Cloture, Continuing Rules and the Constitution

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Notes
Cloture, Continuing Rules
and the Constitution

Filibusters, session after session, have highlighted the United States Senate’s rules for limiting debate. Under the now-famous cloture rule, debate on a motion, even on a motion to revise the cloture rule itself, can be limited only upon consensus (two-thirds) of the senators present and voting. By another—more far-reaching though less-famous—Senate rule, the rules of the Senate continue automatically from Congress to Congress. The author of this Note compares the wisdom of consensus with majority rule as a procedure for limiting debate and then considers whether the Constitution compels either. He concludes that cloture by consensus or majority rule is simply a matter of Senate choice; that since the Constitution requires neither, the Senate is free to make that choice; but that one Senate cannot bind succeeding Senates to its choice—a continuing Senate rule which limits the revision of the rules is void.

Monticello, January 17, 1810

Dear Sir:

I observe that the House of Representatives are sensible of the ill effects of the long speeches in their House on their proceedings. But they have a worse effect in the disgust they excite among the people, and the disposition they are producing to transfer their confidence from the Legislature to the executive branch, which would sap our Constitution. . . .

Ever affectionately yours.
Thomas Jefferson

I. INTRODUCTION

In the past half-century, perhaps no subject has been more a source of frustration to the United States Senate than the controversy over its own rules. The years since 1917, the date cloture was adopted by the Senate, have seen at least five major encounters within that body, consuming hundreds of hours, thousands

of pages of print, and eliciting a wide range of philosophic and pragmatic arguments, noteworthy as much for their passion as for their profundity. In each conflict the specific concern was the problem of unlimited debate; but underlying the immediate issue was a basic disagreement as to the permissible method by which the Senate may adopt a new rule limiting debate.\(^3\)

Senate debate is not totally unlimitable. Senate Rule XXII — the now-famous cloture rule — provides

(2) ... [A]ny time a motion signed by sixteen Senators, to bring to a close the debate upon any measure, motion, or other matter pending before the Senate, ... is presented to the Senate, the Presiding Officer shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and ... submit to the Senate by a yea-and-nay vote the question:

"Is it the sense of the Senate that the debate shall be brought to a close?"

And if that question be decided in the affirmative by two-thirds of the Senators present and voting, then said measure, motion, or other matter... shall be the unfinished business to the exclusion of all other business until disposed of.

Thereafter no Senator shall be entitled to speak in all more than one hour on the measure, motion, or other matter pending before the Senate ... .\(^4\)

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4. Senate Committee on Rules and Administration, *Senate Manual*, S. Doc. No. 1, 88th Cong., 1st Sess. Rule XXII (1963) [hereinafter cited as 1963 *Senate Manual*]. Cloture, and its predecessor, the motion for the previous question, see 1 Haynes, *The Senate of the United States* 392–96 (1938); Mason, *Manual of Legislative Procedure* 241–46 (1953), has had a long and turbulent history. The motion for the previous question apparently originated in the British House of Commons in 1604. See 105 Cong. Rec. 307 (1959). During the 17th century it was successfully employed 491 times by that body in order to shut off debate and bring the pending matter to a vote. *Ibid.* The previous question was adopted by both houses of Congress in 1789. See Burdette, *Filibustering in the Senate* 219–20 (1940); Galloway, *Limitation of Debate in the United States Senate* 6 (1961); 1 Haynes, *op. cit. supra* at 392. Through its use, debate could be closed by majority vote. While the motion was itself debatable, the presiding officer had unappealable power to demand relevance in debate. See 105 Cong. Rec. 307–08 (1959). The motion was omitted from the Senate rules in 1806, but until 1828 the presiding officer retained the absolute power to rule speakers out of order for using speech as a dilatory tactic. *Ibid.* In 1828 the Senate made such a ruling by the chair appealable to the Senate body. 4 Cong. Deb. 278–341 (1828). In 1879 the Vice-President ruled that the presiding officer had no power to require a Senator to surrender the floor because of irrelevancy in debate. Cong. Globe, 42d Cong., 2d Sess. 1293–94 (1872); Haynes, *op. cit. supra* at 423–24.
Thus, the Senate abandoned its last effective control over debate.

In the 45 years that followed, filibustering... assumed astounding proportions. In the last two decades of the nineteenth century storms of obstruction... swept the chamber. Parliamentary tactics to overcome obstruction proved to be hopeless and ineffectual. The power of the Senate lay not in votes but in sturdy tongues and iron wills. The premium rested not upon ability and statesmanship but on effrontery and audacity.

BURDette, op. cit. supra at 79-80.

