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.

REBUTTAL

The Filibuster and the Conscientious Senate

Michael J. Gerhardt[†]

My friend Professor Chafetz never disappoints, and his Opening Statement is as thoughtful and novel a critique of the filibuster as any I have read. His principal argument is that the filibuster has been increasingly used in violation of Article I, Section 7's "principle of majoritarianism for legislating in Congress." While I do not agree with this argument, I do believe that the lawmaking process within the Senate has become frustrating—albeit not because of the filibuster or something unconstitutional. The problem is that the Senate lacks a majority genuinely committed to challenging abuses of Senate procedures and to ruling on many issues.

Professor Chafetz acknowledges but does not dawdle over either of the conventional arguments against the constitutionality of the filibuster. Nevertheless, they are worth examining briefly because understanding why they are wrong underscores the constitutionality of the filibuster. The first objection is that the filibuster as a delaying mechanism is unconstitutional because it is not specifically authorized by the Constitution. (I am not sure whether Professor Chafetz agrees with this objection because he does not argue that any procedural device that delays the implementation of majority will at any given moment is unconstitutional.) The first problem with this objection is that Article I, Section 5 expressly vests the House and the Senate each with the authority to "determine the Rules of its Proceedings." U.S. CONST., art. I, § 5, cl. 2. The Framers were not averse to establishing specific procedural requirements in the House or Senate (such as quorum requirements for doing business or requirements that senators be on oath or affirmation in impeachment trials), but in Section 5 they specified no limitations on the procedures that the House or Senate may devise for its proceedings. *See id.* This Section plainly grants to the Senate plenary authority to devise procedures for internal governance, and the filibuster is a rule for debate. Second, historical practices overwhelmingly support the filibuster's constitutionality. *See generally* Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21

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CONST. COMM. 445, 451-55 (2004). Professor Chafetz acknowledges that the filibuster, in one form or another, has been a feature of the Senate since 1790. It is one of many countermajoritarian procedures, including unanimous-consent requirements governing what comes to the floor for consideration in the Senate.

The second conventional objection to the filibuster is that Senate Rule XXII, which allows a filibuster of a motion to amend the Rule and requires a supermajority to end any such filibuster, STANDING RULES OF THE SENATE, R. XXII, *as reprinted in* S. DOC. NO. 106-15, at 15-17 (2000), is unconstitutional. The argument (about which I take Professor Chafetz to be agnostic) is that Rule XXII violates an anti-entrenchment principle implied in Article I that bars a present majority from binding the hands of a future one to act as it pleases with respect to any legislative matter.

There is, however, no such principle. To begin with, Article I says nothing about, much less anything against, entrenchment, and Senate Rule XXII's procedures for amending Rule XXII are consistent with the plenary authority expressly given to the Senate to determine the rules for its proceedings. Second, historical practices amply uphold Rule XXII's entrenchment. The Senate has consistently stood behind this Rule and consistently required that efforts to amend it be done in accordance with the Senate's rules, including the supermajority voting requirements set forth therein. Third, Rule XXII is one of many standing rules in the Senate that have become entrenched because of the Senate's structure. Article I, Section 3 has structured the Senate "so that one third may be chosen every second Year." U.S. CONST., art. I, § 3, cl. 2. The Senate has been designed, in other words, so that every election cycle, only a third of its seats are up for election. This design makes the Senate unique among legislatures as a "continuing body" because two-thirds of its members carry their terms over from one legislative session to the next. Indeed, in dicta, the Supreme Court has said as much on three separate occasions.

The anti-entrenchment principle presumes that entrenchment is illegal because it prevents a newly elected majority from adopting whatever rules it prefers, but in the Senate there never is a majority of seats subject to election at any one time. There is thus no group in the Senate in a position analogous to the full membership of the House, in which every two years there is, by design, a genuinely new majority that is elected. Professor Chafetz's concern is with majority rule, but if a majority changes in the Senate it is because of the outcomes of elections involving only one-third of the seats. I know of no

constitutional principle investing a third of a legislative body with special power to remake the body itself.

