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COULD THE MODERN SENATE MANAGE AN OPEN-AMENDMENT PROCESS?

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INTRODUCTION

At the start of the 114th Congress, newly minted Senate Majority Leader Mitch McConnell, R-Ky., announced he was returning the chamber to “regular order.” While the phrase “regular order” is ambiguous,¹ McConnell made clear his new approach would end the contentious practice of “filling the tree,” wherein the majority leader blocks meddlesome amendments from the floor by stacking the available slots with his own amendments.² The strategy of filling the tree had been attacked both within and outside the chamber as an undemocratic restriction on the rights and duties of individual senators. McConnell and his

1. See e.g., See Sarah Binder, “Why Can’t Mitch McConnell Keep his Promises?” *Washington Post*, May 26, 2015; Walter J. Oleszek, “The Evolving Congress: Overview and Analysis of the Modern Era,” in *The Evolving Congress, Congressional Research Service*, 2014; and James Wallner, *The Death of Deliberation: Partisanship and Polarization in the United States Senate*, Lexington, Ky.: Lexington Books, 2013.

2. For more on filling the amendment tree see, e.g., Richard S. Beth, Valerie Heitshusen, Bill Heniff, Jr. and Elizabeth Rybicki, “Leadership Tools for Managing the U.S. Senate,” Paper prepared for the 2009 Annual Meeting of the American Political Science Association, Toronto, Canada; and Steven S. Smith, *The Senate Syndrome*. Norman, Okla.: University of Oklahoma Press, 2014.

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fellow Republicans, then in the minority, highlighted former Majority Leader Harry Reid’s use of the technique in their 2014 campaign,³ suggesting it was the primary cause of the legislative inefficiency that plagued the chamber.⁴

For their part, Reid, D-Nev., and his Democratic colleagues had argued that individual senators were abusing their rights, offering divisive, irrelevant amendments purely for electoral purposes. In their view, filling the tree was a necessary tactic

3. Republican candidates featured Reid’s control of the chamber in attack ads in virtually all competitive races, including North Carolina, Alaska, Kansas, Kentucky, Louisiana and Georgia. See Tarini Parti, “Tillis: Doomsday if GOP Falls Short,” *Politico*, Nov. 1, 2014; Seth McLaughlin, “Harry Reid is the Democrat EVERY Republican is Running Against this Fall,” *The Washington Times*, Sept. 8, 2014; and Bruce Alpert, “To Watch Louisiana Senate Race, You’d Think Harry Reid and Mitch McConnell are on the Ballot,” *NOLA.com*, Sept. 3, 2014. Criticism did not come solely from Republicans. For example, Sen. Christopher Murphy, D-Conn., noted that he “got more substance on the floor of the House in the minority than I have as a member of the Senate majority.” Quoted in Manu Raju and Burgess Everett, “Harry Reid’s New Challenge: His Fellow Democrats,” *Politico*, June 23, 2014.

4. See, e.g.; Burgess Everett, “Harry Reid Releases Iron Grip on Senate Floor,” *Politico*, Nov. 17, 2014; Carl Hulse, “McConnell Votes a Senate in Working Order, if He Is Given Control,” *The New York Times*, March 3, 2014; Niels Lesniewski, “McConnell Plots a Functional, Bipartisan Senate,” *Roll Call*, Dec. 8, 2014; Stephen Dinan and S.A. Miller, “Harry Reid Lords over Crippled Congress,” *The Washington Times*, July 7, 2014; Tamar Hallerman, “Cochran’s Top Appropriations Goal: Regular Order,” *Roll Call*, Jan. 27, 2014; and Brian Darling, “Tyranny in the United States Senate,” *The Heritage Foundation*, June 4, 2014.

to increase legislative efficiency. For example, Sen. Angus King, I-Maine, quoted a senator up for re-election during a Democratic caucus meeting: “I don’t mind making hard votes, but not if the Republicans are going to turn around and filibuster the bill anyway, so it’s all for naught.” Sen. Saxby Chambliss, R-Ga., conceded:

“It’s pretty easy for us to put the blame on Harry Reid.... But the fact of the matter is, too, that we have some folks who are bound and determined to come up with some wild and crazy amendments that are intended to be purely political amendments rather than doing the business we were sent here to do in a very serious way.”⁵

Just a month into the new Congress, the Senate already had voted on more amendments under McConnell’s leadership than in all of 2014 under Reid.⁶ However, members from both parties have criticized McConnell for violating his open-amendment-process pledge at times. Recent episodes suggest he may be unable to maintain it.

McConnell allowed an open-amendment process on the Keystone Pipeline bill, the first major piece of legislation considered in the 114th Senate. In response, senators filed nearly 300 amendments to the bill on a disparate range of issues, from climate change to endangered species and private-property rights.⁷ Negotiations and a successful cloture motion reduced the number of amendments granted floor consideration by more than 80 percent.⁸ In March 2015, House and Senate Republicans criticized McConnell for filling the amendment tree to ensure a vote on a “clean” funding bill for the Department of Homeland Security.⁹ In June, after suffering what was dubbed his “biggest legislative defeat” of the Congress,¹⁰ members of both parties criticized the majority leader for barring amendments to the USA Freedom Act. The decision led Sen. Rand Paul, R-Ky., refused to consent to

vote on cloture, causing a one-day lapse in certain provisions of the PATRIOT Act.¹¹

The debate over the process of filling the amendment tree highlights an ever-present tension in Congress between members’ individual rights and legislative efficiency. Are floor amendments best characterized as helpful attempts by individuals to improve legislation? Or are they simply electoral tools to highlight differences between members and their partisan or ideological opponents?

The answer, certainly, is both. But our data demonstrate the ratio is changing. Specifically, preliminary evidence from a new dataset of 29,860 amendments filed and offered to approximately 497 landmark legislative enactments from the 45th Congress (1877-1878) through the 111th Congress (2009-2010) reveals the number of amendments offered has leapt. Additionally, more amendments are being offered by senators in the minority party, leading majority leaders to block them. Thus, absent internal reforms to discourage senators from offering contentious amendments, majority leaders will continue to “fill the tree” and make us of other amendment-barring maneuvers.

THE SENATE AMENDMENT PROCESS

Nearly all major legislation that reaches the floor of the U.S. House does so pursuant to a rule promulgated by the House Rules Committee. These rules usually restrict individual members’ ability to offer amendments on the floor. House rules further restrict the amending process by imposing a general requirement that all amendments be germane or related to the bill. This grants the chamber’s majority party leadership substantially more leeway in controlling the floor agenda.

By contrast, the U.S. Senate lacks comparable institutional features to rein in individual members. Unless the chamber is operating under a unanimous consent agreement, a bill can be subject to amendment once the Senate moves to consider it. In the absence of a unanimous consent agreement,¹² debate on an amendment can only be brought to a close by

5. Mark Warren, “Help, We’re in a Living Hell and Don’t Know How to Get Out,” *Esquire*, Oct. 14, 2014. http://www.esquire.com/news-politics/news/a23553/congress-living-hell-1114/?src=nl&mag=esq&list=nl_enl_news&date=101514

6. See, e.g., Katie Sanders, “Senate Votes on More Amendments in January than it did in all of 2014,” *Punditfact*, Feb. 2, 2015.

