Workarounds in American Public Law

Daniel A. Farber,[*] Jonathan S. Gould[**] & Matthew C. Stephenson[***]

A workaround is a maneuver that seems consistent on its face with the formal rules but employs those rules in an unanticipated way to circumvent a legal obstacle. Though some workarounds are tolerated or even celebrated, workarounds (and proposed workarounds) often provoke instinctive skepticism or hostility. When, if ever, is such skepticism justified? Do workarounds raise distinctive legal or public policy concerns? This Article seeks to provide a systematic normative assessment of workarounds in American public law.

We argue, first, that when framed as a question of public welfare, the desirability of a workaround depends primarily on the desirability of the rule that is being worked around. Put simply, workarounds will typically advance the public interest when the legal obstacle being worked around does more harm than good, while workarounds will set back the public interest when the obstacle being worked around serves an important public purpose. Other objections to workarounds—for example, that they will erode government legitimacy, weaken norms of self-restraint, undermine the credibility of government commitments, or sap energy for more substantial reforms—are either empirically implausible or relatively insignificant when compared to the first-order question of whether the obstacle being circumvented is itself in the public interest.

Questions concerning the legality *of workarounds raise different issues. While adjudicators who emphasize the primacy of legal text should have no intrinsic objections to workarounds as such, adjudicators who place significant weight on fidelity to the purposes or functions of legal rules (or rule systems) should embrace an anti-workaround presumption. But this*

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* Sho Sato Professor of Law, University of California, Berkeley.

** Class of 1965 Professor of Law, University of California, Berkeley.

*** Henry L. Shattuck Professor of Law, Harvard Law School. We are grateful to Curtis Bradley, Guy-Uriel Charles, Erwin Chemerinsky, Christopher Edley, Benjamin Eidelson, Einer Elhauge, Richard Fallon, Daniel Hemel, Howell Jackson, Louis Kaplow, Randall Kennedy, Orin Kerr, Michael Klarman, Daryl Levinson, Sandy Levinson, Katerina Linos, David Pozen, Sai Prakash, Daphna Renan, Andrea Roth, Fred Schauer, Hannah Shaffer, Steven Shavell, Kenneth Shepsle, Ganesh Sitaraman, Mark Tushnet, and workshop participants at Berkeley, Chicago, and Harvard for helpful comments.

presumption can and should be overcome in certain cases. Most significantly—and perhaps most controversially—we argue that the anti-workaround presumption should give way when the obstacle that the challenged workaround would sidestep is itself inconsistent with the larger purposes of the rule system. The question should not be whether the alleged workaround, viewed in isolation, is inconsistent with the purposes of the relevant rules, but whether the combination of obstacle and workaround, considered together, is more inconsistent with the purposes of those rules than the obstacle standing alone. Therefore, even strong purposivists might embrace certain workarounds—including workarounds to the Senate filibuster and the Electoral College.

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Introduction

Political actors who seek to change the law are often stymied by restrictive legal rules. The Constitution requires that statutes pass through bicameralism and presentment,[1] that international treaties be approved by two-thirds of the Senate,[2] and that presidential appointments of judges and

1. U.S. CONST. art. I, § 7, cl. 2.
2. *Id.* art. II, § 2, cl. 2.

principal government officers receive Senate consent.[3] The Senate filibuster creates a de facto supermajority rule for ordinary legislation, and formal changes to the filibuster rule can themselves be filibustered.[4] Administrative agencies must comply with statutory requirements, such as the notice-and-comment process laid out by the Administrative Procedure Act (APA),[5] before they can issue binding regulations.[6] Amendments to the Constitution must comply with Article V's demanding requirement of ratification by three-fourths of the states.[7] In short, on issues large and small, obstacles found in the Constitution, statutes, or cameral rules can make it difficult for political actors to achieve their objectives.

When confronted with such an obstacle, proponents of a legal or policy change have four options. First, they can stick with the standard channels and abide by the associated requirements. Doing so, however, means that the advocates of the legal or policy change may not be able to accomplish their goals—the obstacle may be insurmountable—or can do so only by making unpalatable concessions. A second possible response is to weaken or eliminate the obstacle by formally changing the rules. But this can often be quite difficult and is sometimes practically impossible. Third, political actors may simply disregard an inconvenient requirement—perhaps with some fig-leaf pretext, but without any serious argument that their noncompliance is lawful. This does happen sometimes, but brazen disregard for the formal rules is rare and generally disfavored, at least in the contemporary United States.

Then there is a fourth option: Proponents of a legal or policy change can circumvent the seemingly insurmountable obstacle by employing some maneuver—a "workaround"—that makes it possible to accomplish their desired objective without meeting the conventional requirements.[8] Such a maneuver often entails making use of what critics might pejoratively describe as a "loophole" or "technicality" to accomplish a result that those who enacted the relevant rules did not foresee or intend. Importantly, the maneuver involves avoiding one rule by deploying a second rule in a way that seems like a contrivance that is inconsistent with that second rule's purpose. To illustrate, consider two examples, one a controversial proposal

3. *Id.*

4. STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, R. XXII(2), at 16 (2013).

5. 5 U.S.C. §§ 551–559, 701–706.

6. *Id.* § 553.

7. U.S. CONST. art. V.

8. *See* KENNETH A. SHEPSLE, RULE BREAKING AND POLITICAL IMAGINATION 5 (2017) (describing as acts of "political imagination" those "resourceful tactic[s] to 'undo' a rule by creating a path around it without necessarily defying it," and contrasting these acts of imagination with outright rule-breaking).

for addressing a recurring public policy crisis, the other a prosaic piece of standard congressional operating procedure.

The first example involves the statute that caps the amount that the federal government can lawfully borrow—the so-called debt ceiling.[9] Congress routinely directs government expenditures that exceed the government's revenue by an amount greater than this borrowing limit. Congress can solve this problem by passing a resolution that raises the debt ceiling. But if Congress does not do so, the government may risk default, which would have catastrophic economic consequences. In recent years, congressional Republicans have regularly threatened not to raise the debt ceiling unless Democrats make significant policy concessions, some of them only tenuously related to fiscal matters.[10] So far, these confrontations have been resolved through negotiation, but there is no guarantee that this will always occur.[11] Indeed, in one recent confrontation over the debt ceiling, the government came perilously close to hitting the borrowing limit.[12] In frustration with this recurring brinksmanship, experts have proposed ways that the U.S. Treasury could continue to pay its debts without securing a debt ceiling increase through the legislative process.[13] Perhaps the most startling proposal is that the Treasury mint one or more trillion-dollar platinum coins and deposit them in the government's account at the Federal Reserve.[14] This proposal relies on a statute that authorizes the Secretary of the Treasury to mint platinum coins of any "denominations . . . in the Secretary's discretion."[15] That provision was not intended to have any connection to the debt ceiling issue; it was supposed to benefit coin collectors by enabling the Treasury to mint collectible platinum coins in smaller denominations than had previously been authorized.[16] But the law's wording imposes no such

9. *See* 31 U.S.C. § 3101 (setting out the public debt limit).

10. *E.g.*, Jim Tankersley, *America's Need to Pay Its Bills Has Spawned a Political Game*, N.Y. TIMES (Oct. 6, 2021), https://www.nytimes.com/2021/09/26/business/economy/america-debt-limit-political-game.html [https://perma.cc/F7VJ-SZBU].

11. *See, e.g.*, Michael D. Shear, *Biden Signs Fiscal Responsibility Act in End to Debt Limit Crisis*, N.Y. TIMES (June 3, 2023), https://www.nytimes.com/2023/06/03/us/politics/biden-debt-bill.html [https://perma.cc/ZL2J-Y5MW] (noting, with respect to the 2023 debt ceiling agreement, that "[n]egotiations to reach that agreement seemed unlikely to succeed at times").

12. *See id.* (noting the legislative resolution "came just two days before the so-called X-date, when . . . the government would run out of cash to pay its debts").

13. *See* Paul Krugman, Opinion, *A Few Ways Out of the Debt Ceiling Mess*, N.Y. TIMES (Apr. 18, 2023), https://www.nytimes.com/2023/04/18/opinion/debt-ceiling-republicans.html [https://perma.cc/49AU-58ZJ] (discussing various possible ways of circumventing the debt ceiling).

14. *See id.* (discussing this possibility).

15. 31 U.S.C. § 5112(k).

16. Janet Nguyen, *Could We Mint a $31 Trillion Coin to Pay the National Debt?*, MARKETPLACE (May 12, 2023), https://www.marketplace.org/2023/05/12/could-we-mint-31-trillion-coin-pay-national-debt/ [https://perma.cc/8L3S-LV38].

limit.[17] So, the argument goes, this obscure statute intended to benefit coin collectors could provide the Treasury Department with a way to circumvent the debt ceiling law. This and other debt ceiling workarounds remain unused and therefore untested. But they will likely continue to attract periodic attention, each time there is a risk of hitting the debt ceiling.[18]

The proposal to mint trillion-dollar coins to get around the debt ceiling has generated significant commentary, with reactions ranging from enthusiasm to skepticism to mockery.[19] But other workarounds fly under the radar, to the point that they have come to be seen as routine and unremarkable. Consider the Constitution's Origination Clause, which requires that all revenue-raising bills originate in the House of Representatives.[20] Although today this clause is rather obscure and rarely discussed, the Constitution's Framers saw the Origination Clause as serving an important function. Many delegates to the Constitutional Convention believed that the power of the purse should rest with the House, because the House is the more representative chamber.[21] The Origination Clause was also a concession to delegates from large states who were unhappy with the decision to give all states equal representation in the Senate.[22] The Origination Clause, as originally conceived, was supposed to be an important limit on the Senate's power. But in practice, the Senate regularly circumvents the Origination Clause using what is sometimes referred to as the "shell bill"

17. *See* Ryan Cooper, *Harvard Law School Professor Laurence Tribe on the Legality of #mintthecoin*, WASH. MONTHLY (Jan. 8, 2013), https://washingtonmonthly.com/2013/01/08/harvard-law-school-professor-laurence-tribe-on-the-legality-of-mintthecoin/ [https://perma.cc/J2V2-BNPT] (quoting Professor Tribe's view that "the plain language that Congress used . . . clearly does authorize the issuance of trillion-dollar coins"); Ezra Klein, *Former Head of U.S. Mint: The Platinum Coin Option Would Work*, WASH. POST (Jan. 8, 2013, 2:37 PM), https://www.washingtonpost.com/news/wonk/wp/2013/01/08/former-head-of-u-s-mint-the-platinum-coin-option-would-work [https://perma.cc/YUB3-U254] (reporting arguments for the legality of the coin gambit by a former U.S. Mint director and Treasury chief of staff). *But see* Neil H. Buchanan & Michael C. Dorf, *The So-Called Platinum Coin Option Is Illegal, Even on Its Own Terms*, VERDICT (Apr. 17, 2023), https://verdict.justia.com/2023/04/17/the-so-called-platinum-coin-option-is-illegal-even-on-its-own-terms [https://perma.cc/5J7H-373M] (arguing that the coin gambit is unlawful).

18. *See* Jim Tankersley & Alan Rappeport, *New Details in Debt Limit Deal: Where $136 Billion in Cuts Will Come From*, N.Y. TIMES (June 2, 2023), https://www.nytimes.com/2023/05/29/us/politics/debt-ceiling-agreement.html [https://perma.cc/KN2M-MPWX] (noting that the 2023 legislation "kick[s] the next potential fight over the nation's debt load to 2025").

19. *See, e.g.*, Peter Coy, Opinion, *What a Trillion-Dollar Coin Can Teach Us*, N.Y. TIMES (Oct. 6, 2021), https://www.nytimes.com/2021/10/06/opinion/trillion-dollar-coin.html [https://perma.cc/C4CK-CD48] (discussing various reactions to the proposal).

20. U.S. CONST. art. I, § 7, cl. 1.

21. *See* Rebecca M. Kysar, *The 'Shell Bill' Game: Avoidance and the Origination Clause*, 91 WASH. U. L. REV. 659, 667 (2014) (describing the hope that "the House would design revenue policy in a manner that was closest to the people's wishes").

22. *See id.* at 666 (noting that "[d]elegates from large states invoked the power to originate revenue bills in the lower house as a counterweight to the powers of the Senate").

workaround: The Senate takes up a bill that originated in the House and then amends that bill by striking out its entire text and replacing that text with revenue-raising provisions. Technically, the resulting bill does not violate the Origination Clause because the bill "originated" in the House, and there is no constitutional or cameral rule that prevents the Senate from amending a House bill however it wants.[23]

Though these two examples may seem worlds apart, they both involve the use (or proposed use) of a workaround. And these are not isolated anomalies. Workarounds and proposed workarounds are pervasive features of American law and politics. Sometimes they are viewed as unremarkable if inelegant fixes for inconvenient design flaws—essentially legal "kludges."[24] Sometimes they are celebrated as creative, ingenious solutions to seemingly intractable governance problems.[25] But they often provoke skepticism or hostility. To call something a "workaround" is often (though not always) to question its legitimacy.[26]

A nice illustration of the ambivalence and ambiguity regarding the normative valence of workarounds (both the phenomenon and the term) concerns the legal and political controversy over the decision by the Occupational Safety and Health Administration (OSHA), acting on President Biden's instructions, to issue a workplace safety rule that obligated large employers to require their employees to either get a Covid-19 vaccine or undergo weekly testing.[27] Many public health experts, both inside and outside the administration, favored a nationwide vaccine mandate, but there were questions about whether such a mandate would be lawful, and in any event legislating a federal vaccine mandate was a political non-starter given opposition in Congress. While OSHA was in the process of developing its

23. *See id.* at 661 (describing the frequent use of this tactic).

24. "Kludge" is computer programming or engineering slang for a haphazard or makeshift solution to a problem; the term has been appropriated in institutional and policy analysis to describe similar sorts of jury-rigged solutions to legal or regulatory gaps or inefficiencies. Steven M. Teles, *Kludgeocracy in America*, NAT'L AFFS., Fall 2013, at 97, 98.

25. *See, e.g.*, Sanford Levinson & Jack M. Balkin, *Democracy and Dysfunction: An Exchange*, 50 IND. L. REV. 281, 292 (2016) (Balkin) (suggesting, optimistically, that undemocratic "features of the system that seem hard-wired, like the Electoral College, can be worked around . . . [f]or example, . . . through an interstate compact"); *see also id.* at 302–03 (Levinson) (expressing more pessimism that the design flaws of the U.S. constitutional system can be adequately addressed "by ingenious (or ingenuous) 'workarounds' of the more dismal features of the system").

26. In a different context (that of providing health care to undocumented immigrants), Nancy Berlinger notes that the term "workaround" may sometimes have positive connotations—that of finding creative, efficiency-enhancing ways to "get[] the job done" or solve problems—but may also have negative connotations, such as "cheating" or stretching the truth. Nancy Berlinger, *"Getting Creative": From Workarounds to Sustainable Solutions for Immigrant Health Care*, 47 J.L. MED. & ETHICS 409, 409 (2019). As she observes, "[l]anguage alluding to workarounds reveals moral intuitions: knowing a 'shortcut' suggests confidence, 'cutting corners' suggests unease." *Id.*

27. COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov. 5, 2021) (codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926, 1928).

vaccine-or-test rule, White House Chief of Staff Ron Klain reposted on social media a journalist's characterization of this rule as "the ultimate work-around for the [f]ederal gov[ernment] to require vaccinations."[28] Klain did not appear to view the "workaround" descriptor as pejorative; rather, his post implied that, by pursuing this workaround, the Administration had found a creative solution to a pressing problem. But opponents seized on Klain's post—and in particular its use of the term "workaround"—as an admission that there was something illegitimate about OSHA's proposed rule.[29] Senator Ted Cruz (R-TX), for example, declared that Klain's post "said the quiet part out loud," and amounted to an admission that OSHA was attempting to do something illegal.[30]

Many courts seem to share this instinctive skepticism of workarounds. In ruling against the legality of OSHA's vaccine-or-test rule, for example, the Fifth Circuit cited Klain's post as evidence that OSHA's stated rationale for the rule was "pretextual."[31] And though the Supreme Court opinion invalidating the rule did not explicitly cite Klain's post,[32] Chief Justice Roberts raised the workaround point—apparently as a concern—in oral argument,[33] and Justice Gorsuch's concurrence disparagingly referred to OSHA's rule as a "legislative 'work-around.'"[34] This case is not unique: In numerous other decisions invalidating an agency's assertion of statutory authority, courts have pointed to the fact that the agency pursued the rule after failed legislative efforts to accomplish a similar policy result.[35]

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28. Edmund DeMarche, *White House's Ron Klain Panned for Retweeting Post on 'Ultimate Work-Around' for Federal Vaccine Mandate*, FOX NEWS (Sept. 10, 2021, 2:28 AM), https://www.foxnews.com/politics/klain-vaccine-coronvirus-mandate [https://perma.cc/4RJP-QY86].

29. *Id.*

30. *Id.*

31. BST Holdings, L.L.C. v. OSHA, 17 F.4th 604, 614 & n.18 (5th Cir. 2021); *see also id.* at 612 ("[T]he Administration pored over the U.S. Code in search of authority, or a 'work-around,' for imposing a national vaccine mandate." (footnote omitted)).

32. Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661 (2022).

33. *See* Amy Davidson Sorkin, *Vaccine Mandates Have a Bad Day at the Supreme Court*, NEW YORKER (Jan. 8, 2022), https://www.newyorker.com/news/daily-comment/vaccine-mandates-have-a-bad-day-at-the-supreme-court [https://perma.cc/G2NS-8H34] (quoting Chief Justice John Roberts).

34. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 668 (Gorsuch, J., concurring) (quoting *BST Holdings*, 17 F.4th at 612).

35. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022) (noting, in invalidating the Clean Power Plan rule, that "Congress considered and rejected" legislation that would have created a cap-and-trade program for carbon (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 144 (2000))); Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2490 (2021) (noting, in invalidating a Covid-19 eviction moratorium rule, that "Congress was on notice that a further extension [of the moratorium] would almost surely require new legislation, yet it failed to act in the several weeks leading up to the moratorium's expiration").

Judicial skepticism of workarounds appears in other contexts as well. For example, in the separation of powers domain, the Supreme Court has at times rejected efforts to circumvent the Constitution's structural requirements.[36] Yet this judicial skepticism of workarounds is not universal. There are also cases in which the Court has upheld apparent workarounds, using language implying that a challenged maneuver's status as a workaround is irrelevant to its legal validity. For example, in upholding Congress's use of its spending power to circumvent limits on its other enumerated powers, the Court declared that there is not "a [constitutional] prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly."[37]

While workarounds have always been a part of the American policymaking repertoire, it seems likely that their use, and controversies over their use, will continue to increase. The unusually cumbersome federal lawmaking process, coupled with political polarization, makes it ever more likely that frustrated political actors will search for and deploy workarounds to achieve their objectives, and that these initiatives will be met with condemnation—and legal challenges—from opponents. For that reason, thinking clearly and systematically about the normative questions that workarounds raise is crucial. Yet while many *individual* workaround proposals have attracted scholarly attention and public debate, there has been less attention to public law workarounds *as a category*, even though many of the objections to workarounds, and many of the responses to those objections, are more general.

This Article seeks to fill this gap by considering the central normative questions regarding the desirability and legitimacy of employing public law workarounds.[38] The use of workarounds (and anxiety about workarounds) is

36. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 946–47 (1983) (rejecting arguments in favor of the legislative veto in part by noting that "[p]resentment to the President and the Presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented"); Clinton v. City of New York, 524 U.S. 417, 444 (1998) (rejecting formalist arguments in favor of the line-item veto, finding that "cancellations pursuant to the Line Item Veto Act are the functional equivalent of partial repeals of Acts of Congress that fail to satisfy Article I, § 7"). The Court has likewise expressed worry that broadly reading Congress's Fourteenth Amendment enforcement power could "effectively circumvent the difficult and detailed amendment process contained in Article V." City of Boerne v. Flores, 521 U.S. 507, 529 (1997).