Finally, on March 8, 1917, following the filibuster of the Armed Ship Bill, see 54 CONG. REC. 4272-73, 4719-5020 (1917); BURDette, op. cit. supra at 115-23, the Senate adopted a cloture rule which provided a method for shutting off debate by two-thirds vote of the present and voting members. 55 CONG. REC. 19-45 (1917). In the succeeding 32 years, cloture under this rule was successful in 4 of 21 attempts. See GALLOWAY, op. cit. supra at 26 (1951).

The utility of the rule was diminished when, on August 2, 1948, Senator Vandenberg, acting in the capacity of President pro tempore of the Senate, ruled that the cloture provision was inapplicable to a motion to consider a measure, 94 CONG. REC. 9602-04 (1948) (Senator Vandenberg, however, did favor amending the cloture rule so as to make it applicable to motions to take up a measure, 95 CONG. REC. 2227 (1949)), which is a debatable motion under general parliamentary rules, see MASON, op. cit. supra at 79-84. Thus, a filibuster could still be successfully waged, without fear of cloture, where the sponsor of a bill attempted to bring that bill to the Senate floor and make it the present business of the Senate.

Disturbed by this limitation and by the general ineffectiveness of the rule, the opponents of unlimited debate attempted to amend the cloture rule in 1949. See 95 CONG. REC. 1606-2724 (1949). The result was a compromise which made the cloture rule applicable to motions to take up a measure, but which expressly made cloture unavailable to limit debate on motions to revise the rules. Senate Committee on Rules and Administration, Senate Manual, S. Doc. No. 5, 82d Cong., 1st Sess. 26-27 Rule XXII (1951) [hereinafter cited as 1951 Senate Manual]. This amendment made it practically impossible to defeat a filibuster designed to prevent a change in the cloture rule itself. The 1949 revision further provided that two-thirds of the members duly chosen and sworn—a “constitutional two-thirds”—would be required to invoke cloture. Ibid. As thus amended, the rule was even less effective as a device for limiting debate than its predecessor; if the “constitutional two-thirds” requirement had been in effect before 1949, only three of the 22 cloture attempts would have been successful. Under the 1917 rule (two-thirds present and voting), cloture succeeded four times: Treaty of Versailles, 78 to 16 vote (1919); World Court, 68 to 26 vote (1926); Branch Banking, 65 to 18 vote (1917); Bureau of Customs and Bureau of Prohibition, 55 to 27 vote (1927). Under a “constitutional two-thirds” requirement, 64 affirmative votes would have been necessary.

In 1959, the final significant change in the cloture rule was adopted. 105 CONG. REC. 10-11 (1959). The effect of this revision was (1) to allow cloture upon two-thirds vote of the members present and voting; (2) to permit the cloture motion to be utilized to limit debate on motions to revise the rules; (3) to provide that the rules of the Senate shall continue from one Senate to the next Senate unless changed in accordance with the present rules. 1963 Senate Manual Rule XXXII(2). At present, therefore, the cloture rule closely resembles the 1917 version, with two exceptions: It is applicable to motions to take up a measure, and the rules recognize that changes in the rules can be accomplished only within the procedure dictated by the existing rules.
Cloture under this rule has proven difficult, and the advocates of unlimited debate have fought off numerous attempts to change the rule to make it available upon majority, or even three-fifths, vote. The extent to which the present Rule XXII assures unlimited debate depends, however, upon the validity of one proposition: that the rules of the Senate are binding upon each succeeding body at and from the moment of its inception. If they are not, the present Rule XXXII, which provides that “the rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules,” is useless verbiage, for any future Senate interested in changing the rules could simply disregard that requirement, shut off debate by majority vote, and adopt a new cloture provision also by majority vote.

The proposition that the rules are automatically binding—that they are “continuing rules”—has been frequently challenged in the past half-century on the ground that each Senate has the constitutional right to make its rules anew. The critics of unlimited debate have also maintained that the provision requiring two-thirds vote in order to obtain cloture violates a constitutional requirement of majority rule in the Senate. The objectives of this Note are to determine first whether the Constitution requires the Senate to function either by consensus or by majority vote; then, assuming that legislation by majority vote or by consensus is a matter of legislative choice, whether succeeding Senates are bound by the choice of their predecessors.