7. After drafting, an amendment often is filed with the clerk and printed in the Congressional Record in advance of its possible consideration. For it to be considered pending business, the senator must be recognized by the presiding officer to formally offer it. See Christopher Davis, “The Amending Process in the Senate,” Congressional Research Service, Report 98-853, 2013; and Walter J. Oleszek, *Congressional Procedures and the Policy Process*, 9th ed., Washington, D.C.: CQ Press, 2013.

8. A total of 45 amendments were considered over 10 days, with only seven adopted, 29 rejected and nine tabled. The bill passed Jan. 29 with nine Democrats on board. Don Wolfensberger, “Keystone Process Tells Tale of Two Houses,” *Roll Call*, Feb. 24, 2015; Laura Barron-Lopez, “Keystone Marathon Begins in the Senate,” *The Hill*, Jan. 21, 2015; and Niels Lesniewski, “McConnell Show’s He’s the Boss,” *Roll Call*, Jan. 23, 2015.

9. Alex Bolton, “McConnell’s Move to Quickly Pass DHS bill Attracts Grumbling,” *The Hill*, March 3, 2015.

10. Shawn Zeller, “McConnell Defeated With Passage of the USA Freedom Act,” *Roll Call*, June 2, 2015.

11. When the bill manager, Sen. Richard Burr, R-N.C., asked for unanimous consent that the Senate vote to consider cloture on the act a day earlier, Sen. Paul responded: “Madam president, reserving the right to object, I would be happy to agree to dispensing with the time and having a vote at the soonest possibility, if we were allowed to accommodate amendments for those of us who object to the bill. I think the bill would be made much better with amendments. If we can come to an arrangement to allow amendments to be voted on, I would be happy to allow my consent. But at this point, I object.” *Congressional Record*, 114th Congress, June 1, 2015, p. S3389.

12. Much of the Senate’s business is governed by unanimous consent agreements. These agreements frequently specify the length of debate and the number and quantity of amendments. See Steven S. Smith and Marcus Flathman, “Managing the Senate Floor: Complex Unanimous Consent Agreements since the 1950s,” *Legislative Studies Quarterly* 14(3), 1989, pp. 349-74; and Walter J. Oleszek, *Congressional Procedures and the Policy Process*, 9th ed., Washington, D.C.: CQ Press, 2013. They often are the result of lengthy negotiations among party leaders, committee chairs and other key senators.

a successful motion to table¹³ or to invoke cloture.¹⁴ Moreover, Senate amendments generally are not required to be germane.¹⁵

The right to unlimited debate and the right to offer non-germane amendments are arguably the two most distinguishing features of the Senate. While separate institutional features, the two nonetheless are intrinsically linked. Lacking the means to end debate with a simple majority vote exacerbates the Senate's time constraints. Accordingly, bill managers and majority leaders are wary of the time devoted to individual amendments. Once a bill is before the Senate—absent a unanimous consent agreement or a successful cloture vote—individual members can offer germane and non-germane amendments that both take up time and force other senators to cast difficult votes.

This is why filling the tree is such a valuable tool. Senators are allowed to offer only a limited number of amendments at any given stage in the process. The precise number permitted depends on the procedural context: what type of measure is being considered and the type and order of amendments already offered. This context is frequently called an “amendment tree.” When the majority leader fills the tree, he or she takes advantage of his or her right of first recognition and offers amendments to all available limbs on the tree, shutting out any further amendments.

While individual senators still have the ability to filibuster, filling the amendment tree provides the majority leader

with some level of *ex ante* leverage over the amending process.¹⁶ Frequently, the majority leader will fill the tree, or threaten to do so, to negotiate a unanimous consent agreement regarding which filed amendments may be offered on the floor. For example, Majority Leader McConnell did not fill the amendment tree during recent consideration of the Medicare Access and CHIP Reauthorization Act of 2015. However, the threat of doing so undoubtedly played a role in the unanimous consent agreement that limited the number of amendments considered to six. While these types of negotiations and agreements are common, the maneuver generated criticism from Sen. Jeff Sessions, R-Ala., who argued the lack of amendments and discussion were a restriction of individual rights and emblematic of a bill that did not “go through regular order.”¹⁷ Instead of negotiating a unanimous consent agreement, the majority leader may also elect to negotiate with individual senators to facilitate a cloture-proof majority.

Just like the procedure itself, the chicken-and-the-egg debate over whether filling the tree is a response to obstruction, or whether obstruction is a response to the tree being filled, is not new. Most scholarly and journalistic accounts credit the procedure to former Senate Majority Leader Robert Byrd, D-W.Va.¹⁸ The technique was then employed by his successors. Former Majority Leader Robert Dole, R-Kan., noted that he “never knew what ‘filling the tree’ was until I tried it, but it turned out to be pretty good.”¹⁹ Dole's successors also employed the maneuver.²⁰

There are a number of difficulties inherent in evaluating how the individual rights extended to senators and the Senate's amending process both have changed. First, as the Keystone Pipeline reauthorization highlights, the term “open amending process” is a bit misleading. Generally, amendments are written and negotiation take place between sponsors, leaders, bill managers and committee chairs over which will be offered on the floor or included in the bill. As Sen. Mary

13. A motion to table is a non-debatable motion subject to a simple majority vote. Measures that are successfully tabled are almost always killed. The motion is used by senators looking to quickly dispose of a pending question. Senators whose amendments are subject to tabling motions frequently complain that the motion deprives them of a direct vote on their amendment, as well as depriving the chamber of debate and discussion. See Chris Den Hartog and Nathan Monroe, *Costly Consideration: Agenda Setting and Majority Party Advantage in the U.S. Senate*, Cambridge, MA: Cambridge University Press, 2011; Jamie Carson, Anthony J. Madonna, and Mark E. Owens, “Regulating the Floor: Tabling Motions in the U.S. Senate, 1865-1945,” *American Politics Research*, forthcoming; and Steven S. Smith, Ian Ostrander, and Christopher M. Pope, “Majority Party Power and Procedural Motions in the U.S. Senate,” *Legislative Studies Quarterly*, 38, 2013, pp. 205-236. For example, during the Keystone Pipeline debate, McConnell tabled a number of Democratic amendments, prompting Democrats like Sen. Edward Markey, D-Mass., to complain their amendments were “blocked.” Laura Barron-Lopez, “Keystone Marathon Begins in the Senate,” *The Hill*, Jan. 21, 2015.

14. While three-fifths of the chamber can vote to invoke cloture to end debate, the process is still fairly time consuming. A cloture petition must wait two calendar days before it is subject to a vote. Then, an additional 30 hours of debate and amending activity can occur before a final vote is taken on the measure. Measures that alter the Senate's standing rules require a two-thirds majority to end cloture. See Christopher M. Davis, “Invoking Cloture in the Senate,” Congressional Research Service, Report 98-425, 2015. Despite the presence of the cloture rule (Rule XXII), incidents of obstruction have increased fairly dramatically in the latter half of the 20th century, as Congress has seen a continuous increase in its membership and responsibilities. Sarah A. Binder and Steven S. Smith, *Politics or Principle? Filibustering in the United States Senate*, Washington, DC: Brookings Institution Press, 1997; and Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate*, Chicago, IL: University of Chicago Press, 2010.

