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Democratizing the Filibuster

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In our polarized age, the Senate filibuster effectively requires sixty votes to pass most legislation. This requirement has produced not bipartisan cooperation, but gridlock. Today, many items on President Biden's legislative agenda—confronting climate change, fixing our immigration system, and promoting civil rights and voting rights, among others—are likely dead on arrival thanks to this procedural roadblock.

To overcome minority obstruction, many have urged the abolition of the filibuster. Doing so would allow the current Senate majority, which represents 56% of the U.S. population, to address pressing national problems. But it would pave the way for minority rule in the future, when, as has often been the case in recent years, a Senate majority represents a minority of the U.S. population.

This Issue Brief proposes an alternative approach to filibuster reform, one that would allow Senate majorities representing population majorities to effectively govern, while still serving as a check on minority rule.[1] This reform has two components. The first is the familiar proposal to eliminate the current version of the filibuster, so that the support of three-fifths of senators would no longer be required to proceed to a final vote. The second and more novel element of our proposal is the replacement of the current filibuster rule with an alternative cloture rule that would require, as a precondition for ending debate, the assent of a majority of senators who collectively represent a larger share of the U.S. population than the senators who oppose cloture. Furthermore, we would extend this new rule to those Senate votes that are not currently covered by the three-fifths cloture rule, including budget reconciliation and confirmation of appointments.

[1] We develop these same ideas in greater detail in Jonathan S. Gould, Kenneth A. Shepsle & Matthew C. Stephenson, *Democratizing the Senate from Within*, 13 J. LEGAL ANALYSIS (forthcoming 2021). This Issue Brief draws both language and arguments from that article.

The practical consequence of this rule—which we refer to as a "popular-majoritarian cloture rule"—would be that for the Senate to proceed to final action—such as passing a bill or confirming a nominee—the senators supporting that action must both (1) constitute a majority of the Senate and (2) collectively represent more of the population than the senators in opposition. This means that a minority of senators could still block Senate action if (and only if) that group of senators collectively represents more people than do the senators who favor the action in question.

This Issue Brief first makes the case for such a rule, explaining why it would be superior to either keeping or eliminating the current cloture rule. The Brief next provides model text for a popular-majoritarian cloture rule, showing what changes would need to be made to the Senate's current Rule XXII in order to implement it. The Brief then considers three other issues: how such a rule would be adopted, why it would be constitutional, and how it could be entrenched against future change.

I. The Case for a Popular Majoritarian Cloture Rule

A. A More Democratic Republic

A foundational principle of representative democracy is that the legislators who represent a larger share of the population should presumptively be able to decide contested questions. Indeed, the Constitution requires other legislative bodies—from the House of Representatives to state legislatures to city councils—to abide by the principle of "one person, one vote."[2] The Senate is the only exception to this equal representation principle.[3] This inequality has real-world implications for where power lies, where resources flow, and which party holds power.[4] While it is not possible to alter the Senate's malapportionment (absent a constitutional amendment), a popular-majoritarian cloture rule provides an indirect means of making the Senate more democratic. Under such a rule, a majority of senators who represent a majority of the population can force a vote on a final measure, but a majority of senators who represent only a minority of the population cannot. And this change would have important practical consequences for legislative action and electoral politics.

First, when a majority of senators represents a majority of the American people, adopting a popular-majoritarian cloture rule would have the same consequences as outright elimination of the filibuster. In such cases, the Senate would no longer be the "kill switch" that prevents even

[2] *See Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).
[3] On democracy deficits caused by the Senate and other features of the constitutional system, see SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006); ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2d ed. 2003).
[4] *See, e.g.*, FRANCES E. LEE & BRUCE I. OPPENHEIMER, SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION (1999).

