

The Senate Amendment Process

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Today's Senate is dysfunctional. The institution once widely considered to be the "world's greatest deliberative body" is paralyzed. Its members are unable to legislate, much less deliberate, on the issues Americans care about most. Senators instead spend their time processing routine presidential nominations to fill vacancies in the executive and judicial branches of the federal government. Since 1989, the number of roll call votes senators cast in relation to presidential nominations each Congress increased by 1,533 percent.

The substantial increase in nomination votes is evidence of the Senate's dysfunction because it means senators are casting fewer votes on legislation. The overall number of roll call votes each Congress has remained relatively unchanged since 1989 while nomination votes have gone up significantly. In other words, senators are casting fewer and fewer votes in relation to legislation.

A closer look at the Senate's amendment activity demonstrates the extent of the institution's dysfunction. In recent years, Senate majorities have empowered their majority leader to exert greater control over the institution's amendment process than at any other point in its history. The majority leader does so primarily by filling the amendment tree or offering a so-called blocker amendment to legislation during floor debate. Both procedural maneuvers limit senators' ability to freely participate in the legislative process on the Senate floor. Filling the amendment tree prevents senators from offering their amendments to legislation absent unanimous consent. And blocker amendments create a process that give senators limited, and largely irrelevant, opportunities to amend the underlying legislation. With each maneuver, the majority leader uses Senate rules and practices that developed over time to facilitate the orderly consideration of senators' amendments on the floor to instead block them.

This paper examines the Senate's declining amendment activity in the context of the majority leader's ability to use its rules and practices to block senators' amendments. It first details the near-total deterioration of the Senate's amendment process over the last two decades. It then accounts for that deterioration by demonstrating how the majority leader limits amendment activity by filling the amendment tree or offering blocker amendments to legislation during floor debate.¹ The paper concludes by considering various reform options to rejuvenate amendment activity on the Senate floor.

A DETERIORATING PROCESS

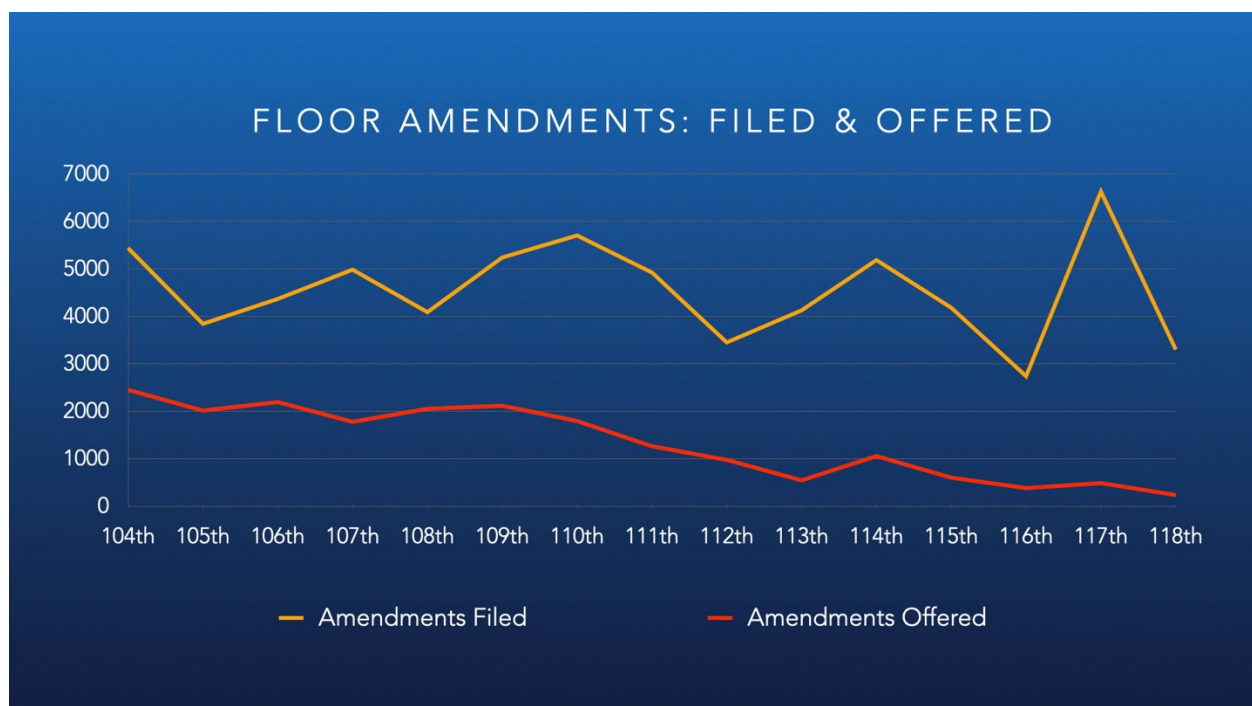
The Senate's declining amendment activity highlights its dysfunction. The ability to offer amendments on the Senate floor empowers individual senators to represent their constituents, as well as achieve their own goals in the institution. It is therefore logical to assume that senators' amendment activity will increase as people outside of the Senate take a greater interest in what