15. Exceptions include if the Senate is operating under a unanimous consent agreement, cloture or considering a general appropriations bill or budget measure. See Christopher Davis, “The Amending Process in the Senate.” Congressional Research Service, Report 98-853, 2013.

16. While individual senators cannot offer an amendment when the tree is filled, the strategy is limited in the sense that the leader cannot reach a final passage vote on the bill without a cloture-proof majority. See Christopher Davis, “The Amending Process in the Senate,” *Congressional Research Service*, Report 98-853, 2013; and Walter J. Oleszek, *Congressional Procedures and the Policy Process*, 9th ed., Washington, DC: CQ Press, 2013.

17. *Congressional Record*, 114th Congress, April 14, 2015, p. S2149. See also Jennifer Haberkorn, “Bipartisan Senate ends flawed Medicare Payment Formula,” *Politico*, April 14, 2015; and Niels Lesniewski, “Senate Returns to an Immediate ‘Doc Fix’ Deadline,” *Roll Call*, April 13, 2015.

18. During a debate over the procedure in 1999, Byrd, who served as majority leader from 1977 to 1981 and from 1987 to 1989, was uncertain as to whether he deserved the credit or not, stating that “I may have been the first one to fill up the tree in my service in the Senate—I am not sure—but I did do that on a few occasions, but only on a very few occasions.” *Congressional Record*, 106th Congress, July 26, 1999, p. S9205.

19. Jonathan Weisman, “The Senate's Long Slide to Gridlock,” *The New York Times*, Nov. 24, 2012.

20. Steven S. Smith, *The Senate Syndrome*, Norman, Okla.: University of Oklahoma Press; and Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate*, Chicago, Ill.: University of Chicago Press, 2010.

Landrieu, D-La., remarked: “There was never a time as long as I’ve been here where there’s been a completely open, completely unlimited, completely freewheeling amendment process. That has never existed.”²¹ Senate bills usually are filtered through this amendment-selection mechanism.²²

Of course, much of this debate centers on whether amendments are offered for sincere policy reasons or for electoral position-taking motivations. As with differentiating filibusters from legitimate debate, determining member intent is difficult. Indeed, most members have mixed motivations. It is both true that senators recognize the electoral value of certain amendment votes and that leaders seek to protect vulnerable party members from difficult roll call votes.²³

ROLL-CALL RECORDS

Roll-call votes in Congress are the product of a two-stage selection mechanism. First, a motion or proposal must be given consideration on the House or Senate floor. This can be a difficult proposition—especially in the House, where majority party leadership can use the Rules Committee to control the floor. Second, a member must formally call for the yeas and nays and, as specified by the Constitution, be supported by a sufficient second.²⁴

Roll-call votes are valuable data to congressional observers. Journalists use roll-call votes to inform the public of member positions on key issues. Members of Congress, campaign consultants and political parties will use them to promote a positive individual or party “brand” on key issues, or to associate a negative brand with a vulnerable member or opposing party. Consistent with this, political scientists have used roll-call votes to generate ideological scores for members of

Congress.²⁵ While recent scholarship has questioned whether these scores represent latent member ideology or if they are a product of other factors,²⁶ scholars generally agree that roll-call voting behavior has serious consequences for members.²⁷ Even though voters initially are poorly informed about their representatives’ votes, campaigns mitigate this through advertising. Once informed of these votes, member effectiveness largely takes a back seat to voter perceptions of member positions. As David Mayhew famously argued, “We can all point to a good many instances in which congressmen seem to have gotten into trouble by being on the *wrong* side in a roll-call vote, but who can think of one where a member got into trouble by being on the *losing* side?”²⁸ Votes on individual amendments represent a substantial portion of the record. From 1953 to 2011, amendments represent roughly 30 percent of all recorded votes cast in the House of Representatives and 40 percent in the Senate.²⁹

Unlike in the House, the threat of a filibuster often forces Senate majority leaders to cut deals to allow difficult amendments to receive both floor consideration and roll-call votes. The lack of a germaneness requirement allows individual members to choose issues they feel will be popular with their supporters. In addition to becoming fodder for campaign ads, roll-call voting scores may be used to portray a member as being ideologically supportive of an unpopular

21. Burgess Everett, and Manu Raju, “Senate Pushes Envelope on Gridlock,” *Politico*, Jan. 26, 2014.

22. Additionally, the procedural context can be manipulated in a way that makes raw counts of amendments or bills inappropriate for analysis. For example, instead of filling the amendment tree, leaders may schedule bills in such a way that time demands force members to choose between the bill and their amendment votes. Leaders may also use omnibus legislation to insulate themselves from large numbers of amendments. Peter Hanson, *Too Weak to Govern: Omnibus Bills, Agenda Control and Weak Senate Majorities*, Boston, Mass.: Cambridge University Press, 2014. Finally, leaders may not fill the tree on specific bills but instead offer controversial measures as amendments to those bills in a manner that they can’t be altered. An example of this occurred in a recent debate over a Defense Authorization Measure, where majority party Republicans offered a controversial cybersecurity measure as an amendment and immediately filed cloture on it, barring any further amendments. Burgess Everett, “Harry Reid and Mitch McConnell Escalate their War of Words,” *Politico*, June 11, 2015.

23. Perhaps the most famous electoral amendment was the one from Sen. Tom Coburn, R-Okla., to bar the Affordable Care Act from providing insurance coverage of Viagra to child molesters and rapists. While Democrats dubbed it a “crass political stunt,” Republicans featured the vote in a number of electoral ads. Angie Drobnic Holan, “Ed Perlmutter voted for Viagra for sex offenders, paid for by health care bill? Nope.” *Politifact*, Oct. 26, 2010.

24. Article 1, Section 7, Clause 3 of the U.S. Constitution states: “The yeas and nays of the members of either House on any question shall, at the desire of one-fifth of those present, be entered on the journal.”

25. Keith T. Poole and Howard Rosenthal. *Ideology and Congress*, New Jersey: Transaction Publishers, 2007.

26. This is not to suggest members of Congress are not polarized; rather, that the cause may not be purely ideological, but partially driven by electoral and institutional factors. While this does not alter the primary products of polarization—crippling gridlock on salient issues and anemic legislative productivity—it does suggest an alternative means of reform. Specifically, by assuming polarization is ideologically driven, the solution to solving the problem of gridlock is to “vote the bums out” and replace them with less-ideological members. However, if polarization is electoral and procedurally driven, then solving the problem requires a more complex and nuanced set of solutions that includes both institutional reform and expanding education about Congress. Michael Crespin, and David W. Rohde, “Dimensions, Issues and Bills: Appropriations Voting on the House Floor,” *Journal of Politics* 72(4), 2010, pp. 976-989; Gary W. Cox, and Keith T. Poole, “On Measuring Partisanship in Roll Call Voting: The U.S. House of Representatives, 1877-1999,” *American Journal of Political Science* 46(3), 2002, pp. 477-489; Keith L. Dougherty, Michael S. Lynch, and Anthony J. Madonna, “Partisan Agenda Control and the Dimensionality of Congress,” *American Politics Research* 42, 2014, pp. 600-627; Frances E. Lee, *Beyond Ideology: Politics, Principles, and Partisanship in the U.S. Senate*, Chicago, IL: University of Chicago Press, 2009; and Hans Noel, *Political Ideologies and Political Parties in America*, New York, NY: Cambridge University Press, 2013.