This brings us to Professor Chafetz's principal concern that "cloture has now effectively become a requirement for passage of any significant measure." Professor Chafetz is right that the filibuster has been increasingly used to obstruct legislative action, but it is a mistake to infer any constitutional violation from this obstruction. First, filibusters are not just directed at bills. Many are directed at judicial and other nominations. Professor Chafetz is relying on the language of Article I, Section 7 for the basis of the "principle of majoritarianism," but this language only pertains to bills or resolutions requiring presidential signatures—not to presidential nominations. One must look elsewhere for textual support to constitutionalize majority rule on nominations, but there is none.

Second, Article I, Section 7 speaks only to what may happen once a bill reaches the floor of the House or Senate. It says nothing about the process through which a bill—or any other matter that may be filibustered—may reach the Senate floor. Article I, Section 5 obviously governs that process, while Article I, Section 7 governs something different—the procedures after passage of a bill in the House or Senate.

Third, the 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.

Nor does Article I establish a time limit by which a matter must be resolved in the Senate. It is impossible to square a "principle of majoritarianism" with the fact that sometimes bills or nominations make it through committee with little or no time left for the Senate to act. I doubt Professor Chafetz is arguing that this principle of majoritarianism requires that a bill or nomination must come to the Senate floor even if no time is left for the Senate to act. American history is replete with bills dying in this manner.

Fourth, majoritarianism is not a fixed constitutional principle. In upholding a state constitutional and statutory requirement that certain changes not be made in the state constitution unless approved by at least sixty percent of the voters in a referendum election, the Supreme Court declared, "Certainly any departure from strict majority rule gives disproportionate power to the minority. But, there is noth-

ing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue." *Gordon v. Lance*, 403 U.S. 1, 6 (1971). This ruling underscores the fact that while there may be constitutional limits to the Senate's internal rulemaking authority, mandatory majority rule is not one of them.

The deliberative process within the Senate is not, however, without problems. Among them is the two-track system for filibusters. I agree that silent filibusters—those that have the effect of deflecting business simply as a result of being threatened—are problematic. They 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. One cannot, or at least I will not, argue that there was anything noble in filibustering civil rights legislation in the 1950s and 1960s; however, at least those filibusters had to be above radar and the people making them were politically accountable. The 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.

Beyond silent filibusters, there are two other problems impeding majoritarianism in the Senate. One is the problem of holds. A longstanding practice of the Senate is the entitlement of each senator to ask the majority leader to place a temporary, anonymous hold on virtually any piece of legislative business headed to the floor. Such holds (sometimes done tag team by members of the opposition party) have been used to obstruct more than a few of President Obama's nominations. This obstruction is often done merely to make the President or Senate Democrats look bad. It is, however, telling that once the Democrats challenged the holds and threatened filibusters against some judicial nominations, the latter were approved unanimously or nearly unanimously. (Two recent examples are the unanimous confirmations of Barbara Keenan to the Fourth Circuit and Rogeriee Thompson to the First Circuit.) An obvious difficulty with taming abusive holds is that the holds are done anonymously, so it is practically impossible to hold senators politically accountable for abusing their hold privileges. It is up to senators to keep each other honest in their deployment of holds.

Another, more important reason for obstruction in the Senate is the absence of a majority committed to ruling on everything. As reflected in the unanimous confirmations of Judges Keenan and Thompson, the votes of eleven Republican senators for President Obama's jobs bill, and the support of nine Republican senators for Jus-

tice Sonia Sotomayor's confirmation, party fidelity does not invariably preclude the Senate from acting. But, in order for there to be obstruction, there has to be something to obstruct, and on many issues there is no working majority. In their 2006 study of the filibuster, Gregory Wawro and Eric Schickler suggested that "the great irony [is] that filibusters have become costless for the minority because the costs to the majority of engaging in wars of attrition have become prohibitively high." GREGORY J. WAWRO & ERIC SCHICKLER, FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE 263 (2006). They concluded that

> [t]he majority could fully clamp down on the minority as was done in the House over a century ago, but to do so would likely require a majority of senators to agree to give up the wellspring of their power by curtailing the right of recognition and other prerogatives. At this moment, an insufficient number of senators seem willing to start down the path that would lead to quotidian majority rule.

