**Rules, Entrcnchment and the Conscientious Senator**

 The recent debate regarding changing the Senate rules leaves the methods of changing those rules in a state of uncertainty. According to the express terms of the rules themselves, as well as the Senate precedents that have been established over the years, a motion to amend the rules may only proceed to a final vote if two-thirds of Senators voting agree to invoke cloture. The conventional wisdom, or at least the old conventional wisdom, is that the rules are “entrenched” and can only be changed by a supermajority.

 An emerging theory, however, suggests that the rules may be changed by a simple majority under some circumstances. This theory is referred to as the “constitutional option.” According to this theory, which seems to be subscribed to by a number of senators, a Senate majority may—but is apparently not required to—invoke the constitutional option to change the rules on the first day of a new Congress.

 Other senators and scholars believe that the rules may be changed by a simple majority at any time. Under this view, the entrenchment of the Senate rules is unconstitutional, and therefore cannot validly be used to prevent a majority from exercising its power to change the rules if it wishes to do so.

 A variant of this view would go even further and argue that the Senate is constitutionally prohibited from applying supermajority cloture rules, even if a majority of the Senate would like to have such rules. Under this view, a senator has a constitutional duty to vote for majority cloture, even if the senator would prefer supermajority cloture as a matter of policy.

 Below I will try to sort through these alternatives from the point of view of a hypothetical “conscientious senator.”

Determining the Rules

 Lets first consider the language of Article I, section 5, cl. 2, which states that “[e]ach House may determine the Rules of its Proceedings.” This is often referred to as the “Rulemaking Clause,” but it is worth noting that the clause does not refer to making rules. Compare U.S. Const., art. I, sect. 8, cl. 11 (Congress has power to “make Rules concerning Captures on Land and Water”) & cl. 13 (Congress has power to “make Rules for the Government and Regulation of the land and naval forces.”).

 The word “determine” suggests ascertainment, as opposed to “make,” which suggests simply the exercise of legislative will. See U.S. Const., art. I, sect. 2, cl. 3 (specifying the manner in which the populations of the states “shall be determined” for purposes of representation and taxation) & sect. 7, cl. 2 (in cases of veto overrides “ the

Votes of both Houses shall be determined by Yeas and Nays.”). Thus, while one might “determine” the rules in a legislative fashion by prescribing them, one might also “determine” them in a common-law like fashion by considering the practices and precedents of general parliamentary law and applying them to the matter at hand.

 Moreover, the word “rules” suggests general standards or principles that are to be applied in a consistent manner. Jefferson opens his Manual of Parliamentary Practice by stressing the importance of adhering to rules. He quotes the maxim that

nothing tended more to throw power into the hands of administration, and those who acted who acted with the majority of the House of Commons, than a neglect of, or departure from, the rules of proceeding, that these forms, as instituted by our ancestors, operated as a check and control on the actions of the majority, and that they were, in many instances, a shelter and protection to the minority, against the attempts of power.

Jefferson goes on to note that “it is always in the power of the majority, by their numbers, to shop any improper measures . . . , [but] the only weapons by which the minority can defend themselves . . . are the forms and rules of proceeding which have been adopted as they were found necessary, from time to time, and are become the law of the House. . . .”

 In Jefferson’s conception, rules must be “entrenched,” or they would be of little use; indeed, they would not be “rules” at all. What the rules are, he says, is not so important; what is important is that they be fixed so “that there may be a uniformity in proceeding in business not subject to the caprice of the Speaker or captiousness of its members.”

 This is not to say that the rules can never be changed, but it implies that the will of the majority alone is not adequate reason to change them. The power to “determine” the rules of the legislative body is more like the power to “say what the law [of the House] is,” and less like an “unfettered choice” (to use Aaron’s term) to establish whatever rules the majority pleases.

 Seen from this perspective, the Senate rules appear less problematic than the House rules. One may in that regard consult the recent work, Parliament and Congress, by William McKay (former Clerk of the House of Commons) and Charles Johnson (former Parliamentarian of the House of Representatives). It notes that “regular order” in the House has “evolved from the once-traditional and predictable reliance upon standing rules, orders, and practices which presume an ‘open’ amendment process, into whatever ad hoc process the Majority leadership deems appropriate to assure daily majorities and the retention of a political majority into the next Congress.” (p. 44) This is not a compliment.

