

# ARTICLES

## The Filibuster

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*The filibuster in the United States Senate imposes an effective supermajority requirement for the enactment of most legislation because sixty votes are required to bring a measure to a vote over the objection of any senator. Filibusters are ubiquitous but virtually invisible, for the contemporary Senate practice does not require a senator to hold the floor to filibuster; senators filibuster simply by indicating to the Senate leadership that they intend to do so. The prevalence and invisibility of this “stealth filibuster” dramatically affects which legislation is passed and which nominees are confirmed. The stealth filibuster also raises serious constitutional questions. Summarizing the historical development of Senate filibusters, Professors Fisk and Chemerinsky show that the nature and effects of filibusters have changed significantly as the Senate has grown larger and busier. They argue that, although dilatory debate has a history, the modern stealth filibuster is in significant respects unprecedented. Professors Chemerinsky and Fisk also assess the effects of the filibuster on Senate practice in light of empirical and public choice theories of congressional behavior. Based on this, they conclude that the filibuster is not alone among congressional procedures in being antimajoritarian and that it may counteract the antimajoritarian aspects of other congressional procedures. Professors Fisk and Chemerinsky then discuss the constitutionality of the filibuster. They first conclude that a judicial challenge to the Senate rules that permit it would be justiciable if brought by proper plaintiffs. They then conclude that, although the filibuster itself is not unconstitutional, the Senate rule that prohibits a majority of a newly elected Senate from abolishing the filibuster is unconstitutional because it impermissibly entrenches the decisions of past Congresses.*

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We dedicate this article to the memory of our dear friend, Julian Eule. His scholarship inspired and improved this article and his life will inspire us always.

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## I. INTRODUCTION

Few movie images are more endearing than that of an exhausted Jimmy Stewart staging a one-person filibuster against corruption in *Mr. Smith Goes to Washington*.<sup>1</sup> But there is a danger in relying on the movies for knowledge about government. The filibuster, as practiced in recent years, is driven by motives less heroic and produces effects more pernicious than those depicted in *Mr. Smith Goes to Washington*. Moreover, the image of Jimmy Stewart nobly holding the Senate floor until he collapses and shames his opposition into submission should not obscure serious questions about the constitutionality of the filibuster and the Senate rules that permit it.

Simply stated, the filibuster enables a minority of U.S. senators to block action favored by a majority of the Senate, the House of Representatives, and the President. The only way the Senate can overcome a filibuster is by a vote of sixty senators to end debate and bring the matter to a vote.<sup>2</sup> Filibusters are so ubiquitous in the contemporary Senate that it is now commonly said that sixty votes in the Senate, rather than a simple majority, are necessary to pass legislation and confirm nominations.<sup>3</sup>

During the Clinton Presidency, the filibuster has consistently fueled considerable controversy, and filibustering tactics have occurred on both sides of the political aisle. In the first two years of the Clinton Administration, a disciplined Republican Senate minority used the filibuster to block key pieces of the President's legislative agenda. Thwarted legislation included an economic stimulus package,<sup>4</sup> campaign finance reform,<sup>5</sup> lobbying reform,<sup>6</sup> health care reform,<sup>7</sup> a bill to prohibit hiring permanent replacement workers for striking employees,<sup>8</sup> and racial justice provisions in a crime bill.<sup>9</sup> Republicans also

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1. *MR. SMITH GOES TO WASHINGTON* (Columbia Pictures 1939).

2. See SENATE COMM. ON RULES & ADMIN., *STANDING RULES OF THE SENATE*, S. DOC. NO. 102-25, at 15-16 (1992) [hereinafter *SENATE RULES*] (Rule XXII requires the votes of three-fifths of all senators duly chosen and sworn for cloture, except on measures to amend Senate rules, which require the votes of two-thirds of senators present and voting).

3. See, e.g., Arthur S. Fleming & Ray Marshall, *Tyranny of the Minority*, N.Y. TIMES, May 30, 1994, at A15.

4. See *id.*; George F. Will, *The Framers' Intent*, WASH. POST, Apr. 25, 1993, at C7.

5. See Helen Dewar, *Campaign Finance Bill Suffers Setback*, WASH. POST, Sept. 28, 1994, at A17; Helen Dewar, *Campaign Finance Showdown Nears: House, Senate Leaders Deadlocked over Limiting PAC Donations*, WASH. POST, June 27, 1994, at A5; Helen Dewar, *Senate Stalemate Kills Campaign Reform Bill*, WASH. POST, Oct. 1, 1994, at A1; Helen Dewar & Kenneth J. Cooper, *Campaign Finance Reform Mired in Gulf Between House and Senate*, WASH. POST, May 28, 1994, at A8.

6. See Helen Dewar, *Leaders Agree on Gift Rules: GOP Senators Imperil Agenda*, WASH. POST, Sept. 23, 1994, at A4; Michael Wiesskopf, *Senate Republicans Block Lobbyist Reform Measure*, WASH. POST, Oct. 6, 1994, at A1.

7. See Helen Dewar & Dana Priest, *Senate Discusses Health on Mostly Vacant Floor: Rare Saturday Session Is All Talk, Little Action*, WASH. POST, Aug. 14, 1994, at A18.

8. See Helen Dewar, *Senate Fails to Break Filibuster on Striker Replacement Bill*, WASH. POST, July 13, 1994, at A6; Helen Dewar & Frank Swoboda, *Republican-Led Filibuster Kills Striker Replacement Bill in Senate*, WASH. POST, July 14, 1994, at A7.

9. See Kenneth J. Cooper, *Conferees to Meet on Crime Bill: Measure Was Stalled More than a Month*, WASH. POST, July 23, 1994, at A10; Kenneth J. Cooper, *"Racial Justice" Deal Is Considered: Compromise Would Apply Safeguards to Federal Death Sentences*, WASH. POST, July 18, 1994, at A5; Helen Dewar, *GOP Threatens Filibuster on Crime Bill*, WASH. POST, July 1, 1994, at A4.

used a filibuster to block Dr. Henry Foster's nomination for United States Surgeon General.<sup>10</sup> After Republicans won a majority of seats in both the House and the Senate in 1994, Democrats organized themselves to rework and block core provisions of the Republicans' "Contract With America," including legislation to reduce civil damage awards<sup>11</sup> and a proposal to amend the Constitution to require a balanced federal budget.<sup>12</sup>

Not since the decades-long Southern filibusters against civil rights legislation ended following the enactment of the Civil Rights Act of 1964 has the filibuster received so much popular attention. For example, editorials in the *Washington Post*<sup>13</sup> and *The New Yorker*<sup>14</sup> have drawn attention to the apparently exponential growth in the number of filibusters during the last fifteen years,<sup>15</sup> and have attacked filibusters as undemocratic and unconstitutional. These editorials have also drawn heated responses, adding fuel to the controversy.<sup>16</sup>

Although senators, litigators,<sup>17</sup> and newspaper editorialists have debated the constitutionality of the filibuster, legal scholars have paid only limited attention to the filibusters.<sup>18</sup> Because much of the debate rests on misperceptions about the nature, effects, and constitutionality of the filibuster, a closer look at this powerful device and its history is in order.

The filibuster is commonly discussed as if it were a single, monolithic, and static practice; however, it is not so readily identifiable or describable. Generally speaking, a filibuster is the strategic use of delay to block legislation, to

10. See Ann Devroy & Spencer Rich, *President Says He'll Stand Behind Foster Nomination*, WASH. POST, Apr. 19, 1995, at A2; John Schwartz, *Gramm Threatens Filibuster Against Foster: Surgeon General Nominee "Has Trouble Leveling," Senator Says*, WASH. POST, Mar. 13, 1995, at A5.

11. See Robert A. Rosenblatt, *House Approves Curbs on Federal Civil Suits*, L.A. TIMES, Mar. 8, 1995, at A1.

12. See Michael Wines, *Senate Democrats Threaten Balanced-Budget Measure: Seek Specifics for Erasing Deficit by 2002*, N.Y. TIMES, Jan. 28, 1995, at A8.

In addition to blocking portions of the Republicans' "Contract with America," Democrats successfully filibustered Republican efforts to extend indefinitely the authorization of the committee investigating Whitewater. See Helen Dewar, *Whitewater Extension Fails Again*, WASH. POST, Mar. 15, 1996, at A15.

13. See, e.g., Lloyd Cutler, *The Way to Kill Senate Rule XXII*, WASH. POST, Apr. 19, 1993, at A23 (arguing that Rule XXII's sixty vote rule to end filibusters is unconstitutional). Cutler later elaborated on his argument in testimony before the Joint Committee on the Organization of Congress. See *Hearings Before the Joint Comm. On the Org. Of Cong.*, 104th Cong. (1995) (statement of Lloyd Cutler, White House Counsel).

14. See, e.g., Hendrick Hertzberg, *Catch XXII: The Filibuster Lives, and It Could Kill Off Health Care*, NEW YORKER, Aug. 22 & 29, 1994, at 9, 10.

15. By one count, almost half of all known filibusters have occurred since 1980. See DEMOCRATIC STUDY GROUP, SPECIAL REPORT: A LOOK AT THE SENATE FILIBUSTER, H.R. REP. NO. 103-28, at 1 (1994).

16. See, e.g., Howard H. Baker, Jr., *Rule XXII: Don't Kill It!*, WASH. POST, Apr. 27, 1993, at A17 (arguing in favor of the filibuster as an important pillar of American democracy—the protection of minority rights from majority rule); Will, *supra* note 4, at C7 (arguing in favor of the filibuster as an effective antimajoritarian mechanism).

17. See *Page v. Dole*, No. 93-1546 (D.D.C. Aug. 18, 1994) (dismissing suit as nonjusticiable), *vacated as moot*, No. 94-5292, 1996 WL 310132 (D.C. Cir. May 13, 1996) (per curiam).

18. For recent legal scholarship on the filibuster, see, e.g., John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483 (1995).

obstruct a nomination, to force an amendment, or to prompt other Senate action. The filibuster is effective in paralyzing legislation because a bill must pass both the House and Senate in identical form and be signed by the President during a single two-year Congress to become a law.<sup>19</sup> Filibusters occur in the Senate, but not in the House, because only the Senate allows unlimited debate on any measure, and no motion exists by which a simple majority of senators can bring a debatable measure to a vote.<sup>20</sup> The only way the Senate can vote on any filibusterable issue over the objection of even a single senator is to obtain cloture (an end of debate) under Senate Rule XXII, which requires the votes of sixty senators.<sup>21</sup>

In this article, we assess the practical significance of the filibuster and examine arguments about its legitimacy from both historical and constitutional perspectives. In Part II, we examine the evolution of the filibuster in the Senate. Because both sides argue that history is on their side, this examination is necessary to understand the modern debate about the nature and legitimacy of the filibuster. Defenders of the filibuster often exalt it as a venerable part of the Senate's tradition; opponents, conversely, denounce modern filibusters as partisan, indiscriminate, and open to abuse.

Although some of the current criticisms of the filibuster are overstated, we nevertheless agree that the contemporary filibuster is an entirely different—and generally more powerful—weapon than the filibuster of the past. Although the Senate tradition of careful deliberation and unlimited debate may have justified the filibusters of yesterday, the smaller size, lighter workload, and more collegial culture of the pre-1950 Senate imposed significant limits on the ability of the minority to use the filibuster to thwart the majority. The modern filibuster, by contrast, has little to do with deliberation and even less to do with debate. The modern filibuster is simply a minority veto, and a powerful one at that. It is not part of a long Senate tradition and history alone cannot justify it.

In Part III, we consider the effects of the filibuster on the legislative process. Critics commonly claim that the filibuster thwarts majority rule. Con-

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19. See U.S. CONST. art. I, § 7, cl. 2; CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 27-32 (1989).

20. See COMM. ON RULES & ADMIN., SEC. OF SENATE & SERGEANT AT ARMS, CONGRESSIONAL HANDBOOK III-18 (Comm. Print 1989). There are two exceptions to the unlimited debate rule. First, the Senate can, by unanimous consent agreement, provide that a matter will be brought to a vote at a specific time or that debate shall be limited. See *id.* Second, some statutes—such as the Congressional Budget and Impoundment Control Act of 1974 or the Gramm-Rudman-Hollings Act of 1985—limit the time for debate on certain bills or resolutions. See *id.* For a thorough description of the evolution of unanimous consent agreements, see STEVEN S. SMITH, CALL TO ORDER: FLOOR POLITICS IN THE HOUSE AND SENATE 86-123 (1989).

House Rules, on the other hand, set general limits on time available for debate. Consideration is further limited when the Rules Committee orders a "Special Rule" or when House Members move, second, and pass a motion for "the Previous Question," which is a nondebatable motion calling for an immediate vote on the measure under consideration. See WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 125-97 (4th ed. 1996) (discussing the scheduling of legislation in the House and House floor procedure).

21. See SENATE RULES, *supra* note 2, at 15-16. The Senate depends heavily upon consent agreements to address procedural and timing issues. Thus, because most scheduling requires unanimous consent, a single senator can block consideration of a bill. See SMITH, *supra* note 20, at 99-119.

versely, advocates claim that the filibuster operates to protect the rights of minorities in the legislative process. We conclude that filibusters have created an effective supermajority requirement for most legislative action. Yet the filibuster cannot be condemned as completely antimajoritarian because it counteracts truly antimajoritarian aspects of Senate procedure, such as the committee system. Its net effect seems, however, to undermine majority rule.

Finally, critics claim that the filibuster is unconstitutional. These attacks fall into two categories: textual and structural. The textual argument is that the Constitution specifically provides that a majority vote in each house is sufficient to send a bill to the President. The structural argument, related to the textual argument, is that the Constitution envisions majority rule. Because the filibuster thwarts majority rule, it is inconsistent with the Constitution's prescriptions for legislative process. In Part IV, therefore, we assess the arguments about the constitutionality of the filibuster. We conclude that the filibuster itself is not unconstitutional, but that the provision in Senate Rule XXII that requires a two-thirds vote to change the rule is unconstitutional. It impermissibly entrenches the views of today's Senate by dictating rules for future Congresses. Moreover, we conclude that a lawsuit challenging the rule could be justiciable.

The debate over the filibuster is enormously important. Over the long term, its outcome will determine which laws the Senate enacts and who the Senate confirms for high-level government posts. Ultimately, the debate addresses the fairness and efficiency of the legislative process and the rights of majorities and minorities in our democracy.

## II. THE HISTORY AND TRANSFORMATION OF THE FILIBUSTER

Almost everyone who discusses the filibuster makes assertions about its role in Senate history and its place in contemporary legislative procedure. Depending on one's perspective, the filibuster appears to be either a pillar of the Senate's venerable tradition of unlimited debate and a bulwark against tyranny of the majority, or evidence of the rise of partisanship and the decline of principle, reason, and collegiality in the Senate. Both of these accounts tend to suffer from the sorts of problems often associated with the instrumental use of history: Senate "tradition" in this context is often more normative than descriptive; that is, it is less about the way things *were* than about the way they were *supposed to have been*.<sup>22</sup> Our look at the history of the filibuster, which itself has some risk of being instrumental, suggests some revisions of the conventional views. We conclude that contemporary critics of the filibuster correctly perceive that the filibuster, as currently used, is not part of an age-old and inviolate Senate tradition of unlimited debate.<sup>23</sup> Moreover, although filibuster opponents err in suggesting that the modern filibuster is uniformly more abusive, more partisan, and less principled than the filibusters of a bygone era, they correctly assert that

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22. See Richard S. Beth, *What We Don't Know About Filibusters* 13 (Mar. 15, 1995) (unpublished manuscript, on file with the *Stanford Law Review*).

23. See Cutler, *supra* note 13, at A23.

the filibuster is a more significant institutional problem in the Senate today. The huge increase in Congress' workload over the last forty years largely accounts for this.

Our purposes in tracing the filibuster's history are threefold. First, the evolution of the filibuster sheds light on the contemporary debate: If the filibuster as it is currently employed had existed from the time of its founding, the argument for its constitutionality would be strengthened. But the practice of filibustering has not remained the same over time. The modern filibuster is powerful in a way that filibusters even forty years ago were not: It offers minorities a stronger veto, and is used with less political accountability. Second, and related to our first point, normative and constitutional arguments about the desirability of the filibuster rest in part on its historic and current effects. Finally, the history of the filibuster provides a unique look at how the Senate enacts laws.

We begin by describing the filibusters of the nineteenth and early twentieth century, along with the controversies surrounding them. We then describe the transformation of the filibuster from the old form of extended debate to its modern incarnation as "the stealth filibuster"—a covert procedural maneuver largely invisible to the public. This history reveals a fundamental change in the nature of filibustering and a dramatic increase in the power of a filibuster threat. Because the stealth filibuster operates so differently from filibusters of the past, rhetoric about the tradition of filibusters is not particularly relevant to the current debate. In the last section of Part II, we briefly canvass the history of constitutional challenges to the filibuster, which occurred principally in the Senate's own debates about its constitutionality. The Senate has recognized serious constitutional questions about the filibuster—especially concerning the Senate majority's inability to change the rules governing filibusters. At the same time, however, the Senate has proven unable to change the filibuster rule. Thus, Senate debates addressing the filibuster provide little insight into its current constitutional or political justifications.

A prefatory note about filibuster historiography is in order. No one has systematically recorded every single filibuster in the Senate's history, so the factual record remains obscure.<sup>24</sup> Moreover, standard histories of the filibuster tend to suffer from a certain romanticism about the Senate's supposed uniqueness as a great deliberative body and protector of minority rights, as well as from an eclectic mix of hostility and affection toward the practices of filibustering.<sup>25</sup> Because this perspective obviously affects some authors' conclusions about the use and abuse of dilatory tactics, and because histories of the Senate

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24. We have not attempted to generate an official count of filibusters ourselves; our history relies largely on secondary sources. A complete history of the filibuster would require reading the records of all floor proceedings as well as the papers of all senators to identify dilatory behavior and to discern its purpose. Moreover, because the *Congressional Record*, which prints the proceedings of the Senate verbatim, did not begin publication until 1873, and prior sources, such as the *Annals of Congress*, *Register of Debates*, and *Congressional Globe*, were not comprehensive, no complete record of the floor proceedings of the early Senate exists.

25. In one history of the Senate, for example, the author lauds the Senate's protection of minority rights to an extent that suggests a certain bias:

lack reliable and consistent methods for identifying filibusters, many of the standard historical conclusions about filibustering should be treated with caution.

A. *Filibusters in the Early Era: 1790-1820*

Little is known about the prevalence of filibusters before the late nineteenth century.<sup>26</sup> Nevertheless, the history of the filibuster in the early Senate reveals a few important points. First, the strategic use of delay in debate is as old as the Senate itself. The first recorded episode of dilatory debate occurred in 1790, when senators from Virginia and South Carolina filibustered to prevent the location of the first Congress in Philadelphia.<sup>27</sup> The issue had come to a vote once before; the House voted to locate the Capitol in Philadelphia, the Senate voted against it.<sup>28</sup> The issue was so close in the Senate that an ailing

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The Senate, though the Senate of the United States, is in fact the Senate of the States, so that never here will the cloud of uniformism roll over the sun of the individual and the minority. The Bigness, the majority, may have its President. But the contrary, the non-conforming—even the prejudiced and the unalterably wrongheaded—they, too, have their place and their representation.

For the Institution protects and expresses that last, true heart of the democratic theory, the triumphant distinction and oneness of the individual and of the little State, the infinite variety in each of which is the juice of national life.

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 This is a large part of the whole meaning of the Institution. Deliberately it puts Rhode Island, in terms of power, on equal footing with Illinois. Deliberately, by its tradition and practice of substantially unlimited debate, it rarely closes the door to any idea, however wrong, until all that can possibly be said has been said, and said again. The price, sometimes, is high. The time killing, sometimes, seems intolerable and dangerous. The license, sometimes, seems endless: but he who silences the cruel and irresponsible man today must first recall that the brave and lonely man may in the same way be silenced tomorrow.

WILLIAM S. WHITE, *CITADEL: THE STORY OF THE U.S. SENATE 18-19* (1956). An earlier work has slightly more restrained rhetoric, but the same gist:

What is sorely needed in Congress is seldom greater speed but always more thorough consideration in law-making. Cloture by a vote of a chance majority in the Senate would have brought many a decision which would have accorded ill with the sober second thought of the American people: it would probably have given us the Force Bill in 1891 [federal supervision of Southern congressional elections to prevent intimidation of black voters]; free silver in 1893; prompt admittance of Lorimer in 1909; the Ship-Purchase Act in 1915; the ratification of the Versailles Treaty in 1919; the Anti-Lynching Bill in 1922; the Ship-Subsidy Bill in 1923; the World Court Adherence without reservations in 1926. Opinions differ widely as to the merits of these measures, but who will now deny that in many of these instances the snapshot decision would have been calamitous?

1 GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* 419 (1960). Senator Robert Byrd's more recent history of the filibuster echoes, in the same reverential tone, the value of debate and deliberation. See 2 ROBERT C. BYRD, *THE SENATE, 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE* 93-163 (1991).

26. Strategic use of extended debate apparently occurred both in the English Parliament and in the Roman Senate. See ROBERT LUCE, *LEGISLATIVE PROCEDURE: PARLIAMENTARY PRACTICES AND THE COURSE OF BUSINESS IN THE FRAMING OF STATUTES* 277-78 (1922). The term "filibuster" did not become associated with the practice until the mid-nineteenth century. In fact, filibustering originally referred to mercenary warfare intended to destabilize a government, and thus the legislative term originally connoted disloyalty. For a discussion of the origins of the term, see text accompanying notes 53-63 *infra*.

27. See FRANKLIN L. BURDETTE, *FILIBUSTERING IN THE SENATE* 14 (1940); 1 HAYNES, *supra* note 25, at 399.

28. See 1 HAYNES, *supra* note 25, at 284.

senator had to be carried into the Senate on his bed to cast the swing vote. One rainy day, knowing that the ill senator could not be carried in, the Senate backers of the House proposal renewed their efforts. To combat this move, Southern senators who preferred a Capitol closer to home made long speeches and dilatory motions that prevented the vote that day. Senator William Maclay, a supporter of the proposal to locate the Congress in Philadelphia, reported in his memoirs that "[t]he design of the Virginians and the Carolina gentlemen was to talk away the time, so that we could not get the bill passed."<sup>29</sup> Maclay complained that the "unreasonable delays" would erode "the confidence of the people" in the Senate.<sup>30</sup>

Successful efforts to curb debate have occurred in the Senate as long as dilatory debate has, which tends to undermine the argument that unlimited debate is a cherished Senate tradition. The earliest cloture device, which was also employed by the Continental Congress and the English Parliament, was a motion for the previous question. The previous question is a nondebatable motion that, if favored by a majority, closes debate and forces an immediate vote on a matter.<sup>31</sup> Both friends and foes of filibusters in the Senate have attempted to find in the previous question motion a pedigree for their views on whether the early Senate allowed unlimited debate, but the historical record resists simple characterization. It is unclear whether the previous question, in the form then practiced, served as a device to bring a measure to a vote,<sup>32</sup> or whether it served to defer discussion of sensitive or embarrassing questions.<sup>33</sup> The one issue on which both sides agree, however, is that the previous question motion was seldom used before the Senate abolished it in the 1806.<sup>34</sup> Therefore, given its early abolition and rare use, the previous question motion is at best weak evidence of the early Senate's views on unlimited debate.

The extent of the use of prolonged debate or procedural delay for tactical purposes in the early Senate remains uncertain. Although it seems to have occurred, the rules probably prohibited it. For example, Thomas Jefferson's *Manual of Parliamentary Procedure*, which was adopted formally by the House and

29. BURDETTE, *supra* note 27, at 14.

30. 2 BYRD, *supra* note 25, at 94; *see* 1 HAYNES, *supra* note 25, at 399.

31. *See* THE PREVIOUS QUESTION: ITS STANDING AS A PRECEDENT FOR CLOTURE IN THE SENATE OF THE UNITED STATES, S. DOC. NO. 87-104, at 1 (1962). The Previous Question rule, which was in force from April 16, 1789, until March 26, 1806, provided: "The previous question being moved and seconded, the question from the Chair shall be: 'Shall the main question be now put?' And if the nays prevail, the main question shall not then be put." 1 HAYNES, *supra* note 25, at 392. The rule was omitted when the Senate rules were revised in 1806. *See id.* at 394.

32. *See* 107 CONG. REC. 241-56 (1961) (statement of Sen. Douglas) (offering excerpts from proceedings of the early Senate and the work of a historian in attempt to show that the previous question motion allowed a majority to bring a pending matter to a vote). Douglas' research emphatically states that a majority could close debate, but does not show why debate was closed. Thus, it may have been custom to use the motion only in ways that preserved the prerogatives of the minority.

Richard Russell, a Southerner and an ardent defender of filibusters in the 1950s and 1960s, contended that the previous question was not a cloture device, but simply a way to postpone discussion. *See* THE PREVIOUS QUESTION, *supra* note 31, at 1.

33. *See* 1 HAYNES, *supra* note 25, at 393 (offering several authorities for the proposition that the previous question was used in the Senate not as a form of cloture but as a way of deferring a question that the majority preferred not to discuss or to act upon).

34. *See id.* at 393-94.



informally by the Senate in the early Congresses, specified: "No one is to speak impertinently or beside the question, superfluously or tediously."<sup>35</sup> Yet, despite this rule, such debate occurred. Virginia's John Randolph, for example, compiled such a record of protracted irrelevant talk during his long service in the House and his subsequent brief tenure in the Senate that Thomas Jefferson used the generic term "a John Randolph" to describe one who protracted the proceedings of Congress.<sup>36</sup> It is not clear, though, whether extended debate with dilatory intent was considered an established practice at this point, or whether it was simply the bad habit of a few persons.

Standard histories of the Senate describe the early decades of the nineteenth century as the golden age of Senate debate.<sup>37</sup> Clay, Webster, and Calhoun were great orators and were quite prone to lengthy speeches. Clay and Webster, however, were never accused of having used debate for dilatory purposes, and actually favored restrictions on debate.<sup>38</sup> Calhoun, however, did not, and he clearly used extended debate for dilatory rather than expository purposes.<sup>39</sup> Calhoun's use of extended debate to protect the interests of Southerners was consistent with his theory of minority rights; he, of course, was a leading proponent of an antimajoritarian theory of government that accommodated the views of the slaveholding white South. Thus, it appears that the Senate's first

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35. THOMAS JEFFERSON, *A MANUAL OF PARLIAMENTARY PRACTICE* 40 (New York, Clark & Maynard 1874). Jefferson wrote his manual of parliamentary procedure for the Senate when he was Vice President (1797-1801). See WALTER J. OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* 7 (4th ed. 1996). It was never formally adopted by the Senate, although it was by the House. See *id.*

36. BURDETTE, *supra* note 27, at 15. According to Burdette, the reporter of Senate proceedings said of Randolph: "I had been told that the bankrupt bill was before the senate—but, during the time stated, he never, to the best of my recollection, mentioned, or even remotely alluded to it, or any of its parts, in any manner whatsoever." *Id.* at 17. Burdette described Randolph's speech as covering a range of topics, including a national bank, Unitarians, family bibles, university presses, Shakespeare, Episcopalianism, wine, and William the Conqueror. See *id.*

37. See LUCE, *supra* note 26, at 262. One source describes the glory of antebellum Senate debate by contrast to the tedium of the later Senate debates:

The oratorical splendor that had brought renown to the Senate in the years preceding the Civil War disappeared with the settlement of the slavery question. For the remainder of the century, Senate debate was not noted for its brilliance. Crucial legislative decisions came to be made in party councils, and few floor speeches were intended to sway votes. Attendance at formal sessions of the Senate became a tedious duty. "It would be a capital thing," wrote Republican Sen. George F. Hoar of Massachusetts in 1897, "to attend Unitarian conventions if there were not Unitarians there, so too it would be a delightful thing to be a United States Senator if you did not have to attend the sessions of the Senate."

