

GRIDLOCK AND SENATE RULES

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INTRODUCTION

Our assignment in this symposium is to explore the role that legal issues play in what is popularly known as “gridlock” in Washington. I am tempted to declare the symposium over by arguing that there are no such relevant legal issues—that our problems are really political and ideological, not stemming from any legal or constitutional deficiencies. But that would be too easy. There are legal defects which contribute to our current frustration, even if we may ultimately conclude that they are symptoms and not causes of gridlock.

It is certainly true that the federal government is in a period of extreme dysfunction.¹ We see it in conflicts between the President and the Congress over appointments and long range fiscal policy. We especially see it in the inability of the House and Senate to cooperate on urgently needed legislative priorities. Year after year, budget resolutions and appropriations bills are not passed in a timely fashion, and often not at all.² Measures dealing with major public issues die in the Senate.³ I want to focus in this paper on one of the most talked about elements of gridlock, the use of Senate rules and practices

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1 See, e.g., THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS* (2012) (characterizing the landscape as containing ideologically polarized parties, including the ideological outliers in the Republican party).

2 See Rebecca M. Kysar, *Reconciling Congress*, 88 NOTRE DAME L. REV. ____ (2013).

3 In the 111th Congress only thirty-six percent of House-passed bills also passed the Senate, while sixty-seven percent of Senate-passed bills passed the House. Gregory Koger, *Filibustering and Partisanship in the Modern Senate*, in *PARTY AND PROCEDURE IN THE UNITED STATES CONGRESS* 217, 224 (Jacob R. Straus ed. 2011). Professor Teter in his Symposium contribution has noted that recent Congresses have passed far fewer bills overall than in

by the minority to block virtually any action unless it is supported by sixty senators. In the public discourse about paralysis in Washington, dysfunction in the Senate may be the most frequently cited cause. Some commentators have even suggested that the Senate now operates as a “vetocracy,”⁴ and others like Mann and Ornstein have observed that changes in the Republican Party have brought about a laser-like focus on obstruction rather than cooperation on legislation.⁵

This is not the place for a deep analysis of the underlying causes of our political dysfunction. But there is agreement on some points. Rarely in our history have the two parties been more polarized.⁶ In the Republican Party, zealots have eliminated the traditional moderate-to-liberal legislators,⁷ and to a lesser extent the Democratic Party is also more homogeneous.⁸ As a result, as a striking chart in Mann and Ornstein’s recent book shows, there is no ideological overlap between the parties in the Senate—the most liberal Republican is still more conservative than the most conservative Democrat.⁹ As Gregory Wawro and Eric Schickler have observed, party lines today correspond to policy preferences and ideology more tightly than at other times in our history.¹⁰ Compromise across the aisle is virtually never obtained. Procedural holds by individual senators have proliferated on both legislation and nominations. The use or threatened use of the filibuster—extended debate used to block Senate action—has become commonplace, resulting in what is in effect a supermajority voting requirement for any legislative business. We can now see that convulsive events like the civil rights movement, the rise of the religious right, and the “Gingrich revolution” of the 1990s have polarized the parties and reshuffled the voters, eliminating the kind of bipartisan cooperation we saw in the 1950s and 1970s. Perhaps more importantly, this realignment has been accompanied by a new rhetoric, illustrated by the “Tea Party” faction of the Republican Party, that characterizes the other party as not just misguided but evil and immoral.¹¹ Since legislating is difficult under

the past. Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. ____ (2013).

4 E.g., Thomas L. Friedman, Op-Ed., *Down with Everything*, N.Y. TIMES, Apr. 22, 2012, at SR11, available at <http://www.nytimes.com/2012/04/22/opinion/sunday/friedman-down-with-everything.html>.

5 MANN & ORNSTEIN, *supra* note 1, at 51–58; see Steven S. Smith, *The Senate Syndrome*, in THE U.S. SENATE 132, 139–41 (Burdett A. Loomis ed. 2012).

6 See David W. Rohde, *Looking Back to See Ahead: The Senate in the Twenty-First Century*, in THE U.S. SENATE, *supra* note 5, at 239, 239–55.

7 MANN & ORNSTEIN, *supra* note 1, at 45.

8 *Id.*

9 *Id.* at 45.

10 Gregory J. Wawro & Eric Schickler, *Legislative Obstructionism*, 13 ANN. REV. POL. SCI. 297, 315 (2010) (“With party lines now corresponding to policy preferences (and ideological groupings) more tightly than in much of American history, the filibuster has become more clearly identified as a key tool of the minority *party* rather than as a tool used by various types of minorities.”).

11 See, e.g., Lloyd Marcus, *Evil Democrat Paradigms*, AM. THINKER (Sept. 12, 2010), http://www.americanthinker.com/2010/09/evil_democrat_paradigms.html (“Here are two par-

the best of circumstances, portraying opponents in this Manichean way, and viewing the policy process as a struggle between good and evil, can have devastating effects. Washington now seems unable to deal with the pressing legal, economic and social issues facing the country in the twenty-first century.

Solving the larger problem of hyper-partisanship and good versus evil rhetoric is not part of my agenda, however. The more limited issue before us is whether there are changes in laws or congressional procedures which can ease governmental gridlock and make it more likely that important policy issues can be addressed successfully. My focus is on the United States Senate, and more particularly on the Senate's unusual rules and traditions which cluster around the right of extended debate. Many critics see this aspect of the Senate, resulting in a sixty vote requirement for any meaningful action, as the crucial element in what we call gridlock. They point to the large increase in the use or threat of filibusters in recent years, and the routine filing of cloture motions, as evidence of a crisis in the Senate.¹² They decry the procedural arms race that has resulted, as the majority resorts to parliamentary tools designed to curtail minority rights, like early cloture filing and filling the amendment tree.¹³ Even though I contend that the abuse of the legislative hold and the right of extended debate are merely symptoms of gridlock, not causes, I propose to analyze these issues from a legal perspective and ask whether anything can and should be done to make the Senate more functional.

SUMMARY OF ARGUMENT

I take as my text for this paper congressional scholar Steven Smith's insightful use of the term "procedural fragility" to describe the Senate's parliamentary culture.¹⁴ The Senate is procedurally fragile in the sense that the body's special traditions of extreme individualism, deference to other members and procedural looseness make it especially vulnerable to members who would take advantage of (some say abuse) the opportunities for obstruction thus created. The Senate has sometimes in the past operated on a cooperative basis, across party lines, but the political polarization and demonization of opponents' ideas we see today can be fatal in a body like the Senate whose rules and traditions allow for and even invite obstruction.

Many critics argue that the only solution for the Senate's woes is to enforce a strict regime of majority rule, under which a simple majority's policy preferences must always prevail. This goal of pure majoritarianism, however, is fanciful. We must remember that the Senate itself is anti-majoritarian by design. Since each state has two senators, bills can and often do pass with

adigns which evil, divisive Democrats have shamefully promoted and exploited for years").

12 See, e.g., MANN & ORNSTEIN, *supra* note 1, at 3–30; Smith, *supra* note 5, at 136–37.

13 Smith, *supra* note 5, at 139–51.

14 *Id.* at 132.

the support of members representing a small minority of the nation's voters. Moreover, the Senate's enactment process, like that of most legislative bodies, includes numerous bottlenecks that may prevent a majority from bringing a bill to the floor for a vote—leadership authority, respect for committee autonomy, and the unrepresentativeness of committee membership, to name only a few. The tradition of extended debate and the hold are merely the most prominent of these obstacles, but they are the most difficult for the majority to overcome.

I argue that the Constitution demands something much more profound—ultimate majority control. By that I mean the power of a simple majority of members present to adopt or amend rules governing the day-to-day business of the Senate at any time. Under this principle, the filibuster itself is not unconstitutional if a majority of senators wish to allow it for institutional reasons. Nor are supermajority voting rules themselves unconstitutional, because the majority may find them useful to ensure consensus on certain kinds of issues. The same is true for all of the other procedural obstacles, like a sticky committee system and the prerogatives of the majority leader. So long as a simple majority may decide at any time to amend or repeal such rules or informal practices, the Constitution is not violated. Even if the so-called “constitutional option” to end debate on a rules change by majority vote is exercised, as I advocate, it seems clear that the Senate would probably continue to operate under some of its current rules, such as the Cloture Rule (Rule XXII), and would continue to tolerate certain kinds of holds and extended debate. But at least under the principle of ultimate majority control, members would have the power to modernize these rules and traditions to reduce their minority veto effect and thus make the Senate a more functional legislative body. It would be, in other words, less procedurally fragile. It would be able to counter more effectively the unreasoning obstructionism that has become commonplace. I will consider what some of these changes might be later on. Most important, the clear establishment in Senate rules and procedures of the principle of ultimate majority control would constrain the minority from abusing its prerogatives because of the ever present threat that the majority would further curtail them.

