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# *Deliberative No Longer: The Eclipse of the Intended Role of the U.S. Senate*

James I. Wallner

“In founding a system which we wish to last for ages, we shd. not lose sight of the changes which ages will produce.”

—James Madison (June 26, 1787)<sup>1</sup>

A view common today in scholarly and popular circles is that the Senate is broken. This implies that it is no longer serving the function for which it was created. As evidence, proponents point to the excessive minority obstruction and resulting gridlock on the Senate floor. Responsibility is assigned to the endemic partisan and ideological polarization of the current environment. The result is that nothing gets done. Put simply, the Senate is broken because it is unable to pass important legislation.

*Endemic  
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concern.*

These developments have led some scholars to argue that the contemporary Senate is an unproductive legislative body in need of reform precisely because it is unable expeditiously to confirm presidential nominations or approve public policies to address society’s most pressing problems. Reflecting mounting bipartisan frustration with these challenges, Senate Republicans tried, and failed, to eliminate the filibuster for judicial nominations in 2005 and Senate Democrats tried, and succeeded, to eliminate the super-majoritarian vote threshold for some judicial and all executive branch nominations in 2013.

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<sup>1</sup> Quoted in *The Records of the Federal Convention of 1787, Vol. I*, Max Farrand, ed. (New Haven, Conn.: Yale University Press, 1911), 422.

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Both of these efforts were pursued by a “reform by ruling” approach (i.e., the nuclear option).<sup>2</sup>

Reflecting similar frustrations, various reforms have routinely been proposed to the way the Senate processes legislation in the form of changes to its Standing Rules over the last several congresses. Members such as Jeff Merkley (D-Oregon), Tom Udall (D-New Mexico), and Tom Harkin (D-Iowa) have called for reforming the Senate’s rules to make the institution a more productive legislative body. Proposed reforms fall into one of two categories: those that would make it more difficult, if not impossible, to obstruct legislation and those that would place new restrictions on the amendment process on the Senate floor.

Proponents of these reforms would like the Senate to restrict the ability of individual members to filibuster and amend legislation. However, the institution’s rules explicitly block Senate majorities from changing those rules over the objection of Senate minorities. Nevertheless, reform proponents typically argue that the Senate may legitimately curtail filibusters by a simple-majority vote at the beginning of a Congress or at any point during a Congress by the “reform by ruling” approach to create a new precedent that is inconsistent with, but nevertheless supersedes, the Senate’s Standing Rules. Such maneuvers would allow a majority efficiently to pass legislation unencumbered by the minority’s opposition.

Yet such a move represents a dramatic departure from past parliamentary practice in the institution. Therefore, it is important to understand the implications of these reforms for the Senate’s role in the American political system more broadly. Such an understanding not only argues against these particular reforms to make the institution more productive. It also points to another, though less noticed, cause of dysfunction in the contemporary Senate and demonstrates that the reforms will do little to address the underlying problems besetting the institution.

Perhaps the least obvious, if not most important, reason to fully understand the broader implications of reform is that the

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<sup>2</sup> The nuclear option refers to the creation of a new precedent that explicitly violates, changes, or otherwise ignores the Standing Rules of the Senate with a simple-majority vote.

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rules debate itself reflects a more fundamental disagreement over the theoretical underpinnings of our political system more generally. That is, reform proponents base their arguments on a certain idea of what kind of institution the Senate *ought* to be. As such, it is helpful to consider what role the Framers of the Constitution envisioned for the Senate when they created it in 1787.

While there were many reasons for the institutional characteristics assumed by the Senate in the Constitution, I focus here on the important, yet recently much neglected, deliberative function that the Framers intended the Senate to perform. Put simply, I argue that the Framers broadly shared in the belief that they were creating a *deliberative* institution explicitly designed to limit the power of popular and transitory majorities as represented in the House of Representatives. There were two important aspects of deliberation for the Framers. First, they believed that more deliberation meant more debate. For example, Alexander Hamilton (New York) argued in the Convention, “A representative ought to have full freedom of deliberation, and ought to exert an opinion of his own.”<sup>3</sup> The Framers also used deliberation in the broader sense. This can best be understood today as legislative deliberation. The Framers used the term to argue that alternatives should be considered in the legislative process. James Wilson (Pennsylvania) reflected this usage when he argued during the Federal Convention against prohibiting the Senate from originating or amending money bills in Congress. Wilson warned that if this provision was not changed, “The House of Reps. will insert the other things in money bills, and by making them conditions of each other, *destroy the deliberate liberty of the Senate.*”<sup>4</sup> In short, Wilson believed that any restrictions on the Senate’s ability to change House-passed legislation (or to originate legislation of its own) unjustly infringed on its ability to engage in legislative deliberation.

Approaching the Senate from the perspective of what the Framers intended the Senate to do suggests that the contemporary institution is not dysfunctional simply because it is mired in partisan gridlock. Rather, the dysfunction stems, in

*Senate was designed to limit power of transitory majorities.*

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<sup>3</sup> Farrand, *Records of the Federal Convention*, I:366.

<sup>4</sup> *Ibid.*, I:275. Italics added for emphasis.

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large part, from the fact that the Senate no longer performs one of the important functions for which the Framers created it. This perspective forces us to engage many of the contemporary critiques of the Senate in a new light by drawing our attention to their underlying normative assumptions. Doing so allows for a fuller debate over whether the Senate should be reformed simply in order to make it a more productive legislative institution. It also demonstrates just how much the contemporary institution has deviated from its original design and purpose, and thereby casts doubts upon the likelihood that recent proposals for Senate reform will accomplish their objectives.

### *A Deliberative Senate*

*“The evils we experience flow from the excess of democracy.”*

During debate over the Senate at the Federal Convention, James Madison (Virginia) remarked that, “in order to judge of the form to be given this institution, it will be proper to take a view of the ends to be served by it.”<sup>5</sup> In turn, the Senate’s intended function was grounded firmly in certain ideas about how the new government ought to operate.<sup>6</sup> These ideas reflected the Framers’ overriding concern with the need to combine “the requisite stability and energy in government, with the inviolable attention due to liberty and to the republican form.”<sup>7</sup> The Framers’ preoccupation with the problem of instability in republican government stemmed from their collective experiences with politics during the preceding decade. Elbridge Gerry (Massachusetts) summed up well the lessons learned by the Framers from these experiences when he stated, “The evils we experience flow from the excess of democracy.”<sup>8</sup> He believed government “had been too republican heretofore.”<sup>9</sup> Edmund Randolph (Virginia) similarly de-

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<sup>5</sup> Farrand, *Records of the Federal Convention*, I:422.

