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Senate Republican Radicalism and the Need for Filibuster Reform

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Abstract: The case for reform of the filibuster practice in the Senate is much stronger now than a few decades ago. The emergence of conservative populism and radical Republican strategies in the Senate has created more serious consequences for the Senate’s traditional rules and practices. This essay draws a clear connection between conservative populism, the strategies of Senate Republicans, and legislative gridlock in the Senate. It concludes with a review of the arguments of Senators Joe Manchin and Kyrsten Sinema against reform and argues that they fail to account for how conservative populism has so thoroughly changed their institution.

Keywords: Senate, filibuster, conservative populism, Republican obstructionism

What should be done about the Senate? There are two fundamental issues: the Senate’s representativeness and the Senate’s responsiveness. I set aside the question of representativeness to focus on responsiveness here. Responsiveness is essential to democratic institutions and the Senate is now failing to be adequately responsive. This appears to be a long-term condition that warrants consideration of basic reforms. This is not a new problem, but, at this moment, as senators are actively discussing how to reform their institution, it warrants close attention. Those reforms must be based on a diagnosis of the problem, which is the purpose of this essay.

My diagnosis focuses on the Senate’s political environment and senators’ political strategies that, in a mutually reinforcing ways, have generated a severe level of obstructionism in Senate legislating in the last two decades. Nothing I say is new. My intention is to highlight certain developments that are often overlooked and to more clearly draw the causal lines between these developments and what we are witnessing in the Senate. These developments have generated gridlock so severe that it has gravely undermined the institution’s responsiveness—far below the level expected by the Framers of the Constitution and warrants serious reform of the way the Senate legislates.

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1 Background

If we accept the formulation of the Framers, including the authors of *The Federalist Papers*, the Senate is expected to slow and redirect policy making that otherwise would be dictated by the House. The Senate is likely to do so because the balance of opinion in the two houses is likely to be different, at least to some degree. The differences are a product of senators’ staggered, six-year terms, which slows turnover in membership, the selection of senators by state legislatures and later statewide elections, and its equal representation of the states. Nowhere in that constitutional formulation is the expectation that a supermajority of the Senate is required to act on regular legislation. For only five specified actions—overriding a veto, convicting a federal official after a House impeachment, ratifying a treaty, expelling a senator, and proposing constitutional amendments—is a two-thirds majority required (Oleszek 2010). Otherwise, the Framer’s intended a simple majority to determine legislative outcomes in the Senate, as in the House. They assigned the vice president the power to cast a tie-breaking vote, which can frequently be required in a body with an even number of members making decisions under a simple-majority requirement.

The Senate also has added rules and adopted parliamentary practices, as the Constitution empowers it to do, that materially influence how legislating is conducted. One rule common to legislative bodies is a rule that ended debate on a measure or motion in order to have a vote on the issue. The Senate did not adopt such a rule until 1917. The cloture rule adopted that year provided for a two-thirds majority to close debate, which was modified a few times in the last century. The current rule, adopted in 1975, sets the cloture threshold at three-fifths of elected senators, or 60 votes if all 100 Senate seats are filled. The absence of a rule limiting debate enabled filibusters, which are still protected if a large minority of 41 or more senators oppose cloture. The Senate also has adopted debate limits allowing a simple majority to act for a variety of legislation—budget resolutions and reconciliation bills are the most important—but most bills may be filibustered unless cloture is invoked by a supermajority of 60.

Before the 1970s, filibusters were rare. As Figure 1 hints, there were usually one or two cloture votes at most on either legislative measures or presidential nominations to executive and judicial posts in most Congresses before the 1970s (before the 92d Congress). The few filibusters were extraordinary events and, at least in the view of the filibustering senators, were reserved for the very most important issues, such as civil rights. In the 1970s, the number of bills subject to filibusters and cloture votes skyrocketed, or at least it seemed so at the time, leading senators and others to worry about the trivialization of the filibuster. This
appeared to be due to the rise of individualistic senators appealing to external audiences and the expansion of the interest group and lobbying community. The successful end of the civil rights era also contributed, conservatives no longer felt that they needed to reserve their filibusters for civil rights bills and avoid reform that might make it easier to enact civil rights bill (Binder and Smith 1997).

