

clause problems do not arise? In fact, the Court has done just that, but in a manner that has preserved the ultimate authority of majority rule. By Court tradition, four justices—a minority—can put a case on the docket and, ordinarily, can guarantee that the petitioner seeking review will be able to press his case via full briefing and oral argument. But ultimately, the Court majority of five has the last word—not just on the merits of the case, but on whether the Court itself will in fact issue any opinion. At any time, a simple Court majority of five can dismiss any case on the docket, even if the remaining four justices adamantly object. In short, minority rules such as the “Rule of Four” nest within a framework of simple majority rule.³³

A SIMILAR ANALYSIS APPLIES to the voting rules followed by the House of Representatives. In general, the House follows the Constitution's implicit directive of simple majority rule in performing its basic constitutional functions: enacting legislation, authorizing expenditures, organizing itself, judging its members' elections and qualifications, issuing subpoenas, adjudicating contempts, maintaining order within its own walls, and impeaching executive and judicial officers. True, a labyrinth of House rules—most obviously, a set of rules enabling committees and the House leadership to dictate the House agenda and another set of rules regulating parliamentary procedure—may prevent a given matter from ever reaching the House floor for a simple majority vote. But these internal rules are themselves authorized at the biennial beginning of each new Congress under the aegis of Article I, section 5—and they are authorized by a simple chamber majority in keeping with the Constitution's letter and spirit.³⁴

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

The filibuster rule itself is not approved biennially at the outset of each new congressional term. Rather, this old rule, initially adopted by the Senate in the 1910s and significantly revised in the 1970s, simply carries over from one Congress to the next by inertia, under the notion that the Senate, unlike the House, is a continuing body. Senate rules, once in place, need never be formally reenacted. Similarly, Senate leaders, once in place, need never be formally reelected.³⁵

But the Senate does generally retain the right to oust any holdover leaders at any time and to do so by a simple majority vote—and this majoritarian principle, which clearly applies to holdover Senate leaders, should also apply to holdover Senate rules. All Senate rules, including the filibuster rule, are valid *if and only if a majority of the Senate at any time may change the old rules by simple majority vote*.³⁶

But some senators today seem to believe that a simple Senate majority cannot change the old filibuster rule, even if this Senate majority emphatically wants change. Why not? Because the old filibuster rule says so. That's some catch, that catch-22.³⁷

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

We need not insist that a current Senate majority has the right to change its rules instantaneously and peremptorily. The Senate's presiding officer may properly allow each side ample time to make its case before holding a vote on a Senate rule change. But any attempt to prevent a reform vote

altogether via dilatory tactics—that is, any attempt to indefinitely filibuster attempted filibuster reform—would violate the applicable written and unwritten constitutional principles.

THIS CONCLUSION MAY ASTONISH, coming as it does in the middle of a survey of American institutional practice. Some might think that if the name of the game is actual governmental practice, the fact that the filibuster exists, and the fact that many senators claim that it cannot be altered by a simple majority, are unanswerable game-winners.

It is precisely at this point that this book's general framework proves its worth. Let us, then, carefully apply this framework to the filibuster issue.

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

And that something is majority rule, as is powerfully evident from America's *enacted* Constitution, which teaches us that majority rule does indeed go without saying in the Constitution, in the absence of strong implicit or explicit contraindication. Majority rule supplied the self-evident master norm for state ratifying conventions organized under Article VII. This key fact provides a compelling reason to believe that majority rule likewise provides the self-evident master norm for senatorial legislation under Article I, section 7, and also for senatorial internal rulemaking under Article I, section 5. Thus, unless we find in the written or unwritten Constitution some strong contraindication, majority rule is the Constitution's proper voting protocol when the Senate decides whether to keep or scrap the filibuster rule.³⁸

Nothing in America's *lived* Constitution provides strong contraindication. Although it would be surprising if the daily rhythms and routines of

average Americans decisively answered technical questions concerning the Senate's internal procedures, it is perhaps noteworthy that when average Americans participate in various clubs and the like, they quite often and without much ado practice majority rule.

Likewise, nothing in America's *doctrinal* Constitution, either pre-Warren or post-Warren, supports the entrenched filibuster. Not only have the justices themselves always followed majority rule, but in the 1892 case *United States v. Ballin*, the Court explicitly embraced majority rule as the background master norm for each house of Congress: "[T]he general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations.... No such limitation is found in the Federal Constitution, and therefore the general law of such bodies obtains."

