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# FILIBUSTER VS. SUPERMAJORITY RULE: FROM POLARIZATION TO A CONSENSUS- AND MODERATION FORCING MECHANISM FOR JUDICIAL CONFIRMATIONS

Brent Wible\*

## INTRODUCTION

Almost no one is happy with the judicial appointments process. Periodically, those who follow the process become alarmed, identifying structural problems that allow for too much partisanship or too much mudslinging. A wave of scholarly and journalistic commentary followed the last great nominations conundrum: the Senate's rejection of Robert Bork's nomination to the Supreme Court in 1987.<sup>1</sup> Similarly, a flood of newspaper editorials and law review articles has been published during the last year as Democratic senators have filibustered a handful of President Bush's nominations and Bush has employed recess nominations to fill judicial slots.<sup>2</sup>

Recommendations for recalibrating the process have spanned the legal landscape, from suggesting that we borrow structural approaches from other constitutional systems,<sup>3</sup> to urging a return to the Founders' principles and allocation of authority concerning appointments.<sup>4</sup> Several commentators, both then and now,

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<sup>1</sup> See, e.g., Richard D. Freer, *Advice? Consent? Senatorial Immaturity and the Judicial Selection Process*, 101 W. VA. L. REV. 495, 495 n.1-2 (1999) (listing articles and books written in reaction to the Senate's rejection of Judge Robert Bork's nomination and the appointment of Justice Clarence Thomas).

<sup>2</sup> See, e.g., John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181 (2004); Dr. John C. Eastman, *The Limited Nature of the Senate's Advice and Consent Role*, 36 U.C. DAVIS L. REV. 633 (2003); Laura T. Gorjanc, *The Solution to the Filibuster Problem: Putting the Advice Back in Advice and Consent*, 54 CASE W. RES. L. REV. 1435 (2004); Emery G. Lee III, *The Federalist in an Age of Faction: Rethinking Federalist No. 76 on the Senate's Role in the Judicial Confirmation Process*, 30 OHIO N.U. L. REV. 235 (2004); The Honorable Stephanie K. Seymour, *The Judicial Appointment Process: How Broken Is It?*, 39 TULSA L. REV. 691 (2004).

<sup>3</sup> See *infra* Part IV (providing a comparative perspective of supermajority requirements for judicial nominations).

<sup>4</sup> See *infra* Part II (discussing an originalist argument for modifying the appointments process).

have suggested that a supermajority voting requirement in the Senate for judicial confirmations may be appropriate. This idea rankles some as radically reconstructing the Founders' constitutional architecture.<sup>5</sup> Others insist that supermajority voting would increase deliberation in the appointments process and lead to moderation, producing mainstream nominations.<sup>6</sup> Some scoff at the latter suggestion, pointing to the polarizing effect of the current filibusters, derided as a supermajority rule, that exacerbate partisan one-upsmanship while leaving judicial seats vacant and adding increased burdens to already heavy federal dockets.

A number of partisan groups have attacked the current Senate filibusters as unconstitutional, supporting a movement to reform Senate rules and decrease the number of votes needed to break a filibuster.<sup>7</sup> Many judge the filibuster, which brings in a supermajority rule through the back door, as unconstitutional for tampering with the Founders' vision of a Senate giving "[a]dvice and [c]onsent"<sup>8</sup> in the nominations process by a simple majority.<sup>9</sup> This Article does not address the filibuster's constitutionality or whether the filibuster rule should be changed.<sup>10</sup> Rather, it argues that the current use of filibusters to impede judicial appointments should not be taken as the bellwether of a true supermajority confirmation mechanism. While a true supermajority rule would empower a Senate minority, it would be more likely to produce moderation and consensus in the confirmation process than the filibuster. It would thus be a more beneficial long-term strategy for both parties, as opposed to engaging in a tit-for-tat game of partisan bickering that amplifies partisan sentiment and produces nominees outside of the mainstream. This Article draws on history, theory, and comparative analysis to suggest that such a rule would reinforce, rather than betray, the founding vision and that it would likely produce substantial structural benefits.

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<sup>5</sup> See, e.g., Michael J. Gerhardt, *The Confirmation Mystery*, 83 GEO. L.J. 395, 428–29 (1994) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994)).

<sup>6</sup> See, e.g., CARTER, *supra* note 5, at 196–98 (arguing that a supermajority requirement would maintain quality and “screen out mediocrity”).

<sup>7</sup> See, e.g., James L. Swanson, *Minority Rules: Filibustering the Constitution*, DAILY COMMENT. (Cato Inst., Washington, D.C.), May 6, 2003, at <http://www.cato.org/dailys/05-06-03-2.html>; Associated Press, *Bush Calls for Ban on Judicial Filibusters: Estrada Nomination Temporarily Pushed Aside*, at <http://www.cnn.com/2003/ALLPOLITICS/03/11/senate.estrada.ap/> (Mar. 11, 2003).

<sup>8</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>9</sup> See, e.g., John C. Eastman, *Filibuster Preservation: Does the Senate Filibuster Need Reform?*, NATIONAL REVIEW ONLINE, May 15, 2003, at <http://nationalreview.com/comment/commenteastman051503.asp>; Swanson, *supra* note 7; George Will, *Unconstitutional Filibuster*, at <http://www.townhall.com/columnists/georgewill/gw20030227.shtml> (Feb. 7, 2003).

<sup>10</sup> See, e.g., Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 239–45 (1997) (discussing the constitutionality of filibusters).

In Part I, this Article surveys the various supermajority rules proposed by lawyers and political scientists to modify the judicial confirmation process and suggests that proponents of such rules have failed to make an adequate case for the reform. Part II explores the drafting of the Appointments Clause and argues that the rise of durable political parties has undermined the structural integrity of the Founders' architecture for judicial appointments. This Part suggests that a supermajority rule would be more faithful to the founding vision than the current process. The Article then examines the Constitution's supermajority provisions in Part III and evaluates the theories that have been offered to explain and justify these departures from majority rule. This Part compares the proposed supermajority rule for judicial confirmations to the Constitution's supermajority provisions and measures it against the supermajoritarian theories. Part III concludes by advancing a set of normative and policy arguments for enacting a supermajority rule for judicial confirmations. Part IV puts the proposal in comparative perspective, analyzing how supermajority rules for judicial appointments have functioned in other constitutional systems. The Article concludes that, while filibusters are problematic in that they exacerbate partisan behavior and prevent consensus, a true supermajority rule would likely be moderation- and consensus-forcing. The Article recognizes that while this rule, like any constitutional amendment, would be difficult if not impossible to achieve politically, it would be a welcome reform to our constitutional architecture.

#### I. AN OVERVIEW OF THE SUPERMAJORITY RULE PROPOSALS FOR JUDICIAL CONFIRMATIONS

Analysts have proposed various schemes for reforming the judicial appointments process in recent years, many of them targeting politicized nominations. Perhaps surprisingly, life tenure has come under serious scrutiny from a bevy of academics. Making comparative reference to the constitutional courts of several European countries, notably Germany, theorists have argued that a single, non-renewable term for judges would lower the political stakes in the appointments process while ensuring that, if a particular judge became extreme once on the bench, he or she would not be able to serve beyond an allotted term.<sup>11</sup> The idea is not new. Thomas Jefferson championed it during the founding period, leaving open the possibility of reappointment, in order to make judges accountable for their

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<sup>11</sup> See, e.g., James E. DiTullio & John B. Schochet, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093 (2004); John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41 (2002); Michael J. Mazza, *A New Look at an Old Debate: Life Tenure and the Article III Judge*, 39 GONZ. L. REV. 131 (2004); Bruce Ackerman, *Judicial Extremism: A German Antidote*, L.A. TIMES, Feb. 19, 2003, at B15.

decisions.<sup>12</sup> Judge Learned Hand also attacked “the fatuity of the system” that grants life tenure.<sup>13</sup> A second proposal that has received attention from lawyers and political scientists in recent years is the establishment of a supermajority Senate voting rule for judicial confirmations.<sup>14</sup> Like a single, non-renewable term, a supermajority rule, it is argued, would reduce partisanship in the appointments process and push courts toward the center.<sup>15</sup>

Bruce Ackerman originally proposed a two-thirds supermajority for judicial confirmations as a means of assuring that “[n]o longer could an ideological President with a weak mandate use a slim Senatorial majority to ram through a constitutional revolution.”<sup>16</sup> Ackerman’s latest thoughts on judicial appointments urge us to look toward Germany’s constitutional court, created after World War II, and to consider its appointments procedure as an evolved mechanism.<sup>17</sup> Ackerman sees much to learn from post-war Europe, arguing that, “since World War II, many nations have followed the American example of judicial review, and half a century of comparative experience should begin to serve as a precious resource for our constitutional self-understanding.”<sup>18</sup> German law requires a two-thirds legislative supermajority for appointments to its highest court.<sup>19</sup> Ackerman’s account of the German system suggests that “[t]he mere existence of the supermajority rule serves as an effective deterrent,” setting up the parameters *ex ante* so that unorthodox or politically extreme candidates simply are not nominated.<sup>20</sup> Ackerman most values this moderation-forcing aspect of the supermajority rule and its potential, in the United States, “to keep the court within the mainstream of American constitutional values.”<sup>21</sup> Recognizing the expanded role the federal judiciary has come to play

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<sup>12</sup> Letter from Thomas Jefferson to William T. Barry (July 2, 1822), in 7 THE WRITINGS OF THOMAS JEFFERSON 256 (H.A. Washington ed., 1859). Thomas Jefferson made the following suggestion:

Let the future appointment of judges be for four or six years and renewable by the President and Senate. This will bring their conduct at regular periods under revision and probation and may keep them in equipoise between the general and special governments . . . . That there should be public functionaries independent of the nation . . . is a solecism in a republic of the first order of absurdity and inconsistency.

*Id.*

<sup>13</sup> GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 249 (1994) (quoting Learned Hand, *Normal Inequalities of Fortune*, NEW REPUBLIC, Feb. 6, 1915, at 5 (published anonymously)).

<sup>14</sup> See Ackerman, *supra* note 11.

<sup>15</sup> See *infra* text accompanying notes 25–30.

<sup>16</sup> 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 407 (1998).

<sup>17</sup> Ackerman, *supra* note 11.

<sup>18</sup> *Id.*

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

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

<sup>21</sup> *Id.*

since the Founding, exercising a power not foreseen at that time, Ackerman asks “whether the framers would have left appointments to the simple majority of the Senate if they had glimpsed the future influence of the Supreme Court.”<sup>22</sup> While Ackerman disregards the structural difference that likely accounts for the German approach — that German judges are appointed solely by the legislature — his historical question is prescient, as will be examined in greater detail in Part II.

Calvin Massey also constructed an early argument in favor of a supermajority voting rule for judicial confirmations.<sup>23</sup> Massey argued that a supermajority rule, by requiring agreement across the political spectrum, would produce nominations with “broad public support” and “a healthy modicum of bipartisan support.”<sup>24</sup>

Stephen Carter has similarly suggested raising the threshold of Senate consent required for confirmation from a simple majority to a two-thirds supermajority.<sup>25</sup> Carter finds much to commend in this proposal, above all that it would force the president to choose nominees who are not strongly identified with a particular ideology and who are generally respected, even by those who disagree with the nominees philosophically.<sup>26</sup> He argues that a supermajority rule would force moderation and consensus.<sup>27</sup> “Requiring a supermajority for confirmation, in other words, would encourage consensus candidates rather than predictable ideologies.”<sup>28</sup> Carter acknowledges a potential difficulty that a supermajority rule may present — empowering *minorities* to use scare tactics and other short-term strategies to defeat nominees they do not like.<sup>29</sup> Although he addresses this concern only in passing, Carter suggests that the supermajority rule would affect the appointments dynamic such that these tactics would be unappealing, resulting in the nomination of thoughtful judges who, while leaning to one side or the other, are fundamentally centrists.<sup>30</sup> The point that Carter does not make is that it is unlikely that short-term strategies or scare tactics employed by Senate minorities would prevail in a two-party system, where a game-theoretic, and the threat of tit-for-tat, would more likely emerge.

Significantly, Carter questions whether there is value in confirming some judges by a simple majority.<sup>31</sup> He dismisses the suggestion, however, stating that close

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<sup>22</sup> *Id.*

<sup>23</sup> Calvin R. Massey, *Getting There: A Brief History of the Politics of Supreme Court Appointments*, 19 HASTINGS CONST. L.Q. 1, 14–16 (1991).

<sup>24</sup> *Id.* at 15.

<sup>25</sup> CARTER, *supra* note 5, at 196–98.

<sup>26</sup> *Id.* at 197.

<sup>27</sup> *Id.* at 197–98.

<sup>28</sup> *Id.* at 198.

<sup>29</sup> *Id.* at 196–97.

<sup>30</sup> *Id.* at 196–98.

