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# The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate

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“If this precedent is pushed to its logical conclusion, I suspect there will come a day when all legislation will be done through reconciliation.”

— Senator Tom Daschle, on the prospect of using budget reconciliation procedures to pass tax cuts in 1996<sup>1</sup>

*Passing legislation in the United States Senate has become a de facto super-majoritarian undertaking, due to the gradual institutionalization of the filibuster — the practice of unending debate in the Senate. The filibuster is responsible for stymieing many legislative policies, and was the cause of decades of delay in the development of civil rights protection. Attempts at reforming the filibuster have only exacerbated the problem. However, reconciliation, a once obscure budgetary procedure, has created a mechanism of avoiding filibusters. Consequently, reconciliation is one of the primary means by which significant controversial legislation has been passed in recent years — including the Bush tax cuts and much of Obamacare. This has led to minoritarian attempts to reform reconciliation, particularly through the Byrd Rule, as well as constitutional challenges to proposed filibuster reforms.*

*We argue that the success of the various mechanisms of constraining either the filibuster or reconciliation will rest not with interpretation by*

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<sup>1</sup> 142 CONG. REC. 11941 (1996).

*the Senate Parliamentary or judicial review by the courts, but in the Senate itself, through control of its own rules. As such, the battle between majoritarian and minoritarian power in the United States Congress depends upon individual incentives of senators and institutional norms. We show that those incentives are intrinsically structured toward minoritarian power, due to: particularism, arising from the salience of localism; institutionalized risk aversion, created by re-election incentives; and path dependence, produced by the stickiness of norms. Consequently, filibuster reform is likely to be continually frustrated, as the 2012–2013 skirmish recently illustrated, and minority dominance will continue unless there is significant institutional change in Congress. Meanwhile, reconciliation will become increasingly central to lawmaking, constituting the primary means of overcoming obstructionism and delay in U.S. policymaking and social reform.*

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#### INTRODUCTION

On January 18, 1973, a mild-mannered economist named Charles L. Schultze testified before a joint House-Senate committee on the budget process, a subject he learned something about as budget director for President Lyndon B. Johnson.<sup>2</sup> The tone was informal; one congressman told Schultze the committee hoped to “pick [his] brains” about its task, a “tough challenge and a real assignment as you well know.”<sup>3</sup> That was an understatement: the committee’s charge was to reformulate the budgetary apparatus of the U.S. Congress.

Over the previous few decades, Members of Congress appeared to have slowly realized that their budgetary process had become unsustainable. The body had abandoned budget reform efforts decades earlier<sup>4</sup> and failed to control deficits and reduce spending during the late 1960s and early 1970s.<sup>5</sup> In response, President Richard Nixon had effectively commandeered the budget process during his first term, impounding social program funds that Congress had appropriated.<sup>6</sup>

The ensuing discussion, driven by congressional panic, had focused on the need for a ceiling on spending each year. Among Schultze’s proposals was a way to make Congress’s spending decisions line up with a spending target. His first idea was to establish standing budget committees to set initial spending targets as the president had always done. The second proposal was for a new type of legislation — he called it a “final budget reconciliation bill” — which would force all of

<sup>2</sup> See David Baumann, *The End of the Line for EF-100*, NATIONALJOURNAL.COM (May 17, 2001), <http://newlive.nationaljournal.com/members/buzz/2001/capitolcorridors/051701.htm>; Todd S. Purdum, *Can They Deliver?*, N.Y. TIMES, May 22, 1994, at CY1.

<sup>3</sup> *Improving Congressional Budget Control: Hearings Before the Joint Study Committee on Budget Control*, 93rd Cong. 1 (1973) (statement of Rep. Al Ullman).

<sup>4</sup> See Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. LEGIS. 387, 442 n.143 (1998) [hereinafter *Rethinking the Structures*] (describing failures and abandonment of centralization of the congressional budgetary process from 1946–1951).

<sup>5</sup> See Charles Tiefer, *How to Steal a Trillion: The Uses of Laws About Lawmaking*, 17 J.L. & POLS. 409, 427 (2001).

<sup>6</sup> See Joseph J. Hogan, *Ten Years After: The US Congressional Budget and Impoundment Control Act of 1974*, 63 PUB. ADMIN. 133, 134 (1985).

the spending that congressional committees proposed throughout the year to reconcile with the new committees' initial targets. The bill would contain all of those legislative ideas and adjust the funds allocated to them to meet Congress's spending goals. "At the end of the year you are going to need a reconciliation bill," Schultze said, "and that consists of adjusting those piecemeal actions to the total."<sup>7</sup>

Congress adopted Schultze's reconciliation proposal in 1974. Nearly forty years later, his simple idea for controlling a budget, run amok, is frequently used in the U.S. Congress. In fact, reconciliation has transformed the way Congress does business. However, the reason has little to do with deficits, the budget, or separation of powers. Reconciliation has become a primary focus (and sometimes *the* primary focus) of business in the Senate for one reason: a reconciliation bill cannot be filibustered. No senator may block it by threatening to speak endlessly, a threat that normally requires 60 votes to defeat — meaning reconciliation bills need just a simple majority to pass. That one feature has prompted senators without 60 votes for their proposals to shoehorn their legislation into filibuster-proof reconciliation bills. Thus, a small budgetary mechanism is transformed into a critical procedural weapon for Senate majorities to use against minoritarian tactics. In other words, to quote Senator Robert Byrd, "[r]econciliation is a nonfilibusterable 'bear trap.'"<sup>8</sup>

Neither Schultze nor those who promoted his package of budget reforms anticipated that reconciliation would move into its current role — it was "little noticed" at the time it was adopted.<sup>9</sup> But Members of Congress have taken note. Many of the major legislative battles of the previous decade involved reconciliation bills in a central role, including, notably, President George W. Bush's tax cuts and President Barack Obama's health care reform. Reconciliation, as a filibuster-proof mechanism for passage, was the deciding factor in each, prompting partisan enmity and even suggestions that its use in such situations is unconstitutional.<sup>10</sup> The deployment of reconciliation in

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<sup>7</sup> 93rd Cong. 14 (statement of Charles L. Schultze).

<sup>8</sup> 147 CONG. REC. S1533 (2001). Byrd explained further: "It is a bear trap because of the fast-track procedures that were included in the Congressional Budget Act to help Congress enact quickly necessary changes in spending or in revenues to ensure the integrity of the budget resolution targets." *Id.* He proved just as eloquent on other occasions: "A reconciliation bill is a super gag rule, the foremost ever created by this institution. Normal cloture is but an infinite speck on the distant horizon when compared with a reconciliation bill." 135 CONG. REC. S13356 (1989).

<sup>9</sup> Tiefer, *supra* note 5, at 428.

<sup>10</sup> See, e.g., Orrin Hatch, *Reconciliation on Health Care Would Be an Assault to the Democratic Process*, WASH. POST, March 2, 2010, at A15 (predicting that the potential

these circumstances has cut squarely against the idea that in the Senate, “just about all matters, controversial or not, require a three-fifths majority.”<sup>11</sup> In other words, this use of reconciliation has cut against the concept of unadulterated minoritarian power that exists under the filibuster.

Despite these complaints, and given the result of the 2012 presidential and congressional elections — with the Senate majority held by the president’s party, but lacking a “filibuster-proof” supermajority — reconciliation is poised to retain its importance for years to come. Reliance on reconciliation will only increase following the failure of filibuster reform in early 2013. Scholars in political science have recognized that reconciliation constitutes a means to “force a high volume of legislative product through the sausage works.”<sup>12</sup> But the growing relevance of reconciliation has received minimal attention within legal academia, even while the procedural weapon has drifted profoundly from its origins in Mr. Schultze’s modest budgetary proposal and become the enabler of both significant tax cuts and Obamacare. However, the failure to appreciate the operation of this procedural mechanism means having little conception of how most important, controversial law is likely to be created in the near to medium future.

In that spirit, this Article provides a detailed assessment of the filibuster and its current foil, the reconciliation process. The former began its life as a cap on unlimited debate, but has had the effect of entrenching and institutionalizing minority power. The filibuster has become the central mechanism of gridlock and delay in the U.S. Senate. The latter was conceived as a simple fiscal device, but has morphed by necessity into the primary enabler of majorities in the Senate against minoritarian interests. In analyzing the filibuster and reconciliation, then, this Article examines whether minoritarian or majoritarian power is ultimately likely to win out in the U.S. Senate.

This analysis is highly salient. The number of filibusters has reached record levels during the Obama Administration.<sup>13</sup> The filibuster itself

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use of reconciliation to pass President Barack Obama’s health care plan “would threaten our system of checks and balances, corrode the legislative process, degrade our system of government and damage the prospects of bipartisanship”); *see also* discussion *infra* Part IV.A.

<sup>11</sup> Ezra Klein, *Let’s Talk: The Move to Reform the Filibuster*, NEW YORKER, Jan. 28, 2013, at 24.

<sup>12</sup> William G. Dauster, *The Congressional Budget Process*, in FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 1, 30 (Elizabeth Garrett et al. eds., 2009).

<sup>13</sup> *See* Klein, *supra* note 11, at 24 (“From 1917 to 1970, the majority sought

has come to define a new status quo for congressional action, particularly in an era of increased party discipline. The growing institutionalization of this extra-constitutional-supermajority requirement has in turn inspired renewed movement in the Senate for filibuster reform. The possibility of reform commanded significant attention during the “fiscal cliff” negotiations between President Obama and congressional Republicans in late 2012; editorial pages, and even television comedies, debated the merits of overhauling the filibuster after the election.<sup>14</sup> Nevertheless, the massive watering down of the most recent efforts at reform was predictable; such ambitions have been voiced previously, to little effect.<sup>15</sup> The reason for this stasis goes beyond the usual intransigence of the Senate. Despite its effect of thwarting Senate majorities, there are institutional incentives for senators collectively to support the ongoing existence of the filibuster.

We lay out three institutional incentives that push away from filibuster reform: particularism, risk aversion, and path dependence arising from the stickiness of norms. First, the localized structure of the constituency-based electoral system incentivizes particularized benefits, raising the salience of each senator’s state benefits over institutional reform. Second, this in turn promotes a kind of institutionalized risk aversion, whereby negating action as a minority has greater value than proposing action as part of the majority. Third, even if these incentives are inadequate to promote a minoritarian norm, the difficulty of changing norms — the stickiness — helps to maintain them. Together, these factors explain the staying power of the filibuster, why only a stealth reform such as reconciliation can meaningfully change it, and why minoritarian pressures against reconciliation, particularly the Byrd Rule, nonetheless arise.

Those opposing filibuster reform do not tend to point to these arguably dysfunctional institutional incentives. Rather, they typically turn to lofty rhetoric about the Madisonian ideal of counter-

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cloture fifty-eight times. Since the start of President Obama’s first term, it has sought cloture more than two hundred and fifty times.”).

<sup>14</sup> See Seung Min Kim, *Filibuster Fight Seizes Senate*, POLITICO (Nov. 26, 2012, 3:36 PM), <http://www.politico.com/news/stories/1112/84237.html>; Editorial, *A New Chance for the Senate*, N.Y. TIMES, Nov. 13, 2012, at A26; Jon Stewart, *The Men Who Stall on Votes*, DAILY SHOW (Dec. 3, 2012), <http://www.thedailyshow.com/watch/mon-december-3-2012/the-men-who-stall-on-votes>.

<sup>15</sup> When Democrats took over the Senate in 1995, for example, their new majority leader, Tom Daschle, had campaigned on an anti-filibuster abuse platform — calling it “one of the most abused parliamentary tools in the Senate” — yet did nothing about removing it; filibusters actually rose during his first term as leader. See KEITH KREHBIEL, *PIVOTAL POLITICS* 95 (1996).

majoritarianism. However, unlike the rest of the separation-of-powers scheme, there is nothing in the U.S. Constitution that requires a supermajoritarian voting rule in either chamber of Congress.<sup>16</sup> Nonetheless, even if filibuster reform and reconciliation are questionable in terms of their constitutionality,<sup>17</sup> U.S. Supreme Court precedent strongly suggests that judicial oversight is unlikely to be forthcoming.<sup>18</sup> Without such oversight, a simple majority can effectively decide that all that is required to change the rules is a majority — not because of subtleties of the law or grand ideals, but because they can. This fact does not mean that the filibuster will never be reformed, only that whether reform will occur depends on politics, not law. But that political effect will set ground rules for passage of all laws.

Part I of this Article describes the filibuster: its origins — how it became cemented in the Senate even as it fell away in the House of Representatives; its impact — empowering Senate minorities to freeze legislation for decades; and its reform attempts — including the many complex procedural mechanisms involved in its alteration. The filibuster is a creation of Congress that has drifted far from its original moorings, to the point where actual talking filibusters occur only in the rarest circumstances, and yet 60 votes are required to defeat one.<sup>19</sup> Attempts at its reform have been continually frustrated because, we

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<sup>16</sup> The Constitution contains no majority or alternative requirement for the passage of legislation and allows Congress to make its own rules. See U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”).

<sup>17</sup> In the spring of 2012, for example, Common Cause filed a lawsuit against Vice President Joe Biden, among others. The group claimed that the 2010 filibuster against the DREAM Act, which was designed to facilitate legal status for immigrant children who grew up in the United States, was unconstitutional in that it was not majoritarian. See Complaint at 1, *Common Cause v. Biden*, 909 F. Supp. 2d 9 (D.D.C. May 14, 2012) (No. 12-775), 2012 WL 1672642, at \*1. The Senate filed a motion to dismiss, arguing that the plaintiffs lacked standing and that the suit presented a non-justiciable political question. See Motion to Dismiss, *Common Cause v. Biden*, 909 F. Supp. 2d 9 (D.D.C. July 20, 2012) (No. 12-cv-00775), 2012 WL 1672642, at \*1; *infra*, text accompanying note 300.

<sup>18</sup> See discussion *infra* Part IV.

<sup>19</sup> As the recent fight over the confirmation of former senator Chuck Hagel as Secretary of Defense illustrated, it is currently impossible to tell whether a filibuster is even occurring in the Senate. See Rachel Weiner, *Why Republicans Won't Call the Hagel Filibuster a Filibuster*, WASH. POST: THE FIX (Feb. 13, 2013, 4:15 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/02/13/so-are-republicans-filibustering-chuck-hagel-or-not/>. However, it should be noted that nominations such as Hagel's are not eligible for inclusion in reconciliation bills.

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argue, the drive toward minoritarian power is entrenched in the interests of the majority of senators. As a result, the filibuster has only grown in power — at least until reconciliation appeared to challenge its authority.

Part II introduces the reconciliation process, identifying its origins and the intentions of those who put it in place, and how it has become the counter to the filibuster. It examines the actual operation of reconciliation in the context of overall budget procedure, and the shift of reconciliation away from its roots as a tool for budget hawks, towards a mechanism of overcoming filibusters to pass broad policy initiatives.

Part III considers the political and legal significance of these two intertwined devices. It examines the prominent episodes during the Reagan, Bush, and Obama Administrations that mark the development of reconciliation and illustrate how reconciliation can be used to great strategic effect. It shows how with reconciliation, majorities in the Senate have finally found an opportunity, albeit a limited one, to assert themselves over the prevailing minority powers in their chamber. This Part also chronicles how minorities have attempted to reassert themselves and limit the reach of reconciliation. The “Byrd [R]ule,”<sup>20</sup> a tool adopted in 1985 to rein in “extraneous” and deficit-exploding uses of reconciliation, also played a role in those recent episodes, with mixed success. Thus, Part III demonstrates that both minoritarian and majoritarian options now exist.

Part IV considers which will ultimately triumph. It first reviews the arguments that, on one hand, the filibuster is unconstitutional as a majority-thwarting device, and on the other, that its reform would constitute an unconstitutional oppression of a legislative minority. We argue that neither position is likely to receive significant judicial support, because the courts strongly prefer to avoid reviewing legislative chambers’ interpretation of their own rules, with good reason. Although there are exceptions to this principle, as we detail, filibuster legislation is unlikely to fit any of them. In addition, this Part describes how the Parliamentarian, although technically the interpreter of Senate rules, does not offer a meaningful check on the majority. The Parliamentarian can and has been fired for opposing the majority on salient policies. As such, the fate of the filibuster, and the consequent strength of minoritarian power, rests with the Senate majority. The best predictor of the success of filibuster reform, then, rests on the institutional incentives we identify in Part II.

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<sup>20</sup> See 2 U.S.C. § 644 (2012).

There are no cases about reconciliation and, as mentioned, little scholarly legal consideration of its significance. Yet reconciliation is a law itself, ensconced in the United States Code, and has been deployed to enact many of the same laws that legal academicians *do* debate about.<sup>21</sup> Perhaps more fundamentally, given the significant difference in the number of votes required for each, the question of whether reconciliation or the filibuster governs the passage of legislation goes to the very heart of how, and whether, our laws are created. Yet since the legal status of these “meta-laws” is likely to be considered a political question by the courts, their ultimate fate, and thus the transcendent question of how many votes are required to pass federal legislation, will be determined by structural incentives and sheer political might.

#### I. THE FILIBUSTER: MINORITARIAN WEAPON

As the most recent attempt at filibuster reform illustrated, the filibuster has become so ingrained in the Senate that senators are unable to defeat it through typical rule-changing means.<sup>22</sup> But if the filibuster causes such consternation among the majorities whose objectives it stymies, why do majorities not assert themselves over the supermajority requirement of the filibuster? This Part describes the somewhat accidental manner in which the filibuster arose as one of the core mechanisms of minoritarian power, and then describes the failure of repeated attempts at its reform. Ultimately, this Part argues that despite being a vehicle for minoritarianism, the filibuster owes its ongoing existence to the incentives of the majority to maintain it.

##### A. “*The Most Infamous Rule*”: *Unlimited Debate and Cloture*

###### 1. The House Filibuster

Before a discussion of filibustering in the Senate, which will demand the bulk of our attention, it is important to note that unlimited debate was not always exclusive to one house of Congress. Though senators have liked to argue that the “necessary evil” of the filibuster was the one thing keeping the Senate from “becom[ing] a mere appendage of

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<sup>21</sup> Such as health care reform. See, e.g., Martha Minow, *Affordable Convergence: “Reasonable Interpretation” and the Affordable Care Act*, 126 HARV. L. REV. 117, 119-20 (2012); Kevin C. Walsh, *The Ghost that Slayed the Mandate*, 64 STAN. L. REV. 55, 57 (2012).

<sup>22</sup> See discussion *infra* Part I.B.

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the House of Representatives,”<sup>23</sup> the House, too, once had what would today be called a filibuster, along with multiple minoritarian tactics that flummoxed majorities for decades.

The practice began in 1789, when the House adopted a rule that bills should be debated in both the Committee of the Whole and on the floor. This gave House members, like senators, the privilege of unlimited debate. In fact, its use was more characteristic of the early House than the early Senate, with House members filibustering twice as much as their Senate counterparts during the 1800s.<sup>24</sup> This practice rendered the House, for the first century of its existence, in the words of the powerful late nineteenth-century Speaker Thomas Brackett Reed, “the most unwieldy parliamentary body in the world.”<sup>25</sup> Yet in 1841, House members voted to limit representatives to one hour of debate per person per bill.<sup>26</sup> In so doing, they were willing to impose limits on minority power in a way the Senate has never done in nearly two and a half centuries.

The few decades needed to reform the House filibuster may seem quick and efficient compared to the still-incomplete efforts to limit or eliminate the filibuster in the Senate. However, reform in the House did require some time as well as circumstances of exceptional conflict. A brief account of this process illustrates the difficulty that reform in the Senate has faced, and that is likely to continue to arise.

Some accounts attribute the catalyst for the effort to reform the House filibuster to Representative John Randolph of Virginia, who filibustered for over four hours in February 1820 on an amendment to the Missouri Compromise Bill<sup>27</sup> — an event marked unceremoniously in the *Annals of Congress* with just two sentences.<sup>28</sup> Less than two

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<sup>23</sup> 2 ROBERT C. BYRD, *THE SENATE 1789–1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE* 163 (1991) (“Without the right of unlimited debate, of course, there would be no filibusters, but there would also be no Senate, as we know it. The good outweighs the bad, and not all filibusters have been bad, even though they may have been exasperating, contentious, and perceived as iniquitous.”).

<sup>24</sup> Gregory Koger, *The Rise of the 60-Vote Senate*, *EXTENSIONS*, Winter 2012, at 2 [hereinafter *60-Vote Senate*].

<sup>25</sup> JAMES GRANT, *MR. SPEAKER!: THE LIFE AND TIMES OF THOMAS B. REED: THE MAN WHO BROKE THE FILIBUSTER* 268 (2011).

<sup>26</sup> See ASHER C. HINDS, *RULES OF THE HOUSE OF REPRESENTATIVES: WITH NOTES ON THE PRACTICE THEREUNDER* 155 (1909).

<sup>27</sup> ASHER C. HINDS, *HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES* 24 (1907) [hereinafter *PRECEDENTS*].

<sup>28</sup> “Mr. Randolph next rose, and spoke more than four hours against the amendment, and on the topics connected with it, the subject of restriction, &c. When he had concluded, (about half-past four o’clock,) an ineffectual motion was made for the Committee to rise.” 36 *ANNALS OF CONG.* 1541 (1820).

months later, a congressman named Stevenson Archer proposed an amendment, which was never voted upon, to the House rules: “No member shall speak upon any question longer than an hour at one time.”<sup>29</sup> A similar proposal failed two years later.<sup>30</sup> Part of the reason for the increased rancor during that time was the ascension of the Whig Party to majorities in both houses, which prompted heavier use of minoritarian tactics against their legislative goals; the strategy prompted Henry Clay, the Whig leader in the Senate, to urge his fellows to “enable the majority to get control of public business.”<sup>31</sup>

No attempt to curtail unlimited debate succeeded in the House until 1841. The effort was part of a procedural gambit, as the House Rules Committee had two weeks before being given authority to report amendments to rules at any time. The committee soon took advantage, reporting the simple-majority change to the floor, itself enacted by a simple majority.<sup>32</sup> Speaker John White, a Whig, “decided that only a majority would be required” to enact it, rather than require the then-customary two-thirds of all members present.<sup>33</sup> Reaction was swift and negative; one member argued that the change, which would allow a majority to cut off debate, would “arrest free inquiry” and “place the minority of this House in the hands of a majority, and subject them to every species of tyranny.”<sup>34</sup> After much rancor, the House voted to allow a majority to cut off debate.

The rule was soon followed by another, limiting speakers to an hour on each bill.<sup>35</sup> Representative Robert Rhett attempted to break the rule immediately, but was shouted down by his colleagues soon after declaring that “this tyrannical act of the majority not only violated the rights of the minority on that floor, but the rights of the people at home.”<sup>36</sup> A few days later, reminded that he had been speaking for an hour and thus “run his race,” Representative Francis Pickens lambasted the new rule as “the most infamous rule ever passed by any legislative body.”<sup>37</sup> Yet the rule stuck.

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<sup>29</sup> 36 ANNALS OF CONG. 2093 (1820).

<sup>30</sup> See HINDS, PRECEDENTS, *supra* note 27, at 24.

<sup>31</sup> Thomas P. Gill, *A Parliament or a Congress?*, 53 CONTEMP. REV. 757, 761 (1888).

<sup>32</sup> See *Committee on Rules: A History*, COMM. ON RULES, [http://archives.democrats.rules.house.gov/110/comm\\_history.html](http://archives.democrats.rules.house.gov/110/comm_history.html) (last visited Jan. 15, 2013).

<sup>33</sup> CONG. GLOBE, 27th Cong., 1st Sess. 153 (1841).

<sup>34</sup> *Id.* (statement of Rep. William Medill).

<sup>35</sup> See HINDS, PRECEDENTS, *supra* note 27, at 24.

<sup>36</sup> CONG. GLOBE, 27th Cong., 1st Sess. 155 (1841).

<sup>37</sup> *Id.* at 164.

Nevertheless, the imposition of the majority's ability to end debate did not mark the end of dilatory tactics in the House. Its members craftily employed other methods that empowered minorities to stop legislation (or legislators) from doing things they opposed. Far from "inoculat[ing] the chamber from filibustering,"<sup>38</sup> the previous question motion still left open several maneuvers, such as the "disappearing quorum." This practice is defined as "members refusing to vote despite their obvious presence to deliberately stop legislative business for lack of sufficient members voting to constitute a quorum."<sup>39</sup> And the practice was popular — so much so that Abraham Lincoln, himself, once instigated it in the Illinois legislature by deciding to jump out of a first-floor window.<sup>40</sup>

This practice was not to survive the Speakership of Thomas Reed, who was elected leader of the House Republicans in 1889. In 1890, Reed was able to convince his fellow Republicans to help him end the disappearing quorum, along with several other delaying tactics, thanks to a unique confluence of several factors. Not only was control of government unified in Republican hands by 1890, but there was also public outrage over congressional inactivity, the consolidation of congressional Republicans behind Reed's leadership, and a strong Republican desire to change American trade policy.<sup>41</sup> Furthermore, Reed seemed particularly adept at ramming through change; he achieved defeat of the disappearing quorum within two months of his ascension to Speaker by ordering the House Clerk to note the presence of non-voting Democrats, thereby achieving a quorum.<sup>42</sup> His action to count the Democrats was backed up by an extraordinarily partisan vote of 162–0, with only Republicans supporting the move and no Democrats voting.<sup>43</sup>

The House was thus much quicker to act than the Senate at limiting debate and other dilatory tactics; in fact, use of the filibuster has actually expanded in the Senate in the past several decades, after attempts at reform were made. Yet while the combination of events in the House that led to the end of unlimited debate and the disappearing

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<sup>38</sup> Koger, *60-Vote Senate*, *supra* note 24, at 2.

