

Burying the “Continuing Body” Theory of the Senate

Aaron–Andrew P. Bruhl*

ABSTRACT: In the U.S. Senate, only one-third of the members stand for election every two years; the rest carry over from one congressional term to the next. In this regard the Senate differs from the House of Representatives, where all members stand for election every two-year cycle. That much is familiar, but what legal consequences flow from this structural difference? According to some legislators, courts, and commentators, this difference is very important in that it makes the Senate, but not the House, a “continuing body.” The continuing-body idea is invoked to defend highly controversial aspects of Senate practice. By far the most familiar context in which the idea arises—and the one with the most potential for generating serious conflict—is the debate over the legality of the filibuster. Under the current Senate rules, it is extremely difficult to restrict or eliminate filibusters, for any attempt to amend the Senate rules can itself be filibustered. Further, precisely because the Senate is considered a continuing body, these nearly unamendable Senate rules never expire but instead remain in effect indefinitely. As a result, the Senate’s supermajoritarian rules are entrenched against future majoritarian change. The continuing-body idea is thus used to justify an outcome that would otherwise seem to conflict with the usual principle that current legislative majorities are not bound by their predecessors’ decisions.

The basic thesis of this Article is that the continuing-body notion, though frequently invoked, cannot withstand scrutiny. I offer several arguments in support of that thesis. The arguments question the premises of the continuing-body idea, attack its supposed conclusions, and demonstrate

* Assistant Professor, University of Houston Law Center. For helpful comments on previous versions, I thank Richard Albert, Ittai Bar-Siman-Tov, Josh Chafetz, Robert Dove, David Dow, Matthew Green, Stephen Huber, Michael Stern, Seth Barrett Tillman, Stephen Vladeck, Howard Wasserman, and audiences at the Southeastern Association of Law Schools Annual Meeting, the University of Houston Law Center, and the University of Texas School of Law (where Mitch Berman was especially generous with comments). Needless to say, the foregoing readers do not necessarily agree with my conclusions, and the responsibility for any errors or misjudgments lies with me. I gratefully acknowledge funding from the University of Houston Law Foundation. I thank Omid Bachari, Niles Illich, and Jerad Najvar for research assistance.

that, if taken seriously, the continuing-body idea has consequences that few of us would accept. If these arguments succeed, then the most immediate consequence would be the loss of the primary contention legitimizing entrenched Senate rules, but there would be other implications for legislative practice as well.

I. INTRODUCTION	1404
II. THE SENATE'S RULES: CONTINUITY AND CONTROVERSY	1410
A. <i>A BRIEF HISTORY OF CONTINUITY</i>	1410
1. In the Beginning: Early Practice	1410
2. Later Developments	1414
3. Contemporary Controversies	1418
B. <i>THE LEGAL ARGUMENTS SURROUNDING REFORM OF SENATE RULES</i> ..	1419
1. The Question of Legality in Extraordinary Senate Reform	1420
2. Majoritarianism	1422
3. Rulemaking Power	1424
4. Anti-Entrenchment (and the Continuing-Body Reply)	1425
III. CONTINUITY, COMMITMENT, AND THE DEAD HAND OF THE PAST SENATE	1427
IV. WHAT DOES IT MEAN FOR THE SENATE TO BE A CONTINUING BODY?	1431
A. <i>CONTINUITY AND IDENTITY</i>	1432
B. <i>WHY DOES THE SENATE'S STRUCTURE MATTER?</i>	1435
1. Continuity of Membership	1435
2. Permanent Quorum	1438
3. Ever-Present Presiding Officer	1440
C. <i>THE (IRRELEVANT) ARGUMENT THAT THE SENATE WAS INTENDED OR DESIGNED TO PROVIDE STABILITY</i>	1442
V. THE INCONSISTENCY OF CONTINUITY	1444
A. <i>PRACTICES REGARDING CONTINUITY IN OTHER CONTEXTS AND WHAT THEY TELL US</i>	1444
1. Lawmaking	1447
2. Contempt of Congress	1448
3. Senate President Pro Tempore	1454
B. <i>WHAT IF THE SENATE TOOK CONTINUITY SERIOUSLY?</i>	1456
VI. IMPLICATIONS AND CONCLUSIONS: TOWARD A MAJORITARIAN SENATE? OR AT LEAST AN ACCOUNTABLE ONE?	1458
A. <i>OPTION 1: END OF THE SUPERMAJORITARIAN SENATE</i>	1459

B. *OPTION 2: INCREMENTAL MOVE TOWARD GREATER MAJORITY*1462

C. *OPTION 3: CONTINUED SUPERMAJORITY UNDER A DIFFERENT LEGAL THEORY*.....1463

D. *OPTION 4: CONTINUED SUPERMAJORITY BY SENATE CHOICE* .1464

I. INTRODUCTION

How long does a legislative body live? Indefinitely, such that today's Congress is the same entity as the 1789 Congress? Or only until the next election, such that every term brings with it not just some new legislators but a new legislature as well?

These questions might seem unduly abstract, but in fact they can have important practical consequences. For example, in a recent dispute over whether presidential advisors had to comply with subpoenas issued by the House of Representatives, a federal court of appeals suggested that the case might become moot when the two-year term of Congress ended.¹ “At that time,” the court said, “the 110th House of Representatives will *cease to exist* as a legal entity, and the subpoenas it has issued will expire.”² The court saw the House as a temporally limited creature, one that “dies” every two years.

Would the court have seen things differently if the Senate had sued? Perhaps surprisingly, the answer might well be yes. Unlike the House, where all members are up for election every two years, the Senate sees only one-third of its members stand for election each cycle.³ For this reason, it is often said that the Senate, unlike the House, is a “continuing body,” such that its subpoenas might have a longer lifespan.⁴

Disputes over the lifespan of congressional subpoenas provide just one example of the influence of the continuing-body notion. The most familiar context in which this idea arises—and the one that seems most likely to generate major conflict—is the debate over the legality of the filibuster, the device by which a Senate minority can extend debate indefinitely and thus prevent a vote on a measure the majority wishes to enact. The filibuster has long been controversial, of course. During President George W. Bush's term, Republican anger over Senate Democrats' filibuster of some judicial nominees brought the Senate to the brink of parliamentary war, complete with threats of a “nuclear option” for changing the rules.⁵ Today, with the

1. *Comm. on the Judiciary v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008).

2. *Id.* (emphasis added).

3. *Compare* U.S. CONST. art. I, § 2, cl. 1 (providing that House members are chosen every second year), *with id.* § 3, cls. 1–2 (providing that senators serve six-year terms with one-third expiring every second year).

4. *E.g.*, *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 512 (1975) (“[I]t appears that the Session in which the House subpoenas were issued has expired. Since the House, unlike the Senate, is not a continuing body, a question of mootness may be raised.” (citation omitted)); *Continuing Effect of a Congressional Subpoena Following the Adjournment of Congress*, 6 Op. Off. Legal Counsel 744, 748–49 & n.11 (1982) (noting the argument that the Senate should have greater ability than the House to enforce subpoenas issued during the prior Congress); *see also infra* text accompanying notes 204–05 (discussing how my approach would handle these issues).

5. *See infra* text accompanying notes 63–66 (describing these incidents).

partisan roles reversed, dissatisfaction over minority obstruction is again creating pressure for reform.⁶

The continuing-body idea plays a pivotal role in the filibuster debate. It enters the discourse in the following way:

Q: Why can a Senate minority filibuster?

A: Because the Senate rules permit it. The rules provide that ending debate (i.e., invoking “cloture”) on a bill or a nomination requires sixty votes, not just a majority.⁷ So a minority of the chamber can effectively block action.

Q: Why can’t the Senate majority, if it wishes, change the cloture rule, so that debate is easier to cut off? To be sure, senators might hesitate before changing the rules, as they might be unsure whether doing so is the right course as a matter of policy or prudence. Nonetheless, the Senate rules can be changed by a majority, correct?

A: It is true that an actual vote to amend the Senate rules requires only a majority to succeed.⁸ But getting the Senate to hold a vote is difficult because the attempt to change the rules, including the cloture rule, can *itself* be filibustered. Under the current Senate rules, ending debate on a motion to amend the rules requires the assent of two-thirds of those present and voting.⁹

Q: I see. The existing rules are hard to change, so long as they are in force. What about when the Senate adopts new rules at the beginning of the *next* two-year Congress—couldn’t it adopt more majoritarian rules that restrict or prohibit filibusters then?

A: But the Senate, unlike the House of Representatives, does not adopt new rules at the beginning of each Congress.¹⁰

Q: Why not?

A: Because Rule V of the Senate rules provides that the rules “shall continue from one Congress to the next Congress unless they are changed as provided in these rules.”¹¹ Remember, the rules

6. See *infra* text accompanying notes 67–68 (noting recent proposals to change the Senate rules).

7. STANDING RULES OF THE SENATE, S. DOC. NO. 110-9, R. XXII.2, at 15–16 (2007). More precisely, the rule specifies a three-fifths vote of those duly chosen and sworn, which is often but not always sixty. *Id.*

8. FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE 1217, 1219 (rev. ed. 1992).

9. STANDING RULES OF THE SENATE, *supra* note 7, R. XXII.2, at 15–16.

10. Compare RIDDICK & FRUMIN, *supra* note 8, at 1220 (explaining that the Senate has adopted new sets of rules on only a few occasions), with CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 110-162, §§ 59–60, at 25–27 (2009) [hereinafter HOUSE MANUAL] (explaining that the House typically adopts rules with each new Congress).

11. STANDING RULES OF THE SENATE, *supra* note 7, R. V.2, at 4.

provide that changing the rules requires, practically speaking, the consent of two-thirds.

Q: That is sheer bootstrapping! The Senate rules cannot be the source of their own authority. If Rule V lacks any force in the new Congress, then it cannot purport to make itself and the other rules carry over. And Rule V *does* lack force in the new Congress, because one Senate cannot purport to bind future Senates. Entrenchment is not allowed.¹² The House of Representatives certainly recognizes that it lacks the power to bind its successors to follow the rules of the previous House.¹³

A: Now we've come to the heart of the matter. There are no "past Senates" and "future Senates." There is just one Senate running in an unbroken thread for over two hundred years. The Senate can continue its internal rules indefinitely because it, unlike the House, is a *continuing body*. The terms of two-thirds of the senators carry over from one Congress to the next. The House expires every two years, but the Senate does not. The Senate is a continuing body with continuing rules.

In short, the continuing-body theory of the Senate holds (1) that the Senate is continuous in a way that the House is not, and (2) that this continuity has important consequences for Senate practice, especially concerning Senate rules. The continuing-body theory is probably regarded as the most powerful constitutional consideration in favor of the permissibility of entrenched Senate rules; it has been invoked many times in the past when filibusters were challenged and is still employed in contemporary debates.¹⁴

The striking feature of the argument is the way it uses a seemingly bland structural fact about the Senate—that only a minority of its members stand for election every two years—to generate the powerful conclusion that the

12. See, e.g., *Newton v. Comm'rs*, 100 U.S. 548, 559 (1879) ("Every succeeding legislature possesses the same jurisdiction and power with respect to [public interests] as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less."); see also *infra* Part II.B.4 (discussing the anti-entrenchment rule).

13. HOUSE MANUAL, *supra* note 10, § 59, at 25.

14. E.g., Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445, 464 (2004) (stating that arguments against entrenched Senate rules are flawed because, "[p]erhaps most importantly, the Senate is a 'continuing body'"); see also CONG. RESEARCH SERV., SENATE CLOTURE RULE: LIMITATION OF DEBATE IN THE CONGRESS OF THE UNITED STATES 23 (Comm. Print 1985) [hereinafter SENATE CLOTURE RULE] ("Opponents of the . . . motion [to adopt new rules in 1953] centered principally on the argument that the Senate is a 'continuing body,' bound by the rules of earlier Senates."); Note, *Cloture, Continuing Rules and the Constitution*, 48 MINN. L. REV. 913, 921 (1964) ("Those who have sought to prevent change in the cloture rule argue that because the Senate is a continuing body, the Senate rules continue automatically from session to session . . ."). Many examples of the invocation of this concept will be discussed throughout the course of this Article.

Senate’s rules can violate what are often regarded as foundational principles of majority rule and non-entrenchment. Among the respected senators, parliamentarians, and academic experts who rely on the continuing-body idea, the argument proceeds almost automatically, as if the logical connection between the Senate’s structure and this startling consequence were natural and completely clear.¹⁵ Seeming to concede that something important would follow from the view that the Senate is continuous, those on the other side of debates over Senate procedure often find themselves denying that the Senate is a continuing body.¹⁶

This discourse would benefit if we could take a step back and ask what we are really talking about. To be sure, we often speak of entities existing over time despite changes, so we cannot dismiss the notion of Senate continuity as sheer nonsense. Nonetheless, although the concept of Senate continuity is frequently deployed, often to great showstopping effect, one fears that a metaphor has substituted itself for careful thinking. What does it mean to say the Senate is a continuing body and the House is not? In what sense is the Senate continuous—just in that senators have overlapping terms of office, or is there something more to it than that? Even more importantly, why does that structural feature matter for purposes of the rules? We can call the Senate a continuing body if we like, but labeling it so does not explain why anything follows from the facts about the Senate’s structure.

This Article is an effort to critically engage the notion that the Senate is a continuing body. Its conclusion is that the continuing-body idea obscures more than it reveals and that the arguments that attempt to use the Senate’s

15. See, e.g., 132 CONG. REC. 16,765 (1986) (statement of Sen. Byrd) (“Since two-thirds carry over, our rules are continuous and do not have to be readopted at the beginning of each Congress.”); TOBIAS A. DORSEY, LEGISLATIVE DRAFTER’S DESKBOOK: A PRACTICAL GUIDE § 2.11, at 22 (2006) (“The Senate is considered a continuing body because about two-thirds of its seats carry over from Congress to Congress. Accordingly, the officers and rules of the Senate carry over”); Gerhardt, *supra* note 14, at 465 (“The unique structure of the Senate relieves it of any obligation, or ability, to reconstitute itself with each new congressional session.”); Interviews by Donald A. Ritchie with Floyd M. Riddick, Senate Parliamentarian, 1964–1974, at 200–01 (July 27, Aug. 1, 25, 1978), available at http://www.senate.gov/artandhistory/history/resources/pdf/Riddick_interview_4.pdf (referring to the debate over “whether the Senate was a continuing body or whether there was a constitutional right to change the rules without filibuster at the beginning of a new Congress” and treating the two questions as equivalent).

16. See, e.g., *Judicial Nominations, Filibusters, and the Constitution: When a Majority Is Denied Its Right To Consent: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the S. Comm. on the Judiciary*, 108th Cong. 309 (2003) (statement of Douglas Kmiec) (“[T]he Senate, by constitutional design, is not a continuing body. It cannot be. The framers carefully provided for staggered terms, whereby one-third of the Senate would stand for election every two years.”); *id.* at 310 (referring to carryover Senate rules as “rules of a different, prior body”); 99 CONG. REC. 204 (1953) (statement of Sen. Douglas) (“The contention that the Senate as a body is continuous and immortal and cannot in effect change its rules is indeed, upon close examination, seen to be ridiculous. . . . [The] separate character [of each Congress] is true of each Senate as it is of the House of Representatives.”); 55 CONG. REC. 10–12 (1917) (statement of Sen. Walsh) (denying that the Senate is a continuing body).

structure to justify the Senate's handling of its rules are mostly untenable. More specifically, the Article proceeds as follows:

Part II presents some background on the history of the Senate's rules and the different legal arguments for and against their continuous character. As this Part explains, the continuing-body idea is the key move in the defense of the Senate's current procedures because continuity is thought to rebut the criticism that the Senate's rules are impermissibly entrenched.

With the basic argumentative moves having been laid out, the next few Parts of this Article then challenge the continuing-body account of the Senate. Part III assumes, for the sake of argument, that the Senate is (in some sense yet to be completely fleshed out) continuous. Continuity is nonetheless inadequate to justify the Senate's current regime of rules. The desired conclusion does not follow from the premises, in other words. Critics of the Senate's rules charge that they are entrenched—that is, that the rules improperly bind future Senates against their will. The notion of the perpetual Senate is meant to defuse the entrenchment problem in the most ingenious way: if there is no such thing as past and future Senates but, rather, just one everlasting Senate, then there is no problem of impermissibly binding one's successors, because such successors do not exist. But mere continuity is insufficient to defend the Senate's rules. Even if the Senate is continuous, the Senate's defenders need a principle of *commitment* that explains why the continuous Senate is allowed to bind *itself*. Put differently, the continuity idea tries to refute the charge of forbidden *other-binding* (i.e., entrenchment), but it cannot by itself justify *self-binding* (i.e., commitment). Even if the Senate is a continuing body, perhaps it should be allowed to change its mind. Part III also highlights some parallels between the present topic and larger debates in constitutional theory, such as the “dead hand” objection to constitutionalism.

Shifting approaches, Part IV focuses on comprehending and then criticizing the initial premise that the Senate is a continuing body in some meaningful sense that other legislative bodies are not. This Part considers several attempts to explain why the Senate's structure of overlapping terms matters. These include claims about implied consent, continuity of membership, and the permanence of a quorum. Upon examination, each claim about the Senate's continuity is either false or fails to distinguish the Senate from the House of Representatives, a body that lacks the special type of continuity the Senate supposedly possesses (though undoubtedly the House should be considered “continuous” in certain other ways).

Next, Part V accepts the continuing-body argument at face value and then considers its implications for other aspects of Senate practice. After all, if the Senate's structure has such important consequences for the Senate's rules, perhaps it should affect other contexts as well. As we will see, however, there does not appear to be any general practice of continuity that supports

the Senate's handling of its rules. Part of the trouble with this debate stems from the fact that the claim that the Senate is a continuing body is ambiguous, so that some of the precedents offered in favor of Senate continuity do not actually support the relevant *type* of continuity. Indeed, to the extent there is a prevailing position across Senate behavior as a whole, it is a position that rejects the type of entrenched continuity that the Senate displays in the rules context.

Admittedly, it is possible that the continuing-body notion has, by this point, become impervious to argument, such that some traditionalists could not be persuaded by any showing whatsoever. And I do not deny that custom and tradition make rightful claims upon our consideration (though, as I will explain, the continuing-body notion as currently manifested does not have the ancient pedigree some may believe). But I do nonetheless hope that, all things considered, the argument against the continuing-body idea is a compelling one. If the argument succeeds, then some distinctions between the two legislative chambers should disappear; certainly, any distinctions would need to be justified on their own terms rather than by simply appealing to a dogmatic metaphysical claim that the Senate is (and the House is not) a "continuing body."

Before proceeding, I should add a comment on the scope of this project. This Article scrutinizes the claim that the Senate is a continuing body—what that notion means and whether it has any validity. My critique of the continuing-body idea is both broader and narrower than the debate over the filibuster. It is broader in that notions of Senate continuity affect multiple contexts of legislative activity, the filibuster being just one especially prominent example. At the same time, my critique is narrower in that it quite obviously cannot claim to resolve the entire debate over the filibuster. Indeed, most of the debate over the filibuster does not involve law. Whether eliminating the filibuster or otherwise reforming the Senate is the right thing to do presents extremely difficult questions of policy and political theory. Simplistic appeals to democracy and majority rule do not suffice: among other reasons, our system is not straightforwardly democratic, and the filibuster might not always frustrate popular majorities. Further, reformers must confront serious prudential questions because it might be that the current arrangements, even if far from optimal in an ideal world, represent a political settlement that would be unduly disruptive to upset. These questions are impossible to banish entirely from one's mind, but it is not this Article's goal to address them.

Moreover, the aim here is not, except glancingly, to discuss legislators' political incentives regarding reform. The filibuster impedes the Senate majority's ability to enact its agenda, but members of the majority realize that they might return to the minority and regret having restricted minority rights. Further, senators of both parties have reason to like the filibuster if it increases their individual power and electoral prospects. As the political

landscape and legislators' perceptions change, these calculations might balance in different ways.

Nonetheless, although our focus is the legal validity of the continuing-body theory, Part VI of this Article concludes by taking a broader look at where the debate over the filibuster stands once the unsatisfactory notion of senatorial continuity has been cleared away. Disposing of the continuing-body theory would make it much harder to justify supermajoritarian features such as the filibuster, though not impossible. Part VI also suggests that discrediting the continuing-body idea might have the practical consequence of further legitimizing procedures (like reconciliation) that marginalize the filibuster, even if the filibuster is not wholly eliminated. Finally, even if Senate behavior remains the same on the surface, the demise of the continuing-body theory could produce an important benefit in terms of accountability. If the majority is not bound by the continuing Senate rules, then the majority should be required to face up to its power over the rules and to take responsibility for the current rules if it chooses to leave them in place.