Over the last three decades, filibusters have become endemic, with a step increase in 1993 (102d Congress) and another in 2007 (110th Congress). In fact, the longstanding and accurate observation that more legislation dies in the Senate than in the House remains true but hardly captures the dramatic effect of Senate filibusters in today’s Congress. In the 2007–2020 period, the Senate cast an average of 155 cloture votes per Congress, or about one cloture vote for every two days the Senate was in session in a two-year Congress. Rather than having multiple cloture votes on a few controversial legislative measures, as was typical in the 1970s and 1980s, the Senate now casts cloture votes on virtually every significant matter on the Senate floor, including nominations when the party opposite the president is in the minority. The effects reach the House, which often does not bother to give serious consideration to legislation until the Senate shows signs of a willingness to

Figure 1: Number of legislative measures and nominations subject to at least one cloture vote and the total number of cloture votes, 1961–2020.
Source: Senate.gov. Many bills and some nominations are subject to more than one cloture vote.
act. When the Senate does act first, as it did in mid-2021 in passing a physical infrastructure bill, the House does not dare modify it, even in the slightest, for fear that the amended bill would get hung up in the Senate. More often than not, filibusters and threatened filibusters, and the uncompromising attitudes signaled by them, cut off meaningful discussion and deliberation—even informal discussion.

The red line in Figure 1 shows the radical change in cloture votes on presidential nominations to executive and judicial positions. After Democrats forced the adoption of simple-majority cloture for nominations in the middle of the 113th Congress (2013–2014), Republicans, in the minority with a Democratic president, in the set the tone by forcing cloture votes on most nominations out of protest. It extended their all-purpose delay and obstruct strategy on legislation to nominations and set the tone for Senate minorities dealing with an opposition president since then. In the 116th Congress, the Senate spent the equivalent of well over a week of floor time voting on cloture motions on nominations alone.

How did the Senate get here? We often cite partisan polarization, which is a complex phenomenon that involves Congress, the electorate, and the larger political environment of activists, political money, and the media. I want to emphasize the origins of the strain of polarization we are now experiencing. I focus on how a particular form of conservative radicalism has manifested itself in Congress and has done so with different consequences for the House and Senate. The majoritarianism of the House has allowed the majority party to live with it, often uncomfortably but with significant effects for how the House does legislate. The super-majoritarianism of the Senate, imposed by the cloture rule, has been debilitating at times and at other times has forced contortions in the legislative process that reformers want to correct and opponents to reform often refuse to recognize.

2 Conservative Populism

Many observers of modern American politics have argued persuasively a conservative populism emerged in the late 20th century and moved in more radical directions in the new century. Abramowitz observes the emergence of a new partisan alignment:

This “great alignment” has transformed the American party system and fundamentally altered American politics in the twenty-first century. On one side of this partisan divide are those who have benefitted from and welcome the new American society, including racial minorities, the LGBT community, religious moderates and skeptics, and more educated

Galston echoes these themes:

In government, the media, and major metropolitan areas, technological change has spurred the growth and consolidation of an education-based meritocracy, giving rise to new class divisions. For citizens with less formal education, particularly those in rural areas and smaller towns, the dominance of this new elite has led to feelings of marginalization. Too often, individuals who have prospered in this meritocracy are seen as harboring a sense of superiority to their fellow citizens. Denying the equal dignity and worth of others is self-defeating: Insult does even more than injury to fuel resentment, one of the most dangerous of all political passions (Galston 2018, 8).

Donald Trump’s core supporters reflected this conservative populism. In a careful analysis of the evolving support for Republican candidates in the 2016 election cycle, one study found that Trump’s earliest supporters were strongly populist—attracted to Trump’s emphasis on “draining the swamp,” little-guy-versus-big-guy themes, and the corrupt values of government and business elites. In fact, Trump support was much more strongly related to populism than to authoritarianism, racial sentiment, and nativism, although they were operating, too (Tucker et al. 2019, Table 2). Trump’s anti-establishment, authoritarian, uncompromising approach roused an admixture of populistic, racist, and nativistic responses that carried him through the campaign and a term in office.

Trump’s candidacy, Abramowitz and Galston remind us, was not the beginning of the modern wave of conservative populism. It emerged through the last decades of the 20th century in response to the larger forces of globalization and automation in the economy, the associated decline of labor unions, and the failure of government to address the widespread economic dislocations.¹ It was reinforced by and often blamed on the social transformations affecting race relations, gender roles, and other cultural values in America. The economic developments challenged the real circumstances and social status of many Americans, particularly those without a college education. The economic prospects of working class Americans, most notably white males, suffered more than others. These changes were well underway in the 1970s and 1980s, were reflected in the gradual realignment of partisan preferences in favor of the Republicans in the South and

¹ For historical studies on American populism and parties, see Kazin (2017), Shafer and Claggett (1995), Sundquist (1983), and Olsen (2010).
rural America, and contributed to the intense competition for partisan control of the Congress and presidency since then. Congress and a string of presidents simply failed to address these issues effectively, which added to the ranks of populists and intensified their passions (Howell and Moe 2020).

