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THE GREAT HOLDUP: HOW THE SENATE AND THE FILIBUSTER THWART GUN LEGISLATION MOST AMERICANS WANT

WILLIAM G. DAUSTER*

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INTRODUCTION

The vast majority of Americans favor tougher regulation of gun sales.¹ More than nine out of 10 Americans have favored mandatory background checks to buy guns.² But Congress has repeatedly failed to enact legislation to do this.³ What explains this failure of Congress to reflect the almost-universally-held views of voters? Major reasons include the structure of the United States Senate, our campaign finance system, and the Senate's filibuster.⁴ There is little chance

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¹ Lydia Saad, *Americans Widely Support Tighter Regulations on Gun Sales*, GALLUP (Oct. 17, 2017), <https://news.gallup.com/poll/220637/americans-widely-support-tighter-regulations-gun-sales.aspx>.

² *Id.*

³ See 159 CONG. REC. 4519, 5381 (2013) (vote on the failed Manchin amendment to expand background checks).

⁴ On the filibuster generally, see, e.g., *Examining the Filibuster: Hearings Before the S. Comm. on Rules & Admin.*, 111th Cong. (2010); CHRISTOPHER M. DAVIS & STANLEY BACH, CONG. RESEARCH SERV., 98-425, INVOKING CLOTURE IN THE SENATE (2017); RICHARD BETH & VALERIE HEITSHUSEN, CONG. RESEARCH SERV., RL30360, FILIBUSTERS & CLOTURE IN THE SENATE (2014); CONG. RESEARCH SERV., SENATE CLOTURE RULE: LIMITATION OF DEBATE IN THE SENATE OF THE UNITED STATES & LEGISLATIVE HISTORY OF PARAGRAPH 2 OF RULE XXII OF THE STANDING RULES OF THE UNITED STATES SENATE (CLOTURE RULE) (Comm. Print 2011); RICHARD A. ARENBERG &

that America will soon change the structure of the Senate. But a progressive Congressional majority could and should improve the chances of background checks — and other policies that a vast majority of Americans want — by changing campaign finance laws and eliminating the filibuster.

I. GUN VIOLENCE IN AMERICA

The United States has a unique relationship with guns. The United States is one of only three countries in the world — along with Mexico and Guatemala — that enshrine gun rights in their constitutions.⁵

The United States has far more civilian guns and more civilian guns per person than any other country.⁶ The United States has more than twice as many civilian guns per person as any other nation, and 3½ times more than any other Organization for Economic Co-operation and Development (OECD) country.⁷ Despite America's large number of guns, only a minority of Americans — about 3 in 10 adults — own guns.⁸

ROBERT B. DOVE, *DEFENDING THE FILIBUSTER: THE SOUL OF THE SENATE* (2d ed. 2012); LAUREN COHEN BELL, *FILIBUSTERING IN THE U.S. SENATE* (2010); SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE: FILIBUSTERING IN THE UNITED STATES SENATE* (1997); FRANKLIN L. BURDETTE, *FILIBUSTERING IN THE SENATE* (1940); 2 ROBERT C. BYRD, *THE SENATE, 1789–1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE* 93–163 (1991); ROBERT A. CARO, *MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON* 92–105 (2002); Martin B. Gold, *Floor Debates in SENATE PROCEDURE & PRACTICE* 35–63 (4th ed. 2018); GREGORY KOGER, *FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE & SENATE* (2010); GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* (2006); William G. Dauster, *The Senate in Transition or How I Learned To Stop Worrying and Love the Nuclear Option*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 631–83 (Dec. 2016); Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 205 (2004); Floyd M. Riddick & Alan S. Frumin, *Cloture Procedure in RIDDICK'S SENATE PROCEDURE: PRECEDENTS & PRACTICES* 282–334 (1992); Richard A. Arenberg, *Five Myths About the Filibuster: It's Not a Long-Winded Speech, and It's Not Unconstitutional*, WASH. POST (May 3, 2019), https://www.washingtonpost.com/outlook/five-myths/five-myths-about-the-filibuster/2019/05/03/271551c8-6ced-11e9-a66d-a82d3f3d96d5_story.html; Richard A. Arenberg, *U.S. Senate Filibuster Reform Is Unnecessary*, WASH. POST (July 11, 2013), https://www.washingtonpost.com/opinions/richard-arenberg-us-senate-filibuster-reform-is-unnecessary/2013/07/11/54d5ba9c-d83f-11e2-a9f2-42ee3912ae0e_story.html; Ronald Brownstein, *Abolishing the Filibuster Is Unavoidable for Democrats*, THE ATLANTIC (Aug. 22, 2019), <https://www.theatlantic.com/politics/archive/2019/08/democrats-filibuster-2020/596572/>; Bill Dauster, *It's Not Mr. Smith Goes to Washington: The Senate Filibuster Ain't What It Used To Be*, WASH. MONTHLY, Nov. 1996, at 34–36; Mitch McConnell, *The Filibuster Plays a Crucial Role*, N.Y. TIMES, Aug. 23, 2019, at A23; Harry Reid, *Abolish the Senate Filibuster*, N.Y. TIMES, Aug. 13, 2019, at A21; John Oliver, *Filibuster*, YOUTUBE (Sept. 8, 2019), <https://youtu.be/3y1QA6OeAcQ>.

⁵ Brennan Weiss and James Pasley, *Only 3 Countries in the World Protect the Right To Bear Arms in Their Constitutions: The US, Mexico, and Guatemala*, BUSINESS INSIDER (Aug. 6, 2019, 2:42 PM), <https://www.businessinsider.com/2nd-amendment-countries-constitutional-right-bear-arms-2017-10>.

⁶ AARON KARP, *SMALL ARMS SURVEY, ESTIMATING GLOBAL CIVILIAN-HELD FIREARMS NUMBERS* 4 (2018), <http://www.smallarmssurvey.org/fileadmin/docs/T-Briefing-Papers/SAS-BP-Civilian-Firearms-Numbers.pdf>.

⁷ *Id.*

⁸ *Guns*, GALLUP, <https://news.gallup.com/poll/1645/guns.aspx>. As Gallup asks the question only of adults, the response in all likelihood overstates the percentage of the total population who own guns, as one can presume that a smaller percentage of children own them.

The United States also has the highest rate of gun killings in the developed world.⁹ Gun-related killings account for 73 percent of homicides in the United States, compared to 38 percent in Canada, 13 percent in Australia, and 3 percent in the United Kingdom.¹⁰

In 2017, nearly 40,000 people died in the U.S. from gun-related injuries — 60 percent (23,854) from suicides, and 37 percent (14,542) from murders.¹¹ That is the highest number since at least 1968, the earliest date that the Centers for Disease Control and Prevention (CDC) has online data.¹²

Gun deaths vary widely from state to state.¹³ States with higher rates of gun deaths — like Alaska, Alabama, and Montana¹⁴ — often have lax gun laws, as reflected in poor ratings from the Giffords Law Center, which advocates stronger gun laws.¹⁵ And states with stronger gun laws — like California, New Jersey, and Connecticut¹⁶ — often have low rates of gun deaths.¹⁷ A 2005 study found that “states with less stringent background check policies also had higher rates of firearm homicides.”¹⁸ A 2008 study found that background checks were associated with reduced rates of gun deaths.¹⁹ When the *New York Times* examined 130 shootings in 2016 in which four or more people were shot, at least one fatally, it found that in most of those cases, an assailant obtained a gun that Federal law nominally prohibited the assailant from buying, usually because of the assailant’s felony conviction.²⁰

⁹ *America’s Gun Culture in Charts*, BBC NEWS (Aug. 5, 2019), <https://www.bbc.com/news/world-us-canada-41488081>.

¹⁰ *Id.*

¹¹ John Gramlich, *What the Data Says about Gun Deaths in the U.S.*, PEW RESEARCH CTR. (Aug. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/08/16/what-the-data-says-about-gun-deaths-in-the-u-s/>.

¹² Sarah Mervosh, *Nearly 40,000 People Died From Guns in U.S. Last Year, Highest in 50 Years*, N.Y. TIMES, Dec. 18, 2018, at A19, <https://www.nytimes.com/2018/12/18/us/gun-deaths.html>.

