THE FILIBUSTER AND THE FRAMING: WHY THE CLOTURE RULE IS UNCONSTITUTIONAL AND WHAT TO DO ABOUT IT

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Abstract: The U.S. Senate's handling of filibusters has changed dramatically in recent decades. As a result, the current sixty-vote requirement for invoking cloture of debate does not produce protracted speechmaking on the Senate floor, as did predecessors of this rule in earlier periods of our history. Rather, the upper chamber now functions under a "stealth filibuster" system that in practical effect requires action by a supermajority to pass proposed bills. This Article demonstrates why this system offends a constitutional mandate of legislative majoritarianism in light of well-established Framing-era understandings and governing substance-over-form principles of interpretation. Having established the presence of a constitutional violation, the Article turns to the subject of formulating a suitable remedy. As it shows, the Constitution does not require wholesale abandonment of supermajority voting rules in the upper chamber. Instead, the Senate might opt for more nuanced approaches that carry forward its tradition of extended deliberation and careful attentiveness to the views of minority blocs, while providing in the end for majoritarian decision making in keeping with the Constitution's commands.

INTRODUCTION

The United States Senate has grappled with "filibusters" from early in its history.[1] The present-day chamber's formal treatment of the subject finds expression in Senate Rule XXII, which requires sixty votes to end debate on

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[1] The term "filibuster," which derives from the Dutch word for "pirate," initially referred to minority efforts to disrupt majority action in the Senate through the use of extended speechmaking. Ezra Klein, *The Move to Reform the Filibuster*, NEW YORKER, Jan. 28, 2013, at 24, 26; *see also* LAUREN C. BELL, FILIBUSTERING IN THE U.S. SENATE 10–11 (2011) (detailing the term's origins). In recent decades, the term has been used more broadly, including by referring to forms of minority intervention that do not include speaking at all. *See infra* notes 151–165 and accompanying text.

most pending matters.[2] This "Cloture Rule" has stirred intense disagreement. Proponents claim that it fosters deliberation, impedes majority overreaching, and differentiates the Senate from the House in salutary ways.[3] Critics respond that the Rule breeds gridlock, contributes to political party polarization, and channels power to fractious minorities.[4]

This Article does not consider these arguments. Instead, it addresses a different question: Does the Cloture Rule violate a constitutional mandate of legislative majority rule? Some analysts have considered this question and shed valuable light on the subject.[5] Even so, their work is incomplete. Of particular importance, both opponents and proponents of the Senate's current regime have failed to take full account of the text of the Constitution and the historical backdrop against which the Framers crafted it.[6] Nor have they considered recent developments, including the use in November 2013 of the so-called "nuclear option" to alter cloture practice for some, but not all, confirmation votes

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[2] Rule XXII states that whenever there is submitted "a motion, signed by sixteen senators, to bring to a close the debate upon any measure, motion, other matter pending before the Senate, or the unfinished business," the Presiding officer shall cause the motion "at once" to be presented to the Senate. U.S. SENATE COMM. ON RULES & ADMIN. STANDING RULES OF THE SENATE, S. DOC. NO. 112-1, at 20–21 (2011) (Rule XXII). Then, if

> that question 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.

Id.

[3] *See, e.g.*, SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE 1 (1997) (suggesting that "[a]ccording to conventional wisdom," Rule XXII safeguards "the right of unrestricted debate in the Senate," helps "moderate extreme legislation" and carries forward the distinctive "origins and traditions of the Senate"); Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 UTAH L. REV. 803, 831 (noting that filibuster-rule proponents claim that its absence would cause the minority to "simply . . . be 'stampeded' or 'steamrolled'"). *See generally* RICHARD A. ARENBERG & ROBERT B. DOVE, DEFENDING THE FILIBUSTER (2012) (setting forth an extended defense of the supermajority-based cloture system).

[4] *See, e.g.*, Tom Harkin, *Fixing the Filibuster: Restoring Real Democracy in the Senate*, 95 IOWA L. REV. BULL. 67, 77 (2010) (arguing that under the filibuster "there is no incentive for the minority to compromise" so that its elimination would make minority Senators "more willing to come to the table and negotiate," while majority Senators would "have an incentive to compromise because they will want to save time").

[5] *See, e.g.*, Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1011–16 (2011) (making an argument from background principles that the filibuster violates constitutional principles of majority rule); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 239–45 (1997) (arguing that the principle of majority rule is insufficient to support a finding that the filibuster is unconstitutional).

[6] *See* Dan T. Coenen, *The Originalist Case Against Congressional Supermajority Voting Rules*, 106 NW. U. L. REV. 1091, 1094–95 (2012).

on presidential nominees.[7] Focusing on these matters, this Article demonstrates why the Senate's current use of Rule XXII clashes with governing constitutional law.

The development of this thesis proceeds in three steps. Part I identifies the two claimed sources of constitutional authority for the Cloture Rule, thereby setting the stage for a systematic critique.[8] The first source is the Any-Voting-Number Theory, which posits that Article I's Rules of Proceedings Clause permits the Senate to impose on itself whatever vote-total requirements it prefers for any action it might take, including the passage of ordinary laws.[9] The second claimed source of authority is the Just-a-Debating-Rule Theory, which rests on the idea that the Rules of Proceedings Clause at least permits each chamber of Congress to establish procedures for its own internal, day-to-day operations.[10] In other words, even if the Senate cannot establish supermajority voting requirements for *substantive* decisions about whether to pass bills or confirm nominees, it may do so for *procedural* decisions about when to end debate.[11] Rule XXII, so the argument goes, embodies just this sort of permissible procedural choice.

Parts II and III of this Article consider these defenses in turn. Part II demonstrates that the Any-Voting-Number Theory fails because the Constitution establishes that the Senate must engage in ordinary lawmaking by way of majority vote and cannot alter that requirement by way of rulemaking.[12] This conclusion finds support in the text of the Constitution as illuminated by com-

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[7] *See infra* notes 280–286 and accompanying text (describing the Senate majority's use of the so-called "nuclear option" on November 21, 2013 to require only fifty-one votes to secure cloture on confirmations for all presidential nominees except Supreme Court Justices).

[8] *See infra* notes 24–50 and accompanying text.

[9] This term, like the term "Just-a-Debating-Rule Theory" set forth below, has been coined by the author. *See* infra notes 44–48 and accompanying text. For the most elaborate developments of the Any-Voting Number Theory, see John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483 (1995) [hereinafter McGinnis & Rappaport I]; John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327 (1997) [hereinafter McGinnis & Rappaport II]. The Rules of Proceedings Clause, which appears in Article I, Section 5 of the Constitution, specifies that "each House may determine the Rules of its Proceedings." U.S. CONST. art. 1, § 5.

[10] *See, e.g.*, Josh Chafetz & Michael J. Gerhardt, *Is the Filibuster Constitutional?*, 158 U. PA. L. REV. PENNUMBRA 245, 264 (2010), http://www.pennlawreview.com/online/158-U-Pa-L-Rev-PENNumbra-245.pdf, *archived at* http://perma.cc/CRM4-L9ED (Gerhardt) (indicating that the Rules of Proceedings Clause "pertains to the Senate's power to devise the rules for its internal governance").

[11] *See id.* at 263 (Gerhardt) (arguing that the Rules of Proceedings Clause "plainly grants to the Senate plenary authority to devise procedures for internal governance, and the filibuster is a rule for debate"); Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445, 456–57 (2004) (arguing that Rule XXII "does not require 60 votes to adopt a law; it requires at least 60 votes to end debate").

[12] *See infra* notes 51–124 and accompanying text.

mon understandings that prevailed at the time of the framing.[13] Part III turns to the Just-a-Debating-Rule Theory.[14] The essential problem with this defense of the Cloture Rule is that the Rule in its current operation does not—to say the least—concern just debate. Rather, the Senate's cloture practice has evolved to a point that it has nothing of significance to do with debating and everything to do with substantive decision making. Given this reality, the sixty-vote Cloture Rule works in practice as a supermajority voting requirement. And because the Rule operates in this way, it is invalid because "the Constitution is concerned, not with form, but with substance."[15]

Part IV takes up the task of devising a suitable constitutional remedy for the constitutional wrong established in Parts I through III, focusing attention on two remedial possibilities.[16] The first would provide for a final up-or-down majority vote on any matter put forward in a timely fashion, but only after affording objectors an extended opportunity to register disagreement and press for change.[17] The second would return the Senate to filibustering in its historical form, thus refocusing votes under Rule XXII on the cloture of true speechmaking on the Senate floor.[18] The underlying purpose of both of these remedies is the same—to ensure that determinative actions in the upper chamber will be controlled in the end by a majority, rather than a supermajority, vote.

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[13] In particular, the self-imposition of supermajority voting rules stands at odds with five key elements of our framing history: (1) the majority-rule-centered background assumptions about how legislative decision making should work that marked the founding period; (2) then-ascendant philosophical commitments to the essential role of majoritarianism within republican systems; (3) the Framers' focused goal of abandoning supermajority voting requirements because those very requirements had immobilized the government under the Articles of Confederation; (4) the forging at the Philadelphia Convention of compromises that were premised on congressional majoritarianism in enacting laws; and (5) the teachings of *The Federalist*. *See infra* notes 51–124 and accompanying text. To be sure, one might seek to defend self-imposed supermajority voting rules under a theory of constitutional interpretation that accords only limited weight to the document's text, history, and design. Nonetheless, no one has sought to make such a case. *Cf.* McGinnis & Rappaport I, *supra* note 9, at 485–500 (defending the Any-Voting-Number Theory solely on originalist grounds). Indeed, even critics of the filibuster regime not commonly associated with originalist methodologies have not endorsed such a nonoriginalist approach. *See* Bruce Ackerman et al., *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539, 1539–43 (1995) (setting forth a critique—endorsed by Professors Ackerman, Amar, Balkin, Bloch, Bobbit, Fallon, Kahn, Kurland, Laycock, Levinson, Michelman, Perry, Post, Rubenfeld, Strauss, Sunstein, and Wellington—of the Any-Voting-Number theory based primarily on text, history, and structure). This result is not surprising because, among other things, text and history do not stand alone in supporting the rejection of the Any-Voting-Number Theory. By way of example, powerful considerations rooted in republican self-rule and common-sense efforts to avoid anomalous results point to the same conclusion. *See, e.g.*, Jed Rubenfeld, *Rights of Passage Majority Rule in Congress*, 46 DUKE L.J. 73, 75 (1996).

[14] *See infra* notes 125–271 and accompanying text.

[15] *See* Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 498 (1931).

[16] *See infra* notes 272–311 and accompanying text.

[17] *See infra* notes 287–299 and accompanying text.

[18] *See infra* notes 300–311 and accompanying text.

The federal courts have not yet resolved whether they have the power to rule on the constitutionality of the Cloture Rule.[19] That subject is best left to others, who can give it the full treatment that limitations of time, space, and energy render impossible here.[20] The bracketing of this question, however, in no way diminishes the importance of the matter that this Article addresses. The key point is this: Even if courts find themselves unable to consider the Cloture Rule's constitutionality, Article VI requires Senators—no less than judges—to take an oath to support the Constitution, and so they must honor the limits it imposes.[21] Indeed, it is all the more essential for Senators to assess the constitutionality of their own rules if judges lack authority to do so.[22] This Article demonstrates why Senators, and particularly—though not only[23]—originalist-minded Senators, have no choice but to look at the Cloture Rule in a new light. They must do so because the analysis offered here shows that this Rule has come to contravene the fundamental principle of legislative majoritarianism established by our founding charter.

I. CONTEXTUALIZING THE FILIBUSTER DEBATE

In due course, this Article will canvass the history of the Senate's regulation of speechmaking by its members.[24] For now, it suffices to note a point established by that history that is of central importance: A "stealth filibuster" system has taken hold in the upper chamber in recent years,[25] and that system has altered Senate decision making in a game-changing way.[26] In particular, unlike

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[19] In a recent ruling, a federal district court determined that it lacked jurisdiction on the facts of the case to consider this question. Common Cause v. Biden, 909 F. Supp. 2d 9, 12–13 (D.D.C. 2012), *appeal filed*, No. 12-5412 (D.C. Cir. June 18, 2013). Just as this issue went to press, the U.S. Court of Appeals for the D.C. Circuit heard oral arguments in the case on January 21, 2014. Courtroom Minutes of Oral Argument, *Common Cause*, No. 12-5412 (D.C. Cir. Jan. 21, 2014), ECF No. 33.

[20] *Compare* Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 HARV. J. ON LEGIS. 467, 500–07 (2011) (arguing that courts have jurisdiction to rule on the constitutionality of the Cloture Rule), *and* Fisk & Chemerinsky, *supra* note 5, at 225–38 (same), *with* Chafetz, *supra* note 5, at 1036–37 (arguing that courts do not have jurisdiction to rule on the constitutionality of the Cloture Rule).

[21] *See* U.S. CONST. art. VI, cl. 3; Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 586–88 (1975) (discussing the duties of legislators to assess the constitutionality of proposed legislation).

[22] *See* Chafetz & Gerhardt, *supra* note 10, at 251 (Chafetz) (noting that, when courts "underenforce . . . constitutional norms," it is "all the more important for constitutionally conscientious members of Congress to take them very seriously"); Neals-Erik William Delker, *The House Three-Fifths Tax Rule: Majority Rule, the Framers' Intent, and the Judiciary's Role*, 100 DICK. L. REV. 341, 380 (1996) (same).

[23] *See supra* note 13 and accompanying text.

[24] *See infra* notes 130–165 and accompanying text.

[25] Fisk & Chemerinsky, *supra* note 5, at 186.

[26] *See infra* notes 151–193 and accompanying text (discussing the "stealth filibuster" and its effects on modern Senate operations).

their predecessors, present-day Senators need not speak on the Senate floor—or even mount a serious threat to speak—to block proposals that enjoy majority support.[27] Moreover, this new system has contributed to such an expanded use of the filibuster mechanism that Senate practice in effect now requires sixty votes as a routine matter to enact most legislation.[28] Even in 1997, Professors Catherine Fisk and Erwin Chemerinsky could rightly claim that "[t]his history reveals a fundamental change in the nature of filibustering and a dramatic increase in the power of a filibuster threat."[29] As it turns out, this statement is even more accurate today.[30]

In recent years, critics have drawn on these points to mount constitutional challenges to the operation of Rule XXII.[31] Although these challenges have taken a variety of forms, the most direct line of attack finds expression in a simple syllogism:

> *Major Premise*: The Constitution establishes that a bill "shall have passed" the House or the Senate, for purposes of the Presentment Clause, if it has received a majority vote; thus, a rule that requires a supermajority vote to enact a law is unconstitutional.[32]
>
> *Minor Premise*: The modern filibuster rule is not really a rule about debating; instead, in practical effect—and thus for controlling legal purposes—it is a rule that requires a supermajority vote to enact a law.[33]
>
> *Conclusion*: The modern filibuster rule is unconstitutional.

Defenders of current Senate practice seek to fend off this argument in two ways. First, they invoke the Any-Voting-Number Theory to attack the syllogism's major premise.[34] Second, they invoke the Just-a-Debating-Rule Theory to attack its minor premise.[35]

One might also seek to argue that this syllogistic argument concerns only bill passing and, therefore, has no effect on the constitutionality of supermajority cloture practice in the context of voting to confirm presidential nominees.

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[27] *See infra* notes 151–156 and accompanying text.

[28] Fisk & Chemerinsky, *supra* note 5, at 182.

[29] *Id.* at 186.

[30] *See infra* notes 157–158, 193 and accompanying text.

[31] *See, e.g.*, Bondurant, *supra* note 20, at 470–79 (reviewing historical developments in building a case against modern practice); Chafetz, *supra* note 5, at 1006–16 (same).

[32] *See infra* notes 51–78 and accompanying text. The relevant "shall have passed" language appears in Article I, Section 7.

[33] *See infra* notes 151–193 and accompanying text.

[34] *See infra* notes 44–48 and accompanying text.

[35] *See infra* notes 42–43 and accompanying text.

Of importance, however, no scholar has argued—at least in a focused and thorough way—that today's supermajoritarian filibuster system can continue to operate in the confirmation context even if that system is unconstitutional as to bill enactment under the syllogism set forth above. To be sure, some commentators have offered policy arguments that support looking with special favor on supermajority-approval rules when the Senate votes on judicial nominees, including for the Supreme Court.[36] On the other hand, two major works defend just the opposite conclusion—namely, that supermajority-approval requirements for confirming judges are especially problematic, including because of the affront they pose to the President's appointment power.[37] In the end, these cross-cutting structural arguments may cancel each other out, thus supporting the conclusion that the ban on supermajority approval applies equally to proposed laws and pending nominations.

The more critical point is that the Constitution's text and history cut sharply against distinguishing between bill votes and confirmation votes in this context. To begin with, Article II's unitary textual treatment of judicial-branch and executive-branch nominees counsels against countenancing a different treatment of the two groups with regard to permissible forms of senatorial "consent,"[38] and the argument seems especially weak for authorizing supermajority-approval requirements for the President's own key executive-branch assistants. Moreover, vigorous arguments for *not* applying supermajority voting requirements to executive-branch and lower court judicial nominees took center stage in the most recent debates over filibuster reform.[39] In any event, there are many indications, in both the constitutional text and our constitutional history, that the ratifying community was committed to legislative majoritarian-

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[36] *See, e.g.*, Catherine Fisk & Erwin Chemerinsky, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO L. REV. 331, 337 (2005) (positing that, because "federal judges . . . hold their positions for life, subject only to the . . . unlikely possibility of impeachment," it is "misguided to criticize filibustering judicial nominations as anti-majoritarian, when the entire nature of the federal judiciary is anti-majoritarian"); Bruce Ackerman, Editorial, *Filibuster Reform Both Parties Can Agree On*, WALL ST. J., Jan. 4, 2011, at A15 ("[G]iven their power to second guess democratic decisions, judicial nominees should gain bipartisan support.").

[37] *See* John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 201 (2003) (arguing that "the constitutional structure of our government dictates that the Senate's power with respect to nominations is necessarily narrower than its power with respect to legislation"); Hatch, *supra* note 3, at 830 (advancing a similar argument).

[38] U.S. CONST. art. II, § 2.

[39] *See infra* notes 280–286 and accompanying text; *see also* Jonathan Weisman & Jennifer Steinhauer, *Senate Strikes Filibuster Deal at Last Minute*, N.Y. TIMES, July 17, 2013, at A1 (quoting Senator Harry Reid as stating that the filibuster deal ensures that "[q]ualified executive nominees [can] not be blocked on procedural supermajority votes"); Jonathan Weisman & Ashley Parker, *Senate's Leader Sets Showdown over Filibuster*, N.Y. TIMES, July 16, 2013, at A1 (reporting on the plan of Senate Majority Leader Harry Reid "to ask a majority of members to ban filibusters against executive nominees").

ism as a general matter.[40] In particular, nothing in the historical record indicates that the Framers, who were unstintingly committed to legislative majoritarianism in enacting laws, were any less committed to such majoritarianism in confirming either judges or executive-branch officials.[41]

For these reasons, there is no apparent basis for concluding that Senate confirmation votes occupy a different status than Senate bill votes when it comes to the constitutional permissibility of self-imposed supermajority voting rules. Moreover, if this proposition is sound, it follows that *all* attempted uses of Rule XXII—whether for bill enactments or nominee confirmations of any kind—must fail unless that Rule finds support in either the Any-Voting-Number Theory or the Just-a-Debating-Rule Theory.

The Just-a-Debating-Rule defense of the Cloture Rule is not hard to follow. It posits that constitutional analysts should consider the Cloture Rule on its own terms; that those terms establish that the Rule concerns debate; and that the control of debate is permissible because the Constitution vests the Senate with the power to "determine the Rules of its Proceedings."[42] Put another way, the Cloture Rule on its face addresses the ending of debate, and that is enough to establish its constitutionality because rules about debate govern how legislative "Proceedings" unfold.[43]

The Any-Voting-Number Theory, by contrast, does not focus on the debate-centered language and lineage of Rule XXII. Instead, its origins lie in the midterm election of 1994, which swept Republican majorities into both the House and the Senate as a result of political campaigns built around then-Speaker Newt Gingrich's "Contract for America."[44] One change made pursuant to this "Contract" involved a new House Rule that required any bill involving a federal income tax rate increase to receive the approval of at least three-fifths of voting Representatives.[45] For the first time in American history, this rule raised the question of whether a chamber of Congress could impose on itself a supermajority voting requirement for the actual enactment of laws.[46] At the time, some scholars insisted that the Constitution prohibits any supermajority voting requirement applicable to a final bill vote, even if a majority remains

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[40] *See infra* notes 55–124 and accompanying text.

[41] *See infra* notes 55–124 and accompanying text.

[42] U.S. CONST. art. I, § 5, cl. 2. For the text of Rule XXII, see *supra* note 2.