Id. at 281. The numbers within the Senate might sometimes fool us into thinking there is a majority disposed to rule. The fact that for the past year Democrats had sixty seats in the Senate and that Republicans had fifty-five seats from 2004–2006 did not ensure that in either period there was a majority committed or prepared to consistently ruling the Senate. Where there is a Senate majority determined to act, it is nearly impossible to stop, as recently demonstrated in the fact that the opposition of every Republican in the Senate did not prevent the passage of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010). But sometimes neither party controls a majority of Senate seats, and sometimes there are no working majorities on certain issues. The Constitution cannot establish a majority where there is none.

The solution to this scenario is not judicial review or deviation from the rules in order to amend them but rather the electoral process. Using elections to hold public officials accountable and not changing the rules in the middle of the game are both among our longstanding traditions. While the upcoming mid-term elections might not change the Senate's leadership, it is through such elections that the will to govern may be fortified or eroded.

CLOSING STATEMENT

Fixing the Filibuster

Josh Chafetz

Michael Gerhardt is one of the smartest and most knowledgeable constitutional scholars around; anyone who disagrees with Professor Gerhardt about an issue of constitutional law would do well to reexamine her own views. It is with a sigh of relief, then, that I realize that Professor Gerhardt and I agree about the filibuster significantly more than we disagree. First, we agree that the increased use of the filibuster has more or less made cloture a de facto requirement for the passage of most bills through the Senate. Second, we agree that, in Professor Gerhardt's words, lawmaking in the Senate "has become frustrating." Third, we agree that neither judicial review nor the flouting of Senate rules is the appropriate response (although I would add the caveat that, just as "a legislative act contrary to the constitution is not law," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), so too a resolution contrary to the Constitution cannot create a binding Senate rule). And fourth, we agree that the two-track system, the increase in the use of "holds," and the sometime timidity of the Senate majority are significant problems (though happily, the recent passage of healthcare-reform legislation suggests that the majority may have taken this latter message to heart).

We do, however, differ on at least one key point: I think that the filibuster as currently practiced is unconstitutional, and Professor Gerhardt does not. This point of disagreement is an important one, because if I am right, a senator who takes her oath seriously, *see* U.S. CONST. art. VI, § 3, is obligated to take steps to alter or abolish the filibuster so as to make Senate rules constitutional. If Professor Gerhardt is right, then senators need only make policy calculations about the filibuster. With some trepidation, then, I am compelled to press my point.

Professor Gerhardt begins with a textual argument: the Rules of Proceedings Clause, *id.* art. I, § 5, cl. 2, contains "no limitations on the procedures that the House or Senate may devise for its proceedings." This, of course, is true, but it cannot be the end of the matter. Surely, the Rules of Proceedings Clause is subject to limitations laid out elsewhere in the Constitution. I take it, for example, that a Senate rule banning practitioners of certain religions from serving on committees would be an unconstitutional violation of the Religious Test Clause,

id. art. VI, § 3, even thought it falls within the ambit of the Rules of Proceedings Clause. Likewise, the hypothetical with which I began my Opening Statement posited an internal Senate rule to govern the Senate's resolution of disputed elections. Specifically, the hypothetical rule provided that an incumbent would be deemed reelected unless a challenger received sixty percent or more of the vote. Professor Gerhardt does not respond to my hypothetical, but for those who share my conclusion that the hypothetical rule is unconstitutional, it establishes two important points. First, it makes it clear that there are constitutional limitations on each chamber's powers under the Rules of Proceedings Clause—not *every* rule a chamber might devise is constitutional. And second, it suggests that the Senate's rulemaking power might be limited by an implicit principle of majoritarianism—that the phrase "elected by the people" in the Seventeenth Amendment forbids the Senate from creating rules that require a supermajority for election to Congress. So, while it is true that the Rules of Proceedings Clause does not, by itself, limit the kinds of rules the Senate can make, other constitutional principles do. And in at least one case—my hypothetical—that limiting constitutional principle is an implicit guarantee of majority rule.

Of course, the mere fact that "elected by the people" in the Seventeenth Amendment seems to carry a requirement of majoritarianism does not necessarily mean that "passed" in Article I, Section 7 carries the same requirement. Here, Professor Gerhardt relies on both the long history of Senate filibusters and the fact that the filibuster is hardly alone among Senate procedures in frustrating majority will. But I remain unconvinced. As to the historical practice, I spent a good portion of my Opening Statement on the issue, and I will not rehash that discussion here. My conclusion there was that the filibuster as practiced today is qualitatively different from, and therefore cannot be justified by, the historical practice. Early filibusters may have been able to delay legislation, but they did not permanently obstruct it. When filibusters did begin to permanently obstruct legislation, the cloture rule was introduced (in 1917) and then made easier to invoke (in 1975). Only in the last few years has cloture become necessary on almost every piece of significant legislation.

