THE CONVENTIONAL OPTION

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ABSTRACT

The filibuster in the United States Senate effectively imposes a supermajority vote requirement to pass any legislation. Both supporters and critics of the filibuster agree that any filibuster reform would require extraordinary measures. In contrast to this consensus, this Article describes a method we call the "conventional option," which allows the filibuster to be reformed by a simple majority of senators at any time using ordinary Senate procedures. As we show below, a majority of senators using the conventional option (1) cannot be filibustered; (2) can act on any day the Senate is in session (not just at the beginning of a new Congress); and (3) does not need to invoke the Constitution. In fact, this Article shows that both the U.S. House of Representatives and the Senate have limited filibustering in the past by using the conventional option described here.

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INTRODUCTION

Senator Harry Reid (D-NV) was fed up. Reid, the majority leader for the Democrats in the United States Senate,[1] had hoped that the Senate would confirm three nominees to the D.C. Circuit Court of Appeals.[2] However, the Republican minority was filibustering their confirmation.[3] Republican obstruction against these nominations was part of a broader strategy of forcing an unprecedented number of votes on whether the Senate should end filibusters using the Senate's "cloture" rule.[4] Since a *three-fifths* majority is necessary to invoke cloture, this increased use of the filibuster effectively imposes a supermajority vote requirement to approve nominations or pass most legislation in the Senate.[5] In the past,

1. For the sake of brevity, we refer to the United States Senate as the "Senate" and the United States House of Representative as the "House of Representatives" or the "House."

2. Press Release, U.S. Senate Democrats, Reid Remarks on Republican Obstruction of Judicial Nominees (Nov. 18, 2013, 3:51 PM), *available at* http://democrats.senate.gov/2013/11/18/reid-remarks-on-republican-obstruction-of-judicial-nominees/.

3. *Id.*

4. *See* Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST, Nov. 21, 2013, http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html (providing chart of increases in the use of filibuster to obstruct).

5. GREGORY KOGER, FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE 1–14 (2010) [hereinafter FILIBUSTERING]. On the Senate cloture rule, see *infra* note 48 and accompanying text. Proposals to change the rules of the Senate are subject to a cloture threshold of two-thirds of all senators voting.

Reid vowed to "change the rules and make the filibuster meaningful."[6] But Reid had refrained from implementing any reform apart from limited changes at the beginning of the 112th and 113th congressional terms.[7]

On Thursday, November 21, 2013, however, Reid made good on his threat to change the rules by setting in motion what has become colloquially known as "the nuclear option."[8] By a vote of fifty-two to forty-eight, senators enacted a new precedent allowing a simple majority of the Senate to limit debate for all nominations except those to the U.S. Supreme Court.[9] The term "nuclear option" dates at least as far back as 2005, when, ironically, then Senate Republican majority leader Bill Frist (R-TN) threatened to use "the nuclear option" to prevent the filibustering of President Bush's judicial nominees.[10] The "nuclear option" then, as now, was based on a proposal made in a law review article written by Martin Gold and Dimple Gupta that argued that a simple majority in the Senate has a limited "constitutional option" to change the existing filibuster rules.[11]

Terms like "nuclear" and "constitutional" reflect a consensus that any reform of the filibuster would require extraordinary and unprecedented measures. This consensus supports a conclusion shared by many that it would be "rude"[12] for a majority of Senators to reform the filibuster because it would "change[] . . . the rules in the midst of a game."[13] Thus, Gold and Gupta emphasized that a majority of senators use the "constitutional option" at the beginning of a congressional term, when, arguably, a new Senate can jettison the old rules and impose new ones to

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6. Suzy Khimm, *Harry Reid Promises Filibuster Reform if Dems Win the Election*, WASH. POST WONKBLOG (July 17, 2012, 10:40 AM), http://www.washingtonpost.com/blogs/wonkblog/wp/2012/07/17/harry-reid-promises-filibuster-reform-if-dems-win-the-election/; *see also* Sam Stein & Ryan Grim, *Harry Reid: Filibuster Reform Will Be Pursued in the Next Congress*, HUFFINGTON POST (Nov. 7, 2012, 1:12 PM), http://www.huffingtonpost.com/2012/11/07/harry-reid-filibuster-reform_n_2088767.html.

7. For a discussion of the 2011 and 2013 reforms, see *infra* Part II.B.4.

8. Kane, *supra* note 4.

9. *Id.*

10. Sheryl Gay Stolberg, *Senators Who Averted Showdown Face New Test in Court Fight*, N.Y. TIMES, July 14, 2005, http://www.nytimes.com/2005/07/14/politics/14gang.html?pagewanted=all.

11. Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 205 (2004).

12. *See* Ezra Klein, *The Date for Filibuster Reform: Jan. 22. Probably.*, WASH. POST WONKBLOG (Jan. 3, 2013, 5:10 PM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/03/the-date-for-filibuster-reform-january-22-probably/?wprss=rss_ezra-klein.

13. *See* Letter from Bruce A. Ackerman et al., to Members of the United States Senate (Dec. 12, 2012), *available at* http://www.tomudall.senate.gov/files/documents/ScholarsLettertoSenate.pdf.

govern the term.[14] Others have tried to support changes to the filibuster by appealing to the Constitution's "implicit directive of simple majority rule."[15] Indeed, prior to Sen. Reid's use of the nuclear option, a lawsuit filed by the left-leaning public interest group Common Cause alleged that the modern Senate filibuster is unconstitutional because it is "inconsistent with the principle of majority rule" implied by various provisions of the Constitution.[16]

In this Article, we argue against the consensus that filibuster reform by a majority of senators is (1) extraordinary, (2) unprecedented, and therefore (3) requires an appeal to Constitutional authority. Indeed, we take issue with the term "nuclear option" insofar as it has been defined as any option that allows a majority of senators to reform the filibuster without the consent of the minority. Instead, we show that filibuster reform by a majority of senators (1) only requires quite ordinary measures, (2) has been done extensively in the past, and, accordingly, (3) should not be viewed as improper or indecorous. Indeed, as we show below, the "nuclear option" as used by Sen. Reid can be understood as a "conventional option," one that has been used throughout the history of the Senate and the House of Representatives.

In Part I, we explain the ordinary procedures a majority of senators can use to reform the filibuster at any time. These procedures, which we call the conventional option, utilize the rules and procedures that govern rule interpretation in the Senate. As we show below, the conventional option is *conventional* in the sense that it only relies upon the ordinary rules and precedents of the Senate.[17] It does not require the cooperation of a supermajority of Senators. It does not require Senators to wait for the beginning of a new Congress. It does not require an appeal to the Constitution.

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14. Gold & Gupta, *supra* note 11, at 217–60 (discussing this option first and at length, as opposed to the conventional option discussed here).

15. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 362–63 (2012); *see also* Akhil Reed Amar & Gary Hart, *How to End the Filibuster Forever*, SLATE (Jan. 6, 2011, 2:11 PM), http://www.slate.com/articles/news_and_politicsjurisprudence/2011/01/how_to_end_the_filibuster_forever.html.

16. Complaint for a Declaratory Judgment at 3, Common Cause v. Biden, No. 1:12-cv-00775, 2014 WL 1420327 (D.D.C. Apr. 15, 2014); *see also* Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1035–37 (2011) (making similar arguments concerning the unconstitutionality of the Senate filibuster, but noting that judicial review of the issue "would be a non-starter").

17. *Conventional*, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/conventional (last visited Sept. 11, 2013) (defining "conventional" as, among other things, "common and ordinary: not unusual").

We further show that the conventional option is quite versatile and can be used to enact a number of reforms. We provide five such potential reforms that a majority of senators could enact through the conventional option.[18] Indeed, we show that the process used by Sen. Reid to abolish the filibuster for judicial nominees is far from optimal and that better alternatives are available.[19]

In Part II, we further demonstrate that the conventional option is "conventional" in another important sense. The rhetoric surrounding the "nuclear option" suggests that any reform of the filibuster by a Senate majority would be unprecedented, or at least a significant departure from the historic practices and procedures of the Senate. But, as we discuss in Part II, the procedures that comprise the conventional option have been used throughout the history of the House and Senate to limit filibustering. Indeed, it has been the most common, conventional method of reforming the filibuster.[20] As we discuss below, the House of Representatives, in fact, abolished the filibuster using the conventional option we discuss in this Article.[21]

Our goal in writing this Article is not to criticize or defend the filibuster. Instead, our goal is to show that the recent actions of the Democratic majority to abolish the filibuster for judicial nominees should not be seen as unprecedented, extraordinary, or unseemly. That view is not only incorrect, but it presumes that the filibuster itself is a normal procedure that senators are, for the most part, powerless to change. However, as we show below, the filibuster is not, nor has to be, an inviolable part of the Senate. More importantly, the existence of the conventional option demonstrates that the key obstacle to filibuster reform is not the Senate rules, but the reluctance of a majority of senators to enact it. Accordingly, we hope that by showing how simple it is for a majority to change the filibuster at any time, public debate will focus squarely on whether filibustering as currently practiced in the Senate advances or harms the public interest. Paradoxically, senators may be more likely to arrive at bipartisan compromises on Senate process once they fully acknowledge the extent of the Senate majority to reshape the rules of the Senate without minority party consent.

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18. *See infra* Part I.B.

19. *See infra* Parts I.B.4 & I.C.

20. MERRIAM-WEBSTER ONLINE DICTIONARY, *supra* note 17 (defining "conventional" as "used and accepted by most people: usual or traditional").

21. *See infra* Part II.A.

I. THE CONVENTIONAL OPTION

This Part provides a guide for reforming the modern filibuster in the Senate, which we call the conventional option. Our guide shows how the conventional option allows a simple majority of senators to reform the filibuster any day the Senate is in session without having to appeal to constitutional authority. As shown below, the conventional option we describe utilizes commonly used procedures of rule interpretation in the Senate.

A. The Rules of the Senate Filibuster

1. Filibustering in the Senate

For the sake of clarity, we define filibustering in a legislature as the threat or use of delay to obstruct an event for strategic gain.[22] Understood in this broad sense, a legislator can filibuster by making dilatory motions, by proposing meaningless amendments, by refusing to vote en masse, or by making long speeches.[23] As defined, filibustering is not unique to the Senate. It has occurred in dozens of state and international legislatures. In fact, and as we discuss later in this Article, filibustering was once pervasive in the House of Representatives.[24]

The traditional response to filibustering is a war of attrition. In these contests, the majority forces the obstructionists to remain on the floor of the chamber and actively consume time. The winner is the side that lasts the longest, but both sides lose time and sleep in the process.

A second response is *cloture*, where the majority attempts to limit the duration of floor debate using a motion provided for in the rules of the legislature. Under Rule XXII of the Senate rules, a senator can move for cloture, but any such motion requires sixty votes to end debate,[25] with some exceptions.[26] In the modern Senate, almost all filibusters consist of

22. FILIBUSTERING, *supra* note 5, at 3 (citing AM. HERITAGE DICTIONARY (4th ed. 2000)).

23. *Id.* at 3–4 (discussing examples).

24. *See infra* Part II.A.

25. SENATE RULE XXII, SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, S. Doc. No. 112-1, at 21 (2011), *available at* http://www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome. "Closure" is also sometimes used to refer to the general idea of a rule to limit debate. *See id.* ("'Is it the sense of the Senate that the debate shall be brought to a close?' And if that question shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn . . . .").

26. There are specific classes of legislation—most notably budget resolutions and budget reconciliation bills—that cannot be filibustered because there are statutory limits on how long they can be debated on the Senate floor. *See id.* at 21–22.

threats to filibuster. Senators rarely occupy the floor of the Senate for an active filibuster, and instead place the burden on the majority to successfully move for cloture.[27]

A third response is to revise the rules and practice of the legislature. Simply put, filibustering is usually the weapon of a minority in legislatures with endogenous rules. Accordingly, a frustrated majority may reduce or eliminate the ability of a minority to obstruct.

