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See Also

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Response

Politics as Rational Deliberation or Theater: A Response to “Institutional Flip-Flops”

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Introduction

I propose that there are (at least) two ways of thinking about politics. A rough description of one of those ways is that it treats politics as a forum for the rational discussion of alternative policies, which are then chosen in substantial part because of a combination of their rational attractions and their ability to satisfy not-fully rational preferences of political actors (the latter understood capaciously to include both individuals and groups, including interest groups).¹ The other treats politics as a form of theater, in which various actors—*le mot juste*, in this case—take on roles, posture for various imagined and real audiences, and speak lines that fit the theatrical form, without necessarily believing them (just as stage actors do not believe the words they are speaking).²

Professors Posner and Sunstein rather clearly affiliate themselves with the first way of thinking about politics,³ as do I, most of the time. But, I

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1. I must emphasize the word “rough” in the text. Clearly, there is much more to the (roughly) rationalistic view of politics than what I have said in the text.

2. I note that one can find both the rationalistic and the dramaturgical perspectives elsewhere. See, e.g., JOHN MUELLER & MARK G. STEWART, TERROR, SECURITY, AND MONEY: BALANCING THE RISKS, BENEFITS, AND COSTS OF HOMELAND SECURITY 132–58 (2011) (taking the rationalistic perspective on airline security); *Security Theater*, WIKIPEDIA, https://en.wikipedia.org/wiki/Security_theater [<https://perma.cc/P3W7-ZYTG>] (describing the dramaturgical perspective on, among other things, airline security).

3. See generally Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 Texas L. Rev. 485 (2016).

suggest in this Response, our understanding of institutional flip-flops might be advanced to a greater degree by seeing them as a form of political theater. I confess at the outset that I do not put myself forward as an astute—or even as a better-than-average—analyst of the theatrical version of politics. Much of what I have to say in this Response operates within the rationalistic view, though with the aim of showing where Posner and Sunstein fall short in providing a strong account of institutional flip-flops and thereby clearing the ground for something other than a rationalistic interpretation.⁴ I occasionally gesture in the direction of a theatrical analysis, but I do not attempt seriously to lay out that alternative.

Part I of this Comment raises some questions about Posner and Sunstein's evidence on the prevalence of flip-flopping, to provide some reason for thinking that the dramaturgical perspective might have something to offer. Part II examines their discussion of remedies for flip-flopping, which takes the rationalistic perspective, and argues that its quite complex structure similarly suggests that *some* alternative perspective, if not necessarily the dramaturgical one, ought to be added to the discussion. The Conclusion returns to the dramaturgical perspective, focusing not on the prevalence of flip-flopping itself, but on the practice of *charging* political opponents with having engaged in flip-flopping. Restating a theme of the Response as a whole, it suggests that charges of flip-flopping result from the specific circumstances of contemporary U.S. politics, with a hyperpartisan and ideologically polarized party system.

I. Parties Are a They, Not an It

I begin with some questions about the extent to which institutional flip-flops are a real political phenomenon. Posner and Sunstein define institutional flip-flops as “judgments that shift dramatically with changes in the political affiliations and substantive views of those who occupy the offices in question.”⁵ Notably, the subject here—that is, the identification of those who hold those judgments—is unspecified. But I believe the only coherent account would take *individuals* to be the subjects.⁶ That is, an institutional flip-flop occurs when a specific individual's judgments shift dramatically in the specified way.

4. I also try to point out places where Posner and Sunstein qualify their argument in ways consistent with both their rationalistic view of politics and the theatrical one I allude to in this Response.

5. See Sunstein & Posner, *supra* note 3, at 486.

6. See *id.* at 493 (“A Democrat who decries presidential power when the president is a Republican and defends it when the president is Democratic engages in a partisan institutional flip-flop.”).