<sup>31</sup> *Id.* at 198.

votes serve only to confirm “slightly qualified or very controversial figures.”<sup>32</sup> On this issue there is, of course, room to differ. One could make a strong case for the value of having diverse viewpoints represented in the federal judiciary and that such diversity is best achieved by maintaining a majoritarian confirmation process. Put differently, a supermajority requirement, by forcing consensus, might produce a gallery of plain vanilla judges that fails to represent the spectrum of judicial approaches. A second concern merits consideration against the diversity value: balance. In the federal judiciary, ideological diversity must include balance as an essential underpinning and counterweight. Where balance fails over time, diversity also fails, and ideological appointments lead to an ideological judiciary. Of course, no neat institutional means of achieving and maintaining equipoise between balance and diversity exists. Politics — the alignment of the electoral majorities that select Congress and the president — prevails in this domain. While one could maintain faith in diversity nonetheless, leaving the question of balance to be determined by electoral trends, it is an open question whether this diversity value, achieved through a majoritarian confirmation process, outweighs the importance of having a mainstream judiciary composed of jurists respected on all sides.<sup>33</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> While, seen from one perspective, appointment by the executive subject to majority confirmation allows the federal bench to remain up to date with electoral majorities, life tenure makes the courts, to some degree, the residue of former administrations. Justice Jackson once wrote that “[t]he judiciary is . . . nearly always the check of a rejected regime on the one in being.” ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 315 (1941). Embedded in this political dynamic is a choice between two conceptions of balance: a balance involving the appointment of ideological judges from a variety of perspectives, on the one hand, and an institutionalized balance in the appointments process itself, designed to encourage the appointment of moderate judges acceptable across the political spectrum. There seems little virtue in the former, however, for what is achieved is only a possible balance of nomination power, subject to electoral outcomes. There is no institutionalized check against nominations that will continue to produce divided courts issuing plurality opinions. See John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 981–82 (2002). Ferejohn and Kramer argue that the current judicial appointment process achieves a different kind of equilibrium, balancing judicial independence with democratic accountability:

The beauty of using appointments to control the bench is that it fosters democratic accountability without in any way threatening judicial independence: The political branches have a regular means to keep the bench in line with prevailing attitudes, but individual judges are immune from further pressure or obligation once they have been appointed.

*Id.*

Carter over-simplified when he alleged that only slightly qualified or highly controversial nominees are confirmed by simple majorities.<sup>34</sup> Historically, he is correct that most appointments have been confirmed with overwhelming majorities.<sup>35</sup> Nonetheless, intense partisanship, as much as the merits of any particular nominee, may produce close votes. Whatever the factors affecting a particular vote, it is not a foregone conclusion that a judiciary potentially representing a broad spectrum of ideological and juridical perspectives would provide more perceived legitimacy, more continuity, or better decisions than one composed of judges who have earned respect as moderate jurists and who are palatable across the political spectrum. These latter values, deserving of as much consideration as the desire for jurisprudential diversity, may correspond more with a supermajoritarian confirmation process. Moreover, the suggestion that a supermajority rule would produce plain vanilla judges is at least overstated, if it does not belie the facts. The dichotomy between majoritarian diversity and supermajoritarian similarity is likely more illusory than real. One need only remember that Justice Stevens and Justice Scalia, the two poles of the current Court, were both confirmed unanimously.<sup>36</sup>

Dennis Mueller has also considered the idea of a supermajority rule for judicial appointments.<sup>37</sup> Mueller identified a potentially troublesome dynamic in majoritarian systems. Where simple majorities are required to enact legislation, and that same majority has the authority to confirm judicial appointments, he argues, the possibility of majority tyranny arises.<sup>38</sup> This dynamic is particularly worrying during periods of congressional-executive partisan alignment, where legislation and confirmations can proceed relatively unhindered. Mueller's proposed solution would give the minority a voice in judicial confirmations because, "[t]he requirement that the minority concur in the selection of judges is a safeguard against the minority's inevitable defeat in both the parliament and the courts."<sup>39</sup> The cost of such a supermajority rule, Mueller believes, is the potential for a deadlock or stalemate.<sup>40</sup> He sees a tradeoff between relative efficiency in the staffing of judicial positions on the one hand versus the impartiality of judicial nominees on the other.<sup>41</sup> He warns that the danger of a stalemate should not be overstated because differences on substantive issues do not preclude agreement "that a particular person can be

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<sup>34</sup> CARTER, *supra* note 5, at 198.

<sup>35</sup> See Massey, *supra* note 23, at 15 (concluding that historically only eight confirmations would have been reversed if a supermajority rule had been in effect, although recognizing that such a rule would have altered confirmation dynamics).

<sup>36</sup> See CARTER, *supra* note 5, at 197.

<sup>37</sup> DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 281–84 (1996).

<sup>38</sup> *Id.* at 281.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*



expected to interpret the law fairly.”<sup>42</sup> Mueller perhaps overstates the possibility of majority tyranny, considering that interbranch partisan alignment typically does not allow the party in power both to enact legislation and to remake the judiciary, because only a few positions on diverse courts require filling at any time. Nonetheless, he identifies a structural concern with majoritarian judicial confirmation processes that is not negligible.

John Ferejohn has made the case for a supermajority rule in the greatest detail.<sup>43</sup> Like Ackerman, he adopts a comparative approach. Remarking on the “judicialization” of politics in both the United States and Europe, characterized by a shift in power from legislatures to courts as law-making bodies, Ferejohn argues that, because of politicized appointments and life tenure for judges, courts are unlikely to exercise “nuanced restraint” in deciding cases.<sup>44</sup> He worries that when courts exercise legislative powers by regulating the conduct of political activity and even making substantive policy, their decisions often “appear to be politically motivated” and the appointments process becomes increasingly partisan.<sup>45</sup> Ferejohn argues that a supermajority rule for confirmations might alter the political dynamic of the Supreme Court, lending it greater perceived credibility.<sup>46</sup> “A supermajority requirement for appointment would mean that newly appointed judges would have to be acceptable across party and ideological lines. This would tend to discourage the appointment of ideologically extreme judges and would probably tend to lead to a court filled with judicial moderates.”<sup>47</sup> In an age when the Court is widely perceived as political, having lost some of its perceived legitimacy, this would be a welcome change. Ferejohn believes that, by changing the means of constituting the Court, the Court’s character would change as well. Ferejohn argues that a new appointments process would lead to greater consensus among the Justices:

[R]eforms . . . would likely lead to a different kind of internal decision-making culture in the Court. The members, being in broad agreement, would tend to see real chances for coming to consensual agreements on many cases. The Court would probably begin developing practices aimed at attaining broad agreement — even agreement based on widely shared principles — rather than settling for determining cases by the majoritarian rule of five. Such a development would lead to an increased confidence in the Court both among elected and

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<sup>42</sup> *Id.* at 282.

<sup>43</sup> Ferejohn, *supra* note 11.

<sup>44</sup> *Id.* at 66.

<sup>45</sup> *Id.* at 65–66.

<sup>46</sup> *Id.* at 66–67.

<sup>47</sup> *Id.*

appointed officials and among the public at large. Support for these conjectures can be obtained from the practices of other constitutional courts.<sup>48</sup>

The constitutional courts of Germany, Italy, and Spain, each constituted, at least in part, by supermajority legislative votes, produce consensus frequently, in stark contrast to the contemporary U.S. Supreme Court.<sup>49</sup> Ferejohn recognizes, however, that a supermajority rule could have costs.

There is a chance that the Court would be reflective of the broad center of U.S. politics but that significant minorities would not see their views reflected. There is also a real concern that reforming the Court will affect substantive outcomes. It is not at all clear, however, that a Court comprised of members who are broadly acceptable across the political spectrum will be hostile to minorities.<sup>50</sup>

Ferejohn's comment voices the concern alluded to by Carter when he questioned the potential value of ideological diversity on the federal bench.<sup>51</sup> It bears repeating that it is not clear that a supermajority rule would result in the nomination of judges of similar temperament, given the range of differences that remains within the mainstream.

Judith Resnik has also recently argued in favor of a supermajority rule in a *New York Times* editorial.<sup>52</sup> Resnik focuses on two characteristics of the federal judiciary in constructing her argument: that federal judges serve life terms and that the number of life-tenured federal judges has expanded from around 100 in 1901 to almost 1,000 today.<sup>53</sup> This expansion reflects the growing importance of the federal judiciary. That life-tenured judges have come to play such a central role in contemporary governance, a role not anticipated by the Founders, Resnik argues, should persuade us to rethink the manner in which these judges are appointed.<sup>54</sup> In an evenly divided Senate representing a politically divided country, Resnik seems to find it troublesome that a simple majority could shape the federal judiciary in its own partisan image, preferring instead a supermajority rule that would weed out the

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<sup>48</sup> *Id.* at 67.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> CARTER, *supra* note 5, at 196–98.

<sup>52</sup> Judith Resnik, *Supermajority Rule*, N.Y. TIMES, June 11, 2003, at A3.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

handful of nominees who are ill-chosen or far from the judicial mainstream.<sup>55</sup> Resnik speculates that, given the size of the federal judiciary, and the political energy and capital that the minority party would be required to expend to oppose a nominee, few nominees would be rejected.<sup>56</sup> When at least forty-one senators believe a nominee to be ill-suited to serve on the bench, however, she suggests that this should give us reason to pause.<sup>57</sup> Resnik's worry about minority voice in judicial nominations echoes Mueller's concern.<sup>58</sup> Given the courts' role in safeguarding minority interests, she argues, courts should perhaps be composed with a multivalent voice, taking into account minority interests.<sup>59</sup>

Michael Gerhardt, author of an authoritative text on the federal appointments process, has criticized supermajority rule proposals.<sup>60</sup> He presents five basic arguments against adopting a supermajority rule for judicial confirmations. First, citing President Clinton's nominations of Justices Ginsburg and Breyer, Gerhardt argues that "a supermajority requirement is not needed to encourage presidents to pick consensus candidates."<sup>61</sup> While Gerhardt is correct, the question is not whether a supermajority rule is *needed* to produce consensus candidates (indeed, in some political circumstances adequate incentives for such nominations may already exist), but rather whether consensus candidates are generally *probable* without a supermajority rule and whether such a rule would tend to produce consensus candidates more often, even in times of interbranch partisan alignment.

Second, Gerhardt contends that "a supermajority vote would not necessarily result in the appointment of superior judges."<sup>62</sup> Again, his argument skirts the issue. The primary motivation behind the supermajority rule would not be to produce superior judges, but to consistently produce mainstream nominees, increasing courts' perceived legitimacy and minimizing courts' perceived partisanship. A fitting response to Gerhardt's argument may be that while a supermajority rule may be unlikely to produce superior judges, it would also be unlikely to produce worse judges than the current process.

Third, Gerhardt argues that a supermajority rule could allow a "hostile faction in the Senate" to block confirmation of a popular president's nominee.<sup>63</sup> A supermajority rule would, by definition, empower a Senate minority, but the

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> See *supra* notes 37–40 and accompanying text.

<sup>59</sup> Resnik, *supra* note 52.

<sup>60</sup> MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 295–98 (2000).

<sup>61</sup> *Id.* at 296.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

political cost of opposing nominations would likely restrict such opposition to a small number of nominees.<sup>64</sup> This Senate minority would likely be susceptible to political pressure if it lacked good reason for its opposition. Finally, as Resnik argues, if a significant minority of senators strongly opposes a particular nominee, perhaps their opinion should be respected.<sup>65</sup>

Fourth, Gerhardt argues that the Constitution's supermajority rules characteristically create a presumption *against* the action in question, while constitutional structure creates a presumption *in favor of* confirmation.<sup>66</sup> Part III of this Article contends that the "presumption against" argument inadequately characterizes the Constitution's supermajority provisions and seems preconceived to make a supermajority rule unattractive in the judicial confirmations context.

Gerhardt is on surer footing when he argues that the Appointments Clause sought to balance efficiency in staffing with a check on executive power.<sup>67</sup> He fails to recognize, however, that political parties have undermined the majoritarian requirement of the Founders' Constitution, creating conditions for near-automatic confirmation in periods of interbranch partisan alignment. During these periods, the balance is upset, tipping precariously away from checks and balances toward efficiency. Intense partisanship in the staffing of the judicial branch may be too high a price to pay for efficiency. While the majority rule jettisons checks in periods of interbranch alignment, a supermajority rule would maintain a check on executive power notwithstanding Senate composition. The key question, then, is to what extent a supermajority rule would sacrifice efficiency in favor of checks and balances, and whether it would tend to produce stalemate rather than consensus candidates. Over time, the latter seems inevitable.