Entrepreneurial politicians, opinion leaders, and partisan activists took stock of those developments, encouraged them, and influenced the direction and speed with which they took hold in segments of the public and influenced the everyday activities of Congress. Ronald Reagan brought the economic and social conservatives together, but, while maintaining a patrician Republican’s image and lifestyle, he did not champion social caucuses or emphasize the anti-establishment threads of populism as much as would the Republicans, and eventually Trump, who would take over the party. Through public appearances, speaking in party circles, and coordinating his collaborators, Newt Gingrich (R-GA), elected in 1978 as the first Republican to represent his suburban Atlanta district, offered a new path forward. He offered an interpretation of those events that persuaded many Republicans that conservatives Republicans were the natural majority in the nation but were suffering from a “minority mind set” that kept them willing to compromise with majority party Democrats.

3 Moving Conservative Populism into Congress

Gingrich offered an alternative to what he considered to be the ineffective strategies of traditional Republican congressional leaders. “Loyal opposition” strategies—working with the majority Democrats where possible, allowing individual Republicans to vote with the Democrats when it helped them get reelected, oppose with civility and respect for the majority—was a recipe for long-term minority status for the Republicans. He advocated something quite different: Polarization, not moderation and compromise, would hasten the end of Democratic dominance of Congress and lead to a new conservative era that Reagan initiated but failed to solidify. Demonizing liberal Democrats—not working with them from time to time—would help Republicans win more elections and a House majority. Gingrich’s “Conservative Opportunity Society” (COS), the group of House Republicans who bought into Gingrich’s perspective, advocated a vague vision of very limited government that would be contrasted with the liberal, corrupt, big government, welfare state.

Gingrich offered a strategy—a playbook—for winning a House majority. Three elements of that strategy merit special notice. First, a strong emphasis on ideology—on the faults of liberalism and the virtues of conservatism—would advantage the Republicans. This was grounded in the observation that more
Americans called themselves conservatives than call themselves liberals. Majorities of Americans may favor individual federal programs, but when the choice is framed as smaller versus larger government, lower versus higher taxes, or conservative versus liberal, the conservative wins. Therefore, ideological labels, rather than something to be avoided in order to avoid alienating moderates, should be emphasized to undermine the image of liberals, motivate conservatives to support Republicans, and force moderates to get off the fence.

Second, Gingrich urged moderate Republicans to stick with their party and oppose the Democrats even on matters that appeal to moderate voters. The reason was simple. By denying Democrats any Republican votes on legislation, Republicans could force conservative Democrats to vote with their liberal leadership and create electoral problems for themselves at home. Discipline was required. Tolerance of party colleagues who frequently voted with the Democrats had to stop. The immediate result, of course, would be more party-line voting and the appearance of greater partisan polarization. Gingrich forecast that the strategy would (a) give voters would have a clearer choice between the two parties to the benefit of Republicans and (b) more Republicans would be elected, particularly from the districts like his that had been electing moderate and conservative Democrats for more than a century.

Third, Gingrich organized. He organized younger House Republicans, often southerners, who were in tune with the development of a populist sentiment in segments of their conservative electorates and were sympathetic with more strident and less compromising tactics within Congress. They turned up the pressure on Minority Leader Bob Michel (R-IL) and committee leaders to take a less compromising approach to legislating and to aggressively pursue public relations efforts, including the exploitation of C-SPAN coverage of House floor sessions, to ridicule liberal Democrats for how they ran Congress and advocated that the party focus on wedge issues to split conservative constituencies from the Democrats. Gingrich created a COS political action committee and think tank, which soon were replaced by larger fundraising and research organizations.

The Gingrich playbook, which was informally adopted with his election as party whip in 1989, represented deliberate polarization of the two parties and a nationalization of congressional elections. It was a strategy that appealed to younger Republicans in the House who believed that the more tolerant approach of “establishment” Republican leadership rooted in the business-oriented constituency of the party had produced long-term minority status for the party. A revolution was required. It would marry social issues with the traditional emphasis on economic issues, be more closely tied to the religious right, and focus squarely on the national issues that divide the two parties. The rise of conservative populism created the conditions that made Gingrich’s strategy attractive; Gingrichism’s
openly uncompromising and divisive approach provided reinforcement of the conservative populism already building in segments of the electorate.