CONG. Q., *CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS* 89 (4th ed. 1991). On the Senate generally during this era, see 1 THE UNITED STATES CONGRESS IN A TRANSITIONAL ERA, 1800-1841 (Joel H. Silbey ed. 1991); LEONARD D. WHITE, *THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1829-1861* (1954).

38. Clay tried at least twice in 1841 to get the Senate to adopt restrictions on debate. He did this by proposing the adoption of the previous question and later by proposing a time limit, but both were rejected. On Clay's two 1841 efforts to limit debate, see SEN. COMM. ON RULES & ADMIN., 99TH CONG., *SENATE CLOTURE RULE, LIMITATION OF DEBATE IN THE CONGRESS OF THE UNITED STATES AND LEGISLATIVE HISTORY OF RULE XXII OF THE STANDING RULES OF THE UNITED STATES SENATE (CLOTURE RULE) 12* (COMM. PRINT 1985) [hereinafter *SENATE CLOTURE RULE*]; 1 HAYNES, *supra* note 25, at 394.

39. Calhoun spoke against Clay's proposal to adopt the previous question. During his term as Vice President and Presiding Officer, Calhoun apparently was quite indulgent of those who wished to prolong debate unnecessarily. See 1 HAYNES, *supra* note 25, at 395 n.1.

serious controversies over "obstructive" uses of debate occurred in the context of the sectional and party disputes of the 1820s.<sup>40</sup>

### B. *The Evolution of Unlimited Debate: 1820-1880*

The precedents creating a right of unlimited debate evolved gradually beginning in the 1820s. The Senate did not finally establish a right of unlimited debate until 1856.<sup>41</sup> Interestingly, the precedents establishing a right of unlimited debate stemmed from the Senate's desire for independence from the Executive Branch rather than from a concern about minority rights.<sup>42</sup>

The first such precedent dates from an 1826 conflict among President John Quincy Adams, Vice President John C. Calhoun, and the voluble John Randolph. Congress stymied President Adams early in his administration by ignoring the major recommendations of his ambitious legislative program.<sup>43</sup> John Randolph, an outspoken foe of Adams, made intemperate remarks on the Senate floor about the Adams administration, precipitating an issue of whether the Vice President, as the presiding officer of the Senate, had authority to call him to order.<sup>44</sup> Unlike today, the Vice President of the early and mid-nineteenth century was not the President's running mate, and Calhoun was no great friend of Adams. Calhoun ruled that the Vice President lacked authority to call Senator Randolph to order, except on request of a member of the Senate, thus reducing Executive Branch authority over the legislature in a fashion that was particularly galling to President Adams.<sup>45</sup> Two years later, the Senate overturned the Calhoun decision, reinstating the Vice President's authority to call a senator to order and adding a right of appeal to the full Senate. This entire dispute, which occurred in the context of partisan rancor between the proto-Whig president and Jeffersonian Senators and was fueled by longstanding animosity between Clay and Calhoun, probably reflected the Senate's desire to be free of Executive Branch control more than a commitment to unlimited debate. Thus, even this early restriction of debate and its subsequent repeal are not particularly indicative of the Senate's attitude toward unlimited debate.

Serious controversy about extended debate in the Senate dates from 1841, when John Tyler became President and attempted to enact the Whig legislative

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40. On the tremendous sectional and party conflicts of the era, see generally DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 123-87 (1978); 1 WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776-1854*, at 308-565 (1990); DAVID M. POTTER, *THE IMPENDING CRISIS, 1848-1861* (1976).

41. See Richard R. Beeman, *Unlimited Debate in the Senate: The First Phase*, 83 POL. SCI. Q. 419, 420 (1968). The Senate has long maintained a system whereby it records rulings on points of order or other procedural questions and treats them as precedents to govern future proceedings. See FLOYD M. RIDDICK, *SENATE PROCEDURE: PRECEDENTS AND PRACTICES*, S. DOC. NO. 93-21, 596 (1974).

42. See Beeman, *supra* note 41, at 421.

43. See *id.* at 424.

44. See *id.* at 422. Among the remarks that sparked the controversy was Randolph's criticism of Henry Clay's parents for giving birth to "this being, so brilliant yet so corrupt, which like a rotten mackerel by moonlight, shined and stunk." *Id.* (quoting HENRY ADAMS, JOHN RANDOLPH 286 (Boston & New York, Houghton, Mifflin and Company 1898)).

45. See *id.* at 424.

program.<sup>46</sup> The Whigs encountered stiff resistance from the Democratic minority.<sup>47</sup> Senator George Hoar recounted that the Democrats in the Senate had a strategy for defeating the Whig initiatives: Hoar quoted Senator Thomas H. Benton's memoir as saying that the Democrats acted " 'on a system, and with a thorough organization, and on a perfect understanding. There were but twenty-two of us, but every one a speaker, and effective. We kept their measures upon the anvil, and hammered them continually; we impaled them against the wall, and stabbed them incessantly.'"<sup>48</sup>

The Democratic minority scoffed at the notion that extended debate wrongly prevented the majority from acting on legislation. " 'Action, action, action,' cried Calhoun, 'means nothing but plunder, plunder, plunder!'"<sup>49</sup> Frustrated by the delay, Henry Clay proposed to impose an hour limit on debate as a way to eliminate obstruction from the opposition.<sup>50</sup> But the Democrats, led by Calhoun, decided "to resist its introduction and trample upon the rule if voted."<sup>51</sup> Calhoun was reported to have said in the Senate that he considered "an attempt to rule the Senate by the despotism of the gag as bad as introducing a band of soldiers into it to force measures through by pitching opposing senators out of the windows."<sup>52</sup>

It is probably this dispute between Calhoun and Clay, and the sectional issues that underlay it, that explain why the first significant strategic use of extended debate (which was not yet called filibustering) has been said to have occurred in 1841. This early "filibuster"—over a bill appointing the publishers of the *Congressional Globe*—was a patronage dispute over partisan control of the Senate.<sup>53</sup> The Whig majority wanted to fire the publishers of the *Globe* and the Democrats determined to oppose it.<sup>54</sup> The debate lasted for ten days, but the effort to block the action was ultimately unsuccessful.<sup>55</sup> The second reported "filibuster" followed in the same year; it was an unsuccessful fourteen

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46. See LUCE, *supra* note 26, at 263, 289-91.

47. See *id.*

48. George H. Hoar, *The Conduct of Business in Congress*, N. AM. REV., Feb. 1879, at 126. Hoar, a Republican with Whig roots, opposed Democratic filibusters. In 1890 he tried to get the Senate to adopt some form of cloture to end Democratic opposition to a bill proposing to use the army to supervise elections in the South. See LUCE, *supra* note 26, at 291-92.

49. See Hoar, *supra* note 48, at 126 (quoting THOMAS HART BENTON, THIRTY YEARS' VIEW 249 (New York, D. Appleton & Co. 1854)); see also LUCE, *supra* note 26, at 290-91.

50. On Clay's efforts to limit debate, see note 38 *supra*.

51. Hoar, *supra* note 48, at 126.

52. *Id.* at 128.

53. See 2 BYRD, *supra* note 25, at 96. The source of this widely accepted identification of the first "filibuster" is a document prepared by the Legislative Reference Division of the Library of Congress in 1917. Printed for the special session of the 65th Congress that adopted Rule XXII, the document lists twenty-two filibusters between 1841 and 1915. See 65TH CONG., SENATE FILIBUSTERS: EXTRACTS FROM THE CONGRESSIONAL GLOBE AND CONGRESSIONAL RECORD RELATING TO FILIBUSTERS IN THE CONGRESS OF THE UNITED STATES 3 (1917). The report does not indicate how it was determined that these were the first filibusters, and the subsequent histories that employ the report's conclusions do not indicate whether they independently verified them.

54. During the debate, Senator King of Alabama challenged Senator Clay to a duel (which was avoided only when the two men were brought before a magistrate). See 2 BYRD, *supra* note 25, at 97.

55. See DEMOCRATIC STUDY GROUP, *supra* note 15, at 5; Memorandum from Richard S. Beth, Congressional Research Service, Filibusters in the Senate, 1789-1993, at 6 (Feb. 18, 1994) (on file with the *Stanford Law Review*).

day talk-a-thon intended to block a bill that would establish a national bank.<sup>56</sup> Thus, the origins of filibustering as an identifiable practice lie in the profound sectional and party crises of the 1830s and 1840s. Filibustering represented the use of procedural rules in the battle for power along sectional and party lines. In this formative era of party politics, when both the Democrats and the Whigs were struggling (often against the crosscurrent of the everlasting sectional divide) to create party power, senators seized upon procedural rules as a weapon in the fight.<sup>57</sup>

The North-South sectional disputes of the 1850s also gave filibustering its name. The term was borrowed from a form of mercenary warfare of the era and originally connoted piracy and brigandage. It derives from a Dutch word, "vrijbouter," or "free booter." From the Dutch, it passed into Spanish as "filibustero," which referred to West Indian pirates who used a small swift ship, known as a filibot.<sup>58</sup> In English, filibuster referred to mercenary sailors who made war against the governments of Central and South America.<sup>59</sup> Although men of other countries engaged in such adventures, only the United States gained the reputation as a nation of filibusterers. This form of expansionism was a product of the breakdown of the Missouri Compromise's effort to maintain parity between slave and free states and a search for new territory where slavery might thrive. The most notorious such filibusterer was William Walker, who before the Civil War led a group of Southern mercenaries to attack Nicaragua, hoping to establish a place hospitable to the expansion of the slavery economy.<sup>60</sup> Use of the term to refer to obstruction of Congress thus connoted adventurism in an effort to thwart a government, in which the perpetrator would be accused of "filibustering against the United States."<sup>61</sup>

Filibustering was first used to connote legislative obstruction during a debate on the floor of the House on January 3, 1853.<sup>62</sup> In 1849 and 1850, a group of Southerners joined expeditions to liberate Cuba from Spain and annex it to the United States. Many of the "filibusterers" were captured and executed, and others were taken as prisoners to Spain. The captives were not released until Congress appropriated \$25,000 to pay Spain for damage to its New Orleans consulate, which was destroyed in anti-Spanish rioting following the capture. In the 1852 elections, Democrats exploited the Whig administration's handling

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56. A filibuster over a bank was not surprising as this was *the* major issue of the day, apart from slavery. See generally, Beeman, *supra* note 41.

57. See LUCE, *supra* note 26, at 285. The filibuster was not the only instance in which substantive disagreements manifested themselves in procedural terms. In 1836, the House and Senate refused to accept antislavery petitions to silence all talk of abolition. The history of this "gag rule" is the subject of a recent book. See WILLIAM LEE MILLER, *ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATE CONGRESS* (1996); see also FEHRENBACHER, *supra* note 40 at 121-22; 1 FREEHLING, *supra* note 40, at 322.

58. See LUCE, *supra* note 26, at 283.

59. See OLESZEK, *supra* note 20, at 269 n.56.

60. Walker even had himself inaugurated as president of Nicaragua in July 1856. See Robert E. May, *Young American Males and Filibustering in the Age of Manifest Destiny: The United States Army as a Cultural Mirror*, 78 J. AM. HIST. 857, 857 (1991).

61. OLESZEK, *supra* note 20, at 269 n.56.

62. See *id.* at 219 n.47. Oleszek says that the term came to mean delaying legislative action on the floor by 1863, but that the term was not used widely until the 1880s. See *id.*

of the affair and the related issue of U.S. policy toward Cuba. Democrat Abraham W. Venable of North Carolina bucked his party by endorsing the Whig noninterventionist policy toward Cuba in the House on January 3, 1853. Venable suggested that the United States should acquire Cuba if Spain were to relinquish it, but that the acquisition should not be achieved through filibustering:

Sir, filibustering [sic] has become a regularly-installed word in our language. We have taken the liberty of altering it, and clothing it in American dress, as is our wont in such cases. Originally freebooter in old English, filibustier in French, fliibustero in Spanish, is now in our tongue filibuster, but still a freebooter; and it will not be surprising if it should become one day the watchword of a party. If the principles of any party should correspond to the term, I utterly eschew any connection therewith. If the policy of any Administration is to make the United States the brigands of the world; if we are to become a race, a nation of bucaniers; if we are to adopt the policy of falling upon our weaker neighbors and appropriating their possessions, and thus fill the measure of national iniquity, I utterly denounce the policy . . . .<sup>63</sup>

Democrat Albert G. Brown of Mississippi rose to respond. He faulted Venable for suggesting that Americans who went to Cuba to liberate it were bucaniers. Venable replied that he had not made such an accusation; only that the United States should not intervene. Brown then retorted, “[w]hen I saw my friend standing on the other side of the House filibustering, as I thought, against the United States, surrounded, as he was, by admiring Whigs, I did not know what to think. It seemed to me he had taken formal leave of his old State-Rights friends, and gone over to the Whigs.”<sup>64</sup>

By 1863, the practice of blocking legislation by extended debate had acquired the name in the Senate. When Republicans objected to a request that a vote on a bill be postponed, Democratic Senator Lazarus Powell replied: “I look upon that as an imputation that our object was to do what is commonly called filibustering.”<sup>65</sup> Powell’s suggestion that filibusters were “commonly” called such is interesting, for by 1863 there had been only six identified filibusters in the Senate.<sup>66</sup> The fact that the name had attached by the mid-1860s indicates that filibustering had by then been identified as a phenomenon, rather than an occasional escapade. Either filibustering had occurred more than existing records suggest or the filibusters that did occur were so entwined with controversial issues, such as slavery and the national bank, that the legislative maneuvers were instantly tarred with the same brush as the causes that they advanced. In the 1850s the Senate was bitterly divided along sectional lines and the association of the legislative practice with disloyalty and piracy had a particularly offensive tone.

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63. CONG. GLOBE, 32d Cong., 2d Sess. 190 (1853).

64. *Id.* at 194.

65. CONG. GLOBE, 37th Cong., 2d Sess. 1437 (1863). We are indebted to the research of Associate Senate Historian Donald Ritchie for uncovering this history.

66. By the Congressional Research Service’s count, there were two in 1841, two in 1846, one in 1850, and one in 1863. *See* Beth, *supra* note 55, at 6.

This raises a general problem: the difficulty of identifying, and thus counting, filibusters. The difficulty stems from the ambivalence senators have always had about them. On the one hand, senators have from the beginning derided filibusters as obstructive, an affront to the Senate colleagues—and perhaps to the House and the President—who support legislation. Filibusters waste time and create inconvenience and conflict in a body that values collegiality. On the other hand, filibusters can be a courageous way of taking a stand, which can be popular with constituents and can even gain grudging respect from colleagues. Not surprisingly, therefore, senators have often been reluctant to acknowledge filibustering when it occurred, and conversely, have used the threat of the filibusters to achieve policy goals without intending to actually filibuster.<sup>67</sup>

Senators' ambivalent attitudes toward filibustering make the Senate's own discussion of its practice difficult to interpret. An illustration of the difficulty of identifying filibusters is the following episode in which a senator punned on the early dual meaning of the term filibuster as a way of disclaiming obstructive intent. A senator from Tennessee took offense at a colleague's accusation that he was filibustering—even though he was obviously attempting to block legislation on the penultimate day of a congressional session. In the course of his protracted remarks, the Tennessee Senator feigned horror that he had been accused of filibustering. Pointing out the dictionary reference to buccaneer, the Senator said: "Mr. President, in my career in politics I have been accused of almost everything except appendicitis, I believe, but it remained for the Senator from New Hampshire to take me from my inland home and launch me as a buccaneer and pirate upon the sea."<sup>68</sup>

The early history of filibustering thus reveals that the process by which the Senate created its rules allowing unlimited debate included an undercurrent of continuing doubt and controversy. Indeed, as soon as the Senate created rules allowing extended debate, it devised ways to evade them. In 1846, for example, the filibuster over the Oregon territory, which raised the controversy over slavery in the territories,<sup>69</sup> prompted the use of a unanimous consent agreement to fix a date in advance for a vote without further debate, a practice which

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67. A more recent example involves the confirmation of William Rehnquist to be Chief Justice. Senators disputed whether liberals were filibustering the nomination. See John P. MacKenzie, *Mini-Filibuster Seen in Senate over Rehnquist*, WASH. POST, Dec. 8, 1971, at A2. The controversy that fueled the alleged filibuster concerned, in part, the revelation that Rehnquist, while a law clerk for Justice Robert Jackson, had written a memo arguing that the separate-but-equal doctrine underlying race segregation was "right and should be reaffirmed." *Id.*

68. BURDETTE, *supra* note 27, at 78. A republican supporter of the bill referred to another dictionary's definition of filibustering in the legislative sense, to which the Tennessee Senator replied that his opponents must have relied on "a Republican dictionary." *Id.* at 78-79.

Apart from their perennial ambivalence about obstructionism and minority rights, nineteenth century senators may have disliked simply the term filibuster for reasons that are lost on modern sensibilities. Whatever they might have thought about the practice, Senators in the mid-nineteenth century might have abhorred the label because of its association with piracy and mercenary warfare. It is difficult to know to what extent it was the term as opposed to the practice that seemed offensive.

69. On the sectional disputes over the Oregon territory, see FEHRENBACHER, *supra* note 40, at 132-35.

continues to this day.<sup>70</sup> To take another example, during the same period that the Senate established the principle that speech need not be relevant, it also considered proposals to limit debate.<sup>71</sup> Later in the late nineteenth century, the Senate established precedents allowing latitude in debate, such as an 1870 decision allowing a senator to read in debate a paper that is irrelevant to the subject matter under consideration and an 1886 precedent allowing debate on motions to reconsider. At the same time, however, the Senate also established procedures to constrain debate. For example, the Senate adopted the Anthony Rule in 1870 to allow action on uncontroversial matters on the calendar before consideration of the matters as to which there is controversy.<sup>72</sup> In sum, the controversy about a minority's use of dilatory tactics is as much a part of Senate tradition as the tactics themselves.

### C. *The First Era of Crisis in Filibustering: 1880-1930*

The early filibusters were largely unsuccessful in blocking legislation; almost every filibustered measure before 1880 was eventually passed.<sup>73</sup> Because both the Senate and the ambit of federal legislation were small by today's standards, the Senate had enough time to wait out the filibusters. Beginning about 1880, however, senators filibustered more often and more successfully than before.<sup>74</sup> "Tactics remained essentially the same, but boldness gave way to ruthlessness, and obstruction began to be bounded only by the daring ingenuity of its designers."<sup>75</sup> By the time the cloture rule was adopted in 1917, senators and the public alike perceived filibustering to be a serious problem.

Among the filibusters that gave rise to this perception were the seventy-five years of successful Southern filibusters against civil rights legislation, as well as several notorious Progressive and Republican filibusters. The heroism of being the determined minority was a key part of the political lore both of the Southerners and of the Progressives; each donned the mantle of the oppressed minority forced to filibuster to defend their principles. On many issues, their

70. A unanimous consent arrangement is an agreement whereby the leadership obtains unanimous consent for a specified procedure to consider a measure. Such agreements are necessary in the Senate because, unlike in the House, there are few rules constraining the debate on a measure and individual senators could therefore cause all business to grind to a halt. See note 20 *supra*.

71. The Senate established this principle allowing unlimited debate in 1856 when it voted down a proposed amendment to the rules which would have required a speaking Senator to "confine himself to the question under debate." Beeman, *supra* note 41, at 432-33. The Senate considered resolutions to adopt the previous question motion or something similar in 1850, 1862, 1868, 1869, 1870, 1873, 1883, 1890, 1893, and then increasingly in various forms after the turn of the century. See SENATE CLOTURE RULE, *supra* note 38, at 12-13, 15-35. See generally LUCE, *supra* note 26, at 291.

72. See SENATE CLOTURE RULE, *supra* note 38, at 12-13.

73. See BURDETTE, *supra* note 27, at 39. The fact that the legislation ultimately passed does not mean the filibuster was entirely unsuccessful. Filibusters often force significant changes in bills.

74. See *id.* at 79-80; C.H. KERR, THE ORIGIN AND DEVELOPMENT OF THE UNITED STATES SENATE 64-67 (Chicago, C.H. Kerr & Co. 1895); LUCE, *supra* note 26 at 291-92; TIEFER, *supra* note 19, at 694 nn.7-8 (citing L. ROGERS, THE AMERICAN SENATE 167 (1926)). On the Senate of the latter half of the nineteenth century, see generally DAVID J. ROTHMAN, POLITICS AND POWER: THE UNITED STATES SENATE, 1869-1901 (1966); THE UNITED STATES CONGRESS IN A PARTISAN POLITICAL NATION, 1841-1896 (Joel Silbey ed., 1991); LEONARD D. WHITE, THE REPUBLICAN ERA (1958).

75. BURDETTE, *supra* note 27, at 43.

deeply held convictions were clearly at odds, but occasionally the two factions joined forces. For example, the famous 1890 filibuster against a bill to provide federal supervision of Southern congressional elections to prevent intimidation of black voters succeeded because Southern Democrats joined forces with Republicans who favored a silver bill. The Southerners appealed to the silverites by persuading them to agree to abandon the election bill in favor of the silver bill, thus aiding in the ultimate defeat of the former.<sup>76</sup> In 1893, there was another prolonged and spectacular filibuster against a bill to repeal a law that required the government to purchase 4.5 million ounces of silver each month. Silver Republicans and silver Democrats were joined by farmer Democrats in trying to block the law, and although the endless speeches, quorum calls, roll calls, and maneuvering dominated the Senate calendar for forty-six days, the filibuster ultimately failed.<sup>77</sup>

One of the most notorious filibusters was Progressive Senator Robert M. LaFollette's 1908 filibuster of a currency bill that he believed was a power grab by the rich. This filibuster set records for length, sophistication of procedural combat, and treachery, and contributed significantly to the Senate's sense that something needed to be done to limit debate. During his eighteen hours holding the floor in the stifling heat of the Senate chamber, including an all-night speech made necessary by a parliamentary ruling that prohibited him from using quorum calls to get a moment's rest, LaFollette sustained himself with turkey sandwiches and eggnog from the Senate restaurant. After taking a large swallow from a particular glass of eggnog, he rejected it as adulterated. And indeed it was; the glass was laced with enough ptomaine to kill him.<sup>78</sup> The ptomaine he had swallowed made him quite ill, but he managed by forcing roll calls to escape for a few minutes of respite, and he continued his speech for another eight hours.<sup>79</sup> The filibuster was ultimately lost when Senator Gore, who was blind, yielded the floor as prearranged to a colleague, who, unbeknownst to Gore, had just stepped out to the cloakroom.<sup>80</sup>

It was another Progressive filibuster—one that successfully blocked President Wilson's proposal to arm merchant ships against German U-boat attacks during World War I—that inspired the Senate to adopt the first true cloture rule. The armed-ship bill passed the House easily, and despite an overwhelming majority for it in the Senate, the determined opposition of eleven (some

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76. *See id.* at 52-57.

77. *See id.* at 58-68.

78. *See id.* at 88.

79. *See id.*

80. *See id.* at 89-90; *see also* 1 BELLE CASE LA FOLLETTE & FOLA LA FOLLETTE, ROBERT M. LA FOLLETTE ch. XXI (1953). Interestingly, in the account of the filibuster in his autobiography, LaFollette does not mention the poisoning. He does say that the *Congressional Record* for that event was doctored to make it seem that the Vice President had recognized another senator at the end of his speech so that the majority could enforce the Senate rule that would have prohibited him from speaking twice on the same subject on the same legislative day. As it happened, the gaffe involving Senator Gore prevented the Senate from having to rely on the two-speech rule and the allegedly forged *Record* to break the filibuster.



count twelve) senators caused the bill to die when Congress adjourned at noon on March 4, 1917.<sup>81</sup>

The armed merchant ship bill came before the Senate on March 2, the day after the public release of the so-called Zimmermann note, which revealed the German invitation to Mexico to form an alliance against the United States in exchange for assistance in seizing Texas, New Mexico, and Arizona.<sup>82</sup> Public outrage at the Zimmermann note generated solid support for the bill, but Progressive opponents feared that arming merchant ships would surely lead the United States into war.<sup>83</sup> Although LaFollette is now the best known of the "little group of willful men" who blocked the bill, in fact he never had the opportunity to speak against it.<sup>84</sup> Initially, other members of the opposition spoke against it, but when the bill's supporters realized in the last few hours of the session that the bill could not be brought to a vote, supporters of the Wilson Administration held the floor simply to prevent LaFollette from gaining the glory of speaking before the crowded galleries.<sup>85</sup>

President Wilson issued a statement that was published in *The New York Times* on March 5th, attacking the opposition senators and calling for a change of the Senate rules:

The termination of the last session of the Sixty-fourth Congress . . . disclosed a situation unparalleled in the history of the country, perhaps unparalleled in the history of any modern Government. In the immediate presence of a crisis fraught with more subtle and far-reaching possibilities of national danger than any other the Government has known within the whole history of its international relations, the Congress has been unable to act either to safeguard the country or to vindicate the elementary rights of its citizens. More than 500 of the 531 members of the two houses were ready and anxious to act; the House of Representatives had acted, by an overwhelming majority; but the Senate was unable to act because a little group of eleven senators had determined that it should not. . . . The Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action. A little group of willful men, representing no opinion but their own, have rendered the great Government of the United States helpless and contemptible.

The remedy? There is but one remedy. The only remedy is that the rules of the Senate shall be so altered that it can act. The country can be relied upon to draw the moral. I believe that the Senate can be relied on to supply the means of action and save the country from disaster.<sup>86</sup>

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81. For a detailed story of the filibuster, see THOMAS W. RYLEY, *A LITTLE GROUP OF WILLFUL MEN* (1975).

82. *See id.* at 83-94. Although the Progressives went down in history as the filibusterers who thwarted the will of the majority, in fact they were only partly to blame. A Republican filibuster of several days designed not to defeat any particular bill but to delay all legislation, preceded the armed ship filibuster, thus embarrassing the Wilson Administration by forcing a special session of Congress after the March *sine die* adjournment. *See BURDETTE, supra* note 27, at 115.

83. *See BURDETTE, supra* note 27, at 118.

84. RYLEY, *supra* note 81, at 120-30.

85. *See BURDETTE, supra* note 27, at 120.

86. 41 THE PAPERS OF WOODROW WILSON 319-20 (Arthur S. Link ed., 1983).