II. THE SENATE'S RULES: CONTINUITY AND CONTROVERSY

To prepare the way for the argument that follows, a bit of background regarding the Senate's rules will be useful. The aim is not to provide a complete historical account but simply to provide the context needed to appreciate the important role the continuing-body idea plays. Accordingly, Part II.A briefly discusses certain aspects of Senate practice and history, in particular as they bear on continuity. Then Part II.B introduces the legal arguments surrounding reform of the Senate's rules and highlights the pivotal role played by the continuing-body theory.

A. A BRIEF HISTORY OF CONTINUITY

1. In the Beginning: Early Practice

The Constitution creates the House and Senate and describes congressional powers, but it says relatively little about how the two houses are to conduct their affairs. To be sure, the text is not entirely silent on parliamentary procedure: it provides, for instance, that both chambers shall keep a journal, that a majority makes a quorum, and that a supermajority is needed to expel members.¹⁷ Apart from those few requirements, the Constitution puts each chamber in charge of its own procedures, providing that "[e]ach House may determine the Rules of its Proceedings."¹⁸ From this authority spring the rules of each chamber, the committee system, and indeed most of what we recognize as the legislative process. The rulemaking

17. U.S. CONST. art. I, § 5.

18. *Id.* § 5, cl. 2.

clause does not suggest any difference between the two houses in terms of the duration of their parliamentary rules: the same language applies to each.

Nonetheless, the two chambers have traditionally exercised their unilateral rulemaking powers quite differently. The House of Representatives characteristically adopts rules by majority vote at the beginning of each Congress. In the brief period before the adoption of new rules, the House considers itself governed by principles of “general parliamentary law” reflected in sources such as Thomas Jefferson’s *Manual*, as modified by traditional House practice.¹⁹ The House has long believed that each new House’s freedom to adopt rules is of constitutional dimension: a departed House lacks the power to force rules upon an unwilling successor.²⁰

The Senate has followed a different path. Ten days after the Senate first achieved a quorum, in April 1789, it adopted a short set of rules.²¹ Unlike the House, the Senate did not readopt rules at the beginning of the second or subsequent Congresses. The old rules simply remained in effect. From time to time, the Senate appended additional rules to the existing set, but there was no general revision of the rules until the Ninth Congress, in 1806. That would become a pattern: the Senate changes individual rules from time to time, but it has readopted or made general revisions to the rules on only a few occasions throughout its history.²²

Although records of the early Senate proceedings are limited, making it hard to draw firm conclusions, it does not appear that the nascent practice of carryover rules generated significant debate or dispute. More broadly, the Senate’s formal rules did not loom very large in the early years. The initial rules were few in number and hardly comprehensive; they did not need to be, given that senators could rely both on the courtesy one would expect in a small body and on the usages and principles of general parliamentary law,

19. HOUSE MANUAL, *supra* note 10, §§ 59–60, at 25–27. House practice has not been completely unequivocal on this matter. From 1860 to 1890, the House rules stated that the rules would remain in effect into the next Congress. (This provision sought to make the carryover rules only a default that the new Congress was free to reject; in other words, the old rules were not entrenched.) DE ALVA STANWOOD ALEXANDER, HISTORY AND PROCEDURE OF THE HOUSE OF REPRESENTATIVES 192–93 (1916); 5 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA §§ 6743–47 (1907). Some members thought even this weak form of continuity went too far, insisting that the old rules were powerless in the new House even as a default. Likely because of the uncertainty and controversy over this point, the House typically followed its prior practice of readopting rules at the start of each term. *E.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 8 (1863). In 1890, Speaker Reed ruled that the House began its term operating under general parliamentary law, which he used to his advantage in pushing through a number of reforms. For accounts of Reed’s actions in 1890, see GEORGE B. GALLOWAY & SIDNEY WISE, HISTORY OF THE HOUSE OF REPRESENTATIVES 55–56 (2d ed. 1976); and WILLIAM A. ROBINSON, THOMAS B. REED, PARLIAMENTARIAN 195–234 (1930).

20. HOUSE MANUAL, *supra* note 10, § 59, at 25, § 388, at 196.

21. S. JOURNAL, 1st Cong., 1st Sess. 13 (Apr. 16, 1789).

22. RIDDICK & FRUMIN, *supra* note 8, at 1217, 1220.

which the senators would know from the prior legislative experience the vast majority of the senators possessed.²³

The debate over the continuing-body idea is not identical to the debate over the Senate filibuster, but it is nonetheless true that the two have become closely linked. That is, the continuity of the Senate's rules has come to generate controversy today primarily in connection with attempts to rein in the filibuster. Therefore, the goal of putting the continuity debate in context requires discussion of the filibuster. The history of attempts to limit debate in the Senate is long and complicated, but here it will suffice to briefly recount a few important filibuster-related developments.²⁴

The early Senate, though not without some rules limiting debate, apparently lacked an effective formal procedure to close debate and force a vote.²⁵ But just as important, there was not much need for such a device. Although senators occasionally engaged in dilatory debate and otherwise manipulated the rules to seek advantage or to extract compromises,²⁶ several factors held obstruction in check. For one, extended debate and other forms of delay were not especially threatening: the Senate was a small body with little to do, so the body could tolerate some delay without the risk of paralyzing the overall legislative agenda. Further, determined obstruction meant sacrifice, requiring real physical effort and potentially compromising one's standing among peers. As a result, the prevailing assumption in the early decades of the Senate's existence seems to have been that even

23. See ROY SWANSTROM, *THE UNITED STATES SENATE 1787–1801*, S. DOC. 100-31, at 37 (1988) (discussing prior legislative experience of early senators); 1 GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* 43 (1938) (same).

24. More detailed treatments of the history include SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE? FILIBUSTERING IN THE U.S. SENATE 1–81, 197–218* (1997); FRANKLIN L. BURDETTE, *FILIBUSTERING IN THE SENATE* (1940); *SENATE CLOTURE RULE*, *supra* note 14; GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE 61–157* (2006); and Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 *STAN. L. REV.* 181, 185–213 (1997).

25. The Senate did originally have a motion for the previous question, which is today used in many legislative bodies as a tool to force an immediate vote. While the evidence is sparse, it appears that in the early Senate the motion did not function as a cloture motion. The motion was rarely used and was eliminated from the Senate rules in 1806 without much fanfare. JOSEPH COOPER, *THE PREVIOUS QUESTION: ITS STANDING AS A PRECEDENT FOR CLOTURE IN THE UNITED STATES SENATE*, S. DOC. NO. 87-104, at 1–2, 26 (1962); BINDER & SMITH, *supra* note 24, at 35–39. There were some limitations on debate. The original Senate rules provided that no member could speak twice in a debate on the same day without permission, and *Jefferson's Manual* gave the chair the (theoretical) power to restrain impertinent and superfluous debate. *S. JOURNAL*, 1st Cong., 1st Sess. 13 (Apr. 16, 1789); *HOUSE MANUAL*, *supra* note 10, § 359, at 175.

26. Indeed, Maclay reports obstructive debate in the first Congress on the bill to establish a permanent capital. *The Diary of William Maclay and Other Notes on Senate Debates*, in 9 *DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789–1791*, at 156 (Kenneth R. Bowling & Helen E. Veit eds., 1988) [hereinafter *Maclay's Diary*].

contentious measures would ultimately come to a majority vote.²⁷ Indeed, according to some accounts of the early decades, it was the House that was more prone to obstructive debate than the Senate.²⁸ Although today we think of the House as a streamlined, highly majoritarian body, it is worth remembering that its modern character is the product of historical development—such as Speaker Reed’s 1890 revolution²⁹—as much as any initial design.

Let us pause to consider what, if anything, this early history establishes. In making judgments about the historical support for the Senate’s current handling of its rules, it is crucial to be on guard against conflating subtly distinct practices. Accordingly, we should distinguish between two different senses in which one might call the rules continuous. As we have seen, the prevailing view in the House of Representatives, which matches the typical understanding in American legislative bodies more broadly,³⁰ holds that the rules automatically die at the end of each two-year term and must be readopted in the next one in order to have force. The end of the term is the death of the rules.

One alternative to this system would be to permit rules to retain their vitality into the next session, at least as an initial default. We might call this regime “mere continuity,” and although having such rules would make the Senate a bit unusual, it would not make the Senate wholly unique.³¹ It is something different, however, to have rules that carry over *and* are insulated

27. SARAH A. BINDER, *MINORITY RIGHTS, MAJORITY RULE: PARTISANSHIP AND THE DEVELOPMENT OF CONGRESS 38–40* (1997); BINDER & SMITH, *supra* note 24, at 50–51.

28. BURDETTE, *supra* note 24, at 14–15.

29. Probably most notably, Reed put an end to the obstructive “disappearing quorum” tactic by asserting the Speaker’s power to count members as present even if they refused to vote. See GALLOWAY & WISE, *supra* note 19, at 55–56 (describing Reed’s parliamentary rulings and changes to the House rules); ROBINSON, *supra* note 19, at 195–234 (same).

30. See LUTHER STEARNS CUSHING, *LEX PARLIAMENTARIA AMERICANA: ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES OF AMERICA* ¶ 792, at 311 (1856) (describing the practice of state legislatures and stating that “[n]o legislative assembly . . . can make any rules, which shall be binding upon its successors, even until abrogated or rescinded by them. . . . [T]he system of standing orders is not in use in our legislative bodies”); NAT’L CONFERENCE OF STATE LEGISLATURES, *MASON’S MANUAL OF LEGISLATIVE PROCEDURE* § 12.3 (rev. ed. 2000) (endorsing the view that rules expire); Donald S. Lutz, *The Colonial and Early State Legislative Process*, in *INVENTING CONGRESS* 49, 53 (Kenneth R. Bowling & Donald R. Kennon eds., 1999) (stating that colonial legislatures adopted or readopted rules at the start of each session).

31. The British House of Commons, which is not contended to be a continuing body, traditionally governed itself in part through standing orders that were presumptively continuous from Parliament to Parliament but were not entrenched. THOMAS ERSKINE MAY, *A TREATISE UPON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT* 132 (photo. reprint 1971) (1844); 2 JOSEF REDLICH, *THE PROCEDURE OF THE HOUSE OF COMMONS* 6 (1908); see also *supra* note 19 and accompanying text (discussing House rules from 1860 to 1890, which purported to be continuous from Congress to Congress); cf. MICH. COMP. LAWS § 4.42 (2004) (providing that upon assembling, the houses operate “under the rules of the preceding houses as temporary rules”).

against change. To take an analogy from contracts, consider the difference between an offer that is left open until withdrawn and one that is irrevocable; both differ from an offer that remains open for a short, fixed period, but they are not at all the same.

Given these distinctions, we have to carefully scrutinize statements that the Senate is a “continuing body” to see which type of continuity—mere continuity or entrenched continuity—is involved. For example, some legislators have cited the case of *McGrain v. Daugherty* to show that the Supreme Court has blessed the idea that the Senate is a continuing body.³² It is true that the opinion used the phrase “continuing body,” but the case involved mere continuity: the continuing validity of a Senate committee investigation authorized in a prior Congress.³³ The Court’s opinion did not suggest that the Senate wished to terminate the committee’s authority.

The early Senates establish a clear precedent for mere continuity, but do they go beyond that? All in all, I would say they do not. Although the written rules remained in effect from Congress to Congress, we should not consider them entrenched in the sense of being insulated against change. By the time of the 1806 revision, the initial set of nineteen rules had more than doubled in size through piecemeal additions.³⁴ The 1806 revisions do not seem to have been very controversial,³⁵ though other procedural matters did generate lengthy debate and close votes.³⁶ What we do not see, however, is evidence of the continuing-body debate playing out in its modern form, in which a minority champions the continuity of the Senate’s rules while reformers argue that each new Senate has the freedom to establish its own rules by majority. Yet, due to the relative lack of conflict on these matters, neither do the early Senates stand as much of a precedent for the majority’s power to change the rules over the dissent of a strong minority.

2. Later Developments

Over the course of the nineteenth century, the Senate transformed into a larger, busier, and more polarized body. Efforts at obstruction—including

32. *McGrain v. Daugherty*, 273 U.S. 135 (1927); *e.g.*, 105 CONG. REC. 109, 111 (1959) (statement of Sen. Robertson) (saying that *McGrain* held “that the Senate is a continuing body”).

33. *McGrain*, 273 U.S. at 180–82.

34. *See, e.g.*, S. JOURNAL, 9th Cong., 1st Sess. 18 (Jan. 9, 1806) (referring to a proposal to amend the 23rd, 27th, 35th, and 41st rules).

35. For instance, the entries in the *Annals* and *Journal* for March 26, 1806, the date the Senate adopted the general revision, show that the Senate adopted the resolution without a call for the yeas and nays, which is required if one-fifth of the members demand it. 15 ANNALS OF CONG. 201 (1806); S. JOURNAL, 9th Cong., 1st Sess. 65 (Mar. 26, 1806).

36. Such was the case regarding the decision whether bills acted upon by only one house in the first session had to start from scratch in the second session. *See* S. JOURNAL, 1st Cong., 2d Sess. 107 (Jan. 25, 1790) (recording 10–8 vote); *Maclay’s Diary*, *supra* note 26, at 185–91 (summarizing debate over the course of several days).

dilatory motions and other tactics, as well as filibusters—became more frequent, though actual success in blocking legislation was rare.³⁷ In the last decades of the nineteenth century and the beginning of the twentieth, the incidence and success of filibusters increased substantially.³⁸ So too did threats and attempts to change Senate practice so as to crack down on obstruction.³⁹ There were in fact some reforms, effected through parliamentary rulings, that blocked certain delaying tactics. For example, the chair ruled that repeated quorum calls were impermissible and that he could count senators present for purposes of making a quorum even if they refused to vote.⁴⁰ Other developments, however, furthered the cause of filibustering. For instance, in 1872 the chair ruled that a senator could not be dispossessed of the floor for irrelevant debate, reversing a prior ruling to the contrary.⁴¹

What role did the continuing-body theory play in these events? There were several episodes during the nineteenth century in which notions of Senate continuity were invoked (or denied) in connection with arguments over matters of parliamentary law. These include the debate over the firing of the Senate printers in 1841,⁴² the abrogation of the joint House–Senate rules in 1876,⁴³ and controversies surrounding the contempt power.⁴⁴ The continuing-body argument was not, however, especially prominent in nineteenth-century debates over filibuster reform.

In the filibuster context, it would be more accurate to date the modern incarnation of the continuing-body debate quite a bit later: to the beginning of the twentieth century, with Senator Thomas J. Walsh’s attack on the notion that the Senate was a continuing body with continuing rules. Walsh conceded, as he had to, that the Senate had often been called a continuing body and that its rules had characteristically remained in effect from Congress to Congress, but he denied that the Senate had ever subjected those practices to serious thought.⁴⁵ In his view, the Senate acted under

37. BINDER & SMITH, *supra* note 24, at 51, 53–54, 80; BURDETTE, *supra* note 24, at 39; WAWRO & SCHICKLER, *supra* note 24, at 56–57.

38. BURDETTE, *supra* note 24, at 43, 79–80; WAWRO & SCHICKLER, *supra* note 24, at 184 fig.8.1, 186 fig.8.2.

39. WAWRO & SCHICKLER, *supra* note 24, at 185–86.

40. BURDETTE, *supra* note 24, at 218–19; WAWRO & SCHICKLER, *supra* note 24, at 70 tbl.3.1.

41. BURDETTE, *supra* note 24, at 220.

42. *See* CONG. GLOBE, 26th Cong., 2d Sess. 236–56 (1841) (reporting the debate over the printers).

43. *See* 4 CONG. REC. 309, 431–38 (1876) (reporting relevant portions of the debate over the joint rules); 5 HINDS, *supra* note 19, §§ 6782–89 (discussing the abrogation of the joint rules).

44. *See infra* Part V.A.2 (discussing the extent of the congressional contempt power).

45. 55 CONG. REC. 8, 10 (1917) (asserting that, despite many invocations of continuity, the matter “had never been directly considered” or given “serious reflection”).

general parliamentary law at the beginning of a Congress and could adopt rules by majority vote, essentially like the House.⁴⁶

The twentieth century did indeed see filibuster reform, though not to the aggressively majoritarian extent that people like Walsh advocated. The catalyzing event occurred in 1917 when President Wilson publicly excoriated the “little group of willful men” that had recently prevented the Senate from acting on his bill to arm merchant ships against German U-boat attacks.⁴⁷ Under intense public pressure, the Senate adopted, by a wide margin, a cloture rule that would end debate on the affirmative vote of two-thirds of those present and voting.⁴⁸ The reform had one effect that is at first surprising: in the pre-cloture Senate, much major legislation still passed without large supermajorities in support, but supermajorities became more routine thereafter.⁴⁹ That is, the advent of the formal cloture rule shifted the Senate further away from majority decisionmaking.

The Senate has amended the cloture rule several times since 1917 in the direction of slightly greater majority control. The original cloture provision was subject to evasion in several ways (for instance, cloture was adjudged unavailable on a motion to proceed to consider a measure).⁵⁰ A 1949 compromise closed loopholes but raised the proportion needed for cloture to two-thirds of the entire Senate, rather than two-thirds of those present and voting. Further, under this compromise, debate on attempts to amend the Senate rules was not subject to cloture at all.⁵¹ In 1959, an amendment reduced the required number back down to two-thirds of those present and voting and made cloture available for ending debate on changing the rules.⁵² The 1959 amendment also added language, currently found in Senate Rule V, to the effect that the rules continue in force from Congress to Congress.⁵³ In 1975, the Senate amended the cloture rule to provide for cloture on the vote of three-fifths of the entire Senate, except for motions to change the rules, which remained at two-thirds of those present and voting.⁵⁴ Apart from some additional tinkering that does not concern us here, that is the rule in effect today.

46. *Id.* at 15, 17.

47. 41 THE PAPERS OF WOODROW WILSON 319–20 (Arthur S. Link ed., 1983).

48. SENATE CLOTURE RULE, *supra* note 14, at 17. The change in the Senate’s rules was codified in Rule XXII, which remains the location of today’s version of the cloture rule. *Id.*; *see also supra* notes 7–9 and accompanying text (discussing the current version of Rule XXII).

49. WAWRO & SCHICKLER, *supra* note 24, at 97–99.

50. *See* SENATE CLOTURE RULE, *supra* note 14, at 20 (referring to Sen. Vandenberg’s statement that “in the final analysis, the Senate has not [sic] effective cloture rule at all”).

51. RIDDICK & FRUMIN, *supra* note 8, at 1221.

52. SENATE CLOTURE RULE, *supra* note 14, at 25.

53. *Id.*

54. *Id.* at 30–32.

There remains sharp disagreement over the contemporary relevance of the events just recounted. Some see the twentieth century’s halting, incremental reforms as a repudiation of the theory that the majority can set new rules free from the existing rules.⁵⁵ The Senate had the chance to embrace the proposition that it is free to set new rules over the opposition of a filibustering minority, the argument goes, but it refused the invitation. On the other side of the argument, other commentators cite various votes that do support the majority’s power to change the rules, if it wishes.⁵⁶

I think that we need to be cautious about extracting precedents from this history. As to the prior instances offered in support of majoritarian change, those episodes might not be momentous enough to serve as precedents for more sweeping changes to the Senate’s rules. Likewise, as to the mid-twentieth-century votes in favor of the continuity of the Senate’s rules, here we must remember that the Senate was divided into several camps. Some senators resisted change of any kind. Other senators favored incremental liberalization of the cloture rule but insisted that change should come by working within the old rules.⁵⁷ Still other senators, with backing from rulings of supportive presiding officers, favored the more revolutionary majoritarian method of procedural change.⁵⁸ Yet, not all of these senators agreed that the new rules the majority might adopt should themselves routinely permit bare majority cloture on legislation.⁵⁹ If a majority of the Senate did not ultimately favor majority cloture on legislation, then there would be little reason for revolutionaries to insist on scrapping the continuity of the rules, provided that traditionalists offered a lower cloture threshold within the old rules. In sum, there were divergent views, but there was not, it seems to me, a definitive head-on resolution at the level of first principles. Rather, the conflicting positions were accommodated, both in 1917 and throughout the middle of the century, with a compromise: the reformers would get a lower cloture threshold or a more effective cloture

55. *E.g.*, MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 120–23 (2008).

56. *E.g.*, 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, 256–60, 262–72 (2004); *see also* WAWRO & SCHICKLER, *supra* note 24, at 65–72 (citing nineteenth-century precedents for majoritarian change through parliamentary rulings).

57. *E.g.*, 99 CONG. REC. 112 (1953) (statement of Sen. Taft); *see also* BINDER & SMITH, *supra* note 24, at 176–81 (discussing the views of Sen. Mansfield, Sen. Gore, and others in 1960s reform efforts).

58. *See, e.g.*, BINDER & SMITH, *supra* note 24, at 181–82 (concluding that in the 1975 reform efforts, “a majority of senators favored an interpretation of the Constitution and Senate rules that would have permitted a simple majority to close debate on new rules at the beginning of a Congress”); SENATE CLOTURE RULE, *supra* note 14, at 24–25, 28–29 (discussing opinions by Vice Presidents Nixon and Humphrey).

