Thus a supermajority would tend to increase the qualities of justices in terms of a range of noncontroversial, traditional criteria.

The rule's tendency toward better quality will not operate in every case. Sometimes legislators will vote for candidates on the basis of personal characteristics that have little or nothing to do with jurisprudential viewpoints. A candidate may have some characteristic that catches the public attention and garners support, independent of his constitutional views. For instance, currently being the first Hispanic to be nominated to the Court would substantially assist confirmation. One can imagine other characteristics, like membership in the Senate or close connections to a member of the Senate, that would increase confirmation chances.<sup>33</sup> Given the greater difficulty of meeting the supermajority hurdle, it is rational to expect that the President would use more such "handles" to get his nominees confirmed. This tendency would weaken, but not eliminate, the movement to more moderate nominees. It would also detract more generally from the greater quality of nominee because these handles would have no necessary connection with qualifications for being a judge.<sup>34</sup>

The supermajority confirmation rule also tempers the countermajoritarian difficulty.

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<sup>33</sup> Souter and Thomas benefitted greatly from their sponsorship by Senators Warren Rudman and John Danforth respectively.

<sup>34</sup> It might be argued that a supermajority rule would encourage "stealth nominees"—nominees whose do not have a record on controversial issues and whose voting pattern cannot be easily predicted. But a supermajority confirmation rule would also give leverage to those Senators who wanted to force nominees to go on the record with their views. Because Senators would often believe that even stealth nominees had subtly signaled their views to the White House, they would have every incentive to use this additional leverage to discover the actual viewpoints of Supreme Court nominees.

Judges who enjoyed supermajoritarian support in the Senate might be thought less likely to invalidate majoritarian laws, because they could be confirmed only if they held a set of preferences about constitutional decisions that enjoyed widespread consensus. It is true that the consensus of legislators about the content of constitutional law will be somewhat different from their consensus about policy preferences embodied in legislation because citizens preferences will also differ on these matters. For instance, citizens may want constitutional law to be more principled and less partisan than ordinary legislation. Thus, legislators would be willing to confirm judges who would invalidate the legislation they pass under some circumstances. Nevertheless, it does not seem likely that legislation passed by a majority would systematically or even often offend consensus or moderate constitutional views, because one would not think that citizens would want the legislation of their representatives regularly invalidated.

The supermajority confirmation rule has a similar rationale to the constitutional rule that demands a supermajoritarian consensus before the legislature can entrench a norm against majoritarian change. The Constitution requires a supermajoritarian process for consent to constitutional amendments—in the usual case a two thirds vote of the legislature for entrenchment as well as three quarters of support for state legislatures.<sup>35</sup> Thus, the Constitution does not permit a mere majority in Congress

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<sup>35</sup> See U.S. Const. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislature of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislature of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.").



to pass a law that cannot be subsequently changed by a majority.<sup>36</sup> Requiring a supermajority for entrenchment of new legal norms or the repeal of previously entrenched norms does suggest that those who gain the power to pass or eliminate entrenched new norms (or erase old entrenchments) should also be required to demonstrate supermajoritarian support. To the degree one regards the Supreme Court as in fact operating like a sitting constitutional convention, this argument becomes powerful indeed.

We have previously developed specific rationales for requiring a supermajority of the legislature to entrench norms through a supermajority vote, which can be applied to confirmation of judges.<sup>37</sup> The first rationale for requiring a supermajority rule for entrenchment is that voters tend to judge legislators on the short term consequences of their actions, because they will not remember the votes taken many years ago and many of the legislators will have retired by the time the long term consequences become apparent. Therefore, the legislators lack incentives to take those long term consequences into account.<sup>38</sup> For this reason, legislative entrenchment decisions will be less accountable than ordinary legislative decisions. Similarly, in the case of judges, because many of their decisions will be made relatively far in the future and will be entrenched even farther into the future, voters are unlikely to evaluate the President or legislators on the basis of their nomination and confirmation choices.

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<sup>36</sup> See *Symmetric Entrenchment*, supra note x, at 391-408.

<sup>37</sup> The rationales are discussed at greater length in *Symmetric Entrenchment* at 422-426

<sup>38</sup> For a discussion of the importance of agency costs in the public choice view of legislators, see A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 447-48 (1999). As the consequences of legislative actions become more difficult to evaluate, agency costs will rise, particularly because voters act in rational ignorance of much of complex politics. See WILLIAM A. NISKANEN, STRUCTURAL REFORM OF THE FEDERAL BUDGET PROCESS 6 (1973) (noting that, because information is expensive, people operate in "rational ignorance").

Second, the legislature will sometimes fail to represent the views of the electorate because the legislative majority may be aberrational. A political party may be swept into office because of presidential coattails or a scandal and thus not represent the electorate's view on the question to be entrenched.<sup>39</sup> Accordingly, because of such possible aberrations, a legislature empowered to pass ordinary legislation should be restrained from entrenchment. Similarly, the President and the Senate may have been elected for reasons that had little or nothing to do with their constitutional viewpoints. This phenomenon will particularly bedevil judicial confirmations because the issue of the proper structure of the Constitution is not a very politically salient issue in most senatorial, or even Presidential, elections.

Third, partisanship may also cause legislators to behave more imprudently with entrenched legislation than they would with ordinary legislation.<sup>40</sup> Having gained a legislative majority, the party acquiring power might seize the opportunity to entrench its agenda, because it believes the other party will do the same once it gets into power. Such forces may operate in the appointment of judges. In particular, parties holding the Presidency and a majority in the Senate may want to use judicial appointments to entrench their agenda. In fact, in the first transition of partisan power in our republic, the Federalists attempted to entrench their values through the appointment of the so-called midnight judges.<sup>41</sup>

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<sup>39</sup>See Nathaniel A. Persily et al., *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299, 1321 (2002) (suggesting that a legislature may be unusually unrepresentative because of presidential coattails or other factors)

<sup>40</sup> *Symmetric Entrenchment*, *supra* note x, at 424.

<sup>41</sup>Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494 (1961) (discussing the appointment of the "midnight judges").

A supermajority rule for judicial confirmations would address each of these rationales for imposing a supermajoritarian constraint on entrenchment. A supermajority rule for judicial confirmation would militate against partisan entrenchment through judicial appointment, because the rule would require more bipartisan support for appointment. A supermajority rule would also make it harder for an aberrational majority to choose judges to entrench their agenda because the rule would require a more substantial, and likely more stable, consensus for appointment. A supermajority rule would also help to mitigate the problem of legislators voting based exclusively on the short run effects, because it would require the support of additional legislators who may have longer time horizons than the legislators in the majority.<sup>42</sup> It would also correct for short time horizons simply by improving the quality of justices who would only be confirmed on a more substantial consensus.<sup>43</sup>

These considerations supporting a supermajority rule for entrenchment resonate more strongly in the context of the Supreme Court than in the context of the lower courts. Supreme Court justices have more discretion to entrench norms than lower courts judges who are bound by previous decisions of the Supreme Court.<sup>44</sup> Also, given the law of large numbers, vacancies are less likely to come in

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<sup>42</sup> They may have longer time horizons, either because of their ideological views or because they expect to be serving in the legislature for many years in the future.

