

DEMOCRATIZING THE SENATE FROM WITHIN

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The U.S. Senate is an undemocratic institution in two respects. First, the filibuster rule allows a minority of Senators to block a final vote on most measures. Second, the Senate's malapportionment means that a Senate majority often represents a minority of the population. Eliminating the filibuster would address the first problem but would exacerbate the second. Most proposals for addressing the Senate's malapportionment either do so only indirectly and contingently, or would require unlikely changes to the Constitution or constitutional doctrine. We therefore propose that the Senate replace its current filibuster rule with what we refer to as a "popular-majoritarian cloture rule." Under this rule, a motion to close debate and proceed to a final vote would carry if but only if supported by a majority coalition of Senators who collectively represent a larger share of the population than those Senators in opposition. This rule, which would be a constitutional exercise of the Senate's power to set the rules of its proceedings, would make the body more democratic, legitimate, and functional, and would be preferable both to the current filibuster rule and to simple majority rule. The democratic illegitimacy and dysfunction of the U.S. Senate as it currently operates justifies the consideration of institutional reforms that might seem, at the moment, both extreme and unlikely. Repairing American governance requires fixing the Senate, and our proposal illustrates one way to democratize the Senate from within.

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INTRODUCTION

The United States Senate is an undemocratic institution. This problem—which is well-known, well-documented, and only getting worse—undermines effective government and threatens the long-term health of the Republic.¹ Two features of the Senate contribute to its undemocratic character. First, the current cloture rule (commonly known as the “filibuster rule”) requires a three-fifths majority to end debate and proceed to a vote for most substantive matters.² This supermajority requirement enables a minority of Senators, who often represent an even smaller minority of the citizenry, to block measures that have broad support.³ Second, because each state elects two Senators, the party that controls the Senate need not, and often does not, represent a majority of the population.⁴ This malapportionment problem not only means that the forty-one Senators who can block Senate action through a filibuster may represent an even smaller minority of the total population. More significantly, it means that for measures that require only a simple majority to pass (such as budget reconciliation and confirmation of executive branch or judicial appointments), Senators who represent a

¹ See, e.g., ADAM JENTLESON, *KILL SWITCH: THE RISE OF THE MODERN SENATE AND THE DECLINE OF AMERICAN DEMOCRACY* (2021); FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION* (1999); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006); ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2d ed. 2003); Eric Orts, *Senate Democracy: Our Lockean Paradox*, 68 AM. U. L. REV. 1981 (2019); Suzannah Sherry, *Our Unconstitutional Senate*, 12 CONST. COMMENT. 213 (1995); William N. Eskridge, Jr., *The One Senator, One Vote Clause*, 12 CONST. COMMENT. 159 (1995); Richard N. Rosenfeld, *What Democracy? The Case for Abolishing the United States Senate*, HARPER’S MAG. (May, 2004); Jack M. Beermann, *The New Constitution of the United States: Do We Need One and How Would We Get One?*, 94 B.U. L. REV. 711, 728–33 (2014); Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 CONN. L. REV. 1041 (2011); Samuel A. Marcossan, *Fixing Congress*, 33 BYU J. PUB. L. 227, 257–65 (2019); Kenneth A. Shepsle, *Dysfunctional Congress?*, 89 B.U. L. REV. 371, 383 (2009); Jonathan Chait, *The Senate Is America’s Most Structurally Racist Institution*, N.Y. MAG. (Aug. 10, 2020).

² The relevant rule is Senate Rule XXII (“Precedence of Motions”), which states that if a motion to close debate on a pending matter is signed by sixteen Senators and presented to the Senate, the Senate shall have an up-or-down vote on the question whether to end debate, and that “if that question shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn—except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting—then said measure, motion, or other matter pending before the Senate, or the unfinished business, shall be the unfinished business to the exclusion of all other business until disposed of.” Following a successful cloture vote, then after a limited period of additional debate (presumptively thirty hours at most), the Senate must vote on the final disposition of the question.

³ For general treatments of the historical and contemporary filibuster and other forms of obstruction, see, for example, SARAH A. BINDER, *MINORITY RIGHTS, MAJORITY RULE: PARTISANSHIP AND THE DEVELOPMENT OF CONGRESS* (1997); SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE* (1996); DOUGLAS DION, *TURNING THE LEGISLATIVE THUMBSCREW: MINORITY RIGHTS AND PROCEDURAL CHANGE IN LEGISLATIVE POLITICS* (1997); GREGORY KOGER, *FILIBUSTER: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE* (2010); STEVEN S. SMITH, *THE SENATE SYNDROME: THE EVOLUTION OF PROCEDURAL WARFARE IN THE MODERN U.S. SENATE* (2014); GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* (2006); Gregory J. Wawro & Eric Schickler, *Legislative Obstructionism*, 13 ANN. REV. POL. SCI. 297 (2010).

⁴ See Orts, *supra* note 1; Vicki C. Jackson, *The Democratic Deficit of United States Federalism? Red State, Blue State, Purple?*, 46 FED. L. REV. 645, 650–51 & n.20 (2018).

minority of the citizenry can impose their will despite the opposition of Senators who represent a substantially larger share of the population.⁵

To overcome the former problem—minoritarian obstruction—many have urged the abolition of the filibuster, such that a motion to close debate could pass with a simple majority.⁶ Others have proposed various modifications that would make filibustering more difficult.⁷ Eliminating the filibuster or making it harder to employ, however, would increase the risks that a slim majority of Senators who represent well under half of the U.S. population would be able to push through decisions opposed by Senators who represent a popular majority.⁸ To ameliorate the root cause of this problem—the Senate’s malapportionment—scholars and activists have proposed a range of options, including granting statehood to Washington, D.C. and certain U.S. territories (such as Puerto Rico),⁹ splitting a few large states into smaller states,¹⁰ amending the Constitution to restructure (or even to abolish) the Senate,¹¹ or embracing imaginative reinterpretations of the Constitution that would permit the allocation of Senators in closer proportion to state population.¹² We do not take a position here on the wisdom or viability of these proposals, except to note, first, that the creation of new states addresses the malapportionment problem only indirectly and contingently,¹³

⁵ See, e.g., Joshua P. Zoffer & David Singh Grewal, *The Counter-Majoritarian Difficulty of a Minoritarian Judiciary*, 11 CALIF. L. REV. 437 (2020) (documenting the rise in “countermajoritarian judges” appointed by Presidents who lost the national popular vote, confirmed by Senators representing a minority of the national population, or both).

⁶ See, e.g., Michael J. Klarman, *Forward: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 236 (2020); Ezra Klein, *The Definitive Case for Ending the Filibuster*, VOX (Oct. 2, 2020); Ronald Brownstein, *Abolishing the Filibuster Is Unavoidable for Democrats*, ATLANTIC (Aug. 22, 2019).

⁷ See, e.g., Michael J. Gerhardt, *Why Gridlock Matters*, 88 NOTRE DAME L. REV. 2107, 2118–19 (2013) (advocating restoration of the “talking filibuster,” such that Senators who wanted to continue debate would have to hold the Senate floor); Norman J. Ornstein, *Why the Senate No Longer Works*, AMERICAN (Mar.-Apr. 2008), at 78 (same); Tom Harkin, *Fixing the Filibuster: Restoring Real Democracy in the Senate*, 95 IOWA L. REV. BULL. 67 (2010) (proposing a rule that would gradually decrease the number of votes required for cloture over a period of days, such that a minority could delay but not prevent the end of debate); Jeanne Shaheen, *Gridlock Rules: Why We Need Filibuster Reform in the U.S. Senate*, 50 HARV. J. ON LEGIS. 1, 14–16 (2013) (urging the reversal of the default rule, such that it would take at least forty-one votes to continue debate rather than requiring at least sixty votes to end debate, and permitting cloture votes to be taken at any time); Al Franken & Norman Ornstein, *Make the Filibuster Great Again*, MINNEAPOLIS STARTRIBUNE (Feb. 7, 2021) (same); Benjamin Eidelson, Note, *The Majoritarian Filibuster*, 122 YALE L.J. 980, 1016–18 (2013) (discussing advantages of reducing the cloture threshold from sixty to fifty-five). See also Shaheen, *supra*, at 14–16 (listing these and other possible filibuster reforms); Ian Millhiser, *How Joe Manchin Can Make the Filibuster “More Painful” for the GOP without Eliminating It*, VOX (Mar. 8, 2021) (same).

⁸ See, e.g., Eidelson, *supra* note 7, at 1015–16.

⁹ See, e.g., Klarman, *supra* note 6, at 237; Ezra Klein, *Democrats Need to Get Serious on Statehood for DC and Puerto Rico*, VOX (Oct. 26, 2018).

¹⁰ See DAVID FARIS, IT’S TIME TO FIGHT DIRTY: HOW DEMOCRATS CAN BUILD A LASTING MAJORITY IN AMERICAN POLITICS (2018); Burt Neuborne, *Divide States to Democratize the Senate*, WALL ST. J. (Nov. 19, 2018).

¹¹ See, e.g., Rosenfeld, *supra* note 1; Daniel Lazare, *Abolish the Senate*, JACOBIN MAG. (Dec. 2014).

¹² See, e.g., Orts, *supra* note 1; Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21, 62–82 (1997).

¹³ Under current political conditions, Senate malapportionment systematically favors the Republican Party, so creating new states (regardless of size) that are likely to elect Democratic Senators may partly offset this

and, second, that amending or reinterpreting the Constitution to eliminate equal state representation in the Senate would have to overcome formidable barriers to constitutional change.¹⁴

In this Article, we raise, explore, and defend an alternative (though not mutually exclusive) approach. We contend that the Senate has the power—pursuant to its constitutional authority to “determine the Rules of its Proceedings”¹⁵—to adopt internal rule changes that would go a long way towards democratizing the body, while preserving its basic structure and its more defensible features. Our reform has two components. The first is the familiar proposal to eliminate the current version of the filibuster, so that the support of three-fifths of Senators would no longer be required to proceed to a final vote. The second and more novel element of our proposal is the replacement of the current filibuster rule with an alternative cloture rule that would require, as a precondition for ending debate, the assent of a majority of Senators who collectively represent a larger share of the U.S. population than the Senators who oppose cloture.¹⁶ Furthermore, we would extend this new rule to those Senate votes that are not currently covered by the three-fifths cloture rule, including budget reconciliation and confirmation of executive branch or judicial appointments.

The practical consequence of this rule—which we refer to as a “popular-majoritarian cloture rule”—would be that for the Senate to proceed to final action—such as passing a bill or confirming a nominee—the Senators supporting that action (the “winning coalition”) must *both* (1) constitute a majority of the Senate *and* (2) collectively represent more citizens than the Senators in opposition. Correlatively, a group of Senators could *block* Senate action if that group (the “blocking coalition”) *either* (1) includes a majority of Senators *or* (2) collectively represents more of the population than the Senators who favor the action in question.

In Part I of this Article, we elaborate on what a popular-majoritarian cloture rule would look like. Part II defends such a rule on grounds of democratic theory, explores its practical consequences using examples and data from recent Congresses, and explains why the rule

Republican structural advantage. This does not alter the malapportionment problem directly, but rather compensates (partially) for the present partisan consequences of this malapportionment.

¹⁴ See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 103–04 (2010); MICHAEL TOMASKY, *IF WE CAN KEEP IT: HOW THE REPUBLIC COLLAPSED AND HOW IT MIGHT BE SAVED* 205 (2019); MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE AMERICAN CONSTITUTION* 626–27 (2016); Baker & Dinkin, *supra* note 12, at 68–84; Noah Feldman, *Revamping the Senate is a Fantasy*, BLOOMBERG OPINION (Oct. 10, 2018).

¹⁵ U.S. CONST. art. I, sec. 5, cl. 2.

¹⁶ Others have suggested reforms along these lines, though only in brief online commentaries. See, e.g., Howell E. Jackson, *With Filibuster, the Senate Has Non-Nuclear Options*, THE HILL (Feb. 18, 2021); Scott Winship, *A Proposed Compromise on the Filibuster*, PROGRESSIVE POL’Y INST.: PROGRESSIVE FIX (Feb. 12, 2010), <http://progressivepolicy.org/2010/02/a-proposed-compromise-on-the-filibuster>; Michael Ettlinger, *A Big Filibuster Reform: Making the Senate More Democratic Via the Filibuster*, MEDIUM (Jan. 15, 2021), <https://mettlinger.medium.com/a-big-filibuster-reform-de4af2e7ae91>. See also Eidelson, *supra* note 7, at 1014–15 (noting the possibility of “allow[ing] all and only Senate majorities that represent a majority of the country to invoke cloture,” but dismissing this idea as a “nonstarter” that “too openly defies the internal logic of the [Senate]”).

would be constitutional. Part III turns to the questions of how such a proposal could be adopted and insulated against reversal.

I. A POPULAR-MAJORITARIAN SENATE CLOTURE RULE

Our core argument is that the same basic technique that has given us the modern filibuster—that is, the adoption of procedural rules that give subgroups of the Senate de facto gatekeeping power—can be deployed to make the Senate more democratic. More specifically, the Senate could eliminate the current requirement that three-fifths of Senators must vote in favor of cloture in order to end debate and proceed to a final vote, and replace that rule with an alternative cloture rule under which the Senate may end debate and proceed to a final vote only with the assent of a majority of Senators who collectively represent a larger share of the U.S. population than the Senators in opposition. Such a rule change could take the form of the following revision of Senate Rule XXII, with the new language in italics and deleted language struck through:

2. ... [A]t any time a motion signed by sixteen Senators, to bring to a close the debate upon any measure, motion, other matter pending before the Senate, or the unfinished business, is presented to the Senate, the Presiding Officer, or clerk at the direction of the Presiding Officer, shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a yea-and-nay vote the question:

“Is it the sense of the Senate that debate shall be brought to a close?” And if that question shall be decided in the affirmative by ~~three-fifths~~ *a majority* of the Senators, duly chosen and sworn, *who collectively represent a larger share of the United States population than the Senators duly chosen and sworn who do not vote in favor of cloture,* ~~—except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting—~~ then said measure, motion, or other matter pending before the Senate, or the unfinished business, shall be the unfinished business to the exclusion of all other business until disposed of. *For purposes of determining whether those supporting or opposing cloture represent a larger share of the U.S. population, each Senator shall be deemed to represent one-half of the total population of the State that Senator represents, as determined in the most recent decennial census. In case the Vice President breaks a tie cloture vote, the Vice President shall not count in the calculation of represented population.*

[...]

After no more than thirty hours of consideration of the measure, motion, or other matter on which cloture has been invoked, the Senate shall proceed, without any further debate on any question, to vote on the final disposition thereof.... The thirty hours may be increased by the adoption of a motion, decided without debate,

by ~~a three-fifths~~ an affirmative vote of a *majority* of Senators duly chosen and sworn who collectively represent a larger share of the U.S. population than those voting in the negative....

If this rule change were implemented,¹⁷ then a group of forty-one Senators would not necessarily be able to prevent a matter or motion from coming to a final vote. Rather, a group of Senators who represent a popular majority could do so—regardless of the number of Senators who make up this group. The formal mechanism that would give such a coalition blocking power is exactly the same formal mechanism that enables the current version of the filibuster. Because cloture would also require a simple majority of Senators,¹⁸ and the final vote would be governed by majority rule except on those matters where the Constitution specifies a supermajority threshold, under our proposal a winning coalition in the Senate must *both* include a majority of Senators *and* collectively represent a popular majority. A blocking coalition—that is, a coalition of Senators with sufficient power to prevent the Senate from passing some measure or motion—could include *either* a majority of Senators *or* a group of Senators who collectively represent a popular majority. Table 1 summarizes how the minimum winning and blocking coalitions would differ under simple majority rule, the current filibuster rule, and our popular-majoritarian cloture rule, assuming a full complement of one hundred Senators present and voting.

Table 1: Minimum Winning and Blocking Coalitions Under Different Rules

	Simple Majority Rule	Current Filibuster Rule	Popular-Majoritarian Cloture Rule
Minimum Winning Coalition	Fifty-one Senators (or fifty Senators plus the Vice President)	Sixty Senators	Fifty-one Senators (or fifty Senators plus the Vice President) who collectively represent more of the population than the Senators in opposition.
Minimum Blocking Coalition	Fifty-one Senators (or fifty Senators plus the Vice President)	Forty-one Senators	Fifty-one Senators (or fifty Senators plus the Vice President) <i>OR</i> The smallest group of Senators who collectively represent more of the population than the Senators in support.

Furthermore, we would extend this popular-majority cloture rule to Senate activities currently exempt from the three-fifths cloture rule, such as budget reconciliation and confirmation of executive branch or judicial nominations.¹⁹ Thus, in contrast to other proposals for filibuster reform, our proposal would not make cloture uniformly easier or harder relative to

¹⁷ This rule change could be implemented either through a formal amendment to the written rules, as sketched above, or by the adoption of a new Senate precedent that accomplishes the same thing, a possibility we consider in Part III–A, *see infra* TAN 87.

