INTRODUCTION

Senate Rule XXII, as currently administered, imposes a de facto supermajority voting rule on the Senate, requiring sixty votes to enact...
legislation, or to provide constitutional advice and consent to a presidential nomination. To be sure, final senate votes on bills and nominations are formally governed by majority rule, but in order to be eligible for a final vote, virtually every proposed nominee or bill must clear a de facto sixty-vote threshold. Over the years, the supermajority threshold, called a filibuster, has evolved from the relatively rare "speaking" filibuster, where a Senator, or a relay of Senators, hijacks the senate floor to block a vote, to the modern "virtual" filibuster, where a single Senator can play at being a virtual pirate, refusing to yield a virtual floor without the inconvenience of actually doing or saying anything.

1. Senate Rule XXII provides:

Notwithstanding ... any other rule of the Senate, at any time a motion [is] signed by sixteen Senators, to bring to a close the debate upon any measure ... pending before the Senate ... the Presiding Officer ... shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertaining that a quorum [of fifty-one Senators] is present, the Presiding Officer shall, without debate, submit to the Senate by a yeo-and-nay vote the question: "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—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—then said measure, motion, or other matter pending before the Senate ... shall be the unfinished business to the exclusion of all other business until disposed of.


2. Article I, Section 5 of the Constitution defines a quorum of the House and Senate as a majority of members, currently 218 in the House and fifty-one in the Senate. Once a quorum is present, no rule of the Senate mandates majority voting. See RULES OF THE SENATE, available at http://www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome. The practice of majority rule is premised on the consensus understanding that, once a quorum exists, a majority of the quorum may act. See United States v. Ballin, 144 U.S. 1, 5-6 (1892) (upholding the constitutionality of a House rule setting quorum at a simple majority of the entire House, and allowing a majority of the quorum to enact legislation). The old rule did not count House members for quorum purposes if they declined to vote on a bill.

STANLEY BACH, CONG. RESEARCH SERV., 98-988 GOV, VOTING AND QUORUM PROCEDURES IN THE HOUSE OF REPRESENTATIVES 4 & n.6 (2001). Federal law makes six justices a quorum of the Supreme Court. 28 U.S.C. § 1 (2012). Thus, under the current rules, legislation may be enacted by as few as 110 House members (approximately twenty-five percent of the body), and statutes struck down as unconstitutional by as few as four Justices (forty-four percent of the body).

3. For an excellent description of the history of the filibuster, see Catherine Fisk & Erwin Chemerinsky, The Filibuster, 49 STAN. L. REV. 181, 187-209 (1997). Recent scholarship in the area owes much to their path-breaking work. The term "filibuster" is derived from Dutch and Spanish slang denoting a pirate or freebooter who hijacks a ship or other cargo. Id. at 192. In the beginning, the term was used in the United States as a derogatory label for nineteenth century southern adventurers seeking to overthrow foreign governments—Cuba and Nicaragua, in particular—to create additional space for slaveholding. Id. In time, it became associated generally with swashbuckling adventurism. Id. Mr. SMITH GOES TO WASHINGTON (Columbia Pictures 1939) depicts a speaking filibuster, with a single heroic Senator refusing to yield the floor in an effort to defend the common good against special interests. Speaking filibusters derailed almost every effort to enact civil rights legislation from 1877-1964, Fisk & Chemerinsky, supra at 198-200, including the
into a de facto supermajority rule for the transaction of almost all senate business.4 I call it the zipless filibuster.5

The basic components of the zipless filibuster emerged in the 1970s as the result of two well-intentioned efforts at reform. The original senate cloture rule governing the old speaking filibuster, dating from 1917, permitted a Senator to delay a vote on an issue by continuing to debate it unless two-thirds of the Senators present and voting opted for cloture. Pre-1970 senate calendar practice, moreover, forbade consideration of other business until the speaking filibuster was resolved one way or another.6 7 Under the old rules, therefore, a filibustering Senator was actually obliged to speak for an extended period of time, supporters of a filibuster had to maintain a substantial physical presence on the floor to assure sufficient votes (one-third of Senators present and voting) to sustain the filibuster against a surprise cloture motion, and the entire Senate was tied up in knots until the filibuster ended or the bill was withdrawn. In the early 1970s, Senate Majority Leader Mike Mansfield, seeking to prevent filibustering Senators from holding the Senate hostage, initiated a two-track senate calendar.8 Under Mansfield’s two-track system, filibusters would be carried on during specific parts of the day, with the remainder reserved for regular senate business, carried out on a separate calendar.9 While Mansfield’s two-track calendar reform succeeded in avoiding general paralysis of the Senate, it also made it unnecessary for a filibustering speaker or group of speakers to hold the senate floor for more than a short period of time each morning before it was time to move on to the other calendar track. Moreover, under a two-track calendar, launching a filibuster no longer had institutional consequences. As far as other senate business is concerned, filibusters became costless.10

“Force Bill” of 1891 and the Anti-Lynching Bill of 1922, id. at 187 n. 25; prevented the arming of merchant ships in 1917 in response to German submarine attacks, id. at 196-97; prevented ratification of the Treaty of Versailles in 1919, blocking American entry into the League of Nations, id. at 187 n. 25; and blocked American membership in the World Court in 1926, id.

4. I am not the first to note the evolution of the filibuster into its current form. See Fisk & Chemerinsky, supra note 3, at 200-09 (describing the emergence of the “stealth” filibuster).

5. For the derivation of “zipless,” see ERICA JONG, FEAR OF FLYING 11-12 (1973).


8. Id. at 15; OLESZEK, supra note 6, at 212.

9. OLESZEK, supra note 6, at 212.

10. The unforeseen consequences of the two-track calendar on the ease with which a filibuster may be mounted have been widely noted. See Josh Chafetz, The Unconstitutionality of the Filibuster, 43 CONN. L. REV. 1003, 1010 (2011); Fisk &
Then, in 1975, reformers, led by Senator Walter Mondale, sought to lower the cloture threshold from two-thirds to three-fifths, but the old guard picked their pockets. Supporters of the filibuster agreed to the three-fifths number, but extracted as a quid pro quo that the cloture number be three-fifths of all Senators—or a fixed sixty votes. It took the reformers a while to realize that under the new “reformed” rule, it was no longer necessary for anyone to support a filibuster on the floor. Since the new cloture threshold was an absolute sixty votes, supporters of a filibuster could stay home in bed and not worry about marshaling one-third of the Senators “present and voting” to defeat a cloture motion. Not only that, reformers agreed to the continuation of the entrenching language in Rule XXII requiring a two-thirds vote of the Senators present and voting to alter the absolute sixty-vote requirement. It was a massacre of the innocents.

The modern zipless filibuster was finally perfected by the informal practice of senate “holds,” often carried out in secret, allowing a single Senator to freeze an issue merely by threatening to mount a filibuster over it. Now it isn’t even necessary for a filibustering Senator to take the floor for a few moments each

Chemerinsky, supra note 3, at 201.


13. See Fisk & Chemerinsky, supra note 3, at 210 (“present and voting” added for clarification).


15. The chronology of cloture “reform” runs from (1) the Senate’s abolition in 1806, at the suggestion of Vice President Aaron Burr, of the motion to call the question by majority vote, leaving no way to cut off Senate debate throughout the nineteenth century; to (2) the adoption of the original version of Rule XXII in 1917, permitting cloture on a two-thirds vote of the Senators present and voting; to (3) a 1949 amendment extending cloture to procedural issues, but at the cost of raising the needed two-thirds vote to the entire Senate; to (4) a 1959 amendment moving the two-thirds rule back to Senators present and voting, but at the cost of an entrenching provision requiring a two-thirds present and voting supermajority to change the Senate voting rules; to (5) a 1975 amendment lowering the cloture vote to three-fifths, but at the cost of going back to three-fifths of the entire Senate, and leaving the entrenching language untouched. Bondurant, supra note 12, at 470-76; Fisk & Chemerinsky, supra note 3, at 185-209; Koger, supra note 11, at 176-79. With reforms like those, you don’t need a problem. We have never found a way back to the pre-1806 practice chronicled in Thomas Jefferson’s vice presidential notebooks where the majority was empowered to cut off debate by calling the question. Early Senate practice is described in Bondurant, supra note 12, at 470-73. The pejorative characterization of the result as a “massacre of the innocents” is my own.

