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Deliberation's Demise: The Rise of One-Party Rule in the Senate

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Deliberation's Demise: The Rise of One-Party Rule in the Senate

Charles Tiefer* and Kathleen Clark**

ABSTRACT

Much of the recent legal scholarship on the Senate expresses concern about gridlock, which was caused in part by the Senate's supermajority requirement to pass legislation and confirm presidential nominees. This scholarship exalted the value of procedural changes permitting the majority party to push through legislation and confirmations, and failed to appreciate salutary aspects of the supermajority requirement: that it provided a key structural support for stability and balance in governance. The Senate changed its rules in order to address the problem of partisan gridlock, and now a party with a bare majority is able to force through much of its agenda. As a result, the minority party no longer plays its traditional and vital role in Senate deliberation. These rules changes—along with increased party polarization—have diminished the Senate's traditional role as a centrist institution, and the nation is suffering from its loss.

The Senate's record in 2017 illustrates the danger of transforming from a deliberative institution to one where a party with a bare majority can force through contentious legislation on a straight party-line vote. This recent record may foreshadow even more extreme steps. This Article examines the "nuclear option," which was employed to ram through the confirmation of Neil

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Gorsuch to the Supreme Court, and reconciliation, which was used to steamroll substantive legislation on tax cuts (successfully) and health care (almost). The Senate has lost its way as a deliberative institution and has come to resemble the House of Representatives. To regain its stature as a deliberative body, the Senate must revitalize the role of the minority party and stabilize its procedure.

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I. INTRODUCTION: FROM CONCERNS ABOUT GRIDLOCK TO ONE-PARTY
RULEA. *Current Senate Concerns*

In 2017, the Senate voted on majority party proposals to repeal the Affordable Care Act (ACA).¹ A small group of senators from a single party wrote the proposals behind closed doors and no Senate committee conducted hearings. By using a procedure known as “reconciliation,” the truly dreadful bill came within one vote of passage. Even some majority senators who voted for the bill declared that they did not want it to become law.² The near-repeal of the ACA is just one example of the risk created by recent changes in the Senate rules: changes that reduce the power of the minority party, undercut the deliberation that the Senate has traditionally provided, and diminish the Senate’s role as a critical check in the legislative process.

For almost a century, the Senate imposed a supermajority cloture requirement for the passage of most legislation and the confirmation of presidential nominees.³ To pass significant legislation, a party with a bare majority in the Senate had to reach across the aisle for support from members of the minority party in order to achieve supermajority support. By imposing a supermajority requirement, the Senate handed power to members of the minority party, who could extract legislative concessions from the majority seeking supermajority support.⁴ This procedural requirement fostered deliberation, with sponsors of legislation looking for ways either to achieve affirmative supermajority support for a bill or to persuade members of the minority not to mount an objection. As a result of the Senate’s supermajority cloture requirement, a sweeping legislative program could pass the Senate only if one of two different

1. MJ Lee & Phil Mattingly, *Health Care Debate: Senate Rejects Full Obamacare Repeal Without Replacement*, CNN (July 27, 2017, 2:44 PM), <https://www.cnn.com/2017/07/26/politics/health-care-bill-wednesday/index.html> [<https://perma.cc/WKX3-4P9L>].

2. *Id.*

3. *See Cloture Rule*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Cloture_Rule.htm [<https://perma.cc/59V3-WZKM>] (last visited Oct. 1, 2018).

4. *See id.*

conditions were met: either (1) the legislation was supported by a majority party that had won a supermajority of Senate seats due to an overwhelming electoral mandate, or (2) members from both major political parties supported the legislation.⁵

The Senate has adopted several key procedural changes reducing the scope of its supermajority requirement, with the roots of this ongoing change visible as early as 2007, when the Senate appeared to be on its way to becoming an institution of one-party rule.⁶ In early 2017, a further sign of this change came as the majority party forced through the confirmation of Supreme Court Justice Neil Gorsuch.⁷ The Senate changed its rules to deny the minority party a role in deliberation when the majority party exercises the “nuclear option.”⁸ This virtually omnipotent procedure could allow the majority party to change in its favor any Senate procedure.

In 2017, the Senate also employed a second technique, reconciliation, which enables the majority party to “fast track” legislation by greatly reducing the role played by the minority party. The majority party planned to push through parts of the Trump Administration agenda while allowing only a limited role for the minority party. Notably, the 52–48 Republican Senate set out to use this technique (and avoid the sixty vote cloture requirement) in order to repeal the ACA and enact large tax cuts for the wealthy.⁹

5. *See id.*

6. Charles Tiefer, *Congress’s Transformative “Republican Revolution” in 2001-2006 and the Future of One-Party Rule*, 23 J. L. & POL. 233 (2007) [hereinafter *The Future of One-Party Rule*].

7. Charles Tiefer, *The Silencing of Elizabeth Warren*, HARV. L. & POL’Y REV. BLOG (Feb. 22, 2017), <http://harvardlpr.com/2017/02/22/the-silencing-of-senator-warren/> [<https://perma.cc/2WBS-6264>] (foreshadowing this trend); Matt Flegenheimer, *The Roots of the Battle over Neil Gorsuch: They Started It*, N.Y. TIMES (Mar. 21, 2017), <https://www.nytimes.com/2017/03/31/us/politics/supreme-court-neil-gorsuch-senate.html> [<https://perma.cc/3B4X-ZB24>].

8. Alexander Bolton, *GOP Triggers ‘Nuclear Option,’ Gutting Filibuster in Gorsuch Fight*, THE HILL (Apr. 6, 2017, 12:35 PM), <http://thehill.com/homenews/senate/327591-gop-triggers-nuclear-option-gutting-filibuster-in-gorsuch-fight> [<https://perma.cc/6FPX-M2M2>].

9. Rebecca M. Kysar, *Reconciling Congress to Tax Reform*, 88 NOTRE DAME L. REV. 2121, 2125–36 (2013); Adam Cancryn et al., *Senate GOP Reveals Obamacare Repeal Bill but Still Lacks the Votes*, POLITICO (June 22, 2017, 7:21 PM), <https://www.politico.com/story/2017/06/22/senate-obamacare->

The majority's "gamble on fast-track rules" to repeal the ACA ultimately failed.¹⁰ Notwithstanding this particular failure, the machinery of Washington governance has largely shifted. In the past, the outcome of a bill in the Senate was determined by centrists from both parties working together. In this new era, the Senate Majority Leader's goal was for a bill's outcome to be determined by the majority party acting by itself: one-party rule.¹¹

Through one-party rule, the majority party was able to enact an enormous tax cut, primarily benefiting corporations and the top bracket. Only Republicans voted for it, and all Democrats voted against it.¹² That bill also repealed the individual mandate in the ACA, which was expected to remove 13 million people from health insurance coverage and increase health insurance costs for the rest.¹³

As the Senate continues down the path of reducing the minority party's role, it comes to resemble the House. In the House, the majority party (whether Republican or Democrat) has for the last century occupied a dominant position, relegating the minority party to a much diminished status.¹⁴ There are advantages to having a Senate that is run differently than the House: balance, consensus, centrism, and stability. Those advantages are at risk as the Senate continues down the path toward House-like one-party rule.

In addition, in 2017 the Senate used a third technique that reduced the role of the minority party. The Congressional Review Act permits a bare majority of the Senate (along with a majority of

repeal-republicans-secrets-239837 [https://perma.cc/6HNU-PC3X].

10. Robert Pear, *Republican Gamble on Fast-Track Rules for Health Care Hits Wall*, N.Y. TIMES (July 26, 2017), <https://www.nytimes.com/2017/07/26/us/politics/republican-fast-track-rules-obamacare-hits-wall.html> [https://perma.cc/H5H5-W9ZN].

11. *The Future of One-Party Rule*, *supra* note 6.