Posner and Sunstein, though, mostly attribute institutional flip-flops to aggregates—“Republican Senators,” “Democratic Senators,” and the like.⁷ I do not think that they identify a single case of a named individual engaging in an institutional flip-flop, though perhaps some of the sources they cite—most of which also refer to aggregates such as “Republican Senate officials”⁸—might do so. But to take one of their examples, “Republicans objected when the Democrats used reconciliation . . . to pass the Affordable Care Act in 2010. Yet Republicans had used reconciliation fourteen times since 1981 to pass legislation they cared about.”⁹ What happens when we disaggregate “Republicans”? Among other things, we will find out that among the objecting Republicans in 2009 were Lisa Murkowski, who was 24 in 1981,¹⁰ and a slew of Senators born in 1951 and 1952, who were around thirty years old then.¹¹ Now some of them may have been so politically precocious that they would have had views on the use of reconciliation to pass legislation, but frankly I doubt it. So, when *they* objected to the use of reconciliation to pass the Affordable Care Act, they might not have been flip-flopping.¹²

Another example is the “vivid” one that occurred “in 2013 and 2014, when the Senate’s Democratic majority enacted filibuster reform that it vigorously resisted under President Bush.”¹³ Of course the Democratic membership in 2013–2014 overlapped somewhat with that in, say 2007, but there were a fair number of new members who could not have flip-flopped.¹⁴

7. *See, e.g., id.* at 486, 506.

8. *Id.* at 486 n.4.

9. *Id.* at 496–97.

10. *U.S. Senate Roll Call Votes: Vote Summary on Passage of the Bill (H.R. 3590 as Amended)*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00396#top [<http://perma.cc/9ZKM-9QQM>]; *Murkowski, Lisa*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–PRESENT, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=m001153> [<https://perma.cc/CB7A-NNMW?type=source>].

11. *See, e.g., Barrasso, John A.*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–PRESENT, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B001261> [<https://perma.cc/82JJ-F3YP?type=source>]; *Collins, Susan Margaret*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS 1774–PRESENT, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=c001035> [<https://perma.cc/7ARJ-H95N?type=source>]; *Crapo, Michael Dean*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS 1774–PRESENT, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=c000880> [<https://perma.cc/GF9Z-JJ6S?type=source>]; *DeMint, James W.*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS 1774–PRESENT, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=d000595> [<https://perma.cc/T9JS-8YEC?type=source>]; *Wicker, Roger F.*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS 1774–PRESENT, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=w000437> [<https://perma.cc/V6FB-WENZ?type=source>].

12. Of course I’ve taken the cheap route here, and perhaps some of these Senators did support some of the uses of reconciliation at some point after 1981 and before 2010.

13. Posner & Sunstein, *supra* note 3, at 496.

14. The Democratic members of the 113th Senate who were not members of the 109th were Tammy Baldwin, Mark Begich, Michael Bennet, Richard Blumenthal, Cory Booker, Sherrod

And, in general, whenever there is a substantial time-gap between the first vote and the second—as between President Reagan’s actions in Grenada and President George H.W. Bush’s in Panama, and President Obama’s in Libya and Syria¹⁵—the number of individuals who *could* flip-flop is going to be smaller than the aggregate “party majority” at the second time.

A similar problem attends the two surveys Posner and Sunstein conducted. Each survey asked *different* groups of people questions with the relevant political actors flipped.¹⁶ The results of the surveys therefore do not show us that *anyone* actually flip-flopped. I have had trouble figuring this out precisely, and so what follows may be wrong in detail (but not, I think, in gross). I think that what the surveys show is that in any reasonably large group of people there are some who, when asked the two questions posed (about Bush and Obama), might say that Bush acted correctly and Obama wrongly, or vice versa.¹⁷

But, I think, the “might” here is important. I think—again with some misgivings about my own grasp of the point—that to use surveys like these to find out whether people actually flip-flop, you would have to ask respondents first about Bush, then somehow get them to forget their answers (maybe by letting a lot of time pass), and then ask them about Obama. Even that, though, would not help in identifying the incidence of flip-flopping in the real world, because of course the political actors Posner and Sunstein write about do know (or will quickly be reminded of) what they said the last time. For a survey to work, in the sense of getting at the real incidence of flip-flopping, I think it would have to ask the Bush/Obama questions of the