27. Stephen Ansolabehere and Philip E. Jones, “Constituents’ Responses to Congressional Roll Call Voting,” *American Journal of Political Science*, 54, 2010, pp. 583-97; Gregory L. Bovitz and Jamie Carson. 2006. “Position-Taking and Electoral Accountability in the U.S. House of Representatives,” *Political Research Quarterly*, 59(2): pp. 297-312; Brandice Canes-Wrone, David W. Brady, and John Cogan, “Out of Step, Out of Office: Electoral Accountability and House Members’ Voting,” *American Political Science Review*, 96(1), 2002, pp. 127-140; and Daniel Lipinski, “The Effect of Messages Communicated by Members of Congress: The Impact of Publicizing Votes,” *Legislative Studies Quarterly*, 26(1), 2001, pp. 81-100.

28. David R. Mayhew *Congress: The Electoral Connection*, New Haven, CT: Yale University Press, 1974, p. 118.

29. David Rohde, *Political Institutions and Public Choice House Roll-Call Database*, Durham, N.C., Duke University, 2010.

national figure. During the 2014 campaign, Democratic senators frequently were hammered for voting too often with Majority Leader Reid or President Obama.³⁰

The founders recognized how roll-call records could be used to undercut legislative efficiency, and wrestled with the issue during the Constitutional Convention. Several delegates argued that any one member of Congress should be able to call for a recorded vote on a given proposal. A counterproposal supported removing any roll-call voting provision from the Constitution on the basis it would result in “frivolous” votes that would “mislead the people.”³¹ The compromise was to keep a provision that would provide a roll call if supported by one-fifth of the chamber. Scholars have argued that increasing electoral competitiveness between the parties and the prevalence of the 30-second television attack ad has made roll-call votes more influential.³² As the data in the next section of this paper indicate, the increased value of the roll-call vote has led senators to exploit their individual right to offer amendments in a manner that weakens legislative efficiency.

CONGRESSIONAL AMENDMENT DATA

In an effort to better evaluate how individual rights and the amending process in the Senate have changed over time; we utilize a new dataset on amendments and roll-call votes in Congress. Specifically, the University of Georgia Amending Project has collected and coded data on roll-call votes on 29,860 amendments to 497 landmark pieces of legislation, sampled from the 45th Congress (1877-1878) to the 111th Congress (2009-2010).³³ The data include information on,

among other things, the manner in which the amendment was handled (roll-call vote, division, teller, voice, withdrawn, not voted on); whether it was offered by way of a motion to recommit, dispensed with by some other procedure (a point of order, motion to table, failed cloture vote, etc.); whether it passed or failed; what it sought to amend; who the sponsor of the amendment was; and whether it was offered on behalf of a committee.

As a brief methodological note, the decision to focus only on amendments to landmark enactments was motivated by several factors. First, the data-collection process for much of congressional history is especially labor-intensive. Coding all amendments in a specific Congress is a massive undertaking, and completing a dataset that spanned a large number of congresses would require resources we simply do not have. Using landmark enactments also helps to minimize biases that would otherwise stem from the large volume of trivial legislation Congress produces.³⁴ Finally, restricting the study to landmark enactments allows us to study a comparable number of bills per Congress.³⁵

While the data are still preliminary, they offer several advantages over existing datasets. The long time series allows us to track temporal changes in both the amending and roll-call generating processes. It is not restricted to amendments or proposals that resulted in roll-call votes. Thus, if defenders of filling the amendment tree are correct and more amendments are being offered for electoral purposes, we should see both an uptick in amendments filed and an increase in the proportion of amendments that yielded roll calls. This

30. See, e.g., Niels Lesniewski, “Vulnerable Democrats Almost Always Voted with Obama,” *Roll Call*, Oct. 27, 2014; Niels Lesniewski, “The Attack Ads Harry Reid Didn’t Want You to See,” *Roll Call*, Oct. 30, 2014; and Lauren Carroll, “Republicans’ Favorite Attack on Incumbent Democrats: Their Loyalty to Obama in Votes,” *Politifact*, Oct. 22, 2014.

31. The provision providing for the recorded voting was debated in the Constitutional Convention on Aug. 10, 1781. Upon its introduction, Gouverneur Morris of Pennsylvania proposed amending it to allow any one member to call for the yeas and nays. This was quickly countered by Roger Sherman of Rhode Island, who proposed eliminating the requirement altogether. Morris professed concern about the ability of small states to reach the one-fifth threshold, while Nathaniel Gorham of Massachusetts worried about the practice of “stuffing the Journals with [votes] on frivolous occasions,” and “misleading the people, who never know the reasons determining the votes.” Max Farrand, ed., *The Records of the Federal Convention of 1787*, New Haven, Conn.: Yale University Press, 1966, p. 255, quoted in Michael S. Lynch and Anthony J. Madonna, “Viva Voce: Implications from the Disappearing Voice Vote,” *Social Science Quarterly*, 94, 2013, pp. 530-550. See also Sarah A. Binder, *Minority Rights, Majority Rule*, New York, N.Y.: Cambridge University Press, 1997. The apparent compromise was to keep the clause with the one-fifth threshold.

32. Frances E. Lee, *Beyond Ideology: Politics, Principles, and Partisanship in the U.S. Senate*, Chicago, Ill.: University of Chicago Press, 2009.

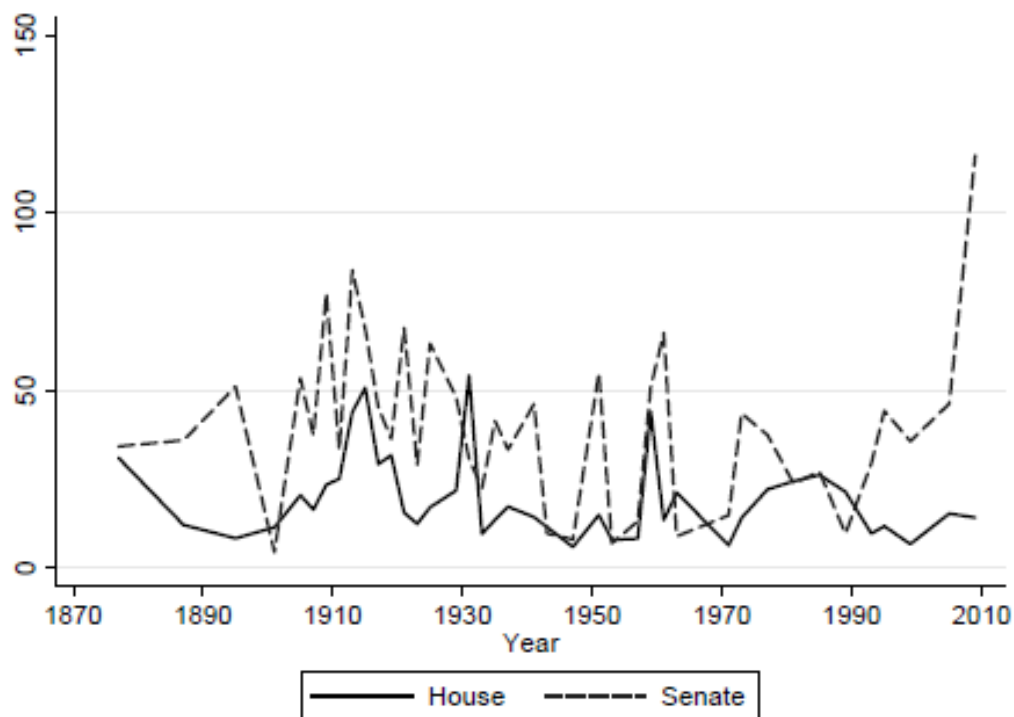
33. The project seeks to integrate undergraduate students into research on congressional politics. The project accomplishes this by combining classroom instruction that provides practical training for congressional internships and knowledge of congressional floor procedure with experiential learning through data collection, management and analysis. The project offers one to two courses a year, with generally between five and 12 students. In addition to attending course lectures and doing assigned readings, students are asked to spend five hours a week collecting data on the congressional amendments. This involves the student reading through an online version of the *Congressional Record* and/or House and Senate journals and entering amendment information into a spreadsheet in a shared folder. During course meetings, students share events or cases they read about during their data collection and

