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# THE UNTOLD STORY OF THE STATE FILIBUSTER: THE HISTORY AND POTENTIAL OF A NEGLECTED PARLIAMENTARY DEVICE

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## I. INTRODUCTION

On June 25, 2013, as Texas State Senator Wendy Davis prepared to launch her now-famous filibuster, the Supreme Court in *Shelby County v. Holder* invalidated Section 4 of the Voting Rights Act (“VRA”),<sup>1</sup> a crucial part of one of the most successful civil rights statutes ever enacted. This Note takes these two seemingly unrelated events as its starting and ending points. While the federal filibuster is a familiar procedural device, Davis’s effort shone a light on its underexamined state equivalent.<sup>2</sup> The invalidation of Section 4 of the VRA also turned attention to the states, this time in the form of alarm bells warning of the need for state-level remedial measures to protect voting rights. This Note links those events together by recovering the history of the state filibuster to reveal how it may—and I argue, should—be used to mitigate the impact of *Shelby County*.

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At the end of a special legislative session called by Texas Governor

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1. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2615 (2013).

2. Out of ease of expression, I will refer to filibusters in state senates as “state filibusters” and filibusters in the U.S. Senate as “Senate filibusters.” By “filibuster,” I mean efforts to talk a bill to death, which is its most common usage. “Filibuster” can also mean any dilatory tactic used in a legislative body, but for the purposes of this Note, I use the term in its more narrow sense.

Rick Perry, Fort Worth Democrat Wendy Davis launched a filibuster against an abortion bill that would have banned abortions after twenty weeks of pregnancy and resulted in the closure of the vast majority of abortion facilities in Texas.<sup>3</sup> Republican senators closely monitored Davis in attempts to catch her violating any of Texas's complex senate rules,<sup>4</sup> which allow senators to speak as long as they please only if they "confine [themselves] to the subject under debate" and "stand upright" without leaning or sitting on a desk or chair.<sup>5</sup> Davis managed to speak on topic for over eleven hours when the end of the legislative session approached and the Republican senators attempted to end the debate and vote on the bill.<sup>6</sup> But crowds in the Senate gallery burst into screams and threw the chamber into chaos.<sup>7</sup> Helped along by the gallery's support, Davis successfully defeated<sup>8</sup> the abortion bill and overnight became "a political celebrity known across the nation."<sup>9</sup>

Perhaps as interesting as the subject and success of Davis's filibuster is the fact that she spoke at all. Today, the filibuster is most closely associated with parliamentary practice in the U.S. Senate, where the "silent" or "stealth" filibuster notoriously reigns supreme.<sup>10</sup> There, we no longer see prolonged debates and efforts to kill legislation by talking bills to death.<sup>11</sup> The U.S. Senate's cloture rule, Senate Rule XXII, which allows three-fifths of the Senate to vote to bring a filibuster to an end, is largely responsible for this atmosphere.<sup>12</sup> As discussed more fully in Part II.B, this rule distorts voting equality in the U.S. Senate, transforming it into a sixty-

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3. Manny Fernandez, *Filibuster in Texas Senate Tries to Halt Abortion Bill*, N.Y. TIMES (June 25, 2013), <http://www.nytimes.com/2013/06/26/us/politics/senate-democrats-in-texas-try-blocking-abortion-bill-with-filibuster.html> [hereinafter *Filibuster in Texas Senate*].

4. Manny Fernandez, *In Texas, a Senator's Stand Catches the Spotlight*, N.Y. TIMES (June 26, 2013), <http://www.nytimes.com/2013/06/27/us/politics/texas-abortion-bill.html?pagewanted=all> [hereinafter *Senator's Stand Catches the Spotlight*].

5. Senate Rules 4.01, 4.03, S. Res. 4, 83d Leg., Reg. Sess. (Tex. 2013), available at <http://www.senate.state.tx.us/rules/SenateRules83.pdf>.

6. *Filibuster in Texas Senate*, *supra* note 3.

7. *Id.*

8. Governor Perry soon called a second special session of the Texas legislature, which passed the abortion bill only a few weeks after Davis's filibuster. Manny Fernandez, *Abortion Restrictions Become Law in Texas, but Opponents Will Press Fight*, N.Y. TIMES (July 18, 2013), <http://www.nytimes.com/2013/07/19/us/perry-signs-texas-abortion-restrictions-into-law.html> [hereinafter *Abortion Restrictions Become Law in Texas*].

9. *Senator's Stand Catches the Spotlight*, *supra* note 4.

10. For more on the "silent filibuster," see *infra* text accompanying notes 39–47.

11. See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 203 (1997) (describing the transformation of the Senate filibuster into its current silent form).

12. Senate Rule XXII, Standing Rules of the Senate, S. Doc. 110–9, 100th Cong., 1st Sess. 15–16 (2007).

vote chamber where only supermajorities can pass any meaningful legislation.<sup>13</sup> The one-person talk-a-thon, perhaps made most famous by Jimmy Stewart in *Mr. Smith Goes to Washington*<sup>14</sup> and Southern Democrats supporting segregation in the mid-twentieth century,<sup>15</sup> rarely occurs today. As one group of scholars aptly explains, the modern Senate filibuster “has little to do with deliberation and even less to do with debate.”<sup>16</sup> But when the national political spotlight turned toward Davis, Americans were reminded that the talking filibuster still exists—not in the U.S. Senate, but in the states.

Over the past few years, the national media has taken little interest in state filibusters.<sup>17</sup> And while the Senate filibuster has garnered the attention of many legal and political scholars and commentators, almost no scholarship exists on state filibusters.<sup>18</sup> In the rare moments when reporters or bloggers do cast their eyes toward state filibusters, they frequently conflate the practice of state and Senate filibustering,<sup>19</sup> misperceive the significance of cloture rules,<sup>20</sup> and treat the state filibusters as curiosities

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13. E.g., Michael J. Teter, *Equality Among Equals: Is the Senate Cloture Rule Unconstitutional?*, 94 MARQ. L. REV. 547, 551 (2010).

14. MR. SMITH GOES TO WASHINGTON (Columbia Pictures 1939).

15. See *infra* text accompanying notes 124–127 (describing Southern Democrats’ monopolization of the filibuster in this period).

16. Fisk & Chemerinsky, *supra* note 11, at 184.

17. For some exceptions, see Niraj Chokshi, *In Many State Legislatures, it Wouldn’t Take Much to Make Ted Cruz Stop Talking*, WASH. POST (Sept. 25, 2013), <http://www.washingtonpost.com/blogs/govbeat/wp/2013/09/25/in-many-state-legislatures-it-wouldnt-take-much-to-make-ted-cruz-stop-talking> (discussing how many states have majoritarian versus supermajoritarian cloture rules); Samantha Paige Rosen, *Wendy Davis’s Filibuster: Keeping Gridlock Alive*, HUFFINGTON POST (June 27, 2013), [http://www.huffingtonpost.com/samantha-paige-rosen/filibuster-reform-wendy-davis\\_b\\_3507444.html](http://www.huffingtonpost.com/samantha-paige-rosen/filibuster-reform-wendy-davis_b_3507444.html) (arguing that filibusters on the state and federal level cause gridlock and need to be reformed).

18. One exception discussed more thoroughly *infra* is Scott Matthew Cody, *The Causes and Consequences of Restrictive Rules of Debate in State Senates* (May 2006) (unpublished Ph.D. dissertation, University of Iowa) (on file with the *Southern California Law Review*).

19. Samantha Rosen, for example, claims that “the filibuster as it has been used recently in state senates and in the United States Senate . . . goes against the purpose of Congress. This tactic is supposed to be employed once in a while to stall a piece of legislation.” Rosen, *supra* note 17. Although she lauded Davis’s efforts, she used the Texas filibuster as an example of an obstructive filibuster in the states. *Id.* However, Rosen seems to conflate state filibusters and Senate filibusters. For in fact, at least in Texas, Davis’s filibuster was the only one that had occurred in 2013 up to that point, and the first in approximately two years. See *Filibusters and Chubbing*, LEGIS. REFERENCE LIBR. TEX. (May 23, 2011, 10:00 AM), <http://www.lrl.state.tx.us/whatsnew/client/index.cfm/2011/5/23/Filibusters-and-Chubbing> (follow “more than 100 filibusters” hyperlink) (citing to a periodically updated chart compiling all recorded filibusters in the Texas Senate in the past seventy-four years).

20. See, for example, Daniel De Groot, *36 State Senates Preclude the Possibility of Filibuster*, OPEN LEFT (Mar. 15, 2010, 5:30 PM), <http://www.openleft.com/diary/17831/36-state-senates-preclude-the-possibility-of-filibuster>. De Groot claims that thirty-six states do “not allow” filibusters, *id.*, which

rather than subjects of serious study.<sup>21</sup> One reason for this underexamination is that in many states, legislators rarely deploy filibusters because they can be easily cut short. Many state senates, most of which allow for unlimited debate, have cloture rules<sup>22</sup> that require the assent of a simple majority of senators to end filibusters and force a vote on pending legislation.<sup>23</sup>

Nonetheless, state filibusters merit serious study. In some state senates, filibusters have occurred and still do occur frequently, generally because of supermajoritarian cloture rules.<sup>24</sup> As in the U.S. Senate, state filibusters also distort voting parity. They implicate the same notions of equality and representation as the federal filibuster, but in the context of state governments that are closer and more directly accountable to the people.

This Note seeks to demonstrate that state filibusters pose a much lesser threat to efficient legislative decisionmaking than the Senate filibuster. In fact, the modern state filibuster resembles the lauded Senate filibuster of the old—one cabined by time and human constraints and not ubiquitous in the legislative process.

This Note also argues that state filibusters could and should assume greater prominence in the voting-rights context. In states that frequently see filibusters—namely, Texas, Alabama, and South Carolina—the state filibuster has a chance to promote minority rights that were once the domain of Section 4 of the VRA. Prior to *Shelby County*, Section 4 enabled the federal government to review voting legislation in “covered” states for potential discrimination, including, for instance, restrictive voter ID laws.<sup>25</sup> While state filibusters will not undo *Shelby County*, they have the potential

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is technically incorrect. Filibusters rarely occur in most states not because they are not *possible*, but because many state senate rules make limiting debate quite easy, thus discouraging filibusters. See Chokshi, *supra* note 17 (explaining how easy stopping a filibuster is in most states).

21. See Chokshi, *supra* note 17 (containing a 2009 chart with state legislatures’ various rules limiting debate because Ted Cruz’s September 2013 talk-a-thon in the Senate “got us thinking” about filibusters in the states, but not exploring the effects of state filibusters or their history).

22. Cloture rules are simply the procedural means for ending filibusters.

23. See Chokshi, *supra* note 17 (detailing in a chart the various cloture rules in state senates as of 2009).

24. De Groot, *supra* note 20. Filibusters occur with the most frequency today in Alabama, South Carolina, Texas, and Nebraska. *Id.* Texas, unlike these other three states, has a majoritarian cloture rule. *Id.*

25. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2618 (2013). See also Kara Brandeisky et al., *Everything That’s Happened Since Supreme Court Ruled on Voting Rights Act*, PRO PUBLICA (Nov. 4, 2014, 11:31 AM), <http://www.propublica.org/article/voting-rights-by-state-map> (detailing all the restrictive voting measures that have been enacted in states since the *Shelby County* decision).

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to mitigate its impact by providing legislatures time to contemplate misguided bills prior to enactment and by generating national media attention and accompanying scrutiny and debate.

The argument proceeds in four major parts. Part II examines the ideology of state senates and the early history of state filibusters to illuminate the theory undergirding the practice and distinguish its development from the Senate filibuster. Part III presents a historical overview of filibustering and the adoption of cloture rules in the states, which have not produced the silent filibuster so common in the U.S. Senate. Absent that radical transformation, this Note argues, state filibusters are a much more limited threat to majority rule and efficient lawmaking than the federal equivalent. Part IV examines a significant recent trend in state filibuster practice: pro-civil rights efforts in Alabama, Texas, and Georgia. Part V turns to *Shelby County* and its aftermath to argue that increased use of state filibusters would remedy some of its detrimental effects. Part VI concludes.

## II. THE IDEOLOGICAL FOUNDATIONS OF STATE FILIBUSTERS

In order to understand state filibusters, an overview of the scholarship and history of state and Senate filibusters is useful. First, acknowledging the lack of state filibuster scholarship is itself important. Understanding this void highlights the challenges of writing about state filibusters and helps delimit the scope of an initial foray into this realm of state legislative practice.

