

Dissent in the Senate

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ABSTRACT. This Essay examines the basic nature of dissent in the Senate—both why and how it happens. Dissent, at its best, does not complicate or impede constitutional debate, but instead enriches it through the expression of diverse perspectives. The Essay outlines the constitutional and legislative designs that both incentivize and constrain dissent in the Senate, arguing that the Constitution and the legislative process are designed to make it likely that senators will dissent. The Essay uses three case studies to demonstrate how dissent in the Senate has enriched constitutional deliberation and checked presidential power and majoritarian control in the Senate—even if such dissent required “winning by losing.” However, leaders and the public must protect against dissent’s lapsing into violence, obstruction, or degradation of Senate or public debate. The Essay concludes with recommendations on norms the Senate could follow to ensure dissent’s constructive role in the constitutional design.

INTRODUCTION

When lawyers envision dissent, they usually imagine a single judge courageously standing up for principle. The late Justice Antonin Scalia comes to mind with his fiery and scalding dissents, often colorfully scolding the majority of the Supreme Court for getting the law wrong and rallying conservatives in support of his stated positions.¹ Yet dissent is not unique to judging. It extends

1. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2628 (2015) (Scalia, J., dissenting) (criticizing the Court’s opinion that struck down bans on same-sex marriage for “lacking even a thin veneer of law”); *King v. Burwell*, 135 S. Ct. 2480, 2507 (2015) (Scalia, J., dissenting) (“We should start calling [the Affordable Care Act] SCOTUScare.”); *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) (criticizing the majority opinion for laying “waste the foundation of . . . rational-basis jurisprudence”); *Morrison v. Olson*, 487 U.S. 654, 699

to the executive branch and even the U.S. Senate, where dissent is common but widely ignored by the legal academy. Senators, like judges, dissent; they dissent from their colleagues, the executive administration, or prevailing policy. Senators dissent for many of the same reasons as judges, but adapt their dissent to their circumstances as elected members of the Senate: They dissent to vent frustration, vindicate principles of law and the Constitution, curry favor with constituents or other factions, enrich constitutional dialogue, point out how the majority or the President has gone wrong, mobilize constituencies, and destabilize the status quo. Understanding the purposes of dissent in the Senate enriches our understanding of dissent in the lawmaking process.

The willingness of senators to dissent—to explain their opposition to majoritarian actions—is far too often dismissed as nothing more than a partisan appeal or blowing off steam. It is often much more than that. For example, the strident, persistent Republican dissent to the enactment of the Affordable Care Act (ACA) has been commonly dismissed as a partisan attempt to obstruct a landmark achievement of the Obama Administration.² But the campaign to repeal the ACA also reflected principled constitutional and policy objections that mobilized public opposition to the law.³ Dismissing the dissent to the ACA's enactment as merely partisan opposition obscures the more complex nature (and objectives) of Senate dissent and the ways in which the Senate's design and procedures enable or dilute dissent.

This Essay examines the significance, objectives, and limitations of dissent in the Senate. In Part I, I examine the basic nature of dissent in the Senate—both why and how it happens. Initially, I focus on the constitutional and legislative designs that both incentivize and constrain dissent in the Senate. The Constitution and the legislative process are designed to make it likely that senators will dissent. Therefore, senators will dissent for many reasons, subject to many different factors, including their constitutional commitments, Senate rules and traditions, public opinion, and their standing in and their relationships to their political parties, their constituents, the presidency, interest groups, and the media.

Part II examines three case studies demonstrating the manifestation of these diverse factors. I discuss how senators have successfully engaged in dissent by creating the proper coalitions for dissent and by developing the willingness to engage in “winning by losing,” or turning their losses to their own

(1988) (Scalia, J., dissenting) (“Frequently an issue of this sort will come before the Court clad . . . in sheep’s clothing But this wolf comes as a wolf.”).

2. See *infra* notes 106-121 and accompanying text.

3. The Republican dissent in the Senate helped to lay the groundwork for a series of electoral victories and set the stage for a change in the Affordable Care Act, which came within a few votes of success in the late spring of 2017. See *infra* notes 115-119 and accompanying text.

advantage. These studies include: (1) judicial confirmation battles, in which Republicans initially lost but eventually turned events to their advantage by using their initial failures to perfect their messaging and eventually to rally public support;⁴ (2) the failure to oust President Clinton for misconduct, which Democratic senators initially believed would work to their electoral advantage but in reality strengthened the presidency by exposing the limitations of impeachment as a meaningful check against presidential misconduct;⁵ and (3) the Republican opposition to the Affordable Care Act, which provided them with a winning platform in subsequent elections but revealed the difficulties of maintaining unity in shaping social policy.

In Part III, I move from a descriptive account to a normative defense of dissent in the Senate. Dissent, at its best, does not complicate or impede constitutional debate, but instead enriches it through diverse perspectives. However, leaders and the public must protect against dissent's lapsing into violence, obstruction, or degradation of Senate or public debate. Senators can preserve or safeguard dissent by helping to reconstruct the conventions of congressional debate. These norms include informal agreements or arrangements within the institution to ensure collegiality and civility, as well as more transparent and candid explication of the constitutional differences in play. At a time when the public is sharply divided, the Senate can merely mirror the discord, or it can lead the way by showing how civil disagreement is a strength of our constitutional order.

I. THE NATURE OF DISSENT IN THE SENATE

In this Part, I examine the nature of dissent in the Senate. After defining dissent, I examine how the structures of the Constitution and the Senate, along with other factors, influence dissent in the Senate.

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4. See generally HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II (5th ed. 2008) (surveying Supreme Court nominations and confirmation battles throughout American history); BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES (2006) (critically examining judicial confirmation contests discussing ways for avoiding or solving them in the future); Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96 (2017) (analyzing the challenges of principled uses of the past in judicial confirmation contests).
 5. *Impeachment of William Jefferson Clinton, President of the United States: Hearing Before the H. Comm. On the Judiciary*, 105th Cong. (1998) (statement of Abbe D. Lowell, Minority Counsel), as reprinted in *Excerpts from Statement of the Judiciary Panel Minority Counsel*, N.Y. TIMES (Dec. 11, 1998), <http://partners.nytimes.com/library/politics/121198impeach-ltext.html> [<http://perma.cc/A5ZB-FWRW>].

A. *Defining Dissent in the Senate*

The standard definition of dissent is “[t]he holding or expression of opinions at variance with those commonly or officially held.”⁶ Dissenting judges are self-proclaimed minorities. Not everyone in a majority feels the same level of intensity about outcomes, and not everyone may choose to call attention to their disagreement. A judge must make the decision to disagree publicly with the majority’s view. The same is true in the Senate, where dissenters are the losers calling attention to their loss.

Consider a vote on some pending legislative business, such as a bill or a judicial nomination. Dissent requires not only opposing the proposed matter but also explicitly objecting to the prevailing majoritarian position. For example, Democratic Senator Sheldon Whitehouse voted against then-Judge Gorsuch’s nomination to the Supreme Court, and he gave speeches to explain his opposition to the nominee.⁷ President Trump declared he had nominated Judge Gorsuch to the Court because he was “very much in the mold” of Justice Scalia, whose seat he was being nominated to fill.⁸ Senator Whitehouse expressed both dismay at President Trump’s failure to appoint a consensus nominee, and concern that Judge Gorsuch would be, like Scalia often was, a critical fifth vote in controversial cases with outcomes of which Senator Whitehouse disapproved.⁹ Senator Whitehouse explained further that he was dissatisfied with the nominee’s failure to appreciate (or acknowledge) the Senator’s concerns with the ramifications of *Citizens United v. FEC*,¹⁰ which allowed, in Senator

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6. *Dissent*, OXFORD LIVING DICTIONARIES, <http://en.oxforddictionaries.com/definition/dissent> [<http://perma.cc/86WG-AN3H>]; see also *Dissent*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining dissent as a “disagreement with a majority opinion, esp. among judges”).
 7. 163 CONG. REC. S2442-43 (daily ed. Apr. 7, 2017) (indicating that Senator Whitehouse voted against the nomination); *Whitehouse Votes ‘No’ On Gorsuch, Urges Consensus Supreme Court Nominee*, SHELDON WHITEHOUSE: U.S. SENATOR R.I. (Apr. 3, 2017), <http://www.whitehouse.senate.gov/news/release/whitehouse-votes-no-on-gorsuch-urges-consensus-supreme-court-nominee> [<http://perma.cc/2WSN-3H2Y>] [hereinafter *Whitehouse Votes ‘No’*] (On the Nomination (Confirmation Neil M. Gorsuch, of Colorado, to be an Associate Justice of the Supreme Court of the United States)).
 8. Jonathan H. Adler, *How Scalia-esque Will Donald Trump’s Supreme Court Nominee Be?*, WASH. POST: VOLOKH CONSPIRACY (Jan. 26, 2017), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/how-scalia-esque-will-donald-trumps-supreme-court-nominee-be> [<http://perma.cc/KQ8E-JHWE>]; accord Michael Gerhardt, *The Gorsuch Nomination: What’s Next*, SCOTUSBLOG (Feb. 7, 2017, 4:08 PM), <http://www.scotusblog.com/2017/02/gorsuch-nomination-whats-next> [<http://perma.cc/X3T4-SBSL>].
 9. See *Whitehouse Votes ‘No’*, *supra* note 7.
 10. See generally 558 U.S. 310 (2010) (limiting regulation of corporate political speech).

Whitehouse's words, "the flood of money into politics."¹¹ Like many others, Senator Whitehouse was thus dissenting to the Judiciary Committee and the Senate's approval of the Gorsuch nomination.

B. Factors Influencing Dissent in the Senate

1. Structural Factors

Although senators dissent for similar reasons as Justices do,¹² the distinctive nature of their dissent as well as the legislative context influence how, when, and whether they dissent. The guarantees of life tenure and undiminished compensation set forth in Article III of the Constitution¹³ insulate judges and Justices from direct political reprisals and pressures. In contrast, senators' elected status¹⁴ subjects them to direct political pressures, such as presidential arm-twisting, dealmaking with other senators or members of the house, raising money for reelection, and working with interest groups. By virtue of their elected offices, senators are also able, unlike Justices, to be directly involved in mobilizing and appealing to their constituencies. These, and other distinctive features of senatorial office, enable senators to do more with their dissents than Justices.

A number of structural factors may incentivize or constrain senators in deciding how or to what extent to make recourse to dissent. First, Article I sets forth bicameralism and presentment,¹⁵ which the Supreme Court has called deliberately "cumbersome."¹⁶ The process is even more complicated if the House's

11. Katherine Gregg & Karen Lee Ziner, *R.I.'s Senators To Vote Against Gorsuch*, PROVIDENCE J. (Mar. 24, 2017, 4:47 PM), <http://www.providencejournal.com/news/20170324/ris-senators-to-vote-against-gorsuch> [<http://perma.cc/Z6EQ-HDDF>].

12. As mentioned above, Justices may express dissent to vindicate constitutional principles or policy, vent frustration, enhance reputations or stature, exert influence, undermine or expose weaknesses in a proposed law or majoritarian actions, promote legal evolution, frame public discourse, or punish those on the other side. For a discussion on how these motivations manifest in judicial dissents, see LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 255–303 (2013); Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101 (2011); Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1 (2010).

