

SUPERMAJORITY RULES AND THE JUDICIAL CONFIRMATION PROCESS*

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INTRODUCTION

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 (of perhaps 60 percent) for confirmation of judicial nominees.¹ 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 that we have advanced elsewhere.² In our previous work, we have argued that supermajority rules can improve political governance in certain situations and we have advocated supermajority rules in a variety of contexts.³

Assessing the benefits of a confirmation supermajority rule involves many subtle considerations and depends on both assumptions about the nature of jurisprudence and the level of judges (Supreme Court or lower federal court) 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

¹ 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.

² See, e.g., John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 418-22 (2003) [hereinafter *Symmetric Entrenchment*]; John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 728-43 (2002) [hereinafter *Our Supermajoritarian Constitution*]; John O. McGinnis & Michael Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 399-441 (1999) [hereinafter *Supermajority Rules as a Constitutional Solution*].

³ See *Supermajority Rules as a Constitutional Solution*, *supra* note 2, at 422-24.

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 could take office. Because of this consensus, the decisions of such judges would enjoy greater legitimacy and would be less likely to systematically subvert majoritarian values.

It may seem paradoxical that a supermajority rule can help protect majoritarian values. But we believe that supermajority rules can have this beneficial effect when some particular circumstance prevents majority rule from reflecting majority sentiment.⁴ In this case, the problem for majority rule is that votes on judicial nominees elicit a high degree of party solidarity. Therefore, confirmation votes under majority rule are likely to reflect the median sentiment in one party rather than the Senate as a whole. The advantage of supermajority rules is that by requiring more bipartisan consensus they move the locus of confirmation power toward the median senator.

On the other hand, supermajority rules may also impose costs by leading to holdouts and substantial delays in the Supreme Court nomination process. The delays could result in nominations being held up during elections, thereby 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 compromise on their selections for nominations, which would be necessary to secure confirmation under the emerging supermajority rule. Thus, a supermajority rule applied without a consensus would provoke bitter fights and lengthy delays.⁵

⁴ See *id.* at 458-59 (demonstrating that when special interests generally favor additional spending, a supermajority rule may more closely reflect majority sentiment on spending than majority rule).

⁵ 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, 341-42 (1997); *Symmetric Entrenchment*, *supra* note 2. 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

While we believe that a supermajority rule might be desirable for Supreme Court appointments, we reject imposing an express supermajority rule to the confirmation of lower federal court judges. The countermajoritarian difficulty is less acute with lower court judges because their countermajoritarian power is limited by Supreme Court precedent. Moreover, 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 are the justices of the Supreme Court, where a few appointments can make dramatic and sometimes aberrational shifts in jurisprudence. Indeed, the jurisprudential diversity potentially offered by the lower court judges confirmed under majority rule can itself be a mechanism of judicial restraint and development of the law, as a few outlying judges can provide both discipline and insight through dissents. A supermajority confirmation rule would unduly narrow the jurisprudential diversity that can be obtained among the thousand lower court federal judges.

We also consider the possible use of a supermajority rule at the committee level to address a different practice that has also become 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 agree 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

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, supra* note 2, at 407-08.

to impose an ad hoc supermajority rule on judicial nominees.⁶ 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.⁷ 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 and thus engages in a more comprehensive form of obstruction at its next opportunity. Thus, even if the Democrats are now only selectively filibustering nominees, at some time in the near future a party may well apply a systematic, if implicit, sixty vote requirement, at least as to lower courts.

We say implicit because the party in opposition to the President would not even try to filibuster nominees who could clearly get sixty votes. 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 are uncertain as to whether the equilibrium will result in a supermajority rule for Supreme Court as well as lower court nominees, because the former nominations are far more visible to the public. Thus, if the Senate were to try to filibuster a Supreme Court nominee, the President may well have an opportunity to persuade the public at large that a filibuster is unfair or inappropriate. If he succeeds, it may be that the filibuster will be sheathed as the weapon of choice in Supreme Court confirmation fights.

We dispose of one argument about the merits of a supermajority rule immediately by considering a Senate supermajority rule that is more ideal than the filibuster. One defect of the filibuster is that its

⁶ 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).

⁷ 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.

form permits senators to say they are voting against a nominee because they want more debate and deliberation, and not because they 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 mostly because they are sure that the nominees should never be confirmed. This aspect of the filibuster raises the information costs to some members of the public of knowing their senators' true positions.⁸ The filibuster thus increases agency costs and will make the filibustering senators' actions less likely to reflect the popular views of their electorate.⁹ Of course, we are not saying that all of the public would be misled by the true nature of the filibuster's objective, but rather that much of the public is inattentive to politics and thus easily confused.¹⁰ Since successful politics operates by securing the support of the marginal voter, confusing even a relatively small number of voters can have an effect.¹¹ Thus, if a confirmation supermajority rule is 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 show here 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.¹²

⁸ 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 & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 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.

