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The Senate: Out of Order?

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The Senate: Out of Order?

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Due to the routine use of the filibuster and related devices, today's Senate operates as a supermajoritarian body. This Symposium Article considers whether this supermajoritarian aspect of the Senate renders it dysfunctional and, if so, what can be done about it. I contend that the Senate is indeed broken. Its current supermajoritarian features have pernicious effects. Further, and contrary to the claims of many of the Senate's defenders, this aspect of the Senate is not part of the original design. I go on to explain why the Senate's procedures, despite their deficiencies, have nonetheless proven resistant to reform. The impediment to change is not based in law but instead derives largely from legislators' incentives. I close by discussing whether and how those incentives could be altered.

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The Senate: Out of Order?

AARON-ANDREW P. BRUHL*

I. INTRODUCTION

The subject of the *Connecticut Law Review*'s 2010 Symposium is whether our constitutional system is broken. My contribution to the Symposium concerns whether the Senate in particular is broken and, if so, whether it can be fixed. Needless to say, that is a large and complicated topic, so I will focus on just a few aspects of it. In particular, I will focus on the filibuster, the parliamentary device that lets a minority of the Senate prevent action on items the Senate majority would like to enact. As I will explain, filibusters have become a routine part of the legislative process, such that the Senate has become, practically speaking, a supermajoritarian institution.

The discussion proceeds in two parts. Part II assesses the Senate's current condition from two different perspectives, one essentially originalist and the other more pragmatic. I contend that the Senate is not functioning well according to either standard. Part III then considers some factors, mostly political, that tend to make the Senate resistant to substantial reform. I conclude with a brief discussion of ways to improve the prospects for future reform.

II. EVALUATING THE SUPERMAJORITARIAN SENATE

A. *The State of the Senate*

I begin with some facts about the contemporary Senate, with particular emphasis on the recently concluded 111th Congress, which ran from January 2009 to January 2011.

Our system of government is not designed to ease the path of legislation. We have not just a bicameral legislature—both the House of Representatives and the Senate have to pass the same bill—but the President has to assent as well, giving us effectively a tricameral legislative

* Assistant Professor, University of Houston Law Center. This is an expanded version of my remarks from the *Connecticut Law Review*'s October 2010 Symposium on the topic "Is Our Constitutional Order Broken?" I thank the editors for inviting me to participate in the Symposium. I thank Josh Chafetz, Michael Teter, and Seth Barrett Tillman for helpful comments on a prior draft.

process.¹ Even so, the 111th Congress opened with the stars aligned for dramatic action, with the Democrats in control (or at least seemingly in control) of all three bodies. Barack Obama had just won the presidential election convincingly. The Democrats had a significant majority in the House, and their margin in the Senate was larger than we have seen in recent times.² The Democrats did not, however, have sixty votes in the Senate when the Congress opened, and they would have that magic number for less than half of the two-year congressional term.³ The sixty-vote threshold is important, of course, because that is the number Senate Rule XXII ordinarily requires in order to invoke “cloture”—that is, to end debate and bring a measure to a vote.⁴ In the contemporary Senate, having sixty votes makes the difference between being in the majority and being in control.

The lack of a large enough majority in the Senate proved critical. Hundreds of bills were passed by the House but then languished or failed in the Senate.⁵ Some of these bills made the headlines. Prominent recent examples include legislation requiring greater disclosure of election expenditures (a reaction to the Supreme Court’s *Citizens United v. Federal Election Commission* decision⁶) and the immigration-related DREAM Act.⁷ Also widely noted have been a few stalled or failed nominations.⁸

Most of the bills and nominations that floundered or foundered in the Senate, however, were not nearly as high profile. Indeed, many of them were not even particularly controversial, which in some ways makes the difficulty in securing approval all the more remarkable. In one notable episode, a Senator held up dozens of presidential appointments not because

¹ See U.S. CONST. art. I, § 7, cl. 2 (setting forth the constitutional requirements of bicameral passage and presentment to the President). The President’s veto can of course be overridden, but only by an extraordinary two-thirds vote of each chamber. *Id.*

² See Perry Bacon, Jr., *Democrats Win 18 More House Seats*, WASH. POST, Nov. 6, 2008, at A41 (noting that Democrats’ election gains gave them the largest House majority in over a decade); Paul Kane, *For 111th Congress, Somber Topics Eclipse Ceremony*, WASH. POST, Jan. 7, 2009, at A05 (noting the unusually large Democratic majorities in both chambers).

³ See Carl Hulse & Jeff Zeleny, *Death of Byrd Weakens Democrats’ Frail Majority*, N.Y. TIMES, June 29, 2010, at A21 (noting that Democrats gained a sixty-vote supermajority with the seating of Sen. Al Franken in July 2009 and lost it with the election of Sen. Scott Brown in January 2010).

⁴ See STANDING RULES OF THE SENATE, S. DOC. NO. 110-9, at 15–16 (2007) (Rule XXII.2). More precisely, the rule specifies a three-fifths vote of those duly chosen and sworn, which is often but not always sixty. *Id.*

⁵ George Packer, *The Empty Chamber: Just How Broken Is the Senate?*, NEW YORKER, Aug. 9, 2010, at 38, 47; see also *372 Bills That Have Been Passed by the House and Not Yet Acted upon by the Senate (As of 8/23/10)*, THE HILL, <http://thehill.com/homenews/senate/83057-290-bills> (listing bills).

⁶ 130 S. Ct. 876 (2010); see also Dan Eggen, *Bill on Political Ad Disclosures Falls Short in Senate*, WASH. POST, July 28, 2010, at A3 (discussing how “Democrats fell just shy of the 60 notes needed to avoid a GOP filibuster”).

