Debating Process: Assessing Recurrent Themes in Recent Supreme Court Confirmation Debates

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ABSTRACT

Public and scholarly concern about the appointments process for Supreme Court justices has been persistent since at least the failed confirmation of Robert Bork in 1987. But, the breadth and depth of concerns about the process have only grown more intense since 2016, with the appointment of four new justices during the first Trump and Biden presidencies. Indeed, an examination of comments from Democratic and Republican senators in recent Supreme Court confirmation debates reveals a notable point of seeming unanimity amongst them: nearly all appear to agree that facets of the process are deeply problematic and suffer from significant flaws. And while the next several Supreme Court appointments may prompt marginally more or less intense partisan fighting compared to recent episodes—depending primarily upon whether a given vacancy might lead to major ideological shifts on the Court—it seems unlikely that these trends will change in any meaningful way for the foreseeable future.

The starting point of inquiry in this paper is to explore the rhetoric of senators during the confirmation debates of the four newest justices appointed after Trump's election to the presidency in 2016. If there is indeed near-unanimity among senators in recent years that the Supreme Court appointments process is problematic in various ways, what precisely do Democratic and Republican senators identify as the points of concern in these debates?

In Parts I-IV, I highlight some recurring themes. These critiques in the Senate debates can be grouped under at least four common concerns. Identifying and fleshing out these four argumentative themes constitutes the first core claim of this paper. They are, in turn: (1) arguments emphasizing majoritarian will; (2) arguments emphasizing Senate institutional norms and practices; (3) arguments prioritizing legal or

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judicial legitimacy; and (4) arguments on the civil or fair treatment of nominees. In Part V, I offer some tentative support for the idea that these arguments have enduring relevance across other confirmation debates by briefly discussing the nomination of Robert Bork to the Supreme Court.

In Part VI, I shift gears to assess these modalities of argument more systemically. One key aspect of these modalities concerns the audiences they are directed to. In particular, I argue that some of these modalities can be more effectively deployed than others to generate interest from larger, broader audiences in a given confirmation debate. Other modalities seem more oriented toward appealing to expert or elite audiences. Understanding this distinction and recognizing the significance of when senators deploy different modalities of argument thus suggests some recurring patterns in how judicial political fights are conducted. This is the second core claim of the Article.

Finally, in Part VII, I turn my attention to the present and the immediate future. If one had the goal of enhancing the alignment of the Supreme Court appointments process and public expectations of it, what does the preceding discussion imply regarding potential changes to the appointments process that would be most valuable? Ultimately, my third core claim is that the Supreme Court confirmation process would best be served by, at present, whatever combination of reforms would result in a *shrinking* of the conflicts encompassed within it. Accordingly, one implication of my argument is a skepticism of long-running suggestions that Supreme Court nominees should discuss their constitutional views more broadly and forthrightly during the confirmation process. Such a step, especially in the present political context, would only be counter-productive; it would very likely heighten the stakes and significance of a given Supreme Court nomination and thereby heighten both the expectations and the level of acrimony around the process.

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I. INTRODUCTION

Public and scholarly concern about the appointments process for Supreme Court justices has been persistent since at least the failed confirmation of Robert Bork in 1987.[1] However, the breadth and depth of concerns about the process have only grown more intense since 2016, with the appointment of four new justices during the first Trump and Biden presidencies. Though many supporters of the Supreme Court's conservative rulings may, at present, be happy with the balance of recent Supreme Court appointments favoring Republicans, it seems unlikely that substantial numbers of either Democrats or Republicans would point to recent judicial politics as a model for how Supreme Court appointments processes should unfold.

Indeed, a look at comments from Democratic and Republican senators in recent Supreme Court confirmation debates reveals a notable point of seeming unanimity amongst them: nearly all appear to agree that facets of the process are deeply problematic and suffer from significant

1. *See, e.g.*, BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES 10–11 (rev. ed. 2009); STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS ix–xi (1994); Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 381, 421–26, 464–67 (2011).

flaws. While this apparent unanimity unsurprisingly disappears when it comes to the questions of what specific items count as flaws and who is to blame for those flaws, senatorial convergence around this sense of dissatisfaction is itself potentially revealing. And while the next several Supreme Court appointments may prompt marginally more or less intense partisan fighting compared to recent episodes—depending especially upon whether a given vacancy might lead to major ideological shifts on the Court—it seems unlikely that these trends will change in any meaningful way for the foreseeable future.

The starting point of inquiry in this paper is to explore the rhetoric of senators during the confirmation debates of the four newest justices appointed after Trump's election to the presidency in 2016. This includes the three Trump appointees in Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, and the lone Biden appointee in Justice Ketanji Brown Jackson. If Democratic and Republican senators are nearly unanimous in the belief that the Supreme Court appointments process is problematic in various ways, what precisely do they identify as the points of concern in these debates? That is, what items do senators emphasize from recent Supreme Court appointments processes as problematic or transgressive of core political or legal commitments?

To be clear, I do not proceed from the assumption that every concern or complaint articulated by senators in these debates necessarily speaks to their true beliefs or an accurate assessment of unfolding events. Indeed, most observers of recent judicial politics presume that instrumental, partisan goals are front and center for many senators in these debates—regardless of whether their comments fully and consistently reflect this preoccupation.[2] Rather, my interest in comments from the Senate debates stems from what they reflect about broader public expectations about the appointments process.

Thus, consider two assumptions, neither of which should be terribly controversial. First, senators are generally motivated, for reelection or other reputational or legacy reasons, to make arguments about Supreme Court appointments that resonate with their constituents and/or broad segments of the public. A second assumption is that sitting senators—all or nearly all of whom, by definition, have won high-profile electoral contests—are reasonably competent in determining what resonates with their key audiences, electoral or otherwise. If those two items are largely true, then the precise themes and arguments that senators repeatedly choose to focus on in Supreme Court confirmation debates should reflect,

2. *See, e.g.*, CARL HULSE, CONFIRMATION BIAS: INSIDE WASHINGTON'S WAR OVER THE SUPREME COURT, FROM SCALIA'S DEATH TO JUSTICE KAVANAUGH 41, 43 (2019).

to a significant degree, the expectations held by broad portions of the voting public for that process.[3]

Identifying these themes from the Senate debates, and unpacking the public expectations implicit in them, has value simply by illuminating the present state of judicial politics. Beyond that, examining these Senate debates helps to illuminate public expectations about how democratic politics should influence Supreme Court rulings.[4] Moreover, understanding the function of these arguments, their purposes, and the particular audiences to which they are directed should further illuminate some underlying dynamics of recent judicial politics. Indeed, even within the very nominee-driven, context-specific debates examined here, the presence of some enduring themes hints at more general dynamics at play.

Finally, there is little indication that present concerns about the Supreme Court appointments process will disappear anytime soon. Many of the points of concern identified in these debates will likely reappear in future Supreme Court appointments. Public and scholarly scrutiny of this process seems likely to persist in its present forms or even to increase in intensity in the coming years. If one is sympathetic to the goal of enhancing the credibility of this process with the broader public, the arguments in this paper will have significance. Grappling with the specifics of present-day discontent should be informative for ongoing discussions regarding reform of the appointments process and growing concern about the legitimacy of the Court.[5]

Having stated my goals for this paper, let me now state my three core claims.

In Parts I-IV, I survey the Senate confirmation debates for Justices Gorsuch, Kavanaugh, Barrett, and Jackson and highlight some recurring themes in senator critiques of the appointments process for Supreme Court justices. These arguments generally present in one or more of the following forms: senators from one party pointing out alleged transgressions by senators from the other party;[6] senators noting that an alleged transgression of the process would occur if they failed to take some action that is accordingly justified;[7] or senators even admitting to their

3. *See* Stuart Chinn, *The Meaning of Judicial Impartiality: An Examination of Supreme Court Confirmation Debates and Supreme Court Rulings on Racial Equality*, 2019 UTAH L. REV. 915, 926.

4. This presumption that the confirmation process—both the Senate Judiciary Committee hearings and the Senate debates—can tell us something insightful about American law and politics more broadly aligns with the argument set forth in PAUL M. COLLINS, JR. & LORI A. RINGHAND, SUPREME COURT CONFIRMATION HEARINGS AND CONSTITUTIONAL CHANGE 11, 67–69, 161 (2013).

5. *See infra* Part VIII.

6. *See, e.g.*, 163 CONG. REC. S2322 (2017) (statement of Sen. Patrick Leahy (D-VT)).

7. *See, e.g.*, *id.* at S2202–03 (statement of Sen. Tom Cotton (R-AR)).

own party's transgressions, though usually in response to more severe past, present, or anticipated transgressions by the opposing party's senators.[8] Not surprisingly, the specific complaints offered by senators diverge sharply based on party affiliation. However, many of their critiques can be grouped under at least four common concerns or general themes. Identifying and fleshing out these four argumentative themes constitutes the first core claim of this paper.[9] These themes are, in turn:

(1) arguments emphasizing majoritarian will: these arguments prioritize the outputs or outcomes of democratic governance. They emphasize the non-alignment of the Supreme Court appointments process with those outputs, the latter of which are perceived as the true or most accurate representations of democratic/majoritarian will.[10]

(2) arguments emphasizing Senate institutional norms and practices: these arguments focus on the non-alignment of Supreme Court appointments processes with certain norms or practices perceived as legitimate and enduring.[11] Unlike the majoritarian will arguments, these arguments are institutionally inward-facing for senators.

(3) arguments prioritizing legal or judicial legitimacy: these arguments emphasize how the democratic influences embodied in the appointments process may endanger or undermine the legitimacy of the law or the federal courts—especially the Supreme Court.[12] Thus, the view here is that the democratic forces bearing on Supreme Court appointments should be contained or disciplined in line with these commitments.

(4) arguments on the civil or fair treatment of nominees: these arguments emphasize unfair and partisan-oriented attacks on judicial nominees as a central problem for Supreme Court appointments processes.[13]

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8. *See, e.g.*, *id.* at S2165 (statement of Sen. John Cornyn (R-TX)).

9. In distinguishing these four categories of argument, I am not suggesting that senators themselves consistently recognize these categories as distinct, and/or that they proceed in their arguments with these categories in mind. Within one extended comment by a senator, one might find all four modalities of argument at work. And correspondingly, responses to that comment by opposing senators might also similarly move between these distinct themes of argument seamlessly. Precisely for these reasons, the task of disaggregating these argumentative themes seems valuable since such conceptual clarity is not always apparent from reading these comments in the *Congressional Record* at first glance. Nor should one generally have high expectations of conceptual clarity in this context since, we might presume, the higher priority for senators in these debates are discrete political or strategic goals—like seeking to persuade other senators, or seeking to carve out a position for a future reelection or a future Senate debate—rather than maintaining conceptual clarity.

10. *See, e.g.*, 166 CONG. REC. S6451–52 (2020) (statement of Sen. Chuck Schumer (D-NY)).

11. *See, e.g.*, *id.* at S6385 (statement of Sen. Mitch McConnell (R-KY)).

12. *See, e.g.*, 163 CONG. REC. S2204 (2017) (statement of Sen. Ted Cruz (R-TX)).

13. *See, e.g.*, 164 CONG. REC. S6534 (2018) (statement of Sen. John Thune (R-SD)).

Having unpacked these different modes of argument, the question arises as to whether these arguments reflect persistent forces at work or whether these argumentative themes are more specific to the four most recent justices and/or the present moment. In Part V, I offer some tentative support for the idea that these arguments have enduring relevance across other confirmation debates by briefly discussing another highly controversial confirmation fight: the nomination of Robert Bork to the Supreme Court in 1987.[14]

In Part VI, I shift gears to assess these modalities of argument more systemically. One key aspect of these modalities concerns the audience they are directed to. In particular, I argue that some of these modalities can be more effectively deployed than others to generate interest from larger, broader audiences in a given confirmation debate. Other modalities seem more oriented toward appealing to expert or elite audiences. Understanding this distinction and recognizing the significance of when senators deploy different modalities of argument thus suggests certain recurring patterns in how judicial political fights are conducted. This is the second core claim of the paper.

Finally, in Part VII, I turn my attention to the present and the immediate future. If one sought to enhance the alignment of the Supreme Court appointments process and public expectations of it, what does the preceding discussion imply for potential changes to the appointments process? Ultimately, my third core claim is that the current Supreme Court confirmation process would best be served by whatever combination of reforms *shrink* the scope of conflict encompassed within it.

The content of the argumentative themes explored in this Article, along with the function of those arguments within the present political context, suggest that the most plausible path to increase public esteem for the appointments process is to make the process a smaller part—and a smaller target—within American constitutional democracy. Though I am undecided as to the exact set of reforms that would bring about this outcome, the goal for any reform or set of reforms should be an outcome in which debates over Supreme Court appointments focus on a smaller and less substantively weighty set of issues, and the significance of Supreme Court appointments in American politics is reduced. That is, the process would be better off if it implicated fewer normative democratic and legal concerns. Accordingly, one implication of my argument is a consequent skepticism of long-running suggestions that Supreme Court nominees should discuss their constitutional views more broadly and forthrightly during the confirmation process. Such a step, especially in the present political context, would only be counter-productive; it would very likely

14. *See* CARTER, *supra* note 1, at x–xi.

heighten the stakes and significance of a given Supreme Court nomination and thereby heighten both the expectations and the level of acrimony around the process.[15]

II. MAJORITARIAN WILL

The Appointments Clause, which covers appointments to the U.S. Supreme Court and the federal appellate and district courts,[16] provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other

15. I might offer a few brief methodological points. First, although I have extensively referenced arguments from the Senate confirmation debates, I make no claim to comprehensiveness in my citations. In some cases, I made judgment calls to include those arguments by senators that were more substantive and bypassed others that were substantively thin or less coherent. Relatedly, my focus is much more squarely on the debates in the full Senate since the kind of extended senator commentary there—as opposed to the greater prevalence of the question-and-answer format in the Senate Judiciary Committee hearings—is more conducive to my goal of tracking modes of argument by senators.

In addition, even with respect to the nomination debates in the full Senate, I have employed a consistent timeframe of beginning to examine debates after the Senate Judiciary Committee's hearings on Supreme Court nominees have been completed. My examination of the *Congressional Record* continues through the concluding Senate vote on the nomination. This approach also counsels against assuming my references are comprehensive, since sometimes nominations garner Senate discussion before the Senate Judiciary Committee's work has been completed. Still, this approach is not an unreasonable one since the debates themselves can take on a different character after the Senate Judiciary Committee Hearings conclude—with items from those hearings sometimes serving as a focal point for the subsequent debates. A different reader of these debates might choose to categorize these arguments in different ways and perhaps include some different categories. My aspiration is that I have provided an accurate flavor of the kinds of arguments that have recurred in these debates and that my choices and categorizations would strike any fair-minded reader as plausible and/or accurate ones.

Third, because my focus is on illuminating public expectations about the appointments process my interests are, unsurprisingly, oriented toward those items that are generalizable across the nominees. Thus, I am less focused on those issues in the Senate confirmation debates that are more specific to a given Supreme Court nominee, and I largely ignore commentary regarding a nominee's perceived sympathy or antagonism to specific legal outcomes such as protecting abortion rights or protecting gun rights. Also, for related reasons, I am largely unconcerned with comments by the nominees themselves; the value of their comments for illuminating either enduring public expectations, or appointments process dynamics beyond their own nomination, seems comparatively less useful than comments by senators. As a partial exception to the above, I do discuss in some detail arguments about civility in relation to how nominees are treated in the confirmation process in Part IV. But even here, my focus remains on public expectations about civility in the appointments process. I am largely unconcerned with the accuracy or non-accuracy of the claim that certain nominees, at a specific moment in time, were being treated unfairly by some senators.

16. *See* BARRY J. MCMILLON, CONG. RSCH. SERV., R45622, JUDICIAL NOMINATION STATISTICS AND ANALYSIS: U.S. CIRCUIT AND DISTRICT COURTS, 1977–2022, at 1 (2023).

Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . ."[17]

Given the involvement of a nationally-elected president and state-elected senators in the appointments process, it should be unsurprising that Senate debates over Supreme Court nominees frequently invoke claims about majoritarian will.[18]

What, then, are the key characteristics of such claims in these debates? Their main characteristic is that they appeal to a source of political authority *external* to the Senate and the senators themselves. Hence, majoritarian will claims typically reference elections, electoral results, public opinion, and vague references to the "mainstream" of public opinion. These arguments sometimes encompass claims about the "true" content of majoritarian public opinion and the accompanying fear that this authentic majoritarian will is being distorted or drowned out by forces that undermine democracy. Consistent in all of these arguments is the presumption that democratic outcomes, of some kind, serve as the normative basis of the speaker's argument.

I illuminate this mode of argument below through the lens of three key themes that recurred throughout the Senate confirmation debates: (a) the Senate Republicans' democratically-based justification for their non-action on President Obama's nomination of Merrick Garland to the Supreme Court in 2016; (b) a persistent worry, heavily emphasized by Senate Democrats, about the problematic role played by special interests in the nomination and confirmation process of federal judicial nominees; and (c) the more recent critical assessment by Senate Republicans of "Court-Packing" reform proposals.

A. Garland's Failed Supreme Court Nomination

On February 13, 2016, Justice Antonin Scalia suddenly passed away while on a hunting trip.[19] With the next presidential election occurring later that year, President Obama nominated Judge Merrick Garland of the D.C. Circuit Court on March 16 to fill the seat vacated by Justice Scalia.[20] A successful confirmation of Judge Garland would have dramatically shifted the Court's ideological balance. Judge Garland's addition to the Court's liberal wing, then composed of Justices Stephen Breyer, Ruth

17. U.S. CONST. art. II, § 2, cl. 2.

18. Others emphasizing the democratic/political components of Article II, Section 2 include, for example, Michael J. Gerhardt, *The Confirmation Mystery*, 83 GEO. L.J. 395, 419, 429–31 (1994) (reviewing STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS (1994)); Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 38, 38–44 (2006).

19. *See* HULSE, *supra* note 2, at 9–10.

20. *See id*. at 119–20.

Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, would have created the first majority of Democratic president-appointed Supreme Court justices in decades.[21] It would have also ushered in the most liberal-leaning Supreme Court since the New Deal.[22] Recognizing these potential consequences of a Garland Supreme Court appointment, Senate majority leader Mitch McConnell issued a public statement just hours after the announcement of Justice Scalia's passing. He stated that the Republican-controlled Senate would not undertake hearings for any Obama nominee to the Supreme Court.[23] As he stated after offering his condolences to Justice Scalia's family: "The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new President."[24]

This move by McConnell and the Senate Republicans stands as the most significant political development of recent Supreme Court judicial politics. To be sure, McConnell and other Republican senators could not have been certain at the time that events would unfold as they ultimately did, with Trump winning in 2016 and someone like Neil Gorsuch joining the Court in 2017. Indeed, many Republican senators believed Hillary Clinton would likely win in 2016 and saw their pause on Garland's nomination as a temporary, less-consequential action (or one that perhaps might result in an emboldened President Hillary Clinton nominating someone even more left-leaning than Garland).[25] As it turned out, President Trump prevailed in 2016. With his quick nomination of Judge Gorsuch, and with Gorsuch's confirmation, Republicans solidified the five-vote majority they had previously enjoyed during Justice Scalia's tenure on the Court.