12. Thomas Kaplan, *House Gives Final Approval to Sweeping Tax Overhaul*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/us/politics/tax-bill-republicans.html?rref=collection%2Fnewseventcollection%2Ftrump-tax-cut-plan&action=click&contentCollection=politics®ion=rk&module=package&version=highlights&contentPlacement=1&pgtype=collection> [https://perma.cc/8UDY-GKMW].

13. Pear, *supra* note 10.

14. CHARLES TIEFER, *THE POLARIZED CONGRESS, THE POST-TRADITIONAL PROCEDURE OF ITS CURRENT STRUGGLES* (UNIVERSITY PRESS OF AMERICA, INC. 2016) [hereinafter *THE POLARIZED CONGRESS*].

the House and the President's signature) to eliminate by "disapproval" recently promulgated regulations.¹⁵ This technique does not require the sixty Senate votes for cloture, just a simple majority.¹⁶ Republicans made extensive use of the Congressional Review Act in 2017.¹⁷

B. Contrast to Fear of Gridlock

These developments demonstrate the need to reconsider the direction of previous scholarship on the Senate. Much of the recent scholarship about the Senate has focused on the condition of gridlock and how the Senate needed to overcome it.¹⁸ Gridlock has indeed characterized the Senate—and Congress as a whole—from 2011 to 2016. Both gridlock and one-party rule result from political parties' unwillingness to work together toward compromise. But observers who previously expressed concern about gridlock should now recognize the troubling consequences that have arisen from one-party rule in the Senate, including the denial of any role for the minority party and the demise of deliberation.

When a single party has a bare majority in the Senate, should that party be able to push through its entire legislative agenda? Or should the rules of the Senate require that a bare majority compromise with the minority party?

This is not just an issue of the Trump era. This demise of deliberation has developed over time as the Senate has made changes to its rules, ratcheting down the power of the minority party. One-party rule also stems from the increasing polarization of the parties in general, and the Senate parties in particular, over the past half-century. The Senate was previously dominated by centrist institutional attitudes, including respect for bipartisan

15. 5 U.S.C.A. § 801 (Westlaw through Pub. L. No. 115-193).

16. *Id.*

17. Michael D. Shear, *Trump Discards Obama Legacy, One Rule at a Time*, N.Y. TIMES (May 1, 2017), <https://www.nytimes.com/2017/05/01/us/politics/trump-overturning-regulations.html> [<https://perma.cc/SP3C-4YMM>].

18. See Jason S. Oh, *Commentary Diagnosing Gridlock*, 67 TAX L. REV. 627, 627 (2014); Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2217 (2013); David S. Law & Lawrence B. Solum, *Judicial Selection, Appointments Gridlock, and the Nuclear Option*, 15 J. CONTEMP. LEGAL ISSUES 51, 53 (2006).

committees, but is now dominated by majority party insistence on achieving political goals with zero involvement from the minority.¹⁹ Changes in the Senate's internal rules reflect increased party polarization. While Democrats are the ones raising concerns about a diminished role for the minority party right now, Republicans will have similar concerns when, as eventually happens, they become the minority party.

This Article examines recent procedural changes in the Senate that have empowered a bare majority to pass legislation and confirm presidential nominees without regard for a minority party's concerns. Those who argued for these procedural changes contended that they would solve the problem of gridlock. While gridlock has been a problem, removing the supermajority requirement also removes a key strength of the Senate. The supermajority requirement gave the majority party an incentive to work with members of the minority party, fostering cross-party alliances among senators with divergent viewpoints who found ways to work together toward legislative goals, creating a legislative body that was not just representative, but also deliberative. This Article proposes a framework that would protect the deliberative function of the Senate. Rather than wiping out the supermajority requirement entirely, these proposed reforms would impose a supermajority requirement for particularly sensitive legislative and confirmation battles.

The Senate has repeatedly made procedural changes that ratchet down the power of the minority party and further diminish deliberation. But it is not inevitable that the Senate will continue down this path, to the demise of deliberation. There are alternatives available to the Senate that would strengthen deliberation, but these alternatives will be far from easy for the Senate to achieve. They require a longer-term leadership perspective, determined efforts at centrism among the senators, pausing before taking radical steps, and tweaking the supermajority requirement to strengthen the institution.

C. Overview

This Article builds on an earlier treatise and book on

19. THE POLARIZED CONGRESS, *supra* note 14, at 4, 6–7.

congressional procedure²⁰ along with law review articles examining particularly dramatic changes in congressional procedure, going back to 2001 and continuing through the 2000s.²¹ These writings chronicled developments, such as the use of the reconciliation process for passing legislation, which was not the original purpose of that procedure. To address gridlock in the Senate, these books and articles did not recommend radical change (such as the blunt nuclear option), but instead proposed limited moderate changes.²² This Article continues in that vein.

Part I of this Article outlines the ways in which the Senate has denied the minority party its traditional role in deliberation and the dangers that arise as a result. It describes procedural changes that have ratcheted down the power of the minority party and the slippery slope toward further changes that the Senate appears to be on. Part II provides historical background on Senate procedures. Some of the rules changes together with increases in party polarization have made it harder for the Senate to function as a centrist institution, and it has moved away from balance and stability.²³ Part III identifies options that would strengthen deliberation in the Senate. Both parties need to support procedural steps that will reinvigorate the center and provide incentives for the majority party to cooperate with—rather than subjugate—the minority party.

II. RECENT DEVELOPMENTS AND NEAR-TERM DANGERS IN MINIMIZING THE ROLE OF THE MINORITY PARTY

A. *The “Nuclear Option”*

Recent changes in Senate rules have severely cut back on the role of the minority party. During the Obama Administration, when the Democratic Party held a majority, it made two changes

20. CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH AND LEGISLATIVE GUIDE (Greenwood Press 1989) [hereinafter CONGRESSIONAL PRACTICE AND PROCEDURE]; see, e.g., Jacobi & VanDam, *infra* note 50; THE POLARIZED CONGRESS, *supra* note 14.

21. E.g., Charles Tiefer, *How to Steal a Trillion: The Uses of Laws About Lawmaking in 2001*, 17 J.L. & POL. 409, 410 (2001) [hereinafter *How to Steal a Trillion*].

22. THE POLARIZED CONGRESS, *supra* note 14, at 171–81.

23. *Id.* at 84–106.

to decrease the power of the Senate Republican minority.²⁴

Most starkly, in November 2013, the Senate Democratic majority took action to expedite the confirmation of most, but not all, presidential nominees. Senate Republicans had slowed the confirmation of President Obama's judicial nominees to a crawl, resulting in a large pool of judgeships left unfilled,²⁵ and had done the same to Obama's nominees for executive posts. This was no small thing. This exercise of minority party power was arguably an abuse of power because the Senate minority used its power not to pass judgment upon the credentials or fitness of individual judicial nominees, but to prevent any confirmations for these posts at all in order to create and to accumulate long-term vacancies.²⁶ In the past, both parties had slowed the confirmation of the other party's nominees at the end of a President's term, but had not obstructed confirmations on such a scale.

In response to this wide-scale Republican obstruction, Democratic Majority Leader Harry Reid changed the cloture rule for confirming almost all presidential nominees. Instead of requiring a supermajority of sixty votes, confirmation would now require only a bare-majority of fifty.²⁷ Perhaps more significant than the rule change itself was Reid's method of making the change. He used a procedure called the "nuclear option."²⁸ During consideration of a nominee, Reid raised a point of order that a cloture vote "for all nominations other than for the Supreme Court of the United States is by majority vote" rather

24. The Democratic Senate Majority Leader Harry Reid, also obtained a compromise standing order as for when the filibuster might be eliminated on a motion to proceed, but it did not matter much. John C. Roberts, *Gridlock and Senate Rules*, 88 NOTRE DAME L. REV. 2189, 2214 (2013).

25. William G. Dauster, *The Senate in Transition or How I Learned to Stop Worrying and Love the Nuclear Option*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 631, 642 (2016).