4 Bridges to the Senate

By the time House Republicans had gained a majority and Gingrich was elected speaker in 1995, the Senate had already experienced substantial change in majority-minority party relations. Until the 1970s, filibusters were rare. Something changed in the early 1970s. The passage of the civil rights era and the rise of a generation of entrepreneurial, individualistic senators had transformed floor politics (Sinclair 1989; Smith 1989). Filibusters and holds became more common—so common that senators and other observers were talking about the trivialization of the filibuster. Obstructive tactics were more frequently used, which generated demands for filibuster reform and contributed to the 1975 reduction of the threshold for cloture from a two-thirds majority of senators voting to three-fifths of duly-elected senators. Even with this reform, the number of filibusters and associated cloture votes remained at a plateau elevated far above what had been the norm for decades. And the 60-vote threshold for cloture remained higher than could be reached by majority parties with their own membership nearly all of the time since the late 1970s.

By the early 1990s, there were signs that the polarization the Gingrich advocated was reaching the Senate. Several of Gingrich’s lieutenants moved to the Senate in the 1990s. Most prominent was Trent Lott (R-MS), who was elected Senate Republican whip in 1994 and became leader upon Bob Dole’s (R-KS) retirement from leadership in 1996. Two aspects of this new generation of Senate Republicans bear close attention.

First, the “Gingrich senators”—those elected to the House with or after Gingrich was first elected to the House in 1978 and eventually moved to the Senate—were responsible for nearly all of the partisan polarization that occurred in the Senate between the 1970s and 2010 (Theriault and Rohde 2011). The Republicans moved right far more than the Democrats moved left, judging by the most widely used measure based on senators’ voting behavior (DW-NOMINATE), and nearly all of the shifting Republican average was due to the more extreme conservatism brought to the Senate by Gingrich-era House Republicans.

Second, the new Republicans were not merely conservatives in the mold Bob Dole and Alan Simpson (R-WY), the Senate Republican leader and whip from the mid-1980s through the mid-1990s. If they had been, they would not have moved the ideological needle of the party to the right so much. They emerged from state Republican politics thoroughly infused with conservative populism and brought
Gingrich’s House playbook to the Senate. While the uncompromising strategy worked less well after Republicans found themselves in the majority in both houses after the 1994 elections, the adherence to a strong form of economic and social conservatism and an uncompromising attitude about legislating with Democrats remained. In most respects, these “first generation” conservative populists were committed to using the Congress’s traditional institutions and processes to enact their own program.

A second generation of conservative populists followed and currently populate the Senate Republican conference. This generation was sometimes associated with the emergence of the House Tea Party Caucus, founded in 2010, and later the Freedom Caucus, formed in 2015. These Republicans took the view that Republican President George W. Bush (2001–2009) and their own congressional leaders compromised with moderates and liberals far too much on fiscal and social policy. They urged their party to exploit the leverage of controlling the House or Senate to a maximum to gain fundamental changes in federal policy. Their obstructionism led Speaker John Boehner (R-OH) to resign from his post in 2015 when they rejected his proposals to compromise with a Democratic Senate and president (Boehner 2021).

In the Senate, this second generation is sometimes led by Ted Cruz (R-TX), but it is not a group that is readily led by anyone. Senators Jim DeMint (R-SC), Josh Hawley (R-MO), Ron Johnson (R-WI), and Mike Lee (UT) are among the most prominent. These senators and others seem to be on continuous alert for issues and causes they can exploit and are eager to fully exploit their parliamentary rights to block majority party Democrats and even stand in the way of their own leader’s initiatives.

While appreciating the importance of conservative populists to winning elections and party control of Congress and the White House, Senate Republican leaders kept the conservative populists at bay much of the time, at least in the 1990s and early 2000s. The Senate party still had many traditional conservatives—Alexander, Bennett, Flake, Hatch, Hutchison, Kyl, Lugar, and McCain come to mind—many of whom held committee leadership posts and shaped party strategy on important issues. But step by step, Republican leaders Lott, Frist, and McConnell acceded to the trend in their party’s electoral base and expectations of this new generation. McConnell appears to have fully adopted the conservative populist playbook.

