

## LECTURE

# ***LEX MAJORIS PARTIS:* HOW THE SENATE CAN END THE FILIBUSTER ON ANY DAY BY SIMPLE MAJORITY RULE**

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### INTRODUCTION

Though I never knew Professor Brainerd Currie—he died when I was just a lad—I did know and admire his son, Professor David Currie, who passed away in 2007. I was especially impressed by the younger Currie’s sustained interest in congressional constitutionalism<sup>1</sup>—that is, in various constitutional issues that have arisen in Congress and that have often involved special rules and procedures of Congress itself. In the tradition of the younger Professor Currie, I propose to use this hour, as the 2013 Currie Lecturer, to address one of the most important contemporary issues of congressional constitutionalism: the Senate filibuster.

In this hour I shall argue that, contrary to what many senators say and what some of them might even believe, the Senate may eliminate current filibuster practice on any day it chooses, and may do so by a simple majority vote. My main argument today reprises material from my recent book, *America’s Unwritten Constitution: The Precedents and Principles We Live By*, and I am particularly grateful

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† Sterling Professor of Law and Political Science, Yale University. This essay derives, virtually verbatim, from the Currie Lecture, delivered at Duke University School of Law on February 21, 2013. Special thanks to the editors of the *Duke Law Journal* for their kind willingness to accommodate my crazy schedule. Readers of this Lecture may be interested to learn that, exactly nine months after I delivered these remarks at Duke—on Thursday, November 21, 2013—the U.S. Senate chose to embrace the constitutional theory of filibuster reform presented in this Lecture. For a brief analysis of the Senate’s actions on November 21, 2013 and of their dramatic implications, see Akhil Reed Amar, *The Nuclear-Option Genie is Out of the Bottle*, SLATE (Nov. 21, 2013, 5:38 PM), [http://www.slate.com/blogs/weigel/2013/11/21/senate\\_goes\\_for\\_nuclear\\_option\\_and\\_nothing\\_will\\_ever\\_be\\_the\\_same.html](http://www.slate.com/blogs/weigel/2013/11/21/senate_goes_for_nuclear_option_and_nothing_will_ever_be_the_same.html).

1. See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801* (1997).

that the Duke Law School has kindly arranged for copies of this book to be given to the students in attendance today. In a brief Coda to my main argument, I shall offer additional elaboration, placing my views in the context of recent events on Capitol Hill and explaining how my proposed approach intersects with longstanding arguments about whether the U.S. Senate is or is not a “continuing body.”

## I.

Multimember institutions, such as the House, the Senate, and the Court, can do nothing—nothing at all!—unless certain basic social-choice rules are in place within these institutions. Crucially, there must exist master rules that determine how many votes within each institution will suffice to achieve certain results. Yet the written Constitution does not textually specify the master voting rule that operates inside these three chambers. Happily, two centuries of actual practice make clear that the bedrock constitutional principle within each is simple majority rule.

Some senators today, however, think otherwise. They think that the Senate’s current filibuster system cannot be abolished by a simple majority vote. They should think again, for they have misread America’s Constitution, written and unwritten. To see why, let’s first canvas the internal voting rules and deliberation protocols that apply within the Supreme Court and the House of Representative and then use the evidence and insights generated by this canvas to analyze the modern Senate filibuster.

The Constitution explicitly provides for a Chief Justice, but does not specify his role, except as the official who chairs presidential impeachment trials. Perhaps the Chief’s most important Court role, established by Court tradition, involves his power to assign opinions. Whenever he finds himself in the initial majority after oral argument, he decides which Justice shall take the lead in trying to compose an opinion on behalf of the Court. Of course, he may opt to assign the opinion-writing power/duty to himself, as John Marshall did in most important cases of his day, and as Earl Warren did in landmark cases such as *Brown v. Board of Education* and *Reynolds v. Sims*.

Thanks to the necessary-and-proper clause, Congress has also vested the Chief Justice with sundry administrative and supervisory responsibilities for the federal judiciary as a whole, but none of these congressional statutes has done much to clarify the Chief’s authority within the Supreme Court itself. And while Congress has defined the

jurisdiction of the Court and has enacted various rules of evidence and procedure for litigants who come before the Justices, federal lawmakers have opted to leave a great deal of the internal protocol among the Justices to be worked out by the Justices themselves.<sup>2</sup>

But by what voting rule? While the written Constitution left the matter unspecified, four interrelated factors pointed to simple majority rule as the master norm among the Justices, at least in the absence of some contrary protocol prescribed by Congress.

First, majority rule has unique mathematical properties that make it the obvious answer. When an uneven number of Justices are deciding between two simple alternatives, such as whether to affirm or reverse a lower-court decision or whether to rule for the plaintiff or the defendant in a trial situation, there is always an alternative that commands the support of a majority, but there might be no alternative that enjoys more than majority support.