37. South Dakota v. Dole, 483 U.S. 203, 210 (1987).

38. The closest work to our own in legal scholarship is a short essay by Mark Tushnet. *See* Mark Tushnet, *Constitutional Workarounds*, 87 TEXAS L. REV. 1499 (2009). We build on Professor Tushnet's contribution in several ways, including by considering workarounds outside the constitutional context and, more importantly, by providing a more in-depth exploration of the normative issues that workarounds raise. *See infra* Parts II–III. Other legal scholarship has touched on related ideas as well. *See, e.g.*, RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION 48–49, 204, 231–32, 350 (2014) (discussing and defending an "anticircumvention" principle in constitutional law); Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in*

commonplace in many areas of law and life, including statutory interpretation,[39] tax law,[40] trade law,[41] criminal justice,[42] religious law,[43] and

Constitutional Law, 2012 UTAH L. REV. 1773 (2012) (describing "anti-evasion doctrines" in constitutional law); Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 480 (2015) (observing "the ways motivated parties avoid the dictates of public law by resorting to legally permissible means of accomplishing ends that public law intends to prohibit"); David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 8 (2014) (examining when separation of powers disputes should be viewed as "efforts to enforce constitutional settlements rather than to circumvent them"). Some legal scholars have also examined workarounds in the context of other nations' constitutions. *See, e.g.*, Robert E. Hawkins, *Constitutional Workarounds: Senate Reform and Other Examples*, 89 CAN. BAR REV. 513 (2010) (Canadian constitutional law). Outside of legal scholarship, the political scientist Kenneth Shepsle has developed ideas related to our concept of workarounds, primarily in the context of circumvention of rules within legislative institutions. *See generally* SHEPSLE, *supra* note 8.

There is also a robust literature on the somewhat related concept of "legal fictions," which generally involve characterizing the *facts* of a case in such a way as to get around an inconvenient legal requirement that would otherwise produce unjust results. *See generally* LON L. FULLER, LEGAL FICTIONS (1967); LEGAL FICTIONS IN THEORY AND PRACTICE (Maksymilian Del Mar & William Twining eds., 2015). Legal fictions could be characterized as "workarounds" of a sort, in that they provide judges with a means of sidestepping seemingly rigid formal rules. But legal fictions are quite different from the sorts of workarounds that are the focus of our discussion here. Perhaps most importantly, a classic legal fiction involves getting around the literal formal rules by recharacterizing key facts; in contrast, our focus is on workarounds that, at least on their face, are consistent with the formal rules without any resort to fictitious recharacterizations of key facts. Additionally, legal fictions are typically tools adopted by judges seeking to justify a legal conclusion in the context of deciding a case; our focus, by contrast, is on workarounds deployed by actors seeking to effect changes in legislative or executive branch policy. So, the literature on legal fictions, while perhaps related at a very general level, is not directly relevant to the phenomenon we investigate here.

39. *See, e.g.*, Garland v. Cargill, 144 S. Ct. 1613, 1634 (2024) (Sotomayor, J., dissenting) ("This Court has repeatedly avoided interpretations of a statute that would facilitate its ready 'evasion' or 'enable offenders to elude its provisions in the most easy manner.'" (quoting The Emily & The Caroline, 22 U.S. (9 Wheat.) 381, 389–90 (1824))); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 63 (2012) (describing a "presumption against ineffectiveness" as an interpretive method that "ensures that a text's manifest purpose is furthered, not hindered").

40. *See, e.g.*, Heather M. Field, *A Taxonomy for Tax Loopholes*, 55 HOUS. L. REV. 545 (2018) (cataloging various tax loopholes).

41. *See, e.g.*, YANNING YU, CIRCUMVENTION AND ANTI-CIRCUMVENTION MEASURES: THE IMPACT OF ANTI-DUMPING PRACTICE IN INTERNATIONAL TRADE (2008) (examining anti-circumvention measures in trade law).

42. *See, e.g.*, William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 803 (2006) ("Prosecutors treat laws defining crimes and sentences as bargaining chips, while legislators liberally supply the chips. Together, they nullify most of the law of criminal procedure and change the character of the substantive law of crimes and sentences.").

43. *See, e.g.*, DANIEL Z. FELDMAN, LETTER AND SPIRIT: EVASION, AVOIDANCE, AND WORKAROUNDS IN THE HALAKHIC SYSTEM (2024) (discussing loopholes in Jewish law); ELANA STEIN HAIN, CIRCUMVENTING THE LAW: RABBINIC PERSPECTIVES ON LOOPHOLES AND LEGAL INTEGRITY (2024) (same).

even professional sports.[44] But workarounds implicate distinctive normative issues in the context of public law—the legal rules that regulate the powers of government entities and public officials—and those issues are our focus here.

The remainder of the Article proceeds as follows. Part I offers a definition of a "workaround" and provides several examples of workarounds that have been used, or proposed, in various public law contexts. We then turn to the normative questions at the heart of the paper. Part II considers the question of whether workarounds are desirable from a more general "public interest" perspective, focusing on the consequences for public welfare. We argue that, from a consequentialist perspective, the most important factor in evaluating workarounds is whether the constraint being worked around tends to produce desirable effects. If it does, then a workaround will generally be undesirable. Conversely, if a legal rule produces undesirable effects, a workaround will generally be a welcome corrective. We also explore various indirect effects of workarounds—such as possible adverse effects of workarounds on government legitimacy, norms of political self-restraint, the credibility of government commitments, and political support for institutional reform. We conclude that while those adverse consequences are possible, they rarely have much real-world significance. From the standpoint of the public interest, then, workarounds will generally be desirable if (and only if) the obstacle being worked around functions as a hindrance to good policy or good governance.

Part III turns to the related but distinct question of how adjudicators, such as courts, should evaluate legal challenges to alleged workarounds. A strict formalist, we contend, should not care (as a legal matter) whether a challenged maneuver is a workaround. Indeed, for strict formalists, the category of "workaround" may be empty or incoherent: Either a maneuver is consistent with the relevant legal texts read in their linguistic context (and thus lawful), or it is not (and thus unlawful). But the analysis is different for adjudicators who embrace a more functionalist or purposivist approach, or a looser version of formalism that incorporates more capacious forms of structural or contextual inference. Adjudicators who believe that legal rules should be interpreted in ways that advance their underlying purposes, and that the rules that structure a lawmaking system should be interpreted so as to help that system function as intended, should treat workarounds with presumptive skepticism. But, crucially, there are several situations in which this anti-workaround presumption should be overcome. Perhaps most importantly, if the obstacle that a workaround circumvents is itself an

44. *See, e.g.*, MITCHELL N. BERMAN & RICHARD D. FRIEDMAN, THE JURISPRUDENCE OF SPORT: SPORTS AND GAMES AS LEGAL SYSTEMS 479–85 (2021) (discussing loopholes in sports and describing them as a form of "cheating within the rules"); *see also id.* at 485–502 (discussing related issues of deception and stalling).

anachronism or a contrived formalism, or has ceased to perform its original function due to systematic misuse—in other words, if the obstacle in question impedes rather than furthers the larger purposes of the institutional scheme—then a purposivist adjudicator need not and should not view the workaround as objectionable. Such adjudicators should ask not whether the alleged workaround, considered in isolation, deviates from the purpose of legal rules or the expectations of their designers, but rather should ask whether allowing the workaround would produce a greater deviation from how the system is supposed to function than would leaving the unworked-around obstacle in place. Therefore, even some strong purposivists might properly approve of some of the most contentious workarounds in contemporary politics—including workarounds to the Senate filibuster and the Electoral College.

I. What Is a Workaround?

A. Defining Workarounds

Our definition of a "workaround" takes as its starting point a setting in which political actors find it impossible, too costly, or otherwise undesirable to accomplish a legal or policy change through the conventional process. In this setting, a "workaround" is an alternative course of action that:

> (1) is adopted in order to accomplish an objective (or something very close) when some obstacle (such as a procedural or jurisdictional requirement) forecloses the most obvious or typical means for accomplishing that objective;
>
> (2) appears to be formally legal (or, at least, a plausible argument can be made for its formal legality); and
>
> (3) makes use of procedural mechanisms or sources of substantive authority in a way that is discordant with the best or most natural understanding of the purposes of those mechanisms or sources of authority.

While we think this is a useful working definition of the concept we want to discuss—one that fairly captures what most people understand the term "workaround" to mean in this context—we acknowledge that this definition, like the concept itself, has fuzzy boundaries. Workarounds cannot always be neatly and cleanly distinguished from other modes of policymaking, and this fact may prove important to how adjudicators, such as courts, ought to evaluate initiatives that could be characterized as workarounds. We return to this issue below.[45] For now, though, we will say a few words about each of the prongs of the definition, explaining why that prong is important but also highlighting the line-drawing problems associated with it.

45. *See infra* notes 195–199 and accompanying text.

The first prong of the definition refers to the political actor's goals. Workarounds provide a way forward for actors faced with a legal or political obstacle, enabling them to accomplish an objective that they could not or would not achieve otherwise, or at least to accomplish something very close to that objective.[46] The cleanest case of a workaround is a maneuver that, if successful, would lead to an outcome that is *identical* to the one that proponents wanted but could not achieve through the more orthodox procedures. We might call such cases *complete workarounds*. For example, when the Senate takes a House bill and amends it with language that would raise revenue (perhaps while deleting all the language from the original House version), the result is exactly the same as what would have happened if there were no Origination Clause, and the Senate could simply introduce its own revenue bills without the House acting first.

But we do not want to limit our discussion to complete workarounds, which are relatively rare. Much more common are what we might call *partial workarounds*, which produce results that are very close—but not quite identical—to those that the proponents of the policy change wanted but could not achieve through the conventional approach. In some cases, the substance of the policy that can be accomplished through a workaround may differ—modestly but meaningfully—from what could be achieved through the orthodox procedures. For example, Congress's use of budget reconciliation to evade the Senate's supermajority cloture rule can at times be a workaround,[47] but it is a partial rather than complete workaround because budget reconciliation bills cannot change the deficit beyond the "budget window," which leads to the inclusion of sunsets in such bills.[48] And sometimes, even though a workaround can produce the same substantive policy outcome as the use of the conventional procedures, that policy will be more easily modified later if it is promulgated via the workaround. For example, when the executive branch promulgates a policy through an agency rule, rather than securing the passage of legislation in Congress, it will be easier for a subsequent administration to modify or repeal that policy.

We acknowledge that including partial workarounds within our definition invites difficult line-drawing questions. It is not always clear when

46. Workarounds, on this understanding, are the mirror image of maneuvers that deploy technical features of the formal rules to block or delay policy changes—a common feature of contemporary politics. *Cf., e.g.*, Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. REV. 1159, 1171–72 (2014) ("[T]he desire to cling to power and forestall the loss of dominance has led various elements of the [Republican] party to push the envelope and to engage in strategies of obstruction and confrontation that well-socialized politicians might not have attempted in the recent past.").

47. *See infra* notes 107–116 and accompanying text (discussing budget reconciliation).

48. BILL HENIFF JR., CONG. RSCH. SERV., RL30862, THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" 5, 13, 16 (2022), https://fas.org/sgp/crs/misc/RL30862.pdf [https://perma.cc/PC8X-YV28].

the use of an alternative lawmaking mechanism is a (partial) workaround, and when it is not a workaround but instead simply a different policy instrument in service of the same broad goal. To keep the workaround concept manageable, we favor a narrower definition: Although a workaround does not have to achieve *exactly* the same result as a policy adopted via the orthodox channels, a high degree of similarity is necessary for the maneuver to qualify as a workaround under our definition.[49] We thus view the category of workarounds as a spectrum, with complete workarounds at one pole, various forms of partial workarounds in the middle, and nonworkarounds at the other pole. As noted above, though, we think it is better to avoid defining workarounds too broadly: If the alternative policy outcome is sufficiently different from the one that was stymied, the alternative begins to look more like a compromise or concession than a workaround.

Our definition's second prong requires that a workaround appears to be legal under the rules as written, at least as a formal matter. We include this requirement to distinguish a workaround from simple disregard for the rules. Indeed, one of the virtues of workarounds (for their proponents) is that they can be plausibly defended as fully consistent with constitutional, statutory, and other legal requirements. That said, the legality of some workarounds is debatable, even as a formal textual matter. Moreover, as we will discuss in greater depth in Part III, some courts and commentators have suggested that workarounds are legally suspect precisely because they are attempts to circumvent the usual procedures or requirements.[50] So we cannot define a workaround as a maneuver that is *clearly* legal, as doing so would rule out novel workarounds, whose legality is untested, and would define away one of the main issues we want to consider, which is whether workarounds *qua* workarounds raise legal concerns. Nevertheless, we think that an important defining feature of workarounds is that they are *plausibly* legal, at least at a formal level, and can be defended as such in good faith. While the line between a good-faith legal argument and a bad-faith pretext is not always easy to draw, we nonetheless think the distinction is meaningful both conceptually and practically.

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49. For this reason, we would not, for example, view the renewable energy subsidies included in the Inflation Reduction Act (IRA), Pub. L. No. 117-169, 136 Stat. 1818 (2022), passed through budget reconciliation, to be a workaround, even though the White House and other proponents of action on climate change may have seen the IRA as a way to get around Congress's inability to enact emission limitations for greenhouse gases through regular Senate procedures. The fiscal policies the IRA enacts are too substantively different from the regulatory legislation that had previously failed in Congress, even though the general policy objectives are broadly similar. *See generally* JONATHAN L. RAMSEUR, CONG. RSCH. SERV., R47262, INFLATION REDUCTION ACT OF 2022 (IRA): PROVISIONS RELATED TO CLIMATE CHANGE (2023), https://crsreports.congress.gov/product/pdf/R/R47262 [https://perma.cc/P3ZY-FBFJ].

50. *See infra* notes 192–194 and accompanying text.

Our definition's third prong limits workarounds to maneuvers that appear to be inconsistent with the apparent *purposes* of the rules—both the rules used to effectuate the workaround and the rules being worked around. This incorporation of a form of purposivist analysis is, we believe, inherent in the concept of a workaround; those who reject any inquiry into *why* a given rule exists, or what that rule is supposed to do, will not have coherent grounds for distinguishing a workaround from any other formally legal mode of effecting a policy change.[51] Those who are open to some form of purposivist analysis, and who therefore consider workarounds to be a meaningful category, will still need to decide how the purpose is to be identified. One approach, here as elsewhere, is to consider the intent or expectations of those who drafted or enacted the legal provisions at issue. For those who reject appeals to lawmakers' intent—on the ground that such intent doesn't exist,[52] cannot be accurately identified,[53] or should be excluded from consideration for some other reason[54]—the "purpose" of the relevant rules might be inferred from the text, the relevant context, and common sense, without reference to the (literal, empirical) intent of the enactors.[55] Consider, for example, the trillion-dollar coin gambit. Nobody claims that one of the purposes of the coin-minting statute is to enable the executive branch to circumvent the debt ceiling (or to make fiscal policy in any form), and this is true even for those who eschew making any statements about the specific intent of the Members of Congress who voted for that statute. We do not take a position in this Article on whether, or how much, the original intentions or

51. *See infra* subpart III(A).

52. *See, e.g.*, Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) ("A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs."); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 254 (1992) ("[P]ublic choice theory . . . provides insight into the meaninglessness of the concept of 'legislative intent.' Individuals have intentions and purpose and motives; collections of individuals do not. To pretend otherwise is fanciful.").

53. *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 92 (2006) ("[T]extualists argue that purposivism cannot deal adequately with legislative compromise because semantic detail . . . is the only effective means that legislators possess to specify the limits of an agreed-upon legislative bargain.").

54. For example, some formalists object that adjudicators are especially likely to be inappropriately influenced by their own policy preferences when ascertaining purposes or intentions. *E.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 34–35 (Amy Gutmann ed., 1997).

55. *Cf.* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378–79 (William N. Eskridge, Jr. & Philip P. Frickey eds., The Found. Press, Inc. 1994) (1958) (arguing that legal interpreters "[i]n determining the more immediate purpose which ought to be attributed to a statute . . . should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably," rather than looking to legislative history to attempt to discern specific intent).

expectations of the lawmakers ought to matter when identifying the purposes of a particular legal provision, though in keeping with much of the discussion in the existing commentary, we will sometimes deploy the language of legislative intentions and expectations.

This emphasis on whether a given use of a legal provision is consistent with that provision's purposes necessarily entails difficult line-drawing problems. This is especially true when public officials deploy a creative or aggressive interpretation of an explicit exception or alternative to the usual lawmaking process. Garden-variety uses of express exceptions or alternatives are not workarounds on our definition, because the law that creates the orthodox procedures builds in the exception in the first place. But an aggressive use of an exception could be a workaround, on our definition, if the parties invoking that exception seek to exploit gaps, ambiguities, or loose language in the exception in order to do things that go well beyond the best understanding of that exception's purposes. For example, Congress created the budget reconciliation process to ease the passage of certain revenue-related measures by exempting them from the Senate filibuster. As such, using budget reconciliation for what we might think of as "ordinary" fiscal measures would not, on our definition, be considered a workaround. But attempting to shoehorn regulatory matters into the reconciliation process—including legal changes that could plausibly be characterized as having a substantial impact on the budget, but that are not the sort of revenue or appropriations measures historically found in budget bills—*would* be a workaround.[56] To take another example that highlights the line-drawing problem, consider the Obama Administration's decision to create the Deferred Action for Childhood Arrivals (DACA) immigration program by publishing a guidance document rather than by using notice-and-comment rulemaking.[57] The Administration argued that the memo creating DACA fit within an APA provision exempting "general statements of policy" from notice-and-comment requirements.[58] Whether the use of a guidance document to create DACA counts as a workaround depends in part on whether one thinks that announcing this sort of policy in a guidance document goes well beyond what the APA's "general statements of policy" exception is meant to encompass (for better or worse), or whether one thinks that the DACA memorandum was at least roughly the sort of non-binding

56. *See infra* notes 107–117 and accompanying text (discussing this example).

57. Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot. et al. 1 (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/Y82V-LQYH] [hereinafter Napolitano Memo].

58. Brief for Petitioners at 65–68, United States v. Texas, 579 U.S. 547 (2016) (No. 15-674), 2016 WL 836758.

enforcement guidance that the "general statement of policy" exemption is supposed to cover.

We recognize that the category of "workaround" has blurry boundaries. Some may argue that this renders the category unhelpful, since blurry boundaries allow critics to characterize many policies or tactics that they dislike as workarounds. We share the concern about inappropriate mischaracterization of garden-variety uses of available alternatives as "workarounds," especially if that characterization can have legal consequences.[59] Yet despite this concern, we believe that the concept captures an important way that policy gets made in the contemporary United States and elsewhere, one that is meaningfully distinct from other ways that political actors respond to significant obstacles (compliance with the rules, change of the rules, and disregard for the rules). Our hope is that this account, coupled with the examples that follow, will provide readers with a sense of what types of maneuvers are fairly categorized as workarounds, and provide the foundation for our subsequent exploration of the normative and legal issues surrounding them.

B. Varieties of Workarounds

Workarounds come in many forms. Below we discuss two broad categories of workarounds, using examples from the contemporary United States: workarounds that opportunistically use alternative legal authority in an unanticipated way to accomplish an objective that is otherwise difficult or impossible to achieve, and workarounds that expansively interpret a legal exception in an unexpected way.[60]

1. Leveraging Alternative Authorities.—Many workarounds accomplish a goal that would not be achievable through the conventional channels by making use of a seemingly unrelated mechanism, such as an alternative procedure or a separate grant of substantive legal authority. As noted above, not every use of an alternative policymaking tool is a workaround; our legal system, by design, creates many channels for effecting legal changes.[61] But when an alternative policymaking mechanism is used in a way that its designers (or a hypothetical reasonable person) likely would not anticipate,

59. *See infra* text accompanying notes 195–197.

