

# THE CONSTITUTIONALITY OF THE FILIBUSTER

*Michael J. Gerhardt\**

## INTRODUCTION

Ignorance about the filibuster is almost universal. What many people might know about the filibuster is based on the climax of the classic film, *Mr. Smith Goes to Washington*, when Jimmy Stewart's character launches a filibuster to stop legislation that would usurp land on which he had hoped to build a special place for wayward boys. Some people might recall reading in history about the use of the filibuster to block civil rights legislation, while it is possible that most literate Americans are familiar with the recent denunciations of the filibusters that have blocked floor votes on six of President George W. Bush's judicial nominations as "outrageous," "disgraceful," "unconstitutional," and nothing short of a violation of basic principles of democratic

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\* Arthur B. Hanson Professor Law, William & Mary Law School; Visiting Professor, University of Minnesota Law School, Fall 2004. Thanks to the participants in a workshop at the University of North Carolina Law School and particularly to Scott Baker, Lou Billionus, Steve Calabresi, Erwin Chemerinsky, Jim Chen, Mike Corrado, Michael Dorf, John Eastman, Max Eichner, Barry Friedman, Dawn Johnsen, Doug Kmiec, Sandy Levinson, Judith Resnik, and Chris Schroeder for enlightening exchanges over the filibuster. Thanks also to Melissa Ptienka, Paul Ranney, and Arista Sims for excellent research assistance.

I completed this Essay in 2003. At the time the Essay went to press in April 2005, there was widespread speculation that Senate Majority Leader Bill Frist, R.-Tenn., was planning to block the next attempted filibuster of a judicial nomination through a measure dubbed the "nuclear option" by the former Majority Leader, Republican Senator Trent Lott. Pursuant to this option, a simple majority of the Senate would be able to disregard Senate Rule XXII, requiring a supermajority to invoke cloture against a filibuster. The focus of this Essay is not on the legality of the "nuclear option" but rather on the arguments for and against the constitutionality of the filibuster. The Essay does suggest, however, that the "nuclear option" is illegal and constitutes an unfortunate breach of the Senate's heretofore unbroken practice of amending its rules in strict accordance with its rules. Of course, the fate of the "nuclear option" does not have a direct bearing on the merits of the arguments favoring the constitutionality of the filibuster. As I attempt to make clear in this Essay, I believe those arguments to be both meritorious and compelling, and they retain their legitimacy and force, regardless of the success of the "nuclear option."

government.<sup>1</sup> The denunciations fell short of their intended purpose of embarrassing the senators responsible for the filibusters, much less of motivating the full Senate to consider the Senate Majority Leader's proposal to amend Senate Rules to allow only a simple majority rather than three-fifths, or 60, senators to end a filibuster.<sup>2</sup> In the end, none of these fragmentary images nor the heated denunciations have enhanced popular understanding of the filibuster or the reasons for its longevity and constitutionality.

This Essay addresses the basic arguments for and against the constitutionality of the filibuster. In spite of the fact that intense debates over the constitutionality of the filibuster have been front page news and intensely divided the Senate throughout 2003,<sup>3</sup> very few legal scholars have devoted serious attention to the filibuster.<sup>4</sup> Determining the constitutionality of the filibuster is, however, by no means easy. It requires analyzing surprisingly complex problems within the legislative process. These include, *inter alia*, making sense of majority rule within the legislative process; the limits to the Senate's discretion in formulating internal rules; the Senate's unique structure and organization; and how the filibuster may alter the balance of power within the Senate and between the Senate and other institutions, including the presidency and the federal judiciary. Assessing the constitutionality of the filibuster further requires determining whether any Senate rule violates "anti-entrenchment," an ancient principle forbidding a past legislature from binding a current one to accept a rule or practice it otherwise would reject,

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1. See generally Neil A. Lewis, *Bitter Senators Divided Anew on Judgeships*, N.Y. TIMES, Nov. 15, 2003, at A1 (describing, *inter alia*, the criticisms and defense of the filibusters against six of President Bush's judicial nominations).

2. Helen Dewar & Mike Allen, *Frist Seeks to End Nominees Impasse*, WASH. POST, May 9, 2003, at A12. By the summer of 2005, Democrats had employed filibusters to block as many as 10 of President Bush's nominees to the federal courts of appeals.

3. See, e.g., Liz Holloran, *Dodd Resists Changes to Rules*, HARTFORD COURANT, July 8, 2003, at A1 (describing, *inter alia*, Republican critiques of the filibuster and responses from Senators Dodd, Daschle, and Byrd).

4. Only a few legal scholars have analyzed the constitutionality of the filibuster at length. See John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 496-500 (1995); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997). For thoughtful, but less thorough, examinations of the constitutionality of the filibuster, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 2-3 n.1, 124 (3d ed. 2000); Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73, 87-89 (1996). Besides these works, legal scholars have generally ignored the filibuster. Indeed, not a single constitutional law casebook mentions the filibuster, while only a few legislation casebooks acknowledge the filibuster with none mentioning any of the arguments for and against its constitutionality.

because it allows a filibuster of a motion to amend Rule XXII (or any other Senate rule) that may be ended only by supermajority vote.

Finally, this Essay sketches some solutions for redressing problems with constitutional argumentation in, and theorizing about, the Senate. It calls attention to the need to measure and ensure the quality of discourse within the Senate on the filibuster and other constitutional matters. This Essay also develops a theory of nonjudicial precedent, that will clarify how much deference senators and perhaps other institutions (including courts) ought to give to the Senate's historical practices.<sup>5</sup>

Part I reviews the relatively straightforward textual, structural, and historical arguments supporting the constitutionality of the filibuster. The filibuster derives its principal authority from the Senate's express power to design its own procedural rules to govern its internal affairs *and* the Senate's consistent support for its constitutionality. It is also one of many counter-majoritarian features of the Senate, such as the committee system and unanimous consent requirements for agenda-setting. The same constitutional arguments support each of these practices. If these practices are constitutional, so is the filibuster.<sup>6</sup>

Part II addresses the strongest arguments against the constitutionality of the filibuster. First, the filibuster is arguably illegitimate, because it is not included among the supermajority voting requirements explicitly set forth in the Constitution. The second claim is that the filibuster allows a minority within the Senate to impede a president's nominating authority. The argument is that filibusters affect nominations and legislation differently. A nomination has no constituent parts, while a bill does.

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5. My proposed theory of nonjudicial precedent is designed in part as a response to criticisms of reliance on longevity only as a basis for determining constitutionality. See, e.g., Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 390 (2002) ("That may be enough that the practice is historically acceptable, but it does not establish that the practice is constitutional." (footnote omitted)); cf. Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171 (1995) (discussing, *inter alia*, the difficulties with relying on historical practices in resolving questions in federal jurisdiction).

6. The first recorded occasion on which legal scholars challenged the constitutionality of a committee's rendering final judgments on legislative matters occurred in the special hearing of the Constitution Subcommittee of the United States Senate Committee on the Judiciary devoted to the analysis of the constitutionality of the filibuster. See *Judicial Nominations, Filibusters, and the Constitution: When a Majority Is Denied Its Right to Consent: Hearing Before the Senate Committee on the Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights*, 108th Cong. 1st Sess. (2003) (comments of Steven Calabresi, John Eastman, and Bruce Fein).

Thus, a filibuster can effectively nullify a nomination in its entirety, whereas filibustering legislation might affect only a portion of it. The third argument is that the filibuster can preclude the Senate from fulfilling its institutional obligations, including providing “Advice and Consent” on presidential nominations. The filibuster arguably impedes the entitlement of a majority of the Senate to render final votes on any matter it likes. The final argument against the filibuster is that Rule XXII, which requires at least two-thirds of the Senate to agree to end a filibuster against a motion to amend Rule XXII, is unconstitutional because it violates the basic principle that a current legislature may not tie the hands of a future one.

Each of these arguments is unpersuasive.<sup>7</sup> First, these arguments are circular. They each assume rather than establish the conclusion that majority rule is a fixed, constitutional principle within the Senate. Second, they cannot be reconciled with the constitutional structure as it was designed or has evolved. Third, Article I contains no explicit or implicit antientrenchment principle that would preclude the Senate from adopting procedural rules that carry over from one session to the next and may only be altered with supermajority approval.

In Part III, I address two problems with constitutional discourse within the Senate that became apparent in the recent filibuster debate. The first problem relates to the effectiveness of the institutional safeguards for ensuring the quality of such discourse. In the filibuster debate, the most effective of these turned out to be the Senate’s rules, which condition some changes in the rules on supermajority approval. This requirement forces the side seeking change to make arguments that can appeal across party lines. This burden facilitates stability and order within the institution. Thus, the rules turn the status quo on a constitutional question into the Senate’s default position in the absence of compelling argumentation to the contrary. Without such stabilizing rules, the Senate would be prone to a vicious cy-

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7. Remarkably few legal scholars agree that both the filibuster and its entrenchment are constitutional. The only other scholars who would appear to agree with this conclusion—as far as I know—are Eric Posner and Adrian Vermeule. See Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002). In contrast, Professors McGinnis, Rappaport, Chemerinsky, and Fisk believe that the filibuster is constitutional but that its entrenchment is unconstitutional. See also John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CAL. L. REV. 1773, 1777 (2003) (defending the basic principle that “[o]ne legislative majority should never be able to bind future legislative majorities by means of ordinary legislation.”).

cle of payback in which a majority might adopt whatever rules maximized its power.

The second set of problems involves the failure of constitutional theorists and even senators to clarify the weight, if any, that the Senate ought to give nonjudicial precedent as a possible source of constitutional meaning. In fact, the Senate has formally approved the constitutionality of Rule XXII each time it has become before the Senate. Critics of the filibuster dismiss these precedents as irrelevant; on their view, the filibuster is not unlike segregation, for it is unconstitutional in spite of its longevity. By contrast, I suggest a narrow but significant role for historical practices as nonjudicial precedents. They help to channel (just as judicial precedents function within constitutional adjudication) and as to facilitate the same institutional ends as do judicial precedents, including consistency, stability, predictability, and reliance. While these functions do insulate a filibuster from challenge on constitutional or policy grounds, they place a burden on its challengers to make a compelling case for change. Those seeking reform need to show, in effect, that if the position of the parties within the legislative body were reversed, it would still be in the best interests of the institution to adopt change. No such case has yet been made.