⁷ Lisa Mascaro & James Oliphant, *DREAM Act Was Key to Bigger Plan*, L.A. TIMES, Dec. 19, 2010, at A27.

⁸ See, e.g., Charlie Savage, *Long After Nomination, an Obama Choice Withdraws*, N.Y. TIMES, Apr. 10, 2010, at A16 (reporting on the failed nomination of Dawn Johnsen to lead the Office of Legal Counsel).

of any objection to the particular nominees but because of a disagreement over two administration decisions affecting federal spending in his state.⁹ (A single Senator cannot defeat a motion for cloture, but he or she can delay action through a device known as a *hold*. A hold is essentially a threat to filibuster, which would eat up valuable legislative time while the majority goes through the process for invoking cloture.¹⁰)

Now, I recognize that a claim that the Senate has gridlocked the political system might seem strange, in light of the fact that the 111th Congress saw the passage of one initiative of potentially historic proportions—the healthcare reform law¹¹—and a few other very important statutes, notably including the early 2009 stimulus package¹² and the more recent financial reform law,¹³ not to mention the confirmation of Supreme Court Justices Elena Kagan and Sonia Sotomayor. This was not a “do nothing” Congress.

Yet even when it came to the measures that passed, the supermajoritarian Senate still took its toll.¹⁴ The bills just mentioned barely survived despite the Democrats’ numerical strength, and they did so only in a highly compromised (some might say disfigured) form that was practically dictated by the Senate alone, with the House having little choice but to accept whatever the Senate would give it.¹⁵ The healthcare law was profoundly influenced by the need to secure sixty votes.¹⁶ The stimulus bill took the shape it did based largely on the need to satisfy Susan Collins,

⁹ See Kate Phillips & Jeff Zeleny, *Roadblock in the Senate*, N.Y. TIMES, Feb. 6, 2010, at A11 (describing holds placed by Republican Sen. Richard Shelby); see also John Broder, *A Nominee Held Hostage*, N.Y. TIMES, Sept. 24, 2010, at A19 (discussing Democratic Sen. Mary Landrieu’s hold on a presidential nominee as a protest over the administration’s moratorium on oil drilling).

¹⁰ The Senate cannot vote to invoke cloture until two calendar days after a cloture petition is filed, and another thirty hours of debate are permitted even after cloture is successfully invoked. STANDING RULES OF THE SENATE, *supra* note 4, at 15 (Rule XXII.2). Thus even a single Senator has substantial leverage.

¹¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

¹² American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

¹³ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

¹⁴ Sometimes particular Senators exact a toll quite literally in the sense that they require special deals in order to win their support. See *infra* text accompanying note 43.

¹⁵ See Joseph J. Schatz, *House Stymied by Senate Rules*, CQ WKLY., Apr. 19, 2010, at 960, available at <http://library.cqpress.com/cqweekly/document.php?id=weeklyreport111-000003643079&type=hitlist&num=0&> (reporting that the rise of the filibuster and sixty-vote threshold has strengthened the Senate’s hand in negotiations with the House).

¹⁶ See, e.g., Shailagh Murray & Lori Montgomery, *Prospects for Public Option Dim in Senate*, WASH. POST, Sept. 30, 2009, at A1 (quoting Sen. Max Baucus (D-Mont.) as follows: “No one has been able to show me how we can count up to 60 votes with a public option I want a bill that can become law.”). It is difficult to say whether the healthcare reform law would have included a public option if not for the filibuster. Such assessments are almost impossible to make with confidence because the need to secure sixty votes shapes the bill and legislators’ behavior at every step. Moreover, Senators can act strategically in their public comments regarding how they will vote.

a minority-party Senator from the lovely but sparsely populated state of Maine.¹⁷ What made her crucial was her ability to deliver the pivotal sixtieth vote.¹⁸

In sum, although our legislative process features several points at which a bill can fail, it is fair to say that the most important of these during the 111th Congress was the Senate. To be sure, there is some contingency involved here, such that the Senate will not always be the critical actor. In particular, the magnitude of the obstacle posed by various entities depends on the partisan alignment of the branches. In the 112th Congress, in which Republicans control the House of Representatives, the Senate should be less critical as a veto point because the other players are already divided. Nonetheless, the powerful Senate of the 111th Congress was not especially unusual, for the Senate—with its ever more automatic sixty-vote requirement—has increasingly become the highest hurdle that legislation must clear.¹⁹

B. *Is the Senate Broken?*

So that is the situation. Now for the diagnosis. That is, is the Senate broken? Or is everything working as it should?

There are a number of ways in which the Senate might conceivably be broken. Two of these we can lay aside at the outset without extended discussion. The first possible dysfunction is simply that the Senate is part of a bicameral rather than unicameral legislature.²⁰ The second is that every state has equal representation in the Senate.²¹

I will ignore those features of the Senate, but not because they are unimportant or uncontroversial. Although bicameralism has much to recommend it and has been widely though not universally adopted, it has its drawbacks as well.²² And the Senate's malapportionment with regard to

¹⁷ See Greg Hitt, *GOP Wields More Influence Over the Stimulus Bill*, WALL ST. J., Feb. 5, 2009, at A3; Carl Hulse, *No Ordinary Republicans: Maine Senators Break with Party on Fiscal Plan*, N.Y. TIMES, Feb. 11, 2009, at A20; Paul Kane, *Key GOP Senator in Stimulus Deal Is Known for Centrist Approach*, WASH. POST, Feb. 12, 2009, at A08.