widely popular bills from becoming law.[5] There are many examples of bills that failed to secure sixty votes for cloture under current Senate rules but would have easily cleared the bar for cloture if the popular-majoritarian cloture rule had been in effect. During the Obama Administration, the Senate failed to garner sixty votes to invoke cloture on the DREAM Act, which would have provided a path to citizenship for millions of immigrants who arrived in the United States as children. Cloture motions on the DREAM Act failed twice in 2010, by votes of 56–43 and 55–41. Under our rule, those motions would have passed. In the first vote, the Senate majority voting for cloture represented 63 percent of the nation's population; in the second vote, the majority represented just under 61 percent.[6] This pattern repeated itself for the Manchin Amendment, a modest gun control measure proposed after the 2012 mass shooting at the Sandy Hook elementary school. The Senate failed to invoke cloture by a vote of 54–46, but the senators voting in favor of cloture represented more than 62 percent of the national population. Likewise, efforts in 2010 to pass the DISCLOSE Act, which would have mandated greater campaign finance transparency, twice failed to overcome filibusters, with cloture failing by votes of 57–41 and 59–39. The senators supporting cloture in those two votes represented over 63 percent and 64 percent of the population, respectively. In each of these examples, a minority of senators representing only thirty-something percent of the population prevented popular legislation from passing the Senate.

A popular-majoritarian cloture rule would, however, prevent senators representing a minority of the American people from enacting policy or confirming nominees over the objections of senators who represent a majority of the population. Simple elimination of the filibuster, by contrast, could well produce such minority rule. Consider, by way of illustration, some recent Senate decisions in contexts where the current filibuster rule does not apply. The Tax Cuts and Jobs Act of 2017, for example, passed under budget reconciliation with the support of fifty-one senators who represented only 43 percent of the population. The popular-majoritarian cloture rule would have enabled the senators opposed to that legislation to block its passage via a filibuster. The same holds for the three Supreme Court Justices nominated by President Trump. After eliminating the filibuster for Supreme Court appointments, the Senate invoked cloture on each of these three nominations with only slim Senate majorities that represented well under half of the national population: 44 percent for Justice Kavanaugh, 46 percent for Justice Gorsuch, and 47 percent for Justice Barrett. Moreover, attempts to repeal the Affordable Care Act—which at one point came within a single vote of passing under the budget reconciliation process—would have been easily blocked under the popular-majoritarian rule, given that

[5] *See, e.g.*, ADAM JENTLESON, KILL SWITCH: THE RISE OF THE MODERN SENATE AND THE DECLINE OF AMERICAN DEMOCRACY (2021).
[6] All calculations in this paragraph and the next are our own.

senators supporting repeal represented far less than half the population, and would have even if Senator John McCain had given repeal a thumbs-up rather than a thumbs-down.

Taken together, these examples show how a popular-majoritarian cloture rule would change legislative outcomes. In some instances, it would make it easier to act, permitting the Senate to pass legislation or take other consequential action that has the support of senators who represent a popular majority, even though fewer than sixty senators support cloture. In other instances, adopting the popular-majoritarian cloture rule would make it harder for the Senate to act, preventing a majority coalition of senators from pushing through a decision opposed by senators who represent a popular majority. In short, the popular-majoritarian cloture rule does not uniformly ratchet up or down the difficulty of taking action. Instead, switching from the current filibuster rule to this alternative cloture rule replaces an undemocratic veto point (the sixty-vote cloture requirement) with a more democratic veto point (the requirement that the coalition invoking cloture represent a majority of the population).

B. A More Equal Republic

Making the Senate more majoritarian would be justified on grounds of democratic equality alone, but it is especially urgent given that the Senate's malapportionment exacerbates other systemic biases in U.S. politics. Perhaps most importantly, because the large states disadvantaged by Senate malapportionment are substantially more racially and ethnically diverse than most small states, malapportionment systematically advantages white voters over voters of color—so much so that some leading commentators have described the Senate as "affirmative action for white people."[7] Numerically speaking, the Senate gives the average Black American only 75 percent as many senators as the average white American.[8] The average Hispanic American gets barely half the Senate representation (55 percent) of the average white American.[9] A popular-majoritarian cloture rule, by enhancing the power of larger states, would also give voters of color something closer to equal representation.