¹ The Senate's amendment trees depict the total number of amendments that may be pending to legislation at once. They developed over time to facilitate the Senate's orderly consideration of senators' amendments. However, the majority leader has used the amendment trees in recent years to prevent the consideration of senators' amendments on the Senate floor. See: James Wallner, "The Historical Development of the Senate's Amendment Process," *R Street Policy Study*, no. 111 (September 2017).

happens inside it. Senators' constituents expect them to act on their behalf once in office. And senators benefit when they act by offering amendments on the Senate floor. Amendments give them an opportunity to take a position on an issue that is important to their constituents and key supporters.² Amendments help senators establish a record in office and fend off potential challengers.³ And they help senators achieve their own goals in office by empowering them to influence legislation before the Senate passes it.

Yet despite these benefits, the procedural record clearly indicates that senators' amendment activity has declined over the last three decades. Senators are presently introducing (*i.e.*, filing) and proposing (*i.e.*, offering) fewer amendments today than in the past.

Figure 1. Floor Amendments Filed & Offered

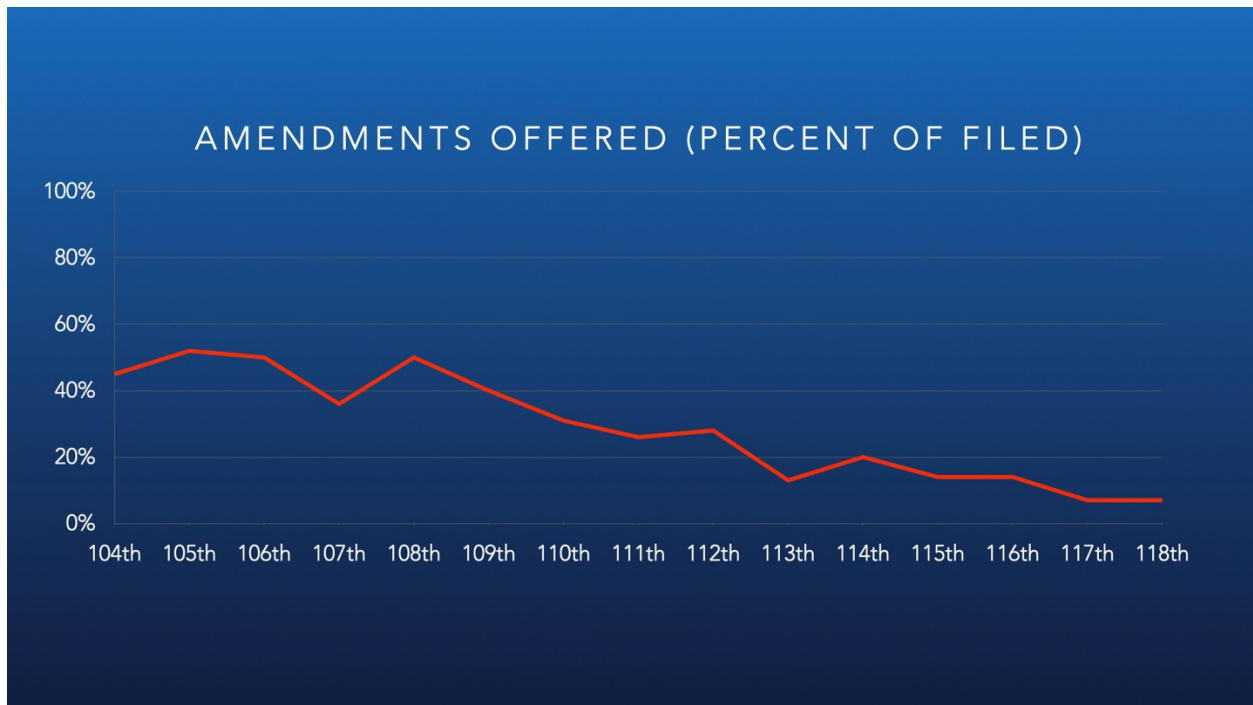


While the number of amendments senators file and offer each Congress has declined steadily over the last thirty years, senators are also offering a smaller and smaller percentage of the amendments they file to legislation during floor debate.

Figure 2. Floor Amendments Offered (Percent of Filed)

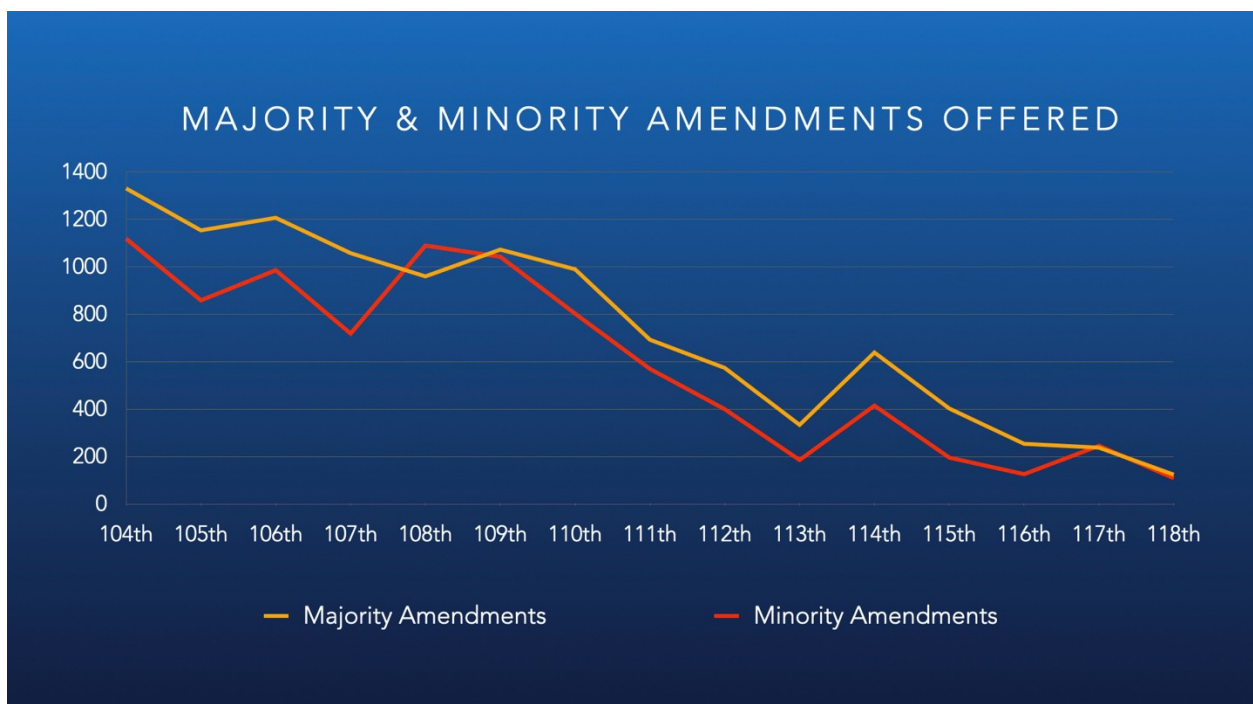
² David Mayhew, *Congress: The Electoral Connection* (New Haven, Connecticut: Yale University Press, 1974).

³ See: Elaine C. Kamarck and James Wallner, "Anticipating Trouble: Congressional Primaries and Incumbent Behavior," *R Street Policy Study*, no. 156 (October 2018).