¹³ See CDC, *Firearm Mortality by State*, https://www.cdc.gov/nchs/pressroom/sosmap/firearm_mortality/firearm.htm (last reviewed Jan. 10, 2019).

¹⁴ See *id.*

¹⁵ See *Annual Gun Law Scorecard*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE (2019), <https://lawcenter.giffords.org/scorecard/>.

¹⁶ See *id.*

¹⁷ See CDC *supra* note 14.

¹⁸ Danny Hakim & Mike McIntire, *Long, Faltering Search for Federal Legislation on Background Checks*, N.Y. TIMES, Aug. 7, 2019, at A17.

¹⁹ *Id.*; Steven A. Sumner, Peter M. Layde & Clare E. Guse, *Firearm Death Rates and Association with Level of Firearm Purchase Background Check*, 35 AM. J. PREVENTIVE MED. 1–6 (2008), <https://www.sciencedirect.com/science/article/abs/pii/S0749379708003103>.

²⁰ Sharon LaFraniere & Emily Palmer, *In 130 of Worst Shootings, Vision of Porous Gun Laws*, N.Y. TIMES, Oct. 22, 2016, at A1.

In 2019, the United States experienced more than 400 mass shootings, more than one a day.²¹ The roll call of communities with mass shootings since 1999 tells a horrific tale of indiscriminate suffering:

- Columbine High School in Littleton, Colorado, April 20, 1999 — 13 killed;
- Virginia Tech in Blacksburg, Virginia, April 16, 2007 — 32 killed;
- Binghamton, New York, April 3, 2009 — 13 killed;
- Fort Hood, Texas, November 5, 2009 — 13 killed;
- Aurora, Colorado, July 20, 2012 — 12 killed;
- Sandy Hook Elementary School in Newtown, Connecticut, December 14, 2012 — 27 killed;
- Washington Navy Yard in Washington, D.C., September 16, 2013 — 12 killed;
- Inland Regional Center in San Bernardino, California, December 2, 2015 — 14 killed;
- Pulse nightclub in Orlando, Florida, June 12, 2016 — 49 killed;
- Las Vegas, Nevada, October 1, 2017 — 58 killed;
- a small church in Sutherland Springs, Texas, November 5, 2017 — 25 killed;
- Marjory Stoneman Douglas High School in Parkland, Florida, February 14, 2018 — 17 killed;
- Santa Fe High School in Santa Fe, Texas, May 18, 2018 — 10 killed;
- Tree of Life synagogue in Pittsburgh, Pennsylvania, October 27, 2018 — 11 killed;
- Borderline Bar & Grill in Thousand Oaks, California, November 7, 2018 — 12 killed;
- a city building in Virginia Beach, Virginia, May 31, 2019 — 12 killed;
- a Walmart store in El Paso, Texas, August 3, 2019 — 22 killed.²²

II. Americans' Views of Gun Legislation

Reacting to reports of shootings, overwhelming majorities of Americans have consistently supported universal background checks for gun purchases. Over the course of ten Quinnipiac University polls from 2013 to 2018 asking whether respondents “support or oppose requiring background checks for all gun buyers,” support has risen steadily from 89 percent in 2013 to 97 percent in 2018, which Quinnipiac calls “almost universal.”²³ Quinnipiac noted that

²¹ *Past Summary Ledgers: Gun Violence Archive 2019*, GUN VIOLENCE ARCHIVE (Feb. 5, 2020), <https://www.gunviolencearchive.org/past-tolls>.

²² *Mass Shootings in the US Fast Facts*, CNN, <https://www.cnn.com/2019/08/19/us/mass-shootings-fast-facts/index.html>.

²³ *U.S. Support for Gun Control Tops 2-1, Highest Ever, Quinnipiac University National Poll Finds; Let Dreamers Stay, 80 Percent of Voters Say*, QUINNIPIAC UNIV. POLL (Feb. 20, 2018), <https://poll.qu.edu/national/release-detail?ReleaseID=2521>.

97 percent gun owners also supported background checks.²⁴ In Quinnipiac’s poll, 97 percent of Republicans and 99 percent of Democrats supported background checks, as did 96 percent of men and 99 percent of women.²⁵ Support was high across regions, including 99 percent in the Northeast, 97 percent in the Midwest, 96 percent in the South, and 98 percent in the West.²⁶ Support was 98 percent in cities, 98 percent in the suburbs, and 95 percent in rural America.²⁷

Gallup polls similarly found high support for universal background checks.²⁸ Gallup found in a 2015 poll that 86 percent favored “a law which would require universal background checks for all gun purchases in the U.S. using a centralized database across all 50 states.”²⁹ Asking whether respondents favored “requiring background checks for all gun purchases,” Gallup found 96 percent supported them in 2017 and 92 percent did in 2018.³⁰

Gallup had found softer support in the immediate aftermath of a 2013 U.S. Senate debate about strengthening background checks.³¹ Gallup asked, “As you may know, last week the U.S. Senate voted on, but did not pass, a measure to expand background checks for gun purchases. Do you think the Senate should or should not have passed the measure to expand background checks for gun purchases?”³² 65 percent responded that the Senate should have, and 29 percent said that they should not have.³³

When in 2016 the *New York Times* asked the polling firm Morning Consult to survey two groups — leading experts on gun violence and a representative sample of voters — both groups overwhelmingly supported universal background checks.³⁴ When Morning Consult asked “Do you support or oppose the following policies to reduce gun homicides?” 86 percent of respondents supported the policy, “Requiring all sellers to run background checks on anyone who buys a gun.”³⁵

In 2018 polling, the Pew Research Center found “overwhelming” or “sizable” majorities of Republicans, Republican-leaning independents, Democrats, and Democratic leaners supported

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Guns*, GALLUP, <https://news.gallup.com/poll/1645/guns.aspx>.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Quotrung Bui & Margot Sanger-Katz, *How to Prevent Gun Deaths? Where Experts and the Public Agree*, N.Y. TIMES (Jan. 10, 2017), <https://www.nytimes.com/interactive/2017/01/10/upshot/How-to-Prevent-Gun-Deaths-The-Views-of-Experts-and-the-Public.html>.

³⁵ *National Tracking Poll, June 17–20, 2016*, MORNING CONSULT, https://morningconsultintelligence.com/public/mc/160609_topline_NYT_v2_AP.pdf.

several policies to expand background checks.³⁶ Pew found 89 percent of both Republicans and Democrats supported barring mentally ill people from buying guns.³⁷ Nearly as many — 86 percent of Democrats and 83 percent of Republicans — favored barring gun purchases by people on Federal watch lists.³⁸ And 91 percent of Democrats and 79 percent of Republicans said that private gun sales and sales at gun shows should be subject to background checks.³⁹

Thus, polling research by a variety of polling organizations has consistently shown very high levels of support for universal background checks.

III. CONGRESSIONAL EFFORTS TO EXPAND BACKGROUND CHECKS

Congress created the National Instant Criminal Background Check System (sometimes called NICS) in the Brady Handgun Violence Prevention Act of 1993,⁴⁰ named after former White House Press Secretary James Brady, who was disabled when a gunman shot at President Ronald Reagan.⁴¹ But that law does not require a background check for all gun purchases.⁴²

In 1999, Senator Frank Lautenberg of New Jersey (on behalf of himself and Senator Bob Kerrey of Nebraska) offered an amendment to extend background checks to gun shows⁴³ — to “close the gun show loophole.”⁴⁴ The Senate passed the Lautenberg-Kerrey Amendment by a vote of 51 to 50, with Vice President Al Gore breaking a tie vote.⁴⁵ The Senate passed the bill, called the School Safety Act of 1999, and the Republican-controlled House of Representatives returned it. The House argued that it contravened the Constitution’s Origination Clause and killed the bill.⁴⁶

In 2013, Senator Joe Manchin of West Virginia (on behalf of himself and Senators Pat Toomey of Pennsylvania, Mark Kirk of Illinois, and Chuck Schumer of New York) offered an amendment to the Safe Communities, Safe Schools Act to expand background checks.⁴⁷ The Senate voted 54 to 46 in favor of the Manchin-Toomey amendment, but the amendment failed because the Senate considered it under a unanimous consent agreement requiring 60 votes for the

³⁶ *Gun Policy Remains Divisive, But Several Proposals Still Draw Bipartisan Support: More Prioritize Controlling Gun Ownership than Protecting Gun Rights*, PEW RESEARCH CENTER (Oct. 18, 2018), <https://www.people-press.org/2018/10/18/gun-policy-remains-divisive-but-several-proposals-still-draw-bipartisan-support/>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, §§ 102–103, 107 Stat. 1536 (codified at 18 U.S.C. § 922 (1998)).