9. “[E]ach House may determine the Rules of its Proceedings . . . .” U.S. Const. art. I, § 5. While the term “each House” has never been judicially defined, it seems clear that it refers not only to both houses of Congress, but also to each succeeding Congress. See United States v. Ballin, 144 U.S. 1 (1892); 103 Cong. Rec. 25 (1957) (brief prepared by Senator Douglas). It is this clause which critics contend is violated by the “continuing rules” theory. See 103 Cong. Rec. 13 (1957) (brief prepared by Senator Douglas); 99 Cong. Rec. 220 (1953) (remarks of Senator Humphrey); 99 Cong. Rec. 185 (1953) (brief placed in the Record by Senator Lehman); 55 Cong. Rec. 9-11 (1917) (remarks of Senator Walsh).
10. This argument appears to have been first advanced by Walter Reuther in Hearings 148-50.
II. CONSENSUS V. MAJORITY RULE

A. A Wiser Choice?

Critics ascribe various legislative evils to the practice of unlimited debate. First, an obvious effect of the filibuster, the creature of unlimited debate, is to prevent the enactment of important legislation that has been the object of the filibuster. Civil rights bills are only the most recent example of legislation so defeated; treaties, public welfare and conservation legislation, and war emergency legislation are among the other victims of the filibuster. Equally undesirable, it has been asserted, is the tendency of the very threat of a filibuster to prevent even the introduction of controversial resolutions into the Senate mill, or to cause those bills to be substantially “watered down” before introduction. Somewhat less obvious, but equally significant, is the fact that time consumed in filibusters may prevent the consideration and enactment of other important, if less controversial legislation; it has been estimated that the time lost in a dozen of the more famous filibusters of the 19th and 20th centuries was 304 days. Finally, in addition to the frustration, delay, and waste occasioned by the filibuster, its critics assert that use of the device results in a tarnishing of the senatorial “image”: “A body which cannot govern itself will not long hold the respect of the people who have chosen it to govern the country,” for, to the electorate, “to vote without debating is perilous, but to debate and never vote is imbecile.”

11. [A] name originally given to the buccaneers. The term . . . was revived in America to designate those adventurers who, after the termination of the war between Mexico and the United States, organized expeditions within the United States to take part in West Indian and Central American revolutions . . . . In the United States it is colloquially applied to legislators who practice obstruction.

9 ENCYCLOPEDIA BRITANNICA 235 (1949). For an authoritative history of the filibuster, see BUSSEY, op. cit. supra note 4. See also HAYNES, op. cit. supra note 4, at 392-427; ROGERS, THE AMERICAN SENATE 161-91 (1926); MYERS, LIMITATION OF DEBATE IN THE UNITED STATES SENATE, 23 TEMP. L.Q. 1 (1949).


13. HEARINGS 150 (brief submitted by Walter Reuther); see 105 CONG. REC. 226 (1959) (remarks of Senator Case); id. at 330 (remarks of Senator Douglas); id. at 395 (remarks of Senator Javits).

14. GALLOWAY, op. cit. supra note 4, at 20-23; see 95 CONG. REC. 2181-87 (1949) (remarks of Senator Pepper).

15. 95 CONG. REC. 2265 (1949) (remarks of Senator O’Mahoney).

16. Lodge, Obstruction in the Senate, 157 NORTH AM. REV. 523, 527 (1893).
The proponents of unlimited debate forcefully assert that the present cloture rule is a desirable method of guaranteeing some degree of senatorial unanimity on important legislation; it assures that a relatively small body of men, representing a significant social, economic, or political interest or area, can prevent enactment of legislation that is fundamentally offensive to that interest or area. This approach to the legislative process—"government by consensus"—may be justifiable on the ground that it will prevent that "tyranny of the majority" which some have considered to be potentially the fatal defect of the American republic.

But while consensus is obviously desirable, that consideration should always be decisive is by no means clear. Experience, for example, might indicate that during periods of national crisis, the principle of majority rule is warranted. Distinctions between the kinds of legislation for which majority rule and consensus rule are desirable might even be possible. The very availability of each alternative might, in fact, have a desirable effect in limiting abuses that might otherwise result from unqualified acceptance of either alternative. A minority, for example, would be well-advised to use the right of unlimited debate only to oppose those resolutions that it considered fundamentally offensive to its interests, rather than as a device to prevent enactment of any legislation it disliked; injudicious use of the right might result in the majority's restricting freedom of debate. That the availability of both rules would prevent abuse of a rule providing a procedure for limiting debate by majority vote is more difficult to argue, however, for the minority would theoretically be unable to adopt a consensus rule even if the majority did abuse the procedure for limiting debate. Yet this objection assumes that elected representatives are mere opportunists; moreover, it fails to acknowledge sufficiently the adverse public reaction that would presumably accompany any extensive and protracted abuse of a rule for limiting debate by majority vote, and the restraining effect that fear of the adverse reaction would have.