13. U.S. CONST. art. III, § 1, cl. 2.

14. U.S. CONST. amend. XVII, cl. 1.

15. U.S. CONST. art. I, § 7, cl. 2.

16. *I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983) ("There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President."). This cumbersome process makes failure much more likely

previously approved bill is different than the one approved by the Senate, then it returns back to the House for approval. This cumbersome process for lawmaking does more than make the passage of laws unlikely—it increases the likelihood of dissent. With failure comes discontent, and discontent spurs dissent. The failure to enact a law, particularly important or salient ones, usually leaves at least some senators displeased.

The different institutions and officials involved in the lawmaking process can, through various means, further spur or inhibit dissent. For example, the Senate's rules influence dissent. Pursuant to the authorization in Article I, section 5, that "Each House may determine the Rules of its Proceedings," the Senate has adopted formal rules for its internal governance, including Senate Rule XXII, which expressly authorizes filibusters or protracted debate to delay or obstruct legislative action.¹⁷ Even though Senate majorities recently ended the use of the filibuster to obstruct executive, lower court, and Supreme Court nominations,¹⁸ filibustering legislation remains permissible. Because a supermajority of at least sixty senators is required to invoke cloture to end debate on legislation, a successful filibuster against legislation can turn the majority favoring legislative action into losers and dissenters.

Furthermore, the structure of the Senate makes dissent highly visible.¹⁹ Indeed, the Senate may be better positioned than the House to influence policy and executive action. Except for its power of impeachment,²⁰ the House has no authority to take final action on legislative matters; instead, the Senate must formally agree with whatever legislation the House has approved (except of

than success. There are a number of veto-gates that can prevent bills from becoming laws: They can fail in committee or fail to get to the floor of the House. Even if the House passes the bill, it can fail to make its way through committee in the Senate or to get to the floor of the Senate. Even if the bill approved in the House gets to the Senate floor, it might fail to have survived any pertinent super-majoritarian votes required by the Senate (for example, at least sixty votes are required under the Senate rules to stop a filibuster of legislation and to approve budget matters). Eventually the bill is sent to the President, who can sign or veto it, and expect his veto to stand unless at least two-thirds of each chamber of Congress vote to override the veto. Of course, if the Senate fails to approve a bill, nothing goes to the President.

17. See S. Res. 285, 113th Cong. (2013) (enacted).

18. See Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013), <http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html> [<http://perma.cc/X8UE-M3CM>].

19. For example, dissenting through filibustering can draw public attention to specific issues. Kathy Gill, *Filibuster Rules of the U.S. Senate*, THOUGHTCO. (July 11, 2016), <http://www.thoughtco.com/filibuster-rules-of-the-us-senate-3368318> [<http://perma.cc/TA87-GJNX>].

20. U.S. CONST. art. I, § 2, cl. 5.

course for the House's internal rule-making).²¹ In addition, the Senate also has its unique authorities over appointments, treaties, and removal of presidents or other high-ranking officials, including judges.²² Extended Senate terms²³ are designed to make it easier for senators to take the long-view, rather than the most expedient perspectives on the issues of the day.²⁴ Moreover, the Senate's rules of governance²⁵ and traditions²⁶ enable each senator to have a significant say over legislative business,²⁷ in contrast with the House, where, at least since the nineteenth century, the majority has controlled virtually every piece of business.²⁸ As a result, the Senate has been, much more often than the House, a place where legislative business has been subject to delay if not obstruction altogether,²⁹ or, as George Washington famously quipped to Thomas Jefferson, a place to allow things to cool off.³⁰ Because of these distinctive features, the Senate has become an institution in which dissent can be more visible than the House, more disruptive to the executive, more frequently and easily expressed, and more often fatal to the business at hand.

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21. See John V. Sullivan, *How Our Laws Are Made*, H. Doc. 110-49 (2007), <http://www.gpo.gov/fdsys/pkg/CDOC-110hdoc49/pdf/CDOC-110hdoc49.pdf> [<http://perma.cc/VZ9C-F7CJ>].
 22. U.S. CONST. art. II, § 2, cl. 2 (establishing the Senate's treaty making and appointment powers); U.S. CONST. art. I, § 3, cl. 6-7 (establishing the Senate's power to try all impeachments and setting the terms for conviction).
 23. Compare U.S. CONST. art. I, § 3, cl. 1 (setting the Senate term for six years) with U.S. CONST. art. 1, § 2, cl. 1 (declaring that House members shall be chosen every two years).
 24. *Constitutional Design of the Senate, 1787*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Origins_Development.htm [<http://perma.cc/J8NK-89HK>].
 25. U.S. CONST. art. I, § 5, cl. 2.
 26. See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 184 (1997) (arguing that the modern filibuster is not a long-standing senate tradition).
 27. See *Unanimous Consent*, U.S. SENATE, http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm [<http://perma.cc/2W5N-S7H9>].
 28. See GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* 26 (2005).
 29. See GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* 34-35 (2006); Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1025 (2011) ("Of course, today, we all know that minority obstruction in the House is nearly nonexistent.").
 30. *Senate Created*, U.S. SENATE, http://www.senate.gov/artandhistory/history/minute/Senate_Created.htm [<http://perma.cc/JBU5-TWQ8>].

2. *The Executive*

Presidents use their various hard³¹ and soft powers³² to both check and provoke dissent. Presidents can express their disapproval of a bill through a veto or a signing statement.³³ And because of the near impossibility today of a supermajority of each chamber voting to override a president's veto,³⁴ members of Congress must heed the executive's legislative preferences.³⁵ The more popular the president or policy, the more difficult it will be to muster veto overrides. Losers may wish to use dissent to express their discontent over the failure to override.

On the other hand, when Congress is unable to enact a policy desired by the president, it leaves a void that presidents are often eager to fill through unilateral executive orders or actions. Once the president acts, it is hard for Congress to undo his action, since he has the authority to veto its enactment. This dynamic leaves the president more powerful than before and leaves members of Congress concerned about, if not dissenting to, the growth of his power, the substantive action(s) that he has taken, or both. Impediments to lawmaking allow presidents to act unilaterally and take advantage of constitutional ambiguity and congressional inertia.³⁶ The more that presidents are able to do this, the more often that members of Congress may find themselves having to dis-

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31. See, e.g., JOSH CHAFETZ, *CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS*, 3 ("Hard Power is, quite simply, 'the ability to coerce.'") (quoting Joseph S. Nye Jr., *Soft Power and American Foreign Policy*, 119 *POL. SCI. Q.* 255, 256 (2004)); RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP*, 30-31 ("From the veto to appointments, from publicity to budgeting, and so down a long list, the White House now controls the most encompassing array of vantage points in the American political system.").
32. See, e.g., Neil Kinkopf, *Is It Better To be Loved or Feared? Some Thoughts on Lessons Learned from the Presidency of George W. Bush*, 4 *DUKE J. CONST. L. & PUB. POL'Y* 45, 50 (2009) (including "the power of the bully pulpit" and the "power to persuade people" in his description of "the President's 'soft power'").
33. See U.S. CONST. art. I, § 7, cl. 2-3. There is not a clear constitutional basis for signing statements, and some even argue that they may violate the Constitution. See, e.g., Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretation of Legislative Intent: An Executive Aggrandizement of Power*, 24 *HARV. J. ON LEGIS.* 363, (1987) ("Use of the presidential signing statement . . . violates the veto requirement of the Constitution.")
34. See U.S. CONST. art. I, § 7, cl. 2-3.
35. See Michael J. Gerhardt, *Constitutional Arrogance*, 164 *U. PA. L. REV.* 1649, 1657 (2016); see generally WILLIAM G. HOWELL & TERRY M. MOE, *RELIC: HOW OUR CONSTITUTION UNDERMINES EFFECTIVE GOVERNMENT AND WHY WE NEED A MORE POWERFUL PRESIDENCY* 95-143 (2016).
36. See Gerhardt, *supra* note 35 at 1654.

sent to expansions of presidential power that disadvantage the Congress's institutional power.

3. *Political Parties*

Political parties also wield significant influence over dissent in the Senate. Keeping senators in line requires party leaders, as well as the members of a party, to be aware of individual members' needs and of how to meet them. Senators—like other elected officials—will be inclined not to follow the party line when it conflicts with their interests.³⁷

Not following the party line, however, can subject senators to retaliation from within their own party or by their constituents. The Senate majority leader can threaten to take away leadership positions, plum committee assignments, or input on legislation or nominations of interest.³⁸ The leadership of each national party can also make decisions about how much funding it directs to incumbents up for reelection. Senators at odds with their party leaders risk losing funds needed to fight off primary challengers as one form of punishment for their independence.

To be sure, political calculations are complex. In particular, few senators are likely to survive long in office when they disregard their constituents' voting preferences on politically salient issues.³⁹ Senators might dissent sometimes to policies or positions that their constituents prefer, but when they do, their positions are likely to be in accord with what their party might prefer. To be at odds with both party and the public can be disastrous for a senator.

At the very least, surviving in the Senate requires successful political campaigning, which can both encourage and discourage dissent. Since the Supreme Court's decision in *Citizens United v. FEC*,⁴⁰ campaign finance has become critical for influencing party allegiance and public opinion and increasingly polarization. Loyal senators can expect greater campaign money, but for dissenting

37. See James M. Snyder, Jr. & Tim Groseclose, *Estimating Party Influence in Congressional Roll-Call Voting*, 44 AM. J. OF POL. SCI. 193, 195 (2000).

38. See *United States Senate: Majority and Minority Leaders*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Majority_Minority_Leaders.htm [<http://perma.cc/9HJM-CR4L>]; see also *Leadership in Congress: It's A Party Matter*, USHISTORY.ORG, <http://www.ushistory.org/gov/6b.asp> [<http://perma.cc/U5FV-PBBB>].

39. See Ethan M. Bernick & Nathan Myers, *Issue Salience, Party Strength, and the Adoption of Health-Care Expansion Efforts*, 40 POL. & POL'Y 131, 131–159 (2012) (analyzing the relationship between issue salience and senators' responsiveness to their state constituents).

40. 558 U.S. 310 (2010).

senators, the risk of receiving less monetary support is real.⁴¹ At the same time, political parties and advocacy groups devote enormous resources to developing public support for their preferred initiatives, both during campaigns and important moments of Senate business, such as Justice Gorsuch's confirmation proceeding.⁴²

The more that party unity is maintained, the more that the majority party can control Senate actions, particularly on matters that cannot be filibustered. If a significant minority does not have recourse to the filibuster, its success depends on its ability to build coalitions. If, however, the opposition party controls the Senate, it can stymie the president's nominations, regardless of the president's popularity, as in the Senate's failure to act on President Obama's nomination of Judge Merrick Garland to the Supreme Court.⁴³ The hostility that President Obama faced from a Republican Senate turned into agreeability after President Trump's inauguration.⁴⁴

However, the fact that the same party controls the White House and the Senate does not guarantee presidential success. Sometimes, senators are able to dissent against—or oppose—a president's preferences. For example, when President George W. Bush nominated Harriet Miers to the Supreme Court in 2005, Republican senators did not fall into line; instead, several questioned her qualifications and ideological commitments.⁴⁵ Building coalitions across party lines,

41. Thomas E. Mann & Anthony Corrado, *Party Polarization and Campaign Finance*, BROOKINGS INSTITUTION (July 2014), http://www.brookings.edu/wp-content/uploads/2016/06/Mann-and-Corrad_Party-Polarization-and-Campaign-Finance.pdf [<http://perma.cc/5QVC-YTJG>].