60. Our focus is on examples from recent history, to show the concept's relevance to current public law debates, but this focus should not imply that workarounds are somehow new. Because workarounds seek to circumvent legal provisions that are barriers to government action, and such barriers always exist, workarounds are likely to be a persistent feature of any legal order, regardless of time and place, though the prevalence of workarounds may vary depending on the difficulties of operating through the formal channels, the degree to which the legal and political culture tolerates formalism, and other factors.

61. For a discussion in the administrative law context, see generally M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004).

that use can qualify as a workaround. The Introduction's examples are both workarounds of this sort. The shell bill workaround involves circumventing a limit on the Senate's power (the Origination Clause) through the creative use of a separate power (the Senate's ability to amend House bills) that was certainly not designed to enable Senators to avoid the constraints of the Origination Clause. Likewise, the trillion-dollar coin gambit involves the executive branch circumventing a statutory limit on its authority (the debt ceiling) by leveraging an unrelated grant of statutory power (the platinum coin-minting provision) in a way that could not plausibly be characterized as consistent with the purpose of that latter provision. Many other workarounds take this same form.

A routine example of this sort of workaround is Congress's use of conditional spending. The federal government's lawmaking authority is limited to those powers listed in the Constitution. Even though some of those powers have been construed expansively, there are still some things that Congress might want to do that appear to lie outside its constitutional lawmaking authority. But there is a workaround, one that derives from Congress's power to spend money "for the General Welfare."[62] In exercising this power, Congress appropriates enormous amounts of money to state and local governments, private entities, and individuals. When making these appropriations, Congress can attach conditions.[63] This gives Congress substantial leverage to induce funding recipients to pursue goals, or comply with restrictions, that Congress would lack the constitutional authority to mandate directly. For example, Congress might lack the power to impose a national minimum drinking age,[64] and Congress is definitely not permitted to mandate that every state enact and enforce a minimum drinking age.[65] But

62. *See* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States"); *see also, e.g.*, Helvering v. Davis, 301 U.S. 619, 640–45 (1937) (broadly construing Congress's spending power, and therefore rejecting a constitutional challenge to the Social Security Act).

63. *E.g.*, Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) ("Congress has frequently . . . condition[ed] receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy.").

64. *See* South Dakota v. Dole, 483 U.S. 203, 206 (1987) ("[W]e need not decide in this case whether [the Twenty-First] Amendment would prohibit an attempt by Congress to legislate directly a national minimum drinking age."); *cf.* United States v. Lopez, 514 U.S. 549, 559–68 (1995) (striking down the Gun-Free School Zones Act's ban on knowingly possessing firearm at place an individual knows or has reasonable cause to believe is school zone as exceeding Congress's authority under the Commerce Clause, on the grounds that gun possession in a school zone is not economic activity, even broadly defined).

65. Doing so would violate the Supreme Court's "anti-commandeering" principle. *See generally* New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898 (1997); Murphy v. NCAA, 138 S. Ct. 1461 (2018).

the Supreme Court has held that Congress *can* withhold federal highway funding from states that do not adopt a law adopting a minimum drinking age specified by Congress.[66] Congress uses this technique—which we would characterize as a partial workaround of the substantive limits on Congress's commerce power—quite frequently. The practice has provoked significant commentary,[67] and the Supreme Court has imposed modest but meaningful limits on Congress's ability to place conditions on grants.[68] Nevertheless, conditional spending remains a potent illustration of Congress's ability to work around limitations on its authority by invoking an alternative power that is not subject to those limitations, but that can be deployed to achieve similar results.[69]

Another potential workaround to substantive limits on Congress's legislative power is the use of the treaty-making power in conjunction with the Necessary and Proper Clause. While Congress can only legislate pursuant to its constitutionally enumerated powers, there is no express subject-matter limit on the treaty power.[70] Therefore, some have suggested that legislation implementing a duly ratified treaty could include legal provisions that Congress would otherwise lack authority to enact—thereby providing Congress with an avenue for circumventing limits on its legislative power.[71] The Supreme Court seemingly endorsed this sort of workaround over a century ago.[72] While the contemporary Court has dodged the question of

66. *Dole*, 483 U.S. at 210–11.

67. *See, e.g.*, Lynn A. Baker & Mitchell N. Berman, *Getting Off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 460 (2003).

68. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 575–85 (2012); *see also* Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861, 906–20 (2013) (discussing the possible implications of *NFIB*'s Spending Clause holding); Einer Elhauge, *Contrived Threats Versus Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 U. CHI. L. REV. 503, 544–53 (2016) (analyzing *NFIB*'s Spending Clause holding).

69. Conditional spending is a partial rather than complete workaround. For one thing, conditional spending only affects entities that receive federal funds. Additionally, potential recipients may lawfully avoid the conditions by declining the money, and the doctrine requires that the conditions not be unduly coercive. The requirement that spending conditions be germane to the spending program further limits the potential of using spending programs to achieve goals sharply at odds with their purposes.

70. *See* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.").

71. *See, e.g.*, Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 33, 49–53 (1997) (asserting that this argument can provide a source of authority for enacting a statute like the Religious Freedom Restoration Act, which the Supreme Court otherwise found to be in excess of Congress's constitutional authority).

72. *See* Missouri v. Holland, 252 U.S. 416, 432 (1920) ("If [a] treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government.").

whether this particular tactic remains available in practice,[73] at least one federal court of appeals has blessed it.[74] This maneuver is plausibly characterized as a workaround, especially when a treaty's subject is something that is not typically thought to be a matter of international concern or if the treaty's only apparent purpose is to circumvent limits on Congress's Article I power.[75]

Another example of an attempt by Congress to work around limits on its legislative authority, albeit an unsuccessful one, is the Line Item Veto Act of 1996.[76] For many years, critics from across the political spectrum lamented Congress's practice of bundling unrelated spending items into a single piece of legislation, with the President having no choice but to sign or veto the entire bill—a practice that these critics thought contributed to excessive "pork barrel" spending. A possible solution to this perceived problem is a so-called "line-item veto," which would allow the President to reject individual spending provisions in a bill while signing the rest of the bill into law. But the Constitution does not give the President this power: Article I, Section 7 says that the President has the authority to sign or veto any *bill* that has passed the House and the Senate, not any *provision* of such a bill.[77] The Line Item Veto Act was an attempt to work around this constitutional obstacle. The statute provided that, for the first five days after signing a bill, the President had the authority to cancel certain individual spending provisions contained within that bill.[78] As a formal matter, proponents argued, the Line Item Veto Act was consistent with Article I, Section 7: Any bill signed by the President still becomes law in full; the "veto" is not a veto at all, but rather the exercise of a discretionary authority, delegated to the President by the Act, to cancel

73. In *Bond v. United States*, 572 U.S. 844 (2014), the Supreme Court narrowly interpreted a federal statute enacted to implement the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 317 (entered into force Apr. 29, 1997), thereby avoiding the question of the outer reach of Congress's power to legislate to implement duly ratified treaties. *Bond*, 572 U.S. at 856–60.

74. *See* United States v. Rife, 33 F.4th 838, 840, 848 (6th Cir. 2022) (finding that a challenged statutory provision regulating extraterritorial conduct by U.S. citizens exceeded the scope of Congress's power under the Foreign Commerce Clause, but citing the Supreme Court's decision in *Missouri v. Holland* to uphold the provision as within Congress's power to enact legislation implementing treaties).

75. This seems to have been the case in *Missouri v. Holland*: The use of a treaty and subsequent implementing legislation to protect migratory birds came on the heels of fierce debates over the constitutionality of an earlier statute meant to protect migratory birds, including two federal district court decisions adverse to that earlier statute. *See* Charles A. Lofgren, Missouri v. Holland *in Historical Perspective*, 1975 SUP. CT. REV. 77, 80–81 (documenting this history).

76. Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996), *invalidated by* Clinton v. City of New York, 524 U.S. 417 (1998).

77. *See* U.S. CONST. art. I, § 7, cl. 2 (referring to the President's power to sign or veto a "Bill").

78. Line Item Veto Act, § 1021(a).

certain spending items *after* the bill had been signed into law.[79] But the Supreme Court rejected this proposed workaround, striking down the statute as an unconstitutional attempt to circumvent the limitations of Article I, Section 7.[80]

Congress has also considered ways to work around the Supreme Court's decision that so-called "legislative veto" provisions—which allow one or both chambers of Congress to block an administrative agency action via a simple majority vote—are unconstitutional.[81] The proposed Regulations of the Executive in Need of Scrutiny (REINS) Act would get around this constitutional obstacle by requiring that, before any major agency regulation can take effect, Congress must pass—through the Article I, Section 7 process—a resolution affirmatively *approving* the rule.[82] The REINS Act could be seen as functionally (though not formally) equivalent to a one-house legislative veto, because the opposition of a single chamber of Congress to the agency's action would be sufficient to prevent the regulation from going into effect.[83] But the REINS Act, its proponents argue, would avoid the constitutional problem that doomed the traditional legislative veto.[84]

Congress also uses workarounds to sidestep its own rules of procedure. Consider, for example, Senate Rule XXII, which imposes a two-thirds supermajority threshold for invoking cloture on changes to the chamber's rules.[85] This high threshold makes it very difficult to change the Senate's written rules through the normal process. Senate majorities have therefore developed the so-called "nuclear option" as a workaround. The choreography of the nuclear option is as follows: When the Senate is in what is known as a

79. *See* Brief for the Appellants at 33–48, Clinton v. City of New York, 524 U.S. 417 (1998) (No. 97-1374), 1998 WL 263832 (making this argument).

80. *Clinton*, 524 U.S. at 446–49; *see also supra* note 36 and accompanying text.

81. *See* INS v. Chadha, 462 U.S. 919, 944–59 (1983) (holding the legislative veto unconstitutional); *see also supra* note 36.

82. *See* Ronald M. Levin, *The REINS Act: Unbridled Impediment to Regulation*, 83 GEO. WASH. L. REV. 1446, 1448, 1451–53 (2015) (describing this proposal). The idea for this workaround appears to have originated in a lecture by then-Judge Stephen Breyer, who described its contours and suggested that it would be constitutional, though he cast doubt on its wisdom as a policy matter. Stephen Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785, 793–98 (1984).

83. *See, e.g.*, REINS Act of 2023, H.R. 277, 118th Cong. § 801(b)(1) ("A major rule shall not take effect unless the Congress enacts a joint resolution of approval . . . .").

84. *See, e.g.*, Jonathan H. Adler, *Placing "REINS" on Regulations: Assessing the Proposed REINS Act*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 24–29 (2013) (arguing that the REINS Act would be constitutional). *But see, e.g.*, Levin, *supra* note 82, at 1464–78 (arguing that the Act would be unconstitutional on separation of powers grounds). In addition, Congress has already employed a range of partial workarounds to retain its influence over how agencies exercise delegated authority. *See* Curtis A. Bradley, *Reassessing the Legislative Veto: The Statutory President, Foreign Affairs, and Congressional Workarounds*, 13 J. LEGAL ANALYSIS 439, 458–66 (2021) (examining congressional use of "report-and-wait" provisions, post-*Chadha* legislative vetoes, and other constraining provisions like sunset clauses).

85. STANDING RULES OF THE SENATE, S. DOC. NO. 113–18, R. XXII(2), at 16 (2013).

non-debatable posture—that is, a time when motions on the floor are not subject to debate, but rather simply an up-or-down vote—a Senator (typically the majority leader) makes a motion that runs contrary to the current rules; then, after an unfavorable ruling from the chair, the majority leader appeals that ruling to the full Senate, which votes to reverse the chair's ruling.[86] Critically, the Senate can ordinarily reverse the chair's ruling with a simple majority vote.[87] Perhaps more surprisingly, decisions to uphold or reverse the chair's ruling are treated as binding precedents that functionally (though not formally) amend the Senate's written rules.[88] The nuclear option thus circumvents a seemingly unambiguous procedural requirement (the supermajority needed to change Senate rules) by making creative use of another procedural device (the Senate's power to reverse procedural rulings of the Chair by a simple majority vote, thereby setting precedents that supersede the written rules). The Senate has repeatedly made use of this device to change its rules,[89] and if the filibuster is modified or eliminated in the future it will almost certainly be through this mechanism.[90]

At times, the vote threshold being worked around is not imposed by Congress itself, as in the case of the filibuster, but by the Constitution. Article II provides that treaties not go into effect unless approved by two-thirds of the Senate.[91] While treaties were once the main mechanism for making international agreements, most international agreements today are not treaties, but rather take other forms that are not subject to the two-thirds supermajority requirement, and in some instances are not subject to congressional approval at all.[92] At least some non-treaty executive agreements take that form because presidents wanted to work around the requirement of two-thirds support in the Senate. An early and precedent-setting example is President Franklin Roosevelt's 1933 agreement with the

86. *See* 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, 645–56 (2016) (explaining how the nuclear option operates).

87. *See id.* at 648 (describing the 2013 simple-majority vote to overrule the Chair in the context of the cloture rules governing judicial nominations).

88. Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 1966 (2020).

89. *See id.* at 1977 n.134 (citing examples).

90. Two of us have proposed that a similar mechanism could be used to partially circumvent the undemocratic effects of the constitutional requirement that two Senators represent each state. *See generally* Jonathan S. Gould, Kenneth A. Shepsle & Matthew C. Stephenson, *Democratizing the Senate from Within*, 13 J. LEGAL ANALYSIS 502 (2021) (proposing and defending a "popular-majoritarian cloture rule").

91. U.S. CONST. art. II, § 2, cl. 2.

92. *See* Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1207–08 (2018) (taxonomizing international agreements in the United States into five categories—treaties, *ex ante* congressional–executive agreements, *ex post* congressional–executive agreements, executive agreements pursuant to treaties, and "sole" executive agreements—only one of which (treaties) requires the approval of two-thirds of the Senate and one of which (sole executive agreements) does not involve Congress at all).

Soviet Union, in which the United States recognized the Soviet Union and assigned to the United States all Soviet claims against U.S. nationals.[93] President Roosevelt opted against making that agreement as a treaty, because he "had no intention of allowing a small number of senators to block his foreign policy decisions."[94] The Supreme Court blessed the use of this workaround,[95] which opened the door to the standard practice of using non-treaty international agreements, often as a means of bypassing the need to win supermajority support in the Senate.

Yet another proposed workaround—this one spearheaded by activists and state legislatures—focuses on the system for electing the President. As is well known, the Electoral College system created by the Constitution does not guarantee that the presidential candidate who receives the most votes will win the election. The difficulty of amending the Constitution, coupled with the fact that one political party and some states benefit from the Electoral College, makes it impossible as a practical matter to amend the Constitution to formally replace the Electoral College with a national popular vote system.[96] Some reformers have therefore proposed using parallel state-level legislation as a way to achieve a national popular vote system for electing the President.[97] Under this so-called National Popular Vote Compact, individual states would enact legislation that allocates the state's electors to whichever candidate wins the national popular vote, but with the proviso that the legislation would go into effect only if similar legislation is enacted by a group of states that collectively account for more than half of the total electoral votes.[98] If enough states were to enact this sort of legislation, and if

93. *See* MATTHEW CRENSON & BENJAMIN GINSBERG, PRESIDENTIAL POWER: UNCHECKED AND UNBALANCED 321 (2007).

94. *Id.*

95. *See* United States v. Belmont, 301 U.S. 324, 330 (1937) (describing a valid "international compact between the two governments" that "did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Art. 2, § 2), require the advice and consent of the Senate").

96. *See, e.g.*, Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 237, 265 (Sanford Levinson ed., 1995) (describing the U.S. Constitution as "unusually, and probably excessively, difficult to amend").

97. *See generally* JOHN R. KOZA, BARRY F. FADEM, MARK GRUESKIN, MICHAEL S. MANDELL, ROBERT RICHIE & JOSEPH F. ZIMMERMAN, EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE (4th ed. 2013) (describing and defending this proposal). The proposed National Popular Vote Compact is "intended to be entirely self-executing" upon passage of state legislation in a sufficient number of states, *id.* at 278, and its proponents argue that it is not an interstate compact requiring congressional approval under the Constitution's Compact Clause, *see* U.S. CONST. art. I, § 10, cl. 3 (providing that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . .").

98. *See generally* KOZA ET AL., *supra* note 97, at 255–84 (discussing the practical mechanics of the National Popular Vote compact and associated legal issues).

the state laws were to survive the inevitable legal challenges, the Electoral College would continue to exist as a formal matter but would become an empty shell because every state that is part of the "compact" would pledge its votes to the candidate who wins the national popular vote.[99]

While some of the policies and tactics discussed above are fairly categorized as workarounds in all circumstances, whether a practice qualifies as a workaround can sometimes vary on a case-by-case basis. Privatization of government services provides an example. Governments frequently enter into contracts with private companies to perform what have traditionally been government functions. Often such privatization is done for reasons of efficiency or capacity, and in those cases privatization would likely not qualify as a workaround. In some instances, however, a government agency might contract with a private party in order to "achiev[e] distinct public policy goals that—but for the pretext of technocratic outsourcing—would be impossible or much more difficult to attain in the ordinary course of nonprivatized public administration."[100] Privatization can allow government actors to evade constitutional, statutory, or bureaucratic constraints on their power, or to bind their successors in ways that might not otherwise be possible.[101] When a government actor privatizes in order to circumvent a legal or practical constraint, it can be fair to characterize privatization as a workaround.

For another example of a practice that is sometimes a workaround, consider an aspect of the longstanding (some would say interminable) debate over legislative history. Critics of the judicial use of legislative history in statutory interpretation have sometimes characterized the production of legislative history as a kind of workaround. According to this argument, Members of Congress deliberately produce legislative history materials, such as committee reports, as a way to sidestep the difficult process of formally altering the text of a bill. Members of Congress, the charge goes, might insert language into committee reports (or other sorts of legislative history materials) that does not have sufficient support to be enacted into law through bicameralism and presentment, or where the transaction costs of hammering out the specific statutory language to achieve that result would have been too

99. *See id.* at 258 ("The Electoral College would remain intact under the National Popular Vote compact. The compact would simply change the Electoral College from an institution that reflects the voters' state-by-state choices . . . into a body that reflects the voters' nationwide choice."). The word "compact" is in quotation marks in the text because it is important to the legality of this scheme that it not be classified legally as a compact, *see supra* note 97, despite the (perhaps inadvisable) use of the term by proponents. This workaround roughly parallels the "Oregon Plan," which sought to partially work around state legislatures' roles in choosing U.S. Senators prior to the enactment of the Seventeenth Amendment. *See infra* notes 170–173 and accompanying text (discussing this workaround).

100. Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 719 (2010).

101. *See id.* at 735–57 (making this argument and providing examples).

high.[102] This charge is often exaggerated. Indeed, most legislative history is created for reasons that have nothing to do with a desire to circumvent bicameralism and presentment.[103] But there is evidence that in *some* cases, Members of Congress do insert material into the legislative history in order to influence subsequent construction of a statute by agencies and courts.[104] In a few settings, this practice has become routine. For example, the House and Senate Appropriations Committees regularly issue reports accompanying appropriations measures that provide agencies with "supplementary information and an explanation of the measure's legislative intent, which often includes a range of directives to the agency."[105] Similarly, Congress's Joint Committee on Taxation produces the "Blue Book," which explains recently enacted tax legislation and has historically been given weight by the Internal Revenue Service and the courts, though the extent of the weight that it warrants has been contested.[106] In such cases, the creation of legislative history may indeed be a way to work around the Constitution's bicameralism and presentment requirements.