<sup>6</sup> See Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence, Kansas: The University Press of Kansas, 1985); Greg Weiner, *Madison’s Metronome: The Constitution, Majority Rule, and the Tempo of American Politics* (Lawrence, Kansas: The University Press of Kansas, 2012).

<sup>7</sup> Publius [James Madison], “Federalist No. 37: Concerning the Difficulties of the Convention in Devising a Proper Form of Government,” in *The Federalist Papers*, ed. Ian Shapiro (New Haven: Yale University Press, 2009), 180-181.

<sup>8</sup> Farrand, *Records of the Federal Convention*, I:48.

<sup>9</sup> *Ibid.*

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scribed the environment when introducing the Virginia Plan at the opening of the Convention:

Our chief danger arises from the democratic parts of our constitutions. It is a maxim which I hold incontrovertible, that the powers of government exercised by the people swallows [sic] up the other branches. None of the constitutions have [sic] provided sufficient checks against the democracy.<sup>10</sup>

There was a general acknowledgement among the Framers of the best way to solve these problems. At the most basic level, they believed that the federal authority should be strengthened. Doing so would enable it to enforce state compliance with its mandates and resist state encroachments on its authority. Yet the Framers were keenly aware that simply increasing federal authority vis-à-vis the states would not fully solve the problem of instability inherent in republican governments. Innovations were needed to ensure that the strengthened federal authority could not encroach upon the states' authority and that it simultaneously would not succumb to the same republican tendencies then plaguing the state governments. As such, the power of the new legislature would need to be checked in some way.

The Framers believed that "the introduction of legislative balances and checks . . . are means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided."<sup>11</sup> Failure to do so would leave the new government vulnerable to the same popular forces that were plaguing the states. Madison warned of the dangers inherent in a republican system. He argued that the second branch of the legislature should be designed to protect the government against these republican dangers.

How is this danger to be guarded agst. on republican principles? How is the danger in all cases of interested co-alitions to oppress the minority to be guarded agst? Amongst other means by the establishment of a body in the Govt. sufficiently respectable for its wisdom & virtue, to aid on such emergencies, the preponderance of justice by throwing its weight into that scale. Such being the objects of the second branch of the proposed Govt. . . .<sup>12</sup>

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<sup>10</sup> Ibid., I:27.

<sup>11</sup> Publius [Alexander Hamilton], "Federalist No. 9: The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection," in *The Federalist Papers*, 43.

<sup>12</sup> Farrand, *Records of the Federal Convention*, I:423.

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In short, the Senate was key to making the new government work.

Edmund Randolph similarly suggested that the Senate was the solution to the problem of instability inherent in republican government.<sup>13</sup> Yet the existence of a Senate, in itself, was not sufficient. Randolph claimed it needed to be “good.”<sup>14</sup> This point is often lost in scholarly treatments of the subject. What did Randolph have in mind when he spoke of a *good* Senate? He offers us a clue in his critique of the existing state senates.

The feeble Senate of Virginia is a phantom. Maryland has a more powerful Senate, but the late distractions in that state have discovered that it is not powerful enough. The check established in the constitution of New York and Massachusetts is yet a stronger barrier against democracy, but they all seem insufficient.<sup>15</sup>

Put simply, Randolph believed that a good Senate would offer “such a check as to keep up the balance, and to restrain, if possible, the fury of democracy.”<sup>16</sup>

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The Framers were in general agreement that in order to provide such a check, the Senate would have to differ significantly from the House in both its composition and the manner by which it conducted its proceedings. Returning to Randolph’s critique of the state senates above, a *good Senate* equaled a *strong Senate*. A strong Senate would be an adequate “barrier against democracy.” The problem with the senates of Virginia, Maryland, New York, and Massachusetts was that they were insufficient checks on the houses in their respective states precisely because their institutional characteristics did not differ sufficiently from the lower chambers. Charles Pinckney echoed this argument during the South Carolina ratification debates when he stated, “The purpose of establishing different houses of legislation was to introduce the influence of *different interests and principles*.”<sup>17</sup>

*Federalist* 62 explicitly acknowledges that the Senate’s checking function is directly related to the extent to which it differs from the House, “. . . as the improbability of sinister

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<sup>13</sup> Ibid., I:51.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid., I:27.

<sup>16</sup> Ibid., I:58.

<sup>17</sup> Ibid., III:249. Italics added for emphasis.

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combinations will be in proportion to the dissimilarity in the genius of the two bodies, it must be politic to distinguish them from each other by every circumstance.”<sup>18</sup>

From this standpoint, it becomes clear that the Framers charged the Senate with two fundamental, yet distinct, goals: passing legislation along with the House and simultaneously checking popular opinion as expressed by the House by promoting deliberation in the legislative process. The Framers were in near total agreement on the need for the Senate to perform these two roles. Viewed from this perspective, the Framers’ blueprint for the bicameral Congress can be interpreted as representing the institutional embodiment of the twin principles of republicanism and constitutionalism inherent in the Constitution. While the House would epitomize republican principles by virtue of its internal structure based on popular representation, the Senate would represent the constitutional principles of limited government by virtue of its role as a check on the House. The prevalence of this view among the Framers is reflected in the Convention’s work on bicameralism, as well as the Senate’s method of selection, size, nature of representation, and term length.

*Bicameral Congress represented twin principles of republicanism and constitutionalism.*

### ***Bicameralism***

A common theme during the Federal Convention concerned the problem of *too much* democracy. This concern in particular motivated the creation of the Senate to serve as a check on the popularly elected House. The Framers were certainly familiar with the concept of an upper chamber; dividing the legislative branch into two separate houses was widely considered at the time to be an effective method for checking legislative power. At the time of the Convention, eleven of the thirteen states had bicameral legislatures and the English Parliament was similarly divided into two separate chambers. Notably, the two states with unicameral legislatures in 1787, Georgia and Pennsylvania, would adopt bicameral legislatures shortly after the Convention.

The decision to adopt a bicameral legislature received virtually unanimous support from the very beginning of the

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<sup>18</sup> Publius [James Madison], “Federalist No. 62: The Senate,” in *The Federalist Papers*, 315.

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Convention. Wilson reflected the views of many of his fellow delegates when he stated, "A division of the power in the legislative body itself . . . [was] the most useful restraint upon the legislature, because it operates consistently."<sup>19</sup> George Mason (Virginia) acknowledged the unanimity in support of bicameralism and attributed it to a miracle or the "genius of the people."<sup>20</sup> Rufus King (Massachusetts) echoed Mason's sentiment, observing, "The two branches being so unanimously adopted must have been the effect of miracle or proof of a fixed character or opinion among America."<sup>21</sup> Indeed, three of the four plans submitted during the Convention provided for an upper chamber. Only the New Jersey Plan called for a unicameral legislature.