Finally, to add one more crucial and unusual element to this brief account: in the last months of the Trump presidency, Justice Ginsburg finally succumbed to illness and passed away on September 18, 2020.

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21. *See* Dylan Matthews, *How Democrats Missed a Chance to Reshape the Supreme Court for a Generation*, VOX, https://perma.cc/675V-JRX8 (Jan. 22, 2017, 2:57 PM). As stated in the Matthews article:

> Ever since Abe Fortas's resignation in 1969, the Court has either been split down the middle or, more often, made up primarily of Republican appointees. Some of those Republican appointees nonetheless turned out to be liberals, but even taking that into account, the Court hasn't been majority liberal since 1971, when William Rehnquist and Lewis Powell joined.

Id.

22. *See* Alicia Parlapiano & Margot Sanger-Katz, *A Supreme Court with Merrick Garland Would be the Most Liberal in Decades*, N.Y. TIMES, https://perma.cc/AAW4-NLL6 (Mar. 16, 2016).

23. *See* HULSE, *supra* note 2, at 12, 17; JAKE SHERMAN & ANNA PALMER, THE HILL TO DIE ON: THE BATTLE FOR CONGRESS AND THE FUTURE OF TRUMP'S AMERICA 71 (2019).

24. Press Release, Mitch McConnell, Justice Antonin Scalia (Feb. 13, 2016), https://perma.cc/2Q7T-4PP9.

25. *See* HULSE, *supra* note 2, at 131; SHERMAN & PALMER, *supra* note 23, at 73.

President Trump now found himself in strikingly similar circumstances to those faced by President Obama in 2016, with a Supreme Court vacancy opening up in the final year of his presidential term (though unlike President Obama, President Trump enjoyed a Republican majority in the Senate and the possibility of winning a second presidential term in 2020). Similar to President Obama's decision to nominate Judge Garland in the final months of his presidency, President Trump moved quickly to nominate Judge Amy Coney Barrett to replace Justice Ginsburg.[26]

This bizarre sequence of events thus put Senate Republicans in a very different position than in 2016. While they had made arguments four years earlier underscoring the significance of pausing on any Supreme Court nomination in an election year for the sake of democratic legitimacy, their incentives to stick with the same position looked significantly less attractive in 2020: they still held a majority in the Senate but now had a president of their own party making the Supreme Court nomination. Predictably, Senate Republicans chose to proceed with Judge Barrett's nomination in 2020—the opposite of their position in 2016. The appearance of hypocrisy was obvious to all involved.[27] But beyond this assessment of Senate Republicans, one could argue that this reversal of position—along with the reversal of positions by the Democrats in the 2020 debates, compared to their previous arguments surrounding the Garland nomination[28]—illuminates better than most events the general flimsiness of principle in Senate debates over Supreme Court appointments.[29]

Among their various points of disagreement in the aftermath of Justice Scalia's passing, Democratic and Republican senators articulated different views on how majoritarian will should be respected in the appointment of a new Supreme Court justice. Republican senators, following the example of Senator McConnell's public statement after

26. *See* Peter Baker & Maggie Haberman, *Trump Selects Amy Coney Barrett to Fill Ginsburg's Seat on the Supreme Court*, N.Y. TIMES, https://perma.cc/M7CA-EHDM (Oct. 15, 2020).

27. *See* HULSE, *supra* note 2, at 278; Aaron Blake, *How the GOP is Trying to Justify its Supreme Court Reversal*, WASH. POST, Sept. 21, 2020, ProQuest, Doc. No. 2444466845.

28. *See infra* notes 34, 53, and 60.

29. As Carl Hulse put it, "With control of the Senate frequently shifting between the parties, senators had to master the art of the 180-degree turn, instantly adopting the language and tactics of the opposition party as soon as they exchanged places." HULSE, *supra* note 2, at 41; *see also id.* at 43; Miguel A. Estrada & Benjamin Wittes, *There No Longer Are Any Rules in the Supreme Court Nomination Process*, WASH. POST, Feb. 19, 2016, Gale in Context: Global Issues, Doc. No. A443730457 ("Today, there is no principle and no norm in the judicial nominations process that either side would not violate itself and simultaneously demand the other side observe as a matter of decency and inter-branch comity."). Estrada, of course, was himself a judicial nominee for the D.C. Circuit and was the subject of a filibuster from Democratic senators. Estrada and this op-ed are mentioned in HULSE, *supra* note 2, at 69–82.

Justice Scalia's death in 2016, claimed that pausing Garland's nomination was necessary to prevent any transgression of majoritarian will. To do anything other than to pause on Supreme Court appointments until after the next presidential election would cede too much power to a sitting president in an election year. It would amount to an illegitimate privileging of past majoritarian will in relation to a more current majoritarian will that would be revealed in the outcome of the upcoming 2016 presidential election.[30]

Senator Ted Cruz, for example, offered the following extended comment in his opening statement in the Judiciary Committee Hearings for Justice Gorsuch:

> The people, therefore, had a choice [in 2016], a choice between an originalist view of the Constitution represented by Justice Scalia or a progressive and activist view of the Constitution represented by Barack Obama and Hillary Clinton. During the campaign, President Trump repeatedly promised to nominate Justices in the mold of Justice Scalia, and, indeed, he laid out a specific list of 21 judges, constitutionalists from whom he said he would choose his nominee. Judge Gorsuch was one of those 21.
>
> Issuing such a list was a move without precedent in our country's Presidential history, and it created the most transparent process for selecting a Supreme Court Justice that our Nation has ever seen. The voters had a direct choice. The voters understand the 21 men and women from whom the President would pick, and they had a very different vision of a Supreme Court Justice that would be put forth by Hillary Clinton.
>
> And in November, the people spoke in what was essentially a referendum on the kind of Justice that should replace Justice Scalia. The people chose originalism, textualism, and rule of law.[31]

Similar comments were repeated in the subsequent Senate debates on the Gorsuch nomination.[32]

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30. I should also note that in addition to the majoritarian will arguments discussed here, Republican senators also offered arguments justifying their non-consideration of the Garland nomination with an appeal to Senate institutional norms and past practices. I discuss the latter set of arguments below at Section xx.

31. *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States*, 115th Cong. 32 (2017) [hereinafter *Gorsuch Confirmation*] (statement of Sen. Ted Cruz (R-TX)).

32. *See* 163 CONG. REC. S2160 (2017) (statement of Sen. Shelley Capito (R-WV)); *id.* at S2165 (statement of Sen. John Cornyn (R-TX)); *id.* at S2169 (statement of Sen. Ron Johnson (R-WI)); *id.* at S2204 (statement of Sen. Ted Cruz (R-TX)); *id.* at S2338 (statement of Sen. Dan Sullivan (R-AK)); *id.* at S2340 (statement of Sen. Orrin Hatch (R-UT)). The comments recurred in the other Senate debates as well. *See, e.g.*, *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to Be an Associate Justice of the*

Democratic senators countered these arguments, in part, by making their own distinct appeal to majoritarian will. As they argued, proper respect for majoritarian will demanded that the Senate should have considered the Garland nomination because President Obama, by virtue of his election to the presidency in 2012, retained the authority to make such nominations until the actual end of his presidential term. Majoritarian will, properly understood, demanded that the Supreme Court appointments process proceed for President Obama in the final year of his second term just as it would have proceeded if the vacancy and nomination had occurred in the first months of his first term. In other words, according to Democratic senators, Republican reliance on the 2016 presidential election as the appropriate guide for discerning majoritarian will was itself transgressive of majoritarian will, as that will had been expressed in the 2012 presidential election. As Senator Patrick Leahy put it during the Gorsuch debates: "It is interesting that the majority leader's argument for obstructing Chief Judge Merrick Garland was that the American people needed to weigh in on this decision, as if they had not weighed in when they reelected President Obama in 2012."[33]

When President Trump nominated Judge Amy Coney Barrett in the final year of his presidency in 2020, and Republicans still in control of the Senate, Democrats pivoted to argue the reverse of their earlier position, advocating for a pause on the Barrett nomination. As discussed in greater detail below in Part II, the core of the Democrats' position on the Barrett nomination resided in an appeal to Senate norms. Because Republicans had advocated for stalling the Garland nomination in 2016 precisely because it was a presidential election year—and had defended these actions in the 2017 debates on Justice Gorsuch's nomination—Democrats argued that after 2016, a new institutional precedent had been set.

However, more relevant for the present argument is that Senate Democrats also made an appeal to majoritarian will in the context of the Barrett nomination. Democratic senators raised concerns about a rushed confirmation process that was taking place against the backdrop of both a presidential election only days away and the COVID pandemic. All of this,

Supreme Court of the United States, 115th Cong. 53 (2018) [hereinafter *Kavanaugh Confirmation*] (statement of Sen. Ted Cruz (R-TX)).

33. 163 CONG. REC. S2322 (2017) (statement of Sen. Patrick Leahy (D-VT)); *see also id.* at S2180 (statement of Sen. Dick Durbin (D-IL)); *id.* at S2333 (statement of Sen. Tom Udall (D-NM)); *Gorsuch Confirmation*, *supra* note 31, at 35 (statement of Sen. Al Franken (D-MN)). This comment recurred in other Senate debates as well. From the Kavanaugh Senate debates, see 164 CONG. REC. S6592 (2018) (statement of Sen. Bob Menendez (D-NJ)) ("It was Senate Republicans who orchestrated the theft of a Supreme Court seat with more than 9 months left in President Obama's term."). From the Barrett Senate debates, see 166 CONG. REC. S6394, S6528 (2020) (statement of Sen. Chris Murphy (D-CT)); *id.* at S6471 (statement of Sen. Tom Carper (D-DE)); *id.* at S6491 (statement of Sen. Bob Menendez (D-NJ)).

they argued, counseled in favor of pausing on a new Supreme Court appointment until after the 2020 presidential election. They effectively argued, in line with the Republican position in 2016, that failing to abide by majoritarian will as it would be revealed in the 2020 presidential election would constitute a transgression of the underlying democratic expectations contained within the appointments process.[34]

B. Special Interests

As seen in the preceding section, majoritarian will, as defined by presidential electoral outcomes, was invoked as a normative standard by senators seeking to defend their actions or to critique the actions of the opposing political party. Alongside those arguments, a related but distinct set of arguments in the Senate confirmation debates similarly emphasized the primacy of majoritarian will. However, these latter arguments did so in the context of discussions about "special interests" and how powerful and privileged constituencies illegitimately distorted democratic processes and policy outcomes. In this context, "true" majoritarian will was not necessarily congruent with electoral outcomes. Rather, true majoritarian will—when free of illegitimate influences—was defined by some senators with reference to some array of policy outcomes that, they posited, were favored by real majorities of the electorate.

The upshot of these arguments was the claim that wealthy interests were corrupting the appointments process—and causing it to deviate from majoritarian will—by virtue of illegitimate financial influence. The problematic flow of financial support from these wealthy interests to individual senators and advocacy groups during a confirmation process distorted majoritarian will by elevating individuals to the Court who held legal and political views at odds with majoritarian views. Furthermore, enough problematic Supreme Court appointments of this type might lead to Court majorities issuing rulings and decisions that similarly sit at odds with majoritarian views. This argumentative theme was much more prominent among Senate Democrats, who claimed that the Republican

34. *See, e.g.*, 166 CONG. REC. S6451–52 (2020) (statement of Sen. Chuck Schumer (D-NY)); *id.* at S6471–72 (statement of Sen. Tom Carper (D-DE)). As to the substantive merits of the argument that a presidential-election year vacancy on the Supreme Court should always be deferred until after the next presidential election, the argument does raise the possibility of a slippery-slope: why defer to majoritarian will in the next presidential election only with respect to vacancies in an election year? Why not also defer to the next presidential election's results in the third year of a sitting president's term, or the second year, or even the first year? Presumably such arguments would have greater appeal if one happened to be opposed to the political party of the sitting president. These questions are not purely hypothetical. It was reported in 2016 that some Republican senators, when contemplating a potential Hillary Clinton presidential victory in that year's election, advocated for keeping the Scalia seat vacant through the entirety of a four-year Clinton presidential term. *See* HULSE, *supra* note 2, at 151, 157.

Party was strategically using the judiciary to enact policy reforms that lacked sufficient support to be legislatively enacted. Senate Republicans also offered their own version of this argument, though given that they emphasized legal and judicial legitimacy more in their claims, their versions of this argument are discussed separately in Section III.A below.

1. Senate Democratic Arguments

For Democratic senators, the starting point for many of their arguments was May 18, 2016, when then-presidential candidate Donald Trump publicly released a list of potential Supreme Court nominees with significant input from Leonard Leo, executive vice president of the Federalist Society. Furthermore, then-candidate Trump publicly committed to choosing one of the individuals from the list to fill the Scalia vacancy and other potential Supreme Court vacancies if elected president.[35]

This degree of pre-commitment and open acknowledgment of an outside organization's influence in creating a short list for a Supreme Court nominee has no ready precedent in American politics. Yet, the value of such a political maneuver for then-candidate Trump was obvious: it helped to shore up his conservative credentials in the 2016 election.[36] However, by shining such a bright light on the Federalist Society with these actions, that group and the Heritage Foundation came under intense scrutiny by Democratic senators still aggrieved about the Garland nomination and reeling from the shock of Trump's victory in November 2016.

Hence, several Democratic senators highlighted what they perceived as an illegitimate role for these special interests in the nomination processes for Justices Gorsuch, Kavanaugh, and Barrett. Democratic senators emphasized that the role of these special interest groups was not transparent and/or reflected the outsized and deeply problematic role of conservative donors in exerting influence on American constitutional government. To quote Senator Dick Durbin on this point in the context of the Gorsuch nomination:

> In May and September 2016, Republican Presidential candidate, Donald Trump, released a list of 21 names, including yours, that he would consider to fill the Scalia vacancy. President Trump thanked the Federalist Society and the Heritage Foundation, two well-known

35. *See* HULSE, *supra* note 2, at 54–55, 140; SHERMAN & PALMER, *supra* note 23, at 73; RUTH MARCUS, SUPREME AMBITION: BRETT KAVANAUGH AND THE CONSERVATIVE TAKEOVER 5, 19–20 (2019).

36. *See* HULSE, *supra* note 2, at 51–52, 140, 149; MARCUS, *supra* note 35, at 18–19, 26, 28.

> Republican advocacy groups, for providing the list that included your name.
>
> Your nomination is part of a Republican strategy to capture our judicial branch of government. That is why the Senate Republicans kept the Supreme Court seat vacant more than a year, and why they left 30 judicial nominees, who had received bipartisan approval of this Committee, to die on the Senate calendar as President Obama left office.[37]

Relatedly, this focus on the influence of special interests—especially in the form of "dark money" or political spending by anonymous donors[38]—aligned neatly with an emergent theme in the Democratic Party that had been prevalent since at least the 2008 *Citizens United v. Federal Election Commission* decision. Democrats had become increasingly preoccupied with the influence of corporations and corporate power at the expense of workers, working-class individuals, and labor unions. Among Democratic senators, this was a line of argument commonly identified with Senators Bernie Sanders and Elizabeth Warren.[39] Not surprisingly, they and other senators seized on the theme of undue corporate influence in the context of Supreme Court appointments. To quote Senator Warren on this point:

> Judge Brett Kavanaugh's nomination to the highest Court in our country is the results of a decades-long assault of our Judiciary, launched by billionaires and giant corporations who want to control every branch of government. For years, those wealthy and well-connected people have invested massive sums of money into shaping our courts to fit their liking.[40]

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37. *Gorsuch Confirmation*, *supra* note 31, at 17. For other statements mentioning the Federalist Society and/or the Heritage Foundation, see 163 CONG. REC. S2386, S2441 (2017) (statement of Sen. Dick Durbin (D-IL)); *id.* at S2161, S2181 (statement of Sen. Chuck Schumer); *id.* at S2312 (statement of Sen. Jeff Merkley (D-OR)); *Kavanaugh Confirmation*, *supra* note 32, at 245 (statement of Sen. Dick Blumenthal (D-CT)); 164 CONG. REC. S6425 (2018) (statement of Sen. Bob Casey (D-PA)); *id.* at S6648 (statement of Sen. Brian Schatz (D-HI)).

38. JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT 281, 305, 326, 454–55, 462 (Vintage Books reprt. ed. 2017) (2016).

39. *See* Ryan Lizza, *The Great Divide*, NEW YORKER, Mar. 14, 2016, Academic Search Complete, AN 113645200.

40. 164 CONG. REC. S6523 (2018) (statement of Sen. Elizabeth Warren (D-MA)); *see also* 163 CONG. REC. S2197 (2017) (statement of Sen. Elizabeth Warren (D-MA)); *id.* at S2186 (statement of Sen. Bernie Sanders (I-VT)); 164 CONG. REC. S6479 (2018) (statement of Sen. Bernie Sanders (I-VT)); 166 CONG. REC. S6498 (2020) (statement of Sen. Elizabeth Warren (D-MA)); *Confirmation Hearing on the Nomination of Hon. Ketanji Brown Jackson to Be an Associate Justice of the Supreme Court of the United States*, 117th Cong. 285 (2022) [hereinafter *Jackson Confirmation*] (statement of Sen. Sheldon Whitehouse (D-

As reflected in these comments, the real consequence of these distortions of the democratic process, at least from the perspective of Democratic senators, was that legal and policy outcomes would not accurately reflect the mainstream views of the American people. Indeed, by the estimation of Democratic senators, such an outcome was precisely the point of the exercise for the Republican Party. By focusing their resources and attention on judicial politics, the Republican Party and conservative special interests and donors sought to shape the Supreme Court in certain ideological directions that favored the wealthy and/or powerful segments of American society because they could not achieve such goals in more democratic forums. To quote Senator Richard Blumenthal on this point in the context of the Barrett nomination:

> Dark money is the vehicle for turning the U.S. Senate into that conveyor belt. As we have documented as recently as Friday, through a report that we produced, showing how the NRA has been at the tip of the spear of a movement involving shell entities making contributions, receiving money, and channeling it to Members of this body who have confirmed those nominees so that that dark money produces appointees to the Federal bench.
>
> Amy Coney Barrett is part of that conveyor belt. She is only the latest of the appointees who threatens to shift not just the Supreme Court but the Federal judiciary radically to the right. The purpose is to achieve in the courts what our Republican friends and the radical right and the fringe elements of the Republican Party couldn't accomplish in the legislatures. They couldn't achieve in the State legislatures or in the Congress what they now seek to do by legislating from the bench through activist judges who will tilt our entire political system against the majority will.[41]

Some arguments by Democratic senators emphasized the outsized role of interest groups and dark money in driving legal developments[42]—such as

RI)); 164 CONG. REC. S6425 (2018) (statement of Sen. Bob Casey (D-PA)); *id.* at S6610 (statement of Sen. Sheldon Whitehouse (D-RI)); 163 CONG. REC. S2376–77 (2017) (statement of Sen. Chris Murphy (D-CT)); *id.* at S2381 (statement of Sen. Mazie Hirono (D-HI)).