16. The practice of using “holds” to trigger a filibuster is described in Fisk & Chemerinsky, supra note 3, at 203-05.
morning. All the Senator has to do is threaten to do it. So, we have moved from a speaking filibuster with three self-limiting transaction costs—(1) significant physical commitment by both the filibustering speaker and as many as thirty-two supporters; (2) public disclosure by forcing a filibuster to occur in the glare of senate debate; and (3) institutional paralysis during the pendency of a filibuster—to a zipless filibuster with no transaction costs for the participating Senators or the Senate itself. To the nation’s loss, we have learned that when you remove the self-limiting transaction costs from the speaking filibuster, it transforms the Senate into a supermajoritarian body. A first step in loosening the current filibuster-driven stranglehold on the Senate would be to restore the transaction costs associated with a filibuster. Abolish “holds.” Scrap the two-track calendar. Restore the old “present and voting” criteria for cloture votes. Moving back to a single-track calendar and ending the in terrorem power of “holds” could be carried out unilaterally by the current Senate Majority Leader, Harry Reid, or through a point of order raised by a courageous Senator challenging the Chair’s ruling that: (1) Rule XXII can be invoked without taking and holding the floor; and (2) the Senate may move on to other matters while a filibuster is in progress. Under the standard rules of the Senate, rejection of such a point of order by the Chair would be immediately appealable to the body without debate, and would be governed by a fifty-one-vote majority.\footnote{Lloyd Cutler, in his capacity as White House Counsel, laid out the blueprint for the point of order challenge to the filibuster. Lloyd Cutler, The Way to Kill Senate Rule XXII, WASH. POST, Apr. 19, 1993, at A23; see also Martin B. Gold & Dimple Gupta, The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster, 28 HARV. J.L. & PUB. POL’Y 205, 252-60 (2004) (describing the 1975 rules change). For a brief description of the use of the technique in 1975, see Fisk & Chemerinsky, supra note 3, at 212-13.} Changing back to a “present and voting” calculation for cloture votes would require a formal amendment to Rule XXII, requiring the same fifty-one votes if, as I believe, the 1959 entrenching provision is unconstitutional.\footnote{Since the existing text of Rule XXII contains an entrenching provision requiring a two-thirds vote to amend Senate rules, Senators seeking to amend the rule by a simple majority would have to argue that the entrenching provision is unconstitutional. Fisk & Chemerinsky, supra note 3, at 245-52, argue that the entrenching language is unconstitutional. The constitutionality of entrenching provisions is defended in Eric A. Posner & Adrian Vermeule, Legislative Entrenchment: A Reappraisal, 111 YALE L.J. 1655 (2002) (supporting the constitutionality of the rule XXII entrenching amendment), and in John O. McGinnis & Michael B. Rappaport, Symmetric Entrenchment: A Constitutional and Normative Theory, 89 VA. L. REV. 385 (2003) (supporting a narrower class of entrenchment provisions).}

Why, you may ask, should fifty-one Senators buck the leadership and begin the process of reinstating the old speaking filibuster? The most obvious response is that reverting to pre-1970s practice would end the zipless filibuster and restore the three self-limiting principal transaction costs associated with the
speaking filibuster: (1) the physical toll on the filibustering Senators and their supporters; (2) the public nature of the spectacle; and (3) the derailing of the entire institution. While the speaking filibuster was capable of bringing the Senate to a halt on a number of occasions, the transaction costs placed a self-limiting lid on the process. When those self-limiting transaction costs were removed in the 1970s, it was just a matter of time until the zipless virtual filibuster evolved into a standard supermajority voting rule with disastrous effects on the Senate’s ability to transact business.

The second reason is that a general supermajority voting rule in the Senate is unconstitutional, not only because it violates an implicit majority rule requirement lurking in the Constitution’s text, but because it violates the Seventeenth Amendment’s requirement that “each Senator shall have one vote” and deprives each state of “equal suffrage in the Senate” in violation of the Entrenchment Clause of Article V of the Constitution.

If the Senators won’t act to rescue the Senate from its current partisan stalemate, who will? Usually, we rely on a court to rescue us from unconstitutional folly. It asks a lot, though, to expect a judge to overcome Article III standing problems, as well as the political question doctrine, and invalidate an internal senate rule in the teeth of the authorization to each house in Article I, Section 5 to “determine the rules of its proceedings.” While I believe that Article III judges have both the power and duty to disallow an unconstitutional supermajority voting rule in the Senate, I have no illusions that they will use that power in the current judicial climate. If, on the other hand, a conscientious Senator (yes, Virginia, there are conscientious Senators) believes that the filibuster rule, as currently administered, has morphed into an unconstitutional supermajority voting rule, that Senator is duty-bound to support and defend the Constitution by raising and supporting a point of order challenging the current zipless filibuster as unconstitutional.

19. See Fisk & Chemerinsky, supra note 3.
20. The dramatic recent increase in the use of the filibuster is chronicled in Bondurant, supra note 12, at 477-79.
22. U.S. Const. art. V (“[N]o state, without its consent, shall be deprived of its equal suffrage in the Senate.”). The constitutional issue is discussed infra Part I.B.
23. U.S. Const. art. I, § 5. The procedural hurdles to Article III review of the filibuster are discussed infra Part II.A.
24. Senators take an oath prescribed by Article VI “to support this Constitution.” U.S. Const. art. VI; see City of Boerne v. Flores, 521 U.S. 507, 535 (1997) (“Congress . . . has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution.”); I Annals of Cong. 520 (Joseph Gales ed., 1790) (statement of James Madison) (“[I]t is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty . . . .”).
I. THE ZIPLESS FILIBUSTER IS UNCONSTITUTIONAL

A. The Connecticut Compromise: “Equal Suffrage in the Senate”

Seventh-grade civics teaches us that the Constitution was made possible by Roger Sherman’s Connecticut Compromise, providing for a House of Representatives apportioned by population and a Senate in which each state has equal representation regardless of population.25 The Senate is, therefore, intentionally malapportioned, and getting worse. Under the Connecticut Compromise, California, with thirty-seven million residents, is entitled to the same representation in the Senate as Wyoming, with 563,626 hardy souls.26 Under the “one-person, one-vote” lens used by the Supreme Court since Baker v. Carr 27 to test for unconstitutional apportionments, a Wyoming resident’s senate vote is sixty-six times as powerful as the senate vote cast by a Californian.28 Under the Connecticut Compromise, fifty-one Senators, representing twenty-six states with less than twenty percent of the nation’s population, can exercise majority control of the Senate.29 The emergence in recent years of the zipless filibuster allocates even more disproportionate political power to Senators representing sparsely populated states. When the Senate operates under a standard voting rule enabling forty-one Senators,

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27. 369 U.S. 186 (1962).

