NATIONAL AFFAIRS

The Case for Filibuster Reform

Thomas Harvey and Thomas Koenig

The conservative legal movement has reached its apogee in recent years. Formed in response to the *Roe v. Wade* ruling and other instances of judicial overreach in the 1960s and '70s, the movement can now boast of a two-thirds majority on the Supreme Court and an overturning of *Roe*. This majority has restrained the role of the judiciary in political disputes and consistently sought to restore the separation of powers to our constitutional order. The Court will hear a case this fall that provides them with an opportunity to continue that work of restoration.

Now that the originalist Court has created more space for the people's elected representatives to govern, Congress must fill it. As Yuval Levin has written, Congress is the true "active agent of political change" and the real "moving force in our system of government." Reorienting the courts toward originalism is just "one facet of a broader constitutionalism." The next step for the conservative legal movement is to help usher in a more "functional Congress."

Unfortunately, Levin notes that conservatives "have taken very little interest in reforms that might modernize the institution [of Congress] and strengthen it in relation to the other branches." Indeed, we suspect that the overwhelming majority of conservatives — legal or otherwise — are against filibuster reform. But that anti-reform stance creates a tension. The more conservatives support and help bring about an ascendant separation-of-powers jurisprudence that requires Congress to take the lead in solving the problems of today (while simultaneously precluding the executive branch and federal courts from doing so), the more untenable it becomes for them to simultaneously oppose reform measures that would

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empower lawmakers to rise to the occasion. Compelling Congress to shoulder the burden of its constitutional duty as the prime mover behind political solutions is a worthy goal. But failing to ensure that Congress can bear that burden undermines this pursuit.

Worrying about congressional capacity isn't the Supreme Court's job; it is the responsibility of conservatives in Congress, academia, and public intellectual life. To that end, the right should embrace a filibuster reform fully in accord with the Constitution. Only by granting lawmakers the power to enact more and better legislation can we ensure that both Congress and the Supreme Court are fulfilling their proper roles in our constitutional order.

THE PROPOSAL

We propose that lawmakers create two alternative tracks to pass legislation through the United States Senate. As is true today, a bill could pass the Senate if it enjoys supermajority support (60 or more votes), such that cloture can immediately be invoked. That's track one. Currently, absent a budgetary-exception scenario approved by the parliamentarian, track one is the only way to pass a contested bill through the Senate. Senators opposed to a bill leverage the filibuster to kill the legislation if it cannot garner supermajority support.

Under track two, if a bill enjoys majority support but fails to clear the 60-vote cloture threshold, it would provisionally pass through the Senate sitting as a "Committee of the Whole." Only a simple majority would be required to clear this threshold. Bills reported favorably by the Committee of the Whole will *not* have been formally passed by the Senate for purposes of the Constitution's Article I, Section 7 bicameralism and presentment requirements. Instead, the reformed Senate rules will state that bills passed through the Committee of the Whole may be considered for actual passage at the start of the *next* Congress (the legislative session beginning after the next election). Crucially, only a second simple majority vote — not a supermajority vote — will be necessary to invoke cloture and pass such bills upon reconsideration in the subsequent Congress.

The upshot of track two is simple: If a bill only enjoys support from a narrow majority, it won't be condemned to the legislative graveyard — as is the case today. Instead, it will have to pass the Senate twice, with an election cycle intervening between its first and second passage.

Critics of filibuster reform worry that partisan legislation would be rammed through the Senate every time a different party takes control. Track two allays those fears by ensuring that a party's proposal receives majority support from lawmakers in two consecutive congresses, as well as public support through an election, before it can be enacted into law. By adding this second track, we can avoid both the Scylla of frequent and severe partisan shifts in our law whenever political control changes as well as the Charybdis of today's status quo — under which, absent an emergency, it's nearly impossible to pass meaningful legislation without an increasingly rare supermajority.

Why reform?