Under my analysis, then, there is only one provision of the Senate's current Standing Rules that offends legal norms, and that is the language of Rule XXII which requires a vote of two-thirds of members present and voting to end debate on a motion to amend those same Rules.¹⁵ If the majority could establish its authority under the Constitution to change Senate rules at any time, some of the minority veto features of the modern Senate could be eliminated or modified. Gridlock might not be eliminated completely—since its roots are not legal or constitutional but rather political and ideological—but at least the Senate would be better armed to resist the worst abuses we see today.

15 SENATE RULE XXII, UNITED STATES SENATE, S. DOC. NO. 110-9, *available at* <http://www.rules.senate.gov/public/index.cfm?p=RuleXXII>.

HISTORICAL BACKGROUND

The roots of today's sixty vote Senate lie in its structure, traditions and culture.¹⁶ The Framers viewed the two houses of Congress as having very different functions, and they developed very different cultures. The House, with younger members elected every two years, was intended to reflect the views of the people more directly, and to be an active legislative body.¹⁷ The Senate, elected by state legislatures and representing the states, was designed as a small elite chamber, with longer terms of office staggered for stability.¹⁸ It would function much like a more experienced older brother to the ram-bunctious House of Representatives, dampening the policy excesses of the other body. In its early years the Senate met in secret and did not originate much legislation.¹⁹ Then, as now, the Senate was viewed as the more prestigious body, and senators were usually the most experienced political leaders of the states, who knew each other well. The early Senate was quite small, and remained so for much of the nineteenth century.

From the outset the Senate developed an unusual culture, reflecting its small size and special function. A sense of the intimacy of the early Senate can be gained from viewing the Old Senate Chamber in the Capital. The entire membership could meet comfortably in a small dining room.²⁰ Since it had a limited agenda, the Senate could afford to operate far more informally than the House.²¹ It had a very brief set of procedural rules, and from the beginning often waived or ignored the ones it had. Instead senators relied on their personal relationships with one another, and a strong deference to the needs and desires of each member. There was a patrician sense of courtesy and institutional pride, and over time the Senate's precedents and traditions were a strong force for stability. The atmosphere was that of an exclusive private club. Several parliamentary traditions emerged in the Senate but were rejected in the House because of its larger size and greater workload. These included the right of each senator to be recognized by the

16 An excellent account of the Senate's early years can be found in ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON* 3–105 (2002). For my own discussion of the Senate's culture, see John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 22 J. L. & POL. 505, 508–13 (2004).

17 THE FEDERALIST NO. 52 (James Madison); THE FEDERALIST NO. 63 (James Madison), (WRITINGS OF JAMES MADISON, Jack N. Rakove ed., 1999) [hereinafter MADISON].

18 Madison wrote two of the Federalist essays, Numbers. 62 and 63, on the nature and functions of the Senate, noting that when some unwise policy is proposed “how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow mediated by the people against themselves, until reason, justice, and truth, can regain their authority over the public mind?” MADISON, *supra* note 17, at 347 (THE FEDERALIST NO. 63).

19 *The Senate 1789–1815*, U.S. CAPITOL VISITOR CENTER, <http://www.visitthecapitol.gov/Exhibitions/online/1789-to-1815/senate-1789-1815.html> (last visited Mar. 7, 2013).

20 See STEPHEN G. CHRISTIANSON, *FACTS ABOUT THE CONGRESS* 1 (1996). The first Senate was comprised of only twenty-six seats representing the thirteen original states. *Id.*

21 *Senate Legislative Process*, UNITED STATES SENATE, http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm (last visited Mar. 18, 2013).

Chair before a vote was taken, a powerful tool since modified by the Majority Leader's right of preferential recognition.²² Senators also had the right to introduce unlimited numbers of amendments, and there was no germaneness rule for either debate or amendments.²³ These unusually loose procedures drastically limited the majority's agenda control, since the minority could always introduce their amendments and could bypass committees by introducing entirely new bills as amendments to unrelated legislation. Later, the Senate was also characterized by a strong seniority system and a tradition of apprenticeship, under which new members deferred to their elders on both substance and procedure. In its routine daily work, the modern Senate often waives or modifies many of its Standing Rules and traditions, relying heavily on unanimous consent agreements to control the sequence of votes and amendments leading to passage of a measure.

Congressional scholars agree that the filibuster—the right of extended debate to obstruct action—did not exist in the early Senate.²⁴ At the beginning, its Standing Rules included a motion for the previous question, which could be employed to end debate and bring a matter to a vote. It was little used and was deleted from the Rules at the suggestion of Vice President Burr during a revision of the rules in 1806.²⁵ From that time until 1917 there was no parliamentary device to end debate in the Senate. One might wonder how the Senate ever voted on controversial measures in the absence of a formal means to end debate. The answer, of course, lies in the Senate's culture and traditions. Throughout the nineteenth century, members occasionally engaged in extended debate, but rarely for purposes of simple obstruction. Given its small size and relatively light workload, the body could afford to wait out the minority and a vote was eventually taken.²⁶ The first real filibuster for purposes of obstruction did not occur until the 1820s.²⁷ Gregory Koger, using contemporary newspaper accounts, traces the breakdown of this informal system to the convulsive period from 1870 to 1917, when Congress's workload increased dramatically and partisan divisions were intense.²⁸ Coupled with many additional senators from new states, these fac-

22 RULE XIX, UNITED STATES SENATE, S. DOC. NO. 106-15, available at <http://www.rules.senate.gov/public/index.cfm?p=RuleXIX>; see FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. NO. 101-28, at 1091-1105 (Alan S. Frumin ed. ., 1992) [hereinafter RIDDICK].

23 RIDDICK, *supra* note 22, at 62-63, 854-62.

24 During the 2011 debate over hold reform, nine prominent congressional scholars submitted a joint letter making this and related historical points. 157 CONG. REC. S317 (daily ed. Jan. 27, 2011) (letter from nine scholars); see SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? 47-51 (1997).

25 157 CONG. REC. S317 (daily ed. Jan. 27, 2011) (letter from nine scholars).

26 See BINDER & SMITH, *supra* note 24, at 39.

27 CARO, *supra* note 16, at 92 (describing how Senator Randolph, in 1825, used the filibuster to prevent votes on many industrial measures which he viewed favored the North); see also GREGORY KOGER, FILIBUSTERING 147-87 (2010) (describing the history and development of the filibuster).

28 KROGER, *supra* note 27, at 147-87.

tors vastly increased the importance of members' time and made the filibuster a much more dangerous parliamentary weapon. Scholars have noted that the Cloture Rule was little used in the decades after its adoption in 1917, however, illustrating the continuing power of the Senate's cooperative culture.²⁹ There was actually more obstruction in the House in the nineteenth century, though it usually took the form of dilatory motions and failures to answer during quorum calls.³⁰ Changes pushed through by House Speaker Reed in the 1890s brought about the strict majority rule institution we see today.³¹

Throughout the Senate's history, there has been an often tenuous balance between the right of individual senators to exploit its traditions of extended debate and unlimited amendments, and the powerful traditions of cooperation, deference to leaders and institutional loyalty. Restraint in the use of obstructive practices arose from recognition of the Senate's procedural fragility—every senator realized that under its loose rules chaos would result if each senator fully exploited his rights, and that each senator's own pet bills were vulnerable to reciprocal obstruction. Between 1917 and 1960 filibusters were rare and by common assent reserved for extremely important measures.³² The unspoken pact counseling restraint started to break down in the 1960s, when Southern conservatives filibustered civil rights legislation and Northern liberals began to realize that extended debate could be used on their issues as well.³³ Many scholars mark the end of this "old-fashioned" Senate to the election of 1980, when Republicans took control and partisan polarization became more evident.³⁴ Full-blown obstruction was much more common starting in 1992. But the system had actually begun to break down after the 1970s reforms that reduced the power of seniority and encouraged members to challenge entrenched authority in the Senate.³⁵ My own experience in the late 1970s as General Counsel for a major Senate committee was that the traditional culture was starting to deteriorate. Senators sometimes

29 See Richard S. Beth, *Remarks at the Annual Meeting of the Western Political Science Association, Portland, Or.: What We Don't Know About Filibusters* 14–17 (March 15–18, 1995), available at <http://www.netrootsmass.net/wordpress/wp-content/uploads/documents/crs/1995-Beth-What-We-Dont-Know-About-Filibusters-ocr150.pdf>; see also SENATE COMM. ON RULES & ADMIN., 112TH CONG., SENATE CLOTURE RULE: LIMITATION OF DEBATE IN THE SENATE OF THE UNITED STATES AND LEGISLATIVE HISTORY OF PARAGRAPH 2 OF RULE XXII OF THE STANDING RULES OF THE UNITED STATES SENATE (CLOTURE RULE), S. PRT. 112-31 (Comm. Print 2011) 46–48 [hereinafter SENATE CLOTURE RULE].