28. Cf. id. at 207-08 (predicating standing on the relative differences in voting power of citizens in malapportioned districts). The precise mathematical test for the one-person, one-vote rule emerged in Justice Douglas’ opinion for the Court in Gray v. Sanders, 372 U.S. 368, 371, 379-80 (1963), comparing the relative mathematical weight of votes in malapportioned districts. In Wesberry v. Sanders, Justice Black, writing for the Court, rested the one-person, one-vote principle, as applied to Congress, on the requirement in Article I, Section 2 that Representatives be chosen “by the People of the several States.” 376 U.S. 1, 7-8 (1964) (quoting U.S. CONST. art. I, § 2). Citing Gray, Justice Black noted that malapportioned congressional districts give different relative mathematical weights to the votes of citizens residing in different districts. Id. The full exposition of the mathematical test occurred in Chief Justice Warren’s opinion for the Court in Reynolds v. Sims, 377 U.S. 533, 561-64, 568 (1964) (demonstrating the relative mathematical diminution of value of malapportioned votes by comparing the pro-rata value of each vote). Applying the Court’s formula to the present-day Senate: in California, each voter has a one-in-37,000,000 say in the outcome. In Wyoming, each voter has a one-in-564,000 say. Thus, according to Baker v. Carr and its progeny, a Senate vote in Wyoming is sixty-six times more powerful than a California vote.

29. The 2010 decennial census described supra note 26, reports a national population of approximately 310,000,000. The twenty-six least-populous states in reverse order of population contain about eighteen percent of the nation’s population.
representing twenty-one states with about eleven percent of the nation’s population, to block legislation or a nomination favored by fifty-nine Senators representing thirty states with eighty-nine percent of the population, it becomes impossible to describe the resulting process as remotely democratic.

That’s precisely what happened when forty-six Senators outvoted fifty-four to block the requirement of background checks for prospective gun purchasers. Assuming for comparison’s sake that each Senator represents half her state’s population, the forty-six Senators voting against cloture represented only 37.5% of Americans. This minority was able to block a vote despite polls indicating that the legislation was supported by more than ninety percent of the nation’s population. The malapportionment would have been even worse, but two Senators from Texas, with twenty-five million residents, and one from Florida, with eighteen million residents, opposed cloture. If the three large-state Senators had voted for cloture, the vote would still have failed forty-three to fifty-seven.

There’s not much that can be done about the basic fact of a malapportioned Senate. Article I, Section 3, which provides that “the Senate of the United States shall be composed of two Senators from each State . . . and each Senator shall have one vote,” was designed to codify Roger Sherman’s Connecticut Compromise, which gave the large states a House of Representatives apportioned by population, and the smaller states a Senate where each state, regardless of population, would exercise “equal suffrage.” The Entrenchment Clause of Article V purports to lock the Connecticut Compromise into place forever by forbidding any constitutional amendment that would deprive a state without its consent of “its equal suffrage in the Senate.”

30. See Census 2010, supra note 26. The twenty-one least populous states in the 2010 Census contain about eleven percent of the nation’s population. Id.
31. The voting breakdown on the background check cloture motion is summarized at U.S. Senate Roll Call Votes 113th Congress, 1st Session: Vote Summary on the Amendment (Manchin Amdt. No. 715), U.S. SENATE LEGIS. & RECS., http://www.senate.gov/~legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00097 (last visited Nov. 5, 2013). The final reported Senate vote on cloture was forty-six to fifty-four, but Majority Leader Harry Reid shifted his vote at the last minute to enable him to call the matter up again in the future under rules of parliamentary procedure. So, the actual vote was forty-five to fifty-five.
34. U.S. CONST. art. I, § 3.
At the Philadelphia Convention, the Connecticut Compromise pot was sweetened for Virginia, a large slave state, and the other southern slave states by the first sentence of Article I, Section 2, Paragraph 3 (the Three-Fifths Compromise), counting each slave as three-fifths of a person for House apportionment purposes, thereby guaranteeing that the slave states would exercise: (1) artificially bloated voting power in the supposedly properly-apportioned House; (2) disproportionate political power in the malapportioned Senate; and (3) enhanced power in the Electoral College. It’s no coincidence that four of our first five Presidents were Virginians, and that slavery resisted democratic reform.

The Connecticut Compromise that gave us a badly malapportioned Senate and enhanced slave-state representation in the House and the Electoral College was adopted in 1787 by the votes of only five states (Connecticut, North Carolina, Maryland, New Jersey, and Delaware) with about thirty-one percent of the nation’s 1790 population. Four states (Virginia, Pennsylvania, South Carolina, and Georgia) representing forty-one percent of the nation’s population in 1790 voted “no.” Massachusetts abstained. New York was unable to vote at all because two of its three delegates had already walked out in protest over the grant of powers to the national government, leaving Alexander Hamilton without power to cast a vote one way or the other. Not surprisingly, New York took it on the political chin. As a large state with very few slaves, it was harmed by both the malapportioned Senate and the Three-Fifths Compromise. It’s no surprise that James Madison in Federalist No. 62 called the Senate a necessary compromise with principle and warned the nation not to

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37. For the 1790 census figures, see Census of Population and Housing, UNITED STATES CENSUS BUREAU, www.census.gov/prod/www/decennial.html (follow “Census of Population and Housing, 1790” hyperlink; then, under “Return of the whole number of persons within the several districts of the United States,” follow “Full Document” hyperlink). Following the precedent of the Articles of Confederation, the Philadelphia Convention balloted state-by-state, with each state voting in accordance with the wishes of a majority of its delegates. A simple majority of the states voting was sufficient to adopt a provision. The story of the convention’s balloting and deliberations is told in EDWARD J. LARSON & MICHAEL P. WINSHIP, THE CONSTITUTIONAL CONVENTION: A NARRATIVE HISTORY FROM THE NOTES OF JAMES MADISON 91 (2005).

seek any theoretical justification for it. Whatever its unsavory democratic provenance, however, it is impossible to articulate a plausible constitutional objection to the Senate’s malapportioned nature. Given the Entrenchment Clause of Article V, you can’t even argue that the passage of the Fourteenth Amendment’s guarantee of equal protection of the laws somehow amended or eroded Article I, Section 3 on a last-in-time basis. In any event, the Seventeenth Amendment, providing for direct election of Senators in 1913, re-enacted the operative language of Article I, Section 3, awarding each state two Senators, each of whom has one vote. Thus, a malapportioned Senate based on equal suffrage for each state, favoring rural America and disfavoring cities, is an enduring constitutional fact of life. Thank you, Roger.

B. The Zipless Filibuster Erodes “Equal Suffrage in the Senate”

The constitutionality of the sixty-vote zipless filibuster is another matter. Lacking explicit constitutional authorization, the zipless filibuster’s constitutionality has been the subject of a good deal of scholarly comment.


40. Roger Sherman, who brokered the Connecticut Compromise in 1787, also persuaded a reluctant House of Representatives in 1789 to overrule James Madison and list our rights in a single document called the Bill of Rights. Sherman is the only founder to have signed all four of our foundational documents: the Continental Association (1774), the Declaration of Independence (1776), the Articles of Confederation (1777, 1778), and the U.S. Constitution (1787). While he was at it, Sherman served on all three drafting committees for the Bill of Rights: the Committee of Eleven, the three-person Committee on Style, and the House-Senate Conference Committee. Not even Madison served on all three. He skipped the Committee on Style. Once the Constitution was ratified, Sherman served in the House and then in the Senate. He died in 1793, while a member of the Senate. In all those years, apart from his insistence on uniting our rights in a single document, Roger Sherman does not appear to have had a single useful idea. See MARK DAVID HALL, ROGER SHERMAN AND THE CREATION OF THE AMERICAN REPUBLIC (2013); 5 THE ROOTS OF THE BILL OF RIGHTS 1050-1140 (Bernard Schwartz ed., 1980).