42. See, e.g., Kenneth P. Voegl, *The 'Resistance,' Raising Big Money, Upends Liberal Politics*, N.Y. TIMES, (Oct. 7, 2017) <http://www.nytimes.com/2017/10/07/us/politics/democrats-resistance-fundraising.html> [<http://perma.cc/L3GN-QBQE>]; Sophia Tesfaye, *NRA's Million Dollar Supreme Court Bet: Gun Lobby to Spend Big on Neil Gorsuch*, SALON, (Mar. 14, 2017, 5:05 PM), <http://www.salon.com/2017/03/14/nras-million-dollar-supreme-court-bet-gun-lobby-to-spend-big-on-neil-gorsuch> [<http://perma.cc/M9UZ-99LW>].

43. Matt Flegenheimer, *Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <http://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html> [<http://perma.cc/9KVG-9HXB>].

44. Sarah Lyall, *Liberals Are Still Angry, but Merrick Garland Has Reached Acceptance*, N.Y. TIMES (Feb. 19, 2017), <http://www.nytimes.com/2017/02/19/us/politics/merrick-garland-supreme-court-obama-nominee.html> [<http://perma.cc/5TDM-4UPW>] (“A few [Republican senators] said privately that they were very sorry, but they could not do anything for the judge.”).

45. Elisabeth Bumiller & Carl Hulse, *Bush's Court Choice Ends Bid; Conservatives Attacked Miers*, N.Y. TIMES (Oct. 28, 2005), <http://www.nytimes.com/2005/10/28/politics/politicsspecial1/bushs-court-choice-ends-bid-conservatives-attacked-miers.html> [<http://perma.cc/A6HK-FCDZ>].

as Bill Clinton did with welfare reform, can also work,⁴⁶ but his strategy of triangulation was not cost-free.⁴⁷ Triangulation can erode support from a party's base, which is needed over the long-term to achieve legislative priorities. The Democratic Party fell into line to save President Clinton from ouster, but Clinton achieved very little during the remainder of his presidency. In his last two years in office, President Clinton met resistance and opposition from within his own party, which had grown tired of defending him and given rise to a phenomenon known as "Clinton fatigue."⁴⁸

For both the parties and the interest groups, polarization is not only inevitable, but indeed critical for mobilizing voters to go to the polls. Yet, the more sharply divided the public, the more sharply divided the Senate is likely to be, and dissent will be more likely, prevalent, and mean-spirited. As the public increasingly sorts itself into like-minded communities, the divisions within society—and therefore the prospects for dissent—correspondingly increase.⁴⁹

The increased prevalence of dissent is an understandable concern to many people. To better understand how these different factors come together to produce dissent and the effects of such dissent in the Senate, the next Part examines three case studies.

II. WINNING BY LOSING IN THE SENATE

This Part focuses on three case studies that illustrate how the different factors influencing dissent affect debate in the Senate. This dissent is often employed to mobilize the public to support a desired policy, constitutional objective, or change in the law. The strategy is not new,⁵⁰ nor is it unique to the

46. John F. Harris & John E. Yang, *Clinton to Sign Bill Overhauling Welfare*, WASH. POST (Aug. 1, 1996), <http://www.washingtonpost.com/wp-srv/politics/special/welfare/stories/wfo80196.htm> [<http://perma.cc/5AS2-HT3M>].

47. See STEPHEN SKOWRONEK, *PRESIDENTIAL LEADERSHIP IN POLITICAL TIME: REPRISE AND REAPPRAISAL* 108 (2d. ed. 2011) (addressing the short-term durability of a triangulation strategy).

48. Michael J. Gerhardt, *The Special Constitutional Structure of the Federal Impeachment Process*, 63 *LAW & CONTEMP. PROBS.* 245, 255 (2000). See generally *Opinion, An Appraisal; Bill Clinton's Mixed Legacy*, N.Y. TIMES (Jan. 14, 2001), <http://www.nytimes.com/2001/01/14/opinion/an-appraisal-bill-clinton-s-mixed-legacy.html> [<http://perma.cc/CN4J-6MQ5>].

49. See generally BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* (2008) (explaining how increasing ideological homogeneity in communities has increased ideological polarization in America).

50. Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 *HARV. L. REV.* 4, 15-16 (2008) (discussing dissenting Justices attempting to influence future "lawyers, judges, and other legal elites"). For a historical overview of winning by losing, see NEIL A. HAMILTON, *REBELS*

legislative process. As noted, judges have long used their dissents to try to mobilize changes in the law. The same is true in the legislative process, in which the losers often seek to attain some political advantage from losing.

The following three case studies illustrate how the Senate's distinctive features and its relationship to political parties and the president influence dissent, particularly the ways in which dissent has been used to win—win stature, attention, votes, influence, public approval, support of or opposition to the President (or to particular nominations he has made or actions he has taken), and reelection—by losing a legislative contest. As these case studies illustrate, these victories do not just advance the interests of the dissenters, but can also come at great costs, including: inhibiting and degrading public discourse, increasing friction within the Senate, diminishing respect for the presidency or the Senate, and injuring careers and reputations.

A. *Dissenting to Judicial Nominations*

Presidents and senators' quest to control the federal courts is as old as the Republic,⁵¹ but over the last thirty years, Senate contests over judicial nominations have intensified to unprecedented levels of obstruction and divisions between Republicans and Democrats in the Senate.⁵² Thirty years ago, the Senate rejected President Reagan's nomination of Robert Bork to the Supreme Court by a vote of 58-42, with a Republican bloc largely in support and a Democratic bloc largely against the appointment.⁵³ For many conservative Republicans, Bork's rejection was a watershed moment, ushering in a new era in which the Democrats in the Senate majority had transformed the Supreme Court appointments process by focusing on nominees' ideologies—how they would rule in future cases—rather than their qualifications. President Reagan's nomination of Anthony Kennedy to the vacancy to which Bork had been nominated infuri-

AND RENEGADES: A CHRONOLOGY OF SOCIAL AND POLITICAL DISSENT IN THE UNITED STATES (2002).

51. See Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 477-78 (1998).
52. See Russell Wheeler, *Judicial Nominations and Confirmations: Fact and Fiction*, BROOKINGS INSTITUTION (Dec. 30, 2013), <http://www.brookings.edu/blog/fixgov/2013/12/30/judicial-nominations-and-confirmations-fact-and-fiction> [<http://perma.cc/MXH7-HTS7>]; see also Michael J. Gerhardt & Richard W. Painter, *Majority Rule and the Future of Judicial Selection*, 2017 WIS. L. REV. 263, 265-66 (2017) (“[J]udges without the support of more than sixty senators rarely are confirmed anymore. That has been the status quo for over twenty-five years . . .”).
53. JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 50 (2007).

ated Republicans further.⁵⁴ Justice Kennedy's joining a five-member majority five years later to reaffirm *Roe v. Wade*⁵⁵ in *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁵⁶ was the first in a series of votes that most Republican senators have denounced as betrayals.⁵⁷

In the thirty years since Bork's rejection, the voting on judicial nominations has split sharply, sometimes uniformly, along strictly partisan lines.⁵⁸ When each party has controlled the Senate, it has attempted to get even for past obstruction,⁵⁹ vindicate the style of judging it prefers (a stricter adherence to the original public meaning of the Constitution for Republicans and more respect for precedent and pragmatic reasoning for Democrats),⁶⁰ and turn their past losses to their present advantage. In the years since the Senate's rejection of Bork's nomination, both liberal and conservative advocacy groups have invest-

54. *Id.* at 36-38, 85-86, 165-66.

55. 410 U.S. 113 (1973).

56. 505 U.S. 833 (1992).

57. See Tom Howell Jr., *Justices Roberts, Kennedy Fall from GOP Favor After Recent Supreme Court Decisions*, WASH. TIMES (July 19, 2015), <http://www.washingtontimes.com/news/2015/jul/19/john-roberts-anthony-kennedy-lose-republican-favor> [<http://perma.cc/9YJA-SCAK>].

58. See David Fontana, *Cooperative Judicial Nominations During the Obama Administration*, 2017 WIS. L. REV. 305, 324 (2017) (“[P]artisanship predicts Supreme Court confirmation votes rather than these votes being unanimous or close to it. . . . For lower court nominations, . . . partisanship is [also] what matters.”); Audrey Carlsen & Wilson Andrews, *How Senators Voted on the Gorsuch Confirmation*, N.Y. TIMES (Apr. 7, 2017), <http://www.nytimes.com/interactive/2017/04/07/us/politics/gorsuch-confirmation-vote.html> [<http://perma.cc/L3T7-TKFF>].

59. See Ryan T. Becker, *The Other Nuclear Option: Adopting a Constitutional Amendment To Furnish a Lasting Solution to the Troubled Judicial Confirmation Process*, 111 PENN ST. L. REV. 981, 984-89 (2007); Russell Berman, *How Democrats Paved the Way for the Confirmation of Trump's Cabinet*, ATLANTIC (Jan. 20, 2017), <http://www.theatlantic.com/politics/archive/2017/01/democrats-trump-cabinet-senate/513782> [<http://perma.cc/27SM-QTR9>]; Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013), <http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html> [<http://perma.cc/ADK8-YQ6M>] (“The Senate approved the most fundamental alteration of its rules in more than a generation on Thursday, ending the minority party's ability to filibuster most presidential nominees in response to the partisan gridlock that has plagued Congress for much of the Obama administration.”).