[43] *See supra* notes 10–11 and accompanying text.

[44] *See* Paul West, *GOP Sweeps to Victory in Momentous Power Shift; Glendening, Sauerbrey Finish in Dead Heat; GOP Takes Control of Both House, Senate*, BALT. SUN, Nov. 9, 1994, at A1, *available at* http://articles.baltimoresun.com/1994-11-09/news/1994313135_1_house-republican-rep-first-republican-speaker, *archived at* http://perma.cc/9RB9-UNBY.

[45] The original House Rule was set forth at H.R. Res. 6, 104th Cong. § 106(a) (1995) (stating that any bill "carrying a Federal income tax rate increase may not be considered as passed or agreed to unless so determined by a vote of not less than three-fifths of the Members voting").

[46] *See* Ackerman et al., *supra* note 13, at 1539 (noting the rule's "unprecedented" nature).

free to repeal that requirement.[47] Critics shot back that the Framers did not set forth this proposition in explicit terms and that the House's new three-fifths bill-voting requirement qualified—just like the Cloture Rule—as a permissible "Rule[] of its Proceedings."[48]

In sum, there are two separate defenses of the Senate filibuster rule. The first—the Any-Voting-Number-Theory—posits that the constitutional defense of the tax-vote-increase House Rule is sound and applicable *a fortiori* to the Senate Cloture Rule.[49] In other words, if the Rules of Proceedings Clause authorizes a chamber of Congress to adopt an explicit supermajority voting rule for passing bills, it logically must also authorize an implicit supermajority voting rule, even assuming the Cloture Rule merits this description. The second defense—the Just-a-Debating-Rule Theory—reflects the view that the Cloture Rule does not target final Senate votes as either an explicit or an implicit matter.[50] Rather, it is a rule about cutting off debate. And for this reason, it falls within the chamber's express power to adopt "Rules of . . . Proceedings," even if the House and Senate may not impose on themselves supermajority voting rules for final actions in passing laws or confirming nominees. In the pages that follow, this Article demonstrates why each of these two defenses fails, so that Rule XXII is unconstitutional as it operates today.

II. The Any-Voting-Number Theory

The first defense of the Senate's modern filibuster regime rests on the Any-Voting-Number Theory. This defense must fail, however, if the Constitution requires final action on passing bills and confirming nominees to proceed by majority vote. In fact, the Constitution does impose a majority-vote requirement for these dispositive actions, as a unanimous Supreme Court recognized in *United States v. Ballin* in 1892.[51] The Court in that case put the point this way:

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

[47] *See id.* at 1542; Rubenfeld, *supra* note 13, at 88–89.

[48] U.S. Const. art. I, § 5, cl. 2. For extensive treatments of the subject, see generally McGinnis & Rappaport I, *supra* note 9; McGinnis & Rappaport II, *supra* note 9.

[49] *See supra* notes 44–48 and accompanying text.

[50] *See supra* notes 42–43 and accompanying text.

[51] 144 U.S. 1 (1892).

> found in the Federal Constitution, and therefore the general law of such bodies obtains.[52]

Some commentators have argued that this pronouncement, at least if given its most natural reading, is off the mark.[53] In reality, however, the text and the history of our Constitution firmly establish the principle of majority decision making recognized in *Ballin*.[54]

A. *Text*

The text of the Constitution negates the Any-Voting-Number Theory in four separate ways. First, Article I, Section 7 states that "[e]very Bill which shall have passed the House of Representatives and the Senate . . . shall . . . be presented to the President."[55] The critical term in this clause is "passed," which Americans understood at the time of the framing—as *Ballin* confirms—to hinge on "the act of a majority of a quorum" in the absence of "specific limitations . . . found in the Federal Constitution" itself.[56] This understanding finds support in established practice at the time of the framing,[57] Noah Webster's dictionary of 1828,[58] and the two English legal dictionaries that existed in 1787.[59] It follows that the Any-Voting-Number Theory clashes with the most natural linguistic understanding of the word "passed" as used in Article I, Section 7.[60] The theory also falters because it would permit the Senate—and the House, too—to fashion a crazy quilt of wildly varying submajority and super-

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[52] *Id.* at 6.

[53] *See* McGinnis & Rappaport I, *supra* note 9, at 493 (rejecting the "first appearances" of statements in *Ballin* in favor of the Any-Voting-Number Theory).

[54] This conclusion draws support from later Supreme Court decisions that reflect the same understanding expressed in *Ballin*. *See* INS v. Chadha, 462 U.S. 919, 956 n.21, 958 (1983) (alluding without qualification to "the simple majority required for passage of legislation," and reiterating that enactment of legislation requires "passage by a majority of both Houses"); Mo. Pac. Ry. Co. v. Kansas, 248 U.S. 276, 283 (1919) (noting the early rejection of a constitutional amendment that would have "required a two-thirds (*instead of a majority*) vote . . . concerning specified subjects" (emphasis added)).

[55] U.S. CONST. art. I, § 7, cl. 2.

[56] *See supra* note 52 and accompanying text.

[57] *See infra* notes 79–124 and accompanying text.

[58] *See* 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 31 (New York, S. Converse 1828) (setting forth definitions of "pass" that include "to receive the sanction of a legislative house or body by a majority of votes").

[59] *See* 2 T. CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY 5 (London, His Majesty's Law Printers 1771) (including in definition of "majority" the following: "The only method of determining the acts of many is by a majority; the major part of members of parliament enact laws . . . ."); GILES JACOB, THE NEW LAW DICTIONARY 354 (London, Henry Lintot 1743) (including in the definition of "majority" that "it is the Majority of Members of Parliament, which enact our Laws").

[60] *See* Coenen, *supra* note 6, at 1098–99.

majority voting requirements in derogation of the Framers' goal of establishing a "single, finely wrought . . . procedure" for enacting federal laws.[61]

Second, Article I, Section 7 goes on to state that, in the event of a veto of a passed bill, the President "shall return it" to the chamber in which it originated.[62] Then, if "two thirds of that House shall agree to pass the bill, it shall be sent . . . to the other House, . . . and if approved by two thirds of that House, it shall become a Law."[63] As these words reveal on their face, the two-thirds vote total for overriding a presidential veto cannot be increased to a higher number.[64] According to the Any-Voting-Number Theory, however, the Senate on its own could set the controlling measure for the initial vote on a bill at 75% or even 100%.[65] Could the Framers really have intended to permit the act of ordinary lawmaking to proceed by unanimous vote, while simultaneously specifying that a two-thirds vote must determine the override of a presidential veto? The utter oddity of such a system confirms the conclusion that a bill is "passed" in the first instance when it receives majority approval.[66]

Third, Article I, Section 3 specifies that the Vice President shall serve as President of the Senate, "but shall have no Vote, unless they be equally divided."[67] Notwithstanding this textual vesting of voting power in the Vice President, the Any-Voting-Number Theory posits that the Senate can strip the Vice President of any vote on all substantive matters by simply specifying via rule that a supermajority—or even a fifty-one-vote simple majority of Senators themselves, excluding the Vice President—is needed to act.[68] That view of things, however, is irreconcilable with the Vice President Voting Clause because it permits a nullification of the "casting vote" —that is, the "vote . . . which decides the question"[69]—that the Framers meant for the Vice President

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[61] *Chadha*, 462 U.S. at 951.

[62] U.S. CONST. art. I, § 7, cl. 2.

[63] *Id.*

[64] This conclusion follows from the clause's specification that, following a veto, a bill reapproved by two-thirds of each chamber "*shall* become a Law." *Id.* (emphasis added).

[65] *See* McGinnis & Rappaport I, *supra* note 9, at 489 (acknowledging that "the Constitution permits [the houses] to choose unusual or odd proportions").

[66] Finding merit in this critique, Professors Fisk and Chemerinsky suggest that the Framers may have meant that the controlling number of votes for the initial passage of bills would have to fall somewhere between 51% and 66%. Fisk & Chemerinsky, *supra* note 5, at 242. For an argument that this extrapolation finds no support in the Framing-era materials, see Coenen, *supra* note 6, at 1101–03.

[67] U.S. CONST. art. I, § 3, cl. 4.

[68] *See* McGinnis & Rappaport I, *supra* note 9, at 488–89 (arguing that the Vice President Voting Clause assumes that majority rule, with ties broken by the Vice President, would be only "the default rule applied when no other procedure was adopted").

[69] *See* 1 WEBSTER, *supra* note 58, at 33 (defining "casting-vote" to mean "[t]he vote of a presiding officer, in an assembly or council, which decides a question, when the votes of the assembly or house are equally divided").

to have.[70] Put simply, Article I, Section 3 shows that the Framers meant for final Senate action on proposed matters to hinge on the vote of a legislative majority, with the Vice President's vote to determine whether an aye-voting or nay-voting majority exists in the event that the Senators themselves are "equally divided."

Finally, the Constitution specifies five and only five instances in which the chambers of Congress are to act by supermajority vote.[71] This list is limited to matters of extraordinary importance—namely, the expulsion of an elected representative,[72] senatorial conviction of the President or others on impeachment charges,[73] senatorial confirmation of treaties,[74] the proposal of constitutional amendments,[75] and, as already noted, the override of presidential vetoes.[76] Under the Any-Voting-Number Theory, however, each chamber of Congress could add to this list in any way it might like. Indeed, the Senate could provide that passing even the most mundane and inconsequential bills requires unanimity, although the Constitution would specifically bar it from, for example, requiring more than a two-thirds vote to approve a treaty.[77] Such a free-form conception of the bill-enactment process is at odds with the cautious treatment of supermajority voting laid down in the constitutional text. In particular, it runs up against the Framers' demonstrated understanding—noted by Joseph Story nearly two-hundred years ago—that "departure from the general rule, of the right of the majority to govern, ought not to be allowed but upon the most urgent occasions."[78]

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[70] *See* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 238 (O.W. Holmes, Jr., ed., 12th ed., Boston, Little, Brown & Co. 1873) (1826) (setting forth Kent's text of the 1820s that "the Vice-President . . . gives the casting vote when they are equally divided"); 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 489–90 (Jonathan Elliot ed., Washington 1836) (statement of James Monroe) (stating that the Vice President "is to have the casting vote in the Senate"); Remarks of Robert Whitehill to the Pennsylvania Convention (Dec. 7, 1787), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 512, 512 (Merrill Jensen ed., 1976) (noting that the Vice President "has the casting vote in the Senate"); THE FEDERALIST NO. 68, at 461 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (noting that the Vice President "should have only a casting vote"); *see also* THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE: FOR THE USE OF THE SENATE OF THE UNITED STATES 133 (Washington, Joseph Milligan & William Cooper 1812) ("In Senate, if they be equally divided, the Vice-President announces his opinion, which decides.").

[71] *See infra* notes 72–76 and accompanying text.

[72] U.S. CONST. art. I, § 5, cl. 2.

[73] *Id.* art. I, § 3, cl. 6.

[74] *Id.* art. II, § 2, cl. 2.

[75] *Id.* art. V.

[76] *Id.* art. I, § 7, cl. 2.

[77] The unalterable nature of the two-thirds voting measure for treaty ratification is established by the specification in Article II, Section 2 that the President "shall have Power . . . to make Treaties, provided two thirds of the Senators present concur." *Id.* art. II, § 2.

[78] 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 887 (Boston, Hilliard, Gray & Co. 1833).

B. *Historical Context*

The context in which the Constitution was adopted confirms that the Framers meant to permit the House and Senate to pass ordinary legislation, and by logical extension to confirm nominees,[79] only by way of majority—and not supermajority—vote.[80] To begin with, longstanding practice in both England and America established that dispositive legislative decision making was to be done by legislative majorities. Parliament had always acted by majority vote.[81] Founding-era state legislatures likewise uniformly adhered to this practice,[82] as did the state ratifying conventions[83] and the Philadelphia Convention itself.[84] Indeed, at the Convention, no less worldly a man than Benjamin Franklin declared that supermajority voting rules were "contrary to the common practice of Assemblies in all Countries and Ages."[85]

Legislative majoritarianism also comported with fundamental Framing-era conceptions of republican theory.[86] The core idea was that self-rule in its nature required majority rule if in fact "all men are created equal."[87] Otherwise, minorities could and would wield governing powers, just as they had done under aristocratic systems.[88] As Thomas Jefferson explained, "The first principle of republicanism is, that the *lex-majoris partis* is the fundamental law of every society of individuals of equal rights . . . ."[89] John Locke made the

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[79] *See supra* notes 36–41 and accompanying text.

[80] *See* Boumediene v. Bush, 553 U.S. 723, 742 (2008) (noting that constitutional interpretation should take account of "history . . . known to the Framers").

[81] *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *181 ("In each house the act of the majority binds the whole . . . ."). *See generally* Chafetz, *supra* note 5, at 1017–23 (discussing parliamentary norms in detail).

[82] *See, e.g.*, AKHIL R. AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 359 (2012) (observing that "neither Parliament nor any state circa 1787 generally required more than simple house majority votes for the passage of bills or the adoption of internal house procedures, even though, in many of these states, no explicit clause specified this voting rule," and that "[i]n America circa 1787, majority rule in these contexts truly did go without saying"). In one essay published in the midst of the ratification process, the author observed: "I can conceive no reason why the ordinary business of legislation should not be determined in Congress by a majority of voices *as is done in all our assemblies, and other public bodies*." *An Independent Freeholder*, WINCHESTER VA. GAZETTE, Jan. 25, 1788, *reprinted in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 325–26 (John P Kaminski et al. eds., 2009) (emphasis added).

[83] *See* AMAR, *supra* note 82, at 368 (noting that the majority-vote principle "had gone without saying in each ratifying convention in 1787–1788").

[84] *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 8, 11 (Max Farrand ed., rev. ed. 1966).

[85] *Id.* at 198.

[86] *See generally* Coenen, *supra* note 6, at 1132–39 (discussing intense notions of republicanism at the Framing).

[87] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[88] *Cf.* U.S. CONST. art. I, §§ 9–10 (outlawing titles of nobility).

[89] Letter from Thomas Jefferson to Baron F.H. Alexander Von Humboldt (June 13, 1817), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 88, 89 (Paul Leicester Ford ed., New York, G.P. Putnam's

same point when he wrote that in organizations "impowered to act by positive laws, where no number is set down by that positive law which impowers them, the act of the majority passes for the act of the whole, and, of course, determines, as having by the law of nature and reason the power of the whole."[90] Professor Akhil Amar underscored the key point when he observed that "this linkage between Republicanism and majority rule runs throughout . . . Founding era discourse . . . ."[91]

To be sure, the Articles of Confederation departed from this pattern by requiring supermajority approval of many actions in the pre-Constitution federal Congress.[92] But that departure reflected the distinctive role of the Articles as a confederation-based treaty among turf-protecting states, rather than a charter of national self-governance built on republican principles.[93] Even more significantly, the core purpose of the new Constitution was to jettison the Articles and the "frail and tottering edifice" it had created.[94] Most important of all, the move to repudiate the Articles was propelled in large measure by condemnation of the very supermajority voting rules they had put in place.[95] As James Wilson emphasized at the Philadelphia Convention, "[g]reat inconveniences had . . . been experienced in Congress from the article of confederation requiring nine votes in certain cases."[96] It strains credulity to suppose that the same men who emphatically rejected the Articles' supermajority voting requirements because of their "contemptible" and "embarrass[ing]" effects[97] simultaneously intended that the newly created federal legislature could freely reinstall them.[98]

Sons 1899); *accord, e.g.*, THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1785), *reprinted in* THE PORTABLE THOMAS JEFFERSON 23, 171 (Merrill D. Peterson ed., 1975) (characterizing majority rule as "the natural law of every assembly of men, whose numbers are not fixed by any other law"); Letter from Thomas Jefferson to the Deputies of the Cherokee Upper Towns (Jan. 9, 1809), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 228, 229 (H.A. Washington ed., New York, Derby & Jackson 1859) ("Our way is . . . to consider that as law for which the majority votes.").

[90] JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 96, at 55 (Thomas P. Peardon ed., Bobbs-Merrill Co. 1952) (1690).

[91] Akhil R. Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 757 (1994).

[92] *See, e.g.*, McGinnis & Rappaport II, *supra* note 9, at 341–42.

[93] *See, e.g.*, AMAR, *supra* note 82, at 57 (noting that, in contrast to the state of affairs created by the Constitution, "each of the thirteen states was a legally sovereign entity" under the Articles and the "Confederation itself was merely a 'league of friendship,'" which "[t]he Philadelphia framers were proposing to dissolve").

[94] THE FEDERALIST NO. 15, *supra* note 70, at 98 (Alexander Hamilton).

[95] *See, e.g.*, BINDER & SMITH, *supra* note 3, at 5 (noting that "the experiment with supermajorities under the Articles of Confederation had been a dismal one" and that key Framers "did not intend to repeat it under the new Constitution").

[96] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 84, at 451 (remarks of James Wilson).

[97] THE FEDERALIST NO. 22, *supra* note 70, at 141–42 (Alexander Hamilton).

[98] Some proponents of the filibuster system are drawn to statements such as Professor Michael Gerhardt's assertion that "the lawmaking process in Article I was designed to be cumbersome—to

The Framers' crafting of the Great Compromise confirms their commitment to subjecting votes on bills to unmodifiable majority control, especially in the Senate.[99] At the outset of the Constitutional Convention, delegates from its namesake state put forward the "Virginia Plan."[100] Under this proposal, each state's population would determine its level of representation in both the House and the Senate—a proposition seen by large-state delegates as commanded by republican principles.[101] Small-state delegates, however, assailed this approach, thus thrusting the Convention into a deadlock that nearly caused its collapse.[102] Delegates worked through the impasse only after weeks of wrangling when the barest of majorities approved the Great Compromise,[103] which fixed representation in the House according to population, while giving each state an "equal voice" in the Senate.[104] The critical point is that the "equal voice" the Framers envisioned was not the minority-favoring *unequal voice* that supermajority voting rules put in place. To be sure, a majority of delegations signed on to a hard-fought compromise under which the seven smallest states, then representing some 28% of the national population, could block by way of a majority vote legislation favored by the six largest states, representing the other 72%.[105] But these delegations never would have embraced a system

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make it harder, not easier, to enact laws." Chafetz & Gerhardt, *supra* note 10, at 264 (Gerhardt). Any argument based on this notion, however, involves an effort to extract original meaning from an extremely general proposition and overreaches because the Framers did not mean to make it hard to pass laws in any way possible. Rather, their pointed repudiation of supermajority voting rules, based on the recent and concrete harms such rules had inflicted under the Articles, reveals a decisive rejection of them as a tool to constrain legislative action.

[99] For one treatment of the Great Compromise, see DAVID O. STEWART, THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION 119–27 (2007).

[100] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 84, at 27–28 & n.20.

[101] *See, e.g.*, RALPH KETCHAM, THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 11 (2003) (noting particularly strong views of Madison and Wilson on this point).

[102] *See* STEWART, *supra* note 99, at 114 (noting that "[d]elegates spoke openly of throwing in the towel and quitting the Convention" over the issue of small-state representation).

[103] *Id.* at 124 (noting that the "compromise was approved by the narrowest of margins, 5–4, with Massachusetts divided").

[104] KETCHAM, *supra* note 101, at 11.

[105] According to the 1790 census, Delaware (with a population of 50,209), Rhode Island (67,877), Georgia (53,284), New Hampshire (141,727), South Carolina (141,979), New Jersey (172,716), and Connecticut (235,182), were the seven smallest states, representing 862,974 people out of a total of 3,113,834 persons in the United States. This total excludes persons who lived in U.S. Territories, including the then-non-state Vermont, while including persons in Maine and Kentucky as residents of Massachusetts and Virginia, respectively. In addition, these numbers reflect the four non-slave categories of persons enumerated in the 1790 census: "Free white Males of 16 years and upwards, including heads of families"; "Free white Males under sixteen years"; "Free white Females, including heads of families"; and "All other free persons." *See* THOMAS JEFFERSON, OFFICE OF THE SEC'Y OF STATE, RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES 3 (1791), *available at* http://www2.census.gov/prod2/decennial/documents/1790a.zip, *archived at* http://perma.cc/PJK3-5VJN.

that permitted Senators from the smallest states to expand their already-extraordinary power by rendering the Senate even more anti-republican in character. In other words, the delegates would never have tolerated, for example, giving Senators authority to install by majority vote a 66% supermajority bill-voting rule, thus empowering the five smallest states, representing only 15% of the population, to flout the will of the majority.[106]

The Federalist—the great document of the ratification debates—confirms that the Constitution prohibits supermajority voting requirements, including such requirements imposed by the House and Senate on themselves. Writing under the pen name "Publius," Alexander Hamilton and James Madison laid out the key points. In *Federalist No. 58*, Madison trained his gaze directly on rules that require "in particular cases, if not in all, more than a majority of a quorum for a decision."[107] He acknowledged that these rules might supply "some advantages" by posing "another obstacle" to the adoption of "hasty and partial measures."[108] Nonetheless, he concluded that "these considerations are outweighed by the inconveniences in the opposite scale."[109] Of particular significance, supermajority voting rules would invite "an interested minority [to] take advantage of [such rules] to screen themselves from equitable sacrifices to the general weal or . . . to extort unreasonable indulgences."[110] In addition, Madison noted that, "[i]n all cases where justice or the general good might require new laws to be passed or active measures to be pursued, the fundamental principle of free government would be reversed. It would no longer be the majority that would rule; the power would be transferred to the minority."[111]

In *Federalist No. 22*, Hamilton decried supermajority voting requirements as "poison."[112] When operating under them, he explained, the government "is often, by the impracticability of obtaining the concurrence of the necessary number of votes, kept in a state of inaction," such that "[i]ts situation must always savour of weakness—sometimes border on anarchy."[113] Then-recent experience under the Articles revealed "how much good may be prevented, and how much ill may be produced, by the power . . . of keeping affairs in the same unfavorable posture in which they may happen to stand at particular periods."[114] At best, according to Hamilton, supermajority voting rules created

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[106] Subtracting the populations of New Jersey and Connecticut from the figures set forth above, the five smallest States consisted of 455,076 persons—that is, 14.6% of the total population. *Id.*; *see supra* note 105.