41. Among the substantial number of excellent articles debating the constitutionality of the filibuster, I found the following particularly informative: Bondurant, supra note 12 (opposing the constitutionality of the filibuster and the entrenching amendment); Aaron-Andrew P. Bruhl, Burying the “Continuing Body” Theory of the Senate, 95 IOWA L. REV. 1401 (2010) (finding the case for entrenchment undermined by strong arguments that the Senate is not a continuing body); Chafetz, supra note 10 (opposing the constitutionality of the filibuster, but acknowledging the lack of Article III power to invalidate it); Fisk & Chemerinsky, supra note 3 (supporting the constitutionality of the filibuster, but opposing the constitutionality of the entrenching amendment); Michael J. Gerhardt, The Constitutionality of the Filibuster, 21 CONST. COMMENT. 445 (2004) (supporting the constitutionality of the filibuster and the entrenching amendment); McGinnis & Rappaport, Symmetric Entrenchment, supra note 18 (opposing constitutionality of the entrenching provision); John O. McGinnis & Michael B. Rappaport, The Constitutionality of Legislative Supermajority Requirements: A Defense, 105 YALE L.J. 483 (1995) (supporting the constitutionality of supermajority requirements); Posner & Vermeule, supra note 18 (supporting the constitutionality of the entrenching amendment); John C. Roberts & Erwin
and the target of several unsuccessful court challenges. Few, if any, scholars challenge the constitutionality of the old, relatively rare, "speaking filibuster," where a Senator continues to debate a bill for as long as he or she wishes, subject only to a supermajority cloture vote. Rather, scholarly attention has focused on the current zipless version that subjects all senate business, including confirmation votes, to a de facto supermajority voting rule. Academic defenders of the filibuster's constitutionality point to the explicit grant of power to the Senate and House in Article I, Section 5 to adopt their own rules of procedure; to the filibuster's formal status as a procedural debate rule, not a substantive voting regulation; and to the absence of any explicit constitutional provision requiring the Senate (or the House) to act by majority vote in ordinary matters. Defenders argue, as well, that the long historic provenance of a filibuster rule in the Senate argues against efforts to displace it as unconstitutional. Finally, defenders marshal the usual array of process-based objections to any judicial challenge to a congressional rule or practice, ranging from standing to political question. Reported judicial challenges to the filibuster have foundered on these procedural grounds.

Academic challengers to the filibuster's constitutionality argue persuasively that even senate rules adopted pursuant to Article I, Section 5 must comply with the rest of the Constitution. Thus, a Senate voting rule declining to count the votes of white Senators would clearly violate the Fifth Amendment, and would be judicially reviewable. Some challengers argue that a supermajority voting rule violates an implied constitutional duty to use majority voting rules in both the House and Senate, derived as a negative pregnant from the six occasions on which the Founders deemed it appropriate

Chemerinsky, Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule, 91 CALIF. L. REV. 1773 (2003) (opposing constitutionality of the entrenching provision); Teter, supra note 21 (opposing the constitutionality of both the filibuster and the entrenching rule); see also RICHARD S. BETH & VALERIE HEITSHUSEN, CONG. RESEARCH SERV., RL 30360, FILIBUSTERS AND CLOTURE IN THE SENATE (2013); JAY R. SHAMPSANSKY, CONG. RESEARCH SERV., RL 32102, CONSTITUTIONALITY OF A SENATE FILIBUSTER OF A JUDICIAL NOMINATION (2004).


43. Arguments supporting the constitutionality of the filibuster are well summarized in Gerhardt, supra note 41, at 450-55.

44. See supra note 42.

45. See United States v. Smith, 286 U.S. 6 (1932) (construing Senate rules, which provided for reconsideration of an advice and consent vote within two executive sessions, to permit appointment by President on the day of the first vote); United States v. Ballin, 144 U.S. 1 (1892) (upholding the constitutionality of a House quorum rule).

46. See Fisk & Chemerinsky, supra note 3, at 230.
to provide explicitly in the body of the Constitution for supermajority action. Opponents of the filibuster also question the historical provenance of the modern zipless filibuster, noting that until 1806, the Senate appears to have maintained a majority rule for ending debate. Opponents stress, moreover, that the old-fashioned speaking filibuster has been transformed into a modern de facto voting rule that vests a minority of the Senate representing a small minority of the population with veto power over the continued existence of the Article III judiciary and the Article II executive branch. Finally, several academics challenge the constitutionality of the entrenchment language of Rule XXII requiring a two-thirds vote of Senators present and voting to amend the filibuster rule, while conceding the constitutionality of the filibuster itself.

1. Implied Majoritarianism

Apart from calling attention to Madison’s observation in Federalist No. 62 that the Senate would ordinarily operate by majority vote, I have little or nothing to add to the merits of the existing debate over the existence of a constitutionally-implied, majority-voting rule. As others have noted, the implied majority rule argument suffers from both process-based and substantive weaknesses. For one thing, it may well be non-justiciable. If an implied majority voting rule exists in the Constitution, who would have standing to enforce it? In Raines v. Byrd, the Court rejected a constitutional challenge to the presidential line-item veto, holding that individual legislators lacked standing to assert an alleged institutional right belonging to the House of Representatives itself. While it is unclear whether a majority-voting rule is institutional or personal in nature, I can imagine a reluctant judge ruling that

48. Fisk & Chemerinsky, supra note 3, at 188; Teter, supra note 21, at 564-66.
50. See Bruhl, supra note 41; Roberts & Chemerinsky, supra note 41.
51. THE FEDERALIST NO. 62 (James Madison), supra note 39.
52. 521 U.S. 811, 813-14 (1997) (holding that individual legislators lack standing to challenge the constitutionality of the line-item veto).
individual Senators lack standing to challenge the imposition of supermajority voting rules. Moreover, even if standing to assert an implied majority rule exists, judges, respectful of the political question doctrine, may be reluctant to rely on such a thin constitutional reed to override the formal characterization of the filibuster as a debate, not a voting rule, and to interfere with the internal workings of the Senate. That’s just what happened to the most recent judicial challenge to the filibuster.53

The second weakness is substantive. It’s not clear to me that the mere existence of six settings where the original Constitution calls explicitly for supermajorities generates a negative pregnant requiring the use of majority rule everywhere else. It is at least plausible to argue that if the Founders used supermajorities seven times, we mortals can learn from their example and use supermajorities in other very important settings as well.54 Acceptance of the existence of a general implied majority rule requirement in the Constitution would, moreover, call all supermajority rules into question. But Gordon v. Lance 55 teaches that a properly apportioned legislative body may tie its hands in particular settings by enacting supermajority requirements, as long as the supermajority rule is not placed beyond reasonable democratic reconsideration by a future majority.56 So, whatever its political attraction, I fear that the implied majority rule argument proves too little and would be impossible to enforce judicially.

2. Equal Suffrage

More recently, Michael Teter has argued that a sixty-vote supermajority

54.Gerhardt, supra note 41, at 455-56.
55.403 U.S. 1, 2, 7-8 (1971) (upholding constitutionality of state constitutional and legislative supermajority requirement of sixty percent to enact new taxes and incur bond debt).
56. Newton v. Mahoning Cnty. Comm’rs, 100 U.S. 548, 559 (1879) (insisting upon power of subsequent legislature to alter or modify acts of past legislatures); Stone v. Mississippi, 101 U.S. 814, 818 (1879) (“[N]o legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.”); see Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. 416, 431 (1853) (forbidding entrenchment whereby legislatures “disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body”); see also Letter from Legal Faculty to Members of the Senate (Dec. 12, 2012), available at www.brennancenter.org/sites/default/files/legacy/Democracy/Scholars_Re_Constitutional_Authority_121212.pdf (arguing that the Ohio Life holding ought to apply to the U.S. Senate and Rule XXII). Compare McGinnis & Rappaport, supra note 18 (supporting a narrow class of entrenching provisions), and Posner & Vermeule, supra note 18, at 1695 (supporting constitutionality of entrenching amendment in Rule XXII), with Bruhl, supra note 41 (opposing constitutionality of entrenching provision), and Roberts & Chemerinsky, supra note 41 (opposing constitutionality of entrenching provision).
rule violates the textual requirement in Article I, Section 3, Clause 1 and the Seventeenth Amendment that "each Senator shall have one vote." The "one Senator, one vote" language had—and has—two obvious purposes. First, it was designed to alter the practice under the Articles of Confederation and the Philadelphia Convention of conducting state-by-state voting, with a majority of a state's delegation determining a state's single vote. Once the Founders decided to have more than a single Senator from each state, the prospect of deadlock between two Senators from the same state created a risk that certain states would be unable to vote at all. In the end, the Founders moved from state-by-state balloting to individual senatorial voting, with two Senators per state, each of whom was entitled to cast one vote.

