

IN PRAISE OF SUPREME COURT FILIBUSTERS

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The genius of our political system largely lies in its rules of procedure. Federal legislation must overcome the hurdles of bicameralism¹ and presentment,² assuring substantial deliberation and thereby improving the quality of legislation (except perhaps when the bill is called a stimulus). The constitution-making process has stringent supermajority rules that require provisions to obtain widespread consensus before they can be put beyond the ordinary democratic process.³

This Essay considers the procedural rules, particularly the operation of the filibuster rule, that relate to the judicial confirmation process. It also considers how the rules affect the kind of nominees, particularly Supreme Court nominees, who can obtain confirmation by the Senate. Although academics usually emphasize that they are presenting new work, we emphasize instead that we are presenting old work. We supported the filibuster rule when President Bush and a Republican Senate were in power;⁴ we support it now that President Obama enjoys the support of a Democratic Senate.

In Washington, constitutional provisions and desirable procedures often mysteriously change their meaning with every election, as each party molds rules to suit its partisan interest.

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1. See U.S. CONST. art. I, §§ 2–3.

2. See U.S. CONST. art. I, § 7, cl. 3.

3. See U.S. CONST. art. V.

4. See, e.g., John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 *Tex. L. Rev.* 1115, 1116 n.2 (2007) [hereinafter McGinnis & Rappaport, *Majority and Supermajority Rules*]; John O. McGinnis & Michael B. Rappaport, *The Judicial Filibuster, the Median Senator, and the Counter-majoritarian Difficulty*, 2005 *SUP. CT. REV.* 257, 258 [hereinafter McGinnis & Rappaport, *The Judicial Filibuster*].

Thus, our first point is that if we are to avoid obvious partisanship we should consider the confirmation process under a veil of ignorance about the partisan identity of the President and the Senate. Under this veil of ignorance, we argue that the routine use of the filibuster will produce better Justices, where better is defined as Justices who have excellent qualifications and whose jurisprudential positions are closer to the median voter. In fact, the filibuster rule will temper the countermajoritarian difficulty—a central problem for constitutionalism created by an unelected judiciary with the power to invalidate the decisions of a popularly elected legislature.⁵

We begin by describing two important political truths that define the confirmation process. First, senators and presidents evaluate Supreme Court candidates largely on their ideological assessment of a candidate's likely votes.⁶ Left-wing Democrat legislators, for example, were most likely to vote against the Supreme Court nominees of President Bush, a conservative Republican. Second, the President likely occupies a more extreme ideological position about the content of judicial review than the median senator.⁷ Presidents must be nominated by primary electorates composed largely of members of their own party.⁸ Primary voters tend to be more ideologically extreme than voters in the general electorate.⁹ Consequently, rather than reflecting the views of the median voter of the electorate, presidents are likely to reflect the views of the median voter in their party, or to be even more extreme. Political scientists confirm that, as a result of these forces, recent presidents have

5. See generally Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334–35 (1998) (casting the problem as “how to explain [the work and existence of] a branch of government whose members are unaccountable to the people, yet have the power to overturn popular decisions”).

6. The view that ideology influences judicial decision making is widely accepted in political science literature, even if it is controversial in legal literature. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 256–60 (1993) (using ideological scores for all justices to predict future results).

7. For an explanation of how this situation came to be, see David C. King, *Who's Partying?*, USATODAY.COM, Aug. 4, 2000, <http://www.usatoday.com/news/opinion/columnists/politics101/pol1.htm>.

8. See *id.*

9. See FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 183–84 (2003) (citing statistics).

reflected the median views of their party more than the median views of the electorate.¹⁰

By contrast, electoral forces tend to produce a body of senators who are likely to reflect both the center and the extremes of the electorate.¹¹ Senators are arrayed over a wider ideological space because of variations in the composition of voters in the states. New England Republicans are more liberal than most Republicans, and thus Republican senators elected from those states will be more centrist.¹² Similarly, Southern Democrats are more conservative than most Democrats, which generates more moderate Democrats.¹³ Consequently, a group of senators from the President's party are likely to have more moderate views than the President.

Thus, one should think of senators as arrayed along a continuum with the most left-wing senator at one and the most right-wing senator at one hundred.¹⁴ A Republican President is likely to be right of center with a position of seventy-five. A Democratic President will be left of center with a position at twenty-five.