*Deliberation  
in the Senate  
was to check  
popular  
opinion as  
expressed in  
the House.*

Significantly, the notes of Madison, William Pierce (Georgia), King, Robert Yates (New York), and James McHenry (Maryland) do not record any significant debate or discussion in opposition to a bicameral legislature. In contrast, the records of the Convention are replete with expressions of concern over the "turbulence and follies of democracy." Each record documents widespread sentiment among the Framers that the Senate was created principally to serve as an institutional palliative for these troubles. Madison echoed this sentiment during the Convention, arguing that the House was "liable to err also, from fickleness and passion. A necessary fence against this danger would be to select a portion of enlightened citizens, whose limited number, and firmness might reasonably interpose against impetuous councils."<sup>22</sup> Viewed from this bicameral perspective, the Senate represents an institutional means to a particular end: checking popular opinion as expressed in the House. It could do so because it was a different body animated by different principles of action. Legislative deliberation was inevitable in such an environment.

While it was widely accepted that an additional defense was needed against the "turbulence and follies of democracy" and that such a defense should take the form of a bicameral

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<sup>19</sup> Quoted in Gordon S. Wood, *The Creation of the American Republic: 1776-1787* (Chapel Hill: The University Press of North Carolina, 1969), 559. Citations refer to the 1998 edition.

<sup>20</sup> Farrand, *Records of the Federal Convention*, I:339.

<sup>21</sup> *Ibid.*, I:349.

<sup>22</sup> *Ibid.*, I:422.

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legislature, there remained some disagreement among the delegates on how best to insulate the Senate from popular opinion and ensure that it conducted its proceedings differently from the House, thereby enabling it to fulfill its primary role as a check on the House.

### *Method of Selection*

Due to the Senate's role in checking the popularly elected House, it logically followed that the upper chamber should have a different basis of representation than the lower chamber. If the people chose the Senate directly, it would be unlikely that the institution would be an effective check on the House. To this end, an indirect mode of selection was supported by virtually all of the delegates present. Three of the four major plans proposed during the Convention called for the indirect selection of senators. Only Wilson opposed indirect selection and instead called for the popular election of senators.

Delegates differed over the procedures for indirect election to the Senate. The Virginia Plan called for selection by the House. Most delegates opposed this method as well since it implied a dependence on the House. For example, Roger Sherman (Connecticut) "was of opinion that if the Senate was to be appointed by the first branch and out of that Body that it would make them too dependent, and thereby destroy the end for which the Senate ought to be appointed."<sup>23</sup> It was in this context that state selection emerged as an attractive alternative. Indeed, some delegates initially opposed state selection because state legislatures were closer to the people than the House. Yet the delegates' desire to check the power of the House left them with no other representational basis for the Senate than the states. Oliver Ellsworth (Connecticut) noted that state selection would produce a Senate more amenable to conducting its proceedings in a different manner than popular election.

The State Legislatures are more competent to make a judicious choice, than the people at large. Instability pervades their choice. In the second branch of the general government we want wisdom and firmness. As to balances, where nothing can be balanced, it is a perfect utopian scheme. But still greater advantages will result in having a second branch endowed with

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<sup>23</sup> Farrand, *Records of the Federal Convention*, I:59.

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the qualifications I have mentioned. *Their weight and wisdom may check the inconsiderate and hasty proceedings of the first branch.*"<sup>24</sup>

Thus, state representation emerged as a practical solution. It was the direct result of the Framers' principled conviction that the Senate's proper role was to serve as a check on the House and that doing so required it to conduct its proceedings in a different manner than the first branch of the legislature.

*Indirect selection was meant to insulate Senate from popular opinion.*

Wilson, while objecting to state selection, inadvertently acknowledged the underlying logic of these arguments. "If one branch of it should be chosen by the legislatures, and the other by the people, the two branches will rest on different foundations and dissention will naturally arise between them."<sup>25</sup> This is precisely the point. Madison argued, "In the states where the Senates were chosen in the same manner as the other branches . . . the institution was found to be no check whatever against the instabilities of the other branches."<sup>26</sup> John Dickinson (Delaware) similarly argued, "If the State governments were excluded from all agency in the national one, and all power drawn from the people at large, the consequence would be that the national government would move in the same direction as the state governments now do, and would run into all the same mischief."<sup>27</sup> Indirect selection of some form was thus embraced during the Convention as a means to insulate the Senate from popular opinion. Indeed, the Framers believed that this method of selection represented the best way to check popular opinion without undermining the republican principles on which the Constitution rested.

### *Size*

The Senate's ability to serve as a check on the House was also closely related to the size of the upper chamber. If the Senate was to check the House, it must also govern itself differently than the lower chamber in its internal proceedings. In short, it must deliberate. This was directly related to the question of size. The Senate's ability to ensure deliberation in the legislative process was not only dependent on the degree

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<sup>24</sup> *Ibid.*, I:414. Italics added for emphasis.

<sup>25</sup> *Ibid.*, I:151.

<sup>26</sup> *Ibid.*, I:219.

<sup>27</sup> *Ibid.*

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of insulation from popular opinion. It also depended on an institutional environment in which deliberation could occur. Reasoned deliberation depended on an informal atmosphere that fostered a free exchange of ideas and facilitated the consideration of alternative proposals. Many delegates believed that a large Senate would be antithetical to such an environment. For example, Pierce Butler (South Carolina) wanted the Senate to be small enough “as to be exempt from the passionate proceedings to which numerous assemblies are liable.”<sup>28</sup> Pinckney suggested that there was a point at which the Senate would no longer be able to perform its functions because its membership would be too large. “If the small states should be allowed one senator only, *the number will be too great*, there will be 80 at least.”<sup>29</sup> Significantly, Pinckney’s observation confronted the delegates with the contradictions presented by a deliberative Senate designed to check the House based on proportional representation.

The Framers’ preoccupation with the Senate’s appropriate size suggests that it was not created simply to serve as the institutional means by which an advantageous filtration of talent could be achieved.<sup>30</sup> In theory, a Senate comprising eighty members would be able to fulfill its stabilizing function so long as those members possessed the requisite virtue and wisdom. Yet the Framers generally believed that there was something intrinsic to large legislative assemblies, separate and apart from the characteristics of their memberships, that prevented them from performing the functions for which they created the Senate. Specifically, a large membership would necessitate a more formal process that would frustrate legislative deliberation. As a result, virtually all of the Framers wanted to keep the number of senators as low as possible in order to create the internal environment on which their goals for the institution depended. Madison during the Convention explicitly linked the size of the Senate to its ability to serve as a check on the larger House, arguing, “The use of the Senate is to consist in its proceedings with more coolness, with more system, and with more wisdom, than the popular branch. Enlarge their

*Senate’s smaller size was intended to facilitate deliberation.*

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<sup>28</sup> Farrand, *Records of the Federal Convention*, I:51.