30 Beth, *supra* note 29, at 14.

31 See KOGER, *supra* note 27, at 53–57.

32 See BINDER & SMITH, *supra* note 24, at 85–86.

33 William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 621 (1991).

34 See generally LEWIS L. GOULD, THE MOST EXCLUSIVE CLUB 277–93 (2005) (describing 1980 as the start of "A Ruder Senate"); IRA SHAPIRO, THE LAST GREAT SENATE (2012) (providing a historical account of the character and actions of the Senate in the 1960s through the 1980s).

35 Smith, *supra* note 5, at 136–37.

ignored unwritten rules like informing committee chairs in advance of amendments, and refusal to agree to unanimous consent agreements became more common. Under my Chairman, John Stennis, the Armed Services Committee operated with a single staff serving both parties and observed the traditions of courtesy and individual rights that had long held sway. After the 1980 election brought a Republican majority, Senator John Tower became Chairman, the staff was split, and the atmosphere became much more partisan. Ira Shapiro, in his recent book, thus marks 1980 as the end of the “Last Great Senate” and of the norm of bipartisan cooperation.

Not only have we seen a large increase in the threat of filibusters in the modern era, and a corresponding use of cloture as a commonly used majority tactic, but the abusive use of the legislative “hold” has also emerged.³⁶ There had long been a tradition, rooted in the Senate’s respect for each member’s rights, of accommodating the request of a senator on the floor to delay a measure briefly for further study or consultation with its sponsor.³⁷ Since agenda control was far less centralized, it made sense for the majority to accede to such requests. Sometime in the 1970s, however, this practice changed into something entirely different. The request to delay consideration of a bill or a nomination was often communicated to the leaders in secret, and the hold carried no time limit.³⁸ Furthermore, holds lost their legitimate focus on the substance of legislation and were increasingly used to retaliate against another senator, extort concessions from the leaders on other bills, or even to force specific actions by the executive branch.³⁹ Moreover, holds were sometimes entered against large numbers of the bills or nominations at the same time. Since the hold was increasingly interpreted as a threat to withhold unanimous consent to proceed to a measure, it operated as a stealth filibuster, but without the need to debate the question or even reveal the identity of the obstructing member. Though the system was entirely voluntary and not set out in Senate Rules, the vast increase in the use of holds has been a lightning rod for criticism, which has been correctly joined with criticism of the filibuster generally.⁴⁰

With this brief review of the history and culture of the Senate, the question is then posed: Can the Senate afford to continue with its traditions of extended debate, deference to desires of individual members, and loose parliamentary rules in a period of crushing national problems, hyper-partisanship, and lack of cooperation between parties? Or must it recognize that its old ways of doing business simply cannot continue in a period of partisan gridlock, when the minority is often willing to stand together to block any

36 See WALTER J. OLESZEK, PROPOSALS TO REFORM “HOLDS” IN THE SENATE, CONG. RES. SERV. 1 (2011), available at <http://www.fas.org/sgp/crs/misc/RL31685.pdf>; Alexandra Arney, Recent Development, *The Secret Holds Elimination Act*, 48 HARV. J. ON LEGIS. 271 (2011) (discussing the impact of anonymous holds on the Senate).

37 See OLESZEK, *supra* note 36, at 1.

38 See generally *id.* (describing proposed limits).

39 *Id.* at 1–2.

40 See Smith, *supra* note 5, at 133, 146–48.

action desired by the majority or the President? The House followed a similar road, as Koger has noted—obstruction was first possible but rare, then became commonplace, raising the costs to the body.⁴¹ Finally, in the 1890s, the situation became intolerable and the Reed Rules tightened majority control.⁴² Can the Senate become more of a majority rule body, like the House, but without losing its unique character and the special role it has played in our legislative system? If change is to come about, its proponents must first confront the procedural hurdle of Rule XXII, which requires that two-thirds of those present and voting agree in order to end debate on a change in the Standing Rules.

THE LEGAL CASE FOR CONTINUING MAJORITY CONTROL

If the Senate is to do as I suggest and reassert ultimate majority control over its rules, that historic step must be seen by the country at large as legitimate. Only then can the majority make the necessary changes today and maintain a credible threat to adopt further changes in the future if the right of extended debate is abused. Supporters of Rule XXII's rule entrenchment always argue that the assertion of majority control would be an unprecedented step and a violation of core constitutional principles. My contention is that the opposite is true—entrenched supermajority rules are an anomaly in the Senate's tradition and inconsistent with both the letter of the Constitution and larger principles of representative self-government. In making that case, I rest on three arguments: the primacy of simple majority rule in our representative system; the explicit constitutional power granted by the Rulemaking Clause of Article I, Section V; and the generally accepted anti-entrenchment principle that one Congress may not bind a future Congress.⁴³

At one level, the argument for ultimate majority control should be non-controversial. After all, the traditional Robert's Rules structure—that so long as a quorum exists a simple majority of those present decides disputed questions—is followed just about universally in American society. In every community book club, college faculty, or city council, it is assumed that a simple majority prevails and that the majority has the power to adopt or change its procedural rules. Viewed in that way, the rule entrenchment of Rule XXII is simply inconsistent with our Western traditions of normal legislative behavior. I have seen no evidence that supermajority control over rules existed in any other American legislative bodies in the eighteenth century or later. More important, there is compelling evidence that those who wrote our Constitution believed in simple majority rule for ordinary legislation. The Framers adopted several supermajority rules for actions like impeachment⁴⁴ and

41 See KROGER, *supra* note 27, at 78–95 (detailing the emergence of obstruction in both the Senate and House).

42 *Id.*

43 I have made these arguments elsewhere in greater detail. See Roberts, *supra* note 16, at 520–47.

44 U.S. CONST. art. II, § 4.

veto overrides⁴⁵ that involved checks and balances between the branches and for especially important matters like expulsion of a member.⁴⁶ But they debated and rejected two proposals that would have required supermajority votes for specific types of legislation—navigation and interstate commerce—strongly suggesting that otherwise majority rule is the norm.⁴⁷ All the major intellectual leaders of the founding group explicitly endorsed majority control as an underlying principle of the legislative branch. These included James Madison,⁴⁸ the chief architect of the Constitution, and Thomas Jefferson,⁴⁹ author of the definitive work on American parliamentary practice still in use today. Moreover, their letters and other writings show a strong aversion to supermajority rules for ordinary legislative business. Madison in particular repeatedly pointed to supermajority rules in the Articles of Confederation as an important source of deadlock in the Confederation Congress and a compelling reason for a new constitutional system.⁵⁰ I am convinced by these explicit statements, and by negative implication from the specific addition of a few supermajority rules, that the Framers intended the majority to control in other instances. Indeed, that argument can be made about the Rulemaking Clause of Article I, Section 5, itself, since the statement of each House’s power over its rules is separated only by a comma from the requirement that two-thirds concurrence is required to expel a member.⁵¹ On the familiar principle of *expressio unius* we can infer that the Constitution contains an underlying idea that on other matters where the voting requirement is not specified the majority should control the outcome.⁵² The Supreme Court relied on just such reasoning in *Powell v. McCormack*⁵³ and *U.S. Term Limit, Inc. v. Thornton*⁵⁴ to hold that the Constitution’s listing of

45 *Id.* art. I, § 7.

46 *Id.* art. I, § 5.

47 See II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 444, 452–53 (interstate commerce), 394–95, 449–53 (navigation) (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND].

48 *E.g.*, MADISON, *supra* note 17, at 336–37 (THE FEDERALIST NO. 58).

49 *E.g.*, CONSTITUTION, JEFFERSON’S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES (1797), H. R. DOC. NO. 107-284, at 266 (2003).

50 I FARRAND, *supra* note 47, at 497 (Madison); II FARRAND, *supra* note 47, at 450 (Sherman). Hamilton made the point forcefully in The Federalist Papers. 1 DEBATES ON THE CONSTITUTION 510 (THE FEDERALIST NO. 22 (Alexander Hamilton)) (Bernard Bailyn ed., 1993). See BINDER & SMITH, *supra* note 24, at 51 (“The delegates at the Constitutional Convention knew full well from their experiences in the Continental Congress that requiring supermajorities was a recipe for stalemate and indecision.”).

51 U.S. CONST. art I, § 5.

52 *Expressio unius est exclusio alterius*—the express inclusion of one or more things implies the exclusion of other things from similar treatment. See, e.g., BLACK’S LAW DICTIONARY 661 (9th ed. 2009). Fear that this canon might be applied led to the inclusion of the Ninth Amendment to the Constitution. See Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1227–38 (1990).

53 395 U.S. 486 (1969).