⁴¹ Hakim & McIntire, *supra* note 19, at A17.

⁴² *Id.*

⁴³ See 145 CONG. REC. 10122 (1999).

⁴⁴ *Id.* at 10122, 10124 (statement of Sen. Lautenberg).

⁴⁵ Roll Call Vote No. 134 Leg., 106th Cong. (1999), 145 CONG. REC. S5642 (daily ed. May 20, 1999).

⁴⁶ See H. Res. 249, 106th Cong. (1999), 145 CONG. REC. H5677–80 (daily ed. July 15, 1999).

⁴⁷ See S. Amend. No. 715, 113th Cong. (2013), 159 CONG. REC. S2584, S2598, S2613–18 (daily ed. Apr. 11, 2013).

amendment's adoption.⁴⁸ (This is the effort to which Gallup referred in its 2013 question, discussed above.⁴⁹)

Again in 2015, Senator Manchin (on behalf of himself and Senators Toomey and Kirk) offered a similar amendment to expand background checks.⁵⁰ Senator Chuck Grassley of Iowa raised a point of order that the amendment violated a provision of the Congressional Budget Act called the "Byrd Rule,"⁵¹ which limits what Senators may offer in amendments to a budget reconciliation bill, and which requires 60 votes to waive.⁵² On the motion to waive the point of order, the Senate voted 48 to 50, falling short of the 60 votes needed, and the amendment fell.⁵³

In 2016, Senator Chris Murphy of Connecticut (on behalf of himself and Senators Cory Booker of New Jersey, Richard Blumenthal of Connecticut, Chuck Schumer of New York, and Ben Cardin of Maryland) offered an amendment to expand background checks.⁵⁴ On a motion to invoke cloture on the amendment, the Senate voted 44 to 56, falling short of the 60 votes needed to invoke cloture.⁵⁵

On that same bill in 2016, Senator Dianne Feinstein of California offered an amendment "to deny requests to transfer a firearm to known or suspected terrorists."⁵⁶ On a motion to invoke cloture on the amendment, the Senate voted 47 to 53, once again falling short of the 60 votes needed.⁵⁷

In 2017, Congress considered a joint resolution introduced by Representative Sam Johnson of Texas that would, in Senator Feinstein's description, "weaken the FBI's gun background check system and make it easier for individuals with severe mental illness to buy guns."⁵⁸ After the resolution passed the House,⁵⁹ the Senate passed it by a 57 to 43 vote.⁶⁰ As the Senate considered the legislation under the fast-track Congressional Review Act, which limits

⁴⁸ Roll Call Vote No. 97 Leg., 113th Cong. (2013), 159 CONG. REC. S2740 (daily ed. Apr. 17, 2013).

⁴⁹ See *supra* text accompanying notes 32–34.

⁵⁰ See S. Amend. No. 2908, 114th Cong. (2015), 161 CONG. REC. S8348, S8383, S8395–400 (daily ed. Dec. 3, 2015).

⁵¹ Sec. 313 of the Congressional Budget Act of 1974, 2 U.S.C. 644, the "Byrd Rule." On the Byrd Rule generally, see BILL HENIFF JR., CONG. RESEARCH SERV., RL30862, THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" (2016).

⁵² 161 CONG. REC. S8348 (daily ed. Dec. 3, 2015) (statement of Sen. Grassley).

⁵³ See Roll Call Vote No. 321, 114th Cong. (2015), 161 CONG. REC. S8348 (daily ed. Dec. 3, 2015).

⁵⁴ See S. Amend. No. 4750, 114th Cong. (2016), 162 CONG. REC. S4290, S4307, S4316–17 (daily ed. June 16, 2016) (Majority Leader Mitch McConnell called up the amendment), 162 CONG. REC. S4351–52 (daily ed. June 20, 2016).

⁵⁵ Roll Call Vote No. 104, 114th Cong. (2016), 162 CONG. REC. S4351–52 (daily ed. June 20, 2016).

⁵⁶ See S. Amend. No. 4720, 114th Cong. (2016), 162 CONG. REC. S4289 (daily ed. June 16, 2016) (Majority Leader Mitch McConnell called up the amendment), 162 CONG. REC. S4335, S4340–43, S4350, S4353 (daily ed. June 20, 2016).

⁵⁷ Roll Call Vote No. 106, 114th Cong. (2016), 162 CONG. REC. S4352 (daily ed. June 20, 2016).

⁵⁸ 163 CONG. REC. S1167 (daily ed. Feb. 15, 2017) (statement of Sen. Feinstein).

⁵⁹ 163 CONG. REC. H894–907 (daily ed. Feb. 2, 2017).

⁶⁰ Roll Call Vote No. 66 Leg. 115th Cong. (2017), 163 CONG. REC. S1169 (daily ed. Feb. 15, 2017).

debate time on resolutions of disapproval, it was not subject to a filibuster.⁶¹ The legislation became law.⁶²

In 2019, the House of Representatives considered and passed the Bipartisan Background Checks Act of 2019 by a 240 to 190 vote.⁶³ The Senate received the measure⁶⁴ and placed it on the Senate Calendar,⁶⁵ where it remains at as of this writing.

Thus, advocates of universal background checks have made several attempts to strengthen the checks but have been thwarted at several turns.

IV. IMPEDIMENTS IN OUR CONSTITUTIONAL STRUCTURE

So why have efforts to strengthen background checks failed? What structural features of our Government contributed to these bills, in the end, not reflecting the popular will?

On one level, many of these failures come as no surprise as a matter of simple arithmetic. The efforts to strengthen background checks in 2015 and 2016 fell short because they simply received fewer votes in the Senate.⁶⁶ The effort to loosen background checks in 2017 succeeded because opponents of background checks simply had more votes in both the House and the Senate.⁶⁷

On another level, the inability of Congress to enact laws to strengthen background checks comes as no surprise to anyone who has taken a high school civics class. The American Constitution contains checks and balances that make lawmaking difficult. So, when the House of Representatives blocks a Senate-passed measure, as it did in 1999,⁶⁸ or when the Senate blocks a House-passed measure, as it is doing now, it is merely a foreseeable result of a bicameral legislature.

But lawmaking is more difficult in the United States than in other long-standing democracies. Professors Alfred Stepan and Juan Linz found:

When we examine our set of 23 long-standing democracies in advanced economies, we find that slightly more than half of these countries (12.5) actually have only one electorally generated veto player. This is so because, with the exception of France, they are all unicameral (or if bicameral, the upper house does not have a veto) and

⁶¹ See 163 CONG. REC. S1167–69 (daily ed. Feb. 15, 2017). On the Congressional Review Act generally, see MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., IF10023, THE CONGRESSIONAL REVIEW ACT (CRA) (2018).

⁶² Pub. L. No. 115–8, 131 Stat. 15 (2017).

⁶³ 165 CONG. REC. H2242–63 (daily ed. Feb 27, 2019); Roll Call 99, 165 CONG. REC. H2263 (daily ed. Feb 27, 2019).

⁶⁴ 165 CONG. REC. S1590 (daily ed. Feb. 28, 2019).

⁶⁵ 165 CONG. REC. S1619 (daily ed. Mar. 4, 2019).

⁶⁶ See Roll Call Vote No. 321, 114th Cong. (2015), 161 CONG. REC. S8348 (daily ed. Dec. 3, 2015); Roll Call Vote No. 104, 114th Cong. (2016), 162 CONG. REC. S4351–52 (daily ed. June 20, 2016); Roll Call Vote No. 106, 114th Cong. (2016), 162 CONG. REC. S4352 (daily ed. June 20, 2016).

⁶⁷ See 163 CONG. REC. H894–907 (daily ed. Feb. 2, 2017); Roll Call Vote No. 66 Leg. 115th Cong. (2017), 163 CONG. REC. S1169 (daily ed. Feb. 15, 2017).