<sup>43</sup> Thus, a supermajority rule might mitigate the problem of short run time horizons by requiring higher quality nominees in general. A supermajority rule might lead to persons who score higher on noncontroversial characteristics, such as prior experience, intelligence, or reputation for moral probity, since only such persons could secure the requisite supermajority support

<sup>44</sup> To be sure, the Supreme Court has reduced the number of case it hears and this reduction may permit lower courts more opportunity to entrench. But still on most major issues, it is the Supreme Court that sets the constitutional parameters within which lower courts operate.

disproportionate clumps in the lower federal judiciary than at the Supreme Court. Thus, an aberrational majority is more likely to be able to skew the composition of the Supreme Court than the federal judiciary as a whole. For these reasons, we believe that a supermajority rule makes much more sense for Supreme Court justices than for the remainder of the federal judiciary.<sup>45</sup>

c) Possible Mitigating Factors for Judicial Entrenchment Even at the Supreme Court level, the benefits and costs of a supermajority for confirmation remain different from a supermajority rule for entrenching legislation. First, the benefits from a supermajority rule may be less substantial, because legislatures have more control over the content of legislative entrenchment than entrenchment by the judiciary. Entrenching legislation is different from confirming judges with entrenchment discretion because Senators cannot be sure how nominees will exercise that discretion. To be sure, Presidents and Senators will evaluate candidates with an eye to how this discretion will be exercised. But two factors put these political actors under a greater veil of ignorance when they are voting for a judge than when they are passing legislation. First, judges have life tenure<sup>46</sup> and are under no obligation to the coalition that confirmed them. They can change their minds and disappoint their patrons and a not insubstantial number—from Earl Warren and William Brennan<sup>47</sup> to Harry Blackmun<sup>48</sup> and David Souter—do just that.<sup>49</sup>

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<sup>45</sup> One countervailing consideration is that lower court nominees receive less attention from the public than Supreme Court nominees. Thus, agency costs in lower court confirmations may be higher than with Supreme Court nominees, giving legislators more opportunity for partisan and aberrational nominees. While this observation is true to some extent, party solidarity on judicial nominations allows parties to make a substantial political issue of controversial lower court nominees and bring them to the public's attention, as the contentious debates of the last decade have shown.

<sup>46</sup> U.S. CONST. Art III, sec. 1.

<sup>47</sup> Christopher E. Smith & Kimberly A. Beuger, *Clouds in the Crystal Ball: Presidential Expectations and the Unpredictable Behavior of Supreme Court Appointees*, 27 AKRON L. REV.

Moreover, as time passes, the issue mix for decisions by courts changes and generates questions which were not in the contemplation of the President and legislators. For instance, the Roosevelt administration chose Supreme Court justices with views disposed to uphold New Deal legislation.<sup>50</sup> But when the issues moved from questions of national powers and economic rights to civil rights, these justices went their separate ways.<sup>51</sup> Because legislators cannot as confidently predict how the justices will vote as they can predict the future content of entrenched norms, a supermajority rule will be less needed to police partisan or aberrational judicial appointments than to police partisan or aberrational entrenchment of norms.

But even if judicial entrenchments are likely to prove less aberrational and partisan than legislative entrenchment,<sup>52</sup> both judicial and legislative entrenchment create similar kind of risks.

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115, 119 (1993) (discussing Eisenhower's disappointment with the decisions of Justices Warren and Brennan).

<sup>48</sup>*Id.* at 121-23 (discussing the change in Justice Blackmun's decisions over the course of his tenure on the court).

<sup>49</sup>*Id.* at 132-35 (discussing Souter's conservative politics and liberal decisions).

<sup>50</sup>HENRY J. ABRAHAM, JUSTICES, PRESIDENTS AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 157-88 (1999) (describes the nominations and confirmations of FDR's and Truman's choices for the Supreme Court, as well as how their viewpoints diverged on later cases).

<sup>51</sup> *Id.*

<sup>52</sup> It might also be argued that judicial entrenchments and legislative entrenchments are not very different, particularly on the realist assumptions on which we are operating here. Legislative entrenchments, after all, would have to be interpreted by judges and thus their meaning could change with the passage of time. Second, the matters that prompted the entrenchment may become less salient and the meaning of the entrenchment applied to new matters may be less clear. For these reasons, just

Moreover, a Senate supermajority rule for judicial confirmation—certainly one requiring sixty votes for confirmation—is a much less stringent supermajority rule than the double hurdles of the constitutional confirmation process. Thus, if dangers from legislative action to empower judicial entrenchment are less acute than legislative entrenchment, the supermajority rule for confirmations would appropriately be more mild. Both may be, in a rough and ready sense, proportionate to the problem they are meant to solve.<sup>53</sup>

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as judges may have somewhat less predictable effects, so may entrenchments.

But even if the power of legislative entrenchment and judicial entrenchment are, on realist assumptions, not different in kind, they remain different in degree. Justices can and do radically depart from the expectations of the coalition that appointed them, completely and from early in their tenure. This wholesale transformation is less likely with respect to legislative entrenchments.

<sup>53</sup> It might be thought that the right comparison for measuring the stringency of the supermajority rule for confirmations is the stringency of the rule for judicial removals. That rule is extremely strict, requiring a two-thirds vote of the Senate for conviction as well as a majority of the House for impeachment. U. S. Const. Art. I, sec. 3, cl. 6; Art. I, sec. 2, cl. 5. Moreover, both the Senate and House votes are governed under the express and limiting standard of “High Crimes and Misdemeanors.” See U.S. CONST. II, sec. 4. We have previously in fact suggested that there should be presumption of symmetry between the standards by which a legislature entrenches a norm and the standards by which it repeals the norm. See *Symmetric Entrenchment*, *supra*, note x, at 426-429. But we do not think that this comparison is necessarily the right one, because, as discussed above, confirming a judge does offer the same scope for partisan and aberrational entrenchment as passing entrenched legislation. Therefore, it does not require the same degree of constraint. Nor is removing a judge the same as repealing an entrenchment: the judge’s decisions are formally unchanged. Thus, removing a judge does not provide the same amount of safeguards against unwise entrenchment as provisions permitting repeal of entrenchment. Thus, a presumption of symmetry for confirmation and removal may not apply in the judicial context.

