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**The Unconstitutionality of the Filibuster Is Our Constitutional Order Broken - Structural and Doctrinal Questions in Constitutional Law: The Use of the Filibuster and Potential Senate Reform**

Josh Chafetz

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## Article

### The Unconstitutionality of the Filibuster

JOSH CHAFETZ

*This Article argues that the filibuster, as currently practiced, is unconstitutional.*

*After a brief introduction in Part I, Part II describes the current operation of the filibuster. Although the filibuster is often discussed in terms of “unlimited debate,” this Part argues that its current operation is best understood in terms of a sixty-vote requirement to pass most bills and other measures through the Senate.*

*Part III presents a structural argument that this supermajority requirement for most Senate business is unconstitutional. This Part argues that the words “passed” in Article I’s description of the legislative process, “determine” in the Rules of Proceedings Clause, and “consent” in the Appointments Clause must be understood to contain an implicit premise that a determined and focused legislative majority must be able to get its way in a reasonable amount of time. Or, to put it differently, the Constitution cannot countenance permanent minority obstruction in a house of Congress.*

*Part IV responds to the most prominent counterarguments. First, it rejects the counterargument from plenary cameral rule-making authority, arguing that rules made pursuant to this authority still cannot run afoul of the structural principle described in Part III. Second, it rejects the counterargument based on historical pedigree. Surveying the history of the House of Commons, the House of Representatives, and the Senate, it finds no longstanding tradition in Anglo-American legislatures of indefinite minority obstruction. And third, it rejects the counterargument that legislative entrenchment is unproblematic.*

*Finally, Part V suggests choreography for eliminating the filibuster. It begins by noting that this is not a matter for Article III courts; the arguments here are—and must be—addressed to constitutionally conscientious Senators. It then suggests that the filibuster need not be eliminated at the beginning of a new Congress; if the filibuster is unconstitutional, then the presiding officer may so rule at any time, and the Senate may uphold that ruling by simple majority. Finally, it notes that the filibuster need not be replaced with a simple majority cloture rule and suggests potential alternatives.*

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# The Unconstitutionality of the Filibuster

JOSH CHAFETZ\*

## I. INTRODUCTION

On January 19, 2010, Republican Scott Brown surprised most of the political cognoscenti by winning the Massachusetts Senate seat left vacant by Edward Kennedy's death the previous August.<sup>1</sup> As a result, the United States Senate had fifty-seven Democrats, two Independents who caucused with the Democrats, and forty-one Republicans. A blogger for the *Village Voice* penned a post headlined, "Scott Brown Wins Mass. Race, Giving GOP 41–59 Majority in the Senate,"<sup>2</sup> a line that President Obama quoted a couple of weeks later.<sup>3</sup>

Because a version had already passed the Senate, the healthcare reform bill, which had taken up much of Congress's attention for the preceding year, became law on March 23, 2010<sup>4</sup>—after two more months of *Sturm und Drang*.<sup>5</sup> A number of other Democratic priorities, however, including a comprehensive energy and climate change bill that had already passed

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\* Assistant Professor of Law, Cornell Law School. This Article was originally prepared for the *Connecticut Law Review's* 2010 "Is Our Constitutional Order Broken?" Symposium, and I am grateful to the Symposium organizers and participants for their comments. Thanks also to Akhil Amar, Aaron Bruhl, Gerard Magliocca, David Pozen, Catherine Roach, Larry Solum, Michael Stern, Keith Werhan, and the participants in the Tulane Law School Faculty Workshop for helpful and thought-provoking comments on earlier drafts. Ava Jacobi and Lisa Wertheimer provided excellent research assistance. Any remaining errors or infelicities are, of course, my own.

<sup>1</sup> See Michael Cooper, *G.O.P. Senate Victory Stuns Democrats*, N.Y. TIMES, Jan. 21, 2010, at A1.

<sup>2</sup> Roy Edroso, *Scott Brown Wins Mass. Race, Giving GOP 41–59 Majority in the Senate*, VILLAGE VOICE BLOG (Jan. 20, 2010, 12:44 PM), [http://blogs.villagevoice.com/runninscared/archives/2010/01/scott\\_brown\\_win.php](http://blogs.villagevoice.com/runninscared/archives/2010/01/scott_brown_win.php).

<sup>3</sup> President Barack Obama, Remarks at the Senate Democratic Policy Committee Issues Conference and a Question-and-Answer Session, 2010 DAILY COMP. PRES. DOC. 1 (Feb. 3, 2010).

<sup>4</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

<sup>5</sup> Although both the House and the Senate had passed versions of the bill at the time of the Massachusetts special election, the differences between the bills were still in the process of being ironed out in conference committee. Because Senate Democrats no longer had the sixty votes necessary to achieve cloture on the conference report, the only way to enact the bill was to have the House pass the identical bill that the Senate had already passed. A number of House members, however, balked at some of the Senate bill's provisions. Ultimately, the House passed the Senate bill, and both chambers immediately passed a number of negotiated "fixes" in a separate bill, which was eligible to pass with limited debate under the Senate's restrictive budget reconciliation procedure. For narratives of the bill's passage, see STAFF OF THE WASH. POST, LANDMARK: THE INSIDE STORY OF AMERICA'S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL 49–62 (2010); Jonathan Cohn, *How They Did It: The Inside Account of Health Care Reform's Triumph*, NEW REPUBLIC, June 10, 2010, at 14, 24–25. For a description of the reconciliation procedure, see STAFF OF S. COMM. ON THE BUDGET, 105TH CONG., THE CONGRESSIONAL BUDGET PROCESS: AN EXPLANATION, S. PRT. NO. 105-67, at 20–22 (Comm. Print 1998).

the House<sup>6</sup> and a number of pending nominations,<sup>7</sup> fell by the wayside.

It seems peculiar, to say the least, that sizeable and determined majorities in both houses of Congress, working in conjunction with the President, would be unable to enact the legislation or confirm the nominees they favor. And yet such is the state of the Senate in early twenty-first-century America. In this Article, I argue that it is not only peculiar; it is unconstitutional.<sup>8</sup>

Part II will take up the issue of the referent of that tricky indexical “it” in the previous sentence—that is, this Part will ask what, exactly, the modern filibuster is, as both a formal and a functional matter. Part III will sketch a fairly simple structural argument for the unconstitutionality of the filibuster as described in Part II. Part IV will respond to the most prominent counterarguments, which attempt to justify the constitutionality of the filibuster on the grounds of plenary cameral rulemaking authority, historical pedigree, and the acceptability of legislative entrenchment. Finally, assuming that the preceding three Parts have persuaded you that today’s filibuster is, in fact, unconstitutional, Part V will discuss possible choreography for eliminating it.

## II. WHAT IS THE FILIBUSTER?

### A. *Formally*

The word “filibuster” appears nowhere in the standing rules of the Senate. Our first task, then, is definitional: What are we talking about when we talk about the filibuster? The *Oxford English Dictionary* defines a filibuster simply as “[a]n act of obstruction in a legislative assembly,”<sup>9</sup> while *Black’s Law Dictionary* offers a somewhat more focused definition: “A dilatory tactic, esp. prolonged and often irrelevant speechmaking, employed in an attempt to obstruct legislative action.”<sup>10</sup> And a recent comprehensive study of the phenomenon by political scientist Gregory Koger defines filibustering as “legislative behavior (or a threat of such

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<sup>6</sup> American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

<sup>7</sup> See, e.g., Carol J. Williams, *Political Logjam on Federal Judgeships*, L.A. TIMES, Aug. 31, 2010, at 7 (noting, *inter alia*, that “two key 9th Circuit appointments were sent back to the White House, effectively scuttling the chances of UC Berkeley law professor Goodwin Liu joining the appeals court or San Francisco Magistrate Judge Edward M. Chen being elevated to the U.S. District Court for Northern California”).

<sup>8</sup> I began sketching out my argument for the unconstitutionality of the contemporary filibuster in Josh Chafetz & Michael J. Gerhardt, Debate, *Is the Filibuster Constitutional?*, 158 U. PA. L. REV. PENNUMBRA 245 (2010), <http://www.pennumbra.com/debates/pdfs/Filibuster.pdf>. The arguments presented here are a significant elaboration on—and in some cases, minor modification of—the arguments there. I again thank Mike Gerhardt for being such a probing and gracious sparring partner.

<sup>9</sup> 5 OXFORD ENGLISH DICTIONARY 906 (2d ed. 1989).

<sup>10</sup> BLACK’S LAW DICTIONARY 704 (9th ed. 2009).

behavior) intended to delay a collective decision for strategic gain.”<sup>11</sup> As Koger observes—and as this Article will discuss in more detail later<sup>12</sup>—filibustering has varied dramatically in its tactics, its frequency, and its efficacy throughout the history of the United States Congress.<sup>13</sup>

The form that the filibuster takes today, however, is rather simple to describe. As a formal matter, a filibuster occurs when a Senator or group of Senators takes advantage of the chamber’s “practice of unlimited debate”<sup>14</sup> in order to delay or obstruct a measure. The only way to end debate and force a vote on most measures is to invoke cloture, as governed by Senate Rule XXII. Under that rule, if sixteen Senators sign a cloture petition, then, two calendar days during which the Senate sits<sup>15</sup> later, the presiding officer will ask whether “it [is] the sense of the Senate that the debate shall be brought to a close?”<sup>16</sup> Because a cloture motion is non-debatable, a vote must be taken immediately upon the question being put. If “three-fifths of the Senators duly chosen and sworn”—that is, sixty Senators, assuming no vacancies—vote to answer that question in the affirmative, then no business is in order other than the matter on which cloture has been invoked.<sup>17</sup> Debate on that measure is limited to thirty hours once cloture has been successfully invoked, at the end of which a vote on the underlying measure must be taken.<sup>18</sup> “No dilatory motion, or dilatory amendment, or amendment not germane shall be in order” during the thirty-hour post-cloture period, and no Senator may speak for more than one hour during that period.<sup>19</sup> In essence, once cloture has been invoked, procedure in the Senate comes more closely to resemble procedure in the House.<sup>20</sup>

There is, however, one very important exception to the sixty-vote requirement for cloture. Invoking cloture on a motion to amend the Senate rules requires “two-thirds of the Senators present and voting.”<sup>21</sup> In other words, invoking cloture on a motion to change the rules—say, to change the rules by lowering the threshold for invoking cloture—will almost always require an even *greater* supermajority than is needed to invoke

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<sup>11</sup> GREGORY KOGER, *FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE* 16 (2010).

<sup>12</sup> See *infra* Section IV.B.

<sup>13</sup> See generally KOGER, *supra* note 11, at 37–187.

<sup>14</sup> FLOYD M. RIDDICK, *SENATE PROCEDURE: PRECEDENTS AND PRACTICES* 568 (1981).

<sup>15</sup> That is, if the petition is presented on Wednesday, then the cloture vote takes place on Friday. If the petition is presented on Friday, then the vote takes place on Tuesday (assuming that the Senate was not in session on Saturday or Sunday).

<sup>16</sup> *STANDING RULES OF THE SENATE*, S. DOC. NO. 110-9, at 16 (2007) (R. XXII.2).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See CONGRESSIONAL QUARTERLY, *HOW CONGRESS WORKS* 90 (4th ed. 2008) (describing the limits on dilatory tactics at all times in the modern House).

<sup>21</sup> *STANDING RULES OF THE SENATE*, *supra* note 16, at 16 (R. XXII.2).

cloture on any other type of measure. Moreover, the Senate, unlike the House, considers itself a “continuing body,” which means that its rules never expire.<sup>22</sup> The supermajority requirement for cloture is thus firmly entrenched in the Senate rules: it cannot be lowered unless at least two-thirds of the Senators present and voting are willing to support cloture on a motion to lower it. Although this state of affairs has been subject to significant criticism, a brief attempt in early 2011 to reform the filibuster sputtered out with a small package of toothless “reforms.”<sup>23</sup>

This, then, is the formal picture of the contemporary filibuster: so long as a single Senator wishes to speak, her colleagues cannot silence her and move to a vote unless they can muster sixty votes to do so. Moreover, they cannot end debate on a motion to lower that sixty-vote threshold unless they can muster sixty-seven votes (assuming full attendance)<sup>24</sup> to do so.

### B. *Functionally*

To complete our picture of how the filibuster *actually* works, we need to recognize that what was once an extraordinary procedure has now become thoroughly routine.<sup>25</sup> Cloture is now a de facto requirement for the passage of any significant measure—and this is a very recent phenomenon. When cloture was first introduced into Senate rules in 1917, it required a two-thirds vote to pass.<sup>26</sup> The threshold was lowered to its current, sixty-vote, requirement in 1975.<sup>27</sup> The table below<sup>28</sup> traces the rise of cloture in five-Congress intervals, beginning with the 66th Congress in 1919–1921.