C. A Less Polarized Republic

An additional advantage of the popular-majoritarian cloture rule is that it creates electoral incentives for the party that benefits from the structural advantage of Senate malapportionment—today, the Republican Party—to craft policy proposals and platforms with broader appeal. Given the combination of Senate malapportionment and contemporary political geography, Republicans can often win a Senate majority, and can almost always secure enough

[7] *See* Jonathan Chait, *The Senate Is America's Most Structurally Racist Institution*, N.Y. MAG. (Aug. 10, 2020); David Leonhardt, *The Senate: Affirmative Action for White People*, N.Y. TIMES (Oct. 14, 2018).
[8] Leonhardt, *supra* note **Error! Bookmark not defined.**.
[9] *Id.*

seats to filibuster Democratic proposals, while appealing to only a minority of the population.[10] This structural bias gives the party's extreme activists and donors more influence, because the electoral costs of playing to the "base" are not as high.[11] Under a popular-majoritarian cloture rule, by contrast, the Republican Party would have stronger incentives to appeal to moderate voters in more populous states, because it will no longer be possible for the party to control outcomes in the Senate by winning Senate seats that represent forty-something percent of the people. This, in turn, will put pressure on the Republican Party to tack back toward the center. A popular-majoritarian cloture rule could therefore help counter the current trend toward hyper-polarization and extremism, especially on the Right.

D. Rebutting Counterarguments

Defenders of the status quo might object that a popular-majoritarian cloture rule is inconsistent with the idea that the Senate is supposed to safeguard against the oppression of small states by large states. But there is very little evidence that, in the real world, large states as a bloc systematically disregard the interests of small states, or even that large states versus small states is a meaningful axis of political division. This defense of Senate malapportionment fixates on a form of oppression that is largely imaginary—the subjugation of small states by large states—while neglecting the ways in which this malapportionment exacerbates forms of systemic inequality and injustice that are all too real. Furthermore, even if there were some genuine concern that more populous states might run roughshod over the interests of less populous states, under the popular-majoritarian cloture rule, a majority of senators would still be required for both cloture and final passage—meaning that the more numerous smaller states would still have the power to stop legislation favored only by the more populous states. The popular-majoritarian cloture rule thus preserves the protection that small states have against large states, but establishes a symmetrical protection for large states (and, more importantly, for their citizens) against the more numerous small states.

Apologists for the current system might respond by arguing that the House of Representatives already provides a popular-majoritarian check on legislative action. On this view, the Constitution's requirement that legislation pass both the Senate and the House means that a law cannot be enacted unless it has the support of legislators who represent a majority of the *states* (in the Senate) and legislators who represent a majority of the *population* (in the House). This argument, however, suffers from several flaws. First, the Senate makes many consequential decisions without the House's involvement—confirmation of nominees being perhaps the most salient example.[12] We are unaware of any convincing justification for empowering legislators

[10] At no point in the twenty-first century has a Republican Senate majority represented a majority of the national population. *See* Gould, Shepsle & Stephenson, *supra* note 1, at 20 tbl. 2.
[11] *See*, *e.g.*, Steven Levitsky & Daniel Ziblatt, *Opinion, End Minority Rule*, N.Y. TIMES (Oct. 23, 2020).
[12] *See* U.S. CONST. art. II, sec. 2, cl. 2.

who represent only a minority of the population to take actions on these matters over the objection of Senators who collectively represent many more people. Second, the House suffers from its own pathologies—including the possibility that temporary passions may lead to wild and excessive swings after certain elections, and the pervasiveness of partisan gerrymandering. The Senate, for all its faults, is more insulated from these pathologies. The fact that Senators serve six-year staggered terms—with only one-third of Senate seats contested in each election cycle—means that the composition of the Senate is less likely to be affected by transient "shocks" in the political mood of the country, and the variance in ideological center-of-gravity of the Senate is likely to be less than that of the House. Furthermore, the Senate is largely immune to the partisan gerrymandering that besets House elections, because state boundaries, though not fully immutable, are largely fixed as a practical matter. For these reasons, incorporating a majoritarian check within the Senate itself is preferable to relying solely on the House to ensure the protection of political majorities against unjust minority rule.