⁹ 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).

¹⁰ See *supra* note 8.

¹¹ In the long run if filibustering judges becomes the norm, everyone will understand the filibuster to be simply a tool of opposition as evidenced by the 1950s where 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.

¹² As we have noted before in *Our Supermajoritarian Constitution*, *supra* note 2, at 716 n.48.

The President and the Senate may have divergent views because they are elected through different processes. First, the President and a majority of the Senate are elected at different times, permitting the electorate to change its voting patterns in the interim.¹³ Second, the President and the Senate are elected by different kinds of popular majorities: the Senate by majorities in the several states, and the President by the Electoral College, which reflects population more than do senatorial elections.¹⁴ Third, voters may consider different issues salient when selecting the President and their Senators, because these officeholders have different responsibilities.¹⁵ For instance, the President is both Commander in Chief and largely responsible for the conduct of foreign policy. Therefore, voters may elect a candidate President because of their agreement with his foreign policy positions even if they disagree with his positions on constitutional jurisprudence.

Thus, the President and the Senate majority at any point may differ in their preferences for Supreme Court justices. A Supreme Court nominee might obtain the support of one institution but not the other. To obtain the support of both, a nominee will often need additional support from voters—the kind of support required by a supermajority rule.¹⁶ This point is most dramatically evident when the President and the Senate are under the control of different political parties, but it 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 demonstrate.¹⁷ 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 beneficial.¹⁸

¹³ *Id.* at 715-16.

¹⁴ *Id.* at 715.

¹⁵ *Id.*

¹⁶ *Id.* at 714 (discussing manner in which obtaining majority support in two differently elected institutions requires more than majority electoral support).

¹⁷ Marty Coyne, *Transportation Talks, Other Factors Delay WRDA Bill Until June*, ENV'T & ENERGY DAILY, May 18, 2004, at Water Resources Vol. 10 No. 9 (discussing the stalemate between the White House and Congress over funding distribution in the current highway bill).

¹⁸ The Framers considered and rejected a two-thirds supermajority requirement for confirmation of judges. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 38, 44 (Max Farrand ed., 1966).

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.¹⁹ 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 it generates additional costs. The first cost is the additional decision-making time required for government officials to make a decision on the government action subject to a supermajority rule.²⁰ On occasion, this additional time can be substantial, because officials will use the additional support required by the rule to engage in strategic delay. When officials use delay for strategic reasons, their delay is often termed “holdout costs.”²¹ 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, it can be termed 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 themselves may be 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 immediate effects. First, it would prevent “mere majority appointments,” which occur when nominees obtain only a majority in the Senate but not the requisite supermajority. Second, it would encourage appointments that

¹⁹ See *Our Supermajoritarian Constitution*, *supra* note 2, at 731-34.

²⁰ *Id.* at 745.

²¹ *Id.*

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, selecting persons who are more likely to be able to secure a Senate supermajority. Once these new candidates are nominated, some will be confirmed and others will not. Let us call such confirmed nominees—those new candidates that are nominated by the President and confirmed by the Senate—“elicited appointments,” because they are elicited by the supermajority rule. Thus, a Senate supermajority would be an improvement only if the quality of those elicited appointments proved better than the mere majority appointments.²² We measure the quality of the appointments by the quality of the resulting decisions of the judiciary as a whole. As we show later, a supermajority rule’s direct improvement in 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.

We discuss whether supermajority rules improve the quality of judicial decisions in terms of two theories of judicial interpretation: first, originalism, and second, realism, or other non-interpretive theories where judges enjoy substantial discretion to decide cases 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

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 special interest 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 Constitution often constrain special interests. For instance, the enumerated powers sustain a competitive federalism

²² Cf. *Symmetric Entrenchment*, *supra* note 2, at 419-20 (providing a similar heuristic for comparing benefits under majority rule to those under supermajority rule).

that restrains the leverage of special interest groups. In this system, states have the authority to establish most social and economic policies, while the power of national majorities acting through the federal government is largely limited to keeping open the avenue of trade and investment.²³ This structure constrains special interests because if they gain too many rents from a particular state, investment and people can exit.²⁴ Other provisions, from bicameralism to the First Amendment, can also be seen as restraining interest groups.²⁵

But constitutional provisions do not make special interests disappear and therefore 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 accomplish this objective is to use their substantial leverage to get the President and the Senate to nominate and confirm judges who are friendlier to constitutional interpretations favored by 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. Moreover, securing votes to get a supermajority is harder than securing additional votes to get a majority. For example, a special interest that is five senators short of a supermajority must secure these additional senators from a smaller group than a special interest that is five senators short of a majority. Further, if one assumes—which seems likely—that the majority coalition already contains the senators who are most supportive of the nominee, securing the additional senators necessary for a supermajority will be particularly difficult. All of these considerations raise the price of confirmation to special interest groups under a supermajority rule.

