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OF RULES AND REPRESENTATION (AND DYSFUNCTION) IN THE UNITED STATES SENATE

Daniel Wirls^{*}

WENDY J. SCHILLER & CHARLES STEWART III, *ELECTING THE SENATE: INDIRECT DEMOCRACY BEFORE THE SEVENTEENTH AMENDMENT* (PRINCETON UNIVERSITY PRESS 2015). Pp. 236. PAPERBACK \$ 29.95.

STEVEN S. SMITH, *THE SENATE SYNDROME: THE EVOLUTION OF PROCEDURAL WARFARE IN THE MODERN U.S. SENATE* (UNIVERSITY OF OKLAHOMA PRESS 2014). Pp. 410. HARDCOVER \$ 34.95.

Whether largely a coincidence or not, the United States Senate experienced its two most significant reforms within four years. In May 1913, ratification of the Seventeenth Amendment made the Senate a body directly elected by voters rather than by state legislatures. In March 1917, the Senate created a rule to end debate by a supermajority vote, a parliamentary mechanism intended to limit filibusters. The former is the one great constitutional change in the structure of the Senate; the latter is the most important alteration of Senate procedure.

At the time, both were seen as democratic reforms. In the long run their consequences would be somewhat ironic and contradictory. The Seventeenth Amendment, the culmination of a decades-long popular and multifaceted progressive reform movement, brought subtle change. It soon seemed as unremarkable as it was inevitable; an ineluctable correction soon taken for granted. The Seventeenth Amendment eliminated one of the main features James Madison and other Founders thought would improve the quality of deliberation in the Senate. Other such features included its smaller size and six-year term. Four years later, and produced, by comparison, virtually overnight and without opposition, supermajority cloture would prove to be far more consequential as the twentieth century unfolded. By creating a rule that allows a minority to prevent action, the Senate did something Madison and company would have never approved. In fact, supermajority cloture was the opposite of what they wanted from the Senate. Madison and other

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Founders sought a different quality, not quantity, of debate, a different kind of deliberation, not a minority veto.

The two transformations have generated separate lines of academic inquiry, especially since the early 1980s with the growth of the field of American Political Development and an institutional turn in legal scholarship. More than the historical study of American politics, the American Political Development approach, which is heavily focused on institutions, has sought to develop and apply theories of political change. Scholars of the Seventeenth Amendment seek to explain how the great constitutional change occurred, and especially what its consequences were. Scholars of Senate procedure probe the dynamics of minority obstruction, the filibuster, and the evolution and politics of supermajority cloture.

Electing the Senate: Indirect Democracy Before the Seventeenth Amendment by Wendy Schiller and Charles Stewart¹ and *The Senate Syndrome: The Evolution of Procedural Warfare in the Modern U.S. Senate* by Steven S. Smith,² are the latest volumes on each of these watersheds in the history of that institution and the Senate's awkward relationship with democracy. As far as ramifications for the substance of American politics, one story pretty much ends in 1913, while the other begins in 1917. If the former has to labor to make a claim of relevance, the latter could hardly be more timely—especially given the historic November 2013 decision by the Senate to limit debate on confirmations of most presidential nominations.

I. ELECTING THE SENATE

On May 31, 1913, Secretary of State Williams Jennings Bryan certified that the requisite number of states had ratified the Seventeenth Amendment to the Constitution. Changing Senate elections from selection by state legislatures to direct popular election, the Seventeenth is the only amendment to fundamentally alter a compositional or representational feature of an institution defined under Articles I, II, and III of the Constitution.³ Democratization of presidential and House elections were evolutionary developments driven by political competition and structured by state laws. Only the Senate required the use of Article V's extraordinary process. The Amendment was the result of a decades-long campaign to fix what more and more of the country perceived as an undemocratic and corrupt Senate.

Given the importance of the Seventeenth Amendment, and because social scientists live for this kind of natural before-and-after experiment, historians and political scientists have scrutinized the effects of direct election of the Senate. The impact of the Amendment was complicated. At the time of its ratification, the Senate had been evolving toward popular selection in an increasing number of states wherein primary elections

1. WENDY J. SCHILLER & CHARLES STEWART III, *ELECTING THE SENATE: INDIRECT DEMOCRACY BEFORE THE SEVENTEENTH AMENDMENT* (2015).

