AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 8: The New Deal and Great Society Era—Powers of the National Government

Senate Hearings on the Filibuster (1957)[1]

The Senate rules regarding filibusters were a topic of recurrent debate in the 1940s and 1950s. Southern Democrats had emerged as the most aggressive defenders of the filibuster, which they used to block votes on civil rights legislation, but the filibuster was valued by conservative and liberal members of both parties. Filibusters were made easier by the routine practice of adjourning debate every weekday evening. When a group of liberal senators filibustered a bill that would facilitate offshore oil drilling in 1953, Republican majority leader Robert Taft explored a cloture motion and a change in the rules to curtail filibusters, but Southern Democrats objected. Finally, Taft brought the filibuster to an end by abandoning courtesy and scheduling twenty-four-hour sessions. Confronted by the need to occupy the floor continuously to sustain the filibuster, the liberals quickly gave in and allowed a vote on the bill.

In 1953, New Mexico Democratic senator Clinton Anderson took a new approach to the problem. On the first day of the new Congress, Anderson moved that the chamber adopt rules to govern its proceedings and, while doing so, to alter Rule XXII to allow a simple majority of the senators to end debate. Taft immediately moved to table the motion, contending that the Senate was a "continuing body" (because two thirds of its members carry over without an intervening election) and as a consequence was always governed by the previously existing rules. Anderson's position would allow the Senate to change the rules of the filibuster by a simple majority vote. Taft's position meant that any proposed change to the rules of the Senate could itself be filibustered and, in practice, would require a supermajority to pass. Only a quarter of the Senate supported Anderson at that time, and the motion was tabled. Anderson tried again in 1957, and this time Vice President Richard Nixon (sitting as the presiding officer of the Senate) supported Anderson's position and ruled that an old Congress could not constitutionally bind a newly elected Congress and that the Senate could adopt new rules by a simple majority vote. Senate majority leader Lyndon B. Johnson led the fight to table the motion, but this time Anderson lost by only a few votes. A number of Republican and Democratic senators introduced resolutions to change the cloture rule, and hearings were held under the joint chairmanship of Georgia's Herman Talmadge and New York's Jacob Javits. The hearings included wide-ranging testimony not only from a number of senators but also from interest groups ranging from the National Association for the Advancement of Colored People and Americans for Democratic Action (both in favor of reform) to the Veterans of Foreign Wars and the American Council of Christian Churches (both opposed). A proposal to change the rule was recommended by the committee, but was never considered by the full Senate.

Is Douglas persuasive that there is a difference between his actions and those of South Carolina's Strom Thurmond? Should the policy goals of the individuals who use the filibuster affect our assessment of the value of the filibuster? Is the filibuster consistent with the larger structure and goals of the American constitutional system? Should legislatures generally make decisions by simple majority rule? Why? When are exceptions from simple majority rule justified? Would it be more or less problematic if the filibuster were consistently used by a particular ideological or partisan faction? Is there anything special about the Senate, or would the exact same considerations hold in considering the possibility of a rule allowing filibusters in the House of Representatives?

[1]Excerpt taken from *Proposed Amendments to Rule XXII of the Standing Rules of the Senate: Hearings before the Committee on Rules and Administration*, U.S. Senate, 85th Cong., 1st Sess. (1957).

SENATOR PAUL H. DOUGLAS (Democrat, Illinois)

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. . . . The best definition of a legislative filibuster which I know is that it is the prolonged discussion of a bill which is intended to prevent a vote.

Both elements of this definition are crucial. . . . It is consequently a device whereby a minority tries to prevent the majority from expressing its will in legislation by interminable talk and debate so that the majority will become tired out and, from fatigue or under the pressure of other business, will give up and lay the pending measure aside.

Mere lengthy discussion is, therefore, not in itself a sure mark of a filibuster. In 1954, for example, I spoke for 3 days against the offshore oil bill. . . . [W]ith my colleagues of the so-called liberal group, we kept the discussion going for approximately a month. We were, therefore, accused of carrying out a filibuster, and when much the same group has attempted to curb the institution of the filibuster, we have been labeled as hypocrites. . . .

