The Senate's first legislative rules, adopted in 1789, directly reflected majority rule. Rule 8 allowed a simple majority to ''move the previous question'' and proceed to vote on a pending matter. Invoked only three times in 17 years, however, Rule 8 was dropped in the Senate rules revision of 1806, meaning unanimous consent was then necessary to end debate. Dozens of reform efforts during the 19th century tried to rein in the minority's abuse of the right to debate. In 1917, President Woodrow Wilson described what had become of majority rule: ''The Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action. . . . The only remedy is that the rules of the Senate shall be altered.'' Leadership turned gridlock into reform, and that year the Senate adopted Rule 22, by which ⅔ of Senators present and voting could invoke cloture, or end debate, on a pending measure.

Just as the minority abused the unanimous consent threshold in the 19th century, the minority abused the ⅔ threshold in the 20th century. A resolution to reinstate the previous question rule was introduced, and only narrowly defeated, within a year of Rule 22's adoption. A steady stream of reform attempts followed, and a series of modifications made until the current 60-vote threshold was adopted in 1975. The point is that the Senate has periodically rebalanced the minority's right to debate and the majority's right to decide. Today's crisis, with constitutional as well as political dimensions and affecting all three branches of government, presents an even more compelling case to do so.

These filibusters are an unprecedented shift in the kind, not just the degree, of the minority's tactics. After a full, fair, and vigorous debate on judicial nominations, a simple majority must at some point be able to proceed to a vote. A simple majority can achieve this goal either by actually amending Rule 22 or by sustaining an appropriate parliamentary ruling.

The Senate exercises its constitutional authority to determine its procedural rules either implicitly or explicitly. Once a new Congress begins, operating under existing rules implicitly adopts them ''by acquiescence.'' The Senate explicitly determines its rules by formally amending them, and the procedure depends on its timing. After Rule 22 has been adopted by acquiescence, it requires 67 votes for cloture on a rules change. Before the Senate adopts Rule 22 by acquiescence, however, ordinary parliamentary rules apply and a simple majority can invoke cloture and change Senate rules.

Some object to this conclusion by observing that, because only a portion of its membership changes with each election, the Senate has been called a ''continuing body.'' Yet language reflecting this observation was included in Senate rules only in 1959. The more important, and much older, sense in which the Senate is a continuing body is its ongoing constitutional authority to determine its rules. Rulings by vice presidents of both parties, sitting as the President of the Senate, confirm that each Senate may make that decision for itself, either implicitly by acquiescence or explicitly by amendment. Both conservative and liberal legal scholars, including those who see no constitutional problems with the current filibuster campaign, agree that a simple majority can change Senate rules at the beginning of a new Congress.

An alternative strategy involves a parliamentary ruling in the context of considering an individual nomination. This approach can be pursued at any time, and would not actually amend Rule 22. The precedent it would set depends on the specific ruling it produces and the facts of the situation in which it arises.

Speculation, often inaccurate, abounds about how this strategy would work. One newspaper, for example, offered a common description that this approach would seek ''a ruling from the Senate parliamentarian that the filibuster of executive nominations is unconstitutional.'' Under long-standing Senate parliamentary precedent, however, the presiding officer does not decide such constitutional questions but submits them to the full Senate, where they are debatable and subject to Rule 22's 60-vote requirement. A filibuster would then prevent solving this filibuster crisis. Should the chair rule in favor of a properly framed non-debatable point of order, Democrats would certainly appeal, but the majority could still sustain the ruling by voting for a non-debatable motion to table the appeal.

Democrats have threatened that, if the majority pursues a deliberate solution to this political and constitutional crisis, they will bring the entire Senate to a screeching halt. Perhaps they see this as way to further escalate the confirmation crisis, as the Senate cannot confirm judicial nominations if it can do nothing at all. No one, however, seriously believes that, if the partisan roles were reversed, Democrats—the ones who once proposed abolishing even legislative filibusters—would hesitate for a moment before changing Senate procedures to facilitate consideration of judicial nominations they favored.