2. STEVEN S. SMITH, *THE SENATE SYNDROME: THE EVOLUTION OF PROCEDURAL WARFARE IN THE MODERN U.S. SENATE* (2014).

3. The Twelfth Amendment separated the election of President from Vice President, but that should be seen as a correction of an oversight.

informed state legislators of the people's preference among the Senate candidates.⁴ Most studies show modest behavioral changes on the part of post-amendment Senators.⁵ The significance of direct election was arguably more in its symbolism than its substance. The nation could not abide an appointed Senate—especially one whose faults were on display—when both the House and President were, either by design or evolution, subject to democratic choice.

As the full title of *Electing the Senate* suggests, Schiller and Stewart are interested primarily in elucidating the process of indirect election prior to the Seventeenth Amendment. To that end, the authors created a comprehensive data set of state legislative balloting based on Senate selections from 1871-1913. The goal was to fill the gap in our knowledge with “a systematic account of how the upper chamber of Congress was *actually* elected in the forty-plus years before the passage of the Seventeenth Amendment.”⁶ Additionally, they sought “to assess the consequences of the switch to direct elections with the adoption of the Seventeenth Amendment” and evaluate whether the change fulfilled its promise.⁷

While a careful reading will reward generalists and congressional scholars alike, *Electing the Senate* could have been a more consistent study. Whether this was partly a result of being a co-authored effort or not, *Electing the Senate* can read as though the authors had not fully resolved either their substantive focus or target audience. *Electing the Senate* fluctuates, sometimes inelegantly, between language and description that seem directed to a general audience and sophisticated data analysis for specialists, to make at times arcane points that would be lost on many, if not most, non-specialists. Moreover, the effort they make to relate the history and consequences of the Amendment to contemporary politics is a source of some distraction and confusion. In the end, there is a tension or gap between the formidable and impressive empirical labors and the novelty, impact, or relevance of the findings.

Aside from some limited potential insights about indirect election and the effect of changes in electoral mechanisms, the Seventeenth Amendment would seem devoid of relevance for contemporary American politics, plagued as it is by layers of dysfunction. Who, after all, would suggest a return to legislative selection of U.S. Senators? The Tea

4. In this type of primary, the electorate voted for candidates for Senate. State legislators were then pledged or pressured to vote for the winning candidate. This was often referred to as the Oregon Plan because of that state's innovative role in implementing and refining this form of electoral influence.

5. Charles III Stewart, *Responsiveness in the Upper Chamber: The Constitution and the Institutional Development of the Senate*, in *THE CONSTITUTION AND AMERICAN POLITICAL DEVELOPMENT* 63-96 (Peter F. Nardulli ed., 1992); Sara Brandes Crook & John R. Hibbing, *A Not-so-distant Mirror: the 17th Amendment and Congressional Change*, 91 *AM. POLIT. SCI. REV.* 845-53 (1997); William Bernhard & Brian R. Sala, *The Re-making of an American Senate: The 17th Amendment and Ideological Responsiveness*, 68 *J. POLIT.* 345-57 (2006); Wendy J. Schiller, *Building Careers and Courting Constituents: U.S. Senate Representation 1889-1924*, 20 *STUD. AM. POLIT. DEV.* 185-197 (2006); Scott R. Meinke, *Institutional Change and the Electoral Connection in the Senate: Revisiting the Effects of Direct Election*, 61 *POLIT. RES. Q.* 445-57 (2008); Sean Gailmard & Jeffery A. Jenkins, *Agency Problems, the 17th Amendment, and Representation in the Senate*, 53 *AM. J. POLIT. SCI.* 324-42 (2009); Steven Rogers, *The Responsiveness of Direct and Indirect Elections*, 37 *LEGIS. STUD. Q.* 509-32 (2012).

6. SCHILLER & STEWART, *supra* note 1, at 2.

7. *Id.* at 1.