The various proposals for a supermajority judicial confirmation rule share much in common. Several adopt a comparative approach, urging us to learn from the constitutional experiments and the appointments processes in other parts of the world. Each focuses on how the federal courts have changed over time — in size, influence, and power — as reason to rethink the confirmation process. While the Framers may have accepted Montesquieu's assumption that the judiciary is a "null power" and an inherently weak institution, believing instead that the legislature presented the greatest threat of consolidating power,<sup>68</sup> history has proved this

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<sup>64</sup> Jesse J. Holland, *More Battles Likely on Bush Judge Picks*, ASSOCIATED PRESS NEWSWIRES, Nov. 5, 2004, Factiva, doc. APRS000020041105e0b500cff (noting that Democrats blocked only ten of President Bush's nominations to federal courts of appeals during his first term, while confirming 203 appointments).

<sup>65</sup> See *supra* note 57 and accompanying text.

<sup>66</sup> GERHARDT, *supra* note 60, at 41, 297.

<sup>67</sup> *Id.* at 297.

<sup>68</sup> Alexander Hamilton explained that "liberty can have nothing to fear from the judiciary alone." THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also *id.* at 437 n.64 (quoting 1 BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 186 (Hamer Publishing Co. 1966) (1748)) ("Montesquieu speaking of them, says, 'of the three

sentiment incorrect, spurring analysts to suggest revisiting the Constitution's institutional checks on the judiciary's composition. Minority protection is a common theme, as is the implicit suggestion that courts should be composed by incorporating minority voices. All of the authors point to the moderation-forcing dimension of the supermajority rule, lauding this revised confirmation procedure as likely to keep courts within the mainstream of judicial and constitutional values and to produce consensus-seeking courts that have greater perceived legitimacy. The following Parts of this Article elaborate on each of these points — revisiting the Founders' debates on the appointment power via the concerns most prominent at the time, examining the theory behind supermajority rules while analyzing their potential as moderation- and consensus-forcing mechanisms, and making a more complete comparative analysis of judicial appointments procedures.

## II. AN ORIGINALIST ARGUMENT FOR MODIFYING THE APPOINTMENTS PROCESS

Other than hoping to avoid the appointment of judges with limited judicial skill, the Framers worried little over how the judicial appointments process would influence the courts. Influenced heavily by Montesquieu, they understood the judiciary, defined by its passive role of receiving and resolving cases or controversies, as the least powerful of all the branches.<sup>69</sup> The Founders assumed that judicial power was not something to fear.<sup>70</sup> The main concerns dominating the

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powers above mentioned, the JUDICIARY is next to nothing.”). Hamilton made the following comparison of the judiciary to the other branches of government:

Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, *the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution*; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

*Id.* at 522 (emphasis added).

<sup>69</sup> Montesquieu wrote that, “[o]f the three powers above mentioned, the judiciary is next to nothing.” 1 THE SPIRIT OF THE LAWS 156 (Thomas Nugent trans., 1949).

<sup>70</sup> THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Hamilton explained the relationship of the judiciary to the legislative and executive branches: [T]he judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the

judicial appointments debate at the Constitutional Convention revolved around state power and the relative strength of the legislative and executive branches. As will be argued below, the Appointments Clause ultimately sought to address these issues by striking a balance between political accountability in the executive branch and a political check in the Senate. In the Framers' constitutional architecture, one based on the supposedly inherent opposing institutional interests of the three branches, life tenure was intended as the main guarantor of judicial independence. Majority consent by the Senate was deemed an adequate check on the executive appointment power. Those who designed this architecture of opposing institutional interests considered the evolution of durable political parties allowing for inter-branch coordination an unthinkable and unwelcome development. The growth of durable parties would eventually undermine the structural integrity of this system of checks and balances based on institutional interests. The contemporary assumption that the Founders envisioned presidential appointment with approval by a simple majority of the Senate is thus anachronistic, obscuring the original inter-branch logic from which the "advise and consent" formulation was conceived. Moreover, recognizing the power that courts have come to wield,<sup>71</sup> Montesquieu no longer provides a workable guiding principle. These considerations should perhaps make us rethink the judicial appointments process.

As much as any clause in the Constitution, the Appointments Clause, written in terse, misleadingly simple language, has a drafting history that does little to clarify its intended application or scope. Not once in the records of the Constitutional Convention is the phrase "advise and consent" discussed or analyzed. To the

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other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: I mean, so long as the judiciary remains truly distinct from both the legislative and executive.

*Id.*

<sup>71</sup> See, e.g., ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS*, at viii–ix (1941); FRANK R. STRONG, *JUDICIAL FUNCTION IN CONSTITUTIONAL LIMITATION OF GOVERNMENTAL POWER 153–70*, 155 (1997) (describing the "threat of an imperial judiciary"). Justice Jackson described the judiciary's ascendancy to power as follows:

The Supreme Court has, from the very nature of its functions, been deep in power politics from the opening of the Court . . . It has moved with such mastery that by 1933 it had established a supremacy that could deny important powers to both state and nation on principles nowhere found in the Constitution itself, or could allocate powers as between state and nation, or between Congress and the executive departments, and could largely control the economic and social policy of the country.

JACKSON, *supra*, at viii–ix.

contrary, that drafting history raises questions about what a judicial appointments process, calibrated to embody the Framers' concerns, should look like. This Part argues that, while evidence from the Constitutional Convention provides little insight into the Framers' decision to adopt the "advice and consent" language, what evidence there is nonetheless sheds significant light on the fundamental concerns that occupied the Founders in drafting the Appointments Clause. These concerns emerge in sharp relief from both the Convention records and the *Federalist Papers*. As political parties came to play a central role in government, however, the structure the Framers chose to address their concerns has proved less robust and durable than expected. The prominence of institutionalized political parties, which make alliances between Congress and the executive possible and which the Framers failed to anticipate, have undermined the original architecture of checks and balances, particularly when Congress and the executive are controlled by the same party. This Part argues that such alignment highlights a significant failure in the Framers' architecture. With the benefit of hindsight, remaining true to the founding vision requires focusing on the concerns that animated the original architecture rather than that architecture itself. A supermajority voting rule may better embody the Founders' concerns than the consent of a simple Senate majority.

The history of the Appointments Clause has been well-documented elsewhere.<sup>72</sup> I propose only to provide a brief sketch of that history to demonstrate the texture of the debates at the Constitutional Convention and to highlight the concerns that motivated the Framers in drafting the clause.

The original Virginia Plan presented at the Constitutional Convention proposed vesting the judicial appointment power in the entire legislature.<sup>73</sup> A number of alternative proposals were tabled on June 5, the first day the Convention occupied itself with the appointments question.<sup>74</sup> James Wilson of Pennsylvania spoke in favor of appointment by the executive, worrying that if this task were left to the legislature, "[i]ntrigue, partiality, and concealment were the necessary consequences."<sup>75</sup> Wilson argued that vesting the appointment power in the president would ensure responsibility, or political accountability, in one person.<sup>76</sup> John Rutledge of South Carolina dismissed Wilson's proposal, arguing that such a

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<sup>72</sup> See, e.g., Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037 (1987); James E. Gauch, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337 (1989); Matthew D. Marcotte, *Advice and Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 519 (2001–2002).

<sup>73</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., Yale Univ. Press rev. ed. 1937) (1911) [hereinafter 1 FARRAND].

<sup>74</sup> 1 *id.* at 115–29.

<sup>75</sup> 1 *id.* at 119.

<sup>76</sup> 1 *id.*

provision would tend too much towards monarchy.<sup>77</sup> James Madison argued against appointment by the entire legislature, echoing Wilson's concerns and fearing that members would distribute appointments among themselves, bringing to the bench legislative talents but not the requisite judicial qualifications.<sup>78</sup> Although Madison also rejected appointment by the executive and seemed to favor vesting the power in the Senate, he stopped short of making an affirmative proposal, moving only to strike the then existing provision, "appointment by the Legislature," and to consider the issue at a later date.<sup>79</sup> On that same day, Alexander Hamilton proposed that the executive nominate judges to be rejected or approved by the Senate.<sup>80</sup> The delegates remained divided over the issue, as is evidenced by Charles Pinckney's statement that he would move to restore the original language providing for legislative appointment when the clause next came before the Convention for debate.<sup>81</sup>

By the end of the day on June 5, the four basic approaches to the appointment power that would resurface throughout the Convention had been outlined — appointment by the entire legislature, by the Senate alone, by the president alone, or by an interbranch mechanism. The concerns raised in these discussions — on the one hand, apprehension of monarchic power and, on the other, warnings of cabal, intrigue, and faction — would resound each time the Convention addressed the appointment power. In the face of these competing perspectives, the Convention accepted Madison's proposal to strike, and the day ended by removing the Virginia Plan's provision from the document.<sup>82</sup>

The Convention reconsidered the appointments provision on June 13, when Edmund Randolph resubmitted an amended version of the Virginia Plan, with Supreme Court Justices to be appointed by the Senate.<sup>83</sup> No records reflect any discussion between June 5 and June 13. Pinckney and Roger Sherman, the delegate from Connecticut, moved to amend the language and return the appointment power to the entire legislature.<sup>84</sup> Madison restated his objections to appointment by the legislature as a whole, emphasizing the lower house's particular susceptibility, by virtue of its size, to improper influence.<sup>85</sup> Arguing that the Senate, being less numerous and more select than the entire legislature, would better judge the quality of nominees, Madison apparently convinced his fellow delegates.<sup>86</sup> Sherman and Pinckney withdrew their motion for appointment by the entire legislature, and

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<sup>77</sup> 1 *id.*

<sup>78</sup> 1 *id.* at 120.

<sup>79</sup> 1 *id.*

<sup>80</sup> 1 *id.* at 128.

<sup>81</sup> 1 *id.* at 121.

<sup>82</sup> 1 *id.* at 120.

<sup>83</sup> 1 *id.* at 230.

<sup>84</sup> 1 *id.* at 232.

<sup>85</sup> 1 *id.* at 232–33.

<sup>86</sup> 1 *id.* at 233.



Madison's proposal was agreed to unanimously and apparently without debate.<sup>87</sup> The issue thus seemed to have been decided in favor of Senate appointment early in the Convention.

By July 18, however, the landscape had shifted for reasons not explicitly addressed by Convention delegates in the records. A number of new proposals concerning the appointment power were introduced that day, and, although the delegates voted on three separate proposals, they ended the day by deciding to resume the debate at a later date.<sup>88</sup> A proposal to resurrect the original Virginia Plan provision vesting the appointment power in the whole legislature was defeated by a two-six vote.<sup>89</sup> The "advice and consent" formulation, echoing Hamilton's June 5 proposal but proposed on this day for the first time by Nathaniel Gorham of Massachusetts, was also defeated four-four.<sup>90</sup> Gorham argued that this solution would be better than appointment by the Senate, which, as a numerous body, would have less political accountability than the executive.<sup>91</sup> Finally, consideration of a new proposal by Madison to vest appointment in the executive subject to a two-thirds Senate veto was postponed.<sup>92</sup> That proposal was later rejected with a three-six vote on July 21,<sup>93</sup> and, after a proposal by Oliver Ellsworth urging legislative nomination subject to a presidential veto and a two-thirds override by the Senate (the process adopted for the enactment of legislation),<sup>94</sup> appointment by the Senate was reapproved with a six-three vote.<sup>95</sup>

The tenor of the debate suggests what happened between June 13 and July 18 to unsettle the earlier agreement to vest the appointment power in the Senate. On June 15, William Patterson, despite having agreed to the Virginia Plan's language, introduced the New Jersey Plan for the Convention's consideration.<sup>96</sup> This plan proposed a radical recalibration of the representative structure of the legislative branch, with states represented equally, regardless of size or population.<sup>97</sup> Under the New Jersey Plan, Supreme Court Justices would have been appointed by the executive.<sup>98</sup> While considering Patterson's proposal, the Convention never directly addressed the appointments provision, and the draft language remained as it had been, allocating the appointment power to the Senate. The Great Compromise,

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<sup>87</sup> 1 *id.*

<sup>88</sup> 2 *id.* at 37–38.

<sup>89</sup> 2 *id.* at 37.

<sup>90</sup> 2 *id.* at 41, 38.

<sup>91</sup> 2 *id.* at 41.

<sup>92</sup> 2 *id.* at 38.

<sup>93</sup> 2 *id.* at 71–72.

<sup>94</sup> 2 *id.* at 81.

<sup>95</sup> 2 *id.* at 72.

<sup>96</sup> 1 *id.* at 241–45.