Originalist judges, in contrast, would not be as likely to be stopped by a supermajority rule if there were even a modest consensus in their favor. This assumption could be true if either 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.²⁶

²³ *Supermajority Rules as a Constitutional Solution*, *supra* note 2, at 385-86.

²⁴ *Id.*

²⁵ See *Our Supermajoritarian Constitution*, *supra* note 2, at 771-72 (bicameralism acts as a restraint on special interest groups).

²⁶ See *Our Supermajoritarian Constitution*, *supra* note 2, at 767 (stating that forces that led to adoption of Constitution would have vested interest in its maintenance).

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.²⁷ Thus – all else being equal – one might expect that originalist judges would be better represented than other types of judges among elicited appointments and less represented among mere majority appointments, which can be easily engineered by special interests. However, we acknowledge that, at best, this effect would be a small one. 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 passions that can equal those generated by substantive issues of public policy.

One other problem with this argument for supermajority rules is that they would seem much more powerful at a time when the Constitution remained a document whose operation largely followed its original meaning. In our era, the interpretation of the Constitution has often—in some cases radically—departed from its original meaning. For instance, the system of constitutional federalism has largely been eviscerated.²⁸ 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 who benefit from these non-originalist precedents 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 may have benefited 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 non-originalist 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.²⁹ Today, this mild supermajority rule may operate to frustrate good laws by repealing excessive regulation that may characterize the status quo.³⁰

²⁷ 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).

²⁸ *Supermajority Rules as a Constitutional Solution*, *supra* note 2, at 391-94 (discussing decline of federalism).

²⁹ See *Our Supermajoritarian Constitution*, *supra* note 2, at 772.

³⁰ *Id.*

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 much more sympathetic to originalism and the Democratic Party opposed.³¹ 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 justices like Antonin Scalia and Clarence Thomas, who keep the flame of 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 assess 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 bolster the legitimacy of the Court, possibly improve the quality of justices, and temper the countermajoritarian difficulty.

First, a supermajority rule will tend to elicit consensus nominees with bipartisan support. It will eliminate nominees with “extreme” views on constitutional law and encourage the appointment of nominees with views closer to that of the median legislator (and thus the median voter) on constitutional decision-making. Because such nominees will more likely render decisions reflecting a popular consensus on the content of constitutional law, the rule will bolster the legitimacy of the Court, at least as realists define legitimacy. Second, the rule will modestly improve the quality of nominees when the quality is measured by uncontroversial traditional criteria, such as legal credentials and moral probity. Finally, the rule will have the advantage of tempering

³¹ 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.”) (emphasis added).

the countermajoritarian difficulty. While median senators may 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).³²

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. Under majority rule, the President can appoint any person who will obtain the support of a majority of the Senate. If the President is from the same party as the Senate majority, he can appoint anyone whom his entire party will support. Depending on the distribution of views in his party, this may allow him to select a quite extreme nominee who is far from the center of the political spectrum. In general, assuming that the President's views are representative of his party and that he wishes to maintain the favor of his party, he will tend to nominate individuals whose views resemble the median voter of the party. Under a supermajority rule, by contrast, the President will tend to select someone whose views are closer to the median voter of the Senate as a whole. In the usual circumstance where no party commands a supermajority, the President will be forced to select someone that can secure the support of some members of the opposing party. This will normally mean that the nominee has more centrist views and therefore will be closer to the median voter of the Senate than the appointee under majority rule.³³

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, but in jurisprudential matters of relatively low political salience, legislators' views themselves may be relatively undeveloped, allowing substantial

³² A supermajority confirmation rule may thus still result in Supreme Court judges who strike down many decisions of states where state legislators have preferences that are different from those of the median federal legislator.

³³ If the President's party is the minority party in the Senate, a supermajority rule will also tend to generate nominees with more centrist views. Under majority rule, the President will need to secure some support from the opposite party, but the President is only constrained to nominate someone whose views are sufficient to satisfy the majority of the Senate that is closest to his preferred view. For example, a Democratic President who faced a Republican Senate could still select a pretty liberal nominee who could gain the votes of all Senate Democrats plus some Republicans. By contrast, under a supermajority rule, the Democratic President would need to secure even more support from Republicans and therefore would be required to appoint someone closer to the median voter of the Senate.