Party, that's who. To be precise, this idea predates the Tea Party in politics⁸ and has been the subject of serious scholarship.⁹ Aside from a few scholars who argue, in the spirit of Madison, that selection rather than election would produce better senators, a revitalization of federalism is the main political goal sought by the repeal of the Seventeenth Amendment.¹⁰ It is claimed a return to selection by state legislatures would stiffen state resistance to congressional encroachments. Especially given recent Republican efforts to gerrymander state districts, one might suspect the Tea Party's overriding goal is more Republican Senators rather than stronger federalism.

This muted call for repeal is what gives the book its claim to relevance, but using it as such engenders some problems. One of the central claims—made several times—is that parties were the crucial factor in the selection of Senators, but we knew that already. The strength of partisanship and power of party organization is a much-documented aspect of late nineteenth century American politics, and its dominant role in selection of senators was one motive for direct election. The authors' repeated assertions about the paramount importance of party are aimed primarily at the Tea Party critique of direct election and its tenuous implication that there was a golden age when senators were elected by "states" to serve "state interests." Senators were instead a product of partisan warfare to serve party interests. This is an example of the authors not carefully distinguishing recent political assertions from existing scholarship. More than once a reader might mistakenly infer that the authors' targeted "conventional wisdom" is what most scholars think, rather than a mostly partisan argument emerging from a minority political movement. This, in turn, deflects attention from their empirical findings about the complexity of the process and outcomes of indirect election.

As far as the partisan struggles to select senators, the authors offer their most important findings in chapters 3 through 5. One interesting argument is that the state party "canvass" (when likely Senate candidates, such as Abraham Lincoln and Stephen Douglas, stumped the state in support of their party's ticket for state elections) and even the subsequent state "primaries" (that essentially instructed state legislators to vote for a particular person) were not quite as determinative as sometimes asserted. Primaries in particular were often effective in producing a candidate to be ratified later by a legislative vote, but intra-party competition within the state legislature sometimes produced a selection different from what the primary put forward.¹¹ Another valuable discussion concerns the variety of party mechanisms—forms of party caucuses—that were employed to structure the selection of senators. Even so, these chapters would have benefitted from a more

8. For example, Democratic Senator Zell Miller introduced a repeal amendment in April 2004 (108 CONG. REC. S4503 (daily ed. Apr. 28, 2004) (statement of Sen. Miller)) and repeal of the 17th Amendment was a part of Republican Alan Keyes' bid for the presidency the same year. See Rick Pearson, *Keyes Says Game Plan Is Controversy*, CHICAGO TRIBUNE, http://articles.chicagotribune.com/2004-09-14/news/0409140179_1_keyes-campaign-officials-keyes-comments-alan-keyes (last visited May 19, 2015).

9. C. H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT* (1995).

10. RALPH A. ROSSUM, *FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY* (2001); Todd Zywicki, *Repeal the Seventeenth Amendment* 62 NAT'L REV. 20 (2010).

11. SCHILLER & STEWART, *supra* note 1, at 116.

precise and smooth integration of quantitative data and case studies.

When Schiller and Stewart shift to the Amendment's consequences, there is a notable tension between what they measure and the larger argument about whether the Amendment fulfilled its promise. Chapter 6, "Senate Electoral Responsiveness under Indirect and Direct Elections," begins with an extended and highly technical discussion of methodological questions regarding the measurement of bias in electoral systems. This is a preface to their quantitative analysis of relative partisan control of the Senate before and after the Amendment. "The Seventeenth Amendment," they conclude, "did not affect which party controlled the Senate for long periods, but it did influence the size of majorities with which Democrats and Republicans tried to govern after 1913."¹² Along with related details, the authors add considerably to our understanding of the political effects of direct election. But partisan control was not the stated, or even *sub rosa*, motivation behind the movement. As the authors themselves note, they want to discern whether the Seventeenth Amendment met its goals of "empowering voters in the choice of U.S. senators, and reducing the corrosive effects of money and party machine power."¹³ In fact, Schiller and Stewart go so far as to claim that "[p]romises made by advocates of direct election about their capacity to produce a more participatory Senate . . . remain unfulfilled."¹⁴ Those objectives and promises are, however, unrelated to which political party benefitted. While interesting, the data and analysis are not always relevant to an assessment of the degree to which the Amendment's effects matched its intentions.