¹⁸ In cloture votes, as in final-passage votes, the Vice President can break a tie. *See, e.g.,* Jordain Carney, *Pence Ends Filibuster on Brownback Nomination*, THE HILL (Jan. 24, 2018).

¹⁹ For a detailed analysis of the exceptions to the three-fifths cloture rule, see MOLLY E. REYNOLDS, EXCEPTIONS TO THE RULE: THE POLITICS OF FILIBUSTER LIMITATIONS IN THE U.S. SENATE (2017).

the status quo. Rather, cloture on all Senate business would now require the support of a majority of Senators who collectively represent a majority of citizens.

To be sure, the popular-majoritarian cloture rule will require some slightly more complicated arithmetic than the current filibuster rule. Instead of just being able to count to sixty, the Presiding Officer will need to calculate whether the Senators voting in favor collectively represent a larger share of the population than those voting against. But this is nothing a few lines of code or a simple Excel spreadsheet cannot handle, and the calculations could be double-checked quickly in case of any uncertainty. And while this “double majority” voting procedure would be novel for the U.S. Senate, it is not unprecedented. The Council of the European Union, for example, uses a similar voting procedure, without notable logistical problems.²⁰

We note briefly a few additional details of the rule change laid out above, which are included for completeness but are not essential to the core of our proposal.

First, our rule proposed would require that the coalition of Senators invoking cloture (1) constitute a majority of Senators, and (2) collectively represent a popular majority. One might consider a variant that dispenses with the first condition, thus allowing cloture to be invoked by any coalition of Senators who collectively represent a popular majority. These two versions of the rule are unlikely to produce different results in most cases. For one thing, under either rule a majority of Senators would still be required for final passage. For another, because the majority party exercises agenda control, the minority party will rarely be able to force cloture (or want to do so). Because the difference between these two versions of the popular-majoritarian cloture rule would have little practical import, and because allowing a minority of Senators to force cloture raises potential complications and questions that are not central to our core argument, our preferred version of the cloture rule includes the requirement that the coalition invoking cloture include a majority of Senators.

Second, our proposed rule leaves in place the requirements, present under the existing version of Rule XXII, that the cloture threshold is calculated based on the number of Senators duly elected and sworn rather than the number of Senators present and voting, and that the rule is structured such that Senators who are absent or do not vote count as de facto “no” votes. Some have advocated reversing the default, such that the opponents of cloture would have to vote to continue debate.²¹ Our proposal would be compatible with such an

²⁰ Members of the Council of the European Union represent EU Member States. For most proposals considered by the Council, passage requires the support of a “qualified majority,” defined as at least 55 percent of the Member States, which collectively represent at least 65 percent of the aggregate population of the EU. See Consolidated Version of the Treaty on the Functioning of the European Union art. 238(3)(a), July 6, 2016, 2008 O.J. (C 202) 153–54. See also Roger J. Goebel, *Supranational? Federal? Intergovernmental? The Governmental Structure of the European Union after the Treaty of Lisbon*, 20 COLUM. J. EUR. L. 77, 107–09 (2010).

²¹ See Shaheen, *supra* note 6, at 14–16; Franken & Ornstein, *supra* note 6.

alternative, as well as with basing the cloture calculations on Senators present and voting rather than Senators elected and sworn.

Third, our revision eliminates the two-thirds requirement for ending debate on a change to the Senate's written rules. We discuss the process for changing Senate rules more below,²² but for now we note that the popular-majoritarian cloture requirement seems to us sufficient to guard against abusive or overly frequent rule changes. That said, one could adopt the popular-majoritarian cloture rule as a replacement for the current three-fifths supermajority requirement for ordinary Senate business, while preserving the two-thirds supermajority requirement for changes to the written rules. The only consequence that this would have for our proposal is that one of the possible approaches to adopting that proposal, discussed in Part III–A, would no longer be viable.²³

Fourth, the rule as drafted above does not require that the Senators supporting cloture represent an absolute majority of the U.S. population. This is principally because not all of the population is represented in the Senate, given the lack of representation for the District of Columbia and U.S. territories.²⁴ Furthermore, resignations, deaths, or contested elections may leave one or more Senate seats vacant at the time of a given cloture vote. For those reasons, it is possible that neither side of a cloture vote will represent an absolute majority of the population. In such cases we think it makes most sense to allow cloture if the Senators in support represent a larger share of the population than do the Senators in opposition. But one could adopt an alternative rule—requiring that those in favor of cloture represent an absolute majority of the population—without altering the core of our proposal.

Fifth, in calculating the population represented by each Senator, our proposal uses the total population of each state, as determined in the most recent decennial census. An alternative would be to use the population of eligible voters.²⁵ Other options would be to use registered voters or the number of voters who voted for each Senator in the most recent election. Our proposal uses overall state population for two reasons. First, this approach is easier to administer. Second, as a normative matter, we tend to think that elected legislators should be considered to represent all of the people in their constituencies, not just those who can vote, did vote, or voted for the incumbent. But other approaches to determining the

²² See *infra* Part III–A.

²³ See *infra* TAN 116–117.

²⁴ As of the 2010 census, the population of the District of Columbia was 601,723, the population of Puerto Rico was 3,725,789, and the population of the various other U.S. territories (American Samoa, the Northern Mariana Islands, Guam, and the U.S. Virgin Islands), was collectively 375,192. Those approximately 4.7 million people represent a little over 1.5 percent of the 2010 census's total U.S. population count of approximately 308.7 million. That might not seem like much, but it exceeds the population of twenty-seven states. Puerto Rico's population alone is large enough that, if Puerto Rico were a state, it would be more populous than twenty-one existing states. The District of Columbia, though much smaller, has more people than Wyoming.

²⁵ Cf. *Evenwell v. Abbott*, 136 S. Ct. 1120, 1126–27 (2016) (considering whether, under the Equal Protection Clause, states may draw districts to equalized total population across districts, or eligible voter population across districts, and holding that the former is permissible).

relevant represented population would be consistent with the broader democratic spirit of our proposed cloture rule.

Though we have advanced the version of the rule that we would be most inclined to adopt, the five aspects of our proposal just outlined are inessential. The heart of our proposal—which would be compatible with alternative choices with respect to these and other subsidiary issues—is that cloture should require the assent of Senators who collectively represent a popular majority.²⁶ It is to the defense of that central proposition that we now turn.

II. THE CASE FOR A POPULAR-MAJORITARIAN CLOTURE RULE

A. Justifications

Our popular-majoritarian cloture rule is designed to address the two principal undemocratic features of the U.S. Senate: the minority obstruction enabled by the current filibuster rule and the extreme malapportionment arising from the two-Senators-per-state principle. The adverse consequences of these design features have been thoroughly documented by others, so we need not belabor them here.²⁷ Nonetheless, we emphasize a few key points.

²⁶ Although our proposed approach is to build the popular-majoritarian requirement into the cloture rule, we note that there may be other ways to implement something like our proposal. For example, it might be possible to create an additional requirement—layered on top of the existing quorum rule—that in order to proceed to take up or vote on certain matters, the presence of Senators representing a popular majority is required. This alternative, however, may give rise to additional legal complications in light of the express constitutional provision that a (simple) “Majority of each [chamber of Congress] shall constitute a Quorum to do Business.” U.S. CONST. art. I, sec. 5, cl. 1. Additionally, the Senate rules contain provisions prohibiting Senators from being absent without leave and for compelling the attendance of absent Senators, *see* Senate Rule VI, cls. 2 & 4, so if the Senate implemented our popular-majoritarian proposal via a change to quorum requirements, the Senate would likely need to modify these other rules as well.

Another possibility, which goes well beyond our core proposal in terms of making the Senate more democratic, would alter the rule (established by Senate precedent rather than by the written rules) that the Senate Majority Leader has priority in terms of recognition by the Presiding Officer. That priority in recognition is a substantial source of the Majority Leader’s power. It gives the Majority Leader control over what items get on the Senate’s calendar, as well as the power (with only a few exceptions) to prevent most matters from getting a floor vote. There is no inherent reason why priority recognition—and the agenda control that goes with it—has to go to the leader of the party with the largest number of Senators. The rule could be changed so that the Senator who has this power is the one whose party represents a larger share of the population. At least on issues where the parties are relatively unified, this alternative rule of speaking priority would implement something like our popular-majoritarian rule: A question could not reach the Senate floor without the assent of the leader of the party that represents a larger share of the population, though the measure would still require a majority vote of all Senators in order to pass. This change would have consequences that sweep more broadly than our proposed cloture rule reform, however. Additionally, changing the priority recognition rule might not always produce results equivalent to the popular-majoritarian cloture rule, because the questions that the leader of the party representing more people would bring to the floor, and the questions that would get the affirmative votes from Senators who collectively represent a larger share of the population, might not always be the same. For these reasons, we do not pursue the possibility of a change in the recognition rule further here, though we consider the general topic to be understudied and worthy of future inquiry.

²⁷ *See supra* note 1 (citing sources).

First, despite the surprisingly successful efforts to normalize the idea that Senate operates under a default sixty-vote supermajority rule, this is in fact a relatively modern innovation.²⁸ Those who wrote and ratified the U.S. Constitution did not anticipate the emergence of the filibuster—they assumed that the Senate would operate under the principle of majority rule except where the Constitution specifically provided that a supermajority is required.²⁹ And although there are plausible arguments in favor of supermajority voting rules under certain circumstances,³⁰ a de facto sixty-vote requirement for ordinary legislation is excessive and debilitating.³¹ To be sure, as some filibuster apologists argue, the Constitution is designed to make enacting federal legislation difficult, in order to protect the interests of political minorities and guard against the possibility that transitory passions might lead to the hasty passage of ill-considered legislation.³² That is fair so far as it goes, but it cannot provide a justification for the modern filibuster. The Constitution was *also* designed to create a more effective federal government, one capable of addressing national problems,³³ and one that would operate on principles of representative democracy.³⁴ The available evidence indicates that the modern filibuster goes substantially too far in enabling minority parties or factions to cripple the federal legislative process, at the expense of getting things done.³⁵

²⁸ Filibusters have become far more common in the early twenty-first century. *See, e.g.*, BENJAMIN I. PAGE & MARTIN GILENS, *WHAT HAS GONE WRONG AND WHAT WE CAN DO ABOUT IT* 169 fig. 4 (2020); JENTLESON, *supra* note 1. On the normalization of the sixty-vote supermajority requirement for most Senate business, *see*, KOGER, *supra* note 5, at 178; Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 118 (2017); James Fallows, *A Modest Proposal: Call Obstruction What It Is*, ATLANTIC (Oct. 12, 2011); Greg Marx, *Normalizing the Filibuster: The Senate's Peculiar Institution Gets Taken for Granted*, COLUM. JOURNALISM REV. (July 1, 2009).

²⁹ *See, e.g.*, BINDER & SMITH, *supra* note 5, at 29–52; KOGER, *supra* note 5, at 37–95 (2010); Bruhl, *supra* note 1, at 1047–49; Akhil Reed Amar, *Lex Majoris Partis: How the Senate Can End the Filibuster on Any Day by Simple Majority Rule*, 63 DUKE L.J. 1483, 1494 (2014)).

³⁰ *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365 (1999); Michael Peress, *Optimal Supermajority Requirements in a Two-Party System* 71 J. POL. 1379 (2009).

³¹ *See* JENTLESON, *supra* note 1.

³² *See, e.g.*, RICHARD A. ARENBERG & ROBERT B. DOVE, *DEFENDING THE FILIBUSTER: THE SOUL OF THE SENATE* 153–77 (2012). *See also, e.g.*, THE FEDERALIST NO. 62, at 376 (James Madison) (Clinton Rossiter ed., 2003) (“Another advantage accruing from [equal state representation in the Senate is] the additional impediment it must prove against improper acts of legislation. . . . The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions.”).

³³ *See, e.g.*, THE FEDERALIST NO. 45, *supra* note 32, at 285 (James Madison) (“[National government is] essential to the security of the people of America against foreign danger . . . essential to their security against contentions and wars among the different States . . . essential to guard them against those violent and oppressive factions which embitter the blessings of liberty, and against those military establishments which must gradually poison its very fountain . . . essential to the happiness of the people of America.”).

³⁴ *See, e.g.*, THE FEDERALIST NO. 10, *supra* note 32, at 75 (James Madison) (“If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote.”).

³⁵ *See* note 1, *supra* (collecting sources). *See also* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 221–24 (1997) (“[M]inority vetoes, including filibusters, tend to perpetuate the status quo even when the majority would prefer a change, and contribute to legislative outcomes that may not reflect the

In fact, the best justification for the modern filibuster is that it may partially offset the Senate's *other* significant antidemocratic feature, extreme malapportionment. This malapportionment, which results from a combination of each state's entitlement to two Senators and the vast differences in state populations, means that the Senate majority may represent a substantially smaller fraction of the U.S. population than does the Senate minority. The filibuster partly compensates for the minority rule problem that this malapportionment creates. Fifty-one Senators who collectively represent 45 percent of the population cannot impose their will on the forty-nine Senators who collectively represent 55 percent of the population if sixty votes are required to take action. More generally, it is much easier to cobble together a coalition of fifty-one Senators who represent less than half of the population than it is to assemble a group of sixty Senators who represent less than half of the population.³⁶ But addressing the malapportionment problem via the filibuster is at best a kludge, one that does not get at the deeper problem that there is no compelling normative justification for the Senate's extreme malapportionment.³⁷

The standard rationalization for the Senate's malapportionment, besides the fact that it appears to be mandated by the Constitution,³⁸ is the idea that equal state representation safeguards the interests of smaller states, protecting them from being subjugated or disregarded by the larger states.³⁹ A related but slightly different argument is that equal state representation in the Senate is one of the "political safeguards of federalism."⁴⁰ The notion here is that equal state representation makes the Senate more sensitive to the interests of states as such, and thus makes the Senate more likely to rein in the federal government's alleged tendency to undermine state governments' autonomy or displace their authority.⁴¹

preferences of the majority."); Tonja Jacobi, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate*, 47 U.C. DAVIS L. REV. 261, 265 (2013) ("The filibuster has become the central mechanism of gridlock and delay in the U.S. Senate."). Additionally, the legislative inaction induced by the filibuster contributes to the understandable efforts of modern presidential administrations to pursue their policy objectives outside the legislative process. *See, e.g.*, Sanford Levinson & Jack M. Balkin, *Democracy and Dysfunction: An Exchange*, 50 IND. L. REV. 281, 325 (2016) ("The worse Congressional gridlock becomes, the more presidents push the envelope of what they can do within the executive branch . . ."); Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1758 (2015) ("[L]egislative gridlock may create instances in which agencies feel compelled to act on their own initiative, despite recognizing that the regulatory challenges at hand would be better addressed through legislation.").

³⁶ *See* Eidelson, *supra* note 7 (finding that successful filibustering minorities sometimes represent more people than the Senate majorities in favor of the action being obstructed).

³⁷ For this reason, proposals to add more reliably Democratic Senate seats through the creation of more states, while arguably justified as yet another kludge, do not get at this more fundamental issue.

³⁸ U.S. CONST. amend. XVII, cl. 1 (providing that "[t]he Senate of the United States shall be composed of two Senators from each State"); *accord id.* art. I, sec. 3, cl. 1 (same).

³⁹ *See* Richard F. Duncan, *Electoral Rules, the Senate, and Article V: How the Architecture of the Constitution Promotes Federalism and Government by Consensus*, 96 NEB. L. REV. 799, 813–14 (2018); John Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 75–76 (2001).

⁴⁰ *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

⁴¹ *See, e.g.*, Wechsler, *supra* note 40, at 547–48; Duncan, *supra* note 39, at 813.

Unlike the argument that the filibuster advances the Framers' vision of a cumbersome federal law-making process, these claims at least have some historical grounding. The Constitutional Convention's "Great Compromise"—which established a bicameral legislature, with popular representation in the House and equal state representation in the Senate—arose principally to accommodate the demands of a few small states, which threatened to leave the Convention if seats in the new national legislature were apportioned exclusively by population.⁴² We nevertheless find these arguments for Senate malapportionment unconvincing.

First, whatever the dynamics of U.S. politics at the time of the founding, big states versus small states is not a particularly important axis of political division today.⁴³ That is not to say there are never issues on which the shared interests of, say, California, New York, Texas, and Florida might conflict with the shared interests of, say, Wyoming, Vermont, Alaska, and Delaware. But such issues are few and far between, and certainly do not include the most important and fraught controversies addressed by the modern Congress. (Just by way of illustration, in 2017–2018 Senator Ted Cruz (R-TX) and Senator John Barrasso (R-WY) voted together 94 percent of the time, while Senator Diane Feinstein (D-CA) and Senator Patrick Leahy (D-VT) also voted together 94 percent of the time. By contrast, Senators Cruz and Feinstein—from the two most populous states—voted together 42 percent of the time, while Senators Barrasso and Leahy—from the two least-populous states—voted together 37 percent of the time.⁴⁴) Insofar as the Senate's malapportionment works to the advantage of small states, this seems to manifest principally in small states receiving disproportionately more federal money per capita, at the expense of larger states.⁴⁵ This is not what those who warn of the need to protect small states from the depredations of large states presumably have in mind.