 Later on the authors (really Johnson) make clear how far the House has departed from Jefferson’s understanding of the “rules of proceeding:”

It cannot be too strongly emphasized that, increasingly in the contemporary U.S. House of Representatives in the last decade, and in contrast to parliamentary bodies over the world, there has been a political majority intent upon restricting debate and minimizing undesirable votes, rather than following established general rules or practices. In fact, this circumvention of other standing rules and practices in furtherance of time and issue certainty has itself become the established practice, regardless of the political majority. Traditional norms which in other parliaments permit the amendment selection process to reside in a non-partisan Chair or which in Congress have been guided by institutionally established precedents based on non-partisan application of germaneness precedent, have given way to processes, depending on Majority party methods of achieving consensus, to minimize spontaneous debate and Minority opportunities, and to maximize Majority party voting majorities.

(p. 429).

 Whether this ad hoc process truly implements the “will of the majority,” as opposed to the will of the Speaker and the House leadership, is (so to speak) debatable. Certainly it does not facilitate consideration of measures that are favored by a majority of the House, but do not command the support of a “majority of the majority.” More to the present point, it deprives the minority of the protection of uniformity in proceeding, thereby undermining the very purpose of having rules of proceeding.

Legal Scholarship

 Generally speaking, legal scholars have agreed that the legislative filibuster, i.e., the requirement of a supermajority to cut off debate and proceed to a final vote on a pending legislative measure, does not violate any constitutional prohibition. Seitz and Guerra go so far as to say that “[t]he academic literature on this subject has uniformly concluded that the filibuster is constitutionally permissible.” At the very least, there appears to be a general consensus on the subject.

 John McGinnis and Michael Rappaport have written broadly in support of the constitutionality of supermajority rules, including those which (unlike the filibuster) require a supermajority for final passage of certain legislation. They argue that the Rules of Proceedings Clause constitutes a broad grant of authority to each house to govern its internal operations. The Constitution contains no textual prohibition on supermajority rules, and they find no implicit principle that prohibits such rules. Specifically, they reject the argument that the Constitution’s explicit supermajority provisions (e.g., for impeachment and treaty ratification) implicitly establish a supermajority rule for all other votes. As they note, “[t]he only inference that can be drawn from the supermajority requirements in the Constitution is that the Constitution itself does not require a supermajority to pass a bill.”

 Using similar reasoning, Catherine Fisk and Erwin Chemerinsky also conclude that the filibuster is constitutional. They rely particularly on the filibuster’s long history in the Senate. Furthermore, they reject attempts to attack the filibuster on majoritarian grounds because (1) the Constitution does not require strict majoritarianism and (2) it is not clear that the filibuster is any more antimajoritarian than other aspects of congressional procedure, such as the committee system.

 Josh’s recent article might seem to take issue with those conclusions (entitled as it is “The Unconstitutionality of the Filibuster”). His objection, however, is not to the filibuster itself, but to its entrenchment. He notes that “I would think it permissible to maintain the sixty-vote requirement for cloture, so long as it was clearly the case that the cloture rule could be changed by a majority vote at any time.” Thus, it appears that he differs from the McGinnis/Rappaport/Fisk/Chemerinsky position (namely that the filibuster is constitutional but, as discussed shortly, its entrenchment is unconstitutional) only to the extent that he does not necessarily find all entrenched rules constitutionally objectionable.

 Josh’s constitutional standard is that (at least with respect to legislation) a “determined and focused majority must be able to get its way in a reasonable amount of time.” Yet it seems to be universally agreed that a majority of the Senate, as a factual matter, can change the cloture rule at any time. This is the import of the article by Martin Gold and Dimple Gupta on the “constitutional option.” They set forth three different ways in which a simple majority could change the cloture rule: (1) a simple majority could vote that the supermajority cloture rule is unconstitutional as applied to motions to change the rules; (2) a simple majority could vote to establish new precedents that constitute de facto rules changes; and (3) a simple majority could vote to enact standing orders which have the effect of amending the Standing Rules.

 As far as I know, no one disputes that a Senate majority has the raw power to accomplish the objectives described by Gold and Gupta. On the other hand, it is equally indisputable that a majority of the Supreme Court could, in effect, nullify any law or eliminate any constitutional right if it so chose. Merely describing the power does not answer the normative question of when it is proper to use that power. Gold and Gupta give little attention to that question.

 As alluded to earlier, the McGinnis/Rappaport and Fisk/Chemerinsky articles argue that the entrenchment of congressional rules is unconstitutional because it violates the principle that one legislature cannot bind another. Just as one legislature cannot enact an unrepealable statute, it cannot enact an unrepealable rule. The subsequent legislature has the same constitutional status as the former legislature and thus must have the same power to change either a law or a rule.