The other benefits of unlimited debate are similarly open to question. The importance of maintaining the Senate as a "great deliberative body" is probably exaggerated, partly because there has been a significant shift in policy making from the legislative

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17. See Wilson, Constitutional Government in the United States 121 (1908); Hearings 253 (quoting former Vice President Stevenson); Lippman, A Critique of Congress, Newsweek, Jan. 20, 1964, p. 20.

to the executive branch, and partly because Senate debate probably has no substantial effect on the members of that body—the arguments for and against important legislation are typically well-known before the proposal reaches the Senate floor. Likewise, with the mass communication network of the present day, unlimited debate is probably not necessary either to call public attention to important issues or to educate the electorate.

Therefore, while the objective of this Note is not to demonstrate that the practice of unlimited debate is without justification, it is suggested that different Senates may, if given the opportunity, rationally reach different conclusions as to whether a consensus rule or a majority rule is preferable. The threshold question, however, in determining whether the Senate has that opportunity, is whether the Constitution requires either alternative.

B. WHAT THE CONSTITUTION REQUIRES

There is substantial evidence, both in circumstances surrounding the constitutional convention and in the Constitution itself, that majority rule was the preference of the nation's founders. The delegates to the convention recognized that the requirement of two-thirds vote for important legislation was a significant weakness of the Articles of Confederation; they selected the principle of majority rule to govern the convention itself. Of more significance is the fact that the convention twice rejected proposals that two-thirds vote be required for enactment of specific types of congressional legislation. The Constitution as finally drafted is further indication of the preference for majority rule, for it provides that a majority, rather than two-thirds of the members, as was proposed in the convention, should constitute a quorum for doing business.

Most frequently advanced as evidence that majority rule is demanded by the Constitution is the enumeration in that document of five areas in which more than majority vote is required

19. Arts. of Confed. arts. IX, X (1777); see 1 Elliot, Debates 127–39 (1886); Prescott, Drafting the Federal Constitution 425 (1941); The Federalist No. 22 (Hamilton).

20. See Farrand, Framing the Constitution of the United States 5 (1913).

21. On August 29, 1787, the convention rejected a motion to subject legislation concerning interstate and foreign commerce to two-thirds vote. A two-thirds requirement for legislation relating to navigation was defeated on September 15, 1787. 5 Elliot, Debates 489–92, 552 (1836).


to obtain senatorial action: impeachments;\textsuperscript{24} expulsion of congressmen;\textsuperscript{25} overriding of presidential veto;\textsuperscript{26} ratification of treaties;\textsuperscript{27} and initiation by Congress of proposals to amend the Constitution.\textsuperscript{28} Advocates of the majority-rule theory contend that "when a document, as carefully drafted and considered as was the Constitution, enumerates particular exceptions to a general rule, it must be concluded that no other exceptions were intended to be made."\textsuperscript{29} Such a construction, they argue, is consistent with the judicial doctrine that "exemptions made in such detail preclude their enlargement by implication."\textsuperscript{30} This argument, however, is not dispositive of whether majority rule is constitutionally required, for the Constitution does not spell out a "general rule" to which the five enumerated areas are "exceptions." Even avoiding that objection, the further question remains whether the exemptions have been made in "such detail" to "preclude their enlargement by implication"; such a question should be resolved analytically on an \textit{ad hoc} basis by evaluating the nature of the exceptions and by comparing them with the scope of the legislative scheme to which they are exceptions.

Majority rule does not need to be proven constitutionally demanded, however, to reject the senatorial consensus theory as a constitutional requirement, for it is at least clear that the framers of the Constitution rejected the latter proposition.\textsuperscript{31} Thus, assuming that the Constitution does not require majority rule, the choice between the two alternatives is not one to be made by recourse to the Constitution; rather, it becomes, under traditional constitutional theory, a matter of legislative choice. The Senate, therefore, has the power to determine whether it will function under rules that insure consensus or under the principle of majority vote. Once that power has been exercised, an inquiry must be directed to the extent to which such action is binding on successive bodies, and the methods by which those bodies may change the rule previously selected.

\begin{itemize}
\item \textsuperscript{24} U.S. Const. art. I, § 3.
\item \textsuperscript{25} U.S. Const. art. I, § 5.
\item \textsuperscript{26} U.S. Const. art. I, § 7.
\item \textsuperscript{27} U.S. Const. art. II, § 2.
\item \textsuperscript{28} U.S. Const. art. V.
\item \textsuperscript{29} \textit{Hearings} 149 (brief submitted by Walter Reuther).
\item \textsuperscript{31} See notes 19–28 \textit{supra} and accompanying text.
\end{itemize}
III. EFFECT OF A LEGISLATIVE CHOICE