Second, anyone who had studied Locke's canonical *Second Treatise of Government*—as had most of the leading American revolutionaries—had learned that majority rule was the natural default principle of all assemblies. In Locke's words: “[I]n assemblies empowered to act by positive laws, where no number is set by that positive law which impowers them, the act of the majority passes for the act of the whole and, of course, determines, as having by the law of nature and reason the power of the whole.”<sup>3</sup>

Other Founding-era authorities said the same thing. Building on this broad tradition, Thomas Jefferson's mid-1780s booklet, *Notes on the State of Virginia*, declared that “*Lex majoris partis* [is] founded in common law as well as common right. It is the natural law of every assembly of men, whose numbers are not fixed by any other law.”<sup>4</sup> In written remarks read aloud to the Philadelphia Convention, Benjamin Franklin described majority rule as “the Common Practice

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2. For general discussion of the various powers of the Chief Justice, see Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575 (2006).

3. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 96 (Thomas P. Peardon, ed., 1952) (1689). See generally WILLMOORE KENDALL, JOHN LOCKE AND THE DOCTRINE OF MAJORITY-RULE (1959); Bernard Wishy, *John Locke and the Spirit of '76*, 73 POL. SCI. Q. 413 (1958).

4. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (Frank Shuffelton ed., Penguin Books 1999) (1795) (footnotes omitted) (citing Brooke, Hakewell, and Puffendorf).

of Assemblies in all Countries and Ages.” None of his fellow delegates said otherwise.<sup>5</sup>

Third, the Constitution’s text evidently incorporated this majoritarian premise, albeit by implication. Whenever a federal institution was authorized by the Constitution to make a certain decision using some principle other than simple majority rule, the exception to the (implicit) rule was specified in the document itself. For example, the text made clear that a two-thirds vote was necessary for the Senate to convict an impeachment defendant or approve a proposed treaty, or for either house to expel a member, approve a constitutional amendment, or override a presidential veto. For other actions, majority rule simply went without saying.

Several of the Constitution’s provisions prescribing supermajorities make the most sense only if we assume that majority rule was the self-evident background principle that applied in the absence of a specific clause to the contrary. Thus, Article I presupposed that each house would “pass” legislative bills by majority vote—except when trying to override presidential vetoes, which would require a *special* supermajority. The supermajorities for constitutional amendments likewise were designed to be *more demanding* than the simple majorities for ordinary statutes; and the Senate supermajority for treaty ratification was meant to erect a *higher* bar than for ordinary Senate agreement to ordinary legislation—a higher bar meant to offset the absence of the House in the formal treaty making process. Similarly, the provisions empowering each house to exclude improperly elected or constitutionally ineligible candidates were meant to operate by simple majority rule—as distinct from the *exceptional* supermajority rule that applied when a house sought to expel duly elected and fully eligible members.<sup>6</sup>

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5. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 198 (Max Farrand ed., 1911).

6. On the enactment of ordinary laws by simple majority, see generally THE FEDERALIST No. 22 (Alexander Hamilton); *id.* No. 58 (James Madison); *id.* No. 62 (James Madison); Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73 (1996). On the basic difference between statutes and constitutional amendments, see BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 3–33 (1991). On the way in which treaty supermajority rules help offset the absence of the House, see AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 190 (2005). On the key differences between house exclusion by majority vote and house expulsion by supermajority, see *Powell v. McCormack*, 395 U.S. 496, 506–12 (1969).

But if majority rule truly went without saying, then why did the Framers feel the need to specify in Article I, Section 5 that a majority of each house would constitute a quorum? The obvious answer is that state constitutions and British practice had varied widely on the quorum question, and thus *on this special issue* there did not exist an obvious default rule from universal usage or mathematical logic. For example, Pennsylvania set the quorum bar at two-thirds, whereas the English rule since the 1640s had provided that any 40 members could constitute a quorum of the House of Commons. But neither Parliament nor any state circa 1787 generally required more than simple house majority votes for the passage of bills or the adoption of internal house procedures, even though in many of these states no explicit clause explicitly specified this voting rule. In America circa 1787, majority rule in these contexts thus truly did go without saying.

We should also note that the Constitution's electoral-college clauses explicitly speak of the need for a majority vote. In this context, involving candidate elections, majority rule did not go without saying as the obvious and only default rule. Plurality rule furnished a salient alternative (and indeed the rule that even today remains the dominant one for candidate contests in America). But this point about candidate elections, which might involve voting on three or more persons simultaneously, did not apply to the enactment of house rules or the exclusion of members under Article I, Section 5 or the enactment of laws under Article I, Section 7—all of which involved *binary* decisions against the status quo. (As noted, majority rule has unique mathematical advantages in situations of binary choice.)

Fourth, and as I explain in considerable detail in my book, *America's Unwritten Constitution*, majority rule was not only implicit in the Constitution's text, but also visible in its very enactment. Nothing in Article VII explicitly said that the thirteen state ratification conventions should act by simple majority rule, but this is what every convention did, and in a manner that suggested that the issue was self-evident.<sup>7</sup>

Thus, in a wide range of constitutional contexts, majority rule went without saying. For the same reason this background rule applied to ratifying conventions, and to each house of Congress, it applied to the Court as well.

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7. AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 56–63 (2012).

From its first day to the present day, the Court has routinely followed the majority-rule principle without even appearing to give the matter much thought. As a rule, when five Justices today say that the law means X and four say it means Y, X it is. Over the years the Court has invalidated dozens of congressional laws by the slimmest of margins: 5–4.