But while we were engaging in prolonged discussion intended to educate both the Senate and the country on the facts and principles of complicated problems, we were not seeking to prevent a vote from being taken. We believed that, in these cases, many of our colleagues were not fully acquainted with the real issues which were at stake. And even more, we believed that the public was in the beginning relatively ignorant about the matter. . . . A long discussion was needed to pound the issues home and to dramatize them. In such a struggle, stunts such as Senator Morse's record breaking 22 ½-hour speech, delivered without sitting down or leaving the Chamber, served their turn in breaking through the crust of indifference and centering attention upon the problem.

. . . . Public opinion in a democracy is ultimately decisive, but it takes time, and upon occasion, drama, to stimulate and educate public opinion. . . .

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But the distinction between using this prolonged debate to inform the Senate and the public and thus influence the final vote, on the one hand, and using it to prevent a vote, on the other hand, is also clear. . . . This is the road block which, unless removed, threatens to stop the Congress from meaningful legislation to protect equality of opportunity for millions of our citizens. This is the anachronism which unless changed will perpetuate the incapacity of the legislative branch of our government to meet certain urgent needs of the present day.

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What, in effect, has been done is to adopt John C. Calhoun's theory of concurrent majorities, under which a majority in the country or in Congress is not permitted to pass legislation unless it also meets the approval of the majority of each and every section of the country. The failure of Calhoun and the South to establish this principle prior to 1860 was one of the factors which led to the Civil War. Its quiet adoption in modern times may well lead us to reconsider just who in the long run won that war.

While a determined filibuster can theoretically be used on a variety of subjects, in practice it is probably limited . . . to those questions which a majority of the country as a whole favors, but which the voters of a large section bitterly oppose. In other words, public opinion back home must back up the filibusters so that they do not lose much, if any, political strength by their action. Civil rights legislation furnishes such an issue. . . .

SENATOR JOHN STENNIS (Democrat, Mississippi)

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[T]he United States Senate is the only place in American Government where the States are represented as States.

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The President represents the Nation as a whole, and his responsibilities are to the people. The executive branch, constituting the civil service, is not responsible to the States. Most of the officials in this branch are never elected, nor can the people bring about their removal. . . .

The Members of the House of Representatives, elected directly by the people . . . , representing their districts which are geographical subdivisions of the States, are responsible to the voters or people of the subdivisions.

The Federal courts certainly do not represent the States, and the recent trend in the Supreme Court decisions has certainly shown disregard for the constitutional and historical respect for the integrity and sovereignty of the States.

It is only in the Senate that the States as such have representation. Their rights and powers are deposited in the Senate Chamber. It is their only forum in Government. It is the only place where their rights and powers . . . find their protectors.

If this is true, and it is true, then it must follow that the Senators elected from their States are the trustees of their States' rights and powers.

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They have a responsibility, where legislation involves the creation of new Federal power, to see that their State's rights are protected.

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Now, if the Senate is just another legislative body with no concept beyond that, then rule XXII cannot be sustained. But, if it has any measure of the concepts that I have tried to outline here in the representation of the States, and that is unquestionably true, then there must be special rules to protect those powers and rights of the Senate; and in our form of government we are down now to where this is the last citadel of protection of those rights and powers.

Centralization of government is now the trend in national affairs, and is proceeding at breakneck speed. I think that the Senate is a brake on this serious change in our form of government. . . .

The question in my mind is: Is not a vote to make cloture easier a vote to diminish State power?—and it certainly is.

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In its present form rule XXII assures full and free debate of measures before the Senate. . . . [I]t places some limitation on unreasonable debate.

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If this rule were eliminated, and cloture were made possible by a mere majority vote of the Senate. . . . It would be a mere annex of the House of Representatives, and would be merely another legislative body.

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Minorities have rights which no majority, however large, should ever be permitted to override. . . . Government is established to protect the rights of the minority down to the individual citizen or person. There is justification for any lawful obstruction to the enactment of measures which would trample and override these rights.

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Now, this rule protects minorities. . . . It gives tie to sound the alarm against ill-considered legislation.

A majority vote in the United States Senate does not necessarily represent a majority of the States, nor of the people. . . .

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Prolonged debate, however, has in the past, and may in the future, prevent hasty majority action which is actually contrary to the will of the people. . . .

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[A]lmost every minority group in the country has benefited because of this principle in conducting the Senate's business. And I believe the country as a whole has also benefited.

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Each State should have a voice in national affairs. Through its Senators the voice of the State is heard, and when the senatorial voices are forcibly silenced, that State is silenced. . . .

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Now, I don't know who would be the first victim of the change of this rule, but I am certain that there will be many victims. I am certain, in my mind, that labor will be within a few years the victim of the change of this rule.