Many conservatives are likely to be skeptical of filibuster reform. But there are three compelling reasons to support our proposal: It would concretize political debate by concentrating on Congress, thereby reducing attacks on the Supreme Court; it would empower lawmakers to live up to the responsibilities that the current Court is increasingly imposing on them due to the justices' new separation-of-powers jurisprudence; and it would further the legitimate objectives that conservatives ascribe to the filibuster itself.

First, as Jonathan Rauch has written in these pages, "a hardening of *incoherent* ideological difference" has begun to dominate American political debates in recent years. Our political arguments often revolve around identities and generalized grievances, not actual policies geared toward addressing specific factual developments. That's unfortunate, because the more unmoored from reality our political arguments become, the more extremist and divisive they will be. Reality is nuanced and complex; arguments grounded in it cannot help but follow suit.

Our proposed reform is a procedural mechanism designed to tether political debate and the resulting legislation to reality: It aims to alter the character of elections and the discourse that defines them. If our proposed reform were adopted, campaigns would be less apt to dwell on abstract argumentation and identity, and more likely to address whatever are the most consequential bills that have passed through the Committee of the Whole.

Candidates would have a clear reason to discuss legislation on the campaign trail: If the party supporting those bills retains control of the Senate following the next election, members would be able to

pass them through the chamber. And if they control the House of Representatives and the White House, those bills could actually become law. That would clarify the stakes of elections, focusing voters' attention and requiring candidates to grapple with the particulars of whatever legislation the party in power has provisionally passed through the Committee of the Whole. A candidate can get away with reciting vague talking points and manipulating the electorate's abstract hopes and fears when it's not at all clear what will happen should the candidate win the election. When the only end products of our politics are arguments and posturing, and not substantive laws that will tangibly affect people's lives, voters are inclined to choose the candidates who *sound* the best, rather than those who would *govern* the best. Candidates respond accordingly.

This dynamic would shift drastically if voters had the chance to elect not just talkers, but *legislators* who possess the power to write the laws that will govern people's lives. When it's clear that legislators will in fact have a chance to legislate if elected, voters will come to expect more than non-concrete talk. They'll call on the candidates to be up front about how they intend to vote on the real, high-stakes bills whose fate hinges on the outcome of the election at hand.

Clarifying the stakes of political debates will also decrease the electoral benefits for candidates who employ irresponsible rhetoric. As a result, citizens would need to act more responsibly when stepping into the political realm. Americans rarely act like sober adults in the context of today's national politics because it's been reduced to something of a game. We don't expect sobriety and fair thinking from one another in our capacity as sports fans—sports are entertainment, after all. The same holds true for citizens when politics becomes just another form of entertainment. But if political rhetoric instead pursues not entertainment value, but "the real welfare of the great body of the people," as James Madison put it, attitudes could change. Voters are less likely to revert to childlike behavior when the quality of their lives is actually and obviously implicated.

Conservatives who rightly care about the institutional health of the Supreme Court would also be wise to support this reform. The Court has come under fire as of late from those on the left who vociferously disagree with the merits of its decisions. Claims that "the Court got it wrong" have devolved into "the Court is illegitimate." It's not surprising that the Court hasn't escaped the wrath of political hyperbole:

A political culture that fuses incompetence with zeal doesn't look kindly on a Court that has resisted adopting the markers of that culture.

The Court does not conduct its business on C-SPAN. The justices do not tweet. Recent decisions like the ruling in *Dobbs v. Jackson Women's Health Organization* that overturned *Roe* elevate the underlying tension between a traditionalist institution and today's political culture to the surface: The outlier institution is making decisions with immense, real-world impact.

If the tenor of our politics became more serious and policy-focused with the help of a filibuster reform, hyperbolic attacks on the Court might decrease. So long as Americans dismiss Congress as the locus of policy change, the public will continue to lash out at other institutional actors and deride them as illegitimate when their decisions fail to align with their own political views. A more sober political culture — one that is attentive to real-world facts and problems, partly because the public feels it is capable of addressing them — will not provide fertile soil for vitriolic attacks on the legitimacy of our governing institutions.