59. *See, e.g.*, 115 CONG. REC. 419–21 (1969) (statement of Sen. Church) (supporting majority’s right to change rules but opposing majority cloture); *see also* BINDER & SMITH, *supra* note 24, at 169 (concluding that “seldom, perhaps never” has a majority of the Senate supported simple-majority cloture).

rule, and the traditionalists would be able to avert more radical change by retaining the view that the existing rules remained in effect indefinitely.⁶⁰

As just noted, some believe that the events of the mid-twentieth century do establish a strong precedent in favor of the Senate being a continuing body, at least insofar as disputes over its rules are concerned. Although I am not so confident that there was a firm settlement of the type that the term “precedent” suggests, my aim here is not to offer another analysis of the circumstances of the votes at issue. Further, I recognize that the persistence of a particular mode of doing things can have some normative force, “precedent” or not. Yet few would say that even precedents are binding absolutely and forever, no matter how misguided.⁶¹ Certainly, such power is not possessed by judicial precedents.⁶² In any event, there is this practical reality: if one function of precedent is to settle disputes, that has not happened here, as the following section shows.

3. Contemporary Controversies

The controversy over the Senate’s rules shows no sign of abating. Filibustering has become even more widespread in recent decades, such that obstruction has blossomed into a routine and expected minority veto. We now have a “sixty-vote Senate” when it comes to almost any mildly controversial measure.⁶³

Some of the most contentious recent debates have concerned judicial nominations. Several years ago the (then-minority) Democrats’ filibusters of some of President Bush’s nominees nearly provoked radical change in the Senate’s handling of judicial appointments. Republican leader Bill Frist initially proposed amending the Senate rules to achieve majority cloture on nominations, but it was clear that he lacked the two-thirds support practically necessary to change the rules while working within them.⁶⁴ Thus arose the prospect of employing the “nuclear option,” a method of

60. See BINDER & SMITH, *supra* note 24, at 175–76 (discussing the 1959 reform effort); *id.* at 181–82 (discussing the 1975 reform effort).

61. *Cf.* INS v. Chadha, 462 U.S. 919, 944–45, 959 (1983) (declaring the legislative veto unconstitutional despite decades of practice); United States v. Ballin, 144 U.S. 1, 5 (1892) (“It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted.”).

62. *E.g.*, Payne v. Tennessee, 501 U.S. 808, 828 (1991) (“*Stare decisis* is not an inexorable command.”).

63. Barbara Sinclair, *The “60-Vote Senate”: Strategies, Process, and Outcomes*, in U.S. SENATE EXCEPTIONALISM 241, 241–44 (Bruce I. Oppenheimer ed., 2002); see also David Herszenhorn, *How the Filibuster Became the Rule*, N.Y. TIMES, Dec. 2, 2007, at 45 (“[F]ilibusters and the efforts to overcome them are being used more frequently, and on more issues, than at any other point in history.”). Today’s filibusters typically do not feature actual extended debate; rather, mere threats to use up the Senate’s valuable time are sufficient to block action. See Fisk & Chemerinsky, *supra* note 24, at 200–09 (discussing the rise of the “stealth filibuster”).

64. John Cochran, *Senators Uneasy with Proposal To Alter Filibuster Rule on Judicial Nominations*, 61 CQ WKLY. 1581, 1605 (2003).

establishing a precedent for majority cloture through a parliamentary ruling from the chair.⁶⁵ The nuclear option was not used, because a bipartisan group of fourteen senators agreed that certain nominees would be confirmed and that the rules would be left alone.⁶⁶

We can expect criticism of the Senate’s rules to flare up whenever a determined minority filibusters a President’s nominees and signature agenda items. Indeed, Republican obstruction of parts of President Obama’s legislative program is already leading some legislators and prominent commentators to call for reform of the Senate’s practices.⁶⁷ More indirectly, dissatisfaction with minority vetoes encourages the increased use of devices that circumvent the filibuster, such as the “reconciliation” process that allows budget measures to pass the Senate by a majority, without filibusters.⁶⁸ Even though the Senate’s rules themselves have remained largely static, the broader debate over Senate self-governance resists any permanent settlement.

B. THE LEGAL ARGUMENTS SURROUNDING REFORM OF SENATE RULES

Having provided a brief account of how the Senate’s rules have developed, we are now in a better position to understand the legal debates over the Senate’s rules and why the continuing-body idea has proven such an attractive, and indeed crucial, argumentative move.

65. There are a few ways this could play out. The presiding officer might make a parliamentary ruling, which would then be appealed to the Senate, or he might refer a point of order to the Senate. The key would be that the Senate would then decide the procedural question through a motion that cannot be filibustered, such as a motion to table. *See generally* BETSY PALMER, CONG. RESEARCH SERV., CHANGING SENATE RULES: THE “CONSTITUTIONAL” OR “NUCLEAR” OPTION 3–7 (2005) (describing various scenarios for majoritarian rules change).

66. Carl Hulse, *Compromise in the Senate: Bipartisan Group in Senate Averts Judge Showdown*, N.Y. TIMES, May 24, 2005, at A1; Memorandum of Understanding on Judicial Nominations (May 23, 2005), available at <http://www.c-span.org/pdf/senatecompromise.pdf>.

67. *E.g.*, S. Res. 416, 111th Cong. (2010) (resolution introduced by Sen. Harkin); S. Res. 396, 111th Cong. (2010) (resolution introduced by Sen. Udall); H.R. Res. 1018, 111th Cong. (2010) (resolution introduced by Rep. McDermott); Paul Kane, *Filibuster Changes: Proceed with Caution*, WASH. POST, Feb. 8, 2010, at A13 (discussing Senate Democrats’ recent push to change filibuster rules); Paul Krugman, *A Dangerous Dysfunction*, N.Y. TIMES, Dec. 21, 2009, at A31 (advocating majority cloture); Posting of Jack Balkin to Balkinization, *Our Dysfunctional Senate*, <http://balkin.blogspot.com/2009/11/our-dysfunctional-senate.html> (Nov. 22, 2009, 07:35 EST) (“[R]eforming [the Senate rules] is perhaps the most seriously needed change in our governmental system today.”); *see also* J. Taylor Rushing, *Sens. Schumer and McConnell Go Head-to-Head in Filibuster Reform*, THE HILL, Apr. 22, 2010, <http://thehill.com/homenews/senate/93939-sens-schumer-and-mcconnell-go-head-to-head-in-filibuster-reform> (reporting on the first of a series of Senate hearings on filibuster reform). Having sixty senators, as the Democrats have intermittently possessed, hardly means filibusters are not a problem. *See* Carl Hulse, *What’s So Super About a Supermajority?*, N.Y. TIMES, July 2, 2009, at A13 (observing that disagreements within the Democratic caucus and other factors rendered the Democrats’ supermajority largely ineffective).

68. *See infra* notes 217–18 and accompanying text (discussing the controversy over the reconciliation procedure).

1. The Question of Legality in Extraordinary Senate Reform

The debate over Senate reform is not, primarily, a legal one. We should resist the temptation to reduce everything to law. But the debate does include a substantial component of what presents itself as legal argument, and it is that component that this Article concerns. Adherents 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. Such adherents have the support of the Senate’s present rules, particularly Rule V, which provides for carryover rules. Those on the other side of the debate insist that the Senate’s rules are themselves unconstitutional to the extent they are perpetually insulated from majoritarian control. Majoritarian rules change would be legal, the latter group contends, even if it goes outside the Senate’s “ordinary” politics.⁶⁹ (In some ways, the dispute over changing the Senate rules *outside Rule V* has resonances in the more famous controversies over whether amending the Constitution *outside Article V* is constitutional, unconstitutional, or extra-constitutional.⁷⁰)

That we are concerned with legal considerations does not mean that we are primarily concerned with courts. The legality of changing the rules is distinct from the question whether courts would intervene.⁷¹ Courts almost certainly would not do so.⁷² So if the question is whether a determined majority could in fact change the rules without interference from any earthly power, the answer is very likely affirmative. But it is precisely because no

69. Cf. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 532 (2004) (distinguishing between ordinary constitutional politics and transformative periods during which taken-for-granted arrangements are brought into question).

70. Most notably, Bruce Ackerman and Akhil Amar have both argued that Article V is not the exclusive method for amending the Constitution. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 15–17 (1998); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994). There are important differences between Ackerman and Amar when it comes to amendment outside Article V, but we need not pursue those here.

71. Cf. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 618 (2007) (Kennedy, J., concurring) (“Government officials must make a conscious decision to obey the Constitution whether or not their acts can be challenged in a court of law and then must conform their actions to these principled determinations.”); Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 589 (1975) (“Decisions *not* striking down laws do not always mean that the laws are constitutional . . . for a court’s failure to invalidate may only reflect its institutional limitations.”).

72. For discussions of the justiciability of disputes over legislative rules, see, for example, JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW* 49–67 (2007); Aaron-Andrew P. Bruhl, *Return of the Line Item Veto? Legalities, Practicalities, and Some Puzzles*, 10 U. PA. J. CONST. L. 447, 486–98 (2008); Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 553–60 (2009); and John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 530–42 (2001).

outside body would intervene that the legislature itself must scrupulously judge the propriety of such actions.

I should acknowledge that some will consider any effort to discuss the legal principles invoked in the debate over the Senate’s rules to be a naïve, credulous enterprise. Arguments about the Senate’s continuing character are exercises in political theater, they will say, mere post hoc rationalizations that are driven by politicians’ preferences regarding the underlying issues. On this view, we should be skeptical when participants on both sides of these debates defend their positions by appealing to principled justifications broader than their current self-interest.⁷³ At the risk of being judged insufficiently cynical, I make two responses to this line of thought.

First, even assuming that positions on the continuing-body idea are driven largely by political expediency rather than by principle, the principles are not irrelevant. Perhaps that is because even when expediency highly influences our positions, we (or at least many of us) still want to make sure that our position is one that is at least defensible on principled grounds. Further, even if an invocation of principles is mostly for show, the show does not succeed as well when the principles invoked are so transparently meritless that they generate only laughs and derision.

Second, we should remember that we are not talking only about politicians here. Parliamentary experts, respected scholars, and the Supreme Court all advance the notion that the Senate is a continuing body.⁷⁴ I do not think we should assume that arguments of principle have no effect on any of them.

So, then, let us turn to the principles. There are three main legal arguments against the Senate’s rules, and they are grounded in majoritarianism, the rulemaking power, and the anti-entrenchment norm. The following account of the argumentative moves does not do them full justice, but it is not meant to. The aim, instead, is to show how the

73. See, e.g., 105 CONG. REC. 113–14 (1959) (statement of Sen. Pastore) (“We are not debating the expediencies of the moment. We are debating the fundamental and constitutional legal question involved, which is the question of whether the Senate shall have the right to make the rules which will guide its actions.”); 105 CONG. REC. 109 (1959) (statement of Sen. Robertson) (“I take this position not for reasons of expediency, with respect to legislative objectives, but because I am convinced that to give up the concept of the Senate as a continuing body will undermine a cornerstone of our Government . . .”); 103 CONG. REC. 153 (1957) (statement of Sen. Russell) (“[I]f I were in favor of majority gag rule in the Senate, and if I favored the so-called civil-rights legislation, I could not, in view of the respect which I have for the Constitution, accept the proposal that the Senate is not a continuing body.”); 99 CONG. REC. 108 (1953) (statement of Sen. Taft) (“This is a constitutional question; it is not a question of civil rights [i.e., one’s views on the passage of civil-rights legislation]; it is a question of whether the Senate is a continuing body.”).

74. E.g., *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 512 (1975); *McGrain v. Daugherty*, 273 U.S. 135, 181–82 (1927); 1 HAYNES, *supra* note 23, at 341; Gerhardt, *supra* note 14, at 464–65; Interviews with Floyd M. Riddick, *supra* note 15, at 121–220.

continuing-body idea comes out looking like the key move in the defense of the Senate's rules.

2. Majoritarianism

At least initially, the most straightforward argument against the Senate's practices is that supermajority requirements violate an implicit constitutional mandate of legislative majority rule. The broadest version of this argument would apply to all forms of legislative supermajority rules, whether they be rules governing voting, rules for closing debate, or rules for setting the procedural rules themselves. All legislative supermajority requirements, the argument would go, should be rejected as contrary to majority rule. The argument relies primarily on inferences from the constitutional text. It typically begins by observing that the Constitution establishes supermajority voting rules only for a few specific situations. For example, the Constitution requires two-thirds for expulsion of members and conviction in impeachment proceedings.⁷⁵ The presence of these few supermajority rules tends to imply, the argument goes, that the Constitution treats these instances as exceptional departures from a baseline mandate of majority rule. Further, the clause requiring a two-thirds vote in each house to override a presidential veto implies that a lesser vote, such as a majority, would suffice to pass legislation in the first place.⁷⁶ Likewise, the Vice President's power to vote only if the senators "be equally divided" shows that the framers expected majority voting.⁷⁷

These textual inferences demonstrate, at the least, that majority voting is the default rule when some measure comes to a vote. That counts for something, but that is not enough to condemn the Senate rules, for two reasons.

First, majority rule might be a mere default and not an immutable mandate. The cited supermajority provisions might not necessarily show that the Constitution mandates majority voting in every situation in which a voting rule was not expressly provided. The decision to specify particular voting rules in some cases, such as for expulsion or treaty approval, might just mean that the question was left up to the legislature everywhere else. Put differently, the Constitution's *requirement* of supermajority voting rules in certain cases does not mean the Constitution cannot *permit* them in still others where the document is silent. An assumption that the legislature would normally operate by majority rule, with certain rules built around that expectation, is not the same thing as a mandate that the legislature so operate. Further, when the framers wanted to be explicit that a majority was the proper standard, they knew how to do so, as they did in specifying that a

75. U.S. CONST. art. I, § 3, cl. 6; *id.* § 5, cl. 2.

76. *Id.* § 7.

77. *Id.* § 3, cl. 4.

majority would constitute a quorum.⁷⁸ In other words, the arguments from textual implication cut both ways. And, after all, what the Constitution actually says about procedural details is just that “[e]ach House” has the gap-filling power to “determine the Rules of its Proceedings.”⁷⁹ So perhaps majority voting is just a default that the two houses can change through the exercise of their constitutional powers.

Second, one can distinguish between voting rules on final passage and (mere) rules of debate. Even if the Constitution’s text implicitly commands a majority voting rule on final passage, one could argue that the cloture rule is instead a rule of debate or agenda control—debate cannot conclude until a supermajority is ready to vote. It 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 a majority must come up for a vote on demand.⁸⁰

Faced with such objections to the initial majoritarian argument, one could respond with a narrower, more sophisticated majoritarian argument. This narrower version concedes that the legislature need not conduct its ordinary operations in a majoritarian way but insists that the process of setting the rules must, at some ultimate level, be majoritarian. That is, the everyday use of supermajority rules can be justified only by remote majoritarianism operating in the background. This argument is better than the broader version of majoritarianism, but again one has to ask where even this requirement of remote legislative majoritarianism comes from. True, one can make many arguments for the superiority of majority rule,⁸¹ but the whole enterprise of constitutionalism, especially as implemented in our

78. *Id.* § 5, cl. 1; see John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 486–87 (1995) (using the Quorum Clause to rebut arguments in favor of mandatory majority voting).

79. U.S. CONST. art. I, § 5, cl. 2.

80. Accordingly, even many of those who otherwise deny that Congress can set a supermajority voting rule on final passage believe the filibuster is constitutionally permitted. *E.g.*, Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73, 88 (1996) (“[T]he filibuster rule does not purport to alter the Constitution’s *rules of recognition*. . . . The argument here is *not* that any rule *impeding* majority rule in the House or Senate is unconstitutional.”); *cf.* Bruce Ackerman et al., *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539, 1543 (1995) (refraining from commenting on the constitutional merits of the filibuster, but distinguishing it from an unconstitutional supermajority voting rule); Susan Low Bloch, *Congressional Self-Discipline: The Constitutionality of Supermajority Rules*, 14 CONST. COMMENT. 1, 2 (1997) (distinguishing cloture rules from voting rules). *But see* Brett W. King, *Deconstructing Gordon and Contingent Legislative Authority: The Constitutionality of Supermajority Rules*, 6 U. CHI. L. SCH. ROUNDTABLE 133, 184–85 (1999) (rejecting attempts to distinguish the filibuster from a supermajority voting rule).

81. *E.g.*, Kenneth O. May, *A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision*, 20 ECONOMETRICA 680, 683 (1952) (arguing that any group decision “not based on simple majority decision . . . will either fail to give a definite result in some situation, favor one individual over another, favor one alternative over the other, or fail to respond positively to individual preferences”).

particular Constitution, is hardly straightforwardly majoritarian. That goes double for the Senate, where the Constitution apportions seats equally to every state regardless of population.⁸² Much of the appeal of majority rule in legislatures derives from the legislature's rough representativeness of the public,⁸³ but that relation is not operative in the Senate, even after the Seventeenth Amendment. So simple-minded appeals to "democracy" do not suffice here. And, again, what the Constitution actually says is that each house may determine its rules. It does not directly say how, how often, or by what voting rules; perhaps it is up to the chamber itself to decide all such questions. And in the case of the Senate, the argument would continue, the body has decided through its practices and its formal rules that debate on changing the rules will be subject to cloture only on a supermajority basis.

Because of the various limitations of majoritarian claims, arguments that start with majoritarianism usually need to add appeals to other grounds, such as those below, to get across the finish line.⁸⁴

3. Rulemaking Power

One such source of support might be the literal text of the Constitution's Rules of Proceedings Clause. It provides that "[e]ach House may determine the Rules of its Proceedings."⁸⁵ That does not, on its face, impose any obvious restrictions on the rulemaking power or forbid insulated rules. Nonetheless, rather than reading this clause as a broad conferral of discretion to do whatever the chamber likes, some opponents of the Senate's carryover rules emphasize the fact that the clause gives power to "[e]ach House," which they read to mean that procedural rules may be determined anew by each new Senate or House of Representatives every two years.⁸⁶

This argument is unavailing. To begin with, the continuing-body theory can respond by asserting that there is just no such thing as a new Senate each Congress. But even without the continuing-body response, this argument is weak. The clause's drafting history suggests that the "each

82. U.S. CONST. art. I, § 3, cl. 1.

83. See Jeremy Waldron, *Principles of Legislation*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 15, 30 (Richard W. Bauman & Tsvi Kahana eds., 2006) (justifying majority rule in legislatures by linking it to constituents' right to equal treatment in the representational structure).

84. Some others have made the same observation. See King, *supra* note 80, at 187 ("To a large extent, the arguments [in favor of majority rule] from text and tradition seem to be indeterminate."); John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J.L. & POL. 505, 523-24 (2004) ("[O]nly when one combines majority rule principles with two other key concepts—the constitutional rulemaking power and the anti-entrenchment principle—can the serious student of this issue feel comfortable in concluding that a binding Cloture Rule and rules like it would violate the Constitution.").

85. U.S. CONST. art. I, § 5, cl. 2.

86. 103 CONG. REC. 25 (1957) (brief submitted by Sen. Douglas); 99 CONG. REC. 220 (1953) (statement of Sen. Humphrey); 55 CONG. REC. 9 (1917) (statement of Sen. Walsh).

House” language just means that the House and Senate may act independently. This is clear because, among other reasons, an earlier draft of the Constitution had separate provisions stating that each chamber “shall have power to make rules for its own government,” but the clauses were later silently consolidated in the course of redrafting into a single clause giving power to “[e]ach House.”⁸⁷ That is, in using this “each House” language, “the [f]ramers were thinking about bicameralism and not temporalism.”⁸⁸ No matter how permanent the Senate’s rules, it is still the Senate and not another branch making them. Thus, the literal text of the Rules of Proceedings Clause does not prevent the Senate from continuing its rules indefinitely.

4. Anti-Entrenchment (and the Continuing-Body Reply)

We come then to what all sides of the debate consider the strongest and most important argument against the Senate’s current system of rules: the anti-entrenchment principle.⁸⁹ The anti-entrenchment principle holds that one legislature cannot bind successors. As Blackstone wrote:

Acts of parliament derogatory from the power of subsequent parliaments bind not. . . . Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind the present parliament.⁹⁰

According to the Blackstonian understanding, legislative equality is bound up with (one version of) parliamentary supremacy: the sovereign Parliament

87. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 140, 142 (Max Farrand ed., 1966) [hereinafter RECORDS].

88. Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 409 n.139; accord Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1683 (2002); Virginia A. Seitz & Joseph R. Guerra, *A Constitutional Defense of “Entrenched” Senate Rules Governing Debate*, 20 J.L. & POL. 1, 6–7 (2004).