Politicians and commentators have occasionally urged Congress to respond with a statute forbidding the Court to strike down federal legislation unless the Court vote is at least 6–3. Yet Congress has never followed this advice—and with good reason, for hidden within this proposal there lurk at least two distinct and insuperable Article VI supremacy-clause problems. First, in situations not governed by the proposed statute the Court would presumably continue to operate by majority rule. For example, Congress surely would not want the Court to enforce state laws violating congressional statutes so long as the state got four of the nine Court votes. But if a simple majority vote would suffice to vindicate a federal statute over a state law, the same simple majority vote should suffice to vindicate the Constitution over a federal statute. By trying to change the Court’s voting rule *selectively*, the proposed statute would violate the legal hierarchy laid down in Article VI, which privileges the Constitution over federal statutes in exactly the same way that it privileges (constitutionally proper) federal statutes over mere state laws. Second and more generally, any statute that gave a jurist brandishing a mere congressional law (or any other sub-constitutional law) a weightier vote than a dueling jurist wielding the Constitution would improperly invert the clear prioritization of legal norms established by the supremacy clause.<sup>8</sup>

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8. Could Congress enact a statute requiring that no federal law be held unconstitutional unless the court hearing the case is unanimous? If so, were Congress to structure a Court of 100 members (as the Constitution allows), the Court would have to enforce a federal law even if 99 of the 100 Justices found that law clearly unconstitutional. At this point, judicial review would have effectively been undone by a mere statute. If this goes too far—and it surely does—the only principled stopping point on the slippery slope is to insist that Congress may pass no law giving any judge who sides against a constitutional claim more weight than a judge who sides with a constitutional claim—a principle implicit in the supremacy clause itself.

Two state constitutions have provisions preventing their respective state supreme courts from declaring state legislation unconstitutional unless the court acts by supermajority. In North Dakota, the state constitution authorizes a majority of a quorum of the state supreme court to act for the court in all situations “provided that the supreme court shall not declare a legislative enactment unconstitutional unless at least four [of the five] of the members of the court so decide.” N.D. CONST. art. VI, § 4. This clause has been understood to apply only when the issue is whether a North Dakota statute violates the state constitution. Thus read, it raises

Could the Justices themselves decide by simple majority rule to abandon Court-majority rule in some situations where these sorts of supremacy-clause problems do not arise? In fact, the Court has done just that, but in a manner that has preserved the ultimate authority of majority rule. By Court tradition, four Justices—a minority—can put a case on the docket and can ordinarily guarantee that the petitioner seeking review will be able to press his case via full briefing and oral argument. But ultimately, the Court majority of five has the last word—not just on the merits of the case, but on whether the Court itself will in fact issue any opinion. At any time, a simple Court majority of five can dismiss any case on the docket, even if the remaining four Justices adamantly object. In short, minority rules such as the “Rule of Four” nest within a framework of simple majority rule.<sup>9</sup>

A similar analysis applies to the voting rules followed by the House of Representatives. In general, the House follows the Constitution’s implicit directive of simple majority rule in performing its basic constitutional functions: enacting legislation, authorizing expenditures, organizing itself, judging its members’ elections and qualifications, issuing subpoenas, adjudicating contempts, maintaining order within its own walls, and impeaching executive and judicial officers. True, a labyrinth of House rules—most obviously, a set of rules enabling committees and the House leadership to dictate the House agenda and another set of rules regulating parliamentary

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no major federal problem. North Dakota is not obliged to have a state constitution that trumps ordinary state statutes, nor is the state obliged to provide for strong judicial enforcement of its state constitution. The Nebraska Constitution features a similar clause: “A majority of the [state supreme court] members sitting shall have authority to pronounce a decision except in cases involving the constitutionality of an act of the Legislature. No legislative act shall be held unconstitutional except by the concurrence of five [of the court’s seven] judges.” NEB. CONST. art. V, § 2. The Nebraska clause apparently has been held by the state supreme court to apply to cases involving claims that a state statute violates the federal Constitution. See *DeBacker v. Brainard*, 161 N.W. 2d 508, 508–09 (Neb. 1968) (per curiam); see also *DeBacker v. Sigler*, 175 N.W. 2d 912, 914 (Neb. 1970) (Spencer, J., dissenting). To the extent that this clause might direct the state’s highest court to affirmatively enforce a state statute despite the fact that a court majority deems the statute contrary to the U.S. Constitution, this clause plainly violates the federal supremacy clause, which specifically addresses state judges and obliges them to prioritize the U.S. Constitution over a mere state statute. No other state follows the North Dakota or Nebraska model. Instead, majority rule generally prevails on state courts. For an excellent discussion, see Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73 (2003).

9. For a subtle analysis of how the Court’s majority has ultimately exercised its power to manage and/or dismiss cases docketed by a Court minority, see Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067 (1988).

procedure—may prevent a given matter from ever reaching the House floor for a simple majority vote. But these internal rules are themselves authorized at the biennial beginning of each new Congress under the aegis of Article I, Section 5—and they are authorized by a simple chamber majority in keeping with the Constitution’s letter and spirit.<sup>10</sup>

## II.

Not so with what has now become perhaps the most dysfunctional aspect of modern American institutional practice: the Senate filibuster. Thanks to an internal Senate rule allowing filibusters—Senate Rule 22, to be precise—the de facto threshold for enacting a wide range of legislation has in recent years become 60 votes instead of the constitutionally proper 51 votes. Under Rule 22, a mere 41 senators can prevent a typical bill from ever reaching the Senate floor for a final vote, even if 59 senators on the other side are intensely eager to end debate and approve the bill. Can you spell “gridlock?”