54 514 U.S. 779 (1995).

specific qualifications for congressmen and senators implied that no other qualifications could be imposed.⁵⁵

Supporters of Rule XXII would have us believe that extended debate which cannot be ended by majority vote has been with us throughout the history of the Senate, but such is not the case. It is certain, for example, that extended debate outside of majority control was not a feature of the original Senate.⁵⁶ As we have seen, the early Senate operated under procedures by which a majority could force a vote by the non-debatable motion for the previous question,⁵⁷ a motion present in Robert's Rules and used almost universally today in committees and bodies of all kinds. No one suggested during the debate over eliminating the rule in 1806 that doing so would eliminate the majority's right to end debate and vote, and no one contended that a supermajority vote was necessary to change the rules. If a simple majority of the Senate possessed the unfettered power to change its rules in 1806, we might well ask how it could lose that power later on. As congressional scholars Gregory Wawro and Eric Schickler have persuasively argued, majority control was in fact alive and well during the nineteenth and early twentieth centuries. They show that when extended debate became too abusive, the majority retained control either by obtaining modifications of Senate practices through sympathetic rulings from the Chair, or by implicit threats to exert its power to change the rules.⁵⁸ When extended debate finally morphed into blind obstruction, a cloture rule was adopted for the first time in 1917,⁵⁹ which may have had the perverse effect of enshrining the notion of supermajority rules in the Senate for the first time. Though the vote was overwhelming, no one argued in 1917 that a supermajority vote was necessary to adopt the cloture rule. Again, if the Senate had the power to change its rules by majority vote in 1917, when and how did it lose that power?

In the modern era, while giving lip service to the requirement that ending debate on a change in the Standing Rules of the Senate requires a two-thirds vote, the Senate has in fact enacted a number of statutes that prohibit filibusters for specific types of legislative action. The most significant of these provisions is the reconciliation process contained in the Congressional Budget Act of 1974,⁶⁰ but there are many others.⁶¹ The Senate takes the odd position that these types of provisions are not explicitly amendments to the

55 *Id.* at 783 ("Such a state-imposed restriction is contrary to the 'fundamental principle of our representative democracy,' embodied in the Constitution Allowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision" (citing *Powell*, 395 U.S. at 547) (internal citations omitted)).

56 See Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 HARV. J. ON LEGIS. 467, 468 (2011).

57 See *id.*

58 GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER* 65–87 (2006).

59 Bondurant, *supra* note 56, at 473.

60 Pub. L. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 U.S.C. (2006)).

61 See Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J. L. & POL. 345, 345–47 (2003); Charles

Standing Rules and therefore may pass without the two-thirds requirement being met.⁶² It is clear to all, however, that these kinds of provisions are in fact modifications of Rule XXII. The political danger that the reconciliation process could lead to a broader undermining of the rule was a motivating factor in the adoption of the Byrd Rule in 1985, which limited it to deficit-reducing provisions.⁶³ These statutes, and the Senate's frequent resort to them, are significant because they demonstrate the underlying vitality of ultimate majority control. A final proof of that point is the action of the Senate in 1975 to modify the Cloture Rule. In that convoluted parliamentary battle, the Senate voted three times to sustain Chair rulings that a majority of the body could change its rules, despite Rule XXII. For political reasons, the Senate a few days later reversed those votes and reasserted the power of Rule XXII, but commentators then and since have recognized that in fact the principle of majority control had been demonstrated.⁶⁴

In addition to rules statutes that limit filibusters, the Senate has also made procedural changes throughout its history by use of sympathetic chair rulings backed by a majority vote to table appeals of those rulings. Commentators have demonstrated convincingly that numerous changes have been made by simple majorities using this method (and occasionally by adopting Standing Orders with precedential value), even in the modern era when the Standing Rules are supposedly protected against majority change by Rule XXII.⁶⁵ The Senate has simply continued the fiction that these types of precedential rulings, sometimes on significant parliamentary issues, are not the same as changes in the Standing Rules. As one scholar has noted, they don't change the rules, but rather change the meaning of the rules.⁶⁶ Once again, this tradition demonstrates that simple majority rule is a consistent underlying principle throughout the Senate's history.

Because they recognize that the filibuster is in fact a powerful tool of obstruction, members from both parties in the modern Senate have been

Tiefer, *How to Steal a Trillion: The Uses of Laws About Lawmaking in 2001*, 17 J.L. & POL. 409, 435–41 (2001).

62 RIDDICK, *supra* note 22, at 1224; see CHRISTOPHER M. DAVIS ET AL., PROPOSALS TO CHANGE THE OPERATION OF CLOTURE IN THE SENATE, CONG. RES. SERV. 18 (2010), available at <http://www.fas.org/sgp/crs/misc/R41342.pdf>.

63 BILL HENIFF, JR., THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE", CONG. RES. SERV. 2 (2010), available at <http://democrats.budget.house.gov/sites/democrats.budget.house.gov/files/documents/reconciliation.pdf>.

64 See 121 CONG. REC. 5243, 5249 (1975) (statement of Sen. Robert Byrd); 2 ROBERT C. BYRD, THE SENATE, 1789–1989, S. DOC. NO. 100-20, at 131–33 (1991); CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 705 (1989) ("Although there had been a face-saving solution, the Rubicon had been crossed.")

65 See, e.g., Martin B. Gold & 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, 363–68 (2005); Gregory Koger, *Filibuster and Majority Rule in the Senate: The Contest over Judicial Nominations, 2003–2005*, in WHY NOT PARTIES? 159, 160–63 (Nathan W. Monroe et al. eds., 2008).

66 Koger, *supra* note 65, at 160.

unwilling to impose tight control over debate. Understandably, they are reluctant to eliminate one of the unique features of the body that confers on each of them such prestige and leverage. That ambivalence, even hypocrisy, exists today, as many senators advocate change only when they are in a frustrated majority.⁶⁷ Ultimate majority control has always had its strong advocates, however. Prominent senators have supported the constitutional option over the years, and, throughout the later twentieth century battles over this issue erupted regularly at the start of a new Congress.⁶⁸ Three Vice Presidents have expressly supported the principle of majority control over rules from the Chair.⁶⁹ Indeed, several historians of the Senate have concluded that each time the Senate has adopted modifications of its debate rules, in 1917, 1949, 1959, 1975 and 1979, it did so under the threat that reformers would succeed in exercising the constitutional option.⁷⁰ And of course in 1975 they did succeed despite ultimately agreeing to a questionable compromise.⁷¹

Despite the power of general majority rule principles, however, in order for the Senate to establish with clarity and finality the principle of ultimate majority control, more specific constitutional and legal arguments may be necessary to convince today's majority to assert its rights, and to persuade the country to support that effort.

I argue that there is support in the plain language of the Constitution for the principle of ultimate majority control, namely the language of Article I, Section 5 providing that "[e]ach House may determine the Rules of its Proceedings."⁷² This provision was probably viewed as routine and non-controversial by the members of the Convention, since it stimulated little discussion. But it has exerted a strong force for the autonomy of the House and Senate in the years since. The Rulemaking Clause may be seen to have several facets.⁷³ First, it is a component of separation of powers, making it clear that the president and the courts may not interfere with the internal workings of the legislative branch. Such interference has not, in fact, occurred.

67 See generally Ezra Klein, *A Great Day for the Filibuster, and for Filibuster Reform*, WASH. POST BLOG (Mar. 6, 2013, 4:27 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/03/06/a-great-day-for-the-filibuster-and-for-filibuster-reform/> (detailing the democrats current push for filibuster reform as the republicans filibuster during John Brennan's nomination to lead the CIA).

68 See BINDER & SMITH, *supra* note 24, at 70–74; SENATE CLOTURE RULE, *supra* note 29, at 48–70. Even Senator Robert Byrd, the ultimate traditionalist, finally supported the idea of a simple majority to change the rules during the effort to tighten post-cloture procedure in 1979. See Shapiro, *supra* note 34, at 228–32.

69 The three Vice Presidents are Nixon in 1957, Humphrey in 1969, and Rockefeller in 1975. See Gold & Gupta, *supra* note 65, at 247–60.

70 See, e.g., *id.* at 208; Wawro & Schickler, *supra* note 10, at 299.

71 See *supra* note 64 and accompanying text.

72 U.S. CONST. art. I, § 5, cl. 2.

73 I have earlier explored this contention in more detail. See John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 528–42 (2001); Roberts, *supra* note 16, at 531–39.