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 among the public. Again, the analysis of legitimacy is wholly realist—the supermajority rule would not necessarily move constitutional law toward 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. Under a supermajority rule, it will be harder for the President to secure the confirmation of his most preferred candidates. To increase additional support, the President could choose nominees who do well in terms of uncontroversial criteria, such as indicia of quality. Thus, the President would be more likely to choose candidates with outstanding intellectual credentials and reputations for probity and thoughtfulness.³⁴

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—independent of his constitutional views—that catches the public attention and garners support. For instance, a candidate's confirmation chances would be enhanced if he were the first Hispanic to be nominated to the Court. One can imagine other characteristics—like membership in the Senate or close connections to a member of the Senate—that would increase confirmation chances.³⁵ 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 from a supermajority rule's improvement of the quality of nominees, because

³⁴ It might be thought that a supermajority will also have the effect of weakening the traditional credentials by eliminating from the pool those strong candidates who might have more extreme views. We agree that this would be an effect but at least at the level of the Supreme Court where the pool of willing candidates comprehend almost the entire bar, we doubt the effect would be so large as to swamp the President's need for more highly credentialed nominees to meet the supermajority confirmation hurdles.

³⁵ Justices David Souter and Clarence Thomas benefited greatly from their sponsorship by Senators Warren Rudman and John Danforth respectively.

these handles would have no necessary connection to the qualifications for being a judge.³⁶

The supermajority confirmation rule also tempers the countermajoritarian difficulty. 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 support. 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 both citizens and legislators may have preferences about constitutional law that differ from their policy preferences about legislation. For instance, citizens may want constitutional law to be more principled and less partisan than ordinary legislation, so that 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 often offend the consensus of constitutional views, because citizens would probably not want the legislation of their representatives regularly invalidated.

The justification for a supermajority confirmation rule parallels the justification for the constitutional rule that demands a supermajoritarian consensus before the legislature can entrench a norm against majoritarian change. The Constitution requires a supermajoritarian process to pass to constitutional amendments – in the usual case, a two thirds vote of both houses of the Congress and approval by three quarters of the state legislatures.³⁷ Thus, the Constitution does not permit a mere majority in Congress to pass a law that cannot be subsequently changed by a majority.³⁸ Requiring a supermajority for entrenchment of new legal norms or the repeal of previously entrenched norms also suggests that judges who gain the power to entrench new norms or to eliminate old entrenched norms should also be required to

³⁶ It might be argued that a supermajority rule would encourage “stealth nominees”—nominees who 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.

³⁷ 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 Legislatures 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 Legislatures 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

³⁸ See *Symmetric Entrenchment*, *supra* note 2, at 391-408.

demonstrate supermajoritarian support. This argument for supermajoritarian support becomes especially powerful to the degree one regards the Supreme Court as operating like a sitting constitutional convention.

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 court judges, who are bound by previous Supreme Court decisions.³⁹ Also, given the law of large numbers, vacancies are less likely to come in disproportionate “clumps” in the lower federal judiciary than in 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.⁴⁰

c. Possible Mitigating Factors for Judicial Entrenchment

Even at the Supreme Court level, the benefits and costs of a supermajority rule for confirmation differ from the benefits and costs of a supermajority rule for entrenching legislation. The benefits of a supermajority rule for confirmation may be less substantial, because legislatures have more control over the content of legislative entrenchment than they do over 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 thicker veil of ignorance when they are voting for a judge than when they are passing

³⁹ To be sure, the Supreme Court has reduced the number of cases 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.

⁴⁰ 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. 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. Another countervailing consideration might be that lower court judges decide more cases. But, as discussed above, a supermajority confirmation rule’s justification lies in the judicial power to entrench new social norms, not in its general power to decide disputes. This former power is limited by Supreme Court precedent and is only modestly amplified by the number of decisions made.

legislation. First, judges have life tenure⁴¹ and are under no obligation to the coalition that confirmed them. They can change their minds and disappoint their patrons, and a substantial number—from Earl Warren and William Brennan⁴² to Harry Blackmun⁴³ and David Souter—do just that.⁴⁴ Moreover, as time passes, the issues that courts face change and generate questions which were not in the contemplation of the President and senators. For instance, the Roosevelt administration chose Supreme Court justices with views disposed to uphold New Deal legislation,⁴⁵ but when the issues moved from questions of national powers and economic rights to civil rights, these justices went their separate ways.⁴⁶ Because legislators cannot predict how justices will vote as confidently as they can predict the future content of entrenched norms, it might be thought that a supermajority rule is less necessary to police their behavior.

Nevertheless, the predictability of judicial and legislative entrenchments differs in degree but not in kind.⁴⁷ 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 milder. Both may be, in a rough and ready sense, proportionate to the problem they are meant to solve.

⁴¹ U.S. CONST. art. III, § 1.

⁴² 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. 115, 119 (1993) (discussing Eisenhower's disappointment with the decisions of Justices Warren and Brennan).

⁴³ *Id.* at 121-23 (discussing the change in Justice Blackmun's decisions over the course of his tenure on the court).

⁴⁴ *Id.* at 132-35 (discussing Souter's conservative politics and liberal decisions).

⁴⁵ HENRY J. ABRAHAM, JUSTICES, PRESIDENTS AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 157-88 (1999) (describing 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).