I believe that the second purpose was to preserve the integrity of the Connecticut Compromise. Given the volatile political climate of the early Republic, it was not beyond imagination to think that men like James Madison, who tells us candidly in Federalist No. 62 that he considers the malapportioned Senate to be a surrender of principle, would attain a majority in the Senate and adopt a weighted voting system to correct the Senate's democratic faults. Weighted voting allows the individual members of a malapportioned legislature to cast votes weighted to reflect the number of persons the legislator actually represents. Under a potential senatorial weighted voting system, each state would continue to be entitled to two Senators, each of whom would cast one formal vote consistent with the literal text of Article I, Section 3, Clause 1, and the Seventeenth Amendment, but the mathematical weight of each vote would vary with the population of the state represented by the Senator. The textual requirement that "each Senator shall have one vote" was aimed at preventing

57. I found Professor Teter's article particularly helpful, and somewhat discouraging because I thought I had come up with an original idea. The requirement in the Seventeenth Amendment that "each Senator shall have one vote" echoes the identical language in Article I, Section 3, Clause 1 establishing the Senate. See U.S. Const. amend. XVII; Teter, supra note 21.

58. See Teter, supra note 21, at 569-71.

59. The Founders' decision to retain state-by-state voting in the House of Representatives in connection with presidential elections where the Electoral College fails to reach a majority, coupled with the initial failure to distinguish between ballots for President and Vice President, almost sank the new Republic. In the election of 1800, the House took thirty-six ballots to break the tie between Thomas Jefferson and Aaron Burr. See Burt Neuborne, Serving the Syllogism Machine: Reflections on Whether Brandenburg Is Now (or Ever Was) Good Law, 44 Tex. Tech. L. Rev. 1, 5-10 (2011). The Twelfth Amendment was designed to fix the problem.

60. The Federalist No. 62 (James Madison), supra note 39.


62. U.S. Const. amend. XVII (emphasis added); see also U.S. Const. art. 1, § 3, cl. 1.
weighted voting by assuring that the mathematical value of each senatorial vote would remain equal. Any doubt about the meaning of the “one Senator, one vote” language is swept away by the equal state suffrage language of Article V designed to entrench the mathematically equal voting power of each state forever.63

If the purpose of the “one Senator, one vote” language in the Seventeenth Amendment, coupled with the Entrenchment Clause of Article V, is to reinforce the guarantee of mathematically equal state suffrage, the equal suffrage principle must run in both directions. Not only does it forbid a senate rule imposing a weighted voting system that leaves California and Wyoming with equal formal—but unequal mathematical—voting power, it must also preclude already overrepresented small-state Senators from using their malapportioned power to adopt supermajority voting rules that further reduce the relative voting power of Senators from other states. Once again, if we go back to the volatile political climate of the Founding, it was not inconceivable that a Senate made up of a majority of High Federalists, like the folks who brought us the Hartford Convention,64 would adopt supermajority senate voting rules allowing a small number of Senators from populous free states to block legislation supported by an over-represented slave-state majority. If the textual requirement that “each Senator shall have one [equal] vote,” and each state shall have “equal Suffrage in the Senate” is aimed at assuring the mathematical equality of states’ suffrage, a moment’s reflection reveals the mathematical impact of a sixty-vote supermajority rule on a constitutional mandate that each state shall enjoy equal suffrage in the Senate. When, as under the zipless filibuster, the votes of forty-one Senators defeat the votes of fifty-nine Senators on virtually all issues before the Senate, each Senator formally casts “one vote” on an issue, but, as in a weighted voting scheme, the formal votes are not mathematically equal. Applying the mathematical formula used by the Supreme Court in Baker v. Carr65 and its progeny to test whether the “one person, one vote” principle has been violated in apportioning legislative power, the individual votes of each of the forty-one victorious Senators exercises a 1/41 influence on the outcome, while each of the defeated fifty-nine Senators casts a vote valued at 1/59, rendering the vote of the 41 victorious Senators approximately 1.5 times more powerful than the individual votes of the 59 Senators.

63. The Entrenchment Clause of Article V provides that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate,” U.S. CONST. art. V.

64. New England High Federalists met from 1814-1815 in The Hartford Convention to discuss concerns over the allocation of power in the Constitution. See William Edward Buckley, The Hartford Convention, in 2 TERCENTENARY PAMPHLET SERIES 1, 1 (1934). Among the concerns was the effect of the Three-Fifths Compromise in over-representing the slave states. Id. at 22-23.

65. 369 U.S. 186, 207-08 (1962) (holding that state legislative districts must abide by a one-person, one-vote mathematic equality test).
defeated Senators. Such a substantial deviation from mathematically equal voting, where each Senator has an equal 1/50 say, denies each state equal suffrage, and each Senator an equal vote on the particular issue before the Senate in flat violation of Article V, and the “one Senator, one vote” principle of the Seventeenth Amendment.

It is no answer to argue that, unlike a weighted voting system where the inequality is state-specific and permanent, the mathematical deviation caused by a supermajority rule is episodic and random, allowing the same Senators, representing the same states, to cast both enhanced and debased votes over time, depending on their respective positions on the merits. The constitutional mandate of equal state suffrage in the Senate cannot be satisfied by aggregating the sum of a number of mathematically unequal retail votes on varying issues in the hope of reaching an average that satisfies wholesale equality. In testing for unconstitutional vote debasement, it is the particular vote that counts, not an aggregate average of many votes over time. It would, for example, be impossible to defend a voting system that gave two votes to left-handed Senators in even years, and two votes to right-handed Senators in odd years. While such a plan might achieve wholesale equality over time, it guarantees that every election is unequal. That’s exactly what happens in the Senate under the supermajority voting rule imposed by the zipless filibuster.

Nor can one argue that a “one Senator, one mathematically equal vote” rule imposed by Article V and the Seventeenth Amendment casts doubt on all supermajority rules in the face of Gordon v. Lance. The constitutional argument for strict mathematical equality in voting is confined to the Senate, just as the heightened one-person, one-vote requirement imposed by Article I, Section 2 is confined to the House of Representatives. Thus, unlike ordinary settings, the sixty-vote supermajority rule in the Senate flies in the face of textual provisions in the Seventeenth Amendment and Article V requiring each Senator to have one mathematically equal vote.

Moreover, while Gordon v. Lance teaches that a fairly apportioned body

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66. I became a lawyer because they promised me there would be no math. I have, however, checked the calculation with colleagues who claim to be able to count, and they confirm its accuracy.

67. 403 U.S. 1, 2, 7-8 (1971) (upholding West Virginia state constitutional and statutory sixty percent supermajority rule for tax increases and incurring bond indebtedness).

68. A similar analysis derives the extremely strict one-person, one-vote rules governing congressional apportionments from the unyielding language of Article I, Section 2. See Karcher v. Daggett, 462 U.S. 725, 740-44 (1983) (invalidating plan with deviations smaller than the margin of error for counting the population); Kirkpatrick v. Preisler, 394 U.S. 526, 531, 533-36 (1969) (invalidating plan with relatively minor population deviations); Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964) (rejecting a “grossly” disproportionate plan and interpreting Article I, Section 2 in light of its “historical context” to mean that “as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s” (footnote omitted)).
may tie its hands in particular settings by imposing supermajority rules on itself (as long as the supermajority rule is not placed beyond reasonable democratic reconsideration), the United States Senate is not a fairly apportioned body. The sixty-six to one ratio in the relative value of the votes of Senators from Wyoming and California mocks the idea of equal apportionment. In such a radically malapportioned setting, the already favored minority should not be permitted to exploit its advantage to leverage itself into even greater power by imposing and embedding additional supermajority rules. As the Supreme Court noted in the context of separation of powers, placing two layers between an administrative official and the President so dilutes the principle of presidential control as to render it meaningless. Similarly, the presence of two cumulative layers of malapportionment so erodes the principle of democratic representation as to render it meaningless.