The Essay concludes that the filibuster is best understood as a classic example of a nonreviewable, legislative constitutional judgment.<sup>8</sup> It has the same claim to constitutionality as many other countermajoritarian practices within the Senate, including the committee structure and unanimous consent requirements. The Constitution permits all of these practices, though it does not mandate any of them. These practices define the Senate's uniqueness as a political institution, particularly its historic commitments to various objectives—respecting the equality of its membership and to minority viewpoints; encouraging compromise on especially divisive matters; and facilitating stability,

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8. In my judgment, a federal court would likely dismiss a judicial challenge to the constitutionality of the filibuster as non-justiciable. First, the constitutional issues arising from the exercise of a filibuster are political questions, because the text of Article I seems to commit the relevant authority in this realm to the Senate, a court's overturning the practice would cause enormous embarrassment to the Senate, the respect due to a coordinate branch of government counsels against a court's adjudicating the merits of the filibuster, and the Senate has an enormous need to rely on its rules as final. Second, it is highly unlikely anyone, particularly within the Senate, would have standing to challenge the filibuster. There is no doubt, for instance, that senators who feel frustrated that the filibuster frustrates majoritarian have no standing. See *Raines v. Byrd*, 521 U.S. 811 (1997). See also *Page v. Shelby*, 995 F. Supp. 23 (D.C. 1998) (holding voter lacked standing to challenge the constitutionality of Rule XXII).

order, and collegiality in the long run. The principal checks on these practices, including the filibuster, are political. They include the Senate Rules, the need to maintain collegiality within the institution, and the political accountability of senators for their support of, or opposition to, specific filibusters.

### I. THE CASE FOR THE FILIBUSTER

Senate Rule XXII, Part 2, provides in pertinent part that the question whether Senate debate “shall be brought to a close . . . shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn—except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting—then said measure, motion, or other matter pending before the Senate, or the unfinished business, shall be the unfinished business to the exclusion of all other business until disposed of.”<sup>9</sup>

Neither the Constitution nor the Senate Rules expressly mention, let alone mandate, the filibuster. Nevertheless, the best starting place for understanding the authority for the filibuster is article I of the Constitution, which governs and defines the powers of the Congress. Of particular importance is article I, section 5, which provides, “Each House [of the Congress] may determine the Rules of its Proceedings.”<sup>10</sup> This section plainly authorizes the Senate to make procedural rules, including but not limited to the length of debate. This section further authorizes the Senate to delegate official responsibility to smaller units (and even individual members) within the Senate.<sup>11</sup> Many of these delegations allow committees and their chairs to have what is sometimes the final say over bills and nominations. The same authority supports many informal practices such as senatorial courtesy—in which individual senators may make recommendations to the President on nominees to federal offices in their respective states<sup>12</sup>—as well as the blue-slip process that has traditionally allowed individual senators to nullify judicial nominations within their respective states.<sup>13</sup> In addition, a single senator may

9. Standing Rules of the Senate, Rule XXII, Part 2.

10. U.S. CONST. art. I, § 5, cl. 2.

11. Standing Rules of the Senate, Rule XXVI, Part 2; *see also* Senate Judiciary Committee Rule I(1).

12. *See generally* Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L.J. 1687 (2001).

13. *See generally* Brannon Denning, *The “Blue-Slip”: Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75 (2001).

place a “hold” on legislation or a nomination, postponing consideration until a later date.<sup>14</sup> The filibuster derives its constitutionality from the same authority that allows each of these other legislative practices. Article I, section 5 empowers the Senate to implement procedural rules, including the specific rule governing cloture, Rule XXII.<sup>15</sup> If these practices are constitutional, so is the filibuster.

The other possible authority for the filibuster is historical practice. The filibuster has been employed, in one form or another, as extended debate in the Senate for more than two hundred years. “[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 senators from Virginia and South Carolina filibustered to prevent the location of the first Congress in Philadelphia.”<sup>16</sup> While the First Congress allowed a so-called motion for the previous question which could not be debated, its name was misleading. In practice, “the previous question motion was seldom used before the Senate abolished it in 1806,”<sup>17</sup> and it rarely succeeded in silencing those senators determined to continue the debate.<sup>18</sup> Instead, the motion tended, once made, to end debate by requiring the removal of the matter being debated from the Senate agenda. Thus, it did not force a vote but rather forced the Senate to move onto other business.<sup>19</sup> Moreover, the availability of this motion did not prevent the Senate from continuing to permit protracted debate to delay floor votes.<sup>20</sup> The eminent biographer Robert Caro explains the history of the filibuster after the abolition of the previous question motion:

For many years after 1806—for 111 years, to be precise—the only way a senator could be made to stop talking so that a

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14. Holds function as signals of the possibility of filibusters against measures about which a senator, or a group of senators, have some concern(s). They are typically granted by the Majority Leader in consultation with the Minority Leader to foster collegiality and to put at ease the senators who might have strong enough concerns about some legislative action to filibuster it (and in doing so to avoid filibusters). See generally WALTER J. OLESZEK, PROPOSALS TO REFORM “HOLDS” IN THE SENATE, C.R.S. REP. RL31685 (2002); WALTER J. OLESZEK, “HOLDS” IN THE SENATE, C.R.S. REP. 98-712 GOV (2002).

15. For Rule XXII, see *supra* note 9 and accompanying text.

16. Fisk & Chemerinsky, *The Filibuster*, *supra* note 4, at 187.

17. *Id.* at 188.

18. For the early history of the filibuster, see generally Richard R. Beeman, *Unlimited Debate in the Senate: The First Phase*, 83 POL. SCI. Q. 419, 421 (1968) and JOSEPH COOPER, THE PREVIOUS QUESTION: ITS STATUS AS A PRECEDENT FOR CLOTURE, S. DOC. NO. 87-104 (2d Sess. 1962).

19. Senate Document 104, *supra* note 18.

20. Fisk & Chemerinsky, *The Filibuster*, *supra* note 4, at 188.

vote could be taken on a proposed measure was if there were unanimous consent that he do so, an obvious impossibility. And there took place therefore so many “extended discussions” of measures to keep them from coming to a vote that the device got a name, “filibuster,” from the Dutch *vrijbouter*, which means “freebooter” or “pirate,” and which passed into the Spanish as *filibustero*, because the sleek, swift ship used by the Caribbean pirates was called a *filibote*, and into legislative parlance because the device was, after all, a pirating, or high-jacking, of the very heart of the legislative process.”<sup>21</sup>

In other words, Senate practice from 1806 until 1917 allowed the smallest minority possible—a single senator—to bar a floor vote on any legislative matter by engaging in an extended speech. During this period, every floor vote required unanimous consent.

The Senate formally curbed the practice of endless debate in 1917, after eleven senators had successfully filibustered President Woodrow Wilson’s proposal to arm American merchantmen against German submarine attacks. At President Wilson’s urging, the Senate passed Rule XXII, which allows debate upon a “pending” matter to be terminated when, after a petition for such “cloture” was presented by sixteen senators and approved by two-thirds of the senators present and voting.<sup>22</sup> In subsequent years, senators from both parties have used the filibuster to block a floor vote on a wide range of legislation.<sup>23</sup> From 1917 until 2000, cloture was invoked 193 times out of the 545 times it was attempted.<sup>24</sup> From 1927 through 1962, the Senate did not invoke cloture once.<sup>25</sup> In this period, conservative senators repeatedly used the filibuster to block civil rights legislation, provoking liberal senators to denounce the filibuster as illegitimate and conservative senators to defend it.<sup>26</sup> In the late 1960s and early 1970s, conservatives and liberals switched positions: Liberal

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21. ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 92 (2002).

22. One study of the filibuster, authorized by the Congress to assist with the deliberations over President Wilson’s proposal to curb the filibuster, indicated that in the period from 1841 until just before the adoption of Rule XXII, there had been at least 22 filibusters employed in the Senate. See LIBRARY OF CONGRESS, *SENATE FILIBUSTERS: EXTRACTS FROM THE CONGRESSIONAL GLOBE AND CONGRESSIONAL RECORD RELATING TO FILIBUSTERS IN THE CONGRESS OF THE UNITED STATES* 3 (1917).

23. See CONGRESSIONAL QUARTERLY INC., *10 CONGRESS AND THE NATION 1997-2001: A REVIEW OF GOVERNMENT AND POLITICS* 967-71 (CQ Press 2002).

24. See *id.* at 971.

25. CHARLES TIEFER, *CONGRESSIONAL PRACTICE AND PROCEDURE* 696 (1989).

26. R. CARO, *supra* note 21, *passim*.

senators used the filibuster to block centerpieces of President Nixon's social and economic agenda, while many conservative senators questioned its constitutionality.<sup>27</sup> After Bill Clinton became President, a series of Republican filibusters blocked key aspects of his legislative agenda, including a comprehensive bill providing for national health care reform.<sup>28</sup> Nevertheless, the filibuster has endured, with the most recent reform occurring in 1985 when a Senate supermajority approved an amendment to Rule XXII requiring only three-fifths, rather than two-thirds, of the Senate as the requisite number to invoke cloture.<sup>29</sup>

Throughout the long history of its deployment in the Senate, the filibuster has not been restricted to delaying floor votes on legislation. It has been often used to thwart presidential nominations. The first recorded instance in which it was clearly and unambiguously employed to defeat a judicial nomination occurred in 1881. At the time, Republicans held a majority of the seats in the Senate but were unable to end a filibuster employed near the end of the legislative session to preclude a floor vote on President Rutherford B. Hayes's nomination of Stanley Matthews to the Supreme Court.<sup>30</sup> Though Matthews eventually served as an Associate Justice, it was only because Hayes's Republican successor, President James Garfield, renominated Matthews in the next legislative session. (There were fourteen occasions in the nineteenth century when the Senate held no floor votes on Supreme Court nominations.)<sup>31</sup> A recent Congressional Research Service study shows that from 1949 through 2002, senators have employed the filibuster against 35 presidential nominations, on 21 of which senators sought and invoked cloture of a filibuster against debate on a legislative matter other than a motion to amend a Senate rule.<sup>32</sup> Seventeen of the 35 nomina-

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27. CONGRESSIONAL QUARTERLY, *supra* note 23, at 967-71.

28. *Id.*

29. SENATE COMM. ON RULES AND ADMINISTRATION, 99TH CONG., SENATE CLOTURE RULE, LIMITATION OF DEBATE IN THE CONGRESS OF THE UNITED STATES AND LEGISLATIVE HISTORY OF RULE XXII OF THE STANDING RULES OF THE UNITED STATES SENATE (CLOTURE RULE) 33 (Comm. Print 1985).

30. See J. MYRON JACOBSTEIN & ROY M. MERSKY, *THE REJECTED* 100 (1993).

31. The nominations to the Court on which the Senate failed to act in the nineteenth century were President John Quincy Adams' nomination of John Crittenden in 1829; President Andrew Jackson's nomination of Roger Taney as an Associate Justice in 1835; President John Tyler's nominations of Reuben Walworth in 1845, Edward King in 1845, and John M. Read in 1845; President Millard Fillmore's nominations of Edward A. Bradford in 1852, George Badger in 1853, and William C. Micou in 1853; and President Andrew Johnson's nomination of Henry Stanberry in 1866. In addition, two other nominees—George Williams and Caleb Cushing in 1874—withdrawed their nominations.