I am certain that business as a whole will see the day when it will be the victim of the rule. There will be areas of the country—my area will be a victim of the rule. There will be other areas.

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ANDREW J. BIEMILLER, legislative director, AFL-CIO

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The effect of this [current cloture] rule is that a minority of only 33 Senators can at any time thwart the will of a majority of the Senate, a majority which otherwise could conclusively dispose of the business before the Senate.

[O]ur Nation politically is a liberal democracy. It is founded on the principle that the majority will create and effectuate the policies of the Government. This principle is followed in every phase of our political life and at every level of Government, local, State and National.

The majority of the people who vote on Election Day select the men and women who will make our laws and who will execute them. In our legislatures . . . laws are adopted and issues are resolved on this same principle of majority rule.

Within this framework of majority rule, we retain constitutional guaranties which protect the basic rights of individuals, rights which cannot be taken from them by even the largest of majorities.

With these two principles of majority rule and minority rights, our forefathers created, and we carry on, probably the greatest and most successful system for free Government that the world now knows or has ever known. But in this one instance we can and should correct a glaring example of undemocratic procedure.

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Through the enforcement of rule XXII, majority rule, 1 of the 2 basic principles of our form of Government, is abandoned to minority rule.

It is no defense to say that the rule is seldom invoked. . . .

[I]n 8 or 22 cloture attempts, the proposed legislation which was defeated by being talked to death was civil rights legislation; legislation ironically intended to enhance the protection of minority rights.

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[T]he AFL-CIO's position is dictated primarily by the apparent need for more comprehensive Federal legislation in the field of civil rights. . . .

But the issue goes far beyond civil rights. It extends to all measures of a controversial nature. It is an issue which affects the very fiber of our democratic form of government, and it is one which should be resolved expeditiously, and resolved in favor of majority rule.

. . . . In every situation in which policies are being formed, which affect the life, liberty, and property of people, the right of a minority to speak freely, openly, and at length in an effort to dissuade the majority from its intention is significant and fundamental.

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But once the views of the minority have been presented in detail, and emphasized by its adherents, the purpose of full and fair debate has been fulfilled. Beyond that, the endless repetition of the merits of the issue . . . provide no useful purpose in a democracy, save an undemocratic and tyrannical minority rule.

[T]he cause of democracy can be advanced in the Senate of the United States. It can be done by modifying the chief tool of a minority bent on obstruction.

. . . . Only [by adopting the principle of simple majority rule] can the Senate be made responsive to the will of the majority of the people.

JOSEPH D. HENDERSON, managing director, American Association of Small Business

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The members of the American Association of Small Businesses, Inc., are in favor of the great freedom of the individual Senators to participate in the discussion on the floor of the Chamber, because it has provided minorities with one of their most potent weapons, the filibuster.

Small business is a minority which is having great difficulty in staying in business in many instances because of excessive taxation, extravagance in Government spending, regulations, regimentation, and the unrewarding responsibility of being forced to serve as a tax collector. . . .

Over the years, small-business men have watched with much interest the so-called filibustering on the floor of the Senate because in most instances the individual Senator doing the talking is either for or against legislation which will either be detrimental or favorable to small businesses.

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The Senate of the United States of America is the greatest legislative body in the world. . . .

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The Founders of our Nation did not provide for limiting the debates on any subject by an individual Senator in the United States Senate chambers. They evidently realized that the time might come in the history of our Nation when it would be necessary for a number of our Senators to stand up and debate for or against national legislation for many long hours. . . .

Many statesmen in the United States Senate have successfully filibustered over the years, and it is interesting to note that a number of advocates of changing the rule to limit debates have taken advantage of their senatorial rights of freedom of speech and set new records. So, it would see that it depends upon whose ox is being gored as to whether the ox should be dehorned.

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Freedom of speech is one of the most cherished rights granted to the citizens of the Nation by our Constitution and Bill of Rights. Certain elements in the country would like to see our constitutional guaranties taken away from us. In fact, the forces of infiltration of communistic thinking is becoming more evident as time goes on. Now, it just might be that the proposals to limit the debate on the floor of the Senate could be the beginning of the end of freedom of speech in the Nation.

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. . . . During these uncertain days, when judicial legislation is being forced upon the people and the Congress is being bypassed, the last hope of a great, free people rests on the integrity of the Members of the Senate of the United States of America.