The filibuster rule itself is not approved biennially at the outset of each new congressional term. Rather, this old rule, initially adopted by the Senate in the 1910s and significantly revised in the 1970s, simply carries over from one Congress to the next by inertia, under the notion that the Senate, unlike the House, is a continuing body. Thus Senate rules, once in place, need never be formally

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10. Although in recent years the House occasionally adopted internal rules requiring supermajority votes in the enactment of certain types of laws—laws raising taxes, for example—leading constitutional scholars have condemned these rules as unconstitutional under Article I, Section 7, see Rubinfeld, *supra* note 6, at 83. Other thoughtful scholars have defended these rules by arguing that each house has always retained the inalienable right to suspend supermajority requirements at any time, and to do so by a simple majority vote—a theory honoring the Constitution’s basic requirement of house-majority rule, but relocating the effective locus of this constitutional norm from Article I, Section 7 to Article I, Section 5. See John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327, 343–46 (1997). One noteworthy limit on the agenda-setting power of House leaders and committees is embodied in the device of the discharge petition. Through this theoretically important if little-used safety valve, a majority of the entire House—218 members—may bypass committee veto-gates and bring a bill to the floor. And for the argument that all House rules are and indeed must be modifiable at all times by a later House majority, see *id.*; see also *United States v. Ballin*, 144 U.S. 1, 5 (1892).

reenacted. Similarly, Senate leaders, once in place, need never be formally re-elected.<sup>11</sup>

But the Senate does generally retain the right to oust any holdover leaders at any time and to do so by a simple majority vote—and this majoritarian principle, which clearly applies to holdover Senate leaders, should also apply to holdover Senate rules. Thus, all Senate rules, including the filibuster rule, are valid *if and only if a majority of the Senate at any time may change the old rules by simple majority vote*.<sup>12</sup>

But some senators today seem to believe that a simple Senate majority cannot change the old filibuster rule, even if this Senate majority emphatically wants change. Why not? Because the old filibuster rule says so. That’s some catch, that Catch-22.<sup>13</sup>

This circular logic will not do. The filibuster rule, like every other American law or regulation, is ultimately subordinate to America’s Constitution. If the Constitution requires ultimate majority rule in the Senate, no purported Senate rule may properly say otherwise. And in fact, America’s Constitution, correctly understood, does require ultimate majority rule in the Senate. Insofar as the old filibuster rule claims the status of an entrenched protocol that cannot be altered by an insistent current Senate majority, then the old filibuster rule is to this exact extent unconstitutional, and should be treated as such by the Senate itself, acting as the proper promulgators and judges of their own procedures. Concretely, if a simple majority of the Senate ever did take steps to repeal the filibuster rule, the Senate’s presiding officer should rule this repeal to be in order and this ruling from the chair should be upheld by a simple Senate majority. And that would be that: No more filibusters.

We need not insist that a current Senate majority has the right to change its rules instantaneously and peremptorily. Thus, the Senate’s presiding officer may properly allow each side ample time to make its

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11. The specific ways in which the Senate operates as a “continuing body” are complex, as I explain in my coda.

12. Thus, while the Senate need not re-enact its standing rules every two years—as the House has generally felt it must—the Senate, like the House, must be free to repeal any standing rule and must be free to do so by simple majority vote.

13. According to Senate Rule 22—I swear I am not making up this number!—a motion to end debate “shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn—except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting.” STANDING RULES OF THE SENATE, R. XXII, *in* COMM. ON RULES & ADMIN., SENATE MANUAL, S. DOC. NO. 112-1, at 21 (2011).

case before holding a vote on a Senate rule change. But any attempt to prevent a reform vote altogether via dilatory tactics—that is, any attempt to indefinitely filibuster attempted filibuster reform—would violate the applicable written and unwritten constitutional principles.

This conclusion may astonish. Some might think that if the name of the game is close attention to actual governmental practice, the fact that the filibuster exists, and the fact that many senators claim that it cannot be altered by a simple majority are unanswerable game-winners.

It is precisely at this point that the general framework that I put forth in my recent book, *America's Unwritten Constitution*, proves its worth. In a nutshell, I argued in that book that there exist various tools and techniques enabling interpreters to range beyond individual words and clauses in the written Constitution while remaining entirely faithful to the grand project of American constitutionalism. Let us, then, carefully apply this framework to the filibuster issue.

Begin by noting that even though majority rule is not always explicitly specified in various clauses of the written Constitution, it surely forms part of America's *implicit* Constitution in certain respects. If the Senate may entrench (that is, enact and insulate from simple majoritarian repeal) a rule that 60 votes are required to pass a given bill, the Senate could likewise entrench a rule that 70 votes are required. But such a rule would plainly violate the letter and logic of Article I, Section 7, which provides that a two-thirds Senate majority always suffices, even when the president vetoes a particular bill. Surely it follows *a fortiori* that something less than a two-thirds vote suffices in the absence of a veto.