[107] THE FEDERALIST NO. 58, *supra* note 70, at 396 (James Madison).

[108] *Id.* at 396–97.

[109] *Id.* at 397.

[110] *Id.*

[111] *Id.*

[112] THE FEDERALIST NO. 22, *supra* note 70, at 140 (Alexander Hamilton).

[113] *Id.* at 141.

[114] *Id.*

"continual negotiation and intrigue," as well as "contemptible compromises of the public good."[115] At worst, these rules subjected "the regular deliberations and decisions of a respectable majority" to the "caprice or artifices of an insignificant, turbulent or corrupt junto."[116] In language of both immediate and prophetic importance, Hamilton observed: "If a pertinacious minority can controul the opinion of a majority respecting the best mode of conducting [the public business,] the majority in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater . . . ."[117]

These ideas—and the bedrock principle of majority rule they reflect—leave no room for supermajority requirements in voting on laws or confirming nominees. To be sure, proponents of the Any-Voting-Number Theory have suggested that *The Federalist* undermines the imposition of supermajority voting rules only by way of the Constitution itself, and not by way of internal rulemaking within the House or Senate.[118] This reading of Publius, however, honors neither the letter nor the spirit of the essays. *Federalist No. 75*, for example, found fault with "all provisions which require more than the majority of any body to its resolutions."[119] *Federalist No. 58* spoke of the risks of supermajority voting rules "[i]n all cases where justice or the general good might require new laws to be passed."[120] And *Federalist No. 54* assured the ratifying community that "[u]nder the proposed Constitution, the federal acts . . . will depend merely on the majority of votes in the Federal Legislature . . . ."[121] Put simply, a need to deal with formal rule-based requirements of sixty (or sixty-seven or seventy-five or one hundred) votes to pass a law in the Senate does not square with a system under which the fate of "federal acts . . . will depend *merely* on the majority of votes."[122]

All of these elements of our founding history—from then-prevailing practices to core republican understandings to excoriation of the Articles' supermajority-voting requirements to the principles of the Great Compromise to the pronouncements of Publius—stand against the Any-Voting-Number Theory.[123]

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[115] *Id.*

[116] *Id.* at 140.

[117] *Id.* at 141.

[118] *See* McGinnis & Rappaport I, *supra* note 9, at 490 (contending that *The Federalist* was "explaining why the Framers did not establish a *constitutional* supermajority requirement," which is a separate issue from "the validity of a *legislative* supermajority requirement").

[119] THE FEDERALIST NO. 75, *supra* note 70, at 507 (Alexander Hamilton).

[120] THE FEDERALIST NO. 58, *supra* note 70, at 397 (James Madison).

[121] THE FEDERALIST NO. 54, *supra* note 70, at 371 (James Madison).

[122] *Id.* (emphasis added).

[123] *Accord, e.g.*, BINDER & SMITH, *supra* note 3, at 33 ("The records of the convention and the arguments in the Federalist Papers give no indication that the framers either anticipated or desired procedural protection for Senate minorities."); *id.* at 51 ("There is no evidence that supermajorities were envisioned by the framers nor demanded by the first senators in order to the ensure that the Sen-

It simply will not work to argue that the Constitution authorizes the modern cloture system because the Senate can impose supermajority voting rules on itself. In fact, as the Supreme Court recognized in *Ballin*, constitutional text and history—and the deep majoritarian values they still support today—demonstrate just the opposite.[124]

III. The Just-a-Debating-Rule Theory

The foregoing discussion shines a light on a cardinal principle: Our Constitution prohibits supermajority voting requirements for the enactment of legislation and the confirmation of presidential nominees. For purposes of this principle, does today's version of the Senate Cloture Rule embody such a supermajority voting requirement? This Part shows why the answer to this question is yes.

Defending this claim involves advancing three propositions. First, the Senate's use of its Cloture Rule has experienced such a radical metamorphosis that it now operates in practical effect as a supermajority vote rule for Senate action, as opposed to a rule that merely concerns debate.[125] Second, because it is the practical operation of the Cloture Rule that must determine its constitutional status, the Rule is unconstitutional as it operates today.[126] Finally, any effort to salvage the Cloture Rule based on its historical justifications fails because of the dramatically altered way in which the Rule now functions.[127] In short, the Just-a-Debating-Rule Theory cannot sustain Rule XXII because it no longer is just a debating rule. Instead, because the Rule has come to operate in practical effect as a supermajority voting requirement, it offends the foundational principle—just established in Part II—that places precisely such requirements beyond the constitutional pale.

A. *The Evolution of the Cloture Rule—From Rule of Debate to Rule of Decision*

The discussion that follows shows that the Senate's system of filibuster control has morphed over time into a system of de facto supermajority voting.

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ate could temper immoderate legislation passed by the House. In fact, the available evidence concerning the framers' views strongly suggests just the opposite."); Ackerman et al., *supra* note 13, at 1540 (noting that the Framers' rejection of supermajority voting rules "was neither casual nor peripheral to their larger design," but, "[i]nstead, it was based on practical experience and careful consideration of the arguments on both sides"); Delker, *supra* note 22, at 349 (noting how the records of the Convention show the Framers' wariness of minority obstructionism and their rejection of broad supermajority requirements).

[124] *See supra* notes 51–52 and accompanying text.

[125] *See infra* notes 128–193 and accompanying text.

[126] *See infra* notes 194–231 and accompanying text.

[127] *See infra* notes 232–271 and accompanying text.

This discussion comprises two sections, which focus on how Rule XXII has come to work in recent years. Subsection 1 places the current filibuster regime in historical context, highlighting how the modern "stealth filibuster" system came to displace the long-time use of the cloture mechanism to control actual, dilatory speechmaking.[128] Subsection 2 goes on to document the consensus understanding among knowledgeable observers—whether from academia, the media, or the Senate itself—that Rule XXII now operates in practical terms as a supermajority voting rule.[129]

1. The History of Filibuster Control

The Senate's treatment of filibusters has traveled a long and winding road.[130] Others have laid out this history at length, and there is no need to recount the details here.[131] To see why present-day practice raises insuperable constitutional difficulties, however, it is necessary to highlight key developments.

First, the earliest Senates permitted a majority of members to halt debate on any pending matter pursuant to what was called the "Previous Question Rule."[132] Some critics of Rule XXII's broad allowance of minority obstruction have relied on this history.[133] According to their argument, this early endorsement of majority-based cloture signals that supermajority voting requirements were and are at odds with the views of the leaders who drafted and ratified the Constitution.[134] One response to this argument is that the Previous Question

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[128] *See infra* notes 130–165 and accompanying text.

[129] *See infra* notes 166–193 and accompanying text.

[130] *See, e.g.*, Chafetz, *supra* note 5, at 1007 (noting that "filibustering has varied dramatically in its tactics, its frequency, and its efficacy throughout the history of the United States").

[131] *E.g.*, *id.* at 1023–28 (describing the history of the filibuster); Fisk & Chemerinsky, *supra* note 5, at 185–213 (same); Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 205, 213–260 (2004) (same).

[132] *See* Fisk & Chemerinsky, *supra* note 5, at 188 ("The earliest cloture device, which was also employed by the Continental Congress and the English Parliament . . . was a motion for the previous question. The previous question is a nondebatable motion that, if favored by a majority, closes debate and forces an immediate vote on a matter."); Gold & Gupta, *supra* note 131, at 214 (confirming that the previous question procedure "was a well-entrenched tradition among legislatures of the time," including "the House of Representatives, which still observes it to this day"). In addition, Thomas Jefferson's *Manual of Parliamentary Practice*, which was "adopted formally in the House and informally in the Senate in the early Congresses," Fisk & Chemerinsky, *supra* note 5, at 188–89, expressly stated that "[n]o one is to speak impertinently or beside the question, superfluously, or tediously." THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE § XVII (1812), *reprinted in* H.R. DOC. NO. 108-241, at 176 (2005). The rules adopted by the first Senate further provided that the presiding officer could call a member to order, at which point the member "shall sit down." S. JOURNAL, 1st Cong., 1st Sess. 12, 13 (1789).

[133] *See, e.g.*, BINDER & SMITH, *supra* note 3, at 33–37; Bondurant, *supra* note 20, at 470–73.

[134] *See* Bondurant, *supra* note 20, at 472–73.

Rule may evidence only what Framing-era congresses felt they *could* do—not what they *had to* do—when it came to limiting debate. But, at a minimum, one thing is clear: The actions of the senatorial bodies most familiar with the Constitution's original meaning provide no affirmative support for the idea that debate on pending matters—far less the taking of final actions—can be made subject to supermajority, as opposed to majority, control.[135]

Second, the Senate abandoned the Previous Question Rule in 1806 on the ground that no need for it existed,[136] opting instead for a system that in effect required unanimous consent to end debate on pending matters.[137] This system created a theoretical possibility that small numbers of dissenters could block votes on bills or nominees by engaging in protracted oratory. Just as reformers had supposed, however, this problem did not arise in the wake of the 1806 reform. Indeed, no known use of the filibuster device occurred in the Senate for three decades.[138] And senators utilitized speech-based delays only in exceptional cases for the remainder of the nineteenth century.[139]

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[135] The importance of early congressional practice is well-established. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 547 (1969) (noting that "precedential value" of congressional actions "tends to increase in proportion to their proximity to the Convention of 1787"); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888) (reasoning that an act which "was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning").

[136] *See* Chafetz, *supra* note 5, at 1023 (noting that the abolition of the previous question motion "was motivated not by a desire to eliminate restrictions on debate, but rather because of 'the belief that the rule's infrequent use made it unnecessary'" (quoting Richard R. Beeman, *Unlimited Debate in the Senate: The First Phase*, 83 POL. SCI. Q. 419, 421 (1968))); *see also* GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE 393–94 (1960) (noting that Vice President Aaron Burr regarded the previous question rule as unnecessary and recommended discarding it). As a result, in making "the rule change in 1806 that made possible the filibuster . . . by eliminating the Senate's previous question rule . . . members of the original Senate expressed no commitment to a right of extended debate." BINDER & SMITH, *supra* note 3, at 33–34; *accord, e.g.*, *Examining the Filibuster: The Filibuster Today and Its Consequences: Hearing Before the S. Comm. on Rules & Admin.*, 111th Cong. 193 (2010) (statement of Norman J. Ornstein, Resident Scholar, American Enterprise Institute for Public Policy Research) (contending that "unlimited debate in the Senate was . . . a historical accident, not an objective of the Framers").

[137] *See* Fisk & Chemerisnky, *supra* note 5, at 188–95 (discussing the development in the early Senate of a "right of unlimited debate").

[138] *See* AMAR, *supra* note 82, at 365 (noting that "the history of the Senate prior to the 1830s offers no notable examples of organized and obstructionist filibustering"); GREGORY KOGER, FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE 62 (2010) (identifying the first filibuster in 1831 and its more prominent second occurrence in 1841); *see also* RICHARD S. BETH, CONG. RESEARCH SERV., FILIBUSTERS IN THE SENATE, 1789–1993, at 6–19 (1994) (setting out in detail filibusters between 1841 and 1993).

[139] *See* Chafetz, *supra* note 5, at 1026 (noting that "[filibusters] remained relatively rare throughout the nineteenth century" and "for most of this time, the absence of formal limits on Senate debate did not operate as a standing minority veto"); Klein, *supra* note 1, at 26 (noting that in this period "minorities used the filibuster more to annoy the majority than to block its agenda"); *see also* Fisk & Chemerinsky, *supra* note 5, at 195 (noting that "almost every filibustered measure before 1880 was

Third, with greater frequency, Senators used speech-based filibusters to impede the enactment of proposed legislation in the early twentieth century.[140] Even during this period, however, these maneuvers took place only in unusual circumstances.[141] In particular, during most of the twentieth century, filibusters focused on civil rights bills, which were bitterly denounced by southern segregationists.[142] Notably, even such targeted use of obstructionist speechmaking triggered ameliorative reforms, including the Senate's replacement in 1917 of its unanimous-consent policy with a rule that authorized cloture by a vote of two-thirds of the members in attendance.[143] To be sure, no reform went so far as to ban long-winded oratory altogether or to permit the halt of speechmaking by simple majority vote.[144] Nonetheless, the threat and reality of extended floor-holding by dissident members continued to have only a minor effect on the chamber's day-to-day work through most of the twentieth century.[145]

Fourth, the high water mark of obstructionist speechifying came when southern Senators occupied the floor for seventy-four days in an effort to block passage of the Civil Rights Act of 1964.[146] This effort, together with follow-up filibustering on other civil rights measures, stirred criticism of the Senate,[147] which triggered a series of reforms. Of particular importance, in 1975 the Sen-

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eventually passed"). *See generally* KOGER, *supra* note 138, at 60 fig.4.3 (charting successful and unsuccessful Senate filibusters between 1790 and 1900).

[140] *See* Fisk & Chemerinsky, *supra* note 5, at 195 (noting the rise of filibusters in the early twentieth century to the point they came to be seen as "a serious problem").

[141] *See* Harkin, *supra* note 4, at 72 ("Historically, the filibuster was an extraordinary tool used only in the rarest of instances."); Norman J. Ornstein, *Why the Senate No Longer Works*, AMERICAN, Mar.-Apr. 2008, at 74, 76–77, *available at* http://www.american.com/archive/2008/march-april-magazine-contents/our-broken-senate, *archived at* http://perma.cc/43UU-VGY7 (noting the historical understanding that filibusters were "reserved for issues of great national importance").

[142] *See* Fisk & Chemerinsky, *supra* note 5, at 199 ("During a forty year period from the late 1920s until the late 1960s, the filibuster became almost entirely associated with the battle over civil rights."); *accord, e.g.*, Chafetz, *supra* note 5, at 1027 (noting that "for the most part, [the filibuster] was reserved specifically for civil rights bills").

[143] *See* Fisk & Chemerinsky, *supra* note 5, at 196–99.

[144] *See* BINDER & SMITH, *supra* note 3, at 79 (detailing failed efforts in 1917 to create a simple majority cloture rule and identifying the two-thirds cloture rule as a compromise between the two parties).

[145] *See, e.g.*, Gerard N. Magliocca, *Reforming the Filibuster*, 105 NW. U. L. REV. 303, 312 (2011) (indicating that, even after the Senate installed its supermajority cloture procedure, there was "little . . . change [in] the Senate's culture" for most of the twentieth century, except that "an exception emerged to the premise that the majority should prevail on the floor for civil rights legislation"); *Senate Action on Cloture Motions*, U.S. SENATE, http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm, *archived at* http://perma.cc/WAP2-22JV (last visited Jan. 5, 2014) (providing details about cloture motions, votes, and results from 1917 to present).

[146] *See* CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 124–217 (1985).

[147] *See* Chafetz, *supra* note 5, at 1027 (noting that in subsequent sessions "Southern Senators mounted filibusters against the 1965 Voting Rights Act, the 1968 Fair Housing Act, the 1970 Voting Rights Act reauthorization, and the 1972 Equal Employment Opportunity Act").

ate adopted its current rule, which requires sixty votes to end debate, regardless of the number of Senators present.[148] In addition, during this same time frame, the chamber embraced a "two-track" system for conducting its work.[149] This system created an environment in which delays in acting on one matter would not block the Senate from moving forward with other business, thus greatly reducing incentives to avoid filibusters that otherwise could grind the entire work of the chamber to a halt.[150]

Fifth, and finally, this new approach gave rise to the "stealth filibuster" system that now exerts a pervasive effect on Senate operations.[151] Under this system, dissenting minorities no longer need to speak to block legislative actions.[152] Rather, communication to the Senate leadership of minority opposi-

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[148] *See* S. COMM. ON RULES & ADMIN., 112TH CONG., SENATE CLOTURE RULE: LIMITATION OF DEBATE IN THE SENATE OF THE UNITED STATES AND LEGISLATIVE HISTORY OF PARAGRAPH 2 OF RULE XXII OF THE STANDING RULES OF THE UNITED STATES SENATE (CLOTURE RULE) 29–31, 208 (Comm. Print 2011). *See generally* Chafetz, *supra* note 5, at 1027–28 (noting that after the adoption of the 1975 Cloture Rule "the filibuster began to turn into the sixty-vote requirement that we know today").

[149] *See* BINDER & SMITH, *supra* note 3, at 15; Chafetz, *supra* note 5, at 1010; Fisk & Chemerinsky, *supra* note 5, at 201 (noting that "in response to repeated civil rights filibusters, Senate Majority Leader Mike Mansfield developed a system whereby the Senate would spend the morning on the filibustered legislation and the afternoon on other business").

[150] *See* Fisk & Chemerinsky *supra* note 5, at 201 (observing that "the two-track system [aided] a filibustering minority, by reducing the amount of time [it had to] hold the floor"); Tonja Jacobi & Jeff VanDam, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate*, 47 U.C. DAVIS L. REV. 261, 276 (2013) (describing the development of the two-track system, which "spurred the 'stealth' or 'silent' filibuster").

[151] The term "stealth filibuster," which I use here, came to my attention by way of Professors Fisk and Chemerinsky. Fisk & Chemerinsky, *supra* note 5, at 181. For a discussion of the emergence of that system, see, for example, RICHARD S. BETH, CONG. RESEARCH SERV., WHAT WE DON'T KNOW ABOUT FILIBUSTERS 18 (1995) (describing, among other things, Senator Mike Mansfield's introduction of the modern "two-track" system). *See also* Chafetz, *supra* note 5, at 1010 (noting that "[t]he effect of the tracking system is that a filibuster no longer ties up the business of the Senate," so that "[o]nce a Senator announces an intention to filibuster a measure, the issue is simply kept on the back burner unless the majority can muster the sixty votes for cloture"; adding that "[t]he tracking system—or, more generally, the unwillingness of the Senate majority to use attrition as a means of breaking filibusters—has enabled the filibuster to become regularized"). *See generally id.* at 1027–28 (detailing the transformation of the filibuster into a "sixty-vote requirement" after 1975).

[152] *See* Aaron-Andrew P. Bruhl, *Burying the "Continuing Body" Theory of the Senate*, 95 IOWA L. REV. 1401, 1418 n.63 (2010) ("Today's filibusters typically do not feature actual extended debate; rather, mere threats to use up the Senate's valuable time are sufficient to block action."); Fisk & Chemerinsky, *supra* note 5, at 203 (noting that "[t]he stealth filibuster is easier, both physically and politically, because it does not require a senator to hold the floor continuously" and that, "[i]n contrast to the dilatory tactics of the past, modern filibusters virtually never involve long speeches, all-night sessions, or the parliamentary maneuvering that used to draw public attention"); Magliocca, *supra* note 145, at 315 ("Just a credible threat to vote against cloture stifles the exchange of ideas by ensuring in most cases that a contested bill or nomination will not be debated on the floor."); Jeanne Shaheen, *Gridlock Rules: Why We Need Filibuster Reform in the U.S. Senate*, 50 HARV. J. ON LEGIS. 1, 10 (2013) (noting that filibustering does not "require a senator to sacrifice his or her time in the way it once did" because "the fact is that a senator no longer needs to be on the floor to maintain a filibuster"); *see also* Shaheen, *supra*, at 11 (observing that while "[b]locking passage of a bill with a filibus-

tion often results in a decision not even to bring an otherwise properly calendared matter to the floor.[153] In addition, when a minority of at least forty-one Senators opposes a matter that is brought forward, cloture votes almost always occur in a way that has nothing to do with debate.[154] Instead, a Senator often makes a cloture motion immediately upon presentation of the matter before anyone speaks at all.[155] Then, when the cloture vote fails, no speechmaking by objectors ensues because the Senate simply moves on to its next item of business.[156] One effect of these changes is that the use of Rule XXII to block action by Senate majorities has soared to unprecedented heights in recent years—indeed, to dizzying heights.[157] As a result, "almost all significant legislation"

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ter used to be rare and generally only used for controversial legislation, such as civil rights legislation," today even "non-controversial bills . . . routinely face filibusters").