Given these assumptions, it is easy to see how the filibuster rule will lead to the appointment of more moderate Justices.¹⁵ In a world without the filibuster rule, the President would merely have to obtain the vote of the median senator to get a simple majority. For a Republican President, the nominee would represent a compromise between the President at seventy-five and a senator at approximately fifty. The same is true, in reverse, for a Democratic President where there will be a compromise between his position at twenty-five and a senator at fifty. Under the filibuster rule, however, the median senator is no longer decisive. Instead, the pivotal senator is the one

10. See McGinnis & Rappaport, *Majority and Supermajority Rules*, *supra* note 4, at 263 n.15.

11. See KEITH T. POOLE & HOWARD ROSENTHAL, *CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING* 81–84 (1997).

12. See Roberta Romano, *The Political Dynamics of Derivative Securities Regulation*, 14 *YALE J. ON REG.* 279, 343 n.222 (1997) (showing the political divergence of New England Republicans from Republicans in general).

13. See *id.* (showing the political divergence of Southern Democrats from Democrats in general); see also McGinnis & Rappaport, *The Judicial Filibuster*, *supra* note 4, at 264.

14. For a more detailed description of this model, see McGinnis & Rappaport, *The Judicial Filibuster*, *supra* note 4, at 261–81.

15. See *id.* at 261.

who would break the filibuster. For a Republican President, it would be a senator at forty; for a Democratic President, it would be a senator at sixty. As a result, the President, whether a Democrat or Republican, would have to nominate a more moderate candidate to obtain confirmation. Thus, in the context of judicial nominations, the paradox is that a supermajority device like the filibuster rule will likely help promote the preferences of the majority of the Senate.

This paradox produces a host of salutary results. As a normative matter, the filibuster rule is good for constitutional law because it tempers the countermajoritarian difficulty. The countermajoritarian difficulty is the problem created by unelected Justices striking down the decisions of the elected branches.¹⁶ A supermajority confirmation rule helps remove a portion of the countermajoritarian difficulty that performs no useful function in our constitutional system. Thus, supermajority appointment rules promote a more democratic form of judicial review without sacrificing constitutional principle.

The filibuster rule accomplishes this objective by moving the Justices closer to the views of judicial review held by the median senator. The views of the median senator are generally more representative of the views of the median voter in the electorate than those of the President. Consequently, the supermajority rule promotes the appointment of Justices who hold views on the Constitution that accord with the views of the median voter.

One might think that Justices with median views will not perform the useful function of judicial review, because a Court whose judicial views reflect a majority of the people would never strike down legislation that the majority has presumably approved. But even from a realist's perspective, judicial deci-

16. See generally Friedman, *supra* note 5, at 334–35. We should note that we are originalists who believe that following the original meaning of the Constitution will overcome the countermajoritarian difficulty. The original meaning was the result of a supermajoritarian consensus that justifies following it rather than a more evanescent majority. See John O. McGinnis & Michael B. Rappaport, *The Good Constitution and the Case for Originalism*, 98 GEO. L.J. (forthcoming 2010). In this Essay, we make the realist assumption that judges generally practice judicial review not by following the original meaning, but instead by enforcing their own values. While this assumption does not necessarily describe the originalist Justices when they are following originalist precedent, it does seem consistent with the behavior of most Supreme Court Justices.

sions differ from legislative decisions. The median voter's view of what Justices should do is thus different from what legislators should do. While judges vote on the basis of their preferences, their institutional background and incentives provide them with different preferences than politicians. For instance, the requirement of writing opinions provides Justices with a greater incentive than elected politicians both to be consistent and to follow the decisions of their predecessors.¹⁷ Second, Justices have internalized the norm of playing by rules previously laid down. This norm serves as a constraint, however weak, on the decisions they reach.¹⁸ Finally, Justices do not have to stand for election and therefore need not conform their decisions to the views of a temporary majority.

For all these reasons, Justices' preferences are often, albeit not always, based on more principled, long-term considerations than those of elected politicians—considerations that may over the long run lead to greater stability and prosperity for the republic. For instance, whereas legislators might pass statutes that seek to suppress the speech rights of their partisan opponents, either overtly or subtly, the Court is less likely to uphold such statutes.

As a result, it is in keeping with judicial review that a judiciary reflecting the median voter's view of the Constitution will strike down legislation of a popularly elected legislature. If that is an aspect of the counter-majoritarian difficulty, it is one inherent in the concept of judicial review and useful to a constitutional policy. By contrast, the kind of judicial review exercised by Justices whose judicial philosophy differs from the median voter's is unnecessary to sound judicial review. Indeed, that difference can over time undermine the nation's respect for the judiciary. Thus, the filibuster rule has the added virtue of protecting the judiciary's legitimacy.

The filibuster rule also has the advantage of promoting nominees of high quality. Although senators are mostly concerned about ideology, they are somewhat concerned about

17. See Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-making*, 75 B.U. L. REV. 941, 968–69, 971–74 (1995) (discussing the import of “judicial adherence to the norms of judicial decision-making”).