As for the political safeguards of federalism argument, it is not clear why malapportionment would favor the interests of states as such, rather than simply favoring the interests of some (smaller) states over the interests of other (larger) states.⁴⁶ Furthermore, the fact that the Senate's malapportionment may lead to some degree of redistribution from large states to small states, coupled with the fact that small states are more numerous, may imply that equal state suffrage in the Senate creates a tendency toward *expanding* federal taxing and

⁴² See KLARMAN, *supra* note 14, at 194–205 (2016); LEVINSON, *supra* note 1, at 62; JACK RAKOVE, ORIGINAL MEANINGS 75–81 (2006).

⁴³ In fact, state size may never have been a particularly important axis of division in U.S. politics. See LEE & OPPENHEIMER, *supra* note 1, at 3.

⁴⁴ ProPublica, "Head to Head: Compare Voting Records," <https://projects.propublica.org/represent/members/compare-votes/116> (last visited Feb. 23, 2021).

⁴⁵ See LEE & OPPENHEIMER, *supra* note 1, at 161–92; Baker & Dinkin, *supra* note 12, at 24–40; Lynn A. Baker, *Constitutional Ambiguities and Originalism: Lessons from the Spending Power*, 103 NW. U. L. REV. 495, 534–36 (2009).

⁴⁶ See Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1071 n.98 (1988).

spending, insofar as doing so disproportionately benefits the more numerous small states.⁴⁷ It is unclear whether a larger federal government is bad for state autonomy, or in some other way might undermine the purported virtues of federalism, but it is hard to characterize this practical consequence as evidence for the operation of “political safeguards of federalism” as that phrase is usually understood.⁴⁸ More generally, we are unaware of any evidence that the equal representation of states in the Senate makes the institution as a whole more sensitive to the interest in state autonomy as such—and indeed the available evidence, such as it is, seems to cut the other way.⁴⁹ In sum, there is a fundamental disconnect between the rhetoric deployed to defend Senate malapportionment—which emphasizes the interests of states generally, and small states in particular—and the actual political dynamics, alignments, and cleavages in the modern U.S. Senate.

Perhaps more importantly, insofar as one is concerned about the possibility that the more populous states might run roughshod over the interests of less populous states, it is crucial to underscore that our proposal does *not* deprive the more numerous smaller states of precisely the same protections against oppressive federal legislation that they currently enjoy. Under our proposal, Senators representing a small number of populous states would not be able to push through decisions opposed by Senators representing a larger number of less populous states, because a majority of Senators would still be required for both cloture and final passage. Our proposal does, however, remedy the inverse problem, which is equally if not more serious: Under a simple majority cloture rule, a slim Senate majority can secure approval of measures that are opposed by Senators who represent substantially more of the U.S. population. Our proposal thus preserves the protection that small states have against large states under the current system, but establishes a symmetrical protection for large states (and, more importantly, for their citizens) against the more numerous small states.

Of course, the traditional response to that latter concern is that the House of Representatives provides the solution. With House seats apportioned by population, the argument goes, House Members will represent a majority of the citizenry, and the bicameralism requirement for enacting legislation ensures that a law cannot pass unless it has the support of legislators who represent a majority of the *states* (in the Senate) and legislators who represent a majority of the *population* (in the House). There are, however, two problems with this argument. First, the Senate is empowered to make many consequential decisions without the House’s involvement—confirmation of presidential nominees being perhaps the most salient example.⁵⁰ We are unaware of any convincing normative justification for empowering legislators who represent only a minority of the population to take actions on these matters

⁴⁷ See LEE & OPPENHEIMER, *supra* note 1, at 161; Misha Tseytlin, Note, *The United States Senate and the Problem of Equal State Suffrage*, 94 GEO. L.J. 859, 878–79 (2006).

⁴⁸ See Daniel Abebe & Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 VAND. L. REV. 723, 758 (2013); Baker, *supra* note 45, at 533; Tseytlin, *supra* note 47, at 879.

⁴⁹ See William H. Riker, *The Senate and American Federalism*, 49 AM. POL. SCI. REV. 452, 455 (1955); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 222–23 (2000).

⁵⁰ See U.S. CONST. art. II, sec. 2, cl. 2.

over the objection of Senators who collectively represent many more people. Second, the House suffers from its own pathologies—including some that the Framers foresaw (such as the possibility that temporary passions may lead to wild and excessive swings after certain elections) and some that they did not (such as partisan gerrymandering).⁵¹ The Senate, for all its faults, is more insulated from these pathologies. The fact that Senators serve six-year staggered terms—with only one-third of Senate seats contested in each election cycle—means that the composition of the Senate is less likely to be affected by transient “shocks” in the political mood of the country, and the variance in ideological center-of-gravity of the Senate is likely to be less than that of the House.⁵² Furthermore, the Senate is largely immune to the partisan gerrymandering that besets House elections, because state boundaries, though not fully immutable, are largely fixed as a practical matter.⁵³ For these reasons, incorporating a majoritarian check within the Senate itself is preferable to relying solely on the House of Representatives to ensure the protection of political majorities against unjust minority rule.

Making the Senate more majoritarian would be justified on grounds of democratic equality alone, but it is especially urgent given that the Senate’s malapportionment exacerbates other systemic biases in U.S. politics. Perhaps most importantly, because the large states disadvantaged by Senate malapportionment are substantially more racially and ethnically diverse than most small states, malapportionment systematically advantages white voters over voters of color.⁵⁴ Thus while the Senate’s malapportionment is defended as a safeguard against a form of oppression that is largely imaginary—the subjugation of small states by large states—in reality this malapportionment exacerbates forms of systemic inequality and injustice that are all too real.⁵⁵

⁵¹ See, e.g., Joseph Bafumi & Michael C. Herron, *Leapfrog Representation and Extremism: A Study of American Voters and Their Members of Congress*, 104 AM. POL. SCI. REV. 519 (2010); Eidelson, *supra* note 7, at 1015–16. A related problem that also diminishes the House as a population-based check on the Senate, in a manner not foreseen by the Framers, is the geographic clustering of politically like-minded citizens in ways that advantage one party over the other. See JONATHAN A. RODDEN, *WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE* (2019) (showing how urban-rural polarization has “created a geographic distribution of partisans that allows Republicans to win seat shares well in excess of their share of the vote,” *id.* at 5, a problem that is exacerbated but not created by gerrymandering).

⁵² See Bafumi & Herron, *supra* note 51, at 520, 535–36.

⁵³ See, e.g., Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 323 (2011) (noting that “[g]errymandering only directly affects House seats ... because Senate ‘districts’ are fixed by unchanging state boundaries”); *Editorial, The Gerrymandered Democrats*, WALL ST. J. (Nov. 5, 2002), at A22 (observing that the House “is now far more insulated from public opinion than is the Senate, because no one has yet found a way to gerrymander a state”). But see Charles Stewart & Barry R. Weingast, *Stacking the Senate, Changing the Nation: Republican Rotten Boroughs, Statehood Politics, and American Political Development*, 6 STUD. AM. POL. DEV. 223, 230–42 (1992) (describing the partisan nature of statehood admissions in the late eighteenth century).

⁵⁴ See Chait, *supra* note 1; David Leonhardt, *The Senate: Affirmative Action for White People*, N.Y. TIMES (Oct. 14, 2018).

⁵⁵ This fact is contingent rather than intrinsic. One could imagine a counterfactual world in which small states were far more diverse than large states and therefore the Senate’s malapportionment served to protect

Given the absence of any convincing normative justification for the Senate's undemocratic character, reform is desperately needed. But why would our proposed solution—establishing a popular-majoritarian cloture rule—be better than the available alternatives, such as simple abolition of the filibuster? The most straightforward answer to that question is that the popular-majoritarian cloture rule has greater democratic legitimacy on its face, because it explicitly connects Senate approval of a measure to support from legislators who collectively represent a majority of the population. But fully evaluating the desirability of such a reform calls for understanding its likely impact as compared with the other most obvious alternatives, including both the existing filibuster rule and simple majority rule. We turn to that analysis next.

B. Consequences

By enhancing the Senate's democratic character, a popular-majoritarian cloture rule would change legislative outcomes. In some instances, this rule would make it easier to act, permitting the Senate to pass legislation or take other consequential action that has the support of Senators who represent a popular majority, even though fewer than sixty Senators support cloture. In other instances, adopting the popular-majoritarian cloture rule would make it harder for the Senate to act, preventing a majority coalition of Senators from pushing through a decision opposed by Senators who represent a popular majority. In short, the popular-majoritarian cloture rule does not uniformly ratchet up or down the difficulty of taking action. Instead, switching from the current filibuster rule to this alternative cloture rule replaces an undemocratic veto point (the sixty-vote cloture requirement) with a more democratic veto point (the requirement that the coalition invoking cloture represent a majority of the population). We illustrate the practical consequences of such a change, first by highlighting a few salient examples from recent Congresses, and then by zooming out to consider our rule's more general impact on which Senator would be pivotal under different possible cloture rules.

It is not hard to identify major pieces of legislation that failed to secure sixty votes for cloture under current Senate rules but that would have easily cleared the bar for cloture if our rule had been in effect. During the Obama Administration, the Senate failed to garner sixty votes to invoke cloture on the DREAM Act, which would have provided a path to citizenship for millions of immigrants who arrived in the United States as children. Cloture motions on the DREAM Act failed twice in 2010, by votes of 56–43 and 55–41.⁵⁶ Under our

racial and ethnic minorities. But that is not our world, and both past history and future demographic trends suggest that more diverse large states and less diverse small states are a stable feature of American politics.

⁵⁶ See U.S. Senate Roll Call Votes 111th Congress—2nd Session, U.S. Senate: Legislation and Records, vote on motion to invoke cloture on the motion to proceed to S. 3454 (Sept. 21, 2010); U.S. Senate Roll Call Votes 111th Congress—2nd Session, U.S. Senate: Legislation and Records, vote on motion to invoke cloture on the motion to concur in the House Amendment to the Senate Amendment No. 3 to H.R. 5281 (Dec. 18, 2010).

rule, those motions would have passed. In the first vote, the Senate majority voting for cloture represented 63 percent of the nation's population; in the second vote, the majority represented just under 61 percent.⁵⁷ This pattern repeated itself for the Manchin Amendment, a modest gun control measure proposed after the 2012 mass shooting at the Sandy Hook elementary school. The Senate failed to invoke cloture by a vote of 54–46,⁵⁸ but the Senators voting in favor of cloture represented more than 62 percent of the national population. Likewise, efforts in 2010 to pass the DISCLOSE Act, which would have mandated greater campaign finance transparency, twice failed to overcome filibusters, with cloture failing by votes of 57–41 and 59–39.⁵⁹ The Senators supporting cloture in those two votes represented over 63 percent and 64 percent of the population, respectively. In each of these examples, a minority of Senators representing only thirty-something percent of the population prevented popular legislation from passing the Senate.

At the same time, had the popular-majoritarian cloture rule been in effect during the Trump Administration, the Senate would likely not have been able to advance certain key pieces of legislation or to confirm President Trump's more controversial appointments. The Tax Cuts and Jobs Act of 2017,⁶⁰ for example, was passed under budget reconciliation—which is exempt from the current filibuster rule—with the support of fifty-one Senators who represented only 43 percent of the population.⁶¹ The popular-majoritarian cloture rule would have enabled the Senators opposed to this legislation to block its passage via a filibuster. The same holds for the three Supreme Court Justices nominated by President Trump. After eliminating the filibuster for Supreme Court appointments, the Senate invoked cloture on each of these three nominations with only slim majorities that represented well under half of the national population: 44 percent for Justice Kavanaugh, 46 percent for Justice Gorsuch, and 47 percent for Justice Barrett.⁶² Moreover, attempts to repeal the Affordable Care Act—which at one point came within a single vote of passing under the budget reconciliation

⁵⁷ All calculations in this section are our own.

⁵⁸ U.S. Senate Roll Call Votes 113th Congress—1st Session, U.S. Senate: Legislation and Records, vote on Manchin Amendment No. 715 (Apr. 17, 2013).

⁵⁹ See U.S. Senate Roll Call Votes 111th Congress—2nd Session, U.S. Senate: Legislation and Records, vote on motion to invoke cloture on the motion to proceed to S.3628 (July 27, 2010); U.S. Senate Roll Call Votes 111th Congress—2nd Session, U.S. Senate: Legislation and Records, vote on motion to invoke cloture on the motion to proceed to S.3628 (upon reconsideration) (Sept. 23, 2010).

⁶⁰ Pub. L. No. 115-97, 131 Stat. 2054 (2017).

⁶¹ U.S. Senate Roll Call Votes 115th Congress—1st Session, U.S. Senate: Legislation and Records, vote on passage of H.R. 1 as amended (Dec. 2, 2017).

⁶² U.S. Senate Roll Call Votes 115th Congress—1st Session, U.S. Senate: Legislation and Records, cloture vote on Justice Gorsuch's nomination (Apr. 6, 2017); U.S. Senate Roll Call Votes 115th Congress—2nd Session, U.S. Senate: Legislation and Records, cloture vote on Justice Kavanaugh's nomination (Oct. 5, 2018); U.S. Senate Roll Call Votes 116th Congress—2nd Session, U.S. Senate: Legislation and Records, cloture vote on Justice Barrett's nomination (Oct. 25, 2020).

process—would have been easily blocked under our rule, given that Senators supporting repeal represented far less than half the population.⁶³

These examples highlight the potential practical consequences of our proposal. We can also characterize the proposal's likely impact on political dynamics and outcomes—in comparison with the three-fifths and simple majority cloture rules—in more general terms. We do this with a stylized spatial model of Senate decision-making, based on a standard approach used by political scientists to analyze how institutional rules affect legislative outcomes.⁶⁴

Suppose that we arrange all one hundred Senators on a traditional left-right axis in order of their political ideology, and that we number them from 1 to 100, with Senator 1 the most liberal Senator and Senator 100 the most conservative. That is obviously a drastic oversimplification, but it is a fair first-cut approximation.⁶⁵ When considering how the Senate would vote on various proposals, we will characterize each proposal as “liberal” or “conservative.” A liberal proposal is one that would move policy outcomes to the left (for example, by making the tax system more progressive, strengthening environmental protection, or confirming a liberal Supreme Court Justice), and a conservative proposal is one that would move policy to the right (for example, by making the tax system more regressive, weakening environmental protection, or appointing a conservative Justice). Given the assumptions of most spatial models, if Senator i favors a given liberal proposal, Senators 1 through $i-1$ (all of whom are more liberal than Senator i) will also favor that proposal; likewise, if Senator i opposes a liberal proposal, Senators $i+1$ through 100 (who are all more conservative than Senator i) will also oppose it. Symmetrically, if Senator i favors a conservative proposal, Senators $i+1$ through 100 will also favor that proposal, while if Senator i opposes a conservative proposal,

⁶³ In the summer of 2017, repeal of the Affordable Care Act fell one vote short of passage in the Senate, on account of a now-iconic “thumbs down” vote by Senator John McCain (R-AZ). See Carl Hulse, *McCain Provides a Dramatic Finale on Health Care: Thumb Down*, N.Y. TIMES (July 28, 2017). If Senator McCain had voted in favor, the repeal bill would have been enacted, given the Republican House and White House. But even if Senator McCain had voted for repeal, the Senators supporting repeal would still have represented less than 44 percent of the population. See U.S. Senate Roll Call Votes 115th Congress—1st Session, U.S. Senate: Legislation and Records, vote on McConnell Amendment No. 667 (July 28, 2017).

⁶⁴ See, e.g., KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* (1998); KENNETH A. SHEPSLE, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS*, 2D ED. (2010); GEORGE TSEBELIS, *VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK* (2002); Thomas Romer & Howard Rosenthal, *Political Resource Allocation, Controlled Agendas, and the Status Quo*, 33 PUB. CHOICE 27 (1978).

⁶⁵ Factor analysis and other statistical techniques demonstrate that although there are many spatial dimensions to Senate roll call voting, the first dimension, usually characterized as a traditional left-right dimension, explains a substantial majority the variance in observed votes, and corresponds to qualitative observations of Senators' ideological orientations. See, e.g., NOLAN MCCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 22 (2006) (noting that the classic liberal-conservative dimension explains 84 percent of all congressional votes since 1789); see also KEITH T. POOLE & HOWARD ROSENTHAL, *CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING* (1997). Nothing in our analysis depends on the assumption that there is only one relevant dimension or that this dimension corresponds to traditional left-right political divisions.