2. Expansively Reading Exceptions.—While the above examples involve workarounds that sidestep constraints on the exercise of a given power by making use of a seemingly unrelated legal mechanism—either a different procedure or a different source of substantive authority—the workaround label may also apply to an especially aggressive or expansive reading of an exception or alternative that is explicitly built into the conventional

102. *See, e.g.*, Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc., 814 F.2d 358, 365 (7th Cir. 1987) (Easterbrook, J.) ("[A] transmutation from 'intent' to law bypasses the processes that form the heart of the constitutional method of legislation."); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 739 (1997) ("Congress's ability to specify legal norms without formally adopting them reduces the decision costs of lawmaking, but at the expense of disserving the important structural objectives promoted by bicameralism and presentment.").

103. Most material generated in the course of the legislative process is created not to influence judicial interpretation, but rather to aid Members of Congress in developing legislation and serving their political goals (such as position-taking on issues that matter to relevant constituencies), or as an incidental consequence of the legislative process. *See generally* Jesse M. Cross, *Legislative History in the Modern Congress*, 57 HARV. J. ON LEGIS. 91 (2020) (discussing the various actors and processes contributing to the production of legislative history).

104. *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 570 (2005) (citing Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 960 n.90 (1991)) (providing an example); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 860 (1992) (discussing effects of judicial use of legislative history on congressional incentives).

105. DREW C. AHERNE, CONG. RSCH. SERV., R44124, APPROPRIATIONS REPORT LANGUAGE: OVERVIEW OF DEVELOPMENT AND COMPONENTS 1 (2023), https://sgp.fas.org/crs/misc/R44124.pdf [https://perma.cc/9FMF-5XTF].

106. *See What Will the TCJA Blue Book's Legal Effect Be?*, 131 J. TAX'N 32, 33 (2019) (quoting courts describing the Blue Book as entitled to "great respect" but noting that the level of respect in practice has varied).

lawmaking process. As noted above, an "ordinary" use of an exception—one that accords with its standard or expected use—does not constitute a workaround. There is nothing suspect about a government actor taking advantage of an exception that the rules explicitly make available. But when an exception is read unexpectedly broadly to take advantage of a technicality, loophole, or imprecision in the language used to delineate that exception, then it is fair to classify that broad reading as a workaround.

The expansive use of budget reconciliation in the Senate, which we mentioned briefly in the previous section, exemplifies this sort of workaround. Senate Rule XXII, which imposes a three-fifths threshold for invoking cloture and moving to a final vote, effectively allows two-fifths of the Senate (plus one) to prevent the passage of ordinary legislation.[107] In times of partisan polarization and a closely divided Senate, Rule XXII generally allows the minority party, if unified, to block the majority's legislative initiatives. As a result, Senate majorities have become increasingly aggressive in deploying exceptions to Rule XXII.[108] The most important of those exceptions is the budget reconciliation process, which allows the Senate to close debate with a simple majority for some budget-related bills.[109] The reconciliation process was initially designed as a way to "reconcile" appropriations in individual spending bills with the limits set by Congress's budget resolution, thus providing an opportunity, if necessary, to rescind appropriations to bring them within the limits set by the budget resolution.[110] The process quickly came to be used as a tool for deficit reduction, and until 1995 the Senate Parliamentarian only permitted its use for that purpose.[111] But the process gradually expanded from there. Starting in the late 1990s, reconciliation came to be used for fiscal legislation that actually increased the deficit, most notably major tax cuts.[112] Over this same

107. STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, R. XXII(2), at 16 (2013).

108. *See generally* MOLLY E. REYNOLDS, EXCEPTIONS TO THE RULE: THE POLITICS OF FILIBUSTER LIMITATIONS IN THE U.S. SENATE (2017) (providing a comprehensive account of such exceptions).

109. *See* RICHARD KOGAN & DAVID REICH, INTRODUCTION TO BUDGET "RECONCILIATION" 1–2 (2022), https://www.cbpp.org/sites/default/files/atoms/files/1-22-15bud.pdf [https://perma.cc/E9JX-CSBE] (explaining the mechanics of the budget reconciliation process).

110. *See* STAFF OF S. COMM. ON THE BUDGET, 117TH CONG., THE CONGRESSIONAL BUDGET PROCESS 415–32 (Comm. Print 2022) [hereinafter THE CONGRESSIONAL BUDGET PROCESS], https://www.govinfo.gov/content/pkg/CPRT-117SPRT49524/pdf/CPRT-117SPRT49524.pdf [https://perma.cc/5CCF-J7Z8] (discussing the origins of reconciliation). Indeed, Congress enacted the Byrd Rule—which, roughly speaking, requires that provisions included in reconciliation measures be predominately budgetary—as a means of preventing the use of reconciliation for matters that are primarily non-budgetary in nature. *See* HENIFF, *supra* note 48, at 1–3 (summarizing the Byrd Rule's legislative history).

111. *See* THE CONGRESSIONAL BUDGET PROCESS, *supra* note 110, at 435 (citing examples and noting the position of then-Parliamentarian Alan Frumin).

112. *See id.* at 435, 482 (discussing this change in the use of reconciliation).

period, Congress increasingly used reconciliation to advance policy priorities motivated by non-budgetary considerations well outside of the reconciliation process's original fiscal purposes. Republicans, for example, used the reconciliation process to open the Arctic National Wildlife Refuge to oil drilling,[113] while Democrats used it to move the energy sector away from reliance on fossil fuels.[114] In both cases, proponents emphasized the fiscal effects of these policy changes. Such claims were factually plausible; after all, these and other changes in the law do affect the federal budget (sometimes significantly). But it seems quite clear that the *reason* budget reconciliation was being used for these measures had little or nothing to do with their budgetary impact. The original purpose of the budget reconciliation process was not to create an all-purpose exception to the Senate's cloture rule, and those who created the reconciliation mechanism likely never imagined that it would be used so broadly.[115] But the specific language of the relevant reconciliation rules can be, and has been, read to permit a variety of measures that are not primarily about fiscal matters.[116] This aggressive use of reconciliation can therefore be considered a workaround, one motivated by the difficulty of securing a supermajority to invoke cloture on ordinary legislation.[117]

The executive branch has similarly relied on aggressive readings of express exceptions to work around obstacles. The use of recess appointments provides an example. The Constitution empowers the President to nominate officers of the United States and federal judges, but requires that the Senate consent to those nominations.[118] The Constitution, however, allows the President to make so-called "recess appointments," without Senate consent,

113. *See* Ellen P. Aprill & Daniel J. Hemel, *The Tax Legislative Process: A Byrd's Eye View*, 81 L. & CONTEMP. PROBS., no. 2, 2018, at 99, 125 (discussing this example).

114. *See* RAMSEUR, *supra* note 49, at 1–2 (discussing the climate-related provisions of the Inflation Reduction Act, which was enacted through budget reconciliation).

115. *See, e.g.*, 156 CONG. REC. 3189 (2010) (statement of Sen. John McCain) (quoting Senator Robert Byrd's statement that "[r]econciliation was never, never, never intended to be a shield . . . for controversial legislation.").

116. Under the Byrd Rule, a provision can be struck from a reconciliation bill if it "produces changes in outlays or revenues which are *merely incidental* to the non-budgetary components of the provision." 2 U.S.C. § 644(b)(1)(D) (emphasis added). That language is sufficiently open-ended that it is often possible to plausibly argue that a given substantive provision, even one motivated by non-fiscal objectives, has budgetary effects that exceed the "merely incidental" threshold.

117. In a similar vein, one of us has proposed another workaround exploiting a filibuster exception, though it focused on the Congressional Review Act rather than budget reconciliation. *See generally* Jody Freeman & Matthew C. Stephenson, *The Untapped Potential of the Congressional Review Act*, 59 HARV. J. ON LEGIS. 279 (2022) (describing how the President and Congress can jointly use the Congressional Review Act to circumvent the filibuster).

118. U.S. CONST. art. II, § 2, cl. 2.

when Congress is not in session.[119] The Framers seem to have included the Recess Appointment Clause to ensure that nominees could serve temporarily when Congress was unavailable; they did not intend the clause to allow presidents to sidestep the normal confirmation process.[120] But presidents have occasionally taken advantage of their recess appointment power to do just that.[121] Over a century ago, President Theodore Roosevelt made 160 recess appointments in the split second between the time the Senate's presiding officer gaveled out one session of Congress and gaveled in the next one.[122] More recently, aggressive use of recess appointments by Presidents George W. Bush and Barack Obama became a flashpoint of political and legal controversy.[123]

Another personnel-related workaround is the proposal to create a "Schedule F" classification for federal workers. The overwhelming majority of federal employees are civil servants who are hired pursuant to merit-based criteria and are protected from at-will removal.[124] In 2020, President Donald Trump signed an executive order to create a new category of federal employees: Schedule F.[125] The new category, had it gone into effect, would have applied to "positions of a confidential, policy-determining, policy-making, or policy-advocating character that are not normally subject to change as a result of a Presidential transition"[126]—a designation that

119. *Id.* art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.").

120. *See, e.g.*, NLRB v. Noel Canning, 573 U.S. 513, 557 (2014) ("[T]he Framers included the Recess Appointments Clause to preserve the 'vig[or] of government' at times when an important organ of Government, the United States Senate, is in recess.").

121. Another technique that presidents sometimes use to work around the Senate confirmation process is greater reliance on "acting" officials. *See, e.g.*, Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533, 545–68 (2020) (discussing various types of workarounds to Senate confirmation).

122. *See* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1555 n.209 (2005) (recounting the appointments in 1903).

123. During the Obama Administration, Senate Republicans employed a countermeasure to stymie the use of the recess appointment workaround: holding brief "pro forma" sessions every few days (during which time the Senate would convene but conduct no business) in order to prevent the Senate from going into a sufficiently long recess to permit recess appointments. *See Noel Canning*, 573 U.S. at 549–50. The use of pro forma sessions is an obstacle, not a workaround, but like a workaround it involves strategic action within a public official's formal authority (here, the Senate's power to convene for a pro forma session) to achieve a substantive goal (here, preventing recess appointments).

124. *See generally* JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RSCH. SERV., R45635, CATEGORIES OF FEDERAL CIVIL SERVICE EMPLOYMENT: A SNAPSHOT (2019), https://crsreports.congress.gov/product/pdf/R/R45635/1 [https://perma.cc/DR7N-5MRZ] (providing an overview of different types of federal civil service positions).

125. Exec. Order No. 13,957, 3 C.F.R. 466 (2021) (repealed by Exec. Order No. 14,003, § 2, 3 C.F.R. 464, 464–65 (2022)).

126. *Id.* § 3, 3 C.F.R. at 468.

encompasses tens of thousands of federal employees.[127] The legal authority for this change was a provision of federal law stating that civil service protections do not apply to an employee "whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character," including by the President.[128] That provision was added to the U.S. Code as part of the Civil Service Reform Act of 1978.[129] It appears to have been intended to cover non-career political appointees below the cabinet or subcabinet level rather than long-term government employees.[130] The drafters of that Act almost certainly could not have imagined—and would not have sanctioned—the use of this provision to create something like Schedule F. The statute's statement of purpose expressly notes the importance of the civil service merit system, makes no mention whatsoever of presidential power, and certainly does not evince any intent to allow the President to reclassify tens of thousands of civil servants.[131] As the Biden White House's Office of Personnel Management later argued, interpreting the statutory language to authorize the creation of Schedule F "would be contrary to congressional intent and decades of applicable case law and practice."[132] These arguments have not been tested in court, and if Schedule F were implemented in the future it might well be found unlawful. But if it were to be upheld as lawful, its discordance with the expectations of those who wrote the enabling statutory language would make it fair to characterize Schedule F as a workaround.

In a different domain, one of the most controversial practices in administrative law—the use of agency guidance documents to effect substantive policy changes—is often characterized by critics as a workaround. The APA requires that agencies generally follow elaborate notice-and-comment procedures in order to issue legally binding rules.[133] But

127. Lisa Rein & Eric Yoder, *Trump Issues Sweeping Order for Tens of Thousands of Career Federal Employees to Lose Civil Service Protections*, WASH. POST (Oct. 22, 2020, 9:23 PM), https://www.washingtonpost.com/politics/trump-order-federal-civil-service/2020/10/22/c73783f0-1481-11eb-bc10-40b25382f1be_story.html [https://perma.cc/EK8G-HT5T].

128. 5 U.S.C. § 7511(b)(2).

129. Pub. L. No. 95-454, Sec. 204(a), § 7511(b)(2), 92 Stat. 1111, 1136.

130. *See* Upholding Civil Service Protections and Merit System Principles, 88 Fed. Reg. 63862, 63871 (proposed Sept. 18, 2023) (to be codified at 5 C.F.R. pts. 210, 212, 213, 302, 432, 451, 752) (arguing that in enacting 5 U.S.C. § 7511(b), Congress intended to except from civil service protections "individuals in positions of a character exclusively associated with a noncareer, political appointment . . . that carries no expectation of continued employment beyond the presidential administration during which the appointment occurred").

131. *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 3, 92 Stat. at 1112–13 (describing the Act's purposes, including "to provide the people of the United States with a competent, honest, and productive Federal work force").

132. Upholding Civil Service Protections and Merit System Principles, 88 Fed. Reg. at 63873.

133. Most importantly, the agency must publish notice of the proposed rule, the public must have the opportunity to comment, and the final rule must be accompanied by a statement of basis and purpose that adequately responds to the comments on the rule. 5 U.S.C. § 553(b)–(c).

the APA also exempts from notice-and-comment requirements so-called "interpretive rules" and "general statements of policy,"[134] which collectively are often called "guidance documents."[135] Many guidance documents simply explain an agency's views of the meaning of existing legal authorities, or announce how the agency intends to use its enforcement discretion. In some instances, however, agencies use guidance documents in ways that approximate the effects of a rule issued through notice-and-comment procedures, leading to accusations that the agency is employing a workaround.[136] While the deliberate use of guidance documents as a workaround is probably less common than critics allege,[137] it may occur from time to time, including on high-profile matters.[138]

* * *

The above examples, which are by no means exhaustive, help clarify the sorts of maneuvers that fit our definition of a workaround, and also demonstrate that workarounds are familiar features of U.S. governance. That workarounds, and proposed workarounds, are relatively common is perhaps unsurprising given structural features of the U.S. federal government. Our Constitution is over two hundred years old and is notoriously difficult to amend.[139] A bicameral Congress, independently elected chief executive, and demanding sub-constitutional rules of legislative procedure (especially the Senate's cloture rule) all make legislating difficult.[140] Federal statutes

134. *Id.* § 553(b)(A).

135. NICHOLAS R. PARRILLO, ADMIN. CONFERENCE OF THE U.S., FEDERAL AGENCY GUIDANCE: AN INSTITUTIONAL PERSPECTIVE 22–26 (2017), https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf [https://perma.cc/JZ4Z-GHAG].

136. *See, e.g.*, Kevin M. Stack, *Preambles as Guidance*, 84 GEO. WASH. L. REV. 1252, 1254 (2016) ("[C]ritics contend that agencies rely on guidance documents in ways that circumvent the notice-and-comment rulemaking process."); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 555 (2000) ("[An] agency has an incentive to mischaracterize a legislative rule as interpretative to circumvent the APA rulemaking procedure.").

137. *See* PARRILLO, *supra* note 135, at 5 (empirical study finding that the proliferation of guidance documents "results mainly from institutional factors that are either beyond the agencies' control or result from the agencies being cross-pressured or under-resourced or operating by inertia—*not* usually because the agencies are engaged in bad-faith circumvention of the APA"); Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 821 (2010) (empirical study concluding that "[a]gencies do not commonly use guidance to make important policy decisions outside of the notice and comment process . . . .").

138. *See, e.g.*, Napolitano Memo, *supra* note 57 (establishing DACA); Dear Colleague Letter: Sexual Violence from Russlynn Ali, Assistant Sec'y for C.R., U.S. Dep't of Educ. (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/RW5J-U29F] (addressing campus sex discrimination, including sexual assault and harassment).

139. Lutz, *supra* note 96, at 265.

140. *See* Alfred Stepan & Juan J. Linz, *Comparative Perspectives on Inequality and the Quality of Democracy in the United States*, 9 PERSPS. ON POL. 841, 844 (2011) (finding the United States exceptional in the number of veto points in its legislative process). The relevance of veto

likewise impose onerous restrictions on rulemaking by federal agencies.[141] Moreover, as time passes, the accumulation of rules, and changes in surrounding conditions, are likely to produce situations in which longstanding legal requirements are out of touch with social or political realities.[142] If those requirements are hard to change or reinterpret, policymakers may be more likely to turn to workarounds to circumvent them.

Yet despite this—or perhaps because of this—workarounds are often controversial. This controversy extends beyond the particular outcome that a given workaround would accomplish: The use of a workaround is sometimes seen as *in and of itself* problematic. Our objective, in the remainder of this Article, is to provide a more detailed normative analysis of workarounds, both in terms of their consequences (Part II) and in terms of their fidelity to legal rules (Part III).

II. Evaluating the Consequences of Workarounds

Workarounds often provoke criticism, not only because of opposition to the outcome that a *particular* workaround would accomplish, but because of an instinct that workarounds *as such* are inappropriate. The hostility of many commentators to the trillion-dollar coin proposal is a particularly striking illustration of this instinct, but this is merely an especially intense version of a more general skepticism toward workarounds. This skepticism is understandable. After all, public law workarounds are, by definition, contrivances for circumventing what are usually understood to be the established rules of the political game—and doing so in a manner that is not consistent with the purposes of either the rules being evaded or the rules that enable the evasion.

Yet this suspicion of workarounds is not universal. Some workarounds have been celebrated (at least in certain quarters) as ingenious fixes for entrenched system-design flaws, or as appropriate forms of self-help to counter bad faith obstructionism. Some workarounds, such as the shell bill gambit for sidestepping the Origination Clause, are seen as entirely unremarkable. Indeed, some workarounds that are initially controversial can come to be accepted as part of the standard lawmaking toolkit. The nuclear option may be an example: When the nuclear option was first used to eliminate the filibuster for confirmations of judges and executive officers, many critics denounced not only the decision to eliminate the filibuster for these appointments, but also the use of this exotic "trick" (the nuclear option)

points to workarounds suggests the hypothesis, which we do not investigate here, that workarounds will be less common (all else equal) in lawmaking systems with fewer veto points.

141. *See* 5 U.S.C. § 553 (setting out requirements for notice-and-comment rulemaking).

142. *Cf.* Steven Callander & Gregory J. Martin, *Dynamic Policymaking with Decay*, 61 AM. J. POL. SCI. 50, 53–55 (2017) (modeling how social, economic, demographic, and technological changes can degrade policy effectiveness over time).

to do so.[143] But it now seems generally accepted that the nuclear option could be used to eliminate the filibuster in other domains.[144] To be clear, the question *whether* to eliminate the filibuster in those other domains remains extremely contentious. But there no longer appears to be much question that the particular *mechanism* that might be employed to eliminate the filibuster—the nuclear option workaround—is a legally and politically legitimate way to accomplish this objective.

These conflicting impulses suggest that a normative evaluation of workarounds—either individually or as a general category—is not straightforward. In this Part, we provide a framework for evaluating workarounds from the standpoint of their consequences for the general welfare, or the "public interest." We first consider the direct impact of workarounds on public policy and governance, and then the possible indirect consequences that workarounds might have, including impacts on government legitimacy, norms of political restraint, the credibility of government commitments, and political support for institutional reform.

Although our main objective is to provide a framework for analysis, rather than advancing strong conclusions about the desirability of workarounds, we do tentatively suggest the need to reconsider the intuitive distrust that workarounds provoke in some quarters. To be sure, some of the objections to workarounds are plausible and ought to be taken seriously. Nevertheless, these objections usually only apply within a limited domain or are contingent on assumptions that often do not hold. Many individual workarounds may well be objectionable, but many are salutary, and it is far from clear whether workarounds *in general* have consistently good or bad consequences for public policy and public institutions.