What's more, less attention would be paid to the Court if Congress were to reach more substantive outcomes that have an impact on people's lives. This logic should be familiar to legal conservatives: The movement sprang up from the insight that the Court had wrongly crept into matters best left to Congress and the state legislatures.

A second benefit of this filibuster reform is that it would empower Congress to assume the duties granted to it by the Court's new separation-of-powers jurisprudence — duties the legislative branch has traditionally been expected to fulfill under our constitutional order. The Court, led by Chief Justice John Roberts, is in the process of gradually forcing Congress to put up or shut up: John Yoo and Robert Delahunty have noted in these pages that the justices are invoking the major-questions doctrine to curb agency actions that lack congressional authorization. *Chevron* deference has also disappeared from the Court's rulings and could be abolished for good this term. As law professor Mila Sohoni recently put it, the Court's emergent separation-of-powers jurisprudence "plac[es] the onus on today's gridlocked Congress to revisit complex regulatory schemes enacted years or decades ago." The Court is becoming less solicitous of the administrative state's claims to immense authority, instead requiring Congress to speak clearly if it means to give federal agencies many of the awesome powers they purport to possess.

This legal development poses something of a political dilemma for conservatives who have become inured to Congress's current state of ineptitude. It's a dilemma for the same reason that we shouldn't require four-year-olds to drive themselves to school: Imposing responsibilities on those who are incapable of living up to them looks silly at best, immoral at worst. Of course, the Court must adhere to and apply the Constitution, and that entails requiring Congress to fulfill its responsibilities under Article I — even if today's lawmakers do not appear to be ready, willing, or able. It's the job of conservatives outside the Court to ensure that Congress *can* do so.

If we fail to reform the filibuster, Congress will remain feeble, and important policy needs will go unaddressed. As law professors Jody Freeman and David Spence have observed, the administrative state will continue to try to awkwardly leverage "old statutes" to address "new problems" that those laws were not designed to manage. But the Roberts Court will grant less leeway to the administrative state's creativity than previous Supreme Courts. As a result, not much gets done. Important problems will continue to fester, and frustration with the Court will mount.

Some conservatives might respond that all that is required is a bit of patience, for the Court's new posture toward Congress will force congressional action under the existing filibuster. That position, however, requires faith that such pressure will remain concentrated on Congress. But as described above, much of that political frustration has been redirected toward the other branches and threatens to destabilize our institutions without breaking the congressional logjam. Our proposal would not only ease this pressure, but ensure that it remains focused on Congress.

Other conservatives might fall back on the maxim that passing legislation is supposed to be difficult, such that there's no tension to resolve. After all, the Supreme Court has pointed out that "the Framers ranked other values higher than efficiency," and the Roberts Court has explicitly relied on such logic in its separation-of-powers jurisprudence. But the framers safeguarded those higher values — like democratic deliberation and protecting minorities from majoritarian tyranny — through the procedural constraints of passing legislation laid out in Article I, Section 7 of the Constitution. In the words of Christopher DeMuth, the Constitution already imposes "deliberately cumbersome procedures" on Congress. Those requirements themselves protect minority rights. Justice Neil Gorsuch has explained:

> Because men are not angels and majorities can threaten minority rights, the framers insisted on a legislature composed of different bodies subject to different electorates as a means of ensuring that any new law would have to secure the approval of a supermajority of the people's representatives. This, in turn, assured minorities that their votes would often decide the fate of proposed legislation.

Note that the institution of the filibuster is nowhere to be found in Justice Gorsuch's discussion because it was not mentioned in the founding-era debates about how to properly design the national legislature and protect the rights of political minorities. The remedy for majoritarian tyranny, as Madison famously explained in Federalist No. 10, was the combination of a republican form of government and an extended territorial sphere of governance — not a filibuster. Those who claim today that our system of governance would collapse if the filibuster were reformed are effectively accusing Madison and the rest of the framers of committing a massive omission in Article I of the Constitution. We believe Madison had the correct view regarding how best to design a legislative institution. His contemporary critics have yet to meet their burden of persuasion.