26. *Id.* at 641–45.

27. *Id.* at 648. Under Senate rules, the vice president has the power to break a tie vote on the floor of the Senate, so a bare majority could consist of fifty Democratic senators and the (tie-breaking) Democratic vice president. *See id.*

28. Jim VandeHei & Charles Babington, *From Senator's 2003 Outburst, GOP Hatched Nuclear Option*, WASH. POST (May 19, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/05/18/AR2005051802144_pf.html [https://perma.cc/RW9J-HW3E].

than sixty votes.²⁹ The President Pro Tempore properly ruled that the point of order was not sustained. Then, the President Pro Tempore put the question before the Senate, and the Senate voted forty-eight in favor of the President Pro Tempore's ruling and fifty-two opposed, overruling the ruling. "The Senate had thus changed Senate procedure for future nominations. The Reid Precedent was set."³⁰ In plain English, a bare majority of the Senate voted to decrease the cloture requirement for all executive and almost all judicial nominations from sixty to fifty votes, leaving the sixty-vote threshold only for Supreme Court nominations.

The majority party had taken away a substantial minority party right. It did not matter whether the minority party became willing to act responsibly, to limit its stalling tactics to only certain nominees, or even to pledge that it would yield after a few days or after a few cloture votes. Rather, the minority party had completely lost its right (except for Supreme Court nominations). Resorting to the "nuclear option" reduced the unwritten taboo or heavyweight reluctance in the Senate to invoke this procedure.³¹ But Majority Leader Reid walled off one type of decision as too sensitive and significant for such diminished deliberation: confirming nominees to the Supreme Court.

In 2015, Republicans became the majority party in the Senate. The shoe was now on the other foot, setting the stage for Senate action on Supreme Court nominees in 2016 and 2017.³² In March of 2016, President Obama nominated Merrick Garland to the Supreme Court. Senate Majority Leader McConnell and the Republican Chair of the Senate Judiciary Committee refused to allow a committee hearing on or floor consideration of the nominee.³³ They did not contend that the President's nominee

29. Dauster, *supra* note 25, at 648 (quoting Senator Reid).

30. *Id.*

31. Law & Solum, *supra* note 18, at 60–63.

32. Chris Cillizza et al., *Why Republicans' Senate Majority Could Be Very Short-Lived*, WASH. POST (Nov. 7, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/11/07/why-republicans-senate-majority-could-be-very-short-lived/?noredirect=on&utm_term=.ef2d9ae1ba74 [https://perma.cc/LG3E-2BZ6].

33. David M. Herszenhorn, *Mitch McConnell Tells Garland the Senate Will Not Act*, N.Y. TIMES (Mar. 16, 2016, 4:08 PM), <https://www.nytimes.com/live/obama-supreme-court-nomination/mcconnell-tells-garland/>

was unqualified or unsuitable. This was about using their power to obstruct President Obama and motivate members of their party to elect a Republican President in November of that year.

When President Trump came to office and nominated his Cabinet secretaries and other officials, the Senate (Democratic) minority party had no ability to weigh those nominations, or selectively deliberate over the most unacceptable nominations, or even slow them down until the Senate had access to a complete record. For example, the minority sought to delay a vote on Scott Pruitt to head the Environmental Protection Agency until after the release of Pruitt's emails that had been ordered by an Oklahoma judge.³⁴ The majority rejected this delay, and the Senate confirmed Pruitt by a vote of 52–46.³⁵ Days after Pruitt's confirmation, the emails were released, and they showed that Pruitt had not told the truth about his email practices and documented a cozy relationship between Pruitt and anti-environment lobbying groups.³⁶

Betsy DeVos, the nominee for Education Secretary, lacked relevant experience and was known as an opponent of public schools in favor of charter schools. Her confirmation hearing went forward even though information on her extensive finances and conflicts of interest was not available.³⁷ The Senate was 50–50 divided about confirming her, but the majority pushed her confirmation through at breakneck speed without meaningful time for deliberation.³⁸

[<https://perma.cc/9ZEJ-HKPW>].

34. Coral Davenport, *Senate Confirms Scott Pruitt as E.P.A. Head*, N.Y. TIMES (Feb. 17, 2017), <https://www.nytimes.com/2017/02/17/us/politics/scott-pruitt-environmental-protection-agency.html> [<https://perma.cc/LKQ3-5CBK>].

35. *Id.*

36. Michael Biesecker & Sean Murphy, *Records Show EPA's Pruitt Used Private Email, Despite Denial*, NBC WASH. (Feb. 27, 2017, 5:52 PM), <https://www.nbcwashington.com/news/politics/Records-Show-EPAs-Pruitt-Used-Private-Email-Despite-Denial-414907603.html> [<https://perma.cc/3N2N-5UKW>].

37. Dan Merica, *Democrats Won't Get a Second Hearing with Betsy DeVos, Trump's Education Pick*, CNN (Jan. 24, 2017, 3:52 PM), <https://www.cnn.com/2017/01/24/politics/betsy-devos-second-hearing-democrats/index.html> [<https://perma.cc/WY53-TJC8>].

38. Kaitlyn Burton, *DeVos Confirmation: How Every Senator Voted on Trump's Education Secretary*, POLITICO (Feb. 7, 2017, 1:32 PM), <https://www.politico.com/blogs/donald-trump-administration/2017/02/betsy-devos-confirmation-vote-count-234744> [<https://perma.cc/AQ4M-6CC7>].

More significantly for Senate procedure, Majority Leader McConnell's refusal to confirm or even consider Judge Garland in 2016 preserved that Supreme Court vacancy in case a Republican won the November 2016 election, as Trump did. Early in 2017, President Trump nominated Neil Gorsuch, a nominee in the Scalia tradition.³⁹ At his Senate Judiciary Committee hearing, Gorsuch refused to disclose his views on virtually any legal question, including whether he would vote to overrule *Roe v. Wade*.⁴⁰ In tone, he was polite and charming. In reality, he treated the Senate as an institution unable to deliberate on his (unstated) positions, with the nuclear option in his own back pocket.

Senate Minority Leader Chuck Schumer announced that every single Democratic senator would stand together to filibuster the Gorsuch nomination.⁴¹ The Democratic base was aroused by President Trump's election and in particular his nomination of Gorsuch. Conversely, much of President Trump's base looked at this Supreme Court nomination as non-negotiable because it was key to many conservative positions in general and overruling *Roe v. Wade* in particular.⁴² Neither base left its Senate party able to work out a compromise.

Such a compromise could have been possible; the minority party could have let Gorsuch through in return for the majority party's promise not to use the nuclear option for "extraordinary" future nominees.⁴³ That would have tracked the compromise for

39. Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html> [<https://perma.cc/BA4N-T2KM>].

40. Matt Flegenheimer et al., *Gorsuch Completes His 20-Hour Test. So How Did He Do?*, N.Y. TIMES (Mar. 23, 2017), <https://www.nytimes.com/2017/03/23/us/politics/neil-gorsuch-supreme-court-hearing.html> [<https://perma.cc/5ADL-8M76>].

41. Robert Barnes et al., *Schumer: Democrats Will Filibuster Gorsuch Nomination*, WASH. POST (Mar. 23, 2017), https://www.washingtonpost.com/powerpost/gorsuch-confirmation-hearing-to-focus-today-on-testimony-from-friends-foes/2017/03/23/14d21116-0fc7-11e7-9d5a-a83e627dc120_story.html?utm_term=.d56572c6b47b [<https://perma.cc/PFZ8-4A5T>].

42. 410 U.S. 113 (1973).