18. See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 29–30 (1993) (discussing the interest judges have in playing by rules).

quality, including measures of quality such as educational credentials, experience, and reasoning ability.¹⁹ The latter ability comes in handy, as Chief Justice John Roberts showed, because it often allows the nominee to make a favorable contrast with the senators themselves. The President can thus get the Senate to move toward a candidate with his vision of judicial review if that candidate is outstanding. Given the greater difficulty of confirmation under the filibuster rule, quality becomes an even more important consideration.

Some might argue that a filibuster rule will create more battles between the Senate and President and generate lengthy contests to fill Supreme Court vacancies. We do not consider delay to be necessarily a cost, but instead a potential benefit. Much of the public is rationally ignorant of the issues surrounding the proper interpretation of the Constitution. Confirmation battles may be the only plausible way to get their attention. Indeed, such lustral struggles may be the only way to prevent a republic from forgetting issues that are central to democratic constitutionalism, like the proper nature of and limits to judicial review. As Niccolo Machiavelli said in *Discourses on Livy*, an internal conflict within a republic can have the salutary effect of returning it to a debate over first principles.²⁰

Although we have defended a filibuster for Supreme Court Justices, the normative case for a filibuster rule at the lower court level is much weaker. Inferior federal courts by themselves ordinarily cannot entrench new constitutional norms against the democratic process, and thus the countermajoritarian difficulty is far less acute. Moreover, the diversity afforded by some outlier appointments on the lower courts, particularly by brilliant outliers, may benefit the nation's jurisprudence as a whole by providing innovative thinking and bracing critiques that a more moderate Supreme Court could then either accept or reject.

19. See CNN Poll: Race, gender not important in Supreme Court pick, <http://politicalticker.blogs.cnn.com/2009/05/18/cnn-poll-race-gender-not-important-in-supreme-court-pick> (May 18, 2009, 18:16 EDT) ("Most Americans . . . have very firm opinions about [a Supreme Court nominee's] experience and legal credentials . . .").

20. See NICCOLO MACHIAVELLI, DISCOURSES ON LIVY 29–31 (Julia Conaway Bondanella & Peter Bondanella eds., 2003) (describing how conflict in Rome led to the creation of the tribune).

We emphasize that approval of the filibuster rule does not entail approval of the bad institutional practices—shenanigans might be a more apt term—in which both parties have indulged. In particular, each party has refused to conduct hearings and hold votes on certain lower court nominees of the opposite party in recent decades.²¹ By delaying or refusing to provide hearings for plausibly qualified federal court nominees, the Judiciary Committee will likely harm the quality of the judiciary. As the record suggests, the Committee often cynically denies hearings to some of the most distinguished nominees because the amplification of their excellence offered by a confirmation hearing or debate would actually advance the prospects of their confirmation.²²

The confirmation of well qualified lower court candidates of both Democratic and Republican presidents could improve American jurisprudence through the synthesis of opposing ideas. In the long run, such a clash of ideas could refine the law. Lengthy delays, however, put lawyers' careers in limbo, deterring the finest candidates. The Senate Judiciary Committee should adopt rules to end such practices, assuring hearings for all judicial candidates unless a substantial supermajority of the committee does not favor a hearing. Given that the same party currently controls the Senate and the presidency, now would be an apt time for the Judiciary Committee to adopt such norms and incorporate them into Committee's standing rules of operation.

We conclude by returning to our major point: filibusters of Supreme Court nominees, whether by Democrats or Republicans, are sound in principle because they preserve judicial review while tempering its extremes. Happily, President Obama implicitly took this position when, with many of his Democratic colleagues, he attempted to filibuster Justice Samuel

21. See Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667, 682–85 (2003) (describing the methods used by senators to delay the confirmation process); Stephan O. Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 DICK. L. REV. 247, 247–49 (1999) (discussing the reduced number of judicial confirmations after the elections of 1994 when the majority of the Senate was of a different party than the President).

22. See John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Judicial Confirmation Process*, 26 CARDOZO L. REV. 543, 572–73 (2005) (describing the delayed hearings of Chief Justice John Roberts and Judge Michael McConnell, and the failed nomination of Elena Kagan to the D.C. Circuit Court of Appeals).

Alito.²³ Thus, we recommend that Republicans follow President Obama's sound example and filibuster any nominee whom they believe has a jurisprudence that will yield extreme and unfortunate results. They will not only be promoting their own individual positions on the proper role of judges. They will also help to moderate judicial review and preserve its legitimacy for future generations.

23. The vote on cloture of the filibuster passed 72-25, with Senator Obama voting against cloture. 152 CONG. REC. S308 (daily ed. Jan. 30, 2006).