A. THE "CONTINUING BODY" THEORY

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; changes in the rules can therefore be accomplished only within the procedure prescribed by the existing rules.32 This rationale was seemingly recognized by the Senate in 1959 when it adopted Rule XXXII, providing for the continuance of rules.33 Although such automatic continuance does prevent a parliamentary vacuum at the commencement of each new Senate,34 the reasons advanced to sustain the procedure are not convincing. The major premise of the argument, the theory that the Senate is a continuing body,35 is defended on several grounds: First, it is argued that the Constitution demands this conclusion because, by providing that "two-thirds of the membership of the Senate be in office at all times, and . . . that a majority of the Senate shall constitute a quorum to do business, it is apparent that the Senate was intended to be and is a continuing body."36 This argument is unpersuasive, however, for the intent of the constitutional framers, in providing for two-thirds carryover of Senate membership, was to guarantee some degree of continuity in governmental policy

32. See authorities cited note 6 supra.
33. See note 4 supra.
34. It has been argued that if the rules did not carry over, two difficulties would confront each new Senate: (1) there would be no rules to govern the proceedings of the Senate in adopting new rules; (2) controversies as to which rules should be adopted, for example cloture by majority or two-thirds vote, would prevent adoption of any rules and the Senate would become a "parliamentary jungle." Yet the House of Representatives adopts its rules anew at the commencement of each new session—a resolution is offered for the adoption of new rules, often phrased in terms of the rules of the preceding Congress. E.g., 99 Cong. Rec. 15-24 (1953); see Galloway, LEGISLATIVE PROCEDURE IN CONGRESS 15 (1955). During the period preceding adoption, the House operates under general rules of parliamentary procedure, under which debate can always be closed by a call for the previous question. E.g., 99 Cong. Rec. 24 (1953). Even where there is controversy as to the rules, debate does not appear to reduce the House to a "jungle." See, e.g., 97 Cong. Rec. 9 (1951); 95 Cong. Rec. 10 (1949).
35. See 103 Cong. Rec. 212-13 (1957) (brief placed in the Record by Senator Daniel); 52 Cong. Rec. 3793 (1916) (remarks of Senator Root); Cong. Globe, 26th Cong., 2d Sess. 240 (1841) (remarks of Senator Buchanan); Beard, AMERICAN GOVERNMENT AND POLITICS 109 (1931); Cushing, LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES 104 (1907); 1 Haynes, op. cit. supra note 4, at 341.
and responsibility; 37 in none of the debates during or after the constitutional convention was there any suggestion that a purpose of the carryover provision was to insure continuance of parliamentary rules. Nor does continuance of the rules appear essential in order to accomplish the continuity in policy and responsibility that the carryover clause was designed to encourage. Similarly, the purpose of the majority quorum provision has been misinterpreted. Its objective was to remedy one of the more troublesome defects of the Articles of Confederation—the requirement of two-thirds approval of important legislation. 38 Thus, the quorum clause does not support the continuing body theory, and in fact, it reflects a preference for majority rule; it is therefore a strange bedfellow to those who defend the two-thirds cloture rule on the ground that that rule is consistent with a constitutional preference for consensus action on legislation.

Supreme Court—as well as some state court 39—decisions have also been advanced as support for the continuing body theory. In McGrain v. Daugherty, 40 a leading example, the Supreme Court considered the legality of a warrant issued by the Senate for attachment of a person who ignored a subpoena from a Senate committee. In holding the warrant valid, the Court considered the question whether the case had become moot because the warrant was issued by a committee of the previous Congress. The Court concluded that "the committee may be continued or revived [by the succeeding Senate] now by motion to that effect . . . . This being so, and the Senate being a continuing body, the case cannot be said to have become moot in the ordinary

37. See Schultz, Creation of the Senate 4–18 (1937); The Federalist Nos. 62, 63 (Hamilton).

38. See authorities cited note 19 supra.

39. Two state decisions have referred to the United States Senate as a continuing body. Robertson v. Smith, 109 Ind. 79, 123, 10 N.E. 582, 603 (1887); State ex rel. Werts v. Rogers, 56 N.J.L. 480, 622, 28 Atl. 726, 760 (1894). Such statements are obviously not controlling, nor under the circumstances of those cases can they be given great weight as the considered conclusions of state courts. In Robertson the court did not assess the merits of the continuing body argument; rather, it assumed the validity of the theory and decided that it was inapplicable to that state’s legislature because, unlike the Senate, a sufficient number of that state’s lawmakers did not carry over to the succeeding legislature. Nor did the court in Rogers assess the merits of the theory; it merely concluded that even though, like the United States Senate, two-thirds of New Jersey’s lawmakers carried over, there was nothing to indicate that the framers of the New Jersey Constitution intended the legislature to be a “continuing body.”