43. Charles Tiefer, *McConnell and Schumer Can Compromise to Avoid the Nuclear Option on Gorsuch*, FORBES (Apr. 4, 2017, 12:13 PM), <https://www.forbes.com/sites/charlestiefer/2017/04/04/mcconnell-and-schumer-can->

lower court nominees that worked for the “Gang of 14” in the 2000s.⁴⁴ In 2005, a bipartisan group of fourteen senators negotiated a compromise to avoid the “nuclear option” by promising a high level of minority deference to the majority party’s confirmation efforts.⁴⁵ Such a deal would have been advantageous for both sides, though it would have disappointed the extremes in each party. But in light of how strongly their bases felt, neither party was inclined to compromise in 2017. The Democratic minority did not have the will to relent on Gorsuch, and the Republican majority did not have the will to prevent confirmation of President Trump’s most extreme Supreme Court nominees in the future.

So Majority Leader McConnell invoked the nuclear option for Supreme Court confirmations.⁴⁶ He obtained the Chair’s negative ruling, appealed, and won the appeal for limiting debate on Supreme Court judgeships. Gorsuch was confirmed to the Supreme Court. In terms of Supreme Court action, the confirmation of Neil Gorsuch certainly mattered on its own. Gorsuch was a mere forty-nine years old and will likely be a part of the Court’s right wing for decades.

But the way that Gorsuch was confirmed will also have lasting significance,⁴⁷ because the nuclear option will limit Senate deliberation over future Supreme Court nominees.⁴⁸ The prior reluctance to use the nuclear option was not absolute, in that Reid invoked it for lower court and executive nominees in 2013. The Senate had used the same approach—overruling the Chair—in previous decades to make a large number of changes to its

compromise-to-avoid-the-nuclear-option-on-gorsuch/#7e3c78cd3a8c
[<https://perma.cc/3HV3-Q24W>].

44. John O. McGinnis & Michael B. Rappaport, *The Judicial Filibuster, the Median Senator, and the Countermajoritarian Difficulty*, 2005 SUP. CT. REV. 257, 258 (2005).

45. *Id.*

46. Seung Min Kim et al., *Senate GOP Goes ‘Nuclear’ on Supreme Court Filibuster*, POLITICO (Apr. 6, 2017, 3:01 PM), <https://www.politico.com/story/2017/04/senate-neil-gorsuch-nuclear-option-236937> [https://perma.cc/9Q6P-WZ6E].

47. 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, 271 (2004).

48. Min Kim et al., *supra* note 46.

procedure, albeit most of those changes were minor.⁴⁹ There had certainly been occasions when the Senate majority party changed Senate procedures, including some when the minority party protested.⁵⁰ However, those minor adjustments in Senate procedure pale in significance compared with the 2013 decision to deny the minority party the power to resist executive and lower court nominations—let alone the 2017 decision to crush any minority party ability to resist Supreme Court nominations.

Moreover, this change means that when other Supreme Court seats become vacant, if the Senate majority party is united, it can again confirm nominees without the minority party having any right to weigh or even significantly discuss.⁵¹ Forty-nine minority senators will not have the right to raise an alarm about what will happen to the Court. Single-party rule, rather than deliberation, will drive Supreme Court nominees to confirmation.

Future nominees may have views even more extreme than Gorsuch's, with their confirmation shifting the balance of the Court. For example, when Justice Kennedy, the median Justice, retired and President Trump nominated Brett Kavanaugh, a judge considerably to the right of Kennedy, the ideological balance of the Court shifted, and the minority did not have the power to weigh or delay that nomination.

B. Reconciliation for Trump Agenda

There is a significant danger that the Senate will attempt to pass large portions of the Trump Administration's substantive agenda using the technique of reconciliation. The reconciliation procedure has been used in deficit swelling tax cuts and in bills dealing with health care, and may readily serve those ends again.⁵² The Byrd Rule limits how far reconciliation bills can stray into non-fiscal "extraneous" subjects.⁵³ For example, the

49. Dauster, *supra* note 25, at 651–53.

50. Gold & Gupta, *supra* note 47.

51. See Michael J. Gerhardt & Richard W. Painter, *Majority Rule and the Future of Judicial Selection*, 2017 WIS. L. REV. 263 (2017).

52. Looking back, "every reconciliation bill from 1980 through 1994 included health care provisions . . ." Tonja Jacobi & Jeff VanDam, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate*, 47 U.C. DAVIS L. REV. 261, 313 (2013).

53. Kysar, *supra* note 9, at 2131–32; THE POLARIZED CONGRESS, *supra*

Byrd Rule would keep a provision attacking Planned Parenthood out of a reconciliation bill addressing health care finances. On the other hand, who knows whether the Senate majority party will respect the limits drawn by the Byrd Rule when it is facing some all-important moment in the future.⁵⁴

More broadly, the recent use of the nuclear option (i.e., reducing the cloture requirement from sixty to fifty votes) for nominations in 2013 and 2017 raises the possibility of using the nuclear option for legislation as well. Majority party senators expressed opposition to this in both 2013 and 2017. But increasing polarization may dial up the pressure to avoid the normal sixty-vote requirements for cloture on legislation.

For example, Congress must periodically pass legislation increasing the debt limit to ensure that the government can pay its obligations (such as interest on the debt and Social Security benefits).⁵⁵ Failure to increase the debt limit would cause the nation to default; its exchanges of payments would seize up, and the government would go into the fiscal equivalent of cardiac arrest. The urgency of getting such a “must-pass” bill through the Senate might lead to carving out an exception to the cloture requirement. Perhaps the Senate majority party could not be faulted for doing that, but the “nuclear option” is a slippery slope. Using the nuclear option for any legislation at all would undermine the deliberation that comes with a sixty-vote supermajority cloture requirement.

note 14, at 140–42.

54. See Alexander Bolton & Niv Elis, *Senate Ref Holds Power Over Trump Agenda*, THE HILL (May 9, 2017, 6:00 AM), <http://thehill.com/homenews/senate/332465-senate-ref-holds-power-over-trump-agenda> [<https://perma.cc/6GXB-96XP>]. See also Paige Winfield Cunningham, *Senate Staffer Speaks Softly but Carries Big Stick*, WASH. POST (May 30, 2017), <https://www.pressreader.com/usa/the-washington-post/20170530/281861528459715>; Charles Tiefer, *Senate Republicans May Go All-Out for Anti-Abortion Provisions in the Health Care Bill*, FORBES (June 26, 2017, 9:29 PM), <https://www.forbes.com/sites/charlestiefer/2017/06/26/senate-republicans-may-go-all-out-for-anti-abortion-provisions-in-the-health-care-bill/#33dca358367e> [<https://perma.cc/R2HZ-G883>].

55. See Charles Tiefer, *Confronting Chaos: The Fiscal Constitution Faces Federal Shutdowns and (Almost) Debt Defaults*, 43 HOFSTRA L. REV. 511 (2014).

C. Congressional Review Act

In 1996, Congress enacted the Congressional Review Act (CRA) as part of Speaker Newt Gingrich's ideological program.⁵⁶ It allows a bare majority of the Senate (i.e., without sixty votes for cloture), together with the House and the President, to disapprove recently enacted agency regulations.⁵⁷ Before 2017,⁵⁸ it had been successfully invoked to disapprove only one regulation.⁵⁹ It comes into play when regulations promulgated at the end of the term of a President of one party are subject to disapproval for a few months by a Congress and a successor President of the other party. Under those circumstances, the Senate can move and pass the disapproval action of the prior President's regulations by a mere fifty votes pursuant to the CRA rather than the usual supermajority of sixty votes for cloture.

2017 proved an ideal period for the CRA. President Trump longed to demonstrate muscle-flexing in his first hundred days, but it would take some time before Congress or even his own administrators could produce concrete law-changing action. So Congress passed and President Trump signed into law fourteen regulatory disapprovals pursuant to the CRA.⁶⁰

Some of these regulatory disapprovals have considerable significance. Congress used this technique to disapprove, and thereby block, the "Stream Protection Rule," which required coal producers that engage in mountaintop removal to restore streams once their mining is complete.⁶¹ The Interior Department had

56. See Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 96 (1997).

57. 5 U.S.C.A. § 801 (Westlaw through Pub. L. No. 115-223).