5 McConnell and the Second Generation

Before McConnell was elected Republican floor leader in late 2006, he was known as a state-oriented senator with a strong ambition to be party leader. He also was
recognized as a “Washington insider,” “behind-the-scenes operator,” and parliamentary expert. He gained such a reputation for years of service on the Appropriations Committee, chairman of the Rules Committee, and four years as whip. McConnell was known as a dealmaker and as a guardian of Kentucky interests on Appropriations rather than as a leading conservative. In fact, for many years McConnell referred to Henry Clay, the Great Compromiser, as his model senator. He combined conservatism, partisanship, and pragmatism in a way that was fairly typical of a senator seeking a leadership post.

McConnell became leader with a little bit of luck. The floor leader’s job was an ambition for McConnell from the day he entered the Senate 22 years earlier. In an interview with me in 2018, he recalled sitting in the rear corner of the Republican side of the Senate chamber during his first year in the Senate at a time when Byrd and Dole were the parties’ floor leaders and thinking that he could do their jobs. It is no exaggeration to say that McConnell made every major move within his party’s organization—working to fight campaign finance reform during his service on the Rules and Administration committee, taking the chairmanship of the party campaign committee, gaining the whip’s job—with the hope that he would eventually be positioned to become floor leader.

However much he wanted to be Republican floor leader, McConnell temporarily gave up much hope of doing so when Bill Frist (R-TN) became leader in 2003. Frist was elected leader at only 55 years of age. Frist had promised Tennesseans that he would serve only two terms in the Senate, but few observers believed he would abide by the commitment once he was elected leader. Frist had presidential ambitions, though, and may have believed that he it was better to work on his presidential plans without the burden of Senate leadership duties. Still, his announcement in 2006 that he would not run for reelection to the Senate surprised most observers. McConnell was whip when Frist made his announcement and, having a reputation for service to his party colleagues, hard work, and parliamentary skills, easily won the top post. In time, he became the longest serving Republican leader.

McConnell’s desire to be leader—and to retain the confidence of his party colleagues—drives his behavior. It requires that he anticipate the parliamentary moves his colleagues would pursue if he did not do so first. In fact, he has moved beyond staying a step ahead of the radicals in his party conference to accepting their general perspective on legislating by pursuing more extreme strategies and dropping any meaningful effort at bipartisanship. McConnell’s behavior has fully adjusted to conservative populism and made the Gingrich playbook, adapted for the Senate, his own.
6 The New Radical Republicanism in Congress

McConnell became the facilitator. While minority obstruction had become commonplace by the time McConnell became minority leader in 2007, he made obstruction a nearly standard operating principle. McConnell adopted the view that the Senate ran with 60 votes, the number required for cloture, and claimed that was the Senate’s traditional standard. This was not true—historically, Senate minorities filibustered sparingly and few cloture votes were cast, as Figure 1 reflects—but McConnell was making it true.

One immediate result is that the majority leader at the time, Harry Reid (D-NV), sought cloture about twice as often to get action on legislation than had been common in the previous two decades. To get some idea of how frequent that became, it involved about one cloture vote related to legislation (setting aside nominations) for every four days of Senate session in 2007–2008. As McConnell intended, refusal to allow the Senate to move forward on a measure without invoking cloture had a cumulative effect—the majority party Democrats struggled to set the floor agenda and accomplished less. Even when cloture could be invoked, the cloture procedure consumed valuable floor time.

Reid and the Democrats responded in other ways, but their moves could not overcome dedicated obstruction from McConnell and the Republicans. They did have the effect of changing the nature of Senate floor deliberations. Three of them are worth brief mention.

First, the majority leader simply sought to avoid the number of opportunities for minority filibusters. In the case of appropriations bills, this meant packaging the bills into omnibus measures or simply gaining agreement on continuing resolutions (CRs) that merely extended last year’s funding without change. In some cases, the majority leader simply would not bring a bill to the floor on which a filibuster seemed inevitable. The end of an annual session of Congress then would involve a crush of activity. The effect was to reduce opportunities for senators to offer and debate amendments on important issues and stimulate complaints about the demise of what legislators often called the “regular order.”

Second, the majority leader “filled the amendment tree” with greater frequency. The term refers to offering a set of first- and second-degree amendments so that no other amendments may be offered until the Senate disposes of one or more of those amendments. The majority leader’s right to be recognized to make a motion before other senators are recognized creates an opportunity for the leader to fill the tree, thereby preventing other amendments from being offered.