⁴⁶ *Id.*

⁴⁷ It might also be argued that judicial entrenchments and legislative entrenchments are not very different, particularly on 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 less clear. For these reasons, just as judges may have somewhat less predictable effects, so may legislative entrenchments.

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 will make it less likely that judges will invalidate legislation that should be invalidated and, in particular, make it more difficult to invalidate legislation that entrenches 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 the case generally, 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.⁴⁸ 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, more enforcement of property rights, or both, to get a supermajority. Only in the case where it offers a nominee favoring 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 kinds 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

⁴⁸ Again we are not considering the President's power of nomination in the comparison of the effects of majority and supermajority rule, because he has that power under either majority or supermajority rule.

important than core abortion rights to the party favoring those rights and more offensive to the party opposing those rights. 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 statutes only by a two-thirds vote. How would this differ 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 minority rights. Any invalidation of a provision on constitutional grounds, including those protecting minority rights, would require six rather than five votes. Thus, those who believe that the Court commits more errors in striking down legislation than in failing to strike down legislation should favor a rule requiring a supermajority of Supreme Court judges to hold that a statute is unconstitutional before the statute is 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.⁴⁹ 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 content 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 decision-making. 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.

⁴⁹ See Evan H. Caminker, *Thayerian Deference to Congress and the Supreme Court Supermajority Rule, Lessons from the Past*, 78 IND. L.J. 73 (2002).

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

The supermajority confirmation rule, however, has certain costs. To begin with, there may be two effects that weaken quality, particularly as to lower federal courts judges. First, the judiciary as a whole may benefit from a diversity of jurisprudential views, but the supermajority rule will narrow that diversity. Second, the supermajority rule will weaken the accountability of the President and the public may lose an important electoral focus where it can register its jurisprudential views. Most importantly, a supermajority rule will increase decision-making 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, which may result in lower quality judicial selections.

1. Decreased Quality

a. Decreases in the Collective Quality of the Judiciary

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 decision-making, however, a supermajority rule may actually decrease the quality of the judiciary overall. First, it may be thought that some of the most important restraints on the 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.⁵⁰ 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

⁵⁰ 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 on the Federal 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).

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 possess 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 other judges. For example, during the confirmation processes ranging from President Reagan through President Clinton, our current lower appellate courts would almost certainly have lost Judges Harvey Wilkinson,⁵¹ Alex Kozinski,⁵² William Fletcher,⁵³ and Richard Paez,⁵⁴ because they were confirmed with less than sixty votes.⁵⁵ Many other similar nominees also may have been defeated, even though they received more than sixty votes, because some Senators may have cast favorable votes knowing the nomination was going to pass anyway under majority rule, even though they would have voted against the nomination under a supermajority rule.

The above list suggests that a 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,⁵⁶ officials who have served in the executive branch, like Kozinski,⁵⁷ or both, like Wilkinson.⁵⁸ 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. Therefore, mere majority appointments may be more likely to be academics or ex-government officials. Losing such judges may detract from the diversity of the bench and its quality, as measured by conventional credentials.⁵⁹ Once again, the question that remains is the degree to

⁵¹ 130 CONG. REC. 23,284 (1984).

⁵² 131 CONG. REC. S15,038-39 (1985) (daily ed. Nov. 7, 1985).

⁵³ 144 CONG. REC. S11,884 (daily ed. Oct. 8, 1998).

⁵⁴ 146 CONG. REC. S1368 (daily ed. Mar. 9, 2000).

⁵⁵ 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.

⁵⁶ *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).

⁵⁷ *Judges of the United States Courts: Kozinski, Alex*, Federal Judicial Center, at <http://www.air.fjc.gov/newweb/jnetweb.nsf/hisj> (Judge Kozinski was special counsel to the Merit Systems Protection Board).

⁵⁸ *Judges of the United States Courts: Wilkinson, James Harvie III*, Federal Judicial Center, at <http://www.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).

⁵⁹ During the Presidencies of Regan, Bush the elder, and Clinton, one other appellate judge

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 for 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. While this scenario could occur, there are reasons to doubt its likelihood. First, a supermajority rule gives more leverage to senators than to the President, and the President is more likely to prefer distinguished nominees than senators are. Historical reputation matters more to Presidents,⁶⁰ while pure patronage matters more to senators.⁶¹ Second, the act of nomination represents a kind of endorsement that merely voting for a nominee does not, and a President may have difficulty nominating someone whose jurisprudential philosophy is 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

received less than sixty votes—Daniel Manion. He is not a judge who would fall into this category, because 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*, CHI. TRIB., July 25, 1986, at 5 (providing Daniel Manion's defense to charges that he is unqualified to hold the lifetime judicial post, with descriptions of those criticisms).

⁶⁰ 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).