<sup>97</sup> 1 *id.*

<sup>98</sup> 1 *id.* at 244.

however, giving each state equal representation in the Senate while maintaining proportional representation in the House, was struck on July 16.<sup>99</sup> Madison, who had been the most vocal champion of lodging the appointment power in the Senate, knew that the Compromise made Senate appointment less palatable, giving small states disproportionate power over judicial appointments.<sup>100</sup> Considering this development, Madison proposed on July 18 that the president appoint Justices subject to a two-thirds Senate veto.<sup>101</sup> Madison gave three reasons for his proposal, the third directly addressing the Great Compromise and the disproportionate power small states would wield under an appointment power held by the Senate.<sup>102</sup> Madison seemed to worry that the Senate's new representative structure, and even maintaining the Great Compromise, required vesting the appointment power in the executive with some means of Senate oversight. Despite the fundamental change in the proposed structure of the legislative branch wrought by the Great Compromise and Madison's misgivings, the Convention voted to retain the existing allocation of the appointment power in the Senate.<sup>103</sup>

While proposals to share the appointment power between the president and the Senate had emerged early in the Convention when Hamilton informally suggested that the Senate have the right to reject or approve the president's nominations,<sup>104</sup> and once again when Gorham introduced the "advice and consent" language, the Convention steadfastly maintained the draft rule vesting the appointment power in the Senate throughout the Convention. On July 24, the Convention appointed a five-member Committee of Detail, chaired by John Rutledge of South Carolina, to prepare a draft constitution encompassing the results of the deliberations up to that

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<sup>99</sup> 2 *id.* at 15.

<sup>100</sup> 2 *id.* at 80–81.

<sup>101</sup> 2 *id.* at 44.

<sup>102</sup> Madison provided the following explanation of the third reason for his proposal:

[T]hat as the 2d. b. was very differently constituted when the appointment of the Judges was formerly referred to it, and was now to be composed of equal votes from all the States, the principle of compromise which had prevailed in other instances required in this that their shd. be a concurrence of two authorities, in one of which the people, in the other the states, should be represented. The Executive Magistrate wd be considered as a national officer, acting for and equally sympathising with every part of the U. States. If the 2d. branch alone should have this power, the Judges might be appointed by a minority of the people, tho' by a majority, of the States, which could not be justified on any principle as their proceedings were to relate to the people, rather than to the States: and as it would moreover throw the appointments entirely into the hands of ye Nthern States, a perpetual ground of jealousy & discontent would be furnished to the Southern States.

2 *id.* at 80–81.

<sup>103</sup> 2 *id.* at 72.

<sup>104</sup> 1 *id.* at 128.

point.<sup>105</sup> The final language of the Appointments Clause referred to the Committee was, “That a national Judiciary be established to consist of one Supreme Tribunal — the Judges of which shall be appointed by the second Branch of the national Legislature.”<sup>106</sup> The Committee made only minor changes, returning a draft to the whole Convention that read, “[t]he Senate of the United States shall have power . . . to appoint . . . Judges of the supreme Court.”<sup>107</sup>

On August 23, the Convention considered all of Article IX, section 1, which then read, “[t]he Senate of the U.S. shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court.”<sup>108</sup> Convention records reveal significant disagreement over the treaty power.<sup>109</sup> Randolph observed that “almost every Speaker had made objections to the clause as it stood,”<sup>110</sup> and consideration of it was postponed.<sup>111</sup> While the delegates did not specifically address the appointment power, as part of the section containing the treaty power, consideration of the Appointments Clause was also postponed.<sup>112</sup> Sherman moved to refer all postponed issues to the Committee of Eleven, composed of a member from each state, on August 31.<sup>113</sup> Without leaving a record of its reasons, when the Committee of Eleven reported to the Convention on September 4, the Appointments Clause included Gorham’s formulation, shifting nomination to the executive subject to the “advice and consent” of the Senate.<sup>114</sup> Curiously, without further discussion, the Convention as a whole approved the clause unanimously on September 7, just ten days before it adopted the new Constitution.<sup>115</sup>

While this drafting history provides little insight into the choice of the Appointments Clause’s final language, Convention debates nonetheless underscored the Founders’ key concerns. Delegates focused on four issues in their debates over the appointment power: (1) responsibility, a term synonymous with the modern understanding of political accountability; (2) corruption and intrigue that would produce poor appointments; (3) the ability to evaluate nominees’ qualifications; and (4) security, a legislative check many delegates believed necessary to counter an appointment power vested in the executive. While these issues reflected a split among delegates who feared a strong executive on the one hand and those who were

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<sup>105</sup> 2 *id.* at 97–98.

<sup>106</sup> 2 *id.* at 132.

<sup>107</sup> 2 *id.* at 183.

<sup>108</sup> 2 *id.* at 392.

<sup>109</sup> 2 *id.* at 392–93.

<sup>110</sup> 2 *id.* at 393.

<sup>111</sup> 2 *id.* at 382–83.

<sup>112</sup> 2 *id.* at 383.

<sup>113</sup> 2 *id.* at 473, 481.

<sup>114</sup> 2 *id.* at 498.

<sup>115</sup> 2 *id.* at 538–39.

distrustful of legislatures on the other,<sup>116</sup> consideration of state interests — specifically the allocation of power between small and large states — undergirded each of these considerations. The Appointments Clause ultimately embodied a compromise both between small and large states and between those who feared and those who believed in a strong executive.<sup>117</sup> It may be the case that the Appointments Clause was more a compromise on executive strength,<sup>118</sup> but the Great Compromise certainly altered the terms of the debate, undermining the previous agreement to vest the appointment power in the Senate.

Before the Great Compromise, the first three issues were predominant in the debates. Wilson and Gorham were two of the most outspoken proponents of responsibility. Wilson argued for appointment by the executive so that judges “might be appointed by a single, responsible person.”<sup>119</sup> Worries about corruption were a corollary to this concern. Appointment by a numerous body, Wilson argued, would result in concealment and intrigue, allowing no one to be held politically accountable for good or bad appointments.<sup>120</sup> Gorham preferred nomination by the executive subject to the advice and consent of the Senate because “[t]he Executive would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone.”<sup>121</sup>

The debate over the ability to evaluate nominees’ qualifications arose in several contexts and was employed by proponents of numerous motions. On July 18, Gunning Bedford and Gorham exchanged arguments about whether the Senate or the executive would be better able to evaluate qualifications.<sup>122</sup> Bedford contended that because the Senate was composed of members from various regions, it would have more personal knowledge of potential candidates while the executive would be forced to rely on the opinions of others in choosing nominees.<sup>123</sup> Gorham countered that senators would have to rely as much as the president on citizens of the various states for advice and suggested that, this criterion being equal, political

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<sup>116</sup> Oliver Ellsworth, Roger Sherman, Elbridge Gerry, Ben Franklin, George Mason, and John Rutledge each “feared that granting” too much power over appointments to the executive “would lead to monarchy.” GERHARDT, *supra* note 60, at 17. Gouverneur Morris, James Wilson, James Madison, Nathaniel Gorham, and Alexander Hamilton worried about the intrigue and cabals that would result if the appointments power were vested in the national legislature. *Id.*

<sup>117</sup> *Id.* at 27.

<sup>118</sup> *Id.* (arguing that the Appointments Clause “was less a compromise (at least explicitly) between larger and smaller states than it was a compromise ultimately between those who believed in and those who feared a strong executive”).

<sup>119</sup> 1 FARRAND, *supra* note 73, at 119.

<sup>120</sup> 1 *id.*

<sup>121</sup> 2 *id.* at 43.

<sup>122</sup> 2 *id.*

<sup>123</sup> 2 *id.*

accountability was a more appropriate metric by which to determine where the appointment power should be lodged.<sup>124</sup>

While few scholars have emphasized the centrality of the Great Compromise to the Appointments Clause, its importance cannot be overstated.<sup>125</sup> The Great Compromise shaped the ultimate debate over the Appointments Clause, causing some influential delegates to rethink previously settled positions. The Supreme Court, relying on statements made by Sherman and Ellsworth in the Connecticut ratification debates,<sup>126</sup> has acknowledged this fact, stating that “the important purpose of those who brought about the restriction [on the executive authority to appoint justices] was to lodge in the Senate, where the small States had equal representation with the larger States, power to prevent the president from making too many appointments from the larger States.”<sup>127</sup> While some have rejected this position as a *post hoc* defense of the Constitution, arguing that the debates over the appointment power occurred between those who favored and those who feared a strong executive,<sup>128</sup> both considerations played an important role.

The political compromise that changed the representative structure of the Senate profoundly influenced the Convention, producing a backlash among large states because all the powers in the draft Constitution had been based on proportional representation in both houses of the legislature.<sup>129</sup> Two days after the compromise, Madison recognized that judicial appointment by the Senate would be less palatable under the new conditions. Having voiced opposition to appointment by the whole legislature since the beginning of the Convention and having been the strongest advocate in favor of Senate appointment, Madison introduced a series of proposals

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<sup>124</sup> 2 *id.*

<sup>125</sup> James Gauch has demonstrated the importance of the Great Compromise in the debates over the Appointments Clause. Gauch, *supra* note 72, at 347–50.

<sup>126</sup> 3 FARRAND, *supra* note 73, at 99 (“The equal representation of the states in the senate, and the voice of that branch in the appointment to offices, will secure the rights of the lesser, as well as of the greater states.”).

<sup>127</sup> *Myers v. United States*, 272 U.S. 52, 119–20 (1926). The Court’s emphasis was misplaced in that it presumed Senate confirmation to be a deviation from appointment by the executive alone. As the foregoing history demonstrates, the important shift during the debates was from appointment by the Senate alone, approved in multiple Convention votes, to executive nomination with Senate confirmation. William Davie, a delegate to the Constitutional Convention from North Carolina, also explained the Appointments Clause as a compromise between small and large states. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 122 (Jonathan Elliott ed., J.B. Lippincott Co. 2d ed. 1941) (1836). “The small states would not agree that the House of Representatives should have a voice in the appointment to offices; and the extreme jealousy of all the states would not give it to the President alone.” *Id.*

<sup>128</sup> JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE 26 (1968).

<sup>129</sup> See 2 FARRAND, *supra* note 73, at 17–18.

on July 18, each involving nomination by the executive with confirmation by the Senate.<sup>130</sup> Randolph, architect of the Virginia Plan and one-time outspoken proponent of nomination by the entire legislature, also changed his opinion in the days after the Great Compromise. On July 18, Randolph's fear of a monarchic executive continued to dominate his thinking. He went so far as to propose that political accountability in the Senate could be achieved by requiring senators to record their votes.<sup>131</sup> Only three days later, however, Randolph announced himself in favor of appointment by the executive with some Senate oversight, valuing "the responsibility of the Executive as a security for fit appointments," and stating that "[a]ppointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications."<sup>132</sup> As Gauch has argued, "[i]t is unlikely that Randolph suddenly realized that appointment by the legislature or the Senate, which he had supported since submitting the Virginia Plan nearly two months before, had problems."<sup>133</sup> He more likely reconsidered his position in light of the Great Compromise, deciding that appointment by the executive was a more attractive alternative than giving the small states disproportionate power over judicial appointments.<sup>134</sup>

Randolph's change of heart provides a window into the interlocking considerations that ultimately shaped the Appointments Clause — the allocation of power between small and large states and disagreements over how strong the executive should be. While the Great Compromise played an important role in the debates over the Appointments Clause, far from determining the Clause's content, it only set the parameters for the debate that would follow, making Senate appointment, as well as appointment by the entire legislature or the executive alone, no longer politically tenable. Once those parameters were set, two overriding considerations came to underpin the debates: the need to balance responsibility (political accountability) and security (a check on executive authority).

The Great Compromise seems to have convinced Madison, who was both fearful of a powerful president and dubious about appointment by the entire legislature, that it would be necessary to blend the executive and legislative branches in the judicial appointments context. Between July 18 and July 21, Madison made a series of proposals for revising the Appointments Clause.<sup>135</sup> He first proposed that Justices be appointed by the executive, subject to approval of one-third of the Senate, although he had originally recorded the figure as two-fifths.<sup>136</sup> In defense of his motion, Madison argued that "[t]his would unite the advantage of *responsibility*

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<sup>130</sup> 2 *id.* at 42–44.

<sup>131</sup> 2 *id.* at 43.

<sup>132</sup> 2 *id.* at 81.

<sup>133</sup> Gauch, *supra* note 72, at 345–46.

<sup>134</sup> *See id.* at 346.

<sup>135</sup> 2 FARRAND, *supra* note 73, at 42–44, 80–81.

<sup>136</sup> 2 *id.* at 42 & n.6.

in the Executive with the *security* afforded in the 2d. branch agst. any incautious or corrupt nomination by the Executive."<sup>137</sup> He next proposed that the president's nomination be subject to a two-thirds Senate veto.<sup>138</sup> Ellsworth, among others, criticized the proposal as giving too much authority to the president, and it was defeated, presumably because such a significant veto requirement would not provide an effective security, or check, on the executive.<sup>139</sup> As interesting as the proposal, however, were the reasons Madison offered for this approach. While his third reason, as noted above, addressed the Great Compromise, his first and second reasons emphasized responsibility, or political accountability, and security, respectively.<sup>140</sup> In his third proposal, Madison made clear that he was not wed to the two-thirds veto requirement, proposing that the executive appoint judges subject to veto by a Senate majority.<sup>141</sup> As noted above, on July 21, the Convention voted three-six to reject executive appointment subject to a Senate veto.<sup>142</sup> They voted six-three in favor of maintaining the clause as it was, with the appointment power vested in the Senate.<sup>143</sup> In both votes, the large states, Pennsylvania, Virginia, and Massachusetts, constituted the minority.<sup>144</sup>

Although the Convention reconfirmed appointment by the Senate on July 21, sending the issue to the Committee of Eleven in late August because of disagreement over the treaty power, Madison's post-Compromise proposals demonstrate a new focus on balancing the issues of responsibility and security, or, in contemporary

<sup>137</sup> 2 *id.* at 42–43 (emphasis added).