Brown, Ben Cardin, Bob Casey, Christopher Coons, Mo Cowan, Joe Donnelly, Al Franken, Kirsten Gillibrand, Kay Hagan, Martin Heinrich, Heidi Heitkamp, Mazie Hirono, Tim Kaine, Angus King (an Independent who caucused with the Democrats), Amy Klobuchar, Joe Manchin, Edward Markey, Clair McCaskill, Jeff Merkley, Christopher Murphy, Brian Schatz, Jeanne Shaheen, Jon Tester, Mark Udall, Tom Udall, John Walsh, Mark Warner, Elizabeth Warren, and Sheldon Whitehouse. *109th Congress Senate Members*, WASH. POST: U.S. CONGRESS VOTES DATABASE, <http://projects.washingtonpost.com/congress/109/senate/members/> [<http://perma.cc/R9C4-HKMM>]; *113th Congress Senate Members*, WASH. POST: U.S. CONGRESS VOTES DATABASE, <http://projects.washingtonpost.com/congress/113/senate/members/> [<http://perma.cc/3P6B-CEXL>]. I do not know how each of these voted on the filibuster question, but there are enough of them for it to be possible that the “Democratic Party” position changed without any individual Democrat having changed his or her position. (That is not to say that the change in rules could have been adopted without one or more Democrats flip-flopping, because of what I recall to be unanimous Republican opposition to the change—but of course some of the Republicans in 2013–2014 would have flip-flopped from their position in 2007.)

15. Posner & Sunstein, *supra* note 3, at 497.

16. *See id.* at 504–05.

17. I do not have the mathematical skills to work out the precise number (in a survey of four hundred people) who would give the “flip-flop” answers, but I know that there is such a number (and my guess is that it is reasonably small).

same people, and then see how many of them said Bush was right but Obama was wrong. My guess is that the number would be close to zero.¹⁸

And, as Posner and Sunstein acknowledge, there is even more to deflate the incidence of flip-flopping in the real world of politics. That is the problem of distinguishing cases. Here I will begin by discussing two of Posner and Sunstein's examples, reconciliation and signing statements, and then turn to the examples they use to open their Article, the filibuster and recess appointments.

One case is distinguished from another when we can identify differences between them that provide a reasoned basis for treating them differently.¹⁹ Consider, then, distinctions between the use of reconciliation to adopt the Affordable Care Act and its prior uses. I cannot offer myself as an expert in discourse among Republicans, but I have picked up a meme that seems to me relevant. The Affordable Care Act, it is said, is the only major social program adopted on a purely partisan basis, with all its support coming from Democrats and none from Republicans. Take that as a criticism not of the Affordable Care Act but (also) as a criticism of the use of reconciliation, and we have a difference between its use there and prior uses: Past uses did not involve "major" "social" programs, and every time the reconciliation vote attracted cross-aisle support (and opposition).²⁰

As to signing statements, some Democrats argue (I believe) that the *scope* of the claims President Obama has made is generally narrower than that made by President Bush, and that President Obama's broad claims have been made much less frequently than were President Bush's. So, the position taken by these Democrats is that their concern is with frequent broad claims of executive authority made in signing statements, and that they have not flip-flopped at all because President Bush's practice was—with respect to that concern—relevantly different from President Obama's.

Of course what counts as a reasoned basis is itself contestable. To determine whether a person has flip-flopped or is "merely" responding to differences in circumstances we have to set some minimum standard for what counts as a reasonable basis. A tradition dating at least from the early period of American Legal Realism holds that in a large proportion of instances distinctions that are socially recognized as reasonable ones are available to explain why one case is properly decided differently from another apparently

18. *Cf.* Sunstein & Posner, *supra* note 3, at 495 (referring to the possibility that someone might say, "I favor the filibuster under Republican presidents, but not under Democratic presidents" and pointing out that "it is noteworthy that they do not explain themselves in this way In fact they would seem both self-serving and preposterous . . .").

19. Posner and Sunstein refer to "relevant differences." *Id.* at 493. In my formulation the term "reasoned basis" provides content to their term "relevant."

20. At this point I have to note that I have not done the research to confirm the factual claims made in the text about prior uses of reconciliation, but I am reasonably confident that those claims are ballpark correct.

similar one. Disagreement arises over whether the proportion is extremely large, as the more radical Realists held, or “merely” rather large. On either view, though, the bar of “reasonableness” that distinctions must get over is not high.