41. 166 CONG. REC. S6550 (2020) (statement of Sen. Richard Blumenthal (D-CT)).

42. *See* 163 CONG. REC. S2180, S2181 (2017) (statement of Sen. Dick Durbin (D-IL)); *id.* at S2286–88 (statements of Sens. Jeff Merkley (D-OR) and Dick Durbin (D-IL)); *id.* at S2336 (statement of Sen. Chris Van Hollen (D-MD)); *id.* at S2354 (statement of Sen. Bob Casey (D-PA)); 164 CONG. REC. S6553 (2018) (statement of Sen. Jeff Merkley (D-OR)); *id.* at S6650 (statement of Sen. Jeff Merkley (D-OR)); *id* at S6663 (statement of Sen. Jack Reed (D-RI)); *id.* at S6669 (statement of Sen. Tammy Baldwin (D-WI)); 166 CONG. REC. S6484 (2020) (statement of Sen. Michael Bennet (D-CO)); *id.* at S6491 (statement of Sen. Bob Menendez (D-NJ)); *id.* at S6498 (statement of Sen. Elizabeth Warren (D-MA)); 166 CONG. REC. S6585 (statement of Sen. Chuck Schumer (D-NY)); 163 CONG. REC.

Senator Blumenthal's statement above—while others more vaguely referred to a right-wing agenda seeking to accomplish the same thing.[43] The thread of continuity between both sets of arguments, however, was an explicit or strongly implied focus on how particular special interests—which were economically powerful and unrepresentative of the broader public—were illegitimately skewing policy away from majoritarian will by exerting influence on the federal courts. These arguments about the outsized influence of these unrepresentative interests underscored a concern about how the appointments deviated from true majoritarian will; here, the few exercised an outsized power over the many.[44]

2. Senate Republican Arguments

For their part, Republican senators had no equally conspicuous interest group targets comparable to the Democratic Party's focus on the Federalist Society and the Heritage Foundation. Republicans did at times mention Demand Justice, a judicial advocacy group with ties to the

S2195 (2017) (statement of Sen. Mazie Hirono (D-HI)); *id.* at S2320 (statement of Sen. Patrick Leahy (D-VT)).

43. *See* 166 CONG. REC. S6394–95 (2020) (statement of Sen. Chris Murphy (D-CT)); *id.* at S6433–34 (statement of Sen. Sherrod Brown (D-OH)); *Gorsuch Confirmation*, *supra* note 31, at 17 (statement of Sen. Dick Durbin (D-IL)); 164 CONG. REC. S6562 (2018) (statement of Sen. Chuck Schumer (D-NY)); *id.* at S6592 (statement of Sen. Bob Menendez (D-NJ)); *Confirmation Hearing on the Nomination of Hon. Amy Coney Barrett to Be an Associate Justice of the Supreme Court of the United States*, 116th Cong. 10 (2020) [hereinafter *Barrett Confirmation*] (statement of Sen. Patrick Leahy (D-VT)); 166 CONG. REC. S6485–86, S6487–88 (2020) (statement of Sen. Jeff Merkley (D-OR)); 166 CONG. REC. S6528 (2020) (statement of Sen. Chris Murphy (D-CT)).

44. I should note some slight exceptions here. Senator Whitehouse was probably the most emphatic and consistent voice among Democratic senators in these confirmation debates regarding the corrosive influence of dark money on both the Supreme Court appointments process and on the actual rulings of the Court. At times, his arguments seem oriented toward concerns about majoritarian will. *See, e.g.*, 166 CONG. REC. S6445–46, S6539, S6540–43 (2020) (statement of Sen. Sheldon Whitehouse (D-RI)). In particular, he has focused on the outsized influence of corporations and business interests, suggesting that these interests are seeking to achieve non-majoritarian and undemocratic outcomes in the courts. *See id.* at S6543. At the same time, his arguments might be read to emphasize the harms that dark money pose to legal legitimacy—discussed in more depth below in Part III. That is, he has also emphasized how the corrupting influence of dark money compromises the integrity of the Court and has possibly reduced it to a "pantomime court." *Id.* at S6542; *see also Gorsuch Confirmation*, *supra* note 31, at 23–25 (statement of Sen. Sheldon Whitehouse (D-RI)); *Kavanaugh Confirmation*, *supra* note 32, at 47–50, 183–90 (statement of Sen. Sheldon Whitehouse (D-RI)) (note: the latter set of pages refers to comments by Senator Whitehouse in the context of an ongoing dialogue with Justice Kavanaugh); 164 CONG. REC. S6610–11 (2018) (statement of Sen. Sheldon Whitehouse (D-MA)); *Jackson Confirmation*, *supra* note 40, at 113–14 (statement of Sen. Sheldon Whitehouse (D-RI)); *id.* at 286. For other examples of Democratic senators articulating the concern about special interests undermining the legitimacy of the Court, see also 163 CONG. REC. S2331, S2333 (2017) (statement of Sen. Jack Reed (D-RI)); *Jackson Confirmation*, *supra* note 40, at 36 (statement of Sen. Dick Blumenthal (D-CT)).

Democratic Party that had first gained attention during the Kavanaugh nomination.[45] Republicans mentioned this group during the Jackson nomination.[46]

However, no Democratic presidential candidate or president became publicly intertwined with Demand Justice or any other interest group in the same way that Trump had with entities like the Federalist Society and the Heritage Foundation. Relatedly, the interest group-line of critique was likely more prominent from Democratic senators given their oppositional position for three of these four Supreme Court nominations. While attacking the democratic credentials of the appointments process makes more sense inherently as an oppositional strategy, it provides a limited strategic benefit if one holds the high ground and seeks to play effective defense to secure a successful confirmation—as Senate Republicans were seeking to do through most of these debates.

Finally, the Democrats' complaint that Republicans were seeking to subvert democracy by effectively legislating through the federal judiciary does have an analogue on the Republican side. However, as noted above, I address it in Part III because this argument, as articulated by the Republicans, was relatively more intertwined with legal and judicial rather than majoritarian concerns. While Democrats primarily saw the specter of judicial policymaking as a violation of democracy, Republicans shared that same worry but connected it somewhat more frequently to concerns about the integrity of the federal courts or the law itself.[47]

III. SENATE INSTITUTIONAL CONCERNS

A great deal of what is encompassed within the present-day process for appointing a Supreme Court justice are institutional rules, norms, and practices. Indeed, a quick examination of the history of Supreme Court appointments helpfully reminds us that the first Supreme Court nominee to be subject to public hearings was Justice Louis D. Brandeis in 1916; the first to testify in Senate hearings on their nomination was Justice Harlan F. Stone in 1925; the first to be invited to testify in Senate hearings on their nomination was Justice Felix Frankfurter in 1939; and Justice John Marshall Harlan II inaugurated the modern practice of Supreme Court nominees appearing in a public hearing before the Senate Judiciary

45. *See* HULSE, *supra* note 2, at 213–15.

46. *See Jackson Confirmation*, *supra* note 40, at 16 (statement of Sen. John Cornyn (R-TX)); *id.* at 228 (statement of Sen. Marsha Blackburn (R-TN)); *id.* at 244–45 (statement of Sen. Thom Tillis (R-NC)); 168 CONG. REC. S2021 (2022) (statement of Sen. Mike Lee (R-UT)).

47. *See infra* Section IV.A.

Committee in 1955.[48] Given this, a familiar normative standard referenced in Senate debates over Supreme Court nominees was one rooted in the Senate's institutional rules, norms, and past practices concerning federal judicial nominees.

The hallmark of these institutional arguments is clear: these arguments referred to normative guidelines rooted in past Senate rules, norms, and practices to identify transgressive actions in the appointments process. Unlike a normative standard rooted in majoritarian will (whether defined by electoral results or policy outcomes), in which the evaluative reference point is external to the Senate, the normative standard here is more self-referential for senators of both parties; these arguments proceed from considerations that reside within the Senate.

Before delving into these institutional arguments, some common themes are worth noting. First, as previously discussed, some arguments identified certain actions (usually by senators of the opposing party) as transgressions of unambiguous Senate rules and/or past practices.[49] Second, at other moments, senators made arguments oriented toward defending their own actions in the present with reference to past institutional practices.[50] These arguments aimed to deny any alleged transgression in the present by invoking the past. Third, senators at other times acknowledged that certain actions favored by their party might violate established practices in the Senate. However, they sought to justify this present-day behavior by claiming it was warranted as a response to even more problematic behavior by the opposing party's senators. Properly understood in this manner, senators contended that their own questionable behavior was actually protective of the Senate's established practices because it was a correction for the other party's senators' rule-breaking (past, present, or anticipated).[51]

Finally, a fourth sub-category of arguments encompassed sober, relatively non-partisan worries about the future of the Senate.[52] These arguments expressed fear about a weakened Senate broken down by increasingly intense and unrestrained partisan conflict. They also expressed anxiety for even more polarized and aggressive Senate fights over future federal judicial nominees. At root, these arguments focused on the character of the Senate itself and how judicial confirmation battles

48. *See* WITTES, *supra* note 1, at 60–70; Scott Bomboy, *Early Supreme Court Hearings Little Resembled Their Modern Counterparts*, NAT'L CONST. CTR.: CONST. DAILY BLOG (Mar. 13, 2017), https://perma.cc/9S9Z-DXVK.

49. *See, e.g.*, 163 CONG. REC. S2222 (2017) (statement of Sen. Jeff Merkley (D-OR)).

50. *See e.g.*, *Gorsuch Confirmation*, *supra* note 31, at 32 (statement of Sen. Ted Cruz (R-TX)).

51. *See, e.g.*, 163 CONG. REC. S2165 (2017) (statement of Sen. John Cornyn (R-TX)).

52. *See, e.g.*, 164 CONG. REC. S6605 (2018) (statement of Sen. Lisa Murkowski (R-AK)).

have changed that character by, among other things, impacting relationships between individual senators.

A. Debating the Failed Garland Nomination in 2017

As noted above, Senate Republicans followed the lead of Senate Majority Leader McConnell in appealing to majoritarian will—in the form of the 2016 presidential electoral result—to justify their non-action on the Garland nomination. As also noted above, Senate Democrats responded to such arguments with extreme skepticism and with their own arguments about majoritarian will.

In addition, Senate Democrats criticized Republican non-action on the Garland nomination by appealing to past Senate practices. Senator Jeff Merkley stated the following about the Garland nomination at the start of a long commentary in the Gorsuch confirmation debate:

> The majority leader made it clear that there would be no committee hearing and no committee vote and no opportunity to come here directly to the floor, bypassing the committee. In other words, he closed off every opportunity for the President's nominee to be considered. This is the first time—this is the only—time that has happened in our Nation's history when there was a vacancy in an election year.
>
> What is the essence of this extraordinary and unusual action when this Chamber fails to exercise its advice and consent responsibility under the Constitution? Were we at a time of war, like the Civil War, in which the Capitol at times was under assault? [53]

For their part, Senate Republicans made several institutionally-oriented arguments in this context. They denied that their position on the Garland nomination violated any established Senate practices. They noted that no recent case of a presidential election-year Supreme Court vacancy being filled in that election year existed. The absence of any such case underscored the historical appropriateness of their actions on the Garland

53. 163 CONG. REC. S2222 (2017) (statement of Sen. Jeff Merkley (D-OR)); *see also id.* at S2231, S2296–97; *Gorsuch Confirmation*, *supra* note 31, at 43 (statement of Sen. Chris Coons (D-DE)); *id.* at 35 (statement of Sen. Patrick Leahy (D-VT)); 163 CONG. REC. S2180 (2017) (statement of Sen. Dick Durbin (D-IL)); *id.* at S2209 (statement of Sen. Tom Carper (D-DE)); *id.* at S2319 (statement of Sen. Patrick Leahy (D-VT)); *id.* at S2335 (statement of Sen. Chris Van Hollen (D-MD)); *id.* at S2161, S2183, S2387 (statement of Sen. Chuck Schumer (D-NY)). Similar comments arose in subsequent Senate debates as well. For examples of these comments from the Kavanaugh and Jackson confirmation debates, see 164 CONG. REC. S6574 (2018) (statement of Sen. Tom Carper (D-DE)); *id.* at S6554 (statement of Sen. Michael Bennet (D-CO)); *id.* at S6563 (statement of Sen. Jack Reed (D-RI)); 166 CONG. REC. S6472 (2020) (statement of Sen. Tom Carper (D-DE)); *id.* at S6527 (statement of Sen. Chris Murphy (D-CT)); 168 CONG. REC. S2031 (2022) (statement of Sen. Tom Carper (D-DE)).

nomination and/or the need for the appointments process in 2016 to be informed by the results of the 2016 presidential election.[54] That is, established institutional practices *did* support the behavior of Republican senators in 2016.[55]

Relatedly, Senate Republicans seized on a past comment by then-Senator Joe Biden discussing how if a Supreme Court vacancy did occur, the Senate should not take up a judicial nomination by President George H.W. Bush in June 1992 because of its proximity to the 1992 presidential election. As then-Senator Biden had stated at the time: "Instead, it would be our pragmatic conclusion that once the political season is under way, and it is, action on a Supreme Court nomination must be put off until after the election campaign is over. That is what is fair to the nominee and is central to the process."[56] To the extent one found this Biden statement to be describing an established practice in the Senate,[57] this would make

54. *See Gorsuch Confirmation*, *supra* note 31, at 32 (statement of Sen. Ted Cruz (R-TX)); *id.* at 27 (statement of Sen. Lindsey Graham (R-SC)); 163 CONG. REC. S2167 (2017) (statement of Sen. Jeff Flake (R-AZ)).

55. On the merits, one might argue instead that presidential election-year vacancies on the Supreme Court are not a frequent enough occurrence for history to provide much guidance either way. Also, as Senate Democrats pointed out, Justice Anthony Kennedy was confirmed in a presidential election year—1988—by a Senate with a Democratic majority no less, but he was left out of Republican historical assessments because the vacancy that he filled had opened up in 1987. *See, e.g.*, 163 CONG. REC. S2238 (2017) (statement of Sen. Jeff Merkley (D-OR)); *id.* at S2286 (statement of Sen. Dick Durbin (D-IL)); *id.* at S2319 (statement of Sen. Patrick Leahy (D-VT)); *see also* HULSE, *supra* note 2, at 19. For an argument that the Senate Republicans' behavior—in the form of their denial of Judiciary Committee Hearings and refusal to hold a vote on the Garland nomination—transgressed an identifiable precedent in the Senate's treatment of Supreme Court nominees, see Robin Bradley Kar & Jason Mazzone, *The Garland Affair; What History and the Constitution* Really *Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53, 55–61 (2016). For a skeptical take on the Kar and Mazzone position, however, see Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 128–30 (2017). More generally, Chafetz advises caution and a sensitivity to broader historical context in making and assessing claims that certain behaviors are "unprecedented" in the context of federal judicial appointments. *Id.* at 130–32.

56. Mike DeBonis, *In 1992, Joe Biden Called for an Election-Year Blockade of Supreme Court Nominations*, WASH. POST, Feb. 22, 2016, Gale in Context: Global Issues, Doc. No. A443976913.

57. One might question how much cover this Biden comment provided for Republican obstruction on the Garland nomination in 2016. Biden was responding to a hypothetical question since there was no Supreme Court vacancy in 1992. *See* HULSE, *supra* note 2, at 43–44. Further, to the extent that the Anthony Kennedy appointment is instructive for Democratic Party behavior on these matters, it demonstrated the Democrats' willingness to confirm a justice in an election year, albeit for a vacancy that occurred in a non-election year. *See* HULSE, *supra* note 2, at 19. In contrast, the juxtaposition of the positions taken by Republican senators in 2016 and 2020 make the charge of their hypocrisy difficult to answer.

There is a separate, but related theoretical question one might ask: how would Democratic senators have behaved in 2016 if they held a majority in the Senate and were faced with an

Senate Republican inaction on the Garland nomination consistent with past practice. Accordingly, Republican senators mentioned it often in the Gorsuch debates in 2017.[58]

B. Debating the Garland Nomination in 2020

Again, in a cruel twist of fate for Democrats but in an unbelievable stroke of good luck for Republicans, President Trump had the opportunity to nominate a third Supreme Court justice in the final year of his term in 2020. Democrats were suddenly in the same position as Republicans in 2016, facing a Supreme Court nomination by a president of the opposing party in an election year—though with one significant difference. Democrats did not have a majority in the Senate and could not execute a stalling strategy like Republican senators did in 2016. With Democrat senators facing these circumstances, a new set of norm-based arguments emerged from both Senate Democrats and Republicans.

First, regarding the Senate Democrats: unlike Senate Republicans in 2016, Senate Democrats in 2020 faced a context for judicial appointments in which there *had* been a pause on the Garland nomination in 2016. Democrats now argued that the Garland precedent set a clear institutional practice on presidential-year openings on the Supreme Court. In 2020, being principled required that senators adhere to the Garland precedent and pause on any Supreme Court nomination in 2020 until after the

election year-nomination to the Supreme Court from a Republican president in their final year in office? Some Republican senators, like McConnell, were quite confident that Democratic senators were opportunistic to their core and would have done the exact opposite of what they advocated in 2016—i.e., they would have urged a pause on the nomination. *See* HULSE, *supra* note 2, at 43; SHERMAN & PALMER, *supra* note 23, at 71. As such, one suspects a number of Republicans believed Senate Democrats would have appeared just as hypocritical as Senate Republicans if they were placed in the same circumstances faced by the latter in 2016 and 2020. Lindsay Graham later made this point in the context of the Senate Judiciary Committee Hearings for Justice Gorsuch in 2017: "The bottom line here is I have no doubt in my mind if the shoe were on the other foot, the other side would have delayed the confirmation process until the next President were elected." *Gorsuch Confirmation*, *supra* note 31, at 32. Still, Democratic senators, to their benefit perhaps—but also ultimately to their political detriment—were never placed in such situations. Republicans, to their detriment (and ultimate benefit) were, and the subsequent hypocrisy was not theoretical. Finally, another institutional practice worth noting was an informal understanding within the Senate of the so-called "Thurmond Rule" which spoke to the idea that the Senate should stop consideration of federal judicial candidates in a presidential election year. *See* HULSE, *supra* note 2, at 17–18. However, this was not a formal rule, and as Hulse notes, "[i]t definitely was not meant to go into force in February [when the Scalia vacancy opened up] with nearly a year left in a presidential term." HULSE, *supra* note 2, at 18.