Wilson got the public excoriation of the Senate for which he obviously hoped. Editorials written on March 5, 1917, banished the opposition senators to the "roll of national dishonor."<sup>87</sup> Newspapers denounced the filibustering senators as "political tramps," "wretches," and as "envious, pusillanimous, or abandoned, [who,] with doubts and quibbles have denied their country's conscience and courage in order to make a Prussian holiday."<sup>88</sup>

In response, Congress met in special session beginning on March 5, at the start of which Majority Leader Thomas Martin introduced a resolution to amend the Senate rules to provide for cloture. On March 8, the Senate adopted the Martin Resolution, a version of the current Rule XXII, by a vote of seventy-six to three.<sup>89</sup> The Rule provides that a cloture petition may be made at any time if signed by sixteen senators, and that "one hour after the Senate meets on the following calendar day but one" the Senate would vote on the motion.<sup>90</sup> Once cloture is invoked, no senator is allowed to speak for more than one hour on the measure or its amendments, and further amendments can be offered only by unanimous consent. In addition, as originally written, Rule XXII required a vote of two-thirds of those present and voting to invoke cloture.<sup>91</sup> The Martin Resolution reflected a compromise between those members of the Senate who favored majority cloture,<sup>92</sup> and those who opposed it but were willing to accept some form of cloture.<sup>93</sup> The senators who thought that discussion should end upon majority vote were outvoted, as they have been on many occasions since 1917.<sup>94</sup>

For nearly fifty years after its adoption, Rule XXII served a purpose more symbolic than real. Between 1917 and 1927, cloture was voted on only ten times and it was adopted only four times.<sup>95</sup> Between 1931 and the enactment of the Civil Rights Act of 1964, cloture was seldom sought and only twice

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87. *Comments of the Morning's Newspapers on the Senate Failure to Uphold Wilson*, N.Y. TIMES, Mar. 5, 1917, at 4.

88. *Id.*; see also RYLEY, *supra* note 81, at 132-42.

89. See SENATE CLOTURE RULE, *supra* note 38, at 17, 105-07; 55 CONG. REC. 45 (1917).

90. See SENATE RULES, *supra* note 2, at 15.

91. See SENATE CLOTURE RULE, *supra* note 38, at 17. In 1949, the requirement was changed to two-thirds of the entire Senate. See *id.* at 21. In 1959, however, it was changed back to two-thirds of those present and voting. See *id.* at 25. In 1975, the rule was changed to allow cloture on a vote of three-fifths of the entire Senate (60 votes). See *id.* at 32. For the entire history of the amendments to Rule XXII, see *id.* at 105-135.

92. See, e.g., 55 CONG. REC. 39 (1917) (remarks of Sen. Vardaman); *id.* at 31 (remarks of Sen. Stone).

93. See, e.g., *id.* at 35 (remarks of Sen. Hardwick); *id.* at 27-28 (remarks of Sen. Norris).

94. Proposals favoring cloture on majority vote were defeated in 1925. See SENATE CLOTURE RULE, *supra* note 38, at 18. Similar proposals failed in 1947, see *id.* at 20, in 1949, see *id.* at 21, and in every Congress between 1951 and 1975, except 1971, see *id.* at 21-29. A recent proposal failed in 1995. See S. Res. 14, 104th Cong. (1995).

95. See *Complete List of Cloture Votes Since Adoption of Rule 22*, 32 CONG. Q. WKLY. REP. 317 (Feb. 9, 1974). The four successful cloture votes pertained to a Prohibition related measure, the Glass Steagall branch banking bill, the Versailles Treaty, and the World Court. See 68 CONG. REC. 4986 (1927) (prohibition bureau); 68 CONG. REC. 3824 (1927) (branch banking); 67 CONG. REC. 2678-79 (1926) (World Court); 58 CONG. REC. 8555-56 (1919) (Versailles Treaty).

obtained.<sup>96</sup> The reluctance to seek cloture and the difficulty of obtaining it resulted in large part from the battle over civil rights, which is the next chapter in the story.

D. *The "Traditional" Filibuster of the Civil Rights Era: 1930-1970*

During a forty year period from the late 1920s until the late 1960s, the filibuster became almost entirely associated with the battle over civil rights. A coalition of Southern senators enjoyed extraordinary power in the Senate, as a result of both the seniority that came from serving in safe seats representing one-party states and the use of the filibuster to block civil rights legislation. The Senate did not vote cloture once between 1927 and 1962.<sup>97</sup> This was in part because Southern senators refused to vote cloture on any issue, in order to be able to take a "principled" stand against cloture on civil rights issues, and in part because the conservative minority restrained its use of the filibuster for any issue except civil rights.<sup>98</sup> The Senate's own debate about filibusters during this era was imbued with inflated rhetoric about an alleged Senate tradition of respecting minority rights and the value of extended debate on issues of great national importance.

The filibusters of civil rights legislation sparked controversy unequalled since 1917. Beginning during Reconstruction and continuing for nearly a century, anti-civil rights filibusters played a major role in blocking measures to prohibit lynching,<sup>99</sup> poll taxes,<sup>100</sup> and race discrimination in employment, housing, public accommodations, and voting.<sup>101</sup> Although the filibuster was not solely responsible for the delay of civil rights legislation—some responsibility must attach to Franklin Roosevelt's reluctance to alienate the powerful Southerners whose support was crucial for the New Deal to survive<sup>102</sup>—the filibuster was indispensable in the Southerners' fight.

The filibuster against the Civil Rights Act of 1964 was unequalled in length and notoriety; it tied up the Senate for seventy-four days.<sup>103</sup> News coverage of it was also unprecedented: CBS News had Roger Mudd report on the progress of the filibuster from the steps of the Capitol during every newscast. The fili-

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96. Cloture was obtained on the Civil Rights Act of 1964 and on a communications satellite bill in 1962. See Beth, *supra* note 55, at 6-20; *Complete List of Cloture Votes Since Adoption of Rule 22*, *supra* note 95, at 317.

97. See TIEFER, *supra* note 19, at 696.

98. See *id.* Not all Southerners were completely "principled" in their opposition to cloture; some voted for cloture to end a liberal filibuster against a communications satellite bill in 1962. See CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE* 127 (1985). Liberals exploited this deviation from "principle," which some believe paved the way for cloture on the Civil Rights Act of 1964. See *id.*

99. Southerners successfully filibustered antilynching legislation in 1922, 1935 and 1938. See BURDETTE, *supra* note 27, at 133-37, 179-81, 191-99; Beth, *supra* note 55, at 7-9.

100. Anti-poll-tax legislation was filibustered in 1942, 1944, and 1946. See Beth, *supra* note 55, at 9; *Complete List of Cloture Votes Since Adoption of Rule 22*, *supra* note 95, at 317.

101. Southerners filibustered assorted civil rights legislation in 1946, 1950, 1957, 1960, 1962, 1964, 1965, 1966, 1968, 1972, and 1975. See Beth, *supra* note 55, at 9-11.

102. See WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL* 186 (1963).

103. For the full story of this filibuster, see WHALEN & WHALEN, *supra* note 98, at 124-217.

buster became such an epic event that news coverage itself became a news topic. As John Horn reported in the *New York Herald Tribune*,

It was only several weeks after Mudd took up his vigil that the full significance of his careful TV watch was appreciated. Caught at all hours, on a minimum of four TV programs daily, giving the latest debate report and time count or interviewing Senators on both sides of the argument, Mudd has been as faithful as a postman. . . .

His continued presence at the scene of Washington inaction has personalized and dramatized the halting processes of our government to the average viewer in a way no amount of words or secondary reports could have.<sup>104</sup>

The visibility of the filibuster was important in stirring up voter outrage against the Southern intransigence on civil rights.<sup>105</sup>

Even while the white supremacy filibusters finally began to fail after the enactment of the Civil Rights Act, they still made legislating excruciatingly difficult. A filibuster delayed the 1965 Voting Rights Act for a month. Conservatives unsuccessfully filibustered the Fair Housing Act of 1968, an extension of the Voting Rights Act in 1970, and an extension of Title VII in 1972.<sup>106</sup> Not surprisingly, therefore, the debate about civil rights legislation became fused with the debate about filibusters and cloture: Conservatives defended them and liberals opposed them.<sup>107</sup> As we will see, that fusion began to dissolve in the early 1970s. More significantly, we will also see that the nature and uses of filibustering in the civil rights era were in many respects unique in Senate history.

#### E. *The Stealth Filibuster: 1970 to the Present*

The 1970s mark the beginning of the modern era of filibustering and a dramatic change in the nature of its practice. This change was primarily the result of three factors. First, the Southern Democrats monopolized filibustering as an anti-civil rights device. Although critics of filibustering typically invoke the civil rights era as a time of principled and "nonpartisan" filibustering,<sup>108</sup> the civil rights filibusters were in some respects extraordinary. During this period senators filibustered primarily on one issue of great importance—civil rights. In addition, filibustering and cloture votes did not follow party lines: opponents of cloture were conservative Southern Democrats joined by conservative small-state Republicans who either sympathized on the civil rights issue or saw

104. William Small, *Equality of Access for Broadcast Journalism*, in CONGRESS AND THE NEWS MEDIA 66, 68-69 (Robert O. Blanchard ed., 1974).

105. See *id.*; WHALEN & WHALEN, *supra* note 98, at 124-93.

106. See Beth, *supra* note 55, at 10.

107. While this perception was generally accurate, even during the civil rights era filibustering was not strictly a tool of conservatives. For instance, liberals filibustered in 1947 against the anti-labor Taft-Hartley bill and in 1953 against a bill to allow oil exploration in coastal tidelands. See Bruce I. Oppenheimer, *Changing Time Constraints on Congress: Historical Perspectives on the Use of Cloture in CONGRESS RECONSIDERED* 393, 399 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 3d ed. 1985).

108. See DEMOCRATIC STUDY GROUP, *supra* note 15, at 6-7; Jacqueline Calmes, "Trivialized" *Filibuster Is Still a Potent Tool*, 45 CONG. Q. WKLY. REP. 2115 (Sept. 5, 1987); (quoting Senators Quayle and Byrd); John B. Gilmour, *Majority Rule in the Senate* (unpublished manuscript, on file with the *Stanford Law Review*).

the filibuster as a powerful tool to protect their constituents whose representatives were outnumbered in the House.<sup>109</sup> But the bipartisan nature of filibusters and their limitation to a single issue of great importance were unique to the civil rights era. The fusion of filibusters and civil rights issues rapidly dissolved in the 1970s when liberals began to filibuster and conservatives began to vote for cloture.<sup>110</sup>

The second factor in the development of the modern filibuster was the adoption of the "two-track system" for handling floor debate in the Senate. In response to repeated civil rights filibusters, Majority Leader Mike Mansfield developed a system whereby the Senate would spend the morning on the filibustered legislation and the afternoon on other business.<sup>111</sup> Mansfield wisely understood that this two-track system would benefit both the Senate majority and the filibustering minority, thereby enabling him to obtain unanimous consent. On the one hand, the two-track system would strengthen the majority's ability to withstand a filibuster by allowing the Senate to enact other legislation.<sup>112</sup> On the other hand, the two-track system would aid a filibustering minority, by reducing the amount of time they must hold the floor. The only senators who might oppose the system would be those most anxious to enact the filibustered legislation. Yet even they might consent to avoid alienating colleagues whose support they want, as the delay allows time to drum up additional votes. Since an effort to end a filibuster is as exhausting to the majority as the filibuster is to the minority and success is not guaranteed, the majority leader could count on obtaining unanimous consent. Although Mansfield devised the two-track system to deal with the exigencies of the civil rights debates, it has become a way of life in the modern Senate.

The adoption of the two-track system changed the game profoundly: It created the silent filibuster—a senator could filibuster an issue without uttering a word on the Senate floor. The enactment of civil rights legislation removed the incentives for restraint and made any sort of legislation subject to filibuster. Senate liberals began resorting to filibusters to ward off conservative measures supported by the Nixon Administration. They filibustered in support of environmental positions, against the Vietnam War, and in defense of busing for urban school desegregation. As result, liberal senators who previously favored easing the cloture requirements changed their position, and Southern senators who previously defended filibusters as fostering free debate began to vote for cloture.<sup>113</sup>

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109. See TIEFER, *supra* note 19, at 692. Critics of contemporary filibustering who refer to the nonpartisan filibustering in the past must use the term in the sense of political parties rather than in the sense of ideology. Filibusters from the beginning have been ideological.

110. For some Southerners, the change of heart came in 1971 when they voted for cloture, for the first time in their careers, to end the liberals' filibuster against an extension of the military draft. See Calmes, *supra* note 108, at 2120.

111. See Oppenheimer, *supra* note 107, at 406. Mansfield devised this system when a cloture vote on employment discrimination legislation failed in 1972. See *id.*

112. See Interview with Donald Ritchie, Associate Senate Historian, in Washington D.C. (June 1994).

113. See GARY ORFIELD, CONGRESSIONAL POWER: CONGRESS AND SOCIAL CHANGE 39-43 (1975). Other senators have experienced similar changes of heart about filibustering brought about by a change

At the same time that filibustering began to cross traditional ideological and party lines, many senators found the waste of valuable floor time simply intolerable. This concern over time is the third explanation for the transformation the filibuster. Throughout history, there were periods in each session when senators felt time was short; filibusters have been most effective during such moments.<sup>114</sup> In the modern Senate, however, senators believe time is scarce for the entire congressional session. With an increased workload after the New Deal, senators could seldom afford to wait out a filibuster.<sup>115</sup> Moreover, the Senate floor evolved from being the central forum for debate to being merely a location for casting votes and addressing the media. Most deliberation occurs, if at all, in committees. It is in committee where senators mark up bills, hold hearings, and informally negotiate over the content and scheduling of legislation. The Senate reserves the floor for voting, press coverage, and documenting its activities for the *Congressional Record*.<sup>116</sup>

In the early 1960s, when the Senate increased the time spent in session to more than nine months annually, the number of cloture votes rose sharply.<sup>117</sup> Although early in the decade senators invoked cloture principally on civil rights legislation, later in the decade cloture votes increasingly addressed other issues.<sup>118</sup> In the 1970s and 1980s the number of filibusters and the range of subjects they covered increased even more sharply.<sup>119</sup> As the Senate began to rely even more on Mansfield's two-track system, the system began to change.

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from majority to minority status. For example, by the end of his career, Senator Hoar, who previously had been an outspoken opponent of filibusters, said he perceived "a virtue in unlimited debate, the philosophy of which cannot be detected upon a surface consideration." LUCE, *supra* note 26, at 298.

114. Many filibusters occurred during the short sessions that ended at noon on the March 4th after an election. Most of the cloture votes that occurred in the first 20 years of Rule XXII occurred during these lame duck sessions. See Oppenheimer, *supra* note 107, at 401. The Twentieth Amendment eliminated the constitutional March 4 adjournment in part to reduce filibustering at the end of each Congress. See 71 CONG. REC. 2390 (1929) (statement of Sen. Swanson) (The amendment "will prevent filibusters and legislation by blackmail. It will put an end to that condition under which in a short session an individual senator may prevent the enactment of desirable legislation unless some measure in which he is interested is also allowed to pass.").

115. See Oppenheimer, *supra* note 107, at 404. The Senate's increased workload is probably the single most important factor in the evolution of the filibuster. The number of public acts passed by each Congress rose from an average of slightly less than 550 between 1901 and 1933 to an average of 780 between 1933 and 1970. See James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 21 n.78 (1994). More significant than the increased number of bills perhaps are the length and complexity of congressional statutes, which have grown even more dramatically. The number of pages each Congress added to the *Statutes at Large* doubled between 1925 and 1954, and nearly doubled again between 1954 and 1984. See *id.*

116. Woodrow Wilson's often-quoted observation dates this phenomenon to the end of the last century: "It is not far from the truth to say that Congress in session is Congress on public exhibition, whilst Congress in its committee-rooms is Congress at work." WOODROW WILSON, CONGRESSIONAL GOVERNMENT 79 (Boston, Houghton, Mifflin & Co. 1885).

117. See Oppenheimer, *supra* note 107, at 404. There were a total of 26 cloture votes between 1961 and 1970, 44 between 1971 and 1979; 73 between 1980 and 1989, and 51 between 1990 and 1993. See Beth, *supra* note 55, at 9-19.

118. See Oppenheimer, *supra* note 107, at 405. There were three cloture votes on efforts to repeal Section 14b of the Taft-Hartley Act—which allows states to prohibit union security arrangements in collective bargaining agreements—two on supersonic transport, two on the abolition of the Electoral College, one on a communications satellite, one on a legislative reapportionment constitutional amendment, and one on the nomination of Abe Fortas to be Chief Justice. See *id.*

119. See Beth, *supra* note 55, at 5-7.

Ultimately, rather than dividing time between the filibustered measure and other matters, the Senate seldom discusses an objectionable matter until the majority could muster sixty votes for cloture.

This modern incarnation of the two-track system, which we call the "stealth filibuster," reduces the ability of a minority to hold legislation hostage. Whereas the traditional filibuster prevented the Senate from accomplishing much, the stealth filibuster permits the Senate to consider anything but objectionable legislation. The stealth filibuster is easier, both physically and politically, because it does not require a senator to hold the floor continuously. In contrast to the dilatory tactics of the past, modern filibusters virtually never involve long speeches, all-night sessions, or the parliamentary maneuvering that used to draw public attention. A credible threat that forty-one senators will refuse to vote for cloture on a bill is enough to keep that bill off the floor. The Senate leadership simply delays consideration of the bill until it has the sixty votes necessary for cloture.<sup>120</sup> In effect, the stealth filibuster eliminates the distinction between a filibuster and a threat to filibuster; any credible threat to filibuster *is* a filibuster because the majority leader must regard it as such. Thus, the stealth filibuster is largely silent, invisible, and relatively painless for both the majority and minority.

The methods employed in the contemporary filibuster vary.<sup>121</sup> A filibuster typically begins when a senator signals an intent to filibuster. This may occur publicly (either on the floor or in a communication to the news media), or privately (in a conversation with the Majority Leader or a sponsor). Senators often commence a filibuster by placing a bill (or a motion to proceed to consider a bill) on "hold." A hold is an informal device to communicate to the leadership that a senator wishes floor consideration of the bill to be delayed. Generally, the Majority Leader will keep the identity of the senator who placed the hold confidential. Senators exploit this secrecy to force the inclusion of pork-barrel projects in legislation. Because no official regulations for placing or lifting holds exist, they work only to the extent that Senate leadership voluntarily respects them.<sup>122</sup> Senators use holds legitimately—such as when they have not had time to read a committee report or materials prepared by their staff; but senators routinely use holds to filibuster.<sup>123</sup> According to Senate

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120. See DEMOCRATIC STUDY GROUP, *supra* note 15, at 1.

121. Contemporary filibuster tactics are described in TIEFER, *supra* note 19, at 706-66.

122. See *id.* at 562-65. Since holds are completely informal, there is no official way to determine how often senators use them. There is, nevertheless, a perception among Senate staff and lobbyists that holds are becoming increasingly frequent, and that they are used now more than in the past to defeat legislation rather than for "legitimate" purposes. See Robert A. Pastor, *Delay and Obstruct*, WASH. POST, Feb. 1, 1995, at A19. One long-time staffer was quoted as saying:

"It used to mean that putting a hold on something meant simply that you would be given twenty-four hours notice that this thing would come up. . . . But four or five or six years ago it started to mean that if you put a hold on something, it would never come up. It became, in fact, a veto."

BARBARA SINCLAIR, *THE TRANSFORMATION OF THE U.S. SENATE* 130 (1989).

123. See DEMOCRATIC STUDY GROUP, *supra* note 15, at 12-14; Jim O'Connell, *Holds, Filibuster Under Fire in Senate's Reform Package*, ROLL CALL, Nov. 8, 1993, at 12.

staff, senators place holds on up to one-half of all legislation pending in the last few weeks of a session.<sup>124</sup>

Although Senate leadership may ignore a hold, or pressure a senator to remove it by demanding a public explanation for it, holds nevertheless are a potent weapon because of the Senate's need to accommodate every senator. The Senate, unlike the House, has neither standing rules to formally guide floor proceedings nor a procedure, like the House's powerful Rules Committee, to adopt such rules on an ad hoc basis. As a consequence, the Senate relies on unanimous consent agreements to structure a surprisingly large amount of its floor deliberations.<sup>125</sup> Without consent agreements, the Senate floor could become chaotic. As a result, the Majority Leader strives to avoid permanently alienating any senator by honoring even illegitimately used holds.<sup>126</sup>

The leadership's constant effort to avoid alienating individual senators facilitates the tactical use of filibusters that have nothing to do with the merits of the filibustered legislation. Senators can threaten filibusters safe in the knowledge that the leadership almost certainly will not call their bluff. For example, a few years ago Republican senators filibustered five nominations for the State Department even though the senators apparently had no objections to the nominees. The purpose of the filibuster was to gain leverage in a dispute over whether the State Department adequately investigated allegations that a former Clinton campaign worker who later served in the State Department searched the records of 160 former political appointees and publicly disclosed the contents of two of the files.<sup>127</sup> While filibusters have often had tactical purposes somewhat afield of the legislation, this filibuster exemplifies a new problem: The easier it is to filibuster, the more widely senators can use the filibuster to gain concessions unrelated to the legislation at issue.

Typically, the Majority Leader will respond to a filibuster or a threatened filibuster in one of two ways. First, the Majority Leader may use the two-track system to allow a filibuster to block consideration of only one bill but not the rest of the Senate's business. The Majority Leader simply seeks unanimous consent to postpone consideration of the filibustered measure—or, less frequently, to confine debate on it to a specified period each day—so that the Senate may move on to other matters.<sup>128</sup>

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124. *See id.*

125. Under Senate Rule X, the Senate, with unanimous consent, can suspend or waive most of its rules. *See SENATE RULES, supra* note 2, at 5. But there is at least one rule that cannot be suspended even with unanimous consent: Rule XIX absolutely forbids senators from bringing to the attention of the Senate an occupant of the galleries and prohibits suspension of the rule by unanimous consent. *See id.* at 19-20.

126. *Hearings before the Joint Comm. of Cong. on Floor Deliberations and Scheduling*, 103d Cong. (1993) [hereinafter *Hearings*] (statements of Steven Smith and Barbara Sinclair). Although Majority Leaders Howard Baker and Robert Dole tried to curb the use of holds in 1982 and 1986, neither was able to make the reform stick. *See SINCLAIR, supra* note 122, at 131; SMITH, *supra* note 20, at 111-13.

127. *See* 139 CONG. REC. S14,624 (daily ed. Oct. 28, 1993) (statement of Sen. Mitchell); *id.* at S14,645 (statement of Sen. Simpson).

128. *See* SMITH, *supra* note 20, at 98. During the 1972 filibuster on a jobs opportunity bill, Majority Leader Mansfield scheduled a certain number of hours each day for debate on the filibustered legislation and then spent the rest of the day on other matters. *See* Oppenheimer, *supra* note 107, at 406.



More commonly, however, the leadership will simply decline to bring the measure to the floor while filing a cloture motion, negotiating with the filibustering senators, and seeking enough votes to end the filibuster. A successful cloture petition severely limits the duration and subject of debate on a bill.<sup>129</sup> Senate Rule XXII, which sets forth rules for cloture, allows only thirty hours of consideration after a successful cloture vote and strictly regulates the amount of time each senator can speak during that thirty hours; it also prohibits nongermane amendments and all amendments that were not filed pre-cloture.<sup>130</sup> Sometimes several cloture motions will be filed on any matter that might be filibustered, including a conference report, a motion to proceed, or the bill itself.<sup>131</sup> Seldom does the leadership risk alienating their colleagues by forcing a senator to actually stand up and debate a bill at length.<sup>132</sup> Moreover, if there are more than a few determined filibusterers, the majority generally cannot break the filibuster by forcing round-the-clock sessions.<sup>133</sup>

Typically, the majority will force a showdown only when the publicity in doing so is valuable in its own right. Thus, in 1988, when the Republican minority was stalling campaign finance reform legislation by refusing to attend floor sessions and the illnesses and travel schedules of five Democrats prevented the majority from obtaining a quorum, Majority Leader Byrd invoked the seldom-used authority to have the Sergeant-at-Arms threaten to arrest absent senators to compel their attendance. When that failed, Byrd and the Democrats voted to order the Sergeant-at-Arms to arrest the absentees and return them to the chamber. In complying with this order, capitol police officers cap-

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129. The cloture process begins when a petition seeking cloture is signed by at least 16 senators and presented to the Chair. The Chair announces the petition to the Senate. When the Senate meets two days after the petition's filing, the business on which cloture has been sought automatically comes up. The Presiding Officer calls the roll to determine that a quorum is present, and the Senate votes on whether "the debate shall be brought to a close." SENATE RULES, *supra* note 2, at 21. If 60 senators vote in the affirmative, the subject on which cloture is sought becomes the unfinished business to the exclusion of all other business until debate on it has ended. The Senate, however, by unanimous consent can override the rule's exclusivity requirement. *See id.* at 21-23.

130. Originally, Rule XXII limited post-cloture consideration to one hour per senator; in 1979, the Senate added a 100-hour cap on the total length of post-cloture consideration. *See SENATE CLOTURE RULE*, *supra* note 38, at 134. In 1986 the total was reduced to 30 hours. *See TIEFER*, *supra* note 19, at 724.

131. The tendency to seek cloture in advance of a threatened filibuster and on several procedural devices pertaining to a single bill explains why counting cloture motions is an imprecise way of counting filibusters. *See ORFIELD*, *supra* note 113, at 43-44. Several cloture votes may be necessary on a single measure because many senators who might support a bill or passage will vote with their obstructionist colleagues against cloture simply as a matter of party loyalty. This party discipline is hard to maintain after one or two high-profile votes, particularly when constituent pressure has been brought to bear on renegade senators who may be willing to break with their party.

132. *See TIEFER*, *supra* note 19, at 712-14. On the origin of the track system, see Oppenheimer, *supra* note 107, at 406. On the strategies of various majority leaders for controlling floor action, see SMITH, *supra* note 20, at 99-110.

133. A 1960 civil rights filibuster demonstrates this point. Majority Leader Johnson kept the Senate going continuously for nine days, which required the majority to keep a quorum of 51 senators on hand at all times for quorum calls. Groups of two filibusterers worked in relays. "It was an absolutely exhausting experience," recalled Democratic Senator William Proxmire, a member of the majority. "We slept on cots in the Old Supreme Court chamber . . . and came out to answer quorum calls." In contrast, the filibusterers, who did all of the talking, "were in great shape, because they would talk for two hours and leave the floor for a couple days." *See Calmes*, *supra* note 108, at 2117.

tured Senator Robert Packwood, who had barricaded himself in his office, and carried him into the Senate chamber feet first. The whole spectacle hit the front page of the *Washington Post*, allowing Democrats to complain about the Republicans' refusal to vote on legislation to clean up Congress and Republicans to complain about "Nazi" tactics.<sup>134</sup> Such confrontation is, however, quite rare. In most cases, the two-track system keeps filibusters out of the public eye.

The two-track system developed by Mansfield may have benefitted the majority in the short run, but its long-term consequences for the Senate have been disastrous. First, as described above, it has reduced the cost of filibustering and thus encouraged strategic filibusters. Under the substantial time pressure of the modern Senate—caused not only by increased legislative business but also by the constant pressure to be away from the Senate raising money for reelection—senators today would refuse to tolerate their colleagues' attempts to hold them hostage. Thus, if senators actually had to hold the floor, most filibusters would quickly fizzle.