To be clear, there is a separate question of whether workarounds might be objectionable on *non*-consequentialist grounds. Perhaps most importantly, we must consider, as a legal matter, whether workarounds entail an impermissible, or at least problematic, lack of fidelity to the intent, purpose, or structure of public law rules. That question, which may be especially

143. *See* STEVEN S. SMITH, THE SENATE SYNDROME 265 (2014) (describing the nuclear option as "radical by Senate standards" because "[i]gnoring the plain text of a standing rule, a majority of senators changed the effective rule by merely declaring it to be something else"); *see also, e.g.*, Richard A. Arenberg, Opinion, *Why Republicans Shouldn't Weaken the Filibuster*, N.Y. TIMES (Jan. 4, 2017), https://www.nytimes.com/2017/01/04/opinion/why-republicans-shouldnt-weaken-the-filibuster.html [https://perma.cc/XZ6X-XLGZ] (characterizing rule changes by appeal as "a parliamentary gimmick" that "interpret[ed] the words 'three-fifths of the senators duly chosen and sworn' to mean a simple majority," and arguing that "[o]ne needn't be either a math whiz or an English major to see that this was ridiculous").

144. *See* Molly E. Reynolds, *What Is the Senate Filibuster, and What Would It Take to Eliminate It?*, BROOKINGS (Sept. 9, 2020), https://www.brookings.edu/articles/what-is-the-senate-filibuster-and-what-would-it-take-to-eliminate-it [https://perma.cc/48YD-VN2W] (describing use of the nuclear option by both parties).

important to judges and other adjudicators, calls for a different sort of analysis, which we take up in Part III. We begin, though, with the more general normative question of whether and when the consequences of workarounds, for policy and governance, are in the public interest.

A. Direct Effects

The most straightforward and direct effect of a public law workaround is, by definition, to relax or eliminate some constraint on making certain types of public decisions. Therefore, the most natural starting point for the normative evaluation of a workaround is the normative evaluation of the obstacle that the workaround helps to circumvent. Does that obstacle, on the whole, tend to produce good or bad consequences? The "on the whole" qualifier is important, because a workaround, once deployed and accepted, can be used again in comparable cases, not just the one that prompted its initial use. For this reason, it makes sense to consider the consequences of relaxing or eliminating the obstacle that the workaround circumvents "wholesale" rather than "retail."

To be sure, reasonable people will disagree as to the empirical consequences of various institutional features, as well as the normative criteria by which to assess whether these consequences are good or bad. We take no position here on those questions or on the fraught debates over how much weight should be given to various types of consequences (which would include not only consequences for public policy outcomes, but also for other values such as liberty, dignity, or effective democratic governance). Rather, we emphasize a simple but important point: Whether the consequences of a *workaround* are, on balance, good or bad depends substantially on whether the *obstacle being worked around* has desirable consequences overall.[145] If one thinks that a given public law rule tends to promote sound public policy or other positive results, then a maneuver that allows evasion of that rule will be unwelcome, all else equal. On the other hand, if one thinks that the rule in question tends to produce undesirable results, then finding a way to circumvent that rule should—again, all else equal—be cause for celebration.[146]

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145. *Cf.* SHEPSLE, *supra* note 8, at 140 ("Whether rule breaking is a good thing or a bad thing . . . depends upon one's assessment of the institution that is being preserved or altered.").

146. Jon Michaels notes that some workarounds may shift power between different public law actors—say, by empowering executives at the expense of legislatures or courts. *See* Michaels, *supra* note 100, at 719 (describing privatization workarounds as "executive aggrandizing," in that they "enable the executive to exercise greater unilateral discretion—at the expense of the legislature, the judiciary, the people, and successor administrations"). For workarounds that shift power among different government entities, the principal normative question for evaluating the workaround is whether that shift is a desirable or undesirable one, given its likely overall effects. Mark Tushnet frames the inquiry not in terms of policy outcomes, but rather in terms of whether a given

For example, if the Origination Clause serves the valuable purpose of partially offsetting the counter-majoritarian features of equal state representation in the Senate—by ensuring that crucial decisions regarding government spending originate in the more majoritarian House—then the Senate's shell bill workaround would be an unfortunate subversion of that objective. But if the Origination Clause is at best an inconvenient anachronism, and at worst a poorly conceived impediment to effective bicameralism, then the Senate's workaround is a welcome fix.[147] Similarly, if the statutory debt ceiling law is a public policy disaster—one that encourages reckless partisan brinksmanship and risks economic catastrophe—then the trillion-dollar coin gambit, for all its superficial silliness, has obvious appeal. By contrast, if the debt ceiling law promotes fiscal prudence by increasing political accountability for overall debt levels, then the trillion-dollar coin is worse than a gimmick—it is a subversion of a valuable statutory constraint. The picture is similar with respect to the various mechanisms for getting around the Senate filibuster. For those who consider the filibuster a vital check on hasty or excessively partisan legislative action, it would be a serious mistake to expansively construe the categories of legislative action that are exempt from the filibuster, or to concoct other clever filibuster workarounds. By contrast, for those who consider the filibuster a much-abused impediment to fair, effective, and democratic governance, finding clever ways to sidestep the filibuster is not only legitimate but perhaps imperative.[148]

These direct effects are far and away the most important determinants of whether a given workaround is in the public interest. In other words, the

workaround circumvents "commitments truly basic to the Constitution," as compared to "provisions [that] set up and regulate the national government" but neither "rest on policy judgments about how a good government is best organized" nor "reflect deep commitments of political philosophy." Tushnet, *supra* note 38, at 1507.

147. *See* Tushnet, *supra* note 38, at 1511 (discussing whether the Origination Clause continues to serve its original purposes).

148. Importantly, the evaluation of the desirability of the obstacle cannot be done in a vacuum but must instead consider the system as a whole. For example, it may not be possible to say anything general about whether a supermajority voting rule for a legislative chamber is good or bad. If a lawmaking system does not have many other constraints or opportunities for minorities with intense preferences to slow down or block legislation, then perhaps a supermajority rule in one legislative chamber might be salutary, and the use of a clever workaround to get around that rule would therefore be undesirable. In contrast, if the lawmaking system is already characterized by a slow, cumbersome process with many choke points that give minorities the opportunity to delay or obstruct legislation, then the same sort of supermajority rule might be counterproductive. *Cf.* Jacob S. Abolafia & Jonathan S. Gould, *When Courts Matter*, BOS. REV. (Apr. 26, 2023), https://www.bostonreview.net/articles/when-courts-matter/ [https://perma.cc/Q566-3J8U] (arguing that normative evaluations of judicial review must take into account the number and character of veto points in the lawmaking system). While we do not take a position here on the desirability of any specific institutional feature of the U.S. lawmaking system, we do note that the U.S. is a global outlier with respect to the high number of veto points in its legislative process. Stepan & Linz, *supra* note 140, at 844.

predominant factor in deciding whether a given workaround is good or bad is whether the obstacle being worked around is good or bad. That observation may seem trivial, but it has a couple of notable implications.

First, to the extent that one's assessment of the desirability of any given workaround is "downstream" from one's assessment of the desirability of the obstacle being evaded, it will not be possible to say anything meaningful about the normative desirability of workarounds as a general category. What really matters is the normative evaluation of the obstacle in question. And since our normative assessment of those obstacles is likely to vary, our normative assessments of various workarounds will vary as well.

Second, and relatedly, if an objection to a given workaround is grounded in the desirability of the obstacle being evaded, then this objection is not really to the workaround *as a workaround* but rather to the relaxation or elimination of the obstacle in question. If one believes that the statutory debt ceiling serves an essential purpose, then one would object not only to the trillion-dollar coin but also to simply eliminating the debt ceiling through ordinary legislation. Likewise, if one views the Origination Clause as substantively valuable, then one should oppose not only the shell bill workaround but also a hypothetical constitutional amendment to repeal the Origination Clause outright. By the same token, someone who believes that the filibuster promotes good public policy would not only object to the Senate enacting a substantive policy change through the filibuster-exempt budget reconciliation process but also to amending the Senate rules to formally allow filibuster-free consideration of that sort of legislation. Objections to the workaround that derive from arguments in favor of the filibuster would apply with equal force to an explicit change in the rules.

The assertion that the normative arguments against a workaround simply parallel the normative arguments against formally changing the rules to allow the actions enabled by the workaround will strike many as counterintuitive. Instinctively, there seems to be something objectionable not just about a workaround's *ends* (eliminating an obstacle to some change in law or policy) but also about the *means* (employing a maneuver that appears consistent with the formal rules but inconsistent with their intent or purpose). Yet we must be careful to distinguish objections to workarounds *qua* workarounds from arguments in favor of any particular rule that might be worked around. These different types of objections are easy to conflate, but they are not the same. If the objection to a workaround is grounded in the alleged desirability of the limitation being evaded, then the normative evaluation must focus on whether that limitation is indeed desirable; the fact that the procedure is being evaded through a workaround, rather than in some other way, is a distraction from the main issue. If the use of a workaround is independently significant—and independently objectionable—it must be for other reasons.

What might such reasons be? One possible ground for objection to workarounds *qua* workarounds would emphasize non-consequentialist considerations, principally the importance of fidelity to the purposes of the rules. We defer consideration of this possibility to Part III. Another possible basis for objecting to a workaround, even when the obstacle being worked around is on balance undesirable, emphasizes the corrosive *indirect* effects that widespread use of workarounds might have on our system of government. We turn to those possible indirect effects next.

B. Indirect Effects

We consider four possible adverse indirect effects that workarounds might have. First, workarounds might undermine the perceived legitimacy of our government and institutions. Second, the use of workarounds, even if technically legal, might be perceived or characterized as violating socially valuable norms of political restraint, thus provoking retaliation and escalation that further undermines those norms. Third, the widespread use and acceptance of workarounds might make it more difficult for public decisionmakers to credibly commit to limits on their authority, and this loss of credibility might have adverse *ex ante* effects on policy and behavior. Fourth, the use of (partial, imperfect) workarounds might reduce the likelihood of more thoroughgoing institutional reforms. Although each of these objections is logically coherent, and in certain specific cases might provide good reasons to eschew an otherwise desirable workaround, we are skeptical that, as an empirical matter, any of these effects is large enough to matter much to the normative evaluation of the majority of individual workarounds, or of workarounds in general.

1. Legitimacy.—A common objection to workarounds—sometimes explicit, often implicit—is that they damage the legitimacy of our legal and political system. This objection is rarely fleshed out, and there are a few different ways of understanding the claim that workarounds undermine "legitimacy." One possible argument, to be discussed in Part III, is that workarounds are *morally* or *legally* illegitimate because they disregard or subvert the purposes for which a set of legal rules was adopted. But there is another, more consequentialist version of the objection, according to which workarounds damage the *sociological* legitimacy of public institutions—that is, they cause people to lose confidence that these institutions are generally deserving of support.[149]

The argument would run as follows: Workarounds are gimmicks and are likely to be perceived as such. This is especially true for proposals like

149. *Cf.* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–801 (2005) (distinguishing and discussing moral, legal, and sociological forms of legitimacy).

the trillion-dollar coin that are easy to mock to a lay audience. While that is an extreme example, citizens might also have a skeptical or cynical reaction to other workarounds. For example, when people learn how the so-called "nuclear option" for changing Senate rules actually works—that it entails a majority of the Senate declaring that the rules do not in fact mean what they clearly say—they might be shocked that the system permits this.[150] Therefore, the argument continues, as workarounds become more common and more salient, citizens are more likely to lose confidence that government operates on rational and transparent principles, that public officials play by the rules, and that government is a serious operation deserving of public respect. And so, the argument concludes, pervasive workarounds damage the sociological legitimacy of public institutions, and from this a range of (often unspecified) adverse consequences may follow.[151]

The argument is coherent, but we are skeptical of its real-world significance. True, at least some of the workarounds that have been employed or proposed tend to provoke surprise and occasional dismay when described to laypeople. But we doubt that very many people are even aware of the existence of most of these workarounds, let alone understand the details of how they operate. Additionally, we suspect that most ordinary citizens care much more about substantive outcomes than procedural gimmickry.[152] Now, we acknowledge that on these empirical questions we do not have any direct evidence either way, so we cannot refute the claim that workarounds undermine the sociological legitimacy of American government. But on its face, we do not find that claim empirically plausible.[153]

Additionally, even if workarounds do entail some sociological legitimacy cost, this cost, like other potential costs of workarounds, would need to be weighed against the benefits of workarounds. Those benefits may

150. *See, e.g.*, Arenberg, *supra* note 143 (asserting that an ordinary person would recognize the nuclear option as a "ridiculous" parliamentary gimmick).

151. *Cf.* Richard Albert, *Constitutional Amendment by Stealth*, 60 MCGILL L.J. 673, 716 (2015) (arguing against circumvention of constitutional amendment procedures on the grounds that "the informality, irregularity, and circumvention of stealth amendment is inconsistent with these rule of law values of transparency, predictability, and accountability").

152. Further, for a sociological legitimacy concern to trump first-order substantive outcomes, it must be true both that the underlying policy issue is high-profile enough to attract public attention (otherwise the workaround would be unlikely to affect sociological legitimacy), and also that the underlying policy issue is not so important that the public would care much more about the substantive decision than about how that decision was made. It seems unlikely that both these conditions will hold simultaneously.

153. To be clear, the analysis might be different if workarounds became so pervasive—and so facially outlandish—that ordinary citizens could no longer assume that the rules of American governance were reasonably fixed and transparent. But we do not think this is the right way to frame the normative question here. Rather, we should focus either on the marginal impact of any given workaround on sociological legitimacy, or, if we are to consider workarounds collectively, we should compare settings with more or fewer workarounds, in some reasonable range comparable to what we find in the real world.

sometimes include sociological legitimacy benefits in addition to more direct policy consequences. For example, even if the gimmickry inherent in the nuclear option may have been off-putting to some attentive observers, the inability of the Senate to confirm, or even hold a final vote on, presidential nominees to key positions might have damaged the government's sociological legitimacy even more than the use of the workaround. More generally, when the obstacle being worked around is itself a formalistic contrivance, or an abuse of a power that was meant to be more circumscribed, the use of a workaround is less likely to undermine the sociological legitimacy of our government institutions. Yes, minting a trillion-dollar coin seems absurd. But when framed as a response to what many would characterize as an irresponsible abuse of power by those willing to risk a disastrous default on the national debt, the net effects of the workaround on sociological legitimacy may not be very great, and might actually be positive.

2. Norms of Political Restraint.—Even if ordinary citizens are unlikely to know or care when political actors rely on workarounds to accomplish their goals, other political actors will certainly both know and care. This gives rise to another potentially dangerous consequence of using a workaround to circumvent some obstacle to achieving a desired legal or policy outcome: The workaround may violate, or at least be perceived or characterized as violating, unwritten norms of political restraint. After all, the decision to deploy a workaround can be understood as a form of "hardball"—doing something that, even if technically legal, contravenes longstanding understandings of how certain institutions are supposed to operate.[154] This violation of unwritten norms of political restraint may provoke, or serve as a justification for, retaliatory violations of other norms of restraint. This escalation may have unwelcome consequences not only for the general public but even for the party that deployed the workaround in the first place.[155]

This concern ought to be taken seriously, and in some circumstances it might be a sufficient reason for political actors to decline to attempt a

154. Scholarly accounts of constitutional hardball include Mark Tushnet, *Constitutional Hardball*, 37 JOHN MARSHALL L. REV. 523 (2004), and Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018).

155. *See, e.g.*, Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEXAS L. REV. 487, 546 (2018) ("Norms of accommodation and restraint . . . are the barriers against all-out political warfare and scorched-earth tactics . . . especially in eras of politically divided government."); Samuel Issacharoff, *Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World*, 98 N.C. L. REV. 1, 13 (2019) ("[N]orms of restraint form the 'spirit' of democratic governance . . . without which political stability could not exist."). For another argument along these lines, made in the context of rule-breaking but plausibly applicable to workarounds, see SHEPSLE, *supra* note 8, at 140–41 (arguing that "persistent violation of rules jeopardizes not only the particular rules being violated but also the *concept* of collective self-regulation by rules" because "decline in respect for [rules], and the frequent transgressions that accompany this decline . . . risks a self-fulfilling downward spiral").

workaround, even when using the workaround would secure desirable public policy outcomes by circumventing an obstacle that produces more harm than good. But we should not exaggerate the scope of the argument by assuming that most, or even many, workarounds would trigger an escalating spiral of retaliatory norm violations.

One reason workarounds might not lead to a cycle of hardball is that some workarounds do not implicate norms that anyone in power views as especially important. The Origination Clause is a good example: Neither political party, nor the House of Representatives as an institution, appears to think that the Origination Clause serves an important purpose. That point may seem relatively narrow in scope. But notice that this and similar examples cut against the notion that *any* workaround will undermine general norms against "gimmickry" or "gaming the system." The objection, if it is to carry weight, must therefore be more specifically that a *particular* workaround would be seen or characterized as transgressing a *particular* norm of restraint.

To be sure, many of the most important actual or proposed workarounds could be characterized in precisely this way. Using the nuclear option to eliminate the filibuster for appointments was criticized as inconsistent with longstanding Senate norms.[156] Minting the trillion-dollar coin would certainly be portrayed as a bad-faith trick to get around the strictures of a duly enacted statute. But the argument that these or similar workarounds would disrupt a political equilibrium characterized by mutual adherence to norms of self-restraint only makes sense if such an equilibrium actually existed prior to the use of the workaround—if, that is, the relevant actors were not already engaged in "hardball" political and legal maneuvering. If, to the contrary, the obstacle being worked around is itself the product of hardball (such as debt ceiling brinksmanship or aggressive use of the filibuster), then the workaround should not be characterized as the initiation of a norm-breaking cycle, but rather as a form of self-help.[157] As it happens, many of the obstacles that the most prominent actual or proposed workarounds would circumvent—routine use of the filibuster, refusal to confirm or even vote on nominees, threatening to default on federal debts in order to secure policy concessions, and so forth—are themselves hardball maneuvers, making it problematic to attribute the collapse of alleged norms

156. *See, e.g.*, Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 543 (2018) (characterizing the elimination of the filibuster for judicial appointments as an example of the willingness of "government officials in both parties . . . to depart from long-standing norms in order to fulfill short-term partisan gains"); *see also* Gould et al., *supra* note 90, at 536 (suggesting that the reason "the nuclear option is not used more often appears to be . . . some combination of internalized norms and fear of escalation").

157. *See generally* Pozen, *supra* note 38 (developing this argument).

of restraint to the workaround rather than the obstruction.[158] In these cases, the workaround is not what turns the political game into hardball—it merely makes the hardball more symmetric.

The fact that a workaround, though inconsistent with certain norms of political self-restraint, might plausibly be characterized as a self-help response to a prior (obstructionist) violation of such norms does not eliminate the concern, however. Deploying a workaround as a countermeasure might offset the initial obstructionist norm-breach and perhaps deter similar norm-breaches in the future, but it is also possible that the retaliatory norm-breach (the workaround) will trigger an escalating spiral of norm violations.[159] While we acknowledge that latter possibility, in the case of workarounds—as distinct from other forms of hardball retaliation—the former possibility seems more likely, at least in most cases. Responding to a norm-violating obstacle with a workaround is a way to neutralize (fully or partially) that obstacle; this is quite different from retaliating against the norm-violating obstacle by engaging in some other form of norm-violation in some other domain. Therefore, it is less likely that a workaround will be seen as disproportionate and thereby trigger escalation; it is a defense rather than a counterstrike. Additionally, if a political actor stymied by an obstacle can respond by using a workaround, this may reduce the chances that the actor will feel the need to engage in even less desirable forms of tit-for-tat retaliation.[160]

In sum, while the concern about triggering an escalating retaliatory spiral should be taken seriously, and in some cases may militate against

158. As one of us has noted elsewhere, "[a] standard difficulty with arguments based on unwritten norms is the level of generality at which the norm is described." Freeman & Stephenson, *supra* note 117, at 322. Although a particular workaround might seem to contravene norms about how the relevant legal mechanisms are to be used,

> if one frames the question more broadly as whether there is a widely-respected congressional norm against exploiting procedural loopholes in the legislative process—that is, whether there is a general norm against pushing the limits of what is technically permitted under the rules in order to do things that those who created those rules did not intend—the picture looks quite different.