<sup>29</sup> *Ibid.*, I:150. Italics added for emphasis.

<sup>30</sup> For example, see Wood, *Creation of the American Republic*.

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number and you communicate to them the vices which they are meant to correct.”<sup>31</sup> In short, size itself matters; it is more difficult for a large Senate to conduct its business differently than the House. Absent this, the check is lost.

Dickinson’s response to Pinckney’s statement above represents the exception that proves the rule in this case. “The greatness of the number was no objection with him. He hoped there would be 80 and twice 80 of them. If their number should be small, the popular branch could not be balanced by them.”<sup>32</sup> Here Dickinson rejects the predominant view among the delegates that the Senate could best check the House only if it had a limited membership that enabled it to order its internal proceedings differently. Gouverneur Morris was the only other delegate who spoke in favor of a large Senate during the Convention.<sup>33</sup>

### *Nature of Representation*

The basis on which representation would be allocated in the Senate received considerably more debate than the method of selection and the size of the institution. More than any other part of the federal government, the Senate was constructed within the larger context of the relationship between the federal and state governments. As a result, concerns over the balance of power in the new political system pervaded the debate over the specific basis of representation in the Senate. Indeed, it is this debate that largely informs popular understanding of the Senate’s creation during the Federal Convention as a compromise between large and small states.

Ellsworth proposed that the states be represented equally in the Senate. He argued that such representation was necessary to protect the interests of the smaller states. Congress should be “partly national; partly federal. The proportional representation in the first branch was conformable to the national principle & would secure the large states against the small. An equality of voices was conformable to the federal principle and was necessary to secure the small states against the

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<sup>31</sup> Farrand, *Records of the Federal Convention*, I:51.

<sup>32</sup> Farrand, *Records of the Federal Convention*, I:150.

<sup>33</sup> George H. Haynes, *The Senate of the United States: Its History and Practice* (Boston: Houghton Mifflin, 1938), I:7-10.

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large.”<sup>34</sup> The small states feared that they would be ignored in a government in which representation was based solely on population. In contrast, the large states feared a scenario in which states representing a minority of the country’s population would pass legislation taxing their citizens and profitable ports. As such, equal representation quickly emerged as a major obstacle at the Convention. Without it, an agreement was unlikely. However, ensuring that the states were represented equally in the Senate did not undermine the deliberative nature of the institution as envisioned by a majority of the delegates. As long as agreement existed that senators should be selected indirectly and that the overall size of the Senate remain small, equal representation could be used to gain the support of the small state delegations without undermining the ultimate goal of checking the lower chamber with a second, more deliberative, upper chamber. In many respects, state selection and equal representation could actually facilitate the Senate’s creation.

Sherman argued that equal representation was a necessary condition, but not because it allowed the states to better articulate their interests within the federal government. Rather, it was needed to keep the federal government from intruding on the states. This is a nuanced, but important distinction. That is, instead of serving to represent the states *within* the federal government, the Framers intended the Senate to protect the states *from* the federal government. In the environment of 1787, the real threat on the minds of the delegates was centralized power, wherever it was found. The Framers most readily feared centralized power in the form of a mob, that is, they feared the tyranny of the majority. A more energetic government was thus needed in order to overcome the defects of the Articles of Confederation and control the popular unrest prevalent in the 1780s. But the delegates also feared a powerful central government. The Spirit of ’76 and the colonists’ successful revolt against a domineering crown and Parliament was still fresh in the Framers’ minds. The Senate was to serve as a defense against both forms of centralized power (executive and legislative). Madison and Dr. William Samuel John-

*States’ equal representation in Senate was intended to protect against federal intrusion.*

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<sup>34</sup> Farrand, *Records of the Federal Convention*, I:468.

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son (Connecticut) were in agreement that the Senate provides a measure of “self-defense to the states.”<sup>35</sup> Dr. Johnson believed that the small states would support the plan being debated if they felt that the new federal government would not be a threat to their interests. The only way to protect the small states was to make concerted government action at the federal level more difficult. The Senate certainly did this by virtue of the fact that it served as a check on the House.

On June 30, Madison provided the first hint that equal representation would be permissible so long as it could be ensured that such equality would not be the means by which individual states forced their interests on the federal government. He wanted to ensure that the Senate would be made independent of the states in other ways so that it would not evolve into the institutional representative of the states within the federal government, thereby distracting from the deliberative nature of the institution. According to Madison, the Senate would simply become “another edition of Congress” if this independence was not secured.<sup>36</sup> The “Congress” to which he was referring was the Confederation Congress, in which representation was by state. Notably, the delegates were assembled in Philadelphia in an effort to correct the deficiencies of the Articles of Confederation in the first place. Perhaps most telling, most of the small state delegates agreed with Madison. Once the problem of equal representation was solved, these delegates surprised many with their support of proposals explicitly designed to make the Senate independent of the states and to increase its power. Madison recollected after the Convention that, “as soon as the smaller states had secured more than a proportional share in the proposed Government, they became favourable to augmentations of its powers.”<sup>37</sup>

### *Term Length*

A term of service long enough to insulate senators from popular opinion, thereby allowing them to make politically unpopular decisions, was necessary to enable the Senate to serve as an effective check on the House. It was feared that with-

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<sup>35</sup> Farrand, *Records of the Federal Convention*, I:461-462.

<sup>36</sup> *Ibid.*, I:490.

<sup>37</sup> *Ibid.*, III:538.

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out such insulation the people acting directly, or indirectly through the state legislatures, would quickly seek to hold the Senate accountable whenever it acted to check popular opinion as expressed in the House or acted contrary to the interests of the states. Such accountability inevitably undermined the independence needed to promote deliberation in the legislative process, and thus check the House, because it made it much more difficult for the Senate to conduct its proceedings differently. Randolph echoed this view during the debates over term limits. “The democratic licentiousness of the State legislatures proved the necessity of a firm Senate. The object of this [second] branch is to control the democratic branch of the [national] legislature. If it be not a firm body, the other branch being more numerous, and coming immediately from the people, will overwhelm it.”<sup>38</sup>

Yates records Madison speaking in support of a seven-year term for the Senate because he “considers this branch as a check on the Democracy—it cannot therefore be made too strong.”<sup>39</sup> In his notes, Madison suggested that term length was designed to make the Senate, in a sense, an anti-republican institution. This was necessary in order to make the broader republican system work. Madison, “Considered 7 years as a term by no means too long. What we wished was to give the Govt. that stability which was every where called for, and which the enemies of the Republican form alleged to be inconsistent with its nature.”<sup>40</sup> While the House derived its power from the legitimacy granted by a close association with the people, the Senate’s power rested on its independence from popular opinion in the individual states and the country at large. All but Connecticut, New York, and Massachusetts supported a seven-year term for the Senate, even before the question of equal representation was resolved. Those individual delegates who opposed a longer term did so because senators would lose touch with their states. No more than four states ever opposed longer terms throughout the Convention.