32. RICHARD S. BETH, *CLOTURE ATTEMPTS ON NOMINATIONS*, CRS REP.

tions filibustered were to Article III courts. All 21 nominations on which cloture was invoked were eventually confirmed. Of the 14 nominations on which cloture was sought but not invoked, 11 were eventually confirmed. For instance, Republican senators filibustered President Clinton's nominations of Walter Dellinger to head the Office of Legal Counsel in the Justice Department and Janet Napolitano to be U.S. Attorney for Arizona, but eventually the Senate confirmed both nominees—Dellinger after Republican senators relinquished their opposition to his nomination and Napolitano after the Senate voted 72-26 on a cloture motion to end the filibuster against her nomination.<sup>33</sup> Four of the 35 filibustered nominations failed altogether—then-Associate Justice Abe Fortas to be Chief Justice and Judge Homer Thornberry to be an Associate Justice in 1968, Sam Brown to be Ambassador in 1994, and Dr. Henry Foster to be Surgeon General in 1995. Other nominations have failed without having been formally filibustered; for example, Senator Jesse Helms's threat of a filibuster nullified President Clinton's intention to nominate then-Assistant Attorney General Walter Dellinger as Solicitor General.<sup>34</sup> Another dramatic use of the filibuster occurred when Republican senators filibustered five of President Clinton's nominations to the State Department in order to gain leverage in a dispute over whether the State Department adequately investigated allegations that a former Clinton campaign worker had improperly searched the records of 160 former political appointees and publicly disclosed the contents of two of the files.<sup>35</sup> As John McGinnis and Michael Rappaport concluded in their extended study of the Constitution's supermajority voting requirements, "the continuous use of filibusters since the early Republic provides compelling support for their constitutionality."<sup>36</sup>

Neither the express authority of the Senate to devise its procedural rules nor the longstanding employment of the filibuster within the Senate definitely settles the constitutionality of the filibuster. In constitutional law, there are few knockout punches, and each of the arguments made on behalf of the constitutional-

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RS20801, at 1, 3, 5-6 (2002).

33. 139 CONG. REC. S16351 (Nov. 19, 1993).

34. See *Judicial Nominations*, *supra* note 6 (statement of Michael J. Gerhardt).

35. See John Aloysius Farrell, *Fight on State Dept. Files Halts Senate*, BOSTON GLOBE, Nov. 4, 1993, National/Foreign section at 24.

36. McGinnis & Rappaport, *supra* note 4, at 497.

ity of the filibuster are prone to counterarguments (of varying quality).

## II. THE CASE AGAINST THE FILIBUSTER

The constitutionality of the filibuster has been challenged on four principal grounds. First, the Framers did not include it among the supermajority voting requirements expressly listed in the Constitution. Second, it violates majority rule in the Senate. Third, it impedes a President's nominating authority. Finally, a supermajority voting requirement to end debate on amending the cloture rule is an impermissible entrenchment that allows one Senate to bind the hands of a future Senate. Each challenge is difficult to reconcile with conventional sources of constitutional meaning.

### A. THE CONSTITUTION DOES NOT SET FORTH ALL PERMISSIBLE SUPERMAJORITY VOTING REQUIREMENTS

The first argument against filibusters is that they are not among the supermajority voting requirements specifically recognized in the Constitution.<sup>37</sup> The Constitution specifically requires a supermajority vote in seven situations.<sup>38</sup> This enumeration of the instances in which the Constitution requires a supermajority suggests arguably that the Framers assumed that a simple majority vote in each chamber would suffice for all other congressional action. One may construe these provisions as showing that the Framers knew how to provide for supermajority voting requirements when they wanted to do so, and their failure to allow for procedural rules requiring supermajority voting reflects their in-

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37. See, e.g., *Judicial Nominations*, *supra* note 6 (statements of John Eastman, Douglas Kmiec, and Steven Calabresi).

38. See U.S. CONST. art. I, § 3, cl. 6 (providing that the "Senate shall have the sole Power to try all Impeachments" and that "no Person shall be convicted without the Concurrence of two thirds of the Members present."); *id.* art. I, § 5, cl. 2 (allowing either chamber of Congress to expel a member if at least two-thirds of the members concur); *id.* art. I, § 7, cl. 2 (providing that overriding a presidential veto requires at least two-thirds of both the House and the Senate); *id.* art. II, § 2, cl. 2 (requiring at least two-thirds of the senators to ratify treaties); *id.* art. V (providing that for Congress to impose a constitutional amendment both the House and the Senate must prove it by a two-thirds vote); *id.* amend. XIV, § 3 (providing that those who have engaged in insurrection or rebellion against the Constitution cannot be elected to Congress or hold any office, but that Congress by a two-thirds vote of both houses may remove such disability); *id.* amend. XXV, § 4 (creating a procedure whereby Congress, by a two-thirds vote of both houses, may determine that a President is disabled).

tention not to authorize any. On this view, the filibuster is troubling because it substitutes a supermajority voting requirement for the majority vote that the Constitution putatively requires in floor votes on nominations and legislation.

The major problem with this reading is that it makes no distinction between substantive and procedural requirements. It proceeds on the assumption that all voting requirements within the Constitution should fall into the same category. But all voting requirements are not the same. 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. None pertains to procedures for governing the internal affairs of the House or the Senate. None appears, in other words, to apply, much less restrict, the discretion expressly vested in each chamber by article I, section 5 to devise rules to govern its respective proceedings. Each of the instances in which the Constitution expressly requires a supermajority is directed at certain substantive decisions that can be made only by the full chamber. The *expressio unius* argument might have worked here had the Senate been trying to impose a supermajority voting requirement in floor votes on nominations, but that is not what the Senate has done. The supermajority voting requirements to invoke cloture is simply a procedural rule, not a substantive one.

#### B. THE CONSTITUTION DOES NOT ESTABLISH MAJORITY RULE IN THE SENATE AS A FIXED CONSTITUTIONAL ENTITLEMENT

The second major argument against the filibuster is that it violates majority rule. This argument is predicated on reading three provisions of the Constitution as fixing majority rule as the requisite margin for *final* action by the Senate on legislation and nominations.<sup>39</sup>

At most, these three provisions establish majority rule as a default rule for floor votes in the absence of any other explicitly constitutionally required procedures. Rule XXII leaves this default rule intact. It does not require 60 votes to adopt a law; it

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39. For the constitutional provisions on which this argument is premised, see U.S. CONST. art. I, § 3, cl. 4 (providing that the "Vice-President . . . shall be President of the Senate, but shall have no Vote, unless they be equally divided"); *id.* art. I, § 5, cl. 1 (providing that "a Majority of each [House] shall constitute a Quorum to do Business"); *id.* art. I, § 7, cl. 2 (providing that Congress can override a presidential veto by a two-thirds vote of each House).

requires at least 60 votes to end debate. Passing a bill, or confirming a nomination, still requires a simple majority. Moreover, the clause declaring that a majority of each chamber ought to constitute a quorum creates the basic threshold for business in each chamber,<sup>40</sup> but it says nothing about the propriety of delegating final authority over various matters to committees or the voting margin necessary to end debates, pass legislation, or confirm nominees.

Transforming the default rule into a fixed principle requires a leap of faith. No language within the Constitution expressly mandates majority rule in the Senate. Nor is there any evidence that the Framers intended to guarantee that majority rule would be the unalterable, required margin for voting on every substantive and procedural vote within the Senate. The operating premise of many critics of the filibuster is that majority rule ought to control every matter within the Senate. They insist that defenders of the filibuster prove that majority rule is not a fixed constitutional principle. In the absence of such "proof," they insist, majority rule prevails. Yet, majority rule can be established as a constitutional principle only by a showing that *it* is grounded in legitimate sources of constitutional meaning. The absence of a convincing argument to the contrary does not suffice.

Supreme Court precedent supports treating majority rule as a default rule rather than an inflexible principle. Chief Justice Warren Burger remarked on behalf of a unanimous Court: "Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue."<sup>41</sup>

An additional argument against Rule XXII derives from *United States v. Ballin*.<sup>42</sup> *Ballin* suggests that Article I, section 5, does not grant unlimited authority in "each house to determine its rules of proceedings."<sup>43</sup> Rather neither house may "by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained."<sup>44</sup> This language acknowl-

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40. *Id.* art. I, § 5, cl. 1 (providing in pertinent part that "a Majority of each [House of Congress] shall constitute a Quorum to do Business").

41. *Gordon v. Lance*, 403 U.S. 1, 6 (1971).

42. 144 U.S. 1 (1892).

43. *Id.* at 5.

44. *Id.*

edges limits to the discretion of the Senate in devising internal rules. The critical question is, however, what those limits are. The Supreme Court's statement in *Ballin* suggests, uncontroversially, that the Senate could not adopt a rule barring members of one party from serving on Committees, because it might violate the free speech guarantee of the First Amendment and the Fifth Amendment's due process guarantee and equal protection component. In contrast, the filibuster is a neutral rule. It may be deployed by any senator, regardless of party affiliation. *Ballin* does not, however, undercut supermajority voting requirements to invoke cloture or to amend Rule XXII. The Court merely seems to subject Senate rules to a rational basis test. In the Court's words, there must be a "reasonable relation[ship]" between a rule and its objective. The objective of the supermajority voting requirements regarding motions to amend Rule XXII arguably is to facilitate stability within the Senate, while filibusters encourage compromise on contentious questions.

Critics of the filibuster also rely on the appointments clause<sup>45</sup> to argue that majority rule applies with special force to judicial nominations.<sup>46</sup> They construe this Clause as obliging the full Senate, rather than a minority of its members, to give its "Advice and Consent" to judicial nominations. They suggest floor votes on every judicial nomination are required to ensure due regard for a president's special prerogative to nominate Article III judges, especially Supreme Court justices. For the Senate to fulfill its institutional obligations, a majority of its members must be able to act on its behalf, but the filibuster makes this practically impossible by enabling a minority to impede the majority's will.

There are, however, at least three serious problems with this argument. First, it is predicated on a seriously flawed reading of the Appointments Clause. The Appointments Clause sets forth the necessary conditions for someone to be appointed as an Article III judge. One of these conditions is nomination by the President; while another is confirmation by the Senate. Confirmation is achieved by a majority vote of the Senate. The Clause sets forth the prerequisites for a lawful judicial appointment. It

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45. U.S. CONST. art. II, § 2, cl. 2 (providing in pertinent part that 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 Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law").

46. See *supra* note 6 and accompanying text.

says nothing about the specific procedures applicable in confirmation proceedings or about how someone may be denied confirmation.