Second, because so little has been written about state filibusters and so much about the Senate filibuster, a logical starting point for any analysis of the former is the scholarly work done on the latter. In fact, Senate filibuster history serves as a useful lens through which to view the state filibuster, as the two closely resembled each other in the early to mid-twentieth century in form, but grew apart in appearance in the century's latter decades.

Third, understanding state constitutional development elucidates the historic purposes of state legislative bodies. So much of Senate filibuster scholarship concerns the political ideology of the Framers, the debates over the Senate in the Constitutional Convention of 1787, and the practices of the early Senate chamber. While the formation of state legislatures is not as thoroughly well documented as that of the U.S. Senate, the existing scholarship on state constitutional formation sheds light on how to understand state filibusters and cloture rules as they relate to equality and representation within senate chambers. Specifically, recognizing important

differences that scholars have drawn between conceptions of equality and representation on the federal level with those on the state level provides a way to understand how the antimajoritarianism of Senate filibusters compares to that of state filibusters.

This part thus provides the foundations for discussing the historical development of state filibusters that follows in Part III. Although state filibusters are not as well documented as Senate filibusters, a look at early newspaper reporting on state filibusters allows us to trace their development throughout the late nineteenth and early twentieth centuries, and how their growth compared to the Senate filibuster's.

#### A. THE VOID IN STATE FILIBUSTER SCHOLARSHIP

Before embarking on an analysis of state filibusters, I must acknowledge the lack of both primary and secondary sources on the topic. I have been able to find only one scholarly article focusing exclusively on state filibusters or that discusses state filibusters as a topic of their own.<sup>26</sup> Additionally, academic articles that do mention state filibusters usually approach them as part of a larger story about a state's political history, rather than focusing closely on the use of cloture rules and dilatory debate.<sup>27</sup>

Another obstacle to overcome in researching state filibusters is that no one has attempted to count each and every filibuster or cloture rule change that has occurred in the states. In fact, doing so may not even be possible. A state senate's journals do not always record changes to senate rules and, even if they do, may not do so in an obvious way.<sup>28</sup> Moreover, state senate journals usually lack an index, making finding a cloture rule change like "finding a pin in a haystack."<sup>29</sup> If a state happens to publish its senate rules, older versions of the rules may not be readily accessible in print or online. This problem is not unexpected given that similar difficulties occur with

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26. Cody, *supra* note 18. However, Cody's focus is different in nature from mine. He focuses on whether different types of cloture rules in state senates promote different ideals of deliberation and efficiency by statistically analyzing cloture votes in Colorado, Nebraska, Montana, and Wisconsin, four states that have changed their cloture rules throughout their histories. I am less concerned with counting and coding cloture votes and more concerned with the historical development of state cloture rules and how filibustering tactics interacted with minority rights in the states.

27. See, e.g., ANNE PERMALOFF & CARL GRAFTON, *POLITICAL POWER IN ALABAMA: THE MORE THINGS CHANGE . . .* 228 (1995) (focusing on filibusters in Alabama only as incidents to a larger political context).

28. Cody, *supra* note 18, at 39 n.17.

29. *Id.* at 39.

regard to researching early filibustering practices in the U.S. Senate,<sup>30</sup> with Catherine Fisk and Erwin Chemerinsky admitting that “[l]ittle is known about the prevalence of filibusters before the late nineteenth century.”<sup>31</sup>

Due to the incompleteness of state senate journals and rules, I have had to turn to alternative sources to investigate the history of state filibusters. Newspapers and periodicals have been the most useful sources for finding information about state filibusters. Indeed, reports of state filibusters have occupied the pages of both local and national newspapers from as early as the mid- to late-nineteenth century. While news reports are not likely to cover every filibuster or cloture vote that occurred in a given state, they provide the context surrounding a cloture vote or a filibuster. These reports help us understand the contemporaneous significance of a senate’s actions. Rather than merely showing a tally of votes, which a senate journal often does, a newspaper article allows us to piece together who was debating and for what. Thus, newspaper reports on state filibusters, although incomplete in certain respects, allow us to pinpoint the most important state filibusters—the filibusters that garnered the most public attention—and analyze why they were meaningful.

#### B. THE U.S. SENATE FILIBUSTER

In the past two decades, scholars and political commentators have widely criticized the modern Senate filibuster, or rather the Senate “Cloture Rule,” which prescribes the means to end debate and has largely turned the Senate into a sixty-vote chamber. Understanding the broad contours of these arguments—and those defending the filibuster—is important, for they provide context to the development of state filibusters. But to even make sense of these arguments, one must begin with the history of unlimited debate in the U.S. Senate.

The earliest filibustering efforts in the U.S. Senate were prolonged debates meant to postpone the enactment of legislation by merely a few days—debates meant to delay and make a stand rather than to kill legislation.<sup>32</sup> As the nineteenth century wore on and the Senate’s policymaking environment transformed into one in which senators could more easily “exploit their procedural rights in pursuit of their legislative goals,”<sup>33</sup> they started to use unlimited debate as a means to defeat

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30. SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE?: FILIBUSTERING IN THE UNITED STATES SENATE* 46, 49 (1997).

31. Fisk & Chemerinsky, *supra* note 11, at 187.

32. Teter, *supra* note 13, at 566.

33. BINDER & SMITH, *supra* note 30, at 60.

legislation by holding the floor until the end of the session.<sup>34</sup> This more fatal use of the filibuster, used with increasing frequency by smaller groups of senators, eventually led to the Senate's adoption of Senate Rule XXII (the "Cloture Rule") in 1917, which required a vote of two-thirds of senators present and voting to end debate.<sup>35</sup>

From the 1920s to 1960s, Southern Democratic senators almost exclusively used the filibuster in order to block civil rights legislation.<sup>36</sup> And in this era, the filibuster took its "traditional" shape, the shape most people probably think of when they imagine a filibuster—unending talk-a-thons that kill legislation to the chagrin of a majority.<sup>37</sup> It was also during this time that Southern Democrats lauded the "tradition" of unlimited debate and minority rights in the U.S. Senate.<sup>38</sup>

But the use of the filibuster markedly changed in the 1970s.<sup>39</sup> Liberal senators finally began using the filibuster, making it more than simply a tool of Southern Democrats.<sup>40</sup> Furthermore, and most importantly, Majority Leader Mike Mansfield instituted the "two-track system" in the Senate, through which senators would address filibustered legislation in the morning and other matters in the afternoon.<sup>41</sup> Prior to this system, a filibuster paused all Senate business; but the tracking system allows the Senate to simply cast aside a filibustered bill and discuss other matters.<sup>42</sup> Indeed, as the number of filibusters increased in the 1970s and 1980s, senators would simply not debate a matter until its supporters had gathered the requisite votes for cloture—today, sixty votes.<sup>43</sup> The two-track system "changed the game profoundly," and in effect "created the silent filibuster—a senator could filibuster an issue without uttering a word on the Senate floor."<sup>44</sup> Thus, the modern filibuster involves no feats of physical endurance, no lengthy speeches, and no overnight sessions to be effective: the "silent" filibuster made filibustering incredibly easy. The effects of this

34. Teter, *supra* note 13, at 566.

35. *Id.*; Fisk & Chemerinsky, *supra* note 11, at 198.

36. BINDER & SMITH, *supra* note 30, at 139–41; Fisk & Chemerinsky, *supra* note 11, at 199–200. *See also infra* text accompanying notes 124–127;

37. *See* Fisk & Chemerinsky, *supra* note 11, at 199–200 (describing the filibuster against the Civil Rights Act of 1964).

38. *Id.* at 199.

39. *See id.* at 200–03 (discussing three factors that led to the change in the use of filibuster in the 1970s).

40. *Id.* at 200–01.

41. *Id.* at 201; BINDER & SMITH, *supra* note 30, at 15.

42. BINDER & SMITH, *supra* note 30, at 15.

43. Fisk & Chemerinsky, *supra* note 11, at 203.

44. *Id.* at 201; Teter, *supra* note 13, at 568.

change have been profound, with scholars of the filibuster noting that today's Senate demands the assent of sixty senators to pass nearly any piece of legislation.<sup>45</sup>

The transformation of the Senate into a sixty-vote chamber has elicited a variety of normative and constitutional arguments against the modern filibuster and Rule XXII more specifically. Many such responses do not bear much on the question of state filibusters, focusing on particular features of the U.S. Senate that do not appear in state senates. For example, one of the more popular lines of argument against the filibuster relies on the antientrenchment norm, which suggests that one Congress cannot enact rules that bind future Congresses. Because Senate Rule XXII requires a two-thirds vote of the Senate to revise the Rules, and because Senate Rule V carries over the Senate Rules from each session to the next, thus entrenching the sixty-vote requirement, the argument goes that these rules together violate antientrenchment principles.<sup>46</sup> Even if this argument does have merit, many state senates reenact their rules with some frequency, rendering it irrelevant to the present discussion.<sup>47</sup>

However, Michael Teter's recent work on the Senate filibuster does have some implications for the analysis of state filibusters.<sup>48</sup> Teter argues that Rule XXII, with its sixty-vote requirement, effectively gives greater weight to the votes of a senatorial minority than it does to the majority, violating commonly shared principles of equality and representation in the voting context.<sup>49</sup> More specifically, he argues Rule XXII is unconstitutional because it violates Article I, Section 3 of the U.S. Constitution, which mandates that "Each Senator shall have one Vote."<sup>50</sup> The Framers' debates and discussions over the Senate strongly support that they meant the Senate to be an active, deliberative upper chamber.<sup>51</sup> The "Each Senator" Clause embodied these principles and, moreover, stressed

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45. Teter, *supra* note 13, at 568–69; Fisk & Chemerinsky, *supra* note 11, at 181. *See also* BINDER & SMITH, *supra* note 30, at 6–7 (noting the "unrestrained filibustering" that has "wreaked havoc on the Senate").

46. Fisk & Chemerinsky, *supra* note 11, at 251–52; John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J.L. & POL. 505, 543 (2004).

47. For example, at the beginning of each four-year term, Alabama's Senate votes on readopting its rules of procedure. *See* The Rules of the Senate of Alabama (2011), available at <http://www.legislature.state.al.us/senate/senaterules/senaterulesindex.html> (noting that the current rules are for the "quadrennium, 2011–2014").

48. *See* Teter, *supra* note 13, at 547.

49. *Id.* at 554–55.

50. *Id.* at 555; U.S. CONST. art. I, § 3, cl. 1.

51. Teter, *supra* note 13, at 560–62.

that Senators would possess an equal vote.<sup>52</sup> The Supreme Court's malapportionment cases—with their “one person, one vote” jurisprudence that stresses the need for equally weighted votes—inform what equality and representation in the voting context mean today, and thus should be read into the “Each Senator” Clause.<sup>53</sup> Finally, because Rule XXII overweighs the votes of senators opposing cloture and makes passing any legislation exceedingly difficult, it violates the principles enshrined in Article I, Section 3. Teter's arguments, while in part specific to Rule XXII, show how filibusters fundamentally implicate notions of equality and representation in the federal legislative process. Understanding how filibusters frustrate both senate efficiency and senatorial voting parity helps answer whether state filibusters subvert notions of equality and representation engrained in state senates.

Furthermore, and as explored further in the next section, normative arguments supporting the Senate filibuster are relevant to this project. Some proponents of the filibuster argue that it serves the antidemocratic purposes of the Senate, which was in part designed to check the more democratic House of Representatives and to act with reason in the face of popular whims.<sup>54</sup> Defenders of Rule XXII also quickly point to the various antimajoritarian features of the Constitution, like the Electoral College and the presidential veto, and Senate practice in general, like the committee structure, as support for the rule's validity.<sup>55</sup> But if state senates traditionally lacked similar antimajoritarian features and more thoroughly embraced majority rule, one might question whether filibusters support state senates' proper functioning.

The Senate filibuster has enjoyed a long and transformative history and has become the target of both defenders and, more often, detractors of modern Senate practice very much due to its metamorphosis over the twentieth century. Today's Senate filibuster has caused the Senate to veer away from its original purpose of being an active, effective, and

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52. *Id.* at 576.

53. *Id.* at 576–79, 587–90.

54. See, e.g., John C. Roberts, *Gridlock and Senate Rules*, 88 NOTRE DAME L. REV. 2189, 2191–92 (2013) (critiquing current use of the filibuster, but arguing it is constitutional and that “[w]e must remember that the Senate itself is anti-majoritarian by design”).