*Longer terms of office enabled Senate to serve “as a check on the Democracy.”*

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<sup>38</sup> Ibid., I:218.

<sup>39</sup> Ibid., I:222.

<sup>40</sup> Ibid., I:218.

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### *Accounting for Accountability*

The great irony of the Senate's creation is that it occurred on the eve of a new era in which the franchise dramatically expanded and popular participation in politics increased. The Senate entered this new age of popular democracy as an institution designed to be a check on popular and governmental majorities. Yet the institutional defenses with which it was equipped, its method of selection, term length, and staggered tenures, were incapable of keeping popular opinion from negatively impacting the Senate's deliberative function. As a result, the Senate changed considerably and, by extension, so did the role it played in the new government.<sup>41</sup>

Put simply, the Senate has grown more accountable to an electorate that has become more interested in its deliberations over the past 225 years. This transformation was precipitated by various developments in the nineteenth century. During the century's first two decades, the Senate's relationship with the American people was strengthened as Federalist and Republican attachments declined in federal and state governments. This development led senators seeking reelection to shift their focus from state legislatures to the electorate itself. In particular, direct contact between senators and the electorate increased between 1829 and 1841. During this period, senators increasingly appealed to the public through the canvas, in which candidates campaigned on behalf of state politicians who pledged to support the senator for a new term if elected to the state legislature.

Recurring deadlocks in state legislatures over the selection of senators, rushed elections in which candidates were not properly vetted, rampant bribery and other forms of corruption, and persistent vacancies in the Senate itself remained endemic throughout the nineteenth century. These problems precipitated a national movement calling for reform. In the 1870s, there occurred a sustained increase in resolutions introduced in the House calling for a constitutional amendment requiring the direct election of senators. By 1905, five votes

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<sup>41</sup> Daniel Wirls and Stephen Wirls, *The Invention of the United States Senate* (Baltimore: The Johns Hopkins University Press, 2004); See also Elaine K. Swift, *The Making of an American Senate: Reconstitutive Change in Congress, 1787-1841* (Ann Arbor: University of Michigan Press, 2002).

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had been taken in the House, referenda called in three states, and action taken by thirty-one state legislatures, all expressing support for such an amendment. The development of informal accountability mechanisms such as the Oregon Ballot in 1904 also reflected the growing public sentiment in favor of senatorial accountability.

This mass movement, and the reforms it spawned, further undermined the power of state legislatures and gradually began the process of developing an independent base of support for individual senators in the electorate.<sup>42</sup> These reforms eventually culminated nationally in the ratification of the seventeenth amendment to the Constitution in 1913. The direct election of senators immediately made members more accountable to their constituents.

While the Senate gradually became more accountable to popular opinion, the American people were developing a greater interest in its deliberations. The federal government began to affect people's lives in new ways as it expanded in the late nineteenth and early twentieth centuries. During this period, the national policy environment underwent a dramatic transformation. The expanded agenda of the Senate grew out of the progressive movement at the turn of the century and reflected a fundamental debate over the extent to which the federal government should intervene in the lives of individual Americans. Successive government programs embodied in presidential platforms like Franklin Delano Roosevelt's New Deal, Harry Truman's Fair Deal, and Lyndon Johnson's Great Society forced the Senate to confront issues it had previously ignored. As a result, the American people developed a greater interest in ensuring that public policy reflected their demands and addressed their needs.

*Increased federal intervention in Americans' lives helped erode Senate's independence.*

The increasing number of interest groups and the expansion of the national news media during the second half of the twentieth century exacerbated the impact of the new issue agenda on the Senate's deliberations and facilitated the ability of an interested electorate to hold the institution accountable. Interest groups established offices in the capital to better lobby

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<sup>42</sup> For example, see Wendy Schiller, "Building Careers and Courting Constituents: U.S. Senate Representation 1889-1924," *Studies in American Political Development* no. 20 (2006): 185-197.

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Congress on behalf of the specific interests they represented. Such lobbying typically involved pressuring the Senate to pass legislation with which these groups agreed and from which they would benefit. In the new political and policy-making environment, these groups represented a valuable source of electoral and institutional resources.

In addition, more Americans had access to information about the Senate's deliberations than ever before as a result of a revolution in communications technology. For example, only 9% of American homes had a television in 1950. This number grew to 65% in 1955 and 87% in 1960. By the early 1970s, virtually 100% of American homes had a television. The expansion of nightly network news programs from fifteen to thirty minutes and the subsequent emergence of twenty-four hour news networks meant that the Senate increasingly deliberated in a much more open and public decision-making environment. This transformation was accelerated as the Internet and social media rapidly revolutionized how Americans received the news and dramatically increased the amount of information to which they had access.<sup>43</sup>

*Senators increasingly susceptible to shifting popular opinion.*

Direct elections combined with the overall growth of government and the revolution in communications technology to produce a Senate significantly more accountable to popular opinion. Yet it is important to note that strengthening the relationship between the Senate and the American people was not, in and of itself, sufficient to precipitate institutional change. Rather, it was the increased accountability that resulted from this point on that allowed the views of popular and transitory majorities to be *quickly* and *directly* reflected inside the Senate. Put simply, popularly elected senators were now more readily susceptible to shifting popular opinion in their constituencies. Such a process inevitably changed the character of the institution and undermined its ability to perform the deliberative function for which it was designed. Paradoxically, an institution originally designed to serve as a sober check on popular opinion was now more accountable to it.

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<sup>43</sup> Barbara Sinclair, *The Transformation of the U.S. Senate* (Baltimore: The Johns Hopkins University Press, 1989), 59, 65-66.

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### *Accountability and Dysfunction*

The changing relationship between the Senate and public opinion made it more difficult for the institution to perform its two fundamental, yet at times distinct, roles of passing legislation with the House and simultaneously checking popular opinion as expressed in the House by promoting deliberation in the legislative process. Members more reflective of their constituents ideologically, and responsive to their demands politically, sought to alter the Senate's internal structure, procedures, and culture to better achieve their electoral, policy, and power goals over the objections of an increasingly cohesive opposition. These developments interacted with the Senate's changing external environment to precipitate institutional change from a loosely organized chamber, to a decentralized body dominated by its standing committees and their chairmen, to an ultimately more centralized institution in which party leadership plays a larger role. In the process, the Senate began to approximate the majoritarian procedures exhibited in the House in an effort to maintain its productivity.

