DEBATE

IS THE FILIBUSTER CONSTITUTIONAL?

With the help of the President, Democrats in Congress were able to pass historic healthcare-reform legislation in spite of—and thanks to—the significant structural obstacles presented by the Senate's arcane parliamentary rules. After the passage of the bill, the current political climate appears to require sixty votes for the passage of any major legislation, a practice which many argue is unsustainable.

In *Is The Filibuster Constitutional?*, Professors Josh Chafetz and Michael Gerhardt debate the constitutionality of the Senate's cloture rules by looking to the history of those rules in the United States and elsewhere. Professor Chafetz argues that the cloture rules represent an unconstitutional principle of entrenchment and highlights the absurdity by analogizing to a hypothetical rule requiring a supermajority to unseat an incumbent senator, which would surely not be tolerated. Chafetz concludes that historical practice fails to justify obstructionist tactics and that any constitutionally conscientious senator has a duty to reject the filibuster as it currently operates.

Professor Gerhardt attributes the Senate's behavior to the lack of a majority committed to curtailing abuses of Senate procedure. He argues that the weaknesses of the traditional arguments against the filibuster underscore the filibuster's inherent constitutionality. Gerhardt points out that a majority of Senate seats is *never* subject to election at the same time and that the Constitution does not forbid, but instead expressly permits, the Senate to draft internal procedures. Failing to find an anti-entrenchment principle implied in the constitutional scheme, Gerhardt groups the filibuster with other Senate traditions—such as holds and bitter partisanship—and finds that the solution to unsatisfactory behavior in the legislature is, and always has been, accountability at the ballot box.

OPENING STATEMENT

The Filibuster and the Supermajoritarian Difficulty

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Suppose that the Senate, using its combined powers to "Judge . . . the Elections . . . of its own Members," U.S. CONST. art. I, § 5, cl. 1, and to "determine the Rules of its Proceedings," *id.*, cl. 2, adopted the following rule: "In any election to this body in which a current senator seeks reelection, the current senator shall be deemed reelected *unless* sixty percent or more of the duly qualified voters cast their votes for another candidate." Would this rule be constitutional?

The Seventeenth Amendment provides that "the Senate . . . shall be composed of two Senators from each State, elected by the people thereof," and that "[t]he electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures," but it does not say that the candidate with the most votes must win. U.S. CONST. amend. XVII. Nor does anything in Article I—or anywhere else in the Constitution, for that matter—prescribe majority rule for congressional elections.

Yet it seems clear that this hypothetical supermajoritarian rule would violate some of our most deeply held constitutional values. Our Constitution, written in the name of "We the People," cannot countenance this sort of self-entrenchment by incumbents. That is to say, we understand the concept of an election of representatives to include within it a structural principle of majoritarianism. Our elected representatives cannot create a new voting rule that substantially entrenches the status quo against change. For them to do so would be for them no longer to be "elected by the people."

My contention in this Debate is that the Senate filibuster, as it currently operates, is strikingly similar to the hypothetical rule described above. Just as we must understand the word "elected" in the Seventeenth Amendment to contain a principle of majoritarianism for election to Congress, we must also understand the word "passed" in Ar-

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ticle I, Section 7 to contain a principle of majoritarianism for legislating in Congress.

I should emphasize at the outset that I am interested not simply in the formal rules governing Senate debate but in the way that the filibuster in fact *operates* in the modern Senate. Moreover, I do not argue that any procedural device that delays the implementation of majority will at any given moment is unconstitutional. *All* procedural requirements delay the immediate implementation of majority will. Structural majoritarianism is a matter of degree, and precise lines between acceptable delays in implementing majority will and unacceptable defiance of majority will are hard to draw. Nevertheless, a constitutionally conscientious senator is obligated to try.

The formal rules governing the filibuster are rather simple: a filibuster occurs when a senator or group of senators takes advantage of the Senate tradition of unlimited debate in order to delay or obstruct a measure. The only way to end debate and force a vote on most measures before the Senate is to invoke cloture. Senate Rule XXII(2) provides that, if sixteen senators sign a cloture petition, then on the next business day, the presiding officer will ask whether "it [is] the sense of the Senate that the debate shall be brought to a close?" STANDING RULES OF THE SENATE, R. XXII(2), *as reprinted in* S. DOC. NO. 106-15, at 15-16 (2000). The cloture motion itself is not debatable; therefore, a vote will be taken immediately. If three-fifths of the senators "duly sworn and chosen" vote "yes," then no business is in order other than the matter on which cloture has been invoked, and debate on that matter is limited to thirty hours, at the end of which a vote must be taken. *Id.* There is one exception: invoking cloture on a motion to amend the Senate rules requires two-thirds of the senators present and voting rather than three-fifths of the senators sworn and chosen. *Id.* Moreover, because the Senate, unlike the House, is considered a "continuing body," *see, e.g., Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 512 (1975) ("the House, unlike the Senate, is not a continuing body"), its rules never expire. *But see* Aaron-Andrew P. Bruhl, *Burying the "Continuing Body" Theory of the Senate*, 95 IOWA L. REV. (forthcoming 2010), *available at* http://ssrn.com/abstract=1427456 (presenting a number of arguments against the "continuing body" theory). Senate Rule XXII exists in perpetuity, unless it is amended—and amending it would almost certainly involve invoking cloture, which would require a two-thirds vote.