⁶⁸ See H. Res. 249, 106th Cong. (1999), 145 CONG. REC. H5677–80 (daily ed. July 15, 1999).

parliamentary; thus, the only veto player whose consent is needed is the prime minister's majority in the lower house. There are 7.5 countries with two veto players, two countries (Switzerland and Australia) with three veto players, and only one country, the United States of America, with four electorally generated veto players. Thus, the United States is politically exceptional in the high number of electorally based veto players who potentially can block social change, by blocking key bills or amendments.⁶⁹

Since the United States Senate represents states — not people — this likely also contributes to a difference between the popular will and Senate action. Senators representing 17.6 percent of the Nation's population constitute a majority of the Senate.⁷⁰ More starkly, the nine most-populous states with the majority of the nation's population have only 18 percent of the votes in the Senate.⁷¹ Of course, states do not align politically on strictly population lines, but the current Republican Senate majority represents states with just 47.9 percent of the Nation's population.⁷²

The Senate's structure also means that the Senators constituting the Senate's majority may not have received as many votes in their elections as the Senators in the minority. In the 2016⁷³ and 2018⁷⁴ elections, Democratic Senatorial candidates received more votes in the aggregate than Republican Senatorial candidates, but Republicans still control the Senate.

⁶⁹ Alfred Stepan & Juan J. Linz, *Comparative Perspectives on Inequality and the Quality of Democracy in the United States*, 9 PERSP. ON POL. 841, 844 (Dec. 2011).

⁷⁰ Together, the residents of the twenty-six least-populous states of Wyoming, Vermont, Alaska, North Dakota, South Dakota, Delaware, Rhode Island, Montana, Maine, New Hampshire, Hawaii, Idaho, West Virginia, Nebraska, New Mexico, Kansas, Mississippi, Arkansas, Nevada, Iowa, Utah, Connecticut, Oklahoma, Oregon, Kentucky, and Louisiana elect fifty-two Senators, but according to estimates for 2018 represent only 57,469,005 of the 327,167,434 Americans. Americans who live in the District of Columbia are counted among the 327.2 million, but are not represented in the Senate. *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2018 (NST-EST2018-01)*, U.S. CENSUS BUREAU (2019), <https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html> [hereinafter CENSUS BUREAU].

⁷¹ Together, the residents of the nine most populous states of California, Texas, Florida, New York, Pennsylvania, Illinois, Ohio, Georgia, and North Carolina have a population of 167,241,101 according to estimates for 2018. *Id.*

⁷² Together, the residents of Alabama, Alaska (counted twice), Arizona, Arkansas (counted twice), Colorado, Florida (counted twice), Georgia (counted twice), Idaho (counted twice), Indiana (counted twice), Iowa (counted twice), Kansas (counted twice), Kentucky (counted twice), Louisiana (counted twice), Maine, Mississippi (counted twice), Missouri (counted twice), Montana, Nebraska (counted twice), North Carolina (counted twice), North Dakota (counted twice), Ohio, Oklahoma (counted twice), Pennsylvania, South Carolina (counted twice), South Dakota (counted twice), Tennessee (counted twice), Texas (counted twice), Utah (counted twice), West Virginia, Wisconsin, and Wyoming (counted twice) have a population of 313,308,220 according to estimates for 2018, which one must divide in half to adjust for double counting, so that the current Republican Senate majority represents states with 156,654,110 of America's estimated 327,167,434 people. *See id*; *Senators of the 116th Congress*, U.S. SENATE, https://www.senate.gov/general/contact_information/senators_cfm.cfm?OrderBy=party&Sort=ASC.

⁷³ *2016 Votes Cast for the U.S. Senate by Party*, FED'L ELECTION COMM., <https://transition.fec.gov/general/FederalElections2016.shtml>. In aggregate, Democratic Senatorial candidates received 51,653,808 votes and Republican candidates received 41,324,322 votes. *Id.*

⁷⁴ *2018 Votes Cast for the U.S. Senate by Party*, FED'L ELECTION COMM., <https://www.fec.gov/introduction-campaign-finance/election-and-voting-information/federal-elections-2018/>; Sabrina Siddiqui, *Democrats Got Millions More Votes – So How Did Republicans Win the Senate?* GUARDIAN, Nov. 8, 2018, <https://www.theguardian.com/us-news/2018/nov/08/democrats-republicans-senate-majority-minority-rule>. “Democrats led Republicans by more than 12 million votes in Senate races.” *Id.*

Aggregating the results of the last three elections, Democratic Senatorial candidates received about 19 million more votes than Republican candidates.⁷⁵

Thus, Senate votes on background checks have often yielded results different from the potential outcome if Senators' votes reflected the total population they represented. Senator Manchin's 2015 amendment failed on a vote of 48 to 50 in the Senate.⁷⁶ But the 48 Senators who voted to strengthen background checks represented states with 56.9 percent of the Nation's population,⁷⁷ while the 50 Senators who voted against strengthening background checks represented states with 40.7 percent of the Nation's population.⁷⁸ (The shares of the two sides do not add up to 100 percent because two Senators did not vote, and because the residents of the District of Columbia are not represented in the Senate.)

Senator Murphy's 2016 amendment failed on a vote of 44 to 56 in the Senate.⁷⁹ The 44 Senators who voted to strengthen background checks represented states with 54.4 percent of the

⁷⁵ In aggregate in 2014, Democratic Senatorial candidates received 20,865,858 votes and Republican candidates received 24,613,889 votes. *2014 Votes Cast for the U.S. Senate by Party*, FED'L ELECTION COMM., <https://www.fec.gov/introduction-campaign-finance/election-and-voting-information/federal-elections-2014/>. In aggregate in 2016, Democratic Senatorial candidates received 51,653,808 votes and Republican candidates received 41,324,322 votes. Fed'l Election Comm., *2016 Votes*, *supra*, note 74. In aggregate in 2018, "Democrats led Republicans by more than 12 million votes in Senate races." Siddiqui, *supra*, note 75. Thus, Kevin McMahon has observed that Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch were confirmed by a majority of Senators who received fewer votes being elected than those in opposition. Kevin J. McMahon, *Will the Supreme Court Still "Seldom Stray Very Far"?: Regime Politics in a Polarized America*, 93 CHICAGO-KENT L. REV. 2 (2018). And Michael Tomasky then observed that the same can be said of Justice Brett Kavanaugh. Michael Tomasky, *The Court's Legitimacy Crisis*, N.Y. TIMES, Oct. 6, 2018, at A19.

⁷⁶ See Roll Call Vote No. 321, 114th Cong. (2015), 161 CONG. REC. S8348 (daily ed. Dec. 3, 2015).

⁷⁷ Together, the residents of Arizona, California (counted twice), Colorado, Connecticut (counted twice), Delaware (counted twice), Florida, Hawaii (counted twice), Illinois (counted twice), Indiana, Maine (counted twice), Maryland (counted twice), Massachusetts (counted twice), Michigan (counted twice), Minnesota (counted twice), Missouri, Montana, Nevada, New Hampshire, New Jersey (counted twice), New Mexico (counted twice), New York (counted twice), Ohio, Oregon (counted twice), Pennsylvania (counted twice), Rhode Island (counted twice), Vermont (counted twice), Virginia, Washington (counted twice), West Virginia, and Wisconsin had a population of 365,139,893 according to estimates for 2015 (when the vote took place), which one must divide in half to adjust for double counting, so that the proponents of the joint resolution represented states with 182,569,946.5 of America's 320,742,673 people in 2015. See CENSUS BUREAU, *supra* note 71; Roll Call Vote No. 321, 114th Cong. (2015), 161 CONG. REC. S8348 (daily ed. Dec. 3, 2015).