II. Model Text of a Popular-Majoritarian Cloture Rule

The Constitution gives both chambers of Congress the power to make their own rules.[13] That power has given us the modern filibuster, but it could also be deployed to adopt the popular-majoritarian cloture alternative we have proposed. Such a rule change could take the form of the following revision of Senate Rule XXII, with the new language in italics and deleted language struck through:

> 2. … [A]t any time a motion signed by sixteen Senators, to bring to a close the debate upon any measure, motion, other matter pending before the Senate, or the unfinished business, is presented to the Senate, the Presiding Officer, or clerk at the direction of the Presiding Officer, shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a yea-and-nay vote the question:
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> "Is it the sense of the Senate that debate shall be brought to a close?" And if that question shall be decided in the affirmative by a majority of the Senators, duly chosen and sworn, who collectively represent a larger share of the United States population than the Senators duly chosen and sworn who do not vote in favor of cloture, then said measure, motion, or other matter pending before the Senate, or the unfinished business, shall be the unfinished business to the exclusion of all other business until disposed of. For purposes of determining whether those supporting or opposing cloture represent a

[13] U.S. CONST. art. I, sec. 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . .").

> larger share of the U.S. population, each Senator shall be deemed to represent one-half of the residents of the State that Senator represents, as determined in the most recent decennial census. In case the Vice President breaks a tie cloture vote, the Vice President shall not count in the calculation of represented population.
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> […]
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> After no more than thirty hours of consideration of the measure, motion, or other matter on which cloture has been invoked, the Senate shall proceed, without any further debate on any question, to vote on the final disposition thereof…. The thirty hours may be increased by the adoption of a motion, decided without debate, by an affirmative vote of a majority of Senators duly chosen and sworn who collectively represent a larger share of the U.S. population than those voting in the negative. . . .

Furthermore, this rule could—and we think should—be extended to Senate activities currently exempt from the three-fifths cloture rule, such as budget reconciliation and confirmation of nominees. Thus, cloture on all Senate business would now require the support of a majority of senators who collectively represent a majority of citizens.

III. Adopting a Popular-Majoritarian Cloture Rule

The Senate Rules as written require a two-thirds majority vote to close debate on proposals to amend those rules. Given the difficulty of meeting this requirement, replacing the current filibuster rule with the popular-majoritarian cloture rule would, as a practical matter, require use of the so-called "nuclear option." The nuclear option—so named because it is understood to be an extreme measure to be used only as a last resort—involves the establishment of a new Senate precedent, which can then supersede the written rules.[14] There are three ways that our proposed change to the cloture rule might be implemented, each of which would involve use of the nuclear option.

First, our proposal could be established as a Senate precedent, along the lines of how Majority Leaders Reid and McConnell choreographed the elimination of the filibuster for executive branch and judicial appointments in 2013 and 2017, respectively. That process would run roughly as follows. After a failed cloture vote and at a time when the Senate is in a non-

[14] *See*, *e.g.*, William G. Dauster, *The Senate in Transition or How I Learned to Stop Worrying and Love the Nuclear Option*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 631 (2016). The nuclear option is viable because of Senate Rule XX, which governs points of order. Under Rule XX, "[a] question of order may be raised at any stage of the proceedings, except when the Senate is voting or ascertaining the presence of a quorum, and, unless submitted to the Senate, shall be decided by the Presiding Officer without debate, subject to an appeal to the Senate." Such an appeal is—crucially—decided by a simple majority vote. This provides a backdoor way to change Senate rules. All a majority leader has to do is raise a point of order (at the appropriate time) setting out a proposed new rule, appeal the Presiding Officer's rejection of that point of order, and garner a simple majority of the Senate in support of their new precedent.

debatable posture, a senator (presumably the Majority Leader) would rise and say something like:

> I raise a point of order that any vote to close debate shall be deemed to pass so long as the senators voting in favor of cloture are both a majority of the senators duly elected and sworn, and represent a larger share of the United States population than the senators who do not vote in favor of cloture, where each senator is deemed to represent one-half of the population of his or her state as determined by the most recent decennial census.