⁶¹ 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.").

legal establishment and hope to join it.⁶² Moreover, the reputation of judges is largely shaped by the views of the legal establishment.⁶³ 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 less likely to be confirmed under a supermajority rule. Currently, the legal establishment leans to the moderate left,⁶⁴ but in early times that was not always the case. Previously, when the legal establishment had a conservative cast, a supermajority rule would have had the opposite effect.

b. Decreases in Quality from the 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 is only one of many ratifying the President's choice, the issue of judicial appointment is of less importance to the rational voter in senatorial elections than in presidential elections. Thus, the public may lose a focal point for its input into judicial nominations, because it 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

⁶² 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.

⁶³ See William Ross, *The Ratings Game: The Factors That Influence Judicial Reputation*, 79 MARQ. L. REV. 401 (1996).

⁶⁴ 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, 842-43 (1998) (finding, in a measure of viewpoints of elite lawyers on various issues, that their study showed lawyers tended to identify as Democrats).

effect its 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 militate against the general tendency of a supermajority rules to improve the quality of nominees. 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 Supreme Court level.

2. Holdout Costs

Like other supermajority rules, a confirmation supermajority rule would create the potential for additional decision-making costs.⁶⁵ 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, legislators who need to be bargained with to join the confirming coalition have greater leverage under a supermajority rule. Under majority rule, the coalition can allow nearly half of the Senate to vote against the nominee, but under a supermajority rule, the coalition must secure greater support and therefore each senator has more leverage in trading his vote. Accordingly, negotiating for the identity of judges that could receive supermajority support might lead to lengthy delays, which 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, an obvious social cost. At the Supreme Court, the vacancies may lead to more tied votes, and multiple simultaneous vacancies may detract from the Court's legitimacy.

Second, in the case of the Supreme Court, these additional delays could cause particular nominations to extend into the next election cycle. As a result, presidential or off-year elections would likely consist partly of referenda on particular nominees—focusing on the personal qualities of the nominees—with opponents engaged in the politics of personal destruction.⁶⁶ This result would also be a cost, if one believed that intense scrutiny of particular nominees by the electorate would unduly politicize the judiciary, discouraging well qualified candidates over time. Such holdout costs might decrease judicial quality in another way, as Presidents would try to nominate candidates with some factor

⁶⁵ See *Our Supermajoritarian Constitution*, *supra* note 2, at 745 (defining decision-making costs).

⁶⁶ 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.

that would help them gain favorable action from the Senate, even though it had nothing to do with their qualifications for Supreme Court justice.

We believe that such delays could be particularly long if applied to Supreme Court justices, especially if they were applied without a firm consensus between the political parties that the historical practice regarding appointments should be changed. Presidents generally have expected that they will enjoy substantial discretion in appointing the judges they want. Their supporters have shared those 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.

However, as with most rules that become an accepted part of the political landscape, Presidents would internalize them over time and bargain in their shadow, thereby reducing the dangers of long-lasting 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.

3. Substitution Costs

Like other supermajority rules, a Senate confirmation supermajority rule would create substitution costs,⁶⁷ 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 decision-making 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.⁶⁸

⁶⁷ See *Our Supermajoritarian Constitution*, *supra* note 2, at 744-45 (defining substitution costs).

⁶⁸ See Virginia L. Richards, *Temporary Appointments to the Federal Judiciary: Article 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

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 these 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,⁶⁹ 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 judicial appointments unless the President commits to forego this power.⁷⁰ Such threats do not mean that recess appointments are 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 discussed changes in the quality of judges, but 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.⁷¹ In the long run, however, a supermajority confirmation rule could affect the number and timing of new lower court judgeships created by Congress, and thus one has to evaluate the quantity effect as well as the quality effect.

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. First, we think a supermajority rule is unlikely to have any effect on the number of Supreme Court justices because tradition fixes their number at nine. Second, it is true that a under a supermajority rule, lower court judgeships may become more valuable to senators because the rule would give senators more leverage in filling

judging that counted the supermajoritarian difficulty as the salient problem of judicial review.

⁶⁹ U. S. CONST. art. II, § 2, cl. 3.

⁷⁰ 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).

⁷¹ 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.

the positions, but the judgeships would then become less valuable to the President. Thus, the overall advantages of the creation of new judgeships may be roughly similar to those existing under majority rule.

The clearest difference between the two confirmation rules would involve the timing of the creation of judgeships. Under the majority rule, when a political party controls the House, the Senate, and the President, it seeks to create judgeships that the President and the Senate can fill.⁷² By contrast, under supermajority rule, a party would have partisan incentives of similar strength to create judgeships only if, in addition to control of the House and the presidency, it also 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.⁷³

E. *The Problem of Transition*

Finally, we 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 politically 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

⁷² 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 J.L. & ECON. 435, 444-45, 452 (1996) (showing that Congress is more likely to create judgeships when the President of its own party can fill them).