60. See Joshua R. Furgeson, Linda Babcock & Peter M. Shane, *Behind the Mask of Method: Political Orientation and Constitutional Interpretive Preferences*, 32 LAW & HUM. BEHAV. 502, 509 (2008); see also Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 545-47 (2006) (describing originalism as “a powerful vehicle for conservative mobilization”).

ed heavily in lobbying efforts to bring about the kind of courts each prefers to see.⁶¹

Once Republicans gained control of the Senate during Clinton's presidency, they slowed down the judicial confirmation process. They rejected a federal district court nominee⁶² and refused to give floor votes or take committee actions for a number of well-qualified nominees, including Elena Kagan, whom Clinton had nominated to the U.S. Court of Appeals for the District of Columbia.⁶³ Once President George W. Bush came into office, Democrats objected to his efforts to stack the federal courts of appeals with relatively young conservative ideologues, who would eventually make good candidates for the Supreme Court. Therefore, the Democrats increased their use of the filibuster to block Senate votes on confirmations to lower courts.⁶⁴ Similarly, the percentage of President Obama's circuit nominees confirmed decreased when Republicans gained seats in the Senate in 2010.⁶⁵ When Republicans turned to the filibuster to block President Obama's nominees, the Democrats eventually countered by deploying the "nuclear option" to dismantle the filibusters of lower court nominees.⁶⁶ While this move made it harder for Republicans to object to President Obama's lower court judicial nominees, they regained control of the Senate in

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61. See Gregory A. Caldeira & John R. Wright, *Lobbying for Justice: Organized Interests, Supreme Court Nominations, and the United States Senate*, 42 AM. J. POL. SCI. 499, 512-21 (1998) (describing interest group lobbying for or against the nominations of Robert Bork, David Souter, and Clarence Thomas and concluding that for Justice Thomas, "lobbying for and against the nomination made a significant difference in how senators voted").
62. See Charles Babington & Joan Biskupic, *Senate Rejects Judicial Nominee*, WASH. POST (Oct. 6, 1999), <http://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/judge100699.htm> [<http://perma.cc/59J6-BXSR>] (discussing the Senate's rejection of Ronnie White to the Federal District Court).
63. Paul Kane, *GOP Set To Block Obama Court Nominee, but Parties' Confirmation Wars Aren't New*, WASH. POST (Nov. 12, 2013), http://www.washingtonpost.com/politics/gop-set-to-block-obama-court-nominee-but-parties-confirmation-wars-arent-new/2013/11/12/ccd3f698-4bb3-11e3-9890-a1e0997fboco_story.html [<http://perma.cc/PC39-HBXZ>].
64. See Office of the Press Sec'y, *President Bush Discusses Judicial Accomplishments and Philosophy*, WHITE HOUSE (Oct. 6, 2008, 3:02 PM EDT), <http://web.archive.org/web/20090813153034/http://georgewbush-whitehouse.archives.gov/news/releases/2008/10/20081006-5.html> [<http://perma.cc/497P-CL5H>]. In the 110th Congress, the Senate confirmed only forty-three percent of President Bush's nominees to the circuit courts. Chafetz, *supra* note 4, at 7-8. When Democrats had a filibuster-proof majority in the first months of the 111th Congress, the Senate confirmed sixty-eight percent of President Barack Obama's nominees, far surpassing the percentage of confirmations at any point during the Bush Administration. *Id.* at 8.
65. *Election 2010: Senate Map*, N.Y. TIMES, <http://www.nytimes.com/elections/2010/results/senate.html> [<http://perma.cc/ZJ5J-2WZN>]; *Election 2012: Senate Map*, N.Y. TIMES, <http://www.nytimes.com/elections/2012/results/senate.html> [<http://perma.cc/E8GT-DQNY>].
66. VALERIE HEITSHUSEN, CONG. RESEARCH SERV., R43331, MAJORITY CLOTURE FOR NOMINATIONS: IMPLICATIONS AND THE "NUCLEAR" PROCEEDINGS 8-9 (2013).

2014, after which they could do more than merely oppose an action.⁶⁷ Once in control of the Senate, Republicans, who had long objected to the Democrats' "Borking" of their nominees,⁶⁸ got their revenge.

Republicans saved their most effective dissent for the last year of Obama's presidency. They confirmed only a single circuit judge that year.⁶⁹ More dramatically, when Justice Scalia died unexpectedly in February 2016, it appeared suddenly that the Democrats had the opportunity to secure a majority of Supreme Court Justices appointed by Democratic presidents for the first time since 1969.⁷⁰ Within twenty-four hours of Justice Scalia's death, Senate Majority Leader Mitch McConnell shut down the possibility of any Supreme Court confirmations entirely, pledging not to take any action on an Obama nominee and to preserve the vacancy for the next president to fill.⁷¹ President Obama's nomination of the eminently qualified, well-regarded circuit judge, Merrick Garland—who at sixty-three was the oldest nominee to the Court in decades—did nothing to weaken the majority leader's resolve to object to any Obama nominee.⁷² Republicans in the Senate united in preventing President Obama from filling the seat. They were determined to keep the Court's composition

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67. Jonathan Weisman & Ashley Parker, *Riding Wave of Discontent, G.O.P. Takes Senate: Election Results: Republicans Win Senate Control with at Least 7 New Seats*, N.Y. TIMES (Nov. 4, 2014), <http://www.nytimes.com/2014/11/05/us/politics/midterm-elections.html> [<http://perma.cc/C6N5-B2GJ>].
68. NCC Staff, *On This Day: Senate Rejects Robert Bork for the Supreme Court*, NAT'L CONST. CTR. (Oct. 23, 2017), <http://constitutioncenter.org/blog/on-this-day-senate-rejects-robert-bork-for-the-supreme-court> [<http://perma.cc/KEW4-6465>]; see also *Bork*, OXFORD LIVING DICTIONARIES, <http://en.oxforddictionaries.com/definition/bork> [<http://perma.cc/83PT-SCN7>] (defining "borking" as the obstruction of someone, especially a candidate for public office, by systematic vilification).
69. See Carl Tobias, *Federal Courts Need 94 Judges. The Senate Should Vote on Qualified Nominees Now*, L.A. TIMES (Nov. 21, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-tobias-federal-judges-vacancies-20161121-story.html> [<http://perma.cc/7FD5-4VNM>]; Andrew Taylor, Associated Press, *Senate Confirms Restrepo as Other Nominees Languish Under GOP Control of Senate*, U.S. NEWS & WORLD REP. (Jan. 11, 2016, 6:40 PM), <http://www.usnews.com/news/politics/articles/2016-01-11/senate-democrats-rammed-through-judges-now-gop-calls-shots> [<http://perma.cc/R5EP-4XWG>].
70. See Gerhardt & Painter, *supra* note 52, at 264.
71. Burgess Everett & Glenn Thrush, *McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama*, POLITICO (Feb. 13, 2016, 9:56 PM EST), <http://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248> [<http://perma.cc/UUZ8-UHE7>].
72. Nina Totenberg, *170-Plus Days and Counting: GOP Unlikely To End Supreme Court Blockade Soon*, NPR (Sept. 6, 2016, 4:30 PM ET), <http://www.npr.org/2016/09/06/492857860/173daysandcountinggopunlikelytoendblockadeongarlandnominationsoon> [<http://perma.cc/CW5M-5KTK>].

from tipping in an ideological direction they did not like.⁷³ Democratic senators objected that the obstruction seemed motivated by partisanship rather than ideology, given that their Republican colleagues had not even allowed a hearing to vet Judge Garland.⁷⁴ Indeed, if the dissent to President Obama's judicial nominees were not purely ideological, it would have been likely that the Senate would have confirmed more than one circuit court nomination in President Obama's last year in office.

Blocking Judge Garland's nomination was the culmination of longstanding opposition by Republicans who objected to Democratic efforts to keep jurists like Robert Bork off the Court and who wanted to preserve a judicial majority that was disposed to reach outcomes that were based on something other than the strict interpretation or original meaning of the Constitution.⁷⁵ Conservative losses in cases such as *Roe v. Wade*,⁷⁶ *Engel v. Vitale*,⁷⁷ and *Garcia v. San Antonio Metropolitan Transit Authority*⁷⁸ made the urgency of preserving the Court's longstanding conservative majority all the more pressing. Any damage done to Judge Garland as a result of the obstruction was merely instrumental to the majority's cause.

The pattern of Republican and Democratic dissent over judicial nominees has helped to build and reify coalitions along party lines as well. Twenty-one percent of the people who voted in the 2016 presidential election said that the Supreme Court was the most important factor in their decisions about which presidential candidate to support, and fifty-seven percent of those voters fa-

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73. See Seung Min Kim, *Frustrated Democrats Plan Their Own Garland Hearing*, POLITICO (May 16, 2016, 6:18 AM ET), <http://www.politico.com/story/2016/05/merrick-garland-senate-democrats-promote-223203> [<http://perma.cc/K4BW-VZMG>] (“Republicans also now openly acknowledge that they want a conservative to fill that seat, left empty by the death of Justice Antonin Scalia in February.”).
74. See Seung Min Kim & Burgess Everett, *Reid Blasts GOP's 'Big Lie' on Supreme Court*, POLITICO (Mar. 17, 2016, 5:42 AM EDT), <http://www.politico.com/story/2016/03/senate-supreme-court-merrick-garland-220909> [<http://perma.cc/R3BL-KEK3>] (“It is a ‘big lie,’ Reid said, for the GOP to oppose Garland now, but it’s consistent with Republicans’ reflexive opposition to everything President Barack Obama does.”).
75. See Michael Grunwald, *Did Obama Win the Judicial Wars?*, POLITICO (Aug. 8, 2016, 5:25 AM), <http://www.politico.com/story/2016/08/obama-courts-judicial-legacy-226741> [<http://perma.cc/H3GC-WUMV>] (“The Republicans blame Democrats for starting the confirmation wars by keeping Robert Bork off the Court in 1987.”).
76. 410 U.S. 113 (1973) (upholding a woman's right to terminate an unwanted pregnancy at least until the fetus is viable).
77. 370 U.S. 421 (1962) (striking down state-mandated school prayer).
78. 469 U.S. 528 (1985) (upholding a federal law mandating that States pay overtime compensation).

vored Trump over his Democratic challenger, Hillary Clinton.⁷⁹ As the Senate becomes increasingly partisan over nominations, so do its constituents.

The Republican strategy to block Judge Garland's nomination paid off with Donald Trump's election. He had vowed to appoint a Justice in the mold of Justice Scalia, and his nominee, Neil Gorsuch, appears to have been just that.⁸⁰ Trump voters helped to maintain firm Republican control of the Senate, making Justice Gorsuch's confirmation all but certain. Democrat senators initially tried to express their opposition to the nomination through a filibuster, but the Republican majority deployed the same nuclear option Democrats had used previously to dismantle filibusters of Supreme Court nominations.⁸¹

The Democrats' muted resistance highlights how Senate procedures can amplify dissent. Without the filibuster as an option, the Democrats' previous efforts to raise concerns over the Republicans' failure to schedule any hearings on Judge Garland's nominations had fallen largely on deaf ears.⁸² Indeed, the absence of any Senate Judiciary Committee hearings deprived the Democrats of an important opportunity to cultivate public support for Judge Garland's nomination.

With Republicans firmly in control of the Gorsuch hearings, Democrats fared no better in setting the terms of the debate or moving public opinion, two important goals of dissent. Although every Democratic senator criticized the Republicans' failure to act on the Garland nomination, all but one of the Republicans said nothing.⁸³ Instead, they kept to their script and praised Gor-

79. ABC News Analysis Desk & Paul Blake, *Election 2016 National Exit Poll Results and Analysis*, ABC NEWS (Nov. 9, 2016, 2:10 AM EST), <http://abcnews.go.com/Politics/election-2016-national-exit-poll-results-analysis/story?id=43368675> [<http://perma.cc/WP24-DQG6>].

80. Adam Liptak, *In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style*, N.Y. TIMES (Jan. 31, 2017), <http://www.nytimes.com/2017/01/31/us/politics/neil-gorsuch-supreme-court-nominee.html> [<http://perma.cc/B4P8-29QH>]; Ramesh Ponnuru, *Neil Gorsuch: A Worthy Heir to Scalia*, NAT'L REV. (Jan. 31, 2017, 4:33 PM), <http://www.nationalreview.com/article/444437/neil-gorsuch-antonin-scalia-supreme-court-textualist-originalist-heir> [<http://perma.cc/8CP7-B7QP>].