However, frustrated majorities in the Senate face a Catch-22. If the Senate rules and practice allow obstruction through the filibuster, then any proposal to restrict filibustering may itself be filibustered. The Senate's cloture rule imposes a higher threshold in such cases: a motion for cloture to end debate on a formal amendment to the Senate rules requires a two-thirds majority, which is greater than the threshold to end an ordinary filibuster against a bill or nomination and seemingly prevents a narrow majority from limiting the Senate filibuster.[28]

2. The Senate Rules

To unravel this Gordian knot, a more detailed discussion of the Senate rules that allow for filibustering is required. The Constitution provides that "[e]ach House may determine the Rules of its Proceedings."[29] But no provision of the Constitution, or parliamentary rule in the Senate or the House, guarantees an explicit right to filibuster.

The Constitution does, however, contain a provision for a roll call vote upon the request of one-fifth of those present,[30] which allows for obstruction by dilatory motions. The Constitution also includes a simple majority quorum requirement for both houses,[31] which allows for obstruction by quorum-breaking. The Framers were well aware that these provisions would provide a basis for obstruction. For example, James Mason, one of the original framers, expressed support for quorum-breaking in the Virginia legislature to thwart a "paper money" bill.[32]

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27. *See* FILIBUSTERING, *supra* note 5, at 179–83.

28. *See id.* at 20–21; SENATE RULE XXII, SENATE MANUAL, at 21 (The three-fifths vote requirement applies "except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting").

29. U.S. CONST., art. I, § 5, cl. 2.

30. *Id.* art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.").

31. *Id.* art. I, § 5, cl. 1 ("[A] Majority of each [house] shall constitute a Quorum to do Business").

32. *Madison Debates, Tuesday, August 10, 1787*, THE AVALON PROJECT: DOCUMENTS IN LAW,

That is not to say that the Framers unequivocally endorsed filibustering or minority vetoes. Indeed, in *The Federalist Papers*, Alexander Hamilton condemned minority obstruction and supermajority thresholds, particularly those contained in the Articles of Confederation.[33] Instead, we only suggest that the Framers were familiar with the practice of obstruction and held mixed views on the practice. In this sense, they were much like contemporary critics and defenders of the Senate filibuster, except their arguments were presumably free from appeals to the true intent of the Founding Fathers.

In accordance with Article I, Section 5 of the Constitution, the Senate has adopted forty-three formal rules to govern its proceedings, including Rule XXII, which is mentioned above.[34] It has long been common practice to treat these rules as continuing in force from one Congress to the next without formal re-adoption.[35] This practice is now codified in Senate Rule V, which provides that "[t]he rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."[36] Of course, Rule V is only binding if the Senate is a "continuous body,"[37] which is itself a parliamentary question that senators can revisit at the beginning of each new Congress.[38]

In their article, Gold and Gupta argue in favor of a "constitutional option" to reform the filibuster, which would overturn this tradition and, instead, require the Senate to begin each new Congress in a state of

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HISTORY & DIPLOMACY, http://avalon.law.yale.edu/18th_century/debates_810.asp (last visited Dec. 17, 2012).

33. *E.g.*, THE FEDERALIST NO. 22 (Alexander Hamilton) (noting that supermajority requirements like the ones found in the Articles of Confederation "substitute the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt [faction for] the regular deliberations and decisions of a respectable majority"); *id.* NO. 75 (Alexander Hamilton) (noting "that all provisions which require more than the majority of any body to its resolutions, have a direct tendency to embarrass the operations of the government, and an indirect one to subject the sense of the majority to that of the minority").

34. *See* SENATE RULE XXII, SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, S. Doc. No. 112-1, at 21 (2011), *available at* http://www.rules.senate.gov/public/index.cfm?p=RulesOfSenate Home.

35. Gold & Gupta, *supra* note 11, at 240–47 (noting this understanding prior to passage of Senate Rule V in 1963).

36. *See* SENATE RULE V, SENATE MANUAL, at 5.

37. Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445, 464 (2004) (noting that "the Senate has always viewed itself as a continuing body and has never reconstructed itself, like the House of Representatives, from scratch at the outset of every session"). Support for the "continuing body" theory of the Senate can also be found in *McGrain v. Daugherty*, where the Court held that subpoenas issued by a Senate committee were not moot after the end of a Congress because the Senate is "a continuing body." 273 U.S. 135, 181 (1927). We note that our argument does not depend on whether the Senate is a continuing body one way or the other.

38. Gold & Gupta, *supra* note 11, at 207–10.

parliamentary anarchy until new rules are formally adopted.[39] We discuss the constitutional option in greater detail in the next section.[40] However, we note that a second way to reform the filibuster, one acknowledged but deemphasized by Gold and Gupta, is to raise and win a parliamentary point of order reinterpreting an existing Senate rule or clarifying an ambiguity in the rules.[41] We argue that this *conventional* option—and not an appeal to constitutional authority—is the secret to filibuster reform by a simple majority. And, critically, the conventional option, unlike the constitutional option, can be utilized *at any time* during a two-year Congressional term.

3. Senate Rule Interpretation

Like statutes or the Constitution, the rules of the Senate are subject to interpretation. But unlike these other legal sources, the Senate rules are enforced and interpreted by the senators themselves rather than a court. During Senate deliberation, any senator can submit a point of order to the Presiding Officer of the Senate challenging the enforcement or interpretation of a rule.[42] Although the Constitution defines the Presiding Officer as the Vice-President,[43] in practice the Senate elects a President *pro tempore* to serve as the Presiding Officer in the Vice-President's absence.[44] The President *pro tempore*, in turn, often delegates the task of presiding over the chamber to other members of the majority party.

Once a point of order is submitted, the Presiding Officer either sustains or denies it, unless it raises a constitutional question.[45] A senator has the

39. *Id.* at 217.

40. *See infra* Part I.B.1.

41. Gold & Gupta, *supra* note 11, at 260–61.

42. SENATE RULE XX, SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, S. Doc. No. 112-1, at 21 (2011), *available at* http://www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome (providing that "[a] question of order may be raised at any stage of the proceedings").

43. U.S. CONST., art. I, § 3, cl. 4 ("The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.").

44. *Id.* art. 1, § 3, cl. 5 ("The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.").

45. SENATE RULE XX, SENATE MANUAL, at 19–20 ("A question of order . . . , unless submitted to the Senate, shall be decided by the Presiding Officer without debate, subject to an appeal to the Senate."). Although the text of RULE XX does not create an exception for constitutional issues, previous Presiding Officers have treated points of order concerning constitutional issues this way. *See* Gold & Gupta, *supra* note 11, at 249 (noting that in 1963 then Vice President Johnson referred a point of order to the full Senate because "the motion raised an issue of constitutional interpretation"); *see*

right to appeal any decision by the Presiding Officer.[46] Appeals are decided by a simple majority vote of those senators present.[47]

However, appeals are typically debatable,[48] and it is unclear if such debate can be limited. One option is for a senator to make a non-debatable motion to table an appeal. Any decision upheld or overturned by a direct vote *or* a tabling motion is considered precedent having the same force and effect as a formal rule.[49] Second, a Presiding Officer might, of his or her own accord, intervene in debate on an appeal and declare that sufficient discussion has occurred. A third tactic would be to raise a *second* point of order that debate is not permitted on an appeal from the ruling of the Presiding Officer. This secondary point of order is guaranteed an immediate vote by Senate Rule XX:

> When an appeal is taken, any subsequent question of order which may arise before the decision of such appeal shall be decided by the Presiding Officer *without debate*; and every appeal therefrom *shall be decided at once, and without debate*.[50]

By invoking this rule, a majority can use a second point of order to circumvent a filibuster on the primary point of order.

B. How to Use the Conventional Option

The general ability of senators to interpret the rules of the Senate at any time has not gained much attention in the legal debate over filibuster reform. In this Section, we show how much discretion senators enjoy over the meaning of their rules and the right to filibuster by sketching out five strategies to reform the filibuster using the procedures for Senate rule interpretation. We refer to this specific method for reforming the filibuster through Senate rule interpretation as the "conventional option," because this method utilizes the conventional, ordinary rules of the Senate, and nothing else.

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also SENATE RULE XX, SENATE MANUAL, at 20 ("The Presiding Officer may submit any question of order for the decision of the Senate.").

46. *Id.* at 19 (providing that any question of order is "subject to an appeal to the Senate").

47. FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. Doc. 101-28, at 145–49 (Alan S. Frumin, ed., rev. ed. 1992).

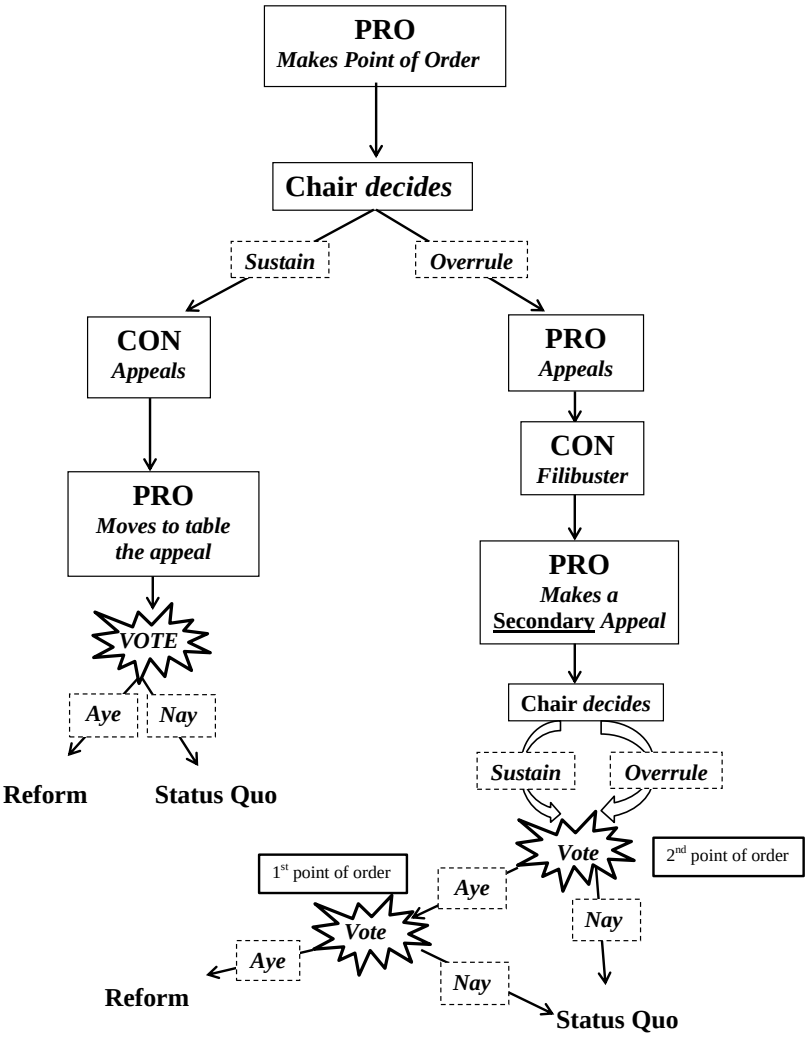
48. *Id.*; *see also* Gold & Gupta, *supra* note 11, at 260 (noting that "debate may generally be had on appeals.").

49. SENATE RULE XX, SENATE MANUAL, at 20 ("[A]ny appeal may be laid on the table without prejudice to the pending proposition, and thereupon shall be held as affirming the decision of the Presiding Officer.").

50. *Id.* at 19 (emphasis added).

Because all five strategies we outline utilize the conventional option, we begin with Figure 1, which provides a stylized example of how the conventional option would be used to reform the filibuster. For the sake of clarity, Figure 1 assumes two teams, Pro and Con, who respectively support and oppose reform, and who make the next parliamentary move at each stage instead of surrendering. Figure 1 also omits any other extraneous motions that may arise.