The Presiding Officer would respond that under the rules, the point of order is not sustained, at which point the Majority Leader would appeal the Presiding Officer's ruling to the full Senate. Presumably (given that all this would have been planned out in advance) a majority of senators would vote to overturn the Presiding Officer's ruling. The Presiding Officer would then declare, "The decision of the Chair is not sustained. Under the precedent set by the Senate today, a vote to close debate shall pass if the senators supporting cloture are a majority of senators duly elected and sworn, and represent a larger share of the U.S. population than the senators opposing cloture." And voila, the new cloture rule would be established.

A second way to accomplish much the same thing would be to use a resolution to formally change the text of Rule XXII, replacing the current three-fifths cloture threshold with a popular-majority cloture rule, and extending that latter rule to measures not presently subject to the three-fifths cloture threshold. The impediment to such a change, as noted above, is the current requirement of a two-thirds supermajority to close debate on changes to Senate rules. To adopt the popular-majoritarian cloture rule via a formal amendment to Rule XXII, the Senate majority would have to exercise the nuclear option to eliminate the two-thirds requirement for cloture on debates over changes to Senate rules.[15]

A third option would be to change the Senate's rules by statute. Enacting a statute, which requires passage by both the House and the Senate as well as presentment to the President, is more difficult than changing the Senate's rules unilaterally and entails additional legal

[15] To initiate this process, the Majority Leader would first bring before the Senate a resolution changing the text of Rule XXII along the lines we suggested above. The minority party would presumably filibuster the motion to proceed to consider that resolution. The Majority Leader would then move to reconsider the cloture vote and raise a point of order that the vote on cloture for changes to Rule XXII (or to any Senate rule) shall be deemed to pass if the senators voting for cloture constitute a majority of senators who collectively represent a larger share of the United States population than the senators who do not vote in favor of cloture. The choreography would then proceed as before, with the Presiding Officer rejecting the point of order and a simple majority of the Senate reversing that ruling on appeal to establish a new precedent. Once the new precedent is established, the cloture vote on the resolution to change the Senate rules would proceed, presumably carry, and be followed by a vote on the rule change itself, which would also presumably pass.

complications.[16] We nevertheless raise the statutory option because, as we discuss below, a rule change enacted via statute might be "stickier" than a rule change adopted by the Senate acting unilaterally. Enacting the popular-majoritarian cloture rule via statute would also require use of the nuclear option, as any bill that contained this rule change would almost certainly be filibustered. A supportive majority would therefore need to use the nuclear option to eliminate the filibuster either for legislation in general, legislation changing Senate rules, or this statute in particular; having done so, the Senate could enact the statute that would replace the current cloture rule with the popular-majoritarian alternative. Assuming that the House passed the statute as well and the President signed it, the new statutory text would then supersede both the existing Rule XXII and the short-lived Senate precedent that had been adopted for purposes of passing this statute.

IV. The Constitutionality of a Popular-Majoritarian Cloture Rule

Would a rule change along the lines we propose be constitutional? We think that it would. The Constitution's Rules of Proceedings Clause[17]gives each chamber of Congress broad latitude to fashion its own rules—including rules that lead to unequal influence among legislators. Still, there is a plausible constitutional objection that population-based voting on cloture motions contravenes one or both of two constitutional provisions. First, the Seventeenth Amendment, which mimics the language of Article I, specifies that "[t]he Senate of the United States shall be composed of two Senators from each state … and each Senator shall have one vote."[18] Second, Article V provides that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."[19]

Article V's equal suffrage clause, however, is best understood not as imposing a general substantive guarantee of equality of state voting power in the Senate, but rather as entrenching Article I's requirement of two senators per state against future change via Article V's constitutional amendment process. The placement of the equal suffrage provision in Article V (which concerns the amendment process) rather than Article I (which concerns Congress's power and organization) supports this reading. Further, the use of the term "depriving" indicates that this clause does not create a new entitlement beyond the equal suffrage guaranteed elsewhere in the Constitution. The historical materials corroborate that this is indeed what the Framers intended,[20] and the judicial precedent, though admittedly sparse,