¹⁸ More precisely, there were three moderate Republicans whom the Obama administration was courting—Susan Collins, Olympia Snowe, and Arlen Specter (before his party switch)—and Collins took the lead as the negotiator for this pivotal group. See Kane, *supra* note 17, at A08 (describing Collins as “the focus of White House attention” and a “central player”).

¹⁹ See Barbara Sinclair, *The New World of U.S. Senators*, in CONGRESS RECONSIDERED 1, 17–18 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 9th ed. 2009) (showing that the number of bills passed by the House but not the Senate has increased in several recent Congresses and linking this development to the filibuster).

²⁰ U.S. CONST. art. I, §§ 1, 7.

²¹ *Id.* § 3, cl. 1.

²² The merit of bicameralism is, unsurprisingly, the subject of a large literature. For rather different approaches to the question, with citations to further work, see SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 29–38 (2006); and Abhinav Muthoo & Kenneth A. Shepsle, *The*

population—which makes citizens of Wyoming seventy times more influential than citizens of California²³—is both highly consequential and quite hard to justify today.²⁴ The reason I ignore these features is that I regard them as givens, items that are not likely to be altered. They are not just provided for in the Constitution, which is extremely difficult to amend, but the Constitution goes even further by purporting to entrench the Senate's basic structure against amendment.²⁵ Moreover, even without any actual legal impediment to such changes, it is hard to imagine the political circumstances in which the states that benefit from the Senate and its apportionment could be persuaded, or forced, to abandon it.

Having set aside bicameralism and equal representation, I will instead discuss the supermajoritarian character of the Senate, which is relatively more up for grabs both legally and practically. Thus reframed and narrowed, the question for discussion is whether the Senate's supermajoritarian character renders it defective. In referring to the Senate's supermajoritarian character, I mean primarily the filibuster as practiced today—that is, the virtually automatic rule that every measure that can be filibustered has to achieve sixty votes to pass.²⁶ Also relevant are related practices like holds, which are essentially threats to filibuster.²⁷

It seems to me that we can approach the question in at least two ways, one (broadly speaking) originalist and the other pragmatic.

1. *Evaluation from Originalist Premises*

By an originalist evaluation, I mean to ask whether the Senate is functioning as it was intended or contemplated to operate. One has to be careful in making such inquiries, of course, as they naturally involve a number of difficulties—contemplated by whom, how do we know, etc.

Constitutional Choice of Bicameralism, in INSTITUTIONS AND ECONOMIC PERFORMANCE 249 (Elhanan Helpman ed., 2008).

²³ See U.S. CENSUS BUREAU, STATE AND METROPOLITAN AREA DATA BOOK: 2010, at 3 tbl.A-1 (7th ed. 2010), available at <http://www.census.gov/prod/2010pubs/10smadb/2010smadb.pdf> (listing California's 2008 population at almost 37,000,000 and Wyoming's at about 500,000).

²⁴ See FRANCES E. LEE & BRUCE I. OPPENHEIMER, SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION 10–11, 189–94, 223–30 (1999) (providing an in-depth examination of how the Senate's structure advantages small states); LEVINSON, *supra* note 22, at 49–62 (condemning the Senate's malapportionment); *cf.* Reynolds v. Sims, 377 U.S. 533, 566, 568, 576 (1964) (requiring that state legislative districts be apportioned on a one-person, one-vote basis).

²⁵ See U.S. CONST. art. V (barring amendments that would deprive a state of its equal representation in the Senate without its consent). The literal text of this provision forbids only changes to the Senate's apportionment. One could posit a number of creative ways of circumventing the restriction, such as by sidelining the Senate altogether. See AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 292–95 (2005). Beyond that, one could question whether Article V has to be regarded as the sole method of amending the Constitution. See *id.* at 295–99.

²⁶ There are certain categories of legislation, notably including some trade agreements and aspects of the federal budget, that are not subject to filibuster. See, e.g., SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE 185–94 (1997) (listing a number of examples).

²⁷ See *supra* text accompanying note 10.

Nonetheless, in this case it is possible to provide an answer that is quite strong as these things go. That answer is *no*: the Senate is *not* functioning the way it was meant to work.

Now, it is true—and yet also a source of great confusion and misunderstanding—that the Senate was meant to be, among other things, a check on the House and a break on overhasty or hyperactive lawmaking.²⁸ Defenders of the status quo constantly invoke this aspect of the Senate’s design. Frequently they recount the story in which George Washington is supposed to have compared the Senate to a cooling saucer.²⁹ Though probably apocryphal,³⁰ the story is close enough to the mark that it seems like it could be true. Yet the notion that the Framers intended the Senate to fulfill its checking function *by itself being supermajoritarian* is fiction: the desired security against imprudent impulse, Madison tells us, would come from a lawmaking process that required the assent of multiple, independently selected and constituted *majorities* in the House and Senate, not supermajority voting rules within the chambers.³¹ The Framers were mostly hostile to minority vetoes in the everyday lawmaking process; supermajority requirements, Hamilton reminds us, had been one of the failings of the Articles of Confederation.³² The Framers certainly understood that supermajority voting rules have some virtues when it comes to blocking unwise laws, but they also understood the serious countervailing disadvantages of minority rule.³³ As Madison put it,

²⁸ *E.g.*, THE FEDERALIST NO. 62, at 378 (probably James Madison) (Clinton Rossiter ed., 1961) (defending the Senate in part because it will restrain “the facility and excess of law-making [that] seem to be the diseases to which our governments are most liable”); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 218–19 (Max Farrand ed., 1966) [hereinafter RECORDS] (reporting that Madison and Randolph favored long senatorial terms to promote stability and bolster the Senate’s ability to resist the House); *id.* at 512 (reporting Morris’s statement that the purpose of the Senate is to “check the precipitation, changeableness, and excesses” of the House).