58. See Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2162-63 (2009).

59. *How to Steal a Trillion*, *supra* note 21, at 471.

60. Tim Devaney, *Here's How Trump Is Using a Special Law to Do Away with Obama Regulations*, THE HILL (Mar. 26, 2017, 7:30 AM), <http://thehill.com/regulation/325737-heres-how-trump-is-using-a-special-law-to-do-away-with-obama-regulations> [<https://perma.cc/QMQ6-3PW4>]. The rules range from another workplace ergonomics rule, to the taking of wildlife in Alaska, to how to prepare land-use plans for public lands. A list is at https://en.wikipedia.org/wiki/Congressional_Review_Act [<https://perma.cc/DT6G-J3JP>].

61. Ari Natter, *Trump Signs Measure Blocking Obama-Era Rule to Protest Streams*, BLOOMBERG NEWS (Feb. 16, 2017, 3:53 PM), <https://www.bloomberg.com/news/articles/2017-02-16/trump-signs-measure-blocking->

spent seven years crafting the rule and estimated that it would protect 6,000 miles of streams and 52,000 acres of forests.⁶²

The symbolic significance of the fourteen rule disapprovals was even greater than the practical significance. President Trump wanted to create an image of activity, but was unable to produce serious full-scale executive actions during his first six months in office. Moving normal legislation through the 52–48 Senate (without the CRA’s built-in cloture) was not easy. Moreover, his own bureaucracy was understaffed at the top levels, and could not conduct the full notice-and-comment procedures, including legally strong justifications, to rescind regulations. Despite the Trump Administration’s inability to provide elaborate administrative preparation and support, Congress’s extensive use of CRA disapprovals helped create the impression that President Trump was taking action. The CRA (and its failure to require a supermajority vote in the Senate) made that possible, fourteen times.

III. MINORITY PARTY STATUS: BENEFITS, BACKGROUND, AND UNDERMINING FACTORS

A. *History*⁶³

1. 1975

The Senate adopted a cloture rule in 1917, and it required sixty-seven votes to force the end of a filibuster. During the 1940s, 1950s, and 1960s, white supremacist senators used the filibuster extensively to block civil rights legislation. From 1949 to 1975, senators supporting civil rights legislation engaged in “the Great Struggle,” fighting to curtail the civil rights filibuster so that their bills could go through.⁶⁴

In 1975, the Senate lowered the threshold for cloture from

obama-era-rule-to-protect-streams.

⁶² *Id.*

⁶³ See SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE: FILIBUSTERS IN THE UNITED STATES SENATE* (The Brookings Institute, 1997).

⁶⁴ CONGRESSIONAL PRACTICE AND PROCEDURE, *supra* note 20, at 704. The 1949–50 Congress included a strong contingent of Northern Democrats supporting civil rights who were elected along with President Truman in 1948. Eric Schickler et al., *Congressional Parties and Civil Rights Politics from 1933-1972*, 72 J. POLS. 672, 674 (July 2010).

two-thirds (sixty-seven votes) to three-fifths (sixty votes). This change was the result of a reform effort that was bipartisan, with Senate Democrats, strengthened by the 1974 post-Watergate election, receiving a forceful and unprecedented ruling from the Republican chair, Vice President Nelson Rockefeller, who had a career-long commitment to civil rights.⁶⁵ Likely due to the bipartisan process that created the 1975 change, it was perceived as institutional reform rather than a partisan political power grab. The 1975 change was seen as legitimate, and it resulted in stability rather than triggering a cascade of further procedural changes for partisan advantage.

Meanwhile, in a little-noticed step, the Congressional Budget Act of 1974 included a provision called “reconciliation.”⁶⁶ This technique required only a bare majority vote, not a supermajority cloture vote, to bring swift action. Reconciliation seemed to apply in a narrow set of circumstances: to annually enact deficit-reducing provisions in an annual package of limited scope—just spending cuts or tax hikes—to make that particular single year’s budget stay on target.

2. 1981

President Reagan’s 1980 election brought a Senate Republican majority, and seemed to constitute an electoral mandate.⁶⁷ The Republican Senate used the reconciliation process to pass an enormous purported cost-savings bill that was intended to justify an even more enormous and very real tax-cutting bill.⁶⁸ The bill included several provisions that were unrelated to the deficit reduction process. In response, Senator

65. *The Future of One-Party Rule*, *supra* note 6, at 247 n.81.

66. For studies of reconciliation (and the PAYGO system), see Anita S. Krishnakumar, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995-96 Budget Train Wreck*, 35 HARV. J. ON LEGIS. 589 (1998); see also Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387 (1998); see also James A. Miller & James D. Range, *Reconciling an Irreconcilable Budget: The New Politics of the Budget Process*, 20 HARV. J. ON LEGIS. 4 (1983).

67. CONGRESSIONAL PRACTICE AND PROCEDURE, *supra* note 20, at 885.

68. *The Future of One-Party Rule*, *supra* note 6, at 250. The purported cost-savings bill including much that did not really deliver savings, such as cuts in authorizations that were not actually going to produce cuts in spending. *Id.*

Robert Byrd convinced the Senate to adopt the “Byrd Rule,” prohibiting the inclusion of “extraneous” provisions in a reconciliation bill.⁶⁹ As reconciliation has grown in importance, so has the reconciliation-limiting Byrd Rule.

Meanwhile, the ideological divisions within Congress gradually became congruent with party lines. Conservative Southern Democrats, known as “boll weevils,” had served as a centrist swing group, leading to centrist bills as they allied alternatively with moderate Democrats to their left or moderate Republicans to their right. Over time, conservative Southern Democrats were replaced by Southern Republicans. Another group smaller in number, liberal Northern Republicans known as “gypsy moths,” was replaced by Northern Democrats.

The election of 1994 swept in the radical Gingrich Republican House majority and a Republican Senate majority, further polarizing Congress.⁷⁰ Gingrich’s changes to House rules in 1995 reduced the role and independence of committees, which previously facilitated the inclusion of centrist minority party views through co-sponsorship of some bills and acceptance of some amendments. Instead, one-party leadership backed by the majority party caucus predominated in the House. In subsequent years, as House members gradually won entry into the Senate, they brought with them the polarized Gingrich model, inflaming the partisan divide within the Senate.

3. 2001

In 2001, President George W. Bush won an electoral college (but not popular vote) victory and Republicans won a 50–50 majority in the Senate.⁷¹ Even though this was not much of a mandate, it started a six-year period of “Republican Revolution,” foreshadowing something like “one-party rule.” The Republican party held both chambers and the presidency, but it held the Senate sometimes by only a very narrow margin. For the Senate Republican party to accomplish its goals, they would have to circumvent or overcome the extant parliamentary restraints

69. 2 U.S.C.A. § 644 (Westlaw through Pub. L. No. 115-193).

70. *The Future of One-Party Rule*, supra note 6, at 240.

71. *Id.* at 252–53.

requiring a supermajority.⁷² Their success in achieving those goals was somewhat at odds with the “gridlock” thesis (i.e., that Congress could no longer pass much legislation because of the strong barriers to action, especially in the Senate).⁷³

Despite having only a bare 50–50 Republican majority in the Senate, Republicans were able to enact enormous tax cuts in 2001 thanks to extreme and outsized use of reconciliation.⁷⁴ They used reconciliation to do precisely the opposite of the deficit reduction intended by the original Congressional Budget Act. They accomplished this by using special new reconciliation techniques, such as a “sunset”⁷⁵ provision on enormous tax cuts that nominally ended after nine years.⁷⁶

Another 2001 event that was little noticed was the Senate Majority Leader’s sacking of the Senate parliamentarian.⁷⁷ The parliamentarian has significant responsibility, including advising the Senate chair on how to rule on whether a motion is in order and whether a proposed provision is consistent with reconciliation.⁷⁸ The parliamentarian is expected to interpret and apply Senate rules without fear or favor, and the parliamentarian is not supposed to be threatened or fired for the inevitable rulings that go against the majority. In 2001, the parliamentarian was fired after expressing views about reconciliation that were contrary to what the majority party wanted.