[153] *See* Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 CONN. L. REV. 1041, 1055 (2011) ("Today, most filibusters do not include extended debate; instead, a Senator 'filibusters' a measure merely by threatening to engage in time-consuming debate, which is usually sufficient to persuade the majority to abandon the measure . . . ."); Chafetz, *supra* note 5, at 1010–11 (noting that "[t]he effect of the tracking system is that a filibuster no longer ties up the business of the Senate" and that "[o]nce a Senator announces an intention to filibuster a measure, the issue is simply kept on the back burner unless the majority can muster the sixty votes for cloture"; and adding that "this state of affairs has been thoroughly internalized by Senators," so that "a measure that cannot command the support of sixty Senators is unlikely even to be introduced onto the Senate floor"); Fisk & Chemerinsky, *supra* note 5, at 203 ("A credible threat that forty-one Senators will refuse to vote for cloture . . . is enough to keep a bill off the floor. The Senate leadership simply delays consideration of a bill until it has the sixty votes necessary for cloture."); *id.* at 216 ("[I]t is clear that the Senate perceives the filibuster to be such a significant feature of the Senate's practice that the leadership is unwilling to proceed on any legislation that does not enjoy strong support."); Harkin, *supra* note 4, at 68 n.10 (observing that effective filibusters "take place without any attempt at cloture" voting and "exist by mere threat"); Barry Friedman & Andrew D. Martin, Op-Ed., *A One-Track Senate*, N.Y. TIMES, Mar. 10, 2010, at A27 ("Today a 'filibuster' consists of merely telling the leadership that 41 senators won't vote for a bill"); Jeff Merkley, *Memo: The Talking Filibuster*, HUFFINGTON POST (Dec. 12, 2012, 5:34 PM), http://www.huffingtonpost.com/2012/12/12/jeff-merkley-filibuster-reform_n_2287831.html, *archived at* http://perma.cc/8ATK-3QY2 (noting that, because of the filibuster threat, "[n]umerous important policy bills developed in committees to address major issues facing America never make it to the Senate floor for debate").

[154] Chafetz, *supra* note 5, at 1011 (noting that it is "pellucidly clear" that "the filibuster as practiced today has almost nothing to do with debating an issue"); Gregory Koger & Sergio J. Campos, *The Conventional Option*, 91 WASH. U. L. REV. (forthcoming 2014) (manuscript at 6) ("In the modern Senate, almost all filibusters consist of *threats* to filibuster. Senators rarely occupy the floor of the Senate for an active filibuster . . . .").

[155] *See supra* notes 151–154 and accompanying text.

[156] *See* Jacobi & VanDam, *supra* note 150, at 276 ("[T]he shift in emphasis [beginning in the 1970s] from attempting to wait out filibusters to forcing immediate votes on them meant that actual filibusters no longer had to occur."); Shaheen, *supra* note 152, at 7 ("It has become common for the majority leader to file cloture on motions to proceed preemptively . . . ."); Olympia Snowe, *The Effect of Modern Partisanship on Legislative Effectiveness in the 112th Congress*, 50 HARV. J. ON LEGIS. 21, 30 (2013) (noting the ability of the Majority Leader to "file a cloture motion as soon as he brings legislation to the floor, before any discussion occurs"); *see also infra* notes 300–311 accompanying text (discussing the resulting proposals to reinstate the "talking filibuster").

[157] *See* AMAR, *supra* note 82, at 365 ("In the late twentieth and early twenty-first centuries, routine filibustering practices have sky-rocketed."); Jacqueline Calmes, *"Trivialized" Filibuster Is Still a Potent*

now needs the support of sixty Senators to secure approval in the upper chamber.[158]

Tool, 45 CQ WKLY. 2115, 2115 (1987) ("Once reserved for the most bitter battles of historic dimension—slavery, war, civil rights—the filibuster has evolved into a tactic so routine that one senator . . . says, 'It's been trivialized.'"); Benjamin Eidelson, *The Majoritarian Filibuster*, 122 YALE L.J. 980, 989 (2013) (explaining why a "shift in incentives" triggered an "explosion of cloture votes since the 1970s," so that now "the filibuster has become routine"; adding that, "[i]n the five decades from 1921 to 1970, a total of 47 cloture votes were held," whereas "112 cloture votes were held in the subsequent decade alone" and that "[t]his trend has only accelerated in recent years: more than 300 cloture votes were held between 2001 and 2010"); Hatch, *supra* note 3, at 821–24 (describing then-recent filibusters on judicial nominees as "unprecedented" and collecting data in support of that claim); Jacobi & VanDam, *supra* note 150, at 265–66 ("The number of filibusters has reached record levels during the Obama Administration. The filibuster itself has come to define a new status quo for congressional action . . . ."); *id.* at 275, 288 n.132 (noting that, before the 1960s, "majorities regularly passed legislation . . . ; it had simply not come to pass yet that *every* bill had the threat of a filibuster hanging over it, as is the case today, and thus *every* bill did not have to acquire 60 votes to pass."); George Packer, *The Empty Chamber*, NEW YORKER, Aug. 9, 2010, at 38, 45 ("The number of filibusters shot up in the eighties and continued to rise in the following decades, as the parties kept alternating control of the Senate and escalating a procedural arms race, routinely blocking the confirmation of executive and judicial appointees."); *All Things Considered: Former Senate Staffer Laments Rise in Use of Cloture*, NAT'L PUB. RADIO (Feb. 2, 2010, 3:00 PM), http://www.npr.org/templates/story/story.php?storyId=123287741, *archived at* http://perma.cc/9MMS-NNRC (statement of Ira Shapiro) (describing "fundamental change" in the extent of filibustering because "[t]here has been a large spike in cloture votes" and "[t]hey are much higher since 2006 than they had ever been before, and by orders of magnitude higher"); Sarah Binder, *Three Reforms to Unstick the Senate*, CNN OPINION (Nov. 29, 2012, 10:14 AM), http://cnn.com/2012/11/29/opinion/binder-filibuster, *archived at* http://perma.cc/4EEW-WFUL (noting Majority Leader Trent Lott's observation in the late 1990s that "[w]e are locked in a rolling filibuster on every issue, which is totally gridlocking the United States Senate," and adding that filibuster efforts since 2007 have set a "historic record"); Robert Byrd, *The Filibuster and Its Consequences*, THE HILL'S CONG. BLOG (May 19, 2010, 1:28 PM), http://thehill.com/blogs/congress-blog/lawmaker-news/98681-the-filibuster-and-its-consequences-sen-robert-byrd, *archived at* http://perma.cc/4TJ5-KD6V (asserting that "[d]uring this 111th Congress . . . the minority has threatened to filibuster almost every matter proposed for Senate consideration" in a time when "just a whisper of opposition brings the 'world's greatest deliberative body' to a grinding halt"). For one collection of numerical data that reveals a sharp spike in cloture motions in recent congressional sessions, see Ezra Klein, *Notes on Whether American Democracy Is Working*, WASH. POST, WONKBLOG (Feb. 6, 2013, 1:41 PM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/06/notes-on-whether-american-democracy-is-working/, *archived at* http://perma.cc/WRD5-3BEQ; *see also* Barbara Sinclair, *The New World of U.S. Senators*, *in* CONGRESS RECONSIDERED 1, 7 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 9th ed. 2009) (charting filibuster and cloture votes from 1951 to 2008); Barbara Sinclair, *The "60-Vote Senate": Strategies, Process, and Outcomes*, *in* U.S. SENATE EXCEPTIONALISM 241, 243 (Bruce I. Oppenheimer ed., 2002) ("In the 1950s, filibusters were rare; they increased during the 1960s and again during the 1970s. By the late 1980s and the 1990s, they had become routine . . . ."). Notably, the leading commentators who associate themselves with defending the filibuster regime acknowledge that there has been an "explosive increase . . . in the use of the filibuster" over the past three decades. ARENBERG & DOVE, *supra* note 3, at 17, 31, 48 (describing the "meteoric rise" of the filibuster and noting that its use "has greatly accelerated").

[158] Chafetz, *supra* note 5, at 1009–10 (collecting data that shows that "cloture has simply become another standard procedural hurdle that almost all significant legislation must clear"); *accord, e.g.*, Eidelson, *supra* note 157, at 989–90 (noting that historically "the filibuster was understood as a corollary of a senator's prerogative to debate," but that this "understanding of the filibuster has eroded along with its procedural foundations"; adding that "[i]ncreasingly, the filibuster has come to be understood as a simple supermajority rule for passing legislation or confirming nominees"); Jacobi &

It is important not to oversimplify how modern filibusters work. To begin with, as we have seen, formal filibuster-control decisions often are not made at the stage of the legislative process when the Senate gives final consideration to bills.[159] Rather, they can and do occur at earlier stages, often in the context of handling the "motion to proceed," which determines whether the Senate will take up a matter at all.[160] In addition, minority blocs have been able to exert pressure at different stages of the legislative process,[161] including when they lack the forty-one votes needed to resist cloture efforts. This is so because even a demand for a cloture vote that is likely to produce sixty supporters can chew up the Senate's working time,[162] which has become increasingly scarce as the

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VanDam, *supra* note 150, at 268 (describing the reconciliation exception as providing "majorities in the Senate . . . an opportunity, albeit a limited one, to assert themselves over the prevailing minority powers"); Koger & Campos, *supra* note 154 (manuscript at 3) ("The filibuster is no longer the seldom-used procedure romanticized in movies like *Mr. Smith Goes to Washington*. It now imposes a de facto supermajority vote requirement to pass any legislation in the Senate."). To be sure, there exists a "reconciliation" exception to the filibuster rule that concerns matters related to federal budget. *See* 2 U.S.C. § 641(e)(2) (2012). But the effect of this exception is limited because "a significant portion of the Senate's business cannot be shoehorned into the budget category, even through creative drafting." Fisk & Chemerinsky, *supra* note 5, at 216.

[159] *See supra* notes 151–156 and accompanying text.

[160] *See* Tom Udall, *The Constitutional Option: Reforming Rules of the Senate to Restore Accountability and Reduce Gridlock*, 5 HARV. L. & POL'Y REV. 115, 119 (2011) (noting that "minority of senators can use the filibuster to actually prevent debate because a motion to proceed to the consideration of a measure is itself a debatable question"). Further complicating matters is the fact that from time to time the Senate tweaks its cloture practice. In January 2013, for example, the Senate made changes as to handling motions to proceed, formation of conference committees, and confirmations of district court judges. *See* ELIZABETH RYBICKI, CONG. RESEARCH SERV., R42996, CHANGES TO SENATE PROCEDURES IN THE 113TH CONGRESS AFFECTING THE OPERATION OF CLOTURE (S.RES. 15 AND S.RES. 16) 19 (2013). As many others have emphasized, however, these reforms, which apply only to the 113th Congress, were of limited significance. *Senators Strike a Deal on Filibusters, Averting 'Nuclear Option' Showdown*, PBS NEWSHOUR (July 16, 2013), http://www.pbs.org/newshour/bb/politics/july-dec13/filibuster_07-16.html, *archived at* http://perma.cc/5DBY-8WHT (statement of Senator Jeff Merkley); *see* Ryan Grim et al., *Harry Reid, Mitch McConnell Reach Filibuster Reform Deal [Update]*, HUFFINGTON POST (Jan. 24, 2013, 11:43 AM), http://www.huffingtonpost.com/2013/01/24/harry-reid-mitch-mcconnell-filibuster_n_2541356.html, *archived at* http://perma.cc/B5GY-NP99 (quoting CREDO's Political Director, Becky Bond, as stating that "[t]he bipartisan deal . . . will do next to nothing to actually fix the filibuster," and quoting a representative of the group "Fix the Senate Now" as summing up the agreement as one that avoids "measures that would actually raise the costs of Senate obstruction" and "a missed opportunity to provide meaningful filibuster reform").

[161] *See, e.g.*, Fisk & Chemerinsky, *supra* note 5, at 205 (asserting that "[s]ometimes several cloture motions will be filed on any matter that might be filibustered, including a conference report, a motion to proceed, or the bill itself"); Binder, *supra* note 157 (noting a then-existing opportunity to filibuster each of the three motions needed to submit a passed bill to a conference committee).

[162] *See, e.g.*, Klein, *supra* note 1, at 27 (describing the great difficulties in getting cloture, and explaining how a single bill could be filibustered "some half a dozen times"); *id.* (explaining that "[e]very step of the process can have its own filibuster, with its own two days to vote to break that filibuster, and its own thirty hours of post-filibuster debate"); *see also* Carl W. Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 780 (2010) (describing the slow process for confirmation of judicial nominees in 2009, and noting that, as a result, "even if Democrats had invoked

scope of government business has expanded and pressures on Senators to leave Washington—typically to raise campaign funds—have intensified.[163] Most important of all, key on-the-ground decisions about the processing of matters within the Senate are routinely made in negotiations between party leaders, who effectively determine whether and when to take up discrete proposals, how much time to allocate to the handling of such proposals, how amendments to such proposals will be processed, and at what stage cloture votes will occur.[164] This largely informal process is marked by subtlety and nuance. But the critical point for present purposes involves no subtlety or nuance at all: All of these negotiations transpire against the backdrop of a settled understanding that "most measures require sixty votes to pass the Senate."[165]

2. Modern Perceptions of Senate Operations

Based on this history, thoughtful observers of Senate practice agree that the body's treatment of filibusters has undergone "dramatic" change.[166] In the past, the Senate's supermajority Cloture Rule operated to permit protracted

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cloture . . . the Republicans would have received thirty hours of debate, thus precluding other nominations from coming to a vote" prior to recess).

[163] *See, e.g.*, Packer, *supra* note 157, at 41 (noting, among other things, that it is now "an unwritten rule of the modern Senate that votes are almost never scheduled for Mondays or Fridays, which allows Senators to spend four days away from the capital," in part because "[n]othing dominates the life of a Senator more than raising money"); Byrd, *supra* note 157 (bemoaning the current environment in which "every Senator spends hours every day, throughout the year and every year, raising funds for re-election and appearing before cameras and microphones" and in which "the Senate often works three-day weeks, with frequent and extended recess periods, so Senators can rush home to fundraisers scheduled months in advance"). On the critical role of time pressure in the modern legislative process, see, for example, Bruce I. Oppenheimer, *Changing Time Constraints on Congress: Historical Perspectives on the Use of Cloture*, *in* CONGRESS RECONSIDERED 393, 396, 404 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 3d ed. 1985), which describes how "Congress now finds itself in an era when it is working under time constraints nearly all the time," making "the luxury of unlimited debate" less affordable and creating "a different incentive structure [that allows] a filibuster or the threat of one [to] be usefully employed at any time in a Congress—not just at the end." *See also* Ornstein, *supra* note 141, at 78 (advocating, along with filibuster reform, a return to "a much more rigorous Senate schedule, ideally five full days a week in session for three consecutive weeks, with one week off to attend to constituent needs").

[164] *See, e.g.*, Packer, *supra* note 157, at 41 (emphasizing that "the main business of the [Senate] is a continuous negotiation" between the majority and minority leaders because "nearly everything in the Senate depends on unanimous consent").

[165] Chafetz, *supra* note 5, at 1040 (observing that "most measures require sixty votes to pass the Senate"); Jacobi & VanDam, *supra* note 150, at 278 (describing present-day Senate as an institution "where an invisible filibuster by default hangs over any controversial legislation, and sixty votes are needed to remove it 'in almost every case'"; "in other words . . . minorities reign").

[166] Fisk & Chemerinsky, *supra* note 5, at 200; *see, e.g.*, Harkin, *supra* note 4, at 73 (finding that "[w]hereas forty years ago fewer than ten percent of major bills were subject to a filibuster, in the last Congress, seventy percent of major bills were targeted").

speechmaking on the Senate floor and to do so only on an occasional basis.[167] Today, in contrast, it functions as "a substantive supermajority voting rule"[168] in connection with "nearly every measure to come before the Senate,"[169] so that "sixty votes in the Senate, rather than a simple majority, are necessary to pass legislation."[170]

Within the legal academy, both proponents and opponents of modern Senate practice have recognized this fundamental shift.[171] Professor Josh Chafetz, for example, has observed that today's filibuster system is "qualitatively different from . . . the historical practice,"[172] so that "cloture has now effectively become a requirement for passage of any significant measure."[173]

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[167] *See, e.g.*, Chafetz, *supra* note 5, at 1027 and accompanying text (noting historic reservation of filibusters for issues of specialized importance—most notably, civil rights); Magliocca, *supra* note 145, at 308 (noting that "until the 1970's, unlimited debate was mainly a procedural device that protected free speech, improved the quality of deliberation, and revealed the intensity of preferences in the Senate"). *See generally supra* notes 140–145 and accompanying text (discussing the increased frequency of speech-based filibusters in the early twentieth century).

[168] Magliocca, *supra* note 145, at 308; *accord, e.g.*, Fisk & Chemerinsky, *supra* note 5, at 213 ("[F]ilibustering has in effect created a supermajority requirement for the enactment of most legislation.").

[169] Chafetz, *supra* note 5, at 1040; *accord id.* at 1011 (emphasizing that "the filibuster is no longer reserved for issues of unusual importance or on which preferences are unusually intense"); Fisk & Chemerinsky, *supra* note 5, at 182 (noting that filibusters now apply to almost all matters).

[170] Fisk & Chemerinsky, *supra* note 5, at 182; *accord* Chafetz & Gerhardt, *supra* note 10, at 249 (Chafetz) ("As a functional matter, it can now be said that [the filibuster] requires sixty votes to pass a piece of legislation in the Senate."); Chafetz, *supra* note 5, at 1008, 1010–11 (noting that "[c]loture is now a de facto requirement for the passage of any significant measure—and this is a very recent phenomenon," and adding that most significant legislation must clear the procedural hurdle of cloture, so that "[i]n the Senate today, a supermajority of sixty Senators is required to pass a bill"); Magliocca, *supra* note 145, at 304 (noting that there is now a "presumption that a supermajority is required for most Senate action"); *see also* GREGORY J. WAWRO & ERIC SCHICKLER, FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE 157 (2006) ("In the contemporary Senate . . . it is safe to assume that a 60% majority is generally necessary to adopt major legislation."). Notably, this view is shared by self-identified defenders of the current filibuster system. ARENBERG & DOVE, *supra* note 3, at 28 (acknowledging that "over the last two decades, a frustrated Senate overburdened by filibusters has succumbed to accepting a '60-vote threshold' on many controversial bills," and finding that one columnist "put his finger on the crux of the dilemma" in observing that "[a] simple majority vote no longer suffices to pass major pieces of legislation").

[171] *See, e.g.*, Chafetz & Gerhardt, *supra* note 10, at 247–49 (making this point); *id.* at 255 (Gerhardt) (not contesting this description); Jacobi & VanDam, *supra* note 150, at 267 ("The filibuster is a creation of Congress that has drifted far from its original moorings, to the point where actual filibusters occur only in the rarest circumstances, and yet 60 votes are required to defeat one."). Indeed, in defending supermajority voting rules at the final voting stage, Professors John McGinnis and Michael Rappaport argued that such rules operate in the same way as present-day Rule XXII. *See* McGinnis & Rappaport I, *supra* note 9, at 497 ("No plausible constitutional distinction exists between the rules that have permitted filibusters and the three-fifths rule" concerning tax-rate legislation); *id.* at 484 (noting that the purpose of the filibuster system "has been the same as the three-fifths rule—to frustrate legislative majorities").

[172] *See* Chafetz & Gerhardt, *supra* note 10, at 259.