55. See Teter, *supra* note 13, at 597–98 (summarizing the various antimajoritarian arguments of Rule XXII's defenders); Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445, 456 (2004) (suggesting that the supermajoritarian voting requirements in the Constitution support for Rule XXII's validity); John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 487 (1995) (similar).

deliberative upper chamber.<sup>56</sup> Whether state filibusters have enjoyed a similarly transformative history will bear on how we might evaluate their relationship to the original purposes of state senates.

### C. THE MAJORITARIAN STATE LEGISLATURE

The previous section makes clear that the Senate filibuster is so susceptible to criticism in part because the supermajoritarian voting requirement departs from the teachings of “one person, one vote” jurisprudence, diluting the voices of a majority of U.S. Senators. As suggested above and argued below, however, such an attack on the Senate filibuster must at least recognize the antimajoritarianism of the Senate itself, where senators are equally apportioned by the number of *states* rather than by the number of *citizens*. State senates, on the other hand, more directly represent citizens. Understanding what this more direct representation means in terms of cloture rules and filibustering tactics involves a brief foray into the scholarship on state constitutionalism. Although early state senates shared many basic structural similarities with the U.S. Senate, both in form and substance state senates were meant to be more representative of the people than was the U.S. Senate. In turn, framers of the early state senates—which served as models for future state senates—more enthusiastically embraced majority rule than did the framers of the U.S. Senate. Finally, I suggest that because state senates are meant to be highly representative, filibusters, especially when accompanied by supermajoritarian cloture rules, can in theory pose a fundamental threat to these senates’ historic purposes.

#### 1. The Federalist Conception of the U.S. Senate and the “Elitist Theory of Democracy”

Looking to the Revolutionary Era helps elucidate the structural and ideological contours of majority rule in the states because this was the original and most influential era of constitution making. Taking the U.S. Senate as a comparison point to its state equivalents highlights the different strains of republicanism that informed the creation of these respective chambers in their early histories.

One of the most important aspects of the earliest state senates was how they differed from the U.S. Senate. To understand the ideological differences between the two, we must distinguish between the Federalism

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56. See Teter, *supra* note 13, at 568–69 (“[T]he distinction between voting against legislation and blocking a vote, between opposing and obstructing, has nearly disappeared.” (quoting BINDER & SMITH, *supra* note 30, at 6–7)).

of the Constitution's framers and the Whiggism of the state constitutions' drafters. In fairness, to ascribe one set of beliefs to the Framers regarding the U.S. Senate is dangerous, as the construction of the Senate was one of the most vociferously debated topics at the Constitutional Convention of 1787.<sup>57</sup> Delegates from the small states fundamentally disagreed with delegates from the large states over what the nature of equality and representation should be in the new Congress. Small-state advocates supported equal representation of states, whereas large-state advocates preferred proportional representation. The ultimate structure of the Senate was in part born as a result of the famous Connecticut Compromise: states would be equally represented in the Senate while the House would be organized according to proportional representation.<sup>58</sup>

Despite the various disagreements among the Framers over the nature of equality and representation, scholars have identified some common principles in the Framers' thoughts concerning representation in the Senate. In drafting the Constitution of 1787, the Framers offered the nation what Gordon Wood calls "an elitist theory of democracy."<sup>59</sup> The Federalists believed that the supreme, sovereign power "*resides* in the PEOPLE, as the foundation of government."<sup>60</sup> But in their eyes, such popular sovereignty did not obviate the need for an upper chamber tempered by the superior reason of the best and wisest among the people (in the Federalists' minds, themselves).<sup>61</sup> Mechanisms built into the Constitution, such as the Electoral College and indirect election of senators by state legislatures, would hopefully ensure a filtration of talent so that only the worthy would hold office.<sup>62</sup> James Madison proclaimed that the Senate was to act "with more coolness, with more system, [and] with more wisdom, than the popular branch."<sup>63</sup> This cool, deliberate Senate would protect the people from "the

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57. 1 GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* 5 (1960). *See also* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 553–55 (1998) (discussing how the "precise nature of the upper house was not at all clear to the [convention] delegates").

58. Teter, *supra* note 13, at 574.

59. WOOD, *supra* note 57, at 517.

60. *Id.* at 530 (quoting James Wilson) (citation omitted). *See also* Teter, *supra* note 13, at 563–64 (describing the "False Premises of the Antidemocratic Purposes of the Senate" and how the Framers generally embraced popular sovereignty when constructing the Senate).

61. *See* WOOD, *supra* note 57, at 496 ("That the people were represented better by one of the natural aristocracy 'whose situation leads to extensive inquiry and information' than by one 'whose observation does not travel beyond the circle of his neighbors and acquaintances' was the defining element of the Federalist philosophy.").

62. *Id.* at 516–17, 555–57.

63. 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 151 (Max Farrand ed., 1937).

transient impressions into which they themselves might be led.”<sup>64</sup> Yet Madison and other delegates to the Constitutional Convention also argued that Senators “would be the representatives of the people”;<sup>65</sup> that they would “represent [and] manage the affairs of the whole, and not . . . be the advocates of State interests.”<sup>66</sup> That Senators were meant to be general representatives of the people and “manage the affairs of the whole,” but would not actually represent the people proportionally, highlights the antimajoritarianism beneath the Federalists’ republican rhetoric. And yet, *internally*, the Senate was meant to operate efficiently and on principles of equality and majoritarianism, which Teter notes is exemplified by Article I, Section 3’s “Each Senator shall have one Vote” clause: no Senator’s vote was meant to be worth more than any other’s—equality was to reign among Senators.<sup>67</sup>

Thus, to at least some Framers, a structurally undemocratic Senate could serve representative and majoritarian functions. The “elitist theory of democracy” could at once support the undemocratic state parity in the Senate and the egalitarianism of equal voting rights among Senators. In other words, while the Senate relied on egalitarianism and majoritarianism to operate internally, its external structure was quite antimajoritarian. Such a dichotomy in Senate structure and purpose is important to examining the Senate’s use of the filibuster. From a normative standpoint, the structural, antimajoritarian aspects of the Senate make a supermajoritarian cloture rule palatable. The antimajoritarianism of the cloture rule matches the antimajoritarianism of the Senate itself. It gives a minority of Senators a method of slowing Senate debate on highly contested issues to ensure the chamber acts with the coolness and wisdom Madison so desired from it. Moreover, as one commentator on the filibuster has suggested, because many Senate majorities actually represent a minority of Americans, many filibusters are not at odds with majoritarianism.<sup>68</sup> In this sense, the filibuster acts as a corrective to the Senate’s unrepresentative structure. As we have seen from the previous section, powerful arguments have been made against the use of the Senate filibuster, especially in its current form. But the Senate’s deliberate malapportionment and the Framers’ original desire for the chamber to be at least one step removed from the people at the very least make arguments defending Rule XXII tenable.

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64. *Id.* at 421.

65. WOOD, *supra* note 57, at 555 (quoting James Madison).

66. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 292 (Max Farrand ed., 1937) (quoting Daniel Carroll). *See also* Teter, *supra* note 13, at 563–64.

67. Teter, *supra* note 13, at 576.

68. Benjamin Eidelson, Note, *The Majoritarian Filibuster*, 122 YALE L.J. 980, 986 (2013).

## 2. The Whig Conception of State Senates and the Importance of Direct Consent

Defending supermajoritarian cloture rules, and even obstructive filibustering at all, in the states appears to be significantly more difficult because of the more direct majoritarianism that serves as the foundation of both the structure and purpose of state senates. Although many of the earliest state constitutions have been replaced, they remain important to understanding equality and representation in the states, for “they established the principles and institutions around which state constitutions are built to this very day.”<sup>69</sup>

Scholars generally consider the drafters of the early state constitutions to have embraced a “Whig” theory of politics.<sup>70</sup> According to this theory, the upper house represented a propertied interest, while the lower house represented the individuals of the community.<sup>71</sup> While this rhetoric seems to mirror the Constitution’s Framers’ belief in a senate composed of the best and wisest men, the state senates were in fact far more democratic in form than the U.S. Senate. Donald Lutz has argued that “Federalists saw majority tyranny where radical Whigs saw a community of interests.”<sup>72</sup> As such, state constitutions emerging from the post-Revolutionary Era generally reflected “a relentless pursuit of *direct* consent by the majority”; they were not mere “transitional efforts leading to a Federalist approach of *indirect* consent by a majority.”<sup>73</sup> In nearly all states, frequent elections of state legislators, a broadly defined suffrage, relatively lax requirements for office holding, and the opportunity for citizens to petition to their state governments furthered efforts by early state constitution-makers to devise highly representative legislatures closely tied to the will of a majority.<sup>74</sup> There was also a concerted effort to make representation fairly equitable: either each county had the same number of representatives as every other county in a state, or senators would be allocated in proportion to population or taxes paid.<sup>75</sup>

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69. Donald S. Lutz, *The Theory of Consent in the Early State Constitutions*, 9 PUBLIUS 11, 11 (1979).

70. *Id.* at 19–20, 36; JACKSON TURNER MAIN, *THE UPPER HOUSE IN REVOLUTIONARY AMERICA 1763–1788*, at 199–201 (1967).

71. MAIN, *supra* note 70, at 188; Lutz, *supra* note 69, at 21. *See also* WOOD, *supra* note 57, at 436 (“[T]he constitutional reformers urged that the upper branches of the legislatures be made more stable, if they were, as Madison said, ‘to withstand the occasional impetuosities of the more numerous branch.’”).

72. Lutz, *supra* note 69, at 41.

73. *Id.* at 13 (emphasis added).

74. *Id.* at 20.

75. MAIN, *supra* note 70, at 207.

As to the senates, most states kept their upper houses, but eliminated the more aristocratic features.<sup>76</sup> Every state but Maryland elected its senate through direct popular vote, an important difference from the election of U.S. Senators.<sup>77</sup> In fact, a substantial majority of state senators in the post-Revolutionary senates was chosen by holders of small amounts of property and for relatively short terms, indicating that state senators were closely tied and held accountable to voters.<sup>78</sup> Thus, framers of state senates did not create equivalents of the elaborate Madisonian filtration system engrained in the Constitution, marked by the removal of the U.S. Senate and Executive from election by direct popular consent. Rather, direct consent of the people became a central feature of state constitutional structures, pervading even the senates.

This direct consent aspect of state senates is highly relevant to thinking about cloture rules in these chambers. The egalitarianism and majoritarianism that pervaded state senates and constitutions on the whole suggests that supermajoritarian cloture rules are anathema to the very form these senates took. As we have seen with regard to Rule XXII, such cloture rules disrupt the will of the majority by increasing the weight of each minority senator's vote, essentially obviating voting parity so that the minority can halt and destroy legislation that a majority may support. As suggested and argued by supporters of the Senate filibuster, this antimajoritarian aspect of Rule XXII may be justified by the fact that the Framers expressed persistent concerns over the dangers of majority rule and the need for the U.S. Senate to check the "popular branch." It may also be justified as a corrective to the severely—and purposefully—malapportioned nature of the U.S. Senate itself.

But state constitutional scholarship supports that the state senates *were* meant to be more directly connected to the will of the people than was the U.S. Senate; they *were* more representative of a state's population than the U.S. Senate was of the national one; and, thus, they *were* closer and more intimately connected to the people, reflecting the "much more democratic and localistic"<sup>79</sup> nature of the Whig-republican tradition as compared to the Federalist one. As such, any justification for supermajoritarian state senate cloture rules based on the need for state senates to check the lower

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76. *Id.* at 205.

77. Lutz, *supra* note 69, at 21.

78. MAIN, *supra* note 70, at 189.

79. Kermit L. Hall, *Mostly Anchor and Little Sail: The Evolution of American State Constitutions*, in *TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS* 388, 397 (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

chambers or to calm the will of tempestuous majorities has little support from the republicanism informing early state constitutionalism or from the early history of post-Revolutionary state senate practice.

Rather, supermajoritarian cloture rules—and, in fact, any filibuster a majority is somehow unable to stop—pose a more fundamental danger to majority rule in state senates than in the U.S. Senate because they give great power to minorities in systems explicitly majoritarian in both structure and purpose. Perhaps this is the reason most state senates do not have antimajoritarian cloture rules. The question nevertheless arises as to how filibusters in the states have taken form and whether they are as damaging to majority rule as one might think. A brief history of state senate filibusters will bring context to the form and function of filibusters in the states.