 McGinnis and Rappaport explain that entrenchment of both laws and rules is constitutionally impermissible because the Constitution itself provides the mechanism by which entrenchment can take place. By attempting to entrench a rule, the legislature would be giving it “quasi-constitutive” status, which is only permissible if it follows the process set forth for enacting constitutional amendments.

 Seitz and Guerra, on the other hand, reject the attempt to equate entrenchment of a rule with entrenchment of a law.[[1]](#footnote-1) They accept that the latter is impermissible, but argue that different considerations govern the internal affairs of a legislative body. While an entrenched law would allow a past (and therefore unaccountable) majority to impose substantive policies on future majorities, an entrenched rule merely allows a current (and still accountable) minority to block legislative action.

 Seitz and Guerra emphasize that simple majority rule is entirely inconsistent with Senate practice and precedent. They point out that the Senate has never permitted a simple majority to end debate on a rules change, and they contend that the Senate has repeatedly rejected the argument that supermajority cloture for rules change is unconstitutional. Finally, they argue that the Senate’s supermajority rules and traditions “are wholly consistent with the Framers’ view of the Senate’s unique role.”

 Neither the anti-entrenchment nor the pro-entrenchment constitutional views are wholly satisfying. On the one hand, the notion that the Senate has unlimited power to entrench its rules would seem to lead to absurd results. Could the Senate enact rules that could never be repealed or amended? Could it empower a single Senator (or, for that matter, the Prime Minister of Canada) to block any changes to the rules?

 On the other hand, the anti-entrenchment position has its own weaknesses. It certainly cannot be the case that any proposed rules change must be given an up or down vote by the entire Senate. Like any legislative proposal, it must undergo a process to determine whether it will be brought to the floor. This process might require, for example, that any proposed rules change be submitted to the Rules and Administration Committee and be favorably reported out before it can be considered by the full Senate. Thus, a minority of Senators (the members of the Rules and Administration Committee) would have an effective veto on rules changes.

 It is difficult to see how the entrenchment inherent in such a process can be distinguished from a supermajority vote for cloture. I suppose it might be argued that if the Rules and Administration Committee consistently blocked rules changes favored by a majority of the Senate (or at least a majority of the majority party in the Senate), its membership would be changed over time. But one also might say, as Seitz and Guerra suggest, that a Senate minority which consistently voted against cloture on popular rules changes would face political accountability for its actions.[[2]](#footnote-2) There is no obvious bright line between the (presumably) permissible entrenchment inherent in any legislative process and the supermajority cloture rule.

 This may explain why supporters of majority cloture are drawn to the idea that the Senate is not a continuing body. If the Senate rules automatically expire at the end of each Congress, all entrenching aspects of the prior rules and the “new” Senate can write on a clean slate.

 Advocates of this theory, however, face something of a dilemma. If it is permissible to enact entrenched rules at the start of a new Congress, there must be a flaw in the constitutional attack on such rules. If the Senate can entrench its rules for a Congress, this gives it the power to establish “quasi-constitutive” law, if only on a temporary basis. Moreover, this would mean that the Senate has more power with respect to rules than with respect to legislation—which it cannot entrench even for a temporary period.

 On the other hand, if entrenched rules are constitutionally invalid, it is hard to see the point of saying that the Senate’s rules “expire” at the end of the Congress. Since the Senate would have the exact same power to change its rules in the middle of the Congress as at the beginning, why not just accept that the Senate rules continue from Congress to Congress until changed, which is what the rules say and how the Senate has always treated them?

 One cannot “prove” that the Senate is a continuing body or, for that matter, that the House is a non-continuing body. Both are legal fictions. Truth be told, the House’s non-continuous status seems the more fictitious; for most intents and purposes, the House is just as continuous as, say, the Department of Agriculture. At the same time, there is a solid basis in constitutional structure and purpose for finding the Senate to be relatively more continuous than the House.

 At the end of the day, the conclusion that the Senate is a continuing body, and that the House is not, is based on experience and precedent, not logic. Aaron tries valiantly to demonstrate that the first century and a quarter of the Senate’s history shows only for the proposition that the Senate rules enjoy “mere continuity,” as opposed to “entrenched continuity.” But it has been nearly a century since Senator Walsh first advanced the theory that Senate rules may be changed by a simple majority at the start of a Congress, and the Senate has, ever since, resolutely refused to act upon this theory. Moreover, for decades the Senate rules have expressly provided for both continuity and entrenchment. If this matter is not considered settled as a matter of Senate precedent, it is difficult to see how any issue could be. [[3]](#footnote-3)

 Of course, there is no reason why Senate precedent should be any more immutable than Supreme Court precedent. If a congressional precedent has proved to be unworkable or its rationale undermined by subsequent rulings or developments, surely it can be reconsidered. But reconsidered does not simply mean ignored when convenient. If the Senate is going to reevaluate whether it is a continuing body, it needs to consider the implications. What would overturning its precedent mean for the validity of the rules under which the Senate has operated for all of its history? Could a Senator or staffer be disciplined for violating rules which were not enacted in that Congress? Are there any valid Senate rules in effect today?