²⁹ *E.g.*, Brian Darling, *Bid To ‘Reform’ Filibuster Is Dangerous*, WASH. TIMES, Jan. 6, 2011, at A2; *Dispute in the Senate: Excerpts from Remarks on Filibusters*, N.Y. TIMES, May 19, 2005, at A25 (quoting Sen. Harry Reid, who was minority leader at the time); *Why We Need the Filibuster*, CHI. TRIB., May 27, 2003, at C18.

³⁰ See *Senatorial Saucer*, MONTICELLO.ORG, <http://www.monticello.org:8081/site/research-and-collections/senatorial-saucer> (last visited Apr. 4, 2011) (pointing out that “no evidence has surfaced” that Washington actually remarked on the similarity of the Senate to a saucer).

³¹ THE FEDERALIST NO. 62, *supra* note 28, at 378 (probably James Madison) (stating that “[an] additional impediment . . . against improper acts of legislation” is that “[n]o law or resolution can now be passed without the concurrence, first, of a *majority* of the people, and then, of a *majority* of the States” (emphasis added)).

³² THE FEDERALIST NO. 22, *supra* note 28, at 147–48 (Alexander Hamilton). When the Convention rejected a proposal to require a two-thirds supermajority for Congress to regulate navigation, some of the delegates cited the unhappy experience under the Articles of Confederation as evidence against such a rule. 2 RECORDS, *supra* note 28, at 449–53.

³³ THE FEDERALIST NO. 58, *supra* note 28, at 361 (James Madison) (“That some advantages might have resulted from such a precaution [i.e., supermajority voting] cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty and partial measures. But these considerations are outweighed by the inconveniences in the opposite scale.”).

majority voting is “the fundamental principle of free government.”³⁴ John Locke would have agreed.³⁵

The Senate’s early history does not support supermajority rule either. A great deal has been written on this topic (a bit of it by me in prior work),³⁶ but for present purposes this summary from two of the leading scholars of the filibuster will suffice: “[In the Senate’s first decades], [S]enators seemed to assume that final votes—even on contentious legislation—would be taken as a matter of course Furthermore, Senators assumed that approval of legislation would require no more than a simple majority vote.”³⁷ In other words, the “sixty-vote Senate”³⁸ is not of ancient origin.

I have been claiming that the Senate is broken according to originalist premises in the sense that it is not functioning as intended. If that is correct, that would count as one reason in favor of reform. It would require somewhat more to show that the Senate’s current practices, particularly the routine filibuster, are so inconsistent with the original understanding as to be actually unconstitutional. Nonetheless, although demonstrating unconstitutionality is not necessary in order to establish dysfunction and argue for reform, the filibuster as now practiced is probably unconstitutional. At a bare minimum, the Constitution certainly *assumes* that the Senate would operate under majority rule. Such is evident from the provision allowing the Vice President to break a tie.³⁹ Similarly, the fact that presidential vetoes can be overridden only by a two-thirds vote⁴⁰ shows that something less was anticipated for initial passage. Moreover, the Constitution itself specifies supermajority rule for several particularly momentous actions such as advancing a constitutional amendment, expelling a member, convicting on impeachment charges, and ratifying a treaty.⁴¹ Add the Framers’ hostility to minority vetoes and this is probably enough to push majority rule within a legislative chamber over the line from constitutional expectation to constitutional requirement.⁴²

³⁴ *Id.*

³⁵ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 52 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690) (“[T]he *act of the majority* [of an assembly] passes for the act of the whole, and of course determines, as having, by the law of nature and reason, the power of the whole.”).

³⁶ See, e.g., BINDER & SMITH, *supra* note 26, at 29–51; GREGORY KOGER, FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE 37–95 (2010); Aaron-Andrew P. Bruhl, *Burying the “Continuing Body” Theory of the Senate*, 95 IOWA L. REV. 1401, 1410–18 (2010); Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1011–16 (2011).

³⁷ BINDER & SMITH, *supra* note 26, at 50–51.

³⁸ Barbara Sinclair, *The “60-Vote Senate”*: *Strategies, Process, and Outcomes*, in U.S. SENATE EXCEPTIONALISM 241, 241–46 (Bruce I. Oppenheimer ed., 2002).

³⁹ U.S. CONST. art. I, § 3, cl. 4.

⁴⁰ *Id.* § 7, cl. 2.

⁴¹ *Id.* § 3, cl. 6 (conviction in impeachment trial); *id.* § 5, cl. 2 (expulsion); *id.* art. II, § 2, cl. 2 (treaties); *id.* art. V (amendments).

⁴² Needless to say, the brief comments in the text hardly do justice to the constitutional debate. As I have acknowledged in prior work, the constitutionality of the filibuster (and the rules that protect it

2. *Evaluation from Pragmatic Premises*

So that is originalism. Turning to more pragmatic considerations of policy consequences, the Senate is broken on this score as well. Now, to be sure, one's assessment here is strongly influenced by the politics of the moment and one's substantive view of the merits of the particular legislation on the agenda. Democrats like obstruction just fine when they are blocking Republican measures; Republicans like it when they can block Democratic measures. Obviously we need to avoid that kind of reasoning when making a more principled assessment.

Beyond the immediate party dynamics, one's assessment of the filibuster might reflect a less directly partisan but still partly ideological stance concerning the general question of how easy it should be to legislate. Again, our system is not designed to facilitate speedy lawmaking; the structure does not provide for a plebiscitary democracy in which present public desires are instantly transformed into public policy. The question here, however, is one of degree. If one wants legislating to be more difficult—not just for certain laws or parties but across the board as a principled matter—then it might seem that adding hurdles like the filibuster would be desirable. Such a sentiment might stem from a certain type of libertarian outlook according to which legislation is presumptively bad because it almost necessarily interferes with liberty, private property, and free markets. (A compatible but distinct position, influenced by public choice theory, sees legislation as presumptively bad because it generally reflects special-interest deals rather than advancing the public interest.)