The United States Senate is a unique institution. Our rules allowing for extended debate protect the minority's role in the legislative process. We must preserve that role. The current filibuster campaign against judicial nominations, however, is the real attack on Senate tradition and an unprecedented example of placing short-term advantage above longstanding fundamental principles. It is not simply annoying or frustrating, but a new and dangerous kind of obstruction which threatens democracy, the Senate, the judiciary, and even the Constitution itself. As such, it requires a more serious and deliberate solution.

While judicial appointments can be politically contentious and ideologically divisive, the confirmation process must still be handled through a fair process that honors the Constitution and Senate tradition. If the fight is fair and constitutional, let the chips fall where they may. As it has before, the Senate must change its procedures to properly balance majority rule and extended debate. That way, we can vigorously debate judicial nominations and still conduct the people's business.

Mr. UDALL of New Mexico. Mr. President, I yield the floor and suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

The ACTING PRESIDENT pro tempore. The Senator from Illinois.

Mr. DURBIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. DURBIN. Mr. President, I ask unanimous consent to speak in morning business.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

HEALTH CARE REFORM

Mr. DURBIN. Mr. President, we were engaged in lengthy debate for months—maybe years—about health care in the United States, and I believe we passed a historic bill that addresses some of the most fundamental issues about health care: first, to address affordability because if you can't afford it, it doesn't matter how good medical care is; second, to make sure it was successful for people rich and poor alike; third, to make sure the basic health insurance policies being offered in America covered the most important things in a person's life. That was part of the debate, and an important part of it.

A fundamental principle of health care reform is to ensure Americans have access to a comprehensive package of health services—we call them essential benefits under the law—which includes maternity care, vaccinations, and preventive care.

Many years ago when I was a new lawyer working in the Illinois State Senate, someone approached me and said: Are you aware of the fact that you can buy a health insurance plan that covers a family and literally covers a newborn but exempts coverage for the first 30 days of their life in Illinois?

I said: No, that is impossible.

He said: No, that kind of health care is for sale, and it is a little cheaper because we all know that if a baby is born with a serious problem, the first 30 days can be extremely expensive.

They were literally selling health insurance plans that left that family and baby vulnerable for 30 days. We changed the law in Illinois and said: You can't offer a health insurance plan that covers maternity and newborns unless you cover them from the moment they are born. So it was written into the law as a protection against consumers who unwittingly would sign up for the cheaper policy that would never be there when they needed it.

When we talked about the Federal standards when it came to health insurance, we wanted to make certain that some of the most basic things—the essential services—were covered, and that includes maternity care, vaccinations, and preventive care for women.

There is an amendment we will consider this week offered by Senator BLUNT of Missouri that I am afraid will threaten the vital consumer protections in the health reform law. These protections ensure that women, men, and children have access to basic health care. The amendment by Senator BLUNT would allow any employer or insurance company to deny health insurance for any essential or preventive health care service they object to on the basis of ''undefined'' religious or moral convictions. That means an employer can not only deny access to family planning and birth control, but they could deny access to any health care services required under our new Federal health care reform law.

Many supporters of this amendment stress how the amendment will protect

employers with religious objections to things such as coverage for contraception, but in reality this amendment goes much further: it would allow employers to deny coverage for any health service. For example, under the Blunt amendment, if an employer objects morally to vaccinations, then their insurance policy would not have to cover potentially lifesaving vaccinations for the children of that employer's workers or if an employer has religious objections to mental health care, their employees would not have access to basic health care services that we fought to protect. The Blunt amendment will have a harmful effect on all people and would undermine our Nation's effort to ensure that everyone in this country has access to a basic standard of health coverage.

Who opposes the Blunt amendment? It is not just women's groups, as you might expect, but the American Academy of Pediatrics, AIDS United, the American Nurses Association, and the American Congress of Obstetricians and Gynecologists.

Mr. President, I know your personal background and field of study has included theology and religious training, in that area, and I know this particular debate was brought on because of President Obama's decision when it came to the health care coverage offered by religious colleges, universities, and charities. The President's offer at this point says that no religious-sponsored institution, such as a college, university, hospital, or charity, will be forced to offer health services that violate their basic principles and values, their religious values. The President goes on to say, though, that the employees of that institution would have the right, on their own initiative, to a service not provided to them under the hospital or university policy that they could secure by going directly to the insurance company. It removes the church-sponsored, religious-sponsored institution from making the initial decision that might run counter to their values but gives the freedom to the individual employee to pursue the health care under the law which they consider to be essential, such as family planning. Some say this is unacceptable. I think it strikes the right balance—the balance between respecting the conscience and religious values of certain institutions while still protecting the freedom of individuals.