⁷³ Under supermajority rule, the optimal timing for the 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. After the Federalist Party dissolved, the all powerful national Republicans divided into more and less nationalist factions. See MICHAEL F. HOLT, *THE RISE AND FALL OF THE WHIG PARTY: JACKSONIAN DEMOCRACY AND THE ONSET OF THE CIVIL WAR 2* (1999). The powerful Republican Congress after the Civil War split into "radical" and more moderate factions. W.R. BROCK, *AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION, 1865-1867* 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, 152-53 (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 between the old and emerging factions of the Democratic party during the New Deal). Thus, even when one party dominates, the supermajority rule may have some substantial effect by requiring disparate factions to reach a consensus on nominees.

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 existing constitutional rules make it less likely 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 the Congress and state legislatures, making an aberrational entrenchment less likely.⁷⁴ Moreover, because state legislatures 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 judiciary that is out of step with majority preferences on constitutional law.⁷⁵

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 only after an intervening presidential election. This was the route Congress took to gain bipartisan support for its attempt to give the President an effective line item veto by providing him with the power to suspend appropriations he deemed excessive.⁷⁶ 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 confirmations is very hard to assess because of its wide ranging, disparate, and diffuse effects. For lower federal courts, we think the supermajority confirmation rule is a mistake. Lower court judges have only a limited ability to entrench norms without affirmation from the Supreme Court. Moreover, the thousand lower court judges offer a real possibility of beneficial jurisprudential diversity and a supermajority

⁷⁴ *Symmetric Entrenchment*, *supra* note 2, at 439.

⁷⁵ *Id.*

⁷⁶ 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).

rule would decrease this benefit.

In contrast, the case for applying a supermajority confirmation rule to Supreme Court justices is stronger for two reasons: because they have substantial power to entrench new norms, and because an politically partisan and unbalanced composition of the Supreme Court is more likely due to the 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 was itself a product of bipartisan agreement that applied only to a future President. Thus, an express supermajority confirmation rule adopted by consensus and applied to a future President might be mildly beneficial.⁷⁷ We caution that the kind of ad hoc rule adopted by filibuster initiated by one party is unlikely to be beneficial because the holdout costs would be very high as the first Presidents resist the rule.

II. A 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 Senate, a substantial number of refusals to hold hearings on nominees is likely to happen only when the Senate is controlled by the party opposing the President. During the last eighteen years, the Senate Judiciary Committee—under both Republican and Democratic control—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.⁷⁸

⁷⁷ Other countries, such as Germany, have an express supermajority rule for their constitutional courts and this process seems to work mechanically well. The German Constitution art 94(1) provides that: "half of the members of the Federal Constitutional Court are elected by the Bundestag and half by the Bundesrat." F.R.G. CONST. art. 94(1), available at 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), available at <http://dejure.org/gesetze/BVerfGG>, specifies the two thirds vote required of the twelve person judicial selection committee of the Bundestag. Section 7 specifies the two thirds vote required by the Bundesrat. 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.

⁷⁸ Stephen O. Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 DICK. L. REV. 247, 247-48 (1999) (discussing the reduced number of judicial confirmations when the President and Senate are from different parties). See generally Gerhardt,

In this section, we discuss how a supermajority rule at the committee level would beneficially be used to stop this practice. 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 who are 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 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 best be understood through a brief review of the pathologies of recent years. Under Democratic leadership, the Judiciary Committee refused to hold hearings for many of President George W. Bush's nominees.⁷⁹ These include John Roberts,⁸⁰ a lawyer who appeared before the Supreme Court thirty-five times for clients of diverse views.⁸¹ It was the second time Roberts endured such treatment; the committee refused him a hearing when he was nominated by the elder George Bush.⁸² The Committee also delayed providing a hearing for over sixteen months to Michael McConnell,⁸³ one of the most eminent law professors in the country who had bipartisan support from members of the legal

supra note 62, at 682-85 (describing 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).

⁷⁹ Gerhardt, *supra* note 62, at 682, 684-85 (“[o]f President Bush’s first eleven circuit court nominations made in May of 2001, the Senate has not even held hearings on eight of them.”).

⁸⁰ *Id.* at n.69 (mentioning John Roberts as one of President Bush’s nominees who was awaiting a hearing).

⁸¹ *John G. Roberts: Biography*, U.S. Department of Justice Office of Legal Policy, ¶ 5 (discussing Roberts’ career, and mentioning that he has argued before the Supreme Court over thirty times), at <http://www.usdoj.gov/olp/robertsbio.htm>.

⁸² Gerhardt, *supra* note 62, at n.69 (mentioning that Roberts was denied a hearing after his nomination by President George H.W. Bush).