Second, there is only one Appointments Clause. The clause provides a uniform process for all confirmable officials. It recognizes no distinction among officers whom the President appoints, with the advice and consent of the Senate. Nor does the clause prioritize presidential nominations. It does not indicate which nominations, if any, should be treated differently for purposes of the Senate's power to give its "Advice and Consent." "Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States" are subject to the same procedures. While the Senate retains the discretion to adopt different procedures for different offices, nothing in the Constitution compels it to do so. In short, there is no textual basis—or any other credible authority—for singling out any particular kind of nomination for constitutional protection.

Moreover, the Appointments Clause does not impose any time limit by which the full Senate must provide its "Advice and Consent." The Constitution does not prohibit senators from taking their time in deliberating over legislation or nominations. Just as the Constitution does not dictate how fast presidents must act in making nominations, it does not direct how quickly the Senate must act in approving or disapproving presidential nominations. Perhaps senators need days, maybe months, or even years to make final decisions.<sup>47</sup> Delays in reaching final judgments might be attributable to many reasons, including an administration's decision not to release documents requested by a committee, difficulty in scheduling witnesses, or simply protracted negotiations among committee members. The absence of a time limit on Senate proceedings is all the more telling because article I, section 7, prescribes a time limit for the President to sign or veto a bill. Hence, it is clear that the Framers knew how to set time limits, but failed to do so in this context. None of these delays offends any constitutional requirement.

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47. In recognition that it might not take final action on a nomination, the Senate has adopted Standing Rules of the Senate, Rule XXXI, Part 6. It provides, "Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being made again to the Senate by the President." This rule, too, is inconsistent with majority rule in the Senate, because it treats a nomination, under the circumstances described, as effectively defeated even though no majority has formally acted upon it.

Third, the argument that filibusters allow a minority to preclude the Senate from fulfilling its institutional obligations mistakenly equates the institution with a majority within it. Yet again, critics of the filibuster have assumed their conclusion. In no place does the Constitution equate a majority of the Senate with the institution itself. Nor, for that matter, is it clear what constitutes the majority that supposedly ought to be treated as the functional equivalent of the institution. This cannot be determined simply by identifying the party affiliations of the senators, because a single party may not control, or barely occupies, a majority within the Senate.

Moreover, the Constitution does not define the institution of the Senate as merely a majority within it. It defines the institution as consisting of two senators from every state (not most states or as some number greater than half of the total of two times the number of states) and charged with the special purpose, as the Framers repeatedly insisted, of offsetting majoritarian impulses.<sup>48</sup> This purpose explains the special design of the Senate, with each state having two senators, each senator having a six-year term,<sup>49</sup> and equal suffrage among the states.<sup>50</sup>

Fourth, elevating majority rule in the Senate to a constitutional entitlement would wreak havoc. It would render unconstitutional any action by a committee or individual senator that had the effect of nullifying a judicial nomination. Mandatory majority rule in the Senate would preclude committees' traditional powers as gatekeepers for nominations or any other legislative business. This principle would also overturn the longstanding practice of conditioning floor action in the Senate on a unanimous consent agreement between the majority and minority leaders. This practice would presumably be unconstitutional because it allows a single senator to object to some matter being brought to the floor of the Senate and thereby prevent a majority (even a supermajority) from voting. This reading of the Appointments Clause would also render unconstitutional any temporary holds, which are used routinely to delay final consideration of legislation and nominations. Temporary holds near the end of a legislative session can often be fatal—delay a nomination just long enough near the end of a session and the nomination lapses. Such actions would be intolerable because

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48. See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 17-38 (revised edition 2003).

49. See U.S. CONST. art. I, § 3, cl. 1.

50. See *id.* art. V.

they purportedly interfere with a majority's entitlement never to be stopped, for procedural reasons, from acting on every presidential nomination.

Reading the Appointments Clause as entitling a majority of the Senate to render final votes on presidential nominations would mean that there would be constitutional violations *every time* a nomination fails to reach a final vote. It is hard, at best, to maintain that this entitlement applies only to judicial nominations. One might argue that the independence of the judiciary depends on the Senate's acting upon every judicial nomination. There is, however, only one appointments clause, whose text establishes no hierarchy among nominations, much less provides any support for different procedures within the Senate regarding different nominations. The constitutional violation presumably arises when a majority is willing but unable for some reason to confirm a nominee, but it is unclear what procedures the Constitution requires to determine a majority's willingness to vote prior to the final vote. It would be absurd to think that the appointments clause requires two votes in the Senate—once by a majority to signal its willingness to confirm and another time for a majority actually to confirm the nominee in question. Even a vote to invoke cloture does not necessarily reflect how senators will vote on a disputed nomination.

Reading the Appointments Clause as empowering a willing majority to vote on a presidential nomination leaves unclear the constitutionality of senators' changing their minds after they signal their initial willingness to confirm. Initial signals about a nomination make the floor vote possible, even though a change of mind in a close vote could spell the difference between rejection and confirmation. Nor is it clear how majority rule can be implemented if some senators whose votes are needed for a majority have not formed their preferences before the final vote on a contested nominee. Enforcing this principle is also practically impossible because once a nomination has expired, the President may nominate someone else to a vacancy. Once the President has made a new nomination, there is no remedy for making whole a nominee who has been denied a final vote by a favorably disposed majority.

For instance, consider what would have happened to Roger Gregory, whom President Clinton nominated to the Fourth Circuit in the final year of his administration. By the end of the session, the Senate had not acted on the nomination, so it expired. Although he was under no constitutional obligation to re-

nominate Gregory, President Bush did so. Had he not, the Senate would not have had a second chance to act upon Gregory's nomination and Gregory would not be a federal judge today.

If a Senate majority has the right to vote whenever it is so disposed, it must have a corresponding right not to vote. A legitimate failure to vote must be the consequence of majoritarian preferences. If a failure to vote does not reflect a majority's actual preferences, then it violates majority rule. To reconcile failures to vote with arguments made on behalf of majority rule, one might suggest, as some critics of the filibuster recently did, that the Senate's committee structure is permissible but the filibuster is not, because majoritarian acquiescence in committee rulings legitimizes them.<sup>51</sup> The problem is how one determines whether a majority has acquiesced in committee rulings. No majority takes a formal vote to approve a committee's negative recommendations, so proof of acquiescence is absent. A failure to act is explicable on all sorts of grounds. A failure to act could be easily construed as evidence that the majority's will is not relevant to committee decisions. The reason committee actions or nonactions are legitimate is not that a majority supports them but that committees are duly authorized pursuant to the Senate's rules.

### C. FILIBUSTERING JUDICIAL NOMINATIONS DOES NOT VIOLATE A PRESIDENT'S NOMINATING AUTHORITY

The third argument against the filibuster is an extension of the second. It posits that by allowing a minority within the Senate to keep the Senate from voting on a president's nominees, filibusters frustrate a President's efforts to fill certain offices. The claim, in effect, is that filibustering nominations nullifies a President's constitutional obligation to nominate judges and other high-ranking officers. This claim is, however, misguided.

First, filibusters do not deprive Presidents of their nominating authority. Presidents retain the complete discretion to nominate whomever they please. Once a President has made his nomination, the exercise of his authority is presumably at an end. The nomination then becomes the Senate's business. The fact that a President were to have such discretion imposes no special obligation on the Senate to approve his nominations or to move on them on *his* terms than *its* own. The Senate retains the

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51. See *supra* note 6 and accompanying text.

discretion to give its "Advice and Consent" as it sees fit, including its preferred pace and procedures for allowing nominations to reach the floor.

Second, there are various mechanisms by which senators seek to counsel Presidents on potential nominees. A much more common practice than the filibuster is senatorial courtesy, in which a president defers to the recommendations of senators from his party on nominees to federal offices within their respective states.<sup>52</sup> Senatorial courtesy requires a President to defer to only one or two senators. A President is free to reject the recommendations of such senators, though, much more often than not, his failure to heed their counsel has resulted in either the formal rejections of his nominations or the failure of a committee or the full Senate to take further action on a substitute nomination. These failures are not constitutionally troubling; they do not interfere with either a President's nominating authority (which he has exercised as he has seen fit) or the full Senate's duty to provide its "Advice and Consent" on presidential nominations (which it has discharged pursuant to its institutional procedures).

Third, the nominating process is the same as the exercises of presidential authority in other contexts that do not impose obligations on other branches. Presidents may propose legislation, but Congress has no institutional obligation to have floor votes on every legislative proposal. Presidents may negotiate treaties, but the Senate is under no obligation to bring treaties to ratification votes on the floor. The fact that a treaty negotiated by a president fails to reach the floor, for whatever reason, does not violate the President's negotiating authority. The same may be said about a filibuster against a President's judicial nominations.

The President's authority to nominate certain officials and his authority to negotiate treaties differ in at least one significant respect. A president is under no constitutional obligation to negotiate a treaty, whereas he may be under a constitutional obligation to make a nomination. He may have the latter obligation because the offices to which he makes nominations exist by virtue of laws enacted by Congress. The President's obligation to enforce the laws faithfully may include staffing the offices created by Congress. The fact that a president has a special duty with respect to nominations that does not correspond to treaties

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52. See generally GERHARDT, *supra* note 48, at 143-53 (describing the evolution of senatorial courtesy).

makes, however, no difference with respect to the Senate's institutional obligation in either case. Senators do not have a corresponding duty to the "take care" clause. The fact that Congress has created an office to which the President has made a nomination will of course be known to the Senate, but it does not alter the Senate's basic discretion to provide its "Advice and Consent," either generally or with respect to particular nominations.

#### D. ARTICLE I CONTAINS NO IMPLICIT ANTI-ENTRENCHMENT PRINCIPLE.

The final argument against the constitutionality of the filibuster is that Senate Rules impermissibly allow the entrenchment of the filibuster. Rule XXII requires at least 60 votes to invoke cloture and at least two-thirds of the Senate to end a filibuster of a motion to amend Rule XXII, while Rule V provides that "[t]he rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."<sup>53</sup> These rules allegedly allow a current Senate to deprive a future majority within the Senate to choose the rules—including those governing the filibuster—under which it prefers to operate.

While this argument is the strongest of those arrayed against the filibuster, it is flawed for several reasons. Perhaps most importantly, the Senate is a "continuing body."<sup>54</sup> For good reason, the Senate has always viewed itself as a continuing body and has never reconstructed itself, like the House of Representatives, from scratch at the outset of every session. On three separate occasions, the Supreme Court has recognized the Senate as a distinctive political body in the constitutional scheme because it is "continuous."<sup>55</sup> As Cynthia Farina has explained, the Senate is unique within our constitutional structure: "[s]taggered election increases institutional stability by rendering the Senate an effectively continuous body in contrast to the House, which must

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53. Standing Rules of the Senate, Rule V, Part 2.