contrast them with assigned readings. More on the University of Georgia Amending Process Project can be found on the project’s website at http://spia.uga.edu/faculty_pages/mlynch/amendment.php.

34. Joshua Clinton and John Lapinski, “Measuring Legislative Accomplishment, 1877-1994,” *American Journal of Political Science* 50(1), 2006, pp. 232-249.

35. As we have argued: “Landmark enactments are by no means perfect. Determining what constitutes a landmark enactment introduces an arbitrary element, and scholars will often differ on certain measures. Additionally, in order to examine how the adoption of an institution influences legislator behavior, we need to utilize a measure of landmark enactments that is not biased towards one or two congresses. To mitigate these problems, we include several different sources of landmark enactments. Acts selected prior to the 79th Congress (1945-1947) include those listed by Stathis (2003), Petersen (2001) and the top 10 most significant enactments per Congress coded by Clinton and Lapinski (2006). For the 79th Congress (1945-1947) to 112th Congress (2011-2013), the acts were selected using a combination of Clinton and Lapinski’s (2006) ten most significant enactments per Congress, Stathis (2014) and Mayhew (1991). Specifically, acts passed prior to the 105th Congress were chosen using those three sources. As Clinton and Lapinski’s (2006) time series ends at the 104th Congress only Mayhew (1991) and Stathis (2014) were employed from the 105th Congress forward. See Michael S Lynch, Anthony J. Madonna, Rebecca Bennett, Jordan McKissick and Hannah Weiss, “Procedural Polarization: Examining Changes in the Construction of the Roll Call Voting Record, 1877-2012,” paper presented at the 2015 Annual Meeting of the Southern Political Science Association, New Orleans, LA, p. 13; Joshua Clinton and John Lapinski, “Measuring Legislative Accomplishment, 1877-1994,” *American Journal of Political Science* 50(1), 2006, pp. 232-249; R. Eric Petersen, “Is It Science Yet? Replicating and Validating the Divided We Govern List of Important Statutes,” paper presented at the 2001 Annual Meeting of the Midwest Political Science Association, Chicago, IL; Stephen W. Stathis, *Landmark Legislation 1774-2002: Major U.S. Acts and Treaties*, Washington, D.C.: CQ Press, 2013; David R. Mayhew, *Divided We Govern: Party Control, Lawmaking and Investigating: 1946-1990*, New Haven, CT: Yale University Press, 1991; and Stephen W. Stathis, *Landmark Legislation, 1774-2012: Major U.S. Acts and Treaties*, 2nd ed., Washington: CQ Press, 2014.

FIGURE I: AMENDMENTS PER LANDMARK ENACTMENT 1877-2010, HOUSE AND SENATE



can only be done if we have data on amendments that were dispensed with by voice or another non-recorded means. Third, from the 93rd Congress (1973-1974), the data allows us to track amendments that were offered but not granted floor consideration.³⁶ Thus, if critics of filling the amendment tree are correct, we should observe a higher proportion of amendments denied floor consideration in recent years.

Figure 1 plots the number of amendments per-landmark-enactment in the House and Senate over time. As we would expect to see—given the lack of a comparable Rules Committee—the bulk of the amending activity occurs in the Senate. Of the 29,860 amendments, 20,171 of them (67.55 percent) are offered in the Senate. Notably, the steep increase in Senate amendments corresponds to the 111th Congress, the first in our dataset where Reid served as majority leader. While this is consistent with the longer trend in the data, there is a more dramatic increase in recent congresses. While 67.55 percent of all amendments were Senate amendments, when examining the four most recent congresses coded in our dataset (the 104th, 106th, 109th and 111th) the percentage of Senate amendments increases to 78.08 percent.³⁷

36. Students coded only amendments dispensed with by voice, teller, division or roll call vote prior to the 93rd Congress (1973-1974). After the 93rd Congress, the congress.gov website makes tracking amendments far easier. Anecdotally, it appeared to be quite rare for amendments to be filed on the floor and not dispensed with by some type of vote before the 93rd Congress. The post-93rd Congress data supports the notion that this is largely a modern phenomenon. For example, in the 95th Congress only 22 of 952 amendments were not dispensed with by some form of a vote on the floor.

37. Coding for the 105th, 107th, 108th, and 110th Congresses is not yet completed.

Figure 1 suggests senators have been exploiting their individual rights to offer amendments more often in recent congresses. In the Senate, the number of amendments offered per-landmark-enactment spiked to 116 in the 111th Congress. One should not read too much into this figure, given the small sample size of coded enactments. Nevertheless, 116 is more than double the number of amendments offered per-enactment in 109th Senate.

Figure 2 builds on the increased exploitation of individual rights by examining the percentage of Senate amendments granted floor consideration subject to a roll-call vote. The figure also includes a simple “LOWESS” smoothing line (locally weighted scatterplot smoothing) to indicate the general trend in the data.³⁸ The figure demonstrates a sharp increase in the percentage of amendments subject to a roll-call vote over time. Of the 17,838 Senate amendments in our total dataset, 2,467 (or 13.83 percent), received roll calls. However, this increases to 34.8 percent of amendments if we examine only the four most recent congresses coded in our dataset (the 104th, 106th, 109th and 111th congresses). Additionally, if the increase in amending activity is attributable to electorally motivated amendments, we should expect the percentage of amendments offered by minority-

38. The LOWESS smoothing line provides visual representation of a locally weighted regress of the percentage of Senate amendments granted floor consideration on time (as measured by Congress).