Now, it may be that reformers simply have to concede that reining in the filibuster, even as a longer-term proposition that abstracts from current partisan aims, is not a win-win proposition that everyone could get behind regardless of their ideology. Nonetheless, I believe that there should be rather few people who, upon reflection, actually have an interest in

from repeal) is a complicated question with many argumentative thrusts and parries but no knockout punches. See Bruhl, *supra* note 36, at 1419–27 (summarizing the arguments). For further elaboration of the argument that the contemporary filibuster rule is unconstitutional to the extent it cannot be changed by a majority, see Josh Chafetz's contribution to this symposium, *supra* note 36, and Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 245–52 (1997). For a contrary view, see Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445, 450–62 (2004). Note that the argument for unconstitutionality does not rely on a simplistic appeal to democracy. First, democracy is a highly complicated and contested concept. Second, our Constitution is not straightforwardly democratic in the majority-rule sense. Third, to the extent that democracy ordinarily requires that popular majorities rule, popular majorities need not line up with Senate majorities. That is, because of the Senate's malapportionment with respect to population, a filibustering minority could represent many more people than the Senate majority. This last fact might tempt one to mount a democratic case for the filibuster. Nonetheless, it seems to me that a party that is strong enough to hold the presidency, the majority in the House, and the majority in the Senate has sufficiently proven its democratic pedigree that it should be permitted to govern. Public opinion acts as a check as well. Thus, we do not need the filibuster to prevent minority rule by an unrepresentative Senate majority.

retaining the filibuster.

To begin with, to the extent the filibuster is thought to be valuable because it simply makes it harder to legislate and thus tends to entrench the status quo, the status quo is not the libertarian common-law baseline. The status quo includes, among other things, government-run retirement financing (i.e., Social Security), Medicare, corporate income taxes, the war on drugs, agricultural subsidies, and, perhaps most immediately relevant, the recent healthcare reform act. The filibuster makes it harder to repeal these programs, cut taxes, and accomplish the rest of a libertarian agenda, just as it makes it harder to create new programs. Put differently, maybe obstruction can keep the government off your back, but obstruction will not get it off your back once it is there.

Further, and contrary to the assumption in the previous paragraph, it is not necessarily the case that the effect of the filibuster is to block legislative action. Sometimes the filibuster simply makes legislation more costly in the quite literal sense that the way to get the support of the last few necessary Senators (who are increasingly distant from a bill's supporters) is not through persuasion or compromise on the merits but through the addition of special benefits desired by the pivotal Senators' constituents and contributors.⁴³ Here the healthcare reform act, with its "Cornhusker kickback" and "Louisiana Purchase," is distinctive only because the deal-making was more visible.⁴⁴ Libertarians and conservatives should be particularly averse to any parliamentary device that encourages such pork-barreling.

Still further, it seems that just about everyone, regardless of ideology, has an interest in maintaining electoral accountability. Elections should have consequences. Whether the majority supports socialism on the one hand or social Darwinism on the other, today the minority can block the majority's legislative program or at least shape it to the minority's liking, even under conditions of unified government. Who, then, should the public blame when the party that appears to be in power disappoints?

⁴³ See Elizabeth Garrett, *A Fiscal Constitution with Supermajority Voting Rules*, 40 WM. & MARY L. REV. 471, 486–87 (1999) (observing that "supermajority voting requirements may increase the amount of special interest legislation as lawmakers work to assemble larger coalitions"). The same point applies to veto points more generally, including bicameralism. Suppose the House wishes to spend money on Project A and the Senate wishes to spend money on Project B. One outcome is that both measures fail, but another is that bicameral logrolling lets both succeed. Cf. 1 RECORDS, *supra* note 28, at 486 (reporting Madison's remark that small states could use their voting power in the Senate to "extort" measures, not just "obstruct" them). For an examination of the complex dynamics of bicameralism and spending, see Kenneth A. Shepsle, *Dysfunctional Congress?*, 89 B.U. L. REV. 371, 378–79 (2009).

⁴⁴ See Chris Frates, *Payoffs for States Seal Senate Deal*, POLITICO.COM (Dec. 19, 2009, 7:56 PM), <http://www.politico.com/news/stories/1209/30815.html> (discussing special deals used to secure the votes of wavering Senators); see generally DIANA EVANS, GREASING THE WHEELS: USING PORK BARREL PROJECTS TO BUILD MAJORITY COALITIONS IN CONGRESS (2004) (discussing the role of particularized benefits in forging legislative coalitions).

True, we will never have the kind of responsible party government found in a parliamentary system.⁴⁵ After all, ours is not a parliamentary system; it is a presidential system that can and frequently does experience divided government—factors that tend to blur the lines of accountability for policy outcomes. Some degree of accountability is required, however, and the current state of affairs is not conducive to it. The problem, as Jack Balkin has astutely observed, is that we now seem to be experiencing an unstable combination of presidential structure and parliamentary behavior.⁴⁶ That is, the opposition party (the Republican Party in the 111th Congress) unites for the purpose of bringing down the government through constant opposition,⁴⁷ yet the majority party lacks the power to enact—and be judged upon—its own preferred program even when it nominally controls all the legislative organs. If the stimulus fails, who is the responsible party? President Obama and the Democrats . . . or Senator Collins?