This formalist account of Senate procedure, however, must be supplemented with an understanding of how the filibuster has actually operated in recent years. Simply put, cloture has now effectively be-

come a requirement for passage of any significant measure. Even a casual glance at the history of cloture motions makes this apparent. When the cloture motion was first introduced into Senate rules in 1917, it required a two-thirds vote to pass. *See* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 198 (1997). From the 66th Congress (1919–1920) to the 91st Congress (1969–1970), there were never more than seven cloture motions filed in a single Congress, and cloture was never invoked more than three times. U.S. Senate, Senate Action on Cloture Motions, http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm (last visited Apr. 1, 2010). It can hardly be said that no contentious legislation came up during this fifty-year period—indeed, it is worth noting that even though Democrats never had a filibuster-proof majority during the 73rd Congress (1933–1934), that Congress managed to pass much of the major legislation of the First New Deal without a single cloture petition having been filed. *See id.*

A rise in filibusters in the early 1970s led to the amendment that gave Rule XXII its present form. From the 94th Congress (1975–1976) to the 102nd Congress (1991–1992), the number of cloture petitions filed ranged from twenty-three to fifty-nine, and cloture was never invoked more than twenty-two times in a Congress. *Id.* The number increased between the 103rd Congress (1993–1994) and the 109th Congress (2005–2006), with between sixty-two and eighty-two motions filed and cloture invoked between nine and thirty-four times. *Id.* And then came the 110th Congress (2007–2008): a whopping 139 cloture motions were filed, with cloture invoked sixty-one times. The 111th Congress is on course for even higher numbers—as of this writing, there have been eighty-two cloture motions filed, and cloture has been invoked forty-four times. *Id.*

A number of factors have contributed to the increased use of filibusters, including changes to procedural mechanisms (the creation of separate legislative "tracks" has allowed other Senate business to continue while one matter is being filibustered, thus lowering the cost of a filibuster), *see* Barry Friedman & Andrew D. Martin, *A One-Track Senate*, N.Y. TIMES, Mar. 10, 2010, at A27; institutional culture (a decline in senatorial bonhomie has increased the willingness of senators to engage in obstructionism), *see* THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 146-48 (2006); and the national political map (partisan realignment has made it more difficult to at-

tract bipartisan support for anything), *see generally* EARL BLACK & MERLE BLACK, THE RISE OF SOUTHERN REPUBLICANS (2002).

Regardless of the precise constellation of causes of this increase in filibusters, two things are clear: the 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 against final passage of a bill need no longer separately justify her decision to vote against cloture. As a functional matter, it can now be said that it requires sixty votes to pass a piece of legislation in the Senate—or, as Roy Edroso eloquently put it on a *Village Voice* blog the day after Republican Scott Brown won a special election to fill Ted Kennedy's Massachusetts Senate seat, "Scott Brown Wins Mass. Race, Giving GOP 41-59 Majority in the Senate." Posting of Roy Edroso to Runnin' Scared, Scott Brown Wins Mass. Race, Giving GOP 41-59 Majority in the Senate, http://blogs.villagevoice.com/runninscared/archives/2010/01/scott_brown_win.php (Jan. 20, 2010); *see also* David R. Mayhew, *Supermajority Rule in the U.S. Senate*, 36 PS: POL. SCI. & POL. 31, 31 (2003) (noting the widespread perception that sixty votes is the threshold for Senate passage).

The question, then, is this: is a constitutionally conscientious senator obligated to reject a system in which a supermajority is required to pass a bill *and* an even larger supermajority is required to alter that supermajority requirement? I think the answer is "yes." As Jed Rubenfeld has persuasively argued, "[w]hat it means for a bill to 'pass' the House or Senate is not open for definition by the House or Senate. It is constitutionally fixed by the implicit majority-rule meaning of 'passed.'" Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73, 83 (1996). Of course, the Constitution itself imposes supermajority requirements in some cases. *See* Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445, 455 n.38 (2004) (listing the seven situations in which the Constitution requires a supermajority vote). But where the Constitution does not specify otherwise, the word "passed"—like the word "elected"—should be understood to prescribe majority rule. It would be odd to operate with a majoritarian assumption when voting for representatives but not when those representatives themselves vote. After all, if Congress can require sixty votes to alter the status quo, then why not ninety-nine? Why can it not declare its own legislation unrepealable? Surely that sort of entrenchment of legislat*ion* is every bit as antithetical to popular sovereignty as the entrenchment of legislat*ors* in the hypothetical at the beginning of this Opening Statement.