<sup>39</sup> Richard G. Forgette, *Reed's Rules and the Partisan Theory of Legislative Organization*, 29 *POLITY* 375, 383 (1997).

<sup>40</sup> See GRANT, *supra* note 25, at 150.

<sup>41</sup> See generally Forgette, *supra* note 39, at 385-94 (analyzing the House reforms under Speaker Reed in 1890 using the principal-agent framework).

<sup>42</sup> GREGORY KOGER, *FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE* 54 (2010).

<sup>43</sup> ERIC SCHICKLER, *DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS* 281, tbl.B.1 (2001).

quorum were unusual, similar strong leadership and eras of intense partisan conflict have occurred in the Senate, but the chamber has still not squelched unlimited debate, nor consequently, minoritarian power. The following sections describe the history of the filibuster in the Senate and consider what it is about the Senate that has allowed the filibuster to continue unabated.

## 2. The Senate Filibuster

The right of unlimited debate in the Senate is often said to be a cherished tradition,<sup>44</sup> but in the early Congresses, the filibuster may not have existed. There were no rules to prevent members from giving endless speeches, but to do so was considered unseemly, as “self-restraint and patience” were sought-after virtues.<sup>45</sup> In general, scholars are uncertain of the extent to which speaking at length was a common dilatory tactic in the early Republic.<sup>46</sup> They often quote Thomas Jefferson’s manual of parliamentary practice for the Senate, which required that “[n]o one is to speak impertinently or beside the question, superfluously or tediously”<sup>47</sup> — advice that might also have a place in today’s Senate. Nonetheless, in 1806, the Senate abolished the ability of its members to curtail debate by forbidding motions for the previous question — although the motion had not been used much before then.<sup>48</sup>

The Senate formally adopted a right of unlimited debate in 1856, just three years after the term “filibuster” — a word from the Spanish *filibustero*, meaning pirates<sup>49</sup> — was applied to an episode of verbal

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<sup>44</sup> See BYRD, *supra* note 23, at 162-63.

<sup>45</sup> See KOGER, *supra* note 42, at 60.

<sup>46</sup> See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 189 (1997).

<sup>47</sup> THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE, COMPOSED ORIGINALLY FOR THE USE OF THE SENATE OF THE UNITED STATES 27 (S.H. Smith 1801) (1993).

<sup>48</sup> Fisk & Chemerinsky, *supra* note 46, at 188.

<sup>49</sup> The word originated in the Dutch as “vrijbouter,” or “freebooter,” and arrived in the Spanish language as “filibustero”; in both languages, it meant “pirate.” Brady Harrison, *The Young Americans: Emerson, Walker, and the Early Literature of American Empire*, 40 AM. STUD. 75, 94 n.1 (1999); see Timothy Noah, *Die, Filibuster, Die: the Biggest Obstacle to the Obama Agenda*, THE NEW REPUBLIC, Dec. 6, 2012, at 2 [hereinafter *Die, Filibuster, Die*]. Nineteenth-century Americans used the term filibuster to describe a private army that attacks sovereign nations. See Robert E. May, *The Domestic Consequences of American Imperialism: Filibustering and Howard Pyle’s Pirates*, 46 AM. STUD. 37, 37 (2005) (describing the term).

legislative obstruction in Congress.<sup>50</sup> For over a century, senators had no way to stop a filibuster. There was no 60-vote requirement in order to do so, as there is today. A minority of one senator with the desire to speak at length could halt business in the Senate at any time. Not even a supermajority could stop such a speech, but at the same time, “the threat of obstruction through unlimited debate was hollow for much of the Senate’s history because senators did not have much to do.”<sup>51</sup> While today’s Senate is often criticized as a “do-nothing”<sup>52</sup> — including its inability to pass a budget since 2009<sup>53</sup> — its laxity pales compared to the Senates of old. Senators often had time to let the clock run on filibusters until their proponents exhausted themselves, as there was not much else to debate.<sup>54</sup> What is more, records are such that scholars are unsure “whether extended debate with dilatory intent was considered an established practice at this point, or whether it was simply the bad habit of a few persons.”<sup>55</sup> In fact, there is little evidence that filibusters succeeded in blocking legislation before the 1880s.<sup>56</sup>

Nevertheless, there was one episode in 1917 that prompted a change. At the outset of American involvement in World War I, Democrats had initiated an organized series of filibusters against a bill to arm American ships against German submarines at the end of the Senate session — more or less guaranteeing the bill would not pass.<sup>57</sup> A furious President Woodrow Wilson referred publicly to these senators as a “little group of willful men,”<sup>58</sup> and a “wave of indignation

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<sup>50</sup> See Fisk & Chemerinsky, *supra* note 46, at 190-93.

<sup>51</sup> Gerard N. Magliocca, *Reforming the Filibuster*, 105 NW. U. L. REV. 303, 310 (2011).

<sup>52</sup> See, e.g., William McGurn, *The Do-Nothing Senate*, WALL ST. J., Feb. 14, 2012, at A17 (arguing that presidential candidates in 2012 should campaign against the Senate’s failure to act on budget, job creation, tax cut, and recess appointment controversies).

<sup>53</sup> See Rosalind S. Helderman & Lori Montgomery, *House Republicans Agree to Vote on Bill to Raise Debt Limit for 3 Months*, WASH. POST, Jan. 19, 2013, at A1 (“As laid out to fellow Republicans by House Speaker John A. Boehner (Ohio) in a speech at the retreat, the goal would be to force Senate Democrats to pass a budget, something they have failed to do for more than three years.”).

<sup>54</sup> See Magliocca, *supra* note 51, at 310 (noting that the Senate in the 1820s typically met for three hours, and on fewer than five days per week).

<sup>55</sup> Fisk & Chemerinsky, *supra* note 46, at 189.

<sup>56</sup> Magliocca, *supra* note 51, at 309.

<sup>57</sup> Gregory Koger, *Filibuster Reform in the Senate, 1913–1917*, in 2 PARTY, PROCESS, AND POLITICAL CHANGE IN CONGRESS 220 (David Brady & Mathew McCubbins eds., 2007) [hereinafter *Filibuster Reform*].

<sup>58</sup> Woodrow Wilson, *Text of the President’s Statement to the Public*, N.Y. TIMES, Mar. 5, 1917, at 1.

at their action . . . stirred the country.”<sup>59</sup> The public burned senators in effigy and sent them death threats. It was then that “[p]ublic pressure to change the rules of the Senate was probably greater than at any other time in Senate history.”<sup>60</sup>

The situation presented a wartime separation-of-powers quandary that has been replicated at few, if any, times in American history.<sup>61</sup> In response, the Senate passed an amendment to its rules allowing a two-thirds majority to shut off debate, a process called “cloture.”<sup>62</sup> The *New York Times* predicted that the new rule would have an “almost unlimited potential effect on future legislation.”<sup>63</sup> The newspaper was incorrect, at least in an immediate sense, as “[s]enators rarely attempted cloture because they developed a general aversion to voting for it.”<sup>64</sup> For the time being, extreme minorities could still effectively impede the Senate, as no senator was willing to mount a challenge to stop them. For example, just 8 cloture votes occurred during the period of 1933 to 1948, and all 8 failed. Senators may have feared reprisals, and circumvention of cloture votes was generally tolerated.<sup>65</sup> It is fairly clear, then, that the institution of cloture had little effect.<sup>66</sup> However, it must also be said that majorities regularly passed legislation in this era; 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.

True national attention was not trained upon the filibuster until the Civil Rights Era, particularly during and after southern senators’ 74-day verbal attack upon the Civil Rights Act of 1964.<sup>67</sup> In response to southern obstructionism, Senate Majority Leader Mike Mansfield fielded two solutions that he thought could fix the problem. It was Mansfield who had allowed the filibusters in response to the Civil Rights Act,<sup>68</sup> and he wanted to avoid similar spectacles.<sup>69</sup> Yet his ideas

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<sup>59</sup> ‘Willful Men’ Deny Aiding Filibuster, N.Y. TIMES, Mar. 7, 1917, at 3.

<sup>60</sup> Koger, *Filibuster Reform*, *supra* note 57, at 220.

<sup>61</sup> See, e.g., *Left with Power to Arm Ships, President Urges Senate to Change Rules to Permit Action*, WASH. POST, Mar. 5, 1917, at 1.

<sup>62</sup> See KOGER, *supra* note 42, at 152.

<sup>63</sup> *Alters Rule of 100 Years*, N.Y. TIMES, Mar. 9, 1917, at 1.

<sup>64</sup> KOGER, *supra* note 42, at 154.

<sup>65</sup> *Id.* at 162-63.

<sup>66</sup> Koger, *60-Vote Senate*, *supra* note 24, at 3.

<sup>67</sup> See Fisk & Chemerinsky, *supra* note 46, at 199-200.

<sup>68</sup> See Donald A. Ritchie, *The Senate of Mike Mansfield*, MONTANA: MAG. OF W. HIST, Winter 1998, at 50, 58 (describing Mansfield’s actions during civil rights debate).

<sup>69</sup> See Koger, *60-Vote Senate*, *supra* note 24, at 5 (noting Mansfield’s determination

turned out to be spectacularly inept, as they ultimately empowered minoritarian forces as never before.

First, Mansfield advocated forcing cloture votes on filibuster threats. He told colleagues that “[t]he only rational remedy under the present rules remains the procedure of cloture.”<sup>70</sup> The strategy hardly portended victory; only 8 of 51 cloture efforts from 1917 to 1970 had succeeded.<sup>71</sup> There were some wins, such as the Senate’s successful cloture motion on a filibuster against a draft extension bill in 1971.<sup>72</sup> Still, success was not to be permanent, as the shift in emphasis from attempting to wait out filibusters to forcing immediate votes on them meant that actual filibusters no longer had to occur. The Senate’s Rule 22, formally requiring a full 60 votes to defeat the filibuster threat,<sup>73</sup> ensured that when majorities lacked those 60 votes, minorities could now *instantly* halt a piece of legislation.

Compounding the problem, Mansfield implemented a “two-track” system intended to keep the Senate moving despite filibusters. The system, installed in 1972 and still in place today, technically allows filibusters to continue while the chamber considers other legislation.<sup>74</sup> The change permitted the majority leader to confine filibustered matters to mornings, and everything else to the afternoon.<sup>75</sup> Eventually, the filibuster material was simply “put aside.”<sup>76</sup> Mansfield implemented this system with the recognition that, unlike Senates of old, the American welfare state had made floor time especially valuable, and that filibusters presented the prospect of “perpetual gridlock” in the face of pressing problems.<sup>77</sup> This creation, however, further spurred the “stealth” or “silent” filibuster, a device much less costly for a minority to put forth than an actual “talking” filibuster.<sup>78</sup> Without the requirement that senators actually stand before the

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to avoid similar fights).

<sup>70</sup> KOGER, *supra* note 42, at 172.

<sup>71</sup> See Editorial, *Can the Senate Control Itself?*, WASH. POST, Sept. 27, 1970, at B6.

<sup>72</sup> See Spencer Rich, *Filibuster Cut off on Draft*, WASH. POST, June 24, 1971, at A1.

<sup>73</sup> See Koger, *60-Vote Senate*, *supra* note 24, at 5-6 (extrapolating Mansfield’s folly).

<sup>74</sup> For a description of the system as initially devised, see Fisk & Chemerinsky, *supra* note 46, at 201.

<sup>75</sup> *Id.*

<sup>76</sup> Sarah A. Binder, Eric D. Lawrence, & Steven S. Smith, *Tracking the Filibuster, 1917 to 1996*, 30 AM. POLS. RES. 406, 411 (2002).

<sup>77</sup> Magliocca, *supra* note 51, at 313–14.

<sup>78</sup> See Binder, Lawrence & Smith, *supra* note 76, at 411-12, 415-16 (hypothesizing that the two-track system decreased the cost of filibustering and thus would have increased the practice, then formally confirming this theory with data).

chamber speaking for hours on end, they simply claim to be filibustering as other business went on. Combined with the 61-vote cloture requirement to end “debate,” the two-track system means that “[t]oday a ‘filibuster’ consists of merely telling the leadership that 41 senators won’t vote for a bill.”<sup>79</sup> Before unique episodes in 2010 and 2013,<sup>80</sup> the last actual filibuster had occurred in 1992.<sup>81</sup> But even though senators no longer have to deliver long-winded stemwinders, they can still “filibuster” any bill they like, making minorities even more powerful.

The adoption of two tracks “changed the game profoundly.”<sup>82</sup> It was followed fairly immediately by a period in which there are more filibusters than ever before. There have been nearly twice as many Senate actions to defeat filibusters (the cloture motions that end debate on an issue, and thus end that filibuster) in the last ten sessions of Congress than in the previous thirty-eight sessions combined. The number of motions to defeat filibusters from the 103rd Congress through the 112th was 888; the number from the 65th through the 102nd was 483.<sup>83</sup> That the number exploded after the two-track

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<sup>79</sup> Barry Friedman & Andrew D. Martin, *A One-Track Senate*, N.Y. TIMES, Mar. 10, 2010, at A27.

<sup>80</sup> Senator Rand Paul of Kentucky revived the filibuster for a day in March 2013 over the Obama Administration’s use of drone strikes. See Rand Paul, *My 13 Hours Were Just the Beginning*, WASH. POST, Mar. 10, 2013, at B1 (describing his filibuster). While Paul hinted he might also filibuster a potential Senate resolution to allow President Obama to conduct air strikes in Syria in September 2013, he later downplayed that possibility. See Ed O’Keefe, *Rand Paul Denies Plan to Filibuster Syria Resolution*, WASH. POST: POST POLITICS (Sept. 4, 2013, 2:32 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/09/04/rand-paul-denies-plans-to-filibuster-syria-resolution>.

<sup>81</sup> Senator Bernie Sanders of Vermont held the Senate floor for over eight and a half hours in late 2010 in order to protest a tax cut deal between President Obama and congressional Republicans. See Michael A. Memoli, *Sen. Bernie Sanders Ends Filibuster*, L.A. TIMES (Dec. 10, 2010), <http://articles.latimes.com/2010/dec/10/news/la-pn-sanders-filibuster-20101211> (noting that Senator Alfonse D’Amato in 1992 was the last to filibuster before Sanders, singing the song “South of the Border” while doing so). In a somewhat ironic development, Sanders actually received praise for his filibuster, because it highlighted the majority party’s unwillingness to force those who threaten filibusters to actually follow through on them. See, e.g., Michael Tomasky, *The Significance of Bernie Sanders’ Filibuster*, GUARDIAN (Dec. 10, 2010, 4:00 PM), <http://www.guardian.co.uk/commentisfree/michaeltomasky/2010/dec/10/bernie-sanders-filibuster-tax-cuts>. See generally BERNIE SANDERS, *THE SPEECH: A HISTORIC FILIBUSTER ON CORPORATE GREED AND THE DECLINE OF OUR MIDDLE CLASS* (2012) (Sanders’s filibuster received so much attention that he actually turned it into a book).

<sup>82</sup> Fisk & Chemerinsky, *supra* note 46, at 201.

<sup>83</sup> *Senate Actions on Cloture Motions*, U.S. SENATE, [http://www.senate.gov/page/layout/reference/cloture\\_motions/clotureCounts.htm](http://www.senate.gov/page/layout/reference/cloture_motions/clotureCounts.htm) (last visited Dec. 5, 2012).

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system was adopted is not coincidental. The system of stealth filibustering “allows [senators] to obstruct Senate business but without paying much, if any, political cost for doing so.”<sup>84</sup> It has led to a Senate where an invisible filibuster by default hangs over any controversial legislation, and sixty votes are needed to remove it “in almost every case.”<sup>85</sup> A Senate, in other words, where minorities reign.

B. *Edge of the Abyss: The Failure of Filibuster Reform in 2013*

The attempt to reform the filibuster in early 2013 provides a good illustration of what has now become common: outrage over the thwarting of majorities leads to proposals for reform, which, despite receiving strong majority and often public support, nonetheless inevitably peter out in the face of strident minority opposition. This raises the question of why minority opposition consistently bests the majority’s impulse for reform. This section describes the latest wrangle over filibuster reform, and how that has become a familiar tale. The following section explains why the conclusion of the story has always been largely the same, one of failure to reform — at least until reconciliation appeared.

Initially, the prospects for this particular attempt to hamstring the invisible filibuster appeared favorable, at least compared to previous efforts. Proponents had identified January 3, 2013, as the day for action, because Senate traditions permit a simple majority to change the chamber’s rules on the first day of the legislative session.<sup>86</sup> On any other day, a rule change would itself be subject to filibuster, and so be self-defeating. Opponents of this procedural approach refer to it as the “nuclear option,” after a similar failed proposal in 2005,<sup>87</sup> because a supermajority is the overwhelming norm for making changes to the rules. Proponents preferred to call the maneuver the “constitutional

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<sup>84</sup> Josh Chafetz & Michael J. Gerhardt, *Is the Filibuster Constitutional?*, 158 U. PA. L. REV. PENNUMBRA 245, 256 (2010).

<sup>85</sup> Jean Edward Smith, *Filibusters: The Senate’s Self-Inflicted Wound*, N.Y. TIMES (Mar. 1, 2009), <http://100days.blogs.nytimes.com/2009/03/01/filibusters-the-senates-self-inflicted-wound/>.

<sup>86</sup> See Jonathan Bernstein, *The Senate’s Opening Day*, WASH. POST (Dec. 30, 2010), [http://voices.washingtonpost.com/plum-line/2010/12/opening\\_day.html](http://voices.washingtonpost.com/plum-line/2010/12/opening_day.html) (“[O]ne Senate tradition says that it takes 67 votes to change the rules; another says that there’s an exception, on the first day of a new Congress.”); see also U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings . . .”).

<sup>87</sup> See Niels Lesniewski, *Reid Has 51 Votes to Change Filibuster, Advocates Say*, ROLL CALL (Jan. 3, 2013, 5:14 PM), [http://www.rollcall.com/news/reid\\_has\\_51\\_votes\\_to\\_change\\_filibuster\\_advocates\\_say-220519-1.html](http://www.rollcall.com/news/reid_has_51_votes_to_change_filibuster_advocates_say-220519-1.html) (describing the “nuclear option” as “changing the rules with a simple majority”).

option,”<sup>88</sup> in reference to the provision of the Constitution allowing the Senate to make its own rules<sup>89</sup> — perhaps an odd label, as the Constitution contains no majority (or supermajority) voting requirement for such rule changes. Regardless, the “nuclear” label was a signal of just how noxious pure majority rule had become to many senators: a majority decision to change the rules had been named after a potential decision to annihilate an enemy with an apocalyptic blast.<sup>90</sup>

With both the Democrat majority (but not a supermajority) in the Senate and the Democrat President being thwarted by a Republican minority through use of the filibuster, the stage was set for majoritarian reform using this procedure. The rhetoric after the 2012 presidential election had grown heated enough that the use of the “nuclear option” was considered likely, even by hardened Senate watchers.<sup>91</sup> Which of a number of possible reforms senators would be voting on was unclear, however. Liberal Democrat senators had advanced an ambitious program of reforms with the aim of making the cost of filibustering much higher. Such reforms included using a simple majority to implement the “talking filibuster,” requiring senators to actually filibuster when they want to filibuster — i.e., to speak for hours on end.<sup>92</sup> An alternative, somewhat weaker proposal being considered would have switched the onus to the filibustering minority to demonstrate on the Senate floor that it had 41 votes to filibuster, rather than requiring the majority to round up 60 votes to end the filibuster.<sup>93</sup> But informal lobbying to avoid either change had

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<sup>88</sup> See Alexander Bolton, *Reid to Lay Out Plans for Filibuster Reform*, THE HILL (Jan. 22, 2013, 5:00 AM), <http://thehill.com/homenews/senate/278419-reid-to-lay-out-plans-for-filibuster-reform> [hereinafter *Reid to Lay Out Plans*] (“Proponents of the tactic, such as Sen. Tom Udall (D-N.M.), call it the ‘constitutional option,’ arguing that the Constitution allows the Senate to set its own rules at the start of a new Congress.”).

<sup>89</sup> See Jennifer Steinhauer, *Resistance on Method for Curbing Filibuster*, N.Y. TIMES, Nov. 28, 2012, at A17 (noting that such a change “is available only on the first day of a new Congress”).

<sup>90</sup> See Mark Leibovich, *In the Senate, the Escalation of Rhetoric*, WASH. POST, May 17, 2005, at C1 (describing origin and use of term as rooted in annihilation rhetoric).

<sup>91</sup> See Alexandra Jaffe, *Warren Pledges to Lead Filibuster Reform*, THE HILL BALLOT BOX (Nov. 15, 2012, 1:54 PM), <http://thehill.com/blogs/ballot-box/senate-races/268267-warren-pledges-to-lead-filibuster-reform> (“A vote to change the filibuster would find little GOP support, and Democrats are likely to use the so-called constitutional or ‘nuclear’ option to pursue reform, in which Senate rules could be changed by a majority vote.”).

<sup>92</sup> See Ryan Grim, *Jeff Merkley Circulates ‘Talking Filibuster’ Reform Proposal*, HUFF. POST (Dec. 12, 2012), [http://www.huffingtonpost.com/2012/12/12/jeff-merkley-filibuster-reform\\_n\\_2287831.html](http://www.huffingtonpost.com/2012/12/12/jeff-merkley-filibuster-reform_n_2287831.html).

<sup>93</sup> Bolton, *Reid to Lay Out Plans*, *supra* note 88; Timothy Noah, *The Filibuster and*

begun before 2012 had even ended, with senators disseminating the concern that it would set a precedent for regular rule changes.<sup>94</sup> One bipartisan group of senators, including John McCain and Carl Levin, made a counterproposal excluding the talking filibuster change, but scuttling filibusters on motions to proceed to consider legislation. It did not touch filibusters on actual legislation and also permitted the minority party two additional amendments on every bill.<sup>95</sup> Opponents of this bipartisan proposal claimed it would “give[ ] even more power to the minority,” because it did “nothing to solve the heart of the problem” — the lack of a talking filibuster requirement.<sup>96</sup>

Still, it appeared for a moment that Senate Majority Leader Reid might actually consider taking up significant filibuster reform.<sup>97</sup> The reform proposal was gaining momentum, and, more importantly, votes.<sup>98</sup> But soon after 2013 began, signals emerged suggesting that Reid would opt for the weaker, non-talking filibuster option.<sup>99</sup> In order to buy time to negotiate with Republicans on a more moderate set of reforms, he employed a parliamentary maneuver that extended

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“*the Fermata*,” THE NEW REPUBLIC (Jan. 22, 2013), <http://www.newrepublic.com/blog/plank/112111/the-filibuster-and-the-fermata> (arguing that neither change “would pare back obstruction by the minority party in any meaningful way”).

<sup>94</sup> See Manu Raju, *Senators Wary of Filibuster ‘Nuclear Option,’* POLITICO (Dec. 9, 2012), <http://www.politico.com/story/2012/12/harry-reid-filibuster-84807.html> (“During floor votes, on the Senate subway and over breakfast meetings, senators from both parties are quietly trading ideas to avoid the precedent-setting move to alter filibuster rules with a simple majority — rather than two-thirds — vote.”).

<sup>95</sup> Alexander Bolton, *Reid Will Postpone Filibuster Reform*, THE HILL (Jan. 2, 2013), <http://thehill.com/homenews/senate/275271-reid-will-postpone-filibuster-reform-until-late-january>.

<sup>96</sup> Greg Sargent, *Filibuster Reform Is in Serious Trouble*, WASH. POST: PLUM LINE (Jan. 2, 2013), <http://www.washingtonpost.com/blogs/plum-line/wp/2013/01/02/filibuster-reform-is-in-serious-trouble/> (quoting Senator Jeff Merkley of Oregon, one of the talking filibuster reform advocates). Merkley argued at the time that “unless Senators are forced to *fully carry out* the filibuster in the eye of the public and media, there will be no political price or disincentive for obstructionism.” *Id.* (emphasis in original).

<sup>97</sup> See Lesniewski, *supra* note 87 (noting reform-minded senators’ hopefulness that Reid could push through talking filibuster reform). This scenario repeated itself later in 2013. See Manu Raju et al., *Harry Reid on Nuclear Option: ‘I Ate Sh—’ on Nominees*, POLITICO (July 11, 2013), <http://www.politico.com/story/2013/07/the-start-of-the-filibusters-end-94062.html?hp=f2> (detailing Reid’s July threat to invoke the nuclear option).

<sup>98</sup> See Alexander Bolton, *Senate Dem Freshmen Want Party Back to ‘Talking Filibuster,’* THE HILL (Jan. 4, 2013), <http://thehill.com/homenews/senate/275549-senate-democratic-freshmen-call-for-talking-filibuster-set-up-fight-with-old-bulls> (noting seven potential new votes for the talking filibuster plan) [hereinafter *Dem Freshmen*].

<sup>99</sup> Sahil Kapur, *Uncertainty over Filibuster Reform Worries Opponents*, T.P.M.D.C. (Jan. 3, 2013), <http://tpmdc.talkingpointsmemo.com/2013/01/filibuster-reform-jeopardy.php>.

the first day of the legislative session beyond the actual date of January 3rd.<sup>100</sup> When the first legislative day resumed on January 22, 2013, with Republicans' help, instead of utilizing the nuclear option he put forth a proposal that largely accepted the recommendations of the bipartisan group. Reid agreed to the Republican request for the right to offer at least two amendments when Democrats tried to block them, and to limiting debate on nominees to lower federal courts and federal agencies,<sup>101</sup> still leaving the onus on the majority party to block a filibuster.