81. Matt Flegenheimer, *Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <http://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html> [<http://perma.cc/A94F-PYZ4>].

82. See Jim Geraghty, *Remember Merrick Garland?*, NAT'L REV. (Sept. 29, 2016, 2:37 PM), <http://www.nationalreview.com/article/440564/merrick-garland-supreme-court-fight-absent-campaign-trail> [<http://perma.cc/9C9W-HCMH>] (noting that Democratic candidates had largely failed to mention Judge Garland in their re-election campaigns and that his nomination had failed to become a campaign issue for them).

83. See Joseph P. Williams, *Neil Gorsuch Hearing: Lindsey Graham Lashes Out at Democrats*, U.S. NEWS (Mar. 21, 2017, 1:12 PM), <http://www.usnews.com/news/politics/articles/2017-03-21/neil-gorsuch-hearing-lindsey-graham-lashes-out-at-democrats> ("'Judge Garland was a fine man, and I'm sure I would have voted for him,' Graham said."); see also *Gorsuch Confirmation*

such's nomination.⁸⁴ Senator Graham, the one Republican to mention Garland, simply explained that Democrats would have done the same to a Republican nominee to the Court if they had been in the majority.⁸⁵ The Senate voted to confirm Justice Gorsuch by a vote of 54-45, with only three of the Senate's forty-five Democratic senators defecting to vote for the nominee. Justice Gorsuch's confirmation was the narrowest favorable vote since the confirmation of Justice Clarence Thomas in 1991.

Ultimately, the Republicans, who had dissented vigorously to the nomination of Merrick Garland to take the open seat on the Court, made good on their opposition. Their obstruction of the Garland nomination laid the groundwork for restoring the Court to the same composition it had at the time of Justice Scalia's death. It was a victory for the Republican majority in the Senate, which not only secured a majority of Republican appointees to the Court, but also replaced the Court's most impassioned conservative with someone whose constitutional commitments were similar to those of Bork, who the Senate had rejected three decades before.

B. Dissenting to Presidential Impeachment

The strategy of "winning by losing" was on fully on display when Democratic House members decided to oppose the impeachment of President Bill Clinton.⁸⁶ The strategy enabled Democrats to score political points in the short term, but it became a model for dissent to be used to their disadvantage in other legislative contexts in the future and helped make it harder to use impeachment against presidents who engaged in conduct they condemned.

Hearing, Day 1, CSPAN (Mar. 20, 2017), <http://www.c-span.org/video/?424146-1/supreme-court-nominee-neil-gorsuch-delivers-opening-statement-confirmation-hearing> [<http://perma.cc/8WBK-GFKA>].

84. Matt Flegenheimer et al., *Six Highlights from the Gorsuch Confirmation*, N.Y. TIMES (Mar. 20, 2017), <http://www.nytimes.com/2017/03/20/us/politics/judge-gorsuch-supreme-court-confirmation-hearings.html> [<http://perma.cc/TB56-GJF2>]; see also *Gorsuch Confirmation Hearing, Day 1*, *supra* note 83.

85. Video Interview by Wolf Blitzer with Sen. Lindsey Graham (Mar. 22, 2017), @CNN, TWITTER (Mar. 22, 2017 3:34 PM), <http://twitter.com/CNN/status/844678825137049600> [<http://perma.cc/4PM3-6ALZ>] ("To my Democratic friends, you're manufacturing this issue. There's no doubt in my mind that if the shoes were on the other foot, you would have done what we did.").

86. See JEFFREY TOOBIN, *A VAST CONSPIRACY: THE REAL STORY OF THE SEX SCANDAL THAT NEARLY BROUGHT DOWN THE PRESIDENCY* 336-37 (1999).

The impeachment of President Clinton should be familiar. Shortly after the publication of the Starr Referral,⁸⁷ which alleged that President Clinton committed impeachable offenses in attempting to hide his relationship with former White House intern Monica Lewinsky,⁸⁸ Democratic members of the House adopted the strategy of winning by losing. If all forty-five Democratic senators stayed united to oppose the President's ouster, Democrats had the numbers to block removal in the Senate⁸⁹ and perhaps to use that loss to gain electoral victories in 1998 and 2000.⁹⁰ The Senate quickly disposed of the matter when it became obvious that it lacked the votes to meet the two-thirds threshold to convict.⁹¹

Democrats stayed unified in both chambers of Congress. In the House, Democrats expressed their dissent by condemning the House majority's rush to judgment. They complained that the House shirked its duty to investigate whether Clinton had engaged in any wrongdoing but instead had simply de-

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87. *Renewal/Impeachment*, FRONTLINE PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/clinton/chapters/5.html> [<http://perma.cc/J22Y-M943>] (describing the low point of Bill Clinton's presidency); see H.R. DOC. NO. 105-310 (1998).
88. H.R. DOC. NO. 105-310, at 3.
89. See MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 179-180 (2d ed. 2000) (highlighting the effectiveness of the "Democrats' uniform opposition"); *President Clinton Survives Impeachment Trial; His Reputation Does Not*, CQ ALMANAC (1999), <http://library.cqpress.com/cqalmanac/document.php?id=cqal99-18-24510-1085981> [<http://perma.cc/3ZLZ-49GH>] (discussing early expectance of party unity in the final votes).
90. See Alison Mitchell & Eric Schmitt, *The 1998 Elections: Congress—The Overview; G.O.P. in Scramble Over Blame for Poor Showing at the Polls*, N.Y. TIMES (Nov. 5, 1998), <http://www.nytimes.com/1998/11/05/us/1998-elections-congress-overview-gop-scramble-over-blame-for-poor-showing-polls.html> [<http://perma.cc/E22A-WU2V>]. For Congress's party composition following these elections, see *Party Divisions of the House of Representatives: 1789-Present*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <http://history.house.gov/Institution/Party-Divisions/Party-Divisions> [<http://perma.cc/5GYM-5L2J>].
91. *President Clinton Survives Impeachment Trial; His Reputation Does Not*, *supra* note 89; Peter Baker & Helen Dewar, *The Senate Acquits President Clinton*, WASH. POST (Feb. 13, 1999), <http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/impeach021399.htm> [<http://perma.cc/2ZK7-NTTR>]; Alison Mitchell, *The President's Acquittal: The Overview; Clinton Acquitted Decisively: No Majority for Either Charge*, N.Y. TIMES (Feb. 13, 1999), <http://www.nytimes.com/1999/02/13/us/president-s-acquittal-overview-clinton-acquitted-decisively-no-majority-for.html> [<http://perma.cc/9H3S-2K92>]. Democrats were further emboldened to protect Clinton due to the President's strong popularity throughout the proceedings. *Presidential Approval Ratings—Bill Clinton*, GALLUP, <http://www.gallup.com/poll/116584/presidentialapprovalratingsbillclinton.aspx> [<http://perma.cc/B6F5-867T>] (tracking presidential approval throughout the presidency); *President Clinton Survives Impeachment Trial; His Reputation Does Not*, *supra* note 89 (discussing "buoyant poll ratings" for the president and the effect on senators).

ferred to the Starr Referral.⁹² They further questioned whether the House's proceeding to impeach Clinton made any sense given the unlikelihood of his removal by the Senate.⁹³

But, when the Democrats blocked the removal of the President, Republicans became the losers, who could broadcast their dissent to the world. Republican senators made the case that Clinton had engaged in impeachable misconduct.⁹⁴ While they failed to remove Clinton from office, their dissent took a toll on the Clintons. In the 2000 presidential election, the Democratic candidate, Vice-President Albert Gore, Jr., lost key Clinton voters who had approved of Clinton's general performance in office, but not of his conduct regarding Lewinsky, contributing to his defeat.⁹⁵ President Trump repeatedly used President Clinton's misconduct to tarnish Secretary Hillary Clinton in the 2016 election.⁹⁶

The failure to convict and to remove President Clinton had arguably the unintended consequence of strengthening the presidency, as impeachment appears in the ensuing years to have become a less effective means for addressing presidential misconduct.⁹⁷ The Clinton impeachment proceeding demonstrated that the real threat to a president is instead a forced resignation.⁹⁸ Further,

92. Michael J. Gerhardt, *Considering Impeachment? Slow Down.*, WASH. POST (May 18, 2017), http://www.washingtonpost.com/opinions/considering-impeachment-slow-down/2017/05/18/5bb60dfc-3bfb-11e7-8854-21f359183e8c_story.html [<http://perma.cc/NAE4-5HS2>].

93. Alison Mitchell, *The Testing of a President: News Analysis; The Uncertainty of 'This Excursion.'* N.Y. TIMES (Oct. 9, 1998), <http://www.nytimes.com/1998/10/09/us/the-testing-of-a-president-news-analysis-the-uncertainty-of-this-excursion.html> [<http://perma.cc/NU3K-QCVD>] ("The conventional wisdom, which Democrats have clung to across these tumultuous weeks for their party, is that the less impulsive Senate will never accumulate the votes to convict Mr. Clinton."); David E. Rosenbaum, *Impeachment: The Senate; Senators Agree on One Thing: That Conviction Seems Unlikely*, N.Y. TIMES (Dec. 20, 1998), <http://www.nytimes.com/1998/12/20/us/impeachment-senate-senators-agree-one-thing-that-conviction-seems-unlikely.html> [<http://perma.cc/8KFK-4FF2>].

94. Mitchell, *supra* note 93.

95. See Gerald M. Pomper, *The 2000 Presidential Election: Why Gore Lost*, 116 POLI. SCI. QUARTERLY 201, 217 (2001).

96. See Patrick Healy & Maggie Haberman, *Donald Trump Opens New Line of Attack on Hillary Clinton: Her Marriage*, N.Y. TIMES (Sept. 30, 2016), <http://www.nytimes.com/2016/10/01/us/politics/donald-trump-interview-bill-hillary-clinton.html> [<http://perma.cc/6R7F-BCEW>] (quoting Donald J. Trump's remark that "Hillary Clinton was married to the single greatest abuser of women in the history of politics").

97. See Michael J. Gerhardt, *Impeachment Defanged and Other Institutional Ramifications of the Clinton Scandals*, 60 MD. L. REV. 59, 77 (2001).

98. See, e.g., Felicity Barringer, *Testing of a President: The Media; Resign or Not To Resign? The Question That Weighs on Editorial Writers*, N.Y. TIMES (Sept. 18, 1998), <http://www.nytimes.com/1998/09/18/us/testing-president-media-resign-not-resign-question-that-weighs-editorial-writers.html> [<http://perma.cc/557N-7T8B>] ("The [Philadelphia] Inquirer, once a

President Clinton's acquittal showed that the efficacy of the impeachment process not only depends on the severity of a president's misconduct, but also relies on a numbers game in Congress: if a president's party controls the House, it can block impeachment as long as its members stay united in opposition to impeachment. Even if the party cannot do that in the House and a majority impeaches the president, she can still avoid conviction and removal as long as her party controls at least a third of the Senate's seats and remains unified against ouster.