 Much of Aaron’s thoughtful article (“Burying the ‘Continuing Body’ Theory of the Senate”) is directed at showing that there is an inconsistency between the House and Senate views of continuity. This is probably true, but it has limited relevance to the validity of the Senate’s precedent. Just as no one would expect the Supreme Court to overturn one of its precedents based on the ruling of a foreign court in a different legal system, the conflict with House precedent is hardly an adequate basis for the Senate to overturn its precedent on continuity.

 Moreover, one should not overstate the internal consistency of the House’s precedents. Consider the following hypothetical dialogue from the opening day of the House:

 Member-elect: I move to raise a question of the privileges of the House.

Clerk: Your motion is out of order. The first order of business is the election of a Speaker.

Member-elect: But the House Rules say that questions of privilege have the highest precedence.

Clerk: I am sorry. There are no House Rules in effect. Under the Constitution, no House can bind another so the rules of the prior House have expired.

Member-elect: Who decided that?

Clerk: That is the longstanding tradition and practice of the House.

Member-elect: It’s not the longstanding tradition and practice of this House. We just assembled fifteen minutes ago.

Clerk: Be that as it may, I am the presiding officer and I rule your motion out of order.

Member-elect: But we didn’t elect you. You were elected by the last House, the one you said couldn’t bind us.

Clerk: That is the longstanding tradition and . . . .

Member-elect: I get it.

The House’s opening day procedures, in other words, have been “determined” by the House as an institution existing over time, not by the particular house which implements them. Moreover, even after the House adopts “new” rules, their content will be identical in most respects to those of the prior House, and the interpretation of and practice under those rules will be governed by precedents established by prior Houses.

The new House, in short, does not write on a blank slate, but operates according to the House’s own “constitution,” a conglomeration of written rules, formal precedents, and informal practices and norms. Indeed, as Aaron says, “[a] chamber’s rules of proceedings are, in a sense, its very own constitution.”

Yet if this is the case, it is hard to see how one can launch a broad-brush attack on the Senate’s rules as quasi-constitutive or suggest, as Aaron does, that the Senate has unconstitutionally arrogated the constitutive power to itself. Instead, it is more accurate to say that determining the rules of proceeding necessarily encompasses a quasi-constitutive power because it requires the legislative body to establish precedents and uniformity of proceeding over time.[[4]](#footnote-4) Indeed, the failure to do so would itself violate the spirit, if not the letter, of the Rules of Proceedings Clause; in the absence of a constitutive framework there would be no rules save the caprice of the presiding and the majority.

Therefore, asking whether the Senate rules or entrenchment are “unconstitutional” is too simplistic. The question would be better asked as how a “conscientious Senator” (to borrow Josh’s term) should go about deciding a particular dispute under the rules. Because the Senator is performing a judicial function, she must take into account the same sort of factors as would a judge—including the canon of constitutional avoidance, the obligation to respect precedent and the need to consider the implications of her ruling on other aspects of the Senate’s “legal system.”

Aaron says that “[a]dherents of the continuing-body idea insist that it would be illegal—not just unwise or impolitic, but illegal—for the majority to change the rules in the face of a filibustering minority.” Although this is in some sense true, I think the use of the word “illegal” here is somewhat misleading. Judges frequently claim that their colleagues are misinterpreting or misapplying the law, but they seldom accuse them of acting illegally.

A more precise statement of the “pro-entrenchment” position would go something like this. The Senate rules explicitly state that it requires a two-thirds vote to end debate on a motion to amend the rules. Longstanding Senate precedent establishes, at a minimum, that the rules continue in force from Congress to Congress (what Aaron calls “mere continuity.”) Therefore, the Senate rule in question must be considered to be in force until it is changed.

Furthermore, while a Senate majority could simply ignore the rules and do whatever it wanted, it would be improper for it to do so. The power to determine the rules of proceedings implies that those rules should be followed, at least in the normal course. In order to justify nullifying a presumptively valid rule, the conscientious Senator needs a powerful justification, particularly when the Senate has repeatedly rejected previous attempts to nullify the rule.