[173] *Id.* at 247–48; *see also id.* at 249 ("[T]he filibuster is no longer reserved only for issues of unusual importance, nor is it used simply to extend debate on an issue. A senator who intends to vote

Professor Aaron-Andrew Bruhl has added, "We now have a 'sixty-vote Senate' when it comes to almost any mildly controversial measure."[174] And Professor Amar has noted that "[t]hanks to an internal Senate rule allowing filibusters—Senate Rule 22, to be precise—the de facto threshold for enacting a wide range of legislation has in recent years become 60 votes . . . ."[175]

Political scientists have reached the same conclusion.[176] Extended study of modern Senate practices led Professors Gregory Wawro and Eric Shickler to conclude that "all the players understand that in the absence of a sixty-vote coalition, legislation will fail to pass."[177] Norman Ornstein of the American Enterprise Institute has observed that "the sharp increase in cloture motions reflects the routinized use of the filibuster . . . as a weapon to delay and obstruct in nearly all matters."[178] After consulting with experts in the field, Ezra Klein reported, "The truth, filibuster scholars say, is that almost everything in today's Senate is effectively filibustered, since at least sixty members have to want to let anything move forward for it to do so."[179]

Those who watch the day-to-day operations of the upper chamber—such as newspaper, magazine, and broadcast media analysts—agree that the upper chamber now operates under "a de facto sixty vote requirement."[180] Both reporters and editorialists often have noted this on-the-ground reality.[181] Indeed,

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against final passage of a bill need no longer separately justify her decision to vote against cloture."); *id.* at 259 ("Today, the filibuster operates as a standing requirement that important legislation (outside of the budget process) needs sixty votes to pass.").

[174] Bruhl, *supra* note 152, at 1418.

[175] *See* AMAR, *supra* note 82, at 361 (adding that this requirement of sixty votes operates "instead of the constitutionally proper 51 votes").

[176] *See, e.g.*, KOGER, *supra* note 138, at 3 (describing "the ability of senators to block bills and nominations unless 60 percent of the Senate votes to override a 'filibuster'"); David R. Mayhew, *Supermajority Rule in the U.S. Senate*, 36 PS: POL. SCI. & POL. 31, 31 (2003) (noting that, at least when major legislation is at issue, "[a]utomatic failure for bills not reaching the 60 mark . . . is the current Senate practice"); Jonathan Bernstein, *Reform: The Motion to Proceed*, A PLAIN BLOG ABOUT POLITICS (Nov. 27, 2012, 12:27PM), http://plainblogaboutpolitics.blogspot.com/2012/11/reform-motion-to-proceed.html, *archived at* http://perma.cc/D7EY-RJP3 (citing "the (de facto) requirement that a bill needs 60 to pass," and adding that "it takes 60 Senators to pass a bill or confirm a nomination").

[177] *See* WAWRO & SCHICKLER, *supra* note 170, at 27 (noting that "all the players understand that in the absence of a sixty-vote coalition, legislation will fail to pass").

[178] *See Examining the Filibuster: The Filibuster Today and Its Consequences*, *supra* note 136, at 193 (statement of Norman J. Ornstein, Resident Scholar, American Enterprise Institute for Public Policy Research).

[179] Klein, *supra* note 1, at 27.

[180] Susan Liss & Mimi Marziani, *The Founding Fathers Would Like Reconciliation, Not the Filibuster*, U.S. NEWS (Mar. 23, 2010), http://www.usnews.com/opinion/articles/2010/03/23/founding-fathers-would-like-reconciliation-not-the-filibuster, *archived at* http://perma.cc/ZJZ5-QWYE (adding that "the threat of filibuster is so constant that a supermajority vote of 60 . . . is assumed necessary to conduct any Senate business"). *See generally infra* notes 181–193 and accompanying text (compiling sources that make this point).

[181] *E.g.*, Arthur S. Fleming & Ray Marshall, Op-Ed., *Tyranny of the Minority*, N.Y. TIMES, May 30, 1994, at A15 (noting that in the Senate, "majority rule is becoming the exception rather than the

working journalists have become so accustomed to the practical operation of Rule XXII that they routinely take it as a given that sixty votes are required to pass bills in the Senate.[182] Other knowledgeable Congress watchers share the same view. During oral argument in the health care case, for example, Justice Antonin Scalia questioned the suggestion that Congress would be able to respond to a Court ruling that invalidated part of the challenged act while leaving

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rule" and that "[t]oday's filibuster epidemic means that in effect the Senate needs nearly as many votes to pass legislation (60) as it does to override a veto, enact a constitutional amendment or impeach a president (67)"); Thomas Geoghegan et al., Editorial, *Bring on the Filibuster*, NATION, Feb. 22, 2010, at 3, 3–4, *available at* http://www.thenation.com/article/bring-filibuster#, *archived at* http://perma.cc/3WRB-B9N8 (noting that "[r]ight now, the Senate operates under a supermajority rule that the founders never intended and that has no precedent in the way the Senate used to operate"); Thomas Geoghegan, Op-Ed., *Mr. Smith Rewrites the Constitution*, N.Y. TIMES, Jan. 11, 2010, at A17 (concluding that "a 60-vote majority is required to . . . pass any contested bill"); Jeremy W. Peters, *New Senate Rules to Curtail the Excesses of the Filibuster*, N.Y. TIMES, Jan. 25, 2013, at A1 (noting minorities' "ability to force a supermajority of 60 votes to advance bills"); Editorial, *Reform and the Filibuster*, N.Y. TIMES, Jan. 3, 2011, at A20 (noting the "automatic way the filibuster has been used in recent years" and that "[b]y simply raising an anonymous objection, senators can trigger a 60-vote supermajority for virtually every piece of legislation"); David E. RePass, Op-Ed., *Make My Filibuster*, N.Y. TIMES, Mar. 2, 2009, at A23 ("In recent years . . . the Senate has become so averse to the [speech-based] filibuster that if fewer than 60 senators support a controversial measure, it usually won't come up for discussion at all."); Jonathan Weisman, *Filibuster Deal Heralds Stirrings of Compromise*, N.Y. TIMES, July 18, 2013, at A13 (reporting that "with a 60-vote threshold in the Senate, the minority party tends to rule absolutely on any issue lacking overwhelming bipartisan support" and "[t]hat is because only the largest gang can muster 60 votes, and a premium is placed on leadership loyalty in the minority party"); Editorial, *The Senate's Abuse of Filibuster Rule Threatens Democracy*, SAN JOSE MERCURY NEWS (Jan. 29, 2010, 8:55 PM), http://www.mercurynews.com/opinion/ci_14291035, *archived at* http://perma.cc/T8LP-4UQ5 ("[A]ny significant legislation will need 60 votes in the Senate rather than just a majority.").

[182] *See, e.g.*, Michael D. Shear & Ashley Parker, *Senate Digs in for Long Battle Over Immigration Bill*, N.Y. TIMES, June 9, 2013, at A1 (explaining in article on proposed immigration legislation that "[i]f all 54 Democratic senators vote for the bill, which is unlikely, supporters would need six Republicans to prevent a filibuster and pass the legislation"). The point is exemplified by the reality that journalists sometimes draw no distinction at all between votes on cloture and votes on bills. In April 2013, for example, the Senate took up a bill on gun-sale background checks that was proposed by Senators Joe Manchin and Pat Toomey. As reported by CNN Politics: "[A]ll the amendments considered Wednesday required 60 votes to pass in the 100-member chamber, meaning Democrats and their independent allies who hold 55 seats needed support from some GOP senators to push through the Manchin-Toomey proposal." Ted Barrett & Tom Cohen, *Senate Rejects Expanded Gun Background Checks*, CNN POLITICS (Apr. 18, 2013, 11:02 AM), http://www.cnn.com/2013/04/17/politics/senate-guns-vote, *archived at* http://perma.cc/NQF7-32BZ. The end result was that the proposal failed because "[t]he final vote was 54 in favor to 46 opposed" —with Majority Leader Reid providing one of the "no" votes solely for technical reasons concerning the possibility of later reconsidering the measure. *Id.* As it turned out, efforts were in fact undertaken to resuscitate a new compromise bill. So well understood is the sixty-vote principle, however, that the *New York Times* reported, in a lengthy article published on June 14, that "[a]dvocates of expanded gun background checks need five senators to change their votes, and a sixth if . . . newly appointed Republican senator, Jeffrey S. Chiesa, is opposed" —without ever pausing to mention that this additional measure of support was needed to secure sixty, not fifty-one, votes. Jonathan Weisman, *Democrats Quietly Renew Push for Gun Measures*, N.Y. TIMES, June 14, 2013, at A17.

the rest of it intact.[183] The problem, he observed, is that "[y]ou can't repeal the rest of the act because you're not going to get sixty votes in the Senate to repeal the act."[184]

Senators themselves have recognized the radically altered nature of cloture practice in the chamber's day-to-day work.[185] For example, while Democrats controlled the Senate during the late 1990s, Senator Joseph Lieberman asserted that "this body, by its rules, has essentially amended the Constitution to require sixty-votes to pass any issue on which Members choose to filibuster or threaten to filibuster."[186] After Republicans recaptured a majority of Senate seats, the chamber's leader, Trent Lott, declared that "to have filibusters on Federal judicial nominations" involves "requiring only forty-one votes to defeat a judicial nomination."[187] Senator Trent Lott's successor, Bill Frist, reached the same conclusion, describing Senate practice under Rule XXII as

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[183] Transcript of Oral Argument at 73–74, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (No. 11-393).

[184] *Id.* at 73.

[185] *See, e.g.*, 159 CONG. REC. S5680 (daily ed. July 15, 2013) (statement of Sen. Jeff Flake) (observing that "[b]ringing even the most non-controversial resolutions to the Senate floor requires the agreement or at least the acquiescence of the minority"); Hatch, *supra* note 3, at 826 (describing the "attempt to use Rule 22's supermajority requirement for cloture to change the Constitution's simple majority requirement for confirmation"); Udall, *supra* note 160, at 115, 118, 122 (explaining that "[t]he use of obstructionist procedural tactics such as the filibuster . . . has expanded rapidly in recent Congresses, to the point where they are now everyday rather than extraordinary occurrences," that "the filibuster no longer serves to extend important debate and improperly shifts control of the legislative agenda to the minority party," and that "[t]he modern filibuster is simply a minority veto, a powerful one at that"); Weisman, *supra* note 181 (noting comments of Senator Mary Landrieu that "now the only people who are empowered are the obstructionists" and that "for the rest of us, the power we should be wielding on behalf of our constituents is virtually nil"). By way of example, in the midst of recent tensions caused by efforts to raise the debt ceiling, Senate Minority Leader Mitch McConnell declared: "[L]et me say that this is almost an out-of-body experience to have someone suggest a 50-vote threshold on a matter of this magnitude . . . ." 157 CONG. REC. S5062 (daily ed. July 29, 2011) (statement of Sen. Mitch McConnell); *see also* Klein, *supra* note 1, at 24–25 (noting Senator McConnell's statement that "[m]atters of this level of controversy always require sixty votes," as well as Vice President Joe Biden's observation that recent terms of Congress constitute "the first time every single solitary decision has required sixty senators"). Notably, House members—including present-day Republicans—also recognize that "while the main rule in the House is 'whoever has 218 votes wins,' the rule in the Senate is different: 'There's nothing you can do without 60 votes.'" *Basic Training: Senate Rules from a House Perspective*, HOUSE OF REPRESENTATIVES COMMITTEE ON RULES—REPUBLICANS, http://rules-republicans.house.gov/Educational/Read.aspx?ID=8, *archived at* http://perma.cc/5B7V-ZYHY (last visited Jan. 5, 2014).

[186] 141 CONG. REC. 38 (1995) (statements of Sen. Joe Lieberman); *see also* 140 CONG. REC. 3459 (1994) (statement of Sen. Tom Harkin) (making the same point and arguing, on that basis, that the Senate filibuster regime had become unconstitutional).

[187] 145 CONG. REC. 21822 (1999) (statement of Sen. Trent Lott); *see* Cornyn, *supra* note 37, at 194 (condemning recent use of Senate rules "to change the voting rule on judicial nominations from a simple majority to 60 votes"); Hatch, *supra* note 3, at 826 (lamenting that the Cloture Rule is being used "to change the Constitution's simple majority requirement for confirmation").

"nothing less than a formula for tyranny by the minority."[188] After Democrats again secured a majority of seats in the Senate, they provided the same—once again accurate—accounts of Republican deployments of the modern stealth filibuster system.[189] In the summer of 2013, for example, Senator Bernie Sanders echoed the now-familiar refrain that "a super-majority of sixty votes is needed to pass virtually any piece of legislation."[190]

Given this avalanche of supporting material, it is no surprise that Professors Fisk and Chemerinsky concluded, even in 1997, that the Senate "has in effect created a supermajority requirement for the enactment of most legislation."[191] Intervening developments leave no doubt that things have moved even more sharply in that direction since those words were written.[192] As Senator Tom Harkin, who now has served in the upper chamber for nearly three decades, recently observed: "Successive Congresses have ratcheted up the level of

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[188] Senator Bill Frist, Restoring Fairness and Dignity to the Judicial Confirmation Process in the United States Senate, Speech at the Heritage Foundation (June 28, 2005) (transcript available at http://www.heritage.org/Events/2005/06/restoring-fairness-to-the-judicial-confirmation-process-in-the-united-states-senate, *archived at* http://perma.cc/44TR-SZ77).

[189] *E.g.*, *Examining the Filibuster: History of the Filibuster 1789–2010: Hearing Before the S. Comm. on Rules & Admin.*, 111th Cong. 65 (2010) (statement of Robert B. Dove, Parliamentarian Emeritus, U.S. Senate) (quoting Vice President Biden as stating: "Most people would agree that the United States has never acted as consistently as they have to require a supermajority, that is 60 votes, to get anything done. That's a fundamental shift."); Harkin, *supra* note 4, at 68 (arguing that the filibuster is being used "at a level without precedent in the 221-year history of the legislative body"); *id.* at 75 ("[I]t has become accepted that any legislation needs sixty votes to pass the Senate."); Timothy Noah, *Die, Filibuster, Die: The Biggest Obstacle to the Obama Agenda*, NEW REPUBLIC, Dec. 6, 2012, at 2, 2 *available at* http://www.newrepublic.com/article/politics/magazine/110215/die-filibuster-die, *archived at* http://perma.cc/KKU8-6XUU (observing that, in 2009, "[e]very returning Democratic senator signed a letter complaining that Republican routinization of filibusters was imposing a 60-vote supermajority requirement on nearly all significant bills"). Notably, modern proponents of the filibuster mechanism do not seriously contest these characterizations. In recent hearings, for example, Senator Lamar Alexander defended modern Senate filibuster practice by observing that over the course of the past two years, "we have not had any experience in working across party lines. What the filibuster does is say, you are not going to pass anything in the Senate unless at least some Republicans and some Democrats agree. You will not pass anything unless you get a consensus." 157 CONG. REC. S26 (daily ed. Jan. 5, 2011) (statement of Sen. Lamar Alexander); *see also id.* (distinguishing the "majoritarian House" from the "different" Senate "where we can say, you are not going to pass anything unless we do it together" —that is, with "consensus," and adding that "if bills [that require bicameral action] come from the House to the Senate, we in the Senate say, woah, let's think this over. We do not pass it. We do not pass it unless we have some kind of consensus."). This effort to defend the filibuster confirms that the essential effect and purpose of modern Senate practice is to require a "consensus" —that is, sixty votes—to pass bills or confirm nominees.

[190] Press Release, Sen. Bernie Sanders, Sanders Welcomes Short-Term Filibuster Fix, Says More Needed to End Senate Dysfunction (July 16, 2013), *available at* http://www.sanders.senate.gov/newsroom/news/?id=1dfed876-4f90-425a-abff-19be75934c10, *archived at* http://perma.cc/DC8M-GAAS (adding that, for this reason, it is "time for real Senate rules reform").

[191] Fisk & Chemerinsky, *supra* note 5, at 213; *see id.* at 184 (adding that the "modern filibuster is simply a minority veto").

[192] *See generally supra* note 157 (collecting materials on this point).

obstructionism to the point where sixty votes have become a de facto requirement to pass any legislation."[193]

B. *The Constitutional Primacy of Substance over Form*

The preceding discussion leads to one conclusion: "sixty votes have become a de facto requirement" for taking large swaths of action in the upper chamber.[194] Put another way, "[t]he idea that it is curtailing debate that takes sixty votes—and not the ultimate passage of anything—has thus been reduced to a legal fiction."[195] All of this raises a question of fundamental importance: Under these conditions, can Rule XXII be reconciled with the constitutional prohibition on supermajority voting rules in enacting legislation? To ask this question is to answer it because "the Constitution is concerned, not with form, but with substance."[196]

This principle has deep roots in our law. The Framers recognized its centrality.[197] It also found expression in the earliest work of the Supreme Court.[198] Building on this foundation, the Court has endorsed the substance-over-form

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[193] Harkin, *supra* note 4, at 72.

[194] *Id.*; Senator Tom Harkin, Address at the 2010 Living Constitution Lecture at the Brennan Center for Justice (June 15, 2010) (transcript available at http://www.harkin.senate.gov/press/release.cfm?i=325688, *archived at* http://perma.cc/FZ8C-CK6S).

[195] Eidelson, *supra* note 157, at 990 (emphasis removed).

[196] Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 498 (1931).

[197] In *The Federalist*, for example, Publius vigorously objected to the ineffectual operation of state constitutional provisions that had come to serve as only "parchment barriers." THE FEDERALIST NO. 48, *supra* note 70, at 333 (James Madison). *See generally* DAN T. COENEN, THE STORY OF THE FEDERALIST: HOW HAMILTON AND MADISON RECONCEIVED AMERICA 108 (2007) (discussing Founding-era concerns that federal bodies would overstep their constitutional authority). In fact, Publius's initial opposition to a federal Bill of Rights was based largely on concerns that, if such a Bill were put in place, its provisions would operate in a similarly ineffectual—and thus intolerably counterproductive—way. *See* COENEN, *supra*, at 174–76. Over time, however, proponents of ratification—including the authors of *The Federalist*—became persuaded that a Bill of Rights could serve its purpose, in part because the independent judiciary created by the Constitution would be capable of responding to attempted evasions of its commands. *See id.* at 177–78.

[198] *See* Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 444 (1827) (upholding a constitutional challenge under the Import-Export Clause, despite the structuring of the state tax as one on occupations because "[i]t is impossible to conceal from ourselves, that this is varying the form, without varying the substance" of an otherwise impermissible law); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174, 178 (1803) (reasoning that judicial review was mandated to ensure that the limits the Constitution places on congressional action have effect "in practice" and emphasizing, more particularly, that "[i]f congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance"); *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819) (precluding Congress from enacting otherwise impermissible legislation under the "pretext" of wielding a granted power).

principle in countless cases.[199] Among the jurists who have relied on it are all members of the current Court, including—and rightly so[200]—those Justices who gravitate most to the originalist interpretive method.[201]

Nor does this principle bear on modern cloture practice in only a loose or tenuous way. The Court, for example, has wielded the substance-over-form norm to thwart congressional attempts to overreach in exercising textually granted powers—just as the preceding discussion suggests the Senate has done in invoking the Rules of Proceedings Clause.[202] The Court has made clear that

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[199] *See, e.g.*, United States v. DiFrancesco, 449 U.S. 117, 142 (1980) ("The exaltation of form over substance is to be avoided. . . . [I]t is the substance of the action that is controlling, and not the label given that action."); Western Union Tel. Co. v. Kansas *ex rel*. Coleman, 216 U.S. 1, 27 (1910) ("This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction, as the adjudged cases abundantly show."); Almy v. California, 65 U.S. (24 How.) 169, 174 (1860) (rejecting a state's argument for the constitutionality of the challenged law because "a tax on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing"). For one of many applications of the rule, see Village of Norwood v. Baker, 172 U.S. 269, 279 (1898), in which the Court held that a sufficiently severe "exaction from the owner of private property of the cost of a public improvement" can amount to a Fifth Amendment taking even if enacted "under the guise of taxation."

[200] *See supra* notes 197–198 and accompanying text.

[201] *See, e.g.*, Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2599 (2013) (Alito, J., joined by Roberts, C.J. and Scalia, Kennedy, and Thomas, JJ.) (rejecting dissent's effort to remove fee-based conditions from Takings Clause scrutiny in part because "if we accepted this argument it would make it very easy for . . . officials to evade the limitations of *Nollan* and *Dolan*" even though such fees "are functionally equivalent to other types of land use exactions"); *id.* at 2608 (Kagan, J., dissenting, joined by Ginsburg, Sotomayor, and Breyer, JJ.) (not questioning majority's anti-evasion principle, but finding it inapplicable because "[n]o one has presented evidence that . . . local officials routinely short-circuit *Nollan* and *Dolan*"); Trevino v. Thaler, 133 S. Ct. 1911, 1918, 1920 (2013) (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.) (deeming inconsequential opportunity for direct review of ineffective-assistance claims that state law provides "on its face" because it operates only "theoretically" so that collateral review constitutes the actual review procedure "as a practical matter"); City of Arlington v. FCC, 133 S. Ct. 1863, 1870–71 (2013) (Scalia, J., joined by Thomas, Ginsburg, Sotomayor, and Kagan, JJ.) (focusing on "reality, laid bare," as opposed to "labels" in rejecting purported jurisdiction exception to principle of *Chevron* deference); Evans v. Michigan, 133 S. Ct. 1069, 1076, 1078 (2013) (Sotomayor, J., joined by all Justices except Alito, J.) (stating that, in applying constitutional double-jeopardy retrial principles, "we have emphasized that labels do not control our analysis" and that instead "the substance of a court's decision does"; observing in particular that constitutional rulings do not hinge on whether the trial judge "incanted the word 'acquit'"); Aetna Health Inc. v. Davila, 542 U.S. 200, 214 (2004) (Thomas, J., joined by all members of the Court) (refusing to "elevate form over substance and allow parties to evade" otherwise controlling principles in the preemption context); Ring v. Arizona, 536 U.S. 584, 604 (2002) (Ginsberg, J., joined by Stevens, Scalia, Souter, and Thomas, JJ.) (reasoning that acceptance of state's argument would reduce a key Sixth Amendment precedent "to a 'meaningless and formalistic' rule of statutory drafting").