Second, it ensures the power of each house of Congress to determine its own rules unhampered by the other house. This also has been non-controversial. Third, and most importantly for our purposes, it articulates a fundamental principle of continuing legislative autonomy, that each group of legislators in successive Congresses has the power to determine its own rules of procedure. In that sense, this third facet of the Rulemaking Clause is an application of the anti-entrenchment principle—that no current group of legislators may bind future groups to follow its ideas of correct policy or procedure.⁷⁴

Some have argued that the Rulemaking Clause only means that the House cannot interfere with Senate procedures, and vice versa. To answer that point we need to consider who may invoke the Rulemaking Clause to make or amend procedural rules. Certainly the initial group of senators convening in 1789 could, and in fact they adopted by majority vote rules to govern the legislative process.⁷⁵ But a moment's reflection leads to the conclusion that all future groups of senators must also possess the power conferred by the Rulemaking Clause. If that were not the case, the first Senate could have adopted rules which could only be changed by unanimous consent, or which could not be changed at all. In that case all succeeding Senates would be unable to adopt new or modified rules of procedure, and the explicit language of the Constitution would be nullified. Does the first Senate possess the power to amend the Constitution in this way? Can the Rulemaking Clause be used to nullify itself? Logic would seem to compel a negative answer.

This continuous power interpretation of the Rulemaking Clause has in fact been articulated throughout our history. Early commentators on the Constitution interpreted it this way.⁷⁶ The Supreme Court and the courts of appeals have many times affirmed the power of each successive House and Senate to adopt its own rules.⁷⁷ And, not surprisingly, the House and Senate themselves have asserted from the beginning the right of each successive Congress to determine its own rules.⁷⁸ When it adopts rules statutes purporting to limit the bodies procedurally, Congress often includes boilerplate language specifying that such provisions do not bind future majorities in the House and Senate.⁷⁹ For practical reasons, of course, any attempt by the

74 See John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CAL. L. REV. 1773 (2003) (arguing anti-entrenchment is a well-established constitutional norm).

75 Gold & Gupta, *supra* note 65, at 207.

76 See, e.g., 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 298 (1833) (Leonard W. Levy ed., 1970).

77 See, e.g., *U.S. v. Ballin*, 144 U.S. 1, 5 (1892) (“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”); *Metzenbaum v. Fed. Energy Regulatory Comm’n*, 675 F.2d 1282, 1288 (D.C. Cir. 1982).

78 See WM. HOLMES BROWN & CHARLES W. JOHNSON, HOUSE PRACTICE 162–63 (2003); RIDDICK & FRUMIN, *supra* note 22, at 1217–27.

79 See, e.g., S. REP. NO. 107-139, at 54 (Bipartisan Trade Promotion Authority Act of 2002) (“[Disclaimer recognizes that procedures for a disapproval resolution] are enacted

Senate to adopt a procedural rule which could not be changed would simply be ignored by future Senates, and there would be no way of enforcing the earlier Senate's wishes.

We might next ask ourselves: What vote is required for the exercise of the rulemaking power? Some scholars have argued that supermajority rules are themselves exercises of the rulemaking power and are thus constitutionally valid.⁸⁰ But again, further analysis eliminates that option. If, as proponents of the constitutionality of Rule XXII rule entrenchment argue, a majority may adopt a supermajority rule that binds future majorities, then it may also adopt un-amendable rules. If such a power over rules exists, there is no stopping point as among a two-thirds requirement, a four-fifths requirement, unanimity, and un-amendability, which would deprive future Senates of their rulemaking power. The only logical stopping point is a simple majority vote. Remember that the Senate's initial rules package in 1789 was adopted by majority vote, and in fact the Senate's rules and procedures still provide that the Rules can be amended by majority vote, in line with its position on the continuing rulemaking power.⁸¹ It is the anomaly of Rule XXII's requirement that a two-thirds vote is required to close debate on a proposal to change Standing Rules that violates the Rulemaking Clause.

A third basis for my argument that rule entrenchment is inconsistent with our legal and constitutional tradition is that it violates the anti-entrenchment principle universally recognized as governing the operation of legislative bodies. Stated simply, the anti-entrenchment norm is simply that no legislative body may act to control the legislative outcomes of future groups of legislators. At one level, it is simply a common sense notion that stems naturally from the basic concept of representative self-government. New groups of legislators, elected by voters with new ideas about public policy, cannot be restrained by decisions made in the past when political, social, or economic conditions were different. The anti-entrenchment norm does not appear in our Constitution, but it has been a mostly unquestioned part of our legislative jurisprudence for hundreds of years.⁸² As argued above, it finds procedural expression in the Constitution's Rulemaking Clause. Entrenchment would also seem to conflict with the thrust of Article I's delegation of all legislative power to the Congress, since a subsequent Congress faced with a "binding" un-repealable statute would clearly have its legislative power impaired.

Substantive entrenchment—the enacting of ordinary laws which cannot be amended or repealed—has never been attempted in the American Con-

pursuant to the rule-making powers of the House of Representatives and the Senate. It further recognizes the constitutional right of either House to change its rules at any time.”).

80 See, e.g., Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445, 450–51 (2004).

81 RIDDICK, *supra* note 22, at 1217.

82 For further discussion of this principle, see ROBERTS, *supra* note 16, at 520–47, and Roberts & Chemerinsky, *supra* note 74.

gress, or in any other legislative body that I know of. Practically speaking, since there is no enforcement mechanism available to hold a future majority to the decisions of a past majority, no Congress would allow its legislative prerogatives to be restricted in such a situation. I have written at length about both the policy arguments and legal justifications for the anti-entrenchment principle and do not intend to repeat them here.⁸³ Suffice it to say that with a few recent scholarly exceptions, none of our Founding Fathers, contemporary commentators, federal judges or congressional leaders have ever questioned it. Charles Black once called it an idea which is “on the most familiar and fundamental principles, so obvious as rarely to be stated.”⁸⁴

The only examples we have of legislative entrenchment are procedural. Rule XXII is the most important one, but the Senate has occasionally added special sixty-vote requirements to legislation. Several are scattered about in the Budget Act to require a supermajority to waive points of order,⁸⁵ but these are really backup versions of the basic cloture requirement of Rule XXII. Occasionally Congress has passed laws that contain other kinds of procedural provisions that purport to restrict future Congresses. When the future arrives, Congress usually ignores such provisions, and the federal courts have refused to intervene.⁸⁶ Nevertheless, some commentators have conceded that substantive entrenchment is beyond the pale but argued that entrenchment of procedural rules, as in Rule XXII, is different and permissible.⁸⁷ That distinction is an illusion. If anything, procedural entrenchment is more of a threat to representative self-government than substantive entrenchment, since it can have a vastly greater effect on legislative discretion. Anyone who has worked in a legislative body knows that many important substantive matters are disposed of on procedural motions. The legislation in question is just as dead as if it had been defeated on an up-or-down vote. Veteran legislators have often pointed out that controlling a chamber’s procedures is in the end more powerful than controlling its substantive policy choices.⁸⁸ Moreover, it is not easy to characterize particular

83 See Roberts & Chemerinsky, *supra* note 74.

84 Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 191 (1972).

85 See, e.g., Congressional Budget and Impoundment Control Act of 1974, Pub. L. 93-344, 88 Stat. 297 (codified at 2 U.S.C. §§ 601–688 (2006)).

86 See, e.g., *Metzenbaum v. Fed. Energy Regulatory Comm’n*, 675 F.2d 1282 (D.C. Cir. 1982) (holding that the claim was not suitable for judicial review as resolution of the issue would require the court to construe the rules of the House and to impose upon the House the court’s interpretations of its rules).

87 See, e.g., Virginia A. Seitz & Joseph R. Guerra, *A Constitutional Defense of “Entrenched” Senate Rules Governing Debate*, 20 J.L. & POL. 1 (2004) (agreeing with the anti-entrenchment norm broadly construed, but arguing in support of the validity of supermajority rules).

88 Walter Oleszek quotes veteran congressman John Dingell as declaring that “if you let me write the procedure, and I let you write the substance, I’ll [beat] you every time.” WALTER J. OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS*, CONG. RES. SERV. 12 (2007).

devices as substantive or procedural. In the Senate, a motion to proceed to a matter, a motion to table, or a motion to recommit are in reality motions on the merits.⁸⁹ Is a hypothetical rule providing that a four-fifths vote is required to close debate on any bill raising income tax rates substantive or procedural? The example illustrates that procedural entrenchment could theoretically be used to foreclose action in an entire area of substantive policy and thus is just as much a violation of the entrenchment principle as substantive entrenchment.

In the end, there is ample justification in our jurisprudence, including explicit constitutional language, to support a determined majority's argument that a simple majority vote can be used to adopt new Senate rules at any time. Reform-minded senators are not violating the constitutional provisions creating the Senate or any other types of legal norms when they assert that power. To the contrary, it is the specific provision of Rule XXII requiring a two-thirds vote to end debate on a proposal to change Senate rules that is inconsistent with our legal and constitutional tradition.