There appeared to be some public misunderstanding about the change, as well as about the current status of the filibuster itself. The "reform," as the *New York Times* put it, would still allow senators "to talk and talk and talk, though for not quite as long as they have grown accustomed to."<sup>102</sup> But no 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. The *Times*, however, did get one thing right: the reform meant that "[t]he majority will still not have absolute rule," and "[t]he minority — currently Republican — will preserve its ability to force a supermajority of 60 votes to advance bills."<sup>103</sup>

In the end, the defeat of the talking filibuster proposal, while maintaining minoritarian power in the Senate, was actually antithetical to the stated goals of its opponents. They often spoke of the Senate's role as a "deliberative" body.<sup>104</sup> And yet they defeated a reform that would have necessitated *more* debate and deliberation in the form of talking filibusters.<sup>105</sup> While such speeches, when they existed, could cover frivolous matters, they could also contain real substance.<sup>106</sup> As new Senator Tim Kaine put it, the "talking filibuster is what enables

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<sup>100</sup> See generally Manu Raju, *Harry Reid Delays Call on Filibuster Overhaul*, POLITICO (Jan. 2, 2013), <http://www.politico.com/story/2013/01/reid-delays-call-on-filibuster-overhaul-85692.html>.

<sup>101</sup> *Id.*

<sup>102</sup> Jeremy W. Peters, *New Senate Rules to Curtail the Excesses of the Filibuster*, N.Y. TIMES (Jan. 25, 2013), <http://www.nytimes.com/2013/01/25/us/politics/bipartisan-filibuster-deal-is-reached-in-the-senate.html>.

<sup>103</sup> *Id.*

<sup>104</sup> See, e.g., Editorial, *Filibuster Follies*, WASH. TIMES (Feb. 1, 2013), <http://www.washingtontimes.com/news/2013/feb/1/filibuster-follies/> ("Though certainly not ideal, the changes preserve the upper chamber's intended role as a deliberative body.").

<sup>105</sup> See Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 761 (2012) (noting that the filibuster "no longer has much of anything to do with debate").

<sup>106</sup> See *supra* note 81 and accompanying text (detailing Senator Bernie Sanders's admirably quixotic talking filibuster of 2010).

your colleagues and the American public to know whether you're interposing some reason for delay or you're just interested in delay for delay's sake."<sup>107</sup> Without filibuster reform, the public will never know. Some observers predicted that it would take another Civil Rights Act-style "galvanizing" filibuster to spur real reform,<sup>108</sup> but such observations miss the point; if the public can never see a filibuster, they can never be galvanized against it. Less than two weeks after the package passed, Republicans in the Senate were already intimating that they would filibuster against confirming former Senator Chuck Hagel as President Obama's Secretary of Defense, which they subsequently did. This was the first filibuster of a Defense Secretary in history,<sup>109</sup> and a breach of the reform deal that Senator Reid and the Republicans had just reached.<sup>110</sup>

Why, then, did Reid retreat? He told the *Washington Post*, "I'm not personally, at this stage, ready to get rid of the 60-vote threshold."<sup>111</sup> One reason was that he did "not want to start the new Congress on a sourly partisan note and would prefer to negotiate a bipartisan alternative."<sup>112</sup> But previous efforts to establish a "gentlemen's agreement" — including just a year earlier at the start of the 112th Congress — had not worked,<sup>113</sup> as Reid well knew. However, Reid was not alone: several prominent senior Democrat senators — just as a reminder, they were in the majority — had "balked" at changing the

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<sup>107</sup> Bolton, *Dem Freshmen*, *supra* note 98.

<sup>108</sup> E.g., Scott Lemieux, *What Killed Filibuster Reform?*, AM. PROSPECT (Jan. 25, 2013), <http://prospect.org/article/what-killed-filibuster-reform> ("The fact that giving up the filibuster requires that most senators give up power means that real filibuster reform will probably require a galvanizing issue (like the filibusters of civil-rights bills that caused the supermajority requirements to be reduced).").

<sup>109</sup> See Jeremy Herb & Ramsey Cox, *Senate Republicans Block Hagel Nomination for Defense Secretary*, THE HILL (Feb. 14, 2013), <http://thehill.com/blogs/defcon-hill/army/283279-senate-gop-blocks-hagel-nomination-in-vote#ixzz2LDjPQkB7> (quoting Senator Reid's claim to that effect).

<sup>110</sup> See Megan Scully & Meredith Shiner, *The GOP's Hagel Dilemma: To Filibuster, or Not to Filibuster*, ROLL CALL (Feb. 1, 2013), [www.rollcall.com/news/the\\_gops\\_hagel\\_dilemma\\_to\\_filibuster\\_or\\_not\\_to\\_filibuster-222096-1.html](http://www.rollcall.com/news/the_gops_hagel_dilemma_to_filibuster_or_not_to_filibuster-222096-1.html) ("Several Cabinet nominees have failed to win the backing of a majority of senators — and others have withdrawn their names before reaching the Senate floor — but a filibuster would mark a serious breach in the unwritten protocol that governs the Senate. Such a challenge could also disrupt the deal reached last month between Democratic and Republican leaders to overhaul the filibuster.").

<sup>111</sup> Paul Kane, *Senate Leaders Agree on Filibuster Changes*, WASH. POST (Jan. 24, 2013), [http://articles.washingtonpost.com/2013-01-24/politics/36520219\\_1\\_filibuster-rules-filibuster-vote-senate-majority-leader](http://articles.washingtonpost.com/2013-01-24/politics/36520219_1_filibuster-rules-filibuster-vote-senate-majority-leader).

<sup>112</sup> Bolton, *Reid to Lay Out Plans*, *supra* note 88.

<sup>113</sup> See *id.*

rule.<sup>114</sup> Although Republicans had threatened Reid that a “nuclear” move would harm talks on the budget and debt limit,<sup>115</sup> the costs for failing to act were also high, with critics charging that failure to stem the tide of filibusters had “come close to destroying the Senate.”<sup>116</sup>

In the end, Reid had simply “backed down,” allowing what many Republicans and liberals labeled a win for the Republicans,<sup>117</sup> and allowing the minority to hamper the work of the Senate, and the President, without even showing up.<sup>118</sup> Yet those who put the failure of reform in 2013 on the individual weaknesses of Harry Reid have failed to learn from the history of failed efforts at filibuster reform. The filibuster reform tussle discussed here was only the first in a series of failed proposals to reform the filibuster in 2013.<sup>119</sup> And these other efforts at reform, including those described above, as well as similar proposals by the Republicans, also fizzled, leading simply to agreements to refrain from full exercises of the filibustering power.

In 2013, it was the Senate’s most senior Democrats who resisted reform, with only the junior senators ultimately pushing for radical change. This highlights not only the consistent failure of filibuster reform, but suggests it was the most experienced senators who gave up

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<sup>114</sup> *Id.*

<sup>115</sup> See generally Kane, *supra* note 111 (discussing the series of votes and handshake agreements that constitute the most significant changes to the Senate’s rules in 35 years).

<sup>116</sup> George Packer, *Senatus Decadens*, NEW YORKER DAILY COMMENT (Jan. 4, 2013), <http://www.newyorker.com/online/blogs/comment/2013/01/senatus-decadens-can-filibuster-reform-save-the-senate.html> (blaming “cultural transformation and individual failure” for the decay of the Senate).

<sup>117</sup> Susan Ferrechio, *GOP Sees Victory in Senate Deal on Filibuster*, WASH. EXAMINER (Jan. 27, 2013), [washingtonexaminer.com/gop-sees-victory-in-senate-deal-on-filibuster/article/2519764](http://washingtonexaminer.com/gop-sees-victory-in-senate-deal-on-filibuster/article/2519764) (describing how Senate Minority Leader Mitch McConnell wrote to his supporters in Kentucky: “We beat the liberals.”). Though others argued that the deal was a loss for everyone. See John Fund, *Filibuster Deal ‘Dramatically Alters the Dynamic of the Senate,’* NAT’L REV.: THE CORNER (Jan. 24, 2013), [www.nationalreview.com/corner/338743/filibuster-deal-dramatically-alters-dynamic-senate-john-fund](http://www.nationalreview.com/corner/338743/filibuster-deal-dramatically-alters-dynamic-senate-john-fund) (noting displeasure about the deal among both liberals and conservatives).

<sup>118</sup> Michael McAuliff, *Tom Harkin: Filibuster Reform Failure Hamstrings Obama Agenda*, HUFF. POST (Jan. 24, 2013), [www.huffingtonpost.com/2013/01/24/tom-harkin-filibuster-reform\\_n\\_2544153.html](http://www.huffingtonpost.com/2013/01/24/tom-harkin-filibuster-reform_n_2544153.html). Harkin went on to argue that President Obama should consider “a four-year vacation,” as failure to strengthen rules against filibusters would make it impossible for him to pass ambitious agenda items. *Id.*

<sup>119</sup> In July 2013, Harry Reid again threatened to invoke the nuclear option, expressing anger in graphic terms to *Politico* over Republicans’ filibustering Obama’s nominees. See Manu Raju et al., *supra* note 97. But once again, the threat proved idle, as Republicans eventually consented to allow a vote on several nominees. Paul Kane & Ed O’Keefe, *Senate Averts Rule Change, Confirms Key Obama Pick*, WASH. POST, July 17, 2013, at A1.

the opportunity available to them on the only day of the year, albeit an extended one, to end the practice. The next section details why.

*C. The Majoritarian Paradox: Explaining the Filibuster's Staying Power*

It is important not to infer that idiosyncratic circumstances in each of the periods of proposed reform described above fully explain the continuing existence of the filibuster. The failure of numerous Senate leaders to achieve its reform has been systematic, not circumstantial. We argue here that this is because its causes are systemic, not ad hoc. Paradoxically, despite its effect of minoritarian empowerment, the filibuster is an institution that reflects and protects the institutional incentives of the majority of senators, which explains why a majority has not employed the nuclear option or any other serious impediment to the filibuster's operation.

The filibuster is just one of the institutionalized practices of the Senate that springs from a number of norms, previously called the "folkways," that are counter-majoritarian, with many not even enforced by a written rule.<sup>120</sup> Many of the folkways have waned in influence in recent decades, particularly those relating to seniority and apprenticeship, as discussed below. However, two norms that remain influential are reciprocity and specialization. One of us (Jacobi) previously analyzed how reciprocity and specialization explain the practice that most resembles the filibuster, senatorial courtesy.<sup>121</sup> Both the similarities and differences of the two norms are illustrative in understanding why the filibuster is respected.

Senatorial courtesy is the informal rule — at times partially formalized in the blue slip process<sup>122</sup> — that is invoked when a nominee is opposed by the senator from the nominee's home state. When this occurs, the Senate will vote down the nomination or never address it, allowing it to lapse. Senatorial courtesy applies to the position of federal judge, U.S. attorney, U.S. marshal, and other offices. This practice, which has operated since the founding and is typically respected across party lines,<sup>123</sup> seems to present a paradox similar to the filibuster, as it involves senators voluntarily refraining

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<sup>120</sup> See Donald R. Matthews, *The Folkways of the United States Senate: Conformity to Group Norms and Legislative Effectiveness*, 53 AM. POL. SCI. REV. 1064, 1064 (1959).

<sup>121</sup> Tonja Jacobi, *The Senatorial Courtesy Game*, 30 LEGIS. STUD. Q. 193, 193 (2005).

<sup>122</sup> Senatorial courtesy predates any written rule, and the blue slip rule appears to exist as a formalization of the norm. See generally Sarah Binder & Forrest Maltzman, *The Limits of Senatorial Courtesy*, 29 LEGIS. STUD. Q. 5 (2004).

<sup>123</sup> *Id.* at 6-9 (finding senatorial courtesy to be statistically significant across party lines, at least within the first few weeks of the nomination process).

from exercising their constitutional prerogative to shape advice and consent nominations. The seeming paradox can be explained by the persuasive effect of reciprocity and retaliation. If a senator thinks it is likely that in the future she will have a strong preference over a nominee from her home state, then she may be willing to forego acting on a weak preference over a nominee from a different state, in expectation that other senators will likewise forego asserting their rights over nominees from her state.<sup>124</sup> Similarly, if there is an expectation that senators will pay each other this courtesy, then senators who decline to do so are likely to face retaliation when they attempt to claim senatorial courtesy themselves. With repeated interactions, each senator expects to be in the majority more often than to be the lone individual asserting the right of veto. However, if senators care significantly more about nominations that directly affect their own state than other states, they will support the dissenting voice out of an expectation of future reciprocity.<sup>125</sup>

This explanation for senatorial courtesy resembles the standard explanation given for the longevity of the filibuster: one day even majority senators expect to be in the minority. For example, as Senator John Cornyn observed when filibuster reform again failed in 2013, “The history of this has been that people get up to the edge of the abyss and they look into the abyss and they pull back because what majorities realize is that majorities are transient and that today’s minority can become the majority.”<sup>126</sup> This would explain why both the filibuster and senatorial courtesy apply in the Senate but not the House: the difference in salience between home state *nominees* and other nominees would have to be much greater to sustain in a 435 person body than a 100 person body.<sup>127</sup> However, the differences

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<sup>124</sup> See HAROLD W. CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* 7 (1972). Scholars of both Congress and the judiciary agree that nominations affecting their own constituency are likely to be more salient to the community, and so more valuable to the senators. *Id.*; STEVEN S. SMITH, *THE AMERICAN CONGRESS* 319 (1999); Jeffrey A. Segal, Charles M. Cameron & Albert D. Cover, *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Nominations*, 36 AM. J. POL. SCI. 96, 110 (1992).

<sup>125</sup> Jacobi, *supra* note 121, at 194. This is true even under quite adverse conditions, including when large portions of the Senate support the nominee. Outcomes will depend on the level of intensity of the greater salience of home state nominations, the level of discounting of future value in comparison to present value, and the stringency of the expected retaliatory strategies played for failing to respect the norm. *Id.* at 201.

<sup>126</sup> Humberto Sanchez & Niels Lesniewski, *Cornyn Predicts Brokered Compromise on Filibuster Issue*, ROLL CALL (Jan. 14, 2013), [http://www.rollcall.com/news/cornyn\\_predicts\\_brokered\\_compromise\\_on\\_filibuster\\_issue-220704-1.html](http://www.rollcall.com/news/cornyn_predicts_brokered_compromise_on_filibuster_issue-220704-1.html).

<sup>127</sup> Jacobi, *supra* note 121, at 203 (“[A]s the size of the chamber increases,

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between the filibuster and senatorial courtesy are quite telling. This reciprocity explanation only appears to make sense for location-specific issues, where greater salience is expected for topics relating to nominations or other matters affecting a senator's own state. However, the filibuster is different from norms such as senatorial courtesy because it applies to legislation across the board. Nonetheless, as we show below, the explanation for the filibuster is somewhat reminiscent of the explanation for senatorial courtesy, although more complex.

Simple logrolling of various salient local interests cannot explain the filibuster. It is true that the filibuster has been used to protect localized concerns through logrolling — for instance, western and southern Democrats joined forces to oppose cloture motions during the battle in the Senate over civil rights legislation, with the southerners convincing the westerners that support for cloture in that situation would undermine future filibusters to protect western interests.<sup>128</sup> However, following three important historical developments that shaped the composition of the Senate, the filibuster can no longer be explained through this kind of logrolling.

First, partially in response to the passage of the Civil Rights Act and partially in response to large geographic movements, significant numbers of conservative southern Democrats became Republicans starting in the late 1960s.<sup>129</sup> This realignment meant that the Democratic Party was far less divided in subsequent decades. Second, in 1994, large numbers of freshman Republicans entered Congress on the back of the Contract with America, some with promises to limit themselves in the number of terms they served in Congress. Those freshman senators were unwilling to follow the norms of seniority and

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sustaining an equilibrium where senatorial courtesy is respected requires the absolute value of the payoffs . . . to increase dramatically relative to the payoffs of the voting senators. Consequently, all other things being equal, senatorial courtesy and other like norms become harder to sustain in a large chamber than in a small chamber.”)

<sup>128</sup> See ROBERT CARO, *THE PASSAGE OF POWER: THE YEARS OF LYNDON JOHNSON* 567 (2012); WILLIAM ESKRIDGE, PHILIP FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* ch. 1 (4th ed. 2007).

<sup>129</sup> This change also affected the House. See NELSON POLSBY, *HOW CONGRESS EVOLVES: SOCIAL BASES OF INSTITUTIONAL CHANGE* 80-85 (2004) (describing how northerners settled in the South after the advent of residential air conditioning, leading to the Dixiecrats being replaced by Republicans and so sharply increasing partisanship among both Democrats and Republicans). However, for challenges to this argument see, for example, SEAN TRENDE, *THE LOST MAJORITY: WHY THE FUTURE OF GOVERNMENT IS UP FOR GRABS — AND WHO WILL TAKE IT* (2012) (arguing that the white South began breaking away from the Democrats in the 1920s, for economic rather than racial issues: Southern whites began voting Republican as their wealth increased, while the Republican Party was still supporting a civil rights platform).

apprenticeship, which gave enormous power to long-serving committee chairs — including many Democrats — and required that freshman serve their time before gaining any influence, or even before it was appropriate for them to speak on the floor.<sup>130</sup> Instead, these freshman senators largely abolished the reciprocity-reliant norm of seniority. Third, campaign finance reform simultaneously restricted “hard money” raised by candidates from individuals and loosened up “soft money” raised by political parties,<sup>131</sup> significantly strengthening the influence of the parties over individual candidates. Together, these three changes paved the way for increases in party discipline, which undermined the opportunity for logrolling between factions or individuals over filibusters, and turned the filibuster into a far greater party-exercised device than ever before.

Consequently, the local salience explanation for senatorial courtesy would not appear to apply to the filibuster for two reasons. First, the heightened salience of home state nominations does not apply to filibusters in the modern context; under that logic, any senator may have an incentive to exercise such a veto, but there would be no reason for other senators to respect it. Put another way, there is no reason to expect greater salience for future bills than present bills, when the issues they address do not vary systematically by locality. Second, without localized interests defining the exercise of any veto, there would be far more potential applications for a general filibuster than a localized exercise of senatorial courtesy, greatly increasing the costs of respecting any such veto by other senators. Nonetheless, what does emerge is an incentive that somewhat resembles the senatorial courtesy explanation.

The rise of party discipline may mean that there is far less incentive for logrolling in support of filibusters, however, it has not led to the decline of the filibuster. Quite the contrary: the rise of party influence has significantly increased use of the filibuster, to the point of it

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<sup>130</sup> See Matthews, *supra* note 120, at 1065. For a modern example of the Senate freshman-as-firebrand, refusing to kowtow to seniority, see Jonathan Weisman, *Texas Senator Goes on Attack and Raises Bipartisan Hackles*, N.Y. TIMES, Feb. 16, 2013, at A1 (describing the very visible and noisy first seven weeks of new senator Ted Cruz of Texas, including his effort to stymie the nomination of Obama appointee (and former senator) Chuck Hagel for Secretary of Defense).

<sup>131</sup> This describes the incentives created between the time of the Supreme Court’s decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), upholding campaign finance restrictions on individual donors, and its decision in *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010), prohibiting restriction on expenditure by unions and corporations.

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becoming a standard part of the procedure on most substantive bills.<sup>132</sup> In 2009, “every returning Democratic senator signed a letter complaining that the Republican routinization of filibusters was imposing a 60-vote supermajority requirement on nearly all significant bills.”<sup>133</sup>

In an era of party discipline, rather than providing a mechanism by which different minorities respect each other’s rights, the filibuster simply empowers the minority at the expense of the majority. This returns us to the standard explanation: that, one day, majorities expect to be in the minority. But breaking this platitude down shows that with greater specificity, it can provide more in the way of an explanation of the filibuster.

For a majority to allow a minority a veto over all legislation, rather than specific localized interests, simply because they expect to be in the minority in the future, it would have to be the case that either senators care more about the future than the present or that senators care more about what happens to legislation that arises when they are in the minority than to legislation arising when they are in the majority. The former explanation is the very definition of irrationality: standard models of behavior provide for discounting future rewards, due to their lower certainty and natural human impatience. Any explanation that rests on senators gaining greater value from future rewards than present rewards makes little sense. The latter explanation could make sense under one of two conditions: either senators are highly risk-averse, or else they truly follow the Madisonian philosophy that it is better to prevent bad legislation from passing than to pass good legislation. Arguably, these two are in fact the same thing: fearing the passage of bad bills more than valuing the passage of good ones is in essence risk aversion at the policymaking level. Risk aversion is itself a kind of irrationality, but one that is common enough to be incorporated into standard models of human behavior: the utility of an expectation is less than the expectation of a utility. However for highly educated senators, is this explanation adequate to capture the strong history of the filibuster? If we consider more precisely the incentives of senators, we can give greater traction to both the risk aversion thesis and the salience thesis.

Two classics of political science from the 1970s, written by David Mayhew<sup>134</sup> and Morris Fiorina,<sup>135</sup> broke down congressional incentives

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<sup>132</sup> See *Senate Actions on Cloture Motions*, *supra* note 83 (detailing explosion in filibuster use in past ten Congresses).

<sup>133</sup> Noah, *Die, Filibuster, Die*, *supra* note 49.

<sup>134</sup> DAVID MAYHEW, *THE ELECTORAL CONNECTION AND CONGRESS* (1974).

based on the drive for re-election. The electoral incentive causes Members of Congress to structure its own institutional rules and policy outcomes. In particular: First, since re-election is based on individual constituencies, Congressmen have an interest in creating localized, and so particularized, benefits; the effect is less for the Senators, who serve whole states, but in essence, the same logic holds. Second, Congressmen benefit from making noise about issues they either support or oppose — through “credit claiming,” “advertising,” “blame shifting,” and “position taking” — but they do not actually need to achieve much at all.<sup>136</sup> The former effect looks like risk aversion, but rather than resting on individual idiosyncratic irrationality, it is far more rational because it is promoted by an institutionalized framework that pushes away from action to actually achieve goals and toward pure position taking. The latter effect, promoting particularized benefits, brings us back to the senatorial courtesy explanation: it means that even though the filibuster operates across the board, senators are nonetheless still likely to be focused disproportionately on those issues affecting their own states. Combine this institutionalized salience with the institutionalized risk aversion effect, and we expect that senators will be willing to accept a minoritarian mechanism that prevents much action from taking place — on the proviso that they can oppose any adverse action directed at their own constituency. Together, these factors provide the institutional incentive for the filibuster.

Ironically, it was this set of institutional incentives that created the budgetary problem that reconciliation was meant to correct, because every representative had an incentive to seek spending for their district or state, but nobody really has the incentive to control the budget.<sup>137</sup> This explanation predicts exactly what happened in 2009, 2013, and during the many other attempts at filibuster reform

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<sup>135</sup> MORRIS FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1974).

<sup>136</sup> Alford and Brady found support for the predictions of both Fiorina and Mayhew, which predicted that the rise in constituency services around the 1960s made members more re-electable. John Alford & David Brady, *Personal and Partisan Advantage in US Congressional Elections, 1846-1990*, in *CONGRESS RECONSIDERED* 141 (Lawrence C. Dodd and Bruce I. Oppenheimer eds., 5th ed. 1993).

<sup>137</sup> Although the rise of the Tea Party, with its emphasis on budgetary restraint, may appear to be the exception, the initially much-anticipated power of the Tea Party failed to materialize in the 2012 election. See David Weigel, *Why the Tea Party Failed*, SLATE (Nov. 9, 2012), [http://www.slate.com/articles/news\\_and\\_politics/politics/2012/11/the\\_tea\\_party\\_lost\\_big\\_on\\_election\\_night\\_and\\_must\\_now\\_work\\_with\\_gop\\_to\\_bounce.html](http://www.slate.com/articles/news_and_politics/politics/2012/11/the_tea_party_lost_big_on_election_night_and_must_now_work_with_gop_to_bounce.html).

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previously described: a lot of talk about reform, raised expectations, but when it comes down to actually bringing about change, very little is done.

The reason is not, as some argue, that there is a serious constitutional impediment to abolishing the filibuster, or that the Senate has a grand history of being a minority institution — the former argument is rebutted below and the latter argument has not been the case since the 1960s, for the reasons described above. Rather, the reason is that while the majority of the Senate *acting as a majority* has the incentive to abolish the filibuster, that majority is made up of individuals, none of whom possess the institutional incentive to significantly reform the filibuster rule.<sup>138</sup> So it is the majority that actually creates and maintains minoritarian power. The filibuster looks like a paradox, but it is really simply a product of institutional incentives toward particularized benefits and away from positive action, including institutional reform.

One final factor adds to this setup in favor of the filibuster: the stickiness of norms. Whether describing the basics of human evolution or the intricacies of the legal rules, scholars have recognized that rules of behavior tend, once established, to be difficult to change: “Norms provide cultural ‘stickiness,’ or viscosity that can help sustain adaptive behavior and retard detrimental changes in society. . . . Equally, though, stickiness can inhibit the introduction and spread of beneficial behaviors . . . .”<sup>139</sup> Norm stickiness means that even if these institutional incentives were not enough to create the filibuster in the first place — as we have seen, the filibuster evolved over time in spite of an early expectation that debate would not be overly drawn out and protracted — nonetheless, once created, it is difficult to abolish. On top of risk aversion and salience, then, we can add path dependence to our explanation. In fact, as the next Part shows, the major reform to the filibuster that has come about, reconciliation, was not heralded or even intended as a reform.