The principal weakness in the Seventeenth Amendment and Article V “one Senator, one vote” argument flows from a combination of history and separation of powers. If supermajority Senate voting requirements are so flatly violative of Article I, Section 3, Clause 1, the Seventeenth Amendment, and Article V, how come no Senator has challenged its constitutionality? Maybe it’s because while the unequal voting power may burden one or more of them when they are in the majority, it may benefit them if and when they fall into the minority? If Senators are politically comfortable with a risk-averse supermajority voting rule that promises equal benefits and burdens over time, why should a judge interfere on the basis of a formal “one Senator, one vote” requirement in the Seventeenth Amendment? The best response is to attack a Senator’s power to get comfortable with a zipless supermajority voting system that appears to violate the Connecticut Compromise. The best way to do that would be to stress the role of the Entrenchment Clause of Article V in locking mathematically equal voting procedures into place regardless of the wishes of Senators who feel more comfortable with a risk-averse supermajority safety net.

Article V identifies three unamendable provisions of the Constitution: a ban on interfering with the Atlantic slave trade until 1808; protection against per capita taxation; and a guaranty that “no state, without its consent, shall be deprived of its equal suffrage in the Senate.” The first two unamendable provisions were designed to protect slave owners from interdiction of supply, and from direct property taxes based on slaveholdings. They worked. Slave owners were able to build up a sufficient stock of human chattels by 1808 to

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69. See Gordon, 403 U.S. at 7-8.
71. U.S. CONST. art. V.
make American slavery self-sustaining until the Civil War, and no effort was ever made by Congress to tax slavery out of existence. The purpose of the "equal state suffrage" clause of Article V was, as Judge Bybee has noted, to tie Ulysses to the mast by preventing future generations from tinkering with the principle of equal state suffrage in the Senate at the heart of the Connecticut Compromise. Substantively, the "each Senator shall have one vote" language of the first clause of the second section of Article I and the Seventeenth Amendment, operates in perfect tandem with the "equal Suffrage in the Senate" language of Article V to lock mathematically equal voting rules into the Senate's DNA. The Entrenchment Clause of Article V is explicitly intended to prevent politicians from trading away the Connecticut Compromise for a mess of pottage in the form of risk-averse supermajority voting rules. In short, the Article V equal suffrage language is made of non-waivable iron. If it cannot be amended away by the people, surely it must be impervious to a Senator's willingness to adopt risk-averse mathematically unequal voting rules that scratch my back today and yours tomorrow.

II. IS THE CONSTITUTIONAL REQUIREMENT OF MATHEMATICALLY EQUAL VOTING IN THE SENATE ENFORCEABLE?

As we've seen, four arguments have been made against the mathematically unequal Senate voting rule generated by the zipless filibuster. First, the emergence of a general supermajority voting rule prevents the Senate from carrying out its responsibilities under the Constitution and should be changed as a matter of policy. Second, the zipless filibuster violates an implied requirement of majority rule latent in the constitutional text. Third, it violates the requirement in the Seventeenth Amendment that each Senator shall cast one, presumably equal, vote. Fourth, it violates the unamendable requirement in Article V that each state must enjoy equal suffrage in the Senate.

A. Judicial Remedies

The availability of a judicial remedy turns on which of the four arguments an Article III judge is asked to enforce. Obviously, the policy-based argument is not judicially enforceable—although the degree to which an Article III judge believes that the zipless filibuster is a legislative disaster will color the judge's response to any legal argument.

The implied majority-rule argument is the most difficult to enforce.

74. U.S. CONST. amend. XVII.
75. U.S. CONST. art. V.
judicially.\textsuperscript{76} Uncertainty over whether the right to a majority vote is an institutional prerogative of the Senate or a personal right of a Senator creates a serious standing problem. If, as in \textit{Raines v. Byrd},\textsuperscript{77} the right is deemed institutional, it’s hard to see who has standing to enforce it, other than the Senate itself. If challengers to the zipless filibuster have enough votes to precipitate the Senate into court, they can fix it themselves by internal Senate votes. If they lack the votes to force the Senate to assert its rights, it’s hard to see under \textit{Raines v. Byrd} why an individual Senator has an Article III interest to enforce an alleged institutional right that the Senate is declining to enforce on its own. Nor would individual citizens have standing, since, as in \textit{Hollingsworth v. Perry},\textsuperscript{78} they would be unable to articulate an injury-in-fact not shared equally with all other citizens. Even if standing exists, moreover, I suspect that many conscientious district judges would be loath to interfere with the internal workings of the Senate on the basis of an implied constitutional norm lacking explicit textual support. While I find the negative pregnant argument in favor of majoritarianism appealing on policy grounds, I must admit that it is a thin justification for extremely aggressive judicial behavior.

Shifting to textual arguments under the Seventeenth Amendment and the Entrenchment Clause of Article V improves the argument for justiciability. The “one Senator, one vote” language of the Seventeenth Amendment and the equal state suffrage language of Article V both appear to vest a personal right in each Senator to cast a mathematically equal vote. Using \textit{Baker v. Carr} as a template, a Senator deprived of the right to cast a mathematically equal vote would have standing to enforce a personal right under \textit{Raines}. Moreover, the explicit textual nature of the argument should assuage the political question and balance of power concerns that proved fatal to the claim in \textit{United States v. Ballin}.\textsuperscript{79} Indeed, the textual hook would be stronger than the semantic morass in \textit{Noel Canning}.\textsuperscript{80} Defenders of the zipless filibuster will be driven to extreme formalism in attempting to distinguish the sixty-vote filibuster rule from a general voting rule on the merits. The filibuster rule, they will be forced to argue, is merely a procedural effort to regulate debate falling within the Article

\textsuperscript{76} The case against judicial enforceability of the implied majority rule argument is summarized in Gerhardt, \textit{supra} note 41, at 449 n.8.

\textsuperscript{77} 521 U.S. 811 (1997). \textit{Raines} was a challenge to the exercise of a line-item veto. The challengers argued that Congress had the exclusive power to define a bill for veto purposes. \textit{Id.} at 816. The Court dismissed the challenge on standing grounds. \textit{Id.} at 830.

\textsuperscript{78} 133 S. Ct. 2652 (2013). The \textit{Hollingsworth} Court rejected citizen-standing to defend an initiative banning same-sex marriage in California, even though the California Supreme Court had held that citizens active in the initiative process had standing under California law to defend the initiative’s constitutionality against judicial challenge. \textit{Id.} at 2662-64.

\textsuperscript{79} 144 U.S. 1, 4-6, 11 (1892).