Id.

159. *See* Fishkin & Pozen, *supra* note 154, at 979–80 (observing that responding to hardball tactics with hardball tactics could "ultimately lead to an equilibrium with less . . . hardball" but could also lead to "tit-for-tat escalation with no obvious endpoint").

160. To be sure, a workaround may trigger retaliation in the form of a countermeasure to the workaround. For example, in response to President Obama's aggressive use of recess appointments to fill vacant offices (a workaround, in response to the Senate's refusal to confirm or even vote on many nominees), the Senate used pro forma sessions in an effort to prevent recess appointments (a countermeasure). *See supra* note 123. And deploying a workaround is risky, because those disadvantaged by the initial use of the workaround might later be in a position to use that workaround for their own ends. But these possibilities are distinct from the concern that a workaround, by transgressing a norm of political self-restraint, will trigger retaliatory action in other areas.

deploying an otherwise appealing workaround, this concern should not be overstated. Political norms do change: They may erode or disappear, sometimes for better and sometimes for worse.[161] But the process of changing norms is often gradual, and many norms—at least those that serve valuable functions for powerful political actors—may prove quite resilient, with a capacity for self-correction or evolution.[162] And, here again, any negative effect on norms of self-restraint would have to be compared to the benefit of eliminating an undesirable obstacle to legal or policy change. When the direct benefits of using a workaround are very large—if, for example, the fate of the global economy plausibly hangs in the balance—arguments about the possibility of eroding norms of self-restraint might not carry much relative weight.

3. Credibility of Commitments.—Another possible indirect effect of workarounds, at least if they become sufficiently commonplace, may be to undermine the ability of government institutions to credibly commit to limits on their authority. The government's ability to make such commitments is often desirable, including to the government institutions that make the commitments.[163] But if workarounds are widespread and widely accepted, those to whom these commitments are made may rationally anticipate that when a commitment starts to bite, clever lawyers will find a workaround. So, the argument goes, even if a *specific* workaround appears to be in the public interest, the practice of tolerating workarounds *in the aggregate* will have adverse effects because it makes it harder for government institutions to make socially valuable commitments.[164]

161. *See* Jonathan S. Gould, *Codifying Constitutional Norms*, 109 GEO. L.J. 703, 742–44 (2021) (discussing the downsides of freezing norms in place).

162. *See* Oren Tamir, *Constitutional Norm Entrepreneuring*, 80 MD. L. REV. 881, 894–95 (2021) ("[N]ot every breach of an alleged norm necessarily leads to the norm's demise . . . . Norms can prove to be rather resilient, both in general but especially once we adopt a longer time horizon.").

163. There are several reasons why this might be the case. Sometimes a credible government commitment is essential to induce private parties to take actions that would end up being ill-advised if the government changes its mind. *See, e.g.*, Glenn Blackmon & Richard Zeckhauser, *Fragile Commitments and the Regulatory Process*, 9 YALE J. ON REG. 73, 76–78 (1992) (discussing the role of commitment in the context of investments in regulated utilities). Also, commitment to procedural or substantive restrictions is sometimes a way to convince reluctant legislators or interest groups to support a given proposal, so that those stakeholders can be confident their interests will be respected later. *See, e.g.*, ERIC M. USLANER, THE DECLINE OF COMITY IN CONGRESS 10–11, 26 (1993) ("If you trust someone to exchange votes and you get stung, you withhold cooperation until the other player learns that cooperation is more profitable in the long run." (citation omitted)). And sometimes the government wants to tie its hands in order to avoid succumbing later on to the temptation to take action that might be politically expedient but damaging in the longer term. *See, e.g.*, JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 88–164 (2000) (discussing the history, theory, and mechanics of precommitment by public actors).

164. *See* Tushnet, *supra* note 38, at 1512–13 (noting the relevance of workarounds to the problem of constitutional commitment).

Here too, we acknowledge the logical coherence of the argument but doubt its empirical premises. To be sure, if workarounds were used to circumvent any and all inconvenient public law rules, then by definition the government could not credibly commit to those rules or use those rules to commit to anything else. But that is a red herring. Workarounds do not always exist, and even when a workaround turns out to be available, it is often discoverable (and discovered) only after considerable effort. The question, then, is not whether it would be a bad idea to render *all* ostensible government commitments non-binding and therefore non-credible. Rather, the right way to think about the objection is in terms of the *marginal impact* that any given workaround, or level of workaround prevalence, will have on credibility of commitments, and how that effect ought to be weighed against other factors.

That last point leads directly into another important observation about the concern that tolerance of workarounds will undermine the credibility of government commitments: The flip side of that argument, which is sometimes neglected, is that *excessive* commitment can also be a problem. Sometimes a public law rule that seemed sensible when adopted turns out to have perverse effects, but it may be too difficult to repeal or modify that rule through the conventional procedures. And even when a rule would *usually* produce good results—restraining opportunistic deviations that would be attractive in the short term but destructive in the long term—unusual circumstances might arise that would justify circumvention of that rule, even at the cost of some degree of future credibility. So, even if one concedes that an undesirable indirect effect of workarounds is making the credibility of (some) government commitments *too weak*, it could also be the case that an undesirable effect of having fewer workarounds is to make the credibility of (some) government commitments *too strong*.[165]

This suggests that the right way to think about workarounds—at least in the abstract—is in terms of the optimal probability (or optimal difficulty) of discovering and implementing a workaround to a given obstacle, rather than focusing only on whether any given workaround, or set of workarounds, is good or bad. If it is too easy to circumvent a given requirement, then that requirement will lack credibility and may not serve its intended purpose. But if it is too hard to find a way around a given requirement, then that

165. It is also worth keeping in mind that, when considering whether workarounds are good or bad, one must always ask: "Compared to what?" In the discussion in the main text, the workaround is being implicitly compared to the alternative of following the orthodox procedures. But a different option—simply ignoring the rules—might be much more destructive than workarounds to government credibility (and to government legitimacy as well). Workarounds might serve as a kind of safety valve, helping to stave off the possibility that frustrated political actors will simply decide to ignore the rules and see if they can get away with this politically. If that is the case, then the claims that workarounds undermine government legitimacy and/or credibility would be particularly misguided.

requirement might end up binding even when the original designers, if they had perfect foresight, would have preferred an exception, or where the workaround's benefits outweigh its costs even after taking into account the effects on government credibility. On this reasoning, the ideal system (at least when focusing on this aspect of the problem) may be one in which it is *sometimes* possible to find ways to work around public law rules, but only after the investment of considerable time and effort. In that world, public law rules function as expected in most cases, but when they start to impose extreme costs, people start looking for workarounds—and sometimes find them.[166]

To be clear, we do not believe that it is actually possible to estimate the difficulty of discovering workarounds, either in general or in any particular case, and we certainly do not think it would be possible to calculate the optimal frequency or difficulty of discovering workarounds. Framing the issue in terms of the optimal difficulty of finding workarounds is intended not as a guide to policy but rather as a way to convey a conceptual point: The ideal world may not be one in which workarounds are impossible, or one in which workarounds are always available, but rather an intermediate situation in which workarounds can sometimes be uncovered but only after the investment of significant effort. This is a specific application of the more general argument that government institutions should be able to make commitments (to themselves and outsiders) that are *credible*—in the sense that one can generally be confident that the government will adhere to those commitments—but not *absolute*.

To sum up: Whether a given workaround's direct policy benefits are outweighed by its effects on the credibility of government commitments is an empirical question as well as a normative question, and though we do not have any direct evidence either way, we suspect that the effect on credibility will usually be small. Although workarounds in American public law are more common than is often appreciated, they are not so ubiquitous that government commitments are viewed by the public or other stakeholders as nonbinding. Workarounds are not being discovered and deployed willy-nilly, and it therefore does not seem plausible that occasional use of workarounds has substantially eroded the ability of the government entities to credibly commit to limitations on their authority. Moreover, in many (though certainly not all) of the cases where workarounds have been deployed, or seriously proposed and debated, either the obstacle being worked around is not viewed

166. Kenneth Shepsle has observed that "[s]ome bodies of rules possess self-correcting features that allow for institutional revision necessitated by environmental shocks"—and such features, we would emphasize, include circumvention via workarounds—while "[o]thers have more rigid requirements, for example, no method for revision or hard-to-implement ones, in which case existential threats must often be dealt with by violating rules or not at all." SHEPSLE, *supra* note 8, at 140.

as having much contemporary normative significance, or there is a plausible case that the obstacle is the product of unforeseen and abusive obstructionism, or the stakes are so high that extreme measures are arguably necessary. That observation, if accurate, suggests that the cases in which workarounds are most likely to be used are the cases in which the impact on government credibility is outweighed by countervailing considerations.

4. Effects on Institutional Reform Efforts.—If a workaround is desirable because the restriction that it sidesteps does more harm than good, then a superior solution would be to change or eliminate that restriction, rather than relying on a workaround.[167] Now, the fact that a better alternative exists is not by itself a reason to object to the workaround. As the saying goes, we should not allow the perfect to become the enemy of the good. But using a workaround might be counterproductive if it dissipates political pressure to alter or abolish the problematic rule. For example, perhaps expansive use of the exceptions to the filibuster (such as budget reconciliation) might sap momentum from efforts to achieve more comprehensive filibuster reform. This is, in essence, a variation of the familiar argument that modest or partial reforms could delay or derail more fundamental change.[168]

This is possible but seems unlikely. For one thing, many of the obstacles that existing or proposed workarounds would help avoid—such as the Senate filibuster for ordinary legislation, the constitutional provision establishing the Electoral College, and the APA's stringent requirements for issuing legislative rules—are unlikely to be changed anytime soon, thanks to the combination of political polarization, close elections, and multiple veto points. As a practical matter, therefore, in most cases the choice is between workarounds and nothing, rather than between workarounds and direct legal or institutional reform. There may be settings in which this is not true, and in those cases, it is at least possible that the deployment of workarounds might make the status quo just tolerable enough to dissipate pressure for broader changes. But we are hard-pressed to identify real-world examples where this is plausibly the case.

Moreover, the notion that workarounds dissipate rather than build momentum for more fundamental change is contestable. Indeed, the expanded use of workarounds to avoid barriers to government action might

167. This is especially true in the case of partial workarounds, which do not achieve exactly the same result that proponents would prefer to enact through the conventional procedures. *See supra* text preceding note 48 (distinguishing "partial" from "complete" workarounds).

168. For discussions of this dynamic in particular policy domains, see, for example, Cary Coglianese & Jocelyn D'Ambrosio, *Policymaking Under Pressure: The Perils of Incremental Responses to Climate Change*, 40 CONN. L. REV. 1411, 1429 (2008), and Carol S. Steiker & Jordan M. Steiker, *Lessons for Law Reform from the American Experiment with Capital Punishment*, 87 S. CAL. L. REV. 733, 749 (2014).

increase rather than decrease the political feasibility of directly reforming the rules that create the barriers in question, for at least two reasons. First, the use of the workaround—and the controversy it may attract—can call attention to the rules that create the obstacle in the first place, and this increased attention might provoke more discussion of changing or eliminating those rules. Second, the expanded use of workarounds might gradually reduce the normative and practical significance of the obstacle at issue, making its reform or elimination more thinkable than would otherwise be the case.

The lead-up to the ratification of the Seventeenth Amendment, which provided for the direct election of Senators,[169] shows how workarounds can help spur more fundamental change. From 1789 until the Amendment's ratification in 1913, the Constitution provided that the U.S. Senate "shall be composed of two Senators from each State, chosen by the Legislature thereof."[170] In the decades before the ratification of the Seventeenth Amendment, some states experimented with ways of partially democratizing Senate elections even in the absence of constitutional change. Perhaps the most prominent example is the so-called "Oregon Plan," adopted in 1904, "institut[ing] direct primaries as a means of nominating candidates for state and local elected office, including for U.S. Senate," which "allowed for Senate candidates to be included on the ballot in statewide elections, and the voters' choice was intended to serve as a popular referendum as to who should be chosen as a senator by the state legislature."[171] Even though state legislatures still held the power of election under the Constitution, the Oregon Plan sought to introduce a more democratic element into Senate elections. Some other states adopted the Oregon Plan, and more still were introducing popular primaries more generally (including for Senate candidates) during that same period.[172] There is no evidence that the Oregon Plan sapped energy for more fundamental constitutional reform; to the contrary, it may well have been an important incremental step in helping to normalize democratic elections for Senators and pave the way for the Seventeenth Amendment.[173]

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169. U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . .").

170. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend XVII.

171. WENDY J. SCHILLER & CHARLES STEWART III, ELECTING THE SENATE: INDIRECT DEMOCRACY BEFORE THE SEVENTEENTH AMENDMENT 11 (2014).

172. *Id.* at 41.

173. This is how the Senate narrates its own history. *See About Electing and Appointing Senators: Historical Overview*, U.S. SENATE, https://www.senate.gov/about/origins-foundations/electing-appointing-senators/overview.htm [https://perma.cc/AFC9-RWTN] ("As more senators were elected based on state referenda, following models like the Oregon Plan, support in the Senate grew for direct election."). The leading scholars to have considered the issue conclude that "[t]he Oregon Plan never quite fit the constitutional requirements . . . and thus was a terrible

In a more contemporary context, attempts to work around the Senate filibuster may exhibit a similar dynamic. The Senate's use of the nuclear option for appointments does not seem to have dissipated calls for broader filibuster reform. If anything, the high drama surrounding the use of this extreme measure drew more attention to the extent to which aggressive use of the filibuster has created a de facto supermajority requirement for most Senate votes, and may have prompted more widespread calls for filibuster reform.[174] Furthermore, expanding the use of budget reconciliation to get around the filibuster may have undermined rather than strengthened the argument that the filibuster is an essential bulwark against hasty or overly partisan legislation. The more often budget reconciliation and other devices are deployed to work around the filibuster for important policy decisions, the more people might question the oft-repeated assertions about the filibuster's importance to good governance. After all, if a filibuster-free process is appropriate for contentious legislation on tax cuts and ambitious new spending programs, then people may well ask why a filibuster-free process is not also good enough for other major issues. To be clear, we do not think that increasing the use of filibuster workarounds is likely to result in the elimination of the filibuster for ordinary legislation any time soon. But that is because, as noted above, achieving filibuster reform is extremely difficult no matter what. As a *comparative* matter, we think it is at least as likely, and probably more likely, that frequent and aggressive use of filibuster workarounds will increase rather than decrease the probability that the filibuster will eventually be curtailed or eliminated.[175]

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substitute" for constitutional reform. SCHILLER & STEWART, *supra* note 171, at 216. But even if so, that point does not negate the important role that the plan may have played in encouraging—or at least not impeding—constitutional change.

174. For calls to eliminate or significantly reform the filibuster for legislation—all made after the nuclear option was used to eliminate the filibuster for confirmations and both parties had enacted major legislation through the reconciliation process—see, for example, ADAM JENTLESON, KILL SWITCH: THE RISE OF THE MODERN SENATE AND THE CRIPPLING OF AMERICAN DEMOCRACY (2021); JEFF MERKLEY & MIKE ZAMORE, FILIBUSTERED! HOW TO FIX THE BROKEN SENATE AND SAVE AMERICA (2024); Kyle Blaine & Veronica Stracqualursi, *Biden Says He Supports Filibuster Carve-Out for Voting Rights*, CNN (Dec. 23, 2021, 8:41 AM), https://www.cnn.com/2021/12/23/politics/joe-biden-filibuster-voting-rights/index.html [https://perma.cc/5ECS-CEDG]; Barbara Sprunt, *Biden Says He Supports Change in Senate Filibuster Rules for Abortion Rights*, NPR (June 30, 2022, 11:46 AM), https://www.npr.org/2022/06/30/1108880746/biden-filibuster-abortion-rights [https://perma.cc/M2G3-RY5Q]; and Lisa Desjardins, *What Every Senate Democrat Has Said About Filibuster Reform*, PBS (June 23, 2021, 12:35 PM), https://www.pbs.org/newshour/politics/what-every-senate-democrat-has-said-about-filibuster-reform [https://perma.cc/7PC4-JQWZ].

175. To be clear, this dynamic is not necessarily good. When the obstacle at issue is desirable rather than undesirable, then the normative valence of the arguments presented in the main text would reverse: If, in the absence of a workaround, those inconvenienced by the relevant obstacle would succeed in lobbying to eliminate it entirely, then a workaround that dissipates pressure for such "reform" is a good thing, with the workaround providing a safety valve that ensures the

III. Workarounds and Legal Fidelity

A workaround typically entails the purported discovery, often years or decades later, of a feature of the formal rules—a quirk or a loophole or a possibility that arises from the unanticipated interaction of several different provisions—that enables government officials to take some consequential action without complying with the restrictions previously thought to apply to that sort of action. So, there is a sense in which workarounds are, by definition, maneuvers that appear consistent with the *formal* rules of the game but that are contrary to the *intentions* and *expectations* of those who promulgated the rules in question, or to the broader *purposes* that those rules are supposed to serve.

This feature of workarounds may explain the intuition that the normative objection to a given workaround is not coextensive with the sort of consequentialist arguments discussed in Part II. One can detest the debt ceiling statute as a potentially disastrous policy mistake, yet still object to the use of an unrelated statute designed to benefit coin collectors as the solution—not just because it seems silly, but because it feels like improper "gaming the system." Similarly, many people who dislike the filibuster might nonetheless feel queasy about using the budget reconciliation process to enact substantive policy changes in areas like immigration reform. Although some aspects of immigration policy undoubtedly have significant effects on the federal budget, even a filibuster skeptic might reasonably conclude that immigration policy is just not the sort of thing that budget reconciliation is supposed to be *for*.[176]

This instinct seems to be grounded in a non-consequentialist notion that *fidelity* to the rules of the game—including respect for their purposes and

survival of a desirable limit on government power. By contrast, if the workaround undermines support for a desirable constraint, then the workaround might be bad on net, even if the specific use of the workaround produces good short-term results. Because our impression is that critics of workarounds are more likely to focus on the possibility that workarounds might dissipate support for desirable institutional reforms, we have focused on that version of the argument. But we acknowledge the possibility that a workaround, even one that is beneficial when considered in isolation, might be problematic if it erodes support for retaining a rule that is desirable in other contexts.

176. *See supra* note 110 and accompanying text (discussing the original purpose of budget reconciliation). In 2021, the Senate Parliamentarian reasoned along roughly these lines, though without an express invocation of the purpose of budget reconciliation, in rejecting an attempt by Senate Democrats to remove barriers to lawful permanent resident status for certain immigrant populations. She concluded that "[t]he reasons that people risk their lives to come to this country—to escape religious and political persecution, famine, war, unspeakable violence and lack of opportunity in their home countries—cannot be measured in federal dollars" and further noted that "[t]he same is true of the value of having the security of [lawful permanent resident] status in this country." THE CONGRESSIONAL BUDGET PROCESS, *supra* note 110, at 723 (quoting E-mail from S. Parliamentarian to Staff of S. Majority Leader, Staff of S. Republican Leader, Staff of S. Comm. on the Budget, Staff of S. Comm. on the Judiciary & Off. of S. Parliamentarian (Sept. 19, 2021, 6:28 PM)).

intended functions, not just compliance with their written terms—is an independent normative value. This notion of fidelity derives from a broader philosophical perspective on the right way to understand and apply institutional rules, one that frowns on formalistic arguments that exploit gaps, conflicts, inartful drafting, or technicalities to accomplish results at odds with the rules' purposes.[177] So one reason—perhaps the main reason—why a critic might find workarounds *qua* workarounds problematic is the view that, independent of the policy consequences, public decisionmakers ought to comply with the *purposes* of the established institutional rules, not merely with their formal provisions.