<sup>138</sup> 2 *id.* at 44.

<sup>139</sup> See, e.g., JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 345 (Ohio Univ. Press 1984) (1840).

<sup>140</sup> Madison stated as his reasons for the motion:

1 that it secured the responsibility of the Executive who would in general be more capable & likely to select fit characters than the Legislature, or even the 2d. b. of it, who might hide their selfish motives under the number concerned in the appointment — 2 that in case of any flagrant partiality or error, in the nomination, it might be fairly presumed that 2/3 of the 2d. branch would join in putting a negative on it. 3. that as the 2d. b. was very differently constituted when the appointment of the Judges was formerly referred to it, and was now to be composed of equal votes from all the States, the principle of compromise which had prevailed in other instances required in this that their shd. be a concurrence of two authorities, in one of which the people, in the other the states, should be represented. The Executive Magistrate wd be considered as a national officer, acting for and equally sympathising with every part of the U. States.

2 FARRAND, *supra* note 73, at 80–81.

<sup>141</sup> 2 *id.* at 82.

<sup>142</sup> 2 *id.* at 71–72.

<sup>143</sup> 2 *id.* at 72.

<sup>144</sup> 2 *id.* at 72 n.3.

terms, political accountability and checks and balances.<sup>145</sup> These two concerns were eventually embodied in the “advice and consent” language adopted by the Convention delegates. Gouverneur Morris aptly summarized the nature of the “advice and consent” compromise on September 7, when the final formulation was approved by the Convention, saying “as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.”<sup>146</sup> These two concerns, as much for the wisdom they contain as for their important role in balancing the various interests threatening to undo the Constitutional Convention, above all tensions between large and small states and disagreements over the extent of executive power, should drive our interpretation of the Appointments Clause today.

Commentary in *The Federalist* reflects this desire to balance “responsibility” and “security.” In several of his publications as Publius, Hamilton addressed these two concerns. While he believed that “[t]he sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation,” he indicated that individual accountability should be supplemented.<sup>147</sup> “The possibility of rejection [by the Senate] would be a strong motive to care in proposing.”<sup>148</sup> In *The Federalist No. 77*, Hamilton addressed this balance directly:

[T]he restraint [imposed by the Senate] would be salutary, at the same time that it would not be such as to destroy a single advantage to be looked for from the uncontrouled agency of that magistrate. The right of nomination would produce all the good of that of appointment and would in a great measure avoid its ills.<sup>149</sup>

Having distinguished between the executive and Senate powers concerning appointment in *The Federalist No. 66*, Hamilton emphasized the value of the “advice and consent” language as maintaining political accountability while

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<sup>145</sup> It is tempting to speculate, given the large states’ opposition to vesting the appointment power in the post-compromise Senate, that Madison negotiated behind the scenes to ensure some form of appointment by the executive with approval by the Senate.

<sup>146</sup> 2 FARRAND, *supra* note 73, at 539.

<sup>147</sup> THE FEDERALIST NO. 76, at 510–11 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>148</sup> *Id.* at 513.

It will readily be comprehended, that a man, who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body; and that body an entire branch of the Legislature.

*Id.*

<sup>149</sup> THE FEDERALIST NO. 77, at 517 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).



avoiding vesting too much authority in the executive.<sup>150</sup> Madison had invoked similar logic in *The Federalist No. 38*, implying his approval of an active oversight role for the Senate when he argued that the Appointments Clause was designed to strike a balance between executive power and legislative involvement beginning at the early stages of the appointment process.<sup>151</sup>

If a change from confirmation by majority vote to a supermajority rule were to be considered, some might find it tempting to resist by citing Madison's proposal that presidential nominations be subject to a two-thirds Senate veto.<sup>152</sup> In recent Senate testimony, in fact, this single proposal has been distorted and presented as evidence that Madison preferred a "preeminent" role for the president in judicial appointments.<sup>153</sup> For both structural and historical reasons, this emphasis is misplaced. Structurally, at least one supermajority veto exists in the Constitution.<sup>154</sup> While a supermajority is required to override a presidential veto of legislation — essentially a veto of the president's veto — this structure is not analogous to the appointments context. In the appointments context, presidential and Senate authority is blended. Other interbranch blendings of power in the Constitution, most notably the treaty power, require Senate approval.<sup>155</sup> Both because the supermajority veto proposal lacked coherence with other supermajority provisions that were approved, and because many delegates at the Convention feared that a supermajority veto would vest too much power in the president, this proposal of Madison's did not garner much traction.<sup>156</sup> Moreover, the supermajority veto was only one of Madison's proposals and not the most prominent. Madison himself said that "[h]e had given this form to his motion chiefly to vary it the more clearly from one which had just been rejected."<sup>157</sup> The rest of his proposals would have required Senate approval of the president's nominations, by minority, majority, or supermajority vote.<sup>158</sup> Judging by the number of "veto" and "approval" proposals Madison made, Madison arguably viewed Senate approval as the best means of exercising a robust check on the executive's nomination power.

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<sup>150</sup> THE FEDERALIST NO. 66 (Alexander Hamilton).

<sup>151</sup> THE FEDERALIST NO. 38, at 245 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>152</sup> 2 FARRAND, *supra* note 73, at 44.

<sup>153</sup> *Hijacking the Confirmation Process: The Filibuster Returns to Its Brigand Roots: Hearing on "Judicial Nominations, Filibusters, and the Constitution: When a Majority Is Denied Its Right To Consent Before the S. Judiciary Subcomm. on the Constitution*, 108th Cong. 7 (2003) (prepared testimony of Dr. John C. Eastman, Professor of Constitutional Law, Chapman University School of Law, and Director, The Claremont Institute Center for Constitutional Jurisprudence), available at <http://www.claremont.org/static/pdf/eastman-testimony.pdf> (May 6, 2003).

<sup>154</sup> U.S. CONST. art. I, § 7, cl. 3.

<sup>155</sup> *Id.* art. II, § 2, cl. 2.

<sup>156</sup> See 2 FARRAND, *supra* note 73, at 80–82.

<sup>157</sup> 2 *id.* at 82.

<sup>158</sup> 2 *id.* at 42, 80.

The Supreme Court has made consistent reference to these founding documents, records from the Constitutional Convention and *The Federalist*, in interpreting the Appointments Clause. While the Court has never examined what balance of power the language of the Appointments Clause establishes between the president and the Senate, and may be unlikely to do so,<sup>159</sup> a number of cases have determined whether particular appointed officials are subject to the advice and consent of Congress before they may serve.<sup>160</sup> In these cases, the Court has given priority to founding documents in interpreting the Appointments Clause.<sup>161</sup> While the Supreme Court recognized in *Edmond v. United States* that “[t]he Framers anticipated that the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body,”<sup>162</sup> the Court also noted that the Senate’s participation “serves both to curb Executive abuses of the appointment power, and ‘to promote a judicious choice of [persons] for filling the offices of the union.’”<sup>163</sup> In *Freytag v. United States*, the Court explained that the Appointments Clause, and “the separation-of-powers concept embedded” therein, guards against “the danger of one branch’s aggrandizing its power at the expense of another branch, . . . and preserves another aspect of the Constitution’s structural integrity by preventing the diffusion of the appointment power.”<sup>164</sup> The opinion went on to emphasize that “the structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic.”<sup>165</sup> These cases suggest that it is appropriate to use historical evidence to determine how best to preserve the structural integrity of the Appointments Clause. Just as that integrity can be undermined by one branch’s aggrandizing moves and by the diffusion of the appointment power, it can equally be undermined by interbranch partisan alignments that undo the carefully calibrated structural checks and balances that were central to the Framers’ Constitution. The Founders’ structural integrity, based on balancing institutional interests that were believed to be inherently antagonistic, is undermined in

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<sup>159</sup> See generally Lee Renzin, Note, *Advice, Consent, and Senate Inaction — Is Judicial Resolution Possible?*, 73 N.Y.U. L. REV. 1739, 1752–56 (1998) (arguing that judicial resolution of the meaning of “advice and consent” is unlikely).

<sup>160</sup> See, e.g., *Edmond v. United States*, 520 U.S. 651, 666 (1997) (holding that Coast Guard criminal appeals judges are not subject to advice and consent because they are “inferior Officers” who may be appointed by Secretary of Transportation); *Freytag v. Comm’r*, 501 U.S. 868, 892 (1991) (holding that tax court judges are subject to advice and consent because they exercise significant powers comparable to those of Article III courts); *Morrison v. Olson*, 487 U.S. 654, 696–97 (1988) (holding that independent counsel are not subject to advice and consent because authority for appointments is vested in judiciary).

<sup>161</sup> *Edmond*, 520 U.S. at 659–60, 663; *Freytag*, 501 U.S. at 870, 883–84; *Morrison*, 487 U.S. at 674–75.

<sup>162</sup> 520 U.S. at 659.

<sup>163</sup> *Id.* (citations omitted).

<sup>164</sup> 501 U.S. at 878.

<sup>165</sup> *Id.* at 880.

our modern partisan system when there is partisan alignment between the Senate and the executive branch. The Constitution's originally intended institutional checks fail to function in this instance. To understand the Founders' structure, and therefore how to maintain its integrity, we must consider the profound structural change the development of political parties wrought.<sup>166</sup> The rise of political parties has transformed what was believed to be a durable Senate check on executive authority over appointments into a check that withers when the Senate and the executive are controlled by the same party, fundamentally altering the Constitution's structure.

Professor Michael Gerhardt has recognized the effect that the rise of political parties has had on the federal appointments process.<sup>167</sup> He devoted the bulk of his analysis of parties' role in judicial appointments, however, to an archaeology of the partisan "spoils system."<sup>168</sup> He largely avoided the structural issue, posing the question whether political parties have "somehow frustrated the framers' original aspirations or design" without seriously considering whether the growth of parties after the founding period undermined the Framers' constitutional order.<sup>169</sup>

A few prescient individuals aside, the Framers did not foresee the development of political parties or partisanship as central to the American political process. That the Framers did not appreciate the role that political parties would play is now well accepted, and some scholars have even gone so far as to suggest that the Constitution was institutionally incomplete from the outset because of its failure to anticipate parties.<sup>170</sup> The Founders' concern primarily involved balancing the branches against each other, giving each branch checks and balances against the

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<sup>166</sup> The growth of political parties in the early years of the Republic had implications for a number of constitutional provisions. For example, a number of Framers worried about including an impeachment power in the Constitution for fear that it would be used politically. The "emergence of political parties" led many founders to think "their fears about possible misuse of impeachment had been greatly understated." Ferejohn & Kramer, *supra* note 33, at 978.

<sup>167</sup> GERHARDT, *supra* note 60, at 50–60.

<sup>168</sup> *Id.* at 54–60.

<sup>169</sup> *Id.* at 60.

<sup>170</sup> See, e.g., RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780–1840*, at 9–24 (1969) (noting Founders' general antipathy toward political parties). Hofstadter comments that the Framers all seemed to agree "that an effective constitution [would be] one that successfully counteract[ed] the work of parties." *Id.* at 53; see also Michael C. Dorf, *The 2000 Presidential Election: Archetype or Exception?*, 99 MICH. L. REV. 1279, 1295 (2001) ("The United States Constitution was flawed from the outset — not just morally flawed because it condoned slavery, but institutionally incomplete because of the Framers' failure to anticipate the development of political parties."); John V. Orth, *Presidential Impeachment: The Original Misunderstanding*, 17 CONST. COMMENT. 587, 588 (2000) ("It is a commonplace of American constitutional history that the Framers did not foresee the development of a system of durable nationwide political parties.").

others.<sup>171</sup> Theirs was a tripartite constitutional architecture in which they perceived institutional interests, rather than partisanship, to predominate.<sup>172</sup> From this perspective, they conceived a certain unity of interest among legislators qua legislators, who would be animated by institutional identity and interest to remain vigilant against encroachments of power from the other branches. They foresaw greater identity and unity among senators, vis-à-vis the executive, than they thought would be possible between a group of senators and the executive.<sup>173</sup> The idea that partisan politics would align a significant portion of the legislature with the executive did not inform their architecture of checks and balances. Their structural framework was premised on the notion that the Senate, with institutional interests inherently opposed to those of the executive, would place an important check, or, in the terms of the Constitutional Convention, an important security, on the presidential appointment power. The modern dynamic, with strong partisan alliances linking the Senate and the executive, leaves the Framers' architectural checks and balances in need of recalibration.