Today, the filibuster operates as a standing requirement that important legislation (outside of the budget process) needs sixty votes to pass. This cannot be justified by the fact that a few senators in 1790 kept the floor and stalled so that the absence of an ill colleague on a rainy day would not result in a bill's passage. *See* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 187-88 (1997) (describing the 1790 incident). Although that incident may some-

times be called a "filibuster," it has very little in common with today's filibuster. We should not be fooled by linguistic drift. *Cf. In re Erickson*, 815 F.2d 1090, 1092-93 (7th Cir. 1987) ("[I]f a change in language or function should cause a new name to be applied to [an old idea or practice] . . . it would be necessary to examine the function of the denotation . . . .").

Professor Gerhardt also suggests that the filibuster is just one of many antimajoritarian rules of legislative procedure—it cannot be unconstitutional unless they all are, the argument goes. Professor Gerhardt gives the examples of committee power, holds, and unanimous consent agreements as limits on majoritarianism. But, on closer examination, none of these results in the permanent minority obstruction of legislation the way today's filibuster does. First, consider committees: Obviously, if a committee approves a measure, it still must go to the full chamber; there is nothing antimajoritarian about this. But, Professor Gerhardt says, when a committee disapproves a measure, it can effectively kill it. This overlooks the fact, however, that both chambers have mechanisms by which a determined majority can circumvent a hostile committee. In the House, that mechanism is a discharge petition, which requires the signatures of a majority of Representatives. *See* CONGRESSIONAL QUARTERLY, HOW CONGRESS WORKS 86-87 (4th ed. 2008). In the Senate, there are two options. A bill can be introduced directly on the Senate floor, as was done with the 1964 Civil Rights Act, where the floor leaders sought to avoid getting bogged down in the Judiciary Committee chaired by Senator James Eastland, a Democrat from Mississippi. *See* CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 132-35 (1985). Alternatively, because the Senate does not require amendments to be germane, any member can offer a bill that is trapped in committee as an amendment to a bill that is already on the floor. *See* CONGRESSIONAL QUARTERLY, *supra*, at 108. Either way, the committee has been circumvented.

Holds are antimajoritarian, but only because they are parasitic on the filibuster. As Professor Gerhardt notes, the hold is an informal device whereby senators anonymously ask the majority leader not to bring business to the floor for a certain period of time. Sometimes this is done for good reason (e.g., to accommodate senators' schedules or to allow more time for consideration of a measure); other times, members will serially file holds in an attempt to forestall *any* consideration of the measure. But the majority leader only respects holds of the second kind because of the possibility of a filibuster. In

essence, a hold functions as the threat of a filibuster, should the matter be brought to the floor. Filibuster reform, then, would *also* be hold reform.

Finally, Professor Gerhardt points to the large amount of business done in the Senate by unanimous consent as evidence of widespread antimajoritarianism. But unanimous consent is, in the end, an expediting procedure. Absent unanimous consent, there remains a regular order of business, and matters can still be considered in this way. *See* CONGRESSIONAL QUARTERLY, *supra*, at 109-18. Unanimous consent agreements governing Senate debate are so popular precisely because they represent a precommitment by all senators not to filibuster.

In short, the filibuster as practiced today requires a supermajority vote for the passage of most legislation. (Professor Gerhardt correctly notes that I am primarily interested in legislation. For most nominations, recess appointments can be used to circumvent filibusters. *See* U.S. CONST. art. II, § 2, cl. 3; Sheryl Gay Stolberg, *Obama Bypasses Senate Process, Filling 15 Posts*, N.Y. TIMES, Mar. 28, 2010, at A1. For judicial nominations, I think the Senate's refusal to vote may well violate its constitutional obligation to give "Advice and Consent." U.S. CONST. art. II, § 2, cl. 2.) Although other devices may slow or burden majority rule, no other device in Congress allows for permanent minority obstruction in this way. This makes today's filibuster qualitatively different from the "filibusters" of early American history, and it also makes it qualitatively different from other procedural rules in Congress. In the end, and despite Professor Gerhardt's thought-provoking and careful arguments to the contrary, I remain convinced that the closest analogue to today's filibuster is the hypothetical—and unconstitutional—rule with which I began my Opening Statement.