And the Senate’s declining amendment activity is a bipartisan phenomenon. Both majority and minority-party senators are offering fewer amendments to legislation on the Senate floor.

Figure 3. Majority and Minority Amendments Offered



One reason why senators are offering fewer amendments today than in the past is, in part, because they have fewer opportunities to do so. This is because senators must almost always ask for permission before they can offer an amendment on the Senate floor. The Senate's recent practice reveals that the floor is almost always in a procedural posture that requires senators to obtain the unanimous consent of their colleagues to offer their amendment during floor debate.

The majority leader uses two procedural maneuvers to control the Senate's amendment process by getting to this posture: filling the amendment tree and offering a blocker amendment. Both maneuvers use Senate rules and practices that were intended to facilitate the orderly consideration of senators' amendments to instead block them.

BLOCKING AMENDMENTS

There are few limits in the Senate's rules and practices on the nature and overall number of amendments senators can offer to legislation during floor debate.⁴ The ability to offer amendments during floor debate is especially useful for minority-party senators – and majority-party senators who disagree with their partisan colleagues on an issue. Amendments offer senators in both parties a powerful tool to represent their constituents and achieve their goals when the Senate's majority-controlled committees resist reporting legislation they support.

Yet in recent decades, Senate majorities have used a complex assortment of rules and practices to limit senators' ability to circumvent the institution's committee's and leadership. Taken together, they limit individual senators' ability to offer amendments to legislation once it reaches the Senate floor. In doing so, they have ensured that any amendments senators do offer will not jeopardize the legislation's chances at passage even if approved. They do so by empowering the majority leader to block senators' amendment entirely or, if that isn't possible, to offer a blocker amendment to limit senators' ability to participate meaningfully in the process and ensure that the Senate passes the underlying legislation unchanged.

In both cases, the majority leader uses his priority of recognition to offer an amendment (or amendments) to a bill before another senator has had a chance to offer their own amendment.⁵ The maneuvers allow the majority leader to exert greater control over the nature and timing of floor debate. In doing so, they give the majority leader leverage in subsequent negotiations with

4 Nongermane amendments are limited by Senate rules and statute. Specifically, they are not in order after senators vote to invoke cloture on legislation. In addition, they are not in order on general appropriations bills and budget measures. The full Senate may also place limitations on both germane and nongermane amendments by unanimous consent. Senate Rule XXII stipulates that during post-cloture consideration of legislation, "No senator shall call up more than two amendments until every other senator shall have had the opportunity to do likewise." "Rule XXII: Precedence of Motions," *Standing Rules of the Senate* (Washington, DC: Government Printing Office, 2007), 16.

5 The majority leader is entitled to recognition by the Senate's presiding officer before any other member pursuant to a 1937 precedent. This precedent serves as the foundation on which the power of centralized party leadership is based in the Senate today. Since any member can technically make a motion to consider legislation or a nomination under the Senate's rules, being the first to do so enables the majority leader to set the schedule and control the agenda to a limited degree. Priority of recognition also allows the leader to block votes on undesirable amendments. The ability to be recognized first before other members enables the majority leader to fill the amendment tree or offer the maximum allowable number of amendments to legislation before other senators have a chance to debate the measure and offer amendments. See: Floyd Riddick and Alan S. Frumin, *Riddick's Senate Procedure* (Washington, DC: Government Printing Office, 1992), 1098-1099.

individual senators. The majority leader uses that leverage to negotiate unanimous consent agreements that block all amendments or, if that isn't possible, permit a limited number of amendments under circumstances that ensure they fail.

These two maneuvers work because they put the Senate in a parliamentary situation in which decisions regarding what, if any, amendments can be offered to the bill are channeled through a veto point (e.g., the majority leader, or his designee). Establishing a veto point is accomplished by putting the Senate in a procedural posture that requires unanimous consent to get an amendment pending to legislation during floor debate. Once established, such a veto point enables the leadership to exercise disproportionate control over which amendments will be made pending to legislation on the Senate floor, as well as to set the terms according to which those amendments will be disposed of.