54. 134 CONG. REC. S1807 (Mar. 3, 1988) (statement of Sen. Byrd); *see also* 132 CONG. REC. S9221 (July 17, 1986) (statement of Sen. Byrd: "Mr. President, the United States Senate is an unbroken thread, running from our time back to its first meeting in New York in April 1789. By this I mean the Senate is a continuous body. While the entire House of Representatives is elected every two years, only one-third of the senators run at each biennial election. Since two-thirds carry over, our rules are continuous and do not have to be readopted at the beginning of each Congress.")

55. *See Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 512 (1975); *Sinclair v. United States*, 279 U.S. 263, 291 (1929); *McGrain v. Daugherty*, 273 U.S. 135, 181 (1927).

fully reconstitute itself every two years.”<sup>56</sup> Vikram Amar agrees: “while the [Supreme] Court historically may appear to be the most continuous body, the Senate is the only institution that cannot—short of amendment—‘turn over’ at one time. The President does, the House conceivably could, and the Court effectively could as well, if the political branches ‘packed it’ . . . .”<sup>57</sup> The unique structure of the Senate relieves it of any obligation, or ability, to reconstitute itself with each new congressional session. The Senate’s design is simply not analogous to that of the House. Rule V formalizes the Senate’s longstanding recognition of itself as a continuing body whose rules are already in effect at the outset of each session.<sup>58</sup>

Because the Senate is a continuing body, it is unclear which members of the Senate are injured by the entrenchment of the filibuster. At the outset of each new session, the Senate is not comparable to other legislative bodies, including the House, all of whose members have either been elected or re-elected to new terms. Staggered election of senators precludes the possibility of there ever being a new majority being sworn into office at the outset of a new congressional session. At the outset of each new session, two-thirds of the Senate are continuing their terms; only a third of the Senate is eligible to begin new terms. It makes no sense to empower only a third of the Senate to express their opinions on the rules: the new members do not constitute a majority of the body and thus do not constitute a “quorum” as defined by the Constitution. (The new members are able to vote upon the rules, though with their votes weighted differently than if a mere majority were sufficient for reform.) Within the Senate, there can be a “new” majority only if one count some combination of members continuing their terms with those being sworn into new terms. Yet, the antientrenchment principle is defended on the need to vindicate the “rights” of *new* members *not* those continuing their terms. The antientrenchment principle presumes that the special circumstances of new members imbues them with a special need to vote anew on the rules, but it makes no sense for those carrying over their terms to take advantage of

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56. Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 1016 n.122 (1997) (citing THE FEDERALIST NO. 63 (James Madison)).

57. Vikram David Amar, *Indirect Effects of Direct Election, A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1400 (1996); see also Vikram David Amar, Note: *The Senate and the Constitution*, 97 YALE L.J. 1111, 1126 (1988).

58. Standing Rules of the Senate, Rule V, Part 2.

this entitlement when they do not share the “special circumstances” giving rise to it.

Moreover, majority rule as a fixed principle has been flatly and invariably rejected by the Senate. Besides questioning the general relevance of historical practices (a matter I address in the next section), one might question the rules requiring supermajority votes to invoke cloture or to amend a Senate rule if they were adopted by a mere majority. If this were true, it would dubiously enable a majority to entrench its power by forcing supermajorities to undo its decisions. The Senate’s rules regarding filibusters have, however, been followed in every instance in which they have either been adopted or modified. There is not a single instance in which the Senate has amended its rules without following its rules.<sup>59</sup> Thus, critics of the filibuster must question entrenchment *per se*.

Such binding is not confined to Rules XXII and V. One congressionally authorized study indicates that the Senate in 1995 had eight rules requiring supermajority voting.<sup>60</sup> Moreover, near the end of President Clinton’s impeachment trial, a motion was made to alter the Senate’s rules requiring closed deliberations on the President’s guilt. The Senate recognized that its rules could be changed only by supermajority vote and failed to muster the requisite number for an amendment, even though this allowed a rule adopted by a much earlier Senate to remain in effect.<sup>61</sup> If a past Senate may not bind the hands of a future one, then the Senate acted illegally when it rejected the motion to open its final deliberations on Clinton’s guilt. No one would accuse the Chief Justice of the United States William Rehnquist as Presiding Officer and the Parliamentarian of failing to recognize, much less to prevent, this supposed breach of the Constitution.

Third, there is no constitutional directive against the entrenchment of procedural rules within the Senate. A leading article by Eric Posner and Adrian Vermeule comprehensively dissects the argument for implying an antientrenchment principle into article I. As they argue, “Article I’s elaborate crafting of the

59. See 4 HIND’S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 4396, 4404, 4405, 4544, 4545 (Asher C. Hinds ed., 1907).

60. Richard S. Beth, Cong. Res. Serv., Cong. Res. Serv. Mem., Supermajority Vote Requirements Currently in Effect in Congress, at 3-4 (1995).

61. 145 CONG. REC. 1069, 1071-72 (Jan. 28, 1999) (Rollcall Vote No. 6: Daschle Amend. 1 to S.Res. 30, 44-54 and Rollcall Vote No. 7: Daschle Amend. 2 to S.Res. 30, 43-55).

metes and bounds of legislative authority counsels against finding [an] additional, implicit restriction[ against entrenchment] on statutes that (by assumption) fall within one of the enumerated grants of power.”<sup>62</sup> They suggest further that entrenchment does not restrict the discretion vested in each chamber by the rules of proceeding clause, whose “reference to ‘each House’ is not a temporal limitation, but just a corollary of bicameralism.”<sup>63</sup> The Constitution “establishes that each house separately, rather than the Congress as a whole, may make rules for its respective internal affairs.”<sup>64</sup> Professors Posner and Vermeule add that “rooting the rule against entrenchment in the equal authority of successive legislatures is hard to square with Congress’ undisputed authority to enact laws containing sunset clauses—clauses that cause a statute to lapse, by operation of law, after a defined period.”<sup>65</sup> Even statutes without sunset clauses entrench policies because they remain in effect indefinitely until a subsequent Congress chooses to displace them and thus require a subsequent Congress to expend resources. Yet, no one questions the constitutionality of such enactments on entrenchment grounds.

Similarly, Professors Posner and Vermeule directly expose the fallacy of attacking Senate Rule XXII as putatively impermissible entrenchment.

[T]he anti-entrenchment objection to the cloture rule is really a wholesale objection to constitutionalism as such. In a binding constitutional order, neither the future legislative majority nor the underlying electorate has any general “right . . . to rule according to its will.” True, the constitutional restrictions come into force by a different procedure than do legislatively entrenched rules, but that is a different, narrower objection; and . . . it is also a question-begging objection, because it unjustifiably assumes that restrictions on any given legislature may derive only from the procedure for constitutional entrenchment, rather than from the procedure for enacting entrenching statutes or rules. . . . The position is inconsistent, not merely with legislative entrenchment, but with the acceptance of binding constitutions generally.<sup>66</sup>

The arguments against inferring a principle of majority rule within the Senate from the text of the Constitution apply as well

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62. Posner & Vermeule, *supra* note 7, at 1675.

63. *Id.* at 1683.

64. *Id.* (citation omitted).

65. *Id.* at 1676.

66. *Id.* at 1695.

to attempts to infer a principle of simple majoritarianism from the structure or the tradition of the Constitution. The latter principle is inconsistent with American constitutional practices. Professors Posner and Vermeule explain the problem with relying on simple majoritarianism as an argument against entrenchment:

. . . If 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, except in those instances in which it provides for the legislation to expire on its own. . . [O]ne Congress would hardly do a favor to a later Congress by making all legislation expire at the end of a [session], for this would impose on the subsequent Congress the burden of renegotiating and reenacting the expired legislation. Short of anticipating the needs and desires of future Congresses—which is impossible—a Congress will inevitably burden future Congresses, for the simple reason that the earlier Congress comes first and cannot avoid actions that will turn out to hinder the later Congress.<sup>67</sup>

It will not respond that displacing a prior statute is easier than changing rules because of different voting procedures. Either antientrenchment is a constitutional principle or it is not. If it were a principle, then it would require forgoing or striking down *any* statute or rule that impedes a legislative majority from implementing its preferences. Yet such a principle cannot be squared with legislative reality. A new Congress cannot muster the will or the resources to enact an entirely new set of laws or rules. It will invariably leave intact some policy or rule not preferred by a current majority and thus allow entrenchment. In any event, Rule V implements the sound practice that the preexisting Rules of the Senate remain in effect and can be changed only in accordance with the Rules themselves. Otherwise, each new Senate would lack procedural rules at the outset of a session, which would be a recipe for chaos. Rule V thus helps to provide for institutional stability within the Senate.

John McGinnis and Michael Rappaport have given the most comprehensive critique of Professors Posner’s and Vermeule’s arguments against inferring an antientrenchment principle into Article I.<sup>68</sup> Professors McGinnis and Rappaport suggest, first, that the popular understanding that a current legislature may not

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67. *Id.* at 1686-87.

68. John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003).

bind the hands of a future one was so widespread that the Framers reasonably felt no need to include it among Article I's express prohibitions.<sup>69</sup> Second, they find "clear statements" supporting an antientrenchment principle "in a famous statute passed by the Virginia legislature one year before the framing of the Constitution and in a statement by the father of the Constitution, James Madison, made in Congress one year after the Constitution took effect."<sup>70</sup> Moreover, the traditional view against legislative entrenchment was itself so well entrenched that "had anyone believed that the Constitution would depart from the traditional view, significant public debate about it would have been likely to have arisen, especially among the Anti-Federalists."<sup>71</sup> According to Professors McGinnis and Rappaport, "if silence from the debates in the area suggests anything, it suggests that the traditional view was accepted."<sup>72</sup>

There are several problems with this analysis. The first is its reliance on constitutional silence as acquiescence. Constitutional silence could mean many things, not least the Framers and the Anti-Federalists' simple failure to address the issue. Silence in the text and silence in the debates add up to nothing. If silence has any meaning, it is a meaning imposed by those purporting to construe it. It will not suffice to be a supposition, not a fact, to suggest that entrenchment was a problem the Framers considered; there is no proof they gave the matter any thought. They had larger, or at least what they considered larger, problems with which to deal. The purpose of constitutional interpretation is to determine the meaning of the Constitution; it is not to perfect the document or to fill gaps that were arguably inadvertently left in the text.

Second, the fact that the Virginia Statute for Religious Freedom expressly included an antientrenchment principle cuts against construing the federal Constitution as implicitly including an antientrenchment principle. The former statute shows that a legislature disposed to adopt such a principle knew how to make its preference explicit. If the Framers had intended to include such a principle in the Constitution, they could have followed the Virginia example. Their failure to follow Virginia's example is telling.

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69. *Id.* at 399-400.

70. *Id.* at 402.

71. *Id.* at 403.