Like the filibuster, filling the tree was rare until recent decades. It is done by the majority leader, or sometimes by a bill manager, to freeze action on amendments.
At a minimum, filling the tree temporarily prevents the consideration of amendments, which often includes minority senators’ amendments that the majority party wants to avoid. The majority leader reasons that there is no point to allowing minority amendments until the minority allows a bill to come to a vote. In most Congresses since early 2007, the number of times the amendment tree has been filled has been over 20—10 times the number typical of Congresses in the 1980s and 1990s. Filling the amendment tree limits the subjects coming to a vote and the opportunities for senators to participate meaningfully in the policy-making process.

Third, when floor amendments are considered, they are more likely to be considered under unanimous consent agreements that require 60 votes for an amendment to be adopted. In 2007, for example, McConnell insisted that a Democratic senator’s amendment to a defense authorization bill be allowed only if Democrats agreed that 60 votes would be required to pass it:

> What we have frequently done is simply negotiated an agreement to have the 60 votes we know we are going to have anyway, and the reason for that is—well, there are several reasons. No. 1, if a cloture vote were invoked, it would further delay consideration of the bill because potentially 30 more hours could be used post cloture on an amendment. So what we have done, in a rational response to the nature of the Senate in this era, is to negotiate 60-vote votes … We are perfectly happy to enter into an agreement, as I suggested yesterday, for a vote on the Webb amendment and the alternative that we would have, the Graham amendment, by consent, two 60-vote requirements. That is not unusual in the Senate; it is just common practice in the Senate, certainly for as long as I have been here (Congressional Record, July 10, 2007, S8918).

McConnell was greatly exaggerating how customary 60-vote thresholds had become in unanimous consent agreements by that time, as Reid was quick to observe: “It appears to me we are arriving at a point where, even on the Defense authorization bill, amendments leading up to a final vote on the Defense authorization bill, which is so important, are going to be filibustered. It is really wrong. It is too bad. We don’t have to have this 60-vote margin on everything we do. That is some recent rule that has just come up in the minds of the minority” (Congressional Record, July 10, 2007, S8918). But, as cloture and 60 votes became the standard requirement for getting a vote on a bill, it became commonplace to require 60 votes for an amendment as a condition for considering any amendments.

I once called the steady flow of minority obstruction and majority countermoves the “Senate syndrome” (Smith 2014). Each party quickly resorts to parliamentary moves that prevent the other party from gaining an edge either in the legislative process or in public relations. While bipartisan compromise is sometimes stimulated, stalemate is a common outcome. It almost always limits the traditional opportunities that senators enjoyed to participate in the process by
offering amendments and negotiating with rank-and-file colleagues in a meaningful way. Floor activity is closely supervised and orchestrated by the floor leaders with party interests given the highest priority. Frequently, sometimes several times in a day, senators’ references to the other party are filled with acrimony and often bitterness.

7 More than Partisan Polarization

We have witnessed more than mere partisan polarization in the Senate. It is not merely the addition of strong conservatives to the Republican conference and strong liberals to the Democratic conference. This polarization is both lopsided (Republicans becoming much more conservative than the Democrats became more liberal) and the introduction of a different brand of conservatism (conservative populism). The latter has launched a fundamentally different view of Senate rules, precedents, norms, and traditions. It is not truly conservative; it is more populist. It is not committed to inherited institutions and norms for using them. The interests of “the people” justifies radical uses of institutions. In the Senate, it means extreme abuse of the filibuster to prevent Democratic majorities from acting, sitting on a Supreme Court nomination, and, when it is convenient, as for Supreme Court nominations, gutting the supermajority requirement for cloture.

Trump, of course, fanned the flames of conservative populism. As often happens with populist movements, offered an authoritarian approach to address the grievances of working class Americans, labeled the “system” corrupt and rigged by those in power, personalized his promises to clean out (“drain the swamp”) those in power, accepted and amplified falsehoods and conspiracy theories, and made speech after speech with racist undertones and nativistic overtones. Republican officer holders, often concerned about their own electoral futures, chose to openly support Trump and most ended up refusing to condemn Trump’s many excesses.