### III. A HISTORY OF THE STATE FILIBUSTER

Two broad trends in state filibuster history stand out as particularly significant. First, a variety of states had begun adopting cloture rules in the nineteenth century, a few decades before the U.S. Senate adopted its own. This trend indicates that the states also confronted problems with dilatory tactics in their upper chambers, and felt cloture rules could help remedy such problems. It also demonstrates that many state senates did not enjoy an extended tradition of unlimited debate, which is significant in light of arguments in support of the Senate filibuster rooted in a supposed tradition of debate in the U.S. Senate.

Second, as the Senate filibuster underwent significant changes—both in who used it and how it was used—state filibusters did not significantly change in form. From the 1920s to 1960s, the Senate filibuster became the preserve of Southern Democrats fighting civil rights legislation. And with the advent of the two-track system in the 1970s, this “traditional” Senate filibuster transformed into the stealth filibuster that dominates Senate voting practices today. But as shown below state filibusters have always been marked by prolonged debate and have been used to fight a variety of issues. They have not been used by simply one senatorial coalition for extended periods, at least in the states that consistently have had filibusters. This second trend is particularly important given that arguments against the Senate filibuster rely on how modern filibustering practice is entirely different from and more powerful than filibustering practice before the 1970s. Perhaps the romanticized and lauded filibuster of the past that we see so rarely today in the U.S. Senate still has a home in the states.

## A. EARLY FILIBUSTERING AND THE ADOPTION OF CLOTURE RULES IN THE STATES

The U.S. Senate abolished its previous question motion<sup>80</sup> in 1806, depriving majorities of the power to force a vote on a pending matter and giving minorities the powerful tool of unlimited debate.<sup>81</sup> Not until the adoption of the supermajoritarian Rule XXII in 1917 did the Senate have a cloture rule of any sort, despite various proposals for debate limits in the latter half of the nineteenth century.<sup>82</sup> While many states lacked cloture rules in the nineteenth century, a variety of states started adopting them long before the U.S. Senate managed to adopt its own. According to one contemporaneous count, by the 1890s at least nine state senates had adopted or used<sup>83</sup> the previous question motion as a way to limit debate in their chambers—Pennsylvania, Ohio, Michigan, Tennessee, Wisconsin, Minnesota, Washington, North Dakota, and New York all had some experience with the previous question.<sup>84</sup>

One of the most widely publicized of these rule changes was the New York Senate's adoption of a previous question motion in 1894,<sup>85</sup> which is significant because New York has one of the more robust filibustering histories. Moreover, this episode in New York legislative history provides insight into what filibustering may have looked like in the states at this time. At least as early as 1877, New York newspapers reported on prolonged senate debate, the minority party's "tricks to stave off . . . vote[s],"<sup>86</sup> and "[l]ively [f]ilibustering in the [s]tate [s]enate."<sup>87</sup> By the early 1890s, many senators seemed to have felt that such dilatory

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80. The previous question motion is an old and traditional rule of parliamentary procedure. It functions similarly to a cloture rule, allowing legislatures to bring an end to debate by majority vote. See 1 HAYNES, *supra* note 57, at 392–93, 392 n.3 (noting Britain's Parliament and the Continental Congress used the previous question motion before the U.S. Senate adopted it in its first session).

81. BINDER & SMITH, *supra* note 30, at 39.

82. See *id.* at 74–75, 79 (discussing the reform attempts to limit debate and the adoption of Rule XXII in 1917).

83. I say "used" because some states seemed to not have had cloture rules on the books, per se, but had invoked cloture by a majority of senators by moving for the previous question. For example, the New York Senate moved for the previous question in 1892 even though it had no cloture rule, with the Lieutenant Governor justifying the motion by explaining that since no cloture rule "had been adopted, general parliamentary laws were in force, and the previous question was in order." *Closure for the State Senate: Amendments to the Rules which Promise Good Results*, N.Y. TIMES, Jan. 11, 1894, at 8 [hereinafter *Closure for the State Senate*].

84. *Closure in a State Senate*, WASH. POST, Jan. 26, 1894, at 4.

85. See *id.* (discussing the New York Senate's 1894 rule change).

86. *The New-York Republicans*, N.Y. TIMES, Jan. 24, 1877, at 1.

87. Cantor "Smelt Politics": *Lively Filibustering in the State Senate*, N.Y. TIMES, Mar. 15, 1893, at 1.

measures hampered Senate business. Indeed, in 1894, when Republican Senator Charles Saxton proposed an amendment to the Senate rules for cloture, the *New York Times* announced that its arrival was “long-expected,”<sup>88</sup> and Republican Senator O’Connor expressed excitement that the Senate might “deviate from the custom which had existed hitherto,”<sup>89</sup> suggesting the Senate saw its fair share of dilatory debate over the past few decades. The proposed rule, which was quickly adopted by a Republican majority in the Senate, provided that “[w]hen any bill, resolution, or motion shall have been under consideration for six hours,” a senator may “move that the debate shall be closed.”<sup>90</sup> If the motion passed by “the affirmative votes of a majority of the Senators present,” then the item under consideration would be put to a vote “without further debate,” except that any senator could speak for one hour or less if so inclined.<sup>91</sup>

Commentators on the new rule especially focused on the fact that it would uphold the will of a majority of senators. When debating the amendment on the Senate floor, Senator O’Connor remarked that “[t]he majority ought to rule, no matter what the merit of the question under discussion.”<sup>92</sup> The *Washington Post* favorably deemed the changes “beneficial in their character,” while it inveighed against the damaging effects of “deadlocks” and “purely dilatory tactics,” which improperly “thwart[] the will of a legislative majority.”<sup>93</sup> Moreover, multiple newspapers highlighted how the Senate Democrats had difficulty opposing the rule; these senators seemed to show “indifference” to it,<sup>94</sup> and their arguments visibly lacked “earnestness and sincerity.”<sup>95</sup> In fact, the cloture rule had been modeled on the one U.S. Senator David Hill, a fellow Democrat from New York, had proposed in the U.S. Senate during the silver debate of 1892.<sup>96</sup> Thus, any Democratic opposition to the bill would smack of hypocrisy—if, as Senator O’Connor put it, the Democrats were “to be consistent,” they must concede to “bestowing upon the majority in the Senate of the State of New-York the same power that they desire to take in the Senate of the United States.”<sup>97</sup> The New York Republican

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88. *Closure for the State Senate*, *supra* note 83, at 8.

89. *The Closure Rule Passed: A Death Blow to Filibustering in the State Senate*, N.Y. TIMES, Jan. 25, 1894, at 4 [hereinafter *Closure Rule Passed*].

90. *Closure in a State Senate*, *supra* note 84, at 4.

91. *Id.*

92. *Closure Rule Passed*, *supra* note 89, at 4.

93. *Closure in a State Senate*, *supra* note 84, at 4.

94. *Id.*

95. *Closure Rule Passed*, *supra* note 89, at 4.

96. *Id.*; *Closure in a State Senate*, *supra* note 84, at 4.

97. *Closure Rule Passed*, *supra* note 89, at 4.

majority may have acted in a partisan manner by voting for a rule that clearly benefited itself, but the rhetoric surrounding the rule's enactment was certainly one celebrating majoritarianism. Given the Democrats' weak attack of the cloture rule and the fairly extensive history of filibustering that seemed to have existed in New York prior to 1894, the rule's enactment cannot simply be characterized as a partisan Republican ploy. It also appeared to be an overt effort to promote majoritarianism in the New York Senate.

Colorado followed suit in 1901 and adopted a supermajoritarian cloture rule, whereby a two-thirds majority vote could end debate on a matter and force a final vote on pending bills.<sup>98</sup> The delays to legislating that filibusters had been causing seemed to animate a decision to reform the Colorado Senate rules.<sup>99</sup> Senator Elias Ammons, leader of the Democratic majority in the Senate, pronounced that if the chamber did not do something to reform the filibuster, its "commerce would stop its sails, lag and droop, and 90 days come to naught."<sup>100</sup>

Beyond New York and Colorado, an active filibustering practice indeed existed in the states. Major national newspapers consistently reported filibusters in Maryland, Massachusetts, Rhode Island, Georgia, Illinois, and California in the early twentieth century.<sup>101</sup> Furthermore, Massachusetts seems to have adopted a majoritarian cloture rule by 1906,<sup>102</sup> and Maryland had some form of cloture by 1916.<sup>103</sup> That many

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98. Cody, *supra* note 18, at 43–44.

99. *Id.* at 43.

100. *Id.* (quoting DENVER POST, Jan. 4, 1901).

101. See, e.g., *Drys Carry Senate, 19-7: Effort to Force Referendum on Measure is Debated*, SUN, Feb. 3, 1918, at 1 [hereinafter *Drys Carry Senate*] (Maryland); *Filibuster: Democrats Used Day in Senate*, BOS. DAILY GLOBE, April 18, 1903, at 8 (Massachusetts); *Senate Exiles Due in Rhode Island: Adjournment of General Assembly After Year's Session Lets Republicans Return*, N.Y. TIMES, Jan. 3, 1925, at 3 (Rhode Island); *Tax Equalization Vote is Delayed: Friends of Measure to Abolish System Conduct Effective Filibuster in State Senate*, ATLANTA CONST., July 29, 1921, at 9 (Georgia); *Senators Begin Bartzen Inquiry: Filibuster Slows Up First Day's Session of Committee in Chicago*, CHI. DAILY TRIB., Mar. 26, 1911, at 3 [hereinafter *Senators Begin Bartzen Inquiry*] (Illinois); *Happenings on the Pacific Slope: May Block Tax Conference*, L.A. TIMES, Jan. 23, 1917, at 14 (California).

102. See *Rejection by Senate of Overtime Bill: Opposition Caught Supporters With Thinned Ranks and Whipped Them*, BOS. DAILY GLOBE, Mar. 24, 1906, at 1 (noting that cloture was invoked twice in the Massachusetts Senate in a debate on an overtime bill).

103. See *"Baby Bill" Passes, Action Held Illegal: Senate Acts on Child Hygiene Hour After Time Limit Expired*, SUN, Apr. 4, 1922, at 1 (noting that the "cloture rule was invoked" in 1916, but not giving specifics on drafting of the rule). This cloture rule seems to have been rarely used, unwritten, or perhaps deleted from Maryland's senate rules at some point. When the senate adopted a supermajoritarian cloture rule in 1974, the *Baltimore Sun* noted that "[p]rior to the new rule, any senator could talk a bill or motion to death while disregarding the majority will of his peers," suggesting the senate had not made use of a cloture rule even if it existed. *Toward a More Deliberate State Senate*,

state senates were witnessing filibusters, invoking cloture, and adopting cloture rules where none had previously existed generally suggests that filibusters were prevalent in state senates at this time and caused some concern to legislatures.

Moreover, that a substantial number of states had cloture rules or had used the previous question motion by the early twentieth century provides at least some circumstantial evidence that unlimited debate was not considered an inviolable tradition of many states' upper chambers. This observation is important in light of arguments surrounding the "tradition" of debate in the U.S. Senate. Many supporters of Rule XXII argue that the lack of cloture rules in the U.S. Senate in the nineteenth century evidenced senators' commitment to a tradition of extended debate, which protected minority interests and promoted "dignity and decorum" in the chamber.<sup>104</sup> Sarah A. Binder and Steven S. Smith have persuasively countered this argument, noting that unlimited debate had been a "contentious issue" in the nineteenth century Senate, and various senators had made efforts before the adoption of Rule XXII to impose limits on debate.<sup>105</sup> Thus, the various state senate efforts to limit debate prior to the twentieth century similarly refute potential arguments based on traditions of debate that support supermajoritarian cloture rules, and further bolster the proposition that such rules run counter to the historic structures and operations of state senates.

#### B. THE CONSISTENCY OF STATE FILIBUSTERS AND THEIR RELATION TO MAJORITY RULE

A second major trend in filibustering history is the relative consistency in the form state filibusters have taken in comparison to the Senate filibuster. Such a trend is significant because it suggests that state filibusters—although inconsistent with majority rule in state senates—are less threatening overall to efficient legislative practice than is the silent Senate filibuster. As with the early Senate filibuster, prolonged debate marked early state filibustering practice. And, moreover, this debate did not typically stretch on for weeks or months; rather, it lasted hours or days. In 1911, for example, a mere day's worth of lengthy speeches could constitute a "persistent filibuster" in the Illinois Senate.<sup>106</sup> In 1918, for the first time in Maryland's history, a group of state senators attempted to invoke cloture in the "bitterest session" ever seen—a mere all-nighter consumed by

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SUN, Jan. 11, 1974, at A10.