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<sup>22</sup> See RIDDICK, *supra* note 14, at 991–95. For incisive criticism of the implications of the “continuing body” view of the Senate, see generally Aaron-Andrew P. Bruhl, *Burying the “Continuing Body” Theory of the Senate*, 95 IOWA L. REV. 1401 (2010).

<sup>23</sup> See Cong. Q. Staff, *Senate Ends ‘Secret Holds’*, CONGRESS.ORG, Jan. 28, 2011, [http://www.congress.org/news/2011/01/28/senate\\_ends\\_secret\\_holds](http://www.congress.org/news/2011/01/28/senate_ends_secret_holds).

<sup>24</sup> Given the high salience and importance of a motion to lower the cloture threshold, and given that cloture motions cannot be voted upon until (at least) two calendar days after they are submitted, it seems reasonable to assume a high level of attendance for the vote to invoke cloture on a motion to amend the Senate rules to lower the cloture threshold.

<sup>25</sup> Aaron Bruhl paints a similar portrait of the contemporary Senate in his contribution to this Symposium. See generally Aaron-Andrew P. Bruhl, *The Senate: Out of Order*, 43 CONN. L. REV. 1041 (2011).

<sup>26</sup> See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 198 (1997).

<sup>27</sup> See KOGER, *supra* note 11, at 176.

<sup>28</sup> All data in this table are from *Senate Action on Cloture Motions*, U.S. SENATE, [http://www.senate.gov/pagelayout/reference/cloture\\_motions/clotureCounts.htm](http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm) (last visited Feb. 8, 2011).

Congresses	Years	Cloture Motions Filed	Cloture Votes	Cloture Invoked
66th–70th	1919–1929	11	10	4
71st–75th	1929–1939	5	3	0
76th–80th	1939–1949	8	6	0
81st–85th	1949–1959	3	3	0
86th–90th	1959–1969	22	21	4
91st–95th	1969–1979	136	97	33
96th–100th	1979–1989	197	135	54
101st–105th	1989–1999	329	221	75
106th–110th	1999–2009	411	334	169

The trend is unmistakable—and a more fine-grained picture tells an even starker story. Through the 109th Congress (2005–2007), there had never been more than eighty-two cloture motions filed (104th Congress), sixty-one cloture votes (107th Congress), or thirty-four invocations of cloture (107th and 109th Congresses).<sup>29</sup> In the 110th Congress (2007–2009), there were one hundred thirty-nine cloture motions filed, one hundred twelve votes on cloture, and cloture was invoked sixty-one times.<sup>30</sup> In other words, that one Congress had 69.5% more cloture motions filed, 83.6% more cloture votes, and 79.4% more successful invocations of cloture *than any Congress had ever had before*. And the 111th Congress (2009–2011) followed suit, with one hundred thirty-six cloture motions filed, ninety-one votes on cloture, and sixty-three invocations of cloture.<sup>31</sup>

Clearly, this cannot be attributed to the nature of the legislation under consideration. Just to take one example, the Democrats never had a filibuster-proof majority during the 73rd Congress (1933–1935), and there was not a single cloture motion even filed during that Congress.<sup>32</sup> And yet that Congress passed the programs of the First New Deal, including the Agricultural Adjustment Act,<sup>33</sup> the Securities Act of 1933,<sup>34</sup> the Glass-Steagall Act of 1933,<sup>35</sup> and the National Industrial Recovery Act,<sup>36</sup> among many others. Rather, the data on cloture petitions and votes indicate that

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Pub. L. No. 73-10, 48 Stat. 31 (1933).

<sup>34</sup> Pub. L. No. 73-22, 48 Stat. 74 (1933).

<sup>35</sup> Pub. L. No. 73-66, 48 Stat. 162 (1933).

<sup>36</sup> Pub. L. No. 73-67, 48 Stat. 195 (1933).

cloture has simply become another standard procedural hurdle that almost all significant legislation must clear. In short, as any number of observers have recognized, it can now accurately be said that it requires sixty votes to pass a bill through the Senate.<sup>37</sup>

Several reasons have been suggested for the rise of the “sixty-vote Senate.” One major culprit is likely the introduction of separate legislative “tracks” in the early 1970s by Senate Majority Leader Mike Mansfield. “Tracking”—which did not involve any formal change to the Senate rules—is a procedure by which the Majority Leader, acting with the approval of the Minority Leader, can keep more than one bill pending on the Senate floor as unfinished business.<sup>38</sup> The effect of the tracking system is that a filibuster no longer ties up the business of the Senate. Once a Senator announces an intention to filibuster a measure, the issue is simply kept on the back burner unless the majority can muster the sixty votes for cloture. This, of course, significantly decreases the costs of filibustering—no longer must a filibusterer justify his tying up the entire business of the Senate to his constituents or colleagues, and no longer must a filibusterer summon the physical endurance to hold the Senate floor.<sup>39</sup> With such reduced costs, there was no longer any reason to treat the filibuster as an extraordinary measure, used in cases in which the minority had very intense preferences. The tracking system—or, more generally, the unwillingness of the Senate majority to use attrition as a means of breaking filibusters<sup>40</sup>—has enabled the filibuster to become regularized.

Other factors have undoubtedly aided in the rise of the sixty-vote Senate, as well. Many congressional observers have detected a shift in Senate culture that has resulted in Senators being less concerned about antagonizing their colleagues.<sup>41</sup> And national partisan realignment may

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<sup>37</sup> See, e.g., KOGER, *supra* note 11, at 3 (describing “the ability of [S]enators to block bills and nominations unless 60 percent of the Senate votes to override a ‘filibuster’”); Chafetz & Gerhardt, *supra* note 8, at 247–49 (Chafetz Opening Statement) (making this point); *id.* at 255 (Gerhardt Rebuttal) (accepting this description); Fisk & Chemerinsky, *supra* note 26, at 182 (“[I]t is now commonly said that sixty votes in the Senate, rather than a simple majority, are necessary to pass legislation and confirm nominations.”); David R. Mayhew, *Supermajority Rule in the U.S. Senate*, 36 PS: POL. SCI. & POL. 31, 31 (2003) (“Automatic failure for bills not reaching the 60 mark. That is the current Senate practice . . .”).

<sup>38</sup> SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE* 15 (1997); WALTER J. OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* 212 (7th ed. 2007); Fisk & Chemerinsky, *supra* note 26, at 201.

<sup>39</sup> See Fisk & Chemerinsky, *supra* note 26, at 203 (“The stealth filibuster is easier, both physically and politically . . .”); Barry Friedman & Andrew D. Martin, *A One-Track Senate*, N.Y. TIMES, Mar. 10, 2010, at A27 (“Not only has it become easier to ‘filibuster,’ but tracking means there are far fewer consequences when the minority party or even one willful member of Congress does so, because the Senate can carry on with other things.”).

<sup>40</sup> Koger views the tracking system as “a minor reform that is symptomatic of a broader shift from attrition to cloture as the dominant response to obstruction.” KOGER, *supra* note 11, at 137.

<sup>41</sup> See THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 146–69 (updated ed. 2008) (identifying a decline in institutional identity and asserting that it has led to Senators’ favoring short-term political

have contributed as well, by creating more ideologically homogenous parties<sup>42</sup> that were willing to use all tools at their disposal to hinder the other party's agenda. But regardless of the precise constellation of reasons for the rapid growth in filibustering, two things are pellucidly clear: (1) the filibuster as practiced today has almost nothing to do with debating an issue; and (2) the filibuster is no longer reserved for issues of unusual importance or on which preferences are unusually intense. A Senator who intends to vote against final passage of a bill need no longer separately justify her decision to vote against cloture—indeed, if anything, a Senator who intends to vote against final passage but votes *for* cloture must explain the seeming inconsistency. And this state of affairs has been thoroughly internalized by Senators: a measure that cannot command the support of sixty Senators is unlikely even to be introduced onto the Senate floor. At least for purposes of political obstruction, the *Village Voice* blogger was on-point: forty-one votes is all a party needs to kill proposals it does not like.<sup>43</sup>

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Combining the formal and functional pictures, we are now in a position to put the question of the filibuster's constitutionality more precisely. In the Senate today, a supermajority of sixty Senators is required to pass a bill. Moreover, an even larger supermajority of sixty-seven is required to alter that supermajority requirement. Is this state of affairs consistent with the Constitution? My answer to that question, which I will explain in the next Part, is *no*.

### III. THE (SIMPLE) STRUCTURAL ARGUMENT AGAINST THE FILIBUSTER

The Senate's cloture rule—indeed, all of its rules—are grounded in each chamber's constitutional power to “determine the Rules of its Proceedings.”<sup>44</sup> The Constitution also gives the Senate the power to “Judge . . . the Elections . . . of its own Members.”<sup>45</sup> Suppose, then, that the Senate adopted the following rule to guide its judgment of elections:

In any election to this body in which a current Senator seeks

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gain over long-term institutional efficacy); *see also* KOGER, *supra* note 11, at 160–61 (suggesting that Senate norms were effective in an earlier period in restraining use of the filibuster).

<sup>42</sup> *See* EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* 379 (2002) (noting that in the 1990s, “[c]onservative Democrats . . . almost disappeared as the Republican party became the undisputed new home of southern conservatism. At the same time the Democrats’ ideological center of gravity moved into the liberal or national range. The result was a significant clarification of party and ideology.”).

<sup>43</sup> *See* Edroso, *supra* note 2.

<sup>44</sup> U.S. CONST. art. I, § 5, cl. 2.

<sup>45</sup> *Id.* § 5, cl. 1.

reelection, the current Senator shall be deemed reelected *unless* sixty percent or more of the duly qualified voters cast their votes for another candidate.<sup>46</sup>

There is no clear piece of constitutional text denying the Senate the power to pass this rule. After all, the Seventeenth Amendment provides that “the Senate . . . shall be composed of two Senators from each State, elected by the people thereof,” and that “[t]he electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures,”<sup>47</sup> but nowhere does it say that the candidate with the most votes must win.<sup>48</sup> Indeed, nothing in the Constitution explicitly provides for majority rule in congressional elections.

And yet this hypothetical rule simply cannot be constitutional. A Constitution written in the name of We the People cannot tolerate this sort of self-entrenchment by incumbents. Indeed, it is the self-entrenching and self-dealing nature of this hypothetical rule that gives it its constitutional

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<sup>46</sup> I used this same hypothetical in Chafetz & Gerhardt, *supra* note 8, at 246 (Chafetz Opening Statement). Anyone familiar with the concept of bipartisan gerrymandering—that is, the practice by which majority and minority parties collude in the shared interest of incumbency protection—will recognize that my hypothetical rule, if it were constitutional, might well garner significant levels of support from sitting Senators of both parties. See Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 572 (2004) (defining a bipartisan gerrymander as “a nonaggression pact between the parties in which they agree to divide up a state in favor of incumbent sinecure” and noting that bipartisan gerrymandering is pervasive).

<sup>47</sup> U.S. CONST. amend. XVII, cl. 1.

<sup>48</sup> Mike Gerhardt suggests that my hypothetical is unconstitutional because it violates the Qualifications Clause and “federalism principles,” rather than the structural principle that I describe below. Chafetz & Gerhardt, *supra* note 8, at 263 (Gerhardt Closing Statement). But Gerhardt is begging the question. The hypothetical rule would only violate the Qualifications Clause if it were adding a new qualification for serving in the Senate. And it would only be adding a new qualification if we assume that the existing constitutional rule is that whoever gets the most votes wins the seat. In other words, the Qualifications Clause argument *assumes as its premise* precisely the structural principle for which I am arguing.

And the same goes for the federalism argument, which Gerhardt describes as focusing on “state sovereignty to organize local elections in accordance with other constitutional provisions, including the Seventeenth Amendment.” *Id.* The formalist response to this point would be that my hypothetical rule says nothing about state organization of elections—it simply sets out how the Senate will exercise its undisputed power of judging those elections and their returns. And this formalist argument points to a deeper structural point: one of the purposes of giving each house the power to judge the elections, returns, and qualifications of its own members was to act as a check on the states. See JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 174–76* (2007) (describing the historical use of this power in order to oversee state election procedures). The houses are not required to accept either state electoral procedures or state returns as conclusive. It is surely the case that the Senate could refuse to seat a candidate (even a candidate whom the state authorities had certified as the winner) on the grounds that a Senate investigation revealed that the candidate’s opponent actually received more votes. See, e.g., *id.* at 174 (describing the *Spaulding v. Mead* controversy in the 9th Congress (1805–1807)). Indeed, if this were not the case, then the Senate’s power to judge elections would be reduced to a nullity. If federalism principles allow for that but do not allow for my hypothetical rule, then it must be *because there is some constitutional difference between majority (or at least plurality) rule and supermajority rule*. That is to say, once again, Gerhardt’s argument assumes as its premise the structural principle for which I am arguing.

dimension. Ordinarily, the right response to bad legislative behavior is to “throw the bums out.” But here, the bad legislative behavior cannot be fixed by the normal political process precisely because it distorts that process, making it significantly harder to throw the bums out. This sort of entrenchment of the status quo of legislative personnel against change simply cannot be squared with popular sovereignty.<sup>49</sup> That is to say, we understand the phrase “elected by the people”<sup>50</sup> implicitly to include the principle that the candidate with the most votes has to win.<sup>51</sup> Any use of the Senate’s power under the Rules of Proceedings Clause that frustrates this principle must be unconstitutional.