⁷⁸ Together, the residents of Alabama (counted twice), Alaska (counted twice), Arizona, Arkansas (counted twice), Colorado, Florida, Georgia (counted twice), Idaho (counted twice), Indiana, Iowa (counted twice), Kansas, Kentucky (counted twice), Louisiana (counted twice), Mississippi (counted twice), Missouri, Montana, Nebraska (counted twice), Nevada, New Hampshire, North Carolina (counted twice), North Dakota (counted twice), Ohio, Oklahoma (counted twice), South Carolina (counted twice), South Dakota (counted twice), Tennessee (counted twice), Texas (counted twice), Utah (counted twice), West Virginia, Wyoming (counted twice) had a population of 260,870,632 according to estimates for 2015 (when the vote took place), which one must divide in half to adjust for double counting, so that the opponents of the joint resolution represented states with 130,435,316 of America's 320,742,673 people in 2015. See CENSUS BUREAU, *supra* note 71; Roll Call Vote No. 321, 114th Cong. (2015), 161 CONG. REC. S8348 (daily ed. Dec. 3, 2015).

⁷⁹ Roll Call Vote No. 104, 114th Cong. (2016), 162 CONG. REC. S4351-52 (daily ed. June 20, 2016).

Nation's population,⁸⁰ while the 56 Senators who voted against the measure represented states with 45.4 percent of the Nation's population.⁸¹

Senator Feinstein's 2016 amendment failed on a vote of 47 to 53 in the Senate,⁸² but the 47 Senators who voted to strengthen background checks represented states with 55.0 percent of the Nation's population,⁸³ while the 53 Senators who voted against it represented states with 44.7 percent of the Nation's population.⁸⁴

⁸⁰ Together, the residents of California (counted twice), Colorado, Connecticut (counted twice), Delaware (counted twice), Florida, Hawaii (counted twice), Illinois (counted twice), Indiana, Maine, Maryland (counted twice), Massachusetts (counted twice), Michigan (counted twice), Minnesota (counted twice), Missouri, Nevada, New Hampshire, New Jersey (counted twice), New Mexico (counted twice), New York (counted twice), Ohio, Oregon (counted twice), Pennsylvania, Rhode Island (counted twice), Vermont (counted twice), Virginia (counted twice), Washington, Wisconsin had a population of 351,445,786 according to estimates for 2016 (when the vote took place), which one must divide in half to adjust for double counting, so that the proponents of the joint resolution represented states with 175,722,893 of America's 323,071,342 people in 2016. *See* CENSUS BUREAU, *supra* note 71; Roll Call Vote No. 104, 114th Cong. (2016), 162 CONG. REC. S4351–52 (daily ed. June 20, 2016).

⁸¹ Together, the residents of Alabama (counted twice), Alaska (counted twice), Arizona (counted twice), Arkansas (counted twice), Colorado, Florida, Georgia (counted twice), Idaho (counted twice), Indiana, Iowa (counted twice), Kansas (counted twice), Kentucky (counted twice), Louisiana (counted twice), Maine, Mississippi (counted twice), Missouri, Montana (counted twice), Nebraska (counted twice), Nevada, New Hampshire, North Carolina (counted twice), North Dakota (counted twice), Ohio, Oklahoma (counted twice), Pennsylvania, South Carolina (counted twice), South Dakota (counted twice), Tennessee (counted twice), Texas (counted twice), Utah (counted twice), West Virginia (counted twice), Wisconsin, Wyoming (counted twice) had a population of 293,323,748 according to estimates for 2016 (when the vote took place), which one must divide in half to adjust for double counting, so that the opponents of the joint resolution represented states with 146,661,874 of America's 323,071,342 people in 2016. *See* CENSUS BUREAU, *supra* note 71; Roll Call Vote No. 104, 114th Cong. (2016), 162 CONG. REC. S4351–52 (daily ed. June 20, 2016).

⁸² Roll Call Vote No. 106, 114th Cong. (2016), 162 CONG. REC. S4352 (daily ed. June 20, 2016).

⁸³ Together, the residents of California (counted twice), Colorado, Connecticut (counted twice), Delaware (counted twice), Florida, Hawaii (counted twice), Illinois (counted twice), Indiana, Maine, Maryland (counted twice), Massachusetts (counted twice), Minnesota (counted twice), Missouri, Montana, Nevada, New Hampshire (counted twice), New Jersey (counted twice), New Mexico (counted twice), New York (counted twice), Ohio, Oregon (counted twice), Pennsylvania, Rhode Island (counted twice), Vermont (counted twice), Virginia (counted twice), Washington (counted twice), West Virginia, Wisconsin had a population of 355,659,951 according to estimates for 2016 (when the vote took place), which one must divide in half to adjust for double counting, so that the proponents of the joint resolution represented states with 177,829,975.5 of America's 323,071,342 people in 2016. *See* CENSUS BUREAU, *supra* note 71; Roll Call Vote No. 106, 114th Cong. (2016), 162 CONG. REC. S4352 (daily ed. June 20, 2016).

⁸⁴ Together, the residents of Alabama (counted twice), Alaska, Alaska, Arizona (counted twice), Arkansas (counted twice), Colorado, Florida, Georgia (counted twice), Idaho (counted twice), Indiana, Iowa (counted twice), Kansas (counted twice), Kentucky (counted twice), Louisiana (counted twice), Maine, Mississippi (counted twice), Missouri, Montana, Nebraska (counted twice), Nevada, North Carolina (counted twice), North Dakota (counted twice), Ohio, Oklahoma (counted twice), Pennsylvania, South Carolina (counted twice), South Dakota (counted twice), Tennessee (counted twice), Texas (counted twice), Utah (counted twice), West Virginia, Wisconsin, Wyoming (counted twice) had a population of 289,109,583 according to estimates for 2016 (when the vote took place), which one must divide in half to adjust for double counting, so that the opponents of the joint resolution represented states with 144,554,791.5 of America's 323,071,342 people in 2016. *See* CENSUS BUREAU, *supra* note 71; Roll Call Vote No. 106, 114th Cong. (2016), 162 CONG. REC. S4352 (daily ed. June 20, 2016).

The one recent piece of background-check legislation that did become law — the 2017 joint resolution that made it “easier for individuals with severe mental illness to buy guns”⁸⁵ — passed the Senate with a 57 to 43 vote.⁸⁶ But the 57 Senators who voted to weaken background checks represented states with 46.5 percent of the Nation’s population,⁸⁷ while the 43 Senators who voted against the resolution represented states with 53.3 percent of the Nation’s population.⁸⁸

The current failure of the Senate to take up background check legislation can also be more narrowly attributed to the Senate Majority Leader, Mitch McConnell. Senator McConnell has described himself as “the grim reaper” for liberal legislation.⁸⁹ How can he effectively block gun legislation? Although the job of the Majority Leader does not appear in the Constitution, Leader McConnell holds the Senate’s most powerful job.⁹⁰

Traditionally, other Senators could affect what the Senate debated by offering amendments. But recent Majority Leaders, and Leader McConnell in particular, have limited opportunities for Senators to offer amendments. Of the 428 roll-call votes that the Senate took in 2019, only 27 were on amendments, and only five of those were on amendments offered by Democratic Senators.⁹¹ The Majority Leader’s increasingly tight control of the Senate schedule and amendments has contributed to the inability of background check proponents to get votes on their proposals.

⁸⁵ 163 CONG. REC. S1167 (daily ed. Feb. 15, 2017) (statement of Sen. Feinstein).

⁸⁶ 163 CONG. REC. S1169 (daily ed. Feb. 15, 2017).

⁸⁷ Together, the residents of Alabama (counted twice), Alaska (counted twice), Arizona (counted twice), Arkansas (counted twice), Colorado, Florida, Georgia (counted twice), Idaho (counted twice), Indiana (counted twice), Iowa (counted twice), Kansas (counted twice), Kentucky (counted twice), Louisiana (counted twice), Maine (counted twice), Mississippi (counted twice), Missouri, Montana (counted twice), Nebraska (counted twice), Nevada, North Carolina (counted twice), North Dakota (counted twice), Ohio, Oklahoma (counted twice), Pennsylvania, South Carolina (counted twice), South Dakota (counted twice), Tennessee (counted twice), Texas (counted twice), Utah (counted twice), West Virginia (counted twice), Wisconsin, and Wyoming (counted twice) had a population of 302,554,280 according to estimates for 2017 (when the vote took place), which one must divide in half to adjust for double counting, so that the proponents of the joint resolution represented states with 151,277,140 of America’s 325,147,121 people in 2017. See CENSUS BUREAU, *supra* note 71; Roll Call Vote No. 66 Leg. 115th Cong. (2017), 163 CONG. REC. S1169 (daily ed. Feb. 15, 2017).