Moreover, even if the presumption were to govern, it is defeasible. All the reasons that militate in favor of judicial independence and freedom from pressures in particular cases suggest that the standard for removing a judge by a legislature should be quite high, higher than any plausible standard for confirmation. It may well be the case, however, that under realist assumptions about judging, the constitutional removal requirement is nevertheless too strict, because it prevents the legislature from removing justices who recklessly and consistently substitute their judgement of constitutional law for *both* the original understanding and the majority’s view of the appropriate scope of constitutional law..

d.) Protecting minority rights. Judging has a different function from legislating in one other important respect. It is often thought that judges should protect minorities from oppressive majority legislation. Thus it might be argued that a supermajority confirmation rule will have a cost that a supermajority for legislative entrenchments will not: it would make it harder to invalidate legislation that should be invalidated and in particular more difficult to invalidate legislation that trenches on minority rights.

The actual effect of a supermajoritarian confirmation rule on minority rights, however, is more complicated and depends on the distribution of minorities across the ideological spectrum. If, as appears to be generally the case, both sides of the ideological spectrum have a concern for minorities, albeit different minorities, a supermajority rule is more likely to make sure that both kinds of minority rights receive some kind of modest enforcement.

This dynamic can be illustrated by a simplified model of party behavior. Consider a case where one party has fifty one Senators and the other party has forty nine.<sup>54</sup> Assume further that the party with fifty one Senators is concerned only with protecting abortion rights and wants no enforcement of property rights, while the other party wants full enforcement of property rights and no enforcement of abortion rights. If only a majority is required, the result will be a nominee favoring full enforcement of abortion rights and no enforcement of property rights. But if a supermajority is required the majority party will have to offer a nominee favoring either less enforcement of abortion rights or more enforcement of property rights or both to get a supermajority. Only in the case where it offers a

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<sup>54</sup> Again we are not considering the President's power of nomination here, because he has that power under either majority or supermajority rule. See *supra* notes xxx and accompanying text.

nominee favoring simply less enforcement of abortion rights and no enforcement of property rights will the enforcement of minority rights of all kinds decline. In all the other cases, the supermajority rule will lead to more enforcement of at least some kind of rights.

Instead, on certain plausible assumptions, one might also think that the likeliest result will be moderate enforcement of both kinds of rights-- with the most valuable aspects of both kinds of rights being given effect. Assume a realistic set of party preferences, namely that the core of the right is more important to the party that favors the right and the fringe less important. Moreover, the fringe of the rights embraced by a party is more offensive to the opposing party than the core of the embraced rights. Thus, partial birth abortion, for instance, is both less important than core abortion rights to the abortion rights favoring party and more offensive to the abortion rights opposition party. In that case, the greatest gains from trade would come in the majority party giving up some of the fringe aspect of its rights and providing protection for the core aspect of the minority party's rights. In that way, a supermajority rule might well result in a more moderate enforcement of a wider range of minority rights. This would be in keeping with the general effect of supermajority described above: it would move enforcement of minority rights as a whole toward the views of the median legislator. Thus, while the enforcement of some minority rights would be reduced, overall enforcement would rise or fall with median views on the appropriate content of minority rights.

We can better gauge the effects on minority rights of a confirmation supermajority rule by comparing them with the effects of a supermajority voting rule in the Supreme Court. For instance, let us assume that the Supreme Court had the authority to invalidate law only by a two thirds vote. How

would this be different from a two-thirds supermajority rule for judicial confirmation? A requirement of a



two-thirds vote to invalidate legislation would protect majoritarian preferences across the board and make it harder to protect minorities rights. Any invalidation of a provision on constitutional grounds, including those protecting minority rights, would require six rather than five votes. Thus, those who really believe that the Court commits more errors in striking down legislation than it does in failing to strike down legislation should favor requiring a supermajority of Supreme Court judges to hold that a statute is unconstitutional before that statute would be invalidated. The supermajority voting rule in the Supreme Court would provide more than a parchment barrier to judicial overreaching and furnish an objective marker of a strong presumption of constitutionality for legislation.<sup>55</sup> In contrast, those who continue to be concerned with protecting minority rights, but are concerned that the rights chosen to be enforced may often be peculiar or extreme should prefer the confirmation supermajority rule. The supermajority rule still sustains the enforcement of minority rights, but moves the context of these rights toward the moderate set embraced by the median legislator.

Thus, we believe that on certain realist assumptions a supermajority rule would have some effects that might improve the quality of Supreme Court decisionmaking. The supermajority rule would result in justices of more “moderate” views where moderate is defined by reference to the constitutional views of the median Senator. It would thus help with the legitimacy of the Court and reduce the countermajoritarian difficulty that besets constitutional law.

C. *Costs of an Express Supermajority Confirmation Rule for the Confirmation of Judges*

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<sup>55</sup> See Evan H. Caminker, *Thayerian Deference to Congress and the Supreme Court Supermajority Rule, Lessons from the Past*, 78 IND. L. J. 73 (2002).

The supermajority confirmation rule, however, has certain costs. To begin with, there may be two effects that may weaken quality, particularly as to lower federal courts judges. First, the judiciary as whole may benefit from a diversity of jurisprudential views, but the supermajority will narrow that diversity. Second, the supermajority rule will weaken the accountability of the President and the public may lose an important electoral focus when it can register its jurisprudential views. Most importantly, a supermajority rule will increase decisionmaking costs and give Senators incentives to holdout and delay. This effect would create enduring vacancies and may politicize the character of the Supreme Court as delays make midterm and presidential elections, at least in part, referenda on particular candidates. Finally, the rule will to some degree increase substitution costs, giving the President incentives to make recess appointments, whose performance may well be of lower quality than permanent appointments.

1. Decreased Quality a) Decreases in the collective quality of the judiciary as opposed to individual quality. So far we have considered judges as if the quality of one is wholly independent of the quality of others. On certain assumptions about the interaction of judges in decisionmaking, however, a supermajority rule may actually decrease the quality of the judiciary. First, it may be thought that some of the most important restraints on imprudent exercise of judicial power come from other judges of differing views. In deliberation and, if necessary, in dissent they can point out the logical flaws and inconsistencies in the arguments of their colleagues. Of course, it is an open question how far such dissenting views influence and restrain other judges, but recent empirical studies have suggested that judges will render different opinions depending on whether judges of differing ideologies are present on



the panel.<sup>56</sup> If such actions do have real world effects, it may well be that diversity of jurisprudential approaches is more likely to assure good discretionary judgment from multimember appellate courts. Given the election over time of Presidents of different parties and various jurisprudential inclinations, mere majority appointments will lead to a wider variety of jurisprudential approaches than elicited appointments. Thus considered as a group, mere majority appointees may have some subtle virtues that elicited appointees lack.