The last chapter, "Myth and Reality of the Seventeenth Amendment," reinforces rather than reconciles the problems of trying to use certain consequences of the amendment as a commentary on contemporary politics. "Does today's Senate," the authors ask, "run more smoothly, efficiently, and honestly than its predecessor chambers elected under indirect elections?"¹⁵ That is, "was the Seventeenth Amendment's adoption a good thing?"¹⁶ They attempt to answer their own questions in part with a passage from a contemporaneous account of Senate dysfunction in 1897. "Sound familiar?" they ask.¹⁷ The implication is that direct election did not do much to improve the institution. But no one ever claimed direct election was a magic bullet that would cure the maladies that afflict collective action institutions such as the Senate, and that it would do so for an entire century.

The authors end by drawing lessons for the effort, hardly a movement, to implement direct election of the president. The first lesson is that direct election of the president would be unlikely to change the type of candidates or the importance of money in presidential elections. However, those are not the core concerns of the current movement.¹⁸ Direct election of the president is motivated by one overriding concern: one per-

12. *Id.* at 196.

13. *Id.* at 1.

14. *Id.* at 4.

15. *Id.* at 199.

16. SCHILLER & STEWART, *supra* note 1, at 199.

17. *Id.* at 200.

18. *See, e.g.,* JOHN R. KOZA ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE (4th ed. 2013).

son, one vote. Whichever candidate gets the most votes nationwide should win. On and after November 7, 2000, millions of voters were not baffled and incensed about the Electoral College because they wanted someone other than Bush or Gore, or loathed the system of campaign finance. Americans could not comprehend how the election could come down to a flawed recount in one state—and an unprecedented Supreme Court intervention¹⁹—when one candidate had won by nearly 550,000 votes nationwide.

The second putative lesson asserted by the authors is that “trying to get around constitutional changes via changes to state laws can be fraught with peril.”²⁰ That might be true in some general sense, but the state laws that preceded the adoption of the Seventeenth Amendment are hardly an example. The so-called Oregon primary laws were an instrumental part of the movement to get an amendment and those changes to state laws elected Senators more willing to vote for the Amendment. Because of this historical and strategic relationship between state efforts and the Amendment, the authors’ claim that “[e]ventually, supporters of a popular vote for senators . . . just had to amend the Constitution to make direct election a reality,” falls flat.²¹ A national amendment was the intention all along and the state-level primary laws were an important part of the campaign. In short, there is much to be gleaned from the authors’ data and analysis, but *Electing the Senate* would have been a more cohesive and informative study had the authors focused on the task that motivated the project—providing the missing story of indirect Senate elections—and avoided commentary on the merits of the Seventeenth Amendment and constitutional reform more generally.

II. OBSTRUCTING THE SENATE

At the time of its passage, some saw the Seventeenth Amendment as only one of two vital steps to bring the Senate into the twentieth century. The other was filibuster reform; that is, some restriction on the practice of unlimited debate. Without this, “the promise of the Seventeenth Amendment may fall far short of realization.”²² Those words were written two years before the Senate enacted such a limitation. In 1917, the Senate added a rule that, for the first time since 1806, provided a motion and mechanism, known as cloture, for bringing debate to a close on a measure or nomination on the Senate floor. In lieu of an ordinary motion, such as the previous question, which is voted on immediately and if passed brings debate to an immediate close, Senate cloture requires a supermajority (three-fifths of the entire Senate) and creates a lengthy period for debate even when the motion is successful. Unlike the Seventeenth Amendment, which had to scale the heights of Article V’s amendment process, this change in the Senate rules required only a majority vote in that body. Instead of fulfilling its intended purpose, cloture gradually empowered obstruction, turned the Senate into a supermajority institution, and became the functional equivalent of a constitutional alteration of the separation of powers. In fact, the contemporary Senate is frequently referred to as the sixty-vote Senate to

19. *Bush v. Gore*, 531 U.S. 98 (2000).