72. See generally *id.*

73. See generally Oh, *supra* note 18.

74. *The Future of One-Party Rule*, *supra* note 6, at 252–53.

75. Kysar, *supra* note 9, at 2133.

76. Reconciliation limits provisions to ten years and calculates whether they exceed the permissible deficit ceiling over the next ten years. So a sunset in the ninth year, allowing rates to pop up to the old high level, reduced the impact of the rate cuts (over the whole ten years) by about ten percent. This allowed a rate cut during the nine years of about ten percent more in those nine years. It depended on the very dubious notion that Congress would let the rates pop right back up in the tenth year. A sophisticated treatment of the reconciliation issue may be found in Michael W. Evans, *The Budget Process and the “Sunset” Provision of the 2001 Tax Law*, 99 TAX NOTES 405 (2003).

77. See Charles Teifer, *Out of Order: The Abrupt Dismissal of the Parliamentarian Threatens Senate Procedure*, LEGAL TIMES (May 14, 2001). See also Andrew Taylor, *Senate’s Agenda to Rest on Rulings of Referee Schooled by Democrats*, 59 CONG. Q. WKLY. REP. 1063 (2001).

78. Jacobi & VanDam, *supra* note 52, at 338–39.

4. 2003–16 and the Gang of 14

Judicial nominations followed a curious course during the 2003–2006 period.⁷⁹ Senate Democrats feared that if they dragged their feet on controversial Supreme Court nominations, Republicans would use the nuclear option.⁸⁰ To avoid that, Senate moderates from both parties, nicknamed the “Gang of 14,” struck a deal.⁸¹ The minority agreed not to use the filibuster for judicial nominations unless there were “extraordinary” circumstances, and the majority agreed not to use the “nuclear option.”⁸² Looked at one way, this period prefigured the slide into use of the nuclear option for non-Supreme Court judicial nominations in 2013–2017. Looked at another way, the fact that moderates from both parties could strike a deal provides a precedent for how a future Senate could make procedural peace on a range of subjects without completely suppressing the minority party and thus denying all deliberation.

In 2009–2010, a Democratic President, House, and Senate had a strong electoral mandate and passed several enormously important laws. Perhaps most important, they enacted the ACA, sometimes referred to as “Obamacare.”⁸³ The ACA marked an important moment in reconciliation. Initially, in 2009, key majority senators successfully opposed reconciliation, arguing that this subject matter was too deserving of deliberation to have its consideration truncated through the reconciliation process.⁸⁴ The bill made its way through the Senate, backed by a sixty-senator Democratic majority, and thus could be defeated by filibuster if even a single majority senator defected. Senate consideration was grueling for the majority (and infuriating for the minority), but it was a triumph for working the old-fashioned way, without

79. See generally E. Stewart Moritz, “Statistical Judo”: *The Rhetoric Senate Inaction in the Judicial Appointment Process*, 22 J.L. & POL. 341 (2006).

80. See generally Elliot E. Slotnick, *Appellate Judicial Selection During the Bush Administration: Business as Usual or a Nuclear Winter*, 45 ARIZ. L. REV. 225, 225 (2006).

81. See Charlie Cook, *Frist, Reid Lost When Gang of 14 Took Over*, NAT’L J. (2005) (analyzing the immediate interpretations and reactions).

82. *Id.*

83. THE POLARIZED CONGRESS *supra* note 14, at 142.

84. *Id.* at 142–45.

reconciliation and without short-circuiting deliberation.

However, in 2010, the Democratic majority lost its sixtieth senator after a Republican won a vacancy election.⁸⁵ The House had adopted a different version of the ACA, and in order for the ACA to become law, the Senate had to pass a compromise version. Now one vote short of the sixty-vote supermajority needed for ordinary legislation, the Senate majority brought the compromise version back as a reconciliation bill, reducing the needed vote tally from sixty to fifty votes.⁸⁶ Republicans would later point to this precedent in order to justify their use of reconciliation in an attempt to repeal the ACA.

During President Obama's two terms, Republicans filibustered many judicial nominees, some executive nominees, and many bills as well. At one point the Senate majority and minority negotiated a deal to limit filibusters, but that accomplished little. As described above, Senate Majority Leader Reid carried out his threat to use the nuclear option in 2013 for all executive and judicial positions except the Supreme Court.⁸⁷ Minority Leader McConnell warned that the time would come when the shoe was on the other foot, accurately predicting that he would eventually use the nuclear option, as he did in 2017.

5. 2016 Election

The 2016 election recreated the same configuration as the 2000 election: a Republican President elected by a minority of voters and a Republican House and Senate. As in 2000, the 2016 election did not, by any stretch of the imagination, provide the Republican Senate with an electoral mandate for one-party action. As the Senate had been 50–50 in 2001, so it was 52–48 in 2017.⁸⁸ Traditionally, such small Senate majorities necessitated a degree of bipartisanship to enact legislation. In order to get to the supermajority of sixty votes required for overcoming determined resistance by a large faction of the minority, a President would need eight senators from the minority party. There was precedent for reaching across party lines in order to obtain sixty votes.

⁸⁵ *Id.*

⁸⁶ Kysar, *supra* note 9, at 2136.

⁸⁷ Dauster, *supra* note 25, at 633.

⁸⁸ *The Future of One-Party Rule*, *supra* note 6, at 242.

President Clinton made multiple bipartisan trade and welfare deals with a Republican Congress in order to obtain centrist results such as NAFTA.⁸⁹ Going this route would require some Democratic votes for Republican-backed legislation.

Both President Bush and President Trump were elected by a minority of the voters. Both sought massive tax cuts that would be regressive in structure and impact.⁹⁰ In key respects, President Trump had a far more ambitious agenda. Initially, he hoped to “repeal and replace” the ACA, cut taxes, slash spending on programs for the poor, and enact an infrastructure program. He succeeded in enacting an enormous tax-cut bill, slashing corporate rates, ending key middle class deductions, and ending the health insurance individual mandate that meant 13 million insureds would lose coverage.⁹¹ The plan was to use reconciliation for these legislative changes that are significantly programmatic, including shrinking regulatory agencies like the Environmental Protection Agency.

B. Benefits of Avoiding One-Party Rule

It is worthwhile to address why there is any demerit at all in procedures that overcome gridlock. Much of the commentary on this issue has either asserted or assumed that gridlock is uniformly reprehensible, and that long-standing barriers to enactment that are rooted in a minority party role should be removed whenever possible.⁹² Such an approach may seem particularly attractive after several Congresses have come and gone without passing any important legislation.

Despite the barriers to action, in 2009 Congress was able to

89. Patrick Cockburn, *Clinton Woos Republicans to Secure NAFTA Vote: President Offers to Support Re-election of All Who Help Get Trade Accord Through US Congress as Narrow Victor Predicted*, THE INDEPENDENT (Nov. 15, 1993, 1:02 AM), <https://www.independent.co.uk/news/world/clinton-woos-republicans-to-secure-nafta-vote-president-offers-to-support-re-election-of-all-who-1504425.html> [<https://perma.cc/2YT3-FGMS>].

90. *How to Steal a Trillion*, *supra* note 21, at 425; *see also* Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. REV. 1159 (2006).

91. Tax Cuts and Jobs Act, 131 Stat. 2054 (2017).

92. *See* Michel J. Gerhardt, *Why Gridlock Matters*, 88 NOTRE DAME L. REV. 2107, 2114 (2013); *see also* Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 WISC. L. REV. 1097, 1097 (2013).

pass a major agenda over minority resistance: a trillion-dollar stimulus bill, the Dodd-Frank financial reform bill, and, above all, the ACA. It also passed other significant bills over vigorous minority resistance, such as legislation giving the FDA the authority to regulate tobacco products. This was not gridlock. The 2008 election provided a national mandate, making it possible to move beyond the gridlock.