But it would be more than a little strange to say that the candidate with the most votes must win election to the legislature, but, within the legislature, the policy with the most votes need not win. Or put differently, it seems quite odd to say that the Constitution prohibits supermajoritarian entrenchment of legislators while allowing a nearly identical entrenchment of legislation. After all, it is hard to see how legislators we cannot get rid of are any more inimical to popular sovereignty than policies we cannot get rid of. A legislature that can make its law unrepealable even by a determined majority continues to rule us even after its members have been voted out of office. If “elected by the people” in the Seventeenth Amendment must contain the principle that the candidate with the most votes has to win the election—and I have argued above that it must—then it is hard to understand how “passed” in Article I’s description of the legislative process,<sup>52</sup> “determine” in the Rules of Proceedings Clause,<sup>53</sup> and “consent” in the Appointments Clause<sup>54</sup> can be sensibly construed so as to allow the sustained and systemic thwarting of majority will. As Jed Rubenfeld has argued: “What it means for a bill to ‘pass’ the House or

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<sup>49</sup> Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 120 (1980) (“We cannot trust the ins to decide who stays out . . .”). As Akhil Amar has noted, the Constitution is deeply concerned with preventing self-dealing by those in power. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 68, 74, 288, 433 (2005); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION*, at xiii, 17–19, 68, 85–86, 117, 130, 244 (1998); Akhil Reed Amar, *America’s Constitution, Written and Unwritten*, 57 *SYRACUSE L. REV.* 267, 270 (2007).

<sup>50</sup> U.S. CONST. amend. XVII, cl. 1.

<sup>51</sup> I previously described this as a principle of “majoritarianism.” Chafetz & Gerhardt, *supra* note 8, at 246 (Chafetz Opening Statement). That phrasing was inapt, however; in a race with more than two candidates, there is no structural problem with a plurality winner. I thank Akhil Amar for bringing this point to my attention.

<sup>52</sup> See U.S. CONST. art. I, § 7, cl. 2 (“Every Bill which shall have *passed* the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States . . .”) (emphasis added).

<sup>53</sup> See *id.* § 5, cl. 2 (“Each House may *determine* the Rules of its Proceedings . . .”) (emphasis added).

<sup>54</sup> See *id.* art. II, § 2, cl. 2 (The President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other [principal] Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . .”) (emphasis added).

Senate is not open for definition by the House or Senate. It is constitutionally fixed by the implicit majority rule meaning of ‘passed.’”<sup>55</sup> To put it more starkly: Why should we care whether or not legislators can entrench themselves in office if we are going to allow them to entrench everything they do while in office?

Of course, the Constitution itself requires supermajorities in some circumstances.<sup>56</sup> But the very weightiness of the issues for which the Constitution provides supermajority requirements—impeachment,<sup>57</sup> expulsion,<sup>58</sup> veto overrides,<sup>59</sup> treaty ratifications,<sup>60</sup> constitutional amendments,<sup>61</sup> etc.—should indicate that a majority otherwise suffices. True, it is logically possible to read the Constitution as leaving the voting rule in all other cases up to the chamber’s rules;<sup>62</sup> nevertheless, it would be structurally strange to allow the Senate to impose a higher threshold for passing ordinary legislation than for passing a proposed constitutional amendment or voting to override a presidential veto.<sup>63</sup> Yet, if the Senate can require sixty votes for passage, why not seventy or eighty?

It may, at this point, be objected that our Constitution has any number of anti-majoritarian devices beyond those enumerated supermajority requirements. The malapportionment of the Senate,<sup>64</sup> to take just one example, means that popular majorities often will not translate into legislative majorities. If the Constitution countenances the thwarting of the will of a majority of the people, this objection runs, then why would it be especially concerned with the thwarting of the will of a majority of Senators? Indeed, are checks on majoritarianism not central to Madisonian design?

But this objection proves too much. The mere fact that our Constitution has *some* anti-majoritarian elements should not serve as a bootstrap by which *any* anti-majoritarian device is made constitutionally legitimate. Indeed, this objection would equally serve to legitimate the

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<sup>55</sup> Jed Rubenfeld, Essay, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73, 83 (1996).

<sup>56</sup> See Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445, 455 n.38 (2004) (listing the seven supermajority requirements in the Constitution).

<sup>57</sup> U.S. CONST. art. I, § 3, cl. 6.

<sup>58</sup> *Id.* § 5, cl. 2.

<sup>59</sup> *Id.* § 7, cl. 2.

<sup>60</sup> *Id.* art. II, § 2, cl. 2.

<sup>61</sup> *Id.* art. V.

<sup>62</sup> See, e.g., Gerhardt, *supra* note 56, at 456 (“One may read the Constitution as requiring supermajority voting in seven specified instances but leaving each chamber free to design its own rules or voting requirements to govern its internal affairs.”).

<sup>63</sup> Both constitutional amendments and veto overrides require two-thirds votes in each house of Congress—although constitutional amendments need not take the congressional route at all. U.S. CONST. art. I, § 7, cl. 2 (veto overrides); *id.* art. V (constitutional amendments).

<sup>64</sup> See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 50–62 (2006); Suzanna Sherry, *Our Unconstitutional Senate*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 95, 95–97 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

hypothetical Senate rule with which this Part began.<sup>65</sup> Rather than use some deviations from majoritarianism to justify still others, we should take note of the essential popular sovereignty foundations of our Constitution<sup>66</sup> and insist that, in such a polity, minority veto cannot be piled atop minority veto indefinitely. The Constitution—our higher law<sup>67</sup>—specifies certain deviations from majoritarianism. But the exceptions should not be allowed to swallow the rule, nor should antimajoritarian devices in higher law be used to justify antimajoritarian devices in ordinary law.

I should be clear here: the principle I am advocating is not that the Constitution requires the immediate fulfillment of every wish of the legislative majority. After all, all procedural rules delay the implementation of majority will to some extent, and all rulemaking has at least something of an entrenching effect. The principle that I believe to be implicit in constitutional structure is more modest than that. It is simply that the Constitution cannot countenance permanent minority obstruction in a house of Congress. Or, to describe it from the other side, a determined and focused legislative majority must be able to get its way in a reasonable amount of time. This is, of course, a standard, not a rule. A constitutionally conscientious Senator would have to exercise her judgment in determining what the line should be between acceptable procedural rules and unacceptable permanent minority obstruction.<sup>68</sup>

For instance, I would think it permissible to maintain the sixty-vote requirement for cloture, so long as it was clearly the case that the cloture rule could be changed by majority vote at any time. In other words, a determined majority could go through a three-step process—first voting to lower the cloture threshold, then voting for cloture on the matter at issue under the new threshold, then voting on the underlying matter. True, the three-step process would involve delay and would alter the shape of the deliberations. It would focus Senators' minds on whether they thought that

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<sup>65</sup> See *supra* text accompanying note 46.

<sup>66</sup> See EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 152 (1988) (“The history of popular sovereignty in both England and America after 1689 can be read as a history of the successive efforts of different generations to bring the facts into closer conformity with the fiction, efforts that have gradually transformed the very structure of society.”); Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 34–37 (2000) (discussing the centrality of popular sovereignty to the Constitution); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) (“The central pillar of Republican Government, I claim, is popular sovereignty. In a Republican Government, the people rule. They do not necessarily rule directly, day-to-day. Republican Government probably does not (as some have claimed) prohibit all forms of direct democracy, such as initiative and referendum, but neither does it require ordinary lawmaking via these direct populist mechanisms.” (internal footnote omitted)).

<sup>67</sup> See Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022, 1039–43 (1984) (distinguishing ordinary lawmaking within constitutional procedures from the higher lawmaking by which those procedures themselves are established).

<sup>68</sup> See *infra* Part V.C (discussing acceptable options short of majority cloture).

the underlying issue was important enough to justify changing the rules of the game.<sup>69</sup> It would also, perhaps, focus Senators' minds on the purposes for which cloture was being used. A Senator who favored the underlying measure might nevertheless be inclined to vote against lowering the cloture threshold if she were convinced that cloture was being sought to cut off actual *debate*. On the other hand, the Senator might be more willing to support the rules change if cloture were being sought to end sheer minority obstruction. I see no objection from constitutional structure in focusing Senators' minds in this way. In the end, a determined majority, willing to spend the time, energy, and political capital, could still get its measure through the chamber. There are undoubtedly other ways of protecting the Senate's tradition of extensive debate—and its role as the cooling saucer of legislation<sup>70</sup>—without violating the structural principle described above. But the Senate's current filibuster practice clearly does violate that principle.

#### IV. THE COUNTERARGUMENTS

##### A. *The Counterargument from Plenary Cameral Rulemaking Authority*

The text-based counterargument to the position described above is simple. The Rules of Proceedings Clause<sup>71</sup> “specific[s] no limitations on the procedures that the House or Senate may devise for its proceedings” and therefore “plainly grants to the Senate plenary authority to devise procedures for internal governance, and the filibuster is a rule for debate.”<sup>72</sup> The filibuster is therefore within the Senate's constitutional power under the Rules of Proceedings Clause.

But this argument confuses a necessary condition for constitutionality with a sufficient one. For Senate Rule XXII to be constitutional, it is necessary that the Senate have the authority to promulgate procedural rules, and the Rules of Proceedings Clause provides such authority. But this is not the end of the matter, because a rule might still be unconstitutional on the grounds that it violates some other constitutional

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<sup>69</sup> In this regard, the three-step process would be akin to requiring a “second opinion” from the same opinion-giver—a process which Adrian Vermeule has noted can lead to cooler and more sober judgments. See Adrian Vermeule, *Second Opinions* 9, 11–13 (Harvard Law Sch. Public Law & Legal Theory Working Paper Series, Paper No. 10-38, 2010), available at <http://ssrn.com/abstract=1646414>.

<sup>70</sup> According to an oft-told tale,

[t]here is a tradition that, on his return from France, Jefferson called Washington to account at the breakfast-table for having agreed to a second chamber. “Why,” asked Washington, “did you pour that coffee into your saucer?” “To cool it,” quoth Jefferson. “Even so,” said Washington, “we pour legislation into the senatorial saucer to cool it.”

3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 359 (Max Farrand ed., rev. ed. 1966).

<sup>71</sup> U.S. CONST. art. I, § 5, cl. 2.

<sup>72</sup> Chafetz & Gerhardt, *supra* note 8, at 253 (Gerhardt Rebuttal).

principle. Consider, for example, a federal law banning the interstate sale of newsmagazines. This is a regulation of interstate commerce—and therefore falls within Congress’s power under the Commerce Clause.<sup>73</sup> It is nevertheless unconstitutional, because it runs afoul of the First Amendment.<sup>74</sup> Or consider a Senate rule banning Jews from serving on committees. This falls within the Senate’s power under the Rules of Proceedings Clause. Yet it, too, is unconstitutional—it violates the Religious Test Clause.<sup>75</sup> Power for Congress to legislate, or for the Senate to make rules, is the first step. But the second step is ensuring that the legislation or rule promulgated pursuant to that power does not violate some independent constitutional stricture.

Just as the Constitution forbids religious tests and abridgements of the freedom of the press, I have argued above that it also forbids permanent minority obstruction in a house of Congress.<sup>76</sup> An insistence that the Rules of Proceedings Clause grants the Senate plenary power over cameral rules no more frees Senate rules from having to comply with that structural stricture than it does from having to comply with the Religious Test Clause or the First Amendment.

#### B. *The Counterargument from History*

Defenders of the filibuster will frequently turn to history, asserting an unbroken practice stretching back to time immemorial supporting the filibuster.<sup>77</sup> But it is important to be clear what we are talking about. Any purported history of “unlimited debate” is immaterial, because, as we have already seen, the modern filibuster is not about debate. If historical practice is to justify the modern filibuster, then it must be historical practice *of something resembling the modern filibuster*. And, as noted above, the defining characteristic of the modern filibuster is that it functions as a sixty-vote requirement for the passage of measures through the Senate. Put succinctly, then, historical practice justifying today’s filibuster would have to be historical practice establishing a right of indefinite obstruction by a cameral minority. Viewed that way, the historical record is emphatically not pro-filibuster.

Consider, first, the British experience.<sup>78</sup> Although debate in

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<sup>73</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>74</sup> *Id.* amend. I.

<sup>75</sup> *Id.* art. VI, cl. 3.

<sup>76</sup> *See supra* Part III.

<sup>77</sup> *See* Gerhardt, *supra* note 56, at 451–55; John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 496–99 (1995).