58. *See, e.g.*, 163 CONG. REC. S2304 (2017) (statement of Sen. Chuck Grassley (R-IA)); *id.* at S2386 (statement of Sen. Mitch McConnell (R-KY)); *id.* at S2401 (statement of Sen. Lindsey Graham (R-SC)); *id.* at S2409 (statement of Sen. Roger Wicker (R-MS)); *id.* at S2403 (statement of Sen. Jim Inhofe (R-OK)).

upcoming presidential election.[59] To do otherwise would demonstrate that Senate Republican behavior during the Garland nomination in 2016 had no norm-affirming or norm-generative effect. A refusal to pause by Senate Republicans would also make clear that the latter had earlier engaged in a simple power-grab.[60]

For Republican senators in 2020, they clearly felt that an appointment by a Republican president in the final year of that president's duly elected term provided sufficient democratic legitimacy for moving forward with the Barrett nomination. To justify the apparent hypocrisy of this position in light of their 2016 position, Republicans sought to differentiate the two sets of circumstances. Senate Republicans in 2020 argued that proceeding with Barrett's nomination was appropriate given that Republicans held a majority in the Senate. Likewise, stalling the Garland nomination in 2016 was appropriate because Democrats did not hold a majority in the Senate then. In other words, the principle that emerged for Republicans from their actions in 2016 and 2020 was that a president's nomination should go forward only if the president's party controlled the Senate. If the president's party did not control the Senate, the nomination should not go forward. This is what Senator McConnell stated early on in the Senate debates over the Barrett nomination:

> The Democratic leader continues to misstate what the Republicans said in 2016. Let me quote verbatim from my very first floor speech after Justice Scalia passed away. Here is what I said: "The Senate has not filled a vacancy arising in an election year when there was divided government since 1888." That is what we had then [in 2016], a divided government—a Republican Senate and a Democratic President. Now, my friend the Democratic leader may be emotionally invested in this idea that I said something else, but that is, in fact, what I said. Historical precedent supported no confirmation in 2016, and it supports confirming Judge Barrett now.[61]

59. *See Barrett Confirmation*, *supra* note 43, at 6 (statement of Sen. Dianne Feinstein (D-CA)); *id.* at 10 (statement of Sen. Patrick Leahy (D-VT)); *id.* at 15 (statement of Sen. Dick Durbin (D-IL)); *id.* at 21 (statement of Sen. Sheldon Whitehouse (D-RI)); *id.* at 33 (statement of Sen. Chris Coons (D-DE)); 166 CONG. REC. S6420, S6421 (2020) (statement of Sen. Chuck Schumer (D-NY)); *id.* at S6423 (statement of Sen. Dick Durbin (D-IL)); *id.* at S6394–95 (statement of Sen. Chris Murphy (D-CT)); *id.* at S6451, S6452 (statement of Sen. Chuck Schumer (D-NY)); *id.* at S6471 (statement of Sen. Tom Carper (D-DE)); *id.* at S6527–29 (statement of Sen. Chris Murphy (D-CT)).

60. *See* 166 CONG. REC. S6421 (2020) (statement of Sen. Chuck Schumer); *id.* at S6394–95 (statement of Sen. Chris Murphy (D-CT)); *id.* at S6471 (statement of Sen. Tom Carper (D-DE)).

61. 166 CONG. REC. S6385 (2020) (statement of Sen. Mitch McConnell (R-KY)). For other references, see *Barrett Confirmation*, *supra* note 43, at 24 (statement of Sen. Ted Cruz (D-TX)); *id.* at 53; 166 CONG. REC. S6447 (2020) (statement of Sen. Steve Daines (R-MT)); *id.* at S6465–66 (statement of Sen. Jim Inhofe (R-OK)).

However, Democrats pointed out at least two problems with this argument: first, this appeared to be revisionist history. The fact that Republicans had a majority in the Senate in 2016 did not seem to figure prominently in Republican justifications for stalling on the Garland nomination at that time. As Senator Chuck Schumer put it: "This idea that because now the Presidency and the Senate are in one party, the rule doesn't apply—they never said that when they blocked Merrick Garland. It is fakery."[62] Second, the Republican argument put forth in 2020 failed to state a rationale or justification for Republican senator behavior that went any deeper than simply saying "we did what we did because we had the votes." It is certainly not an illogical position, but it is not especially principled. It is, rather, only a descriptive statement of relative partisan strength and partisan advantage. Accordingly, some Democratic senators spoke directly to this point in saying that Senate Republicans were motivated by nothing deeper than the desire to maximize their political advantage.[63]

C. The "Nuclear Option" in 2013 and 2017

Next, consider the Senate debates on the use of the filibuster in federal judicial nominations. The so-called "nuclear option" was adopted in 2013 by a 52–48 vote—aided by a 55-vote Democratic and Independent majority in the Senate at that time—for judicial nominees to the lower federal courts.[64] In effect, it eliminated the potential use of a filibuster for lower federal court judicial nominees. Instead, the nuclear option allowed for a simple majority of senators to end debate on a nomination and move forward with a vote on the nomination. This was a departure from the prior Senate rule requiring a 60-vote super-majority to end debate on these nominations.[65]

62. 166 CONG. REC. S6386 (2020). For other references see *id.* at S6447 (statement of Sen. Sheldon Whitehouse (D-RI)); *id.* at S6527–28 (statement of Sen. Chris Murphy (D-CT)). For assessments from journalists supportive of Schumer's critique, see, for example, HULSE, *supra* note 2, at 278; Blake, *supra* note 27.

63. *See* 166 CONG. REC. S6447 (2020) (statement of Sen. Sheldon Whitehouse (D-RI)); *id.* at S6527–28 (statement of Sen. Chris Murphy (D-CT)).

64. *See* 159 CONG. REC. S8418 (2013).

65. *See* HULSE, *supra* note 2, at 29, 109; Paul Kane, *Reid, Democrats Trigger "Nuclear" Option; Eliminate Most Filibusters on Nominees*, WASH. POST, Nov. 21, 2013, ProQuest, Doc No. 1460798371. Stated more precisely, the old Senate rule was that a 60 vote super-majority was required to invoke cloture to end a filibuster on these lower federal court judicial nominees. The nuclear option functioned to set the cloture requirement in this context to a simple majority, thus eliminating the possibility of a filibuster in this context as the term is usually understood. *See* Molly E. Reynolds, *What is the Senate Filibuster, and What Would it Take to Eliminate It?*, BROOKINGS, https://perma.cc/U9Q4-DULW (Jan. 29, 2021).

Fast forward to 2017, when Republicans held a 52-vote majority in the Senate and were on the verge of confirming Justice Neil Gorsuch to the Supreme Court. Democrats, having the Garland nomination still prominent in their minds, filibustered the Gorsuch nomination to prevent the assembly of a 60-vote super-majority needed to end debate on the nomination and allow for Justice Gorsuch's confirmation. Republicans, who held a majority, responded as expected and jettisoned the 60-vote threshold for cloture for Supreme Court nominees in a 52–48 vote. On April 6 of that year, the nuclear option was extended to Supreme Court nominations, thus requiring only a simple majority to end debate on a Supreme Court nomination.[66] With the old Senate rule discarded, Judge Gorsuch was confirmed by the Senate the following day.[67]

How did the senators address these rule changes in the confirmation debates? In some of the more acrimonious comments cataloged in this Article, senators from both parties repeatedly sought to justify their own questionable actions by pointing to the unwarranted aggression and flouting of established Senate practices and rules perpetrated by the other side.

Consider first the rationale offered by Senate Democrats for ending the lower court filibuster rule in 2013. They argued that this change was a needed response to a preceding Republican practice of routinely filibustering lower federal court judicial nominees during the Obama presidency.[68] Especially galling to Senate Democrats was Senate Republicans' attempt to stall the appointment of any new judges to the D.C. Circuit Court. Senate Republicans claimed that the workload of that court did not justify the addition of new appointees.[69]

Senate Republicans, for their part, argued that the Senate Democrats' use of the nuclear option in 2013 unambiguously departed from established Senate rules.[70] In response to accusations of obstructionist

66. *See* 163 CONG. REC. S2390 (2017).

67. *See id.* at S2442–43; *see also* Matt Flegenheimer, *Senate Republicans Deploy "Nuclear Option" to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), https://perma.cc/F9NU-ZEWA; HULSE, *supra* note 2, at 85.

68. *See* 166 CONG. REC. S6452, S6584–85 (2020) (statement of Sen. Chuck Schumer (D-NY)); 163 CONG. REC. S2161, S2182–83, S2387 (2017) (statement of Sen. Chuck Schumer (D-NY)); *id.* at S2209 (statement of Sen. Tom Carper (D-DE)); *id.* at S2311 (statement of Sen. Ben Cardin (D-MD)); *id.* at S2355 (statement of Sen. Bob Casey (D-PA)); *id.* at S2320 (statement of Sen. Patrick Leahy (D-VT)).

69. *See* HULSE, *supra* note 2, at 104; 163 CONG. REC. S2161, S2182–83 (2017) (statement of Sen. Chuck Schumer (D-NY)); *id.* at S2209 (statement of Sen. Tom Carper (D-DE)); *id.* at S2311 (statement of Sen. Ben Cardin (D-MD)).

70. *See* 166 CONG. REC. S6409 (2020) (statement of Sen. Mitch McConnell (R-KY)); *id.* at S6453 (statement of Sen. John Thune (R-SD)); 168 CONG. REC. S1951 (2022) (statement of Sen. Mitch McConnell (R-KY)); 163 CONG. REC. S2341 (2017) (statement of Sen. Orrin Hatch (R-UT)); *id.* at S2384–85 (statement of Sen. Mitch McConnell (R-KY)); *Senate Judiciary Committee Holds Markup of the Nomination of Amy Coney Barrett to Be*

behavior during the Obama presidency, Senate Republicans countered by claiming that their use of the filibuster for those lower court judicial nominees was no worse and/or a proper response to even earlier filibustering efforts by Senate Democrats. These efforts included the filibustering of lower court judicial nominees during the George W. Bush administration,[71] and earlier (but unsuccessful) attempts by Senate Democrats to filibuster Alito's nomination to the Supreme Court in 2007.[72]

In 2017, the Democratic filibuster of the Gorsuch nomination unsurprisingly prompted accusations from Republicans that the former was now breaking a long-standing Senate norm. Democrats engaging in a partisan filibuster of a Supreme Court nominee were violating established Senate practices.[73] In addition, anticipating the need to invoke the nuclear option for Supreme Court nominees to get Gorsuch confirmed and the likely criticisms from Democrats that would follow if they did so, Senate Republicans, in a bit of proactive defense, energetically cataloged what they perceived to be the past transgressions of Senate practices by Democrats in years-long fights over the judiciary.[74]

Democrats' arguments in 2017 mirrored those of their Republican counterparts. Democrats justified their filibuster of Gorsuch by pointing to past Republican transgressions, such as non-action on the Garland nomination,[75] and past obstruction of President Obama's lower court

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an Associate Justice on the Supreme Court of the United States and Pending Business (2020) [hereinafter *Barrett Markup*] (statement of Sen. Mike Lee (R-UT)) ("In 2013 with a number of Obama policies . . . .")

71. *See* 166 CONG. REC. S6409 (2020) (statement of Sen. Mitch McConnell (R-KY)); 168 CONG. REC. S1951 (2022) (statement of Sen. Mitch McConnell (R-KY)); 163 CONG. REC. S2384–85 (2017) (statement of Sen. Mitch McConnell (R-KY)); *see also* HULSE, *supra* note 2, at 97–103.

72. For Senate Republican references to this, see 166 CONG. REC. S6409, S6410 (2020) (statement of Sen. Mitch McConnell (R-KY)); 163 CONG. REC. S2384 (2017) (statement of Sen. Mitch McConnell (R-KY)).

73. *See* 163 CONG. REC. S2165 (2017) (statement of Sen. John Cornyn (R-TX)); *id.* at S2180 (statement of Sen. Mitch McConnell (R-KY)); *id.* at S2191–92 (statement of Sen. Chuck Grassley (R-IA)); *id.* at S2192 (statement of Sen. Cory Gardner (R-CO)).

74. *See* 163 CONG. REC. S2202–03 (2017) (statement of Sen. Tom Cotton (R-AR)); *id.* at S2341 (statement of Sen. Orrin Hatch (R-UT)); *id.* at S2383–85 (statement of Sen. Mitch McConnell (R-KY)). These items were later repeated in subsequent confirmations. *See, e.g.*, *Barrett Markup*, *supra* note 70 (statement of Sen. Mike Lee (R-UT)) ("When he selected Judge Neil Gorsuch . . . ."); *id.* (statement of Sen. Mike Lee (R-UT)) ("The only precedents Democrats . . . .").

75. *See* 163 CONG. REC. S2209 (2017) (statement of Sen. Tom Carper (D-DE)); *id.* at S2322 (statement of Sen. Patrick Leahy (D-VT)); *id.* at S2335–36 (statement of Sen. Chris Van Hollen (D-MD)); *id.* at S2161, S2183, S2387 (statement of Sen. Chuck Schumer (D-NY)); *id.* at S2311 (statement of Sen. Ben Cardin (D-MD)); *id.* at S2355 (statement of Sen. Bob Casey (D-PA)).

judicial nominees.[76] Further, they emphasized the very obvious departure from Senate rules embodied in the Senate Republicans' deployment of the nuclear option for Supreme Court nominees.[77]

D. The Legislative Filibuster and the Character of the Senate

Given the preceding events, it is unsurprising that some of the dialogue in these Senate debates included speculation about the future and the possibility of greater damage to the institution. Thus, in response to chatter from Democratic Party leaders on the possibility of abandoning the filibuster for legislation,[78] Senate Republicans consistently criticized the idea of abandonment. The concerns Senate Republicans raised in this context bear the same general preoccupation as the other arguments raised in this Part: that discarding this established Senate practice would damage the institution for the sole purpose of short-term partisan gains.[79] Further, other arguments more precisely voiced the concern that with the end of the legislative filibuster, a fundamental transformation of the Senate would occur in which its core characteristic—its orientation toward deliberation and consensus—would be replaced by a majoritarian institutional orientation akin to the House of Representatives.[80]

Finally, and relatedly, I should note that several senators, as somewhat implied in the preceding discussion, assessed that the present state of affairs around judicial confirmations posed serious challenges to the institutional health of the Senate. Tightly intertwined with the array of transgressions alleged by each party's senators against their counterparts

76. *See id.* at S2160–61, S2182–83, S2387 (statement of Sen. Chuck Schumer (D-NY)); *id.* at S2209 (statement of Sen. Tom Carper (D-DE)); *id.* at S2355 (statement of Sen. Bob Casey (D-PA)).

77. *See* 163 CONG. REC. S2182, S2183 (2017) (statement of Sen. Chuck Schumer (D-NY)); *id.* at S2242 (statement of Sen. Jeff Merkley (D-OR)). I should additionally note that some Senate Democrats criticized the Republican deployment of the nuclear option in majoritarian will terms. They argued that preserving the filibuster and the requirement of a 60-vote supermajority to invoke cloture was appropriate because it ensured that successful Supreme Court nominees would speak to the "mainstream" because of the higher threshold for confirmation. *See, e.g.*, *id.* at S2208 (statement of Sen. Cory Booker (D-NJ)); *id.* at S2209 (statement of Sen. Tom Carper (D-DE)); *id.* at S2355 (statement of Sen. Bob Casey (D-PA)). In speaking to normative considerations external to the Senate, these arguments align more with the types of arguments catalogued in Part I.

78. *See, e.g.*, Harry Reid, *The Filibuster Is Suffocating the Will of the American People*, N.Y. TIMES (Aug. 12, 2019), https://perma.cc/7PVD-FWSC; Paul Waldman, *Elizabeth Warren Just Called for Eliminating the Filibuster. She's Got a Point*, WASH. POST, Apr. 5, 2019, Gale in Context: Global Issues, Doc No. A581403567.

79. *See* 166 CONG. REC. S6548 (2020) (statement of Sen. Todd Young (R-IN)); *Jackson Confirmation*, *supra* note 40, at 245 (statement of Sen. Thom Tillis (R-NC)) ("Back in January, Senator Schumer . . . .").

80. *See* 163 CONG. REC. S2167 (2017) (statement of Sen. Jeff Flake (R-AZ)); *Barrett Confirmation*, *supra* note 43, at 32 (statement of Sen. Ben Sasse (R-NE)); 166 CONG. REC. S6538–39 (2020) (statement of Sen. Ben Sasse (R-NE)).

was a more systemic concern that the weight of institutional conflict from these battles has corroded individual relationships between Senate members. During these confirmation debates, Senator Lisa Murkowski might be seen as a conspicuous voice for the ideological center of the Senate. She offered this extended comment near the conclusion of the Kavanaugh confirmation debates, referencing Senator Susan Collins—another widely recognized centrist senator.

> But I am worried. I am really worried that this will become the new normal, where we find new and even more creative ways to tear one another down, and good people are just going to say: Forget it. It is not worth it.
>
> I am looking at some of the comments and the statements that are being made against me and against my good friend, my dear friend from Maine—the hateful, aggressive, truly, truly awful manner in which so many are acting now. This is not who we are. This is not who we should be. This is not who we raised our children to be.
>
> So as we move forward, again, through a very difficult time for this body and for this country, I want to urge us to a place where we are able to engage in that civil discourse that the Senate is supposed to be all about—that we show respect for one another's views and differences and that when a hard vote is taken, there is a level of respect for the decision that each of us makes.[81]

Consistent with the arguments in this Part, the troublesome state of affairs identified by Senator Murkowski can only be assessed as such against a normative standard tied to institutional concerns. Because the arguments in this Part are inward-looking for senators and tied to their relationships, one might suspect individual senators felt added emotional intensity about them.

IV. LEGAL AND JUDICIAL LEGITIMACY

A third cluster of comments proceeded from a different normative starting point: a stated interest in maintaining the legitimacy of the law and the federal courts. While Democratic and Republican senators unsurprisingly focused on different things connected to the appointments process that would undermine this legitimacy, they clearly converged on the importance of this normative goal. As elaborated below, they further referenced it in the confirmation debates as a basis for both criticizing

81. 164 CONG. REC. S6605 (2018) (statement of Sen. Lisa Murkowski (R-AK)). For a similar comment by Senator Collins, see 168 CONG. REC. S2065 (2022) (statement of Sen. Susan Collins (R-ME)). For other arguments referencing a more dysfunctional present-day Senate and/or a more collegial Senate in the past, see *Barrett Confirmation*, *supra* note 43, at 2 (statement of Sen. Lindsey Graham (R-SC)).

various actions or positions taken by senators from the other party and for critiquing the Supreme Court nominees preferred by the other party.[82]

A. Senate Republican Arguments

Chief Justice John Roberts famously analogized the role of a judge to the role of an umpire in his Senate Judiciary Committee Hearings in 2005:

> Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.[83]

Since then, Republican senators have been extremely fond of repeating this analogy. For them, the image of judge-as-umpire invokes the ideal of a neutral adjudicator, ensuring that the law is applied without any special treatment—good or bad—toward any party.[84] Republican Senators did not invoke this observation in Senate debates solely for explanatory purposes. The purpose of referencing the analogy was to suggest or even highlight the idea that Democratic senators or Democrat-appointed judicial nominees did not align with this view. Because of this, the appointments process—when controlled by Democratic senators—functioned to undermine the legitimacy of the law and/or the federal courts because of the Democratic party's acceptance of non-neutral judging and preference for judicial nominees who subscribe to that view. In some instances, Republican senators made the explicit point that Democrats' comfort with non-neutral judging amounted to a Democratic preference for politics and policymaking through the appointments process and the judiciary.[85]

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82. *See infra* sections IV.A-IV.C below.

83. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

84. *See* Chinn, *supra* note 3, at 927–30.

85. *See Jackson Confirmation*, *supra* note 40, at 108 (statement of Sen. John Cornyn (R-TX)) (comments came in an exchange with Judge Jackson, and his specific focus was on substantive due process); *id.* at 21 (statement of Sen. Mike Lee (R-UT)); 168 CONG. REC. S2068 (2022) (statement of Sen. Mitch McConnell (R-KY)); *Barrett Confirmation*, *supra* note 43, at 13 (statement of Sen. John Cornyn (R-TX)); 166 CONG. REC. S6393, 6427, 6462 (2020) (statement of Sen. John Cornyn (R-TX)); *Kavanaugh Confirmation*, *supra* note 32, at 24 (statement of Sen. Chuck Grassley (R-IA)); 166 CONG. REC. S6422–23 (2020) (statement of Sen. John Thune (R-SD)); *Kavanaugh Confirmation*, *supra* note 32, at 46 (statement of Sen. Mike Lee (R-UT)); *id.* at 37 (statement of Sen. John Cornyn (R-TX)); *id.* at 79 (statement of Sen. John Kennedy (R-LA)); *Gorsuch Confirmation*, *supra* note 31, at 9 (statement of Sen. Orrin Hatch (R-UT)); *id.* at 14–16 (statement of Sen. John

Senator Cruz offered a representative comment in this regard:

> This notion of partisan, results-oriented judging is directly contrary to the constitutional system we have in this country. My Democratic colleagues are openly calling for judges to enforce their own political preferences from the bench, and they want to use a person's willingness or unwillingness to do so as a litmus test for who gets on the Court. This isn't even a jurisprudential position, it is a political position. And it is difficult to imagine a more effective way to destroy our judicial system—the best in the world, despite its flaws—than to adopt this results-oriented approach.[86]

In other words, these arguments by Senate Republicans resembled the claims made by Senate Democrats, noted above in Part I, about special interests illegitimately seeking to utilize the federal courts to achieve policy goals that they could never win in the legislative arena. Yet, a qualified divergence should be noted here. While Democratic senators seemed to put somewhat greater emphasis on the theme of judicial policymaking as undermining democracy and majoritarian will, Republican senators—relatively speaking—appear to be doing something a little different. For them, somewhat greater emphasis is placed on judicial policymaking as undermining legal and judicial legitimacy.[87]

Republican senators supplemented these arguments with others focused on judicial approaches to constitutional interpretation. Some Republican senators explicitly endorsed originalism and/or textualism as the only acceptable interpretative approach for a neutral judge.[88] In a similar vein, during the Senate Judiciary Committee hearings for Justice Jackson, several Republican senators were keen for her to elaborate on her "judicial philosophy" to determine whether she would be an "activist"

Cornyn (R-TX)); *id.* at 49 (statement of Sen. Mike Crapo (R-ID)); 168 CONG. REC. S2059–60 (2022) (statement of Sen. Mitch McConnell (R-KY)).

86. 163 CONG. REC. S2204 (2017) (statement of Sen. Ted Cruz (R-TX)).

87. I qualified this point regarding the arguments of some Democratic senators and previously identified some of their comments that, contrary to the thrust of the present assertion, seemed to focus at least in part on legal legitimacy. *See infra* note 44. Similarly, the comments from Republican senators cited below are oriented more toward discussing judicial policymaking as an infringement of democracy. *See Jackson Confirmation*, *supra* note 40, at 26 (statement of Sen. Ted Cruz (R-TX)); *Barrett Markup*, *supra* note 70 (statement of Sen. Mike Lee (R-UT)) ("Liberals, not conservatives, turn to the Supreme Court . . . ."); *Kavanaugh Confirmation*, *supra* note 32, at 64–65 (statement of Sen. Ben Sasse (R-NE)); *id.* at 94 (statement of Sen. Thom Tillis (R-NC)); *Gorsuch Confirmation*, *supra* note 31, at 32 (statement of Sen. Ted Cruz (R-TX)); *id.* at 51 (statement of Sen. Thom Tillis (R-NC)).

88. *See* 168 CONG. REC. S2060, S2068 (2022) (statement of Sen. Mitch McConnell (R-KY)).

justice inclined to make policy and unwarranted legal conclusions.[89] Subsequent to those hearings, some senators voiced their dissatisfaction with Justice Jackson's answers and/or her prior judicial record and articulated the belief that she would not live up to the judge-as-umpire model of neutrality and modesty.[90]

Finally, I previously discussed comments from Republican senators on the possibility of the legislative filibuster being discarded and their criticisms of the idea.[91] "Court-Packing," or the idea of a President and a Senate majority jointly working to statutorily increase the size of the Supreme Court to allow for more appointees to join the Court immediately, has similarly been advocated by at least some portions of the Democratic Party in recent years.[92] Republican senators have consistently voiced their opposition to this idea in these Senate debates. The dominant objection to it, either explicit or strongly implied, was that such a move would undermine the legitimacy of the federal courts and any actions the federal courts might subsequently undertake.

That is, if a future Congress and President were ever to move to increase the size of the Supreme Court statutorily—thus ensuring a more sympathetic Supreme Court posture toward key legal and policy positions of the party in power—the costs to the Court's reputation would be immediate. So the argument goes, it would be apparent to the public that the Court was just a tool of the political branches. Public belief in legal neutrality or judicial independence would be severely undermined.[93]

89. *See Jackson Confirmation*, *supra* note 40, at 33 (statement of Sen. Ben Sasse (R-NE)); *id.* at 44 (statement of Sen. Tom Cotton (R-AR)); *id.* at 53 (statement of Sen. Thom Tillis (R-NC)).

90. *See* 168 CONG. REC. S1953–54 (2022) (statement of Sen. John Cornyn (R-TX)); *id.* at S2015 (statement of Sen. Rick Scott (R-FL)); *id.* at S2059–60 (statement of Sen. Mitch McConnell (R-KY)); *id.* at S1973 (statement of Sen. Joni Ernst (R-IA)); *id.* at S2018 (statement of Sen. Marsha Blackburn (R-TN)); *id.* at S1953–54 (statement of Sen. Mike Lee (R-UT)); 168 CONG. REC. S2026–28 (2022) (statement of Sen. James Lankford (R-OK)).

91. *See infra* notes 78-80 and accompanying text.

92. *See, e.g.*, Amber Phillips, *What is Court Packing, and Why are Some Democrats Seriously Considering It?*, WASH. POST, Oct. 8, 2020, ProQuest, Doc. No. 2444766429; Astead W. Herndon & Maggie Astor, *Ruth Bader Ginsburg's Death Revives Talk of Court Packing*, N.Y. TIMES, https://perma.cc/B5AH-QC3B (Oct. 22, 2020).

93. *See* 166 CONG. REC. S6549 (2020) (statement of Sen. John Thune (R-SD)); *Barrett Confirmation*, *supra* note 43, at 8 (statement of Sen. Chuck Grassley (R-IA)); *id.* at 13–14 (statement of Sen. John Cornyn (R-TX)); *id.* at 32 (statement of Sen. Ben Sasse (R-NE)); *id.* at 126 (statement of Sen. Mike Lee (R-UT)) (comments occurring in the context of dialogue with Justice Barrett); 166 CONG. REC. S6385 (2020) (statement of Sen. Mitch McConnell (R-KY)); *id.* at S6444–45, S6446 (statement of Sen. Steve Daines (R-MT)); *Jackson Confirmation*, *supra* note 40, at 22 (statement of Sen. Mike Lee (R-UT)); *id.* at 43 (statement of Sen. Tom Cotton (R-AR)); *id.* at 206 (statement of Sen. John Kennedy (R-LA)) (comments occurring in the context of dialogue with Judge Jackson); *id.* at 245–46 (statement of Sen. Thom Tillis (R-NC)); *id.* at 290–91 (statement of Sen. Mike Lee (R-UT)).

Indeed, several senators justified their "no" votes on Justice Jackson's nomination at least partly because the latter refused to disavow the idea of Court-Packing when asked about it during her Judiciary Committee Hearings.[94]

B. Senate Democratic Arguments

Not surprisingly, Senate Democrats have critiqued the judge-as-umpire analogy[95] and an originalist approach to constitutional interpretation[96] in these debates. The alternative argument they have offered regarding legal legitimacy has focused on how adjudication that takes social facts into account enhances that legitimacy. Senate Democrats have argued that "fair" adjudication requires a competent judge to understand the sometimes disproportionate burdens placed upon specific social groups and to recognize how the law should be applied in ways sensitive to such conditions. Notably, then-Senator Obama articulated this idea when he invoked the importance of "empathy" in judging during the confirmation debates over Chief Justice John Roberts:

> The problem I face—a problem that has been voiced by some of my other colleagues, both those who are voting for Mr. Roberts and those who are voting against Mr. Roberts—is that while adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court, so that both a Scalia and a Ginsburg will arrive at the same place most of the time on those 95 percent of the cases—what matters on the Supreme Court is those 5 percent of cases that are truly difficult. In those cases, adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. That last mile can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy.[97]

94. *See* 168 CONG. REC. S1958 (2022) (statement of Sen. Tom Cotton (R-AR)); *id.* at S1973 (statement of Sen. Joni Ernst (R-IA)); *id.* at S2059 (statement of Sen. Mitch McConnell (R-KY)). Jackson was indeed careful to avoid any assessment of the idea of increasing the size of the Supreme Court when asked about it. *See, e.g.*, *Jackson Confirmation*, *supra* note 40, at 206 (exchange between Judge Jackson and Senator Kennedy (R-LA)).

95. *See* 164 CONG. REC. S6615 (2018) (statement of Sen. Angus King (I-ME)).

96. *See* 163 CONG. REC. S2347 (2017) (statement of Sen. Michael Bennet (D-CO)); 166 CONG. REC. S6458 (2020) (statement of Sen. Dick Durbin (D-IL)); *id.* at S6550 (statement of Sen. Dick Blumenthal (D-CT)); *Barrett Confirmation*, *supra* note 43, at 162–63 (statement of Sen. Chris Coons (D-DE)); 163 CONG. REC. S2180–81 (2017) (statement of Sen. Dick Durbin (D-IL)); *id.* at S2331 (statement of Sen. Jack Reed (D-RI)); 166 CONG. REC. S6484 (2020) (statement of Sen. Michael Bennet (D-CO)); *id.* at S6394–95 (statement of Sen. Chris Murphy (D-CT)).

97. 151 CONG. REC. 21032 (2005) (statement of Sen. Barack Obama (D-IL)).

President Obama later invoked this empathy concern in his nomination of Justice Sotomayor in 2009.[98] And not surprisingly, the topic of "empathy" received a great deal of attention in her confirmation debates.[99]

For the confirmation debates central to this Article, Senate Democrats more commonly expressed the empathy concern through the argument that a conscientious judge had to recognize the effect of the law and adjudication upon "real people." To the extent that Republican Senators and the preferred Supreme Court nominees of Republican presidents failed to consider this factor in an appointments process, that process and the judicial appointees produced by it would inevitably be flawed. More precisely, both the appointments process and confirmed nominees of this type should be viewed as falling short of the normative requirements imposed by the law and by the judicial role.

Thus, Senator Amy Klobuchar stated the following in her opening remarks in the Judiciary Committee Hearings for Justice Jackson:

> As we are here to confirm a new justice for [Justice Breyer's] seat, I urge my colleagues to remember his words about how the court must consider the effect of its actions on people's lives, how it must be able to see the real people at the other end of its rulings. Like Americans who are one Supreme Court decision away from losing their health insurance, or one Court decision away from the ability to make their own healthcare choices, or the Dreamers who could lose the only country they've ever known, or the people who waited for hours in the rain one recent Election Day in Wisconsin wearing garbage bags and homemade masks in the middle of what would soon become a global pandemic just to cast a ballot, just to exercise their constitutional right to vote.[100]

Similarly, then-Senator Kamala Harris said the following in her assessment of Justice Gorsuch in the 2017 Senate debate on his nomination:

> Judge Gorsuch has Ivy League credentials, but his record shows he lacks sound judgment to uphold justice. He ignores the complexities of human beings—the humiliating sting of harassment, the fear of a cancer patient or a worker who feels his life is in danger. In short, his rulings lack a basic sense of empathy. Judge Gorsuch understands the text of the law, to be sure, but he has repeatedly failed to show that he

98. *See Obama's Remarks on the Resignation of Justice Souter*, N.Y. TIMES (May 1, 2009), https://perma.cc/A4VD-PQQC.

99. *See* Chinn, *supra* note 3, at 935–40.

100. *Jackson Confirmation*, *supra* note 40, at 23 (statement of Sen. Amy Klobuchar (D-MI)).

> fully understands those important words: "equal justice under law.'' For the highest Court in the land, I say, let's find someone who does.[101]

These comments strongly imply that an appointments process that confirms justices in the Gorsuch mold—justices who allegedly overlook the social dimensions of the law—should be assessed negatively based on what both the law and the judicial role require. Moreover, this view suggests that Senate Republicans—who actively work to confirm Supreme Court nominees that prioritize strict adherence to black-letter law while dismissing social realities—ultimately work to undermine key legal and judicial-institutional goals of the appointments process.

C. Precedents, Rights, and Policies

Finally, a very expansive set of arguments by senators from both parties focused on specific precedents, rights, and/or policies that, they alleged, would be bolstered or undermined by a given nominee's possible elevation to the Court. These arguments typically lacked the broad scope of those arguments that focused more on the interpretative methodology or the proper role of the federal courts. However, these arguments clearly articulate the implications for the overall legitimacy of the law and/or the federal courts.

References to specific precedents, rights, and policies within these confirmation debates are too numerous to be cataloged in this Article. Among other things, abortion rights, excessive corporate power, and the legality of the Affordable Care Act remained points of great interest for Senate Democrats during the confirmation debates for Justices Gorsuch,[102] Kavanaugh,[103] and Barrett.[104] During the Jackson confirmation, Senate

101. 163 CONG. REC. S2197 (2017) (statement of Sen. Kamala Harris (D-CA)); *see also Jackson Confirmation*, *supra* note 40, at 29 (statement of Sen. Chris Coons (D-DE)); 168 CONG. REC. S2000 (2022) (statement of Sen. Bob Casey (D-PA)); *id.* at S2011 (statement of Sen. Gary Peters (D-MI)); *id.* at S2061 (statement of Sen. Patrick Leahy (D-VT)); *id.* at S1962 (statement of Sen. Jack Reed (D-RI)); *Kavanaugh Confirmation*, *supra* note 32, at 97 (statement of Sen. Kamala Harris (D-CA)); 164 CONG. REC. S6621 (2018) (statement of Sen. Dick Blumenthal (D-CT)); 163 CONG. REC. S2194–95 (2017) (statement of Sen. Michael Bennet (D-CO)); *id.* at S2197 (statement of Sen. Elizabeth Warren (D-MA)); *id.* at S2205–07 (statement of Sen. Cory Booker (D-NJ)); *id.* at S2324 (statement of Sen. Dianne Feinstein (D-CA)); *id.* at S2334 (statement of Sen. Tom Udall (D-NM)).

102. *See, e.g.*, 163 CONG. REC. S2196 (2017) (statement of Sen. Tammy Duckworth (D-IL)) (commenting on abortion rights); *id.* at S2197 (statement of Sen. Elizabeth Warren (D-MA)) (commenting on excessive power of corporations).

103. *See, e.g.*, 164 CONG. REC. S6592 (2018) (statement of Sen. Bob Menendez (D-NJ)) (commenting on abortion rights); *id.* at S6646 (statement of Sen. Brian Schatz (D-HI)) (commenting on abortion rights).

104. *See, e.g.*, 166 CONG. REC. S6478–79 (2020) (statement of Sen. Mazie Hirono (D-HI)) (commenting on LGBTQ rights, abortion rights, and the Affordable Care Act); *id.* at S6514–17 (statement of Sen. Chris Van Hollen (D-MD)) (commenting on abortion rights and the Affordable Care Act).

Republicans focused, among other things, on prior criminal sentencing decisions she had made as a district judge and pressed the critique that she was soft on crime.[105]

V. CIVILITY AND THE TREATMENT OF NOMINEES

A final normative standard invoked in these debates should be a familiar one. Senators defending nominees they supported frequently complained that opposing senators and/or outside interest groups criticized the nominee too aggressively. The various charges ranged from parties engaging in irresponsible mischaracterizations of the nominee's past record to concerted efforts of character assassination.

Among the justices discussed in this Article, Justice Kavanaugh garnered the most attention in this regard by far. Just ahead of the Senate Judiciary Committee's planned vote on his nomination, claims emerged that Justice Kavanaugh had attempted to sexually assault Christine Blasey Ford decades earlier when both were teenagers. A highly unusual sequence of events brought these claims to light, culminating in Ford and Justice Kavanaugh testifying before the Senate Judiciary Committee on the matter.[106] Recognizing Kavanaugh's political vulnerability in light of these accusations, Republicans quickly went on the offensive, accusing Democrats of orchestrating a coordinated effort to engage in character assassination of the nominee.[107]

As Senator John Thune stated it:

> As I said earlier, Democrats made clear from the beginning that they would do anything they could to defeat Judge Kavanaugh's nomination. Throughout this process, they have grasped any straw that appeared: too few documents, too many documents, an unrelated investigation, outlandish accusations.[108]

105. *See, e.g.*, 168 CONG. REC. S1957–58 (2022) (statement of Sen. Tom Cotton (R-AR)) (commenting on crime); *id.* at S2018 (statement of Sen. Marsha Blackburn (R-TN) (commenting on crime).

106. *See* HULSE, *supra* note 2, at 242–58; MARCUS, *supra* note 35, at 223–317. The testimony of Ford and Kavanaugh, and their dialogue with the Senate Judiciary Committee, is at *Kavanaugh Confirmation*, *supra* note 32, at 627–732.

107. *See Kavanaugh Confirmation*, *supra* note 32, at 702 (statement of Sen. Lindsey Graham (R-SC)); 164 CONG. REC. S6404, S6563–64 (2018) (statement of Sen. Mitch McConnell (R-KY)); *id.* at S6459, S6565 (statement of Sen. John Cornyn (R-TX)); *id.* at S6475, S6577, S6692 (statement of Sen. Roy Blunt (R-MO)); *id.* at S6477 (statement of Sen. David Perdue (R-GA)); *id.* at S6556 (statement of Sen. Rob Portman (R-OH)); *id.* at S6559–61, S6694 (statement of Sen. Chuck Grassley (R-IA)); *id.* at S6565 (statement of Sen. Susan Collins (R-ME)); *id.* at S6595 (statement of Sen. Mike Lee (R-UT)).

108. 164 CONG. REC. S6534 (2018) (statement of Sen. John Thune (R-SD)).