89. Various commentators have remarked on the pivotal role played by the entrenchment challenge. *E.g.*, Fisk & Chemerinsky, *supra* note 24, at 247 (finding textual arguments against Senate rules “not conclusive” and relying instead on the “fundamental constitutional principle” of anti-entrenchment); Gerhardt, *supra* note 14, at 464 (describing the anti-entrenchment principle as the strongest argument against the filibuster); McGinnis & Rappaport, *supra* note 78, at 504–05 (deeming textual arguments against insulated rules inconclusive and relying instead on the principle of legislative equality over time); Roberts, *supra* note 84, at 540 (arguing that a binding supermajority rule would “violate the established anti-entrenchment principle which lies at the heart of our representative democracy”); Vikram David Amar, *Can the Senate Bind Itself So that Only a Supermajority Can Change Its Rules? A Key Issue in the Controversial Filibuster Debate*, WRIT, June 27, 2003, <http://writ.news.findlaw.com/amar/20030627.html> (emphasizing the key role of the anti-entrenchment principle in challenging the Senate’s supermajority rules).

90. 1 WILLIAM BLACKSTONE, COMMENTARIES *90.

is omnipotent, and so each Parliament is equally omnipotent.⁹¹ The notion of parliamentary supremacy did not take root in this country, but the notion of legislative equality did.⁹² The equal legal power of each succeeding legislature is probably the most common justification in American law for the rule against entrenched legislation. For example, in a dispute over whether a state legislature could relocate a county seat despite earlier legislation that purported to establish a permanent location, the Supreme Court stated:

Every succeeding legislature possesses the same jurisdiction and power with respect to [public interests] as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things.⁹³

This anti-entrenchment principle in American constitutional law applies most obviously to legislative enactments that are absolutely unamendable, such as the law in the case just mentioned. In addition, the anti-entrenchment norm is also understood to condemn enactments that purport to restrict their own amendability in less absolute ways, such as laws that can be amended only after a certain time or by a particular procedure, such as a supermajority vote.⁹⁴ (The anti-entrenchment principle, that is, incorporates some assumptions about the normal legislative process: it is impermissible to “bind” successors, and successors are considered impermissibly “bound” when they cannot undo prior actions by ordinary majoritarian means.)

Entrenchment seems like an apt idiom in which to express what might be wrong with the Senate’s rules. Recall that the Senate’s rules do not *merely* continue in effect from term to term. Rather, the Senate’s rules carry over

91. It does not follow as a matter of logic that omnipotence requires the anti-entrenchment rule. There are at least two types of omnipotence: “continuing” omnipotence that cannot be diminished and “self-embracing” omnipotence that holds the power to diminish itself. See H.L.A. HART, *THE CONCEPT OF LAW* 149–50 (2d ed. 1994) (distinguishing between these two types of omnipotence); see also A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 62–68 (8th ed. 1915) (discussing the British conception of parliamentary sovereignty and its relationship to entrenchment). The claim is not that the concepts of sovereignty and equality necessarily entail a certain rule on entrenchment, just that they in fact went together as a historical matter.

92. John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 394 (2003) (distinguishing between British and American understandings of the anti-entrenchment rule).

93. *Newton v. Comm’rs*, 100 U.S. 548, 559 (1879).

94. Eule, *supra* note 88, at 384–85 (describing different types of entrenchment). The anti-entrenchment principle is, at least in its broad outlines, almost universally accepted. But for an argument denying its status as a constitutional rule, see generally Posner & Vermeule, *supra* note 88.

and are insulated from change. The Senate’s rulemaking process deviates from the norm of majority rule, and, crucially, the source of that deviation is rules that the Senate adopted in the past.

Defenders of the Senate could respond to the entrenchment argument in various ways. For example, one could contend that the anti-entrenchment principle has diminished force when it comes to parliamentary ground rules as opposed to substantive legislation.⁹⁵ But the winning move in the game, for the Senate’s defenders, has typically been the continuing-body idea. The continuing-body idea is, in a way, brilliant. Its genius is that it appears capable of dissolving the entrenchment critique: if there is no such thing as “past Senates” and “future Senates” but rather just one continuous Senate, then there is no issue of impermissibly binding one’s successors, there being no successors to speak of. Accordingly, leading commentators agree that it is the strongest response to the entrenchment critique.⁹⁶

Given the crucial role played by the continuing-body idea, much is riding on its validity. As I now turn to explaining, it cannot support the weight.

III. CONTINUITY, COMMITMENT, AND THE DEAD HAND OF THE PAST SENATE

The continuing-body theory of the Senate holds (1) that the Senate is continuous in a way that the House is not, and (2) that this continuity has important consequences for Senate practice, especially concerning Senate rules. I will present a number of arguments against the continuing-body theory in this Article. Part IV will question the premise that the Senate is structurally continuous in any relevant way that the House is not. Part V will explain that the Senate’s practices surrounding its rules are anomalous in the broader context of the Senate’s own behavior and that accepting the continuing-body theory would have troubling implications elsewhere.

We begin here, though, with an even more serious defect in the continuing-body theory: even if we accept that the Senate is a continuing body (in some sense yet to be fully articulated), that would not suffice to justify the Senate’s practices with regard to its rules.

To see why, it is useful to draw a parallel between the entrenchment critique of the Senate’s rules and the more general constitutional problem of the dead hand. The dead-hand problem—how can the will of the past control the future, the dead dictate to the living—represents one of the most powerful challenges to constitutionalism. How is it that a relatively small number of long-dead men could bind us today to accept a particular governmental structure that can be changed only with great difficulty (and,

95. Compare Seitz & Guerra, *supra* note 88, at 22–32 (defending this distinction), with Roberts, *supra* note 84, at 543–47 (rejecting the distinction).

96. For instance, Professor Gerhardt writes: “While [the anti-entrenchment] argument is the strongest of those arrayed against the filibuster, it is flawed for several reasons. Perhaps most importantly, the Senate is a ‘continuing body.’” Gerhardt, *supra* note 14, at 464.

with regard to certain important matters, practically not at all)?⁹⁷ This foundational problem has generated a number of responses that seek to legitimize the Constitution's claim on us, ranging from implied consent of the living⁹⁸ to the availability of majoritarian, extra-constitutional amendment⁹⁹ to arguments that current majorities could do no better.¹⁰⁰ One of the cleverest attempts to answer the dead-hand problem, though, is the invocation of an intertemporal polity. In the words of Jed Rubenfeld, one of the most eloquent recent proponents of this approach, "a people, understood as an agent existing over time, across generations, is the proper subject of democratic self-government."¹⁰¹ If the entity that ratified the Constitution years ago is the same entity that is bound by it today—the same "We the People"—then there is no dead hand of the past. As Richard Primus explains:

[T]he subject of democratic assent to the Constitution is not an aggregation of individuals but rather the American People, conceived as a corporate and temporally extended entity. Individuals are born and die, but the People continue, and it is the People who form the relevant polity. . . . [I]n submitting to the Constitution, we merely accept what we ourselves agreed to.¹⁰²

The strategy of resorting to an intertemporal polity should remind one of how the continuing-body theory ingeniously attempts to dissolve the entrenchment critique of the Senate's rules. If there is just one temporally extended Senate, then there is no problem of an old Senate binding a future one. As an illustration of this logic in action, consider the comments of then-Senator and eventual President James Buchanan in an 1841 debate over whether the Senate could replace the printers that had been hired in the last Congress. Defending the continued validity of the printers'

97. *E.g.*, U.S. CONST. art. V (providing that, even if the arduous supermajoritarian amendment procedures are complied with, "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate"); see SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 21 (2006) ("As a practical matter . . . Article V makes it next to impossible to amend the Constitution with regard to genuinely controversial issues, even if substantial—and intense—majorities advocate amendment.").

98. *Cf.* JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ch. 8, §§ 119–21 (C.B. Macpherson ed., 1980) (1690) (explaining that people born under a government that they did not create can be considered to implicitly consent to its authority by living under that government and accepting its benefits).

99. Amar, *supra* note 70, at 457–58, 508.

100. John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 388–89, 392–94 (2007).

101. JED RUBENFELD, *FREEDOM AND TIME* 145 (2001).

102. Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 198 (2008) (emphasis added). To be clear, Primus is describing this approach rather than endorsing it.

appointment against charges of impermissible entrenchment, Buchanan responded:

This was the very same body, constitutionally, and in point of law, which had assembled on the first day of its meeting, in 1789. It had existed, without any intermission, from that day until the present moment It never dies; and it was the sheet-anchor of the Constitution, on account of its permanency. *Senators [on the other side of the debate] were thus deprived of the poor apology that one Senate had no right to bind its successors.*¹⁰³

Just as the idea of the temporally extended People attempts to defuse the dead-hand argument against constitutionalism writ large, the idea of the everlasting Senate promises to do the same for the entrenchment argument as applied to the Senate rules.

We come now to the problem. The difficulty with invoking an intertemporal Senate to defeat the entrenchment challenge is easily overlooked but, once perceived, fundamental. I am happy to concede (for the moment) that today’s Senate is “the same Senate” as yesterday’s; further, I will even suppose that the Senate is a continuing body in some way that the House of Representatives and other bodies are not. Accordingly, I will concede that there is no entrenchment against “future Senates.” But defenders of the Senate’s practices still need to explain why the Senate is allowed to bind *itself* into the future. Put differently, the continuity/identity idea can show that there is no forbidden *other*-binding (i.e., entrenchment) going on, but it does not by itself provide a justification for *self*-binding.

Of course, another word for self-binding is *commitment*. The ability to commit oneself is central to the enterprise of defeating dead-hand objections. (Indeed, Rubinfeld calls his account of constitutionalism a “commitmentarian” account.¹⁰⁴) Adherents of the continuing-body idea seem to have assumed that the power to make commitments just flows naturally from the Senate’s continuous identity. Persons can commit themselves unproblematically.¹⁰⁵ So can peoples, at least if we believe in an intertemporal “We the People.” But does that power reside in a representative body, even a persisting one?

Notice that the Senate’s defenders do not really have much to say here. Repeatedly we are told that the Senate is a continuing body, as if that were

103. CONG. GLOBE, 26th Cong., 2d Sess. 240 (1841) (statement of Sen. Buchanan) (emphasis added).

104. RUBENFELD, *supra* note 101, at 92–94.

105. Some philosophers would challenge our easy acceptance of this proposition, arguing that an individual person should be viewed as a collection of successive selves existing at different times. See generally DEREK PARFIT, REASONS AND PERSONS pt. 3 (rev. ed. 1987) (challenging familiar assumptions about personal identity). For purposes of this argument, we can assume that individual commitment is unproblematic.

the showstopping argument. But what the Senate's defenders do not tell us is why the Senate can commit itself to live by certain rules for the rest of its life. There is a gap in the argument. Where is that account of Senate commitment?

Granted, it would perhaps be a cheap argumentative trick to demand that the Senate's defenders produce such an account, point to its absence, and then declare victory. So what is my affirmative argument that the Senate lacks the ability to commit to follow rules in the future? It would begin with this observation: even if the Senate is, like persons and peoples, a subject that exists over time, it is a subject that is also an agent. Senators are not "the people themselves."¹⁰⁶ The Senate's authority depends on the authority that the principals conferred.

What, then, is the scope of this agent's authority? More particularly, does it extend to making commitments? I would say no. The agent's principals—whether we conceive of them as persons or a People or (before the Seventeenth Amendment) states—have a way of making political commitments. The principals do this through making and amending a constitution. The Senate, through its commitment to a set of rules that are not laid down in the Constitution, has arrogated that constitutive power to itself.¹⁰⁷

Now, that is a highly condensed sketch of an argument. These matters implicate deep questions of democracy, sovereignty, and constitutionalism, and it would be foolhardy to claim to resolve them here in some comprehensive way. We can, however, raise some additional doubts about the possibility of Senate commitment by focusing on matters that are more tightly tied to the topic of this Article. First, as will be suggested in Part V, any argument justifying Senate commitment to particular parliamentary rules would seem to have consequences for other aspects of Senate procedure, and those consequences would probably make us uncomfortable. That is, we might not be able to contain Senate commitment to the rules context; it might infect other domains as well, domains where it would seem even more problematic. Second, an argument in favor of Senate

106. Cf. THE FEDERALIST NO. 71, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves . . .").

107. Conceiving of these kinds of issues in terms of agency and authority is not original to me. Notably, Julian Eule argues that entrenchment is forbidden because legislators are elected only to limited terms; just as they may not extend their own terms into the future, they may not extend their influence into the future either. Eule, *supra* note 88, at 403–05. But Eule's argument seems deficient because the existence of a limited term does not necessarily show that the principals did not confer authority to make binding commitments that last beyond that term. In business settings, for instance, agents can make commitments (e.g., through contracts) that bind the company for a period beyond the agents' term in office. So term limits do not tell us about the limits of the authority conferred. That is why I appeal to the Senate's usurpation of the principals' commitment power.

commitment might well suggest that the House should be able to commit itself to parliamentary rules too, which would conflict with longstanding House practice. True, defenders of Senate exceptionalism will try to point to differences between the two bodies so as to avert that result. But as we will see next, any such attempt to identify a *relevant* distinction between the chambers is fraught with difficulty.

IV. WHAT DOES IT MEAN FOR THE SENATE TO BE A CONTINUING BODY?

The previous Part assumed that the Senate is, in some important sense, continuous. It then argued that the desired conclusions about the Senate’s rules do not follow. Here we try to understand, and then challenge, the initial premise that the Senate is a continuing body.

The meaning of continuity in the context of a legislative body like the Senate is unclear. On one possible understanding, we would label a body as continuous only if it is continuously in session. That type of continuity might roughly describe our presidency, but it certainly does not describe either our House or our Senate, for they are not always sitting.¹⁰⁸ So that could not be the sense of continuity that the continuing-body theory employs.

Taking a different approach, if we compare our institutions to the British House of Commons, we might label *both* of our houses continuing bodies. There are intervals when there is no House of Commons in existence due to a dissolution of Parliament, which terminates the members’ status, but that is not true of either of our chambers of Congress.¹⁰⁹ Indeed, some legislators have for this reason called the House of Representatives continuous—“a permanent body,” one early congressman said, “[i]n the same way the President and Senate were permanent.”¹¹⁰ Again, that could not be what defenders of the continuing-body theory of the Senate have in mind.

So in what sense is the Senate a continuing body in a special way that other legislative bodies, particularly the House, are not? This portion of the Article considers several attempts to answer that question, and it is arranged as follows: Subpart A examines the relationship between the continuing-body theory and Senate identity over time. I show that the continuing-body theory does not make for a satisfactory account of identity. Subpart B

108. See JOINT COMM. ON PRINTING, U.S. CONG., OFFICIAL CONGRESSIONAL DIRECTORY, 111TH CONGRESS, 2009–2010, at 526–42 (2009) (providing all dates for when Congress has been in and out of session); cf. AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 132 (2005) (“While the new Congress would go in and out of session, America itself would always be in session, as would the nation’s new presiding officer. . . . [Several clauses of the Constitution] plainly presupposed the essential continuity of presidential power.”).

109. See *infra* notes 130–38 and accompanying text (elaborating on this point).

110. 7 ANNALS OF CONG. 685 (1797) (remarks of Rep. Smith); see also CONG. GLOBE, 26th Cong., 2d Sess. 237 (1841) (remarks of Sen. Clay) (calling both houses “continuous bodies”); Seth Barrett Tillman, *Defending the (Not So) Indefensible*, 16 CORNELL J.L. & PUB. POL’Y 363, 368 n.22, 379 (2007) (calling both chambers continuous in this sense).

considers the structural features of the Senate that are said to make it a continuing body, namely its overlapping term structure. I show that the claims made about these structural features are either false or fail to distinguish the Senate from the supposedly noncontinuous House of Representatives. Subpart C then takes up the claim that the Senate is distinctive because the framers intended or designed it to provide stability in the government. That might be true, but it is irrelevant to the continuity of the Senate's rules. In sum, I find all of the explanations for Senate continuity wanting.

A. CONTINUITY AND IDENTITY

One way to understand the continuing-body idea is to understand it as a claim about the Senate's identity over time. To say that the Senate is a continuing body is to say that today's Senate is the very same entity that came into existence at the Founding. Although this line of thought can have a very abstract, philosophical feel, senators nevertheless invoke these metaphysical notions in debates over concrete matters of Senate governance. We have already seen an instance in which then-Senator Buchanan tried to refute a charge of entrenchment by citing the Senate's continuing character, calling the 1841 Senate "the very same body" as the 1789 Senate.¹¹¹ That notion of a timeless, immortal Senate has held much appeal. Many other quotations could be adduced, but the following few statements should suffice to illustrate the point. To begin, consider another senator's remarks from that same 1841 debate:

There was no such thing as a new Senate known to the Constitution of this Republic. . . . There was a new House of Representatives, because the entire House expired at the expiration of the second year But not so the Senate. The Constitution replenishes that body every two years, by the election of a class of Senators, and thereby gives eternity to the duration of the body. There was no new, nor was there any old, Senate.¹¹²

Then, decades later:

Unlike the House of Representatives, which expires every two years and is renewed fresh from the people, the Senate never dies. The same which it was when it met, in 1789, it is now, and has held continuous and unbroken existence ever since.¹¹³

In 1959, yet another senator captured a similar sentiment:

111. *Supra* text accompanying note 103.

112. CONG. GLOBE, 26th Cong., 2d Sess. 236 (1841) (statement of Sen. Allen).

113. 9 CONG. REC. 47 (1879) (statement of Sen. Anthony).

[It is a] very ridiculous constitutional position . . . that a body which is continuous in its existence, a body which never dies, a body which always remains in being . . . cannot adopt continuous rules.¹¹⁴

One cannot dismiss these claims about senatorial identity as nonsense. We constantly speak of persons, objects, or groups as existing over time. And persistence over time is not incompatible with change. It is possible to ask whether I am still the *same* person after a heart transplant or after a psychological change of heart. We can ask whether a ship is still the *same* ship when some, most, or all of its planks are gradually replaced with new ones.¹¹⁵ We can ask whether a musical group is still the *same* group, despite changes in membership or musical style. And, just so, it should be comprehensible to ask the same question about the Senate: is the Senate today the *same* entity as the Senate in the past? Those who adopt the continuing-body notion answer the question in the affirmative, and they think that an important consequence follows: namely, that it is legitimate for the Senate to be governed by past decisions, just as I am bound by my own past promises. Continuing existence justifies entrenched rules, in other words.

Although this line of argument—that there is no entrenchment problem because the Senate today is the same entity as in the past—looks promising in certain ways, it is beset by problems. We have already questioned whether the defenders of the Senate's rules can establish the conclusions they need,¹¹⁶ but for the moment let us focus on just one antecedent difficulty: namely, that the argument relies on a curious criterion of identity.

We are told that the Senate is the same body over time because of its overlapping term structure, and the House is not the same body because all members' terms expire simultaneously.¹¹⁷ Yet, it is hard to see why, when talking about legislative bodies as intertemporal entities, we would pick out

114. 105 CONG. REC. 122 (1959) (statement of Sen. Ervin).

115. This familiar example derives from Plutarch's description of Theseus' ship:

The ship wherein Theseus and the youth of Athens returned had thirty oars, and was preserved by the Athenians . . . for they took away the old planks as they decayed, putting in new and stronger timber in their place, insomuch that this ship became a standing example among the philosophers, for the logical question of things that grow; one side holding that the ship remained the same, and the other contending that it was not the same.

PLUTARCH, *THE LIVES OF THE NOBLE GRECIANS AND ROMANS* 14 (Arthur Hugh Clough ed., John Dryden trans., Modern Library 1900).

116. See *supra* Part III (examining the links between continuity, entrenchment, and commitment).

117. See *supra* note 15 and accompanying text (introducing the basic rationale for the continuing-body theory).

this overlapping structure as the thing that establishes the Senate's identity over time. For my own part, I find it more natural to say something like the following about the Senate's identity:

The Senate is one branch of a bicameral legislature created by the U.S. Constitution, composed of persons called senators who satisfy certain qualifications and are elected for a particular term by voters of states; it is a body whose members interact with each other in certain ways and which interacts with other parts of the U.S. government in certain ways (legislating together with the House of Representatives, conducting impeachment trials, consenting to treaties and nominations presented by the President, and so forth).

Based on this understanding of what the Senate is, one could then ask whether the Senate remains the Senate, one and the same, when various things change. Does the Senate remain the Senate when its meeting place changes from New York to Philadelphia to Washington, D.C.? What about when the Seventeenth Amendment changes the mode of election of senators so that they are elected by popular vote rather than by state legislatures? What if the Senate were reapportioned? What sorts of changes does the Senate survive, though altered, and which kill it?