\textsuperscript{80} See \textit{Noel Canning v. NLRB}, 705 F.3d 490, 496-98 (D.C. Cir. 2013) (establishing jurisdiction to decide petitioner’s constitutional claims).
1, Section 5 rulemaking power of the Senate, as opposed to the imposition of a supermajority rule on the merits. Perhaps in years past when the speaking filibuster merely prevented the termination of ongoing debate in a relatively small number of settings, a plausible argument existed that it was merely procedural, not substantive. But in its current zipless mode, where the virtual filibuster functions as a routine roadblock to voting on the merits of every issue with no link to preserving actual debate, no plausible distinction exists between its procedural and substantive impact. At that point, I believe that a judge should recognize an Article III duty sounding in *Marbury v. Madison* to reach the merits.⁸¹

Deep down, though, I'm doubtful that a majority of the current crop of Article III judges has it in them to enforce the Constitution against the strong as well as the weak. The current Supreme Court majority is great at protecting the constitutional rights of the politically powerful, whether it's a corporate right to spend unlimited funds to influence the outcome of elections,⁸² or a state's right to be treated equally in the context of congressional rules designed to protect the voting rights of minorities,⁸³ or the white majority's right to oppose affirmative action,⁸⁴ or the business community's right to be free from pesky aggregate litigation challenging its unlawful conduct.⁸⁵ When the rights of the weak are at stake, though, the current Article III judiciary too often takes a walk. For all the Supreme Court's rhetoric about Guantanamo,⁸⁶ nothing practical has been done judicially to deal with an appalling breakdown in the rule of law that will be viewed in years to come as a second *Korematsu*. And, for all the Court's libertarian rhetoric about protecting suspected drunk drivers

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⁸¹. 5 U.S. (1 Cranch) 137, 141 (1803).
⁸⁴. Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2421 (2013) (reversing Fifth Circuit decision upholding University of Texas at Austin's affirmative action program).
against forced police blood testing,\textsuperscript{87} or preventing the police from putting GPS devices on a suspect's car,\textsuperscript{88} the Court has stood by as the Fourth Amendment collapses under a flood of unlawful government surveillance and Kafkaesque secret national security courts.\textsuperscript{89} My prediction is that the current Supreme Court majority won't do any better in enforcing the equal suffrage aspects of the Connecticut Compromise against senate leaders bent on eroding it for reciprocal bipartisan political advantage.

B. Internal Senate Remedies

That leaves the Senators themselves. It has been argued that that the current sixty-vote rule cannot be changed by anything short of a two-thirds vote of Senators present and voting in accordance with an entrenching provision in Rule XXII.\textsuperscript{90} The argument claims that unlike the House of Representatives, which renews itself completely every two years and must re-enact new rules biennially at the beginning of each new incarnation of the House, the Senate views itself under Senate Rule V as a continuing body with only one-third of its members subject to re-election every two years.\textsuperscript{91} As a continuing body, the argument goes, all existing senate rules remain in effect, including the zipless filibuster, unless altered by a two-thirds vote of Senators present and voting in accordance with the entrenching provision of Rule XXII. The irony of using an entrenching rule to erode the Entrenchment Clause of Article V seems lost on Senators and academics bent on preserving the status quo.

I believe that the entrenchment argument is a red herring.\textsuperscript{92} While the Founders may have had the power to entrench certain aspects of the Constitution against future constitutional amendment under Article V (itself a

\textsuperscript{87} Missouri v. McNeely, 133 S. Ct. 1552, 1556-57, 1568 (2013) (finding warrantless taking of blood samples for drunk driving test is not per se justified by exigency of blood alcohol content dissipation).


\textsuperscript{89} Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1142-44, 1155 (2013) (denying standing to challenge massive NSA surveillance).

\textsuperscript{90} Posner & Vermeule, supra note 18 (supporting constitutionality of entrenching amendment in Rule XXII). The operative language of the entrenching provision in Senate Rule XXII is:

\textit{[I]f that question shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn—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—then said measure, motion, or other matter pending before the Senate . . . shall be the unfinished business to the exclusion of all other business until disposed of.}


\textsuperscript{91} S.R. V, available at http://www.rules.senate.gov/public/index.cfm?p=RuleV ("The rules of the Senate shall continue from one Congress to the next congress unless they are changed as provided in these rules.").

\textsuperscript{92} For a recent refutation of the entrenchment thesis, see Bruhl, supra note 41.
doubtful proposition), ordinary democratic institutions, especially one as malapportioned as the Senate, lack the power to entrench their transitory democratic judgments against reconsideration by future democratic majorities by imposing supermajority rules for repeal or amendment. While the Senate may well be a continuing body for some purposes, it would, in my opinion, be flatly unconstitutional to permit an earlier Senate to dictate to a newly-constituted Senate how the current body should conduct its business. Four Vice Presidents have ruled from the chair in 1957 (Nixon), 1959 (Nixon), 1967 (Humphrey), and 1975 (Rockefeller), and one has ruled less formally in 2005 (Cheney), that, despite the entrenching language of Rule XXII, a majority of the Senate remains free to alter or modify its rules.

To the extent, moreover, that the Senators would be acting to repeal or alter an unconstitutional voting rule, I believe that there can be no doubt of the right—indeed the duty—of the Senate to act immediately by majority vote to redress a violation of the Constitution. Whatever power the entrenching argument may have in ordinary settings, it cannot insulate unconstitutional government conduct from remedial action.

A more difficult question exists concerning the power of the majority to change the Senate’s rules in midsession. While an emerging consensus of scholars recognizes power at the opening of each newly-elected Senate to alter the Senate’s rules by majority vote, once that window of opportunity passes, I believe that the ordinary rules of the Senate (including the entrenching provision) may not be changed until the next window of opportunity after the next Senate elections. Otherwise, rules designed to protect a senate minority become meaningless, since they can be set aside by fifty-one Senators at any

93. See Amar, supra note 35; see also Linder, supra note 35.
94. See Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. (16 How.) 416, 431 (1853) (holding that the Ohio legislature may not bind future legislatures to refrain from taxing a corporate entity). The Court did not enter a majority opinion. Six Justices supported the power of a subsequent legislature to tax a corporation. Id. at 416, 431. Three Justices dissented, reasoning that the original corporate charter constituted a contract within the meaning of the Contracts Clause. Id. at 450-51; see also Newton v. Mahoning Cnty. Comm’rs 100 U.S. 548, 559 (1879) (insisting upon power of subsequent legislatures to alter or modify acts of past legislatures); Stone v. Mississippi, 101 U.S. 814, 818 (1879) ("[N]o legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.").
95. The five vice presidential rulings are discussed in the so-called Brennan Center letter signed on December 12, 2012 by a number of liberal and conservative academics arguing that the Senate may alter its rules by majority vote during the organizational phase of each new Congress. Letter from Legal Faculty to Members of the Senate, supra note 56. In the interest of full disclosure, I signed the Brennan Center letter.
96. The constitutional argument against the entrenching provision is set out in full in Fisk & Chemerinsky, supra note 3, at 245-54.
97. See Bruhl, supra note 41; Fisk & Chemerinsky, supra note 3, at 245-54; Letter from Legal Faculty to Members of the Senate, supra note 56.
time. To my knowledge, however, discussion of the Senate’s power to alter the filibuster rule in midsession has not attempted to distinguish between a policy-driven change of an ordinary rule, and a change driven by constitutional considerations. My view is that policy-driven changes can only occur during the organizational phase of each newly-elected Senate, but that constitutionally-mandated changes may—indeed, must—be permitted to take place at any time. Constitutionally-valid rules that provide protection to the minority, like the old speaking filibuster rule, won’t mean much if the majority may suspend them at will. But where an existing rule is unconstitutional, Senators are duty-bound under their oaths of office to put an end to it as quickly as possible, regardless of when the issue arises. Thus, I believe that a so-called constitutional “nuclear option” exists, granting power to the Senate majority to change or waive the filibuster rule as unconstitutional at any time by a point of order reinforced by a majority vote.98

As a practical matter, of course, any attempt to alter the zipless filibuster by majority vote in the Senate must contend with three practical impediments: (1) the difficulty of assembling fifty-one votes for change; (2) the almost obsessive unwillingness of many Senators to consider changing anything to do with the so-called traditions of the Senate; and (3) a risk-averse view by those in the majority that they may need the filibuster rule someday to protect them when they are in the minority. That’s where an appeal to a Senator’s sworn duty to uphold and defend the Constitution has real bite. As Senator Russ Feingold has noted, a disturbing tendency exists at the legislative level to outsource questions of constitutional law to the judiciary.99 After all, Article III judges tell us ad nauseum that it is their duty—and power—to say what the law is, even when the political branches disagree. Accepting that judges have the final word on constitutionality should not, however, excuse a conscientious legislator from an independent duty to consider the constitutionality of his or her actions, especially when Article III considerations may inhibit—even block—judicial review.100 As Senator Feingold argues so persuasively, it’s long

98. See Cutler, supra note 17; Gold & Gupta, supra note 17. A threat by Majority Leader Reid to invoke the “nuclear option” to abolish the filibuster in connection with the Senate’s consideration of presidential executive appointments induced the Republican minority to agree to a vote on seven pending executive appointments, including two new nominees to the National Labor Relations Board to replace members sitting by contested recess appointments. See Burgess Everett et al., Senate Deal Averts Nuclear Option, POLITICO (July 17, 2013, 6:47 AM), www.politico.com/story/2013/07/senate-nuclear-option-94259.html.