What, then, is to be done? First, I wholeheartedly agree with Professor Gerhardt's suggestion, also made recently by Barry Friedman and Andrew Martin, that abolition of the two-track system for filibusters would be a step in the right direction. Barry Friedman & Andrew D. Martin, *A One-Track Senate*, N.Y. TIMES, Mar. 10, 2010, at A27. It would preserve the Senate's tradition of unlimited *debate*, while abolishing obstruction unrelated to debate. A constitutionally conscientious senator has a number of other options, as well. At one extreme would be some version of the "nuclear option"—either a ruling by the presiding officer (sustained by majority vote) that the supermajority requirement for cloture is unconstitutional, or a ruling by the presiding officer that the Senate is not a continuing body, thus allowing the adoption of new rules (again, by majority vote) at the beginning of the next Congress. One less extreme response would be to institute a

"declining filibuster," whereby the number of votes needed to invoke cloture on a measure would gradually decline until a bare majority sufficed. *See* S. Res. 416, 111th Cong. (2010) (pending resolution to amend Senate rules to create a declining filibuster); Sen. Tom Harkin, *Fixing the Filibuster*, HUFFINGTON POST, Feb. 12, 2010, http://www.huffingtonpost.com/sen-tom-harkin/fixing-the-filibuster_b_459969.html (explaining the proposal). A related solution would be to treat the failure to invoke cloture as a suspensive, rather than an absolute, veto. This would allow forty-one senators to delay a final vote for a certain amount of time but not to prevent one indefinitely. *See* Gerard N. Magliocca, *Reforming the Filibuster*, 105 NW. U. L. REV. (forthcoming 2011), *available at* http://ssrn.com/abstract=1564747.

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. I think a constitutionally conscientious senator could support any of these proposals (or, indeed, some combination of them). But despite Professor Gerhardt's spirited defense of the filibuster's constitutionality, I end my Closing Statement on the same note on which I ended my Opening Statement: a constitutionally conscientious senator cannot support the practice of the filibuster as it currently exists.

CLOSING STATEMENT

Still Standing After All These Years

Michael J. Gerhardt

Upon seeing Niagara Falls for the first time, Oscar Wilde reputedly remarked that "[i]t would be more impressive if it flowed the other way." In his thoughtful, well-argued Opening and Closing Statements, Professor Chafetz has tried mightily to reverse the flow of constitutional support for the filibuster, but I believe his efforts are in vain. The filibuster still stands because its constitutional support is so strong. Professor Chafetz's novel arguments might obscure the strength of this support as well as the fact that, even though they are longstanding, the arguments against the constitutionality of the filibuster have never prevailed in any forum, with the possible exception of the academy. As the history of the filibuster shows, the filibuster's constitutional pedigree is sufficiently strong that if amended, it will be done—as it always has been done—in accordance with the Senate rules and, even then, as a reaction to enormous pressure from within the Senate and the American people.

Professor Chafetz's first, strong push against the constitutionality of the filibuster is through his hypothetical Senate rule requiring that senators must be elected by at least sixty percent of the popular vote. He suggests that this hypothetical rule is unconstitutional for the same reason the filibuster is—namely, because each violates a constitutional principle of majoritarianism.

The analogy does not work, however, for several reasons. First, it obscures the fact that Article I, Section 5, contains no internal constraint on the Senate's power to "determine Rules of its Proceedings." U.S. CONST. art. I, § 5. If the filibuster is unconstitutional, it is because it violates some external constraint—some fundamental right or principle—derived from another part of the Constitution. Professor Chafetz's hypothetical is unconstitutional precisely because it violates two external constraints: the Qualifications Clause in Article I (which the Supreme Court in *Powell v. McCormack*, 395 U.S. 486, 547-48 (1969), construed as setting forth the only three permissible limitations on qualifications for being seated in Congress) and federalism principles (particularly state sovereignty to organize local elections in accordance with other constitutional provisions, including the Seventeenth Amendment). Obviously, Rule XXII, STANDING RULES OF THE SENATE, R. XXII, *as reprinted in* S. Doc. 106-15, at 15-17 (2000), does not violate the Qualifications Clause or state sovereignty..