104. BINDER & SMITH, *supra* note 30, at 21, 55.

105. *Id.* at 21.

106. *Senators Begin Bartzzen Inquiry*, *supra* note 101, at 3.

filibustering.<sup>107</sup> And in 1919, a seventeen-hour filibuster in the New York Senate was notable for its length, suggesting that this filibuster was one of the longer ones staged in New York up to that point.<sup>108</sup>

As the Senate filibuster metamorphosed into the Southern Democrats' tool for suppressing civil rights measures from the 1920s to 1960s,<sup>109</sup> and as longer debate became more common in the U.S. Senate,<sup>110</sup> state filibusters did not noticeably change in form and were not used to counter any one specific type of legislation on the whole.<sup>111</sup> Filibustering practice in the Texas Senate illustrates this point well. By one count, most Texas filibusters in the last seventy-five years have not lasted longer than ten hours, with the longest reaching sixty-two.<sup>112</sup> Sixty-two hours may have been record-breaking for Texas, but is nothing compared to the United States Senate's seventy-four *day* filibuster of the Civil Rights Act of 1964.<sup>113</sup> Furthermore, Texas senators using the filibuster attempted to quash a variety of matters—from a bill extending mineral leases on school land, to a constitutional amendment to provide money for building water-storage dams, to legislation establishing state colleges—rather than focusing intently on any one specific matter.<sup>114</sup> Admittedly, unlike the U.S. Senate, the Texas Senate did not and does not have a supermajoritarian cloture rule—once a filibustering senator stops speaking or veers off topic, a majority of senators can end the debate and force a vote on the pending matter.<sup>115</sup> This cloture rule difference may account in part for the

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107. *Drys Carry Senate*, *supra* note 101, at 1.

108. *See Welfare Bills to Die Despite Big Filibuster*, N.Y. TRIB., Apr. 16, 1919, at 1 (stressing how “big” the filibuster was).

109. *See infra* text accompanying notes 124–127.

110. *See* BINDER & SMITH, *supra* note 30, at 14–15 (emphasizing the time constraints on the chamber and how that time pressure would work in favor of the filibustering senator).

111. One exception is South Carolina, where senators consistently filibustered reapportionment efforts, which could tie up the Senate for weeks. *See, e.g., Apportionment Pact Ends 13-Day Carolina Filibuster*, N.Y. TIMES, Feb. 2, 1966, at 36 (“The South Carolina Senate ended its 13-day filibuster on reapportionment tonight by giving in to the filibustering small-county forces.”); *If Words Were Dollars, They Could Wipe Out the Tax: Senate Charts a Course for Rough Waters; Filibuster Gets Up Stream*, SPARTANBURG HERALD, May 10, 1967, at 11, available at <http://news.google.com/newspapers?id=4m4sAAAAIIBAJ&sjid=pssEAAAIAIBAJ&pg=7279,1675078&dq> (noting that senators believed a filibuster over reapportionment would last ten days).

112. *See Filibusters and Chubbing*, *supra* note 19 (noting that the longest single-person filibuster in Texas history was forty-three hours and citing a chart compiling all recorded filibusters in the Texas Senate dating back to 1939).

113. Fisk & Chemerinsky, *supra* note 11, at 199.

114. *See Filibusters and Chubbing*, *supra* note 19 (citing a chart detailing the various filibusters that have occurred since 1939).

115. *See* Senate Rules 4.01, 4.03, 6.09, *supra* note 5 (making clear that Texas has always had a majoritarian cloture rule).

disparities in Texas Senate and U.S. Senate filibustering practice from the 1920s to 1960s.

Indeed, the Alabama and South Carolina Senates, which had and still have supermajority cloture rules, witnessed longer filibusters that consumed significant amounts of legislative time and deterred their chambers from acting.<sup>116</sup> In 1971, the editors of Alabama's *Florence Times* expressed concern over "the lack of action thus far in the State Legislature, particularly the State Senate where filibusters have repeatedly halted the legislative process."<sup>117</sup> The fact that only a handful of senators "ground the legislative machinery to a halt"—made possible by the supermajoritarian cloture rule—especially distressed the editors.<sup>118</sup>

But even though the Alabama and South Carolina senates were susceptible to certain degrees of gridlock due to their cloture rules and filibustering traditions, their filibustering practices remained tame compared to the effects of the "silent" filibuster that eventually took hold of the U.S. Senate in the 1970s. Two of the most recent Alabama and South Carolina filibusters did not last more than two days, and South Carolina has not seen a weeks-long filibuster since the late 1990s.<sup>119</sup> The silent filibuster is ubiquitous and unyielding, burying important legislation without even the murmur of debate or discussion. But the silent filibuster, made possible by the two-track system as discussed above,<sup>120</sup> has not emerged in the states, which have not adopted such a two-track system of legislation. As long as the filibuster remains marked by lengthy speeches that must end at some point—whether with the invocation of cloture or the end of a legislative session—the filibuster will not present as great a threat to

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116. See, e.g., *State Senate is Again in Filibuster*, FLORENCE TIMES, Jul. 22, 1969, at 13, available at <http://news.google.com/newspapers?nid=1842&dat=19690722&id=vnA0AAAIAIAJ&sjid=f8YEAAAIAIAJ&pg=903,3129022> (noting that a filibuster over a meat inspection bill "handcuffed the Alabama Senate" only shortly after another lengthy filibuster and dilatory measures over a credit code proposal that "shackled" the chamber for nearly seven weeks); *Apportionment Pact Ends 13-Day Carolina Filibuster*, *supra* note 111, at 36 (discussing a 13-day filibuster on reapportionment).

117. *Lack of Senate Action Distressing*, FLORENCE TIMES, June 27, 1971, at 6, available at <http://news.google.com/newspapers?nid=1842&dat=19710627&id=4RgsAAAIAIAJ&sjid=18gEAAAIAIAJ&pg=849,4962182>.

118. *Id.*

119. See, e.g., *SC Senators Refuse to Back Limited Early Voting*, LIVE 5 NEWS (Jun. 17, 2010, 1:59 PM), <http://www.live5news.com/Global/story.asp?S=12668263> (noting a two day filibuster in South Carolina); Paul West, *Governor of S.C. Bets on Fight Against Poker Gaming: A Republican Stakes His Chances for Re-Election on a Proposal That Would Pull the Plug on Lucrative Video Gaming*, BALT. SUN (Apr. 7, 1998), [http://articles.baltimoresun.com/1998-04-07/news/1998097021\\_1\\_video-poker-legalized-gambling-gambling-money](http://articles.baltimoresun.com/1998-04-07/news/1998097021_1_video-poker-legalized-gambling-gambling-money) (noting a filibuster that lasted over two weeks in South Carolina).

120. See *supra* text accompanying notes 39–45.

majority rule in the states as it does to Congress. To take Wendy Davis's most recent filibuster as another example, Davis brought the Texas Senate to a halt for merely half a day at the end of a special legislative session, which she left visibly exhausted, clutching her back.<sup>121</sup> And while her efforts were successful in preventing a vote on the abortion bill, the Republican majority enacted it only a few weeks later in a separate thirty-day legislative session<sup>122</sup>—a filibuster lasting that long would have been impossible given the Texas Senate's cloture rules. Because these rules force a filibustering senator to stand and speak when attempting to obstruct legislation and allow a majority of senators to end debate and call a vote on pending bills,<sup>123</sup> filibusters can only go so far in Texas. Thus, progressives can laud Davis's filibuster as an effective way to draw the nation's attention to an important women's rights issue, just as Texas's conservative majority can rest assured that a liberal minority will not be able to use the filibuster to obstruct all significant legislation.

### C. CONCLUSION

Conceptually, the state filibuster is anathema to majority rule in state senates, which were originally meant to be close to the will of the people under the direct consent theory of democracy. The filibuster gives inordinate power to a minority group, allowing it to impose its will against the governing majority. However, the general history of state filibusters strongly suggests that they have not been as threatening to majoritarianism as the U.S. Senate's silent filibuster has been. State filibusters have important limits because they have consistently been marked by *actual* debate, by *actual* talking. Because state filibusters rely on the human body to have any form, they are limited by human tiredness, by human exhaustion, whereas the U.S. Senate has removed the human element entirely from its filibustering practice. Thus, as we have seen in the early twentieth century with the relatively shorter filibusters in Illinois, Massachusetts, and New York, in the mid-twentieth century with the longer but transient filibusters in Alabama and South Carolina, and in the modern era with Wendy Davis's palpably exhausting eleven-hour filibuster, the state filibuster can remain a bastion for the voice of the minority, while not fundamentally threatening the operation of senate chambers designed to give effect to the majority's will. In this sense, the state filibuster is very much like the Senate filibuster of the early and mid-twentieth century. The

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121. *Senator's Stand Catches the Spotlight*, *supra* note 4.

122. *Abortion Restrictions Become Law in Texas*, *supra* note 8.

123. Senate Rules 4.01, 4.03, *supra* note 5.

“traditional” filibuster still has life.

#### IV. MINORITY RIGHTS AND REDISTRICTING FILIBUSTERS

With the requisite sketch of state constitutional theory and state filibuster history complete, it is time to turn to one of the most significant and neglected filibustering trends among the states—minority rights filibusters. As mentioned in Part II.B, one of the most infamous eras in U.S. Senate filibustering history is the approximately forty-year period between the 1920s and 1960s. During that time, the filibuster became the exclusive tool of Southern Democratic senators, who consistently used it to quash progressive civil rights legislation.<sup>124</sup> Among the measures suffering death-by-filibuster were three anti-lynching bills in the 1920s and 1930s, bills banning poll taxes in the 1940s, all civil rights measures on employment and housing after 1946, and a 1962 bill meant to ban arbitrary literacy tests as a precondition for voting.<sup>125</sup> Between 1927 and 1962, the Senate did not invoke cloture once due to Southern Democrats’ refusal to face cloture on civil rights issues.<sup>126</sup> And, before the Senate enacted the Civil Rights Act of 1964, the notorious Southern Democrat filibuster against it brought the Senate to a halt for a record seventy-four days.<sup>127</sup> Thus, the early twentieth-century Senate filibuster has a dark history marked by the unyielding segregationist policies of the Southern Democrats.

But while many scholars of the Senate and the filibuster have pointed to this infamous history in telling the Senate filibuster’s story, they have not highlighted what was occurring in a few southern state senates in the first few decades of the twentieth century. In fact, a small but noticeable number of filibusters attempting to counter *anti*-civil rights legislation occurred in a variety of state senates—namely, Alabama, Texas, and Georgia. These filibusters are not only important because they provide a new take on how filibusters were used in the early to mid-twentieth century, but also because they suggest something counterintuitive about how filibusters might relate to majority rule. As argued above, the early history of state senate formation suggests that the filibuster, especially if paired with a supermajoritarian cloture rule, is anathema to majority rule in the states—it endangers popular sovereignty.<sup>128</sup> But each of these minority

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124. Fisk & Chemerinsky, *supra* note 11, at 199.

125. BINDER & SMITH, *supra* note 30, at 139–41.

126. Fisk & Chemerinsky, *supra* note 11, at 199.

127. *Id.*

128. *See supra* Part II.C.

rights filibusters occurred in states that in some way deprived certain classes of citizens of representation in government, or that somehow improperly (even to contemporaneous observers) obfuscated the political voices of such classes. And in each of these states—especially in Alabama, which has a supermajoritarian cloture rule—the filibuster promoted the rights of those denied a voice in government, essentially helping to fulfill the highly representative ideal engrained in state constitutional republicanism, an ideal the filibuster in theory appears to subvert.

#### A. MINORITY RIGHTS FILIBUSTERS IN ALABAMA

The Alabama Senate deserves the most attention, as it witnessed the two most successful filibusters aimed against segregationist legislation and politics. The importance of such a trend becomes clearer once one has a better grasp of Alabama’s constitutional structure and history. In many ways, Alabama embraced the notion of direct consent of the majority that Donald Lutz has shown pervaded the earliest state constitutions. Historians have called the Constitution of 1819, the state’s first, a “liberal document for its time,” as it established universal white manhood suffrage, requiring no property, tax-paying, or militia requirements for voting or holding office.<sup>129</sup> Members of both the upper and lower houses of the legislature faced annual election and met in annual sessions, “keep[ing] representatives closely in touch with their constituents.”<sup>130</sup> Overall, the constitution was “[i]n line with postrevolutionary sentiments.”<sup>131</sup>

If the Constitution of 1819 could be said to have been a “liberal” document championing majority rule *for its time*, the Constitution of 1901—Alabama’s most recent—certainly was not. It departed from the fundamental principles that generally inhered in early state constitutions. The enactment of the 1901 Constitution was in many ways an explicit effort to engrain white supremacy into Alabama’s political culture. Indeed, one of the main goals of the delegates was black disenfranchisement.<sup>132</sup> Through the erection of formidable conditions for voting, including a heap of different property, tax-paying, and literacy requirements, the Constitution of 1901 ensured that African Americans (along with many

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129. WILLIAM WARREN ROGERS ET AL., *ALABAMA: THE HISTORY OF A DEEP SOUTH STATE* 69 (1994).