The third and final benefit of reform is that it would better advance the most defensible Madisonian arguments put forth by the filibuster's supporters today. Inserting a cooling-off period between congresses addresses conservatives' reasonable concern that absent a filibuster, massive legal changes would occur every few years. If inaction is today's problem, they say, we risk replacing it with the even worse malady of legal instability tomorrow. Under the reform we propose, a party will not only need to seize and then to retain control of the Senate for two straight election cycles, but also to convince both the House and the White House at the time of the bill's second passage if it seeks to undo all that the other party had enacted. That's a tall order, and if a party can meet it, it has earned the right to do some legislating.

This proposal will not only reduce the chances of legal whiplash but also help reshape the legislative process along the lines the framers originally envisioned. As Greg Weiner lays out in his masterful book *Madison's Metronome*, Madison conceived of time and reason going hand in hand: The longer a policy position could withstand scrutiny, the higher the likelihood that it was the product of reason rather than

passion. According to Madison, passions are inherently fleeting. Thus, he championed a system that wouldn't snuff out majority rule but would rather slow its pace. In Madison's eyes, Weiner explains, "time defuses the passions." Thus "majorities should prevail only after cohering for an interval sufficient to ensure that reason rather than impulse guides their will." This is why Weiner himself has written that Madison would not support the present-day iteration of the filibuster, for it has failed to promote "deliberation and moderation."

Implementing our proposal would better align the filibuster with this Madisonian insight: To become law, a bill must enjoy majority support not merely for a fleeting moment, but for a more considerable time. If a bill clears that temporal hurdle, it is more likely to be a product of reasoned deliberation and reflection across the body politic rather than passion alone. Thus, this proposal aims to clear the way not only for more bills, but also for more higher-quality legislation.

DISCONTINUING THE SENATE

The case for filibuster reform is clear — but how could lawmakers implement it?

Our proposal requires amending the rules of the Senate outside the formal amendment processes that those rules prescribe. Rule XXII requires two-thirds support to invoke cloture on a proposed rule change. Further complicating matters, Rule V states that the rules of the Senate continue from one Congress to the next unless they are changed according to the procedures provided by those rules.

But it is not necessary to clear Rule XXII's threshold to bring about the filibuster reform we propose. As legal scholars Martin Gold and Aaron-Andrew Bruhl have argued, the clause of Rule V enforcing the rules against future Congresses is not binding on the Senate unless those rules are voluntarily adopted by the new Congress. Gold and Bruhl are right to reject the constitutionally dubious "continuing body" theory of the Senate, which has been used to justify Rule V. This rejection clears the way for a better pathway for accomplishing filibuster reform: an amendment to the Senate's standing rules by a majority of senators at the opening of Congress when the body operates under general parliamentary law.

Article I, Section 5, Clause 2 of the Constitution provides that "[e]ach House may determine the Rules of its Proceedings, punish its Members

for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member." As Gold explains, the Senate establishes its own rules in four principal ways: the text of the standing rules of the Senate; special proceedings found in rulemaking statutes; precedents interpreting the standing rules, rulemaking statutes, or prior precedents; and unanimous consent orders. For our purposes, the most important sources of Senate rules are the first and third — the text of the standing rules and the chamber's own interpretive precedents. The best pathway to reform targets the first source, amending the standing rules at the beginning of a new Congress.

As is already recognized in the House, a past Senate lacks the constitutional authority to bind future Senates. This challenges a prominent conception of the Senate as a "continuing body." Because of the Senate's unique structure, under which the terms of two-thirds of the members continue from one Congress to the next, the body never "dissolves" in the same sense as the House — or so the theory goes. Rule V attempts to enshrine this principle in the standing rules: "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."

This conception runs afoul of a long-standing legal principle (emphasized by Blackstone in his *Commentaries*) that a current legislature may not bind a future one. During the founding era, as John McGinnis and Michael Rappaport have argued, this non-binding precept was widely acknowledged. Chief Justice John Marshall recognized that the principle lived on in American law as one of legislative equality, though limited by the legal hierarchy between the states and the federal Constitution. For example, the Contract Clause of Article I, Section 10 indicates that the framers grasped, and feared, this legislative principle. The clause would be unnecessary if legislatures were presumed capable of binding their future sittings — ordinary rules of contract law would provide an ongoing constraining force. Instead, the Contract Clause was necessary to displace the ordinary presumption that past legislatures *cannot* bind future ones.