I will now turn to how a conscientious Senator should evaluate claim that a simple majority can invoke cloture with respect to a rules change.

The Conscientious Senator

 Now we come to how our hypothetical conscientious Senator (lets call her Xena) should approach the question of whether to vote for majority cloture on a motion to change the rules. At the outset, it is apparent that Xena’s decision will not be influenced by whether the motion has been made at the beginning of the Congress or at some other time. Xena will distinguish between the issues of continuity and entrenchment, and see that the former is both well-settled under Senate precedent and not seriously vulnerable to a claim of constitutional invalidity. Thus, if the Senate’s rule requiring a supermajority vote on cloture is valid and (in some sense) binding, then it is just as much so at the beginning of the Congress as at any other time.

 Xena must also consider what it means for a Senate rule to be valid or binding. She has, of course, taken an oath to uphold the Constitution and, being conscientious, takes that oath seriously. But she has taken no oath to uphold the Senate rules and therefore it might be argued that she is free to view them, in H.L.A. Hart’s terms, from the “external point of view.” (Xena has memorized The Concept of Law).

 Xena will reject this argument. In the first place, in her capacity as an individual senator, she understands that she is subject to the rules and can be disciplined or expelled for violating them. While in theory she could obey the rules simply because of the possibility of punishment and not out of any sense of obligation, this attitude goes against her conscientious grain.

 Moreover, Xena understands that the Senate rules could not function as a legal system unless at least some senators view them from the internal point of view. In a larger and more complex legal system, it is only necessary (according to Hart) that the official class view the rules from the internal point of view. Since all senators are effectively part of the official class (they are involved in making, interpreting and applying the rules), it would seem that at least a majority of senators would need to view the rules as binding or obligatory. Put another way, how could Xena vote in good conscience to penalize a fellow senator for violating the rules if she did not believe they are binding?

 Like the Discipline Clause, the Rules of Proceedings Clause implies a duty to faithfully apply and follow the rules of the legislative body. As discussed earlier, the very concept of having rules entails a consistency and uniformity of interpretation and application. Therefore, Xena cannot comply with her constitutional obligations unless she realizes that the Senate rules are in some sense obligatory. This means in turn that she is required to follow the rules even when it is not in her interest to do so.. See The Concept of Law 87 (“Hence obligations and duties are thought of as characteristically involving sacrifice or renunciation, and the standing possibility of conflict between obligation or duty and interest is, in all societies among the truism of both the lawyer and the moralist.”).

 Xena may, however, draw a distinction here. While she will recognize an obligation to adhere to the rules of the Senate’s legal system, including its secondary rules of adjudication and change, she may reasonably conclude that the Senate is not constitutionally obligated to maintain the same legal system in perpetuity. After all, if Jefferson did not believe in perpetual constitutions, it would seem odd to cite his Manual for the proposition that the Senate’s constitution need be permanent. Thus, there is always the possibility that the Senate could decide to replace its current constitution with a new one. The criteria for judging the propriety of such a quasi-revolutionary act are beyond the ken of the constitutional lawyer.

 Xena will insist, however, that any attempt to overthrow the Senate Rules must be done openly. So long as those who wish to change the rules purport to act within the existing legal system, they must do so in accordance with the system’s rules of adjudication and change. Under those rules, any attempt to end debate on a proposed rules change requires a two-thirds vote.

 Of course, Xena will accept that a Senate rule is invalid if it conflicts with the Constitution. One can imagine a Senate rule that would clearly be invalid on this basis—for example, a rule that purported to lower the supermajority requirement to approve treaties or override vetoes.

 The cloture rule, however, does not conflict with the Constitution in this direct way. In the first place, the Constitution does not expressly require majority voting on any matter. It is argued that the Constitution implicitly sets a majority voting requirement for matters where no supermajority is specified but, even if one accepts this argument, it only establishes a workable rule for voting on final passage of measures. Decisions about which measures to bring to a vote on final passage involve choosing and prioritizing among a large number of possibilities; such decisions are not susceptible to a majority vote requirement. Moreover, supermajority voting requirements have existed in both the House and Senate for a very long time without raising constitutional objections. For example, the House rule requiring a two-thirds vote to waive a rule dates back to the early 19th Century.