72. *Id.*

Moreover, James Madison's recognition of this principle in the House of Representatives hardly establishes it as a prohibition applicable to the Senate. Madison's comments made sense for the House, which reconstitutes itself every two years, but they are inapplicable to the Senate because of its unique structure.

Third, the text of the Constitution overcomes any argument based on the silence of the Framers. The written text purports to provide positive law where there was none before; its effectiveness and meaningfulness depend on its enforcement.<sup>73</sup> No sensible rule of constitutional construction would place the written text below the silence of the Framers.

Professors McGinnis and Rappaport fail to address a final problem. Even though the House must re-constitute itself at the outset of each new session, it follows a preset agenda. When the members show up to reconstitute themselves, they already have an agenda to follow. This is, however, not an agenda made by the newly constituted House. To the contrary, it is an agenda inherited by the newly constituted House from its predecessors. Between sessions of the House, someone must speak for the House in notifying the newly elected members when and where they must meet to reconstitute, the order of items on which they must vote, the voting margin required for each of their votes, the rules they may adopt or revise, the committees to which members will be assigned, and the jurisdictions of those committees. This agenda illustrates the extent to which entrenchment is a fact of life in Congress.

### III. THE FUTURE OF THE FILIBUSTER

No one knows for sure what reform, if any, is in store for the filibuster. If past is prologue, we can expect questions about the constitutionality of the filibuster to persist and for the Senate, at some point, to amend Rule XXII. In anticipation of fur-

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73. See *Wright v. United States*, 302 U.S. 583, 588 (1938) ("To disregard such a deliberate choice of words and their natural meaning would be a departure from the first principle of constitutional interpretation."); *Holmes v. Jennison*, 39 U.S. 540, 570-71 (1840) ("In expounding the Constitution of the United States every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added."); *Calder v. Bull*, 3 U.S. 386, 399 (1798) (Iredell, J., dissenting) ("If . . . the Legislature of the Union . . . shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice.").

ther debate and the possible reform of Rule XXII, it might be useful to consider what the recent debate about the filibuster teaches us about constitutional discourse within the Senate. The first is the need for institutional safeguards to ensure the quality of constitutional debate within the Senate. The second is the need to develop a coherent notion of nonjudicial precedent. I suggest answers to those needs below.

#### A. ENSURING THE QUALITY OF CONSTITUTIONAL DEBATE.

The Constitution provides several institutional safeguards for ensuring the quality of constitutional debate in the Senate. The reduced political accountability of senators, their unusually long terms, and the Senate's function as a countermajoritarian institution have been designed to prod senators to take the long, rather than the expedient, view in deciding constitutional questions.<sup>74</sup> Add around-the-clock media coverage to the mix,<sup>75</sup> and it would appear as if there were many incentives for senators to rise above partisanship in deliberating the constitutionality of Rule XXII.

Measuring the quality of legislative debate is not easy,<sup>76</sup> but by at least two admittedly imperfect standards the Senate debate on Rule XXII was mixed at best. One possible standard would be measuring the extent of debate, including the institutional resources devoted to debate. The Senate debate on the filibuster consisted of four hearings scheduled over the course of less than two months.<sup>77</sup> At three of the four hearings, no more than four

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74. Every source points to the Senate as a uniquely designed political institution whose composition, members, organization, and powers are all supposed to enable it to resist popular pressure and to deliberate in the long-term interests of the republic. See generally GERHARDT, *supra* note 48, at 63-69 (discussing the implications of the original design of the Senate as a counter-majoritarian institution). For instance, the least populous states are represented on a par with the most populous states in the Senate, and over 50% of the Senate is elected by no more than 16% of the nation. Such design was intended to ensure that senators would be less prone than their House counterparts to implement simple, majoritarian preferences.

75. See generally ROBERT A. KATZMANN, *COURTS AND CONGRESS* 19 (1997).

76. For one of the few exceptions to the general absence of legal scholars' development of criteria to measure the quality of constitutional discourse within the Senate, see Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985) and Abner Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587 (1983). Fisher and Mikva disagree over, *inter alia*, the extent to which members of Congress have the time, expertise, and interest to master constitutional analysis and to which either chamber devotes special resources to support members in undertaking constitutional analysis either generally or on specific occasions.

77. See *Markup on S. Res. 138, S. Res. 148, S. Res. 178: Hearing Before the Senate Rules Committee*, 108th Cong. (2003) (approving proposals to amend Rule XXII); *Hear-*

members of the committees were ever present at the same time. A simple majority of a committee was present at only one hearing, but no Democrats attended.<sup>78</sup> The special evening sessions designed to embarrass the Democrats featured only a few extended discussions about the constitutionality of Rule XXII. The committees produced no findings or reports, and neither the Congressional Research Service nor the Office of Senate Legal Counsel produced any official studies or reports to assist the committees.

A second, more subjective standard is to examine the consistency in members' statements or votes, particularly whether they would maintain their position if they were on opposite sides of the constitutional question before the Senate. This test measures the extent to which senators seeking change have argued in good faith. If a senator would support an argument only when it helps him, then one could fairly accuse him of inconsistency (assuming he has no credible explanation for his seemingly incoherent positions). This standard would have required asking whether the Republicans who favored the impeachment and removal of President Clinton would have favored impeaching and removing a Republican president who had engaged in similar misconduct. The debate over Rule XXII has allowed us a decent opportunity to measure the consistency of many senators' positions on the constitutionality of the filibuster. In 1995, Democratic Senators Tom Harkin and Joseph Lieberman proposed amending Rule XXII almost precisely along the lines suggested by Majority Leader Frist.<sup>79</sup> A joint commission subsequently

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*ing on Senate Resolution 151, Requiring Public Disclosure of Notices of Objection ("Holds") to Proceedings to Motions or Measures in the Senate: Hearing Before the Senate Rules Committee, 108th Cong. (2003); Hearing on Senate Rule XXII and Proposals to Amend This Rule: Hearing Before the Senate Rules Committee, 108th Cong. (2003); Judicial Nominations, supra note 6. Interestingly, at no point in any of these hearings did the Republican majority address, much less reconcile its arguments with, the House's rule requiring a supermajority to approve tax increases. For a description of the rule, see MICHAEL J. GRAETZ, THE UNITED STATES INCOME TAX: WHAT IT IS, HOW IT GOT THAT WAY, AND WHERE WE GO FROM HERE 286-88 (1999). See also Ackerman, et al., An Open Letter to Congressman Gingrich, 104 YALE L.J. 1539 (1995) (critiquing the rule). Given the House rule and Rule XXII, one has to wonder whether there is anything the Senate may not do in the rulemaking process. The question is whether there is a point, even for defenders of the constitutionality of the filibuster, at which entrenchment becomes a constitutional difficulty within the legislative process. This is a big question, but a short answer, for purposes of this paper, is that the Senate may adopt any procedural rule it wants as long as it does in accordance with its own rules. See Rubinfeld, supra note 4, 87-88.*

78. See Markup, supra note 77.

79. See *Hearings Before the Joint Commission on the Organization of Congress*, 108th Cong. (1995); Ross Mackenzie, *The Democratic Filibuster Invites "Systemic Col-*

studied the question, but the Senate took no action upon any of its recommendations. A decade later, every Democrat who had denounced the filibuster in 1995 changed positions to defended the constitutionality of the filibuster while every Republican who had defended the filibuster in 1995 changed positions to question its constitutionality. Thus, in debating the filibuster, most senators have been on both sides and appear to have succumbed to petty partisanship.

There are several reasons for this failure. First, lower federal court appointments tend to have relatively low political salience.<sup>80</sup> There is no evidence indicating the public is generally aware of lower court nominations. Second, united government (in which the same political party controls the White House and the Senate) generally lacks incentives for extended deliberation. Such was the case, of course, with 2003's filibuster debate.<sup>81</sup> The final reason for the failure is that we may be looking at the problem from the wrong angle. If we change our perspective, we might understand the failure to amend Rule XXII as simply the failure of the party seeking formal change to discharge its burden of persuasion.<sup>82</sup>

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*lapse*," RICHMOND TIMES DISPATCH, June 12, 2003, at A17.

80. Cf. Roger E. Hartley & Lisa M. Holmes, *The Increasing Senate Scrutiny of Lower Federal Court Nominees*, 117 POL. SCI. Q. 259 (2002) (suggesting, *inter alia*, senators' scrutiny of judicial nominees has relatively low political salience except during periods of divided government).

81. The proposal to amend Rule XXII went further through the legislative process in united than divided government. The Senate Rules Committee approved amending the rule in 2003, while no committee took any action on a similar proposal in 1995 in spite of a joint commission's inquiry. The reason is that with united government the party in power had an incentive to protect those interests of the presidency, which it considers to coincide with its own. There was no such overlap when the Republicans controlled the Senate during Bill Clinton's presidency.

82. The Senate has taken no action yet on the proposed amendment of Rule XXII approved by the Rules Committee. The failure to act may signal different majorities, or perhaps the absence of any majoritarian preference, within the Senate. For instance, the absence of floor action may derive from a majority's support for the status quo, though its composition and the intensity of its members' preferences are far from clear. There may also be a majority that does not support the constitutionality of Rule XXII, though its composition, too, is unclear. A majority of senators may disapprove of Rule XXII, but for different reasons. It may also be possible that the proposed amendment has failed because the Majority Leader has not persuaded even his own side. There may even be a supermajority that favors amending Rule XXII in accordance with the rules but not along the lines proposed by the Majority Leader. A majority within the Senate may have figured the outcome of the effort to amend Rule XII was a foregone conclusion, but the members of this majority might have come to this conclusion for different reasons. The literature on the inherent difficulties of defining or clarifying majoritarian will is voluminous. See, e.g., WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM* (1982); KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963). For a thoughtful work on the challenges that social choice theory poses for the concept of democracy as

A change in perspective might allow one to view Senate Rule XXII in an entirely new light. Rule XXII makes change difficult. It conditions change on widespread consensus. In the absence of such consensus, the default position is the status quo. The rule, in other words, facilitates stability within the system. It creates an enormously but not impossibly high hurdle for change. My research indicates that out of 79 proposals considered by the Senate over the years to amend the cloture rule, it has approved only six,<sup>83</sup> but each time change occurred only in accordance with the supermajority voting requirements. A mechanism that encourages arguments to have broad, bipartisan appeal to effect change is another safeguard for ensuring the quality of constitutional debate within the Senate.

The fact that no formal action has been taken to amend Rule XXII does not mean that the debate on its constitutionality is over. Inaction should not be confused with either indifference or the absence of discourse. The formal debates do not reflect the full extent to which the Senate engaged the arguments over the filibuster's constitutionality. Left out of this picture is the significant discourse about the constitutionality of the filibuster that occurred in numerous venues outside the Senate, including but not limited to party caucuses, visits with or speeches to constituents, Senate hallways, the dining rooms, offices, telephone exchanges, network coverage, newspaper commentaries, and lobbying by interested parties (including academics). Senators are not nearly as restricted as judges in the range of information

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merely the implementation of pure majoritarian will, see Richard H. Pildes & Elizabeth S. Anderson, *Slingshot Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2142 (1990).