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<sup>138</sup> This can include moderates. See John O. McGinnis & Michael B. Rappaport, *The Judicial Filibuster, the Median Senator, & the Countermajoritarian Difficulty*, 2005 SUP. CT. REV. 257, 272-73 (arguing why moderate senators may prefer supermajority rules such as the filibuster, as they tend to produce more moderate nominees).

<sup>139</sup> PAUL R. EHRLICH & ANNE H. EHRLICH, *THE DOMINANT ANIMAL: HUMAN EVOLUTION AND THE ENVIRONMENT* 115 (2008); see Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607 (2000) (applying this concept to the law).

## II. RECONCILIATION: MAJORITARIAN COUNTER

In contrast to ordinary bills, which are subject to a filibuster that requires 60 votes to overcome through cloture, debate on reconciliation bills in the Senate is limited to twenty hours.<sup>140</sup> As this Part makes clear, such stringent restrictions on debate were only intended to apply to budgetary procedures, but the very fact of their stringency made them more broadly appealing to avoid the across-the-board de facto supermajority requirement that the institutionalization of the filibuster had created. We maintain that it is no coincidence that reconciliation emerged as a majoritarian alternative to the filibuster during the exact time period when the filibuster became most prevalent.

Senator Mansfield installed the two-track system just before the Joint Study Committee on Budget Control was holding its hearings in 1972, from which the reconciliation procedure emerged. Before the two-track system, filibusters were an annoyance, sometimes a tragic one in the case of civil rights, but not an everyday occurrence. They only became a standard fixture after the requirement to actually stand up and speak disappeared, and the filibuster turned into an option to place an invisible hold on any bill, removable only through a 60-vote cloture motion. Reconciliation's evolution occurred within this very time frame. While debate on reconciliation bills was limited by statute from the start, senators (and presidents) did not begin to advocate using those limits strategically to pass bills by simple majorities until the time that filibuster usage exploded. Not surprisingly, both the post-two-track expansion of filibusters and the first attempt to use reconciliation to pass a tax cut, date to a time of bitter partisan conflict — the “Republican Revolution” and the Contract With America in the mid-1990s. By that time, a true supermajority requirement had come to dominate Senate business, but at the very same time majorities began to use reconciliation for reasons far outside its original budgetary purposes. Both structures had drifted far away from their original uses, at exactly the right time to clash with each other.

### A. *Origins of Reconciliation*

#### 1. Arising from Conflict

Reconciliation was created during a time of panic on Capitol Hill. After nearly two centuries of American government, no one was truly

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<sup>140</sup> 2 U.S.C. § 641(e)(2) (2012).

sure by the early 1970s who controlled the government's budget. The committee that invited Charles Schultze to present budget reform proposals received its commission in 1972,<sup>141</sup> but reform of the budgetary procedure had been a long time coming. Deficits, which are commonplace in congressional budgets today, were an alarming prospect at the time. The Joint Study Committee on Budget Control observed that there had been 37 deficit-laden budgets in the 54 years since 1920, and while there were ten years with surpluses prior to 1931, there were only six after.<sup>142</sup> Deficits had recently reached their highest levels since the New Deal, averaging \$20.3 billion for the previous three years, roughly equivalent by inflation to the trillion-dollar-plus deficits of the first Obama Administration.<sup>143</sup>

Beyond the numbers, however, there was a bigger problem: the sense that Congress's hold on the budget was lost. While Congress had dominated budget making for over a century after the Founding, it formally ceded authority to the president in 1921, helping lead to the "imperial presidency" of the 1960s and early 1970s — a reign that extended to budget control.<sup>144</sup> President Nixon had acted in 1972 to "impound," or withhold spending of, billions of dollars of funds that Congress had allocated, a move that "threaten[ed] Congress's very existence," as one senator declared.<sup>145</sup> Similarly, the President had demanded that Congress install a \$250 billion ceiling on spending for 1973.<sup>146</sup> After the explosive growth of government during the New Deal, Congress had, for the previous several decades, "developed its budget in a highly decentralized fashion so that lawmakers and voters had difficulty both developing an accurate picture of the magnitude of spending that resulted and controlling individual decisions so that they accorded with larger spending objectives."<sup>147</sup>

Most in Congress had no overall sense of how much the body was spending as a whole, especially considering "backdoor spending" that

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<sup>141</sup> See S. REP. NO. 93-17, at 1 (1973).

<sup>142</sup> JOINT STUDY COMM. ON BUDGET CONTROL, RECOMMENDATIONS FOR IMPROVING CONGRESSIONAL CONTROL OVER BUDGETARY OUTLAY AND RECEIPT TOTALS, H.R. REP. NO. 93-147, at 1 (1973) [hereinafter BUDGET STUDY COMMITTEE RECOMMENDATIONS].

<sup>143</sup> See OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES tbl.1.1, <http://www.whitehouse.gov/omb/budget/Historicals> (last visited Feb. 13, 2013).

<sup>144</sup> See ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 10-18 (2007) [hereinafter FEDERAL BUDGET].

<sup>145</sup> *Fund Impounding by Nixon Backed*, N.Y. TIMES, Mar. 25, 1971, at 13 (quoting Senator Charles Mathias, Jr.).

<sup>146</sup> See ALLEN SCHICK, CONGRESS AND MONEY: BUDGETING, SPENDING AND TAXING 17 (1980) [hereinafter CONGRESS AND MONEY].

<sup>147</sup> Garrett, *Rethinking the Structures*, *supra* note 4, at 394.

was not covered in the appropriations process.<sup>148</sup> One hand did not know, or avoided learning, what the other was doing. Congress would often vote for overall spending decreases, but in the same year increase outlays for individual programs, “a budgetary swamp from which there was no easy escape.”<sup>149</sup> While congressional appropriations committees had previously guided the process, they had lost that power over time to multiple other committees.<sup>150</sup> All of these factors, particularly Nixon’s threat to Congress’s power of the purse, prompted members to act “[w]ith unusual speed” in reforming budget procedures in the early 1970s.<sup>151</sup>

Congress’s first move toward reform, perhaps predictably, was to form a committee — but it was at the committee level where reconciliation entered the story. At the same time that it increased the country’s debt limit in 1972, Congress created the Joint Study Committee on Budget Control in order to study “procedures which should be adopted by the Congress for the purpose of improving congressional control of budgetary outlay and receipt totals.”<sup>152</sup> The committee invited Charles L. Schultze and countless others to offer analysis and ideas. When the committee voted on sending its report to the full Congress, its members backed it unanimously; their decisive recommendations were soon hailed.<sup>153</sup>

The committee made several recommendations that found their way into the law itself. The law made good on the Joint Study Committee’s original charge to completely reformulate the budget process. The legislation established whole new institutions (standing budget committees and the Congressional Budget Office), a new type of legislation (the concurrent budget resolution), and a new calendar

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<sup>148</sup> See Philip G. Joyce, *Congressional Budget Reform: The Unanticipated Implications for Federal Policy Making*, 56 PUB. ADMIN. REV. 317, 318 (1996).

<sup>149</sup> JOHN B. GILMOUR, RECONCILABLE DIFFERENCES?: CONGRESS, THE BUDGET PROCESS, AND THE DEFICIT 17 (1990).

<sup>150</sup> See WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 67 (8th ed. 2011).

<sup>151</sup> Hogan, *supra* note 6, at 134.

<sup>152</sup> Act of Oct. 27, 1972, Pub. L. No. 92-599, § 301(b)(1), 86 Stat. 1324, 1325.

<sup>153</sup> See, e.g., Eileen Shanahan, *A Bid for Rationality: Plan for Congressional Budget System Could Bring Order out of Fiscal Chaos*, N.Y. TIMES, Apr. 18, 1973, at 65 (“If they are adopted . . . the procedures may well constitute the greatest step toward rational decision making in the area of economic policy since passage of the Employment Act of 1946 . . . .”); Editorial, *Toward a Legislative Budget*, WASH. POST, Apr. 22, 1973, at B6 (“It is a remarkable drive for reforms, led by some of the most senior and influential men on Capitol Hill and spurred by a fortuitous mixture of concern over excessive spending, apprehension for the health of Congress, and challenges from the President.”).

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(shifting the start of the fiscal year to October 1).<sup>154</sup> During floor debate on the Congressional Budget and Impoundment Control Act of 1974, as it was officially known, Senator Bill Brock summed up the purpose of the entire law: “We have evolved and created so many Federal programs of late that it seems that Congress has lost control of the oversight function. This bill, in a truly conservative sense, is an effort to re-establish that function.”<sup>155</sup> Others were willing to offer even more fulsome praise, such as Senator Robert Byrd: “[W]hen we look back some years in the future, many of us may be able to say that it was among the most important measures acted upon during our entire service in the Congress.”<sup>156</sup>

Despite some initial wariness from certain factions in Congress,<sup>157</sup> the Budget Act passed the Senate unanimously in May 1974.<sup>158</sup> President Nixon’s signature on the Act was among his final acts as Chief Executive.

## 2. Intentions Behind Reconciliation

An allowance for omnibus reconciliation legislation to square Congress’s spending targets with its policy proposals was an important part of the budget package in 1974, one that proponents explicitly called for.<sup>159</sup> But it was not the most important element. Some have even argued that the Act’s framers “viewed reconciliation as unimportant,” because “it was an optional process for tying the ceilings enacted in the second concurrent budget resolution (since eliminated) to the changes in laws governing taxes and spending (mainly appropriations) necessary to achieve them.”<sup>160</sup> Whether or not that is true, it seems fairly certain that reconciliation was intended to serve as a player in the backfield of the new budget structure,

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<sup>154</sup> OLESZEK, *supra* note 150, at 68-71.

<sup>155</sup> 120 CONG. REC. 7154 (1974).

<sup>156</sup> *Id.* at 7147.

<sup>157</sup> See Mary Russell, *Congress Warily Eyes New Budget Controls*, WASH. POST, May 12, 1973, at A4.

<sup>158</sup> STAFF OF S. COM. ON GOV’T OPERATIONS, 93RD CONG., LEGISLATIVE HISTORY: S. 1541—H.R. 7130, at xviii (Comm. Print. 1974) [hereinafter BUDGET ACT HISTORY].

<sup>159</sup> See, e.g., Alice M. Rivlin & Charles L. Schultze, Op-Ed., *Congress and the Budget*, WASH. POST, Sept. 9, 1973, at C4 (echoing Schultze’s earlier suggestion more forcefully that “Congress must have procedures for looking at all spending and revenue actions together and for making necessary adjustments to reconcile the separate pieces.”).

<sup>160</sup> Joyce, *supra* note 148, at 319.

providing defense and protecting the entities at the heart of the action — the budget committees and their budget resolutions.

Reconciliation's main role in the overall operation of the Act was to provide an "enforcement procedure" for the spending limits established in other parts of the legislation and to ensure that the new budget resolutions under the law were not "meaningless."<sup>161</sup> Because the law ultimately called for Congress to adopt two budget resolutions each year, reconciliation bills were intended to make the advisory targets in the first budget resolution align with the mandatory rules in the second.<sup>162</sup> Reconciliation was tied to the second resolution, meaning it "could only be expected, at that late point in the year, as a last-ditch mechanism to address a problem that had arisen since the first resolution."<sup>163</sup>

As we consider reconciliation today, the defining feature of a reconciliation bill is its self-imposed limitation on floor debate, the element that brings reconciliation bills into conflict with the filibuster. In most matters in the modern Senate, 60 votes are needed to invoke cloture, or the end of debate. Any one senator can force a bill's proponents to find 60 votes for their proposal, as any senator can threaten to filibuster any matter. But that is not so with reconciliation. As adopted, the reconciliation law provides that "[d]ebate in the Senate on any reconciliation bill . . . and all amendments thereto and debatable motions and appeals in connection therewith, shall be limited to not more than 20 hours."<sup>164</sup> Because debate by definition on a reconciliation bill is not unlimited, there can be no filibuster to hold it up. This limitation was not in the original bill, but was added in the version that emerged from the House Rules Committee and stayed put thereafter.<sup>165</sup>

Exactly why the limitation emerged is unclear. Within the entire 2,132-page legislative history of the 1974 Budget Act, there is only one reference explaining the limitation of 20 hours on debate of reconciliation bills: "Time allowed for floor debate and amendments has been reduced to levels that are ample for full discussion of the contrasting views about the economic and budget issues contained in

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<sup>161</sup> STANLEY E. COLLENDER, *THE GUIDE TO THE FEDERAL BUDGET: FISCAL 1987*, at 39 (1987).

<sup>162</sup> See ALLEN SCHICK, *RECONCILIATION AND THE CONGRESSIONAL BUDGET PROCESS 5* (1981) [hereinafter *RECONCILIATION*].

<sup>163</sup> Tiefer, *supra* note 5, at 429 n.92.

<sup>164</sup> 2 U.S.C. § 641(e)(2) (2012).

<sup>165</sup> Interestingly, the Budget Act only has procedural rules that affect the Senate, and not the House. See SCHICK, *RECONCILIATION*, *supra* note 162, at 29.

the concurrent resolutions.”<sup>166</sup> When G. William Hoagland, former staff director of the Senate Budget Committee, set out to research whether the Budget Act’s framers were aware that its debate limitations might clash with the filibuster, he admitted he “found very few answers.”<sup>167</sup>

In fact, when the Joint Study Committee filed its final report of recommendations for reforming the congressional budget process, reconciliation was not mentioned by name at all. The report did mention limits on debate, suggesting that each house be limited to 30 hours of talk on either budget resolution that it passes during a fiscal year, but said nothing of debate on a reconciliation-style bill.<sup>168</sup> Discussing the bill on the Senate floor, Senator Byrd, the chamber’s unofficial dean of procedure, said he had personally analyzed it with the Parliamentarian to make sure the bill “would not too greatly disturb the existing methods of doing business in the Senate”<sup>169</sup> — among them, presumably, the Senate’s tradition of unlimited debate. His only other comment was that the House Rules Committee’s “principal change regarding procedure” to the 1974 Budget Act was “the rewriting of the limitation on debate on concurrent resolutions and the reconciliation bill.”<sup>170</sup>

There is thus some evidence that senators were aware of the limitation on debate of reconciliation bills, though they did not much discuss its purpose or how it interacted with filibuster rules. There is not much dispute that, in general, the purpose of the limit was probably “to ease and speed up passage of the budget.”<sup>171</sup> Over twenty years after the adoption of the Budget Act, Representative Lee Hamilton summed up the reason for this limitation: “[T]he rule, as we all know, is designed to keep the package intact and not to weaken it.”<sup>172</sup> Yet it is also clear that the legislative history of the Budget Act suggests zero “congressional intent to create a filibuster-proof way of

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<sup>166</sup> S. REP. NO. 93-688, at 27 (1974), reprinted in BUDGET ACT HISTORY, *supra* note 158, at 851, 877.

<sup>167</sup> *Senate Procedures for Consideration of the Budget Resolution/Reconciliation: Hearing Before the S. Comm. on the Budget*, 111th Cong. 25 (2009) (statement of G. William Hoagland) [hereinafter *Senate Procedures Hearing*].

<sup>168</sup> BUDGET STUDY COMMITTEE RECOMMENDATIONS, *supra* note 142, at 22-23.

<sup>169</sup> 120 CONG. REC. 7148 (1974).

<sup>170</sup> *Id.* at 7149.

<sup>171</sup> Cheryl D. Block, *Pathologies at the Intersection of the Budget and Tax Legislative Processes*, 43 B.C. L. REV. 863, 881 (2002).

<sup>172</sup> *Markup of the Committee’s Response to the House’s Reconciliation Instructions and Consideration of the Committee’s Recommendations with Respect to the Dismantling of the Department of Commerce*, 104th Cong. 6 (1995).

pushing through spending increases or tax cuts having nothing to do with deficit reduction.”<sup>173</sup>

Therefore, the reconciliation procedure emerged from the successful budget overhaul of the early 1970s as an option, though not necessarily a prominent one, for helping Congress stay within its self-imposed spending limits. Though the Budget Act was “born in conflict” between the president and Congress over budget procedure,<sup>174</sup> its provisions, including reconciliation, won wide acceptance on Capitol Hill. If its proponents foresaw a peaceful era for the foreseeable future, it was because they failed to consider how the limits on debate in a reconciliation bill might affect strategic thinking vis-à-vis the filibuster — and cause further conflict — in Congress for years to come.

### B. *How Reconciliation Works*

Reconciliation bills typically have only one chance to appear each year, as they are a product of a budget process that Congress tends to go through just once annually. That process has several basic steps, starting with the requirement that the president send Congress a budget proposal by February.<sup>175</sup> After that, the budget committees put together a resolution that sets spending targets for the budget.<sup>176</sup> Should the budget resolution require changes in existing statutes to meet spending goals — and it often does — the resolution will include reconciliation instructions.<sup>177</sup> Those instructions will identify the committee in question, outline the budgetary changes that Congress wants to make within the committee’s policy jurisdiction, the fiscal years during which the changes are to occur, and a deadline for the committee to submit its own recommendations.<sup>178</sup>

Once the budget committees pass their resolutions, the non-budgetary congressional committees approve bills that meet resolution spending targets; the individual bills are then cobbled together in an omnibus reconciliation bill.<sup>179</sup> Sometimes, Congress short-circuits this

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<sup>173</sup> Tiefer, *supra* note 5, at 429 n.92.

<sup>174</sup> SCHICK, CONGRESS AND MONEY, *supra* note 146, at 17.

<sup>175</sup> See GLEN S. KRUTZ, HITCHING A RIDE: OMNIBUS LEGISLATING IN THE U.S. CONGRESS 108 (2001).

<sup>176</sup> SCHICK, FEDERAL BUDGET, *supra* note 144, at 118.

<sup>177</sup> See BILL HENIFF, JR., CONG. RESEARCH SERV., 98-814, BUDGET RECONCILIATION LEGISLATION: DEVELOPMENT AND CONSIDERATION I (2012).

<sup>178</sup> See ROBERT KEITH & BILL HENIFF, JR., CONG. RESEARCH SERV., RL33030, THE BUDGET RECONCILIATION PROCESS: HOUSE AND SENATE PROCEDURES 13 (2005).

<sup>179</sup> *Id.*

process by not passing a budget resolution at all. This occurred in 1998, 2002, 2004, and 2006,<sup>180</sup> meaning that no reconciliation bills were possible in those years. (Reconciliation cannot reconcile individual bills with the budget resolution if there is no resolution.) Otherwise, the reconciliation bill eventually lands before each house of Congress. In the Senate, the bill must be taken up without delay, as a reconciliation bill is considered privileged and no senator can hold up a motion to proceed to consider it.<sup>181</sup>

By law, as discussed above, debate on reconciliation bills in the Senate is limited to 20 hours, or exactly 12 minutes per senator. This provision is crucial, as it leaves no possibility for a long-winded filibuster, or the threat of one, to delay Senate business. In practice, the 20 hours are divided evenly between the parties.<sup>182</sup>

While actual debate on the substance of a reconciliation bill is obviously limited, there is still the potential for senators to drag out overall consideration of the legislation indefinitely. They may do so by offering a theoretically endless string of amendments to the bill, in a tactic that has become known as the “Vote-a-Rama.” Its conception is somewhat ingenious in its adherence to the letter of the law. While the text of the reconciliation statute indicates that debate on “all amendments” to a reconciliation bill must fall within the twenty-hour limit,<sup>183</sup> the text does not say that all *voting* on the bill must occur within the same timeframe, nor does it limit the number of potential amendments. Senators, therefore, will occasionally attack a reconciliation bill through proposing amendment after amendment in hopes of killing the bill. While the Senate usually allows only a minute per side to explain and defend such amendments, they can go on indefinitely — a procedural spectacle that some have described as “unseemly” and “egregious.”<sup>184</sup> Yet others have defended the practice as “a way to protect the rights of the minority” in the Senate.<sup>185</sup> A Vote-a-Rama was deployed against the health care reform reconciliation bill in 2010, but it was ultimately unsuccessful at derailing the bill.<sup>186</sup> Perhaps that is because senators employing the

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<sup>180</sup> SCHICK, FEDERAL BUDGET, *supra* note 144, at 119.

<sup>181</sup> See KEITH & HENIFF, JR., *supra* note 178, at 75.

<sup>182</sup> See *id.* at 75-76.

<sup>183</sup> 2 U.S.C. § 641(e)(2) (2012).

<sup>184</sup> RICHARD A. ARENBERG & ROBERT B. DOVE, DEFENDING THE FILIBUSTER: THE SOUL OF THE SENATE 114-15 (2012).

<sup>185</sup> *Senate Procedures Hearing*, *supra* note 167, at 6 (statement of Senator Judd Gregg).

<sup>186</sup> See discussion *infra* Part III.D.

Vote-a-Rama — unlike those who “filibuster” all manner of legislation today — must actually stand up and speak in order to effectuate obstruction.

Other than the Byrd Rule, discussed below, the Vote-a-Rama is the most significant limitation on how reconciliation operates — which is to say that there are few significant limitations on the process. How does this fit with our institutional incentives explanation, described above? If there is a strong incentive toward protecting minoritarian interests, created by particularism, risk aversion, and path dependence, why did the Senate allow for the creation of the reconciliation process? And once created, why was reconciliation used; why did the same institutional norms not push away from exploiting it? In fact, initially, reconciliation was rarely used to its full potential, and only gradually became a powerful weapon for reassertion of majority power, as the next Part makes clear.

### III. MAJORITARIANISM ASCENDANT?

The strategic implications of using reconciliation to maximize its immunity from the filibuster appeared to dawn only slowly on senators. In December 1975, the Senate considered a reconciliation bill, and the rules for debate were still obscure enough that no less a figure than Senator Russell Long, chairman of the Senate finance committee, had to ask what they were. “Mr. President, how much time does the law spell out, how the time is to be divided?” he asked.<sup>187</sup> (He received the correct answer, but the bill failed.)

For the first several years of its existence, reconciliation sat mostly dormant as Congress attempted to try out its new budgetary procedures. Though potentially powerful, reconciliation remained only a “paper tiger” during the 1970s,<sup>188</sup> a procedure “hardly discussed, let alone attempted.”<sup>189</sup> Among the reasons was the following: Members of Congress were wary of alienating the committees that had previously handled the budget in piecemeal fashion, tempting defeat of a reconciliation bill.<sup>190</sup> In 1977, for example, the Senate Budget Committee bowed to Senate farm interests

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<sup>187</sup> 121 CONG. REC. 40540 (1975). Senator Long recovered a few minutes later in response to another clarifying question from Senator Carl Curtis, remembering the gist of the new device’s rules: “The 20 hours is spelled out by the law in view of the fact that this is part of the reconciliation process under the budget law.” *Id.*

<sup>188</sup> SHELLEY LYNNE TOMKIN, *INSIDE OMB: POLITICS AND PROCESS IN THE PRESIDENT’S BUDGET OFFICE* 140 (1998).

<sup>189</sup> COLLENDER, *supra* note 161, at 39-40.

<sup>190</sup> *See id.* at 40.

who wished to keep \$700 million worth of crop support in violation of a tight-fisted budget resolution; the reconciliation instructions ordering the \$700 million cut were deleted.<sup>191</sup>

It was not until 1980 that reconciliation was first successfully used to pass a budget, but Congress has passed a reconciliation bill in most years since.<sup>192</sup> By the 1990s and 2000s, Members of Congress had come to recognize the strategic value of bootstrapping their legislative priorities to an omnibus reconciliation bill free from the leisurely deliberation for which the Senate is known. In 2001, the same Senator Byrd who was so effusive in his praise for the Budget Act in 1974 lamented, “[H]ow far we have wandered from the course originally conceived by the Congress as the reconciliation process,” alleging that “the misuse has been gross,” and that reconciliation bills “have proven to be almost irresistible vehicles for Senators to use to move all manner of legislation because of these fast-track procedures.”<sup>193</sup>

Yet there was never anything to stop them from doing so initially. The law establishing reconciliation has changed little since its adoption, including its limitation on debate of reconciliation bills. What has changed, however, is senators’ thinking about how to use the procedure. As the specter of the filibuster loomed larger over the Senate during the 1980s, 1990s, and 2000s, growing into a “de facto minority-party veto” requiring 60 votes on most legislation,<sup>194</sup> the limited-debate rules of reconciliation grew more attractive as a way to avoid the filibuster’s supermajority requirement.

#### A. Reagan-Era Reconciliation

Before the presidency of Ronald Reagan, reconciliation had almost no potential to become a strategic device. But by the time Reagan had left office, not only had the rules reflecting reconciliation changed, but the use of the procedure to get things done in Congress had transformed as well. Reagan’s broad vision for reviving the economy required a device that could allow senators to push through contentious legislation without necessarily acquiring 60 votes. During his presidency, conditions shifted to allow reconciliation to be that device, setting the stage for later conflicts.

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<sup>191</sup> See SCHICK, CONGRESS AND MONEY, *supra* note 146, at 326.

<sup>192</sup> KEITH & HENIFF, JR., *supra* note 178, at 4-5.

<sup>193</sup> 147 CONG. REC. 2181 (2001).

<sup>194</sup> Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2372 (2006); see also JACOB R. STRAUS, PARTY AND PROCEDURE IN THE UNITED STATES CONGRESS 221 (2012).