Indeed, Republican anger over this incident persisted; Senate Republicans later invoked the alleged ill-treatment of Justice Kavanaugh in the Justice Barrett[109] and Justice Jackson[110] nominations several years later.

While not remotely as prominent, similar concerns regarding the uncivil treatment of nominees emerged in each of the other confirmation debates. During Justice Gorsuch's confirmation, Republicans defended him against a plagiarism allegation and expressed frustration with Senate Democrats' efforts to portray Justice Gorsuch as an unempathetic, pro-business judge.[111] With respect to Justice Barrett, several Republican senators charged Democrats of bias against her because of her religious faith and/or a combination of her religious faith, political conservatism, and gender.[112] Finally, in response to sharp questioning and commentary from numerous Republican senators—particularly Senators Tom Cotton,[113] Ted Cruz,[114] and Josh Hawley[115]—regarding Justice Jackson's prior record as a federal district judge on sentencing child pornography offenders, Democratic senators made several statements defending her record while also criticizing these attacks.[116]

Finally, I should note one other argument raised by Republican senators in this context. While not necessarily tied to any specific nominee, they raised a concern about the aggressiveness of progressive advocacy and its unwelcome intrusion into the appointments process. Especially in the context of the Kavanaugh confirmation debates, Republican senators repeatedly complained that the Democrats were inciting aggressive party activism that seemingly had no bounds. The concern raised in these comments centered on Democrat senators' alleged irresponsible rhetoric facilitating lawlessness or anarchy from Democratic Party supporters.[117]

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109. *See, e.g.*, 166 CONG. REC. S6443 (2020) (statement of Sen. Kevin Cramer (R-ND)).

110. *See, e.g.*, *Jackson Confirmation*, *supra* note 40, at 26–27 (statement of Sen. Ted Cruz (R-TX)); *id.* at 12–13 (statement of Sen. Lindsey Graham (R-SC)).

111. *See, e.g.*, 163 CONG. REC. S2412–13 (2017) (statement of Sen. James Lankford (R-OK)); *id.* at S2315, S2391 (statement of Sen. John Cornyn (R-TX))

112. *See Barrett Confirmation*, *supra* note 43, at 38 (statement of Sen. Josh Hawley (R-MO)); *id.* at 48 (statement of Sen. Joni Ernst (R-IA)); 166 CONG. REC. S6387 (2020) (statement of Sen. John Thune (R-SD)); *id.* at S6477 (statement of Sen. Marsha Blackburn (R-TN)).

113. *See, e.g.*, 168 CONG. REC. S1957 (2022) (statement of Sen. Tom Cotton (R-AR)).

114. *See, e.g.*, *id.* at S1988 (statement of Sen. Ted Cruz (R-TX)).

115. *See, e.g.*, *Jackson Confirmation*, *supra* note 40, at 322 (statement of Sen. Josh Hawley (R-MO)).

116. *See id.* at 344 (statement of Sen. Cory Booker (D-NJ)); 168 CONG. REC. S19555, 1991 (2022) (statement of Sen. Dick Durbin (D-IL)); *id.* at S2019 (statement of Sen. Ron Wyden (D-OR)).

117. *See* 164 CONG. REC. S6477 (2018) (statement of Sen. David Perdue (R-GA)); *id.* at S6561 (statement of Sen. Chuck Grassley (R-IA)); *id.* at S6565–66, S6692 (statement of Sen. John Cornyn (R-TX)).

Senator Mike Lee offered this comment during the Barrett confirmation debate:

> [I]t is an understatement to say that the last few weeks have been unusual in Senate history. I have never seen anything like it in the 8 years that I have been serving in this body. Every day when we show up to work, as we walk to our offices, we have to walk through a sea, a mob, of angry protestors, people screaming, shouting, yelling things at us—not pleasant things. In many instances, Members have to be accompanied as they walk to and from their offices, to and from the Senate floor where they cast their votes, to and from their committee hearings, in and out of rooms where they have to conduct their business.
>
> This is unusual. It is unpleasant. It is relatively unprecedented, certainly, in the time that I have been here. It is unfortunate and unnecessary. You see, this is not how the process is supposed to work.[118]

Thus, this alleged transgression, like the preceding arguments on the ill-treatment of nominees, centered on a critique of the appointments process rooted in an underlying requirement that the process be conducted with some minimum level of civility and orderliness.[119]

VI. THEMATIC CONTINUITIES: A REFERENCE TO THE BORK NOMINATION

Assuming one is convinced by the preceding discussion that these modalities of argument prominently recurred through the past four Supreme Court appointments, some questions remain before one can begin to assess the significance of both the arguments themselves and the fact of their recurrence. Perhaps the most obvious question concerns historical

118. 166 CONG. REC. S6592 (2018) (statement of Sen. Mike Lee (R-UT)); *see also id* at S6594–95.

119. I should briefly note one other argument that is not addressed above, but that is related to the concerns mentioned in this Part. Subsequent to Kavanaugh's confrontational behavior during the Senate Judiciary Committee hearings—after he was questioned about the Ford accusation—a number of Senate Democrats stated during the Senate debates that his behavior fell below a required level of decorum and civility. The more common terminology they used was that Kavanaugh displayed a disqualifying absence of temperament required for a Supreme Court justice. These types of argument thus presume an expectation of civil behavior by the nominee as part of a "normal" appointments process, which is distinct from the comments noted above that focus on the expectation of civil behavior by senators or others toward the nominee. There are many references to this concern in the Senate confirmation debates for Kavanaugh, but for some examples, see 164 CONG. REC. S6519 (2018) (statement of Sen. Patrick Leahy (D-VT)); *id.* at S6657–58 (statement of Sen. Kirsten Gillibrand (D-NY)); *id.* at S6585 (statement of Sen. Tim Kaine (D-VA)); *id.* at S6604–05 (statement of Sen. Lisa Murkowski (R-AK)). I do not dwell on this point because it has no strong analogue in the other confirmation debates.

context: is there something unique about the past four Supreme Court appointments that prompted these modalities of argument to recur, or are the past four appointments merely an illustration of a more enduring dynamic?

While I cannot conclusively answer this question here, I assert with some confidence that the kinds of themes mentioned in the preceding four Parts are almost certainly not unique to the present time. To be sure, some of the sub-categories of argument above reference events and developments that occurred in 2016 or later, providing context-specificity that, not surprisingly, speaks to the current moment. But if these argumentative themes are viewed more abstractly—focusing on democracy, Senate institutional practices, legal and judicial legitimacy, and civility—one might reasonably expect some or all of these themes to appear whenever the Senate debates any Supreme Court nominee in the modern era (subsequent to John Marshall Harlan's confirmation in 1955) who is sufficiently controversial to generate sustained debate in the full Senate.

Partial support for this view emanates from the nature of the argumentative themes themselves. Because these themes are broad and speak to enduring and fundamental issues, any sustained discussions of judicial power and democracy would likely intersect with some or all of them eventually. Stated otherwise, it is hard to imagine a more relevant set of themes that might be repeatedly deployed to criticize or defend controversial Supreme Court nominations.

However, additional support for this claim emanates from another extremely controversial Supreme Court nomination that occurred decades before the Justice Gorsuch confirmation: the failed nomination of Robert Bork in 1987. Again, one might reasonably expect the Bork debates to differ significantly from those referenced above, given the very different context. Among many other things, in 1987, (1) the Senate had not yet weathered fights over the Garland nomination and the nuclear option for both lower federal and Supreme Court nominees; (2) the heightened and more extreme partisan polarization of more recent decades was not present;[120] and (3) compared to all of the Trump and Biden administrations' nominees, Bork stood out as an unusual nominee. Prior to his nomination, Bork carved out a highly visible and controversial public profile for himself.[121] Additionally, scholars—and apparently

120. For a review of recent commentary on this topic, see Thomas B. Edsall, *'A Perfect Storm for the Ambitious, Extreme Ideologue,'* N.Y. TIMES (Sept. 20, 2023), https://perma.cc/UY7M-NKWC.

121. As then-senator and then-chairman of the Senate Judiciary Committee Joe Biden put it in his opening statement during those hearings, "You are no ordinary nominee, Judge, to your great credit. Over more than a quarter of a century you have been recognized as a leading—perhaps the leading—proponent of a provocative constitutional philosophy . . . "

subsequent Supreme Court nominees—viewed Bork as abnormally candid during his Judiciary Committee hearings.[122]

And yet, the Bork debates share strong points of continuity with the themes identified in the preceding four Parts. In 1987, Senators discussed the importance of democratic legitimacy, senate institutional concerns, legal and judicial legitimacy, and voiced very strong concerns about civility and the appropriate treatment of judicial nominees. Not surprisingly, these arguments took different forms compared to more recent confirmation debates, shaped by a different legal and political context. Senators also had to craft their arguments within constraints set by the nominee's record and testimony, as well as evolving public opinion surrounding the nomination. Yet, the recurrence of these four general themes in a pivotal Senate confirmation debate from decades earlier underscores that senators—and the broader public—continue to focus on the same considerations when the stakes are high with a Supreme Court nomination.

Retrospective assessments often cite the Senate confirmation debates over Robert Bork as the starting point of the modern-day judicial confirmation battles.[123] But even the participants in these debates understood something significant was afoot. Senator Patrick Moynihan invoked the comparison of the Court-Packing debates of the New Deal era in making this comment near the end of the Bork debates:

> Madam President, we are now in the final hour of a constitutional debate of considerable, some would say historical importance. Just this morning the dean of one of the Nation's finest law schools offered me his view that there has not been its like since the Court packing debate of 1937, a full half century ago.[124]

In the midst of this significant moment, Senators converged in discussing Bork's preferred interpretative methodology—originalism, several institutional concerns related to the Senate, and concerns about civility and fair treatment of the nominee.

Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States, 100th Cong. 95 (1987) (statement of Sen. Joe Biden (D-DE)); *see also* ETHAN BRONNER, BATTLE FOR JUSTICE; HOW THE BORK NOMINATION SHOOK AMERICA 14–17 (Union Square Press, 2007) (1989) (noting Bork's status as an established leader among legal conservatives prior to his nomination, and the recognition within the Reagan administration that a Bork nomination would draw controversy).

122. *See* MARCUS, *supra* note 35, at 181, 201.

123. *See, e.g.*, HULSE, *supra* note 2, at 57.

124. 133 CONG. REC. 29095 (1987) (statement of Sen. Daniel Moynihan (D-NY)).

A. Originalism: Majoritarian Will and Legal/Judicial Legitimacy

One of the most prominent features of Bork's background was his strong identification with originalism as a method of constitutional interpretation. Flowing from this methodological commitment was an accompanying commitment to judicial "modesty"—the aspiration that federal judges should leave greater, as opposed to less, space for democratic institutions to settle pressing matters of public policy. Appropriately, Bork briefly touched on these items in his opening statement before the Senate Judiciary Committee.[125] From that starting point, Bork's Senate defenders (nearly all of whom were Republicans) argued that the nominee's critics—presumably both in the Senate and outside it—were aligned with judicial activism instead of judicial modesty.

Some of Bork's defenders referenced democracy or majoritarian will arguments to attack the nominee's critics. They claimed Bork's critics only sought to elevate activist judges who inappropriately engaged in policymaking (a label that did not fit Bork, according to his supporters). According to his defenders, the critics' push for activist justices threatened democracy by undermining the legitimacy and primacy of democratic institutions. That is, like the arguments outlined in Part I, Bork's defenders accused his critics of utilizing activist judges to achieve policy change while side-stepping the elected branches.[126]

At the same time, some arguments, similar to those in Part III, began by emphasizing the harm of judicial activism and used this stance to defend Bork or attack his critics on legal and judicial legitimacy grounds. These defenses of Bork emphasized the denigration of the law and the judiciary that would ensue if judicial activism were encouraged by a Senate practice of confirming or not-confirming judicial nominees based on ideological considerations. More precisely, if Bork's critics successfully defeated his nomination and subsequently elevated activist justices (chosen mainly for a political ideology acceptable to certain senators and/or to powerful interest groups), it would erode judicial independence and the autonomy of the law.[127]

125. *See Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States*, 100th Cong. 103–05 (1987) (statement of Judge Robert Bork); *see also* BRONNER, *supra* note 121, at 211.

126. *See* 133 CONG. REC. 28705, 28955, 28970–72 (1987) (statement of Sen. Orrin Hatch (R-UT)); *id.* at 28849 (statement of Sen. Steve Symms (R-ID)); *id.* at 29049–50 (statement of Sen. John Danforth (R-MO)); *id.* at 29108 (statement of Sen. Bob Dole (R-KS)).

127. *See id.* at 28677, 29103 (statement of Sen. Orrin Hatch (R-UT)); *id.* at 28716, 28728 (statement of Sen. Bill Armstrong (R-CO)); *id.* at 28856 (statement of Sen. Chuck Grassley (R-IA)); *id.* at 28870 (statement of Sen. Phil Gramm (R-TX)); *id.* at 28938 (statement of Sen. Howell Heflin (D-AL)); *id.* at 29091 (statement of Sen. David Karnes

For their part, Bork's critics criticized his constitutional interpretative methodology as problematic from the standpoint of legal legitimacy. For these critics, originalism precluded a much-needed flexibility in judicial application of the law; instead, they preferred an approach closer to living constitutionalism.[128]

As previously referenced, these democratic and legal legitimacy arguments are in some ways two sides of the same coin. One can identify the phenomenon of judges legislating from the bench as an affront to both democratic ideals and the autonomy of the law and the judiciary. Thus, it should not be surprising that some senators managed to invoke both democratic and legal considerations within the same comment, as Senator Orrin Hatch did:

> If slick, multimedia disinformation campaigns waged by special interest groups are to guide judicial selection in America, our liberties will be entrusted neither to the consensus of the majority nor to the conscience of an independent judiciary. Instead, the definition of "rights" in America will become the vaunted prize in a contest of who can yell the loudest, create the most hatred and fear, and make the most intimidating threats. This replaces majority rule with mob rule, and replaces fair-minded judges with promise-bound politicians.[129]

B. Senate Institutional Concerns: Deference to the President and External Pressures

With respect to Senate institutional practices, it is striking to re-read these debates with the knowledge of what would occur in future decades. In his opening remarks in the Senate debates, then-Senator Joe Biden voiced the exact concerns later mentioned by Senator Lisa Murkowski during the Kavanaugh confirmation debates—earlier quoted in Part II.

(R-NE)); *id.* at 29107 (statement of Sen. Bob Dole (R-KS)). In light of his prominence in later judicial confirmation fights, this comment from Senator McConnell on post-Bork Senate practices is interesting:

> We in the Senate are going to make our decision on any basis we darn well please, and if we object as a matter of philosophical persuasion to the direction the President is trying to move the Court, whether to the right or to the left, we can just stand up and say that and vote accordingly. No deliberation, no standards of excellence, no standards at all. All of that is out the window for good.

Id. at 28901 (statement of Sen. Mitch McConnell (R-KY)).

128. *See id.* at 28656 (statement of Sen. Joe Biden (D-DE)); *id.* at 28666 (statement of Sen. Arlen Specter (D-PA)); *id.* at 29074 (statement of Sen. John Chafee (R-RI)); *id.* at 29060 (statement of Sen. Al Gore (D-TN)).

129. *Id.* at 28971 (statement of Sen. Orrin Hatch (R-UT)); *see also id.* at 28903 (statement of Sen. Lisa Murkowski (R-AK)); *id.* at 28859 (statement of Sen. William Roth (R-DE)); *id.* at 28912, 28914–15 (statement of Sen. Gordon Humphrey (R-NH)); *id.* at 28922 (statement of Sen. Jim McClure (R-ID)); *id.* at 28934–35 (statement of Sen. Alan Simpson (R-WY)).

Then-Senator Biden referenced the breakdown of "mutual respect and the personal restraint that holds this body together."[130]

Related to the institutional arguments cataloged in Part II, the dominant institutional issues during the Bork confirmation debates concerned this question: what was the appropriate level of discretion senators should exercise in relation to a presidential nomination? Supporters of Bork emphasized the appropriateness of the Senate largely deferring to a president's nomination, barring something unusually problematic about the candidate.[131] Perhaps the most blunt statement of this view was by Senator Larry Pressler:

> It has been my strongest feeling that the conservative side deserves [a Supreme Court] appointment. Ronald Reagan was elected and reelected. That is the way the system works . . . . I believe what this Senate will probably do tomorrow . . . will fly in the face of fair play.[132]

Among Bork's critics—who had little partisan incentive to provide help to President Reagan—senators emphasized the appropriateness of the Senate exercising a more robust discretion in this regard.[133]

Beyond this simple and unsurprising point of disagreement, two other institutional arguments are noteworthy given their invocations of majoritarian will and the absence of a perfect analogue to them in the more recent confirmation debates. First, some critics of the Bork nomination blended democratic and institutional arguments in justifying the Senate's right to reject Bork. These individuals viewed the expansive and intense engagement of interest groups and voters on this matter as a normal and healthy part of democracy. Further, these senators viewed this democratic input, flowing into the Senate, as an appropriate component of the appointments process—and as a legitimate item for senators to weigh in negatively assessing Bork's nomination.[134] Relatedly, some Bork critics

130. 133 CONG. REC. 28656 (1987) (statement of Sen. Joe Biden (D-DE)).

131. *See id.* at 28705 (statement of Sen. Orrin Hatch (R-UT)); *id.* at 28858 (statement of Sen. William Roth (R-DE)); *id.* at 29059 (statement of Sen. David Durenberger (R-MN)); *id.* at 29021 (statement of Sen. Pete Domenici (R-NM)).

132. *Id.* at 28943 (statement of Sen. Larry Pressler (R-SD)). For another notable comment linking Senate deference to the President with democratic legitimacy considerations stemming from Reagan's reelection, see *id.* at 28868–69 (statement of Sen. Phil Gramm (R-TX)).

133. *See id.* at 28657 (statement of Sen. Joe Biden (D-DE)); *id.* at 28554 (statement of Sen. Daniel Inouye (D-HI)); *id.* at 28873–74 (statement of Sen. Patrick Leahy (D-VT)); *id.* at 29024–25 (statement of Sen. James Exon (D-NE)); *id.* at 29032, 29079 (statement of Sen. John Kerry (D-MA)); *id.* at 29074 (statement of Sen. John Chafee (R-RI)); *id.* at 29102 (statement of Sen. John Kennedy (D-MA)).