FIGURE 1—SEQUENCE OF MOVES IN RULING ON POINTS OF ORDER



It is worth highlighting that a strategy which uses the conventional option illustrated by Figure 1 only requires a majority of senators *present* who favor the strategy to ensure its passage. Indeed, because, under the Constitution, the Senate only requires "a majority" of senators to establish a quorum, filibuster reform through the conventional option could be enacted with as few as twenty-six senators.[51]

Figure 1 demonstrates that the easiest way to use the conventional option to enact filibuster reform is to have a Presiding Officer who will decide in favor of the reform strategy. As shown on the left side of Figure 1, once the Presiding Officer has ruled in favor of the reform strategy contained in the initial point of order, a simple majority can table any appeal of that ruling. By tabling the appeal, a majority effectively enacts the Presiding Officer's favorable ruling as binding precedent.

But Figure 1 also shows that a pro-reform majority is not dependent on a favorable ruling from the Presiding Officer to reform the filibuster. As shown on the right side of Figure 1, if the Presiding Officer rules against Pro's first point of order, and if Con filibusters Pro's appeal of the denial, then Pro can raise a second point of order (or "secondary appeal") that debate on the Presiding Officer's ruling is not permitted (or subject to some specified limit). Again, a second point of order is not subject to debate, and thus cannot be filibustered.[52] Accordingly, once the second point of order is passed, then a vote on the first point of order immediately occurs (or occurs after a specified time), which itself only requires a simple majority of those senators present to vote in its favor to pass.

While, in our view, each of the five strategies we discuss is possible, our primary goal is only to illustrate the *power* of a majority to change the Senate rules. In order to refute our thesis that a majority of senators can reform the filibuster at any time, one would have to prove that *none* of these strategies are possible, and that *no other* strategy employing parliamentary points of order is possible as well. In providing these five strategies, we posit four criteria for any reform strategy:

> *Magnitude*: We are agnostic on the desirability of reforming the filibuster, but we assume that any coalition implementing one of

51. U.S. CONST., art. I, § 5, cl. 1 (providing that "a Majority of each [House] shall constitute a Quorum to do Business").

52. SENATE RULE XX, SENATE MANUAL. Richard Beth, an expert at the Congressional Research Service, notes that "any course of action through which this suggestion might be implemented might be too complex for practical feasibility." RICHARD S. BETH, CONG. RESEARCH SERV., R42929, PROCEDURES FOR CONSIDERING CHANGES IN SENATE RULES 13 (2013). As noted in Part II.A.1, the members of the U.S. House found this approach practical and feasible in 1811.

these strategies will consider whether the reform would constitute a major change in the practice of the Senate.

Practicality: Reforms may have unintended, but foreseeable, consequences once they have been adopted. It is worthwhile to consider how strategic politicians will react to a reform after it is enacted. In practice, a "major" reform may be completely unworkable.

Plausibility: We do not consider it necessary or sufficient for a successful parliamentary interpretation to be objectively "right" or "wrong." However, the stronger the logic of the pro-reform argument, the easier it will be to explain to the media and gain the approval of the general public.

Simplicity: We take the view that determined majorities can accomplish major changes, but some strategies are preferable because they require fewer steps than others, and thus may take less time with less risk of failure.

The first two criteria capture different dimensions of how the reform will change the daily practice of the Senate.[53] The last two criteria measure (at least in part) the transaction costs reformers must pay to impose these changes. We assume these costs are lower for plausible reforms that require fewer steps to implement.

In discussing each strategy below, we note factors that limit the strategy's magnitude, practical effect, plausibility, and simplicity of implementation.

1. Repeal the Traditional Notion that the Senate Is a Continuing Body

Although this may be the most complicated of the strategies, it has also been the most attempted.[54] First, a majority must overturn a precedent that the Senate is a "standing body"—that the Senate rules automatically

53. The effect of a reform on policy choices also depends on factors exogenous to the strategy selected, such as the party, preferences, and agendas of other key actors. In particular, the effect of reform on executive and judicial nominations will tend to be more significant when the Senate majority party is the same party as the President and more significant on legislative proposals when the Senate, House of Representatives, and Presidency are controlled by the same party.

54. *See* Gold & Gupta, *supra* note 11, at 217–40 (discussing examples); JULIAN E. ZELIZER, ON CAPITOL HILL: THE STRUGGLE TO REFORM CONGRESS AND ITS CONSEQUENCES, 1948–2000 (2004) (same); *see also* Aaron-Andrew P. Bruhl, *Burying the "Continuing Body" Theory of the Senate*, 95 IOWA L. REV. 1401 (2010).

continue from Congress to Congress.[55] Next, the Senate, like the House, would consider amendments to its rules by simple majority vote. While a minority might still try to obstruct, this strategy gives pro-reform senators significant advantages by removing the old Senate rules as a fallback.

This was the primary strategy of cloture reformers from 1953 to 1975. In 1963, 1967, 1969, 1971, and 1975, senators voted (directly or indirectly) on whether the Senate is a standing body.[56] It was not until 1975 that a majority of the Senate was willing to take the first step in this reform strategy. In 1975, a 51–42 majority initially supported repeal of the Senate's standing body precedent, but Senate reformers negotiated a modification in the cloture rule rather than force a simple majority vote on Senate rules.[57] While senators failed to fully execute their strategy, it nonetheless led to cloture reform and could have provided an open debate on the Senate's rules.

Two advantages of this approach are that (1) it is based on a plausible argument and that, (2) if fully implemented, it can lead to any type of reform in the form of new, formal rule changes. In fact, once the Senate has committed to the notion that it must debate and re-adopt its rules every two years, there will be a regular opportunity for a simple majority to adopt future rule changes.

The main disadvantage of this approach—and a major reason senators have never embraced it—is that it is extremely difficult to implement. The initial precedent repealing the Senate's standing body status is merely the first step in a long debate over the rules of the Senate. While senators who vote to repudiate the "standing body" tradition may do so to achieve filibuster reform, they also open the door to any and all proposals to revise Senate rules. Other senators may demand votes on proposals to change the Senate's committee system, the ethics code, the agenda-setting system, and so on.[58]

Furthermore, this potentially long and complex debate over the rules of the Senate would occur without any formal rules in place to regulate the

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55. In 1959, senators amended Rule V to state, "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules." Gold & Gupta, *supra* note 11, at 240. This action changed nothing. The Senate can always decide that its rules (including Rule V) do *not* continue from Congress to Congress, in which case this provision would cease to be a constraint.

56. *See* Gold & Gupta, *supra* note 11, at 217–40.

57. SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE 181–82 (1997).

58. Senator Richard Russell (D-GA) threatened this response in 1957. *See* ROBERT A. CARO, MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON 857 (2002).

debate. Instead, the Senate would operate under "general parliamentary law,"[59] which is as vague as it sounds. Senators could appeal to the Constitution, Thomas Jefferson's *Manual of Parliamentary Practice*, the rules of the House of Representatives and state and foreign legislatures, and *Robert's Rules of Order* as authorities on general practice.[60] As occurred in 1975, this would create ample opportunities for points of order and votes on parliamentary disputes.

The prospect of this enormous debate, unguided by any set of rules, with high uncertainty about the outcomes, makes this option both costly and risky for senators who might otherwise support filibuster reform. In particular, it is not clear (1) whether any filibuster reform will emerge from the process, (2) what other reforms might be adopted, and (3) what reforms will be adopted in subsequent rule debates at the start of each Congress now that these debates are mandatory. Consequently, this strategy makes it especially difficult for pro-reform senators to build a simple majority coalition for their effort.[61]

2. Introduce a Previous Question Motion

Since 1811, the House of Representatives has used its "previous question" motion to limit debate—or to attempt to do so. As discussed in Part II.A, the meaning of the term "previous question" has evolved greatly since 1789, but in the modern U.S. House this motion, if approved, has the effect of terminating debate. Some scholars attribute the persistence of obstruction in the Senate to the fact that the formal rules of the Senate do not explicitly provide for a previous question motion.[62] As we argue in Part II, this view drastically overstates the importance and effectiveness of the previous question motion.[63] Nonetheless, if a simple majority of the Senate wants to introduce a previous question motion to the Senate, it would be simple to do so.

This strategy starts with the recognition that while the rules of the Senate may not expressly *provide* for a previous question motion, they

59. *See* FILIBUSTERING, *supra* note 5, at 54.

60. *Id.*

61. *See* Alexander Bolton, *Dems short on votes for filibuster reform*, THE HILL (Nov. 13, 2012, 10:00 AM), http://thehill.com/homenews/senate/267471-dems-short-on-votes-for-filibuster-reform (noting that many Democratic supporters of filibuster reform are otherwise nervous about constitutional option).

62. SARAH A. BINDER, MINORITY RIGHTS, MAJORITY RULE: PARTISANSHIP AND THE DEVELOPMENT OF CONGRESS (1997).

63. *See infra* Part II.A (discussing the House previous question motion and its effect on filibustering in the House).

also do not expressly *forbid* the use of a previous question motion. Surely, a reformer might argue, senators should be free to use a motion that is generally used in American parliamentary practice if it will make the Senate a more effective legislature. Thus, any senator may move the previous question on any bill, nomination, or motion on the Senate floor. This would doubtless set in motion a cycle of parliamentary objection, a ruling from the Presiding Officer, and angling for a decisive vote.

A crucial distinction between this strategy and the "continuing body" approach, however, is that a winning vote on a parliamentary ruling is also substantively decisive. Once the reform coalition wins the vote on the appeal from the chair, senators will be able to move the previous question. Thus, this is a high-impact reform that is simple to implement. And, importantly, reformers can take this action at any point within a two-year Congress, and not just at the very beginning.

In the past, senators have considered this strategy plausible enough to attempt it. In February 1915, Ollie James (D-KY) suggested during Senate debate that any member could move the previous question on the bill.[64] Once the chair ruled this motion out of order, any member could appeal the ruling and bring about a simple majority vote on adding a previous question motion to Senate procedure. James promised to force a vote on his ruling if he was the Presiding Officer.[65] Democrats seriously considered the strategy but did not have the majority needed to win the procedural question.[66]

The main drawback of this strategy is that the previous question motion may not be a practical response to filibustering. As we discuss in the next section, the House of Representatives struggled to use the previous question motion as a constraint on excessive debate without limiting *all* fair debate and amending activity on the chamber floor.[67] Furthermore, the previous question motion was vulnerable to obstruction by dilatory motions and disappearing quorums, limiting its effectiveness as a cloture mechanism.[68]

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64. 52 CONG. REC. 3738 (1915) (statement of Sen. James).
65. *Id.*
66. FRANKLIN L. BURDETTE, FILIBUSTERING IN THE SENATE 112–13 (1940).
67. *See infra* Part II.A.2.
68. BURDETTE, *supra* note 66, at 112–31; *see also* BINDER, *supra* note 62, at 92–129.

3. Transform the Motion to Suspend the Rules

Senate Rule V allows motions to suspend the rules—that is, to ignore any rule or practice—provided that senators file the motion one day before they bring it up in the Senate.[69] These motions can include all the detail of an agenda-setting "special rule" in the House—calling up a bill, laying out the terms of debate and amendment, and then a specific time for a final passage vote.[70] In that sense, they are very flexible tools for preventing obstruction. Unlike the comparable House rule, Senate Rule V does *not* specify a threshold for suspending the rules, so the default interpretation would normally be that a simple majority is required.[71]

However, in 1915 and 1916, the Senate enacted precedents that a two-thirds majority is required to suspend the rules.[72] These precedents demonstrate the ability of a simple majority of the Senate to alter the practical meaning of standing rules by using the conventional option. The imposition of a two-thirds threshold was contrary to the previous, if rare, standard for this motion in the Senate and the general norm of parliamentary construction: unless specified otherwise, all decisions are based on simple majority rule.[73] The best parliamentary justification that senators could muster for the two-thirds threshold was that the House of Representatives requires a two-thirds majority to suspend its rules, but this is only because the rules of the House have specified this threshold since 1822.[74]

Two new precedents would be required to convert the motion to suspend the rules into a flexible source of majority power in the Senate. First, a new precedent is required to ensure that a motion to suspend the

69. SENATE RULE V, SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, S. Doc. No. 112-1, at 5 (2011), *available at* http://www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome ("No motion to suspend, modify, or amend any rule, or any part thereof, shall be in order, except on one day's notice in writing, specifying precisely the rule or part proposed to be suspended, modified, or amended, and the purpose thereof.").