And that something is majority rule, as is powerfully evident from America's *enacted* Constitution—that is, from the very process by which the written text itself was enacted into law and thus sprang to life. This enactment process in 1787–88 confirms that majority rule does indeed go without saying in the Constitution, in the absence of strong implicit or explicit contraindication. Majority rule supplied the self-evident master norm for state ratifying conventions organized under Article VII. This key fact provides a compelling reason to believe that majority rule likewise provides the self-evident master norm for senatorial legislation under Article I, Section 7 and also for senatorial internal rulemaking under Article I, Section 5. Thus, unless we find in the written or unwritten Constitution some strong contraindication, majority rule is the Constitution's proper voting

protocol when the Senate decides whether to keep or scrap the filibuster rule.<sup>14</sup>

Nothing in America's *lived* Constitution—the norms and customs of ordinary Americans living out their daily lives—provides strong contraindication. While it would be surprising if the daily rhythms and routines of average Americans decisively answered technical questions concerning the Senate's internal procedures, it is perhaps noteworthy that when average Americans participate in various clubs and the like, they quite often and without much ado practice majority rule.

Likewise, nothing in America's *doctrinal* Constitution, based on judicial teachings, supports the entrenched filibuster. Not only have the Justices themselves always followed majority rule, but in the 1892 case, *United States v. Ballin*, the Court explicitly embraced majority rule as the background master norm for each house of Congress:

[T]he general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations. . . . No such limitation is found in the Federal Constitution, and therefore the general law of such bodies obtains.<sup>15</sup>

Nor does anything in America's *symbolic* Constitution—the special cultural icons in our legal-cultural pantheon, such as Lincoln's Gettysburg Address and King's "I Have a Dream" speech—argue for an entrenched Senate filibuster rule. Many ordinary citizens today disdain Senate Rule 22, and this disdain has a long history. The most memorable filibusters in the American experience occurred in the 1950s and early 1960s, when various Southern senators tried to thwart much-needed civil rights legislation—legislation that eventually passed in the mid-1960s and became the pride of the nation, reaffirming the equality of all races (and also of both sexes). In short, key elements of America's symbolic Constitution came about despite the filibuster, not because of it.

Nor, finally, does the history of actual *institutional* practice provide solid support for an entrenched filibuster rule. Properly

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14. On majority rule as the obvious command of Article I, Section 7, see Rubinfeld, *supra* note 6, at 78–85. On majority rule as the obvious command of Article I, Section 5 see McGinnis & Rappaport, *supra* note 10, at 343–46.

15. *United States v. Ballin*, 144 U.S. 1, 6 (1891).

construed and contextualized, the history of Senate practice in fact supports modern-day filibuster reformers.<sup>16</sup>

Nothing like Rule 22's Catch-22 was in place in the age of George Washington or in the Jeffersonian era that followed. Throughout the 1790s and early 1800s the Senate practiced and preached simple majority rule. Under the procedures that governed the Senate during its earliest years, a senator could move "the previous question" and thereby end debate if a majority of senators agreed; and senators could also call an unruly orator to order at any time and thereby oblige him to "sit down," subject to a ruling by the chair and if necessary an appeal to the Senate as whole.<sup>17</sup>

While some scholars have quibbled about the precise operation of these initial rules, the history of the Senate prior to the 1830s offers no notable examples of organized and obstructionist filibustering—and absolutely nothing like a pattern of systematic, self-perpetuating, entrenched frustration of Senate-majority rule. Thomas Jefferson, the Senate's presiding officer from 1797–1801, was thus describing actual senatorial norms and usages when he penned the following passages of his 1801 *Manual of Parliamentary Practice for the Use of the Senate of the United States*: "No one is to speak impertinently or beside the question, superfluously or tediously. . . . The voice of the majority decides. For the *lex majoris partis* is the law of all councils, elections, &c. where not otherwise expressly provided."<sup>18</sup>

For much of the mid-nineteenth century, even as Senate minorities began to develop and deploy dilatory tactics, these tactics typically occurred with the indulgence of the Senate majority. Longwinded speechifying occasionally delayed the Senate's business, but ordinarily orations did not prevent majorities from ending debate at some point and taking a vote. The Senate in those days was smaller and had less business to transact. The upper chamber often opted to indulge individual senators as a matter of courtesy. In turn, the indulged senators did not routinely try to press their privileges so as to prevent Senate majorities from governing. For example, in 1850

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16. For a wise reminder that practices do not typically interpret and contextualize themselves, and that different opinions are apt to exist about how best to interpret a practice, see Jerry L. Mashaw, *Governmental Practice and Presidential Direction: Lessons from the Antebellum Republic?*, 45 WILLAMETTE L. REV. 659, 663 (2009).