20. SCHILLER & STEWART, *supra* note 1, at 216.

21. *Id.*

22. Charles S. Thomas, *The Shackled Senate*, 202 N. AM. REV. 424-31 (1915).

highlight the extent to which this supermajority procedure structures nearly all legislative action in that body.

As a result, Steven Smith's, *The Senate Syndrome: The Evolution of Procedural Warfare in the Modern U.S. Senate*, could not be more timely as far as the lamentable state of American government is concerned. Smith, one of the nation's leading scholars of Congress and particularly the Senate, is not new to his subject. Given that "procedural warfare" has been the defining feature of the contemporary Senate and one of the main sources of systemic dysfunction, Smith does not have to labor for relevance. In fact, the book begins with the historic alteration of Senate procedure on November 21, 2013. On that date, the 113th Senate, employing the so-called "nuclear" or "constitutional" option, used a simple majority vote on a ruling from the chair to amend Senate practice and, in place of a three-fifths supermajority, allow debate to be closed on most presidential nominations by a majority vote. According to Smith, who calls this "reform by ruling," the "new precedent of 2013 was one of the most important procedural developments in Senate history[,]""²³ certainly the most significant change to cloture since 1975, and arguably since it was written into Senate rules. This makes Smith's volume the first in a long line of recent books on Senate process—and the filibuster in particular—to confront and comment on an actual, rather than speculative, limitation of minority power.²⁴

Those who study legislative affairs are familiar with Smith's concept of the "Senate syndrome" from an article-length piece of the same name.²⁵ Smith informs us that "[e]xplaining its emergence and consequences is my challenge in this book."²⁶ The Senate syndrome is "a pattern of behavior" created by the "combination of minority-motivated obstruction and majority-imposed restrictions."²⁷ It is a syndrome because it involves

the emergence of several behaviors that combine to make the Senate's decision-making process much different from what it has been during most of its history. These behaviors include the greater frequency of minority obstruction, more concerted efforts by the majority to limit amending activity and circumvent the floor, the invention of new parliamentary strategies, quicker resort to last-resort tactics, and an enhanced role for party leaders in coordinating and implementing these strategies. An "obstruct and restrict" pattern has dominated the Senate in recent Congresses—obstructive strategies by the minority are met by majority strategies to limit debate and amendment. "Reg-

23. SMITH, *supra* note 2, at 8.

24. RICHARD A. ARENBERG, *DEFENDING THE FILIBUSTER: THE SOUL OF THE SENATE* (2012); LAUREN C. BELL, *FILIBUSTERING IN THE U.S. SENATE* (Scott A. Frisch & Sean Q. Kelly eds., 2011); GREGORY KOGER, *FILIBUSTERING A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE* (2010); LAUREN C. BELL, *FILIBUSTERING IN THE U.S. SENATE* (2011); RICHARD A. ARENBERG, *DEFENDING THE FILIBUSTER: THE SOUL OF THE SENATE* (2012); GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* (2006); JAMES I. WALLNER, *THE DEATH OF DELIBERATION: PARTISANSHIP AND POLARIZATION IN THE UNITED STATES SENATE* (2013).

25. Steven S. Smith, *The Senate Syndrome*, in *THE U.S. SENATE: FROM DELIBERATION TO DYSFUNCTION* 132-58 (Burdette A. Loomis ed., 2011).

26. SMITH, *supra* note 2, at 3.

27. *Id.* at 3.

ular order” evaporates and the Senate, known historically for its informality, is tied up in parliamentary procedure.²⁸

The syndrome is characterized by a spiraling effect wherein exploitation of the rules by the minority engenders majority efforts to undermine or get around such obstruction. The minority then claims it is forced to obstruct because the majority acts so precipitously to restrict its participation. And like some physical syndromes, what is causing what gets hard to pin down. But there is no denying the various behaviors are logically related.