In contrast, elicited appointments are likely to cover a narrower range of judicial methodologies and ideological preferences because they will need to be consensus appointments. Thus, the judiciary will not be as likely to have outliers who may tend to act as watchdogs on the justices. To be concrete, for instance, during the confirmation processes from President Reagan through President Clinton, our current lower appellate courts would almost certainly have lost Judges Harvey Wilkinson,<sup>57</sup> Alex Kozinski,<sup>58</sup> William Fletcher,<sup>59</sup> Richard Paez,<sup>60</sup> because they were confirmed with less than sixty

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<sup>56</sup> There is some empirical evidence that the presence of judges of different ideology from those in the majority can change the way appellate courts make decisions. Frank B. Cross & Emerson Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing in the Court of Appeals*, 107 YALE L. J. 2155 (1998) (demonstrating that majority often decides cases differently when a judge appointed by a different President is present on the panel).

<sup>57</sup>130 CONG. REC. 23,284 (1984).

<sup>58</sup>131 CONG. REC. 31,069 (1985).

<sup>59</sup>144 CONG. REC. S11,884 (daily ed. Oct. 8, 1998).

<sup>60</sup>146 CONG. REC. S1368 (daily ed. Mar. 9, 2000).

votes.<sup>61</sup> Many other similar nominees also may have been defeated because some Senators may have cast favorable votes because they knew the nomination was going to pass anyway under majority rule and would have changed their votes to negative under a supermajority rule.

The above list suggests that some large proportion of such judges may be of higher distinction than average, perhaps because judges of high distinction are likelier to be academics like Fletcher,<sup>62</sup> or officials who have served in the executive branch, like Kozinski,<sup>63</sup> or both, like Wilkinson.<sup>64</sup> In highly visible and high powered positions such nominees would have created more of a paper trail and thus become more of a target than a lawyer from private practice. Thus, mere majority appointments may be more likely to be academics or ex-government officials. Losing such judges may detract from the quality of the bench as measured by conventional credentials as well as from its diversity.<sup>65</sup> Once again the

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<sup>61</sup> Of course we cannot be sure that the nominations would have been blocked because their supporters may have traded for more votes if the threshold had been higher.

<sup>62</sup> *Faculty Profiles: William Fletcher*, Boalt Hall School of Law University of California, Berkeley, at <http://www.law.berkeley.edu/faculty/profiles/facultyProfile.php?facID=39> (Judge Fletcher was a professor at the University of Berkeley).

<sup>63</sup> *Judges of the United States Courts: Kozinski, Alex*, Federal Judicial Center, at <http://air.fjc.gov/newweb/jnetweb.nsf/hisj> (Judge Kozinski was special counsel to the Merit Systems Protection Board).

<sup>64</sup> *Judges of the United States Courts: Wilkinson, James Harvie III*, Federal Judicial Center, at <http://air.fjc.gov/newweb/jnetweb.nsf/hisj> (Judge Wilkinson was a Professor at the University of Virginia and a Deputy Assistant Attorney General in the Civil Rights Division at the Department of Justice).

<sup>65</sup> The one other appellate judge in the Presidencies of Reagan, Bush the elder, and Clinton, who got less than sixty votes was Daniel Manion—not a judge who would fall into this category and was widely assailed at the time for his lack of distinction. See Howard Witt, *New Judge Pleads Ignorance: Manion Admits He Has 'A Lot to Learn,' Defends Record*, CHICAGO TRIBUNE, July 25, 1986 at p. 5 (providing Daniel Manion's defense to charges that 'he is unqualified to hold the lifetime

question would remain of the degree to which brighter and more accomplished judges produce better decisions. One might well think that they analyze and recombine legal concepts in a way that adds permanent value to the law.

The combination of a supermajority rule for Supreme Court nominees and a majority rule for lower court nominees might actually encourage more distinguished but controversial nominees at the lower courts than our current confirmation structure. Under this regime Senators would no longer be as fearful that confirmation to a lower court would substantially increase chances of confirmation to the Supreme Court.

It is true that a supermajority rule might not decrease the jurisprudential diversity of lower court judges if the President and Senate were willing to bargain to create a slate of nominees that would include such distinguished nominees so long as equally distinguished nominees of opposing views were included. Perhaps this would occur but there are reasons to doubt its likelihood. First, a supermajority rule gives more leverage to Senators and less to the President and Presidents are more likely to prefer distinguished nominees than the Senators. Historical reputation matters more to Presidents,<sup>66</sup> while pure patronage matters more to Senators.<sup>67</sup> Second, the act of nomination represents a kind of endorsement

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judicial post', with descriptions of those criticisms).

<sup>66</sup>See Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 675 (2003) (detailing how Ulysses Grant, Herbert Hoover and Jimmy Carter strove to end senatorial courtesy and patronage in favor of higher standards for judicial nominees).

<sup>67</sup> See Tracey E. George, *Judicial Independence and the Ambiguity of Article III Protections*, 64 OHIO ST. L.J. 221, 234 (2003) ("From the very beginning, senators appreciated the patronage potential of their Article II role in judicial appointments and have actively used it to reward their supporters.").

that merely voting for a nominee does not and it seems likely that a President would have difficulty nominating someone of whatever distinction whose jurisprudential philosophy was diametrically opposed to his. It is hard to imagine President Bush agreeing to nominate Laurence Tribe for a circuit seat even if the Senate Democrats were to agree to confirm Richard Epstein.

Thus, whether a supermajority rule for appointments is beneficial depends in part on whether a judiciary with more diverse jurisprudential approaches is better than a judiciary with a narrower range of views. A related consideration is that a supermajority rule may also strengthen the power of the legal establishment, because only someone of strong views is likely to buck that establishment. Once a judge or justice is appointed, he is surrounded by clerks who have been educated by the legal establishment and hope to join it.<sup>68</sup> Moreover, the reputation of judges is largely shaped by the views of the legal establishment.<sup>69</sup> Thus, judges must swim in strong currents pushing them toward legal conformity. Judges of more extreme views or eccentric temperament are more likely to resist such currents, but they are also less likely to be confirmed under a supermajority rule. Currently, the legal establishment leans to the moderate left,<sup>70</sup> although in early times that was not always the case. Previously, when the legal

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<sup>68</sup> Clerks have influence in part because they are the only lawyers whom judges can talk to about cases at will. Judges, of course, may talk to other judges about cases, but outside of official deliberation this requires much more coordination and preparation.