THE CONTINUING BODY ARGUMENT

The principal defense to arguments that rule entrenchment in Rule XXII violates both the Rulemaking Clause and the anti-entrenchment principle is that the Senate is a continuing body, and therefore there is no "future Senate" to bind.⁹⁰ On its face the continuing body argument sounds almost frivolous—can it really be that easy to avoid the dire consequences of entrenchment, just by declaring that there has been only one Senate since 1789? A more specific response begins with the observation that virtually all Western legislative bodies abide by the rule that a simple majority can adopt new procedural rules after an election, if not at any time.⁹¹ The continuing body theory as an argumentative tool was unknown in the early American Senate and seems not to have been advanced until 1841. The Senate, unlike the House, did consider its Standing Rules to be continuous from the beginning, in the sense that they were in effect until changed. But there was no assertion of a supermajority requirement to modify or repeal standing rules. Motions to change the rules could be filibustered like any others, but then as now the actual vote required to change the rules was a simple majority.⁹² When the cloture rule was adopted in 1917, it did not apply to motions to change the rules. The 1949 amendments to broaden cloture still left it unavailable on rules changes. Entrenchment of the Standing Rules stems from the 1959 compromise, when Rule V was added asserting that the Senate was a continuing body and that rules remained in effect until changed as

89 See *id.* 12–13.

90 See, e.g., Gerhardt, *supra* note 80, at 464–65.

91 Senator Walsh, during the 1917 cloture rule debate, noted that the idea of majority control over rules was "universal among . . . American legislatures." Gold & Gupta, *supra* note 65, at 223.

92 See *id.* at 217–27.

provided by the rules themselves. This linked the continuing body notion with the part of Rule XXII that required a two-thirds majority to end debate on changes in the Standing Rules. Since the notion of continuity can simply mean that rules continue unless the majority decides to change them, the real entrenchment culprit is Rule XXII, not Rule V.⁹³

Is the Senate really continuous, and if so in what way? In some larger sense all of the entities created by the Constitution are continuous in that they are created by the founding document independent of the men and women who serve on them—that is why we often speak of “the Presidency” or “the Senate” with a broader historical meaning. Advocates of the continuing body theory seize on the fact that only one-third of the Senate is elected every two years as proving that there is never a new Senate.⁹⁴ A majority of senators constitutes a quorum, they say, and the same quorum remains through each election.⁹⁵ There are several responses to this highly formalistic argument. First, it doesn’t distinguish the Senate from the House, which has never asserted that it is a continuing body. In terms of actual continuity of membership, the House is sometimes more continuous than the Senate, since a high percentage of House members are reelected each cycle. And House members’ terms expire only at the moment when new members are sworn in, so the House quorum is also continuous in fact.⁹⁶ Second, arguing that the Senate after each election is “the same” Senate flies in the face of common sense. Over time we know that the makeup of the Senate can change dramatically; is today’s Senate the same parliamentary body as it was in the 1950s, when seniority was inviolable and Southern Democrats with permanent seats controlled the body? We also must acknowledge that on the frequent occasions when control changes in an election the result is different majority leadership, different officers, different committee chairs, and many new staff members, to mention just the obvious changes. Depending on the election, the body might have a radically different policy agenda as well. Such drastic changes can even take place even without a change in control, if the views of a majority of senators, some newly elected and some continuing, change because of economic conditions, the mood of the country, or foreign threats. It seems silly to assert that the Senate is always the same when such radical shifts can and do occur.

Moreover, the Senate itself does not always act in ways consistent with the continuing body theory. As Professor Bruhl has pointed out, there are many non-continuous aspects of Senate rules and practices.⁹⁷ All senators refer to “the 112th Congress” as do committee reports and other Senate documents. On the most important legislative issue of all—the status of pending

93 On the history of changes to Rule XXII, see SENATE CLOTURE RULE, *supra* note 29, at 11–41.

94 See, e.g., Gerhardt, *supra* note 80, at 464–65.

95 *Id.* at 465.

96 U.S. CONST. amend. XX, § 1.

97 See Aaron-Andrew P. Bruhl, *Burying the “Continuing Body” Theory of the Senate*, 95 IOWA L. REV. 1401, 1444–56 (2010).

bills and nominations—the Senate is decidedly not continuous. All bills and nominations not disposed of by the end of a Congress disappear and have to be reintroduced.⁹⁸ All numbering of bills and other business starts over.⁹⁹ And in other ways the Senate does not always act in accordance with the continuing body theory. It doesn't always treat its chair rulings and informal practices as binding, and in fact frequently ignores them or sees them changed by new rulings of the Chair.¹⁰⁰ As we have noted, the Senate often refuses to enforce statutory procedural rules, explicitly arguing that it is not bound by them because of the continuing power of the Rulemaking Clause. It is no exaggeration to say that the Senate does not recognize any kind of rule entrenchment with the exception of Rule XXII. Is it logical to argue that the Senate is a continuing body only for the purpose of entrenching its Standing Rules? What is the constitutional basis for such an assertion?

The real problem with the idea that the Senate is a continuing body is that it proves too much. Advocates of this response to the Rulemaking Clause and anti-entrenchment critiques never explain *why* simply observing that the Senate thinks it is a continuing body can explain the far reaching legal and policy effects. Taken seriously, the one-Senate theory would allow a simple majority of members at its first meeting in 1789 to adopt un-amendable rules, or rules amendable only by unanimous consent. The Rulemaking Clause and the anti-entrenchment principle rest on profound truths about representative democracy and popular sovereignty. How can these fundamental tenets be overborne by the simple assertion that the Senate is continuous? And even if one were to agree that there is only one continuous Senate since 1789, that doesn't explain why that Senate has the power, in the face of the Rulemaking Clause and the anti-entrenchment principle, to bind *itself* in the future. Both principles are violated by Rule XXII rule entrenchment even if the Senate is a continuing body. Rule V and Rule XXII cannot be used to amend or abrogate the Rulemaking Clause of the Constitution, particularly since there is no support for the continuing body theory in the language of the Constitution.

In truth, the continuing body theory is a political device of recent origin developed to further placate opponents of loosening cloture rules. It is not rooted in any specific constitutional language. Its basis is vague and confusing, and it is inconsistent with the rest of Senate practice. As I have argued, the rule entrenchment part of Rule XXII should be exposed as unconstitutional, majority control should be restored, and Rule V should be considered only a statement that Senate Standing Rules continue in force until changed by simple majority vote.

98 See *id.* at 1447 & n.159.

99 See *id.*

100 See *id.* at 1440–41.

REFORMING THE FILIBUSTER

Let us now assume that a majority of senators accepts my argument that underlying principles of majority rule, the constitutional rulemaking power, and the venerable anti-entrenchment principle, provide sufficient justification for the assertion of ultimate majority control. What should the majority do? The parliamentary battles from the 1960s on have demonstrated that the Senate as a whole does not wish to simply abolish extended debate. The traditions of the Senate are simply too powerful, and the value of the filibuster as a device to ensure consensus and protect intensely-held minority views is clear to both parties. Moreover, there is force to the argument that the Senate's role of ensuring lengthier consideration of important issues than the House is important in a bicameral system. To be successful, a majority today needs to abandon the goal of abolition. It must make the rhetorical case that ultimate majority control is constitutionally required and that the Senate needs to return to the core values of the filibuster. The goals of reform should be to re-establish the filibuster as an instrument of extended debate, not knee-jerk obstruction, to confine the filibuster to issues of real importance, and to streamline the procedural aspects of cloture. In short, the Standing Rules must be changed to recognize that the old consensus controls of restraint and cooperation that kept the filibuster weapon from destroying the Senate's work are no longer functioning. Moreover, to be successful, changes must be balanced, curbing some of the excesses of the majority that have been employed to control filibustering. These changes could be accomplished while retaining the current sixty-vote cloture requirement, which many in and out of the Senate see as important.

The debate in early 2011 over proposals to reform filibusters and holds is instructive. A variety of reform resolutions was introduced, but no one advocated complete abolition of the filibuster.¹⁰¹ The Harkin proposal for reducing the vote necessary for cloture over time came the closest, and it had little support.¹⁰² The debate was about various devices to reform the hold, which of course is closely related to the filibuster. In order to avoid the need for a two-thirds vote under Rule XXII, most of the changes were adopted as Standing Orders, which were subject to the sixty-vote requirement for cloture if filibustered. Some of the reformers asserted that a simple majority had the right to adopt new rules at the beginning of a new Congress, and their opponents did not argue that such a course would be unconstitutional; the arguments centered on the value of the filibuster and the need to protect it on the merits.¹⁰³ The debate suggested that a majority may exist for some types of filibuster reform.

101 121 CONG. REC. S295–S348 (daily ed. Jan. 27, 2011) (discussing amending the Standing Rules of the Senate).

102 His proposal, S. Res. 8, 112th Cong. (2011), was defeated by a vote of 84 to 12. 157 CONG. REC. S327 (daily ed. Jan. 27, 2011).