I do not claim to have answers to the questions just posed. Nor do I contend that everyone would agree with the approach to Senate identity I have just described. Identity over time is a complicated philosophical problem. More modestly, however, I do claim that if we ask ourselves what makes the Senate the same entity (or not) over time, we should in all candor admit that overlapping terms are not determinative.¹¹⁸ If that structure were critical, it would be impossible to speak of entities that lacked such an overlapping-term structure as existing over time, but clearly we do. In fact, we often talk about the House of Representatives as an enduring entity and not just the 90th House or the 111th House.¹¹⁹ We speak similarly of clubs,

118. Certainly, a change in the Senate's term structure, such as eliminating the overlapping classes, might have an impact on the Senate's identity. But the same is true of other changes to the Senate's structure that do not eliminate overlap, such as having one-sixth of senators elected every year, or changing senatorial terms to sixty years with one-third elected every twentieth year. All of these changes might be relevant to maintaining identity, because the Senate's current term structure might be part of the criteria of its identity. The point is just that the typical person would not focus upon overlapping *per se* as the thing that makes the Senate identical over time.

119. As one senator has observed:

If the judges of the Supreme Court were all to die to-day, and their successors should be appointed to-morrow, it would still be the same Supreme Court, although the individuals would be changed. [The House of Representatives'] . . . character does not depend on its personnel; its character does not depend on the individuality of its members; it is the House which, according to the true idea of the Constitution, is a perpetual House, whoever may constitute the individual members of that House.

musical groups, and the like. For any such entity, people can certainly disagree about the criteria of identity and whether the criteria are satisfied, but it would contradict our ordinary usages to treat overlapping membership as determinative.

I gladly admit that my comments in this Subpart take us only so far, for they attack only one possible interpretation of the continuing-body theory. Charity demands that we consider other interpretations. Maybe we should allow the Senate's defenders to use their own idiosyncratic criteria of identity, criteria that would distinguish between the House and the Senate. Or maybe we should not read these people as actually making claims about identity in the sense that we have been discussing it. That is, maybe their claim that the Senate is a continuing body is just a different kind of claim. Let us grant that. So what kind of claim is it? What is it, exactly, that makes the Senate a continuing body in a way that other legislative bodies are not? The following Subpart considers another set of potential answers.

B. WHY DOES THE SENATE'S STRUCTURE MATTER?

Adherents of the continuing-body view gesture toward the Senate's structure but tend not to spell out why that structure matters. It is logically possible that the whole idea of Senate continuity consists in nothing else than the fact that the senators' terms of office overlap. I will confront that formalist approach below. Another possibility, addressed first, is the view that the overlapping structure is important either because it leads to certain consequences or is associated with other features that would justify regarding the Senate as a distinctively continuing body. As I show, however, the various claims about the significance of the Senate's structure turn out to be either false or equally true of the supposedly noncontinuous House of Representatives.

1. Continuity of Membership

One possibility is that what matters is not the overlapping terms per se but, rather, the fact that this structure leads to continuity of membership: most of the senators from the 109th Congress are senators in the 110th Congress, and most of the senators in the 110th Congress are senators in the 111th Congress, etc.

Why should continuity of membership matter? Perhaps the idea is meant to involve a sort of implied consent, but any such consent-based argument very quickly reveals itself as untenable. It does not even necessarily work from one Congress to the next. It is possible that Senate $n+1$, with a somewhat different membership, would vote differently on the rules than its predecessor Senate n . (Suppose the rules had only narrowly achieved the decisive proportion in Senate n , and all the departing senators had voted in

4 CONG. REC. 432 (1876) (statement of Sen. Thurman).

favor of the rules.) After a number of years, it is an obvious fiction to speak of the original consent still existing, given changes in membership. And we have not even mentioned that continuing members might have changed their minds. So we can dismiss the implied-consent theory.

One might believe that continuity of membership is what matters without embracing an untenable implied-consent theory. Nonetheless, there are still multiple serious difficulties with fastening upon continuity of membership as the key factor.

To begin, consider a hypothetical. If continuity of membership is what matters, what would happen if, in some tragedy, a majority or even all of the senators died more or less simultaneously? When the Senate reassembles with its replacement senators,¹²⁰ would the preexisting Senate rules still apply, notwithstanding the minimal or even nonexistent continuity of membership? Thankfully, we do not know the answer to this question for certain. My suspicion, however, is that most people would conclude, upon reflection, that the death of the persons serving as senators should not matter for purposes of the continuing-body idea or the validity of Rule V's carryover provision. The Senate lives even when its members die. The Senate would be regarded as a continuing body regardless of the continuity of its members, and the old rules would remain in effect. Senatorial continuity, for those who believe in it, does not arise just out of the lucky contingency that a large number of senators have not heretofore simultaneously died.

Although the example above tends to show that continuity of membership is not what matters—not what makes the Senate a continuing body, not what allows its rules to carry over—one might complain that I have concocted an implausible scenario that leads to unreliable intuitions. “True, it is possible that all the Senators could die,” the response would go, “but we should instead focus upon what happens in practice. In practice, the structure of overlapping terms serves to ensure high levels of continuity of membership in the Senate.”

Fair enough, but appealing to practical continuity of membership is not going to help the defenders of Senate exceptionalism at all. For if real-world continuity of membership is what matters, the House is just as continuous as the Senate! There is very little turnover in the House, especially in modern times. Even though all members of the House must stand for reelection every two years, the large majority of them seek reelection, and almost all of them win.¹²¹ Although the Senate's six-year terms give it a built-in advantage in terms of continuity of membership, the rates of seeking reelection and

120. See U.S. CONST. amend. XVII, cl. 2 (providing for filling of vacancies by special elections and temporary gubernatorial appointments).

121. In recent decades, typically about ninety percent of incumbents seek reelection, and ninety percent of them succeed. REELECTION RATES OF INCUMBENTS 23 fig.1, 27 (David C. Huckabee ed., 2003). Reelection rates were also very high in the earliest Houses, but fewer incumbents sought reelection, so turnover was higher. *Id.* at 22.

winning reelection are usually somewhat lower in the Senate than in the House.¹²² As a result, if we combine the various effects and just look at turnover figures—that is, the percentage of the members of each chamber that are freshmen in each new Congress—we find that turnover in the Senate from one Congress to the next is sometimes higher than it is in the House. Put differently, the Senate is sometimes *less continuous in membership* than the House from one Congress to the next, even though two-thirds of the Senators do not even have to run for reelection every two years. For example, in the 107th Congress, 10% of the senators were replacements (10 of 100), while 9.4% of the House members were replacements (41 of 435).¹²³

Nor does the Senate look more continuous in membership than the House if one looks at the early years of the Republic. Turnover was higher in both houses than it is in the modern era of congressional careerism. In particular, the early Senate was plagued by high rates of resignation (over a third quit mid-term),¹²⁴ and many of the senators who did finish their terms did not seek reelection.¹²⁵ In the first several terms of the House of Representatives, members were comparatively more likely to serve out their terms and seek reelection (and over ninety percent of them won), such that the majority of members typically carried over from one House to the next.¹²⁶ The net result is that there was little difference between early Senates and Houses in overall continuity of membership, or at least little difference that favored the Senate. Indeed, in the first dozen Congresses, it was often true that the average representative had been in office *longer* than the average senator.¹²⁷ Only two senators served the whole period from 1789 to 1801.¹²⁸ In sum, the House is quite continuous in terms of membership, sometimes more so than the Senate. If continuity of membership is what matters, then we should consider the House a continuing body for rules purposes; the House should be able to entrench its rules against successor

122. *Id.* at 3 fig.1, 4 figs.2 & 3, 12.

123. MILDRED AMER, CONG. RESEARCH SERV., FRESHMEN IN THE HOUSE OF REPRESENTATIVES AND SENATE BY POLITICAL PARTY: 1913–2005, at 5 (2005), available at <http://www.llsdc.org/sourcebook/docs/CRS-RS20723.pdf>.

124. SWANSTROM, *supra* note 23, at 80; DANIEL WIRLS & STEPHEN WIRLS, THE INVENTION OF THE UNITED STATES SENATE 171–74 (2004). Many senators quit in order to take jobs in state government. *Id.* at 171–72.

125. REELECTION RATES OF INCUMBENTS, *supra* note 121, at 8 tbl.1; SWANSTROM, *supra* note 23, at 80–81.

126. REELECTION RATES OF INCUMBENTS, *supra* note 121, at 26 tbl.1; WIRLS & WIRLS, *supra* note 124, at 172; Morris P. Fiorina et al., *Historical Change in House Turnover*, in CONGRESS IN CHANGE: EVOLUTION AND REFORM 24, 29–32 (Norman J. Ornstein ed., 1975).

127. WIRLS & WIRLS, *supra* note 124, at 172–73. For example, in the 12th Congress the average representative had served 5.6 years, and the average senator had served 5.2 years. *Id.*

128. SWANSTROM, *supra* note 23, at 80.

Houses. But of course the House does not do this, and it believes that the Constitution does not permit it to do so.¹²⁹

2. Permanent Quorum

If continuity of membership does not work, then we are still looking for an answer to the question of why overlapping terms should matter. Another popular argument is this: overlapping terms ensure that a quorum of the Senate is always available. Thus, the Senate is always able to do business.¹³⁰ And in this regard, the Senate is said to differ crucially from the House. As one member of the Senate put it:

[T]here never has been a time since the organization of this Government, that two-thirds of the Senate were not in existence. It is, therefore, a perpetual body The House is not so. It is true of the House of Lords; it is not true of the House of Commons. Precisely what is true of the House of Lords is true of the Senate; precisely what is true of the House of Commons is true of the House of Representatives here.¹³¹

And in the words of another:

The House of Representatives is a continuing body during the term of office of its Members, and is not a continuing body when their term of office expires, but the difference between the House and the Senate is that there are always Members of the Senate covering the entire period of time, without ending or beginning.¹³²

129. See *supra* text accompanying notes 19–20 (describing how each new House has the power to adopt its own rules).

130. E.g., 99 CONG. REC. 115 (1953) (statement of Sen. Russell) (referring to continuing quorum); 99 CONG. REC. 108 (1953) (statement of Sen. Taft) (“I think [the precedents holding that the Senate is a continuing body] arose out of the fact that the Senate always has at least 64 Members, or substantially that number. They can meet and can act.”); 4 CONG. REC. 432 (1876) (statement of Sen. Thurman) (explaining that the Senate is said to be perpetual because a quorum is always in existence). Because a majority is required for a quorum, it is evidently crucial here that two-thirds of the Senate carries over, rather than just half. As Senator Thurmond stated:

Had the Founding Fathers desired continuity only, but less than a continuing body, they could have provided for a staggered term of 4 years for a Senator with one-half of the Senate returning from one session to the next. This would not have provided the necessary quorums to do business at all times, and the Senate would not have been a continuing body.

105 CONG. REC. 144 (1959); cf. *Robertson v. State ex rel. Smith*, 10 N.E. 582, 603 (Ind. 1887) (Niblack, J., concurring) (opining that the state senate was not a continuing body because one-half of its members stood for election each term but two-thirds were required for a quorum).

131. 4 CONG. REC. 438 (1876) (statement of Sen. Maxey).

132. 55 CONG. REC. 11 (1917) (statement of Sen. Poindexter).

The statements above are wrong to the extent they purport to identify a difference between the House and Senate. Indeed, the second quotation above was quickly followed by this altogether correct response from another senator: “[T]he very moment the term of office of the sitting Members of the House of Representatives expires, that moment the term of office of their successors begins, and there never is any interval.”¹³³ There is no gap in seisin in the House. This is especially clear after the ratification of the Twentieth Amendment, which provides that the term of the incoming members begins the instant the term of the outgoing members expires—currently noon on January 3rd of odd-numbered years.¹³⁴ It is certainly true that the outgoing House might have finally adjourned its last session some time before January 3rd, but the two-year-long constitutional authority of the old House and its members would not have expired. They could reassemble before January 3rd if needed, for instance by a presidential request.¹³⁵ And it is also true that the new House might not initially meet on January 3rd, such that an organized House was not actually *sitting* for some period after the beginning of the two-year constitutional term.¹³⁶ But again, the new members could be summoned and organize to conduct business. Needless to say, the Senate is not perpetually in session either, so the above facts do

133. *Id.* (statement of Sen. Walsh).

134. U.S. CONST. amend. XX, § 1 (“[T]he terms of Senators and Representatives [shall end] at noon on the 3d day of January . . . and the terms of their successors shall then begin.” (emphasis added)). The January 3rd turnover date strongly implies, and arguably implicitly commands, that elections take place and new members take office before that date, so that the terms can “then begin.”

To be sure, one can imagine bizarre scenarios, especially before the Twentieth Amendment, that would generate a period during which no members of the House existed. What if an outgoing Congress (or state legislatures, as they have authority over election dates in the absence of congressional action, U.S. CONST. art. 1, § 4, cl. 1), set elections for a date *after* the previous two-year constitutional term expired? For example, House elections might be scheduled for June of an odd-numbered year, even though the two-year term of the old outgoing House’s members expired months earlier. In this scenario, in April there would be no members of the House. Even before the Twentieth Amendment, one could attack such an electoral calendar as unconstitutional, though the argument would have to rely on structural inferences that are less certain than they are today. *See* Tillman, *supra* note 110, at 379 (arguing that such an attempt to create a gap would be unconstitutional). Nonetheless, whatever is or might have been possible, there never has been any such gap in the House: at the time of the expiration of the old House, the vast bulk of the newly elected or reelected members of the new House are in place. 4 CONG. REC. 432 (1876) (statement of Sen. Thurman). That is why Senator Walsh could say in 1917, before the Twentieth Amendment’s adoption, that “there never is any interval.” 55 CONG. REC. 11 (1917).

135. U.S. CONST. art. II, § 3 (“[The President] may, on extraordinary Occasions, convene both Houses, or either of them.”).

136. *Id.* at amend. XX, § 2 (providing that the new House will meet on January 3rd, unless a different date is provided by law).

not distinguish the two chambers. The chambers stand on the same footing when it comes to the permanence of a quorum.¹³⁷

As the first block quotation above indicates, some confusion about the nature of the House and Senate might stem in part from some false analogies between American and British institutions. The monarch had the power to dissolve Parliament—put an end to its existence—and, during the period between the dissolution of one Parliament and the election of members for the next Parliament, there would be no House of Commons in existence.¹³⁸ The House of Commons had gaps. During such a gap, no one could rightfully be considered a member of the House of Commons. In this respect, the House of Commons certainly differs from our Senate, but it also differs from our House of Representatives.

3. Ever-Present Presiding Officer

A contention closely related to the quorum argument, and sometimes mentioned in connection with it, is that the Senate is perpetual because it is always in possession of a presiding officer, namely the Vice President, and thus is always an organized body.¹³⁹ This argument fails for many of the same reasons as does the quorum argument.

137. I recognize that there could be various scenarios—such as the death, incapacity, or resignation of many Representatives or the failure of jurisdictions to hold elections—that might deprive the House of a quorum, depending on how one defines the “majority” that the Constitution says constitutes a quorum. *Id.* at art. II, § 5, cl. 1 (“[A] Majority of each [House] shall constitute a Quorum to do Business.”). Compare John Bryan Williams, *How to Survive a Terrorist Attack: The Constitution’s Majority Quorum Requirement and the Continuity of Congress*, 48 WM. & MARY L. REV. 1025, 1064–67 (2006) (arguing that the constitutionally required denominator for computing a quorum is the whole number of authorized seats), with HOUSE MANUAL, *supra* note 10, § 53, at 22–23 (explaining that long-standing House practice excludes authorized seats from the denominator for various reasons, such as death of a member). But these possibilities affect the Senate as well.

138. See generally MAY, *supra* note 31, at 31–37 (describing royal prerogatives to summon and dissolve Parliament); Tillman, *supra* note 110, at 377 (discussing this difference between Parliament and Congress). The British Parliament today is highly continuous, much like our own legislature, and this transition was already under way by the time of the Founding. See 1 BLACKSTONE, *supra* note 90, at *146 (“[B]y some modern statutes, on the demise of a king or queen, if there be then no parliament in being, the last parliament revives . . .”); THOMAS ERSKINE MAY, ERSKINE MAY’S TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS, AND USAGE OF PARLIAMENT 272 (William McKay et al. eds., 23d ed. 2004). The author notes:

[There is] an interregnum between the dissolution of a Parliament and the meeting of its successor during which there is no Parliament in existence; but the principle of the unbroken continuity of Parliament is for all practical purposes secured [today] by the fact that the proclamation which dissolves a Parliament also provides for the election and meeting of a new Parliament.

Id.

139. *E.g.*, 99 CONG. REC. 115 (1953) (statement of Sen. Russell) (arguing that the Senate is continuous because of its term structure and the Vice President’s four-year term); CONG. GLOBE, 26th Cong., 2d Sess. 240 (1841) (statement of Sen. Buchanan) (arguing that the Senate is a permanent and continuous body and noting that the “Senate always had a President”);

To begin, although the Constitution automatically authorizes the Vice President to serve as presiding officer, so that no senatorial election or other action is required (as it is for choosing a Speaker of the House), there is no reason why the position of Vice President could not be vacant. Indeed, before the Twenty-Fifth Amendment’s provisions for filling a vice-presidential vacancy, the office could sit empty for years. Of course, the Senate can and does choose one of its own members to serve as President Pro Tempore in the Vice President’s absence from the Senate.¹⁴⁰ But this just puts the Senate on the same footing as the House, which elects its Speaker. A body might find itself without a presiding officer for any number of reasons (death, resignation, failure to be reelected), and this is equally true in the House and the Senate.¹⁴¹ Thus, claims that the Senate always has a presiding officer add nothing to the debate.

* * *

In sum, what can we say about why the Senate’s structure of overlapping terms matters? Not that it supports a theory of implied consent. Not that it guarantees continuity of membership across two-year terms: it does not guaranty such continuity of membership either in theory (e.g., because many members could die) or in actual practice (because the House has very high continuity of membership, sometimes higher than the Senate). Not that it guarantees a quorum will always exist: this is equally true of the House. Neither do we find enlightenment in any claims about the supposed permanence of the Senate’s presiding officer.

What, then, is there? Overlapping terms matter because it means that terms overlap? That is, the mere fact that there is no instant at which all senatorial terms turn over has powerful consequences for Senate rulemaking, even if it does not line up with any feature that marks the Senate as distinctively continuous compared to the House? Such a view

CUSHING, *supra* note 30, ¶ 272, at 104–05 (noting that the Senate is a “continuous and permanent body” and explaining that there is always a presiding officer “ready to proceed at once with his duties . . . without any further authority from the senate”); *cf.* *Werts v. Rogers*, 28 A. 726, 760 (N.J. 1894) (deciding that the New Jersey Senate, despite two-thirds carryover, differed from the U.S. Senate regarding perpetual existence because the latter has a permanent presiding officer, i.e. the Vice President).

140. U.S. CONST. art. I, § 3, cl. 5.

141. One could respond that the office of the President Pro Tempore is more permanent than that of the Speaker because a senator’s election to that post does not automatically end at the close of a two-year Congress. *See infra* Part V.A.3 (discussing the tenure of the President Pro Tempore). The Constitution does not say exactly how long the President Pro Tempore (or the Speaker, for that matter) can stay in office, and indeed that has been a matter of some debate and evolution over time. *See infra* Part V.A.3. But to the extent that the President Pro Tempore’s continuity in office has been *justified* by the Senate’s continuity, *see, e.g.*, S. REP. NO. 44-3, at 2 (1876); 21 CONG. REC. 46 (1889) (statement of Sen. Reagan), it would be wholly circular to use that to *prove* the Senate’s continuity. Of course, none of this affects the point that permitting continuous tenure in office does nothing to prevent vacancies in the office.

seems to me not so much formalistic as just empty. Nonetheless, for those who find mere overlap of terms important, they can consider all of the other lines of argument in this Article. At the moment, though, let us consider, and debunk, one additional account of what it might mean for the Senate to be a continuing body.

C. *THE (IRRELEVANT) ARGUMENT THAT THE SENATE WAS INTENDED OR DESIGNED TO PROVIDE STABILITY*

It might be said that I am missing the point here, failing to see the forest for the trees. The Senate's status as a continuing body depends not on nice details such as those discussed above but on the fact that the Senate was, the argument would go, *designed* or *intended* to be a continuous, stable body.

There is clearly something appealing in this line of thought. The Senate was designed, in part, to provide stability in the government. Because senators served longer terms than House members, they would be able to resist the sudden impulses of an impetuous and overly popular lower chamber.¹⁴² The decision to make the senators' longer terms overlap would likewise tend to dampen swings in policy over time. As Publius explained:

The mutability in the public councils arising from a rapid succession of new members, however qualified they may be, points out, in the strongest manner, the necessity of some stable institution in the government. Every new election in the States is found to change one half of the representatives. From this change of men must proceed a change of opinions; and from a change of opinions, a change of measures. But a continual change even of good measures is inconsistent with every rule of prudence and every prospect of success.¹⁴³

142. *E.g.*, THE FEDERALIST NO. 62 (probably James Madison), *supra* note 106, at 379 (noting that the Senate "ought to hold its authority by a tenure of considerable duration" to give it "firmness"); 1 RECORDS, *supra* note 87, at 218 (Madison's notes from June 12, 1787, documenting that Madison and Randolph favored longer senatorial terms to promote stability and bolster the Senate's ability to resist the House); *id.* at 289–91 (Madison's notes from June 18, 1787, documenting Hamilton's arguments in favor of senators holding office for life, in order to attain "stability and permanency").