Senators 1 through $i-1$ will also oppose it.⁶⁶ These assumptions imply that any given policy proposal will cleave the Senate into two voting blocs, one on the left and one on the right.

We can then ask which Senator, under various institutional rules, is “pivotal.” For a liberal proposal, the pivotal Senator is the least-liberal Senator whose support guarantees passage of that proposal; for a conservative proposal, the pivotal Senator is the least-conservative Senator whose support guarantees passage. Identifying the pivotal Senator is useful because this is the Senator to whom the majority party’s leadership must make just enough concessions to ensure passage of a bill. (In the context of a confirmation vote, the pivotal Senator is the one whom the President must satisfy to ensure confirmation of a nominee.) The pivotal Senator does not necessarily, or even usually, get her ideal outcome, but the pivotal Senator nevertheless exerts substantial influence because the agenda setter—say, the Senate Majority Leader or the President—must secure the pivotal Senator’s support.⁶⁷

Under simple majority rule, the pivotal Senator is either Senator 50 or Senator 51, depending on how the Vice President would break a tie. We will refer to the pivotal Senator under this voting rule as the “median Senator.”

Under the three-fifths cloture rule, the pivotal Senator depends on whether the proposal is liberal or conservative. For a liberal proposal, Senators 1–60 are required for cloture, and Senator 60 is pivotal; for a conservative proposal, Senators 41–100 are required for cloture, and Senator 41 is pivotal.

Identifying the pivotal Senator under our popular-majoritarian cloture rule is slightly more complicated, because the coalition in support must include a majority of Senators *and* those Senators must collectively represent more of the U.S. population than the Senators in opposition. Let us define Senator x as the “tipping point” Senator with respect to representation of a popular majority. That is, the aggregate population represented by Senators 1 through x exceeds the aggregate population represented by Senators $x+1$ through 100, and the aggregate population represented by Senators x through 100 exceeds the population represented by Senators 1 through $x-1$. For a liberal proposal, the pivotal Senator is either the median Senator or Senator x , whichever is more conservative; for a conservative proposal, the pivotal Senator is either the median Senator or Senator x , whichever is more liberal.

Using this stylized setup, together with a few additional simplifying assumptions,⁶⁸ we can assess how the pivotal Senator—and, thus, bargaining power and likely outcomes—

⁶⁶ If Senator i favors a liberal proposal, it is possible that some Senators to the right of i might also favor it, and if Senator i favors a conservative proposal, some Senators to i ’s left might also support the proposal.

⁶⁷ See KREHBIEL, *supra* note 64; Romer & Rosenthal, *supra* note 64; Jonathan S. Gould, *Rethinking Swing Voters*, 74 VAND. L. REV. 85, 97–112 (2021).

⁶⁸ First, we assume that a Democratic Vice President would vote in favor of a liberal proposal and against a conservative proposal, while a Republican Vice President would vote the opposite way. Thus the median Senator is Senator 50 during a Democratic administration and Senator 51 during a Republican administration. Second, we assume that when Republicans control the Senate, only conservative proposals are considered, and

would differ under different Senate cloture rules. We focus on the 2001–2021 period. For each Congress during this time (the 107th through 116th Congresses), we identify the pivotal Senator and his or her estimated ideology under each of three voting systems: simple majority rule, the current three-fifths cloture rule, and our popular-majoritarian cloture rule. To estimate Senators' ideology, we follow the common practice of using DW-NOMINATE scores, which are based on roll call votes. For state populations, we use 2000 and 2010 census data. If there was turnover within a single Congress, we use the hundred Senators who served the longest during that Congress, except when the change in Senate personnel affects the identity of the pivotal Senator under any of the three voting systems considered. This occurred twice, in the 107th Congress (when Vermont Senator Jim Jeffords left the Republican Party, thus handing Senate control to the Democrats) and in the 111th Congress (when Republican Scott Brown's victory in the special election to fill Democrat Ted Kennedy's Massachusetts Senate seat deprived the Democrats of their sixty-Senator supermajority). We split the 107th and 111th Congresses into separate periods to reflect these changes. For interested readers, a brief Appendix discusses these and other methodological choices in greater detail.

The first column of Table 2 lists the Congress (or partial Congress) and the corresponding years. The second and third columns display, respectively, the party in control of the White House (with the President's initials in parentheses), and the Party in control of the Senate (with the party split in parentheses). The final three columns present the pivotal Senator under each of the three voting rules under consideration. Each cell in these three columns includes: (1) at the top, the name and party affiliation of the pivotal Senator; (2) below in boldface, the pivotal Senator's ideology score (where lower values indicate more liberal voting records and higher values indicate more conservative voting records⁶⁹); (3) in parentheses, that Senator's ideological position in the set of one hundred Senators in that Congress (where Senator #1 and Senator #100 are, respectively, the most liberal and most conservative Senators in that Congress); and (4) in italics at the bottom, the percentage of the population that is represented by a minimum winning coalition (that is, the smallest winning coalition that includes the pivotal Senator) under the relevant voting rule.

that under Democratic Senate control only liberal proposals are considered. These assumptions imply that when Democrats control the Senate, Senator 60 is the pivotal under the current filibuster rule, while under Republican Senate control the pivotal Senator under the current filibuster rule is Senator 41.

In assuming that the party that controls the Senate determines what proposals are considered, we are implicitly focusing on *legislative* proposals. For confirmation of presidential nominations, the proposer would be the President rather than the Senate majority party leadership. With a Democratic President, we can assume that nominees will (usually) move the relevant court or department in a more liberal direction, while a Republican President's nominees would typically move the court or department in a more conservative direction. For simplicity, we focus on legislative proposals. The analysis would be similar for nominations except that the President, rather than the Senate majority party leadership, would make the proposal.

⁶⁹ DW-NOMINATE scores range between -1 and +1. In our sample, the Senator with the most liberal voting record is Elizabeth Warren (D-MA), with a DW-NOMINATE score of -0.773, and the Senator with the most conservative voting record is Mike Lee (R-UT), with a DW-NOMINATE score of 0.917.

Table 2: Pivotal Senator Under Different Voting Rules

Year/ Congress	White House	Senate	Pivotal Senator for passing legislation		
			Majority rule	Three-fifths cloture	Popular-majoritarian
2001 (107 th Congress)	Rep (GWB)	Rep (50-50)	Jim Jeffords (R-VT) 0.014 (#51) 43.2%	Max Baucus (D-MT) -0.212 (#41) 50.7%	Joe Lieberman (D-CT) -0.205 (#42) 50.5%
2001–03 (107 th Congress)	Rep (GWB)	Dem (51-49)	Lincoln Chafee (R-RI) 0.003 (#51) 56.8%	Pete Domenici (R-NM) 0.257 (#60) 64.8%	Lincoln Chafee (R-RI) 0.003 (#51) 56.8%
2003–05 (108 th Congress)	Rep (GWB)	Rep (51-49)	Olympia Snowe (R-ME) 0.091 (#51) 43.9%	Mary Landrieu (D-LA) -0.203 (#41) 53.1%	Bill Nelson (D-FL) -0.193 (#43) 51.8%
2005–07 (109 th Congress)	Rep (GWB)	Rep (55-45)	Gordon Smith (R-OR) 0.192 (#51) 45.4%	Bill Nelson (D-FL) -0.193 (#41) 54.0%	Evan Bayh (D-IN) -0.158 (#44) 50.5%
2007–09 (110 th Congress)	Rep (GWB)	Dem (51-49)	Ben Nelson (D-NE) -0.030 (#51) 57.7%	Pete Domenici (R-NM) 0.257 (#60) 64.4%	Ben Nelson (D-NE) -0.030 (#51) 57.7%
2009–10 (111 th Congress)	Dem (BHO)	Dem (60-40)	Mary Landrieu (D-LA) -0.203 (#50) 55.2%	Ben Nelson (D-NE) -0.030 (#60) 65.5%	Mary Landrieu (D-LA) -0.203 (#50) 55.2%
2010–11 (111 th Congress)	Dem (BHO)	Dem (59-41)	Kay Hagan (D-NC) -0.202 (#50) 55.5%	Olympia Snowe (R-ME) 0.091 (#60) 64.5%	Kay Hagan (D-NC) -0.202 (#50) 55.5%
2011–13 (112 th Congress)	Dem (BHO)	Dem (51-49)	Jim Webb (D-VA) -0.169 (#50) 54.7%	Richard Lugar (R-IN) 0.304 (#60) 61.5%	Jim Webb (D-VA) -0.169 (#50) 54.7%
2013–15 (113 th Congress)	Dem (BHO)	Dem (55-45)	Tom Carper (D-DE) -0.176 (#50) 55.7%	Lamar Alexander (R-TN) 0.324 (#60) 62.3%	Tom Carper (D-DE) -0.176 (#50) 55.7%
2015–17 (114 th Congress)	Dem (BHO)	Rep (54-46)	Mark Kirk (R-IL) 0.274 (#50) 45.8%	Tom Carper (D-DE) -0.176 (#41) 49.2%	Bill Nelson (D-FL) -0.193 (#40) 52.3%
2017–19 (115 th Congress)	Rep (DJT)	Rep (51-49)	Shelly Moore Capito (R-WV) 0.263 (#51) 43.8%	Mark Warner (D-VA) -0.202 (#41) 51.3%	Mark Warner (D-VA) -0.202 (#41) 51.3%
2019–21 (116 th Congress)	Rep (DJT)	Rep (53-47)	Lamar Alexander (R-TN) 0.324 (#51) 46.5%	John Tester (D-MT) -0.216 (#41) 51.0%	Mark Warner (D-VA) -0.202 (#40) 50.9%

Table 2, though obviously a simplification, helps illustrate a number of important points about how different voting rules are likely to affect Senate outcomes. First, the table provides straightforward corroboration of the well-known problem that the current filibuster rule induces gridlock. If the status quo lies somewhere in between the most-preferred outcomes of Senators 41 and 60, then under the three-fifths cloture rule no change is possible, as neither a liberal change nor a conservative change could garner sixty votes to end debate.⁷⁰ In the six periods of Republican Senate control listed in Table 2, the pivotal Senator under the three-fifths cloture rule has an ideology score well to the left (-0.171 on average), while during the six periods of Democratic control, the pivotal Senator under the three-fifths cloture rule is well to the right (with an average ideology score of 0.172). If the minority party is willing to exercise its blocking power under the filibuster rule, it is very difficult to take action on any controversial matter when this cloture rule is in effect.

Eliminating the filibuster would ameliorate this gridlock problem. But would it make the Senate more democratic, in the majoritarian-representation sense? Table 2 shows that replacing the current filibuster rule with a simple majority cloture rule would make the Senate more democratic in some cases but not always. In six of the twelve time periods covered, the Senate majority party also represents a popular majority (in all six of these cases, this is the Democratic Party). But in the other six periods, the Senate majority party (in all six instances the Republican Party) represents well under half of the population (ranging between 43.2 and 46.5 percent). In most of these periods of Republican control, the three-fifths cloture rule actually comes fairly close to a requirement that a minimum winning coalition represents a simple majority of the population: During the six periods of Republican control, the minimum winning coalition under the three-fifths cloture rule represents between 49.2 and 54 percent of the population. By contrast, in those periods where the majority party also represents a popular majority (that is, during periods of Democratic control), the minimum winning coalition under simple majority rule represents well over half the population (ranging from 54.7 to 57.7 percent).⁷¹ Note a striking thing here: During periods of Republican Senate control, the sixty-Senator supermajority coalition that the Republican leadership would need to break a filibuster consistently represents *less* of the U.S. population than do the fifty or fifty-one Senators that Democratic Senate leadership would need to take action under simple majority rule. More generally, at least for the periods considered in Table 2, replacing the existing filibuster with simple majority cloture would make the Senate more democratic (in the majoritarian-representation sense) during the six periods of Democratic control, but would make the Senate less democratic during the six periods of Republican control.

Table 2 also shows that eliminating the filibuster—that is, replacing the three-fifths cloture rule with a simple majority cloture rule—would shift the pivotal Senator’s ideology to

⁷⁰ Political scientists refer to this as the “gridlock region.” See KREHBIEL, *supra* note 64.

⁷¹ Under the three-fifths cloture rule, the Democratic leadership needed to put together a coalition representing over 60 percent of the population (between 61.5 and 65.5 percent in our sample period) to break a Republican filibuster.

the left during periods of Democratic Senate control and to the right during periods of Republican Senate control. That is unsurprising. But notably, at least over the two decades under consideration here, the latter effect is larger. As a result, if one averages across the twelve periods covered in Table 2, a change from the three-fifths cloture rule to a simple majority cloture rule shifts the pivotal Senator's ideology score to the right by approximately 0.032 points.⁷² Of course, one must be cautious about placing too much confidence in the exact values of DW-NOMINATE scores. Nonetheless, the above result is striking, not least because the Republican Party consistently represented fewer people throughout these two decades. In light of this, the fact that using majority rule rather than the three-fifths rule for cloture would shift the pivotal Senator's ideology to the right ought to give some pause to those who advocate democratizing the Senate by abolishing the filibuster.⁷³

What about the popular-majoritarian cloture alternative? During periods of Democratic control, a move from the three-fifths cloture rule to the popular-majoritarian cloture rule

⁷² It might be problematic to give the four partial Congresses (the separate portions of the 107th and 111th Congresses) equal weight in a simple average, especially since the 111th Congress was under Democratic control throughout. If one drops these four periods and averages across the other eight, the finding is in the same direction, though larger: A shift from the three-fifths cloture rule to simple majority rule would shift the pivotal Senator's ideology score to the right by 0.109 points, on average.

⁷³ These results echo the more detailed analysis of actual cloture votes conducted by Eidelson, *supra* note 7, which finds that the filibuster is sometimes a majoritarian rather than counter-majoritarian device.

Advocates of abolishing the filibuster have a potential rejoinder to this concern: Under current political conditions, the filibuster benefits Republicans far more than the Democrats because of the asymmetry in the parties' interests in passing legislation. On this account, while the Democrats have a laundry list of legislative priorities (in areas such as environmental protection, immigration, voting rights, civil rights, and gun control) that are routinely blocked by Republican filibusters, Republicans do not have that many pieces of federal legislation that they are anxious to enact or repeal, and so Democratic filibusters do not hurt the larger Republican political agenda as much. Furthermore, the argument continues, the items that the Republicans care most about, such as judicial appointments and tax cuts, are already exempt from the three-fifths cloture rule. So, even if the filibuster creates a formally symmetric power for each party to block the other party's legislative agenda, in practice this power has profoundly asymmetric consequences. See Jonathan S. Gould & David E. Pozen, *Structural Bias in Structural Constitutional Law*, N.Y.U. L. REV. (forthcoming 2022) (on file with authors), at 25–27.

This is a fair point. A complete assessment of the impact of various cloture rules would need to take into account not only how these rules affect the identity and ideology of the pivotal Senator (and, thus, likely outcomes), but also how much those differences in outcome matter to the parties and their constituents. And the evidence does indicate an asymmetry in how much Democrats and Republicans lose from Senate gridlock. Nevertheless, the claim that the Republican Party does not have much of a legislative agenda (beyond tax cuts and other measures that can be adopted, at least on a temporary basis, through budget reconciliation) is likely overstated. As Eidelson, *supra* note 7, documents, there have actually been quite a few instances in which Democrats were able to filibuster Republican-sponsored legislation on a range of important topics. And while those examples are from a somewhat earlier period, more recent commentators have noted a range of legislative initiatives that a future Republican Senate might be able to push through if unconstrained by the filibuster. See, e.g., Ruth Marcus, *Opinion: Kill the Filibuster – and Reap What You Sow*, WASH. POST (Mar. 19, 2021) (considering a world in which Republicans retake the presidency and secure slim majorities in the House and Senate, and predicting that in the absence of the filibuster, the consequences might include the passage of legislation that would require voter ID in all federal elections and restrict mail-in voting; repeal of the assault weapons ban and establish a nationwide right to carry concealed weapons; ban abortion after the 20th week of pregnancy and defund Planned Parenthood; protect employees from having to pay union dues; and permanently repeal the estate tax).

would have exactly the same impact as abolishing the filibuster altogether. The reason is simple: Democrats represented a popular majority in every period covered in Table 2. During these periods of Democratic control, moving from the three-fifths cloture rule to the popular-majoritarian cloture rule would move the pivotal Senator's ideology score to the left by approximately 0.161 points on average.⁷⁴

The effects of replacing the current filibuster rule with the popular-majoritarian cloture rule are different during periods of Republican control, because the Republican Party never represented a popular majority during the timeframe covered in Table 2. During periods of Republican control, replacing the three-fifths cloture rule with the popular-majoritarian cloture rule would *usually* (in four out of the six periods covered in Table 2) shift the pivotal Senator's ideology to the right.⁷⁵ In most of these periods, the number of additional votes that the Republican leadership would need for a winning coalition under the popular-majoritarian cloture rule is smaller than the number of additional votes the leadership would need under the three-fifths rule. This suggests that when Republicans control the Senate, they are usually in a better position to advance their agenda under the popular-majoritarian cloture rule than under the three-fifths cloture rule.