Finally, legislative dysfunction creates the risk that the action simply moves elsewhere. Decisions must be made, and action must be taken, especially as circumstances change and new problems arise. The political system is like a hydraulic system: shut off a valve here and the pressure will exert itself through other channels.⁴⁸ The policy choices will be made, just not through our elected legislators acting through the constitutionally envisioned channels. A broken legislative process means a greater role for executive, administrative, and judicial lawmaking.

These developments are already apparent. When legislation stalls, the relevant agency interprets its existing authority more aggressively.⁴⁹ Measures that cannot overcome a filibuster might end up in an executive order. Similar dynamics apply to presidential appointments that require Senate confirmation. If the confirmations process is gridlocked, the

⁴⁵ Essentially, the idea of responsible party government is that the parties present the voters with clearly contrasting programs and the party that wins the election is allowed to implement its program and is then judged on its performance at the next election. See generally COMM. ON POL. PARTIES, AM. POL. SCI. ASS'N, TOWARD A MORE RESPONSIBLE TWO-PARTY SYSTEM (1950); AUSTIN RANNEY, THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT: ITS ORIGINS AND PRESENT STATE (1954).

⁴⁶ Jack M. Balkin, *Parliamentary Parties in a Presidential System*, BALKINIZATION (Nov. 30, 2010, 6:42 AM), <http://balkin.blogspot.com/2010/11/parliamentary-parties-in-presidential.html>.

⁴⁷ See Peter Baker, *Tide Turns, Starkly*, N.Y. TIMES, Nov. 3, 2010, at A1 (reporting on Republican leader Mitch McConnell's statement that "the single most important thing we want to achieve is for President Obama to be a one-term president"); Carl Hulse & Adam Nagourney, *Senate Republican Leader Finds Weapon in Party Unity*, N.Y. TIMES, Mar. 17, 2010, at A13 (describing McConnell's strategy of holding his caucus together in order to "slow things down" and "deny Democrats any Republican support on big legislation"); see also Jonathan Chait, *The GOP's Secret Senate Plan*, NEW REPUBLIC (Dec. 17, 2010, 6:55 AM), <http://www.tnr.com/blog/jonathan-chait/80139/gop-secret-senate-plan-mcconnell> (speculating that McConnell secured a pledge from all Republicans that they would vote together on procedural matters).

⁴⁸ Cf. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) (using the hydraulic metaphor to describe the role of money in political campaigns).

⁴⁹ See, e.g., David A. Fahrenthold & Juliet Eilperin, *EPA To Pick Up Climate Change Where Congress Left Off*, WASH. POST, Aug. 4, 2010, at A3.

President can circumvent the constitutionally prescribed appointments process with more aggressive use of recess appointments⁵⁰ and non-confirmed White House czars.⁵¹ These developments hold risk for representative government.

In sum, while complete neutrality may not be possible, it seems to me that just about everyone should regard the current situation—a routine supermajority rule in the Senate—as unattractive and untenable. Why, then, does it prove so resistant to change?

III. IMPEDIMENTS TO FIXING THE SENATE

I next turn to the topic of Senate reform, in particular the obstacles that impede it. I do not take a position here on how exactly the Senate's rules should be changed. The choice of a particular decision procedure is a complicated question combining political science, political theory, and political morality. Perhaps the best solution is simple majority rule without filibusters, on the model of the House of Representatives. Or perhaps the ideal solution is a suspensive veto that would let the minority delay legislation but not block it.⁵² Quite possibly the rule should vary depending on the kind of measure at issue: substantive legislation, appropriations, judicial appointments, or executive appointments.⁵³ My goal here is to explain why any move toward majoritarianism is difficult.

Part of the difficulty of reforming the supermajoritarian Senate stems from the rules for changing the rules. An amendment to the Senate's rules—such as a reduction in the filibuster threshold or some other filibuster reform—is itself subject to filibuster. In fact, it is even harder to invoke cloture on a motion to amend the rules—which requires a two-thirds vote in favor—than it is to invoke cloture on ordinary legislation—

⁵⁰ U.S. CONST. art II, § 2, cl. 3 (“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”). President Obama has made a number of recess appointments; some of the appointees had faced significant opposition, while others were delayed despite being noncontroversial. Sheryl Gay Stolberg, *Obama Bypasses Senate Process, Filling 15 Posts*, N.Y. TIMES, Mar. 28, 2010, at A1; Sheryl Gay Stolberg, *Six Recess Appointments To Be Made, Obama Says*, N.Y. TIMES, Dec. 30, 2010, at A18.

⁵¹ See, e.g., BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 154–57 (2010) (explaining how filibusters, holds, and delays encourage presidents to circumvent senatorial confirmation for top policy advisors); Brady Dennis, *Warren Expected To Be Adviser*, WASH. POST, Sept. 16, 2010, at A18 (reporting that Elizabeth Warren was selected to organize the Bureau of Consumer Financial Protection as a presidential advisor rather than appointed director in order to avoid protracted confirmations process).

⁵² See generally Gerard N. Magliocca, *Reforming the Filibuster*, 105 NW. U. L. REV. 303 (2011) (proposing this reform).