 Thus, Xena cannot accept a simple constitutional rule against supermajority voting. She recognizes, however, the distinction between a ban on supermajority voting per se and the objection that certain supermajority voting requirements will impermissibly entrench the rules. Thus, there is (at least arguably) a tension between the Senate’s authority to establish procedural requirements for bringing measures to a final vote, including requiring a supermajority to end debate, and tis authority to determine the Rules of its Proceedings. The latter includes the authority to make or amend rules, and sufficiently onerous procedural requirements could effectively eliminate that authority.

 On the other hand, it cannot be the case that the Senate is prohibited from entrenching its rules at all. As Josh notes, all procedural rules have the effect of entrenching the status quo to some degree. Unless the Senate is required to allow (immediate) final votes on all proposed rules changes (which, among other things, would give any senator an effective means of tying up Senate business), it must be able to establish procedures that will prevent some proposed changes from coming to a final vote.

 So how is Xena to resolve this dilemma? One possibility is that she can rely on the Senate’s power to replace its rules (or, more precisely, to replace its legal system). The existence of this power, she may reason, will ensure that the Senate’s rules never become so calcified that they prevent it from exercising its constitutional function of determining the rules of its proceedings. Furthermore, because measuring the degree of entrenchment is not merely a matter of evaluating any particular rule or procedure, but requires consideration of all the rules, plus the Senate’s norms, practices and workload, she may conclude that an essentially political remedy is the best solution to the problem.

 Nonetheless, Xena may wish to consider whether a less drastic option exists. Is there a workable test that would allow her to distinguish between constitutionally permissible and impermissible entrenchment? Josh proposes the following test: “a determined and focused legislative majority must be able to get its way in a reasonable amount of time.”

 As Josh notes, this is a standard, not a rule. Applying it will require the exercise of judgment and discretion. This in itself may be something of a problem for Xena. It is all very well for legal theorists to argue that the conscientious application of discretionary legal standards by idealized judges will yield a right answer in every case, but Xena lives in the real world of the U.S. Senate, and there Josh’s standard amounts to an invitation to do whatever the majority feels is in its interest. There is a reason that the cloture rule specifies a two-thirds or three-fifths vote, rather than, say, a “substantial majority.”

 The proposed standard also suffers from a considerable amount of circularity. Let’s say that Bill A has been reported out of committee and cloture motion is filed. How would a senator know that it would be “unconstitutional” to apply a supermajority voting requirement to this motion? A majority may support Bill A, but how do we know that it is “determined and focused”? Presumably if the majority votes to waive the supermajority requirement it is sufficiently determined; otherwise it is not. But this provides no guidance to the conscientious senator like Xena who wishes to decide in accordance with the law.

 Apart from the workability of the standard, Xena will have a hard time justifying it as a matter of constitutional law and Senate precedent. As we have already discussed, neither constitutional text nor legislative practice supports the theory that all measures supported by a majority must be brought up for a vote on final passage. As Aaron notes, “[i]t is almost impossible to argue, in light of the committee system and other mechanisms that structure the legislative process, that there is some constitutional rule mandating that anything favored by the majority must come up for a vote on demand.”

 It is true that the sue of the filibuster as a routine mechanism to block legislation is a comparatively recent phenomenon, but the constitutional significance of this fact and its relationship to Josh’s proposed standard are unclear. After all, if it is constitutional to empower the minority to block a single piece of legislation (or those pieces of legislation which it opposes intensely), under what theory could it be unconstitutional to empower the minority to block all legislation? Indeed, Josh’s proposal would prevent the minority from blocking any legislation, thus depriving it of power that it has explicitly had under Senate rules since 1917 and more debatably has enjoyed for all of the Senate’s history.

 Josh argues that legislative bodies generally have acted to limit minority obstruction at points where it came to threaten the vital interests of the majority. No doubt it is true, although again somewhat circular, that when majorities have found minority obstruction to be intolerable, they have ceased to tolerate it. But this begs the question of what actions a majority may properly take in that instance.

 Moreover, if we grant Josh’s premise that there is a certain level of minority obstruction that would justify the majority in taking corrective action, it is difficult to imagine that one could develop a legal test for identifying that level of obstruction. Merely adding up the number of cloture motions, cloture votes and cloture invocations tells us only a limited amount about whether the chamber’s business is truly being obstructed. It is not the case that the Senate has stopped passing legislation. Indeed, the Senate Majority Leader was recently quoted as saying the following regarding the 111th Congress: “This was by far the most productive Congress in American history, and the lame-duck session we’re finishing was the most productive of its kind.”