Crucially, though, under a popular-majoritarian cloture rule the Republican Party would have to garner significantly more votes than the party would need if the filibuster were eliminated outright. To get to popular majority representation during the six periods of Republican Senate control covered in Table 2, the Republican leadership would need to pick up somewhere between seven and eleven more votes than would be needed under simple majority cloture. As a consequence, shifting from simple-majority cloture (as is currently used for budget reconciliation and judicial appointments, among other things) to popular-majoritarian cloture would shift the pivotal Senator's ideology score to the left by somewhere between 0.219 and 0.526 points. Given that these scores are on a scale that ranges between -1 and +1, this is a substantial difference. Averaging this leftward movement in the pivotal voter's ideology during periods of Republican control (0.385 points) with the lack of any change during the periods of Democratic control yields the result that, for our sample, the pivotal Senator's ideology score under the popular-majoritarian cloture rule is, on average, approximately 0.193 points to the left of where it would be under simple majority rule.⁷⁶

⁷⁴ A difference of 0.161 points is just slightly smaller than the difference between the DW-NOMINATE scores of Kyrsten Sinema (D-AZ) (whose ideology score is -0.101) and Diane Feinstein (D-CA) whose score is -0.267). Dropping the four periods from the 107th and 111th Congresses changes this only slightly, to a leftward shift of approximately 0.152 points on average.

⁷⁵ Interestingly, though, in one of the periods covered by Table 2 (the 115th Congress) the pivotal Senator would not change, and in another (the 114th Congress) the pivotal Senator is slightly more liberal under the popular-majoritarian cloture rule than under the three-fifths cloture rule. In that Senate, the sixty most conservative Senators (the fifty-four Republicans plus five Democrats and one independent from relatively small states) represent only 49.2 percent of the population.

⁷⁶ This difference of 0.193 on the DW-NOMINATE scale is just about the same as the difference in the ideology scores of Lindsey Graham (R-SC) (who has a score of 0.405) and Lisa Murkowski (R-AK) (whose

In sum, Table 2 provides straightforward corroboration of the problems with both simple majority rule and the current filibuster rule, as well as suggesting a few perhaps more surprising results. The current filibuster rule can prevent a party from carrying out its agenda, even if that party both has more Senate seats and represents a larger share of the population than does the other party. Abolishing the filibuster solves that problem, but exacerbates the inverse problem: When the Senate's majority party represents a minority of the population, eliminating the filibuster does not improve the democratic legitimacy of Senate outcomes, and will often make things worse. Our proposed alternative—a popular-majoritarian cloture rule—makes the Senate more democratic than either of the other two alternatives. When the Senate majority party also represents a popular majority, that party can pursue its agenda largely unimpeded by minority obstruction. (Because cloture and final passage still require a majority of Senators, the minimum winning coalition may still represent a supermajority of the population, though one closer to 56 percent rather than 64 percent.⁷⁷) In contrast, when the Senate majority party represents only a minority of the population, the popular-majoritarian cloture rule will compel this party to attract a degree of bipartisan support for its more controversial initiatives, though in most cases the amount of bipartisan support needed will be less than what would be required under the current filibuster rule. Under simple majority rule, by contrast, such a party could force through measures that have the support of Senators who, despite holding more seats in the Senate, represent only about 45 percent of the population on average.⁷⁸

Our argument in favor of the popular-majoritarian cloture rule boils down to the view that a system in which the winning coalition represents a larger share of the population is presumptively more legitimate, in both the moral and sociological senses, than a system that permits either minority obstructionism or minority rule.⁷⁹ The popular-majoritarian cloture rule, like other majoritarian mechanisms, also creates desirable incentives for parties to craft policy proposals with broader appeal and more widely distributed benefits.⁸⁰ To be sure, the popular-majoritarian cloture rule does not change the fact that no measure can pass without the support of a majority of Senators. This means that citizens of less populous states would retain a degree of disproportionate power, for better or worse. But in the main, the popular-

score is 0.212). The 0.193 difference is a bit larger than the difference in the ideology scores of Susan Collins (R-ME) (0.114) and Joe Manchin (D-WV) (−0.055), and a bit smaller than the difference in scores between Collins and Kyrsten Sinema (D-AZ) (−0.101).

⁷⁷ Of the six periods of Democratic Senate control covered in Table 2, the minimum winning coalition under the three-fifths cloture rule represented 63.8 percent of the population on average, while the minimum winning coalition under the popular-majoritarian cloture rule (or, equivalently, simple majority rule) during these periods represented 55.9 percent of the population on average.

⁷⁸ Over the six periods of Republican Senate control covered in Table 2, the minimum winning coalition under simple majority rule represented approximately 44.8 percent of the population on average.

⁷⁹ For a useful general discussion of these different concepts of legitimacy, as well as the related but distinct concept of legal legitimacy, see Richard H Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–1801 (2005).

⁸⁰ See BRUCE BUENO DE MESQUITA ET AL., *THE LOGIC OF POLITICAL SURVIVAL* (2003); Mancur Olson, *Dictatorship, Democracy and Development*, 87 AM. POL. SCI. REV. 567 (1993).

majoritarian cloture rule would make the U.S. Senate a substantially more democratic institution.

One more point bears mention here: As the foregoing discussion makes clear, under current political conditions our proposal would not only make the Senate a more “small-d” democratic institution, but it would also make the Senate a more “big-D” Democratic institution, in that a popular-majoritarian cloture rule would make it easier for today’s Democratic Party to enact its agenda, and more difficult for today’s Republican Party to do the same.⁸¹ We recognize that many readers may be inclined to either embrace or condemn our proposal based on these short-term partisan consequences. But our argument for a popular-majoritarian cloture rule is grounded principally in small-d democratic virtues that we hope would be attractive to those across the political spectrum. That those democratic virtues happen to interact with today’s partisan coalitions in a way that benefits the Democratic Party is contingent—a feature of contemporary political geography—rather than intrinsic.⁸² Furthermore, the fact that Democratic Senators consistently represent more of the population than do Republican Senators is at least in part a consequence of the existing rules, not an exogenous and immutable feature of American politics. The current rules mean that Republicans can often achieve a Senate majority, and can almost always secure enough seats to filibuster Democratic proposals, while appealing to only a minority of the population. If the Senate were to operate under a different and more small-d democratic cloture rule, the Republican Party would have much stronger incentives to appeal to voters in more populous states, even if doing so might require moving away from positions favored by the party’s more extreme donors and activists. This adjustment, in turn, might force Democratic Senators in now-safe states to alter their own positions in order to compete, possibly by pivoting more toward the center. Thus the partisan consequences of adopting a popular-majoritarian cloture rule, while unmistakable in the short term, are much more complicated in the longer term.

C. Constitutionality

Would a rule change along the lines we propose be constitutional? We think that it would, for the simple reason that the Rules of Proceedings Clause gives each chamber of Congress broad latitude to fashion its own rules—including rules that lead to unequal influence among legislators. Still, there is a plausible constitutional objection that a population-based voting scheme, of the sort our proposal implements for cloture votes, contravenes one or both of

⁸¹ See, e.g., John D. Griffin, *Senate Apportionment as a Source of Political Inequality*, 31 LEG. STUD. Q. 405, 420 (2006) (“[T]he residents of states with less-than-average voting weight [in the Senate] ... tend to be more liberal and to identify with and vote for the candidates of the Democratic Party.”); Colin McAuliffe, *The Senate Is an Irredeemable Institution*, DATA FOR PROGRESS 2 (Dec. 17, 2019) (noting that “[s]mall-population states are modestly more Republican” and that “states with smaller populations tend to be whiter (the outlier being Hawaii), have lower levels of immigration, and have fewer residents who do not speak English”).

⁸² Cf. Gould & Pozen, *supra* note 73, at 48 (documenting the ways in which partisan biases in constitutional design, including biases arising from the malapportionment of the Senate, are “co-produced by institutions and politics”).

two constitutional provisions. First, the Seventeenth Amendment, which mimics the language of Article I, specifies that “[t]he Senate of the United States shall be composed of two Senators from each state ... and each Senator shall have one vote.”⁸³ Second, Article V provides that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”⁸⁴ Under our proposal, in determining whether a cloture motion carries, the vote of a Senator from a populous state—say, California or Texas—has more impact on the outcome than the vote of a Senator from a small state, such as Vermont or Wyoming. Thus, one could argue, our proposal violates the one-Senator-one-vote clause of the Seventeenth Amendment, the equal state suffrage clause of Article V, or both.⁸⁵

The easier of two objections to rebut is the one based on Article V’s equal suffrage clause. That clause is best understood not as imposing a general substantive guarantee of equality of state influence or voting power in the Senate, but rather as entrenching Article I’s requirement of two Senators per state against future change via Article V’s constitutional amendment process. The placement of the equal suffrage provision—not in Article I, but as a proviso in Article V listing three topics on which amendments are not permitted⁸⁶—supports this reading. Further, the use of the term “depriving” indicates that this clause does not create a new entitlement beyond the equal suffrage guaranteed elsewhere in the Constitution. The historical materials corroborate that this is indeed what the Framers intended,⁸⁷ and the judicial precedent, though admittedly sparse and not directly on point, appears to endorse the view that Article V’s equal suffrage clause “constitutes a limitation upon the power of amendment,” rather than providing an additional substantive guarantee.⁸⁸

⁸³ U.S. CONST. amend. XVII; see also *id.* art. I, sec. 3, cl. 1.

⁸⁴ U.S. CONST. art. V.

⁸⁵ See Eidelson, *supra* note 7, at 1015. One might also suggest, along similar lines, that a cloture system that accounted for state population would be in tension with the principle, emphasized in the context of the Supreme Court’s Voting Rights Act (VRA) decisions in *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) and *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), that “all states enjoy equal sovereignty,” *id.* at 2618; see also *Northwest Austin* at 203. The VRA cases, however, address a different issue, concerning a statute that targets *particular* states. If the popular-majoritarian cloture rule does not offend the Seventeenth Amendment or Article V, it is hard to see why it might nonetheless be unconstitutional in light of the “equal sovereignty” language in *Northwest Austin* and *Shelby County*. That said, we acknowledge that the Court’s concern for equal treatment of states in other contexts might inform its assessment of the Seventeenth Amendment and Article V issues, if the Court were to adjudicate those claims on the merits.

⁸⁶ U.S. CONST. art. V. (describing the process for setting out amendments but ending with the following: “provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate”).

⁸⁷ See, e.g., Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 719–22 (1981); Paul J. Scheips, *Significance and Adoption of Article V of the Constitution*, 26 NOTRE DAME L. REV. 46, 58–60 (1950).

⁸⁸ *Barry v. U.S. ex rel. Cunningham*, 279 U.S. 597, 615–16 (1929). *Barry* rejected a claim that the refusal to seat a Senator during a pending investigation violated the Article V equal suffrage clause. The Court held that this clause “has nothing to do” with such a situation, because “[t]he temporary deprivation of equal representation which results from the refusal of the Senate to seat a member pending inquiry as to his election or

The Seventeenth Amendment's requirement that "each Senator shall have one vote" poses a more significant challenge, but not an insurmountable one. There are two plausible ways to read the one-Senator-one-vote clause. First, this guarantee of equal voting power could be read narrowly to apply only to votes on final action in the exercise of one of the Senate's constitutional powers, such as passing a bill,⁸⁹ giving consent to a presidential nominee,⁹⁰ approving a treaty,⁹¹ or rendering a verdict in an impeachment trial.⁹² Under this approach, the system used for votes on agenda-setting and other procedural matters are left to the Senate's discretion under the Rules of Proceedings Clause. Alternatively, the one-Senator-one-vote clause could be interpreted broadly to mandate that Senators have equal voting power in all votes taken in the Senate, including not only votes on final passage but also in all prior procedural or agenda-setting votes. Though reasonable arguments could be made for both readings, we find that the former, narrower reading is more appropriate.

First, the narrower reading parallels, and harmonizes with, a standard defense of the constitutionality of the current filibuster rule. Some critics of the filibuster have suggested that the supermajority cloture rule is unconstitutional because the text and structure of the Constitution require that the Senate decide matters by simple majority rule.⁹³ The standard response to this objection is that the Rules of Proceedings Clause gives the Senate broad discretion to fashion its rules for whether and how to take up a question—including, as relevant here, the rules on when debate on a question should end. Thus, the argument continues, even if one stipulates that the Constitution requires that the passage of legislation or

qualifications is the necessary consequence of the exercise of a constitutional power, and no more deprives the state of its 'equal suffrage' in the constitutional sense than would a vote of the Senate vacating the seat of a sitting member or a vote of expulsion." *Id.* at 616. *Accord* *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 348 (1855) (describing the equal suffrage requirement as a "permanent and unalterable exceptions to the power of amendment"); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 621 (1895) ("The constitution ordains affirmatively that each state shall have two members of that body, and negatively that no state shall by amendment be deprived of its equal suffrage in the senate without its consent.") None of these cases involves anything as ambitious as the rule change we propose, but these cases do, we think, recognize that the better reading of Article V is that it creates no new substantive guarantee of state equality, but rather exempts the constitutional guarantee of state equality in Senate representation from the possibility of repeal through constitutional amendment.

⁸⁹ U.S. CONST. art. I, sec. 7.

⁹⁰ *Id.* art. II, sec. 2.

⁹¹ *Id.*

⁹² *Id.* art. I, sec. 3.

⁹³ See, e.g., Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003 (2011); Dan T. Coenen, *The Filibuster and the Framing: Why the Cloture Rule Is Unconstitutional and What to Do About It*, 55 B.C. L. REV. 39 (2014); Burt Neuborne, *One-State/Two-Votes: Do Supermajority Senate Voting Rules Violate the Article V Guarantee of Equal State Suffrage?*, 10 STAN. J. CIV. RTS. & CIV. LIBERTIES 27 (2014); Michael J. Teter, *Equality Among Equals: Is the Senate Cloture Rule Unconstitutional?*, 94 MARQ. L. REV. 547 (2010). This line of attack should be distinguished from the related but distinct argument that the *entrenchment* of the filibuster, by making proposed changes to the cloture rule themselves subject to filibuster, is unconstitutional. See Fisk & Chemerinsky, *supra* note 35; John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J.L. & POL. 505 (2004). Our focus in the main text is on the argument that the three-fifths cloture rule is itself unconstitutional.

other final Senate action be determined by a simple majority vote,⁹⁴ the three-fifths cloture rule is constitutional because it does not affect the procedure for *final votes*. Rather, Rule XXII is constitutionally permissible as a procedural rule that determines when a given bill or other matter can *proceed* to a final vote—or, to be more technically accurate, when debate on the matter must end even if some Senators want to keep the debate going.⁹⁵ The same argument can support reading the popular-majoritarian cloture rule as consistent with the one-Senator-one-vote clause. If we accept that the Constitution’s (implicit) requirement of majority rule extends only to votes on final passage, the (explicit) requirement that each Senator have one vote should be so limited as well.⁹⁶ Like the current filibuster rule, the popular-majoritarian cloture rule concerns the Senate’s internal rules for when debate must end; any final vote on

⁹⁴ Although the Constitution does not say explicitly that final votes must be governed by simple majority rule except where the Constitution expressly provides otherwise, many scholars have persuasively argued that this is the reading that is more faithful to both the structure and original understanding of the document. See Bruce Ackerman et al, *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539 (1995); Dan T. Coenen, *The Originalist Case Against Congressional Supermajority Voting Rules*, 106 NW. U. L. REV. 1091 (2012); Coenen, *supra* note 93, at 47–56; Amar, *supra* note 29, at 1492–93; Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73 (1996); Susan Low Bloch, *Congressional Self-Discipline: The Constitutionality of Supermajority Rules*, 14 CONST. COMMENT. 1 (1997). And the Supreme Court appeared to adopt this view over a century ago. See *Ballin v. United States*, 144 U.S. 1, 6 (1892) (“[T]he general rule for all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations.... No such limitation is found in the Federal Constitution, and therefore the general law of such bodies obtains.”). But see John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483 (1995) (arguing that chambers of Congress have the authority, pursuant to the Rules of Proceedings Clause, to adopt supermajority voting rules for the passage of ordinary legislation, so long as those supermajority rules can themselves be changed by a simple majority vote); Robert S. Leach, *House Rule XXI and an Argument Against a Constitutional Requirement for Majority Rule in Congress*, 44 UCLA L. REV. 1253 (1997) (same).

⁹⁵ See Virginia A. Seitz & Joseph R. Guerra, *A Constitutional Defense of Entrenched Senate Rules Governing Debate*, 20 J.L. & POL. 1 (2004); Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445 (2004); Rubenfeld, *supra* note 94, at 87–88. See also Fisk & Chemerinsky, *supra* note 35 (arguing that although the provision of Rule XXII that requires a de facto two-thirds majority to change the cloture rule is unconstitutional, the filibuster itself is not).