Throughout the Senate's history, prominent senators have spoken eloquently against the questionable theory that the chamber is a continuing body. Some have even initiated rule-change efforts quite similar to those we propose here. Senator Thomas Walsh, a Democrat from Montana, advocated filibuster reform in the early 20th century. He noted that the "idea of a 'continuing' Senate is at war with the theory

of parliamentary government the world over." Legislatures, he argued, come into being and pass out of existence at the conclusion of their terms and are powerless to bind their successors.

Several vice presidents, when presiding over the Senate, have suggested that the chamber operates by general parliamentary rules at the opening of a Congress. Vice President Richard Nixon offered such an advisory opinion at the opening of the 85th Congress, asserting that the Senate is not bound by the rules of a prior Congress unless it agrees to be bound (either tacitly or formally). Rule V, Section 2 was added to the standing rules to resolve this debate. But Gold notes that even at its adoption, dissenting senators contended that the clause should be considered a constitutional nullity.

Bruhl also points out that the continuing-body theory would produce unacceptable results in other legislative contexts. The theory is thus selectively ignored when convenient. For example, in lawmaking, a bill that fails to fully satisfy the requirements of Article I, Section 7 in a single Congress is considered dead upon that Congress's expiration. The House may not resurrect that bill, pass it itself, and treat its passage through the Senate in the *prior* Congress as satisfying the Senate passage demanded by the Constitution. In other words, the continuing-body theory is discarded in the lawmaking context. So too should we discard it in the context of the Senate rules.

Discarding the continuing-body theory offers the best avenue for achieving filibuster reform without meeting Rule XXII's onerous cloture requirements: At the beginning of a Congress, before the tacit or formal readoption of the rules, the Senate should update its standing rules through a majority vote. The House of Representatives, which has long been more forthright about its majoritarian features, does this at the beginning of each Congress, operating under general parliamentary law until it adopts a formal rules package. Senator Walsh attempted such a reform in 1917; his request provides a template for such a process today.

Following Walsh's example, a senator would move for an amendment to Rule XXII on the grounds that the Senate is operating under general parliamentary law. A senator opposed to the motion to update the standing rules would raise a point of order asserting that, per Rule V, Section 2, the Senate is bound by the rules of the prior Congress — and under those standing rules, such an amendment must satisfy the cloture requirements in Rule XXII. The presiding officer would then rule on the

motion: Perhaps he would be convinced by the persuasive authority of Vice President Nixon's 1957 advisory opinion challenging the dubious constitutional foundations of the Senate's continuing-body character, or, conversely, he might find himself bound by the text of Rule V, Section 2. Whichever way the presiding officer rules, that decision is ultimately subject to the final judgment of the Senate as a body. If a majority of the Senate is committed to rejecting the continuing-body understanding, it possesses the authority and procedural ability to do so.

Because our proposal proceeds in two steps, the plan requires two alterations to current Senate practice. First, the Senate would reestablish a Committee of the Whole procedure akin to that of the House of Representatives. Every member of the Senate would be a part of the committee, and it would consider legislation as a body. Following debate, the committee would vote as a body. Crucially, a bill's passage through the Senate sitting as a Committee of the Whole would not constitute its final passage by the Senate for Article I, Section 7 purposes. Second, the Senate would amend Rule XXII to lower the cloture threshold for bills that passed through the Committee of the Whole *in the prior Congress* to a bare majority of the Senate.