<sup>78</sup> As I have noted elsewhere, British parliamentary practice formed the background against which American congressional practice developed. *See* CHAFETZ, *supra* note 48, at 2–3; Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1085 (2009) [hereinafter Chafetz,

Parliament was long free from formal limits, political norms kept minorities from using debate for purposes of indefinite obstruction in the eighteenth and early nineteenth centuries. As Josef Redlich explained it, a distinctly English “political prudence” long “secure[d] the majority against abuse of the principle of the protection of the minority.”<sup>79</sup> Of course, that political prudence was largely the effect of a pre-Reform Act politics in which aristocratic patronage served as a gatekeeper to the lower house, thus ensuring “[g]entlemanly debates, [and] gentlemanly parliamentary procedure.”<sup>80</sup> The great parliamentary reforms and expansions of the franchise in the mid-nineteenth century eroded these “gentlemanly” norms, and the issue of parliamentary obstruction, in particular, came to the fore in the 1870s and 1880s.

Specifically, it was the formation of the Irish nationalist “Home Rule” party and the rise of Charles Stewart Parnell that first brought the issue of long-term parliamentary obstruction to the fore.<sup>81</sup> After the 1874 general election, Home Rulers had fifty-nine seats at Westminster,<sup>82</sup> and yet, in their determination “strictly to follow English parliamentary tradition,” they found that they were unable to focus the House’s attention on Irish issues.<sup>83</sup> In 1875, the twenty-eight year old Charles Stewart Parnell won a by-election in the constituency of Meath as a Home Ruler, and he was off to London.<sup>84</sup> Impatient with the conservative tactics of Isaac Butt, then the leader of the Home Rulers in Parliament, Parnell undertook a study of previous instances of parliamentary obstruction.<sup>85</sup> Although there were a few precedents, they consisted of “short transient episode[s]” of “emphatic protest.”<sup>86</sup> It was Parnell’s innovation to turn transient protest into permanent war. In Redlich’s words, Parnell saw himself as the “enemy” of the House.<sup>87</sup> In keeping with this view of his role, he used obstructive

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*Contempt*]; Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 DUKE L.J. 177, 214–15 (2008) [hereinafter Chafetz, *Resignation*].

<sup>79</sup> 1 JOSEF REDLICH, *THE PROCEDURE OF THE HOUSE OF COMMONS: A STUDY OF ITS HISTORY AND PRESENT FORM* 132 (A. Ernest Steinthal trans., 1908).

<sup>80</sup> Geddes W. Rutherford, *Some Aspects of Parliamentary Obstruction*, 22 SEWANEE REV. 166, 171–72 (1914).

<sup>81</sup> On the Home Rule movement and Parnell’s rise to the leadership thereof, see ROBERT KEE, *THE LAUREL AND THE IVY: THE STORY OF CHARLES STEWART PARNELL AND IRISH NATIONALISM* 64–66 (1993); 1 R. BARRY O’BRIEN, *THE LIFE OF CHARLES STEWART PARNELL* 44–69 (Greenwood Press, 1969) (1898).

<sup>82</sup> 1 REDLICH, *supra* note 79, at 135.

<sup>83</sup> *Id.* at 136.

<sup>84</sup> 1 O’BRIEN, *supra* note 81, at 78–79.

<sup>85</sup> *Id.* at 269–70.

<sup>86</sup> 1 REDLICH, *supra* note 79, at 139; *see also* ROBERT LUCE, *LEGISLATIVE PROCEDURE: PARLIAMENTARY PRACTICES AND THE COURSE OF BUSINESS IN THE FRAMING OF STATUTES* 279 (1922) (noting that, with Parnell, the use of obstructive tactics “grew to be really serious and compelled reform of procedure”); Rutherford, *supra* note 80, at 174 (“Before Parnell took his seat in the House of Commons obstruction had been a sort of transient episode, arising from the temper of the opposition, and was little more than an emphatic protest against the conduct of an overbearing majority.”).

<sup>87</sup> 1 REDLICH, *supra* note 79, at 140.

tactics, not simply to combat individual pieces of legislation, but to bring the entire functioning of Parliament to a halt.<sup>88</sup> In short, Parnell “was the founder of systematic obstruction”<sup>89</sup> in Parliament—the kind of obstruction that looks a lot like the filibuster in the modern American Senate.

And the House had very little patience for Parnell’s tactics. As early as 1877, an exchange with Parnell prompted Speaker Henry Brand to announce that:

[T]he House is perfectly well aware that any Member wilfully and persistently obstructing Public Business, without just and reasonable cause, is guilty of a contempt of this House; and is liable to punishment, whether by censure, by suspension from the service of this House, or by commitment, according to the judgment of the House.<sup>90</sup>

Stafford Northcote, the Chancellor of the Exchequer, then immediately moved that Parnell be held in contempt and suspended from sitting for a week and a half;<sup>91</sup> after some discussion, debate was adjourned without taking any action on the motion.<sup>92</sup> Northcote, however, was not done with Parnell. Two days later, he moved two resolutions, both of which were meant to create session rules to address obstruction by the Home Rulers. The second resolution limited dilatory motions in the Committee of the Whole House, and it passed with relatively little debate.<sup>93</sup> The first, however, provoked sustained debate. That resolution provided that, if a Member were twice declared out of order during a debate, and if the Speaker or the Chairman of Committees declared that Member to be “disregarding the authority of the Chair,” then a motion could immediately be made that the Member not be allowed to speak for the remainder of the debate. That motion would be non-debatable, except that the Member in question would be allowed to explain himself.<sup>94</sup> In other words, at the Chair’s discretion, a Member making a nuisance of himself could be silenced for the remainder of the debate by majority vote. In the ensuing

<sup>88</sup> *Id.* For a summary of the tactics he employed, see *id.* at 142–43.

<sup>89</sup> *Id.* at 137; see also DOUGLAS DION, TURNING THE LEGISLATIVE THUMBSCREW: MINORITY RIGHTS AND PROCEDURAL CHANGE IN LEGISLATIVE POLITICS 192 (1997) (“What then was so novel about Parnell’s behavior? . . . For the British, it was his willingness to obstruct *all* legislation, not just those dealing with the affairs of Ireland, that made him a legislative revolutionary.”); Rutherford, *supra* note 80, at 174 (“It was Parnell who employed parliamentary obstruction to block all government business so that Irish reform would be effected. He was, indeed, as Redlich properly suggests, the real founder of wilful or conscious obstruction.”).

<sup>90</sup> 235 PARL. DEB., H.C. (3d ser.) (1877) 1814 (U.K.). For background on the contempt power in the houses of Parliament, see generally CHAFETZ, *supra* note 48, at 193–206; Chafetz, *Contempt*, *supra* note 78, at 1093–1119.

<sup>91</sup> 235 PARL. DEB., H.C. (3d ser.) (1877) 1815 (U.K.).

<sup>92</sup> *Id.* at 1833.

<sup>93</sup> 236 PARL. DEB., H.C. (3d ser.) (1877) 80–82 (U.K.).

<sup>94</sup> *Id.* at 25.

debate, George Sandford proposed an amendment which would require a three-fourths vote to carry a motion prohibiting a Member from speaking.<sup>95</sup> Sir William Harcourt immediately stood to declare his opposition to supermajority voting rules:

They never had such a Rule, and he was surprised that [Sandford], who wished to appear so very conservative of their Rules, should have proposed one of the most radical innovations of those Rules that had ever been attempted. There was nothing in that Resolution itself which was half so great a novelty as that Amendment.<sup>96</sup>

Northcote, too, expressed his opposition to introducing supermajority rules,<sup>97</sup> and it is telling that no Member came forward to suggest that there was any precedent whatsoever for such a rule. In the end, Sandford's amendment to the proposed resolution was voted down.<sup>98</sup> As to the resolution itself, both Parnell and his obstructionist colleague Joseph Biggar insisted that they were not, in fact, obstructionists—that the resolution was (in Parnell's words) an “unconstitutional” attempt “to muzzle him.”<sup>99</sup> In other words, rather than defend a right to obstruct, they denied that their project was obstructionist at all. Their colleagues in the House, however, were not buying it—especially after Northcote asked the Home Rulers “whether they can say conscientiously that all the opposition which they have conducted in the course of this Session has been of the character which [Parnell] describes?”<sup>100</sup> and then proceeded to list acts of obstruction that could not, by any stretch of the imagination, be described as part of actual debate.<sup>101</sup> Northcote's resolution passed by a vote of 282 to 32.<sup>102</sup>

Northcote was still not done with Parnell. In February of 1880, he proposed a new standing order of the House.<sup>103</sup> Under this rule, the Speaker or Chairman of the Committee of the Whole House could declare that a Member was “disregarding the authority of the Chair, or abusing the Rules of the House by persistently and wilfully obstructing the business of

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<sup>95</sup> *Id.* at 34.

<sup>96</sup> *Id.* at 38.

<sup>97</sup> *Id.* at 68.

<sup>98</sup> *Id.* at 70.

<sup>99</sup> *Id.* at 54; *see generally id.* at 54–59 (reporting Parnell and Biggar's speeches defending their actions).

<sup>100</sup> *Id.* at 66.

<sup>101</sup> *See id.* at 66–67.

<sup>102</sup> *Id.* at 80.

<sup>103</sup> A standing order continues from Parliament to Parliament unless repealed. In contrast, a session rule—like the 1877 rules proposed by Northcote and adopted by the House—expires at the end of the parliamentary session. *See* 2 REDLICH, *supra* note 79, at 6 (describing the difference between standing orders and session rules).

the House, or otherwise.”<sup>104</sup> A non-debatable motion could then be made to suspend the named Member for the rest of the day.<sup>105</sup> If a Member was suspended three times in a single parliamentary session, then the third suspension would last for a week, at which point the House would then vote on whether he could resume his seat or whether the suspension should continue.<sup>106</sup> The House adopted Northcote’s proposed standing order by a vote of 166 to 20.<sup>107</sup>

Nor did the fight over obstruction end with the demise of the Tory government in April 1880. When Gladstone’s government brought in the Irish Coercion Bill in January of 1881, the Home Rulers reacted with forty-one and a half hours of continuous obstruction.<sup>108</sup> At this point, Speaker Brand had enough. He declared that:

A crisis has . . . arisen which demands the prompt interposition of the Chair, and of the House. The usual rules have proved powerless to ensure orderly and effective Debate. An important measure [i.e., the Coercion Bill], recommended in Her Majesty’s Speech nearly a month since, and declared to be urgent, in the interests of the State, by a decisive majority, is being arrested by the action of an inconsiderable minority, the Members of which have resorted to those modes of “Obstruction,” which have been recognised by the House as a Parliamentary offence. . . .

A new and exceptional course is imperatively demanded; and I am satisfied that I shall best carry out the will of the House, and may rely upon its support, if I decline to call upon any more Members to speak, and at once proceed to put the Question from the Chair.<sup>109</sup>

The question was thus put on the Coercion Bill, which passed decisively.<sup>110</sup>

Perhaps most importantly of all, in 1882, the House adopted, on Gladstone’s motion, a closure procedure. If the Speaker informed the House “that the subject has been adequately discussed,” then any Member could move to put the question.<sup>111</sup> If that motion—which was non-debatable—was supported by majority vote, then the question would be immediately put on the underlying matter.<sup>112</sup> The procedure did require a

<sup>104</sup> 250 PARL. DEB., H.C. (3d ser.) (1880) 1706 (U.K.).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1708.

<sup>108</sup> 1 REDLICH, *supra* note 79, at 153.

<sup>109</sup> 257 PARL. DEB., H.C. (3d ser.) (1881) 2032–33 (U.K.).

<sup>110</sup> *Id.* at 2035.

<sup>111</sup> 137 H.C. JOUR. 505 (Nov. 10, 1882) (U.K.).

<sup>112</sup> *Id.*

larger-than-normal quorum (although the quorum threshold was still significantly less than half the membership of the House),<sup>113</sup> but relied on a majority voting rule. Moreover, the resolution creating the procedure was itself adopted by majority rule—and by a slim majority of 304 to 260, at that.<sup>114</sup> Gladstone explicitly described the purpose of the procedure as the elimination of parliamentary obstruction, which he defined as “the disposition either of the minority of the House, or of individuals, to resist the prevailing will of the House otherwise than by argument.”<sup>115</sup> And he reacted with horror to any suggestion that invoking closure should require a supermajority: “God forbid that we should see so vast an innovation introduced into the practice of this House, applicable to our ordinary procedure, as would be a Rule of the House under which the voice of the majority was not to prevail over that of the minority.”<sup>116</sup>

Let us briefly pause and take note of several important lessons of these debates over parliamentary obstruction. First, there was widespread consensus that the tactics employed by Parnell and his Home Rule colleagues—that is, the indefinite obstruction of parliamentary business across a wide range of substantive areas—were something new in parliamentary history in the 1870s. Moreover, neither Parnell nor Biggar was willing to stand up for a right to obstruct; instead, they both insisted that they were not engaged in obstructionism at all, but rather in ordinary debate. Second, the reaction to the Home Rulers’ obstruction was swift and decisive, beginning with Speaker Brand’s 1877 announcement that obstruction was grounds for a contempt citation, and culminating in the 1882 adoption of majority closure. The instant that procedures were used for the purpose of obstruction, methods were found to curtail the obstructive uses of those procedures. And third, Tories like Northcote and Liberals like Gladstone found common ground, not only in their determination to stop obstruction, but also in their revulsion to the idea of a supermajority rule for devices meant to curb obstruction. In other words, none of the defining features of the modern filibuster find any support in

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<sup>113</sup> *Id.* (providing that the closure motion “shall not be decided in the Affirmative, if a Division be taken, unless it shall appear to have been supported by more than Two hundred Members, or unless it shall appear to have been opposed by less than Forty Members and supported by more than One hundred Members”).