⁹⁶ See *supra* note 95. As noted above, some scholars contest the claim that the Constitution in fact imposes any such requirement, at least so long as any supermajority rules adopted for final action can themselves be changed via simple majority rule. See McGinnis & Rappaport, *supra* note 94; Leach, *supra* note 94. We are more persuaded by the argument that the Constitution clearly, though implicitly, requires that votes on final action are governed by simple majority rule. If that is correct, and if we stipulate that the current filibuster is indeed constitutional, then the most natural implication would be that the default constitutional requirement that decisions be taken by simple majority rule does not apply to cloture votes.

Others might accept the view that the Constitution requires that final votes be governed by simple majority rule but argue that because this requirement is implied rather than explicitly stated in the constitutional text, this requirement can be plausibly limited to final votes, whereas the express constitutional requirement that each Senator has one vote must apply to *all* votes. While one could certainly draw this distinction, this seems to us to be begging the question. The issue is whether the “each Senator shall have one vote” language applies only to final votes or to procedural votes. If we stipulate that the Constitution requires simple majority rule for final passage but not for procedural votes, this establishes that certain constitutional voting requirements apply to the former but not to the latter. And this justifies (though does not require) similarly limiting other constitutional voting requirements, which do not by their plain terms establish their scope of application.

a matter before the Senate would still be governed by the one-Senator-one-vote requirement. We acknowledge, of course, that this constitutional argument is contestable, and that it might be reasonable to treat certain nominally procedural rules as producing impermissible de facto deviations from the Constitution's requirements. But the constitutional objection to the popular-majoritarian cloture rule, if accepted, would also call into question the current super-majoritarian cloture rule, or at least undermine the standard constitutional defense of that rule.

Another reason to prefer the narrower reading of the one-Senator-one-vote clause is that adopting the broader reading appears inconsistent with the Senate committee system. The Senate has long used committees and subcommittees as gatekeepers of the Senate floor. Not only do committee and subcommittee chairs control agendas within their respective jurisdictions,⁹⁷ but committees take formal votes on whether to advance certain matters to the full Senate. In such votes, Senators are unequal: each member of the relevant committee has one vote, while other Senators have zero.⁹⁸ This translates directly into inequality among states, given that on any given committee some states are represented while others are not. Consider, as a particularly important example, the Senate Judiciary Committee. The Judiciary Committee votes on whether to refer presidential nominees for federal judgeships for debate and vote on the Senate floor. If a majority of the committee members votes against a nominee, then for all practical purposes a nomination cannot move forward, even if a majority of Senators would have voted to approve the appointment. Only twenty states currently have a Senator on the Judiciary Committee; California and Texas each have two. The other thirty states have no representation on the Judiciary Committee, and the Senators from those states therefore may not participate in Judiciary Committee votes on whether to advance a nomination. If the one-Senator-one-vote clause were to apply to all Senate business, rather than just final votes, then a given committee's grant of one vote to some Senators (committee members) and zero votes to others (nonmembers) would be unconstitutional. Yet despite the fact that the committee system institutionalizes unequal voting power among Senators and states, we are unaware of any serious argument that this longstanding inequality violates the constitutional requirement that each Senator have one vote.⁹⁹ The longstanding acceptance of the committee system—among Senators, the courts, and the broader public—

⁹⁷ CONG. RESEARCH. SERV., RS20794, THE COMMITTEE SYSTEM IN THE U.S. CONGRESS 2 (updated Oct. 14, 2009) (“A committee’s authority is centered in its chair. In practice, a chair’s prerogatives usually include determining the committee’s agenda, deciding when to take or delay action, presiding during meetings, and controlling most funds allocated by the chamber to the committee.”).

⁹⁸ See Fisk & Chemerinsky, *supra* note 35, at 217–18.

⁹⁹ See Gerhardt, *supra* note 95, at 450 (arguing that the Rules of Proceedings Clause authorizes the Senate to adopt procedural rules that “allow committees and their chairs to have what is sometimes the final say over bills and nominations”; *id.* at 460 (asserting that “[m]andatory majority rule in the Senate would preclude committees’ traditional powers as gatekeepers for nominations or any other legislative business”); Leach, *supra* note 94, at 1270 (observing that the committee system “concentrate[s] power in a few individuals”); McGinnis & Rappaport, *supra* note 94, at 507 n.117 (pointing out if the Constitution barred procedural rules that prevent the House or Senate from deciding some issue by majority vote, then “the committee system would be unconstitutional to the extent that it prevented a majority from voting on a measure”). *Cf.* Fisk & Chemerinsky, *supra*

counsels a narrow reading of the one-Senator-one-vote clause.¹⁰⁰ And that narrow reading, in turn, would permit other deviations from one-Senator-one-vote—including voting rules that account for state population—at stages prior to final passage.¹⁰¹

note 35, at 214 (observing that the filibuster rule “does not necessarily offend [the majority rule principle] more than ... the committee system”); James I. Wallner, *The Foundations of Advice & Consent: Original Intent & the Judicial Filibuster*, 31 J.L. & POL. 297, 326 (2016) (pointing out, in the context of judicial nominations, that “[b]ecause a nomination is not eligible for consideration on the Senate floor until a committee has reported it, the Senate’s committee system empowers a small number of members to effectively block a confirmation vote well before forty-one senators have the opportunity to mount a filibuster”).

The Senate institutionalizes other forms of inequality as well. For example, the Senate Majority Leader’s priority in recognition by the Presiding Officer gives the Majority Leader (and, by extension, that state that the Majority Leader represents) extraordinary power over what matters the Senate considers. See Richard J. Pierce, Jr., *Delegation, Time, and Congressional Capacity: A Response to Adler and Walker*, 105 IOWA L. REV. ONLINE 1, 10 (2020) (observing that the “majority leader controls the agenda-setting process” and “regularly uses that control to preclude the Senate from voting on Bills that would be enacted by a majority if they were the subject of a vote”); see also Sarah Binder & Forrest Maltzman, *Advice and Consent During the Bush Years: The Politics of Confirming Federal Judges*, 92 JUDICATURE 320, 325 (2009). Right now, when the question is whether a particular matter will receive consideration on the Senate floor, a Senator representing the State of New York (Chuck Schumer) has one (de facto) vote, and Senators from all other states have zero votes. To be sure, the Majority Leader’s priority in recognition is not technically a “vote,” but the Majority Leader’s power is yet another example of inequalities among Senators that are widely accepted as constitutional.

¹⁰⁰ That said, advocates of a broad reading of the one-Senator-one-vote requirement might reconcile that principle with these other features of Senate procedure on the grounds that, even if procedural devices like the committee system and the current filibuster are in tension with the broad reading of the one-Senator-one-vote clause, these latter institutional features have been validated by their long history, while other more novel deviations from one-Senator-one-vote should be prohibited. We acknowledge that the Supreme Court has sometimes embraced this sort of approach (sometimes implicitly). See, e.g., Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2139 (2015); Jonathan H. Adler, *Conservative Minimalism and the Consumer Financial Protection Bureau*, U. CHI. L. REV. ONLINE 28, 31 (Aug. 27, 2020). But the fact that the Constitution *could* be read this way (establishing a broad one-Senator-one-vote rule, but with exemptions for inconsistent features of Senate practice that have been around for a long time) does not mean that the Constitution *should* be read in that way. The fact that the narrower reading of the one-Senator-one-vote clause is easier to harmonize with longstanding features of Senate practice is, at the very least, a consideration that counts in favor of that latter reading. And as several scholars have persuasively argued, the fact that an institutional design is novel should not be treated as a reason to view it with greater constitutional skepticism. See Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017); John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 46 (2014).

¹⁰¹ Even one who accepts that the broadest possible reading of the one-Senator-one-vote clause is implausible might advocate an intermediate reading that would require one-Senator-one-vote whenever the full Senate votes on the floor, but not for votes on prior agenda-setting matters. See, e.g., Teter, *supra* note 93, at 606 (arguing that “when the Senate votes as a chamber, equality is required,” such that “on any vote—substantive or procedural—before the [full] Senate, Article I, Section 3 controls”). This reading would wreak less havoc on longstanding Senate practice (most notably the committee system) while still preventing procedural innovations such as a popular-majoritarian cloture rule. But the lines drawn by this intermediate reading are harder to square with the Constitution than either the narrow or the broad reading of the relevant clause. The broad reading would impose a general requirement that all Senators have equal voting power on all matters, while the narrow alternative reads one-Senator-one-vote in conjunction with the other constitutional provisions empowering the Senate to take certain actions—such as passing legislation, granting consent to appointments, and approving treaties—and limits the equal voting power requirement to those constitutionally recognized contexts. Reading

All that said, we acknowledge that there may be—indeed, should be—some constitutional limit on the ability of the Senate to adopt procedural rules that privilege certain Senators over others.¹⁰² But whatever the outer limits of the Senate’s power under the Rules of Proceedings Clause may be, the popular-majoritarian cloture rule fits comfortably within them. There are very few Supreme Court precedents that address the scope of the chambers’ powers under the Rules of Proceedings Clause, but what precedent does exist sets out an undemanding rational basis test under which nearly all rules are permissible.¹⁰³ Like the existing filibuster, the popular-majoritarian cloture rule establishes a voting rule for ending debate that differs from the constitutionally required procedure for taking final action. Like the existing committee system, the popular-majoritarian cloture rule gives some Senators—and thus some states—more votes than others with respect to what questions get a final vote on the Senate floor. The popular-majoritarian cloture rule neither discriminates among Senators on grounds forbidden by other provisions of the Constitution (such as race, gender, or partisan affiliation), nor does it lack a reasonable relationship to a legitimate objective. Indeed, this cloture rule advances the legitimate objective of majoritarian democracy—or, to be more technically accurate, the interest in continuing debate when, but only when, the Senators who want debate to continue represent more people than do the Senators who want to end debate and proceed to a decision.

A skeptic might object that because the popular-majoritarian cloture rule gives Senators from populous states greater influence than Senators from smaller states, this rule is in more tension with background assumptions about the Senate’s purpose and function than are the

the one-Senator-one-vote requirement as applying to all floor votes (procedural and final), but only to floor votes, requires drawing a line that is neither found in the Constitution’s text nor suggested by its structure.

Furthermore, the restrictions purportedly imposed by this intermediate reading could easily be easily circumvented. If the one-Senator-one-vote requirement were understood to apply only on the floor and not in committee, the Senate could account for state population through convening as a “committee of the whole,” in which all Senators would be members, but votes in this “committee” would not count as floor votes. Such a workaround would be novel in the Senate context, but from the First Congress to the present, the House has conducted significant business through a “committee of the whole,” precisely because it provides a more streamlined set of procedural rules as compared to those that apply on the House floor. *See* CONG. RESEARCH. SERV., RS20147, COMMITTEE OF THE WHOLE: AN INTRODUCTION 2–5 (updated May 15, 2013).

¹⁰² *See, e.g.,* McGinnis & Rappaport, *supra* note 94, at 507 n.117 (observing that it would be problematic for each chamber of Congress to have “unlimited discretion to pass rules that regulate the opportunity to hold votes”).

¹⁰³ The leading case remains *United States v. Ballin*, 144 U.S. 1 (1892), which held that congressional rules of procedure “may not ... ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be obtained,” but that “within these limitations all matters or method are open to the determination of each house,” *id.* at 5. The proposed popular-majoritarian cloture rule easily passes this weak rational basis test, although other procedural rules, for example those that discriminated among Senators on the basis of party affiliation, might not. *Cf.* Gerhard, *supra* note 95, at 458 (suggesting that a procedural rule that explicitly discriminated against Senators on the basis of party affiliation might violate the First and Fifth Amendments, but that other rules would not, so long as they bear a reasonable relationship to a legitimate objective).

other procedural rules to which we analogize.¹⁰⁴ Perhaps. But given the absence of more explicit constitutional text, the lack of convincing empirical evidence that the Senate’s malapportionment actually protects the interests of small states (or states generally) in the manner that the Framers envisioned,¹⁰⁵ and the fact that the Constitution already departed substantially from the original design when the Seventeenth Amendment mandated popular election of Senators,¹⁰⁶ we find this appeal to original intent too weak a reed to support a constitutional objection to a reform that would substantially improve the Senate’s effectiveness and democratic legitimacy—values that are just as much at the heart of the Constitutional design as the preservation of state sovereignty. The fact that a narrower reading of the one-Senator-one-vote clause would give the Senate greater flexibility and freedom to reform its procedures in ways that improve the body’s functioning and democratic legitimacy is, in our view, a reason to embrace that narrower reading.¹⁰⁷

Finally, while we cannot confidently predict what the Supreme Court might do if presented with a constitutional challenge to the popular-majoritarian cloture rule, existing precedent and practice suggest that the judiciary would be exceedingly reluctant to second-guess the Senate’s constitutional judgment on such matters. For one thing, a controversy over the constitutionality of the Senate’s cloture rule may well qualify as a non-justiciable political question.¹⁰⁸ For another, even if a challenge to the Senate’s cloture rule were justiciable, the case law in this area, while admittedly sparse, adopts an extremely deferential approach to reviewing how a chamber of Congress exercises its discretion under the Rules of Proceedings Clause.¹⁰⁹ Thus, while Senators themselves should give due regard to constitutional concerns

¹⁰⁴ Proponents of this view might argue that, even if we are correct that the equal state suffrage language in Article V does not create any additional substantive guarantee of state equality, *see supra* TAN 86–88, the fact that equal state suffrage in the Senate is one of the few constitutional provisions that cannot be amended implies that this principle is so important that the one-Senator-one-vote principle should be read broadly.

¹⁰⁵ *See supra* TAN 43–49 and accompanying notes.

¹⁰⁶ *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1508 (1994) (contending that direct state representation in the Senate “was the chief protection afforded to state institutions in the original plan of the Constitution,” but that this protection “basically evaporated with the adoption of the Seventeenth Amendment”); Terry Smith, *Rediscovering the Sovereignty of the People: The Case for Senate Districts*, 75 N.C. L. REV. 1, 67 (1996) (similarly noting that “[w]hatever may have been the Framers’ intentions for the Senate, the Seventeenth Amendment has virtually abolished any notion of that body representing states as states”); H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 912 (1999) (arguing that “any protection [for states] afforded by the Constitution’s original scheme of direct representation [in the Senate] was eliminated with the passage of the Seventeenth Amendment, and the fact that each state is equally represented simply enhances the relative power of small states”) (footnotes omitted).

¹⁰⁷ Indeed, the fact that equal state suffrage in the Senate is one of the few constitutional provisions that is unamendable through Article V is not, in our view, a reason to read the one-Senator-one-vote clause broadly, *see supra* note 104, but rather a reason to read it narrowly.

¹⁰⁸ *See, e.g.,* Jacobi & VanDam, *supra* note 35, at 323–25. On this point, even scholars who disagree as to whether the current cloture rule is unconstitutional agree that the courts likely would and should treat constitutional challenges to the cloture rules as non-justiciable on political question grounds. *See* Chafetz, *supra* note 93, at 1036; Gerhardt, *supra* note 95, at 449 n.8.

¹⁰⁹ *See, e.g.,* Ballin v. United States, 144 U.S. 1, 5 (1892); Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 1959–60 (2020); Rebecca M. Kysar, *The ‘Shell Bill’ Game: Avoidance and the Origination Clause*, 91 WASH.

regarding this or any other proposed change to Senate rules, the fact that there is a colorable constitutional argument in support of the rule may be sufficient to dissuade the courts from invalidating the rule.

III. ADOPTING AND ENTRENCHING A POPULAR-MAJORITARIAN CLOTURE RULE

Describing and defending the popular-majoritarian cloture rule is the easy part. The harder questions concern how a Senate majority could adopt and entrench this rule. In this Part, we first discuss the procedures the Senate could use to adopt the rule, and we then turn to the entrenchment issue.

A. Adoption

As noted above, the Senate Rules as written require a two-thirds majority vote to close debate on proposals to amend those rules. For a proposal such as ours, which would shift power in the Senate in easily foreseeable directions, reaching this two-thirds threshold would be impossible. The replacement of the current filibuster rule with the popular-majoritarian cloture rule would therefore require use of the so-called “nuclear option,” a parliamentary maneuver that allows the Senate to change its rules with a simple majority. The nuclear option—so named because it has traditionally been seen as an extreme measure to be used only as a last resort—involves the establishment of a new Senate precedent, which can then supersede the written rules.¹¹⁰ This was the mechanism used by the Democrats under Majority Leader Harry Reid (D-NV) to eliminate the filibuster for confirming presidential appoint-

U. L. REV. 659, 699–703 (2014); Michael Teter, *Rethinking Consent: Proposals for Reforming the Judicial Confirmation Process*, 73 OHIO ST. L.J. 287, 321 (2012).