17. S. JOURNAL, 1st Cong., 1st Sess. 13 (April 16, 1789).

18. See generally SARAH S. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE (1997); Richard R. Beeman, *Unlimited Debate in the Senate, the First Phase*, 83 POL. SCI. Q. 419 (1968).

politicians of all stripes from all regions understood that California's admission—giving free states a narrow but decisive majority over slave states in the Senate—mattered hugely *precisely because the Senate's operative principle in the mid-nineteenth century was in fact simple majority rule*. According to one expert treatise, prior to the 1880s virtually every obstructed measure eventually prevailed against the opposition's stalling tactics.<sup>19</sup>

In the late twentieth and early twenty-first centuries, routine filibustering practices have skyrocketed. Yet senators in the modern era have failed to achieve a general consensus via a compelling line of clean, consistent Senate rulings on the key constitutional question. Properly framed, this question is not whether the Senate may choose by inaction and inertia to keep the filibuster, nor whether the Senate may choose to keep the filibuster by re-adopting it via a fresh majority vote. Rather, the question is whether the current Senate is simply stuck with the old filibuster rule, even if a current majority emphatically wants to change the rule and explicitly votes to do so. This issue has only intermittently arisen in a clean parliamentary fashion. Over the years various senators may have quietly favored the old filibuster rule but have not wanted to publicly take the blame for this position, preferring instead to shroud the issue in layer upon layer of procedural complexity.

In 1975, a majority of the Senate in fact upheld a constitutional ruling of the vice president, sitting in the chair, that a mere majority could rightfully end debate on filibuster reform and overturn the old filibuster rule. Shortly thereafter, however, the Senate voted to reconsider its earlier action, leaving us today with a Rorschach-blot precedent whose meaning is largely in the eye of the beholder. In the early twenty-first century, Republican senators frustrated by the success of the Democratic minority in blocking votes on various judicial nominations loudly threatened to revise the old filibuster rule by a simple majority vote. This threatened revision, popularly nicknamed "the nuclear option," never came to a conclusive floor vote. Instead, Democrats moderated their obstructionism and Republicans sheathed their sword.

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19. FRANKLIN L. BURDETTE, *FILIBUSTERING IN THE SENATE* 39 (1940); *see also* David R. Mayhew, *Supermajority Rule in the U.S. Senate*, 36 *POL. SCI. & POL.* 31, 31 (2003) (noting that for most of its history, the Senate never "had any anti-majoritarian barrier as concrete, as decisive, or as consequential as today's rule of 60"). *See generally* Beeman, *supra* note 18.

Precursors of this “nuclear option”—also known as “the constitutional option”—were forcefully advocated by prominent senators throughout the twentieth century, and at various moments over the last sixty years these precursors have in fact won the considered support of vice presidents and Senate majority leaders of both parties. Many of the most important filibuster reforms of the twentieth century came about when reformers first threatened the “constitutional option” and then compromised by effectuating their desired reforms in an endgame process that formally obeyed the Senate’s Catch-22 rule structure.<sup>20</sup>

If a Senate majority truly were powerless to set things right, then Senate practice would be wildly out of step with the practice of its sibling body, the House of Representatives. In the House, majority-rule rules today and has always ruled. While this fact alone does not prove that majority rule is required by Article I, Section 5, it surely confirms that majority rule is consistent with this Section.<sup>21</sup>

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20. For discussion of the 1975 rulings, see John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J.L. & POL. 505, 516–17 (2004). For a contrasting account claiming the existence of a clear senatorial pattern rejecting prototypes of the nuclear option, see Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445, 476–78 (2004). Gerhardt’s own narrative, however, itself provides evidence that the Senate has in fact flip-flopped on the key issue. For an illuminating account of the strong senatorial and vice presidential support for the nuclear/constitutional option for much of the last century, and a sophisticated discussion of how the strong threat of the nuclear/constitutional option has repeatedly operated to win filibuster reforms that formally followed the Catch-22 voting rules laid down by previous Senate rules, see Martin B. Gold and Dimple Gupta, *The Constitutional Option To Change Senate Rules and Procedures: A Majoritarian Means To Overcome the Filibuster*, 28 HARV. J.L. & PUB. POL’Y 205 (2004). For the early-twenty-first-century Republicans’ argument for the nuclear option, see John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL’Y 181 (2003); Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 UTAH L. REV. 803.

21. For a qualification/clarification of my claim about House practice, see *supra* note 10. Note that the majority-rule principle operates slightly differently for each half of Congress. In the House, new rules are affirmatively adopted by majority vote at the start of every new congressional term. In the Senate, the old rules need not be adopted by majority vote at the start, but must be repealable by majority rule. Under an alternative characterization, the old Senate’s rules do lapse at the end of each Congress, just like the old House’s rules, but the new Senate need not formally vote to readopt the old Senate rules at the outset of a new Congress. Instead, the new Senate may implicitly readopt the old Senate simply by acting in conformity with them. On this view, the new Senate at the beginning of its session may adopt a wholly new set of rules and may do so by following “general parliamentary law”—which enables a simple majority to end debate—until these new rules are adopted. See Gold & Gupta, *supra* note 20, at 220–22 (explaining this theory—an early version of the constitutional option—as put forth by Senator Thomas J. Walsh in 1917).

## III.

The politically convenient assertion that today's Senate majority is simply a powerless captive of ghosts of Senates past should ring particularly hollow to British ears—and this hollowness deserves special attention in any analysis of how America's Constitution might look to a proper British constitutionalist attentive to unwritten constitutional norms and principles. While Britain has never had an American-style written Constitution, the British have developed a deep understanding of the proper relationship among Parliaments over time. It is a bedrock principle of British constitutionalism that one Parliament cannot bind a later Parliament. Otherwise, the inalienable right of parliamentary self-government would be lost. Indeed, what makes a right *inalienable* is precisely the fact that it is incapable of being waived, even by an actual practice of apparent waiver.