The modern partisan dynamic, which has largely replaced the institutional dynamic, leaves essentially no check on the presidential appointment power when a majority of senators are members of the president's political party, absent the politically costly filibuster. Certainly the Framers did not intend their intricate architecture of checks and balances to dissipate under these conditions. Moreover, the possibility that these fifty-one senators could represent a minority of the national population further upsets an allocation of power intended both to restrain any one branch's authority and to ensure, in Madison's formulation, that judges not be appointed by a majority of states but by a minority of people.<sup>174</sup> Given the partisan

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<sup>171</sup> See, e.g., THE FEDERALIST NO. 51, at 347–53 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>172</sup> See, e.g., Dorf, *supra* note 170, at 1296 (“The Madisonian system of checks and balances depends upon government bodies pursuing discrete institutional interests rather than the interest of whichever party happens to control a given body.”).

<sup>173</sup> In the words of Richard Hofstadter,

While most of the Fathers did assume that partisan oppositions would form from time to time, they did not expect that valuable permanent structures would arise from them . . . . The solution, then, lay in a nicely balanced constitutional system, a well-designed state which would hold in check a variety of evils, among which the divisive effects of parties ranked high. The Fathers hoped to create not a system of party government under a constitution but rather a constitutional government that would check and control parties. . . . Although Federalists and Anti-Federalists differed over many things, they do not seem to have differed over the proposition that an effective constitution is one that successfully counteracts the work of parties.

HOFSTADTER, *supra* note 170, at 53.

<sup>174</sup> 2 FARRAND, *supra* note 73, at 80–81.

political conditions in which appointments are now made and that the Framers did not foresee, appealing to original practice to support a robust presidential appointments power is simply historically inaccurate. A more historically sensitive strategy would identify, as this Article has attempted to do, the concerns the Framers intended to target with their constitutional architecture and to analyze those concerns through a contemporary lens. As argued above, the overriding concerns that led to the “advice and consent” compromise were essentially two-fold: (1) ensuring political accountability for appointments by lodging the appointment power in one official, the executive, and (2) providing security, a check on the executive appointment power, via the Senate. In a world where institutional interests were presumed to predominate, this architecture would have been effective at weeding out those judicial nominees who were either ill-qualified or extremist. The Senate, presumed to have an inherent institutional interest in opposing the executive, likely would have provided an adequate check on the president’s appointments. Today, however, institutional interests play only a small role in the appointments process, where partisan politics dominate. The Framers’ structure is inadequate in this world.

While political parties were an unexpected development that the Framers did not accommodate in designing their constitutional architecture (hoping, in fact, to impede their formation), it is now commonly believed that the development of durable parties, although extraconstitutional, was necessary.<sup>175</sup> The Madisonian strategy of dividing power among branches and between the federal government and the states to preserve liberty presented the danger of governmental paralysis, with each institution frustrating the will of the others.<sup>176</sup> Political parties have facilitated

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<sup>175</sup> See, e.g., Dorf, *supra* note 170, at 1296; Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 274 (2000) (“The rudimentary parties that emerged by 1800 . . . did mark a dramatic change in the structure of constitutional government — answering the Anti-Federal challenge by providing the institutional support needed to sustain republican government on an extended scale.”); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1484 (2001). Prakash and Yoo argue that parties were necessary to overcome inefficiency created by the Constitution:

Parties formed to overcome the manner in which the Constitution divided governmental authority in the United States. Both the separation of powers and federalism threatened to make the rational exercise of government power impossible. Political parties arose in order to “organiz[e] the majorities necessary to fill offices and adopt policies.”

*Id.* (quoting Harvey C. Mansfield, Jr., *Political Parties and American Constitutionalism*, in AMERICAN POLITICAL PARTIES AND CONSTITUTIONAL POLITICS 3 (Peter W. Schramm & Bradford P. Wilson eds., 1993) (alteration in original)).

<sup>176</sup> See, e.g., WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 200 (1908) (“[T]he danger of coördinate and coequal powers such as the framers of the Constitution had set up was that they might at their will pull in opposite directions and hold the government at a deadlock which no constitutional force could overcome . . .”).

coordination among branches and between the levels of government, reducing the risk of gridlock. Sidney Milkis, a leading political scientist who has studied this issue, has written that “[t]he two-party system has played a principal part in combining the separated institutions of constitutional government, thus centralizing government sufficiently for it to perform its essential duties.”<sup>177</sup> Because the Framers feared that an efficient government would threaten liberty, they created an intricate separation of powers, checks and balances, and federalism; political parties have helped overcome these constitutional structures, which debilitate the government’s ability to act, providing an extraconstitutional means of coordinating government operations. Political parties have thus recalibrated the Framers’ constitutional structure, introducing an efficiency-producing means of coordination where the Framers intended to weaken government, atomizing political power and making its exercise difficult in the interest of preserving liberty.

Partisan alignments between Congress and the executive clearly facilitate judicial appointments and, absent the use of filibusters, encourage efficiency over gridlock. One must question, however, whether there are limits to the value of efficiency and whether, particularly in the staffing and composition of the judicial branch, a measure of the Madisonian vision of divided power should not be restored. While the original balance between the demands of efficiency in the day-to-day activities of government and the wisdom of dividing power so as to preserve liberty may have been recalibrated for the better by the development of political parties, judicial appointments may merit a different calculus. In the appointments context, particularly in periods of Senate-executive partisan alignment, the need for a meaningful check on executive authority outweighs the alternative — efficiency in staffing without any meaningful check at all.

While no easy metric exists for determining where political parties’ facilitation role interferes too much with the founding vision of checks and balances, judicial appointments seem to be the easy case. Such checks are particularly important when the composition of one of the three branches of government is at issue. A recalibrated system in which a three-fifths or two-thirds supermajority of senators is required to confirm judicial nominees would address the concerns that animated the Founders, ensuring political accountability in the executive and a check on presidential appointments in the Senate that is meaningful regardless of temporary electoral outcomes. Such a rule would undermine the elegance of a single Appointments Clause covering all federal appointments, creating a different rule for federal judges than for other appointees, but when the composition of one of the three branches of government is at stake, the virtue of uniformity loses some of its luster.

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<sup>177</sup> SIDNEY M. MILKIS, *POLITICAL PARTIES AND CONSTITUTIONAL GOVERNMENT: REMAKING AMERICAN DEMOCRACY* 2 (1999).

## III. SUPERMAJORITY RULES, THE CONSTITUTION, AND JUDICIAL APPOINTMENTS

The notion that the American democratic system is fundamentally majoritarian, that majority vote is the only truly democratic means of making decisions, and thus, that a supermajority rule for judicial confirmations would run counter to our deepest democratic commitments should be dispelled immediately. This kind of argument obscures more than it clarifies. American democracy and the negotiated process of creating and shaping democratic institutions bely such an understanding.

The Electoral College, as Americans know too well, allows a president to be elected despite losing the popular vote. The Congress is also fundamentally anti-majoritarian in at least one sense, with each state having equal representation in the Senate, notwithstanding striking population asymmetries. The Great Compromise that produced the Senate's representative structure is an example of a common trend in states transitioning to democracy. In such states, minority groups, whether identifiable by geography, ethnicity, religion, or other commonality, often shy from committing to constitutional structures in which, as perpetual minorities, their voices likely would remain unheard because of majoritarian rules. In fact, the Articles of Confederation that preceded the Constitution required that Congress secure a supermajority before most actions could be taken, largely because states feared the national government would displace their authority.<sup>178</sup> Having one house of Congress composed by equal representation of geographic sub-districts is only one solution to this antimajoritarian precommitment problem, yet it demonstrates that the negotiated process of creating and sustaining democracy, rather than being permeated with majoritarian structures, must often involve structures that empower minorities.<sup>179</sup> Thus, rather than being fundamentally undemocratic, some anti-majoritarian structures serve as the architectural foundation that makes democracy possible.

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<sup>178</sup> ARTICLES OF CONFEDERATION art. IX, para. 6 (U.S. 1777) (requiring a vote of nine out of thirteen states to take various actions, including engaging in war, entering into treaties, coining money, borrowing money, and appropriating money).

<sup>179</sup> For example, "minority veto" provisions are common in ethnically plural societies. Anna Morawiec Mansfield, *Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina*, 100 COLUM. L. REV. 2052, 2083 (2003). "Belgium's constitution provides for a minority veto for any bill 'affecting the cultural and educational interests of the language groups' and requires two-thirds approval by each chamber of the legislature as well as a majority of the representatives from the affected group for the provision to take effect." *Id.* at 2084–85 n.136. John Calhoun's notion of a "concurrent majority" to protect Southern interests is synonymous with the minority veto. *Id.* at 2084 n.136; see AREND LJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* 37 (1977). Proportional representation is also common in ethnically plural democracies where power is allocated to groups according to their numeric strength rather than along the "winner takes all" logic of majority rule. *Id.* at 41–42.

The remainder of this Part examines supermajority provisions in the Constitution, considering theories that explain why the Founders chose supermajority rules in certain cases. It suggests that a supermajority rule in the judicial confirmations context would not offend the most plausible of these theories. Moreover, it argues that the importance of quality decision making militates in favor of a supermajority rule for judicial confirmations. It concludes that, understanding the changed circumstances since the founding period, these arguments for a supermajority rule should weigh heavily.

The original U.S. Constitution contained seven explicit supermajority provisions: (1) treaties cannot be ratified without approval by two-thirds of the Senate;<sup>180</sup> (2) a two-thirds Senate vote is necessary before an executive official or a judge can be convicted in an impeachment trial;<sup>181</sup> (3) expulsion of a congressman requires a two-thirds vote of his or her house;<sup>182</sup> (4) a two-thirds vote of both houses of Congress is necessary to override a presidential veto;<sup>183</sup> (5) when the Electoral College produces deadlock, a two-thirds quorum of state delegations is necessary before the House of Representatives can select the president;<sup>184</sup> (6) constitutional amendments require both a two-thirds vote of Congress to propose an amendment or of the states to call a convention to propose an amendment, and a three-fourths vote of the states to ratify it;<sup>185</sup> and finally, (7) nine of the thirteen states were required to ratify the Constitution before it would go into force.<sup>186</sup> In addition to the supermajority provisions included in the originally drafted Constitution, several supermajority provisions have been proposed, debated, and added to our architecture of governance.<sup>187</sup>

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<sup>180</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>181</sup> *Id.* art. I, § 3, cl. 6.

<sup>182</sup> *Id.* art. I, § 5, cl. 2.

<sup>183</sup> *Id.* art. I, § 7, cl. 2.

<sup>184</sup> *Id.* art. II, § 1, cl. 3.

<sup>185</sup> *Id.* art. V.

<sup>186</sup> *Id.* art. VII.

<sup>187</sup> Two supermajority rules became part of the Constitution by amendment. The Fourteenth Amendment restricts persons who had served as government officials and then joined the Confederacy during the Civil War from undertaking various offices of public trust without a two-thirds vote of both houses of Congress. U.S. CONST. amend. XIV, § 3. The Twenty-Fifth Amendment contains a provision that allows Congress by a two-thirds vote to approve a suspension of the president over his objection when the vice president and a majority of the cabinet have concluded that he is unable to discharge his duties. U.S. CONST. amend. XXV, § 4. Supermajority rules have been vocally supported in other contexts, too. The Hartford Convention, during the aftermath of the War of 1812 and the national divisions that manifested themselves after the war, proposed that a two-thirds vote of both houses be required to admit a new state, interdict trade, or declare war. 1 ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 149 (7th ed. 1991). During the Great Depression, New Dealers proposed requiring a supermajority vote of the Supreme Court to hold federal laws unconstitutional. *See 2 id.* at 481; *cf.* Jed Handelsman Shugerman,



While neither records from the Constitutional Convention nor *The Federalist* reveal an explicit, coherent rationale for the Constitution's supermajority provisions, a number of theories have been proposed to explain them. Kathleen Sullivan has argued that the Framers used supermajority provisions only in "extraordinary situations implicating either individual rights or interbranch or intergenerational checks and balances."<sup>188</sup> Some interpret the supermajority provisions as advancing the Framers' separation of powers goals.<sup>189</sup> "A third view sees the Constitution's supermajority voting provisions as part of a 'finely crafted' document that was the result of bargaining and careful structural manipulation."<sup>190</sup> Others have suggested that the Framers used supermajority rules to promote deliberation and consensus on certain issues "to prevent rash decision making."<sup>191</sup> Finally, citing Madison's justification at the Convention for a supermajority rule for member expulsion, that "the right of expulsion . . . was too important to be exercised by a bare majority of a quorum,"<sup>192</sup> it is often suggested that supermajority rules were included in certain provisions because of their significance in the governmental structure.<sup>193</sup>

A more recent analysis takes a different tack, arguing that the Constitution's supermajority provisions "have one of two things in common: they either relate to important actions taken unicamerally by state representation or provide for the Congressional reversal of a decision previously taken by another 'majority rule' entity."<sup>194</sup> According to Brett King, presidential impeachment, expulsion of a senator, and approving treaties are the important actions taken unicamerally by the

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*A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893 (2003) (advocating adoption of such a rule today). Two recent proposals sought to restrain the federal government's fiscal powers by creating a supermajority rule for raising debts and taxes in the Balanced Budget and Tax Limitation Amendments in 1994. H.R.J. Res. 1, 104th Cong. § 1 (1995) (Balanced Budget Amendment); H.R.J. Res. 62, 105th Cong. § 1 (1997) (Tax Limitation Amendment).