I infer that Posner and Sunstein (properly, in my view) set the bar rather low.²¹ For that reason, it does not matter that the differences between the use of reconciliation for the Affordable Care Act and prior uses arise because in the past we did not have the kind of hyperpartisanship we have recently experienced (or, put differently, because in the past both parties were coalitions consisting of conservative and moderate Republicans and liberal and moderate Democrats, which made it possible for policies to be adopted with votes from moderates in both parties). Or, at least, I would need an argument to explain why hyperpartisanship means that the “past uses were different” argument does not get over the low bar Posner and Sunstein set.²²

The question of whether some Republicans and Democrats have flip-flopped with respect to the filibuster and recess appointments is a more complex one.²³ Here there may have been some inconsistencies in positions some Senators took, though here too it would help to identify specific

21. My inference is based on their characterization of those who criticize the majority in *Bush v. Gore* for engaging in what they call a “tactical flip-flop” as “unfair, accusatory, and wrong.” Posner & Sunstein, *supra* note 3, at 515. Those to whom they refer make a two-fold argument: First, that the majority adopted a view of the Equal Protection Clause inconsistent with the views of that same Clause taken by the Court’s conservatives both before and after *Bush v. Gore*; and second, that they did so to ensure that a Republican president would have the opportunity to name their successors. The “unfair, accusatory, and wrong” statement refers to the second of these components, but the second makes sense only with the first as a predicate. I have seen accounts purporting to explain the conservatives’ votes on the basis of various concerns, including institutional ones such as those mentioned by Posner and Sunstein and perhaps on the basis of their desire to find some common ground, with some of the Justices thinking the so-called Article II argument was a good one but finding themselves unable to secure a majority for that view. *See id.* at 515–16. But I do not recall seeing a cogent account reconciling the conservatives’ view of the Equal Protection Clause in *Bush v. Gore* with their views in other Equal Protection cases. And, I feel compelled to note, again snarkily, that Justice Scalia’s “defense” of his position is, “Get over it,” which hardly counts as a reasoned account of relevant differences. *See* CNN, *Justice Scalia on Bush vs. Gore*, YOUTUBE (July 18, 2012), <https://www.youtube.com/watch?v=aOqiH-bTXIc> [<https://perma.cc/7GLC-8GU4>] (CNN interview of Justice Scalia); *Cf.* Posner & Sunstein, *supra* note 3, at 491 (“[T]he flip-flop accusation often arises because the person in question fails to explain his or her reasons in an adequate fashion.”).

22. With respect to signing statements, the question would be whether the claim that President Obama’s uses are generally narrower and, when broad, less frequent, is accurate enough to get over the bar of “reasoned distinction.” *But see* Posner & Sunstein, *supra* note 3, at 487 (observing that “several [signing statements] involved contested issues with respect to presidential authority to protect national security.”) (emphasis added).

23. It is “one” question, I believe, because nearly all the discussion of whether the filibuster rule should be changed, or has been appropriately changed, centers on the use of the filibuster to prevent the confirmation of judges and principal officers for whose appointment Senate concurrence is required by the Constitution. The inability to obtain votes on confirmations induced Presidents Bush and Obama to use the recess-appointment power in ways arguably different from the ways it had been used earlier.

Senators whose positions actually changed. My view, though, is that the best explanation for whatever flip-flops there were is best accounted for by an analogue to the Bayesian updating mechanism Posner and Sunstein identify.²⁴ The difficulty, in my view, is that Senators became aware of both the fact of hyperpartisanship and its effects on the policy-making process, including the confirmation process, during the same period that the flip-flops occurred. Hyperpartisanship leads to the breakdown of institutional norms that developed under different institutional conditions, and political actors have to come up with new norms appropriate to the new circumstances.²⁵ Senators were, I think, trying to figure out the set of institutional arrangements appropriate to an era of hyperpartisanship; they were, in some sense, learning and updating their views about the filibuster and the confirmation process. Learning is sometimes messy, with some people adhering to old norms longer than is appropriate, and then having to adjust their views, and others getting too far ahead of the curve, and then having to retract some views they had previously expressed—all within the relatively compressed time-frame in which genuine flip-flops can occur.