Put another way, the Senate's ability to perform the deliberative function for which the Framers designed it was increasingly being eroded by the changing nature of the Senate's external environment and the subsequent response of its members internally. Incentives were created by the new environment for senators to be involved in a broader array of issues. New procedural mechanisms like the "hold" process gave individual members the ability to be more active in the Senate's deliberations, regardless of their seniority or committee assignments. Furthermore, the increasingly crowded Senate agenda and the corresponding growth of interest groups seeking representation in the policy process created more opportunities for members to be legislatively active.<sup>44</sup> These developments led party leaders to exert more control over Senate decision-making more generally.

Specifically, obstruction increased as the norms that had previously restrained member behavior eroded. The typical senator was more likely to avail himself of filibusters and other procedural tools to protect his own particular inter-

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<sup>44</sup> Sinclair, *The Transformation of the U.S. Senate*.

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*Obstruction increased as Senate's collective interest took back seat to individual senators' agendas.*

ests. This transformation created significant problems for the institution and led to the creation of the "60-vote Senate."<sup>45</sup> It is now more difficult for the Senate to complete work on "must-pass" legislation each year. This results from broader member participation and is exacerbated by narrower partisan majorities and a crowded agenda as well as the willingness of individual senators to pursue their own agenda at the expense of the institution's collective interests. In response, the majority party, acting through its leadership, has exerted greater control over the legislative process in order to limit this conflict and maintain the Senate's productivity. As a result, the Senate has continued to pass important legislation despite these difficulties. It has been able to do so because party leaders were able to increase productivity with the innovative utilization of existing procedures. However, doing this has come with a cost. Senatorial productivity has been improved at the expense of the institution's deliberative function.

### *Decision-Making in the Contemporary Senate*

The procedural record suggests that the legislative process in the contemporary Senate, during periods of both Democratic and Republican control, cannot be considered deliberative in the way that the Framers envisioned or that characterized the Senate for much of its history. During the 1990s and 2000s, both Democratic and Republican majority leaders responded to what they perceived to be excessive obstruction by more aggressively utilizing the existing procedures at their disposal to limit the minority's ability to delay their legislative agenda. As a result, decision-making came to approximate the majoritarian process utilized in the House. To the best of its ability, the majority party leadership used the tools at their disposal in order to exert tighter control over the agenda-setting process and to block the consideration of alternative proposals. For example, Majority Leaders George Mitchell (D-Maine) and Trent Lott (R-Mississippi) increasingly filed cloture motions to end debate on the Senate floor earlier in the consideration of legislation in anticipation of minority obstruction. Similarly,

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<sup>45</sup> Barbara Sinclair, "The '60-Vote Senate': Strategies, Process, and Outcomes," in *U.S. Senate Exceptionalism*, ed. Bruce I. Oppenheimer (Columbus, Ohio: Ohio State University Press, 2002), 241-261.

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Lott was the first majority leader to routinely resort to “filling the amendment tree” to block members from offering controversial amendments to important legislation.<sup>46</sup> The use of this tactic increased during the subsequent tenures as majority leader of Bill Frist (R-Tennessee) and Harry Reid (D-Nevada). Both parties also threatened to eliminate the filibuster for judicial nominations in the face of persistent minority filibusters. The Democrats successfully eliminated the filibuster for some judicial and all executive branch nominations in late 2013.

In reaction to increased polarization and obstruction, Senate majorities of both parties predictably attempt to control the legislative process in order to ensure that policies they favor are advantaged and those they oppose are blocked. That is, they seek to increase the institution’s productivity by limiting the minority’s ability to debate and amend measures on the Senate floor. This is not to suggest that Senate minorities are always acting in a sincere and responsible manner with respect to debating and amending legislation. Minority senators certainly utilize floor speeches and amendments to obstruct for partisan or ideological gain. However, limiting such behavior inevitably limits sincere and responsible legislative behavior as well. The consequences are thus that the minority’s ability to participate in the legislative process is limited, *regardless of its motivation*.

*Efforts to reduce obstruction limit responsible legislative behavior as well.*

While it is difficult to discern how the Framers would specifically weigh the protection of minority rights against efforts to prevent blatant obstructionist behavior in the Senate, such obstructionist behavior would not have been alien to them. For example, consider the following procedural guide from the parliamentary manual written by Thomas Jefferson while he presided over the Senate as Vice President in the 1790s:

Amendments may be made so as totally to alter the nature of the proposition; and it is a way of getting rid of a proposition, by making it bear a sense different from what was intended by the movers, so that they vote against it themselves.<sup>47</sup>

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<sup>46</sup> The Senate’s precedents give the majority leader the right of first recognition on the Senate floor. This preferential recognition allows the leader to “fill the amendment tree,” or offer the maximum allowable number of amendments to legislation, and file cloture on a bill before other senators have a chance to debate the measure and offer amendments.

<sup>47</sup> Thomas Jefferson, *A Manual of Parliamentary Practice For the Use of the*

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This represents a form of procedural warfare against which Senate majorities routinely seek to protect themselves today by filling the amendment tree. Yet the parliamentary practice was sufficiently engrained in state legislatures and the English Parliament in the eighteenth century for Jefferson to include it in his manual.

*Majority leadership usurping committees' traditional roles.*

The majority typically circumvents the committee process when it seeks to improve productivity by limiting the participation of the minority party in the legislative process more generally. Legislation developed within the majority party under the direction of the party leadership is placed directly on the Senate calendar, bypassing the hearing and “mark-up” or drafting roles traditionally performed by committees. As a result, subsequent efforts by the majority leader to move to the legislation on the Senate floor are highly controversial. Cloture on the motion to proceed to such legislation is common and vote outcomes on such motions are highly partisan.

A closed process on the Senate floor is indicative of the lack of substantive deliberation in the institution. There are significant barriers to participation, even for interested members willing to expend the necessary time and resources to be involved. Controlling the agenda in this manner begets a partisan legislative process in which the minority party is essentially blocked from participating. The majority party leadership is the only meaningful participant, and it exercises centralized, partisan control over the debate and amendment process.