[202] *See, e.g.*, *Powell*, 395 U.S. at 547 (refusing to permit the House to exercise "under the guise" of another power that is "essentially that same power" that the Constitution had denied to it). Notably, substance-over-form constitutional reasoning took center stage in the Court's recent decision on whether congressional health care reforms exceeded the federal legislative power. *See, e.g.*, *Sebelius*, 132 S. Ct. at 2595 (Roberts, C.J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.) (asserting that the Court must examine the constitutionality of a purported tax law by "[d]isregarding the desig-

this principle outlaws putatively "procedural" rules that render substantive constitutional restrictions ineffectual—thus foreclosing the convenient wrapping of supermajority voting rules in the verbal garb of debate-cloture restrictions.[203] Finally, the Court has deployed the substance-over-form canon to ensure adherence to the Framers' structure of carefully divided powers[204]—a structure that supermajority voting rules in their nature recalibrate and distort.[205]

This substance-over-form principle has found expression in a rich variety of formulations, all of which apply with full force here. Our constitutional law "reaches past formalism."[206] Thus, "we must look . . . behind labels"[207] and past "semantics"[208] to the "substance" of things[209]—that is, how a rule works

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nation of the exaction, and viewing its substance and application"); *id.* at 2597 (emphasizing that "labels should not control here"); *id.* at 2605 (Roberts, C.J., joined by Breyer and Kagan, J.) (asserting that, when "in reality" a law does not operate in accordance with its title, that title is "irrelevant" in determining constitutionality); *id.* at 2660 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (reasoning that "Congress effectively engages in . . . impermissible compulsion when state participation in a federal spending program is coerced" so as to render "illusory" the states' supposed right to decline offered funds).

[203] Speiser v. Randall, 357 U.S. 513, 526 (1958) (invalidating a "procedural" rule because "[i]n practical operation [it] produce[d] a result which the State could not command directly"); *see, e.g.*, Bailey v. Alabama, 219 U.S. 219, 239 (1911) (holding that "[i]t is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a . . . presumption any more than it can be violated by direct enactment" and that "[t]he power to create presumptions is not a means of escape from the constitutional restrictions").

[204] *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 444 (1998) (holding unconstitutional the Line Item Veto Act because presidential "cancellations pursuant to [it] are the functional equivalent of partial repeals of Acts of Congress that fail to satisfy Article I, § 7"); *see also id.* at 469 (Scalia, J., dissenting) (reasoning that "the doctrine of unconstitutional delegation . . . is preeminently *not* a doctrine of technicalities" and disagreeing with the majority based on the view that "insofar as the substance of [the President's] action is concerned, it is no different than what Congress has permitted the President to do since the formation of the Union").

[205] For discussion of the problematic impact of supermajority voting rules on the constitutional separation of powers, see Susan Loh Bloch, *Congressional Self-Discipline: The Constitutionality of Supermajority Voting Rules*, 14 CONST. COMMENT. 1, 3–5 (1997); Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 761–68 (2012); Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2082–84 (2013); and Coenen, *supra* note 6, at 1112–17. One subtle illustration of this difficulty has been identified in recent political science research, which suggests that Rule XXII has contributed to a "huge transfer of power to the Supreme Court," which "now almost always has the last word, even in decisions that theoretically invite a Congressional response." Adam Liptak, *In Congress's Paralysis, a Mightier Supreme Court*, N.Y. TIMES, Aug. 21, 2012, at A10 (summarizing these findings). Another related point is that critical decision making has been shifted by default from Congress to administrative agencies, "where power is exercised less transparently and accountability to voters is less direct." Robert B. Reich, Op-Ed., *The Real Price of Congress's Gridlock*, N.Y. TIMES, Aug. 14, 2013, at A23.

[206] Lee v. Weisman, 505 U.S. 577, 595 (1992).

[207] City of Detroit v. Murray Corp. of Am., 355 U.S. 489, 492 (1958).

[208] United States v. Paradise, 480 U.S. 149, 192–93 (1987) (Stevens, J., concurring) (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31 (1971)).

[209] *Id.*

"in practical terms,"[210] in its "practical consequences,"[211] and with regard to "practical concerns."[212] Over and over, the Court has insisted that we "must be vigilant to scrutinize the attendant facts with an eye to . . . prevent violations of the constitution by circuitous . . . methods."[213] Otherwise, the "guaranties embedded in the Constitution of the United States may . . . be manipulated out of existence"[214] and "easily evaded."[215]

In sum, under controlling constitutional law, it is the "practical operation" of legislatively created rules,[216] rather than the "form of descriptive words,"[217] that controls their constitutionality. Given the recognized real-world effects of current cloture practice, this principle dictates that Rule XXII now offends the constitutional prohibition on supermajority legislative voting requirements.[218] Indeed, one could easily advance reinforcing arguments here by noting that (1) the Cloture Rule imposes a supermajority voting mechanism as a matter of purpose as well as effect;[219] (2) the substance-over-form norm should take hold with special force in this context because of the "fundamental" nature of the principle of legislative majoritarianism;[220] and (3) the current operation of Rule XXII in a way that is "[s]weeping"[221] and "far-reaching"[222]—rather than "confined" and discrete"[223]—magnifies the constitutional problem.[224]

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[210] Bowshar v. Synar, 478 U.S. 714, 726 (1986).

[211] Nippert v. City of Richmond, 327 U.S. 416, 431 (1946).

[212] Boumediene v. Bush, 553 U.S. 723, 764 (2008).

[213] Byars v. United States, 273 U.S. 28, 32 (1927); *accord, e.g.*, *Bailey*, 219 U.S. at 244 (emphasizing, for this reason, that the government "may not do indirectly" what it cannot do directly).

[214] Gomillian v. Lightfoot, 364 U.S. 339, 345 (1960) (quoting Frost & Frost Trucking Co. v. Ry. Comm'n, 271 U.S. 583, 594 (1926)).

[215] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 831 (1995).

[216] *Speiser*, 357 U.S. at 526.

[217] Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 363 (1941).

[218] *Accord, e.g.*, Benjamin Lieber & Patrick Brown, *On Supermajorities and the Constitution*, 83 GEO. L.J. 2347, 2383 (1995) (indicating that the Cloture Rule "effectively institutes a supermajority voting requirement . . . contrary to the Constitution's mandate of simple majority rule").

[219] *See* Hatch, *supra* note 3, at 823 (recognizing that "frustrating the will of the Senate majority was squarely the objective" of recent filibuster efforts); *id.* at 859 ("These filibusters are intended to manipulate Senate rules to accomplish the political objective of defeating specific judicial nominations."); *see also supra* note 189 (detailing the views of Senator Alexander).

[220] THE FEDERALIST NO. 58, *supra* note 70, at 397 (James Madison); *accord* THE FEDERALIST NO. 22, *supra* note 70, at 139 (Alexander Hamilton).

[221] City of Boerne v. Flores, 521 U.S. 507, 532 (1997) (stating that the Religious Freedom Restoration Act raised constitutional red flags in part because it targeted state laws "of almost every description").

[222] Romer v. Evans, 517 U.S. 620, 635 (1996); *see id.* at 632 (adding that the challenged state law presented difficulties in part because of its "broad and undifferentiated" application).

[223] *City of Boerne*, 521 U.S. at 532–33.

[224] *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012) (emphasizing, in finding a First Amendment violation, that the challenged statute applies to statements "made at any time, in any place, to any person," thus giving it a "sweeping, quite unprecedented reach"). Indeed, the impact of Rule XXII is far greater, and thus more legally problematic, than first meets the eye. The current regime, after all, bears down not only on actual laws, but on every measure the Senate even considers

In addition, the modern operation of Rule XXII presents constitutional difficulties that are in some ways even graver than those that would be raised by explicit supermajority voting rules made directly applicable to final Senate actions. The problem is that the stealth filibuster system undermines the proper operation of our political processes precisely because of its stealthy nature. In particular, the Framers recognized that sound self-rule requires the meaningful accountability of elected officials,[225] which in turn puts a premium on open government.[226] Recent developments in Senate practice, however, have shifted the essential nature of filibustering from on-the-floor public speechmaking to under-the-radar, backroom obstruction.[227] For this reason, current Senate practice raises a distinctive risk of voter confusion. The electorate, after all, might attribute the failure to honor campaign promises to majority party Senators because the electorate put them in control of the legislative body. The majority party, however, no longer *does* control the Senate precisely because of Rule

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enacting. Indeed, it overhangs every measure that any Senator might even consider proposing. *See* WAWRO & SCHICKLER, *supra* note 170, at 27, 157. In other words, the constitutionally problematic effects of the Senate filibuster rule touch the entire federal lawmaking process, including every action of any kind that any Senator might simply think about pursuing. An informative contrast is provided in the 1971 Supreme Court decision in *Gordon v. Lance*. 403 U.S. 1, 6 (1971). That case presented the question of whether the Fourteenth Amendment's one-person-one-vote principle precluded West Virginia from requiring a sixty percent majority of local referendum voters to approve the issuance of bonds and some tax increases. *Id.* at 2. In upholding this state-imposed supermajority voting rule, the Court noted that "a simple majority vote is insufficient on some issues" even under the federal Constitution. *Id.* at 6. Building on this truism, the Court found no problem in a state's imposition of supermajority voting requirements for "certain decisions" because the majority need not "always prevail on every issue." *Id.* at 6–7. In other words, it was permissible for a state to make it "more difficult for some kinds of governmental actions to be taken." *Id.* at 5–6. As Professor Laurence Tribe has observed, *Gordon* reflects the idea that governmental sovereigns may single out a special category of "those things it deems fundamental," which as a consequence may be made distinctly "resistant to change by ordinary majorities." LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 13–17, at 1096 n.3 (2d ed. 1988). In the federal system, as we have seen, that singling out occurs in the Constitution itself. *See, e.g.*, *supra* notes 51–54 and accompanying text (noting the endorsement of this idea by the Supreme Court in *United States v. Ballin*). Under the logic of *Gordon*, the Senate's implementation of still more supermajority voting requirements—especially on a far-reaching, generally-applicable basis—is not tenable.

[225] *See generally* COENEN, *supra* note 197, at 125–26 (collecting materials from *The Federalist* on this point).

[226] *See, e.g.*, THE FEDERALIST NO. 77, *supra* note 70, at 517 (Alexander Hamilton) (praising the constitutional provision that deals with presidential appointment and Senate confirmation of government officers, in part because these actions "would naturally become matters of notoriety; and the public would be at no loss to determine what part had been performed by the different actors").

[227] *See, e.g.*, Fisk & Chemerinsky, *supra* note 5, at 206 ("In most cases, the two-track system keeps filibusters out of the public eye."); *id.* at 181 ("Filibusters are ubiquitous but virtually invisible, for the contemporary Senate practice does not require a senator to hold the floor to filibuster; senators filibuster simply by indicating to the Senate leadership that they intend to do so.").

XXII's minority-empowering operation.[228] It follows that the stealth system may well perversely render the very Senators who exploit it "insulated from the electoral ramifications of their decision," thus producing an electoral environment in which "[a]ccountability is . . . diminished."[229]

These supplementary arguments based on purpose, fundamentality, sweep, and accountability all carry constitutional weight. None of them, however, is essential to establish Rule XXII's invalidity. It is enough, as we have seen, to conclude that the Rule operates to impose a supermajority requirement in its practical operation.[230] And the drumbeat of pronouncements by academics, journalists, Senators, and others—all to the same and telling effect—indicates that Rule XXII now works just that way.[231]

C. *The Failed Defenses of Supermajority Cloture Practice*

Confronted with this state of affairs, defenders of modern-day filibuster practice might resort to the device of confession and avoidance. In other words, they might claim that—notwithstanding the obvious constitutional problems that the stealth filibuster system raises—countervailing justifications

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[228] *See id.* at 184 (noting that the filibuster creates "a minority veto"); Harkin, *supra* note 4, at 69 ("[T]hanks to the filibuster, even when a party has been resoundingly repudiated at the polls, that party retains the power to prevent the majority from governing.").

[229] New York v. United States, 505 U.S. 144, 169 (1992) (noting the importance of legislator accountability in the context of setting forth constitutional principles of federalism). Senator Merkley has offered one elaboration of this point, reasoning that, "rather than seeing obstruction and placing responsibility with the minority, the public sees inaction and blames the majority" and that "this is one reason the silent filibuster is so tempting to the minority." Merkley, *supra* note 153. To his credit, Professor Gerhardt, even while defending Senate practice against constitutional challenge, also has acknowledged the reality and seriousness of this problem. *See* Chafetz & Gerhardt, *supra* note 10 at 256 (Gerhardt) (noting that today's "silent filibusters . . . are problematic because they obscure one of the most important checks on abuses of the filibuster: the political accountability of the members of the Senate," and adding that "[t]he two-track system provides the wrong incentives to senators: it allows them to obstruct Senate business but without paying much, if any, political cost for doing so"). For a related point, see Reich, *supra* note 205, which notes a reduction in the openness and accountability that stems from the filibuster system's shifting of government power from elected representatives to unelected agency officials.

[230] *See supra* notes 130–165 and accompanying text.

[231] *See generally supra* notes 166–193 and accompanying text (discussing the Rule's modern operation). Indeed, it may even be that "a simple analogy clinches this case." Florida v. Jardine, 133 S. Ct. 1409, 1418 (2013) (Kagan, J., concurring). Consider a Senate Rule that states: "It shall be a rule of this body that no bill shall be voted on by the Senate unless it first receives a favorable pre-vote by 60 members." Could such a rule be constitutional because it technically purports not to deal with final votes, but only with "pre-votes"? No, because such a result would fly in the face of the substance-over-form principle. In its current operation, however, Rule XXII works this way in practical operation, by effectively requiring a supermajority "pre-vote" on pending matters that channels *de facto* decision making control to legislative minorities.

properly recognized by our law override those difficulties.[232] There are three historic defenses of the supermajority cloture mechanism embodied in Rule XXII. Those defenses focus on: (1) longstanding acceptance;[233] (2) the value of legislative debate and deliberation;[234] and (3) the claimed difficulty of constraining any principle that would render invalid the supermajority filibuster rule.[235] All of these justifications for the Senate's supermajority-based filibuster-control system, however, have lost their sting with the emergence of the modern stealth system. And the resulting absence of any sound defense for present-day cloture practice serves to confirm its unconstitutionality.

1. The History-Based Justification

The first defense of Rule XXII resonates with Holmes's famous aphorism that "a page of history is worth a volume of logic."[236] According to this argument, the Senate's supermajoritarian treatment of filibusters has gained validation from its steady use for more than two centuries.[237] Continuous adherence to an approach launched in 1806, so the argument goes, suffices to establish the sort of "consistent historical practice" that renders Rule XXII immune to constitutional attack.[238]

The difficulty with this history-based defense is that it overlooks the relevant history.[239] The Supreme Court has rightly emphasized that the approach of our earliest Congresses provides the best usage-based indicator of the Constitution's governing meaning.[240] But there is no indication that our earliest representatives—who best knew the understood meaning of the then recently ratified Constitution—meant to tolerate minority control of legislative decision making in the Senate or the House.[241] And even if the Senate's earliest history

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[232] *Cf.* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (noting that even governmental race discrimination, for example, will stand if it is "suitably tailored to serve a compelling state interest").

[233] *See infra* notes 236–253 and accompanying text.

[234] *See infra* notes 254–261 and accompanying text.

[235] *See infra* notes 262–271 and accompanying text.

[236] N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

[237] *See supra* notes 136–158 and accompanying text.

[238] Eldred v. Ashcroft, 537 U.S. 186, 204 (2003). *See generally* Chafetz & Gerhardt, *supra* note 10, at 265 (Gerhardt) (arguing that the filibuster "is directly traceable to and based on . . . earlier, longstanding practices"); *id.* at 253 ("[H]istorical practices overwhelmingly support the filibuster's constitutionality."); McGinnis & Rappaport I, *supra* note 9, at 497 (claiming that "continuous use of filibusters since the early Republic provides compelling support for their constitutionality").

[239] *See, e.g.*, Ornstein, *supra* note 141, at 74 (emphasizing the "unprecedented" nature of modern filibuster practice). *See generally supra* notes 130–158 (detailing the historical developments that have produced dramatic modern changes).

[240] *See supra* note 135 (setting forth illustrative authorities on this point).

[241] *See, e.g.*, AMAR, *supra* note 82, at 364 (noting that, in fact "[n]othing like Rule 22's catch-22 was in place in the age of George Washington or in the Jeffersonian era that followed" but instead that "[t]hroughout the 1790s and early 1800s, the Senate practiced and preached simple majority rule");

were somehow to count for nothing, the current stealth filibuster system began to take hold only in the 1970s[242] and did not gather full steam until much more recently than that.[243] Put simply, if modern scholarship in this area establishes anything at all, it is that present day cloture practice is far removed from, rather than closely tied to, more than 180 years of Senate operations.[244]

No less important, the functional characteristics of the stealth filibuster system distinguish it from its forebears in ways that are constitutionally significant. We have seen, for example, that modern Senate practice raises new threats to legislative accountability.[245] A no less serious problem stems from the shift in incentives that it has brought about. Specifically, by greatly reducing the political costs of minority intransigence,[246] the modern behind-the-scenes operation of cloture practice has removed the self-regulating feature of filibustering that once served to curb its abuse.[247] A true filibuster—pursuant to which dissenters openly take and hold the Senate floor—threatens to saddle dissenters with opprobrium by exposing their actions for all to see, making vivid their willingness to throw a wrench in the workings of the upper chamber.[248] In times gone by, the need to filibuster in this way had exactly this de-

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see also supra notes 132–135 (detailing the Senate's pre-1806 majoritarian approach for dealing with potential delay and obstruction).

[242] *See supra* note 148 and accompanying text.

[243] *See supra* note 157 and accompanying text.

[244] *See, e.g.*, Chafetz, *supra* note 5, at 1017 ("Any purported history of 'unlimited debate' is immaterial, because, as we have already seen, the modern filibuster is not about debate. . . . [and] the historical record is emphatically not pro-filibuster."); Fisk & Chemerinsky, *supra* note 5, at 185–86 (noting that "the filibuster, as currently used, is not part of an age-old and inviolate Senate tradition of unlimited debate," and stating that "[i]f the filibuster as it is currently employed had existed from the time of its founding, the argument for its constitutionality would be strengthened. But the practice of filibustering has not remained the same over time."); Udall, *supra* note 160, at 122 ("The modern filibuster bears faint resemblance to its historical predecessors.").

[245] *See* Jacobi & VanDam, *supra* note 150, at 282 ("[I]f the public can never see a filibuster, they can never be galvanized against it."); *see also supra* note 229 and accompanying text (discussing public perception of Congress and how the stealth filibuster may obscure causes of legislative inaction).

[246] WAWRO & SCHICKLER, *supra* note 170, at 260 (arguing that the filibuster, in its current form, is "virtually costless for bill opponents").

[247] *See* Fisk & Chemerinsky, *supra* note 5, at 215 (observing that "it is the stealth aspect of the filibuster that permits its widespread threat to constitute an effective supermajority requirement for much Senate action"); Byrd, *supra* note 157 (noting that, for most of the Senate's history, "[t]rue filibusters were . . . less frequent, and more commonly discouraged, due to every Senator's understanding that such undertakings required grueling personal sacrifice, exhausting preparation, and a willingness to be criticized for disrupting the nation's business").

[248] *See, e.g.*, WAWRO & SCHICKLER, *supra* note 170, at 260 (discussing the contrasting operation of modern "costless filibustering"); Chafetz, *supra* note 5, at 1010 (noting that traditional filibusters required the "filibusterer [to] justify his tying up the entire business of the Senate to his constituents or colleagues, and [to] summon the physical endurance to hold the Senate floor").

terrent effect.[249] The modern stealth system, in contrast, imposes no similar internal check on minority overreaching.[250]

The removal of this self-regulating feature of the filibuster mechanism is of functional importance, as illustrated by the dramatic rise in the use of that mechanism in recent decades.[251] It also raises special constitutional difficulties under Supreme Court precedent by heightening the risks to constitutional values that the practice poses.[252] The broader point is that efforts to defend the stealth filibuster system based on longstanding practice stand on feet of clay. In fact, longstanding practice cuts against validation of the stealth system precisely because that system has dramatically altered—rather than carried forward—the Senate's traditional manner of operating.[253]

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[249] *See* Jacobi & VanDam, *supra* note 150, at 291 (noting that filibusters "only became a standard fixture after the requirement to actually stand up and speak disappeared"); *see also supra* notes 141, 167.