130. *Id.* at 68.

131. *Id.* at 68–69.

132. *Id.* at 343, 345. *See also* MALCOLM COOK MCMILLAN, *CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1789–1901: A STUDY IN POLITICS, THE NEGRO, AND SECTIONALISM* vi (1978) (“The main purpose of the [constitutional] convention [of 1901] was to disfranchise the blacks and . . . the ex-Populist poor whites who had been disrupting the Democratic Party.”).

poor whites) would lose the right to vote, a right gained after the Civil War and the abolition of slavery—it thus purposefully promoted the dominance of wealthier, educated white men in government.<sup>133</sup> The Constitution lived up to its goals: in the first four decades of the twentieth century, African Americans constituted a marginally insignificant percentage of Alabama’s voting populace.<sup>134</sup>

But the 1944 U.S. Supreme Court decision in *Smith v. Allwright*<sup>135</sup> outlawed the Democratic Party’s practice of having all-white primaries, leading many Southern white leaders to fear that the door had opened for black voter registration.<sup>136</sup> In response to such fears, the Alabama legislature passed the Boswell Amendment in 1946, which required prospective voters to “understand and explain” any section of the U.S. Constitution to the satisfaction of the registrar in order to register to vote.<sup>137</sup> Yet in 1949, a three-judge panel of a U.S. District Court ruled that the Boswell Amendment was unconstitutional; not only did the court conclude that the “understand and explain” language purposely meant to subvert *Allwright*, but it also ruled that the Amendment violated the Fifteenth Amendment by attempting to deprive African American citizens the right to vote.<sup>138</sup>

Amidst the reaction to this ruling came what seems to be the first pro-civil rights filibuster in the Alabama Senate. The Alabama legislature attempted to amend the Boswell Amendment so as to continue disenfranchising blacks without falling prey to *Allwright* or the Fifteenth Amendment.<sup>139</sup> Instead of the “understand and explain” language, the newly proposed amendment would have required potential voters to “sign non-Communist affidavits; show they were of good character; [and] demonstrate they understood and embraced the duties and obligations of citizenship.”<sup>140</sup> The substitute amendment was introduced to the Senate on the last week of the 1949 legislative session. Led by Senator Joseph Langan, a veteran of World War II who reacted against injustice at home after witnessing atrocities abroad,<sup>141</sup> four senators who opposed the measure mounted a twenty-three hour filibuster on the last day of the

133. ROGERS ET AL., *supra* note 129, at 347.

134. Scotty E. Kirkland, *Mobile and the Boswell Amendment*, 65 ALA. R. 205, 210–11 (2012).

135. *Smith v. Allwright*, 321 U.S. 649 (1944).

136. Kirkland, *supra* note 134, at 209.

137. *Id.* at 219.

138. *Id.* at 242 (citing *Davis v. Schnell*, 81 F. Supp. 872, 880–81 (S.D. Ala. 1949)).

139. *Id.* at 243–44.

140. *Alabama Filibuster Balks Legislature*, N.Y. TIMES, Sept. 11, 1949, at L11.

141. Kirkland, *supra* note 134, at 224–26.

session until “the clock reached midnight,” successfully defeating it.<sup>142</sup>

In an era in which the Alabama Constitution and state legislature vigorously protected segregationist policies, the 1949 filibuster gave a voice to the unfairly disenfranchised. As the U.S. Senate’s Southern Democratic minority filibustered to death bills that would promote black voter registration, a minority of Alabama Senators helped destroy a clear effort to keep black Alabamian voices suppressed in politics. Even though Langan’s efforts were an antimajoritarian coup when considering how small a minority his filibustering coalition was in the Alabama senate (four of thirty-five members<sup>143</sup>), one must consider that they in essence promoted the rights of a much larger proportion of African Americans who did not have the power to elect a single representative. In the final moments of the Alabama Senate’s 1949 legislative session, a seemingly antimajoritarian ploy in fact pushed Alabama’s government closer to being a more representative political entity by helping to open up black voter registration—or at least end its complete suppression. Because of the purposefully undemocratic nature of Alabama politics under the Constitution of 1901, the 1949 filibuster actually helped further, rather than counter, that type of equality and representation that were fundamental characteristics of state senates as originally devised in the eighteenth century.

In 1965, a minority coalition in the Alabama Senate staged another of the chamber’s more memorable filibusters, at a time when Alabama was the scene of severe malapportionment, and was led by the power-hungry Governor George C. Wallace, who championed segregation. One group of scholars has noted that “[s]ome of the most glaring inequities in representative democracy existed in the state senates” in the Southeast at this time.<sup>144</sup> This observation is especially true of early 1960s Alabama, where the value of one vote in its smallest senatorial district was worth the equivalent of nearly twenty votes in its largest.<sup>145</sup> Such disparity in voting equality greatly affected the more populous, urban counties like Montgomery, Mobile, and Jefferson, which each elected only one senator yet contained the greatest concentrations of moderate voters.<sup>146</sup>

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142. *Alabama Filibuster Balks Legislature*, *supra* note 140, at L11; Kirkland, *supra* note 134, at 244.

143. *Alabama Filibuster Balks Legislature*, *supra* note 140, at L11 (“The stalling tactics were largely supported by only four Senators.”)

144. Donald O. Bushman & William R. Stanley, *State Senate Reapportionment in the Southeast*, 61 ANNALS ASS’N AM. GEOGRAPHERS 654, 654 (1971).

145. *Id.* at 656.

146. *Id.* at 657–58.

Moreover, as black voter registration grew in the 1950s and 1960s, the majority of Alabama's white population refused to endorse any gubernatorial candidate seeking black support.<sup>147</sup> In fact, Alabama was an aberration in the South, where every other state elected a progressive "New South governor" in the latter half of the twentieth century.<sup>148</sup> Rather than embracing this progressive tide, Alabama whites flocked to Wallace, who dominated state politics in the 1960s,<sup>149</sup> taking as his battle cry, "Segregation now, segregation tomorrow, segregation forever."<sup>150</sup> More notable among his early efforts defending segregation were a nationally publicized stand against the integration of the University of Alabama when faced with a federal court injunction to do so, and the establishment of a special committee that drafted legislation to hamper integration efforts and attack liberal organizations.<sup>151</sup>

In an effort to keep a grip on the governorship in light of an upcoming gubernatorial election, Wallace launched a campaign in 1965 to amend the Alabama Constitution, which barred governors from succeeding themselves.<sup>152</sup> A succession bill quickly passed through the Alabama House, but when it reached the Senate, a filibuster immediately began.<sup>153</sup> The Senate's cloture rule required the assent of two-thirds of its members (twenty-four of thirty-five senators) to end debate and force a vote on pending legislation,<sup>154</sup> while amendments to the Constitution required the support of only three-fifths of each house (for the Senate, twenty-one of thirty-five senators) to become effective.<sup>155</sup> Wallace went to great lengths to quash the filibuster, even challenging the constitutionality of the Senate's cloture rule: his supporters in the Senate passed a resolution asking the Alabama Supreme Court to strike down the rule.<sup>156</sup> They argued that because its "practical effect" was to "substitute its two-thirds (2/3)

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147. ROGERS ET AL., *supra* note 129, at 566.

148. *Id.*

149. *See id.* at 571-72 (noting Wallace's influence in Alabama, and stating that "Wallace would preside over Alabama in one way or another").

150. PERMALOFF & GRAFTON, *supra* note 27, at 168.

151. *See* ROGERS ET AL., *supra* note 129, at 572-73 (describing Wallace's efforts to fight against the integration of the University of Alabama).

152. *See* PERMALOFF & GRAFTON, *supra* note 27, at 228 (noting a bill to amend the state constitution which would allow Wallace to succeed himself as governor).

153. *Id.* at 228-29.

154. *See Alabama Nears Succession Vote: Decision on Wallace Future May Be Made Today*, N.Y. TIMES, Oct. 17, 1965, at 82 [hereinafter *Alabama Nears Succession Vote*] (noting that twenty-four votes are "needed to invoke closure").

155. PERMALOFF & GRAFTON, *supra* note 27, at 229.

156. Opinion of the Justices No. 185, 179 So. 2d 155, 155-56 (Ala. 1965); PERMALOFF & GRAFTON, *supra* note 27, at 229.

requirement for the [Constitution's] three-fifths (3/5) requirement," the rule was in "contravention of . . . the Constitution."<sup>157</sup> However, the argument was unavailing to the justices, who held that because the Constitution allowed each house to establish the rules of its proceedings, the Senate's cloture rule was constitutional.<sup>158</sup> Undeterred, Wallace attempted to wield his political influence to attack the antisuccession senators. He not only withdrew patronage from them (a highly unpopular move that he quickly reversed), but also launched a speaking tour throughout these senators' districts calling for succession and convinced liquor companies to stop advertising in antisuccession newspapers.<sup>159</sup> Despite this full-fledged campaign against the Senate's filibustering minority, the filibusterers did not yield. And when they finally allowed a vote on the bill, it did not receive the requisite twenty-one votes to pass as a constitutional amendment; it garnered the support of only eighteen senators.<sup>160</sup>

Some historians have painted the succession fight as "nothing more than politicians jockeying for power,"<sup>161</sup> but such a characterization fails to acknowledge the importance both race and moderate politics played in the battle. In the last speech against the proposed amendment, State Senator Kenneth Hammond inveighed that "Wallace travels in the same circles as Adolf Hitler and the other dictators" and would "pit the white race against the minority in the same way that Hitler pitted his people against the Jews."<sup>162</sup> While this speech, with its clear denouncement of Wallace's segregation politics, may have been one of the more vitriolic ones made, Hammond's palpable disgust for Wallace elucidates that the filibuster was more than mere political "jockeying," at least for some. In fact, at the time of the filibuster, all of the major contenders for the governor's office that Wallace's detractors in the legislature supported took a more moderate stance toward race than did Wallace, and their attitude toward race was one of their principal differences from him.<sup>163</sup> Indeed, State Senator Ryan de-Graffenreid, a early front-runner for the governor's office, held moderate

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157. *Opinion of the Justices No. 185*, 179 So. 2d at 156.

158. *Id.* at 157–58.

159. PERMALOFF & GRAFTON, *supra* note 27, at 229. *See also Alabama Nears Succession Vote*, *supra* note 154, at 82 (noting that six Alabama newspapers "disclosed that all pending liquor advertising had been cancelled" and that "[s]ome members of the Legislature have disclosed that public institutions in their counties have been threatened with the loss of state funds because of the position they took on succession").

160. *Alabama's Senate Kills Wallace Plan For a Second Term*, N.Y. TIMES, Oct. 23, 1965, at 1 [hereinafter *Alabama's Senate Kills Wallace Plan*].

161. PERMALOFF & GRAFTON, *supra* note 27, at 230.

162. *Alabama's Senate Kills Wallace Plan*, *supra* note 160, at 1, 21.

163. STEPHAN LESHER, *GEORGE WALLACE: AMERICAN POPULIST 352–53* (1994).

views on race compared to Wallace; former Governor John Patterson declared that he would run a “color-blind” administration if he returned to office; and attorney general Richmond Flowers had visible support from black voters and white liberals.<sup>164</sup> This moderate opposition and Hammond’s telling statements suggest that the battle over the succession amendment was as much about the future of racial relations in Alabama as it was about a grab for political power.