Second, the stealth filibuster has all but eliminated public accountability for senators who filibuster. Prior to the 1970s, the public could rely on detailed newspaper coverage to follow the high drama and outlandish comedy of a filibuster. For example, the public read a newspaper log of Huey Long's famous 1935 filibuster against a provision of the New Deal; the story reported that at 4:32 P.M. one senator suggested Long sing rather than talk; at 6:50 P.M. Long recited recipes for frying oysters and making potlikker; at 12:50 A.M. Long discussed the beauties of sleep; at 2:05 A.M. Long asked the Senate's presiding officer what became of the sword that Federick the Great sent to George Washington.<sup>135</sup> Now, of course, C-SPAN coverage of floor proceedings would make it even easier for the public to know about filibusters, which would substantially limit their use. In an era of public concern over "gridlock" in Washington, most senators would not want their constituents to witness an old-fashioned filibuster.<sup>136</sup> In creating the stealth filibusters, the two-track system has substantially increased the use (or abuse) of filibusters.

Following the election of a Democratic president in 1992, a rash of Republican filibusters that blocked key aspects of Clinton's legislative program contributed to a sense of crisis. Asserting a sharp increase in the number of

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134. Helen Dewar, *Midnight Manhunt in the Senate: "Banana Republic" Tactics Hit After Packwood's Arrest in Filibuster*, WASH. POST, Feb. 25, 1988, at A1. After more than 50 hours of continuous session and a record-setting eight cloture votes, the Democrats fell seven votes short of obtaining cloture, and the bill died. See Helen Dewar, *Campaign Finance Bill Loses Again in Senate: GOP Blocks Vote on Limiting Spending*, WASH. POST, Feb. 27, 1988, at A4.

135. See Memorandum on the Huey Long filibuster of June 12-13, 1935 (Mar. 3, 1940) (citing WASH. DAILY NEWS, June 13, 1935) (on file with the Senate Historian's Office).

136. Of course, the presence of televisions may cause some filibusters that might not otherwise occur, as when a senator might wish constituents to see him standing for some provision of particular interest to them. At the end of the 102d Congress, for example, Senator Alphonse D'Amato held the floor for an entire night because a provision benefiting one of his corporate constituents was not included in a tax bill. He surely knew he would not succeed, but he was in a close race for reelection and the filibuster signaled to voters his dedication to their interests. See 138 CONG REC. S16,846-924 (daily ed. Oct. 5, 1992) (remarks of Sen D'Amato).

filibusters in recent years, Democrats attacked the filibuster as an obstructive tactic that permitted the Republican minority in the Senate to thwart the legislative efforts of the Democratic administration and Democratic majorities in the House and Senate.<sup>137</sup> During joint House-Senate hearings on congressional reorganization in 1993, Congress examined the use and abuse of filibusters.<sup>138</sup> House Democrats were particularly alarmed and published a report highly critical of the use of the filibuster.<sup>139</sup> Former senators capitalized on increased public awareness of filibusters by organizing a "citizens group" known as "Action, Not Gridlock!" which focused on eliminating the filibuster.<sup>140</sup> An irate Democratic voter sued the Senate alleging that the rule permitting filibusters infringed on the constitutional principle of majority rule.<sup>141</sup> In short, the events of the last few years have confirmed that the contemporary filibuster is both insidious and tremendously important in the legislative process in a way that is unprecedented in U.S. history.

Not every aspect of modern filibustering is without precedent, however. Many characteristics of filibusters that have been most criticized lately have historical roots. First, filibusters today focus on issues neither more trivial nor more momentous than filibusters of the past. As is the case today, some early filibusters addressed important, highly contentious issues such as slavery in states admitted to the Union,<sup>142</sup> the use of federal troops to supervise Southern elections,<sup>143</sup> and ratification of the Versailles Treaty.<sup>144</sup> Others were over bills whose enduring significance is not immediately apparent.<sup>145</sup> Examples include the 1841 patronage dispute over the official Senate printers,<sup>146</sup> a filibuster of a provision in a naval appropriation bill setting the purchase price for armor plate,<sup>147</sup> a filibuster against a rivers and harbors bill providing federal money for improvements,<sup>148</sup> a 1903 filibuster that extorted appropriations to cover

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137. See Robert Shogan, *Once Used Sparingly, Filibuster Becomes a Common Obstacle*, L.A. TIMES, Aug. 31, 1994, at A5 (referring to Democratic attacks of Republican filibusters as partisan delay tactics).

138. See *Operations of the Congress: Testimony of the House and Senate Leaders, Hearing Before the Joint Comm. on the Org. of Cong.*, 103d Cong. 48 (1993) (statement of Sen. Mitchell).

139. See DEMOCRATIC STUDY GROUP, *supra* note 15, at 3.

140. See Helen Dewar, *Ex-Senators Urge Restraint on Filibusters*, WASH. POST, June 23, 1994, at A27.

141. See *Page v. Dole*, No. 94-5292, 1996 WL 310132 (D.C. Cir. May 13, 1996) (per curiam).

142. See BURDETTE, *supra* note 27, at 28.

143. This issue sparked filibusters in 1879 and again in 1890-91. See *id.* at 43.

144. See Beth, *supra* note 55, at 7.

145. This is not to say that these issues were unimportant. Many seemingly inconsequential bills tap into large issues. The rivers and harbors appropriation in 1846, for instance, was controversial because federal expenditures to support internal improvements reflected a vision of federal power that was anathema to the Southern proslavery view of limited national authority over the Territories. See FEHRENBACHER, *supra* note 40, at 129. Many of the filibusters enumerated below concerned bills with similarly significant symbolic importance.

146. This may have been a patronage dispute of special significance, as the new Whig majority apparently felt that consolidation of their own power would be aided by ousting the reporters of Senate proceedings whom they considered unduly loyal to the Democratic minority. Since Senate proceedings were not then reported verbatim, the political bias of the publisher might have been a more potent issue than it would seem from today's perspective. See BURDETTE, *supra* note 27, at 68.

147. See *id.* at 68.

148. See *id.* at 69-71.

\$47,000 of South Carolina's expenses during the War of 1812,<sup>149</sup> and Huey Long's renowned fifteen hour filibuster—during which he read recipes into the *Congressional Record*—over the appointment of officials under a provision of the short-lived National Recovery Administration.<sup>150</sup> By the late nineteenth century, the use of filibusters seemed to be dictated as much by timing as by the gravity of the matter at hand.<sup>151</sup>

Contemporary filibusters also resemble those of the past in the extent to which their critics decry them as “partisan.” Partisanship in this context means both party-driven, and, more generally, narrowly ideological, unprincipled, and divorced from a vision of the common good.<sup>152</sup> The paradigmatic nonpartisan filibusters were those launched by the coalition of Southern Democrats and Conservative Republicans over civil rights. But the civil rights filibusters were the exception rather than the rule. Filibusters may have become more consistently partisan, but filibusters certainly were used to partisan advantage regularly in the past. For example, the filibuster that preceded the famous 1917 armed-ship filibuster was not in objection to any particular legislation, but was simply a Republican effort to embarrass the Wilson Administration.<sup>153</sup> After Republicans had gained a majority in the 1919 Congress, but before they had actually taken office, Republicans in the lame-duck Congress filibustered for the entirety of the short session to prevent the outgoing Democratic majority from enacting any more legislation.<sup>154</sup> In sum, partisan filibusters are nothing new, and to the extent that recent filibusters have failed to cross party lines, it may simply reflect greater ideological consistency in the parties than has existed in the past.<sup>155</sup>

149. *See id.* at 72.

150. *See id.* at 3-4; 1 HAYNES *supra* note 25, at 413-14.

151. *See* 141 CONG. REC. S32 (daily ed. Jan. 4, 1995) (statement by Sen. Harkin) (explaining that filibusters during the nineteenth century were used at the end of a legislative session when a majority would try to ram through legislation over the objections of the minority). Bruce Oppenheimer argues that the increased number of cloture votes after 1961 is attributable to the increased time pressure in the Senate. Prior to the 1960s, the Senate could often afford to wait out a filibuster and did not need to resort to the cloture mechanism. *See* Oppenheimer, *supra* note 107, at 400-01.

152. One scholar has asserted that “[n]ever before has the minority party used the filibuster against a president of the other party to block important initiatives.” Gilmour, *supra* note 108, at 1; *see also* DEMOCRATIC STUDY GROUP, *supra* note 15, at 7 (discussing the indiscriminate use of filibusters against various legislative proposals); Calmes, *supra* note 108, at 2116 (discussing the increased use of filibusters by Senate minority).

153. *See* text accompanying note 81 *supra*.

154. *See* BURDETTE, *supra* note 27, at 128-31. The outgoing Vice President Thomas R. Marshall was reportedly so disgusted with the Republican filibuster that when he slammed down the gavel on March 4, 1919, he declared the session adjourned *sine Deo* (“without God”) rather than, as usual, *sine die* (“without day,” meaning a day set for reconvening). *See id.* at 131.

155. Senator Phil Gramm's filibuster threat that blocked the nomination of Dr. Henry Foster to be Surgeon General suggests that even conservative Senate leadership is not enough to prevent filibusters in support of conservative causes (at least where presidential election politics make a conspicuous opposition stand useful). *See* Devroy & Rich, *supra* note 10, at A2; Schwartz, *supra* note 10, at A5. For a discussion of the greater ideological consistency in the parties in the contemporary Senate, see Norman J. Orenstein, Robert L. Peabody & David W. Rhode, *The U.S. Senate in an Era of Change*, in CONGRESS RECONSIDERED 15, 17-18 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 5th ed. 1993). One of the more cynical (and effective) uses of the filibuster in recent times was the Republicans' systematic use of it towards the end of the 103d Congress to prevent Democrats from achieving legislative victories on health care, campaign finance reform, Congressional reform, and labor law, while simultaneously criti-

Since Republicans took control of the House and the Senate in 1994, Democratic criticism of the filibuster predictably has been muted, although it has not entirely disappeared.<sup>156</sup> Republicans, on the other hand, have yet to register much demand for reform, perhaps because they have not suffered many defeats at the hands of a Democratic opposition.<sup>157</sup> Despite changes in party leadership, filibusters coming from all points on the ideological spectrum remain a significant and problematic aspect of the legislative process.

#### F. *History of the Debate About Cloture*

Over the years, the merits and the constitutionality of the filibuster have been repeatedly debated in the Senate, the courtroom and the press. Since the adoption of Rule XXII, most reformers have focused on strengthening its provisions and closing its loopholes.

One of the first loopholes to be opened and closed was an early interpretation of Rule XXII that determined that cloture could not prevent filibusters on procedural matters. Following early precedent, senators began to filibuster a procedural matter, such as a motion to proceed to consider a measure, rather than the measure itself. The absence of a cloture device for motions to proceed meant that a skillful filibuster could not be defeated. Indeed, during a 1948 filibuster of a anti-poll-tax bill, when the President pro tem reluctantly ruled that cloture could not be invoked on a motion to proceed, he lamented that, "in the final analysis, the Senate has no effective cloture rule at all."<sup>158</sup>

The Truman Administration realized that liberalization of cloture was essential to civil rights, and therefore supported an effort in 1949 to allow cloture

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cizing Democrats' failure to accomplish proposed changes. See Helen Dewar & Kenneth Cooper, *103rd Congress Started Fast But Collapsed at Finish Line*, WASH. POST, Oct. 9, 1994, at A1. For instance, Republicans filibustered a bill to apply employment laws to Congress in late 1994 and then the Republican majority's first order of business in January 1995 was to pass the very bill they had just filibustered, thus claiming credit for reforming Congress. See Kenneth J. Cooper, *House Sends Congressional Compliance Bill to Clinton*, WASH. POST, Jan. 18, 1995, at A4; Helen Dewar, *Quick Action Planned for Ambitious Hill Agenda*, WASH. POST, Jan. 3, 1995, at A4.

156. Democratic leadership in the 104th Congress was reportedly less committed than the Republicans of the 103d to the filibuster as a tool of minority power. See Dewar, *supra* note 155, at A1. Despite the changed emphasis, Democrats filibustered Republican bills. See Helen Dewar, *Senate Blocks Damages Limit in Civil Suits*, WASH. POST, May 5, 1995, at A1 (limits on punitive damages in civil suits); Helen Dewar & Kenneth J. Cooper, *Hill Leaders Vow Action on Anti-Terrorism Bill*, WASH. POST, Apr. 25, 1995, at A6 (discussing the Democratic attempts to block Republican repeal of assault weapons ban); Helen Dewar & Eric Pianin, *Balanced Budget Amendment Losing Democrats, GOP Senators Say*, WASH. POST, Feb. 4, 1995, at A4 (discussing Democratic attempts to block the balanced budget amendment); *Digest*, WASH. POST, Mar. 30, 1995, at D10 (discussing Democratic threats to filibuster Republican repeal of Davis-Bacon Act).

157. Republicans may also have been reluctant to advocate majority rule in the Senate because the Republican leadership in the House was trumpeting its new House rule requiring a three-fifths vote for tax increases. The rule was supposed to "make it virtually impossible to raise taxes." Andrew Taylor, *Budget-Amendment Vote Likely to Be First Up*, 52 CONG. Q. WKLY. REP. 3331, 3331 (1994). The three-fifths rule prompted all sorts of partisan wrangling and litigation. See, e.g., *Skaggs v. Carle*, 898 F. Supp. 1 (D.D.C. 1995) (charging the House rule as unconstitutional); Alissa J. Rubin, *Democrats Hope Tax-Raising Rule Will Come Back to Haunt GOP*, 53 CONG. Q. WKLY. REP. 2045 (1995) (describing partisan struggles which erupted over the three-fifth rule).

158. *Senate Filibuster Rule*, 21 CONG. Q. WKLY. REP. 11 (1963); see SENATE CLOTURE RULE, *supra* note 38, at 20.

on any pending business. The proposal was extremely controversial and was enacted only after a compromise increased the number of votes required to sustain cloture from two-thirds of those present and voting to two-thirds of the entire Senate. But the rules still did not permit cloture on a motion to change Senate rules. Finally, in 1959, the Senate amended Rule XXII to allow cloture by a two-thirds vote even on a motion to change the rules.<sup>159</sup> In 1975, the Senate again liberalized cloture by reducing the number of votes needed to invoke cloture from two-thirds of those present to three-fifths of the entire Senate.<sup>160</sup>

Shortly after the Senate eased the requirement for cloture in 1975, the post-cloture filibuster became a problem. Senators discovered they could filibuster even after the Senate had voted for cloture by exploiting loopholes in the limits on post-cloture debate. After freshmen Senators Metzenbaum and Abourezk angered the majority leader by conducting an impressive post-cloture filibuster of natural gas price deregulation, the Senate in 1979 amended Rule XXII to restrict the ability of members to delay after cloture.<sup>161</sup> In 1986, the Senate further restricted post-cloture filibusters by reducing the total time allowed for debate after cloture.

During debates on many of these amendments to Rule XXII, filibuster opponents, notably senators allied with the struggle for civil rights, argued that the supermajority requirement for changing Rule XXII was unconstitutional. Their principal argument was that at the beginning of a new Congress a majority of the Senate could adopt *all* new rules, including a change to the cloture rule, by majority vote.<sup>162</sup> They argued that under Article I, Section 5 of the Constitution, which provides that "each House may determine the rules of its proceedings," a majority of the Senate has the right to adopt whatever rules it wants at the beginning of each new Congress.<sup>163</sup> The filibuster opponents further argued that it is constitutionally impermissible for one Congress to bind a subsequent Congress, and cited several Supreme Court cases in support.<sup>164</sup> Furthermore, they noted that one of the first items of business the House addresses in each new Congress is the adoption of rules that will govern its pro-

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159. See SENATE CLOTURE RULE, *supra* note 38, at 20-25.

160. See *id.* at 32.

161. See OLESZEK, *supra* note 20, at 259. Prior to the 1979 amendment, although the rule limited post-cloture debate to one hour per senator, the time spent on quorum calls and the reading of amendments was not charged against the hour. See *id.* Because there was no overall limit on the time for post-cloture consideration, post-cloture procedural maneuverings could impose significant delays. During the Metzenbaum-Abourezk filibuster, 500 amendments had been offered to the bill pre-cloture. The filibustering senators called each up for consideration, and demanded that each be read in full, thereby managing to delay a final vote for a week after cloture. See Oppenheimer, *supra* note 107, at 409. The 1979 amendment imposed an overall 100-hour cap on post-cloture proceedings and restricted the calling up of amendments. See SENATE CLOTURE RULE, *supra* note 38, at 35, 60. The 100 hour limit was reduced to 30 hours in 1986. See note 130 *supra*.

162. See 121 CONG. REC. 756 (1975) (statement of Sen. Pearson); 107 CONG. REC. 235 (1961) (brief in support of cloture reform). Rule V provides that "[t]he rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules." SENATE RULES, *supra* note 2, at 5.

163. 107 CONG. REC. 235-36 (1961).

164. See *id.*

ceedings during that Congress.<sup>165</sup> Until the new rules are adopted, the House operates under “general parliamentary procedure,” which allows a simple majority vote to decide an issue or close debate.<sup>166</sup> If this policy existed in the Senate, a majority could adopt rules that would allow a majority to end debate.

Filibuster opponents made other arguments as well. With respect to the long-held Senate practice of acting as if its rules were binding from Congress to Congress, the filibuster opponents asserted that acquiescence in the past does not constitute a waiver or loss of power to adopt rules by majority vote.<sup>167</sup> They also noted that the Senate has always believed it must start most of its business anew at the beginning of each Congress. This practice, they contended, rather than the fact that only one-third of the Senate seats are open to change each election, ought to determine whether a majority of the Senate can adopt new rules at the beginning of a new Congress.<sup>168</sup>

The filibuster opponents based their final argument on the text of the Constitution. Pointing to five circumstances in which the Constitution expressly requires a supermajority for legislative action, they argued that majority rule is a constitutional requirement for both houses of Congress except where the Constitution explicitly provides otherwise.<sup>169</sup> They asserted that the proceedings of the Constitutional Convention supported the view that the Framers intended majority rule except where the Constitution specifies a supermajority, and that majority rule is a fundamental principle of republican government.<sup>170</sup>

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165. Usually the House simply adopts the rules that were in effect during the preceding Congress with some amendments. *See, e.g.*, 139 CONG. REC. H35-H54 (daily ed. Jan. 5, 1993) (debate and votes relating to the adoption of House rules for the 103d Congress).

166. *See* 107 CONG. REC. 239 (1961).

167. *See* 121 CONG. REC. 762 (1975) (statement of Sen. Mondale).

168. *See id.* One of the few exceptions to this practice are treaties, which remain before the Senate indefinitely until acted upon. *See* SENATE COMM. ON RULES & ADMIN., 102d CONG., SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE U.S. SENATE 64-65 (Comm. Print 1992) (Rule XXX).

169. There are seven instances where the Constitution explicitly requires a two-thirds vote. *See* U.S. CONST. art. I, § 3, cl. 6 (Senate’s guilty verdict on impeachments); U.S. CONST. art. I, § 5, cl. 2 (the expulsion of a member from either house); U.S. CONST. art. I, § 7 (both houses overriding a presidential veto); U.S. CONST. art. II, § 2, cl. 2 (Senate’s ratification of a treaty); U.S. CONST. art. V (both houses proposing a constitutional amendment); U.S. CONST. amend. XIV, § 3 (to remove disability from congressional service of those who participated in insurrection); U.S. CONST. amend. XXV, § 4 (determination of presidential disability).

An additional textual argument is the provision that the Vice President may vote in the Senate only if “they be equally divided.” U.S. CONST. art. I, § 3, cl. 4. The constitutional provision giving the Vice President no vote in the Senate “unless they be equally divided” implies reliance on the parliamentary principle of *lex majoris partis*. For an evaluation of these arguments, see text accompanying notes 340-347 *infra*.

170. *See* 107 CONG. REC. 240 (1961) (brief in support of the proposition that a majority of the Senate has the power to amend its rules at the beginning of a new Congress). The Senate has considered arguments based on something other than democratic theory and constitutional notions of majority rule. For instance, during the fight over filibusters in 1963, Senator Bourke Hickenlooper asked the Legislative Reference Service of the Library of Congress to prepare an estimate of the cost of filibusters to the Senate. The estimated cost of printing the text of the filibuster proceedings in the *Congressional Record* from 1944 to January 14, 1963 was \$493,104.27; other, less tangible, costs could not be determined. *See* Letter from Walter Kravitz to Sen. Bourke B. Hickenlooper 2 (Jan. 14, 1963) (on file with the *Stanford Law Review*).

Southern senators opposed to federal civil rights legislation strenuously objected to all efforts to liberalize cloture, and especially to defeat the right of the majority to change Senate rules. They argued that the Senate is a "continuing body" because only one-third of its membership is elected every two years; therefore, they argued, its rules carry over from Congress to Congress. In addition, filibuster supporters asserted, the Constitution does not require the adoption of new rules every two years, and if the Senate originally had the power to adopt new rules it had lost that power through disuse.<sup>171</sup> They also argued that the constitutional provision requiring the election of two senators from every state, no matter its size, was proof that the Framers did not intend the Senate to be a majoritarian body.<sup>172</sup>

Despite these arguments, two different vice presidents during this time, acting as presiding officers of the Senate, issued rulings favoring majority cloture. In 1957, Vice President Richard Nixon ruled that the Senate could not be bound by any previous rule "which denies the membership of the Senate the power to exercise its constitutional right to make its own rules."<sup>173</sup> The Senate, however, never voted on Nixon's opinion.<sup>174</sup> Then, in 1969, Vice President Hubert Humphrey issued a similar ruling, finding that a majority of the Senate had a right to cut off debate and to proceed on changing the rules; however, the Senate voted to overturn his ruling.<sup>175</sup> The Senate majority's unwillingness to uphold the principle of majority rule might seem puzzling since the majority's civil rights program had been thwarted by filibusters for years. But on close examination, it is not hard to see why the majority suddenly became nervous about liberalizing cloture.

By 1970, the proponents of cloture liberalization—who were also the proponents of civil rights legislation—may have realized that they were not going to get much more civil rights legislation through Congress. They may have wanted to retain the filibuster weapon to fight conservative causes—such as restricting busing or repealing labor laws. This might explain why, after biennial efforts to ease cloture since 1957, no such effort reached the floor in 1973. It is thus ironic that at the beginning of the next Congress in 1975, just when interest in cloture reform seemed to dwindle, the Senate finally liberalized the cloture rule.<sup>176</sup>

In 1975, in the wake of the Watergate scandal, filibuster opponents led by Senator Walter Mondale introduced a motion to amend Rule XXII to authorize

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171. See 103 CONG. REC. 153-59, 177 (1957) (statements of Sen. Thurmond and Sen. Russell).

172. See *id.*

173. *Id.* at 179.

174. The Senate never voted on Nixon's opinion because it was rendered in response to a parliamentary inquiry, and there is no appeal from such a response. Even if Nixon's opinion had been appealable, it would not necessarily have eliminated filibusters since a constitutional question is a debatable issue and can therefore be filibustered. Former Parliamentarian Floyd Riddick, who worked closely with Nixon, believed that Nixon's actions were prompted by a desire "to placate the administration" and not to be "reactionary as far as civil rights were concerned." Interview with Floyd Riddick conducted by Associate Senate Historian Donald Richie, in Washington D.C., (July 27, 1978), at 158-161 (on file with the Senate Historian's Office).

175. See SENATE CLOTURE RULE, *supra* note 38, at 28-29.

176. See Interview with Floyd Riddick, *supra* note 174, at 208.



majority cloture. Mondale moved that debate on the matter be closed upon a vote of a majority.<sup>177</sup> Majority Leader Mansfield raised a point of order, arguing that the motion to close debate violated the two-thirds requirement of Rule XXII.<sup>178</sup> The Senate voted to table the point of order, thereby rejecting Senator Mansfield's position and allowing a vote on the amendment.<sup>179</sup> Although this gave the majority the power to adopt a majority cloture rule, the Senate backed away from such a radical change and instead adopted a compromise offered by Senator Long that provided for cloture on a three-fifths vote.<sup>180</sup> In the process, the Senate reconsidered and voted to sustain the Mansfield point of order, thus establishing that a majority of the Senate would abide by the supermajority requirement for amending Senate rules.<sup>181</sup>

The cloture rule was last changed in 1986, when the Senate reduced the number of hours of postcloture consideration from 100 to thirty.<sup>182</sup> For several years following this change, the Senate did not consider the constitutionality of the filibuster. Recently, however, with the increasing ideological division in the Senate, the filibuster has reemerged as a controversial political issue. Although most of the contemporary arguments about filibusters are not new, the emphasis in recent debate has been on the textual constitutional arguments and the contentions about majority rule and minority rights. Little attention has been paid to the entrenchment issues—the inability of a current majority of the Senate to change rules adopted by a past majority—that preoccupied the Senate in the past.

The Senate has never formally articulated a response to the arguments against the filibuster that have been presented over the years, not even in 1969 when it rejected Vice President Humphrey's opinion that a majority could change the rules. Unlike a court that must give reasons for its decisions, senators can vote, and the Senate can act, without ever officially addressing the arguments on an issue. That leaves the filibuster in a questionable position. Although the filibuster is well established as a part of Senate procedure, it is, at least in its current stealth form, not part of a long tradition. And although the Senate has rejected the constitutional questions surrounding the filibuster, it has never provided a reasoned defense for its position.

### III. THE EFFECTS OF FILIBUSTERS ON THE LEGISLATIVE PROCESS

The stealth filibuster's impact on the legislative process is enormous. Describing and evaluating its effects comprehensively and precisely is a task that has never been done and is too large to be done here. We venture here only to suggest several observations that seem particularly germane to our thesis. First, filibustering has in effect created a supermajority requirement for the enactment of most legislation. Second, filibustering may reduce committee

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177. See 121 CONG. REC. 4108 (1975).

178. See *id.* at 4370-71.

179. See *id.* at 4370.

180. See *id.* at 4370-71, 5652.

181. See *id.* at 5251.

182. See 132 CONG. REC. S1752 (daily ed. Feb. 27, 1986).

control over legislation by increasing the leverage that individual senators may exercise over the floor agenda. These two effects certainly influence the outcome of Senate decisionmaking, although it is unclear whether the influence skews results in a systematic fashion.

Third, when, as in the Senate, neither party has a sixty vote majority, filibusters augment the influence of moderates because their votes are essential to the success or failure of cloture motions. Fourth, the stealth filibuster, as compared to its "speaking" predecessor, seems to place greater power in the hands of party leadership in the Senate.

Finally, we briefly explore the institutional constraints on filibustering. Despite the many incentives for launching the stealth filibuster, political and institutional constraints prevent senators from employing the filibuster to its fullest extent. As a result, the modern incarnation of the filibuster is not as destabilizing to the legislative process as it might first appear to be.

These effects of and constraints on the stealth filibuster have implications for understanding its majoritarian, or antimajoritarian, consequences. In assessing these implications, we must keep in mind that legislative decisions do not necessarily reflect the wishes of the majority in a simple sense. The notion that the legislature enacts a statute that reflects the will of the majority must be qualified in light of what we know about the role of Senate committees, parties, and leadership in shaping the agenda and in light of the role that agenda setting has on decisionmaking results.<sup>183</sup> Public choice scholars theorize that the preferences of a legislative majority are not the sole determinants of legislative outcomes because, for any bill that has more than one dimension of choice, there exists an alternative bill that could defeat it.<sup>184</sup> Any constitutional challenge to the filibuster based on the simple position that it prevents the enactment of a bill supported by fifty-one senators must therefore confront two problems. First, the filibuster is not alone among Senate procedures in thwarting bills favored by a majority. Second, and somewhat inconsistently, the filibuster is not in every case antimajoritarian. Thus, even if majority rule were a constitutional imperative (which, as we explain below, it is not), the filibuster does not necessarily offend that principle more than, say, the committee system.<sup>185</sup> And in some cases, it is not obvious that the filibuster is really antimajoritarian at all.