134. *See id.* at 28874–75 (1987) (statement of Sen. Patrick Leahy (D-VT)); *id.* at 28921 (statement of Sen. Howard Metzenbaum (D-OH)); *id.* at 29102 (statement of Sen. John Kennedy (D-MA)); *id.* at 28881 (statement of Sen. George Mitchell (D-ME)).

also highlighted—usually in response to Republican claims that Democrats had "politicized" the process—that President Reagan was responsible for prompting broad political engagement on this nomination.[135]

Second, however, some Bork defenders essentially took the opposing view and saw broad political engagement on this nomination as problematic for the appointments process. They feared that intense political involvement and interest on this matter, directed at the Senate, might negatively affect the independence and sound judgment of the Senate. Under this view, outside political influences had unhelpfully moved the Senate away from the more appropriate course of action of confirming Bork and foreshadowed a troubling future in which the Senate would become less insulated from outside pressures with respect to Supreme Court appointments.[136]

C. Civility

Finally, mirroring the discussion in Part IV, another set of arguments prominent in the Bork Senate debates should be unsurprising for anyone with a passing familiarity of this episode. Some of Bork's defenders criticized the appointments process by emphasizing what they viewed as ill-treatment and an absence of basic decency toward Bork by various parties during the confirmation process. They claimed that outside interest groups and some senators unfairly characterized Bork's professional record, and as a result, he was unjustly smeared by a widespread campaign of intentional misinformation during this process. This shortcoming of the confirmation process was raised both out of a concern for the treatment of Bork as an individual but also in connection with the possibility of future institutional and political conflict.[137] For example, following extensive discussion regarding the unfair criticisms leveled at Bork, Senator Hatch

135. *See id.* at 28656–57, 28724 (statement of Sen. Joe Biden (D-DE)); *id.* at 28697 (statement of Sen. John Kennedy (D-MA)); *id.* at 29075–76 (statement of Sen. John Kerry (D-MA)).

136. *See id.* at 28915–16 (statement of Sen. Gordon Humphrey (R-NH)); *id.* at 28921, 29036, 29038 (statement of Sen. Jim McClure (R-ID)); *id.* at 28924–25 (statement of Sen. Sam Nunn (D-GA)); *id.* at 28935 (statement of Sen. Alan Simpson (R-WY)); *id.* at 29058 (statement of Sen. David Durenberger (R-MN)).

137. *See* 133 CONG. REC. 28678–82, 28701–02 (1987) (statement of Sen. Orrin Hatch (R-UT)); *id.* at 28657–58 (statement of Sen. Strom Thurmond (R-SC)); *id.* at 28709–13, 28726–27 (statement of Sen. Bill Armstrong (R-CO)); *id.* at 28847–49 (statement of Sen. Steve Symms (R-ID)); *id.* at 28855–57 (statement of Sen. Chuck Grassley (R-IA)); *id.* at 28877 (statement of Sen. Malcolm Wallop (R-WY)); *id.* at 28910–11 (statement of Sen. Gordon Humphrey (R-NH)); *id.* at 28921, 29033–35 (statement of Sen. Jim McClure (R-ID)); *id.* at 28927–28 (statement of Sen. Alan Simpson (R-WY)); *id.* at 28943 (statement of Sen. Larry Pressler (R-SD)); *id.* at 29020–21 (statement of Sen. Pete Domenici (R-NM)); *id.* at 29052–53 (statement of Sen. John Danforth (R-MO)); *id.* at 29068, 29071 (statement of Sen. Jesse Helms (R-NC)); *id.* at 29107 (statement of Sen. Bob Dole (R-KS)).

directly linked this alleged poor treatment of the nominee to larger concerns about the health of the Senate and legal and judicial legitimacy:

> Despite the lessons of the Constitution and Senate precedent, the Bork nomination has become a bruising political wrestling match, ultimately decided by political muscle in the form of lobbying strength, media attacks, fundraising, and majority party solidarity. The potential damage to the independence and integrity of the judiciary is a cost yet to be fully counted.
>
> The tragedy is that this "deft blend" of ridicule, rumor, and racism is politicizing a sensitive constitutional process, which carries implications far beyond the career of Judge Robert Bork. The seriousness of the Senate's task and the independence of the judiciary are jeopardized by this crass political trickery.[138]

VII. ARGUMENT PURPOSES

With a better understanding of these categories of argument from the preceding Parts, it is now worth exploring the distinctive functions served by each category of argument. When senators deploy these different modes of argument, what array of purposes are they seeking to achieve?

A. Arguments and Audiences

I start with a well-known observation about political conflict made by E.E. Schattschneider in 1960. As Schattschneider observed, the scope of a political conflict is a crucial determinant of both political activity and political outcomes. The scope of conflict is, however, contestable by participants. This basic fact, Schattschneider argued, illuminated some crucial facets of American democracy and politics.[139] For our purposes, one of Schattschneider's observations is particularly relevant: it is generally in the interests of those on the weaker side of a political conflict to want to expand its boundaries and try to convert bystanders into participants in a conflict. In Schattschneider's words, "[i]t is the *loser* who calls in outside help"[140] and who will want to expand or "socialize"[141] the conflict at issue in the hope of potentially altering the terrain in their favor.[142] In contrast, Schattschneider's claims suggest that those on the stronger side of a conflict may have relatively greater incentives to

138. *Id.* at 28683 (statement of Sen. Orrin Hatch (R-UT)).

139. *See* E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 2–18 (Cengage Learning 1st ed. 1975) (1960).

140. *Id.* at 16.

141. *Id.* at 7.

142. *See id.* at 15, 17.

"privatize"[143] the conflict—to seek to maintain a more modest scope of the dispute.[144]

Stated more simply, if Party A suffers a seemingly insurmountable disadvantage relative to Party B in enjoying the support of only 40% of the likely voting electorate on a given issue, Party A will have very strong incentives to, among other things, (a) try to find new issues to emphasize in order to change the debate, and/or (b) try to find new strategies of voter outreach in order to attract and/or energize individuals in the electorate who would otherwise vote for Party B, or who would not vote at all. Party B, on the other hand, would have much less incentive to do any of these things unless it was engaged in a strategy of proactive defense against Party A. Under the status quo, B holds the advantage, and would prevail if conditions did not change.

Just as Schattschneider offered illustrations of this theory at work in the middle of the twentieth century, one can likewise glean how these insights are relevant to the Senate confirmation debates discussed here. In particular, one might easily intuit how the categories of argument referenced above can serve these purposes—of expanding or limiting the scope of conflict—to the potential benefit or detriment of different sides in a Senate confirmation debate. More precisely, I would claim that of the modalities of argument discussed in Parts I-IV, some are decidedly more conducive toward appealing to broader audiences, such that more members of the electorate may decide to pay attention to a given Supreme Court confirmation and perhaps orient their present and/or future political behavior in reference to that episode. These sorts of arguments are precisely what speakers have in mind when they criticize their opponents for "playing politics." And these are precisely the types of arguments that the "losing" or disadvantaged side in a Senate confirmation fight might find relatively more appealing.

Other arguments are decidedly less conducive to the task of facilitating broader interest. Instead, they appeal to smaller, more expert or elite audiences, drawing upon the (in theory) stronger shared understandings within that smaller audience. These arguments may still hold some political value, to the extent that minds can be swayed within these groups. Moreover, the individuals who press these arguments may feel great passion and intensity about them. Yet while the reasons for articulating these arguments vary, it is clear that this latter group of arguments will usually not have the greatest instrumental value for the losing or disadvantaged side in a confirmation fight.

143. *Id.* at 7, 11, 16.
144. *See id.* at 11–12, 16–18.

Finally, other modalities of argument are capable of doing both tasks —appealing to broader audiences and more elite audiences—at different moments in time.

B. Qualifications and Clarifications

Before elaborating on the preceding points, let me offer some key clarifications and qualifications. First, when I refer to an "advantaged" or "disadvantaged" side in a Senate confirmation debate, these terms could apply in several ways, given the broad array of factors relevant in facilitating or undermining a successful confirmation. For simplicity's sake, I largely use the terms in reference to which party controls the presidency and which party enjoys numerical strength in the Senate. That is, a particular side is clearly "advantaged" if it encompasses the nominating president and a likely strong majority of votes in the Senate on a confirmation vote. Conversely, a particular side is disadvantaged if it does not hold both of those elements.

Second, regardless of how I define "advantaged" and "disadvantaged" in the discussions below, it may often be the case that senators amid a confirmation debate do not perceive these terms as applicable to their side or their opponents. The political context can be fluid,[145] and even clear-eyed vote counters may anticipate a very close final vote on a nominee. Thus, we might expect, at least in some cases, that senators on a given side might orient their arguments as if they were *both* advantaged and disadvantaged within a given nomination fight.

Third, when I discuss the different functions served by each category of arguments below, what I really have in mind is something like a relative or a cumulative effect stemming from the consistent articulation of those arguments. A given argument made in a Senate debate may not be especially telling—especially if that comment, in context, was relatively abnormal and made by a senator not seen as influential or central in a given confirmation debate. Rather, what is especially worthy of attention is when groups of senators—recognized by other members of their party or by the public as important voices in a confirmation debate—repeatedly emphasize specific argumentative themes. Such converging behavior more plausibly suggests the existence of a more central, shared goal behind the choice of argument.

Fourth and finally, although my focus in the discussion below is on senators directing their arguments to audiences in the present, sometimes

145. The Kavanaugh confirmation is one of the best illustrations of this point among the confirmations discussed in this paper, since the success of his nomination directly hinged on his response to the testimony of Christine Blasey Ford in front of the Senate Judiciary Committee. *See* HULSE, *supra* note 2, at 252–58; MARCUS, *supra* note 35, at 302–17.

they are motivated by additional audiences, like future audiences assessing individual legacies. These sorts of considerations may also inform the types of arguments senators make at specific moments.

C. Democracy and Majoritarian Will Arguments

With those preliminary points said, I return to Schattschneider's observation that the disadvantaged have strong incentives to expand the scope of a conflict to seek more favorable conditions for political contestation. Majoritarian will arguments most clearly serve this purpose in Senate confirmation debates. If one was a typical Senate Democrat in the context of the Gorsuch, Kavanaugh, Barrett and Bork nominations, there would be a substantial political incentive to find some way to engage a broader portion of the electorate, or to increase the intensity of an already-engaged portion of the electorate. In each of these nominations, Senate Democrats likely realized they were underdogs and that the status quo conditions would lead to the successful confirmation of the nominee.[146] Their only hope then was to attempt to bring additional political pressure upon opposing senators—especially those Senate Republicans who might have to face a more bipartisan electorate in their next election—if they wanted to change the likely outcome. Thus, it is not surprising that in these debates Democrats repeatedly invoked majoritarian will concerns—by discussing corporate interests, the Federalist Society, the Heritage Foundation, and dark money[147]—to critique the nominations.

The Bork nomination merits additional discussion. Here, assessing who was on the advantaged or disadvantaged side is a bit more challenging. President Reagan, a Republican, made the nomination, and the partisan balance in the Senate was 54 Democrats to 46 Republicans. This might appear, at first glance, to more accurately reflect the context of stalemate.

However, given the political context of the time, Senate Democrats likely understood that they were the underdog at the outset of this nomination. Then-prevailing expectations favored Senate deference to the

146. In all four of these cases, the nominating president was, of course, a Republican. The partisan balances in the Senate for the three Trump nominee confirmation debates was as follows:

- Gorsuch: 46 Democrats; 52 Republicans; 2 Independents (who caucused with the Democrats). *See* Gorsuch Confirmation Vote Summary, U.S. SENATE (Apr. 7, 2017), https://perma.cc/LR2B-7RNU.
- Kavanaugh: 47 Democrats; 51 Republicans; 2 Independents (who caucused with the Democrats). *See* Kavanaugh Confirmation Vote Summary, U.S. SENATE (Oct. 6, 2018), https://perma.cc/7ZH4-2WUC.
- Barrett: 45 Democrats; 53 Republicans; 2 Independents (who caucused with the Democrats). *See* Barrett Confirmation Vote Summary, U.S. SENATE (Oct. 26, 2020), https://perma.cc/S6G4-L3E2.

147. *See infra* Subsection II.B.1.

president. As Ethan Bronner stated regarding Democratic Party interest in challenging the Bork nomination in 1987:

> The idea of such a fight in the Senate was a new one. In the preceding half century a tradition had built up that the president had the power to nominate judges and the Senate's job was to confirm them unless there were signs of gross incompetence or corruption.[148]

Finally, later-breaking developments added one additional wrinkle to this: by the time the Senate debates occurred, it was clear that a successful confirmation for Bork was out of reach. Emerging problems with the nomination crystallized with an unfavorable vote on his nomination in the Senate Judiciary Committee on October 6, 1987.[149] Bork was on the verge of withdrawing his name from consideration subsequent to that vote but ultimately decided to seek a full vote in the Senate with the goal of having his defenders offer a rebuttal to some of the criticisms of him.[150] He did so understanding that he would ultimately lose a confirmation vote in the Senate, given that fifty-three senators had already declared their opposition.[151] Other senators also recognized this very likely outcome in their comments during the Senate debates.[152]

Given the fast-moving pace of the nomination process—the Committee vote happened on October 6th, and Senate debates began on October 21st—the most accurate way to assess the Senate debates is as a set of arguments oriented toward the political conditions present at the start of the nomination. With the outcome all but ensured, both Bork defenders and critics used the Senate debates to memorialize the kinds of arguments that were already in circulation.[153] Given these circumstances surrounding the Senate debates, I maintain that Democrats argued from the position of the disadvantaged side, and Republicans emphasized (for the most part) arguments typical of those who had earlier held the advantage.

With this in mind, Senate Democrats' enthusiasm for, and defense of, interest group pressures upon the Senate during the Bork debates reflect another instance of an underdog seeking to reorient the terms of the nomination fight.[154] The Democratic senators who favored such pressures

148. BRONNER, *supra* note 121, at 95; *see also id.* at 95–112.

149. *See Judiciary Committee Votes on Recent Supreme Court Nominees*, U.S. SENATE COMM. ON THE JUDICIARY, https://perma.cc/H7KR-V7CV (last visited Feb. 2, 2025).

150. *See* BRONNER, *supra* note 121, at 284–91.

151. *See id.* at 287.

152. *See, e.g.*, 133 CONG. REC. 28708 (1987) (statement of Sen. Bill Armstrong (R-CO)) ("I am under no illusions [sic] about the likely outcome.").

153. *See* BRONNER, *supra* note 121, at 292–93 (describing the Senate debates as "testy and predictable" and "seen by most as pro forma").

154. For another example, see Senator Leahy's advocacy for moving forward on the Garland nomination in 2016. *See infra* note 33. For discussion about Senator Ted

believed they merely reflected appropriate democratic majoritarian pressures that should be incorporated into a confirmation debate. More instrumentally, such pressures also reflected and facilitated an increased interest from a broader audience in this nomination.

At the same time, Senate Republicans found majoritarian will arguments attractive when they faced the unwelcome prospect of having to deal with the Garland nomination in 2016. President Obama selected Garland, perceived as an ideological centrist, to put pressure on centrist Republicans to confirm him—especially because seven Republicans still serving in the Senate had earlier confirmed Garland to the D.C. Circuit.[155] To be sure, Senate Republicans in 2016 were not as disadvantaged as the Senate Democrats would later be in the confirmation debates for the Trump nominees: Republicans still held a majority of the Senate in 2016. Yet, Senate Republicans undoubtedly saw significant political value in making a broader, public-facing claim that a president should not be able to confirm a new Supreme Court justice in an election year and thus change the ideological balance of the Court. They accordingly critiqued the Garland nomination and justified their obstruction with an appeal to majoritarian will—the need for the appointments process to receive fresh democratic input from the upcoming 2016 election.

None of the above discounts the possibility that individual senators may genuinely care about majoritarian will. After all, as previously noted, the textual commands of Article II, Section 2 clearly structure the appointments process to incorporate democratic elements.[156] It certainly would not be out of character for any senator to claim that majoritarian will mattered in a Supreme Court confirmation. Still, even if senators held a genuine commitment to majoritarian will when assessing a Supreme Court nomination, that commitment could easily coexist with a pragmatic political calculation that such arguments also have value in expanding the scope of conflict and providing strategic advantages.

D. Civility Arguments

In some ways, the opposite of majoritarian will arguments are those that focus on civility and the fair treatment of Supreme Court nominees. To be sure, one can imagine these latter arguments targeting a broader audience, and thus seeking to expand the scope of interest and attention on a given nomination fight. In theory, senators on the disadvantaged side of a confirmation battle may be motivated to highlight the terrible treatment of a nominee by the nominee's opponents. This strategy could successfully

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Kennedy's role specifically in organizing and coordinating a broad, expansive anti-Bork effort that stretched far beyond the Senate, see BRONNER, *supra* note 121, at 90–94.

155. *See* HULSE, *supra* note 2, at 34–36, 114–15.

156. *See* U.S. CONST. art. II, § 2, cl. 2.

energize and provoke outrage from casual, previously disinterested members of the electorate, potentially leading them to support the nominee and/or the ill-treated political party.

However, unlike majoritarian will arguments, which focus entirely outward from the appointments process, the civility and fair treatment argument centers largely on matters internal to the process itself. The concerns, while they may encompass things like the treatment of a nominee in the public sphere and partisan media, focus on the treatment of the nominee by other senators. Furthermore, civility considerations on their own terms often call for comparative assessments of how other nominees were treated, and how senators grappled with other forms of behavior that tested the boundaries of the acceptable in the Senate in the past. These kinds of arguments might accordingly have bite only with well-informed, long-time observers and participants, and for that reason, may have some degree of an inside-baseball orientation to them.

In the examples discussed in Part IV above, it was the case that civility concerns were generally voiced by senators from the advantaged side. This suggests that we tend to see civility concerns predominately from senators seeking to preserve their advantage in a confirmation fight, and perhaps seeking to defang some of the more aggressive arguments from those looking to derail a nomination.[157]

In a similar vein, the focus on civility by Senate Republicans in the case of Bork also aligns with this pattern (even if the Senate Republicans in that case were, in reality, clearly on the losing side by the time of that confirmation debate). Senate Republicans enjoyed a slight advantage at the start of the Bork nomination. As a result, they undoubtedly would have preferred a greater focus on civility and other matters that would have kept the nomination more conventional, of greater interest to elite and expert audiences, and of lesser interest to a broader swath of the electorate. By the time of the Senate debates, the Senate Republican discussion of civility also likely had some added bite to it, as their critiques became intertwined with the knowledge both that Senate Democrats' tactics had prevailed on the end result, and that this victory could incentivize the future use of those tactics (to the additional detriment, perhaps, of institutional norms).

Thus, at least in recent years, critiques about the appointments process stemming from civility concerns tend to be deployed as a defensive argument, again possibly with the goal of blunting some of the more aggressive arguments from those seeking to derail a nomination.[158]

157. *See supra* Part V.

158. *See supra* Part V. A possible counter-argument is the case of Merrick Garland. One could claim that the treatment of Garland was possibly less-than-civil by Senate Republicans in 2016. Senate Democrats talked about Garland at length in the context of the Gorsuch nomination in 2017—a time when Democrats were not the advantaged party:

E. Senate-Institutional Concerns

Senate-institutional arguments and arguments about legal/judicial legitimacy sit somewhere in between majoritarian will and civility arguments. Both institutional and legal/judicial legitimacy arguments can be powerfully deployed to grab the attention of broader audiences—with the goal of expanding the scope of conflict and changing the debate. But each argument contains strong elements oriented to more elite and expert concerns, and these seem to align more with civility arguments.