[250] *See* Eidelson, *supra* note 157, at 989 (noting that modern system "reduces the cost of filibustering, since the opponents of a measure no longer need to hold the floor for hours on end or conspicuously identify themselves as obstructionists"); Fisk & Chemerinsky, *supra* note 5, at 203 (emphasizing that "[t]he stealth filibuster is easier, both physically and politically"); Ornstein, *supra* note 141, at 77–78 (describing how the filibuster was changed, at first, to help Senate leaders in moving along their agendas, but adding that this "well-intentioned move" had "unintended consequences": "instead of expediting business, the change in practice meant an increase in filibusters because it became so much easier to raise the bar to 60 or more, with no 12- or 24-hour marathon speeches required"); Friedman & Martin, *supra* note 153 ("Not only has it become easier to 'filibuster,' but tracking means there are far fewer consequences when the minority party or even one willful member of Congress does so, because the Senate can carry on with other things.").

[251] *See supra* notes 157, 167–170 and accompanying text.

[252] As to the constitutional significance of governing structures that tend to constrain or encourage affronts to constitutional values, see, for example, Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 444 n.18, 447 (1978), in which the Court stated that there would be less reason to take an activist role when a "State's own political processes will act as a check on local regulations that unduly burden interstate commerce."

[253] There is another serious difficulty with any "longstanding practice" defense of the stealth filibuster system. The difficulty is that this style of constitutional argument is typically advanced to help justify long-employed exercises of federal lawmaking power. Exercises of federal *lawmaking* power, however, contrast markedly with senatorial *rulemaking* power because lawmaking, unlike rulemaking, requires joint action by both the Senate and the House, and either concurrence by the Chief Executive or a supermajoritarian override of a presidential veto by both chambers of Congress. Common sense suggests that such extraordinarily collaborative action, reflecting the collective views of varying centers of power, raises a strong presumption as to the constitutionality of a practice, especially when it is persisted in over long periods of time. Senate Rules, however, cannot lay claim to the same sort of presumption because they emanate only from the Senate and thus require approval by neither the House nor the President. Indeed, it is not easy to conclude that Rule XXII's sixty-vote requirement enjoys longstanding support even within the Senate itself—at least if the relevant inquiry focuses on majority support—given the specification that that Rule can itself be undone only by a two-thirds, rather than a majority, vote. *See supra* notes 236–238 and accompanying text. Of no less significance, the Rules of Proceedings Clause does not channel authority only to the Senate. Rather, it applies equally to both the Senate and House, and in actual practice "[i]n the House, majority-rule rules today and has always ruled," AMAR, *supra* note 82, at 366, with the sole exception being House Rule XXI, which was not adopted until 1994. *See supra* note 45 and accompanying text. The point is this: Any constitutional boost that modern Senate filibuster practice might gain on the basis of

2. The Debate-and-Deliberation Defense

An alternative defense of the Senate's filibuster-control system rests on the idea that open debate and unhurried deliberation are good things. It follows, according to this line of thought, that the minority-protecting effect of the Cloture Rule serves a valuable end because it slows down legislative proceedings, so as to produce more studied, more thoughtful, and more reliable legislative decision making.[254] The difficulty with this analysis is that the Cloture Rule of today has all but nothing to do with fostering debate and deliberation.[255] Indeed, under current practice, "a vote against cloture does not lead to extended floor debate"; rather, "it leads to *no* floor debate."[256] A system that

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longstanding Senate practice is feeble at best because of recent and radical changes in that practice. But even assuming that some such tenuous boost were otherwise available, it is counterbalanced by the House's unitary adherence for more than two centuries to the norm of majority rule in applying exactly the same Rules of Proceedings Clause on which defenders of Senate filibuster rules rely. Put simply, if longstanding practice matters in interpreting the Rules of Proceedings Clause, it supports on the better view the principle of mandatory-majority—rather than permissible-supermajority—legislative decision making.

[254] *See, e.g.*, John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J.L. & POL. 505, 511 (2004) (arguing that there may be "[no] better device to slow down precipitous action or force full consideration of the pros and cons of a controversial measure than extended debate"). Put another way, by requiring a supermajority vote, the Cloture Rule creates a world in which at least two things are true. First, rash majorities cannot ram proposals through the Senate. *See id.* at 509, 511 (noting that "the Framers intended that the Senate have [a] vital function in the new government; they expected the second chamber to act as a check on rash or unwise action in the House" through the exercise of "more mature reflection"). And, second, minority voices can be fully heard, thus expanding opportunities to "expose flaws in and potential improvements to proposed bills." WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 27 (4th ed. 1996) (adding that, while "House rules are designed to permit a determined majority to work its will," the "Senate rules . . . are intended to slow down, or even defer, action on legislation by granting inordinate parliamentary power (through the filibuster, for example) to individual members and determined minorities").

[255] *See, e.g.*, Chafetz, *supra* note 5, at 1017 ("[T]he modern filibuster is not about debate."); Cornyn, *supra* note 37, at 194 (bemoaning "[t]he current use of the standing rules of the Senate, not to ensure adequate debate, but to change the voting rule on judicial nominations from a simple majority to 60 votes in order to block a Senate majority from confirming judges"); Fisk & Chemerinsky, *supra* note 5, at 184 ("The modern filibuster . . . has little to do with deliberation and even less to do with debate."); Harkin, *supra* note 4, at 73 ("[T]he current use of the filibuster has little to do with deliberation and everything to do with obstruction and delay."); Magliocca, *supra* note 145, at 315 ("In effect, modern cloture practice operates as a gag rule."). According to Senator Harkin:

> There is absolutely no reason to filibuster a motion to proceed except as a means of delay and obstruction. If a Senator does not like a piece of legislation, he or she has the opportunity to offer amendments to try to improve the measure. But Senators cannot do that if the Senate is prevented from even considering and debating a bill.

Harkin *supra* note 4, at 75.

[256] Magliocca, *supra* note 145, at 306 (emphasis added); *accord, e.g.*, Chafetz, *supra* note 5, at 1040 (arguing that "[t]he contemporary filibuster is not a mechanism of debate; it is a mechanism of obstruction, plain and simple"); Eidelson, *supra* note 157, at 989 (stating that "when a senator or group of senators signals an intention to filibuster a measure, the majority leader typically does not

does not promote debate—but, rather, discourages it from occurring—is hardly justifiable on debate-enhancement grounds.

The desideratum of facilitating deliberation also provides no meaningful support for modern cloture practice.[257] To be sure, stealth filibusters halt action on pending matters, so that one might say they generate a less hasty consideration of them.[258] There is, however, a deep difficulty in building a defense of Rule XXII on this idea. The problem is that any such defense necessarily rests on the proposition that it is proper to slow down legislative action by requiring sixty, rather than fifty-one, votes to act. In other words, the way in which the stealth filibuster system fosters delay and deliberation is the same way that outright supermajority voting rules foster delay and deliberation—that is, by requiring a supermajority, rather than a majority, to move forward with taking legislative action.[259]

For this reason, the deliberation-enhancement justification for the Senate's current filibuster regime simply moves it from the constitutional frying pan into the constitutional fire. It does not help the case for constitutionality to recognize that the stealth filibuster system fosters deliberation only because it operates in the same way as does an overt supermajority voting requirement for acting on legislative proposals. Instead, this fact makes it all the more apparent that the two types of rules are "functionally the same,"[260] so that the former is no less unconstitutional than the latter.[261]

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bring the measure up for live debate at all, instead filing a cloture motion and endeavoring to assemble the sixty votes necessary to win the cloture vote," while "the Senate proceeds to other business on a second track, unhindered by the dilatory debate that the cloture motion nominally exists to curtail"); Jacobi & VanDam, *supra* note 150, at 277 (noting that "[b]efore unique episodes in 2010 and 2013, the last actual filibuster had occurred in 1992," and suggesting that the lack of a need "to deliver longwinded stemwinders . . . mak[es] minorities even more powerful"); *id.* at 281 ("[N]o one ever 'talks and talks' anymore when filibustering; the term now simply refers to a flat minoritarian hold on any piece of legislation or nomination."); *id.* at 317 ("[A]ctual filibusters no longer occur."); Klein, *supra* note 1, at 26, 28 ("Today nobody talks. The filibuster is an exclusively procedural tool [that] no longer has anything to do with debate"); *see also* WAWRO & SCHICKLER, *supra* note 170, at 260 ("The contemporary context of lawmaking in the Senate has essentially eliminated the informational benefits that used to accrue from these kinds of battles.").

[257] *See* Eidelson, *supra* note 157, at 990 (noting that "the filibuster debate is not really about the Senate's internal rules for governing its deliberative processes").

[258] *Cf.* Fisk & Chemerinsky, *supra* note 5, at 221 (suggesting that, if "filibusters force intense negotiation between the majority and the minority, filibusters may actually prompt more careful consideration of statutory language than a bill might otherwise receive").

[259] *See, e.g.*, *supra* note 189 (discussing, among other things, comments of Senator Alexander).

[260] United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 854 (1996).

[261] *See supra* notes 196–218 and accompanying text (discussing substance-over-form principle of constitutional interpretation).

3. The Slippery Slope Justification

The final argument against invalidating the Senate filibuster regime tries to ride the slippery slope. According to this argument, if a principle of legislative majoritarianism renders modern cloture practice unconstitutional, the resulting effect will be a catastrophic disruption of the entire federal legislative process.[262] All sorts of critical decisions, so the argument goes, are made by legislative minorities. A single committee can keep a bill from moving forward, and a single committee chair can impede committee review. One or two Senate leaders might block consideration of a bill by pushing it to the back of the legislative agenda. Another few Senators might derail its enactment by proposing amendments late in a legislative session. In these and other ways, a minority of Senators—even a small minority—can squelch the enactment of a law that enjoys majority support.[263] And so, according to the slippery-slope critique, if a principle of legislative majoritarianism outlaws the Senate's countermajoritarian cloture practice, that same principle must outlaw these other—and widely accepted—countermajoritarian bill-killing practices as well.[264]

This argument fails because it misidentifies the constitutional principle that controls in this context. That principle is not one that prohibits the taking of any significant action in the Senate by anybody (or any body) other than a majority of its members. Rather, the governing principle is one that prohibits supermajority *voting* rules applicable to *the full body of the Senate* as it takes dispositive action on a *specific proposal* as that proposal is considered *by that body as a whole.* Such a principle does not speak to efficiency-based gatekeeping rules, such as those that concern committee review, committee chair discretion, or the calendaring of legislative business by duly designated leaders of the chamber. Even more emphatically, this principle does not concern parliamentary maneuvering by individual Senators—whether that maneuvering comes in the form of amendment-proposing, outright horse-trading, or informal accommodations secured from Senate leaders.

The crux of the matter is that none of these actions runs afoul of a constitutional principle that prohibits self-imposition of supermajority voting re-

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[262] *See* Chafetz & Gerhardt, *supra* note 10, at 255, 267 (Gerhardt).

[263] As Professor Gerhardt explains:

> [T]he filibuster is one of many Senate procedures that may preclude final floor action. When committees reject nominations or committee chairs refuse to schedule hearings or votes on nominations or other legislative matters, their decisions are effectively final. Yet none of these procedures violates Article I, Section 7. The fact that a bill or nomination is stymied through the tactical use of procedures does not mean that Article I, Section 7 is violated: it means the Senate has followed its own rules.

Id.

[264] *Id.* at 267 (Gerhardt) (arguing that an end to the filibuster "would signify the end of the Senate's numerous other countermajoritarian features, practices, rules, traditions, and norms").

quirements for the full Senate when the full Senate acts. As a practical matter, however, the sixty-vote requirement of Rule XXII now works just this way.[265] The Rule is unconstitutional for this reason. To reach that conclusion, however, says nothing about matters that do not involve voting by the full body of the Senate, such as decision making by committees or, for that matter, outcome-determinative delays produced by individual Senators through actual speechmaking on the Senate floor.[266]

In the end, the argument for the Senate's modern Cloture Rule rests largely on florid rhetoric.[267] Defenders of the Rule are drawn to sound-bite descriptions of the Senate as the "greatest deliberative body in the world."[268] No less of an expert than Senator John McCain, however, recently dismissed this characterization as "the greatest exaggeration in history."[269] Proponents of modern practice also point to President George Washington's (perhaps apocryphal) portrayal of the Senate as a saucer into which the heated actions of the House

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[265] *See supra* notes 190–191 and accompanying text.

[266] Another consideration also serves to distinguish Rule XXII from other nonmajoritarian bill-blocking mechanisms:

> There's a difference between the use of the filibuster to derail a nomination and the use of other Senate rules—on scheduling, on not having a floor vote without prior committee action, etc.—to do so. All those other rules . . . can be overridden by a majority vote of the Senate . . . whereas the filibuster can't be overridden in that way. A majority of the Senate could ride herd on a rogue Judiciary Committee chair who refused to hold a hearing on some nominee; it can't do so with respect to a filibuster.

Cornyn, *supra* note 37, at 226. For further observations along these same lines, see Chafetz & Gerhardt, *supra* note 10, at 260–61 (Chafetz), in which the author notes that "none of these [mechanisms] results in the permanent minority obstruction of legislation the way today's filibuster does."

[267] *See, e.g.*, Fisk & Chemerinsky, *supra* note 5, at 187 n.25 (noting, for example, historical accounts of the filibuster that emphasize "in [a] reverential tone, the value of debate and deliberation"); Hatch, *supra* note 3, at 835 (noting that Rule XXII proponents frequently resort to the tea-cooling-saucer imagery described below, *infra* note 270 and accompanying text, and adding that they "use this metaphor as if uttering it alone justifies filibusters").

[268] Marvin E. Adams, *The United States Senate, "A Change Is Gonna Come,"* OUR DAILY THREAD (Apr. 29, 2013), http://www.ourdailythread.org/content/united-states-senate-change-gonna-come, *archived at* http://perma.cc/6DWE-Q5F3 (purporting to quote former President James Buchanan).

[269] Ed Morrissey, *McCain: Why Are These Republicans Trying to Block Gun Control?*, HOT AIR (Apr. 8, 2013, 8:41 AM), http://hotair.com/archives/2013/04/08/mccain-why-are-these-republicans-trying-to-block-gun-control, *archived at* http://perma.cc/FJ37-HKHH; *see also* Packer, *supra* note 157, at 41 (quoting Senator Merkley as stating "I wince each time I hear [the 'greatest deliberative body' phrase], because the amount of real deliberation, in terms of exchange of ideas, is so limited"). Notably (and sadly), recent media reports suggest that prospective candidates are opting out of Senate races because of perceptions of the body's now-dysfunctional character. *See, e.g.*, Jeremy W. Peters, *As Senators Head for Exit, Few Step Up to Run for Seats*, N.Y. TIMES, May 3, 2013, at A13 (quoting Louisiana's Republican Lieutenant Governor Jay Dardenne, "who decided not to run next year against Senator Mary L. Landrieu, a Democrat considered among the most vulnerable," as stating "I don't know that you'd find any legislative body in America—or the world—that's as dysfunctional").

are wisely poured to cool.[270] It is one thing, however, to let hot tea cool off; it is another thing to stop brewing it altogether.

Neither President Washington nor any member of the founding generation argued that sixty votes could be required to take legislative action. Indeed, just the opposite is true. The Framers endorsed the principle that legislative majorities, not supermajorities, must control the fate of substantive decision making in both the House and the Senate.[271] Because the modern stealth filibuster system offends this principle, it is unconstitutional.

IV. Remedying the Constitutional Wrong

The preceding discussion shows that current cloture practice abridges a binding norm of majority-based voting in the chambers of Congress. Given this constitutional violation, a remedy must be devised. Moreover, at a minimum, that remedy must guard against continuing unconstitutional conduct.

Several remedial approaches are available. One of them envisions leaving the existing non-speech-centered Senate filibuster-control system in place.[272] Adjustments to the system would be made, however, to shift its effect from vesting minority blocs with controlling voting power to facilitating meaningful deliberation. Under an alternative approach, the existing regime would be jettisoned in favor of the same sort of system that guided the Senate's work for most of its history—that is, a system that focuses cloture votes on actual Senate speechmaking.[273] The ensuing discussion shows that either strategy could remedy existing constitutional problems. Before turning to those matters, however, it is worth pausing to consider the significance of the so-called "nuclear option" and the Senate's recent exercise of it to abandon the use of supermajority cloture votes in assessing most presidential nominees.[274]

A. *The Impact of the Nuclear Option*

As we have seen, Rule XXII now supports a system of minority voting control in the Senate. Indeed, minority blocs can and do leverage Rule XXII in many ways to ensure that supermajority support—rather than majority support—is needed to pass bills and resolutions as a routine matter. For example, Senate leaders often give Rule XXII effect by declining to place items on the legislative agenda unless they already have, or may get, sixty votes in their

[270] Bell, *supra* note 1, at 9–10 (quoting a Senate website that recounts supposed exchange between President Washington and Thomas Jefferson).

[271] *See supra* notes 79–124 and accompanying text.

[272] *See infra* notes 287–299 and accompanying text.

[273] *See infra* notes 300–311 and accompanying text.

[274] *See infra* notes 275–286 and accompanying text.

support.[275] In addition, if a matter does make its way before the Senate, it can advance only with a favorable vote on a "motion to proceed"; yet, because Rule XXII applies to such motions, the proposal may well be defeated at this stage unless sixty Senators agree to move it forward.[276] Finally, even if a motion to proceed carries, Rule XXII permits a minority to demand a cloture vote at other, later decision points—such as in processing proposed amendments to a bill.[277] In practical terms, all of this means that, so long as a determined minority so insists, sixty votes are required for the Senate to act.[278]

Further disrupting the opportunity for majority control in the upper chamber is that portion of Rule XXII that by its terms requires a two-thirds vote of members who are present and voting to secure cloture on motions to amend the Senate's rules, including the generally applicable sixty-vote Cloture Rule established by Rule XXII.[279] In the past, this two-thirds vote rule frustrated efforts at filibuster reform. After all, if a majority of Senators wished to change the basic sixty-vote Cloture Rule so as to shut down a threatened or ongoing filibuster, they first had to secure even more than sixty votes to make that change happen. Things took a dramatic turn, however, on November 21, 2013, when a majority of fifty-two Democrats wielded the so-called "nuclear option" to require only fifty-one votes, rather than sixty votes, to secure cloture on confirmations of all presidential nominees except Supreme Court Justices.[280]

The end result of this reform was both important and salutary because it served to bring Senate practice into closer alignment with constitutional requirements. At the same time, the Senate's action raises significant questions, including as to whether the majority acted in proper conformance with its rules and traditions in proceeding as it did.[281] Those questions lie beyond the scope of this Article. Important for present purposes, however, are two key points about the November reform. First, in a sharp break from past practice, the Senate demonstrated its ability to circumvent Rule XXII's dictates, in the face of a filibuster, by simple majority vote. Second, this action raises obvious tensions

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[275] *See supra* note 153 and accompanying text.

[276] *See supra* note 160 and accompanying text.

[277] *See supra* note 161 and accompanying text.

[278] *See supra* notes 168–170 and accompanying text.

[279] *See* U.S. SENATE COMM. ON RULES & ADMIN, *supra* note 2, at 20–21 (setting forth the operative language of Rule XXII). In other words, the sixty-vote cloture standard of Rule XXII does not stand alone; it also includes a separate and specialized provision as to cloture of debate on proposed changes to the rules themselves. *See id.* at 20–22. This requirement—which appears between two hyphens in Rule XXII—provides that cloture on proposed rule changes requires a two-thirds vote of the number of Senators present and voting. *Id.*

[280] Jeremy W. Peters, *Senate Vote Curbs Filibuster Power to Stall Nominees*, N.Y. TIMES, Nov. 22, 2013 at A16.

[281] By way of illustration, some critics might argue that any change to the Senate Rules, whether of a formal or de facto nature, must occur at the outset of a new Senate session. *See* Hatch, *supra* note 3, at 851.

with the previously accepted premises that underlay Rule XXII. Against this backdrop, it is necessary to ask what the ongoing impact of this "November 2013 Revolution" will be. Three observations are of dominating importance on this score.