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183. On strategic behavior in agenda setting, see Calvin J. Mouw & Michael B. Mackuen, *The Strategic Agenda in Legislative Politics*, 86 AM. POL. SCI. REV. 87 (1992). On the effect of agenda setting on legislative outcomes, see Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561, 564 (1977); Richard D. McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY, 472, 480-81 (1976); Kenneth Shepsle & Barry R. Weingast, *When Do Rules of Procedure Matter?*, 46 J. POL. 206, 206 (1984).

184. For explanations and critiques of public choice theories of legislative behavior, see generally DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY* (1994).

185. The equation of political legitimacy with majority rule is of course a vast oversimplification of the large and complex question of the role of majority rule in democratic government. See generally MAJORITIES AND MINORITIES (John W. Chapman & Alan Wertheimer eds., 1990) (a collection of essays on the challenges of pluralism and democracy).

### A. A Supermajority Requirement

The widespread use of filibusters or threats of filibusters has effectively increased the number of votes it takes to enact legislation from fifty-one (or fifty plus the vice president's vote) to sixty.<sup>186</sup> Whereas the filibusters of the past were mainly the weapon of last resort, now filibusters are part of daily life. As we saw in Part II, this is not because, if push came to shove, every single piece of legislation would be filibustered. Rather, due to a chronic shortage of floor time, Senate leadership is generally unwilling to bring to the floor any legislation that does not enjoy a sufficient majority to overcome a filibuster when one is or may be threatened. Since the institutionalization of the two-track system in the 1970s, therefore, it often takes a supermajority to get legislation or a nomination through the Senate.<sup>187</sup> Thus, it is the stealth aspect of the filibuster that permits its widespread threat to constitute an effective supermajority requirement for much Senate action.

One whole category of Senate business is, however, exempt from filibuster threat: the budget process. Under the congressional legislation governing the budget, all budget reconciliation legislation is considered under procedural rules that strictly limit the time for debate and other procedural delay.<sup>188</sup> Reconciliation bills cannot be filibustered because the time for debate is strictly limited by statute. They cannot be delayed by excessive amendments because, when the time for debate expires, the Senate votes on all filed amendments without any debate and then immediately on the reconciliation bill itself.<sup>189</sup> Because of the streamlined procedures for reconciliation bills, senators often try to draft proposed legislation as a reconciliation bill to prevent filibusters. The recent welfare "reform" and Medicaid legislation enacted in the 104th Congress both were reconciliation bills and thus were immune from filibustering.<sup>190</sup> A significant portion of the Senate's business is now being conducted

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186. See Calmes, *supra* note 108, at 2116. This supermajority requirement may not be a recent development. In 1974, when it took a two-thirds vote to invoke cloture, Senator Kennedy complained that Senate decisionmaking "is turning into a rule by two-thirds." Spencer Rich, *Allen a Master of New-Style Filibuster*, WASH. POST, July 1, 1974, at A2. He claimed that "[u]nless you have two-thirds, on an issue that really reaches at the important power bases of this country, you can't get a vote." *Id.*

187. There are, of course, exceptions. The nomination of Clarence Thomas to the United States Supreme Court is one. Justice Thomas was confirmed by a vote of 52 to 48. See 137 CONG. REC. S14,704 (daily ed. Oct. 15, 1991).

An example of a filibuster that produced significant substantive changes in legislation is the 1972 filibuster of the expansion of Title VII. The prolonged Southern filibuster forced a weakening of the enforcement powers of the EEOC. See ORFIELD, *supra* note 113, at 90. For a study of other instances in which filibusters successfully extracted changes in bills, see SINCLAIR, *supra* note 122, at 136.

In principle, of course, a similar give-and-take may occur under a strict majoritarian procedure: one senator may demand, as the price of her support on bill A, that some provision be added or deleted from bill B, or even that bill B be dropped entirely. Thus, it may not have been the filibuster alone that blocked antilynching laws in the 1930s, but more precisely, the filibuster plus the fact that Roosevelt needed Southern senators' support for the New Deal. See note 102 *supra* and accompanying text. However, the more weapons there are at the disposal of a senator, the more likely they will be used.

188. See Congressional Budget Act, Pub. L. No. 93-944, 88 Stat. 297 (1974) (codified as amended at 2 U.S.C. §§ 601-603, 651-658 (1996)).

189. See *id.*

190. See S. 1956, 104th Cong. (1996); see also, 142 CONG. REC. S8396-04 (daily ed. July 22, 1996) (discussing welfare and medicaid reform).

as reconciliation bills.<sup>191</sup> Thus, one rather technical consequence of the prevalence of stealth filibusters has been to prompt the Senate to consider a substantial part of its legislation under the rubric of the budget reconciliation process.

The Senate cannot prevent filibusters on *all* legislation simply by drafting everything as a reconciliation bill, however. Senate procedural rules require that reconciliation bills be germane to the federal budget.<sup>192</sup> The welfare and Medicaid bills obviously fit this category because they are relevant to control of federal expenditures. But a significant portion of the Senate's business cannot be shoehorned into the budget category, even through creative drafting. Moreover, as a normative matter, it is not necessarily desirable that the Senate should use the budget process for so much legislation, simply to avoid a filibuster threat.

The stealth aspect of the filibuster permits its widespread threat to constitute an effective supermajority requirement for all Senate action except budget matters. This is significant when, as in the current Senate, neither party holds a sixty seat majority, for it enables the minority party to exert substantial control over the legislation that reaches the floor.

The fact that senators seem to believe that filibusters have recently become so ubiquitous as to pose an effective supermajority requirement does not mean, as is often asserted, that actual filibusters are *in fact* more prevalent now than in the past.<sup>193</sup> The data from the nineteenth century is incomplete,<sup>194</sup> and while there is much better data for the last fifty years, it too has flaws.<sup>195</sup> The problem is essentially that a filibuster is a matter of intent, and the intent is often unspoken. This is not to say that filibusters are not significant, or that they are not more common now than they have been in the past, but only that we do not really know whether these common perceptions are grounded in fact. The perceptions themselves are significant, however, because those perceptions shape the strategies of Senate leaders in deciding whether to take legislation to the floor.

Thus, although it is not clear whether filibusters are more common or more likely to be successful now than in the past, it is clear that the Senate perceives the filibuster to be such a significant feature of the Senate's practice that the leadership is unwilling to proceed on any legislation that does not enjoy strong support. The senators' workload is so great that they simply do not have time to wait out a filibuster. Because of the chronic shortage of floor time, there-

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191. See Heidi Glenn, *Budget Facelift Possible Next Year*, 1996 TAX NOTES 1716, 1717. Forty percent of the Senate's business is now being conducted as reconciliation bills (which cannot be filibustered), budget resolutions (which, as concurrent resolutions, do not have the force of law), and appropriation bills (which can be filibustered). See *id.*

192. See Pub. L. No. 93-944, § 313, 88 Stat. 297 (1974); see also 142 CONG. REC. S8070-01 (daily ed. July 18, 1996) (discussing the Byrd Rule); 141 CONG. REC. S16,691-01 (daily ed. Nov. 3, 1995) (same). The germaneness requirement can be waived by a vote of 60 senators. See Pub. L. No. 93-944, § 904, 88 Stat. 297 (1974).

193. See Beth, *supra* note 22, at 4.

194. See *id.* at 8.

195. The most common method of counting filibusters since the adoption of Rule XXII is to count cloture votes. This method is unreliable because there are filibusters where cloture is not sought and there is often more than one cloture vote per filibuster. See *id.* at 5-6.

fore, if the leadership perceives a serious threat of filibuster, it negotiates to change a bill that would not have been changed absent the threat.<sup>196</sup> These effects of filibusters cannot readily be measured.

Although the stealth filibuster effectively creates a supermajority requirement for much of the Senate's business, it should not be singled out as *the* sole antimajoritarian procedure of the Senate.<sup>197</sup> The stealth filibuster is neither the sole cause of logrolling nor the only aspect of Senate decisionmaking procedure that occurs in secret. Furthermore, it is unclear whether filibusters actually prevent the majority from enacting legislation, or how often they successfully force amendments that would otherwise be opposed by a majority.<sup>198</sup> Legislative outcomes are necessarily the result of the Senate's rules for structuring the decisionmaking process,<sup>199</sup> and such rules inevitably advantage one sort of minority over another.<sup>200</sup> In short, the power that the filibuster accords individual senators works not so much against majority rule as against other forms of minority power.

### B. *The Effect on Committee Power*

Committees and subcommittees have significant power in both the House and the Senate.<sup>201</sup> As Woodrow Wilson most famously put it, "Congress in committees is Congress at work."<sup>202</sup> Senate Committees influence the content

196. See, e.g., note 187 *supra*.

197. It is sometimes asserted in defense of filibusters that the Senate is not a majoritarian institution by design because representation is not proportional to population. For example, the Republican minority in the 103d Congress represented states with a total population of just over 37% of the nation's population; in the 104th Congress, the Republican majority represented states with just over 48% of the population. Therefore, a Senate majority could conceivably represent far less than a majority of the nation's population. The mere fact that a majority of the Senate does not necessarily represent a majority of the population, however, does not make the Senate antimajoritarian. Since majoritarianism can apply to representation on the basis of geography as well as population, the majority in the Senate is a majority of states rather than of people. Thus, it is no justification of filibustering to say that the Senate is antimajoritarian.

198. Opponents of filibusters obviously emphasize legislation that was permanently blocked or substantially delayed. Filibuster defenders, on the other hand, usually assert that filibusters seldom block legislation permanently, but instead only delay it. Thus, defenders assert, rather than preventing a determined majority from acting, filibusters merely force deliberation and sober second thoughts. As Senator Byrd concluded in his history of the filibuster:

Delay, deliberation, and debate—though time consuming—may avoid mistakes that would be regretted in the long run. The Senate is the only forum in the government where the perfection of laws may be unhurried and where controversial decisions may be hammered out on the anvil of lengthy debate. The liberties of a free people will always be safe where a forum exists in which open and unlimited debate is allowed.

2 BYRD, *supra* note 25, at 162.

199. For the seminal works on this point, see KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957); and MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* (1965). In recent hearings on procedural reform, Congress heard from political scientists concerning this literature. See *Hearings, supra* note 126, at 241 (citing Keith Krehbiel, *Spacial Models of Legislative Choice*, 8 LEGIS. STUD. Q. 259 (1988)).

200. A full consideration of the implications of this are beyond the scope of this paper. However, one example is the argument that the rules that restrict floor debate and amendments favor stable, organized majorities over transitory majorities. See GREEN & SHAPIRO, *supra* note 184, at 98-123.

201. We refer to committees and subcommittees collectively as committees.

202. WILSON, *supra* note 116, at 79.

of proposed legislation and determine what legislation reaches the floor for a vote.<sup>203</sup> Indeed, over the years committees and even individual committee chairs have been able to block or channel action favored by majorities of each body.<sup>204</sup> Although determined majorities in both the House and the Senate can extract legislation from reluctant committees, in both chambers it is difficult to do and seldom accomplished.<sup>205</sup> Furthermore, committee members also dominate conference committees, which reshape legislation and resolve differences between the House and Senate after a vote has been taken in each chamber. Committee members' influence in this ex post adjustment process reinforces committee power during all stages of the process.<sup>206</sup> Given the extraordinary power of committees and committee chairs, a rule of procedure that reduces the power of committees may counteract the antimajoritarian tendency of the committee system. The filibuster is such a rule.

Although committees held dominant power in the Senate during the post-World War II period, political scientists generally agree that committee leaders retain less control today<sup>207</sup> and that floor activity by noncommittee members, such as the introduction of significant floor amendments, is more common.<sup>208</sup> The decline of committee control has resulted in a wider dispersion of power in the Senate; a senator need not be a senior member of a key committee, or even be on the committee, to influence legislation that the committee produces.<sup>209</sup> This decline of committee control may be a democratizing trend; the ability to

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203. See Norman J. Ornstein, Robert L. Peabody & David W. Rohde, *The Contemporary Senate: Into the 1980s*, in CONGRESS RECONSIDERED 26 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 3d ed. 1985) (noting that "[t]he committee system is the single most important feature affecting legislative outcomes in the Senate."). See generally STEVEN S. SMITH & CHRISTOPHER J. DEERING, COMMITTEES IN CONGRESS (1984) (explaining the workings of the committee system); Roger H. Davidson, *Subcommittee Government: New Channels for Policy Making*, in THE NEW CONGRESS 99 (Thomas E. Mann & Norman J. Ornstein eds., 1981) (discussing the power of subcommittees in policymaking). The public choice literature on committees is critiqued in GREEN & SHAPIRO, *supra* note 184, at 116-46.

204. Among the most famous examples of the power of a committee to block legislation favored by a majority of the Senate was the Judiciary Committee of the 1950s and early 1960s, which, under the chairmanship of James Eastland, was the graveyard of many civil rights bills. The Civil Rights Act of 1964 became law in part because the Senate sponsors of the bill introduced it directly on the floor without committee consideration in order to bypass Eastland's committee. See WHALEN & WHALEN, *supra* note 98, at 132-35.

205. See OLESZEK, *supra* note 20, at 133-38, 231-34.

206. See Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 94-100 (1987).

207. See generally, RICHARD E. FENNO, JR., CONGRESSMEN IN COMMITTEES (1973) (discussing the goals that motivate committee members); SMITH, *supra* note 20, at 86-130 (discussing the evolution of decisionmaking in the Senate); Richard Fleisher & Jon R. Bond, *Beyond Committee Control: Committee and Party Leader Influence on Floor Amendments in Congress*, 11 AM. POL. Q. 131 (1983) (explaining the relationship between committees and floor amendments); Randall B. Ripley, *Power in the Post-World War II Senate*, 31 J. POL. 465 (1969), reprinted in STUDIES OF CONGRESS 297 (Glenn R. Parker, ed. 1985) (analyzing the dispersion of power in the Senate post-1945); Shepsle & Weingast, *supra* note 206, at 85 (examining how institutional structure of Congress implicates the power of committees); Barbara Sinclair, *Senate Styles and Senate Decision Making, 1955-1980*, 48 J. POL. 877 (1986) (exploring how legislative styles affect policymaking). For a discussion of the evolution of decisionmaking in the Senate, see SMITH, *supra* note 20, at 86-130.

208. See, e.g., Fleisher & Bond, *supra* note 207, at 154; Sinclair, *supra* note 207, at 882-84.

209. See Ornstein, et al., *supra* note 203, at 29; Ripley, *supra* note 207, at 316.

exercise power does not depend on one's formal position and a majority favoring legislation cannot be thwarted by a handful of influential committee chairs.

Filibusters may counteract some committee dominance; they offer a means to reduce the control that committees have on the Senate's agenda and output.<sup>210</sup> Senators often use filibusters either to block legislation favored by a committee or to force changes rejected by a committee.<sup>211</sup> Anecdotal evidence of this phenomenon may be found in Senator Alan Simpson's 1993 defense of Republican filibusters. He attributed these filibusters to Democrats having denied the Republicans a fair hearing in the committee process. If Democrats "stiff the minority in committee," he said, "you know what [the minority is] going to do. . . . They are going to come here to the floor of the U.S. Senate, where they have an opportunity to put in their amendment."<sup>212</sup> Simpson's comment illustrates that the anarchic individualism of filibusters can be moderated only when other changes in the legislative process incorporate dissenting voices in some acceptable way.

The extent of the power-spreading effect of filibusters is difficult to judge, even speculatively. If the filibustering senator wishes to see a different form of legislation on the subject enacted, committee members, as members of the conference committee, may retain substantial power because of their role in reconciling the Senate and House bills.<sup>213</sup> If the senator simply wants no legislation enacted, however, a filibuster may be extremely effective in derailing a committee proposal. Thus filibusters, depending on the circumstances, counteract the antimajoritarian aspects of the committee system.

Whether the rise of the filibuster is a cause or an effect of this dispersion of power remains debatable. A series of influential studies of the Senate of the 1950s suggests that filibustering is a consequence of a dispersion of power in the Senate, the cause of which was a change in Senate norms brought about in part by the increased national prominence of senators.<sup>214</sup> Among the traditional norms of Senate behavior were the norms of "apprenticeship" (the idea that junior senators should not be influential), "specialization" (the idea that senators should become experts in a few subjects and defer to the judgments of others in areas outside their expertise), and "reciprocity" (the idea that senators should not push their individual powers too far). The consensus view among

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210. There are however, some aspects of committee power that filibusters do not alter. Two examples come to mind. First, committees exercise significant oversight power over Executive branch agencies and filibusters cannot directly control this power. Second, committees operate as gatekeepers controlling what laws reach the floor for a vote; the power to block legislation tends to preserve the status quo. See, e.g., Arthur Denzau & Robert Mackay, *Gatekeeping and Monopoly Power of Committees: An Analysis of Sincere and Sophisticated Behavior*, 27 AM. POL. SCI. REV. 740, 745-48 (1983). Filibusters generally only reinforce the committee ability to protect the status quo.

211. Cf. David E. Price, *Congressional Committees in the Policy Process*, in CONGRESS RECONSIDERED, *supra* note 203, at 161, 169 (noting that committees are "a corrective to congressional individualism").

212. 139 CONG. REC. S14,644 (daily ed. Oct. 28, 1993).

213. On the power of committee members in the conference committee process, see Shepsle & Weingast, *supra* note 206, at 94-100.

214. See, e.g., DONALD R. MATTHEWS, U.S. SENATORS AND THEIR WORLD (1960); WHITE, *supra* note 25.

scholars in the field of legislative studies is that these norms generally describe the behavior of most senators most of the time, but that the norms of apprenticeship and reciprocity seem to have decayed in the last twenty years.<sup>215</sup> To the extent that these norms once controlled Senate behavior, their decay would explain the rise in filibustering and the corresponding reduction of the power of senior committee chairs.

The availability of the filibuster played a role in the transformation of norms. The filibuster is not itself an incentive to greater individual activism; the incentives arise from changes in the Washington political community, a change in the nature of senatorial elections that makes financial support, including out-of-state contributions, increasingly more significant, and an increase in the opportunities for junior senators to attain national prominence. But the filibuster is a means to these ends, and without the filibuster, it would be more difficult for an individual senator not on a relevant committee to be a key player in shaping legislation.

Having said all this, we can only conclude that the relationship between committees, the filibuster, and majoritarianism is complex.<sup>216</sup> Although the change of Senate norms has resulted in greater floor activism by senators, this does not mean that a majority necessarily controls. The scarcity of time and the costs of obtaining information prevent senators from becoming fully involved in every bill, particularly given the complexity of much of the legislation before the Senate today.<sup>217</sup> Thus, even today, the Senate makes crucial decisions without a large portion of the membership participating.<sup>218</sup> Although political scientists disagree about the continuing significance of committees, one study has shown that participation is still concentrated in the leadership of the committee and in the subcommittee with jurisdiction.<sup>219</sup> Because the Senate continues to value committee expertise, theorists predict that it will continue to defer

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215. See, e.g., David W. Rohde, Norman J. Ornstein & Robert L. Peabody, *Political Change and Legislative Norms in the U.S. Senate, 1957-1974*, in *STUDIES OF CONGRESS* 147-88 (Glenn R. Parker ed., 1985). For the change in Senate norms brought about by liberal senators in the 1960s and early 1970s, see MICHAEL FOLEY, *THE NEW SENATE: LIBERAL INFLUENCE ON A CONSERVATIVE INSTITUTION, 1959-1972*, at 118-69 (1980).

216. See e.g., Lawrence C. Dodd, *Congress, the Constitution, and the Crisis of Legitimation*, in *CONGRESS RECONSIDERED*, *supra* note 203, at 390.

217. The increased quantity and complexity of Congress' work is both a cause and a consequence of the enormous growth in congressional staff, which has had significant effects on the legislative process. See Michael H. Malbin, *Delegation, Deliberation, and the New Role of Congressional Staff*, in *THE NEW CONGRESS*, *supra* note 203, at 134.

218. See C. Lawrence Evans, *Participation and Policy Making in Senate Committees*, 106 *POL. SCI. Q.* 479, 488 (1991). But see Sinclair, *supra* note 207, at 898 ("The typical senator offers large numbers of floor amendments and is little concerned with whether the bill at issue originated in a committee on which he serves. The intercommittee reciprocity . . . is clearly dead. Specialization also seems to have lost its hold. . . . [S]enators participate on a broad array of issues."). The difference of opinion between these two authors seems to be one of degree: Sinclair found much greater activism by noncommittee members in the 1980s than in the 1950s, but Evans noted that current activity is still dominated by subcommittee members.

219. See Evans, *supra* note 218, at 488.



to committee recommendations even when it could grapple with an issue itself.<sup>220</sup>

In sum, the filibuster is but one of a number of mechanisms for minority vetoes in Congress.<sup>221</sup> These forms of the minority veto have three policy repercussions: (1) a bias in favor of the status quo; (2) a possible increase in vague or ill-considered legislation enacted at the last minute (because minority vetoes delayed the measure for most of the session); and (3) an increased use of omnibus bills that are more difficult for minorities to block or change.<sup>222</sup> Of course, filibusters are not solely to blame for legislation being enacted hurriedly at the end of a session. Moreover, to the extent that filibusters force intense negotiation between the majority and the minority, filibusters may actually prompt more careful consideration of statutory language than a bill might otherwise receive. And the threat of a filibuster is not the only incentive for drafting legislation as an omnibus bill; legislative deals are easier to arrange if all the components can be enacted in one bill because it reduces the risk of defection in Congress and veto by the President.<sup>223</sup> Nevertheless, minority vetoes, including filibusters, tend to perpetuate the status quo even when the majority would prefer a change, and contribute to legislative outcomes that may not reflect the preferences of the majority. In addition, to the extent that minority vetoes cause an increase in omnibus bills that combine a large number of disparate policy decisions, they may contribute to incoherence in legislative outcomes.<sup>224</sup>

### C. *Other Effects of the Stealth Filibuster*

Two other possible effects of the filibuster merit further study, although there is, as yet, insufficient empirical data to conclusively attribute these effects to it. One effect of the filibuster, at least in the 103d and 104th Congresses, has been the enhancement of the importance of moderates of both parties. Generally, senators at the ideological extremes are more likely to filibuster and to refuse a compromise to end a filibuster. For example, when Democrats were in control in the 103d Congress, conservative Republicans were most likely to filibuster. The sixty-vote requirement for cloture had an important effect on the power of the moderate members of the Republican party. Because the Republicans had forty-four members in the 103d Congress, conservatives could not

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220. See Daniel Diermeier, *Commitment, Deference, and Legislative Institutions*, 89 AM. POL. SCI. REV. 344, 351 (1995).

221. In addition to filibustering, a minority can block a bill in the committee or subcommittee of either the House or the Senate, or block it by the Senate Majority Leader's failure to schedule the bill for floor action, or on the floor. See Roberta Herzberg, *Blocking Coalitions and Policy Change*, in CONGRESS AND POLICY CHANGE 201, 206-13 (Gerald C. Wright, Jr., Leroy N. Rieselbach & Lawrence C. Dodd eds., 1986).

222. See *id.* at 217-20.

223. On legislative structures that facilitate enforcement of bargains regarding votes, see Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 140 (1988).

224. See Herzberg, *supra* note 221, at 219-20. On the power of minority factions in American politics, see Nelson W. Polsby, *Coalition and Faction in American Politics: An Institutional View*, in PARTY COALITIONS IN THE 1980s 153-178 (Seymour Martin Lipset ed., 1981).

afford to lose more than three Republican cloture votes unless they could pick up the support of Democratic moderates. "There's no question that the filibuster and the need to get sixty votes to end it puts enormous power in the hands of six to ten moderates in both parties," said Senator J. James Exon, a moderate Democrat.<sup>225</sup> In the 103d Congress, Republican moderates voted with Democrats to end Republican filibusters only on the condition that the filibustered bills were modified in certain ways.<sup>226</sup> The same phenomenon occurred in the 104th Congress—the Republican majority could enact legislation over threatened Democratic filibusters only if they could pick up some Democratic votes, causing the deletion of some of the most conservative provisions.<sup>227</sup> Thus, the filibuster has made the Senate a significant impediment to unfettered action by both liberal and conservative majorities.

Of course, this phenomenon is not unique to filibustering. When a legislative body governed by majority rule is factionalized, without any party commanding enough votes to prevail on an issue, one faction must gain votes from another to pass a bill. The swing votes do not necessarily have to be the moderates though; in some parliaments a relatively extreme faction might hold the balance of power. In the recent Senate, however, the swing votes tended to come from a group of political moderates of both parties. We do not claim that the enhancement of the power of moderates that senators have attributed to the sixty-vote rule is an inherent characteristic; we only claim that the rule had that effect in recent Congresses because an identifiable group of political moderates held the balance of power on many issues.<sup>228</sup>

Moreover, in addition to increasing the power of moderates, the filibuster seems to place key decisionmaking authority in the hands of the Senate majority and minority party leadership. When the stealth filibuster replaced the traditional speaking filibuster, the party leadership acquired a more important role in the use and control of filibustering than the leadership had during the era of speaking filibusters. When filibustering consisted of one senator or a group of senators holding the floor through prolonged debate, the intervention of party leadership was not necessary to initiate or prolong the filibuster. Now, a filibuster simply consists of conveying a message to the leadership of some senators' *intent* to block legislation should it arrive on the floor. Thus, a filibuster exists only if the leadership recognizes it.

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225. Helen Dewar, *Senate's Republican Moderates: Filibuster Busters*, WASH. POST, July 29, 1993, at A7.

226. *See id.* According to one former staffer interviewed by the authors, five or six moderate Republican senators shaped significant aspects of the health care, campaign finance reform, and MotorVoter legislation on the Senate floor because their votes were crucial for cloture. *See* Telephone interview with Elizabeth Garrett (October 1996).

227. *See* Helen Dewar, *Regulatory Bill Illustrates GOP Drive, Difficulties*, WASH. POST, July 15, 1995, at A7.

228. The Presidential veto and the need for a two-thirds vote to override it may have a similar effect on the power of moderates. *See generally* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528-32 (1992) (discussing the importance of views of the median legislator and pivotal voter in veto override votes). The Eskridge-Ferejohn model might be modified to take account of the pivotal voter in a cloture vote situation.

Because the Senate leadership is determined by party, filibusters are now heavily associated with the minority party rather than with individual senators or ideological and geographic factions. For instance, most people today could not identify a master filibusterer in the current Senate the way that the public in the past could identify LaFollette, Long, or the Dixiecrats of the 1950s and 1960s. These two effects of the filibuster—enhancing the power of moderates and of the party leadership—are very significant for the Senate's daily operations. But they are difficult to connect to policy outcomes either generally or in particular cases. Moreover, as a normative matter, we cannot say whether these developments are positive or negative in the abstract, whether they will make the Senate more or less efficient, fair, democratic. We say only that these are among the many significant effects of the stealth filibuster.