This non-consequentialist, fidelity-based objection may be particularly relevant to the issue of how courts (or other adjudicators) should assess challenges to alleged workarounds.[178] Indeed, although the consequentialist considerations discussed in Part II are central to assessing whether a given workaround is in the public interest, we doubt that judges could or should focus on these considerations when deciding whether a particular workaround is lawful.[179] By contrast, the question of fidelity—whether a

177. *Cf.* ROBERT A. KATZMANN, JUDGING STATUTES 31 (2014) (describing statutory purposivism, an interpretive philosophy premised on the view that "[t]he task of the judge is to make sense of legislation in a way that is faithful to Congress's purposes").

178. The fidelity-based objection might be relevant in non-adjudicative contexts. Some might argue that even if a workaround that exploits a loophole or technicality is *lawful*, it is still *improper* for policymakers to disregard the expectations or intentions of the rule-makers, because doing so demonstrates a lack of respect for their decisions and an inappropriately formalistic and cynical attitude toward legal rules and rule systems. But because the fidelity-based argument is most central in the context of legal adjudication, we focus on that setting.

Additionally, the main text focuses on how *courts* might adjudicate legal challenges to alleged workarounds. Such adjudication (or quasi-adjudication) might be conducted by other entities, such as the House or Senate Parliamentarian or the Justice Department's Office of Legal Counsel. And it is possible that the appropriate approach to adjudicating workarounds may differ depending on the identity of the adjudicator. For example, some who argue that courts ought to adopt a more formalist or textualist approach focus on the alleged institutional limits of the judiciary; such arguments might not apply to non-court adjudicators. Notwithstanding this important caveat, for the most part the arguments we develop regarding adjudication by courts would apply to other adjudicators as well, and so we focus on the judicial context in the main text.

179. Judges are unlikely to possess the institutional competence to determine, for example, whether the Senate filibuster improves or degrades the quality of legislation, or whether the debt ceiling law is wise, or whether the APA's notice-and-comment requirements typically improve regulatory quality enough to justify the delays and costs associated with that process. Additionally, judges' lack of democratic accountability is an independent reason for them not to base decisions on such contested policy judgments. We recognize that *in practice* judges' policy views are likely to influence their judgments on the legal issues. And we also recognize that there is an important and longstanding strain in legal theory that maintains that it is entirely appropriate, indeed important, for such substantive considerations to influence judicial opinions. *See, e.g.*, RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 59–85 (2003) (describing and elaborating on "principles of pragmatic adjudication"). And even those who would reject that position in most cases might nonetheless allow for the possibility that in a narrow set of circumstances, adjudicators

challenged action is consistent with the rules that our governing institutions have established (that is, with the law)—is the standard stuff of adjudication. We therefore frame the discussion that follows around how a judge or other adjudicator should evaluate a legal challenge to an alleged workaround. If the adjudicator concludes that the maneuver is indeed a workaround—a deliberate effort to exploit a formal feature of the rules in an unanticipated way to get around onerous legal requirements—should the adjudicator treat this as a reason to be more skeptical of the maneuver's legality than would otherwise be the case? Should there be an implicit legal presumption against the validity of workarounds? If so, how strong should that presumption be and when should it be overcome?[180]

The answers to those questions depend on how one understands the notion of legal fidelity, which in turn depends on whether one subscribes to a strictly formalist approach to adjudication, or instead embraces a more functionalist or purposivist approach.[181] Strict formalists, we argue, should not care whether a challenged maneuver is a workaround. Indeed, for strict formalists, the category of "workaround," as we have defined it, may be empty or incoherent: Either a maneuver is consistent with the formal rules (and thus lawful), or it is not (and thus unlawful). By contrast, we argue that adjudicators who believe that legal rules should be interpreted in ways that advance their underlying purposes—and that the rules that structure a lawmaking system should be interpreted so as to help that system function as intended—should treat workarounds with presumptive skepticism. But, crucially, we also argue that there are several situations in which this anti-workaround presumption should not apply. If legal text unambiguously allows a workaround, or if the workaround circumvents a public law rule that itself lacks a defensible purpose (perhaps because the obstacle is an anachronism or a contrived formalism), then a functionalist or purposivist

should be influenced by arguments from policy necessity. Nevertheless, in the discussion that follows, we adhere to what we take to be the prevailing conventional view, according to which judges should not base their legal decisions on whether the obstacle that the workaround would evade is, on balance, good or bad for society.

180. In any individual case, of course, there will be a variety of context-specific legal arguments for and against the challenged maneuver. Our focus is not on those arguments, but rather on whether the allegation that the challenged maneuver *is a workaround* should be relevant to the legal analysis.

181. We recognize that the distinction between formalism and functionalism (or purposivism) is not always a sharp one. Indeed, it may be more accurate to speak of a given adjudicator's "formalism" as a matter of more-or-less, rather than yes-or-no. And even that may be too simple, as there is a great deal of diversity within each of these broad categories, which makes the reductionist exercise of characterizing an adjudicator's approach on an implicitly one-dimensional formalism–functionalism (or textualism–purposivism) axis an inevitable oversimplification. Despite these caveats, we think that it is helpful to consider how an ideal-type "strict formalist" would approach a challenge to an alleged workaround, and to contrast this with how a more purpose-oriented adjudicator would think about such a challenge.

adjudicator need not and should not view the workaround as intrinsically problematic.

A. Strict Formalism and Workarounds

We consider first how a legal formalist should respond to the argument that workarounds *qua* workarounds are legally suspect. Of course, the term "formalism" covers a family of related approaches to legal interpretation, and there is considerable variation both in the types of formalism and in their underlying justifications.[182] In the interest of keeping the discussion manageable, we focus here on the approach of an adjudicator who embraces a strict version of formalism that denies that interpreters should attribute purposes to legal texts, and maintains that the subjective intentions or expectations of those who adopted legal rules have *no* normative significance.

For this sort of strict formalist, the fact that a given maneuver might be characterized as a workaround should not matter. Indeed, to a strict formalist, the "workaround" category lacks meaningful content. Recall that our definition of a workaround (which, to be clear, we think is just a more precise articulation of the way this term is typically used) expressly incorporates judgments about the *purpose* or *intent* of legal rules—both the rules being evaded and the rules that enable the evasion—and these judgments are based, at least for many, on inferences about the intentions or expectations of the creators of those rules. But if one views such an inquiry as illegitimate or incoherent,[183] it will not be appropriate, and may not even be possible, to distinguish a workaround from a garden-variety decision to use one rather than another of the available mechanisms for effecting some change in law or policy. This does not mean that a strict formalist would have to uphold every challenged workaround. The adjudicator might conclude that the challenged maneuver is inconsistent with the relevant formal requirements. But the strict formalist should have no objection to workarounds *as such*.

Interestingly, though, some jurists who have embraced a rather strict version of formalism, at least in their rhetoric, have sometimes used strong anti-workaround language that is hard to square with their avowed formalist commitments. The Supreme Court's recent "major questions" decisions provide a high-profile example of Justices who generally have formalist inclinations looking with skepticism upon agency rulemakings that appear to be attempts to circumvent the legislative process.[184] For a strict formalist,

182. For discussions of formalism in legal theory, see generally Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111 (2010); Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251 (1975); and Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

183. *See supra* notes 52–54 (citing sources for these views of intent).

184. *See supra* note 35 (citing examples).

however, a given rulemaking should be either lawful or unlawful on its own terms, based only on a reading of the statutory text and the relevant context. A particular rulemaking's (alleged) status as a workaround of the legislative process should be immaterial to that determination. The skepticism of workarounds evinced in opinions by otherwise formalist jurists suggests that the strict formalist position, though perhaps attractive in theory, is not always easy to follow in practice.

That said, not all formalists embrace a strong form of intent-skepticism that rules out any inquiry into the overall design and objectives of a set of legal rules. Indeed, many self-described formalists emphasize that, while it would be impermissible to deviate from the clear meaning of a legal rule to better serve the (alleged) purposes of the law or the intentions of the lawmakers, adjudicators can and should consider the overall *structure* of a legal instrument or rule system, rather than considering individual terms in isolation.[185] A word, phrase, or provision that seems ambiguous when read on its own may become clearer when the larger legal context—the full constitution, statutory scheme, or other body of legal rules—is taken into account. Moreover, even when there is no prima facie textual ambiguity, some formalists may find inferences from (linguistic) context and (constitutional or statutory) structure strong enough to conclude that a different reading of the disputed provision is more appropriate.[186]

This embrace of structural analysis may provide formalist interpreters with grounds for objecting to workarounds, without making forbidden reference to subjective intentions, original expectations, or policy goals. For example, many formalists would endorse the view that each provision of a legal document should be presumed to have independent meaning, which implies that adjudicators should disfavor interpretations that render some

185. *See, e.g.*, Manning, *supra* note 53, at 84–85 ("[I]n cases of ambiguity, textualists are sometimes willing to make rough estimates of purpose from sources such as the overall tenor or structure of the statute, its title, or public knowledge of the problems that inspired its enactment."); Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1282–83 (2020) ("[M]odern defenders of textualism note the need for context when construing statutes—and embrace a range of extratextual aids that provide such context . . . . [T]hey contend that judges should derive such purpose from the statute's text and the surrounding *corpus juris* . . . ."); Russell C. Bogue, Note, *Statutory Structure*, 132 YALE L.J. 1528, 1533 (2023) ("[S]ome types of structural argument the Court uses are not explicitly premised on any articulable statutory purpose, but rather on appeals to coherence, symmetry, and context . . . . [This can be] highly attractive for textualist interpreters who are wary of purposivism's traditional embrace of extrinsic sources of statutory meaning.").

186. *See, e.g.*, King v. Burwell, 576 U.S. 473, 497 (2015) (Roberts, C.J.) ("In this instance, the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase."); *see also* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 66 (2015) ("One way to understand *King* is that the Chief Justice chooses the holistic side of textualism, one that has always shared with purposivism the assumption that Congress legislates rationally, with means to an end.").

provisions redundant or otherwise superfluous.[187] Similarly, formalists may also embrace the linguistic canon that enumerated lists should be presumed exhaustive.[188] So, if accepting a given workaround would render other legal provisions irrelevant or meaningless, or would imply that explicit lists are not actually exhaustive, or something of that nature, even a formalist might find the maneuver legally suspect. More broadly, some formalists may be willing to infer broad principles from a legal instrument's text and structure—for example, inferring general principles of state sovereignty or the separation of powers from the Constitution—and may treat those principles as a valid part of the (formal) law.[189]

Although these types of structural or linguistic inference may provide formalist adjudicators with a basis for objecting to certain types of workarounds, it is important to emphasize the limited scope for this sort of reasoning. The narrowly linguistic form of the objection—which relies on specific canons such as the presumption against (linguistic) redundancy—only applies when the workaround depends on an aggressive reading of certain phrases in a legal text. Most workarounds, however, do not take this form. The broader version of the structuralist objection to workarounds may be nominally "formalist" insofar it disclaims any reliance on the lawmakers' subjective intentions or substantive policy objectives, but this more ambitious approach to structural inference nevertheless presumes that adjudicators can and should draw conclusions about which interpretation of a rule system's component parts would contribute to the system's coherence, integrity, or rationality, all of which seem very close to considerations of function or purpose, separate and distinct from the (linguistic) meaning of the relevant texts. For this reason, we think this more capacious formalism—which embraces a broad understanding of what counts as legitimate structural or contextual inference—is best grouped together with the more functionalist or purposivist approaches to adjudication that we discuss in the next section.

187. *See, e.g.*, SCALIA & GARNER, *supra* note 39, at 167–82 (2012) (discussing the whole-text, surplusage, and harmonious-reading canons). Relatedly, many formalists would likely endorse the linguistic canon that seemingly open-ended terms are implicitly limited by the surrounding terms—especially if failure to infer such limits would mean that the open-ended term covers everything covered by the more specific terms. *See, e.g.*, *id.* at 195–213 (discussing the *noscitur a sociis* and *ejusdem generis* canons).

188. *See, e.g.*, *id.* at 107–11 (discussing the *expressio unius* canon).

189. In the statutory realm, one leading textualist judge, Frank Easterbrook, has argued that "[w]e should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words." Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988). In the constitutional domain, John Manning has observed that "[t]he Rehnquist and Roberts Courts have repeatedly invalidated statutory programs" based on "new structuralism," which "rests on freestanding principles of federalism and separation of powers." John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 4 (2014).

B. An Anti-Workaround Presumption and Its Limits

We now consider how an adjudicator who is willing to consider the purposes of legal rules and (perhaps) the intentions of the rule-makers should evaluate the lawfulness of attempted workarounds. (As noted above, this discussion might also apply to a self-described formalist who has a capacious understanding of the factors that can be incorporated into structural or contextual inference.) Just as our definition of a workaround implies that strict formalists should not be concerned about whether a maneuver is a workaround, our definition also implies that a more purposivist or functionalist interpreter should at least begin with a skeptical attitude toward an apparent workaround. Exploiting loopholes, technicalities, incautiously broad language, or other features of the formal rules in ways that system designers did not anticipate or intend—or that contravene the evident purpose or structure of the rules—is anathema to adjudicators who place great weight on respecting the purposes or objectives of legal rules or rule systems.[190] We therefore suggest that purposivist interpreters should adopt an anti-workaround presumption—a skepticism of aggressive, formalistic readings that go against the spirit or purpose of a given rule or rule system's design.[191] But, critically, we argue that there are several situations in which the presumption should be overcome—arguably including several of the most high-profile and contentious workarounds and proposed workarounds.

1. The Anti-Workaround Presumption.—A purposivist interpreter has reason to presume, at least as a starting point, that an action's status as a workaround should count against the legality of that action. Such an anti-workaround presumption is consistent with the purposivist's commitment to reading legal texts in a manner consistent with the purposes of both particular provisions and systems of rules as a whole. Workarounds use legal provisions in a manner that is in tension with their purposes or intended functions, and so, the reasoning goes, a purposivist interpreter should be skeptical of workarounds.

190. By a "rule system," we mean a collection of independent legal provisions that together advance certain goals or organize an area of governance. Examples include constitutional law provisions and cases that create the separation of powers and federalism, statutory and common law rules that govern the administrative state, and cameral rules that govern legislative procedure in the House and Senate.

191. This idea is related to the broader notion, discussed previously, that bodies of law (constitutions, statutes, cameral rules, etc.) should be read as systematic and coherent wholes, such that adjudicators should disfavor an interpretation of a given provision if that interpretation, though linguistically plausible, would render some other provision irrelevant or ineffective. *See supra* notes 187–188 and accompanying text.

To the best of our knowledge, no court has ever expressly articulated such a presumption in the public law context.[192] But when courts cast doubt on the legality of a purported workaround, they often use functionalist language that suggests something like an anti-workaround principle at work—even when much of the surrounding opinion is more formalist in tenor. For example, when the Supreme Court held that legislative veto provisions are unconstitutional, the Court stressed that the importance of the Article I, Section 7 process to the Framers counseled against permitting circumvention of that process.[193] Similarly, in finding the Line Item Veto Act unconstitutional, the Court rejected the government's formalist attempt to distinguish a line item veto (rejection of part of a statute passed by Congress) from what the Line Item Veto Act, despite its title, actually did (delegate to the President the power to cancel spending that had been authorized in a duly enacted statute).[194] In each instance, the government's argument was compelling on its face, at least as a formalist matter, but the Court insisted that the functional equivalence of the two mechanisms counted against the government's position.

Now, just because a litigant asserts that a given exercise of lawmaking power is a workaround does not make it so. The challenged maneuver might instead be better understood as an "ordinary" decision to use one of several alternative methods for achieving some legal change. An adjudicator who embraces an anti-workaround presumption need not and should not accept at face value the claim that a challenged exercise of authority is in fact a workaround. Indeed, if a given maneuver's characterization as a workaround is to count against its legality, then the burden should be on the litigant challenging the maneuver to show that this maneuver is actually a workaround; the starting presumption should be that it is not. After all, as we emphasized in Part I, though we think the concept of a workaround is conceptually coherent, in practice the boundaries of the category are fuzzy on multiple dimensions.[195]

Judges might properly doubt their ability to confidently sort cases into workarounds and non-workarounds, especially when this classification would require making contestable judgments about the purposes of both the obstacle being sidestepped and the tool being used to enable the

192. That said, some scholars have advocated something along these lines and have claimed to find it implicit in the doctrine. *See* EPSTEIN, *supra* note 38, at 48–49, 204, 231–32, 350 (invoking an anti-circumvention norm in analyzing Supreme Court decisions).

193. *See supra* notes 36, 81–84 and accompanying text (discussing INS v. Chadha, 462 U.S. 919 (1983)).

194. *See supra* notes 36, 76–80 and accompanying text (discussing Clinton v. City of New York, 524 U.S. 417 (1998)).

195. *See supra* subpart I(A).

circumvention.[196] Judges might also reasonably conclude that the expected costs of "false positives" (wrongly categorizing an unobjectionable exercise of power as a problematic workaround) are greater than the expected costs of "false negatives" (failing to recognize a maneuver as a genuine workaround). And we might reasonably worry that judges, possibly subconsciously, will be too quick to label a policy initiative they dislike as a "workaround," thereby triggering the anti-workaround presumption.[197] These concerns provide reasons to hesitate to apply the workarounds label in individual cases. But for those actions that are properly classified as workarounds, purposivist interpreters should apply an anti-workaround presumption.[198] This presumption, however, has significant limits, to which we turn next.

2. The Presumption's Limits.—A general anti-workaround presumption should not be absolute. There are several situations, including some that are highly politically salient, in which even a purposivist interpreter should find that this presumption is overcome.[199]

First, a court might conclude that a challenged maneuver, though likely a workaround, is so clearly authorized by unambiguous text that the court lacks legitimate grounds for rejecting that maneuver. Even those who believe that the background purposes or objectives of a legal rule should inform how ambiguities in the rule's text should be resolved ought to hesitate before

196. For a discussion of this difficulty in the context of executive branch efforts to circumvent the major questions doctrine, see Daniel J. Hemel, *Major Questions Avoidance and Anti-Avoidance*, 98 S. CAL. L. REV. (forthcoming 2025) (manuscript at 35–40), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4893190 [https://perma.cc/2SU8-B3SW].

197. This concern parallels criticisms that have been leveled against the major questions doctrine. *See, e.g.*, Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 23 (2023) ("Without a clearer demarcation of the [doctrine's] domain, it is perfectly reasonable to worry that judges will be influenced (perhaps subconsciously) by their hostility to a particular regulation—or to a particular agency or administration—when determining that a rule is extraordinary enough to require extra-clear congressional authorization.").

198. An important caveat: If the pathologies described in this paragraph—difficulties of categorization, the costs of false positives, and worries about motivated reasoning—are sufficiently pervasive, a rational system designer might conclude that an anti-workaround presumption, even if justified in individual cases by purposivist reasoning, is in fact likely to decrease the overall quality of judicial decisions and therefore should not be adopted as a categorical matter.