Just as Americans at the Founding surely understood that no person could be a judge in his own case, thanks in part to Blackstone's clear formulation of the basic principle, so too the Founders were intimately familiar with and embraced what Blackstone had to say about the relationship between one legislature and its successor: "Acts of parliament derogatory from the power of subsequent parliaments bind not." Why not? Because, Blackstone explained, prior Parliaments are not legally superior to subsequent Parliaments. By what voting rule would each parliament proceed? Here too, Blackstone was clear: "In each house the act of the majority binds the whole."<sup>22</sup>

The same logic applies on this side of the Atlantic. Each house can make rules for itself. But neither house can entrench rules in a way that prevents a later house from governing itself. Only the Constitution can create entrenched rules of this sort. And on this

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22. 1 WILLIAM BLACKSTONE, COMMENTARIES \*181. For analysis of British practice and theory strongly supportive of the approach advocated here, see Josh Chafetz's remarks in his debate with Michael Gerhardt, *Is the Filibuster Constitutional?*, 158 U. PA L. REV. PENNUMBRA 245, 250 (2010). On the equality of legislatures across time, see THE FEDERALIST No. 78 (Alexander Hamilton) ("[T]he last [statute] in order of time shall be preferred to the first . . . from the nature and reason of the thing. . . . [B]etween the interfering acts of an *equal* authority, that which was the last indication of its [the legislature's] will, should have the preference."); cf. *Newton v. Comm'rs*, 100 U.S. 548, 559 (1879) (similar). On majority rule within each house, see *supra* note 15 and accompanying text.

issue, the rule that the Constitution has entrenched for each house is majority rule.<sup>23</sup>

Because this protocol is established by the Constitution itself, the protocol cannot be changed by either house or by statute. Just as Congress may not properly enact an ordinary statute that changes the constitutional rules governing how future ordinary statutes are to be enacted, so too neither house may properly enact a house rule that changes the constitutional rules governing how future house rules are to be enacted.

#### IV.

Here is one way, then, of pulling together the basic argument. It is obvious that some specific voting rule must be used to operationalize the Article I, Section 5 power and duty of each house to determine its own rules of proceeding. If majority rule is not the implicit rule, what is? Without some jumpstarting rule, the first House and the first Senate in 1789 would have faced an insoluble infinite regress problem. (By what initial voting rule would each house decide what voting rule to use in determining its rules of proceedings? By what pre-initial voting rule would that initial voting rule be decided? By what pre-pre-initial voting rule would the pre-initial voting rule be decided? And so on, without end.) But no such infinite regress in fact occurred in the first Congress because majority rule did in fact go without saying in each house in 1789 just as it had gone without saying in each ratifying convention in 1787–88. This first set of Article I, Section 5 votes thus established the first key point of actual practice.

Just as the first House and the first Senate each used majority rule to decide its procedures, every subsequent House and Senate may and must do the same, for nothing in the Constitution made the Congress of 1789 king over later Congresses. All Congresses are equal in this respect. In fact—and this is a second key point about

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23. Clear evidence that the Founding generation accepted this logic comes from the text of Virginia's 1786 Bill of Religious Freedom, a landmark statute enacted largely thanks to the efforts of Jefferson and Madison: "[W]e well know that this Assembly, elected by the people for the ordinary purposes of Legislation only, have no power to restrain the acts of succeeding Assemblies constituted with powers equal to our own, and that therefore to declare this act irrevocable would be of no effect in law." An Act for Establishing Religious Freedom, 1785 Va. Acts ch. 34, *reprinted in* 12 STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 84, 86 (photo. reprint 1969) (William W. Hening ed., Richmond, George Cochran 1823).

actual practice—neither house has ever formally required a supermajority for amendment of its rules. Not even Senate Rule 22 has the audacity to openly assert that it cannot be repealed by simple majority vote. Rather, Rule 22 says only that *debate* on its own repeal cannot be ended by simple majority vote.

The question thus becomes, is this supermajoritarian aspect of Rule 22 a genuine rule of debate or a de facto rule of decision? If Rule 22 simply means that the rule itself should not be repealed without a fair opportunity to debate the repeal, then Rule 22 is fully valid. But insofar as Rule 22 in fact allows repeal opponents to stall interminably so as to prevent a majoritarian repeal vote from ever being held, then Rule 22 is to that precise extent operating as an unconstitutionally entrenching supermajority rule of decision rather than a proper rule of debate. It is the right and duty of each senator to adjudicate for herself whether Rule 22 has in fact come to operate as an improper rule of decision rather than a proper rule of debate. And in adjudicating that question, the Senate, acting as a constitutional court of sorts, acts by majority rule, just as the Supreme Court itself does when adjudicating constitutional (and other) questions.

#### CODA: A NOTE ON THE SENATE AS A CONTINUING BODY

A simple question: Is the Senate a continuing body? It turns out the answer is not so simple, as illustrated by last month's activities on Capitol Hill. And getting the right answer matters crucially for sensible filibuster reform in the weeks and months ahead.