Filling the Amendment Tree

The most straightforward way that the majority leader can establish a veto point while blocking amendments entirely is by filling the amendment tree. The majority leader does so by offering an amendment in one of the available slots such that further amendments are precluded by the principles of precedence if that amendment is pending.⁶ No amendments are in order once all the extant branches on the tree are occupied by the majority leader's amendments.⁷ At that point, the majority leader can focus on negotiations with interested senators in both parties to craft a unanimous consent agreement that provides for several amendments and a vote on final passage without having to worry about a senator jeopardizing the legislation's prospects by offering a controversial or otherwise unwanted amendment without permission. The maneuver was not used for prior to 1991. By 2014 it had become routine when the Senate considered major legislation.

There are several reasons why the majority leader fills the amendment tree. The majority leader may want to prevent unwanted amendments from receiving votes on the Senate floor. Alternatively, the majority leader may want to expedite consideration of the underlying bill and fear that the amendment in question would slow the process down. The majority leader also fills the tree to shut down the floor and get leverage in negotiations over unanimous consent agreements. Regardless of the specific reason, the majority leader fills the amendment tree to exert leadership control over the nature and timing of the Senate's floor debate. The tactic shifts the balance of power between the majority leader and rank-and-file senators in the leader's favor.

Blocker Amendment

The majority leader blatantly blocks all amendments when filling the tree. The maneuver can therefore act as a bar to negotiations and make it harder for the majority leader to secure a unanimous consent agreement that structures floor debate on important legislation. In those situations, the majority leader can use a subtler maneuver – the blocker amendment – to control floor debate without jeopardizing the Senate's ability to pass legislation without amending it.

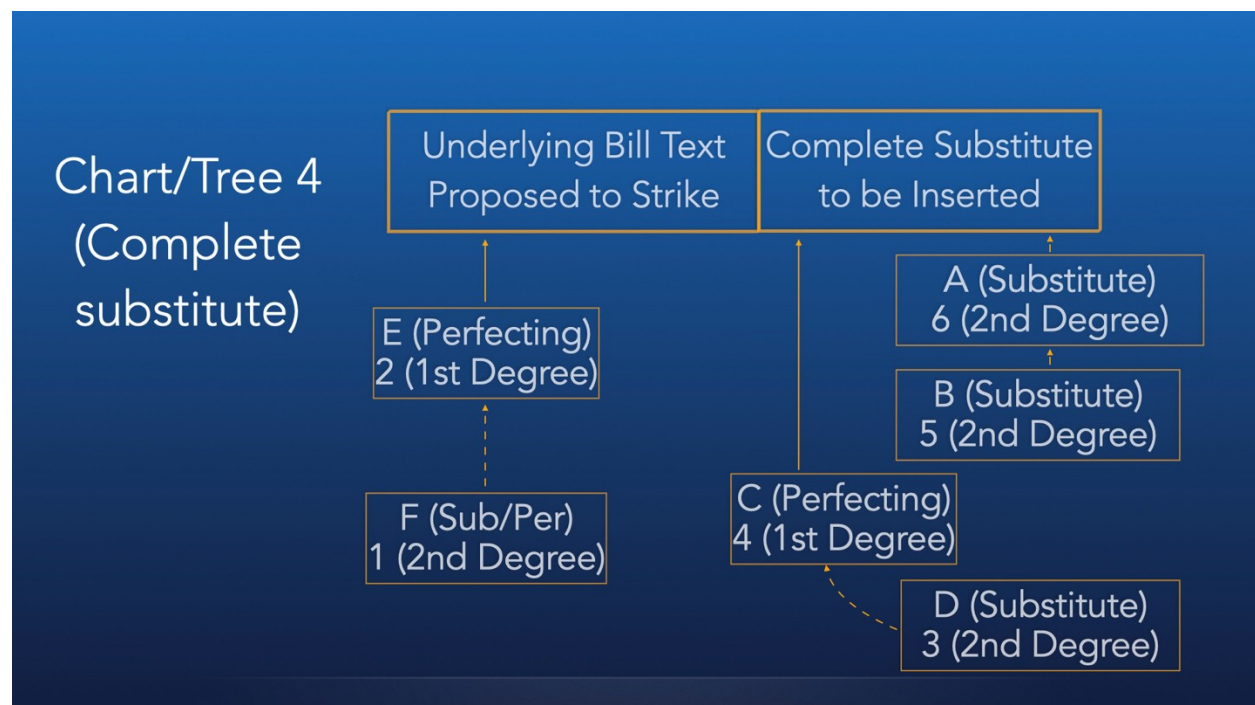
⁶ *Riddick's Senate Procedure*, 24-26.