⁸⁸ Together, the residents of California (counted twice), Colorado, Connecticut (counted twice), Delaware (counted twice), Florida, Hawaii (counted twice), Illinois (counted twice), Maryland (counted twice), Massachusetts (counted twice), Michigan (counted twice), Minnesota (counted twice), Missouri, Nevada, New Hampshire (counted twice), New Jersey (counted twice), New Mexico (counted twice), New York (counted twice), Ohio, Oregon (counted twice), Pennsylvania, Rhode Island (counted twice), Vermont (counted twice), Virginia (counted twice), Washington (counted twice), and Wisconsin had a population of 346,348,580 according to estimates for 2017 (when the vote took place), which one must divide in half to adjust for double counting, so that the opponents of the joint resolution represented states with 173,174,290 of America’s 325,147,121 people in 2017. See CENSUS BUREAU, *supra* note 71; Roll Call Vote No. 66 Leg. 115th Cong. (2017), 163 CONG. REC. S1169 (daily ed. Feb. 15, 2017).

⁸⁹ Sheryl Gay Stolberg, *Washington’s Eyes Turn to McConnell for Response to Gun Violence*, N.Y. TIMES, Aug. 6, 2019, at A14, <https://www.nytimes.com/2019/08/05/us/politics/mitch-mcconnell-guns.html>.

⁹⁰ *Floor Leaders, Majority and Minority Leaders, Party Whips*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Leaders_Whips.htm.

⁹¹ See U.S. Senate, *Roll Call Votes 116th Congress — 1st Session (2019)*, https://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_116_1.htm.

On one level, Senator McConnell acts as the representative of a particular state — Kentucky — whose 4.5 million residents (1.4 percent of the Nation’s population) may have different views from those of the Nation as a whole.

On another level, Leader McConnell acts on behalf of the Senators in the current majority. His actions to prevent consideration of gun control legislation may in part reflect how gun control has become an increasingly partisan issue among Members of Congress. After examining 16 gun-control votes in Congress, Danielle Kurtzleben found “that gun control votes tend to fall . . . sharply along party lines.”⁹² Kurtzleben also noted that “Democrats, who favor gun control more than Republicans, tend to be more likely than Republicans to break ranks.”⁹³ Thus, Leader McConnell, as the Leader of Senate Republicans, may feel a need to block gun-control legislation in an effort to represent the Senators in his caucus.

V. IMPEDIMENTS FROM CAMPAIGN FINANCE

Why is the partisan divide so pronounced among Members of Congress, when it is not among people in the Nation at large? One contributing factor may be how America finances campaigns. When Raymond Arke and Geoff West compared how Senators voted on the 2013 Manchin-Toomey amendment with the Senators’ sources for campaign contributions, the authors reported:

The Center for Responsive Politics found that nearly all of the 46 senators who voted against the amendment had accepted significant campaign contributions from the political action committees of gun rights groups. There were exceptions to the rule, notably the measure’s sponsors, Sens. Joe Manchin (D-W.Va.) and Pat Toomey (R-Pa.). But in general, the correlation was a close one.⁹⁴

Arke and West also found: “Gun rights interests have given more than \$43.8 million to candidates, parties and outside spending groups since 1989, with 90 percent of the funds contributed to candidates and parties going to Republicans.”⁹⁵

When the Center for Responsive Politics added up contributions from the gun-rights group the NRA over the lifetime of candidates, the 70 candidates receiving the most net support were all Republicans.⁹⁶ Of the 260 candidates in favor of whom the NRA spent money, only 18 were Democrats or Independents.⁹⁷ And the 41 candidates against whom the NRA spent the most were all Democrats or Independents.⁹⁸ Of the 169 candidates against whom the NRA spent

⁹² Danielle Kurtzleben, *Chart: How Have Your Members of Congress Voted on Gun Bills?* NPR (Feb. 19, 2018), <https://www.npr.org/2018/02/19/566731477/chart-how-have-your-members-of-congress-voted-on-gun-bills>.

⁹³ *Id.*

⁹⁴ Raymond Arke & Geoff West, *Gun Rights vs Gun Control*, OPENSECRETS.ORG CTR FOR RESPONSIVE POLITICS (May 2019), <https://www.opensecrets.org/news/issues/guns/>.

⁹⁵ *Id.*

⁹⁶ *Gun Rights vs Gun Control*, OPENSECRETS.ORG (2019), <https://docs.google.com/spreadsheets/d/1-7PdCI2NawSgP1QE-cGYVYedetYqepR-4jBweaJyqFo/edit#gid=1782600961> (data last updated on Aug. 04, 2019 by the Center for Responsive Politics).

⁹⁷ *Id.*

⁹⁸ *Id.*

money, only 4 were Republicans.⁹⁹ Observing these NRA spending habits, Republican leaders might reasonably consider the NRA as allied with the Republican Party.

Arke and West concede: “There’s no denying that much of the strength of the leading gun rights organization, the National Rifle Association (NRA), comes from its broad and passionate membership base and its mastery of grassroots politics.”¹⁰⁰ But some have also argued that the NRA serves as a conduit for gun industry contributions.¹⁰¹ And others have charged the NRA has “essentially become a business enterprise.”¹⁰² To the extent that the NRA has become more reflective of business interests and less reflective of members, it may also have become less responsive to public opinion.

Democratic Presidential candidates have called the NRA’s role corrupting. At the Democratic Presidential debate in Houston on September 12, 2019, ABC News *World News Tonight* Anchor and Managing Editor David Muir asked Senator Elizabeth Warren of Massachusetts, “What can you get done on gun control?”¹⁰³ Senator Warren replied:

The question we need to ask is, when we’ve got this much support across the country, 90 percent of Americans want to see us do — I like registration — want to see us do background checks, want to get assault weapons off the streets, why doesn’t it happen? And the answer is corruption, pure and simple.

We have a Congress that is beholden to the gun industry. . . .

Until we attack the systemic problems, we can’t get gun reform in this country. We’ve got to go straight against the industry and we’ve got to change Congress, so it doesn’t just work for the wealthy and well-connected, so it works for the people.¹⁰⁴

Senator Bernie Sanders of Vermont agreed, saying:

But I want to get back to a point that Elizabeth made and that, in fact, in terms of gun issues, picking up on Cory [Booker] and Beto [O’Rourke] and everybody else, what we are looking at is a corrupt political system, and that means whether it is the drug companies or the insurance companies or the fossil fuel industry determining what’s

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See, e.g., Walt Hickey, *How the Gun Industry Funnels Tens of Millions of Dollars to the NRA*, BUSINESS INSIDER (Jan. 16, 2013), <https://www.businessinsider.com/gun-industry-funds-nra-2013-1>.

¹⁰² Chuck Schumer, *Schumer Statement on New Senate Finance Committee Report Detailing the NRA’s Relationship with Russia and New Evidence that NRA Potentially Violated U.S. Tax and Sanctions Laws*, SEN. DEMOCRATS (Sept. 27, 2019), <https://www.democrats.senate.gov/dsoc/press-releases/schumer-statement-on-new-senate-finance-committee-report-detailing-the-nras-relationship-with-russia-and-new-evidence-that-nra-potentially-violated-us-tax-and-sanctions-laws>; see also U.S. SENATE COMM. ON FINANCE MINORITY STAFF, *THE NRA AND RUSSIA: HOW A TAX-EXEMPT ORGANIZATION BECAME A FOREIGN ASSET*, Sept. 2019, [https://www.finance.senate.gov/imo/media/doc/The%20NRA%20&%20Russia%20-%20How%20a%20Tax-Exempt%20Organization%20Became%20a%20Foreign%20Asset%20\(with%20addendum\).pdf](https://www.finance.senate.gov/imo/media/doc/The%20NRA%20&%20Russia%20-%20How%20a%20Tax-Exempt%20Organization%20Became%20a%20Foreign%20Asset%20(with%20addendum).pdf).

¹⁰³ *Read the Full Transcript of ABC News’ 3rd Democratic Debate*, ABC NEWS (Sept. 13, 2019), <https://abcnews.go.com/US/read-full-transcript-abc-news-3rd-democratic-debate/story?id=65587810>.