<sup>69</sup> See William Ross, *Supreme Court Justices in the Ratings Game: The Factors That Influence Judicial Reputation* (1996).

<sup>70</sup> Amy E. Black & Stanley Rothman, *Shall We Kill All the Lawyers First?: Insider and Outsider Views of the Legal Profession*, 21 HARV. J.L. & PUB. POL'Y 835, 842-843 (1998) (in a measure of viewpoints of elite lawyers on various issues, the study showed that lawyers tended to identify as Democrats).

establishment had a conservative cast, a supermajority rule would have had the opposite effect.

b) Decreases in Quality from Reduction of Presidential Accountability Another possible disadvantage is that a Senate supermajority rule will dilute the accountability of the President for appointments. Because the President will have to negotiate with a wider group of Senators to assure confirmation, he will have less influence over the identity of the nominee. Such a weakening of accountability may have two costs. First, the greater responsibility of the President for appointments under majority rule means that the jurisprudential views of prospective appointments are likely to become a campaign issue between candidates with differing constitutional philosophies. On the other hand, because even under a supermajority rule each Senator offers only one voice of many in ratifying the President's choice, the issue of judicial appointment is generally of less importance to the rational voter in Senatorial elections than are issues over which the Senator is likely to possess more initiative. Thus, it may be that the public will lose a focal point for its input into judicial nominations because they will no longer be so salient in Presidential election campaigns. If we think that public attention to the constitutional approach espoused by competing presidential candidates during elections is likely to improve the character of their judicial nominees, this diminution in accountability may decrease the margin by which elicited appointments are superior to mere majority appointments.

Moreover, if the Senate is concerned with how patronage will effect their reelection prospects while the President is more concerned with how the quality of judicial nominees will affect his historical reputation, the shift in power from the Senate to the President will for this reason create one factor leading to diminution in quality. Once again this factor is likely to have greatest play in lower court nominees where variance in quality among nominees is more substantial than at the level of the Supreme

Court.

2. Holdout Costs Like other supermajority rules, Senate supermajority rules would create the potential for additional decisionmaking costs.<sup>71</sup> The more stringent the supermajority rule the more time is necessary to get parties to agree to support a measure, because more legislators are necessary to create the requisite confirming coalition. Moreover, since there are few legislators to choose from, legislators have more leverage in such negotiations. Accordingly, negotiating for the identity of judges that could receive supermajority support might lead to lengthy delays. These delays could result in two kinds of costs.

First and most simply, delays would result in more vacancies. At the lower court level delays would result in increased waits for judicial decisions which is an obvious social cost. At the Supreme Court, the vacancies may lead to more tie votes in decisions and multiple simultaneous vacancies may detract from the legitimacy of the court.

Second, in the case of the Supreme Court, these delays could become so significant as to make particular nominations last into the next election cycle. As a result presidential or off-year elections would become more likely to be in part referenda on particular nominees, focusing on the personal qualities of the nominees with opponents engaged in the politics of personal destruction. This result too would be a cost, if one believed that intense scrutiny of particular nominees by the electorate would unduly politicize the judiciary, discouraging over time well qualified candidates. Such holdout costs would also likely decrease judicial quality in another way as Presidents would try to nominate candidates

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<sup>71</sup> See *Our Supermajoritarian Constitution* at 745 (defining decisionmaking costs).



with some factor that would help them gain favorable action from the Senate even though it had nothing to do with their qualifications for Supreme Court justice.<sup>72</sup>

We believe that such delays could be particularly long if applied to Supreme Court justices, especially if it were applied without a firm consensus between the parties that the historical practice should be changed. Presidents generally have had an expectation that they will have very substantial discretion in appointing the judges they want. Their supporters have similar expectations and will not be pleased if the President departs from them. Presidents will not easily give up old traditions in light of new rules, particularly if the rules do not enjoy a popular consensus. They will nominate candidates who are less moderate than the balance of power under the new supermajority rule would dictate and fight to bend the Senate to their will.

As with most rules that become an accepted part of the political landscape, however, Presidents would internalize them over time and bargain in their shadow, reducing the dangers of long holdouts. But the fact that holdout costs will be highest at the beginning underscores a serious problem that we discuss later: the appropriate timing for introducing a new supermajority rule. The introduction of a supermajority rule has the potential to deny the sitting President appointments, simply because he was the President sitting at the time of the rule's introduction.

### 3. Substitution Costs Like other supermajority rules, a Senate confirmation supermajority rule

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<sup>72</sup> The effect of such delay would differ from the effects described above of presidential accountability under majority rule. Majority rule puts the focus on the President's jurisprudential and general political philosophy, not particular nominees. It is thus not as likely to introduce extraneous personal factors into the confirmation process.

would create substitution costs,<sup>73</sup> as political actors—in this case the President— seek to find alternatives to the high hurdles created by the supermajority rule. In particular, a supermajority rule here would encourage the President to make more recess appointments. These substitutions may decrease the quality of judicial decisionmaking in two ways. First, judges with recess appointments would not even have to pass the filter of the Senate, making fewer judges subject to the mild supermajority rule we already have. Second, because such judges would be making decisions with the prospect of a potential vote on their confirmation, decisions made by recess appointees may reflect a focus on personal political gain.<sup>74</sup>

Unlike the potential holdout costs which we believe could work a substantial transformation on the confirmation process by leading to lengthy delays and judicial vacancies, we do not believe the substitution costs are likely to be very high. First, recess appointments provide a poor substitute for the judges confirmed in the regular confirmation process. Recess appointments last only to the end of the next session of Congress,<sup>75</sup> making them far less valuable to the President than the life time appointments obtained through the judiciary.

Second, the Senate minority can, as the Senate Democrats recently did, threaten to hold up

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<sup>73</sup> See *Our Supermajoritarian Constitution* at 744-745 (defining substitution costs).

<sup>74</sup> See Virginia L. Richards, *Temporary Appointments to the Federal Judiciary: Articles II Judges?*, 60 N.Y.U.L. REV. 702, 702 (1985) (“Because the recess appointee is not assured of retaining his government position beyond the next session of the Senate, he potentially has an incentive to make judicial decisions consistent with the partisan political viewpoint of the executive or of Senate leaders who can deny or secure his permanent appointment”).

Note that the latter effect might be thought not to be a cost and even a benefit under a realist view of judging that counted the supermajoritarian difficulty as the salient problem of judicial review.

<sup>75</sup> U. S. CONST. Art. II, sec. 2, cl. 3.

judicial appointments unless the President commits to forego this power.<sup>76</sup> Such threats do not mean that the recess appointment is unimportant, because the threats may not be successful and because the President may be able to obtain concessions for foregoing the exercise of this power. Nevertheless, such agreements suggest that the power is unlikely to be used to launch a large flotilla of recess appointees.