⁵³ See, e.g., John O. McGinnis & Michael B. Rappaport, *The Judicial Filibuster, the Median Senator, and the Counter-majoritarian Difficulty*, 2005 SUP. CT. REV. 257, 261 (discussing the benefits of filibusters of Supreme Court appointments); Bruce Ackerman, *Filibuster Reform Both Parties Can Agree On*, WALL ST. J., Jan. 4, 2011, at A15 (arguing for supermajority rules for judicial appointments but simple majorities for executive appointments).

which requires a “mere” three-fifths.⁵⁴ And the rules also provide that they remain in force from Congress to Congress indefinitely, such that the filibuster rule is entrenched.⁵⁵ Thus, at least according to the Senate rules, the majority cannot establish majority rule. The difficulty of amending the rules through this process explains the occasional threatened recourse to the “nuclear” or “constitutional” option, according to which the majority would assert the power to set new rules free of the supermajoritarian features of the current rules.⁵⁶ Such a maneuver would be extraordinary inasmuch as it would deviate from the Senate’s established rules and usual practices. As I have explained at length elsewhere, I nonetheless believe such a procedure would be lawful because the Senate’s rules cannot validly entrench themselves in perpetuity against majoritarian change.⁵⁷ Yet even those who condemn the filibuster hesitate to eliminate it through this route.

Of course, not all Senators will agree with the legal proposition that the rules can be validly changed by a majority, and others will believe that the Senate was meant, as a historical matter, to operate by supermajority rules. I believe those views are mistaken, but they surely exist. Further, some Senators no doubt genuinely believe that the body should be supermajoritarian in order to raise the difficulty of legislating, a reasonable view (though again one that I, with the support of high authority,⁵⁸ reject).

The deeper explanation for the absence of substantial reform, however, is perhaps not so much legal or philosophical as political. It is a matter of Senators’ incentives. Both sides, majority and minority, have reasons to favor supermajority rules. The Senators in the minority have an obvious and immediate incentive to protect minority vetoes, so that they can block the other party’s initiatives or extract compromises or favors as the price of their support. And the members in the majority, despite the immediate desire to get their way, are not so shortsighted as to overlook the fact that they will probably return to the minority sooner or later. Apart from those party- and policy-oriented considerations that tend to impede reform, Senators also have an individualistic interest in preserving the filibuster because it likely increases the Senators’ power relative to other government officials and may increase the power of rank-and-file Senators

⁵⁴ STANDING RULES OF THE SENATE, *supra* note 4, at 15 (Rule XXII.2). The denominator for the two cloture votes differs. For cloture on legislation, it is the whole Senate membership; for cloture on amending the rules, it is the number of Senators present and voting. *Id.* Still, given the stakes of a vote on changing the Senate’s rules, one would expect full or nearly full attendance.

⁵⁵ *Id.* at 4 (Rule V).

⁵⁶ See Martin B. Gold & Dimple Gupta, *The Constitutional Option To Change Senate Rules and Procedures: A Majoritarian Means To Overcome the Filibuster*, 28 HARV. J.L. & PUB. POL’Y 205, 219–26, 232–69 (2004) (detailing a number of prior instances in which majoritarian change was threatened or employed).

⁵⁷ Bruhl, *supra* note 36, at 1410–18.

⁵⁸ See *supra* notes 28–35 and accompanying text.

relative to the Senate leadership.⁵⁹ I imagine that when a Senator puts a hold on several bills or nominations, legislative leaders and cabinet secretaries suddenly become much more eager to hear about the issue that is bothering the Senator at the moment.

As recent events illustrate, political incentives have mostly favored the status quo. At one time it appeared that the start of the 112th Congress in January 2011 might see major changes to the Senate's rules. Over the course of the previous year, the Senate had held a series of hearings on the history, legality, and consequences of the filibuster and related practices like holds.⁶⁰ Several Senators introduced reform proposals, some of which were quite ambitious in that they attempted to move the Senate in the direction of majority rule.⁶¹ In December 2010, shortly before the new Congress convened, every returning Democratic Senator signed a letter endorsing reform.⁶²

Yet when the actual reform package was unveiled, it was quite mild. Most notably, it did not contemplate lowering the sixty-vote cloture threshold. Instead, it proposed five changes to current practice.⁶³ First, it would eliminate filibusters on the motion to proceed, a motion that the Senate uses to bring a matter up for debate. This reform would reduce the number of distinct filibusters to which a particular measure could be subjected. Second, the reform package provided that post-cloture debate—that is, the amount of debate permitted even after cloture is invoked—would be reduced from thirty hours to two hours for nominations (though not for legislation). Third, the package would eliminate *anonymous* holds. Holds by individual Senators would still be allowed, but the responsible Senator would have to own up to the delay. Fourth, it would attempt to ensure that more filibusters were actual talking filibusters. (Today, most filibusters do not include extended debate; instead, a Senator “filibusters” a measure merely by threatening to engage in time-consuming debate, which is usually sufficient to persuade the majority to abandon the measure and

⁵⁹ See BARBARA SINCLAIR, *THE TRANSFORMATION OF THE U.S. SENATE* 90, 140 (1989) (explaining that changes in the political landscape have increased incentives to engage in filibustering and other individualistic behavior); GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* 263 (2006) (explaining that “bids to eliminate the filibuster in the contemporary Senate run up against individual senators’ personal power goals”).

⁶⁰ *Examining the Filibuster: Hearings Before the S. Comm. on Rules and Administration*, 111th Cong. 111–706 (2010) (printing materials from six hearings held during 2010).

⁶¹ E.g., S. Res. 416, 111th Cong. (2010) (resolution introduced by Sen. Harkin, which would eventually permit majority cloture after a series of cloture votes); S. Res. 396, 111th Cong. (2010) (resolution introduced by Sen. Udall, which asserted the right to adopt new rules at the start of the next Congress by majority vote).

⁶² Dan Friedman, *Senate’s Returning Democrats Unanimously Favor Filibuster Reform*, NAT’L J., Dec. 22, 2010, available at <http://www.nationaljournal.com/congress/senate-s-returning-democrats-unanimously-favor-filibuster-reform-20101222>.