⁷ *Ibid.*

Offering a so-called blocker amendment establishes a veto point while preserving the illusion of an open amendment process unlike filling the amendment tree entirely. The maneuver allows the Senate to look like it is using an open amendment process because it is designed to ensure that senators' amendments fail, or otherwise have no effect if approved.

For example, an amendment offered to branch *C* on Chart 4 (see figure 3) serves as a blocker amendment when it is offered first and in the form of a motion to insert or to strike and insert text.

Figure 4. Chart (or Tree) 4



Once the amendment is pending at branch *C*, any other amendment offered directly to the amendment in the nature of a substitute (ANS) – the underlying Senate bill – would require consent to get pending (which presumably would be denied if the majority leader wanted to block the amendment in the first place). Branches *A* and *B* are no longer open for amendment if an amendment is offered at branch *C* before an amendment is offered at *A* or *B*.

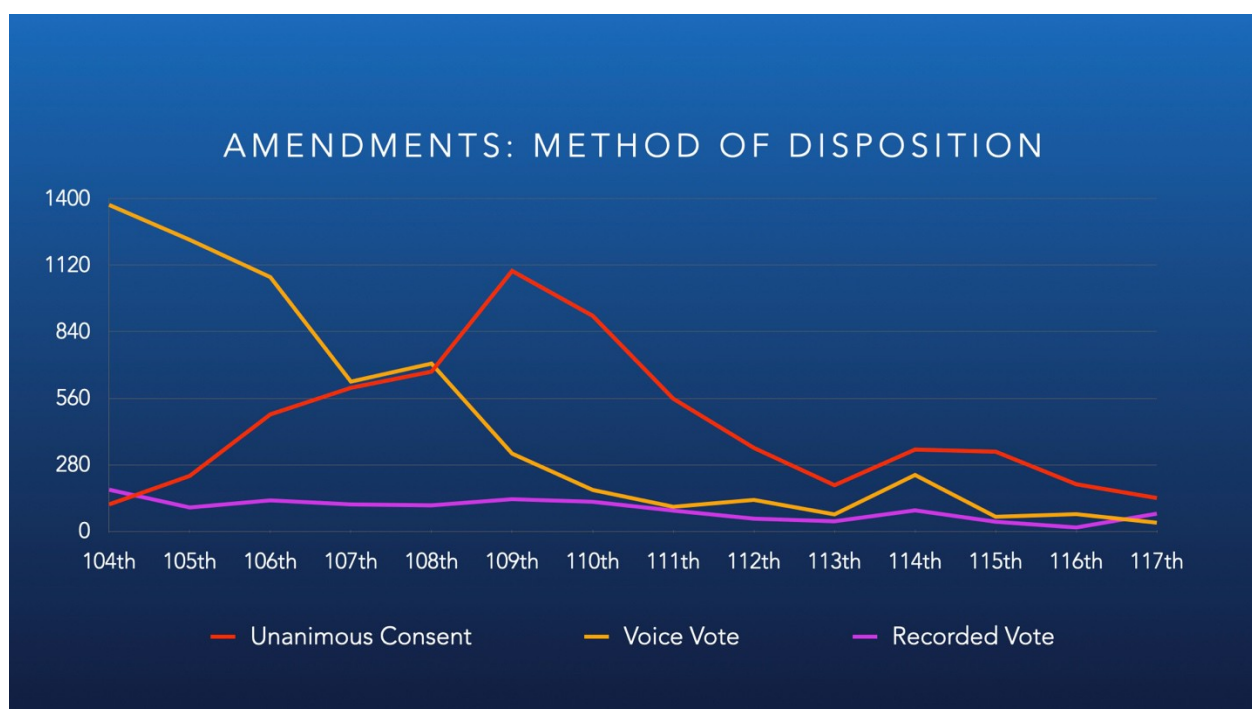
This maneuver is less aggressive than completely filling the amendment tree and therefore does not present the same hurdle to unanimous consent negotiations because it leaves a few branches open for possible amendment. However, these branches are not connected to the ANS directly. In the Chart 4 example, the blocker amendment leaves branches *E* and *F* (on the left side of the tree) open. Branch *D* (second degree to branch *C* on the right side) is also left open. These branches do not present the same challenges to proponents of the bill because the impact would be minimal if the amendments there prevailed. The majority leader could move to table *C* to prevent a vote on *D* on the right side of the tree if a senator offered an unwanted amendment there. Additionally, adoption of amendments pending at *E* and *F* on the left side of the tree would