143. THE FEDERALIST NO. 62 (probably James Madison), *supra* note 106, at 380; *see also id.* NO. 77 (Alexander Hamilton), at 459 (arguing that the Senate would be more consistent than the President); James Wilson, Of the Constitutions of the United States and of Pennsylvania—of the Legislative Department, in 2 COLLECTED WORKS OF JAMES WILSON 829, 853 (Kermit L. Hall & Mark David Hall eds., 2007) (1790–91) ("The qualities of stability and consistency will be expected chiefly from the senate; because the senators continue longer in office; and because only a part of them can be changed at any one time.").

To be sure, it would be a mistake to suppose that there was a single rationale for this or any other design choice,¹⁴⁴ and certainly there is some peril in the whole enterprise of trying to foist principled justifications, based on sketchy and partial evidence, on decisions that were rooted in pragmatic compromise as much as in political theory. Nonetheless, I am willing to concede that the Senate was meant to provide stability. But it is all too easy to slide from statements in *The Federalist* and other early authorities on the function of the Senate to the altogether different matter that is involved in the continuing-body debate. That move is unjustified for several reasons.

To begin with, there are some argumentative gaps between the goal of stability and the conclusion that the Senate may act as a continuing body for purposes of its rules and other matters. The unstated but implicit assumption is that a concern for stability would militate in favor of parliamentary rules that are themselves stable over time. It is empirically questionable whether rigidity in parliamentary rules (or in anything else) promotes long-term stability; rigidity may just invite revolutionary upheaval by foreclosing more measured attempts at reform. More to the point, so far as I am aware there is no evidence that the framers linked the Senate’s overlapping structure with permanent parliamentary rules or that they actually intended that the Senate’s procedures be resistant to change—apart from the handful of procedural rules that the Constitution itself fixed equally for both the House and the Senate.¹⁴⁵ Further, even though stability was an important aim in designing the Senate, that does not mean the Constitution includes every possible design choice that conduces to maximal stability: we do not elect senators for life, for example, though Alexander Hamilton and some others might have favored that.¹⁴⁶ What the document provides regarding rules is that each chamber has the power to make them.¹⁴⁷

144. For example, the decision to have staggered elections might also have been motivated by the desire to guard against the risk that a group of state legislatures might temporarily conspire to paralyze the federal government by refusing to appoint enough senators to make a quorum. See THE FEDERALIST NO. 59 (Alexander Hamilton), *supra* note 106, at 359 (“The senators are to be chosen for the period of six years; there is to be a rotation [A] temporary combination of a few States to intermit the appointment of senators could neither annul the existence nor impair the activity of the body”). Another justification is that having three classes of senators would introduce enough diversity of sentiment to prevent them from banding together to aggrandize the Senate. 1 RECORDS, *supra* note 87, at 426 (Madison’s notes from June 26, 1787, documenting Wilson’s arguments in favor of having three classes of senators).

145. *E.g.*, U.S. CONST. art. I, § 5, cl. 1 (majority makes a quorum); *id.* at cl. 2 (two-thirds needed to expel a member); *id.* at cl. 3 (yeas and nays recorded on the vote of one-fifth of those present). See generally Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361 (2004) (discussing aspects of the Constitution that govern the legislative process).

146. 1 RECORDS, *supra* note 87, at 300, 309–10, 409.

147. U.S. CONST. art. I, § 5, cl. 2.

Finally, if stability was the aim, in what does that aim manifest itself? Presumably, in the structural features whose (ir)relevance we have already discussed. Surely the idea is not that the Senate was given these features and then *on top of that* the framers breathed into the Senate some separately existing, everlasting spirit that they denied the House. If Part IV.B's attempt to explain senatorial continuity dead-ended with arid formalism, this attempt seems to lead to mysticism.

* * *

Based on the considerations above, I do not believe there is any satisfactory account of why the Senate, but not the House, is a continuing body.¹⁴⁸ Nonetheless, for purposes of the next Part of this Article, we will assume that there is something special about the Senate that has important implications for the continuity of the Senate's rules. We will then ask whether this has other consequences too.

V. THE INCONSISTENCY OF CONTINUITY

If the Senate's basic structure makes it a continuing body (whatever exactly that means), then one might expect that fact to have consequences across multiple domains of legislative procedure. In truth, however, there is no uniform practice of continuity when one looks at Senate practice as a whole. The Senate is a continuing body, except when it isn't.

This inconsistency poses difficulties for the continuing-body theory. Part V.A documents the variety of ways that the Senate behaves with respect to continuity and, more importantly, shows that the *explanations* offered in support of the Senate's behavior in other contexts contradict the continuing-body theory. Further, as Part V.B argues, if the Senate did act in other domains the same way it acts regarding its rules, we would find that highly problematic.

A. PRACTICES REGARDING CONTINUITY IN OTHER CONTEXTS AND WHAT THEY TELL US

Senate practice displays great variety, so it is useful to begin with some conceptual categories. First is the *death-knell* view: a certain instrument, office, or proceeding automatically expires at the end of a certain period. The death-knell approach could be further divided into different versions

148. There is nothing logically inconsistent in saying that the House and the Senate are both continuing bodies in some sense. Indeed, at various points in this Article, I point to ways in which the House is "continuous" in one way or another. Again, the trouble is that (non)continuity can mean different things, so one needs to be careful about what exactly one means. If a claim that the House is continuous were construed to mean that the House could entrench its rules, that would conflict with established House practice and would be vulnerable to many of the arguments against the Senate's continuing-body theory presented in the rest of this Article.

depending on whether the key date is the end of the annual session, the end of the two-year Congress, or some other event. Another conceptual category of behavior is *mere continuity*: the instrument, office, or proceeding survives into the next period without automatically expiring. This division between death knell and mere continuity does not exhaust all of the possibilities, however, for a third category could be called *entrenched continuity* or *permanence*: an instrument, office, or proceeding continues into the next period with restrictions on amendment, withdrawal, or termination.

With those distinctions in mind, consider how the Senate behaves in a variety of non-rules contexts:

- A bill passed by one chamber of Congress but not the other chamber dies at the end of the Congress; for it to become law, both houses would have to pass the bill in the next Congress.¹⁴⁹
- When the Senate confines someone for contempt of the Senate, the confinement terminates at the end of the session (or, according to other authorities, the end of the Congress).¹⁵⁰
- Under the Senate rules, nominations submitted to the Senate for its consent lapse at the end of each session and must be resubmitted. But if the Senate decides to dispense with the rule by unanimous consent, the nomination can survive the end of the session but lapse at the end of the Congress.¹⁵¹
- Articles of impeachment presented to the Senate in one Congress remain pending in the next one.¹⁵²
- Treaties submitted to the Senate for its consent can remain pending in the Senate indefinitely, even for decades (though the Senate can return them to the President if it wishes).¹⁵³
- The Senate’s President Pro Tempore (its presiding officer in the absence of the Vice President) remains in office from one Congress to the next, but is subject to removal at the pleasure of the Senate.¹⁵⁴

The list above might hold some interest for its own sake, but what does this diversity of practices prove? One has to be careful here about the

149. *Infra* Part V.A.1.

150. *Infra* Part V.A.2.

151. MARTIN B. GOLD, SENATE PROCEDURE AND PRACTICE 154–55 (2004).

152. HOUSE MANUAL, *supra* note 10, § 592, at 307, § 620, at 328; RIDDICK & FRUMIN, *supra* note 8, at 875. One could attack the historical precedents in various ways and question their consistency with constitutional principles. See BRUCE ACKERMAN, THE CASE AGAINST LAMEDUCK IMPEACHMENT 42–44, 57–64 (1999). Here we are just trying to lay out objectively what the prevailing practices are.

153. CONG. RESEARCH SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE U.S. SENATE 143–45 (Comm. Print 2001); see 2 HAYNES, *supra* note 23, at 626 n.1 (describing a treaty that was pending in the Senate for over twenty years).

154. *Infra* Part V.A.3.

conclusions that can properly be drawn. Two grounds for caution are particularly worth noting.

The first caveat is that one should not assume that observed practice represents the outer boundary of what is constitutionally permissible. Put differently, the Senate might not always act as continuously as it could. Indeed, history shows there is some room for practices to evolve, displaying greater or lesser degrees of continuity in different eras.¹⁵⁵ Maybe the Senate has decided, for reasons of prudence or otherwise, that it is advantageous to have certain proceedings start afresh each Congress, but that does not necessarily mean it *must* act that way.

A second limitation stems from the nature of comparative analysis. If each legislative context is governed by its own unique historical idiosyncrasies, then we should not be surprised to find no Grand Unified Theory of senatorial continuity. Consider impeachment practice. There have been several instances in which the House presented the Senate with articles of impeachment at the end of one Congress and the Senate's trial concluded during the next.¹⁵⁶ One might therefore be inclined to say that the Senate is (in that sense) a continuing body for impeachment-trial purposes. But when one seeks an explanation for the Senate's practices, the answer one finds does not have to do with the Senate's overlapping terms or abstract notions of continuity. Rather, the justification (such as it is) for carryover impeachments appears to rest on a particularized historical pedigree: namely, the British rule was that the dissolution of a Parliament did not affect impeachment proceedings in the House of Lords.¹⁵⁷ Jefferson, in his famed parliamentary manual, gave no justification for doing the same thing in this country other than to cite the familiar British practice.¹⁵⁸ To put this lesson in more general terms, the Senate's practices in one area might not tell us much about how it must behave in another area, for the various realms might not be governed by universal principles.

Because of these two limitations, the mere observation of diversity does not prove much. One must dig a bit deeper. I attempt to do so in the

155. See *infra* note 188 (discussing evolving practices regarding the Senate President Pro Tempore).

156. *Supra* note 152 and accompanying text.

157. HOUSE MANUAL, *supra* note 10, § 620, at 328 ("An impeachment is not discontinued by the dissolution of Parliament, but may be resumed by the new Parliament.").

158. *Id.* § 592, at 307. Jefferson stated:

When it was said above that all matters depending before Parliament were discontinued by the determination of the session, it was not meant for judiciary cases depending before the House of Lords, such as impeachments, appeals, and writs of error. These stand continued, of course, to the next session. Impeachments stand, *in like manner*, continued before the Senate of the United States.

Id. (citation omitted) (emphasis added). Jefferson does not explore the rationale for the British practice or whether that rationale applies to our system.

material below, which examines several domains of Senate activity in more detail. These contexts provide a challenge to the continuing-body theory not just because the Senate’s behavior in these fields diverges from its conduct concerning its rules but, crucially, because of the proffered *explanations* for the Senate’s behavior in these other contexts. The explanations appeal to the same matters of Senate structure and character as does the continuing-body argument. Because the explanations appeal to the same grounds, we should expect consistent answers. In fact, however, the explanations for the Senate’s behavior in these contexts contradict the premises of the continuing-body argument.

1. Lawmaking

The conventional view is that a bill passed by one house of Congress but not the other dies at the end of the two-year congressional term.¹⁵⁹ If the Senate alone passed a certain bill during the 109th Congress, no valid law results if the House alone passes the same bill in the 110th Congress and then sends it to the President for his approval; rather, both houses have to pass the same bill in the same two-year Congress. That is, bicameral lawmaking requires contemporaneity.

Why? Perhaps surprisingly, the Constitution does not explicitly set forth a rule mandating contemporaneous bicameral action. The text just says that both houses must “pass” a bill, without specifying when.¹⁶⁰ Why, then, is this a rule that “everyone knows” to be true?¹⁶¹ Although it is hard to say with certainty, as this is not a rule to which most people have devoted much thought, the rule is linked to the limited temporal existence of each house

159. See, e.g., CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 27 (1989) (“[A]s a formal matter, all bills either receive enactment in a Congress, or lapse at the Congress’s end.”); *id.* at 32 (“When the [second] session ends, all bills not enacted into law die.” (footnote omitted)). In the early decades, Congress applied this principle even more strictly such that both houses had to act during the same *session* of a Congress. See 1 ANNALS OF CONG. 975, 1082–87, 1092–94, 1110–12, 1116–17 (Joseph Gales ed., 1834) (reporting debate and decision on this point in the 1st Congress); see also 5 HINDS, *supra* note 19, § 6727 (summarizing historical development).

160. U.S. CONST. art. I, § 7. Relying on this apparent silence in the text, Seth Barrett Tillman argues that contemporaneity is not in fact required; Congress could engage in noncontemporaneous lawmaking if it wished. Seth Barrett Tillman, *Noncontemporaneous Lawmaking: Could the 110th Senate Enact a Bill Passed by the 109th House?*, 16 CORNELL J.L. & PUB. POL’Y 330 (2007). But see generally Aaron-Andrew P. Bruhl, *Against Mix-and-Match Lawmaking*, 16 CORNELL J.L. & PUB. POL’Y 349 (2007) (defending the conventional view).

161. As Senator Humphrey put it:

[E]very Member of the Senate knows, and every reporter in the press gallery knows, and every citizen of the United States knows, and everyone else knows that at the end of every Congress bills which have cleared committees and remain on the Senate calendar but have not been acted upon by the Senate are dead, that they lose their hold on life.

105 CONG. REC. 142 (1959).

of Congress. As Michael Stokes Paulsen has put it, a proposed law passed by just one house “has limited life by virtue of the *term* of the proposing body.”¹⁶² Or as Bruce Ackerman says, bills “expire with the *expiration of the House or Senate* that endorsed them.”¹⁶³

According to the continuing-body theory, the Senate does not “expire” or “die” but has life everlasting. If that is so, then it seems contemporaneity should not be required. Although a bill passed only by the House of Representatives should die at the end of a two-year term, a bill passed only by the Senate should not. A bill passed by the Senate in the 109th Congress should retain its vitality in the 110th (or 210th, for that matter), just as Senate rules carry over from one Congress to the next, and for the same reason: the Senate itself, the source of those instruments’ power, remains continuously in existence.¹⁶⁴

Now, perhaps one could argue that the House’s acknowledged discontinuity somehow infects the Senate in the latter’s legislative capacity too, such that the lawmaking process has little force as a counterexample. That same argument would not work when it comes to the Senate’s inherent contempt power, however. The contempt power is a unilateral power, like the rules power. How, then, does the Senate see itself when it comes to contempt?

2. Contempt of Congress

Each house of Congress enjoys an inherent power, which in recent times has lain nearly dormant, to hold non-members in contempt.¹⁶⁵ A

162. Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 730 (1993) (emphasis added).

163. ACKERMAN, *supra* note 152, at 64–65 (emphasis added); *see also id.* at 9 (referring to “the death of the House that passed [a bill]”).

164. To be sure, one could explain the automatic death of unenacted bills without appealing to metaphysical claims about legislative lifespans. For example, one could say that Senate approval must come in the current Congress rather than in a prior one so that we know that the Senate still supports the bill. I personally find that kind of explanation more powerful than claims about when a body expires. Yet this alternate explanation for the need for contemporaneous action also poses a problem for the continuing-body theory because it suggests that the Senate should need to express renewed support for the procedural rules each term.

165. Although the Constitution does not expressly provide such a power, the contempt power has a strong (albeit not entirely uncontested) foundation in early legislative and judicial precedents. *See Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 226–31 (1821) (recognizing inherent contempt power); ERNEST J. EBERLING, CONGRESSIONAL INVESTIGATIONS 37–50 (1928) (discussing the 1795–96 Randall/Whitney case in the House and the 1800 Duane case in the Senate); Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1093–1131 (2009) (discussing British and early American legislative assertions of contempt power); C.S. Potts, *Power of Legislative Bodies To Punish for Contempt*, 74 U. PA. L. REV. 691, 719–22 (1926) (same). For early criticism of Congress’s claimed contempt power over non-members, see HOUSE MANUAL, *supra* note 10, §§ 297–98, at 138–40; and ST. GEORGE TUCKER, VIEW OF THE

common offense is the failure to provide testimony or documents requested by a congressional committee, but acts including bribing or assaulting members have also been punished as contempts.¹⁶⁶ The continuing-body idea has implications for the exercise of the contempt power because it may impact how long the Senate can confine a contemnor.

As with many questions about the contempt power, it is hard to provide a definitive answer to how long confinement can last. In part, this is because the houses’ inherent contempt power has fallen into disuse in favor of statutory civil- and criminal-contempt schemes that enlist the assistance of other branches of government.¹⁶⁷ Although the inherent contempt power still exists, the availability of these alternatives means that there are few occasions for the houses to push the bounds of their unilateral authority.

Nonetheless, keeping in mind the difficulty of speaking with certainty, the usual statement of the rule on the duration of the power to confine for contempt is that the power terminates with the end of the legislative body’s session.¹⁶⁸ That rule is typically (though, as we will see, not invariably) understood to mean that the power to confine terminates at the end of the particular legislative session at issue, even if it is not the last session of a given two-year Congress. (Recall that each Congress most often has two sessions, one each year.)

There seem to be several reasons for the session rule. To some degree, the rationale depends on which of the two types of confinement is at issue, coercive or punitive. To the extent that coercive confinement is at issue, one quite sensible view is that the detention can only continue while the house still actively needs the testimony or evidence the witness is withholding; if the house is not in session, then its business is not being impeded, so the

CONSTITUTION OF THE UNITED STATES, WITH SELECTED WRITINGS 146–50 (Liberty Fund 1999) (1803).

166. CHAFETZ, *supra* note 72, at 222–34 (summarizing various contempt cases).

167. In 1857, Congress enacted a statute whereby the houses can refer certain alleged contempts to federal prosecutors for trial in the courts as ordinary crimes, with convicted defendants subject to fines and imprisonment. 2 U.S.C. §§ 192, 194 (2006). More recently, Congress has created a civil-enforcement scheme whereby a chamber can sue to seek enforcement of a legislative subpoena that is being flouted; if the witness refuses the court’s order to comply, he or she can be held in contempt of court. *See* MORTON ROSENBERG & TODD B. TATELMAN, CONG. RESEARCH SERV., CONGRESS’S CONTEMPT POWER: LAW, HISTORY, PRACTICE, AND PROCEDURE 33–46 (2007) (discussing statutory civil contempt). There is express statutory authority for enforcement suits brought on behalf of the Senate. 2 U.S.C. § 288d; 28 U.S.C. § 1365 (2006). As for the House, the authority to sue has typically taken the form of a resolution. *See* ROSENBERG & TATELMAN, *supra*, at 37–39 (discussing the authority to sue).

168. *See, e.g.,* Marshall v. Gordon, 243 U.S. 521, 542 (1917) (“[S]uch imprisonment may not be extended beyond the session of the body in which the contempt occurred.”); 5 ANNALS OF CONG. 183 (1795) (statement of Rep. Milledge) (“It is admitted that the utmost which can be done to the prisoners is confinement till the rising of the session . . .”); CUSHING, *supra* note 30, ¶¶ 677–78, at 267 (stating, as a default principle of parliamentary law, that a prisoner is entitled to be discharged at the end of the legislative session).

witness should be freed.¹⁶⁹ A related argument for limiting confinement to the session is that because a recusant witness's coercive confinement should cease when he decides to comply (i.e., when the coercion succeeds), there needs to be a house present to hear his decision to comply, lest he remain imprisoned unnecessarily.¹⁷⁰ The above rationales would not supply an ending point for punitive confinement, but another rationale does: the session rule has sometimes been defended on the ground that basic principles of justice dictate that for every person held in custody there should always be some available authority that has the power to take mercy upon him or otherwise decide to release him.¹⁷¹

The force of the foregoing rationales for the session rule depends on how the legislature operates during a given era. Today the rationales make little sense. Although in the past one could contend that imprisonment beyond the end of the session meant keeping someone locked up for the better part of a year while Congress was away,¹⁷² today the breaks between the sessions are very short, typically ranging from two weeks to a month.¹⁷³ In any event, with modern modes of communications and travel and the legislature's large permanent machinery of clerks and staffers, the line between when Congress is in session and when it is not in session has become less clear and less important. Today's Congress is, practically speaking, always open for business. Indeed, even as early as 1871, some senators were arguing that no inconveniences would result from confining contemnors during a long intersession recess: if the detainees relented, the sergeant-at-arms could convey that fact to the relevant committee; then, if the committee did not affirmatively order their continued detention, the contemnors could be released.¹⁷⁴ In short, the above justifications for

169. This same reasoning explains why the coercive confinement of a witness who refuses to cooperate with a grand jury ends with the close of the grand jury's term: "Once the grand jury ceases to function, the rationale for civil contempt vanishes . . ." *Shillitani v. United States*, 384 U.S. 364, 372 (1966); see also 28 U.S.C. § 1826 (providing that the imprisonment of recalcitrant witnesses shall not exceed the life of the court proceeding or the term of the grand jury).