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[16] *See* Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345 (2003).
[17] *See* U.S. CONST. art. I, sec. 5, cl. 2 (providing that "[e]ach House may determine the Rules of its Proceedings").
[18] *Id.* amend. XVII; *see also id.* art. I, sec. 3, cl. 1.
[19] *Id.* art. V.
[20] *See*, *e.g.*, *Douglas Linder*, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 719–22 (1981); Paul J. Scheips, *Significance and Adoption of Article V of the Constitution*, 26 NOTRE DAME L. REV. 46, 58–60 (1950).

appears to endorse the view that Article V's equal suffrage clause "constitutes a limitation upon the power of amendment," rather than providing an additional substantive guarantee.[21]

The Seventeenth Amendment's requirement that "each Senator shall have one vote" poses a more significant challenge, but not an insurmountable one. There are two plausible ways to read the one-senator-one-vote clause. First, this guarantee could be read narrowly to apply only to votes on final action in the exercise of one of the Senate's constitutional powers, such as passing a bill, giving consent to a presidential nominee, approving a treaty, or rendering a verdict in an impeachment trial.[22] Under this approach, the systems used for votes on agenda-setting and other procedural matters are left to the Senate's discretion under the Rules of Proceedings Clause. Alternatively, the one-senator-one-vote clause could be interpreted broadly to mandate that senators have equal voting power in all votes, including votes on procedural matters. Though reasonable arguments could be made for both readings, we conclude that the former, narrower reading is more appropriate.

First, the narrower reading parallels, and harmonizes with, a standard defense of the constitutionality of the current filibuster rule. Some critics of the filibuster have suggested that the supermajority cloture rule is unconstitutional because the text and structure of the Constitution require that the Senate decide matters by simple majority rule.[23] The standard response to this objection is that the Rules of Proceedings Clause gives the Senate broad discretion to fashion its rules for whether and how to take up a question—including, as relevant here, the rules on when debate on a question must end. Thus, the argument continues, even if one stipulates that the Constitution requires that the passage of legislation or other final Senate action be determined by a simple majority vote,[24] the three-fifths cloture rule is constitutional because it does not affect the procedure for *final votes*. Rather, Rule XXII is constitutionally

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[21] *Cf. Barry v. U.S. ex rel. Cunningham*, 279 U.S. 597, 615–16 (1929) (rejecting a claim that the refusal to seat a senator during a pending investigation violated the Article V equal suffrage clause, and noting that this clause "has nothing to do" with such a situation, because "[t]he temporary deprivation of equal representation which results from the refusal of the Senate to seat a member pending inquiry as to his election or qualifications is the necessary consequence of the exercise of a constitutional power, and no more deprives the state of its 'equal suffrage' in the constitutional sense than would a vote of the Senate vacating the seat of a sitting member or a vote of expulsion").

[22] U.S. CONST. art. I, secs. 3, 7; *id.* art. II, sec. 2.

[23] *See*, *e.g.*, Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003 (2011); Dan T. Coenen, *The Filibuster and the Framing: Why the Cloture Rule Is Unconstitutional and What to Do About It*, 55 B.C. L. REV. 39 (2014)); Michael J. Teter, *Equality Among Equals: Is the Senate Cloture Rule Unconstitutional?*, 94 MARQ. L. REV. 547 (2010).

[24] Although the Constitution does not say explicitly that final votes must be governed by simple majority rule except where the Constitution expressly provides otherwise, many scholars have persuasively argued that this is the reading that is more faithful to both the structure and original understanding of the document. *See also Ballin v. United States*, 144 U.S. 1, 6 (1892) ("[T]he general rule for all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations. . . . No such limitation is found in the Federal Constitution, and therefore the general law of such bodies obtains.").

permissible as a procedural rule that determines when a given bill or other matter can *proceed* to a final vote—or, to be more technically accurate, when debate on the matter must end even if some senators want to keep the debate going. The same argument can support reading the popular-majoritarian cloture rule as consistent with the one-senator-one-vote clause. If we accept that the Constitution's (implicit) requirement of majority rule extends only to votes on final passage, the Constitution's (explicit) requirement that each senator have one vote should be so limited as well. Like the current filibuster rule, the popular-majoritarian cloture rule concerns the Senate's internal rules for when debate must end; final votes would still be governed by the one-senator-one-vote requirement.