FIGURE 2: PERCENT OF SENATE AMENDMENTS GRANTED FLOOR CONSIDERATION RECEIVING ROLL CALL VOTES, 1877-2010

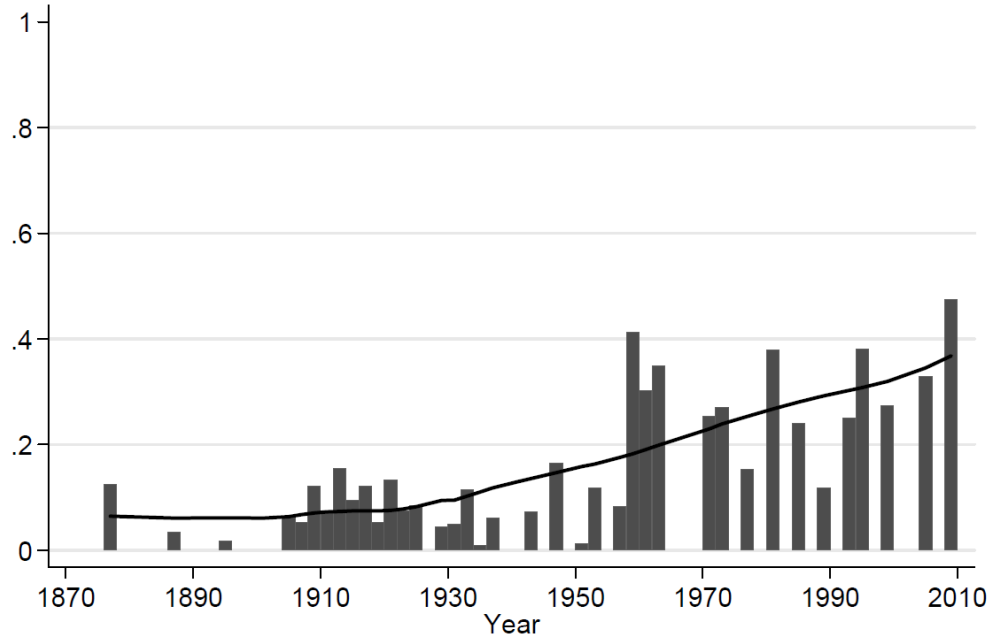


FIGURE 3: PERCENT OF NON-COMMITTEE AMENDMENTS OFFERED BY MINORITY-PARTY SENATORS, 1877-2010

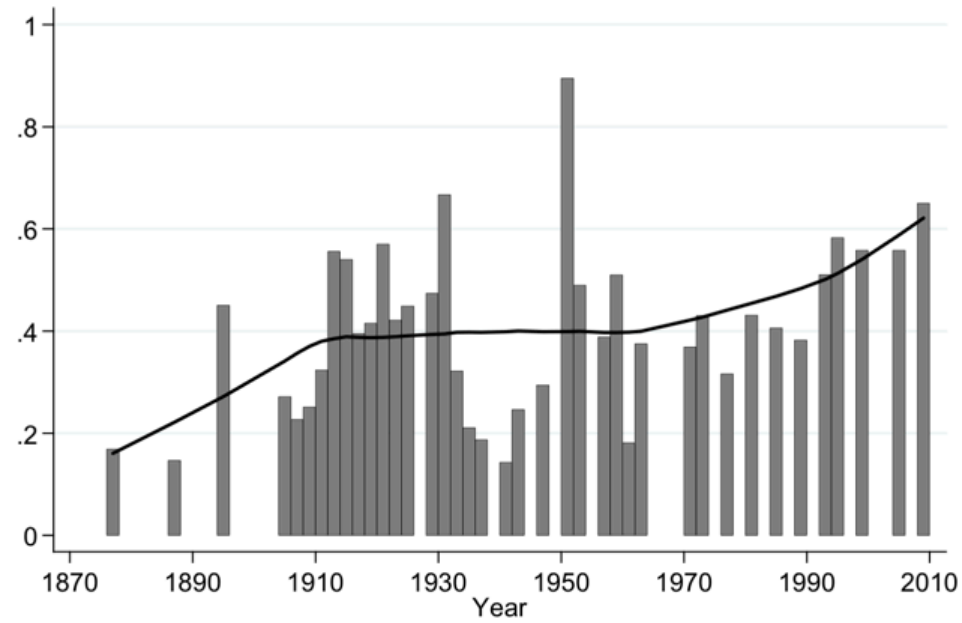
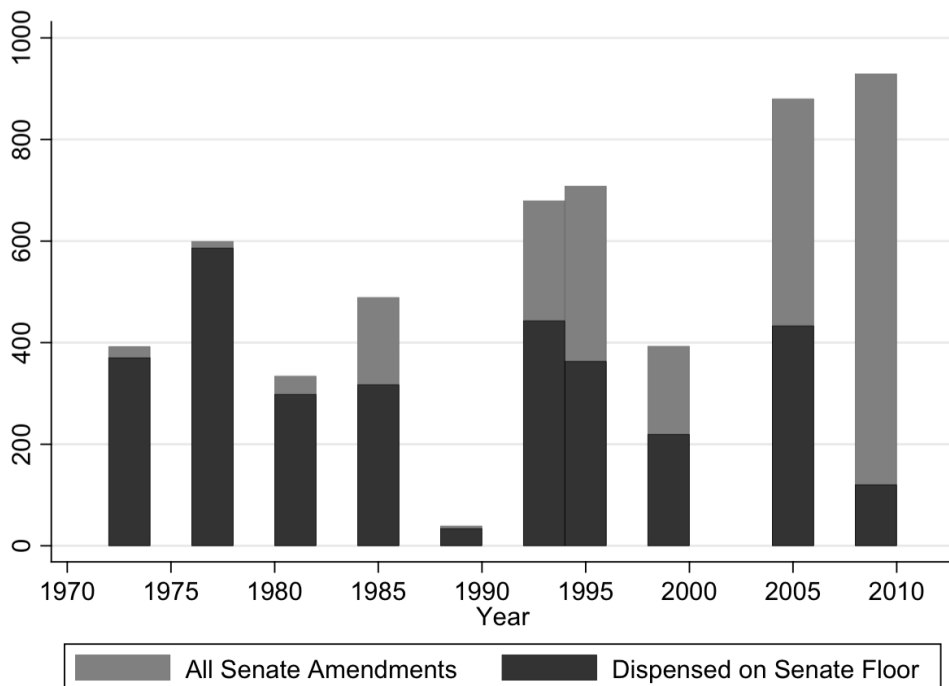


FIGURE 4: SENATE AMENDMENTS FILED AND GRANTED FLOOR CONSIDERATION, 1973-2010



party members to be rising. This is what we see in Figure 3.³⁹ The figure also includes a simple LOWESS smoothing line. Consistent with the electorally driven amending narrative, the percentage of amendments sponsored by minority-party senators has increased sharply over time. By the 111th Congress, the majority of amendments were being offered by minority-party members.⁴⁰

The preceding figures suggest that Reid was forced to deal with more amendments than his predecessors. Figure 4, which plots the total numbers of amendments filed, with the numbers that were dispensed with on the floor, indicates that Reid also blocked floor amendments far more frequently than his predecessors.⁴¹ The 111th Congress (2009-2010) offers the greatest proportion of amendments not granted floor consideration. While the proportion appears to be increasing over the time series, the 111th Congress represents a notable departure. Of the 929 amendments coded in the 111th Sen-

ate, 120 of them (12.91 percent) were considered on the floor. This compares to 433 of 880 amendments (49.20 percent) in the 109th Senate.⁴²

In sum, the data suggests the amending process is changing dramatically. It is an unenviable development produced by the confluence of factors inherent to the Senate, and exogenous to it. Both parties have a reasonable expectation to succeed in the next election and voters respond to advertisements that feature roll-call votes.⁴³ Thus, it is not surprising more amendments are being filed per-enactment and more roll calls are being cast on amendments granted floor consideration. Chamber leadership, meanwhile, faced with the limited time available for moving legislation,⁴⁴ have sought to increase legislative productivity by curtailing individual rights through the amending process.