103 See generally David Sarasohn, *Taking on the Filibuster Starts a Long Conversation*, OREGONLIVE (Jan. 29, 2011, 5:32 PM), http://www.oregonlive.com/news/oregonian/david_sarasohn/index.ssf/2011/01/taking_on_the_filibuster_start.html (discussing the

One proposal often advanced by filibuster reformers would be to restrict the filibuster to final passage of a measure, while retaining the current sixty-vote cloture requirement.¹⁰⁴ Most filibusters and holds on legislation today are centered on the parliamentary devices necessary to make a bill the pending business of the Senate.¹⁰⁵ It is for this reason that many see the modern filibuster as the exact opposite of extended debate, since real or threatened filibusters that block consideration of a bill prevent any discussion of the measure.¹⁰⁶ Restricting filibusters to the vote on final passage would ensure that on measures of real importance there could still be extended debate, and would have the added advantage of exposing the issues to the public, perhaps increasing pressure on those mounting the filibuster. Eliminating filibusters on taking up a bill would have the added benefit of reducing holds on bills, since the purpose of the hold is often to prevent the majority from being able to debate the bill and build public support for it.¹⁰⁷ To foreclose another obstructive tactic, the rules should also be changed to abolish filibusters on the procedural motions necessary to send a passed bill to conference with the House, allowing a filibuster only on final passage of the Conference Report. Thus the six filibusters allowed on each measure under current practice would be reduced to two.

Returning the filibuster to its classical roots could also be advanced by changes in the rules to actually require extended debate. Today, as we have noted, there are actually very few “talking filibusters,” since the Senate over time has allowed merely the suggesting of a possible filibuster on a measure, usually through a hold or an objection to a unanimous consent agreement, to end consideration of a bill before it begins.¹⁰⁸ If the rules required that those engaging in a filibuster at the time of final passage actually be present on the floor to conduct debate (by standing at their desks, as Senate rules require), it would raise the burden on the minority and make it easier to obtain the sixty votes needed to close debate.¹⁰⁹ Along the same lines, the Senate could adopt the suggestion made by reformers from time to time that the quorum call procedure after cloture has been filed be modified to make

Senate’s rejection of the proposed plan as the only place in America where “the word ‘constitutional’ was [not] an unstoppable trump card”).

104 See Leigh Ann Caldwell, *Senate Approves Modest Restrictions on Filibusters*, CBS NEWS (Jan. 24, 2013, 9:39 PM), http://www.cbsnews.com/8301-34222_162-57565736-10391739/senate-approves-modest-restrictions-on-filibusters/ (explaining the Senate passed a bill to curb filibusters).

105 RICHARD S. BETH & VALERIE HEITSHUSEN, *FILIBUSTERS AND CLOTURE IN THE SENATE*, CONG. RES. SERV. 20–21 (2011), available at http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E%2C*PLW%3D%22P++%0A.

106 *Id.*

107 *Id.*

108 See Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1009–10 (2011).

109 This was among the reform proposals by Senators Udall, Harkin, and Merkley that were defeated in January 2011. See S. Res. 21, 112th Cong. (2011) (defeated by a vote of forty-nine to forty-six); 157 CONG. REC. S328 (daily ed. Jan. 27, 2011).

the filibuster more difficult to sustain.¹¹⁰ In the classical filibuster, the majority must keep its fifty-one votes constantly available in case of quorum calls, while the minority only needs one senator on the floor at a time to maintain the filibuster. It is an unequal contest. If the Standing Rules were changed to require that the minority show the presence of its forty-one votes each time a quorum call is made, it would vastly increase the difficulty of maintaining the filibuster. It seems only fair, again referring to the supposed purpose of the filibuster, to put the onus on the minority to continuously demonstrate its strength or lose the floor. Finally, if reformers really wanted to increase the pain involved in filibustering, so as to make it less common, they could eliminate the “two-track” system, which allows a filibuster to continue while other necessary action on other measures is taken.¹¹¹ This would involve enforcing the principle that once a filibuster started no other business could be conducted.

It has to be recognized that some of the reforms outlined above could dramatically slow down the business of the Senate when the minority attempts to filibuster. But by making it harder and more painful for the minority to filibuster, the rules might well make it much less common. At any rate, since Senate business is often obstructed now by the one-person stealth filibuster, it is hard to see how the situation could get much worse. As noted above, the slowing of Senate business is balanced by the increased public visibility for the issues being debated.

An alternative approach might be to change the rules to restrict the kinds of matters that could be filibustered. Both parties have at times advocated eliminating filibusters on executive and judicial nominations, for example, a topic I have chosen not to address specifically in this paper.¹¹² The filibuster’s effect could also be reduced by the use of more so-called rules statutes, exempting certain kinds of bills from the tradition of extended debate. The Senate could today, as we have noted, carve out more exemptions from Rule XXII as it has for the reconciliation process, but it would be difficult to find consensus on the kinds of bills that deserve such favored treatment. In addition, the more attention is focused on the fact that such statutes are really changes in the Senate’s rules, the more opposition there would be to expanding this category.

Another useful set of reforms might center on post-cloture procedure. Tightening the specific rules governing the current requirement of thirty

110 This device was recommended by, among others, Mann and Ornstein in their recent book. MANN & ORNSTEIN, *supra* note 1, at 168–69.

111 The two-track system was instituted by the Democratic leadership in the early 1970s. OLESZEK, *supra* note 89, at 212.

112 See, e.g., Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 UTAH L. REV. 803, 860 (discussing the unconstitutionality of “the current filibuster campaign against majority-supported judicial nominations”).

hours of debate after cloture has actually been achieved could significantly reduce the actual time needed to get a vote on final passage.¹¹³

Some progress was made in 2011 to address the abusive use of holds, but the results have been limited.¹¹⁴ The use of holds in recent years perfectly exemplifies the procedurally fragile Senate. In a Senate which actually operated under its original culture, which emphasized personal relationships, courtesy, and respect for each member, the hold would be infrequent and based on a legitimate institutional concern. What started as a courtesy extended to each member, however, has developed into a potent weapon of individual veto, all without any basis in the Standing Rules. A determined Majority Leader could put an end to abusive holds tomorrow. The 2011 reforms centered on transparency, to avoid secret holds, and on time limits.¹¹⁵ Both changes try to eliminate holds that actually have nothing to do with the merits of the measure in question and ensure that the hold's effect on the substantive bill is purely temporary. Unfortunately, enforcement has been lacking, and members have found ways around the new rules.¹¹⁶ Like the filibuster, the hold is too potent a weapon in the current Senate for members to easily give it up.

As noted above, reforms in the filibuster and the cloture rule to tip the scales of action more toward the majority might have the salutary effect of reducing some of the tactics used by the majority to overcome obstruction, such as routine early filing of cloture motions and restricting minority amendments.¹¹⁷ To increase support among members for significant reform, the Rules should be changed to modify the Senate's ubiquitous unanimous consent procedure to provide greater protection for the minority's historic right to offer amendments. Changes that balance limits on filibustering with increased protection for minorities in other areas have the potential to ratchet down polarization and partisan recrimination. They also have a better chance of garnering public support for change.

113 For example, splitting the thirty hours between the majority and the minority, so that advocates of the bill could waive their time, or reducing drastically the overall time limit for debate after cloture.

114 See Carl Hulse, *Senate Approves Changes Intended to Ease Gridlock*, N.Y. TIMES, Jan. 28, 2011, at A20, available at <http://www.nytimes.com/2011/01/28/us/politics/28cong.html>. (“[T]he Senate approved other changes . . . in rules intended to quicken the pace of action, including new limits on a single lawmaker’s ability to anonymously block legislation and nominations.”).

115 S. Res. 21, 112th Cong. (2011).

116 See, e.g., Melanie Sloan, *Sloan: Secret Holds Are Filibuster’s Silent Partner in Stalling*, ROLL CALL (Jan. 23, 2013, 5:24 PM), http://www.rollcall.com/news/sloan_secret_holds_are_filibusters_silent_partner_in_stalling-221053-1.html. (“[S]enators continue to employ secret holds to anonymously stall, and at times kill, crucial nominations and legislation. Over the past three years, there have been only 20 instances of a ‘notice of intent to object’ placed in the Senate Calendar of Business—more than half by [Senators] Grassley and Wyden—but secret holds appear to have been placed on numerous other bills and nominations contrary to the agreed-upon rule.”).

117 See *supra* Part II.

Defenders of the status quo may argue that accepting the right of each Senate to control its rules by simple majority vote would lead to instability and chaos. Presumably they are concerned that there might be wild swings in Senate procedure, which would adversely affect the legislative process. It is hard to square this argument with history or common sense. The House, like virtually all other legislative bodies, has the power to change its rules after each election, and there is no evidence that chaos has been the result.¹¹⁸ On a few occasions (1995 and 2011 come to mind) it has taken significant steps to enhance majority control after a big electoral shift, but usually only modest changes are made after each election.¹¹⁹ And remember that Rule V ensures that the Senate's rules would continue in force until changed by the majority, obviating the concern that there would be no rules to govern procedure at the beginning of a Congress. Given the stubborn resistance to rules changes over its history, it is difficult to imagine that even after the principle of ultimate majority control is finally confirmed, the Senate would be prone to constant tinkering. Everything we know about the Senate tells us that it will always be slow to adopt major rules changes and will always protect minority rights. Finally, making it easier to change the rules can hardly be more threatening to the regular order than the Senate's long-established practice of ignoring its rules and procedures routinely through Unanimous Consent Agreements. It is ironic indeed that we should be debating the power to change the Senate's rules in the context of the Senate's long history of extremely informal floor practice.