The rise of hyperpartisanship suggests another point. Posner and Sunstein write of flip-flops *sub specie aeternitatis*, or at least *sub specie* separation-of-powers systems.²⁶ That is, their rationalistic analysis deals with incentives and audiences of politicians taken generally. But it seems to me worth noting and wondering about the significance of the fact that essentially all of their examples come from the recent past—that is, from the period during which the U.S. party system was undergoing a transformation. It would be interesting to examine whether wither flip-flops or charges of flip-flopping were common during other periods.²⁷ My guess, and it is only that, is that the phenomenon Posner and Sunstein discuss either is confined to the present and the recent past, or is conditioned on some generic characteristics of politics during periods of transition (or, more narrowly, during a period of transition to hyperpartisanship).

In writing the preceding paragraphs, I was reminded of Goya's etching, *The Sleep of Reason Begets Monsters*.²⁸ Hyperpartisanship may be the sleep

24. Posner & Sunstein, *supra* note 3, at 519–23.

25. As a matter of personal privilege, I note that I first developed this analysis in Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004), and it was elaborated upon and modified, with appropriate acknowledgements to that article, in the works cited in Posner & Sunstein, *supra* note 3, at 536 n.186.

26. Conditions in parliamentary systems might be different. Still, I do not recall a literature characterizing Tony Blair as a flip-flopper when he led the Labour Party in a new direction.

27. For example, I wonder whether “Republicans” were charged with flip-flopping when in the early 1950s the party leadership came to terms (at least for a generation) with the New Deal state. In addition, I wonder about the prevalence of flip-flopping and charges thereof during periods when the U.S. party system was reasonably stable.

28. The original Spanish *produce* is sometimes translated as “produces,” sometimes as “brings forth”; I learned it as “begets.”

of reason, and flip-flopping may be the monster it begets. The resonance of the phenomenon of flip-flopping with Goya's evocative phrase leads me to suggest, finally, that thinking about institutional flip-flops in artistic terms may offer an alternative perspective to Posner and Sunstein's rationalistic one. Suppose I am correct in thinking that the actual incidence of flip-flopping, identified as it should be at the individual level, is relatively low. What do the (few) political actors who engage in flip-flops think of themselves (or perhaps better, how should *we* think of them)?

The image I have of these people is that of the charming rogue, who winks at the camera when he behaves in a way transparently inconsistent with how he has previously represented himself to us.²⁹ For an older generation, the model might be Bret Maverick;³⁰ for a younger one, the model might be Dr. King Schultz, the character played by Christoph Waltz in *Django Unchained*.³¹ Institutional flip-floppers may be the charming rogues of politics, and the reasons they offer us are not supposed to be taken seriously, and aren't.

Posner and Sunstein acknowledge the possibility that institutional arguments about flip-flops are "theater or 'cheap talk.'"³² There are, I think, real differences between seeing something as theater—a performance for an audience, designed to entertain or provoke—and seeing it as cheap talk, a term drawn from the rationalistic tradition. Still, Posner and Sunstein do put forth the possibility that the dramaturgical view is helpful.

I hope that the preceding discussion is not taken as an effort to undermine the key insight embodied in "Institutional Flip-Flops." For me, though, that insight is not that institutional flip-flops are common, but rather that *charges* of institutional flip-flopping are. For Posner and Sunstein, charges are common because "real flip-flops occur frequently enough to lend plausibility to accusations of flip-flopping."³³ Similarly, "in [their] view . . . flip-flopping accusations are so common only because the ubiquity of actual flip-flopping makes the accusations credible."³⁴ An alternative view would be that charges of flip-flopping are like the musical interludes in Shakespeare's plays, or like songs and dialogue performed when a theater's curtain is down. They have functions, allowing the audience to take a break from intense action or allowing the crew to change the set behind the curtain.

29. Cf. Posner & Sunstein, *supra* note 3, at 512 (describing "[s]ome tactical flip-flops [as] . . . shameless").

30. *Maverick (TV Series)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Maverick_\(TV_series\)](https://en.wikipedia.org/wiki/Maverick_(TV_series)) [<https://perma.cc/FF4G-DYRQ>].

31. *Django Unchained*, WIKIPEDIA, https://en.wikipedia.org/wiki/Django_Unchained [<https://perma.cc/NW6X-Q5P7>].

32. Posner & Sunstein, *supra* note 3, at 514. In doing so they also describe them as "common," a characterization about which I have raised questions. *Id.*

33. *Id.* at 488–89.