 As Wawro and Schickler find in their 2006 study, “Filibuster: Obstruction and Lawmaking in the U.S. Senate,” the systemic impact of the filibuster has not been to paralyze the Senate or render it unable to govern, but to increase the average size of coalitions that support successful legislation. Whether this is a good thing or not may be controversial, but they point out that it does not necessarily make the results less representative or democratic. To the contrary, they argue that a larger coalition may enact policies more reflective of the median voter than would a narrow majority. They also not that “from a separation of powers standpoint, supermajority rule in the Senate is one of the few remaining barriers to presidential dominance in a context of highly polarized parties and unified control of Congress and the presidency.”

 Finally, one should be careful not to overstate the degree of minority obstruction in the contemporary Senate. In significant ways the minority has less power to obstruct than previously. The number of votes required to invoke cloture is lower than it was. Major areas of legislation, such as appropriations, are no longer subject to the filibuster at all. [[5]](#footnote-5)

 All of which suggests to Xena that the question of whether the Senate has become too dysfunctional, or minority obstruction has grown too great, is a political issue, not a legal or constitutional one. Of course, one can still contend that it is unconstitutional to empower the minority to block any legislation for an extended period of time, but this requires acknowledgment that the Senate has acted unconstitutionally for a very long time.

 Moreover, it is not necessary to accept Josh’s proposal in order to sustain the concept of remote majoritarianism, i.e., the principle that there must remain a way for a sufficiently committed and motivated majority to enforce its will, despite the presence of procedural barriers that would normally prevent it from doing so. Xena has already accepted that a Senate majority can legally replace the Senate’s legal system with a new one. If a majority is convinced that the existing system is irreparably dysfunctional, it can overthrow that system without complying with its rules of change. Just as nothing can stop a nation from discarding its old constitution and adopting a new one, so could the Senate scrap its own constitution.[[6]](#footnote-6) Doing so may entail serious costs in terms of legitimacy and stability, but it would violate no legal or constitutional duty.

 Whether or not Xena is prepared to endorse this “nuclear option,” and if so under what circumstances, is a matter for her political judgment. So long as the Senate’s existing legal system remains in place, however, she will recognize an obligation to adhere to its rules, its rules of change (which specify that debate cannot be ended on a proposed rules change without a supermajority vote) and adjudication (which give weight to the Senate’s prior decisions regarding the need for supermajority cloture on rules changes).[[7]](#footnote-7) Therefore, she will not vote for majority cloture, either for a rules change or for ordinary legislation, although she may favor the policy being blocked by the minority.[[8]](#footnote-8)

What Will Xena Do?

Respecting the Senate’s rules of change and adjudication does not mean that Xena is precluded from supporting reforms. On the contrary, Xena will be inclined to support reforms that can be accomplished within the existing legal framework and that will reduce pressure to violate existing rules and norms. This may be viewed as a form of “constitutional avoidance” that enables issues to be resolved without requiring the Senate to rule on the foundational elements of its legal system.

Most obviously, Xena will look for reforms that can command a two-thirds supermajority necessary to invoke cloture. With this level of support, the rules can be changed without violating the existing rules.

An alternative to a formal rules change would be agreement among senators to curb perceived abuses of the rules. In 2005, the so-called “Gang of Fourteen” reached such an agreement regarding filibusters of judicial nominations. This group of senators agreed to oppose attempts to change the filibuster rules outside the existing system (meaning that they would not vote for majority cloture on a rules change), but they also agreed that specific nominees should receive a final vote on confirmation and they announced that judicial nominations in general should be filibustered only in “extraordinary circumstances.”

 The alternative to these types of accommodations would be for a simple majority to impose rules changes unilaterally. Although this has never been done, some will argue that a majority of the Senate now accepts that, in principle, such a step could be taken on the first day of a new Congress. The basis of this argument is that most Republicans were prepared to take such a step in 2005 and that most Democrats were prepared to do so in January 2011. Moreover, the 2011 agreement between the Senate majority and minority leaders implicitly recognizes the possibility of using the “constitutional option” to change the rules by simple majority, although they promise not to do so in the 112th or 113th Congresses.

 The establishment of precedent in the legislative branch is different than in the judicial branch. One cannot rule out the possibility that widespread acceptance of the “constitutional option” could eventually establish a new Senate norm, even though not formally endorsed in a Senate vote. At this point, however, the invocation of the “constitutional option” in repeated failed attempts to impose majority cloture would seem to be a dubious basis for a new Senate precedent. Equally importantly, it is not at all clear how many senators actually endorse the “constitutional option,” or what reasons they would give for doing so.