For some purposes, the Senate is surely a continuing body. Whereas the incoming House of Representatives had to affirmatively vote for John Boehner as its Speaker, no similar drama unfolded in the Senate: Harry Reid continued as Majority Leader purely by inertia, with no fuss or fanfare. So too, because Senator Pat Leahy had become Senate President pro tempore in the old Congress, he simply remained in place as the new Congress commenced.

For other purposes, however, the Senate is not a continuing body. All the bills that passed the Senate before January 3 went "poof" as the clock chimed midnight. Most obviously, the \$60 billion Hurricane Sandy relief package approved by the Senate in late December turned to dust at the witching hour. Thus a new relief bill had to be affirmatively re-passed by the new Senate, alongside the new House.

So the correct answer to our simple yes-or-no question is yes-and-no. Though this seeming doublespeak may trouble some layfolk, there is nothing sinister afoot here. Law often works this way, as many of you doubtless learned in your 1L classes. For example, are corporations persons? Yes and no. Surely yes, for some purposes: Government cannot deprive a corporation of its property without due process of law. But for other purposes, corporations are properly not treated as persons. The axiom of one person, one vote applies only to flesh-and-blood.

But what unifying principle explains when to treat the Senate as continuous and when to treat it as noncontinuous? And what does this unifying principle mean for filibuster reform?

Because our written Constitution is remarkably terse, certain overarching principles must be inferred from the document read as a whole—principles such as the separation of powers, federalism, and the rule of law. Legislative bicameralism is another implicit principle. When passing laws, the Senate must act in tight bicameral coordination with the House.

The House is obviously not a continuing body. Every two years its entire membership comes before the voters, who are free to choose a completely new slate. Legally, no House member holds over from one House to the next. Because each House begins anew biennially, all House legislative bills legally expire when that House expires and a new House arises to replace it. In the spirit of bicameral symmetry and co-ordination, the same rules about legislative bills sensibly apply to the Senate: All Senate bills die when one Congress ends and a new one begins. Such has been the practice since the Founding.

But on matters other than bicameral lawmaking, the Constitution generally allows each chamber to govern itself, and neither need mirror the other. The House must choose its leaders and its own internal rules of procedure at the outset of each new Congress, because all its members have been freshly elected by the voters. By contrast, only a third of the Senate's membership comes before the voters in any given election, so this chamber can simply allow its internal procedures and its internal leadership to continue by inertia. Harry Reid need not be re-elected at the outset of this new Congress, but of course he can be ousted on any day if a Senate majority so decides. So too with old Senate rules, which need not be formally readopted every other January, but can be changed at any time.

Which brings us back, one last time, to the question of filibuster reform. The old Senate's rules permitting filibusters carry forward by inertia. Of course they can be changed in January of odd-numbered years, as a new Congress begins, but they can also be changed on any other day—just as the Senate leadership can be changed at any time. Changing rules or leaders within a session is not improperly changing the rules of the game in the middle of the game. Rather, the game itself, as defined by the Constitution's governing principles, allows new procedural rules and new leaders at any moment.

But there is at least one basic constitutional principle that, absent a constitutional amendment, cannot be changed, ever: Majority rule—*lex majoris partis*. The Constitution makes no sense without this rule as the implicit backdrop. Constitutional amendments require supermajorities precisely because ordinary statutes do not; overruling a president's veto requires a two-thirds vote of each house precisely because passing an ordinary law requires something less, namely a simple majority. In 1789, the first Senate adopted its procedural rules by simple majority vote, and all later Senates may likewise amend these rules by simple majority.

Notably, the Senate's existing filibuster rules do not themselves purport to require a supermajority vote to change them. But they do purport to require a supermajority vote to end debate on the question of filibuster reform.

The simple solution to the issue of filibuster reform is thus for the Senate to take Rule 22 at its word and insist that this rule remain a mere rule of *debate* rather than a de facto rule of *decision*. In other words, the Senate must see to it that internal rules of debate and procedure stay within their constitutional bounds, and do not unconstitutionally morph into entrenched supermajority voting rules. The Senate itself today or on any day may properly decide that filibuster-reform opponents are actually preventing filibuster reform from *ever* coming to a vote. If so, reform opponents have improperly crossed a constitutional line: the filibuster rule is no longer operating as a constitutionally proper rule of genuine *debate*, but has instead become an unconstitutional supermajority rule of *decision*. In this situation, a simple majority of the Senate can rule that the filibuster system is operating unconstitutionally, in violation of the underlying majority-rule principle that constitutionally governs both House and Senate. Thus, a simple majority of Senators can rule any filibuster out of order, as a violation of constitutional first principles.

And to repeat, a majority of Senators can do this today or on any day, not just in January of odd-numbered years. On *this* precise issue, the Senate is indeed a continuing body; no day is any different from any other day. And unless the Constitution itself explicitly specifies otherwise (as it does for veto overrides, impeachment trials, and so on), the Senate always—today and every day—operates by ultimate majority rule. Every Senate rule and procedure must be amendable by a determined Senate majority, if that determined majority deems the old rule unsuitable. It's just that simple.