Another reason to prefer the narrower reading of the one-senator-one-vote clause is that the broader reading appears inconsistent with the Senate committee system. Not only do committee and subcommittee chairs control agendas within their respective jurisdictions, but committees take formal votes on whether to advance certain matters to the full Senate. In such votes, senators are unequal: each member of the relevant committee has one vote, while other senators have zero votes.[25] This translates directly into inequality among states: on any given committee some states are represented while others are not. If the one-senator-one-vote clause applied to all Senate business, rather than just final votes, then a committee's grant of one vote to some senators (committee members) and zero votes to others (nonmembers) would be unconstitutional. Yet we are unaware of any serious argument that this inequality violates the constitutional requirement that each senator shall have one vote. The longstanding acceptance of the committee system thus counsels a narrow reading of the one-senator-one-vote clause. And that narrow reading would permit other deviations from one-senator-one-vote—including voting rules that account for state population—at stages prior to final passage.

A skeptic might object that because the popular-majoritarian cloture rule gives senators from populous states greater influence than senators from smaller states, this rule is in more tension with background assumptions about the Senate's purpose and function than are the other procedural rules to which we analogize. But given the absence of more explicit constitutional text, the lack of convincing empirical evidence that the Senate's malapportionment actually protects the interests of small states (or states generally) in the manner that the Framers envisioned, and the fact that the Constitution already departed substantially from the original design when the Seventeenth Amendment mandated popular election of senators, this appeal to original intent is too weak a reed to support a constitutional objection to a reform that would substantially improve the Senate's effectiveness and democratic legitimacy—values that are just as much at the heart of the constitutional design as the preservation of state sovereignty. Indeed, the fact that a narrower reading of the one-senator-one-vote clause would give the

[25] *See* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 217–18 (1997)

Senate greater flexibility to reform its procedures in ways that improve the body's functioning and democratic legitimacy is, in our view, a reason to embrace that narrower reading.

Finally, existing precedent and practice suggest that the judiciary would be exceedingly reluctant to second-guess the Senate's constitutional judgment on internal procedural matters. A controversy over the constitutionality of the Senate's cloture rule may well qualify as a non-justiciable political question, and even if a challenge to the Senate's cloture rule were justiciable, the case law in this area, while admittedly sparse, adopts an extremely deferential approach to reviewing how a chamber of Congress exercises its discretion under the Rules of Proceedings Clause.[26] Thus, while senators themselves should give due regard to constitutional concerns regarding this or any other proposed change to Senate rules, the fact that there is a colorable constitutional argument in support of the rule may be sufficient to dissuade the courts from invalidating it.

V. Entrenching a Popular-Majoritarian Cloture Rule

We believe the popular-majoritarian cloture rule would substantially improve both the practical performance and democratic legitimacy of the U.S. Senate and could be adopted straightforwardly via an aggressive but permissible use of established Senate procedures. But if this rule change is to make a difference, the change must stick. We must therefore address the concern that as soon as the Senate has a majority party that represents a minority of the population, that party would eliminate the popular-majoritarian cloture rule.

One way to entrench the popular-majoritarian cloture rule against such reversal would be for the Senate that adopted this rule to extend it to appeals from rulings of the Presiding Officer. Doing so would restrict the future availability of the nuclear option itself, such that a simple majority of the Senate could change rules via new precedents only if that simple majority also represented a majority of the population.[27] This does not guarantee that a determined Senate majority could not find a way to undo the popular-majoritarian cloture rule, but by expressly removing the formal mechanism that permits the creation of a superseding Senate precedent with only a simple majority, this aggressive procedural gambit would make it much harder for a subsequent Senate to undo the rule change.

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[26] *See*, *e.g.*, Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 1959–60 (2020).