### 1. Changing the Rules

The structural change that was necessary for reconciliation to begin its transition away from its status as a budgetary backstop was Congress's decision in 1980 to abandon the idea of producing two budget resolutions each year. Reconciliation, as noted above, was originally intended to square the targets called for in the year's first budget resolution in the spring, which was advisory, with those monies requested in the second budget resolution, which was binding.<sup>195</sup> But this structure was causing a problem; it left Congress just 10 days after the second resolution to put together and pass a reconciliation bill, discouraging Members of Congress from using it.<sup>196</sup>

In passing the Budget Act of 1974, Congress included what came to be known as an "elastic clause," permitting itself to "set forth such other matters, and require such other procedures, relating to the budget, as may be appropriate to carry out the purposes of this Act."<sup>197</sup> This clause would prove crucial to promoting the use of reconciliation. Democrats on the House Budget Committee in 1980 moved aggressively to transfer reconciliation to the spring resolution,<sup>198</sup> thus allowing reconciliation instructions to attach initially to measures, rather than as a response in the second budget resolution. Despite some protest, this move "profoundly altered" the budget process.<sup>199</sup> Suddenly, a reconciliation bill seemed achievable, because there was so much more time to put one together. While the change may have "reduce[d] procedural flexibility" in doing away with the second budget resolution each year,<sup>200</sup> it brought strategic value to reconciliation in a previously unanticipated fashion.

### 2. Harnessing the Change

President Reagan and the Republicans "exploited most thoroughly" the change in rules in 1981, shortly after Reagan took office.<sup>201</sup> His

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<sup>195</sup> See KEITH & HENIFF, JR., *supra* note 178, at 5-6.

<sup>196</sup> See Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-in-Government*, 100 COLUM. L. REV. 702, 718-19 (2000) [hereinafter *Congressional Budget Process*].

<sup>197</sup> 2 U.S.C. § 632(b)(4) (2012).

<sup>198</sup> Garrett, *Congressional Budget Process*, *supra* note 196, at 719.

<sup>199</sup> See GILMOUR, *supra* note 149, at 109-11.

<sup>200</sup> Mark S. Kamlet & David C. Mowery, *The First Decade of the Congressional Budget Act: Legislative Imitation and Adaptation in Budgeting*, 18 POL'Y SCI. 313, 322 (1985).

<sup>201</sup> *Id.* at 323.

plan: \$100 billion worth of spending reductions over three years.<sup>202</sup> Putting his proposal, which included the largest tax cut in history, into place would require short-circuiting the separation-of-powers intentions of the 1974 Budget Act, which was intended to empower Congress to take back control of the budget process. Luckily, he had willing allies in congressional Republicans, who agreed that the best way to implement such a large package of cuts was a “‘quick, up-front reconciliation’ measure that would short-cut the usual long legislative route.”<sup>203</sup>

While passing all of the measures Reagan’s aides wanted would normally require at least a dozen separate bills,<sup>204</sup> reconciliation allowed them to do so with just two votes: the first on the budget resolution, and the second on the reconciliation bill. The strategy worked. The Republicans held a majority in the Senate, and the House Republicans were able to convince enough “boll weevil Democrats” to win easy passage of the bill — a feat that would have been nearly impossible under the old multi-committee-based system of budget process.<sup>205</sup>

The success of Reagan’s gambit produced much soul-searching, including hemming and hawing over separation-of-powers questions of whether the episode had transferred budget power back to an administration that was “arrogantly trying to impose their will on Congress.”<sup>206</sup> Reaction from Democrats in opposition, the first individuals to discover the strategic power of reconciliation, was swift and unkind. Representative Gillis W. Long called reconciliation “an extremely dangerous situation.”<sup>207</sup> Senator Richard Bolling went further, decrying the “exploitation of the reconciliation process, coupled with draconian Republican Party discipline,” which “enabled the executive to unilaterally impose its will” and represented “a potent recipe for despotism.”<sup>208</sup>

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<sup>202</sup> SCHICK, RECONCILIATION, *supra* note 162, at 1.

<sup>203</sup> Steven Rattner, *President Planning to Ask Budget Cuts of over \$41 Billion*, N.Y. TIMES, Feb. 18, 1981, at A1, A20.

<sup>204</sup> BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 112 (4th ed. 2012).

<sup>205</sup> See GILMOUR, *supra* note 149, at 122-23.

<sup>206</sup> Steven V. Roberts, *The Fight on the Budget and Balance of Powers*, N.Y. TIMES, June 25, 1981, at B15.

<sup>207</sup> Robert G. Kaiser, *Budget ‘Reconciliation’ Has Potential to Shift Power in Government*, WASH. POST, June 14, 1981, at A9.

<sup>208</sup> Robert G. Kaiser, *Budget Chief Backs Reconciliation Process*, WASH. POST, Oct. 7, 1981, at A2.

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Fair or not, it is clear that the sudden success of reconciliation to enact a large package of spending changes was unprecedented.<sup>209</sup> Soon after the conclusion of this first successful reconciliation episode, reconciliation expert Allen Schick made a prophetic prediction: “If reconciliation takes root on Capitol Hill, Congress might become a very different institution from what it has been for many years . . . . Reconciliation would redistribute legislative power, giving some participants more influence over outcomes while diminishing the role of others.”<sup>210</sup> While Schick could not identify exactly how Congress would change, his prophecy turned out to be spot on.

Reconciliation was eventually exploited, raising the question of why there was the incentive to exploit it if local salience, risk aversion, and path dependence lead away from suppressing minority power. The difference is that while the inertia of existing norms may prevent an adequate incentive from arising to reform rules such as the filibuster, it is less costly to exploit a rule that is already in existence. In particular, stickiness of norms does not arise once a rule has already been crafted, but there is also less of a problem of risk aversion. Because use of reconciliation came on gradually, it was unclear that *failure* to use it would be reciprocated in the same way as exercise of a norm such as senatorial courtesy or the filibuster. The Reaganites, for example, no doubt thought the reconciliation process could only be used in one direction, in line with their political philosophy of *cutting* spending. This suggests that, unlike senatorial courtesy, salience alone is not enough when applied to an across-the-board rule such as the filibuster; stickiness and risk aversion play an important part.

So the story reconciliation suggests is that the institutional structure of the Senate does not prevent majoritarian reforms per se, it only makes them difficult to pass; once the door is opened, the majority will take advantage of them. However, the next stage in the story of the filibuster and reconciliation displays the power of reciprocity. Reconciliation was to, in fact, cut both ways — for and against spending. This created pressure not only to simply allow the filibuster to go unchecked, but to actually push back against reconciliation and the majoritarian direction that reconciliation represents.

#### *B. Minoritarian Resurgence: Adoption of the Byrd Rule*

After the successful (and repeated) use of large reconciliation bills during the first half of the Reagan Administration, it became obvious

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<sup>209</sup> Editorial, *Unfairness in the Budget Package*, WASH. POST, June 4, 1981, at A18.

<sup>210</sup> SCHICK, RECONCILIATION, *supra* note 162, at 33.

that reconciliation was becoming an “attractive vehicle[ ] for the inclusion by certain committees of provisions of particular interest to the majority of that committee.”<sup>211</sup> There was little senators could do to block the inclusion of such provisions even when they did not appear to be germane to budgetary matters. This issue arose quickly after the first use of reconciliation in the early 1980s, as reconciliation soon began being used for non-budgetary purposes.

In 1983, for example, reconciliation legislation reduced the number of Federal Communications Commission members and reduced the terms of Interstate Commerce Commission members.<sup>212</sup> The temptation to bootstrap programs with little relation to fiscal discipline to reconciliation bills started to become “enormous”<sup>213</sup> and had “escalated to the point where it now dominate[d] the entire reconciliation process.”<sup>214</sup> The minority response was the development in 1985 of a special point of order to eliminate such measures. The so-called “Byrd Rule” introduced an important check on the sprawl of reconciliation outside deficit reduction matters. But it was not a perfect solution.

The Byrd Rule started not as a rule at all, but as an amendment. The floor debate on the 1985 reconciliation bill had been particularly weighted down with amendments that could not have normally been offered because they would have been filibustered.<sup>215</sup> But because no one could filibuster anything associated with a reconciliation bill, the amendments flowed forth unchecked. In response, Senator Robert Byrd offered Amendment no. 878 during a floor debate on the 1985 reconciliation legislation. It provided that any “extraneous” amendment “shall be deemed stricken from the bill.”<sup>216</sup> In presenting his amendment, Byrd reported that he had counted 122 extraneous items in the reconciliation bill under discussion — and that the Senate’s newfound habit of offering such items was nothing short of the opening of “Pandora’s box.” “It was never foreseen that the Budget

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<sup>211</sup> FLOYD M. RIDDICK & ALAN S. FRUMIN, *RIDDICK’S SENATE PROCEDURE: PRECEDENTS AND PRACTICES* 504 (Alan S. Frumin ed., rev. ed. 1992).

<sup>212</sup> COLLENDER, *supra* note 161, at 41.

<sup>213</sup> SINCLAIR, *supra* note 204, at 126.

<sup>214</sup> *The Budget Reconciliation Process: The Inclusion of Unrelated Matters: Hearing Before the Subcomm. on the Legislative Process of the H. Comm. on Rules*, 99th Cong. 70 (1986) (Statement of Allen Schick, Professor of Public Policy, Univ. of Md.).

<sup>215</sup> See 131 CONG. REC. 28968 (1985) (statement of Sen. Bob Dole: “Mr. President, it occurs to me that we may have a problem on how we are going to dispose of the reconciliation bill without a lot of other amendments that would not be offered because of filibusters, cloture, whatever”).

<sup>216</sup> *Id.*

Reform Act would be used in that way,” Byrd said.<sup>217</sup> His forceful critique appeared to win the day:

Mr. President, the Senate is a deliberative body, and the reconciliation process is not a deliberative process. . . . Such an extraordinary process, if abused, could destroy the Senate’s deliberative nature. . . . The Senate must protect itself from this attack by its own committees, and, if necessary, the reconciliation bill will be amended to the extent necessary to achieve a preponderance of nonreconciliation matters and thus return this bill to a nonprivileged status.<sup>218</sup>

Byrd’s amendment was adopted — but why? It can surely be posited that no senator enjoys a filibuster threat except the one making it; one might therefore ordinarily expect that most senators would favor using reconciliation to avoid the filibuster and further their legislative goals, *especially* “extraneous” ones. But as we have seen, there are institutional incentives toward minoritarianism and away from majoritarian pressures in the Senate. The rise of the Byrd Rule to check the primary limit of the filibuster, reconciliation, comports with our expectations stemming from the institutional incentives of senators.

Nonetheless, Byrd did his best to overcome his fellow senators’ qualms by minimizing the purported impact of his rule. When Byrd proposed the new rule, his fellow senators asked him whether his amendment would affect the current reconciliation bill, or only future ones; only future ones, and only those not already in a bill, he said. They also asked whether the amendment would change any of the standing rules of the Senate itself; no, he said, only reconciliation rules. And how would he define extraneous? He replied that the word applied only to those amendments that did not “contribute[ ] to reducing the deficit and balancing the budget.”<sup>219</sup> After Senator Byrd had addressed these concerns, the amendment passed by far more than a majority. The vote was 96–0.<sup>220</sup>

Byrd’s new rule was not intended to last forever. It was set to expire on January 2, 1987, in less than a year.<sup>221</sup> The following year, it was

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> 131 CONG. REC. 28,968–74 (1985) (colloquy between Sen. Byrd and several others).

<sup>220</sup> *Id.* at 28,974.

<sup>221</sup> See BILL HENIFF, JR., CONG. RESEARCH SERV., RL30862, THE BUDGET RECONCILIATION PROCESS: THE SENATE’S “BYRD RULE” 2 (2010) [hereinafter SENATE’S

extended for another year, then for five more.<sup>222</sup> By 1990, senators were already calling it “the Byrd Rule,”<sup>223</sup> and along with the House, they ended the ritual of yearly extensions and added it to the law governing Congress’s budgetary procedure, albeit in a greatly expanded form.

Codified at 2 U.S.C. § 644, the Byrd Rule considers any provision within a reconciliation bill extraneous if it “does not produce a change in outlays or revenues.”<sup>224</sup> Even if a provision *does* change outlays or revenues, it is still extraneous if it causes a committee to disobey its reconciliation instructions, if its subject matter is not in that committee’s jurisdiction, or if the budget change it produces is “merely incidental.”<sup>225</sup> Finally, the Byrd Rule allows senators to strike a provision that *increases* net outlays, or *decreases* revenues, so long as the changes “are greater than outlay reductions or revenue increases resulting from other provisions in such title in such year.”<sup>226</sup> And it allows them to do so in a piecemeal fashion, not unlike a line-item veto; senators can use it to “excise specific language and leave the rest of the bill or amendment to go along its merry way.”<sup>227</sup>

Senators have used the Byrd Rule willingly. Of the 18 reconciliation bills considered between 1985, when the Byrd Rule took effect, and 2010, 14 featured invocations of the rule.<sup>228</sup> During this period, 65 Byrd Rule points of order were offered, and 55 were successful, most often for the reason that the challenged matter did not change outlays or revenues.<sup>229</sup> And there have likely been many more instances in which the Byrd Rule had an effect on blocking extraneous additions to reconciliation bills, as it has often convinced senators not to offer such additions.<sup>230</sup>

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“BYRD RULE”].

<sup>222</sup> See *id.* at 3.

<sup>223</sup> See, e.g., 136 CONG. REC. 15,462–63 (1990) (Sen. Max Baucus: “I came over to the floor to also rise to speak for the purpose of making a point of order against the reconciliation bill; the minimum allocation change is extraneous to the budget bill and, therefore, should fall under the Byrd Rule”).

<sup>224</sup> 2 U.S.C. § 644(b)(1)(A) (2012).

<sup>225</sup> *Id.* §§ 644(b)(1)(B)–(D).

<sup>226</sup> *Id.* § 644(b)(1)(E).

<sup>227</sup> Dauster, *supra* note 12, at 30.

<sup>228</sup> HENIFF, JR., SENATE’S “BYRD RULE”, *supra* note 221, at 7.

<sup>229</sup> *Id.* at 8–10.

<sup>230</sup> See MARTIN B. GOLD, SENATE PROCEDURE AND PRACTICE 158 (2d ed. 2008).

### 1. Limitations on the Byrd Rule

Opinion on the rule is generally positive, if not universally so. Not surprisingly, Senator Byrd offered praise, considering it “one of the most effective” measures taken to curtail strategic use of reconciliation for non-budgetary purposes.<sup>231</sup> Others justify the rule as “a critical protection” for the Senate minority, which is otherwise hamstrung by reconciliation’s cancellation of the filibuster.<sup>232</sup> But the Byrd Rule is not necessarily as powerful as it might at first seem.

Byrd’s rule is not self-enforcing. It relies upon the adversarial nature of Senate debate to take effect. The rule permits an individual senator to enforce its dictates by raising a point of order against any extraneous part or parts of a reconciliation bill.<sup>233</sup> However, the point of order does not have the immediate effect of nullifying an extraneous provision; the judge of extraneity is the presiding officer of the Senate. And that officer relies upon the Senate Parliamentarian for assistance and reflects the Parliamentarian’s views in his or her ruling.<sup>234</sup> If the presiding officer, after the ruling of the Parliamentarian, upholds the point of order against the extraneous provision, the decision cannot be overridden without the votes of three fifths of the Senate<sup>235</sup> — the same number required to defeat a filibuster.

The definition of “extraneous” is not easy to parse. It “can be complex, ambiguous, and often depends on controversial rulings from the Chair [of Proceedings].”<sup>236</sup> In 1993, for example, senators challenged the table of contents of a reconciliation bill, pointing out that they did not relate to the deficit-cutting mission of reconciliation — a point of order the Parliamentarian helpfully rejected.<sup>237</sup>

Furthermore, the dependence of those rulings from the Chair of Proceedings upon the opinion of the Parliamentarian presents other problems. Most plainly, there is the possibility that the Parliamentarian is simply wrong, or not objective; his or her rulings

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<sup>231</sup> *Senate Procedures Hearing*, *supra* note 167, at 8.

<sup>232</sup> *E.g.*, GOLD, *supra* note 230, at 158.

<sup>233</sup> 2 U.S.C. § 644(e) (2012).

<sup>234</sup> See George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174, 221 (2009).

<sup>235</sup> See GOLD, *supra* note 230, at 156; HENIFF, JR., SENATE’S “BYRD RULE”, *supra* note 221, at 4.

<sup>236</sup> Block, *supra* note 171, at 882.

<sup>237</sup> See Mary Jacoby, *Senate Parliamentarian Purges Budget Bill of Measures That Could Violate Byrd Rule*, ROLL CALL, Aug. 5, 1993 (“Somebody just raised the question that if you were truly applying the Byrd Rule, the table of contents technically should be stricken.”).

can change up until the “moment an issue is considered on the Senate floor.”<sup>238</sup> One former budget committee staff director has complained that the Parliamentarian’s “interpretation of the Byrd Rule would change, depending on what the issue was.”<sup>239</sup> The Parliamentarian is not required to evaluate opposing points of view.<sup>240</sup> In addition, the Parliamentarian must occasionally consult the Senate Budget Committee to provide a determination of budget levels, which can produce varying answers.<sup>241</sup> Finally, as discussed below,<sup>242</sup> the majority party has the ability to fire the Parliamentarian, which would seem to add further uncertainty to the Byrd Rule process.

There are also ways around the Byrd Rule. For example, in 1987, the budget resolution for the next fiscal year simply declared within its reconciliation instructions that the inclusion of a Deficit Reduction Account within the bill was not “extraneous.”<sup>243</sup> A more effective way to avoid Byrd Rule violations, however, is to add “sunset” or expiration rules to provisions that would otherwise violate the rule, meaning that the provisions do not permanently decrease revenues. As discussed in the next section, the Byrd Rule prompted proponents of President George W. Bush’s tax cuts to include these sunset rules, allowing them to escape its mandate despite lowering revenues. In sum, then, the Byrd Rule’s intentions might be described as noble, and its use frequent, but like most legislative devices, it contains loopholes and can be defeated.

### C. *The Bush Tax Cuts*

While Ronald Reagan’s reconciliation-backed victory over Democrats in 1981 represented a change in the strategic deployment of reconciliation, the resulting legislation still aligned with the goal of the original 1974 Budget Act: deficit reduction. But during the presidency of George W. Bush, there was a still larger change in how senators used reconciliation to their strategic advantage. For the first quarter-century of its existence, reconciliation was used exclusively

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<sup>238</sup> Donald B. Tobin, *Less Is More: A Move Toward Sanity in the Budget Process*, 16 ST. LOUIS U. PUB. L. REV. 115, 134 (1996) (“Thus a member may believe that a specific provision is valid under the Budget Act, but find out later that the Parliamentarian changed his mind and advised the Chair that the provision violated the Act.”).

<sup>239</sup> See David Baumann, *The Octopus that Might Eat Congress*, NAT’L J., May 14, 2005.

<sup>240</sup> Tobin, *supra* note 238, at 133-34.

<sup>241</sup> See Yin, *supra* note 234, at 221-22.

<sup>242</sup> See discussion *infra* Part III.C.

<sup>243</sup> See KEITH & HENIFF, JR., *supra* note 178, at 10.

for deficit control,<sup>244</sup> but during the Bush presidency, Members of Congress determined they could also use it in ways that *increased* the deficit — namely through large tax cuts.

Republicans had tried a similar idea before, in efforts to enact the Contract With America during the Clinton Administration, but failed. The congressional leadership in 1995 passed a massive reconciliation bill containing \$894 billion in deficit cuts and \$245 billion in tax cuts, only to watch its fate get tied up in the infamous government shutdown standoff of that year, ending with Clinton's veto.<sup>245</sup> That episode represented the first attempt to employ reconciliation to such massive, deficit-*increasing* effect. Just two years earlier, during the debate over Clinton's contentious stimulus bill, "no one envisioned reconciliation to facilitate fiscal bills unrelated to deficit control."<sup>246</sup>

Upon taking office, however, President Bush faced a budget situation unlike those of previous reconciliation battles, as it was in surplus. Before even taking the oath of office, Bush's team proposed an idea for using the surplus in the form of a \$1.3 trillion tax cut, the largest ever attempted.<sup>247</sup> While the presence of the surplus provided some pressure for Democrats to go along with Bush's proposal,<sup>248</sup> the party composition of the Senate was not in Bush's favor. It was cleanly divided, with fifty Democrats and fifty Republicans. Without a 60-senator supermajority, or at least 60 friendly votes, Bush's forces would have no ability to invoke cloture and overcome the filibuster threat that Democrats would surely mount against his tax cut plan.

Enter reconciliation. In the two years prior to Bush's first term in office, two separate tax cuts had been included in reconciliation bills. Yet in order to circumvent the Byrd Rule, which prevents the inclusion of provisions that decrease revenues in a reconciliation bill, both of the tax cuts were "sunsetting," or limited in life to the period covered by the reconciliation instructions.<sup>249</sup> These laws provided a playbook for Bush, who also sunsetted his 2001 tax cut to gain Byrd Rule compliance.<sup>250</sup> However, he also sought to do something different than any other tax cut passed under reconciliation: he did not offer

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<sup>244</sup> See Tiefer, *supra* note 5, at 427-34.

<sup>245</sup> See Anita S. Krishnakumar, Note, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995-96 Budget "Train Wreck,"* 35 HARV. J. LEGIS. 589, 603-09 (1998).

<sup>246</sup> Tiefer, *supra* note 5, at 432.

<sup>247</sup> See Janet Hook, *Surplus, Slow Growth Fuel Momentum for Tax Cuts*, L.A. TIMES, Jan. 5, 2001, at A1.

<sup>248</sup> *Id.*

<sup>249</sup> HENIFF, JR., SENATE'S "BYRD RULE", *supra* note 221, at 15-16.

<sup>250</sup> *Id.* at 16.

corresponding spending reductions that offset the revenue decreases from the tax cuts. This notion, and the idea in general of using reconciliation, originally a deficit-control device, to pass tax cuts, upset Democrats.

Nevertheless, the Republicans' gambit was successful. Senator Byrd took the floor to mount a vigorous defense of the original purposes of the reconciliation process as antithetical to increasing the deficit through tax cuts.<sup>251</sup> His statements appeared to convince the Senate Parliamentarian that reconciliation instructions could not be used for a tax cut.<sup>252</sup> But rumors of the Parliamentarian's upcoming ruling prompted a strategic procedural maneuver. The rumors convinced the Republican leadership to offer reconciliation instructions not as part of the original bill, but as an amendment at the last minute, removing reconciliation from the limelight until just before senators were to vote on the bill.<sup>253</sup> Republicans still expected the move to touch off a "parliamentary showdown"<sup>254</sup> — just perhaps not as large of a showdown as would be inevitable were reconciliation attached to the bill from the start.

Senator Byrd again objected, mounting a dramatic speech in which he compared the Republicans to Augustus abusing the senators of Rome and to King George III.<sup>255</sup> He declared that reconciliation was originally intended to be "neutral in its purpose," but that use of reconciliation's limited-debate procedures to pass tax cuts was forcing the people of the United States to "relinquish the right of representation in the legislature."<sup>256</sup> But he did not formally object. Byrd clearly seemed to recognize that the tax cut debate had the potential to formally transform reconciliation into a majoritarian weapon, and it was, ironically, for that reason that he did not actually raise a point of order under his own eponymous rule labeling the tax cuts "extraneous." As noted earlier, Byrd Rule points of order must be

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<sup>251</sup> See 147 CONG. REC. 2180-83 (2001).

<sup>252</sup> See Andrew Taylor, *Law Designed for Curbing Deficits Becomes GOP Tool for Cutting Taxes*, CONG. Q. WKLY, Apr. 7, 2001, at 770 ("It appears [the Parliamentarian] reflected very carefully on what Sen. Byrd has said and come to a conclusion," said the chief of staff; "The legislative history as interpreted by Bob [Dove, the Parliamentarian] is that you can only give reconciliation protection to a bill or bills that increase taxes, decrease mandatory spending or make changes in the public debt.").

<sup>253</sup> Tiefer, *supra* note 5, at 439.

<sup>254</sup> Lisa Caruso & Stephen Norton, *Breaux to Offer Compromise \$1.25 Trillion Tax Cut Plan*, NAT'L J.'S CONGRESS DAILY, Apr. 3, 2001.

<sup>255</sup> See 147 CONG. REC. 5648-51 (2001).

<sup>256</sup> *Id.* at 5651.

sustained by the Chair of the Proceedings;<sup>257</sup> the Chair's rulings, once made, can only be overridden by a three-fifths majority.<sup>258</sup> Yet Byrd's party was in the minority, and surely could not muster enough votes to override an expected ruling from the majority Chair against a Byrd Rule point of order, and so Byrd stood down. He did not want a losing vote to set a "precedent of the highest order" firmly establishing reconciliation as a vehicle for tax cuts, so he did not force one.<sup>259</sup> His party concurred, with members announcing after a caucus meeting that they would not engage in "a bunch of procedural tit-for-tat" with the Republicans.<sup>260</sup>

Without a Byrd Rule objection, the reconciliation instructions were then passed on a party-line vote, enabling the tax cuts to pass the full Senate with a simple majority, free from the 60-vote requirement to overcome an otherwise sure filibuster.<sup>261</sup> Though the tax cut acquired reconciliation-bill status on a razor's edge, its passage appeared to mark a new precedent: if maneuvers like sunseting and procedural wrangling are employed, reconciliation can empower majorities to evade filibusters and pass nearly any proposal that spends or saves money, despite whatever reconciliation was originally intended to do in 1974. Republicans used reconciliation to pass tax cuts again in 2003 and 2005.