#### *D. Long Term Changes in the Quantity of Judges*

So far we have talked only of the changes in the quality of judges, not changes in their quantity. In the short run, our assessment of the quality of judicial appointments is static as far as the numbers of appointees is concerned, because a fixed number of judicial appointments are available at any given time.<sup>77</sup> In the long run, however, a supermajority rule for confirmations could affect the number and timing of new lower court judgeships created by Congress and thus one would have to evaluate the quantity effect as well on the quality of judicial decisionmaking. We think it unlikely that it will have any effect on the number of Supreme Court justices because tradition fixes their number at nine.

We believe that a supermajority rule's effect on quantity would be modest and would be unlikely to detract much from the net benefits of a supermajority rule. Under a supermajority rule judgeships may become more valuable to Senators because the rule would give Senators more leverage in filling the positions, but they would become less valuable to the President. Thus, the overall

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<sup>76</sup> See Neil A. Lewis, *Deal Ends Impasse over Judicial Appointments*, N.Y. TIMES, May 19, 2004 at 19 (detailing agreements in which President Bush agreed to make no more recess appointments of judges during the course of the current term in return for the Democrats' agreement not to filibuster twenty five judges).

<sup>77</sup> Thus, the calculus differs from assessing the effects of a supermajority rule on legislation, because there the change in quantity as well as quality matters. Even if a supermajority rule improves the quality of legislation on average, it can still reduce net benefits because it would so reduce the quantity of less good but still beneficial legislation.

advantages from the creation of new judgeships may be roughly similar to that existing under majority rule.

The clearest difference between the two confirmation rules would involve the timing when judgeships would be created. Under majority rule, when a party controls the House, the Senate and the President, it seeks to create judgeships that the President and the Senate can fill.<sup>78</sup> By contrast, under supermajority rule, a party would have a similar partisan incentive to create judgeships only if it not only controlled both houses and the presidency, but also if it had a supermajority in the Senate. Since this degree of control by a single party is less likely to occur, judgeships under a supermajority rule are more likely to be created during periods of disparate control and thereby reflect the joint influence of the parties.<sup>79</sup> .

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<sup>78</sup> See John M. DeFigueredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical And Empirical Analysis of the Expansion of the Federal Judiciary*, 39 L. & ECON. 435, 44-445, 452 (1996) (showing that Congress is more likely to create judgeships when the President of its own party can fill them).

<sup>79</sup> Under supermajority rule, the optimal timing for creation of judges occurs when a single party controls both the Presidency and the Senate by a filibuster-proof (or in the ideal case supermajority-proof) margin as well as the House of Representatives. Thus judge creation bills would likely be particularly likely to be enacted during those times. During such periods of one party dominance of the confirmation process, it might seem that there would be much less difference between mere majority appointments and elicited appointments than at other times. While the wedge between these kinds of appointments would indeed be smaller, it should be remembered that when parties have very large majorities in Congress they tend to break up into different factions. The powerful Republican Congress after the civil war split into “radical” and more moderate factions. W.R. BROCK, *AN AMERICAN CRISIS: CONGRESS AND THE RECONSTRUCTION, 1865-1867* at 70-75 (1963) (discussing the split between Radical and more moderate Republicans during Reconstruction, using the vote on an 1867 Reconstruction bill as an illustration). In the New Deal era, the Democratic party divided into more enthusiastic and less enthusiastic supporters of the New Deal. JORDAN A. SCHWARTZ, *THE NEW DEALERS: POWER POLITICS IN THE AGE OF ROOSEVELT* 142, 152-3 (1993) (describing the political factions in the Democratic party during the New Deal). ARTHUR M. SCHLESINGER, JR., *THE POLITICS OF UPHEAVAL* 409 (1960) (describing the ideological differences

### *E. The Problem of Transition*

Finally, we would note that there could be substantial additional costs if the timing of transition from majority to a supermajority rule ended up making the composition of the judiciary more aberrational or partisan. This kind of timing could occur if a majority already had made a lot of appointments over a long period of time and then left a supermajority rule to apply to a successor majority of the opposite party. Under these circumstances, a supermajority rule could delay a return to a more moderate judiciary by making it harder for the new majority to create a counterweight to the old. Such timing may make a real difference to the course of constitutional law, particularly because constitutional doctrines are path dependent.

Fortunately, some of the constitutional rules already in place militate against the likelihood that the timing of the rule change would be inappropriate. If a previous majority imposed a supermajority confirmation rule by legislative rule, the subsequent majority could repeal the rule by a majority. Placing a supermajority confirmation rule in the constitution, on the other hand, requires a stringent supermajority of both houses of Congress and state legislatures, making an aberrational entrenchment less likely.<sup>80</sup> Moreover, because state legislatures and conventions are elected at different times and through different processes than the federal legislature, this kind of double supermajority provides another check against the possibility that the accidents of politics will result in a new constitutional framework that will protect a

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between the old and emerging factions of the Democratic party during the New Deal). Therefore even at these times the supermajority rule may have some substantial effect by requiring these disparate factions to reach consensus on nominees

<sup>80</sup> *Symmetric Entrenchment* at 439.

judiciary that is out of step with majority preferences on constitutional law.<sup>81</sup>

Of course, each party would like the transition to happen when the other party is in a position to make nominations. One recommendation is for a supermajority rule to be applied prospectively to the next President after a presidential election. This was the route Congress took to gain bipartisan support for its attempt to change the existing rules to give the President an effective line item veto by providing him with the power to suspend appropriations he deemed excessive.<sup>82</sup> This kind of introduction would decrease the very substantial holdout costs that would otherwise flow from a more ad hoc imposition of a supermajority confirmation rule.

**F. Summing up the Calculus of the Supermajority Confirmation Rule** In conclusion, the overall beneficence of a Senate supermajority rule for confirmation is very hard to assess because of these wide ranging, disparate and diffuse effects. For lower federal courts, we think the supermajority confirmation rule is a mistake. Lower court justices lack the ability to make substantial entrenchment stick without affirmation from the Supreme Court. Moreover, the thousand judges of the lower courts offer a real possibility of beneficial jurisprudential diversity and a supermajority rule would decrease this benefit.