First, however dramatic the Senate's use of the nuclear option might have been, its actions left unaltered Rule XXII's preexisting treatment of supermajority cloture with respect to votes on laws and resolutions, as well as Supreme Court nominees. Indeed, key supporters of the Senate's November action took care to disclaim any support for altering Senate practice except with regard to executive-branch and lower-court appointee confirmation votes.[282] As a result, the need for supermajority cloture votes remains fully in place for most matters of Senate business, including virtually every matter as to which the House needs supportive Senate action to transform bills into law.[283]

Second, some observers have suggested that the Senate's supermajority cloture rules are now nothing but a paper tiger, readily subject to revision through majoritarian use of the nuclear option at any time for any reason.[284] Thus, so the argument goes, the Senate has become a majority-vote, rather than a supermajority-vote, institution, and its operations therefore can no longer offend any governing norm of majority rule. The difficulty with this argument is not hard to see: As a matter of both legal command and the limited purposes of the Senate's November 21 action, Rule XXII remains in place no less today than it did before with respect to both passing laws and confirming Supreme Court Justices—and this is so whether or not a determined Senate majority may again wield the nuclear option in the future.

To understand why this state of affairs matters is of both legal and practical importance, it is worth recalling an analogous chapter of congressional history. When the House adopted a supermajority voting rule for tax rate increases in 1995, a long list of leading constitutional scholars assailed its constitutionality despite the House's ability to change that supermajority voting rule by majority vote.[285] The same principle applies to Senate Rule XXII as it stands

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[282] *See, e.g.*, 159 CONG. REC. S8415 (daily ed. Nov. 21, 2013) (statement of Sen. Harry Reid); Press Release, Sen. Patrick Leahy, Leahy Supports Change in Senate Rules to Address Unprecedented Filibusters (Nov. 13, 2013), *available at* http://www.leahy.senate.gov/press/leahy-supports-change-in-senate-rules-to-address-unprecedented-filibusters-, *archived at* http://perma.cc/R2JQ-DBES.

[283] Put another way, the sixty-vote requirement will continue to operate as the generally governing default rule under which the Senate will conduct all of its law-making business. And it is hard to see how a default rule that dictates that a *supermajority* vote will decide whether to enact laws can be squared with a constitutional norm that a *majority* vote must govern such decisions. *See supra* notes 51–124 and accompanying text.

[284] *See, e.g.*, Brad Plumer, *It's Official: The Senate Just Got Rid of Part of the Filibuster*, WASH. POST WONKBLOG (Nov. 21, 2013, 12:42 PM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/11/21/the-senate-just-got-rid-of-part-of-the-filibuster, *archived at* http://perma.cc/Y782-JLTT (noting comments along these lines by Senator McConnell).

[285] *See supra* note 13 and accompanying text (citing to numerous scholars on this point).

and operates under current conditions. Indeed, it applies *a fortiori* because the scope of the Senate's supermajority requirement reaches far beyond the narrow subject of tax-rate increases to embrace proposed laws and resolutions in an across-the-board fashion. No less important, this supposed background capacity to negate the operation of a supermajority voting rule by majority vote hardly renders that supermajority voting rule an empty letter. Rather, the very label "nuclear option" signals the sort of distinctly extraordinary exertion that displacement of Rule XXII's supermajority-voting rules—even if by majority action—continues to require.

Finally, whether or not the Senate's limited use of the "nuclear option" will reverberate across all of the body's future operations, an important question remains: With what new filibuster regime should the Senate replace its past approach? In fact, two alternative reforms are available for the Senate's use, each of which would remediate existing constitutional problems while carrying forward the upper chamber's tradition of paying heed to minority-bloc concerns.[286] At least, the Senate's recent experience with the nuclear option—as well as the uncertainty that this departure from Rule XXII has left in its wake—has put in clearer focus the benefits that each of these potential reforms would bring.

B. *The Go-Slow Approach*

How might the Senate rework Rule XXII to cure the constitutional problems it presents while still honoring the commitment to deliberate decision making that the institution long has worn as its badge of honor? One possibility is to adjust the cloture process to preclude a final vote on any contested matter in the Senate until a substantial period for consideration of the matter has passed. Such a go-slow approach would permit "the tea to cool," even for

[286] Notably, a third reform proposal, which has been advanced by Senator Al Franken, illustrates the sort of rule change that would fall short of providing a proper constitutional remedy. According to that proposal, the existing sixty-vote Cloture Rule would be replaced with a new 41-vote rule that effectively requires the affirmative support of this number of Senators to halt consideration of a pending matter. Press Release, Sen. Al Franken, Sen. Franken Introduces Provision to Improve Senate Filibuster Rules (Jan. 6, 2011), *available at* http://www.franken.senate.gov/?p=press_release&id=1248, *archived at* http://perma.cc/RUP7-X6C5. Because this rule change would simply substitute one de facto supermajority voting requirement for another, it would fail to vindicate the constitutional requirement of legislative majoritarianism. Senator Michael Bennet has proposed supplementing the shift to a requirement that 41% of Senators vote against cloture with refinement in some circumstances—raising this 41% threshold to a higher level (e.g., 45%) if initial opponents of cloture were later to change their positions. *See* Brian R.D. Hamm, Note, *Modifying the Filibuster: A Means to Foster Bipartisanship While Reining in Its Most Egregious Abuses*, 40 HOFSTRA L. REV. 735, 755–56 (2012) (describing Senator Bennet's proposal); *see also id.* at 767–70 (endorsing a revised version of Senator Bennet's proposed reform). But this refinement does not address the constitutional problem presented by Senator Frankin's proposal because it too would keep in place a regime of ultimate minority voting control.

an extended period, during which Senators could openly exchange ideas about, voice objections to, and wrangle for modifications of the pending proposal.[287]

Building on this idea, stealth filibuster critics who represent a broad cross section of the Senate have advocated a "stair step" reform under which the number of votes required for cloture would gradually diminish over time.[288] Under one such proposal, for example, the vote threshold for cloture would move from 60% to 57% to 54% to 51% as time passes, thus providing substantial opportunity for discussion and accommodation.[289] To be sure, some Senators have argued that the Constitution requires a reform of this kind only for judicial confirmation votes, as opposed to action on bills.[290] For reasons touched on earlier, however, this claimed distinction is not constitutionally sound and thus lacks legal significance.[291] What is significant is that the stair step approach has attracted support from Senators of both political parties, particularly when their partisan interests have aligned with filibuster reform. Along the way, this remedy has been championed by such diverse and long-serving members of the Senate as Bill Frist, Orrin Hatch, Joseph Lieberman, and Tom Harkin.[292] Many other Senators have signaled their support for these

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[287] *See* James L. Swanson, Editorial, *Filibustering the Constitution*, WASH. TIMES, May 6, 2003, at A18, *available at* http://www.cato.org/publications/commentary/minority-rules-filibustering-constitution, *archived at* http://perma.cc/W5L2-C9SG (defending the efforts to slow down action on legislation and confirmations that are "employed merely to guarantee a reasonable and limited period of debate before proceeding to an up or down vote").

[288] *See infra* notes 292–293 and accompanying text. Others have characterized this reform as involving a "declining" or "sliding-scale" filibuster procedure. Hatch, *supra* note 3, at 849.

[289] *See* Klein, *supra* note 1, at 29 (detailing this proposal by Senator Harkin and noting that it would provide for "sixteen days of debate before a simple majority vote would be sufficient to pass a bill"); *see also* Hatch, *supra* note 3, at 849–50 (identifying an alternative proposal that would provide for 57-day delay and noting that "the specific goal is a mechanism whereby, after a full and vigorous debate, a simple majority can proceed to a vote").

[290] *See* Cornyn, *supra* note 37, at 199–201, 217; Hatch, *supra* note 3, at 829–31, 850–51.

[291] *See supra* notes 36–41 and accompanying text. It is also worth noting that the writings of the very Senators who have most elaborately suggested that judicial appointments present special problems—namely, Senators Orrin Hatch and John Cornyn—provide strong support for rejecting the supermajority Cloture Rule in all of its applications. In particular, Senator Hatch's insistence that the Constitution imposes an unmodifiable requirement of majority voting in the judicial-confirmation context relies overwhelmingly on legal materials—such as the *United States v. Ballin* ruling, Jefferson's *Manual of Parliamentary Practice*, *The Federalist*, and history-analyzing secondary literature—that focus on majority voting in the enactment of bills. *See* Hatch, *supra* note 3, at 826–29. In addition, Senator Hatch lays heavy weight on the argument from negative implication based on the original Constitution's inclusion of five, and only five, expressly-stated supermajority voting requirements. *Id.* at 828 n.130, 830 n.141. In similar fashion, Senator Cornyn's constitutional argument relies on sources such as *Ballin*, Jefferson's writings, the negative implication argument from the constitutional text, and *The Federalist*. *See* Cornyn, *supra* note 37, at 195–97. As with Senator Hatch's work, Senator Cornyn's arguments provide no basis for distinguishing between legislation and confirmations when it comes to de facto supermajority voting rules. *See also* Chafetz & Gerhardt, *supra* note 10, at 255 (Gerhardt) (indicating that there is no distinctive "textual support to constitutionalize majority rule on nominations").

[292] *See* Hatch, *supra* note 3, at 849, 855–56.

proposals as well.[293] This large-scale coming together of members from both sides of the aisle offers telling support for the soundness of the stair step approach from the viewpoint of a dispassionate lawgiver seeking to operate from behind the "veil of ignorance."[294]

The stair step proposal also reflects an underlying sensitivity to governing constitutional principles. As noted earlier, the stealth filibuster system may be seen as facilitating deliberation, at least in a loose sense, by impeding quick Senate action.[295] It has this effect, however, only because it installs the functional equivalent of the sort of outright supermajority voting requirement that runs headlong into the constitutional principle of legislative majoritarianism.[296] Pursuing the goal of facilitating deliberation is fine, but not if it comes at the cost of breaching the constitutional mandate of majority decision making in taking dispositive action. As a result, a "less restrictive alternative"[297] must be sought. And the sort of remedy offered by the stair step reform—even though it incorporates significant supermajoritarian features—represents such an alternative, constitutionally permissible innovation.

In short, the stair step remedy would ensure opportunities for deliberation by genuinely slowing down the legislative process—and sensibly slowing it down most of all for matters that generate the closest divisions in Senate.[298] To be sure, the failure to secure sixty "aye" votes at the outset would put off, perhaps for an extended period, final action on a legislative proposal. But the stair step proposal differs in a critical way from the current Senate regime because, once the requisite time for due deliberation has run its course, a majority, rather than a supermajority, makes the final decision. The Constitution, in other

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[293] *E.g.*, Cornyn, *supra* note 37, at 211 (indicating that the Harkin-Lieberman version of the stair step approach "was endorsed by 19 Senate Democrats, as well as the *New York Times*"); Hatch, *supra* note 3, at 856 n.329, 855 (listing Democrats who supported the Harkin-Lieberman proposal as including "Senators Bingaman, Boxer, Feingold, Harkin, Kerry, Lautenburg, Lieberman, and Sarbanes," as well as Senator Kennedy; and discussing a sliding scale reform, applying only to nominations, proposed in 2003 by Senators Bill Frist and Zell Miller, with cosponsors who included "Senators McConnell, Stevens, Santorum, Kyl, Hutchison, Lott, Hatch, Cornyn, Chambliss, and Allen"). Scholars have endorsed the stair step approach, as well. *See* Cornyn, *supra* note 37, at 212 (noting that "Congressional experts from think tanks as diverse as the American Enterprise Institute, the Brookings Institution, and the Cato Institute have endorsed similar proposals").

[294] JOHN RAWLS, A THEORY OF JUSTICE 136 (1971).

[295] *See supra* note 258 and accompanying text.

[296] *See supra* note 259 and accompanying text.

[297] United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000).

[298] *See* Harkin, *supra* note 4, at 77 ("Under my proposal . . . Senators would have ample time to make their arguments and attempt to persuade the public and a majority of their colleagues. This protects the rights of the minority to full and vigorous debate and deliberation, maintaining the very best features of the United States Senate."); Hatch, *supra* note 3, at 855 ("This sliding-scale approach . . . ensures the debate that current filibuster proponents posit is the heart of Senate tradition and that they use to justify their filibusters."); Binder, *supra* note 157 (noting that this system "would allow the Senate to reach votes by simple majority while still protecting the minority's parliamentary rights").

words, does not require an instantaneous majority vote on legislative proposals. But it does require the making of determinative decisions on such proposals by majority action at the end of the day.[299]

C. *The Talking Filibuster*

An alternative remedy would involve abandoning the stealth filibuster system while retaining the Rule's sixty-vote requirement. This approach centers on the idea of redirecting Rule XXII's supermajority voting requirement at true, old-fashioned filibustering—that is, open speechmaking that actually occurs on the Senate floor.[300] To be sure, such a system would carry forward opportunities for minority control of the Senate's business. To exert that control, however, dissident Senators would have to hold the floor until their orations were shut down by a sixty-member vote directed at the actual "cloture" of debate.[301]

Critics might argue that this system will not provide a proper remedy on the theory that the sixty-member vote it envisions would itself abridge the constitutional ban on supermajority decision making. They have a point. If a tenacious minority can hold the floor long enough to cause the proponents of a bill to fold their tent, the minority in effect will have determined the contested bill's fate.[302] There is, however, another side of the constitutional coin. If a supermajority voting rule targets real-life debating—in contrast to merely mirroring a supermajority requirement for final votes—the case is much-strengthened for concluding that the rule reflects a genuine exercise of the power to fashion "Rules of . . . *Proceedings*."[303] In addition, connecting up filibuster control with actual speechmaking would restore the self-limiting features of the fili-

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[299] *See* Chafetz & Gerhardt, *supra* note 10, at 262 (Chafetz) ("What these proposals have in common is that they allow a determined majority to get its way—not immediately, but in the end. They therefore satisfy the structural majoritarianism principle of Article I."); *see also* AMAR, *supra* note 82, at 362 (emphasizing principle of "ultimate majority rule in the Senate"). For a similar analysis, see Magliocca, *supra* note 145, at 305, which offers a proposal under which "forty-one senators should be able to extend debate on bills or nominations that reach the floor for no more than one year," because such a "suspensory veto" would "return the Senate to its traditional practice, which let a determined majority get its way except at the end of a congress when claims of undue haste were more legitimate."

[300] *See, e.g.*, Klein, *supra* note 1, at 28–29 (noting the possibility of talking-filibuster reform).

[301] *See, e.g.*, Ornstein, *supra* note 141, at 78 (inquiring how the Senate's practices can be made more efficient "without altering its basic character," and asserting that "[t]he first big step would be to go back to the future—to return at least on occasion to real filibusters, bringing the place to a halt and going round the clock to break the deadlock").

[302] *See, e.g.*, 55 CONG. REC. 20 (1917) (statement of Pres. Woodrow Wilson) (criticizing the then-prevailing use of speech-based filibusters on the ground that the "Senate . . . is the only legislative body in the world which cannot act when its majority is ready for action").

[303] U.S. CONST. art. I, § 5 (emphasis added).

buster mechanism and thereby diminish, perhaps to a great extent, efforts by minority blocs to impede action favored by Senate majorities.[304]

Because refocusing the Cloture Rule on "talking filibusters" holds the promise of addressing core flaws in current Senate practice, it is not surprising that reform proposals along these lines have surfaced in recent years. In particular, Senators Mark Udall and Jeff Merkley have advocated a rule change directed at cases in which out-of-the box cloture motions generate majority support but not the sixty votes now needed to proceed with the matter at hand.[305] In essence, they propose that a period of "extended debate" on that matter should come into effect immediately in these situations. During this period, objectors who trigger the operation of this extended period would have to hold the floor on an around-the-clock basis because any break in speaking would immediately empower the presiding officer to schedule a majority-controlled cloture vote on the filibustered proposal. The resulting majority-controlled cloture vote would then presumably succeed because it was a majority vote for cloture that brought about the period of extended debate in the first place. And once a majority vote for cloture occurred, the follow-on majority vote on the substantive proposal would predictably succeed as well.[306]

Any move to a talking-filibuster system will bring with it practical challenges. Under the Udall-Merkley proposal, for example, the Senate Majority Leader would retain authority to move the Senate on to other business if the threat of a lengthy talking filibuster arose.[307] The retention of this power presents a problem because its past exercise contributed to development of the existing stealth filibuster system.[308] Given this history, it remains unclear whether a talking-filibuster reform would actually produce talking filibusters. At the least, however, the Senate's adoption of the Udall-Merkley proposal would reshuffle the filibuster deck, perhaps in a way that would often require minority objectors to hold the floor to defeat proposals that enjoy majority

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[304] *See, e.g.*, Fisk & Chemerinsky, *supra* note 5, at 206 (predicting that "[u]nder the substantial time pressure of the modern Senate . . . senators today would refuse to tolerate their colleagues' attempts to hold them hostage" and that "if Senators actually had to hold the floor, most filibusters would quickly fizzle"); Ornstein, *supra* note 141, at 78 (reasoning that return to speech-based filibustering "would deter the casual use of delaying tactics and dramatize the problem"); *see also* Chafetz & Gerhardt *supra* note 10, at 256 (Gerhardt) (noting that "at least [talking] filibusters had to be above radar and the people making them were politically accountable" and that "[t]he two-track system provides the wrong incentives to senators: it allows them to obstruct Senate business but without paying much, if any, political cost for doing so"). *See generally supra* note 238 and accompanying text (recognizing the historical use of filibuster in the form of active speechmaking).

[305] *See* Press Release, Sen. Mark Udall, On 1st Day of Congress, Mark Udall Calls on Colleagues to Improve Bipartisan Cooperation in Senate (Jan. 5, 2011), *available at* http://www.markudall.senate.gov/?p=press_release&id=866, *archived at* http://perma.cc/P9DK-JVRB; Merkley, *supra* note 153.

[306] *See* Merkley, *supra* note 153.

[307] *See id.*

[308] *See supra* notes 146–158 and accompanying text.

support. In the end, there is no way to know if this reform will have its intended effect unless the Senate puts it in operation. And so a cautious first-step remedy might involve implementing a talking-filibuster reform, at least for a trial period.

As we just have seen, one critique of the talking-filibuster approach is that it might not alter existing Senate operations in any significant way.[309] An alternative critique is that it might change Senate operations in a way that is both significant and deeply harmful. On this view, if the minority party becomes able to achieve its obstructive goals only by resorting to true filibustering, that is exactly what the minority party will do. The result will be endless speechmaking on even minor matters, with the consequence that the Senate finds itself so tied in knots that it cannot conduct any business at all.[310]

This could happen. But the future threat of self-imposed immobilization cannot justify the Senate's persistence in an ongoing course of unconstitutional conduct. To be sure, the on-the-ground impact of talking-filibuster reform is unknowable, and in the short term it may generate even worse forms of legislative stalemate than now exist. But it bears reemphasis that a key purpose of reinstating a talking-filibuster system is to push the lawmaking process into more open view.[311] If the result of filibuster reform is an insistence by a passionate, floor-holding minority that its policy views warrant overriding the majority's position, that stance will be put squarely before the public for it to evaluate. One possible result is that the open airing of the minority's arguments will cause them to win out in the forum of public opinion. Another possible result is that voters in time will send to Washington representatives better able to collaborate and compromise. The critical point is that decision making in the Senate—whether it involves collaboration and compromise or dissension and deadlock—must unfold against a backdrop of governing rules that comport with the Constitution's commands. And those commands dictate that, in the end, Senate decision making must occur through majority, rather than supermajority, voting.

CONCLUSION

Modern Senate practice centers on a stealth filibuster system that has taken hold in recent decades. Despite the formal phrasing of Rule XXII, this system does not focus on controlling floor debate. Instead, its practical effect is to

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[309] *See supra* notes 307–308 and accompanying text.

[310] *See* Snowe, *supra* note 156, at 28 ("[I]n a very real sense, the filibuster has the potential to bring the Senate to a grinding halt. If the minority were to filibuster every piece of legislation that comes to the Senate floor, the Senate would be unable to make progress on those bills, and nothing could be accomplished."); Klein, *supra* note 1, at 28–29 (noting expression of this concern by Senator Harkin).

[311] *See supra* notes 225–226 and accompanying text.

require supermajority action to pass proposed bills and take other critical actions. As a result, that system offends the Constitution because the Framers required dispositive decision making in both houses of Congress to proceed by majority, not supermajority, vote.

The Senate enjoys a proud tradition of collegiality and interparty collaboration. In recent years, however, that tradition has morphed into a regime of minority-vote control. In due time, the courts may remedy this constitutional wrong. Before courts act, however, the Senate should search its own soul. Workable remedies that would counteract hastiness and facilitate deliberation in the law-making process are there for the Senate to install, even while honoring the overarching constitutional norm of legislative majoritarianism. It is time for the Senate to embrace such a remedy, regardless of what party now holds a majority of seats or may come to hold a majority of seats in the next election or the next or the next. Deteriorating public perceptions of the Senate counsel such a reform. But, of even greater importance, our Constitution requires it.