The succession filibuster is also notable in that the supermajoritarian aspect of the Senate’s cloture rule was a crucial element of the filibuster’s success. Indeed, its two-thirds mandate so frustrated Wallace and his supporters in the Senate that they challenged its constitutionality. And, importantly, Wallace spoke of democracy, of the people, when criticizing the filibuster:

I regret that the people of Alabama have been deprived of the opportunity of voting on the matter of succession. I deeply appreciate the support of the members of the House of Representatives and members of the Senate who worked so long and hard in favor of the proposition that the people be allowed to speak.<sup>165</sup>

However rhetorically powerful Wallace’s statements were, they were riddled with irony. To allow “the people of Alabama” to speak in the next gubernatorial election, an undemocratic, severely malapportioned Senate would have had to push through a constitutional amendment. The Senate’s supermajoritarian cloture rule allowed a minority of senators to act as a momentary corrective to this undemocratic process—to slow down the chamber until garnering enough votes to stop the Senate from conceding to Wallace’s will.<sup>166</sup> Together, the 1949 and 1965 Alabama Senate filibusters demonstrate that although black voters and city-dwelling moderates and liberals had little political recourse in the face of decades-long malapportionment, suppression, and segregation, the filibuster could occasionally be used to explicitly or implicitly support minority rights, something unheard of in the U.S. Senate at this time.

#### B. MINORITY RIGHTS FILIBUSTERS IN TEXAS

Although Alabama’s Senate witnessed some of the more successful and publicized minority rights filibusters, state senators in Texas also made

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164. *Id.*

165. *Alabama’s Senate Kills Wallace Plan*, *supra* note 160, at 21.

166. Wallace would go on to lead Alabama as governor once again, PERMALOFF & GRAFTON, *supra* note 27, at 298, and even manage to get his wife elected governor in the 1966 election so that he could run the state from behind the scenes. *Id.* at 241.

use of the parliamentary tactic to support minority rights. Indeed, in 1957 the Texas Senate witnessed a variety of important minority rights filibusters launched by state senators Henry Gonzalez and Abraham Kazen. As in Alabama, segregation was part of Texas's social and political culture for much of the twentieth century, and the legislature played an instrumental role in ensuring Texas stayed segregated, especially after *Brown v. Board of Education*<sup>167</sup> and its progeny mandated integration.<sup>168</sup> In fact, at the time of the 1957 filibusters, the Texas legislature was in the midst of passing at least nine "color bills" aimed at perpetuating segregation in the state.<sup>169</sup> Gonzalez and Kazen respectively represented San Antonio and Laredo, districts with primarily Latin American populations, and thus knew that their constituents would greatly feel the effects of these measures.<sup>170</sup> The two senators took a stand when the segregation bills came before the Senate in May, vowing to "bury with words every segregation measure as it was raised."<sup>171</sup> Most notably, they staged a record-breaking thirty-six-hour filibuster in an attempt to prevent the passage of a bill that would have allowed school boards to "assign pupils to any school in [their] jurisdiction, thus by-passing integration."<sup>172</sup>

In November of 1957, they mounted a lengthy twenty-hour filibuster against two segregation bills, one of which would have given the state's attorney general "\$50,000 to help local school districts fight lawsuits challenging the constitutionality of state laws designed to preserve segregation in the schools."<sup>173</sup> While the bills they filibustered ultimately passed, Gonzalez and Kazen received national attention for their efforts, with newspapers in Chicago, New York, and Los Angeles chronicling their filibusters.<sup>174</sup> The *Los Angeles Tribune* aptly noted that Gonzalez "used the

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167. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

168. See Cary D. Wintz, *The Struggle for Dignity: African Americans in Twentieth-Century Texas*, in TWENTIETH-CENTURY TEXAS: A SOCIAL AND CULTURAL HISTORY 69, 78–80 (John W. Storey & Mary L. Kelley eds., 2008) (citing legislation that segregated train stations, state facilities, medical facilities, theaters, and amusement parks).

169. See *Texas Senate Passes Bias Legislation*, CHI. DEFENDER, May 18, 1957, at 4 (noting that in addition to the bill being filibustered by Gonzalez and Kazen, "eight other color bills [were] pending in the senate").

170. *Texas Curbs Near for Integration: Two Special Session Bills Headed for Enactment After Vain Filibusters*, N.Y. TIMES, Nov. 24, 1957, at 42 [hereinafter *Texas Curbs Near for Integration*].

171. *Bias Delays Pledged: Two Texas Senators Plan New Segregation Filibusters*, N.Y. TIMES, May 4, 1957 [hereinafter *Bias Delays Pledged*].

172. *Texas Senate Passes Bias Legislation*, *supra* note 169, at 4.

173. *Texas Curbs Near for Integration*, *supra* note 170, at 42.

174. E.g., *Texas Senate Passes Bias Legislation*, *supra* note 169, at 4; *Bias Delays Pledged*, *supra* note 171; *Texas Curbs Near for Integration*, *supra* note 170, at 42; *Tex. Champion of Civil Rights to Speak Here*, L.A. TRIB., Oct. 10, 1958, at 7.

filibuster in exactly the opposite way it is usually used,” undoubtedly referencing U.S. Senate filibustering practice.<sup>175</sup> In an effort to uphold *Brown*'s constitutional mandate, Gonzalez and Kazen used the filibuster to fight segregation in the face of a majority of senators seeking to perpetuate an unconstitutional social regime.

### C. MINORITY RIGHTS FILIBUSTERS IN GEORGIA

Georgia's minority rights filibuster centered on a different issue in a slightly earlier era—women's suffrage in 1919, when state legislatures debated whether to ratify the Nineteenth Amendment, which secured the right to vote for women.<sup>176</sup> In Georgia, the amendment faced severe opposition, and suffragists understood that allowing the Senate to vote on it “would mean certain death to ratification.”<sup>177</sup> In fact, state Senator Jim Flynt, leader of the antisuffrage faction, openly “assailed the character of the late Susan B. Anthony, the author of the amendment, by declaring that she was the worst enemy the south ever had,” as he lambasted the amendment's supporters.<sup>178</sup> A small minority of senators who advocated for women's suffrage—led by Senators Elders and Dorris<sup>179</sup>—launched a filibuster in order to prevent the fatal vote from occurring, which would dash all hopes of Georgia's ratification of the amendment.<sup>180</sup> They worked to stave off a vote for the previous question and managed to engage the Senate “in a long debate, which . . . consumed the entire time of the body for seven days.”<sup>181</sup> The prosuffrage senators could not extend the filibuster longer than a week, and the Senate eventually rejected the amendment by a vote of thirty-nine to ten.<sup>182</sup> Nonetheless, the filibuster was a principled effort to give a voice to the women of Georgia who had so long been deprived of one in politics—women who could only applaud rather than speak in support of the amendment from the gallery as the senators waged

175. *Tex. Champion of Civil Rights to Speak Here*, *supra* note 174, at 7.

176. See *Suffrage Friends Wage Filibuster: Advocates of Susan B. Anthony Amendment Wage Uphill Fight in Georgia Senate*, ATLANTA CONST., July 18, 1919, at 9 [hereinafter *Suffrage Friends Wage Filibuster*] (covering Georgia state senators using the filibuster in support of passing the Susan B. Anthony Amendment).

177. *Id.*

178. *Id.*

179. Senators voting for ratification included Senators Adams, Allen, Dorris, Duncan, Elders, Glenn, Kaigler, Pittman, Rice, and Steed. *Suffrage Fight Lost in Senate: By Vote of 39 to 10, Georgia Senators Reject the Susan B. Anthony Amendment*, ATLANTA CONST., July 25, 1919, at 2 [hereinafter *Suffrage Fight Lost in Senate*].

180. *Suffrage Friends Wage Filibuster*, *supra* note 176, at 9.

181. *Suffrage Fight Lost in Senate*, *supra* note 179, at 2.

182. *Id.*

their filibuster.<sup>183</sup>

Furthermore, the filibuster was notable because it directly countered the filibuster that one of Georgia's U.S. senators waged earlier in the year in the nation's upper chamber. When the U.S. Senate considered the suffrage amendment before sending it to the states for ratification, Georgia Senator Hoke Smith resorted to a filibuster in order to delay a vote on the amendment in the Senate, where it had overwhelming majority support.<sup>184</sup> The Georgia Senate filibuster of voting on the suffrage amendment was thus an ironic twist in light of events in the U.S. Senate. The prosuffrage senators' stand not only demonstrated that the antimajoritarian filibuster could be used to invoke the rights of suppressed minorities, but also highlighted how the state filibuster could counter oppressive uses of the Senate filibuster.

#### D. CONCLUSION

At a time when U.S. Senators used the filibuster to keep minorities oppressed and voice support for segregation and white dominance, state senators in Alabama, Texas, and Georgia found a way to use the same device in precisely the opposite fashion. The Alabama filibusters of 1949 and 1965 against the substitute Boswell Amendment and Wallace's succession bill, respectively, supported the equality of African Americans and political moderates at a time when legislators feared and suppressed the black vote and a malapportioned Senate, which in no way mirrored the Alabama population. The Texas filibusters of 1957 against segregation bills demonstrated that Latino and African American Texans would not be completely shut out of politics by the efforts of a majority to perpetuate unconstitutional segregation. And the Georgia filibuster of 1919 against the suffrage amendment ratification vote showed that Georgian women who were deprived a voice in politics had advocates in a select group of state senators. Although these state filibusters did not fully counter the damage the Senate filibuster caused to civil rights in the first half of the twentieth century, they shed new light onto the so-called "civil rights filibuster," traditionally known only as a tool used by Southern Democrats to destroy progressive legislation.<sup>185</sup> Rather, as this group of state filibusters proves,

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183. See *Suffrage Friends Wage Filibuster*, *supra* note 176, at 9 ("A large gallery of suffragettes was present and at several times were so stirred by the fight for the amendment waged by Mr. Dorris that their applause had to be stopped.").

184. J. A. Holloman, *Filibuster Stops Woman Suffrage: Southern Senators, Led by Hoke Smith, Delay Action on Amendment. Passage Expected in Few Days*, ATLANTA CONST., May 27, 1919, at 2.

185. See BINDER & SMITH, *supra* note 30, at 85 (speaking only of the Senate filibuster when discussing the "civil rights filibusters").

the “civil rights filibuster” has two faces—one represented by the U.S. Senate’s Southern Democrats, and the other by state senators such as Alabama’s Langan, Texas’s Gonzalez, and Georgia’s Elders.

#### V. A NEW ROLE FOR THE STATE FILIBUSTER AFTER *SHELBY COUNTY*

In a world without federal preclearance of new voting rights rules in once-covered jurisdictions, the state filibuster is poised to play a crucial role in the future of state voting rights and legislation. State filibusters retain their historic vibrancy in Alabama, South Carolina, and Texas, where they have operated less to impede efficient legislation than to protect minority rights. *Shelby County v. Holder*, which invalidated Section 4 of the Voting Rights Act, has created a new need for just such a tool. This part proceeds in three steps. First, it sketches the history of the VRA. Second, it reviews state efforts to restrict voting rights subsequent to *Shelby County*. Finally, it contends that where state filibusters remain vibrant, they are appropriate responses to efforts to restrict voting rights.

##### A. THE VOTING RIGHTS ACT

As we have seen, in the early twentieth century, states took significant legal measures to ensure minorities stayed suppressed in the voting context.<sup>186</sup> The various civil rights acts of the 1950s did little to impede the efforts of states in suppressing minority votes.<sup>187</sup> In Alabama, for example, black voter registration increased only from 14.2 to 19.4 percent between 1958 and 1964.<sup>188</sup> In Mississippi, the percentage dismally rose from 4.4 to 6.4 percent between 1954 and 1964.<sup>189</sup> In 1965, the federal political branches responded to states’ “unremitting and ingenious defiance of the Constitution” in the area of voter discrimination by enacting the Voting Rights Act.<sup>190</sup> With black voter registration percentages as low as the single digits in some states the year prior to enactment, the VRA set up special rules for jurisdictions if they (1) had a “test or device” as a requirement to voting implemented before or on November 1, 1964, and (2) less than half of those of voting age were registered on November 1, 1964, or less than half of those of voting age actually voted in the November 1964 election.<sup>191</sup>

186. *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966). *See also supra* Part IV.

187. *Id.* at 313.

188. *Id.*

189. *Id.*

190. *Id.* at 309, 315.

191. *Id.* at 317.