In contrast, the case for applying a supermajority confirmation rule to Supreme Court justices is stronger, both because they have substantial power to entrench new norms and because an

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<sup>81</sup> *Id.*

<sup>82</sup> Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265, 277 n. 35 (2001)



aberrational and unbalanced, partisan composition of the Supreme Court is more likely on account of its small number of justices. The most substantial costs of the rule are the holdout costs, which are likely to be particularly high at the beginning of the rule's operation. These costs could be reduced if the change to the supermajority rule were itself a product of bipartisan agreement that applied to a President elected in the future. Thus, an express supermajority confirmation rule adopted by consensus and applied to a future President might be mildly beneficial.<sup>83</sup> We caution that the kind of ad hoc rule adopted by filibuster initiated by one party is likely not to be beneficial because the holdout costs would be very high as the first Presidents attempted to prevent the new rule from sticking.

## II. Committee Supermajority Rule to Assure Hearings.

While the use of filibusters to prevent votes on the merits is a relatively recent phenomenon, another way of frustrating the opportunity for majority votes is simply to decline to hold hearings on the President's nominees. Unlike the filibuster, which can be deployed by even the minority party in the

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<sup>83</sup>Other countries, such as Germany, have an express supermajority rule for their constitutional courts and this process seems to work mechanically well. German Const. Art. 94 (1) provides that "half of the members of the Federal Constitutional Court shall be elected by the Bundestag and half by the Bundesrat" available at [http://www.oefre.unibe.ch/law/the\\_basic\\_law.pdf](http://www.oefre.unibe.ch/law/the_basic_law.pdf). The provisions for the two-thirds supermajority vote are provided in the Bundesverfassungsgerichtsgesetz [Federal Constitutional Court Act], often referred to as BVerfGG. BVerfGG §6(5) specifies the two thirds vote required of the 12 person judicial selection committee of the Bundestag. §7 specifies the two thirds vote required by the Bundesrat. Available at <http://dejure.org/gesetze/BVerfGG>. But it is far from clear that the German Court bulks as large in the political life of Germany and wields as much power as the Supreme Court does in the United States. If it does not, the effects of a supermajority rule here may well be different, particularly as to matters like holdout costs. Thus, a full comparison the effect of supermajority confirmation rules on Germany and the United States is beyond the scope of this essay.

Senate, a substantial number of refusals to hold hearings on nominees is likely to happen only when the Senate is controlled by the party in opposition to the President. During the last eighteen years, the Senate Judiciary Committee under Republican and Democratic control alike has often refused to hold hearings or takes votes on federal court nominees of a President who is a member of the opposing political party.<sup>84</sup>

In this section, we discuss how a supermajority rule at the committee level would beneficially be used to stop this practice which is distinct from that of the filibuster. We believe that such refusals to hold hearings are not in the public interest because they make the confirmation process less transparent. Without hearings, it is harder for the public to hold the Senate accountable for blocking good nominees and the President accountable for sending up bad nominees. Unlike the nominees blocked by a Senate supermajority confirmation rule, there is likely to be no connection between nominees refused a hearing and nominees who cannot command a popular consensus. Indeed, the opposition party might have particular incentives to block nominees who may generate favorable publicity through the airing of their credentials and through their general performance at a hearing.

Now that the same party controls the Presidency and the Senate, the Senate has the opportunity to establish nonpartisan rules to help insure that future instances of divided government will not result in such damaging gridlock. The Senate should require that the Judiciary Committee hold a hearing within

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<sup>84</sup> Stephen O. Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 DICK. L. REV. 247, 247-248 (1999) (discussing the reduced number of judicial confirmations when the President and Senate are from different parties). *See generally* Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS. L. REV. 667, 682-85 (2003) (describes the methods used by senators to delay the confirmation process and discusses instances where these tactics were used, especially in cases where party politics came into play).



six months of a nomination and take a vote within one month of the hearing unless two-thirds of the committee members conclude that a delay is warranted.

The need to reform the hearing process can be best understood through a brief review of the pathologies of recent years. Under Democratic leadership, the Judiciary Committee refused to hold hearing for many of President George W. Bush's nominees.<sup>85</sup> These include John Roberts<sup>86</sup>, a lawyer who for clients of diverse views appeared before the Supreme Court thirty five times.<sup>87</sup> It was the second time Roberts endured such treatment: the committee refused him a hearing when he was nominated by George Bush the elder.<sup>88</sup> The Committee also delayed providing a hearing for over sixteen months to Michael McConnell,<sup>89</sup> one of the most eminent law professors in the country who had bipartisan support from members of the legal academy.<sup>90</sup>

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<sup>85</sup>Gerhardt, *supra* note 34, at 682, 684-85 ("...of President Bush's first eleven circuit court nominations made in May of 2001, the Senate has not even held hearings on eight of them.").

<sup>86</sup> *Id.* at n. 69 (mentions John Roberts as one of President Bush's nominees who was awaiting a hearing).

<sup>87</sup>*John G. Roberts: Biography*, U.S. Department of Justice Office of Legal Policy, ¶ 5, at <http://www.usdoj.gov/olp/robertsbio.htm> (in discussing Roberts' career, mentions that he has argued before the Supreme Court over 30 times).

<sup>88</sup>Gerhardt, *supra* note 34, at n. 69 (mentions that Roberts was denied a hearing after his nomination by President George H.W. Bush).

<sup>89</sup>Byron York, *The Battle That Wasn't*, National Review Online (Sept. 18, 2002) at <http://www.nationalreview.com/york/york091902.asp> (describes McConnell's Senate hearing and the delays leading up to it).

<sup>90</sup>Letter from academics to Senator Orin Hatch, (available at <http://www.usdoj.gov/olp/michaelmcconnellsupportletter.htm>) (letter sent to Senator Hatch in support of McConnell's nomination).

But the problem cannot be simply laid at the door of Democrats. When the Republicans controlled the Judiciary Committee, they also let distinguished nominees, like Harvard Law professor Elena Kagan, wait months and in some cases years without a hearing.<sup>91</sup> While both sides are now playing a statistics game to show the other side behaved worse, the reality is that both parties were at fault – each trapped in a cycle of escalating partisanship.

By delaying or refusing to provide hearings for plausible federal court nominees, the judiciary committee is likely to harm the quality of the judiciary. As the record suggests, the committee often cynically denies hearings to some of the most distinguished nominees. The confirmation of well qualified candidates of both Democratic and Republican Presidents might well improve American jurisprudence by creating the diversity of jurisprudential approaches that, as discussed above, would help refine the law. Lengthy delays, however, put lawyers' careers in limbo, deterring the finest candidates.