Even during times of relative gridlock, such as 2007–2008 and 2011–2016, Congress managed to pass annual appropriations bills.⁹³ When these appropriations bills ran into difficulty, Congress resorted to simpler and less specific continuing resolutions. In other years, Congress enacted fully-detailed appropriations, complete with policy riders. These appropriations bills constitute legislative action, deciding not just spending, but also policy. For example, Congress blocked Obama’s key initiative to close Guantanamo through an appropriations bill.

During the Obama Administration, Congress enacted other bills, including the extension of tax cuts and spending caps. So congressional action or inaction during 2007–2016 was not an all-or-nothing proposition. The role of the minority party in the Senate during this time period effected a balance, however crude, between inaction on major legislation and action on appropriations and lesser bills. Congressional achievements during the Obama Administration include a few pieces of substantial legislation (e.g., the ACA and Dodd-Frank) which were enacted while the President’s party controlled both houses of Congress, along with significant enactments relatively narrow in scope that were attached to appropriations bills.

When changes in Senate procedure decrease the role for deliberation, there is an increased risk of one-party rule. Some of our most significant legislative achievements were made possible when the President’s party had a supermajority in the Senate and/or other manifestations of a strong electoral mandate. A classic example occurred in the mid-1960s after the national election mandate of 1964 led to enactment of President Johnson’s “Great Society” program (notwithstanding very strong conservative barriers in the Senate).⁹⁴ Other electoral mandates

93. THE POLARIZED CONGRESS, *supra* note 14, at 143–67.

94. *Id.* at 16–17.

occurred in 1980 (with the election of Ronald Reagan) and in 1992 (with the election of Bill Clinton).

The most recent electoral mandate on this scale occurred in 2008. Democratic candidate Obama won the Presidency by nine million votes, and the Democratic majority in the Senate reached sixty seats. Initially, Obama was able to pursue a strong legislative program and get his nominees confirmed without using either the nuclear option or reconciliation (except for the final round of ACA enactment).

The election of 2016 contrasted sharply with those of 1964 and 2008, and did not result in the same kind of national electoral mandate. Republican candidate Trump received three million fewer votes than his Democratic rival, winning the Presidency only due to the odd math of the Electoral College.⁹⁵ In the Senate, Republicans had only a narrow 52–48 majority, well short of President Obama’s 60–40 majority after the 2008 election. Moreover, President Trump has not proven himself to be an effective leader of Congress the way that Johnson, Reagan, and Obama did. Thus, the majority party’s drive for major legislative accomplishments in 2017 lacked a strong national electoral mandate to support it.

C. *Polarization and Other Factors*

Certain powerful causes have driven these developments in Congress. First comes national polarization.⁹⁶ In the past, more states served as Senate swing states. For example, up to the 1980s, parts of the South had strong historic ties to strongly conservative Democrats who often voted like conservative Republicans.⁹⁷ Similarly, in the past, parts of the Northeast had historic ties to moderate Republicans. But, competition came from Democrats, increasingly tied to national Democratic figures more in tune with the regional views. In today’s vocabulary, the Northeast is “blue,” leaning Democratic in Senate elections.⁹⁸

95. Erik M. Jensen, *The Foreign Emoluments Clause*, 10 ELON L. REV. 73, 89 (2018).

96. THE POLARIZED CONGRESS, *supra* note 14, at 6–7.

97. BYRON E. SHAFER & RICHARD JOHNSTON, THE END OF SOUTHERN EXCEPTIONALISM: CLASS, RACE, AND PARTISAN CHANGE IN THE POSTWAR SOUTH 137 (Harvard University Press, 2006).

98. *Id.* at 191.

Moreover, the political party has become less ideologically diverse, and on average has moved from the center toward opposite ideological poles. During the 1970s, the most significant division in the Senate was ideological rather than party-based. There was a “conservative coalition”—conservative Democrats who teamed up with Republicans (other than moderate Republicans from the North).⁹⁹ Regardless of whether Democrats or Republicans were in the majority, the conservative coalition controlled powerful institutional structures in the Senate. Committees had much greater power at that time than they do today, and committee chairs were appointed based on seniority.¹⁰⁰ As a result, conservative Democrats held a disproportionate share of those committee chairs. To preserve their institutional power, those conservative Democratic committee chairs would sometimes bend their actions toward the choices of the national Democratic Party as a whole. Hence, during Democratic majorities, the chamber generally took a moderate position, balancing the preferences of conservatives who held institutional power with the preferences of moderates and liberals who outnumbered conservatives.

In contrast, the modern Senate is highly polarized along party lines. When the Senate considered the ACA in 2009, no Republicans voted in support. Eight years later, when Senate Republicans sought to repeal the ACA, no Democrats voted in support. When the Senate moved to the “nuclear option” (removing the supermajority requirement) in 2013 for most nominations and in 2017 for Supreme Court nominations, the decisive procedural votes were along party lines.

Similarly, when the Senate uses the reconciliation process to enact key bills, senators vote largely along party lines, with the majority party voting in favor of the reconciliation process and the minority party voting against. With tax cut legislation, some members of the minority party cross party lines to vote with the majority on final passage. But at an earlier critical stage, when the issue on amendments is precisely how the tax rate changes will favor the wealthy, those votes largely fall along party lines.

The process of ideological polarization has gained momentum

99. THE POLARIZED CONGRESS, *supra* note 14, at 6.

100. *Id.* at 4.

along path-dependent lines.¹⁰¹ The Senate maintains a sharp procedural distinction between its two types of business: legislation and confirmations.¹⁰² In 2013, when the Senate removed the supermajority requirement to confirm executive branch and lower-court nominees, it reinforced the distinction between legislation and confirmations by maintaining the supermajority cloture requirement for legislation. Four years later, in 2017, the Senate removed the supermajority requirement for Supreme Court nominees, but did not remove the supermajority requirement for enacting legislation.¹⁰³ The established line between legislation and confirmations made that a natural stopping point.¹⁰⁴

Another path dependent feature is the distinction between annual appropriations bills and general fiscal legislation. Senate rules ease passage of appropriations bills by prohibiting amendment of such bills with “legislation” (i.e., provisions that make policy rather than appropriating specific amounts of money).¹⁰⁵ This limitation speeds passage of appropriations bills by avoiding the controversies over policy that can slow down legislation. There has been no attempt to adopt appropriations through the reconciliation mechanism. If an appropriation bill cannot pass, the Senate instead passes a continuing resolution, which extends the previous year’s spending levels. Neither party

101. Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 931–33 (2005).

102. CONGRESSIONAL PRACTICE AND PROCEDURE, *supra* note 20, at 605–13. The Senate refers to its consideration of nominations and treaties as the “executive calendar.” The Senate rule change cannot decrease the number of votes required for approval of treaties because the Constitution requires a two-thirds vote for ratification. *Id.*

103. Neal Devins, *Congress, the Courts, and Party Polarization: Why Congress Rarely Checks the President and Why the Courts Should Not Take Congress’s Place*, 21 CHAP. L. REV. 55, 66 (2018).

104. See Jeffrey Toobin, *Blowing up the Senate*, NEW YORKER (Mar. 7, 2005), <https://www.newyorker.com/magazine/2005/03/07/blowing-up-the-senate> [<https://perma.cc/A4PZ-MW8R>]. Senator Charles Grassley identified a reason to retain the supermajority requirement for legislation but not confirmations: “Filibusters are designed so that the minority can bring about compromise on legislation. You can always change the words of a bill or the dollars involved. But you can’t compromise a Presidential nomination. It’s yes or no.” *Id.*

105. U.S. SENATE, THE STANDING RULES OF THE SENATE, RULE XVI(D) (2013).

gets the change in direction that it would want. While this may be a suboptimal way to govern, it ensures relative stability.¹⁰⁶

The discussion up to this point warrants a question few have asked. What practical benefits accrue from preventing a party with a majority but not an electoral mandate from pushing its own ideological agenda through the Senate? The literature critiquing gridlock seems to imply that a majority party should be able to push through its agenda on a one-party basis even when it lacks a sizable electoral mandate.