[27] Although Rule XX does not explicitly specify the voting rule for appeals, consistent practice establishes that appeals are decided by simple majority vote. *See* FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. NO. 101-28, at 148 (Alan S. Frumin ed., 1992). The same coalition of senators that implemented the popular-majoritarian cloture rule could also change Rule XX to require that the ruling of the chair be sustained unless overruled by a majority of senators who also represent a majority of the population. Any of the means of changing Senate rules—by precedent, resolution, or statute—could be used to implement this change.

In addition to the possibility of formally entrenching a popular-majoritarian cloture rule, such a rule might be more politically sticky than it first appears. To be sure, a political party that rarely represents a popular majority (in today's politics, the Republican Party) would have strong incentives to reverse the popular-majoritarian cloture rule as soon as that party controls a majority of Senate seats. But at least some within such a party might prefer to preserve the popular-majoritarian cloture rule even if their party, and party leadership, would prefer simple majority rule. Most notably, centrist members might favor retaining a popular-majoritarian cloture rule because such a rule may give their party a political incentive to moderate its national platform. As noted above, the Republican Party's structural electoral advantages, including Senate malapportionment, have contributed to the party's increasing extremism over the past generation. This is bad for the party's moderates for at least two reasons. First, the moderates prefer more centrist policies. Second, insofar as the moderates' political fortunes are tied to their party's national brand, they may worry that the party's extremism threatens their own re-election. To the extent that a popular-majoritarian cloture rule would force the party that benefits from Senate malapportionment (today, the Republicans) to curb the extremism of the party's national brand, moderate senators from that party may benefit and may therefore be reluctant to replace the popular-majoritarian cloture rule with a simple majority cloture rule. In a closely divided Senate, it would only take a handful of defections to leave the rule in place.

Another factor that might contribute to the rule's entrenchment over time, at least if it survives its "infancy" period, is the normalization of institutional innovations. If an institutional rule persists for a sufficient period of time, and generates results that are broadly seen as legitimate or at least tolerable, and if people get used to the rule, then the rule may start to seem normal, and proposals to change it begin to appear disruptive. This factor works against the adoption of our popular-majoritarian rule in the first place, but if such a change, once implemented, lasts for long enough, and if the Senate during that time operates reasonably well—with the rule imposing some constraints but not preventing either party from advancing important elements of its agenda when in power—then the rule may gradually become entrenched in much the same way that the current filibuster has been entrenched. Moreover, the popular-majoritarian cloture rule, unlike the current filibuster, has the added benefit of being defensible in terms of majoritarian democracy, which might contribute to the rule's legitimacy, and hence to its stickiness.[28]

[28] An additional possible means of political entrenchment bears mention: Implementing the new procedural rule through a statute, rather than through a resolution or precedent, may make the rule more politically durable. To be sure, it is questionable whether, as a legal matter, such a statute could prevent a single chamber of Congress from unilaterally altering a procedural rule contained in that statute. *See* Bruhl, *supra* note 16, at 349–50, 367–69. Nevertheless, there are three related reasons why a "statutized" version of our rule might prove more resistant to change. First, the use of the nuclear option to override the clear text of a statute might appear legally dubious. Second, disregarding a statute might be more politically costly than changing or ignoring a rule that the Senate had unilaterally

VI. Conclusion

The Senate is an undemocratic institution. It can stop legislation in its tracks even when that legislation commands broad public support, and it can allow senators representing well under half the American population to impose their will on the nation. A popular-majoritarian cloture rule would help address both of these problems. It would empower senators representing a national majority to enact their agendas, while at the same time safeguarding against minority rule. As Washington considers how the Senate could work better for the American people, a popular-majoritarian cloture rule is a promising way forward.

adopted. Third, the existence of a statute might give political cover to Senators who are inclined to buck their party's leadership by refusing to support efforts to rescind the rule. *See* Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 CONN. L. REV. 1041, 1011–12 & n.178 (2011). For these reasons, implementing the popular-majoritarian cloture rule through a statute might increase the odds that the rule will persist even if the disadvantaged party subsequently wins a majority of the Senate.

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