70. *See* RICHARD S. BETH, CONG. RESEARCH SERV., 93-854 GOV, THE MOTION TO PROCEED TO CONSIDER A MEASURE IN THE SENATE, 1979–1992 (1993).

71. RIDDICK & FRUMIN, *supra* note 47, at 1415 ("The Senate can control almost anything by a majority vote unless a limitation is found in the rules.").

72. Gregory Koger, *Filibuster Reform in the Senate, 1913–17, in* 2 PARTY, PROCESS, AND POLITICAL CHANGE IN CONGRESS: FURTHER NEW PERSPECTIVES ON THE HISTORY OF CONGRESS 205 (David W. Brady & Matthew D. McCubbins eds., 2007); *see also* RIDDICK & FRUMIN, *supra* note 47, at 1271–72.

73. *See* AMAR, *supra* note 15, at 363–69 (citing a number of sources demonstrating that majority rule is the default rule); *see also* Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73 (1996) (same).

74. Koger, *supra* note 72, at 214; *see also* BINDER, *supra* note 62, at 89–92.

rules is nondebatable.[75] In Senate parlance, a motion or question that is "debatable" is subject to a filibuster, so the ability to "debate" motions to suspend the rules limits their use to prevent filibustering. The rationale for such a precedent is simple. If this motion is debatable or otherwise vulnerable to filibustering, its function is nullified because the purpose of suspending the rules is to circumvent any rule or practice that thwarts the intent of a majority (or supermajority) of the chamber. To fulfill its purpose, the motion to suspend the rules should be nondebatable. By itself, this precedent would provide the Senate with a new procedural tool against filibusters by single senators or very small coalitions. Instead of using the standard cloture process, which takes time to attempt and allows obstructionists to demand and use hours of post-cloture floor time, a large coalition of senators could suspend the rules by a two-thirds vote to quickly end a filibuster by a small coalition.

If the majority of the Senate wishes to proceed further and institute simple majority rule in the Senate, then this is even easier to achieve. After a motion to suspend the rules receives the support of a majority of the Senate, but less than a two-thirds supermajority, the Presiding Officer will declare the motion failed in accordance with the 1915 and 1916 precedents mentioned above. At that moment, any senator can raise a point of order that a simple majority is sufficient to suspend the rules and, backed by a majority, overturn the precedents.

This reform scores very well on our criteria. First, it has a high impact because motions to suspend the rules can be used to completely inoculate proposals against obstruction and ensure timely consideration of legislation supported by a Senate majority.

Second, it is practical. Like special rules in the House, the content of the motions can be adapted to a wide range of situations as long as the motion is filed a day ahead of time. But unlike special rules in the House, the motions would, in practice, probably come directly from the leader of the majority party rather than a standing committee.[76]

Third, it is perfectly plausible. This strategy restores the most logical interpretation of Rule V. It is nonsensical that a motion to suspend the rules can be filibustered, and the current two-thirds supermajority to

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75. RIDDICK & FRUMIN, *supra* note 47, at 785 (noting that a motion to suspend the rules is debatable).

76. Any senator can draft and introduce a motion to suspend the rules, but the majority leader enjoys priority in recognition, so the Presiding Officer will always call on him or her first. Consequently, no other senator could call up a motion to suspend the rules without at least the tacit consent of the majority party leader. *See* RIDDICK & FRUMIN, *supra* note 47, at 1093.

suspend the rules was concocted out of thin air in defiance of the ordinary interpretation of Rule V.[77] Last but not least, the strategy is simple to implement. It requires two decisive precedents that can be adopted separately.[78]

4. Convert Rule XXII Into a Simple Majority Motion

This option is audacious but effective, as demonstrated by the Senate Democrats' use of this tactic in November 2013. As prescribed by Senate Rule XXII, a pro-reform coalition files a cloture petition on a measure and the Senate votes at noon after a two-day wait. If the number of votes for cloture is over fifty but under sixty, when the Presiding Officer states that the cloture attempt has failed, a reformer then raises a point of order that a simple majority is required to invoke cloture. This objection may be specific to a particular class of legislation, such as appropriations bills or executive nominations, or it may be generally applied. In November 2013, for example, Reid's objection stated that the appropriate threshold for cloture on all nominations *except the Supreme Court* should be simple majority. Reid also retained the sixty-vote threshold for legislation and Supreme Court nominations.[79]

The benefit of this approach is that it quickly institutes simple majority cloture in the Senate without the nearly impossible task of building a

77. *See* THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE 91 (New York, Clark & Maynard 1871) ("The voice of the majority decides. For the *lex majoris partis* is the law of all councils, elections, &c., where not otherwise expressly provided.").

78. Arguably there is *constitutional* support for this strategy. Akhil Amar argues that the Constitution implicitly establishes majority rule as a default. AMAR, *supra* note 15, at 363–69. Although not specified in the text of the Constitution, the fact that the Constitution only specifies non-majority rule voting rules arguably supports an inference that a majority rule is the default rule. *Id.* at 363; *see, e.g.*, U.S. CONST., art. I, § 7, cl. 2 (providing that, after a veto, "[i]f after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law"). In fact, the Court has noted that "the general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body." United States v. Ballin, 144 U.S. 1, 6 (1892). Thus, although reinterpreting the motion to suspend the rules into a majoritarian motion rule would leave the existing cloture rules in place, it would at least provide a majoritarian means of avoiding a Senate filibuster, which would be consistent with the default of majority rule. *Cf.* John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327 (1997) (arguing that supermajority rules are constitutional as long as there is a majoritarian right to suspend supermajority requirements at any time). Although we acknowledge this argument, we do not address its validity. In our view, such constitutional arguments are not necessary because the conventional option is sufficient to allow a majority of senators to implement this strategy.

79. *See supra* note 4 and accompanying text.

supermajority coalition to pass a formal rules change. On the other hand, this reform leaves in place—at least for the time being—the delays built into the cloture process, such as waiting periods between filing and voting and an entitlement to post-cloture debate. These delays will still provide individual senators with great power to slow the progress of individual measures, or to delay the overall Senate agenda by forcing the chamber to go through the slow cloture process on any measure blocked by a single senator.

Another benefit of this strategy is that there is a convenient path to a decisive vote. Once debate begins on the reformers' initial point of order, a reformer can raise a second point of order invoking the terms of Rule XXII: "Points of order, including questions of relevancy, and appeals from the decision of the Presiding Officer, shall be decided without debate."[80] As a secondary point of order and (in the reformers' view) a point of order arising post-cloture, an immediate vote is guaranteed.

On the other hand, the downside of this strategy is that it is an especially bold reinterpretation of the existing rule. While many words and phrases are subject to multiple meanings, Rule XXII's phrase "three-fifths of the Senators duly chosen and sworn" is unambiguous and hard to reconcile with a simple majority threshold.[81] We include this proposal, however, to highlight that this sort of action is *possible*. The reinterpretation is problematic not because it is "incorrect," but because the reforming coalition would have to forthrightly acknowledge and defend an especially obvious power play.[82]

5. Expand the Right to the Yeas and Nays

Article 1, Section 5 of the Constitution states that "the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal."[83] As currently interpreted by Senate practice, this constitutional right to a roll call vote is interpreted

80. SENATE RULE XXII, SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, S. Doc. No. 112-1, at 21 (2011), *available at* http://www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome.

81. We note the possibility that reformers using this strategy may limit it to specific circumstances, leaving the general three-fifths requirement in place.

82. One could also argue that Rule XXII is unconstitutional because it violates an implicit constitutional default of majority rule. *See* AMAR, *supra* note 15, at 362 (making this argument); *see also supra* text accompanying note 78 (discussing this implicit constitutional rule). However, and as we noted earlier, given the availability of the conventional option to implement other strategies that would functionally accomplish the same thing, we do not address this argument in any detail.

83. U.S. CONST., art. I, § 5, cl. 3.

as conditional upon a vote actually occurring. Senators may request—and typically receive—a roll call vote on a bill or amendment, but if this request is granted debate continues unabated.[84] These requests are understood as being about the *form* of a vote: if a vote on a proposition occurs, an order for the yeas and nays guarantees a roll call vote rather than a voice vote or a standing vote, but does not guarantee that this vote actually occurs.[85]

While the current practice is understandable, an advocate for reform could argue that it subverts the clear meaning of this passage. If one-fifth of all the senators in the chamber ask for a vote on a pending amendment or measure, one could argue that they have a constitutional right to that vote *actually occurring*,[86] while the current practice of the Senate denies senators their constitutional right to have their "Yeas and Nays" recorded in the journal.[87]

This strategy is straightforward. A senator first brings up a measure or amendment, asks for the yeas and nays on that proposal, and then (perhaps after waiting a respectable time for debate to occur, or requesting a time for a vote by unanimous consent) makes a point of order that the constitutional guarantee of a vote has been nullified, with an immediate vote as the only remedy.

This strategy has the rhetorical advantage of being based on a plausible constitutional argument and being relatively simple to implement. Substantively, it promises a major change in how the Senate functions because a minority of senators would suddenly be able to circumvent obstruction and obtain a vote on their proposals.[88]

However, this reform may be impractical to use on a day-to-day basis. Unless the Senate wants to eliminate *all* debate between a call for the yeas and nays and the actual occurrence of the vote, it may be difficult to devise a non-arbitrary threshold for deciding how long discussion can continue

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84. RIDDICK & FRUMIN, *supra* note 47, at 774 ("The ordering of the yeas and nays on a question does not preclude or shut off further debate thereon before the vote is taken.").

85. WALTER J. OLESZEK, CONG. RESEARCH SERV., 98-227, VOTING IN THE SENATE: FORMS AND REQUIREMENTS (2008). A voice vote occurs when the Presiding Officer says, "all in favor say 'aye,'" then "all in favor say 'nay,'" then the chair declares the winner based on which side seems to have the most members. A standing vote is the same, but senators stand to register their preferences when their position is called. *Id.* at 1.

86. The call for a yea and nay vote must be supported by one-fifth of those present, assuming a quorum is present. A majority of the Senate is required for a quorum, so a motion for a roll call vote may be supported by as few as ten senators. *See* RIDDICK & FRUMIN, *supra* note 47, at 1416.

87. U.S. CONST., art. I, § 5, cl. 3.

88. This would put a premium on the Senate Majority Leader to pre-screen bills and amendments coming to the Senate floor and only call up measures that he or she would like to see come to a formal vote.

before it begins to violate the constitutional right to a roll call vote. Furthermore, senators who oppose the reform may subsequently spend a lot of time devising new ways to force the Senate to take roll call votes. In practice, this approach would probably prove unworkable by itself but it would give a pro-reform Senate majority a tremendous bargaining chip it could use to negotiate for formal rule changes restricting obstruction.

C. Comparison of Conventional Strategies

This list of five strategies to reform the filibuster is not intended to be exhaustive. We have focused on reforms that are likely to significantly change the practice of filibustering. Thus, this list of strategies excludes other possible major reforms and omits a whole range of incremental reforms that could be imposed by precedent.

Instead, the list is intended to demonstrate that there are a variety of options that are reasonably plausible. More subtly, the list demonstrates that we can compare and contrast strategies to select the approach that is easiest to implement and the most likely to have its desired effect.