<sup>188</sup> Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691, 697–98 (1996); see also Brett W. King, *The Use of Supermajority Provisions in the Constitution: The Framers, The Federalist Papers and the Reinforcement of a Fundamental Principal*, 8 SETON HALL CONST. L.J. 363, 400 (1998) (positing reasons why the Framers included supermajority provisions in the Constitution).

<sup>189</sup> King, *supra* note 188, at 400 & n.160.

<sup>190</sup> *Id.* at 400.

<sup>191</sup> *Id.* at 401; see, e.g., *Center on Budget and Policy Priorities: Hearings on Constitutional Amendment on Tax Increase Votes Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, Apr. 15, 1995 (statement of Lloyd N. Cutler, Co-founder, Concord Coalition) ("The present constitution requires supermajority votes in a very limited number of cases, where the Framers regarded a high degree of consensus as more important than the gridlock resulting from a failure to obtain the required supermajority.").

<sup>192</sup> King, *supra* note 188, at 401 & n.164.

<sup>193</sup> *Id.* at 401 & n.163.

<sup>194</sup> *Id.* at 406.

Senate that require supermajority vote.<sup>195</sup> Expelling a member from either house, overriding a presidential veto, impeachment, and amending the Constitution each, in some way, involve the congressional reversal of a previous majoritarian decision.<sup>196</sup> In both cases, King argues, the Constitution's supermajority provisions counteract what would otherwise be a countermajoritarian structure in the Constitution.<sup>197</sup>

King's framework is attractive in some respects. First, that congressional reversals of previous majority decisions would require supermajority vote is intuitively satisfying. Congressional override of a presidential veto, for example, would render meaningless the president's veto if it did not require a supermajority. It is logical that a similar principle should apply to impeachment of elected officials. Second, while state size generally does not correlate with positions on particular issues today, the Framers were anxious about the relationship between small and large states. Unicameral Senate action was preferred by the Framers on some issues, but the fact that a majority of states representing a minority of the population could prevail under majority rule undoubtedly troubled some Framers — an anxiety that led to the adoption of supermajority rules. Although a supermajority rule for these unicameral Senate actions could prevent large states from enacting measures even though they contained a majority of the population, this kind of rule would reduce the likelihood that small state senators could enact a measure without representing a majority of the population. Given the Framers' notorious bias against government action, this trade-off may have been viewed as worthwhile.

King's analysis, however, leaves a significant stone unturned. He does not address what, if any, criteria were used to qualify certain unicameral actions as warranting a supermajority vote. Senate confirmation of judicial nominees is a unicameral action for which the Constitution did not create a supermajority rule. King offers no reason why the appointments power should have evaded the logic of unicameral supermajorities. A finer dissection of King's two categories suggests one possibility. Of the actions taken unilaterally by the Senate and subject to a supermajority vote, only one, treaty approval, could not also fall into his other category — reversal of a previous majoritarian decision. What explains this *sui generis* case? The Founders viewed decision making by equal state representation in this case to be inadequate. More specifically, the Founders likely adopted a supermajority rule in this context because the Senate acts unilaterally, albeit with the president, and the action taken through treaties was thought to profoundly affect states as states.<sup>198</sup> The effect of treaties on states was thought to be so significant

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<sup>195</sup> *Id.* at 408.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1135 (2000).

that the Founders granted a minority veto against treaty ratification. Not perceiving the Appointments Clause to affect states but rather to affect the people, the Founders required a simple majority for judicial confirmations. As argued above, however, the Founders' view of inherent institutional animosity among the three branches obscured the need for more than a simple majority to protect the people from ill-considered appointments.

John McGinnis and Michael Rappaport have gone further than any of these authors, seeking not simply to explain whether there is any coherence underlying the Constitution's supermajority provisions, but arguing that the "central principle underlying the Constitution is governance through supermajority rules."<sup>199</sup> They argue that the Framers used "supermajority rules as a means of improving legislative decision making in various circumstances where majority rule would operate poorly."<sup>200</sup> Three of their insights are particularly instructive when applied to the judicial confirmations context.

First, they argue that supermajority rules may improve decision making where the decision could not be repealed by a majority.<sup>201</sup> Given life tenure, the appointment of federal judges is an irrevocable decision that could only be reversed via the infrequently used supermajority impeachment process. This permanence should make us wary of confirming nominees by a simple majority. While senators presumably should take into account the irrevocability of their decisions when voting for or against confirmation, they are likely to be guided more by short-term incentives, such as accountability to the party leadership.<sup>202</sup> In light of these considerations, a supermajority rule may improve decision making in this context.

Second, McGinnis and Rappaport argue that, where decisions are best made on the basis of consensus, supermajority rules may also be beneficial.<sup>203</sup> Consensus is particularly valuable in the judicial confirmations context, given the courts' intended nonpartisan role in interpreting the law. In contrast to growing perceptions of a highly politicized judiciary and a Supreme Court that routinely issues plurality opinions, a supermajority, consensus-forcing rule should shore up judicial independence, restoring confidence in the courts.

Finally, they argue that supermajority rules may be wise where the costs of decision making are asymmetrical.<sup>204</sup> In other words, a supermajority rule would be advisable where the cost of acting badly outweighs the cost of refusing to act.<sup>205</sup>

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<sup>199</sup> John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 705 (2002).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 739–41.

<sup>202</sup> *Id.* at 740.

<sup>203</sup> *Id.* at 741.

<sup>204</sup> *Id.* at 739.

<sup>205</sup> *Id.*

The appointments process currently encourages “political solidarity”;<sup>206</sup> those who diverge from the party line often incur substantial political costs. Unlikely to be held accountable electorally for their votes on judicial nominees, but facing serious consequences within their party, senators might be too willing to support their president’s nominees, regardless of their position on the merits.<sup>207</sup> Given the irrevocable nature of appointing judges with life tenure and the importance of consensus to maintain confidence in the federal judiciary, the cost of confirming a marginally qualified or highly political nominee arguably outweighs the cost of refusing a qualified one. Rather than tilting the scales against confirmation, however, a supermajority rule should have the *ex ante* effect of producing consensus nominees. A serious potential cost of the supermajority rule would be gridlock — the failure to appoint judges at all. This decision-making cost, including the time and effort to build the supermajority required to approve nominations, would be prohibitive if it effectively damaged the confirmations process, leaving the federal judiciary understaffed. As noted throughout this Article, however, by providing a basis for partisan criticism, a filibuster is more likely to produce this gridlock than a true supermajority rule that defines *ex ante* the parameters under which appointments occur.

McGinnis and Rappaport’s framework provides a theoretical grounding for a supermajority rule for judicial confirmations. Others, however, reject the proposition out of hand. Writing specifically about why a supermajority provision should not be required for judicial confirmations, Michael Gerhardt has argued that,

[t]he Framers reserved a two-thirds supermajority voting requirement as a means of creating a *presumption against* certain decisions that it expected to arise only infrequently, ensuring greater deliberation on a matter, decreasing the chances for political or partisan reprisals on removals and treaty ratifications, and protecting an unpopular minority from being abused in Senate votes on these questions.<sup>208</sup>

While facially attractive, Gerhardt’s understanding both lacks nuance and seems conceived, with its emphasis on a “presumption against” action, to reject a supermajority rule for confirmation. His “presumption against” argument fails to adequately describe the Constitution’s supermajority provisions.

A few examples should elucidate the flaws in his interpretation. First, the congressional supermajority required to override a president’s veto is grounded more in logic than in the Framers’ supposed intent to create a presumption against overrides. As noted above, if a supermajority vote were not required, the president’s

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Gerhardt, *supra* note 5, at 428 (emphasis added).

veto would be meaningless. Second, while some Framers may have anticipated George Washington's concern with "entangling alliances,"<sup>209</sup> the two-thirds requirement to approve treaties was not animated by this concern. Rather, the recognition that states would be profoundly affected by treaties led the Framers to vest the treaty power in the Senate, where states were equally represented, and even to grant a minority veto.<sup>210</sup> A third and final example is the constitutional amendment process. Certainly the Framers intended that the Constitution would not be easy to amend, but to suggest that the supermajority requirements for amendment reflect a presumption against amendment demonstrates misplaced emphasis. A more faithful historical and structural explanation is that the Framers meant to demand the same process for amendment as was required for original enactment. This original high bar was set not as a presumption against enactment of the Constitution (an absurd proposition), but as essential to the drafting and adoption of fundamental, higher law generated by consensus. Gerhardt's categorical analysis, while plausible at first glance, is not sensitive enough, failing to adequately characterize the Constitution's supermajority provisions. It seems conceived more to criticize a proposed supermajority rule for confirmations than to explain this constitutional structure.

The Constitution's supermajority provisions, while raising the bar, did not create a presumption against action. Although historical evidence presents no express rationale for the supermajority provisions included in the Constitution, a more apt, albeit general, characterization is that they were intended to promote good decision making in instances where majority rule would have proved problematic in some respect. While the Framers did not create a supermajority rule for judicial appointments, such a rule would not offend the most plausible justifications for those supermajority rules that were adopted. Given the changed circumstances since the

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<sup>209</sup> George Washington, *Farewell Address* (1796), reprinted in MAJOR PROBLEMS IN AMERICAN FOREIGN POLICY 76 (Thomas G. Patterson ed., 1989).

<sup>210</sup> Golove, *supra* note 198, at 1135. The unlimited scope of the treaty power, as opposed to the limited legislative powers enumerated in the Constitution, also contributed to the supermajoritarian requirement. Alexander Hamilton explained the need to guard the treaty power:

[I]t was understood *by all* to be the intent of the [treaty] provision to give to that power the most ample latitude to render it competent to all the stipulations, which the exigencies of National Affairs might require — competent to the making of Treaties of Alliance, Treaties of Commerce, Treaties of Peace and every other species of Convention usual among nations . . . . And it was emphatically for this reason that it was so carefully guarded; the cooperation of two thirds of the Senate with the President being required to make a Treaty.

Alexander Hamilton, *The Defence No. XXXVIII*, in THE [NEW YORK] HERALD; A GAZETTE FOR THE COUNTRY, Jan. 9, 1796, reprinted in XX THE PAPERS OF ALEXANDER HAMILTON 22 (Harold C. Syrett ed., 1974).

founding period, such a rule may in fact be appropriate. First, given the irrevocability of judicial appointments, the value of consensus in the confirmation of nominees, and the asymmetrical consequences of appointments, the confirmation process could be improved through a supermajority rule. The extraordinary growth in the number and power of federal courts since the founding — a development that the Framers did not anticipate — makes improved decision making in this context all the more important. Second, although blended with the exclusive nominating authority of the executive, the confirmation process is performed unicamerally by the Senate. The Framers did not understand appointments to implicate states in the way that treaties did, and they thus created a simple majority rule for appointments as opposed to the supermajority they required for treaty approval. The Framers presumably assumed that a majority vote of states, equally represented, would be an adequate check on the presidential nomination power. As the preceding Part explained, however, the Framers failed to anticipate the growth of durable political parties, and the structural check they envisioned dissipates when the Senate and the executive are controlled by the same party.<sup>211</sup> While the threat of gridlock should not be discounted, a supermajority rule for judicial confirmations would not offend the founding vision, would be congruent with the supermajority provisions already existing in the Constitution, and would likely improve decision making, creating stable, moderate courts with perceived legitimacy.

#### IV. SUPERMAJORITY VOTING REQUIREMENTS FOR JUDICIAL APPOINTMENTS IN COMPARATIVE PERSPECTIVE

Some American lawyers in academia have despaired that “[i]t is difficult to find anyone who is satisfied with the way Supreme Court Justices are appointed today.”<sup>212</sup> Constitutional courts with the power of judicial review have proliferated since midcentury, and Americans now have a number of alternative appointment processes to consider. As noted above, Ackerman has argued that Americans should adopt a “German antidote” to judicial extremism by creating a supermajority rule for judicial appointments, highlighting Germany as the most prominent country with such a rule.<sup>213</sup> In fact, constitutional courts composed under some variation of a supermajority rule are typical in Europe. Germany, Portugal, Italy, and Spain each appoint judges to their constitutional courts through a supermajority voting procedure.<sup>214</sup> While the appointments procedures in these countries are complicated

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<sup>211</sup> See *supra* Part II.