100. See City of Boerne v. Flores, 521 U.S. 507, 535 (1997) (“Congress . . . has not just the right but the duty to make its own informed judgment about the meaning and force of the Constitution.”); 1 ANNALS OF CONG. 520 (Joseph Gales ed., 1790) (statement of James
past time to ask each Senator to confront his or her conscience, and to consider whether the mathematically unequal voting power that inevitably accompanies a supermajority voting rule can be squared with the only remaining unamendable duty under the Constitution—protection of equal state suffrage in the malapportioned Senate. Surely, worrying about the constitutional equality rights of states cannot be confined to an equal right to use cynical tricks to disenfranchise black voters. 101

A BRIEF ADDENDUM

As this article was in the final stages of the editing process, fifty Democratic Senators, joined by two Independents who caucus with the Democrats, driven to distraction by successful Republican filibusters of three highly qualified presidential nominees to the influential D.C. Circuit Court of Appeals, 102 and galvanized by several opinions by ideologically conservative judges that appeared to further weaken Roe v. Wade 103 and others that appeared

Madison) ("[I]t is incontrovertibly of as much importance to this branch of Government as to any other, that this constitution shall be preserved entire. It is our duty . . . .").


In recent years, the eight active judges of the D.C. Circuit have been equally divided between four Republican and four Democratic nominees. The presence, as well, of four senior Republican judges and only two senior Democratic judges (senior judges sit on all but en banc cases) gave the Republicans a mathematical edge in controlling randomly selected three-judge panels, and en banc voting control in most cases because a senior judge who participates on a panel may also participate in the en banc vote. Senate confirmation of the three pending Democratic nominees would shift control of the en banc D.C. Circuit to the Democrats seven to four, and shift the balance on the court from eight Republicans and six Democrats to nine Democrats and eight Republicans, increasing the mathematical odds of a Democratic-controlled panel.

103. Texas has recently enacted a series of laws designed to make it more difficult to
to create additional obstacles to the administration of the Affordable Care Act.\textsuperscript{104} invoked the “nuclear option” in midsession to permit a simple majority to force an up-or-down vote on a presidential nominee to an executive branch position, or to an inferior Article III court.\textsuperscript{105} For the present, Supreme Court nominations, as well as garden-variety legislation, remain subject to the zipless filibuster rules, although now that the elephant’s (or more precisely, the donkey’s) nose is in the tent, I believe it is a matter of time until Supreme Court nominations, and perhaps legislation itself, escape from the filibuster as well.

Opinion is divided on the wisdom of eliminating the filibuster for all presidential nominations, except to the Supreme Court. Supporters of the rule change argue that partisan obstructionism, intensified in recent years, has made it impossible for the President to staff an administration and to enjoy the traditional presidential prerogative of appointing qualified nominees of the President’s choice to the lower federal courts.\textsuperscript{106} Opponents argue that the

\textsuperscript{104} The courts have divided over the constitutionality of provisions of the Affordable Care Act requiring all employers to provide health insurance coverage that includes contraception. The Tenth Circuit ruled that, as applied, the Act violates the religious freedom of small corporate employers. The Supreme Court has accepted review. See Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), \textit{cert. granted}, 2013 WL 5297798 (U.S. Nov. 26, 2013) (No. 13-354). In \textit{Conestoga Wood Specialties Corp. v. Sebelius}, No. 13-1144, 2013 WL 1277419 (3d Cir. Feb. 8, 2013), \textit{cert. granted}, 2013 WL 5297800 (U.S. Nov. 26, 2013) (No. 13-356), the Third Circuit rejected a similar challenge.

\textsuperscript{105} Three Democratic Senators, Carl Levin (Mich.), who had anchored a bloc of Democratic Senators who had been reluctant to alter a tradition of the Senate, and Joe Manchin (W. Va.) and Mark Pryor (Ark.), Democrats from thinly-populated states who face difficult re-election campaigns, voted to retain the zipless filibuster. All forty-five Republican Senators voted to retain Rule XXII, as written. See Jeremy W. Peters, \textit{In Landmark Vote, Senate Limits Use of the Filibuster}, N.Y. TIMES, Nov. 21, 2013, at A1, \textit{available at} http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html.

\textsuperscript{106} For a chart summarizing the use of the filibuster in recent years, see Alicia Parlapiano & Keith Collins, \textit{The Filibuster’s Power to Block Nominees}, N.Y. TIMES, Nov.
change will usher in an era of overly-ideological judicial nominees.  

Two items are worthy of note. First, the entrenchment aspect of the filibuster rule, which would have required sixty-seven votes to amend Rule XXII, played almost no role in the debate. The majority just ran over it. While judicial challenges may lie ahead based on the entrenching rule, the challenges are almost certainly doomed by the political question doctrine, and by prevailing anti-entrenchment constitutional law.

Second, the claimed unconstitutionality of the filibuster did not appear to play a significant role in the debate, although it may have played a minor role in detaching several of the tradition-oriented Democratic Senators like Barbara Boxer (Cal.), Dianne Feinstein (Cal.), and Mary Landrieu (La.) who had joined with Senator Carl Levin (Mich.) at the opening of the session in declining to support filibuster reform.

As a practical matter, even with the demise of the zipless filibuster, the minority party can slow things down by insisting on quorum calls and denying unanimous consent to moving senate business efficiently, but it cannot prevent a vote indefinitely. The principal roadblock to voting on presidential judicial nominees will now become the “blue slip” hold process that, under current practice established by Senator Patrick Leahy (Vt.) as Chairman of the Senate Judiciary Committee, informally allows a Senator from either party to place an indefinite hold on committee hearings in connection with nominees for Article III district judgeships in the Senator’s home state. Unlike the filibuster rule, though, “blue slip” holds are informal exercises in “Senatorial courtesy” (yes, Virginia, there is something called “Senatorial courtesy”), subject to unilateral alteration by a committee chair. Senator Leahy has warned that he will not


108. See supra notes 92-96 and accompanying text for discussion of the entrenchment rule.


countenance "unreasonable" use of the "blue slip" hold process to block a judicial nominee. 111

Maybe elections really will have consequences.

111. Id. Once upon a time, routine "blue slip" holds were available only to members of the President's party, unless the President was nominating an Article III judge belonging to the other party (yes, Virginia, that actually happened from time to time). New York State operated for many years under an informal arrangement that allowed the Senator from the party out of power the ability to propose a nominee to fill every fourth Article III district court vacancy. That's how Justice Sonia Sotomayor was nominated to the U.S. District Court for the Southern District of New York in 1991 by President George Bush. See Kirk Johnson, The Street Fighter and the Professor: Moynihan and D'Amato: A Loyal Pair, N.Y. TIMES, Mar. 15, 1993, at B1, available at http://www.nytimes.com/books/98/10/04/specials/moynihan-pair.html. For a study of the current deeply partisan "blue slip" hold process, see Ryan C. Black et al., Obstructing Agenda-Setting: Examining Blue Slip Behavior in the Senate, 9 FORUM 1 (2011), available at law.wisc.edu/m/9zwjh/.