Two cheers for filibusters

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Alerted by the near-derailment of health care reform legislation and Republican recalcitrance on financial regulation, Senate liberals may push for changes in the filibuster rules. Their goal, of course, is to empower a Democratic majority in anticipation of key battles down the road — including U.S. Supreme Court confirmations.

From a policy perspective, the filibuster rules are an invaluable restraint on the legislative process, no matter which party is in power. But there's a crucial argument that cuts the other way: The current rules are unconstitutional.

The culprit is Senate Rule XXII, which establishes the 60-vote cloture requirement. But the real point of contention is a second cloture requirement embedded in that same rule. Suppose senators want to revise the 60-vote rule. They can do so by majority vote. But suppose further that the vote on revising the 60-vote rule is itself filibustered. According to Rule XXII, if a vote to change the 60-vote cloture rule is filibustered, it takes two-thirds of the senators present and voting to break the filibuster.

Because the founders were justifiably concerned about majoritarian tyranny, they wrote a Constitution replete with safeguards that limited majority rule: enumerated federal powers, two senators from each state, the electoral college, a ban on bills of attainder and the Bill of Rights. Critics who object that super majorities are "undemocratic" miss the point. The Constitution itself is undemocratic, for good reason.

During the past half-century, politicians in power have repeatedly pressed to restrict and limit filibusters. They correctly saw filibusters as a barrier to implementing their agendas. Without the filibuster, we would no doubt be laboring under a federal government far larger than today's behemoth. Thanks to the filibuster, senators can occasionally throw a few grains of sand in the ever-grinding wheels of the regulatory and redistributive state. Nobel laureate Milton Friedman captured that same point in a 1991 address: "I just shudder at what would happen to freedom in this country if the government were efficient."

A supermajority requirement makes even more sense for judicial nominations than it does for legislation. A bill can be repealed if a new majority wants to do so. A federal judge is on the bench for life. Why shouldn't it take 60 or 67 votes to get a lifetime appointment? Former *New York Times* Supreme Court reporter Linda Greenhouse evidently agrees, writing in April: "A filibuster is a power play, a manifestation of political meltdown, while a [supermajority] rule that is hard-wired into the system is politically neutral and permits everyone to plan ahead."

Those are persuasive arguments for codified supermajorities. We are governed, however, by the provisions that actually appear in our written Constitution, not the provisions we might have preferred. Plainly, the framers did not intend that most legislation would need a Senate supermajority. Otherwise, they would have said so in writing — as they did by requiring a two-thirds vote to propose constitutional amendments, override vetoes, approve treaties, impeach the president and expel a congressman.

Conceivably, a court might refuse to decide a filibuster dispute on the grounds that it's a "political question" — to be resolved by the elected branches and ultimately by the voters. That occasionally happens when applicable legal standards are inadequate or the court determines it would be imprudent to interfere. But here, a legal standard is available if the courts choose to use it. The Latin term is expressio unius est exclusio alterius. As applied in this instance, it means that an express listing of supermajority requirements — for treaties, impeachments, etc. — presumptively

excludes all items not on the list, such as a supermajority for cloture when altering the filibuster rules.

That conclusion is reinforced by the specific text of Article I, § 5: "Each House may determine the Rules of its Proceed ings, punish its members for disorderly behavior, and, with the Concurrence of two thirds, expel a member." Note, only expulsion requires a supermajority. Yet the remaining two items are listed within the same sentence. The inescapable logic of that sentence is that punishing members does not require a supermajority, nor does determining procedural rules. In other words, the Senate is constitutionally authorized to determine its own rules, but not authorized to demand more than 51 votes to do so.

Note also that Article I, § 5 assigns rulemaking authority to "Each House." Perhaps that term is meant to distinguish the House of Representatives from the Senate. Then again, perhaps "Each House" refers to, say, the 110th Congress as distinguished from the 111th. If the latter meaning applies, then no Senate may bind future Senates as Rule XXII now does. Even if "Each House" doesn't mean successive Senates, the possible entrenchment of past voting rules, without express constitutional authority, cannot have been intended by the framers. Imagine if today's Senate were able to lock in all existing rules by mandating a 100% vote for cloture on any motion to change those rules. In short, each Senate can require a supermajority for cloture. But each Senate must also be free to re-examine the cloture rule and change it, if desired, by simple majority vote. Because Senate Rule XXII compels a two-thirds vote to shut off debate whenever a proposed rule change is filibustered, Rule XXII is unconstitutional.

The mistakes of the framers were few and far between. But they would have been better advised to have codified a supermajority requirement for most of the Senate's substantive legislation. Instead, the framers provided that Con gress could slow down the legislative locomotive by adopting procedural rules such as cloture, under which it currently takes 60 votes to end debate, but not 60 votes to pass a bill or approve a nomination. By contrast, a constitutionalized supermajority requirement for substantive legislation would permanently curb the excesses of majoritarianism and constrain our inexorable descent into bigger and more intrusive government. Let the amendment process begin.

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