#### D. *Constraints on Filibustering*

Given the incentives for filibustering and the changes in Senate norms that allow more unrestrained filibustering, one might wonder why the Senate does not grind to a complete halt. We see two reasons. First, the special procedural rules for budget reconciliation legislation allow the Senate to act on budget matters with reduced opportunities for minority obstruction. Second, there are significant incentives for senators to refrain from using all the power that the filibuster theoretically gives. The empirical literature descending from the quasi-sociological studies of congressional behavior of the 1950s provides one explanation of why senators do not use the power of the filibuster to its full potential. This literature uniformly notes an increase in floor activity, but detects continuing limits on obstructive behavior.<sup>229</sup> In this view, the rise in floor activity is attributable to a decline in traditional Senate norms of apprenticeship and deference to committees.<sup>230</sup> At the same time, however, the surviving norms of courtesy and reciprocity continue to constrain filibustering. Although these norms may have suffered on account of the angry, partisan rhetoric in the 104th Congress, senators nevertheless have reason not to ignore each other's interests and expertise.<sup>231</sup>

The public choice literature that models incentives for opportunistic behavior also sheds light on the constraints on filibustering. This theoretical literature on "structure-induced equilibrium" predicts that the legislative process should be chaotic; majorities favoring legislation produced in committee should disintegrate when the bill reaches the floor because members of the coalition supporting the bill would have a strong incentive to engage in opportunistic behavior.<sup>232</sup> Despite this expectation, empirical studies of Congress continue

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229. SINCLAIR, *supra* note 122, at 132-39; SMITH, *supra* note 20, at 88-93; Sinclair, *supra* note 207, at 898.

230. Rohde et al., *supra* note 215, at 151-67; Sinclair, *supra* note 207, at 898.

231. Evans, *supra* note 218, at 488; Shepsle & Weingast, *supra* note 206, at 86-90; Barry R. Weingast, *Floor Behavior in the U.S. Congress: Committee Power Under the Open Rule*, 83 AM. POL. SCI. REV. 795, 795-96, 798-800 (1989).

232. See Weingast, *supra* note 231, at 795-96, 798-800.

to show that committee bills tend to survive on the floor.<sup>233</sup> Explaining this divergence between theory and reality, recent public choice models of legislative behavior focus on the sanctions imposed on obstructive behavior and on the institutional power that leadership enjoys.<sup>234</sup> In addition, the literature theorizes the incentives for legislatures to defer to committee expertise, which committees have an incentive to develop because of the expectation of deference.<sup>235</sup> Based on these factors, we believe that individual senators may not push their filibustering prerogatives to their limits because the structure and culture of the Senate impose constraints on the use of the filibuster.

In sum, the filibuster may tend to reduce committee control and to disperse power broadly within the Senate. In this sense, it counteracts the antimajoritarian aspects of the committee system. At the same time, however, the filibuster gives power to the minority and adds to the antimajoritarian aspects of the institution. Further, the filibuster also seems to enhance the power of the leadership and moderates of both parties. Yet, sanctions on filibustering may moderate its uses. These various and somewhat contradictory tendencies should counsel caution in making any sweeping generalizations, but it is safe to say that the filibuster's effect on the Senate is not, on balance, clearly antimajoritarian.

#### IV. IS THE FILIBUSTER CONSTITUTIONAL?

Article I of the Constitution defines Congress' procedures and powers, but does not mention the possibility of a filibuster. But as explained in Part II, there are strong textual arguments that the filibuster is unconstitutional. The Constitution's procedures for adopting laws assume that a majority vote in each house would be sufficient to enact a law, and the Constitution expressly outlines those situations where supermajority votes are required.<sup>236</sup> Additionally, it can be argued that the filibuster is inconsistent with the general constitutional commitment to majoritarianism.<sup>237</sup>

However, the constitutionality of the filibuster is more complicated than simply evaluating the strength of these arguments. First, there are serious doubts as to whether a court could reach the merits of a constitutional challenge. The government would be sure to move to dismiss any challenge to the constitutionality of the filibuster on justiciability grounds,<sup>238</sup> by arguing that

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233. *See id.* at 795, 797-98.

234. *See id.* at 796. Keith Krehbiel, in *Unanimous Consent Agreements: Going Along to Get Along*, 48 J. POL. 541 (1986), explains why senators agree to unanimous consent agreements despite strong temptations to object.

235. *See* Diermeier, *supra* note 220, at 351. The theoretical public choice literature is, however, quite weak in acknowledging the role of socialpsychology in social role and group affiliation. *See, e.g.*, GREEN & SHAPIRO, *supra* note 184, at 141-42.

236. *See* text accompanying notes 340-361 *supra*.

237. *See* text accompanying notes 362-372 *supra*.

238. Indeed, this is exactly what the government did in the one known case where there was a constitutional challenge to the filibuster. *Page v. Dole*, No. 93-1546 (D.D.C. Aug. 18, 1994), *vacated as moot*, No. 94-5292, 1996 WL 310132 (D.C. Cir. May 13, 1996) (*per curiam*). The district court dismissed the challenge for a lack of standing, but the D.C. Circuit dismissed the case as moot. Similarly, a

the challenge poses a nonreviewable political question and that the plaintiff lacks standing because any injury from a filibuster is highly speculative. Also, senators named as defendants in any challenge to the filibuster would argue that they have absolute immunity to suit under the Speech and Debate Clause of Article I of the Constitution.

Moreover, even if these problems could be overcome, and a court did ultimately reach the issue of the constitutionality of the filibuster, two distinct constitutional questions would arise. The first is whether the filibuster is inherently unconstitutional by effectively requiring a vote of sixty senators to enact any law. Is Senate Rule XXII unconstitutional in requiring that there be a three-fifths vote of the Senate to close debate on a pending matter?

The second constitutional issue is more subtle: Is it unconstitutional for the Senate to follow a procedure whereby a two-thirds vote is required to change Senate Rule XXII? If this requirement is unconstitutional, then a majority vote would be sufficient to change Rule XXII and the Senate could modify or even eliminate the filibuster.

#### A. *Could a Court Decide the Constitutionality of the Filibuster?*

The repeated failure of efforts to adopt majority cloture or to permit a majority to change Rule XXII suggests that it is unlikely that the Senate will decide on its own that the filibuster is unconstitutional.<sup>239</sup> Therefore, judicial action will be needed for the filibuster to be ruled unconstitutional. The government, however, would likely move to dismiss any lawsuit challenging the constitutionality of the filibuster on three independent grounds: that the constitutionality of the filibuster is a nonjusticiable political question; that the plaintiffs lack standing to bring the suit; and that the Speech and Debate Clause immunizes senators from being sued as to their votes.

##### 1. *The political question doctrine.*

The political question doctrine refers to allegations of constitutional violations that the federal courts will not adjudicate or decide, even though all of the jurisdictional and other justiciability requirements are met.<sup>240</sup> The Supreme Court has held that constitutional interpretation in some areas are "political questions" and should be left to the politically accountable branches of government: the President and Congress.<sup>241</sup>

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constitutional challenge to the House rule requiring a supermajority vote for tax increases was dismissed for lack of justiciability. See *Skaggs v. Carle*, 898 F. Supp. 1 (D.D.C. 1995).

239. See text accompanying notes 171-181 *supra*.

240. For a detailed discussion of the political question doctrine, see ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 142-66 (2d ed. 1994).

241. There is an on-going debate among scholars as to whether there should be a political question doctrine. Compare Martin Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031 (1985) (arguing against the political question doctrine) with ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 183-98 (1962) (arguing in favor of the political question doctrine).

For example, the Supreme Court has consistently held that cases brought under Article IV, Section 4, which states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government," are nonjusticiable political questions.<sup>242</sup> It is therefore up to Congress to decide what a "Republican Form of Government" is and whether a state has one.<sup>243</sup> Likewise, the Court frequently has found that challenges to the President's conduct of foreign policy pose a nonjusticiable political question.<sup>244</sup>

The classic, oft-quoted, statement of the political question doctrine was provided in *Baker v. Carr*,<sup>245</sup> where the Court stated:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>246</sup>

Based on these criteria, there are two primary arguments that a challenge to the constitutionality of the filibuster poses a political question. One is that such a challenge to congressional self-governance would express a lack of respect due to a coordinate branch of government. The other is that there is a textually demonstrable constitutional commitment to Congress to make its own rules.

As to the former, on several occasions the Court has considered whether the political question doctrine prevents federal court review of congressional decisions concerning its legislative processes. A review of the cases indicates that a constitutional challenge to the filibuster should not be declared a nonjusticiable political question on this basis. Because of the need for an external check to ensure compliance with the Constitution, the Court rightly has been willing to hear claims that Congressional procedures are unconstitutional.

In all but one case the Court has held challenges to Congressional procedures justiciable. The exception was *Field v. Clark*, in which the Court dismissed a claim that a section of a bill passed by Congress was omitted from the final version of the law authenticated by the Speaker of the House and the Vice President and signed by the President.<sup>247</sup> The Court emphasized that judicial review was unnecessary because Congress could protect its own interests by adopting additional legislation. It is precisely the inability of members of Con-

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242. See, e.g., *Pacific States Tel. Co. v. Oregon*, 223 U.S. 118, 133 (1912); *Taylor & Marshall v. Beckham*, 178 U.S. 548, 578-79 (1900); *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849).

243. See *Luther*, 48 U.S. at 42.

244. See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (plurality opinion); *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918).

245. 369 U.S. 186 (1962).

246. *Id.* at 217.

247. See 143 U.S. 649 (1892).

gress to protect their own interests that distinguishes the filibuster from *Field v. Clark*. A majority of the Senate cannot adopt additional legislation to remedy the filibuster's harms because of the sixty votes needed for cloture and the two-thirds margin required to change the Senate's rules.

Indeed, in several more recent cases the Supreme Court rejected motions to dismiss challenges to Congressional self-governance on political question grounds. These decisions indicate that the Court will decide constitutional objections to congressional procedures when there is reason to believe that internal congressional mechanisms are inadequate to deal with the problem. Perhaps the most important case rejecting the application of the political question doctrine to judicial review of internal congressional decisions is *Powell v. McCormack*.<sup>248</sup> In 1967, the House of Representatives refused to seat Representative Adam Clayton Powell, even though he had been elected by his constituents. A House subcommittee found that Powell deceived Congress by presenting false travel vouchers for reimbursements and made illegal payments to his wife with government funds. Powell and thirteen of his constituents sued, arguing that the refusal to seat him was unconstitutional because Powell had been properly elected and met all of the requirements stated in the Constitution for service as a representative. Although he was not seated at all during that term of Congress, he was reelected in 1968 and eventually seated in 1969.<sup>249</sup>

The defendants argued that the case posed a political question, citing Article I, Section 5, which provides that each house of Congress shall "be the Judge of the Qualifications of its own Members."<sup>250</sup> But the Court held that the House of Representatives had discretion only to determine if a member met the qualifications stated in Article I, Section 2—that is, the requirements of age, citizenship, and residence.<sup>251</sup> Because Powell's exclusion was not based on these requirements, but on other factors, the Court held that it had authority to review the case.<sup>252</sup> The Court saw its decision as necessary to protect the integrity of the democratic process, by ensuring that people are allowed to select their legislators.<sup>253</sup>

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248. 395 U.S. 486 (1969).

249. The Supreme Court held that Powell's suit was not moot because his claim for back pay for the time in which he was not seated remained a live controversy. *See id.* at 498-500.

250. U.S. CONST. art. I, § 5, cl. 1. The Constitution specifically provides that each house of Congress may, by a vote of two-thirds of its members, expel a member. *See* U.S. CONST. art. I, § 5, cl. 2. However, the Court noted that the issue in *Powell v. McCormack* was not expulsion; rather it was exclusion. *See* 395 U.S. at 507 n.27.

251. *See id.* at 548 (concluding "that Art. 1, § 5, is at most a " 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution.") (citations omitted).

The Court recently relied on *Powell* to declare unconstitutional a state law that limited access to the ballot for candidates for the United States House of Representatives and the United States Senate after they had served a specified number of terms. *See United States Term Limits v. Thornton*, 115 S. Ct. 1842 (1995). The Court again emphasized that Article I set the only permissible qualifications for a member of Congress. *See id.* at 1852.

252. *See Powell*, 395 U.S. at 547-48.

253. *See id.*

The defendants urged the Court to dismiss the case rather than risk conflict with another branch of government.<sup>254</sup> The Court rejected the argument that such considerations should influence its ruling: "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility."<sup>255</sup>

More recently, in *United States v. Munoz-Flores*, the Court refused to apply the political question doctrine to bar a challenge to a federal assessment.<sup>256</sup> The issue in *Munoz-Flores* was whether the statute requiring the assessment violated the Origination Clause of the Constitution,<sup>257</sup> which provides that "[a]ll bills for raising [r]evenue shall originate in the House of Representatives."<sup>258</sup> The federal statute required courts to collect a monetary assessment on any person convicted of a federal misdemeanor. A lower court held that the assessment was unconstitutional because the bill for the assessments arose in the Senate and not the House.<sup>259</sup> The government argued that the House's passage of the assessment bill implied it did not believe the bill violated its constitutional prerogatives; any finding by the Court that the law was unconstitutional would imply disrespect for the House's determination.<sup>260</sup> Justice Thurgood Marshall, writing for the Court, rejected this argument: "[D]isrespect [for congressional determinations of a bill's constitutionality] . . . cannot be sufficient to create a political question. If it were, every judicial resolution of a constitutional challenge to a congressional enactment would be impermissible. . . . On the contrary, this Court has the duty to review the constitutionality of congressional enactments."<sup>261</sup>

Most recently, in *U.S. Department of Commerce v. Montana*, the Court rejected the government's argument that Congress' selection of an apportionment method presented a political question not subject to judicial review.<sup>262</sup> The Court noted that "[r]espect for a coordinate branch of Government raises special concerns not present in our prior cases, but those concerns relate to the merits of the controversy rather than to our power to resolve it."<sup>263</sup>

These cases strongly suggest that the Supreme Court will not likely deem a challenge to the constitutionality of the filibuster a political question based on a judicial need to defer to congressional self-governance. The Supreme Court repeatedly has refused to dismiss allegations of constitutional violations simply because they involve judicial review of congressional procedures. Nor should the Court dismiss such claims; the Constitution requires the judiciary to be a

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254. *See id.* at 548.

255. *Id.* at 549 (citations omitted).

256. 495 U.S. 385, 396 (1990).

257. *See id.* at 387.

258. U.S. CONST. art. I, § 7, cl. 1.

259. *See Munoz-Flores*, 495 U.S. at 388.

260. *See id.* at 390.

261. *Id.* at 390-91.

262. 503 U.S. 442, 456-59 (1992).

263. *Id.* at 459.



check on the unconstitutional impulses of Congress. In fact, if Congress adopts a clearly unconstitutional procedure for enacting laws, the judiciary must act to ensure the limits in the Constitution are observed.

A second argument why the political question doctrine should preclude a challenge to the filibuster is based on the second element of the *Baker v. Carr* formulation: there is a “textual . . . commitment” to the Senate to decide its own rules.<sup>264</sup> Article I, Section 5 provides that the Senate has the power “to determine the rules of its [p]roceedings.”<sup>265</sup> Thus any constitutional challenge to the filibuster is arguably a political question because it involves the Senate’s express constitutional power to make its own rules.

The Supreme Court’s decision in *Nixon v. United States*<sup>266</sup> provides some authority for this position. At issue in *Nixon* was the constitutionality of the Senate’s procedure for trying persons who have been impeached.<sup>267</sup> Walter Nixon, a federal judge, had been impeached by the House of Representatives for making false statements to a grand jury. However, he refused to resign from the bench and continued to collect his judicial salary even while in prison. After the House impeached Nixon, the Senate, in accord with its rules, created a committee to hear the evidence against Nixon and to make a recommendation to the full Senate. The committee followed this procedure and recommended Nixon’s removal from office. The entire Senate followed this recommendation by voting for Nixon’s removal.<sup>268</sup>

Nixon contended that the Senate’s rule and procedures violated Article I, Section 3 of the Constitution, which provides that the “Senate shall have the sole power to try all [i]mpeachments.”<sup>269</sup> Nixon argued that this meant that the entire Senate had to try him and that the use of a committee to hear testimony and make a recommendation was unconstitutional.

Writing for the Court, Chief Justice Rehnquist, found that Nixon’s suit posed a nonjusticiable political question.<sup>270</sup> The Court pointed to the language and structure of Article I, Section 3 as strong evidence of a textual commitment to leaving removal procedures in the hands of the Senate.<sup>271</sup> The Court distinguished *Powell* by noting that granting the Senate unreviewable impeachment power would not infringe other constitutional provisions.<sup>272</sup>

In light of *Nixon*, the argument against judicial review of the filibuster is that Article I, Section 5 allows the Senate to make all rules concerning debate and cloture. The Constitution says nothing about a limit on debates in either the House or the Senate, and this always has been a matter dealt with by the rules of each chamber. Thus, the textual commitment of rulemaking to each house makes any challenge to the rules a nonjusticiable political question.

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264. 369 U.S. 186, 217 (1962).

265. U.S. CONST. art. I, § 5, cl. 2.

266. 506 U.S. 224 (1993).

267. *See id.* at 226.

268. *See id.* at 228.

269. U.S. CONST. art. I, § 3, cl. 6.

270. *See Nixon*, 506 U.S. at 238.

271. *See id.* at 229-33.

272. *See id.* at 237.

However, *Nixon* is distinguishable from a challenge to the filibuster in at least two ways. First, as noted in *Nixon*, other constitutional provisions limit the ability of each house to make procedural rules.<sup>273</sup> Thus, as the Court noted in *United States v. Ballin*, a house of Congress "may not by its rules ignore constitutional restraints or fundamental rights."<sup>274</sup> For example, it would be unconstitutional and justiciable if the Senate were to adopt a rule that prevented African-Americans from speaking on the floor of the Senate. Likewise, it would be unconstitutional for Congress to pass a law with a provision preventing it from being changed except by a 90 percent vote in the future.<sup>275</sup> The Court would likely regard a challenge to such a law justiciable because the entrenchment of the law violates basic constitutional principles limiting the ability of one Congress to bind another.<sup>276</sup>

In other words, each chamber of Congress has complete discretion to make its own rules as long as the rules do not violate the Constitution. The Court should be as willing to adjudicate constitutional objections to the filibuster as it would be to adjudicate a challenge to any other Senate rule with potential constitutional infirmities.

Second, *Nixon* is distinguishable from a constitutional challenge to the filibuster because the *Nixon* Court declined to intervene for reasons specific to the impeachment process. The Court explained that the Framers likely intended that there would be two proceedings against officeholders charged with wrongdoing: a judicial trial and legislative impeachment proceedings.<sup>277</sup> The Court concluded that the Framers created two forums to eliminate the risk of bias that judicial review of the Senate's procedures might introduce.<sup>278</sup> The Framers saw impeachment as the only legislative check on the judiciary; judicial involvement in reviewing the impeachment process would therefore undercut this goal.<sup>279</sup> In contrast, judicial review of the filibuster does not raise the concern that the judiciary will act in an institutionally self-interested manner.

On the contrary, it is the political process itself that makes judicial review essential. As discussed above, it is unlikely that the political process will ever address the constitutional issue. Previous attempts in the Senate to declare Rule XXII unconstitutional have been unsuccessful,<sup>280</sup> and it would be difficult for either party ever to achieve the two-thirds margin required to change Rule XXII. The political party that is in the minority in the Senate always has a strong incentive to continue the filibuster rule. The filibuster allows the minority to block legislation favored by the majority and tremendously increase the minority's power and bargaining strength. Therefore, even if one political party has two-thirds of the seats in the Senate, the filibuster rule is extremely unlikely to be changed: a party with such control of the Senate would have a

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273. *See id.*

274. 144 U.S. 1, 5 (1892).

275. *See* text accompanying notes 373-415 *infra*.

276. *See id.*

277. *See Nixon*, 506 U.S. at 234.

278. *See id.*

279. *See id.* at 235.

280. *See* text accompanying notes 139-181 *supra*.

filibuster-proof majority, and it would probably continue the rule to protect itself against the day when it might again become the minority party.

The need for judicial review of the filibuster is thus similar to why the Court ultimately concluded that challenges to malapportioned state legislatures were justiciable.<sup>281</sup> The political process was not going to remedy malapportionment because those who controlled the process benefitted from it.<sup>282</sup> Judicial review was therefore essential to uphold the Constitution and promote democratic rule.<sup>283</sup> The filibuster, like malapportionment, is unlikely to be corrected by the political process, and its elimination would further majoritarian decisionmaking.

In sum, the political question doctrine should not preclude the courts from reviewing the constitutionality of the filibuster and of Senate Rule XXII. To the contrary, as expressed in *Marbury v. Madison*,<sup>284</sup> the central purpose of judicial review is to ensure that the political branches of government observe the limits contained in the Constitution.<sup>285</sup> Chief Justice John Marshall wrote: "If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? . . . It is emphatically the province and duty of the judicial department to say what the law is."<sup>286</sup> Allowing the Senate to make an unconstitutional rule and precluding all judicial review as a political question would make the limits of the Constitution meaningless.

## 2. Standing.

Standing is the second major obstacle to judicial review of the constitutionality of the filibuster. Who, if anyone, has standing to challenge the filibuster rule?

The Supreme Court has interpreted Article III of the Constitution as requiring that a plaintiff seeking to sue in federal court must meet three requirements:

It is by now well settled that "the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."<sup>287</sup>

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281. *Cf. Baker v. Carr*, 369 U.S. 186, 248 (1962) (Douglas, J., concurring); *id.* at 258-59 (Clark, J., concurring).

282. See Louis H. Pollak, *Judicial Power and the "Politics of the People,"* 72 *YALE L.J.* 81, 88 (1962).

283. In fact, Chief Justice Earl Warren said that the reapportionment cases were the most important decided by the Court during his tenure. See *The Warren Court: An Editorial Preface*, 67 *MICH. L. REV.* 219, 220 (1968).

284. 5 U.S. (1 Cranch) 137 (1803).

285. See *id.* at 176.

286. *Id.* at 177. This argument also was advanced by Alexander Hamilton. See *THE FEDERALIST* No. 8 (Alexander Hamilton).

287. *United States v. Hays*, 115 S. Ct. 2431, 2435 (1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) (omission in original).

In light of these requirements, a constitutional challenge to the filibuster would face a number of standing problems. First, it would be difficult to demonstrate that a person is injured by a rule that allows debate to continue in the Senate. Since the failure to cut off debate is arguably an injury only if it prevents a particular law from being enacted, it may be "conjectural" to assume that the law would be adopted but for the filibuster. Second, it is difficult to characterize the filibuster as the cause of the harm suffered by not adopting legislation. For example, the Southern filibuster of the Civil Rights Act of 1964 was not the cause of racial discrimination. The harm was already there; the filibuster, at most, prevented the enactment of a remedy.

The third criterion for standing, redressability, would also present a problem: It is inherently speculative whether declaring the filibuster unconstitutional would remedy the harm. Even without the filibuster, there is no assurance that the Senate would pass the measure. Indeed, even if the bill passed the Senate, it still could be defeated in the House, derailed in a conference committee, or vetoed by the President.

Moreover, even if a plaintiff could meet these requirements, the Court has said that plaintiffs lack standing if they present generalized grievances and assert injuries "shared in substantially equal measure by all or a large class of citizens."<sup>288</sup> Thus, a citizen challenge to the constitutionality of the filibuster would seemingly present a generalized grievance because the filibuster affects all or most other citizens in society. The Court has dismissed other challenges to Congress' failure to follow constitutionally required procedures for this very reason. In *United States v. Richardson*, the Court held that a plaintiff challenging the constitutionality of statutes providing for the secrecy of the Central Intelligence Agency's budget lacked standing because his case presented a generalized grievance.<sup>289</sup> The plaintiff alleged that the secret budgets violated the Constitution's requirement for a regular statement and account of all expenditures.<sup>290</sup> The Court found that the plaintiff was "seeking to employ a federal court as a forum in which to air his generalized grievances about the conduct of government."<sup>291</sup>

Similarly, in *Schlesinger v. Reservists Committee to Stop the War*, the Court dismissed a lawsuit challenging the constitutionality of the military reserve membership of various members of Congress.<sup>292</sup> In *Schlesinger*, the plaintiffs argued that Article I, Section 6 of the Constitution prevents a senator or representative from holding civil office and sought to enjoin members of Congress from serving in the military reserves.<sup>293</sup> The Court concluded that the plaintiff lacked standing because the alleged violation "would adversely affect only the

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288. *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see also Lujan*, 504 U.S. at 573-74 (holding that a plaintiff does not state an Article III case or controversy if the harm alleged affects all citizens generally).

289. 418 U.S. 166, 176-77, 180 (1974).

290. *See id.* at 167-68.

291. *Id.* at 175 (citations omitted).

292. 418 U.S. 208 (1974).

293. *See id.* at 210-11.

generalized interest of all citizens in constitutional governance.”<sup>294</sup> Such a generalized interest was too abstract to satisfy Article III’s standing requirements.<sup>295</sup>

In light of these cases, the government would likely argue that the filibuster injures all citizens in the same way and therefore any lawsuit challenging it must be dismissed on standing grounds. The government is sure to move to dismiss the case as an attempt to use the federal courts as a forum for generalized grievances.

In fact, the only known lawsuit challenging the constitutionality of the filibuster was dismissed on standing grounds.<sup>296</sup> In *Page v. Dole*, the plaintiff, a private citizen, alleged that the Senate’s failure to end debate on President Clinton’s economic stimulus package in April 1993 injured him and that similar filibusters in the future would harm him.<sup>297</sup> The plaintiff contended that the filibuster was unconstitutional because it diluted the power of the Democratic majority in the Senate.<sup>298</sup>

The U.S. District Court for the District of Columbia dismissed the case on standing grounds. While the cause was on appeal, the Republicans gained a majority in the Senate. In light of this change in majority party, the Court of Appeals vacated the district court’s order and remanded the case with instructions to dismiss the complaint as moot.<sup>299</sup> The court reasoned that the “Democratic majority . . . and [the plaintiff] as its supporter are not now allegedly being injured the rule.”<sup>300</sup>

Undoubtedly, standing will be an issue in any suit challenging the constitutionality of Rule XXII. But it is possible to envision some suits that could be distinguished from these cases involving either generalized grievances or speculative injuries. For example, an individual who could show a personal and unique injury from a particular filibuster might have standing to sue if there were clear evidence that a majority of the Senate would pass the measure but for the filibuster. Imagine the strongest case: The President nominates a woman to be Chief Justice of the Supreme Court and a group of senators filibuster, openly declaring that they believe that a woman never should hold the position. Imagine, too, that fifty-nine senators are on record supporting the nomination and have even voted for cloture.

Under these facts, the nominee would meet the standing requirement. First, the individual has suffered a personal injury—gender discrimination. Her lawsuit would not be presenting a generalized grievance because her injury is distinct from all others in the population. Second, the filibuster is the “but for”

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294. *Id.* at 217.

295. *See id.* at 227.

296. *Page v. Dole*, No. 94-5292, 1996 WL 310132, at \*1 (D.C. Cir. May 13, 1996) (per curiam), vacating No. 93-1546 (D.C.C. Aug. 18, 1994). The United States District Court dismissed on standing grounds and the United States Court of Appeals for the District of Columbia Circuit vacated on mootness grounds.

297. *Page v. Dole*, No. 93-1546 (D.C.C. Aug. 18, 1994), at 5-18.

298. *See id.*

299. *Page*, 1996 WL 310132, at \*1.

300. *Id.*

cause of her injury. Finally, her injury would be remedied if Rule XXII is declared unconstitutional.