The attempts to escape or overcome the syndrome have produced further Madisonian ironies. As Frances Lee has documented in her award-winning work, much of the Senate’s action is geared toward partisan electoral strategy rather than law-making. Polarization, divided government, and a sixty-vote Senate facilitate a rational calculation by many senators that substantive legislation is unlikely to pass, so if nothing else try to make the other side look bad.²⁹ In turn, part of the syndrome—fueled by hyperpartisanship—involves a new form of top-level centralization as the only way to break deadlocks to get at least something, anything, done.³⁰ Instead of the kind of free and open debate that supposedly characterizes the Senate, the majority and minority leaders often negotiate agreements behind closed doors, agreements that their senate troops often feel compelled to ratify. This is a strange form of bipartisanship and not exactly the kind of deliberation Madison had in mind.

The Senate Syndrome is organized in two parts. The first provides a 200-page history of the development of modern Senate procedure, divided into six periods from the 1950s through the 2013 nuclear option. The second part covers select aspects of the political implications of the syndrome. This is the most thorough and effective account of the rise of the sixty-vote Senate and the syndrome that attends it. The explanation of the evolution of the syndrome features an exemplary combination of specificity and approachability. While the detail might exhaust even the most interested reader (the author might have skipped an account or two within each chapter), Smith’s ability to bring clarity to even the most arcane aspects of Senate process never lapses.

Smith shows that the sixty-vote Senate and the Senate syndrome were built from myriad small steps and actions involving a host of formal and informal procedures, all pushed and prodded by divided government and increasing partisan polarization. As norms that inhibited or limited obstruction eroded, various devices—some new and some enhanced—were turned into weapons of parliamentary warfare, including unanimous consent agreements, holds, informal methods of reaching bicameral agreement, the budgetary and reconciliation process, amendment trees, and proactive use of cloture. Senate practices evolved in such a way that minority factions, and even individual senators, came to see obstruction as a powerful and increasingly accepted tool, which in turn

28. *Id.* at 9.

29. FRANCES E. LEE, *BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE U.S. SENATE* (2009).

30. WALLNER, *supra* note 24.

motivated majority leaders to find new and unconventional ways of coping. One relatively recent example is the incorporation of a sixty-vote threshold, most commonly for amendments, into unanimous consent agreements to structure action on a bill.³¹ That is, to obtain agreement to consider a bill, the unanimous consent request provides that one or more amendments must get at least sixty votes to be incorporated into the legislation, thereby building supermajority votes directly into final decisions.³²

The second section of *Senate Syndrome* covers select aspects of what Smith terms the implications of the syndrome. This part is likewise excellent, even if at points some repetition could have been avoided. Smith keeps the focus on empirical analysis: how supermajority cloture affects Senate lawmaking; further detail on the implications of the 2013 “reform by ruling”; other possible changes and the motives senators and parties have in resisting or promoting procedural reform. Smith also uses a chapter to show how media coverage unwittingly contributes to the syndrome. All too frequently Senate action is not precisely depicted by journalists, such as reporting that the Senate defeated a measure when in fact a majority supported it, or implying that sixty votes were required to pass a particular measure. The first way of portraying things obscures the fact that a minority prevented a majority decision; the second gives the impression that a constitutional supermajority threshold of support was required but not reached.

In the end, Smith is refreshingly skeptical about claims—often voiced by senators—that the problem is not the rules but hyper-partisanship and the behavior of senators, and he clearly sees the syndrome as a problem to be remedied. But, after such a comprehensive analysis of the evolution and manifestations of the syndrome, his final thought—“[t]he Senate syndrome . . . makes it even more challenging to hold Senate parties accountable for their behavior”³³—lacks punch. Smith renders no verdict on the value of supermajority cloture, and he resists any normative conclusions about reform. I think this unfortunate because it would be an even better book with such judgments, and if scholars such as Smith do not draw appropriate conclusions, the public debate is that much more impoverished.³⁴

III. FIXING THE SENATE

Thus, the relationship of these two volumes to institutional change is somewhat ironic. While *Electing the Senate* offers would-be reformers some unwarranted advice or caution rather loosely connected to any live issue, the *Senate Syndrome* is silent as to recommendations even though supermajority rule in the Senate is one of the central dilemmas and controversies in current American government. I think political science, and congressional studies in particular, should take on questions of reform with greater regu-

31. SMITH, *supra* note 2, at 221-27.

32. Senate action on gun control in the wake of the Sandy Hook school massacre is one of the most noted and notorious examples of this abuse of supermajority procedure. Jonathan Weisman, *Senate Blocks Drive for Gun Control*, N.Y. TIMES, Apr. 17, 2013, <http://www.nytimes.com/2013/04/18/us/politics/senate-obama-gun-control.html>.