34. *Id.* at 490–91.

These functions derive from the “technology” of theater. Perhaps charges of flip-flopping should be understood not as attempts to engage in the rational consideration of policy options, but as performances for hyperpartisan audiences: Republican and Democratic voters alike get a shiver down their spines when they hear charges that their political adversaries have flip-flopped.³⁵

II. Procedure as a Way Out?

Concluding that flip-flopping is “common,” Posner and Sunstein offer “a way forward,”³⁶ which is an inquiry into optimal institutional design. They suggest two possible goals. One is the development of resilient “rules of the game” in a setting where external enforcement mechanisms are unavailable.³⁷ By “resilient” I mean rules that cannot be displaced by simple tactical maneuvering, including what Posner and Sunstein call “tactical flip-flops”³⁸ (and which seem to me the most interesting sub-category). The other is the development of a procedure that generates a standard by which observers can evaluate the justifications for seeming flip-flops: When we observe a flip-flop, we ask for a justification, which will “[t]ypically” take the form of a behind-the-veil invocation of public values, and “[i]f a consensus emerges about the optimality of a rule, then this is a strong argument in favor of that rule.”³⁹

Their way forward to these goals appears to involve the imposition of some sort of veil of ignorance.⁴⁰ To my eyes, Posner and Sunstein’s

35. The rationalistic explanation might then be that charges of flip-flopping are party-maintaining efforts in an era of hyperpartisanship.

36. *Id.* at 492.

37. *Id.* at 492, 525–26; *see also id.* at 532 (assuming the “absence of legal enforcement”). Posner and Sunstein’s brief discussion of foreign involvement seems to me in some tension with this assumption. *See id.* at 534. The human rights treaties to which they refer incorporated legal enforcement through the judgments of the European Court of Human Rights, and the Privy Council was similarly a body with enforcement power. It seems to me worth noting as well that when nations decided to act in ways arguably inconsistent with their prior commitments (“flip-flopped,” though the time period here is relatively long), the foreign involvement did not deter them. The examples are Hungary after 2010, where moves in an authoritarian direction were met only with statements of disapproval from the Council of Europe, *see generally* Bojan Bugarič, *Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge* (The London Sch. of Econ. and Political Sci. ‘Europe in Question’ Discussion Paper Series, Working Paper No. 79, 2014), <http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper79.pdf> [<https://perma.cc/A96E-5FCB>], and the withdrawal of Caribbean nations from their prior agreement to be subject to Privy Council review, *see generally* Margaret Burnham, *Indigenous Constitutionalism and the Death Penalty: The Case of the Commonwealth Caribbean*, 3 INT’L J. CONST. L. 582 (2005).

38. Posner & Sunstein, *supra* note 3, at 511–16.

39. *Id.* at 531.

40. I write *appears to be* because early in the Article Posner and Sunstein write: The idea of the veil is that if people imagine that they *do not know their party affiliation*, or even many of their interests, they can more easily agree on the institutional norms that would advance the public interest. In many contexts,

presentation of their argument is quite labored, which suggests to me at least some problems at its foundation in the veil-of-ignorance idea.⁴¹ My basic concern is rather simple. The Rawlsian veil of ignorance is quite thick, so to speak: Those engaged in designing a society's basic structure know a fair amount about the laws of nature and about economic theory, but they know almost nothing about themselves. Posner and Sunstein's veil is in contrast (as they acknowledge) quite a bit thinner. But, note what those behind the veil have to know even if they do not know their party affiliation. They must know that they are trying to come up with optimal rules for a nation with a separation-of-powers system, with two legislative houses, one of which has equal representation from permanently defined geographical units and the other which has district-based elections, and in both houses an election rule that awards seats to the plurality winner ("first past the post")—and that, I think, is only the beginning. My concern is that Posner and Sunstein do not motivate their failure to explain why those behind the veil are ignorant of other institutional features, which are—as I have been harping upon—whether the national political parties are internally ideologically diverse or homogeneous and whether, in the latter case, the parties are located at substantially different places on the policy spectrum.⁴²

This matters, I think, because these latter concerns, which I have called hyperpartisanship, strongly affect both whether there can be resilient rules of the game and whether a consensus about the rules of the game is likely to emerge from justifications for flip-flops. I begin my exposition here with the observation that flip-flops are a temporal phenomenon; that is, they occur in real (in front of the veil) time.⁴³ Participants in the practice have to ask themselves, What comes next? Posner and Sunstein allude to one possibility,

however, there is a pervasive problem: If we put ourselves behind such a veil, we might find it exceptionally difficult to identify clear answers to institutional questions.