In *Duke Power Co. v. Carolina Environmental Study Group*, the Court approved exactly this type of "but for" causation as sufficient for standing.<sup>301</sup> In *Duke Power*, the Supreme Court concluded that the plaintiffs had standing to challenge the Price-Anderson Act, which limited liability of utility companies in the case of a catastrophic accident.<sup>302</sup> The Court reasoned that "but for" the Price-Anderson Act, the nuclear reactor would not be built, and thus the reactor would not harm the plaintiffs through its radiation emissions and thermal pollution.<sup>303</sup> Similarly, the nominee for Chief Justice in the above hypothetical would be confirmed "but for" the filibuster. This should be sufficient for standing.

The hypothetical is important because it reveals that there is no inherent reason why all challengers to Rule XXII would lack standing. Instead, standing will need to be evaluated on a case-by-case basis.

This hypothetical plaintiff could argue that her inability to obtain consideration—a vote—on a measure favored by a majority of the senators injured her. An analogy can be drawn to the Court's definition of injury in equal protection cases. In *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida*, the Supreme Court held that white contractors had standing to challenge an affirmative action program even though they could not show that they would have received public works contracts in the absence of affirmative action.<sup>304</sup> The Court said that the injury was in the denial of the ability to be considered for the contracts.<sup>305</sup> Justice Thomas, writing for the Court, explained:

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.<sup>306</sup>

Likewise, the injury caused by the filibuster can be characterized as the denial of consideration of the legislation. The plaintiff need not show that the law would have been adopted but for the filibuster any more than the plaintiff in an equal protection case must demonstrate that he or she would have received the benefit absent the set aside program.

There is another type of plaintiff who could obtain standing: A member of the Senate might sue to challenge Rule XXII. Imagine a senator who favored a bill that was supported by a majority of the Senate, but not the sixty votes

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301. 426 U.S. 26, 81 (1976).

302. *See id.*

303. *See id.* at 74-75.

304. 508 U.S. 656, 666 (1993).

305. *See id.*

306. *Id.*; *see also* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14 (1978) (standing to challenge set-aside in a medical school admission program does not require proof that the individual would have been accepted; the denial of the ability to compete for all of the seats in the class is a sufficient injury).

needed for cloture. The senator could argue that her future vote on the legislation effectively had been nullified by the filibuster and that this is a basis for standing.

The Supreme Court has not articulated a standard defining the circumstances under which it will reach the merits of suits brought by members of Congress, but the U.S. Court of Appeals for the D.C. Circuit has addressed the matter.<sup>307</sup> The D.C. Circuit has created a two part test for evaluating Congressional standing. First, the court has recently held that members of Congress must meet the same Article III standing requirements as other plaintiffs.<sup>308</sup> However, the court has focused on the degree to which the senator or representative has suffered a diminution of legislative influence.<sup>309</sup> Second, the court has developed a doctrine of equitable discretion to dismiss certain cases which raise separation of powers problems, even when the plaintiffs have standing.<sup>310</sup>

In evaluating the general standing requirement of personal injury within the context of suits by members of Congress, the D.C. Circuit has held that vote nullification is a sufficient injury to confer standing. In *Kennedy v. Sampson*, for example, the court held that a senator suffered an injury cognizable for standing purposes when the President used a “pocket veto”—that is, a veto that occurs when the President leaves a bill unsigned at the end of a legislative session, which denies Congress the opportunity for a potential override vote—to obstruct the passage of a bill for which the senator had voted.<sup>311</sup> The court found that the effect of the pocket veto was to nullify Senator Kennedy’s vote, and that this constituted an injury sufficient to confer standing.<sup>312</sup> The court noted that its decision as to the legal validity of the pocket veto would “determine the effectiveness . . . of [Senator Kennedy’s] actions as a legislator with respect to the legislation in question.”<sup>313</sup>

Eight years later, the D.C. Circuit clarified the degree of vote nullification required for congressional standing in *Goldwater v. Carter*.<sup>314</sup> In *Goldwater*, the court held that “[t]o be cognizable for standing purposes, the alleged diminution in congressional influence must amount to a disenfranchisement, a complete nullification or withdrawal of a voting opportunity; and the plaintiff must point to an objective standard in the Constitution, statutes, or congressional house rules, by which disenfranchisement can be shown.”<sup>315</sup> In *Goldwater*, the Court found that a Senator had standing to challenge the President’s rescission of a treaty because it nullified the Senator’s ability to vote on the issue; however,

307. See, e.g., *Melcher v. Federal Open Mkt. Comm.*, 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1042 (1988); *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978).

308. See *Bochner v. Anderson*, 30 F.3d 156, 159-60 (D.C. Cir. 1994).

309. See, e.g., *Kennedy v. Sampson*, 511 F.2d 430, 436 (D.C. Cir. 1974).

310. See, e.g., *Melcher*, 836 F.2d at 565; *Crockett*, 720 F.2d at 1357.

311. 511 F.2d 430, 433 (D.C. Cir. 1974).

312. See *id.* at 436.

313. *Id.* at 433; see also *Barnes v. Kline*, 759 F.2d 21, 26 (D.C. Cir. 1984), *vacated as moot sub nom. Barnes v. Barnes*, 479 U.S. 361 (1987) (holding that members of Congress have standing to challenge pocket vetoes).

314. 617 F.2d 697 (D.C. Cir.) (en banc), *vacated*, 444 U.S. 996 (1979).

315. *Id.* at 702.

the Supreme Court later vacated this opinion by relying on considerations of ripeness and political question doctrine and did not address the issue of standing.<sup>316</sup>

In subsequent cases, the D.C. Circuit has rejected the strict vote nullification test that it developed in *Goldwater*, favoring instead a more lenient approach based on vote dilution. In *Riegle v. Federal Open Market Committee*,<sup>317</sup> for example, the court evaluated Senator Donald Riegle's alleged injuries by applying "the traditional standing tests for noncongressional plaintiffs gleaned from opinions of the Supreme Court,"<sup>318</sup> without any mention of the vote nullification standard developed in *Goldwater*. The court's departure from the *Goldwater* approach was confirmed in *Vander Jagt v. O'Neill*,<sup>319</sup> where the court explicitly announced that *Riegle* had abolished the distinction "between allegations that a legislator's vote had been 'nullified' and allegations that the legislator's influence has merely been diminished."<sup>320</sup>

More recently, in *Michael v. Anderson*, twelve members of Congress challenged a House rule that allowed delegates from the District of Columbia and several U.S. territories to vote in the House Committee of the Whole.<sup>321</sup> The injury the plaintiffs alleged was a dilution of voting strength resulting from the voting privileges that the House rule extended to the delegates.<sup>322</sup> Noting that "*Vander Jagt* . . . establishes that congressmen asserting such a claim have suffered an Article III injury," the court found that a dilution of voting strength is sufficient injury to confer standing on a member of Congress.<sup>323</sup>

A senator challenging Rule XXII could certainly satisfy the personal injury standard developed for congressional standing analysis in this line of cases. Rule XXII obviously has a major impact on the effectiveness of a senator with respect to particular legislation. Absent the rule, a senator needs to cast one of the fifty-one votes in the majority to pass a measure. With Rule XXII, a senator must cast one of sixty votes to end debate and pass that same measure. This represents an even greater vote dilution than in *Michael*, where the addition of five votes in a body of 435 members was sufficient injury to confer standing.<sup>324</sup> Moreover, any alteration of Rule XXII would require approval of two-thirds of senators present and voting, which could represent an even greater dilution of the votes of each individual senator.

In addition, the decisions of the D.C. Circuit indicated another potential obstacle to any suit brought by a senator. Even where a congressional plaintiff can show an injury adequate for standing purposes, the court may refuse to reach the merits of the case based on the doctrine of equitable or remedial discretion. In *Riegle*, for example, the court announced that it would employ

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316. *See id.* at 703.

317. 656 F.2d 873 (D.C. Cir.).

318. *Id.* at 878.

319. 699 F.2d 1166 (D.C. Cir.).

320. *Id.* at 1168.

321. 14 F.3d 623, 626 (D.C. Cir. 1994).

322. *See id.*

323. *Id.* at 625.

324. *See id.* at 626.



this doctrine, independently of its standing analysis, to dismiss a suit “[w]here a congressional plaintiff could obtain substantial relief from his fellow legislators.”<sup>325</sup> *Riegle* concerned a senator’s challenge to the constitutionality of the appointment provisions of the Federal Reserve Act. The court recognized that the injury asserted by Senator Riegle was sufficient for standing, but nonetheless dismissed the case, as it was entirely within the power of Congress to amend the legislation in question.<sup>326</sup> Similarly, in *Crockett v. Reagan*, the court relied on remedial discretion to dismiss a suit brought by twenty-nine members of Congress contending that the government’s aid to El Salvador violated that Foreign Assistance Act of 1991.<sup>327</sup> In both cases, the court’s equitable dismissal was predicated on the availability of a legislative remedy.

It is the absence of a means by which a majority of Congress can eliminate the filibuster that distinguishes *Riegle* and *Crockett*. Although a legislative remedy does exist, in the sense that Rule XXII could be modified with a two-thirds vote of the Senate, the availability of this “remedy” presupposes the non-existence of the injury, since it potentially requires more votes than are necessary for cloture. Given the unlikelihood that a private plaintiff could establish standing, dismissing a congressional challenge to Rule XXII would allow an alleged constitutional violation to remain unremedied. There is simply no way for fifty-nine senators to bring a matter to a vote in the face of determined minority opposition, just as there was nothing Congress could have done to challenge the pocket veto in *Kennedy v. Sampson* or the rescision of the treaty in *Goldwater v. Carter*.

Moreover, courts have long recognized their obligation to intervene in the face of unconstitutional behavior by the legislative branch, even when such behavior is entirely internal to the House or Senate. Indeed, in *Vander Jagt v. O’Neill*, the D.C. Circuit expressly said: “[I]f Congress should adopt internal procedures which ‘ignore constitutional restraints or violate fundamental rights,’ it is clear that we must provide remedial action.”<sup>328</sup>

Thus, courts should be willing to reach the merits of a challenge to Rule XXII brought by either a noncongressional plaintiff who can show that a particular filibuster imposes a specific harm, or by a member of the Senate who can show the requisite diminution of legislative influence. By extension of this analysis, it may be possible for a member of the House of Representatives to gain standing to challenge a filibuster that nullifies his or her vote on a particular bill. If the House passed a bill that has presidential support, for example, that bill would almost certainly become law if adopted by the Senate. If the bill was stifled by a filibuster but not supported by a majority of the Senate, a House member who voted for the bill could plausibly claim that the filibuster effectively nullified his or her vote.

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325. *Riegle*, 656 F.2d at 881.

326. *See id.* at 882.

327. 720 U.S. 1355, 1357 (D.C. Cir. 1983).

328. 699 F.2d 1166, 1170 (D.C. Cir.).

### 3. *The Speech and Debate Clause.*

The Speech and Debate Clause of the Constitution affords members of Congress absolute immunity to suits based on any of their actions within the "sphere of legitimate legislative activity."<sup>329</sup> The Supreme Court has made it clear that this absolute immunity precludes both suits for money damages and suits for injunctive relief.<sup>330</sup> The Supreme Court has indicated that the Speech and Debate Clause applies not only to words spoken in debate, but also to voting,<sup>331</sup> committee reports,<sup>332</sup> resolutions,<sup>333</sup> and any other matter which constitutes "an integral part of the deliberative and communicative processes . . . with respect to the consideration and passage or rejection of proposed legislation."<sup>334</sup> Therefore, any suit challenging the constitutionality of the filibuster is sure to face a government motion to dismiss based on the Speech and Debate Clause.

Yet, the Speech and Debate Clause should not preclude judicial review of the filibuster. At most, the Speech and Debate clause prevents suits against individual members of Congress; no suit ever has extended it to prevent suits against the government or the Senate as a whole. Thus, the United States or the United States Senate could be named as the defendant without running afoul of the Speech and Debate Clause. Federal law specifically allows suits against the United States for injunctive relief.<sup>335</sup>

Furthermore, a plaintiff could easily avoid the problems of the Speech and Debate Clause by simply bringing the suit against an administrative employee of the Senate who is responsible for the certification or administration of Rule XXII. Decisions by both the Supreme Court and the D.C. Circuit indicate that this is possible.<sup>336</sup> In *Powell v. McCormack*, the plaintiff was an individual elected to the House of Representatives who was denied his seat because of alleged fiscal improprieties.<sup>337</sup> His suit, challenging the House's refusal to seat him, named a variety of defendants, including several congressmen and the Sergeant at Arms of the House. Although the Supreme Court dismissed Powell's suit as to the defendant congressmen because of the Speech and Debate Clause, it allowed the case to proceed against the Sergeant at Arms and granted Powell relief on that basis.<sup>338</sup> Similarly, a plaintiff seeking to challenge the constitutionality of Rule XXII could probably avoid Speech and Debate Clause problems by naming the Secretary of the Senate as a defendant in a suit.

329. U.S. CONST. art. I, § 6, cl. 1.

330. See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975). See generally Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and Separation of Powers*, 86 HARV. L. REV. 1113 (1973) (discussing the history and scope of the Speech and Debate Clause).

331. See *Gravel v. United States*, 408 U.S. 606, 624 (1972); see *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

332. See *Kilbourn*, 103 U.S. at 204.

333. See *id.*

334. *Gravel*, 408 U.S. at 625.

335. See 5 U.S.C. § 702.

336. See *Powell v. McCormack*, 395 U.S. 486 (1969); *Michel v. Anderson*, 14 F.2d 623 (D.C. Cir. 1994).

337. 395 U.S. at 501-06, 550.

338. See *Michael*, 14 F.3d at 625.

### B. *Is Rule XXII and its Entrenchment Constitutional?*

There are two constitutional challenges against Rule XXII. First, filibusters are unconstitutional because they essentially require a supermajority of sixty votes to pass a bill in the Senate. Second, Senate rules which require a two-thirds vote to change Rule XXII are unconstitutional. Each argument is discussed below.

#### 1. *Are filibusters unconstitutional?*

The Constitution is silent on the topic of filibusters; it neither authorizes them nor prohibits them. As discussed in Part II, the history of the filibuster is ambiguous. Although debate was used to delay in the earliest days of the Senate, the form of the filibuster has changed greatly in recent decades.<sup>339</sup> The major argument that the filibuster is unconstitutional is a textual one.

One interpretation of the Constitution, based on the text and the framers' intent suggests that majority vote in each house of Congress is sufficient to adopt a bill. First, the Constitution is specific about the situations where more than a simple majority is required for Congress, or a house of Congress, to act.<sup>340</sup> The Constitution explicitly requires a supermajority in only seven situations.<sup>341</sup> Second, the careful enumeration of the situations where a two-thirds vote is required is consistent with the framers' belief that majority vote would be sufficient for legislative action. The construction of the Constitution reflects the basic premise that Congress would generally operate by majority rule.<sup>342</sup>

The Supreme Court's reasoning in *Marbury v. Madison*<sup>343</sup> supports this construction of the Constitution. The Supreme Court interpreted the Judiciary Act of 1789 as attempting to confer original jurisdiction in an instance not described in the text of Article III.<sup>344</sup> The Supreme Court held the Act unconstitutional.<sup>345</sup> Chief Justice John Marshall explained that the Constitution's

339. See notes 13-157 *supra* and accompanying text.

340. See *Cutler*, *supra* note 13, at A23.

341. Article I, Section 3 provides that the Senate may remove an officer after an impeachment if two-thirds of the senators concur. U.S. CONST. art. I, § 3, cl. 6. Article I, Section 5 allows either House to expel a member if two-thirds agree. U.S. CONST. art. I, § 5, cl. 2. Article I, Section 7 provides that to override a presidential veto requires a two-thirds vote of both the House and the Senate. U.S. CONST. art. I, § 7. Article II, Section 2 gives the President the power to make treaties provided that two-thirds of the senators approve it. U.S. CONST. art. I, § 2, cl. 2. Article V provides that for Congress to propose a constitutional amendment both Houses must approve it by a two-thirds vote. U.S. CONST. art. V. Section 3 of the Fourteenth Amendment provides that those who have engaged in insurrection or rebellion cannot be elected to Congress or hold any office, but says that Congress by a two-thirds vote of both Houses may remove such a disability. U.S. CONST. amend. XIV, § 3. Finally, the Twenty-fifth Amendment creates a procedure whereby Congress, by a two-thirds vote of both Houses, can determine a President to be disabled. U.S. CONST. amend. XXV, § 4. See also Benjamin Lieber & Patrick Brown, Note, *On Supermajorities and the Constitution*, 83 GEO. L.J. 2347, 2350 (1995).

342. See *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539 (1995) (seventeen law professors argue that a recently adopted House rule requiring a supermajority vote for a tax increase is contrary to the framers' intent and is unconstitutional).

343. 5 U.S. (1 Cranch) 137 (1803).

344. See *id.* at 173. Note that there is a strong argument that the provision in the Judiciary Act pertained entirely to appellate jurisdiction, not original jurisdiction. See William W. Van Alstyne, A *Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 14-16.

345. See 5 U.S. (1 Cranch) at 173.

enumeration of original jurisdiction is superfluous if Congress could add to them:

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested.<sup>346</sup>

Similarly, the argument is that the enumeration of instances where a supermajority is required would be superfluous if Congress could require supermajorities in other instances. Therefore, the Constitution's listing of seven instances where a two-thirds vote is required is seen as establishing that a simple majority is generally sufficient for action by a House of Congress. Any time that there is a filibuster, however, adopting a law requires 60 percent, rather than a simple, majority. Thus, it is unconstitutional.

Other constitutional provisions further support the argument that the Constitution makes a majority vote sufficient for action by the Senate. Article I, Section 3, Clause 4 provides that the "Vice President . . . shall be President of the Senate, but shall have no Vote, unless they be equally divided."<sup>347</sup> The Vice President's role as a tiebreaker would occur only if the Senate utilizes a majority vote, creating a situation where the Senate could be equally divided.

Article I, Section 5 provides that "a Majority of each [House] shall constitute a quorum to do Business." The Supreme Court in *United States v. Ballin* held that "the act of a majority of the quorum is the act of the body. This has been the rule for all time."<sup>348</sup>

Article I, Section 7 provides that if the President vetoes a bill, Congress can override the veto by a two-thirds vote of each House. The assumption is that the requirement for a supermajority to override a veto implies that less than two-thirds would be necessary to adopt the law initially. It is presumed that the framers thought that a majority vote of each House would pass a bill and then a two-thirds vote would be needed if there was a veto.

It can be argued that all of these textual provisions establish that the Senate must follow a majority vote rule, except in those instances where the Constitution specifically provides otherwise. Rule XXII thus would be unconstitutional in that it requires a supermajority of sixty votes to end debate and in practical effect requires sixty votes to adopt legislation any time there is a filibuster.

Although this textual argument is strong, there are several responses that are persuasive. Because the text is silent about the vote needed to stop debate or pass a law, Congress has the option to set the voting requirement. The enumeration of seven instances where a supermajority vote is required does not mean that these are the only instances where such a supermajority vote is permissible. It is equally consistent with the text to read it as requiring

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346. *Id.* at 174.

347. See Cutler, *supra* note 13, at A23 (discussing how the clause only requires a majority vote for all areas of legislation but ones that are constitutionally specified).

348. 144 U.S. 1, 6 (1891).

supermajority votes in at least these instances, but leaving it to Congress in other situations to decide the required voting margin. Where the text enumerates a requirement, it must be followed, but otherwise, Congress may decide the voting rule.

In other words, just as the Framers imposed a specific voting rule when they wanted, they could just as easily have created a general majority voting rule. Those who argue that the filibuster is unconstitutional want to make the Constitution's silence into an argument for a majority vote rule.<sup>349</sup> But to the contrary, the silence means that nothing in the Constitution precludes Congress from identifying other areas where it wants to follow a supermajority voting rule.<sup>350</sup>

Nor does the provision allowing the Vice President to break ties necessarily mean that the Constitution envisions majority rule in all instances. The provision could simply mean that the Vice President should break ties when a majority vote rule is followed and the Senate is equally divided. The Constitution's solution for a particular contingency, a tie, only means that the framers wanted to deal with that possibility. It does not mean that the framers necessarily had any opinion about how often the possibility would arise. Professors McGinnis and Rappaport explain: "The Vice President Voting Clause, however, does not begin to support a majority rule requirement. The clause simply reflects the Framers' reasonable assumption that the houses would often choose to use majority rule and that majority rule would be the default rule applied when no other procedure was adopted."<sup>351</sup>

Furthermore, a supermajority voting rule does not mean that the Vice President's tie breaking role is superfluous. As mentioned above, several constitutional provisions expressly require supermajority votes in the Senate; no one would suggest that these render the clause that creates the Vice President's role in breaking ties completely meaningless. Rather, they indicate that the framers did not intend that the Vice President potentially be able to break a tie for all bills; they provided the tie-breaking provision for the instances where it was needed.

Likewise, the clause declaring that a majority is a quorum only creates the basic rule for when a House of Congress can do business. It does not say anything about the vote margin necessary to end debates or pass legislation. Quite the contrary, it is telling that the Framers chose to specify that a majority

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349. See, e.g., Cutler, *supra* note 13, at A23.

350. See John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 486-89 (1995). Professors McGinnis and Rappaport offer a powerful example as to why silence in the Constitution should not be interpreted as precluding unenumerated practices:

The Constitution requires each house to keep a journal, but no one would argue that this provision disables each house from directing under its Rules of Proceedings Clause that other kinds of records of its proceedings also be printed. The Constitution requires the President to report on the "State of the Union," but no one would argue that he is constitutionally disabled from sending messages to Congress on other subjects.

*Id.* at 488.

351. *Id.*

vote was sufficient for a quorum, but did not specify the vote required to cutoff debate or to adopt a law.<sup>352</sup>

The clause allowing Congress to override a veto by two-thirds of both Houses does not specify what initial vote is required to pass a bill. Anything less than two-thirds would preserve the distinction between initial passage of a bill and votes to override a veto. Therefore, even if Rule XXII is understood to create a 60 percent rule for adopting a law, it in no way would violate the spirit or letter of Article I, Section 7, which says that a two-thirds vote overrides a veto.

A second major problem with the textual argument is that Article I, Section 5 specifically provides: "Each House may determine the Rules of its Proceedings."<sup>353</sup> Therefore, textual authority exists for Congress to make rules concerning matters such as the length of debate. Rule XXII does not require sixty votes to adopt a law; it only requires sixty votes to end debate. Passing a bill still requires only a simple majority. Therefore, Rule XXII both is an exercise of Congress' power to make rules for its operation and is completely consistent with the principle that a majority is sufficient to pass a law.<sup>354</sup>

In fact, the Senate's ability to make rules concerning its procedures would even permit it to enact a rule that required a supermajority in order to pass a bill. Obviously, one important rule for any proceeding is the voting principle to be followed. Article I, Section 5 empowers Congress to decide this and articulates no limit on Congress' ability to devise the voting rules that it chooses except in the few areas where there are explicit constitutional provisions.

Third, the filibuster's long history makes the textual argument highly questionable.<sup>355</sup> At best, the textual argument indicates that there are two alternative readings of the Constitution: one way requires a majority vote in the Senate to be sufficient and the other allows Congress to decide the voting rules to be followed.<sup>356</sup> The above analysis suggests that there is nothing in the text

352. Professors McGinnis and Rappaport note:

[T]here is nothing strange about requiring a majority for a quorum but permitting a chamber to require a supermajority to pass legislation. The Framers had reason to treat the two situations differently, because preventing a minority from defeating a quorum may be understood as far more important than preventing a minority from impeding legislation. A minority that attempts to block legislation must confront the many political pressures that induce legislatures to behave reasonably, such as debate, deliberation, and publicity. By contrast, a minority that defeats a quorum will be much less vulnerable to these pressures because the failure to establish the quorum will prevent the operation of the legislature and simultaneously frustrate the political dynamics that constrain the legislators' behavior.

*Id.* at 487 n.14.

353. U.S. CONST. art. I, § 5.

354. See McGinnis & Rappaport, *supra* note 350, at 485 (arguing that a supermajority voting requirement for enacting tax legislation is constitutional because of the clause authorizing each house to make rules for its proceedings). *But see An Open Letter to Congressman Gingrich*, *supra* note 342, at 1541 (arguing that the clause authorizing each house to make its own rules simply authorizes rules that advance efficient debate).

355. See Will, *supra* note 4, at C7 (stating historical use of filibuster contradicts argument that text of the Constitution implies that each house must make all decisions by majority rule).

356. Compare Cutler, *supra* note 13, at A23, with Baker, *supra* note 16, at A17, and Will, *supra* note 4, at C7.

of the Constitution to establish that the former is the only permissible interpretation.

History strongly suggests that allowing Congress to implement a supermajority voting rule is constitutionally acceptable. The Supreme Court long has declared that historical practice is relevant in evaluating constitutionality. In *McCulloch v. Maryland*, in upholding the constitutionality of the Bank of the United States, Chief Justice John Marshall contended that historical experience supports the constitutionality of a practice.<sup>357</sup> This argument reappears consistently throughout Supreme Court opinions. In *United States v. Midwest Oil Co.*, the Court declared that a "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent."<sup>358</sup> In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Felix Frankfurter expressed the view that a "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive power' vested in the President."<sup>359</sup> In *Dames & Moore v. Regan*, the Court approvingly invoked Justice Frankfurter's words in upholding an executive agreement to lift a freeze on Iranian assets in the United States as a part of a deal to have American hostages there released.<sup>360</sup> As described in Part II, the filibuster has a long history.<sup>361</sup> Requiring a supermajority vote to end debate is supported by well-established historical practice in the Senate. As such, it is incorrect to read the ambiguous textual provisions as making the filibuster inherently unconstitutional.

The third argument that the filibuster is unconstitutional is premised on a claimed constitutional principle of majoritarianism. Although the textual provisions described above might be invoked to support this view, the majoritarianism argument is based more on the underlying philosophy and overall structure of the Constitution.<sup>362</sup> There is support for the proposition that the framers of the Constitution articulated a philosophy of majority rule. Alexander Hamilton, in *Federalist 22*, declared that "the fundamental maxim of republican government . . . requires that the sense of the majority should prevail."<sup>363</sup> James Madison similarly remarked: "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat

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357. 17 U.S. (4 Wheat.) 316, 401 (1819). In his holding, Chief Justice John Marshall stated: It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

*Id.* at 401.

358. 236 U.S. 459, 474 (1915).

359. 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

360. 453 U.S. 654, 686 (1981).

361. See text accompanying notes 22-182 *supra*.

362. For a discussion of this type of constitutional argument, see generally CHARLES BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

363. *THE FEDERALIST NO. 22* (Alexander Hamilton).

its sinister views by regular vote."<sup>364</sup> Contemporary commentators also echo the view that majority rule is the central principle of American democracy.<sup>365</sup>

There are, however, many serious flaws with this argument. First, a general commitment to majoritarianism is not necessarily a commitment to a 50 percent voting rule in all instances. As described above, the Constitution includes several provisions that require supermajority votes for legislative action.

Second, the Constitution does not enshrine a commitment to majority rule in all instances such that all deviations from majoritarianism are unconstitutional. Almost all of the institutions created by the Framers of the Constitution reflect a distrust of majorities.<sup>366</sup> The President is chosen by the electoral college and not by a majority of the popular vote. Senators initially were chosen by state legislatures and always have been allocated equally among the states regardless of their population size. The federal judiciary has life tenure and never is directly democratically accountable.