There was one casualty to the 2001 tax cut episode: the Senate Parliamentarian. Robert Dove, a 36-year Senate employee who had intimated he would rule against using reconciliation instructions for tax cuts, was fired. Although the Senate Parliamentarian has been referred to as an "umpire or referee," making neutral calls on rules questions, that supposedly innocuous role was not enough to save Dove's job.<sup>262</sup> The overarching reason given for his firing was that "[h]e has made it hard for the leadership to plot a strategy"<sup>263</sup> — a strategy that hinged on a favorable application of reconciliation for political gain. The Parliamentarian's sacking was further

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<sup>257</sup> See 2 U.S.C. § 644(a) (2012) (outlining Byrd Rule procedure).

<sup>258</sup> See HENIFF, JR., SENATE'S "BYRD RULE", *supra* note 221, at 4; Dauster, *supra* note 12, at 30-32 (outlining requirements to sustain an appeal to the ruling of the Chair on a Byrd Rule point of order).

<sup>259</sup> Lisa Caruso & Geoff Earle, *Outcome in Doubt as Senate Budget Vote Comes Down to Wire*, NAT'L J.'S CONGRESS DAILY, Apr. 6, 2001.

<sup>260</sup> Lisa Caruso & Geoff Earle, *Senate Dems Drop Hostile Procedural Strategy on FY02 Budget*, NAT'L J.'S CONGRESS DAILY, Apr. 3, 2001 (quoting Sen. Kent Conrad).

<sup>261</sup> Tiefer, *supra* note 5, at 439-40.

<sup>262</sup> Editorial, *Ump Sacking*, ROLL CALL, May 10, 2001.

<sup>263</sup> David E. Rosenbaum, *Rules Keeper Is Dismissed by Senate, Official Says*, N.Y. TIMES, May 8, 2001, at A20 (quoting Republican staff assistant).

demonstration that reconciliation had become crucial for the ability of majorities to assert themselves over otherwise strong minorities in the Senate. It also showed that, in anything but the short term, there was now essentially no supervision over the implementation of reconciliation. The Parliamentarian could rule against the majority's desire to use reconciliation, but the majority could use procedural maneuvers to get around his rulings, or simply fire him outright.<sup>264</sup> A precedent had been set.

#### D. *Obamacare*

The Bush Administration tax cuts proved that reconciliation was more flexible at accommodating the desires of majorities than previously anticipated. That notion received its final confirmation during the first two years of President Obama's Administration. It was then that the same Democrats who cried foul over reconciliation as a tax cut vehicle turned around to use it themselves to ensure the operation and effectiveness of Obama's health care reform program. The successful campaign to make Obamacare possible through reconciliation confirmed what now seems inevitable in hindsight: that reconciliation had become the de facto legislative strategy for avoiding the filibuster's 60-vote supermajority requirement.

It is a common misconception that the entire range of proposals commonly labeled Obamacare passed via reconciliation.<sup>265</sup> However, just hours after the original Affordable Care Act ("ACA") became law, the Senate began its floor work on a second bill, the Health Care and Education Reconciliation Act of 2010.<sup>266</sup> That bill, as its title suggests, was a reconciliation bill — and its importance was such that, as some commentators have argued, "[r]econciliation enabled the overhaul of the health care system."<sup>267</sup>

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<sup>264</sup> See discussion *infra* Part IV.C (discussing the other Parliamentarians who have been fired).

<sup>265</sup> At an October 2011 debate between the Republican presidential candidates in Hanover, New Hampshire, Mitt Romney vowed to "repeal Obamacare" by using "the reconciliation bill," adding, "because, as you know, it was passed by reconciliation, 51 votes." See Mark Halperin, *Complete Transcript of Hanover Economic Debate*, TIME: THE PAGE (Oct. 11, 2011), <http://thepage.time.com/2011/10/11/complete-transcript-of-hanover-economic-debate/>.

<sup>266</sup> See Shailagh Murray & Lori Montgomery, *In Senate, GOP Has Last Chance to Change Health-Care Overhaul*, WASH. POST, Mar. 24, 2010, at A6.

<sup>267</sup> Eileen Burgin, *Congress, Health Care Reform, and Reconciliation*, 39 CONGRESS & THE PRESIDENCY 270, 279 (2012). For a partisan viewpoint on the same question, see James C. Capretta, *The Reconciliation Option*, NAT'L REV. ONLINE (Oct. 18, 2011, 4:00 AM), <http://www.nationalreview.com/articles/280274/reconciliation-option-james-c->

The year 2010 did not represent the first instance of reconciliation assisting the passage of a health care measure. In fact, every reconciliation bill from 1980 through 1994 included health care provisions, and 40 of 66 health policy attachments to omnibus bills during a similar period arose via reconciliation.<sup>268</sup> At the start of the Obamacare push, Senate leaders contemplated using reconciliation to pass the entire measure, prompting grumbling from the minority party.<sup>269</sup> It was widely acknowledged, and thus glaringly obvious to Democrats, that “Republicans’ best hopes of killing health reform rest on the use of a filibuster in the Senate.”<sup>270</sup> But the reconciliation-only strategy was eventually scuttled as unnecessary, given Democrats’ 60-seat (and theoretically filibuster-proof) majority — an advantage that was instantly dashed with the 2010 election of Republican Scott Brown into the seat vacated by the death of Democrat Senator Ted Kennedy. Brown’s victory “stunned the president and congressional Democrats, upended their plan to move expeditiously to get health care reform signed into law, and revived GOP hopes that they could kill the legislation.”<sup>271</sup>

Yet that hope to kill the bill brought reconciliation back into the picture. Brown’s victory instead prompted the Democratic leadership of the Senate to undertake a “dual-bill strategy,” wherein they would urge the House to pass the Senate bill that had already ascended from that chamber earlier in the year, and then institute alterations in a second bill that would soothe House Democrats upset over measures in the initial bill.<sup>272</sup> The announcement of Senate Majority Leader Harry Reid was crystal clear in confirming that reconciliation would be used explicitly as an end run around obstruction (suggesting it is easy to underestimate the impact of reconciliation if only looking to its actual use). Reid cited the fact that the Republican caucus had “conspicuously shattered the record for obstruction last Congress” in indicating he would go forward with reconciliation for amending the

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capretta (arguing that “[w]ithout reconciliation, Obamacare would not have become law at all” (emphasis in original)).

<sup>268</sup> KRUTZ, *supra* note 175, at 107-08.

<sup>269</sup> “It stinks,” said Senator John Cornyn of Texas. Carl Hulse, *A Fight for the Right to Filibuster*, N.Y. TIMES, Mar. 29, 2009, at A17.

<sup>270</sup> Thomas E. Mann et al., *Reconciling with the Past*, N.Y. TIMES, Mar. 7, 2010, at WK12.

<sup>271</sup> Mark J. Oleszek & Walter J. Oleszek, *Legislative Sausage-Making: Health Care Reform in the 111th Congress*, in PARTY AND PROCEDURE IN THE UNITED STATES CONGRESS 253, 274 (Jacob R. Straus ed., 2012).

<sup>272</sup> *Id.* at 274-75.

health care bill, a move he avowed was not “unusual or extraordinary” in any way.<sup>273</sup>

The amendments bill that ended up succeeding through reconciliation made several changes, though it can be argued that “[t]he substantive importance of the reconciliation addendum pales in comparison to its procedural significance.”<sup>274</sup> The amendments addressed concerns of Members of the House who were not pleased about passing the original Senate bill, while at the same time making “the end result better than either the Senate or the House bill.”<sup>275</sup> They included:

[P]has[ing] out the Medicare prescription drug plan “doughnut hole” gap, rais[ing] the penalties for employers not providing health coverage, modif[ying] the penalties for U.S. residents failing to obtain insurance, speed[ing] up enactment of restrictions barring insurance companies from denying coverage because of preexisting conditions, and clarif[ying] the requirement that insurers allow adult children to remain on parents’ policies until age 26.<sup>276</sup>

Republicans, however, still entertained hopes of defeating the bill, though not through a filibuster, which would not have been allowed under reconciliation rules. Instead, they turned to Byrd Rule challenges. Republicans believed “a Byrd [R]ule violation that went to the heart of the bill could bring the bill down entirely,”<sup>277</sup> and they were probably right — yet they were unable to successfully convince the Parliamentarian that one existed. Republicans rested their hopes on the argument that a provision in the bill relating to an excise tax on “Cadillac” (or really expensive) insurance plans violated 2 U.S.C.

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<sup>273</sup> Letter from Harry Reid, Senate Majority Leader, to Mitch McConnell, Senate Minority Leader (Mar. 11, 2010), available at <http://democrats.senate.gov/2010/03/11/reid-in-letter-to-mcconnell-outlines-the-path-forward-on-health-reform/>.

<sup>274</sup> Burgin, *supra* note 267, at 287.

<sup>275</sup> SINCLAIR, *supra* note 204, at 232.

<sup>276</sup> Burgin, *supra* note 267, at 287-88. The bill further eliminated perhaps the most notorious feature of the original Affordable Care Act, known as the “Cornhusker Kickback” — a provision granting Senator Ben Nelson \$100 million in Medicaid funds for his home state of Nebraska. See Kevin Sack & Eric Lichtblau, *For Attorneys General, a Long Shot On Health Care Law Brings Payoffs*, N.Y. TIMES, July 1, 2012, at A18. Despite the removal of the “kickback” from the health care regime, Justice Antonin Scalia apparently still believed it existed during oral argument over the constitutionality of the Affordable Care Act. See Byron Tau, *Scalia Knocks ‘Cornhusker Kickback,’ POLITICO* (Mar. 28, 2012, 1:11 PM), <http://www.politico.com/politico44/2012/03/scalia-knocks-cornhusker-kickback-118960.html>.

<sup>277</sup> SINCLAIR, *supra* note 204, at 227.

§ 641(g), which disallows through the Byrd Rule any reconciliation bill that makes changes to Social Security.<sup>278</sup> The Parliamentarian, Alan Frumin, disagreed, essentially sinking Republican hopes to beat back the bill.<sup>279</sup> Such challenges would never have been necessary under a filibuster-only regime. Indeed, the Parliamentarian would not need to be consulted, and the bill likely would have never come to the floor, as the implied threat of a filibuster would have kept it away. But under reconciliation, the bill passed, 56–40.

Reconciliation allowed a simple majority to have its way on the most important legislative item of President Obama's first-term agenda: "In the end, it was the budget process that made enactment of the health care reform bill possible."<sup>280</sup> Republicans would have surely filibustered the reconciliation bill if they could have and after Scott Brown's election, they had the numbers to do so. But reconciliation, born as a small part of the 1974 budget reform movement got in the way. As the events surrounding Obamacare showed, Senators' thinking about how to use it had altered drastically in the ensuing four decades.

#### IV. THE FUTURE OF LEGISLATION: MAJORITARIANISM OR MINORITARIANISM

Even without filibuster reform, arguments are being made that, with reconciliation ascendant as an alternative to the filibuster, "Congress has become a majoritarian body, to a degree virtually unprecedented in modern times."<sup>281</sup> However, the filibuster is typically an "unbreakable" tactic,<sup>282</sup> requiring a supermajority of sixty votes to defeat it. Reconciliation has therefore increasingly been used when possible to cobble together controversial legislation that "would have provoked filibusters had they been possible, and quite likely these filibusters would have been successful."<sup>283</sup> In that sense, the two procedures, reconciliation and the filibuster, are now joined at the hip. For example, in the run-up to the 2012 presidential election, it was assumed in the political press that a potential President Mitt Romney

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<sup>278</sup> See David M. Drucker & Emily Pierce, *Parliamentarian Weighing GOP Challenge to Reconciliation Bill*, ROLL CALL (Mar. 22, 2010, 1:25 PM), <http://www.rollcall.com/news/-44514-1.html>.

<sup>279</sup> See Manu Raju, *Senate Democrats Get Favorable Ruling*, POLITICO (Mar. 23, 2010, 2:12 AM), <http://www.politico.com/news/stories/0310/34840.html>.

<sup>280</sup> SINCLAIR, *supra* note 204, at 232.

<sup>281</sup> GILMOUR, *supra* note 149, at 94.

<sup>282</sup> CARO, *supra* note 128, at 452.

<sup>283</sup> SINCLAIR, *supra* note 204, at 156.

would have to push Congress to use reconciliation widely if he hoped to avoid filibusters getting in the way of majority votes on his agenda.<sup>284</sup> And it was already being argued in early 2013 that reconciliation could become more common in future budget debates as a result of the tax compromise between President Obama and Senate Republicans on the “fiscal cliff.”<sup>285</sup> As the healthcare legislation passage shows, the effect of this device is not limited to financial matters. Rather, much controversial modern legislation creation is likely to hinge on the reconciliation process, which has evolved into a clear if limited majoritarian alternative to the filibuster.<sup>286</sup>

Reconciliation’s evolution has produced a chorus of critics. Chief among them before his death was Senator Byrd, himself, one of the architects of the original 1974 Budget Act, who pleaded with his colleagues from the Senate floor to use reconciliation, the “bear trap,” only “sparingly” and “for purposes of fiscal restraint.”<sup>287</sup> The outcry from opponents of the health care reconciliation bill was similar. The general complaint was that reconciliation’s empowerment of majorities “substantially diminish[es] the procedural rights normally enjoyed by senators.”<sup>288</sup> That phrase, “procedural rights,” refers of course to the right of a Senate minority to filibuster a bill.

The clash between reconciliation and the filibuster is likely to continue, and heighten. The reconciliation episodes of the 2000s and 2010s have shown that the procedure’s potential use to spend or save

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<sup>284</sup> See, e.g., Jonathan Chait, *November 7th*, N.Y. MAG, Oct. 14, 2012 (citing speculations that a President Romney would use reconciliation to pass his budget plan); Major Garrett, *Smooth Mitt*, NATIONALJOURNAL.COM (Oct. 18, 2012, 12:15 PM), [www.nationaljournal.com/columns/all-powers/how-mitt-dodges-bullets-on-taxes-20121016](http://www.nationaljournal.com/columns/all-powers/how-mitt-dodges-bullets-on-taxes-20121016) (“[T]he only realistic chance that Romney would have of passing a big tax measure would be through reconciliation . . . .”); David Leonhardt, *Romney’s First 100 Days*, N.Y. TIMES, Aug. 26, 2012, at WR1, 8 (describing Senate Republicans’ plans to pass the “mother of all reconciliation bills” under a potential Mitt Romney presidency).

<sup>285</sup> See, e.g., Sam Goldfarb, *Washington’s Tax Compromise May Raise Reconciliation Possibility*, ROLL CALL (Jan. 11, 2013, 3:59 PM), [http://www.rollcall.com/news/washingtons\\_tax\\_compromise\\_may\\_raise\\_reconciliation\\_possibility-220693-1.html?zkPrintable=true](http://www.rollcall.com/news/washingtons_tax_compromise_may_raise_reconciliation_possibility-220693-1.html?zkPrintable=true).

<sup>286</sup> During the run-up to the 2012 election, for example, Senate Republicans had vowed to use reconciliation heavily in the event of a Romney presidency, promising to use the procedure “to pass legislation out of the Senate by a 51-vote majority — circumventing a filibuster — on everything from tax reform to repealing major portions of the health care law.” Manu Raju & Seung Min Kim, *Fiscal Cliff: Congress Weighs Another Round of Kick the Can*, POLITICO (Sept. 9, 2012, 6:56 PM), <http://www.politico.com/news/stories/0912/80966.html>.

<sup>287</sup> 147 CONG. REC. 1534 (2001).

<sup>288</sup> See GOLD, *supra* note 230, at 155.

government funds is vast, provided that its proponents are able to skirt around the Byrd Rule — not always a difficult task.

Reconciliation's ascendance to the forefront of Senate strategy marks a chance for majorities to reassert themselves on major legislation. It also marks a fascinating chapter in the evolution of congressional procedure as an obscure budgetary device retrofitted as a weapon for majoritarian (and often partisan) action. The filibuster, too, has changed from the days of a more genteel Senate, to the point where actual filibusters no longer occur. But filibusters remain quite real in their effect, and even if filibuster reform is eventually successful, the Senate's interest in its long-held tradition of unlimited debate is likely to remain strong. That idea will make reconciliation all the more important as legislators and presidents decide what legislation they truly cannot live without — or at least that for which they cannot muster sixty votes.

#### A. *The Constitutionality of Filibuster Reform and Reconciliation*

There is a lively debate over whether the filibuster's minoritarian obstruction can or should be challenged in the courts as an unconstitutional procedure of the Senate.<sup>289</sup> On the flip side, there is a similar debate over whether reform of the filibuster, particularly when exercised by a simple majority, would be an unconstitutional intrusion on the rights of a minority of senators. Similar sentiments have been raised in regard to the exercise of reconciliation.<sup>290</sup> None of these positions are clearly, incontrovertibly correct, as this section shows; at any rate, none is likely to be proved more or less persuasive because, as the next section shows, the issue is unlikely to ever be resolved by the U.S. Supreme Court.

Much of the debate turns on implications drawn from the constitutional text, which may seem curious since the U.S. Constitution makes no reference to filibusters, or unlimited debate, or whether simple majorities are needed to pass a bill in the Senate. In

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<sup>289</sup> Only a few years ago, the debate was dismissed as having been clearly decided in favor of the filibuster's constitutionality. See Virginia A. Seitz & Joseph R. Guerra, *A Constitutional Defense of Entrenched Senate Rules Governing Debate*, 20 J.L. & POL. 1, 1 (2004) (describing the scholarly analysis as "uniform" in perceiving its constitutionality). However, recent cases and controversies have reignited the debate. See Fisk & Chemerinsky, *supra* note 46, at 249 ("[E]ntrenchment frustrates the legislative accountability that is essential for a properly functioning democratic government.").

<sup>290</sup> See Hatch, *supra* note 10, at A15 (describing Senator Hatch's feeling that reconciliation as a counter to the filibuster "degrade[s] our system of government").

fact, the text does not provide any rule of vote aggregation for ordinary Senate business, including enacting legislation. Instead, the Constitution empowers the Senate to make its own rules.<sup>291</sup> We argue that this provision of power is ultimately determinative, in that it prevents judicial resolution of the issue. Nevertheless, both sides of the debate emphasize the text heavily, both for what it contains and what it leaves out.

The Constitution's text does include several supermajority-voting requirements for certain events, such as a congressional override of a presidential veto,<sup>292</sup> and the expulsion of a member<sup>293</sup> (there are, in fact, seven of these total).<sup>294</sup> One's interpretation of the presence of these supermajority requirements in the Constitution, and the contrasting silence about voting requirements for any other matter in Congress, tends strongly to correlate with whether one wants to eliminate or protect the filibuster.

It is arguable that these seven areas imply either that *only* those matters to which the Constitution assigns supermajority requirements need a specified number of votes — or that, by implication, all other matters require *fewer* votes.<sup>295</sup> The interpretive canon of *expressio unius* buttresses the former argument: the fact that the Constitution does specify a numerical minimum for some votes implies that it has no requirement for others. Others go further, arguing that “the central principle underlying the Constitution is governance through supermajority rules.”<sup>296</sup> This claim is belied by the Federalist Papers, in which both Madison<sup>297</sup> and Hamilton<sup>298</sup> opined against a general legislative supermajority requirement.

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<sup>291</sup> U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings . . .”).

<sup>292</sup> *Id.* § 7, cl. 2.

<sup>293</sup> *Id.* § 5, cl. 2 (“[A]nd, with the Concurrence of two thirds, expel a Member.”).

<sup>294</sup> See John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 706 (2002) [hereinafter *Our Supermajoritarian Constitution*] (listing all seven supermajority voting requirements).

<sup>295</sup> See Fisk & Chemerinsky, *supra* note 46, at 240 (outlining both sides of the argument).

<sup>296</sup> McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 294, at 705.

<sup>297</sup> THE FEDERALIST NO. 58 (James Madison) (1787) (a requirement of more than a majority to pass legislation would have meant that “the fundamental principle of free government would be reversed. It would be no longer the majority that would rule: the power would be transferred to the minority”).

<sup>298</sup> *Id.* NO. 22 (Alexander Hamilton) (“[T]he fundamental maxim of republican government[] requires that the sense of the majority should prevail . . . . To give a minority a negative upon the majority (which is always the case where more than a

A different emphasis, which many of the constitutional objections to the filibuster rely on, is an assumption that *majority* rule is the Senate's constitutionally-ordained lodestar — but, as Michael Gerhardt points out, this claim rests on a dubious basis.<sup>299</sup> The term “majority” is mentioned in the legislative content of the document just once, in stating that a majority is enough to constitute a quorum.<sup>300</sup> Thus, what effect the *absence* of any reference to “majorities” has in the Constitution is up for discussion — there exist many different vertical aggregation mechanisms. For example, as Catherine Fisk and Erwin Chemerinsky argue, the Constitution's list of seven supermajority circumstances is not necessarily exhaustive, and certainly is not explicitly so.<sup>301</sup>

Without a clear textual cue as to how many votes the Framers believed should be required to enact a piece of legislation, opponents of the filibuster's constitutionality occasionally resort to analogy instead. Josh Chafetz, for example, posits a fictional Senate rule that would not allow seating of a member unless that member acquired sixty percent of the popular vote.<sup>302</sup> Just as with the filibuster, he writes, there is no constitutional provision blocking such a rule — and yet it “simply cannot be constitutional,” because a “Constitution written in the name of We the People cannot tolerate this sort of self-entrenchment by incumbents.”<sup>303</sup> Yet it is exactly this sort of supermajority that makes amendment of the Constitution so difficult — a provision that enforces a kind of self-entrenchment.<sup>304</sup> It is far from clear whether the same must be true of the filibuster.

This debate, however, appears destined to be relegated to the pages of law review articles, without any actual judicial assistance or interest. Reality may have set in for academic filibuster opponents in

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majority is requisite to a decision), is, in its tendency, to subject the sense of the greater number to that of the lesser.”)

<sup>299</sup> Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445, 448 (2004) (“[T]hese arguments are circular. They each assume rather than establish the conclusion that majority rule is a fixed, constitutional principle within the Senate.”).

<sup>300</sup> U.S. CONST. art. I, § 5, cl. 1.

<sup>301</sup> Fisk & Chemerinsky, *supra* note 46, at 24-41.

<sup>302</sup> Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1011-12 (2011) [hereinafter *Unconstitutionality of the Filibuster*].

<sup>303</sup> *Id.* at 1012.

<sup>304</sup> U.S. CONST. art. V (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, [and] . . . ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof.”).

December 2012, when the District Court for the District of Columbia dismissed a lawsuit by four members of the House along with the non-profit group Common Cause seeking to declare the filibuster unconstitutional.<sup>305</sup> The plaintiffs had sought an injunction to prevent Vice President Biden in his capacity as Senate President along with various Senate staffers (including the Parliamentarian) from enforcing the Senate's Rule 22, which permits the filibuster to exist and thus to require a supermajority of sixty votes to pass legislation.<sup>306</sup> Their primary argument: the filibuster is not majoritarian but supermajoritarian, and "[t]he Framers of the Constitution refused to require more than the vote of a simple majority except in six carefully defined circumstances . . . ."<sup>307</sup> This reading appeared somewhat disingenuous, as it assumed a default condition — majority rule for the passage of a bill — that it never proved.<sup>308</sup>

The district court was unswayed by the complaint's criticism of the filibuster. Although it conceded that "even the mere threat of a filibuster is powerful enough to completely forestall legislative action,"<sup>309</sup> the court dispatched the Common Cause suit on multiple grounds, most resoundingly on the question of justiciability.<sup>310</sup> First, the court pointed out, as it clearly had to, that the Senate has the power to make its own rules; it then decided that the Senate rule in question was not limited by any constitutional provision.<sup>311</sup> The plaintiffs tried to overcome that argument by alleging that the Framers

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<sup>305</sup> *Common Cause v. Biden*, 909 F. Supp. 2d 9, 12, 31 (D.D.C. 2012). The House members included Representatives John Lewis, Michael Michaud, Hank Johnson, and Keith Ellison. *Id.* at 15.

<sup>306</sup> See Complaint, *supra* note 17, at \*2, \*15-16.

<sup>307</sup> *Id.* at \*4.

<sup>308</sup> See Gerhardt, *supra* note 299, at 460 ("[T]he argument that filibusters allow a minority to preclude the Senate from fulfilling its institutional obligations mistakenly equates the institution with a majority within it. Yet again, critics of the filibuster have assumed their conclusion. In no place does the Constitution equate a majority of the Senate with the institution itself."). The complaint goes on to directly assert that the Presentment Clause (U.S. CONST. art. I, § 7, cl. 2) states that "only the vote of a simple majority of a quorum of each house of Congress would be required for passage of a bill." Complaint, *supra* note 17, at \*25. This is creative writing. If the Presentment Clause actually contained such a command, the cloture rule would not exist, and this debate would never have been possible.

<sup>309</sup> *Common Cause*, 909 F. Supp. 2d at 12.

<sup>310</sup> *Id.* at 27. The court also found that the plaintiffs lacked standing to sue, *id.* at 18, but did not reach the defendants' argument that the Speech or Debate clause also barred the suit, *id.* at 31 n.19. It did not have to, as its other grounds for dismissal made such a finding unnecessary.

<sup>311</sup> *Id.* at 27-29. *But see infra* text accompanying note 361 (discussing *Powell*).