While the Court did state that the Senate is a continuing body, that factor was clearly not essential to the result. The decision was premised on the possibility of revival, which led the Court to conclude only that the case was not moot; the Court did not decide that a committee may continue automatically beyond the life of the expired Senate. Even assuming the Court did so decide, that holding would not, of course, be dispositive of whether the Senate is a continuing body for all purposes. Moreover, if the Court in *McGrain* had held otherwise, the investigatory power of Congress would have been impaired, for any person could then ignore with impunity any subpoena issued near the expiration of a congressional session. No similarly compelling reason demands the acceptance of the continuing body theory with reference to the Senate rules.

Finally, it is contended that long-continued acquiescence by the Senate "definitely points to the acceptance of the theory that the Senate is a continuing body." Since its organization, the custom of the Senate has been to begin operation of each Congress without readopting its rules. The practice was never questioned until 1917 when, at the opening of the 65th Congress, Senator Walsh of Montana offered a resolution squarely raising the issue whether the rules are continuous. The question was not voted

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41. *Id.* at 182.

42. *Sinclair v. United States*, 279 U.S. 263 (1928), has been considered a direct holding by the Court that the Senate is a continuing body. 105 Cong. Rec. 109, 111 (1959) (remarks of Senator Robertson). *Sinclair* involved the validity of the conviction of petitioner for refusal to answer questions before a Senate committee. The committee investigation had been authorized by two resolutions of the Senate of the 67th Congress. S. Res. 282, 67th Cong., 2d Sess., 82 CONG. REC. 6097 (1922); S. Res. 294, 67th Cong., 2d Sess., 62 CONG. REC. 8140 (1922). A third resolution, S. Res. 434, 67th Cong., 4th Sess., 64 CONG. REC. 3048 (1923), adopted before the end of the 67th Congress, stated that the investigation authorized by the two previous resolutions should be continued until the end of the 68th Congress. Petitioner argued that the last resolution was of no force and effect because the committee expired with the Congress. 279 U.S. at 273. Senator Robertson, however, apparently misread the decision, for although the issue of whether the Senate is a continuing body was raised by the facts and argued before the Court, it was never discussed in the opinion. The portion of the decision quoted by the Senator as support for "a direct holding" concerns the validity of a resolution incorrectly identifying a previous resolution.

43. This rationale is equally applicable to the *Sinclair* case. See note 42 supra.

44. 105 Cong. Rec. 212 (1957) (brief placed in the *Record* by Senator Daniel).

45. Resolved: That until further ordered the rules in force at the close of the sixty-fourth Congress be adopted as the rules of the Senate, with
on, however, for the Senate agreed almost unanimously to adopt a two-thirds cloture rule. Having obtained the rule he desired, Senator Walsh withdrew his resolution. In 1953 and 1957 the issue was again raised, but a vote was avoided on both occasions. Whatever meaningful acceptance there has been of the theory occurred in 1959 when the Senate adopted the provision that the rules shall continue automatically to the succeeding Senate. Even this "acquiescence" can scarcely be taken as evidence of the validity of the theory, however, because the critics of unlimited debate were more concerned in 1959 with obtaining an improved cloture rule than with opposing the inclusion of a rule that they contended would have no binding effect on future Senates in any event.

Indeed, it may be persuasively argued that the continuing body theory has not been accepted by the Senate at all, for that body indicates indirectly in many ways that it is not truly continuing. With reference to the introduction of bills, election of officers, election of committee members, consideration of treaties, and submission and consideration of nominations, the exception of Rule XXII thereof.