¹¹⁰ See, e.g., Gregory Koger & Sergio J. Campos, *The Conventional Option*, 91 WASH. U. L. REV. 867 (2014); William G. Dauster, *The Senate in Transition or How I Learned to Stop Worrying and Love the Nuclear Option*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 631 (2016); David S. Law & Lawrence B. Solum, *Judicial Selection, Appointments Gridlock, and the Nuclear Option*, 15 J. CONTEMP. LEGAL ISSUES 51, 58–63 (2006); Sarah A. Binder et al., *Going Nuclear, Senate Style*, 5 PERSP. ON POL. 729 (2007); Gregory J. Wawro & Eric Schickler, *Reid’s Rules: Filibusters, the Nuclear Option, and Path Dependence*, 43 LEG. STUD. Q. 619 (2018).

The nuclear option is viable because of Senate Rule XX, which governs points of order. Under Rule XX, “[a] question of order may be raised at any stage of the proceedings, except when the Senate is voting or ascertaining the presence of a quorum, and, unless submitted to the Senate, shall be decided by the Presiding Officer without debate, subject to an appeal to the Senate.” Such an appeal is—crucially—decided by a simple majority vote. This provides a backdoor way to change Senate rules. All a majority leader has to do is raise a point of order setting out a proposed new rule, appeal the Presiding Officer’s rejection of that point of order, and garner a simple majority of the Senate in support of their new precedent.

For example, in using the nuclear option in 2013, Majority Leader Harry Reid (D-NV) raised a point of order “that the vote on cloture under rule XXII for all nominations other than for the Supreme Court of the United States is by majority vote.” 159 CONG. REC. S8417 (Nov. 21, 2013). The Presiding Officer did not sustain the objection, because Rule XXII clearly required a three-fifths majority for cloture votes. Reid appealed, and the Senate voted not to sustain (that is, to overrule) the Presiding Officer by a 52-48 margin. By doing so, the Senate created a new precedent that overrode the text of Rule XXII. See *id.* at S8417–18. This gambit had to take place at the appropriate time—namely, after a motion to proceed to cloture, the failure of that motion, and a motion to reconsider—but the most important move for our purposes is the appeal from the ruling of the Presiding Officer to create a new precedent.

ments to executive branch offices and lower courts, and later employed by Republicans under Majority Leader Mitch McConnell (R-KY) to eliminate the filibuster for Supreme Court appointments.¹¹¹ That the nuclear option is not used more often appears to be due to some combination of internalized norms and fear of escalation.¹¹² (Of course, the same thing could have been said a generation ago about the filibuster itself.)

There are three ways that our proposed change to the cloture rule might be implemented, each of which would involve use of the nuclear option.

First, our proposal could be established as a Senate precedent, along the lines of how Majority Leaders Reid and McConnell choreographed the elimination of the filibuster for executive branch and judicial appointments. That process would run roughly as follows. After a failed cloture vote and at a time when the Senate is in a non-debatable posture,¹¹³ a Senator (presumably the Majority Leader) would rise and say something like:

I raise a point of order that any vote to close debate shall be deemed to pass so long as the Senators voting in favor of cloture are both a majority of the Senators duly elected and sworn, and represent a larger share of the United States population than the Senators who do not vote in favor of cloture, where each Senator is deemed to represent one-half of the population of his or her state as determined by the most recent decennial census.

The Presiding Officer would respond that under the rules, the point of order is not sustained, at which point the Majority Leader would appeal the Presiding Officer's ruling to the full Senate. Presumably (given that all this would have been planned out in advance) a majority of Senators would vote to overturn the Presiding Officer's ruling.¹¹⁴ The Presiding Officer would then declare, "The decision of the Chair is not sustained. Under the precedent set by the Senate today, a vote to close debate shall pass if the Senators supporting cloture are a

¹¹¹ See, Gould, *supra* note 97, at 2000–01; Dauster, *supra* note 110.

¹¹² See Ellen P. Aprill & Daniel J. Hemel, *The Tax Legislative Process: A Byrd's Eye View*, 81 L. & CONTEMP. PROBS. 99, 127 (2018); Wawro & Schickler, *supra* note 110, at 640–43.

¹¹³ This timing is necessary to prevent the attempt to set a new Senate precedent from itself being filibustered. But this is not much of an obstacle. See Dauster, *supra* note 110, at 656 (discussing how Majority Leader Reid choreographed the 2013 use of the nuclear option, and noting that "a future Majority Leader can replicate and broaden the Reid Precedent whenever that future Leader has the votes of a majority of the Senate to do so"). While the process is slightly more involved for legislation than for confirming nominees—because legislation has to clear at least two cloture votes (one on the motion to proceed to the measure's consideration, and one on the measure itself), see CONG. RESEARCH. SERV., RL30360, FILIBUSTERS AND CLOTURE VOTES IN THE SENATE 10 (updated Apr. 7, 2017)—the basic contours are the same. The only difference is that the precedent set for changing the cloture rules for one stage of the legislative process would need to be expressly framed to apply to cloture rules for all stages in that process.

¹¹⁴ Technically either a majority vote or a tie vote would be sufficient to overrule the decision of the Presiding Officer, because the question on appeal is phrased as the question of whether to uphold the Presiding Officer's decision. Cf. 159 CONG. REC. S84118 (Nov. 21, 2013).

majority of Senators duly elected and sworn, and represent a larger share of the U.S. population than the Senators opposing cloture.” And voila, the new cloture rule would be established.¹¹⁵

A second way to accomplish much the same thing would be to use a resolution to formally change the text of Rule XXII, replacing the current three-fifths cloture threshold with a popular-majority cloture rule, and extending that latter rule to measures not presently subject to the three-fifths cloture threshold. The impediment to such a change, as noted above, is the current requirement of a two-thirds supermajority to close debate on changes to Senate rules.¹¹⁶ To adopt the popular-majoritarian cloture rule via a formal amendment to Rule XXII, the Senate majority would have to exercise the nuclear option to eliminate the two-thirds requirement for cloture on debates over changes to Senate rules.¹¹⁷

A third option would be to change the Senate’s rules by statute.¹¹⁸ Enacting a statute, which requires passage by both the House and the Senate as well as presentment to the President, is more difficult than changing the Senate’s rules unilaterally. Statutory regulation of a single chamber’s procedures also entails legal complications that do not arise when either chamber sets its own rules.¹¹⁹ Despite these complications, we raise the statutory option here because, as we discuss below, a rule change enacted via statute might be “stickier” than a rule

¹¹⁵ To be clear, on this approach the text of Rule XXII would remain unchanged, but the portion that requires a three-fifths majority for cloture would be a dead letter, and cloture votes would now be subject to an additional requirement—assent by a coalition representing a popular majority—that appears nowhere in the rule’s text. That may seem odd, but under longstanding Senate practice a procedural precedent can take priority over the written rules. *See, e.g., Stanley Bach, The Nature of Congressional Rules*, 5 J.L. & POL. 725, 733–34 (making this point and providing the example of the Senate precedent that establishes priority recognition for the Majority and Minority Leaders, even though this contravenes Senate Rule XIX’s written requirement that “the Presiding Officer shall recognize the Senator who shall first address him”). While our proposed use of the nuclear option differs from its use in 2013 and 2017 insofar as we propose enacting new procedural requirements, as opposed to eliminating an existing requirement, there is no reason the nuclear option can only be used for the latter sort of rule change.

¹¹⁶ *See* Senate Rule XXII(2) (providing that for motions to amend Senate rules, “the necessary affirmative vote [for cloture] shall be two-thirds of the Senators present and voting”).

¹¹⁷ To initiate this process, the Majority Leader would first bring before the Senate a resolution changing the text of Rule XXII along the lines we suggested in Part I. The minority party would presumably filibuster the motion to proceed to consider that resolution. The Majority Leader would then move to reconsider the cloture vote and raise a point of order that the vote on cloture for changes to Rule XXII (or to any Senate rule) shall be deemed to pass if the Senators voting for cloture constitute a majority of Senators who collectively represent a larger share of the United States population than the Senators who do not vote in favor of cloture. The choreography would then proceed as before, with the Presiding Officer rejecting the point of order and a simple majority of the Senate reversing that ruling on appeal to establish a new precedent. Once the new precedent is established, the cloture vote on the resolution to change the Senate rules would proceed, presumably carry, and be followed by a vote on the rule change itself, which would also presumably pass.

¹¹⁸ Although the Constitution’s Rules of Proceedings Clause gives each chamber the power to set its own rules, numerous statutes regulate legislative procedure. *See* Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345 (2003); Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 718 (2005).

¹¹⁹ *See* Bruhl, *supra* note 118.

change adopted by the Senate acting unilaterally.¹²⁰ Enacting the popular-majoritarian cloture rule via statute would also require use of the nuclear option, as any bill that contained this rule change would almost certainly be filibustered. A supportive majority would therefore need to use the nuclear option to eliminate the filibuster either for legislation in general, legislation changing Senate rules, or this statute in particular; having done so, the Senate could then enact the statute that would replace the current cloture rule with the popular-majoritarian alternative. Assuming that the House passed the statute as well and the President signed it, the new statutory text would then supersede both the existing Rule XXII and the short-lived Senate precedent that had been adopted for purposes of passing this statute.

B. Entrenchment

We are confident that the popular-majoritarian cloture rule would substantially improve both the practical performance and democratic legitimacy of the U.S. Senate, and that such a rule could be adopted straightforwardly via an aggressive but permissible use of Senate procedures. Nevertheless, two substantial obstacles remain.

First, there may not be the political will to embrace such a dramatic revision of Senate practices. Even the leadership of a political party that has a Senate majority and anticipates that most of the time it will have a popular majority—such as the Democrats right now—might not be willing to take advantage of the opportunity to push through such a radical change. And even if the party leadership were open to this reform, it may not be possible to secure the support of a sufficient number of Senators. More moderate Senators and Senators from smaller states might be especially reluctant to embrace this rule, even if their political party typically represents more citizens than does the other party.

We acknowledge this obstacle but do not have much to say about it here. Whether or not a majority party in the Senate has the political will to take drastic action to democratize the institution in the manner we suggest depends on myriad factors, and what might seem politically unthinkable today might start to seem more plausible in a year or two—or five or ten—depending on the outcome of elections, shifts in public opinion, and how severely the Senate's undemocratic features interfere with its ability to perform its constitutional functions or advance the public interest. So while we acknowledge that a lack of political will may prevent our proposal from ever getting off the ground, we bracket this concern for now. The political will to embrace a reform like this will come when it will come.¹²¹

The second concern, though, is one that we cannot so easily sidestep. If the rule change we propose is to make a difference, the change must stick—it must persist even when it prevents the Senate from taking some action that could pass under simple majority rule. It

¹²⁰ See *infra* note 137.

¹²¹ It may be worth noting, in this context, that prior to the adoption of Rule XXII in 1917, the Senate operated by unanimous consent, meaning that a single Senator could prevent the body from proceeding to a vote. See Fisk & Chemerinsky, *supra* note 35, at 187–98; Seitz & Guerra, *supra*, note 95, at 7–10. For much of the nineteenth century, changing this system likely seemed politically impossible, perhaps unthinkable.

would be pointless to invest a lot of time and effort into pushing through such a controversial rule if that rule will be reversed at the first opportunity. Yet the moment that the Senate has a majority party that represents a minority of the population, that party would have an incentive to eliminate the popular-majoritarian cloture rule. This concern is exacerbated by the fact that, at least in the short-to-medium term, the partisan winners and losers from the popular-majoritarian cloture rule are obvious: under current political circumstances, this rule would benefit Democrats, and more generally would move policy outcomes to the left.¹²²

We must therefore consider whether it is possible to sufficiently entrench the rule to make its adoption worthwhile. Candidly, we are unsure. But there are plausible arguments as to why this rule, if adopted, may prove harder to undo than one might first suppose. We first examine formal mechanisms that might help entrench the rule against repeal. We then turn to a discussion of some reasons why, as a political matter, a popular-majoritarian cloture rule could have more staying power than it seems at first glance.

1. Formal entrenchment. — No Senate rule of procedure can be made completely irreversible, and this is probably for the best. Still, a Senate that wished to entrench a popular-majoritarian cloture rule could extend that voting rule not only to cloture, but also to other procedural votes. In particular, if the Senate were to apply a popular-majoritarian cloture rule to appeals from rulings of the Presiding Officer, then the nuclear option itself would be changed, such that a simple majority of the Senate could change rules via new precedents only if that simple majority also represented a majority of the population.¹²³ This does not guarantee that a determined Senate majority could not find a way to undo the popular-majoritarian cloture rule, especially given that such a majority could install a Presiding Officer who was willing to collaborate. But by expressly removing the formal mechanism that permits the creation of a superseding Senate precedent with only a simple majority, this aggressive procedural gambit would make it much harder for a subsequent Senate to undo the rule change.

That said, this approach has a number of potential disadvantages. For one thing, there are questions about whether any mechanism that purported to deprive the Senate of its ability

¹²² See Part II–B, *supra*.

¹²³ Although Rule XX does not explicitly specify the voting rule for appeals, consistent practice establishes that appeals are decided by simple majority vote. See FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. NO. 101-28, at 148 (Alan S. Frumin ed., 1992). (Further support for an implied majority vote baseline for appeals is provided by the fact that while nearly all references to appeals in the Senate rules are silent on the voting procedure, in one circumstance, concerning conference committees, the Senate rules expressly provide for a supermajority rule on appeals. See Senate Rule XXVIII(6)(b).) The same coalition of Senators that implemented the popular-majoritarian cloture rule could also change Rule XX to require that the ruling of the chair be sustained unless overruled by a majority of Senators who also represent a majority of the population. Any of the means of changing Senate rules—by precedent, resolution, or statute—could be used to implement this change.

to change its rules through a simple majority vote would be constitutional.¹²⁴ For another, even if one puts the constitutional concerns to the side, the political costs of first using the nuclear option to implement a rule change and then immediately modifying the nuclear option to make it harder to undo that rule change may smack of opportunism. While we think that this sort of aggressive action is justified—exploiting the Senate’s procedural loopholes in order to make the institution on the whole more democratic and legitimate—the political costs to the party attempting this maneuver might be high.¹²⁵ Despite these risks, we think that the normative case for our proposed reform and the challenges of entrenching that reform are both sufficiently strong that changes to the nuclear option, at least for attempts to undo the popular-majoritarian cloture rule if not more broadly, ought to be on the table.¹²⁶

2. Political entrenchment. — A political party that rarely represents a popular majority (such as the Republican Party today) would have strong incentives to reverse our popular-majoritarian cloture rule as soon as that party controls a majority of Senate seats. But a political party is not a unitary actor. And if this party’s Senate majority is slim, the defections of only a small number of Senators would be enough to leave the popular-majoritarian cloture rule in place.¹²⁷ Furthermore, at least two categories of Senators might prefer to preserve the popular-majoritarian cloture rule even if their party, and party leadership, would prefer simple majority rule.¹²⁸

First, moderate Senators might prefer the popular-majoritarian cloture rule if the party leadership, which controls the agenda, is more ideologically distant from moderate party members than are moderates from the other party. We can illustrate this with a simple spatial model. Imagine a hypothetical Senate that consists of five Senators, each of whom can be ordered on an ideological dimension from left to right. Senators 1 and 2 are from the left-wing party (call them Democrats) and Senators 3, 4, and 5 are from the right-wing party (call

¹²⁴ See, e.g., Roberts, *supra* note 93; McGinnis & Rappaport, *supra* note 94, at 503–07. But see Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1694–95 (2002) (defending the constitutionality of entrenching supermajoritarian procedural rules, like the filibuster, through the device of applying those procedural rules to proposals to alter the procedural rules themselves).

¹²⁵ Furthermore, we recognize that the maneuver we suggest here could be deployed pre-emptively by a Senate majority that opposes our principal reform, freezing the current cloture rule in place.

¹²⁶ More drastic reforms could further entrench a popular-majoritarian cloture rule. For example, as we noted earlier, the Senate could alter its procedures to give priority recognition not to the leader of the majority party, but rather to the leader of the party whose members represent the larger share of the population. See *supra* note 26. Such a rule could vest control over the Senate floor not in the party with the largest number of Senators, but rather in the party whose Senators represent the larger share of the population. Were such a rule in place over the past two decades, the Democratic leader would have controlled the Senate’s agenda throughout that time. Thus, even when there were more Republican Senators than Democratic Senators, a unified Democratic Party could have prevented the Republicans from undoing the popular-majoritarian cloture rule.

¹²⁷ It is worth noting, in this context, that the Republican Party has held more than fifty-three seats in the Senate only twice since 2001: In the 109th Congress (2005–2007), the Republicans had fifty-five seats, and in the 114th Congress (2015–2017), they held fifty-four seats.