Id. at 490 (emphasis added). Yet, in outlining their "way forward," Posner and Sunstein describe the "type of veil [they] have in mind" as "[a] politician who considers the merits of a norm . . . should ask herself whether she would support the norm *if she did not know whether she was a Republican or Democrat.*" *Id.* at 527–28 (emphasis added). I forgo attempting to resolve the tension between these two statements.

41. *Cf. id.* at 529 ("In the abstract, it is not simple to provide a disciplined answer to these questions."); *id.* at 531 ("While we recognize these problems with the veil construct, it nonetheless seems to us a useful method for thinking about flip-flops.")

42. To the extent that I can find some allusion to these concerns, it is in a brief passage noting that "[f]lip-flopping . . . is connected to the problem of evaluating ambiguous rules of institutional design . . . in the 'midst' of normal politics." *Id.* at 525 (emphasis added). But, my theme has been that flip-flopping, or charges thereof, is characteristic of either transition periods or periods of hyperpartisanship, neither of which seem to me encompassed in Posner and Sunstein's understanding of "normal" politics.

43. *Cf. id.* at 528–29 ("On this view, the veil of ignorance is unhelpful It might follow that the use of a veil of ignorance is helpful only if we benefit from having a degree of (unrealistic?) agnosticism about the future electoral success of the parties and also about which party is correct on the merits.")

which is that disaster comes next if one's political opponents take power.⁴⁴ I doubt, though, that consensus could emerge based on "appeal[s] to public values rather than to the agent's self-interest,"⁴⁵ because in these circumstances the agent's self-interest is—on the agent's view—identical to "true" public values. Democrats will want the filibuster if there is a real chance that Republicans will take power and produce disastrous outcomes, and will not want it if they believe that they will hold power; and similarly, with the appropriate modifications, for Republicans.

I can put the point somewhat differently, though I think it is the same one. Return to the world before hyperpartisanship. We saw in the United States the development of a resilient set of rules for such a world, because partisans in both parties understood that there was a real possibility that, though they occupied relevant positions of power today, they might not do so tomorrow.⁴⁶ The conditions of politics had the effect of placing them behind Posner and Sunstein's thin veil. In contrast, I believe that in a hyperpartisan world, members of both parties expect that in the relatively near future they will decisively and permanently win office even though they have not yet done so.⁴⁷ Once (if) that future emerges, another resilient set of rules will emerge.⁴⁸ But, until it does, the rules will not be resilient because hyperpartisans will make tactical use of institutional norms.

Finally, a brief note on how rules and norms can be resilient in a world without legal enforcement: Posner and Sunstein list several mechanisms. Reputation depends on "enforcement" via disapproval and withdrawal of support for those who engage in flip-flops. Flip-flops lead to a loss of credibility, which makes "people" more reluctant to support the flip-flopper in the future.⁴⁹ The key point here lies in identifying the "people" who impose the reputational sanction. In a hyperpartisan world, political actors interact only with co-partisans—and, where flip-flops are tactical, to gain partisan advantage, roughly speaking *everyone* the politician cares about will flip-flop, as is suggested by Posner and Sunstein's aggregation of individuals into parties. In such a world there is no reputational sanction for flip-flopping.

The audience in public opinion, of course, is the public—but perhaps only a segment thereof. Posner and Sunstein note the possibility that the

44. *See id.* at 495–96 (discussing the appropriate behavior when existing norms will "lead to extremely bad outcomes.").

45. *Id.* at 531.

46. *See id.* at 514 ("A current majority is aware that if it adopts rules that greatly weaken the authority of the current minority, it might itself be disempowered in the future.").

47. Posner and Sunstein discuss one aspect of this with respect to what they call feasibility, which is, I think, related to what I have been calling resilience. *Id.* at 530.