TABLE 1: COMPARISON OF REFORM OPTIONS

	Magnitude of Change	Practical Effect?	Plausibility of Objection	Simplicity of Implementation
Repeal Standing Body Tradition		 (high uncertainty)		
Move the Previous Question				
Transform Motion to Suspend the Rules				
Rule XXII Cloture by Simple Majority				
Yeas & Nays				

Table 1 summarizes this discussion of the reforms based on the review of each proposal in Part I.B. It is not surprising that almost every strategy is intended to have a major effect, but the reforms vary across other dimensions. Based on our comparison, the option that has been tried the most often—renouncing the Senate's tradition of acting as a continuous body—is the least effective and most costly strategy. On the other hand, we rate the strategy of revising the Senate's motion to suspend the rules as the most effective and least costly.

The critical point, however, is that each of these reforms is a viable option and that a simple majority of the Senate can pursue a precedent-based strategy while working within the normal Senate procedures for rule interpretation.

One may argue, however, that the criteria we posit are insufficient for assessing reform because they do not consider the *appropriateness* of using the conventional option we illustrate here. For example, some consider it "rude" to reform the filibuster "with 51 votes."[89] Moreover, a group of constitutional law scholars recently sent a letter to the Senate Judiciary Committee arguing in favor of the "constitutional option" to reform the filibuster on the first day of the new Congress.[90] In the letter the professors note that "[t]he standing two-thirds requirement for altering the Senate's rules" in the middle of a Congressional session "is a sensible effort at preventing changes to the rules in the midst of a game."[91]

Our concern is with the analogy of Senate politics to a "game" in which fair play—including rigid adherence to status quo rules—trumps any sense of purpose. The Constitution established the Senate to "promote the general Welfare" of the people, even it if means hurting the feelings of obstructionist senators.[92] The rules of the Senate exist to steer the chamber toward decisions that fit this mandate; to the extent that the status quo rules detract from the public welfare, senators have a responsibility to alter their decision-making process. Moreover, filibustering itself is "rude." In its various forms, filibustering is the exploitation of rights of deliberation to deny the majority of a legislature the right to make decisions on public policy issues.

Most importantly, any argument against the appropriateness of the conventional option has to take into account the history of the option. If the conventional option has been used frequently in the past to limit filibustering, then it would be extraordinarily difficult to argue that the use of the conventional option *now* is an unacceptable break with tradition. As it turns out, the conventional option we describe has been used repeatedly

89. *See* Klein, *supra* note 12. In his post, Klein includes a link to support his claim that the Senate can change the rules "with 51 votes." *Id.* Klein's link is to a blog post with a lengthy discussion of how to change the Senate rules with fifty-one votes written by one of the authors. *Id.* (citing Jonathan Bernstein, *A Very Wonky Post About Senate Rules*, A PLAIN BLOG ABOUT POLITICS (Dec. 15, 2010, 2:17 PM), http://plainblogaboutpolitics.blogspot.com/2010/12/very-wonky-post-about-senate-rules.html).

90. *See* Letter by Bruce Ackerman, *supra* note 12.

91. *Id.* at 1.

92. *See* U.S. CONST., pmbl.

by both the House and the Senate to curb filibustering. We now discuss that history in the next Part.

II. A BRIEF HISTORY OF FILIBUSTER REFORM IN CONGRESS

The previous Part demonstrated that simple majorities of the Senate can achieve major reforms by using the conventional option. This Part explains how the conventional option has been critical to the development of procedural rules on filibustering in both the Senate and the House of Representatives. Along the way, we compare and contrast our historical account of Congressional filibustering with different accounts found in the political science and legal scholarship. Our perspective reflects recent research in political science[93] that, as we discuss in more detail, corrects classic claims about filibustering and the Senate.

This Part shows that filibustering is not an idiosyncrasy of the Senate. Filibustering, in fact, was once common in the House of Representatives. During the first century of Congressional history, there were roughly twice as many filibusters in the House as the Senate.[94] We further show that the House achieved its current majoritarian structure by using the conventional option we describe in this Article. Accordingly, we argue that much can be learned about how legislators can restrict filibustering by closely examining how the members of the House reduced obstruction in their chamber.

This Part also shows that filibustering has not always been pervasive in the Senate. The Senate, like the House, has limited filibustering in the past by using the conventional option. As we discuss below, the Senate has limited the filibuster before, and can do so again if a majority of senators so choose.

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93. *E.g.*, FILIBUSTERING, *supra* note 5; GREGORY J. WAWRO & ERIC SCHICKLER, FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE (2006); KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING (1998); BINDER & SMITH, *supra* note 57; Gregory J. Wawro & Eric Schickler, *Legislative Obstructionism*, 13 ANN. REV. POL. SCI. 297 (2010); Gregory Koger, *Filibustering and Majority Rule in the Senate: The Contest over Judicial Nominations, 2003–2005*, *in* WHY NOT PARTIES?: PARTY EFFECTS IN THE UNITED STATES SENATE 159 (Nathan W. Monroe et al. eds., 2008); Bruce I. Oppenheimer, *Changing Time Constraints on Congress: Historical Perspectives on the Use of Cloture*, *in* CONGRESS RECONSIDERED 393 (3d ed., Lawrence C. Dodd & Bruce I. Oppenheimer eds., 1985).

94. FILIBUSTERING, *supra* note 5, at 37–96.

A. Reforming the Filibuster in the House

Before we discuss the history of filibuster reform in the House, we begin by debunking a common myth about why filibustering in the Senate persists while it does not in the House. Several previous analyses of filibustering begin with the premise that filibustering in the Senate persists because a procedural motion known as the "previous question" was deleted from the rules of the Senate in 1806.

In its simplest form, the argument is that:

1. The previous question is intrinsically a simple majority motion to cut off debate;
2. The rules of the House allow members to move the previous question;
3. The rules of the Senate do not include a previous question motion, and have not since the motion was deleted from the rules in 1806;

Ergo, the House is a majority rule chamber while the Senate is not.

This premise, and the argument that flows from it, are both widely accepted in the existing literature. For example, Emmet J. Bondurant begins an essay on filibuster reform with this claim:

> Filibusters in the Senate are a profoundly undemocratic result of a mistake made in 1806 when the Senate accepted the advice of Aaron Burr and eliminated the "previous question" motion from its rules. Before that change, the previous question motion had been a "non-debatable motion that, if favored by the majority, close[d] debate and force[d] an immediate vote on a matter."[95]

Consequently, Bondurant concludes that "filibusters as a parliamentary tactic were unknown at the time the Constitution was adopted."[96]

For support, Bondurant quotes Catherine Fisk and Erwin Chemerinsky, who offer a more nuanced discussion of the topic.[97] According to Fisk and

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95. Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 HARV. J. ON LEGIS. 467, 468 (2011) (footnote omitted).

96. *Id.* As noted earlier, the claim that filibusters were "unknown" to the authors of the Constitution or the early members of the Senate is incorrect. There were filibusters in the Continental Congress and state legislatures prior to the drafting of the Constitution. *See supra* text accompanying notes 22–23.

97. Bondurant, *supra* note 95, at 468 n.3 (citing Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 188 (1997)).

Chemerinsky, "[i]t is unclear whether the previous question, in the form then practiced, served as a device to bring a measure to a vote, or whether it served to defer discussion of sensitive or embarrassing questions."[98] Indeed, the version of the previous question motion adopted by the House in the First Congress stated that "[o]n a previous question no member shall speak more than once without leave."[99] Admittedly, this is a bit more restrictive than the general two-speech rule that applied to other questions.[100] However, the text of the rule makes clear that, far from cutting off all debate and bringing a bill to an immediate vote, a previous question motion *initiated* a new (albeit limited) debate about whether to continue discussing the topic on the floor. And, if the previous question motion was approved, then debate on the main subject would continue unabated.

This latter view—that the previous question motion of the First Congress initiated debate, not stopped it—is more consistent with the historical record. Robert Luce notes that in the early years of Congress, if a chamber voted *against* a previous question motion, then "it meant the main question was suppressed for the day."[101] This claim is confirmed in a monograph by Joseph Cooper, later printed as a Senate document, which explored the early use of the previous question motion in the Senate to determine if approving the motion had the effect of ending debate.[102] Moreover, Vice President Aaron Burr's rationale for eliminating the previous question motion in the Senate was that it was redundant with the motion for indefinite postponement.[103] This rationale is further evidence that the previous question motion was used to put off delicate matters, not to end obstruction by prolonged speechmaking.

1. Transforming the Previous Question Motion, February 1811

If the initial rules of the House did not include a motion to limit debate, how did the House arrive at its current limits on debate? A first step along

98. Fisk & Chemerinsky, *supra* note 97, at 188 (footnote omitted).

99. H. JOURNAL, 1st Cong., 1st Sess. 9 (1789).

100. *Id.*

101. ROBERT LUCE, LEGISLATIVE PROCEDURE: PARLIAMENTARY PRACTICES AND THE COURSE OF BUSINESS IN THE FRAMING OF STATUTES 270 (1922); *see also* DE ALVA STANWOOD ALEXANDER, HISTORY AND PROCEDURE OF THE HOUSE OF REPRESENTATIVES 180–81 (1916).

102. JOSEPH COOPER, THE PREVIOUS QUESTION: ITS STANDING AS A PRECEDENT FOR CLOTURE IN THE UNITED STATES SENATE, S. DOC. NO. 87-104 (1962).

103. 1 JOHN QUINCY ADAMS, MEMOIRS OF JOHN QUINCY ADAMS: COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848, at 365 (Charles Francis Adams ed. 1874).

this path was the transformation of the previous question motion during the tense period preceding the War of 1812.

In the early morning hours of February 28, 1811, House members voted to change the interpretation of the previous question from a means of shelving delicate issues into a tool for cutting off debate.[104] During a debate on American-English trade, a frustrated Republican majority moved and approved the previous question.[105] Immediately afterwards, Thomas Gholson (R-VA), a member of the Republican majority, made a point of order that debate was not allowed after the previous question had been approved.[106] When Barent Gardenier (Fed-NY), a particularly loquacious obstructionist, rose to speak on the point of order, another member, Peter Porter (R-NY), made a *second* point of order that debate is not allowed on challenges to the chair's rulings.[107] All eight Federalists voted to allow debate on challenges, but Republicans voted 66–5 to prohibit it.[108] Once debate on rulings from the chair had been stifled, the House swiftly approved Gholson's point of order, which prohibited debate after the previous question motion had been approved.[109] In two quick steps, the previous question motion was transformed from a means for continuing debate to a tool for ending it.[110]

There are two important lessons in this episode. The first lesson is that the method used by the House majority above illustrates the general point of Part I: when a majority is faced by an obstructionist minority, using the conventional option of reinterpreting rules and setting new precedents can be more efficient and effective than attempting to formally change the rules. Specifically, this episode illustrates the right-side path in Figure 1, which shows a majority overturning an unfavorable decision by the chair by invoking a secondary point of order limiting debate on the first point of order.[111]

The second lesson is that legislative majorities have extremely wide latitude when interpreting the rules of their own chamber. In 1811, the House converted the previous question—which previously had the effect

104. Most contemporary and subsequent accounts of the previous question consider the night of February 27–28, 1811, the decisive act that transformed the previous question motion. *See* 22 ANNALS OF CONG. 1091–93 (1811); ALEXANDER, *supra* note 101, at 185–88; 5 ASHER C. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 5445 (1907).

105. 22 ANNALS OF CONG. 1091–93.

106. *Id.* at 1091–92.

107. *Id.* at 1091–94.

108. *Id.*

109. *Id.*

110. *Id.*

111. *See supra* Figure 1, at page 11.

of continuing the conversation if affirmed—into a motion to do the exact opposite. For senators seeking to emulate the House's actions on this late night in 1811, the lesson is *not* that the Senate reformers need a previous question motion. Instead, senators need *any* existing Senate rule or constitutional provision that can be converted into a means for limiting debate, and the conventional option gives them wide latitude to redefine the meaning of that rule.