D. Principles

The benefits of promoting deliberation and avoiding one-party rule fall into three categories: legitimacy, rationality, and balance.¹⁰⁷ As to legitimacy, we must distinguish technical constitutional legitimacy from democratic legitimacy in terms of political theory. A bill pushed through the Senate using the reconciliation procedure (or, in the future, the nuclear option) would have technical constitutional legitimacy if it also passes the House and is signed into law by the President. That would satisfy Article I, section 7, clause 2, achieving technical constitutional legitimacy even if the predominant sentiment in the country opposed the bill.

However, a bill pushed through the Senate using the reconciliation procedure or the nuclear option may well lack democratic legitimacy. Even after enactment, most of the public may oppose the law. The public may express that predominant sentiment through hostile polls, at angry public demonstrations and town halls, in harshly reactive regular and social media, and by engaging in counter-activity at the state and local level. If the issue is sufficiently salient, the next election or two could result in enough congressional support for repeal, making it possible to roll back the legislation or at least limit its implementation. The struggles over pushing through and later repealing such legislation can chew up and swallow a large share of the nation's stock of time, attention, and political consensus.

Deliberation may also increase the rationality of resulting

106. THE POLARIZED CONGRESS, *supra* note 14, at 41–43.

107. See also RICHARD A. ARENBERG & ROBERT B. DOVE, DEFENDING THE FILIBUSTER: THE SOUL OF THE SENATE 106 (Indiana University Press, 2012).

legislation. At least some of the time, wisdom, and stability in the eyes of a diverse country may lie in the middle of the political spectrum. This tendency to favor a middle (rather than extreme) path can be found in the record of appropriations bills, responsible for the country's overall federal spending (apart from entitlements like Medicare). Appropriations do change with changes in congressional majority parties, but the shifts are not nearly as profound as the more partisan parts of party agendas.

Procedural rules facilitate a relatively stable level of appropriations, and bipartisan congressional sentiment favors stability in appropriations. Appropriations last only one year, and hence need annual passage. This necessary pattern of regular passage promotes continuing steady bipartisan compromise and support, facilitating gradual adaptation to political change. Changes to appropriations tend to be moderate, different from substantive legislation that bursts forth on a particular subject at comparatively long intervals. The procedures for appropriations are a long-term expression of a bipartisan congressional sentiment favoring stable support for annual action. This, in turn, reflects a judgment that the wise and rational approach for appropriations requires stability and centrism.

A third benefit is balance. The system of checks and balances is meant to prevent the accumulation of undue power. The Senate's supermajority cloture requirement is not technically part of the constitutional system of checks and balances.¹⁰⁸ The Senate's traditional stance against one-party, bare-majority rule is similarly necessary for the system of checks and balances. Without the supermajority requirements, radical shifts of direction come too quickly. One party had a bare majority in the Senate in early 2001, then lost that majority in mid-2001, and won it back again in early 2003. If a bare majority could freely pursue its agenda, that would produce dizzying shifts in where the legislative ship is heading. Costly triumphs of interest groups rooted in a single party would alternate frequently between achieving victory and being vanquished, undermining the country's stability.

108. Brent Wible, *Filibuster vs. Supermajority Rule: From Polarization to a Consensus—and Moderation—Forcing Mechanism for Judicial Confirmations*, 3 WM. & MARY BILL RTS. J. 923, 954 (2005).

The absence of an electoral mandate should be understood to mean that a majority of the country does not want the extreme policies that result from one-party rule. When a bare legislative majority can exercise great power without accommodating the minority's concerns, a substantial plurality of people, if not a majority, are likely to feel alienated from the government.

IV. CONCLUSION: POTENTIAL FOR PROGRESS

The Senate has the ability to change its rules and procedures in order to produce a more balanced, less polarizing legislative process. When the majority party can exert its will unilaterally, the minority party experiences a kind of powerlessness. The goal should be to give the majority party enough of an incentive to pursue a centrist alliance with members of the minority party that it would forego the cruder approach of pushing bills and nominees through on a one-party basis. For this approach to work, the rules must give members of the minority party some power of procedural resistance. This can be accomplished by tweaking the supermajority requirement so that the majority party has a reason to mine the minority party for support.

For example, the Senate could reinstate a supermajority cloture requirement for confirmation of Supreme Court Justices in exchange for the Senate minority party promise to filibuster nominees only if there are "extraordinary circumstances." This concept—including this specific language—comes from the 2005 "Gang of 14" compromise.¹⁰⁹ In concrete terms, it would mean that the current Senate majority would need a supermajority to confirm a nominee who would shift the ideological balance of the Supreme Court.

A more challenging measure would be to make it easier—but not too much easier—for the majority to pass legislation without resorting to the nuclear option or reconciliation. One way to do that would be to lower the threshold for cloture below the current sixty votes, but only if some of the votes for cloture come from the minority party.¹¹⁰ For example, the cloture threshold could be

109. John O. McGinnis & Michael B. Rappaport, *The Judicial Filibuster, the Median Senator, and the Countermajoritarian Difficulty*, 2005 SUP. CT. REV. 257, 282 (2005).

110. Benjamin Eidelson, *The Majoritarian Filibuster*, 122 YALE L.J. 980,

lowered to fifty-seven votes, as long as those fifty-seven include at least five votes from the minority party, giving the majority party an incentive to negotiate sufficiently centrist legislation to win five senators from the minority party.¹¹¹ This way, a majority party that held less than sixty seats could weaken—rather than destroy—the supermajority requirement, without sinking to the nuclear option.¹¹²

Another possible compromise would involve changing the rules for reconciliation, allowing the majority party to use reconciliation for largely non-fiscal bills, such as health care, but permitting the minority party to offer relevant but non-germane proposals as amendments. The reconciliation process does not permit robust debate through consideration of minority amendments, making it inappropriate for complex and important legislation like healthcare reform. Health care entitlements, such as Medicare and Medicaid, will need legislative reforms in years to come as the population ages and health care costs rise. In light of Democrats using reconciliation in 2010 for the last vote on the ACA and Republicans attempting to use it to repeal the ACA in 2017, the Senate is unlikely to bar use of reconciliation for future healthcare reform. But the Senate could legitimize the health care reform process and strengthen its ability to deliberate on such legislation by allowing the minority to offer additional kinds of amendments.

More broadly, the Senate needs to create incentives for members of both parties to become open to supporting compromise proposals and centrist bills from the other party. For example, centrists in the majority party could withhold support for cloture for a reasonable time, facilitating an open procedure before a bill nears final passage. Conversely, centrists in the minority party could offer support for cloture after a reasonable time, recognizing that they have had an opportunity to shape or moderate the bill.

1004 (2013) (“Rather, the majority that is prevented from holding a vote has been made up of only 54.5 senators on average.”).

111. *Id.* at 1016–17 (analyzing lowering the threshold).

112. *Id.* at 1010. When the almost-sixty majority senators pushing for cloture at Democrats, they represent a higher majority of the population; when Republicans are in the majority, they represent a lower majority—or possibly even a minority—because Democratic senators tend to represent higher average populations. *Id.*

This could provide a path for centrists in both the majority and minority parties to seek compromise.

Senators may be reluctant to step away from bright-line all-or-nothing action. Majority party senators may be reluctant to give up the power provided by one-party rule. Minority party senators may be reluctant to give up their remaining ability to rail against the majority party agenda.

Repeated moves toward one-party rule have diminished the Senate's ability to deliberate on significant legislative changes. The Senate can reinvigorate its deliberative role by restoring—and adjusting—its requirement of a supermajority. It can keep changing in a new and different way. We need it to. Let us hope it will.