¹⁰⁴ *Id.*

happening in Washington or, in this case, you've got an NRA which has intimidated the president of the United States and the Republican leadership.¹⁰⁵

And at the Democratic Presidential debate in Westerville, Ohio, on October 15, 2019, Vice President Joe Biden and South Bend, Indiana, Mayor Pete Buttigieg both spoke of wanting to confront the NRA.¹⁰⁶

VI. IMPEDIMENTS FROM THE FILIBUSTER

At the Democratic Presidential debate in Houston on September 12, 2019, Senator Warren also said:

And unless we're willing to address that head-on and roll back the filibuster, we're not going to get anything done on guns. I was in the United States Senate when 54 senators said let's do background checks . . . and with 54 senators, it failed because of the filibuster.¹⁰⁷

Moderator David Muir then said:

Senator Warren, thank you. You bring up eliminating the filibuster, which means you would need simply a simple majority in a Republican Senate to get something done. I want to turn to Senator Sanders on this, because you've said before of this, if Donald Trump supports ending the filibuster, which he's talked about himself, you should be nervous. Would you support ending the filibuster?¹⁰⁸

Senator Sanders replied:

No. But what I would support, absolutely, is passing major legislation, the gun legislation the people here are talking about, Medicare for all, climate change legislation that saves the planet. I will not wait for 60 votes to make that happen, and you can do it in a variety of ways. You can do that through budget reconciliation law. You have a vice president who will, in fact, tell the Senate what is appropriate and what is not, what is in order and what is not.¹⁰⁹

Again, at the Democratic Presidential debate in Westerville, Ohio, on October 15, 2019, Senator Warren said:

¹⁰⁵ *Id.*

¹⁰⁶ *The October Democratic Debate Transcript*, WASH. POST (Oct. 16, 2019), <https://www.washingtonpost.com/politics/2019/10/15/october-democratic-debate-transcript/>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* Similarly, in a September 2019 statement, Senator Sanders said:

[T]he budget reconciliation process, with 50 votes, has been used time and time again to pass major pieces of legislation. Under our Constitution and the rules of the Senate, it is the vice president who determines what is and is not permissible under budget reconciliation. While a president does not have the power to abolish the filibuster, I can tell you that a vice president in a Bernie Sanders administration will determine that a Green New Deal, Medicare for All and other bold progressive legislation can pass through the Senate under reconciliation and is not in violation of the rules.

Sunrise Movement, Twitter, Sept. 6, 2019, <https://twitter.com/sunrisemvmt/status/1170039622266695690>.

I stood in the United States Senate in 2013 . . . when 54 senators voted in favor of gun legislation and it didn't pass because of the filibuster. . . . We have got to attack the corruption and repeal the filibuster or the gun industry will always have a veto over what happens.¹¹⁰

In these exchanges, Senator Warren referred to the 2013 Manchin-Toomey amendment, for which the Senate voted 54 to 46 in favor, but which failed because the Senate considered it under a unanimous consent agreement requiring 60 votes for the amendment's adoption.¹¹¹ That requirement for 60 votes reflected the provisions of the Senate's cloture rule, which requires 60 votes to overcome a filibuster.¹¹² Senators enter into such unanimous consent agreements in response to opponents' threats to filibuster unless all Senators agree to require a 60-vote hurdle. So, as Senator Warren highlighted, the Senate's filibuster has contributed to the failure of Congress to reflect popular will on gun legislation.

In that 2013 vote, the 54 Senators who voted to expand background checks represented states with 62.1 percent of the Nation's population,¹¹³ while the 46 Senators who voted against expanding background checks represented states with 37.7 percent of the Nation's population.¹¹⁴ The anti-majoritarian nature of the Senate's filibuster added to the unrepresentative nature of the Senate to yield defeat for the 2013 Manchin-Toomey amendment.¹¹⁵

¹¹⁰ *The October Democratic Debate Transcript*, *supra* note 107. For the positions of other Democratic Presidential candidates on the filibuster, see *Should Democrats Eliminate the Senate Filibuster the Next Time They Control the Chamber?* WASH. POST, <https://www.washingtonpost.com/graphics/politics/policy-2020/voting-changes/eliminate-senate-filibuster/>.

¹¹¹ Rollcall Vote No. 97 Leg., 113th Cong. (2013), 159 CONG. REC. S2740 (daily ed. Apr. 17, 2013).

¹¹² See SENATE COMM. ON RULES & ADMIN, STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, at R. XXII, ¶ 2 (2013).

¹¹³ Together, the residents of Arizona, California (counted twice), Colorado (counted twice), Connecticut (counted twice), Delaware (counted twice), Florida, Hawaii (counted twice), Illinois (counted twice), Indiana, Iowa, Louisiana, Maine (counted twice), Maryland (counted twice), Massachusetts (counted twice), Michigan (counted twice), Minnesota (counted twice), Missouri, Montana, New Hampshire, New Jersey (counted twice), New Mexico (counted twice), New York (counted twice), North Carolina, Ohio, Oregon (counted twice), Pennsylvania (counted twice), Rhode Island (counted twice), South Dakota, Vermont (counted twice), Virginia (counted twice), Washington (counted twice), West Virginia (counted twice), and Wisconsin had a population of 392,262,932 according to estimates for 2013 (when the vote took place), which one must divide in half to adjust for double counting, so that the proponents of the amendment represented states with 196,131,466 of America's 316,057,727 people in 2013. See CENSUS BUREAU, *supra* note 71; Rollcall Vote No. 97 Leg., 113th Cong. (2013), 159 CONG. REC. S2740 (daily ed. Apr. 17, 2013).

¹¹⁴ Together, the residents of Alabama (counted twice), Alaska (counted twice), Arizona, Arkansas (counted twice), Florida, Georgia (counted twice), Idaho (counted twice), Indiana, Iowa, Kansas (counted twice), Kentucky (counted twice), Louisiana, Mississippi (counted twice), Missouri, Montana, Nebraska (counted twice), Nevada (counted twice), New Hampshire, North Carolina, North Dakota (counted twice), Ohio, Oklahoma (counted twice), South Carolina (counted twice), South Dakota, Tennessee (counted twice), Texas (counted twice), Utah (counted twice), Wisconsin, and Wyoming (counted twice) had a population of 238,551,660 according to estimates for 2013 (when the vote took place), which one must divide in half to adjust for double counting, so that the opponents of the amendment represented states with 119,275,830 of America's 316,057,727 people in 2013. See Census Bureau, *supra* note 71; Rollcall Vote No. 97 Leg., 113th Cong. (2013), 159 CONG. REC. S2740 (daily ed. Apr. 17, 2013).

¹¹⁵ See generally Dauster, *The Senate in Transition*, *supra* note 5, at 636–37.

At its theoretical extreme, the filibuster could empower the 41 Senators who represent the least populous 21 states to block legislation. The elected representatives of as little as 10.7 percent of the Nation's current population could theoretically use the Senate's filibuster to thwart the will of the other 89.3 percent.¹¹⁶

Once again, political interest is not entirely correlated with the size of a state. But the Senators voting for the Manchin-Toomey amendment represented, on average, states with populations of 7,264,128,¹¹⁷ while Senators voting against the Manchin-Toomey amendment represented, on average, states with populations of 5,185,905.¹¹⁸ (In 2013, the average state had a population of 6,529,300.¹¹⁹) Thus opposition to the Manchin-Toomey amendment was somewhat correlated with less-populous (often more rural) states, and support was somewhat correlated with more populous (often more urban) states. Consequently, the structure of the Senate and the filibuster combined to contribute to a result at variance with the will of the majority of Americans.

The one recent piece of background-check legislation that did become law — the 2017 resolution introduced by Representative Sam Johnson of Texas — passed the Senate with a 57 to 43 vote¹²⁰ only because the Senate considered the legislation under the fast-track Congressional Review Act, which prevented the usual threat of a Senate filibuster.¹²¹

CONCLUSION

Overwhelming majorities of Americans want stricter background checks for gun purchases.¹²² But several structural features of America's system of Government have contributed to Congress's failure to respond to the popular will.