2. Filibustering in the House, 1811–1889

Despite the reforms made on February 28, 1811, subsequent House majorities struggled to use the previous question motion to end debate. Initial rulings by Speaker Henry Clay held that approving the previous question motion led to a direct vote on the underlying bill.[112] Amendments which had been approved in the Committee of the Whole or which were still pending when the previous question was called were dropped. This clumsiness, combined with general norms against suppressing deliberation, led to infrequent use of the motion in the years following the War of 1812.[113]

Figure 2 illustrates the number of roll call votes on previous question motions from 1789 to 1889.[114] Once House members began to use the motion more frequently after 1830, they made several changes to the previous question rule to make it more useful. The House adopted rules changes in 1840, 1848, 1860, 1880, and 1890 that improved the application of the previous question.[115] In its 1890 form, the rule allowed a member to apply the previous question motion to a single motion, a series of motions, an amendment or amendments, or to carry a bill through to final passage.[116] The numerous reforms to the previous question rule illustrate how an institutional change like the 1811 transformation may require subsequent reforms to be effective. These subsequent revisions add to the transaction costs for the initial reform.

112. HINDS, *supra* note 104, § 5446.

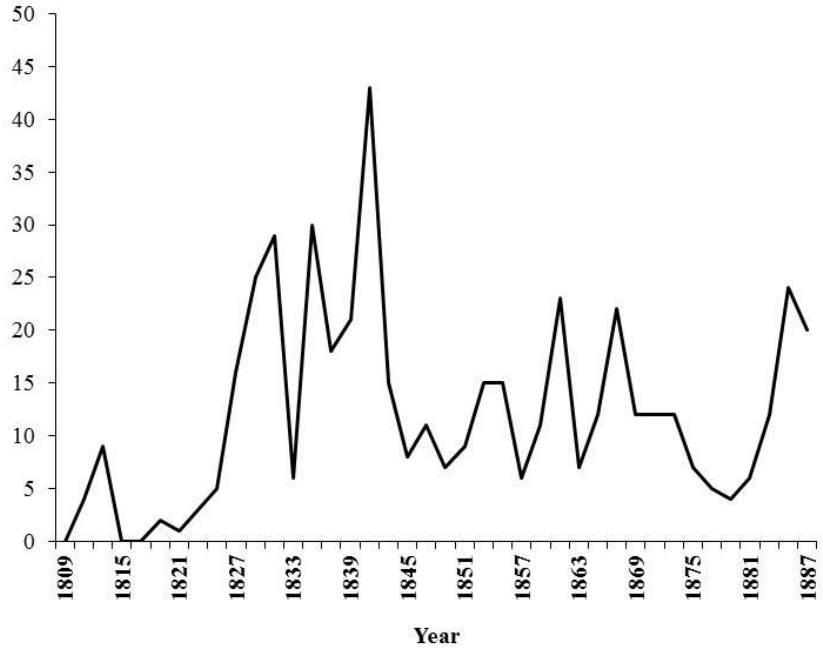
113. BINDER, *supra* note 62, at 89.

114. The information in Figure 2 is based on data contained in Inter-University Consortium for Pol. & Soc. Research & Cong. Quarterly, United States Congressional Roll Call Voting Records, 1789–1996 (1998).

115. ALEXANDER, *supra* note 101, at 189–206.

116. *Id.* at 277–79.

FIGURE 2—ROLL CALL VOTES ON PREVIOUS QUESTION MOTIONS, 1789–1889



Despite the use and improvement of the previous question motion, obstruction was common in the House throughout the nineteenth century. Why? The previous question motion was only effective as a limit on normal deliberation, such as speaking and offering amendments to a bill. But members of both the House and Senate used other filibustering tactics that were immune to the previous question motion. First, they could make and repeat motions that had priority over a vote on the previous question, such as a motion to adjourn, take a recess, or fix the day to which the House shall adjourn.[117] For example, if one member moved the previous question and another member subsequently moved to adjourn, the first vote would be on the motion to adjourn. These dilatory motions could be alternated until either the minority or majority faction grew tired.

117. FILIBUSTERING, *supra* note 5, at 17.

Second, previous question motions were also ineffective against a minority obstructing by refusing to vote en masse, a tactic called the "disappearing quorum." Again, this tactic entailed members of a legislature refusing to participate in a vote so that the participation rate falls below the threshold for a quorum. In 2003 (Texas) and 2011 (Wisconsin and Indiana), state legislators fled across state lines to avoid being forcibly returned to their legislatures to contribute to a quorum.[118] In the House and Senate, there was a norm, despite rules to the contrary, that members were not compelled to vote, and if they did not vote they did not count toward a quorum. If some legislators were absent for innocuous reasons like illness or travel, a minority of the legislature could "break" a quorum by refusing to vote and thereby "disappearing."[119]

Incorporating these tactics into our definition of "filibustering" produces a surprising pattern. There was more obstruction in the nineteenth century House of Representatives than in the Senate. Figure 3 depicts a summary of this pattern, showing during the nineteenth century both the general increase in obstruction over time in both chambers and the higher level of obstruction in the House.[120]

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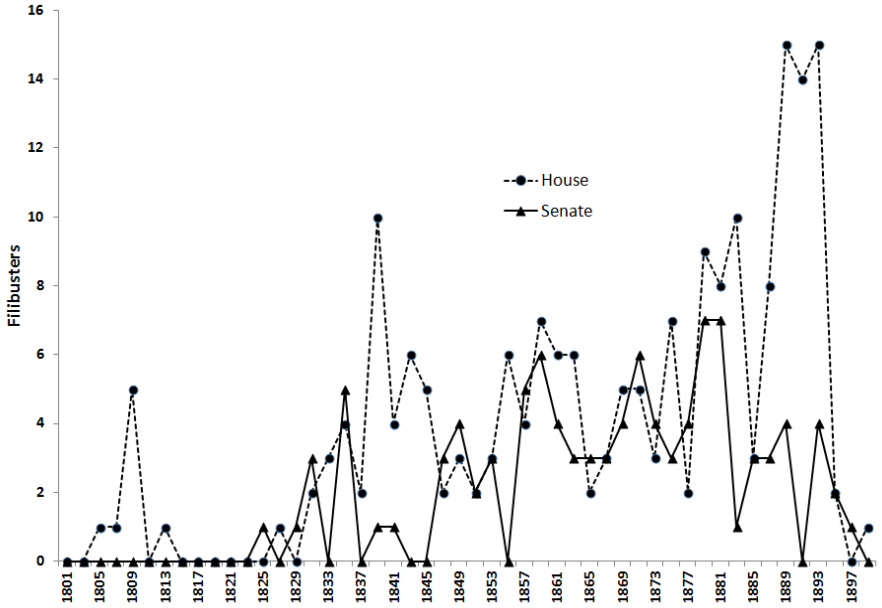
118. Karl Kurtz, *Disappearing and Bolting Forums*, THE NAT'L COUNCIL ON STATE LEGISLATORS: THE THICKET AT STATE LEGISLATURES BLOG (Feb. 21, 2012, 3:33 PM), http://ncsl.typepad.com/the_thicket/2012/02/disappearing-and-bolting-quorums.html.

119. FILIBUSTERING, *supra* note 5, at 18.

120. Based on data collected, Koger identifies attempted disappearing quorums by scanning roll call records for votes on which most members of one party voted, most members of the opposing party did not vote, and the difference between the two proportions was statistically significant. A "dilatory motion" is one of a set of procedural motions that failed a roll call vote. A filibuster is defined as a bill or nomination opposed by a threshold level of obstruction. *See id.* at 42–53.

FIGURE 3—FILIBUSTERS IN THE U.S. HOUSE AND SENATE, 1801–1901



Obstruction by non-voting was impervious to a previous question motion because, in the absence of a quorum, the House could not make any legislative decisions, including calling the previous question. As filibustering reached crisis levels between 1881 and 1889, there were fourteen successful disappearing quorums against previous question motions.[121] During a subsequent showdown over House obstruction from 1890 to 1894, there were forty-three more successful efforts to break a quorum.[122]

Critically, the general ability of House and Senate members to filibuster included the power to obstruct changes to the rules of their respective chambers. In both chambers, legislators faced a situation similar to the modern Senate: any rules change, including proposed restrictions on filibustering, was itself subject to obstruction. In practice, as it turns out, this was a greater obstacle for rules changes in the nineteenth century House than the Senate. There were more filibusters against proposed rules

121. These statistics are based on an analysis of the data used to create Figure 3.
122. *Id.*

changes in the House than the Senate, including two rules changes that were blocked by obstruction in 1882 and 1889.[123] In the latter case, the obstructionists actually blocked a previous question motion successfully.[124] The main proponent of the 1889 rule change, Thomas Reed (R-ME), learned that he would have to try a different approach if he wanted to force through controversial changes in the House rules.[125]

3. The Revolution in the House, 1889–1894

At the beginning of the 51st Congress in 1889, the leaders of the Republican Party faced a challenge that may sound familiar. Filibustering had reached a crisis level. Both contemporary observers and historians consider the 50th Congress one of the most ineffective in history because one chamber of Congress was paralyzed by obstruction.[126] The minority party considered itself entitled to veto the policy agenda of the party which had gained united control of Congress and the White House in the previous election. And any attempt to correct this dysfunction by amending the rules of the House was itself subject to obstruction and a minority party veto.

When the 51st Congress began, the Republicans elected Thomas Reed as Speaker.[127] Reed had been arguing for more centralized and efficient House rules for several years. Reed waited to act until the House began debating a contested election on January 29, 1890.[128] Democrats refused to vote on the motion to consider this case, thereby breaking the quorum, but Reed directed the House Clerk to note that several Democrats were present but not voting so a quorum was present. After heated debate, this ruling was sustained 162-0 the next day, with zero Democrats voting. On January

123. FILIBUSTERING, *supra* note 5, at 65–66.

124. *Id.*

125. *See generally* WILLIAM A. ROBINSON, THOMAS B. REED: PARLIAMENTARIAN (1930) (discussing history of 1889 rule change).

126. RICHARD V. REMINI, THE HOUSE: THE HISTORY OF THE HOUSE OF REPRESENTATIVES 243 (2006). Since 1889 to 1894 is the pivotal period of House history, the events are recounted in numerous sources. For recent works, see BINDER & SMITH, *supra* note 57; FILIBUSTERING, *supra* note 5; ERIC SCHICKLER, DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS (2001); and for classic works, see LUCE, *supra* note 101; ORLANDO OSCAR STEALEY, TWENTY YEARS IN THE PRESS GALLERY (1906).

127. *Speakers of the House (1789 to present)*, U.S. HOUSE OF REPRESENTATIVES, http://history.house.gov/People/Office/Speakers/.

128. REMINI, *supra* note 126, at 248. At this point the House had not yet adopted any rules to govern the 51st Congress, so the House was using "general parliamentary law." Since this term had little precise meaning, this tactic provided Reed with extra leeway in his parliamentary rulings. However, this was not necessary for Reed's actions. Reed felt his rulings were entirely Constitutional, so his rulings would have been valid in either case. *See id.* at 250.

31, a second ruling (163–0, zero Democrats voting) affirmed the Speaker's right to ignore dilatory motions.[129] Accordingly, in a span of only three days the Republicans had used the conventional option to suppress the two primary forms of filibustering in the Nineteenth Century House.

Ten days after the second ruling, the House began debate on a new code of House rules, including rules codifying Speaker Reed's decisions. Having been deprived of their obstructionist techniques, the minority Democrats did not compel the Republicans to use the previous question to end debate on the Reed Rules. Instead, the majority and minority negotiated an agreement for consideration of the rules.[130] The Republicans agreed to a resolution for considering the rules dictated by the Democrats. The resolution passed without any recorded disagreement.[131] This accord automatically enforced the previous question after three days. But it is worth emphasizing that the previous question motion was not used to stifle obstruction against the adoption of chamber rules. Reed's precedents had already accomplished that feat.