<sup>114</sup> *Id.*

<sup>115</sup> 266 PARL. DEB., H.C. (3d ser.) (1882) 1140 (U.K.).

<sup>116</sup> *Id.* at 1146. Gladstone focused on the inappropriateness of supermajority rules for *ordinary* procedure because he had, just the previous year, proposed a supermajority procedure for ending debate in *extraordinary* situations. See 258 PARL. DEB., H.C. (3d ser.) (1881) 103 (U.K.) (proposing the “urgency rule,” under which a three-quarters supermajority could sustain a motion from a member of the Government that pending business was urgent, after which the Speaker would have extensive powers to control debate on the urgent measure); *id.* at 155–56 (noting the passage of the urgency rule, as slightly amended). Apparently, in Gladstone’s view, supermajority rules might be appropriate in extreme circumstances, but they certainly could not properly be introduced into everyday lawmaking procedures.

historic British parliamentary practice.

Nor is the early history of Congress<sup>117</sup> more favorable to filibuster proponents. Jefferson, the great parliamentarian of the early Republic and President of the Senate from 1797 to 1801, wrote that “[n]o one is to speak impertinently or beside the question, superfluously or tediously.”<sup>118</sup> Jefferson anticipated that anyone violating this stricture could be called to order, and “[i]f repeated calls do not produce order, the Speaker may call by his name any member obstinately persisting in irregularity, whereupon the house may require the member to withdraw.”<sup>119</sup> The rules adopted by the first Senate provided that, “[w]hen a member shall be called to order, he shall sit down until the President shall have determined whether he is in order or not.”<sup>120</sup> Moreover, those rules provided a mechanism for ending debate, in the form of a previous question motion,<sup>121</sup> although the previous question was “originally intended to postpone discussion and thereby delay proceedings on a bill rather than end debate . . . [y]et on four occasions in the next seventeen years the previous question was used . . . to end debate.”<sup>122</sup> True, the previous question motion was abolished in 1806—but this change was motivated not by a desire to eliminate restrictions on debate, but rather because of “the belief that the rule’s infrequent use made it unnecessary.”<sup>123</sup>

Several scholars have insisted that a 1790 incident provides a historical pedigree for the filibuster,<sup>124</sup> but a closer look at this incident demonstrates why it is inapt as a precedent for the sixty-vote Senate. The issue was where the First Congress (then sitting in New York) should be located. The House had voted to locate Congress in Philadelphia,<sup>125</sup> but the Senate refused to concur by a vote of thirteen to eleven.<sup>126</sup> Samuel Johnston of North Carolina was so ill that he had to be brought to the Senate in his bed

<sup>117</sup> Or, indeed, the history of pre-constitutional American legislatures. *See, e.g.*, MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 178 n.21 (1943) (noting that “[l]ong or inappropriate speech was frowned upon in [the American colonies] as in England” and that the Pennsylvania colonial legislature even had a cloture rule).

<sup>118</sup> THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE § 17, at 36 (Cosimo Classics 2007) (1801).

<sup>119</sup> *Id.* at 38.

<sup>120</sup> S. JOURNAL, 1st Cong., 1st Sess. 13 (1789); *see also* Richard R. Beeman, *Unlimited Debate in the Senate: The First Phase*, 83 POL. SCI. Q. 419, 421 (1968) (noting that this rule constituted a “potential weapon against long-winded or improper debate”).

<sup>121</sup> S. JOURNAL, 1st Cong., 1st Sess. 13 (1789) (“The previous question being moved and seconded, the question from the Chair shall be: ‘Shall the main question be now put?’ And if the nays prevail, the main question shall not then be put.”).

<sup>122</sup> Beeman, *supra* note 120, at 421.

<sup>123</sup> *Id.*

<sup>124</sup> *See* Fisk & Chemerinsky, *supra* note 26, at 187 (“[T]he strategic use of delay in debate is as old as the Senate itself. The first recorded episode of dilatory debate occurred in 1790, when [S]enators from Virginia and South Carolina filibustered to prevent the location of the first Congress in Philadelphia.”); Gerhardt, *supra* note 56, at 451 (quoting Fisk & Chemerinsky).

<sup>125</sup> H.R. JOURNAL, 1st Cong., 2d Sess. 228–31 (1790).

<sup>126</sup> S. JOURNAL, 1st Cong., 2d Sess. 151–52 (1790).

in order to participate in this vote.<sup>127</sup> Two days later, the House again took up a resolution calling for the next session of Congress to be located in Philadelphia.<sup>128</sup> The issue was not resolved that day—accounts of the debate show Elbridge Gerry of Massachusetts and William Loughton Smith of South Carolina talking until the exhausted pro-Philadelphia forces finally consented to adjourn for the day.<sup>129</sup> Fisher Ames, a House member from Massachusetts, explained the maneuvering in a letter to his friend Thomas Dwight:

Yesterday it rained, and Governor Johns[t]on, who had been brought in a sick bed to vote in Senate against Philadelphia, could not be safely removed in the rain. It was supposed, that if the resolve to remove could be urged through the House, and sent up while it continued raining, that it would pass in Senate. They called for the question, but Gerry and Smith made long speeches and motions, so that the question was not decided till this morning.<sup>130</sup>

Two things should stand out about this incident. First, this was the use of a brief delay in the service of majoritarianism, not in derogation of it. After all, the Senate had already voted against Philadelphia; the pro-Philadelphia forces in the House were hoping to take advantage of the bad weather and Senator Johnston's ill health so that the pro-Philadelphia *minority* in the Senate could sneak one past the majority. The delay lasted for less than a day, and it was designed to allow Senator Johnston to participate, and thus the majority in the Senate to have its way. That is a far cry from the distinctly counter-majoritarian use of the filibuster in today's Senate. Second, the delay described above took place in the *House*, not the Senate.<sup>131</sup> This is an important point, not simply because it

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<sup>127</sup> See *The Diary of William Maclay and Other Notes on Senate Debates*, in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 286 (Kenneth R. Bowling & Helen E. Veit eds., 1988) [hereinafter DOCUMENTARY HISTORY] (noting in a diary entry dated June 8, 1790 that "Izard & Butler actually went & brought Governor Johns[t]on with his night Cap on, out of bed. [sic] and a bed with him, the bed was deposited in the Committee room, Johns[t]on was brought in a Sedan" (alterations in original)).

<sup>128</sup> H.R. JOURNAL, 1st Cong., 2d Sess. 237–38 (1790).

<sup>129</sup> See *Debates in the House of Representatives: Second Session: April–August 1790*, in 13 DOCUMENTARY HISTORY, *supra* note 127, at 1555 (Helen E. Veit et al. eds., 1994).

<sup>130</sup> Letter from Fisher Ames to Thomas Dwight (June 11, 1790), in 1 WORKS OF FISHER AMES WITH A SELECTION FROM HIS SPEECHES AND CORRESPONDENCE 79, 79–80 (Seth Ames ed., 1971) (1854).

<sup>131</sup> The main source on which Fisk and Chemerinsky rely gets this fact correct. See FRANKLIN L. BURDETTE, *FILIBUSTERING IN THE SENATE* 14 (1940) (describing a "wrangle in the House which unquestionably bears the filibuster stamp" (emphasis added)). But Fisk and Chemerinsky seem to have taken the fact that the filibuster was designed to protect the participation of an ill Senator as evidence that it took place in the Senate. See Fisk & Chemerinsky, *supra* note 26, at 187–88. And Gerhardt simply adopted Fisk and Chemerinsky's description of the events. See Chafetz & Gerhardt, *supra* note 8, at 264 (Gerhardt Closing Statement) (quoting Fisk & Chemerinsky); Gerhardt, *supra* note 56, at 451 (same). In earlier work, I, too, relied on the Fisk and Chemerinsky account without returning to the

deprives filibuster proponents of a valued First Congress precedent, but—more importantly—because it points us toward the simple fact that “there was more obstruction in the House than the Senate from 1789 to 1901.”<sup>132</sup> Of course, today, we all know that minority obstruction in the House is nearly nonexistent; indeed, “[t]here is only one important rule in the House: the majority rules.”<sup>133</sup> This should prove deeply unsettling to the standard filibuster narrative for two reasons: first, because it suggests that there is nothing structurally inevitable or historically mandated about the Senate’s role as the obstructionist house; and second, because, if the House can flip, surely the Senate can, too.

Indeed, it is worth taking a closer look at the process by which the House flipped. As Koger has demonstrated, the 1880s were marked by increasing obstruction in the House. Koger describes the Fiftieth Congress (1887–1889), in which the Democrats had a slim majority, as “especially dysfunctional.”<sup>134</sup> When the Fifty-First Congress convened in 1889, the Republicans had taken control, but they had an even slimmer majority, and they fully expected Democratic obstructionism. When the Democrats refused to vote in the hopes of breaking a quorum, the new Speaker, Thomas Reed, operating at the beginning of the session under general parliamentary law,<sup>135</sup> took notice from the chair of the presence of non-voting Democrats.<sup>136</sup> Reed announced from the chair that:

The object of a parliamentary body is action, and not stoppage of action. Hence, if any member or set of members undertakes to oppose the orderly progress of business, even by the use of the ordinarily recognized parliamentary motions, it is the right of the majority to refuse to have those motions entertained, and to cause the public business to proceed.<sup>137</sup>

When frustrated Democrats appealed from Reed’s ruling to the floor of the House, the ruling was upheld by a vote of 163 to 0, with no Democrats voting and with Reed noting the presence of Democrats in order to make a

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original sources. See Chafetz & Gerhardt, *supra* note 8, at 250 (Chafetz Opening Statement) (citing Fisk & Chemerinsky); *id.* at 259–60 (Chafetz Closing Statement) (same). Mea culpa.

<sup>132</sup> KOGER, *supra* note 11, at 39.

<sup>133</sup> CONGRESSIONAL QUARTERLY, *supra* note 20, at 83; see also *id.* at 90 (noting the sharp limits on dilatory tactics in the contemporary House).

<sup>134</sup> KOGER, *supra* note 11, at 53.

<sup>135</sup> 21 CONG. REC. 996 (1890) (Speaker Reed announcing that the rules of the House are “the rules which govern every parliamentary assembly”). On the use of general parliamentary law at the beginning of a new Congress, see 5 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 6761–63, at 888–89 (1907).

<sup>136</sup> See 21 CONG. REC. 997, 998, 1000 (1890); see also GEORGE B. GALLOWAY, HISTORY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 1789–1994, H.R. DOC. NO. 103-324, at 181–82 (1994) (noting Reed’s war on the disappearing quorum).

<sup>137</sup> 21 CONG. REC. 999 (1890).

quorum.<sup>138</sup> A couple of weeks later, the House adopted a package of permanent rules codifying Reed's rulings from the Chair.<sup>139</sup> The two central planks of the "Reed Rules" were the ability to prevent disappearing quorums by taking note of members present but not voting, and the ability of the chair to ignore motions and appeals made solely for the purpose of delay, even if they were otherwise in order.<sup>140</sup>

The 1890 elections were not kind to the Republicans, and the Fifty-Second Congress assembled with a significant Democratic majority. Part of the Democrats' electoral platform had consisted of criticizing the Republicans' rulemaking innovations,<sup>141</sup> and the Democrats quickly reversed the Reed Rules.<sup>142</sup> But three years in power were enough to convince the Democrats that the Republicans had the right idea in the first place,<sup>143</sup> in 1894, the House re-adopted the Reed Rules,<sup>144</sup> and the Reed Rules' "goals and principles have remained deeply embedded in the proceedings of the House of Representatives ever since."<sup>145</sup> In short, the trajectory of the House of Representatives is very much like that of the House of Commons: when normal parliamentary tactics were turned into regular weapons of permanent minority obstruction, the rules were changed—by majority vote and in the middle of a legislative session—to eliminate the obstruction.<sup>146</sup>

Meanwhile, the combination of its small size, relatively small workload, and use of attrition as a response to dilatory tactics meant that permanent obstruction in the Senate in this period was almost unknown. Koger does not identify a Senate filibuster occurring until 1831,<sup>147</sup> and they remained relatively rare throughout the nineteenth century.<sup>148</sup> Moreover, for most of this time, the absence of formal limits on Senate debate did not operate as a standing minority veto. As Fisk and Chemerinsky note, "almost every filibustered measure before 1880 was eventually passed."<sup>149</sup>

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<sup>138</sup> *Id.* at 1000.