170. CONG. GLOBE, 42d Cong., Spec. Sess. 880 (1871) (statement of Sen. Windom); *id.* at 869 (statement of Sen. Thurman).

171. H.R. REP. NO. 41-105, at IX (1870); CONG. GLOBE, 42d Cong., Spec. Sess. 924 (1871) (statement of Sen. Bayard).

172. As one senator said in an 1871 debate over the contempt power, if a contemnor can be held beyond the session, "he may be [held] for the nine months that frequently elapse between the sessions of Congress, and during that time a sentence imposed of mere imprisonment for some alleged contempt may, by the operation of such a principle, become a sentence of death itself upon him." CONG. GLOBE, 42d Cong., Spec. Sess. 924 (1871) (statement of Sen. Bayard).

173. For example, in the 110th Congress, the Senate finally adjourned its first session on December 19, 2007, and the second session commenced on January 3, 2008. See generally JOINT COMM. ON PRINTING, *supra* note 108, at 526-42 (providing session dates for all Congresses).

174. CONG. GLOBE, 42d Cong., Spec. Sess. 880-85 (1871). Today, the intrasession recesses during the summer or during campaign seasons are often somewhat longer than the gaps

limiting the period of confinement carry little weight under modern circumstances.

There has, however, always been a more fundamental rationale for the session rule, one that we might call metaphysical in the sense that it does not really depend on the practical inconveniences of holding a contemnor while the legislature is away but focuses instead on the nature and source of the contempt power itself. The power to hold in contempt springs from the power of the legislative body, and so the contempt power cannot outlive the body’s death. As the Supreme Court said in the 1821 case that recognized the inherent contempt power, a limit on the duration of confinement “is imposed, by *the nature of things*, since *the existence of the power that imprisons is indispensable to its continuance*.”¹⁷⁵ The confinement cannot continue indefinitely, the Court stated, because “the legislative body *ceases to exist*.”¹⁷⁶ Or, as Senator Charles Sumner put it in an 1871 Senate debate on the extent of the contempt power: “[The contemnors’] imprisonment expires with the Senate, because it takes its life from the Senate. . . . This session will die some time or other; and when it does die any order for imprisonment dies”¹⁷⁷

The metaphysical rationale for the limit on the contempt power might identify the end of the particular (typically annual) session as the key date marking the death of the legislative power, and indeed that is the most common understanding of the limit.¹⁷⁸ But it certainly need not fasten upon

between sessions. *See generally* JOINT COMM. ON PRINTING, *supra* note 108, at 526–42 (providing session dates for all Congresses). It seems the traditional session rule would not prevent confinement during such an intrasession recess, regardless of length. Admittedly, it is hard to know, given the paucity of modern precedents.

175. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821) (emphasis added).

176. *Id.* (emphasis added).

177. CONG. GLOBE, 42d Cong., Spec. Sess. 875 (1871); *see also id.* at 914–15 (statement of Sen. Sherman) (“This limitation of the [duration of the contempt] power is inherent, in the nature of things, in every deliberative body. . . . [W]hen we adjourn, separate, and go to our homes, the power of the Senate, in my judgment, ceases . . .”).

178. Although the majority of authorities old and new say that confinement ends with the “session,” it is not always clear what that word should mean in the context of our Congress. To begin with, although the word “session” has been used in many legislatures, that word might have a different significance in different legislatures. The period called a “session” of one body might not correspond to the annual “session” of our Congress; the better analogy might be to our two-year congressional terms. *See, e.g.*, 1 ANNALS OF CONG. 1116 (Joseph Gales ed., 1834) (reporting 1790 debate over whether adjournments between congressional sessions were analogous to prorogations that ended sessions of Parliament); *id.* at 1078 (statement of Rep. Tucker) (discussing a dispute over the length of a “session”); *Maclay’s Diary*, *supra* note 26, at 186 (arguing that the reasons behind British rules about sessions of Parliament have no application in this country). Compounding the problem, in some instances the authorities use other terminology that is ambiguous. For example, in *Anderson v. Dunn* the Court stated that “the legislative body ceases to exist, on the moment of its adjournment or periodical dissolution.” 19 U.S. at 231. An adjournment might refer to the end of a session but could mean an intrasession break, and dissolution suggests the end of a constitutional term rather than the mere end of a session. So it is just not clear what the Court meant. All of this is just to say that

that date. Indeed, the focus on the power and the life of the legislative body would, if anything, actually tend to direct our thoughts to the end of the body's two-year constitutional term. Members of Congress and others have occasionally made this connection and suggested that the end of the term—not the end of a particular session—is the true outer boundary of the contempt authority.¹⁷⁹ Indeed, there is precedent (albeit controversial) for extending confinement beyond the session, so long as it remains within the constitutional two-year term. In particular, in 1870 the House punished a contemnor for assault by committing him for a term of three months, even though it was understood that the House was about to close its current session.¹⁸⁰

If we took Senate continuity seriously, the metaphysical rationale for limiting the contempt power should have no application to the Senate, for its power is supposedly continuous and unbroken. Indeed, from time to time legislators and commentators have suggested that the Senate should have a more extensive contempt power than the House. But, notably, the Senate has not adopted this view. As an initial example, consider the debate on the 1857 bill to make contempt of Congress a crime punishable in the courts, which was hurriedly introduced in the House near the end of the Congress in order to prevent a defiant witness from running out the clock on the

the familiar statement that confinement ends with the end of the “session” conceals some complexities and potential anachronisms beneath the surface.

179. See, e.g., CONG. GLOBE, 34th Cong., 3d Sess. 430 (1857) (statement of Rep. H. Marshall) (“[T]he imprisonment may be extended to the very end of the constitutional existence of the House.”); *id.* at 405–06 (statement of Rep. Orr) (“[The House’s] power to punish for any contempt . . . expires unquestionably when the commission of the members constituting that body expires. . . . I believe that no one has ever held that the House has authority to go beyond the limitation of the term for which the members are elected . . .”); WILLIAM HOLMES BROWN & CHARLES W. JOHNSON, HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE 444 (2d ed. 2003) (“[T]he jurisdiction of the House cannot extend beyond the end of a Congress.” (citing *Anderson*, 19 U.S. at 204)); see also CONG. GLOBE, 39th Cong., 1st Sess. 4055 (1866) (showing members disagreeing over whether the contempt power terminates at the end of each session or at the end of each two-year term).

180. The House committee charged with investigating the contempt concluded (over dissenting views from some members) that the House could hold the contemnor, Patrick Woods, beyond the end of its session but no longer than March 4, 1871, the end of the constitutional term of that Congress. H.R. REP. NO. 41-105, at II–III (1870). The full House received the committee’s report and voted, on July 7, 1870, to imprison Woods for three months; on July 15, 1870, the session terminated. See 2 HINDS, *supra* note 19, §§ 1627–28 (describing the Woods case). The Woods case was controversial. In a Senate contempt proceeding the next year, some senators expressed their view that the Woods confinement was illegal and without precedent. CONG. GLOBE, 42d Cong., Spec. Sess. 902–03 (1871) (statements of Sens. Sherman and Sumner). Despite that objection, the Senate voted to confine two contemnors during the intersession recess, although soon thereafter (and after some senators had left town) the Senate reversed itself and voted to release them on the last day of the current session. *Id.* at 863–929.

House.¹⁸¹ In the course of the brief debate, the House sponsor stated that “there can be no doubt” that the House’s power to confine ends with the expiration of its members’ commissions, but he allowed that “[a] question might be raised on that point in the Senate of the United States, where a majority of the Senators hold over.”¹⁸² When the bill went to the Senate, there was some debate on it, mostly concerning whether the bill abrogated testimonial privileges, but as far as I can discern no senator suggested that the bill was superfluous as regards the Senate.¹⁸³ Also notable is the extensive Senate debate over the contempt power in 1871. A few members argued that the Senate, like the House of Lords, was a “body of perpetual duration,” apparently implying that the Senate, again like the House of Lords (but unlike the House of Representatives or the House of Commons), could confine indefinitely.¹⁸⁴ But based on the reported debate, this expansive view of the Senate’s contempt power seems to have been the exception. In sum, the logic of continuity has been noted but not accepted.

Now, I suppose one could try to discount this evidence from the contempt context on the grounds that contempt is a poor vehicle for exploring the relevance of the continuing-body idea. Any limits on the contempt power, the skeptical reader might think, have to do with our concern for the contemnor’s individual rights, not structural features of the legislative body. That would be an understandable initial thought, but I believe it would be wrong in light of what we have seen above.

First, considerations of individual rights do not match up with the actual limits on the contempt power that we observe. If congressionally adjudicated contempt is just illegal, perhaps because it denies due process or the right to a jury trial, then confinement should not be permitted regardless of duration. At the same time, if the individual-rights concern were with unconstitutionally long incarceration, any such durational limitation would not be triggered (if ever¹⁸⁵) until long after the session rule would already have freed the contemnor.

181. See CONG. GLOBE, 34th Cong., 3d Sess. 405 (1857) (statement of Rep. Orr) (stating that the then-existing inherent contempt power “will be insufficient to extort testimony”); *id.* at 406 (statement of Rep. Orr) (“On the 4th of March the power of the House will end. We want additional power.”).

182. *Id.* at 406 (statement of Rep. Orr); see also ROSENBERG & TATELMAN, *supra* note 167, at 9 (stating that it is “an unresolved question” whether the limitations on the House’s contempt power apply to the Senate, which is a “continuing body” (internal quotation marks omitted)).

183. The Senate debated the bill on January 23, 1857. The debate is recorded at CONG. GLOBE, 34th Cong., 3d Sess. 434–45 (1857).

184. *E.g.*, CONG. GLOBE, 42d Cong., Spec. Sess. 877–78, 910 (1871) (statements of Sen. Thurman). On the British parliamentary law concerning the duration of contempt, see MAY, *supra* note 138, at 160–61.

185. *Cf.* *Shillitani v. United States*, 384 U.S. 364, 370 (1966) (“Where contempt consists of a refusal to obey a court order to testify at any stage in judicial proceedings, the witness may be confined until compliance.”); *Chadwick v. Janecka*, 312 F.3d 597, 600, 613 (3d Cir. 2002) (rejecting habeas petition seeking release after seven years of coercive contempt confinement).

Second, the fact is that Congress and commentators have discussed the limitations on the duration of confinement not by arguing that, say, the Eighth Amendment limits confinement to the end of the session, but rather by appealing to the calendar of the legislative assembly. And when they make such appeals, they have contradicted the premises of the continuing-body theory.

3. Senate President Pro Tempore

The lawmaking and contempt contexts just discussed are notable, but not just because the Senate's practices, and the justifications for them, are inconsistent with the continuing-body theory. Even more striking is that these contexts display an extreme version of noncontinuity: namely, the death-knell view according to which an instrument, proceeding, or office automatically terminates at the end of some legislative period. Now, I certainly do not claim that the death-knell view represents a dominant mode of Senate behavior; indeed, we have already observed that the Senate acts in a few different ways, displaying multiple degrees of continuity depending on the context.¹⁸⁶ Let us therefore turn now to a domain in which the Senate has rejected the death-knell view.

The Senate's President Pro Tempore presides over the Senate in the absence of the Vice President.¹⁸⁷ The President Pro Tempore is treated as a continuing officer in the sense that a Senator selected in one Congress remains in that office in the following Congress.¹⁸⁸ There is no death knell, as with bills and contempt. The Senate has justified the continuity of the office, at least in part, by observing that it is "a perpetual body."¹⁸⁹ Yet, critically, the invocation of the continuing-body notion has not led to entrenched presiding officers. In 1876, the Senate voted on a series of resolutions concerning its President Pro Tempore. One of the resolutions provided that the officer serves at the pleasure of the Senate.¹⁹⁰ The resolution's supporters evidently thought this proposition

186. *Supra* text accompanying notes 149–54.

187. U.S. CONST. art. I, § 3, cl. 5.

188. At one time, the President Pro Tempore's tenure was understood to terminate whenever the Vice President returned; this practice generated quite a bit of debate over the course of many years and was eventually abandoned. In addition, some early authority and equivocal practice also suggested the office terminated at the end of a legislative session, though this limitation was much more quickly reversed. All in all, the office has become gradually more continuous over time. *See* HOUSE MANUAL, *supra* note 10, § 313, at 150 (stating Jefferson's view that the President Pro Tempore's tenure was terminated by the Vice President's return and by intersession recess); S. REP. NO. 44-3, at 8 (1876) (concluding that Jefferson's view as to intersession recess was not borne out by usage); 1 HAYNES, *supra* note 23, at 249–51 (summarizing changes in tenure over time).

189. S. REP. NO. 44-3, at 2; *see also* 21 CONG. REC. 46 (1889) (statement of Sen. Reagan).

190. S. REP. NO. 44-3, at 8; 4 CONG. REC. 311 (1876).

uncontroversial.¹⁹¹ Some senators did disagree, however, and argued that the President Pro Tempore enjoyed tenure for the duration of the Vice President’s absence and could not be removed save perhaps for serious misconduct. Some of these senators grounded their objection to the resolution on the Constitution’s literal text.¹⁹² More interestingly for present purposes, one senator suggested that it would conflict with the nature and purposes of the Senate to permit removal of the President Pro Tempore merely because of a change in party control during a session.¹⁹³ Supporters of the resolution responded that the President Pro Tempore should be responsible to the body he serves and can be removed if the body loses confidence in him:

[T]o say that one party may saddle another for the time being with a President *pro tempore*, and that that other party, when the times shall change, and they become responsible for the administration of affairs, cannot oust him and have a presiding officer of their own, would, in my opinion, be contrary to the principles of republican government.¹⁹⁴

Notably for our purposes, these senators also pointed out that to say the office is a continuing one is one thing, but it is quite another to say that they cannot change the occupant.¹⁹⁵ The resolution passed by a substantial margin,¹⁹⁶ and it has prevailed to this day: the President Pro Tempore’s office does not automatically expire at the end of a Congress, *but* he can be removed at the pleasure of the Senate, such as when there has been a change in partisan control.¹⁹⁷ Continuity without entrenchment, in other words.

* * *

Where does this leave us? Perhaps the reader will simply conclude that this tour of different domains of Senate behavior reveals only inconsistency

191. S. REP. NO. 44-3, at 8–9; 4 CONG. REC. 316, 363 (1876) (statements of Sens. Edmunds and Morton).

192. The Constitution provides that “[t]he Senate shall choose . . . a President pro tempore, in the absence of the Vice President.” U.S. CONST. art. I, § 3, cl. 5. Some senators construed this to mean that the officer had a protected tenure during that entire absence. 4 CONG. REC. 362–63 (1876) (statement of Sen. Wallace); *id.* at 369–70 (statement of Sen. Thurman).

193. 4 CONG. REC. 312 (1876) (statement of Sen. Merrimon).

194. *Id.* at 362 (statement of Sen. Edmunds); *see also* S. REP. NO. 44-3, at 8–9 (citing the importance of a presiding officer maintaining the confidence of the legislative body, which is ensured by permitting the body to remove the officer at pleasure).

195. 4 CONG. REC. 367–68 (1876) (statements of Sens. Morton and Edmunds).

196. 4 CONG. REC. 373 (1876) (recording 34–15 vote).

197. STANDING RULES OF THE SENATE, *supra* note 7, R. I.1, at 1; RIDDICK & FRUMIN, *supra* note 8, at 1021, 1024; *see, e.g.*, 153 CONG. REC. S6 (daily ed. Jan. 4, 2007) (electing Robert Byrd (D-WV) President Pro Tempore and thanking Ted Stevens (R-AK) for his service in that office).

and contradictions but no affirmative conclusions about the Senate's temporal character. The Senate is just schizophrenic, we would say. In fact, however, that is not all we are left with. It would be more accurate to say that, despite the Senate's diversity of practices—which follow the death-knell view in some respects and display mere continuity in other respects—the Senate is almost uniformly consistent on one point: entrenchment is not allowed. The exception is, of course, the Senate's rules. What we have, then, is not so much a bunch of data points scattered all over the place but rather a line with an anomalous outlier representing the Senate's handling of its rules.

B. *WHAT IF THE SENATE TOOK CONTINUITY SERIOUSLY?*

The discussion above not only reveals a diversity of practices but also shows that in certain domains the *explanations* for the Senate's practices are based, at least in part, on structural reasoning that should apply across the board. Bills die at the end of a Congress *because* the Senate's term expires; confinement for contempt is limited *because* the Senate is finite; the President Pro Tempore must be subject to removal *because* past preferences cannot dictate future governance. These explanations contradict the continuing-body theory.

To be sure, the existence of a contradiction does not, as a matter of logic, tell us which of the two contradictory positions is correct. We should therefore consider what we would think about a Senate that acted in every context the way it does with regard to its rules.

Recall again the differences between the death-knell view, mere continuity, and entrenched continuity. The death-knell view and mere continuity are not that different. The difference between them is mainly a difference in default positions: does an instrument or proceeding automatically terminate at some fixed interval, as if it contained a sunset clause, or does it continue indefinitely, subject to termination?¹⁹⁸

Moving between those two regimes is not always a radical change. For instance, even under today's death-knell view of confinement for contempt, the contemnor is hardly saved when the gavel falls. The Senate could probably just recommit him repeatedly, indeed *indefinitely*, so long as the Senate still desires the contemnor's testimony, documents, or other forms of cooperation.¹⁹⁹ Indeed, even in the House of Representatives, which

198. See generally Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247 (2007) (discussing sunset clauses and similar issues).

199. Cf. *Shillitani v. United States*, 384 U.S. 364, 371 n.8 (1966) (observing that, although confinement for civil contempt ends with the end of the grand jury's inquiry, "the sentences of imprisonment may be continued or reimposed if the witnesses adhere to their refusal to testify before a successor grand jury"). Under the session rule, sometimes there would be a short gap during which the Senate would have to free the contemnor before recommitting him; under the term rule, the confinement would be effectively continuous, as one term begins the instant

otherwise jealously guards each new House’s prerogatives to make itself anew, the Clerk of the prior Congress has traditionally remained in office into the next Congress until a successor is chosen.²⁰⁰ And, as already noted, even the House has sometimes flirted with rules that are continuous though not entrenched.²⁰¹ I do not deny that switching such defaults can be important in many contexts, but there does, after all, have to be some default supplied from somewhere; no choice is wholly neutral.

More momentous is the move from mere continuity to entrenched continuity. Here the legislature does not merely set a default that exists into the next time period but rather attempts to change how people in the next period can make choices. Legislative bodies ordinarily do not engage in such overreaching, and they are condemned when they do—except when it comes to the Senate’s rules. Consider the consequences for the contempt power if this conduct spread to that context. This new version of the contempt power would not merely permit the Senate to confine a person indefinitely, so long as the Senate still willed it; rather, a closer analogue would be locking someone up and throwing away the key—sentencing them to eventual death in the Capitol jail. That is, the Senate could purport to confine someone for contempt and restrain itself from later changing its mind, either absolutely or through a supermajority requirement for release. For as regards the Senate’s rules, the Senate has effectively thrown away the key.

My own Constitution-sense tells me that the Senate of the 110th Congress cannot lock someone up in a dungeon so deep that the Senate of the 111th Congress cannot release him. And not just because I worry about individual rights of the contemnor: the Senate cannot select a permanent President Pro Tempore, either.²⁰² If the reader agrees that such actions would be intolerable, constitutionally speaking, that provides a reason to reject Senate commitment.²⁰³

the prior one ends. See U.S. CONST. amend. XX, §1 (“[T]he terms of Senators and Representatives [shall end] at noon on the 3d day of January . . . and the terms of their successors shall then begin.”).

200. 1 HINDS, *supra* note 19, §§ 187, 244.

201. *Supra* notes 19, 31.

202. Given that the President Pro Tempore is not an officer of great authority within the Senate, one might wonder whether there would be much incentive to try such stunts. Recall, though, that the President Pro Tempore is third in the line of succession to the presidency. 3 U.S.C. § 19 (2006).

203. In other words, general principles can be answerable to firm convictions about specific cases, not just the other way around. Cf. Mitchell N. Berman, *Reflective Equilibrium and Constitutional Method: Lessons from John McCain and the Natural Born Citizenship Clause* (Univ. of Tex. Pub. Law & Legal Theory Research Paper Series, Paper No. 157, 2009), available at <http://ssrn.com/abstract=1458108> (discussing the role of particular cases in the selection of theories of constitutional interpretation).