While this is the critical battle for purposes of this Article, we note that the war over filibustering continued for another four years. The Democrats regained control of the House in the 1890 elections and repudiated the anti-obstruction rules in 1891. By 1893, the Democrats had quietly devised their own response to dilatory motions. By 1894, the Democrats accepted limits on disappearing quorums after a prolonged Republican filibuster. The Republican minority lost their veto power but won their point. The House of Representatives could not govern the republic with a minority party empowered to veto everything.[132]

As with the transformation of the previous question motion in 1811, the lesson from the House's efforts to suppress obstruction in the 1890s is that the critical step was a pair of decisive votes on rulings from the Presiding Officer. These rulings were achieved in much the same way as senators enforce or revise their rules because the members of the House could not and did not invoke an already-enforceable cloture rule.

An even more important ingredient was determination. By the 1890s, the members and leaders of the majority party in the House of Representatives decided that their institution was at an impasse. They

129. FILIBUSTERING, *supra* note 5, at 54–55.
130. 21 CONG. REC. 1206–08 (1890).
131. *Id.*
132. For a more extensive discussion of this phase, see SCHICKLER, *supra* note 126; FILIBUSTERING, *supra* note 5, at 55–56.

faced a choice between governing and maintaining the traditions of the chamber, and they chose the former.

B. Reforming the Filibuster in the Senate

As with our discussion of the House, we do not intend to survey the entire history of filibustering and reform in the Senate in this section.[133] Instead, we merely seek to point out that senators had the power, through the conventional option, to adopt strong limits on filibustering throughout much of Senate history. If they had chosen to do so, their path to reform was no more difficult—and probably easier—than for their counterparts in the pre-Reed House.

1. Limits on Senate Filibustering Before 1917

The rules of the first Senate provided for the Presiding Officer to call senators to order for violating chamber rules and holding votes when the application of the rules to a case was uncertain. By 1828, the Senate rule clearly stated that every decision by the Presiding Officer was subject to an appeal to a vote by the Senate, in effect establishing the conventional option.[134] This power could be used, and was used, to restrict filibustering.

Senators reinterpreted rules to limit filibustering before the adoption of the first Senate cloture rule in 1917. Three prominent anti-obstruction precedents were:[135]

- 1879: the Presiding Officer counts *all* present senators, even nonvoting senators, toward a quorum.[136]
- 1897: the Presiding Officer mandates that a senator cannot request a quorum call immediately after a vote revealing the presence of a quorum.[137]

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133. For well-researched accounts, see FILIBUSTERING, *supra* note 5; WAWRO & SCHICKLER, *supra* note 93; ZELIZER, *supra* note 54; BINDER & SMITH, *supra* note 57; BURDETTE, *supra* note 66; GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE (1938); CLARA HANNAH KERR, THE ORIGIN AND DEVELOPMENT OF THE UNITED STATES SENATE (1895); Oppenheimer, *supra* note 93.

134. WAWRO & SCHICKLER, *supra* note 93, at 65–72. The authors go on to trace the development of a nondebatable motion to table appeals from rulings of the Presiding Officer.

135. For additional examples, see *id.* at 70; BINDER & SMITH, *supra* note 57, at 7.

136. BURDETTE, *supra* note 66, at 38–39.

137. *Id.* at 68.

- 1908: the Presiding Officer counts nonvoting senators toward a quorum on a roll call vote. Upheld by roll call votes of thirty-five to eight and thirty-five to thirteen.[138]

These actions, and similar precedents set over the years, suffice to show that majorities could restrict obstruction by precedent if they chose to do so.

But the historic Senate, like the current Senate, permitted filibustering by endless debate. In fact, some scholars point to a threatened filibuster against a proposed previous question rule in 1841 and an actual filibuster against an anti-obstruction rule proposal in 1891 as evidence that it was difficult to restrict obstruction in the Senate.[139] In these two instances, it would have been easier to bring these anti-obstruction proposals to a vote if obstruction was already impossible, although it is not certain in either case that the propositions had enough votes to succeed.[140] What these two incidents do *not* prove, however, is that it was impossible to restrict obstruction in the Senate, or more difficult to restrict obstruction in the Senate than the House. After all, these proposals were exposed to filibustering because their sponsors proposed them as formal rules changes. The reform advocates in both cases could have circumvented this quandary by using the conventional option to force votes on anti-obstruction points of order instead. Senators also had the option of bringing up rules changes at the beginning of a new Congress while the floor agenda was usually uncrowded (1841 being a bit of an exception), which would make it easy for senators to wait out a filibuster.

There is an alternative explanation for why the Senate did not follow the more drastic course set by the House in the 1890s. For the most part, Senate majorities were able to wait out filibusters, so it was rare for senators to pay the high costs of obstruction with little prospect of success.[141] Narrow majorities were often able to win in this environment without strict rules to limit debate and, if necessary, could expedite the passage of controversial bills with new parliamentary precedents.[142]

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138. *Id.* at 86–88.

139. BINDER, *supra* note 62, at 178–99. *But see* WAWRO & SCHICKLER, *supra* note 93, at 72–87.

140. As Wawro and Schickler point out, the coalitions supporting the underlying bills were, in both cases, internally divided. This is especially clear in the 1891 case, when the election enforcement bill (labeled the "Force Bill" by its detractors) and the rule proposal were eventually sidelined by motions to switch to other legislation. WAWRO & SCHICKLER, *supra* note 93, at 72–87.

141. FILIBUSTERING, *supra* note 5, at 78–95.

142. *See generally* WAWRO & SCHICKLER, *supra* note 93 (discussing the procedures the Nineteenth Century Senate had for expediting passage of bills).

During this era, a majority cloture rule was a solution without a recurring problem.

2. Cloture and Reform in the Senate, 1917–1949

The "classic" Senate, in which filibustering was possible but rare and subject to the patience of the majority, lasted until the early twentieth century. During the presidency of Woodrow Wilson, Senate Republicans played the now-familiar role of a minority party obstructing the agenda of a newly elected Democratic President taking power after a period of divided government. In some cases, defecting Senate Democrats welcomed the cover provided by Republican obstruction. Wilson, however, came to despise the filibuster. The 1916 Democratic Party platform—drafted by Wilson—included an endorsement of a Senate rule limiting filibustering.[143]

The Senate's first "cloture" rule would come soon after the 1916 election. After "a little band of willful men," as Wilson called them, blocked a bill concerning merchant shipping in the final days of the 66th Congress, Wilson called the chamber back into session to adopt its first cloture rule.[144] Senators, however, fearing the concentration of power that would result from the combination of a majority cloture rule, party caucuses that could dictate the floor votes of party members, and a President making aggressive use of patronage and the bully pulpit, only adopted a rule providing for closure by a two-thirds vote.[145] This rule essentially codified the status quo, since it took a third of the chamber or more to sustain a filibuster.[146] Over the next eight years, senators rejected simple majority cloture on three different occasions.[147] At the same time, senators allowed the rule to be undermined by new cloture-proof tactics

143. Koger, *supra* note 72; *see also* Kathleen Bawn & Gregory Koger, *Effort, Intensity and Position Taking: Reconsidering Obstruction in the Pre-Cloture Senate*, 20 J. THEORETICAL POL. 67 (2008); THOMAS W. RYLEY, A LITTLE GROUP OF WILLFUL MEN: A STUDY OF CONGRESSIONAL PRESIDENTIAL AUTHORITY (1975); Gold & Gupta, *supra* note 11, at 217–26.

144. Koger, *supra* note 72, at 220.

145. Gold and Gupta credit the adoption of the 1917 cloture rule to the threat of a "constitutional option" expressed during floor debate over the closed rule. Gold & Gupta, *supra* note 11, at 217–26. This is inconsistent with the near-universal account of the 1917 rule, which attributes the timing of this rule to the firestorm of public opinion excited by Woodrow Wilson. In order for a threatened constitutional option to lead to bargaining and concessions, the opponents of reform must consider the threat credible. There is little evidence to suggest that the senators proposing a constitutional option had the votes to carry through. *See* Koger, *supra* note 72, at 209–20.

146. Koger, *supra* note 72, at 221.

147. Gregory Koger, *Cloture Reform & Party Government in the Senate, 1918–25*, 68 J. POL. 708 (2006).

like filibustering during the opening of the Senate and filing hundreds of amendments to a bill before cloture is invoked.[148]

During the 1920s, senators did embrace a different kind of reform: changing the congressional schedule so there is no longer a filibuster-prone "short" session that continues until the March following an election.[149] Senators were more likely to filibuster during short sessions because their end date was known in advance. This meant that everyone knew how long the filibuster had to last to succeed, how much other legislation was pending and, finally, how much potential collateral damage would be caused by a filibuster. This reform was finally adopted as the 20th Amendment to the Constitution in 1933.[150]

3. The Long Debate on Cloture Reform, 1949–1975

In 1949, after a decade of relative stability, senators renewed their debate over filibustering and reform. This conversation would last for three decades and culminate in four major revisions of the cloture rule. The net result of these revisions was a shift in the threshold for cloture from two-thirds of all voting senators to three-fifths of the entire Senate, and a rule that was a little more foolproof. In the beginning, the cloture reform effort was closely tied to the politics of the civil rights movement, with supporters of civil rights legislation seeking a more restrictive cloture rule and opponents opposing cloture reform.[151] The reform effort persisted after the landmark Civil Rights Act of 1964 and Voting Rights Act of 1965, however, supported by a coalition of left-leaning interest groups and senators.[152]

Much of the effort to change the cloture rule could have been avoided if senators had simply used the conventional option to reinterpret the cloture rule in 1949. In March 1949, reformers set out to close the loopholes in the 1917 cloture rule, particularly the interpretation that held that the rule only applied to bills once they were on the floor of the Senate, but not to motions to bring those bills to the floor.[153] On March 11, 1949, the Senate held a vote on this interpretation of the rule, with Vice President Alben Barkley ruling from the chair that the cloture rule also

148. FILIBUSTERING, *supra* note 5, at 156–57.
149. *Id.* at 41–42.
150. *Id.* at 109–11.
151. ZELIZER, *supra* note 54, at 14–61.
152. *Id.* at 61–173.
153. BINDER & SMITH, *supra* note 57, at 173–75.

applied to motions.[154] However, senators overturned this ruling by a vote of forty-six to forty-one.[155] After this defeat the reformers agreed to a compromise rule, but, since they had lost this critical vote, they had little leverage.[156] The 1949 rule allowed cloture on any "measure, motion, or issue" by two-thirds of the entire Senate, except no cloture was possible on resolutions to change Senate rules.[157]

The reformers' reliance on the constitutional option, rather than the conventional option, began in earnest as a response to the 1949 rule, which seemingly allowed no mechanism for contested rules changes. Efforts in 1953 and 1957 failed, but by 1959 Majority Leader Lyndon Johnson (D-TX) was nervous enough about the danger of a majoritarian coup that he proposed a new compromise rule which lowered the cloture threshold to two-thirds of all senators voting and re-applied the cloture rule to proposed revisions to Senate rules.[158]

Neither the 1959 rule nor the passage of major civil rights legislation quelled the movement for further cloture reform. Reform efforts came up for a vote in 1961, 1963, 1967, 1969, and 1971.[159] But in each case the reformers lost test votes or votes on key parliamentary rulings.[160]

4. The Modern Senate Filibuster, 1975–Present

In 1975, however, the reformers had a clear opportunity for success. The Democratic majority's ranks swelled to sixty members, and Vice President Rockefeller, a Republican, strongly supported cloture reform.[161] For the first time, reformers won a test vote on whether the Senate is a standing body, fifty-one to forty-two.[162] In the ensuing debate, reformers showed little interest in squelching last-gasp filibustering by James Allen (D-AL) and, after negotiations with the leaders of both parties, the reformers settled for the current cloture thresholds: (1) three-fifths of the

154. *Id.* at 173.
155. *Id.*
156. Gregory Koger, Getting Closure: Majority Rule and Cloture Reform in the Senate, 1949–75 (2010) (unpublished manuscript) (on file with authors).
157. *Id.* The reformers might have been better off if they had not agreed to this deal. The vote was close and they could have re-challenged the interpretation of the rule as soon as they gained a little more support.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. 94 CONG. REC. 3854 (1975).

entire Senate to invoke cloture on most measures, and (2) two-thirds of those voting for rules changes.[163]

The 1975 episode illustrates the drawbacks of the constitutional option. It was extremely difficult to build a majority for the constitutional option even though, as Sarah Binder and Steve Smith stress, there were multiple instances between 1959 and 1975 when a simple majority voted to support reform.[164] Moreover, when the reformers finally won their critical vote in 1975, this victory did not directly impose any real limits on filibustering, nor lay out a clear path to voting on rules changes.