<sup>139</sup> *Id.* at 1347.

<sup>140</sup> See GALLOWAY, *supra* note 136, at 182.

<sup>141</sup> See KOGER, *supra* note 11, at 55.

<sup>142</sup> *Id.*

<sup>143</sup> In a perverse twist, some of the intervening time was taken up with a Republican filibuster mounted as an attempt to force the Democrats to reinstate the Reed Rules. "For months, the Democrats were so committed to minority rights that they endured delay, defeat, and embarrassment rather than empower themselves. After seven and a half months, the Republicans got their wish: the Democrats proposed a rule depriving them of their filibustering tactics." *Id.*

<sup>144</sup> See 26 CONG. REC. 3786–92 (1894); KOGER, *supra* note 11, at 55.

<sup>145</sup> GALLOWAY, *supra* note 136, at 182.

<sup>146</sup> See KOGER, *supra* note 11, at 95 ("The historic House provides an interesting case study of the life cycle of obstruction: initially obstruction is possible but rare, then it is frequent, then a majority imposes dramatic reforms, then obstruction is rare again.")

<sup>147</sup> *Id.* at 62.

<sup>148</sup> See *id.* at 60 fig.4.3.

<sup>149</sup> Fisk & Chemerinsky, *supra* note 26, at 195; see also KOGER, *supra* note 11, at 60 fig.4.3 (demonstrating this point in graphic form).

During this period, the undisputed master of dilatory tactics was John C. Calhoun, who repeatedly used the tactic in an attempt to protect the interests of the Southern states.<sup>150</sup> As the congressional workload began to increase in the aftermath of the Civil War, the cost of waiting out a filibuster correspondingly rose. By the early twentieth century, “[S]enators and the public alike perceived filibustering to be a serious problem.”<sup>151</sup> It is, then, unsurprising that the Senate’s first cloture rule—requiring a two-thirds vote to cut off debate—was adopted in 1917, in the aftermath of a filibuster that killed a bill that would have armed merchant ships against German U-boat attacks.<sup>152</sup>

Even with such a high cloture threshold, filibustering for most of the twentieth century was reserved for issues of especially intense preferences—and, for the most part, it was reserved specifically for civil rights bills.<sup>153</sup> Strom Thurmond infamously spoke continuously for twenty-four hours and eighteen minutes as part of a filibuster against the 1957 Civil Rights Act.<sup>154</sup> And, of course, the 1964 Civil Rights Act occupied the Senate continuously from February 17 to June 19 of that year (cloture had been invoked on June 10).<sup>155</sup> During that debate, Thurmond limited himself to a modest five-hour-and-forty-minute performance.<sup>156</sup> In subsequent years, Southern Senators mounted filibusters against the 1965 Voting Rights Act, the 1968 Fair Housing Act, the 1970 Voting Rights Act reauthorization, and the 1972 Equal Employment Opportunity Act.<sup>157</sup>

As use of the filibuster became more common (and less tethered to civil rights) in the 1970s,<sup>158</sup> pressure mounted for reform. The result was the lowering of the cloture threshold to sixty votes in 1975,<sup>159</sup> as well as the development of the “tracking” system.<sup>160</sup> And, as we have seen, from there, the filibuster began to turn into the sixty-vote requirement that we

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<sup>150</sup> See Beeman, *supra* note 120, at 421–31; Fisk & Chemerinsky, *supra* note 26, at 189–92.

<sup>151</sup> Fisk & Chemerinsky, *supra* note 26, at 195.

<sup>152</sup> See *id.* at 196–98.

<sup>153</sup> See *id.* at 199 (“During a forty year period from the late 1920s until the late 1960s, the filibuster became almost entirely associated with the battle over civil rights.”); see also KOGER, *supra* note 11, at 116–24 (describing the civil rights filibusters and noting that Southern success generally resulted from their greater intensity of effort).

<sup>154</sup> CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 143 (1985).

<sup>155</sup> For a full account of the Senate debate, see generally *id.* at 124–217.

<sup>156</sup> *Id.* at 145.

<sup>157</sup> Fisk & Chemerinsky, *supra* note 26, at 200.

<sup>158</sup> See KOGER, *supra* note 11, at 107 fig.6.3 (showing the increase in filibustering in the early 1970s); Fisk & Chemerinsky, *supra* note 26, at 201 (noting that filibustering became less tied to civil rights around that same time).

<sup>159</sup> See KOGER, *supra* note 11, at 176 (noting that the Senate revised Rule XXII to require a three-fifths majority for cloture).

<sup>160</sup> See *supra* text accompanying notes 38–40 (explaining the “tracking” system and describing its effects on the filibuster).

know today.<sup>161</sup>

This historical treatment has necessarily been truncated, but it should be enough to make several points clear. First, filibuster proponents are simply mistaken when they assert that the filibuster has a long and distinguished pedigree. In fact, the history of the House of Commons, the House of Representatives, and the Senate itself show precisely the opposite: when ordinary procedures began to be used for the purpose of indefinite minority obstruction, those procedures were reformed in order to eliminate that obstruction. Perhaps the Senate in 2011 is simply where the House of Commons was in 1877, and where the House of Representatives was in 1890. Moreover, the fact that obstruction was more prevalent in the House for the first century of the Republic should put to rest any claim that a right to obstruct is somehow built into the Senate's design. Supporters of today's sixty-vote Senate simply cannot find substantial justification in the institution's history.

And what historical precedents there are for minority obstruction are ones that they ought to be hesitant to claim. After all, the two great filibusterers in American history were John C. Calhoun and Strom Thurmond—the great champions of slavery and segregation, respectively. While the morality of a tactic is generally divorceable from the morality of the cause in which it is employed, arguments from historical pedigree must take the entire historical record into account. And I would submit that the great obstructionists in the history of the American Senate have a precedential status more anti-canonical than canonical, more *Plessy* than *Brown*.<sup>162</sup>

### C. *The Counterargument from the Acceptability of Legislative Entrenchment*

The final category of counterarguments to the unconstitutionality of the filibuster, as described above, sounds in structural reasoning. Specifically, this line of counterarguments, following an important article by Eric Posner and Adrian Vermeule,<sup>163</sup> argues that there is simply “no rationale to be found” for the traditional rule against legislative entrenchment.<sup>164</sup> If Posner and Vermeule are correct, then the particular form of entrenchment embodied in the filibuster<sup>165</sup> is likewise

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<sup>161</sup> See *supra* Part II.B (describing the actual operation of the filibuster).

<sup>162</sup> On reasoning from anti-canons, see J.M. Balkin & Sanford Levinson, Commentary, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018–21 (1998); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. (forthcoming 2011), available at <http://ssrn.com/abstract=1776488>; Richard A. Primus, Essay, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 252–64 (1998).

<sup>163</sup> Eric A. Posner & Adrian Vermeule, Essay, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002).

<sup>164</sup> *Id.* at 1666.

<sup>165</sup> See *supra* Part III (arguing that the filibuster impermissibly entrenches the status quo).

unobjectionable.<sup>166</sup>

I do not, however, think that Posner and Vermeule are correct.<sup>167</sup> They make two broad arguments that are relevant to our discussion here. First, they assert that constitutional text, history, and structure provide no grounds for objection to legislative entrenchment,<sup>168</sup> and second, they argue that objections premised on “simple, time-bound majoritarianism” are incoherent.<sup>169</sup> I will address each in turn.

First, it is not clear that Posner and Vermeule actually have the better of the historical argument. The canonical sources on English law certainly support a constitutional principle against legislative entrenchment. Francis Bacon insisted that an attempt “by a precedent act of Parliament to bind or frustrate a future” was “illusory,” as “a supreme and absolute power cannot conclude itself, neither can that which is in nature revocable be made fixed.”<sup>170</sup> Coke, in a section headed “Acts against the power of the Parliament subsequent bind not,”<sup>171</sup> wrote that, although

divers Parliaments have attempted to barre, restrain, suspend, qualifie, or make void subsequent Parliaments, yet could they never effect it, for the latter Parliament hath ever power to abrogate, suspend, qualifie, explain, or make void the former in the whole or in any part thereof, notwithstanding any words of restraint, prohibition, or penalty in the former: for it is a maxime in the law of the Parliament, *quod leges posteriors priores contrarias abrogant*.<sup>172</sup>

Petyt quoted this passage from Coke in its entirety,<sup>173</sup> and, indeed, listed “abrogateth old Laws” first among the powers of Parliament.<sup>174</sup> And Blackstone wrote that:

Acts of parliament derogatory from the power of subsequent parliaments bind not. . . . Because the legislature, being in

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<sup>166</sup> See Gerhardt, *supra* note 56, at 464–70 (relying on Posner and Vermeule to argue that there is no constitutional problem with the entrenchment created by the filibuster).

<sup>167</sup> Others have responded to Posner and Vermeule’s arguments in more detail than space permits me here. See generally John O. McGinnis & Michael B. Rappaport, Essay, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003); John C. Roberts & Erwin Chemerinsky, Essay, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773 (2003).

<sup>168</sup> See Posner & Vermeule, *supra* note 163, at 1673–85.

<sup>169</sup> See *id.* at 1685–88.

<sup>170</sup> FRANCIS BACON, THE HISTORY OF THE REIGN OF KING HENRY THE SEVENTH 135 (Jerry Weinberger ed., Cornell Univ. Press 1996) (1622).

<sup>171</sup> EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 42 (Garland Publ’g 1979) (1644).

<sup>172</sup> *Id.* at 43.

<sup>173</sup> GEORGE PETYT, LEX PARLIAMENTARIA, OR, A TREATISE OF THE LAW AND CUSTOM OF PARLIAMENTS 77–78 (London, J. Stagg, 2d ed. 1690).

<sup>174</sup> *Id.* at 69; see also *id.* at 71–72 (insisting that Parliament always retains full power to “abrogate, adnul, amplifie, or diminish” any laws that it chooses).

truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind the present parliament.<sup>175</sup>

Posner and Vermeule mention Bacon only in a footnote<sup>176</sup> and do not mention Coke or Petyt at all; they dismiss Blackstone's comment because it occurs in a section devoted to "the construction of statutes,"<sup>177</sup> which, they suggest, does not speak "to the constitutional question about intertemporal choice-of-law."<sup>178</sup> But this misunderstands the nature of the British Constitution, in which "the actual, current structure of institutions is constitutive of the Constitution itself."<sup>179</sup> In Britain, a principle of statutory construction is not so neatly separable from a constitutional principle. Certainly, Dicey thought he was stating a central constitutional principle when he wrote that "there is no law which Parliament cannot change."<sup>180</sup> True, Dicey acknowledged that language in certain statutes gave the impression of permanence,<sup>181</sup> but he argued that these passages were mere rhetorical flourishes, without any legal effect.<sup>182</sup> Posner and Vermeule suggest that Dicey had it backwards and that these passages should be seen instead as "highly successful entrenchments."<sup>183</sup> But longevity is not the same as entrenchment—laws may simply last because people like them. (Consider that the 1351 Treason Act<sup>184</sup> is still in force,<sup>185</sup> although it does not purport to entrench itself.) Indeed, as Dicey notes, the Act of Union with Scotland has been repeatedly amended, despite its claims of self-entrenchment.<sup>186</sup> And the Act of Union with Ireland—which likewise purported to be perpetual—died shortly before Dicey himself did, with Parliament's ratification of the Anglo-Irish Treaty in 1921.<sup>187</sup> In

<sup>175</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*90.

<sup>176</sup> See Posner & Vermeule, *supra* note 163, at 1665 n.4.

<sup>177</sup> BLACKSTONE, *supra* note 175, at \*87.

<sup>178</sup> Posner & Vermeule, *supra* note 163, at 1677.

<sup>179</sup> CHAFETZ, *supra* note 48, at 1; see also Josh Chafetz, Book Review, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1115 (2011).

<sup>180</sup> A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 37 (Liberty Classics 1982) (8th ed. 1915).

<sup>181</sup> See, e.g., Act of Union, 1800, 39 & 40 Geo. 3, c. 67, art. I (joining Great Britain and Ireland "for ever after . . . into one kingdom, by the name of the United Kingdom of Great Britain and Ireland"); Act of Union, 1707, 6 Anne, c. 11, art. I (joining England and Scotland "for ever after . . . into One Kingdom by the Name of Great Britain").

<sup>182</sup> See DICEY, *supra* note 180, at 21–23.

<sup>183</sup> Posner & Vermeule, *supra* note 163, at 1678.

<sup>184</sup> Treason Act, 1351, 25 Edw. 3, stat. 5, c. 2.

<sup>185</sup> See O. HOOD PHILLIPS ET AL., CONSTITUTIONAL AND ADMINISTRATIVE LAW 299 (8th ed. 2001) (noting that the 1351 Act, with amendments, is still in force).