There has been a lot of talk in this Presidential campaign about religion, and much of it has come from a former Senator from Pennsylvania. I would like to remind him and those who have not followed it closely that there are exactly three provisions in the U.S. Constitution when it comes to religion. One of them says that we have the freedom of religion, religious belief, which gives us the right to believe what we want to believe or to believe nothing. That is guaranteed under the Constitution. Secondly, the government will not pick a religion. I have heard candidates say we are a Christian nation. No. We are an American nation, which includes many Christians but also others of different religious beliefs, and the Constitution says the government will never pick its religion. The third point that is often overlooked—and I would refer to the Senator from Pennsylvania—it is in the Constitution that there will be no religious test for office. In other words, we could not establish under the law, if anyone cared to, that only Christians or Jewish people could be elected to the Senate or the House. That is strictly unconstitutional.

Those three principles have guided us well, and it is important for us to make sure as we tackle the issues of the day that we apply the principles that have endured. In this circumstance, we have to understand that militant secularization is as intolerant as militant desecularization. We have to try to strike that balance.

I recommend to those who are following my remarks and would like to read more an article that was published in the New York Times on February 24 by Joe Nocera entitled ''A Revolutionary Idea.'' Mr. Nocera is a thoughtful writer, and he traces the history of this. His opening remarks include the following: ''Rick Santorum is John Winthrop''—referring, of course, to Mr. Winthrop who joined with the Puritans in trying to assert that our government needed to stand for puritanical values and beliefs. That debate, which even predates the Constitution, is one that molded our country and makes it what it is today. There emerged from that debate over the Puritans and what they would do a feeling that there had to be a separation between church and state, religious belief and secular administration of our government. That is the debate that continues today.

This generation, regardless of the issue of the day, needs to preserve the same basic values that led to this debate in the early Colonies and ultimately to our constitutional principles. As we find countries all over the world bitterly and violently divided over religion, we need to take care in our generation that we protect the basics. The President's decision when it comes to health care through the insurance policies protects those basic values.

I yield the floor and suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. DURBIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

RECESS

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate stands in recess until 2:15 p.m. today.

Thereupon, the Senate, at 12:31 p.m., recessed until 2:15 p.m. and reassembled when called to order by the Presiding Officer (Mr. WEBB).

Mr. REID. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. REID. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. FRANKEN). Without objection, it is so ordered.

MOVING AHEAD FOR PROGRESS IN THE 21ST CENTURY ACT—Resumed

Mr. REID. Mr. President, would you state the pending business.

The PRESIDING OFFICER. The pending business is S. 1813, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 1813) to reauthorize Federal-aid highway and highway safety construction programs, and for other purposes.

Pending:

Reid amendment No. 1730, of a perfecting nature.

ORDER OF PROCEDURE

Mr. REID. Mr. President, at the beginning of this month—in fact, February 7—I moved to proceed to the surface transportation bill that is before us today—an extremely important bill, a bipartisan bill. This effort has been led by two fine Senators—one quite progressive and the other very conservative—Senators BOXER and INHOFE, the chairman and ranking member of the very important Environment and Public Works Committee. This is a vital job-creating measure. The bill would create and maintain up to 2.8 million jobs.

On February 9, 2 days after I moved to this bill, the Senate voted 85 to 11 to invoke cloture on the motion to proceed. The bill has broad bipartisan support. But immediately after the Senate moved to the bill on February 9, Senator BLUNT asked unanimous consent that it be in order to offer his amendment on contraception and women's health. I was stunned. I couldn't believe this. I said, What is going on here? I objected at the time. I didn't see why this surface transportation jobs bill was the appropriate place for an amendment on contraception and women's health.

But the Republican leader and others on the Republican side of the aisle have made it very clear the Senate is not going to be able to move forward on this important surface transportation bill unless we vote on contraception and women's health. My friend the Republican leader said it on national TV