The ongoing Senate investigation into possible Russian influence in the 2016 presidential election may be a case in point. President Trump has denounced vigorously the investigation of possible collusion between his campaign and the Russian government as a "witch-hunt."⁹⁹ He insists that there was no such collusion. While he acknowledged that he fired the Director of the Federal Bureau of Investigation, James Comey, in part to stop the "witch hunt,"¹⁰⁰ he and his defenders have argued that it was a lawful exercise of his authority rather than an attempt to obstruct justice.¹⁰¹

Yet, even if there were proof that President Trump engaged in misconduct that provided a legitimate basis for impeachment, the numbers, at least at present, work in his favor. Impeachment seems unlikely as long as the members of his party control both chambers of Congress. If united in the House, Republicans can block easily any impeachment investigation, as they have done so far. Even if, for some reason, the President's support broke down in the House and a majority approved impeachment articles against him, conviction seems impossible. If Republicans retain control of the Senate—or control even only a third of the Senate—their remaining united precludes conviction and removal.

With conviction and removal seemingly impossible because of the number of seats controlled by the President's party in both the House and the Senate, it is reasonable to ask what, if any, options remain to deal with the President's

staunch supporter of the President, was one of at least 115 daily newspapers in the country . . . to make the same plea to Mr. Clinton [that he resign].").

99. See Donald Trump (@realDonaldTrump), TWITTER (June 16, 2017, 6:07 AM), <http://twitter.com/realDonaldTrump/status/875701471999864833> [<http://perma.cc/YZ3S-9FEF>]; see also Kevin Liptak et al., *Trump Says He Is Being Investigated over Comey Firing*, CNN (June 16, 2017, 5:09 PM), <http://www.cnn.com/2017/06/16/politics/donald-trump-james-comey-investigated/index.html> [<http://perma.cc/5WBJ-GRM4>] (reporting on President Trump's tweet).

100. James Griffiths, *Trump Says He Considered 'This Russia Thing' Before Firing FBI Director Comey*, CNN (May 12, 2017, 9:11 AM), <http://www.cnn.com/2017/05/12/politics/trump-comey-russia-thing/index.html> [<http://perma.cc/J7Z2-H4X5>].

101. See Liptak et al., *supra* note 99; Charlie Savage, *Trump, Comey and Obstruction of Justice: A Primer*, N.Y. TIMES (June 8, 2017), <http://www.nytimes.com/2017/06/08/us/politics/obstruction-of-justice-trump-comey.html> [<http://perma.cc/9B6V-H3BH>].

possible misconduct, assuming it were proved.¹⁰² One is to defeat his potential reelection campaign, while another is a forced resignation, as occurred with President Nixon.¹⁰³ If the President wins reelection or refuses to resign in spite of evidence of any misconduct, the only recourse left for punishing the President in some way will be through dissent. If the dissent is strong and loud enough, it might make a difference to the historical judgment of Trump's presidency. Even if the investigations do not lead to an impeachment, Democrats might be able to use their dissent to shape the judgment of history. If they are successful, their dissent could help to brand President Trump, in the judgment of history, as corrupt, just as has been done with earlier presidents who had engaged in or tolerated significant corruption within their administrations.¹⁰⁴

C. *Dissenting to the Affordable Care Act*

Dissent has played a major role in the lifespan of the Affordable Care Act,¹⁰⁵ President Obama's signature achievement,¹⁰⁶ in three significant ways. First, during the passage of the law, Republicans were certain of its success, given Democrats' control of the House and filibuster-proof majority in the Senate.¹⁰⁷ Therefore, Republicans turned quickly to the strategy of winning by losing. Because the Act became law by a straight party vote,¹⁰⁸ Republicans complained that neither President Obama nor the Democratic majority in either

102. The Twenty-Fifth amendment is a check on presidential disability rather than presidential misconduct. See Akhil Reed Amar, *Applications and Implications of the Twenty-Fifth Amendment*, 47 HOUS. L. REV. 1, 20 (2010). Though not yet invoked, it requires, as set forth in its third and fourth sections, either a declaration of incapacity by the President himself or from key figures from within an administration or an authority designated by the Congress.

103. See John Herbers, *Nixon Resigns*, N.Y. TIMES (Aug. 8, 1974), <http://www.nytimes.com/learning/general/onthisday/big/0808.html> [<http://perma.cc/DHS4-DFRC>].

104. See Mike Rothschild, *Trump or Clinton: The Winner of the Election Won't Be as Corrupt as These U.S. Presidents*, ATTN (Sept. 30, 2016), <http://www.attn.com/stories/11743/most-corrupt-american-presidents-in-history> [<http://perma.cc/NFC4-5726>].

105. Patient Protection and Affordable Care Act (Affordable Care Act) (Obamacare), 42 U.S.C. § 18001 (2012).

106. Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish*, N.Y. TIMES (Mar. 23, 2010), <http://www.nytimes.com/2010/03/24/health/policy/24health.html> [<http://perma.cc/2CZN-CTPW>].

107. See Robert Pear, *Senate Passes Health Care Overhaul on Party-Line Vote*, N.Y. TIMES (Dec. 24, 2009), <http://www.nytimes.com/2009/12/25/health/policy/25health.html> [<http://perma.cc/S8UL-6ZXJ>].

108. *Id.*

chamber of Congress consulted seriously with them.¹⁰⁹ Republicans went further to challenge the constitutionality of the law, including that Congress lacked the authority to impose the individual mandate,¹¹⁰ which required most Americans to purchase private health care insurance or pay a penalty in the form of a special tax.¹¹¹ Their persistent assault against the law arguably produced electoral victories in 2010¹¹² and 2014, in which they finally gained control of the Senate and widened their margin of control in the House.¹¹³ In 2016, Republicans maintained control of both chambers of Congress and their presidential nominee defeated Hillary Clinton for the presidency based on a promise to repeal the ACA.¹¹⁴

Dissent figured prominently in the ensuing attempt by the Republican Congress, spurred on by President Trump, to fulfill their campaign pledge to repeal and replace Obamacare. The House approved a bill in early May, despite the fact that every Democratic member voted against the legislation.¹¹⁵ Howev-

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109. *E.g.*, David Bernstein, *Let's Recall Why the Affordable Care Act Is So Messed Up*, WASH. POST: VOLOKH CONSPIRACY (June 25, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/25/lets-recall-why-the-affordable-care-act-is-so-messed-up> [<http://perma.cc/C8F9-WPMU>]; Patrick Caldwell, *Republicans, Rushing Their Health Bill Through, Complain Obamacare Was Passed Too Quickly*, MOTHER JONES (Mar. 7, 2017, 6:01 PM), <http://www.motherjones.com/politics/2017/03/republicans-still-complaining-obamacare-was-rushed-through> [<http://perma.cc/8E9A-GGQD>].
110. Tom Gaziano et al., *Why the Personal Mandate To Buy Health Insurance Is Unprecedented and Unconstitutional*, HERITAGE FOUND. (Dec. 9, 2009), <http://www.heritage.org/health-care-reform/report/why-the-personal-mandate-buy-health-insurance-unprecedented-and> [<http://perma.cc/GL6S-6S2R>].
111. 26 U.S.C. § 5000A(a) (2012).
112. See Chris Cillizza, *What Effect Did Health-Care Reform Have on Election?*, WASH. POST (Nov. 7, 2010, 9:57 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/07/AR2010110705311.html> [<http://perma.cc/KH58-DHYT>] (discussing the impact of campaigning against the health care law); Carl Hulse & Adam Nagourney, *Senate G.O.P. Leader Finds Weapon in Unity*, N.Y. TIMES (Mar. 16, 2010), <http://www.nytimes.com/2010/03/17/us/politics/17mccconnell.html> [<http://perma.cc/HTS7-TUPT>] (“Republicans are monolithically against the health care legislation . . .”).
113. *Federal Elections 2014: Election Results for the U.S. Senate and the U.S. House of Representatives*, FED. ELECTION COMM’N (2014), <http://classic.fec.gov/pubrec/fe2014/federalections2014.pdf> [<http://perma.cc/TQP4-K4CC>]; *Federal Elections 2012: Election Results for the U.S. President, the U.S. Senate and the U.S. House of Representatives*, FED. ELECTION COMM’N (2012), <http://classic.fec.gov/pubrec/fe2012/federalections2012.pdf> [<https://perma.cc/H7T3-H4PL>].
114. *Official 2016 Presidential General Election Results*, FED. ELECTION. COMM’N (Jan. 30, 2017), <http://transition.fec.gov/pubrec/fe2016/2016presgeresults.pdf> [<http://perma.cc/ZB5M-EDU8>].
115. Gregor Aisch, et al., *How Every Member Voted in the House Health Bill*, N.Y. TIMES (May 4, 2017), <http://www.nytimes.com/interactive/2017/05/04/us/politics/house-vote-republican-health-care-bill.html> [<http://perma.cc/HE56-S9MW>]; Thomas Kaplan & Robert Pear,

er, it met resistance in the Senate because of concerns that it did not guarantee coverage for preconditions, which would result in millions of people losing coverage.¹¹⁶ When the final vote in the Senate came, three Republican senators dissented and voted with the Democrats to defeat the repeal bill.¹¹⁷ Their dissent produced in turn a harsh response from President Trump, who tweeted his disdain for the defecting senators, particularly Arizona Republican Senator John McCain. Yet, the losses and prospects of losing further spurred Republicans eventually to approve a tax bill that weakened but did not fully replace Obamacare,¹¹⁸ Consequently, it has become the Democrats' turn this loss into a victory, either in the mid-term elections of 2018 or the presidential election in 2020.¹¹⁹

Third, the failed effort to repeal and replace was a dramatic reminder of the hazards of failed coalition-building when dissenting: as described above, the cumbersome nature of the constitutional lawmaking process renders failure much likelier than success.¹²⁰ In the ACA example, President Trump turned his ire against Senator McConnell, whom he chided for failing to unite Republicans to approve the bill; against Democratic senators for failing to join the coalition to repeal and replace; and against the Senate's rules allowing filibusters of legislation and requiring supermajority votes on budget matters.¹²¹ His frustra-

House Passes Measure To Repeal and Replace the Affordable Care Act, N.Y. TIMES (May 4, 2017), <http://www.nytimes.com/2017/05/04/us/politics/health-care-bill-vote.html> [http://perma.cc/7KRA-9SS5].