For whatever reason, no majority has emerged in support of the so-called "nuclear option" for amending Rule XXII. This option envisions a specific sequence of events unfolding in a floor proceeding on a motion to amend the rule. First the Democrats would initiate a filibuster (pursuant to the rule) against the motion to amend. Then the Majority Leader would ask the Parliamentarian for a ruling on the constitutionality of Rule XXII. The Parliamentarian is expected to uphold the constitutionality of this rule, but the Majority Leader would appeal this ruling to the Presiding Officer, who is the Vice-President of the United States. The Vice-President, Dick Cheney, would overrule the Parliamentarian, at which point the Democrats may appeal his ruling to the full Senate. At this moment things could implode within the Senate, for a majority could then claim the non-revivable power to affirm his ruling and proceed with amending the cloture rule as it sees fit. If a majority were to do this, the Senate as we have known it would likely cease to be. Almost all the Democrats would probably storm out of the Senate, and upon their return would undoubtedly deny unanimous consent for any measures desired by their Republican counterparts.

83. The most significant alterations to the filibuster were made in 1917, 1949, 1975, and 1985. See DEMOCRATIC STUDY GROUP, SPECIAL REPORT: A LOOK AT THE SENATE FILIBUSTER, H. R. REP. NO. 103-28, at 1 (1994).

that they may take into account or even seek while deliberating constitutional questions. While the Senate has yet to take any final action on the majority leader's proposal, one may safely assume that there were a number of informal exchanges between the majority and minority leaders and their respective caucuses over the constitutionality of Rule XXII and strategies for maintaining—or thwarting—the filibusters against the President's judicial nominations. This extensive discourse about the constitutionality of Rule XXII cannot and should not be discounted in measuring the quality of constitutional discourse within the Senate. Such discourse is essential to meaningful deliberation because it constitutes the manner in which senators receive background information on a problem. It also is likely to enrich constitutional deliberation, because senators are likely to be more candid with each other behind closed doors and to avoid posturing for the media. This discourse is consistent with—and indeed has been encouraged within—the design of the Senate, even though the full extent of this discourse can never be known.

#### B. NON-JUDICIAL PRECEDENT

The other problem with Rule XXII is not unique to that controversy. It involves the weight, if any, of historical practices as a source of constitutional meaning. While the Supreme Court, for more than two centuries, has emphasized the relevance of historical practices for determining the constitutionality of a contested action,<sup>84</sup> some scholars might question its relevance. They point to the absence of any standard for identifying which practices ought to guide constitutional interpretation.<sup>85</sup> The longevity of a practice arguably provides a dubious basis for its constitutionality given that some longstanding practices, such as segregation, are generally regarded as unconstitutional.

Critics of Rule XXII have been disposed to treat historical practices in at least two different ways. The first has been to reject all or most historical practices as untrustworthy. Many people, in fact, do not trust Congress to make altruistic judgments

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84. See, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding practice of legislative prayers that began in First Congress and spanned two hundred years); *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 678 (1970) (noting that “an unbroken practice . . . is not something to be lightly cast aside” by constitutional challenge); *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (noting that “[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions”).

85. See *supra* 5 and accompanying text.

about its own power. Their concern is that the Congress will be prone to aggrandize its powers, particularly if its members know courts may defer to (and perhaps not even review) those practices. This concern might serve as a good reason for not allowing historical practices to be absolutely binding on either the courts or on Congress, but it does not justify depriving them of all constitutional relevance. Institutional self-interest does not necessarily yield to indefensible or even incoherent results. It might lead members of Congress to make judgments that increase public confidence and stability, order, and efficiency within the institution.

Alternatively, critics of the filibuster may construe historical practices as favorable to their position. Some point to vice-presidential rulings and Senate votes in 1957, 1969, and 1975 as supporting their judgment that Rule XXII is unconstitutional. Yet, a closer look at the record indicates that the Senate rejected the arguments against the constitutionality of Rule XXII.

In 1957, Vice-President Nixon declared that "he believed the Senate could adopt new rules 'under whatever procedures the majority of the Senate approves.'"<sup>86</sup> Nixon also stated that the Senate must determine for itself Rule XXII's constitutionality. The Senate then proceeded to ignore Nixon's statement and to adhere to the requirements in the rule. Though Nixon reiterated his belief about majority rule in 1961, the Senate once again ignored his declaration. The fact that he made this declaration as a lame duck might have increased the likelihood it would have been ignored.

In 1967, Senator George McGovern proposed amending the cloture to require only a three-fifth vote of the Senate to invoke cloture. McGovern proposed ending debate on a motion to consider his proposed resolution, and suggested he thought only a majority was needed to end this debate. Some construed his request as asking that proposals to amend Rule XXII be subject only to a majority vote to invoke cloture. Vice-President Humphrey refused to comment on McGovern's request. Instead, he relied on a precedent allowing the Senate, rather than the Vice-President, to decide constitutional questions. The Senate then voted to reject McGovern's proposal for ending debate 37-61, and then voted 59-37 to sustain a point of order raised by Senator Dirksen, who had challenged the constitutionality of

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86. CLOTURE RULE, *supra* note 29, at 29.

McGovern's motion. These votes are construed as finding McGovern's motion to have been unconstitutional.

In 1969, the Senate again debated the constitutionality of Rule XXII. In the course of the debate, Senator Church asked the Chair whether a majority vote could invoke cloture. Humphrey said, "yes," and then explained that "if a majority of the Senators present and voting but fewer than two-thirds vote in favor of the pending motion for cloture, the Chair will announce that a majority having agreed to limit debate on [the resolution under consideration,] to amend Rule XXII, at the opening of a new Congress, debate will proceed under the cloture provisions of that rule."<sup>87</sup> Humphrey acknowledged that this ruling was subject to appeal (to the Senate) without debate. The Senate initially voted 51-47 to invoke cloture, after which Humphrey declared cloture had been invoked. The Senate then voted to reverse itself on appeal by a 45-53 roll call vote. The latter vote was understood at the time as the Senate's reverting to the two-thirds cloture vote requirement.

In 1975, the most confusing exchange (yet) over the constitutionality of Rule XXII occurred, though it concluded with clear reaffirmation of the constitutionality of the rule. Senator Mondale proposed to amend Rule XXII to require only three-fifths vote to invoke cloture. In the course of the debate over his proposal, he asked whether a majority of the Senate may "change the rules of the Senate, uninhibited by the past rules of the Senate?" Vice-President Rockefeller refused to answer the question, submitting it instead to the Senate for consideration.<sup>88</sup>

Subsequently, Senator Pierson moved to consider Mondale's proposal and suggested a majority vote was sufficient for cloture. The Senate initially rejected 51-42 a point of order (raised by Senate Majority Leader Mansfield) against the point of order, perhaps signaling approval of Mondale's claim that a majority vote was sufficient to invoke cloture on proposed changes to Senate rules at the outset of a new session. After a break, the Senate took another vote, 53-38, to reconsider what it had done, and then voted 53-43 to sustain a point of order that a majority lacked the authority to amend Rule XXII. The Senate thus "erased the precedent of majority cloture established two weeks before, and reaffirmed the 'continuous' nature of the Sen-

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87. *Id.* at 28-29.

88. *Id.*

ate rules.”<sup>89</sup> After these votes, the Senate proceeded to take two additional votes as a likely compromise devised by Senator Byrd to allow for (1) an amendment to Rule XXII to require only a three-fifths vote to invoke cloture for all matters except for proposed changes to Rule XXII and (2) preserving Rule XXII’s requirement of two-thirds to invoke cloture of a filibuster against a motion to amend Rule XXII. On March 7, 1975, the Senate voted 73-21 to end debate on Mondale’s proposal to amend Rule XXII, and adopted the amendment later that day 56-27 (pursuant to Rule XXII, which allows a majority to amend the rule).

The fact that the Senate has invariably amended its rules in accordance with its rules carries enormous weight in the Senate.<sup>90</sup> Indeed, senators have always recognized the influence of nonjudicial precedent. This sort of precedent includes historical practices, which in turn include past constitutional judgments at institutional and individual levels. At the institutional level, these practices include floor votes and committee votes on any matters, as well as parliamentary rulings (whether ratified, overturned, or not acted upon by the Senate).<sup>91</sup> These practices also

89. CLOTURE RULE, *supra* note 29, at 31.

90. See *supra* notes 59 and 83 and accompanying text. Proposals favoring cloture by majority vote were defeated in 1925, 1947, 1949, and in every Congress between 1961-1975 with the exception of 1971 in which there was no vote on the question. See CLOTURE RULE, *supra* note 29; see also Complete List of Cloture Votes Since Adoption of Rule XXII, 32 Cong. Q. Weekly Rep. 317 (February 9, 1974). The rejections of proposals favoring cloture by majority rule were particularly significant in the years in which the Senate rejected Vice-Presidents’ rulings against the constitutionality of Rule XXII.

Proponents of the measure popularly known as the “nuclear option” argue that there is precedent supporting for a simple majority within the Senate changing the Senate’s rules regardless of any language or provisions within the rules to the contrary. They rest this assertion on the reasoning in a recent article published by one former and one current Senate staffer. Martin Gold and Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster*, 28 HARV. J. L. & PUB. POL’Y 205 (2005).

Gold’s and Gupta’s support for the “nuclear option” simply lack any merit. Perhaps most importantly, they acknowledge that “each time the Senate rules have been amended, the body has followed the rules-change procedures set forth in the rules themselves.” The most pertinent precedent within the Senate is thus all against deployment of the “nuclear option.” Gold and Gupta agree that the “nuclear option” would be unprecedented. They recognize that the “nuclear option” would, if deployed, constitute a “new” precedent. It would constitute the first time in history in which the Senate deviated from its practice of amending its rules in accordance with its rules.

Gold’s and Gupta’s primary authority for the “nuclear option” consists of four instances in which a majority of the Senate voted to resolve questions pertaining to Senate practices. None of the four merit detailed explication here. None involved approving anything remotely analogous to the “nuclear option,” much less approving such an alternative. Each of these instances involved attempts to implement or enforce existing rules of the Senate.

91. There are at least three compilations which purportedly contain references to, or excerpts from, the Senate’s proceedings on all the matters that have come before it.

include the informal arrangements, traditions, and norms (such as senatorial courtesy) for doing business in the Senate. At the individual level is the recognition that each senator retains the authority to make his or her own constitutional judgments on questions that come before the Senate. Senators recognize the practical impossibility of enforcing a uniform standard on what the Constitution requires. Thus, senators historically have reached their own judgments about, for instance, the relevance of ideology in confirmation proceedings, the burden of proof in a vote on a presidential nomination, and the burden of proof and the rules of evidence in impeachment proceedings. The normative weight of nonjudicial precedent within the Senate thus depends on the extent to which senators choose to defer or not.