55 Cong. Rec. 9 (1917).
46. 55 Cong. Rec. 19-45 (1917) (76 to 3 vote). The cloture rule adopted was introduced by Senator Martin. 55 Cong. Rec. 10 (1917).
49. 1963 Senate Manual Rule XXXII(2). While the Senate did operate under continuing rules from 1789 to 1917 without protest, that "acceptance" of the continuing body theory seems to have been uncritical. Not until 1917 did the Senate undertake to consider that theory on its merits. Cf. 99 Cong. Rec. 188-89 (1953) (brief placed in the Record by Senator Lehman). See also note 4 supra.
51. 1963 Senate Manual Rule XXXII; see 103 Cong. Rec. 27 n.8 (1957); 99 Cong. Rec. 188 (1957).
52. The old officers carry over until new ones are elected, for the sake of convenience. The same situation exists in the House of Representatives, which does not operate under continuing rules. See 103 Cong. Rec. 28-29 (1957) (brief submitted by Senator Douglas).
53. 1963 Senate Manual Rule XXV. The old members retain their seats until new members are elected. See 99 Cong. Rec. 184 (1953).
54. "[A]ll proceedings on treaties shall terminate with the Congress, and they shall be resumed at the commencement of the next Congress as if no proceedings had previously been had thereon.
1963 Senate Manual Rule XXXVII(2).
55. Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session
operations of the Senate start afresh with each new Congress. Further, the Senate has twice determined that it was not bound by procedural resolutions of previous legislatures. In 1841 the Senate voted to dismiss the Senate printer appointed by the previous Senate in accordance with a joint resolution authorizing each house of Congress to choose the printer for the next succeeding house. In voting to dismiss, the Senate presumably was unimpressed by the continuing body argument advanced by Senators Allen and Buchanan. Again, in 1876 the Senate seemingly rejected the continuing body theory when it decided that the joint rules of the House and Senate, adopted by the first Congress, were not binding upon the then-present Senate, unless that body adopted them anew.

In light of past and present Senate practices, therefore, it is difficult to conclude that the Senate has acquiesced in the continuing body proposition; in every respect, in fact, except with reference to its rules, it appears to have considered itself a noncontinuous body.

The most fundamental objection to the statement that the Senate is a continuing body, however, is that it is meaningless. It is merely another way of expressing the fact that two-thirds of the Senators carry over; it has no other significance:

The argument for the carryover of the rules seems to come down to this: Because two-thirds of the Senators carry over, the Senate is a continuous body; because the Senate is a continuous body, the rules carry over. Striking the words "continuous body" out of this formula, the argument comes down to this: Since two-thirds of the Senators carry over, the rules carry over. But this is a patent nonsequitur. It assumes that the carryover . . . always carries over a majority in favor of the rules.

The objection to the formula is even more fundamental. Even assuming that a majority of the surviving Senators favor the rules, there is still no logical relation between the two statements in the formula; the fact that two-thirds of the membership carries over furnishes no basis for concluding anything about the rules.

without being again made to the Senate by the President . . .


56. CONG. GLOBE, 26th Cong., 2d Sess. 236-40 (1841); see 103 CONG. REC. 26 (1957) (brief prepared by Senator Douglas); 99 CONG. REC. 187 (1953) (brief placed in the Record by Senator Lehman); BURBETTE, op. cit. supra note 4, at 21-22.

57. CONG. GLOBE, 26th Cong., 2d Sess. 240 (1841).

58. 4 CONG. REC. 517-20 (1876); see 99 CONG. REC. 187 (1953) (brief placed in the Record by Senator Lehman).

59. 103 CONG. REC. 29 (1957) (brief prepared by Senator Douglas).

60. See 105 CONG. REC. 188-89 (1959).
Thus, the rationale offered in support of the continuing rules theory is vulnerable on every ground. Clearly, the Constitution cannot be said to require its acceptance, nor is there any evidence that continuing rules are essential for the attainment of the constitutional objective of continuity in policy and responsibility. Court decisions offer no meaningful support because none has considered the question on the merits. The acquiescence theory is not supported by Senate history, nor, if it were, would the theory be compelling — acquiescence presupposes the right of nonacquiescence.

B. LIMITATIONS ON THE “CONTINUING RULES” THEORY

Assuming, however, that the Constitution requires or tradition permits the Senate to treat itself as continuing with reference to its rules, the question arises as to what, if any, limitations may be placed on the ability of a succeeding body to change those rules. That one legislative body cannot bind its successor irrevocably to its enactments is well settled.\(^{61}\) Probably none would disagree that the doctrine is as applicable for legislative rules as for substantive laws. Critics of the present cloture rule contend that this doctrine is violated by the present rules\(^{62}\) — because the rules can only be changed under procedures prescribed in the existing rules and because a two-thirds vote is required in order to end a filibuster on a motion to change the rules, it is practically impossible to change the cloture rule. Yet this argument misses the real issue, for the present rule has not made the Senate rules irrevocable; Rule XXII has only made it difficult to change the rules — “to admit that difficulty exists in changing the rules... is to admit that the rules are revocable.”\(^{63}\) Thus, the precise issue is not whether a legislative body can pass irrepealable laws, but what limitations, if any, one legislature may place on the ability of its successor to change those enactments. For example, may one legislature stipulate that one or more of its enactments may be repealed or amended only by two-thirds vote; may that body require that its parliamentary rules shall continue until unanimously rejected; may one Senate provide that its successor can limit debate on a motion to adopt new rules only by two-thirds vote?