39. A large portion of the amendments coded were offered on behalf of the reporting committee. The overwhelming majority of these amendments were adopted—and generally without controversy. Notably, the trends depicted in all four figures hold regardless of whether committee amendments are included or omitted.

40. Relatedly, if the goal of an amendment is to get a vulnerable senator on record as opposing a popular position, we should expect more roll calls on amendments that fail. Consistent with the electoral-motivation thesis, this percentage has increased substantially in recent senates. The average percentage of roll calls on amendments that fail was 45.75 for the first 35 senates in the data. This jumps to 82.59 percent during the four most recent senates.

41. This certainly does not mean that all amendments not granted floor consideration were blocked by a filled tree. For example, amendments may have been withdrawn, including in a broader substitute amendment, or an agreement was reached to consider them in later legislation. The number not granted floor consideration is simply the best proxy measure we have available at this time. Additionally, the temporal variation matches most of the anecdotal accounts we have presented thus far, providing us with confidence that our conclusions are broadly correct.

42. Using data from Lynch, Madonna and Roberts, it contrasts with 1,385 of 4,232 amendments (or 32.73 percent) offered to all bills considered under structured rules in the 111th House. Michael S. Lynch, Anthony J. Madonna, and Jason M. Roberts, "The House Majority Party and the Rules Committee: Bargaining over Chamber Procedure," *Legislative Studies Quarterly*, forthcoming.

43. Frances E. Lee, *Beyond Ideology: Politics, Principles, and Partisanship in the U.S. Senate*, Chicago, Ill.: University of Chicago Press, 2009.

44. In recent years, the Senate has spent fewer than 75 days per-year in session. Majority Leader McConnell has increased the "work days" of the chamber in the 114th Congress, which may provide him with more time to permit non-committee amendments to receive roll-call votes. See Bipartisan Policy Institute, "Healthy Congress Index," July 21, 2015, at <http://bipartisanpolicy.org/congress/#working-days>

CONCLUSION

In a recent exchange over a Defense Authorization Act, Majority Leader McConnell suggested former Majority Leader Reid was being hypocritical. Reid responded by suggesting McConnell “walk into his office, his little bathroom in there and look into that mirror, because over that mirror he should be able to see the words ‘hypocrisy’ and ‘cynicism,’ because the speech he gave was fervent with hypocrisy and cynicism.”⁴⁵ Accusations like these are frequently made during battles over procedure because, frankly, members frequently look like hypocrites when it comes to procedure.⁴⁶ This is understandable. Nobody runs for Congress because they are deeply enthusiastic about the motion to recommit or other parliamentary maneuvers. If they did, the evidence suggests they would not be elected, as voters appear to be less consistent on issues of congressional procedure than members.⁴⁷

Accordingly, it is not surprising that Senate observers have been skeptical about McConnell’s pledge to expand individual rights by returning the chamber to “regular order.” Observers were equally skeptical when Democratic leaders in the House and Senate pledged to return the chamber to regular order after taking control in 2007. They were similarly skeptical when Republicans pledged to return to regular order in 1995.⁴⁸ Given the opportunity, members will abuse the amending process to generate roll-call votes for electoral purposes. They will do this because they know voters respond to it. As Walter Oleszek noted with respect to the House, regardless of which party is in control, “the fundamental objective of the majority is to maximize the achievement of its policy and political goals, even if that minimizes or prevents entirely the minority party’s opportunity to amend legislation.”⁴⁹

So what is to be done about the Senate amending process? There are a number of proposed reforms that have been offered over the years. All of them merit consideration, with the caveat that procedural reform in the Senate is particu-

larly difficult given the chamber’s super-majoritarian decision rules for enacting such changes.⁵⁰

The first set of reforms involves altering the leader’s ability to restrict individual senators’ right to offer amendments by filling the tree directly. These include—but are certainly not limited to—proposals such as guaranteeing “at least 10 amendments (if offered) in order, given in alternating order between senators of both parties.”⁵¹

These proposals may successfully prevent the majority leader from filling the amendment tree on the floor. However, it is worth noting that these reforms may make the Senate less efficient, and may push more intra-senate conflict out of the public view. With the majority leader’s leverage effectively undercut, he or she may opt to wait until a unanimous-consent agreement is in place before bringing a bill before the Senate. The end result could be fewer bills considered under an open-amending process on the floor.

A second set of reforms focuses on stemming individual senators’ ability to offer amendments indiscriminately. Expanding the germaneness requirements to a broader set of bills and issues is an example of this type of reform. Such proposals likely would make it difficult for individual senators to offer “hobby horse” amendments to every piece of legislation.⁵² However, as germaneness rules bolster leadership at the expense of individual senators, they would likely meet with bipartisan resistance.⁵³ They may also encourage individual senators to engage in more obstructive efforts to get their proposals included and/or voted upon later in the session, such as refusing unanimous consent.

Third, as the preceding discussion has demonstrated, unlimited debate is intertwined with the amending process (and negotiations over the amending process); successful reform efforts might necessitate pairing reforms to cut down on

45. *Congressional Record*, 114th Congress, June 11, 2015, p. S4066. See also Burgess Everett, “Harry Reid and Mitch McConnell Escalate their War of Words,” *Politico*, June 11, 2015.

46. On member consistency on the filibuster, see Sarah A. Binder and Steven S. Smith, *Politics or Principle? Filibustering in the United States Senate*, Washington, D.C.: Brookings Institution Press, 1997.

47. For recent examples regarding the public’s attitude on procedure see Steven S. Smith and Hong Min Park, “Americans Attitudes about the Senate Filibuster,” *American Politics Research* 41, 2013, pp. 735-760; and Steven S. Smith, Ian Ostrander and Christopher M. Pope, “Majority Party Power and Procedural Motions in the U.S. Senate,” *Legislative Studies Quarterly* 38(2), 2013, pp. 205-236.

48. See Sarah S. Binder, “Why Can’t Mitch McConnell Keep his Promises?” *Washington Post*, Monkey Cage, May 26, 2015; Don Wolfensberger, “Will Democrats’ Timetable Trump ‘Regular Order’ Pledge?” *Roll Call*, Nov. 20, 2006; Steven S. Smith, *The Senate Syndrome*, Norman, Okla.: University of Oklahoma Press, 2014; and Walter J. Oleszek, *Congressional Procedures and the Policy Process*, 9th ed., Washington, D.C.: CQ Press, 2013.

49. Walter J. Oleszek, *Congressional Procedures and the Policy Process*, 9th ed., Washington, D.C.: CQ Press, 2013, p. 182.

50. Sarah A. Binder, Anthony J. Madonna and Steven S. Smith, “Going Nuclear, Senate Style,” *Perspectives on Politics*, 5(4), 2007, pp.729-40.