In these “covered” jurisdictions “no change in voting procedures can take effect until approved”<sup>192</sup> (1) through review by the U.S. Attorney General or (2) by a declaratory judgment proceeding presided over by a three-judge panel from the U.S. District Court for the District of Columbia.<sup>193</sup> After Congress updated the formula with voting data from the November 1972 election,<sup>194</sup> covered jurisdictions included Alabama, Alaska, Arizona, Georgia, Louisiana, South Carolina, Texas, and Virginia.<sup>195</sup> While the preclearance requirement and coverage formula were initially meant to expire after five years, Congress reauthorized the VRA in 1970, 1975, 1982, and 2006, and extended the length of time the formula would apply.<sup>196</sup> In 2013, jurisdictions were deemed “covered” given 40-year-old data.<sup>197</sup>

The VRA has been widely heralded as among the most successful civil rights statutes ever passed.<sup>198</sup> Within only five years of enactment, nearly as many African Americans registered to vote in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as had registered since the end of the Civil War.<sup>199</sup> As Congress noted during its 2006 reenactment of the VRA, “significant progress has been made in eliminating first generation barriers experienced by minority voters.”<sup>200</sup>

Despite this progress, discriminatory voting practices in covered jurisdictions remain and continue to emerge. The legislative record from the 2006 reauthorization of the VRA, for instance, reveals that between 1982 and 2006 the Attorney General issued 626 objections blocking discriminatory voting changes; jurisdictions withdrew or modified over 800 proposed changes in response to More Information Requests; the Court ruled against jurisdictions in 653 cases under Section 2 of the Act and in 105 Section 5 enforcement actions as well as in 25 judicial preclearance

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192. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2615 (2013).

193. *Id.* at 2615, 2620; Voting Rights Act of 1965, Pub. L. No. 89-110, sec. 4, 79 Stat. 437, 438.

194. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, secs. 101, 202, 89 Stat. 400, 401.

195. Civil Rights Div., U.S. Dep’t of Justice, *Section 5 of the Voting Rights Act*, U.S. DEP’T JUSTICE, [http://www.justice.gov/crt/about/vot/sec\\_5/about.php](http://www.justice.gov/crt/about/vot/sec_5/about.php) (last visited Dec. 27, 2014).

196. *Shelby Cnty.*, 133 S. Ct. at 2620–21.

197. *Id.* at 2629 (noting that the formula is based on “40-year-old facts”).

198. THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982–2005, at 12 (2006), available at [http://www.lawyerscommittee.org/admin/voting\\_rights/documents/files/0023.pdf](http://www.lawyerscommittee.org/admin/voting_rights/documents/files/0023.pdf). See also *Shelby Cnty.*, 133 S. Ct. at 2626 (“The Act has proved immensely successful at redressing racial discrimination and integrating the voting process.”).

199. See *Shelby Cnty.*, 133 S. Ct. at 2634 (Ginsburg, J., dissenting).

200. *Id.* (quoting Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, sec. 2(b)(1), 120 Stat. 577, 577).

actions; and tens of thousands of observers were sent to covered jurisdictions.<sup>201</sup>

#### B. *SHELBY COUNTY* AND ITS AFTERMATH

By the time *Shelby County v. Holder* reached the Supreme Court, the Court had twice upheld the VRA as a valid exercise of Congress's power to enforce the Fifteenth Amendment.<sup>202</sup> Indeed, in *City of Rome v. United States*, it declared federal preclearance "an appropriate method of promoting the purposes of the Fifteenth Amendment."<sup>203</sup> Rather than merely challenge that settled precedent, the covered jurisdiction of Shelby County, Alabama, attacked, *inter alia*, the validity of Section 4(b) of the Act. It argued the provision was outdated and unnecessary because of changed conditions and that the federal government was intruding on state sovereignty. The Supreme Court agreed and struck down Section 4(b), the coverage formula. Absent future action by the Department of Justice to "bail in" jurisdictions to renewed coverage, the impact of the ruling was to eliminate preclearance by emptying the category of "covered" jurisdictions.<sup>204</sup>

In writing for the majority, Chief Justice John Roberts explained that preclearance represents a "drastic departure from basic principles of federalism" because it requires states to "beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own."<sup>205</sup> Because preclearance only applied to a select group of states and counties, he wrote, it also represented a "dramatic departure from the principle that all States enjoy equal sovereignty."<sup>206</sup> As a result, the VRA's "current burdens must be justified by current needs, and any disparate geographic coverage must be sufficiently related to the problem that it targets."<sup>207</sup> According to the

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201. *Shelby Cnty. v. Holder*, 679 F.3d 848, 872 (D.C. Cir. 2012), *cert. granted in part*, 133 S. Ct. 594, (2012), *and rev'd*, 133 S. Ct. 2612 (2013).

202. *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (using rational basis review to conclude that Sections 4 and 5 of the Act addressed "an insidious and pervasive evil which had been perpetuated in certain parts of our country"); *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (holding that federal preclearance is "an appropriate method of promoting the purposes of the Fifteenth Amendment").

203. *City of Rome*, 446 U.S. at 177.

204. *Shelby Cnty.*, 133 S. Ct. at 2625, 2631 (majority opinion); *id.* at 2648 (Ginsburg, J., dissenting) ("The Court stops any application of § 5 by holding that § 4(b)'s coverage formula is unconstitutional.").

205. *Id.* at 2618, 2624 (majority opinion).

206. *Id.* at 2618.

207. *Id.* at 2627 (internal quotation marks omitted).

Court, since “things have changed in the South,” with “[v]oter turnout and registration rates now approach[ing] parity” and with blatant “discriminatory evasions of federal decrees” rarely seen,<sup>208</sup> the coverage formula had no “logical relation to the present day.”<sup>209</sup>

Whatever the legal merits of *Shelby County*, it presents significant practical threats to minority voting rights. In the four months after the Court announced its June 25, 2013 decision, numerous formerly “covered” states enacted restrictive voting measures that once would have faced and perhaps failed preclearance.<sup>210</sup> On the very day of the decision, Texas Attorney General Gregg Abbott “immediately” moved to enact a voter ID law that a federal court the year before had deemed the “most stringent” such law in the country and condemned for imposing “strict, unforgiving burdens on the poor” before denying preclearance.<sup>211</sup> And Alabama’s Secretary of State Beth Chapman announced that the state would now implement a 2011 voter ID law that the state had previously been unwilling even to submit for preclearance.<sup>212</sup>

### C. THE POTENTIAL OF THE STATE FILIBUSTER TO PROTECT VOTING RIGHTS

Reacting to the flurry of voting restrictions and voter ID laws enacted after *Shelby County*, scholars and advocates for reform have proposed *federal* means of breathing new life into Section 5.<sup>213</sup> But the responses that may have the most immediate impact may be at the *state* level, where legislators in chambers with frequent filibusters can act immediately and

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208. *Id.* at 2621 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009)).

209. *Id.* at 2629.

210. See Brandeisky et al., *supra* note 25 (detailing all the restrictive voting measures that have been enacted in states since the *Shelby County* decision).

211. *Texas v. Holder*, 888 F. Supp. 2d 113, 144 (2012), *vacated*, 133 S.Ct. 2886 (mem.); Brandeisky et al., *supra* note 25; *Federal Court Rules Texas Voter ID Law Is Discriminatory*, TMP MUCKRAKER (Aug. 30, 2012 4:50 PM), <http://talkingpointsmemo.com/muckraker/federal-court-rules-texas-voter-id-law-is-discriminatory>.

212. Brandeisky et al., *supra* note 25.

213. See, e.g., Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After Shelby County*, 102 CALIF. L. REV. 1123, 1125–26 (2014) (advocating for a new coverage formula using data on racial stereotyping); Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 121–22 (2013) (proposing states disclose any alterations in voting practices and that those practices be subject to challenge); Daniel Tokaji, *Shelby County v. Holder: Don't forget the Elections Clause*, SCOTUSBLOG.COM (Feb. 13, 2013, 11:43 AM), <http://www.scotusblog.com/2013/02/shelby-county-v-holder-dont-forget-the-elections-clause> (arguing that the Constitution’s Elections Clause authorizes many requirements of preclearance).

unilaterally to protect minority voters from overly restrictive voter legislation. That possibility exists, for instance, in the formerly covered states of Alabama, South Carolina, and Texas. This section promotes that approach for three reasons. First, history suggests that the state filibuster is well suited to the task. Second, contemporary practice supports the same conclusion. Third, state-level filibusters are unlikely to raise federalism objections or impose heavy costs on legislative efficiency.

As Part IV showed, the state filibuster has a demonstrated history of promoting minority rights. In Alabama, Texas, and Georgia, filibusters combatted legislation to restrict or perpetuate discrimination against minorities in voting-related matters. Some succeeded. Others stalled the legislative process and drew national media attention. As a new wave of voting restrictions crests, history could and should repeat.

Recent state filibusters in South Carolina and Nebraska show the filibuster to remain well suited to delaying or defeating restrictive voting-rights legislation. In 2010, Republican South Carolina state senators failed to enact restrictive voting measures.<sup>214</sup> A filibuster launched by a Democratic senator killed a June 2010 bill that would have “limit[ed] voters’ ability to cast ballots early.”<sup>215</sup> In Nebraska, a 2012 bill would have required voters to show government identification to cast a ballot.<sup>216</sup> Supporters claimed it was a measure to prevent voter fraud, while detractors launched a filibuster and criticized it as a ploy to keep poor, elderly, and college-age voters from the polls.<sup>217</sup> The bill failed to pass when supporters failed to gather the needed votes to invoke cloture before the session ended.<sup>218</sup>

State filibusters also have advantages over efforts to respond to *Shelby County* through congressional action. For one, current political conditions make it unlikely that the federal political branches will enact substantial voting-rights legislation any time soon. For another, politically palatable congressional action could reprise the federalism concerns that animated

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214. See *SC Senators Refuse to Back Limited Early Voting*, *supra* note 119 (reporting that a June 2010 effort failed).

215. *Id.*

216. Grant Schulte, *Filibuster Kills Nebraska Voter ID Measure*, REAL CLEAR POLITICS (March 28, 2012), [http://www.realclearpolitics.com/news/ap/politics/2012/Mar/28/filibuster\\_kills\\_nebraska\\_voter\\_id\\_measure.html](http://www.realclearpolitics.com/news/ap/politics/2012/Mar/28/filibuster_kills_nebraska_voter_id_measure.html).

217. *Id.*

218. *Id.* While Nebraska was not a fully covered state under the VRA, its experience with the filibuster is still illustrative of the procedural tool’s potential to serve as a check on restrictive voting policies.

*Shelby County* and thus potentially run afoul of Supreme Court review.<sup>219</sup> State filibusters raise no such concerns. And as we have seen, they present little threat to efficient legislation.<sup>220</sup>

## VI. CONCLUSION

For too long scholars and political commentators have ignored state filibusters and their relationship to majority rule. At a time when the Senate filibuster, or rather the Senate Cloture Rule, has transformed the Senate into a sixty-vote chamber that no longer embraces majority rule, a look at filibustering in the states is particularly important, as state government is meant to be much more reflective of the people's will. This Note has sought to start filling in the large void in state filibuster scholarship by analyzing the state filibuster in light of the U.S. Senate filibuster. On a broad level, I have argued that state constitutional theory, which strongly embraces majority rule, suggests that filibusters in state legislatures are anathema to such majoritarianism and subvert democratic rule in state senates. However, because state filibusters have changed little in form over the twentieth century and are still marked by actual debate, they do not threaten senates to the same degree that the U.S. Senate's modern silent filibuster does. Rather, the state filibuster is reminiscent of the "traditional" Senate filibuster of the early and mid-twentieth century that has disappeared in the U.S. Senate. More specifically, I have sought to bring attention to a particularly significant trend in state filibustering history: the minority rights filibusters that occurred from 1919 to 1965 in Alabama, Texas, and Georgia. These filibusters, which gave voices to suppressed and, very often, unconstitutionally underrepresented minorities in these states, serve as important foils to the seemingly unstoppable filibustering efforts of Southern Democrats in the U.S. Senate who destroyed all civil rights measures from the 1920s to the 1960s. The minority rights filibusters in the states give new meaning to the term "civil rights filibuster" and problematize the one-sided history that scholars of parliamentary practice previously portrayed.

Building on this newly constructed history, I have suggested a new role for the state filibuster in a post-*Shelby County* South. In states that still make use of the filibuster—Alabama, South Carolina, and Texas, which also happen to have been fully covered states under the Voting Rights Act—legislators should look to the filibuster in the face of a majority

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219. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2618, 2624 (2013).

220. See *infra* Part III.B.

coalition seeking to enact overly restrictive voting measures. The state filibuster has a demonstrated history of usage in the voting rights context and has very recently proved effective at blocking potentially discriminatory voting legislation. It thus has the potential to fill some of the gaps *Shelby County* has left in the VRA that still need filling, regardless of whether the Court made the right decision. The state filibuster can assume a new role in protecting minority rights in the South, living up to its long-lived, yet underappreciated history.