be negated once the Senate adopts the ANS (as it would wipe out the bill text depicted on the left side of the tree).

DISPOSITION OF AMENDMENTS

The way amendments are disposed of on the Senate floor reflects the majority leader's increased control over the process. For example, the number of amendments approved by voice vote has declined over the last thirty years. But the number of amendments approved by unanimous consent has increased. (Although the number of amendments approved by unanimous consent has also declined in recent years, along with the Senate's amendment activity more generally.)

Figure 5. Method of Disposition



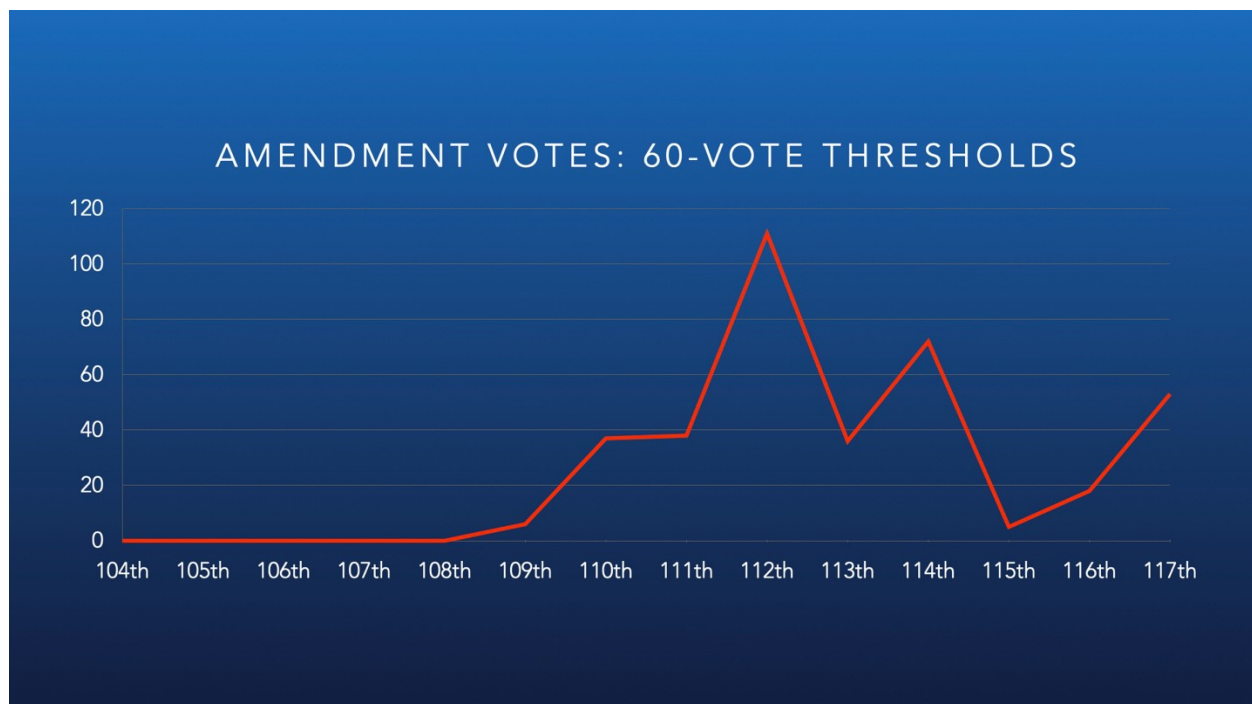
The increase in the share of amendments passed by unanimous consent reflects the disproportionate role played by the majority leader in the Senate's amendment process because the majority leader typically takes the lead in crafting consent agreements behind closed doors to structure the legislative process on the floor. The declining share of amendments passed by voice vote reflects the decreased influence of committee leadership because committee chairmen and ranking minority members typically arrange voice votes during floor debate.