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

Nor, finally, does the history of actual *institutional* practice—from the *Georgian* period to the present—provide solid support for an entrenched filibuster rule. Properly construed and contextualized, the history of Senate practice in fact supports modern-day filibuster reformers.³⁹

Nothing like Rule 22's catch-22 was in place in the age of George Washington or in the Jeffersonian era that followed. Throughout the 1790s and early 1800s, the Senate practiced and preached simple majority rule. Under the procedures that governed the Senate during its earliest years, a senator could move "the previous question" and thereby end debate if a majority of senators agreed; and senators could also call an unruly orator to order at

any time and thereby oblige him to “sit down,” subject to a ruling by the chair and, if necessary, an appeal to the Senate as whole.⁴⁰

Although some scholars have quibbled about the precise operation of these initial rules, the history of the Senate prior to the 1830s offers no notable examples of organized and obstructionist filibustering—and absolutely nothing like a pattern of systematic, self-perpetuating, entrenched frustration of Senate majority rule. Thomas Jefferson, the Senate’s presiding officer from 1797 to 1801, was thus describing actual senatorial norms and usages when he penned the following passages of his 1801 *Manual of Parliamentary Practice for the Use of the Senate of the United States*: “No one is to speak impertinently or beside the question, superfluously or tediously.... The voice of the majority decides. For the *lex majoris partis* is the law of all councils, elections, &c. where not otherwise expressly provided.”⁴¹

For much of the mid-nineteenth century, even as Senate minorities began to develop and deploy dilatory tactics, these tactics typically occurred with the indulgence of the Senate majority. Long-winded speechifying occasionally delayed the Senate’s business, but orations usually did not prevent majorities from ending debate at some point and taking a vote. The Senate in those days was smaller than it is today and had less business to transact. The upper chamber often opted to indulge individual senators as a matter of courtesy. In turn, the indulged senators did not routinely try to press their privileges so as to prevent Senate majorities from governing. For example, in 1850, politicians of all stripes from all regions understood that California’s admission—giving free states a narrow but decisive majority over slave states in the Senate—mattered hugely, *precisely because the Senate’s operative principle in the mid-nineteenth century was in fact simple majority rule*. According to one expert treatise, prior to the 1880s virtually every obstructed measure eventually prevailed against the opposition’s stalling tactics.⁴²

In the late twentieth and early twenty-first centuries, routine filibustering practices have skyrocketed. Yet senators in the modern era have failed to achieve a general consensus via a compelling line of clean, consistent Senate rulings on the key constitutional question. Properly framed, this question is not whether the Senate may choose by inaction and inertia to keep the filibuster, nor whether the Senate may choose to keep the

filibuster by readopting it via a fresh majority vote. Rather, the question is whether the current Senate is simply stuck with the old filibuster rule, even if a current majority emphatically wants to change the rule and explicitly votes to do so. This issue has only intermittently arisen in a clean parliamentary fashion. Over the years, various senators may have quietly favored the old filibuster rule but have not wanted to publicly take the blame for this position, preferring instead to shroud the issue in layer upon layer of procedural complexity.

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

Precursors of this “nuclear option”—also known as “the constitutional option”—were forcefully advocated by prominent senators throughout the twentieth century, and at various moments over the past sixty years these precursors have in fact won the considered support of vice presidents and Senate majority leaders of both parties. Many of the most important filibuster reforms of the twentieth century came about when reformers first threatened the “constitutional option” and then compromised by effectuating their desired reforms in an endgame process that formally obeyed the Senate’s catch-22 rule structure.⁴³

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

should also remind us that, in sharp contrast to the 1860s, when the House got the Senate and the president to bless its use of old House clerks to birth new Houses, the modern filibuster rule has not received any encouragement from the lower house or the executive branch.⁴⁴

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

Just as Americans at the Founding surely understood that no person could be a judge in his own case, thanks in part to Blackstone's clear formulation of the basic principle, so, too, the Founders were intimately familiar with and embraced what Blackstone had to say about the relationship between one legislature and its successor: "Acts of parliament derogatory from the power of subsequent parliaments bind not." Why not? Because, Blackstone explained, prior Parliaments are not legally superior to subsequent Parliaments. By what voting rule would each Parliament proceed? Here, Blackstone was clear: "In each house the act of the majority binds the whole."⁴⁵