 If in fact her colleagues seemed intent on establishing such a precedent in the future, Xena would argue that the most legitimate way to make this change would be to amend the Senate rules so that they expressly allowed majority cloture for rule changes proposed on the first day of the new Congress. In other words, the first use of the “constitutional option” would simply be to change the Senate rules so that they reflected the existence of this option. It would not be until the following Congress that majority cloture could be used to make other substantive changes in the rules. In this way, Xena would contend, the Senate majority would avoid any implication that it was changing the rules simply to obtain a temporary advantage.

1. In his article on “statutized rules,” Aaron expressed a similar view, stating that “the case against rules entrenchment is in fact not nearly so strong as the case against legislative entrenchment.” [↑](#footnote-ref-1)
2. Note that political accountability is not necessarily limited to punishment by the electorate. Even if a senator’s constituents agree with, or are indifferent to, the senator’s position on a rules change, there are ways in which the senator’s colleagues can exact retribution as well. [↑](#footnote-ref-2)
3. As Aaron noted in his article on statutized rules, “when squarely faced with votes on the question in 1967, 1969, and 1975, Senate majorities upheld the principle that a simple majority cannot invoke cloture. “ He therefore suggested “the legality of rules entrenchment appears, in the Senate, quite well-settled.”

In his more recent article on the Senate as a continuing body, Aaron amends this somewhat, observing that the precedents have not in fact “settled” the controversy in the Senate.

Both of Aaron’s observations are in a sense correct, which is part of the circularity problem that we face with this issue. Can the Senate be a body of rules if its well-settled precedents do not in fact settle anything? [↑](#footnote-ref-3)
4. As Aaron asks, “doesn’t the fact that the chambers keep voluminous records of internal procedural precedents suggest that they do not view their rules as solely the creatures of current majorities?” [↑](#footnote-ref-4)
5. Thus, while Senator Udall recently pointed to the failure to “properly fund the government” as evidence of the Senate’s dysfunction, he erred in suggesting that this problem could be attributed to the filibuster or minority obstruction. [↑](#footnote-ref-5)
6. In Hart’s terms, a constitution provides a legal system’s ultimate rule of recognition, and therefore is not justified by reference to any external rule or principle. It is accepted because it is accepted. [↑](#footnote-ref-6)
7. To use Hart’s analogy to the rules of games, the Senate may have an unfettered choice as to whether it wishes to play golf or basketball. But if it chooses golf, it has an obligation to apply the scoring rules of golf, and a duty not to use basketball’s scoring rules when they would be more convenient. [↑](#footnote-ref-7)
8. As a practical (as opposed to a legal) matter, the Senate’s rules are only as entrenched as the Senate decides they are to be. Thus, it may strike some as meaningless to ask whether the Senate has an obligation to follow its own rules and precedents regarding entrenchment. The Senate can declare that its rules are entrenched, but the Senate can always choose at a later time not to treat them as entrenched. It may therefore be argued that the Senate has no obligation to follow its own entrenchment rules, although it may voluntarily choose to do so.

Taken to its logical conclusion, however, this argument would seem to undermine all congressional rules. Let’s say the House had a rule forbidding members from wearing hats on the floor (actually it does). A member shows up one day wearing a hat, and argues that there is no “binding” rule against doing so. It is true that the House has declared sometime in the past that members should not wear hats, he argues, but the House is free at any time to repeal this rule, to decline to apply it, or to interpret it as inapplicable to his situation. Thus, there is no obligation not to wear a hat.

The Speaker then rules that the member is in violation of the rule, and the House overwhelmingly votes to sustain the ruling, although a few members who would like to wear hats vote in the negative. The next day the same member appears again wearing a hat. This time, he claims, his position is stronger than it was the day before. True, there is now a precedent directly rejecting his position, but some members agreed with him, and nothing could be clearer than that the House may reconsider its precedents.

It may be objected that this hypothetical confuses the member’s individual obligation with the question of whether the body as a whole is bound by its rules. But I would submit that the hat-wearing member violated not only the rule against wearing hats, but the rules and norms with regard to how the rules themselves may be interpreted and changed. Most members may not care whether hats are worn or not, but they likely would object to a claim that the rule does not ban the wearing of hats when it obviously does. And even if that claim were plausible they would expect the House’s ruling on the claim to settle the matter.

In short, the members see the rules from the internal point of view. They recognize, as a factual matter, that the House has the power to ignore, nullify or wildly misinterpret the rules, but they do not concede that this makes the rules meaningless.

Because Xena takes the rules seriously, she cannot accept the anti-entrenchment position. That position denies the legislature’s power to bind itself, but that power is the essence of adhering to rules. Otherwise one would not have rules, merely predictions. [↑](#footnote-ref-8)