The conservative populism facilitated and then was promoted by developments in the larger political environment. The demise of the fairness doctrine for broadcasters in 1987, rise of conservative talk radio and the creation of Fox News in the 1990s, the emergence of internet news and opinion sites in the new century, and the proliferation of social media radically changed the information environment of politics. This environment was ripe for exaggerated and false claims about those in government and politics. Court decisions also have enabled ideologically-driven individuals and groups to both raise large sums of money from individuals and to spend their own money and the money they raise in hidden ways. These
developments transformed the political environment in which members of Congress operate into one that encourages grandstanding and even radical behavior.

8 The Dysfunctional Senate and Reform

These mutually reinforcing developments—the emergence of a conservative populism, the new political environment, the election of legislators skilled at exploiting the new environment, and the Trumpism that energizes that populism today—have transformed the Senate by altering traditional understandings of how to use its unique procedural features (filibustering and cloture). This basic fact should be the starting point for thinking about reform. The Republicans show no sign of resisting, let alone successfully resisting, the temptation to exploit conservative populism or even the more extreme Trump variant. It has made the party, whether in the majority or the minority, uncompromising, which in turn has encouraged both parties to more fully exploit their parliamentary rights. This is different in kind from difficult periods in the Senate’s past and it will last for the foreseeable future.

Willingness to create gridlock in the Senate, of course, has implications for the Congress’s ability to meet a range of deadlines and pseudo-deadlines. Annual appropriations bills, recurring authorization bills, debt limit increases, and other measures are put at greater risk than ever before. Many of these deadlines serve the purpose of enhancing congressional power over the executive branch, but the ability of a minority of senators to block action puts the exercise of that power in jeopardy and risks serious consequences for the nation.

It is against this backdrop that the 2020 election cycle saw many Senate Democrats, some of whom were presidential candidates, advocate filibuster reform to enable a simple majority of senators to act on legislation. Many of them expected a Democrat to win the White House but have her or his legislative program blocked by a Senate minority. Even presidential and vice presidential candidates Joe Biden and Kamala Harris, both of whom had long opposed reform, indicated that they would consider filibuster reform if Senate Republicans obstruction action on important legislation.

After the Democrats won the presidency and a technical majority in the Senate, two Democrats—Joe Manchin (D-WV) and Kyrsten Sinema (D-AZ)—stood in the way of reform and explained their views in *Washington Post* op-eds. Their arguments are outlined in Table 1. They state similar concerns about partisanship, moderation, policy stability, and imply that legislation passed with bipartisan support is better for the nation than legislation passed with little or no minority
party support. Manchin, from West Virginia, brings in small-state interests that Sinema does not mention. Sinema emphasizes that a conservative majority would threaten federal programs that liberals support and suggests that her colleagues do not appreciate the consequences of reform as she does.

I take these arguments seriously; they are oft-repeated defenses of Senate tradition. Both senators’ observations, however coherent in the abstract, fail to account for how rules have been used in practice for two decades and are likely to be continued to be used. Plainly, the high threshold for cloture has not spawned sufficiently strong incentives to generate the negotiation and compromise, moderation, and policy stability that the senators claim. Instead, the Senate’s traditional methods of legislation facilitate the no-compromise politics of conservative populism. The political forces behind the conservative populism that has taken over the Republican party are stronger than the incentives generated by Senate Rule XXII.

The senators’ traditional arguments may be based on assumptions that are not tenable. One assumption is that senators recognize the nation’s problems as problems and therefore are eager to see Congress respond with legislative solutions. Another is that moderate or compromised legislation will meet the nation’s challenges and thereby heal the nation’s wounds. And a third claim is that senators have given inadequate thought about the matter, in contrast to Manchin and Sinema.

In fact, the conservative populism and Trumpism that has infused Senate Republican strategy define the nation’s problems and the appropriate solutions in

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Table 1: Arguments of Senators Joe Manchin and Kyrsten Sinema in opposition to filibuster reform, 2021.

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<thead>
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<th>Manchin (Washington Post, April 7, 2021)</th>
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<td>– The high cloture threshold protects the interests of small states.</td>
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<td>– The high cloture threshold prevents “drastic swings” in policy and government instability.</td>
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<td>– The high cloture threshold prevents “dysfunction and gridlock.”</td>
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<td>– The high cloture threshold prevents “partisan solutions” that cannot solve the nation’s problems.</td>
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<th>Sinema (Washington Post, June 21, 2021)</th>
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<td>– The high cloture threshold “compels moderation.”</td>
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<td>– Bipartisan deals stand the test of time and heal the country’s divisions.</td>
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<td>– The high cloture threshold protects from “wild swings between opposing policy poles.”</td>
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<td>– The high cloture threshold forces negotiations toward better solutions.</td>
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<td>– The high cloture threshold protects important federal programs.</td>
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<td>– The high cloture threshold serves our democracy.</td>
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<td>– The Senate should fully debate reform in order that senators can “fully consider the concerns and consequences.”</td>
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fundamentally different ways than the liberals of recent decades. Defeating, if not destroying, the Democratic party, not sharing in legislative accomplishment, is the goal. Compromise and moderation are inherently corrupt.