<sup>212</sup> David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1491 (1992).

<sup>213</sup> Ackerman, *supra* note 11.

<sup>214</sup> Victor Ferreres-Comella, *A Defense of Constitutional Rigidity* 45, 57 n.31, *Faculta di Giurisprudenza, Universita degli Studi di Genova*, [http://www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi\\_2000/ferreres.pdf](http://www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi_2000/ferreres.pdf) (last visited Jan. 16, 2005).

by factors that distinguish the courts from the U.S. Supreme Court and the lower federal courts, empirical evidence from these countries suggests that supermajority rules have a moderating and consensus-forcing impact on the appointments process without producing stalemate.<sup>215</sup>

The appointments process to European constitutional courts differs in various respects from the process in the United States. In Germany, as Ackerman has emphasized, appointments are made under a supermajority rule and judges are limited to a single twelve year term. Also, unlike in the United States, the nominating authority is not vested in the executive branch at all.<sup>216</sup> Each house of the German legislature appoints an equal number of members to the constitutional court subject to a two-thirds supermajority approval requirement.<sup>217</sup> Portugal has a similar two-thirds supermajority rule for the ten of its constitutional court's thirteen judges that are appointed by the legislature.<sup>218</sup> The remaining three are appointed by the judges chosen by the legislature.<sup>219</sup> In Spain, eight of the twelve constitutional court justices are appointed to a single, nonrenewable term by the legislature under a three-fifths supermajority voting procedure.<sup>220</sup> The first third of Italy's fifteen-member constitutional court is appointed by the president, with the remaining two-thirds appointed by the legislature and the ordinary and administrative supreme courts, respectively.<sup>221</sup> A three-fifths supermajority is required for the five judges appointed by parliament.<sup>222</sup> The nominations process to constitutional courts in Europe thus differs in several key respects from the U.S. system. Not only are judges typically appointed for single, nonrenewable terms, often at least in part by national legislatures acting alone, but they also are typically appointed subject to a supermajority voting requirement.

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<sup>215</sup> See *infra* notes 223–26 and accompanying text.

<sup>216</sup> See DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 21–22 (2d ed. 1997).

<sup>217</sup> *Id.* The Bundesrat appoints its half through a two-thirds vote of the body as a whole, while the Judicial Selection Committee of the Bundestag, where party representation is proportional to representation in the body as a whole, appoints its half subject to a two-thirds vote.

<sup>218</sup> CONSTITUIÇÃO art. 222 (Port.).

<sup>219</sup> *Id.*

<sup>220</sup> The House of Representatives and the Senate each appoint four of the court's twelve members under a three-fifths voting rule. The government and the General Council of the Judiciary each appoint two members. The Court is renewed by thirds every three years. CONSTITUCIÓN [C.E.] art. 159 (Spain).

<sup>221</sup> COSTITUZIONE [Cost.] art. 135 (Italy). Similar approaches have been implemented in new constitutional systems around the world, including in Bulgaria, Korea, and Mongolia. Tom Ginsburg, *Economic Analysis and the Design of Constitutional Courts*, 3 *THEORETICAL INQUIRIES* L. 49, 67 (2002).

<sup>222</sup> William J. Nardini, *Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America from the Italian Constitutional Court*, 30 *SETON HALL L. REV.* 1, 12 n.33 (1999).

The complicated appointments processes to Europe's constitutional courts reflect political calculations animating constitutional architectures different from those that exist in the United States, in part because of the lessons learned from the American experience. Architects of these modern constitutional courts were aware, as their American counterparts were not, of the powers a constitutional court would wield. Creating courts with the explicit purpose of exercising judicial review, these architects were unwilling to vest such power in a constitutional court without the assurance that the court would be comprised of moderate judges. Moreover, designing judicial appointment mechanisms in full awareness of the role political parties would play, these architects have been almost uniformly unwilling to grant constitutional courts the power of judicial review without the assurance that judicial appointees would be impartial and moderate.<sup>223</sup> The appointment mechanism typically has been one of the most important issues in designing constitutional courts.<sup>224</sup> In fact, as part of a precommitment strategy, "[c]onstitutional designers are unlikely to adopt constitutional review unless they believe it will be carried out by impartial appointees."<sup>225</sup> Particularly where constitutional designers believe they will not be in a position to appoint judges, they are eager to avoid "overly partisan" appointment mechanisms.<sup>226</sup> Their task is to devise "an appointment mechanism that will maximize the chances that judges will interpret the text in accordance with the intentions of the Constitution writers."<sup>227</sup> The overwhelmingly popular appointments mechanism, intended to encourage the appointment of moderate judges, involves some sort of supermajority rule. Given the growth in size and power of the federal courts since the founding period, as well as the influence parties have come to exert over appointments, a similar supermajority rule may now be advisable in the United States.

It would be rash to suggest learning from the European model without fully understanding how these constitutional courts differ from American courts. In addition to the historical difference just discussed, a key structural difference noted above may explain why Europe's constitutional courts use supermajority appointments rules. The supermajority rules in Europe's constitutional courts may reflect a concern embedded in an appointments process driven by the legislature, or any other single branch acting alone. Investing a mere legislative majority with the authority to appoint members to the constitutional court through a single-body mechanism, as opposed to a cooperative interbranch mechanism as in the United States, may have been seen to concentrate too much power. It is at least plausible that the supermajority requirements were intended to serve as the same check on

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<sup>223</sup> See Ginsburg, *supra* note 221, at 65–66.

<sup>224</sup> *Id.* at 65.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*



legislatures' appointments processes in these countries as the American Founders believed the "advice and consent of the Senate" would provide on the executive's nominations.

Without engaging in too much speculation on this point, it is nonetheless possible to learn something empirically from Europe's courts. In Germany in particular, as Ackerman has argued, "[t]here is an institutional incentive to converge on the selection of judges with a reputation for impartiality and relative moderation."<sup>228</sup> Empirical evidence shows that the supermajority rule has led to a "norm of reciprocity" among German political parties, "produc[ing] a stable court that reflects broad political preferences."<sup>229</sup> In several other European courts, an equilibrium among appointments by majority and opposition parties has also emerged.<sup>230</sup> The appointments process in these countries is not as divisive or as partisan as it is in the United States, in part because the process cannot be monopolized by a particular party at any given time. For those concerned about restoring a measure of propriety to the American appointments process, a lesson could be learned from these countries.

Despite the structural differences distinguishing the European constitutional courts from American federal courts, the fact that their appointments processes have produced moderate judges and dampened divisive partisanship suggests that a true supermajority rule, rather than the polarizing Senate filibusters, would be a consensus- and moderation-forcing mechanism in the United States. The German court in particular remains independent and largely free of ideological tones because no party can shape the court without the assent of the opposition. Under supermajoritarian appointment procedures like those in Germany, no single party can lock in a political program by capturing the judicial branch, and the stakes involved in each nomination are thus lowered. While the European approach may tend to prevent the kind of "transformative appointments" that have fundamentally reshaped the U.S. Constitution,<sup>231</sup> it adds an element of stability and moderation to courts that helps preserve their integrity and perceived independence.<sup>232</sup>

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<sup>228</sup> Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 669 (2000).

<sup>229</sup> Ginsburg, *supra* note 221, at 68.

<sup>230</sup> CARLO GUARNIERI & PEDRO C. MAGALHÃES, DEMOCRATIC CONSOLIDATION, JUDICIAL REFORM, AND THE JUDICIALIZATION OF POLITICS IN SOUTHERN EUROPE (Instituto de Ciências Sociais da Universidade de Lisboa, Working Paper No. 1, 2001), available at <http://www.ics.ul.pt/publicacoes/workingpapers/ANTIGOS/seurjud.pdf> (last visited Jan. 16, 2005).

<sup>231</sup> Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988).

<sup>232</sup> A supermajority rule for judicial nominations actually may serve to reinforce the supermajority rule required for constitutional amendments. Because of the stringency of that rule and the difficulty of amending the Constitution, administrations often seek appointment of Supreme Court Justices who will reinterpret and change the meaning of the Constitution. This kind of substitution effect, using judicial nominations to reinterpret constitutional provisions, could be counteracted by a supermajority confirmation process.

Created over two centuries ago, the U.S. constitutional system could learn something from its more recently designed European counterparts. The prevalence of supermajority rules for judicial appointments, in particular, merits consideration. These supermajority rules have had systemic effects on European constitutional courts. With lower stakes and a more consensual process, judicial appointments to these courts are less partisan and less divisive than in the United States. Supermajority rules have prevented individual parties from monopolizing judicial appointments for a period of time and from attempting to lock in a particular political agenda. Finally, as a result of consensus-forcing supermajority appointments rules, the courts are perceived as having great integrity and legitimacy and being relatively free of partisan influence. Introducing or strengthening each of these characteristics would benefit the American appointments process.

### CONCLUSION

While filibustering judicial nominees has proven to be a problematic, polarizing tactic that entrenches partisanship in the appointments process, a true supermajority rule likely would be moderation- and consensus-forcing. Unfortunately, a supermajority rule would be difficult to achieve politically. Ackerman recently wrote that “there is little hope of enacting a constitutional amendment that changes the formal rules for judicial selection.”<sup>233</sup> He proposed instead that “[t]he Senate filibuster, for instance, could become a regular part of the process,” and that this “would serve as a check on extremism in high court appointments.”<sup>234</sup> Empirically, however, the filibuster has not encouraged moderation in federal judicial nominations. To the contrary, use of the filibuster has become a political issue itself, emboldening the president to nominate candidates who approach the law from a particular perspective. Use of the filibuster has even created a substitution effect, encouraging the president to resort to recess appointments that would command only a simple majority if presented to the Senate. Thus, whether constitutional or not, the confirmation filibuster appears to be a strategy with only short-term, ambiguous benefits. A true supermajority rule, politically difficult though it may be to achieve, would be more likely to produce the kind of consensus and moderation Ackerman desires.

Other scholars have suggested alternative means by which a supermajority rule could be achieved without a constitutional amendment. Ferejohn has argued:

[s]uch a reform can be implemented conventionally, as the British changed their constitution. If members of the Senate regarded a two-thirds majority as required for appointment, they

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<sup>233</sup> Ackerman, *supra* note 11.

<sup>234</sup> *Id.*

could simply (but not necessarily easily) refuse to approve any nomination that failed to receive that level of support. . . . Whether senators would be capable of withstanding the partisan heat that would be put on them is another matter.<sup>235</sup>

Ferejohn acknowledged the political difficulty with his argument — a majority party member who committed herself to such a rule would no doubt incur serious political costs. Others have argued that, because the Appointments Clause “does not declare expressly that the consent required is by a simple majority, . . . the majority necessary for exercise of the consent power bestowed on the Senate may be altered from time to time by ordinary legislation.”<sup>236</sup> This argument suffers from the same difficulty as Ferejohn’s. The immediate beneficiary of any such legislation would necessarily be the minority party, a bitter pill to swallow for senators in the majority party. Beyond the political risks senators would face, it is possible that such a rule, if used consistently, would receive constitutional scrutiny. While courts may refuse to hear such a challenge based on the political question doctrine, it seems unlikely, both for political and constitutional reasons, that such a reform could be adopted either informally or via legislation.

Despite the immense hurdles a constitutional amendment would face, efforts should be made to refashion the judicial appointments process. When the executive and legislative branches are divided between the parties, internal incentives for cooperation encourage the nomination and appointment of moderate candidates. When governmental power is aligned in the hands of one party, however, that party has the opportunity to leave a powerful and permanent ideological imprint on the judicial branch. While aligned government may reflect an electoral mandate in favor of one party, such a mandate should not include exclusive formative power over the appointment of the third branch without minority input and the moderating influence that a supermajority voting rule would require. Allowing no single party to place its stamp on the federal courts without the assent of the minority opposition, such a rule would allow the federal courts to remain politically neutral and composed of moderate judges. As Ackerman wrote in his original argument in favor of the supermajority rule, such a rule would prevent “an ideological President with a weak mandate [from] us[ing] a slim Senatorial majority to ram through a constitutional revolution.”<sup>237</sup>

The supermajority rule is proposed here in the spirit of maintaining mainstream and moderate federal courts and may be most appropriately applied to Supreme Court nominations, where the stakes are highest. A supermajority rule would not

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<sup>235</sup> Ferejohn, *supra* note 11, at 67–68.

<sup>236</sup> Massey, *supra* note 23, at 14.

<sup>237</sup> Ackerman, *supra* note 11, at 407.

rid the nominations process of ideological considerations altogether, especially where disagreement turns on an issue over which the parties cannot compromise. It would prevent, however, a president whose party controlled the Senate from locking in a political program through the nomination and confirmation of sympathetic judges while tempering partisanship in the appointments process.