⁸³ Byron York, *The Battle That Wasn’t*, NAT’L REV. ONLINE (Sept. 18, 2002) (describing McConnell’s Senate hearing and the delays leading up to it), at <http://www.nationalreview.com/york/york091902.asp>.

academy.⁸⁴

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, or even years, without a hearing.⁸⁵ 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 plausibly qualified 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 could 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 cause of this aspect of our confirmation discontents is a familiar bane of modern democracy—interest group politics. Interest groups, like those who favor and oppose abortion rights, have inordinate leverage in 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 elements of their parties' coalitions.⁸⁶ Because most of those judicial candidates nominated by Presidents Clinton and Bush—but opposed by such interest groups—would be aided by the favorable publicity produced by a fair hearing, interest groups influence 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.⁸⁷ Their disregard for the public interest in the confirmation

⁸⁴ *Michael McConnell Support Letter*, available at <http://www.usdoj.gov/olp/michael/mcconnellsupportletter.htm> (letter sent to Senator Hatch in support of McConnell's nomination).

⁸⁵ 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).

⁸⁶ See Appendix I: Ideological Ratings of Senators on the Senate Judiciary Committee *infra*.

⁸⁷ 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 "its gain in a form . . . [that is]

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 agrees 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 presidency provides the best opportunity to pass this rule. This constellation of power makes changes feasible.

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 traditionally required senators from the nominee's home state to return slips indicating they do not object to a hearing of the President's nominee.⁸⁸ 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 of a state's senators 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 the District of Columbia Circuit, which has no senators. 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 the committee supermajority rule could be adopted independent of an end to the blue slip, the rule would be much more efficacious if the blue slip disappeared at the same time.

The committee supermajority rule differs from the reform offered

easily obscured"); John O. McGinnis, *The Bar Against Challenges to Employment Discrimination Consent Decrees: A Public Choice Perspective*, 54 LA. L. REV. 1507, 1530-31 (1994) (raising information costs of opponents is an important technique of interest groups).

⁸⁸ 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).

by President Bush in 2002 because it does not require each nominee to receive a floor vote when the nominee is rejected by the Committee.⁸⁹ The Judiciary Committee, like other congressional committees, develops expertise in its subject matter and therefore 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 its party accountable for its actions. Indeed, the Committee's rejection of Judges Priscilla Owens and Charles Pickering became an issue in the midterm election.⁹⁰

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 an opposing party president. The public cannot follow the complexities of hearing schedules, but they would more easily understand an attack on the hearing rule for what it is—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.⁹¹ 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 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

⁸⁹ 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>.

⁹⁰ 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).

⁹¹ 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).

senators.

On realist assumptions about judging, an express 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 rule 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 most clearly beneficial 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 restrain the obstructive tactics of interest groups on both the right and left that gain advantages through silently blocking nominees.

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APPENDIX

Republicans on the Senate Judiciary Committee

Ranked by ACU Rating

(Shaded members exceed the average Republican ACU rating of 81)

Senator	Rating
Saxby Chambliss (R-GA)	90
Larry E. Craig (R-ID)	90
Lindsey O. Graham (R-SC)	90
Jon Kyl (R-AZ)	90
Jeff Sessions (R-AL)	90
Mike DeWine (R-OH)	85
Charles E. Grassley (R-IA)	80
Orrin G. Hatch (R-UT)	80
Arlen Specter (R-PA)	65

Republicans on the Senate Judiciary Committee

Ranked by ADA Rating

(Shaded members exceed the average Republican ADA rating of 13)

Senator	Rating
Arlen Specter (R-PA)	25
Mike DeWine (R-OH)	15
Lindsey O. Graham (R-SC)	15
John Cornyn (R-TX)	10
Orrin Hatch (R-UT)	10
Jon Kyl (R-AZ)	10
Saxby Chambliss (R-GA)	5
Larry E. Craig (R-ID)	5
Charles E. Grassley (R-IA)	5
Jeff Sessions (R-AL)	0

Democrats on the Senate Judiciary Committee
 Ranked by ADA Rating
 (Shaded members exceed the average Democratic ADA rating of 83)

Senator	Rating
Richard J. Durbin (D-IL)	95
Russ Feingold (D-WI)	95
Edward M. Kennedy (D-MA)	95
Herb Kohl (D-WI)	95
Charles E. Schumer (D-NY)	95
Dianne Feinstein (D-CA)	90
Patrick J. Leahy (D-VT)	85
Joseph R. Biden, Jr. (D-DE)	75
John Edwards (D-NC)	65

Democrats on the Senate Judiciary Committee
 Ranked by ACU Rating
 (Shaded members exceed the average Democratic ACU of 18)

Senator	Rating
Joseph R. Biden, Jr. (D-DE)	26
Russ Feingold (D-WI)	25
Herb Kohl (D-WI)	25
Patrick J. Leahy (D-VT)	16
John Edwards (D-NC)	13
Richard J. Durbin (D-IL)	10
Edward M. Kennedy (D-MA)	10
Charles E. Schumer (D-NY)	10
Dianne Feinstein (D-CA)	5