Let me elaborate first on institutional arguments. One might reasonably assume that broader political calculations provide significant motivation for arguments by senators that emphasize the transgression of Senate practices, rules, and norms. At different times, senators from both parties likely desired to elaborate—in an extremely detailed fashion—how the other party's senators lacked integrity and good faith regarding these items with the larger goal of convincing voters (and hoping the other party's senators would accordingly be punished in their next election). Clearly, partisan calculations were an important consideration when these arguments were deployed.

But, any close reading of the *Congressional Record* during these debates inescapably suggests that these disagreements about Senate rules and practices cannot be wholly reduced to partisanship and political posturing. Especially in considering those comments by various senators, in both more recent confirmation debates and the Bork nomination, that touch on themes of Senate dysfunction and frayed relationships, some of those comments seem to be directed more at colleagues.[159] Furthermore, it is not hard to discern some degree of genuine feeling in those comments.

In addition to their desire to engage the broader electorate, senators deploy institutional arguments for at least these three additional reasons. First, they do so because they are engaged in a real internal debate within the Senate. These senators are all repeat players who will engage and argue with each other in future debates. When they offer differing interpretations of Senate rules and practices in the context of these confirmation debates, they also have strategic and interpersonal reasons to want to set clear markers that can be reference points for future dialogue and negotiation on other matters in the Senate. Second, senators focus on and discuss these

they controlled neither the presidency nor the Senate in 2017. Still the example fits oddly with the claim I am making because it involves discussion about the uncivil treatment of a *past* judicial nominee rather than the nominee then under scrutiny, which was Gorsuch. Beyond that, and consistent with how I have categorized other Senate discussions of past judicial nominees (for example, the various references in the post-2016 confirmation debates to lower court judicial nominees by Obama), I view these discussions of Garland in 2017 as more centrally concerned with Senate institutional practices and precedents, rather than about civility.

159. *See* sources cited *supra* notes 81, 130.

institutional matters likely because they want to maintain and adhere to a vision of themselves—and presumably other senators—as principled, statesmanlike political actors. Thus, the outrage they articulate for the opposing side's transgressions, or the defenses they articulate on behalf of their own party's questionable actions, likely stem, at least in part, from a desire to see themselves, and to be seen by others, as having professional integrity. Legacy concerns, or how future audiences might perceive them when examining the historical record, may also be a component of this consideration.

Third and finally, another reason why senators may make these arguments stems from a felt obligation of professional competence—both for themselves as individuals and on behalf of the institution. Senators may feel quite vested in the notion that the institution should be well-functioning and should generally behave in a rational, expeditious, and dignified manner—especially on matters that have the significance of a Supreme Court appointment.[160] These sorts of considerations may intersect with the type of high-minded statesmanship concerns noted in the preceding paragraph. But I mention this point separately because the concern here is relatively less about statesmanship and more about competence. Senators likely proceed, at least in their less cynical moments, with the presumption that the Senate is supposed to function and get things done; it is supposed to *work*.

Whether a given senator's true focus in making institutional arguments is on the health of the Senate, ensuring resilient rules for future political engagement, legacy concerns, or a commitment to personal and institutional competence, it is clear that none of these concerns are terribly attractive as a means to redirect the public's attention or to reorient a given instance of political conflict. The audience that would value these types of concerns are more elite and expert audiences. Thus, senators making these arguments in a Senate confirmation fight may be "playing politics," but they may also be "playing elite politics." In this latter regard, the deployment of institutional arguments by a given senator would not depend on whether a given senator was on the advantaged or disadvantaged side of a fight but on whether that senator cared about elite political concerns.

F. Legal and Judicial Legitimacy

Many of the proceeding points about institutional arguments might also be applied in the context of arguments about legal and judicial legitimacy, though with some wrinkles. The legal/judicial legitimacy

160. *See, e.g.*, *supra* note 124 and accompanying text (quoting a comment by Senator Moynihan).

arguments most likely suited for appealing to the broader electorate—and most suited for potentially achieving immediate partisan benefit—are those that focus on specific rights or key precedents that might be undermined (or protected) by a given nominee's elevation to the Court. Thus, in the debates discussed in this Article, competing views on items like abortion rights, the Affordable Care Act, and gun rights are addressed in the context of whether a given nominee was likely to be supportive or critical of each of these items.[161]

We might readily speculate, of course, that a primary goal of senators in drawing attention to these concerns was to energize a broader portion of the electorate to be more or less supportive of a given nominee, depending upon that nominee's position on these issues and a given voter's interest on these issues. Indeed, I might further speculate that for most senators seeking to draw broader attention to a given confirmation debate, focusing on some discrete legal or policy issue is probably the most common and direct way to do this.

Again, I mentioned these precedent or issue-oriented arguments somewhat in passing in Part IV because the specific precedents discussed for a given nominee, not surprisingly, varied a great deal depending upon the nominee and their prior judicial record. However, the notable frequency with which these arguments appeared in the Senate confirmation debates discussed here suggests that the appeal of cultivating and/or shoring up broader support for one's side in a confirmation fight by utilizing this form of argument is somewhat universal, at least in present times. I suspect the lesson of Bork is instructive here, in which the advantaged side (Senate Republicans) was outflanked by an energized opposition that aggressively appealed to the broader public first. Currently, senators seeking to derail a nomination have obvious incentives to make arguments about threatened precedents or troubling new legal rulings. However, senators seeking to defend a Supreme Court nominee have equally strong incentives to talk early and often about the same things as part of a proactive defense.

Aside from these more strategic and instrumental calculations, it is not implausible that senators may have focused on legal/judicial legitimacy arguments because they served other benefits. Among them, and mirroring points made in the proceeding paragraphs on institutional arguments, senators likely talk about the importance of legal and judicial legitimacy because they genuinely think they are important—even if they may strongly disagree with their colleagues about what this legitimacy entails. Many, if not most, senators probably care about the specific legal precedents they invoke either for endorsing a given nominee or criticizing

161. *See infra* notes 102-105 and accompanying text.

them. Furthermore, some may appeal to and invoke judicial and legal legitimacy because they care about their reputation among legal and political elites. They may place importance on how lawyers, academics, and other experts will assess their public posturing, either in the moment or in the future.[162]

Finally, it is likely not an uncommon belief among senators that legal or constitutional matters are distinct in a meaningful way from pure partisan politics. As a result, assessing the appointments process with an eye to maintaining legal and judicial legitimacy is probably linked, at least for some senators to a degree, to a belief that the Senate should be elevated as an institution during such moments. Confirming a Supreme Court justice may be a process rooted in democratic politics, but it is also obviously intertwined with constitutional and adjudicative considerations that, for some senators, may separate it from business as usual in the Senate.

Perhaps even more so than Senate-institutional arguments, arguments about legal and judicial legitimacy have clear appeal for senators seeking to grab the broader public's attention and for senators seeking to further goals within more elite circles. Accordingly, we might expect these arguments to appear prominently and consistently among senators on both the advantaged and disadvantaged sides of a confirmation fight, with their prevalence rising or falling depending upon the specific priorities of a given senator at a given moment.

VIII. ASSESSING ARGUMENT PURPOSES IN THE PRESENT POLITICAL CONTEXT

My final task in this Article is to turn to the present and the near future. If comments from the Senate debates are at all telling, substantial portions of the electorate would look at recent Supreme Court appointments with varying levels of dissatisfaction. If that is true, the natural question to ask is how we might change this state of affairs. That is, how might the appointments process be changed so that public assessments would improve?

This question has garnered a great deal of attention over the past several decades,[163] and as with earlier comments on the topic, addressing it now requires that we examine the question with an eye to the current

162. Ensuring that the Judiciary Committee Hearings for Bork were conducted in a respectful and substantive manner, sufficient to win approval from various sectors of elite opinion, seemed to be a point of strong interest for then-Senator and then-Chairman Joe Biden. *See, e.g.*, 133 CONG. REC. 28654, 28654–57 (1987) (statement of Sen. Joe Biden (D-DE)).

163. *See supra* notes 1–4 and accompanying text; *see also infra* notes 166–69, 71 and accompanying text.

political context. Approaches that might be efficacious in a time of unified government, or even in 1987 after the failed Bork nomination, may not be the correct ones for the present moment in time. Unlike in 1987 or even 2005, when Chief Justice Roberts was confirmed as chief justice, we have now witnessed several contentious Supreme Court appointments—especially the Gorsuch and Kavanaugh confirmations. Our current politics are characterized by increasingly deep polarization,[164] with partisan divides centered on recent, highly charged events such as the legitimacy of the 2020 presidential election, the January 6, 2021 storming of the U.S. Capitol, and the criminal charges against Trump.[165]

The answer to this question cannot be to address every critique cataloged in Parts I-IV. Even assuming that there was a dominant governing coalition capable of pressing forward on an expansive list of possible changes in the most relevant rules, norms, and informal behaviors tied to the appointments process, the various normative standards discussed in Parts I-IV can significantly conflict with one another. One can easily imagine, for example, a strong commitment to majoritarian will being deeply at odds with the maintenance of established Senate rules and norms (as was the case with the Bork confirmation debates) or different conceptions of majoritarian will being at odds with each other (as was the case in debates over Republican non-action on the Garland nomination).

I offer no definitive answers here about what discrete set of next steps are the right ones to enhance public approval for the appointments process. However, I would offer a vision or an articulation of what the proper goal should be. I suspect that public approval of the appointments process would be enhanced by whatever set of reforms are needed to ensure that the process is a "smaller" rather than a "larger" process.

Schattschneiderian approaches to expand the scope of conflict will be irresistible to disadvantaged coalitions seeking to find some edge in a confirmation fight because they are otherwise outgunned under the status quo conditions. But this strategy of expanding the scope of conflict is unlikely to enhance public approval of the appointments process, at least at present. At this moment, when partisan polarization is highly intense, expanding the scope of the conflict implicated in a Supreme Court appointments process—by, for example, invoking new majoritarian will arguments or highlighting deeply controversial legal questions like the scope of the Second Amendment or the scope of substantive due process—will only succeed in putting more weight and controversy onto the appointments process. Put differently, nothing external to the

164. *See infra* note 120.

165. *See* Rachel Weiner et al., *Republicans Loyal to Trump, Rioters Climbs in 3 Years After Jan. 6 Attack*, WASH. POST, Jan. 2, 2024, Gale in Context: Global Issues, Doc. No. A777995454.

appointments process, at present, seems likely to possess a broad consensus of support among the electorate such that it could be utilized to shore up the appointments process. The broader political sphere beyond the appointments process is marked by even greater controversy and disagreement. To the extent senators continue to go to that external source, they will only inject more significant controversy and conflict into the appointments process.

I would suggest that a more modest-sized appointments process—one with a narrower scope of conflict and contestation—has greater hope of enhancing public approval. Specifically, a technocratic, dry, and even somewhat publicly incomprehensible process would likely improve its public approval precisely because such things would make it a matter of lesser interest and thus a smaller magnet for political disagreement. This change would thus encompass a deemphasis on majoritarian will arguments and a greater collective emphasis among senators on some types of civility, institutional, and legal/judicial legitimacy arguments.

This suggestion is directly at odds with one reform proposal for the appointments process that has persisted in recent years. That suggestion urges more candid and substantive discussion of judicial philosophy and constitutional values from the nominee during Judiciary Committee hearings.[166] The inclination behind these suggestions is easy to understand. The Committee hearings component of the appointments process has become a frustrating bit of theater, especially for those knowledgeable about legal issues. Then-professor Elena Kagan characterized the Committee hearings of then-recent Supreme Court appointments as a "vapid and hollow charade, in which repetition of platitudes has replaced discussion of viewpoints and personal anecdotes have supplanted legal analysis."[167] In place of any substantive dialogue between the nominee and senators, Judiciary Committee hearings are merely a drawn-out game in which senators attempt to catch nominees in a mistake or a slip of the tongue to score political points, and nominees

166. Perhaps the most well-known example for this line of argument due, one suspects, to its author is Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 920, 925–30, 934–37, 940–42 (1995) (reviewing STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS (1994)); *see also, e.g.*, CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS 169–77 (2007); Post & Siegel, *supra* note 18, at 44–45, 48, 50–51; Linda Greenhouse, *How Will We Know What a Supreme Court Nominee Really Thinks?*, N.Y. TIMES (July 5, 2018), https://perma.cc/C94W-QSXP.

167. Kagan, *supra* note 166, at 941. Not surprisingly, portions of this quotation were often repeated during Kagan's nomination fifteen years later. *See, e.g.*, Linda Greenhouse, *Just Answer the Question*, N.Y. TIMES: OPINIONATOR (May 10, 2010, 8:41 PM), https://perma.cc/YU9H-J48W.

attempt to sound thoughtful and sincere without saying anything of substance.

The desire for greater candor is a very understandable one. But, if our goal is greater public approval of the process, I highly doubt that such approval would follow, at present, from extreme candor from a nominee on the most highly controversial legal issues of the day. One suspects, for instance, that liberal Democrats concerned about further expansion of Second Amendment rights would only feel heightened antagonism toward a Republican president-appointed nominee who confirmed their suspicions by openly and unapologetically championing expansive gun rights at length. Supreme Court nominees, especially since the failed Bork nomination, have intuited that saying more on the substance of such legal issues would only prompt greater controversy around their nomination and potentially greater skepticism about their judicial impartiality if elevated to the bench. I strongly suspect that this intuition is correct. To put the point otherwise, had Justice Barrett or Justice Jackson been more forthcoming on their opinions of specific legal matters, it seems highly unlikely that such actions would have made their confirmations smoother or inspired greater public confidence in the appointments process across a broader swath of American voters.

In at least partial sympathy with some recent scholarly works that are preoccupied with related concerns, I would assert that the Court's legitimacy and support from the public would be enhanced if it became a smaller institution within the larger landscape of American government.[168] Some obvious obstacles exist for such a development, however. A surprising amount of instinctive sympathy for the Supreme Court persists from progressives despite the declining power of the Court's liberal wing.[169] This may be partly due to the firm hold of the Warren Court and

168. Probably the most emphatic, recent statement of this in the legal scholarly literature is Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703 (2021), who endorse "disempowering reforms" that would shift power away from the federal courts. *Id.* at 1708–09, 1711, 1719–21, 1725–28, 1734–38. Though they diverge from Doerfler and Moyn on their analysis and suggestions for reforms of the Supreme Court, Epps and Sitarman likewise orient their reform proposals in part toward the goal of reducing the political stakes around each individual Supreme Court nomination. *See* Daniel Epps & Ganesh Sitarman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 170 (2019); *see also* Daniel Epps & Ganesh Sitarman, *Supreme Court Reform and American Democracy*, YALE L.J. FORUM 821, 836–50 (March 8, 2021). Finally, Suzanna Sherry identifies the phenomenon of justices-as-celebrities as a core contributor to Supreme Court dysfunction, and offers reforms meant to counteract it. *See* Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181–82, 185–93, 197 (2020).

169. *See, e.g.*, Ryan D. Doerfler & Samuel Moyn, *A Plea to Liberals on the Supreme Court: Dissent with Democracy in Mind*, N.Y. TIMES (Dec. 20, 2022), https://perma.cc/7GZU-HW3M.

legal liberalism on the imagination of some left-leaning constituencies.[170] Legal conservatives, for their part, have little reason to deemphasize judicial power at a moment when they hold a substantial numerical majority. More generally, we might readily speculate that the focus on the Court by partisans of many stripes is linked to a hope that the Court will secure them favorable outcomes. In a time of persistent divided government with no dominant governing coalition having emerged in decades, the appeal of the Court is only enhanced because major policy change through the elected branches seems increasingly remote.[171]

In more concrete terms, a sign that the appointments process was improving—at least from the perspective of this Article—would be fewer majoritarian will arguments and more civility arguments in Senate confirmation debates. A further indication of positive trends would be if senators increasingly used Senate-institutional and judicial/legitimacy arguments oriented toward elite and expert audiences. All these developments would suggest an appointments process aiming to be, or trending toward, a more technocratic affair as opposed to a campaign event.

I have no ready answers as to why a disadvantaged side in a given confirmation fight might choose, in a sense, to forego its best political tools unilaterally. Nor do I have an answer for the most zealous advocates of a given issue who, if their side were the disadvantaged side, would question the virtue of simply accepting inevitable defeat on an issue they felt was of tremendous moral, social, and political weight.

To the extent that one can set aside, if only for a moment, the question of how best to secure legal outcomes from the Court that align with one's political preferences, and to the extent one has a concern for the legitimacy of the appointments process, my claim is that a shift in orientation is needed for the appointments process (and for the Court itself) to occupy less space in our political concerns in order for them to enjoy greater public esteem. Again, it is not apparent that the political incentives will imminently exist for this kind of de-escalation and deemphasis on the Court—especially if a Supreme Court vacancy were ever to arise that might swing the ideological orientation of the Court, as was the case with Justice Kavanaugh's nomination. The most likely conditions that might facilitate such a shift would be ones external to the Court and beyond the control of senators. These conditions might include the rise of a durable governing coalition that might, among other things, shift more

170. On legal liberalism and the Warren Court, see, *e.g.*, LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 2–10 (1996).

171. Indeed, the increased significance of the Supreme Court is what Wittes emphasizes in understanding the causes of dysfunction in federal judicial appointments. *See* WITTES, *supra* note 1, at 11–12, 19, 81.

policymaking power back to the elected branches, reduce the incentives for persistent, intense partisan fights with majority and minority factions in Congress,[172] establish credible threats of retaliation from the elected branches toward instances of judicial overreach, and generally reduce the electorate's fixation on the federal courts.

Beyond that, one other source of hope may reside within the longevity of Senate tenures. Under different conditions, senators may have incentives to think about adherence to Senate rules and norms with an eye to prolonged, sustained engagement with the same individuals. Furthermore, their interests in adhering to ideals of collegiality, competence, and principled statesmanship may provide a source for one day reframing the work of Supreme Court appointments as a common institutional endeavor within the Senate. This type of change seems hard to imagine at present, but if those types of intra-Senate considerations are visible even in the midst of the highly acrimonious appointments processes examined here, perhaps they might be nurtured to more positive effect under different, as-yet-unseen political conditions in the future.

IX. CONCLUSION

There is nothing inherently problematic or illegitimate about political actors seeking to capture the attention of more citizens on the significant issues at stake in a Supreme Court confirmation fight. The formal requirements of the appointments process itself invite democratic influences, and the senators who choose to appeal to broader audiences are not bad actors for doing so.

However, it is also the case that the polity stands at a moment in time when such behaviors—which may be entirely unproblematic under certain circumstances—cumulatively work to place added strain and blemishes upon the broader legitimacy of the appointments process. Until those underlying conditions change, both conservatives and progressives only make matters worse by deploying arguments that heighten the stakes of judicial confirmation fights. For senators, citizens, and activists who care about the legitimacy of the Supreme Court, the path toward bolstering the appointments process likely lies in talking and thinking about it much less than we presently do.

172. *See* FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN 3–12, 198, 247–48 (2016) (noting that one negative byproduct of a highly competitive environment with respect to Congress is a greater incentive for partisan conflict among legislators).