*did* limit how many votes the Senate may require for a piece of legislation by placing some *supermajority* provisions in the Constitution. But “[t]his is simply not the case,” Judge Sullivan wrote. “None of these provisions contains any language that expressly limits the Senate’s power to determine its rules, including when and how debate is brought to a close.”<sup>312</sup> The court’s language became even more plain when considering the extent to which the plaintiffs’ request for an injunction would force judicial intrusion into legislative affairs:

Plaintiffs provide no authority . . . for the proposition that the Court’s review of an internal rule of Congress, rather than a legislative act, would reflect respect for the Constitution and not a lack of respect for the Senate, particularly where, as here, Plaintiffs have identified no constitutional restraint on the Senate’s power to make rules regulating debate.<sup>313</sup>

Perhaps the Common Cause complaint was simply poorly written or reasoned. But future litigation is unlikely to fare any better. Without a controlling provision in the Constitution on the subject of how exactly the Senate is to vote, or a convincing extrapolation of one, the courts are likely to rely on long-settled separation-of-power limits when deciding whether to intervene, as this next section establishes.

### B. *The Empty Threat: Judicial Review of Senate Rules*

The U.S. Supreme Court has developed multiple doctrines that, taken together, display a reluctance to review the capacity of either congressional chamber to interpret its own rules. This creates a strong expectation that the Court would refuse to insert itself into any conflict within the Senate over either the operation of the filibuster or reconciliation, or their reform.

#### 1. The Filibuster as a Political Question

As the Court stated in *United States v. Ballin*, when considering whether a facially valid act of Congress can be challenged because there may not have been a quorum to pass it:

The [C]onstitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and

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<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 31.

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there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just . . . . It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.<sup>314</sup>

As this quote makes clear, there are some exceptional circumstances where the Court will overcome its general disinclination to assess Senate or House procedure, as the next section details. However, judicial intrusions of this kind have been few, and limited in application. In contrast, multiple mechanisms exist for the Court to avoid addressing a conflict between the minority and the majority over the constitutionality of either filibuster reform or the application of reconciliation.

In terms of any challenge to the use of the filibuster itself, the Court is extremely unlikely to involve itself. As we have seen, the filibuster is somewhat analogous to senatorial courtesy, which has not been directly challenged in federal court. However, three of the most controversial exercises of senatorial courtesy by the New Jersey State Senate have led to judicial challenges in New Jersey state courts. The first was by citizens who claimed their rights under the Fourteenth Amendment of the New Jersey Constitution were violated by senators rejecting nominees for public office for purely personal reasons.<sup>315</sup> The second arrived because a disproportionately large number of judicial vacancies existed in a particular county due to the exercise of senatorial courtesy.<sup>316</sup> The third arose because a sitting judge's renomination lapsed due to the exercise of senatorial courtesy.<sup>317</sup> In each case, the justices recognized that senatorial courtesy was a long tradition which each court was powerless to prevent.<sup>318</sup> To attempt to promote individual rights contrary to internal Senate rules would "involve delving into the thought processes and motivations which led each individual senator to vote or not vote as he did,"<sup>319</sup> which the

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<sup>314</sup> 144 U.S. 1, 5 (1892).

<sup>315</sup> *Kligerman v. Lynch*, 223 A.2d 511, 512 (N.J. Super. Ct. Ch. Div. 1966).

<sup>316</sup> *Passaic Cnty. Bar Ass'n v. Hughes*, 260 A.2d 261, 262-64 (N.J. Super. Ct. Ch. Div. 1969).

<sup>317</sup> *De Vesa v. Dorsey*, 634 A.2d 493, 495-97 (N.J. 1993).

<sup>318</sup> *Kligerman*, 223 A.2d at 513; *Hughes*, 260 A.2d at 267; *De Vesa*, 634 A.2d at 504.

<sup>319</sup> *Kligerman*, 223 A.2d at 513.

court has consistently refused to do. Challenges to exercises of the filibuster are likely to receive the same short shrift.

A challenge based instead on *protecting* the filibuster from reform, or use of reconciliation, on the basis of protecting the rights of the minority, taps more naturally into conceptions of the U.S. Supreme Court as having a special role as protector of minority rights.<sup>320</sup> Nonetheless, such a challenge is little more likely to receive serious review by the Court.

Most naturally, the Court would turn to the political question doctrine.<sup>321</sup> All of *Baker v. Carr*'s three central boundary questions would arguably apply to discourage review of any challenge by a minority against a majority for weakening minoritarian rights.<sup>322</sup> First and most glaringly, resolution of the issue would involve addressing questions "committed by the text of the Constitution to a coordinate branch of Government," since Article I, Section 5 of the Constitution provides that each house may determine the rules of its proceedings. On this basis, the Court has refused to entertain multiple challenges analogous to the arguments proposed in the previous section relating to the filibuster and reconciliation. As well as refusing to examine whether quorum existed contrary to the recording of quorum in the Senate, as mentioned above, these refusals have included, for example, refusing to reconsider whether the Senate had properly delegated its power over conviction to a subcommittee in an impeachment process,<sup>323</sup> and other like cases, as discussed below.

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<sup>320</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation [promotes] . . . prejudice against discrete and insular minorities.").

<sup>321</sup> See *Luther v. Borden*, 48 U.S. 1, 47 (1849) (stating that whether the people of the state have changed their government "is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it").

<sup>322</sup> 369 U.S. 186, 217 (1962) (describing the elements of a political question as "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question"). These are generally summarized as the following three inquiries. See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring) ("As set forth in the seminal case of *Baker v. Carr*, [citations] the doctrine incorporates three inquiries . . .").

<sup>323</sup> *Nixon v. United States*, 506 U.S. 224, 226 (1993).

On the basis of this first prong alone, then, the Supreme Court would likely refuse to address the issue, but it could possibly also refuse on the basis of the other two *Baker v. Carr* prongs. The second prong, whether resolution of the question would require the Court go beyond its areas of judicial expertise, has the least clear implications.<sup>324</sup> Arguably, addressing the role of the filibuster would be beyond judicial expertise, if only because the Court has generally stayed out of such topics; however, the Court has some experience in assessing the impact of rules on minority rights in analogous fields, such as corporate law.<sup>325</sup> But a stronger argument can be made on the third prong, that “prudential considerations counsel against judicial intervention,”<sup>326</sup> because of the separation-of-powers implications of the textual command that each chamber manage its own regulations. While being sure not to abdicate policing the separation of powers, the Supreme Court has been conscious to respect “the supremacy of each branch within its own assigned area of constitutional duties.”<sup>327</sup>

This implication of the third prong captures something of a “departmentalist” view of constitutional interpretation — “that each of the three branches of the federal government possesses independent and coordinate authority to interpret the Constitution.”<sup>328</sup> Though some take departmentalism to the extreme that executives can reassess constitutional judicial determinations de novo,<sup>329</sup> more commonly

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<sup>324</sup> This topic is generally prone to difficulty of definition, since descriptive claims about judicial expertise often rest on preconceptions of judicial motivations, character, and inherent capacity and are arguably normative arguments in disguise. Compare Lon Fuller, *Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 393-405 (1978) (arguing judicial capacity is limited and so judges should exercise self-restraint), with Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1316 (1976) (disputing previous).

<sup>325</sup> See, e.g., *Va. Bankshares Inc. v. Sandberg*, 501 U.S. 1083, 1086-87 (1991). But note the opinion questioned whether it is appropriate (or not) for the Court to consider the fairness of a merger to minority shareholders, *id.* at 1093 n.6, and there is arguably some reluctance to get into core debates about what is fair to minority shareholders at the federal level (or more precisely, at the Supreme Court level), with the Supreme Court delegating much of this issue to the state courts. See, e.g., *Santa Fe Indus., Inc., v. Green*, 430 U.S. 462, 479 (1977) (“Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities . . .”).

<sup>326</sup> *Goldwater*, 444 U.S. at 998 (Powell, J., concurring).

<sup>327</sup> *United States v. Nixon*, 418 U.S. 683, 705 (1974).

<sup>328</sup> Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1031 (2004).

<sup>329</sup> See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994) (“[T]he President possesses the power of full “legal review” of the actions of the other branches — the full power to

departmentalists agree that while each branch may express its own views on constitutional issues, and even vehemently disagree with the Court's rulings, the Court's rulings govern constitutional questions — at least on discrete cases.<sup>330</sup> Either way, a departmentalist view at least supports the position that when a judicial interpretation would directly determine another branch's reign over its own realm, the Court should resist review. The enumeration of powers implies the privilege of each branch to determine its own operation, subject to the separation of powers.<sup>331</sup> The reason this is a prudential consideration for the judiciary is that since the Court wants to be respected as the sole vessel of judicial power, it needs to similarly respect the province of the other branches within their own spheres of influence. As such, two of the three prongs of the political question doctrine point strongly against judicial intervention in a dispute over the filibuster, and the third is simply ambiguous.

In addition to the political question doctrine, the Court could use ripeness as a means of finding non-justiciability, as it did in *Goldwater v. Carter*, by refusing to determine whether President Carter's rescindment of a treaty with Taiwan required Senate approval, as treaty adoption does.<sup>332</sup> Although the Court dismissed without comment in that case, both concurring justices argued that the issue was a “nonjusticiable political dispute that should be left for resolution by the Executive and Legislative Branches,”<sup>333</sup> not the courts, at least until there was conflict between the two branches.<sup>334</sup> Otherwise, the Court would be potentially involving itself in the Senate's decision not to assert its own power; then it would effectively

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review the lawfulness or correctness of their legal interpretations of the Constitution, of federal statutes, and of treaties.”).

<sup>330</sup> See Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421, 1427 & n.33 (1999) (noting Abraham Lincoln's disagreement with but respect for the Dred Scott decision); David W. Tyler, *Clarifying Departmentalism: How the Framers' Vision of Judicial and Presidential Review Makes the Case for Deductive Judicial Supremacy*, 50 WM. & MARY L. REV. 2215, 2221 (2009) (“[E]ach branch of the national government engages constitutional review, but in which the Supreme Court provides the most telling assessments of constitutionality.”).

<sup>331</sup> Post & Siegel, *supra* note 328, at 1031-32.

<sup>332</sup> 444 U.S. 996, 996 (1979) (Powell, J., concurring) (arguing that the Court should have dismissed for lack of ripeness).

<sup>333</sup> *Id.* at 1003 (Rehnquist, J., concurring).

<sup>334</sup> *Id.* at 996 (Powell, J., concurring) (“[T]he Judicial Branch should not decide issues affecting the allocation of power between the President and Congress, unless the political branches have reached a constitutional impasse.”).

not be policing process, but replacing the Senate's substantive policy judgment with its own.

A third alternative is that the Court could achieve the same effect by using standing to avoid any filibuster controversy. In *Raines v. Byrd*, the Court held that, despite a specific legislative provision for any Member of Congress adversely affected by a line item veto exercised by the president to bring an expedited judicial challenge to that exercise, no individual or group of senators had standing for such a challenge.<sup>335</sup> Instead, the Court emphasized that standing restrictions were “especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.”<sup>336</sup> The Court was making it clear that it would aggressively use standing as a means of avoiding disputes within and between the elected branches.

*Raines v. Byrd* is particularly pertinent when contemplating any potential challenge to filibuster reform or use of reconciliation, as it concerned a minority of senators challenging an internal rule on the basis that its exercise diluted their voting power. The Court emphasized that “the abstract dilution of institutional legislative power” is not enough to warrant judicial intrusion on the operation of Senate rules.<sup>337</sup> It concluded that there was no injury to these senators, beyond any effect on them solely due to being Members of Congress — just as would be asserted in any filibuster protection claim.

Prior precedent to the contrary could mean, the *Raines* Court said, “at most,” that it would inquire whether there had been total effective nullification of a Senator's vote.<sup>338</sup> To give an illustration of such nullification, the Court referred to the possibility of a bill erroneously passing when it otherwise would not have, when a majority of votes were not actually cast. But rather than giving any consideration to the possibility of minoritarian voting rights, the Court instead emphasized that senators could vote to repeal such legislation — and presumably any rule change — and so there was no meaningful harm to the interests, even in the long run.<sup>339</sup> As such, *Raines* almost directly addresses any potential claim that could be brought on the basis of

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<sup>335</sup> *Raines v. Byrd*, 521 U.S. 811, 830 (1997) (“[T]hese individual members of Congress do not have a sufficient ‘personal stake’ in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing.”).

<sup>336</sup> *Id.* at 819-20.

<sup>337</sup> *Id.* at 826.

<sup>338</sup> *Id.* at 823.

<sup>339</sup> *Id.* at 824.

minoritarian rights under the filibuster, and dismisses them for lack of standing.

There is good reason for this reluctance by the Court to involve itself in internal congressional disputes: while the judiciary is meant to police the Constitution, it cannot overly police the political branches without impinging on separation of powers itself. This is illustrated in *Nixon v. United States*, which concerned the impeachment of Judge Walter Nixon.<sup>340</sup> Judge Nixon was convicted by the Senate, but the hearings on his impeachment were held by a Senate committee, which he argued was contrary to the constitutional provision that “the Senate shall have sole power to try all impeachments.”<sup>341</sup> Nixon argued that the term “sole” implied that the duty was non-delegable to a committee; but the Court held the issue to be non-reviewable, both because the term “sole” meant that there was nothing for the judiciary to review<sup>342</sup> and because impeachment is the mechanism of legislatures reviewing judges, so judges could thus not review legislatures reviewing judges.<sup>343</sup> This may be a particularly stark illustration of how separation-of-powers problems could arise were the Supreme Court to go against its tradition of refraining from reviewing internal Senate rules, but the principle applies even when unconcerned with the oversight of one’s own overseer.

There are thus many strongly buttressed means of rejecting judicial challenges to filibuster reform. However, opposition to such reform could also challenge not the actual change itself, but rather the means of such a change, particularly as exercised by a bare majority. This argument posits that even if the Senate has sole power over its own rules, it is still subject to the rest of the Constitution,<sup>344</sup> including the protection of minorities and their right to exercise the filibuster against any attempt to reform the filibuster. But given the clarity of the Constitution’s textual empowerment of the Senate to craft its own

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<sup>340</sup> *Nixon v. United States*, 506 U.S. 224, 226 (1993).

<sup>341</sup> U.S. CONST. art. I, § 3, cl. 6; *Nixon*, 506 U.S. at 229.

<sup>342</sup> *Nixon*, 506 U.S. at 231 (“The commonsense meaning of the word ‘sole’ is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted.”).

<sup>343</sup> *Id.* at 234-35 (“[J]udicial review would be inconsistent with the Framers’ insistence that our system be one of checks and balances. In our constitutional system, impeachment was designed to be the only check on the Judicial Branch by the Legislature.”).

<sup>344</sup> Bruce Ackerman et al., *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539, 1541 (1995) (U.S. CONST. art. I, § 3, cl. 6 “does not authorize the House to violate fundamental principles of constitutional democracy. It simply authorizes the House to organize itself for informed and efficient debate and decision.”)

rules, this challenge to the “nuclear option” ultimately collapses down to the same claim of minority rights protection dismissed above.

A persuasive analysis of the legitimacy of both the filibuster and its amendment by the Senate chamber was put forth by none other than Vice President Richard Nixon in his capacity as Chair of the Senate.<sup>345</sup> Nixon argued that the constitutional provision for one-third of the Senate to change in every election indicated; “[T]he intent of the framers that the Senate should be a continuing parliamentary body for at least some purposes. By practice for 167 years the rules of the Senate have been continued from one Congress to another.”<sup>346</sup> Those procedural rules include the filibuster. On the other hand, “there can be no question that the majority of the new existing membership of the Senate . . . ha[s] the power to determine the rules under which the Senate will proceed.”<sup>347</sup> These two positions are nonetheless reconcilable: the latter takes precedence, and any rule restricting the power of the majority by the will of the previous Congress is unconstitutional; however, unless the Senate indicates its will to the contrary, the old rules will be assumed to be effective.<sup>348</sup> Nixon’s concise analysis provides a reasonable interpretation that supports both the constitutionality of the filibuster and the constitutionality of majoritarian changes to the filibuster. The only constitutional restriction that arises for Nixon from looking at the constitutional text and practice is on the entrenchment of a supermajority rule, and so by implication his analysis supports changes to the filibuster being made by a simple majority.<sup>349</sup>

Furthermore, while U.S. courts have not addressed the question, other common law countries have a well-developed jurisprudence around the general rule that legislatures cannot ordinarily entrench a supermajority rule. Essentially, supermajority rules can apply to all procedures *except* those that consider amendment to the rule, unless under exacting rules of manner and form.<sup>350</sup> To do otherwise is to bind

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<sup>345</sup> 103 CONG. REC. 178 (daily ed., Jan. 4, 1957).

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> *Id.* at 179. With one important exception — “[T]hat the Senate should not be bound by any provision in those previous rules which denies the membership of the Senate the power to exercise its constitutional right to make its own rules.” *Id.*

<sup>349</sup> See Fisk & Chemerinsky, *supra* note 46, at 249 (“[E]ntrenchment frustrates the legislative accountability that is essential for a properly functioning democratic government”).

<sup>350</sup> See, e.g., Anupam Chander, Note, *Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights*, 101 YALE L.J. 457 (1991) (summarizing the doctrine).

subsequent legislatures to the will of the current body. The same principle ought to apply at least equally to the U.S. Senate, since all legislatures have limits on their powers, and this rule essentially mandates a basic limit on the ability of a legislature to change its own powers,<sup>351</sup> a principle well-established by U.S. courts.<sup>352</sup> As such, the nuclear option controversy has the logic reversed: it is the application of the filibuster to legislative reconsideration of the filibuster rule that raises constitutional problems. But again, this conclusion is unlikely to be articulated directly by the courts, since they are unlikely to consider the issue.

The consequent notion of the Senate's complete freedom to create its own rules raises the conundrum that a unanimity requirement for all legislation on one hand, or a coin flip on the other, would be equally unreviewable. Indeed, many of the arguments against the filibuster rely on pointing out the potential for such absurdities.<sup>353</sup> And in fact the strong implication from the *Nixon* Court majority was that the Senate could flip a coin to decide Nixon's fate, if it so chose — only one concurring justice was willing to question such an outcome.<sup>354</sup> Yet the Court is likely to be unwilling, and rightly so, to step in to either abolish a core Senate procedure or restrict its reform. Nonetheless, such stringent or lax voting rules have somehow never materialized. Something else, then, is policing the Senate. And as the emergence of reconciliation indicates, that something, however gingerly its approach, may be the Senate itself.

## 2. The Limited Exceptions to Reviewing Senate Rules

The Court's avoidance of reviewing the propriety of the Senate's interpretation of its own rules and procedures is consistent with the political question doctrine; however, there have been some cases where the Supreme Court has stepped in, as described below. But in

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<sup>351</sup> Pavlos Eleftheriadis, *Parliamentary Sovereignty and the Constitution*, 22 CANADIAN J.L. AND JURISPRUDENCE 1 (2009) (arguing the same principle applies in the U.S., since all legislatures have limits on their powers, particularly on the ability to change its own powers), available at [www.law.cam.ac.uk/faculty-resources/10006399.pdf](http://www.law.cam.ac.uk/faculty-resources/10006399.pdf).

<sup>352</sup> See discussion *infra* section IV.B.2.

<sup>353</sup> See, e.g., Chafetz, *Unconstitutionality of the Filibuster*, *supra* note 302, at 1014 (“[I]f the Senate can require sixty votes for passage, why not seventy or eighty?”).

<sup>354</sup> Justice Souter suggested review may be appropriate in such a circumstance, but did not describe the criteria for making such an assessment. See *Nixon v. United States*, 506 U.S. 224, 253-54 (“If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss . . . judicial interference might well be appropriate.”).

those few cases, there are generally other considerations at play that mandate judicial involvement. Most notably, the Court has stressed that when Senate action affects the rights of others, the Court is obliged to act, even though doing so involves itself in overseeing Senate rules.<sup>355</sup> We note another circumstance where the Court has stepped in, and is likely to do so again: when in defining its rules, the Senate overreaches, attempting to manipulate its own separation-of-powers-constraints. We argue, however, that neither exception applies to any likely conflict over the filibuster, and so, despite these exceptions, the Court is nevertheless still likely to refrain from deciding the fate of the filibuster or reconciliation.

When legislative procedure affects the rights of others, such as when a lawful commission is being denied, application of congressional rules can become a judicial question. This is particularly the case if the individual whose rights are being affected has been singled out for especially unfavorable treatment — recognized as early as *Marbury v. Madison*.<sup>356</sup> This is true not only where, as in *Marbury*, a right such as a commission is being denied to a citizen outside of the legislative sphere, but also to a decision of a legislative chamber to deny a right to one of its own, as illustrated in *Powell v. McCormack*.<sup>357</sup> In *Powell*, Representative Adam Clayton Powell had been accused of corruption, for submitting deceptive travel expenses and making illegal salary payments to his wife. But instead of taking formal action against Powell, upon his re-election, the House simply excluded him from taking his seat in the new Congress. As the Court stressed in *Raines*, *Powell* concerned action by a legislative chamber that affected the rights of an individual — in this case to take up the seat that he had rightfully won in an election. Challenge to such a rule, however, even if concerning internal legislative procedure, is not ultimately about the operation of the legislature at all, but rather about a body (that happens to be a legislative body) improperly discriminating against an individual. The *Raines* Court distinguished *Powell* in these terms, terms that would appear to apply to a challenge concerning the filibuster:

*Powell* does not help appellees. First, appellees have not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies. Their claim is that the Act causes a type of institutional injury (the diminution of

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<sup>355</sup> See *Raines v. Byrd*, 521 U.S. 811, 821 (1997).

<sup>356</sup> 5 U.S. 137, 139 (1803).

<sup>357</sup> *Powell v. McCormack*, 395 U.S. 486, 489 (1969).

legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally. Second, appellees do not claim that they have been deprived of something to which they *personally* are entitled — such as their seats as Members of Congress after their constituents had elected *them*. Rather, appellees' claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete.<sup>358</sup>

The *Raines* Court made clear that, absent some specific circumstances whereby an individual has been injured by the operation or undermining of the filibuster directly — an injury that would have to go beyond any diminution in their voting power — the first exception would simply not apply, and so the Court would be unlikely to involve itself in the question.

*Powell* also illustrates the second exception. The Court suggested that if the House had chosen to expel Powell, consistent with the Constitution,<sup>359</sup> for failing to meet the qualifications that the Constitution prescribes,<sup>360</sup> that decision would probably be immune to judicial review,<sup>361</sup> since the House has exclusive power to determine the qualifications of its members.<sup>362</sup> However, by simply excluding him from his rightful seat, the House had effectively imposed additional qualifications that it had extra-constitutionally created.<sup>363</sup> As such, the Court concluded that the case was justiciable, and not a political question.<sup>364</sup> Rather than being a circumstance where, as in *Nixon*, the Court felt it had to avoid addressing the question of the treatment of an individual before a legislative chamber, out of respect for the separation of powers, in *Powell*, judicial involvement was required in order to promote constitutional checks and balances.

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<sup>358</sup> *Raines*, 521 U.S. at 821 (emphasis in original).

<sup>359</sup> U.S. CONST. art. I, § 5 (providing that the House has authority to expel a member “with the Concurrence of two thirds”).

<sup>360</sup> U.S. CONST. art. I, § 2 cl. 2 (“No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chose.”).

<sup>361</sup> *Powell*, 395 U.S. at 548 (“Art. I, § 5, is at most a ‘textually demonstrable commitment’ to Congress to judge only the qualifications expressly set forth in the Constitution,” for which the political question argument could be maintained).

<sup>362</sup> U.S. CONST. art. I, § 5, cl. 1 (“Each house shall be the Judge of the Elections, Returns and Qualifications of its own Members.”).

<sup>363</sup> See *Powell*, 395 U.S. at 508 (“Nor is the distinction between exclusion and expulsion merely one of form.”).

<sup>364</sup> *Id.* at 549.

Otherwise, a legislative chamber would have been able to effectively nullify the Constitution's mandate of a two-thirds vote requirement to expel a member if it could achieve the same effect through a majority vote for exclusion.<sup>365</sup>

The distinction between *Powell* and *Nixon*, then, makes clear that a second exemption exists to its general refusal to review a chamber's power of self-governance: the Court cannot allow a congressional chamber to interpret its own rules if, in doing so, the chamber would be effectively creating for itself more power than the Constitution provides. This exception applies not only to prohibiting a chamber to promote its own power, but also to prohibiting it from diminishing the power of another coequal branch, as exemplified by *United States v. Smith*.<sup>366</sup>

*Smith* concerned a presidential nomination to the Federal Power Commission. The Senate confirmed the nomination, but, consistent with its rules that allowed for reconsideration within two days of the confirming vote, requested the president return the name of the appointee, which the president refused to do. The Senate disputed whether *Smith* was therefore duly appointed. The Court found that, although the Senate's interpretation of its own rules is always given great weight, when such a construction could constitute a self-serving post hoc expansion of its own power, it is less persuasive.<sup>367</sup> The Court refused to adopt the Senate's construction of its own rules, as doing so would have mitigated the president's power by preventing the president from proceeding with any authority without first checking back with the Senate.<sup>368</sup> So the Senate's interpretation of its rule was really a mechanism of controlling what the executive could do in response to its actions. Respecting that would not promote the separation of powers, but rather undermine it.