A key impediment is simply the structure of the U.S. Senate. In all recent congressional efforts on background checks, Senators representing a majority of Americans have voted in favor of strengthening the checks, or against weakening them. But the Senate overrepresents states with small populations and underrepresents states with large populations. And Senators from states with smaller populations have been more protective of gun rights, on average, than Senators from states with larger populations. So our Government's bicameral legislature and

¹¹⁶ Together, the residents of the twenty least-populous states of Wyoming, Vermont, Alaska, North Dakota, South Dakota, Delaware, Rhode Island, Montana, Maine, New Hampshire, Hawaii, Idaho, West Virginia, Nebraska, New Mexico, Kansas, Mississippi, Arkansas, Nevada, Iowa elect forty Senators, but according to estimates for 2018 represent only 33,473,063 Americans. In the most extreme case, only one of the two Senators representing the next most populous state, Utah, need join the filibuster for it to succeed, and thus one would need to divide Utah's population of 3,161,105 in half (yielding 1,580,552.5) to avoid double counting. Thus, representatives of as few as 35,053,615.5 of the 327,167,434 Americans could sustain a filibuster. *See* Census Bureau, *supra* note 71.

¹¹⁷ 392,262,932 (*see supra*, note 17) divided by 54.

¹¹⁸ 238,551,660 (*see supra*, note 18) divided by 46.

¹¹⁹ 2013 national population of 316,057,727 minus D.C. population of 650,431 = 315,407,296, divided by 50. *See* CENSUS BUREAU, *supra* note 71.

¹²⁰ 163 CONG. REC. S1169 (daily ed. Feb. 15, 2017).

¹²¹ *See* 163 CONG. REC. S1167–69 (daily ed. Feb. 15, 2017). On the Congressional Review Act generally, *see* CAREY & DAVIS, *supra* note 62.

¹²² *See supra* notes 24–40 and accompanying text.

Senate that represents states and not people contribute to results that differ with majority views at a particular moment.

There is little prospect for a Constitutional amendment to conform the Senate to the principle of one person, one vote. On the margin, enacting statehood for the District of Columbia, and if its residents want it, for Puerto Rico, would mitigate the Senate's bias toward rural interests. But the Senate's bias in favor of small states appears likely to continue to provide a hurdle for background check proponents.

Republican Members of Congress, however, appear more unified in opposition to background check legislation than Republican voters. The role of the NRA as an adjunct of Republican electoral efforts appears to be a contributing factor in the position of Republican Members of Congress.

The outsized role of special interest political givers is not limited to the politics of gun control. But here, as in other issues, an increased role for public financing of political campaigns would enhance the freedom of Members of Congress to respond to their constituents rather than to campaign donors. Ideas like an enhanced match for small contributors would not negate the role of contributors with intensely-held views, but by making the candidate's funding based on voters' interests, instead of intermediaries who bundle and deliver contributions, they would reduce the influence of special interest groups.

The Senate's filibuster has amplified the effect of the Senate's unrepresentative nature. The filibuster blocked the recent attempt to expand background checks that came closest to success — the 2013 Manchin-Toomey amendment. And unless proponents of background checks eliminate the filibuster or find another way around it, filibusters by gun rights advocates will likely block future attempts, as well.

Because Senators have used the filibuster to block the “almost universal”¹²³ will of American people for stronger background checks, proponents of background checks have good reason to call for eliminating the filibuster. Eliminating the filibuster would be another step toward making our Government more democratic.¹²⁴ Doing so would also allow other progressive reform efforts to proceed — from voting rights to health care to climate change. Senate Harry Reid of Nevada wrote the roadmap for how a simple majority of the Senate can eliminate the filibuster, when he created a precedent that reduced to a simple majority the votes needed for cloture on most nominations.¹²⁵ Senator McConnell twice followed that example to further limit the filibuster.¹²⁶ A future majority could follow those examples, as well, to aid passage of background checks.

¹²³ *U.S. Support*, *supra* note 24.

¹²⁴ *See generally*, e.g., Oliver, *supra* note 5; Brownstein, *supra* note 5; Reid, *supra* note 5; Dauster, *The Senate in Transition*, *supra* note 5.

¹²⁵ *See* Dauster, *The Senate in Transition*, *supra* note 5, at 656.

¹²⁶ *See*, e.g., Matt Flegenheimer, *Republicans Gut Filibuster Rule to Lift Gorsuch*, N.Y. TIMES, Apr. 7, 2017, at A1; Kelsey Snell, *Senate Rewrites Rules to Speed Confirmations for Some Trump Nominees*, NPR, Apr. 3, 2019, <https://www.npr.org/2019/04/03/709489797/senate-rewrites-rules-to-speed-confirmations-for-some-trump-nominees>.

Senators could take other steps short of eliminating the filibuster, as Senator Sanders suggested at the Houston Democratic Presidential debate.¹²⁷ Senator Sanders mentioned “budget reconciliation” and “hav[ing] a vice president who will . . . tell the Senate . . . what is in order and what is not.”¹²⁸ The budget reconciliation process allows a simple majority to pass changes to fiscal policy, but the Senate’s Byrd Rule prevents including in budget reconciliation bills matters that the Presiding Officer rules are nonbudgetary or “merely incidental to the non-budgetary components.”¹²⁹ Traditionally, the Presiding Officer follows the advice of the Senate Parliamentarian to interpret this rule.¹³⁰ So proponents of using budget reconciliation could try to persuade the Parliamentarian that background checks are budgetary. Or, as happened under Majority Leader Bob Dole, a Majority Leader could place in the Parliamentarian’s job someone who would interpret the Byrd Rule more liberally.¹³¹ Or, as Senator Sanders seemed to suggest, a Vice President could personally exercise the job’s constitutional role and rule that something was in order to be considered on a fast-track vehicle, no matter what the Parliamentarian advised. These last two options may appear just as “nuclear” as simply abolishing the filibuster.

The filibuster can at times serve as a tool for Senators representing the majority of the Country’s population to block legislation advanced by Senators representing a minority of the Country’s population.¹³² Had proponents of background checks been able to filibuster against the 2017 Johnson resolution to weaken background checks, they probably would have. And they would have done so with the representatives of the majority of the Country’s population on their side.¹³³

A Senate without a filibuster might change laws more frequently, enacting the Manchin-Toomey amendment in 2013 and then rolling some of it back with the Johnson resolution in 2017. But even without the filibuster, the U.S. Constitution will still have more checks and balances than any other long-standing democracy. As Stepan and Linz pointed out, the United States has the most exceptionally high number of veto players of any long-standing democracy.¹³⁴ Even without the filibuster, we would still have the least responsive long-standing democracy in the world. The time may have come to make the U.S. Government just that little bit more democratic.

Background checks are just one lens through which to look at the Senate’s filibuster. The filibuster has blocked many other efforts to bring about social change. Observers can argue about

¹²⁷ *The October Democratic Debate Transcript*, *supra* note 110.

¹²⁸ *Id.*

¹²⁹ See Sec. 313(b)(1) of the Congressional Budget Act of 1974, 2 U.S.C. 644(b)(1); HENIFF, *supra* note 52; WILLIAM G. DAUSTER, BYRD RULE ANNOTATED 14–18 (2005), <https://budgetcounsel.files.wordpress.com/2016/12/byrd-rule-annotated-preliminary-draft-october-2005.pdf>.

¹³⁰ See, e.g., Margot Sanger-Katz, *Byrd Bath: Seven Provisions that Could Disappear from the Senate Health Bill*, N.Y. TIMES (July 21, 2017); Paige Winfield Cunningham, *Senate Staffer Speaks Softly But Carries Big Stick: Parliamentarian Will Decide If GOP Can Follow Through on Obamacare*, WASH. POST, May 30, 2017, at A15.

¹³¹ See, e.g., STEVEN S. SMITH, THE SENATE SYNDROME: THE EVOLUTION OF PROCEDURAL WARFARE IN THE MODERN U.S. SENATE 190–91 (2014).

¹³² See, e.g., Benjamin Eidelson, *The Majoritarian Filibuster*, 122 YALE L.J. 980–1023 (2013).

¹³³ See *supra* notes 89–90 and accompanying text.

¹³⁴ Stepan & Linz, *supra* note 70.

whether other efforts would also warrant eliminating the filibuster. But one might well argue that helping to prevent thousands of needless deaths from gun violence is reason enough.