<sup>186</sup> See DICEY, *supra* note 180, at 21–22.

<sup>187</sup> On the Anglo-Irish Treaty, see Ronald A. Christaldi, Comment, *The Shamrock and the Crown: A Historic Analysis of the Framework Document and Prospects for Peace in Ireland*, 5 J. TRANSNAT'L L. & POL'Y 123, 151 (1995). On the date of Dicey's death, see Roger E. Michener, *Foreword to DICEY*, *supra* note 180, at xi, xi.

short, the overwhelming authority—both at the time of the American Founding and subsequently<sup>188</sup>—supported the proposition that a Parliament could not bind future Parliaments.

The American history suggests that the same principle was understood to hold on this side of the Atlantic. Consider the 1786 Virginia Statute on Religious Freedom, drafted by Jefferson and shepherded through the state legislature by Madison.<sup>189</sup> The Statute concludes with the following paragraph:

And though we 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 to be irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind . . . .<sup>190</sup>

This paragraph is clearly intended to be declaratory of a widely recognized preexisting principle. Indeed, it is a statement against interest,<sup>191</sup> for surely the legislature would have liked to make this declaration of the “natural rights of mankind” unrepeatable; the Virginians understood, however, that a basic principle of Anglo-American constitutionalism made them unable to do so.

Hamilton, too, recognized this principle, writing in *The Federalist No. 78* that, when two statutes conflict, “[t]he rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first.”<sup>192</sup> Hamilton went on to write that “this is a mere rule of construction, not derived from any positive law but from the nature and reason of the thing.”<sup>193</sup> Posner and Vermeule seize on this latter sentence, arguing that Hamilton meant that this “mere rule of construction” was applicable only “when the relevant statutes are silent about their relative priority.”<sup>194</sup> But Hamilton’s claim must be read in context: He is defending judicial review against the argument that it violates the last-in-

<sup>188</sup> *Cf. Vauxhall Estates Ltd. v. Liverpool Corp.*, (1931) 1 K.B. 733 at 743 (U.K.) (Avory, J.) (“[W]e are asked to say that by a provision of this Act of 1919 the hands of Parliament were tied in such a way that it could not by any subsequent Act enact anything which was inconsistent with the provisions of the Act of 1919. It must be admitted that such a suggestion as that is inconsistent with the principle of the constitution of this country.”); *id.* at 745–46 (Humphreys, J.) (describing the principle that a 1919 Act trumps a 1925 Act as “an astonishing proposition”).

<sup>189</sup> See 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 73–74 (Melvin I. Urofsky & Paul Finkelman eds., 2d ed. 2002) (briefly describing the Statute’s history).

<sup>190</sup> *Id.* at 74–75 (reprinting the Statute).

<sup>191</sup> *Cf. FED. R. EVID.* 804(b)(3) (recognizing that statements against interest are generally considered reliable).

<sup>192</sup> THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>193</sup> *Id.*

<sup>194</sup> Posner & Vermeule, *supra* note 163, at 1677.

time rule.<sup>195</sup> Just as “the nature and reason of the thing” dictate that the more recent statute controls the older one, so too they require that “the prior act *of a superior* ought to be preferred to the subsequent act of an inferior and subordinate authority.”<sup>196</sup> It should not pass without notice that Hamilton repeats the phrase “the nature and reason of the thing” in both instances: Just as the Constitution’s status as higher law *naturally and reasonably* means that it takes precedence over statutes, so too when legal provisions partake of the same level of authority, they *naturally and reasonably* should be interpreted according to the last-in-time rule. Nothing in *The Federalist No. 78* even remotely suggests that Congress could choose to give an ordinary statute priority over any later statute. Indeed, the nature and reason of the thing suggest otherwise.

Posner and Vermeule, then, are left with a single piece of evidence suggesting Founding-era support for legislative entrenchment: a letter that Madison wrote to Jefferson in February of 1790,<sup>197</sup> responding to Jefferson’s famous insistence that all laws—including the Constitution—should expire every nineteen years.<sup>198</sup> In response, Madison divided the “Acts of a political society” into three categories:

1. the fundamental constitution of the Government
2. laws involving some stipulation, which renders them irrevocable at the will of the Legislature
3. laws involving no such irrevocable quality.<sup>199</sup>

Posner and Vermeule regard the inclusion of the second category as evidence that “Madison himself recognized the validity of entrenching statutes.”<sup>200</sup> But the only example Madison gives of a political act falling into this second category is the creation of public debt.<sup>201</sup> As McGinnis and Rappaport note, legislation creating vested property rights is a special category, as the Constitution itself—through the Contracts Clause, the Takings Clause, and the Due Process Clauses—suggests a special

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<sup>195</sup> THE FEDERALIST No. 78, *supra* note 192, at 468 (Alexander Hamilton).

<sup>196</sup> *Id.* (emphasis added).

<sup>197</sup> Two versions of Madison’s letter exist, although the revisions are “all stylistic and do not affect the substance of the ideas expressed.” Editorial Note, in 13 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES 18 (Charles F. Hobson & Robert A. Rutland eds., 1981) [hereinafter MADISON PAPERS]. I shall therefore quote from the later, revised version, as I take it to be Madison’s more considered phrasing.

<sup>198</sup> See Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 5 THE WRITINGS OF THOMAS JEFFERSON, 1788–1792, at 121 (G.P. Putnam & Sons ed., 1895) (“Every constitution then, and every law, naturally expires at the end of 19 years. . .”).

<sup>199</sup> Letter from James Madison to Thomas Jefferson (Revised Text) (Feb. 4, 1790), in 13 MADISON PAPERS, *supra* note 197, at 22.

<sup>200</sup> Posner & Vermeule, *supra* note 163, at 1677.

<sup>201</sup> Letter from James Madison to Thomas Jefferson, *supra* note 199, at 23.

solicitude for vested property rights.<sup>202</sup> Indeed, a better gauge of Madison's views on ordinary legislation is probably from a debate in the House of Representatives, several months after his exchange with Jefferson, on the location of the national capital.<sup>203</sup> The bill under consideration would move the capital to Philadelphia for ten years, while Washington was being built. In response to fears that Philadelphia would subsequently convince Congress to make it the permanent capital, Madison shrugged:

It is said that before the ten years expire a repeal of the act may take place, and thus Congress be kept at Philadelphia. But what more can we do than pass a law for the purpose? It is not in our power to guard against a repeal—our acts are not like those of the Medes and Persians, unalterable. A repeal is a thing against which no provision can be made. If that is an objection, it holds good against any law that can be passed. If those states that may have a superiority in Congress at a future day, will pay no respect to the acts of their predecessors or to the public good, there is no power to compel them.<sup>204</sup>

This would be hard to square with a general belief in the permissibility of legislative entrenchment.<sup>205</sup> The American history, like the British, thus evinces a strongly anti-entrenchment view.

But what about Posner and Vermeule's structural argument that objections to entrenchment are simply incoherent? First, they insist that legislative entrenchments do not really reduce the power of future legislatures: "The mistake here is the . . . premise that 'the subjects of legislation' remain the same over time. In fact, new issues arise with changes in technology, society, and politics, so that the later legislature will always have the opportunity to address policy questions that earlier legislatures could not have envisioned."<sup>206</sup> But this is far too blasé about the perennial subjects of legislation. True, legislative entrenchment may never reach the stage where subsequent Congresses are the equivalent of

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<sup>202</sup> See McGinnis & Rappaport, *supra* note 167, at 404. In a new article, Chris Serkin also focuses on the ways in which governments—especially local governments—can entrench policy positions by creating property rights. See Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. (forthcoming 2011) (manuscript at Part II) (copy on file with author).

<sup>203</sup> This is, indeed, a continuation of the debate the beginning of which is described *supra* text accompanying notes 124–30.

<sup>204</sup> 13 DOCUMENTARY HISTORY, *supra* note 127, at 1648.

<sup>205</sup> Note, again, that this is a statement against interest, as Madison sought the bill's passage. He might have won over some of its opponents if he could have promised that Philadelphia would not be made the permanent capital. He knew, however, that he could not. See *supra* note 191 and accompanying text (noting the special reliability of statements against interest).

<sup>206</sup> Posner & Vermeule, *supra* note 163, at 1676 n.31.

the Chiltern Hundreds,<sup>207</sup> mere offices without responsibility,<sup>208</sup> but some of the most important issues will always be with us. Consider a law setting the highest marginal income tax rate at ten percent. Now, assume that this law also contains an entrenching provision, requiring a unanimous vote to change it in any way. Surely, subsequent Congresses have significantly less actual power than the Congress that passed this law did.<sup>209</sup> And this is true (albeit to a lesser extent) if the entrenchment requires a mere sixty percent supermajority to change the law, rather than unanimity.

Here is where Posner and Vermeule's argument about the incoherence of "simple, time-bound majoritarianism" comes in. They will reply that, yes, in a functional sense, the later Congress has lost some power in the example described above. But, they will say, this is true even if the tax law can be changed by simple majority vote. That is because *all legislation entrenches*. In their words, "[i]f there are political or logistical costs to repealing legislation—and there surely are—then an earlier Congress 'binds' a later Congress by enacting legislation that cannot be costlessly repealed or changed . . . ."<sup>210</sup> And if legislation inevitably entrenches, then it is simply incoherent to object to "legislative entrenchment." But this is something of a *reductio ad absurdum*. To see why, consider an analogous argument: almost all legislation burdens speech.<sup>211</sup> Surely, this does not mean that the prohibition on laws "abridging the freedom of speech"<sup>212</sup> is incoherent. Rather, it must be understood in some other way. The same is true for the argument against legislative entrenchment: if we understand it as a principle that any law that constrains future choices is invalid, then it is nonsensical for precisely the reason that Posner and Vermeule identify. But the principle against legislative entrenchment is best understood, not as arguing that any Congress must be able to bring about any state of the world that it wishes, but rather as arguing that any Congress must be able to pass any piece of legislation that it wishes.<sup>213</sup> Of course, the current

<sup>207</sup> See Chafetz, *Resignation*, *supra* note 78, at 192–95 (describing the Chiltern Hundreds).

<sup>208</sup> But see G.K. CHESTERTON, *ALARMS AND DISCURSIONS* 155–59 (1910) (describing Chesterton's fantasy of running for Parliament, taking the Chiltern Hundreds, and then demanding to exercise the duties of the office).

<sup>209</sup> See McGinnis & Rappaport, *supra* note 167, at 415 n.108 (describing Posner and Vermeule's description of formal legislative equality as "weak and idiosyncratic").

<sup>210</sup> Posner & Vermeule, *supra* note 163, at 1686.

<sup>211</sup> Taxes take my money, leaving me with fewer resources to devote to speech. Property rights exclude me from areas in which I might want to speak. The decision to build a courthouse instead of a public park leaves fewer spaces in which I can freely speak to large groups of people. Etc. See, e.g., MICHAEL C. DORF & TREVOR W. MORRISON, *THE OXFORD INTRODUCTIONS TO U.S. LAW: CONSTITUTIONAL LAW* 163 (2010) ("[I]f taken to the extreme, of course, nearly any government action can be construed as restricting some activity or item that is needed to facilitate speech.")

<sup>212</sup> U.S. CONST. amend. I.

<sup>213</sup> See Roberts & Chemerinsky, *supra* note 167, at 1798 ("The difference is between a law that can be changed through the usual legislative process and a law that cannot. Countless factors may influence whether a legislature acts or not, but that does not mean that each of them equally restricts legislative action. . . . [E]ntrenchment is different because it places formal, binding obstacles in the path

state of the world will very much factor into its calculus about whether it wishes to pass a certain piece of legislation. A city council's decision at time  $T_1$  to build a municipal building on a vacant lot will undoubtedly create a state of the world in which it is much more difficult for the council at time  $T_2$  to turn that same lot into a park. But the fact that the state of the world inevitably conditions legislative incentives does not mean that it must therefore be unobjectionable to allow the legislature at  $T_1$  to prohibit the legislature at  $T_2$  from repealing or amending a law that the  $T_2$  legislature—given the state of the world at  $T_2$ —wishes to repeal. In other words, the fact that the council can build a building on the lot does not mean that it can also prevent any future legislature from tearing down the building and putting in a park, should that future legislature wish to expend the resources and political capital to do so.

In responding to Posner and Vermeule's arguments, I have not made an affirmative case that legislative entrenchment is unconstitutional. Others have made those arguments,<sup>214</sup> and rehearsing them is beyond the scope of this Article. But given that—as Posner and Vermeule themselves recognize—the rule against legislative entrenchment is orthodoxy,<sup>215</sup> it seems reasonable to put the burden of proof on them. Moreover, the orthodox position simply fits better with our ordinary structural intuitions—could it *really* be the case that Congress could pass an unrepeatable law?<sup>216</sup> And if not—that is, if our intuition that legislative entrenchment is impermissible is correct—then the special subset of legislative entrenchment that is the filibuster must also be impermissible.