The normative weight of nonjudicial precedent outside the Senate is, of course, a different matter, and one over which the Senate understandably has limited control. The Senate may control the extent to which other authorities defer to its practices by providing persuasive authority. Thus, the Senate has an institutional incentive to invest resources in creating and formulating nonjudicial precedent, so that other branches of government and the public have confidence in its constitutional judgments.

As a practical matter, the officials in other branches remain free to disagree with either the outcomes of Senate proceedings or the bases for Senate action or inaction. Even then, there may be a cost to interfering with the Senate, particularly its internal affairs. One can, for instance, suspect but not prove that President Bush's administration strongly encouraged Republican senators to consider amending Rule XXII to ease the requirements for cloture. There is a fine line between encouragement and pressure, and senators, even the President's fellow Republicans, may consider pressure from the White House to be offensive. Even from a popular president, senators will not appreciate being told how to wield their institutional prerogatives. Such pressure, for instance, probably persuaded James Jeffords to switch parties. It eroded relations between Jimmy Carter and the Democratic senators he had urged to adopt merit selection pan-

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These compilations include Hind's and Riddick's *Precedents* as well as Senator Robert Byrd's treatise on Senate practice. While useful, none of these works is exhaustive; they do not cover either all conceivable subjects or all the possible material that could be relevant to a particular subject. For instance, none has any material on, or any references to discussions of, censure of Presidents or other high-ranking officials. At best, these books are useful starting points for research on how the Senate has handled procedural, legislative, and constitutional questions.

els (and thus diminish the extent to which he would have deferred to senatorial courtesy in judicial nominations). It had no effect when the Republican-controlled Senate refused to adopt President Bush's suggestions during the midterm elections of 2002 on the scheduling of committee and floor votes on judicial nominations.

There are three other ways in which nonjudicial precedents may affect the constitutional decision-making of other branches. First, they may function as one of multiple modes of discourse about the Constitution. Just as judicial precedents comprise an argumentative mode within constitutional adjudication, institutional and individual judgments on constitutional questions enable the senators themselves and other branches to engage in Constitutional argument. Precedent can be defined broadly enough to encompass the constitutional judgments of courts and Congress. In this manner, historical practices of the Senate may influence, but not bind, constitutional decisionmaking by other branches.

The second way in which nonjudicial precedents may be accorded some weight by other branches is the extent to which historical practices may be construed as serving the same institutional interests as precedents do within the courts. Justices defer to their own past decisions, apart from their merits, because they facilitate consistency, stability, predictability, and reliance on the Court.<sup>92</sup> Senators will defer to past practices within their own institutions for similar reasons, and to the extent these concerns matter to the other branches, nonjudicial precedent may be accorded further respect outside the legislative process. Indeed, there is a point at which non-judicial precedent encompasses matters that courts should simply avoid altogether. Each of the considerations that is relevant for determining whether some contested practice is nonjusticiable—whether the Constitution commits the challenged discretion solely to some nonjudicial authority and the need to achieve finality, to avoid embarrassment, and to give another branch its due respect—provide further evidence on nonjudicial precedents.<sup>93</sup>

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92. See generally Michael J. Gerhardt, *The Role of Precedent in Constitutional Decision-making and Theory*, 60 GEO. WASH. L. REV. 68 (1991). These concerns matter to the Court in part because they are important to the parties in the lawsuits adjudicated by the Court. Concerns about *stare decisis* provide, *inter alia*, notice to litigants about the rules of the game in constitutional adjudication. The Senate's rules, along with the Constitution, make up the rules of the lawmaking game.

93. On the political question doctrine, see generally Rachel E. Barkow, *More Supreme than Court?*, *The Fall of the Political Question Doctrine and the Rise of Judicial*

Another obvious way in which senators may try to get other branches to defer to its practices is through the confirmation process. Through the exercise of its advise and consent power, senators may try to staff the federal judiciary, the executive branch, and independent agencies with people disposed to defer to their preferred interpretive methodologies, which may include a robust deference to both judicial precedent and nonjudicial precedent.

In the context of the filibuster, nonjudicial precedents have, and ought to have, significant weight. The filibuster falls within an area in which the Constitution clearly invests special power within the Senate—namely, to devise the rules to govern its internal affairs. The Senate's procedural rules matter most to the Senate itself, and the institution has devoted considerable resources to their maintenance, including a full-time Parliamentarian and the Office of the Senate Legal Counsel. The Senate has also considered the constitutionality of the filibuster several times.<sup>94</sup> Each time it has squarely upheld the constitutionality of the filibuster. If a court were to have followed a similar pattern, most people would be inclined to think that overruling precedent was not just becoming increasingly difficult, but well-nigh impossible. There is no reason to think differently about the Senate's posture on an issue it has repeatedly embraced.

As a practical matter, none of this means that the filibuster is immune to amendment. There is always the option of amending Rule XXII in accordance with the rules, a past course which has proven fruitful in lowering the number of senators required to invoke cloture. Even apart from challenging the filibuster on constitutional grounds, a senator could question the coherence of the filibuster as policy. In the meantime, the starting point for any discussion of the merits, or constitutionality, of the filibuster is not a blank slate. The Senate's historic practices constitute a serious obstacle to its dismantlement; they effectively create a rebuttable presumption of constitutionality. The fact that this presumption remains intact demonstrates yet again how entrenchment is a feature of the legislative process.

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*Supremacy*, 102 COLUM. L. REV. 237, 248-53 (2002); Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachment After Nixon*, 44 DUKE L.J. 231 (1994).

94. See *supra* notes 60 and 78 and accompanying text.

## CONCLUSION

The filibuster may be an unusual and occasionally or even frequently disagreeable legislative practice, but it is not unconstitutional. First, it is a rule for debate that the Senate has been constitutionally authorized to adopt pursuant to its power to devise procedural rules. Second, the filibuster has been an unbroken practice within the Senate, one that has been ratified expressly and implicitly on a repeated basis since the founding of the republic. While there may be good reason not to defer completely to popular practices, there is good reason to respect an institution's repeated and consistent judgments about its authority in an area of special expertise. Deference fosters stability, predictability, reliance, and consistency in Senate proceedings. Third, the Constitution does not exhaust the full range of supermajority voting requirements that the Senate may adopt. It sets forth only the mandatory minimum of such requirement, and leaves the discretion within the Senate to adopt procedural rules that may (but need not) require supermajority approval. Fourth, even if the filibuster violates majority rule, the Constitution does not establish majority rule as a fixed, inflexible principle within the legislative process. It is, instead, the default rule to be followed in floor votes. Fifth, the filibuster is not unconstitutionally entrenched. The anti-entrenchment principle is applicable primarily to lawmaking; it is designed to prevent a legislative majority from binding future majorities by means of ordinary legislation. The anti-entrenchment principle applies to procedural rulemaking when a legislative body, such as the House, must reconstitute itself at the outset of each new session because every member stands for re-election in any given cycle. The anti-entrenchment principle is designed to vindicate the interests of a new majority extracted from the entirely new body that will then determine the rules under which it wishes to operate. The Senate, unlike the House, has no constituency that corresponds to the new majority within the House, or, for that matter, the entire House. It never has a need to reconstitute itself at the outset of a new session because only a third of its members stand for re-election in any given cycle. The remaining two-thirds of the Senate continue their terms from one legislative session to the next. The Senate is a continuing body with standing committees and rules because it never lacks a sufficient number of members in order to do its business. Sixth, the filibuster does not violate a President's nominating authority. It does not bind a President to the will of a minority of senators any more than a majority's re-

peated rejections of a President's nominees binds the presidency to its will. Seventh, the filibuster is a plausible commitment by the Senate to facilitate institutional stability and order.

Of course, none of these reasons insulates the filibuster from modification. Rule XXII places the burden on the party seeking change to make a broad, bipartisan appeal. In the absence of such an appeal, the filibuster persists. It reflects the Senate's longstanding respect for minority views and the equality of its membership; it provides senators with a voice that might not have the same volume in an institution (such as the House) in which the majority is in total control. The filibuster has had the salutary effect of counterbalancing some of the other counter-majoritarian features of the Senate, such as the committee system, by enabling individual senators to block legislation or nominations favored by a committee or to force different nominations or changes in legislation rejected by a committee. The filibuster has the additional salutary effect of encouraging the President and the Senate to find common ground. With regard to nominations to an independent branch of government such as the judiciary, the filibuster encourages the President to make peace with the Senate by nominating individuals who can garner consensus. The need to find such common ground should not be discounted, especially with respect to judicial nominations.

Entrenchment of the filibuster supposedly violates the principle that a current legislature may not bind the hands of a future one. Yet, confirming an article III judge does just that. While a majority conceivably might be able to undo a policy that is in effect, no subsequent legislature has the power, short of the extraordinary process of impeachment and removal, to undo the confirmation of an article III judge.<sup>95</sup> It is therefore especially important that any nominees for article III judgeships be supported, if at all possible, by more than a bare-bones majority so that the public at large—and not only members of the party in power—will respect the edicts of federal judges. Filibusters are a useful way of checking and balancing the desire of a temporary majority to pack the federal judiciary with lifetime appointees picked, at least in part, on the basis of their devotion to the political agenda of the party in power. It is not bad policy to require supermajority approval of someone who will wield significant power within our system of government long after the

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95. See U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6; *id.* art. III, § 1.

dissolution of the majorities which brought into power the President who nominated him and the Senate that confirmed him.

Finally, the debate over the need to reform the cloture rule has discounted a significant safeguard against using the filibuster. If the majority's will were frustrated, the Constitution provides two remedies. The first is to provide a president with the power to make recess appointments<sup>96</sup> and thereby circumvent the obstruction of a substantial minority of senators. The second is to allow the President and those who have supported his contested nominations to exact revenge through the political process or to seek common ground to resolve their differences with a substantial minority of their colleagues. Whichever path they follow is constitutional, just as constitutional as the filibuster itself.

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96. U.S. CONST. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."). Interestingly, this clause demonstrates that the Framers knew how to provide a limit to authority that could bind a legislature from one session to the next if they had wanted to do so. It also raises an interesting question whether a president may place someone on an Article III court through a recess appointment. Formalism, or requiring each exercise of governmental power to be an exercise of some express authority, might lead one to doubt whether someone without the special protections accorded by Article III may nevertheless exercise Article III power. Functionalism, which calls for balancing competing considerations, would likely lead one to uphold the practice, because it has been employed by most presidents (including George Washington) who sensibly construe the clause's language referring to "all Vacancies" as applying to all vacancies.