Moreover, the argument that the future of American democracy rests on retaining Rule XXII is wild and careless. Nothing in the Constitution or the writings of the Framers support the view that the Senate was intended to have a supermajority threshold. Madison and Hamilton were expressly critical of supermajority thresholds for policy making (Federalist No. 22 and No. 58). The Constitution reserves supermajority thresholds for only a few specified matters.

Manchin and Sinema must argue that the Senate learned through experience that the democratic project of the U.S. is well served by allowing a minority of senators to block action on measures they disapprove. This entails weighing the costs and benefits for democracy of the current rule. Manchin and Sinema make only a stab at this. For example, they simply ignore how Senate filibusters blocked federal action to protect voting rights and respond to lynchings for decades.

Sinema is correct in observing that the Senate in the current Congress has not had a general floor debate on filibuster reform. She is incorrect when she suggests that her colleagues are not aware of the relevant considerations. Few senators—probably no senators—have failed to give considerable thought to and engaged in discussions about reform. They are well aware of how traditional Senate practices facilitate their pursuit of personal and factional interests. In recent decades, the filibuster practice has been broken for the consideration of presidential nominations and nearly every policy area that generates a party division has been affected by Senate inaction, including many issues on which sizable majorities of Americans favor action.

9 What About Reconciliation?

With the parties drifting apart and more fully exploiting obstructionist strategies, it is not surprising that the Senate’s majority party has resorted to reconciliation procedures to enact important elements of its legislative program. Beginning with tax cuts in 2001 and 2003, the resolution of House-Senate differences on Obamacare in 2010, tax cuts in 2017, and a social infrastructure bill (Build Back Better) in 2021 (yet to be passed), congressional majority parties have used reconciliation to avoid a Senate filibuster that almost certainly would have blocked or forced radical changes in the legislation eventually enacted. Should we think of reconciliation as making the Senate effectively majoritarian like the House?

Hardly. In fact, the Byrd rule, which requires that only budget-related items can be included in a reconciliation bill, and interpretations of the Budget Act
that limit the number of reconciliation bills make reconciliation a limited and somewhat inflexible method legislating. Many proposals related to appropriations, immigration, climate change, social security, and other major issues are barred from consideration.

10 Conclusions

It is interesting that Manchin and Sinema do not make one traditional argument about supermajority cloture, at least not squarely. It was once argued that a truly committed majority backed by popular opinion can eventually overcome an obstructionist minority. That is, the filibuster practice does little harm and much good. Bills that do not make it should be killed; deserving bills make it eventually. In 1949, three southern senators made the argument that “proponents of change failed to present one single example of any real injury to the American people caused by the delay on legislation due to extended debate.” They went on to argue that the country was better off when several civil rights bills designed to address racial discrimination and worse (the elections bill of 1890, the antilynching bills of the early 20th century, anti-poll tax bills, and others) were killed by filibuster. The thesis was extended by Senator Robert Byrd and others in the following decades. Byrd, for example, insisted that the filibuster “never has been and never will be fatal to the overall public good.”

Manchin and Sinema wisely do not make this argument. It is a plainly inaccurate characterization of the Senate of the current generation. Manchin and Sinema sidestep the fact that important legislation has been killed by filibuster and instead say the legislation would be better if it was negotiated to be more moderate. They do not address the real and experienced possibility that important legislation is killed without a moderate substitute. They merely imply that we are better off with no legislation than legislation passed by a simple majority. Lacking any evidence to support the argument, I’m not persuaded.

The political imperatives observed by Senate Republicans, infused with conservative populism, are Manichean. They are fundamentally inconsistent with the Senate’s traditional arguments in favor of supermajority cloture and have yielded a Senate that, rather than preserving the right to be heard and to vote, simply prevents meaningful deliberation and informed decisions from occurring. In practice, they dramatically undercut the Senate’s responsiveness to public demands for effective government action on a range of policy challenges.

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2 Both quotations from Binder and Smith (1997, 127–8).
References


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