It is important to note that Madison viewed such a concentration of influence in the hands of a few individuals as a negative development that would undermine the quality of a legislature’s internal deliberations. He writes in *Federalist* 58 of what would result:

The countenance of government may become more democratic, but the soul that animates it will be more oligarchic. The machine will be enlarged, but the fewer, and often more secret, will be the springs by which its motions are directed.<sup>48</sup>

While Madison was referring specifically to the House in

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*Senate of the United States* (Washington, D.C.: Government Printing Office, 1993), 61.

<sup>48</sup> Publius [James Madison], “Federalist No. 58: Objection That the Number of Members Will Not be Augmented as the Progress of Population Demands Considered,” in *The Federalist Papers*, 299.

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this instance, he acknowledges that such internal dynamics characterize “all legislative assemblies.”

As a result of the predominant influence exercised by the majority party leadership, substantive action largely occurs off the Senate floor within meetings of the majority party. Decisions made in such meetings are merely ratified on the Senate floor. At that stage, the majority leader usually seeks to control the number and nature of the amendments offered by filling the amendment tree and filing cloture. If any amendments are allowed, they are typically majority party amendments. A low percentage of amendments filed are actually offered to legislation on the Senate floor. Recorded votes, typically motions to table, are usually necessary to dispose of any minority amendments permitted by the majority. Vote outcomes on amendments are largely partisan in nature, and the success rate of majority amendments is high compared to a low success rate for minority amendments.

*Most substantive action occurring off the Senate floor within the majority party.*

Cloture is primarily used preemptively by the majority leader to speed consideration of legislation throughout the process regardless of the time spent on the floor. Vote outcomes on the final passage of legislation are highly partisan. Finally, a process of amendment exchange between the House and Senate is typically utilized to resolve any differences between the two bills.

### *Treating a Symptom or the Underlying Problem?*

Proposals to reform the Senate’s rules, such as those requiring senators filibustering legislation to actually speak on the Senate floor (i.e., a *talking filibuster*) and making motions to proceed to consider legislation non-debatable, are unlikely to reverse the current dysfunction in the Senate, as defined in this article, because that dysfunction is symptomatic of a more fundamental problem: a decline in the institution’s deliberative function. Indeed, these reforms may even make the situation worse to the extent that they limit, rather than enhance, deliberation in the Senate. They do so by increasing the ability of Senate majorities more easily to develop and pass their agendas over the objections of the minority party without meaningful debate and without the consideration of alterna-

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tive proposals on the Senate floor. This necessarily limits the deliberative nature of Senate decision-making. Consistently shutting the minority out of the legislative process, while perhaps necessary for improving productivity in the near term, will only encourage the majority and minority parties to mimic the behavior of their more combative counterparts in the House. In response, the majority will clamp down further on the minority's parliamentary rights effectively to participate in the legislative process, thereby precipitating even more minority obstruction and protest. This cycle is illustrated by the minority's response to efforts by the majority in recent years to increase productivity by limiting the ability of minority party members to participate in the legislative process.

The gridlock that results from such efforts to restrict deliberation is perpetuated by members of the minority party resorting to procedural maneuvering in response to the legislative tactics of the majority. The majority party, acting through the majority leader, resorts to such procedures in order to limit conflict that results from the combination of the Senate's permissive procedural atmosphere and the polarized political environment in which it deliberates. Put simply, the majority party, acting through its leadership, seeks to structure the legislative process to its advantage. Viewed in this context, the evolution of the cloture rule is helpful in tracking the increase in efforts by the majority leader and, by extension, the majority party in the Senate, to increase the institution's productivity. This procedure is the principal means by which unified and ideologically cohesive majority parties seek to maintain the Senate's productivity while also passing their policy agenda. This inevitably entails reducing opportunities for Senate minorities to participate in the decision-making process. Minority party members are limited in the amendments they can offer and are often forced to resort to obstructionist tactics in order to make substantive policy arguments.

It is certainly not incorrect to view cloture motions and filibusters as related. However, such a narrow focus overlooks the many advantages that the cloture rule offers Senate majorities. Then-Majority Leader Harry Reid acknowledged these benefits in an exchange with the Minority Leader at the time, Mitch McConnell (R-Kentucky), in 2012, observing, "The filibuster was

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originally . . . to help legislation get passed. That is the reason they changed the rules here to do that.”<sup>49</sup> The evolution in the use of cloture during the second half of the twentieth century for purposes other than to simply combat minority obstruction and proceed to a final vote on legislation favored by a supermajority of the Senate increased the influence of the majority leader. Specifically, cloture has been utilized in recent years preemptively to speed consideration of legislation regardless of time spent on the floor. In this process, the majority party limits the minority’s ability freely to debate measures and offer amendments pursuant to the Senate rules. Such behavior may simply result from the anticipation of expected obstruction by the minority party. It could also represent a genuine effort to push the majority’s agenda through the Senate unchanged in a timely manner. The restrictive process could also be utilized to defend carefully negotiated legislation from killer amendments or to protect majority party members from having to take politically difficult votes.

Without the cloture process, the majority leader would be unable to structure the legislative proceedings to the majority’s advantage. When combined with the practice of filling the amendment tree (a process that prevents others from offering amendments), the cloture process further allows the majority leader to limit the ability of individual senators to participate in the legislative process without having to change the Senate’s rules to reduce their procedural prerogatives.

Filling the amendment tree and filing cloture both block amendments, and thus give the majority leader more power to negatively control the agenda. As instances of filling the amendment tree and filing cloture motions increase, the majority leader’s control over the agenda increases as well. Such control is particularly evident when cloture is filed early in the process before any obstruction can be said to have occurred. Indeed, the majority leader has increasingly circumvented the regular legislative process in the Senate by filling the amendment tree and filing cloture on measures *before* a filibuster could be said to have actually occurred. The number of instances in which cloture has been utilized during the early

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<sup>49</sup> Cong. Rec. S5,094 (2012) (statement of Sen. Reid).

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Use of cloture  
before a  
filibuster . . .

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with filling of  
amendment  
tree prevents  
effective  
minority  
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stages of a bill's consideration on the Senate floor has risen dramatically since 2001 under both Democratic and Republican majority leaders.

The effort to increase senatorial productivity at the expense of the institution's deliberative function is further illustrated when the cloture and filling the amendment tree procedures are utilized *in tandem* by the majority leader to restrict the minority's ability freely to debate and amend measures on the Senate floor. The amendment tree was filled during the consideration of three measures during the 108th Congress, and cloture was filed on the same day the legislation was brought to the floor on just one of these measures (33 percent). However, this number increases considerably in the next three congresses. In the 109th Congress, the majority leader utilized the *same day cloture* procedure during the consideration of seven out of the nine measures on which he filled the amendment tree (78 percent). In the 110th Congress, this number was ten of eighteen (56 percent). The majority leader utilized the *same day cloture* procedure during the consideration of fourteen out of the fifteen measures on which he filled the amendment tree (93 percent) in the 111th Congress. Finally, the majority leader utilized the *same day cloture* procedure during the consideration of thirteen out of the twenty measures on which he filled the amendment tree (65 percent) in the 112th Congress. These numbers support the argument that the majority leader increasingly utilizes his procedural prerogatives to negatively control the agenda and pass policies the majority party supports over the objections of the minority and in contradiction of long-standing Senate traditions and rules.