¹²⁸ We are assuming here, plausibly we think, that after the adoption of the popular-majoritarian cloture rule, there would be no going back to the three-fifths cloture rule.

them Republicans). The ideology scores for Senators 1 through 5, in order, are -1 , -0.25 , 0 , $+0.5$, and $+1$. Assume that Senator 2 is the “tipping point” Senator: That is, Senators 1 and 2 together (the Democrats) represent a majority of the population, but if Senator 2 were to vote with the three Republicans, they would represent a popular majority. Senator 4 is the Majority Leader, who can determine what bills come up for a vote.

Now consider a situation in which the status quo policy is at -0.5 . What would the policy outcome be under various voting rules?¹²⁹ Under simple majority rule, the Majority Leader would propose a policy that shifts the outcome from -0.5 to $+0.5$, and this proposal would pass on a 3–2 party line vote.¹³⁰ Senator 3, the pivotal Senator, would prefer a smaller rightward shift, but she does not control the agenda.¹³¹ Under the popular-majoritarian cloture rule, the Majority Leader needs to propose a policy that will attract the vote of Senator 2. The most conservative policy that Senator 2 would support is 0 , so that is what the Majority Leader will propose; this proposal will pass with a 4–1 vote. Importantly, this outcome is better for Senator 3 than is the outcome under simple majority rule: The need to attract support from Senator 2 forces the Majority Leader to propose a more moderate policy, which makes Senator 3 better off. Thus in this example, Senator 3—the median Senator—prefers the outcome under the popular-majoritarian cloture rule, even though her party leadership would prefer simple majority rule.¹³²

Of course, it would be easy to construct similar stylized examples in which the median Senator would prefer majority rule over the popular-majoritarian cloture rule. Whether the median Senator is generally better off under one rule or the other depends on the probabilities of various political configurations. What this simple spatial model illustrates, though, is that it is at least possible that more moderate members of the party seemingly disadvantaged by the popular-majoritarian cloture rule might be reluctant to abandon that rule once it is in place. Such a rule may temper the extremism of the party’s leadership, resulting in outcomes more to the liking of the party’s centrists.

Relatedly, centrist members of the party that consistently represents a smaller share of the population might prefer to leave the popular-majoritarian rule in place because doing so may give their party a political incentive to moderate its national platform. To illustrate this, consider the modern Republican Party, which has moved steadily to the right over the past generation, adopting policies that are favored by party activists but are unpopular with most

¹²⁹ In this example we will ignore the House and the President, and focus only on the Senate outcome.

¹³⁰ We assume that if a Senator is indifferent between voting yea and nay on a proposal, she will vote yea.

¹³¹ In this example, the outcome would be the same under the three-fifths cloture rule. In a slightly different example, or with a more demanding cloture rule, the outcome would remain at -0.5 .

¹³² Though this may seem like a contrived hypothetical example, it is worth noting—with all the appropriate caveats—that Susan Collins (R-ME) has a DW-NOMINATE score (0.115) that is closer to that of Joe Manchin (D-WV) (-0.056) than to those of both Mitch McConnell (R-KY) (0.4) and the median Senators of the current Republican Senate caucus (John Cornyn (R-TX) (0.49) and Michael Crapo (R-ID) (0.51)).

citizens.¹³³ While the reasons for the shift are complex, scholars have argued that the Republican Party's structural electoral advantages, including malapportionment in the Senate, are a significant contributing factor.¹³⁴ When a party shapes its national platform and political brand, it often must trade off the pursuit of the policy objectives pushed by donors and activists against the risk of losing elections—a risk that increases as the party's platform moves further from mainstream public opinion. Structural electoral advantages that reduce the political costs of advocating unpopular policies therefore mean that, at the margin, the party will adopt more extreme positions. This is bad for the party's moderates for at least two reasons. First, the moderates prefer more centrist policies. Second, insofar as the moderates' political fortunes are tied to their party's national brand, they may worry that the party's extremism threatens their own re-election.¹³⁵ To the extent that a popular-majoritarian cloture rule would force the party that benefits from Senate malapportionment (today, the Republicans) to curb the extremism of the party's national brand, moderate Senators from that party may benefit, and may therefore be reluctant to replace the popular-majoritarian cloture rule with a simple majority cloture rule.

The second set of Senators who might be reluctant to reverse the adoption of a popular-majoritarian cloture rule, even though their party consistently represents less than half of the population, consists of Senators who are willing to make sacrifices on the traditional left-right dimension in exchange for better outcomes on some other dimension (perhaps another ideological dimension, or perhaps “pork” for their constituents) that their party's leadership does not value. To see this, imagine a situation in which the Republican Party has fifty-three Senate seats, but these Senators collectively represent 49.5 percent of the population. The addition of the most conservative Democrat is enough to give the Republican-led coalition a 50.5 percent share of the represented population. Now suppose that the Republican leadership is considering proposing a bill, and an individual Republican Senator, from a state representing over one percent of the population, has a pet project that she would like to include in that bill. The leadership opposes this provision but would be willing to include it if doing so is necessary for the bill to pass. For the Senator in question, the pet project is very important, but her only leverage in negotiations with the leadership is to threaten to

¹³³ See, e.g., JACOB S. HACKER & PAUL PIERSON, *OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY* (2008); THEDA SKOCPOL & VANESSA WILLIAMSON, *THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM* (2012); JACOB S. HACKER & PAUL PIERSON, *LET THEM EAT TWEENS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY* (2020). On the asymmetric character of partisan polarization, see Jacob S. Hacker & Paul Pierson, *Confronting American Polarization*, in *SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA* 59–60 (Nathaniel Persily ed., 2015).

¹³⁴ See, e.g., Steven Levitsky & Daniel Ziblatt, *Opinion*, *End Minority Rule*, N.Y. TIMES (Oct. 23, 2020) (“Excessively counter-majoritarian institutions blunt Republicans’ incentive to adapt to a changing American electorate. As long as the Republicans can hold onto power without broadening their shrinking base, they will remain prone to the kind of extremism and demagoguery that currently threatens our democracy.”)

¹³⁵ To be sure, the party and its leadership want to protect the moderates as well, especially because losing any seats in a close election may cost the party control of the chamber. But the national party probably does not internalize all of the costs to individual Senators of losing their seats, and so may take positions that are more extreme than what the party's moderate Senators would favor.

withdraw her support for the bill if the project is not included. Under simple majority rule, this does not amount to much, because the leadership has votes to spare: If all other Republicans support the bill, then even if this Senator defects, the bill will still pass 52–48. Under the popular-majoritarian cloture rule, by contrast, if this Senator withdraws her support, then even though the bill—moderated to ensure the support of the most conservative Democratic Senator—would attract fifty-three affirmative votes, these fifty-three Senators would represent less than half of the population. The party leadership therefore has a stronger incentive to keep the idiosyncratic Republican Senator happy by putting her pet project in the bill. Thus this Senator would prefer (at least for this bill) to keep the popular-majoritarian cloture rule in place rather than replace it with a simple majority cloture rule.

To generalize the point: Under the popular-majoritarian cloture rule, when the Senate majority party represents a smaller share of the population, all Senators in that party (with the possible exception of those from tiny states), plus the most moderate members of the other party whose support is needed to get to popular majority representation, are essential to the coalition. As a result, all of those Senators have substantial bargaining leverage that they can use to extract concessions from the leadership. The situation is comparable to one in which the majority party controls fifty seats, with the Vice President as the tiebreaker: Every vote is critical, which gives individual Senators in the majority coalition a great deal of leverage. (That leverage is likely to be even greater for Senators from populous states, whose defection would be more devastating.) This situation is bad for party leaders and others who care principally about general policy on the principal left-right dimension. But it is good for Senators from the majority party whose idiosyncratic policy preferences loom larger. And those Senators might therefore be reluctant to do away with the popular-majoritarian cloture rule, as doing so would shift more power in intra-coalition negotiations back to the party leadership.

To be sure, the above discussion is a radical simplification. Intra-party bargaining, to the best of our knowledge, rarely involves blatant threats to defect. But the basic idea still applies: For parties that have trouble reaching the popular representation threshold, the popular-majoritarian cloture rule will tend to shift intra-party bargaining power from the leadership to rank-and-file Senators with more idiosyncratic priorities.¹³⁶ These Senators might therefore resist efforts by their party leadership to do away with the popular-majoritarian rule in favor of simple majority rule.

For these reasons, while we recognize that if our proposal were adopted, the leadership of the party that typically represents a smaller population share would prefer to reverse it as soon as possible, it is possible that a sufficient number of Senators from that party might resist these efforts—because they benefit from the moderation that the rule induces, or because the rule increases their leverage in intra-party negotiations, or both. In a closely divided

¹³⁶ This logic also implies that large-state Senators will have more bargaining power in general. But this is acceptable, and in many cases desirable, given that these Senators in fact represent more people.

Senate, it would only take a handful of defections to leave the rule in place (in much the same way, we acknowledge, that it would take only a handful of defections to prevent the rule from being adopted).

Another factor that might contribute to the rule's entrenchment over time, at least if it survives its "infancy" period, is the same phenomenon that has helped sustain the modern version of the filibuster: the normalization of institutional innovations. If an institutional rule persists for a sufficient period of time, and generates results that are broadly seen as legitimate or at least tolerable, and if people get used to the rule and learn to operate under it, then the rule may start to seem normal, and proposals to change it begin to appear disruptive. Precisely this factor works against the adoption of our popular-majoritarian rule in the first place, and we acknowledge that our rule would only be adopted if the Senate becomes so dysfunctional that the majority party is prepared to take extreme measures. But if such a change, once implemented, lasts for long enough, and if the Senate during that time operates reasonably well—with the rule imposing some constraints but not preventing either party from advancing important elements of its agenda when in power—then the rule may gradually become entrenched in much the same way that the current filibuster has been entrenched. Moreover, the popular-majoritarian cloture rule, unlike the current filibuster, has the added benefit of being defensible in terms of majoritarian democracy, which might contribute, albeit likely in a minor way, to the rule's sociological legitimacy, and hence to its stickiness.¹³⁷

For these reasons, we think that the popular-majoritarian cloture rule, if adopted, may not be as vulnerable to immediate reversal by the disadvantaged party as one might first suppose. Nevertheless, we acknowledge that the political and sociological considerations just described might not be sufficient to entrench the popular-majoritarian cloture rule, especially

¹³⁷ An additional possible means of political entrenchment bears mention: Implementing the new procedural rule through a statute, rather than through a resolution or precedent, may make the rule more politically durable. To be sure, it is questionable whether, as a legal matter, such a statute could prevent a single chamber of Congress from unilaterally altering a procedural rule contained in that statute. See Bruhl, *supra* note 119, at 349–50, 367–69; Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process Is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. 960, 1007–10 (2007); Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 427–31 (2004). And the Senate might well claim that it is constitutionally entitled to do so. Nevertheless, there are three related reasons why a "statutized" version of our rule might prove more resistant to change. First, the use of the nuclear option to override the clear text of a statute might appear legally dubious. While we doubt that a court would intervene if the Senate were to alter a statutory procedural requirement by unilateral action, this legal uncertainty, and the instinct that statutes should be respected, might cause a sufficient number of Senators to balk at proposals to disregard or override the statute. Second, and relatedly, disregarding a statute might be more politically costly than changing or ignoring a rule that the Senate had unilaterally adopted. Third, the existence of a statute might give political cover to Senators who are inclined to buck their party's leadership by refusing to support efforts to rescind the rule. See Bruhl, *supra*, at 1011–12 & n.178. For these reasons, implementing the popular-majoritarian cloture rule through a statute might increase the odds that the rule will persist even if the disadvantaged party subsequently wins a majority of the Senate. We do not, however, make any strong claim about whether this additional increment of entrenchment would be worth the costs of pursuing the rule change we advocate via statute, especially given that we tentatively think that, as a legal matter, such a statute could indeed be overridden unilaterally by the Senate.

given that this rule so clearly works to one party's advantage in the short to medium term. Those less convinced by the argument for political entrenchment would be more reliant on formal entrenchment of the sort described in the previous section, while those more convinced of the possibility of political entrenchment might be more inclined to make do without formal entrenchment.

CONCLUSION

Malapportionment and the filibuster combine to make the Senate a fundamentally unrepresentative institution. Rather than protecting federalism or checking the excesses of the House, the modern Senate more often functions as an antidemocratic choke point that bears little relationship to anything the Framers envisioned, and that cannot be justified by any plausible normative democratic theory. The practical result is that Congress is often unable to enact legislation that has the support of, and would benefit, substantial majorities of the citizenry. The difficulty of legislating makes it tempting to eliminate the filibuster, but doing so comes with its own risks. Given the Senate's malapportionment, when the Senate operates under simple majority rule, Senators representing a minority of the population can enact their agenda over the opposition of Senators representing a majority of Americans.

The Senate's undemocratic nature may appear constitutionally hardwired, and in some respects it is. But the Senate has a much greater capacity for democratization from within than has been widely appreciated. The popular-majoritarian cloture rule we have advocated would empower Senators representing a national majority to enact their agendas, while at the same time safeguarding against minority rule. The adoption of such a rule could help revitalize an institution widely seen as broken.

We recognize that our proposal may seem radical. But desperate times call for desperate measures. Due to increasing awareness of the Senate's persistent democratic deficit and dysfunction, Senate reform has entered the popular discourse to a greater extent than at any time in recent memory. We hope to contribute to that conversation, and to help to chart a new way forward.

APPENDIX

This Appendix summarizes several methodological choices that we made in constructing Table 2.

Measure of Senator ideology. As noted in the body text, we measure Senator ideology based on DW-NOMINATE scores. These scores, which are based on roll call data, are the measure of ideology most commonly used by political scientists to measure ideology in Congress.¹³⁸ There are other measures of Senator ideology that do not rely on roll call data, but these alternative measures are generally very highly correlated with DW-NOMINATE scores.¹³⁹

Population figures. In making population calculations, we use 2000 census data for the 107th to 111th Congresses, and we use 2010 census data for the 112th to 116th Congresses. Throughout, we include only the population that is represented in the Senate (i.e. the population of the fifty states).

Independents. In counting Senators for purpose of party control, we count Independents together with the party with which they caucused.

Changes in Senate composition. In a number of instances there were changes in the composition of the Senate within a single Congress that did not affect the pivotal vote for any of the three rules that we consider. Thus, while not directly relevant to Table 2, we note here that we dealt with those situations as follows:

- In the 109th Congress, we include Senator Robert Menendez (D-NJ) rather than Senator Jon Corzine (D-NJ);
- In the 110th Congress, we include Roger Wicker (R-MS) rather than Trent Lott (R-MS), and John Barrasso (R-WY) rather than Senator Craig Thomas (R-WY);
- In the 111th Congress, we include Mark Udall (D-CO) and Michael Bennett (D-CO) and exclude Senator Ken Salazar (D-CO), we include Tom Carper (D-DE) and Ted Kaufman (D-DE) and exclude Joe Biden (D-DE) and Chris Coons (D-DE), we include Dick Durbin (D-IL) and Roland Burris (D-IL) and exclude Mark Kirk (D-IL), we include Chuck Schumer (D-NY) and Kristen Gillibrand (D-NY) and exclude Hillary Clinton (D-NY), we include Robert Byrd (D-WV), and we count Arlen Specter of Pennsylvania, who switched from the Republican to the Democratic Party in April 2009, as a Democrat;
- In the 112th Congress, we include Dean Heller (R-NV) rather than John Ensign (R-NV), and we include Daniel Inouye (D-HI) rather than Brian Schatz (D-HI);

¹³⁸ See Jeffery B. Lewis, et al., *Voteview: Congressional Roll-Call Votes Database* (Feb. 28, 2021), <https://voteview.com>.

¹³⁹ See, e.g., Adam Bonica, *Mapping the Ideological Marketplace*, 58 AM. J. POL. SCI. 367 (2014) (developing an alternative ideology measure using campaign contribution data); *id.* at 370–72 (finding that this alternative measure correlates strongly with DW-NOMINATE scores).

- In the 113th Congress, we include Cory Booker (D-NJ) and Bob Menendez (D-NJ), we include Elizabeth Warren (D-MA) and Ed Markey (D-MA), and we included Jon Tester (D-MT) and Max Baucus (D-MT);
- In the 115th Congress, we included Richard Shelby (R-AL) and Luther Strange (R-AL) rather than Jeff Sessions (R-AL) and Doug Jones (D-AL), we include Jeff Flake (R-AZ) and John McCain (R-AZ) and exclude Jon Kyl (R-AZ), we include Al Franken (R-MN), and we include Roger Wicker (R-MS) and Thad Cochran (R-MS) and exclude Cindy Hyde-Smith (R-MS);
- In the 116th Congress, we include Krysten Sinema (D-AZ) and Martha McSally (R-AZ) and exclude Mark Kelly (D-AZ), and we include David Purdue (R-GA) and Johnny Isakson (R-GA) and exclude Kelly Loeffler (R-GA).