CONCLUSION

As I noted at the outset, the goal of a more functional Senate cannot be attained without political change—less polarization and greater willingness to cooperate across party lines. It may not be attainable without stronger leadership, like that provided by Lyndon Johnson in the 1950s or the combination of Robert Byrd and Howard Baker in the 1970s. Because of the Senate's unusual susceptibility to minority obstruction, however, rules reform can play a role in restoring its ability to legislate effectively. A more reasonable balance between majority rights and minority prerogatives is clearly required, and for that to happen, ultimate majority control must be reasserted. Each party supports this principle when it is in the majority, and since party control has changed four times in the past eighteen years, even the current minority party should recognize that reform will be in its ultimate best interests.

118 See *Committee on Rules: A History*, U.S. H.R. COMMITTEE ON RULES DEM., http://democrats.rules.house.gov/110/comm_history.html (providing a brief history of the Committee on Rules).

119 See, e.g., MICHAEL L KOEMPEL & JUDY SCHNEIDER, A RETROSPECTIVE OF HOUSE RULES CHANGES SINCE THE 110TH CONGRESS, CONG. RES. SERV. (2012), available at http://assets.opencrs.com/rpts/R42395_20120307.pdf (cataloging several categories of rules changes since the 110th Congress).

This paper has argued that ultimate majority control has ample justification in the Constitution and our broader legal tradition of democratic self-government. The principle had been successfully vindicated in the past through mutual restraint, parliamentary deterrence, and chair rulings, but those weapons have proven too weak in today's caustic political atmosphere. Aided by a sympathetic chair willing to make the appropriate rulings, a determined Majority Leader and a united majority should first assert its constitutional right to control its rules and then embark on sensible reforms that preserve the right of filibuster while imposing discipline on its exercise. The Senate must be willing to change some of its time honored traditions in order to adapt to the polarized political world of the twenty-first century, while preserving the core values that make it a unique legislative body.

POSTSCRIPT

Two developments following the Symposium and while this paper was being prepared for publication deserve brief notice. First, the lawsuit brought in the U.S. District Court for the District of Columbia to declare that the sixty-vote requirement of Rule XXII is unconstitutional and that cloture could be invoked by simple majority vote was dismissed on December 21, 2012.¹²⁰ Plaintiffs included Common Cause, four House members who alleged that their vote for the DREAM Act was nullified by the inability of the Senate to overcome the sixty-vote threshold, and three individuals who argued that they would have benefitted from the DREAM Act had it been enacted into law.¹²¹ Judge Emmet G. Sullivan found that none of the plaintiffs had standing.¹²² He went on to find that the court lacked subject matter jurisdiction under the political question doctrine. Relying on separation of powers principles and the Rulemaking Clause, he found that "it is for the Senate, and not this Court, to determine the rules governing debate."¹²³

Second, significant efforts to modify the Senate's filibuster and cloture procedures were made at the start of the 113th Congress, supported by reform groups and many editorial writers. Soon after the election, Majority Leader Reid announced that he would propose rules changes, using the constitutional option if necessary.¹²⁴ With a fifty-five to forty-five majority, he had four parliamentary options. If no senator objected he could try to change Rule XXII with a simple majority vote. Assuming that at least one member would object, he could attempt to persuade Republicans to support change and thus meet the required two-thirds voting requirement to end

120 Common Cause v. Biden, C.A. No. 12-775 (EGS), 2012 WL 6628951 (D.D.C. Dec. 21, 2012).

121 *Id.* at *1.

122 *Id.* at *8.

123 *Id.* at *17.

124 See, e.g., Lauren Fox, *Filibuster Reform Takes Center Stage on First Day Back: Minority-Empowering Tool Again in Senate Majority's Crosshairs*, U.S. NEWS (Nov. 26, 2012), <http://www.usnews.com/news/articles/2012/11/26/filibuster-reform-takes-center-stage-on-first-day-back>.

debate on rules changes under Rule XXII. He could also propose changes in the form of a Standing Order, which could have the effect of a rules change but would require only sixty votes to close debate. Finally, he could seek a Chair ruling from Vice President Biden that a simple majority of senators could close debate on a rules change at the beginning of a new Congress—the constitutional option. Many of the changes debated in January 2011 again surfaced, including elimination of the filibuster on a motion to proceed to a matter, the requirement of a talking filibuster and elimination of filibusters on the motions necessary to go to conference with the House.¹²⁵ A bipartisan group of senators who opposed the constitutional option, led by Senators Carl Levin and John McCain, also proposed a compromise that would make more limited changes to the debate rules.¹²⁶

Despite Majority Leader Reid's repeated statements that he was willing to invoke the constitutional option, he ultimately entered into a compromise with the minority that largely tracked the limited changes contained in the Levin-McCain proposal.¹²⁷ The two key measures pushed by reformers—elimination of the filibuster on a motion to proceed to a bill and the requirement of a "talking filibuster"—were shelved. Instead, the Senate agreed to a new Standing Order, good only for the current Congress, that eliminates the filibuster on a motion to proceed if the Majority Leader permits at least four amendments, two from each side.¹²⁸ If non-germane, they would be subject to a sixty-vote requirement for adoption. In addition, votes on most nominations would be expedited once cloture was obtained.¹²⁹ The Standing Rules were also amended, using a two-thirds vote threshold for adoption, to add a new method of bringing up a bill.¹³⁰ If the two leaders and seven members from each side agree on a cloture motion, the procedure would be expedited. In addition, the three motions now required to go to conference with the House would be collapsed into one, reducing the number of filibuster opportunities.¹³¹ The leaders also announced an informal agreement to address certain kinds of dilatory tactics during the post-cloture period.¹³²

Given the widespread support for more far-reaching change among Democrats and those outside Congress, this outcome represents a lost opportunity to address Senate gridlock. The new rules may make business move somewhat faster, but the power of the minority to obstruct is largely undimin-

125 See, e.g., S. Res. 4, 5, 6, & 7, 113th Cong. (2013).

126 See Alexander Bolton, *Bipartisan Senate Group Supports Plan to Avoid 'Nuclear Option' in Filibuster Reform*, THE HILL (Dec. 28, 2012, 5:23 PM), <http://thehill.com/homenews/senate/274823-bipartisan-group-of-senators-rallies-around-plan-to-avoid-nuclear-option>.

127 See David Weigal, *Fili-busted: Democrats Pull Back from the Nuclear Option on Filibuster Reform. Did They Get a Bum Deal?*, SLATE (Jan. 24, 2013, 7:55 PM), http://www.slate.com/articles/news_and_politics/politics/2013/01/filibuster_reform_senate_democrats_compromise_instead_of_forcing_the_nuclear.html.

128 S. Res. 15, 113th Cong. (2013).

129 *Id.*

130 S. Res. 16, 113th Cong. (2013).

131 *Id.*

132 For the full debate, see 159 CONG. REC. S247–S274 (daily ed., Jan. 24, 2013).

ished.¹³³ In the end, Senator Reid may have felt that he did not have a majority in his party for the constitutional option, but also realized that using it would provoke partisan rancor at a time when critical issues were before the Senate. Early reaction from commentators on the modest package of changes ranged from muted praise to outrage.¹³⁴

133 See Niels Lesniewski, *Changes to Filibuster May Give Senate Leaders Political Heartburn*, ROLL CALL (Jan. 24, 2013, 7:33 PM) http://www.rollcall.com/news/changes_to_filibuster_may_give_senate_leaders_political_heartburn-221106-1.html.

134 See, e.g., Editorial, *Progress in the Senate*, WASH. POST, Jan. 26, 2013, at A14, available at http://articles.washingtonpost.com/2013-01-26/opinions/36562515_1_filibuster-senate-floor-reid; see also Greg Sargent, *No Price for Unprecedented Obstructionism and Destructive Governance*, WASH. POST (Jan. 24, 2013, 5:02 PM), <http://www.washingtonpost.com/blogs/plum-line/wp/2013/01/24/no-price-for-unprecedented-obstructionism-and-destructive-governance/>. For an early balanced appraisal from a key congressional scholar, see Sarah A. Binder, *Take a Little, Give a Little: The Senate's Effort at Filibuster Reform*, BROOKINGS (Jan. 24, 2013), <http://www.brookings.edu/research/opinions/2013/01/24-filibuster-reform-binder>.