Once the Senate is in a procedural posture that requires senators to obtain unanimous consent to get an amendment pending to legislation on the floor, the majority leader can use his increased leverage to secure a higher vote threshold for adoption of that amendment. The majority leader uses the threat of not allowing amendments to get pending to compel individual senators to agree

to the higher vote threshold on their amendment, even though doing so means that the amendment will most likely be rejected.

The increase in sixty-vote thresholds to dispose of amendments therefore reflects the majority leader's control of amending activity on the floor. Pursuant to unanimous consent agreements establishing 60-vote thresholds, the amendment is withdrawn if it does not get the requisite number of votes. The logic is that an amendment's supporters get the opportunity to demonstrate support for cloture without going through the time-consuming process of invoking it. The reality is that senators agree to higher thresholds that ensure their amendment fails.

Figure 6. Sixty-Vote Thresholds



As with offering a blocker amendment, the use of 60-vote thresholds to process amendments allows the majority leader to create the impression that he is allowing an open amendment process to transpire on the Senate floor without doing so. The ploy usually works because it does not present a problem for majority party members who oppose the amendment in question, and a 60-vote threshold means that it is unlikely to pass. The majority leader also expects members opposed to the underlying bill, or those who merely want to change its provisions, will support this process even though it disadvantages them relative to the bill's supporters because it provides an opportunity to offer the amendment in question and get a vote on it, all without having to expend the necessary resources to filibuster the underlying legislation.

REFORMS

There are three general approaches to increasing senators' ability to offer amendments on the Senate floor. One approach is to give individual senators leverage with which to negotiate

amendment opportunities on a case-by-case basis. An alternative approach is to guarantee senators the ability to offer amendments in certain circumstances.

One way senators can gain leverage in negotiations over unanimous consent request agreements to structure floor debate by threatening to ignore the majority leader's blocker amendment and offer their amendments to legislation during floor debate. When the presiding officer rules their amendment out of order based on the Senate's current practices (not rules), they would appeal the ruling of the chair to force a vote in relation to their amendment (at a simple majority threshold) and/or other senators to filibuster their appeal.

This maneuver is permissible under current rules but not precedents. And it forces senators to take votes on procedural questions related directly to the amendment in question. Procedural votes have been viewed as substantive votes when the question is related directly to the policy and the tactic is utilized on a regular basis. Cloture votes in the Senate and motions to recommit votes in the House are examples of procedural votes that are seen as substantive votes by lawmakers.

Threatening to ignore the majority leader's blocker amendments forces the majority to return to the Senate's historical way of doing business. It effectively eliminates the majority leader's ability to fill the amendment tree on a regular basis. In doing so, it encourages the majority leader to moderate the use of blocker amendments in most circumstances to preserve their effectiveness in extraordinary circumstances.

Senators can guarantee that they will have an opportunity to offer amendments in certain circumstances by amending the Senate rules or creating new precedents that make that stipulation. For example, senators could add language from Rule XXII prohibiting any senator from offering "more than two amendments until every other Senator shall have had the opportunity to do likewise" after the Senate invokes cloture to Rule XV.⁸ Alternatively, senators could add language to Rule XXII guaranteeing senators an opportunity to offer a germane amendment to the underlying legislation after the Senate invokes cloture on it if they voted for cloture. And senators could adopt other changes guaranteeing a specific number of amendments for the majority and minority parties, while leaving it up to each party to decide what amendments will be offered.

Finally, senators can increase their opportunities to participate in floor debate and offer amendments by directing their leaders – especially the majority leader – to allow amendments on the Senate floor. Whereas Senate majorities empowered the majority leader to limit or block amendments in the past, they can empower the majority leader to facilitate amendment activity moving forward.

⁸ "Rule XXII: Precedence of Motions," *Standing Rules of the Senate*, 16.