The same logic applies on this side of the Atlantic. Each house can make rules for itself. But neither house can entrench rules in a way that prevents a later house from governing itself. Only the Constitution can create entrenched rules of this sort. And on this issue, the rule that the Constitution has entrenched for each house is majority rule.⁴⁶

Because this protocol is established by the Constitution itself, the protocol cannot be changed by either house or by statute. Just as Congress may not properly enact an ordinary statute that changes the constitutional rules

governing how future ordinary statutes are to be enacted, so, too, neither house may properly enact a house rule that changes the constitutional rules governing how future house rules are to be enacted.

HERE IS ONE FINAL WAY of pulling together the basic argument. It is obvious that some specific voting rule must be used to operationalize the Article I, section 5, power and duty of each House to determine its own rules of proceeding. If majority rule is not the implicit rule, what is? Without some jumpstarting rule, the first House and the first Senate in 1789 would have faced an insoluble infinite regress problem. (By what initial voting rule would each house decide what voting rule to use in determining its rules of proceedings? By what pre-initial voting rule would that initial voting rule be decided? By what pre-pre-initial voting rule would the pre-initial voting rule be decided? And so on, without end.) But no such infinite regress in fact occurred in the first Congress because majority rule did in fact go without saying in each house in 1789, just as it had gone without saying in each ratifying convention in 1787–1788. This first set of Article I, section 5, votes thus established the first key point of actual practice.

Just as the first House and the first Senate each used majority rule to decide its procedures, every subsequent House and Senate may and must do the same, for nothing in the Constitution made the Congress of 1789 king over later Congresses. All Congresses are equal in this respect. In fact—and this is a second key point about actual practice—neither house has ever formally required a supermajority for amendment of its rules. Not even Senate Rule 22 has the audacity to openly assert that it cannot be repealed by simple majority vote. Rather, Rule 22 says only that *debate* on its own repeal cannot be ended by simple majority vote.

The question thus becomes, is this supermajoritarian aspect of Rule 22 a genuine rule of debate or a de facto rule of decision? If Rule 22 simply means that the rule itself should not be repealed without a fair opportunity to debate the repeal, then Rule 22 is fully valid. But insofar as Rule 22 in fact allows repeal opponents to stall interminably so as to prevent a majoritarian repeal vote from ever being held, then Rule 22 is to that precise extent operating as an unconstitutionally entrenching supermajority rule of decision rather than a proper rule of debate. It is the right and duty of

each senator to adjudicate for herself whether Rule 22 has in fact come to operate as an improper rule of decision rather than a proper rule of debate. And in adjudicating that question, the Senate, operating as a constitutional court of sorts, acts by majority rule, just as the Supreme Court itself does when adjudicating constitutional (and other) questions.

“This Constitution...shall be the supreme Law”

AMERICA DELIGHTS IN ITS INVENTIONS. From bifocals at the Founding to light bulbs, flying machines, and iPhones in the modern era, we constantly quest for the holy grail of the next new thing. America's lawyers over the centuries have proved especially inventive in devising new institutions and institutional devices to respond to perceived problems. As post-bellum America's economy, society, and laws became increasingly complex, requiring more scientific expertise and bureaucratic rationality within government to regulate both private actors and the government itself, new “independent agencies” arose. And as legislators felt obliged to give more policymaking authority to administrators, Congress sought to reserve a checking role for itself via a newfangled contraption called the “legislative veto.” In the wake of Watergate, a new breed of judicially appointed “independent counsels” emerged to keep all the president's men in line.

This much is well understood by lawyers and scholars of all stripes. What is not well understood is why certain modern institutional innovations have endured while others have imploded. A glance at four of the past century's most notable institutional innovations will suggest a startlingly simple answer: Innovations that utterly disregarded the written Constitution's blueprint ultimately proved structurally unsound and collapsed of their own weight. Innovative institutions carefully erected inside the flexible (but not infinitely flexible) lines of the blueprint remain standing.

CONSIDER FIRST THE *legislative veto*, a device that modern Congresses have insinuated, in some form or other, into hundreds of statutes. A legislative-veto clause purports to vest one or both houses of Congress, or some subset thereof (say, a House or Senate committee) with the legal authority to block—to “veto,” in effect—certain attempted executive-branch imple-