The one external constraint that Professor Chafetz cites as the principal limitation on the filibuster—Article I, Section 7—is inapplicable to both his hypothetical and the filibuster. Section 7 defines the procedures to be followed in order for a bill to become law after it has "passed" the Congress. Professor Chafetz's hypothetical is not, however, the kind of legislative action to which Section 7 applies. The plainest, most sensible reading of Sections 5 and 7 together is that the former pertains to the Senate's power to devise the rules for its internal governance and the latter dictates the procedure after a bill has "passed" on the floor. By its plain language, Section 7 does not apply to internal governance. It makes little or no sense to construe it as overriding the plenary authority over internal governance that is given just two sections before in Section 5, especially because the two Sections plainly deal with different phases of the lawmaking process.

Professor Chafetz's novel reading of Section 7 amounts to a constitutional entitlement of a bill to reach the floor of the House or Senate. This is an inevitable consequence of his principle of majoritarianism, because it would be impossible, in the absence of such an entitlement, to know for sure whether the principle was actually satisfied. There is, however, nothing in the language of the Constitution—or any other source of which I know—that would provide such a special entitlement for legislation. Professor Chafetz would agree, I am sure, that the lawmaking process in Article I was designed to be cumbersome—to make it harder, not easier, to enact laws.

Professor Chafetz's strong, second push against the constitutionality of the filibuster is to question its historical support. Professor Chafetz suggests that the Framers did not envision a filibuster in its present form, though, as he acknowledges, the practice of endless debate traces its roots to ancient Rome. More relevantly, the Senate has employed this practice from the beginning. As Professors Catherine Fisk and Erwin Chemerinsky note in their extended study of the filibuster, "[t]he strategic use of delay in debate is as old as the Senate itself. The first recorded episode of dilatory debate occurred in 1790, when senators from Virginia and South Carolina filibustered to prevent the location of the first Congress in Philadelphia." Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 489 STAN. L. REV. 181, 187 (1997). Similarly, Robert Caro, in his study of Lyndon Johnson's Senate years, depicts the uninterrupted use of the filibuster (and functionally identical devices) from 1790 to the 1950s, *see* ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE 91-93 (2002), while Professors John McGinnis and Michael Rappaport conclude, af-

ter studying the filibuster's history, that "the continuous use of filibusters since the early Republic provides compelling support for their constitutionality." John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 497 (1995). Professor Chafetz suggests that the filibuster to which these studies refer is not the same as the one to which he objects, though this seems to be a distinction without a difference since Rule XXII is directly traceable to and based on these earlier, longstanding practices.

The House, too, has employed several supermajority voting requirements, sometimes to obstruct lawmaking. Indeed, the filibuster was used in the House of Representatives until 1842, when the House adopted a permanent rule limiting the duration of debate. Moreover, the House "often conducts business under suspension of the rules, which requires two-thirds support." GREGORY J. WAWRO & ERIC SCHICKLER, FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE 235 (2006). The House "resorts to this procedure" to "expedite the passage of legislation," though it is significant that expediting legislation in the House requires more than a majority's support. *Id.* Professor Chafetz quotes approvingly from Jed Rubenfeld's article defining the term "passed" in Article I, Section 7. Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73, 83 (1996). The most important thing about Rubenfeld's article, however, is that it was a failed attempt to persuade the House to abandon its rule requiring that at least sixty percent of the House had to agree to allow a vote on a tax increase. *Id.* at 73.

Third, Professor Chafetz pushes particularly hard against the argument in my Rebuttal that the filibuster is analogous to other countermajoritarian practices of the Senate, such as unanimous-consent requirements, holds, Senate committee chairs' decisions over the scheduling of committee hearings and votes, blue slips, and committee actions (or nonactions). In a recent study, the Congressional Research Service identified five such practices, *see* WALTER J. OLESZEK, SUPER-MAJORITY VOTES IN THE SENATE 2 (2008), not including a motion to amend the Senate rules governing impeachment trials. *See also* Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445, 466 (2004). Professor Chafetz argues that these practices are not analogous to the filibuster because none of them is necessarily fatal. Of course, the same could be said about the filibuster; it, too, is not necessarily obstructive. Nevertheless, Professor Chafetz suggests that these procedures differ from the filibuster in that they

allow for ways, such as discharge petitions, by which a majority might maneuver around them.