The cloture rule no longer simply represents a procedural tool to bring debate to a close on a particular measure, thereby overcoming minority filibusters. As the majority party sought to expand its control over Senate decision-making by structuring the legislative process to its advantage, the minority party increasingly resorted to procedures such as the right to extended debate and the ability freely to offer amendments to legislation in an effort to protest the new-found limitations on their participation in the consideration of legislation on the Senate floor. This dynamic can be isolated, however, and a more accurate number of minority filibusters can be discerned by com-

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paring the total number of cloture motions filed in a particular Congress with the number filed when omitting those motions filed on the first day of legislation's consideration or very early in the legislative process. Any assessment of gridlock should begin with these updated numbers.

It is still too early in the 114th Congress to accurately assess whether the new Republican majority will be successful in achieving its stated goal of making the Senate a more deliberative institution than it has been in recent years. Should they fail in their effort, however, it is likely that Senate decision-making will once again exhibit the characteristics described here. And in such an environment, reforms designed to address symptoms associated with the minority's response to the majority's efforts to increase Senate productivity may only exacerbate the underlying problem because they further reduce the institution's deliberative function.

### *Conclusion*

I have argued here that the Framers shared a common belief in the idea that the creation of a deliberative institution was necessary in order to limit the power of popular and transitory majorities in the federal government. To this end, they created a Senate with two distinct roles: producing legislation and checking popular opinion through the deliberative process. While passing legislation was certainly important, it was not the Senate's *only* important function. Indeed, the Framers gave as much consideration to the idea of deliberation as to the need for quickly passing legislation. They believed that such an institutional structure represented the best method to preserve individual liberty by checking popular opinion without undermining the republican principles on which the Constitution rested. The Senate should thus be interpreted as reflecting one part of a balanced and deliberate outcome.

Is contemporary Senate dysfunction caused by partisan gridlock or by the Senate's no longer performing the other important role it was intended by the Framers to play in the federal government? The preceding analysis suggests the second possibility is the most likely explanation. While the Senate continues to produce important legislation at relatively con-

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*Reasoned  
deliberation  
has nearly  
disappeared in  
contemporary  
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sistent rates despite a rapidly changing environment and increasing workload, it has done so largely at the expense of the institution's deliberative function. Reasoned deliberation has nearly disappeared in the contemporary Senate as decision-making has gradually migrated from committee hearings and the Senate floor to informal and ad hoc meetings of interested members typically held under the auspices of the party leadership and out of public view.

Driving this development is the fact that the Senate has grown closer to an electorate that has become increasingly attentive to its deliberations. Direct elections combined with the overall growth of government and the revolution in communications technology to produce a Senate more and more subservient to popular opinion. Paradoxically, an institution, originally *and* explicitly designed to serve as a sober check on popular and transitory opinion, was now more accountable to it. As a result, the contemporary Senate has difficulty passing controversial legislation in a timely *and* deliberative manner. Instead, it has increasingly come to rely on procedures similar to those in the House that enable the majority party leadership to set the agenda and tightly limit the alternatives considered, thereby truncating legislative deliberation.

Thus, senatorial accountability combined with heightened expectations of legislative productivity may ironically prove damaging to our political system, at least as envisioned by the delegates at the Federal Convention in 1787. Despite the fact that more groups are participating in the federal policy process than ever before, they are expressing their viewpoints within an echo chamber lacking in thoughtful deliberation. Alternative proposals are rarely debated today because majority parties fear that simply permitting their consideration on the Senate floor will make it less likely that their own preferred measures will pass. Members of the majority party may also feel that publicly voting on legislative alternatives could hurt them in the next election. As a consequence, Senate minorities are increasingly presented with legislative ultimatums and only permitted to vote yes or no on cloture and final passage.

Restricting deliberation in order to protect individual senators, Senate majorities, and the policies they advocate in an environment in which accountability to the electorate has

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increased has several consequences for the Senate and for our political system more generally. First, the pivotal players, beyond party leaders, who largely determine policy outcomes, are not easily identified. Second, the opaqueness of the legislative process obscures the inflection points at which the substance of bills may be significantly influenced. Senators, their constituents, and organized interest groups may not know where best to direct their efforts in order to influence policy outcomes. Once legislation has made it to the floor, it may be too late to impact the outcome as the process has, in all likelihood, already been structured to ensure the bill's passage.

Admittedly, these developments help mitigate the contemporary Senate's accountability problem. But they do so at the expense of the institution's deliberative function. Moreover, the ability of voters effectively to participate in the process is hindered when most consequential decisions are made behind closed doors. Assigning responsibility for policy outcomes is not easily done. This leads to disillusionment and cynicism because the public cannot observe their claims being adjudicated in the Senate and policy outcomes may differ from what voters expect. As a result, the American people are increasingly disillusioned with the Congress and cynical about its accomplishments (or perceived lack thereof). This disillusionment may ultimately lead to the adoption of reforms designed to further curtail the Senate's deliberative function in an effort to improve its productivity. This article has sought to make the case that such reforms would fundamentally alter one of the roles the institution was originally created to play in the federal government, and that adopting them could exacerbate the dysfunction they are designed to address.

An alternative approach is needed that allows the Senate to perform its deliberative function without sacrificing the increased accountability that has arisen over the course of its history. Yet this would require senators to embrace legislative deliberation despite the electoral risks that doing so would entail. Such an approach is not premised on a naïve view that greater deliberation would inevitably lead to consensus. Conflict is an enduring aspect of the contemporary environment. Our polarized politics are likely to persist for some time. Rather, the increased deliberation that such an approach entails

*Most consequential decisions now made behind closed doors.*

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Senators  
should  
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deliberation  
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electoral risk.

actually would strengthen accountability by forcing the Senate publicly to adjudicate the claims of its constituents. Doing so would shift the frustration currently directed at the Senate to the broader balance of forces in society that are responsible for the polarized nature of our politics today. As this article has suggested, the Senate is unable to bear this frustration while still performing its institutional functions. Diverting this frustration in a more appropriate direction would enable the Senate to get back to performing the primary function for which it was created by the Framers: checking the House's susceptibility to temporary popular passions by promoting deliberation in the legislative process.

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