## V. GETTING RID OF THE FILIBUSTER

Okay, let's assume you're still with me. That is to say, let's suppose that you think I have accurately described the contemporary filibuster (Part II), demonstrated its unconstitutionality (Part III), and adequately rebutted the various counterarguments (Part IV). What is to be done about it? This Part will answer that question by considering which institutional actor can get rid of the filibuster, when it can do so, and what might replace it.

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of current majorities seeking to perform their legislative responsibilities.”); *id.* at 1816–18 (arguing that what distinguishes actual legislative entrenchment from the “binding” effects of facts on the ground is that the latter can be overcome by a determined legislative majority).

<sup>214</sup> See generally Roberts & Chemerinsky, *supra* note 167.

<sup>215</sup> See Posner & Vermeule, *supra* note 163, at 1665–66; see also Roberts & Chemerinsky, *supra* note 167, at 1775–76.

<sup>216</sup> See McGinnis & Rappaport, *supra* note 167, at 387 (noting that Posner and Vermeule “never directly discuss the radical laws and measures their approach would allow”); Roberts & Chemerinsky, *supra* note 167, at 1776 (noting that Posner and Vermeule “fail to address fully the practical realities of their proposal”).

### A. *The Who*

The judiciary is (rightly) impotent in the face of the filibuster for two reasons. First, cameral rules are nonjusticiable political questions.<sup>217</sup> But second, even supposing that a court were willing to hear the claim, and even supposing that it found that someone had standing to bring the suit, there is no one who could properly be named as the defendant. The Speech or Debate Clause<sup>218</sup> would require that the case be dismissed as against any Senators who were named as defendants.<sup>219</sup> Who would be left to sue?

Some might be led astray by *Powell v. McCormack*,<sup>220</sup> but a closer examination of that case shows why it is disanalogous. In that case, Adam Clayton Powell and thirteen of his constituents sued John McCormack, the Speaker of the House, five individual members of the House, and the Clerk, Sergeant-at-Arms, and Doorkeeper of the House.<sup>221</sup> The plaintiffs asserted that Powell had been unconstitutionally excluded from the 90th Congress; therefore, they claimed, it was actionable when “the Clerk of the House threatened to refuse to perform the service for Powell to which a duly elected Congressman is entitled, . . . the Sergeant at Arms refused to pay Powell his salary, and . . . the Doorkeeper threatened to deny Powell admission to the House chamber.”<sup>222</sup> The Supreme Court held that the case must be dismissed as against all of the defendants who were members of the House, but that it could continue as against all of the defendants who were not.<sup>223</sup> So, in our hypothetical suit to have the filibuster declared unconstitutional, who would take the place of the Clerk, Sergeant-at-Arms, or Doorkeeper? After all, no one is seeking access to the floor, nor is anyone seeking back pay or any of the other ministerial services that non-member officers of the chamber perform. Instead, our hypothetical plaintiffs would be seeking the use of different cameral rules—and determination of cameral rules falls squarely within the purview of the Senators themselves.<sup>224</sup> It would be tempting to suggest the Senate Parliamentarian as the proper defendant, but the Parliamentarian’s role is purely advisory—even if he could be ordered by a court to recommend a certain ruling to the presiding officer, the presiding officer always has the

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<sup>217</sup> See CHAFETZ, *supra* note 48, at 57–59.

<sup>218</sup> U.S. CONST. art. I, § 6, cl. 1 (“[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.”).

<sup>219</sup> See generally CHAFETZ, *supra* note 48, at 87–110 (discussing the history, meaning, and scope of the Speech or Debate Clause).

<sup>220</sup> 395 U.S. 486 (1969).

<sup>221</sup> *Id.* at 493.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 501–06; see also CHAFETZ, *supra* note 48, at 97 (discussing this holding of *Powell*).

<sup>224</sup> See U.S. CONST. art. I, § 5, cl. 2 (Rules of Proceedings Clause).

discretion to rule differently.<sup>225</sup> And, as the presiding officer is always a member or the Vice President, she would be protected from suit by the Speech or Debate Clause.

There are thus at least two independent reasons why a lawsuit seeking to get rid of the filibuster would be a non-starter. First, it would be nonjusticiable; and second, there would be no one who could properly be named as a defendant. The claim that the filibuster is unconstitutional must therefore be addressed to the Senators themselves. Senators, after all, take the same oath “to support this Constitution” that judges do,<sup>226</sup> and we should not presume that they take that oath any more lightly than judges do. The arguments here, then, are addressed to the constitutionally conscientious Senator.<sup>227</sup>

### B. *The When*

The question of timing is also relevant: When is the proper time to make this argument before the Senate? Many have argued that the beginning of a new Congress is the proper time to do so. The claim runs something like this: As noted in Part II, one of the ways in which the filibuster entrenches itself is by requiring an even higher threshold—two-thirds of the Senators present and voting—for achieving cloture on a motion to amend the rules. And because the Senate is considered a “continuing body,” the rules never expire on their own. Therefore, according to the rules themselves, the cloture threshold can never be lowered without a two-thirds supermajority.<sup>228</sup>

But Aaron Bruhl has recently launched a detailed and sophisticated attack on the idea of the Senate as a “continuing body.”<sup>229</sup> If Bruhl is correct, then the Senate must be free to adopt new rules at the beginning of each Congress, just as the House does. Moreover, the vote to adopt the new rules would occur under “general parliamentary law”<sup>230</sup>—under which the majority rules.<sup>231</sup> The Senate could thus adopt whatever rules it wanted, by majority vote, every two years. These rules might include a supermajority cloture mechanism, but that mechanism would be less entrenched than it currently is, because it would be subject to majoritarian revision every two years.

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<sup>225</sup> See MARTIN B. GOLD, *SENATE PROCEDURE AND PRACTICE* 11 (2d ed. 2008) (“It is often misstated that the parliamentarian makes rulings. The presiding officer rules after having received the parliamentarian’s counsel. . . . [T]he presiding officer has the power to ignore the parliamentarian’s advice . . .”).

<sup>226</sup> U.S. CONST. art. VI, cl. 3.

<sup>227</sup> Cf. Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

<sup>228</sup> See *supra* text accompanying notes 21–24.

<sup>229</sup> See generally Bruhl, *supra* note 22 (critiquing the continuing body theory).

<sup>230</sup> See *supra* note 135 and accompanying text.

<sup>231</sup> See Bruhl, *supra* note 22, at 1459–60.

I would argue, however, that the proper time for filibuster reform is *any time*. If I am correct that the current sixty-vote Senate is unconstitutional, then the Senate rules, as applied to create this circumstance, are void. That is to say, just as “a legislative act contrary to the constitution is not law,”<sup>232</sup> so too a resolution contrary to the Constitution cannot create a binding cameral rule.<sup>233</sup> This would mean that, at any time, a member could move to amend the Senate rules and lower the cloture threshold. Presumably, the minority would begin to filibuster the motion. The sponsors of the motion would then have two options. They could seek cloture on their motion. Suppose, then, that more than half but fewer than two-thirds of the Senators present and voting vote to invoke cloture. Under the Senate rules as written, cloture would therefore fail.<sup>234</sup> But instead, the presiding officer announces that the motion has passed, on the grounds that Rule XXII is unconstitutional insofar as it requires a supermajority to invoke cloture on a motion to amend the rules—that is, he buys the argument I laid out in Part III. And because the Rule is unconstitutional, it does not bind him. The presiding officer’s ruling is immediately appealed to the Senate as a whole, where it is sustained by majority vote.<sup>235</sup> Cloture has now been achieved on the motion to amend the rules, and the motion proceeds to a vote. If it receives a majority, then the Senate rules have been amended.<sup>236</sup> Alternatively, the sponsors of the motion to amend the rules could raise a point of order and argue that the filibusterers were engaging in dilatory tactics and were therefore out of order.<sup>237</sup> The presiding officer would find the filibusterers out of order—a finding that would be upheld by majority vote—and the underlying motion could then pass by majority vote. There is no reason that either of these routes would require waiting until the beginning of a new Congress.

Of course, another possibility is that a supermajority of Senators come to accept the argument that the filibuster is unconstitutional and, taking

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<sup>232</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>233</sup> It is important to note here that this is a *legal* argument. I am not making the claim that a majority of the Senate, by the application of brute force, could displace legitimate rules; rather, I am arguing that the rules they would be displacing are unconstitutional and therefore illegitimate. To use a familiar analogue, when a court (properly) strikes down a law as unconstitutional, it is not exercising brute force in contravention of law; it is, instead, applying higher law to displace ordinary law. The Senate, here, would be doing precisely the same thing.

<sup>234</sup> See *supra* text accompanying notes 21–24.

<sup>235</sup> RIDDICK, *supra* note 14, at 115 (noting that appeals from rulings from the chair are decided by majority vote).

<sup>236</sup> For a more detailed discussion of this tactic and its pedigree, see 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, 217–60 (2004).

<sup>237</sup> See *supra* text accompanying notes 90, 94, 104–107, 109–110, 118–120, 135–140 (noting that dilatory tactics have been found to be out of order in the House of Commons, the House of Representatives, and the Senate).

their oath seriously, vote to change the Senate rules. As Gold and Gupta have noted, Senators' constitutional consciences can be pricked by the threat of a majoritarian determination that the current rules are unconstitutional.<sup>238</sup>

### C. *The What*

Having argued that only the Senate can get rid of the filibuster and that it can do so at any time, one question remains: What, exactly, must be gotten rid of, and what, exactly, can replace it? Must the Senate become simply a smaller version of the House, in which the majority can almost always be assured of the nearly instantaneous implementation of its will? I have already suggested that the Senate need not follow that course. Recall that the constitutional principle for which I have argued is simply that a determined and focused legislative majority must be able to get its way in a reasonable amount of time.<sup>239</sup>

Obviously, majority cloture—that is, debate can be cut off by majority vote—is consistent with this principle. But Senators may rightly feel wary of instituting majority cloture. After all, the Senate certainly has a tradition of robust debate, and perhaps there is a real fear that majority cloture would too often be used to limit actual debate, as opposed to obstruction. Moreover, there may be some deliberative value in allowing for certain forms of “soft” obstructionism. That is, perhaps measures supported by more than half but less than three-fifths of the members are contentious enough that debate on those measures should be slowed down, so as to allow more time for reflection and persuasion. This “soft” obstruction would look a lot more like nineteenth-century filibusters.<sup>240</sup> Again, so long as a determined and focused legislative majority could get its way in a reasonable amount of time, I do not see any constitutional problem with “soft” obstruction.

So, are there any reform possibilities which might assuage Senators' fears about majority cloture while still conforming to the constitutional principle laid out above? I think there are several, including: non-entrenched supermajority cloture (that is, a supermajority is required to achieve cloture, but the supermajority rule can be changed by majority vote); a suspensory filibuster (that is, a minority can delay but not permanently defeat a majority proposal);<sup>241</sup> or a declining filibuster (that is,

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<sup>238</sup> Gold & Gupta, *supra* note 236, at 260 (noting that, “on at least four occasions,” changes to Senate rules that passed with supermajoritarian support “were forced by attempts to use the constitutional option”).

<sup>239</sup> See *supra* text accompanying notes 63–70.

<sup>240</sup> See *supra* text accompanying note 149.

<sup>241</sup> For more on this idea, see Gerard N. Magliocca, *Reforming the Filibuster*, 105 NW. U. L. REV. (forthcoming 2011) (manuscript at 317–23), available at <http://ssrn.com/abstract=1564747> (arguing

after debate on a measure began, the number of votes needed for cloture would slowly decline until a bare majority sufficed).<sup>242</sup> Each of these has arguments to recommend it, and I would think that a constitutionally conscientious Senator could justify supporting any of them. A constitutionally conscientious Senator cannot, however, justify supporting the status quo.

## VI. CONCLUSION

The contemporary filibuster cannot be justified on the grounds of a Senate tradition of unlimited debate. The contemporary filibuster is not a mechanism of debate; it is a mechanism of obstruction, plain and simple. And in recent Congresses, it has become a mechanism to be applied to nearly every measure to come before the Senate, such that it can now accurately be said that most measures require sixty votes to pass the Senate. This, I have argued, is unconstitutional, for it violates a structural principle against permanent minority obstruction in a house of Congress. The question for a constitutionally conscientious Senator should simply be which of the available options to bring Senate practice in line with this constitutional requirement she supports.

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“that the cloture threshold should be changed into a temporary veto that a Senate majority can override after one year”).

<sup>242</sup> For more on this idea, see S. Res. 416, 111th Cong. § 1 (2010); Tom Harkin, *Fixing the Filibuster: Restoring Real Democracy in the Senate*, 95 IOWA L. REV. BULL. 67, 76–78 (2010), available at [http://www.uiowa.edu/~ilr/bulletin/ILRB\\_95\\_Harkin.pdf](http://www.uiowa.edu/~ilr/bulletin/ILRB_95_Harkin.pdf).