33. SMITH, *supra* note 2, at 361.

34. It is worth noting that as part of an earlier co-authored book on the filibuster, Smith advocated significant limitations on supermajority cloture; SARAH A BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE?: FILIBUSTERING IN THE UNITED STATES SENATE (1997).

larity and authority. By comparison, legal scholarship has often done a better job of taking positions on institutional reform.³⁵ Smith's is the best general account of the plight of the contemporary Senate, but on some questions we need better normative arguments rather than additional empirical analysis. While it has not been a huge topic in democratic thought, political theorist Melissa Schwartzberg, for example, subjects supermajority procedures to a thorough and precise critique.³⁶

We can debate the abstract merits of repealing the Seventeenth Amendment, but that train is not leaving the station. And whereas it is not clear what would be gained from a return to legislative selection for senators, the case for ending or restricting supermajority cloture is compelling, if still debatable. In contrast to the Seventeenth Amendment, supermajority cloture eventually contradicted its original purpose to become the functional equivalent of a constitutional amendment. Instead of taming the abuse of extended debate it created the sixty-vote Senate and the Senate syndrome. Instead of enhancing deliberation, it has subverted it. Limitations on supermajority cloture might have seemed as quixotic as repeal of the Seventeenth Amendment, but in late 2013 the Senate voted for an historic reassertion of majority rule on nominations. In my view, further movement in that direction should be encouraged and pursued.

Meanwhile, there is another foundation of the Senate that, while implicit in any discussion of the institution, goes all but unmentioned in these studies. Two senators per state or equal representation, "always a subject more or less disturbing to logical minds,"³⁷ runs afoul of the central principle of modern democracy—one person, one vote—and makes the Senate by some measures the most unrepresentative legislative body in the world. An end to equal representation is certainly more fanciful than a return to direct election of Senators or the implementation of direct presidential election, but it is worth having that debate because there is no larger violation of the fundamental principle of democracy with almost no contemporary justification to offset that objection. Empiricists might argue that we would end up electing the same kind of people, but that is hardly the point. The modern Senate, as a result, is defined by the distortions of equal representation and supermajority cloture. And the combination of these two attributes in the same legislative body is rarely noted, studied, or criticized. Again, we do not need more empirical analysis of their effects as much as we need to decide whether the distortions, especially united in the same institution, are acceptable democratic practice.

These two books evoke the Senate's troubled relationship to American democracy. If direct election remedied one tension, supermajority cloture has produced another, even as equal representation performs its ongoing and increasingly obscure function. Despite its self-conception as the greatest deliberative body in the world, the Senate too often appears as all but the opposite of nearly everything it claims to be, more a problem than a palladium as far as democracy and good governance are concerned. Robert Lindblom

35. For example, Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445 (2004); Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003 (2011).

36. MELISSA SCHWARTZBERG, COUNTING THE MANY: THE ORIGINS AND LIMITS OF SUPERMAJORITY RULE (2014). See also Frances E. Lee, *A discussion of Melissa Schwartzberg's Counting the Many: The Origins and Limits of Supermajority Rule*, 13 PERSPECT. POLIT. 455-65 (2015).

37. S. E. Moffett, *Is the Senate Unfairly Constituted?*, 10 POLIT. SCI. Q. 248-56, 248 (1895).

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closes his magnum opus *Politics and Markets* with a final comment on the power of the modern business corporation “as a peculiar organization in an ostensible democracy.”³⁸ The large private corporation, he writes, “fits oddly into democratic theory and vision. Indeed, it does not fit.”³⁹ The same can be said of the contemporary United States Senate. Even if inadvertently, *Electing the Senate* reminds us that the Senate can be fundamentally changed to improve the fit, and *The Senate Syndrome* gives us the place to begin that project.

38. CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL ECONOMIC SYSTEMS* 356 (1977).

39. *Id.*