Moreover, many aspects of contemporary government are not strictly majoritarian. As discussed in Part III, countless aspects of Congressional procedure—from the power of committees to the ability of senators to place holds on matters—are not consistent with majority rule, at least in its simplistic form. Administrative agencies and regulatory bodies exercise tremendous power even though they are not majoritarian or democratically accountable in any direct way. It thus cannot be said that the Constitution embodies a principle of majoritarianism that must be followed in all instances.

In fact, the Supreme Court has expressly rejected the argument that the Constitution requires simple majority rule and has allowed legislatures to deviate from such rule. *Gordon v. Lance* states this point clearly.<sup>367</sup> West Virginia law required that political subdivisions may not incur bonded indebtedness without the approval of 60 percent of the voters in a referendum election.<sup>368</sup> The Supreme Court upheld the West Virginia law, even though it violated the principle of majority rule.<sup>369</sup> Chief Justice Burger, writing for the Court, said: "Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue."<sup>370</sup>

The point is not that majoritarianism is an unimportant value in the American system of government; obviously it is of enormous significance. Rather, the point is that majoritarianism is not a universal principle of American gov-

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364. THE FEDERALIST NO. 10 (James Madison).

365. Professor John Hart Ely, for example, argues that rule by the majority "is the core the American governmental system." JOHN HART ELY, DEMOCRACY AND DISTRUST 7 (1980).

366. Nor was this arrangement accidental. The Framers were very distrustful of majority rule. In the *Federalist Papers*, James Madison repeatedly expressed distrust for majority rule. The Framers did not embrace simple majority rule, but rather tried to shield their government from it. See, e.g., THE FEDERALIST NO. 10 (James Madison).

367. 403 U.S. 1 (1971).

368. See *id.* at 2.

369. See *id.* at 7.

370. *Id.* at 6.



ernment such that all deviations from it are unconstitutional. It thus cannot be said that Rule XXII is unconstitutional simply because it requires sixty votes, instead of fifty-one, to end debate.

The filibuster is unconstitutional only if it offends some other constitutional principle besides majoritarianism. Because some deviations from majoritarianism are permissible and others impermissible, this principle cannot, by itself, be used to determine when procedures are unconstitutional. Therefore, other principles must be used in evaluating constitutionality.

However, no other viable constitutional arguments seem to exist. Filibusters, for example, cannot be attacked on the ground that they are arbitrary and unreasonable, rendering them unconstitutional. Reasonable people can differ as to whether it is desirable to have a strong presumption in favor of allowing debate to continue.

Finally and perhaps most importantly, it is unclear whether the filibuster actually violates the principle of majority rule. As we explain above, although Rule XXII imposes an effective supermajority requirement for much of the Senate's action, it is not clear that its overall effect is, on balance, antimajoritarian.<sup>371</sup> Specifically, the filibuster may partially counteract other nonmajoritarian aspects of Senate practice, such as the power of the committees and committee chairs, and the process of scheduling floor time for debate.<sup>372</sup>

## 2. *Is the entrenchment of the Filibuster Rule unconstitutional?*

There is another, stronger argument against the constitutionality of the current Senate rules regarding the filibuster: Rule XXII greatly limits the ability of future Senates to change current rules. The House of Representatives adopts new rules every Congress by majority vote.<sup>373</sup> Because the entire membership of the House is determined every two years, the House is not considered to be a continuing body.<sup>374</sup> In contrast, the Senate considers itself to be a continuing body because only one-third of the Senate seats are the subject of election every two years. As a result, the Senate's rules continue; they are not newly adopted with each new session of Congress. Specifically, Senate Rule V provides: "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."<sup>375</sup>

The continuation of the Senate's rules means that it is extremely difficult for the Senate to modify or abolish Rule XXII. Unless the majority party has sixty seats in the Senate, the minority party can always successfully filibuster

371. See text accompanying note 197-201 *supra*.

372. See text accompanying notes 210-214 *supra*.

373. See RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 103-342, at 768 (1995). Rule XXII incorporates the rules of parliamentary practice composed in Jefferson's Manual adopted in 1837 to the extent they are not inconsistent with the standing rules and orders of the House and the joint rules of the Senate. See JEFFERSON, *supra* note 35. Section 388 of Jefferson's Manual states that "Congress may not by law interfere with the constitutional right of a future House to make its own rules . . . [and] one House may not continue its rules in force to and over its successor." *Id.* at 184.

374. See, e.g., *Gojack v. United States*, 384 U.S. 702, 706 n.4 (1966) (stating that House practice is to adopt its rules at the beginning of each Congress).

375. SENATE RULES, *supra* note 2, at 4.

any effort to change the Rule. Because the filibuster enormously increases the minority's power and gives it the ability to block bills it opposes, the minority party would have every incentive to do so.

Actually, the problem with attempting to change Senate Rule XXII is even greater than the possibility of a filibuster. Rule XXII specifically provides that cloture on any motion to amend the Senate Rules requires the agreement of two-thirds of those present and voting.<sup>376</sup> Thus, a majority of the current or any future Senate could not repeal or modify Rule XXII. The Senate that adopted Rule XXII bound all Senates in the future and made change of the Senate's Rules extremely difficult. A textual argument can be made against the constitutionality of the entrenchment of Senate Rule XXII, but it has flaws similar to the problems with the textual arguments described above. It might be argued, for instance, that Article I, Section 5's provision that "each House may determine the Rules of its Proceedings,"<sup>377</sup> grants each new *session* of each House the ability to adopt a set of procedures. Some argue that Article V of the Constitution, which prescribes the process for amending the Constitution,<sup>378</sup> means that "only by constitutional amendment can one truly bind the future."<sup>379</sup> A third textual provision that can be invoked is the Oath of Office Clause in Article VI.<sup>380</sup> Arguably, this provision posits that senators who do not adopt or reject laws based on a majority vote violate their oath of office.

These textual arguments, however, are inconclusive; it is also possible to interpret the provisions to support the constitutionality of the filibuster. For example, Article I, Section 5 says that "each house," shall make its rules, but it is silent as to timing.<sup>381</sup> The Senate approved the rules it operates under, including Rule XXII, pursuant to this constitutional provision. The challenge to Rule XXII based on entrenchment reads into Article I, Section 5, the additional words, "each session of each house." But that is not what the constitutional provision says. It still might be defended as the proper interpretation, but it cannot be done on a simple textual reading. Thus, Rule XXII is consistent with the literal language of Article I, Section 5. Without more, Article I, Section 5 cannot be treated as a bar to entrenchment.<sup>382</sup>

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376. The Rule declares that "on a measure or motion to amend the Senate rules. . . the necessary affirmative vote shall be two-thirds of the Senators present and voting." SENATE RULES, *supra* note 2, at 21.

377. For an excellent explanation of this principle, see generally Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 384-425.

378. See U.S. CONST., art. I, § 5, cl. 2.

379. U.S. CONST., art. V.

380. See *Extending the Ratification Period for the Proposed Equal Rights Amendment: Hearings on H.R.J. Res. 638, Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 95th Cong. 51 (1977) (statement of Laurence Tribe).

381. U.S. CONST., art. VI, cl. 3 ("The Senators and Representatives . . . shall be bound by Oath or Affirmation, to support this Constitution).

382. See U.S. CONST., art. I, § 5, cl. 2 ("[E]ach House may determine the Rules of its Proceedings, Punish its Members for disorderly Behavior, and with the Concurrence of two thirds, expel a member.").

Similarly, Article V prescribes that a supermajority of Congress must pass constitutional amendments.<sup>383</sup> But that does not speak, one way or the other, to whether supermajorities might be used by Congress in other instances.

Nor is the argument based on the Oath of Office Clause decisive. A Senator only would violate her oath of office by acting against the Constitution. However, if the Senate does not change Rule XXII for want of the supermajority willing to change it, a given senator's inability to modify Rule XXII cannot be said to constitute a violation of her oath in office.

Although the textual argument is not conclusive, the stronger claim is that the entrenchment of the filibuster violates a fundamental constitutional principle: One legislature cannot bind subsequent legislatures.<sup>384</sup> It is a principle expressed long ago by Blackstone: "Acts of parliament derogatory from the power of subsequent parliaments bind not. . . . Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if it's [sic] ordinances could bind the present parliament."<sup>385</sup>

The United States Supreme Court often has expressed this principle against legislative entrenchment. In *Ohio Life Insurance and Trust Co. v. Debolt*, the Court held that one session of a legislature could not limit the ability of a future session to impose taxes.<sup>386</sup> Similarly, in *Newton v. Commissioners*, the Court ruled that the Ohio legislature could move its state capitol, notwithstanding decisions by a legislature thirty years earlier as to its location.<sup>387</sup> Although the American Constitution rejects the notion of parliamentary sovereignty, it retained that of legislative equality—"the legislature does not have the power to bind itself in the future."<sup>388</sup> In *Stone v. Mississippi*, the Court held that the contract clause in Article I, Section 10 of the Constitution did not limit the ability of legislatures to adopt laws that they believed to be reasonable exercises of the police power.<sup>389</sup> It was the Court's belief that any other view

383. Compare U.S. CONST., art. I, § 5, cl. 2 with Rules V, XXII, S. Doc. No. 17, 102d Cong. (1992).

384. See U.S. CONST., art. V. For other instances where the Constitution requires supermajorities, see note 169 *supra*.

385. McGinnis & Rappaport, *supra* note 350, at 505 (alteration in original) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 90).

386. 57 U.S. (16 How.) 416, 440 (1853). Justice Taney, writing for the Court, stated:

The powers of sovereignty confided by the legislative body of a state are undoubtedly a trust committed to them, to be executed to the best of their judgment for the public good; and no one Legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body.

*Id.* at 431.

387. 100 U.S. 548 (1879). The Court emphatically declared:

Every succeeding Legislature possesses the same jurisdiction and power . . . as its predecessors. The latter must have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result is fraught with evil.

*Id.* at 559.

388. McGinnis & Rappaport, *supra* note 350, at 506.

389. 101 U.S. 814 (1880).

would impermissibly allow one legislature's acts to bind the hands of the future sessions of the legislature.<sup>390</sup>

In many other cases, the Court has expressed the same view that it is unconstitutional for a legislature to bind its successors. In *Connecticut Mutual Life Ins. Co. v. Spratley*, the Court said: "[E]ach subsequent legislature has equal power to legislate upon the same subject. The legislature has power at any time to repeal or modify [an] act."<sup>391</sup> In *Reichelderfer v. Quinn*, the Court echoed this and remarked that "the will of a particular Congress which does not impose itself upon those to follow in succeeding years."<sup>392</sup>

Indeed, in the famous footnote four of *United States v. Carolene Products Co.*<sup>393</sup>—which is often said to be the blueprint for modern judicial review<sup>394</sup>—the Court reserved for itself the possibility of applying a "more exacting judicial scrutiny," when evaluating legislation that "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."<sup>395</sup> Under the *Carolene Products* representation-reinforcement approach to judicial review, the Constitution is overwhelmingly concerned with procedural fairness within a representative democracy,<sup>396</sup> and the role of the court is to protect our democracy from "systematic malfunctioning."<sup>397</sup> Congressional rules which allow simple majorities of one session of Congress to bind majorities of future sessions can be viewed as precisely the sort of "systematic malfunctioning" of which the Court should be concerned.

The conjunction of Rules V and XXII does exactly what all of these cases say that the Constitution forbids: it allows one session of the Senate to bind later sessions to its procedure for approving legislation. Rule XXII effectively extends a supermajority requirement to the passage of any measure before it, including proposed rule changes.<sup>398</sup> Rule V preserves all Senate rules from one session to the next.<sup>399</sup> The Senate thus violates the Court's declaration in *Newton* by depriving "succeeding legislature[s] . . . [of] the same jurisdiction

390. *See id.* at 818 (stating "no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police").

391. 172 U.S. 602, 621 (1898).

392. 287 U.S. 315, 318 (1932).

393. 304 U.S. 144 (1938).

394. *See* Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1088 (1982) (stating that footnote four is "recognized as a primary source of 'strict scrutiny' of judicial review"); *see also* Owen M. Fiss, *The Supreme Court, 1978 Term—Foreward: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979) (*Carolene Products* footnote four is "[t]he great and modern charter for ordering the relation between judges and other agencies of government."). *But see* Sugarman v. Dougall, 413 U.S. 634, 655-57 (1973) (Rehnquist, J., dissenting) (commenting that footnote four should not be made into a theory of judicial review); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1294-95 (1982) (commenting that footnote four was intended to protect minorities against systematic discrimination, not to introduce a theory of judicial review).

395. *Carolene Products*, 304 U.S. at 152 n.4.

396. *See id.* at 87.

397. *See id.* at 103.

398. *See* text accompanying notes 159-161 *supra*.

399. Rule V, S. Doc. No. 17, 102d Cong. (1992).

and power . . . as its predecessors.”<sup>400</sup> Rules V and XXII unconstitutionally limit the power of those sessions which came after their enactment.<sup>401</sup>

There are compelling reasons for why the Court is correct in holding such legislative entrenchment unconstitutional. First, American democracy is premised upon government by the people, as expressed through representatives.<sup>402</sup> Popular sovereignty is frustrated when one session of the legislature can prevent or limit action by future sessions. Professor Eule expresses this well when he writes:

Just as the members of Congress lack power to extend their terms beyond those set by the Constitution, they may not undermine the spirit of that document by immutably extending their influence beyond those terms. Each election furnishes the electorate with an opportunity to provide new direction for its representatives. This process would be reduced to an exercise in futility were the newly elected representatives bound by the policy choice of a prior generation of voters.<sup>403</sup>

Second, such entrenchment frustrates the legislative accountability that is essential for a properly functioning democratic government.<sup>404</sup> Democracy is based on the view that people can hold their representatives accountable by the threat of electing different officials.<sup>405</sup> “If most of us feel we are being subjected to unreasonable treatment by our representatives, we retain the ability . . . to turn them out of office.”<sup>406</sup> The knowledge that behavior in office must be submitted to the voters for approval deters unwise judgments,<sup>407</sup> or failing that, enables the people to replace public officials with others who will implement better policies.<sup>408</sup>

400. *Newton v. Commissioners*, 100 U.S. 548, 559 (1879).

401. There is no reason to draw a distinction between the entrenchment of laws and the entrenchment of rules. Both are impermissible because both tie the hands of future legislatures. For example, in *United States v. Ballin*, 144 U.S. 1 (1892), the Court considered whether the House of Representatives quorum rule is a proper method for adopting legislation. In its decision, the Court spoke of the need for legislatures to have authority to modify their rules:

[A]ll matters of method are open to the determination of the house. . . . It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within limitation suggested, absolute and beyond the challenge of any other body or tribunal.

*Id.* at 5. Significantly, the aforementioned “limitation” was a constitutional one. “The Constitution empowers each house to determine its rules, it may not by its rules ignore constitutional restraints.” *Id.*

402. See ELY, *supra* note 365, at 78 (the basic idea of our form of government is that the people rule through the election of representatives); D. Bruce La Pierre, *Political Accountability in the National Political Process*, 80 Nw. U. L. REV. 577, 642 (1986) (democratic self-governance is a “fundamental, albeit implicit, postulate of the Constitution”); Powell, *supra* note 394, at 1088-89 (our Constitution assumes that the majority of the population should rule through their legislative representatives).

403. See Eule, *supra* note 377, at 404-05 (footnotes omitted).

404. See ELY, *supra* note 365, at 78; La Pierre, *supra* note 402, at 640.

405. See La Pierre, *supra* note 402, at 644.

406. ELY, *supra* note 365, at 78.

407. Cf. La Pierre, *supra* note 402, at 646 (stating that “[w]hen the political checks are effective, congressional political decisions satisfy the fundamental principle that those with the power to make decisions should bear, to the fullest extent possible, the costs and benefits . . . for their decisions”).

408. See ELY, *supra* note 365, at 78.

Thus, entrenchment of laws and rules frustrates the accountability necessary for effective democratic rule.<sup>409</sup> Absent the very unlikely event that a Senate is elected where two-thirds of the members will vote for repeal or reform,<sup>410</sup> the people cannot change filibuster rules no matter how much they may dislike them. The senators responsible for enacting the rules cannot be held accountable because they are no longer members of the body. At the same time, current legislators cannot effectively be held accountable for their failure to adopt laws that are blocked by filibusters. It would be futile, as well as unfair, to blame senators in the majority for not passing a bill stopped by a filibuster.

Perhaps the most important result of this lack of accountability is that it prevents laws from being adopted to meet current needs.<sup>411</sup> Entrenchment's obstruction of the legislature's inherent authority to adapt to current circumstances represents a serious infringement upon the right of the electorate to rule according to its will.<sup>412</sup>

It is important to distinguish this argument from one based solely on the theory of majoritarianism, as criticized above.<sup>413</sup> The objection here is not solely that Senate Rule XXII frustrates the will of the majority. As explained above, antimajoritarianism is insufficient by itself to make a practice unconstitutional.<sup>414</sup> Rather, the reason Rule XXII is unconstitutional is that it frustrates the will of *future* majorities and violates the democratic principles of representation and accountability. In other words, there would be no constitutional objection if this session of the Senate adopted Rule XXII for itself as long as it expired at the end of this session. Even though the Rule still would frustrate majoritarianism, it would be constitutional. In contrast, Rule XXII is unconstitutional because it binds future Senates and makes repeal or revision of the rule extremely difficult.

An example illustrates why entrenchment violates basic democratic principles, thereby rendering it constitutionally suspect. Imagine that the current Republican Congress were to adopt a law or rule saying that any statute that it enacted could be repealed or modified only by a supermajority of a future session of Congress. Obviously, electoral control of the legislative process would be seriously compromised, and with it, the basic presuppositions of popular sovereignty and democracy would be infringed.<sup>415</sup>

A second constitutional challenge could be mounted against the entrenchment of laws and rules. Not only does entrenchment seriously infringe upon

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409. Cf. Paul W. Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185, 209 (1986) (discussing how Gramm-Rudman's binding of future Congressional action disrupts the accountability of both current and future Congresses).

410. See text accompanying notes 280-283 *supra*.

411. See text accompanying notes 9-10, 99-104 *supra* (filibuster used to block economic stimulus package, campaign finance reform, health care reform, and racial justice bill).

412. See Robert A. Graham, Note, *The Constitution, the Legislature, and Unfair Surprise: Toward a Reliance-Based Approach to the Contract Clause*, 92 MICH. L. REV. 398, 424 (1993) (describing the legislature's "inherent" power to abandon, amend, or otherwise modify existing legal rules).

413. See text accompanying notes 362-372 *supra*.

414. See *id.*

415. See Kahn, *supra* note 409, at 200.

the legislative authority of the electorate and Congress, it also violates the constitutional rights of succeeding legislatures. The inability of future members of Congress to alter legislation and rules is unconstitutional because it denies senators their constitutional right to adopt bills favored by a majority of that body. As discussed above, courts have consistently recognized the dilution or nullification of a representative or senator's voting power as a sufficient basis to establish that member's standing to challenge a rule or law.<sup>416</sup> Analogously, senators, and all legislators for that matter, should be seen as having a right to change the laws and rules. Additionally, because the First Amendment protects the electorate's right to vote and associate,<sup>417</sup> it should also protect a senator's right to vote. Finally, preventing members of a current session of the Senate from exercising their ability to change a rule denies them equal protection; those in the Senate that adopted the Rule had the power to do so, while those in the current or future Senates are treated unequally. In fact, the many court cases that have recognized standing for members of Congress when there is vote nullification establish that regardless of the specific constitutional basis, members of Congress have a right to vote and participate.<sup>418</sup> The restriction of that ability by entrenchment violates this right.

It might be argued in response that the Constitution itself authorizes the relative disenfranchisement of current senators because only one-third of the Senate is elected each year. Arguably, because the Senate is a continuing body, its rules should continue from session to session.

This response is based on several unsupported and untenable assumptions. First, it assumes that because two-thirds of the senators continue to serve after each election, the Senate as a whole should be regarded as a continuing body. But the latter does not follow from the former. Each session of the Senate is given a new number. Each session may elect new officers. In every other way, each new Senate is treated as a new body. For example, after the 1994 election, a Republican majority replaced a Democratic majority.<sup>419</sup> In terms of its political identity, it was a new Senate;<sup>420</sup> only the institution itself and two-thirds of the members continued.

Second, the response assumes that, even if the Senate is a continuing body, the rules of the Senate should carry over to each new session. Professor Eule powerfully refutes this assumption when he declares:

There is no support, however, for the proposition that this carry-over concept was designed to entrench the actions of a given Senate. The staggered terms mandate continuity of personnel, not of law. James Madison's expectation that a second branch of the legislative assembly might secure the people better

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416. See text accompanying notes 307-325 *supra*.

417. Cf. *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (finding a political patronage program violative of the First Amendment inasmuch as it compels or restrains freedom of belief and association); *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973) ("[U]nduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments") (citing *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)).

418. See text accompanying notes 307-328 *supra*.

419. See Edward Walsh, *After the Vote, the Party Planning*, WASH. POST, Nov. 10, 1994, at A27.

420. See *id.*

against those who "may forget their obligations to their constituents" would hardly be furthered by a branch that was unable to respond to the electorate's biennial messages.<sup>421</sup>

The conclusion that emerges is clear: laws and rules that restrict changes by future legislatures are unconstitutional. This view has been followed by the Supreme Court throughout American history<sup>422</sup> and it is supported by compelling arguments. As such, Rule XXII is unconstitutional in requiring that any revision be by a two-thirds margin.

When a justiciable case is brought to federal court, the court should not find the entirety of Rule XXII unconstitutional. Rather, the Court's ruling should be that Rule XXII is unconstitutional in its requirement that change be approved by two-thirds vote to change the Rule. The effect of declaring this unconstitutional is that the current Senate could change Rule XXII by majority vote. In other words, a majority of this Senate could eliminate the filibuster if a majority wished to do so. It also means that each future session of the Senate will decide for itself whether to have a version of Rule XXII and to allow the filibuster.

## V. CONCLUSION

The constitutional issues surrounding the filibuster and Rule XXII have enormous significance. First, the filibuster dramatically influences the adoption of laws. The filibuster, for example, prevented civil rights legislation from being adopted for nearly a century.<sup>423</sup> Recently, the filibuster blocked enactment of key pieces of legislation to reform the law in areas such as campaign finance, welfare, civil damage awards, and health care.<sup>424</sup> The filibuster is largely responsible for the perception of gridlock in Congress and thus has escalated the frustration with government.<sup>425</sup>

Second, the constitutionality of the filibuster is important in evaluating the constitutionality of more recent attempts to require supermajority voting margins for Congressional action. For example, on the opening day of the 104th Congress, the House of Representatives adopted a procedural rule that requires a three-fifths vote to enact any tax increases.<sup>426</sup> The arguments against this rule are identical to the arguments that the filibuster is inherently unconstitutional: The text of the Constitution creates a general rule requiring governance by majority vote and embodies a principle of majoritarianism that precludes supermajority voting rules.<sup>427</sup>

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421. Eule, *supra* note 377, at 408-09 (citations omitted).

422. See text accompanying notes 385-392 *supra*.

423. See text accompanying notes 75-76, 96-106 *supra*.

424. See text accompanying notes 9-16 *supra*.

425. See text accompanying notes 137-141 *supra*.

426. See Lieber & Brown, *supra* note 341, at 2347.

427. See generally *An Open Letter to Congressman Gingrich*, *supra* note 342.



Third, in an increasing array of instances, Congress is adopting legislation that has entrenching effects; that is, it binds future sessions of Congress.<sup>428</sup> For example, the Gramm-Rudman-Hollings Act<sup>429</sup> sets the maximum allowable deficit for each of five years and prescribed automatic across-the-board spending cuts if the deficit exceeded this ceiling.<sup>430</sup> Also, the Budget Enforcement Act of 1990 provided that committees cannot be permitted to exceed their spending allocations for the five years covered by the budget resolution.<sup>431</sup> In the Senate, waiving this or most other requirements of the Budget Enforcement Act would require a sixty vote majority.<sup>432</sup> In late 1995, there was an effort to develop a seven-year budget plan that would bind future sessions of Congress and future Presidents.

Our conclusion is that supermajority voting rules in Congress are not inherently unconstitutional. Neither the Constitution's text nor an underlying philosophy of majoritarianism impose a general rule that a majority vote must be sufficient in all instances. However, it is unconstitutional for Congress to bind future sessions of Congress. It is a clearly established principle of constitutional law, supported by fundamental democratic principles, that one Congress cannot tie the hands of future Congresses

Therefore, Senate Rule XXII is unconstitutional in requiring a two-thirds vote in order to change the Senate's rules. Declaring this rule unconstitutional would mean that a majority of the Senate could abolish or reform the filibuster. Ideally, the Senate would recognize this violation and revise its own rules to eliminate the requirement for a supermajority. It is unlikely, however, that the Senate would make such a change; if nothing else, the change is likely to be filibustered by the minority party in the Senate.

The Constitution requires that the judiciary declare Rule XXII's requirement that there be a two-thirds vote for a change in the Senate's rules unconstitutional. Three decades ago, the Supreme Court declared that malapportioned legislatures were unconstitutional and acted out of a recognition that without

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428. Efforts to control the procedure by which future Congresses may act have been included in legislation since at least Reorganization Act of 1939, which contained an antifilibuster provision that limited debate to ten hours to be divided equally between proponents and opponents of a presidential reorganization proposal. See SENATE CLOTURE RULE, *supra* note 38, at 19.

429. See The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, tit. II, 99 Stat. 1037, 1038 (1985), amended by The Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, tit. I-II, 101 Stat. 754 (1987), amended by The Budget Enforcement Act of 1990, Pub. L. No. 101-508, tit. XIII, 104 Stat. 1388 (1990) (codified as amended at 2 U.S.C.A. §§ 901-922 (West Supp. 1990)).

430. See *id.* See generally Kahn, *supra* note 409.

431. See Budget Enforcement Act, 2 U.S.C.A. §§ 901-922 (West Supp. 1990).

432. See 2 U.S.C.A. § 637 (West Supp. 1996); see also 2 U.S.C.A. § 634 (West 1996) (on the budget process); 2 U.S.C.A. § 688 (West 1985) (same); 2 U.S.C.A. § 908 (West 1996) (same); 3 U.S.C.A. § 17 (West 1985) (limiting debate on objections to votes in the Electoral College); 5 U.S.C.A. § 912 (West 1996); 15 U.S.C.A. § 719(f)(d) (West Supp. 1996) (congressional rulemaking); 16 U.S.C.A. § 1823(d)(5) (West 1985) (floor consideration in the Senate); 19 U.S.C.A. § 2192(f)(3) (West Supp. 1996) (Senate procedure); 19 U.S.C.A. § 2193(d) (West Supp. 1996) (conference reports in Senate); 29 U.S.C.A. § 1232(d) (West 1985) (congressional review of labor regulations); 29 U.S.C.A. § 1306(b) (West Supp. 1996) (congressional procedures regarding labor regulations); 42 U.S.C.A. § 2159(c) (West 1994) (committee consideration of reports regarding health and welfare); 50 U.S.C.A. § 1941u(d) (West Supp. 1996) (committee report regarding national defense).

judicial action a serious constitutional violation would go unremedied. Likewise, unless the federal courts declare the entrenchment of the filibuster unconstitutional, a serious constitutional violation that frustrates the democratic process will go unremedied.