Supporters of the filibuster may, at this point, turn to history. They will say that the United States has a long history of unlimited debate and that this history supports the constitutionality of the filibuster. *See* Gerhardt, *supra*, at 451-55. But of course today's filibuster is not about unlimited debate—indeed, it is not about debate at all. It is simply about permanent minority obstruction. And that has a somewhat lesser history. The use of unlimited debate solely for the purposes of obstruction was almost unknown in the British House of Commons until Charles Stewart Parnell was elected in 1875. Parnell, "who employed parliamentary obstruction to block all government business so that Irish reform would be effected," can be understood as "the real founder of wilful or conscious obstruction" in the House of Commons. Geddes W. Rutherford, *Some Aspects of Parliamentary Obstruction*, 22 SEWANEE REV. 166, 174 (1914); *see also* 1 JOSEF REDLICH, THE PROCEDURE OF THE HOUSE OF COMMONS 138-40 (A. Ernest Steinthal trans., 1908). The reaction to this new method of obstruction was swift: in 1882, the House of Commons adopted *by majority vote* (indeed, by a slim majority of 304 to 260) a resolution introduced by William Gladstone giving the Speaker the authority to inform the House "that [a] subject has been adequately discussed." 137 H.C. Jour. 505 (Nov. 10, 1882). Thereafter, a majority could vote to end debate and force a vote on the issue in question. *Id.* In Britain, once the power of unlimited debate came to be used for long-term obstruction, it was quickly taken away.

In the United States, too, the history is not unambiguously pro-filibuster. Jefferson, the great parliamentarian of the early Republic and President of the Senate from 1797 to 1801, wrote, "No one is to speak impertinently or beside the question, superfluously, or tediously." THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE IN THE UNITED STATES 27 (Gov't Printing Office 1993) (1801). Indeed, the rules adopted by the First Senate provided that the presiding officer could call a member to order, at which point the member "shall sit down." 1 SEN. J. 12, 13 (1789). True, dilatory tactics were first used in 1790, but only to delay a vote long enough that an ill senator—who happened to be the decisive vote—could participate. *See* Fisk & Chemerinsky, *supra*, at 187-88 (describing the incident). This was a use of the filibuster in the service of majoritarianism, not in derogation of it. Over the next sixteen years, the "previous question" motion provided for in the First Senate's rules, *see* 1 SEN. J. 12, 13 (1789), was used on four occasions to end debate. Richard R. Beeman, *Unlimited Debate in the Senate: The First Phase*, 83 POL.

SCI. Q. 419, 421 (1968). When the "previous question" motion was abolished in 1806, it was because of "the belief that the rule's infrequent use made it unnecessary," not because of any desire to allow unlimited minority obstruction. *Id.*

The great nineteenth-century champion of the use of unlimited debate for obstructionist purposes was none other than John C. Calhoun. *See id.* at 421-31; Fisk & Chemerinsky, *supra*, at 189-92. And as Fisk and Chemerinsky note, the nineteenth century's smaller volume of legislation allowed the majority to wait out filibusters so that "almost every filibustered measure before 1880 was eventually passed." Fisk & Chemerinsky, *supra*, at 195. When that ceased to be the case, the Senate adopted the first cloture rule in 1917. *Id.* at 198. For most of the twentieth century, of course, the filibuster was largely used to obstruct civil rights legislation. *Id.* at 199. John C. Calhoun and Strom Thurmond are indeed precedents for the power of a minority to indefinitely obstruct legislation in the Senate—but are they precedents that filibuster proponents are proud to claim, or does their precedential value partake more of *Plessy* than of *Brown*?

Constitutional structure cannot support the filibuster as it exists today any more than it can support the hypothetical rule with which this Opening Statement began. And history establishes no unambiguous right to obstruct. Of course, these observations raise at least as many questions as they answer. All procedural rules delay the implementation of majority will—how much delay is too much? All rulemaking has at least something of an entrenching effect—how much entrenchment is too much? These questions do not admit of easy answers, and they are certainly not suitable for judicial resolution. *See* JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 57-59 (2007) (arguing that each chamber's internal rules are generally nonjusticiable). But the fact that courts underenforce these constitutional norms makes it all the more important for constitutionally conscientious members of Congress to take them very seriously. *See* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 586 (1975) (arguing that judicial restraint in addressing certain constitutional issues does not "suggest[] that the legislature should exercise restraint in assessing the constitutionality of its own product"); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1240 (1978) ("[T]he legislature is permitted to refine . . . [certain constitutional] notions beyond the capacity of the judiciary to do so."). senators will have to draw their own lines and devise their own

remedies. But whatever line they draw, the filibuster as practiced today must be on the wrong side.