51. Richard Dorment, “22 Simple Reforms That Could #FixCongress Now,” *Esquire*, Oct. 15, 2014. These reforms were proposed and agreed to by a panel consisting of former Majority Leaders Trent Lott, R-Miss., and Tom Daschle, D-S.D.; former Reps. Barney Frank, D-Mass., and Bob Livingston, R-La., and political pundit Lawrence O’Donnell.

52. One frequent hobby-horse amendment that dogged Reid was Sen. David Vitter’s, R-La., proposal to end health-care contributions for members and staff under the Affordable Care Act. News sources attribute several instances of filling the amendment tree on Reid’s behalf to his desire to bar Vitter from offering the amendment. Democratic leaders criticized the maneuver and the amendment. Reid argued that “punishing hard-working congressional staff, who put in long hours because they believe in public service—that is, the work we do here in Congress—will not roll back the benefits of Obamacare.” Press accounts suggested that Reid and Sen. Barbara Boxer, D-Calif., floated an amendment that would deny government contributions to lawmakers “if there is ‘probable cause’ they solicited prostitutes.” Manu Raju and John Breshnahan, “Will Democrats Haul Out Hookers in David Vitter Fight?” *Politico*, Sept. 12, 2013. The amendment referenced a 2007 scandal in which Vitter was tied to a prostitution ring. *Congressional Record Daily*, 113th Congress, Sept. 17, 2013, p. S6479.

53. See Don Wolfensberger, “Is the Senate Germane? Majority Leader Reid’s Lament.” *Roll Call*, Aug. 13, 2007.

filling the amendment tree with broader filibuster-rules reform. These proposals might limit obstruction on motions to proceed, which could save bill supporters time that could be reallocated to the amending process. Alternatively, the Senate could revive either of the reforms adopted before the 113th Congress. The first of these created a motion to proceed that could be adopted by a simple majority in exchange for the guaranteed consideration of at least four amendments (two from each party). It expired after the 113th Congress ended. The second procedural reform created a new standing rule allowing a bipartisan group to expedite the end of debate on a motion to proceed.⁵⁴ While the direct effect of such reform efforts is theoretically quite muted, in the sense that they do not touch individual senators ability to obstruct legislation directly (or threaten to obstruct directly),⁵⁵ it certainly is possible that such proposals influence negotiations over scheduling and amending. Short of altering the Senate's debate rules directly, any effort to improve the Senate amending process will require a combination of approaches.

A final avenue is directed to lowering the value of electorally motivated floor amendments. There are three general ways to accomplish this. The first involves limiting the source of information being transmitted to voters. Scholars have observed that greater transparency in Congress—while providing many normative benefits—has made deal-making more difficult and the lawmaking process less efficient.⁵⁶ Altering congressional rules to roll back transparency in ways that relegate amending to committees, or encourage more unrecorded voting, might help in this regard. The number of hobby-horse and electorally aimed amendments would presumably decline, as senators no longer would be able to offer amendments to embarrass senators of the other party. However, such reforms would be nearly impossible and would face intense political opposition outside the chamber.⁵⁷

The second general approach would limit the manner in which information is transmitted to voters through a substantive reform of our campaign-finance system. Such reforms, typically, either aim to reduce the flow of misinformation to voters,⁵⁸ or to offset it through the delivery of nonpartisan,

factual communications that would contextualize roll-call votes and other legislative activities. As has been well-documented, legal challenges have substantially complicated this alternative. Even if there was no issue regarding constitutional interpretation, it is unclear whether the quality of the information voters receive would improve.⁵⁹

Finally, senators take advantage of their individual rights to offer amendments and force uncomfortable roll-call votes because they believe voters respond positively to this technique. An obvious way to discourage them from doing so would be to make the public less susceptible to charges made through roll calls. Having taught Introduction to American Government to college students, we are aware that getting the public excited to learn more about the legislative process directly is a nearly impossible task. However, this could be mitigated by either increasing the level of information on legislative process and procedure possessed by elites and the media⁶⁰ or by making the system less complex, such as by adopting several of the previously discussed internal procedural reforms.⁶¹

What seems clear is that the job of majority leader is largely a thankless one. It carries with it almost all the expectations of the House speakership, with very few of the tools. Balancing longstanding individual senators' rights with the need to maintain some level of legislative efficiency is exceptionally difficult in an era of high polarization and electoral competitiveness. As long as members have incentives to take greater advantage of their individual rights to offer amendments, we should expect to see leaders use whatever tools they have at their disposal to protect electorally vulnerable fellow party members and increase legislative efficiency.

for reducing electoral advertisements.

59. For a debate on campaign finance laws and legislative effectiveness see, e.g., Thomas E. Mann and E.J. Dionne, Jr. "The Futility of Nostalgia and the Romanticism of the New Political Realists: Why Praising the 19th-Century Political Machine Won't Solve the 21st Century's Problems," *The Brookings Institution*, June 2015; Jonathan Rauch, "Political Realism: How Hacks, Machines, Big Money, and Back-Room Deals Can Strengthen American Democracy," *The Brookings Institution*, May 2015; Ray La Raja and Brian Schaffner, "Want to Reduce Polarization? Give Parties more Money," *The Washington Post*, July 21, 2014; and Lee Drutman, "The Debate over State Polarization and Campaign Finance Laws Continues," *The Brookings Institution*, July 16, 2015.

60. For a discussion of increased media sophistication during the health care debate, see John Sides, "What We Have Learned from the Health Care Debate," *TheMonkeyCage.org*, Dec. 16, 2009.

61. Both the total number of electorally generated veto players and the permissiveness of individual legislator rights in the United States are higher than in most other nations. On electorally generated veto players, see Alfred Stepan and Juan J. Linz, "Comparative Perspectives on Inequality and the Quality of Democracy in the United States," *Perspectives on Politics* 9(4), 2011, pp. 841-856; and on individual/minority rights, see Andrew J. Taylor, *The Floor in Congressional Life*, Ann Arbor, MI: The University of Michigan Press, 2012. This both slows down the lawmaking process and muddles the final output. Steven M. Teles, "Kludgeocracy in America," *National Affairs*, 17, 2013, pp. 97-114. This makes it more complex and difficult for voters to understand. Thus, holding elective officials "accountable" for policies is more difficult in the United States than in most other democracies. Essentially, the current system may be asking too much of the voters.

54. Elizabeth Rybicki, "Changes to Senate Procedures in the 113th Congress Affecting the Operation of Cloture (S.Res. 15 and S.Res. 16)," Congressional Research Service, Report R42996, 2013.

55. Steven S. Smith, *The Senate Syndrome*, Norman, Okla.: University of Oklahoma Press, 2014.

56. Sarah A. Binder and Frances E. Lee, "Making Deals in Congress," in Nathaniel Persily, ed., *Solutions to Political Polarization in America*, New York, N.Y.: Cambridge University Press, pp. 240-260.

57. In addition to the difficulties in marshalling coalitions to alter internal Senate rules—as we previously discussed—the yeas and nays are protected by the Constitution. Additionally, social media and improved technology has made it nearly impossible to restrict the flow of information. Even if they do not take advantage of it directly, voters almost always support greater transparency.

58. Tightening caps on campaign spending by private groups is a common proposal

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