The causes of this aspect of our confirmation discontents are a familiar bane of modern democracy – interest group politics. Interest groups, like those who favor and oppose abortion rights, have inordinate leverage on the confirmation process. By holding up nominees acceptable to the more moderate majority, these groups display their political might and raise funds for their enterprises. To some extent their behavior is symbiotic with the members of the Senate judiciary committee. Because, on average, the Republican and Democratic members of this committee stand respectively to the right and left of the median of their caucuses, they can gain from raising money from the more extreme

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<sup>91</sup>Jonathan Groner, *Bush May Need to Show Restraint in Judge Picks*, LEGAL TIMES, November 13, 2000 at 9 (discussing Elena Kagan's nomination and the absence of a hearing).

elements of their parties' coalitions.<sup>92</sup> Because most of those nominated by Presidents Clinton and Bush but opposed by such groups would be aided by the favorable publicity produced by a fair hearing, interest groups prevail upon the chairman not to schedule a hearing – the beltway equivalent of blackballing a candidate.

Obfuscation is a familiar political strategy of interest groups in other contexts as well: they raise the costs of information to the public, whether by slipping in enriching legislative provisions at the last minute or by killing a public interest provision in a closed door conference committee.<sup>93</sup> Their disregard for the public interest in the confirmation process is underscored by the strategy of denying hearings to some of the most distinguished nominees, because airing their records would do them the most good.

Fortunately, there is a way to restrain the power of special interests in the confirmation process. The Senate could pass a supermajority rule requiring the Judiciary Committee to hold a hearing within six months of a nomination and to hold a committee vote without one month of the hearing unless at least two thirds of the committee agreed to postpone it. The nominee would then be assured of a hearing unless several members of the minority party agreed to delay. While the public would gain the benefit of more deliberative democracy, the rule would maintain the Committee's autonomy and avoid hearings on extraordinarily weak candidates that would merely waste time. A single party's control of both the Senate and the President provides the best opportunity to pass this rule. This constellation of power

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<sup>92</sup> See Appendix I: Ideological Ratings of Senators on the Senate Judiciary Committee

<sup>93</sup> See Philip Nelson, *Political Information*, 19 J. L. & ECON. 315, 323 (1976) (suggesting that when rent seekers lack a majority they have incentives to take "their gain in a form that is easily obscured"); John O. McGinnis, *The Bar Against Challenges to Employment Discrimination Consent Decrees: A Public Choice Perspective*, 54 LA. L. REV. 1507, 130-153 (1994) (raising information costs of opponents is an important technique of interest groups).

makes changes feasible and dissolves the timing problem that we noted with a Senate supermajority confirmation rule, because the rule would become of benefit to the President only upon an unpredictable change of party control.

The judiciary committee can adopt such a proposal with or without the additional step of getting rid of the “blue slip” process. The Senate judiciary committee has by tradition required Senators from the home state of the nominee to return slips indicating that they do not object to a hearing of the President’s nominee.<sup>94</sup> While it seems to us that the blue slip process provides unnecessary deference to regional and state political authority for an appointment to what is a quintessentially national office, we recognize that this practice may be too entrenched to be eliminated. In that event, the supermajority committee rule would still ensure committee hearings in a wide variety of circumstances-- when both Senators of a state are from the President’s party or are moderate members of the opposition party willing to return blue slips or when the nominations are to District of Columbia Circuit where no Senators are to be found. Thus, the committee supermajority rule would bring benefits even under the current blue slip regime.

The rule would work much better, however, if blue slips could also be eliminated. Because of the ever present possibility of substitution, one would expect members of a partisan majority intent on denying hearings to certain nominees to make more use of the blue slip process to block nominees. Thus, while committee supermajority rule can be adopted independently of an end to the blue slip, the rule would be much more efficacious if the blue slip disappeared at the same time.

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<sup>94</sup>Brannon P. Denning, *The “Blue Slip”: Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75, 76-77, n. 4 (2001) (describing the blue slip process).

The committee supermajority rule differs from the reform offered by President Bush in 2002, most importantly because it would not require that each nominee receive a floor vote even if rejected by the Committee.<sup>95</sup> The Judiciary Committee, like other congressional committees, develops expertise in its subject matter and thus should enjoy the autonomy of deciding what nominees are reported to the floor. So long as the Committee is required to vote on nominees, the public can hold its members and their party accountable for its actions. Indeed, the Committee's rejection of Judges Priscilla Owens and Charles Pickering became an issue in the midterm election.<sup>96</sup>

Once in effect, the rule would be difficult to repeal, even if an opportunistic majority wanted to go back to the old ways in order to stall the nominees of the President of an opposing party. The public cannot follow the complexities of hearing schedules, but they would more easily understand an attack on the hearing rule for what it was –pure partisanship.

The nation would benefit from more serious debates on constitutional law. Machiavelli warned that Republics may decay as their founding principles gradually recede from public view.<sup>97</sup> A Senate confirmation hearing can keep these principles in view by creating a lustral battle between competing interpretations of the Constitution. If Senators believe that a nominee's confirmation would harm the

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<sup>95</sup>Press Release, The White House, President Announces Plan for Timely Consideration of Judicial Nominees (Oct. 30, 2002) (*available at* <http://www.whitehouse.gov/news/releases/2002/10/20021030-4.html>).

<sup>96</sup>SHELDON GOLDMAN ET AL., *W. Bush Remaking the Judiciary: Like Father Like Son?*, 86 *Judicature* 282, 298 (2003) (discussing how the judicial nomination process was a major campaign issue that helped Republicans).

<sup>97</sup>NICCOLO MACHIAVELLI, *THE DISCOURSES* (1531), *reprinted in* 2 *The Historical, Political, and Diplomatic Writing of Niccolo Machiavelli* 98-102 (Christian E. Detmold trans., Boston, Houghton Mifflin & Co. 1891).

Constitution, they should articulate their reasons and vote against the nominee. But denying hearings and refusing to take votes encourages neither candor nor an informed public. Such obstructionism simply allows the well organized to frustrate the rational deliberation.

### Conclusion

Most of the attention on supermajority rules and the confirmation process has understandably focused on the rise of the filibuster as an implicit supermajority rule. The filibuster itself has a substantial defect as a supermajority rule. Its ostensible purpose of encouraging more deliberation is usually a cover for outright opposition to the measure or nominee proposed. It thus makes it harder for the public, which is rationally ignorant of politics, to understand the positions of their Senators. On realist assumptions about judging, a supermajority confirmation rule for Supreme Court judges might well be beneficial, but only if it were adopted by a bipartisan consensus and applied to a President not yet elected. A supermajority confirmation for lower court judges, however, would probably not be beneficial under any circumstances, because it would decrease the diversity of the bench without the benefit of disciplining unreviewable entrenchments.

The best use of a supermajority rule to improve the confirmation process would be at the committee level. There a rule requiring a hearing in the absence of a committee consensus to the contrary would increase public awareness of nominees and would restrain the obstructive tactics of interest groups on both the right and left that gain advantages through silently blocking nominees.