The 1975 rule ended the biennial efforts to lower the cloture threshold for the next twenty years, but it also began a period of tightening and clarifying the rule. In 1976 the rule was amended to clarify the process for filing amendments before cloture is invoked.[165] In a June 1976 precedent, the Senate voted that a motion to indefinitely postpone an amendment after cloture was invoked was dilatory. In early 1977, an attempt by then-Majority Leader Robert Byrd to limit post-cloture filibusters by forcing votes on dozens of amendments was blocked by the threat of a filibuster.[166] However, in October 1977, Byrd, working with Vice President Walter Mondale, successfully cracked down on this tactic by ruling the gratuitous amendments dilatory and out of order.[167] This was a clear illustration that senators can limit obstruction using the conventional option without revoking the Senate's standing body status.[168]

More reforms would come under Byrd's leadership. In 1979, the Senate revised the cloture rule to prevent filibusters-by-amendment after cloture had been invoked.[169] The Republican majority agreed to this revision in exchange for Byrd dropping his threat to push through a broader package of reforms by majority vote.[170] Subsequently, Byrd also streamlined the

163. *Id.* For a detailed account of the 1975 contest, see MARTIN GOLD, SENATE PROCEDURE & PRACTICE 60–68 (2d ed. 2008).

164. BINDER & SMITH, *supra* note 57, at 161–85.

165. S. COMM. ON RULES & ADMIN., 112TH CONG., SENATE CLOTURE RULE 209–10 (Comm. Print 2011), http://www.gpo.gov/fdsys/pkg/CPRT-112SPRT66046/pdf/CPRT-112SPRT66046.pdf (prepared by the Congressional Research Service and the Library of Congress).

166. *Senate Filibuster Rule, 1977*, *in* CONGRESS AND THE NATION, 1977–1980, VOL. V: THE 95TH AND 96TH CONGRESSES (5th ed. 1981).

167. *The Nation: Night of the Long Winds*, TIME, Oct. 10, 1977, *available at* http://www.time.com/time/magazine/article/0,9171,915562,00.html.

168. Gold & Gupta, *supra* note 11, at 263.

169. *Senate Filibuster Rule, 1979 Legislative Chronology*, *in* CONGRESS AND THE NATION, *supra* note 166, at 915–19. The rule limited total post-cloture debate to 100 hours and prevented any senator from calling up more than two amendments until every senator had an opportunity to call up amendments.

170. FILIBUSTERING, *supra* note 5, at 178.

nomination process by combining the motion to switch from legislative to executive business (treaties and nominations) and to take up a specific nomination.[171] This reform was accomplished by a vote on a parliamentary ruling in March 1980—*not* a rule change, and *not* at the beginning of a new Congress. In other words, this reform was implemented through the conventional option, with no lasting adverse consequences.

After three decades of debate over the cloture rule change and six years of revision and extension, the Senate stabilized from 1981 to the present. In 1986, senators agreed to reduce post-cloture debate time from 100 hours to thirty hours, but otherwise left the rule intact.[172] In 1995, a proposal by Tom Harkin (D-IA) and Joseph Lieberman (D-CT), which lowered the cloture threshold by three votes after each failed cloture vote until it reached fifty-one senators, failed by a large seventy-six to nineteen margin, after which there was little mention of cloture reform for several years.[173] From 2003 to 2005, the Senate engaged in a well-known argument over judicial nominations that ended in May 2005 with a bargain between a bipartisan group of senators dubbed the "Gang of 14," many of whom were ideologically moderate.[174] The resulting bargain did not result in any rule changes but defused the crisis with informal guarantees of fair behavior. As in previous disputes, the key to this deal was the threat of manipulation of chamber rules by simple majority vote in the middle of a session.

Obviously, the debate over filibuster reform continues. In January 2011, frustrated Democratic senators proposed reforms that would revive attrition-style filibusters by forcing filibustering senators to actually hold the floor of the Senate.[175] These proposals failed forty-four to fifty-one and forty-six to forty-nine, with all votes in favor coming from Democratic senators; these votes suggested near-universal support within the majority party.[176] These margins are somewhat deceptive, however, since these proposals required a two-thirds majority for passage in accordance with an agreement struck between Democratic and Republican leaders. As part of

171. Gold & Gupta, *supra* note 11, at 265–67.

172. Richard F. Fenno, Jr., *The Senate through the Looking Glass: The Debate Over Television*, 14 LEGIS. STUD. Q. 313 (1989).

173. On this 1995 effort, see BINDER AND SMITH, *supra* note 53, at 182–84.

174. Koger, *supra* note 93, at 167–74. *See also* Sarah A. Binder et al., *Going Nuclear, Senate Style*, 5 PERSPECTIVES ON POL. 729, 736 (2007).

175. This effort was preceded by a series of hearings by the Senate Rules Committee. *See, e.g.*, 157 CONG. REC. S33 (daily ed. Jan. 5, 2011) (statement of Sen. Tom Udall (D-NM)).

176. U.S. SENATE ROLL CALL VOTES, 112TH CONG., 1ST SESS. (2011), http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_112_1.htm. Bernie Sanders of Vermont, formally an independent but aligned with the Democratic party, supported both measures. *Id.*

this deal the Senate also enacted standing orders to publicize individual threats to filibuster, known as holds, and to waive the reading of amendments. The reforms were limited because the Democrats lacked the votes to force their reforms through and hence the bargaining leverage to extort major concessions from the minority party.[177]

Democratic frustration clearly increased. On October 6, 2011, Reid led an effort to prohibit motions to suspend the rules and allow nongermane amendments after cloture has been invoked. Notably, Reid and a near-unanimous Democratic majority (Democrats fifty-one to one; Republicans zero to forty-seven) made this reform by overturning both a ruling from the Presiding Officer and the advice of the Senate Parliamentarian based on earlier precedents.[178] While this reform was relatively modest by itself, the willingness of the Democrats to use this method suggested that they were frustrated enough to use parliamentary precedents to reshape Senate process. In May 2012, Reid expressed this frustration, stating, "If there were anything that ever needed changing in this body, it's the filibuster rules, because it's been abused, abused, abused."[179]

In January 2013, Reid negotiated a second set of reforms with minority leader Mitch McConnell (R-KY). This reform package included two rules changes: (1) it streamlined the steps to initiate a conference committee to resolve differences with the House on a bill to a single cloture vote and two hours of debate, and (2) established an expedited process for cloture petitions on agenda-setting "motions to proceed", provided the cloture petition is supported by the leaders and at least seven other members of each party. Additionally, two "trial reforms" were adopted for the duration of the 113th Congress: (1) shortened post-cloture debate for low-level executive positions and district court judges, and (2) simple-majority cloture for motions to proceed provided that each party is allowed to offer two amendments of its choice.[180]

The January 2013 agreement included a pledge of good behavior (that is, no unreasonable obstruction) by the Republicans and a commitment

177. Alexander Bolton, *Reid Must Wrestle with Undecided Dems to Reform Filibuster Rules*, THE HILL (Nov. 30, 2012, 2:42 AM), http://thehill.com/homenews/senate/270237--reid-must-wrestle-with-nine-undecided-democrats-to-reform-filibuster-rules.

178. Ryan Grim & Michael McAuliff, *Harry Reid Busts Up Senate Precedent*, HUFFINGTON POST (Dec. 6, 2011, 5:12 AM), http://www.huffingtonpost.com/2011/10/06/harry-reid-senate-precedent_n_999291.html (updated version).

179. Manu Raju, *Frustrated Harry Reid: Reform the Filibuster*, POLITICO (May 10, 2012, 6:32 PM), http://www.politico.com/news/stories/0512/76189.html.

180. Ryan Grim, et al., *Harry Reid, Mitch McConnell Reach Filibuster Reform Deal*, HUFFINGTON POST (Jan. 24, 2013, 11:43 AM), http://www.huffingtonpost.com/2013/01/24/harry-reid-mitch-mcconnell-filibuster_n_2541356.html (updated version).

from Reid that he would not pursue any conventional option maneuvers during the 113th Congress. Neither promise lasted six months. By mid-July, Reid threatened to impose simple majority cloture on executive branch nominations in order to push through candidates for Secretary of Labor, the directors of the Consumer Financial Protection Bureau and Environmental Protection Agency, and three slots on the National Labor Relations Board.[181] In the hours before the Senate held its showdown votes on a conventional option, Reid struck a deal with some Republican members to approve the held-up nominations, except that two of the three NLRB nominees were swapped for other candidates.[182]

This uneasy peace lasted until November 2013. The Democrats were frustrated by Republican obstruction of three nominations to the U.S. Court of Appeals for the District of Columbia Circuit and the nomination of Representative Melvin Watt (D-NC) to head the Federal Housing Finance Agency, and once again threatened to reinterpret Rule 22 so a simple majority is sufficient to limit debate on nominations. Unlike previous iterations of this game, however, senators did not defuse the crisis with a last-minute bipartisan deal. On November 21 senators voted fifty-two to forty-eight (with three Democratic "nay" votes) to "reinterpret" the three-fifths clause of Senate Rule 22 to mean "simple majority" for all executive nominations and all district and appellate court positions.[183] Note that Reid's proposed reinterpretation excludes Supreme Court nominations without any clear basis for this distinction. The precedent could easily be extended to Supreme Court nominations if the situation arises. The precedent also retains the three-fifths cloture threshold for ordinary legislation.

Filibustering persists in the Senate because no majority of the Senate has ever taken the necessary steps to abolish the practice. The Senate filibuster will be reformed if and when a majority of the chamber decides that they lose more than they gain by tolerating the existing practice. Should that day come, the pro-reform majority will not lack for procedural strategies to limit filibustering.

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181. Humberto Sanchez, *Senate Democrats Set Showdown Over Filibusters of Nominees*, CQ WEEKLY, July 15, 2013, at 1212.

182. *Id.*

183. This process is summarized above in Part I.B.4. *See also* Humberto Sanchez, *A Landmark Change to Filibuster*, CQ WEEKLY, Dec. 2, 2013, at 1992–93.

CONCLUSION

As noted in the Introduction, Senator Reid has recently used the "nuclear option" to abolish the filibuster for judicial nominees.[184] But by using such terms as "nuclear option," reformers imply that the chief obstacle to reform is the set of current Senate rules and procedures. As shown in this Article, there is nothing stopping a majority of senators from enacting further reforms during this current Congressional term or at any point during a subsequent session. In fact, and as evidenced by the conventional option, the existing Senate rules and procedures demonstrate that a majority of senators can enact any reform it desires at any time—that the Senate is ultimately a majoritarian institution. Accordingly, the debate over reform should not "shroud the issue in layer upon layer of procedural complexity," but focus on the merits of any proposed reform and the reasons why senators prefer the status quo or reform.[185]

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184. Kane, *supra* note 4.
185. AMAR, *supra* note 15, at 366.