VI. IMPLICATIONS AND CONCLUSIONS: TOWARD A MAJORITARIAN SENATE?
OR AT LEAST AN ACCOUNTABLE ONE?

During debates over the Senate rules, legislators and commentators frequently invoke the notion that the Senate is a continuing body, most notably in connection with arguments over attempts to change the filibuster rule. In this Article, I have argued that the continuing-body idea cannot withstand serious scrutiny, for the following reasons:

- The continuing-body idea is insufficient to justify the Senate's current regime of rules. Even if the Senate is continuous over time, which tends to deflate the argument that the Senate is improperly binding its successors, we need a principle of *commitment* that explains why a continuous Senate can bind *itself*. No such principle is currently in evidence, and such a principle seems highly problematic. (Part III.)
- It is not clear what makes the Senate a continuing body in a way that other legislative bodies are not. Various claims about why overlapping Senate terms matter are either false or fail to distinguish the Senate from the House. (Part IV.)
- If the Senate were a continuing body, it should act that way in areas besides the rulemaking context. But it does not. In fact, the Senate embraces propositions that contradict the continuing-body theory. But that is probably for the best, for we would strongly object to a Senate that modeled all its behavior after its handling of its rules. (Part V.)

I believe these arguments are compelling. If I am right, what are the implications? Recall that the continuing-body notion arises in various contexts besides the filibuster debate. To pick one example, some authorities suggest that the supposed difference between the House and the Senate regarding continuity has an effect on the lifespan of legislative investigations: House subpoenas expire at the end of a Congress and might moot any lawsuit involving them, but Senate subpoenas do not lapse.²⁰⁴ After the defeat of the continuing-body theory, there is no basis for making such a distinction. This does not necessarily mean that both House *and* Senate subpoenas should expire at the end of a Congress on the ground that neither one is a continuing body. The point of this Article is to get us away from such metaphysical notions. Rather, we should be free to decide such matters using common sense and ordinary principles of law.²⁰⁵ If the House

204. See *supra* text accompanying note 4 (noting the argument that Senate subpoenas might have a longer lifespan than House subpoenas).

205. Cf. *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 87–89 (D.D.C. 1998) (permitting the 105th House to prosecute a suit to prevent injury to a future House based on practical considerations, despite arguments that the House is not a continuing body), *appeal dismissed*, 525 U.S. 316 (1999).

or the Senate of the new Congress still wants the documents or testimony from the recalcitrant witness—which desire the chamber might manifest through a vote to reauthorize the subpoena, for example—then the case is not moot. To require the whole process to start again because the old House “expired” would be legally unnecessary as well as probably undesirable in that it would promote hasty litigation in a context where we would rather have sensitive deliberation.

Turning to the much more politically contentious matter of the Senate’s rules, and the filibuster in particular, what are the implications for the Senate if I am correct about the continuing-body theory? I have to acknowledge the possibility that there would not be any effect at all in this highly charged domain. To begin with, there is the possibility that the continuing-body theory just cannot be defeated at this point. No matter how wrong-headed, the continuing-body notion has been written into Senate Rule V. As with a venerable judicial precedent, maybe it no longer matters whether it is right or wrong; at this point, it might be impervious to logic, no longer up for grabs. On this view, challenging the Senate’s rules regime is like arguing that *Marbury v. Madison* was wrongly decided. Further, it is possible that the debate over the continuing-body idea, despite its apparent earnestness, is all just political theater. If the continuing-body idea lacks any causal potency in the disputes over Senate reform, then its demise would not make any difference. I discussed earlier why I think the above view is too exaggerated and crude even when it comes to politicians (let alone scholars, courts, and others),²⁰⁶ but it cannot be wholly ruled out.

Supposing that the Senate comes to accept the bankruptcy of the continuing-body theory when it comes to the filibuster, there are at least four possible outcomes: (1) an end to the supermajoritarian Senate; (2) a more indirect and incremental move toward greater majoritarianism; (3) continued supermajoritarianism justified by another theory separate from the continuing-body theory; and (4) continued supermajoritarianism as a matter of Senate choice. To elaborate on each possibility:

A. OPTION 1: END OF THE SUPERMAJORITARIAN SENATE

The defeat of the continuing-body theory would provide a route to the end of continuous supermajority rules; that is, it could result in the end of the supermajoritarian Senate as we know it. The path to that result would be relatively straightforward. The defeat of the continuing-body theory means that the 111th Senate cannot dictate to the 112th or bind it to follow any particular rules. The 112th Senate would choose its own procedural rules. How? By majority vote, which as a matter of general parliamentary principle is the baseline that exists in the absence of some other authoritative act

206. *Supra* text accompanying notes 73–74.

setting forth a different rule.²⁰⁷ Further, again as a matter of general parliamentary principle, minorities cannot filibuster so as to prevent a majority from acting.²⁰⁸ No authorized decision to deviate from these parliamentary default rules is present here: the Constitution does not itself supply a contrary rule, and the Senate of the past is not empowered to bind its successors to follow contrary rules. Accordingly, we revert to the default of majority voting and no filibusters.²⁰⁹ The Senate majority would then be free to choose whatever rules it wished.

Supposing the Senate chose more majoritarian rules, would that choice be a cause for joy or regret? On the one hand, it is easy to condemn the Senate in general and its supermajority rules in particular. One could argue that our system already has too many obstacles that stand in the way of legislation, and the Senate with its filibuster is the worst. As a result, problems of great importance go unaddressed or are addressed through laws too full of compromises to succeed. On the other hand, there are obvious responses: the added hurdle promotes due deliberation, averts the enactment of unwise legislation, prevents majority tyranny, and so forth.

207. See, e.g., *United States v. Ballin*, 144 U.S. 1, 6 (1892) (“[T]he general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body.”); HOUSE MANUAL, *supra* note 10, § 508, at 267–68 (“The voice of the majority decides; for the *lex majoris partis* is the law of all councils, elections, &c., where not otherwise expressly provided.”); CUSHING, *supra* note 30, ¶ 414, at 168 (“[T]he law of the majority is universally admitted in all legislative assemblies; unless, in reference to particular cases, persons or circumstances, a different rule is prescribed, by some paramount authority, or is agreed upon beforehand and established by the assembly itself . . .” (footnote omitted)); LOCKE, *supra* note 98, at ch. 8, § 96 (“[T]he *act of the majority* [of an assembly] passes for the act of the whole, and of course determines as having by the law of nature and reason, the power of the whole.”); RIDDICK & FRUMIN, *supra* note 8, at 912 (“The Senate operates under ‘a majority rule’ to transact business . . . with the exceptions set forth in the Constitution and the rules of the Senate.”).

208. As to an assembly’s power to stop dilatory debate under parliamentary law, see, for example, HOUSE MANUAL, *supra* note 10, § 359, at 176, §§ 365–66, at 182–83; 5 HINDS, *supra* note 19, §§ 5450–55; NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 30, § 131; and Paul Mason, *The Legal Side of Parliamentary Procedure*, in READINGS IN PARLIAMENTARY PROCEDURE 42, 51–52 (Haig A. Bosmajian ed., 1968). I believe that the proposition just stated is the prevailing view and the correct view, but I acknowledge that there is some authority to the contrary. See sources cited at 99 CONG. REC. 168 (1953) (asserting that majority cannot close debate as a matter of general parliamentary law).

209. I do not mean here to require the Senate to follow the death-knell view of rules that prevails in the House of Representatives. At least as a practical matter, there does not seem to be much of a problem with the Senate’s rules (or even the House’s rules, for that matter) merely carrying over as a default, so long as they are readily defeasible by a majority. See *supra* notes 19, 31 (discussing legislative bodies with merely continuous rules). In other words, we do not necessarily have to accept the view that the Senate operates solely under general parliamentary law at the start of a Congress. It could instead operate under its old rules, shorn of those rules’ supermajority requirement for cloture. Some basic rules from somewhere have to exist at the start of a new Congress in order to avoid bootstrapping and infinite regress problems. The key is just that the Senate’s choice of rules—whether to adopt new ones or just continue under the old ones—must be majoritarian.

More nuanced versions of each position are also available. For instance, a democratic reformer might think that the Senate’s worst sin is not so much the filibuster as it is equal suffrage by state, such that Wyoming and Rhode Island hold as many votes as California and Texas.²¹⁰ Because of this malapportionment, it is possible for a filibustering Senate minority to represent a majority of the people, which complicates simplistic majoritarian condemnations of the filibuster.²¹¹ The more general point is that when the most preferred outcome (here, by hypothesis, population-based apportionment) is not available, achieving the next-best outcome might require additional otherwise unattractive compromises.²¹² Any debate over the filibuster thus involves complicated questions of institutional design, empirics, and political morality.

Leaving aside the filibuster in particular, it is also not obvious how we should feel about a Senate that enjoys the freedom to rewrite the procedural rules however the majority desires. For although just about everyone acknowledges the downsides of entrenched substantive legislation, perhaps entrenched parliamentary procedure is not quite so bad.²¹³ A chamber’s rules of proceedings are, in a sense, its very own constitution. The same considerations typically adduced in support of the value of entrenched constitutional ground rules suggest the potential value of entrenching some internal procedures against the whims of shifting partisan majorities.²¹⁴ In recognition of that fact, the Constitution does, of course, entrench a few parliamentary rules.²¹⁵ But perhaps too few parliamentary rules were

210. See LEVINSON, *supra* note 97, at 49–62 (deeming the Senate “illegitimate” for this reason); cf. Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21, 55–68 (1997) (arguing for reform in which the Senate is apportioned according to population but would use supermajority voting).

211. See LEVINSON, *supra* note 97, at 53 (“Majority rule’ within the Senate may have only a random relationship to majority rule within the country as a whole.”); Ben Eidelson, *Let the Majority Rule*, SLATE, Feb. 8, 2010, <http://www.slate.com/id/2244060> (analyzing data showing that the filibuster sometimes compensates for the Senate’s malapportionment).

212. This is the point of the theory of the second best, i.e. when one condition for optimality is not satisfied, the second-best outcome does not necessarily result from setting the other conditions at their optimal value. R.G. Lipsey & Kelvin Lancaster, *The General Theory of the Second Best*, 24 REV. ECON. STUD. 11, 17–18 (1956).

213. See Seitz & Guerra, *supra* note 88, at 25–27 (distinguishing entrenched rules from entrenched legislation); see also Gerhardt, *supra* note 14, at 448, 474 (describing normative value of ground rules protected by supermajority requirements).

214. There are various ways that one might try to ensure that any decision that fundamentally changes the Senate rules is done in a more principled and less opportunistically partisan way, such as by delaying the effective date of any such change. See generally Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 419–24 (2001) (discussing delay as a strategy for creating uncertainty over who will benefit from a change in rules).

215. See *supra* note 145 and accompanying text (listing several procedural rules set forth in the Constitution itself).

constitutionalized. If so, the inability of a chamber to entrench more of its rules might be regarded as an unfortunate design defect.

All of this is just to say that it is not entirely clear how we should feel about a more majoritarian, more procedurally flexible Senate, assuming that such a Senate emerged.

B. OPTION 2: INCREMENTAL MOVE TOWARD GREATER MAJORITARIANISM

Another possibility is a more measured move toward greater majoritarianism at the margin. When push comes to shove, determined majorities tend to get their way, particularly on matters of legislative procedure.²¹⁶ Thus, minority rights are partly the product of the majority's indulgence. The Senate majority's willingness to tolerate minority obstruction, it seems reasonable to assume, is based partly on prudential calculations but also partly on the majority's view of the legitimacy of the minority's claims. To the extent that the continuing-body theory is undermined, one would expect some decrease in the majority's view of the legitimacy of the minority's cause. Even if that is not enough to provoke the outright repudiation of the filibuster, this change in sentiments would tend to increase the legitimacy of methods for limiting and circumventing the filibuster.

Of particular relevance here is the so-called "reconciliation" mechanism. An element of the congressional budget process, reconciliation permits certain legislation to pass the Senate by a majority, without filibusters.²¹⁷ The rules of the reconciliation process limit this special treatment to certain kinds of bills; to simplify, only budget-related items qualify. But the vagaries of language conspire with the lack of judicial supervision to make the test depend on political argument as much as legal definition. Faced with the prospect of Republican filibusters of health care reform, energy legislation, and other initiatives, some Democrats have responded with the possibility of sidestepping the filibuster by using reconciliation.²¹⁸ Some of these proposals might stretch reconciliation beyond its intended scope. The point here is just that the legitimacy of such

216. See *supra* notes 71–72 and accompanying text (discussing barriers to judicial resolution of internal legislative disputes); see also Adrian Vermeule, *The Force of Majority Rule* 11 (Harvard Pub. Law Working Paper No. 08-48, 2008) (“[M]ajority rule has a political and psychological force independent of its merits.”), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1280201.

217. See generally ROBERT KEITH & BILL HENIFF, JR., CONG. RESEARCH SERV., *THE BUDGET RECONCILIATION PROCESS: HOUSE AND SENATE PROCEDURES* (2005) (describing the reconciliation process).

218. See Carl Hulse, *Congressional Memo; A Fight for the Right to Filibuster*, N.Y. TIMES, Mar. 29, 2009, at A17; Shailagh Murray, *Divisive Legislative Tool Gaining Democrats' Favor; Health-care Reconciliation May Be Option*, WASH. POST, Apr. 1, 2009, at A3. Ultimately, part of the health care reform was enacted through reconciliation. Carl Hulse, *A Fail-Safe Works for Legislation, but Not as Expected*, N.Y. TIMES, Mar. 29, 2010, at A25.

maneuvers, and the legitimacy of pushing their boundaries, increases as the legitimacy of the filibuster decreases. Thus, one consequence of the defeat of the continuing-body theory might be that legislators will more aggressively use measures, including reconciliation, that tend to circumvent the filibuster.

C. OPTION 3: CONTINUED SUPERMAJORITY
UNDER A DIFFERENT LEGAL THEORY

Up to this point, we have been assuming that the continuing-body theory is the sole legal justification for continuing supermajoritarian rules. That is not necessarily so. As stated in Part I, although the continuing-body idea is the key move in the defense of the Senate’s practices, there is some room to try to defend the Senate’s continuous rules even without it.

The potential opening for supporters of a supermajoritarian Senate would be to argue that the default parliamentary common law of the Senate is not the majoritarian default that characterizes general parliamentary law. The default parliamentary law *of the Senate*, one could argue, is in relevant respects supermajoritarian. Even in the House of Representatives, the general parliamentary law that governs in the period before the House adopts rules is understood to be not just the principles and usages reflected in works such as *Jefferson’s Manual* but rather to consist of that ancient law “as modified by the practice of American legislative assemblies, especially of the House of Representatives.”²¹⁹ In the Senate, the argument would continue, past *Senate* practice would shape default parliamentary law. This is not to say that any particular Senate can directly bind the rest through its own positive enactments. Rather, this is just to recognize the gradual, long-term impact of practice on background customary law. And that practice, the argument would continue, has been one in which minorities can block votes through obstructive debate. In other words, the argument would be that the Senate’s default law just *is* supermajoritarian, even without the continuing force of positive rules actually specifying supermajoritarianism.

Now, without further expanding the scope and complexity of this Article by dilating on the argument just stated, let me briefly say that I do not think this back-up argument for supermajoritarianism succeeds. Even supposing that default majoritarianism is mutable, the supermajoritarian character of the Senate has been greatly exaggerated. Despite what one often hears about the purpose of the Senate, the notion that the framers intended the Senate to be supermajoritarian in order to retard a potentially

219. HOUSE MANUAL, *supra* note 10, § 60, at 26–27 (emphasis added); *see also id.* (“Before the adoption of rules the House is governed by general parliamentary law, but Speakers have been inclined to give weight to the rules and precedents of the House in modifying the usual constructions of that law.”); 5 HINDS, *supra* note 19, §§ 6761–6763; *cf.* 53 CONG. REC. 3732 (1916) (statement of the President Pro Tempore) (“[*Jefferson’s Manual*] has a certain degree of influence, but is not a direct authority [in the Senate].”).

overactive legislative power is fiction: the desired security against imprudent impulse would come from a lawmaking process that required the assent of multiple, independently selected and constituted *majorities*, not supermajorities.²²⁰ The framers were not partisans of minority vetoes in legislatures.²²¹ And moving beyond the original design, while it is true that the Senate has long been deliberative and responsive to determined minorities, the “60-vote Senate” we know today is a recent innovation.²²² So, while some may resist my arguments on the ground that a page of history is worth a volume of logic, they should not be allowed to do so on the basis of faulty history.

D. *OPTION 4: CONTINUED SUPERMAJORITY BY SENATE CHOICE*

Finally, even if there were no legal justification for the Senate’s retention of supermajoritarian rules, that does not necessarily mean the Senate would eliminate the rules. Even if the Senate openly acknowledged the right to choose its rules in a manner that is majoritarian, it might not choose rules that are themselves majoritarian. The Senate majority might instead choose to continue to employ supermajority rules that allow filibusters. If so, the Senate’s daily operations would look on the surface much the same as they do today under the continuing-body theory.

Nonetheless, a Senate that was supermajoritarian by choice would represent an important advance over the status quo in terms of *accountability*. It is possible that even now the Senate is a supermajoritarian body purely as a matter of unfettered choice. Yet debate in the Senate currently does not proceed as if all sides agree that the rules are amendable at the majority’s pleasure. Members of the minority do not simply appeal to the majority’s grace but make claims of right: they say that it would be illegal to change the rules by majoritarian means.²²³ And the majority frequently (though not

220. THE FEDERALIST NO. 62 (probably James Madison), *supra* note 106, at 378 (stating that “[an] additional impediment . . . against improper acts of legislation” is that “[n]o law or resolution can now be passed without the concurrence, first, of a majority of the people, and then, of a majority of the States”).

221. *E.g., id.* NO. 58 (James Madison), at 361 (calling majority voting “the fundamental principle of free government”); *id.* NO. 22 (Alexander Hamilton), at 147–48 (condemning minority vetoes).

222. *See supra* text accompanying notes 24–66 (discussing the gradual development of the Senate’s supermajoritarian character).

223. *E.g.,* 103 CONG. REC. 158 (1957) (statement of Sen. Russell) (contending that changing the rules by a majority “is without doubt unconstitutional”); 99 CONG. REC. 108 (1953) (statement of Sen. Taft) (“This is a constitutional question[;] . . . it is a question of whether the Senate is a continuing body.”); *id.* at 115 (statement of Sen. Russell) (“[Changing the rules] has to be done by the method prescribed by law . . . I shall await with interest any precedent that can be cited . . . to demonstrate that [the principle that the Senate is a continuing body] has ever been challenged seriously in the Senate.”); *see also* Catherine Fisk & Erwin Chemerinsky, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO L. REV. 331, 348

always) gives credence to such claims by acting as if it is bound by the rules.²²⁴ To the outside observer, it appears that the majority mostly accepts the continuing-body idea. Or perhaps the majority is just trying to delude the public and deflect responsibility for its lack of will by hiding behind a supposed minority veto.²²⁵ It is hard to know, because the availability of the continuing-body idea makes the majority's adherence to the rules ambiguous with regard to the majority's true preferences. That obfuscatory strategy would not be available were the majority required, as I would require it, to face up to its freedom to set the rules. Put differently, today's Senate majority either sincerely (and incorrectly) believes that it is impotent, or it merely feigns impotence; both prevent it from being accountable.

If we come to accept that the Senate can, as a matter of fact *and* a matter of right, change its rules by majoritarian means, we can then have a genuine debate over whether that would be a wise thing to do. Senators in the majority might decide after good-faith reflection that preserving a minority veto serves the polity's long-term interests. Or they might embrace the right to filibuster out of a sense of institutional patriotism. Or they might fear what will happen when they return to the minority. Or they might simply retain the supermajoritarian status quo because they believe doing so maximizes their own personal power.²²⁶ The point is that these are choices, and senators should be accountable for them.

(2005) (calling the majoritarian "nuclear option" "illegitimate"); Gerhardt, *supra* note 14, at 445 n.* (tentatively suggesting that the majoritarian "nuclear option" is "illegal").

224. See, e.g., Paul Kane, *Harkin and Shaheen Seek To Change Senate Filibuster Rule; Reid Dismisses Effort*, WASH. POST, Feb. 12, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/11/AR2010021104880.html> (reporting comments of Senate Majority Leader Harry Reid dismissing attempts to reform filibuster rule).

225. Consider this news item on Senate Democrats' failure in 2007 to pass a deadline for withdrawal from Iraq:

Senate leaders are likely to move a defense measure on the week of [September] 17th that essentially calls for a withdrawal to begin later this year, but drops language that would require completion by April 30, 2008. "We are not backing off anything," Senate Majority Leader Harry Reid told reporters today, while adding in the next breath that "we need 60 votes"

Mark Murray, *Democratic Retreat on Iraq?*, MSNBC, Sept. 6, 2007, <http://firstread.msnbc.msn.com/archive/2007/09/06/347918.aspx>.

226. Cf. BARBARA SINCLAIR, *THE TRANSFORMATION OF THE U.S. SENATE* 90, 140 (1989) (explaining that changes in the political landscape have increased senators' incentives to engage in filibustering and other individualistic behavior).