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61. E.g., Toomer v. Witsell, 334 U.S. 385, 393 n.19 (1948); Reichelderfer v. Quinn, 287 U.S. 315, 318 (1932); Newton v. Commissioners of Mahoning County, 100 U.S. 548, 559 (1879); 55 Cong. Rec. 10-11 (1917) (remarks of Senator Walsh); COOLEY, CONSTITUTIONAL LIMITATIONS 146–47 (1890).

62. See authorities cited note 9 supra.

63. 103 Cong. Rec. 212 (1957) (brief placed in the Record by Senator Daniel).
While there is no direct authority in the United States on the question of legislative limitations, both the Supreme Court and scholars are apparently of the view that “if a legislature could in any degree bind its successors, the result would be an erosion of power which over the years would render later legislatures helpless in the face of the past.” To prevent such “erosion of power,” the Court has concluded that “every succeeding legislature possesses the same jurisdiction and power with respect to them 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.” The wisdom of this conclusion becomes obvious when the alternative is considered. If a succeeding body were bound by previous provisions for changing the rules, a prior legislature might specify that cloture was inapplicable to motions to change the rules and that such motions could be adopted only by unanimous consent, thus, as a practical matter, assuring the permanence of the rule itself. Such a procedure not only could result in the Senate being stymied by inefficient rules, but it would also appear to conflict with the intent of the constitutional framers that the question of legislation by consensus or by majority vote be left to congressional discretion. Moreover, it seems anomalous to suggest that the framers chose not to give a constitutional permanence to either the consensus theory or the majority rule theory but yet intended that a single legislative body could accomplish that same result.

Any legislative body, therefore, may properly ignore any provision that attempts to dictate the procedure to be followed in amending or repealing antecedent legislation or in changing its own parliamentary rules. In considering changes in its rules, the body would operate under whatever parliamentary rules it has provided for itself, or, in the absence of such rules, under general rules of parliamentary procedure. This rationale would allow the rules to continue insofar as they dictate the proper procedure in considering legislation; they would be inapplicable, however, to

64. The Parliament of the Union of South Africa has been similarly troubled by the question of the binding effect of legislative enactments on subsequent legislatures with reference to its substantive laws. See Marshall, Parliamentarv Sovereignty and the Commonwealx 180–218 (1957); cf. Mitchell, Sovereignty of Parliament — Yet Again, 70 LAW Q. REV. 196, 203–15 (1953).

65. 99 Cong. Rec. 182 (1953) (brief placed in the Record by Senator Lehman); see authorities cited note 61 supra.

66. Newton v. Commissioners of Mahoning County, 100 U.S. 548, 559 (1879).
the extent that they prescribed, without the consent of the Senate, procedures for changing the rules. Whatever advantages flow from permanent rules regarding the substantive legislative process would thus be retained, while the possibility that the body would find itself restricted by abusive or inefficient rules would be avoided.

CONCLUSION

During the past half-century, the Senate membership has frequently disagreed on whether it ought to allow, in its deliberations, unlimited debate, two-thirds cloture, three-fifths cloture, or cloture by majority vote. This Note has not attempted to determine which rule is preferable; rather the objective has been to resolve two issues which have frequently troubled the Senate in choosing between the alternatives: whether the Constitution compels the Senate to operate under rules that insure consensus or under the principle of majority vote — if it does compel either alternative, then, short of constitutional amendment, the question of the wiser alternative is irrelevant; and whether, if the Constitution does not dictate the choice, a Senate may specify the procedure by which a succeeding body shall make the choice.

An analysis of events surrounding the constitutional convention and of the constitutional provisions concerning the Senate leads to the conclusion that the Constitution clearly does not require consensus and probably does not demand that the Senate operate only under the principle of majority vote — the decision is a matter of legislative choice. As to the latter issue, prescriptions by previous Senates of procedures for changing the rules cannot be persuasively defended by reference to the “continuing body” theory. At the least, it seems clear that constitutional theory demands that the continuing rules be considered void insofar as they limit or control the ability of a succeeding body to change the rules.

67. If, for example, on the commencement of a new Senate there was no dissatisfaction with the rules, the Senate could affirmatively, or by acquiescence, acknowledge that the old rules were binding even as to attempts to change the rules. If, on the other hand, a majority of members were dissatisfied with any rule, they could provide that the old rules would be inapplicable to any motion to change the rules during that Congress. This would avoid the dilemma previously facing critics of the rules: if they attacked the “continuing rules” at the commencement of the session, important legislation might be delayed; if the attack on the rules were delayed until the legislation had been considered they might have “acquiesced” in the existing rules. See generally 99 Cong. Rec. 180–81 (1953) (brief submitted by Senator Lehman).