116. Robert Pear, Thomas Kaplan, & Emily Cochrane, *Health Care Debate: Obamacare Repeal Fails as McCain Casts Decisive No Vote*, N.Y. TIMES (July 27, 2017), <http://www.nytimes.com/2017/07/27/us/politics/senate-health-care-vote.html> [http://perma.cc/Z9WK-LVDH].
117. Alicia Parlapiano et al., *How Each Senator Voted on Obamacare Repeal Proposals*, N.Y. TIMES, (July 28, 2017), <http://www.nytimes.com/interactive/2017/07/25/us/politics/senate-votes-repeal-obamacare.html> [http://perma.cc/AH9S-9CQQ].
118. *See An Act to Provide for Reconciliation pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018*, Pub. Law No. 115-97, 131 Stat. 2054 (2017), <http://www.congress.gov/bill/115th-congress/house-bill/1/titles> [http://perma.cc/SP9N-E7N3].
119. *See Jennifer Steinhauer, McConnell's Calculation May Be That He Still Wins by Losing*, N.Y. TIMES (June 22, 2017), <http://www.nytimes.com/2017/06/22/us/politics/mcconnell-senate-health-care-bill.html> [http://perma.cc/V9GU-EHKU].
120. *See supra* notes 15-16 and accompanying text.
121. Thomas Kaplan, *'Let Obamacare Fail,' Trump Says as G.O.P. Health Bill Collapses*, N.Y. TIMES (July 18, 2017), <http://www.nytimes.com/2017/07/18/us/politics/republicans-obamacare-repeal-now-replace-later.html> [http://perma.cc/U7TX-4TNC]; Miranda Green, *Trump: Change Senate Rules To Speed Up Health Care, Tax Reform*, CNN (May 30, 2017, 1:16 PM), <http://www.cnn.com/2017/05/30/politics/trump-change-senate-votes/index.html> [http://perma.cc/U22H-U9CD]; Gabrielle Levy, *Trump Note Done Hitting McConnell over Obamacare Repeal*, U.S. NEWS (Aug. 10, 2017, 11:31 AM), <http://www.usnews.com/news/politics/articles/2017-08-10/trump-takes-new-swipe-at-mitch-mcconnell-over-obamacare-repeal-failure> [http://perma.cc/Z8ZS-7S9R].

tion reflected the overly optimistic, arguably naïve presumption that party unity was all that is needed in order to ensure success in the lawmaking process.

But, dissent, either by the President or in the Senate, is rarely the end of the story. The effort to repeal and replace the Affordable Care Act was somewhat victorious with the passing of tax reform.¹²² The saga illustrated the persistence of dissenting voices to keep pushing for a change until there is one, at which the point the contending sides reverse positions with the losers hoping, sooner or later, to turn their loss into a victory.

In all of these case studies, the senators who were dissenting wanted their dissents to help them become part of a majority. After all, majorities are more likely to get things done than dissenters. The next Part considers the possible norms that could encourage such cooperation. These norms would replace or diminish the impulses to dissent and to win by losing that have damaged civility and collegiality within the Senate, as well as the public's respect for the Senate itself.

III. NORMS, DEBATE, AND THE FUTURE OF DISSENT IN THE SENATE

The preceding case studies demonstrate some of the fiercest policy and constitutional disagreements and their fallout in the Senate. The longstanding, customary practices of the institution comprise the Senate's informal rules and tradition. These norms place some constraints on dissent, such as limiting the amount of time, speaking opportunities, and the manner of expression in debates.¹²³ Yet, senators do not restrain their dissent to the Senate floor; they also rely on the media to express their disagreements with, or vigorous dissent to, a majority's actions within the Senate.¹²⁴

122. Robert Pear, *Without Health Insurance Mandate, Healthcare's Future May Be in Doubt*, N.Y. TIMES (Dec. 18, 2017), <http://www.nytimes.com/2017/12/18/us/politics/tax-cut-obamacare-individual-mandate-repeal.html> [<http://perma.cc/B2B5-M865>]

123. JUDY SCHNEIDER, CONG. RESEARCH SERV., RL30945, HOUSE AND SENATE RULES OF PROCEDURE: A COMPARISON 2–12 (2005).

124. See *United States v. Brewster*, 408 U.S. 501, 512 (1972) (“It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include . . . preparing so-called ‘news letters’ to constituents, news releases, and speeches delivered outside the Congress.”); *Kilbourn v. Thompson*, 103 U.S. 168, 203–04 (“I would define [the speech and debate clause] as securing to every member exemption from prosecution for everything said or done by him as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular, according to the rules of the House, or irregular and against their rules. I do not confine the member to his place in the House; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representatives’ chamber.” (quoting *Coffin v. Coffin*, 4 Mass. 1 (1808))).

Dissent often frames public debate, as it did in the media and in the Senate debate on repealing and replacing Obamacare. Indeed, “Obamacare” is a term that rose to prominence through dissent as the Congress debated the Affordable Care Act.¹²⁵ Dissent for these various purposes improves the quality of deliberation in the lawmaking process.

Yet neither the purposes nor the effects of dissent are always benign. In the next Section, I consider the different ways in which Senate dissent can be harmful to collegiality and civility within the chamber and to the reputations or careers of the targets of dissent, before considering some possible ways to ameliorate dissent’s potentially (and sometimes quite real) destructive impacts.

A. *The Dark Side of Dissent*

If dissent in the Senate goes off the rails, it can do so in several ways. First, it can lapse into or encourage violence. In 1856, Representative Preston Brooks famously came onto the Senate floor with his metal-tipped cane and savagely beat Senator Charles Sumner to protest statements the latter had made criticizing a relative who served in the Senate.¹²⁶ While such violence on the Senate floor is rare, debates within the Senate might reflect larger societal conversations. Such debates can often include hateful speech, which the First Amendment protects.¹²⁷ Although neither the First Amendment¹²⁸ nor the Speech or Debate Clause¹²⁹ condones violence, senators, who engage in vigorous debate on sensitive, divisive issues, should be aware that their fierce debate have consequences on more than just the policies or principles at stake. They can provoke anger and violence, as sometimes arose in campaign rallies and town hall meetings held by some members of Congress on the ACA.¹³⁰

125. Gregory Wallace, ‘Obamacare’: *The Word That Defined the Health Care Debate*, CNN (June 25, 2012 1:20 AM ET), <http://www.cnn.com/2012/06/25/politics/obamacare-word-debate/index.html> [<http://perma.cc/W5VF-WPRV>].

126. *The Caning of Senator Charles Sumner*, U.S. SENATE, http://www.senate.gov/artandhistory/history/minute/The_Caning_of_Senator_Charles_Sumner.htm [<http://perma.cc/H55M-DHQU>].

127. See *Matal v. Tamm*, No. 15-1293, Slip Op. 15-1293 (U.S. June 19, 2017).

128. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (“The First Amendment does not protect violence.”)

129. U.S. CONST., art. I, section 6, cl. 1.

130. See Martha Shanahan, *5 Memorable Moments When Town Hall Meetings Turned to Rage*, NPR, (Aug. 7, 2013, 6:25 PM) <http://www.npr.org/sections/itsallpolitics/2013/08/07/209919206/5-memorable-moments-when-town-hall-meetings-turned-to-rage> [<http://perma.cc/9B65-NCSA>] (“Demonstrations at some of these gatherings led to fistfights, arrests and even hospitalizations.”).

Second, dissent can become such an irritant that majorities may wish to silence or at least marginalize dissenters. In fact, the elimination of filibusters for judicial nominees did not lead to better debate in the Senate; rather, it removed the incentive for the majority to consult with or bother to debate dissenters. Dissenters could be and were ignored.¹³¹ But the filibuster did not have to be deployed in this way. Traditionally, the Senate required actual dialogue whenever a filibuster was attempted.

The real difficulty with the filibuster was not that it led to obstruction. Instead, the current issues with the filibuster date from a 1975 move to create a two-track system, which allowed the mere threat of a filibuster to take the matter in question off the agenda, allowing the Senate to move forward on other business.¹³² Afterwards, the mere threat of a filibuster produced obstruction. If, instead, the Senate had retained its prior process of requiring debate each time an actual filibuster was attempted, actual dialogue would have likely ensued.¹³³ Cloture might have been invoked and a final vote held, but at least there was the opportunity for a dissent to be heard on the Senate floor.

Third, dissent has also contributed to the degradation of the legislative process. The widely reported breakdown of civility and collegiality within the Senate has included sharper, more mean-spirited dissent – not just on the Senate floor but in the media.¹³⁴ It is hard, if not impossible, to figure out whether the breakdown in civility and collegiality in the Senate reflects a similar breakdown in society, or vice versa. In any event, the breakdown not only further reduces

131. See Burgess Everett & Seung Min Kim, *McConnell Ratchets Up Judicial Wars—Again*, POLITICO (Oct. 11, 2017, 12:52 PM), <http://www.politico.com/story/2017/10/11/mitch-mcconnell-judicial-battles-243669> [<http://perma.cc/5RHM-BRFE>]; Elana Schor, *Why Democrats Have No Regrets After McConnell's 'Nuclear' Blast*, POLITICO (Apr. 9, 2017, 7:33 AM), <https://www.politico.com/story/2017/04/democrats-have-no-regrets-after-mcconnells-nuclear-blast-237016> [<http://perma.cc/7CSZ-BWNE>] (“If this were a nominee that were a product of consultation, not the product of a very conservative think tank . . . but it isn’t,” California Sen. Dianne Feinstein . . . told reporters after her party tried to block Gorsuch.”).

132. See James Fallows, *How the Modern Faux-Filibuster Came to Be*, POLITICO (Apr. 2, 2012), <http://www.politico.com/story/2017/08/17/confederate-monuments-debate-cory-booker-241732> [<http://perma.cc/7CSZ-BWNE>]; see also MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 122 (2008).

133. See 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, 89–91 (“[A] key purpose of reinstating a talking-filibuster reform is to push the lawmaking process into more open view.”).

134. Angela Marie McGowan, *Encouraging Bipartisanship: Polarization and Civility as Rhetorical Tools for Ameliorating the U.S. Senate’s Partisan Environment* 104 (May 8, 2015) (unpublished Ph.D dissertation, University of Southern Mississippi), <http://aquila.usm.edu/dissertations/57> [<http://perma.cc/7LBJ-96EX>] (“Partisan political discourse, after all, makes for captivating television and an audience may have a difficult time turning away from the incivility.”)

the public's already low opinion of Congress, but perhaps also widens the breach between the parties.¹³⁵

B. Restoring the Norms of Civility and Collegiality

The solution to these degrading effects of dissent does not entail shutting down debate. In our constitutional culture, the ideal remedy for “evil” or false speech is not violence or suppression but rather, as Justice Louis Brandeis declared, “more speech.”¹³⁶ Expanding the opportunities for dissent creates goods for our constitutional culture: helping the search for truth, expanding the marketplace of ideas, blowing off steam, promoting tolerance, and checking government, just to name a few.¹³⁷

Second, the restoration of basic norms of civility and collegiality would improve debate in the Senate. Norms are informal arrangements, the breach of which usually leads to some kind of sanction.¹³⁸ Senator McConnell silenced Senator Elizabeth Warren when he thought she had stubbornly “persisted” in making ad hominem attacks on then-Attorney General nominee Jeff Sessions that Senator McConnell deemed inappropriate.¹³⁹ While silenced on the floor, Senator Warren continued to make her case through the press, and the debate over the propriety of her silencing continued in the Senate and the media. Whether one takes Senator McConnell's or Senator Warren's side, it is possible that no compulsory silencing would have been required if the two senators had been able to address their differences in a civil fashion. What happens on the Senate floor likely reflects the nature of their relations off the floor. If those re-

135. See *Congress and the Public*, GALLUP, (Oct. 23, 2017, 6:37 PM), <http://news.gallup.com/poll/1600/congress-public.aspx> [<http://perma.cc/4L2U-WUCE>] (reporting an approval rating of Congress of thirteen percent for the week of Oct. 5, 2017).

136. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

137. See Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, in *ETERNAL VIGILANCE: FREE SPEECH IN THE MODERN ERA*, 85 (2002) (“Persons who live in a free-speech regime are forced to cope with persistent, and frequently intractable, differences of understanding.”); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 301, 304-06 (1992) (“[T]he First Amendment is principally about political deliberation.”); Lawrence Byard Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 69 (1989) (“The marketplace of ideas metaphor suggests that truth is most likely to emerge when all opinions are expressed openly and competing opinions are juxtaposed in debated evaluated by large audiences.”).

138. See Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1863 (2013); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1181-82 (2013).

139. Eric Bradner, *Silencing Elizabeth Warren Backfires on Senate GOP*, CNN (Feb. 8, 2017, 10:34 PM), <http://www.cnn.com/2017/02/07/politics/elizabeth-warren-silenced/index.html> [<http://perma.cc/F2EF-FWD2>].

lations are constructive, then the ensuing debate has a better chance of not going off the rails.

Senators can choose not to express their disagreements through the name-calling and badgering that President Trump uses or that Justice Scalia often employed. They could set a better example for their constituents and the public. For example, when one Republican senator suggested Senator John McCain's brain tumor may have factored into his defection on the repeal and replace bill, the Arizona statesman shot back, lamenting that his colleague would so question his judgment.¹⁴⁰ Personal friction is inevitable in the cumbersome lawmaking process, but it is corrosive to the work of the Senate.

A related question is whether the breakdown in civility, collegiality, and mutual respect in the Senate, or in the relationship between senators and the president, reflects a breakdown in our constitutional order. The problem, in other words, might not just be that dissenters can be shrill and abusive, but rather that whatever safeguards that are meant to protect the system against the degradation of political discourse are not working,¹⁴¹ assuming that they ever did.

But because no one can realistically expect that the process for lawmaking set forth in Article I can be changed through an amendment,¹⁴² it is worth focusing instead on four rather modest norms that could be used in the Senate to ameliorate the destructive potential of dissent. The first is for the Senate to adopt a variation of the practice that the House adopted in 2010, which requires every proposed bill to specify its constitutional authority.¹⁴³ The Senate could consider requiring all the senators to specify the policy and constitutional grounds for any of their actions, including legislative votes, as well as all actions taken on legislation and any of the matters specially restricted to Senate

140. Andrew Kaczynski & David Wright, *Sen. Johnson Walks Back Remarks on McCain's Brain Cancer*, CNN (Aug. 10, 2017 12:52 PM), <http://www.cnn.com/2017/08/09/politics/kfile-ron-johnson-john-mccain/index.html> [<http://perma.cc/U5PX-3HJK>].

141. See Thomas E. Mann & Norman J. Ornstein, *Let's Just Say It: The Republicans Are the Problem*, WASH. POST (Apr. 27, 2012), http://www.washingtonpost.com/opinions/lets-just-say-it-the-republicans-are-the-problem/2012/04/27/gIQAxCVUIT_story.html [<http://perma.cc/JF3P-H9CC>] ("We have been studying Washington politics and Congress for more than 40 years, and never have we seen them this dysfunctional."); see also Ezra Klein, *14 Reasons Why This Is the Worst Congress Ever*, WASH. POST (Jul. 13, 2012) <https://www.washingtonpost.com/news/wonk/wp/2012/07/13/13-reasons-why-this-is-the-worst-congress-ever> [<http://perma.cc/ET2N-PC8M>] (noting a lack of productivity and public support for Congress).

142. See U.S. CONST. art. V.

143. David Weigel, *Republicans Start Teaching Members How to Obey the Constitution*, SLATE (Dec. 10, 2010, 1:49 PM), http://www.slate.com/blogs/weigel/2010/12/20/republicans_start_teaching_members_how_to_obey_the_constitution.html [<http://perma.cc/6GPV-LF92>].

consideration. This includes treaties, nominations, and conviction or removal in impeachment trials.¹⁴⁴ Many senators might already do this, but making it a uniform practice within the chamber has the potential to channel Senate debate in a constructive direction.

Another practice worth cultivating is to urge senators to consider constitutional education to be among their most important responsibilities. This responsibility goes beyond merely specifying the grounds for their actions in the Senate to push Senators to use their positions, including their dissent, to enrich people's understanding of the Constitution. Senators need not agree on their interpretation of the Constitution to do this; they need to agree only to explain, more thoroughly and frequently than they do, their understandings of the Constitution.

The third norm to consider is to protect the blue slip process, which was the longstanding, customary practice of asking each senator from a state in which the president has nominated a federal district judge to return a blue slip acknowledging his or her approval.¹⁴⁵ This fall, the Majority Leader announced the Senate leadership's intention to alter the significance of the practice.¹⁴⁶ In the past, the failure to return a blue slip effectively obstructed a nomination. The Majority Leader suggested that the failure to return a blue slip would be treated instead as an indication of how a senator would vote on a nomination rather than as a complete obstruction of it. The shift on the blue slip process undoubtedly will facilitate majority rule on judicial nominations and increase presidential authority to make such nominations with less fear of minority obstruction. But, it does so at the cost of diminishing the Senate's commitment to engaging every senator, regardless of their state or party, in the confirmation process for lower court judges.

To be sure, the majority might argue that the blue slip process merely allowed a senator from the party not in control of the Senate to exert undue influence over qualified judicial nominees. Maximizing the majority party's control of the Senate, as the Majority Leader's decision on the blue slip process practice does, further mutes the effect of a minority's dissent to a particular judicial nomination. To the extent that argument is persuasive, then perhaps the

144. Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277 (2001).

145. See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 147 (2000).

146. Joseph P. Williams, *McConnell to End Senate's Blue Slip Tradition*, U.S. NEWS (Oct. 11, 2017, 2:14 PM), <https://www.usnews.com/news/politics/articles/2017-10-11/mcconnell-to-end-senates-blue-slip-tradition> [<http://perma.cc/LFQ8-A96Y>] ("From now on, McConnell said, Senate Republicans will treat blue slips "as simply notification of how you're going to vote, not as an opportunity to blackball" a nominee.").

Senate could consider some other way to allow senators from the minority party to be meaningfully involved in the judicial appointments process. For example, the president and certain senators could reach an agreement to allow for at least one out of a number of judgeships in a party state be recommended by the senator from the opposition party.¹⁴⁷ Through this arrangement, some senators from the minority party became much more invested in the confirmation process than they otherwise would have been and therefore less inclined to dissent in obstructive or obnoxious ways.

Last but not least, another practice worth considering is finding a constructive way to engage in a debate with extremist positions. Stephen Carter, for example, suggests that one way to respond to extremists or fanatics is to do so with love.¹⁴⁸ Carter's point is not for senators to be ridiculously romantic or sappy, but rather to respond to fanatical or even hateful expression with respectful engagement. As David Brooks recently explained, in practice this would mean to respond to extremist or hateful rhetoric with a recognition of "the dignity of every human being" and "compassionate listening,"¹⁴⁹ which ensures that even the extremists know their message is being heard and considered. Dissenters pound the table, or worse, when they think they are not being heard or taken seriously. At the very least, senators can show each other, as well as the country as a whole, that they actually do hear and respect the points of views of their colleagues even when they disagree with each other.

The alternative is disheartening to many people. The two parties appear to be on a path of mutual destruction. The failure to take any corrective action will only exacerbate the apathy or hopelessness that many people already have toward their government. The challenge to the American people is to resist the temptations to appeal to the worst in us in order to secure fleeting victories but instead to do the hard, selfless work of restoring the basic norms of civility and collegiality in the Senate and public discourse. Marginalizing and denigrating dissent in the Senate exacerbates rather than tempers or heals the divisions within the Senate.

CONCLUSION

Senators dissent for many reasons. They dissent to appeal to constituents, mobilize public support, enrich or frame constitutional debate, vindicate constitutional and other principles of law or policy, point out where the majority

147. See, e.g., GERHARDT, *supra* note 145, at 140, 222.

148. See STEPHEN L. CARTER, CIVILITY 231-32 (1998).

149. David Brooks, *How to Engage with a Fanatic*, N.Y. TIMES (Oct. 24, 2017), <http://www.nytimes.com/2017/10/23/opinion/engaging-fanatics.html> [<http://perma.cc/V8E5-YLTL>].

has gone wrong, make the majority accountable for its choices, and vent frustration. These purposes are largely benign: enriching and emboldening the deliberative process within the Senate.¹⁵⁰

At its best, dissent is not obstructive but instructive, and can lay the foundations for popular movements and changes in the law. At its worst, dissent can be defamatory, mean-spirited, abusive, divisive, and even violent. It can appeal to the worst in us. To ensure that dissent fulfills benign purposes, senators should try to reconstruct norms of civility that keep their discourse, in the Senate, in the media, and on the campaign trail focused on substantive differences rather than personal slights or shortcomings. They are in the best position to police themselves to produce model debates on critical issues.

The American public can take its cue from its leaders, and senators can of course take their cue from the public. Over the span of a single day, three senior Republican senators—McCain, Corker, and Flake—decried the degradation of the norms of civility and mutual respect in public discourse; each, in different ways, blamed President Trump for his responsibility in debasing public discourse.¹⁵¹ It remains to be seen whether, or to what extent, these and other senators will move beyond their rhetoric to take actions that will help to upgrade public discourse and to narrow the breach within the Senate and beyond.

The public can play a significant role in restoring lost norms of civility and collegiality within the Senate. If senators believe they will be rewarded for degrading constitutional discourse, they will not be inclined to adhere to norms of civility. More than anything else, senators will do what they need to do to remain in office, which requires appeasing their donors, their party, and their most ardent supporters. If their donors, their party, and supporters demand or reward demeaning dissent, they will likely get what they want. If they reward senators who use their dissents to widen the breaches in the Senate, the breaches will persist. But, if the public wants something different, if they want to seal the breaches, they can reward senators for uplifting and enriching con-

150. For examples on the benign purposes of dissent, see MELVIN I. UROFSKY, *DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE* (2015).

151. See Alex Isenstadt & Kevin Robillard, *Flake Announces Retirement as He Denounces Trump*, POLITICO (Oct. 24, 2017, 4:48 PM), <http://www.politico.com/story/2017/10/24/flake-retiring-after-2018-244114> [<http://perma.cc/TG34-B69B>]; Sean Sullivan & Elise Viebeck, *Trump Meets with Republicans as Corker Slams Him for 'Untruths,' 'Debasing' the Country*, WASH. POST (Oct. 24, 2017), http://www.washingtonpost.com/powerpost/what-do-republicans-want-to-hear-from-trump-at-lunch-a-lot/2017/10/24/40806300-b8ad-11e7-be94-fabb0f1e9ffb_story.html [<http://perma.cc/3GQV-PVVW>]; Chris Cillizza, *John McCain Keeps Serving His Revenge to Trump Ice Cold*, CNN (Oct. 24, 2017, 3:34 AM), <http://www.cnn.com/2017/10/23/politics/john-mccain-trump/index.html> [<http://perma.cc/WW6T-2GT6>].

stitutional discourse by supporting and reelecting them. If they want to punish destructive dissent, they can make their wishes known, not just through their rhetoric, but through punishing the dissenters by voting them out.

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