We must also address an alternative pathway to reform — the "nuclear option" — that has now been invoked by both parties. This option would likely wreak more havoc on the Senate's internal operations. It either rests on an unjustifiable pretense of "interpretation" utterly divorced from the actual text of the standing rules, or it denies the Senate majority's ability to bind itself *within* a Congress. This is not our preferred route, but recent history — namely Senator Harry Reid's invocation of the nuclear option in 2013 and Senator Mitch McConnell's in 2017 — has rendered it viable. With four sitting Supreme Court justices and many more circuit and lower federal-court judges confirmed under precedents established by invocations of the nuclear option, the cat is out of the proverbial bag.

The Nuclear Option

The nuclear option provides an alternative means of bypassing Rule XXII, in which the Senate exercises its authority as the final interpreter of its rules to establish a binding precedent that supersedes the clear text of the standing rules.

The Senate sitting as a body is the final arbiter of the meaning of its own rules. The judiciary declines to police congressional procedure

under a doctrine known as the "enrolled bill rule," leaving internal Senate practices as the only means by which the body interprets and enforces its rules. The presiding officer is typically the first interpreter of Senate rules, precedents, and customs, but the officer's rulings are appealable to the whole body for a majority vote. The decision of the Senate establishes a precedent of the highest standing, which controls the future decisions of presiding officers interpreting the rules of Senate practice. In fact, as made clear by then-majority leader Reid's invocation of the nuclear option in 2013 (for executive and lower-court nominations) and by then-majority leader McConnell in 2017 (for Supreme Court nominations), interpretive "precedents" with loose — if any — basis in text are controlling over the actual text of the standing rules, including the cloture process of Rule XXII.

The nuclear option entails revision of the rules disguised as interpretation. Supporters of the nuclear option like Gold justify this move on the grounds that a chamber cannot limit its own ability to change its rules *within* a Congress. This proposition enjoys a less-established historical pedigree than the first path we have outlined above. Moreover, it's not clearly discernible from the text of the Constitution, which grants each chamber the authority to make its own rules. That grant of authority can naturally be read as authorizing each chamber to promulgate rules that bind itself.

If the Senate were to once again pursue the nuclear option, its exercise would closely mirror the previous actions of Reid and McConnell. Because our proposed change involves two steps, however, the Senate would need to implement the option in successive Congresses.

The Senate would first establish a Committee of the Whole through a motion for the body to convene as the committee to consider a proposed piece of legislation. An opposing senator would raise a point of order denying the motion's authority under the standing rules. We believe a friendly presiding officer would be justified in denying the point of order on the grounds that the standing rules do not displace the Senate's general parliamentary authority to sit as a committee. The explicit establishment of standing committees in Rule XXV need not be construed to exclude the general parliamentary power to convene as a Committee of the Whole. Should the presiding officer deny the motion nonetheless, the senator motioning to sit as the committee would appeal the ruling to the whole Senate. A majority of the Senate would then

decide the body's authority to debate legislation under such a structure. Once established, the committee would debate the underlying legislation and report the bill favorably by majority vote. That would conclude Senate activity on the bill for the duration of the first Congress.

In the successive Congress, a supportive senator would move for consideration of a bill identical to the one that passed the Committee of the Whole in the prior Congress. Should the bill fail to meet Rule XXII's cloture threshold, the senator would appeal the ruling of the presiding officer and a majority of the Senate would establish an exception for such bills.

The repeated and bipartisan use of the nuclear option, paired with judicial reluctance to police congressional procedure, may limit the practical import of the distinction between the two methods we offer. We still believe that the formal amendment process, however — as opposed to the nuclear option — better safeguards the Senate's legitimacy.

pairing duty with power

Conservatives, rightly skeptical of the unintended consequences of change, should take heed of Madison's insight in Federalist No. 14 that a proposal like ours ought not be rejected "merely because it may comprise what is new." Madison continued:

> Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?

If the filibuster were reformed along the lines we've proposed, Congress would not only have more concrete legislative debates that would tether our political discourse to reality; it would also become more capable of living up to the constitutional role that the Supreme Court increasingly seeks to impose on it. Conservatives who support requiring Congress to fulfill its constitutional duties ought to do their part in granting it the power to do so. Failing to pair duty with power will only serve to further poison our politics — and imperil the Court's constitutional role and legitimacy.