48. To use Posner and Sunstein's examples, in such a world there would be no filibuster and presidential power would be expansive. *See id.* at 486–87.

49. *Id.* at 532.

(general) public has no views about institutional matters independent of its views about the underlying substance. In addition, hyperpartisan politicians care almost exclusively about co-partisans among the public, just as they care almost exclusively about their co-partisans in the House or Senate. In a hyperpartisan world, I doubt that general public opinion—and in particular the opinion of those who make or attend to charges of flip-flopping—exercises substantial constraint.

Conclusion: The Theater of Flip-Flopping

I have raised questions about the extent to which flip-flopping actually occurs. I do not doubt, though, that claims that someone, always someone on the other side of the partisan divide, has flip-flopped are reasonably common. Posner and Sunstein suggest that “politicians try to avoid the ‘flip-flopper’ label,”⁵⁰ although once we individualize the analysis, take relevant distinctions into account, and allow the charge to be dismissed if the circumstances indicate learning, it is not clear to me that many politicians really think that the label is bothersome. I suspect, instead, that politicians treat charges of flip-flopping as just another piece of political theater—a set piece that one’s opponents will trot out when it seems to them useful—much like the characterization of pro-choice politicians as baby-killers and pro-life politicians as engaged in a war on women.

For me, then, the interesting question on which Posner and Sunstein’s analysis sheds light is the prevalence of charges of flip-flopping. I have suggested that such charges have proliferated because the U.S. party system has become, or is in the process of becoming, different from what it was a few decades ago. Where the party system is hyperpartisan and ideologically polarized, I suspect that political communication occurs almost exclusively within partisan communities.⁵¹ One charges political opponents with flip-flopping, and the opponents basically do not care because no one to whom they appeal is listening to the charges anyway, or, if listening, cares about the charges.⁵²

50. *Id.* at 534.

51. I am reasonably sure that there is evidence of this, although I am also sure that the evidence is more ambiguous than I would like. The standard citation for polarization of political communication in modern media is Eszter Hargittai et al., *Cross-Ideological Discussions Among Conservative and Liberal Bloggers*, 134 *PUB. CHOICE* 67 (2008).

52. It would be interesting, I think, to supplement Posner and Sunstein’s analysis with an examination of the prevalence of claims that political journalists have engaged in “gotcha” political rhetoric, a term that treats making charges of flip-flopping as a disreputable practice. For a recent discussion by a political journalist, see Mark Leibovich, *Crying ‘Gotcha,’* *N.Y. TIMES MAG.* (May 5, 2015), http://www.nytimes.com/2015/05/10/magazine/crying-gotcha.html?_r=0 [<http://perma.cc/2L64-YC3M?type=live>]. Leibovich writes:

Crying “gotcha” has now become like crying wolf. The term has been cheapened by overuse. It’s one thing for a candidate or campaign to complain that certain questions are either distracting or not relevant. But it’s another thing to conclude, just by

Why, then, do charges of flip-flopping occur? I have suggested that the answer is not that the charges occur because flip-flopping occurs often enough to be a matter of political concern but because charging an opponent with flip-flopping is one of the rhetorics of contemporary politics. Posner and Sunstein's illuminating account of flip-flopping opens the way to a different perspective on politics today. They might reject my suggestion that taking a dramaturgical perspective might be analytically valuable. And, I suspect, they would be dismayed at characterizing (contemporary) politics as no more than political theater. As am I, most of the time. But perhaps the remedy for flip-flopping and charges thereof will emerge from thinking about hyperpartisanship and what can be done about it. I suspect that the way out does not lie in procedures or rules, but in a substantive change in our politics. The prospects for that, I confess, with no little regret, seem rather slim today. So perhaps we should say, with Justice Scalia, "Get over it."⁵³

labeling something "gotcha," that the person raising the question is preoccupied with a matter the American people simply do not care about. How do we know the American people don't care? Because the candidate knows and has said so.

Id. This seems to me relevant to the discussion of flip-flopping as well. (I do not offer this citation to suggest that I have done a serious examination of the phenomenon of decrying gotcha politics; it turned up on the first page of the results of a Google search on "gotcha politics.")

53. See *Justice Scalia on Bush vs. Gore*, *supra* note 21.