⁶³ The remainder of this paragraph describes the proposals contained in S. Res. 10, 112th Cong. (2011), which was introduced by Sen. Tom Udall on January 5, 2011.

use its valuable time on other priorities.) Fifth, in order to accommodate the minority's complaints that it is forced to obstruct because the majority will not allow it to offer amendments,⁶⁴ the package guarantees the minority leader the right to offer three germane amendments.

As noted, these proposed changes were modest, at least compared to lowering the cloture threshold. Potentially the most important was the attempt to return to a system in which filibustering Senators must actually hold the floor. The proposal provided that filibustering Senators must actually engage in debate and cannot ask for a quorum call or make dilatory motions.⁶⁵ If no Senator is willing to continue the debate, cloture would be invoked notwithstanding the previous failure of a cloture vote.⁶⁶ This would tend to shift a greater burden onto the filibustering Senators and raise the costs of obstruction. Such a change could be important because, as with most things, when the price goes up, the quantity purchased goes down. Indeed, several political scientists have contended that filibusters have increased so much in recent decades because the cost of filibustering has dropped so far that the minority can almost always outlast the majority.⁶⁷ If obstruction became more taxing, the majority would more often be able to win wars of attrition.

This reform package failed. It became apparent that support for major reforms was weak even within the Democratic caucus, such that the most committed reformers lacked even the fifty-one votes needed to proceed under the constitutional or nuclear option, let alone the supermajority required under the current rules.⁶⁸ The ultimate result of all the agitation for reform was a deal, worked out by leaders in both parties, that involved a few relatively minor changes to the Senate's practices.⁶⁹ Pursuant to the agreement, the Senate overwhelmingly voted to restrain the use of anonymous holds by heightening the disclosure requirements.⁷⁰ It also voted to restrict the minority's ability to delay through forcing the oral reading of amendments.⁷¹ Apart from those formal resolutions, the Democratic and Republican leaders also publicly committed to the following: neither side would seek to use the nuclear or constitutional

⁶⁴ *E.g.*, Susan M. Collins, *Congress Got Nasty. Here's How To Fix It*, WASH. POST, Oct. 10, 2010, at B4 (stating that Republicans "overuse the filibuster, because our only option is to stop a bill to which we cannot offer amendments").

⁶⁵ S. Res. 10, 112th Cong. § 4 (2011).

⁶⁶ *Id.*

⁶⁷ *See, e.g.*, KOGER, *supra* note 36, at 197–99; WAWRO & SCHICKLER, *supra* note 59, at 30–31, 259–64.

⁶⁸ *See* Paul Kane, *Senate Nears Approval of Filibuster Changes*, WASH. POST, Jan. 26, 2011, at A03 (describing opposition from Republicans as well as senior Democrats to more sweeping reform proposals).

⁶⁹ Carl Hulse, *Senate Approves Changes Intended To Ease Gridlock*, N.Y. TIMES, Jan. 28, 2011, at A20.

⁷⁰ S. Res. 28, 112th Cong. (2011) (enacted).

⁷¹ S. Res. 29, 112th Cong. (2011) (enacted).

option to change the rules by majority vote in the 112th or the 113th Congress, both parties would work together to pass legislation exempting many lower-level executive appointments from the requirement of senatorial confirmation, and the minority would reduce filibustering on the motion to proceed in exchange for the majority leader's promise to allow the minority to offer amendments.⁷²

It is still too early to assess the full significance of the changes that have been implemented and promised. Nonetheless, at the most they will amount to rather minor improvements.

IV. CONCLUSION AND PROSPECTS FOR FUTURE REFORM

The Senate's supermajoritarian voting rules render it dysfunctional. There is no legal impediment to change. Yet significant reform seems out of reach, in substantial part due to Senators' private incentives.

Is there any way to heighten the prospects of meaningful reform by altering those incentives? Probably so, and in closing I will mention two approaches: veiling partisanship and harnessing partisanship.

The essence of the veiling strategy is to render the immediate winners and losers of reform uncertain.⁷³ This could be done, for example, by delaying the effective date of any reform for several years, so that we would not know which party would hold the White House and the Senate when the new rules (whatever they happen to be) came into effect. One benefit of veiling is that it can reduce opposition that is based on immediate partisan calculations. Another benefit, of a different type, is that veiling can also reduce *support* for reform that is based on immediate partisan calculations. This is beneficial because it lends legitimacy to reform efforts. A related way to increase the legitimacy of Senate reform is to do it when the stakes of reform are lower, such as when the House of Representatives and the presidency are already divided. This is of course the situation in the 112th Congress. In such an alignment, the filibuster is not such an important hurdle, at least when it comes to legislation rather than appointments.

Another route to reform is quite the opposite of veiling. It is to positively harness the majority's immediate partisan imperatives to enact its agenda. One of the shortcomings of veiling is that it does not do anything to persuade those Senators who on sober reflection sincerely believe that the Senate should be supermajoritarian no matter who is in the majority. Nor does pushing off reform until after the next election

⁷² This agreement was memorialized in a colloquy between Senators Reid and McConnell on the Senate floor. 157 CONG. REC. S324–25 (daily ed. Jan. 27, 2011).

⁷³ See Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 399, 403–04 (2001) (describing how veiling strategies attempt to suppress self-interested decisions by restricting information).

diminish Senators' individualistic incentives to retain a device that makes them individually more powerful regardless of whether they find themselves in the majority or the minority after the next election. But one imagines that at some point the immediate partisan need to enact one's program overcomes the contrary considerations just mentioned. This is a less desirable scenario for reform from a good-government perspective, but it is no less efficacious. If obstruction continues to become more potent, at some point the conditions for partisan-driven reform will materialize. The circumstances of such reform will be a cause for regret, but the long-term benefit of a more majoritarian Senate may be worth it if there is no alternative.