As such, not all Senate interpretation of its rules deserves equal respect from the Court, but there is no reason to think that filibuster litigation would raise such a separation-of-powers issue to warrant judicial intervention. The filibuster is an internal Senate rule that determines when and how a vote can be held to have passed; it is not a mechanism of claiming that, once passed, a vote could be retracted, or any other similar inter-branch challenge; nor is it a means of undermining a restriction on Senate power, or any other similar mode

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<sup>365</sup> *Id.* at 547 (allowing a majority-vote exclusion "would effectively nullify the Convention's decision to require a two-thirds vote for expulsion").

<sup>366</sup> 286 U.S. 6, 35 (1932).

<sup>367</sup> *Id.* at 33.

<sup>368</sup> *Id.* at 35.

of expanding its own power. To the contrary, the filibuster actually slows the Senate's business, and so its reach of influence. But that does not suggest that instead filibuster reform or reconciliation are any more likely to fit one of these exceptions. The effect of the filibuster is simply to alter the balance of power between different groups within the Senate — which the Court has explicitly refused to recognize as an adequate injury to justify its intervention. Whether filibuster litigation concerned a majority challenging the effect of the filibuster or a minority challenging an attempt to abolish or mitigate it, the Court is unlikely to be tempted to resolve the question.

### 3. Recess Appointments: Not a New Exception

The 2013 decision by the U.S. Court of Appeals for the D.C. Circuit in *Noel Canning v. NLRB* — that the Senate cannot properly be in recess during midsession recesses, or adjournments, and so the president cannot make recess appointments — may appear to constitute an additional exception, but this impression is misleading.<sup>369</sup>

The case concerned appointments to the National Labor Relations Board, which require the advice and consent of the Senate, unless the Senate is in recess, when the president can then make recess appointments to unilaterally temporarily fill the positions.<sup>370</sup> Using a tactic first employed from 2007 to 2009 by the Democrats to prevent recess appointments by President Bush,<sup>371</sup> in January 2012 Republican Members of Congress<sup>372</sup> refused to go into formal recess, holding brief “pro forma” sessions with the sole purpose of preventing a formal recess, and thus any recess appointments by President Obama. The President, claiming that the Senate was effectively in recess regardless of the pro forma proceedings, made the recess appointments, and the decision of the subsequently constituted Board was challenged for lack

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<sup>369</sup> See *Noel Canning v. NLRB*, 705 F.3d 490, 506 (D.C. Cir. 2013) (ruling that, considering the text, history, and structure of the Constitution, reference to “the Recess” is limited to intersession recesses).

<sup>370</sup> U.S. CONST. art. II, § 2, cl. 3 (“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of the next Session.”); *Noel Canning*, 705 F.3d at 493.

<sup>371</sup> See Jeff VanDam, *The Kill Switch: The New Battle Over Presidential Recess Appointments*, 107 NW. U. L. REV. 361, 376-78 (2012) (tracking history of pro forma session as obstructionist strategy).

<sup>372</sup> The House can prevent the Senate from adjourning. See U.S. CONST. art. I, § 5, cl. 4 (“Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days . . .”).

of quorum.<sup>373</sup> The court upheld this challenge, concluding that the appointments were invalid from their inception.<sup>374</sup>

The court held that “the appointments structure would have been turned upside down if the President could make appointments any time the Senate so much as broke for lunch,” or in any other undefined number of days break.<sup>375</sup> “Allowing the President to define the scope of his own appointments power would eviscerate the Constitution’s separation of powers.”<sup>376</sup>

The court was essentially refusing to allow the President’s interpretation of Senate rules to trump its own. It is one thing to allow the *Senate* to follow its own determination of its own rules, but the position rejected by the court would have instead allowed the *President* to determine congressional rules. Here, the Senate majority did determine its own rules — that it was not going to recess. As such, the case was not about either chamber being allowed to interpret its own rules, but rather about the President’s ability to interpret Senate rules in his own favor, and so does not constitute an exception to the courts’ reluctance to disfavor judicial intervention in the self-governance of a coequal branch.

Akhil Amar has characterized this action as a “serious wound” to democracy, since it recognized the Senate minority — in the form of *amicus curiae*<sup>377</sup> — as the proper representatives of the Senate, and empowered its members to stymie the “tacit consent” of the majority and so to undermine “Senate majority rule for executive branch appointments.”<sup>378</sup> But this misrepresents the basis for the decision. Amar would have the Court make a functional assessment of “what a majority of senators in fact favored,” and characterized not doing so as the court empowering the minority of senators, the *amici*, to

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<sup>373</sup> *Noel Canning*, 705 F.3d at 497.

<sup>374</sup> *Id.* at 507.

<sup>375</sup> *Id.* at 503.

<sup>376</sup> *Id.* at 504.

<sup>377</sup> Senate Republican Leader Mitch McConnell and 41 other members of the U.S. Senate wrote in support of petitioner Noel Canning. See Brief for Amici Curiae Senate Republican Leader Mitch McConnell and 41 Other Members of the U.S. Senate in Support of Petitioner/Cross-Respondent Noel Canning, *Noel Canning*, 705 F.3d (D.C. Cir. 2013) (Nos. 12-1115, 12-1153).

<sup>378</sup> Akhil Reed Amar, *Senate Democracy Is Dead*, SLATE (Jan. 30, 2013, 3:33 PM) [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/01/filibuster\\_reform\\_failure\\_and\\_recess\\_appointment\\_ruling\\_death\\_of\\_senate.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/01/filibuster_reform_failure_and_recess_appointment_ruling_death_of_senate.html) (“[T]he judges in effect recognized them — the minority! — as the Senate’s proper spokesmen [over appointments that] . . . probably had the tacit consent of Reid and the Democrats [which would have] . . . restored Senate majority rule for executive branch appointments during midsession recesses.”).

overwhelm that majority preference by preventing the president from overcoming Senate filibusters of his nominees.<sup>379</sup> However, the Senate majority failed to intervene to prevent the outcome, either in the legislative or judicial sphere. As the concurrence said in *Goldwater v. Carter*: “Neither the Senate [n]or the House has rejected the President’s claim. If the Congress chooses not to confront the President, it is not our task to do so.”<sup>380</sup> The fact that a minority of senators wrote an amicus was not even addressed by the court. As such, *Raines v. Byrd* did not arise as an issue, and so characterizing this case as a judicial enforcement of the filibuster, or minoritarian power more generally, is misleading. Rather, if the court *had* gone digging into what the majority “truly wanted,” disregarding formal appearances, then it really would have been undermining departmentalist respect for each branch interpreting its own rules.

As such, *Noel Canning* is simply the flipside to *Smith*, as *Powell* was to *Nixon*. Just as the Supreme Court had refused to allow the Senate to impose its interpretation on a presidential exercise of power, the circuit court refused to allow the president to interpret Senate rules in a self-aggrandizing manner. Accordingly, this case fits within the short list of circumstances for court intervention, and does not pose a meaningful exception to the rule that the courts will attempt as much as possible, to leave the determination of Senate rules to the Senate.<sup>381</sup> It leaves intact the strong precedent, and equally strong expectation, that the fate of the filibuster rests not in the legal realm, but in the political realm.

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<sup>379</sup> *Id.*

<sup>380</sup> 444 U.S. 996, 998 (1979) (Powell, J., concurring).

<sup>381</sup> The court nonetheless muddied the issue and opened itself up to criticism by unnecessarily outlining a novel constitutional argument in addition to its central determination. After acknowledging that its ruling on the first constitutional argument was sufficient to determine the case, the court nonetheless went on to embrace a second constitutional argument that was considerably more radical. The court concluded that as well as only empowering the president to *make* recess appointments during an intersessional recess, the court declared that the power was limited to making those appointments that *arose* during an intersessional recess. It interpreted the president’s “[p]ower to fill up all [v]acancies that may happen during the [r]ecess,” by interpreting “happen” to mean “happen to arise,” i.e. “to begin,” rather than to mean “happen to exist.” *Noel Canning*, 705 F.3d at 511-12. For this more revolutionary interpretation, the court found it necessary to justify its failure to defer to the Senate in the determination of its own rules, concluding that “The Senate’s desires do not determine the Constitution’s meaning. The Constitution’s separation-of-powers features, of which the Appointments Clause is one, do not simply protect one branch from another. These structural provisions serve to protect the *people*, for it is ultimately the people’s rights that suffer when one branch encroaches on another.” *Id.*

C. *The Neutered Review Power of the Parliamentarian*

In theory, the Senate possesses another potential veto point — indeed, a supposed neutral adjudicator — in the Parliamentarian, a nonpartisan, nonpolitical appointee. The Parliamentarian, who has a cohort in the House, has several duties, not least of which is the ability to assist the chair of any proceeding in deciding a question on the rules — such as those on Byrd Rule points of order against reconciliation maneuvers. (Former Parliamentarian Floyd Riddick has said that the Parliamentarian “whispers” the correct procedures into the Chair’s ear.<sup>382</sup>) That adjudicatory role uniquely places the Parliamentarian “at the nexus of Senate rules and the behavior of individual members.”<sup>383</sup> The “parls,” as they are called, have increasingly been forced in recent decades to rule upon new complex points of order,<sup>384</sup> just as knowledge of procedural rules in the Senate has deteriorated.<sup>385</sup> Reconciliation represents perhaps the largest part of this relatively new role.<sup>386</sup> Yet despite some episodes of independence, and latitude over the whims and wills of senators, the Parliamentarian, like anyone else, can be ignored — or worse, and perhaps more often, fired.

In fact, the very first Parliamentarian was fired, after serving the Senate for nearly six decades. Charles Lee Watkins came to the Senate in 1904 as a stenographer for a senator from his home state of Arkansas,<sup>387</sup> and left at the hands of Majority Leader Michael

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<sup>382</sup> James Wallner, *Parliamentary Rule: The Origins, Development, and Role of the Senate Parliamentarian in the Legislative Process* 17 (Ann. Meeting of the Cong. & Hist. Conf. 2011), available at <http://www.brown.edu/conference/congress-and-history/sites/brown.edu.conference.congress-and-history/files/uploads/Parliamentary%20Rule-%20Wallner.pdf>.

<sup>383</sup> *Id.* at 3.

<sup>384</sup> David Rogers, *Elizabeth MacDonough Is Senate’s First Female Parliamentarian*, POLITICO (Feb. 6, 2012, 11:35 PM), <http://www.politico.com/news/stories/0212/72526.html> (“[T]he Senate parliamentarian’s office can’t escape the partisan turmoil of the modern Congress. And that task has only gotten harder with more action-forcing laws that require the parliamentarian to rule on elaborate points of order and even triggering events on a world stage.”).

<sup>385</sup> Wallner, *supra* note 382, at 19.

<sup>386</sup> See Alexander Bolton, *After Nearly 20 Years, Senate Parliamentarian Alan Frumin to Retire*, THE HILL (Jan. 31, 2012, 10:57 AM), <http://thehill.com/homenews/senate/207635-senate-parliamentarian-alan-frumin-to-retire-setting-up-big-question-for-next-congress> [hereinafter *Alan Frumin*] (“But perhaps the biggest job of the [P]arliamentarian is to decide what can and cannot be done under the reconciliation process, which allows the Senate to pass legislation with a simple majority instead of the usual 60 votes.”).

<sup>387</sup> See Donald A. Ritchie, *Charles Lee Watkins*, in *ARKANSAS BIOGRAPHY: A*

Mansfield. Watkins was beloved — a filibuster was once halted to wish him happy birthday<sup>388</sup> — and he was credited with “crystalliz[ing]” the office of Parliamentarian,<sup>389</sup> having never allowed Charles Dawes, Vice President to Calvin Coolidge, to be overruled as Chair.<sup>390</sup> Yet Mansfield dismissed Watkins, apparently because his failing memory had tempered his otherwise “wise”-like mind.<sup>391</sup> “I’ll find something else to do,” the eighty-five-year-old Watkins said as he left office.<sup>392</sup>

The same fate befell Robert Dove, the Parliamentarian during the Bush tax cut debate of 2001, who through his rules interpretations “made it hard for the leadership to plot a strategy.”<sup>393</sup> His ruling against using reconciliation for tax cuts was circumvented, and then he was fired. In fact, the 2001 episode was not his first dismissal: Senator Byrd fired him when Democrats gained control of Congress in 1987, a move that was considered unusual at the time.<sup>394</sup> Yet the rationale was simply the displeasure of Senator Byrd, himself a master parliamentarian, over an unfavorable ruling Dove had made the previous year (which was later defeated by 87 votes).<sup>395</sup> Once Byrd gained the gavel over the Senate, Dove became unemployed.<sup>396</sup>

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COLLECTION OF NOTABLE LIVES 302 (Nancy A. Williams & Jeannie M. Whyne eds., 2000).

<sup>388</sup> C.P. Trussell, *Senate Aide Ends a 59-Year Career*, N.Y. TIMES, Dec. 31, 1964, at 5.

<sup>389</sup> Anthony J. Madonna, *The Evolution of Frustration: Revisiting the Role of Inherited Institutions in the United States Senate* 147 (Dec. 2008) (unpublished Ph.D. dissertation, Washington University in St. Louis) (quoting another former Parliamentarian, Charles J. Riddick).

<sup>390</sup> See *Rules Arbiter Retires After 60 Years on Hill*, WASH. POST, Dec. 30, 1964, at A1. Watkins was responsible for educating famous figures such as Senators Richard Russell and Lyndon B. Johnson on Senate procedure. See ROBERT A. CARO, *MASTER OF THE SENATE* 152, 177, 391 (2003).

<sup>391</sup> See *July 1, 1935: First Official Parliamentarian*, U.S. SENATE, [http://www.senate.gov/artandhistory/history/minute/First\\_Official\\_Parliamentarian.htm](http://www.senate.gov/artandhistory/history/minute/First_Official_Parliamentarian.htm) (last visited Feb. 11, 2013).

<sup>392</sup> Trussell, *supra* note 388, at 5.

<sup>393</sup> See *supra* notes 263-264 and accompanying text.

<sup>394</sup> David L. Wilson et al., *People: Washington’s Movers and Shakers*, NAT’L J., June 27, 1987, at 1678. After being fired, Dove promptly went to work as a consultant for Senate Republicans, though that did not prevent him from regaining his old job as Parliamentarian later. *Id.*

<sup>395</sup> Wayne King & Warren Weaver, Jr., *Washington Talk: Briefing: Of Rules and Prayer*, N.Y. TIMES, Jan. 1, 1987, § 1, at 8.

<sup>396</sup> Dove himself replaced Murray Zweben, who retired just before Republicans could discard him in 1981 upon their taking control of the Senate; Zweben had written an amicus brief in support of a Jimmy Carter policy, which angered Senator Barry Goldwater, among others. See Albert Eisele, *Parliamentarian Fired? It’s Not the*

Before the firings, of course, the Parliamentarian does retain relevance, a good deal of it related to ruling on reconciliation and Byrd Rule challenges. The current Parliamentarian, Elizabeth MacDonough — the first woman to serve in the job<sup>397</sup> — has stood up to congressional leaders. In April 2012, just two months after taking the job, she issued a key ruling against Majority Leader Reid, preventing him from blocking Republican budget proposals and votes.<sup>398</sup> The one-page opinion she released on the issue reads like an administrative law exam response, noting that the question is “subject to multiple, reasonable interpretations.”<sup>399</sup> That her ruling went against the senator who first requested it<sup>400</sup> no doubt increased its credibility. And during the Obamacare debate, the Parliamentarian, Alan Frumin, became “one of the most talked-about men in Washington”<sup>401</sup> for his ability to make seemingly crucial rulings. However, it likely did not harm Frumin’s job prospects that his rulings on Obamacare and reconciliation favored the majority-party Democrats.<sup>402</sup> And it should also be noted that Frumin’s stint as Parliamentarian during the Obamacare debates was not his first. He, too, was previously fired from the job in 1995; when the Republicans came back into power and put Robert Dove back in the chair.<sup>403</sup>

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*First Time*, THE HILL, May 16, 2001.

<sup>397</sup> See Rogers, *supra* note 384.

<sup>398</sup> See Scott Wong, *Harry Reid Loses Procedural Ruling on Budget Vote*, POLITICO (Apr. 3, 2012, 11:38 PM), <http://www.politico.com/news/stories/0412/74801.html>.

<sup>399</sup> Letter from Elizabeth MacDonough, Senate Parliamentarian, to Members of Senate (Apr. 3, 2012), available at [http://images.politico.com/global/2012/04/macdonough\\_opinion.pdf](http://images.politico.com/global/2012/04/macdonough_opinion.pdf).

<sup>400</sup> See Wong, *supra* note 398 (noting that Senate Budget Committee Chairman Kent Conrad had requested the ruling, which when released “turn[ed] up the heat” on him because it would allow Republican opposition members to offer alternative budget proposals).

<sup>401</sup> Jada F. Smith, *In a First, a Woman Will Be Senate Parliamentarian*, N.Y. TIMES CAUCUS (Jan. 31, 2012, 4:03 PM), <http://thecaucus.blogs.nytimes.com/2012/01/31/in-a-first-a-woman-will-be-senate-parliamentarian/>.

<sup>402</sup> See Bolton, *Alan Frumin*, *supra* note 386 (“Frumin delivered a crucial ruling in 2010 that allowed Senate Democrats to reconcile healthcare legislation with a House-passed version despite having fewer than 60 votes. The procedural maneuver allowed the Democratic-controlled Congress to pass landmark legislation that was on the brink of failure.”).

<sup>403</sup> See Mary Jacoby, *Dole Aide Dove Is New Senate Parliamentarian*, ROLL CALL, Jan. 12, 1995. Interestingly, Dove expressed approval for the use of reconciliation by Joe Biden, as President of the Senate, along with actual parliamentary rulings by Biden as chair of Senate proceedings. Garance Franke-Ruta, *Former Senate Parliamentarian: Biden Could Play Big Role in Reconciliation Process*, WASH. POST (Mar. 1, 2010, 11:31 AM), <http://voices.washingtonpost.com/44/2010/03/former-senate-parliamentarian.html>.

It would seem, then, that the role of Senate Parliamentarian is not necessarily one for those interested in job security. Rather than being a fully independent figure, the Parliamentarian serves at the pleasure of the majority. While the Parliamentarian can — and often does — make independent rulings on rules questions, several holding the position have been done away with when those rulings have gone against the majority's wishes. At least one of those rulings has been related to reconciliation, and what is more, the removal of such a figure is not likely to have a high apparent public cost. That the firings have come frequently in the past three decades indicates that the public does not hold the Senate majority accountable or in contempt for essentially ejecting the referee. While the Parliamentarian's offense no doubt needs to be egregious in the eyes of the majority to warrant firing, the definition of what is or is not egregious no doubt changes with each legislative session, and is likely to hinge on the salience of the legislation at issue rather than the substance of the ruling itself. In terms of reconciliation, or any other rules question in the Senate, then, the Parliamentarian is a decidedly imperfect gatekeeper. The Parliamentarian provides little as a meaningful check for highly salient policies. Without this oversight, or likely judicial oversight, the decision over whether majoritarianism or minoritarianism is to prevail in the Senate is essentially up to the majority.

#### CONCLUSION: MAJORITY POWER OVER MINORITARIAN POWER

In avoiding the political question of the legal fate of the filibuster, the Supreme Court will be practicing the judicial art of “not doing” — refusing to either check another branch or legitimate its actions.<sup>404</sup> But “not doing” is not the same as doing nothing; judicial avoidance always involves doing something other than checking or legitimating, such as permitting prior judgments to have a policy effect, frustrating or checking a prior legislative or official decision, or allowing lower courts to engage in constitutional experimentation.<sup>405</sup> The avoidance we have described in this Part does not translate to the Court having no effect; rather, it constitutes a decision to “leave the other institutions, particularly the legislature, free . . . to make or remake their own decisions.”<sup>406</sup>

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<sup>404</sup> ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 200-01 (1986).

<sup>405</sup> *Id.*

<sup>406</sup> *Id.* at 202.

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Respecting departmentalism means allowing another branch to determine its own rules, which translates to permitting the manipulation of those rules by whomever or whatever controls that branch. Despite its long history of minoritarian power, institutionalized through norms and rules such as the filibuster, the default for the Senate, like any collective institution, is majority rule — and so majority control. If we are correct that the Supreme Court will not take a case about the filibuster under ordinary circumstances — that is, absent an individual injury beyond diminution of voting power, or some overreach by the Senate that impacts the separation of powers — then the future of the minoritarian filibuster lies in the hands of the Senate majority. But that does not mean that majoritarianism will win out over minoritarianism, only that the Senate majority has power over minoritarian power.

Consequently, the extensive references by both sides of the debate to constitutional arguments for and against the filibuster are essentially just political rhetoric. Although arguments can be made for constitutional support or opposition to whether a simple majority can change a supermajority rule, the constitutional legitimacy of such a change is ultimately irrelevant if the courts will not hear the case. As such, adverting to legal argumentation is theater aimed at political persuasion, not serious preparations for significant litigation.

That result seems appropriate, given that although much is made of minoritarian traditions, unlike the rest of the separation-of-powers scheme, there is nothing in the Constitution about a 60 person (or any other) supermajoritarian voting requirement in either chamber. So judicial intervention would be speculative, at best, which perhaps illustrates the wisdom behind judicial avoidance in the circumstances.

Legal precedent may offer little guidance — beyond the determination of the courts to offer no guidance — but political science models may also be of limited help in picking winners and losers between filibuster advocates and its potential reformers. The problem is that positive political theory models are used to map the impact of institutional arrangements on outcomes, including legislation; but they are typically not designed for predicting what those arrangements will be. For instance, Keith Krehbiel argues that the individual preferences of key members of the legislative process will determine what policy outcomes will emerge.<sup>407</sup> Those key members include, importantly, those individual senators whose policy ideals lie on the distribution of senatorial ideological preferences at the

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<sup>407</sup> See generally KREHBIEL, *supra* note 15, at 95 (arguing that individual preferences of key members of the legislative process is determinative of policy outcomes).

two points of the filibuster (ten to the left and the right of the majority). The relative placement of the pivotal filibuster points, along with other vetoes, determines whether a policy proposal will pass or not, which, inferring backwards, determines what policies will be proposed.<sup>408</sup> But this analysis is premised on the existence of the filibuster, and so tells us little of whether that veto point will continue to exist, or its likely future form.

Looking to the text of internal Senate procedure provides little guidance either. Whether the Senate's rules, including the filibuster, can be changed by a simple majority — other than on the first day of the session, however long that day is defined to be — is hotly disputed. But the central interpreter of those rules, the Parliamentarian, only has power over the Senate to the extent that the Senate continues to want him to have power — otherwise he gets fired. Without judicial oversight or any meaningful oversight by the Parliamentarian, then realistically, a simple majority can decide that all that is required to change the rules is a simple majority — not because of subtleties of law or tradition, but because they say so, and nobody can effectively say otherwise.

That is not to predict that the filibuster will be reformed. In fact, we predict the opposite, that there will be little meaningful reform of the filibuster in the near to medium future. But that is not because of any rule or law; rather it is because of political reality. Senate majorities face coordination problems that disable them from overcoming their shared interest in filibuster reform, due to a triune pull: the salience of localism and particularism, institutionalized risk aversion, and the path dependence created by stickiness of norms.

Those effects are only likely to be undermined by changes in the Senate that are larger than just filibuster reform, such as continued increases in party discipline and ideological polarization. If the trend that began in the 1960s continues,<sup>409</sup> whereby the Democrats and Republicans act as homogenous, disciplined counterweights to one another, then a majority may have the will to meaningfully reform the filibuster. But in that case, it will be because Congress will have moved

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<sup>408</sup> Others have applied this logic to predict various legal outcomes, as well as the more general impact of the judiciary. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 531-34 (1992).

<sup>409</sup> See discussion *supra* Part I.C. In addition to the changes described therein, another element pushing toward greater party discipline is the dramatic rise in the use of primaries in presidential elections. See AUSTIN RANNEY, *CURING THE MISCHIEFS OF FACTION: PARTY REFORM IN AMERICA* 137 (1975) (describing the history of primary election reform, beginning in 1968, and arguing that primaries have led to the fractionalization and disintegration of party organizations).

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away from Madison's scheme of government by minorities, and toward majoritarianism.<sup>410</sup> That would constitute a far larger change to the political system, with far greater ramifications for legal outcomes, than reform of the filibuster.

Otherwise, filibuster reform depends on enough minority coalitions coalescing against the majority — an unlikely outcome, given legislative incentives. In the absence of strengthened party discipline, then, change to the filibuster will come not through reform, but through the continued ascension of reconciliation. What began as a desperate budget balancing mechanism has become one of the primary means by which majorities pass important controversial legislation — both financial and substantive legislative policies. So change to the filibuster has only come through either a sly or largely accidental amendment process. Even then, as we have seen, reconciliation has not always been fully exploited because of the minoritarian interests promoted by localism and risk aversion. But the third institutional characteristic we identified, path dependence, has meant that reconciliation has remained, enabling the majority to gradually reassert itself even without filibuster reform. Majoritarianism, then, will not assert itself with dramatic flourish through reform of the filibuster, that mechanism that defied reform and kept civil rights and other policy innovation at bay for so many decades. Rather, it will be through slightly slippery Senate maneuverings and manipulation of the rules — which seems only appropriate for determining the ultimate fate of that accidental minoritarian weapon, the filibuster.

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<sup>410</sup> THE FEDERALIST NO. 51, at 317, 321 (James Madison) (Clinton Rossiter ed., 2003) (arguing that oppression of society by its rulers is best avoided by creating “so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable”).