There are two problems with this argument. The first is that discharge of a bill languishing in committee is not possible in the absence of a hearing, and committee chairs have complete control over the scheduling—or nonscheduling—of hearings. It is practically impossible to discharge a bill on which the committee has never scheduled or held a hearing. Second, and more importantly, discharging legislation from a committee is rare. It is rare because the Senate rules allow a discharge petition to be subject to the same procedures as other legislative business, including Rule XXII. A discharge petition is subject, therefore, to a filibuster. Hence, it is not fully accurate to say that bypassing committees is achievable only with a simple majority. Third, apart from the filibuster, "[t]here are essentially three features of the [Senate] rules that form the basis of the institution's tradition of obstruction: the right of recognition, the absence of a previous question rule, and the lack of a germaneness rule." WAWRO & SCHICKLER, *supra*, at 13. The first of these is the right of each senator to be recognized by the presiding officer when she seeks the floor; the second is a device by which a majority can block rather than force a vote on a bill; and the third is the longstanding practice allowing senators to speak on "any topic of her choosing." *Id.* at 15. Obstructing final floor votes on legislation is nothing new in the Senate; a constitutional entitlement to such votes *would* be new to the Senate.

Professor Chafetz also questions whether precedent supports the constitutionality of the filibuster—though it does, in more than one way. To begin with, the Senate has an unbroken tradition of amending its rules in accordance with its rules. Moreover, on four occasions, the Senate has expressly refused to recognize the unconstitutionality of Rule XXII or the constitutional entitlement of a majority to amend Rule XXII without having to comply with Senate rules. On all these occasions, the Senate rejected vice-presidential judgments that Rule XXII violated majority rule. On three other occasions, the Supreme Court has explicitly recognized that the Senate is "a continuing body," a dicta that is completely consistent with both the legality and necessity of standing Senate rules. On yet another occasion, the Supreme Court rejected the kind of principle for which Professor Chafetz is arguing when it held that the Constitution does not "require[] that a majority always prevail on every issue." *Gordon v. Lance*, 403 U.S. 1, 6 (1971). Together, these precedents provide forceful support for the filibuster *and* its entrenchment within Rule XXII.

Professor Chafetz does not comment on the Senate's design, which provides additional constitutional support for the Senate's standing rules, including Rule XXII. Such rules are fully consistent with the Senate's design as "a continuing body," two-thirds of which carries over from one legislative session to the next. The argument that Rule XXII violates an anti-entrenchment principle implicitly incorporated into Article I depends in part on the rights of newly elected or reelected senators to determine their internal rules of governance. It makes no sense, however, to give such rights to senators who have not gone through the special circumstances that are supposed to give rise to such rights in the first place.

The question remains how to fix the filibuster. Professor Chafetz's answer, that the Senate must break its rules, would produce disastrous consequences. It would signify the end of the Senate's numerous other countermajoritarian features, practices, rules, traditions, and norms. More importantly, it would produce a terrible precedent that would legitimize a majority's breaking the rules whenever it liked. Just how terrible the Senate considers such a precedent to be is evident from the fact that the Senate has steadfastly refused to create it.

The Constitution leaves the fate of the filibuster in the hands of senators and the American people. The fact that the filibuster is a practice that many people dislike does not make it unconstitutional. Nor does the fact that it is constitutional mean that it must be done. A tax increase is a good analogy; it might be constitutional but it's generally a bad idea. We can, however, keep faith with the principle of majoritarianism without constitutionalizing it. If the Senate's deliberative function is broken, it is because a majority lacks the courage of its convictions. This is not always true, as reflected in the Senate's passage of significant education, economic, and healthcare legislation within the past twelve months. Nevertheless, the place to find or fortify the courage to change the filibuster is the electoral process. The filibuster will not likely change until or unless the American people want to change it. As history shows, they sometimes do, and when they do, the filibuster will have met its match. But until then, the filibuster still stands.

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