199. In presenting our framework this way—as a default presumption that can be overcome in a set of scenarios—we imply a structured, step-by-step inquiry. This is indeed our preferred approach, but an alternative approach would be to adopt a more open-ended, all-things-considered assessment. On this approach, the fact that a challenged maneuver is (arguably) a workaround would be one factor among several that weighs against its legality, but other factors, including several of the factors we discuss below, would cut the other way. While different in orientation, the content of this less structured approach would be much the same as what we describe in the main text: The fact that a practice is a workaround would heighten a purposivist adjudicator's skepticism of its legality, while the presence of one or more of the factors discussed in this section would decrease one's skepticism of the challenged practice's legality. While our preference is for a more structured inquiry—a default presumption and the conditions under which that presumption may be overcome—this is not essential to our core argument.

invoking those intents or purposes to foreclose a workaround that fits the plain text of the relevant rules. In the face of text that, read in context, clearly permits a workaround, even a functionalist or purposivist adjudicator may well feel constrained to uphold the workaround given its clear formal legality.[200]

Second, an anti-workaround presumption should not apply (or should be considered overcome) if the obstacle being circumvented is *itself* objectionable on purposivist, functionalist, or structural grounds. For the purposivist argument against workarounds to hold water, it must be the case that by exploiting a loophole or technicality to evade an obstacle to government action, the workaround disserves or undermines the overall design and intended function of either a given legal provision or the lawmaking system as a whole. After all, the fidelity-based objection to a workaround presumes that the obstacle being worked around in fact serves a legitimate purpose, one that is connected to the broader institutional design. In most cases, it is safe to assume that this is so. But not always. At times, the obstacle being circumvented does not have a plausible functional, purposive, or structural justification. Instead, the only basis for the legal legitimacy of the obstacle is (narrowly) formal: The obstacle is consistent with the rules as written. This does not necessarily mean that a purposivist adjudicator should rule the obstacle legally invalid. The legal texts that create the obstacle might be unambiguous, or the legality of the obstacle may lie beyond the adjudicator's power to decide. But if the obstacle itself can be justified only on formalist grounds, not on functional or purposive grounds, then the functionalist or purposivist judge should be untroubled by the invocation of another formalist application of the rules to get around that obstacle. When one side of a public policy dispute exploits a technicality to obstruct some action, then one can hardly object to the other side's use of a different technicality to get around that obstruction. What's sauce for the goose is sauce for the gander.

To put this another way, the adjudicator should not frame the question narrowly as whether the challenged workaround deviates from the purposes of the rules or the intentions of the rule-makers. Instead, the adjudicator should ask whether the combination of the obstacle and the workaround entails a greater or lesser deviation from those purposes or intentions than the obstacle alone. This argument can be understood as an application of the institutional version of the General Theory of Second Best: Even if our ideal world would not allow any opportunistic exploitation of technicalities at all, it might still be the case that we are better off allowing two such formalistic

200. We express no view here on the appropriate legal standard dictating when the presumption should be treated as overcome—i.e., whether the presumption should yield more easily or instead only in the face of evidence that is "compelling," "clear and convincing," or the like.

contrivances (the obstacle and the workaround) than having only one (the obstacle alone), because the former arrangement gets us closer to our ideal world than the latter.[201] Now, this is not always the case. Sometimes even if an obstacle is incompatible with the overall system design, the workaround might make things worse rather than better. The General Theory of Second Best does not indicate that correcting a subset of system flaws *always* makes things worse, only that it *might*. The important point is that the premise of an anti-workaround presumption is that the obstacle being circumvented can be justified on purposivist, functional, or structural grounds, and that when this is not so, the presumption should no longer apply—leaving the adjudicator to decide whether, on the whole, allowing the workaround would result in greater overall fidelity to the larger design or purpose of the system than would leaving the unworked-around obstacle in place.

The question then arises: How might it come to pass that a given hurdle to government action does not have a plausible functional justification, such that an anti-workaround presumption ought not apply? There are several possibilities.

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201. In welfare economics, the General Theory of Second Best refers to the finding that when a market suffers from multiple market failures, correcting only a subset of those failures will not necessarily improve overall social welfare, and may worsen it. R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11 (1956). A standard example is a monopolist producer of a product with significant negative externalities (such as pollution). In this setting, there are two deviations from an ideal market: the lack of competition and the negative externality. Correcting the first market failure—say, by breaking up the monopoly and fostering robust competition—will reduce prices and lead to greater overall production and consumption. But if the negative externality is left uncorrected, overall social welfare might go down, because the increase in production exacerbates the negative externality, and if the social costs of the negative externality exceed the gains in consumer surplus, the net social welfare impact of breaking up the monopoly will be negative.

Social scientists and legal scholars have recognized an institutional version of the General Theory of Second Best: When a legal or institutional system deviates from the ideal system in multiple respects, reforming one institutional feature—in a manner that gets closer to what that feature would look like in an ideal system—might not improve the system overall, if other non-ideal features of the system remain unchanged. *E.g.*, Matthew C. Stephenson, *Judicial Reform in Developing Economies: Constraints and Opportunities*, *in* ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS—REGIONAL: BEYOND TRANSITION 311, 320–25 (François Bourguignon & Boris Pleskovic eds., 2007); Dani Rodrik, *Second-Best Institutions*, AM. ECON. REV.: PAPERS & PROC., May 2008, at 100, 100; Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 17–23 (2009); Bruce Talbot Coram, *Second Best Theories and the Implications for Institutional Design*, *in* THE THEORY OF INSTITUTIONAL DESIGN 90, 90–95 (Robert E. Goodin ed., 1996); Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307, 311–12, 327–28 (2008). The qualified defense of workarounds we suggest in the main text is an application of this institutional version of the Second Best theory: An ideal lawmaking system might include *neither* the contrived obstacle (say, the filibuster) *nor* the contrived workaround (say, the expansive notion of what qualifies for inclusion in a budget bill), but eliminating only *one* of those deviations (here, the reconciliation workaround) might produce a lawmaking system that is *worse* than a system in which both of those deviations are present.

One reason this might be the case involves the passage of time, together with changes in surrounding laws, institutions, and political context. A requirement that was originally seen as important may later become merely an inconvenient technicality or, worse, an anomaly that clashes with the (reformed) system's overall design, assumptions, and implicit normative commitments. Here, the Electoral College provides a useful example. A primary motive for the creation of the Electoral College was the perpetuation of slavery,[202] an odious rationale that has been repudiated by the Thirteenth Amendment and near-universal moral consensus.[203] Other rationales for initially adopting the Electoral College, like the protection of small states from oppression by large states[204] or the preservation of independent judgment in the selection of the President,[205] carry little weight today. State population size is no longer a salient axis of political division,[206] and it is virtually unthinkable (and in many states unlawful) for electors to exercise independent judgment to change the result of a presidential election.[207] The Electoral College, in short, is a vestigial institution, one that does not serve any of the purposes for which it was intended.[208] But the fact that it has clear

202. Akhil Reed Amar, Opinion, *Actually, the Electoral College Was a Pro-Slavery Ploy*, N.Y. TIMES (Apr. 6, 2019), http://nytimes.com/2019/04/06/opinion/electoral-college-slavery.html [https://perma.cc/5BWC-H5JM]; Paul Finkelman, *Original Sin: The Electoral College as a Pro-Slavery Tool*, L.A. REV. OF BOOKS (Dec. 19, 2016), https://lareviewofbooks.org/article/original-sin-electoral-college-proslavery-tool [https://perma.cc/7TV5-M8P6].

203. *See* U.S. CONST. amend. XIII, § 1 (banning slavery).

204. *See* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 231–32 (2016) (discussing the role of state size in debates at the Philadelphia convention over the Electoral College).

205. *See* THE FEDERALIST NO. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[T]he immediate election should be made by men most capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation . . . .").

206. *See* Gould et al., *supra* note 90, at 514–15 (discussing the irrelevance of state size in predicting the voting patterns of federal representatives and citing sources).

207. *See Presidential Elections*, FAIRVOTE (last updated Oct. 2022), https://fairvote.org/resources/presidential-elections/#faithless-elector-state-laws [https://perma.cc/2FME-YMKN] (collecting state laws on so-called "faithless electors"); *see also* Chiafalo v. Washington, 140 S. Ct. 2316, 2323–29 (2020) (upholding state faithless elector laws as constitutional).

208. Contemporary commentators have proffered various defenses of the Electoral College separate from the reasons the Framers had for adopting it. Purposivist interpreters can reasonably differ on what sort of role such *post hoc* justifications should have in legal analysis, but the patent weaknesses of the modern arguments in favor of the Electoral College should, in our view, lead to the rejection of those arguments even by interpreters who are generally open to purposivist arguments unmoored from the intent of a system's designers. *See* Eric Levitz, *Here's Every Defense of the Electoral College—And Why They're All Wrong*, N.Y. MAG. (Mar. 20, 2019), https://nymag.com/intelligencer/2019/03/why-every-argument-for-preserving-the-electoral-college-is-wrong-warren-cnn.html [https://perma.cc/6EUB-NMCG] (collecting and rebutting common defenses of the Electoral College). The question whether to take into account purposes that arose after enactment is one of the general questions facing theories of purposivism. We do not address the problem here, except to note that if such post-enactment purposes are taken into account when interpreting rules, they should also be taken into account when evaluating workarounds.

political beneficiaries, coupled with the difficulty of formally amending the Constitution, means that the Electoral College is, for all practical purposes, impossible to eliminate through the Article V amendment process.[209] If advocates for a National Popular Vote Compact succeeded in getting a sufficient number of states to join the scheme, and the "compact" or its implementing legislation were subsequently challenged as an evasion of the Article V amendment process, even a strongly purposivist judge who embraces an anti-workaround presumption would be on firm footing in refusing to apply that presumption in adjudicating this challenge.[210]

In other cases, the obstacle being worked around arises not from any deliberate institutional design decision, but rather due to an oversight or anomaly that political actors later figured out how to exploit. The most famous example of such a case is the Senate filibuster, which originated not as an intentional choice to adopt a general supermajority voting rule, but rather by accident. Those who wrote and ratified the Constitution assumed and intended that the Senate, like other legislative bodies, would operate on the principle of majority rule, except in those specific cases where the Constitution specified a supermajority requirement.[211] So how did we end up with the filibuster, and with it a de facto supermajority rule in the Senate for most matters? A combination of accident and opportunism: An early nineteenth-century effort to streamline Senate rules led the chamber to eliminate a procedural device (the "previous question" motion) that allowed a simple majority to cut off debate.[212] "Because the [previous question] rule had not been used as a means of limiting debate," Sarah Binder and Steven Smith have observed, "its deletion could not have signaled a commitment to the principle of extended debate."[213] This rule change laid the groundwork for the rise of the filibuster in the nineteenth century. To be sure, Congress later institutionalized rules—in the shadow of the then-existing filibuster—

209. *See* KLARMAN, *supra* note 204, at 626 ("[A]n amendment to alter this aspect of the system would be virtually impossible to enact—both because the even more drastically malapportioned U.S. Senate would very likely never pass it and because the smaller states, which benefit from the malapportionment, would never ratify it.").

210. We take no position here on whether the National Popular Vote Compact would in fact be constitutional. Our argument is limited to the claim that the status of the compact *as a workaround* should not have any bearing on the proper adjudication of the legal challenges.

211. Sarah Binder and Steven Smith's history of the filibuster concludes that "delegates to the [constitutional] convention did not write into the Constitution any procedural protections for Senate minorities," that those delegates "had seen full well in the experience of the Continental Congress what harm supermajority requirements could bring," and that the authors of the Federalist Papers "made clear that the experiment with supermajorities under the Articles of Confederation had been a dismal one and that they did not intend to repeat it under the new Constitution." SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE 5 (1997); *see also id.* at 29–51 (discussing this history).

212. *See id.* at 34–39 (describing this history).

213. *Id.* at 37.

providing for supermajority cloture.[214] But it cannot be seriously denied that the filibuster has its *origins* in the exploitation of a technical feature of the formal rules, and that a supermajority requirement for ordinary Senate business is contrary to the intentions and expectations of the Constitution's Framers and ratifiers. This does not necessarily imply that the filibuster is unconstitutional or otherwise unlawful.[215] What it does imply, in our view, is that it would be not only strange but perverse for an adjudicator—even a strongly purposivist adjudicator—to apply an anti-workaround presumption to a maneuver that seeks to sidestep the filibuster. Indeed, for those who care about the original design of the Senate, filibuster workarounds might lead today's Senate to be closer to that original design.

Purposivist adjudicators might also consider the anti-workaround presumption overcome in cases where a procedural device or requirement that was intended to further one purpose is instead being used for a quite different purpose, one that is not consistent with the evident design of the system or the intentions of the system's designers. This is a trickier case, because in this situation one cannot say, in general, that the obstacle being circumvented serves *no* valid purpose. The argument, instead, is that the formal rules are being used to achieve a purpose that is *different* from the one for which those rules were intended, and that is in tension rather than harmony with the larger system design. The power of the Senate to withhold its consent to presidential appointments provides an example. That power plausibly serves many legitimate purposes: ensuring high-quality nominees, preventing presidential patronage, and encouraging the nomination of more moderate individuals.[216] There is no evidence, however, that the Framers gave the Senate the power to withhold consent as a means to enable the Senate to prevent federal agencies from performing their statutory functions. Nor do we see any argument that refusing to confirm appointees is a valid way for one chamber of Congress to negate a statute passed by both chambers and signed by the President. But this is precisely how the Senate has sometimes used its (non)confirmation power in our partisan age, especially

214. *See id.* at 7 tbl. 1-1 (documenting changes to Rule XXII). Things are somewhat more complicated, because the passage of time coupled with the occasional revision of rules regulating the filibuster arguably imply that the Senate has accepted the legitimacy of the filibuster as we know it today (though the expanding use of filibuster workarounds by the Senate may undercut that argument).

215. Some scholars have made such an argument, however. *See generally* Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445 (2004) (providing an overview of relevant arguments for and against the filibuster's constitutionality).

216. Founding-era evidence suggests that some, but not all, of these purposes motivated the inclusion of this provision. *See* KLARMAN, *supra* note 204, at 221–24 (discussing debates at the Philadelphia convention over the role of the Senate in confirmation of nominees).

in the wake of the creation of the Consumer Financial Protection Bureau.[217] Working around the Senate in such circumstances (such as through aggressive use of recess appointments) therefore does not undermine the purpose of the confirmation process, particularly when considered from the perspective of those who created that process.[218]

* * *

In each of the situations just described, there is a strong case for setting aside the general anti-workaround presumption. When an institutional design feature has an original purpose that has long since become irrelevant (as in the case of the Electoral College), has no original purpose at all (as in the case of the accidental creation of the filibuster), or is being used in ways that do not further its legitimate purposes (as in the case of some Senate decisions not to confirm nominees), the principal reason for a purposivist adjudicator to treat workarounds with skepticism falls away. Such an adjudicator must instead ask whether allowing the workaround would be more or less

217. *See* Jonathan Cohn, *The New Nullification: GOP v. Obama Nominees*, NEW REPUBLIC (July 18, 2011), https://newrepublic.com/article/92167/cordray-warren-cfpb-obama-republicans-nomination [https://perma.cc/5PSG-78LE] (describing blocked confirmations in President Obama's first term as an effort by Senate Republicans "to achieve, through the confirmation process, what they could not achieve through legislation").

218. There is a difficult question as to what a court should do when a challenged workaround is being used to circumvent an obstacle that is sometimes, but not always, inconsistent with the larger design of the system. Our preferred remedy is to allow the workaround across the board, rather than trying to make case-by-case determinations of whether the obstacle being circumvented is being used improperly in a specific instance. Given that the question is how to interpret the rule that is invoked as the basis for the workaround, it would be odd to say that the rule means one thing in some of its possible uses and something else in others. So, we would tend to think that an adjudicator should not ask whether, in one individual case, the strategic use of certain rules to obstruct a proposed action is inconsistent with the purposes of the relevant rules, but rather whether there is a general pattern or practice of engaging in this sort of formalistic obstruction. Though that may appear to be a difficult line to draw, we suspect that in practice opportunistic use of procedural barriers is seldom a one-off and tends to indicate a breakdown in the original function of the barrier. For instance, although refusing to confirm a nominee in the hope of "decapitating" an agency is rare, blocking confirmation for reasons unrelated to the nominee's merits is lamentably common. *See, e.g.*, Jonathan S. Gould, *The Law of Legislative Representation*, 107 VA. L. REV. 765, 817 (2021) (providing examples).

This line of argument might provide a justification for accepting filibuster workarounds, even if one resists our earlier assertion that the filibuster is (generally) objectionable on purposive, functional, or structural grounds. *See supra* notes 211–215 and accompanying text. Suppose that, notwithstanding those arguments, a purposivist adjudicator believes that the supermajority cloture rule can serve—and perhaps was originally intended to serve—the legitimate function of enabling Senators with unusually intense opposition to some measure to hold it up. Even if this is a plausible and legitimate understanding of the purpose of the cloture rules, the modern practice of requiring a supermajority to advance all ordinary legislation demonstrates a disconnection between the actual practice and the allegedly legitimate purpose. That general practice should be enough to make an adjudicator, such as the Senate parliamentarian, more sympathetic towards filibuster workarounds.

consistent with the overall system design than leaving the unworked-around obstacle in place.[219]

To be sure, this sort of holistic analysis demands difficult judgments about purposes or functions of particular rules, as well as contestable conclusions about whether a given workaround would circumvent those purposes. But those are the judgments that purposivism or functionalism—or a capacious version of structuralism—require in this context. A critic might conclude that it would be inappropriate or unwise for judges to undertake this sort of holistic analysis. The reasons are familiar: concerns about judicial capacity constraints, institutional competence, and the risk that this sort of subjective inquiry may be unduly shaped (perhaps subconsciously) by judges' policy preferences or ideologies. Indeed, even those who advocate judicial purposivism in other contexts might hesitate before embracing it here, given the complexity of the necessary inquiry. We do not take a position on this issue. We do emphasize, though, that an adjudicator who believes that the sort of integrated inquiry into purposes or functions sketched above is not possible or advisable has a ready alternative: The adjudicator can revert to a more strictly formalist approach, simply deciding whether the workaround is compatible with the text of the relevant rules, read in their (linguistic) context.[220] But in doing so, the adjudicator would need to abandon the anti-workaround presumption, reverting instead to the interpretive approach that we sketched above in subpart III(A)—in which there is nothing objectionable about workarounds as such, and indeed the category "workaround" is not meaningfully different from other means for effecting legal or policy change.

In short, our core argument is an argument for symmetry: An adjudicator who is a strict formalist with respect to the obstacle being worked around—and who would therefore reject as irrelevant arguments that this obstacle is inconsistent with the purposes of the rules—should reject arguments that a workaround to that obstacle is illegitimate by virtue of its inconsistency with the rules' purposes. Likewise, purposivist adjudicators should be consistently purposivist: They should apply a presumption against workarounds if—but only if—the obstacles being worked around themselves

219. As an example of a case where we think the presumption probably *should* apply, consider Schedule F. *See supra* notes 124–132 and accompanying text (providing an overview of Schedule F). The point of Schedule F was to nullify statutory civil service protections for a large group of federal employees. Not everyone favors those protections in their current form, but the civil service merit system clearly still has an identifiable, legitimate, and relevant purpose.

220. *Cf.* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 79 (2000) ("The most plausible responses to the uncertain conditions of interpretive choice suggests that courts' foremost concern should be to minimize the costs of judicial decisionmaking and of legal uncertainty. That concern pushes interpretive doctrine in the direction of formalism." (footnote omitted)). *See generally* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006) (further developing this argument).

serve the purpose for which the relevant rules (or broader rule systems) were designed. If such an adjudicator is willing to invoke functional, purposive, or structural arguments to characterize a given maneuver—pejoratively—as a workaround, the adjudicator should also be receptive to functional, purposive, or structural arguments that this workaround is a justified countermeasure in response to an obstacle that is itself objectionable on functional, purposive, or structural grounds. Mixing and matching formalist and non-formalist approaches, by contrast, is both unprincipled and conducive to outcome-oriented decisionmaking.

Conclusion

Workarounds are pervasive features of American law and politics. Because our system makes lawmaking difficult across a host of domains, it is unsurprising that public officials and activists have looked for ways to sidestep the onerous constraints of conventional lawmaking processes. In the short term, the reaction to any given workaround is often driven by partisan affiliation and policy preferences. But the widespread use of workarounds also invites more general questions about whether workarounds should be considered intrinsically objectionable or legally suspect. If workarounds will remain a feature of our public law, as we expect that they will, then it is important to understand their advantages and disadvantages, and their proper role in our system. Elected officials, judges, and citizens alike will continue to face questions of how they should understand and evaluate workarounds. Our hope is that this Article's analysis helps them in thinking through these questions.